

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/STOP PRESS: CORONERS AND JUSTICE ACT 2009

## **CRIMINAL LAW, EVIDENCE AND PROCEDURE (**

### **STOP PRESS:**

The Coroners and Justice Act 2009 makes provision in relation to coroners, about the investigation of deaths and certification and registration of deaths, to amend the criminal law, about criminal justice and about dealing with offenders, about the Commissioner for Victims and Witnesses, relating to the security of court and other buildings, about legal aid and about payments for legal services provided in connection with employment matters, for payments to be made by offenders in respect of benefits derived from the exploitation of material pertaining to offences and to amend the Data Protection Act 1998. The Act received the royal assent on 12 November 2009 and the following provisions came into force on that day: ss 47, 48, 116, 143, 151, 152, 154, 176, 177 (in part), 178 (in part), 179, 181, 183, Schs 18, 21-23 (in part). Further provisions came into force on 14 December 2009: ss 106 (in part and in the relevant local justice areas), 107 (in the relevant local justice areas), 108 (in the relevant local justice areas), 109, 110: SI 2009/3253. Further provisions came into force on 1 January 2010: ss 86-97, Schs 21-23 (in part): s 182(3). Further provisions came into force on 12 January 2010: ss 73, 138, 178 (in part), Schs 21-23 (in part): s 182(2). Further provisions came into force immediately before 1 February 2010: s 142 and Sch 23 Pt 5 (in part) (SI 2010/145). Further provisions came into force on 1 February 2010: ss 35, 59-61, 72, 112, 114, 115, 118(2) (for certain purposes), 140, 141, 149, 150, 153, 173 (in part), 174, 175 (in part), 180, Sch 12, Sch 15 paras 1-4, 5 (for certain purposes), 6, 7 (for certain purposes), 9, 10 (for certain purposes), Sch 20 paras 1-3, Sch 21 paras 53-61, 74-78, Sch 22 paras 7-11, 25, 28, 39, and Sch 23 (in part) (SI 2010/145). Further provisions came into force on 6 April 2010: ss 62-71, 74-85, 113, 118 (so far as it is not already in force), 119-136, 146, 147, 155-172, 173 (so far as it is not already in force), 175 (in part), 177 (for certain purposes), 178 (in part), Schs 13, 15 (so far as it is not already in force), 19, 20 (in part), 21-23 (in part) (SI 2010/816). Further provisions came into force on 4 October 2010: ss 52, 54, 55, 56(1), (2)(a), 57, 177 (in part), 178 (in part), Schs 21 (in part), 23 (in part) (SI 2010/816). The remaining provisions come into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the Current Service Noter-up booklet.

### ***Part 1 (ss 1-51) Coroners etc***

#### ***Chapter 1 (ss 1-17) Investigations into deaths***

Section 1 establishes a senior coroner's duty to investigate certain deaths. A senior coroner who is under a duty to conduct an investigation may request a senior coroner for another area to conduct the investigation: s 2. Under s 3, the Chief Coroner may direct a senior coroner to conduct an investigation into a person's death even though, apart from the direction, a different senior coroner would be under a duty to conduct it. Section 4 makes provision for the discontinuance of investigation where the cause of death is revealed by post-mortem examination. The matters to be ascertained are who the deceased was, how, when and where the deceased came by his death and the particulars required by the Births and Deaths

Registration Act 1953 to be registered concerning the death: 2009 Act s 5. A senior coroner who conducts an investigation into a person's death must hold an inquest into the death: s 6. Section 7 specifies whether a jury is required. Where there is a jury, the jury at an inquest is to consist of seven, eight, nine, ten or eleven persons: s 8. Section 9 makes provision as to determinations and findings by jury. Section 10 specifies the determinations and findings to be made after hearing the evidence at an inquest into a death. Section 1, Sch 1 make provision about suspension and resumption of investigations. Section 12 concerns investigation in Scotland. The circumstances in which investigation in England and Wales may be made, despite a body being brought to Scotland, are given in s 13. A senior coroner may request a suitable practitioner to make a post-mortem examination of a body: s 14. Under s 15, a senior coroner may order the body to be removed to any suitable place. A senior coroner who is conducting an investigation into a person's death that has not been completed or discontinued within a year must notify the Chief Coroner of that fact and must notify the Chief Coroner of the date on which the investigation is completed or discontinued: s 16. The Chief Coroner must monitor investigations into service deaths and secure that coroners conducting such investigations are suitably trained to do so: s 17.

#### *Chapter 2 (ss 18-21) Notification, certification and registration of deaths*

The Lord Chancellor may make regulations requiring a registered medical practitioner to notify a senior coroner of a death of which the practitioner is aware: s 18. Primary care trusts, in England, and local health boards, in Wales, must appoint persons as medical examiners to discharge the functions conferred on medical examiners by or under ss 18-21: s 19. Provision may be made requiring a registered medical practitioner who attended the deceased before his death to provide a medical certificate of the cause of death: s 20. The Secretary of State may appoint a person as National Medical Examiner: s 21.

#### *Chapter 3 (ss 22-24) Coroner areas, appointments etc*

Section 22, Sch 2 make provision about coroner areas. Provision is also made about the appointment of senior coroners, area coroners and assistant coroners: s 23, Sch 3. Section 24 deals with the provision of staff and accommodation.

#### *Chapter 4 (ss 25-31) Investigations concerning treasure*

Section 25, Sch 4 make provision about the appointment of the Coroner for Treasure and Assistant Coroners for Treasure. The Coroner must conduct an investigation concerning an object in respect of which notification is given under the Treasure Act 1996 s 8(1): 2009 Act s 26. The Coroner for Treasure may, as part of an investigation under s 26, hold an inquest concerning the object in question: s 27. A determination must be made as to the outcome of investigations concerning treasure: s 28. Section 29 makes provision as to the exception to the duty to investigate. The Treasure Act 1996 s 8A, which concerns the duty to notify the coroner of the acquisition of certain objects, is added by the 2009 Act s 30. Section 31 s 31 makes provision for a code of practice under the Treasure Act 1996 s 11.

#### *Chapter 5 (ss 32-34) Further provision to do with investigations and deaths*

The 2009 Act s 32, Sch 5 make provision about powers of senior coroners and the Coroner for Treasure. Section 33, Sch 6 set out offences relating to jurors, witnesses and evidence. Section 34, Sch 7 provide details about allowances, fees and expenses.

#### *Chapter 6 (ss 35-42) Governance etc*

Under s 35, Sch 8, provision is made about the appointment of the Chief Coroner and Deputy Chief Coroners. The Chief Coroner must give the Lord Chancellor a report for each calendar year: s 36. The Chief Coroner may make regulations about the training of senior coroners, area coroners and assistant coroners, the Coroner for Treasure and Assistant Coroners for Treasure and coroners' officers and other staff: s 37. Section 38, Sch 9 make provision about the appointment of the Medical Adviser to the Chief Coroner and Deputy Medical Advisers to the

Chief Coroner. It is the duty of inspectors of court administration appointed under the Courts Act 2003 s 58(1) to inspect and report to the Lord Chancellor on the operation of the coroner system: 2009 Act s 39. Section 40 concerns appeals to the Chief Coroner that may be made by an interested person. Section 41, Sch 10 make provision for an investigation into a person's death to be carried out by the Chief Coroner or the Coroner for Treasure or by a judge, former judge or former coroner. Pursuant to s 42, the Lord Chancellor may issue guidance about the way in which the coroner system is expected to operate in relation to interest persons.

#### *Chapter 7 (ss 43-51) Supplementary*

The Lord Chancellor may make regulations for regulating the practice and procedure at or in connection with investigations under ss 1-51, examinations under s 14 and exhumations under Sch 5 para 6: s 43. The Lord Chancellor may also make regulations for regulating the practice and procedure at or in connection with investigations concerning objects that are or may be treasure or treasure trove: s 44. Coroners rules may be made for regulating the practice and procedure at or in connection with inquests: s 45. The office of coroner of the Queen's household is abolished: s 46. Section 47 defines 'interested person' and s 48 provides general interpretation. Sections 49, 50, Sch 11 relate to Northern Ireland and Scotland. Section 51 amends the Access to Justice Act 1999 Sch 2 in relation to public funding for advocacy at certain inquests.

### **Part 2 (ss 52-73) Criminal offences**

#### *Chapter 1 (ss 52-61) Murder, infanticide and suicide*

The 2009 Act s 52 substitutes the Homicide Act 1957 s 2 so that a person who kills or is a party to the killing of another is not to be convicted of murder if he was suffering from an abnormality of mental functioning which arose from a recognised medical condition, substantially impaired his ability to do certain specified things and provides an explanation for his acts and omissions in doing or being a party to the killing. The 2009 Act s 53 relates to Northern Ireland. Section 54 provides the partial defence to murder of loss of control. Section 55 gives the meaning of 'qualifying trigger'. The common law defence of provocation is abolished and replaced by ss 54, 55: s 56. Section 57 amends the Infanticide Act 1938 s 1. The 2009 Act s 58 relates to Northern Ireland. Section 59 provides that a person commits an offence if he does an act capable of encouraging or assisting the suicide or attempted suicide of another person and his act was intended to encourage or assist suicide or an attempt at suicide. Section 60 relates to Northern Ireland. Section 61, Sch 12 make special provision in relation to persons providing information society services.

#### *Chapter 2 (ss 62-69) Images of children*

It is an offence for a person to be in possession of a prohibited image of a child, however this does not apply to excluded images, an 'excluded image' being an image which forms part of a series of images contained in a recording of the whole or part of a classified work: ss 62, 63. Section 64 specifies defences and s 65 gives the meaning of 'image' and 'child'. Section 66 deals with penalties and s 67 with entry, search, seizure and forfeiture. Section 68, Sch 13 make special rules relating to providers of information society services. Section 69 amends the Protection of Children Act 1978 s 1A so as to include pseudo-photographs with photographs.

#### *Chapter 3 (ss 70-73) Other offences*

The 2009 Act s 70 amends the International Criminal Court Act 2001 in relation to genocide, crimes against humanity and war crimes. The 2009 Act s 71 provides that a person commits an offence if he holds another person in slavery or servitude and the circumstances are such that he knows or ought to know that the person is so held, or he requires another person to perform forced or compulsory labour and the circumstances are such that he knows or ought to know that the person is being required to perform such labour. Section 72 amends the Criminal Law

Act 1977 s 1A in relation to conspiracy. The common law offences of sedition and seditious libel, defamatory libel and obscene libel are abolished: 2009 Act s 73.

### ***Part 3 (ss 74-117) Criminal evidence, investigations and procedure***

#### *Chapter 1 (ss 74-85) Anonymity in investigations*

Section 74 defines 'qualifying offences' for the purposes of ss 74-85. For the purpose of ss 74-85 a criminal investigation is a qualifying criminal investigation if it is conducted by an investigating authority wholly or in part with a view to ascertaining whether a person should be charged with a qualifying offence or whether a person charged with a qualifying offence is guilty of it: s 75. Section 76 defines 'investigation anonymity order'. Section 77 concerns applications for investigation anonymity orders made to a justice of the peace. Section 78 provides conditions for making the order. An appeal may be made against the refusal of an order: s 79. A justice of the peace may discharge an investigation anonymity order if it appears to the justice to be appropriate to do so: s 80. A chief officer of police of a police force in England and Wales may authorise a person to exercise the chief officer's functions under ss 74-85: s 81. Section 82 provides that nothing in ss 74-85 affects the common law rules as to the withholding of information on the grounds of public interest immunity. Under s 83, the Secretary of State must review the operation of ss 74-85 and prepare a report of that review. Section 84 makes provision as to the application of ss 74-85 to the armed forces. Section 85 provides interpretation.

#### *Chapter 2 (ss 86-97) Anonymity of witnesses*

Section 86 defines 'witness anonymity order'. Under s 87, an application for a witness anonymity order to be made in relation to a witness in criminal proceedings may be made to the court by the prosecutor or the defendant. Section 88 provides the conditions for making a witness anonymity order. The relevant considerations for deciding whether Conditions A-C in s 88 are met are set out in s 89. Where, on a trial on indictment with a jury, any evidence has been given by a witness at a time when a witness anonymity order applied to the witness, the judge must give the jury such warning as the judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the defendant: s 90. A witness anonymity order may be discharged or varied: s 91. Section 92 deals with discharge or variation after proceedings. Discharge or variation of the order may be made by the appeal court: s 93. Special provisions apply in relation to service courts: see s 94. Nothing in ss 86-97 affects the common law rules as to the withholding of information on the grounds of public interest immunity: s 95. The Criminal Evidence (Witness Anonymity) Act 2008 ss 1-9, 14 cease to have effect: 2009 Act s 96. Section 97 provides interpretation.

#### *Chapter 3 (ss 98-105) Vulnerable and intimidated witnesses*

Section 98 amends the Youth Justice and Criminal Evidence Act 1999 ss 16, 21, 22 in relation to the age of child witnesses in the context of eligibility for special measures. The 2009 Act s 99, Sch 14 concern eligibility for special measures with regard to offences involving weapons. Section 100 amends the Youth Justice and Criminal Evidence Act 1999 s 21 with regard to special provisions relating to child witnesses. The 2009 Act s 101 makes special provisions relating to sexual offences. Section 102 concerns the presence of a supporter where evidence is given by live link. Section 103 concerns supplementary testimony where there is video recorded evidence in chief. Section 104 makes provision for the examination of the accused through an intermediary. Section 105 makes provision in relation to the age of a child complainant.

#### *Chapter 4 (ss 106-110) Live links*

Section 106 amends the Crime and Disorder Act 1998 s 57B so that directions may be given to attend through a live link. The 2009 Act 107 amends the Police and Criminal Evidence Act 1984



ss 46ZA, 46A in relation to answering to live link bail. The 2009 Act s 108 adds the 1984 Act s 54B so that a constable may search at any time any person who is at a police station to answer to live link bail and any article in the possession of such a person. The 2009 Act s 109 concerns the use of live link in certain enforcement hearings. Section 110 permits the power to give a live link direction for hearings in the Court of Appeal to be exercised by the registrar.

#### *Chapter 5 (ss 111-117) Miscellaneous*

Section 111 amends the Criminal Justice Act 2003 s 138 in relation to the effect of the admission of a video recording. The 2009 Act 112 concerns the admissibility of evidence of previous complaints. Section 113 sets out the powers in respect of offenders who assist investigations and prosecutions. Section 114 provides that if the defendant is charged with murder, the defendant may not be granted bail unless the court is of the opinion that there is no significant risk of the defendant committing, while on bail, an offence that would, or would be likely to, cause physical or mental injury to any person other than the defendant. A person charged with murder may not be granted bail except by order of a judge of the Crown Court: s 115. Section 116 amends the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2 in relation to indictment of offenders. The 2009 Act makes provision in respect of the detention of persons under the Terrorism Act 2000 s 41.

### **Part 4 (ss 118-141) Sentencing**

#### *Chapter 1 (ss 118-136) Sentencing Council for England and Wales*

The 2009 Act s 118, Sch 15 establish a Sentencing Council for England and Wales. The Council must, as soon as practicable after the end of each financial year, make to the Lord Chancellor a report on the exercise of the Council's functions during the year: s 119. 'Sentencing guidelines' means guidelines relating to the sentencing of offenders: s 120. Section 121 provides for sentencing ranges. Section 122 defines 'allocation guidelines'. Under s 123, provision is made for the preparation or revision of guidelines in urgent cases. The Lord Chancellor can propose to the Council that it prepare or revise its guidelines: s 124. Every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so: s 125. Section 126 makes provision as to the determination of tariffs. Where the Council publishes draft guidelines under s 120 or s 122, or issues guidelines as definitive guidelines under s 120 or s 122, the Council must publish a resource assessment in respect of the guidelines: s 127. Under s 128, the Council must monitor the operation and effect of its sentencing guidelines. The Council may promote awareness of matters relating to the sentencing of offenders by courts in England and Wales: s 129. Section 130 provides that the annual report for a financial year must contain a sentencing factors report. The annual report for a financial year must contain a non-sentencing factors report: s 131. The Council's duty to assess the impact of policy and legislative proposals is dealt with in s 132. By s 133, the Lord Chancellor may provide the Council with such assistance as it requests in connection with the performance of its functions. Section 134 provides for the entrenchment of the Lord Chancellor's functions. The Sentencing Guidelines Council and the Sentencing Advisory Panel are abolished: s 135. Section 136 provides for interpretation.

#### *Chapter 2 (ss 137-141) Other provisions relating to sentencing*

Section 138, Sch 16 make provision about the extension of disqualification for holding or obtaining a driving licence in certain circumstances. Section 138 makes provision for certain terrorism offences. Section 139 concerns Northern Ireland. Section 140 makes provision with regard to appeals against certain confiscation orders. Section 141 concerns Northern Ireland.

### **Part 5 (ss 142-148) Miscellaneous criminal justice provisions**

Section 142 modifies the status and functions of the Commissioner for Victims and Witnesses. Section 143 allows the implementation of the European Parliament and EC Council Directive 2000/31 on e-commerce and the European Parliament and EC Council Directive 2006/123 on services in the internal market. Section 144, Sch 17 contain amendments relating to the treatment of criminal convictions imposed by courts outside England and Wales. Section 145 deals with the transfer to the Parole Board of functions under the Criminal Justice Act 1991. The 2009 Act s 146 amends the Courts Act 2003 s 55 in relation to the retention of knives surrendered or seized. The 2009 Act s 147 relates to Northern Ireland. The Lord Chancellor may, by order, authorise or require the Lord Chancellor, or such other person as may be specified, to designate persons as security officers in relation to a specified description of tribunal buildings: s 148.

### ***Part 6 (ss 149-154) Legal aid and other payments for legal services***

Section 149 makes provision with regard to pilot schemes for Community Legal Service. Section 150 amends the Access to Justice Act 1999 Sch 2 with regard to the excluded service of help in connection with business matters. The 2009 Act s 151 extends the power to seek information from the Commissioners for Her Majesty's Revenue and Customs and the Secretary of State, which at present may be exercised for purposes relating to an individual's financial eligibility for legal aid services to cover purposes relating to an individual's liability to make contributions toward the cost of those services. Section 152, Sch 18 provide for the enforcement of an order to pay for the cost of representation. By virtue of s 153, secondary legislation made by the Lord Chancellor may include consequential, incidental supplementary, transitional, transitory and saving provisions. Section 154 provides for the regulation of damages-based agreements in respect of claims relating to employment matters.

### ***Part 7 (ss 155-172) Criminal memoirs etc***

A court may make an exploitation proceeds order in respect of a person if it is satisfied, on the balance of probabilities, that the person is a qualifying offender and has obtained exploitation proceeds from a relevant offence: s 155. Section 156 defines 'qualifying offender'. Section 157 makes further provision as to qualifying offenders in relation to service offences. Section 158 makes supplementary provision in relation to qualifying offenders. Section 159 defines 'relevant offence'. Section 160 sets out what amounts to 'deriving a benefit' for the purposes of s 155. A court may not make an exploitation proceeds order except on the application of an enforcement authority: s 161. Section 162 sets out a range of factors that the court must take into consideration when deciding whether to make an exploitation proceeds order in respect of any benefit and, if it makes an order, the recoverable amount to be specified in the order. Section 163 places a limit on the amount that the court can order a person to pay ('the recoverable amount'). The available amount is the total of the value of the respondent's relevant assets, to the extent that any benefits identified in the order are benefits secured for a person other than the respondent, the value of those benefits, and the value, at the time the exploitation proceeds order is made, of such relevant gifts, if any, as the court considering making the exploitation proceeds order considers it just and reasonable to take account of in determining the available amount: s 164. 'Property' is all property wherever situated and includes money, all forms of real, corporeal or personal property and things in action and other intangible or incorporeal property: s 165. Section 166 makes provision as to where the court has made an exploitation proceeds order and a conviction relevant to the order is quashed. Section 167 sets out the powers of the court on repeat applications. A court making an exploitation proceeds order may also make an additional proceeds reporting order in respect of the respondent: s 168. Section 169, Sch 19 extend the provisions relating to investigations to include exploitation proceeds investigations. Section 170 makes consequential changes to the

functions of the Serious Organised Crime Agency. Section 171 has the effect that an application for an exploitation proceeds order may not be made more than six years after the enforcement authority's cause of action accrued. Section 172 provides interpretation.

### ***Part 8 (ss 173-175) Data Protection Act 1998***

Section 173 provides so that the Commissioner may serve a data controller with a notice for the purpose of enabling the Commissioner to determine whether the data controller has complied or is complying with the data protection principles. Section 174 amends the Data Protection Act 1998 s 52 so that the Commissioner must prepare a code of practice which contains practical guidance in relation to the sharing of personal data in accordance with the requirements of the 1998 Act and such other guidance as the Commissioner considers appropriate to promote good practice in the sharing of personal data. The 2009 Act s 175, Sch 20 contain further amendments of the Data Protection Act 1998.

### ***Part 9 (ss 176-183) General***

Orders or regulations made by the Secretary of State, the Lord Chancellor, the Welsh Ministers or the Chief Coroner under the 2009 Act are to be made by statutory instrument: s 176. Section 177, Schs 21, 22 make consequential amendments and transitional and saving provisions. Section 178, Sch 23 contain repeals. Section 179 deals with financial provision. Section 180 makes provision as to the effect of amendments to provisions applied for purposes of service law. Sections 181-183 deal with extent, commencement and short title.

### ***Amendments, repeals and revocations***

Subscribers should note that the lists below mention repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. Please also note that these lists are not exhaustive.

Specific provisions of a number of Acts are added, amended or repealed. These include: Infanticide Act 1938 s 1; Homicide Act 1957 s 2; Suicide Act 1961 ss 2-2B; Criminal Appeal Act 1968 ss 11, 11A; Criminal Law Act 1977 s 1A; Limitation Act 1980 s 27C; Police and Criminal Evidence Act 1984 ss 54B, 54C; Treasure Act 1996 s 8A; Data Protection Act 1998 s 52A-52E; Crime and Disorder Act 1998 s 57B, 57C, 57F; Access to Justice Act 1999 ss 17, 17A, Sch 2; Youth Justice and Criminal Evidence Act 1999 ss 16, 21, 22, 22A, 24, 27, 33BA, 33BB, 35; International Criminal Court Act 2001 ss 53, 60, 65A, 65B, 67A; Police Reform Act 2002 s 51; Criminal Justice Act 2003 s 138, Sch 15; Domestic Violence, Crime and Victims Act 2004 ss 48-50.

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## **STOP PRESS:**

The Policing and Crime Act 2009 makes provision (1) about the police; (2) about prostitution, sex offenders, sex establishments and certain other premises; (3) for reducing and dealing with the abuse of alcohol; (4) about the proceeds of crime; (5) about extradition; (6) amending the Aviation Security Act 1982; (7) about criminal records, including amendments to the Safeguarding Vulnerable Groups Act 2006; (8) conferring, extending and facilitating search, forfeiture and other powers relating to the United Kingdom's borders and elsewhere; and (9) for combatting crime and disorder. The 2009 Act received the royal assent on 12 November 2009 and ss 100, 111, 112(3)-(9), 113-117 and Sch 8 (in part) came into force on that date. Sections 88 and 91 came into force on 30 November 2009, and ss 6-9, 26, 51, 61, 62, 64, 67-78, Schs 7 (in part) and 9 (in part) came into force on 25 January 2010: SI 2009/3096. The 2009 Act Schs 7 (in part) and 8 (in part) came into force on 12 January 2010: s 116(6). Sections 98, 99, 101, 112 (in part) and Sch 8 (in part) came into force on 25 January 2010: SI 2010/52. The 2009 Act ss 10-13, 28-33, 79, 80, 83, 84 (for certain purposes), 97, 110, Schs 4, 6, Sch 7 paras 27-44, and Sch 8 (in part) came into force on 29 January 2010: SI 2010/125. The 2009 Act s 1 came into force on 15 March 2010: SI 2010/125. The 2009 Act ss 3, 4, 112 (in part) and Sch 8 (in part) came into force on 19 April 2010: SI 2010/999. The 2009 Act s 112 (in part), Sch 7 (in part) came into force in relation to Wales only on 8 May 2010: SI 2010/999. The 2009 Act s 2 comes into force on 1 September 2010: SI 2010/999. The remaining provisions come into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the Current Service Noter-up booklet.

### ***Part 1 (ss 1-13) Police reform***

Sections 1-5 amend the Police Act 1996. By virtue of the 2009 Act s 1, police authorities are required, when discharging any of their functions, to have regard to the views of the public in their area concerning policing. Section 2 establishes the Police Senior Appointments Panel, which has the function of advising the Secretary of State on any matter on which it is consulted by the Secretary of State in connection with senior officer appointments, on consents to deputy chief constables and assistant chief constables fulfilling the role of the chief constable for a period exceeding three months, and on consents for the second most senior officer in the City of London police to act as Commissioner for a particular period. Under s 3, regulations under the 1996 Act s 50 may make provision for payments to be made to senior officers who cease to serve before the end of their fixed-term appointment. The 2009 Act s 4 gives the Commissioner a formal role in appointments to the ranks of Assistant Commissioner, Deputy Assistant Commissioner and Commander in the Metropolitan Police. By virtue of s 5, agreements may be made between chief officers of police forces to carry out their functions through collaboration in the interests of the efficiency or effectiveness of policing. Section 6 amends the Police Act 1997 s 93 to enable an authorising officer acting under s 93(5)(a)-(c) to grant an authorisation to interfere with property on an application made by a member of the officer's own police force or by a member of another police force. The 2009 Act ss 7-9 amend the Regulation of Investigatory Powers Act 2000. The 2009 Act s 7 empowers a person who is a designated person by reference to an office, rank or position with a police force to grant an authorisation for persons holding offices, ranks or positions with another police force to obtain communications data under the 2000 Act. Under the 2009 Act s 8, arrangements equivalent to

those in the 2000 Act s 29(5) must be in force in relation to sources of police collaborative units comprising two or more police forces. A person who is a designated person for the purposes of s 28 or 29 by reference to his office, rank or position with a police force is entitled to grant an authorisation under s 28 or 29 on an application made by a member of another police force: 2009 Act s 9. Section 10 amends the 1996 Act to provide for an order-making power to amend s 97 to add further types of service that qualify as relevant service outside a police officer's own force. The 1996 Act is also amended by the 2009 Act s 11 so that the Secretary of State may make regulations concerning software used by the police. By virtue of ss 12 and 13, regulations requiring police forces to adopt particular procedures or practices or concerning common facilities or services need not apply to all police forces.

### ***Part 2 (ss 14-27) Sexual offences and sex establishments***

Section 14 amends the Sexual Offences Act 2003 by creating a strict liability offence which is committed if someone pays or promises payment for the sexual services of a prostitute who has been subject to exploitative conduct of a kind likely to induce or encourage the provision of sexual services for which the payer has made or promised payment. Equivalent provision is made in relation to Northern Ireland by the 2009 Act s 15. Section 16 amends the offence of loitering or soliciting for the purposes of prostitution, as set out in the Street Offences Act 1959 s 1, by introducing a requirement that the conduct must have been carried out at least twice in any three-month period. The 1959 Act is also amended by the 2009 Act s 17, Sch 1, which introduce a new penalty for those convicted of loitering or soliciting for the purpose of prostitution, allowing the court to make a rehabilitative order instead of imposing a fine or any other penalty. Section 18 amends the Rehabilitation of Offenders Act 1974 s 5 to apply a rehabilitation period of six months for those sentenced to an order following conviction for loitering or soliciting. Under the 2009 Act s 19, a new offence of soliciting is created which replaces the offences of kerb-crawling in a street or public place and persistent soliciting in a street or public place for the purposes of prostitution. Equivalent provision is made in relation to Northern Ireland by s 20. The courts are empowered by s 21, Sch 2 to close, on a temporary basis, premises being used for activities related to certain sexual offences. Sections 22-25 amend the Sexual Offences Act 2003. The Magistrates' Courts Act 1980 s 127 is disapplied by the 2009 Act s 22 in relation to applications for civil orders made under the Sexual Offences Act 2003 Pt 2 (ss 80-136). The 2009 Act s 23 raises the age of a child that must be at risk in order for a foreign travel order to be made, and s 24 extends, from six months to five years, the maximum duration of such an order. By virtue of s 25, offenders who are subject to a foreign travel order that prohibits them from travelling anywhere outside the United Kingdom must surrender their passports at a police station specified in the order. The 2000 Act s 53 is amended by the 2009 Act s 26 so that a maximum sentence of five years' imprisonment can be imposed in relation to cases involving the showing, taking or possessing an indecent photograph of a child. Section 27, Sch 3 add a new category of sex establishment called a 'sexual entertainment venue' to the Local Government (Miscellaneous Provisions) Act 1982 Sch 3, which brings the licensing of lap dancing and pole dancing clubs and other similar venues under the regime set out in the Local Government (Miscellaneous Provisions) Act 1982, which is currently used to regulate establishments such as sex shops and sex cinemas.

### ***Part 3 (ss 28-33) Alcohol misuse***

Section 28 amends the offence of persistently selling alcohol to children so that the offence is committed if alcohol is sold to an individual under the age of 18 on two or more occasions within three months rather than on three or more occasions within three months. The Confiscation of Alcohol (Young Persons) Act 1997 is amended by the 2009 Act s 29 so that police officers can confiscate sealed containers of alcohol from young persons in public places without needing to prove that they were consuming alcohol or that they intended to consume

alcohol in a public place. A person under the age of 18 commits an offence contrary to s 30 if he is caught with alcohol in a public place three or more times within a 12-month period. Section 31 amends the Violent Crime Reduction Act 2006 s 27(1) so that the police can issue directions to leave to persons between the ages of 10 and 15. The 2009 Act s 32 gives effect to Sch 4, which makes provision about mandatory licensing conditions relating to alcohol. Section 33 amends the Licensing Act 2003 ss 13 and 69 to allow members of a licensing authority to act as interested parties.

#### ***Part 4 (ss 34-50) Injunctions: gang-related violence***

Section 34 enables the court to grant an injunction in order to prevent a person from engaging in, encouraging or assisting gang-related violence (as defined) and/or to protect a person from gang-related violence. The possible effects that prohibitions or requirements contained in the injunction could have on the person are listed in s 35. Supplementary provision relating to such injunctions is made by s 36, including in relation to time limits and review hearings. Under s 37, an application for an injunction can be made by the police or a local authority. Before applying for an injunction, the applicant authority must consult with any local authority, any chief officer of police and any other body or individual that the applicant thinks it appropriate to consult: s 38. Provision for without notice applications is made by s 39. Section 40 prescribes the powers of the court to grant an interim injunction where the court adjourns a hearing of which notice has been given to the respondent. The court's powers to grant an injunction where it adjourns the hearing of an application which has been made without notice are specified in s 41. Provision is made by s 42 for the variation and discharge of an injunction. Under s 43, if a power of arrest has been attached to any of the prohibitions or requirements contained in an injunction, a police officer may arrest without warrant a respondent who is reasonably suspected to be in breach of that prohibition or requirement. Section 44 allows a court to grant a warrant for arrest if it believes that the respondent is in breach of any provision of the injunction. If a person has been arrested, with or without a warrant, s 45 empowers the court to remand a person for the purpose of medical examination and report if it has reason to consider that such a report will be required. Section 46 gives effect to Sch 5, which makes further provision about the powers to remand under ss 43 and 44. The Secretary of State is required by s 47 to issue and publish guidance in relation to injunctions. Rules of court may be made which provide that powers conferred on county courts are exercisable by judges of a county court and district judges: s 48. Section 49 defines various terms used in Pt 4. Under s 50, the Secretary of State is required to review the operation of Pt 4 and prepare and publish a report of that review.

#### ***Part 5 (ss 51-66) Proceeds of crime***

Part 5 amends the Proceeds of Crime Act 2002. By virtue of the 2009 Act s 51, receivers from the Crown Prosecution Service and Revenue and Customs Prosecutions Office, along with accredited financial investigators and members of staff of other departments and public bodies, are entitled to deduct their expenses from recovered sums when they are appointed as receivers pursuant to the 2002 Act s 48 or 50. An appropriate officer (as defined) can continue to retain property that has been or may be seized under a specified seizure power if that property is also subject to a restraint order: 2009 Act s 52. Sections 53 and 54 make equivalent provision in relation to Scotland and Northern Ireland. Section 55 provides for search and seizure powers to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. Sections 56 and 57 make equivalent provision in relation to Scotland and Northern Ireland. By virtue of s 58, property that has been seized by an appropriate officer under a relevant seizure power, or which has been produced to such an officer in compliance with a production order under the 2002 Act s 345, may in certain circumstances be sold to meet a confiscation order. The 2009 Act ss 59 and 60 make comparable provision in relation to

Scotland and Northern Ireland. Section 61 adds the Serious Organised Crime Agency to the list of enforcement authorities that are liable to pay compensation to a person whose property has been affected by the enforcement of confiscation legislation. Under s 62, the limitation period for actions for the civil recovery of property obtained through unlawful conduct under the 2002 Act Pt 5 Ch 2 (ss 243-288) is extended from 12 to 20 years. An officer can require the search of a vehicle if he has reasonable grounds for suspecting there is cash in the vehicle which is recoverable property or intended for use in unlawful conduct: 2009 Act s 63. Section 64 provides that the period during which cash seized under the 2002 Act s 294 can be detained may be extended for a period of six months. By virtue of the 2009 Act s 65, law enforcement agencies may forfeit detained cash without a court order in uncontested cases. Section 66 transfers the jurisdiction for applications relating to detained cash investigations from a High Court judge to a judge entitled to exercise the jurisdiction of the Crown Court.

### ***Part 6 (ss 67-78) Extradition***

Part 6 amends the Extradition Act 2003. The 2009 Act ss 67 and 68 ensure that the United Kingdom is in a position to deal with alerts transmitted via the second generation Schengen Information System which request the arrest of a person for extradition purposes. By virtue of ss 69 and 70, an appropriate judge is permitted to adjourn extradition proceedings on the basis of a domestic sentence after a person has been brought before him before the extradition hearing has begun. Section 71 clarifies that, where consideration of an extradition request is deferred in order to allow domestic proceedings to be concluded or a prison sentence to be served, consideration of the extradition request should recommence once the person is released from detention pursuant to any sentence imposed. Provision is made by s 72 for the treatment of persons who are serving a sentence of imprisonment in the United Kingdom, are extradited to a category 1 territory under a European Arrest Warrant, and then return to the United Kingdom. Corresponding provision is made in s 73 for persons who return to the United Kingdom after being extradited to a category 2 territory. Section 74 provides a regime within which the United Kingdom will be able to provide undertakings as to a person's treatment in the United Kingdom and eventual return to a requested territory. The protection afforded by the Extradition Act 2003 s 152 applies where a person is extradited to the United Kingdom from a territory which is neither a category 1 nor a category 2 territory: 2009 Act s 75. Section 76 deals with situations in which the United Kingdom would want to deal with an offence committed by a person previously extradited to the United Kingdom for the purposes of prosecution for a different offence. Under s 77, weekends and certain specified holidays are excluded from the calculation of the 48-hour period during which a person provisionally arrested under the Extradition Act 2003 s 5 must be brought before, and relevant documents provided to, the appropriate judge. The 2009 Act s 78 enables a judge to give a live link direction in hearings before the judge other than the extradition hearing itself and other than any extradition proceedings which postdate surrender.

### ***Part 7 (ss 79, 80) Aviation security***

Section 79 amends the Aviation Security Act 1982 by making provision for the establishment of Risk Advisory Groups and Security Executive Groups at aerodromes. The 2009 Act s 80 gives effect to Sch 6, which makes further amendments to the Aviation Security Act 1982 supplementary to and consequential on the creation of these bodies.

### ***Part 8 (ss 81-111) Miscellaneous***

#### ***Chapter 1 (ss 81-97) Safeguarding vulnerable groups and criminal records***

Section 81 renames the Independent Barring Board as the Independent Safeguarding Authority and makes consequential amendments to various enactments. Sections 82-89 amend the Safeguarding Vulnerable Groups Act 2006. The effect of the 2009 Act s 82 is that a person who is required under the Safeguarding Vulnerable Groups Act 2006 s 13 to make a check on a member of a governing body (a 'governor') of an educational establishment does not commit an offence if the governor fails to consent to the check or fails to provide the appropriate officer with any information necessary to make the check. The 2009 Act s 82 also makes it an offence for a governor to act as a member of a governing body before consenting to the check or providing the appropriate officer with any information required to carry out the check. The Secretary of State is entitled to determine the form, manner and content of the form for applying to become subject to monitoring pursuant to the Safeguarding Vulnerable Groups Act 2006 s 24: 2009 Act s 83. Section 84 makes provision for the payment of a fee by persons who are subject to monitoring and have benefited from a free application to the monitoring scheme as a volunteer, if they subsequently enter paid employment in activities regulated under the Safeguarding Vulnerable Groups Act 2006. The requirements arising from the declaration to be made by persons eligible to receive vetting information under s 30 or information about the cessation of monitoring under s 32 are revised by the 2009 Act ss 85 and 86. Section 87 creates an additional duty and confers a further power on the Independent Safeguarding Authority in circumstances where it proposes to bar an individual from working with children or vulnerable adults. Under s 88, the Independent Safeguarding Authority is empowered to provide information that it holds to the police for use by the police for any of various specified purposes. It is the Independent Safeguarding Authority rather than the Secretary of State that must now be satisfied that a person has met the prescribed criteria for automatic barring before the Authority is required to bar him: s 89. Sections 90-92 make provision in relation to Northern Ireland equivalent to that made by ss 87-89. By virtue of s 93, a copy of a person's criminal conviction certificate is to be sent to an employer where specifically requested. Section 94 amends the Police Act 1997 to provide for 'right to work' information to be recorded on basic, standard and enhanced disclosures where a request for such information is made. The 2009 Act s 95 allows for other methods of identity verification to be prescribed under the Police Act 1997 s 118 when making an application for a criminal conviction certificate. The Criminal Records Bureau is authorised to check the suitability of individuals to be registered to countersign and receive standard and enhanced disclosures against the new barred lists established under the Safeguarding Vulnerable Groups Act 2006: 2009 Act s 96. The Police Act 1997 is amended by the 2009 Act s 97 so that the Secretary of State may determine the form, manner and contents of applications for criminal records disclosures.

#### *Chapter 2 (ss 98-111) Other*

Section 98 amends the Customs and Excise Management Act 1979 by enabling an officer of Revenue and Customs to require a person entering or leaving the United Kingdom to produce his passport or travel documents and answer questions about his journey. The 1979 Act is also amended by the 2009 Act s 99, which clarifies the powers available to officers at the border to ask questions about, and to search for, cash that is recoverable property or is intended by any person for use in unlawful conduct. Section 100 clarifies that the protection from interception afforded to postal communications in the 2000 Act does not restrict Revenue and Customs' powers to check international postal traffic for customs or excise purposes. A prohibition on the importation and exportation of false identity documents is created by the 2009 Act s 101. Section 102 amends the Criminal Justice Act 1988 by empowering the Secretary of State to specify weapons for the purposes of the prohibition on importation. The 2009 Act s 103 amends the Football Spectators Act 1989 so that those subject to banning orders in England and Wales are also banned from attending regulated football matches in Scotland and Northern Ireland. Under the 2009 Act s 104, when an individual is directed to report to police by the court or an enforcing authority, the specified police station may be anywhere in the United Kingdom and thus local to the individual's place of residence. Section 105 deals with the enforcement of the 1989 Act in Scotland and Northern Ireland. The offence of failing to comply with the



requirements of a Scottish banning order or a notice issued by the Scottish Football Banning Orders Authority and the offence of giving false information in connection with an application for an exemption are extended to England and Wales by the 2009 Act s 106. Section 107 adds to the list of relevant offences for the purposes of the 1989 Act Pt 2 (ss 14-22A) (1) failing to comply with a requirement made on initially reporting to the police in respect of an English and Welsh imposed order; and (2) knowingly making false statements in relation to an application for an exemption to the English and Welsh enforcing authority. Under the 2009 Act s 108, every provider of probation services in a particular area whose arrangements under the Offender Management Act 2007 s 3 provide for it to be a responsible authority is to be added to the list of responsible authorities which comprise Crime and Disorder Reduction Partnerships (in England) or Community Safety Partnership (in Wales) in that area. The Serious Organised Crime and Police Act 2005 is amended by the 2009 Act s 109 by the creation of three exceptions to the general rule that employees of the Serious Organised Crime Agency are not servants of the Crown. Section 110 amends the Firearms Act 1968 so that certain provisions of the 1968 Act apply to a member of the Scottish Crime and Drug Enforcement Agency in the same way as they apply to a member of a police force and a member of staff of the Serious Organised Crime Agency. The requirement that a constable who wishes to obtain a warrant under the Misuse of Drugs Act 1971 s 23(3) to enter and search premises must be acting for the police area within which the premises are situated is removed by the 2009 Act s 111.

### ***Part 9 (ss 112-117) General***

Sections 112 and 113 prescribe the order-making power of the Secretary of State for the purposes of the 2009 Act. Section 112 also gives effect to Sch 7, which makes minor and consequential amendments, and Sch 8, which makes various repeals and revocations. Section 114 makes financial provision, s 115 deals with extent, s 116 makes provision for commencement, and s 117 specifies the short title.

### ***Amendments, repeals and revocations***

Subscribers should note that the lists below mention repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. Please also note that these lists are not exhaustive.

The following Act is repealed in full: Sexual Offences Act 1985.

Specific provisions of a number of Acts are added, amended or repealed. These include: Street Offences Act 1959 s 2; Aviation Security Act 1982 ss 25, 25A, 30; Prosecution of Offences Act 1985 s 22A; Crime and Disorder Act 1998 ss 14, 15, 44; Criminal Justice and Police Act 2001 ss 48, 49; Vehicles (Crime) Act 2001 s 36; Police Reform Act 2002 s 84; Proceeds of Crime Act 2002 s 45; Extradition Act 2003 ss 143, 144, 151; Drugs Act 2005 s 2; Serious Organised Crime and Police Act 2005 s 120; and Serious Crime Act 2007 s 78.

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## **1. PRINCIPLES OF CRIMINAL LIABILITY**

### **(1) THE NATURE OF CRIME**

#### **1. Definition of 'crime'.**

'Criminal' and 'crime' are words of ordinary English usage. There is no satisfactory definition of 'crime' which will embrace the many acts and omissions which are criminal and which will at the same time exclude all those which are not<sup>1</sup>. Ordinarily a crime is a wrong which affects the security or well-being of the public generally so that the public has an interest in its suppression<sup>2</sup>. A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general moral sense of the community. There are, however, many crimes which exhibit neither of these characteristics<sup>3</sup>. An act may be made criminal by Parliament simply because it is criminal, rather than civil, process which offers the more effective means of controlling the conduct in question.

1 Whether conduct amounts to a crime may be determined by whether it is followed by criminal or civil proceedings: see PARA 2 post.

2 See *Mogul Steamship Co v McGregor, Gow & Co* (1889) 23 QBD 598 at 606, CA, per Lord Esher MR ('an illegal act which is a wrong against the public welfare seems to have the necessary ingredients of a crime').

3 See *Sherras v De Rutzen* [1895] 1 QB 918 at 922 per Wright J ('acts which . . . are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty').

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## 2. Criminal and civil proceedings distinguished.

Civil proceedings have for their object the recovery of money or other property, or the enforcement of a right or advantage on behalf of the claimant, whereas criminal proceedings have for their object the punishment of a person who has committed a crime<sup>1</sup>. Criminal proceedings are not to be used as a means of enforcing a civil right<sup>2</sup>. Whether conduct amounts to a crime may be determined by ascertaining whether the conduct in question is followed by criminal or civil proceedings. If the proceedings will result in the punishment of a party, the conduct in question will be a crime notwithstanding that it may be a matter of small consequence<sup>3</sup>.

It is a question of construction in each case whether a breach of statutory duty for which Parliament has provided no remedy creates an offence or not: among the factors which will have to be considered are whether the duty is mandatory or prohibitory, whether the statute is ancient or modern, and whether there are any other means of enforcing the duty<sup>4</sup>. It is easier to infer in the case of a modern statute that Parliament does not intend to create an offence unless it says so: in the case of a mandatory duty imposed by a modern statute, enforceable by way of judicial review, the inference that Parliament did not intend to create an offence in the absence of an express provision to that effect is, nowadays, almost irresistible<sup>5</sup>.

An act may be prohibited or commanded by statute in such a manner that the person contravening the provision is liable to a pecuniary penalty which is recoverable as a civil debt; and in such an instance contravention is not a crime<sup>6</sup>.

1 *A-G v Radloff* (1854) 10 Exch 84 at 101 per Platt B. See also *Re Douglas* (1842) 3 QB 825; *A-G v Bradlaugh* (1885) 14 QBD 667, CA; *R v Hausmann* (1909) 73 JP 516, 3 Cr App Rep 3, CCA.

2 *R v Peel* [1943] 2 All ER 99, 29 Cr App Rep 73, CCA (defendant convicted of embezzlement (now theft) of £5; no power to bind over on condition of payment of £70, the total amount embezzled, because this would enforce by criminal procedure what was in effect a civil debt). As to the powers of criminal courts to award compensation or restitution see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375 et seq.

3 *Parker v Green* (1862) 2 B & S 299 at 311; *Mellor v Denham* (1880) 5 QBD 467, CA; *R v Sullivan* (1874) IR 8 CL 404.

4 *R v Horseferry Road Justices, ex p Independent Broadcasting Authority* [1987] QB 54, [1986] 2 All ER 666, DC.

5 *R v Horseferry Road Justices, ex p Independent Broadcasting Authority* [1987] QB 54, [1986] 2 All ER 666, DC.

6 See *Brown v Allweather Mechanical Grouting Co Ltd* [1954] 2 QB 443, [1953] 1 All ER 474, DC. See also *Atcheson v Everitt* (1776) 1 Cowp 382; *Ex p Beeching* (1825) 4 B & C 136 at 137; *A-G v Siddon* (1830) 1 Cr & J 220; *A-G v Radloff* (1854) 10 Exch 84 at 96; *Parker v Green* (1862) 2 B & S 299; *R v Hawkhurst Inhabitants* (1862) 1 New Rep 88; *A-G v Bradlaugh* (1885) 14 QBD 667, CA; *Newman v Jones* (1886) 17 QBD 132 at 136; *R v Tyler and International Commercial Co* [1891] 2 QB 588 at 594, CA, per Bowen LJ; *St Helen's District Tramways Co v Wood* (1891) 60 LJMC 141, DC.

Whether a statute creates a criminal offence is a question of interpretation: eg if the word 'penalty' as distinct from the word 'fine' is used, the general rule is that the penalty must be recovered as a debt in a civil court: see *Brown v Allweather Mechanical Grouting Co Ltd* supra at 446 and at 475 per Lord Goddard CJ; but cf *R v Paget* (1881) 8 QBD 151. The Common Informers Act 1951 s 1(3) (amended by virtue of the Criminal Justice Act 1982

ss 38, 46) substituted fines for the penalties previously recoverable in many common informer actions and made the acts for which the penalties had been recoverable into crimes.

The word 'offence' is sometimes used to describe a criminal act (see *R v Paget* supra) and sometimes to describe an act which is not criminal (see *A-G v Radloff* supra at 101; *Brown v Allweather Mechanical Grouting Co Ltd* supra). There is a rule of statutory interpretation that 'a man is not to be put in peril upon an ambiguity': *London and North Eastern Ry Co v Berriman* [1946] AC 278 at 313-314, [1946] 1 All ER 255 at 270, HL, per Lord Simonds.

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### **3. Legal punishment.**

Legal punishment is punishment awarded in a process instituted at the suit of the Crown standing forward as prosecutor on behalf of the subject on public grounds<sup>1</sup>. Such process, once instituted, may be stayed:

- 1 (1) after the indictment has been signed only at the instance of the Attorney General acting on behalf of the Crown<sup>2</sup>;
- 2 (2) during the preliminary stages of the proceedings in magistrates' courts, and subject to statutory conditions, by the Director of Public Prosecutions<sup>3</sup>; or
- 3 (3) after a person has been sent for trial but before the indictment has been preferred, and subject to statutory conditions, by the Director of Public Prosecutions or a specified authority<sup>4</sup>,

and the punishment, when imposed, may be remitted only by the Crown<sup>5</sup> or by Parliament.

1 *Burdett v Abbot* (1811) 14 East 1 at 162 per Bayley J. In the absence of statutory provision to the contrary any person may of his own initiative, and without any preliminary consent, institute criminal proceedings with a view to an indictment: see PARA 1071 post. The prosecution is, however, always at the suit of the Crown. Hence criminal proceedings were known as Pleas of the Crown. As to the circumstances in which consent is required to proceedings being brought see PARA 1071 post; as to the right of any person to prefer an indictment see PARA 1205 post; as to the penalties which may be imposed in criminal proceedings see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 1 et seq; and as to sentencing principles see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 615 et seq.

2 As to the entry of a nolle prosequi by the Attorney General see PARA 1229 et seq post.

3 See the Prosecution of Offences Act 1985 s 23 (as amended); and PARA 1159 post.

4 See *ibid* s 23A (as added); and PARA 1160 post.

5 See PARA 1978 post; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 823 et seq.

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## **(2) THE ELEMENTS OF CRIME**

### **(i) In general**

#### **4. The constituents of crime in general.**

A person is not to be convicted of a crime unless he has, by his conduct, brought about those elements which by common law or statute constitute that crime, and in general a person does not incur criminal liability unless he had the requisite state of mind as to those elements which constitute the crime. These concepts are traditionally expressed in the maxim 'actus non facit reum nisi mens sit rea'<sup>1</sup>. In some instances a person may be convicted of a crime if he has negligently brought about its constituent elements<sup>2</sup>.

In certain crimes, nearly all of which are created by statute, a person may incur criminal liability even though he was blamelessly inadvertent as to one or more of the elements of that crime<sup>3</sup>. Such crimes are known as crimes of strict liability. Notwithstanding that the statute creating an offence contains no expression indicating that a mental element is a necessary constituent, there is a presumption in favour of the requirement of mens rea<sup>4</sup>; and, before criminal liability without fault can be imposed, this presumption must be displaced by clear words or by necessary implication<sup>5</sup>.

1 The maxim originated with Coke: see 3 Co Inst 6. It has been said that 'the maxim not only looks more instructive than it really is, but suggests fallacies which it does not precisely state': 2 *Stephen's History of the Criminal Law* 95. See also *Haughton v Smith* [1975] AC 476 at 491-492, 58 Cr App Rep 198 at 206-207, HL, per Lord Hailsham of St Marylebone LC ('the phrase means 'an act does not make a man guilty of a crime unless his mind be also guilty'. It is thus not the actus which is reus but the man and his mind respectively . . . it is well to record this as it has frequently led to confusion'); *Sweet v Parsley* [1970] AC 132 at 162, 53 Cr App Rep 221 at 245, HL, per Lord Diplock.

2 See PARA 14 post.

3 See PARA 15 post.

4 This presumption was categorically affirmed by the House of Lords in *Sweet v Parsley* [1970] AC 132, 53 Cr App Rep 221, HL; *B (A Minor) v DPP* [2000] 2 AC 428, [2000] 2 Cr App Rep 65, HL; *R v K* [2001] UKHL 41, [2002] 1 AC 462, [2002] 1 Cr App Rep 121.

5 See PARA 15 post.

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## **(ii) The Criminal Conduct**

### **5. The actus reus.**

Every crime has specified elements, prescribed by the common law or by the statutory definition of the offence, which together make up its actus reus. The expression actus reus can be summarised as meaning an act (or sometimes an omission or state of affairs) indicated in the definition of the offence charged together with:

- 4 (1) any consequences of that act which are indicated by that definition; and
- 5 (2) any surrounding circumstances so indicated (other than references to the mens rea or element of negligence required on the part of the defendant, or to any defence).

In a criminal trial the prosecution must prove the existence of all those elements constituting the offence; failure to prove the existence of any particular element necessarily involves a failure to establish the commission of the crime<sup>1</sup>. Where, on the other hand, it is proved that the defendant brought about all the constituent elements of the particular crime, he is not entitled to be acquitted merely because certain facts exist which, unknown to him, provided a justification<sup>2</sup>.

1 *R v Deller* (1952) 36 Cr App Rep 184, CCA (conviction for obtaining by false pretences quashed where prosecution could not prove statement to be untrue though defendant believed it to be untrue).

2 *R v Dadson* (1850) 2 Den 35, 4 Cox CC 358, CCR (constable, unaware of circumstances which would have justified his use of force, convicted of wounding with intent to cause grievous bodily harm). But see *R v McKoy* [2002] EWCA Crim 1628, (2002) Times 17 June (where a defendant used force to escape from a police officer, mistakenly believing that he was being unlawfully arrested, it was held that his mistake did not affect his entitlement to use reasonable force to resist unlawful arrest and his conviction for assault occasioning actual bodily harm and another offence was accordingly quashed). As to justification see PARA 16 et seq post.

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## 6. Omissions.

Save in exceptional circumstances the criminal law imposes no obligation on persons to act so as to prevent the occurrence of harm or wrongdoing. There is no general duty to prevent the commission of crime<sup>1</sup>; nor does a person commit a crime or become a party to it solely because he might reasonably have prevented its commission<sup>2</sup>. Omission to act in a particular way will give rise to criminal liability only where a duty so to act arises at common law or is imposed by statute<sup>3</sup>. Such a duty is exceptional at common law and the criminal law does not ordinarily require a person to be his brother's keeper<sup>4</sup>. Nevertheless, if a person assumes that role, he may incur criminal liability not only for any subsequent acts but also for omissions<sup>5</sup>. In such circumstances there is no need to prove that the defendant had been obliged by law to undertake the particular duty, or that he was bound by contract to care for the other<sup>6</sup>; it is sufficient that he voluntarily undertook the care of another in circumstances in which that other was unable to fend for himself<sup>7</sup>.

Where the defendant inadvertently creates a situation endangering a person or property (so that he lacks the necessary mens rea at that time) he is under a duty to take such steps as lie within his power to try to counteract the danger before it materialises; if he becomes aware of the train of events caused by his act before the resulting harm is complete (and has the necessary mens rea in consequence) but fails to take those steps he can be convicted of the crime which the resulting consequence entails<sup>8</sup>.

It is possible for the person owed the duty to release from it the person owing the duty, either before or at the time that the duty would otherwise require action, even if it is contrary to his best interests, provided that the subject is an adult capable of making a rational decision<sup>9</sup>.

A crime may be so defined that it is impossible or difficult to conceive of circumstances in which the actus reus could be constituted by an omission<sup>10</sup>; but it would seem that, in conjunction with the appropriate mens rea, most offences against the person and most offences against property, including theft<sup>11</sup> and dishonest handling<sup>12</sup>, may be so constituted.

1 A constable has a duty to prevent crime: see *R v Dytham* [1979] QB 722, [1979] 3 All ER 641, CA (failure by uniformed police officer to intervene when he saw a man being kicked to death; it was held that he could be convicted of the common law offence of misconduct in public office (see PARA 536 post)); and it is an offence for a person to refuse without reasonable excuse to assist in quelling a breach of the peace when called upon by a constable (*R v Brown* (1841) Car & M 314; and see PARA 738 post).

2 Cf *Rice v Connolly* [1966] 2 QB 414, [1966] 2 All ER 649, DC (person refusing to answer questions is not 'wilfully obstructing' a police officer even though this may hamper inquiries). See also *Swallow v LCC* [1916] 1 KB 224, DC.

3 Where pursuant to an Act of Parliament an order is made requiring a corporation to effect certain works, an indictment lies for failure to comply: *R v Birmingham and Gloucester Rly Co* (1842) 3 QB 223.

4 At common law a parent has a duty to act for the welfare of his child and, if harm is caused to the child by his failure to act, he may be criminally liable for the resulting harm: *R v Bubb*, *R v Hook* (1850) 4 Cox CC 455; *R v Gibbins*, *R v Proctor* (1918) 13 Cr App Rep 134, CCA. Cf *R v Knights* (1860) 2 F & F 46.

5 *R v Smith* (1826) 2 C & P 449. See also *R v Stone*, *R v Dobinson* [1977] QB 354, 64 Cr App Rep 186, CA (the occupier of a house and the woman with whom he was living were both convicted of manslaughter for failing to provide nursing care for the occupier's sister who lodged with them).



6 See eg *R v Pittwood* (1902) 19 TLR 37 (a railway level-crossing keeper who forgot to close the gates was convicted of manslaughter). As to the extent of a medical practitioner's duty to maintain life-prolonging treatment see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 202.

7 'In this case, as in most cases, the legal duty can be nothing else than the taking upon oneself the performance of a moral obligation': *R v Instan* (1893) as reported in 17 Cox CC 602 at 603, CCR, per Lord Coleridge. Thus a woman who assumes responsibility for the care of another's child may be liable in respect of a failure to provide food (*R v Gibbins, R v Proctor* (1918) 13 Cr App Rep 134, CCA) or to provide medical aid (*R v Lee, R v Parkes* (1917) 13 Cr App Rep 39, CCA). See also *R v Instan* [1893] 1 QB 450, CCR; the Children and Young Persons Act 1933 s 1 (as amended); para 143 post; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 611.

8 See *R v Miller* [1983] 2 AC 161, 77 Cr App Rep 17, HL (accidentally setting fire to mattress and, with knowledge of the fire, taking no steps to put it out; guilty of arson).

9 *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, [1992] 4 All ER 649, CA; *Re C (Adult: Refusal of Treatment)* [1994] 1 All ER 819, [1994] 1 WLR 290; *Airedale NHS Trust v Bland* [1993] AC 789 at 857, [1993] 1 All ER 821 at 860, HL, per Lord Keith of Kinkel, at 864 and 866 per Lord Goff of Chieveley, at 883 and 882 per Lord Browne-Wilkinson, and at 891-892 and 889 per Lord Mustill; *St George's Healthcare NHS Trust v S* [1999] Fam 26, [1998] 3 All ER 673, CA; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARAS 199, 202. As to advance decisions to refuse treatment see the Mental Capacity Act 2005 ss 24-26; and MENTAL HEALTH vol 30(2) (Reissue) PARAS 653-655.

10 Eg offences under the Forgery and Counterfeiting Act 1981 Pt I (ss 1-13) (as amended): see PARA 346 et seq post.

11 An appropriation includes 'keeping . . . [property] as owner': see the Theft Act 1968 s 3(1); and PARA 284 post.

12 See *R v Pitchley* (1973) 57 Cr App Rep 30, CA; and PARA 302 post.

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## **7. Causation.**

To give rise to criminal liability in a crime whose actus reus specifies a consequence, it is not enough that the defendant had a culpable state of mind: it must be proved that the consequence was caused<sup>1</sup> by some conduct on his part<sup>2</sup>. That conduct need not be the sole or the effective cause of the consequence: it is sufficient, if it is a cause, that is a cause which cannot be dismissed as minimal or as slight or trifling<sup>3</sup>. It is therefore possible to have two or more independent operative causes of a consequence, and any person whose conduct constitutes a substantial (that is, more than minimal) cause may be convicted of an offence in respect of the consequence<sup>4</sup>.

Unless it is so gross as to prevent the defendant's act being a substantial cause, the contributory negligence of the victim is no defence<sup>5</sup>. The existence of a medical condition which rendered the victim more susceptible to death or injury does not prevent attribution of that consequence to the defendant; the defendant must take his victim as he finds him<sup>6</sup>.

The occurrence of an independent intervening natural event causing the specified consequence, which would not have had that effect but for the defendant's act, will not prevent the attribution of the consequence to the defendant if the type of event (as opposed to the details of the particular event) was reasonably foreseeable in the ordinary course of things; in such a case the specified consequence is said to be a 'natural' consequence of the defendant's act<sup>7</sup>.

Where the defendant's act is not an operating cause of the required consequence but nevertheless contributes to it, in that an intervening act by another person, whether the third party or the victim, which is the immediate cause of the consequence, would not have occurred but for the defendant's act, the rule is that the free, deliberate and informed intervention of that other person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the defendant of criminal responsibility: otherwise an intervening act by another person does not prevent the consequence being attributed to the defendant<sup>8</sup>. A different approach is, however, taken in respect of an offence which imposes a duty which requires one to guard against, or makes one responsible for, the deliberate acts of third parties, as is the case with certain offences of negligence and strict liability: an intervening third party act does not prevent attribution of the consequence to the conduct of the person under the duty (the defendant) unless that act was extraordinary, rather than a normal fact of life<sup>9</sup>. In addition, if the defendant prepares a syringe of a controlled drug for immediate self-injection by another, who self-injects it, the defendant may be convicted of causing a noxious substance to be administered to the other<sup>10</sup> and, if the other dies in consequence of that injection, of manslaughter<sup>11</sup>.

If the defendant puts the victim in fear of harm and the victim brings about his own death or injures himself in trying to escape, the victim's death or injury can be attributed to the defendant, provided that the victim's reaction was within the foreseeable range of possible responses of a reasonable person in the victim's situation<sup>12</sup>.

If a wound is inflicted and death results, the person who inflicted the wound will be held to have caused the death although the victim may have neglected to use proper remedies<sup>13</sup>, or refused to undergo a necessary operation<sup>14</sup>. Similarly, where a wound or hurt has necessitated medical treatment and such treatment is negligent so that death ensues, the wound will be regarded as

causing the death if it continues to be an operating cause at the time of death<sup>15</sup>. Moreover, if the original wound is not an operating cause of death because the deceased does not die from the wound caused by the defendant but from the negligent treatment given for it, the wound will be regarded as causing death unless the treatment is so independent of the defendant's conduct and in itself so potent as to render the contribution to death of the defendant's conduct insignificant<sup>16</sup>.

1 In the context of homicide offences, 'cause' simply means 'accelerate': see *R v Dyson* [1908] 2 KB 454, 1 Cr App Rep 13, CCA; *R v Adams* (1957) unreported, summarised at [1957] Crim LR 375; and PARA 89 post.

2 *R v Dalloway* (1847) 3 Cox CC 273 (driver not guilty of manslaughter where his negligent driving did not contribute to death of child who ran into path of vehicle).

3 *R v Hennigan* [1971] 3 All ER 133, 55 Cr App Rep 262, CA; *R v Cato* [1976] 1 All ER 260, 62 Cr App Rep 41, CA; *R v Notman* [1994] Crim LR 518, CA; *R v Kimsey* [1996] Crim LR 35, CA.

4 *R v Benge* (1865) 4 F & F 504. See also *R v Mitchell* [1983] QB 741, 76 Cr App Rep 293, CA; *R v Smith* [1959] 2 QB 35, 43 Cr App Rep 121, C-MAC; *R v Pagett* (1983) 76 Cr App Rep 279 at 288; *R v Cheshire* [1991] 3 All ER 670, 93 Cr App Rep 251, CA.

5 *R v Longbottom* (1849) 13 JP 270. See also *R v Swindall*, *R v Osborne* (1846) 2 Car & Kir 230; *R v Hutchinson* (1864) 9 Cox CC 555 at 557 per Byles J; *R v Jones* (1870) 11 Cox CC 544; *R v Kew*, *R v Jackson* (1872) 12 Cox CC 355.

6 *R v Hayward* (1908) 21 Cox CC 692.

7 *Hallett v R* [1969] SASR 141, S Aust FCsw; *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 36, sub nom *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1998] 1 All ER 481 at 492-493, HL, per Lord Hoffmann.

8 See *R v Latif*, *R v Shahzad* [1996] 1 All ER 353, [1996] 2 Cr App Rep 92, HL; *R v Pagett* (1983) 76 Cr App Rep 279 at 289, CA, per Robert Goff LJ. Where the defendant is jointly engaged in the process whereby another person injects himself with a controlled drug, with fatal effect, as where the defendant hands a syringe of the drug to the other for immediate use or where he applies a tourniquet while the other injects, the defendant acts in concert with the other with the result that the other's free, deliberate and informed act does not break the chain of causation linking the provision of the drug with the other's death: *R v Kennedy* [2005] EWCA Crim 685, [2005] 1 WLR 2159, [2005] 2 Cr App Rep 348. See also *R v Rogers* [2003] EWCA Crim 945, [2003] 2 Cr App Rep 160.

9 *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, sub nom *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1998] 1 All ER 481, HL.

10 Ie contrary to the Offences Against the Person Act 1861 s 23 (as amended) (see PARA 475 post).

11 *R v Finlay* [2003] EWCA Crim 3868; *R v Kennedy* [2005] EWCA Crim 685, [2005] 2 Cr App Rep 348. It was held in *R v Rogers* [2003] EWCA Crim 945, [2003] 2 Cr App Rep 160, that a defendant who held a tourniquet to the arm of another who injected himself with a lethal dose of heroin had unlawfully administered the drug because of his active participation in the injection process, and that the victim's self-injection did not break the chain of causation. As to manslaughter see PARA 92 et seq post.

12 *R v Roberts* (1971) 56 Cr App Rep 95, CA; *R v Mackie* (1973) 57 Cr App Rep 453, CA; *R v Williams* [1992] 2 All ER 183, 95 Cr App Rep 1, CA; *R v Corbett* [1996] Crim LR 594, CA. Although this test is being applied on the basis of what a reasonable person in the defendant's shoes would have foreseen (*R v Williams* supra), that reasonable person is not endowed with the defendant's age or sex or any other of his characteristics (*R v Marjoram* [2000] Crim LR 372, CA).

13 1 Hale PC 428; 1 East PC 344; *Rew's Case* (1662) Kel 26; *R v Wall* (1802) 28 State Tr 51; *R v Flynn* (1867) 16 WR 319, CCR.

14 *R v Holland* (1841) 2 Mood & R 351; *R v Blaue* [1975] 3 All ER 446, [1975] 1 WLR 1411, CA; *R v Dear* [1996] Crim LR 595, CA.

15 *R v Smith* [1959] 2 QB 35, 43 Cr App Rep 121, C-MAC. See also *R v Malcherek*, *R v Steel* [1981] 2 All ER 422, 73 Cr App Rep 173, CA (disconnection of life support machine did not break chain of causation).

16 *R v Cheshire* [1991] 3 All ER 670, 93 Cr App Rep 251, CA. See also *R v Mellor* [1996] 2 Cr App Rep 245, CA; *R v Smith* [1959] 2 QB 35, 43 Cr App Rep 121, C-MAC; cf *R v Jordan* (1956) 40 Cr App Rep 152, CCA (said in *R v Smith* supra to be a special case depending on its particular facts).

## **UPDATE**

### **7 Causation**

NOTES 8, 11--*Kennedy*, cited, reversed: [2007] UKHL 38, [2007] 4 All ER 1083 (person who supplies Class A controlled drug to deceased can never be guilty of manslaughter where deceased has chosen to inject himself with drug which killed him). Cf *Kane v HM Advocate*; *MacAngus v HM Advocate* (2009) Times, 6 February (causal link not always broken).

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### (iii) The Mental Element

#### 8. Mens rea in general.

As a general rule every crime requires a mental element<sup>1</sup>, the nature of which will depend upon the definition of the particular crime in question. Expressions connoting the requirement of a mental element include: 'with intent'<sup>2</sup>; 'recklessly'<sup>3</sup>; 'maliciously'<sup>4</sup>; 'wilfully'<sup>5</sup>; 'knowingly'<sup>6</sup>; 'knowing or believing'<sup>7</sup>; 'fraudulently'<sup>8</sup>; and 'dishonestly'<sup>9</sup>. Each of these expressions is capable of bearing a meaning which differs from that ascribed to any other. The meaning of each must be determined in the context in which it appears, and the same expression may bear a different meaning in different contexts<sup>10</sup>.

Although the view has been expressed that it is impossible to ascribe any particular meaning to the term mens rea<sup>11</sup>, concepts such as those of intention, recklessness and knowledge are commonly used as the basis for criminal liability and in some respects may be said to be fundamental to it.

1 See, however, *R v Larsonneur* (1933) 24 Cr App Rep 74, CCA; and PARA 6 note 1 ante. Even in crimes of strict liability some mental element is normally required: see PARA 15 note 3 post.

2 See PARAS 10, 13 post.

3 See PARA 11 post.

4 For the meaning of 'maliciously' in the context of the Offences against the Person Act 1861 s 23 (as amended) see *R v Cunningham* [1957] 2 QB 396, 41 Cr App Rep 155, CCA (held to import intention or recklessness as to the particular kind of harm done: see further PARA 124 post). In the context of the Offences against the Person Act 1861 s 20 (as amended), in order to prove that the defendant acted 'maliciously' it is sufficient to prove that he intended his act to result in some unlawful bodily harm to some other person, albeit of a minor nature, or was reckless as to the risk that his act might result in such harm: see *R v Savage* [1992] 1 AC 699, [1991] 4 All ER 698, HL; and see further PARA 120 post.

5 For the meaning of 'wilfully' in the context of the Children and Young Persons Act 1933 s 1 (as amended) (cruelty to a child: see PARA 143 post; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 611) see *R v Sheppard* [1981] AC 394, 72 Cr App Rep 82, HL; in the context of the Malicious Damage Act 1861 s 36 (wilful obstruction of railway: see PARA 344 post) see *R v Gittins* [1982] RTR 363, CA; in the context of the common law offence of misconduct in public office (see PARA 536 post) see *A-G's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73, [2004] 2 Cr App Rep 366, CA. In these offences there is no material difference between wilfulness and recklessness (see PARA 11 post), and the same is doubtless true of 'wilfulness' in the context of other offences in the absence of a judicial decision to the contrary.

6 For the meaning of 'knowingly' in the context of the Explosive Substances Act 1883 s 4(1) (see PARA 711 post) see *R v Hallam* [1957] 1 QB 569, 41 Cr App Rep 111, CCA; overruling *R v Dacey* [1939] 2 All ER 641, 27 Cr App Rep 86, CCA.

Knowledge includes the state of mind of a person who shuts his eyes to the obvious: see *Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 TLR 284 at 288-289 per Devlin J; *James & Son Ltd v Smee* [1955] 1 QB 78 at 91, [1954] 3 All ER 273 at 278 per Parker J; *Warner v Metropolitan Police Comr* [1969] 2 AC 256 at 279, 52 Cr App Rep 373 at 389, HL, per Lord Reid; *Westminster City Council v Croxallgrange Ltd* [1986] 2 All ER 353, 83 Cr App Rep 155, HL.

7 For the meaning of 'knowledge' in the context of handling stolen goods see PARA 304 post.

8 For the meaning of 'fraudulently' see *R v Sinclair* [1968] 3 All ER 241 at 246, 52 Cr App Rep 618 at 622, CA; and see PARA 346 et seq post.

9 See PARA 283 post.

10 See notes 4-8 supra.

11 See 2 *Stephen's History of the Criminal Law* 95; and PARA 4 note 1 ante.

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## 9. Extent to which mens rea is required.

In principle, in order to establish guilt of a common law or statutory offence, there must be proof of some form of mens rea in relation to all the elements which constitute the offence, although an offence may be defined (or interpreted) in such a manner as to require intention or recklessness or some other form of mens rea to be shown as to one or more elements, but not to be shown in relation to every one<sup>1</sup>. Nevertheless, even in the case of offences of strict liability, some mental element must normally be proved<sup>2</sup>.

1 On a charge of assault occasioning actual bodily harm contrary to the Offences against the Person Act 1861 s 47 (as amended) (see PARA 149 post), it must be shown that the defendant intended to commit the assault, but not that he intended or foresaw that the assault would occasion actual bodily harm: *R v Savage* [1992] 1 AC 699, [1991] 4 All ER 698, HL; and see also *R v Roberts* (1971) 56 Cr App Rep 95, CA. See also the Offences against the Person Act 1861 s 23 (as amended) (administering a noxious thing so as thereby to endanger life: see PARA 124 post); s 27 (as amended) (exposing a child whereby life is endangered: see PARA 143 post); the Explosive Substances Act 1883 s 2 (as substituted) (causing explosion likely to endanger life or property: see PARA 127 post); the Administration of Justice Act 1970 s 40 (as amended) (harassment of debtors in a manner calculated to cause distress: see PARA 838 post); the Aviation Security Act 1982 s 2(1) (so damaging an aircraft as to be likely to endanger its safety in flight: see AIR LAW vol 2 (2008) PARA 628); the Police Act 1996 s 90(2) (wearing articles calculated to deceive others into thinking the wearer is in police uniform: see PARA 379 post; and POLICE vol 36(1) (2007 Reissue) PARA 481). In *Turner v Shearer* [1973] 1 All ER 397, [1972] 1 WLR 1387, DC, it was held that 'calculated to deceive' under the Police Act 1964 s 52(2) (repealed: see now the Police Act 1996 s 90(2)) meant 'likely to deceive' and that accordingly it was not a defence that the defendant did not intend to deceive. See also *R v Davison* [1972] 3 All ER 1121, 57 Cr App Rep 113, CA.

In such cases as those referred to above it may be said that the particular statute lends itself to the interpretation that intention or foresight is not required as to an element in the offence. A statutory provision may, however, be interpreted so as to require intention or recklessness as to some of the elements of the offence but not as to others, although the statute does not naturally lend itself to such an interpretation. On a charge of malicious wounding contrary to the Offences against the Person Act 1861 s 20 (as amended) (see PARA 120 post), it is necessary to show only that the defendant intended or was reckless as to some unlawful bodily harm to another, and not that he intended or foresaw the wounding: *R v Savage* [1992] 1 AC 699, [1991] 4 All ER 698, HL. On a charge of assaulting a constable in the execution of his duty contrary to the Police Act 1996 s 89(1) (as amended) (see PARA 735 post; and POLICE vol 36(1) (2007 Reissue) PARA 481), it is necessary to show that the defendant had the mens rea for the assault on another but not that he knew that the other was a constable acting in the execution of his duty: *R v Forbes*, *R v Webb* (1865) 10 Cox CC 362; *R v Maxwell*, *R v Clanchy* (1909) 2 Cr App Rep 26, CCA; *Albert v Lavin* [1982] AC 546, 74 Cr App Rep 150, HL; and see also *McBride v Turnock* [1964] Crim LR 456, DC.

2 See PARA 15 note 3 post.

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## 10. Intention.

The mental element required to constitute many serious crimes is an intention to bring about a specified consequence, which may or may not be required to result from the defendant's conduct; such crimes can be committed only by intention<sup>1</sup>. A person intends a consequence where it is his aim or purpose to bring it about<sup>2</sup>. Where he has this aim or purpose, he acts intentionally as to that consequence, though, to his knowledge, the chances of his causing the result are small. If he does not have this aim or purpose, he may nevertheless be found to have intended it in the rare case where he nevertheless appreciated that the consequence was virtually certain to result: where (in such a rare case) it is necessary to direct the jury on the matter, it should be directed that it is not entitled to find the necessary intention unless it is sure that the consequence was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case<sup>3</sup>.

In order to constitute some offences the defendant must have acted with intent to do some further act. In these offences (and certain other offences) only proof of aim or purpose can suffice to prove intention; the requirement of intention is in a context where it would be inappropriate to speak of intention where the defendant does not aim to achieve the relevant thing<sup>4</sup>.

Intention is not the same thing as motive<sup>5</sup>. The mental element of a crime ordinarily involves no reference to motive<sup>6</sup>.

1 Eg the Infant Life (Preservation) Act 1929 s 1 (see PARA 108 post) requires an 'intent to destroy the life of the child'. The offences created by the Aviation Security Act 1982 ss 2, 3 (which are concerned with destroying, damaging or endangering the safety of aircraft: see AIR LAW vol 2 (2008) PARAS 628-629) require that the specified acts should be done 'unlawfully and intentionally'. The offence created by the Protection from Eviction Act 1977 s 1(3) (as amended) (see PARA 609 post) requires that the defendant landlord should intend to cause the residential occupier to give up the occupation of the premises. For the offence of murder the defendant must intend unlawfully to kill, or do grievous bodily harm to, another human being: see PARA 89 post.

2 *R v Mohan* [1976] QB 1 at 8, 60 Cr App Rep 272 at 276, CA, per James LJ. Such aim or purpose is not to be equated with desire: see *R v Moloney* [1985] AC 905 at 926, 81 Cr App Rep 93 at 106-107, HL, per Lord Bridge; *R v Nedrick* [1986] 3 All ER 1 at 3, 83 Cr App Rep 267 at 270, CA. In so far as desire predicates something that is wanted because it causes pleasure or involves gain, desire in this sense is not essential to criminal intention; a killing is no less intentional where it is done by a parent to spare a child pain and suffering: *R v Simpson* (1915) 11 Cr App Rep 218, CCA; *R v Gray* (6 October 1965, unreported); cf *R v Steane* [1947] KB 997, 32 Cr App Rep 61, CCA.

3 *R v Woollin* [1999] 1 AC 82, [1999] 1 Cr App Rep 8, HL. See also *R v Nedrick* [1986] 3 All ER 1, 83 Cr App Rep 267, CA; *R v Matthews* [2003] EWCA Crim 192, [2003] 2 Cr App Rep 461.

4 In addition, there have been rare occasions where a court has held that necessary intent for an offence requires proof of an aim or purpose: see eg *R v Ahlers* [1915] 1 KB 616, 11 Cr App Rep 63, CCA (treason by adhering to the Queen's enemies). See also *Selvanayagam v R* [1951] AC 83, PC.

5 For the meaning of 'motive' see *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 452, [1942] 1 All ER 142 at 152-153, HL, per Viscount Maugham; *Hyam v DPP* [1975] AC 55 at 73, 59 Cr App Rep 91 at 100-101, HL, per Lord Hailsham of St Marylebone LC.

6 A bad motive is no more reason for convicting a person of crime than a good motive is an excuse for acquitting him: see eg *R v Simpson* (1915) 11 Cr App Rep 218, CCA; *R v Gray* (6 October 1965, unreported); and see *R v Sharpe* (1857) Dears & B 160, CCR; *R v Hicklin* (1868) LR 3 QB 360; *R v Booth* (1872) 12 Cox CC 231;



*Steele v Brannan* (1872) LR 7 CP 261; *R v Smith* [1960] 2 QB 423, 44 Cr App Rep 55, CCA; *Chandler v DPP* [1964] AC 763, 46 Cr App Rep 347, HL; *Hyam v DPP* [1975] AC 55 at 73, 59 Cr App Rep 91 at 100-101, HL, per Lord Hailsham of St Marylebone LC; *R v X* [1994] Crim LR 827, CA; *A-G's Reference (No 1 of 2002)* [2002] EWCA Crim 2392, [2003] Crim LR 410.

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## **11. Recklessness.**

Recklessness on the part of the defendant is sufficient mens rea for certain statutory offences<sup>1</sup> and the common law crime of manslaughter<sup>2</sup>. Recklessness means the taking of an unreasonable risk of which the risk-taker is aware: a person acts 'recklessly' with respect to a circumstance when he is aware of a risk that did or would exist, and acts recklessly with respect to a consequence when he is aware of a risk that it will occur, and, in either case, it is, in the circumstances known to him, unreasonable to take the risk<sup>3</sup>. Provided that it is proved that the defendant was aware of a risk of a relevant circumstance or consequence, it is irrelevant that for some reason, such as bad temper, he chooses to disregard the risk or to put it to the back of his mind or to close his mind to it, not caring whether the risk materialises or not<sup>4</sup>.

Where a statute prohibits the doing of an act 'maliciously', this imports intention or recklessness<sup>5</sup>.

1 Eg the offences of criminal damage contrary to the Criminal Damage Act 1971 s 1 (see PARA 334 post).

2 See PARA 92 et seq post.

3 *R v G* [2003] UKHL 50 at [41], [2004] 1 AC 1034 at [41], [2004] 1 Cr App Rep 237 at [41] per Lord Bingham of Cornhill. An earlier authority for this definition of recklessness, in respect of a consequence, is *R v Stephenson* [1979] QB 695, 69 Cr App Rep 213, CA. See also *R v Cunningham* [1957] 2 QB 396, 41 Cr App Rep 155, CCA; *A-G's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73, [2004] 4 All ER 303.

4 *R v Stephenson* [1979] QB 695, 69 Cr App Rep 213, CA.

5 See *R v Savage* [1992] 1 AC 699, [1991] 4 All ER 698, HL.

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## **12. Transferred fault.**

Where a person who commits the actus reus of a particular crime acts with the necessary intent or recklessness, he may be convicted notwithstanding that his conduct takes effect in a manner which was unintended or unforeseen<sup>1</sup>.

<sup>1</sup> See *R v Latimer* (1886) 17 QBD 359, CCR (the defendant aimed a blow at another's head: the blow did not harm that person but wounded a third person, and it was held that the defendant could be convicted of unlawfully and maliciously wounding that third person contrary to the Offences against the Person Act 1861 s 20 (see PARA 120 post) because he had an intent to injure and it was irrelevant that he had not intended to injure that person specifically); cf *R v Pembliton* (1874) LR 2 CCR 119 (the defendant threw a stone at persons fighting, which missed but smashed nearby window: conviction for maliciously damaging window contrary to the Malicious Damage Act 1861 s 51 quashed because he had acted with intent to injure persons and not with intent to damage property, and the jury had not been directed to consider whether the defendant had been reckless as to the risk of breaking the window). See also *R v Mitchell* [1983] QB 741, 76 Cr App Rep 293, CA (defendant's unlawful act directed at one person led to the death of another; conviction for manslaughter upheld).

A person who injures a pregnant woman with intent to do her unlawful grievous bodily harm (ie having the mens rea for murder) and thereby causes the premature birth and subsequent death of her child cannot be convicted of the murder of that child, although he may be convicted of manslaughter: *A-G's Reference (No 3 of 1994)* [1998] AC 245, [1998] 1 Cr App Rep 91, HL.

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### **13. Proof of intention and foresight.**

Whenever an offence is defined so as to require proof that a person intended or foresaw a particular result, the court or jury is not bound in law to infer that such person intended or foresaw that result by reason only of its being a natural and probable consequence of his actions, but must decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as may be proper in the circumstances<sup>1</sup>. Foresight of the consequences of an act does not necessarily imply the existence of intention but it may be a factor from which, when considered together with all the other evidence, the jury may find that the defendant had the alleged intention<sup>2</sup>. When directing juries about the mental element in any crime of intent, judges should avoid any elaboration or paraphrase as to what is meant by 'intent'<sup>3</sup>. Some further direction may, however, be necessary if the prosecution invites the jury to find intent from the foresight of a consequence as virtually certain to result<sup>4</sup>. As a matter of evidence, the greater the probability of a consequence, the more likely it is that it was foreseen and, if that consequence was foreseen, the more likely it is that it was also intended<sup>5</sup>.

1 See the Criminal Justice Act 1967 s 8 (see PARA 1366 post), which in effect reversed the decision in *DPP v Smith* [1961] AC 290, 44 Cr App Rep 261, HL, to the effect that there was an irrebuttable presumption that a man is presumed to intend the natural and probable consequences of his acts; and see *Frankland v R, Moore v R* [1987] AC 576, 86 Cr App Rep 116, PC. The Criminal Justice Act 1967 s 8 deals not with substantive law but with the law of evidence: see *DPP v Majewski* [1977] AC 443, 62 Cr App Rep 262, HL.

2 *R v Hancock* [1986] AC 455, 82 Cr App Rep 264, HL.

3 *R v Moloney* [1985] AC 905, 81 Cr App Rep 93, HL.

4 *R v Hancock* [1986] AC 455, 82 Cr App Rep 264, HL; *R v Woollin* [1999] 1 AC 82, [1999] 1 Cr App Rep 8, HL.

5 *R v Hancock* [1986] AC 455, 82 Cr App Rep 264, HL.

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## **14. Negligence.**

Criminal liability for negligence is exceptional at common law; manslaughter and public nuisance appear to be the only common law crimes which may result from negligence<sup>1</sup>. Crimes where negligence is of the essence may be created by statute<sup>2</sup>, and a statute may provide that negligence as to an element of the actus reus suffices<sup>3</sup>. In addition, a statute may provide that it is a defence to charges brought under its provisions for the defendant to prove that he was not negligent<sup>4</sup>.

What is or is not negligent involves a consideration of that which a reasonable person would or would not have done, or been aware of, in the circumstances<sup>5</sup>. A statutory provision may be so phrased as to require consideration of the defendant's knowledge, intelligence or maturity in order to determine whether it was negligent for him to have acted as he did<sup>6</sup>.

Degrees of negligence are recognised; thus negligence which is sufficient to sustain a charge of driving without due care and attention<sup>7</sup> is not sufficient to found a charge of dangerous driving<sup>8</sup>.

1 As to manslaughter see PARA 92 post; and as to public nuisance see NUISANCE vol 78 (2010) PARAS 105-106.

2 See eg the Road Traffic Act 1988 ss 2, 3 (both as substituted) (dangerous driving; driving without due care and attention); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARAS 964, 971.

3 See eg the Official Secrets Act 1989 s 5(2) (disclosure without lawful authority of information protected from disclosure, knowing or having reasonable cause to believe that it is protected from disclosure: see PARA 487 post); and the Sexual Offences Act 2003 s 1 (rape: absence of reasonable belief that victim consents to sexual penetration required: see PARA 165 post).

4 See eg the Trade Descriptions Act 1968 s 24 (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 504); the Misuse of Drugs Act 1971 s 28 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 262); the Food and Environment Protection Act 1985 s 22.

5 On a charge of driving a vehicle without due care and attention the defendant's physical infirmity or lack of experience is irrelevant since by driving a motor vehicle he has undertaken to conform to an objective and impersonal standard: *Simpson v Peat* [1952] 2 QB 24, [1952] 1 All ER 447, DC. See also *McCrone v Riding* [1938] 1 All ER 157 at 158, DC, per Lord Hewart CJ ('The question is not a question dependent upon inexperience or lack of skill. It is a question dependent upon lack of care and attention . . . 'Due care and attention' is something not related to the proficiency of the driver but governed by the essential needs of the public on the highway').

6 See the offences under the Sexual Offences Act 2003 ss 1-4; and PARA 165 et seq post. See also the Protection from Harassment Act 1997 s 4; and PARA 153 post.

7 See notes 2, 6 supra.

8 *R v Conteh* [2003] EWCA Crim 962, [2004] RTR 1.

## **UPDATE**

### **14 Negligence**

TEXT AND NOTES--See Corporate Manslaughter and Corporate Homicide Act 2007; and PARA 38A.



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## 15. Strict liability.

Despite the general rule that criminal liability is not imposed unless a person has mens rea as to the constituents of a crime<sup>1</sup>, there are instances in which strict liability is imposed. Such instances mainly arise under statute<sup>2</sup>. Where strict liability is imposed, the defendant incurs criminal liability though he was ignorant of one or more of the factors which rendered his conduct criminal<sup>3</sup>, and even though he was blamelessly inadvertent because his ignorance is not attributable to any default or negligence on his part.

In all statutory offences whenever a provision is silent as to mens rea there is a presumption that the mens rea is nonetheless an essential element of the offence<sup>4</sup>. That presumption can be rebutted only by express provision or by necessary implication, and a 'necessary implication' connotes one which is compellingly clear, truly necessary and free from ambiguity; also the presumption must not involve an internal inconsistency<sup>5</sup>.

In determining whether the effect of a provision is by necessary implication to rebut the presumption that the offence requires mens rea, the following considerations are relevant:

- 6 (1) the language of the provision creating the offence, and in particular the presence in other offences in the statute of words expressly requiring mens rea, although such presence and the absence of such an express requirement in the offence in question does not necessarily mean that mens rea is excluded<sup>6</sup>;
- 7 (2) whether the act is criminal in the generally accepted sense or is an act which, in the public interest, is prohibited under a penalty<sup>7</sup>;
- 8 (3) the nature of the mischief at which the provision is aimed and whether the imposition of strict liability will tend to suppress that mischief<sup>8</sup>, although strict liability will not be inferred simply because the offence may be described as a grave social evil<sup>9</sup>; and
- 9 (4) the more serious the offence, the greater is the weight to be attached to the presumption that mens rea is required<sup>10</sup>.

1 See PARA 8 ante.

2 There are some instances of strict liability imposed at common law: eg outraging public decency (see PARA 764 post); and contempt of court (see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 410 et seq). It has also been suggested that, as a result of the majority decision in *Whitehouse v Gay News Ltd, Whitehouse v Lemon* [1979] AC 617, 68 Cr App Rep 381, HL, blasphemy is a common law offence of strict liability: cf the minority judgments of Lord Diplock and Lord Edmund-Davies and the majority judgments of Viscount Dilhorne, Lord Russell and Lord Scarman. Quare whether the minority opinion is to be preferred. As to blasphemy and blasphemous libel see PARA 826 post.

The imposition of vicarious criminal liability (see PARA 59 et seq post) may be regarded as a common law development of strict liability.

3 An offence may be so defined as to require intention or knowledge as to certain of its elements but not as to others (cf para 9 ante).

4 *Sweet v Parsley* [1970] AC 132, 53 Cr App Rep 221, HL; *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] AC 1, 80 Cr App Rep 194, PC; *B (A Minor) v DPP* [2000] 2 AC 428, [2000] 2 Cr App Rep 65, HL; *R v K* [2001] UKHL 41, [2002] 1 AC 462, [2002] 1 Cr App Rep 121.

5 *B (A Minor) v DPP* [2000] 2 AC 428, [2000] 2 Cr App Rep 65, HL; *R v K* [2001] UKHL 41, [2002] 1 AC 462, [2002] 1 Cr App Rep 121; *R v Kumar* [2004] EWCA Crim 3207, [2005] 1 WLR 1352, [2005] 1 Cr App Rep 566.

6 Contrast *Cundy v Le Cocq* (1884) 13 QBD 207, DC, *Westminster City Council v Mavroghenis* (1983) 11 HLR 56, DC, and *Pharmaceutical Society of Great Britain v Storkwain Ltd* [1986] 2 All ER 635, 83 Cr App Rep 359, HL (mens rea expressly required in other offence(s) in statute but not in offence in question; it was held that the offence was one of strict liability) with *Sherras v De Rutzen* [1895] 1 QB 918, DC, and *R v Berry (No 3)* [1994] 2 All ER 913, 99 Cr App Rep 88, CA (mens rea expressly required as to other offences in statute but not in offence in question: held offence nevertheless not one of strict liability).

7 *Sherras v De Rutzen* [1895] 1 QB 918 at 924, DC, per Wright J; *Sweet v Parsley* [1970] AC 132, 53 Cr App Rep 221, HL; *Alphacell Ltd v Woodward* [1972] AC 824, [1972] 2 All ER 475, HL. See also *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] AC 1, 80 Cr App Rep 194, PC; *Wings Ltd v Ellis* [1985] AC 272, [1984] 3 All ER 577, HL; *Chilvers v Rayner* [1984] 1 All ER 843, 78 Cr App Rep 59, DC; *R v Wells Street Metropolitan Stipendiary Magistrate, ex p Westminster City Council* [1986] 3 All ER 4, [1986] 1 WLR 1046, DC; *Pharmaceutical Society of Great Britain v Storkwain Ltd* [1986] 2 All ER 635, 83 Cr App Rep 359, HL. As to whether an offence is truly criminal see *R v Blake* [1997] 1 All ER 963, [1997] 1 Cr App Rep 209, CA (offence punishable with two years' imprisonment 'truly criminal in character'); *Harrow London Borough Council v Shah* [1999] 3 All ER 302, [1999] 2 Cr App Rep 457, DC (offence punishable with two years' imprisonment 'not truly criminal'); *R v Muhamad* [2002] EWCA Crim 1856, [2003] QB 1031 (court doubted whether an offence punishable with two years' imprisonment was 'truly criminal').

8 *Hobbs v Winchester Corpn* [1910] 2 KB 471, CA; *Reynolds v GH Austin & Sons Ltd* [1951] 2 KB 135, [1951] 1 All ER 606, DC; *R v St Margaret's Trust Ltd* [1958] 2 All ER 289, 42 Cr App Rep 183, CCA; *Yeandel v Fisher* [1966] 1 QB 440, [1965] 3 All ER 158, DC; *Lockyer v Gibb* [1967] 2 QB 243, [1966] 2 All ER 653, DC; *Warner v Metropolitan Police Comr* [1969] 2 AC 256, 52 Cr App Rep 373, HL; *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] AC 1, 80 Cr App Rep 194, PC; *R v Brockley* (1993) 99 Cr App Rep 385, CA; *R v Bezzina* [1994] 3 All ER 964, [1994] 1 WLR 1057, CA; *R v Muhamad* [2002] EWCA Crim 1856, [2003] QB 1031.

9 *Lim Chin Aik v R* [1963] AC 160, [1963] 1 All ER 223, PC.

10 *B (A Minor) v DPP* [2000] 2 AC 428 at 464, [2000] 2 Cr App Rep 65 at 72, HL, per Lord Nicholls of Birkenhead. Despite the powerful re-affirmation of the presumption that mens rea is required and the stringent limitations on its rebuttal in *B (A Minor) v DPP* supra and *R v K* [2001] UKHL 41, [2002] 1 AC 462, [2002] 1 Cr App Rep 121 (see the text and note 5 supra), the Court of Appeal has on occasions been prepared to find that the presumption was rebutted in cases involving what might be regarded as regulatory offences: see *R v Muhamad* [2002] EWCA Crim 1856, [2003] QB 1031 (offence of materially contributing to insolvency by gambling, contrary to the Insolvency Act 1986 s 362(1), held to be one of strict liability); *Matudi v R* [2003] EWCA Crim 697 (offence of importing animal products without border inspection, contrary to the Produce of Animal Origin (Import and Export) Regulations 1996, SI 1996/3124, regs 21, 37 (now revoked), held to be one of strict liability). Cf *R v Kumar* [2004] EWCA Crim 3207, [2005] 1 WLR 1352, [2005] 1 Cr App Rep 566 (offence of buggery with boy under 16, contrary to the Sexual Offences Act 1956 s 12 (now repealed), not one of strict liability as to age).



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### **(3) GENERAL DEFENCES TO CRIME**

#### **16. In general.**

The general principle of the common law is that the prosecution must prove the guilt of a defendant beyond all reasonable doubt<sup>1</sup>; it is not incumbent upon a defendant to establish his innocence<sup>2</sup>. Where one of those matters affording a defence at common law, such as accident<sup>3</sup>, consent<sup>4</sup>, self-defence, prevention of crime and related defences<sup>5</sup>, duress by threats<sup>6</sup>, duress of circumstances<sup>7</sup>, necessity<sup>8</sup>, or non-insane automatism<sup>9</sup> is set up as a defence, the burden of proving the absence of such justification lies upon the prosecution<sup>10</sup>; this is also the rule in the case of provocation such as to reduce a killing from murder to manslaughter<sup>11</sup>. The burden of proving insanity<sup>12</sup> or the statutory defences of diminished responsibility<sup>13</sup> or marital coercion<sup>14</sup> lies upon the defence; but the standard of proof is not as high as that required of the prosecution to prove guilt<sup>15</sup>.

1 *Woolmington v DPP* [1935] AC 462, 25 Cr App Rep 72, HL; and see PARAS 1369, 1372 post.

2 See PARA 1368 et seq post.

3 See PARA 19 post.

4 A valid consent is a defence in respect of many offences against the person (see PARA 115 post) and certain sexual offences (see PARA 163 post). See also PARA 298 post (taking a conveyance).

5 See PARAS 20-22 post. The 'defences' of self-defence, prevention of crime and related defences are different from the defences of duress by threats, duress of circumstances and marital coercion because, if successfully pleaded, they render the defendant's conduct lawful; they justify it, as opposed simply to excusing him from liability for conduct which is nevertheless unlawful. The 'defences' of consent and of necessity also have this effect.

6 See PARA 23 post.

7 See PARA 25 post.

8 See PARA 26 post.

9 See PARA 35 post.

10 See PARA 1368 et seq post.

11 See PARAS 94-95 post.

12 See PARA 33 post. As to insanity alleged by the prosecution where the defence sets up diminished responsibility see PARA 96 post.

13 See PARAS 96-97 post.

14 See PARA 24 post.

15 As to the standard of proof see PARA 1372 post.

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## 17. Mistake or ignorance of law.

Ignorance or mistake of law is no defence to a criminal charge; mens rea does not involve knowledge on the part of a defendant that his acts or omissions were against the law and constituted a crime<sup>1</sup>.

Where a person acts under a mistake of civil law which precludes him from having the requisite mental element for a particular offence, he cannot be guilty of that offence<sup>2</sup>. This is the case whether or not it was reasonable to make the mistake<sup>3</sup>.

1 *R v Bailey* (1800) Russ & Ry 1, CCR; *R v Esop* (1836) 7 C & P 456; *Re Barronet and Allain* (1852) 1 E & B 1. For modern recognition of this see *Official Solicitor v News Group Newspapers Ltd* [1994] 2 FCR 552, [1994] 2 FLR 174; *Reading Borough Council v Ahmad* (1999) 163 JP 451, DC. If the defendant is aware of the factual situation which constitutes an element of the actus reus of the offence (eg the absence of a licence), it is irrelevant that because of his ignorance of the criminal law he does not realise its legal significance: *A-G's Reference (No 1 of 1995)* [1996] 4 All ER 21, [1996] 2 Cr App Rep 320, CA. Ignorance of the law may be a ground for mitigation of sentence: *R v Crawshaw* (1860) Bell CC 303, CCR; *Paul v Ministry of Posts and Telecommunications* [1973] RTR 245, DC. See also *R v Derriviere* (1969) 53 Cr App Rep 637, CA. A mistaken belief that a prosecution will not be instituted in respect of the offence is not a defence: *R v Arrowsmith* [1975] 1 All ER 463, 60 Cr App Rep 211, CA. Where erroneous legal advice has been given by an official in the organisation which subsequently prosecutes the defendant, a court can stay the prosecution as an abuse of process if in the light of the defendant's reliance on it the prosecution is unfair: *Posternobile plc v Brent London Borough Council* (1997) Times, 8 December, DC. Where a person is charged with contravening a statutory instrument, it is a defence if he proves that the instrument had not been issued by or under the authority of Her Majesty's Stationery Office at the date of the alleged contravention, unless it is proved by the prosecution that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of the persons likely to be affected by it, or of the person charged: see the Statutory Instruments Act 1946 s 3(2) (amended by the Statutory Instruments (Production and Sale) Act 1996 s 1(1)(a)); and STATUTES vol 44(1) (Reissue) PARA 1511. See also *Defiant Cycle Co Ltd v Newell* [1953] 2 All ER 38, [1953] 1 WLR 826, DC; *R v Sheer Metalcraft Ltd* [1954] 1 QB 586, [1954] 1 All ER 542.

A continuing act or proceeding, not originally unlawful, commenced before the passing of a statute which prohibits it, cannot be treated as unlawful by reason of the passing of the statute until a reasonable time has been allowed for its discontinuance: *Burns v Nowell* (1880) 5 QBD 444 at 454, CA, per Baggallay LJ.

As to abuse of process see PARA 1225 post.

2 See *R v Smith* [1974] QB 354, 58 Cr App Rep 320, CA; *Secretary of State for Trade and Industry v Hart* [1982] 1 All ER 817, [1982] 1 WLR 481, CA.

3 *R v Smith* [1974] QB 354, 58 Cr App Rep 320, CA. A mistake about legal rights does not extend to refusal to accept an order of the court in the belief that it has been fraudulently obtained: *R v Barrett* (1981) 72 Cr App Rep 212, CA.

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## **18. Mistake of fact.**

Where an offence is so defined that proof of intention, recklessness, knowledge or other state of mind is necessary<sup>1</sup>, mistake of fact is a defence provided that, on the facts as the defendant believed them to be, he did not have the mens rea required to constitute the offence charged<sup>2</sup>. The defence is made out provided that the defendant's belief was honestly<sup>3</sup>, even if unreasonably, held<sup>4</sup>. Where, however, an offence is so defined that negligence<sup>5</sup> as to all, or some, elements of the actus reus constitutes sufficient mens rea, mistake of fact as to such an element affords a defence only if the mistaken belief was honestly held and there were reasonable grounds for holding it: a person who acts under an unreasonable mistake is necessarily negligent<sup>6</sup>.

Mistake of fact, however reasonable, does not afford a defence to crimes of strict liability<sup>7</sup>.

1 See PARA 8 et seq ante.

2 *DPP v Morgan* [1976] AC 182, 61 Cr App Rep 136, HL; *R v Kimber* [1983] 3 All ER 316, 77 Cr App Rep 225, CA; *R v Williams* [1987] 3 All ER 411, 78 Cr App Rep 276, CA; *Beckford v R* [1988] AC 130, [1987] 3 All ER 425, PC.

3 The word 'honestly' may be useful emphasis but in fact adds nothing: *Albert v Lavin* [1981] 1 All ER 628 at 633, 72 Cr App Rep 178 at 183, DC, per Hodgson J.

4 The reasonableness of the defendant's belief is material to the question of whether the belief was held by him at all; but, if it was in fact held, its unreasonableness is irrelevant: *DPP v Morgan* [1976] AC 182, 61 Cr App Rep 136, HL; *R v Kimber* [1983] 3 All ER 316, 77 Cr App Rep 225; *R v Williams* [1987] 3 All ER 411, 78 Cr App Rep 276, CA; *Beckford v R* [1988] AC 130, [1987] 3 All ER 425, PC.

5 See PARA 14 ante.

6 In manslaughter by gross negligence a material mistake which is not grossly negligent (ie grossly unreasonable) will excuse the defendant: *R v Lamb* [1967] 2 QB 981, 51 Cr App Rep 417, CA.

7 As to crimes of strict liability see PARA 15 ante.

## **UPDATE**

### **18 Mistake of fact**

NOTE 4--See also *R v Faraj* [2007] EWCA Crim 1033, [2007] 2 Cr App Rep 322 (judge's failure to direct jury on mistaken belief).

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## **19. Accident.**

In offences for which an intent to produce a consequence is required, it is a defence that, although the defendant did the act which would be criminal if done with intent, it was done by accident so that the necessary intent was absent<sup>1</sup>. Where a prohibited consequence occurs by accident, a defendant can be convicted of an offence in which liability may be based on recklessness or negligence if he has been reckless or negligent as to that consequence<sup>2</sup>.

1 1 Hale PC 38; 4 Bl Com (14th Edn) 26; *Batting v Bristol and Exeter Rly Co* (1860) 3 LT 665, CCR.

2 As to recklessness and negligence see PARAS 11, 14 ante.

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## **20. Use of force in the prevention of crime or in effecting or assisting in lawful arrest.**

A person may use such force as is reasonable in the circumstances in the prevention of crime<sup>1</sup> or in effecting or assisting in the lawful arrest of offenders or persons unlawfully at large<sup>2</sup>. The use of reasonable force for such a purpose renders the defendant's conduct lawful<sup>3</sup>.

At common law the rules relating to the use of force in such circumstances were not altogether clear and appear to have varied according to the situation in which the force was used. Under the present law the same requirement, namely that the force used should be reasonable in the circumstances, is applicable to all cases where force is used in the prevention of crime or lawful arrest of another and the common law rules are to that extent superseded<sup>4</sup>. In determining whether the force used was reasonable account should be taken of all the circumstances of the case in which the defendant believed he was placed, including the nature and degree of force used on each side, the relative strength on each side, the seriousness of the evil to be prevented and the possibility of preventing it by other means<sup>5</sup>. This statutory provision is of general application<sup>6</sup>, but it would not be reasonable to use even slight force to prevent very trivial offences<sup>7</sup>. The circumstances in which it can be considered reasonable to kill another in the prevention of crime must be of an extreme kind; they could probably arise only in the case of an attack against the person which is likely to cause death or serious bodily injury and where killing the attacker is the only practicable means of preventing the harm.

The ordinary rules relating to mistake of fact are applicable so that where the force used is reasonable having regard to the facts as the defendant supposed them to have been, the defendant commits no offence although the force used is excessive having regard to the facts as they were<sup>8</sup>.

Where the force used is unreasonable and death results, the defendant is liable to be convicted of murder or manslaughter according to his mens rea; there is no special rule to the effect that death caused by the use of excessive force in the prevention of crime can only be manslaughter<sup>9</sup>.

1 'Crime' means a crime under English law; a crime against peace or a crime of aggression (which is only a crime under international law) is not a 'crime' for these purposes: *R v Jones* [2006] UKHL 16, [2006] 2 All ER 741, [2006] 2 WLR 772.

2 Criminal Law Act 1967 s 3(1). See PARA 926 post. The only circumstances which are relevant for the purposes of s 3(1) are the immediate circumstances in which the force is used: *Farrell (formerly McLaughlin) v Secretary of State for Defence* [1980] 1 All ER 166, 70 Cr App Rep 224, HL. 'Crime' in the Criminal Law Act 1967 s 3(1) refers to a crime under domestic law, and not to something which is a crime only under international law: *R v Jones* [2004] EWCA Crim 1981, [2005] QB 259, [2004] 4 All ER 955. The Criminal Law Act 1967 s 3(1) may afford a defence to a charge of dangerous driving where the intention is to effect or assist arrest: *R v Renouf* [1986] 2 All ER 449, 82 Cr App Rep 344, CA.

3 The defendant need not have used the force personally; the use of a dog in self-defence, the effecting of an arrest and so on is capable of amounting to the use of reasonable force: *Pollard v Chief Constable of West Yorkshire* [1999] PIQR P219, CA (use of properly trained and handled police dog to effect an arrest). As to the burden of proof see PARA 1371 post; and as to the direction to the jury where such a defence is raised see PARA 1320 post.

- 4 Criminal Law Act 1977 s 3(2). See PARA 926 post.
- 5 See *Allen v Metropolitan Police Comr* [1980] Crim LR 441, DC.
- 6 As to the particular provisions relating to police officers see PARAS 857, 924 post.
- 7 See *Criminal Law Revision Committee, Seventh Report, Felonies and Misdemeanours* (Cmnd 2659) (1965) PARAS 20-23. As to the abolition of the distinction between felonies and misdemeanours see PARA 49 note 6 post.
- 8 As to mistake of fact see PARA 18 ante. See also *R v Oatridge* (1991) 94 Cr App Rep 367, CA.
- 9 *R v McInnes* [1971] 3 All ER 295, 55 Cr App Rep 551, CA; *Palmer v R* [1971] AC 814, 55 Cr App Rep 223, PC. See also *R v Shannon* (1980) 71 Cr App Rep 192, CA.

## **UPDATE**

### **20 Use of force in the prevention of crime or in effecting or assisting in lawful arrest**

TEXT AND NOTES--See Criminal Justice and Immigration Act 2008 s 76 (reasonable force for purposes of self-defence etc). For transitional provisions and savings see Sch 27 para 27.

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## **21. Self-defence or defence of another.**

If the act alleged to constitute a crime is done in self-defence or defence of another, it is justified and the defendant's conduct is lawful provided that no more force is used than is necessary for mere defence<sup>1</sup>.

A person acting in self-defence is normally acting to prevent the commission of a crime, as is a person acting in defence of another. The test to be applied in cases of self-defence or defence of another is now established<sup>2</sup> to be the same as for cases of prevention of crime<sup>3</sup>, that is the force used in self-defence or in defence of another must be reasonable in the circumstances as the defendant believed them to be. Thus genuine belief in facts which would justify the defendant using force in self-defence may be relied upon even if there are no reasonable grounds for the belief and it results in the use of force which is in fact unreasonable<sup>4</sup>.

Provided the force used is reasonable, a person is entitled to defend not only himself or a member of his family, but even a complete stranger if the stranger is subject to unlawful attack by others<sup>5</sup>. Acts of self-defence are not limited to spontaneous acts done in response to actual violence, but the threatened danger must be reasonably imminent and must be of a nature which could not be met by more pacific means<sup>6</sup>.

In deciding whether the force used was reasonable, all the circumstances as the defendant believed them to be may be considered. In deciding whether the defendant used reasonable force account may be taken of his physical characteristics but not (except in 'exceptional circumstances' making the evidence specially probative) the fact that he was suffering from a psychiatric condition<sup>7</sup>. The matter is one of fact and not one of law, hence it cannot be ruled that a person who is attacked must retreat before retaliating. A person's opportunity to retreat with safety is a factor to be taken into account in deciding whether his conduct was reasonable, as is his willingness to temporise or disengage himself before resorting to force<sup>8</sup>. A man is not obliged to refrain from going where he may lawfully go because he has reason to believe that he may be attacked, and is not thereby deprived of his right of self-defence<sup>9</sup>. A person who kills someone in a quarrel which he has started is not thereby precluded from relying on self-defence if the retaliation by the victim is disproportionate<sup>10</sup>.

At the trial the judge need not leave the issue of self-defence to the jury if it is not raised by the defence and there is no evidence to support it<sup>11</sup>.

Where the force used is unreasonable and death results, the defendant is liable to be convicted of murder or manslaughter according to his mens rea; there is no special rule to the effect that death caused by the use of excessive force in self-defence can only be manslaughter<sup>12</sup>.

No defence is available if what the defendant is defending himself or another against is neither a criminal nor an unlawful act<sup>13</sup>.

1 *R v Wheeler* [1967] 3 All ER 829, 52 Cr App Rep 28, CA; *R v Abraham* [1973] 3 All ER 694 at 696, 57 Cr App Rep 799 at 802, CA, per Edmund Davies LJ; *R v Williams* [1987] 3 All ER 411, 78 Cr App Rep 276, CA; *Beckford v R* [1988] AC 130, 85 Cr App Rep 378, PC. See also *R v Jones* [1978] 3 All ER 1098, 67 Cr App Rep 166, CA (resistance to forcible attempt by police to take fingerprints unlawfully was justified); *R v Shannon* (1980) 71 Cr App Rep 192, CA. As to the burden of proof see PARA 1371 post; and as to the direction to the jury where such a defence is raised see PARA 1320 post.

2 *R v McInnes* [1971] 3 All ER 295, 55 Cr App Rep 551, CA.

3 See PARA 20 ante.

4 *R v Williams* [1987] 3 All ER 411, 78 Cr App Rep 276, CA; *Beckford v R* [1988] AC 130, 85 Cr App Rep 378, PC; *Ansell v Swift* [1987] Crim LR 194; *R v Fisher* [1987] Crim LR 334, CA; *R v Owino* [1996] 2 Cr App Rep 128, CA; *DPP v Armstrong-Braun* (1998) 163 JP 271, [1999] Crim LR 416, DC. See also *R v Oatridge* (1992) 94 Cr App Rep 367, CA; and PARA 18 ante. The defendant may not, however, rely upon an honest belief which results from an intoxicated mistake: *R v O'Grady* [1987] QB 995, 85 Cr App Rep 315, CA; *R v Hatton* [2005] EWCA Crim 2951, [2006] Crim LR 353.

5 *R v Rose* (1884) 15 Cox CC 540; *R v Duffy* [1967] 1 QB 63, 50 Cr App Rep 68, CCA.

6 *A-G's Reference (No 2 of 1983)* [1984] QB 456, 78 Cr App Rep 183, CA (possession of petrol bombs to defend person and property from attack). See also *R v Shannon* (1980) 71 Cr App Rep 192, CA. The fact that a person goes to a scene to exact revenge does not rule out self-defence: *R v Rashford* [2005] EWCA Crim 3377, [2005] All ER (D) 192 (Dec). A person who kills another in a quarrel which the first person has started can nonetheless depend on self-defence if the victim retaliates: *R v Rashford* supra.

7 *R v Martin* [2001] EWCA Crim 2245, [2003] 1 QB 1, [2002] 1 Cr App Rep 323.

8 *R v Julien* [1969] 2 All ER 856, 53 Cr App Rep 407, CA; *Palmer v R* [1971] AC 814 at 827, 55 Cr App Rep 223 at 236, PC; *R v McInnes* [1971] 3 All ER 295, 55 Cr App Rep 551, CA. See also *R v Deana* (1909) 2 Cr App Rep 75, CCA (self-defence not limited to warding off blows); *R v Whyte* [1987] 3 All ER 416, 85 Cr App Rep 283, CA. A defendant may rely on a plea of self-defence even though he has failed to demonstrate unwillingness to fight; but the best evidence to cast doubt on an allegation that he was the attacker, retaliator or acting in revenge is that he tried to call off the fight: *R v Bird* [1985] 2 All ER 513, 81 Cr App Rep 110, CA.

9 *R v Field* [1972] Crim LR 435, CA. As to the burden of proof see PARA 1371 post; and as to the direction to the jury where such a defence is raised see PARA 1320 post.

10 *R v Rashford* [2005] EWCA Crim 3377, [2005] All ER (D) 192 (Dec).

11 *DPP v Walker* [1974] 1 WLR 1090, PC (force used far greater than that needed for self-defence).

12 *R v Clegg* [1995] 1 AC 482, [1995] 1 Cr App Rep 507, HL.

13 Hale 1 PC Ch 8; *DPP v Bayer* [2003] EWHC 2567 (Admin), [2004] 1 WLR 2856, [2004] 1 Cr App Rep 493.

## UPDATE

### 21 Self-defence or defence of another

TEXT AND NOTES--See Criminal Justice and Immigration Act 2008 s 76 (reasonable force for purposes of self-defence etc). For transitional provisions and savings see Sch 27 para 27.

NOTE 7--See *R v Hussain* [2010] All ER (D) 116 (Jan), CA; and PARA 118.

NOTE 13--See *R v Burns* [2010] All ER (D) 186 (Apr), CA (defendant seeking to remove person from his car who he had invited in).



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## **22. Defence of property.**

Where a person in defending his property is also acting in the prevention of crime, he may use such force as is reasonable in the circumstances as he believes them to be<sup>1</sup>. Where no crime is involved, as where there is merely a trespass, the same rule of reasonable force in the circumstances as the defendant believed them to be is applicable<sup>2</sup>. No defence is available if what the defendant is defending property against is neither a criminal nor an unlawful act<sup>3</sup>.

1 See PARA 20 ante.

2 1 Hawk PC c 28(1) s 23; *Weaver v Bush* (1798) 8 Term Rep 78; *Harrison v Duke of Rutland* [1893] 1 QB 142, CA; *R v Hussey* (1924) 89 JP 28, 18 Cr App Rep 160, CCA; and see PARAS 18, 20-21 ante. As to the burden of proof see PARA 1371 post; and as to the direction to the jury where such a defence is raised see PARA 1320 post.

3 Hale 1 PC Ch 8; *DPP v Bayer* [2003] EWHC 2567 (Admin), [2004] 1 WLR 2856, [2004] 1 Cr App Rep 493.

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### 23. Duress by threats.

Duress by threats provides a defence to a charge of any offence<sup>1</sup> other than murder<sup>2</sup>, attempted murder<sup>3</sup> and possibly some forms of treason<sup>4</sup>. The defence is concerned with the case where the defendant commits the actus reus of an offence with the relevant mens rea but is induced to act by a threat made by another person (or a reasonable belief in such a threat) to the effect that, unless the defendant commits the offence charged<sup>5</sup>, harm will be done to him or a third person. The defence involves both a subjective and an objective test<sup>6</sup>. Where the defence is open to the defendant on his account of the facts, it should be left to the jury to determine:

- 10 (1) whether the defendant was, or might have been, impelled to act as he did because as a result of what he reasonably believed<sup>7</sup> another person had said or done he had good cause to fear that otherwise death or serious physical injury<sup>8</sup> would result to him or a person for whom he would reasonably regard himself as responsible<sup>9</sup>; and
- 11 (2) if so, whether a sober person of reasonable firmness, sharing the characteristics<sup>10</sup> of the defendant, would have responded to the situation by acting as the defendant did<sup>11</sup>.

Duress by threats is not available as a defence if it is proved that the defendant failed to take advantage of an opportunity to neutralise the effects of the threat which a reasonable person of a sort similar to the defendant in his position would have taken<sup>12</sup>.

The defence is available only where the threat was operative and effective at the time of the act or omission alleged to constitute the offence<sup>13</sup>, and is not available to a person when as a result of his voluntary association with others engaged in criminal activity he has foreseen or ought reasonably to have foreseen the risk of being subjected to any compulsion by acts of violence<sup>14</sup>.

Where it is sought to rely on duress as a defence, the defendant must show a proper foundation for the defence so that the issue is fit and proper to be considered by the jury; once this is done, it is for the prosecution to establish beyond reasonable doubt that the defence is not made out<sup>15</sup>.

1 *R v Hudson, R v Taylor* [1971] 2 QB 202 at 206, 56 Cr App Rep 1 at 4, CA, per Widgery LJ. See the following cases where the defence has been recognised as applicable: *R v Shiartos* (1961, unreported) (criminal damage, including arson); *R v Gill* [1963] 2 All ER 688, 47 Cr App Rep 166, CCA (theft); *R v Hudson, R v Taylor* supra (perjury); *R v Baker* [1999] 2 Cr App Rep 335, CA (robbery); *R v K* (1983) 78 Cr App Rep 82, CA (contempt of court); *R v Ortiz* (1986) 83 Cr App Rep 173, CA (possessing or supplying controlled drugs); *R v Panton* [2001] EWCA Crim 611, [2001] All ER (D) 134 (Mar) (possession of controlled drugs with intent to supply); *R v Valderrama-Vega* [1985] Crim LR 220, CA (being concerned in the importation of controlled drugs).

2 *R v Howe* [1987] AC 417, 85 Cr App Rep 32, HL (overruling *DPP for Northern Ireland v Lynch* [1975] AC 653, sub nom *Lynch v DPP for Northern Ireland* [1975] 1 All ER 913, HL). See also *Abbott v R* [1977] AC 755, 63 Cr App Rep 241, CA.

3 *R v Gotts* [1992] 2 AC 412, 94 Cr App Rep 312, HL.

4 There appears to be no decision which unequivocally denies the defence to the principal in treason (see *M'Growther's Case* (1746) 18 State Tr 391; *R v Oldcastle* (1419) 1 Hale PC 50) and, while there are dicta to this effect (see eg *R v Hudson, R v Taylor* [1971] 2 QB 202 at 206, 56 Cr App Rep 1 at 4, CA), the point may now be regarded as open; cf the observations in *DPP for Northern Ireland v Lynch* [1975] AC 653 at 672, sub nom *Lynch v DPP for Northern Ireland* [1975] 1 All ER 913 at 919, HL, per Lord Morris of Borth-y-Gest, and at 707-708 and 949 per Lord Edmund-Davies. It is submitted that duress is not a defence to treason involving the death of the Sovereign, but may be a defence to less serious forms of treason: see PARA 363 et seq post.

5 The defence applies only where the offence charged is 'the very offence' nominated by the person making the threat: *R v Cole* [1994] Crim LR 582, CA.

6 *R v Graham* [1982] 1 All ER 801, 74 Cr App Rep 235, CA; *R v Howe* [1987] AC 417, 85 Cr App Rep 32, HL.

7 In *R v Z* [2005] UKHL 22 at [23], [2005] 2 AC 467 at [23], sub nom *R v Hasan* [2005] 4 All ER 685 at [23], Lord Bingham of Cornhill rejected the suggestion that the defendant's belief was not reasonable.

8 A threat of serious psychological injury is insufficient (*R v Baker* [1997] Crim LR 497, CA) although in the light of *R v Ireland, R v Burstow* [1998] AC 147, [1998] 1 Cr App Rep 177, HL (in which it was held that recognisable psychiatric illness fell within the scope of 'bodily harm' for the purposes of the Offences Against the Person Act 1861 ss 20, 47 and that, in the context of those provisions, 'inflict' included the inflicting of psychiatric injury) there is 'a great deal of force' in criticism of this decision (*DPP v Rogers* [1998] Crim LR 202, DC). A threat to property is also insufficient (*M'Growther's Case* (1746) Fost 13, 18 State Tr 391), and so is a threat of pain unaccompanied by serious injury (*R v Quayle, A-G's Reference (No 2 of 2004)* [2005] EWCA Crim 1415, [2006] 1 All ER 988, [2005] 2 Cr App Rep 527).

9 *R v Martin* [1989] 1 All ER 652 at 653-654, 88 Cr App Rep 343 at 345-346, CA, per Simon Brown J; *R v Shayler* [2001] EWCA Crim 1977 at [49], [2001] 1 WLR 2206 at [49] per Lord Woolf CJ; *R v Z* [2005] UKHL 22 at [21], [2005] 2 AC 467 at [21], sub nom *R v Hasan* [2005] 4 All ER 685 at [21] per Lord Bingham. See also *R v Ortiz* (1986) 83 Cr App Rep 173, CA (threat to injure defendant's wife or family); *R v Wright* [2000] Crim LR 510, CA.

10 The ordinary person of reasonable firmness is not to be invested with a characteristic on the defendant's part such as pliancy, vulnerability to pressure, timidity, or emotional instability, since it would be a contradiction in terms to invest an ordinary person of reasonable firmness with these: *R v Bowen* [1996] 4 All ER 837, [1996] 2 Cr App Rep 157, CA; *R v Hegarty* [1994] Crim LR 353, CA; *R v Horne* [1994] Crim LR 584, CA; *R v Hurst* [1995] 1 Cr App Rep 82, CA. Characteristics due to self-induced abuse, eg addiction to drink or drugs, are also irrelevant: *R v Flatt* [1996] Crim LR 576, CA. On the other hand, if the defendant is in a category of persons whom the jury might think less able to resist pressure than those outside that category, the characteristic which puts him in that category may be a relevant one: examples are age, where a young person may well not be so robust as a mature one; pregnancy, where there is added fear for the unborn child; serious physical disability, which may inhibit self-protection; and recognised mental illness or psychiatric condition, such as post-traumatic stress disorder leading to learned helplessness: *R v Bowen* supra.

11 *R v Martin* [1989] 1 All ER 652 at 653-654, 88 Cr App Rep 343 at 345-346, CA, per Simon Brown J; *R v Graham* [1982] 1 All ER 801, 74 Cr App Rep 235, CA; *R v Howe* [1987] AC 417, 85 Cr App Rep 32, HL.

12 *R v Baker* [1999] 2 Cr App Rep 335, CA. See also *R v Gill* [1963] 2 All ER 688, 47 Cr App Rep 166, CCA; *R v Hudson, R v Taylor* [1971] 2 QB 202, [1971] 2 All ER 244, CA. It should be made clear to juries that if the retribution threatened against the defendant or his family or a person for whom he feels responsible is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged: *R v Z* [2005] UKHL 22 at [28], [2005] 2 AC 467 at [28], sub nom *R v Hasan* [2005] 4 All ER 685 at [28] per Lord Bingham of Cornhill.

13 *DPP for Northern Ireland v Lynch* [1975] AC 653, sub nom *Lynch v DPP for Northern Ireland* [1975] 1 All ER 913, HL; *R v Hudson, R v Taylor* [1971] 2 QB 202, 56 Cr App Rep 1, CA.

14 *R v Z* [2005] UKHL 22, [2005] 2 AC 467, sub nom *R v Hasan* [2005] 4 All ER 685.

15 *R v Gill* [1963] 2 All ER 688, 47 Cr App Rep 166, CCA; *R v Bone* [1968] 2 All ER 644, 52 Cr App Rep 546, CA; *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, PC. As to burden of proof generally, and standard of proof required, see PARA 1368 et seq post.

## UPDATE

### 23 Duress by threats

NOTE 2--See *R v Wilson* [2007] All ER (D) 228 (May), CA (duress no defence to murder no matter how susceptible defendant might be to the duress).

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## 24. Marital coercion.

Where a married woman<sup>1</sup> is charged with any offence other than treason or murder, it is a defence to prove that the offence was committed in the presence of<sup>2</sup>, and under the coercion of, her husband<sup>3</sup>.

The burden of proving coercion lies upon the defendant<sup>4</sup>. Proof of the defence requires proof that the offence was committed as a result of the wife's will being overborne by the husband, so that she was forced unwillingly to participate in the offence; simply persuading a wife to act out of loyalty will not do<sup>5</sup>.

1 'Married woman' is construed strictly and a belief, even on reasonable grounds, that the defendant was married when she was not, is not sufficient: *R v Ditta* [1988] Crim LR 43, CA.

2 See *Hughes's Case* (1813) 2 Lew CC 229; *Connolly's Case* (1829) 2 Lew CC 229.

3 Criminal Justice Act 1925 s 47. This provision replaced the presumption at common law, in relation to certain crimes, that, where such a crime was committed by a wife in the presence of her husband, the wife acted under the coercion of her husband: see s 47. The provision does not affect the common law defence of duress by threats (see PARA 23 ante) which is capable of application between husband and wife: see *R v Bourne* (1952) 36 Cr App Rep 125, CCA.

4 Although the defence of coercion is in this respect less favourable to the defendant than that of duress (see PARA 23 ante), coercion includes threats or intimidation less than threats of death or personal injury; 'moral threats' can suffice if they have the necessary effect: *R v Shortland* [1996] 1 Cr App Rep 116, CA; *R v Cairns* [2002] EWCA Crim 2838 at [55]-[57], [2003] 1 WLR 796 at [55]-[57].

As to the burden of proof, and as to whether the burden placed on the defendant is a persuasive or evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

5 *R v Shortland* [1996] 1 Cr App Rep 116, CA.

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## 25. Duress of circumstances.

The defence of duress of circumstances is concerned with the situation where the defendant acts to avert a threat of death or serious physical injury to himself (or to another person for whom he is, or for whom he is made by the situation, responsible<sup>1</sup>), whether from another person or from a natural cause<sup>2</sup>; unlike the defence of duress by threats<sup>3</sup> the threat does not have to be accompanied by the instruction to commit an offence 'or else'. Where such a defence is open to the defendant on his account of the facts, it should be left to the jury with a direction to determine: (1) whether the defendant was, or might have been, impelled to act as he did because, as a result of what he reasonably believed to be the situation, he had good cause to fear that otherwise death or serious physical injury would result<sup>4</sup>; and (2) if so, whether a sober person of reasonable firmness, sharing the characteristics of the defendant, would have responded to the situation by acting as the defendant did<sup>5</sup>. If both questions are answered affirmatively, the defence of duress of circumstances is established<sup>6</sup>.

The defence of duress of circumstances applies to offences in general<sup>7</sup>; three exceptions which have been recognised are murder, attempted murder and some forms of treason<sup>8</sup>.

1 *R v Shayler* [2001] EWCA Crim 1977 at [49], [2001] 1 WLR 2206 at [49] per Lord Woolf CJ.

2 *R v Martin* [1989] 1 All ER 652, 88 Cr App Rep 343, CA, applying *R v Conway* [1989] QB 290, 88 Cr App Rep 159, CA. In *R v Jones* [2004] EWCA Crim 1981, [2005] QB 259, [2005] 1 Cr App Rep 154, the Court of Appeal held that the defence is limited to the case where the defendant is responding to a threat of an offence under domestic law. No authority was cited, and this decision is inconsistent with *R v Martin* supra, where the threat to which the defendant was responding was a threat of suicide, which is not an offence. The House of Lords did not refer to the point on appeal in *R v Jones* [2006] UKHL 16, [2006] 2 All ER 741, [2006] 2 WLR 772. The defence of duress of circumstances was not available to a person who committed a drugs offence (possession of cannabis resin) in order to alleviate the pain of an injury: moreover, the fact that in these circumstances the state provided that the only way in which a person could alleviate his pain was by breaking the criminal law and risking punishment up to and including imprisonment did not mean that the state was subjecting that person to inhuman or degrading treatment contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 3 (prohibition of inhuman or degrading treatment): *R v Altham* [2006] EWCA Crim 7, (2006) Times, 1 February. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. See also *R v Quayle, A-G's Reference (No 2 of 2004)* [2005] EWCA Crim 1415, [2006] 1 All ER 988, [2005] 2 Cr App Rep 527.

3 The threat must be extraneous to the defendant, ie it must come from some external agency, and be capable of external scrutiny by judge and jury: *R v Rodger* [1998] 1 Cr App Rep 143, CA; *R v Quayle, A-G's Reference (No 2 of 2004)* [2005] EWCA Crim 1415, [2006] 1 All ER 988, [2005] 2 Cr App Rep 527.

4 *R v Martin* [1989] 1 All ER 652, 88 Cr App Rep 343, CA. Although the peril of death or serious physical injury must be imminent, the execution of the threat need not be immediately in prospect: *R v Abdul-Hussain* [1999] Crim LR 570, CA. However, this is subject to the limitation that there must have been no evasive action which the defendant could reasonably have been expected to take: *R v Z* [2005] UKHL 22 at [21], [28], [2005] 2 AC 467 at [21], [28], sub nom *R v Hasan* [2005] 2 Cr App Rep 314 at [21], [28] per Lord Bingham of Cornhill. The defendant is unlikely to be able to avail himself of the defence where there has been a continuous and deliberate course of otherwise unlawful self-help: *R v Quayle, A-G's Reference (No 2 of 2004)* [2005] EWCA Crim 1415, [2006] 1 All ER 988, [2005] 2 Cr App Rep 527. The threat must be operative at the time of the offence charged; where a person has embarked on committing an offence and the threat then becomes ineffective, he must stop committing the crime as soon as he reasonably can (regard being had to the circumstances in which he is placed): *R v Pommell* [1995] 2 Cr App Rep 607, CA. The aversion of serious psychological injury or of pain will not suffice: *R v Baker* [1997] Crim LR 497, CA; *R v Quayle, A-G's Reference (No 2 of 2004)* supra; *R v Altham* [2006] EWCA Crim 7, (2006) Times, 1 February.

5 *R v Martin* [1989] 1 All ER 652, 88 Cr App Rep 343, CA.

6 *R v Martin* [1989] 1 All ER 652, 88 Cr App Rep 343, CA.

7 The defence has been held applicable, for example, to dangerous driving (*R v Symonds* [1998] Crim LR 280, CA; *R v Cairns* [1999] 2 Cr App Rep 137, [2000] RTR 15, CA); careless driving (*R v Symonds* supra; *R v Backshall* [1999] 1 Cr App Rep 35, [1999] Crim LR 662, CA); driving while disqualified (*R v Martin* [1989] 1 All ER 652, 88 Cr App Rep 343, CA); driving with excess alcohol (*DPP v Davis* [1994] Crim LR 600, DC); possession of a prohibited weapon (*R v Pommell* [1995] 2 Cr App Rep 607, CA); causing grievous bodily harm with intent (*R v Cairns* supra); hijacking (*R v Abdul-Hussain* [1999] Crim LR 570, CA); and offences under the Official Secrets Act 1989 (*R v Shayler* [2001] EWCA Crim 1977, [2001] 1 WLR 2206 (on appeal [2002] UKHL 11, [2003] 1 AC 247, where the matter was not considered by the House of Lords on the ground that the facts of the case did not raise any question of duress of circumstances)).

8 *R v Dudley, R v Stephens* (1884) 14 QBD 273, CCR; *R v Abdul-Hussain* [1999] Crim LR 570, CA; *R v Z* [2005] UKHL 22 at [21], [2005] 2 AC 467 at [21], sub nom *R v Hasan* [2005] 4 All ER 685 at [21] per Lord Bingham of Cornhill. In addition, in a statutory offence, the policy and scheme of a piece of legislation may be interpreted as excluding the defence of duress of circumstances in a particular context: *R v Quayle, A-G's Reference (No 2 of 2004)* [2005] EWCA Crim 1415, [2006] 1 All ER 988, [2005] 2 Cr App Rep 527 (one of the reasons for not allowing the defence in respect of drugs offences where cannabis had been taken to alleviate pain was that to allow the defence to apply in such a context would create a conflict with the purpose and effect of the legislative policy and scheme relating to cannabis).

## UPDATE

### 25 Duress of circumstances

NOTE 2--*Altham*, cited, reported at [2006] 1 WLR 3287.

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## 26. Necessity.

Apart from the circumstances in which it is not criminal for a person to cause harm to the person or property of another<sup>1</sup>, the defence of necessity in extreme circumstances has been recognised in the context of medical treatment<sup>2</sup>. There are three requirements for the application of the defence of necessity to conduct by such persons: that the act must be necessary to avoid inevitable and irreparable evil; that no more should be done than is reasonably necessary for the purpose to be achieved; and that the evil inflicted must not be disproportionate to the evil avoided<sup>3</sup>. Where it applies, the defence of necessity justifies conduct which would otherwise be unlawful, that is it renders it lawful<sup>4</sup>.

Whether necessity can be a defence in cases other than those of medical necessity, and, if so, to what extent, remains uncertain.

1 These cases include self-defence and defence of another (see PARA 21 ante), defence of property (see PARA 22 ante), force used in the prevention of crime (see PARA 20 ante), duress by threats (see PARA 23 ante), marital coercion (see PARA 24 ante) and duress of circumstances (see PARA 25 ante).

2 See *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL; *R v Bournwood Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458, [1998] 3 All ER 289, HL; *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, [2000] 4 All ER 961, CA. The common law defence of necessity by extraneous circumstances is not available where its role would be to legitimise conduct which is contrary to the clear legislative policy and scheme adopted in relation to controlled drugs: see *R v Quayle, A-G's Reference (No 2 of 2004)* [2005] EWCA Crim 1415, [2006] 1 All ER 988, [2005] 2 Cr App Rep 527 (necessitous medical use of cannabis not a defence to offences involving the cultivation, production, importation and supply of cannabis).

3 *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 at 240, [2000] 4 All ER 961 at 1052, CA, per Brooke LJ. Provided that these requirements are satisfied, the defence applies to a charge of murder where, and only where, the following formulation is applicable: (1) that it is impossible to preserve the life of some other patient (X) without bringing about the death of Y; (2) that Y by his continued existence will inevitably bring about X's death within a short period of time; and (3) that X is capable of living an independent life but Y is incapable under any circumstances (including all forms of medical intervention) of viable independent existence: see *Re A (Children) (Conjoined Twins: Surgical Separation)* supra at 205 and 1018 per Ward LJ.

4 *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 73, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 at 564, HL, per Lord Goff of Chieveley.

## UPDATE

### 26 Necessity

NOTE 4--See also *R v S* [2009] All ER (D) 84 (Feb), CA.



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## **27. Superior orders.**

The mere fact that a person does a criminal act in obedience to the order of a duly constituted superior does not of itself excuse the person who does it from criminal liability<sup>1</sup>. A person acting under superior orders which he carries out in good faith may, however, lack the mental element required for criminal liability; the orders may have led the defendant to make a material mistake of fact<sup>2</sup>. Alternatively superior orders may lead a person to have a belief which is a statutory defence<sup>3</sup>.

Those subject to military law are amenable to the criminal law to the same extent as other subjects; obedience to superior orders is not in itself a defence to a criminal charge<sup>4</sup>.

1 See *R v Thomas* (1816) Ms of Bayley J, CCR, Turner and Armitage, Cases on Criminal Law 67 (sentry killing intruder under mistaken impression that it was his duty so to do; convicted of murder); *Lewis v Dickson* [1976] RTR 431, DC (security officer causing obstruction of highway by checking all the vehicles entering his employer's premises; no defence that he was obeying his employer's instructions); *Yip Chin-Cheung v R* [1995] 1 AC 111, 99 Cr App Rep 406, PC (no place for a general defence of executive authorisation of a breach of the criminal law); and see also *R v Clegg* [1995] 1 AC 482 at 494, [1995] 1 Cr App Rep 507 at 518, HL, per Lord Lloyd of Berwick.

2 *R v James* (1837) 8 C & P 131; *R v Trainer* (1864) 4 F & F 105.

3 See *R v Denton* [1982] 1 All ER 65, 74 Cr App Rep 81, CA.

4 See ARMED FORCES vol 2(2) (Reissue) PARA 3. The orders of a superior officer afford no excuse for consorting with rebels: *Axtel's Case* (1660) 5 State Tr 1146 at 1175.

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## 28. Effect of voluntary intoxication.

The voluntary taking of alcohol or drugs cannot of itself excuse the commission of a crime; and it is not a defence that a person's mind was so affected by alcohol that he acted in a way he would not have done had he been sober<sup>1</sup> or that he did not know that he was doing wrong<sup>2</sup>. Whether the alleged intoxication is induced through alcohol or through drugs, the principles to be applied are the same<sup>3</sup>. Voluntary (that is, self-induced) intoxication<sup>4</sup> is a factor relevant to criminal liability if a specific intent is an essential element of the offence charged and the defendant's intoxication affords evidence that he lacked the mens rea for that offence<sup>5</sup>; also, where a statute expressly provides that a particular belief is a defence to the offence charged, evidence of intoxication may be used to support a claim that the defendant had that belief<sup>6</sup>.

Where, on a charge of an offence of basic intent (that is, an offence which does not require a specific intent), a claim of lack of mens rea is supported by evidence of voluntary intoxication, that evidence cannot afford evidence that the defendant lacked the mens rea for that offence<sup>7</sup> and should be disregarded in deciding in the light of any other evidence whether or not the defendant had that mens rea<sup>8</sup>. The question for the tribunal of fact is whether the defendant had the mens rea for the basic intent offence, or would have had that mens rea if he had not been voluntarily intoxicated<sup>9</sup>. However, if the intoxication arises from the taking of a soporific or sedative drug, or a drug which has been lawfully prescribed or administered by a doctor, it can be taken into account as evidence of lack of the mens rea required for the basic intent offence, unless the defendant was reckless<sup>10</sup> in taking the drug in the circumstances or quantities in which he took it<sup>11</sup>.

Voluntary intoxication at the time of committing an offence causing death can at most operate to reduce the crime from murder to manslaughter<sup>12</sup>.

Intoxication which is self-induced with a view to committing crime, as where a person drinks to give himself courage to carry out an intention to kill, does not excuse even though at the time of committing the act the defendant could not, because of the drink taken, form the specific intent required for that crime<sup>13</sup>.

1 *DPP v Majewski* [1977] AC 443, 62 Cr App Rep 262, HL; and see *R v Sheehan*, *R v Moore* [1975] 2 All ER 960, 60 Cr App Rep 308, CA. See also *DPP v Beard* [1920] AC 479, 14 Cr App Rep 159, HL.

2 *DPP v Beard* [1920] AC 479, 14 Cr App Rep 159, HL.

3 *R v Lipman* [1970] 1 QB 152, 53 Cr App Rep 600, CA; but see the text to notes 8, 10 infra.

4 Intoxication is voluntary where it results from the defendant knowingly taking alcohol or some other drug or intoxicating substance or a combination of these (see *R v Lipman* [1970] 1 QB 152, 53 Cr App Rep 600, CA; *DPP v Majewski* [1977] AC 443, 62 Cr App Rep 262, HL), even though he does not know its precise nature or strength (*R v Allen* [1988] Crim LR 698, CA).

5 *DPP v Majewski* [1977] AC 443, 62 Cr App Rep 262, HL. An offence is one of specific intent if intention and nothing less is required as to at least one element of the offence: this definition seems to have commanded the most support among their lordships in *DPP v Majewski* supra and avoids the difficulties inherent in other definitions propounded.

At a trial in the Crown Court, the judge must normally direct the jury on the relevant law if there is evidence, whatever its source and even though it is not relied on by counsel, on which a jury might conclude that there is a reasonable possibility that the defendant did not have the relevant mens rea, because of intoxication: *R v*

*Bennett* [1995] Crim LR 877, CA. However, if the defendant is not contending that he lacked the necessary mens rea, it is open to the judge to see whether defence counsel objects to such a direction: if defence counsel objects to the direction being given, the judge does not have to give it: *R v Groark* [1999] Crim LR 669, CA. In his direction in respect of an offence requiring specific intent, the judge must inform the jury that in deciding whether the defendant had the necessary mens rea it must take into account the evidence that he was intoxicated and that if it considers that because he was drunk he did not have the necessary mens rea or might not have had it, he is entitled to be acquitted: *R v Brown* [1998] Crim LR 485, CA. In other words, the judge must tell the jury that it can convict the defendant of a specific intent offence only if it is sure, having regard to all the evidence (including that of intoxication), that he had the necessary mens rea: *R v Groark* supra.

6 *Jaggard v Dickinson* [1981] QB 527, 72 Cr App Rep 33, DC. An honest belief in the need to act in self-defence which results from an intoxicated mistake may not be relied upon to excuse the defendant: *R v O'Grady* [1987] QB 995, 85 Cr App Rep 315, CA; *R v Hatton* [2005] EWCA Crim 2951, [2006] Crim LR 353.

7 *DPP v Majewski* [1977] AC 443, 62 Cr App Rep 262, HL.

8 *R v Woods* (1981) 74 Cr App Rep 312, CA; *R v Aitken* [1992] 1 WLR 1006, 95 Cr App Rep 305, C-MAC; *R v Richardson* [1999] 1 Cr App Rep 392, CA.

9 *R v Aitken* [1992] 1 WLR 1006, 95 Cr App Rep 305, C-MAC; *R v Richardson* [1999] 1 Cr App Rep 392, CA.

10 le as to the risk of becoming unpredictable or aggressive.

11 See *R v Hardie* [1984] 3 All ER 848, 80 Cr App Rep 157, CA; and PARA 34 post.

12 *DPP v Beard* [1920] AC 479 at 499, 14 Cr App Rep 159 at 192-193, HL, per Lord Birkenhead LC, approving the view of Stephen J in *R v Doherty* (1887) 16 Cox CC 306 at 307; *R v Lipman* [1970] 1 QB 152, 53 Cr App Rep 600, CA; *R v Howell* [1974] 2 All ER 806. However, cf *R v Sheehan*, *R v Moore* [1975] 2 All ER 960, 60 Cr App Rep 308, CA. If the voluntary intoxication does reduce the crime from murder to manslaughter it cannot operate as a mitigating factor in respect of the sentence for manslaughter: *R v McCullough* [1999] NI 39, NI CA.

13 *A-G for Northern Ireland v Gallagher* [1963] AC 349 at 382, 45 Cr App Rep 316 at 344, HL, per Lord Denning. Special provision is made in connection with the commission of offences under the Public Order Act 1986 Pt 1 (ss 1-6) (as amended) (see PARAS 555-560 post) by intoxicated persons: see s 6(5); and PARA 555 post.

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## **29. Involuntary intoxication.**

Involuntary intoxication refers to the case where intoxication is produced by others, as where a defendant's drink was 'laced' with alcohol without his knowledge. Evidence of such intoxication may be taken into account in deciding whether the defendant had the necessary mens rea for the offence (whether or not a specific intent is required)<sup>1</sup>; if it does not prevent the defendant having that mens rea, it is irrelevant to liability, but may well be a substantial mitigating factor<sup>2</sup>.

Once the issue of involuntary intoxication has been raised, the burden of proof is generally on the prosecution to show that the intoxication was voluntary<sup>3</sup>.

1 *R v Kingston* [1995] 2 AC 355, [1994] 3 All ER 353, HL. For the meaning of 'specific intent' see PARA 28 note 4 ante.

2 *R v Kingston* [1995] 2 AC 355, [1994] 3 All ER 353, HL. See also *R v Davies* [1983] Crim LR 741.

3 *R v Stripp* (1978) 69 Cr App Rep 318 at 323; *R v Bailey* [1983] 2 All ER 503 at 507, 77 Cr App Rep 76 at 81, CA. Special provision is made in connection with the commission of offences under the Public Order Act 1986 Pt 1 (ss 1-6) (as amended) (see PARAS 555-560 post) by intoxicated persons: see s 6(5); and PARA 555 post.

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### **30. Intoxication and insanity contrasted.**

The criminal law is concerned with the effect, not the origin, of disease of the mind<sup>1</sup>. If insanity supervenes as a result of alcoholic excess, it is as much a defence to a criminal charge as insanity from any other cause<sup>2</sup>: however, the defence of insanity and the rules relating to intoxication are otherwise in no way analogous.

1 See *R v Kemp* [1957] 1 QB 399, 40 Cr App Rep 121; and PARA 31 note 4 post.

2 *DPP v Beard* [1920] AC 479 at 500, 14 Cr App Rep 159 at 193, HL; *R v Davis* (1881) 14 Cox CC 563; *R v Baines* (1886) Times, 25 January.

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### 31. Insanity.

Where, on a criminal charge, it appears<sup>1</sup> that, at the time of the act or omission giving rise to the offence alleged<sup>2</sup>, the defendant was labouring under a defect of reason<sup>3</sup> owing to a disease of the mind<sup>4</sup> so as not to know the nature and quality of his act<sup>5</sup>, or, if he knew this, so as not to know that what he was doing was wrong<sup>6</sup>, he is not regarded in law as responsible for his act<sup>7</sup>.

The question whether, owing to a defect of reason due to disease of the mind, the defendant was not responsible for his act is a question of fact to be determined by the jury<sup>8</sup>. Where the jury finds insanity is made out in the Crown Court, the verdict takes the special form of not guilty by reason of insanity<sup>9</sup>.

1 As to the burden and mode of proof of insanity see PARA 33 post.

2 The defendant's state of mind before or after that time is irrelevant except in so far as it tends to establish or negative insanity at the time of the act. Where a defect of reason is self-induced, as where a psychopath takes drink to give himself the courage to kill, he cannot rely on insanity at the time of the act if he was responsible when he formed the intent to kill: *A-G for Northern Ireland v Gallagher* [1963] AC 349 at 382, 45 Cr App Rep 316 at 344, HL, per Lord Denning.

3 The defence of insanity is not available to a person who retains the power of reasoning, but who in a moment of confusion or absentmindedness fails to use that power to the full: *R v Clarke* [1972] 1 All ER 219, 56 Cr App Rep 225, CA. As to uncontrollable impulse see also PARA 32 post.

4 The criminal law is not concerned with the origin of the disease but with its effect; it matters not whether the defect of reason is due to a degeneration of the brain cells, or to some other form of mental derangement, or to a physical disorder, such as arteriosclerosis, which, by cutting off the supply of blood to the brain, impairs the reasoning process; nor does it matter whether the disease is curable or incurable, temporary or permanent: *R v Kemp* [1957] 1 QB 399, 40 Cr App Rep 121; *R v Sullivan* [1984] AC 156, 77 Cr App Rep 176, HL (epileptic seizure held to be a disease of the mind); *R v Hennessy* [1989] 2 All ER 9, 89 Cr App Rep 10, CA (hyperglycaemia caused by inherent defect and not corrected by insulin is a disease capable of falling within the M'Naghten Rules); *R v Burgess* [1991] 2 QB 92, 93 Cr App Rep 41, CA (sleepwalking due to an internal factor); and see PARA 30 ante.

There must be a malfunctioning of the mind caused by disease; a malfunctioning caused by an external factor such as alcohol, drugs or injury does not constitute a disease of the mind: *R v Quick*, *R v Paddison* [1973] QB 910, [1973] 3 All ER 347, CA. Where an underlying mental condition which would not otherwise produce a disease of the mind sufficient to satisfy the other parts of the M'Naghten Rules is aggravated by external factors so that the defendant has a defect of reason such that he does not know the nature and quality of his act (or that it is wrong), this does not bring the M'Naghten Rules into play: see *A-G for Northern Ireland v Gallagher* [1963] AC 349, 45 Cr App Rep 316, HL; *R v Roach* [2001] EWCA Crim 2698, [2002] 3 Archbold News 1, CA.

5 The expression 'nature and quality' has always been held to refer to the physical nature and consequences of the act, and does not refer to its moral aspects: *R v Codère* (1916) 12 Cr App Rep 21, CCA.

6 For this purpose a person knows that an act is wrong if he knows that it is contrary to law: see the dicta in *R v Windle* [1952] 2 QB 826, 36 Cr App Rep 85, CCA; *R v Holmes* [1953] 2 All ER 324, 37 Cr App Rep 61, CCA. Cf the answers of the judges to questions 2 and 3 in *M'Naghten's Case* (1843) 10 Cl & Fin 200 at 210, HL and the view of Lord Reading CJ in *R v Codère* (1916) 12 Cr App Rep 21, CCA, that the test is whether the act is right or wrong according to the standard accepted by reasonable men.

7 *M'Naghten's Case* (1843) 10 Cl & Fin 200, HL; *R v Layton* (1849) 4 Cox CC 149; *Pate's Case* (1850) 8 State Tr NS 1; *R v Richards* (1858) 1 F & F 87; *R v Davies* (1858) 1 F & F 69; *R v Law* (1862) 2 F & F 836; *R v Vyse* (1862) 3 F & F 247; *R v Townley* (1863) 3 F & F 839; *R v Southey* (1865) 4 F & F 864; *R v Leigh* (1866) 4 F & F 915; *R v Atherley* (1909) 3 Cr App Rep 165, CCA; *R v Smith* (1910) 5 Cr App Rep 123, 26 TLR 614, CCA; *R v True*

(1922) 16 Cr App Rep 164, 127 LT 561, CCA; *R v Kopsch* (1925) 19 Cr App Rep 50, CCA; *R v Flavell* (1926) 19 Cr App Rep 141, CCA; *R v Rivett* (1950) 34 Cr App Rep 87, CCA.

The defence of insanity also applies where a person acts under an insane delusion as to existing facts. If he labours under a partial delusion only and is not in other respects insane, his responsibility must be determined as if the facts with regard to which the delusion exists were real: *M'Naghten's Case* supra. Cf *R v Townley* (1863) 3 F & F 839; *Pate's Case* supra at 47 per Alderson B.

The defence of insanity is available only in respect of offences requiring an element of mens rea: *DPP v H* [1997] 1 WLR 1406, DC. These principles apply only to insanity as a substantive defence; as to the raising of the issue of unfitness to plead see PARAS 1264-1265 post.

8 *R v Rivett* (1950) 34 Cr App Rep 87, CCA; *R v Kemp* [1957] 1 QB 399 at 406, 40 Cr App Rep 121 at 126 per Devlin J (approved by Lord Denning in *Bratty v A-G for Northern Ireland* [1963] AC 386, 46 Cr App Rep 1, HL). See also *R v Sullivan* [1984] AC 156, 77 Cr App Rep 176, HL; and PARA 97 note 4 post.

9 Trial of Lunatics Act 1883 s 2(1) (amended by the Criminal Procedure (Insanity) Act 1964 s 1). The amendment by the Criminal Procedure (Insanity) Act 1964 s 1 effects a replacement of the verdict of guilty but insane introduced by the Trial of Lunatics Act 1883 s 2(1) as originally drafted. The Trial of Lunatics Act 1883 s 2 (as amended) provides that where at the trial of a person for an offence 'it is given in evidence . . . that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury . . . that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict that the accused is not guilty by reason of insanity'. The requirement that it should appear to the jury that the defendant 'did the act or made the omission charged' before he can be found not guilty by reason of insanity refers to the actus reus of the offence; the prosecution does not have to prove that the defendant acted or omitted to act with the requisite mens rea: *A-G's Reference (No 3 of 1998)* [2000] QB 401, [1999] 2 Cr App Rep 214, CA. If the prosecution is unable to prove beyond reasonable doubt that the defendant has committed the actus reus, he is entitled to a simple not guilty verdict whether or not he was insane at the material time: *A-G's Reference (No 3 of 1998)* supra.

The defence of insanity applies to cases tried in a magistrates' court (*R v Horseferry Road Magistrates' Court, ex p K* [1997] QB 23, [1996] 2 Cr App Rep 574, DC) but no provision is made for the equivalent of the special verdict. Consequently, if the defence succeeds at a summary trial the defendant must simply be found not guilty.

As to the orders which may be made by a court where a special verdict has been returned see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332; as to appeal against a verdict of not guilty by reason of insanity see PARA 1887 post; and as to appeal against an order made following such a verdict see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332.

## UPDATE

### 31 Insanity

NOTE 7--See *R v Johnson* [2007] All ER (D) 128 (Jul), CA (paranoid schizophrenic unable to use defence of insanity).

NOTE 8--See *R v Phillip* [2007] UKPC 31, [2007] All ER (D) 55 (May) (in order to make proper findings, jury needed more direction from judge regarding nature of delusions).

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### **32. Uncontrollable impulse.**

The defence of insanity<sup>1</sup> is not established by showing merely that the defendant suffers from a disease of the mind and because of that he more readily gives way to passion or is less able to control his reactions. It is no defence that a person is mentally defective<sup>2</sup> or may be regarded as morally defective or displays lack of moral judgment<sup>3</sup>, or that he cannot control his impulses owing to a disease of the mind<sup>4</sup>.

1 See PARA 31 ante.

2 *R v Alexander* (1913) 9 Cr App Rep 139, 109 LT 745, CCA.

3 *R v Burton* (1863) 3 F & F 772.

4 *R v Barton* (1848) 3 Cox CC 275; *R v Holt* (1920) 15 Cr App Rep 10, CCA; *R v Quarmby* (1921) 15 Cr App Rep 163, CCA; *R v Kopsch* (1925) 19 Cr App Rep 50, CCA; *R v Flavell* (1926) 19 Cr App Rep 141, CCA. Cf *R v Hay* (1911) 75 JP 480; *R v Fryer* (1915) 24 Cox CC 403, in which the defence was allowed, but which cannot stand in the light of the later authorities.

The defence of insanity as defined by the M'Naghten Rules does not apply to the case of a defendant who knew what he was doing and that it was wrong, but was unable, owing to disease of the mind, to prevent himself from doing what he did. In this class of case, in charges of murder, the defence of diminished responsibility is available: see the Homicide Act 1957 s 2; and PARAS 96-97 post.



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### 33. Burden and mode of proof of insanity.

It is for the defence to raise the question of insanity<sup>1</sup>; and, if the prosecution has evidence of insanity, it must make that evidence available to the defence<sup>2</sup>. Where, however, the defence raises a plea of diminished responsibility<sup>3</sup>, the prosecution may adduce or elicit evidence of insanity by way of rebuttal<sup>4</sup>, and the burden of proving insanity in these circumstances rests on the prosecution<sup>5</sup>. Otherwise it is for the defence to prove insanity on the balance of probabilities<sup>6</sup>.

A jury may not return a special verdict of not guilty by reason of insanity<sup>7</sup> except on the written or oral evidence of two or more registered medical practitioners<sup>8</sup> at least one of whom is duly approved<sup>9</sup>.

Where the medical evidence is all to the effect that the defendant was insane so as not to be criminally responsible, and that evidence is uncontroverted by the facts or surrounding circumstances, a verdict of guilty will be set aside on the ground that no reasonable jury could have reached such a verdict<sup>10</sup>; but a conviction will not be quashed merely because the jury has chosen to disagree with expert medical opinion<sup>11</sup> or because the medical evidence tends to support the defence, if there is other evidence to the contrary<sup>12</sup>.

1 See, however, PARA 36 note 4 post. In certain exceptional circumstances, and provided that there is evidence of the factors to be taken into account under the M'Naghten Rules (see PARA 31 ante), the judge may raise the issue of insanity of his own volition and leave the issue to the jury: see *R v Dickie* [1984] 3 All ER 173, 79 Cr App Rep 213, CA; *R v Thomas* (1994) 29 BMLR 120, [1995] Crim LR 314, CA.

2 *R v Dickie* [1984] 3 All ER 173, 79 Cr App Rep 213, CA.

3 See PARAS 96-97 post.

4 See the Criminal Procedure (Insanity) Act 1964 s 6; and PARA 96 post.

5 See *R v Bastian* [1958] 1 All ER 568n, [1958] 1 WLR 413; *R v Grant* [1960] Crim LR 424.

6 *M'Naghten's Case* (1843) 10 Cl & Fin 200, HL; *R v Stokes* (1848) 3 Car & Kir 185; *R v Layton* (1849) 4 Cox CC 149; *R v Smith* (1910) 6 Cr App Rep 19, CCA; *R v Casey* (1947) 32 Cr App Rep 91, 63 TLR 487, CCA; *Bratty v A-G for Northern Ireland* [1963] AC 386, 46 Cr App Rep 1, HL. As to the standard of proof see PARAS 1371-1372 post.

7 Ie under the Trial of Lunatics Act 1883 s 2(1) (as amended): see PARA 31 note 9 ante.

8 As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 4.

9 Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 1(1). 'Duly approved', in relation to a medical practitioner, means approved for the purposes of the Mental Health Act 1983 s 12 (as amended) (see MENTAL HEALTH vol 30(2) (Reissue) PARAS 482-484) by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder: Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 6(1). The Mental Health Act 1983 s 54(2), (3) (see MENTAL HEALTH vol 30(2) (Reissue) PARA 492) has effect with respect to proof of the defendant's mental condition for the purposes of the Trial of Lunatics Act 1882 s 2 (as amended) (see PARA 31 note 9 ante) as they have effect with respect to proof of an offender's mental condition for the purposes of the Mental Health Act 1983 s 37(2)(a) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 333); Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 1(2).

10 *R v Matheson* [1958] 2 All ER 87, 42 Cr App Rep 145, CCA. Cf *R v Latham* [1965] Crim LR 434, CCA. Both cases were decided on diminished responsibility but similar principles are applicable in the case of insanity. See also PARA 96 post.

11 *R v Rivett* (1950) 34 Cr App Rep 87, CCA; *R v True* (1922) 16 Cr App Rep 164, 127 LT 561, CCA.

12 *R v Latham* [1965] Crim LR 434, CCA.

## **UPDATE**

### **33 Burden and mode of proof of insanity**

NOTE 6--In contrast, a verdict of unlawful killing is available in a coroner's court only if insanity, properly raised on the evidence, is disproved to the criminal standard: see *R (on the application of O'Connor) v HM Coroner for the District of Avon* [2009] EWHC 854 (Admin), [2009] 4 All ER 1020, DC; and CORONERS vol 9(2) (Reissue) PARA 988.

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### **34. Involuntary conduct.**

In general<sup>1</sup>, no crime is committed if the prohibited act, omission or event on the part of the defendant is involuntary<sup>2</sup>. An act, omission or event on the part of the defendant is involuntary where it is beyond his control, as where an act is compelled by external physical force<sup>3</sup> or where he acts in a state of automatism<sup>4</sup>. An omission to act is involuntary where the defendant is incapable of doing the act which he has failed to do<sup>5</sup>; and a state of affairs is involuntary if it is brought about by external physical compulsion or is otherwise beyond the defendant's control.

An act is not involuntary merely because it is done in circumstances of constraint which affect the freedom of action of the person doing it, as where an act is done under threats<sup>6</sup> or on the command of a superior<sup>7</sup>. For an act to be regarded as involuntary, the person doing it must not only be deprived of a free choice as to what to do, he must also be divested of the ability to control what he does.

1 An offence involving an omission or a state of affairs may be so defined as apparently to require no proof that the omission or state of affairs, as the case may be, was voluntary on the part of the defendant: see *Sparks v Worthington* [1986] RTR 64, DC; *Davey v Towle* [1973] RTR 328, DC (omissions); *R v Larsonneur* (1933) 24 Cr App Rep 74, CCA; *Winzar v Chief Constable of Kent* (1983) Times, 28 March, DC (states of affairs).

Even though some conduct on the part of the defendant may have been involuntary, he may incur criminal liability in respect of voluntary conduct which took place before the involuntary conduct: see eg *Kay v Butterworth* (1945) 173 LT 191, DC (driver continuing to drive when overcome with drowsiness thereby committed careless driving). See also *Henderson v Jones* [1955] Crim LR 318, DC; *R v Sibbles* [1959] Crim LR 660; *R v Jarmain* [1946] KB 74, 31 Cr App Rep 39, CCA. As to vicarious liability see PARA 59 et seq post.

2 *Bratty v A-G for Northern Ireland* [1963] AC 386 at 408-409, 46 Cr App Rep 1 at 16 per Lord Denning; *Kilbride v Lake* [1962] NZLR 590, NZ SC; *Ryan v R* (1967) 121 CLR 205, Aust HC.

3 1 Hale PC 434; *Hawkins* 1 PC Ch 29, s 3; *Hill v Baxter* [1958] 1 QB 277, 42 Cr App Rep 51, DC.

4 See PARA 35 post.

5 See eg *Leicester v Pearson* [1952] 2 QB 668, [1952] 2 All ER 71, DC.

6 As to the defences of duress by threats and duress of circumstances, however, see PARAS 23, 25 ante.

7 See PARA 27 ante.

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### 35. Automatism.

A person does not incur criminal liability for acts done in a state of automatism, as where he causes harm to someone during a mental blackout induced by an external factor such as violence or drugs, including anaesthetics, alcohol and hypnotic influences<sup>1</sup>, or by forces outside his control<sup>2</sup>, because such an act is involuntary on his part. An act is done in a state of automatism if it is done by the muscles without any control by the mind (such as a reflex action, or a spasmodic or convulsive act) or if it is done during a state involving a loss of consciousness<sup>3</sup>. In law automatism is limited to cases where there is a total destruction of voluntary control; impaired or reduced awareness will not do<sup>4</sup>.

If, however, the defendant's state of automatism results from self-induced intoxication due to alcohol or drugs, it is not a defence to offences of 'basic intent'<sup>5</sup>, although it may negative mens rea in offences requiring a 'specific intent'<sup>6</sup>.

Automatism which is self-induced by other means is a defence even to an offence of 'basic intent', except that it is not a defence to an offence of 'basic intent' where it is proved that the defendant, before he became an automaton, was reckless (that is, appreciated the risk) that something which he did or failed to do was likely to make him aggressive, unpredictable or uncontrollable with the result that he might endanger others and he deliberately ran the risk or otherwise disregarded it<sup>7</sup>.

There is no burden upon the defence to establish automatism where insanity is not involved; the burden is upon the prosecution to exclude it<sup>8</sup>. Before the prosecution is required to negative the assertion that conduct on the part of the defendant was involuntary, the defence must, in the course of the evidence, lay a proper foundation for that assertion<sup>9</sup>. The defendant's own evidence will rarely be enough and should be supported by medical evidence<sup>10</sup>. The prosecution may call medical evidence to rebut a plea of automatism<sup>11</sup>.

1 *R v Quick, R v Paddison* [1973] QB 910 at 922, [1973] 3 All ER 347 at 356, CA. Cf *R v Kemp* [1957] 1 QB 399, 40 Cr App Rep 121.

2 *Hills v Baxter* [1958] 1 QB 277, 42 Cr App Rep 51, DC.

3 *Bratty v A-G for Northern Ireland* [1963] AC 386 at 408-409, 46 Cr App Rep 1 at 16, HL, per Lord Denning.

4 *A-G's Reference (No 2 of 1992)* [1994] QB 91, 97 Cr App Rep 429, CA. See also *Broome v Perkins* (1986) 85 Cr App Rep 321, [1987] Crim LR 271, DC.

5 *DPP v Majewski* [1977] AC 443, 62 Cr App Rep 262, HL. As to the meaning of 'offence of basic intent' see PARA 28 ante.

6 As to specific intent see PARA 28 note 5 ante. As to the consequences of self-induced intoxication see PARA 28 ante.

7 *R v Bailey* [1983] 2 All ER 503, 77 Cr App Rep 76, CA.

8 *Bratty v A-G for Northern Ireland* [1963] AC 386, 46 Cr App Rep 1, HL. See also PARA 36 note 4 post. As to the burden of proof generally see PARA 1368 et seq post.

9 *Bratty v A-G for Northern Ireland* [1963] AC 386, 46 Cr App Rep 1, HL.

10 *Bratty v A-G for Northern Ireland* [1963] AC 386, 46 Cr App Rep 1, HL.

11 *R v Smith* [1979] 3 All ER 605, 69 Cr App Rep 378, CA.

## **UPDATE**

### **35 Automatism**

NOTE 10--See *R v C* [2007] EWCA Crim 1862, [2007] All ER (D) 91 (Sep) (defendant had to provide evidential basis for asserting he could not reasonably have avoided a hypoglycaemic attack by advance testing and that there had been no advance warnings of attack).

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### 36. Automatism and insanity contrasted.

A person's conduct may be involuntary<sup>1</sup> where he commits the actus reus of an offence but, owing to a defect of reason arising from a disease of the mind within the rules relating to the defence of insanity<sup>2</sup>, does so without any awareness of the act, or without any rational control over his actions. In such a situation the defendant is entitled to an acquittal in relation to what would otherwise be a guilty act, and the proper verdict is one of not guilty by reason of insanity<sup>3</sup>. Where the sole cause assigned for involuntary conduct is insanity, it follows that the defence of automatism is inapt and inapplicable<sup>4</sup>. Where, however, on the evidence issues of both insanity and automatism arise, it is necessary for the trial judge to distinguish clearly between them as a matter of law<sup>5</sup>. Where there is more than one cause of automatism, the question is whether the immediate cause is an external or internal one; if it is the former, the verdict is not guilty by reason of insanity and, if it is the latter, the verdict is a complete acquittal<sup>6</sup>. Where the immediate cause of alleged automatism is disputed on the evidence (so that it indicates that it may be internal or external), the judge will have to leave the defence of insanity (that is, insane automatism) and the defence of non-insane automatism to the jury, directing it to consider which was the immediate cause. Because of the difference in the burden of proof, the judge's direction will unavoidably be complicated in such a case because he will have to explain that, while the defendant carries the burden of proving insanity, it is for the prosecution to negative the defence of automatism<sup>7</sup>.

1 See PARA 34 ante.

2 See PARA 31 ante. See also *R v Sullivan* [1984] AC 156, 77 Cr App Rep 176, HL (assault committed during an epileptic fit); *R v Hennessy* [1989] 2 All ER 9, 89 Cr App Rep 10, CA (defendant was insulin-dependent diabetic suffering from hyperglycaemia); *R v Burgess* [1991] 2 QB 92, 93 Cr App Rep 41, CA (sleepwalking due to internal cause); and see also *R v Kemp* [1957] 1 QB 399, 40 Cr App Rep 121 (mental blackout due to cerebral tumour). The case of *R v Charlson* [1955] 1 All ER 859, 39 Cr App Rep 37, CCA (cerebral tumour) is inconsistent with *R v Sullivan* supra and should no longer be followed.

3 See PARA 1345 post.

4 *Bratty v A-G for Northern Ireland* [1963] AC 386, 46 Cr App Rep 1, HL. Where the defence of insanity is raised, the evidence may be such that, while it fails to support a finding that the defendant was suffering from a disease of the mind, a jury may nevertheless be left in doubt whether the crime was the result of a conscious and deliberate act or omission on the part of the defendant. Insanity is an answer in the nature of confession and avoidance, and must in general be raised and proved by the defence: see PARA 33 ante. Where the evidence tendered by the defence is such as to show that the defendant was suffering from a defect of reason arising from a disease of the mind, the defendant cannot avoid a verdict of not guilty by reason of insanity by seeking to rely exclusively upon a defence of automatism: see *Bratty v A-G for Northern Ireland* supra at 411 and 19 per Lord Denning. See also *R v Sullivan* [1984] AC 156, 77 Cr App Rep 176, HL (defendant who inflicted grievous bodily harm during an epileptic fit sought to rely on a defence of automatism; it was held that the proper verdict was one of not guilty by reason of insanity); *R v Hennessy* [1989] 2 All ER 9, 89 Cr App Rep 10, CA.

5 *R v Sullivan* [1984] AC 156, 77 Cr App Rep 176, HL.

6 *R v Roach* [2001] EWCA Crim 2698, [2002] 3 Archbold News 1. On internal and external influences see *R v Quick*, *R v Paddison* [1973] QB 910, [1973] 3 All ER 347, CA.

7 *R v Burns* (1973) 58 Cr App Rep 364, CA, applying *R v Quick*, *R v Paddison* [1973] QB 910, [1973] 3 All ER 347, CA. See also PARA 35 text to notes 9-12 ante.

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#### **(4) CRIMINAL CAPACITY AND IMMUNITY**

##### **37. Children under ten.**

There is a conclusive presumption that no child under the age of ten years can be guilty of a criminal offence<sup>1</sup>.

<sup>1</sup> See the Children and Young Persons Act 1933 s 50 (amended by the Children and Young Persons Act 1963 s 16(1)); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 29. As to the general principles relating to criminal proceedings against or involving children and young persons see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1232 et seq. As to the abolition of the common law presumption that a child between the ages of ten and 14 is incapable of forming a criminal intention see PARA 1376 post. A person attains a particular age at the commencement of the relevant anniversary of the date of his birth: see the Family Law Reform Act 1969 s 9(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 2.



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### 38. Corporations.

In general, a corporation is in the same position in relation to criminal liability as a natural person and may be convicted of common law<sup>1</sup> and statutory<sup>2</sup> offences including those requiring mens rea<sup>3</sup>. There are, however, crimes which a corporation is incapable of committing<sup>4</sup> or of which a corporation cannot be found guilty as a principal<sup>5</sup>; nor can a corporation be convicted of a crime for which imprisonment is the only punishment<sup>6</sup>.

Where an offence requires mens rea, a corporation is guilty of it if the offence is committed in the course of the corporation's business by a person in control of its affairs to such a degree that it may fairly be said to think and act through him so that his actions and intent are the actions and intent of the corporation; in such a case his acts and state of mind are regarded in law as the acts and state of mind of the company<sup>7</sup>. It is not enough that the person whose conduct it is sought to impute to the corporation is a manager or responsible agent or high executive<sup>8</sup>; whether persons are the 'directing mind and will' of a corporation, so that their conduct in its affairs becomes the conduct of the corporation, must depend on all the circumstances<sup>9</sup>. An important circumstance is the constitution of the corporation to the extent to which it identifies the natural persons who, by the memorandum and articles of association or as a result of action taken by the directors or by the corporation in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the corporation<sup>10</sup>.

A corporation is vicariously liable for a crime committed by its servant or agent in the course of his employment or agency in the same circumstances as an employer or principal who is a natural person<sup>11</sup>.

Where a corporation is criminally liable for an offence, a natural person involved may also be convicted of it, as a joint principal (if he is the person who physically committed the offence) or as an accomplice (if he aided, abetted, counselled or procured its commission). In addition, many statutes now provide for the guilt of controlling officers of the corporation who would not be criminally liable under ordinary principles, or whose guilt it would otherwise be hard to prove. The common example of this type of provision is: 'Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent<sup>12</sup> or connivance<sup>13</sup> of, or to be attributable to any neglect<sup>14</sup> on the part of, any director, manager<sup>15</sup>, secretary or other similar officer of the body corporate, or any person who was purporting to act in that capacity, he, as well as the body corporate, shall be guilty of that offence<sup>16</sup>. Some provisions omit the words 'attributable to any neglect on the part of'<sup>17</sup>.

1 *R v Great North of England Rly Co* (1846) 2 Cox CC 70 (public nuisance); *R v JG Hammond & Co Ltd* [1914] 2 KB 866 (contempt of court); *R v ICR Haulage Ltd* [1944] KB 551, 30 Cr App Rep 31, CCA (conspiracy to defraud); *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1939) Ltd* [1939] 2 KB 395, [1939] 2 All ER 613, CA (criminal libel).

2 Unless the contrary intention appears, 'person' in any Act includes a body of persons corporate: see the Interpretation Act 1978 ss 5, 22(1), Sch 1; and STATUTES vol 44(1) (Reissue) PARA 1382. This definition, so far as it includes bodies corporate, applies to any provision of an Act whenever passed relating to an offence punishable on indictment or on summary conviction: s 22(1), Sch 2 para 4(5). See also *R v Birmingham and Gloucester Rly Co* (1842) 3 QB 223 (non-repair of highway); *R v Tyler and International Commercial Co* [1891] 2 QB 588 at 592-594, CA (default in forwarding list of members to registrar); *A-G v London and North Western Rly Co* [1900] 1 QB 78, CA (excessive speed of trains); *Pearks, Gunston and Tee Ltd v Ward* [1902] 2 KB 1, DC; *R v Ascanio Puck & Co and Paice* (1912) 76 JP 487 (sale of food); *Provincial Motor Cab Co Ltd v Dunning* [1909] 2 KB 599 (breach

of road traffic regulations); *R v Gainsford Justices* (1913) 29 TLR 359 (breach of Factory and Workshop Acts); *Evans & Co Ltd v LCC* [1914] 3 KB 315 (breach of the Shops Act 1912 s 4 (repealed)); *Mousell Bros Ltd v London and North Western Ry Co* [1917] 2 KB 836 (giving false account of goods to toll collector); *Brentnall and Cleland Ltd v LCC* [1945] 1 KB 115, [1944] 2 All ER 552, DC (offence against the Weights and Measures Act 1889 s 29 (repealed)); *Orpen v Haymarket Capitol Ltd* (1931) 145 LT 614; *Houghton-Le Touzel v Mecca Ltd* [1950] 2 KB 612, [1950] 1 All ER 638 (offence against the Sunday Observance Act 1780 (repealed)); *Worthy v Gordon Plant (Services) Ltd* [1989] RTR 7n, DC (breach of road traffic legislation concerning drivers' hours); *R v Associated Octel Co Ltd* [1996] 4 All ER 846, [1996] 1 WLR 1543, HL (breach of Health and Safety at Work etc Act 1974 s 3(1)); *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78, [1997] 2 Cr App Rep 40, CA (breach of Health and Safety at Work etc Act 1974 s 2(1)).

3 *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146, [1944] 1 All ER 119, DC; *R v ICR Haulage Ltd* [1944] KB 551, 30 Cr App Rep 31, CCA. As to corporate personality generally see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1225-1226; and as to the effect of a petition for administration, an administration order or a winding-up order on the initiation or pursuit of proceedings against a company see COMPANIES vol 14 (2009) PARA 48; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARAS 149, 157, 490; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 887, 893.

4 *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146, [1944] 1 All ER 119, DC (treason). There is a conflict in the case law as to whether a corporation can commit perjury: cf *R v ICR Haulage Ltd* [1944] KB 551 at 554, 30 Cr App Rep 31 at 34, CCA (corporation cannot commit perjury or bigamy); *Wych v Meal* (1734) 3 P Wms 310 (corporation cannot commit perjury); *Odyssey Re (London) Ltd (formerly Sphere Drake Insurance plc) v OIC Run-Off Ltd (formerly Orion Insurance Co plc)* [2001] Lloyd's Rep IR 1, (2000) Times, 17 March, CA (corporation can commit perjury). A corporation cannot be convicted of conspiracy where the only other party to it is the sole director of the corporation: *R v McDonnell* [1966] 1 QB 233, 50 Cr App Rep 5. A corporation can commit manslaughter: *R v P & O European Ferries (Dover) Ltd* (1991) 93 Cr App Rep 72; *R v HM Coroner for East Kent, ex p Spooner* (1987) 88 Cr App Rep 10, 3 BCC 636, DC.

5 A corporation cannot be guilty as a principal of dangerous driving or of driving without due care and attention. In *R v Robert Millar (Contractors) Ltd, R v Millar* [1970] 2 QB 54, 54 Cr App Rep 158, CA, the corporation was convicted as a secondary party to the offence of causing death through dangerous driving (contrary to what is now the Road Traffic Act 1988 s 1 (as substituted): see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 963).

6 *R v ICR Haulage Ltd* [1944] KB 551 at 554, 30 Cr App Rep 31 at 34, CCA; *Pharmaceutical Society v London and Provincial Supply Association* (1880) 5 App Cas 857 at 869, HL, per Lord Blackburn; *R v Cory Bros & Co Ltd* [1927] 1 KB 810; *Law Society v United Service Bureau Ltd* [1934] 1 KB 343 at 350, DC, per Avory J.

Except for crimes such as murder where the punishment is fixed by law, the courts generally have power to fine: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139. Accordingly limitation on a corporation's criminal liability by reference to punitive sanctions is of little practical importance.

7 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127, HL. See also *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146, [1944] 1 All ER 119, DC; *R v ICR Haulage Ltd* [1944] KB 551, 30 Cr App Rep 31, CCA; *Moore v I Bressler Ltd* [1944] 2 All ER 515, DC; *Magna Plant Ltd v Mitchell* (1966) 110 Sol Jo 349, DC; *John Henshall (Quarries) Ltd v Harvey* [1965] 2 QB 233, [1965] 1 All ER 725, DC; *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, CA. It is not possible to aggregate the acts and states of mind of two or more controlling officers (none of whom could be criminally liable) so as to render the corporation liable: *R v HM Coroner for East Kent, ex p Spooner* (1987) 88 Cr App Rep 10, 3 BCC 636, DC; *R v P & O European Ferries (Dover) Ltd* (1990) 93 Cr App Rep 72; *A-G's Reference (No 2 of 1999)* [2000] QB 796, [2000] 3 All ER 182, CA.

8 *R v Andrews Weatherfoil Ltd* [1972] 1 All ER 65, [1972] 1 WLR 118, CA.

9 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127, HL; *R v Andrews Weatherfoil Ltd* [1972] 1 All ER 65, [1972] 1 WLR 118, CA. As to the directing mind of a company see COMPANIES vol 14 (2009) PARA 312.

10 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 199-200, [1971] 2 All ER 127 at 155, HL, per Lord Diplock.

11 See PARA 59 et seq post. Where it is a statutory defence for an employer or principal to prove that the offence was due to the act or default of another, and that he took all reasonable precautions, this defence is available to a corporation; in such circumstances 'another person' is a person other than the directors or other superior officers who control the corporation's affairs: *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, [1971] 2 All ER 127, HL. Where it is a statutory defence for a defendant to prove that he neither knew nor had reasonable ground to believe a particular fact the defence is not available to a corporation, even though no director or superior officer had such knowledge or reason to believe, if it cannot prove that the employee who

performed the act did not have such knowledge or reason to believe: *Tesco Stores Ltd v Brent London Borough Council* [1993] 2 All ER 718, [1993] 1 WLR 1037, DC.

12 A person 'consents' to the commission of an offence by a corporation if he is aware of what is going on and agrees to it: *Huckerby v Elliott* [1970] 1 All ER 189, 134 JP 175, DC.

13 'Connivance' is generally regarded as involving wilful blindness as to the commission of the offence: *Somerset v Hart* (1884) 12 QBD 360, DC.

14 An offence is attributable to any neglect on the part of a director, manager or other similar officer of a corporation only if that person was in breach of a duty to check the conduct (which resulted in the offence) of the person who committed the offence; normally there is no duty to check the conduct of an experienced member of staff whom one can expect to act in accordance with one's instructions unless there is something to prompt one into checking: *Lewin v Bland* [1985] RTR 171, 148 JP 69, DC.

15 Is a person managing in a governing role the affairs of the corporation, as opposed to someone with a day-to-day management function: *R v Boal* [1992] QB 591, [1992] 3 All ER 177, CA.

16 Examples of this type of provision are the Trade Descriptions Act 1968 s 20(1) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 500); the Insolvency Act 1986 s 432(2) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 928); the Consumer Protection Act 1987 s 40(2) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 538); and the Food Safety Act 1990 s 36 (see FOOD vol 18(2) (Reissue) PARA 460).

17 Examples of this type of provision are the Theft Act 1968 s 18 (see PARA 310 post); and the Public Order Act 1986 s 28(1) (see PARA 562 post). For a similar type of provision see the Official Secrets Act 1920 s 8(5); and PARA 505 post.

## UPDATE

### 38 Corporations

TEXT AND NOTES--The Corporate Manslaughter and Corporate Homicide Act 2007 provides for a new offence of corporate manslaughter: see PARA 38A. As to the criminal liability of partnerships as distinct from the liability of individual partners see *R v W Stevenson & Sons (a partnership)* [2008] EWCA Crim 273, [2008] Bus LR 1200, [2008] All ER (D) 351 (Feb).

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **38A. Corporate manslaughter.**

The Corporate Manslaughter and Corporate Homicide Act 2007 provides for a new offence of corporate manslaughter (to be called corporate homicide in Scotland).

Section 1, Sch 1 provide that a specified organisation is guilty of the offence of corporate manslaughter if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased, and provides that an organisation that is guilty of corporate manslaughter is liable on conviction on indictment to a fine. The organisations to which s 1 applies are corporations (other than corporations sole: see s 25), the government bodies and other bodies listed in Sch 1 (amended by Serious Crime Act 2007 Sch 8 para 178, Sch 14; SI 2008/396; and SI 2009/2748), police forces, and partnerships, trade unions and employer's associations, that are employers. The term 'relevant duty of care', in relation to an organisation, is defined by reference to specified duties owed under the law of negligence: Corporate Manslaughter and Corporate Homicide Act 2007 s 2 (in force in part: SI 2008/401). However, the following matters are excluded from the scope of the term 'relevant duty of care': (1) any duty of care owed by a public authority in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests), certain duties of care in respect of things done in the exercise of an intrinsically public function and certain duties of care owed by a public authority in respect of inspections carried out in the exercise of statutory functions (Corporate Manslaughter and Corporate Homicide Act 2007 s 3); (2) any duty of care owed by the Ministry of Defence in respect of certain activities performed by the armed forces (s 4); (3) certain duties of care owed by a public authority in respect of policing and law enforcement activities (s 5); (4) certain duties of care owed by various emergency services when responding to emergencies (s 6); and (5) certain duties of care owed by a local authority in relation to the exercise of specific functions to protect children from harm and in relation to the activities of probation services (s 7 (amended by SI 2008/912)). In assessing whether an organisation's breach of a relevant duty of care was gross, the jury is required to consider whether the organisation failed to comply with relevant health and safety legislation, the seriousness of such a failure, how much of a risk of death it posed, and the wider context of the failure: Corporate Manslaughter and Corporate Homicide Act 2007 s 8. A court has the power to order an organisation convicted of corporate manslaughter to take steps to remedy the breach, any matters which resulted from that breach and any deficiency as regards health and safety matters in the organisation's policies, systems or practices: s 9. A court may order an organisation convicted of corporate manslaughter to publicise the fact of its conviction, specified particulars of the offence, the amount of any fine imposed and the terms of any remedial order made: s 10. Provision is made to ensure that the Corporate Manslaughter and Corporate Homicide Act 2007 applies to the Crown (s 11) and provision is also made as to its application to the armed forces (s 12) and to police forces (s 13). A partnership is to be treated as owing whatever duties of care it would owe if it were a body corporate; proceedings must be brought in the name of such a partnership and any fine imposed on it is to be paid out of the funds of the partnership: s 14. Procedural matters relating to the prosecution of organisations for corporate manslaughter are set out: s 15. Where the functions have been transferred between or out of government departments or other bodies listed in Sch 1, incorporated Crown bodies or police forces, it is provided that prosecutions are to be commenced, or continued, against the public body that currently has responsibility for the function: s 16. Proceedings for

an offence of corporate manslaughter may not be instituted without the consent of the Director of Public Prosecutions: s 17. An individual cannot be guilty of aiding, abetting, counselling or procuring the commission of an offence of corporate manslaughter: s 18 (amended by Serious Crime Act 2007 s 62). The fact that an organisation is charged with or has been convicted of corporate manslaughter does not preclude a further charge of a health and safety offence which arises out of the same set of circumstances: Corporate Manslaughter and Corporate Homicide Act 2007 s 19. The common law offence of manslaughter by gross negligence is abolished in its application to organisations to which s 1 applies: s 20. The Secretary of State may extend the categories of organisation to which the offence of corporate manslaughter applies (s 21) and may amend the list of government and other bodies set out in Sch 1 (s 22). The Secretary of State may extend the categories of person to whom a 'relevant duty of care' is owed: s 23. Orders under the Corporate Manslaughter and Corporate Homicide Act 2007 are to be made by statutory instrument: s 24. For sentencing principles in relation to corporate manslaughter, see Sentencing Guidelines Council Guideline on *Corporate Manslaughter and Health and Safety Offences Causing Death* (2010); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 638.

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### **39. Unincorporated associations.**

Criminal liability may be imposed by statute on unincorporated associations<sup>1</sup>.

<sup>1</sup> See eg the Trade Union and Labour Relations (Consolidation) Act 1992 ss 45, 131(1) (as amended), which make both trades unions and employers' associations liable for refusing or wilfully neglecting to perform certain statutory duties; and EMPLOYMENT vol 40 (2009) PARAS 905-907, 1038.

Unless a contrary intention appears, 'person' in any Act passed after 1889 includes a body of persons unincorporate: see the Interpretation Act 1978 ss 5, 22(1), Sch 1, Sch 2 para 4(1)(a); and STATUTES vol 44(1) (Reissue) PARA 1382. A statute may make special provision for criminal proceedings against unincorporated associations: see eg the Trade Marks Act 1994 s 101(1) (see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 139); the Financial Services and Markets Act 2000 s 403 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574); and the Licensing Act 2003 s 188 (see LICENSING AND GAMBLING vol 67 (2008) PARAS 158-159).

It is uncertain whether criminal proceedings may be instituted against an unincorporated body at common law; but see *A-G v Able* [1984] QB 795 at 810, 78 Cr App Rep 197 at 206 per Woolf J ('the society is an unincorporated body and there can be no question of the society committing an offence').

#### **UPDATE**

### **39 Unincorporated associations**

NOTE 1--See *R v L* [2008] EWCA Crim 1970, [2009] 1 All ER 786 (provision which imposed criminal liability on officers of body corporate who were personally culpable could not be read as excepting from criminal liability officers or members of unincorporated association who were not personally culpable).

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#### **40. Members of Parliament.**

Except in relation to anything said in debate<sup>1</sup>, a member of the House of Lords or of the House of Commons is subject to the ordinary course of criminal justice<sup>2</sup>; the privileges of Parliament<sup>3</sup> do not apply to criminal matters<sup>4</sup>.

1 Although members are probably subject to the jurisdiction of the courts in respect of other conduct in Parliament, they cannot be made criminally responsible in the courts for what is said by them in Parliament while it is sitting; see the Privilege of Parliament Act 1512 s 2. The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament: Bill of Rights (1688) s 1. Members of Parliament are not subject to the jurisdiction of the courts for a conspiracy to deceive Parliament by making false speeches in the House: *Ex p Wason* (1869) LR 4 QB 573.

2 See *Bradlaugh v Gossett* (1884) 12 QBD 271 at 283 per Stephen J; *R v Elliot, Hollis and Valentine* (1630) Cro Car 181, 605 (revsd on other grounds (1668) 3 State Tr 294, HL); *Jay and Topham's Case* (1689) 12 State Tr 822.

3 As to these privileges see PARLIAMENT vol 78 (2010) PARA 1076 et seq.

4 The privilege of members of Parliament from arrest does not apply to criminal process: *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639 at 665; and see Erskine May *Parliamentary Practice* (23rd edn) pp 119-121. See also PARLIAMENT vol 78 (2010) PARA 1085.

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#### **41. The Sovereign.**

The King or Queen is exempt from all criminal process, and no court has any coercive power over Him or Her<sup>1</sup>.

<sup>1</sup> *Cooke's Case* (1660) 5 State Tr 1077 at 1113; *Tobin v R* (1864) 33 LJCP 199 at 205 per Erle CJ. See further CROWN AND ROYAL FAMILY vol 12(1) (Reissue) PARA 47.

As to the liability of Crown servants for criminal acts done by them see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 388.



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#### **42. Ambassadors, High Commissioners and diplomatic staff.**

The person of a diplomatic agent<sup>1</sup> is inviolable; and he is not liable to any form of arrest or detention<sup>2</sup>. A diplomatic agent enjoys immunity from the criminal jurisdiction of the receiving state<sup>3</sup>. The same privileges and immunities extend to the members of the family of a diplomatic agent forming part of his household if they are not nationals of the receiving state<sup>4</sup> and to members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, if they are not nationals of or permanently resident in the receiving state; but members of the service staff enjoy such immunity only in respect of acts performed in the course of their duties<sup>5</sup>. The private servants of a member of a mission do not enjoy immunity from criminal jurisdiction<sup>6</sup>.

The immunities of a diplomat normally cease when he leaves the country, or on expiry of a reasonable period in which to do so, but with respect to acts performed in the course of his functions as a member of the mission immunity continues to subsist<sup>7</sup>.

The immunities are a privilege of the sending state<sup>8</sup>; as such they may be waived by that state, though not by the representative himself<sup>9</sup>.

1 For the meaning of 'diplomatic agent' see the Diplomatic Privileges Act 1964 s 2, Sch 1 art 1(e); and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 273.

2 See *ibid* Sch 1 art 29; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 273.

3 See *ibid* Sch 1 art 31; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 274.

4 See *R v Guildhall Magistrates' Court, ex p Jarrett-Thorpe* (1977) Times, 5 October, DC.

5 See the Diplomatic Privileges Act 1964 Sch 1 art 37; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 279-281. Other members of staff of the mission who are nationals of the receiving state or permanently resident in it enjoy immunity from criminal jurisdiction only to the extent admitted by the receiving state: see Sch 1 art 38; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 274. The diplomatic immunities of a particular mission may be restricted or withdrawn by Order in Council if it appears that corresponding immunities granted to British diplomats are similarly restricted or withdrawn: see s 3; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 288. Proceedings instituted against persons entitled to diplomatic immunity where the immunity is not waived (see the text and note 9 *infra*) are therefore null and void as being without jurisdiction: *R v Madan* [1961] 2 QB 1, 45 Cr App Rep 80, CCA. As to the immunity of a diplomatic agent who is not accredited to the mission see also *R v Guildhall Magistrates' Court, ex p Jarrett-Thorpe* (1977) Times, 5 October, DC.

6 See the Diplomatic Privileges Act 1964 Sch 1 art 37; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 281. This is subject to any extension of immunity admitted by the receiving state; no such admission has been made by the United Kingdom in respect of criminal jurisdiction.

7 See *ibid* Sch 1 art 39.2; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 285.

8 See, however, *R v Governor of Pentonville Prison, ex p Teja* [1971] 2 QB 274 at 282, [1971] 2 All ER 11 at 17, DC (acceptance of the representative by the host country is a condition precedent to his immunity).

As to the immunity from jurisdiction of a diplomatic agent (or members of his family) passing through a third state see the Diplomatic Privileges Act 1964 Sch 1 art 40; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 287.

9 *R v AB* [1941] 1 KB 454, sub nom *R v Kent* (1941) 28 Cr App Rep 23, CCA; *R v Madan* [1961] 2 QB 1, 45 Cr App Rep 80, CCA.



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#### **43. Foreign heads of state.**

The provisions relating to diplomatic immunity as respects criminal jurisdiction<sup>1</sup> apply<sup>2</sup> to a foreign sovereign or other head of state, his household and private servants, as they apply to a head of a diplomatic mission and to members of his household<sup>3</sup>. Like a former diplomat, a former head of state is entitled to immunity from prosecution only in respect of acts done by him (or on his orders) in connection with his former office during his tenure of it<sup>4</sup>.

1 See the Diplomatic Privileges Act 1964 Sch 1; para 42 ante; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 265 et seq.

2 le with appropriate modifications.

3 See the State Immunity Act 1978 s 20; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 263.

4 See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* [2000] 1 AC 147, [1999] 2 All ER 97, HL; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 263. Such immunity will not, however, exist if the state concerned has, by treaty, determined that no immunity should attach to the act, eg ordering torture, in question: *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* supra.

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#### **44. Persons connected with international organisations.**

In respect of an international organisation of which the United Kingdom is a member, certain 'quasi-diplomatic' immunities may be granted to its officers or representatives by Order in Council<sup>1</sup>. The precise terms of such immunities vary from one case to another<sup>2</sup>. Because the immunities are a privilege of the international organisation, they may be waived by the organisation, but not by the officer or representative himself<sup>3</sup>.

1 See the International Organisations Act 1968 s 1, Sch 1 (as amended); and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 309 et seq.

2 For example, the United Nations and International Court of Justice (Immunities and Privileges) Order 1974, SI 1974/1261, grants full immunity to judges of the International Court of Justice and to the Secretary-General of the United Nations, and immunity to other officers, counsel, assessors and experts in respect of acts done or omitted in the course of their duties (see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 311); and the Commonwealth Secretariat Act 1966 s 1, Sch 1 (as amended) gives senior officers of the Commonwealth Secretariat the like privileges and immunities as are accorded by law to a diplomatic agent and the members of his family forming part of his household, and immunity to other officers or servants in respect of acts or omissions done in the course or performance of official duties (see COMMONWEALTH vol 13 (2009) PARA 723).

3 See PARA 42 text and note 9 ante.

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#### **45. Consular officers and other members of a consular post.**

Career consular officers<sup>1</sup> are not liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority; and, except in such a case, career consular officers may not be committed to prison or be made liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect<sup>2</sup>. Career consular officers and consular employees employed in the administration or technical service of a consular post<sup>3</sup> are not amenable to the jurisdiction of United Kingdom courts in respect of acts performed in the exercise of consular functions<sup>4</sup>.

No provision is made for immunities for honorary consular officers.

1 For the meaning of 'consular officer' see the Consular Relations Act 1968 s 1, Sch 1 art 1(d); and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 292.

2 See *ibid* Sch 1 art 41; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 296. This immunity is not enjoyed by a consular officer who is a United Kingdom citizen or permanently resident in the United Kingdom: see Sch 1 art 71.1; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 297. 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706 preamble, art 1; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom.

3 For the meaning of 'consular post' see the Consular Relations Act 1968 Sch 1 art 1(a); and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 292.

4 See *ibid* Sch 1 arts 1(e), 43.1; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARAS 295-296. The immunities in Sch 1 arts 41, 43 may be reduced or supplemented by Order in Council in accordance with any agreement between the United Kingdom and the foreign state concerned: see s 3, Sch 2; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 301. The immunities of Commonwealth and Irish consular missions are governed by Orders in Council made under s 12 (as substituted): see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 302.

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#### **46. Visiting forces.**

Members of the armed forces of certain countries, visiting the United Kingdom, and members of some international headquarters and defence organisations are, in certain respects, exempt from the criminal jurisdiction of the English courts<sup>1</sup>.

<sup>1</sup> See the Visiting Forces Act 1952 ss 3, 4 (s 3 as amended); the International Headquarters and Defence Organisations Act 1964 s 1, Schedule; the International Headquarters and Defence Organisations (Designation and Privileges) Order 1965, SI 1965/1535 (as amended); and ARMED FORCES vol 2(2) (Reissue) PARAS 143-150; INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 324. These provisions do not affect any power of arrest, search etc with respect to offences believed to have been committed against English law: see the Visiting Forces Act 1952 s 5 (as amended); and ARMED FORCES vol 2(2) (Reissue) PARA 66. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

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#### **47. Aliens.**

In general, aliens are subject to the jurisdiction of the English courts only for crimes committed within the territorial limits of England and Wales, or on British or United Kingdom ships or British controlled aircraft<sup>1</sup>.

<sup>1</sup> See PARA 1054 et seq post.

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#### **48. Immunity notices.**

A specified prosecutor<sup>1</sup> who thinks that for the purposes of the investigation or prosecution of any offence it is appropriate to offer any person immunity from prosecution may give that person an immunity notice<sup>2</sup>. If a person is given such a notice, no proceedings for an offence of a description specified in the notice may be brought against that person in England and Wales except in circumstances specified in the notice<sup>3</sup>. An immunity notice ceases to have effect in relation to the person to whom it is given if the person fails to comply with any conditions specified in the notice<sup>4</sup>.

1 Each of the following is a specified prosecutor for these purposes in relation to proceedings in England and Wales: (1) the Director of Public Prosecutions; (2) the Director of Revenue and Customs Prosecutions; (3) the Director of the Serious Fraud Office; and (4) a prosecutor designated for these purposes by any such prosecutor: Serious Organised Crime and Police Act 2005 s 71(4). The Director of Revenue and Customs Prosecutions is appointed under the Commissioners for Revenue and Customs Act 2005 s 34: see PARA 1068 post. As to the Director of Public Prosecutions see PARA 1066 post. As to the Director of the Serious Fraud Office see PARA 1067 post.

2 Serious Organised Crime and Police Act 2005 s 71(1). An immunity notice is a written notice under s 71(1), and must not be given in relation to an offence under the Enterprise Act 2002 s 188 (cartel offences: see COMPETITION vol 18 (2009) PARA 319): Serious Organised Crime and Police Act 2005 s 71(7). The Director of Public Prosecutions or a prosecutor designated by him (see note 1 supra) may not give an immunity notice in relation to proceedings in Northern Ireland: s 71(5). See also s 71(6).

3 Ibid s 71(2).

4 Ibid s 71(3).



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## **(5) PARTICIPATION IN CRIME**

### **(i) Complicity in Crime**

#### **49. Complicity in crime generally.**

Provided that he has the necessary mens rea<sup>1</sup>, a person who participates in a crime may be convicted as a party to it if he is the perpetrator<sup>2</sup> of it, or if he assists or encourages the perpetrator at the time of its commission or before its commission (a secondary party)<sup>3</sup>.

Any person who aids, abets, counsels or procures the commission of any indictable offence<sup>4</sup>, whether an offence at common law or by statute, is liable to be tried and punished as a principal offender<sup>5</sup>. A person who aids, abets, counsels or procures the commission by another person of a summary offence<sup>6</sup> is guilty of the like offence and may be tried<sup>7</sup> (whether or not he is charged as a principal) either by a court having jurisdiction to try that other person or by a court having by virtue of his own offence jurisdiction to try him<sup>8</sup>; and any offence consisting in aiding, abetting, counselling or procuring the commission of an offence triable either way<sup>9</sup> is triable either way<sup>10</sup>.

Except in the case of treason<sup>11</sup>, a person who gives assistance after the commission of a crime does not become thereby a party to the crime<sup>12</sup>.

1 As to mens rea see PARA 8 et seq ante. As to the mens rea required to be a secondary party see PARA 52 post.

2 See PARA 50 post.

3 See Fost 341, 347. Hence, if the crime is committed in England, a secondary party commits that crime though the acts of abetting or counselling took place outside the jurisdiction: *R v Robert Millar (Contractors) Ltd*, *R v Millar* [1970] 2 QB 54, 54 Cr App Rep 158, CA; *R v Wall* [1974] 2 All ER 245 at 249, [1974] 1 WLR 930 at 935, CA. A person can be convicted as a secondary party to an offence of which he could not be convicted as principal, so that, for example, a woman can be convicted of rape as an accessory: see *R v Ram* (1893) 17 Cox CC 609. The mens rea required to be proved against a person who has assisted or encouraged the perpetrator is not identical to that required to be proved against the perpetrator; as to the mens rea to be proved against one who assists or encourages see PARA 52 post.

4 'Indictable offence' means an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either way: Interpretation Act 1978 s 5, Sch 1. As to proceedings on indictment see PARA 1232 et seq post.

5 Accessories and Abettors Act 1861 s 8 (amended by the Criminal Law Act 1977 s 65(4), Sch 12); and see PARAS 51-57 post. As this provision is essentially procedural, it does not affect the common law rule that a person can be convicted of abetting or counselling a crime only if the crime is thereafter committed (*R v Gregory* (1867) LR 1 CCR 77), although he may incur liability for incitement or conspiracy (see PARA 65 et seq post). See also *R v De Marny* [1907] 1 KB 388, CCR; *R v Burton* (1875) 13 Cox CC 71, CCR; *R v Waudby* [1895] 2 QB 482, CCR; *Benford v Sims* [1898] 2 QB 641, DC.

6 'Summary offence' means an offence which, if committed by an adult, is triable only summarily: Interpretation Act 1978 Sch 1. As to summary trial see PARA 1104 et seq post. At common law crimes were classified as treasons, felonies and misdemeanours, and a distinction was drawn in relation to felonies between the principal in the first degree, the principal in the second degree (the aider or abettor) and the accessory before the fact (the counsellor or procurer). In the case of felonies, the accessory after the fact was also guilty

of an offence. All persons who incite, aid or abet treason are regarded as principals, as is any person who receives or assists the traitor, knowing him to be such: see *Fost* 431; 1 Hale PC 233. All distinctions between felony and misdemeanour have been abolished (see the Criminal Law Act 1967 s 1(1)); and on all matters in which a distinction was formerly drawn the law and practice is assimilated to that formerly applicable to misdemeanours (see s 1(2)).

7     Is subject to the same time limit under the Magistrates' Courts Act 1980 s 127(1) as apply to a perpetrator: see *Gould & Co v Houghton* [1921] 1 KB 509, 85 JP 93, DC; *Homolka v Osmond* [1939] 1 All ER 154, DC; and MAGISTRATES vol 29(2) (Reissue) PARA 589.

8     See the Magistrates' Courts Act 1980 s 44(1); and MAGISTRATES vol 29(2) (Reissue) PARA 525.

9     Is other than an offence listed in *ibid* s 17(1), Sch 1: see PARA 1103 post. Aiding, abetting, counselling or procuring the commission of an offence so listed (except an offence under the Criminal Law Act 1967 ss 4(1), 5(1) (see PARAS 58, 734 post)), is triable either way by virtue of the Magistrates' Courts Act 1980 Sch 1 para 33: see PARA 1103 post.

10    See *ibid* s 44(2); and MAGISTRATES vol 29(2) (Reissue) PARA 525.

11    Any person who assists a traitor knowing him to be such is guilty of treason: see note 6 *supra*.

12    *R v M'Makin and Smith* (1808) Russ & Ry 333n; *King's Case* (1817) Russ & Ry 332, CCR; *R v Dyer and Disting* (1801) 2 East PC 767; *R v McPhane* (1841) Car & M 212; and see note 6 *supra*. He may, however, be guilty of assisting an offender: see the Criminal Law Act 1967 s 4 (as amended); and PARA 58 post.

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## 50. Principal or perpetrator.

A principal is a person who by his own act or omission directly brings about the actus reus<sup>1</sup>, or any part of the actus reus, of a crime<sup>2</sup>. A person may be a principal, notwithstanding the fact that he is not present when the crime is committed, if he causes the actus reus by some contrivance<sup>3</sup>, or by the use of an innocent agent<sup>4</sup>.

1 As to the actus reus see PARA 5 ante.

2 *R v Sheppard* (1839) 9 C & P 121; *R v Kelly and M'Carthy* (1847) 2 Car & Kir 379; and see *R v Dyer and Disting* (1801) 2 East PC 767. If several persons combine to forge an instrument, each of them who executes any part is a principal though he may not know by whom the other parts are executed: *Bingley's Case* (1821) Russ & Ry 446, CCR; *Kirkwood's Case* (1831) 1 Mood CC 304; *Dade's Case* (1831) 1 Mood CC 307, CCR.

There is no statutory definition of a principal. The Accessories and Abettors Act 1861 s 8 (as amended) (see PARA 49 ante) recognises the principal but does not define him. Notwithstanding the abolition of the distinctions between felonies and misdemeanours and the assimilation of the law to that applicable to misdemeanours (see the Criminal Law Act 1967 s 1; and PARA 49 note 6 ante) it would seem that one who would formerly have been a principal in the first degree to felony will now be a principal or perpetrator whatever the offence. Cases decided under the former law accordingly remain authoritative in defining a principal.

3 See eg Fost 349; Kel 52. See also Russell on Crime (12th Edn) pp 128-129 cited in *R v Robert Millar (Contractors) Ltd*, *R v Millar* [1970] 2 QB 54 at 72, 54 Cr App Rep 158 at 165, CA.

4 Fost 349; Kel 53; *R v Tyler* (1838) 8 C & P 616; *R v Michael* (1840) 2 Mood CC 120, CCR; *R v Manley* (1844) 1 Cox CC 104; *R v Bannen* (1844) 2 Mood CC 309; *R v Bull* (1845) 1 Cox CC 281; *R v Clifford* (1845) 2 Car & Kir 202; *R v Blaesdale* (1848) 2 Car & Kir 765; *R v Butcher* (1858) Bell CC 6; *R v Stringer* (1991) 94 Cr App Rep 13, CA.

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## **51. Secondary parties; the actus reus.**

A person who aids, abets, counsels or procures the commission of a crime and is liable to be tried and punished as a principal offender<sup>1</sup> may be termed a secondary party<sup>2</sup>.

The words 'aids, abets, counsels or procures' should be construed in their ordinary meaning and not in a technical sense<sup>3</sup>. To 'procure' the commission of an offence there must be a causal connection between the act constituting the procurement and the commission of the offence, but there need be no agreement or discussion as to the form which the offence should take<sup>4</sup>.

Although the commission of the principal offence must be proved, proof that the defendant's assisting or encouraging was a cause of its commission by the principal, in the sense that the principal would not have committed the offence but for that assistance or encouragement, is not required<sup>5</sup>, unless the allegation against the defendant is necessarily one of procuring, where such a causal link must be established<sup>6</sup>.

A person who is present abetting the principal when the crime is committed is liable as a secondary party even though he takes no part in the actual perpetration of the crime<sup>7</sup>. Mere presence at the commission of the crime is not enough to create criminal liability<sup>8</sup>, nor is it enough that a person is present with a secret intention to assist the principal should assistance be required<sup>9</sup>. Some encouragement or assistance must have been given to the principal either before or at the time of the commission of the crime with the intention of furthering its commission<sup>10</sup>.

Presence without more may, however, afford some evidence of assistance and encouragement<sup>11</sup>.

Knowledge that a crime is to be committed does not of itself make a person a secondary party. He must by his conduct have aided, abetted, counselled or procured the crime<sup>12</sup>. Thus it is enough if a person supplies materials in order that a crime of the particular kind may be committed but without knowing the details of the crime<sup>13</sup>, or supplies information to enable the crime to be carried out<sup>14</sup>. Rendering assistance knowing that one of several crimes is going to be committed, without knowing which crime, is enough<sup>15</sup>; but not if the only knowledge is of an intention to do something illegal<sup>16</sup>. Any assistance which enables the crime to be committed, given with knowledge of the relevant circumstances, will suffice<sup>17</sup>, unless the person was not in law entitled to withhold that assistance<sup>18</sup>.

Where assistance or encouragement is given a person may be a secondary party even though it cannot be shown that he conspired or was in direct communication with the principal<sup>19</sup>.

A person who renders assistance after the commission of the crime does not thereby become a party to it<sup>20</sup>.

1 See the Accessories and Abettors Act 1861 s 8 (amended by the Criminal Law Act 1977 s 65(4), Sch 12); the Magistrates' Courts Act 1980 s 44(1); and PARAS 49 ante, 55, 57 post. Since the Accessories and Abettors Act 1861 s 8 (as amended) is essentially procedural and neither enlarges nor restricts the common law rules relating to participation in crime, any person who would formerly have been a principal in the second degree or an accessory before the fact to felony (see PARA 49 note 6 ante) continues to be a party to crime, but not otherwise.

2 All persons who incite, aid or abet treason are, however, themselves guilty of treason as principals and may be indicted accordingly: see PARA 49 note 6 ante.

3 *A-G's Reference (No 1 of 1975)* [1975] QB 773, [1975] 2 All ER 684, CA.

4 *A-G's Reference (No 1 of 1975)* [1975] QB 773, [1975] 2 All ER 684, CA.

5 *R v Calhaem* [1985] QB 808, 81 Cr App Rep 131, CA (counselling); and see also *A-G v Able* [1984] QB 795 at 812, 78 Cr App Rep 197 at 208 per Woolf J (the fact that the person counselled would have tried to commit suicide anyway made no difference to a charge under the Suicide Act 1961 s 2(1) (see PARA 106 post)). Cf *R v Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr App Rep 592, which implies the need for a causal link between abetting and the commission of the offence.

6 *A-G's Reference (No 1 of 1975)* [1975] QB 773, [1975] 2 All ER 684, CA. It appears from the decision of the Court of Appeal in *R v Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr App Rep 592, that, although proof is not required that the defendant's aiding, abetting or counselling was a cause of the commission of the principal offence, in the sense that the offence might not otherwise have been committed by the perpetrator, there must be some causal link between such conduct and the commission of the principal offence.

7 *Coal-Heavers' Case* (1768) 1 Leach 64, CCR; *R v Towle* (1816) Russ & Ry 314, Ex Ch.

8 1 Hale PC 439; *R v Coney* (1882) 8 QBD 534, CCR.

9 1 Hale PC 439; *R v Allan* [1965] 1 QB 130, 47 Cr App Rep 243, CCA.

10 There must be an intent to aid and also an act or omission that amounts to an aiding or encouraging. Mere presence in pursuance of an agreement to commit the crime will suffice, but, where there is no prior counselling or procuring, mere presence will not suffice without some evidence of active assistance or encouragement given. An apparent exception to this rule is where a person has a right to control the actions of another, when his failure to take an opportunity to do so may afford evidence of encouragement by means of tacit approval of the other's actions: *Du Cros v Lambourne* [1907] 1 KB 40 DC; *Rubie v Faulkner* [1940] 1 KB 571, [1940] 1 All ER 285, DC; *Tuck v Robson* [1970] 1 All ER 1171, [1970] 1 WLR 741, DC; *R v Webster* (2006) Times, 15 March, CA.

11 *R v Coney* (1882) 8 QBD 534 at 557-558 per Hawkins J; *Wilcox v Jeffrey* [1951] 1 All ER 464, DC; *R v Clarkson* [1971] 3 All ER 344, 55 Cr App Rep 445, C-MAC. See also *R v Young* (1838) 8 C & P 644. An intent to aid or encourage may be inferred from the fact that the parties were engaged in a joint unlawful enterprise (*R v Baldessare* (1930) 22 Cr App Rep 70, 144 LT 185, CCA); but a party is nevertheless criminally liable only if he has mens rea; cf *R v Borthwick* (1779) 1 Doug KB 207. Where a defendant has unwittingly encouraged another by his misinterpreted words or gestures, he cannot be convicted as a secondary party: see *R v Coney* (1882) 8 QBD 534 at 552 per Lopes J, and at 557-558 per Hawkins J; and see also *R v Jefferson* [1994] 1 All ER 270, 99 Cr App Rep 13, CA.

12 *R v Taylor* (1875) LR 2 CCR 147 (stakeholder for prize fight not a party to the offence).

13 *R v Bainbridge* [1960] 1 QB 129, 43 Cr App Rep 194, CCA (supplying cutting equipment for use in a breaking offence without knowing the details).

14 *R v Bullock* [1955] 1 All ER 15, 38 Cr App Rep 151, CCA; *Cook v Stockwell* (1915) 84 LJKB 2187, DC; *Cafferata v Wilson* [1936] 3 All ER 149, DC. Where the selling of particular goods is a criminal offence, the buyer may be guilty of abetting the seller: *Sayce v Coupe* [1953] 1 QB 1 at 8, [1952] 2 All ER 715 at 718, DC, per Lord Goddard CJ. As to the ingredients of the offence of counselling a person to commit an offence see *R v Calhaem* [1985] QB 808, 81 Cr App Rep 131, CA. As to exemption from liability for various offences under the Sexual Offences Act 2003 for those who give contraceptive advice or assistance or other advice or assistance to children under 16 for specified purposes and not for the purpose of sexual gratification or of causing or encouraging sexual activity see PARA 164 post.

15 *DPP for Northern Ireland v Maxwell* [1978] 3 All ER 1140, 68 Cr App Rep 128, HL (the defendant drove another to an inn knowing that his passenger intended either to plant a bomb or to shoot someone).

16 *R v Bainbridge* [1960] 1 QB 129, 43 Cr App Rep 194, CCA; *R v Patel* [1970] Crim LR 274, CA.

17 *National Coal Board v Gamble* [1959] 1 QB 11, 42 Cr App Rep 240, DC; *Garrett v Arthur Churchill (Glass) Ltd* [1970] 1 QB 92, [1969] 2 All ER 1141, DC.

18 *R v Lomas* (1913) 110 LT 239, 9 Cr App Rep 220, CCA. See also *R v Bullock* [1955] 1 All ER 15 at 17, 38 Cr App Rep 151 at 155 per Devlin J, explaining *R v Lomas* supra. However, cf *Garrett v Arthur Churchill (Glass) Ltd* [1970] 1 QB 92, [1969] 2 All ER 1141, DC.

19 *R v Cooper* (1833) 5 C & P 535. The procurement may be personal or through the intervention of a third person: see *M'Daniel's Case* (1755) 19 State Tr 745 at 804 per Foster J; *Earl of Somerset's Case* (1616) 2 State Tr 965, HL. See also *Mohan v R* [1967] 2 AC 187, [1967] 2 All ER 58, PC.

20 See PARA 49 ante.

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## 52. Secondary parties; the mental element.

For the defendant to be convicted as a secondary party<sup>1</sup>, it must be proved that his act which constituted aiding, abetting etc was done:

- 12 (1) intentionally, in the sense that he did it deliberately (and not accidentally), knowing that his act was capable of encouraging the commission of the principal offence<sup>2</sup>; and
- 13 (2) with intent to assist or encourage the perpetrator (and not to obstruct or hinder him)<sup>3</sup>.

In addition, a person cannot be convicted as a secondary party unless he was aware of all the essential circumstances which make the act done a crime; but he need not have known that the act amounted in law to a crime<sup>4</sup>. Whether a defendant was aware of essential matters is to be decided on all the relevant evidence. He can be adjudged to have known if he deliberately closed his eyes to the circumstances<sup>5</sup>.

Lastly, a secondary party must be proved to have foreseen as a real possibility that the principal is acting, or may act, with the mens rea (if any) required for the principal offence<sup>6</sup>.

Criminal liability as a secondary party arises by virtue of the common law; hence mens rea is required of that party, even though the offence is one of strict liability as regards the principal<sup>7</sup>. It is not enough that the secondary party does acts which in fact aid or encourage the commission of the crime. Although it must be proved that the defendant had the mens rea set out above, it does not have to be proved that it was his purpose or desire that this crime be committed<sup>8</sup>. It is not necessary, however, to prove that there was a shared intention between the secondary party and the principal<sup>9</sup>. A person does not become a secondary party to a particular crime by rendering assistance to others knowing merely that the others have some criminal objective in view; but he need not know the details of the crime since it is enough if it is shown that he knew<sup>10</sup> that the crime contemplated was of the same kind or one of several kinds as that in fact committed<sup>11</sup>.

1 See PARA 51 ante.

2 *R v Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr App Rep 592, CA. An accomplice does not have to be proved to have been aware for certain of the act which the principal commits; it is enough that he is aware that there is a real possibility that the perpetrator may do the act in question or an equally dangerous act: *R v Powell, R v English* [1999] 1 AC 1, [1998] 1 Cr App Rep 261, HL. See also *Chan Wing-Siu v R* [1985] AC 168, 80 Cr App Rep 117, PC; *Hui Chi-ming v R* [1992] 1 AC 34, 94 Cr App Rep 236, PC; *R v Rook* [1993] 2 All ER 955, 97 Cr App Rep 327, CA.

3 *R v Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr App Rep 592, CA.

4 *Johnson v Youden* [1950] 1 KB 544, [1950] 1 All ER 300, DC; *Ackroyds Air Travel Ltd v DPP* [1950] 1 All ER 933, DC; *Thomas v Lindop* [1950] 1 All ER 966, DC; *Davies, Turner & Co Ltd v Brodie* [1954] 3 All ER 283, [1954] 1 WLR 1364, DC. See also *Ferguson v Weaving* [1951] 1 KB 814 at 821, [1951] 1 All ER 412 at 415, DC, per Lord Goddard CJ; *Carter v Richardson* [1974] Crim LR 190, DC.

5 *R v Griffiths* (1974) 60 Cr App Rep 14 at 18; *Ross v Moss* [1965] 2 QB 396, [1965] 3 All ER 145.

6 *R v Powell, R v English* [1999] 1 AC 1, [1998] 1 Cr App Rep 261, HL. See also *R v Hyde* [1991] 1 QB 134, 92 Cr App Rep 131, CA. As to the meaning of 'foresight of real possibility' see PARA 53 note 2 post.

7 *Callow v Tillstone* (1900) 83 LT 411, DC; *Ferguson v Weaving* [1951] 1 KB 814, [1951] 1 All ER 412, DC; *Smith v Mellors and Soar* (1987) 84 Cr App Rep 279, DC.

8 *National Coal Board v Gamble* [1959] 1 QB 11, 42 Cr App Rep 240, DC; *R v Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr App Rep 592, CA. Cf *R v Fretwell* (1862) Le & Ca 161, CCR.

9 *A-G's Reference (No 1 of 1975)* [1975] QB 773, [1975] 2 All ER 684, CA.

10 See PARA 8 note 6 ante.

11 *R v Bainbridge* [1960] 1 QB 129, 43 Cr App Rep 194, CCA; *R v Patel* [1970] Crim LR 274, CA; *DPP for Northern Ireland v Maxwell* [1978] 3 All ER 1140, 68 Cr App Rep 128, HL. See also *R v Reardon* [1999] Crim LR 392, CA; and see further PARA 53 post.



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### **53. Commission of offence outside scope of joint criminal enterprise.**

If several persons pursue a joint criminal enterprise, and one of them does an act in pursuance of the enterprise, all are responsible to the same extent for a consequence of that act which was unforeseen by them, for example because it resulted by accident or mistake<sup>1</sup>.

Cases of accidental departure from a joint criminal enterprise must be distinguished from those where, in carrying out a joint criminal enterprise with the defendant, the principal intentionally perpetrates an offence (the 'further offence') which the defendant has not assisted or encouraged him to commit.

Where one party to a joint enterprise to commit an offence foresees as a real possibility<sup>2</sup> that another party may, in the course of it, and with the necessary mens rea, do the act in question or an equally dangerous act, constituting the further offence (and the latter party does so), the former party is liable for that offence, even if he has not expressly or tacitly agreed to that offence, and even though he has expressly forbidden it<sup>3</sup>. Even if an alleged accomplice intended or foresaw that the principal would or might act with the mens rea for the further offence, he cannot be convicted as a party to that offence if the principal's act was fundamentally different from the acts intended or foreseen by the alleged accomplice<sup>4</sup>.

A defendant who is not guilty of being an accomplice to murder, because he did not contemplate that the principal might act with the mens rea for that offence in carrying out the joint enterprise, can nevertheless be convicted of manslaughter<sup>5</sup> if he contemplated that the principal might act with the mens rea for that offence and if the principal's act was the one foreseen as a real possibility by the defendant, or was no more dangerous than the one foreseen as a real possibility by the defendant<sup>6</sup>, but not if the act was fundamentally different from that so foreseen by the defendant<sup>7</sup>.

A person is not liable as a secondary party if he aids, abets, counsels or procures another to commit a particular offence against a particular person or property and that other knowingly commits a different offence or knowingly commits the particular offence against another person or property<sup>8</sup>; but if that other, although varying the manner, place or time of performance, does in substance that which he is procured to do, the instigator is liable as a secondary party<sup>9</sup>.

1 If two persons race one another on the highway both are guilty of manslaughter if one accidentally runs over a pedestrian and kills him: *R v Swindall* (1846) 2 Car & Kir 230; cf *R v Baldessare* (1930) 22 Cr App Rep 70, 144 LT 185, CCA.

2 The requisite degree of foresight, 'foresight of real possibility' means foresight of a risk which is not foreseen as so remote that the defendant 'dismissed it as altogether negligible': *R v Powell, R v English* [1999] 1 AC 1, [1998] 1 Cr App Rep 261, HL. See also *Chan Wing-Siu v R* [1985] AC 168, 80 Cr App Rep 117, PC; *R v Ward* (1986) 85 Cr App Rep 71, [1987] Crim LR 338, CA; *R v Hyde* [1991] 1 QB 134, 92 Cr App Rep 131, CA; *R v Roberts* [1993] 1 All ER 583, 96 Cr App Rep 291, CA.

The principles to which the text and notes 6, 7 infra refer are not limited to pre-planned criminal enterprise; they are equally applicable to a case where two or more people spontaneously combine together in an attack encouraging and assisting each other: *R v Uddin* [1999] QB 431, [1999] 1 Cr App Rep 319, CA.

3 *R v Powell, R v English* [1999] 1 AC 1, [1998] 1 Cr App Rep 261, HL. See also *R v Uddin* [1999] QB 431, [1999] 1 Cr App Rep 319, CA; *R v Greatrex, R v Bates* [1999] 1 Cr App Rep 126, CA. See note 2 supra.

4 *R v Powell, R v Daniels; R v English* [1999] 1 AC 1, [1998] 1 Cr App Rep 261, HL. See note 2 supra.

5 ie involuntary manslaughter: see PARA 99 post.

6 *R v Stewart, R v Schofield* [1995] 3 All ER 159, [1995] 1 Cr App Rep 441, CA; *R v Gilmour* [2000] 2 Cr App Rep 407, NI CA; *R v Day* [2001] Crim LR 984, CA. Cf *R v Wan* [1995] Crim LR 296, CA, which is inconsistent with what appears in the text; it is submitted that this case cannot be good law in the light of the authorities cited above.

Views differ about whether the rules relating to joint criminal enterprise set out in the text are separate from those relating to accomplices in general. In *R v Stewart, R v Schofield* supra, the Court of Appeal distinguished between cases of joint enterprise where an accomplice was physically present when the offence was committed and those where the assistance or encouragement was given before its commission, stating that: 'If the principal has committed the crime of murder, the liability of the secondary party can only be a liability for aiding and abetting murder. In contrast, where the allegation is joint enterprise, the allegation is that one defendant participated in the criminal act of another. This is a different principle': see *R v Stewart, R v Schofield* supra at 165 and 447. No mention was made of the earlier decision of the Court of Appeal in *R v Rook* [1993] 2 All ER 955, 97 Cr App Rep 327, where it was held that the rules about joint criminal enterprise apply whether the person who has lent assistance or encouragement has done so before the commission of the offence or is present when it is committed.

7 *R v Anderson, R v Morris* [1966] 2 QB 110, 50 Cr App Rep 216, CCA. See also *R v Lovesey, R v Peterson* [1970] 1 QB 352, 53 Cr App Rep 461, CA; *Chan Wing-siu v R* [1985] AC 168, 80 Cr App Rep 117, PC; *R v Ward* (1986) 85 Cr App Rep 71, CA; *R v Slack* [1989] QB 775, 89 Cr App Rep 252, CA; *R v Uddin* [1999] QB 431, [1999] 1 Cr App Rep 319, CA; *R v Mitchell, R v King* (1999) 163 JP 75, CA. As to whether a secondary party may be convicted of a higher degree of crime than the perpetrator see PARA 57 post.

8 Fost 469. Thus if A procures B to burn C's house, and B in so doing steals, A will be liable as a secondary party in respect of the burning, but not in respect of the theft: see 1 Hale PC 617, 4 BI Com 37; and see *R v Saunders, R v Archer* (1573) 2 Plowd 473 (on defendant's advice, principal gave his wife a poisoned apple, intending to kill her; wife gave apple to child who ate it with fatal result, watched by principal; defendant not a secondary party to the murder committed by principal).

9 Fost 369, 370; 2 Hawk PC c 29 s 20; Bacon's Maxims, Regula 16.

## UPDATE

### 53 Commission of offence outside scope of joint criminal enterprise

NOTES 3, 4--As to guidance on the imposition of liability see *R v Rahman* [2008] UKHL 45, [2008] 4 All ER 351. See also *R v Mendez* [2010] EWCA Crim 516, [2010] All ER (D) 206 (Mar) (not just for defendant to be found guilty of murder where act of another was of different kind from, and much more dangerous than, sort of acts which defendant intended or foresaw as part of joint enterprise).

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#### **54. Withdrawal from participation.**

A person may excuse himself from liability for an offence which he has assisted, encouraged, counselled or procured by voluntarily making an effective withdrawal from participation before the offence is committed. Mere repentance is not enough for this purpose<sup>1</sup>; nor is merely failing to turn up at the scene of the crime as arranged<sup>2</sup>; nor is merely running away from the scene of the crime<sup>3</sup>. What is required depends on the circumstances of each case but one essential element is that, where practicable and reasonable, there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it; what is 'timely communication' must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw<sup>4</sup>.

The mere fact that an accomplice is arrested before the principal offence is committed does not prevent him being convicted of it<sup>5</sup>.

1 *R v Croft* [1944] 1 KB 295, 29 Cr App Rep 169, CCA; *R v Fletcher* [1962] Crim LR 551, CCA.

2 *R v Rook* [1993] 2 All ER 955, 97 Cr App Rep 327, CA.

3 *R v Becerra, R v Cooper* (1975) 62 Cr App Rep 212, CA.

4 *R v Whitehouse* [1941] 1 WWR 112 at 115, BC CA, per Soan JA, approved in *R v Becerra, R v Cooper* (1975) 62 Cr App Rep 212, CA; *R v Grundy* [1977] Crim LR 543, CA; *R v Whitefield* (1983) 79 Cr App Rep 36, CA. Whether or not a person has done enough to demonstrate that he is withdrawing is ultimately a question of fact and degree for the jury. Account will be taken of, inter alia, the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the nature of the action said to constitute withdrawal. Those principles apply even in cases of spontaneous violence: *R v Robinson* [2000] EWCA Crim 8, explaining *R v Mitchell, R v King* (1999) 163 JP 75, CA. Cf *R v O'Flaherty, R v Ryan, R v Toussaint* [2004] EWCA Crim 526 at [61], [2004] 2 Cr App Rep 315 at [61] per Mantell LJ.

5 *R v Johnson, R v Jones* (1841) Car & M 218.

#### **UPDATE**

#### **54 Withdrawal from participation**

NOTE 4--See also *R v Mitchell* [2008] EWCA Crim 2552, [2009] 1 Cr App Rep 438, [2008] All ER (D) 31 (Nov) (person had not withdrawn from violent attack even though had taken no part).

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## 55. Official collaboration in crime.

There is no defence of entrapment in English law<sup>1</sup>. A person charged with crime is accordingly not entitled to an acquittal by reason only of the fact that the crime has been instigated by another<sup>2</sup>, whether he be a person holding an official position or not<sup>3</sup>; or by reason of the fact that the conduct of the police or their agents contributed to the commission of the crime<sup>4</sup>. It may, however, be lawful to take part in an offence which has already been planned and is going to be committed if the participation is for the purpose of trapping the offender<sup>5</sup>; and it makes no difference that police participation in these circumstances may have affected the time for the commission of the offence<sup>6</sup>.

It is doubtful whether a police officer, or a person acting under the directions of the police, who aids, abets, counsels or procures the commission of a crime for the purpose of detecting offenders and bringing them to justice thereby becomes a secondary party to the crime<sup>7</sup>.

1 *R v Sang* [1980] AC 402, 69 Cr App Rep 282, HL.

2 Such conduct may, however, amount to a defence where eg consent is in issue: see *R v Macro* [1969] Crim LR 205, CA (conviction for robbery quashed where owner of property, acting under police directions, was not put in fear).

3 It is, however, improper for the police (and, presumably, other persons holding official positions) to instigate crime: *Brannan v Peek* [1948] 1 KB 68, [1947] 2 All ER 572, DC; *R v Birtles* [1969] 2 All ER 1131n, 53 Cr App Rep 469, CA; *R v McCann* (1971) 56 Cr App Rep 359, CA. Infiltration of suspect societies by the police is lawful and proper in appropriate cases: *R v Mealey*, *R v Sheridan* (1974) 60 Cr App Rep 59, CA. See also *R v Bickley* (1909) 73 JP 239, CCA.

4 *R v Sang* [1980] AC 402, 69 Cr App Rep 282, HL. At common law there is no judicial discretion to rule that the prosecution may not lead evidence of offences so instigated, except possibly in the exceptional circumstances where the prosecution amounts to an abuse of the court; a trial judge has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value, but, save with regard to admissions and confessions and generally with regard to evidence obtained from the defendant after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means: *R v Sang* supra at 437 and 291 per Lord Diplock, explaining dicta in *Kuruma Son of Kaniu v R* [1955] AC 197, [1955] 1 All ER 236, PC. As to admissibility of evidence generally see PARA 1364 et seq post. As to the statutory discretion to exclude relevant prosecution evidence see the Police and Criminal Evidence Act 1984 s 78 (as amended); *R v Christou*, *R v Wright* [1992] QB 979, 95 Cr App Rep 264, CA; *R v Morley*, *R v Hutton* [1994] Crim LR 919, CA; *R v Smurthwaite*, *R v Gill* [1994] 1 All ER 898, 98 Cr App Rep 437, CA; *R v Shannon* [2001] 1 WLR 51, [2001] 1 Cr App Rep 168, CA; and PARA 1365 post.

In a case of entrapment by a law enforcement officer, or his agent, a court has power to stay the proceedings for abuse of process if it concludes that a fair trial is not possible or that, although a fair trial is possible, it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place: *R v Latif*, *R v Shahzad* [1996] 1 All ER 353, [1996] 2 Cr App Rep 92, HL; *R v Looseley*, *A-G's Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 4 All ER 897, [2002] 1 Cr App Rep 360. The main curb on excessive entrapment should be a stay of proceedings rather than ruling evidence inadmissible: *R v Looseley*, *A-G's Reference (No 3 of 2000)* supra. As to stay of proceedings in the Crown Court for abuse of process see PARA 1225 post.

In determining sentence, however, the court may have regard to the fact that the crime would not, or might not, have been committed but for official participation: *R v Sang* supra; and see also *Browning v JH Watson (Rochester) Ltd* [1953] 2 All ER 775 at 779, [1953] 1 WLR 1172 at 1177, DC, per Lord Goddard CJ; *R v Birtles* [1969] 2 All ER 1131n, 53 Cr App Rep 469, CA; *R v McCann* (1971) 56 Cr App Rep 359; *R v Chapman*, *R v Denton* [1989] Crim LR 846, 11 Cr App Rep (S) 242, CA; *R v Perrin* (1992) 13 Cr App Rep (S) 518, CA; *R v Mackey* [1992] Crim LR 602, CA; *R v Bigley* (1992) 14 Cr App Rep (S) 201, CA; *R v Springer* [1999] 1 Cr App Rep

(S) 217, CA; *R v Mayeri* [1999] 1 Cr App Rep (S) 304, CA (no entrapment where undercover police officers purchased drugs from willing seller).

5 *R v McCann* (1971) 56 Cr App Rep 359, CA; *R v Clarke* (1984) 80 Cr App Rep 344, CA.

6 *R v McEvilly* (1973) 60 Cr App Rep 150, CA.

7 A dishonest policeman who induces a third person to commit a crime in order to improve his detection record will himself incur criminal liability: see *R v Sang* [1980] AC 402 at 443, 69 Cr App Rep 282 at 296, HL, obiter per Lord Salmon. The use of 'dishonest' seems to be superfluous, and it seems that any police officer or his agent who incites the commission of an offence which is not already laid on becomes a secondary party to it (see *Brannan v Peek* [1948] 1 KB 68, [1947] 2 All ER 572, DC), despite earlier authority to the contrary (ie *R v Mullins* (1848) 3 Cox CC 526; *R v Bickley* (1909) 73 JP 239, CCA). A person acting in a purely private capacity in inciting an offence which is not already laid on is liable as a secondary party: *R v Smith* [1960] 2 QB 423, 44 Cr App Rep 55, CCA.

## UPDATE

### 55 Official collaboration in crime

NOTE 4--See *R v Winter* [2007] All ER (D) 440 (Nov), CA (friend of defendant solicited person to act as secondary party to murder).

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## **56. Victims as parties to crime.**

Where conduct has been made criminal with a view to the protection of a particular class of persons particularly open to exploitation, such as children and young persons under 16, it would appear that, in general<sup>1</sup>, any member of that class of persons who is the victim of such a crime is not to be regarded as a party to it, although he was willing that it be committed or has in fact instigated its commission<sup>2</sup>.

Though in such a case a willing victim is not to be regarded as a party to an offence committed upon himself, he may, if of the age of criminal responsibility<sup>3</sup>, be criminally liable for abetting or counselling the commission of the offence upon another<sup>4</sup>.

1 It has not been settled whether the rule applies outside the field of sexual offences.

2 *R v Tyrrell* [1894] 1 QB 710, CCR (girl under 16 years of age could not be convicted of aiding and abetting a male person to have carnal knowledge of her contrary to the Criminal Law Amendment Act 1885 s 5 (repealed: see now the Sexual Offences Act 2003 ss 9, 13; and PARA 173 post)). See also *R v Whitehouse* [1977] QB 868, 65 Cr App Rep 33, CA.

3 The age of criminal responsibility is ten years: see PARA 37 ante.

4 *R v Cratchley* (1913) 9 Cr App Rep 232, CCA.

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## 57. Indictment etc of secondary parties.

So that a defendant may know whether he is alleged to have been a principal or a secondary party, the particulars of the offence in the indictment should make it clear whether it is alleged that he was a principal or secondary party<sup>1</sup>. However, if the prosecution is advanced on the basis that the defendant was either the principal or secondary party this does not prevent the prosecution from alleging this in a single count alleging the different ways of participation; it is not necessary to have separate counts<sup>2</sup>.

In general, a secondary party may be tried and convicted whether or not the principal has been tried and whether or not the court has jurisdiction to try the principal<sup>3</sup>. The fact that the alleged principal has been acquitted, whether on a procedural point<sup>4</sup> or on the merits, is no bar to the conviction of a secondary party<sup>5</sup>; there may be cases where the conviction of a secondary party must be quashed as inconsistent<sup>6</sup> or unsafe<sup>7</sup> where the principal is acquitted; but, where the offence can be proved against the secondary party, he is not entitled to be acquitted because the offence is not proved against the alleged principal<sup>8</sup>. A secondary party cannot be convicted unless the crime to which he is alleged to have been a party is proved to have been committed<sup>9</sup>. However, if the actus reus of an offence requiring its perpetrator to be of a particular description, for example a person with a penis in rape or a married person in bigamy, is committed by a person of that description who lacks the necessary mens rea or who has a defence, a person not of that description who has aided, abetted, counselled or procured him to commit that offence can be convicted of it as a secondary party<sup>10</sup>. Where offences share a common actus reus, being distinguished by different requirements as to mens rea, it seems that a secondary party may be convicted of an offence of a more serious degree than that for which the principal has been convicted<sup>11</sup>.

1 *DPP for Northern Ireland v Maxwell* [1978] 3 All ER 1140, 68 Cr App Rep 128, HL. See also *R v Gaughan* (1990) 155 JP 235, CA; *R v Taylor*, *R v Harrison*, *R v Taylor* [1998] Crim LR 582, CA.

2 *R v Gaughan* (1990) 155 JP 235, CA.

3 See PARA 51 ante.

4 See *R v Daily Mirror Newspapers Ltd*, *R v Glover* [1922] 2 KB 530, 16 Cr App Rep 131, CCA; considered in *Minister of Food v O'Rourke* [1951] NI 97.

5 'It does not in the least follow because a principal is acquitted that another person may not be convicted of aiding and abetting': *Morris v Tolman* [1923] 1 KB 166 at 169, DC, per Lord Hewart CJ; and see *R v Hughes* (1860) Bell CC 242, CCR; *R v Burton* (1875) 13 Cox CC 71, CCR; *R v Anthony* [1965] 2 QB 189, 49 Cr App Rep 104, CCA; *R v Humphreys and Turner* [1965] 3 All ER 689.

6 *Surujpaul (called Dick) v R* [1958] 3 All ER 300, 42 Cr App Rep 266, PC (evidence same against both).

7 *R v Quick*, *R v Paddison* [1973] QB 910, [1973] 3 All ER 347, CA (possibility that secondary party unaware that principal acted without conscious volition).

8 *R v Humphreys*, *R v Turner* [1965] 3 All ER 689; *R v Davis* [1977] Crim LR 542, CA. The acquittal of the alleged principal at an earlier trial is no bar to the subsequent conviction of an accomplice, and is inadmissible at the trial of the accomplice (because it is irrelevant as merely being the opinion of the jury at the earlier trial): *Hui Chi-ming v R* [1992] 1 AC 34, 94 Cr App Rep 236, PC.

9 *R v Gregory* (1867) LR 1 CCR 77; *Morris v Tolman* [1923] 1 KB 166, DC; *Thornton v Mitchell* [1940] 1 All ER 339, DC; *R v Loukes* [1996] 1 Cr App Rep 444, CA; and see PARA 49 note 5 ante. See also *R v Austin* [1981] 1 All ER 374, 72 Cr App Rep 104, CA (if the principal has committed the offence, it is irrelevant that he is exempt from prosecution).

10 *R v Bourne* (1952) 36 Cr App Rep 125, CCA; *R v Cogan, R v Leak* [1976] QB 217, 61 Cr App Rep 217, CA; *R v Millward* [1994] Crim LR 527; *DPP v K and B* [1997] 1 Cr App Rep 36, DC. It was held in *R v Cogan, R v Leak* supra that alternatively the person who had aided, abetted etc such an offence could be convicted as the principal via an innocent agent; but this has been criticised and was not accepted by the Divisional Court in *DPP v K and B* supra.

11 The decision to the contrary (at least if the defendant was not present) in *R v Richards* [1974] QB 776, 58 Cr App Rep 60, CA, was heavily criticised, although not expressly overruled, in *R v Howe* [1987] AC 417 at 457-458, 85 Cr App Rep 32 at 65, HL, obiter per Lord Mackay of Clashfern; and it is submitted that *R v Richards* supra no longer represents the law on this point.



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## (ii) Assisting Offenders

### 58. Assisting offenders.

Where a person has committed a relevant offence<sup>1</sup>, any other person commits an offence who, knowing or believing him to be guilty of the offence<sup>2</sup> or of some other relevant offence<sup>3</sup>, does, without lawful authority or reasonable excuse<sup>4</sup>, any act<sup>5</sup> with intent to impede his apprehension or prosecution<sup>6</sup>.

This offence is punishable on indictment according to the gravity of the principal offence, as follows:

- 14 (1) if the principal offence is one for which the sentence is fixed by law, the offender is liable to imprisonment for not more than ten years<sup>7</sup>;
- 15 (2) if it is one for which a person, not previously convicted, may be sentenced to imprisonment for a term of 14 years, the offender is liable to imprisonment for not more than seven years<sup>8</sup>;
- 16 (3) if it is an offence, not included in heads (1) and (2) above, but for which a person, not previously convicted, may be sentenced to imprisonment for a term of ten years, the offender is liable to imprisonment for not more than five years<sup>9</sup>; and
- 17 (4) in any other case, the offender is liable to imprisonment for not more than three years<sup>10</sup>.

No proceedings may be instituted for such an offence except by or with the consent of the Director of Public Prosecutions<sup>11</sup>.

1 If an offence for which the sentence is fixed by law (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 15) (Criminal Law Act 1967 s 4(1A)(a) (s 4(1A) added by the Police and Criminal Evidence Act 1984 s 119(1), Sch 16 para 17; and substituted by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 40(1), (2))) or an offence for which a person of 18 years or over (not previously convicted) may be sentenced to imprisonment for a term of five years (or might be so sentenced but for the restrictions imposed by the Magistrates' Courts Act 1980 s 33 (as amended) (see MAGISTRATES vol 29(2) (Reissue) PARA 661)) (Criminal Law Act 1967 s 4(1A)(b) (as so added and substituted)).

2 The offence must be specified in the charge: *R v Morgan* [1972] 1 QB 436, 56 Cr App Rep 181, CA. A prior conviction of the principal offender is not a prerequisite to a conviction under the Criminal Law Act 1967 s 4(1) (as amended): *R v J Donald*, *R v L Donald* (1986) 83 Cr App Rep 49, CA.

3 It is necessary only that the person charged should have known all the facts which constitute the offence; it is not necessary that he should have known that the facts constituted a relevant offence in law: see PARA 52 text and note 4 ante.

4 Whether given facts are capable of constituting lawful authority or reasonable excuse is a matter of law for the judge (*R v Johnson* (1873) LR 2 CCR 15; *Dickins v Gill* [1896] 2 QB 310, DC); whether they do is for the jury.

5 Some positive act is required but it is presumably enough that the act is done through an agent: see *R v Jarvis* (1837) 2 Mood & R 40.

6 See the Criminal Law Act 1967 s 4(1) (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 40(1), (2)). A person commits this offence only where his intent is to impede the arrest etc of another. It is

presumably not enough that his intention is to impede his own arrest even though he realises that this incidentally impedes the arrest of another (cf *R v Jones* [1949] 1 KB 194, 33 Cr App Rep 33, CCA, decided on the former law relating to accessories after the fact); or that his intention is to make a profit for himself (*R v Andrews*, *R v Craig* [1962] 3 All ER 961n, 47 Cr App Rep 32, CCA). See also *R v Woods* [1969] 1 QB 447, 53 Cr App Rep 30, CA. It is not necessary to prove that the person charged knew the identity of the offender provided that he intended to impede the apprehension etc of that person: *R v Brindley*, *R v Long* [1971] 2 QB 300, 55 Cr App Rep 258, CA.

Where the prosecution desires to rely on the possibility of a conviction of assisting an offender, contrary to the Criminal Law Act 1967 s 4(1) (as amended), there should be a specific count charging that offence; in the absence of such a count, the matter should be raised as early as possible during the trial: *R v Vincent* (1972) 56 Cr App Rep 281, CA, following *R v Cross*, *R v Channon* [1971] 3 All ER 641, 55 Cr App Rep 540, CA.

7 Criminal Law Act 1967 s 4(3)(a). As to the power to fine see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139. The offence is triable either way where the offence to which it relates is triable either way: see the Magistrates' Courts Act 1980 s 17(1), Sch 1 para 26(a); and MAGISTRATES vol 29(2) (Reissue) PARA 655. As to offences triable either way see PARAS 1103, 1109 et seq post; and as to the circumstances in which a verdict of an offence under the Criminal Law Act 1967 s 4(1) (as amended) (see text to notes 1-6 supra) may be returned on an indictment for a relevant offence see s 4(2) (as amended); and PARA 1337 post.

8 Ibid s 4(3)(b). See note 7 supra.

9 Ibid s 4(3)(c). See note 7 supra.

10 Ibid s 4(3)(d). See note 7 supra.

11 Ibid s 4(4) (amended by the Criminal Jurisdiction Act 1975 s 14(5), Sch 6 Pt I). As to the effect of this limitation see PARA 1071 post.

## UPDATE

### 58 Assisting offenders

NOTES 1, 2--Where person has pleaded guilty to charge of assisting an offender, conviction is not rendered unsafe where the principal offender is subsequently acquitted of the offence with which he is charged: *R v Zaman* [2010] EWCA Crim 209, [2010] 1 WLR 1304.

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### **(iii) Criminal Liability for the Acts of Others**

#### **59. Vicarious liability: the general rule.**

In general an employer or principal is not criminally liable for an offence committed by his employee or agent even though it is committed in the course of the employment or agency<sup>1</sup>. There is no presumption that a crime committed by an employee or agent in the course of his duties has been authorised by the employer or principal<sup>2</sup>.

To this general rule, however, there are exceptions both at common law<sup>3</sup> and under statute<sup>4</sup>.

1 *R v Stephens* (1866) LR 1 QB 702 at 710 per Blackburn J; *Hardcastle v Bielby* [1892] 1 QB 709 at 712 per Collins J.

2 *R v Huggins* (1730) 2 Ld Raym 1574; *R v Holbrook* (1877) 3 QBD 60 at 63 per Lord Cockburn CJ; *R v Pearson (No 2)* (1908) 1 Cr App Rep 77, 72 JP 451, CCA; *R v Key* (1908) 1 Cr App Rep 135, 52 Sol Jo 784, CCA.

3 See PARA 60 post.

4 See PARAS 61-63 post.

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## **60. Vicarious liability at common law.**

Public nuisance constitutes an exception at common law to the general rule as to vicarious liability<sup>1</sup>. An employer is criminally liable where a nuisance is created in the ordinary course of his employee's employment<sup>2</sup> and he cannot escape liability on the ground that he was ignorant of the nuisance or that it was created contrary to his orders<sup>3</sup>.

Criminal libel constitutes the second exception at common law to the general rule as to vicarious liability. An employer is criminally liable for a criminal libel published by his employee<sup>4</sup> unless he proves that he did not authorise the publication and that the publication did not arise from want of due care on his part<sup>5</sup>.

1 See PARA 59 ante. As to public nuisance see NUISANCE vol 78 (2010) PARAS 105-106.

2 *R v Medley* (1834) 6 C & P 292.

3 *R v Stephens* (1866) LR 1 QB 702.

4 *R v Walter* (1799) 3 Esp 21; *R v Gutch*, *R v Fisher*, *R v Alexander* (1829) Mood & M 433. As to criminal proceedings for libel see LIBEL AND SLANDER vol 28 (Reissue) PARA 288 et seq.

5 Libel Act 1843 s 7.

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## 61. Vicarious liability in relation to statutory offences.

Criminal liability may be imposed by statute on an employer or principal for the acts or omissions of his employee or agent either expressly or by implication<sup>1</sup>. The implication may arise either because a person has delegated to another the performance of his own statutory duties<sup>2</sup> or because the acts of another may be in law his own acts<sup>3</sup>. Such liability may arise where the offence is one requiring mens rea<sup>4</sup> or one imposing strict liability<sup>5</sup>.

1 To determine whether a statute impliedly imposes vicarious liability, regard must be had to 'the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed': *Mousell Bros Ltd v London and North Eastern Rly Co* [1917] 2 KB 836 at 845 per Atkin J. It is not to be lightly presumed that the legislature intended that one person is to be punished for the fault of another (see *Chisholm v Doulton* (1889) 22 QBD 736 at 741 per Cave J; and see also *Reynolds v GH Austin & Sons Ltd* [1951] 2 KB 135 at 149, [1951] 1 All ER 606 at 611 per Devlin J); and vicarious liability can be imposed only where from consideration of the terms of the statute and other relevant circumstances it appears clearly that that must have been the intention of Parliament (*Vane v Yiannopoulos* [1965] AC 486, [1964] 3 All ER 820, HL).

A partner can also be vicariously liable for the acts or omissions of his fellow partner, and a principal for his independent contractor, in the type of case described in PARA 63 post.

2 See *Allen v Whitehead* [1930] 1 KB 211; *Vane v Yiannopoulos* [1965] AC 486, [1964] 3 All ER 820, HL. In the latter case doubt was cast on the validity of the delegation principle; but the principle was reaffirmed in *R v Winson* [1969] 1 QB 371, [1968] 1 All ER 197, CA; *Howker v Robinson* [1973] QB 178, [1972] 2 All ER 786, DC.

3 Many examples are provided by cases arising under statutes dealing with the sale, use, keeping and possession of goods under statutes such as the Trade Descriptions Act 1968 and the Food Safety Act 1990. See *Coppen v Moore (No 2)* [1898] 2 QB 306 (selling goods with a false trade description contrary to the Merchandise Marks Act 1887 s 2(2) (repealed: see now the Trade Descriptions Act 1968 s 1; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 475)); *James & Son Ltd v Smees, Green v Burnett* [1955] 1 QB 78, [1954] 3 All ER 273 (using a motor vehicle in contravention of the Motor Vehicles (Construction and Use) Regulations 1951, SI 1951/2101 (revoked: see now the Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078 (as amended); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 267 et seq)). See also PARA 63 note 2 post.

4 See PARA 62 post. In *Chisholm v Doulton* (1889) 22 QBD 736 at 742, Cave J thought that vicarious liability could not be imposed where the crime was one of negligence (as to which see PARA 14 ante) but this view was doubted by Lord Parker CJ in *G Newton Ltd v Smith* [1962] 2 QB 278, [1962] 2 All ER 19 at 22. See also *Niven v Greaves* (1890) 54 JP 548, DC; *Armitage Ltd v Nicholson* (1913) 108 LT 993.

5 See PARA 63 post. The express imposition of strict liability is exceptional but see eg the Road Traffic Offenders Act 1988 s 64(5) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1108); and the Property Misdescriptions Act 1991 s 1(2) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 791).

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## 62. Statutory offences involving mens rea.

Where a statutory offence is one involving mens rea, vicarious liability can arise only where there has been delegation<sup>1</sup>. Where the legislature places a duty upon one person and he delegates the performance of that duty to another, whether an employee or agent<sup>2</sup>, the delegator is criminally liable for the failure of his delegate to perform that duty, at least where the performance of the duty cannot be properly secured without the imposition of vicarious liability<sup>3</sup>. For vicarious liability to arise there must be a real and effective delegation<sup>4</sup>; to constitute such a delegation the activity delegated must be under the exclusive control of the delegate, free from the principal's supervision<sup>5</sup>. If the employer or principal remains in control of the activity he is liable for his own acts and omissions but not for those acts of his employee or agent which he does not actually counsel or abet<sup>6</sup>.

1 See *Vane v Yiannopoulos* [1965] AC 486 at 503, [1964] 3 All ER 820 at 827, HL, per Lord Evershed ('In my judgment, it can and should now fairly be taken as established by the authorities that, where by the terms of the relevant statutory provision 'knowledge' is required as a condition of liability, none of the decided cases has accepted or imposed liability in the absence of the knowledge on the licensee's part or in the absence on the licensee's part of real 'delegation' of his powers and duties'). See also *R v Winson* [1969] 1 QB 371 at 382, [1968] 1 All ER 197 at 202, CA, per Lord Parker CJ ('The principle of delegation comes into play, and only comes into play, in cases where, though the statute uses words which import knowledge or intent . . . nevertheless it has been held that a man cannot get out of the responsibilities which have been put on him by delegating those responsibilities to another'). As to the expressions of doubt concerning the validity of the principle of delegation see, however, *Vane v Yiannopoulos* supra; and PARA 61 note 2 ante. See also *Portsea Island Mutual Co-operative Society Ltd v Leyland* (1978) 122 Sol Jo 486, [1978] Crim LR 554, DC (employer not liable for illegal employment of minor by unauthorised employee).

2 *Linnett v Metropolitan Police Comr* [1946] KB 290, [1946] 1 All ER 380, DC.

3 *Allen v Whitehead* [1930] 1 KB 211, DC (where, if the owner of the premises had not been liable for the conduct of his manager in knowingly allowing prostitutes to remain on the premises, the statute would have been rendered ineffective). See also *Police Comrs v Cartman* [1896] 1 QB 655 at 658, DC, per Lord Russell CJ; *R v Winson* [1969] 1 QB 371, [1968] 1 All ER 197, CA.

4 *Vane v Yiannopoulos* [1965] AC 486, [1964] 3 All ER 820, HL (no delegation where licensee retained overall control of the premises though he was in the basement at the time when his employee did the prohibited act on the ground floor). An employer may, however, delegate control though he remains on the premises: see *Howker v Robinson* [1973] QB 178, [1972] 2 All ER 786, DC.

5 *Somerset v Hart* (1884) 12 QBD 360, DC.

6 *Vane v Yiannopoulos* [1965] AC 486, [1964] 3 All ER 820, HL; *Somerset v Hart* (1884) 12 QBD 360, DC; *Ross v Moss* [1965] 2 QB 396, [1965] 3 All ER 145, DC.

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### 63. Statutory offences of strict liability.

Even where an offence is one of strict liability<sup>1</sup>, vicarious liability can arise only where this appears clearly to have been the intention of the legislature. Where the offence is so defined as to impose a strict duty upon a person, that person may be liable in respect of the performance of that duty by his employee or agent, whether there has been a delegation or not<sup>2</sup>, if to hold otherwise would be to render the statutory provision ineffective<sup>3</sup>. Where an employer or principal is thus made vicariously liable, he cannot (unless the statute provides a defence to this effect) escape his liability by showing that he took all reasonable care that the law should not be contravened, and he is liable notwithstanding that his employee or agent may have disobeyed his instructions, so long as the conduct of the employee or agent remains in the course of his employment or agency<sup>4</sup>.

These principles also apply so as to render a partner criminally liable for the acts of a fellow partner<sup>5</sup> or a principal criminally liable for the acts of an independent contractor, in the same way as if that contractor had been his employee or agent<sup>6</sup> but not for the acts of an employee of an employment agency which has supplied that person to work for him<sup>7</sup>. They do not apply so as to render a member of the board of directors, or governing committee, of a body corporate vicariously liable for the acts of an employee or agent of that body corporate<sup>8</sup>.

1 As to offences of strict liability see PARA 15 ante.

2 'When an absolute offence has been created by Parliament, then the person on whom a duty is thrown is responsible, whether he has delegated or whether he has acted through a servant; he is absolutely liable regardless of any intent or knowledge or mens rea': *R v Winson* [1969] 1 QB 371 at 382, [1968] 1 All ER 197 at 202, CA, per Lord Parker CJ. In determining whether such a duty is created, a factor of importance appears to be whether the expression used is capable in its context of describing both the activity of the employer or principal, and that of the employee or agent. Such expressions include 'sells' (*Coppen v Moore (No 2)* [1898] 2 QB 306, DC); 'keeps' (*Strutt v Clift* [1911] 1 KB 1, DC); 'possesses' (*Melias Ltd v Preston* [1957] 2 QB 380, [1957] 2 All ER 449, DC); and 'uses' (*James & Son Ltd v Smee, Green v Burnett* [1955] 1 QB 78, [1954] 3 All ER 273, DC); but not 'drives' (*Richmond upon Thames London Borough Council v Pinn & Wheeler Ltd* [1989] RTR 354, DC).

3 *Coppen v Moore (No 2)* [1898] 2 QB 306, DC.

4 *Coppen v Moore (No 2)* [1898] 2 QB 306, DC; *Police Comrs v Cartman* [1896] 1 QB 655, DC. The employer is not liable where the employee acts outside the course of his employment; while the employer may be liable where the employee does what he is employed to do albeit in an unauthorised manner (*Police Comrs v Cartman* supra), he is not liable where the employee does something which he is not employed to do at all (*Boyle v Smith* [1906] 1 KB 432, DC; *Phelon and Moore Ltd v Keel* [1914] 3 KB 165, DC).

5 *Clode v Barnes* [1974] 1 All ER 1166, [1974] 1 WLR 544, DC. Contrast *Bennett v Richardson* [1980] RTR 358, DC.

6 *FE Charman Ltd v Clow* [1974] 3 All ER 371, [1974] 1 WLR 1384, DC; *Hallett Silberman Ltd v Cheshire County Council* [1993] RTR 32, DC.

7 *Howard v GT Jones & Co Ltd* [1975] RTR 150, DC.

8 *Phipps v Hoffman* [1976] Crim LR 315, DC. The body corporate as employer or principal may be criminally liable: see PARA 38 ante.





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#### **64. No vicarious liability in relation to abetment or attempt.**

There can be no vicarious liability for an attempt to commit a crime, even in cases where the employer or principal would incur criminal liability for that crime if it were completed<sup>1</sup>; nor can there be vicarious liability for the aiding, abetting, counselling or procuring of a crime and this is so even where the employer or principal would be liable had the crime been perpetrated by the employee<sup>2</sup>. This rule applies in the case both of crimes at common law<sup>3</sup> and statutory offences. As criminal liability both for an attempt and for aiding and abetting, although statutory, derives from the common law, both require mens rea<sup>4</sup> and this is equally applicable where the substantive offence is one of strict liability<sup>5</sup>.

1 Cf *Gardner v Akeroyd* [1952] 2 QB 743 at 751, [1952] 2 All ER 306 at 311, DC, per Lord Goddard CJ.

2 *Ferguson v Weaving* [1951] 1 KB 814, [1951] 1 All ER 412, DC.

3 Except in the case of public nuisance and criminal libel, there is no vicarious liability at common law for a substantive offence: see PARA 60 ante.

4 As to the mental element in aiding and abetting and in attempt see PARAS 52 ante, 81 post.

5 In the case of attempt, a further ground of exclusion of vicarious liability is that the employer or principal might otherwise be liable for his employee or agent's attempt even though he intervened to prevent the completion of the employee's offence: *Gardner v Akeroyd* [1952] 2 QB 743 at 751, [1952] 2 All ER 306 at 311, DC, per Lord Goddard CJ.

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## **(6) INCHOATE CRIMES**

### **(i) Incitement**

#### **65. Incitement.**

It is an indictable offence at common law for a person to incite or solicit another to commit an offence<sup>1</sup>, even though no such offence is either committed or attempted<sup>2</sup>. The penalty for incitement is imprisonment or a fine or both at the discretion of the court<sup>3</sup>.

For an incitement to be complete there must be some form of actual communication with a person whom it is intended to incite; where, however, a communication is sent with a view to incite, but does not reach the intended recipient, the sender may be guilty of an attempt to incite<sup>4</sup>. Incitement is complete though the mind of the person incited is unaffected and notwithstanding that the person incited intends to inform on the inciter<sup>5</sup>.

In order to prove incitement it is necessary to show that the defendant sought to persuade or encourage<sup>6</sup>, or compel by threats or other pressure<sup>7</sup>, another to commit an act that would constitute a crime if done by that other<sup>8</sup>. It is irrelevant that the initiative is taken by the person alleged to have been incited, who invites the alleged inciter to incite him<sup>9</sup>. It must be proved that the defendant intended that the crime incited should be carried out; it is irrelevant whether or not the person incited had the mens rea for that crime<sup>10</sup>. It is no defence that, at the time of the incitement, the offence incited could not have been committed if it was envisaged that it would be capable of commission on the occurrence of some future event<sup>11</sup>.

If the person who incites believes that the crime can be accomplished by the means suggested, he commits an offence although the crime incited cannot be accomplished by those means; but there is no offence of incitement where he does not believe that the crime can be thus accomplished even if the person incited believes that it can<sup>12</sup>.

Incitement to commit an offence cannot be committed where it is absolutely impossible to commit the offence alleged to have been incited<sup>13</sup>.

1 *R v Higgins* (1801) 2 East 5; *R v Gregory* (1867) LR 1 CCR 77. For statutory forms of the offence of incitement see the Offences against the Person Act 1861 s 4 (as amended) (incitement to murder: see PARA 104 post); the Perjury Act 1911 s 7(2) (see PARA 721 post); and the Official Secrets Act 1920 s 7 (see PARA 497 post). Such statutory forms of incitement appear to add nothing to the substantive law of incitement at common law. For a consideration of the meaning of the word 'incite' see *Invicta Plastics Ltd v Clare* [1976] RTR 251, DC (company which advertised a device which could detect police radar traps properly convicted of the common law offence of inciting people who read the advertisement to use unlicensed apparatus for wireless telegraphy contrary to the Wireless Telegraphy Act 1949 s 1(1) (as amended) (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARAS 228-229)).

Incitement to commit the offence of conspiracy, whether the conspiracy incited would be an offence at common law or under the Criminal Law Act 1977 s 1 (as amended) (see PARA 67 post) or any other enactment is no longer an offence: see the Criminal Law Act 1977 s 5(7) (amended by the Criminal Attempts Act 1981 s 10, Schedule Pt I). However, it is submitted that an incitement to incite is an offence except perhaps where it amounts to an incitement to conspire: see *R v Sirat* (1985) 83 Cr App Rep 41 at 44 ('Lest there be any doubt, we do not intend to indicate that the common law offence of inciting to incite no longer exists').

An incitement in England and Wales to commit an offence abroad is not an offence under English law unless the incited offence, if committed, would be triable in England and Wales, because otherwise the conduct is not an

offence for the purposes of English law: see PARA 1054 et seq post. For an exception to this see the Criminal Justice Act 1993 s 5(4) (a person may be convicted of incitement to commit a specified offence of dishonesty if the incitement takes place in England and Wales and would be triable in England but for what the person charged had in view not being an offence triable in England and Wales). It is immaterial whether or not the defendant was a British citizen at any material time or was in England at any such time: see s 3(1); and PARA 362 post. A person is guilty of an offence triable by virtue of s 5(4) only if what he had in view would involve the commission of an offence under the law in force where the whole or any part of it was intended to take place: s 6(2). Conduct punishable under the law in force in any place is an offence under that law for the purpose of s 6, however it is described in that law: s 6(3). A condition specified in s 6(2) is to be taken to be satisfied unless, not later than rules of court may provide, the defence serves on the prosecution a notice:

- 1 (1) stating that, on the facts as alleged with respect to what the defendant had in view, the condition is not in its opinion satisfied (s 6(4)(a), (5)(b));
- 2 (2) showing the grounds for that opinion (s 6(4)(b)); and
- 3 (3) requiring the prosecution to show that the condition is satisfied (s 6(4)(c)).

The court, if it thinks fit, may permit the defence to require the prosecution to show that the condition is satisfied without the prior service of a notice under s 6(4): s 6(6). In the Crown Court, the question whether the condition is satisfied is to be decided by the judge alone: s 6(7).

'Rules of court', in relation to any court, means rules made by the authority having power to make rules or orders regulating the practice and procedure of that court; and the power of the authority to make rules of court includes power to make such rules for the purpose of any Act which directs or authorises anything to be done by rules of court: Interpretation Act 1978 s 5, Sch 1.

For special rules relating to jurisdiction in respect of incitement to commit abroad sexual offences with children see PARA 243 post; and for special rules relating to offences of computer misuse see PARA 361 post.

2 *R v Higgins* (1801) 2 East 5; *R v Johnson* (1678) 2 Show 1; *R v Vaughan* (1769) 4 Burr 2494.

3 As to penalties see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139. Without prejudice to any other enactment by virtue of which any offence is triable only summarily, any offence consisting in the incitement to commit a summary offence is triable only summarily: see the Magistrates' Courts Act 1980 s 45(1), (2); and MAGISTRATES vol 29(2) (Reissue) PARA 653. On conviction of an offence consisting in the incitement to commit a summary offence, a person is liable to the same penalties as he would be liable to on conviction of such offence: see s 45(3); and MAGISTRATES vol 29(2) (Reissue) PARA 656. See also *R v Curr* [1968] 2 QB 944, 51 Cr App Rep 113, CA (decided under the Magistrates' Courts Act 1952 s 19(1), Sch 1 para 20 (repealed)).

Any offence consisting in the incitement to commit an offence triable either way, except an offence mentioned in the Magistrates' Courts Act 1980 s 17(1), Sch 1 para 33 (ie an offence of aiding, abetting, counselling or procuring particular offences: see MAGISTRATES vol 29(2) (Reissue) PARA 655) is triable either way: see Sch 1 para 35 (amended by the Criminal Attempts Act 1981 s 10, Schedule Pt I); para 1103 post; and MAGISTRATES vol 29(2) (Reissue) PARA 655. On summary conviction of an offence consisting in the incitement to commit an offence triable either way, a person is not liable to any greater penalty than he would be liable to on summary conviction of such offence: Magistrates' Courts Act 1980 s 32(1)(b). See further MAGISTRATES vol 29(2) (Reissue) PARA 656.

4 *R v Banks* (1873) 12 Cox CC 393; *R v Ransford* (1874) 13 Cox CC 9, CCR; *R v Cope* (1921) 16 Cr App Rep 77, 38 TLR 243, CCA.

5 *R v De Kromme* (1892) 66 LT 301, CCR; *R v Krause* (1902) 66 JP 121.

6 *R v Hendrickson*, *R v Tichner* [1977] Crim LR 356, CA; *R v Marlow* [1997] Crim LR 897, CA.

7 *Race Relations Board v Applin* [1973] QB 815 at 825, [1973] 2 All ER 1190 at 1194, CA, per Lord Denning MR.

8 *DPP v Armstrong* [2000] Crim LR 379, DC. See also *Invicta Plastics Ltd v Clare* [1976] RTR 251, DC; *R v Whitehouse* [1977] QB 868, [1977] 3 All ER 737, CA; *R v Pickford* [1995] QB 203, [1995] 1 Cr App Rep 420, CA; *R v C* [2005] EWCA Crim 2817, [2006] Crim LR 345. The persuasion etc need not be directed to a particular person: see *R v Most* (1881) 7 QBD 244, CCR (newspaper article); *Invicta Plastics Ltd v Clare* [1976] RTR 251, DC (advertisement in motoring journal).

9 *R v Goldman* [2001] EWCA Crim 1684, [2001] All ER (D) 157 (Jul) (advertiser of indecent photographs of children could be incited to distribute them by reader of advertisement who offered to buy them). Indeed in *R (on the application of O) v Coventry Magistrates' Court* [2004] EWHC 905, [2004] Crim LR 948, DC, it was held that a human mind could be incited by a would-be buyer of child pornography inserting details into a computer which communicated with another computer operated by a child pornography business, the whole process

being entirely automated; by subscribing through the means of the computer the would-be buyer incited someone, namely those lying behind the computer.

10 *DPP v Armstrong* [2000] Crim LR 379, DC (defendant incited police officer to supply pornographic photographs even though the officer had no intention to supply the material); *R v C* [2005] EWCA Crim 2817, [2006] Crim LR 345. In the light of comments in these cases *R v Curr* [1968] 2 QB 944, 51 Cr App Rep 113, CA, in so far as it appeared to require proof that the person incited possessed the mens rea for the crime incited, must be regarded as manifestly unsound.

11 In *R v Shephard* [1919] 2 KB 125, 14 Cr App Rep 26, CCA, where the defendant had incited a pregnant woman to kill her child when it was born, it was held that, to support a charge of inciting to murder contrary to the Offences against the Person Act 1861 s 4, it was not essential that the intended victim should be in existence at the time of the incitement. See also *R v Smith*, *R v Turner* [2004] EWCA Crim 2187.

12 *R v Brown* (1899) 63 JP 790.

13 *R v Fitzmaurice* [1983] QB 1083, 76 Cr App Rep 17, CA (applying *DPP v Nock*, *DPP v Alsford* [1978] 2 All ER 654, 67 Cr App Rep 116, HL). It is therefore necessary to analyse the evidence in order to decide the precise offence which the defendant is alleged to have incited and whether it was possible to commit that offence: *R v Fitzmaurice* supra. For a qualification of the statement in the text see *R v McDonough* (1962) 47 Cr App Rep 37, CCA, as explained in *R v Fitzmaurice* supra.

## UPDATE

### 65 Incitement

TEXT AND NOTES--The common law offence of inciting the commission of another offence is abolished: Serious Crime Act 2007 s 59. For provision relating to encouraging or assisting crime see the 2007 Act Pt 2 (ss 44-67) and PARA 65A.

NOTE 1--1977 Act s 5(7) repealed: 2007 Act Sch 6 para 54, Sch 14.

See further 2007 Act Sch 6 para 21(b) (references to common law offence of incitement).

NOTE 3--1980 Act ss 32(1)(b), 45, Sch 1 para 35 repealed: 2007 Act Sch 6 para 55, Sch 14.

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## **65A. Encouraging or assisting crime.**

The Serious Crime Act 2007 Pt 2 (ss 44-67) creates offences in respect of the encouragement or assistance of crime. For transitional and transitory provisions and savings see Sch 13.

### **1. Inchoate offences**

A person commits an offence if he does an act capable of encouraging or assisting the commission of an offence; and he intends to encourage or assist its commission: Serious Crime Act 2007 s 44(1). But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act: s 44(2).

A person commits an offence if (1) he does an act capable of encouraging or assisting the commission of an offence; and (2) he believes that the offence will be committed; and that his act will encourage or assist its commission: s 45.

A person commits an offence if (a) he does an act capable of encouraging or assisting the commission of one or more of a number of offences; and (b) he believes (i) that one or more of those offences will be committed (but has no belief as to which); and (ii) that his act will encourage or assist the commission of one or more of them: s 46(1). It is immaterial for the purposes of head (ii) whether the person has any belief as to which offence will be encouraged or assisted: s 46(2). If a person is charged with an offence under s 46(1) (A) the indictment must specify the offences alleged to be the 'number of offences' mentioned in head (a); but (B) nothing in head (A) requires all the offences potentially comprised in that number to be specified: s 46(3). In relation to an offence under s 46, reference in Pt 2 (ss 44-67) to the offences specified in the indictment is to the offences specified by virtue of head (A): s 46(4).

Provision is made relating to how an offence under ss 44-46 may be proved (s 47) and further rules are provided in relation to what needs to be proved to establish guilt for an offence under s 46 (s 48). Supplemental provision is made: s 49, Sch 3.

### **2. Reasonableness defence**

A person is not guilty of an offence under the Serious Crime Act 2007 Pt 2 (ss 44-67) if he proves (1) that he knew certain circumstances existed; and (2) that it was reasonable for him to act as he did in those circumstances: s 50(1). A person is not guilty of an offence under Pt 2 if he proves (a) that he believed certain circumstances to exist; (b) that his belief was reasonable; and (c) that it was reasonable for him to act as he did in the circumstances as he believed them to be: s 50(2). Factors to be considered in determining whether it was reasonable for a person to act as he did include (i) the seriousness of the anticipated offence (or, in the case of an offence under s 46 (see PARA 65A.1), the offences specified in the indictment); (ii) any purpose for which he claims to have been acting; (iii) any authority by which he claims to have been acting: s 50(3).

### **3. Limitation on liability**

In the case of protective offences, a person does not commit an offence under the Serious Crime Act 2007 Pt 2 (ss 44-67) by reference to such an offence if (1) he falls within the protected category; and (2) he is the person in respect of whom the protective offence was committed or would have been if it had been committed: s 51(1). 'Protective offence' means an offence that exists (wholly or in part) for the protection of a particular category of persons ('the protected category'): s 51(2).

#### **4. Jurisdiction and procedure**

The rules that will govern jurisdiction over the offences in the Serious Crime Act 2007 Pt 2 (ss 44-67) are set out: s 52, Sch 4. No proceedings for an offence triable by reason of any provision of Sch 4 may be instituted in England and Wales, except by, or with the consent of, the Attorney General: s 53. Any powers that apply to a substantive offence will apply to an offence of encouraging and assisting that substantive offence: s 54. An offence under s 44 or 45 (see PARA 65A.1) is triable in the same way as the anticipated offence; and an offence under s 46 (see PARA 65A.1) is triable on indictment: s 55.

In proceedings for an offence under Pt 2 ('the inchoate offence') the defendant may be convicted if (1) it is proved that he must have committed the inchoate offence or the anticipated offence; but (2) it is not proved which of those offences he committed; and for these purposes, a person is not to be treated as having committed the anticipated offence merely because he aided, abetted, counselled or procured its commission: s 56.

The offences in relation to which a person may be found guilty as an alternative where he has been prosecuted on indictment for an offence under ss 44, 45 and 46 are set out: s 57. Provision is made as to the penalties that will apply to the offences created in Pt 2: s 58. References in existing legislation to the common law offence of incitement are to be read as references to the offences in ss 44-46: s 63, Sch 6 Pt 1. Provision is also made with respect to interpretation (ss 64-67).

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## **(ii) Conspiracy**

### **A. IN GENERAL**

#### **66. Matters common to all conspiracies.**

There are statutory<sup>1</sup> and common law<sup>2</sup> offences of conspiracy. The essence of the offences of both statutory and common law conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made<sup>3</sup>; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be<sup>4</sup>. The *actus reus*<sup>5</sup> in a conspiracy is therefore the agreement for the execution of the unlawful conduct, not the execution of it<sup>6</sup>. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose<sup>7</sup>. It is not, however, necessary that each conspirator should have been in communication with every other<sup>8</sup>.

A director of a company who is solely responsible for the conduct of the company's business cannot be convicted of conspiring with the company, since only one mind is involved despite the fact that the company has a separate legal personality<sup>9</sup>. Where, however, a director conspires in the course of the company's activities with other persons, the company may be indicted as a party to the conspiracy<sup>10</sup>.

The fact that the person or persons who, so far as appears from the indictment on which any person has been convicted of conspiracy, was or were the only other party or parties to the agreement on which his conviction was based have been acquitted of conspiracy by reference to that agreement, whether after being tried with the person convicted or separately, is not a ground for quashing his conviction unless under all the circumstances of the case his conviction is inconsistent with the acquittal of the other person or persons in question<sup>11</sup>.

1 See PARAS 67-71 post.

2 See PARAS 72-75 post.

3 Mere negotiations are insufficient: *R v Jones* (1832) 4 B & Ad 345 at 349 per Denman CJ. A person cannot be party to an agreement by virtue of an uncommunicated intention to enter into that agreement: *R v Scott* (1978) 68 Cr App Rep 164, CA.

4 See *DPP v Doot* [1973] AC 807, 57 Cr App Rep 600, HL; *R v Reilly* [1982] QB 1208, 75 Cr App Rep 266, CA (the offence of conspiracy continues to exist while the planned acts are carried out even though the offence of conspiracy was committed and completed when the conspirators made their agreement). See also *R v Khalil* [2003] EWCA Crim 3467, [2004] 2 Cr App Rep (S) 121 (defendant became involved after a contract killer (an undercover police officer) had apparently committed the murder; held he could not be convicted of conspiracy to murder).

5 As to the *actus reus* of a crime see PARA 5 ante.

6 See *Poulterers' Case* (1610) 9 Co Rep 55b; and see *Kamara v DPP* [1974] AC 104, 57 Cr App Rep 880, HL. The offence is completely constituted when the agreement is made; it matters not that it is never carried out: *R v Doot* [1973] QB 73 at 81, 57 Cr App Rep 13 at 20, CA; revsd on other grounds sub nom *DPP v Doot* [1973] AC 807, 57 Cr App Rep 600, HL. Where the conduct agreed upon could not possibly result in the commission of an offence, there may nevertheless be a statutory conspiracy: see the Criminal Law Act 1977 s 1(1)(b) (as substituted); and PARA 67 post.

7 See *R v Walker* [1962] Crim LR 458, CA; *R v Mills* [1963] 1 QB 522, 47 Cr App Rep 49, CCA.

8 *R v Parnell* (1881) 14 Cox CC 508 at 515; *R v Meyrick*, *R v Ribuffi* (1929) 21 Cr App Rep 94, CCA. As to 'wheel conspiracies' see *R v Griffiths* [1966] 1 QB 589, 49 Cr App Rep 279, CCA (a conspiracy between B and C is not to be inferred from the fact that A has conspired with B in the same terms as A has conspired with C; nor do B and C conspire with one another because each knows of the other's agreement with A; to constitute a conspiracy between B and C each must know that, through the medium of A, there is a common plan which goes beyond the unlawful act he has agreed to do with A).

9 *R v McDonnell* [1966] 1 QB 233, 50 Cr App Rep 5.

10 *R v ICR Haulage Ltd* [1944] KB 551, 30 Cr App Rep 31, CCA.

11 Criminal Law Act 1977 s 5(8). Any rule of law or practice inconsistent with the provisions of s 5(8) has been abolished: see s 5(9). See also *R v Holmes* [1980] 2 All ER 458, sub nom *R v Holmes*, *R v Merrick*, *R v Thornton*, *R v Wood* (1980) 71 Cr App Rep 130, CA; *R v Longman* (1980) 72 Cr App Rep 121, CA; *R v Roberts* (1983) 78 Cr App Rep 41, CA; *R v Testouri* [2003] EWCA Crim 3735, [2004] 2 Cr App Rep 26. The Criminal Law Act 1977 s 5(8) abolished the former common law rule of law whereby, if two persons were tried together for conspiring with each other, and there was no allegation of conspiring with any other person, they had both to be convicted or acquitted: see *R v Grimes* (1688) 3 Mod Rep 220; *R v Nichols* (1742) 13 East 412n; *R v Cooke* (1826) 5 B & C 538, CCR; and see also *DPP v Shannon* [1975] AC 717 at 754, 59 Cr App Rep 250 at 262, HL, per Lord Morris of Borth-y-Gest.



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## **B. STATUTORY CONSPIRACY**

### **67. Statutory conspiracy.**

If a person agrees with any other person or persons that a course of conduct is to be pursued which, if the agreement is carried out in accordance with their intentions, either:

- 18 (1) will necessarily<sup>1</sup> amount to, or involve the commission of, any offence<sup>2</sup> or offences<sup>3</sup> by one or more of the parties<sup>4</sup> to the agreement<sup>5</sup>; or
- 19 (2) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible<sup>6</sup>,

he is guilty of conspiracy to commit the offence or offences in question<sup>7</sup>. A person is not, however, so guilty of conspiracy to commit any offence if he is an intended victim of that offence<sup>8</sup>.

Where, in pursuance of any agreement, the acts in question in relation to any offence are to be done in contemplation or furtherance of a trade dispute<sup>9</sup> that offence is to be disregarded<sup>10</sup> provided that it is a summary offence which is not punishable with imprisonment<sup>11</sup>.

A person is not guilty of statutory conspiracy<sup>12</sup> to commit any offence or offences if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say his spouse or civil partner<sup>13</sup>, a person under the age of criminal responsibility<sup>14</sup>, or an intended victim of that offence or of each of those offences<sup>15</sup>.

Where a statute exempts a particular person or a particular class of persons from liability for an offence, whether as principal or as a secondary party, it does not necessarily follow that that person, or a person belonging to that class, cannot be convicted of conspiring with another to commit that offence. In such a case, the question must be determined by considering the purpose of the statute, whether it would be defeated by holding that such a person may be party to such a conspiracy or whether the immunity was not intended to extend to the case where he agrees with others to commit the offence<sup>16</sup>.

Where a person is immune from liability whether in respect of the crime itself or in respect of conspiracy to commit the crime, another who agrees with him to commit that crime may be convicted of conspiracy notwithstanding the immunity of the former<sup>17</sup>.

A conspiracy between a person in England or Wales and a person abroad to commit a crime in England or Wales is a conspiracy which is indictable in England and Wales<sup>18</sup>. Where a conspiracy is formed outside the jurisdiction to commit a crime in England or Wales, it is indictable in England and Wales even though no act in furtherance of that agreement is committed in England or Wales<sup>19</sup>.

1 'Necessarily' for these purposes does not mean that there must inevitably be the carrying out of an offence; it means, if the agreement is carried out in accordance with the plan, there must be the commission of the offence referred to in the conspiracy count: *R v Jackson* [1985] Crim LR 442, CA. See also *R v O'Hadhmaill* [1996] Crim LR 509, CA; *R v Reed* [1982] Crim LR 819, CA; *R v Bolton* (1991) 94 Cr App Rep 74, CA.

2 For the purposes of the Criminal Law Act 1977 Pt I (ss 1-5) (as amended), 'offence' means an offence triable in England and Wales: s 1(4) (amended by the Criminal Justice (Terrorism and Conspiracy) Act 1998 s 9(3)(a), Sch 1 para 4(b), Sch 2 Pt II). The doing of something with the appropriate mens rea for an offence would not amount to or involve an offence for these purposes if the actus reus of that offence would not be committed: *R v Harmer* [2005] EWCA Crim 1, [2005] 2 Cr App Rep 23.

3 There is no compelling reason why 'offence or offences' should be construed exclusively conjunctively: *R v Hussain, R v Bhatti, R v Bhatti* [2002] EWCA Crim 6, [2002] 2 Cr App Rep 363.

4 As to parties to the agreement see the text and notes 12-15 infra; and PARA 66 ante.

5 Criminal Law Act 1977 s 1(1)(a) (s 1(1) substituted by the Criminal Attempts Act 1981 s 5(1)).

6 Criminal Law Act 1977 s 1(1)(b) (as substituted: see note 5 supra).

7 Ibid s 1(1) (as substituted: see note 5 supra). The statement in *R v Anderson* [1986] AC 27, 81 Cr App Rep 253, HL, that a person is guilty of conspiracy if, and only if, it is shown that, when he entered into the agreement, he intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve, was explained in *R v Siracusa* (1989) 90 Cr App Rep 340 at 347-350, CA, per O'Connor LJ, on the basis that a person can 'play a part' merely by continuing to concur in the criminal activity of another or others. As to the mental element in conspiracy see PARA 69 post.

The rules laid down by the Criminal Law Act 1977 ss 1, 2 (as amended) (see the text and notes 1-6 supra) apply for determining whether a person is guilty of an offence of conspiracy under any enactment other than s 1 (as amended); but conduct which is an offence under any such other enactment is not also an offence under s 1 (as amended): s 5(6).

8 Ibid s 2(1).

9 Ie within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992 s 244: see EMPLOYMENT vol 41 (2009) PARAS 1324-1326.

10 Ie for the purposes of the Criminal Law Act 1977 s 1(1) (as substituted): see the text and notes 1-6 supra.

11 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 242; and EMPLOYMENT vol 41 (2009) PARA 1328. As to the penalty for statutory conspiracy see PARA 71 post.

12 Ie under the Criminal Law Act 1977 s 1 (as substituted): see the text and notes 1-6 supra.

13 Ibid s 2(2)(a) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 56). A husband and wife (or civil partners) may, however, be guilty as co-conspirators where others are involved (see 1 Hawk PC c 27 s 8; *R v Whitehouse* (1852) 6 Cox CC 38 (conspiracy of husband, wife and daughter)) but only if knowledge that there are other conspirators is proved (*R v Chrastrny* [1992] 1 All ER 189, 94 Cr App Rep 283, CA). A husband and wife (or, presumably, both members of a civil partnership) may also be guilty of a conspiracy entered into before their marriage or before their civil partnership was entered into: *Robinson's Case* (1746) 1 Leach 37.

14 Criminal Law Act 1977 s 2(2)(b). A person is under the age of criminal responsibility for these purposes so long as it is conclusively presumed, by virtue of the Children and Young Persons Act 1933 s 50 (as amended) (see PARA 37 ante; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 29) that he cannot be guilty of any offence: Criminal Law Act 1977 s 2(3).

15 Ibid s 2(2)(c). As to intended victims see s 2(1); and the text to note 8 supra.

16 *R v Whitchurch* (1890) 24 QBD 420, CCR (woman convicted of conspiring to procure her own abortion though she was not pregnant and could not commit the substantive offence); *Wakefield's Case* (1827) 2 Lew CC 1; *R v Crossman, ex p Chetwynd* (1908) 98 LT 760; *R v Mackenzie, R v Higginson* (1910) 75 JP 159, 6 Cr App Rep 64, CCA.

17 *R v Duguid* (1906) 70 JP 294, CCR (defendant was convicted of conspiring with a mother to remove her child from her guardian's possession contrary to the Offences against the Person Act 1861 s 56 (repealed), though the mother, had she been charged, might have been immune from liability). See also *R v B* [1984] Crim LR 352, CA; *R v Sherry, R v El-Yamani* [1993] Crim LR 537, CA.

18 See *R v Parnell* (1881) 14 Cox CC 508 at 515; *R v Meyrick, R v Ribuffi* (1929) 21 Cr App Rep 94 at 99; *R v Hammersley* (1958) 42 Cr App Rep 207 at 217, CCA.

19 *Somchai Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225, 92 Cr App Rep 27, PC; *R v Sansom* [1991] 2 QB 130, 92 Cr App Rep 115, CA. This rule applies to common law conspiracies as well: *R v Sansom* supra. As to the ambit of criminal jurisdiction generally see PARA 1054 et seq post.

On a charge of conspiracy to commit a specified offence of dishonesty, the defendant may be guilty of the offence whether or not he became a party to the conspiracy in England and Wales, and whether or not any act or omission or other event in relation to the conspiracy occurred in England and Wales: see the Criminal Justice Act 1993 s 3(2); and PARA 362 post. For these purposes, a person may be so guilty whether or not he was a British citizen at any material time, or was in England and Wales at any such time: see s 3(1); and PARA 362 post.

## **UPDATE**

### **67 Statutory conspiracy**

NOTE 7--An agreement to aid and abet an offence is not in law capable of constituting a criminal conspiracy under s 1(1): *R v Kenning* [2008] EWCA Crim 1534, [2008] 2 Cr App Rep 451, [2008] All ER (D) 317 (Jun).

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**68. Statutory conspiracy to commit offences outside the United Kingdom which would not be triable in England and Wales.**

The statutory provisions relating to conspiracy<sup>1</sup> also have effect<sup>2</sup> in relation to an agreement<sup>3</sup> where:

- 20 (1) the pursuit of the agreed course of conduct would at some stage involve an act by one or more of the parties<sup>4</sup>, or the happening of some other event<sup>5</sup>, intended to take place in a country or territory outside the United Kingdom<sup>6</sup>;
- 21 (2) that act or other event constitutes an offence under the law in force in that country or territory<sup>7</sup>;
- 22 (3) the agreement would fall within the statutory requirements for establishing conspiracy<sup>8</sup> as an agreement relating to the commission of an offence<sup>9</sup> but for the fact that the offence would not be an offence triable in England and Wales if committed in accordance with the parties' intentions<sup>10</sup>; and
- 23 (4) a party to the agreement, or a party's agent, did anything in England and Wales<sup>11</sup> in relation to the agreement before its formation<sup>12</sup>; or a party to the agreement became a party in England and Wales (by joining it either in person or through an agent)<sup>13</sup>; or a party to the agreement, or a party's agent, did or omitted anything in England and Wales in pursuance of the agreement<sup>14</sup>.

In any proceedings in respect of an offence triable by virtue of these provisions it is immaterial to guilt whether or not the defendant was a British citizen at the time of any act or other event proof of which is required for conviction of the offence<sup>15</sup>.

1 Ie the Criminal Law Act 1977 Pt 1 (ss 1-5) (as amended).

2 Ie as they have effect in relation to an agreement falling within *ibid* s 1(1) (as substituted) (see PARA 67 ante).

3 Nothing in these provisions applies to an agreement entered into before 4 September 1998 (which is the day on which the Criminal Justice (Terrorism and Conspiracy) Act 1998 was passed, ie received the Royal Assent) (Criminal Law Act 1977 s 1A(14)(a) (s 1A added by the Criminal Justice (Terrorism and Conspiracy) Act 1998 s 5(1))) or imposes criminal liability on any person acting on behalf of, or holding office under, the Crown (Criminal Law Act 1977 s 1A(14)(b) (as so added)).

4 *Ibid* s 1A(1), (2)(a), (13) (as added: see note 3 *supra*).

5 *Ibid* s 1A(2)(b) (as added: see note 3 *supra*).

6 *Ibid* s 1A(2) (as added: see note 3 *supra*). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

7 *Ibid* s 1A(3) (as added: see note 3 *supra*). Conduct punishable under the law in force in any country or territory is an offence under that law for these purposes however it is described in that law: s 1A(7) (as so added). In general, this requirement is to be taken to be satisfied unless, not later than rules of court may provide, the defence serves on the prosecution a notice: (1) stating that, on the facts as alleged with respect to the agreed course of conduct, the condition is not in its opinion satisfied (s 1A(8)(a) (as so added)); (2) showing the grounds for that opinion (s 1A(8)(b) (as so added)); and (3) requiring the prosecution to show that it is satisfied (s 1A(8)(c) (as so added)), although the court may permit the defence to require the prosecution to

show that this requirement is satisfied without the prior service of such a notice (s 1A(9) (as so added)). In the Crown Court, the question whether this requirement is satisfied is decided by the judge alone, and must be treated as a question of law for the purposes of the Criminal Justice Act 1987 s 9(3) (as amended) (preparatory hearing in fraud cases: see PARA 1253 post) (Criminal Law Act 1977 s 1A(10)(a) (as so added)) and the Criminal Procedure and Investigations Act 1996 s 31(3) (as amended) (preparatory hearing in other cases: see PARA 1253 post) (Criminal Law Act 1977 s 1A(10)(a) (as so added)). As to rules of court see PARA 65 note 1 ante.

8     Ie the provisions of *ibid* s 1(1) (as substituted) (see PARA 67 ante).

9     For the meaning of 'offence' see PARA 67 note 2 ante. In the application of *ibid* Pt 1 (ss 1-5) (as amended) to an agreement in the case of which each of the conditions set out in the text is satisfied, a reference to an offence is to be read as a reference to what would be the offence in question but for the fact that it is not an offence triable in England and Wales: s 1A(6) (as added: see note 3 *supra*).

10    *Ibid* s 1A(4) (as added: see note 3 *supra*).

11    Any act done by means of a message (however communicated) is to be treated for these purposes as done in England and Wales if the message is sent or received in England and Wales: *ibid* s 1A(11) (as added: see note 3 *supra*).

12    *Ibid* s 1A(5)(a) (as added: see note 3 *supra*).

13    *Ibid* s 1A(5)(b) (as added: see note 3 *supra*).

14    *Ibid* s 1A(5)(c) (as added: see note 3 *supra*).

15    *Ibid* s 1A(12) (as added: see note 3 *supra*).

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## **69. The mental element in statutory conspiracy.**

A person cannot be convicted of statutory conspiracy unless he and at least one other party to the agreement satisfy certain requirements<sup>1</sup>. Mens rea for statutory conspiracy<sup>2</sup> requires proof of an intention that the requisite course of conduct be pursued and that the substantive offence or offences which their agreed course of conduct will (or would) necessarily involve, or which it will (or would) involve, will be committed<sup>3</sup>. It follows that it is no defence for the defendant to plead that the intended course of conduct could not in fact have been pursued.

In addition, where a substantive offence which it is alleged that the defendant conspired to commit depends on the existence of a specified fact or circumstance, it must be proved that the defendant intended or knew that circumstance must or will exist when the conduct constituting the offence is to take place<sup>4</sup>. Where liability for any offence<sup>5</sup> may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person is nevertheless not guilty of conspiracy to commit that offence unless he and at least one other party to the agreement intend or know that that fact or circumstance must or will exist at the time when the conduct constituting the offence is to take place<sup>6</sup>.

1 This is implicit in the wording of the Criminal Law Act 1977 s 1(1) (as substituted) (see PARA 67 ante) and explicit in s 1(2) (see the text and notes 5-6 infra).

2 See under ibid s 1(1) (as substituted) (see PARA 67 ante) and s 1A (as added) (see PARA 68 ante).

3 See ibid s 1(1) (as substituted); and PARA 67 ante. In *R v Anderson* [1986] AC 27, 81 Cr App Rep 253, HL, it was held that such an intention need not be proved against an individual defendant. However, this decision has been overlooked or ignored in a number of subsequent decisions where it has been held that an intention that an agreement be carried out is required on the part of a conspirator: *R v Edwards* [1991] Crim LR 45, CA; *R v Ashton* [1992] Crim LR 667, CA; *R v Harvey*, *R v Williams* [1999] Crim LR 70, CA. See also *R v McPhillips* [1989] NI 360, NI CA; *Yip Chiu-cheung v R* [1995] 1 AC 111, 99 Cr App Rep 406, PC. Note *R v Siracusa* (1989) 90 Cr App Rep 340 at 350, CA, per O'Connor LJ ('the mens rea sufficient to support the commission of a substantive offence will not necessarily be sufficient to support a charge of conspiracy to commit that offence. An intent to cause grievous bodily harm is sufficient to support the charge of murder, but is not sufficient to support a charge of conspiracy to murder or of attempt to murder').

4 For the application of the present requirement in respect of conspiracies relating to the importation of various types of prohibited goods see *R v Siracusa* (1989) 90 Cr App Rep 340, CA; *R v Broad* [1997] Crim LR 666, CA; *R v Taylor* [2001] EWCA Crim 1044, [2002] Crim LR 205. It has been held that a defendant could not be convicted of a statutory conspiracy to contravene money-laundering legislation if he entered into an agreement to convert property in respect of which he had reasonable grounds to suspect and did in fact suspect but did not actually know was the proceeds of crime: *R v Saik* [2006] UKHL 18, [2006] 2 WLR 993; and see *R v Ramzan*; *R v Israel*; *R v Vaikilipour* [2006] All ER (D) 318 (Jul), CA.

5 For the meaning of 'offence' see PARA 67 note 2 ante; and see also PARA 68 note 9 ante.

6 Criminal Law Act 1977 s 1(2).

## **UPDATE**

### **69 The mental element in statutory conspiracy**

NOTE 4--See *DPP of Mauritius v Hurnam* [2007] UKPC 24, [2007] 1 WLR 1582 (obstruction of police investigation was the intended and foreseeable object of acting to exonerate suspect).

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## **70. Restrictions on the institution of proceedings.**

Proceedings for conspiracy<sup>1</sup> to commit any offence<sup>2</sup> or offences may not be instituted against any person except by or with the consent of the Director of Public Prosecutions if the offence or, as the case may be, each of the offences in question is a summary offence<sup>3</sup>. Proceedings for a conspiracy to commit an offence<sup>4</sup> outside the United Kingdom<sup>5</sup> may not be instituted except by or with the consent of the Attorney General<sup>6</sup>.

Any prohibition by or under any enactment on the institution of proceedings for any offence which is not a summary offence otherwise than by, or on behalf or with the consent of, the Director of Public Prosecutions or any other person applies also in relation to proceedings for conspiracy to commit that offence<sup>7</sup>.

Where an offence has been committed in pursuance of any agreement<sup>8</sup> and proceedings may not be instituted for that offence because any time limit applicable to the institution of any such proceedings has expired<sup>9</sup>, proceedings for conspiracy to commit that offence may not be instituted against any person on the basis of that agreement<sup>10</sup>.

1    Ie under the Criminal Law Act 1977 s 1 (as amended) (see PARA 67 ante).

2    For the meaning of 'offence' see PARA 67 note 2 ante.

3    Criminal Law Act 1977 s 4(1). As to the effect of this limitation see PARA 1071 post. In relation to the institution of proceedings under s 1 (as amended) for conspiracy to commit either an offence which is subject to a prohibition by or under any enactment on the institution of proceedings otherwise than by, or on behalf or with the consent of, the Attorney General (s 4(2)(a)), or two or more offences of which at least one is subject to such a prohibition (s 4(2)(b)), s 4(1) has effect with the substitution of a reference to the Attorney General for the reference to the Director of Public Prosecutions. As to the meaning of 'the institution of proceedings' see PARA 1071 note 8 post. As to consent generally see PARA 1071 post. As to proof of consents to prosecutions see PARA 1469 post. Consent to a prosecution for a substantive offence does not extend to a prosecution for conspiracy to commit that offence: *R v Pearce* (1981) 72 Cr App Rep 295, CA.

4    For the meaning of 'offence' in the context of the Criminal Law Act 1977 s 1A (as added) see PARA 67 note 2 ante; and see also PARA 68 note 9 ante.

5    Ie an offence triable by virtue of *ibid* s 1A (as added) (see PARA 68 ante). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

6    *Ibid* s 4(5) (s 4(5)-(7) added by the Criminal Justice (Terrorism and Conspiracy) Act 1998 s 5(2)). The Secretary of State may by order provide that the Criminal Law Act 1977 s 4(5) (as added) does not apply, or does not apply to any case of a description specified in the order: s 4(6) (as so added). An order under s 4(6) (as added) must be made by statutory instrument (s 4(7)(a) (as so added)) and may not be made unless a draft has been laid before, and approved by resolution of, each House of Parliament (s 4(7)(b) (as so added)). At the date at which this volume states the law no such order had been made.

7    *Ibid* s 4(3).

8    *Ibid* s 4(4)(a).

9    *Ibid* s 4(4)(b).

10   *Ibid* s 4(4).





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## **71. Penalties for statutory conspiracy.**

A person guilty<sup>1</sup> of conspiracy to commit any offence<sup>2</sup> or offences is liable on conviction on indictment:

- 24 (1) where the relevant offence or any of the relevant offences<sup>3</sup> is murder or any other offence for which the sentence is fixed by law<sup>4</sup>, or an offence for which a sentence extending to imprisonment for life is provided<sup>5</sup>, or an indictable offence punishable with imprisonment for which no maximum term of imprisonment is provided<sup>6</sup>, to imprisonment for life<sup>7</sup>;
- 25 (2) where in a case other than one to which head (1) above applies the relevant offence or any of the relevant offences is punishable with imprisonment, to imprisonment for a term not exceeding the maximum term<sup>8</sup> provided for that offence or (where more than one such offence is in question)<sup>9</sup> for any of those offences<sup>10</sup>; or
- 26 (3) in any other case, to a fine<sup>11</sup>.

1 Ie by virtue of the Criminal Law Act 1977 s 1 (as amended) or s 1A (as added): see PARAS 67, 68 ante.

2 For the meaning of 'offence' see PARA 67 note 2 ante; and see also PARA 68 note 9 ante.

3 Ie the offence or offences in question.

4 Criminal Law Act 1977 s 3(2)(a). As to sentences fixed by law see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 15.

5 Ibid s 3(2)(b).

6 Ibid s 3(2)(c). An indictable offence at common law not subject to any specific penalty is punishable by fine and imprisonment and the term of imprisonment is not fixed; but in the case of statutory offences, where the sentence is not limited to a specified term or expressed to extend to imprisonment for life, it is fixed at two years by virtue of the Powers of Criminal Courts Act (Sentencing) Act 2000 s 7(3) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17). Such offences do not therefore fall within the Criminal Law Act 1977 s 3(2) (c).

7 Ibid s 3(1)(a), (2). In a case falling within s 3(2), (3) (ie within heads (1), (2) in the text) a person is liable to imprisonment for a term related in accordance with those provisions to the gravity of the offence or offences in question: s 3(1)(a). See also *R v Ashbee* [1989] 1 WLR 509, 88 Cr App Rep 357, CA.

8 In the case of an offence triable either way the references in head (2) in the text to the maximum term provided for that offence are references to the maximum term so provided on indictment: Criminal Law Act 1977 s 3(3).

9 Ie taking the longer or the longest term as the limit for these purposes where the terms provided differ.

10 Criminal Law Act 1977 s 3(1)(a), (3). See note 7 supra.

11 Ibid s 3(1)(b). Section 3(1)(b) is not to be taken as prejudicing the application of the Criminal Justice Act 2003 s 163 (general power of the court to fine offenders convicted on indictment: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139) in a case falling within the Criminal Law Act 1977 s 3(2) or (3) (see heads (1), (2) in the text): s 3(1) (amended by the Criminal Justice Act 2003 s 304, Sch 32 para 24). The maximum punishment in respect of 'small value criminal damage', which is lower than for criminal damage in general (see

PARA 333 et seq post), does not apply to a charge of conspiracy to commit such criminal damage; the normal maximum for conspiracy applies: *R v Ward* [1997] 1 Cr App Rep (S) 442, CA.

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## **C. COMMON LAW CONSPIRACY**

### **72. In general.**

A person who enters into an agreement with any other person or persons to defraud<sup>1</sup>, to corrupt public morals<sup>2</sup> or to outrage public decency<sup>3</sup> is guilty of an offence at common law<sup>4</sup>; but an agreement to corrupt public morals or outrage public decency is a common law conspiracy only where it would not amount to or involve the commission of an offence if carried out by a single person otherwise than in pursuance of such an agreement<sup>5</sup>. Subject to these exceptions, the offence of conspiracy at common law has been abolished<sup>6</sup>.

A person is not guilty of conspiracy at common law where the only parties to the agreement are husband and wife (or, presumably, civil partners)<sup>7</sup>; but a husband and wife (or civil partners) may be guilty as co-conspirators where others are involved<sup>8</sup>.

1 See PARA 73 post.

2 See PARA 74 post.

3 See PARA 75 post.

4 As to agreements made abroad for such a purpose see PARA 67 note 19 ante.

5 See the Criminal Law Act 1977 s 5(3); and PARAS 74-75 post.

6 Ibid s 5(1).

7 1 Hawk c 27 s 8; *Mawji v R* [1957] AC 126, 41 Cr App Rep 69, PC. This rule results from the fiction that husband and wife are one person: see *Kowbel v R* [1954] 4 DLR 337, Can SC.

8 See the cases cited in PARA 67 note 13 ante.

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### 73. Conspiracy to defraud.

A person who agrees with one or more other persons by dishonesty<sup>1</sup> either to deprive a person of something which is his or to which he would be or might be entitled or to injure some proprietary right of a person<sup>2</sup> is guilty of conspiracy to defraud<sup>3</sup> at common law<sup>4</sup>. Causing economic loss or prejudice need not be the purpose of the parties, but a defendant must have foreseen that such loss or prejudice would or might result<sup>5</sup>.

In addition, where a person agrees with one or more other persons to bring about a situation which would or might deceive a public official performing public duties<sup>6</sup> to act contrary to such a duty, there is a conspiracy to defraud at common law, even though there is no risk of causing economic loss to anyone or of prejudicing his economic interests<sup>7</sup>.

A person may be guilty of conspiracy to defraud if:

- 27 (1) a party to the agreement constituting the conspiracy, or a party's agent, did anything in England and Wales in relation to the agreement before its formation<sup>8</sup>;
- 28 (2) a party to it became a party in England and Wales (by joining it either in person or through an agent)<sup>9</sup>; or
- 29 (3) a party to it, or a party's agent, did or omitted anything in England and Wales in pursuance of it<sup>10</sup>,

and the conspiracy would be triable in England and Wales but for the fraud which the parties to it had in view not being intended to take place in England and Wales<sup>11</sup>. A person is, however, guilty of an offence triable by virtue of this provision only if the pursuit of the agreed course of conduct would at some stage involve either an act or omission by one or more of the parties<sup>12</sup> or the happening of some other event<sup>13</sup>, constituting an offence under the law in force where the act, omission or other event was intended to take place<sup>14</sup>.

If a person agrees with any other person or persons that a course of conduct is to be pursued<sup>15</sup> and that course will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions<sup>16</sup>, the fact that it will do so does not preclude a charge of conspiracy to defraud being brought against any of them in respect of the agreement<sup>17</sup>.

1 'Dishonesty' in conspiracy to defraud bears the same meaning as under the Theft Acts 1968 and 1978 (see PARA 283 post): see *R v Ghosh* [1982] QB 1053, 75 Cr App Rep 154, CA.

2 As to whether the victim may be a stranger outside the contemplation of the parties to the conspiracy see *R v Hollinshead* [1985] AC 975, 81 Cr App Rep 365, HL.

3 For the meaning of 'defraud' see *Welham v DPP* [1961] AC 103 at 123-124, 44 Cr App Rep 124 at 141-142, HL, per Lord Radcliffe, and at 133 and 155 per Lord Denning. See also *Scott v Metropolitan Police Comr* [1975] AC 819, 60 Cr App Rep 124, HL; *R v Terry* [1984] AC 374, 78 Cr App Rep 101, HL. It is not duplicious for a single count of conspiracy to defraud to be founded on many similar fraudulent transactions; and furthermore so long as there is a single agreement to defraud, the conspirators need not all be involved in every transaction: see *R v Mba* [2006] All ER (D) 73 (Jan), CA.

4 *Scott v Metropolitan Police Comr* [1975] AC 819, 60 Cr App Rep 124, HL. The Criminal Law Act 1977 s 5(1) (abolition of offence of conspiracy at common law: see PARA 72 ante) does not affect the offence of conspiracy to defraud: s 5(2) (amended by the Criminal Justice Act 1987 s 12(2)).

See also *R v Clucas* [1949] 2 KB 226, 33 Cr App Rep 136, CCA; *R v Sinclair* [1968] 3 All ER 241, 52 Cr App Rep 618, CA; *R v Allsop* (1976) 64 Cr App Rep 29, CA; *Tarling v Government of the Republic of Singapore* (1978) 70 Cr App Rep 77, HL; *R v Hollinshead* [1985] AC 975, 80 Cr App Rep 285, HL; *Wai Yu-tsang v R* [1992] 1 AC 269, 94 Cr App Rep 264, PC; *Adams v R* [1995] 1 WLR 52, [1995] 2 Cr App Rep 295, PC. It was decided in *R v Zempel*, *R v Melik* (1985) 81 Cr App Rep 279, CA, that an agreement dishonestly and temporarily to delay payment of a debt is not a conspiracy to defraud, but such an agreement clearly falls within the ambit of *Scott v Metropolitan Police Comr* supra and the decision in *R v Zempel*, *R v Melik* must therefore be regarded as wrong. As to conspiracies to defraud by officers of companies see COMPANIES vol 14 (2009) PARA 314.

5 *R v Allsop* (1976) 64 Cr App Rep 29, CA; *Wai-Yu-tsang v R* [1992] 1 AC 269, 94 Cr App Rep 264, PC. Contrast *A-G's Reference (No 1 of 1982)* [1983] QB 751, [1983] 2 All ER 721, CA (causing of economic loss or prejudice must be defendant's purpose).

6 This phrase does not include bank managers and the like: *DPP v Withers* [1975] AC 842 at 877-878, 60 Cr App Rep 85 at 106-107, HL, per Lord Kilbrandon. See also *R v Moses*, *R v Ansbro* [1991] Crim LR 617, CA. In *Wai Yu-tsang v R* [1992] 1 AC 269, 94 Cr App Rep 264, the Privy Council advised that this type of conspiracy to defraud is not limited to public officials acting in pursuance of their duties.

7 *Board of Trade v Owen* [1957] AC 602 at 622, 41 Cr App Rep 11 at 40 per Lord Tucker; *Welham v DPP* [1961] AC 103, 44 Cr App Rep 124; *DPP v Withers* [1975] AC 842 at 872-873, 60 Cr App Rep 85 at 102-103 per Lord Simon of Glaisdale, and at 877 and 106-107 per Lord Kilbrandon; *Wai Yu-tsang v R* [1992] 1 AC 269, 94 Cr App Rep 264, PC. The cases concerned with persons performing public duties, in which it is not necessary to show an intention on the part of the deceiver to inflict pecuniary or economic harm to convict a person of intention to defraud, are not to be regarded as a special category, but rather as exemplifying the general principle that conspiracies to defraud are not restricted to cases of intention to cause the victim economic loss: *Wai Yu-tsang v R* supra at 270 and 279 (disapproving dictum of Lord Diplock in *Scott v Metropolitan Police Comr* [1975] AC 819 at 840-841, 60 Cr App Rep 124 at 131, HL; and approving dictum of Lord Radcliffe in *Welham v DPP* [1961] AC 103 at 124, 44 Cr App Rep 124 at 141-142, HL); applied in *Adams v R* [1995] 1 WLR 52, [1995] 2 Cr App Rep 295, PC.

On a charge of conspiracy to defraud the defendant may be guilty of the offence whether or not he became a party to the conspiracy in England and Wales, and whether or not any act or omission or other event in relation to the conspiracy occurred in England and Wales: see the Criminal Justice Act 1993 s 3(2); and PARA 362 post. For these purposes, a person may be so guilty whether or not he was a British citizen at any material time, or was in England and Wales at any such time: see s 3(1); and PARA 362 post.

8 Ibid s 5(3)(a).

9 Ibid s 5(3)(b).

10 Ibid s 5(3)(c).

11 Ibid s 5(3).

12 Ibid s 6(1)(a).

13 Ibid s 6(1)(b).

14 Ibid s 6(1) (amended by the Criminal Justice (Terrorism and Conspiracy) Act 1998 s 9(1), (2), Sch 1 para 7(2), Sch 2 Pt II). A person may be so guilty whether or not he was a British citizen at any material time, or was in England and Wales at any such time: Criminal Justice Act 1993 s 3(1). Conduct punishable under the law in force in any place is an offence under that law for these purposes however it is described in that law: s 6(3). In general, a condition specified in s 6(1) is to be taken to be satisfied unless, not later than rules of court may provide, the defence serves on the prosecution a notice: (1) stating that, on the facts as alleged with respect to the relevant conduct, the condition is not in its opinion satisfied (s 6(4)(a)); (2) showing the grounds for that opinion (s 6(4)(b)); and (3) requiring the prosecution to show that the condition is satisfied (s 6(4)(c)). However, the court, if it thinks fit, may permit the defence to require the prosecution to show that the condition is satisfied without the prior service of such a notice: s 6(6). In the Crown Court, the question whether the condition is satisfied must be decided by the judge alone: s 6(7). 'The relevant conduct' means, where the condition in s 6(1) (as amended) is in question, the agreed course of conduct: s 6(5)(a). As to rules of court see PARA 65 note 1 ante.

15 Criminal Justice Act 1987 s 12(1)(a).

16 Ibid s 12(1)(b).

17 Ibid s 12(1). As to the penalty for conspiracy to defraud see PARA 77 post.

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#### **74. Conspiracy to corrupt public morals.**

A person who enters into an agreement with any other person or persons to engage in conduct<sup>1</sup> which tends to corrupt public morals<sup>2</sup>, but which would not amount to or involve the commission of an offence<sup>3</sup> if carried out by a single person otherwise than in pursuance of an agreement, is guilty of conspiracy at common law<sup>4</sup>.

No person may, however, be proceeded against for an offence at common law of conspiring to corrupt public morals in respect of an agreement to present or give a performance of a play, or to cause anything to be said or done in the course of such a performance<sup>5</sup>.

1 See eg *Shaw v DPP* [1962] AC 220, 45 Cr App Rep 113, HL (publication of magazine containing advertisements by prostitutes). Other examples of such conduct might be publicly advocating and encouraging, by pamphlet and advertisement, homosexual practices not in themselves illegal, encouraging and promoting lesbianism, or encouraging 'fornication and adultery': *Shaw v DPP* supra at 268 and 149 per Viscount Simonds, at 285 and at 169 per Lord Tucker and at 294 and at 179, 180 per Lord Hodson. See also *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, [1972] 2 All ER 898, HL (publication of advertisements inducing readers to meet advertisers for the purpose of homosexual practices and encouraging readers to indulge in such practices). 'Corrupt' is a strong word and 'corrupt public morals' means more than 'lead morally astray': *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435 at 456, 490-491, [1972] 2 All ER 898 at 904, 932, HL, per Lord Reid, and at 490-491 and 932 per Lord Simon of Glaisdale. 'Corrupt' is synonymous with 'deprave' (*Kneller (Publishing, Printing and Promotions) Ltd v DPP* supra at 456 and 904 per Lord Reid), and what is required is conduct which 'a jury might find to be destructive of the very fabric of society' (at 490-491 and 932 per Lord Simon of Glaisdale). Conspiracy to corrupt public morals is something of a misnomer: 'It really means to corrupt the morals of such members of the public as may be influenced by the matter published by the accused': *Kneller (Publishing, Printing and Promotions) Ltd v DPP* supra at 456 and 904 per Lord Reid. It is doubtful whether a jury would find that there was a conspiracy to corrupt public morals if a case similar to *Shaw v DPP* supra or *Kneller (Publishing, Printing and Promotions) Ltd v DPP* supra came before it today.

2 Whether or not conduct 'tends to corrupt public morals' is a question of fact for the jury: *Shaw v DPP* [1962] AC 220 at 269, 45 Cr App Rep 113 at 150, HL, per Viscount Simonds, at 289 and 173-174 per Lord Tucker, at 292 and 177-178 per Lord Morris of Borth-y-Gest, and at 294 and 180 per Lord Hodson.

3 Is an agreement which would not constitute a statutory conspiracy: see PARA 67 ante.

4 Criminal Law Act 1977 s 5(3). Section 5(1) (abolition of offence of conspiracy at common law: see PARA 72 ante) does not affect the offence of conspiracy to corrupt public morals: s 5(3). See also *Shaw v DPP* [1962] AC 220, 45 Cr App Rep 113, HL; *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, 56 Cr App Rep 633, HL. As to parties to the agreement see PARA 66 ante; and as to the penalty see PARA 77 post.

5 See the Theatres Act 1968 s 2(4); and LICENSING AND GAMBLING vol 67 (2008) PARA 246. A similar restriction applies in the case of an agreement to give a film exhibition (see PARA 747 note 8 post) or to cause a programme to be included in a programme service or to cause anything to be said or done in the course of a programme which is so included (see PARA 747 note 2 post).



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## **75. Conspiracy to outrage public decency.**

A person who enters into an agreement with any other person or persons to engage in conduct<sup>1</sup> which tends to outrage public decency<sup>2</sup>, but which would not amount to or involve the commission of an offence<sup>3</sup> if carried out by a single person otherwise than in pursuance of an agreement, is guilty of conspiracy at common law<sup>4</sup>. No person may, however, be proceeded against for an offence at common law of conspiring to do any act contrary to public morals or decency in respect of an agreement to present or give a performance of a play, or to cause anything to be said or done in the course of such a performance<sup>5</sup>.

1 The insertion of outrageously indecent matter on the inside pages of a book or magazine which is sold in public or is capable of being seen by more than one person may constitute such conduct: *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, 56 Cr App Rep 633, HL, per Lord Kilbrandon, Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale (Lord Diplock and Lord Reid dissenting).

2 "Outrage" is a very strong word: and 'outraging public decency' goes considerably beyond offending the susceptibilities of, or even shocking, reasonable people . . . Recognised minimum standards of decency . . . are likely to vary from time to time . . . Public decency must be viewed as a whole . . . the jury should be invited, where appropriate, to remember that they live in a plural society, with a tradition of tolerance towards minorities, and this atmosphere of toleration is itself part of public decency': *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435 at 495, 56 Cr App Rep 633 at 698, HL, per Lord Simon of Glaisdale.

3 Is an agreement which would not constitute a statutory conspiracy: see PARA 67 ante. As to the offence of outraging public decency see PARA 764 post.

4 Criminal Law Act 1977 s 5(3). Section 5(1) (abolition of offence of conspiracy at common law: see PARA 72 ante) does not affect the offence of conspiracy to outrage public decency (see PARA 764 post): s 5(3). There can be no real doubt that the offence of outraging public decency is coterminous with outraging public decency as the object of a conspiracy, in which case a conspiracy to outrage public decency will always be a statutory conspiracy and the effect of s 5(3) is to abolish the common law offence of conspiracy to outrage public decency. As to parties to the agreement see PARA 66 ante; and as to the penalty see PARA 77 post.

5 See the Theatres Act 1968 s 2(4); and LICENSING AND GAMBLING vol 67 (2008) PARA 246. A similar restriction applies in the case of an agreement to give a film exhibition (see PARA 747 note 8 post) or to cause a programme to be included in a programme service or to cause anything to be said or done in the course of a programme which is so included (see PARA 747 note 2 post).

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## **76. Impossibility in common law conspiracy.**

Where the object of the agreement is at the time of the agreement capable of being achieved but cannot actually be achieved because of some supervening event or because the proposed means are insufficient, there can be a conviction for conspiracy: however, in any other case of impossibility, whether physical or legal, there cannot be a conviction for common law conspiracy<sup>1</sup>.

1 *DPP v Nock, DPP v Alford* [1978] AC 979, [1978] 2 All ER 654, HL.

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## **77. Penalties for common law conspiracy.**

A person guilty of conspiracy to defraud<sup>1</sup> is liable on conviction on indictment to imprisonment for a term not exceeding ten years or a fine, or to both<sup>2</sup>. A person guilty of conspiracy to corrupt public morals<sup>3</sup> or to outrage public decency<sup>4</sup> is liable on conviction on indictment to imprisonment or a fine, or to both at the discretion of the court<sup>5</sup>.

1 See PARA 73 ante.

2 Criminal Justice Act 1987 s 12(3).

3 See PARA 74 ante.

4 See PARA 75 ante.

5 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

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## **D. INDICTMENT IN CONSPIRACY**

### **78. Indictment in conspiracy.**

Where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder, or, failing justification, to elect whether to proceed on the substantive or on the conspiracy counts; joinder is justified if the judge considers that the interests of justice demand it<sup>1</sup>.

There are no rigid rules governing the inclusion of a conspiracy count in an indictment with other charges<sup>2</sup>. The guiding principles are:

- 30 (1) a conspiracy charge should not be included where it adds nothing to an effective and sufficient charge of a substantive offence<sup>3</sup>;
- 31 (2) all offences charged should not only be supported by the evidence but should also represent the criminality disclosed by the evidence<sup>4</sup>;
- 32 (3) only those charges should be included which make for simplification of the issues and avoid complexity<sup>5</sup>; and
- 33 (4) a count for conspiracy should not be included if it will lead to unfairness to the defence<sup>6</sup>.

A single count which charges what are distinct though overlapping conspiracies is bad for duplicity<sup>7</sup>.

In an indictment for conspiracy to defraud it is unnecessary to specify the particular overt acts of the conspiracy so long as the defendants understand the allegations against them<sup>8</sup>; but the particulars should be such as to enable the defendants and the judge to know precisely the prosecution's case<sup>9</sup>.

1 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.34.3, CA. The updated version of these directions is available on-line at Her Majesty's Courts Service website.

2 *R v Jones* (1974) 59 Cr App Rep 120, CA.

3 *Verrier v DPP* [1967] 2 AC 195, 50 Cr App Rep 315, HL; *R v Cooper and Compton* [1947] 2 All ER 701, 32 Cr App Rep 102, CCA; *R v Boulton* (1871) 12 Cox CC 87; *R v Luberger* (1926) 135 LT 414, 19 Cr App Rep 133, CCA. See also *R v Ward* [1997] 1 Cr App Rep (S) 442 (agreement in question more wicked overall than conduct agreed to; conspiracy charge appropriate).

4 *R v Jones* (1974) 59 Cr App Rep 120, CA. Hence the inclusion of a charge of conspiracy is proper where the conspiracy is a distinct and more serious crime: see *Verrier v DPP* [1967] 2 AC 195, 50 Cr App Rep 315, HL.

5 *R v Jones* (1974) 59 Cr App Rep 120, CA; *Verrier v DPP* [1967] 2 AC 195, 50 Cr App Rep 315, HL; *R v Cooper*, *R v Compton* [1947] 2 All ER 701, 32 Cr App Rep 102, CCA.

6 *R v Jones* (1974) 59 Cr App Rep 120, CA. Adding what may be called a 'rolled up' conspiracy charge is a wrong practice: *R v Griffiths* [1966] 1 QB 589, 49 Cr App Rep 279, CCA; cf *R v Hammersley* (1958) 42 Cr App Rep 207, CCA (one conspiracy consisting of more than one overt act); *R v Greenfield* [1973] 3 All ER 1050, 57 Cr App Rep 849, CA.

7 *R v West* [1948] 1 KB 709, 32 Cr App Rep 152, CCA; *R v Davey* [1960] 3 All ER 533, 45 Cr App Rep 11, CCA; cf *R v Hammersley* (1958) 42 Cr App Rep 207, CCA (one conspiracy consisting of more than one overt act); *R v Greenfield* [1973] 3 All ER 1050, 57 Cr App Rep 849, CA. As to duplicity see PARA 1220 post.

8 *R v Addis* [1965] 2 All ER 794n, 49 Cr App Rep 95, CCA; *R v Churchill* [1965] 2 All ER 793, 49 Cr App Rep 317 (affd in *R v Churchill (No 2)* [1967] 1 QB 190 at 195-196, [1966] 2 All ER 215 at 217-218, CCA; revsd on other grounds sub nom *Churchill v Walton* [1967] 2 AC 224, 51 Cr App Rep 212, HL).

9 See *R v Landy* [1981] 1 All ER 1172, 72 Cr App Rep 237, CA; *R v Bennett* (1999) unreported, CA; *R v K* [2004] EWCA Crim 2685, [2005] 1 Cr App Rep 408. Further particulars should be given where it is necessary for defendants to have further general information as to the nature of the charge and to stop the prosecution shifting its ground during the case without the leave of the judge and the making of an amendment: *R v Landy* supra; and see also *R v Hancock*, *R v Warner*, *R v Michael* [1996] 2 Cr App Rep 554, CA; *R v K* supra. Such further particulars form no part of the ingredients of the offence and on these the jury does not have to be unanimous: *R v Hancock*, *R v Warner*, *R v Michael* supra; and see *R v K* supra. The archaic words 'and by divers other false and fraudulent devices' should not be used: *R v Landy* supra.

## UPDATE

### 78 Indictment in conspiracy

NOTE 1--As to settling the indictment, see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 IV.34 (substituted by *Practice Direction (Amendment No 15 to the Consolidated Criminal Practice Direction)* [2007] All ER (D) 520 (Mar), CA; and amended by *Practice Direction (Amendment No 17 to the Consolidated Criminal Practice Direction) (Arraignment in Two Stage Trials)* [2007] All ER (D) 16 (Dec), CA).

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### (iii) Attempt

#### 79. Attempting to commit an offence.

A person is guilty of attempting to commit an offence if, with intent<sup>1</sup> to commit any offence which, if it were completed, would be triable in England and Wales as an indictable offence<sup>2</sup>, he does an act which is more than merely preparatory to the commission of the offence<sup>3</sup>.

A person may be guilty of attempting to commit such an offence even though the facts are such that the commission of the offence is impossible<sup>4</sup>.

A person is guilty of an attempt under a special statutory provision<sup>5</sup> if, with intent<sup>6</sup> to commit the relevant full offence, he does an act which is more than merely preparatory to the commission of that offence<sup>7</sup>; and a person may be guilty of an attempt under a special statutory provision even though the facts are such that the commission of the relevant full offence is impossible<sup>8</sup>.

1 A person is regarded as having had an intent to commit a particular offence for these purposes in any case where: (1) apart from these provisions his intention would not be regarded as having amounted to an intent to commit an offence (Criminal Attempts Act 1981 s 1(3)(a)); but (2) if the facts of the case had been as he believed them to be, his intention would be so regarded (s 1(3)(b)). As to the mental element in attempt see PARA 81 post.

2 I.e. an offence to which *ibid* s 1 (as amended) applies: s 1(1), (4). As to the meaning of 'indictable offence' see PARA 1102 note 1 post. Excluded from the offences to which s 1 applies are: (1) conspiracy at common law (see PARA 72 et seq ante) or under the Criminal Law Act 1977 s 1 (as amended) (see PARA 67 ante) or any other enactment (Criminal Attempts Act 1981 s 1(4)(a)); (2) aiding, abetting, counselling, procuring or suborning the commission of an offence (s 1(4)(b)); and (3) offences under the Criminal Law Act 1967 s 4(1) (as amended) (assisting offenders: see PARA 58 ante) or s 5(1) (as amended) (accepting or agreeing to accept consideration for not disclosing information about a relevant offence: see PARA 734 post) (Criminal Attempts Act 1981 s 1(4)(c)). Thus the Criminal Attempts Act 1981 prevented the creation of the separate offence of attempting to aid and abet the commission of a crime; but did not remove from criminal responsibility the offence of aiding and abetting an attempt to commit a crime: *R v Dunnington* [1984] QB 472, 78 Cr App Rep 171, CA. An offence of criminal damage where the value of the property destroyed or of the damage done is less than £5,000 is an 'indictable offence', notwithstanding that it has to be proceeded with as if it was a summary offence (see PARA 334 post): *R v Bristol Magistrates' Court, ex p E* [1998] 3 All ER 798, [1999] 1 WLR 390, DC.

Where a substantive offence consists of aiding, abetting, counselling or procuring an activity, such as aiding and abetting suicide (see PARA 106 post), a person who attempts to perpetrate such an offence can be convicted of an attempt to commit it: *R v McShane* (1977) 66 Cr App Rep 97, CA; *Chief Constable of Hampshire v Mace* (1986) 84 Cr App Rep 40, DC.

Where an act is done in England and Wales, and it would fall within the Criminal Attempts Act 1981 s 1(1) as more than merely preparatory to the commission of an offence under the Computer Misuse Act 1990 s 3 (see PARA 360 post) but for the fact that the offence, if completed, would not be an offence triable in England and Wales, then, subject to s 8 (as amended) (relevance of external law: see PARA 360 post), what the person doing it had in view is treated as an offence to which the Criminal Attempts Act 1981 s 1 (as amended) applies: s 1(1A), (1B) (added by the Computer Misuse Act 1990 s 7(3)).

3 Criminal Attempts Act 1981 s 1(1). On a charge of attempting to commit a specified offence of dishonesty, the defendant may be guilty of the offence whether or not the attempt was made in England and Wales, and whether or not it had an effect in England and Wales: see the Criminal Justice Act 1993 s 3(3); and PARA 362 post. A person may be guilty of attempting to commit such an offence whether or not he was a British citizen at

the material time, and whether or not he was in England and Wales at any such time: see s 3(1); and PARA 362 post.

Where an act is done in England and Wales, and it would fall within the Criminal Attempts Act 1981 s 1(1) as more than merely preparatory to the commission of a Group A offence (as to the meaning of which see the Criminal Justice Act 1988 s 1(2); and PARA 362 post) but for the fact that the offence, if completed, would not be an offence triable in England and Wales, the offence which that person had in view is treated as an offence to which the Criminal Attempts Act 1981 s 1(1) applies: s 1A(1)-(3) (s 1A added by the Criminal Justice Act 1993 s 5(2)). A person is guilty of an offence triable by virtue of the Criminal Attempts Act 1981 s 1A (as added) only if what he had in view would involve the commission of an offence under the law in force where the whole or any part of it was intended to take place: s 1A(4) (as so added); Criminal Justice Act 1993 s 6(2). Conduct punishable under the law in force in any place is an offence under that law for the purpose of s 6, however it is described in that law: s 6(3). A condition specified in s 6(2) is to be taken to be satisfied unless, not later than rules of court may provide, the defence serves on the prosecution a notice:

- 4     (1)   stating that, on the facts as alleged with respect to what the defendant had in view, the condition is not in its opinion satisfied (s 6(4)(a), (5)(b));
- 5     (2)   showing the grounds for that opinion (s 6(4)(b)); and
- 6     (3)   requiring the prosecution to show that the condition is satisfied (s 6(4)(c)).

The court, if it thinks fit, may permit the defence to require the prosecution to show that the condition is satisfied without the prior service of a notice under s 6(4): s 6(6). In the Crown Court, the question whether the condition is satisfied is to be decided by the judge alone: s 6(7). As to rules of court see PARA 65 note 1 ante.

Where a person does an act to which the Criminal Attempts Act 1981 s 1A (as added) applies, the offence which he commits is for all purposes treated as the offence of attempting to commit the relevant Group A offence: s 1A(5) (as so added).

Where, in proceedings against a person for an offence under s 1 (as amended), there is evidence sufficient in law to support a finding that he did an act falling within s 1(1), the question whether or not his act so fell is a question of fact: s 4(3). In any case in which a court may proceed to summary trial of an information charging a person with an offence and an information charging him with an offence under s 1 (as amended) of attempting to commit it or an attempt under a special statutory provision (see note 5 *infra*), the court may, without his consent, try the informations together: s 4(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

The offence of attempt at common law and any offence at common law of procuring materials for crime are abolished (s 6(1)); and references in any enactment passed before the Criminal Attempts Act 1981 which fall to be construed as references to the offence of attempt at common law are to be construed as references to the offence under s 1 (as amended) (s 6(2)). The Criminal Attempts Act 1981 was passed (ie received the Royal Assent) on 27 July 1981.

A court in England or Wales has jurisdiction over an attempt committed abroad provided that it was intended to result in the commission of an offence in England and Wales, even though no overt act takes place in England and Wales: see *R v Baxter* [1972] 1 QB 1, 55 Cr App Rep 214, CA; *DPP v Stonehouse* [1978] AC 55, 65 Cr App Rep 192, HL.

Provisions of any of the following descriptions made by or under any enactment (whenever passed) have effect with respect to an offence under the Criminal Attempts Act 1981 s 1 (as amended) of attempting to commit an offence as they have effect with respect to the offence attempted:

- 7     (a)   provisions whereby proceedings may not be instituted or carried on otherwise than by, or on behalf or with the consent of, any person, including any provisions which also make other exceptions to the prohibition (s 2(1), (2)(a));
- 8     (b)   provisions conferring power to institute proceedings (s 2(2)(b));
- 9     (c)   provisions as to the venue of proceedings (s 2(2)(c));
- 10    (d)   provisions whereby proceedings may not be instituted after the expiration of a time limit (s 2(2)(d));
- 11    (e)   provisions conferring a power of arrest or search (s 2(2)(e));
- 12    (f)   provisions conferring a power of seizure and detention of property (s 2(2)(f));

- 13 (g) provisions whereby a person may not be convicted or committed for trial on the uncorroborated evidence of one witness (including any provision requiring the evidence of not less than two credible witnesses) (s 2(2)(g));
- 14 (h) provisions conferring a power of forfeiture, including any power to deal with anything liable to be forfeited (s 2(2)(h)); and
- 15 (i) provisions whereby, if an offence committed by a body corporate is proved to have been committed with the consent or connivance of another person, that person is also guilty of an offence (s 2(2)(i)).

As from a day to be appointed head (g) supra is amended so as not to refer to committal for trial: see s 2(2)(g) (prospectively amended by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 52, Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

4 Criminal Attempts Act 1981 s 1(2). See *R v Shivpuri* [1987] AC 1, 83 Cr App Rep 178, HL (a person is guilty of an attempt if he did an act which was more than merely preparatory to the commission of the offence which he intended to commit, even if the facts were such that the actual offence was impossible), overruling *Anderton v Ryan* [1985] AC 560, 81 Cr App Rep 166, HL.

5 For these purposes, an attempt under a special statutory provision is an offence which: (1) is created by an enactment other than the Criminal Attempts Act 1981 s 1 (as amended), including an enactment passed after 27 July 1981 (s 3(2)(a)); and (2) is expressed as an offence of attempting to commit another offence ('the relevant full offence') (s 3(2)(b)). Where the full offence and the attempt are expressed in the very same provision, it depends on the exact wording of the statutory provision in question whether the attempt is 'expressed as an act of attempting to commit another offence': see *R v Bolton Justices, ex p Khan* [1999] Crim LR 912, DC. Even if it is not, so that the Criminal Attempts Act 1981 s 3 is inapplicable, the court is likely to adopt the terms of s 1 (as amended) as the basis for the approach to the attempt alleged: *R v Qadir, R v Khan* [1997] 9 Archbold News 1, CA.

6 A person is regarded as having had an intent to commit a particular offence for these purposes in any case where: (1) apart from these provisions his intention would not be regarded as having amounted to an intent to commit the relevant full offence (Criminal Attempts Act 1981 s 3(5)(a)); but (2) if the facts of the case had been as he believed them to be, his intention would be so regarded (s 3(5)(b)).

7 Ibid s 3(1), (3). Where, in proceedings against a person for an attempt under a special statutory provision, there is evidence sufficient in law to support a finding that he did an act falling within s 3(3), the question whether or not his act so fell is a question of fact: s 4(4).

Section 3(3)-(5) (see the text and notes 5-6 supra, 8 infra) have effect subject to any inconsistent provision in any other enactment: s 3(1).

8 Ibid s 3(4).

## UPDATE

### 79 Attempting to commit an offence

NOTE 4--See *R v Jones* [2007] EWCA Crim 1118, [2007] 4 All ER 97; *Police Service for Northern Ireland v MacRitchie* [2008] NICA 26 (20 June 2008, unreported).



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## 80. The actus reus of attempt.

A person is guilty of an attempt if he does an act which is more than merely preparatory to the commission of the offence which he intended to commit, even if the facts were such that commission of the actual offence was impossible<sup>1</sup>. Whether the act relied on is capable of being more than merely preparatory so as to be capable of amounting to an attempt is a question of law; and whether the act was actually more than merely preparatory is a matter of fact for the jury<sup>2</sup>.

1 See the Criminal Attempts Act 1981 s 1(1), (2); and PARA 79 ante. As to the actus reus of an offence generally see PARA 5 ante. The requirement of an act that is more than merely preparatory to the commission of the offence intended must be applied according to the plain and natural meaning of those words, and not by reference to the case law on the abolished common law offence of attempt: *R v Jones* [1990] 3 All ER 886, 91 Cr App Rep 351, CA; *R v Campbell* (1990) 93 Cr App Rep 350, CA. See also *R v Gullefer* [1990] 3 All ER 882, 91 Cr App Rep 356n, CA.

If the defendant can be said to have got as far as having embarked on the commission of the offence, there is sufficient evidence of an act more than merely preparatory to the commission of the intended offence: *R v Gullefer* supra; *R v Jones* supra; *R v Geddes* (1996) 160 JP 697, CA ('It is, we think, an accurate paraphrase of the statutory test and not an illegitimate gloss upon it to ask whether the available evidence, if accepted, could show that a defendant has done an act which shows that he has actually tried to commit the offence in question, or whether he has only got ready or put himself in a position or equipped himself to do so': per Lord Bingham CJ at 705); *R v Qadir*, *R v Khan* [1997] 9 Archbold News 1, CA. Contrast *R v Campbell* (1990) 93 Cr App Rep 350, CA (defendant arrested, armed with imitation firearm, as he approached within a yard of the door of a post office where he intended to commit a robbery; charged with attempted robbery; insufficient evidence to leave to the jury that the defendant's acts were more than merely preparatory) and *R v Geddes* supra (defendant found in boys toilet at a school; his rucksack contained lengths of string, masking tape and a knife; he was charged with attempted false imprisonment; but there was insufficient evidence to support a finding that the defendant had moved beyond mere preparation) with *R v Jones* supra (defendant pointed loaded firearm at P who managed to disarm him; defendant charged with attempted murder; sufficient evidence of more than merely preparatory act, despite fact that the safety catch was on and the defendant had not yet put his finger on the trigger and pulled it) and *R v Tosti* [1997] Crim LR 746, CA (defendants approached barn door and examined lock, having concealed oxyacetylene equipment in a nearby hedge; charged with attempted burglary; facts proved in evidence sufficient for judge to leave to the jury the question of whether the defendants' acts were or were not more than merely preparatory). See also *A-G's Reference (No 1 of 1992)* [1993] 2 All ER 190, 96 Cr App Rep 298, CA (attempted physical penetration by defendant's penis of the victim not necessary for case of attempted rape to be left to jury); *R v Patnaik* [2000] 3 Archbold News 2, CA (not a necessary threshold for attempted rape to be left to the jury that defendant, who was engaged in violently subduing victim with intent to rape her, should have gone as far as starting to undo or remove her (or his) clothing or to do some other unequivocal sexual act). In making a ruling on whether or not an act was capable of being more than merely preparatory the judge must keep in mind the essential nature of the offence attempted, ie the essential act or transaction on which it hinges and any consequence required to complete it: *R v Qadir*, *R v Khan* supra.

2 See the Criminal Attempts Act 1981 s 4(3), (4); and PARA 79 ante; *R v Gullefer* [1990] 3 All ER 882 at 884, 91 Cr App Rep 356n at 357-358, CA, per Lord Lane CJ; *R v Campbell* (1990) 93 Cr App Rep 350, CA; *R v Griffin* [1993] Crim LR 515, CA.

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### **81. The mental element in attempt.**

In order to support a charge of attempting to commit a crime, it must be shown that the defendant intended to commit the completed crime to which the charge relates<sup>1</sup>. However, although this means that it must be proved that the defendant intended to commit an act or to continue with a series of acts which, when completed, will amount to the offence allegedly attempted (assuming the other elements of the offence are satisfied)<sup>2</sup> and that the defendant intended any requisite consequence of that offence to result from his intended act or acts<sup>3</sup>, intention does not have to be proved as to any circumstance of the actus reus of the offence allegedly attempted or any ulterior element of it if recklessness, negligence or even blameless inadvertence suffices for the completed offence because proof of recklessness as to these elements suffices instead on a charge of attempt<sup>4</sup>.

In any case where a person's intention would not be regarded<sup>5</sup> as having amounted to an intent to commit an offence but, if the facts of the case had been as he believed them to be, his intention would be so regarded, he is to be regarded<sup>6</sup> as having had an intent to commit that offence<sup>7</sup>.

Provided that the defendant has formed a firm intention to commit the substantive offence if a particular condition is satisfied, and that he has gone beyond mere preparation, he can be convicted of an attempt to commit that offence<sup>8</sup>. Thus, provided that the attempted theft of some or all of the contents of a handbag is alleged (rather than the attempted theft of a specific object), a person who is arrested as he opens a handbag, intending to look inside it, to examine its contents and, if there is anything worth stealing, to steal that thing, can be convicted of attempted theft<sup>9</sup>.

1 See the Criminal Attempts Act 1981 s 1 (as amended); and PARA 79 ante.

2 See *R v Khan* [1990] 2 All ER 783, 91 Cr App Rep 29, CA.

3 *R v Pearman* (1984) 80 Cr App Rep 259, CA. Therefore, on a charge of attempted murder it must be proved that the defendant intended to kill; it is a misdirection to direct the jury that the charge may be supported by evidence of an intent to cause grievous bodily harm: *R v Whybrow* (1951) 35 Cr App Rep 141, CCA; *R v Walker*, *R v Hayles* (1989) 90 Cr App Rep 226, [1990] Crim LR 44, CA. See also *R v Millard*, *R v Vernon* [1987] Crim LR 393, CA. As to the mens rea of an offence see PARA 8 et seq ante.

4 *R v Khan* [1990] 2 All ER 783, 91 Cr App Rep 29, CA (attempted rape; at the time definition of rape required defendant to know or be reckless as to absence of consent; recklessness as to lack of consent held sufficient on charge of attempted rape); *A-G's Reference (No 3 of 1992)* [1994] 2 All ER 121, 98 Cr App Rep 383, CA (charge of attempting to commit offence of destroying or damaging property, intending or being reckless as to endangering life thereby; it was held that it is sufficient on a charge of such an attempt to prove recklessness as to the endangering of life).

5 Ie apart from the Criminal Attempts Act 1981 s 1(3) or s 3(5): see PARA 79 ante.

6 Ie for the purposes of ibid s 1(1) or s 3(3): see PARA 79 ante.

7 Ibid ss 1(3), 3(5). See also PARA 79 ante; and see *R v Shivpuri* [1987] AC 1, 83 Cr App Rep 178, HL.

8 *A-G's References (Nos 1 and 2 of 1979)* [1980] QB 180, [1979] 3 All ER 143, CA; *Scudder v Barrett* [1980] QB 195, [1979] 3 WLR 591, DC; *R v Bayley* [1980] Crim LR 503, CA; *R v Smith* [1986] Crim LR 166, CA.

9     *A-G's References (Nos 1 and 2 of 1979)* [1980] QB 180, [1979] 3 All ER 143, CA; *Scudder v Barrett* [1980] QB 195, [1979] 3 WLR 591, DC; *R v Bayley* [1980] Crim LR 503, CA; *R v Smith* [1986] Crim LR 166, CA; *R v Toothill* [1998] Crim LR 876, CA.

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## **82. Conviction for attempt on charge of full offence.**

Where, on a person's trial on indictment for any offence except treason or murder, the jury finds him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include, expressly or by implication, an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence<sup>1</sup>; and for these purposes any allegation of an offence is to be taken as including an allegation of attempting to commit that offence<sup>2</sup>. On an indictment for murder a person found not guilty of murder may be found guilty of, inter alia, an attempt to commit murder<sup>3</sup>. If the case is tried summarily, however, the magistrates may not convict of an attempt if the completed offence is charged<sup>4</sup>.

Where a person is charged on indictment with attempting to commit an offence, or with any assault or other act preliminary to an offence, but not with the completed offence, then, subject to the court's discretion to discharge the jury or otherwise act with a view to preferring an indictment for the completed offence, he may be convicted of the offence charged notwithstanding that he is shown to be guilty of the completed offence<sup>5</sup>.

Where on summary trial for an attempted offence the commission of the completed offence is proved, the attempted offence does not merge with the completed offence and the magistrates' court may convict of the attempt<sup>6</sup>.

1 Criminal Law Act 1967 s 6(3).

2 Ibid s 6(4).

3 See ibid s 6(2)(c); and PARA 1336 post.

4 *Pender v Smith* [1959] 2 QB 84 at 88, [1959] 2 All ER 360 at 360-361 per Lord Parker CJ; *Re Crown Court at Manchester, ex p Hill* (1985) 149 JPN 29, DC.

5 Criminal Law Act 1967 s 6(4) (amended by the Criminal Justice Act 2003 s 331, Sch 36 para 41). See PARA 1335 post.

6 *Webley v Buxton* [1977] QB 481, 65 Cr App Rep 136, DC (explaining *Rogers v Arnott* [1960] QB 244, 44 Cr App Rep 195, DC).

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### **83. Penalty for statutory attempt.**

A person guilty<sup>1</sup> of attempting to commit an offence:

- 34 (1) if the offence attempted is murder or any other offence the sentence for which is fixed by law<sup>2</sup>, is liable on conviction on indictment to imprisonment for life or for any shorter term<sup>3</sup>;
- 35 (2) if the offence attempted is indictable but does not fall within head (1) above, is liable on conviction on indictment to any penalty to which he would have been liable on conviction on indictment of that offence<sup>4</sup>; and
- 36 (3) if the offence is triable either way<sup>5</sup>, is liable on summary conviction to any penalty to which he would have been liable on summary conviction for that offence<sup>6</sup>.

1 He by virtue of the Criminal Attempts Act 1981 s 1 (as amended): see PARA 79 ante.

2 As to sentences fixed by law see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 15.

3 Criminal Attempts Act 1981 s 4(1)(a). Section 4(1) has effect notwithstanding anything in the Criminal Law Act 1977 s 32(1) (no limit to fine on conviction on indictment: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139) (Criminal Attempts Act 1981 s 4(5)(b)(i)) or in the Powers of Criminal Courts (Sentencing) Act 2000 s 78(1), (2) (prospectively repealed) (maximum of six months' imprisonment on summary conviction unless express provision made to the contrary: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 6) (Criminal Attempts Act 1981 s 4(5)(b)(ii) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 82)). As from a day to be appointed the reference to the Powers of Criminal Courts (Sentencing) Act 2000 s 78(1), (2) is repealed and replaced with a reference to the Criminal Justice Act 2003 s 154(1), (2) (general limit on magistrates' power to impose imprisonment: see MAGISTRATES): Criminal Attempts Act 1981 s 4(5)(b)(ii) (prospectively substituted by the Criminal Justice Act 2003 s 304, Sch 32 para 33). At the date at which this volume states the law no such day had been appointed.

4 Criminal Attempts Act 1981 s 4(1)(b). See note 3 supra.

5 As to offences triable either way see PARAS 1103, 1109 et seq post.

6 Criminal Attempts Act 1981 s 4(1)(c). See note 3 supra.

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## **2. OFFENCES AGAINST THE PERSON**

### **(1) HOMICIDE**

#### **(i) In General**

##### **84. Classification of homicide.**

The term 'homicide' is used to describe the case where a person<sup>1</sup> kills<sup>2</sup> a human being. Such a killing may be lawful<sup>3</sup> or it may be unlawful and criminal.

Unlawful homicide includes murder<sup>4</sup>, manslaughter<sup>5</sup>, causing death by dangerous driving<sup>6</sup>, causing death by careless driving when under the influence of drink or drugs<sup>7</sup>, and infanticide<sup>8</sup>.

1 As to the liability of a corporation for unlawful homicide see PARA 38 ante.

2 As to the rules of causation see PARA 7 ante.

3 Formerly 'lawful homicide' was classified as either justifiable (eg a killing in pursuance of a sentence of a court) or excusable (eg a killing by accident) but the distinction is now without substance: in either case no offence is committed.

4 As to murder see PARAS 89-91 post. Where the killing is done with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, the offence may be charged as genocide: see the International Criminal Court Act 2001 s 50(6), Sch 8; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 454.

5 See PARAS 92-102 post.

6 See ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 963.

7 See ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 974.

8 See PARA 103 post. As to alternative verdicts on indictments for murder, manslaughter or infanticide see PARAS 86, 103, 1336 post.

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## **85. Restrictions on prosecutions.**

The common law rule known as the 'year and a day rule' (that is, the rule that, for the purposes of offences involving death and of suicide, an act or omission is irrebuttably presumed not to have caused a person's death if more than a year and a day elapsed before he died<sup>1</sup>) has been abolished for all purposes<sup>2</sup>, except in relation to a case where the act or omission (or the last of the acts or omissions) which caused the death occurred before June 17 1996<sup>3</sup>.

In relation to deaths occurring on or after that date, proceedings for a fatal offence<sup>4</sup> may be instituted by or with the consent of the Attorney General<sup>5</sup> and may be instituted only if:

- 37 (1) the injury alleged to have caused the death was sustained more than three years before the death occurred<sup>6</sup>; or
- 38 (2) the person has previously been convicted of an offence committed in circumstances alleged to be connected with the death<sup>7</sup>.

1 3 Co Inst 53; 1 Hawk PC c 13 s 9; 1 East PC 343, 344; see also *R v Dyson* [1908] 2 KB 454, 1 Cr App Rep 13, CCA; *R v Inner West London Coroner, ex p De Luca* [1989] QB 249 at 252, [1988] 3 All ER 414, DC.

2 Law Reform (Year and a Day Rule) Act 1996 s 1.

3 Ibid s 3(2). The date mentioned in the text is the day on which the Law Reform (Year and a Day Rule) Act 1996 was passed (ie received the Royal Assent).

4 For these purposes, 'fatal offence' means: (1) murder, manslaughter, infanticide or any other offence of which one of the elements is causing a person's death (ibid s 2(3)(a)); (2) the offence of aiding, abetting, counselling or procuring a person's suicide (s 2(3)(b)); or (3) an offence under the Domestic Violence, Crime and Victims Act 2004 s 5 (causing or allowing the death of a vulnerable adult: see PARA 107 post) (Law Reform (Year and a Day Rule) Act 1996 s 2(3)(c) (added by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 33)).

5 Law Reform (Year and a Day Rule) Act 1996 s 2(1). For the effect of this limitation see PARA 1071 post. No provision that proceedings may be instituted only by or with the consent of the Director of Public Prosecutions applies to proceedings to which the Law Reform (Year and a Day Rule) Act 1996 s 2 (as amended) applies: s 2(4).

6 Ibid s 2(2)(a).

7 Ibid s 2(2)(b).

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## **86. Murder and manslaughter.**

It is murder for a person of sound memory<sup>1</sup> and of the age of discretion<sup>2</sup>, unlawfully to kill any human creature<sup>3</sup> in being and under the Queen's peace, with malice aforethought, either express or implied by law<sup>4</sup>.

There are two types of manslaughter: voluntary manslaughter, where the liability of a defendant otherwise liable for murder is reduced to manslaughter by virtue of one of three special defences available on a charge of murder; and involuntary manslaughter, which differs from murder in relation to the mental element which is necessary to support the charge<sup>5</sup>. On a charge of murder or manslaughter of a child, the jury may alternatively convict the defendant of child destruction<sup>6</sup>.

Where a subject of Her Majesty<sup>7</sup> commits a murder or manslaughter on land out of the United Kingdom<sup>8</sup>, whether within the Queen's territories or without, and whether the person killed was a subject of Her Majesty or not, he may be tried in England and Wales<sup>9</sup>.

If a person is criminally stricken, poisoned or otherwise hurt upon the sea or at any place out of England and Wales or Northern Ireland, and dies of such hurt in England and Wales or Northern Ireland, or, being so stricken, poisoned or otherwise hurt, in any place in England and Wales or Northern Ireland, dies of such hurt upon the sea or at any place out of England and Wales or Northern Ireland, the offence, whether it amounts to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished, in England and Wales or Northern Ireland<sup>10</sup>.

1 As to the liability of persons of unsound mind see PARAS 31-33 ante.

2 This is a reference to the age of criminal responsibility: see PARA 37 ante.

3 Any human being is included, however deformed or disabled: see *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961, [2001] Fam 147, CA (conjoined twins, each with a brain (although one was so undeveloped as to be practically useless) and nearly complete bodies, were regarded as separate persons). Where no body or part of a body has been found, the death of the victim may be proved by circumstantial evidence; and the jury is entitled to convict where the evidence is consistent with no other rational conclusion than that the victim is dead and that his death was caused by the defendant: *R v Onufrejczyk* [1955] 1 QB 388, 39 Cr App Rep 1, CCA. However, where no body or part of a body has been found, it has long been considered that a jury should use caution before convicting, particularly in those cases in which death is relied upon from the fact of the disappearance of the deceased: see *Upington v Saul Solomon & Co* (1879) Buch 240 at 276, Cape SC. Where the victim has been killed by one of two or more acts of the defendant, each of which is sufficient to establish manslaughter, there is no need to establish which act caused the death and the absence of a body is therefore immaterial: *A-G's Reference (No 4 of 1980)* [1981] 2 All ER 617, 73 Cr App Rep 40, CA.

The name of the deceased must, if it is known or can be ascertained with reasonable diligence, be stated in the indictment; if it cannot be so ascertained, the deceased must be described as 'a person unknown': *R v Hicks* (1840) 2 Mood & R 302; and see *R v Campbell* (1843) 1 Car & Kir 82.

4 3 Co Inst 47, 50. As to malice aforethought see PARA 89 post; and as to the procedural provisions relating to prosecutions for the murder or manslaughter of a child or young person see PARA 1164 post. The 'year and a day' rule regarding offences involving death and suicide has been abolished: see PARA 85 ante.

5 See PARA 92 post.

6 See the Infant Life (Preservation) Act 1929 s 2(2); and PARA 109 post.



7 As to Her Majesty's subjects see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 23 et seq.

8 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

9 See PARA 1061 post. Murder and manslaughter are included in the list of offences specified in the Terrorism Act 2000 s 63B (as added) for the purposes of extra-territorial jurisdiction regarding terrorist acts abroad by United Kingdom nationals or residents: see s 63B(1), (2)(a) (as added); and PARA 474 post. As to the extended territorial scope of manslaughter in the case of acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983 s 1(1); and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583.

10 Offences against the Person Act 1861 s 10 (amended by the Irish Free State (Consequential Adaptation of Enactments) Order 1923, SR & O 1923/405, art 2; and the Criminal Law Act 1967 s 10(1), (2), Sch 2 para 6, Sch 3 Pt III). The Offences against the Person Act 1861 s 10 (as amended) does not apply to a foreigner who causes the death of another person by an act committed outside the jurisdiction of the Queen: *R v Lewis* (1857) Dears & B 182, CCR.

Proceedings for murder or manslaughter may, subject to certain restrictions, be brought against a person in the United Kingdom irrespective of his nationality in respect of an alleged offence which was committed during the period beginning with 1 September 1939 and ending with 5 June 1945 in a place which at the time was part of Germany or under German occupation, and which constituted a violation of the laws and customs of war: see the War Crimes Act 1991 s 1(1)-(3); and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 465.

As to the ambit of criminal jurisdiction see PARA 1054 et seq post; and as to the jurisdiction of the Crown Court see PARAS 1052, 1232 post.

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## **87. Person in being.**

On a charge of murder or manslaughter it must be shown that the person killed was one who was in being. It is neither murder nor manslaughter to kill an unborn child while still in its mother's womb<sup>1</sup> although it may constitute the statutory offences of child destruction or abortion<sup>2</sup>. If, however, the child is born alive and afterwards dies by reason of an unlawful act done to it in the mother's womb or in the process of birth, the person who committed that act cannot be convicted of murder but he may be convicted of manslaughter<sup>3</sup>.

A child is not considered in law to be in being, so as to be the subject of a charge of murder or manslaughter, until the whole body of the child is extruded from the womb<sup>4</sup> and has an existence independent of the mother. Whether the child has an independent existence generally turns upon whether it has an independent circulation<sup>5</sup>, and has breathed independently of its mother<sup>6</sup>. However, a child may have an independent existence, even though it has not drawn breath and even though the umbilical cord is not severed<sup>7</sup>.

In relation to the law of homicide a person continues in being until his being is extinguished by death<sup>8</sup>.

1 3 Co Inst 50; 1 Hale PC 433; 1 Hawk PC c 13 s 16.

2 See PARAS 108, 109 post.

3 *A-G's Reference (No 3 of 1994)* [1998] AC 245, [1998] 1 Cr App Rep 91, HL. As to the situation where the child dies as a result of an injury to its mother before birth see PARA 89 note 7 post.

4 *R v Poulton* (1832) 5 C & P 329.

5 *R v Enoch* (1833) 5 C & P 539; *R v Wright* (1841) 9 C & P 754.

6 *R v Handley* (1874) 13 Cox CC 79; *C v S* [1988] QB 135, [1987] 1 All ER 1230, CA; *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, [1991] 1 All ER 801. See also *R v Crutchley* (1837) 7 C & P 814 per Parke B; *R v Sellis* (1837) 7 C & P 850 per Coltman J (where it was laid down that the fact that a child had breathed was not conclusive proof that it was born alive, as it might have breathed and died before birth); *R v Wright* (1841) 9 C & P 754 per Gurney B.

7 *R v Crutchley* (1837) 7 C & P 814; *R v Trilloe* (1842) 2 Mood CC 260, CCR; *R v Reeves* (1839) 9 C & P 25 per Vaughan J.

8 'Death' means brain stem death: *Airedale National Health Service Trust v Bland* [1993] AC 789 at 856, [1993] 1 All ER 821 at 859, HL, per Lord Keith of Kinkel, at 863 and 865 per Lord Goff of Chieveley, and at 878 and 878 per Lord Browne-Wilkinson; *Mail Newspapers plc v Express Newspapers plc* [1987] FSR 90; *Re A* [1992] 3 Med LR 303.

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### **88. Person under the Queen's peace.**

On a charge of murder or manslaughter it must be shown that the person killed was under the Queen's peace. The effect of this is to exclude from those offences killings of enemy aliens in the actual heat and exercise of war<sup>1</sup> and, possibly, rebels in the course of a rebellion<sup>2</sup>; otherwise, everyone is under the Queen's peace<sup>3</sup>.

1 1 Hale PC 433; 1 East PC 227; 4 Bl Com (14th Edn) 198; *R v Page* [1954] 1 QB 170, 37 Cr App Rep 189, C-MAC.

2 *R v Page* [1954] 1 QB 170, 37 Cr App Rep 189, C-MAC.

3 *R v Page* [1954] 1 QB 170, 37 Cr App Rep 189, C-MAC (Egyptian national killed in an Egyptian village by a British soldier within the Queen's peace); *Maria v Hall* (1807) 1 Taunt 33 at 36 (unjustified shooting of prisoners of war was held to be murder).

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## (ii) Murder

### 89. The elements.

To establish a case of murder the prosecution must prove: (1) that the unlawful death of the victim was caused<sup>1</sup> by an act or omission<sup>2</sup> of the defendant; and (2) that the defendant did that act or omitted to act with malice aforethought, express or implied<sup>3</sup>. The burden of proof remains throughout on the prosecution and, apart from the special defences of insanity and diminished responsibility and the anomalous case of suicide pacts, it is at no time incumbent upon the defendant to establish any defence, or partial defence, to the charge<sup>4</sup>.

The mental element of murder, traditionally called malice aforethought, may take the form of an intention unlawfully<sup>5</sup> to kill (express malice) or an intention unlawfully to cause grievous bodily harm<sup>6</sup> (implied malice)<sup>7</sup>. Intent is the essential element in both forms of malice aforethought<sup>8</sup>. When directing juries, judges should not elaborate on what intent means but should rely upon the good sense of juries to decide whether the defendant acted with intent, unless, on the facts and in the light of the way that the case has been presented to the jury, further explanation in terms of foresight of virtual certainty<sup>9</sup> is necessary to avoid misunderstanding<sup>10</sup>.

1 As to causation see PARA 7 ante.

2 See *R v Gibbins, R v Proctor* (1918) 13 Cr App Rep 134, CCA; and see also PARA 6 ante. If death is caused by one act in a series of acts, it is irrelevant that the defendant lacked the necessary intent for murder when that act was done, if he had that intent when an earlier act in the series was done: *Thabo Meli v R* [1954] 1 All ER 373, [1954] 1 WLR 228, PC. The same principle also applies mutatis mutandis to involuntary manslaughter: *R v Church* [1966] 1 QB 59, [1965] 2 All ER 72, CCA. See also *R v Moore, R v Dorn* [1975] Crim LR 229, CA; *R v Le Brun* [1992] QB 61, 94 Cr App Rep 101, CA.

Where there are two routes by which a murder may have been committed, the jury either must be unanimous on which act caused death (*R v Boreman, R v Byrne, R v Byrne* [2000] 1 All ER 307, [2000] 2 Cr App Rep 17, CA) or must be unanimous that it was either act A or act B which caused the death, albeit some believe it was act A (and if not act B) and others believe that it was act B (and if not act A): *R v Giannetto* [1997] 1 Cr App Rep 1, CA.

3 *Woolmington v DPP* [1935] AC 462, 25 Cr App Rep 72, HL; *Mancini v DPP* [1942] AC 1, 28 Cr App Rep 65, HL.

There is no statutory definition of 'express malice' or 'implied malice' in the Homicide Act 1957 s 1, which abolished the doctrine of 'constructive malice'; at common law 'express malice' and 'implied malice' have the meanings set out in the text: *R v Moloney* [1985] AC 905 at 921, 81 Cr App Rep 93 at 102, HL (approving *R v Vickers* [1957] 2 QB 664, 41 Cr App Rep 189, CCA).

4 *Chan Kau v R* [1955] AC 206, [1955] 1 All ER 266, PC. See also *R v Wheeler* [1967] 3 All ER 829, 52 Cr App Rep 28, CA; *R v Abraham* [1973] 3 All ER 694, [1973] 1 WLR 1270, CA.

The public interest in the administration of justice is best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning but irrespective of the wishes of trial counsel, any obvious alternative offence which there was evidence to support: thus on a charge of murder it is in the interests of justice that a judge direct a jury as to manslaughter, as an alternative to murder: *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154, [2006] All ER (D) 253 (Jul). The judge should not leave manslaughter as an alternative to murder when this is inconsistent with the defence case: *Fazel Mohammed v The State (Trinidad and Tobago)* [1990] 2 AC 320, 91 Cr App Rep 256, PC.

5 As to the requirement that the defendant must intend unlawfully to kill or do grievous bodily harm see *Beckford v R* [1988] AC 130, [1987] 3 All ER 425, PC (a person cannot be convicted of murder, even if he intentionally killed someone, if he did so in a mistaken belief in facts which if true would justify him in using reasonable force in self-defence and he had not exceeded such force, because he would not have intended unlawfully to kill his victim).

6 'Grievous bodily harm' means really serious bodily harm: *DPP v Smith* [1961] AC 290, 44 Cr App Rep 261, HL; *R v Metharam* [1961] 3 All ER 200, 45 Cr App Rep 304, CCA; *R v Cunningham* [1982] AC 566, 73 Cr App Rep 253, HL. See further PARA 120 post.

7 *R v Cunningham* [1982] AC 566, 73 Cr App Rep 253, HL. This form of malice aforethought is 'implied' in the sense that it is not necessary to prove that the defendant either intended or foresaw the death of the victim. It must, however, be proved that the defendant intended to cause grievous bodily harm (cf the Criminal Justice Act 1967 s 8: see PARA 1366 post), and to that extent use of the expression 'implied malice' may be misleading.

The doctrine of transferred fault (see PARA 12 ante) applies to both types of intent referred to in the text: see Bract, De Corona, c 36; Fost 261; *R v Saunders*, *R v Archer* (1573) 2 Plowd 473; *R v Hunt* (1825) 1 Mood CC 93, CCR; *R v Bernard* (1858) 1 F & F 240 per Campbell CJ. For an exception see *A-G's Reference (No 3 of 1994)* [1998] AC 245, [1998] 1 Cr App Rep 91, HL (an assailant who directs violence at a pregnant woman with the intent of causing her grievous bodily harm, will be guilty of manslaughter but not murder, if the child is subsequently born alive, enjoys an existence independent of his mother and thereafter dies with the injuries having caused or made a substantial contribution to his death). It would seem that the same would be true if the assailant had intended to kill the mother.

8 See *R v Hancock*, *R v Shankland* [1986] AC 455 at 471, 82 Cr App Rep 264 at 274, HL.

9 See PARA 13 ante.

10 See *R v Moloney* [1985] AC 905 at 926, 81 Cr App Rep 93 at 106, HL, per Lord Bridge; *R v Nedrick* [1986] 3 All ER 1 at 3, 83 Cr App Rep 267 at 270, CA.

## UPDATE

### 89 The elements

NOTE 4--*R v Coutts*, cited, reported at [2006] 4 All ER 353.

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## 90. Penalty for murder.

The penalty for murder is fixed by law; it is imprisonment for life<sup>1</sup>. Where a court<sup>2</sup> passes a life sentence<sup>3</sup> in circumstances where the sentence is fixed by law it must order that the early release provisions<sup>4</sup> are to apply to the offender as soon as he has served the part of his sentence which is specified in the order<sup>5</sup>, unless the offender was aged 21 or over when he committed the offence and the court is of the opinion that, because of the seriousness of the offence<sup>6</sup>, or of the combination of the offence and one or more offences associated with it, no such order should be made, in which case the court must order that the early release provisions are not to apply to the offender<sup>7</sup>. Where a court makes an order that the early release provisions are to apply as soon as the offender has served the part of his sentence which is specified<sup>8</sup>, or makes an order that those provisions are not to apply<sup>9</sup>, it must state in open court<sup>10</sup>, in ordinary language, its reasons for deciding on the order made<sup>11</sup>.

1 Murder (Abolition of Death Penalty) Act 1965 s 1(1). As to sentences on persons under the age of 18 (detention during Her Majesty's pleasure) see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 81. As to murder committed in connection with the hijacking of aircraft see AIR LAW vol 2 (2008) PARA 625.

The sentence is fixed by law and cannot be appealed against under the Criminal Appeal Act 1968 s 9 (as amended); see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 46. However, an appeal against sentence may be brought against an order made under the Criminal Justice Act 2003 s 269(2) or (4) (see notes 5, 7 infra); see the Criminal Appeal Act 1968 s 9(1A) (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 46. In addition, the Attorney General may apply for a review of such an order: see the Criminal Justice Act 1988 s 36(3A) (as added); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 57. The mandatory life sentence for murder has been held by the House of Lords not to be incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 3 (prohibition of inhuman or degrading treatment) or art 5(1) (right to liberty) on the ground that the operation in practice of an indeterminate sentence for murder does not constitute an arbitrary and disproportionate punishment: *R v Lichniak*, *R v Pyrah* [2002] UKHL 47, [2003] 1 AC 903, [2003] 1 Cr App Rep 560. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

Provision is made for the assessment and management of the risks posed by persons who have been convicted and sentenced for, or (in certain circumstances) found to be not guilty and been made the subject of a hospital or guardianship order in consequence of, the offence of murder, and other persons who, by reason of offences committed by them, are considered by the responsible authority to be persons who may cause serious harm to the public: see the Criminal Justice Act 2003 ss 325, 326, 327(1), (3), (4).

2 'Court' includes a court-martial: *ibid* s 277.

3 'Life sentence' in this context means a sentence of imprisonment for life, a sentence of detention during Her Majesty's pleasure, or a sentence of custody for life passed before the commencement of the Criminal Justice and Court Services Act 2000 s 61(1) (which abolishes that sentence): Criminal Justice Act 2003 s 277.

4 Ie the provisions of the Crime (Sentences) Act 1997 s 28(5)-(8) (as amended): see PRISONS vol 36(2) (Reissue) PARA 621.

5 Criminal Justice Act 2003 s 269(1), (2). The part of the offender's sentence so specified is to be such as the court considers appropriate taking into account the seriousness of the offence, or of the combination of the offence and any one or more offences associated with it (see note 6 infra) (s 269(3)(a)) and the effect of any direction which it could have given under s 240 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 36) crediting periods of remand in custody if it had sentenced him to a term of imprisonment (s 269(3)(b)).

In relation to persons sentenced to a fixed life sentence on or after 18 December 2003 (ie the date on which s 269 was brought into force by virtue of s 336(2)) for an offence committed before that date, the court may not

specify a part of the sentence which in its opinion is greater than the part which would have been likely to have been specified by the Secretary of State under the practice followed by him before December 2002: s 276, Sch 22 paras 9, 10(a); and see also *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.49, CA; *Practice Direction (Crime: Mandatory Life Sentences) (No 2)* [2004] 1 WLR 2551 at IV.49; *R v Sullivan, R v Gibbs, R v Barry Elener, R v Derek Elener* [2004] EWCA Crim 1762, [2005] 1 Cr App Rep 23.

6 In considering under these provisions the seriousness of an offence (or of the combination of an offence and one or more offences associated with it), the court must have regard to the general principles set out in the Criminal Justice Act 2003 Sch 21 (s 269(5)(a)) and any guidelines relating to offences in general which are relevant to the case and are not incompatible with the provisions of Sch 21 (s 269(5)(b)). For the meaning of 'guidelines' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 635; definition applied by s 277. The guidance given by Sch 21 provided to assist the judge to determine the appropriate sentence. The judge must have regard to that guidance, but each case depends critically on its particular facts. If the judge concludes that it is appropriate to follow a course that does not appear to reflect that guidance, the judge should explain the reason for this: *R v Jones* [2005] EWCA Crim 3115, [2006] Crim LR 262.

If the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high (Criminal Justice Act 2003 Sch 21 para 4(1)(a)) and the offender was aged 21 or over when he committed the offence (Sch 21 para 4(1)(b)), the appropriate starting point is a whole life order (ie an order under s 269(4): see the text and note 7 *infra*) that the early release provisions are not to apply (Sch 21 para 1)). The court will normally consider that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high in cases involving: (1) the murder of two or more persons, where each murder involves a substantial degree of premeditation or planning (Sch 21 para 4(2)(a)(i)), the abduction of the victim (Sch 21 para 4(2)(a)(iii)), or sexual or sadistic conduct (Sch 21 para 4(2)(a)(iii)); (2) the murder of a child (ie a person under 18 (Sch 21 para 1)) if involving the abduction of the child or sexual or sadistic motivation (Sch 21 para 4(2)(b)); (3) a murder done for the purpose of advancing a political, religious or ideological cause (Sch 21 para 4(2)(c)); or (4) a murder by an offender previously convicted of murder (Sch 21 para 4(2)(d)). As to the whole life starting point see *R v Jones supra*.

If the case does not fall within these requirements but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high (Criminal Justice Act 2003 Sch 21 para 5(1)(a)), and the offender was aged 18 or over when he committed the offence (Sch 21 para 5(1)(b)), the appropriate starting point in determining the minimum term is 30 years. 'Minimum term' means the part of the sentence to be specified in an order under s 269(2); and 'mandatory life sentence' means a life sentence passed in circumstances where the sentence is fixed by law: Sch 21 para 1. Cases in this category would normally include: (a) the murder of a police officer or prison officer in the course of his duty (Sch 21 para 5(2)(a)); (b) a murder involving the use of a firearm or explosive (Sch 21 para 5(2)(b)); (c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, or done for payment, or done in the expectation of gain as a result of the death) (Sch 21 para 5(2)(c)); (d) a murder intended to obstruct or interfere with the course of justice (Sch 21 para 5(2)(d)); (e) a murder involving sexual or sadistic conduct (Sch 21 para 5(2)(e)); (f) the murder of two or more persons (Sch 21 para 5(2)(f)); (g) a murder that is racially or religiously aggravated or aggravated by sexual orientation (Sch 21 para 5(2)(g)); or (h) a murder falling within Sch 21 para 4(2) (see heads (1)-(4) *supra*) committed by an offender who was aged under 21 when he committed the offence (Sch 21 para 5(2)(h)). Note that in the context of head (e) *supra* the word 'sadistic' does not require a sexual element: see *A-G's References (Nos 108 and 109 of 2005)*, *R v Swindon* [2006] EWCA Crim 513, [2006] All ER (D) 210 (Feb). As to the meaning of 'racially or religiously aggravated' for these purposes see the Crime and Disorder Act 1998 s 28 (as amended); and PARA 155 *post* (definition applied by the Criminal Justice Act 2003 Sch 21 para 2). For these purposes an offence is aggravated by sexual orientation if it is committed in circumstances falling within s 146(2)(a)(i) or s 146(2)(b)(i) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 621): Sch 21 para 3.

If the offender was aged 18 or over when he committed the offence and the case does not fall within any of the descriptions of offence set out above, the appropriate starting point in determining the minimum term is 15 years: Sch 21 para 6. Where the 15-year starting point has been chosen, judges should have in mind that this starting point encompasses a very broad range of murders, and it should not be assumed that Parliament intended to raise all minimum terms that would previously have had a lower starting point to 15 years: *R v Sullivan, R v Gibbs, R v Barry Elener, R v Derek Elener* [2004] EWCA Crim 1762, [2005] 1 Cr App Rep 23; *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.49, CA; *Practice Direction (Crime: Mandatory Life Sentences) (No 2)* [2004] 1 WLR 2551 at IV.49. If the offender was aged under 18 when he committed the offence, the appropriate starting point in determining the minimum term is 12 years: Criminal Justice Act 2003 Sch 21 para 7.

Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point: Sch 21 para 8. Aggravating factors (additional to those mentioned in Sch 2 para 4(2) (see heads (1)-(4) *supra*) and Sch 2 para 5(2) (see heads (a)-(h) *supra*)) that may be relevant to the offence of murder include a significant degree of planning or premeditation (Sch 21 para 10(a)), the fact that the victim was particularly vulnerable because of age or disability (Sch 21 para 10(b)), mental or physical suffering inflicted on the victim before death (Sch 21 para

10(c)), the abuse of a position of trust (Sch 21 para 10(d)), the use of duress or threats against another person to facilitate the commission of the offence (Sch 21 para 10(e)), the fact that the victim was providing a public service or performing a public duty (Sch 21 para 10(f)), and concealment, destruction or dismemberment of the body (Sch 21 para 10(g)). Mitigating factors that may be relevant to the offence of murder include an intention to cause serious bodily harm rather than to kill (Sch 21 para 11(a)), lack of premeditation (Sch 21 para 11(b)), the fact that the offender suffered from any mental disorder or mental disability which (although not falling within the Homicide Act 1957 s 2(1) (see PARA 96 post)) lowered his degree of culpability (Sch 21 para 11(c)), the fact that the offender was provoked (for example, by prolonged stress) in a way not amounting to a defence of provocation (see PARA 94 post) (Sch 21 para 11(d)), the fact that the offender acted to any extent in self-defence (Sch 21 para 11(e)), a belief by the offender that the murder was an act of mercy (Sch 21 para 11(f)), and the age of the offender (Sch 21 para 11(g)). These lists are illustrative and not exhaustive: *R v Peters*, *R v Palmer*, *R v Campbell* [2005] EWCA Crim 605, [2005] Cr App Rep (S) 607. Thus, for example, a judge is entitled to regard the unlawful carrying of an offensive weapon in a public place as an aggravating factor (*R v Richardson* [2005] EWCA Crim 1408, [2005] Crim LR 804) or the defendant's remorse, previous good character or lack of previous convictions as a mitigating factor (*R v Simmons* [2006] All ER (D) 187 (May)). Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order: Criminal Justice Act 2003 Sch 21 para 9.

Where aggravating factors have led the judge to adopt the higher of two potential starting points, or mitigating factors had led him to adopt the lower, the judge must be careful not to apply those factors a second time round in making any adjustment to that starting point that may be appropriate to reflect the other material facts: *R v Jones* supra.

Nothing in the Criminal Justice Act 2003 Sch 21 restricts the application of s 143(2) (previous convictions: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 618), s 143(3) (offences committed on bail: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 618) and s 144 (guilty plea: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 623): Sch 21 para 12.

The Secretary of State may by order amend Sch 21: s 269(6). Any power to make orders or rules under the Criminal Justice Act 2003 must be exercised by statutory instrument: s 330(1), (2). Any such power may be exercised so as to make different provision for different purposes or different areas (s 330(3)(a)), and may be exercised either for all the purposes to which the power extends, or for those purposes subject to specified exceptions, or only for specified purposes (s 330(3)(b)); and it includes the power to make any supplementary, incidental or consequential provision, and any transitory, transitional or saving provision (s 330(4)(a), (b)), which the minister making the instrument considers necessary or expedient. In general, a statutory instrument made pursuant to these powers is subject to annulment in pursuance of a resolution of either House of Parliament (s 330(6)), although this is not the case in relation to a statutory instrument containing only an order made under one or more of s 202(3)(b) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 273), s 215(3) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 284), s 253(5) (see PRISONS), s 325(6)(i) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 557) or s 336 (s 330(7)). A statutory instrument containing an order under any of s 25(5) (see PARA 1044 post), s 103 (see PARA 1507 post), s 161(7) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 629), s 178 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 175), s 197(3) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 104), s 223 (see SENTENCING AND DISPOSITION OF OFFENDERS), s 246(5) (see PRISONS), s 260 (see PRISONS), s 267 (alteration by order of relevant proportion of sentence), s 269(6) (see note 6 supra), s 281(2) (alteration of penalties for summary offences), s 283(1) (see PARA 1121 post), s 291 (see PARA 662 post), s 301(5) (see ROAD TRAFFIC), s 325(7) (see PARA 244; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 70), Sch 31 para 5, an order under s 336(3) bringing s 43 into force (see PARA 1284 post), an order making any provision by virtue of s 333(2)(b) which adds to, replaces or omits any part of the text of an Act, or rules under s 240(4)(a) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 36), may only be made if a draft of the statutory instrument has been laid before, and approved by a resolution of, each House of Parliament: s 330(5). Before making an order under s 269(6), the Secretary of State must consult the Sentencing Guidelines Council: s 269(7).

In relation to pleas of guilty the Sentencing Guidelines Council has issued definitive sentencing guidelines on reducing sentences for guilty pleas of murder. Where a court determines that there should be a whole life minimum term, there will be no reduction for a guilty plea. In other circumstances:

- 16 (i) the court will weigh carefully the overall length of the minimum term taking into account other reductions for which offenders may be eligible so as to avoid a combination leading to an inappropriately short sentence;
- 17 (ii) where it is appropriate to reduce the minimum term having regard to a plea of guilty, the maximum reduction will be one-sixth;
- 18 (iii) however, even where a minimum term of over 30 years (but not whole life) is fixed, the reduction should never exceed five years;
- 19 (iv) the sliding scale will apply so that, where it is appropriate to reduce the minimum term on account of a guilty plea, the maximum reduction is available only where there has been an indication of willingness to plead guilty at the first reasonable opportunity (as to which see *R v*



*Peters, R v Palmer, R v Campbell* [2005] EWCA Crim 605, [2005] Crim LR 492), with a maximum of 5% for a late guilty plea;

- 20 (v) the court should then review the sentence to ensure that the minimum term accurately reflects the seriousness of the offence taking account of the statutory starting point, all aggravating and mitigating factors and any guilty plea entered.

These guidelines should be applied to offences committed before they came into force (ie 10 January 2005): *R v Last, R v Holbrook, R v Crane, R v Quillan* [2005] EWCA Crim 106, [2005] Crim LR 407. Although the court must have regard to these guidelines, they do not remove the judge's discretion, and as long as he gives a valid reason for doing so the judge is free to depart from them: *R v Last, R v Holbrook, R v Crane, R v Quillan* supra. See also *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.49, CA; *Practice Direction (Crime: Mandatory Life Sentences) (No 2)* [2004] 1 WLR 2551 at IV.49; *R v Peters, R v Palmer, R v Campbell* [2005] EWCA Crim 605, [2005] Crim LR 492.

In relation to whole life terms, the single judge should consider the fact that the defendant had pleaded guilty to murder when deciding whether it is appropriate to make such an order. However, a case calling for the imposition of a whole life term is unlikely to be a borderline cases. Where it is not there may be no need for the judge to spell out why, although he has had regard to the plea, this has not affected the sentence: *R v Jones* [2005] EWCA Crim 3115, [2006] Crim LR 262.

7 Criminal Justice Act 2003 s 269(4). In relation to persons sentenced to a fixed life sentence on or after 18 December 2003 (see note 5 supra) for an offence committed before that date, the court may not make an order under s 269(4) unless it is of the opinion that, under the practice followed by the Secretary of State before December 2002, he would have been likely to give the offender a notification of an intention that he should never be released on licence: Sch 22 para 10(b).

8 Ie an order under *ibid* s 269(2) (see the text and notes 1-5 supra).

9 Ie an order under *ibid* s 269(4) (see the text and notes 6-7 supra).

10 In *R v Denbigh Justices, ex p Williams* [1974] QB 759, [1974] 2 All ER 1052, DC, Lord Widgery CJ stated, in the context of a submission that a hearing had not been in open court: 'The trial should be 'public' in the ordinary common-sense acceptation of that term. The doors of the courtroom are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects . . . with due regard to the size of the courtroom, the convenience of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial.'

11 Criminal Justice Act 2003 s 270(1). In stating its reasons the court must, in particular, state which of the starting points in Sch 21 (see note 6 supra) it has chosen and its reasons for doing so (s 270(2)(a)), and state its reasons for any departure from that starting point (s 270(2)(b)). Section 270 does not apply to the extent that the explanation will disclose that a sentence has been discounted in pursuance of the Serious Organised Crime and Police Act 2005 s 73 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 625) but this has not been stated in open court by virtue of s 73(4) (ie on the ground that to do so would not be in the public interest: s 73(7)). As to the procedure for announcing the minimum term in open court see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.49, CA; *Practice Direction (Crime: Mandatory Life Sentences) (No 2)* [2004] 1 WLR 2551 at IV.49.

## UPDATE

### 90 Penalty for murder

NOTE 1--Criminal Justice Act 2003 ss 325, 326 amended: Criminal Justice and Immigration Act 2008 Sch 26 paras 74, 75.

NOTE 2--Definition of 'court' amended to refer to the renamed Court Martial: Armed Forces Act 2006 Sch 16 para 230.

NOTE 5--The effect of prohibition on heavier retrospective penalties by virtue of the European Convention on Human Rights art 7 is that the court has to ask itself what minimum term the Secretary of State would have set on any different factual basis adopted by the court and limit the minimum term it set accordingly, even though the 2003 Act Sch 22 contains no transitional provisions to that effect: see *Re Bingham (application under para 3 of Sch 22 to the Criminal Justice Act 2003)* [2006] EWHC 2591 (QB), [2006] All ER (D) 262 (Oct). See also *R v Caines; R v Roberts* [2006] EWCA

Crim 2915, [2007] 1 WLR 1109 (guidance on transitional mandatory life sentences cases determined under 2003 Act Sch 22); *Re Taylor* [2006] EWHC 2944 (QB), [2007] 3 All ER 441; *R v Sampson* [2006] EWCA Crim 2669, [2006] All ER (D) 284 (Oct); and *Re Cole (application pursuant to para 3 of Sch 22 to the Criminal Justice Act 2003)* [2006] EWHC 3036 (QB), [2006] All ER (D) 274 (Dec).

Criminal Justice Act 2003 s 269(3)(b) amended: Criminal Justice and Immigration Act 2008 s 22(3).

NOTE 6--Now, where the case does not fall within the Criminal Justice Act 2003 Sch 21 para 4(1) or 5 (1), and the offender took a knife or other weapon to the scene intending to commit any offence, or have it available to use as a weapon, and used that knife or other weapon in committing the murder, and the offender was aged 18 or over when the offender committed the offence, the offence is normally to be regarded as sufficiently serious for the appropriate starting point, in determining the minimum term, to be 25 years: Sch 21 para 5A(1), (2) (added by SI 2010/197). Criminal Justice Act 2003 Sch 21 paras 6, 10 amended: SI 2010/197. Criminal Justice Act 2003 Sch 21 para 12 amended: Armed Forces Act 2006 Sch 16 para 236.

It is open to a judge, when assessing the culpability of an offender, to have regard not only to the gravity of the offence but also to antecedent behaviour not all of which is necessarily evidenced by previous convictions: *R v Thomas* [2009] EWCA Crim 904, [2009] All ER (D) 16 (May). See *C v HM Advocate* [2009] HCJAC 44, 2009 SLT 707 (account taken of offender's abnormality of mind which was insufficient to establish plea of diminished responsibility).

Head (3) now refers to a political, religious, racial or ideological cause: Criminal Justice Act 2003 Sch 21 para 4(2)(c) (amended by Counter-Terrorism Act 2008 s 75(1), (2)(c)).

Head (c). A murder done for gain includes a domestic murder done to solve debt problems: *Re Bingham (application under para 3 of Sch 22 to the Criminal Justice Act 2003)* [2006] EWHC 2591 (QB), [2006] All ER (D) 262 (Oct). See *R v Bouhaddaou* [2006] EWCA Crim 3190, [2007] 2 Cr App Rep (S) 122 (murder committed to effect escape in course of burglary constituted murder for gain).

*A-G's References (Nos 108 and 109 of 2005)*, cited, reported at [2006] 2 Cr App Rep (S) 531. See *A-G's Reference (No 127 of 2006)*; *R v H*; *A-G's Reference (No 126 of 2006)*; *R v H* [2007] EWCA Crim 53, [2007] 2 Cr App Rep (S) 362 (appropriate sentence remained fact-specific despite defined starting point); *A-G's References (Nos 143 and 144 of 2006)*; *R v Brown* [2007] All ER (D) 202 (May), CA (where two offenders, one aged just under, and other just over, 18, equally culpable for murder, small disparity in their ages could not properly be reflected by more than one years' difference in minimum terms); *R v Barot* [2007] EWCA Crim 1119, [2007] All ER (D) 246 (May) (mass murder by fanatical terrorists and associated conspiracies and attempts); *R v McGrady* [2007] EWCA Crim 192, [2007] 2 Cr App Rep (S) 347 (whole life order appropriate for murder and dismemberment, with sexual motivation, of 15-year-old girl); *R v Jalil* [2008] EWCA Crim 2910, [2009] 2 Cr App Rep (S) 276, [2008] All ER (D) 51 (Dec) (see further PARA 128). It is proper to have regard to the offender's state of health when setting the minimum term: *Re Walker (application under para 3 of Sch 22 to the Criminal Justice Act 2003)* [2007] EWHC 156 (QB), [2007] All ER (D) 284 (Feb).

Head (e). See *Re Allitt (reference under para 6 of Sch 22 to the Criminal Justice Act 2003)* [2007] EWHC 2845 (QB), [2007] All ER (D) 77 (Dec) (sadistic element to personality of offender suffering from Munchausen's Syndrome by Proxy); and *R v Davis* [2008] All ER (D) 284 (Apr) (speculation murder sexually motivated insufficient to increase minimum term to 30 years). The features to be borne in mind under the 2003 Act Sch 21 in fixing a minimum term of a life sentence for murder also apply to appropriate cases of conspiracy to murder where the objective is fulfilled and criminal

culpability is extremely high: *R v McNee* [2007] All ER (D) 73 (May), CA. As to the setting of a minimum term where two offenders are tried for the same offence in separate trials see *Re Lambe* (reference under para 6 of Sch 22 to the Criminal Justice Act 2003) [2007] EWHC 1864 (QB), [2007] All ER (D) 126 (Aug). See also *R v Bonellie* [2008] EWCA Crim 1417, [2009] 1 Cr App Rep (S) 297, [2008] All ER (D) 213 (Jul) (for murder to involve sadistic conduct it had to involve a significant degree of awareness of pleasure in the infliction of pain, suffering or humiliation). The sexual conduct must be connected to the offence; sexual intercourse with the victim is not sufficient for this purpose: *R v Walker* [2007] EWCA Crim 2631, [2008] 2 Cr App Rep (S) 38, [2007] All ER (D) 354 (Oct). See also *R v Height* [2008] EWCA Crim 2500, [2009] 1 Cr App Rep (S) 656, [2008] All ER (D) 297 (Oct) (motive for first defendant, desire to rid himself of wife; motive for second defendant, financial gain). The sentencing judge has no discretion to disapply the statutory starting point: *A-G's Reference (No 24 of 2008)*; *R v Sanchez* [2008] EWCA Crim 2936, [2009] 3 All ER 839. A reduction in the minimum term may be appropriate where there has been exceptional progress in custody, even if the offence was particularly serious: *R v Pitchfork* [2009] EWCA Crim 963, [2009] All ER (D) 132 (May). While not expressly dealt with in the Criminal Justice Act 2003 Sch 21, desecration of the deceased's body after death and cannibalism will normally be identified as profoundly serious features which fall within the 'particularly high level of seriousness' category: *R v Morley* [2009] EWCA Crim 1302, [2010] Cr App Rep (S) 275, [2009] All ER (D) 85 (Jun), CA.

The Sentencing Guidelines Council has issued revised definitive sentencing guidelines on *Reduction in Sentence for a Guilty Plea* (2007). The guidelines apply to all cases sentenced on or after 23 July 2007.

A draft statutory instrument is also required in the case of an order under the Criminal Justice Act 2003 s 22(3C) (see PARA 1044) or rules under s 240A(4)(a) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 37), and in the case of an order under s 23A(4) which makes provision increasing the fraction in s 23A(3)(a), or increasing the figure in s 23A(3)(b) by more than is necessary to reflect changes in the value of money: s 330(5) (amended by Police and Justice Act 2006 s 17(5); and Criminal Justice and Immigration Act 2008 s 21(7), Sch 26 para 76 (not yet in force)).

Criminal Justice Act 2003 s 330(5) further amended: Criminal Justice and Immigration Act 2008 Sch 4 para 95, Sch 28 Pt 1.

As to guidance relating to the appropriate sentence where a knife is used to kill, see *R v Maina*; *R v Kika*; *R v Saddique* [2009] All ER (D) 157 (Nov), CA.

NOTE 7--A whole life sentence does not violate an offender's rights under the European Convention on Human Rights art 3 provided that he is not detained beyond a period that is justified on the grounds of punishment and deterrence: *R v Bieber* [2008] EWCA Crim 1601, [2009] 1 All ER 295.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/2. OFFENCES AGAINST THE PERSON/(1) HOMICIDE/(ii) Murder/91. Joint enterprise.

### **91. Joint enterprise.**

The normal principles of criminal liability in a joint enterprise apply in cases of homicide so that a person who participates in a joint enterprise which results in the unlawful killing of the victim by another participant is guilty of either murder or manslaughter if the relevant principles are satisfied<sup>1</sup>.

<sup>1</sup> See PARA 53 ante.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/2. OFFENCES AGAINST THE PERSON/(1) HOMICIDE/(iii) Manslaughter/A. IN GENERAL/92. In general.

### **(iii) Manslaughter**

#### **A. IN GENERAL**

##### **92. In general.**

Manslaughter may be classified as voluntary or involuntary<sup>1</sup>, the distinction being that in cases of voluntary manslaughter a person may be convicted of the offence, notwithstanding that he has the malice aforethought of murder, if he kills under provocation<sup>2</sup>, or suffering from diminished responsibility by reason of abnormality of mind<sup>3</sup>, or in pursuance of a suicide pact<sup>4</sup>. Involuntary manslaughter is committed where the defendant does not intend to kill or cause grievous bodily harm<sup>5</sup> but where death results from an unlawful act which any reasonable person would recognise as likely to expose another to the risk of injury<sup>6</sup> or is caused by a grossly negligent act or omission<sup>7</sup>, or where the person who causes death is reckless as to the risk of serious injury<sup>8</sup>.

1 As to procedural provisions relating to prosecutions for the manslaughter of a child or young person see PARA 1164 post. As to jurisdiction see PARA 86 ante; and as to restriction on prosecutions see PARA 85 ante. As to causation see PARA 7 ante.

2 As to provocation see PARAS 94-95 post.

3 As to diminished responsibility see PARAS 96-97 post.

4 See PARA 98 post.

5 *R v Taylor* (1834) 2 Lew CC 215.

6 See PARA 99 post.

7 See PARA 100 post.

8 See PARA 101 post.

#### **UPDATE**

##### **92 In general**

TEXT AND NOTES--The Corporate Manslaughter and Corporate Homicide Act 2007 provides for a new offence of corporate manslaughter: see PARA 38A.

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### 93. Penalty for manslaughter.

The penalty for manslaughter is imprisonment for life or for any shorter term<sup>1</sup>.

<sup>1</sup> Offences against the Person Act 1861 s 5 (amended by the Criminal Justice Act 1948 s 1(1), Sch 10 Pt I). For sentencing guidelines in the case of voluntary manslaughter on the ground of provocation see the Sentencing Guidelines Council Guideline *Manslaughter by Reason of Provocation* (2005). For sentencing guidelines in the case of voluntary manslaughter on the ground of diminished responsibility see *R v Chambers* (1983) 5 Cr App Rep (S) 190, CA. For sentencing guidelines in the case of voluntary manslaughter on the ground of a suicide pact see *R v Sweeney* (1986) 8 Cr App Rep (S) 419, CA; *R v England* (1990) 12 Cr App Rep (S) 98, CA. For sentencing guidelines in respect of involuntary manslaughter (see PARA 92 ante) see *A-G's Reference (Nos 19, 20 and 21 of 2001)*, *R v Byrne* [2001] EWCA Crim 1432, [2002] 1 Cr App Rep (S) 136. See also *R v Coleman* (1991) 95 Cr App Rep 159, CA; *R v Gunn* (1992) 13 Cr App Rep (S) 544, CA; *R v Kime* [1999] 2 Cr App Rep (S) 3, CA (fist fights); *R v Klair* (1995) 16 Cr App Rep (S) 660, CA; cf *R v O'Mahoney* (1980) 2 Cr App Rep (S) 57, CA (use of firearm); *R v Ali* (1988) 10 Cr App Rep (S) 59, CA; *R v Bashford* (1988) 10 Cr App Rep (S) 359, CA (victim a young child); *R v Saha* (1994) 15 Cr App Rep (S) 342, CA; *R v Kite* [1996] 2 Cr App Rep (S) 295, CA (killing by recklessness or gross negligence); *A-G's Reference (No 90 of 2005)*, *R v Dalton* [2006] EWCA Crim 270, [2006] All ER (D) 109 (Jan) (aggravating factors including failure to call for medical assistance); *A-G's Reference (No 9 of 2005)* [2005] EWCA Crim 812, [2005] 2 Cr App Rep (S) 664 (one-punch manslaughter).

As to disqualification for driving and endorsement of licence where the driver of a motor vehicle is convicted of manslaughter see the Road Traffic Offenders Act 1988 ss 34(2), 97(2), Sch 2 Pt II; and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1060.

## UPDATE

### 93 Penalty for manslaughter

TEXT AND NOTE 1--The value of authorities on unlawful act manslaughter involving violence prior to the Criminal Justice Act 2003 s 143(1), which requires the court to consider harm that the offence caused, was intended to cause or might foreseeably have caused in considering the seriousness of any offence, is doubtful. The court must increase its focus on the fact that a victim has died in consequence of an unlawful act of violence: *A-G's Reference (No 60 of 2009)*; *R v Appleby*; *R v Bryan*; *R v Cowles* [2009] EWCA Crim 2693, [2009] All ER (D) 182 (Dec). See also *A-G's Reference (No 111 of 2006)*; *R v Hussain* [2006] EWCA Crim 3269, [2007] 2 Cr App Rep (S) 146 (driving with victim trapped under vehicle); *A-G's References (Nos 38, 39 and 40 of 2007)* [2007] EWCA Crim 1692, [2008] 1 Cr App Rep (S) 319, [2007] All ER (D) 34 (Sep) (manslaughter during robbery); and *A-G's Reference (No 5 of 2009)*; *R v Carbon* [2009] EWCA Crim 1313, [2010] 1 Cr App Rep (S) 286, [2009] All ER (D) 103 (Jun) (unprovoked stabbing); and *R v Holtom* [2010] All ER (D) 124 (Apr), CA (workplace accident caused by inadequate supervision).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/2. OFFENCES AGAINST THE PERSON/(1) HOMICIDE/(iii) Manslaughter/B. VOLUNTARY MANSLAUGHTER/94. Provocation as defence to murder charge.

## **B. VOLUNTARY MANSLAUGHTER**

### **94. Provocation as defence to murder charge.**

Provocation may reduce a charge of murder<sup>1</sup> to one of manslaughter<sup>2</sup>. The test of whether the defence of provocation is entitled to succeed is a dual one. The alleged provocative conduct<sup>3</sup> must be such as:

- 39 (1) actually causes in the defendant a sudden and temporary loss of self-control<sup>4</sup>, making him so subject to passion that he is not the master of his mind (the subjective test)<sup>5</sup>; and
- 40 (2) was enough to make a reasonable man do as the defendant did (the objective test)<sup>6</sup>.

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked<sup>7</sup>, whether by things done or by things said<sup>8</sup>, or by both together, to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did must be left to be determined by the jury<sup>9</sup>. In determining that question the jury must take into account everything both done and said according to the effect which, in the jury's opinion, it would have on a reasonable man<sup>10</sup>.

1 Provocation is a defence only to a charge of murder: *R v Cunningham* [1959] 1 QB 288, 43 Cr App Rep 79, CCA (provocation not a defence to a charge of unlawful wounding); *R v Bruzas* [1972] Crim LR 367, Crown Ct (provocation not a defence to a charge of attempted murder). The defence of provocation is available to an accomplice to murder: *R v Marks* [1998] Crim LR 676, CA.

2 The defence of provocation is available where it is proved or admitted that the defendant has committed the actus reus of murder with the mens rea for murder: see *A-G of Ceylon v Kumarasinghe Don John Perera* [1953] AC 200 at 206, [1953] 2 WLR 238 at 243, PC; *Lee Chun-Chuen v R* [1963] AC 220, [1963] 1 All ER 73, PC; *Parker v R* [1964] AC 1369, [1964] 2 All ER 641, PC; *R v Martindale* [1966] 3 All ER 305, 50 Cr App Rep 273, C-MAC; *Smith v R* [2001] UKPC 27, [2001] 1 WLR 1532, [2002] 1 Cr App Rep 92.

3 Conduct constituting provocation may include spoken words: see note 8 infra. It is not essential that the conduct be directed at the defendant himself. At common law, however, the conduct had to be directed at the defendant or a near relative: see eg *R v Harrington* (1866) 10 Cox CC 370 (defendant provoked by an assault on a member of his family). This rule has by implication been changed by the Homicide Act 1957 s 3 (see the text and notes 7-10 infra); now the conduct need not be directed at the defendant or a near relative: see *R v Pearson* [1992] Crim LR 193, CA. In general provocation is a defence when it causes the defendant to kill the person giving the provocation (see *R v Simpson* (1915) 84 LJB 1893, 11 Cr App Rep 218, CCA), but it may provide a defence even where it causes him to kill a third person (see *R v Davies* [1975] QB 691, 60 Cr App Rep 253, CA; and see also the Homicide Act 1957 s 3; and the text and notes 7-10 infra). A person may rely on self-induced provocation where his own conduct causes a reaction in another which in turn causes him to lose his own self-control: *R v Johnson* [1989] 2 All ER 839, 89 Cr App Rep 148, CA (the mere fact that the defendant caused a reaction in others which in turn led him to lose his self-control does not result in the issue of provocation being kept outside the jury's consideration); *Edwards v R* [1973] AC 648, 57 Cr App Rep 157, PC (blackmailer not generally entitled to rely on predictable reaction of person blackmailed as constituting provocation, but may do so where the victim's reaction goes to extreme lengths; explained in *R v Johnson* supra).

4 This requirement of the common law was not changed by the Homicide Act 1957 s 3 (see the text and notes 7-10 infra): see *R v Thornton* [1992] 1 All ER 306, 96 Cr App Rep 112, CA; *R v Ahluwalia* [1992] 4 All ER

889, 96 Cr App Rep 133, CA. 'Sudden' does not mean 'immediate'; a delayed reaction to the alleged provocative conduct (or the last piece of provocative conduct) can fall within the defence provided that when it occurs the loss of self-control is abrupt: *R v Ahluwalia* supra. It is essential to the defence that the defendant should in fact have lost his self-control at the time of the killing. In considering whether there was such a genuine loss of self-control the jury may have regard to the whole factual situation, including the time elapsing between the provocation and the killing (*R v Hayward* (1833) 6 C & P 157; *Kwaku Mensah v R* [1946] AC 83, PC; *R v Duffy* [1949] 1 All ER 932n, CCA; *R v Ibrams, R v Gregory* (1981) 74 Cr App Rep 154, CA), to the manner of the killing itself which may support or negative contrivance or design (1 Hale PC 454; Fost 291; 1 Hawk PC c 13 s 42; 1 East PC 235; *Thorpe's Case* (1829) 1 Lew CC 171; *R v Shaw* (1834) 6 C & P 372; *R v Thomas* (1837) 7 C & P 817; *Mancini v DPP* [1942] AC 1, 28 Cr App Rep 65, HL; *R v Gilbert* (1977) 66 Cr App Rep 237, CA), and to the defendant's characteristics (*R v Ahluwalia* supra). See also *R v Cocker* [1989] Crim LR 740, CA (husband gave way to wife's entreaties that he should kill her; loss of self-restraint but not of self-control; no evidence of provocation). Where there has been a protracted course of cruel, insulting or violent conduct, the whole course of that conduct must be taken into account by the jury in considering whether or not the defendant suffered a sudden and temporary loss of self-control as a result of the final occurrence: *R v Humphreys* [1995] 4 All ER 1008, [1996] Crim LR 431, CA. If the defendant has endured abuse over a period, especially where this has resulted in 'battered woman syndrome', a jury may more readily find (on a 'last straw' basis) that there was a sudden loss of control triggered by even a minor incident: *R v Thornton (No 2)* [1996] 2 All ER 1023 at 1030, [1996] 2 Cr App Rep 108 at 116, CA, per Lord Taylor CJ; *Luc Thiet Thuan v R* [1997] AC 131 at 141, [1996] 2 All ER 1033 at 1047, PC.

5 See *R v Duffy* [1949] 1 All ER 932n, CCA, approving the direction given to the jury by Devlin J; *R v Whitfield* (1976) 63 Cr App Rep 39 at 42, CA.

6 See PARA 95 post.

7 Where there is any evidence of provocation which would, if accepted, justify the jury in returning a verdict of manslaughter, the judge must leave that issue to the jury whatever the line of defence adopted at the trial (*R v Hopper* [1915] 2 KB 431, 11 Cr App Rep 136, CCA; *Kwaku Mensah v R* [1946] AC 83, PC; *Bullard v R* [1957] AC 635, 42 Cr App Rep 1, PC; *R v Porritt* [1961] 3 All ER 463, 45 Cr App Rep 348, CCA; *Rolle v R* [1965] 3 All ER 582, [1965] 1 WLR 1341, PC; *R v Cascoe* [1970] 2 All ER 833, 54 Cr App Rep 401, CA; *R v Newell* [1989] Crim LR 906, CA; *R v Sawyer* [1989] Crim LR 831, CA; *R v Cambridge* [1994] 2 All ER 760, 99 Cr App Rep 142, CA; and see also *Knowles v R* [1930] AC 366, PC; *Mancini v DPP* [1942] AC 1, 28 Cr App Rep 65, HL) and even if, in the opinion of the trial judge, on the evidence a verdict of manslaughter would be perverse (*R v Gilbert* (1977) 66 Cr App Rep 237, CA; *R v Newell* supra; *R v Stewart* [1995] 4 All ER 999, [1996] 1 Cr App Rep 229n, CA; *R v Baillie* [1995] 2 Cr App Rep 31, CA). Where there is such evidence the judge must leave the defence to the jury notwithstanding that the defendant or his counsel would prefer that it was not: *R v Dhillon* [1997] 2 Cr App Rep 104, CA. Counsel on both sides are obliged to draw the judge's attention to any evidence of provocation: *R v Cox* [1995] 2 Cr App Rep 513, CA. Where provocation is not left to the jury where it should have been, a manslaughter verdict will be substituted on appeal unless the Court of Appeal is sure that the jury would inevitably have found the defence of provocation disproved and have convicted the defendant of murder: *R v Dhillon* supra; *R v Van Dongen* [2005] EWCA Crim 1728, [2005] 2 Cr App Rep 632. See also *Franco v R* (2001) Times, 11 October, PC (an appellate court should be very cautious in drawing inferences as to how a jury would have resolved an issue, such as provocation, which was never before it). Where the evidence discloses a possible defence of provocation, the burden of proof remains on the prosecution, and it is not for the defendant to establish the defence; this must be made clear to the jury: *Chan Kau v R* [1955] AC 206, [1955] 1 All ER 266, PC; *R v McPherson* (1957) 41 Cr App Rep 213, CCA; *R v Cascoe* supra. If the jury has a reasonable doubt whether or not there was provocation, the defendant is entitled to a verdict of manslaughter: *R v Prince* [1941] 3 All ER 37, 28 Cr App Rep 60, CCA; *R v McPherson* supra.

Evidence which was adduced in support of an unsuccessful defence, eg self-defence, may be relied on in whole or in part as affording provocation: see *Bullard v R* supra; *R v Porritt* supra.

If the judge decides that there is insufficient evidence for a jury to conclude that there is a reasonable possibility that there was specific provoking conduct resulting in loss of self-control by the defendant, he must not leave the defence of provocation to the jury: *R v Acott* [1997] 1 All ER 706, [1997] 2 Cr App Rep 94, HL.

8 At common law the defence of provocation tended to be limited to certain particular situations (such as physical attack or finding of spouse in adultery) and it was held in *Holmes v DPP* [1946] AC 588, 31 Cr App Rep 123, HL, that words alone, save in extreme and exceptional cases, would not amount to provocation. The effect of the Homicide Act 1957 s 3 is to remove these limitations upon the defence; anything, whether things done or words said or both together, which causes a loss of self-control in the defendant may be considered by the jury in determining whether it is capable of amounting to provocation: *R v Davies* [1975] QB 691, 60 Cr App Rep 253, CA. See also *R v Doughty* (1986) 83 Cr App Rep 319, CA (baby's continuous crying may constitute evidence of provocation).

9 Homicide Act 1957 s 3. Section 3 involves two questions, to be answered by the judge: whether there is any evidence of specific provocative conduct, and whether there is any evidence that that conduct caused the defendant to lose his self-control: *R v Gilbert* (1977) 66 Cr App Rep 237, CA; and see also *Franco v R* [2001]



UKPC 38, 145 Sol Jo LB 216, (2001) Times, 11 October, PC. Where the judge is required to leave the issue of provocation to the jury, he should indicate, unless it is obvious, what evidence might support the conclusion that the defendant had lost his self-control: *R v Stewart* [1995] 4 All ER 999, [1996] 1 Cr App Rep 229n, CA. See also *R v Humphreys* [1995] 4 All ER 1008, [1996] Crim LR 431, CA. As to the effect of provocation on a reasonable man see PARA 95 post.

10 Homicide Act 1957 s 3.

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## 95. Provocation: the objective test.

The function of the objective test for provocation is to introduce an objective standard of self-control against which the defendant's actions must be measured<sup>1</sup>. Traditionally, the objective criterion has been expressed as a requirement that the alleged provocative words or conduct must have been such as might have caused a reasonable man (that is, an ordinary person) to suffer a loss of self-control and, having lost self-control, to do as the defendant did<sup>2</sup>. This is a question to be decided according to the opinion of the jury<sup>3</sup>. For the purposes of the defence of provocation, a defendant is to be judged by the standard of a person having ordinary powers of control, which standard is a constant, objective standard in all cases<sup>4</sup>. The jury must assess the gravity of the provocation to the defendant and must do so by reference to the particular defendant's peculiarities<sup>5</sup>, but the gravity of the provocation to the defendant having been assessed, the standard of self-control by which his conduct is to be evaluated for the purpose of the defence of provocation is the external standard of a person having and exercising ordinary powers of self-control of someone of the defendant's age and sex, and is not to be evaluated by reference to the standard which one could expect of the particular defendant with his particular characteristics<sup>6</sup>. There is no rule of law that the retaliation must be proportionate to the provocation: it is merely a matter to be considered by the jury in determining whether a reasonable man would have acted as the defendant did<sup>7</sup>. Where a person, owing to the taking of alcohol or drugs, makes a mistake of fact, he is entitled, for the purposes of the defence of provocation, to be treated as though the supposed fact was true; hence, if owing to his drunkenness he believed that another was about to make an attack upon him, the jury ought to take that into consideration in determining the issue of provocation<sup>8</sup>.

1 *DPP v Camplin* [1978] AC 705, 67 Cr App Rep 14, HL; *R v Morhall* [1996] AC 90, [1995] 2 Cr App Rep 502, HL.

2 See eg *DPP v Camplin* [1978] AC 705, 67 Cr App Rep 14, HL.

3 See the Homicide Act 1957 s 3; and PARA 94 ante. At common law the judge might withdraw the issue of provocation from the jury where, upon the evidence, no reasonable jury could find that a reasonable man would have been provoked (see eg *Holmes v DPP* [1946] AC 588, 31 Cr App Rep 123, HL), but the Homicide Act 1957 s 3 makes it clear that the judge may no longer withdraw the issue on this ground. If there is evidence that the defendant was in part provoked, the issue must be left to be determined by the jury. For instances where the court has considered provocation and its effect on a reasonable man after the Homicide Act 1957 see eg *R v Simpson* [1957] Crim LR 815 (threats and nagging constituting provocation); *R v Fantle* [1959] Crim LR 584 (taunts by deceased of having spent the night with defendant's wife constituting provocation); *R v Doughty* (1986) 83 Cr App Rep 319, CA (baby's continuous crying capable of constituting provocation).

The Criminal Justice Act 1967 s 8 (see PARA 13 ante) has not affected the operation of the Homicide Act 1957 s 3: *R v Williams* [1968] Crim LR 678, CA.

4 *A-G for Jersey v Holley* [2005] UKPC 23, [2005] 2 AC 580, [2005] 2 Cr App Rep 588 (applying *DPP v Camplin* [1978] AC 705, 67 Cr App Rep 14, HL, and *Luc Thiet Thuan v R* [1997] AC 131, [1996] 2 Cr App Rep 178, PC; and overruling *R v Smith* [2001] 1 AC 146, [2001] 1 Cr App Rep 31, HL). See *R v Mohammed* [2005] EWCA Crim 1880, [2005] All ER (D) 154 (Jul) (in which *A-G for Jersey v Holley* supra was considered). See also *R v James*, *R v Karimi* [2006] EWCA Crim 14, [2006] 1 All ER 759.

5 *DPP v Camplin* [1978] AC 705, 67 Cr App Rep 14, HL; *R v Morhall* [1996] AC 90, [1995] 2 Cr App Rep 502, HL; *A-G for Jersey v Holley* [2005] UKPC 23, [2005] 2 AC 580, [2005] 2 Cr App Rep 588.

6 *A-G for Jersey v Holley* [2005] UKPC 23, [2005] 2 AC 580, [2005] 2 Cr App Rep 588 (applying *DPP v Camplin* [1978] AC 705, 67 Cr App Rep 14, HL, and *Luc Thiet Thuan v R* [1997] AC 131, [1996] 2 Cr App Rep 178, PC; and overruling *R v Smith* [2001] 1 AC 146, [2001] 1 Cr App Rep 31, HL). See also *R v James*, *R v Karimi* [2006] EWCA Crim 14, [2006] 1 All ER 759.

7 *Phillips v R* [1969] 2 AC 130, 53 Cr App Rep 132, PC; *R v Walker* [1969] 1 All ER 767, 53 Cr App Rep 195, CA; *R v Brown* [1972] 2 QB 229, 56 Cr App Rep 564, CA.

8 *R v Letenock* (1917) 12 Cr App Rep 221, CCA; *R v Wardrope* [1960] Crim LR 770. Cf *R v O'Grady* [1987] QB 995, 85 Cr App Rep 315, CA; *R v Hatton* [2005] EWCA Crim 2951, [2006] Crim LR 353 (defendant not entitled to rely, so far as self-defence is concerned, on a mistaken belief, induced by voluntary intoxication, that he is under attack).

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## **96. Diminished responsibility as defence to murder charge.**

Where a person kills or is a party to the killing of another, he may not be convicted of murder<sup>1</sup> if he was suffering from such abnormality of mind<sup>2</sup> (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury<sup>3</sup>) as substantially impaired his mental responsibility<sup>4</sup> for his acts and omissions in doing or being a party to the killing<sup>5</sup>. A person who but for the defence of diminished responsibility would be liable<sup>6</sup> to be convicted of murder is liable instead to be convicted of manslaughter<sup>7</sup>. The fact that one party to a killing is by virtue of such defence not liable to be convicted of murder does not, however, affect the question whether the killing amounted to murder in the case of any other party to it<sup>8</sup>.

The onus is on the defence to prove that by reason of diminished responsibility the defendant is not liable to be convicted of murder<sup>9</sup>, but the burden is not so heavy as the burden of proof on the prosecution and is only that of showing a preponderance of probabilities<sup>10</sup>. As a rule of practice, a plea of guilty of manslaughter on the ground of diminished responsibility should not generally be accepted; the issue of diminished responsibility should be left to the jury<sup>11</sup>. Where such a plea is tendered, however, and the medical evidence plainly shows that the plea can properly be accepted, it is permissible for the court to accept it and thus avoid a trial for murder<sup>12</sup>. Where the defence seeks a verdict of manslaughter on the ground of diminished responsibility and on another ground<sup>13</sup> and the jury returns a verdict of manslaughter, the judge may ask the jury on which ground its verdict is based or whether it was based on both grounds<sup>14</sup>.

1 Diminished responsibility is not a defence to a charge of attempted murder: *R v Campbell* [1997] Crim LR 495, Crown Ct. The defence arises only where the defendant would otherwise be guilty of murder because the actus reus and mens rea of murder have been proved or admitted: see *R v Antoine* [2001] AC 340, [2000] 2 Cr App Rep 94, HL. A person accused of murder who is found unfit to plead, and is found to have done the act charged, cannot raise the defence of diminished responsibility: *R v Antoine* supra.

2 'Abnormality of mind', which has to be contrasted with the expression 'defect of reason' in the defence of insanity (see PARA 31 ante), means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal; it appears to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment: *R v Byrne* [1960] 2 QB 396 at 403, 44 Cr App Rep 246 at 252, CCA. To establish mental abnormality under the Homicide Act 1957 s 2(1) (see the text and note 5 infra), it is not necessary to show that the defendant's abnormality existed from birth: *R v Gomez* (1964) 48 Cr App Rep 310, CCA.

3 Abnormality of mind induced by alcohol or drugs is not due to inherent causes: see *R v Gittens* [1984] QB 698, 79 Cr App Rep 272, CA; *R v Fenton* (1975) 61 Cr App Rep 261, CA. If, however, the imbibing of alcohol has reached the stage that the defendant's brain has been damaged so that there is gross impairment of judgment and emotional responses, or the defendant's use of alcohol is involuntary because he can no longer resist the impulse to drink, the defence of diminished responsibility is available: see *R v Tandy* [1989] 1 All ER 267, 87 Cr App Rep 45, CA. See also *R v Inseal* [1992] Crim LR 35, CA. Where the evidence is that the defendant was suffering from abnormality of mind due to two or more causes, one of which is a specified cause and the other of which is intoxication through drink or drugs, the defendant is not deprived of the defence of diminished responsibility merely because he would not (or might not) have killed if he had not been intoxicated: the question for the members of the jury is whether the defendant satisfied them that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts: *R v Dietschmann* [2003] UKHL 10,

[2003] 1 AC 1209, [2003] 2 Cr App Rep 54 (approving *R v Fenton* (1975) 61 Cr App Rep 261, CA; *R v Gittens* [1984] QB 698, 79 Cr App Rep 272, CA). If the jury is so satisfied, it must find him not guilty of murder but guilty of manslaughter: *R v Dietschmann* supra. 'Induced by disease or injury' refers to organic or physical injury or disease of the body including the brain, while 'any inherent cause' covers functional mental illness: *R v Sanderson* (1994) 98 Cr App Rep 325, CA. 'Battered women's syndrome', listed in the British Classification of Mental Diseases in 1994, can give rise to the defence of diminished responsibility: *R v Hobson* [1998] 1 Cr App Rep 31, CA. Unless an alleged abnormality of the mind can be shown to fall within one of the causes specified in the Homicide Act 1957 s 2(1), the defence of diminished responsibility cannot be sustained: *R v King* as reported in [1965] 1 QB 443 at 450, CCA.

4 The expression 'mental responsibility for his acts' points to a consideration of the extent to which the defendant's mind is answerable for his physical acts, which must include a consideration of the extent of his ability to exercise will-power to control his physical acts: *R v Byrne* [1960] 2 QB 396 at 403, 44 Cr App Rep 246 at 252, CCA. Such abnormality as 'substantially impairs his mental responsibility' involves a mental state which in popular language a jury would regard as amounting to partial insanity or being on the borderline of insanity: *R v Byrne* supra at 404 and at 253. It is not appropriate in every case to direct a jury that the test of diminished responsibility is partial or borderline insanity: see *Rose v R* [1961] AC 496, 45 Cr App Rep 102, PC (cited in *R v Seers* (1984) 79 Cr App Rep 261, CA (a case of chronic reactive depression)). It is not appropriate where the abnormality relied on cannot readily be related to any of the generally recognised types of insanity, as, for example, where the defendant pleads diminished responsibility occasioned by a depressive illness: *Rose v R* supra; *R v Seers* supra. Moreover, even where it is appropriate for a judge to invite a jury to take into consideration borderline insanity, he should make it plain that he is not using the word 'insanity' in the narrow legal sense of the M'Naghten Rules but in 'its broad popular sense': *Rose v R* supra.

As to the meaning of 'substantially' see *R v Lloyd* [1967] 1 QB 175, 50 Cr App Rep 61, CCA ('substantial' means that the impairment of the defendant's mental responsibility need not be 'total' but must be more than 'trivial' or 'minimal': 'substantial' means something in between). The difficulty which the defendant had in controlling his conduct must have been substantially greater than would have been experienced by an ordinary person, without mental abnormality, in the circumstances in question: *R v Simcox* [1964] Crim LR 402, CCA.

5 Homicide Act 1957 s 2(1). Where on a trial for murder the defendant contends either that at the time of the alleged offence he was insane so as not to be responsible according to law for his actions (Criminal Procedure (Insanity) Act 1964 s 6(a)), or that at that time he was suffering from such abnormality of the mind as is specified in the Homicide Act 1957 s 2(1) (Criminal Procedure (Insanity) Act 1964 s 6(b)), the court must allow the prosecution to adduce or elicit evidence tending to prove the other of those contentions, and may give directions as to the stage of the proceedings at which the prosecution may adduce such evidence (s 6). In such a case the prosecution must prove the elements of the defence beyond reasonable doubt: *R v Grant* [1960] Crim LR 424. If, however, the defendant does not raise insanity or diminished responsibility, and in no way suggests any abnormality of mind, the prosecution may not introduce evidence tending to establish insanity or diminished responsibility: see *R v Dixon* [1961] 3 All ER 460n, [1961] 1 WLR 337. As to whether the judge may raise the issue of diminished responsibility see *R v Kookan* (1981) 74 Cr App Rep 30, CA; *R v Campbell* (1986) 84 Cr App Rep 255, CA.

Where the medical evidence of diminished responsibility is based on certain facts, it is for the defence to prove those facts by admissible evidence: *R v Ahmed Din* [1962] 2 All ER 123, 46 Cr App Rep 269, CCA.

6 Ie whether as principal or as secondary party: Homicide Act 1957 s 2(3).

7 Ibid s 2(3).

8 Ibid s 2(4).

9 Ibid s 2(2). This does not contravene the presumption of innocence articulated in the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence): see *R v Lambert*, *R Ali*, *R v Jordan* [2002] QB 1112, [2001] 1 Cr App Rep 205, CA (affd on other grounds [2001] UKHL 37, [2002] 2 AC 545, [2001] 2 Cr App Rep 511). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. Although the Homicide Act 1957 does not provide that a defence of diminished responsibility must be based on medical evidence, such a defence is not likely to succeed without such evidence: *R v Dix* (1982) 74 Cr App Rep 306, CA.

10 *R v Dunbar* [1958] 1 QB 1, 41 Cr App Rep 182, CCA. As to the burden of proof see PARA 1368 et seq post.

11 *R v Matheson* [1958] 2 All ER 87, 42 Cr App Rep 145, CCA.

12 *R v Cox* [1968] 1 All ER 386, 52 Cr App Rep 130, CA.

13 Eg provocation: see PARAS 94-95 ante.

14 *R v Matheson* [1958] 2 All ER 87, 42 Cr App Rep 145, CCA. Contrast *R v Larkin* [1943] KB 174, 29 Cr App Rep 18, CCA (two possible defences to murder on facts: 'provocation' and 'no intent to injure'; judge should not seek to ascertain basis of manslaughter decision); *R v Paul Byrne* [2002] EWCA Crim 1975, [2003] 1 Cr App Rep (S) 338 (defence based on lack of intent; judge left provocation to jury; judge declined to ask jury for basis of manslaughter decision; held judge had discretion so to decline). If the jury is to be asked for the basis of a manslaughter verdict it should be warned to this effect in the summing up: *R v Douglas Jones* (1999) Times 17 February, CA.

## **UPDATE**

### **96 Diminished responsibility as defence to murder charge**

NOTE 3--In the case of alcohol dependency syndrome, the question is ultimately whether the defendant's mental responsibility for his actions when killing the deceased was substantially impaired as a result of the alcohol consumed under the influence of the syndrome: *R v Wood* [2008] EWCA Crim 1305, [2008] All ER (D) 272 (Jun). As to consideration of the guidance given to juries where the defence of diminished responsibility on the ground of alcohol dependency syndrome is raised, see *R v Stewart* [2009] EWCA Crim 593, [2010] 1 All ER 260.

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## 97. Diminished responsibility; functions of judge and jury.

In his summing up the judge must give to the jury a proper explanation of the terms contained in the statutory provisions concerned with diminished responsibility<sup>1</sup>.

Whether or not the defendant was suffering from an abnormality of the mind at the time of the killing is for the jury to decide<sup>2</sup> and while the medical evidence is important, the jury is not bound to accept it if other evidence is adduced which conflicts with or outweighs it<sup>3</sup>. The question whether the defendant's abnormality of mind was sufficiently substantial to impair his mental responsibility is a question of degree; and it should also be decided by the jury<sup>4</sup>. However, the aetiology<sup>5</sup> of the abnormality of the mind is a matter to be determined on medical evidence<sup>6</sup>.

The judge should review the evidence in detail for the jury<sup>7</sup>. When directing the jury on burden of proof, the judge must point out that the burden on the defence of establishing diminished responsibility is not so great as the burden on the prosecution<sup>8</sup>. Comment by the judge on the failure of the defendant to give evidence in such cases is only rarely proper<sup>9</sup>.

1 *R v Terry* [1961] 2 QB 314, 45 Cr App Rep 180, CCA; *R v Gomez* (1964) 48 Cr App Rep 310, CCA. Cf *R v Spriggs* [1958] 1 QB 270, 42 Cr App Rep 69, CCA, as explained in *R v Walden* [1959] 3 All ER 203, 43 Cr App Rep 201, CCA; *R v Terry* supra. The statutory provisions concerned with diminished responsibility are those of the Homicide Act 1957 s 2(1): see PARA 96 ante. See in particular, in connection with terms such as 'abnormality of mind', 'defect of reason', 'induced by disease or injury', 'mental responsibility for his acts' and 'substantially impairs his mental responsibility' para 96 notes 2-4 ante.

2 *R v Dunbar* [1958] 1 QB 1 at 9, 41 Cr App Rep 182 at 186, CCA, per Lord Goddard CJ; *R v Spriggs* [1958] 1 QB 270, 42 Cr App Rep 69, CCA. The jury should approach this task in a broad common sense way: *Walton v R* [1978] AC 788, 66 Cr App Rep 25, PC.

3 The jury is entitled to consider all the evidence including the acts and statements of the defendant and his demeanour: *R v Byrne* [1960] 2 QB 396 at 403, 44 Cr App Rep 246 at 253, CCA. The decision on the issue of diminished responsibility is entrusted to the jury, after proper direction, most obviously when there is a conflict of medical evidence: *R v Jennion* [1962] 1 All ER 689, 46 Cr App Rep 212, CCA. The jury may return a verdict contrary to the medical evidence if the verdict is otherwise supportable: *R v Latham* [1965] Crim LR 434, CCA; *Walton v R* [1978] AC 788, 66 Cr App Rep 25, PC; *R v Kiszko* (1978) 68 Cr App Rep 62, CA; *R v Sanders* (1991) 93 Cr App Rep 245, CA. Where, however, a verdict of murder entirely lacks support from the evidence adduced it will be reversed on appeal, and a verdict of manslaughter will be substituted for one of murder: *R v Matheson* [1958] 2 All ER 87, 42 Cr App Rep 145, CCA; *R v Bailey* (1961) reported in (1977) 66 Cr App Rep 31n, CCA. The principle that mental responsibility is a matter for the jury is the same whether the defence pleads insanity or diminished responsibility: *R v Jennion* supra at 692 and 217. As to the issue of insanity being left to the jury see PARA 31 ante.

4 *R v Byrne* [1960] 2 QB 396 at 402-403, 44 Cr App Rep 246 at 253, CCA. For the direction to be given where abnormality resulted from a combination of alcohol or drugs and inherent causes see *R v Dietschmann* [2003] UKHL 10, [2003] 1 AC 1209, [2003] 2 Cr App Rep 54. As to alcoholism see PARA 96 ante.

5 Ie whether the abnormality arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury: cf para 96 note 3 ante.

6 *R v Byrne* [1960] 2 QB 396 at 403, 44 Cr App Rep 246 at 253, CCA.

7 *R v Terry* [1961] 2 QB 314, 45 Cr App Rep 180, CCA; *R v Gomez* (1964) 48 Cr App Rep 310, CCA. It is bad practice, and normally constitutes an inadequate direction, for the judge merely to hand transcripts of the medical evidence to the jury: *R v Terry* supra.

8 *R v Dunbar* [1958] 1 QB 1, 41 Cr App Rep 182, CCA.

9 *R v Bathurst* [1968] 2 QB 99, 52 Cr App Rep 251, CA. For examples of cases where it would be proper to comment see *R v Bathurst* supra and *R v Bradshaw* (1985) 82 Cr App Rep 79, CA (situations where it would be reasonable to expect the defendant to give evidence). Where comment is proper, it may take the form that the defendant is not bound to give evidence, but that the burden is on him and if he does not give evidence he runs the risk of not being able to prove his case. It is submitted that these propositions remain true despite the subsequent enactment of the Criminal Justice and Public Order Act 1994 s 35 (drawing inferences from failure of accused to give evidence: see PARA 1555 post).

## UPDATE

### 97 Diminished responsibility; functions of judge and jury

NOTE 2--Where the evidence is such that no reasonable jury, properly directed, could conclude that the defendant had failed to prove on a balance of probabilities that the defendant had suffered from an abnormality of mind and that that abnormality of mind substantially impaired the defendant's mental responsibility for his acts, the judge is permitted to withdraw the charge of murder from the jury: *R v Khan* [2009] EWCA Crim 1569, [2010] 1 Cr App Rep 74, [2009] All ER (D) 288 (Jul).

NOTE 4--See also *R v Ramchurn* [2010] All ER (D) 32 (Feb), CA.



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## 98. Suicide pacts.

Suicide, which was self-murder at common law, is no longer an offence<sup>1</sup>. However, where a person, acting in pursuance of a suicide pact between himself and another, kills the other or is a party to the other being killed by a third party, he is guilty of manslaughter<sup>2</sup>. For these purposes, 'suicide pact' means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact is to be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact<sup>3</sup>. Where it is shown that a person charged with the murder of another killed the other or was a party to his being killed, it is for the defence to prove<sup>4</sup> that the person charged was acting in pursuance of a suicide pact between him and the other<sup>5</sup>.

1 Suicide Act 1961 s 1.

2 Homicide Act 1957 s 4(1) (s 4(1), (2) amended by the Suicide Act 1961 s 3(2), Sch 2). As to complicity in another's suicide see PARA 106 post. As to the penalty for manslaughter see PARA 93 ante. See also PARA 92 ante.

3 Homicide Act 1957 s 4(3).

4 This imposes a legal (or persuasive) burden on the defendant, although this is not incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence): see *A-G's Reference (No 1 of 2004)*, *R v Edwards* [2004] EWCA Crim 1025 at [118]-[132], [2004] 1 WLR 2111 at [118]-[132], [2004] 2 Cr App Rep 424 at [118]-[132] per Lord Woolf CJ; and PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

5 Homicide Act 1957 s 4(2) (as amended: see note 2 supra). For the related offence of aiding, abetting, counselling or procuring suicide or attempted suicide see PARA 106 post.

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### **C. INVOLUNTARY MANSLAUGHTER**

#### **99. Killing by unlawful and dangerous act: constructive manslaughter.**

Where death is caused<sup>1</sup> by an unlawful act, the person doing that act is guilty of manslaughter if it is dangerous in the sense that any reasonable person would inevitably recognise that the act would expose some other person<sup>2</sup> to the risk of at least some harm<sup>3</sup>. This type of manslaughter is often described as 'constructive manslaughter'. The objective test mentioned above is applied on the basis of the facts known to the defendant at the time of his unlawful act<sup>4</sup>. Where the victim is killed by one or other of two different acts of the defendant, each of which if it caused the death is sufficient to establish manslaughter, it is not necessary to prove which act caused the death provided that the defendant had the necessary mental element at the time of each of those acts<sup>5</sup>.

To be an unlawful act, the act must constitute a criminal offence<sup>6</sup>; an unlawful act does not include an act which is tortious but not criminal<sup>7</sup>, nor does it include an act which becomes unlawful merely because of the negligent manner in which it is performed. Thus a person who causes the death of another while committing the offence of careless or inconsiderate driving<sup>8</sup> is not necessarily<sup>9</sup> guilty of manslaughter<sup>10</sup>. It would also seem that a distinction is to be drawn between omissions and acts of commission; only an unlawful and dangerous act of commission resulting in death suffices for constructive manslaughter<sup>11</sup>.

Although it need not be proved that the defendant himself intended, or even foresaw, harm to another, the requirement of an unlawful act will ordinarily require proof that he had the requisite mens rea to render the act unlawful<sup>12</sup>. Thus where, for example, the unlawful act alleged is an assault, a verdict of manslaughter cannot be supported unless it is shown that the defendant had the mens rea for an assault<sup>13</sup>.

Where a person accidentally kills another while playing a lawful game, the killing is not manslaughter<sup>14</sup>. A contestant who causes the death of his opponent in wrestling or boxing is not guilty of manslaughter if the death results from conduct ordinarily incident to the sport<sup>15</sup>; but prize-fighting<sup>16</sup> is by its nature illegal and, if death results, the survivor is guilty of manslaughter while those who are present encouraging the fight are guilty of manslaughter as abettors<sup>17</sup>. If two persons fight a duel and one is killed, the survivor is guilty of murder or manslaughter according to his mens rea, while the seconds and other persons giving encouragement are liable as abettors<sup>18</sup>.

It would appear that to cause death by an unlawful abortion would amount at least to manslaughter<sup>19</sup>.

1 It is an essential element that the unlawful and dangerous act must have caused the death: *R v Inner South London Coroner, ex p Douglas-Williams* [1999] 1 All ER 344 at 350, CA, per Lord Woolf MR; *R v Carey* [2006] EWCA Crim 17, [2006] All ER (D) 189 (Jan). As to causation see PARA 7 ante.

2 The objective risk of harm need not be of harm to the victim; it suffices that that risk is of harm to another, and this is so even if the victim was outside any category of persons whom a reasonable person might consider potentially at risk: *A-G's Reference (No 3 of 1994)* [1998] AC 245, [1998] 1 Cr App Rep 1, HL. The cases cited in note 3 infra spoke in terms of an objective risk of harm to the victim and must be understood in light of this case.

For the purposes of the definition of 'dangerousness', 'harm' means physical harm; the reasonably foreseeable risk of emotional disturbance produced by terror is not enough; but the reasonably foreseeable risk of physical harm from emotional disturbance is: *R v Dawson*, *R v Nolan*, *R v Walmsley* (1985) 81 Cr App Rep 150, CA.

3 *R v Church* [1966] 1 QB 59 at 70, [1965] 2 All ER 72 at 76, CCA; *R v Larkin* as reported in [1943] 1 All ER 217, CCA; *R v Lamb* [1967] 2 QB 981, 51 Cr App Rep 417, CA; *R v Cato* [1976] 1 All ER 260, 62 Cr App Rep 41, CA; *R v Goodfellow* (1986) 83 Cr App Rep 23, CA; *R v Dawson*, *R v Nolan*, *R v Walmsley* (1985) 81 Cr App Rep 150, CA; *R v Ball* [1989] Crim LR 730, CA; *R v Watson* [1989] 2 All ER 865, 89 Cr App Rep 211, CA; *DPP v Newbury*, *DPP v Jones* [1977] AC 500, 62 Cr App Rep 291, HL; *R v Carey* [2006] EWCA Crim 17, [2006] All ER (D) 189 (Jan). See also note 2 supra.

4 *R v Dawson*, *R v Nolan*, *R v Walmsley* (1985) 81 Cr App Rep 150, CA (the question is whether, on the facts known to the defendant at the time of the unlawful act, a reasonable person would have realised that that act must subject somebody to at least the risk of some harm resulting from it). See also *R v Carey* [2006] EWCA Crim 17, [2006] All ER (D) 189 (Jan). As to the duration of the unlawful act see *R v Watson* [1989] 2 All ER 865, 89 Cr App Rep 211, CA (unlawful act comprised the whole of a burglarious intrusion, and not just the time of entry, during which defendant gained knowledge of victim's old age and frailty).

5 *A-G's Reference (No 4 of 1980)* [1981] 2 All ER 617, 73 Cr App Rep 40, CA.

6 See eg *R v Dias* [2001] EWCA Crim 2986 at [9], [2002] 2 Cr App Rep 96 at [9] per Keene LJ; *R v Andrews* [2002] EWCA Crim 3021, [2003] Crim LR 477, CA. See also *R v Rodgers* [2003] EWCA Crim 945, sub nom *R v Rogers* [2003] 1 WLR 1374, [2003] 2 Cr App Rep 160; *R v Finlay* [2003] EWCA Crim 3868, [2003] All ER (D) 142 (Dec); *R v Kennedy* [2005] EWCA Crim 685, [2005] 1 WLR 2159, [2005] 2 Cr App Rep 348.

7 *R v Franklin* (1883) 15 Cox CC 163; *R v Lamb* [1967] 2 QB 981 at 988, [1967] 2 All ER 1282 at 1283-1284, CA.

8 le contrary to the Road Traffic Act 1988 s 3 (as substituted): see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 971.

9 If the driving is grossly negligent, however, the driver may be guilty of manslaughter on that account: see PARA 100 post. As to the offence of causing death by dangerous driving see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 963 et seq.

10 *Andrews v DPP* [1937] AC 576, 26 Cr App Rep 34, HL.

11 *R v Lowe* [1973] QB 702, 57 Cr App Rep 365, CA (parent not guilty of manslaughter merely because he was guilty of the offence of wilfully neglecting the child contrary to the Children and Young Persons Act 1933 s 1(1) (as amended) (see PARA 143 post; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 611), and death had resulted from that neglect). An omission may give rise to liability for manslaughter if it is grossly negligent or if the defendant was reckless as to causing serious injury: *R v Waters* (1849) 1 Den 356, CCR; *R v Walters* (1841) Car & M 164; *R v Plummer* (1844) 1 Car & Kir 600; *R v Bubb* (1850) 4 Cox CC 455; *R v Smith* (1865) Le & Ca 607, CCR; *R v Conde* (1867) 10 Cox CC 547; *R v Nicholls* (1874) 13 Cox CC 75; *R v Instan* [1893] 1 QB 450, CCR; *R v Chattaway* (1922) 17 Cr App Rep 7, CCA; *R v Stone*, *R v Dobinson* [1977] QB 354, 64 Cr App Rep 186, CA (decided before recklessness was required to be as to serious injury); *R v Bonnyman* (1942) 28 Cr App Rep 131, CCA. Cf *R v Shepherd* (1862) Le & Ca 147, CCR; *R v Hall* (1919) 122 LT 31, 14 Cr App Rep 58, CCA. See also *R v Marriott* (1838) 8 C & P 425. See further PARA 100 post.

12 See *R v Church* [1966] 1 QB 59 at 79, [1965] 2 All ER 72 at 76, CCA. Cf *R v Lipman* [1970] 1 QB 152 at 159, 53 Cr App Rep 600 at 607, CA. A defendant is guilty of manslaughter if it is proved that he intentionally did an act which was unlawful and dangerous and that act inadvertently caused death; it need not be proved that he knew that the act was unlawful or dangerous, the test being whether sober and reasonable people would recognise its danger: *DPP v Newbury*, *DPP v Jones* [1977] AC 500, 62 Cr App Rep 291, HL (applying dicta in *R v Larkin* as reported in [1943] 1 All ER 217, CCA, and *R v Church* supra; and disapproving dictum in *Gray v Barr* [1971] 2 QB 554, [1971] 2 All ER 949, CA). See also *A-G's Reference (No 3 of 1994)* [1998] AC 245, [1998] 1 Cr App Rep 91, HL. The defendant's mistaken belief that what he was doing was not dangerous is irrelevant for these purposes: *R v Ball* [1989] Crim LR 730, CA. The act must be likely to cause harm, however slight, but need not be directed at the victim provided that there is no fresh and intervening cause between the act and the victim's death: *R v Goodfellow* (1986) 83 Cr App Rep 23, CA (explaining *R v Dalby* [1982] 1 All ER 916, 74 Cr App Rep 348; and applying dicta in *R v Larkin* supra and *DPP v Newbury*, *DPP v Jones* supra). As to the effect of alcohol or drugs on offences where death is caused see PARAS 28-30 ante.

13 *R v Lamb* [1967] 2 QB 981, 51 Cr App Rep 417, CA; *R v Scarlett* [1993] 4 All ER 629, 98 Cr App Rep 290, CA. As to an assault causing death see also *R v Hopley* (1860) 2 F & F 202; *R v Alabaster* (1912) 47 L Jo 397; *R v Woods* (1921) 85 JP 272; *R v Larkin* [1943] KB 174, 29 Cr App Rep 18, CCA; *R v Mitchell* [1983] QB 741, 76 Cr App Rep 293, CA. For the meaning of 'assault' see PARA 147 et seq post. See also *R v Church* [1966] 1 QB 59, 49

Cr App Rep 206, CCA; *R v Moore*, *R v Dorn* [1975] Crim LR 229, CA; *R v Le Brun* [1992] QB 61, 94 Cr App Rep 101, CA; and PARA 89 note 5 ante.

14 Fost 259, 260; 1 Hawk PC c 11 ss 6, 7; *R v Bradshaw* (1878) 14 Cox CC 83; *R v Moore* (1898) 14 TLR 229. A person is not guilty of manslaughter merely because he has broken the rules of the game: *R v Moore* supra. As to accidental killing see PARA 102 post.

15 *R v Canniff* (1840) 9 C & P 359; *R v Young* (1866) 10 Cox CC 371.

16 For the meaning of 'prize-fighting' see *R v Coney* (1882) 8 QBD 534, CCR.

17 *R v Canniff* (1840) 9 C & P 359; *R v Hargrave* (1831) 5 C & P 170; *R v Murphy* (1833) 6 C & P 103; *R v Orton* (1878) 14 Cox CC 226, CCR; *R v Coney* (1882) 8 QBD 534, CCR.

18 1 Hale PC 442; 1 Hawk PC c 13 ss 21, 22; Fost 297; *R v Mawgridge* (1706) 17 State Tr 57; *R v Oneby* (1727) 17 State Tr 29; *R v Rice* (1803) 3 East 581; *R v Cuddy* (1843) 1 Car & Kir 210; *R v Young* (1838) 8 C & P 644.

19 *R v Buck*, *R v Buck* (1960) 44 Cr App Rep 213; *R v Creamer* [1966] 1 QB 72, 49 Cr App Rep 368, CCA.

## UPDATE

### 99 Killing by unlawful and dangerous act: constructive manslaughter

NOTE 6--*Kennedy*, cited, reversed: [2007] UKHL 38, [2007] 4 All ER 1083 (see PARA 7). See also *Kane v HM Advocate*; *MacAngus v HM Advocate* (2009) Times, 6 February.

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### 100. Killing by gross negligence.

A person is guilty of manslaughter if he is under a duty of care towards the victim, he does or fails<sup>1</sup> to do something in breach of that duty, the breach of duty causes the death of the victim<sup>2</sup>, and the breach of duty constitutes gross negligence<sup>3</sup>. Although the 'ordinary principles of the law of negligence' apply to ascertain whether there has been a breach of the duty of care towards the victim<sup>4</sup>, this does not mean that outside the 'ordinary' case of negligence the duty of care in manslaughter automatically corresponds with that in tort where different policy considerations apply<sup>5</sup>. For gross negligence to be established the defendant's conduct must in the circumstances have been such that a reasonably prudent person would have foreseen a serious and obvious risk of death<sup>6</sup> and in respect of that risk his conduct in all the circumstances in which he was placed must have fallen so far below the standard to be expected of a reasonable person as to go beyond a mere matter of compensation to amount to a criminal act or omission<sup>7</sup>. Thus a higher degree of negligence is necessary to render a person guilty of manslaughter than to establish civil liability against him<sup>8</sup>; mere carelessness is not enough<sup>9</sup>. Negligence sufficient to support a conviction for a criminal offence such as dangerous driving or careless driving<sup>10</sup> will not necessarily support a conviction for manslaughter<sup>11</sup>.

The death must have been caused by personal misconduct or personal negligence on the part of the defendant<sup>12</sup>. The defendant is not vicariously criminally liable if the death was directly caused in his absence by the negligence of his employees or others<sup>13</sup>.

1 For authority that an omission in breach of duty can suffice see *R v Markus* (1864) 4 F & F 356 (doctor leaving seriously ill patient unattended); *R v Curtis* (1885) 15 Cox CC 746 (relieving officer of local authority failing to provide medical assistance for destitute person). As to whether a person who has supplied a controlled drug to another owes a duty of care when the other, having consumed the drugs, becomes in need of medical treatment in his presence, contrast *R v Khan* [1998] Crim LR 830, CA, with *R v Sinclair* [1998] NLJR 1353, CA.

2 It is an essential ingredient that the breach of duty must have caused the death: *R v Inner South London Coroner, ex p Douglas-Williams* [1999] 1 All ER 344 at 350, CA, per Lord Woolf MR.

3 *R v Adomako* [1995] 1 AC 171, 99 Cr App Rep 362, HL (applying *R v Bateman* (1925) 19 Cr App Rep 8, CCA, and *Andrews v DPP* [1937] AC 576, 26 Cr App Rep 34, HL; and overruling *R v Seymour* [1983] 2 AC 493, 77 Cr App Rep 215, HL). The ingredients of the offence of manslaughter by gross negligence are sufficiently clear and do not offend against the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 7 (requirement of certainty): see *R v Misra, R v Srivastava* [2004] EWCA Crim 2375, [2005] 1 Cr App Rep 328. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. Manslaughter by gross negligence or by an unlawful and dangerous act are not mutually exclusive; in some circumstances a person can be guilty by both routes: *R v Willoughby* [2004] EWCA Crim 3365, [2005] 1 WLR 1880, [2005] 1 Cr App Rep 495.

4 *R v Adomako* [1995] 1 AC 171 at 187, 99 Cr App Rep 362 at 369, HL, per Lord Mackay of Clashfern. Under those principles, a duty of care exists where it is foreseeable that negligence on the part of the defendant will imperil another person who is in a relationship of sufficient 'proximity' with the defendant and it is 'just and reasonable' to impose liability: see eg *Marc Rich & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1996] AC 211, [1995] 3 All ER 307, HL.

5 *R v Wacker* [2002] EWCA Crim 1944, [2003] QB 1207, [2003] 4 All ER 295 (tortious ex turpi causa rules whereby a duty of care between participants in a criminal activity is not recognised held inapplicable in respect of existence of duty of care in manslaughter).

As to whether the existence of the duty of care is a question of law for the judge, or whether the judge's task is simply to rule whether there was evidence capable of giving rise to a duty of care, leaving it to the jury to decide in the light of the judge's direction whether it actually did arise, contrast *R v Singh* [1999] Crim LR 582, CA, with *R v Khan* [1998] Crim LR 830, CA, and *R v Sinclair* [1998] NLJR 1353, CA. See also *R v Willoughby* [2004] EWCA Crim 3365, [2005] 2 WLR 1558, [2005] 1 Cr App Rep 495 (the latter approach was adopted; however, it was held that there might be exceptional cases where a duty of care obviously existed, eg that between a doctor and patient or where Parliament had imposed a particular type of statutory duty, and that in such cases a judge could properly direct the jury that a duty existed).

6 *R v Gurphal Singh* [1999] Crim LR 582, CA; *R v Misra, R v Srivastava* [2004] EWCA Crim 2375, [2005] 1 Cr App Rep 328; *R v Yaqoob* [2005] EWCA Crim 2169, [2005] All ER (D) 109 (Aug).

7 *R v Bateman* (1925) 94 LJB 791, 19 Cr App Rep 8, CCA; *Akerele v R* [1943] AC 255, [1943] 1 All ER 367, PC; *R v Adomako* [1995] 1 AC 171, 99 Cr App Rep 362, HL; *R v Misra, R v Srivastava* [2004] EWCA Crim 2375, [2005] 1 Cr App Rep 328. Although evidence of the defendant's state of mind is not a pre-requisite to liability for manslaughter by gross negligence, there may be cases where his state of mind is relevant to the issue of the criminality of his conduct: *A-G's Reference (No 2 of 1999)* [2000] QB 796, [2000] 2 Cr App Rep 207, CA. See also *R v DPP, ex p Jones* [2000] IRLR 373, DC. Whether negligence is to be regarded as of such a nature is a question for the jury, after it has been properly directed by the judge as to the standard to be applied, and depends on the facts of the particular case: *R v Bateman* supra at 796 and 13; *Akerele v R* supra at 262 and 371. If, on a trial for murder, a verdict of manslaughter by negligence is as a matter of law a possible verdict in view of the facts of the case, the judge should direct the jury that such a verdict is open to it: *R v Roberts* [1942] 1 All ER 187, 28 Cr App Rep 102, CCA. The number of persons affected by a single act of negligence does not affect the degree of negligence: *Akerele v R* [1943] AC 255 at 264, [1943] 1 All ER 367 at 372, PC. See also *Brown v R* [2005] UKPC 18, [2006] 1 AC 1, [2005] 2 WLR 1558 (a case involving causing death by reckless driving).

8 *R v Bateman* (1925) 94 LJB 791 at 796, 19 Cr App Rep 8 at 13, CCA (where the difference was described as a difference in kind); *Akerele v R* [1943] AC 255 at 262, [1943] 1 All ER 367 at 371, PC; *The People (A-G) v Dunleavy* [1948] IR 95, CCA; *R v Misra, R v Srivastava* [2004] EWCA Crim 2375, [2005] 1 Cr App Rep 328.

9 *R v Large* [1939] 1 All ER 753, 27 Cr App Rep 65, CCA; *R v Bateman* (1925) 94 LJB 791 at 794, 19 Cr App Rep 8 at 11-12, CCA, per Hewart LC; *Andrews v DPP* [1937] AC 576 at 582-583, 26 Cr App Rep 34 at 46-48, HL; *Akerele v R* [1943] AC 255 at 262, [1943] 1 All ER 367 at 371, PC; and see also *R v Bonnyman* (1942) 28 Cr App Rep 131, CCA.

10 As to these offences see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 963 et seq.

11 See PARA 99 text to notes 8-10 ante.

12 A corporation may be personally liable for manslaughter see PARA 38 ante.

13 *R v Bennett* (1858) Bell CC 1, CCR (the defendant had unlawfully kept in his house a quantity of fireworks, which through the negligence of his employees, were set on fire, and thus caused the death of the deceased; it was held that the defendant could not be convicted of manslaughter).

## UPDATE

### 100 Killing by gross negligence

NOTE 4--*Adomako*, cited, applied: *R v Evans* [2009] EWCA Crim 650, [2010] 1 All ER 13 (failure to seek medical help after giving heroin to person who overdosed).

NOTE 12--The common law offence of manslaughter by gross negligence is abolished in its application to corporations, and in any application it has to other organisations to which the Corporate Manslaughter and Corporate Homicide Act 2007 s 1 applies: s 20. As to corporate manslaughter see PARA 38A.

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**101. Killing with recklessness as to serious injury.**

A person is guilty of manslaughter if he unlawfully causes the death of another and is reckless as to the risk that he might cause serious injury<sup>1</sup>. In this context 'recklessness' requires foresight of the high probability of serious injury<sup>2</sup>.

1 *R v Lidar* [2000] 4 Archbold News 3, CA. A fortiori, recklessness as to the risk of death would suffice since serious injury must include death. Unlawful violence on an individual with a fragile and vulnerable personality, which is proved to be a material cause of death (even if the result of suicide) (see PARA 149 post) would at least arguably be capable of amounting to manslaughter: see *R v Dhalwal* [2006] EWCA Crim 1139, [2006] All ER (D) 236 (May).

2 *R v Lidar* [2000] 4 Archbold News 3, CA.

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## **102. Accidental killing.**

Killing by misadventure or misfortune, where the act causing death is not unlawful or culpably negligent, is not a crime<sup>1</sup>.

1 1 Hale PC 492; Fost 264, 282; *R v Knock* (1877) 14 Cox CC 1 at 2.



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#### **(iv) Infanticide**

##### **103. Infanticide.**

Where a woman by any wilful act or omission causes<sup>1</sup> the death of her child under the age of 12 months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that the offence would have amounted to murder<sup>2</sup>, she is guilty of infanticide and may be punished as if she had been guilty of the manslaughter of the child<sup>3</sup>.

1 As to causation see PARA 7 ante.

2 Ie but for the Infanticide Act 1938.

3 Ibid s 1(1); Criminal Law Act 1967 s 12(5)(a). For a restriction on prosecution see PARA 85 ante. As to the penalty for manslaughter see PARA 93 ante. On an indictment for infanticide, the mother may be convicted of child destruction: see the Infant Life (Preservation) Act 1929 s 2(2); and PARAS 108, 1336 post. On a trial for murder the jury may in the circumstances referred to in the text return a verdict of infanticide: Infanticide Act 1938 s 1(2).

Nothing in the Infanticide Act 1938 affects the power of a jury upon an indictment for the murder of a child to return a verdict of manslaughter or a verdict of not guilty by reason of insanity: s 1(3) (amended by the Criminal Law Act 1967 s 10(2), Sch 3 Pt III). As to alternative verdicts generally see PARAS 1335-1338 post; and as to procedural provisions relating to infanticide see PARA 1164 post.

Custodial sentences are most rare; offenders are usually dealt with by way of a community sentence (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163 et seq) or a hospital order (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332): *R v Sainsbury* (1989) 11 Cr App Rep (S) 533, CA.

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## **(2) OFFENCES RELATING TO HOMICIDE**

### **(i) Offences Ancillary to Murder**

#### **104. Soliciting murder.**

Any person who solicits, encourages, persuades or endeavours to persuade, or proposes to<sup>1</sup> any person to murder<sup>2</sup> any other person<sup>3</sup>, whether he is a subject of Her Majesty or not and whether he is within the jurisdiction or not, is guilty of an offence and liable on conviction on indictment to imprisonment for life<sup>4</sup>.

An article or letter in a newspaper may amount to an incitement to murder, although no particular person is named, so long as the proposed victims belong to a definable class<sup>5</sup>. The communication containing the incitement must be proved to have reached the person intended to be incited, although it is not necessary to show that the latter's mind was affected by it<sup>6</sup>. If the communication cannot be proved to have reached him, the defendant may be convicted of an attempt to incite<sup>7</sup>.

1 As to the common law offence of incitement see PARA 65 ante; and as to the statutory offence of conspiracy see PARA 67 ante. The offence of soliciting murder under the Offences against the Person Act 1861 s 4 (see the text and notes 2-4 infra) is based on the same principles as the common law offence of incitement. It is, however, wider in that it applies to an incitement of someone who is not a subject of Her Majesty to commit murder outside the jurisdiction, which under the normal rules of jurisdiction (see PARA 1050 et seq post) would not be the case for common law incitement.

2 A solicitation to kill not merely to do serious bodily harm must be proved: *R v Bainbridge* (1991) 93 Cr App Rep 32, [1991] Crim LR 535, CA. Because what is solicited must be murder, it is not an offence to solicit someone to kill in self-defence or defence of others: see *R v El-Faisal* [2004] EWCA Crim 456, [2004] 3 Archbold News 3.

3 Soliciting another to murder at birth a child then in the womb but subsequently born alive is soliciting to murder 'a person': *R v Shephard* [1919] 2 KB 125, 14 Cr App Rep 26, CCA (solicitation of pregnant woman to murder infant after birth).

4 Offences against the Person Act 1861 s 4 (amended by the Criminal Law Act 1977 ss 5(10), 65(5), Sch 13).

5 *R v Most* (1881) 7 QBD 244, CCR; *R v Antonelli*, *R v Barberi* (1905) 70 JP 4.

6 *R v Fox* (1870) 19 WR 109, CCR; *R v Krause* (1902) 66 JP 121; *R v Diamond* (1920) 84 JP 211.

7 *R v Krause* (1902) 66 JP 121. See also *R v Ransford* (1874) 13 Cox CC 9, CCR; *R v McCarthy, Holland and O'Dwyer* [1903] 2 IR 146.

## **UPDATE**

### **104 Soliciting murder**

NOTE 1--An offence under the 1861 Act s 4 may be committed in respect of soliciting murder outside the jurisdiction where the person solicited is not a British national: *R v Hamza* [2006] EWCA Crim 2918, [2007] 3 All ER 451.



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## **105. Threatening to kill.**

Any person who without lawful excuse<sup>1</sup> makes to another a threat<sup>2</sup>, intending that that other would fear it would be carried out<sup>3</sup>, to kill that other or a third person<sup>4</sup> is guilty of an offence<sup>5</sup> and liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup>, to a fine not exceeding the prescribed sum<sup>7</sup>, or to both<sup>8</sup>.

1 Self-defence or the prevention of crime may constitute a lawful excuse provided that it was reasonable in the circumstances to make such a threat; and it is for the prosecution to prove the absence of lawful excuse and for the jury to decide what was reasonable: see *R v Cousins* [1982] QB 526, 74 Cr App Rep 363, CA. Lawful excuse does not depend on whether the life of the defendant was in immediate jeopardy when he made the threat: *R v Cousins* supra. The reasonableness of the defendant's belief that he had lawful excuse is judged on the facts as he believed them to be: see *R v Williams* [1987] 3 All ER 411, 78 Cr App Rep 276, CA; *Beckford v R* [1988] AC 130, 85 Cr App Rep 378, PC; and PARA 18 ante.

2 The threat may be conditional and it may be implied as well as express: *R v Solanke* [1969] 3 All ER 1383, [1970] 1 WLR 1, CA. It would seem that the threat may be made by any means: see eg *R v Williams* (1986) 84 Cr App Rep 299, CA (threatening telephone calls). Whether a communication amounts to a threat to kill is a matter for the jury: *R v Boucher* (1831) 4 C & P 562, *R v Tyler* (1835) 1 Mood CC 428. As to threatening letters see also the Malicious Communications Act 1988 s 1 (as amended); and PARA 767 post.

3 Evidence of the previous history between the parties is admissible to prove that the defendant intended his threats to be taken seriously: *R v Williams* (1986) 84 Cr App Rep 299, CA.

4 Where a person threatens a pregnant woman with the words 'I am going to kill your baby' and the threat is to the foetus in utero, no offence under these provisions is made out since the foetus is not another person distinct from its mother: *R v Tait* [1990] 1 QB 290, [1989] 3 All ER 682, CA. Where, however, the threat is to kill the child after its birth, it seems that such an offence may be made out: *R v Tait* supra (obiter); and see PARA 104 note 3 ante.

5 Offences against the Person Act 1861 s 16 (substituted by the Criminal Law Act 1977 s 65(4), Sch 12). This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

7 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

8 Offences against the Person Act 1861 s 16 (as substituted: see note 5 supra); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 5(a).

## **UPDATE**

### **105 Threatening to kill**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## (ii) Complicity in Suicide

### 106. Aiding, abetting, counselling or procuring suicide or attempted suicide.

Although suicide is no longer an offence in itself<sup>1</sup>, any person who aids, abets, counsels or procures<sup>2</sup> the suicide<sup>3</sup> of another, or an attempt by another to commit suicide, is guilty of an offence<sup>4</sup> and liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>5</sup>. No proceedings for this offence may be instituted except by or with the consent of the Director of Public Prosecutions<sup>6</sup>.

<sup>1</sup> See PARA 98 ante.

<sup>2</sup> As to what constitutes aiding, abetting, counselling and procuring see PARA 51 et seq ante. It is necessary for the requisite mens rea to be proved in each case of the offence of aiding, abetting, counselling or procuring suicide: *A-G v Able* [1984] QB 795, 78 Cr App Rep 197 (supply of booklets describing methods of suicide).

<sup>3</sup> An adult patient of sound mind who refuses to receive nutrition and other treatment with fatal effect does not commit suicide for these purposes: *Secretary of State for the Home Dept v Robb* [1995] Fam 127, [1995] 1 All ER 677.

<sup>4</sup> Suicide Act 1961 s 2(1). The fact that the person counselled would have tried to commit suicide anyway makes no difference to a charge under s 2(1): *A-G v Able* [1984] QB 795 at 812, 78 Cr App Rep 197 at 208, DC, per Woolf J.

If on the trial of an indictment for murder or manslaughter it is proved that the defendant aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of that offence: Suicide Act 1961 s 2(2). As to procedural provisions relating to prosecutions for aiding etc the suicide of a child or young person see PARA 1164 post. For a restriction on prosecution see PARA 85 ante.

In *R v McShane* (1977) 66 Cr App Rep 97, CA, a conviction for an attempt to commit an offence under the Suicide Act 1961 s 2(1) was upheld. A refusal by the Director of Public Prosecutions to give an undertaking not to consent to prosecution for an offence under s 2(1) where the offence has not yet been committed does not breach the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 2 (right to life), art 3 (prohibition of inhuman or degrading treatment), art 8 (right to respect for private and family life), art 9 (freedom of thought, conscience and religion) or art 14 (enjoyment of Convention rights without discrimination): *R (on the application of Pretty) v DPP (Secretary of State for the Home Department intervening)* [2001] UKHL 61, [2002] 1 AC 800, [2002] 2 Cr App Rep 1; *Pretty v United Kingdom* (2002) 35 EHRR 1, 12 BHRC 149, ECtHR. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

<sup>5</sup> Suicide Act 1961 s 2(1).

<sup>6</sup> *Ibid* s 2(4) (amended by the Criminal Law Act 1967 s 10(2), Sch 3 Pt II; and the Criminal Jurisdiction Act 1975 s 14(5), Sch 6 Pt I). As to the effect of this limitation see PARA 1071 post.

## UPDATE

### 106 Aiding, abetting, counselling or procuring suicide or attempted suicide

NOTE 4--See *R (on the application of Purdy) v DPP* [2009] UKHL 45, [2009] 4 All ER 1147; and PARA 1083.



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### **(iii) Causing or Allowing Death of a Child or Mentally Vulnerable Adult**

#### **107. Causing or allowing death of a child or mentally vulnerable adult.**

If a child<sup>1</sup> or vulnerable adult<sup>2</sup> dies as a result of the unlawful act<sup>3</sup> of a person who was a member of the same household as him<sup>4</sup> and had frequent contact with him<sup>5</sup>, and at that time there was a significant risk of serious physical harm<sup>6</sup> being caused to the child or vulnerable adult by the unlawful act of such a person<sup>7</sup>, then any person who at the time of the act was a member of the same household as the child or vulnerable adult and had frequent contact with him<sup>8</sup> is guilty of an offence<sup>9</sup> if<sup>10</sup>:

- 41 (1) he was the person whose act caused the death<sup>11</sup>; or
- 42 (2) he was, or ought to have been, aware of the risk of serious physical harm being caused to the child or vulnerable adult by his unlawful act<sup>12</sup>, he failed to take such steps as he could reasonably have been expected to take to protect the child or vulnerable adult from the risk<sup>13</sup>, and the act occurred in circumstances of the kind that he foresaw or ought to have foreseen<sup>14</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, to a fine, or to both<sup>15</sup>.

1 le a person under the age of 16: Domestic Violence, Crime and Victims Act 2004 s 5(6).

2 le a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise: *ibid* s 5(6).

3 For these purposes, 'act' includes a course of conduct and also includes omission (*ibid* s 5(6)); and an 'unlawful' act is one that either constitutes an offence (s 5(5)(a)) or would constitute an offence but for being the act of a person under the age of ten (s 5(5)(b)(i)) or of a person who is entitled to rely on a defence of insanity (s 5(5)(b)(ii)). An act which would constitute an offence but for being the act of a person under the age of ten or of a person who is entitled to rely on a defence of insanity is not an unlawful act for these purposes if it is an act of the person who commits the offence under these provisions: s 5(5).

The reference in s 5(1)(a) to an unlawful act does not include an act that (or so much of an act as) occurs before 21 March 2005: s 59, Sch 12 para 2.

4 *Ibid* s 5(1)(a)(i). For these purposes, a person is to be regarded as a 'member' of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it: s 5(4)(a). Where the child or vulnerable adult lived in different households at different times, 'the same household as him' refers to the household in which the child or vulnerable adult was living at the time of the act that caused his death: see s 5(4)(b).

5 *Ibid* s 5(1)(a)(ii).

6 'Serious' harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861 (see PARA 118 ante): Domestic Violence, Crime and Victims Act 2004 s 5(6).

7 *Ibid* s 5(1)(c).

8 *Ibid* s 5(1)(b).



9 A person who is not the mother or father of the child or vulnerable adult may not be charged with an offence under these provisions if he was under 16 at the time of the act that caused the child or vulnerable adult's death: *ibid* s 5(3)(a).

Where a person ('the defendant') is charged in the same proceedings with an offence of murder or manslaughter and an offence under s 5 in respect of the same death ('the s 5 offence'):

- 21 (1) the charge of murder or manslaughter is not to be dismissed under the Crime and Disorder Act 1998 Sch 3 para 2 (as amended) (see PARA 1138 post) unless the s 5 offence is dismissed (Domestic Violence, Crime and Victims Act 2004 s 6(1), (3));
- 22 (2) at the defendant's trial the question whether there is a case for the defendant to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the s 5 offence, before that earlier time) (s 6(4)); and
- 23 (3) where by virtue of the Criminal Justice and Public Order Act 1994 s 35(3) (see PARA 1555 post) a court or jury is permitted, in relation to the s 5 offence, to draw such inferences as appear proper from the defendant's failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty of murder or manslaughter (Domestic Violence, Crime and Victims Act 2004 s 6(2)(a)) or of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter (s 6(2)(b)) even if there would otherwise be no case for him to answer in relation to that offence (s 6(2)).

An offence under s 5 is an offence of homicide for the purposes of: the Magistrates' Courts Act 1980 ss 24, 25 (both as amended) (mode of trial of child or young person for indictable offence: see PARAS 1116-1119 post); the Crime and Disorder Act 1998 s 51A (as added) (sending cases to the Crown Court: children and young persons: see PARA 1133 post); and the Powers of Criminal Courts (Sentencing) Act 2000 s 8 (power and duty to remit young offenders to youth courts for sentence: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 5): Domestic Violence, Crime and Victims Act 2004 s 6(5)(a)-(c).

10 The prosecution does not have to prove whether it is the first alternative in *ibid* s 5(1)(d) (see head (1) in the text) or one of the others (see heads (2)-(4) in the text) that applies: s 5(2).

11 *Ibid* s 5(1)(d).

12 *Ibid* s 5(1)(d)(i).

13 *Ibid* s 5(1)(d)(ii). A person who is not the mother or father of the child or vulnerable adult cannot have been expected to take any such step as is referred to in the text before attaining the age of 16: s 5(3)(b).

14 *Ibid* s 5(1)(d)(iii).

15 *Ibid* s 5(7).

## UPDATE

### 107 Causing or allowing death of a child or mentally vulnerable adult

NOTE 7--The word 'significant' in s 5(1)(c) is not intended to bear anything other than its ordinary meaning: *R v Mujuru* [2007] EWCA Crim 1249, (2007) Times, 20 June.

NOTE 9--The 2004 Act s 6(4) does not prohibit, but merely postpones, a submission of no case to answer where it is appropriate: *R v Ikram* [2008] EWCA Crim 586, [2008] 4 All ER 253.

NOTES 12-14--See *R v Khan* [2009] EWCA Crim 2, [2009] 4 All ER 544.

NOTE 13--See *R v Liu* [2006] All ER (D) 242 (Nov), CA (deceased, virtually enslaved by husband, who stood idly by while his mistress abused deceased to death).

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## **(iv) Child Destruction, Abortion and Concealment of Birth**

### **108. Child destruction.**

Any person who, with intent to destroy the life of a child capable of being born alive<sup>1</sup>, by any wilful act<sup>2</sup> causes a child to die before it has an existence independent of its mother, is guilty of child destruction<sup>3</sup> and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>4</sup>. No person may, however, be found guilty of such an offence unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother<sup>5</sup>.

1 For these purposes, evidence that a woman had at any material time been pregnant for a period of 28 weeks or more is prima facie proof that she was at that time pregnant of a child capable of being born alive: Infant Life (Preservation) Act 1929 s 1(2). Once a foetus is capable, if born, of breathing and living by reason of its breathing through its own lungs alone without connection with its mother, it is 'capable of being born alive': *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, [1991] 1 All ER 801 (27-week foetus capable of being born alive). See also *C v S* [1988] QB 135, [1987] 1 All ER 1230, CA (foetus of gestational age between 18 and 21 weeks incapable of being born alive).

2 It is presumed that an act of omission would not suffice to support the charge: cf *R v Shepherd* (1862) Le & Ca 147, CCR (mother of pregnant woman under no duty to get midwife).

3 Infant Life (Preservation) Act 1929 s 1(1); Criminal Law Act 1967 s 12(5)(a). Where on the trial of any person for child destruction the jury is of opinion that the person charged is not guilty of that offence but that he is shown by the evidence to be guilty of an offence under the Offences against the Person Act 1861 s 58 (as amended) (using means to procure an abortion: see PARA 109 post), the jury may find him guilty of that offence: Infant Life (Preservation) Act 1929 s 2(3).

4 Ibid s 1(1); Criminal Justice Act 1948 s 1(1).

5 Infant Life (Preservation) Act 1929 s 1(1) proviso. The words 'preserving the life of the mother' have been widely construed by judges when directing juries: see *R v Bourne* [1939] 1 KB 687 at 692-694, [1938] 3 All ER 615 at 618-619, CCA, per Macnaghten J; *R v Newton and Stungo* [1958] Crim LR 469 at 469 per Ashworth J (both cases on abortion: see PARA 109 post). No offence under the Infant Life (Preservation) Act 1929 is committed by a registered medical practitioner who terminates a pregnancy in accordance with the Abortion Act 1967 (see PARA 112 post; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 209): s 5(1) (substituted by the Human Fertilisation and Embryology Act 1990 s 37(4)).

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### **109. Use of poison or instruments to cause miscarriage.**

Any woman, being with child, who, with intent to procure her own miscarriage, unlawfully<sup>1</sup> administers to herself any poison or other noxious thing<sup>2</sup>, or unlawfully uses any instrument or other means whatsoever with the like intent, and any person who, with intent to procure the miscarriage of any woman, whether or not she is with child, unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means<sup>3</sup> whatsoever with the like intent, is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>4</sup>. This offence is commonly but inaccurately (because no miscarriage need be procured) described as the offence of abortion.

1 Not all abortions are unlawful: see PARA 112 post; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 209. For the purposes of the law relating to abortion (ie the Offences against the Person Act 1861 ss 58, 59 (as amended) (see PARA 111 post), and any rule of law relating to the procurement of abortion), anything done with intent to procure a miscarriage (or, in the case of a woman carrying more than one foetus, the miscarriage of any foetus) is unlawfully done unless authorised by the Abortion Act 1967 s 1: see ss 5(2), 6 (s 5(2) amended by the Human Fertilisation and Embryology Act 1990 s 37(5)). See also PARA 112 post; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 209.

Where death results from a criminal abortion, this constitutes manslaughter at least: see PARA 99 ante. As to the constituents of unlawfully procuring an abortion see PARA 110 post.

2 As to poisons and other noxious things for these purposes see PARA 110 post.

3 As to the meaning 'other means' see PARA 110 post.

4 Offences against the Person Act 1861 s 58; Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 12(5) (a). On a trial for this offence, the jury may acquit of this offence and convict of child destruction (see PARA 108 ante): Infant Life (Preservation) Act 1929 s 2(2).

## **UPDATE**

### **109 Use of poison or instruments to cause miscarriage**

NOTE 4--See *R v Magira* [2008] EWCA Crim 1939, [2009] 1 Cr App Rep (S) 390, [2008] All ER (D) 29 (Nov) (three-and-a-half years' imprisonment imposed where person surreptitiously fed a woman abortion pills).

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### **110. Constituents of offence of use of poison or instruments to cause a miscarriage.**

The offence of using poison or instruments to cause a miscarriage<sup>1</sup> is concerned with the administration of a poison or other noxious thing or the use of an instrument or other means, with intent to procure a miscarriage. 'Poison' means a recognised poison; if a recognised poison is administered it is irrelevant that the quantity is so small as to be incapable of doing harm<sup>2</sup>. 'Noxious thing' means something other than a recognised poison, which is harmful in the dosage in which it is administered, even though it may be harmless in small quantities<sup>3</sup>. 'Any other means' includes manual interference and hitting a woman in the lower part of her body<sup>4</sup>. It is irrelevant that, unknown to the defendant, that thing or means in question is incapable of procuring a miscarriage<sup>5</sup>. Where the thing administered is mistakenly believed to be a poison or noxious thing, the defendant may be convicted of attempting to commit the offence<sup>6</sup>.

If a person procures poison for a woman with intent to procure her miscarriage, to which intent she is a party, and she takes it, although in his absence, he may be convicted of causing it to be taken by the woman, and not merely of procuring it with that intent<sup>7</sup>.

A woman cannot be convicted of administering poison to herself with intent to procure her own miscarriage unless she is in fact with child; but even if she is not pregnant, she may be convicted of attempt to commit the offence or of conspiracy to commit it<sup>8</sup>, or of aiding and abetting others in administering poison or some noxious thing to her with intent to procure her miscarriage<sup>9</sup>.

For the purposes of the requirement of an intent to procure a miscarriage, 'miscarriage' is construed as presupposing that the fertilised ovum has become implanted in the endometrium of the uterus; it follows that the use of a drug or device to prevent implantation of a fertilised ovum is not done with intent to procure a miscarriage<sup>10</sup>.

To prove the intent with which the noxious thing was administered or the instrument or other means used, evidence showing that the defendant had on previous occasions used similar means with the avowed intention of procuring an abortion, or that he or she had previously admitted having often done the same thing, is admissible<sup>11</sup>.

On a charge of using an instrument to procure an abortion, evidence of the administration of drugs to other women for that purpose may be admitted in order to rebut the defence of innocent user<sup>12</sup>.

1 See PARA 109 ante.

2 *R v Cramp* (1880) 5 QBD 307 at 309-310, CCR, per Field J and Stephen J.

3 *R v Cramp* (1880) 5 QBD 307, CCR. See also *R v Hennah* (1877) 13 Cox CC 547; *R v Marcus* [1981] 2 All ER 833, 73 Cr App Rep 49, CA (both decided under the Offences against the Person Act 1861 s 23 (see PARA 475 post)).

4 *R v Spicer* (1955) 39 Cr App Rep 189.

5 *R v Marlow* (1964) 49 Cr App Rep 49; and see also *R v Spicer* (1955) 39 Cr App Rep 189; *R v Douglas* [1966] NZLR 45, Wellington CA.

6 See the Criminal Attempts Act 1981 s 1 (as amended); and PARA 79 ante.

7 *R v Wilson* (1856) Dears & B 127, CCR; *R v Farrow* (1857) Dears & B 164, CCR.

8 *R v Whitchurch* (1890) 24 QBD 420, CCR.

9 *R v Sockett* (1908) 72 JP 428, 1 Cr App Rep 101, CCA.

10 *R (on the application of Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin), [2002] 2 FCR 193, [2002] 2 FLR 146.

11 *R v Bond* [1906] 2 KB 389 at 405, 417, CCR. Such evidence should be admitted with great caution: it should be admitted only where the defendant has suggested that the administration of the drug or the use of the instrument was legitimate or accidental on his part, and not where the defence is a denial of the act itself; and proof of only one other similar case, without any special connection with the case charged in the indictment, the object of such evidence being to prove a systematic course of conduct by the defendant and so to negative the defence that his action on the particular occasion was legitimate or accidental, ought not to be admitted: *R v Bond* supra at 405, 417. Where a witness who is permitted to give such evidence is in the position of being an accomplice to the illegal acts, the jury should be warned as to acting on the evidence in the absence of corroboration: *R v Mohamed Farid* (1945) 30 Cr App Rep 168, CCA. Even where he is not an accomplice and corroboration is not strictly necessary, the jury should be advised to approach the evidence with care: *R v Sanders* (1961) 46 Cr App Rep 60, C-MAC. See further PARA 1453 post.

12 *R v Starkie* [1922] 2 KB 275, 16 Cr App Rep 61, CCA.

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### **111. Supplying or procuring poison or instruments with intent to procure a miscarriage.**

Any person who unlawfully supplies or procures<sup>1</sup> any poison or other noxious thing<sup>2</sup>, or any instrument or thing whatsoever, knowing that it is intended to be unlawfully<sup>3</sup> used or employed with intent to procure the miscarriage of any woman<sup>4</sup>, whether or not she is with child, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding five years<sup>5</sup>.

A person who supplies something which he knows to be harmless cannot be convicted of inciting the woman to commit an offence<sup>6</sup>, although he knows that she will take it in the belief that it is noxious and with intent to procure abortion<sup>7</sup>.

The fact that medicine supplied by the defendant is followed by illness and a miscarriage is evidence that the thing supplied is noxious<sup>8</sup>.

The requirement of knowledge that the thing procured or supplied is to be unlawfully used to procure a miscarriage is satisfied if the defendant believes that that thing will be so used<sup>9</sup>, so that the defendant can be convicted if the person for whom he procures, or to whom he supplies, the thing does not intend so to use it.

1 For the purposes of the Offences against the Persons Act 1861 s 59 (see the text and notes 2-5 infra), 'procure' means to get possession from another person of something which the defendant has not got. If the defendant already has it in his possession, eg in a cupboard, he does not procure it if he takes it out in order to sterilise it or for some other purpose: see *R v Mills* [1963] 1 QB 522, 47 Cr App Rep 49, CCA.

2 As to the meanings of 'poison' and 'noxious thing' see PARA 110 ante.

3 As to the meaning of 'unlawfully' see PARAS 109 ante, 112 post; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 209.

4 It follows from this requirement that contraceptive devices such as the morning-after pill or the intra-uterine device are not covered by the Offences against the Person Act 1861 s 59 (as amended): see *R (on the application of Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin), [2002] 2 FCR 193, [2002] 2 FLR 146; and PARA 110 ante.

5 Offences against the Person Act 1861 s 59; Penal Servitude Act 1891 s 1(1); Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 1.

6 It is the offence under the Offences against the Person Act 1861 s 58: see PARA 110 ante.

7 *R v Brown* (1899) 63 JP 790.

8 *R v Hollis* (1873) 12 Cox CC 463 at 467, CCR, per Bramwell B.

9 *R v Hillman* (1863) Le & Ca 343, CCR; *R v Titley* (1880) 14 Cox CC 502.

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## **112. Medical termination of pregnancy.**

A person is not guilty of an offence under the law relating to abortion<sup>1</sup> where a pregnancy is terminated by a registered medical practitioner<sup>2</sup> if two registered medical practitioners are of the opinion, formed in good faith:

- 43 (1) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family<sup>3</sup>;
- 44 (2) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman<sup>4</sup>;
- 45 (3) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated<sup>5</sup>; or
- 46 (4) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped<sup>6</sup>.

A man has no right to prevent his wife or girlfriend from having a legal abortion<sup>7</sup> and the foetus, while unborn, cannot be a party to legal proceedings instituted for that purpose<sup>8</sup>.

1 As to the meaning of 'the law relating to abortion' see PARA 109 note 1 ante. For the purposes of the law relating to abortion, anything done with intent to procure a miscarriage (or, in the case of a woman carrying more than one foetus, the miscarriage of any foetus) is unlawfully done unless authorised by the Abortion Act 1967 s 1 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 209): s 5(2) (amended by the Human Fertilisation and Embryology Act 1990 s 37(5)). In the case of a woman carrying more than one foetus, an act is so authorised if: (1) the ground for the termination of the pregnancy specified in the Abortion Act 1967 s 1(1)(d) (as substituted) (see head (4) in the text) applies in relation to any foetus and the act is done for the purpose of procuring the miscarriage of that foetus (s 5(2)(a) (as so amended)); or (2) any of the other grounds for termination of the pregnancy in s 1 (as amended) (see heads (1)-(3) in the text) applies (s 5(2)(b) (as so amended)).

2 As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 4. As to what constitutes termination by a registered medical practitioner see *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, [1981] 1 All ER 545, HL.

3 Abortion Act 1967 s 1(1)(a) (s 1(1)(a), (b) substituted, and s 1(1)(c), (d) added, by the Human Fertilisation and Embryology Act 1990 s 37(1)). See further MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 209.

4 Abortion Act 1967 s 1(1)(b) (as substituted: see note 3 supra).

5 Ibid s 1(1)(c) (as substituted: see note 3 supra).

6 Ibid s 1(1)(d) (as substituted: see note 3 supra).

7 *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276, [1978] 2 All ER 987, DC (husband refused injunction to prevent legal termination); *C v S* [1988] QB 135, [1987] 1 All ER 1230, CA (injunction refused to putative father).

8 *C v S* [1988] QB 135, [1987] 1 All ER 1230, CA.

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### **113. Concealment of birth.**

If any woman has been delivered of a child, any person who, by any secret disposition of the dead body of the child, whether such child died before, at, or after its birth, endeavours to conceal its birth, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months<sup>1</sup>, to a fine not exceeding the prescribed sum<sup>2</sup>, or to both<sup>3</sup>.

1 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

2 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

3 Offences against the Person Act 1861 s 60; Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 ss 1, 10, Sch 2 para 13(1), Sch 3 Pt III; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 5(j). As to the constituents of concealing a birth see PARA 114 post; as to registration of births and deaths and offences in that connection see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 504 et seq; and as to unlawful disposal of a corpse see PARA 732 post.



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#### **114. Constituents of concealing birth.**

In order to constitute concealment of birth a woman must have been delivered of something which may properly be called a child, and not the unformed subject of a premature miscarriage<sup>1</sup>. The child must be so far developed that in the ordinary course of events it would have had a fair chance of life when born<sup>2</sup>.

There must be a concealment of the fact of birth, carried out by a secret disposition of the body<sup>3</sup>, and this implies some act of concealment<sup>4</sup>. Proof that a woman still had the body of her child in her possession, although about to dispose of it<sup>5</sup>, or that she allowed others to take away the body, unless it was at her request or with her knowledge and consent<sup>6</sup>, or that she merely denied that she had given birth to a child<sup>7</sup>, is not sufficient to support a conviction for concealment.

There is a concealment when the child is placed where it is not likely to be found; and the most complete exposure of the body in a secluded place where it would not be likely to be found may be a concealment<sup>8</sup>. Leaving it in a street, although it may amount to a public nuisance<sup>9</sup>, is not a concealment of birth<sup>10</sup>.

The secret disposition need not be in a place where it is intended finally to leave the body; a temporary place of concealment is sufficient<sup>11</sup>.

The dead body must be found and identified as that of the child the attempted concealment of whose birth is alleged<sup>12</sup>, or at least there must have been a confession by the defendant<sup>13</sup>.

A person does not commit the offence of endeavouring to conceal the birth of a child if he or she puts it while it is still alive in a place of concealment, even though it may subsequently die<sup>14</sup>; but if such person later on visits the place, and, finding the child dead, replaces the clothes or other things with which it was concealed, that person commits this offence<sup>15</sup>.

The offence does not consist in the concealment of the birth of a child from any particular individual, but in such a concealment as would keep the world at large in ignorance of the birth<sup>16</sup>.

It is a question of law for the judge whether there is evidence that the place where the body was put was such that the body might have been disposed of there so as to conceal it. It is for the jury to say whether the body had in fact been so disposed of by the defendant, and with intent to conceal the birth<sup>17</sup>.

1 *R v Hewitt, R v Smith* (1866) 4 F & F 1101.

2 *R v Berriman* (1854) 6 Cox CC 388. It has been said that, although no specific limit can be assigned to the period when the chance of life begins, it may perhaps be safely assumed that, in the case of a child which has been less than seven months in the womb, the great probability is that it would not be born alive: *R v Berriman* supra. The reference to seven months would doubtless be reconsidered by a modern court in the light of the fact that the modern threshold of viability is generally 24 weeks from conception (see eg the Abortion Act 1967 s 1(1)(a) (as substituted); and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 209) and sometimes as low as 22 weeks. Contrast the approach in *R v Colmer* (1864) 9 Cox CC 506, where a lower threshold was adopted (Martin B held that a foetus not bigger than a man's finger, but having the shape of a child, might be a child within the meaning of the statute; in this case the woman had been confined in the fourth or fifth month after pregnancy, and Martin B expressed the opinion at 507 that, as soon as a foetus which had the outward appearance of a

child was born, the offence of concealment of birth could be committed); and see Stephen's Digest of the Criminal Law (9th Edn) 227. See also PARA 108 note 1 ante. It is submitted that the question of whether that which was concealed was 'the dead body of a child' is in each case a question of fact for the jury. See also *R v Kersey* (1908) 1 Cr App Rep 260, CCA (mother confessing to killing her newly-born child and disposing of body; murder charge insupportable in absence of evidence that child had existence separate from its mother and had breathed; conviction for concealment of birth despite absence of body).

3 *R v Rosenberg* (1906) 70 JP 264 (where the child's body was on the bed on which defendant lay, it being covered with a petticoat, an acquittal was directed). Cf *R v Perry* (1855) Dears CC 471, CCR (where the defendant put the body under a bolster on which she put her head, the conviction was upheld). See also *R v ----* (1906) 70 JP Jo 545; *R v Veaty* (1910) 74 JP Jo 352.

4 *R v Derham* (1843) 1 Cox CC 56 (where it was held that the fact that the defendant had left the body in a privy where she said she had been confined was not evidence of concealment).

5 *R v Snell* (1837) 2 Mood & R 44.

6 *R v Bate* (1871) 11 Cox CC 686; *R v Douglas* (1836) 1 Mood CC 480; *R v Bird* (1849) 2 Car & Kir 817; *R v Skelton* (1850) 3 Car & Kir 119.

7 *R v Turner* (1839) 8 C & P 755.

8 *R v Brown* (1870) LR 1 CCR 244; and see also *R v Sleep* (1864) 9 Cox CC 559; *R v Cook* (1870) 11 Cox CC 542; *R v Rosenberg* (1906) 70 JP 264; *R v George* (1868) 11 Cox CC 41; *R v Waterage* (1846) 1 Cox CC 338.

9 As to public nuisance see NUISANCE vol 78 (2010) PARAS 105, 106.

10 *R v Clark* (1883) 15 Cox CC 171.

11 *R v Perry* (1855) Dears CC 471.

12 *R v Williams* (1871) 11 Cox CC 684. Cf *R v Kersey* (1908) 1 Cr App Rep 260, CCA.

13 *R v Kersey* (1908) 1 Cr App Rep 260, CCA.

14 *R v May* (1867) 10 Cox CC 448, CCR. However, according to the circumstances, the woman would be guilty of murder or manslaughter or infanticide, or of cruelty to the child.

15 *R v Hughes* (1850) 4 Cox CC 447.

16 *R v Morris* (1848) 2 Cox CC 489; *R v Higley* (1830) 4 C & P 366.

17 *R v Clarke* (1866) 4 F & F 1040.

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### **(3) NON-FATAL OFFENCES AGAINST THE PERSON**

#### **(i) Consent**

##### **115. Relevance of consent.**

Many offences against the person cannot be committed if the victim gives a valid consent. In such cases a valid consent renders the conduct lawful<sup>1</sup>. On the other hand, if a victim refuses consent to what is done, an offence against the person will be committed (unless some other excuse is available<sup>2</sup>).

An offence against the person can be committed, despite the victim's consent, if that consent is invalid. While one can validly consent to an application of force which does not cause actual bodily harm<sup>3</sup>, or in some cases even if it does, no one can lawfully consent to his own death at the hands of another<sup>4</sup>.

A person's consent is irrelevant and cannot prevent criminal liability for an offence if actual bodily harm was intended and/or caused<sup>5</sup>. However, a person may validly consent in such a case where the public interest requires an exception to this rule<sup>6</sup>. A few general exceptions have been recognised, for example, properly conducted games or sports<sup>7</sup>, reasonable surgical interference<sup>8</sup>, and tattooing and earpiercing<sup>9</sup>. Other exceptions which have been recognised are that, if a person is caused actual bodily harm by rough and undisciplined horseplay which is not intended to cause injury, his consent to run the risk of it is legally relevant<sup>10</sup>; that a person who takes part in a dangerous exhibition can give a valid consent to the risk of being unintentionally harmed<sup>11</sup>, and that a person can validly consent to run the known risk of infection, as well as all the other risks inherent in, and possible consequences of, sexual intercourse, just as they can validly consent to run the risks inherent in other aspects of everyday life<sup>12</sup>. The application of the public interest test when new situations arise can give rise to fine distinctions<sup>13</sup>.

If there is evidence that the victim may have consented (in a case where consent could be valid), the prosecution must prove a lack of consent<sup>14</sup>. A belief in consent, even though unreasonably held, is a defence<sup>15</sup>.

Consent is no defence to murder or to certain statutory offences involving children or young persons or mentally vulnerable persons<sup>16</sup>.

1 Consent can render conduct lawful only if the act constituting the alleged offence falls within that which is freely permitted by the other: cf *Donnelly v Jackman* [1970] 1 All ER 987, [1970] 1 WLR 562, DC. A person who consents to play football does not thereby consent to deliberate and dangerous kicking (see *R v Bradshaw* (1878) 14 Cox CC 83; *R v Moore* (1898) 14 TLR 229). The Sexual Offences Act 2003 makes express provision in relation to consent for the purposes of offences under it: see PARA 163 post.

2 ie such as the defences of duress of circumstances (see PARA 25 ante) or of necessity (see PARA 26 ante).

3 For the meaning of 'actual bodily harm' see PARA 149 post.

4 *R v Young* (1838) 8 C & P 644; *R v Cuddy* (1843) 1 Car & Kir 210.

5 *R v Donovan* [1934] 2 KB 498, 25 Cr App Rep 1, CCA (beating of 17-year-old girl for defendant's sexual gratification; if blows likely or intended to cause bodily harm, immaterial whether or not girl consented); *A-G's*

*Reference (No 6 of 1980)* [1981] QB 715, 73 Cr App Rep 63, CA (consensual fight; consent no defence if actual bodily harm intended or caused); applied in *R v Brown* [1994] 1 AC 212, 97 Cr App Rep 44, HL (male homosexual sado-masochistic practices resulting in wounding and actual bodily harm; participants' consent no defence). The prosecution and conviction of the defendants in *R v Brown* supra did not contravene the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 (right to respect for private and family life): *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, ECtHR. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. In *R v Brown* supra the majority of the House of Lords were of the view that consent was a defence to a charge of common assault (a term which includes a battery). More importantly, in *R v Barnes* [2004] EWCA Crim 3246 at [7], [2005] 2 All ER 113 at [7], [2005] 1 Cr App Rep 507 at [7], Lord Woolf CJ stated that: 'When no bodily harm is caused, the consent of the victim to what happened is always a defence to a charge'. Read literally, the reference to actual bodily harm being 'intended and/or caused' means that it is irrelevant that actual bodily harm was unforeseen or even unforeseeable by the defendant (or the victim, for that matter), but see *R v Boyea* [1992] Crim LR 574, CA (suggests that it must have been likely that actual bodily harm would be caused); *R v Slingsby* [1995] Crim LR 570, Crown Ct (defendant must have intended actual bodily harm or anticipated risk of it).

6 *R v Brown* [1994] 1 AC 212, 97 Cr App Rep 44, HL; *A-G's Reference (No 6 of 1980)* [1981] QB 715, 73 Cr App Rep 63, CA.

7 A person who takes part in a properly conducted contact game or sport, like football, rugby or cricket, validly consents to the risk of actual bodily harm, even serious harm, such as can reasonably be expected during the game or sport: *R v Coney* (1882) 8 QBD 534, 51 LJMC 66, CCR; *R v Barnes* [2004] EWCA Crim 3246, [2005] 2 All ER 113, [2005] 1 Cr App Rep 507. He does not, however, consent to the intentional infliction of actual bodily harm: *R v Bradshaw* (1878) 14 Cox CC 83; *R v Barnes* supra. The fact that the play is within the rules of the game gives a firm indication that what has happened is not criminal. In judging whether conduct is criminal or not, it must be remembered that, in highly competitive sports, conduct outside the rules can be expected to occur in the heat of the moment, and even if the conduct justifies, for example, a player being sent from the field of play by the referee, it still may not reach the threshold level required for it to be criminal. That level is an objective one and does not depend upon the views of individual players. The type of the sport, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury, and the state of mind of the defendant are all likely to be relevant in determining whether the defendant's actions go beyond the threshold. Whether conduct reaches the required threshold to be criminal depends on all the circumstances. However, there will be cases that fall within a 'grey area', and then the tribunal of fact will have to make its own determination as to which side of the line the case falls: *R v Barnes* supra; and see also *R v Bradshaw* supra; *R v Moore* (1898) 14 TLR 229.

Boxing under the Queensberry Rules is a properly conducted sport: *R v Brown* [1994] 1 AC 212 at 231, 97 Cr App Rep 44 at 47 per Lord Templeman, at 241 and 55-56 per Lord Jauncey of Tullichettle, at 265 and 74-75 per Lord Mustill, and at 278 and 86 per Lord Slynn of Hadley. On the other hand, prize fighting is not regarded as a properly conducted sport: *R v Coney* supra. For the meaning of 'prize-fighting' see *R v Coney* supra.

8 This exception was recognised in *A-G's Reference (No 6 of 1980)* [1981] QB 715, 73 Cr App Rep 63, CA; *R v Brown* [1994] 1 AC 212, 97 Cr App Rep 44, HL. 'Reasonable surgical interference' includes a sex-change operation for genuine therapeutic reasons (*Corbett v Corbett* [1971] P 83 at 99, [1970] 2 All ER 33 at 43) and ritual male circumcision (*R v Brown* [1994] 1 AC 212 at 231, 97 Cr App Rep 44 at 47 per Lord Templeman; *Re J (Child's Religious Upbringing and Circumcision)* [2000] 1 FCR 307, [2000] 1 FLR 571, CA), but it does not include female genital mutilation (see the Female Genital Mutilation Act 2003 s 1; and PARA 157 post). It seems that reasonable surgical interference includes cosmetic surgery or, at the present day, sterilisation operations (whether for eugenic or contraceptive reasons), both of which have now become routine. An obiter dictum in *Bravery v Bravery* [1954] 3 All ER 59 at 67-68, [1954] 1 WLR 1169 at 1180, CA, per Denning LJ, to the effect that a sterilisation operation for sterilisation purposes (as opposed to eugenic purposes) is an unlawful assault would seem not to represent the current legal position: see *R v Dica* [2004] EWCA Crim 1103 at [41], [2004] 2 QB 1257 at [41], [2004] 2 Cr App Rep 467 at [41] per Judge LJ. The court's jurisdiction should be invoked whenever it is proposed to perform a sterilisation operation on an adult woman disabled by mental incapacity, since, while a doctor may lawfully operate on such a patient if it is in her best interests, a declaration will establish by judicial process whether the proposed operation is in her best interests and therefore lawful: *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL; and MENTAL HEALTH vol 30(2) (Reissue) PARAS 553, 612-613.

9 This exception was recognised in *R v Brown* [1994] 1 AC 212 at 231, 97 Cr App Rep 44 at 47 per Lord Templeman, and at 277 and 85 per Lord Slynn of Hadley. The tattooing of a person aged under 18 (otherwise than by a qualified medical practitioner for medical reasons) is, however, an offence under the Tattooing of Minors Act 1969 s 1: see PARA 145 post; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 646.

10 *R v Jones* (1986) 83 Cr App Rep 375, [1987] Crim LR 123, CA. See also *R v Richardson* [1999] QB 444, [1998] 2 Cr App Rep 200, CA.

11 This was recognised in *A-G's Reference (No 6 of 1980)* [1981] QB 715, 73 Cr App Rep 63, CA.

12 *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257, [2004] 2 Cr App Rep 467. To be valid the consent must be an informed one, which it will not be if the defendant has concealed his disease (unless the victim knows of the disease through another source): *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App Rep 198. In the case of the intentional transmission of serious disease, the consent of the infected party would be no defence: *R v Dica* supra at [46], [58] per Judge LJ.

13 Contrast *R v Wilson* [1997] QB 47, [1996] 2 Cr App Rep 241, CA (husband branded wife's buttocks at her request in privacy of matrimonial home; held on those particular facts wife's consent was valid) with *R v Emmett* (1999) unreported, CA (defendant tied plastic bag over partner's head during sexual activity causing her eyes to become bloodshot; no treatment required; and on another occasion during sexual activity defendant caused a 6cm x 4cm burn to her breasts, having poured lighter fuel on them and set light to it; skin graft not required; defendant alleged partner consented on both occasions; held on these facts there could not be a valid consent).

14 *R v May* [1912] 3 KB 572 at 575, CCA, per Lord Alverstone CJ.

15 *R v Kimber* [1983] 3 All ER 316, 77 Cr App Rep 225, CA; and see PARA 18 ante.

16 See eg the Sexual Offences Act 2003 ss 5-29, 34-44 (see PARAS 166-194, 202-213 post); and the Tattooing of Minors Act 1969 s 1 (see PARA 145 post; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 646).

## UPDATE

### 115 Relevance of consent

NOTE 7--*R v Barnes* distinguished in *H v Crown Prosecution Service* [2010] All ER (D) 56 (Apr), DC (teacher at a special needs school does not impliedly consent to violence against him by a pupil).

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### 116. Apparent consent invalid.

An apparent consent is invalid where the person giving it is so young, drunk or mentally disordered as to have no real understanding of what is involved, or (in other words) to have such a limited knowledge or understanding as not to be in a position to make a rational decision whether or not to consent<sup>1</sup>. The victim's apparent consent may be invalid if it has been procured by an express or implied threat<sup>2</sup>.

There is no valid consent if a person, apparently consenting, is induced to do so by a mistake, whether induced by the defendant's fraud or self-induced<sup>3</sup>, as to the nature of the act or as to the identity of the defendant<sup>4</sup> or as to the quality of the act<sup>5</sup>. While someone who consents to sexual intercourse in ignorance that the other party has a serious sexually transmitted disease nevertheless validly consents to the bodily contact involved, that person does not consent to run the risk of being infected by the disease in consequence<sup>6</sup>. To be effective there must be an informed consent to run such risk<sup>7</sup>.

1 *Burrell v Harmer* [1967] Crim LR 169, DC; *R v Howard* [1965] 3 All ER 684, 50 Cr App Rep 56, CCA; *R v Lang* (1975) 62 Cr App Rep 50, CA. In respect of surgical, medical or dental treatment a minor aged over 16 can give a valid consent: see the Family Law Reform Act 1969 s 8; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 4. A minor under 16 can also give a valid consent to treatment if he has sufficient maturity and understanding to understand what is involved: see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402, HL; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 4. However, a refusal of consent to treatment by a competent minor under 16 can be overridden by consent being given by someone with parental responsibility or by a civil court exercising an appropriate jurisdiction over children: *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11, [1991] 4 All ER 177, CA. As to the rights of a parent to consent on behalf of a child see and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 4.

2 *R v Day* (1841) 9 C & P 722.

3 *R v Richardson* [1999] QB 444 at 450, [1998] 2 Cr App Rep 200 at 206, CA.

4 *R v Rosinski* (1824) 1 Mood CC 19; *R v Case* (1850) 4 Cox CC 220; *R v Clarence* (1888) 22 QBD 23 at 43, CCR; *R v Williams* [1923] 1 KB 340, CCA. As to the identity of a person see *R v Richardson* [1999] QB 444, [1998] 2 Cr App Rep 200, CA ('identity' does not include his qualifications or attributes).

5 See *R v Tabassum* [2000] 2 Cr App Rep 328, [2000] Lloyds Med Rep 404, CA (intimate touching of women by defendant who had stated falsely that he was medically qualified), distinguishing *R v Clarence* (1888) 22 QBD 23, CCR (majority of court held that wife's consent to husband having intercourse was not vitiated by his concealment of his venereal disease) and *R v Linekar* [1995] QB 250, [1995] 3 All ER 69, CA, on the doubtful ground that no mistake of quality was involved in those cases. See also *R v Rosinski* (1824) 1 Mood CC 19 (a male doctor, or person assuming to act as one, who strips a patient naked on the pretence that he is diagnosing her case, is guilty of assault). Contrast *R v Dica* [2004] EWCA Crim 1103 at [39], [2004] QB 1257 at [39], [2004] 2 Cr App Rep 467 at [39] per Judge LJ (where a man has sexual intercourse with a woman after concealing his sexually transmitted disease, the woman consents to the bodily contact involved for the purposes of negating the offence of rape).

6 *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257, [2004] 2 Cr App Rep 467.

7 *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App Rep 198. A person can validly consent to run the known risk of infection, as well as all the other risks inherent in, and possible consequences of, sexual intercourse, just as he can validly consent to run the risks inherent in other aspects of everyday life; if the defendant, who has a serious sexual disease, has sexual intercourse with a person who knows that the

defendant may be infected with the disease but nevertheless consents to run the risk and have the intercourse, and that person becomes infected and suffers grievous bodily harm in consequence, he will have given a valid consent to the risk of being infected and suffering grievous bodily harm: *R v Dica* [2004] EWCA Crim 1103 at [47]-[50], [2004] QB 1257 at [47]-[50], [2004] 2 Cr App Rep 467 at [47]-[50] per Judge LJ.

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### **117. Implied consent.**

Consent may be express or implied. Most of the physical contacts of ordinary life are not criminal because they are impliedly consented to by all who move in society and expose themselves to the risk of bodily contact, such as the jostling which is inevitable from presence in a supermarket, an underground station or a busy street; or having one's hand seized in friendship, or one's back (within reason) slapped<sup>1</sup>. Although such cases are regarded as examples of implied consent, it is, however, more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life<sup>2</sup>.

1 *Cole v Turner* (1704) 6 Mod Rep 149; *Collins v Wilcock* [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177 per Robert Goff LJ.

2 *Collins v Wilcock* [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177 per Robert Goff LJ; *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 72, 73, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 at 563, HL, per Lord Goff of Chieveley. Whether physical contact goes beyond what is acceptable in the ordinary conduct of daily life is a question of fact for the jury or magistrates, as the case may be: *Mepstead v DPP* [1996] Crim LR 111, DC.



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## **(ii) Wounding or Causing Grievous Bodily Harm with Intent**

### **118. Wounding, or causing grievous bodily harm, with intent.**

Any person who unlawfully<sup>1</sup> and maliciously by any means whatsoever wounds or causes any grievous bodily harm to any person<sup>2</sup> with intent to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, is guilty of an offence<sup>3</sup> and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>4</sup>.

1 As to when wounding or causing grievous bodily harm may be lawful see PARAS 20-22, 115 ante.

2 As to causation see PARA 7 ante. A charge of causing grievous bodily harm contrary to the Offences against the Person Act 1861 s 18 (see the text and note 3 infra) includes an allegation of inflicting grievous bodily harm contrary to s 20 (as amended) (see PARA 120 post): *R v Mandair* [1995] 1 AC 208, 99 Cr App Rep 250, HL.

3 Offences against the Person Act 1861 s 18; Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 ss 10(2), 12(5)(a), Sch 3 Pt III. In relation to an offence under the Offences against the Person Act 1861 s 18, battery of a child cannot be justified on the ground that it constituted reasonable punishment: see the Children Act 2004 s 58(1), (2)(a); and PARA 161 post. Although the Offences against the Person Act 1861 s 18 creates a single offence there are two variations on that offence: wounding with a specified intent and causing harm with a specified intent: *R v Naismith* [1961] 2 All ER 735, [1961] 1 WLR 952, C-MAC. The offence specified in the Offences against the Person Act 1861 s 18 is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post. For the extended territorial scope of an offence under the Offences against the Person Act 1861 s 18 or s 20 (as amended) (see PARA 120 post) in connection with acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983 s 1(1)(b); and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583. Such an offence may also constitute an 'act of violence' for the purposes of the Aviation Security Act 1982 s 2: see AIR LAW vol 2 (2008) PARA 628. As to the constituents of wounding with intent see PARA 119 post. As to procedural provisions applying where an offence involving bodily injury to a child or young person is charged see PARA 1164 post; as to the finding of causing grievous bodily harm with intent to do so on a charge of murder see PARA 1336 post; and as to the general power to convict of an offence other than that charged see PARA 1335 post. See also *R v Monger* [1973] Crim LR 301, Crown Ct; *R v Slimmings* [1998] 8 Archbold News 1, CA.

Where several defendants inflict injuries on a victim, in which a serious injury such as a broken nose is sustained, it is the totality of the injuries which is to be considered in relation to a charge of causing grievous bodily harm with intent contrary to the Offences against the Person Act 1861 s 18; it is immaterial that one defendant joins in the attack slightly after the others have begun to inflict injuries, which may have included the broken nose; he is aiding the commission of the offence and participating as soon as he joins in: *R v Grundy*, *R v Gerrard*, *R v Patterson* (1989) 89 Cr App Rep 333, CA. This decision was distinguished in relation to wounding in *R v Percival* (2003) Times, 23 May, CA, where it was held that if the offence of wounding is completed and then a person punches the victim of the wounding without previously having formed any intention to be a party to the wounding offence, then the person who punches may be guilty of assault, or of assault occasioning actual bodily harm, but he would not be guilty of wounding.

A defence of intoxication must be very extreme before it induces the prosecution to accept a plea of guilty to the lesser offence of unlawful wounding (see PARA 120 post): *R v Stubbs* (1988) 88 Cr App Rep 53, [1988] Crim LR 389, CA. As to voluntary intoxication see PARA 28 ante.

4 Offences against the Person Act 1861 s 18; Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 12(5) (a). For sentencing guidelines see *A-G's References (Nos 59, 60 and 63 of 1998)*, *R v Goodwin* [1999] 2 Cr App Rep (S) 128 (all offences against the Offences against the Person Act 1861 s 18 are of great seriousness and will

almost always attract a custodial sentence; even where a defendant responds in self-defence with unreasonable force a custodial sentence is generally appropriate). Where a charge of the less serious offence under the Offences Against the Person Act 1861 s 20 (see PARA 120 post) is available as an alternative to a charge under s 18, a charge under s 20 should be included in an indictment when a s 18 offence is alleged: *R v Lahaye* [2005] EWCA Crim 2847, [2006] 1 Cr App Rep 205, [2006] Crim LR 241.

## **UPDATE**

### **118 Wounding, or causing grievous bodily harm, with intent**

NOTE 4--See *A-G's Reference (No 19 of 2007) (Holroyd)* [2007] EWCA Crim 1312, [2008] 1 Cr App Rep (S) 32 (use of motor vehicle as weapon); *R v Roswell Smith* [2008] EWCA Crim 1212, [2009] 1 Cr App Rep (S) 206 (racial provocation constituted mitigating circumstance); *A-G's Reference (No 6 of 2009)* [2009] EWCA Crim 1132, [2009] 2 Cr App Rep (S) 707 (stabbing by young person). See also *R v Hussain* [2010] All ER (D) 116 (Jan), CA (defendants' sentences reduced after being convicted of causing grievous bodily harm with intent, having attacked man who attempted to burgle the home of one of the defendant's). As to the interpretation of the sentencing guidelines for the most serious category of the offence see also *R v Collins* [2009] All ER (D) 171 (Oct), CA.

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### **119. Constituents of wounding etc with intent.**

In order to constitute a wounding there must be an injury to the person by which the skin is broken<sup>1</sup>; the continuity of the whole skin must be severed, not merely that of the cuticle or upper skin<sup>2</sup>. A bruise or internal rupturing of blood vessels is not sufficient<sup>3</sup>, nor is a broken bone alone<sup>4</sup>. The skin severed need not, however, be external<sup>5</sup>, but it is not sufficient to prove merely that a flow of blood was caused<sup>6</sup>, unless there is evidence to show where the blood came from<sup>7</sup>. It is not necessary that any instrument should have been used, as an injury caused for instance by a kick may be a wounding<sup>8</sup>.

'Grievous bodily harm' simply means 'really serious bodily harm'<sup>9</sup>. 'Harm' refers to injury and 'bodily harm' is not limited to the skin, flesh and bones of the victim, but also includes an identifiable psychiatric injury<sup>10</sup>. Whether harm is 'grievous' must be judged objectively, according to the ordinary standards of usage and experience, not subjectively from the standpoint of how the victim would describe it<sup>11</sup>.

The word 'maliciously' does not connote spite or ill-will<sup>12</sup>. In order to prove that the defendant acted maliciously, it is sufficient to prove that he intended his act to result in some unlawful<sup>13</sup> bodily harm to some other person, albeit of a minor nature, or was reckless as to the risk that his act might<sup>14</sup> result in such harm<sup>15</sup>.

On an indictment for wounding with intent the actual intent must be proved<sup>16</sup>.

The intent need not be an intent to do grievous bodily harm to the person actually injured, the offence being complete if there is an intent to do grievous bodily harm to any person<sup>17</sup>.

Where the intent is to resist or prevent lawful apprehension, it is negated if the attempted apprehension is believed to be unlawful and would be unlawful if the facts had been as the defendant honestly but mistakenly believed them to be<sup>18</sup>.

1 *R v Wood, R v McMahon* (1830) 1 Mood CC 278; *Moriarty v Brooks* (1834) 6 C & P 684; *R v Beckett* (1836) 1 Mood & R 526.

2 *R v M'Loughlin* (1838) 8 C & P 635; *C (A Minor) v Eisenhower* [1984] QB 331, 78 Cr App Rep 48.

3 *C (A Minor) v Eisenhower* [1984] QB 331, 78 Cr App Rep 48.

4 *R v M'Loughlin* (1838) 8 C & P 635.

5 *R v Smith* (1837) 8 C & P 173 ('skin' within mouth); *R v Waltham* (1849) 3 Cox CC 442 (lining membrane of urethra).

6 *R v Jones* (1849) 3 Cox CC 441.

7 *R v Waltham* (1849) 3 Cox CC 442.

8 *R v Duffill* (1843) 1 Cox CC 49.

9 *DPP v Smith* [1961] AC 290 at 334, 44 Cr App Rep 261 at 291, HL, per Viscount Kilmuir LC. It is undesirable to attempt any further definition: see *DPP v Smith* supra at 334 and at 291. See also *R v Metharam* [1961] 3 All ER 200, 45 Cr App Rep 304, CCA; *R v Cunningham* [1982] AC 566, 73 Cr App Rep 253, HL; *R v Brown* [1994] 1

AC 212, 97 Cr App Rep 44, HL. As to the meaning of 'really' contrast *R v Saunders* [1985] Crim LR 230, CA, and *R v Janjua*, *R v Choudhury* [1999] 1 Cr App Rep 91, CA.

10 *R v Ireland*, *R v Burstow* [1998] AC 147, [1998] 1 Cr App Rep 177, HL. Where really serious psychiatric injury is alleged but not admitted by the defence, the question whether or not the defendant caused such injury should not be left to the jury in the absence of expert evidence: *R v Ireland*, *R v Burstow* supra. 'Bodily harm' includes lack of consciousness: *R (on the application of T) v DPP* [2003] EWHC 266 (Admin), [2003] Crim LR 622.

11 *R v Brown*, *R v Stratton* [1998] Crim LR 485, CA. Although the test of whether bodily harm is grievous is objective, in deciding whether or not the harm is really serious regard must be had to the effect of the injury on the particular victim, taking account of the victim's age, health and any particular factor: *R v Bollom* [2003] EWCA Crim 2846, [2004] 2 Cr App Rep 50. Where the defendant has caused a number of injuries to the victim, whether there is grievous bodily harm can be judged by looking at the totality of those injuries; injuries which individually are not really serious can amount to really serious harm when aggregated: *R v Birmingham* [2002] EWCA Crim 2608, [2002] All ER (D) 299 (Nov). The ambit of grievous bodily harm is potentially wide. In order to be 'really serious harm', harm need not be life-threatening or permanent or have lasting consequences or even require treatment: *R v Bollom* supra.

12 *R v Cunningham* [1957] 2 QB 396, 41 Cr App Rep 155, CCA.

13 *R v Jones* (1986) 83 Cr App Rep 375, CA.

14 It was affirmed in *R v Rushworth* (1992) 95 Cr App Rep 252, CA, that it need only be foreseen that harm might (as opposed to would) result.

15 *R v Savage*, *R v Parmenter* [1992] 1 AC 699, 94 Cr App Rep 193, HL. See also *R v Mowatt* [1968] 1 QB 421, 51 Cr App Rep 402, CA; and PARA 120 note 2 post. It has been said that 'maliciously' in the Offences against the Person Act 1861 adds nothing, because the ulterior intention required by s 18 is more specific than the intention or recklessness required by 'maliciously': *R v Mowatt* supra. While this is no doubt true in a case of wounding or causing grievous bodily harm with intent to do grievous bodily harm, 'maliciously' does add something where the alleged intent is to resist or prevent lawful apprehension or detainer: it would seem unduly harsh to convict a person of the serious offence under the Offences against the Person Act 1861 s 18 where he accidentally but seriously injured another in trying to resist or prevent a lawful arrest. It seems to have been assumed in *R v Morrison* (1988) 89 Cr App Rep 17, CA, that 'maliciously' in the context of a charge under s 18 involving an intent to resist or prevent arrest does add something.

16 *R v Cox* (1859) 1 F & F 664; *Yardy v Greenwood* (1935) 79 Sol Jo 363, CA; and see further PARA 1366 post. Foresight of or recklessness as to causing grievous bodily harm is not sufficient to constitute intent to do such harm (*R v Belfon* [1976] 3 All ER 46, 63 Cr App Rep 59, CA), but if foresight that grievous bodily harm is virtually certain is proved the jury is entitled to find that the defendant had such an intention (see PARA 10 ante).

17 Offences against the Person Act 1861 s 18; cf *R v Stopford* (1870) 11 Cox CC 643; *R v Lynch* (1846) 1 Cox CC 361 (where the defendant mistook the complainant for another person); *R v Fretwell* (1864) Le & Ca 443, CCR (where the defendant fired at a group of persons intending generally to do grievous bodily harm).

18 See *R v Williams* [1987] 3 All ER 411, 78 Cr App Rep 276, CA; and PARA 18 ante.

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### **(iii) Unlawful Wounding or Infliction of Grievous Bodily Harm etc**

#### **120. Unlawful wounding or infliction of grievous bodily harm.**

Any person who unlawfully<sup>1</sup> and maliciously<sup>2</sup> wounds<sup>3</sup> or inflicts<sup>4</sup> any grievous bodily harm<sup>5</sup> upon any other person, either with or without any weapon or instrument, is guilty of an offence<sup>6</sup> and liable on conviction on indictment to imprisonment for a term not exceeding five years, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup>, to a fine not exceeding the prescribed sum<sup>8</sup>, or to both<sup>9</sup>.

Although no specific intention need be alleged or proved, the prosecution must nonetheless prove that the act was committed unlawfully and maliciously<sup>10</sup>.

Provocation is no defence to a charge of unlawful wounding<sup>11</sup>.

1 See PARA 118 note 1 ante.

2 For the meaning of 'maliciously' see PARA 119 text to notes 12-15 ante. The fact that recklessness as to the risk of causing some unlawful bodily harm to another suffices for these purposes means that if the defendant, knowing that he has some sexually transmitted disease, and therefore aware of the risk of infecting a sexual partner, has intercourse with a person who consents to the intercourse in ignorance of the defendant's disease, the defendant will be guilty of an offence under these provisions if that person becomes infected with the disease and suffers grievous bodily harm in consequence: *R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257, [2004] 2 Cr App Rep 467. In *R v Konzani* [2005] EWCA Crim 706 at [42], [2005] 2 Cr App Rep 198 at [42], Judge LJ stated that where a defendant who knows that he is suffering from a serious sexually transmitted disease deliberately conceals it from a sexual partner his silence is incongruous with a genuine belief that there was an informed consent to the risk of contracting the disease.

'Where the evidence for the prosecution, if accepted, shows that the physical act of the defendant which caused the injury to another person was a direct assault which any ordinary person would be bound to realise was likely to cause some physical harm to the other person (as, for instance, an assault with a weapon or the boot or violence with the hands) and the defence put forward on behalf of the defendant is not that the assault was accidental or that he did not realise that it might cause some physical harm to the victim, but is some other defence such as that he did not do the alleged act or that he did it in self-defence, it is unnecessary to deal specifically in the summing up with what is meant by the word 'maliciously': *R v Mowatt* [1968] 1 QB 421 at 426-427, 51 Cr App Rep 402 at 407, CA, per Diplock LJ. However, this is a subject which it will be prudent for the trial judge to discuss with counsel before he starts his summing up: *R v Barnes* [2004] EWCA Crim 3246, [2005] 2 All ER 113, [2005] 1 Cr App Rep 507.

A defendant who has been shown to have foreseen that his victim was likely to suffer some bodily harm is not entitled to be acquitted on the basis of not having foreseen the harm actually suffered by the victim: *DPP v W* [2006] EWHC 92 (Admin), [2006] All ER (D) 76 (Jan).

3 For the meaning of 'wound' see PARA 119 ante.

4 Grievous bodily harm can be inflicted without an assault and without the application of violence directly or indirectly to the body of the victim: *R v Ireland*, *R v Burstow* [1998] AC 147, [1998] 1 Cr App Rep 177, HL. Thus causing a person to suffer grievous bodily harm by infecting him with a disease constitutes an infliction of that harm (*R v Dica* [2004] EWCA Crim 1103, [2004] QB 1257, [2004] 2 Cr App Rep 467, where the Court of Appeal confirmed that the reasoning which led the majority in *R v Clarence* (1888) 22 QBD 23 to hold that there could not be a conviction under the Offences against the Person Act 1861 in a case of infecting another has no continuing application). For the purposes of the Criminal Law Act 1967 s 6(3) (alternative verdicts: see PARA 1335 post), a charge of inflicting grievous bodily harm contrary to the Offences against the Person Act 1861 s

20 (as amended) includes an allegation of assault occasioning actual bodily harm contrary to s 47 (as amended) (para 149 post): *Metropolitan Police Comr v Wilson, R v Jenkins* [1984] AC 242, 77 Cr App Rep 319, HL.

As to causation see PARA 7 ante.

5 For the meaning of 'grievous bodily harm' see PARA 119 ante.

6 Offences against the Person Act 1861 s 20. As to the racially or religiously aggravated form of this offence see PARA 155 post. In relation to an offence under s 20, battery of a child cannot be justified on the ground that it constituted reasonable punishment: see the Children Act 2004 s 58(1), (2)(a); and PARA 161 post. As to procedural provisions applying where an offence involving bodily injury to a child or young person is charged see PARA 1164 post. As to the offence committed by a person who at the time of committing or being arrested for an offence under the Offences against the Person Act 1861 s 20 has in his possession a firearm or imitation firearm see PARA 677 post. As to the general power to convict of an offence other than that charged see PARA 1335 post. For the extended territorial scope of an offence under s 20 in connection with acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983 s 1(1)(b); and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583.

An offence under the Offences against the Person Act 1861 s 20 is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post. Such an offence may also constitute an 'act of violence' for the purposes of the Aviation Security Act 1982 s 2: see AIR LAW vol 2 (2008) PARA 628.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

8 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

9 Offences against the Person Act 1861 s 20; Penal Servitude Act 1891 s 1(1); Criminal Justice Act 1948 s 1(1); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 5(b).

10 See eg *R v Kemp* [1957] 1 QB 399, 40 Cr App Rep 121; *R v Bailey* [1983] 2 All ER 503, 77 Cr App Rep 76, CA. As to the meaning of 'unlawfully' in the Offences against the Person Act 1861 s 20 see *R v Clarence* (1888) 22 QBD 23 at 40-41, CCR, per Stephen J.

11 *R v Cunningham* [1959] 1 QB 288, 43 App Rep 79, CCA. Provocation may be available as a defence only to murder: see PARA 94 ante.

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### **121. Attempt to choke etc.**

Any person who by any means whatsoever attempts to choke, suffocate or strangle any other person, or by any means calculated to produce that effect attempts to render any other person insensible, unconscious or incapable of resistance, with intent thereby to enable himself or any other person to commit, or with intent to assist any other person in committing, any indictable offence is guilty of an offence<sup>1</sup> and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>2</sup>.

1 Offences against the Person Act 1861 s 21; Criminal Law Act 1967 s 12(5)(a). This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post. The offence may also constitute an 'act of violence' for the purposes of the Aviation Security Act 1982 s 2: see AIR LAW vol 2 (2008) PARA 628.

As to the offence committed by a person who at the time of committing or being arrested for an offence under the Offences against the Person Act 1861 s 21 has in his possession a firearm or imitation firearm see PARA 677 post. As to procedural provisions applying where an offence involving bodily injury to a child or young person is charged see PARA 1164 post.

2 Offences against the Person Act 1861 s 21; Criminal Justice Act 1948 s 1(1).

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## **(iv) Administering Drugs or Poison**

### **122. Administering drugs.**

Any person who unlawfully applies or administers<sup>1</sup> to, or causes to be taken by, or attempts to apply or administer to, or attempts to cause to be administered to or taken by, any person, any chloroform, laudanum or other stupefying or overpowering drug, matter or thing, with intent thereby to enable himself or any other person to commit, or with intent to assist any other person in committing, any indictable offence, is guilty of an offence<sup>2</sup> and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>3</sup>.

1 'Administer' does not necessarily involve the application of direct physical force and includes eg the spraying of tear gas from a distance: see *R v Gillard* (1988) 87 Cr App Rep 189, CA. Where a person acts in concert with another who self-injects a drug (eg by holding a tourniquet around that person's arm while he self-injects or by preparing and giving that person the drug for immediate self-injection), both persons can be regarded as administering the drug because their actions are interlinked (though separate) parts of the overall process of administering the drug: *R v Rogers* [2003] EWCA Crim 945, [2003] 1 WLR 1374, [2003] 2 Cr App Rep 160 (tourniquet); *R v Kennedy* [2005] EWCA Crim 685, [2005] 1 WLR 2159, [2005] 2 Cr App Rep 348 (preparation and giving).

2 Offences against the Person Act 1861 s 22; Criminal Law Act 1967 s 12(5)(a). As to the offence committed by a person who at the time of committing or being arrested for an offence under the Offences against the Person Act 1861 s 22 has in his possession a firearm or imitation firearm see PARA 677 post; as to the administration of a substance to a person, or causing a substance to be taken, for the purpose of enabling any other person to engage in sexual activity that involves that person see PARA 230 post; as to the administration of poisons etc with intent to annoy see PARA 124 post; and as to offences in relation to controlled drugs see PARA 770 et seq post.

This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post. The offence may also constitute an 'act of violence' for the purposes of the Aviation Security Act 1982 s 2: see AIR LAW vol 2 (2008) PARA 628.

3 Offences against the Person Act 1861 s 22; Criminal Justice Act 1948 s 1(1).

## **UPDATE**

### **122 Administering drugs**

NOTE 1--*Kennedy*, cited, reversed: [2007] UKHL 38, [2007] 4 All ER 1083 (see PARA 7). See also *Kane v HM Advocate*; *MacAngus v HM Advocate* (2009) Times, 6 February.



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### **123. Use of noxious substances or things to cause harm and intimidate.**

A person commits an offence if he takes any action which involves the use of a noxious substance<sup>1</sup> or other noxious thing<sup>2</sup> and has, or is likely to have, the effect<sup>3</sup> of:

- 47 (1) causing serious violence against a person anywhere in the world<sup>4</sup>;
- 48 (2) causing serious damage to real or personal property anywhere in the world<sup>5</sup>;
- 49 (3) endangering human life or creating a serious risk to the health or safety of the public<sup>6</sup> or a section of the public<sup>7</sup>; or
- 50 (4) inducing in members of the public the fear that the action is likely to endanger their lives or create a serious risk to their health or safety<sup>8</sup>,

if the action in question is designed to influence the government<sup>9</sup> or an international governmental organisation or to intimidate the public or a section of the public<sup>10</sup>. A person is similarly guilty if he makes a threat that he or another will take any action which constitutes this offence<sup>11</sup> and intends thereby to induce in any person anywhere in the world<sup>12</sup> the fear that the threat is likely to be carried out<sup>13</sup>.

These provisions apply to conduct done in the United Kingdom<sup>14</sup>. They also apply to conduct done outside the United Kingdom which: (a) is done by a United Kingdom national<sup>15</sup> or resident<sup>16</sup>, is done by any person to, or in relation to, a United Kingdom national, resident or protected person<sup>17</sup>, or is done by any person in connection with an attack (or threat of attack) on the residence or diplomatic premises of a United Kingdom diplomat, or his vehicle, while he is on the premises or in the vehicle<sup>18</sup>; and (b) is done for the purpose of advancing a political, religious or ideological cause<sup>19</sup>.

A person guilty of any such offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or a fine, or both<sup>20</sup>, and on summary conviction to imprisonment for a term not exceeding six months<sup>21</sup>, to a fine not exceeding the statutory maximum<sup>22</sup>, or to both<sup>23</sup>.

1 'Substance' includes any biological agent and any other natural or artificial substance (whatever its form, origin or method of production): Anti-terrorism, Crime and Security Act 2001 s 115(1).

2 Ibid s 113(1)(a).

3 Any effect on the person taking the action is disregarded for these purposes: ibid s 113(2).

4 Ibid s 113(1)(b), (2)(a).

5 Ibid s 113(2)(b).

6 'The public' includes the public of a country other than the United Kingdom: ibid s 113(5).

7 Ibid s 113(2)(c).

8 Ibid s 113(2)(d).

9 le the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom: *ibid* s 113(5).

10 *Ibid* s 113(1)(c) (amended by the Terrorism Act 2006 s 34(b)).

11 Anti-terrorism, Crime and Security Act 2001 s 113(3)(a).

12 For a person to be guilty of an offence under *ibid* s 113(3) it is not necessary for him to have any particular person in mind as the person in whom he intends to induce the belief in question: s 115(2).

13 *Ibid* s 113(3)(b).

14 *Ibid* s 113A(1)(a) (ss 113A, 113B added by the Crime (International Co-operation) Act 2003 s 53). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

15 le an individual who is a British citizen, a British overseas territories citizen, a British National (Overseas), a British overseas citizen, a person who is a British subject under the British Nationality Act 1981 or a British protected person within the meaning of s 50(1): Terrorism Act 2000 s 63A(2) (s 63A added by the Crime (International Co-operation) Act 2003 s 53); Anti-terrorism, Crime and Security Act 2001 s 113A(4)(a), (c) (as added: see note 14 supra). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43; as to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 44-57; as to the status of British National (Overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 63-65; as to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 58-62; as to British subjects under the British Nationality Act 1981 see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 66-71; and as to British protected persons within the meaning of s 50(1) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 72-76. For these purposes it is immaterial whether a person knows that another is a United Kingdom national or resident or a protected person: Anti-terrorism, Crime and Security Act 2001 s 113A(5) (as so added).

16 *Ibid* s 113A(1)(b), (3)(a) (as added: see note 14 supra). For these purposes, a 'United Kingdom resident' is an individual who is resident in the United Kingdom: Terrorism Act 2000 s 63A(3) (as added: see note 15 supra); Anti-terrorism, Crime and Security Act 2001 s 113A(4)(b) (as so added).

17 *Ibid* s 113A(3)(b) (as added: see note 14 supra). As to protected persons see note 15 supra.

18 *Ibid* s 113A(3)(c) (as added: see note 14 supra). The reference in the text to an attack on diplomatic premises or vehicles or persons occupying those premises or vehicles is a reference to circumstances which fall within the Terrorism Act 2000 s 63D(1)(b), (c), (3)(b), (c) (as added) (see PARA 476 post): Anti-terrorism, Crime and Security Act 2001 s 113A(3)(c) (as so added).

19 *Ibid* s 113A(2) (as added: see note 14 supra).

20 *Ibid* s 113(4)(b).

21 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

22 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

23 Anti-terrorism, Crime and Security Act 2001 s 113(4)(a). Proceedings for an offence committed under s 113 outside the United Kingdom are not to be started in England and Wales, except by or with the consent of the Attorney General: s 113B(1)(a) (as added: see note 14 supra). Proceedings for an offence outside the United Kingdom under s 113 may be taken, and the offence may for incidental purposes be treated as having been committed, in any part of the United Kingdom: s 113B(2) (as so added).

## UPDATE

### 123 Use of noxious substances or things to cause harm and intimidate

TEXT AND NOTES 1-13--Where an offence under the Anti-terrorism, Crime and Security Act 2001 s 113 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental

purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(b).

TEXT AND NOTE 19--After 'religious' read ', racial': Anti-terrorism, Crime and Security Act 2001 s 113A(2) (amended by the Counter-Terrorism Act 2008 s 75(1), (2)(b)).

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#### **124. Administering poison etc.**

Any person who unlawfully and maliciously<sup>1</sup> administers<sup>2</sup> to or causes to be administered to or taken by any other person any poison or other destructive or noxious thing so as thereby to endanger the life of that person, or so as to inflict upon him any grievous bodily harm, is guilty of an offence<sup>3</sup> and liable on conviction on indictment to imprisonment for a term not exceeding ten years<sup>4</sup>.

Any person who unlawfully and maliciously administers to or causes to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, is guilty of an offence<sup>5</sup> and liable on conviction on indictment to imprisonment for a term not exceeding five years<sup>6</sup>.

If, in fact, grievous bodily harm is caused by the noxious thing, the defendant commits the first-mentioned offence, although the intent was merely to injure or annoy<sup>7</sup>.

The drug or thing administered must be a poison, or other destructive or noxious thing or the defendant cannot be convicted, although there may have been an intent to injure or annoy<sup>8</sup>. If the thing administered is a recognised poison, the quantity used is immaterial<sup>9</sup>. 'Noxious thing' means something other than a recognised poison which is sufficient in the actual amount administered to cause injury, even though when taken in smaller quantities the particular thing given would be harmless<sup>10</sup>. The administering does not necessarily consist in the actual giving of the poison or destructive or noxious thing to the victim by the defendant: it is sufficient if the poison or destructive or noxious thing is placed by the defendant where it will be taken<sup>11</sup>, or if it is handed to a third person in order that it may be given to another, although it may ultimately reach and be taken by someone for whom it was not intended<sup>12</sup>.

The administration of a drug to a woman with the intention of exciting her sexual passion is an administration of a noxious thing with intent to injure or annoy<sup>13</sup>.

1 'Maliciously', where harm is done indirectly, postulates foresight of consequences and requires either an intention to do the particular kind of harm that was done or recklessness whether such harm occurs or not: *R v Cunningham* [1957] 2 QB 396, 41 Cr App Rep 155, CCA (causing escape of coal gas); distinguished in *R v Cato* [1976] 1 All ER 260, 62 Cr App Rep 41, CA (deliberately injecting heroin into victim 'malicious' without proof of intention or recklessness as to harm caused thereby). See also PARAS 8 note 4, 119 text to notes 12-15 ante.

2 For the meaning of 'administer' see the text and notes 11-12 infra; and PARA 122 note 1 ante.

3 Offences against the Person Act 1861 s 23; Criminal Law Act 1967 s 12(5)(a). For the meaning of 'grievous bodily harm' see PARA 119 ante. As to the finding of a verdict of maliciously administering poison with intent to injure, aggrieve or annoy on a charge of maliciously administering poison so as to endanger life see PARA 1338 post; and as to procedural provisions applying where an offence involving bodily injury to a child or young person is charged see PARA 1164 post.

This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post. The offence may also constitute an 'act of violence' for the purposes of the Aviation Security Act 1982 s 2: see AIR LAW vol 2 (2008) PARA 628.

4 Offences against the Person Act 1861 s 23; Criminal Justice Act 1948 s 1(1).

5 Offences against the Person Act 1861 s 24; Criminal Law Act 1967 s 1. There is an intent to injure for the purposes of the Offences against the Person Act 1861 s 24 only if the defendant intended to injure in the sense of causing physical harm: *R v Hill* (1986) 83 Cr App Rep 386, HL. The purpose for which a substance is administered may be relevant in determining whether or not it was intended to cause physical harm: *R v Hill* supra at 390 per Lord Griffiths.

This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post. The offence may also constitute an 'act of violence' for the purposes of the Aviation Security Act 1982 s 2: see AIR LAW vol 2 (2008) PARA 628.

6 Offences against the Person Act 1861 s 24; Criminal Justice Act 1948 s 1(1).

7 *Tulley v Corrie* (1867) 10 Cox CC 584, 640.

8 *R v Hennah* (1877) 13 Cox CC 547.

9 *R v Cramp* (1880) 5 QBD 307 at 309-310, CCR, per Field J and Stephen J (decided under the Offences against the Person Act 1861 s 58: see PARA 109 ante); *R v Hennah* (1877) 13 Cox CC 547 at 549 per Cockburn LCJ.

10 *R v Cramp* (1880) 5 QBD 307, CCR. See also *R v Hennah* (1877) 13 Cox CC 547; *R v Cato* [1976] 1 All ER 260, 62 Cr App Rep 41, CA (heroin held to be a noxious thing because it is liable to cause injury in common use); *R v Marcus* [1981] 2 All ER 833, 73 Cr App Rep 49, CA (sedatives added to bottle of milk; whether noxious a question of fact and degree). Cf *R v Weatherall* [1968] Crim LR 115 (small quantity of sedative not noxious).

11 *R v Harley* (1830) 4 C & P 369.

12 *R v Michael* (1840) 9 C & P 356, CCR; *R v Lewis* (1833) 6 C & P 161.

13 *R v Wilkins* (1861) Le & Ca 89, CCR. As to the administration of stupefying drugs see PARAS 122 ante, 230 post.

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## **(v) Injury by Explosion, Corrosives, Mantraps etc**

### **125. Causing bodily injury by explosion.**

Any person who unlawfully and maliciously<sup>1</sup> by the explosion of gunpowder or other explosive substance<sup>2</sup> burns, maims, disfigures, disables or does any grievous bodily harm<sup>3</sup> to any person is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>4</sup>.

1 For the meaning of 'maliciously' see PARA 119 text to notes 12-15 ante.

2 As to the meaning of 'explosive substance' in a related offence under the Offences against the Person Act 1861 see PARA 126 post.

3 For the meaning of 'grievous bodily harm' see PARA 119 ante.

4 Offences against the Person Act 1861 s 28; Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 12(5) (a). This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post. As to procedural provisions applying where an offence involving bodily injury to a child or young person is charged see PARA 1164 post.

This offence may be constituted by an act done in connection with the offence of hijacking committed or attempted on board an aircraft: see AIR LAW vol 2 (2008) PARA 625. The offence may also constitute an 'act of violence' for the purposes of the Aviation Security Act 1982 s 2: see AIR LAW vol 2 (2008) PARA 628.

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## 126. Causing explosion.

Any person who unlawfully and maliciously<sup>1</sup>:

- 51 (1) causes any gunpowder or other explosive substance<sup>2</sup> to explode<sup>3</sup>;
- 52 (2) sends or delivers to, or causes to be taken or received by, any person any explosive substance or any other dangerous or noxious thing<sup>4</sup>; or
- 53 (3) puts or lays at any place, or casts or throws at or upon or otherwise applies to any person, any corrosive fluid, or any destructive or explosive substance<sup>5</sup>,

with intent, in any such case, to burn, maim, disfigure, or disable<sup>6</sup> any person, or to do some grievous bodily harm<sup>7</sup> to any person, whether any bodily injury is effected or not, is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>8</sup>.

1 For the meaning of 'maliciously' see PARA 119 text to notes 12-15 ante.

2 A petrol bomb is an 'explosive substance' within the meaning of the Offences against the Person Act 1861 s 29: *R v Howard* [1993] Crim LR 213, CA (following *R v Bouch* [1983] QB 246, 76 Cr App Rep 11, CA (see PARA 127 note 7 post)).

3 Offences against the Person Act 1861 s 29; Criminal Law Act 1967 s 12(5)(a).

4 Offences against the Person Act 1861 s 29; Criminal Law Act 1967 s 12(5)(a).

5 Offences against the Person Act 1861 s 29; Criminal Law Act 1967 s 12(5)(a). Boiling water was held to be 'a destructive matter' for the purposes of the Offences Against the Person Act 1837 s 5 (*R v Crawford* (1845) 2 Car & Kir 129, CCR) but subsequently it was held that it was not a 'destructive substance' for the purposes of the Offences against the Person Act 1861 (*R v Crawford* (1877) 62 LT Jo 372 per Huddleston B).

6 Where an intent to disable is alleged, the prosecution need not prove that the defendant intended to disable permanently: *R v James* (1979) 70 Cr App Rep 215, CA.

7 For the meaning of 'grievous bodily harm' see PARA 119 ante.

8 Offences against the Person Act 1861 s 29; Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 12(5)(a). This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post.

An offence under the Offences against the Person Act 1861 s 29 may be constituted by an act done in connection with the offence of hijacking committed or attempted on board an aircraft: see AIR LAW vol 2 (2008) PARA 625. The offence may also constitute an 'act of violence' for the purposes of the Aviation Security Act 1982 s 2: see AIR LAW vol 2 (2008) PARA 628.

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### **127. Causing explosion likely to endanger life or property.**

A person who in the United Kingdom<sup>1</sup> or (being a British citizen<sup>2</sup>, a British overseas territories citizen<sup>3</sup>, a British overseas citizen<sup>4</sup> or a British National (Overseas)<sup>5</sup>) in the Republic of Ireland unlawfully and maliciously<sup>6</sup> causes by any explosive substance<sup>7</sup> an explosion of a nature likely to endanger life or to cause serious injury to property is guilty of an offence, whether any such injury has been actually caused or not, and is liable on conviction on indictment to imprisonment for life or for any shorter term<sup>8</sup>.

1 'It would be quite extraordinary if, in the circumstances prevailing in 1975 [ie the year in which the Explosive Substances Act 1883 s 2 was substituted: see note 8 infra], Parliament when enacting the new s 2 intended to limit the crime so as to require the physical presence of the offender as opposed to defining the place where the damage occurred': *R v Ellis* (1991) 95 Cr App Rep 52 at 66, CCC, per Swinton Thomas J. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43.

3 As to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 44-57.

4 As to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 58-62.

5 As to the status of British National (Overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 63-65.

6 For the meaning of 'maliciously' see PARA 119 text to notes 12-15 ante.

7 'Explosive substance' includes any materials for making any such substance, and also any apparatus, machine, implement or materials, or any part thereof, used or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance: Explosive Substances Act 1883 s 9(1). In the absence of a definition of 'explosive' in the Explosive Substances Act 1883, it has been held that that term in that Act should be construed in the light of the definition of 'explosive' in the Explosives Act 1875 s 3, whereby 'explosive': (1) means gunpowder, nitroglycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury or of other metals, coloured fires and every other substance, whether similar to those above mentioned or not, used or manufactured with a view to producing a practical effect by explosion or a pyrotechnic effect; and (2) includes fog-signals, fireworks, fuses, rockets, percussion caps, detonators, cartridges, ammunition of all description, and every adaptation or preparation of an explosive as defined: see *R v Wheatley* [1979] 1 All ER 954, 68 Cr App Rep 287, CA (fire-damaged sodium chlorate mixture used in pipe bomb held to be an explosive substance for purposes of the Explosive Substances Act 1883 even if it only had a pyrotechnic effect); and EXPLOSIVES vol 17(2) (Reissue) PARA 905. 'Pyrotechnic effect' has a broad meaning, and it is not limited to, eg, fireworks; a petrol bomb is an 'explosive substance' because the fireball produced by it clearly has a pyrotechnic effect: *R v Bouch* [1983] QB 246, 76 Cr App Rep 11, CA (*R v Wheatley* supra applied; definition of 'explosion' in 1886 edition of *Encyclopaedia Britannica* approved). See also *R v Elliott* (1984) 81 Cr App Rep 115, CA. A part of a vessel filled with an explosive substance (see *R v Charles* (1892) 17 Cox CC 499); a shotgun (see *R v Downey* [1971] NI 224); and electronic timers (see *R v Berry (No 3)* [1994] 2 All ER 913, 99 Cr App Rep 88, CA) have also been held to be 'explosive substances' for the purposes of the Explosive Substances Act 1883: see further EXPLOSIVES vol 17(2) (Reissue) PARA 1022.

8 Ibid s 2 (substituted by the Criminal Jurisdiction Act 1975 s 7(1), (3)); British Nationality Act 1981 s 51(3)(a) (ii) (amended by the British Nationality (Falkland Islands) Act 1983 s 4(3); the British Overseas Territories Act 2002 ss 2(2)(b), 5, Sch 1 para 6; and the Hong Kong (British Nationality) Order 1986, SI 1986/948, art 7(9)).

An offence under the Explosive Substances Act 1883 s 2 (as substituted) may also constitute an 'act of violence' for the purposes of the Aviation Security Act 1982 s 2: see AIR LAW vol 2 (2008) PARA 628.



No proceedings may be instituted except by or with the consent of the Attorney General: Explosive Substances Act 1883 s 7(1) (amended by the Criminal Jurisdiction Act 1975 s 14(5), Sch 6 Pt I). As to the effect of this limitation see PARA 1071 post.

As to inquiries under the Explosive Substances Act 1883 see EXPLOSIVES vol 17(2) (Reissue) PARA 1044.

The Explosives Act 1875 ss 73, 74, 75, 89, 96 (search for, seizure and detention of explosive substances, forfeiture, and the disposal of explosive substances seized or forfeited: see EXPLOSIVES vol 17(2) (Reissue) PARAS 1027-1029) apply as if a crime or forfeiture under the Explosive Substances Act 1883 were an offence or forfeiture under the Explosives Act 1875: Explosive Substances Act 1883 s 8(1).

## **UPDATE**

### **127 Causing explosion likely to endanger life or property**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **128. Attempting to cause explosion.**

A person who in the United Kingdom<sup>1</sup> or a dependency<sup>2</sup> or (being a British citizen<sup>3</sup>, a British overseas territories citizen<sup>4</sup>, a British overseas citizen<sup>5</sup> or a British National (Overseas)<sup>6</sup>) elsewhere unlawfully and maliciously<sup>7</sup> either does any act with intent to cause, or conspires to cause, by an explosive substance<sup>8</sup> an explosion of a nature likely to endanger life, or cause serious injury to property, whether in the United Kingdom or elsewhere<sup>9</sup>, or makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property, whether in the United Kingdom or elsewhere, or to enable any other person to do so<sup>10</sup>, is guilty of an offence, whether or not any explosion takes place or any injury to person or property is actually caused, and is liable on conviction on indictment to imprisonment for life or for any shorter term, and the explosive substance must be forfeited<sup>11</sup>.

1 These words do not govern the person but govern the relevant act complained of; they create a geographical limitation on the place where those relevant acts take place, ie acts preparatory to explosions in the United Kingdom: *R v Ellis* (1991) 95 Cr App Rep 52, CCC. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 'Dependency' means the Channel Islands, the Isle of Man and any colony, other than a colony for whose external relations a country other than the United Kingdom is responsible: Explosive Substances Act 1883 s 3(2) (s 3 substituted by the Criminal Jurisdiction Act 1975 s 7(1), (3)).

3 As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43.

4 As to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 44-57.

5 As to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 58-62.

6 As to the status of British National (Overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 63-65.

7 For the meaning of 'maliciously' see PARA 119 text to notes 12-15 ante.

8 For the meaning of 'explosive substance' see PARA 127 note 7 ante.

9 Explosive Substances Act 1883 s 3(1)(a) (s 3 as substituted (see note 2 supra); and s 3(1) amended by the Criminal Law Act 1977 s 65(4), Sch 12; and by the Terrorism Act 2006 s 17(5)).

10 Explosive Substances Act 1883 s 3(1)(b) (as substituted and amended: see notes 2, 9 supra).

11 No proceedings for this offence may be instituted except by or with the consent of the Attorney General: *ibid* s 7(1) (amended by the Criminal Jurisdiction Act 1975 s 14(5), Sch 6 Pt I). As to the effect of this limitation see PARA 1071 post. For ancillary provisions see the Explosive Substances Act 1883 s 8(1); and PARA 127 note 8 ante. As to possessing something with intent to destroy or damage property see PARA 338 post; and as to inquiries under the Explosive Substances Act 1883 see EXPLOSIVES vol 17(2) (Reissue) PARA 1044. For sentencing guidelines see *R v Patrick Martin* [1999] 1 Cr App Rep (S) 477, CA.

## **UPDATE**

## **128 Attempting to cause explosion**

NOTE 11--The level of sentencing in *Martin*, cited, cannot govern sentences for terrorist conspiracies where the potential for mass injury and loss of life may be vastly greater: *R v Jalil* [2008] EWCA Crim 2910, [2009] 2 Cr App Rep (S) 276, [2008] All ER (D) 51 (Dec).

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### **129. Sending for proof gun barrels containing explosive substances.**

Any person who knowingly sends for proof<sup>1</sup> any barrel<sup>2</sup> containing any explosive substance or any other matter calculated by explosion or otherwise to occasion injury to any person handling or having to do with the barrel for the purposes of proof or otherwise, or puts in the barrel before or when it is sent such explosive substances or other matter, or causes, procures, or knowingly permits any such offence or an attempt at any such offence, or knowing that any such offence or attempt has been or is to be committed does not give warning thereof to some officer employed at the proof house in question, is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>3</sup>.

1 'Proof' means provisional proof and definitive proof, or, as the case requires, provisional proof or definitive proof; and 'provisional proof' means proof of a barrel liable in any subsequent stage of manufacture to be reduced in strength before it forms part of a small arm in a finished state; and 'definitive proof' means proof of a barrel not liable in any subsequent stage of manufacture to be reduced in strength before it forms part of a small arm in a finished state: Gun Barrel Proof Act 1868 s 4. See further note 2 *infra*. 'Sending for proof' involves sending for proof to the Proof House of the Gunmakers Company of the City of London or the Birmingham Proof House or any branch proof house: see s 123 (amended by the Gun Barrel Proof Act 1978 s 8(1), Sch 3 para 12). As to the proof and marking of gun barrels see further TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 487.

2 For these purposes, 'barrel' includes every barrel of every small arm, and every breech of every small arm, and every small arm which would in the user of the small arm contain all or any part of its charge; every part of every small arm in, from, or through which, in the user of the small arm all or any part of its charge would be exploded or discharged; and every barrel welded, forged, or cast, finished or unfinished or in any other progressive state of manufacture and any and every part of a barrel: see the Gun Barrel Proof Act 1868 s 4. 'Small arms' includes small arms of every description (whether 'of present use or of future invention') respectively adapted for the discharge of bullets, shots or other projectiles either by means of the explosion, ignition or other action of gunpowder, gun-cotton, fulminating powder or other substance (whether 'of present use or of future invention or application') or by means of the expansion of steam or gas or by any other means not being merely mechanical means, except air guns ('as at present manufactured'): s 4. In the immediately preceding sentence phrases have been printed within inverted commas to draw attention to the historical interpretation which must be given to this definition in the Gun Barrel Proof Act 1868.

3 Ibid s 123 (as amended: see note 1 *supra*). As to other offences under the Gun Barrel Proof Act 1868 see PARAS 355, 667 *post*.

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### **130. Placing or throwing explosive substances.**

Any person who unlawfully and maliciously<sup>1</sup> places or throws in, into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance<sup>2</sup>, with intent to do any bodily injury to any person, whether or not any explosion takes place and whether or not any bodily injury is effected, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>3</sup>.

1 For the meaning of 'maliciously' see PARA 119 text to notes 12-15 ante.

2 As to the meaning of 'explosive substance' in a related offence under the Offences against the Person Act 1861 see PARA 126 note 2 ante.

3 Ibid s 30; Criminal Justice Act 1948 s 1(1), Sch 10 Pt I; Criminal Law Act 1967 s 12(5)(a). This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post.

As to the offence committed by a person who at the time of committing or being arrested for an offence under the Offences against the Person Act 1861 s 30 has in his possession a firearm or an imitation firearm see PARA 677 post.

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### **131. Setting mantraps etc.**

Any person who sets or places, or causes to be set or placed, any spring-gun, mantrap, or other engine<sup>1</sup> calculated to destroy human life or inflict grievous bodily harm<sup>2</sup>, with the intent that it will, or whereby it may, destroy or inflict grievous bodily harm on a trespasser or other person coming in contact with it, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding five years<sup>3</sup>.

Any person who knowingly and wilfully permits any such spring-gun, mantrap or other engine, which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person, to continue so set or placed is deemed to have set or placed it with the above-mentioned intent<sup>4</sup>.

However, nothing in these provisions makes it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin, or to set or place, or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring-gun, mantrap or other engine which is set or placed, or caused or continued to be set or placed, in a dwelling house for its protection<sup>5</sup>.

1 An 'engine' in this context means a mechanical contrivance: *R v Munks* [1964] 1 QB 304, 48 Cr App Rep 56, CCA. It does not include an arrangement of electric wires: *R v Munks* supra.

2 For the meaning of 'grievous bodily harm' see PARA 119 ante.

3 Offences against the Person Act 1861 s 31; Penal Servitude Act 1891 s 1(1); Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 1. Where death is caused by setting such an instrument, the setter is guilty of manslaughter: *R v Heaton* (1896) 60 JP 508.

4 Offences against the Person Act 1861 s 31.

5 Ibid s 31.

### **UPDATE**

#### **131 Setting mantraps etc**

NOTE 1--Given the evident purpose behind the 1861 Act s 31, there is every reason not to give the term 'other engine' an unduly narrow meaning: *R v Cockburn* [2008] EWCA Crim 316, [2008] QB 882, [2008] 2 All ER 1153 (heavy spiked metal object, triggered into dangerous movement by inadvertent pressure on a wire or string, capable of amounting to 'other engine' for purposes of s 31).

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## **(vi) Endangering Railway Passengers**

### **132. Placing wood etc on railway, taking up rails, turning points, showing or hiding signals etc with intent to endanger passengers.**

Any person who unlawfully and maliciously<sup>1</sup> puts or throws upon or across any railway any wood, stone or other matter or thing, or takes up, removes or displaces any rail, sleeper or other matter or thing belonging to any railway, or turns, moves or diverts any points or other machinery belonging to any railway, or makes or shows, hides or removes, any signal or light upon or near to any railway, or does or causes to be done any other matter or thing, with intent to endanger the safety of any person travelling or being upon such railway, is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>2</sup>.

<sup>1</sup> For the meaning of 'maliciously' see PARA 119 text to notes 12-15 ante.

<sup>2</sup> Offences against the Person Act 1861 s 32; Criminal Justice Act 1948 ss 1(1), 83(1), Sch 10 Pt I; Criminal Law Act 1967 s 12(5)(a). An acquittal on indictment under the Offences against the Person Act 1861 s 32 is no bar to a subsequent indictment on the same facts for an offence under s 34 (see PARA 134 post): *R v Gilmore* (1882) 15 Cox CC 85. As to the offence committed by a person who at the time of committing or being arrested for an offence under the Offences against the Person Act 1861 s 32 has in his possession a firearm or an imitation firearm see PARA 677 post.

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**133. Casting stone etc upon a railway carriage, with intent to endanger the safety of any person therein, or in any part of the same train.**

Any person who unlawfully and maliciously<sup>1</sup> throws, or causes to fall or strike, at, against, into, or upon any engine, tender, carriage or truck used on any railway, any wood, stone, or other matter or thing, with intent to injure or endanger the safety of any person in or upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage or truck forming part of the same train, is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>2</sup>.

1 For the meaning of 'maliciously' see PARA 119 text to notes 12-15 ante.

2 Offences against the Person Act 1861 s 33; Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 12(5) (a). Throwing a stone at engines or carriages may also be an offence under the Offences against the Person Act 1861 s 34 (see PARA 134 post): *R v Bowray* (1846) 10 Jur 211.



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#### **134. Doing or omitting anything so as to endanger passengers by railway.**

Any person who, by any unlawful act<sup>1</sup>, or by any wilful omission or neglect, endangers or causes to be endangered<sup>2</sup> the safety of any person conveyed or being in or upon a railway, or who aids or assists therein, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup>, to a fine not exceeding the prescribed sum<sup>4</sup>, or to both<sup>5</sup>.

1 Throwing a stone at engines or carriages may be an offence for these purposes (*R v Bowray* (1846) 10 Jur 211), as is playing with a cart on railway premises so as to let it run within a dangerous distance of the track (*R v Monaghan*, *R v Granger* (1870) 11 Cox CC 608).

2 Proof of the causation of actual danger is not essential if the facts proved may properly be described as potentially endangering the safety of any person conveyed by railway: *R v Pearce* [1967] 1 QB 150, 50 Cr App Rep 305, CA.

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

4 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

5 Offences against the Person Act 1861 s 34; Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 s 1(1); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 5(e).

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## **(vii) False Imprisonment, Kidnapping and Child Abduction**

### **135. False imprisonment.**

False imprisonment is an offence at common law punishable by fine and imprisonment at the discretion of the court<sup>1</sup>. False imprisonment consists in the unlawful<sup>2</sup> and intentional or reckless<sup>3</sup> restraint of a victim's freedom of movement from a particular place<sup>4</sup>.

1 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139. This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(b) (as added); and PARA 474 post. For sentencing guidelines see *R v Spence, R v Thomas* (1983) 5 Cr App Rep (S) 413, CA. In assessing the seriousness of a false imprisonment, attention ought to be paid to the purpose for which the imprisonment was carried out: *R v Willoughby* [1999] 2 Cr App Rep 82, [1999] Crim LR 244 (life sentence not appropriate for false imprisonment for the purposes of indecent assault).

As to the tort of false imprisonment see TORT vol 97 (2010) PARA 542 et seq.

2 As to whether or not an arrest is a lawful restraint see PARAS 910-934 post. The restraint (eg imprisonment) of a person in pursuance of a court order is not unlawful (*Greaves v Keene* (1879) 4 Cox D 73) provided that the order is valid on its face (*Henderson v Preston* (1888) 21 QBD 362, CA). The detention of a person after his acquittal or after the expiry of his term of imprisonment is unlawful restraint: *Mee v Cruickshank* (1902) 20 Ex CC 210.

A parent will rarely be guilty of false imprisonment in respect of his child because the sort of restraint imposed on children is usually well within the realms of reasonable parental discipline and therefore not unlawful, but parental restraint may be unlawful where, for example, a court order has given parental control to someone other than the parent and the restraint is contrary to that order, or where the restraint is outside the realm of parental discipline (which is a question of fact): *R v Rahman* (1985) 81 Cr App Rep 349, CA.

3 Recklessness bears its normal subjective meaning: *R v James* (1997) Times, 2 October, CA.

4 *R v Rahman* (1985) 81 Cr App Rep 349, CA. The victim may be restrained physically, eg by locking him in a room (as in *R v Linsberg and Leies* (1905) 69 JP 107, CCC) or by words, eg intimidation or commands, if he submits (*R v James* (1997) Times, 2 October, CA). A restraint may consist simply of being prevented from proceeding in a particular direction (2 Co Inst 482 at 589), but not if a safe alternative route is available (*Bird v Jones* (1845) 7 QB 742 (tort of false imprisonment)). There is authority that in the tort of false imprisonment (see TORT vol 97 (2010) PARA 542 et seq), there can be an imprisonment without the detained person knowing that he is being detained: *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44, CA; but see *Herring v Boyle* (1834) 1 Cr M & R 377 to the contrary effect.

## **UPDATE**

### **135 False imprisonment**

TEXT AND NOTES--See *R v N*; *R v D*; *R v L* (2010) Times, 11 May, CA (unnecessary inclusion of count of false imprisonment in indictment).

NOTE 2--See also *Connor v Chief Constable of Merseyside Police* [2006] All ER (D) 293 (Nov), CA.

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### 136. Kidnapping.

It is an offence at common law punishable by fine and imprisonment at the discretion of the court<sup>1</sup> to kidnap any person<sup>2</sup>. Kidnapping consists of the taking or carrying away<sup>3</sup> of one person by another by force<sup>4</sup> or fraud<sup>5</sup> without the consent of the person so taken or carried away<sup>6</sup> and without lawful excuse<sup>7</sup>. Even in the case of a child victim, it is the absence of the victim's consent which is material, whatever the victim's age may be<sup>8</sup>.

The common law offence of kidnapping exists in the case of a victim under the age of 14<sup>9</sup>; and it may be committed by a parent who takes away by force or fraud his own unmarried child under the age of 18, without the child's consent and without lawful excuse<sup>10</sup>, or by a husband on his wife if he treats her with hostile force and carries her away from the place where she wishes to remain<sup>11</sup>. Where the offence is committed against a child under the age of 16 by a person connected with the child<sup>12</sup>, no prosecution may be instituted except by or with the consent of the Director of Public Prosecutions<sup>13</sup>.

1 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139. For sentencing guidelines see *R v Spence*, *R v Thomas* (1983) 5 Cr App Rep (S) 413. See also *R v Winslow (Terence)* [2004] EWCA Crim 3417, [2005] 2 Cr App Rep (S) 307; *A-G's Reference (No 6 of 2004)* [2004] EWCA Crim 1275, [2005] 1 Cr App Rep (S) 83.

2 See *R v D* [1984] AC 778, 79 Cr App Rep 313, HL, where the earlier authorities are reviewed. Kidnapping is one of the offences specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(1), (2)(a) (as added); and PARA 474 post.

3 Contrast false imprisonment (see PARA 135 ante) which simply requires an unlawful restraint on the victim's freedom of movement. All that must be proved for kidnapping is a deprivation of liberty coupled with a carrying away from the place where the victim wishes to be; it is unnecessary to prove that the kidnapper carried the victim to the place he intended: *R v Welland* [1978] 3 All ER 161, 67 Cr App Rep 364, CA (defendant deceived victim into accompanying him for about 100 yards to a car, in which he said he would drive her home; defendant was stopped after victim was in the car but before he could drive off; held, although there might be circumstances where the movement would be insufficient for a carrying away, the movement of the victim and putting her in the car was ample evidence that she had been carried away from the place where she wanted to be).

4 'Force' in this context is not restricted to force in the sense of physical violence or the threat of it. Its function is to encompass any conduct which, coupled with the carrying away, overrides the true consent of the person carried away. Thus the exercise of a mental or moral power or influence to compel or force another to do something against his will would suffice if it is sufficiently compelling to overcome that person's will: *R v Singh*, *R v Southward* [1995] 8 Archbold News 3, CA.

5 Since taking or carrying away by fraud is part of the definition of kidnapping, issues of consent will rarely arise, if ever, because a victim who has been deceived will not have consented to being taken or carried away by fraud: *R v Cort* [2003] EWCA Crim 2149, [2004] QB 388, [2004] 1 Cr App Rep 199.

6 The offence can be committed even though the defendant only took the victim where the victim wanted to go, if the taking is by fraud: *R v Cort* [2003] EWCA Crim 2149, [2004] QB 388, [2004] 1 Cr App Rep 199 (defendant falsely told woman at bus stop that bus had broken down and offered her a lift, which she accepted; defendant drove woman to her destination; conviction for kidnapping upheld).

7 *R v D* [1984] AC 778, 79 Cr App Rep 313, HL. 'Without lawful excuse' has the same meaning as 'unlawful' in false imprisonment (see PARA 135 ante). The defendant's belief that the victim is an illegal immigrant is not a defence: *R v D* supra.

Kidnapping may be committed although the person carried away at first consents. If, while being carried away, he or she ceases to consent, any person who then uses force to continue the process is guilty of the offence: *R v Lewis* [1993] 5 Archbold News 2, CA.

8 In the case of a very young child, it would not have the understanding or the intelligence to give its consent, so that absence of consent would be a necessary inference from its age. In the case of an older child, however, it is a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent; if, but only if, the jury considers that a child has these qualities, it must then go on to consider whether it has been proved that the child did not give its consent. While the matter will always be for the jury alone to decide, a jury will not frequently find that a child under 14 had sufficient understanding and intelligence to give its consent. While the absence of the consent of the person having custody or care and control of a child is not material to the issue of absence of consent, the giving of consent by such a person may well support a defence of lawful excuse: *R v D* [1984] AC 778 at 803, 79 Cr App Rep 313 at 323, HL, per Lord Brandon.

9 *R v D* [1984] AC 778, 79 Cr App Rep 313, HL.

10 *R v D* [1984] AC 778, 79 Cr App Rep 313, HL. The giving of consent by a person having custody or care and control of the child may be relevant to a defence of lawful excuse: *R v D* supra.

11 *R v Reid* [1973] QB 299, [1972] 2 All ER 1350, CA. The fact that the parties are cohabiting at the time of the offence is immaterial: *R v Reid* supra.

12 le connected with the child within the meaning of the Child Abduction Act 1984 s 1 (as amended): see PARA 137 post.

13 Child Abduction Act 1984 s 5. As to the effect of this limitation see PARA 1071 post. As to child abduction see PARAS 137-141 post; and as to the offence of hostage-taking see PARA 468 post. In general it is undesirable as a matter of policy to prosecute for kidnapping parents who snatch their own children in defiance of a court order; such conduct should be dealt with as a contempt of court and a prosecution for kidnapping should be used only in exceptional cases, where the conduct of the parent concerned is so bad that an ordinary right-thinking person would without hesitation regard it as criminal in nature: *R v D* [1984] AC 778 at 806, 79 Cr App Rep 313 at 323-324, HL, per Lord Brandon. Where a count alleging abduction contrary to the Child Abduction Act 1984 s 1 (see PARA 137 post) encompasses the allegation against the defendant, the inclusion of a count alleging kidnapping is to be deprecated: see *R v C (Kidnapping: Abduction)* [1991] 2 FLR 252, [1991] Fam Law 522, CA; and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 786.

## UPDATE

### 136 Kidnapping

NOTE 3--Causing a person by a fraudulent misrepresentation to move unaccompanied from one place to another does not in itself constitute taking and carrying away: *R v Hendy-Freegard* [2007] EWCA Crim 1236, [2008] QB 57.

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### **137. Abduction of child by parents or persons connected with child.**

A person connected with a child<sup>1</sup> under the age of 16 commits an offence if he takes<sup>2</sup> or sends<sup>3</sup> the child out of the United Kingdom<sup>4</sup> without the appropriate consent<sup>5</sup>. A person does not commit such an offence, however, by doing anything without the consent of another person whose consent is so required if:

- 54 (1) he does it in the belief that the other person either has consented<sup>6</sup> or would consent if he was aware of all the relevant circumstances<sup>7</sup>;
- 55 (2) he has taken all reasonable steps to communicate with the other person but has been unable to communicate with him<sup>8</sup>; or
- 56 (3) the other person has unreasonably refused to consent<sup>9</sup>.

Where in proceedings for such an offence there is sufficient evidence to raise an issue as to the application of heads (1) to (3) above, it is for the prosecution to prove that heads (1) to (3) do not apply<sup>10</sup>. Special provision is made in connection with the abduction of a child who is the subject of adoption<sup>11</sup>, is in the care of a local authority<sup>12</sup>, or is detained in a place of safety or remanded to local authority accommodation<sup>13</sup>.

Provision is made for the punishment and prosecution of child abduction offences<sup>14</sup>.

1 For these purposes, a person is connected with a child if: (1) he is a parent of the child (Child Abduction Act 1984 s 1(2)(a) (s 1(2)-(4), (7) substituted, and s 1(4A), (5A) added, by the Children Act 1989 s 108(4), Sch 12 para 37(2)-(4)); (2) in the case of a child whose parents were not married to each other at the time of his birth, there are reasonable grounds for believing that he is the father of the child (Child Abduction Act 1984 s 1(2)(b) (as so substituted)); (3) he is a guardian of the child (s 1(2)(c) (as so substituted)); (4) he is a special guardian of the child (s 1(2)(ca) (s 1(2) as so substituted; and s 1(2)(ca), (3)(iia), (5A)(a)(ia) added, and s 1(4)(a), (b) further substituted, by the Adoption and Children Act 2002 s 139(1), Sch 3 para 42)); (5) he is a person in whose favour a residence order is in force with respect to the child (Child Abduction Act 1984 s 1(2)(d) (as so substituted)); or (6) he has custody of the child (s 1(2)(e) (as so substituted)). For the meaning of 'guardian of a child' see the Children Act 1989 s 105(1) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 144); for the meaning of 'special guardian' see s 14A (as added) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 151); and for the meaning of 'residence order' see s 8(1) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 262) (definitions applied by the Child Abduction Act 1984 s 1(7)(a) (as so substituted; and amended by the Adoption and Children Act 2002 s 139(1), Sch 3 para 42(1), (6))). A person is treated as having custody of a child if there is in force an order of a court in the United Kingdom awarding him (whether solely or jointly with another person) custody, legal custody or care and control of the child: Child Abduction Act 1984 s 1(7)(b) (as so substituted). References to a child's parents and to a child whose parents were (or were not) married to each other at the time of his birth are to be construed in accordance with the Family Law Reform Act 1987 s 1 (which extends their meaning: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125); Child Abduction Act 1984 s 3(d) (added by the Children Act 1984 Sch 12 para 39).

A person who could not personally perpetrate an offence contrary to the Child Abduction Act 1989 s 1 (as amended) (see the text and notes 2-10 infra; and PARAS 138-140 post) because he is not connected with the child can be convicted of a conspiracy with someone who is so connected for the abduction of a child by that person: *R v Sherry, R v El Yamani* [1993] Crim LR 537, CA.

2 For these purposes, a person is regarded as taking a child if he causes or induces the child to accompany him or any other person or causes the child to be taken: Child Abduction Act 1984 s 3(a). His acts need not be the sole cause of the child accompanying him, but they must be an effective cause of the child accompanying

him; if they are it is immaterial that there are also other causes, such as the child's state of mind: *R v A (Child Abduction)* [2000] 2 All ER 177, [2001] 1 Cr App Rep 418, CA (taking under the Child Abduction Act 1984 s 2 (see PARA 141 post)). The child's act is irrelevant: *R v A (Child Abduction)* supra.

3 For these purposes, a person is to be regarded as sending a child if he causes the child to be sent: Child Abduction Act 1984 s 3(b).

4 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 Child Abduction Act 1984 s 1(1). For these purposes, 'the appropriate consent', in relation to a child, means: (1) the consent of the child's mother (s 1(3)(a)(i) (as substituted: see note 1 supra)), father (if he has parental responsibility for the child) (s 1(3)(a)(ii) (as so substituted)), any guardian of the child (s 1(3)(a)(iii) (as so substituted)), any special guardian of the child (s 1(3)(a)(iiiia) (as substituted and added: see note 1 supra)), any person in whose favour a residence order is in force with respect to the child (s 1(3)(a)(iv) (as so substituted)), or any person who has custody of the child (s 1(3)(a)(v) (as so substituted)); (2) the leave of the court granted under or by virtue of any provision of the Children Act 1989 Pt II (ss 8-16) (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 247-269) (Child Abduction Act 1984 s 1(3)(b) (as so substituted)); or (3) if any person has custody of the child, the leave of the court which granted custody to him (s 1(3)(c) (as so substituted)). For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 134 (definition applied by the Child Abduction Act 1984 s 1(7)(a) (as so substituted)). A person is treated as having custody of a child if there is in force an order of a court in the United Kingdom awarding him (whether solely or jointly with another person) custody, legal custody or care and control of the child: Child Abduction Act 1984 s 1(7)(b) (substituted by the Children Act 1989 s 108(4), Sch 12 para 37(3)).

A person does not commit an offence under the Child Abduction Act 1984 s 1 (as amended) by taking or sending a child out of the United Kingdom without obtaining the appropriate consent if either he is a person in whose favour there is a residence order in force with respect to the child and he takes or sends him out of the United Kingdom for a period of less than one month (s 1(4)(a) (as so substituted)) or he is a special guardian of the child and he takes or sends the child out of the United Kingdom for a period of less than three months (s 1(4)(b) (as so substituted)). Section 1(4) (as substituted) does not apply if the person taking or sending the child out of the United Kingdom does so in breach of an order under the Children Act 1989 Pt II (as amended): Child Abduction Act 1984 s 1(4A) (as added: see note 1 supra).

As to applications to the police for assistance where danger of removal of the child from the jurisdiction is imminent see *Practice Direction* [1986] 1 All ER 983, [1986] 1 WLR 475.

6 Child Abduction Act 1984 s 1(5)(a)(i).

7 Ibid s 1(5)(a)(ii).

8 Ibid s 1(5)(b).

9 Ibid s 1(5)(c). This provision does not, however, apply if the person who refused to consent is a person in whose favour there is a residence order in force with respect to the child (s 1(5A)(a)(i) (as added: see note 1 supra)), or is a person who is a special guardian of the child (s 1(5A)(a)(ia) (as so added)) or who has custody of the child (s 1(5A)(a)(ii) (as so added)); or if the person taking or sending the child out of the United Kingdom is, by so acting, in breach of an order made by a court in the United Kingdom (s 1(5A)(b) (as so added)).

10 Ibid s 1(6).

11 See PARA 138 post.

12 See PARA 139 post.

13 See PARA 140 post.

14 See PARA 142 post.

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### **138. Abduction of child who is the subject of adoption.**

A person connected with a child<sup>1</sup> under the age of 16 who is placed for adoption by an adoption agency<sup>2</sup> or who such an agency is authorised to place for adoption<sup>3</sup> commits an offence if he takes or sends<sup>4</sup> the child out of the United Kingdom<sup>5</sup> without either the consent of each person who has parental responsibility<sup>6</sup> for the child or the leave of the High Court<sup>7</sup>, and a person connected with a child under the age of 16 in respect of whom a placement order<sup>8</sup> is in force or a parental responsibility order<sup>9</sup> has been made, or in respect of whom an application for an adoption order<sup>10</sup>, a placement order or a parental responsibility order has been made but not disposed of, commits an offence if he takes or sends the child out of the United Kingdom without the leave of the court<sup>11</sup> which made the order<sup>12</sup> or, in respect of pending orders, the court to which the application was made<sup>13</sup>. A person does not, however, commit an offence under these provisions by taking or sending a child out of the United Kingdom without obtaining the appropriate consent if he is a special guardian<sup>14</sup> of the child and he takes or sends the child out of the United Kingdom for a period of less than three months<sup>15</sup> or if he provides the home of a child who is placed for adoption by an adoption agency, who such an agency is authorised to place for adoption, or in respect of whom a placement order is in force, and he takes or sends him out of the United Kingdom for a period of less than one month<sup>16</sup>.

Where a child is the subject of adoption<sup>17</sup> and is also in local authority care<sup>18</sup>, these provisions apply to the exclusion of those concerned with the abduction of children in local authority care<sup>19</sup>.

Provision is made for the punishment and prosecution of child abduction offences<sup>20</sup>.

1 For the meaning of 'connected with a child' see PARA 137 note 1 ante.

2 Ie under the Adoption and Children Act 2002 s 19 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 332, 333). For the meaning of 'adoption agency', and as to references to an adoption agency placing a child for adoption, see the Adoption and Children Act 2002 ss 2(1), 18(5); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 329, 393-395 (definitions applied by the Child Abduction Act 1984 s 1(8), Schedule para 5(a) (s 1(8) amended, and Schedule paras 3(3), 5 substituted, by the Children Act 1989 s 108(4), Sch 12 paras 37(1), (5), 40; and the Child Abduction Act 1984 s 1(4)(a), (b), Schedule para 3(1), (2) substituted, and Schedule para 5(a) amended, by the Adoption and Children Act 2002 s 139(3), Sch 3 paras 42(1), (4), 43(1)-(3))).

3 Ie under the Adoption and Children Act 2002 s 19 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 332, 333).

4 As to when a person is regarded as 'taking' or 'sending' a child see PARA 137 notes 2-3 ante.

5 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

6 For the meaning of 'parental responsibility' see the Children Act 1989 s 3; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 134 (definition applied by the Child Abduction Act 1984 s 1(7)(a) (s 1(7) substituted by the Children Act 1989 s 108(4), Sch 12 para 37(1), (4))).

7 Child Abduction Act 1984 s 1(1), Schedule para 3(1)(a), (2)(a)(i) (as substituted: see note 2 supra). As to applications to the police for assistance where danger of removal of the child from the jurisdiction is imminent see *Practice Direction* [1986] 1 All ER 983, [1986] 1 WLR 475.

8 For the meaning of 'placement order' see the Adoption and Children Act 2002 s 21(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 335 (definition applied by the Child Abduction Act 1984 Schedule para 5(a) (as substituted and amended: see note 2 supra).

9 Ie an order under the Adoption and Children Act 2002 s 84 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 502).

10 For the meaning of 'adoption order' see *ibid* s 46(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 359 (definition applied by the Child Abduction Act 1984 Schedule para 5(a) (as substituted and amended: see note 2 supra).

11 *Ibid* Schedule para 3(2) (as substituted) is to be construed as if reference to 'the court' included, in any case where the court is a magistrates' court, a reference to any magistrates' court acting for the same area as that court: Schedule para 3(3) (as substituted: see note 2 supra). 'Area', in relation to a magistrates' court, means the petty sessions area for which the court is appointed: Schedule para 5(b) (as so substituted: and amended by the Access to Justice Act 1999 s 106, Sch 15 Pt V). References to a 'petty sessions area' are presumably to be read as references to a local justice area.

12 Child Abduction Act 1984 s 1(1), Schedule para 3(1)(b), (e), (2)(a)(ii), (iv) (as substituted: see note 2 supra).

13 *Ibid* s 1(1), Schedule para 3(1)(c), (d), (e), (2)(a)(iii), (iv) (as substituted: see note 2 supra).

14 For the meaning of 'special guardian' see the Children Act 1989 s 14A (as added); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 151 (definition applied by the Child Abduction Act 1984 s 1(7)(a) (as substituted: see note 6 supra)).

15 *Ibid* s 1(4)(b) (as substituted: see note 2 supra).

16 *Ibid* s 1(4)(a), Schedule para 3(2)(c) (as substituted: see note 2 supra).

17 Ie falls within *ibid* Schedule para 3 (as amended) (see the text and notes 1-16 supra).

18 Ie falls within *ibid* Schedule para 1 (as amended) (see PARA 139 post).

19 *Ibid* Schedule para 4. As to the provisions concerned with the abduction of children in local authority care see PARA 139 post.

20 See PARA 142 post.



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### **139. Abduction of child in local authority care.**

A person connected with a child<sup>1</sup> under the age of 16 who is in the care of a local authority in England or Wales<sup>2</sup> commits an offence if he takes or sends<sup>3</sup> the child out of the United Kingdom<sup>4</sup> without the consent of the local authority in whose care the child is<sup>5</sup>. Where a child is the subject of adoption<sup>6</sup> and is also in local authority care<sup>7</sup>, the provisions concerned with the abduction of children who are the subject of adoption<sup>8</sup> apply to the exclusion of those concerned with the abduction of children in local authority care<sup>9</sup>.

Provision is made for the punishment and prosecution of child abduction offences<sup>10</sup>.

1 For the meaning of 'connected with a child' see PARA 137 note 1 ante.

2 I.e. a local authority within the meaning of the Children Act 1989 s 105(1) (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 248): Child Abduction Act 1984 s 1(8), Schedule para 1(1) (amended by the Children Act 1989 s 108(4), Sch 12 paras 37(1), (5), 40(1), (2)).

3 As to when a person is regarded as 'taking' or 'sending' a child see PARA 137 notes 2-3 ante.

4 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 Child Abduction Act 1984 s 1(1), Schedule para 1(2)(a). As to applications to the police for assistance where danger of removal of the child from the jurisdiction is imminent see *Practice Direction* [1986] 1 All ER 983, [1986] 1 WLR 475.

6 I.e. falls within the Child Abduction Act 1984 Schedule para 3 (as amended) (see PARA 138 ante).

7 I.e. falls within *ibid* Schedule para 1 (as amended) (see the text and notes 1-5 supra).

8 As to the provisions concerned with the abduction of children who are the subject of adoption see PARA 138 ante.

9 Child Abduction Act 1984 Schedule para 4.

10 See PARA 142 post.

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#### **140. Abduction of child from a place of safety.**

A person connected with a child<sup>1</sup> under the age of 16 who is detained in a place of safety<sup>2</sup> or remanded to local authority accommodation<sup>3</sup> commits an offence if he takes or sends<sup>4</sup> the child out of the United Kingdom<sup>5</sup> without the leave of any magistrates' court acting for the area in which the place of safety is<sup>6</sup>.

Provision is made for the punishment and prosecution of child abduction offences<sup>7</sup>.

1 For the meaning of 'connected with a child' see PARA 137 note 1 ante.

2 Ie under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 7 para 7(4) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 265).

3 Ie under the Children and Young Persons Act 1969 s 23 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1247-1253).

4 As to when a person is regarded as 'taking' or 'sending' a child see PARA 137 notes 2-3 ante.

5 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

6 Child Abduction Act 1984 s 1(1), (8), Schedule para 2(1), (2)(a) (s 1(8) amended, and Schedule para 2(1) substituted, by the Children Act 1989 s 108(4), Sch 12 paras 37(5), 40(1), (3); and the Child Abduction Act 1984 Schedule para 2(1) amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 93). For the meaning of 'area', in relation to a magistrates' court, see PARA 138 note 11 ante. As to applications to the police for assistance where danger of removal of the child from the jurisdiction is imminent see *Practice Direction* [1986] 1 All ER 983, [1986] 1 WLR 475.

7 See PARA 142 post.

#### **UPDATE**

#### **140 Abduction of child from a place of safety**

NOTE 6--Child Abduction Act 1984 Schedule para 2(1) further amended and Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 93 partly repealed: Criminal Justice and Immigration Act 2008 Sch 4 paras 31, 104, Sch 28 Pt 1.

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#### **141. Abduction of children by other persons.**

A person other than one who is connected with a child<sup>1</sup> commits an offence if, without lawful authority or reasonable excuse, he takes<sup>2</sup> or detains<sup>3</sup> a child under the age of 16 either so as to remove him from the lawful control<sup>4</sup> of any person having lawful control of the child<sup>5</sup> or so as to keep him out of the lawful control of any person entitled to lawful control of him<sup>6</sup>.

In proceedings against any person for such an offence it is a defence for that person to prove<sup>7</sup>:

- 57 (1) where the father and mother of the child were not married to each other at the time of his birth, either that he is the child's father<sup>8</sup> or that, at the time of the alleged offence, he believed, on reasonable grounds, that he was the child's father<sup>9</sup>; or
- 58 (2) that, at the time of the alleged offence, he believed that the child had attained the age of 16<sup>10</sup>.

Provision is made for the punishment and prosecution of child abduction offences<sup>11</sup>.

1 A person other than: (1) where the father and mother of the child were married to each other at the time of the birth, the child's father and mother (Child Abduction Act 1984 s 2(2)(a) (ss 1(2), 2(2) substituted, s 2(1) amended, and s 2(3) added, by the Children Act 1989 s 108(4), Sch 12 paras 37, 38)); (2) where the father and mother were not so married, the child's mother (Child Abduction Act 1984 s 2(2)(b) (as so substituted)); (3) a guardian of the child (ss 1(2)(c), 2(2)(c) (as so substituted)); (4) a special guardian of the child (s 1(2)(ca) (s 1(2) as so substituted; and s 1(2)(ca) added by the Adoption and Children Act 2002 s 139(1), Sch 3 para 42(1), (2))); (5) a person in whose favour a residence order is in force with respect to the child (Child Abduction Act 1984 s 1(2)(d) (as so substituted)); or (6) a person who has custody of the child (s 1(2)(e) (as so substituted)). For the meanings of 'guardian of a child', 'special guardian' and 'residence order' see PARA 137 note 1 ante. As to references to a child's parents and to a child whose parents were (or were not) married to each other at the time of his birth, and as to when a person is treated as having custody of a child, see PARA 137 note 1 ante.

2 As to when a person 'takes' a child see PARA 137 note 2 ante.

3 For these purposes, a person is regarded as 'detaining' a child if he causes the child to be detained or induces the child to remain with him or any other person: Child Abduction Act 1984 s 3(c).

4 No removal from one place to another is required by the words 'so as to remove him from the lawful control of any person having lawful control of the child'; and who has control of a child is a question of fact: *R v Leather* [1994] 1 FCR 877, CA. A relevant question relating to the phrase is whether, without lawful authority or reasonable excuse, the child was deflected by some action by the defendant from that which with the consent of his parents, or other person having lawful control at the time, he would otherwise have been doing, into some activity induced by the defendant: *R v Leather* supra at 882. 'So as to' is concerned with the objective consequence of the taking or detaining, and not with the defendant's intention: *R v Mousir* [1987] Crim LR 561, [1987] LS Gaz R 1328, CA. Cf *Re Owens* [2000] 1 Cr App Rep 195, sub nom *O v Governor of Holloway Prison* [2000] 1 FLR 147, DC ('so as to' means 'with the intention of' removing the child from lawful control, and not merely 'with the effect' of such removal; and 'lawful control' is not to be equated with 'legal custody'). In *Re Owens* supra the court was not referred to *R v Leather* supra or *R v Mousir* supra. In *Foster v DPP* [2004] EWHC 2955 (Admin) at [26]-[27], [2005] 1 FCR 153 at [26]-[27], DC, Pitchford J stated that he was bound by the decisions in *R v Leather* supra and *R v Mousir* supra and that it did not seem that the applicant's successful arguments in *Re Owens* supra on the construction of the Child Abduction Act 1984 s 2 (as amended) could or should have survived them.

5 Child Abduction Act 1984 s 2(1)(a) (as amended: see note 1 supra). This provision creates two separate means by which the offence may be committed, and neither is an alternative to the other: *Foster v DPP* [2004] EWHC 2955 (Admin), [2005] 1 FCR 153, DC. The mens rea required for an offence under the Child Abduction Act 1984 s 2 (as amended) is an intentional or reckless taking or detention of a child under the age of 16, the effect or objective consequence of which was to remove or keep that child from the lawful control of any person having or being entitled to lawful control of him: *Foster v DPP* supra. The distinction between removal from a person having control, and keeping from a person entitled to control, is intended to reflect materially different states of affairs. The first requires the child there and then to be in the lawful control of someone when taken or detained. The second requires only that the child is kept out of lawful control of someone entitled to it when taken or detained: *Foster v DPP* supra. This provision does not apply to any person providing a refuge at a home certified by the Home Secretary (or to a foster parent likewise certified) who provides a refuge for a child at that home (or who provides foster parent refuge in accordance with the Children Act 1989 s 51): see s 51(6), (7)(d); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 609.

6 Child Abduction Act 1984 s 2(1)(b) (as amended: see note 1 supra). See note 5 supra.

7 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

8 Child Abduction Act 1984 s 2(3)(a)(i) (as substituted: see note 1 supra).

9 Ibid s 2(3)(a)(ii) (as substituted: see note 1 supra). This defence is not available where the defendant makes a mistake of identity (ie takes child A thinking him to be child B, and believing himself to be connected to child B); the issue is one of reasonable excuse: *R v Berry* [1996] 2 Cr App Rep 226, CA.

10 Child Abduction Act 1984 s 2(3)(b) (as substituted: see note 1 supra). See note 9 supra.

11 See PARA 142 post.

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#### **142. Punishment of, and prosecution for, statutory child abduction offences.**

A person guilty of a statutory offence of child abduction<sup>1</sup> is liable on conviction on indictment to imprisonment for a term not exceeding seven years<sup>2</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup>, to a fine not exceeding the statutory maximum<sup>4</sup>, or to both<sup>5</sup>. No prosecution for such an offence may, however, be instituted except by or with the consent of the Director of Public Prosecutions<sup>6</sup>.

1    Is an offence under the Child Abduction Act 1984 s 1 (as amended), as appropriate where modified by the Schedule (as amended) (see PARAS 137-140 ante) or s 2 (as amended) (see PARA 141 ante).

2    Ibid s 4(1)(b).

3    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4    As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5    Child Abduction Act 1984 s 4(1)(a). As to the offence committed by a person who at the time of committing or being arrested for an offence under s 1 (as amended) has in his possession a firearm or imitation firearm see PARA 677 post.

6    Ibid s 4(2). As to the effect of this limitation see PARA 1071 post. The common law offence of kidnapping may be committed by a parent or person connected with the child: see PARA 136 ante. Where a count alleging abduction contrary to the Child Abduction Act 1984 s 1 (as amended) encompasses the allegation against the defendant, the inclusion in the indictment of a count alleging kidnapping is to be deprecated: *R v C (Kidnapping: Abduction)* [1991] 2 FLR 252, [1991] Fam Law 522, CA.

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## (viii) Cruelty to Children

### 143. Cruelty to persons under sixteen.

If any person who has attained the age of 16 years and has responsibility<sup>1</sup> for any child or young person<sup>2</sup> under that age, wilfully assaults<sup>3</sup>, ill-treats, neglects<sup>4</sup>, abandons<sup>5</sup>, or exposes<sup>6</sup> him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely<sup>7</sup> to cause him unnecessary suffering or injury to health<sup>8</sup>, he is guilty of an offence<sup>9</sup> and liable on conviction on indictment to imprisonment for a term not exceeding ten years, or to a fine, or to both<sup>10</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>11</sup>, to a fine not exceeding the prescribed sum, or to both<sup>12</sup>.

A person may be convicted under these provisions notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person<sup>13</sup> and notwithstanding the death of the child or young person in question<sup>14</sup>.

1 The persons who are presumed to have responsibility for a child or young person for these purposes are any person who either has parental responsibility (within the meaning of the Children Act 1989 s 3: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 134) for that child or young person (Children and Young Persons Act 1933 s 17(1)(a)(i) (s 17 substituted by the Children Act 1989 s 108(5), Sch 13 paras 2, 5)) or is otherwise legally liable to maintain him (Children and Young Persons Act 1933 s 17(1)(a)(ii) (as so substituted)) and any person who has care of him (s 17(1)(b) (as so substituted)). A person who is presumed to be responsible for a child or young person by virtue of s 17(1)(a) (as substituted) is not to be taken to have ceased to be responsible for him by reason only that he does not have care of him: s 17(2) (as so substituted).

2 For these purposes, 'child' means a person under the age of 14 years; and 'young person' means a person who has attained the age of 14 years and is under the age of 18 years: *ibid* s 107(1) (amended by the Criminal Justice Act 1991 s 68, Sch 8 para 1(3)). In this context the term 'young person' must, however, be read subject to the age limitation referred to in the text. As to the protection of children from cruelty and danger generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 611 et seq.

3 'Wilfully' appears to govern all expressions such as 'assaults', 'ill-treats', 'neglects' etc, as they are also qualified by the words 'in a manner likely to cause unnecessary suffering or injury to health'. The offence of wilfully neglecting a child contrary to the Children and Young Persons Act 1933 s 1 (as amended) (see the text and notes 4-14 *infra*) is not an offence of strict liability and is to be judged by a subjective test as to the risk of suffering or injury to health: *R v Sheppard* [1981] AC 394, 72 Cr App Rep 82, HL. The requirement of wilfulness can be satisfied only where the defendant is aware that the child's health may be at risk if it is not provided with medical aid, or where his unawareness of this fact is due to his not caring whether the child's health was at risk or not: *R v Sheppard* *supra*. The Court of Appeal in *A-G's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73, [2004] 2 Cr App Rep 366, held that there was no material difference between the definition of 'wilfulness' in *R v Sheppard* and that of 'recklessness' adapted in *R v G, R v R* [2003] UKHL 50, [2004] 1 AC 1034, [2004] 1 Cr App Rep 237 (as to which see PARA 11 *ante*).

The Children and Young Persons Act 1933 s 1 (as amended) does not create five distinct offences of 'assaulting', 'neglecting' etc but one single offence dealing with various forms of cruelty (*R v Hayles* [1969] 1 QB 364, 53 Cr App Rep 36, CA); however, the prosecution should choose with care the word which more precisely and appropriately than any other describes the conduct complained of (*R v Beard* (1987) 85 Cr App Rep 395, CA). To fall within the Children and Young Persons Act 1933 s 1 (as amended) an assault must be one which is likely to cause unnecessary suffering or injury to health: *R v Hatton* [1925] 2 KB 322, 19 Cr App Rep 29, CCA.

The particulars of the offence should include the word 'wilfully': *R v Walker* (1934) 24 Cr App Rep 117, CCA.

4 For these purposes: (1) a parent or other person legally liable to maintain a child or young person, or the legal guardian of a child or young person, is deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, being unable to provide it, he fails to take steps to procure it under the enactments applicable in that behalf (Children and Young Persons Act 1933 s 1(2)(a) (amended by the Children Act 1989 Sch 12 para 2; and by the National Assistance (Adaptation of Enactments) Regulations 1950, SI 1950/174)); and (2) where it is proved that the death of an infant under three years of age was caused by suffocation, not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the infant, while the infant was in bed with some other person who has attained the age of 16 years, that other person, if he was, when he went to bed, under the influence of drink, is deemed to have neglected the infant in a manner likely to cause injury to its health (Children and Young Persons Act 1933 s 1(2)(b)).

'Neglect' may include the refusal to allow a child to undergo an operation to remove adenoids; the question as to whether it does or not is a question of fact dependent for its answer on the circumstances of the case: *Oakey v Jackson* [1914] 1 KB 216. Deliberate or reckless omission to supply medical or surgical relief necessary for a child is within the Children and Young Persons Act 1933 s 1 (as amended): *R v Senior* [1899] 1 QB 283, CCR; *R v Sheppard* [1981] AC 394, 72 Cr App Rep 82, HL; and see note 3 supra. The possibility that resort to public assistance by the mother might have obviated the effect of the father's neglect is no answer to a charge under the Children and Young Persons Act 1933 s 1 (as amended): *Cole v Pendleton* (1896) 60 JP 359.

5 'Abandon' means to leave a child to its fate: *Mitchell v Wright* 1905 SC 568 at 574, Ct of Sess, per Lord Dunedin; *R v Boulton* (1957) 41 Cr App Rep 105, CCA. Leaving a child in court causing some mental suffering is not an abandonment: *R v Whibley* [1938] 3 All ER 777, 26 Cr App Rep 184, CCA.

6 Any person who unlawfully abandons or exposes any child under the age of two years, whereby his life is endangered or his health is or is likely to be permanently injured, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding five years, or on summary conviction to imprisonment for a term not exceeding six months, or to a fine not exceeding the prescribed sum, or to both: Offences against the Person Act 1861 s 27; Penal Servitude Act 1891 s 1(1); Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 1; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 5(d). See PARA 1103 post. As from a day to be appointed the maximum six-month term referred to above is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES' COURTS ACT 1980 (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 141. As to procedural provisions applying to offences under the Offences against the Person Act 1861 s 27 see PARA 1164 post.

For the purposes of an offence under s 27 the exposure need not necessarily consist of the physical placing of the child somewhere with intent to injure him: *R v Williams* (1910) 26 TLR 290, 4 Cr App Rep 89, CCA. See also *R v Falkingham* (1870) LR 1 CCR 222 (five week old child sent by railway in a hamper); *R v White* (1871) LR 1 CCR 331 (nine month old child left outside house from 7 pm to 1 am).

7 For these purposes, 'likely' is to be understood as excluding only what can fairly be described as highly unlikely: *R v Wills* [1990] Crim LR 714, CA (applying dictum of Lord Diplock in *R v Sheppard* [1981] AC 394 at 405, 72 Cr App Rep 82 at 87, HL).

8 'Injury to health' includes injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement: Children and Young Persons Act 1933 s 1(1).

9 In relation to an offence under *ibid* s 1 (as amended), battery of a child cannot be justified on the ground that it constitutes reasonable punishment: see the Children Act 2004 s 58(1), (2); and PARA 161 post. Where the facts of a case justify it, a prosecution may be brought under an enactment other than the Children and Young Persons Act 1933 s 1 (as amended) even though this may entail a more severe penalty: *R v Beanland* (1970) 54 Cr App Rep 289, CA. As to procedural provisions applying to offences under the Children and Young Persons Act 1933 s 1 (as amended) see PARA 1164 post. For sentencing guidelines in cases involving cruelty to children see *A-G's Reference (No 96 of 2005)*, *R v Didi* [2006] EWCA Crim 114, [2006] All ER (D) 89 (Jan).

10 Children and Young Persons Act 1933 s 1(1)(a) (amended by the Children and Young Persons Act 1963 s 64(1), (3), Sch 3 para 1, Sch 5; the Children Act 1975 s 108(1)(b), Sch 4 Pt III; the Criminal Justice Act 1988 s 45(1); and the Children Act 1989 Sch 13 para 2). Where the offence is committed by a mother suffering from post-natal depression, a sentence beyond a short custodial sentence is inappropriate: *R v Isaac* [1998] 1 Cr App Rep (S) 266, CA. See also *R v Weaver* [1998] 2 Cr App Rep (S) 56, CA (neglect of child resulting in death).

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

12 Children and Young Persons Act 1933 s 1(1)(b) (amended by the Children and Young Persons Act 1963 Sch 3 para 1, Sch 5; and the Magistrates' Courts Act 1980 s 32(2)).

13 Children and Young Persons Act 1933 s 1(3)(a).

14 Ibid s 1(3)(b). If a child dies as a result of neglect in respect of which someone is criminally liable under s 1 (as amended), it does not necessarily follow that the person concerned is guilty of manslaughter: see *R v Lowe* [1973] QB 702, 57 Cr App Rep 365, CA; and PARA 99 ante.



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#### **144. Exposing child under the age of 12 to risk of burning.**

If any person who has attained the age of 16 years, having responsibility for any child<sup>1</sup> under the age of 12 years<sup>2</sup>, allows the child to be in any room containing an open fire grate, or any heating appliance liable to cause injury to a person by contact with it, which is not sufficiently protected to guard against the risk of the child being burnt or scalded, without taking reasonable precautions against that risk, and the child is killed or suffers serious injury for that reason, that person is guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale<sup>3</sup>.

1 As to responsibility for a child see PARA 143 note 1 ante.

2 As to proof of age see PARA 1470 post.

3 Children and Young Persons Act 1933 s 11 (amended by the Children and Young Persons (Amendment) Act 1952 ss 8, 9, Schedule; the Criminal Justice Act 1982 s 46; and the Children Act 1989 s 108(5), Sch 13 para 3). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. Neither the Children and Young Persons Act 1933 s 11 nor any proceedings taken under it affects the liability of any person to be proceeded against by indictment for any indictable offence: s 11 proviso. As to procedural provisions applying to offences under s 11 (as amended) see PARA 1164 post. As to the protection of children from danger generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 612 et seq.

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#### **145. Tattooing of minors.**

It is an offence to tattoo<sup>1</sup> a person under the age of 18<sup>2</sup> except when the tattoo is performed for medical reasons by a duly qualified medical practitioner or by a person working under his direction<sup>3</sup>. It is a defence, however, for a person charged to show<sup>4</sup> that at the time the tattoo was performed he had reasonable cause to believe that the person tattooed was of or over the age of 18 and did in fact so believe<sup>5</sup>.

A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>6</sup>.

1 For these purposes, 'tattoo' means the insertion into the skin of any colouring material designed to leave a permanent mark: Tattooing of Minors Act 1969 s 3.

2 As to proof of age see PARA 1470 post.

3 Tattooing of Minors Act 1969 s 1.

4 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

5 Tattooing of Minors Act 1969 s 1.

6 Ibid s 2 (amended by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

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## **(ix) Offences against Employees**

### **146. Neglect to provide food etc for employees.**

Any employer<sup>1</sup> who, being legally liable to provide for an employee<sup>2</sup> necessary food, clothing or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, or unlawfully and maliciously<sup>3</sup> does or causes to be done any bodily harm to the employee, so that his life is endangered or his health is, or is likely to be, permanently injured, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding five years, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup>, to a fine not exceeding the prescribed sum<sup>5</sup>, or to both<sup>6</sup>.

Where an employer<sup>7</sup>, being legally liable to provide for his employee<sup>8</sup> necessary food, clothing, medical aid or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, so that the health of the employee is or is likely to be seriously or permanently injured, he is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding level 2 on the standard scale<sup>10</sup>.

1 The Offences against the Person Act 1861 s 26 (see the text and notes 2-6 infra) refers to a 'master or mistress'.

2 Ibid s 26 refers to any 'apprentice or servant'.

3 For the meaning of 'maliciously' see PARA 119 text to notes 12-15 ante.

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

6 Offences against the Person Act 1861 s 26; Penal Servitude Act 1891 s 1(1); Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 1; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 5(c). See note 4 supra. As to the common law liability of an employer, apart from liability arising from contract, for the wilful neglect to supply necessities or medical treatment to an employee or apprentice see *R v Gould* (1704) 1 Salk 381; *R v Self* (1776) 1 Leach 137, 1 East PC 226; *R v Wintersetts Inhabitants* (1783) Cald Mag Cas 298 at 300 per Buller J; *Newby v Wiltshire* (1785) 2 Esp 739; *Scarman v Castell* (1795) 1 Esp 270; *Simmons v Wilmott* (1800) 3 Esp 91; *Atkins v Banwell* (1802) 2 East 505; *Wennall v Adney* (1802) 3 Bos & P 247; *R v Ridley* (1811) 2 Camp 650; *Sellen v Norman* (1829) 4 C & P 80; *Cooper v Phillips* (1831) 4 C & P 581; *R v Smith* (1837) 8 C & P 153; *R v Crumpton* (1842) Car & M 597; *R v Smith* (1865) Le & Ca 607, CCR. See also *McKeating v Frame* 1921 SC 382, Ct of Sess.

7 The Conspiracy, and Protection of Property Act 1875 s 6 (as amended) (see the text and notes 8-10 infra) refers to 'a master'.

8 Ibid s 6 refers to 'servant or apprentice'.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

10 Conspiracy, and Protection of Property Act 1875 s 6 (amended by the Criminal Law Act 1977 s 31; and the Criminal Justice Act 1982 ss 38, 46); Criminal Justice Act 1948 s 1(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

### **146 Neglect to provide food etc for employees**

TEXT AND NOTES--Repealed: Statute Law (Repeals) Act 2008.

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## **(x) Assault**

### **A. COMMON ASSAULT AND BATTERY**

#### **147. Assault and battery.**

A person commits an assault if he intentionally or recklessly causes<sup>1</sup> another person to apprehend the application to his body of immediate, unlawful<sup>2</sup> force<sup>3</sup>. An assault can be committed by words alone if they cause the necessary apprehension<sup>4</sup>. The requirement of the apprehension of immediate force is satisfied if the prosecution proves a fear of force at some time not excluding the immediate future<sup>5</sup>.

A person commits a battery if he intentionally or recklessly applies<sup>6</sup> unlawful<sup>7</sup> force to the body of another person<sup>8</sup>. The slightest degree of force, even mere touching, suffices<sup>9</sup>. It is not necessary that the victim should feel the force through his clothes: a touching of a person's clothes is the equivalent of touching him<sup>10</sup>. Without the application, however, of some force there cannot be a battery. Thus causing someone psychiatric harm by a threat does not constitute a battery<sup>11</sup>. Similarly, the use of force merely to pull away from another does not constitute a battery<sup>12</sup>.

Although an assault is a separate, independent crime and should be treated as such<sup>13</sup>, for practical purposes the term 'assault' is generally synonymous with 'battery' and is used to mean the actual intended use of unlawful force to another person<sup>14</sup>. Where there is actual as well as apprehended unlawful force the charge should be assault by beating rather than assault and battery since the latter form is duplicitous<sup>15</sup>.

1 As to causation see PARA 7 ante. A mere omission to act which creates the requisite apprehension is not enough: *Fagan v Metropolitan Police Comr* [1969] 1 QB 439, 52 Cr App Rep 700, DC. The only exception is where the defendant has created a dangerous situation (even inadvertently) in which case he is under a duty to take such steps as lie within his power to counteract the danger, and a failure to do so will suffice if it results in the necessary apprehension: *DPP v Santana-Bermudez* [2003] EWHC 2908 (Admin), [2004] Crim LR 471, DC (applying *R v Miller* [1983] 2 AC 161, 77 Cr App Rep 17, HL).

2 As to when apprehended immediate force is lawful see PARAS 20-22, 115 ante, 161 post.

3 *Fagan v Metropolitan Police Comr* [1969] 1 QB 439, 52 Cr App Rep 700, DC; *R v Venna* [1976] QB 421, [1975] 3 All ER 788, CA; *R v Kimber* [1983] 3 All ER 316, 77 Cr App Rep 225, CA; *R v Savage*, *R v Parmenter* [1992] 1 AC 699, 94 Cr App Rep 193, HL; *R v Ireland*, *R v Burstow* [1998] AC 147, [1998] 1 Cr App Rep 177, HL. As to whether assault requires a hostile intent see note 8 infra.

4 *R v Constanza* [1997] 2 Cr App Rep 492, CA; *R v Ireland*, *R v Burstow* [1998] AC 147, [1998] 1 Cr App Rep 177, HL. Even silence can suffice if it has the necessary result, as it can in the case of a 'silent telephone call': *R v Ireland*, *R v Burstow* supra at 165-167, 191-195 per Lord Hope of Craighead.

5 *R v Constanza* [1997] 2 Cr App Rep 492, CA. See also *Smith v Chief Superintendent, Woking Police Station* (1983) 76 Cr App Rep 234, DC; *Logdon v DPP* [1976] Crim LR 121, DC; *R v Ireland*, *R v Burstow* [1998] AC 147, [1998] 1 Cr App Rep 177, HL.

6 As to whether a battery can be committed by an indirect application of force see *DPP v K (A Minor)* [1990] 1 All ER 331, 91 Cr App Rep 23, DC; *R v Clarence* (1888) 22 QBD 23 at 36-37, CCR, per Wills J, and at 41 per Stephen J. These cases provide authority that it can. Contrast *R v Clarence* supra at 46-55 per Hawkins J

(dissenting); *Metropolitan Police Comr v Wilson, R v Jenkins* [1984] AC 242 at 259-261, 77 Cr App Rep 319 at 326-327, HL, per Lord Roskill. See also *Haystead v Chief Constable of Derbyshire* [2000] 3 All ER 890, [2000] 2 Cr App Rep 339, DC, where it was stated that there can be a battery by an indirect application of force (although in reality there had been a direct application of force on the facts).

7 Under certain circumstances it may be a defence that the defendant was using only such force as was necessary to serve civil process: see *Harrison v Hodgson* (1830) 10 B & C 445. Serving process by thrusting a document into the fold of a man's coat is not necessarily a battery: see *Rose v Kempthorne* (1910) 103 LT 730.

8 *Fagan v Metropolitan Police Comr* [1969] 1 QB 439, 52 Cr App Rep 700, DC; *R v Venna* [1976] QB 421, [1975] 3 All ER 788, CA; *R v Kimber* [1983] 3 All ER 316, 77 Cr App Rep 225, CA; *R v Savage, R v Parmenter* [1992] 1 AC 699, 94 Cr App Rep 193, HL; *R v Ireland, R v Burstow* [1998] AC 147, [1998] 1 Cr App Rep 177, HL. See also *R v Gladstone Williams* [1987] 3 All ER 411, 78 Cr App Rep 276, CA. Quaere, however, whether battery implies a 'hostile' touching: see *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 73, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 at 563-564, HL, per Lord Goff of Chieveley (disapproving dicta to that effect in *Wilson v Pringle* [1987] QB 237, [1986] 2 All ER 440, CA).

9 1 Hawk PC c 15(2) ss 1, 2; BI 4 Commentaries (18th Edn) 217, referring to 3 Commentaries (18th Edn) 120; *Cole v Turner* (1704) 6 Mod Rep 149; *Collins v Wilcock* [1984] 3 All ER 374, [1984] 1 WLR 1172, DC.

10 *R v Thomas* (1985) 81 Cr App Rep 331 at 334, CA.

11 *R v Ireland, R v Burstow* [1998] AC 147, [1998] 1 Cr App Rep 177, HL.

12 *R v Sherriff* [1969] Crim LR 260, CA.

13 See eg *R v Rolfe* (1952) 36 Cr App Rep 4, CCA; *DPP v Taylor, DPP v Little* [1992] QB 645, 95 Cr App Rep 28, DC.

14 *Fagan v Metropolitan Police Comr* [1969] 1 QB 439 at 444, 52 Cr App Rep 700 at 703, DC, per James J.

In this paragraph the term 'assault' is used in its strict sense (see the text and notes 1-3 supra); except where the context otherwise requires, the term is used elsewhere in this title to mean assault and battery (see eg para 148 et seq post).

15 *DPP v Taylor, DPP v Little* [1992] QB 645, 95 Cr App Rep 28, DC.

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#### **148. Prosecutions for assault; penalty.**

Common assault and battery are summary offences and a person guilty of either of them is liable on conviction to imprisonment for a term not exceeding six months<sup>1</sup>, to a fine not exceeding level 5 on the standard scale<sup>2</sup>, or to both<sup>3</sup>.

A count charging a person with common assault<sup>4</sup> may be included in an indictment if the charge is founded on the same facts or evidence as a count charging an indictable offence<sup>5</sup> or is part of a series of offences of the same or similar character as an indictable offence which is also charged<sup>6</sup>, but only if (in either case) the facts or evidence relating to the offence were disclosed to a magistrates' court inquiring into the offence as examining justices or are disclosed by material served<sup>7</sup> on the person charged after he has been sent for trial<sup>8</sup>. Where a count charging common assault is included in an indictment, the offence must be tried in the same manner as if it were an indictable offence; but the Crown Court may only deal with the offender in respect of it in a manner in which a magistrates' court could have dealt with him<sup>9</sup>.

1 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

2 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 142.

3 Criminal Justice Act 1988 s 39. See *DPP v Taylor*, *DPP v Little* [1992] QB 645, 95 Cr App Rep 28, DC (assault and battery separate statutory offences; information alleging assault and battery contrary to Criminal Justice Act 1988 s 39 therefore bad for duplicity). For the separate offence of racially or religiously aggravated assault see PARA 155 post.

4 The reference to 'common assault' in the Criminal Justice Act 1988 s 40 (as amended) (see the text and notes 5-9 infra) includes a battery: *R v Lynsey* [1995] 3 All ER 654, [1995] 2 Cr App Rep 667, CA.

5 Criminal Justice Act 1988 s 40(1)(a).

6 Ibid s 40(1)(b).

7 Ie in pursuance of regulations made under the Crime and Disorder Act 1998 Sch 3 para 1 (procedure where person sent for trial under s 51 (as substituted and amended) or s 51A (as added) (see PARAS 1132-1133 post).

8 Criminal Justice Act 1988 s 40(1), (3)(a) (s 40(1) amended by the Criminal Procedure and Investigations Act 1996 s 47, Sch 1 para 34; the Crime and Disorder Act 1998 s 119, Sch 8 para 66; and the Criminal Justice Act 2003 s 41, Sch 3 para 60(1), (7)(b)). See PARA 1211 post. As from a day to be appointed it is no longer permissible to include in an indictment a count charging a person with a summary offence of common assault by virtue of the facts or evidence relating to the offence having been disclosed to a magistrates' court inquiring into the offence as examining justices: see the Criminal Justice Act 1988 s 40(1) (as so amended; prospectively further amended by the Criminal Justice Act 2003 Sch 3 para 60(7)(a)). At the date at which this volume states the law no such day had been appointed.

9 Criminal Justice Act 1988 s 40(2). See PARA 1233 post. For the purposes of the Criminal Law Act 1967 s 6(3) (alternative verdicts: see PARA 1335 post), an offence to which the Criminal Justice Act 1988 applies is an offence which falls within the jurisdiction of the Crown Court, even if a count charging it is not included in the indictment: Criminal Law Act 1967 s 6(3A) (added by the Domestic Violence, Crime and Victims Act 2004 s 11).





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## **B. AGGRAVATED ASSAULT**

### **149. Assault occasioning actual bodily harm.**

Any person who is convicted on indictment of any assault<sup>1</sup> occasioning actual bodily harm<sup>2</sup> is guilty of an offence<sup>3</sup> and liable on conviction on indictment to imprisonment for a term not exceeding five years, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup>, to a fine not exceeding the prescribed sum<sup>5</sup>, or to both<sup>6</sup>.

1 As to assault and battery see PARA 147 ante. The mens rea for the offence of assault occasioning actual bodily harm is identical with that required for assault or battery, as the case may be (see PARA 147 text and note 1 ante); no mens rea is required as to the element of actual bodily harm: *R v Savage, R v Parmenter* [1992] 1 AC 699, 94 Cr App Rep 193, HL (approving *R v Roberts* (1971) 56 Cr App Rep 95, CA).

2 'Bodily harm' has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the victim. Such hurt or injury need not be permanent but must be more than merely transient and trifling: *R v Donovan* [1934] 2 KB 498, 25 Cr App Rep 1, CCA. See also *R v Miller* [1954] 2 QB 282, [1954] 2 All ER 529. The meaning of 'actual bodily harm' was explained further in *R v Chan Fook* [1994] 2 All ER 552, 99 Cr App Rep 147, CA (approved in *R v Ireland, R v Burstow* [1998] AC 147, [1998] 1 Cr App Rep 177, HL), where it was held that 'harm' is a synonym for 'injury' and 'actual' indicates that the injury should not be so trivial as to be wholly insignificant (although there was no need for it to be permanent); that 'bodily harm' is not limited to harm to the skin, flesh and bones of the victim (on which point see also *DPP v Smith* [2006] EWHC 94 (Admin), [2006] 2 All ER 16, [2006] 1 WLR 1571, DC, in which it was held that the cutting of a victim's hair constitutes actual bodily harm for these purposes, since that part of the hair that was attached to the scalp was 'bodily' and the hair itself, whether alive beneath the skin or dead above it, was an attribute and part of the human body); that the 'body' of the victim includes all parts of his body, including his organs, his nervous system and his brain; that 'bodily injury' therefore includes injury to any of those parts of the victim's body responsible for his mental or other faculties; and, accordingly, that 'actual bodily harm' is capable of including an identifiable psychiatric injury, but not panic or an hysterical or nervous condition (see also *R v Dholiwal* [2006] EWCA Crim 1139, [2006] All ER (D) 236 (May)). Where psychiatric injury is alleged but not admitted by the defence, the question whether or not the assault occasioned psychiatric injury should not be left to the jury in the absence of expert evidence: *R v Chan Fook* supra; *R v Morris* [1998] 1 Cr App Rep 386, CA.

Loss of consciousness is 'harm', because it involves an injurious impairment to the victim's sensory functions: *R (on the application of T) v DPP* [2003] EWHC 266 (Admin), [2003] Crim LR 622. As to causation see PARA 7 ante.

3 Offences against the Person Act 1861 s 47 (amended by the Criminal Justice Act 1988 s 170(2), Sch 16). As to the position where actual bodily harm is alleged to result from the cumulative effect of a course of conduct see *R v Cox* [1998] Crim LR 810, CA. In relation to an offence under the Offences against the Person Act 1861 s 47 (as amended), battery of a child cannot be justified on the ground that it constitutes reasonable punishment: see the Children Act 2004 s 58(1), (2)(b); and PARA 161 post. As to the offence committed by a person who at the time of committing or being arrested for an offence under the Offences against the Person Act 1861 s 47 (as amended) has in his possession a firearm or an imitation firearm see PARA 677 post; and as to procedural provisions applying where an offence involving bodily injury to a child or young person is charged see PARA 1164 post. As to the offence of racially or religiously aggravated assault occasioning actual bodily harm see PARA 155 post.

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

6 Offences against the Person Act 1861 s 47; Penal Servitude Act 1891 s 1(1); Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 1; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 5(h) (amended by the Criminal Justice Act 1988 Sch 16).

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**150. Aggravated assault; assault committed in certain specified circumstances.**

Specific statutory provision is made for the punishment of persons who have committed an assault in specified circumstances. Examples are the offences of assault:

- 59 (1) with intent to resist or prevent the lawful apprehension or detainer of the defendant or of any other person for any offence<sup>1</sup>;
- 60 (2) on a constable, or a person assisting a constable, in the execution of his duty<sup>2</sup>;
- 61 (3) on a magistrate or other lawfully authorised person on account of his preserving a wreck<sup>3</sup>; and
- 62 (4) on a clergyman celebrating divine service or who is en route to or from doing so<sup>4</sup>.

1 See PARA 737 post.

2 See PARA 735 post.

3 See SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1228.

4 See PARA 827 post.

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### **C. EFFECT OF SUMMARY CONVICTION OR DISMISSAL OF INFORMATION**

#### **151. Effect of summary conviction or dismissal of information.**

Any person who has been convicted on summary trial of assault or battery<sup>1</sup> on an information<sup>2</sup> preferred by or on behalf of the person aggrieved and has undergone the imprisonment awarded or paid any fine and costs, or against whom a written charge or information alleging assault or battery preferred by or on behalf of the person aggrieved has been dismissed, and who has obtained a certificate of dismissal<sup>3</sup>, is released from all further or other proceedings, civil or criminal, whether taken by the prosecutor or any other person aggrieved<sup>4</sup>, for the same cause<sup>5</sup>.

1 As to assault or battery see PARAS 147-148 ante.

2 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

3 If the justices, upon the hearing of any case of assault or battery upon the merits where the written charge or information was preferred by or on behalf of the party aggrieved, deem the offence not to be proved or find the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismiss the written charge or information, they must forthwith make out a certificate, stating the fact of such dismissal, and must deliver such certificate to the party against whom the complaint was preferred: Offences against the Person Act 1861 s 44 (amended by the Magistrates' Courts Act 1980 s 50; the Criminal Justice Act 1988 s 170, Sch 15 paras 2, 3, Sch 16; and the Courts Act 2003 s 109(1), (3), Sch 8 paras 41, 43, Sch 10). The certificate is a valid bar to an action for assault although not applied for when the summons was heard and not drawn up until after the parties had left: *Hancock v Somes* (1859) 1 E & E 795. The certificate must be delivered 'forthwith' on demand, not on dismissal (*Costar v Hetherington* (1859) 1 E & E 802) and should state the grounds on which the charge is dismissed (*Skuse v Davis* (1839) 10 Ad & El 635).

Where the defendant appeared and pleaded not guilty, and the complainant declined to proceed, stating he meant to bring an action, those proceedings were held to constitute such a hearing: *Tunnicliffe v Tedd* (1848) 5 CB 553. Similarly, where a complainant purported to withdraw the summons and the defendant appeared and asked for a certificate, which was granted, further proceedings were barred: *Vaughton v Bradshaw* (1860) 9 CBNS 103; cf *Reed v Nutt* (1890) 24 QBD 669, DC (where the certificate was held to be no bar to a subsequent action, since there had been no hearing on the merits because the summons had been withdrawn for want of prosecution); *Ellis v Burton* [1975] 1 All ER 395, [1975] 1 WLR 386, DC (wrong to issue certificate after plea of guilty).

4 *Masper v Brown* (1876) 1 CPD 97.

5 Offences against the Person Act 1861 s 45 (amended by the Criminal Justice Act 1988 s 170, Sch 15 paras 2, 4); Criminal Justice Act 1948 s 1(2). The Offences against the Person Act 1861 s 45 (as amended) has effect subject to the Criminal Procedure and Investigations Act 1996 s 54(4) (which provides that where an order is made quashing a tainted acquittal, proceedings may be taken against the acquitted person for the offence of which he was acquitted: see PARA 1276 post): s 57(1). For an example of the operation of the Offences against the Person Act 1861 s 45 (as amended) in relation to civil proceedings see *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932, CA. Although the charge may have been of a simple assault, the certificate of dismissal or the conviction is a bar to an indictment for a more serious assault arising out of the same transaction (*R v Walker* (1843) 2 Mood & R 446; *R v Elrington* (1861) 1 B & S 688; *Holden v King* (1876) 46 LJQB 75; *R v Miles* (1890) 24 QBD 423, CCR), but not to an indictment for manslaughter if the person assaulted subsequently dies (*R v Morris* (1867) LR 1 CCR 90) nor probably to an indictment for rape (see *R v Miles* supra at 433 (obiter) per Hawkins J). Nor does it prevent justices ordering a defendant to enter into recognisances to keep the peace: *Ex p Davis* (1871) 35 JP 551. On conviction for unlawful wounding, the

imposition of a sentence of imprisonment and payment to the plaintiff of a sum of money for costs and allowances for loss of time was held to be no bar to an action for damages for bodily suffering, permanent injury and medical expenses arising out of the same assault: *Lowe v Horwarth* (1865) 13 LT 297. The conviction of an employee or agent does not operate as a release of the employer: *Dyer v Munday* [1895] 1 QB 742. As to the effect of the bar on appeals see *Magee v Storey* [1929] NI 134, CA.

There is no rule corresponding to that under the Offences against the Person Act 1861 s 45 (as amended) if the prosecution is not a private prosecution: see *Wong v Parkside Health NHS Trust* supra at [16].

A conviction followed by the defendant's entering into recognisances is not sufficient to establish a bar: *Hartley v Hindmarsh* (1866) LR 1 CP 553; *Murray v Fitzpatrick* (1914) 78 JP Jo 521; *Gibbons v Harris* (1956) 106 L Jo 828, County Court. Cf *Jones v Lamond* (1935) 79 Sol Jo 859, CA.

An employer's disciplinary inquiry into an employee's alleged misconduct does not fall within the ambit of the Offences against the Person Act 1861 s 45 (as amended); and a certificate of acquittal does not release the employee from such an inquiry: *Saeed v Inner London Education Authority* [1985] ICR 637.

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## (xi) Harassment

### 152. Prohibitions of harassment and offence of harassment.

A person must not pursue a course of conduct<sup>1</sup> which amounts to harassment<sup>2</sup> of another person<sup>3</sup>, and which he knows or ought to know amounts to harassment of the other<sup>4</sup>. A person also must not pursue a course of conduct which involves harassment of two or more persons<sup>5</sup>, which he knows or ought to know involves harassment of those persons<sup>6</sup>, and by which he intends to persuade any person<sup>7</sup> either not to do something that he is entitled or required to do<sup>8</sup> or to do something that he is not under any obligation to do<sup>9</sup>.

These provisions do not, however, apply to a course of conduct if the person who pursued it shows<sup>10</sup> that the course of conduct was pursued for the purpose of preventing or detecting crime<sup>11</sup>, under any enactment or rule of law or to comply with any condition or requirement imposed under any enactment<sup>12</sup>, or was reasonable in the particular circumstances<sup>13</sup>. In addition, the Secretary of State may certify that anything done on behalf of the Crown for national security or other purposes is exempt from these provisions<sup>14</sup>.

A person who pursues a course of conduct in breach of these provisions is guilty of an offence<sup>15</sup>, and liable on summary conviction to imprisonment for a term not exceeding six months<sup>16</sup>, to a fine not exceeding level 5 on the standard scale<sup>17</sup>, or to both<sup>18</sup>.

1 A 'course of conduct' must involve: (1) in the case of conduct in relation to a single person, conduct on at least two occasions in relation to that person (Protection from Harassment Act 1997 s 7(3)(a) (ss 1(1A), 7(5) added, ss 1(2), (3), 2(1) amended, and s 7(3) substituted, by the Serious Organised Crime and Police Act 2005 s 125(1)-(3), (7))); or (2) in the case of conduct in relation to two or more persons, conduct on at least one occasion in relation to each of those persons (Protection from Harassment Act 1997 s 7(3)(b) (as so substituted)). For these purposes, a person's conduct on any occasion is to be taken, if aided, abetted, counselled or procured by another, to be conduct on that occasion of the other (as well as conduct of the person whose conduct it is) (s 7(3A)(a) (s 7(3A) added by the Criminal Justice and Police Act 2001 s 44(1))) and to be conduct in relation to which the other's knowledge and purpose, and what he ought to have known, are the same as they were in relation to what was contemplated or reasonably foreseeable at the time of the aiding, abetting, counselling or procuring (s 7(3A)(b) (as so added)).

'Conduct' includes speech: s 7(4). Although there can be a course of conduct comprising only two incidents, the fewer the incidents and the wider apart they are spread the less likely it is that a finding of harassment can reasonably be made: *Lau v DPP* [2000] 1 FLR 799, [2000] Crim LR 580, DC. Nevertheless, incidents as far apart as a year can constitute a course of conduct, eg a threat made once a year on a person's birthday: *Lau v DPP* supra. A finding that three separate and distinct telephone calls to a former partner within the space of five minutes constituted a course of conduct has been held not to be irrational; the time interval between the calls was only one factor to be taken into account: *Kelly v DPP* [2002] EWHC 1428 (Admin), [2003] Crim LR 45, DC. The incidents do not have to be similar in nature but it may be more difficult to prove a course of conduct if they are different, and will be particularly difficult if the parties have been reconciled during that period: *R v H* [2001] 1 FLR 580, [2001] Crim LR 318, CA. The issue is whether or not the incidents, however many there may have been, can properly be said to be so connected in type and in context as to justify the conclusion that they can amount to a course of conduct, and when directing the jury on a charge of harassment based on incidents few in number and widely spaced in time, it is necessary for the trial judge to point this out to the jury: *R v Nitin Patel* [2004] EWCA Crim 3284, [2005] 1 Cr App Rep 440; and see also *Lau v DPP* supra; *Pratt v DPP* [2001] EWHC 483 (Admin), 165 JP 800.

The publication of a series of newspaper articles can constitute conduct amounting to harassment (*Thomas v News Group Newspapers* [2001] EWCA Civ 1233, [2002] EMLR 78 (publication of racial criticism causing distress)), as can the flying of banners and distribution of leaflets displaying abusive and derogatory remarks

(*Howlett v Holding* [2006] EWHC 41 (QB), 150 Sol Jo LB 161). Where only a small number of incidents of behaviour is involved, prosecutors should be cautious in bringing charges for the offence of harassment contrary to the Protection from Harassment Act 1997 s 1(1), and should ensure not merely that two or more incidents occurred but that such repetitious behaviour had caused harassment to the other: *Pratt v DPP* supra.

In the context of harassment by way of speech, a person's freedom of expression under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10 does not have automatic precedence over another person's right under art 8 to his physical and psychological integrity: *Howlett v Holding* supra. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

The Protection from Harassment Act 1997 s 1 (as amended) should be given a restrictive interpretation so as not to cover conduct involved in pursuance of litigation by a claimant: *Tuppen v Microsoft Corp Ltd* (2000) Times, 15 November (a case under the Protection from Harassment Act 1997 s 3 (see TORT vol 97 (2010) PARA 557)). However, placing a person under secret surveillance in an attempt to prove that he was committing benefit fraud amounted to harassment for these purposes: *Howlett v Holding* supra.

2 References to harassing a person include alarming him or causing him distress: Protection from Harassment Act 1997 s 7(2). For other provisions about harassment under legislation other than the Protection from Harassment Act 1997 see PARAS 560, 609 post.

3 Ibid s 1(1)(a). References to a person, in the context of the harassment of a person, are references to a person who is an individual: s 7(5) (as added: see note 1 supra).

4 Ibid s 1(1)(b). A person whose course of conduct is in question ought to know that his conduct amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other: s 1(2) (as amended: see note 1 supra). The 'reasonable person' in this context is a hypothetical reasonable person; he is not endowed with the defendant's standards or characteristics: *R v Colohan* [2001] EWCA Crim 1251, [2001] 2 FLR 757, [2001] Crim LR 845.

5 Protection from Harassment Act 1997 s 1(1A)(a) (as added: see note 1 supra).

6 Ibid s 1(1A)(b) (as added: see note 1 supra).

7 Ie any person, whether or not one of those mentioned in the text and notes 5-6 supra: ibid s 1(1A) (as added: see note 1 supra).

8 Ibid s 1(1A)(c)(i) (as added: see note 1 supra).

9 Ibid s 1(1A)(c)(ii) (as added: see note 1 supra).

10 As to whether this imposes a legal (or persuasive) burden or an evidential one see PARA 1368 et seq post; and see also *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2002] EMLR 78 (a civil case in which the Court of Appeal stated that the burden of proof was on the defendant). See further the Convention for the Protection of Human Rights and Fundamental Freedoms art 6(2) (the presumption of innocence); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 142.

11 Protection from Harassment Act 1997 s 1(3)(a) (as amended: see note 1 supra). This defence exists only for the benefit of law enforcement agencies and cannot be used by private individuals: *Howlett v Holding* [2006] EWHC 41 (QB), 150 Sol Jo LB 161.

12 Protection from Harassment Act 1997 s 1(3)(b) (as amended: see note 1 supra).

13 Ibid s 1(3)(c) (as amended: see note 1 supra). See *DPP v Selvanayagam*, *DPP v Moseley*, *DPP v Woodling* (1999) Times, 23 June, DC (Collins J stated that in determining whether conduct was reasonable a court had to balance the interests of the victim against the purpose and nature of the course of conduct pursued, including the right to peaceful protest; however, the Divisional Court agreed that, if the course of conduct in question involved breach of an injunction, it could not be reasonable conduct, at least unless the circumstances were very special). As to an attempted use of the Protection from Harassment Act 1997 to limit rights of protest and demonstration see *Huntingdon Life Sciences Ltd v Curtin* (1997) Times, 11 December.

14 See the Protection from Harassment Act 1997 s 12(1), under which it is provided that if the Secretary of State certifies that in his opinion anything done by a specified person on a specified occasion related to national security, the economic well-being of the United Kingdom, or the prevention or detection of serious crime, and was done on behalf of the Crown, that certificate is conclusive evidence that the Protection from Harassment Act 1997 does not apply to any conduct of that person on that occasion. 'Specified' means specified in the certificate in question: s 12(2). A document purporting to be a certificate under s 12(1) may be received in evidence and, unless the contrary is proved, treated as being such a certificate: s 12(3).

15 Ibid s 2(1) (as amended: see note 1 supra). For the separate offence of racially or religiously aggravated harassment see PARA 155 post. The offence under s 2(1) (as amended) is a continuing offence and is complete only when the last act in the course of conduct is committed; accordingly, provided that at least one of the incidents relied on falls within the six-month limitation period for summary proceedings under the Magistrates' Courts Act 1980 s 127 (see MAGISTRATES vol 29(2) (Reissue) PARA 589) then s 127 will not be violated: *DPP v Baker* [2004] EWHC 2782 (Admin), DC.

As to civil proceedings for conduct in breach of the prohibition of harassment under the Protection from Harassment Act 1997 s 1(1) see s 3 (as amended); and TORT vol 97 (2010) PARA 557. As to injunctions to prevent persons from harassment under s 1(1A) (as added) see s 3A (as added); and TORT vol 97 (2010) PARA 557. It is an offence to breach an injunction granted in such civil proceedings: see ss 3(6)-(9), 3A(3) (as added); and TORT vol 97 (2010) PARA 557. For guidance as to the interrelationship between the Family Law Act 1996 s 42 (non-molestation orders: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 716) and the Protection from Harassment Act 1997 and the management of concurrent proceedings in the family, civil and criminal justice systems arising from domestic violence incidents see *Lomas v Parle* [2003] EWCA Civ 1804, [2004] 1 All ER 1173.

16 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

17 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

18 Protection from Harassment Act 1997 s 2(2). As to the relevant considerations when sentencing a defendant convicted of an offence under these provisions see *R v Liddle, R v Hayes* [1999] 3 All ER 816, [1999] Crim LR 847, CA. As to restraining orders see the Protection from Harassment Act 1997 s 5 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 349.

## UPDATE

### 152 Prohibitions of harassment and offence of harassment

NOTE 1--As a general proposition, facts of other, separately charged, offences as might be found proved, irrespective of whether they led to a conviction, are capable of forming part of a course of conduct amounting to harassment: *Jones v DPP* [2010] All ER (D) 230 (Feb). See *R v Curtis* [2010] EWCA Crim 123, [2010] All ER (D) 94 (Feb) (in volatile relationship, six incidents over period of one year did not amount to course of conduct amounting to harassment).



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### **153. Putting a person in fear of violence.**

A person whose course of conduct<sup>1</sup> causes another to fear<sup>2</sup>, on at least two occasions<sup>3</sup>, that violence will be used against him is guilty of an offence if he knows or ought to know<sup>4</sup> that his course of conduct will cause the other so to fear on each of those occasions<sup>5</sup>. The offence is punishable on conviction on indictment<sup>6</sup> with imprisonment for a term not exceeding five years, a fine, or both<sup>7</sup>, or on summary conviction with imprisonment for a term not exceeding six months<sup>8</sup>, a fine not exceeding the statutory maximum<sup>9</sup>, or both<sup>10</sup>.

It is, however, a defence for a person to show<sup>11</sup> that his course of conduct was pursued for the purpose of preventing or detecting crime<sup>12</sup>, under any enactment or rule of law or to comply with any condition or requirement imposed under any enactment<sup>13</sup>, or that his pursuit of such course was reasonable for the protection of himself or another or for the protection of his or another's property<sup>14</sup>. In addition, the Secretary of State may certify that anything done on behalf of the Crown for national security or other purposes is exempt from these provisions<sup>15</sup>.

1 As to the meaning of 'conduct' and what amounts to a 'course of conduct' see PARA 152 note 1 ante.

2 Direct evidence from the victim that he was caused to fear violence is not essential, because a court may infer such fear if there is other evidence entitling it to do so: *R v DPP* [2001] EWHC 17 (Admin), [2001] All ER (D) 120 (Jan).

3 It must be proved that at least one person feared on at least two occasions that violence would be used against him; it is not enough that on one occasion he fears violence against himself and on another occasion he fears violence against another, even though he and the other form part of a close knit and identifiable group: *Caurti v DPP* [2001] EWHC Admin 867, [2002] Crim LR 131, DC.

4 For these purposes, a person ought to know that his conduct will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion: Protection from Harassment Act 1997 s 4(2).

5 Ibid s 4(1). See note 3 supra. For the separate racially or religiously aggravated version of this offence see PARA 156 post.

6 As to the relevant considerations when sentencing a defendant convicted of an offence under these provisions see *R v Liddle*, *R v Hayes* [1999] 3 All ER 816, [1999] Crim LR 847, CA. A person acquitted on indictment of an offence under the Protection from Harassment Act 1997 s 4 may be found guilty of an offence under s 2 (as amended) (see PARA 152 ante): s 4(5). In such a case, the Crown Court then has the same sentencing powers as the magistrates' court would have under s 2 (as amended): s 4(6).

7 Ibid s 4(4)(a).

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

10 Protection from Harassment Act 1997 s 4(4)(b). As to restraining orders see s 5 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 349.

11 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

12 Protection from Harassment Act 1997 s 4(3)(a).

13 Ibid s 4(3)(b).

14 Ibid s 4(3)(c).

15 See ibid s 12; and PARA 152 note 14 ante.

## **UPDATE**

### **153 Putting a person in fear of violence**

NOTE 6--The 1997 Act s 4(5) does not require the case to be stopped and the prosecution recommenced for the alternative charge of harassment to be considered by the jury: *R v Livesey* [2006] All ER (D) 241 (Dec), CA.

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## (xii) Racially or Religiously Aggravated Non-fatal Offences

### 154. 'Racially or religiously aggravated'.

An offence is racially or religiously aggravated<sup>1</sup> if:

- 63 (1) at the time of committing it, or immediately<sup>2</sup> before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership<sup>3</sup> of (or presumed<sup>4</sup> membership of) a racial or religious group<sup>5</sup>; or
- 64 (2) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group<sup>6</sup>.

For these purposes, 'racial group' means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins<sup>7</sup>; and 'religious group' means a group of persons defined by reference to religious belief or lack of religious belief<sup>8</sup>.

It is immaterial for these purposes whether or not the offender's hostility is also based, to any extent, on any other factor<sup>9</sup>.

1. See for the purposes of the Crime and Disorder Act 1998 ss 28-32 (as amended) (see PARAS 155-156 post. 'Racial or religious aggravation' can exist notwithstanding that the defendant is of the same racial or religious group as the object of the offence: *R v White (Anthony)* [2001] EWCA Crim 216, [2001] 1 WLR 1352, [2001] Crim LR 576. For other racially or religiously aggravated offences see PARAS 335, 561 post. As to racial or religious aggravation as a factor aggravating sentence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 619.

2. 'Immediately' qualifies both 'before' and 'after': *Parry v DPP* [2004] EWHC 3112 (Admin), [2005] ADC 260.

3. 'Membership', in relation to a racial or religious group, includes association with members of that group: Crime and Disorder Act 1998 s 28(2) (s 28(1)-(3) amended, and s 28(5) added, by the Anti-terrorism, Crime and Security Act 2001 s 39(1), (3), (4)).

4. 'Presumed' means presumed by the offender: Crime and Disorder Act 1998 s 28(2).

5. *Ibid* s 28(1)(a) (as amended: see note 3 supra). For this test to be satisfied where racial aggravation is alleged, the defendant must have formed the view that the victim was a member of a racial group and must have done or said something which demonstrated hostility towards the victim based on that membership: *R v Philip Rogers* [2005] EWCA Crim 2863, [2006] Crim LR 351 (subjects of words 'bloody foreigners' were Spanish; held that these words were capable of satisfying the requirements of the Crime and Disorder Act 1998 s 28(1)(a) (as amended)). The words used may or may not expressly identify the racial group to which the victim belongs: see *A-G's Reference (No 4 of 2004)*, *R v D* [2005] EWCA Crim 889, [2005] 1 WLR 2810 (victim Indian, brown skinned; called an 'immigrant doctor' by defendant immediately before defendant assaulting him; held open to jury to conclude that the defendant had identified her victim as falling within the racial groups of Indian and brown-skinned and that the use of 'immigrant' demonstrated hostility based on the victim's membership of such groups).

See also *R v Philip Rogers* supra (all who were black formed a racial group within the Crime and Disorder Act 1998 s 28(4), as did all who were white, and it is no great extension of the concept to embrace within a single racial group all who were foreign; on the facts of this case the use of the words 'bloody foreigners' satisfied the requirements of the Crime and Disorder Act 1998 s 28(1)(a) (as amended)); *DPP v M (A Minor)* [2004] EWHC 1453 (Admin), [2004] 1 WLR 2758, [2005] Crim LR 392 (use of 'bloody foreigners' at time of committing offence

might, depending on context, qualify as a demonstration of racial hostility for these purposes because the Crime and Disorder Act 1998 s 28(1)(a) (as amended) can be satisfied in a non-inclusive as well as an inclusive sense according to the circumstances and context; the fact that the defendant's hostility was based more on a dispute over food at a kebab shop did not prevent racial aggravation being established). A statement in *R v White (Anthony)* [2001] EWCA Crim 216 at [19], [2001] 1 WLR 1352 at [19], [2001] Crim LR 576 at [19] per Pill LJ which was in conflict with the reasoning in *DPP v M (A Minor)* supra and *A-G's Reference (No 4 of 2004)*, *R v D* supra was held to be obiter in *R v Philip Rogers* supra; the Court of Appeal stated that to the extent that it was in conflict it should not be followed. See also *DPP v Green* [2004] EWHC 1225 (Admin), [2004] 7 Archbold News 3, DC (the Crime and Disorder Act 1998 s 28(1)(a) (as amended), unlike s 28(1)(b) (as amended), does not require the defendant to be motivated by racial or religious hostility); *DPP v Pal* [2000] Crim LR 756, DC; *DPP v Woods* [2002] EWHC 85 (Admin), [2002] All ER (D) 154 (Jan).

The victim is not required to be in the presence of the defendant at the time of the demonstration of racial or religious hostility: *Parry v DPP* [2004] EWHC 3112 (Admin), [2005] ADC 260.

6 Crime and Disorder Act 1998 s 28(1)(b) (as amended: see note 3 supra). Proof of motivation by hostility towards members of a racial or religious group based on their membership of that group can be established by evidence relating to what the defendant may have said or done on other occasions: *G v DPP* [2004] EWHC 183 (Admin), 168 JP 313, DC. Prosecutors should not bring charges for a racially aggravated offence unless satisfied that the facts truly suggest that the offence charged was aggravated by racism: *R v Philip Rogers* [2005] EWCA Crim 2863, [2006] Crim LR 351.

7 Crime and Disorder Act 1998 s 28(4). The wording of this definition must be given a broad, non-technical interpretation: *R v White (Anthony)* [2001] EWCA Crim 216, [2001] 1 WLR 1352, [2001] Crim LR 576 ('African' describes a racial group defined by reference to race because in ordinary language 'African' denotes a limited group of people regarded as of common stock and as one of the major divisions of humankind having distinct physical features in common; it 'denotes a person characteristic of the blacks in Africa', despite the fact that strictly 'African' is capable of covering Egyptians and white South Africans who would not commonly be described as 'Africans'). As to the meaning of 'ethnic origins' see *Mandla v Dowell Lee* [1983] 2 AC 548, [1983] 1 All ER 1062, HL.

8 Crime and Disorder Act 1998 s 28(4) (as added: see note 3 supra).

9 Ibid s 28(3) (as amended: see note 3 supra). The reference in the text to 'any other factor' is a reference to any other factor not mentioned in s 28(1)(a) (as amended) or s 28(1)(b) (as amended) (see the text and notes 1-6 supra): s 28(3) (as so amended).

## UPDATE

### 154 'Racially or religiously aggravated'

NOTES 5, 6--*Rogers*, cited, affirmed: [2007] UKHL 8, [2007] 2 All ER 433. The defendant's subjective intention is not relevant to the offence contrary to the Crime and Disorder Act 1998 s 28(1)(a), but is relevant to the offence contrary to s 28(1)(b): *Jones v DPP* [2010] All ER (D) 230 (Feb).

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### **155. Racially or religiously aggravated assaults.**

A person is guilty of an offence if he commits an offence of unlawful wounding or grievous bodily harm<sup>1</sup>, assault occasioning actual bodily harm<sup>2</sup> or common assault<sup>3</sup> which is racially or religiously aggravated<sup>4</sup>, and is liable on conviction on indictment to a term of imprisonment not exceeding seven years (or two years in the case of common assault), to a fine, or to both<sup>5</sup>, or on summary conviction to a term of imprisonment not exceeding six months<sup>6</sup>, to a fine not exceeding the statutory maximum<sup>7</sup>, or to both<sup>8</sup>.

1 Crime and Disorder Act 1998 s 29(1)(a). The offence of unlawful wounding or grievous bodily harm is an offence under the Offences against the Person Act 1861 s 20 (as amended): see PARA 120 ante.

2 Crime and Disorder Act 1998 s 29(1)(b). The offence of assault occasioning actual bodily harm is an offence under the Offences against the Person Act 1861 s 47 (as amended): see PARA 149 ante.

3 Crime and Disorder Act 1998 s 29(1)(c). As to the offence of common assault see PARA 148 ante.

4 Ibid s 29(1) (amended by the Anti-terrorism, Crime and Security Act 2001 s 39(1), (5)(b), (6)(a)). For the meaning of 'racially or religiously aggravated' see PARA 154 ante.

5 Crime and Disorder Act 1998 s 29(2)(b), (3)(b). As to sentencing guidelines for racially aggravated offences see *R v Saunders* [2000] 1 Cr App Rep 458, [2000] 2 Cr App Rep (S) 71, CA; *R v Kelly*, *R v Donnelly* [2001] EWCA Crim 170, [2001] 2 Cr App Rep (S) 341; *A-G's Reference (No 92 of 2003)*, *R v Pells* [2004] EWCA Crim 924, [2004] All ER (D) 407 (Mar).

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

8 Crime and Disorder Act 1998 s 29(2)(a), (3)(a).

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### **156. Racially or religiously aggravated harassment etc.**

A person is guilty of an offence if he commits an offence of harassment<sup>1</sup> or an offence of putting a person in fear of violence<sup>2</sup> which is racially or religiously aggravated<sup>3</sup>, and is liable on conviction on indictment to imprisonment for a term not exceeding two years (or seven years in the case of the offence of putting a person in fear of violence), to a fine, or to both<sup>4</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup>, to a fine not exceeding the statutory maximum<sup>6</sup>, or to both<sup>7</sup>.

If, on the trial on indictment of a person charged with a racially or religiously aggravated offence of harassment<sup>8</sup>, the jury finds him not guilty of the offence charged, it may find him guilty of the basic offence (that is, the offence of harassment)<sup>9</sup>; and if, on the trial on indictment of a person charged with a racially or religiously aggravated offence of putting a person in fear of violence<sup>10</sup>, the jury finds him not guilty of the offence charged, it may find him guilty of a racially or religiously aggravated offence of harassment<sup>11</sup>.

1 Crime and Disorder Act 1998 s 32(1)(a). A offence of harassment is an offence under the Protection from Harassment Act 1997 s 2 (as amended): see PARA 152 ante.

2 Crime and Disorder Act 1998 s 32(1)(b). A offence of putting a person in fear of violence is an offence under the Protection from Harassment Act 1997 s 4: see PARA 153 ante.

3 Crime and Disorder Act 1998 s 32(1) (amended by the Anti-terrorism, Crime and Security Act 2001 s 39(1), (5)(b), (6)(b)). For the meaning of 'racially or religiously aggravated' see PARA 154 ante.

4 Crime and Disorder Act 1998 s 32(3)(b), (4)(b). As to sentencing guidelines for racially aggravated offences see *R v Saunders* [2000] 1 Cr App Rep 458, [2000] 2 Cr App Rep (S) 71, CA; *A-G's Reference (No 92 of 2003)*, *R v Pells* [2004] EWCA Crim 924, [2004] All ER (D) 407 (Mar).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7 Crime and Disorder Act 1998 s 32(3)(a), (4)(a). See note 5 supra. A court sentencing or otherwise dealing with a person convicted of an offence under these provisions may additionally make a restraining order under the Protection from Harassment Act 1997 s 5 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 349), prohibiting the defendant from doing anything described in the order, for the purpose of protecting the victim of the offence or any other person mentioned in the order: Crime and Disorder Act 1998 s 32(7). As from a day to be appointed s 32(7) is repealed by the Domestic Violence, Crime and Victims Act 2004 s 58(1), (2), Sch 10 para 48, Sch 11, and restraining orders may be made by a court sentencing or otherwise dealing with a person convicted of any offence: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 349. At the date at which this volume states the law no such day had been appointed.

8 Ie the offence under the Crime and Disorder Act 1998 s 32(1)(a): see the text and notes 1, 3 supra.

9 Ibid s 32(5). As to the offence of harassment see PARA 152 ante.

10 Ie the offence under ibid s 32(1)(b): see the text and notes 2-3 supra.

11 Ibid s 32(6). As to the offence of putting a person in fear of violence see PARA 153 ante. A restraining order may also be made: see note 7 supra.

## **UPDATE**

### **156 Racially or religiously aggravated harassment etc**

NOTE 7--Appointed day is 30 September 2009: SI 2009/2616.

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### **(xiii) Female Genital Mutilation**

#### **157. Offence of mutilating a girl's genitalia.**

A person who excises, infibulates or otherwise mutilates the whole or any part of a girl's<sup>1</sup> labia majora, labia minora or clitoris is guilty of an offence<sup>2</sup> unless he is either a registered medical practitioner<sup>3</sup> who performs a surgical operation on a girl which is necessary for her physical or mental health<sup>4</sup> or a registered medical practitioner, a registered midwife, or a person undergoing a course of training with a view to becoming such a practitioner or midwife who performs a surgical operation on a girl who is in any stage of labour, or has just given birth, for purposes connected with the labour or birth<sup>5</sup>. It is also an offence to assist a girl in mutilating her own genitalia<sup>6</sup> or to assist a non-United Kingdom national or resident to mutilate a girl's genitalia overseas<sup>7</sup>. Provision is made for the punishment of offenders and for the extension of these provisions to cover extra-territorial acts<sup>8</sup>.

1 'Girl' includes 'woman': Female Genital Mutilation Act 2003 s 6(1).

2 Ibid s 1(1).

3 As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 4.

4 Female Genital Mutilation Act 2003 s 1(2)(a), (3)(a). For the purpose of determining whether an operation is necessary for the mental health of a girl, it is immaterial whether she or any other person believes that the operation is required as a matter of custom or ritual: s 1(5).

No offence is committed by a person who performs outside the United Kingdom such an operation as falls within s 1(2)(a) or s 1(2)(b) (see the text and note 5 *infra*) and, in relation to the operation, exercises functions corresponding to those of a registered medical practitioner or, as the case may be, a registered midwife or a person undergoing a course of training with a view to becoming such a practitioner or midwife: s 1(4). As to registered midwives see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 716 *et seq.* For the meaning of 'United Kingdom' see PARA 45 note 2 *ante*.

5 Ibid s 1(2)(b), (3)(b).

6 See *ibid* s 2; and PARA 158 *post*.

7 See *ibid* s 3; and PARA 158 *post*.

8 See *ibid* ss 4, 5; and PARA 159 *post*.



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### **158. Assisting in the mutilation or self-mutilation of a girl's genitalia.**

A person is guilty of an offence if he aids, abets, counsels or procures:

- 65 (1) a girl<sup>1</sup> to excise, infibulate or otherwise mutilate the whole or any part of her own labia majora, labia minora or clitoris<sup>2</sup>; or
- 66 (2) a person who is not a United Kingdom national<sup>3</sup> or permanent United Kingdom resident<sup>4</sup> to do a relevant act of female genital mutilation<sup>5</sup> outside the United Kingdom<sup>6</sup>.

In the latter case, no offence is committed if the act in question is a surgical operation which is either necessary for the girl's physical or mental health<sup>7</sup> or is performed on a girl who is in any stage of labour, or has just given birth, for purposes connected with the labour or birth<sup>8</sup>, provided the operation is performed by a person who, in relation to such an operation, is a registered medical practitioner<sup>9</sup>, a registered midwife<sup>10</sup>, or a person undergoing a course of training with a view to becoming such a practitioner or midwife, or a person who exercises functions corresponding to those of such a person<sup>11</sup>. Provision is made for the punishment of offenders and for the extension of these provisions to cover extra-territorial acts<sup>12</sup>.

1 As to the meaning of 'girl' see PARA 157 note 1 ante.

2 Female Genital Mutilation Act 2003 s 2.

3 A 'United Kingdom national' is an individual who is a British citizen, a British overseas territories citizen, a British National (Overseas), a British overseas citizen, a person who is a British subject under the British Nationality Act 1981, or a British protected person within the meaning of the British Nationality Act 1981 s 50(1); Female Genital Mutilation Act 2003 s 6(2)(a)-(c). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43; as to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 44-57; as to the status of British National (Overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 63-65; as to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 58-62; as to British subjects under the British Nationality Act 1981 see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 66-71; and as to British protected persons within the meaning of s 50(1) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 72-76.

4 A permanent United Kingdom resident is an individual who is settled in the United Kingdom (within the meaning of the Immigration Act 1971: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 5); Female Genital Mutilation Act 2003 s 6(3). As to persons settled in the United Kingdom see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 134.

5 An act is a relevant act of female genital mutilation if it is done in relation to a United Kingdom national or permanent United Kingdom resident (ibid s 3(2)(a)) and if it would, if done by such a person, constitute an offence under s 1 (see PARA 157 ante) (s 3(2)(b)).

6 Ibid s 3(1).

7 As to the determination of whether an operation is necessary for the mental health of a girl see PARA 157 note 4 ante.

8 Female Genital Mutilation Act 2003 s 3(3)(a).

- 9 As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 4.
- 10 As to registered midwives see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 716 et seq.
- 11 Female Genital Mutilation Act 2003 s 3(3)(b).
- 12 See ibid ss 4, 5; and PARA 159 post.

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### **159. Penalties for, and extent of, offences involving female genital mutilation.**

A person guilty of an offence involving female genital mutilation<sup>1</sup> is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, to a fine, or to both<sup>2</sup>, and on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup>, to a fine not exceeding the statutory maximum<sup>4</sup>, or to both<sup>5</sup>.

The provisions governing the offences involving female genital mutilation<sup>6</sup> extend to any act done outside the United Kingdom<sup>7</sup> by a United Kingdom national<sup>8</sup> or permanent United Kingdom resident<sup>9</sup>; and, if such an offence is committed outside the United Kingdom, proceedings may be taken<sup>10</sup>, and the offence may for incidental purposes be treated as having been committed<sup>11</sup>, in any place in England, Wales or Northern Ireland<sup>12</sup>.

1    le an offence under the Female Genital Mutilation Act 2003 ss 1-3: see PARAS 157-158 ante.

2    Ibid s 5(a).

3    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4    As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5    Female Genital Mutilation Act 2003 s 5(b). As to procedural provisions applying where an offence involving infliction of bodily harm on a child or young person is charged see PARA 1164 post.

6    le ibid ss 1-3: see PARAS 157-158 ante.

7    For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

8    For the meaning of 'United Kingdom national' see PARA 158 note 3 ante.

9    Female Genital Mutilation Act 2003 s 4(1). For the meaning of 'permanent United Kingdom resident' see PARA 158 note 4 ante.

10   Ibid s 4(2)(a).

11   Ibid s 4(2)(b).

12   Ibid s 4(2).

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## **(xiv) Torture**

### **160. Torture.**

If, in the United Kingdom<sup>1</sup> or elsewhere, a public official or a person acting in an official capacity, whatever his nationality, intentionally inflicts severe pain or suffering<sup>2</sup> on another in the performance or purported performance of his official duties, he is guilty of the offence of torture<sup>3</sup> and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>4</sup>. A person, whatever his nationality, also commits this offence, and is correspondingly liable on conviction, if, not being a public official or a person acting in an official capacity, he intentionally inflicts in the United Kingdom or elsewhere severe pain or suffering on another at the instigation or with the consent or acquiescence of either a public official<sup>5</sup> or of a person acting in an official capacity<sup>6</sup>, where that official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it<sup>7</sup>.

It is, however, a defence for a person charged with an offence under these provisions in respect of any conduct of his to prove<sup>8</sup> that he had lawful authority, justification or excuse<sup>9</sup> for that conduct<sup>10</sup>.

1 For the meaning of 'United Kingdom' see PARA 45 note 2 ante. Her Majesty may by Order in Council make provision for extending the Criminal Justice Act 1988 ss 134, 135, with such modifications and exceptions as may be specified in the order, to any of the Channel Islands, the Isle of Man or any colony: s 138(1). See the Criminal Justice Act 1988 (Torture) (Overseas Territories) Order 1988, SI 1988/2242 (amended by SI 1992/1715); and the Criminal Justice Act 1988 (Torture) (Isle of Man) Order 1989, SI 1989/983.

2 For these purposes, it is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission: Criminal Justice Act 1988 s 134(3).

3 Ibid s 134(1). Proceedings for an offence under s 134 may not be begun except by or with the consent of the Attorney General: s 135(a). As to the effect of this limitation see PARA 1071 post.

4 Ibid s 134(6). In connection with the prohibition on torture see also CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 124.

5 Ibid s 134(2)(a)(i).

6 Ibid s 134(2)(a)(ii).

7 Ibid s 134(2)(b), (6). As to the restriction on the institution of proceedings see note 3 supra.

8 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

9 In relation to pain or suffering inflicted in the United Kingdom, 'lawful authority, justification or excuse' means lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted: Criminal Justice Act 1988 s 134(5)(a). In relation to pain or suffering inflicted outside the United Kingdom, 'lawful authority, justification or excuse' means: (1) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful

authority, justification or excuse under that law (s 134(5)(b)(i)); (2) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting (s 134(5)(b)(ii)); or (3) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted (s 134(5)(b)(iii)).

10 Ibid s 134(4).

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## **(xv) Corporal Punishment**

### **161. Corporal punishment.**

Parents<sup>1</sup> and other persons in loco parentis are entitled as a disciplinary measure<sup>2</sup> to apply a reasonable degree of force<sup>3</sup> to their children or charges old enough to understand its purpose<sup>4</sup>.

Battery<sup>5</sup> of a child cannot be justified on the ground that it constituted reasonable punishment<sup>6</sup> in relation to the offences of wounding with intent to do grievous bodily harm<sup>7</sup>, inflicting bodily injury<sup>8</sup>, assault occasioning actual bodily harm<sup>9</sup>, or cruelty to a person aged under 16<sup>10</sup>. Nor can battery of a child causing actual bodily harm<sup>11</sup> be justified in any civil proceedings on the ground that it constituted reasonable punishment<sup>12</sup>.

A teacher is no longer entitled by virtue of his position as such to apply reasonable corporal punishment as a disciplinary measure<sup>13</sup>.

1 A father who was not married to the mother at the time of the child's birth is not a 'parent' for this purpose, unless he has subsequently acquired parental responsibility (ie parental rights, duties etc) and not ceased to have it in accordance with the Children Act 1989: see s 2(2) (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 138 et seq.

2 See *Cleary v Booth* [1893] 1 QB 465, 62 LJMC 87; *R v Donovan* [1934] 2 KB 498 at 509; *R v Mackie* (1973) 57 Cr App Rep 453, CA.

3 When considering the question of reasonableness, a jury or magistrates' court must consider the nature and context of the defendant's behaviour, the duration of the behaviour, the physical and mental consequences for the child, the child's age and personal characteristics, and the defendant's reasons for administering the punishment: *R v H (Assault of Child: Reasonable Chastisement)* [2001] EWCA Crim 1024, [2002] 1 Cr App Rep 59. Note that this case was decided before the enactment of the Children Act 2004 s 58 (see the text and notes 5-12 infra), relying on factors identified in *A v United Kingdom* (1998) 27 EHRR 611, ECtHR. See also the following older cases: *R v Miles* (1842) 6 Jur 243; *R v Hopley* (1860) 2 F & F 202 at 206; *Cleary v Booth* [1893] 1 QB 465, 62 LJMC 87; *R v Mackie* [1973] Crim LR 54, Crown Ct.

4 *R v Griffin* (1869) 11 Cox CC 402. An elder sibling not in loco parentis has no right to strike a younger brother merely because he is impudent: *R v Woods* (1921) 85 JP 272.

The formerly recognised right physically to chastise servants, apprentices, mutinous seamen etc may be assumed to have fallen into desuetude; and corporal punishment in prisons was abolished by the Criminal Justice Act 1967 s 65. A husband is not entitled to inflict physical chastisement on his wife: *R v Jackson* [1891] 1 QB 671 at 679, 683, CA; *R v Lister* (1721) 1 Stra 478.

5 See PARA 147 ante.

6 Children Act 2004 s 58(1).

7 Ibid s 58(2)(a). The offence referred to in the text is an offence under the Offences against the Person Act 1861 s 18: see PARA 118 ante.

8 Children Act 2004 s 58(2)(a). The offence referred to in the text is an offence under the Offences against the Person Act 1861 s 20 (as amended): see PARA 120 ante.

9 Children Act 2004 s 58(2)(b). The offence referred to in the text is an offence under the Offences against the Person Act 1861 s 47 (as amended): see PARA 149 ante.

10 Children Act 2004 s 58(2)(c). The offence referred to in the text is an offence under the Children and Young Persons Act 1933 s 1 (as amended): see PARA 143 ante.

11 'Actual bodily harm' has the same meaning as it has for the purposes of the Offences against the Person Act 1861 s 47 (as amended) (see PARA 149 note 2 ante): Children Act 2004 s 58(4).

12 Ibid s 58(3).

13 See the Education Act 1996 s 548 (as substituted and amended); and EDUCATION vol 15(1) (2006 Reissue) PARA 577. The prohibition on corporal punishment by teachers does not affect their power to use reasonable force to restrain a pupil from causing or continuing to cause injury to a person or damage to property, or from behaving or continuing to behave in a way prejudicial to good order and discipline at the school or among its pupils: see s 550A (as added); and EDUCATION vol 15(1) (2006 Reissue) PARA 576.

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### 3. SEXUAL OFFENCES

#### (1) IN GENERAL

##### 162. Meaning of 'sexual'.

For the purposes of the various statutory sexual offences<sup>1</sup> (except sexual activity in a public lavatory<sup>2</sup>), penetration<sup>3</sup>, touching<sup>4</sup> or any other activity is 'sexual' if a reasonable person would consider either:

- 67 (1) that whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual<sup>5</sup>; or
- 68 (2) that because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual<sup>6</sup>.

1 le the offences under the Sexual Offences Act 2003 Pt 1 (ss 1-79): see PARA 165 et seq post.

2 le the offence under *ibid* s 71: see PARA 237 post.

3 Penetration is a continuing act from entry to withdrawal: *ibid* s 79(1), (2). The slightest degree of penetration is sufficient: *R v Hughes* (1841) 9 C & P 752; *R v Lines* (1844) 1 Car & Kir 393.

4 'Touching' includes touching with any part of the body, with anything else, or through anything, and in particular includes touching amounting to penetration: Sexual Offences Act 2003 s 79(1), (8). Where a person is wearing clothing, touching of that clothing constitutes 'touching' for these purposes: *R v H* [2005] EWCA Crim 732, [2005] 2 All ER 859, [2005] Crim LR 735.

5 Sexual Offences Act 2003 s 78(a).

6 *Ibid* s 78(b). A two-fold test is to be applied for these purposes: first, whether because of its nature the actual touching or other activity *could be* sexual (in relation to which the circumstances before it or after it, or any evidence as to the purpose of any person in relation to it, are irrelevant); and second, if the activity could be sexual, whether in view of the circumstances and/or the purpose of any person in relation to the activity it was *in fact* sexual: *R v H* [2005] EWCA Crim 732, [2005] 2 All ER 859, [2005] Crim LR 735.



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### 163. Consent.

For the purposes of the statutory sexual offences<sup>1</sup> involving the absence of consent, a person 'consents' if he agrees by choice and has the freedom and capacity to make that choice<sup>2</sup>.

Certain evidential presumptions and conclusive presumptions as to the absence of consent and as to the absence of a reasonable belief in consent apply in the case of rape<sup>3</sup>, assault by penetration<sup>4</sup>, sexual assault<sup>5</sup> or causing a person to engage in sexual activity without consent<sup>6</sup>.

If in proceedings for such an offence it is proved that the defendant did the relevant act<sup>7</sup>, that any of a number of specified circumstances rendering the complainant incapable of freely consenting<sup>8</sup> existed<sup>9</sup>, and the defendant knew that those circumstances existed<sup>10</sup>, the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it<sup>11</sup>.

Further, if in such proceedings it is proved that the defendant did the relevant act and that he intentionally deceived the complainant as to the nature or purpose of the act<sup>12</sup> or intentionally induced the complainant to consent to the act by impersonating a person known personally to the complainant<sup>13</sup>, it is to be conclusively presumed that the complainant did not consent to the act<sup>14</sup> and that the defendant did not believe that the complainant consented to it<sup>15</sup>.

1    Ie the offences under the Sexual Offences Act 2003 Pt 1 (ss 1-79): see PARA 165 et seq post.

2    Ibid s 74. The absence of consent does not have to be demonstrated by offering resistance or by communicating it to the defendant: *R v Malone* [1998] 2 Cr App Rep 447, [1998] Crim LR 834, CA (decided under the now repealed Sexual Offences Act 1956, but there can be no doubt that the same is true in respect of all the non-consensual offences under the new Act).

3    Ie an offence under the Sexual Offences Act 2003 s 1: see PARA 165 post. The 'relevant act' for these purposes is the defendant intentionally penetrating, with his penis, the vagina, anus or mouth of the complainant: s 77. 'Vagina' includes vulva: s 79(1), (9). References in the Sexual Offences Act 2003 to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery): s 79(3).

4    Ie an offence under ibid s 2: see PARA 167 post. For the meaning of 'penetration' see PARA 162 note 3 ante. The 'relevant act' for these purposes is the defendant intentionally penetrating, with a part of his body or anything else, the vagina or anus of the complainant where the penetration is sexual: s 77. For the meaning of 'sexual' see PARA 162 ante.

5    Ie an offence under ibid s 3: see PARA 169 post. The 'relevant act' for these purposes is the defendant intentionally touching the complainant, where the touching is sexual: s 77.

6    Ie an offence under ibid s 4: see PARA 171 post. The 'relevant act' for these purposes is the defendant intentionally causing the complainant to engage in an activity, where the activity is sexual: s 77.

7    Ibid s 75(1)(a). See notes 3-6 supra.

8    Ie: (1) that any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him (ibid s 75(2)(a)); (2) that any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person (s 75(2)(b)); (3) that the complainant was, and the defendant was not, unlawfully

detained at the time of the relevant act (s 75(2)(c)); (4) that the complainant was asleep or otherwise unconscious at the time of the relevant act (s 75(2)(d)); (5) that because of the complainant's physical disability he would not have been able at the time of the relevant act to communicate to the defendant whether he consented (s 75(2)(e)); or (6) that any person had administered to or caused to be taken by the complainant, without his consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act (s 75(2)(f)). In s 75(2)(a), (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began: s 75(3).

9 Ibid s 75(1)(b).

10 Ibid s 75(1)(c).

11 Ibid ss 1(3), 2(3), 3(3), 4(3), 75(1).

12 Ibid ss 1(3), 2(3), 3(3), 4(3), 76(2)(a).

13 Ibid s 76(2)(b).

14 Ibid s 76(1)(a).

15 Ibid s 76(1)(b).

## **UPDATE**

### **163 Consent**

NOTE 2--A defendant's failure to mention the fact he is HIV positive to a person with whom he has had sexual intercourse is irrelevant to the issue of consent under the 2003 Act s 74: *R v B* [2006] EWCA Crim 2945, [2007] 1 WLR 1567. In cases involving intoxication, the question is whether the complainant retained the capacity to consent: *R v Bree* [2007] EWCA Crim 804, [2007] 2 All ER 676.

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#### 164. Exceptions to aiding, abetting and counselling.

There are statutory exceptions to the offence of aiding, abetting or counselling the commission of certain sexual offences against children<sup>1</sup> where the person in question acts not for the purpose of obtaining sexual<sup>2</sup> gratification or causing or encouraging the activity constituting the offence or the child's participation in it, but for the purpose of either protecting the child from sexually transmitted infection<sup>3</sup>, protecting the physical safety of the child<sup>4</sup>, preventing the child from becoming pregnant<sup>5</sup> or promoting the child's emotional well-being by the giving of advice<sup>6</sup>. The offences which are specified for these purposes are:

- 69 (1) rape of a child aged under 13<sup>7</sup>;
- 70 (2) assault of a child aged under 13 by penetration<sup>8</sup>;
- 71 (3) sexual assault of a child aged under 13<sup>9</sup>;
- 72 (4) sexual activity with a child<sup>10</sup>;
- 73 (5) child sex offences committed by children or young persons<sup>11</sup> which would comprise the offence of sexual activity with a child<sup>12</sup> if the offender were aged 18<sup>13</sup>;
- 74 (6) sexual activity with a child involving abuse of a position of trust<sup>14</sup>;
- 75 (7) sexual activity with a child family member<sup>15</sup>;
- 76 (8) sexual activity with a person with a mental disorder<sup>16</sup> impeding choice<sup>17</sup>;
- 77 (9) inducement, threat or deception to procure sexual activity with a person with a mental disorder<sup>18</sup>;
- 78 (10) sexual activity by a care worker<sup>19</sup> with a person with a mental disorder<sup>20</sup>.

1 As to complicity in crimes generally see PARAS 49-57 ante. The provisions with which this paragraph is concerned do not affect any other enactment or any rule of law restricting the circumstances in which a person is guilty of aiding, abetting or counselling an offence under the Sexual Offences Act 2003 Pt 1 (ss 1-79) (as amended): s 73(3).

2 For the meaning of 'sexual' see PARA 162 ante.

3 Sexual Offences Act 2003 s 73(1)(a).

4 Ibid s 73(1)(b).

5 Ibid s 73(1)(c).

6 Ibid s 73(1)(d).

7 Ie an offence under ibid s 5 (see PARA 166 post): s 73(2)(a).

8 Ie an offence under ibid s 6 (see PARA 168 post): s 73(2)(a).

9 Ie an offence under ibid s 7 (see PARA 170 post): s 73(2)(a).

10 Ie an offence under ibid s 9 (see PARA 173 post): s 73(2)(b).

11 Ie an offence under ibid s 13 (see PARA 177 post).

12 Ie an offence under ibid s 9 (see PARA 173 post).

13 Ibid s 73(2)(c).

- 14    le an offence under ibid s 16 (see PARA 180 post): s 73(2)(d).
- 15    le an offence under ibid s 25 (see PARA 191 post): s 73(2)(d).
- 16    As to the meaning of 'mental disorder' see PARA 196 post.
- 17    le an offence under the Sexual Offences Act 2003 s 30 (see PARA 197 post): s 73(2)(d).
- 18    le an offence under ibid s 34 (see PARA 202 post): s 73(2)(d).
- 19    For the meaning of 'care worker' see PARA 211 post.
- 20    le an offence under the Sexual Offences Act 2003 s 38 (see PARA 207 post): s 73(2)(d).

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## **(2) NON-CONSENSUAL SEXUAL OFFENCES**

### **(i) Offences of Rape**

#### **165. Rape.**

A person ('A') who intentionally penetrates<sup>1</sup>, with his penis<sup>2</sup>, the vagina<sup>3</sup>, anus or mouth of a person ('B')<sup>4</sup> commits an offence if that person does not consent<sup>5</sup> to the penetration<sup>6</sup> and if he does not reasonably believe<sup>7</sup> that the person consents to it<sup>8</sup>. A person guilty of this offence is liable on conviction on indictment to imprisonment for life<sup>9</sup>.

1 For the meaning of 'penetration' see PARA 162 note 3 ante.

2 As to references to parts of the body see PARA 163 note 3 ante.

3 As to the meaning of 'vagina' see PARA 163 note 3 ante.

4 Sexual Offences Act 2003 s 1(1)(a).

5 As to consent, and the evidential and conclusive presumptions applicable in rape cases, see PARA 163 ante.

6 Sexual Offences Act 2003 s 1(1)(b).

7 Whether a belief in consent is reasonable is to be determined having regard to all the circumstances, including any steps the defendant has taken to ascertain whether the victim consents: *ibid* s 1(2). As to the evidential and conclusive presumptions that the defendant did not reasonably believe that the complainant consented see PARA 163 ante.

8 *Ibid* s 1(1)(c). This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents): see s 63B(2)(a) (as added); and PARA 474 post.

9 Sexual Offences Act 2003 s 1(4). For sentencing guidelines see *R v Millberry* [2002] EWCA Crim 2891, [2003] 2 All ER 939, [2003] 1 Cr App Rep 396; *R v Garvey, A-G's Reference (No 104 of 2004)* [2004] EWCA Crim 2672, [2005] 1 Cr App Rep (S) 666; *R v Ismail* [2005] EWCA Crim 397, [2005] Crim LR 491; *R v Best* [2006] EWCA Crim 330, [2006] All ER (D) 134 (Jan); *R v Ertogul* [2006] All ER (D) 250 (Jan), CA; *R v B* [2006] All ER (D) 52 (Feb), CA; *A-G's Reference (No 49 of 2006)*; *R v Johnson* [2006] All ER (D) 197 (Jul). It should be routine to obtain a victim impact statement in such cases, particularly where the victim is as young as 16: *R v Ismail* *supra*.

### **UPDATE**

#### **165 Rape**

NOTE 9--See also *R v Lloyd* [2007] EWCA Crim 590, [2007] All ER (D) 461 (Mar).

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### **166. Rape of a child under 13.**

A person commits an offence if he intentionally penetrates<sup>1</sup>, with his penis<sup>2</sup>, the vagina<sup>3</sup>, anus or mouth of a person<sup>4</sup> who is under 13<sup>5</sup>, and he is liable on conviction on indictment to imprisonment for life<sup>6</sup>. A person may not, however, be guilty of aiding, abetting or counselling the commission of this offence if he acts for the purpose of protecting the child in question<sup>7</sup>.

1 For the meaning of 'penetration' see PARA 162 note 3 ante.

2 As to references to parts of the body see PARA 163 note 3 ante.

3 As to the meaning of 'vagina' see PARA 163 note 3 ante.

4 Sexual Offences Act 2003 s 5(1)(a).

5 Ibid s 5(1)(b). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243. Whether or not the other person consents to the penetration is irrelevant, since a child under 13 is legally incapable of giving a legally significant consent; moreover, where it transpires that the sexual activity was, or should be treated as having been, consensual, there is no need to substitute an alternative charge of breach of the Sexual Offences Act 2003 s 13 (see PARA 177 post) (see *R v G* [2006] EWCA Crim 821, [2006] All ER (D) 185 (Apr)).

6 Sexual Offences Act 2003 s 5(2). For sentencing guidance see *R v Corran* [2005] EWCA Crim 192, [2005] Crim LR 404; *R v D* [2006] EWCA Crim 111, [2006] All ER (D) 92 (Jan). As to the compatibility of these provisions with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence) see *R v G* [2006] EWCA Crim 821, [2006] All ER (D) 185 (Apr); and PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

7 See the Sexual Offences Act 2003 s 73; and PARA 164 ante.

### **UPDATE**

### **166 Rape of a child under 13**

NOTE 6--*Corran*, cited, approved: *A-G's Reference (No 83 of 2007)*; *R v Fenn*; *A-G's Reference (No 74 of 2007)*; *R v Foster* [2007] EWCA Crim 2550, [2008] 1 Cr App Rep (S) 640, [2007] All ER (D) 167 (Oct). *R v G*, cited, affirmed: [2008] UKHL 37, [2008] 3 All ER 1071.

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## **(ii) Assault**

### **167. Assault by penetration.**

A person ('A') who intentionally penetrates<sup>1</sup>, with a part of his body or anything else<sup>2</sup>, the vagina<sup>3</sup> or anus of another person ('B') commits an offence<sup>4</sup> if the penetration is sexual<sup>5</sup>, B does not consent<sup>6</sup> to it<sup>7</sup>, and A does not reasonably believe<sup>8</sup> that B consents to it<sup>9</sup>. A person guilty of such an offence is liable, on conviction on indictment, to imprisonment for life<sup>10</sup>.

1 For the meaning of 'penetration' see PARA 162 note 3 ante.

2 As to references to parts of the body see PARA 163 note 3 ante.

3 As to the meaning of 'vagina' see PARA 163 note 3 ante.

4 Sexual Offences Act 2003 s 2(1)(a).

5 Ibid s 2(1)(b). For the meaning of 'sexual' see PARA 162 ante.

6 As to consent, and the evidential and conclusive presumptions applicable in sexual assault cases, see PARA 163 ante.

7 Sexual Offences Act 2003 s 2(1)(c).

8 Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the defendant has taken to ascertain whether the person consents: *ibid* s 2(2). As to the evidential and conclusive presumptions that the defendant did not reasonably believe that the complainant consented see PARA 163 ante.

9 Ibid s 2(1)(d).

10 Ibid s 2(4). For sentencing guidelines see *R v Garvey, A-G's Reference (No 104 of 2004)* [2004] EWCA Crim 2672, [2005] 1 Cr App Rep (S) 666; *R v Holness, A-G's Reference (No 128 of 2004)* [2004] EWCA Crim 3066, [2005] 2 Cr App Rep (S) 92.

## **UPDATE**

### **167 Assault by penetration**

NOTE 10--*Garvey*, cited, considered in *A-G's Reference (No 79 of 2006)*; *R v Whitta* [2006] EWCA Crim 2626, [2006] All ER (D) 383 (Oct) (mistaken identity not a relevant circumstance in assessing whether offender reasonably believed consent given).

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**168. Assault of a child under 13 by penetration.**

A person commits an offence if he intentionally penetrates<sup>1</sup>, with a part of his body or anything else<sup>2</sup>, the vagina<sup>3</sup> or anus of a person<sup>4</sup> who is under 13<sup>5</sup>, and the penetration is sexual<sup>5</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for life<sup>6</sup>. A person may not, however, be guilty of aiding, abetting or counselling the commission of this offence if he acts for the purpose of protecting the child in question<sup>7</sup>.

1 For the meaning of 'penetration' see PARA 162 note 3 ante.

2 As to references to parts of the body see PARA 163 note 3 ante.

3 As to the meaning of 'vagina' see PARA 163 note 3 ante.

4 Sexual Offences Act 2003 s 6(1)(a).

5 Ibid s 6(1)(c). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243. Whether or not the other person consents to the penetration is irrelevant, since a child under 13 is legally incapable of giving a legally significant consent.

6 Sexual Offences Act 2003 s 6(2).

7 See ibid s 73; and PARA 164 ante.



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### **169. Sexual assault.**

A person ('A') who intentionally touches<sup>1</sup> another person ('B') commits an offence<sup>2</sup> if the touching is sexual<sup>3</sup>, B does not consent<sup>4</sup> to it<sup>5</sup>, and A does not reasonably believe<sup>6</sup> that B consents to it<sup>7</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years<sup>8</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup>, to a fine not exceeding the statutory maximum<sup>10</sup>, or to both<sup>11</sup>.

1 As to the meaning of 'touching' see PARA 162 note 4 ante.

2 Sexual Offences Act 2003 s 3(1)(a).

3 Ibid s 3(1)(b). For the meaning of 'sexual' see PARA 162 ante.

4 As to consent, and the evidential and conclusive presumptions applicable in sexual assault cases, see PARA 163 ante.

5 Sexual Offences Act 2003 s 3(1)(c).

6 Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the defendant has taken to ascertain whether the person consents: *ibid* s 3(2). As to the evidential and conclusive presumptions that the defendant did not reasonably believe that the complainant consented see PARA 163 ante.

7 Ibid s 3(1)(d).

8 Ibid s 3(4)(b).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

11 Sexual Offences Act 2003 s 3(4)(a).

### **UPDATE**

#### **169 Sexual assault**

NOTE 1--Voluntary intoxication cannot be relied on to negate the basic intent required to make out an offence of sexual assault: *R v Heard* [2007] EWCA Crim 125, [2008] QB 43, [2007] 3 All ER 306.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/3. SEXUAL OFFENCES/(2) NON-CONSENSUAL SEXUAL OFFENCES/(ii) Assault/170. Sexual assault of a child under 13.

### **170. Sexual assault of a child under 13.**

A person commits an offence if he intentionally touches<sup>1</sup> a person<sup>2</sup> who is under 13<sup>3</sup> and the touching is sexual<sup>4</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>5</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup>, to a fine not exceeding the statutory maximum<sup>7</sup>, or to both<sup>8</sup>. A person may not, however, be guilty of aiding, abetting or counselling the commission of this offence if he acts for the purpose of protecting the child in question<sup>9</sup>.

1 As to the meaning of 'touching' see PARA 162 note 4 ante.

2 Sexual Offences Act 2003 s 7(1)(a).

3 Ibid s 7(1)(c). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243. Whether or not the other person consents to the touching is irrelevant, since a child under 13 is legally incapable of giving a legally significant consent.

4 Sexual Offences Act 2003 s 7(1)(b). For the meaning of 'sexual' see PARA 162 ante.

5 Ibid s 7(2)(b). For sentencing guidance see *R v Corran* [2005] EWCA Crim 192, [2005] Crim LR 404.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

8 Sexual Offences Act 2003 s 7(2)(a).

9 See ibid s 73; and PARA 164 ante.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/3. SEXUAL OFFENCES/(2) NON-CONSENSUAL SEXUAL OFFENCES/(iii) Other Non-consensual Offences/171. Causing a person to engage in sexual activity without consent.

### **(iii) Other Non-consensual Offences**

#### **171. Causing a person to engage in sexual activity without consent.**

A person who intentionally causes<sup>1</sup> another person to engage in an activity which is sexual<sup>2</sup> commits an offence<sup>3</sup> if that other person does not consent<sup>4</sup> to engaging in the activity<sup>5</sup> and the first person does not reasonably believe<sup>6</sup> that the second person consents to it<sup>7</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years<sup>8</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup>, to a fine not exceeding the statutory maximum<sup>10</sup>, or to both<sup>11</sup>. However, if the activity caused involved either penetration<sup>12</sup> of the second person's anus or vagina<sup>13</sup>, penetration of that person's mouth with any person's penis<sup>14</sup>, penetration of any person's anus or vagina with a part of the second person's body or by the second person with anything else<sup>15</sup>, or penetration of any person's mouth with the second person's penis<sup>16</sup>, the offence is punishable on conviction on indictment by imprisonment for life<sup>17</sup>.

1 A person ('A') causes another ('B') to engage in sexual activity without consent if B engages in the activity in consequence of A exerting a capacity which he possesses to control or influence B's acts; it is not enough simply to prove that some antecedent event or condition produced by A contributed to the determination of the will of B to engage in the sexual activity, or that in producing that antecedent event or condition A was actuated by desire that B should engage in it: *O'Sullivan v Truth and Sportsman Ltd* (1957) 96 CLR 220, Aust HC (approved in *A-G of Hong Kong v Tse Hung Lit* [1986] AC 876, PC); *McLeod (or Houston) v Buchanan* [1940] 2 All ER 179 at 187, HL, per Lord Wright; *Shave v Rosner* [1954] 2 QB 113, [1954] 2 All ER 280, DC; *Shulton (Great Britain) Ltd v Slough Borough Council* [1967] 2 QB 471, [1967] 2 All ER 1327, DC. Cause requires proof of an act: *Price v Cromack* [1975] 2 All ER 113, [1975] 1 WLR 988, DC.

2 Sexual Offences Act 2003 s 4(1)(b). For the meaning of 'sexual' see PARA 162 ante.

3 Ibid s 4(1)(a).

4 As to consent, and the evidential and conclusive presumptions applicable in cases concerning causing a person to engage in sexual activity without consent, see PARA 163 ante.

5 Sexual Offences Act 2003 s 4(1)(c).

6 Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps the defendant has taken to ascertain whether the person consents: *ibid* s 4(2). As to the evidential and conclusive presumptions that the defendant did not reasonably believe that the complainant consented see PARA 163 ante.

7 Ibid s 4(1)(d).

8 Ibid s 4(5)(b).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

11 Sexual Offences Act 2003 s 4(5)(a).

12 For the meaning of 'penetration' see PARA 162 note 3 ante.

13 Sexual Offences Act 2003 s 4(4)(a). As to the meaning of 'vagina', and references to parts of the body generally, see PARA 163 note 3 ante.

14 Ibid s 4(4)(b).

15 Ibid s 4(4)(c).

16 Ibid s 4(4)(d).

17 Ibid s 4(4).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/3. SEXUAL OFFENCES/(2) NON-CONSENSUAL SEXUAL OFFENCES/(iii) Other Non-consensual Offences/172. Causing or inciting a child under 13 to engage in sexual activity.

## **172. Causing or inciting a child under 13 to engage in sexual activity.**

A person commits an offence if he intentionally causes or incites<sup>1</sup> a person aged under 13 ('B')<sup>2</sup> to engage in an activity<sup>3</sup> which is sexual<sup>4</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>5</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup>, to a fine not exceeding the statutory maximum<sup>7</sup>, or to both<sup>8</sup>. However, if the activity caused involved either penetration<sup>9</sup> of B's anus or vagina<sup>10</sup>, penetration of B's mouth with a person's penis<sup>11</sup>, penetration of any person's anus or vagina with a part of B's body or by B with anything else<sup>12</sup>, or penetration of a person's mouth with B's penis<sup>13</sup>, the offence is punishable on conviction on indictment by imprisonment for life<sup>14</sup>.

1 As to the meaning of 'causes' see PARA 171 note 1 ante; and as to incitement see PARA 65 ante.

2 Sexual Offences Act 2003 s 8(1)(c). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243. Whether or not the other person consents is irrelevant, since a child under 13 is legally incapable of giving a legally significant consent.

3 Sexual Offences Act 2003 s 8(1)(a).

4 Ibid s 8(1)(b). For the meaning of 'sexual' see PARA 162 ante. Since the essence of this offence is incitement, it is not a necessary ingredient for the offence, and the prosecution does not have to prove, that the defendant intended that the incited activity should take place: see *R v Walker* [2006] All ER (D) 08 (Jun), CA.

5 Sexual Offences Act 2003 s 8(3)(b). For sentencing guidance see *R v Corran* [2005] EWCA Crim 192, [2005] Crim LR 404.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

8 Sexual Offences Act 2003 s 8(3)(a).

9 For the meaning of 'penetration' see PARA 162 note 3 ante.

10 Sexual Offences Act 2003 s 8(2)(a). As to the meaning of 'vagina', and references to parts of the body generally, see PARA 163 note 3 ante.

11 Ibid s 8(2)(b).

12 Ibid s 8(2)(c).

13 Ibid s 8(2)(d).

14 Ibid s 8(2).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/3. SEXUAL OFFENCES/(3) CHILD SEX OFFENCES/173. Sexual activity with a child.

### **(3) CHILD SEX OFFENCES**

#### **173. Sexual activity with a child.**

A person ('A') aged 18 or over commits an offence if:

- 79 (1) he intentionally touches<sup>1</sup> another person ('B')<sup>2</sup>;
- 80 (2) the touching is sexual<sup>3</sup>; and
- 81 (3) either B is aged under 16<sup>4</sup> and A does not reasonably believe that he is aged 16 or over<sup>5</sup>, or B is aged under 13<sup>6</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years if the touching involved:

- 82 (a) penetration<sup>7</sup> of B's anus or vagina<sup>8</sup> with a part of A's body or anything else<sup>9</sup>;
- 83 (b) penetration of B's mouth with A's penis<sup>10</sup>;
- 84 (c) penetration of A's anus or vagina with a part of B's body or anything else<sup>11</sup>; or
- 85 (d) penetration of A's mouth with B's penis<sup>12</sup>.

In other cases a person guilty of the offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>13</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>14</sup>, to a fine not exceeding the statutory maximum<sup>15</sup>, or to both<sup>16</sup>.

It is also an offence to arrange or facilitate the commission of this offence<sup>17</sup>. A person may not, however, be guilty of aiding, abetting or counselling the commission of this offence if he acts for the purpose of protecting the child in question<sup>18</sup>.

1 As to the meaning of 'touches' see PARA 162 note 4 ante.

2 Sexual Offences Act 2003 s 9(1)(a).

3 Ibid s 9(1)(b). For the meaning of 'sexual' see PARA 162 ante.

4 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

5 Sexual Offences Act 2003 s 9(1)(c)(i).

6 Ibid s 9(1)(c)(ii).

7 For the meaning of 'penetration' see PARA 162 note 3 ante.

8 As to the meaning of 'vagina', and references to parts of the body generally, see PARA 163 note 3 ante.

9 Sexual Offences Act 2003 s 9(2)(a).

10 Ibid s 9(2)(b).

- 11 Ibid s 9(2)(c).
- 12 Ibid s 9(2)(d).
- 13 Ibid s 9(3)(b). For sentencing guidance see *R v Corran* [2005] EWCA Crim 192, [2005] Crim LR 404.
- 14 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.
- 15 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.
- 16 Sexual Offences Act 2003 s 9(3)(a).
- 17 See *ibid* s 14; and PARA 178 post.
- 18 See *ibid* s 73; and PARA 164 ante.

## UPDATE

### 173 Sexual activity with a child

NOTES 13-16--Where the defendant has not corrupted a child, a non custodial sentence does not meet the need to protect children not only from adult offenders but from themselves: *A-G's Reference (No 29 of 2008) (Jon Peter Dixon)* [2008] EWCA Crim 2026, [2009] 1 Cr App Rep (D) 515. When sentencing an offender for sexual activity with a child, a distinction should not be made on the basis of the victim's gender: *A-G's Reference (No 67 of 2008) (Sharon Edwards)* [2009] EWCA Crim 132, [2009] 2 Cr App Rep (S) 428.

NOTE 13--See also *R v Wilson* [2007] EWCA Crim 509, [2007] 2 Cr App Rep (S) 58.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/3. SEXUAL OFFENCES/(3) CHILD SEX OFFENCES/174. Causing or inciting a child to engage in sexual activity.

**174. Causing or inciting a child to engage in sexual activity.**

A person ('A') aged 18 or over commits an offence if:

- 86 (1) he intentionally causes or incites<sup>1</sup> another person ('B') to engage in an activity<sup>2</sup>;
- 87 (2) the activity is sexual<sup>3</sup>; and
- 88 (3) either B is aged under 16<sup>4</sup> and A does not reasonably believe that B is aged 16 or over<sup>5</sup>, or B is aged under 13<sup>6</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years if the activity caused or incited involved:

- 89 (a) penetration<sup>7</sup> of B's anus or vagina<sup>8</sup> with a part of A's body or anything else<sup>9</sup>;
- 90 (b) penetration of B's mouth with A's penis<sup>10</sup>;
- 91 (c) penetration of A's anus or vagina with a part of B's body or anything else<sup>11</sup>; or
- 92 (d) penetration of A's mouth with B's penis<sup>12</sup>.

In other cases a person guilty of the offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>13</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>14</sup>, to a fine not exceeding the statutory maximum<sup>15</sup>, or to both<sup>16</sup>.

It is also an offence to arrange or facilitate the commission of this offence<sup>17</sup>.

1 As to the meaning of 'causes' see PARA 171 note 1 ante; and as to incitement see PARA 65 ante.

2 Sexual Offences Act 2003 s 10(1)(a).

3 Ibid s 10(1)(b). For the meaning of 'sexual' see PARA 162 ante.

4 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

5 Sexual Offences Act 2003 s 10(1)(c)(i).

6 Ibid s 10(1)(c)(ii).

7 For the meaning of 'penetration' see PARA 162 note 3 ante.

8 As to the meaning of 'vagina', and references to parts of the body generally, see PARA 163 note 3 ante.

9 Sexual Offences Act 2003 s 10(2)(a).

10 Ibid s 10(2)(b).

11 Ibid s 10(2)(c).



- 12 Ibid s 10(2)(d).
- 13 Ibid s 10(3)(b). For sentencing guidance see *R v Corran* [2005] EWCA Crim 192, [2005] Crim LR 404.
- 14 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.
- 15 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.
- 16 Sexual Offences Act 2003 s 10(3)(a).
- 17 See *ibid* s 14; and PARA 178 post.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/3. SEXUAL OFFENCES/(3) CHILD SEX OFFENCES/175. Engaging in sexual activity in the presence of a child.

### **175. Engaging in sexual activity in the presence of a child.**

A person ('A') aged 18 or over commits an offence if:

- 93 (1) he intentionally engages in an activity<sup>1</sup>;
- 94 (2) the activity is sexual<sup>2</sup>;
- 95 (3) for the purpose of obtaining sexual gratification he engages in it when another person ('B') is present or is in a place from which the activity can be observed<sup>3</sup> and knowing or believing that B is aware, or intending that he should be aware, that he is engaging in it<sup>4</sup>; and
- 96 (4) either B is aged under 16<sup>5</sup> and A does not reasonably believe that A is aged 16 or over<sup>6</sup>, or B is aged under 13<sup>7</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding 10 years<sup>8</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup>, to a fine not exceeding the statutory maximum<sup>10</sup>, or to both<sup>11</sup>.

It is also an offence to arrange or facilitate the commission of this offence<sup>12</sup>.

1 Sexual Offences Act 2003 s 11(1)(a).

2 Ibid s 11(1)(b). For the meaning of 'sexual' see PARA 162 ante.

3 Ibid s 11(1)(c)(i). References to observation are references to observation whether direct or by looking at an image (s 79(1), (7)); and 'image' means a moving or still image and includes an image produced by any means and, where the context permits, a three-dimensional image (s 79(4)).

4 Ibid s 11(1)(c)(ii).

5 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

6 Sexual Offences Act 2003 s 11(1)(d)(i).

7 Ibid s 11(1)(d)(ii).

8 Ibid s 11(2)(b). For sentencing guidance see *R v Corran* [2005] EWCA Crim 192, [2005] Crim LR 404.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

11 Sexual Offences Act 2003 s 11(2)(a).

12 See ibid s 14; and PARA 178 post.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/3. SEXUAL OFFENCES/(3) CHILD SEX OFFENCES/176. Causing a child to watch a sexual act.

### **176. Causing a child to watch a sexual act.**

A person ('A') aged 18 or over commits an offence if:

- 97 (1) for the purpose of obtaining sexual gratification<sup>1</sup> he intentionally causes<sup>2</sup> another person ('B') to watch a third person engaging in an activity, or to look at an image<sup>3</sup> of any person engaging in an activity<sup>4</sup>;
- 98 (2) the activity is sexual<sup>5</sup>; and
- 99 (3) either B is aged under 16<sup>6</sup> and A does not reasonably believe that B is 16 or over<sup>7</sup>, or B is aged under 13<sup>8</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding 10 years<sup>9</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup>, to a fine not exceeding the statutory maximum<sup>11</sup>, or to both<sup>12</sup>.

It is also an offence to arrange or facilitate the commission of this offence<sup>13</sup>.

1 'Sexual gratification' is not defined for these purposes and might take any of forms which sexual gratification can take (see *R v Abdullahi* [2006] All ER (D) 334 (Jul), CA; and cf the definition of 'sexual' in PARA 162 ante); moreover the sexual gratification intended to be obtained need not be contemporaneous or simultaneous to the display of the relevant material: a display which envisages the obtaining of further gratification, for example in the event of obtaining a sexual act with the child, may be caught by these provisions (*R v Abdullahi* supra).

2 As to the meaning of 'causes' see PARA 171 note 1 ante.

3 For the meaning of 'image' see PARA 175 note 3 ante. References to an image of a person include references to an image of an imaginary person: Sexual Offences Act 2003 s 79(1), (5).

4 Ibid s 12(1)(a).

5 Ibid s 12(1)(b). For the meaning of 'sexual' see PARA 162 ante.

6 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

7 Sexual Offences Act 2003 ss 12(1)(c)(i).

8 Ibid s 12(1)(c)(ii).

9 Ibid s 12(2)(b). For sentencing guidance see *R v Corran* [2005] EWCA Crim 192, [2005] Crim LR 404.

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

11 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

12 Sexual Offences Act 2003 s 12(2)(a).

13 See ibid s 14; and PARA 178 post.



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### **177. Child sex offences committed by children and young persons.**

A person aged under 18<sup>1</sup> commits an offence if he does anything which would comprise the offence of sexual activity with a child<sup>2</sup>, causing or inciting a child to engage in sexual activity<sup>3</sup>, engaging in sexual activity in the presence of a child<sup>4</sup> or causing a child to watch a sexual act<sup>5</sup>, if he were aged 18<sup>6</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years<sup>7</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>8</sup>, to a fine not exceeding the statutory maximum<sup>9</sup>, or to both<sup>10</sup>.

It is also an offence to arrange or facilitate the commission of this offence<sup>11</sup>. A person may not, however, be guilty of aiding, abetting or counselling the commission of this offence if he acts for the purpose of protecting the child in question<sup>12</sup>.

1 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

2 Ie an offence under the Sexual Offences Act 2003 s 9 (see PARA 173 ante).

3 Ie an offence under ibid s 10 (see PARA 174 ante).

4 Ie an offence under ibid s 11 (see PARA 175 ante).

5 Ie an offence under ibid s 12 (see PARA 176 ante).

6 Ibid s 13(1).

7 Ibid s 13(2)(b). For sentencing guidance see *R v Corran* [2005] EWCA Crim 192, [2005] Crim LR 404.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

10 Sexual Offences Act 2003 s 13(2)(a).

11 See ibid s 14; and PARA 178 post.

12 See ibid s 73; and PARA 164 ante.

### **UPDATE**

### **177 Child sex offences committed by children and young persons**

NOTES 4-7--See *R v B* [2008] All ER (D) 62 (Apr), CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/3. SEXUAL OFFENCES/(3) CHILD SEX OFFENCES/178. Arranging or facilitating the commission of a child sex offence.

### **178. Arranging or facilitating the commission of a child sex offence.**

A person commits an offence if he intentionally arranges or facilitates something that he intends to do, intends another person to do, or believes that another person will do, in any part of the world<sup>1</sup>, where doing it will involve either sexual activity with a child<sup>2</sup>, causing or inciting a child to engage in sexual activity<sup>3</sup>, engaging in sexual activity in the presence of a child<sup>4</sup>, or causing a child to watch a sexual act<sup>5</sup>. There is, however, an exception which is aimed at the promotion of the protection of vulnerable persons: a person does not commit this offence if he intentionally arranges or facilitates something that he believes another person will do, but that he does not intend to do or intend another person to do<sup>6</sup>, where any of the offences referred to above which the doing of that thing would involve would be an offence against a child for whose protection he acts<sup>7</sup>.

A person guilty of the offence of arranging or facilitating the commission of a child sex offence<sup>8</sup> is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>9</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup>, to a fine not exceeding the statutory maximum<sup>11</sup>, or to both<sup>12</sup>.

1 Sexual Offences Act 2003 s 14(1)(a).

2 Ie the commission of an offence under *ibid* s 9 (see PARA 173 ante); s 14(1)(b). For the meaning of 'sexual' see PARA 162 ante.

3 Ie the commission of an offence under *ibid* s 10 (see PARA 174 ante).

4 Ie the commission of an offence under *ibid* s 11 (see PARA 175 ante).

5 Ie the commission of an offence under *ibid* s 12 (see PARA 176 ante).

6 *Ibid* s 14(2)(a).

7 *Ibid* s 14(2)(b). For these purposes, a person acts for the protection of a child if he acts for the purpose of protecting the child from sexually transmitted infection (s 14(3)(a)), protecting the physical safety of the child (s 14(3)(b)), preventing the child from becoming pregnant (s 14(3)(c)), or promoting the child's emotional well-being by the giving of advice (s 14(3)(d)), and not for the purpose of obtaining sexual gratification or for the purpose of causing or encouraging the activity constituting any of the offences referred to in the text or the child's participation in any of them (s 14(3)).

8 Ie an offence under *ibid* s 14(1) (see the text and notes 1-5 supra).

9 *Ibid* s 14(4)(b).

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

11 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

12 Sexual Offences Act 2003 s 14(4)(a). An offence under these provisions is also a 'lifestyle offence' in respect of which the court may make a financial reporting order: see the Proceeds of Crime Act 2002 s 75, Sch 2 para 8(2)(a) (as substituted); the Serious Organised Crime and Police Act 2005 s 76(3)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 476.

## **UPDATE**

### **178 Arranging or facilitating the commission of a child sex offence**

NOTE 1--The offence under the 2003 Act s 14 is something more than, and wider than, a criminal attempt under the Criminal Attempts Act 1981 (see PARA 79 et seq); it requires no agreement or arrangement, nor the consent or acquiescence of anyone else: *R v Robson* [2008] EWCA Crim 619, [2009] 1 WLR 713 (there can be an attempt to commit such an offence). See also *R v Robson* [2009] All ER (D) 252 (Jun), CA.

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### **179. Meeting a child following sexual grooming etc.**

A person ('A') aged 18 or over<sup>1</sup> commits an offence if having met or communicated<sup>2</sup> on at least two earlier occasions with a person ('B') who is aged under 16<sup>3</sup> and is not reasonably believed by A to be aged 16 or over<sup>4</sup>, he intentionally meets B<sup>5</sup> or travels with the intention of meeting him in any part of the world<sup>6</sup> with the intention of doing anything to or in respect of him, during or after the meeting and in any part of the world, which if done will involve the commission by A of a sexual offence<sup>7</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years<sup>8</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup>, to a fine not exceeding the statutory maximum<sup>10</sup>, or to both<sup>11</sup>.

1 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

2 For these purposes the reference to A having met or communicated with B is a reference to A having met B in any part of the world or having communicated with him by any means from, to or in any part of the world: Sexual Offences Act 2003 s 15(2)(a).

3 Ibid s 15(1)(c).

4 Ibid s 15(1)(d).

5 Ibid s 15(1)(a)(i).

6 Ibid s 15(1)(a)(ii).

7 Ibid s 15(1)(b). The applicable sexual offences for these purposes (referred to as 'relevant offences') are offences under Pt 1 (ss 1-79) (as amended) (s 15(2)(b)(i)), corresponding offences under Northern Irish law (s 15(2)(b)(ii), Sch 3 paras 61-92), and also anything done outside England and Wales and Northern Ireland which is not such an offence but would be an offence under Pt 1 (as amended) if done in England and Wales (s 15(2)(b)(iii)).

8 Ibid s 15(4)(b).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

11 Sexual Offences Act 2003 s 15(4)(a).

### **UPDATE**

### **179 Meeting a child following sexual grooming etc**

TEXT AND NOTES 5-7--Sexual Offences Act 2003 s 15(1)(a), (b) substituted: Criminal Justice and Immigration Act 2008 Sch 15 para 1.



NOTES 8-11--Where the defendant has not corrupted a child, a non custodial sentence does not meet the need to protect children not only from adult offenders but from themselves: *A-G's Reference (No 29 of 2008) (Jon Peter Dixon)* [2008] EWCA Crim 2026, [2009] 1 Cr App Rep (D) 515. See also *R v Barnett* [2007] EWCA Crim 1625, [2008] 1 Cr App Rep (S) 354, [2007] All ER (D) 345 (Jun) (30 months' imprisonment excessive where defendant of previous good character and had been caught by sting operation).

NOTE 8--See *R v Wilson* [2007] EWCA Crim 509, [2007] 2 Cr App Rep (S) 58.

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## **(4) ABUSE OF POSITION OF TRUST**

### **180. Sexual activity with a child.**

Provided that he has any necessary mens rea<sup>1</sup>, a person ('A') aged 18 or over<sup>2</sup> commits an offence<sup>3</sup> if:

- 100 (1) he intentionally touches<sup>3</sup> another person ('B')<sup>4</sup>;
- 101 (2) the touching is sexual<sup>5</sup>;
- 102 (3) A is in a position of trust in relation to B<sup>6</sup>; and
- 103 (4) B is under 18<sup>7</sup>.

1 See head (1) in the text; and PARA 185 post.

2 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

3 As to the punishment of offences involving abuse of a position of trust see PARA 187 post. A person may not be guilty of aiding, abetting or counselling the commission of this offence if he acts for the purpose of protecting the child in question: see the Sexual Offences Act 2003 s 73; and PARA 164 ante.

Anything which, if done in England and Wales or Northern Ireland, would constitute an offence under these provisions also constitutes that offence if done in Scotland: s 20.

3 As to the meaning of 'touches' see PARA 162 note 4 ante.

4 Sexual Offences Act 2003 s 16(1)(a).

5 Ibid s 16(1)(b). For the meaning of 'sexual' see PARA 162 ante.

6 Ibid s 16(1)(c). As to when a person is in a position of trust see PARA 184 post. There are statutory exceptions to this offence in respect of spouses and civil partners and for pre-existing sexual relationships: see PARA 186 post.

7 Ibid s 16(1)(e)(i).

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**181. Causing or inciting a child to engage in sexual activity.**

Provided that he has any necessary mens rea<sup>1</sup>, a person ('A') aged 18 or over<sup>2</sup> commits an offence<sup>3</sup> if:

- 104 (1) he intentionally causes or incites<sup>4</sup> another person ('B') to engage in an activity<sup>5</sup>;
- 105 (2) the activity is sexual<sup>6</sup>;
- 106 (3) A is in a position of trust in relation to B<sup>7</sup>; and
- 107 (4) B is under 18<sup>8</sup>.

1 See head (1) in the text; and PARA 185 post.

2 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

3 As to the punishment of offences involving abuse of a position of trust see PARA 187 post. There are statutory exceptions to this offence in respect of spouses and civil partners and for pre-existing sexual relationships: see PARA 186 post.

Anything which, if done in England and Wales or Northern Ireland, would constitute an offence under these provisions also constitutes that offence if done in Scotland: Sexual Offences Act 2003 s 20.

4 As to the meaning of 'causes' see PARA 171 note 1 ante; and as to incitement see PARA 65 ante.

5 Sexual Offences Act 2003 s 17(1)(a).

6 Ibid s 17(1)(b). For the meaning of 'sexual' see PARA 162 ante.

7 Ibid s 17(1)(c). As to when a person is in a position of trust see PARA 184 post.

8 Ibid s 17(1)(e)(i).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/3. SEXUAL OFFENCES/(4) ABUSE OF POSITION OF TRUST/182. Sexual activity in the presence of a child.

## **182. Sexual activity in the presence of a child.**

Provided that he has any necessary mens rea<sup>1</sup>, a person ('A') aged 18 or over<sup>2</sup> commits an offence<sup>3</sup> if:

- 108 (1) he intentionally engages in an activity<sup>4</sup>;
- 109 (2) the activity is sexual<sup>5</sup>;
- 110 (3) for the purpose of obtaining sexual gratification he engages in it when another person ('B') is present or is in a place from which A can be observed<sup>6</sup> and knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it<sup>7</sup>;
- 111 (4) A is in a position of trust in relation to B<sup>8</sup>; and
- 112 (5) B is under 18<sup>9</sup>.

1 See head (1) in the text; and PARA 185 post.

2 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

3 As to the punishment of offences involving abuse of a position of trust see PARA 187 post. There are statutory exceptions to this offence in respect of spouses and civil partners and for pre-existing sexual relationships: see PARA 186 post.

Anything which, if done in England and Wales or Northern Ireland, would constitute an offence under these provisions also constitutes that offence if done in Scotland: Sexual Offences Act 2003 s 20.

4 Ibid s 18(1)(a).

5 Ibid s 18(1)(b). For the meaning of 'sexual' see PARA 162 ante.

6 Ibid s 18(1)(c)(i). As to references to 'observation' see PARA 175 note 3 ante.

7 Ibid s 18(1)(c)(ii).

8 Ibid s 18(1)(d). As to when a person is in a position of trust see PARA 184 post.

9 Ibid s 18(1)(f)(i).

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### **183. Causing a child to watch a sexual act.**

Provided that he has any necessary mens rea<sup>1</sup>, a person ('A') aged 18 or over<sup>2</sup> commits an offence<sup>3</sup> if:

- 113 (1) for the purpose of obtaining sexual gratification, he intentionally causes another person ('B') to watch a third person engaging in an activity, or to look at an image<sup>4</sup> of any person engaging in an activity<sup>5</sup>;
- 114 (2) the activity is sexual<sup>6</sup>;
- 115 (3) A is in a position of trust in relation to B<sup>7</sup>; and
- 116 (4) B is under 18<sup>8</sup>.

1 See head (1) in the text; and PARA 185 post.

2 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

3 As to the punishment of offences involving abuse of a position of trust see PARA 187 post. There are statutory exceptions to this offence in respect of spouses and civil partners and for pre-existing sexual relationships: see PARA 186 post.

Anything which, if done in England and Wales or Northern Ireland, would constitute an offence under these provisions also constitutes that offence if done in Scotland: Sexual Offences Act 2003 s 20.

4 For the meaning of 'image' see PARA 175 note 3 ante; and as to an image of a person see PARA 176 note 3 ante.

5 Sexual Offences Act 2003 s 19(1)(a).

6 Ibid s 19(1)(b). For the meaning of 'sexual' see PARA 162 ante.

7 Ibid s 19(1)(c). As to when a person is in a position of trust see PARA 184 post.

8 Ibid s 19(1)(e)(i).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/3. SEXUAL OFFENCES/(4) ABUSE OF POSITION OF TRUST/184. Position of trust.

#### 184. Position of trust.

For the purposes of the statutory offences involving abuse of a position of trust<sup>1</sup>, a person is in a position of trust in relation to another person if:

- 117 (1) he looks after persons aged under 18<sup>2</sup> who are detained in an institution by virtue of a court order or under an enactment, and that other person is so detained in that institution<sup>3</sup>;
- 118 (2) he looks after persons aged under 18 who are resident in a home or other place in which accommodation and maintenance are provided by an authority<sup>4</sup> or accommodation is provided by a voluntary organisation<sup>5</sup> and that other person is resident, and is so provided with accommodation and maintenance or accommodation, in that place<sup>6</sup>;
- 119 (3) he looks after persons aged under 18 who are accommodated and cared for in either a hospital<sup>7</sup>, an independent clinic<sup>8</sup>, a care home<sup>9</sup>, a community home<sup>10</sup>, a voluntary home<sup>11</sup>, a children's home<sup>12</sup>, or a home for the accommodation of children who are in need of particular facilities and services<sup>13</sup>, and that other person is accommodated and cared for in that institution<sup>14</sup>;
- 120 (4) he looks after persons aged under 18 who are receiving education at an educational institution and the other person is receiving, and he is not receiving, education at that institution<sup>15</sup>;
- 121 (5) he is appointed to be the other person's guardian under Northern Irish legislation<sup>16</sup>;
- 122 (6) he is engaged in the provision of careers services<sup>17</sup> or services to encourage, enable or assist effective participation by young persons in education or training<sup>18</sup> and, in that capacity, looks after the other person on an individual basis<sup>19</sup>;
- 123 (7) he regularly has unsupervised contact with the other person (whether face to face or by any other means) in the exercise of local authority functions<sup>20</sup> connected with the provision of accommodation for children (including accommodation for children in police protection or detention or on remand)<sup>21</sup>;
- 124 (8) as a person who is to report<sup>22</sup> to the court on matters relating to the welfare of the other person, he regularly has unsupervised contact with him (whether face to face or by any other means)<sup>23</sup>;
- 125 (9) he is a personal adviser appointed<sup>24</sup> for the other person and in that capacity looks after him on an individual basis<sup>25</sup>;
- 126 (10) he looks after the other person on an individual basis in the exercise of functions conferred<sup>26</sup> by virtue of a care order<sup>27</sup>, a supervision order<sup>28</sup> or an education supervision order<sup>29</sup> to which that other person is subject<sup>30</sup>;
- 127 (11) he is an officer of the Children and Family Court Advisory and Support Service<sup>31</sup> or a Welsh family proceedings officer<sup>32</sup> appointed<sup>33</sup> for the other person, or is appointed<sup>34</sup> a children's guardian of the other person, or is appointed<sup>35</sup> to be that person's guardian ad litem, and in that capacity regularly has unsupervised contact with him (whether face to face or by any other means)<sup>36</sup>;
- 128 (12) he looks after the other person on an individual basis in pursuance of requirements imposed on that person by or under an enactment on his release from detention for a criminal offence or by a court order made in criminal proceedings<sup>37</sup>; or

129 (13) any condition specified in an order<sup>38</sup> made by the Secretary of State is met<sup>39</sup>.

1     le sexual activity with a child (see the Sexual Offences Act 2003 s 16; and PARA 180 ante), causing or inciting a child to engage in sexual activity (see s 17; and PARA 181 ante), sexual activity in the presence of a child (see s 18; and PARA 182 ante) and causing a child to watch a sexual act (see s 19; and PARA 183 ante).

2     Subject to the provisions relating to the looking after of a person on an individual basis (see note 19 infra), a person looks after persons aged under 18 if he is regularly involved in caring for, training, supervising or being in sole charge of such persons: *ibid* s 22(1), (2). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

3     Sexual Offences Act 2003 s 21(1)(a), (2). For the additional mens rea required to be established where the existence or otherwise of such a position of trust is in issue see PARA 185 post.

4     le under the Children Act 1989 s 23(2) (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 877, 878) or corresponding Northern Ireland legislation: Sexual Offences Act 2003 s 21(3)(a). In relation to England and Wales, 'authority' means a local authority: s 22(5). As to the local authorities in England and Wales for these purposes see the Children Act 1989 s 105(1) (as amended); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 248.

5     le under the Children Act 1989 s 59(1) (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 975) or corresponding Northern Ireland legislation: Sexual Offences Act 2003 s 21(3)(b). As to voluntary organisation for these purposes see the Children Act 1989 s 105(1); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 248.

6     Sexual Offences Act 2003 s 21(3).

7     Ibid s 21(4)(a). In relation to England and Wales, 'hospital' means a hospital within the meaning given by the National Health Service Act 1977 s 128(1) (see HEALTH SERVICES vol 54 (2008) PARA 12) or any other establishment which is a hospital within the meaning given by the Care Standards Act 2000 s 2(3) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 983); Sexual Offences Act 2003 s 22(5).

8     Ibid s 21(4)(b). In relation to England and Wales, 'independent clinic' has the meaning given by the Care Standards Act 2000 s 2(4) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 983); Sexual Offences Act 2003 s 22(5).

9     Ibid s 21(4)(c). For these purposes, a 'care home' is an establishment which is a care home for the purposes of the Care Standards Act 2000 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 985); Sexual Offences Act 2003 s 22(5).

10    Ibid s 21(4)(d). 'Community home' has the meaning given by the Children Act 1989 s 53 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 967 et seq); Sexual Offences Act 2003 s 22(5).

11    Ibid s 21(4)(d). In relation to England and Wales, 'voluntary home' has the meaning given by the Children Act 1989 s 60(3) (as substituted) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 976); Sexual Offences Act 2003 s 22(5).

12    Ibid s 21(4)(d). In relation to England and Wales, 'children's home' has the meaning given by the Care Standards Act 2000 s 1 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 983); Sexual Offences Act 2003 s 22(5).

13    Ibid s 21(4)(e). Homes for the accommodation of children who are in need of particular facilities and services are provided under the Children Act 1989 s 82(5) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 158); Sexual Offences Act 2003 s 21(4)(e).

14    Ibid s 21(4). This category of person also includes persons who look after persons aged under 18 who are accommodated and cared for in residential care homes, private hospitals and residential family centres, for which provision is made under Northern Irish legislation: s 21(4)(c), (f).

15    Ibid s 21(5). A person receives education at an educational institution if he is registered or otherwise enrolled as a pupil or student at the institution (s 22(4)(a)) or he receives education at the institution under arrangements with another educational institution at which he is so registered or otherwise enrolled (s 22(4)(b)).

16 Ibid s 21(6). The Northern Irish legislation referred to in the text is the Children (Northern Ireland) Order 1995, SI 1995/755 (NI 2), art 159 or art 160: Sexual Offences Act 2003 s 21(6).

17 Ie under, or pursuant to anything done under, the Employment and Training Act 1973 ss 8-10 (as amended) (see EMPLOYMENT vol 40 (2009) PARAS 567-569): Sexual Offences Act 2003 s 21(7)(a).

18 Ie under, or pursuant to anything done under, the Learning and Skills Act 2000 s 114 (see EDUCATION vol 15(2) (2006 Reissue) PARA 1149): Sexual Offences Act 2003 s 21(7)(b).

19 Ibid s 21(7). For these purposes, a person looks after another person on an individual basis if he is regularly involved in caring for, training or supervising that person (s 22(3)(a)) and in the course of his involvement regularly has unsupervised contact with him (whether face to face or by any other means) (s 22(3)(b)).

20 Ie under the Children Act 1989 s 20 or s 21 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 863-866): Sexual Offences Act 2003 s 21(8)(a).

21 Ibid s 21(8)(a).

22 Ie under the Children Act 1989 s 7 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 311, 317) or corresponding Northern Irish legislation: Sexual Offences Act 2003 s 21(9).

23 Ibid s 21(9).

24 Ie under the Children Act 1989 s 23B(2), Sch 2 para 19C (as added) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 873, 929) or corresponding Northern Irish legislation: Sexual Offences Act 2003 s 21(10).

25 Ibid s 21(10).

26 Ie conferred on an authorised person or the authority designated by the relevant order: ibid s 21(11)(b).

27 In relation to England and Wales, 'care order' has the same meaning as in the Children Act 1989 (see ss 31(11), 105(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 271): Sexual Offences Act 2003 s 22(5).

28 In relation to England and Wales, 'supervision order' has the meaning given by the Children Act 1989 s 31(11) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 271): Sexual Offences Act 2003 s 22(5).

29 In relation to England and Wales, 'education supervision order' has the meaning given by the Children Act 1989 s 36 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 296-298): Sexual Offences Act 2003 s 22(5).

30 Ibid s 21(11).

31 See the Children Act 1989 s 105(1) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 paras 87, 95); the Criminal Justice and Court Services Act 2000 s 11(3); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 230.

32 Ie within the meaning given by the Children Act 2004 s 35 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 230): Sexual Offences Act 2003 s 21(12)(a) (amended by the Children Act 2004 s 40, Sch 3 para 18).

33 Ie under the Children Act 1989 s 41(1) (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 311): Sexual Offences Act 2003 s 21(12)(a) (as amended: see note 32 supra).

34 Ie under the Adoption Rules 1984, SI 1984/265, r 6 or r 18 (as amended): Sexual Offences Act 2003 s 21(12)(b).

35 Ie under the Family Proceedings Rules 1991, SI 1991/1247, r 9.5 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 493) or corresponding Northern Irish legislation: Sexual Offences Act 2003 s 21(12)(c).

36 Ibid s 21(12).

37 Ibid s 21(13).



38 Any power to make orders or regulations conferred by the Sexual Offences Act 2003 on the Secretary of State is exercisable by statutory instrument: s 138(1). A statutory instrument containing an order or regulations under s 21, s 86 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 567) or s 130 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 361, 560) may not be made unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament: s 138(2). Any other statutory instrument, except one containing an order under s 141 (commencement), is to be subject to annulment in pursuance of a resolution of either House of Parliament: s 138(3).

39 Ibid s 21(1)(b). At the date at which this volume states the law no such order had been made.

## **UPDATE**

### **184 Position of trust**

NOTE 7--Definition of 'hospital' in 2003 Act s 22(5) amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 238.

NOTE 18--Sexual Offences Act 2003 s 21(7)(b) substituted: Education and Skills Act 2008 Sch 1 para 81.

NOTE 38--Sexual Offences Act 2003 s 138(2) amended: Criminal Justice and Immigration Act 2008 s 142(10). See also Sexual Offences Act 2003 s 138(4) (added by Criminal Justice and Immigration Act 2008 Sch 26 para 57). For transitional provisions and savings see Sch 27 para 38.

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### **185. Mens rea.**

In addition to requiring the defendant intentionally to do the thing specified by each individual offence involving abuse of a position of trust<sup>1</sup>, further provision is made as to the mens rea required in respect of the child's age and the existence of a position of trust.

In terms of the mens rea as to the age of the child, unless the child is under 13<sup>2</sup>, it is necessary that the defendant does not reasonably believe that the child is aged 18 or over<sup>3</sup>. Although the prosecution has the persuasive burden of proof of the fault element as to the child's age where he is aged 13 to 17<sup>4</sup>, the prosecution is assisted by the provision that where in proceedings for an offence under these provisions it is proved that the child was under 18, the defendant is to be taken not to have reasonably believed that he was aged 18 or over unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it<sup>5</sup>.

In terms of whether or not a person ('A') is in a position of trust, where A was in a position of trust in relation to another ('B') by virtue of B being detained<sup>6</sup>, resident<sup>7</sup>, accommodated and cared for<sup>8</sup> or in receipt of education<sup>9</sup> at a specified institution<sup>10</sup>, but A was not also in a position of trust by virtue of other circumstances<sup>11</sup>, it must be proved that A knew or could reasonably be expected to know of the circumstances by virtue of which he is in a position of trust in relation to B<sup>12</sup>. Proof of this is aided by the provision that, where it is proved that A was in a position of trust in relation to B by virtue of B being so detained, resident, accommodated and cared for or in receipt of education<sup>13</sup>, and it is not proved that he was in such a position of trust by virtue of other circumstances<sup>14</sup>, it is to be presumed that A knew or could reasonably have been expected to know of the circumstances by virtue of which he was in such a position of trust unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know of those circumstances<sup>15</sup>. As a corollary of these provisions, where a position of trust issue arises wholly or partly by virtue of the other categories of circumstance under which such an issue may arise, no further proof of mens rea as to the position of trust is required.

1 See the Sexual Offences Act 2003 s 16(1)(a) (sexual activity with a child: see PARA 180 ante), s 17(1)(a) (causing or inciting a child to engage in sexual activity: see PARA 181 ante), s 18(1)(a) (sexual activity in the presence of a child: see PARA 182 ante) and s 19(1)(a) (causing a child to watch a sexual act: see PARA 183 ante).

2 Ibid ss 16(1)(e)(ii), 17(1)(e)(ii), 18(1)(f)(ii), 19(1)(e)(ii). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

3 Sexual Offences Act 2003 ss 16(1)(e)(i), 17(1)(e)(i), 18(1)(f)(i), 19(1)(e)(i).

4 As to the burden and standard of proof see PARA 1368 et seq post.

5 Sexual Offences Act 2003 ss 16(3), 17(3), 18(3), 19(3).

6 Ie detained in an institution by virtue of a court order or under an enactment: see ibid s 21(2); and PARA 184 ante.

7 Ie resident in a home or other place in which accommodation and maintenance are provided by an authority or accommodation is provided by a voluntary organisation: see ibid s 21(3); and PARA 184 ante.

8     le accommodated and cared for in a hospital, an independent clinic, a care home, a community home, a voluntary home, a children's home, or a home for the accommodation of children who are in need of particular facilities and services, or the Northern Irish equivalent of any such place: see *ibid* s 21(4); and PARA 184 ante.

9     le receiving education at an educational institution: see *ibid* s 21(5); and PARA 184 ante.

10    *Ibid* ss 16(2)(a), 17(2)(a), 18(2)(a), 19(2)(a).

11    *Ibid* ss 16(2)(b), 17(2)(b), 18(2)(b), 19(2)(b).

12    *Ibid* ss 16(1)(d), 17(1)(d), 18(1)(e), 19(1)(d).

13    *Ibid* ss 16(4)(a), 17(4)(a), 18(4)(a), 19(4)(a).

14    *Ibid* ss 16(4)(b), 17(4)(b), 18(4)(b), 19(4)(b).

15    *Ibid* ss 16(4), 17(4), 18(4), 19(4).

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**186. Exceptions for spouses and civil partners and for pre-existing sexual relationships.**

Conduct by a person ('A') which would otherwise be an offence involving abuse of a position of trust<sup>1</sup> against another person ('B') is not such an offence if at the time:

- 130 (1) B is aged 16 or over<sup>2</sup> and A and B are lawfully married to, or are civil partners of, each other<sup>3</sup>; or
- 131 (2) immediately before the position of trust arose, a sexual relationship existed between A and B<sup>4</sup>.

1 The sexual activity with a child (see the Sexual Offences Act 2003 s 16; and PARA 180 ante), causing or inciting a child to engage in sexual activity (see s 17; and PARA 181 ante), sexual activity in the presence of a child (see s 18; and PARA 182 ante) and causing a child to watch a sexual act (see s 19; and PARA 183 ante).

2 Ibid s 23(1)(a). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

3 Sexual Offences Act 2003 s 23(1)(b) (s 23(1)(b), (2) amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 173(1)-(3)). In proceedings for an offence it is for the defendant to prove that he and the person in respect of whom he was in a position of trust were at the time lawfully married or civil partners of each other: Sexual Offences Act 2003 s 23(2) (as so amended). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

4 Sexual Offences Act 2003 s 24(1). In proceedings for an offence it is for the defendant to prove that such a relationship existed at that time (s 24(3): see note 3 supra), and the defence is not available if at the relevant time sexual intercourse between the two persons would have been unlawful (s 24(2)).

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### **187. Punishment.**

A person guilty of any offence involving abuse of a position of trust<sup>1</sup> is liable on conviction on indictment to imprisonment for a term not exceeding five years<sup>2</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup>, to a fine not exceeding the statutory maximum<sup>4</sup>, or to both<sup>5</sup>.

1 The sexual activity with a child (see the Sexual Offences Act 2003 s 16; and PARA 180 ante), causing or inciting a child to engage in sexual activity (see s 17; and PARA 181 ante), sexual activity in the presence of a child (see s 18; and PARA 182 ante) and causing a child to watch a sexual act (see s 19; and PARA 183 ante).

2 Ibid ss 16(5)(b), 17(5)(b), 18(5)(b), 19(5)(b).

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5 Sexual Offences Act 2003 ss 16(5)(a), 17(5)(a), 18(5)(a), 19(5)(a).

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## **(5) FAMILIAL SEX OFFENCES**

### **(i) Sex with an Adult Relative**

#### **188. Prohibited activity.**

A person ('A') aged 16 or over commits an offence, punishable by imprisonment or a fine<sup>2</sup>, if:

- 132 (1) he intentionally penetrates<sup>3</sup> another person's vagina<sup>4</sup> or anus<sup>5</sup> with a part of his body or anything else, or penetrates another person's mouth with his penis<sup>6</sup>;
- 133 (2) the penetration is sexual<sup>7</sup>;
- 134 (3) the other person ('B') is aged 18 or over<sup>8</sup>;
- 135 (4) A is related to B in a specified way<sup>9</sup>; and
- 136 (5) A knows or could reasonably be expected to know that he is related to B in that way<sup>10</sup>.

A person ('A') aged 16 or over commits an offence, punishable by imprisonment or a fine<sup>11</sup>, if:

- 137 (a) another person ('B') penetrates A's vagina or anus with a part of B's body or anything else, or penetrates A's mouth with B's penis<sup>12</sup>;
- 138 (b) A consents<sup>13</sup> to the penetration<sup>14</sup>;
- 139 (c) the penetration is sexual<sup>15</sup>;
- 140 (d) B is aged 18 or over<sup>16</sup>;
- 141 (e) A is related to B in a specified way<sup>17</sup>; and
- 142 (f) A knows or could reasonably be expected to know that he is related to B in that way<sup>18</sup>.

1 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

2 As to punishments see PARA 190 post.

3 For the meaning of 'penetration' see PARA 162 note 3 ante.

4 As to the meaning of 'vagina' see PARA 163 note 3 ante.

5 As to references to parts of the body see PARA 163 note 3 ante.

6 Sexual Offences Act 2003 s 64(1)(a).

7 Ibid s 64(1)(b). For the meaning of 'sexual' see PARA 162 ante.

8 Ibid s 64(1)(c).

9 Ibid s 64(1)(d). As to the family relationships to which this offence applies, and as to the circumstances by virtue of which a defendant is required to know whether or not he is in such a relationship, see PARA 189 post.

10 Ibid s 64(1)(e).

- 11 As to punishments see PARA 190 post.
- 12 Sexual Offences Act 2003 s 65(1)(a).
- 13 As to consent see PARA 163 ante.
- 14 Sexual Offences Act 2003 s 65(1)(b).
- 15 Ibid s 65(1)(c).
- 16 Ibid s 65(1)(d).
- 17 Ibid s 65(1)(e).
- 18 Ibid s 65(1)(f).

## **UPDATE**

### **188 Prohibited activity**

TEXT AND NOTES--Sexual Offences Act 2003 ss 64, 65 amended so that the offences of sex with an adult relative are committed where an adoptive parent has consensual sex with their adopted child when he or she is aged 18 or over: Criminal Justice and Immigration Act 2008 Sch 15 paras 5, 6.

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### **189. Degrees of relationship and requisite mens rea.**

The offence of sex with an adult relative<sup>1</sup> is committed where the defendant is related to the other person as parent, grandparent, child, grandchild, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece<sup>2</sup>. It is necessary that the defendant knows or could reasonably be expected to know that he is related to the other person in such a way<sup>3</sup>, and in terms of this requirement where in proceedings for the offence it is proved that the defendant was related to the other person in any such way it is to be taken that the defendant knew or could reasonably have been expected to know that he was related in that way unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know that he was<sup>4</sup>.

1 See PARA 188 ante.

2 Sexual Offences Act 2003 ss 64(2), 65(2). For these purposes, 'uncle' means the brother of a person's parent, and 'aunt' has a corresponding meaning (ss 64(3)(a), 65(3)(a)); 'nephew' means the child of a person's brother or sister, and 'niece' has a corresponding meaning (ss 64(3)(b), 65(3)(b)).

3 Ibid ss 64(1)(e), 65(1)(f).

4 Ibid ss 64(4), 65(4).



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## **190. Punishment.**

A person guilty of an offence involving sex with an adult relative<sup>1</sup> is liable on conviction on indictment to imprisonment for a term not exceeding two years<sup>2</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup>, to a fine not exceeding the statutory maximum<sup>4</sup>, or to both<sup>5</sup>.

1 See PARA 188 ante.

2 Sexual Offences Act 2003 ss 64(5)(b), 65(5)(b).

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5 Sexual Offences Act 2003 ss 64(5)(a), 65(5)(a).

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## **(ii) Familial Offences Relating to Children**

### **191. Sexual activity with a child family member and incitement to such activity.**

Provided that he has the necessary further mens rea<sup>1</sup>, a person commits an offence, punishable by imprisonment or a fine<sup>2</sup>, if he intentionally touches<sup>3</sup>, in a manner which is sexual<sup>4</sup>, a family member<sup>5</sup> who is under the age of 18<sup>6</sup> or if he intentionally incites<sup>7</sup> such a family member<sup>8</sup> to touch, or allow himself to be touched by, him<sup>9</sup> in such a manner<sup>10</sup>.

1 See the text and notes infra; and PARA 193 post.

2 As to the punishment of offences involving sexual activity with a family member see PARA 195 post. A person may not be guilty of aiding, abetting or counselling the commission of this offence if he acts for the purpose of protecting the child in question: see the Sexual Offences Act 2003 s 73; and PARA 164 ante.

3 Ibid s 25(1)(a). As to the meaning of 'touches' see PARA 162 note 4 ante.

4 Ibid s 25(1)(b). For the meaning of 'sexual' see PARA 162 ante.

5 Ibid s 25(1)(c). As to the family relationships to which this offence applies see PARA 192 post.

6 Ibid s 25(1)(e)(i). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

7 As to incitement see PARA 65 ante.

8 Sexual Offences Act 2003 s 26(1)(c).

9 Ibid s 26(1)(a).

10 Ibid s 26(1)(b). There are statutory exceptions to these offences in respect of spouses and civil partners and for pre-existing sexual relationships: see PARA 194 post.

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## 192. Family relationships.

For the purposes of the offences of sexual activity with a child family member and incitement to such activity<sup>1</sup> the person ('A') who commits the offence and the person ('B') in respect of whom the offence is committed are 'family members' in relation to each other<sup>2</sup> if:

- 143 (1) one of them is the other's parent, grandparent, brother, sister, half-brother, half-sister, aunt or uncle<sup>3</sup>;
- 144 (2) A is or has been B's foster parent<sup>4</sup>;
- 145 (3) they live or have lived in the same household, or A is or has been regularly involved in caring for, training, supervising or being in sole charge of B, and: (a) one of them is or has been the other's step-parent<sup>5</sup>; (b) they are cousins<sup>6</sup>; (c) one of them is or has been the other's stepbrother or stepsister<sup>7</sup>; or (d) the parent or present or former foster parent of one of them is or has been the other's foster parent<sup>8</sup>;
- 146 (4) they live in the same household<sup>9</sup> and A is regularly involved in caring for, training, supervising or being in sole charge of B<sup>10</sup>; or
- 147 (5) their relationship would fall within any of these categories but for the operation of the statutory provisions governing the familial status of adopted children<sup>11</sup>.

1 See PARA 191 ante.

2 For the mens rea required to be established as to the existence of a family relationship see PARA 193 post.

3 Sexual Offences Act 2003 s 27(1)(a), (2)(a). For these purposes, 'aunt' means the sister or half-sister, and 'uncle' means the brother or half-brother, of a person's parent: s 27(5)(a).

4 Ibid s 27(2)(b). A person is a child's foster parent if he is a person with whom the child has been placed under the Children Act 1989 s 23(2)(a) (as amended) (fostering for local authority: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 877-878, 900) or s 59(1)(a) (fostering for voluntary organisation: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 975) (Sexual Offences Act 2003 s 27(5)(c)(i)) or if he fosters the child privately (within the meaning of the Children Act 1989 s 66(1)(b) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1049) (Sexual Offences Act 2003 s 27(5)(c)(ii)).

5 Ibid s 27(3)(a). A 'step-parent' includes a parent's partner (s 27(5)(e)); and a person is another's partner (whether they are of different sexes or the same sex) only if they live together as partners in an enduring family relationship (s 27(5)(d)). The step-parent of a person also includes a person who is the civil partner of that person's parent (but is not that person's parent): Civil Partnership Act 2004 ss 246(1), 247(1)(a), Sch 21 para 61.

6 Sexual Offences Act 2003 s 27(3)(b). 'Cousin' means the child of an aunt or uncle: s 27(5)(b).

7 Ibid s 27(3)(c). 'Stepbrother' and 'stepsister' include the child of a parent's partner: s 27(5)(e). A person's stepbrother or stepsister also includes a person who is the son or daughter, as the case may be, of the civil partner of that person's parent (but is not the son of either of that person's parents): Civil Partnership Act 2004 ss 246(1), 247(1)(a), Sch 21 para 61.

8 Sexual Offences Act 2003 s 27(3)(d).

9 Ibid s 27(4)(a).

10 Ibid s 27(4)(b).

11 Ibid s 27(2)(b). The statutory provisions governing the familial status of adopted children are contained in the Adoption and Children Act 2002 s 67 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 377); Sexual Offences Act 2003 s 27(2)(b). The effect of this provision is that the categories of relationship set out in heads (1)-(4) in the text continue to apply to an adoptive child's biological family relationships if the child is adopted, as well as applying to its adoptive family relationships.

## **UPDATE**

### **192 Family relationships**

TEXT AND NOTES--Sexual Offences Act 2003 s 27 amended: Criminal Justice and Immigration Act 2008 Sch 15 para 3.

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### **193. Mens rea.**

In addition to requiring the defendant intentionally to do the thing specified by each individual offence involving sexual activity with a child family member<sup>1</sup>, further provision is made as to the mens rea required in respect of the child's age and the existence of a family relationship.

In terms of the mens rea as to the age of the child, provided that the child is not under 13<sup>2</sup>, it is necessary that the defendant does not reasonably believe that the child is aged 18 or over<sup>3</sup>. Although the prosecution has the persuasive burden of proof of the fault element as to the child's age where he is aged 13 to 17, the prosecution is assisted by the provision that where in proceedings for an offence under these provisions it is proved that the other person was under 18, the defendant is to be taken not to have reasonably believed that he was aged 18 or over unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it<sup>4</sup>.

It is necessary that the defendant knows or could reasonably be expected to know that his relation to the other person is of a relevant description<sup>5</sup>, and where in proceedings for such an offence it is proved that the relation of the defendant to the other person was of such a description it is to be taken that the defendant knew or could reasonably have been expected to know that his relation to the other person was of that description unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know that it was<sup>6</sup>.

1 See the Sexual Offences Act 2003 s 25(1)(a) (sexual activity with a child family member), s 26(1)(a) (causing or inciting a child family member to engage in sexual activity); and PARA 191 ante.

2 Ibid ss 25(1)(e)(ii), 26(1)(e)(ii). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

3 Sexual Offences Act 2003 ss 25(1)(e)(i), 26(1)(e)(i).

4 Ibid ss 25(2), 26(2).

5 Ie that his relation to the other person is of a description falling within ibid s 27 (see PARA 192 ante): ss 25(1)(d), 26(1)(d).

6 Ibid ss 25(3), 26(3).

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#### **194. Exceptions for spouses and civil partners and for pre-existing sexual relationships.**

Conduct by a person which would otherwise be an offence involving sexual activity with a child family member<sup>1</sup> is not such an offence if:

- 148 (1) at the time the person in respect of whom the conduct is committed is aged 16 or over<sup>2</sup> and the two are lawfully married to, or are civil partners of, each other<sup>3</sup>; or
- 149 (2) a sexual relationship existed between the two immediately before the relationship between them became a family relationship<sup>4</sup>.

<sup>1</sup> Sexual activity with a child family member and causing or inciting a child family member to engage in sexual activity: see the Sexual Offences Act 2003 ss 25, 26; and PARA 191 ante.

<sup>2</sup> Ibid s 28(1)(a). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

<sup>3</sup> Sexual Offences Act 2003 s 28(1)(b) (s 28(1)(b), (2) amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 174(1)-(3)). In proceedings for an offence it is for the defendant to prove that he and the other person were at the time lawfully married to or civil partners of each other: Sexual Offences Act 2003 s 28(2) (as so amended). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

<sup>4</sup> Sexual Offences Act 2003 s 29(1)(c). The reference in the text to the relationship between the two persons becoming a family relationship is a reference to their relationship becoming a relationship of a description falling within s 27 (see PARA 192 ante): s 29(1)(c). This exception applies only if neither person is the other's parent, grandparent, brother, sister, half-brother, half-sister, aunt or uncle (s 29(1)(a)) or would not be such a person if the Adoption and Children Act 2002 s 67 (which governs the familial status of adopted children: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 377) did not apply (Sexual Offences Act 2003 s 29(1)(b)), and does not apply if immediately before the relationship between them became a family relationship sexual intercourse between them would have been unlawful (s 29(2)). For the meanings of 'aunt' and 'uncle' see PARA 192 note 3 ante. In proceedings for an offence under s 25 or s 26 it is for the defendant to prove these matters: s 29(3). See note 3 supra.

#### **UPDATE**

#### **194 Exceptions for spouses and civil partners and for pre-existing sexual relationships**

NOTE 4--Sexual Offences Act 2003 s 29(1)(b) amended: Criminal Justice and Immigration Act 2008 Sch 15 para 4.

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## 195. Punishment.

A person ('A') guilty of an offence involving sexual activity with a child family member ('B')<sup>1</sup> is liable on conviction on indictment to imprisonment for a term not exceeding either 14 years (where he is aged 18 or over at the time of the offence)<sup>2</sup> or five years (where he is aged under 18 at that time)<sup>3</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup>, to a fine not exceeding the statutory maximum<sup>5</sup>, or to both<sup>6</sup>. However, if A was aged 18 or over at the time of the offence and the touching<sup>7</sup> or, as the case may be, the touching to which the incitement<sup>8</sup> related involved either penetration<sup>9</sup> of B's anus or vagina<sup>10</sup> with a part of A's body or anything else<sup>11</sup>, penetration of B's mouth with A's penis<sup>12</sup>, penetration of A's anus or vagina with a part of B's body<sup>13</sup>, or penetration of A's mouth with B's penis<sup>14</sup>, the offence is punishable on conviction on indictment by imprisonment for a term not exceeding 14 years<sup>15</sup>.

1     Is an offence under the Sexual Offences Act 2003 s 25 (sexual activity with a child family member) or s 26 (causing or inciting a child family member to engage in sexual activity): see PARA 191 ante.

2     Ibid ss 25(4)(b)(ii), 26(4)(b)(ii). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

3     Sexual Offences Act 2003 ss 25(5)(b), 26(5)(b).

4     As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5     As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

6     Sexual Offences Act 2003 ss 25(4)(b)(i), (5)(a), 26(4)(b)(i), (5)(a).

7     As to the meaning of 'touching' see PARA 162 note 4 ante.

8     As to incitement see PARA 65 ante.

9     For the meaning of 'penetration' see PARA 162 note 3 ante.

10    As to the meaning of 'vagina', and references to parts of the body generally, see PARA 163 note 3 ante.

11    Sexual Offences Act 2003 ss 25(6)(a), 26(6)(a).

12    Ibid ss 25(6)(b), 26(6)(b).

13    Ibid ss 25(6)(c), 26(6)(c).

14    Ibid ss 25(6)(d), 26(6)(d).

15    Ibid ss 25(4)(a), 26(4)(a). For sentencing guidance see *R v Thomas* [2005] EWCA Crim 2343, [2006] Crim LR 71.

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## **(6) OFFENCES AGAINST MENTALLY DISORDERED PERSONS**

### **(i) Meaning of 'Mental Disorder'**

#### **196. Meaning of 'mental disorder'.**

For the purposes of the statutory offences involving sexual activity with mentally disordered persons<sup>1</sup>, 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind; and 'mentally disordered' is to be construed accordingly<sup>2</sup>.

1 See the Sexual Offences Act 2003 ss 30-44; and PARAS 197-214 post.

2 Mental Health Act 1983 s 1; Sexual Offences Act 2003 s 79(1), (6). As to the meaning of 'mental disorder' and related expressions see MENTAL HEALTH vol 30(2) (Reissue) PARA 401 et seq.



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## **(ii) Offences against Persons with a Mental Disorder Impeding Choice**

### **197. Sexual activity with a mentally disordered person.**

A person ('A') commits an offence<sup>1</sup> if:

- 150 (1) he intentionally touches<sup>2</sup> another person ('B')<sup>3</sup>;
- 151 (2) the touching is sexual<sup>4</sup>;
- 152 (3) B is unable to refuse because of or for a reason related to a mental disorder<sup>5</sup>;  
and
- 153 (4) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse<sup>6</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person see PARA 201 post. A person may not be guilty of aiding, abetting or counselling the commission of this offence if he acts for the purpose of protecting the person in question: see the Sexual Offences Act 2003 s 73; and PARA 164 ante.

2 As to the meaning of 'touches' see PARA 162 note 4 ante.

3 Sexual Offences Act 2003 s 30(1)(a).

4 Ibid s 30(1)(b). For the meaning of 'sexual' see PARA 162 ante.

5 Ibid s 30(1)(c). As to the meaning of 'mental disorder' see PARA 196 ante. A person is unable to refuse the touching if either he lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason) (s 30(2)(a)) or he is unable to communicate such a choice to the person doing the touching (s 30(2)(b)).

6 Ibid s 30(1)(d).

## **UPDATE**

### **197 Sexual activity with a mentally disordered person**

NOTE 5--See *R v Cooper* [2009] UKHL 42, [2009] 4 All ER 1033 (a mentally disordered person might be quite capable of exercising choice in one situation but not in another), reversing [2008] EWCA Crim 1155, [2009] 1 Cr App Rep 211, [2008] All ER (D) 335 (May).

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**198. Causing or inciting a mentally disordered person to engage in sexual activity.**

A person ('A') commits an offence<sup>1</sup> if:

- 154 (1) he intentionally causes or incites<sup>2</sup> another person ('B') to engage in an activity<sup>3</sup>;
- 155 (2) the activity is sexual<sup>4</sup>;
- 156 (3) B is unable to refuse because of or for a reason related to a mental disorder<sup>5</sup>; and
- 157 (4) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse<sup>6</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person see PARA 201 post.

2 As to the meaning of 'causes' see PARA 171 note 1 ante; and as to incitement see PARA 65 ante.

3 Sexual Offences Act 2003 s 31(1)(a).

4 Ibid s 31(1)(b). For the meaning of 'sexual' see PARA 162 ante.

5 Ibid s 31(1)(c). As to the meaning of 'mental disorder' see PARA 196 ante. A person is unable to refuse if either he lacks the capacity to choose whether to agree to engaging in the activity caused or incited (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of the activity, or for any other reason) (s 31(2)(a)) or he is unable to communicate such a choice to the person causing or inciting the activity (s 31(2)(b)).

6 Ibid s 31(1)(d).

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**199. Engaging in sexual activity in the presence of a mentally disordered person.**

A person ('A') commits an offence<sup>1</sup> if:

158 (1) he intentionally engages in an activity<sup>2</sup>;

159 (2) the activity is sexual<sup>3</sup>;

160 (3) for the purpose of obtaining sexual gratification, he engages in it:

1

1. (a) when another person ('B') is present or is in a place from which A can be observed<sup>4</sup>; and

2. (b) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it<sup>5</sup>;

2

161 (4) B is unable to refuse because of or for a reason related to a mental disorder<sup>6</sup>; and

162 (5) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse<sup>7</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person see PARA 201 post.

2 Sexual Offences Act 2003 s 32(1)(a).

3 Ibid s 32(1)(b). For the meaning of 'sexual' see PARA 162 ante.

4 Ibid s 32(1)(c)(i).

5 Ibid s 32(1)(c)(ii).

6 Ibid s 32(1)(d). As to the meaning of 'mental disorder' see PARA 196 ante. A person is unable to refuse if either he lacks the capacity to choose whether to agree to being present (whether because he lacks sufficient understanding of the nature of the activity, or for any other reason) (s 32(2)(a)) or he is unable to communicate such a choice to the person engaging in the activity (s 32(2)(b)).

7 Ibid s 32(1)(e).

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**200. Causing a mentally disordered person to watch a sexual act.**

A person ('A') commits an offence<sup>1</sup> if:

- 163 (1) for the purpose of obtaining sexual gratification, he intentionally causes<sup>2</sup> another person ('B') to watch a third person engaging in an activity, or to look at an image of any person<sup>3</sup> engaging in an activity<sup>4</sup>;
- 164 (2) the activity is sexual<sup>5</sup>;
- 165 (3) B is unable to refuse because of or for a reason related to a mental disorder<sup>6</sup>; and
- 166 (4) A knows or could reasonably be expected to know that B has a mental disorder and that because of it or for a reason related to it B is likely to be unable to refuse<sup>7</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person see PARA 201 post.

2 As to the meaning of 'causes' see PARA 171 note 1 ante.

3 For the meaning of 'image' see PARA 175 note 3 ante; and as to an image of a person see PARA 176 note 3 ante.

4 Sexual Offences Act 2003 s 33(1)(a).

5 Ibid s 33(1)(b). For the meaning of 'sexual' see PARA 162 ante.

6 Ibid s 33(1)(c). As to the meaning of 'mental disorder' see PARA 196 ante. A person is unable to refuse if either he lacks the capacity to choose whether to agree to watching or looking (whether because he lacks sufficient understanding of the nature of the activity, or for any other reason) (s 33(2)(a)) or he is unable to communicate such a choice to the person causing him to do the watching or looking (s 33(2)(b)).

7 Ibid s 33(1)(d).

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## 201. Punishment.

A person ('A') guilty of the offence of sexual activity with a mentally disordered person ('B')<sup>1</sup> or causing or inciting a mentally disordered person ('B') to engage in sexual activity<sup>2</sup> is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>3</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup>, to a fine not exceeding the statutory maximum<sup>5</sup>, or to both<sup>6</sup>. If, however:

167 (1) the offence was one of sexual activity with B<sup>7</sup> and the touching<sup>8</sup> involved:

- 3
3. (a) penetration<sup>9</sup> of B's anus or vagina<sup>10</sup> with a part of A's body or anything else<sup>11</sup>;
4. (b) penetration of B's mouth with A's penis<sup>12</sup>;
5. (c) penetration of A's anus or vagina with a part of B's body<sup>13</sup>; or
6. (d) penetration of A's mouth with B's penis<sup>14</sup>; or

4  
168 (2) the offence was one of causing or inciting B to engage in sexual activity<sup>15</sup> and the activity caused or incited<sup>16</sup> involved:

- 5
7. (i) penetration of B's anus or vagina<sup>17</sup>;
8. (ii) penetration of B's mouth with a person's penis<sup>18</sup>;
9. (iii) penetration of a person's anus or vagina with a part of B's body or by B with anything else<sup>19</sup>; or
10. (iv) penetration of a person's mouth with B's penis<sup>20</sup>,

6

the summary procedure is not available<sup>21</sup> and the offence is punishable on conviction on indictment by imprisonment for life<sup>22</sup>.

A person guilty of the offence of engaging in sexual activity in the presence of a mentally disordered person<sup>23</sup> or causing a mentally disordered person to watch a sexual act<sup>24</sup> is liable on conviction on indictment to imprisonment for a term not exceeding 10 years<sup>25</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>26</sup>, to a fine not exceeding the statutory maximum, or to both<sup>27</sup>.

1 le an offence under the Sexual Offences Act 2003 s 30 (see PARA 197 ante).

2 le an offence under ibid s 31 (see PARA 198 ante).

3 Ibid ss 30(4)(b), 31(4)(b).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

6 Sexual Offences Act 2003 ss 30(4)(a), 31(4)(a).

- 7    le an offence under *ibid* s 30 (see PARA 197 ante).
- 8    As to the meaning of 'touching' see PARA 162 note 4 ante.
- 9    For the meaning of 'penetration' see PARA 162 note 3 ante.
- 10   As to the meaning of 'vagina', and references to parts of the body generally, see PARA 163 note 3 ante.
- 11   Sexual Offences Act 2003 s 30(3)(a).
- 12   *Ibid* s 30(3)(b).
- 13   *Ibid* s 30(3)(c).
- 14   *Ibid* s 30(3)(d).
- 15   le an offence under *ibid* s 31 (see PARA 198 ante).
- 16   As to the meaning of 'caused' see PARA 171 note 1 ante; and as to incitement see PARA 65 ante.
- 17   Sexual Offences Act 2003 s 31(3)(a).
- 18   *Ibid* s 31(3)(b).
- 19   *Ibid* s 31(3)(c).
- 20   *Ibid* s 31(3)(d).
- 21   *Ibid* ss 30(4), 31(4).
- 22   *Ibid* ss 30(3), 31(3).
- 23   le an offence under *ibid* s 32 (see PARA 199 ante).
- 24   le an offence under *ibid* s 33 (see PARA 200 ante).
- 25   *Ibid* ss 32(3)(b), 33(3)(b).
- 26   As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.
- 27   Sexual Offences Act 2003 ss 32(3)(a), 33(3)(a).

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### **(iii) Inducement, Threat or Deception to a Mentally Disordered Person**

#### **202. Inducement, threat or deception to procure sexual activity with a mentally disordered person.**

A person ('A') commits an offence<sup>1</sup> if:

- 169 (1) with the agreement of another person ('B') he intentionally touches<sup>2</sup> that person<sup>3</sup>;
- 170 (2) the touching is sexual<sup>4</sup>;
- 171 (3) A obtains B's agreement by means of an inducement offered or given, a threat made or a deception practised by A for that purpose<sup>5</sup>;
- 172 (4) B has a mental disorder<sup>6</sup>; and
- 173 (5) A knows or could reasonably be expected to know that B has a mental disorder<sup>7</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person procured by inducement, threat or deception see PARA 206 post. A person may not be guilty of aiding, abetting or counselling the commission of this offence if he acts for the purpose of protecting the person in question: see the Sexual Offences Act 2003 s 73; and PARA 164 ante.

2 As to the meaning of 'touches' see PARA 162 note 4 ante.

3 Sexual Offences Act 2003 s 34(1)(a).

4 Ibid s 34(1)(b). For the meaning of 'sexual' see PARA 162 ante.

5 Ibid s 34(1)(c).

6 Ibid s 34(1)(d). As to the meaning of 'mental disorder' see PARA 196 ante.

7 Ibid s 34(1)(e).

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**203. Causing a mentally disordered person to engage in or agree to engage in sexual activity by inducement, threat or deception.**

A person ('A') commits an offence<sup>1</sup> if:

- 174 (1) by means of an inducement offered or given, a threat made or a deception practised by him for this purpose, he intentionally causes<sup>2</sup> another person ('B') to engage in, or to agree to engage in, an activity<sup>3</sup>;
- 175 (2) the activity is sexual<sup>4</sup>;
- 176 (3) B has a mental disorder<sup>5</sup>; and
- 177 (4) A knows or could reasonably be expected to know that B has a mental disorder<sup>6</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person procured by inducement, threat or deception see PARA 206 post.

2 As to the meaning of 'causes' see PARA 171 note 1 ante.

3 Sexual Offences Act 2003 s 35(1)(a).

4 Ibid s 35(1)(b). For the meaning of 'sexual' see PARA 162 ante.

5 Ibid s 35(1)(c). As to the meaning of 'mental disorder' see PARA 196 ante.

6 Ibid s 35(1)(d).



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**204. Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a mentally disordered person.**

A person ('A') commits an offence<sup>1</sup> if:

- 178 (1) he intentionally engages in an activity<sup>2</sup>;
- 179 (2) the activity is sexual<sup>3</sup>;
- 180 (3) for the purpose of obtaining sexual gratification, he engages in it:
- 7
- 11. (a) when another person ('B') is present or is in a place from which A can be observed<sup>4</sup>; and
- 12. (b) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it<sup>5</sup>;
- 8
- 181 (4) B agrees to be present or in the place referred to under head (a) above because of an inducement offered or given, a threat made or a deception practised by A for the purpose of obtaining that agreement<sup>6</sup>;
- 182 (5) B has a mental disorder<sup>7</sup>; and
- 183 (6) A knows or could reasonably be expected to know that B has a mental disorder<sup>8</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person procured by inducement, threat or deception see PARA 206 post.

2 Sexual Offences Act 2003 s 36(1)(a).

3 Ibid s 36(1)(b). For the meaning of 'sexual' see PARA 162 ante.

4 Ibid s 36(1)(c)(i).

5 Ibid s 36(1)(c)(ii).

6 Ibid s 36(1)(d).

7 Ibid s 36(1)(e). As to the meaning of 'mental disorder' see PARA 196 ante.

8 Ibid s 36(1)(f).

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**205. Causing a mentally disordered person to watch a sexual act by inducement, threat or deception.**

A person ('A') commits an offence<sup>1</sup> if:

- 184 (1) for the purpose of obtaining sexual gratification, he intentionally causes<sup>2</sup> another person ('B') to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity<sup>3</sup>;
- 185 (2) the activity is sexual<sup>4</sup>;
- 186 (3) B agrees to watch or look because of an inducement offered or given, a threat made or a deception practised by A for the purpose of obtaining that agreement<sup>5</sup>;
- 187 (4) B has a mental disorder<sup>6</sup>; and
- 188 (5) A knows or could reasonably be expected to know that B has a mental disorder<sup>7</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person procured by inducement, threat or deception see PARA 206 post.

2 As to the meaning of 'causes' see PARA 171 note 1 ante.

3 Sexual Offences Act 2003 s 37(1)(a). For the meaning of 'image' see PARA 175 note 3 ante; and as to an image of a person see PARA 176 note 3 ante.

4 Ibid s 37(1)(b). For the meaning of 'sexual' see PARA 162 ante.

5 Ibid s 37(1)(c).

6 Ibid s 37(1)(d). As to the meaning of 'mental disorder' see PARA 196 ante.

7 Ibid s 37(1)(e).

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## 206. Punishment.

A person ('A') guilty of the offence of procuring sexual activity with a mentally disordered person ('B') by inducement, threat or deception<sup>1</sup> or of causing a person with a mental disorder ('B') to engage in or agree to engage in sexual activity by inducement, threat or deception<sup>2</sup> is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>3</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup>, to a fine not exceeding the statutory maximum<sup>5</sup>, or to both<sup>6</sup>. If, however:

189 (1) the offence was one of procuring sexual activity with B by inducement, threat or deception<sup>7</sup> and the touching<sup>8</sup> involved:

- 9
- 13. (a) penetration<sup>9</sup> of B's anus or vagina<sup>10</sup> with a part of A's body or anything else<sup>11</sup>;
  - 14. (b) penetration of B's mouth with A's penis<sup>12</sup>;
  - 15. (c) penetration of A's anus or vagina with a part of B's body<sup>13</sup>; or
  - 16. (d) penetration of A's mouth with B's penis<sup>14</sup>; or

10  
190 (2) the offence was one of causing B to engage in or agree to engage in sexual activity by inducement, threat or deception<sup>15</sup> and the activity caused or agreed to<sup>16</sup> involved:

- 11
- 17. (i) penetration of B's anus or vagina<sup>17</sup>;
  - 18. (ii) penetration of B's mouth with a person's penis<sup>18</sup>;
  - 19. (iii) penetration of a person's anus or vagina with a part of B's body or by B with anything else<sup>19</sup>; or
  - 20. (iv) penetration of a person's mouth with B's penis<sup>20</sup>,
- 12

the summary procedure is not available<sup>21</sup> and the offence is punishable on conviction on indictment by imprisonment for life<sup>22</sup>.

A person guilty of the offence of engaging in sexual activity in the presence, procured by inducement, threat or deception, of a mentally disordered person<sup>23</sup> or causing a mentally disordered person to watch a sexual act by inducement, threat or deception<sup>24</sup> is liable on conviction on indictment to imprisonment for a term not exceeding 10 years<sup>25</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>26</sup>, to a fine not exceeding the statutory maximum, or to both<sup>27</sup>.

1 le an offence under the Sexual Offences Act 2003 s 34 (see PARA 202 ante).

2 le an offence under ibid s 35 (see PARA 203 ante).

3 Ibid ss 34(3)(b), 35(3)(b).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post),

although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

6 Sexual Offences Act 2003 ss 34(3)(a), 35(3)(a).

7 Ie an offence under ibid s 34 (see PARA 202 ante).

8 As to the meaning of 'touching' see PARA 162 note 4 ante.

9 For the meaning of 'penetration' see PARA 162 note 3 ante.

10 As to the meaning of 'vagina', and references to parts of the body generally, see PARA 163 note 3 ante.

11 Sexual Offences Act 2003 s 34(2)(a).

12 Ibid s 34(2)(b).

13 Ibid s 34(2)(c).

14 Ibid s 34(2)(d).

15 Ie an offence under ibid s 35 (see PARA 203 ante).

16 As to the meaning of 'caused' see PARA 171 note 1 ante.

17 Sexual Offences Act 2003 s 35(2)(a).

18 Ibid s 35(2)(b).

19 Ibid s 35(2)(c).

20 Ibid s 35(2)(d).

21 Ibid ss 34(3), 35(3).

22 Ibid ss 34(2), 35(2).

23 Ie an offence under ibid s 36 (see PARA 204 ante).

24 Ie an offence under ibid s 37 (see PARA 205 ante).

25 Ibid ss 36(2)(b), 37(2)(b).

26 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

27 Sexual Offences Act 2003 ss 36(2)(a), 37(2)(a).

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#### **(iv) Offences by Care Workers**

##### **207. Sexual activity by a care worker with a mentally disordered person.**

A person ('A') commits an offence<sup>1</sup> if:

- 191 (1) he intentionally<sup>2</sup> touches<sup>3</sup> another person ('B')<sup>4</sup>;
- 192 (2) the touching is sexual<sup>5</sup>;
- 193 (3) B has a mental disorder<sup>6</sup>;
- 194 (4) A knows or could reasonably be expected to know that B has a mental disorder<sup>7</sup>; and
- 195 (5) A is involved in B's care<sup>8</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person by care workers see PARA 214 post. A person may not be guilty of aiding, abetting or counselling the commission of this offence if he acts for the purpose of protecting the person in question: see the Sexual Offences Act 2003 s 73; and PARA 164 ante.

2 For specific provisions relating to the mens rea applicable to offences involving sexual activity with mentally disordered persons by care workers see PARA 212 post.

3 As to the meaning of 'touches' see PARA 162 note 4 ante.

4 Sexual Offences Act 2003 s 38(1)(a).

5 Ibid s 38(1)(b). For the meaning of 'sexual' see PARA 162 ante.

6 Ibid s 38(1)(c). As to the meaning of 'mental disorder' see PARA 196 ante.

7 Ibid s 38(1)(d).

8 Ibid s 38(1)(e). As to when a person is involved in another's care for these purposes see PARA 211 post. There are exceptions to this offence for spouses and civil partners and for persons whose relationships predate the care relationship: see PARA 213 post.

#### **UPDATE**

##### **207 Sexual activity by a care worker with a mentally disordered person**

NOTE 8--See *R v Bradford* [2006] All ER (D) 258 (Oct), CA (issue of consent not relevant).

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**208. Care worker causing or inciting a mentally disordered person to engage in sexual activity.**

A person ('A') commits an offence<sup>1</sup> if:

- 196 (1) he intentionally<sup>2</sup> causes or incites<sup>3</sup> another person ('B') to engage in an activity<sup>4</sup>;
- 197 (2) the activity is sexual<sup>5</sup>;
- 198 (3) B has a mental disorder<sup>6</sup>;
- 199 (4) A knows or could reasonably be expected to know that B has a mental disorder<sup>7</sup>; and
- 200 (5) A is involved in B's care<sup>8</sup>.

<sup>1</sup> As to the punishment of offences involving sexual activity with a mentally disordered person see PARA 214 post.

<sup>2</sup> For specific provisions relating to the mens rea applicable to offences involving sexual activity with mentally disordered persons by care workers see PARA 212 post.

<sup>3</sup> As to the meaning of 'causes' see PARA 171 note 1 ante; and as to incitement see PARA 65 ante.

<sup>4</sup> Sexual Offences Act 2003 s 39(1)(a).

<sup>5</sup> Ibid s 39(1)(b). For the meaning of 'sexual' see PARA 162 ante.

<sup>6</sup> Ibid s 39(1)(c). As to the meaning of 'mental disorder' see PARA 196 ante.

<sup>7</sup> Ibid s 39(1)(d).

<sup>8</sup> Ibid s 39(1)(e). As to when a person is involved in another's care for these purposes see PARA 211 post. There are exceptions to this offence for spouses and civil partners and for persons whose relationships predate the care relationship: see PARA 213 post.

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**209. Sexual activity by care worker in presence of a mentally disordered person.**

A person ('A') commits an offence<sup>1</sup> if:

- 201 (1) he intentionally<sup>2</sup> engages in an activity<sup>3</sup>;
- 202 (2) the activity is sexual<sup>4</sup>;
- 203 (3) for the purpose of obtaining sexual gratification, he engages in it:
- 13
- 21. (a) when another person ('B') is present or is in a place from which A can be observed<sup>5</sup>; and
- 22. (b) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it<sup>6</sup>;
- 14
- 204 (4) B has a mental disorder<sup>7</sup>;
- 205 (5) A knows or could reasonably be expected to know that B has a mental disorder<sup>8</sup>; and
- 206 (6) A is involved in B's care<sup>9</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person see PARA 214 post.

2 For specific provisions relating to the mens rea applicable to offences involving sexual activity with mentally disordered persons by care workers see PARA 212 post.

3 Sexual Offences Act 2003 s 40(1)(a).

4 Ibid s 40(1)(b). For the meaning of 'sexual' see PARA 162 ante.

5 Ibid s 40(1)(c)(i).

6 Ibid s 40(1)(c)(ii).

7 Ibid s 40(1)(d). As to the meaning of 'mental disorder' see PARA 196 ante.

8 Ibid s 40(1)(e).

9 Ibid s 40(1)(f). As to when a person is involved in another's care for these purposes see PARA 211 post. There are exceptions to this offence for spouses and civil partners and for persons whose relationships predate the care relationship: see PARA 213 post.

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**210. Care worker causing mentally disordered person to watch a sexual act.**

A person ('A') commits an offence<sup>1</sup> if:

- 207 (1) for the purpose of obtaining sexual gratification, he intentionally<sup>2</sup> causes<sup>3</sup> another person ('B') to watch a third person engaging in an activity, or to look at an image of any person<sup>4</sup> engaging in an activity<sup>5</sup>;
- 208 (2) the activity is sexual<sup>6</sup>;
- 209 (3) B has a mental disorder<sup>7</sup>;
- 210 (4) A knows or could reasonably be expected to know that B has a mental disorder<sup>8</sup>; and
- 211 (5) A is involved in B's care<sup>9</sup>.

1 As to the punishment of offences involving sexual activity with a mentally disordered person see PARA 214 post.

2 For specific provisions relating to the mens rea applicable to offences involving sexual activity with mentally disordered persons by care workers see PARA 212 post.

3 As to the meaning of 'causes' see PARA 171 note 1 ante.

4 For the meaning of 'image' see PARA 175 note 3 ante; and as to an image of a person see PARA 176 note 3 ante.

5 Sexual Offences Act 2003 s 41(1)(a).

6 Ibid s 41(1)(b). For the meaning of 'sexual' see PARA 162 ante.

7 Ibid s 41(1)(c). As to the meaning of 'mental disorder' see PARA 196 ante.

8 Ibid s 41(1)(d).

9 Ibid s 41(1)(e). As to when a person is involved in another's care for these purposes see PARA 211 post. There are exceptions to this offence for spouses and civil partners and for persons whose relationships predate the care relationship: see PARA 213 post.



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## **211. Meaning of 'care worker'.**

For the purposes of the offences involving sexual activity with mentally disordered persons<sup>1</sup> by care workers<sup>2</sup>, a person is involved in the care of another if:

- 212 (1) that other person is accommodated and cared for in a care home<sup>3</sup>, community home<sup>4</sup>, voluntary home<sup>5</sup> or children's home<sup>6</sup> and the first person has functions to perform in the home in the course of employment<sup>7</sup> which have brought him or are likely to bring him into regular face to face contact with the other person<sup>8</sup>;
- 213 (2) that other person is a patient for whom services are provided by a National Health Service body<sup>9</sup> or an independent medical agency<sup>10</sup> or in an independent clinic<sup>11</sup> or an independent hospital<sup>12</sup> and the first person has functions to perform for the body or agency or in the clinic or hospital in the course of employment which have brought him or are likely to bring him into regular face to face contact with the other person<sup>13</sup>; or
- 214 (3) he is, whether or not in the course of employment, a provider of care, assistance or services to that other person in connection with that other person's mental disorder<sup>14</sup> and as such has had or is likely to have regular face to face contact with him<sup>15</sup>.

1 As to the meaning of 'mental disorder' see PARA 196 ante.

2 le sexual activity with a mentally disordered person (see the Sexual Offences Act 2003 s 38; and PARA 207 ante), causing or inciting a mentally disordered person to engage in sexual activity (see s 39; and PARA 208 ante), sexual activity in the presence of a mentally disordered person (see s 40; and PARA 209 ante), and causing a mentally disordered person to watch a sexual act (see s 41; and PARA 210 ante).

3 For these purposes, a 'care home' is an establishment which is a care home for the purposes of the Care Standards Act 2000 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 985): Sexual Offences Act 2003 s 42(5).

4 'Community home' has the meaning given by the Children Act 1989 s 53 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 967 et seq): Sexual Offences Act 2003 s 42(5).

5 'Voluntary home' has the meaning given by the Children Act 1989 s 60(3) (as substituted) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 976): Sexual Offences Act 2003 s 42(5).

6 Ibid s 42(1), (2)(a).

7 For these purposes, 'employment' means any employment, whether paid or unpaid and whether under a contract of service or apprenticeship, under a contract for services, or otherwise than under a contract: ibid s 42(5).

8 Ibid s 42(2)(b).

9 'National Health Service body' means a health authority (see HEALTH SERVICES vol 54 (2008) PARAS 75-93), a National Health Service trust (see HEALTH SERVICES vol 54 (2008) PARAS 155-173), a primary care trust (see HEALTH SERVICES vol 54 (2008) PARAS 111-135) or a special health authority (see HEALTH SERVICES vol 54 (2008) PARAS 136-154): ibid s 42(5).

10 Ibid s 42(3)(a). 'Independent medical agency' has the meaning given by the Care Standards Act 2000 s 2(1), (5), (8) (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 985): Sexual Offences Act 2003 s 42(5).

11 'Independent clinic' has the meaning given by the Care Standards Act 2000 s 2(1), (4), (8) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 983): Sexual Offences Act 2003 s 42(5).

12 Ibid s 42(3)(b). 'Independent hospital' has the meaning given by the Care Standards Act 2000 s 2(1)-(6), (6)-(8) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 983): Sexual Offences Act 2003 s 42(5).

13 Ibid s 42(3).

14 Ibid s 42(4)(a).

15 Ibid s 42(4)(b).

## **UPDATE**

### **211 Meaning of 'care worker'**

NOTE 9--In the definition of 'National Health Service body' for 'health authority' read 'local health board': References to Health Authorities Order 2007, SI 2007/961.

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## **212. Mens rea.**

For the purposes of the sexual offences that may be committed by care workers<sup>1</sup> in respect of mentally disordered persons<sup>2</sup> in their care (that is, the offences of sexual activity with a mentally disordered person<sup>3</sup>, causing or inciting a mentally disordered person to engage in sexual activity<sup>4</sup>, engaging in sexual activity in the presence of a mentally disordered person<sup>5</sup>, and causing a mentally disordered person to watch a sexual act<sup>6</sup>), in addition to requiring the defendant intentionally to do the thing specified by each individual offence<sup>7</sup> further provision is made as to the mens rea required in respect of the person's mental disorder. It is required that the defendant knows or could reasonably be expected to know that the person in question has a mental disorder<sup>8</sup>; and where in proceedings for such an offence it is proved that the person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it<sup>9</sup>.

1 For the meaning of 'care worker' see PARA 211 ante.

2 As to the meaning of 'mental disorder' see PARA 196 ante.

3 Ie an offence under the Sexual Offences Act 2003 s 38 (see PARA 207 ante).

4 Ie an offence under ibid s 39 (see PARA 208 ante).

5 Ie an offence under ibid s 40 (see PARA 209 ante).

6 Ie an offence under ibid s 41 (see PARA 210 ante).

7 See ibid ss 38(1)(a), 39(1)(a), 40(1)(a), 41(1)(a); and PARAS 207-210 ante.

8 Ibid ss 38(1)(d), 39(1)(d), 40(1)(e), 41(1)(d).

9 Ibid ss 38(2), 39(2), 40(2), 41(2).

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### **213. Exceptions for spouses and civil partners and for pre-existing sexual relationships.**

Conduct by a person which would otherwise be an offence involving sexual activity with a mentally disordered person<sup>1</sup> by a care worker<sup>2</sup> is not such an offence if:

- 215 (1) at the time the mentally disordered person is aged 16 or over<sup>3</sup> and the two are lawfully married to, or are civil partners of, each other<sup>4</sup>; or
- 216 (2) a sexual relationship existed between the two immediately before the care worker became involved in the other's care<sup>5</sup>.

<sup>1</sup> As to the meaning of 'mental disorder' see PARA 196 ante.

<sup>2</sup> See the Sexual Offences Act 2003 s 38 (sexual activity with a mentally disordered person: see PARA 207 ante), s 39 (causing or inciting a mentally disordered person to engage in sexual activity: see PARA 208 ante), s 40 (sexual activity in the presence of a mentally disordered person: see PARA 209 ante), and s 41 (causing a mentally disordered person to watch a sexual act: see PARA 210 ante). For the meaning of 'care worker' see PARA 211 ante.

<sup>3</sup> Ibid s 43(1)(a). As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

<sup>4</sup> Sexual Offences Act 2003 s 43(1)(b) (s 43(1)(b), (2) amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 175(1)-(3)). In proceedings for an offence it is for the defendant to prove that he and the other person were at the time lawfully married to, or civil partners of, each other: Sexual Offences Act 2003 s 43(2) (as so amended). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

<sup>5</sup> Sexual Offences Act 2003 s 44(1). The reference in the text to the care worker becoming involved in the other's care is a reference to that person becoming involved in the other's care in a way which falls within s 42 (see PARA 211 ante): s 44(1). This exception does not apply if at that time sexual intercourse between them would have been unlawful: s 44(2). In proceedings for an offence under any of ss 38-41 (see note 2 supra) it is for the defendant to prove that such a relationship existed at the time: s 44(3). See note 4 supra.

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## 214. Punishment.

A care worker<sup>1</sup> ('A') guilty of the offence of sexual activity with a mentally disordered person in his care ('B')<sup>2</sup> or of causing or inciting a mentally disordered person in his care ('B') to engage in sexual activity<sup>3</sup> is liable on conviction on indictment to imprisonment for a term not exceeding 10 years<sup>4</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup>, to a fine not exceeding the statutory maximum<sup>6</sup>, or to both<sup>7</sup>. If, however:

217 (1) the offence was one of sexual activity with B<sup>8</sup> and the touching<sup>9</sup> involved:

15

23. (a) penetration<sup>10</sup> of B's anus or vagina<sup>11</sup> with a part of A's body or anything else<sup>12</sup>;

24. (b) penetration of B's mouth with A's penis<sup>13</sup>;

25. (c) penetration of A's anus or vagina with a part of B's body<sup>14</sup>; or

26. (d) penetration of A's mouth with B's penis<sup>15</sup>; or

16

218 (2) the offence was one of causing or inciting B to engage in sexual activity<sup>16</sup> and the activity caused or incited<sup>17</sup> involved:

17

27. (a) penetration of B's anus or vagina<sup>18</sup>;

28. (b) penetration of B's mouth with a person's penis<sup>19</sup>;

29. (c) penetration of a person's anus or vagina with a part of B's body or by B with anything else<sup>20</sup>; or

30. (d) penetration of a person's mouth with B's penis<sup>21</sup>,

18

the summary procedure is not available<sup>22</sup> and the offence is punishable on conviction on indictment by imprisonment for a term not exceeding 14 years<sup>23</sup>.

A care worker guilty of the offence of engaging in sexual activity in the presence of a mentally disordered person in his care<sup>24</sup> or of causing a mentally disordered person in his care to watch a sexual act<sup>25</sup> is liable on conviction on indictment to imprisonment for a term not exceeding seven years<sup>26</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>27</sup>, to a fine not exceeding the statutory maximum, or to both<sup>28</sup>.

1 For the meaning of 'care worker' see PARA 211 ante.

2 Ie an offence under the Sexual Offences Act 2003 s 38 (see PARA 207 ante).

3 Ie an offence under ibid s 39 (see PARA 208 ante).

4 Ibid ss 38(4)(b), 39(4)(b).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

- 6 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.
- 7 Sexual Offences Act 2003 ss 38(4)(a), 39(4)(a).
- 8 Ie an offence under ibid s 38 (see PARA 207 ante).
- 9 As to the meaning of 'touching' see PARA 162 note 4 ante.
- 10 For the meaning of 'penetration' see PARA 162 note 3 ante.
- 11 As to the meaning of 'vagina', and references to parts of the body generally, see PARA 163 note 3 ante.
- 12 Sexual Offences Act 2003 s 38(3)(a).
- 13 Ibid s 38(3)(b).
- 14 Ibid s 38(3)(c).
- 15 Ibid s 38(3)(d).
- 16 Ie an offence under ibid s 39 (see PARA 208 ante).
- 17 As to the meaning of 'caused' see PARA 171 note 1 ante; and as to incitement see PARA 65 ante.
- 18 Sexual Offences Act 2003 s 39(3)(a).
- 19 Ibid s 39(3)(b).
- 20 Ibid s 39(3)(c).
- 21 Ibid s 39(3)(d).
- 22 Ibid ss 38(4), 39(4).
- 23 Ibid ss 38(3), 39(3).
- 24 Ie an offence under ibid s 40 (see PARA 209 ante).
- 25 Ie an offence under ibid s 41 (see PARA 210 ante).
- 26 Ibid ss 40(3)(b), 41(3)(b).
- 27 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.
- 28 Sexual Offences Act 2003 ss 40(3)(a), 41(3)(a).

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## **(7) OFFENCES RELATING TO PROSTITUTION AND SEX TRAFFICKING**

### **(i) Offences Relating to Prostitution and Pornography**

#### **215. Paying for sexual services of a child.**

A person ('A') commits an offence if:

- 219 (1) he intentionally obtains for himself the sexual<sup>1</sup> services of another person ('B')<sup>2</sup>;
- 220 (2) before obtaining those services, he has made or promised payment<sup>3</sup> for those services to B or a third person, or knows that another person has made or promised such a payment<sup>4</sup>; and
- 221 (3) either:
  - 19 31. (a) B is under 18<sup>5</sup>, and A does not reasonably believe that B is 18 or over<sup>6</sup>; or
  - 32. (b) B is under 13<sup>7</sup>.
- 20

A person guilty of such an offence against a person under 13 is liable on conviction on indictment to a term imprisonment for life<sup>8</sup> if the offence involved:

- 222 (i) penetration<sup>9</sup> of B's anus or vagina<sup>10</sup> with a part of A's body or anything else<sup>11</sup>;
- 223 (ii) penetration of B's mouth with A's penis<sup>12</sup>;
- 224 (iii) penetration of A's anus or vagina with a part of B's body or by B with anything else<sup>13</sup>; or
- 225 (iv) penetration of A's mouth with B's penis<sup>14</sup>.

A person guilty of such an offence against a person under 16 is liable on conviction on indictment to a term of imprisonment not exceeding 14 years, if the offence involved penetrative activity (as described above)<sup>15</sup>.

A person guilty of such an offence not involving such penetrative activity against a person under 16 is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>16</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>17</sup>, to a fine not exceeding the statutory maximum<sup>18</sup>, or to both<sup>19</sup>.

A person guilty of such an offence against a person under 18 (that is, aged 16 or 17) is liable on conviction on indictment to imprisonment for a term not exceeding seven years<sup>20</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>21</sup>, to a fine not exceeding the statutory maximum, or to both<sup>22</sup>.

1 For the meaning of 'sexual' see PARA 162 ante.

2 Sexual Offences Act 2003 s 47(1)(a).

3 'Payment' means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount: *ibid* ss 47(2), 51(3).

4 *Ibid* s 47(1)(b).

5 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

6 Sexual Offences Act 2003 s 47(1)(c)(i).

7 *Ibid* s 47(1)(c)(ii).

8 *Ibid* s 47(3).

9 For the meaning of 'penetration' see PARA 162 note 3 ante.

10 As to the meaning of 'vagina', and references to parts of the body generally, see PARA 163 note 3 ante.

11 Sexual Offences Act 2003 s 47(6)(a).

12 *Ibid* s 47(6)(b).

13 *Ibid* s 47(6)(c).

14 *Ibid* s 47(6)(d).

15 *Ibid* s 47(4)(a).

16 *Ibid* s 47(4)(b)(ii).

17 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

18 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

19 Sexual Offences Act 2003 s 47(4)(b)(i).

20 *Ibid* s 47(5)(a).

21 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

22 Sexual Offences Act 2003 s 47(5)(a).



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**216. Causing, inciting, controlling, arranging or facilitating child prostitution or pornography.**

A person ('A') commits an offence if he intentionally:

- 226 (1) causes or incites<sup>1</sup> another person ('B') to become a prostitute<sup>2</sup>, or to be involved in pornography<sup>3</sup>, in any part of the world<sup>4</sup>;
- 227 (2) controls any of the activities of another person ('B') relating to B's prostitution<sup>5</sup> or involvement in pornography in any part of the world<sup>6</sup>; or
- 228 (3) arranges or facilitates the prostitution or involvement in pornography in any part of the world of another person ('B')<sup>7</sup>;

and either:

- 229 (a) B is under 18<sup>8</sup>, and A does not reasonably believe that B is 18 or over<sup>9</sup>; or
- 230 (b) B is under 13<sup>10</sup>.

A person guilty of any of these offences is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>11</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>12</sup>, to a fine not exceeding the statutory maximum<sup>13</sup>, or to both<sup>14</sup>.

1 As to the meaning of 'causes' see PARA 171 note 1 ante; and as to incitement see PARA 65 ante.

2 'Prostitute' means a person who, on at least one occasion and whether or not compelled to do so, offers or provides sexual services to another person in return for payment or a promise of payment to himself or herself or a third person: Sexual Offences Act 2003 s 51(2). For the meaning of 'payment' see PARA 215 note 3 ante. As to prostitutes at common law see PARA 224 note 1 post.

3 For these purposes, a person is involved in pornography if an indecent image of that person is recorded; and similar expressions, and 'pornography', are to be interpreted accordingly: *ibid* s 51(1). For the meaning of 'image' see PARA 175 note 3 ante.

4 *Ibid* s 48(1)(a).

5 'Prostitution' is to be interpreted in accordance with the definition of 'prostitute' in *ibid* s 51(2) (see note 2 *supra*): s 51(2).

6 *Ibid* s 49(1)(a).

7 *Ibid* s 50(1)(a).

8 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

9 Sexual Offences Act 2003 ss 48(1)(b)(i), 49(1)(b)(i), 50(1)(b)(i).

10 *Ibid* ss 48(1)(b)(ii), 49(1)(b)(ii), 50(1)(b)(ii).

11 Ibid ss 48(2)(b), 49(2)(b), 50(2)(b).

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

13 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

14 Sexual Offences Act 2003 ss 48(2)(a), 49(2)(a), 50(2)(a). An offence under any of these provisions is also a 'lifestyle offence' in respect of which the court may make a financial reporting order: see the Proceeds of Crime Act 2002 s 75, Sch 2 para 8(2)(b)-(d) (as substituted); the Serious Organised Crime and Police Act 2005 s 76(3)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 476.

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## **217. Exploitation of prostitution.**

A person commits an offence if he intentionally:

- 231 (1) causes or incites<sup>1</sup> another person to become a prostitute<sup>2</sup> in any part of the world<sup>3</sup>; or
- 232 (2) controls any of the activities of another person relating to that person's prostitution<sup>4</sup> in any part of the world<sup>5</sup>,

and he does so for or in the expectation of gain<sup>6</sup> for himself or a third person<sup>7</sup>.

A person guilty of one of these offences is liable on conviction on indictment to imprisonment for a term not exceeding seven years<sup>8</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup>, to a fine not exceeding the statutory maximum<sup>10</sup>, or to both<sup>11</sup>.

1 As to the meaning of 'causes' see PARA 171 note 1 ante; and as to incitement see PARA 65 ante.

2 For the meanings of 'prostitute' and 'prostitution' see PARA 216 note 2 ante; definition applied by the Sexual Offences Act 2003 s 54(2).

3 Ibid s 52(1)(a).

4 See note 2 supra.

5 Sexual Offences Act 2003 s 53(1)(a).

6 'Gain' means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount (ibid s 54(1)(a)) or the goodwill of any person which is or appears likely, in time, to bring financial advantage (s 54(1)(b)).

7 Ibid ss 52(1)(b), 53(1)(b).

8 Ibid ss 52(2)(b), 53(2)(b).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

11 Sexual Offences Act 2003 ss 52(2)(a), 53(2)(a). An offence under either of these provisions is also a 'lifestyle offence' in respect of which the court may make a financial reporting order: see the Proceeds of Crime Act 2002 s 75, Sch 2 para 8(2)(e), (f) (as substituted); the Serious Organised Crime and Police Act 2005 s 76(3) (c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 476.

## **UPDATE**

### **217 Exploitation of prostitution**

TEXT AND NOTE 4--Activities may be controlled without compulsion, force, or coercion: it suffices for the defendant to instruct or direct the complainant to carry out the activity of prostitution or to do it in a certain way: *R v Massey* [2007] EWCA Crim 2664, [2008] 2 All ER 969.

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## (ii) Brothels

### 218. Keeping a brothel.

It is an offence for a person to keep a brothel<sup>1</sup> or to manage<sup>2</sup>, or act or assist in the management<sup>3</sup> of a brothel<sup>4</sup>. The offence is triable summarily<sup>5</sup>; and a person guilty of such an offence is liable on a first conviction to imprisonment for a term not exceeding three months, or to a fine not exceeding level 3 on the standard scale<sup>6</sup>, or to both; or after a previous conviction<sup>7</sup> to imprisonment for a term not exceeding six months<sup>8</sup>, to a fine not exceeding level 4 on the standard scale, or to both<sup>9</sup>.

1 Whether the premises constitute a brothel is a question of fact and degree: *Stevens and Stevens v Christy* (1987) 151 JP 366, DC. A brothel is a place resorted to by persons of opposite sexes where the women offer themselves as participants in physical acts of indecency for sexual gratification of men. It is not essential that there is evidence that normal sexual intercourse is provided on the premises: *Kelly v Purvis* [1983] QB 663, 76 Cr App Rep 165, DC (evidence of masturbation provided for clients), explaining *Winter v Wolfe* [1931] 1 KB 549, CCA, and *R v Holland, Lincolnshire Justices* (1882) 46 JP 312. See, however, note 4 infra. Premises frequented by men for intercourse with only one woman are not a brothel (*Singleton v Ellison* [1895] 1 QB 607; *Mattison v Johnson* (1916) 85 LJB 741) whether the woman is the tenant or not (*Caldwell v Leech* (1913) 109 LT 188). Where two women use the premises for prostitution, the fact that one is the tenant does not prevent the premises from being a brothel: *Gorman v Standen, Palace-Clark v Standen* [1964] 1 QB 294, 48 Cr App Rep 30, DC. Where prostitutes use the premises, with two receptionists, as a team, but never more than one prostitute is present on any given day, the premises are being used as a brothel: *Stevens and Stevens v Christy* supra. It is not necessary to prove that the women using the premises are known to the police as prostitutes or that payments are made to them (*Winter v Wolfe* supra; *Kelly v Purvis* supra); but evidence that the women are prostitutes is admissible on the question of whether the premises are a brothel provided that the fact of the women being prostitutes is within the personal knowledge of any deponent who makes the assertion (*R v Korie* [1966] 1 All ER 50). Nor is it necessary that the use of the premises should have caused a nuisance to neighbours (*R v Holland, Lincolnshire Justices* supra) or that indecency or disorderly conduct should be apparent from outside (*R v Rice and Wilton* (1866) LR 1 CCR 21). Where premises are used by more than one prostitute for her trade, the question of whether the premises or part of the premises are or is a brothel is a question of fact in each case to be deduced from the circumstances as a whole; the mere fact that individual rooms were let under separate tenancies for exclusive occupation by one woman does not of itself preclude the whole or part of a house from being a brothel: *Donovan v Gavin* [1965] 2 QB 648, [1965] 2 All ER 611, DC. See also *Durose v Wilson* (1907) 71 JP 263 (numbers of flats in block each let to and used by one woman for prostitution; held to be a brothel); *Abbott v Smith* [1965] 2 QB 662n, [1964] 3 All ER 762 (house let off in single room apartments with exclusive occupation; held to be a brothel). Cf *Strath v Foxon* [1956] 1 QB 67, 39 Cr App Rep 162, DC (three-storey house, two floors and one floor let separately to prostitutes; held not to be a brothel).

2 'Managing a brothel' means taking an active part in the running of the business; and to establish 'management' evidence must show something suggesting control in contrast to purely menial and routine duties: *Abbott v Smith* [1965] 2 QB 662n, [1964] 3 All ER 762. Evidence by police officers of conversations in the absence of the accused in which immoral services are offered by women employed at the premises, as masseuses, is admissible to show the purpose for which the premises are used: such evidence is not hearsay, since the truth of the statements alleged to have been made is not in point; the relevance of the evidence lies in the fact that such offers are made: *Woodhouse v Hall* (1980) 72 Cr App Rep 39, DC; *R v Wilson (Donald)* (1983) 78 Cr App Rep 247, CA.

3 It is not a necessary condition for assisting in the management of a brothel that the defendant actually exercises some control over the brothel or carries out some specific act of management; 'assisting' is a wider concept, and the question is one of fact in each case: *Jones v DPP* (1992) 96 Cr App Rep 130, DC (defendants had taken advertisements to the post office, and even paid for them; held to be clear evidence of assisting in the management of a brothel). See *Gorman v Standen, Palace-Clark v Standen* [1964] 1 QB 294, [1963] 3 All ER 627, DC (the mere fact that a woman participates in the activities being conducted in the brothel does not make

her a person assisting in the management of a brothel). Where women in a massage parlour not only performed lewd acts, but (inter alia) discussed the nature of the acts to be performed and negotiated the terms of payment for their services, they were assisting in the management of a brothel; the tasks went considerably beyond the menial tasks, such as cleaning and removing rubbish from the premises, which could be done without taking part in the management: *Elliott v DPP, Dublides v DPP* (1989) Times, 19 January.

4 Sexual Offences Act 1956 s 33. It is also an offence to keep a brothel for the purposes of prostitution: see s 33A (as added); and PARA 219 post. As to prostitution at common law see PARA 224 note 1 post. For the purposes of s 33, s 33A (as added), s 34, s 35 (see PARAS 219-220 post), premises are to be treated as a brothel if people resort to them for the purpose of lewd homosexual practices in circumstances in which resort to them for lewd heterosexual practices would have led to their being treated as a brothel for the purposes of those provisions: Sexual Offences Act 1967 s 6. If the information charges a single transaction, taking place over a period of time within the previous six months, it will not be bad for duplicity: *Anderton v Cooper* (1980) 145 JP 128, DC. As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

5 Sexual Offences Act 1956 s 37(1), (2), Sch 2 para 33 (amended by the Criminal Law Act 1977 s 65, Sch 13).

6 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 A previous conviction under the Sexual Offences Act 1956 ss 34-36 (s 36 as amended) (see PARAS 220-221 post) is to be taken into account: see s 37(1), (4), (5), Sch 2 para 33.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

9 Sexual Offences Act 1956 s 37(1), (3), Sch 2 para 33 (amended by the Criminal Justice Act 1982 ss 38, 46). An offence under these provisions is also a 'lifestyle offence' in respect of which the court may make a financial reporting order: see the Proceeds of Crime Act 2002 s 75, Sch 2 para 8(1) (as substituted); the Serious Organised Crime and Police Act 2005 s 76(3)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 476.

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## **219. Keeping a brothel used for prostitution.**

It is an offence for a person to keep, or to manage, or act or assist in the management of, a brothel<sup>1</sup> to which people resort for practices involving prostitution<sup>2</sup> (whether or not also for other practices)<sup>3</sup>. A person guilty of such an offence is liable on conviction on indictment to a term of imprisonment not exceeding seven years<sup>4</sup>, or on summary conviction to a term of imprisonment for a term not exceeding six months<sup>5</sup>, to a fine not exceeding the statutory maximum<sup>6</sup>, or to both<sup>7</sup>.

1 As to keeping a brothel, and the management of a brothel, see PARA 218 notes 1-4 ante.

2 For the meanings of 'prostitute' and 'prostitution' see PARA 216 note 2 ante (definition applied by the Sexual Offences Act 1956 s 33A(2) (s 33A, Sch 2 para 33A added by the Sexual Offences Act 2003 s 55)). As to prostitution at common law see PARA 224 note 1 post.

3 Sexual Offences Act 1956 s 33A(1) (as added: see note 2 supra).

4 Ibid s 37(1)-(3), Sch 2 para 33A(i) (as added: see note 2 supra).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7 Sexual Offences Act 1956 Sch 2 para 33A(ii) (as added: see note 2 supra).

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## **220. Use of premises as a brothel.**

It is an offence for the lessor or landlord of any premises or his agent either to let the whole or part of the premises with the knowledge that it is to be used, in whole or in part, as a brothel<sup>1</sup> or, where the whole or part of the premises is used as a brothel, to be wilfully a party to that use continuing<sup>2</sup>. It is also an offence for the tenant<sup>3</sup> or occupier, or person in charge, of any premises knowingly to permit the whole or part of the premises to be used as a brothel<sup>4</sup>. Where the tenant or occupier of any premises is so convicted and either the lessor or landlord, after having the conviction brought to his notice, fails to exercise his statutory rights<sup>5</sup> in relation to the lease or contract under which the premises are held by the person convicted, or the lessor or landlord, after exercising his statutory rights so as to determine that lease or contract, grants a new lease or enters into a new contract of tenancy of the premises to, with or for the benefit of the same person, without having all reasonable provisions to prevent the recurrence of the offence inserted in the new lease or contract, then, if subsequently an offence under these provisions is committed in respect of the premises during the subsistence of the lease or contract or during the subsistence of the new lease or contract, the lessor or landlord is deemed to be a party to that offence unless he shows that he took all reasonable steps to prevent the recurrence of the offence<sup>6</sup>.

These offences are triable summarily<sup>7</sup>; and a person guilty of such an offence is liable on a first conviction to imprisonment for a term not exceeding three months<sup>8</sup>, or to a fine not exceeding level 3 on the standard scale<sup>9</sup>, or to both; or after a previous conviction<sup>10</sup> to imprisonment for a term not exceeding six months<sup>11</sup>, to a fine not exceeding level 4 on the standard scale, or to both<sup>12</sup>.

1 For the meaning of 'brothel' see PARA 218 notes 1, 4 ante.

2 Sexual Offences Act 1956 s 34.

3 Cf *Siviour v Napolitano* [1931] 1 KB 636 (in the Criminal Law Amendment Act 1885 s 13 (repealed) (tenant, lessee or occupier permitting use of premises as a brothel) the word 'lessee' referred to a lessee in occupation and did not cover a landlord who was himself a lessee).

4 Sexual Offences Act 1956 s 35(1).

5 For these purposes, references to the statutory rights of a lessor or landlord refer to his rights under *ibid* s 35(2), Sch 1 (as amended): see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 22.

6 *Ibid* s 35(3)(a), (b).

7 *Ibid* s 37(1), (2), Sch 2 paras 34, 35 (amended by the Criminal Law Act 1977 s 65, Sch 13).

8 As from a day to be appointed the Secretary of State may by order either provide that this offence is no longer to be punishable by imprisonment or extend the maximum term of imprisonment for this offence to a maximum term of 51 weeks: see the Criminal Justice Act 2003 s 281(1), (2), (7) (not yet in force). Any such order may make such supplementary, incidental, or consequential provision as the Secretary of State considers necessary or expedient, including provision amending any relevant enactment (s 281(3) (not yet in force)), but may not affect the penalty for any offence committed before the commencement of that order (s 281(6)(a) (not yet in force)). At the date at which this volume states the law no such day had been appointed and no such order had been made.



9 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

10 A previous conviction under the Sexual Offences Act 1956 s 33 (see PARA 218 ante), s 34, s 35 or s 36 (as amended) (see PARA 221 post), is to be taken into account: see s 37(1), (4), (5), Sch 2 paras 34, 35.

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

12 Sexual Offences Act 1956 Sch 2 paras 34, 35 (amended by the Criminal Justice Act 1982 ss 38, 46). The offence of letting premises with the knowledge that they are to be used as a brothel (ie the offence under the Sexual Offences Act 1956 s 34 (see the text and notes 1-2 supra)) is also a 'lifestyle offence' in respect of which the court may make a financial reporting order: see the Proceeds of Crime Act 2002 s 75, Sch 2 para 8(1) (as substituted); the Serious Organised Crime and Police Act 2005 s 76(3)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 476.

## **UPDATE**

### **220 Use of premises as a brothel**

NOTE 6--Sexual Offences Act 1956 s 35 amended: Statute Law (Repeals) Act 2008.

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## **221. Permitting premises to be used for prostitution.**

It is an offence for the tenant<sup>1</sup> or occupier of any premises knowingly to permit the whole or part of the premises to be used for the purposes of habitual prostitution<sup>2</sup> (whether any prostitute involved is male or female)<sup>3</sup>. The offence is triable summarily<sup>4</sup>; and a person guilty of such an offence is liable on a first conviction to imprisonment for a term not exceeding three months<sup>5</sup>, or to a fine not exceeding level 3 on the standard scale<sup>6</sup>, or to both; or after a previous conviction<sup>7</sup> to imprisonment for a term not exceeding six months<sup>8</sup>, to a fine not exceeding level 4 on the standard scale, or to both<sup>9</sup>.

1 As to the meaning of 'tenant' see PARA 220 note 3 ante.

2 For the meaning of 'prostitution' see PARA 224 note 1 post.

3 Sexual Offences Act 1956 s 36 (amended by the Sexual Offences Act 2003 s 56, Sch 1 para 1).

4 Sexual Offences Act 1956 s 37(1), (2), Sch 2 para 36 (amended by the Criminal Law Act 1977 s 65, Sch 13).

5 As from a day to be appointed the Secretary of State may by order either provide that this offence is no longer punishable by imprisonment or extend the maximum term of imprisonment for this offence to a maximum term of 51 weeks: see the Criminal Justice Act 2003 s 281(1), (2), (7) (not yet in force). Any such order may make such supplementary, incidental, or consequential provision as the Secretary of State considers necessary or expedient, including provision amending any relevant enactment (s 281(3) (not yet in force)), but may not affect the penalty for any offence committed before the commencement of that order (s 281(6)(a) (not yet in force)). At the date at which this volume states the law no such day had been appointed and no such order had been made.

6 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 A previous conviction under the Sexual Offences Act 1956 s 33 (see PARA 218 ante), s 34 or s 35 (see PARA 220 ante), is to be taken into account: see s 37(1), (4), (5), Sch 2 para 36.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

9 Sexual Offences Act 1956 Sch 2 para 36 (amended by the Criminal Justice Act 1982 ss 38, 46).

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## **222. Allowing a person under sixteen to be in a brothel.**

If any person having the responsibility<sup>1</sup> for a child or young person who has attained the age of four years and is under the age of 16 years<sup>2</sup> allows that child or young person to reside in or to frequent a brothel<sup>3</sup>, he is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup>, to a fine not exceeding level 2 on the standard scale<sup>5</sup>, or to both<sup>6</sup>.

1 For the meaning of 'responsibility' see PARA 143 note 1 ante.

2 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

3 For the meaning of 'brothel' see PARA 218 notes 1, 4 ante.

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6 Children and Young Persons Act 1933 s 3(1) (amended by the Children and Young Persons Act 1963 s 64(1), (3), Sch 3; the Criminal Law Act 1977 ss 15, 30, Sch 1; the Criminal Justice Act 1982 s 46; and the Children Act 1989 s 108(5), Sch 13 para 3(a)).

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### (iii) Disorderly Houses

#### 223. Disorderly houses.

A person commits an indictable offence at common law who keeps<sup>1</sup> a common, ill-governed and disorderly house<sup>2</sup>. A house found to be kept open to, and frequented by, persons who conduct themselves in such a manner as to violate law and good order is a disorderly house<sup>3</sup>. Where, however, the essence of the charge is the taking place of indecent performances or exhibitions, the fact that persons resorting to the premises are merely spectators does not prevent the premises constituting a disorderly house<sup>4</sup>; nor need disorderly conduct be visible from the exterior of the house<sup>5</sup>; nor need there be any spectators when the performance, exhibition or service is performed for one client<sup>6</sup>. A disorderly house may amount to a common nuisance, but this is not an essential ingredient of the offence<sup>7</sup>.

Where indecent performances or exhibitions are alleged as rendering premises a disorderly house, it must be proved that the matters performed or exhibited there are of such a character that their performance or exhibition in a place of common resort would amount to an outrage of public decency, tend to corrupt or deprave, or be otherwise calculated to injure the public interest so as to call for condemnation and punishment<sup>8</sup>. The defendant must have knowledge of the use to which the premises are put<sup>9</sup>.

The penalty for keeping a disorderly house is a fine and imprisonment at the discretion of the court<sup>10</sup>. Any person who acts or behaves as master or mistress, or as the person having the care, government or management, of any bawdy-house, or other disorderly house, is deemed and taken to be the keeper of it, and is liable to be prosecuted and punished as such, notwithstanding that that person is not in fact the real owner or keeper<sup>11</sup>.

1 'Keep' involves an element of habitual keeping or persistence: *Moore v DPP* [1992] QB 125, [1991] 4 All ER 521, 94 Cr App Rep 173, DC (single performance of indecent exhibition insufficient).

2 3 Co Inst 205; *R v Higginson* (1762) 2 Burr 1232.

3 *R v Berg* (1927) 20 Cr App Rep 38, CCA; *R v Tan* [1983] QB 1053, 76 Cr App Rep 300, CA. There must be an element of 'open house', albeit the premises need not be open to the public at large: *R v Berg* supra.

4 *R v Quinn, R v Bloom* [1962] 2 QB 245, 45 Cr App Rep 279, CCA.

5 *R v Rice, R v Wilton* (1866) LR 1 CCR 21.

6 *R v Tan* [1983] QB 1053, 76 Cr App Rep 300, CA.

7 *R v Quinn, R v Bloom* [1962] 2 QB 245, 45 Cr App Rep 279, CCA. As to offences of public nuisance at common law see NUISANCE vol 78 (2010) PARA 104 et seq.

8 *R v Quinn, R v Bloom* [1962] 2 QB 245, 45 Cr App Rep 279, CCA; *R v Tan* [1983] QB 1053, 76 Cr App Rep 300, CA. As to the common law offence of outraging public decency see PARA 764 post.

9 *Moore v DPP* [1992] QB 125, [1991] 4 All ER 521, 94 Cr App Rep 173, DC.

10 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139. See also *R v Goldstein* [1971] Crim LR 300, CA (sentences in respect of three counts of running a disorderly house of nine, nine and 12

months were upheld; it depends upon nature of exhibition); *R v Brady, R v Ram* [1964] 3 All ER 616n, 47 Cr App Rep 196, CCA (fines imposed). In *Moore v DPP* [1992] QB 125, [1991] 4 All ER 521, 94 Cr App Rep 173, DC, the offence of keeping a disorderly house was treated as triable either way. If the offence is charged as a species of public nuisance (which is triable either way by virtue of the Magistrates' Courts Act 1980 s 17, Sch 1 para 1 (see MAGISTRATES vol 29(2) (Reissue) PARA 655)) this is correct, but keeping a disorderly house does not necessarily amount to a public nuisance (see *R v Quinn, R v Bloom* [1962] 2 QB 245, 45 Cr App Rep 279, CCA; and the text and note 7 supra).

11 Disorderly Houses Act 1751 s 8 (amended by the Betting and Gaming Act 1960 s 15, Sch 6 Pt I). This does not, however, apply in relation to premises which are 'relevant premises' (ie, generally, licensed premises) for the purposes of the Licensing Act 2003 Pt 7 (ss 136-159) (offences): see the Licensing Act 2003 ss 159, 198, Sch 6 para 2; and LICENSING AND GAMBLING vol 67 (2008) PARA 132 et seq. The offence is triable either way: see the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 2; para 1103 post; and MAGISTRATES vol 29(2) (Reissue) PARA 661.

## **UPDATE**

### **223 Disorderly houses**

TEXT AND NOTE 11--Disorderly Houses Act 1751 repealed: Statute Law (Repeals) Act 2008.

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## **(iv) Solicitation by Prostitutes**

### **224. Prostitute loitering or soliciting.**

It is an offence for a common prostitute<sup>1</sup> (whether male or female) to loiter or solicit<sup>2</sup> in a street<sup>3</sup> or public place<sup>4</sup> for the purpose of prostitution<sup>5</sup>. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 2 on the standard scale<sup>6</sup> or, for an offence committed after a previous conviction, to a fine not exceeding level 3 on the standard scale<sup>7</sup>.

1 'Common prostitute' includes a person who offers his or her body for purposes amounting to common lewdness in return for payment; there need not be an act of ordinary sexual intercourse: see *R v De Munck* [1918] 1 KB 635, CCA (procuring a woman to become a common prostitute, contrary to the Criminal Law Amendment Act 1885 s 2(2) (repealed)); *Kelly v Purvis* [1983] QB 663, 76 Cr App Rep 165, DC (keeping etc a brothel, contrary to the Sexual Offences Act 1956 s 33 (see PARA 218 ante)); *R v Morris-Lowe* [1985] 1 All ER 400, 80 Cr App Rep 114, CA (attempting to procure a woman to become a common prostitute, such procuring being an offence contrary to the Sexual Offences Act 1956 s 22 (repealed)). 'Prostitution' is not confined to cases where a person offers his or her body for lewdness in a passive way but includes cases where a person offers his or her body as a participant in physical acts of indecency for the sexual gratification of men: see *R v Webb* [1964] 1 QB 357, [1963] 3 All ER 177, CCA (procuring a woman to become a common prostitute and living off immoral earnings contrary to the Sexual Offences Act 1956 s 30 (repealed)); *Kelly v Purvis* supra. Persuading a person for reward to offer himself or herself for lewdness with the defendant alone does not constitute the offence because that person would not commonly offer himself or herself for lewdness and therefore not be a common prostitute: *R v Morris-Lowe* supra. In *R v McFarlane* [1994] QB 419, 99 Cr App Rep 8, CA, it was held (in relation to the offence of living off immoral earnings) that the essence of prostitution is the making of an offer of sexual services for reward, and that it is immaterial that the person making the offer does not intend to perform them and does not do so. Note that all these cases were decided before the present offence was extended to include males by the Sexual Offences Act 2003 s 56, Sch 1 para 2.

2 'Soliciting' involves the physical presence of the prostitute and conduct on his or her part amounting to an importuning of prospective customers; a prostitute who displays an advertisement in a street or public place that he or she is available as a prostitute does not 'solicit': *Weisz v Monahan* [1962] 1 All ER 664, [1962] 1 WLR 262, DC; *Burge v DPP* [1962] 1 All ER 666n. A female prostitute sitting scantily clad at a window bathed in red light and in an area where prostitutes were sought was held to be 'soliciting' in the sense of tempting or alluring prospective customers to come in for prostitution and projecting her solicitation to passers by: *Behrendt v Burridge* [1976] 3 All ER 285, [1977] 1 WLR 29, DC. See also *Knight v Fryer* [1976] Crim LR 322, DC; and note 3 infra.

3 For these purposes, 'street' includes any bridge, road, lane, footway, subway, square, court, alley or passage, whether a thoroughfare or not, which is for the time being open to the public; and the doorways and entrances of premises abutting on a street and any ground adjoining and open to a street, are treated as forming part of the street: Street Offences Act 1959 s 1(4). Conduct amounting to soliciting by prostitutes on a balcony or at a window overlooking the street is 'soliciting in the street': *Smith v Hughes* [1960] 2 All ER 859, [1960] 1 WLR 830, DC; *Behrendt v Burridge* [1976] 3 All ER 285, [1977] 1 WLR 29, DC.

4 'Public place' is not defined in the Street Offences Act 1959, but must presumably be construed ejusdem generis with the extended definition of 'street': see note 3 supra. In *R v Wellard* (1884) 14 QBD 63 at 66-67, CCR, Grove J said 'A public place is one where the public go, no matter whether they have a right to go or not'. See also *R v Collinson* (1931) 23 Cr App Rep 49, CCA (field to which the public was temporarily admitted held to be a public place); *Elkins v Cartledge* [1947] 1 All ER 829, DC (an enclosure at the rear of a public house where cars were parked held to be a public place).

5 Street Offences Act 1959 s 1(1) (amended by the Sexual Offences Act 2003 Sch 1 para 2).

6 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 Street Offences Act 1959 s 1(2) (substituted by the Criminal Justice Act 1982 s 71(1)).

**UPDATE**

**224 Prostitute loitering or soliciting**

NOTE 1--See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).

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## **225. Application to court by a person cautioned for loitering or soliciting.**

Where in respect of his conduct in a street<sup>1</sup> or public place<sup>2</sup> a person is cautioned<sup>3</sup> by a constable that if he persists in such conduct it may result in his being charged with an offence<sup>4</sup>, he may apply to a magistrates' court<sup>5</sup> for an order directing that no entry is to be made in respect of that caution in any record maintained by the police of those so cautioned and that any such entry already made is to be expunged<sup>6</sup>. The court must make the order unless satisfied that on the occasion when the person was cautioned he was loitering or soliciting in a street or public place for the purpose of prostitution<sup>7</sup>.

1 For the meaning of 'street' see PARA 224 note 3 ante (definition applied by the Street Offences Act 1959 s 2(4)).

2 As to the meaning of 'public place' see PARA 224 note 4 ante.

3 As to cautions see PARA 959 post. Pursuant to a system under the Street Offences Act 1959 s 2 (as amended) a person who has not previously been convicted of loitering or soliciting for the purpose of prostitution is not charged unless he or she has been cautioned by the police on at least two occasions and such cautions have been formally recorded. See *Collins v Wilcock* [1984] 3 All ER 374, 79 Cr App Rep 229, DC. The Street Offences Act 1959 does not confer power on a police officer to stop and detain a person who is a prostitute for the purpose of giving a cautioning: *Collins v Wilcock* supra.

4 Ie under the Street Offences Act 1959 s 1 (as amended): see PARA 224 ante.

5 Application must be made not later than 14 clear days after the caution (ibid s 2(1)) and must be by way of complaint against the chief officer of police for the area in which the person is cautioned or against such officer of police as the chief officer of police may designate for the purpose in relation to that area or any part of it (s 2(2) (amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 30; and the Sexual Offences Act 2003 s 56, Sch 1 para 3(1), (4))). As to chief officers of police and their functions see POLICE vol 36(1) (2007 Reissue) PARA 178 et seq.

6 Street Offences Act 1959 s 2(1) (amended by the Sexual Offences Act 2003 Sch 1 para 3(3)). Subject to any provision to the contrary in rules made under the Magistrates' Courts Act 1980 s 144 (see MAGISTRATES vol 29(2) (Reissue) PARA 588), on the hearing of any such complaint the procedure is the same as if it were a complaint by the police officer against the person, except that this does not affect the operation of ss 55-57 (non-attendance of parties to a complaint: see MAGISTRATES vol 29(2) (Reissue) PARAS 701, 703-704): Street Offences Act 1959 s 2(2) (as amended: see note 5 supra).

The application must be heard and determined in private unless the person desires that the proceedings be conducted in public: s 2(3) (amended by the Sexual Offences Act 2003 Sch 1 para 3(5)).

7 Street Offences Act 1959 s 2(1) (amended by the Sexual Offences Act 2003 Sch 1 para 3(1), (3)).



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## 226. Placing of advertisement relating to prostitution.

A person commits an offence if he places on or in the immediate vicinity of a public telephone<sup>1</sup> an advertisement relating to prostitution<sup>2</sup> and he does so with the intention that the advertisement should come to the attention of any other person or persons<sup>3</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup>, to a fine not exceeding level 5 on the standard scale<sup>5</sup>, or to both<sup>6</sup>.

1 'Public telephone' means any telephone which is located in a public place and made available for use by the public, or a section of the public; and where such a telephone is located in or on, or attached to, a kiosk, booth, acoustic hood, shelter or other structure, that structure: Criminal Justice and Police Act 2001 s 46(5). 'Public place' means any place to which the public has or is permitted to have access, whether on payment or otherwise, other than any place to which children under the age of 16 years are not permitted to have access, whether by law or otherwise, and any premises which are wholly or mainly used for residential purposes: ss 46(5), 47(2).

The Secretary of State may by order provide for s 46 to apply in relation to any public structure of a description specified in the order as it applies in relation to a public telephone: s 47(1). For these purposes, 'public structure' means any structure that is provided as an amenity for the use of the public or a section of the public and is located in a public place: s 47(2). The power to make such an order is exercisable by statutory instrument (s 47(4)) but no such order may be made unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament (s 47(5)). At the date at which this volume states the law no such orders had been made.

2 Ibid s 46(1)(a). As to the meaning of 'prostitution' at common law see PARA 224 note 1 ante. For these purposes, an advertisement is an advertisement relating to prostitution if it is for the services of a prostitute, whether male or female (s 46(2)(a)) or indicates that premises are premises at which such services are offered (s 46(2)(b)). In any proceedings for an offence, any advertisement which a reasonable person would consider to be an advertisement relating to prostitution is presumed to be such an advertisement unless it is shown not to be: s 46(3).

3 Ibid s 46(1)(b).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6 Criminal Justice and Police Act 2001 s 46(4).

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## **227. Soliciting for the purpose of prostitution.**

A person commits an offence if he solicits another person, or different persons, for the purpose of prostitution<sup>1</sup> either from a motor vehicle<sup>2</sup> while it is in a street<sup>3</sup> or public place<sup>4</sup> or in a street or public place while in the immediate vicinity of a motor vehicle that he has just got out of or off<sup>5</sup>, persistently<sup>6</sup> or in such manner or in such circumstances as to be likely to cause annoyance to the person (or any of the persons) solicited, or nuisance to other persons in the neighbourhood<sup>7</sup>. A person also commits an offence if in a street or public place he persistently solicits another person, or different persons, for the purpose of prostitution<sup>8</sup>. A person guilty of either of these offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>9</sup>.

1 For these purposes, references to a person soliciting another person for the purpose of prostitution are references to his soliciting that person for the purpose of obtaining that person's services as a prostitute: Sexual Offences Act 1985 s 4(1) (amended by the Sexual Offences Act 2003 s 56, Sch 1 para 4(1), (5)(b)-(e)). As to the meanings of 'prostitute' and 'solicit' at common law see PARA 224 notes 1, 2 ante.

2 For the meaning of 'motor vehicle' see the Road Traffic Act 1988 s 185(1); and ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 210 (definition applied by the Sexual Offences Act 1985 s 1(3) (amended by the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 3 para 29)).

3 For these purposes, 'street' includes any bridge, road, lane, footway, subway, square, court, alley or passage, whether a thoroughfare or not, which is for the time being open to the public; and the doorways and entrances of premises abutting on a street, and any ground adjoining and open to a street, are to be treated as forming part of the street: Sexual Offences Act 1985 s 4(4).

4 Ibid s 1(1)(a) (s 1(1) amended by the Sexual Offences Act 2003 Sch 1 para 4(1), (3)). As to the meaning of 'public place' see PARA 224 note 4 ante.

5 Sexual Offences Act 1985 s 1(1)(b) (as amended: see note 4 supra).

6 There must be a degree of repetition, either of invitations to one person or to different persons, but two invitations may be sufficient to support a charge: see *Dale v Smith* [1967] 2 All ER 1133, [1967] 1 WLR 700, DC (decided under the Sexual Offences Act 1956 s 32 (repealed)).

7 Sexual Offences Act 1985 s 1(1) (as amended: see note 4 supra). In convicting a person of 'kerb-crawling' contrary to s 1 (as amended), justices are entitled to apply their local knowledge of the area where the offence occurred and conclude that his activities would have been likely to cause a nuisance to other persons in the neighbourhood even though there was no direct evidence that a nuisance had actually been caused to anyone: *Paul v DPP* (1989) 90 Cr App Rep 173, DC.

8 Sexual Offences Act 1985 s 2(1) (amended by the Sexual Offences Act 2003 Sch 1 para 4(1), (4)). There must be more than one act of soliciting in order to establish the element of persistence: *Darroch v DPP* (1990) 91 Cr App Rep 378, [1990] Crim LR 814, DC. To prove soliciting, the prosecution must prove that the defendant gave some indication, by act or words, to the prostitute, that he required the prostitute's services: *Darroch v DPP* supra (act of persistently driving a motor vehicle round an area frequented by prostitutes did not constitute an act of soliciting a woman for the purposes of prostitution; thus although there had been one act of soliciting, beckoning to a prostitute, there had not been persistent soliciting).

9 Sexual Offences Act 1985 ss 1(2), 2(2) (amended by the Statute Law (Repeals) Act 1993). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

## **227 Soliciting for the purpose of prostitution**

NOTE 6--See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).

NOTE 7--A single act by a male on foot soliciting a woman for prostitution within a recognised vice area does not amount to the common law offence of public nuisance: see *DPP v Fearon* [2010] EWHC 340 (Admin), (2010) 174 JP 145, DC; and NUISANCE vol 78 (2010) PARA 106.

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## **(v) Sex Trafficking Offences**

### **228. Trafficking into, from or within the United Kingdom for sexual exploitation.**

A person commits an offence<sup>1</sup> if he intentionally arranges or facilitates the arrival in<sup>2</sup>, the departure from<sup>3</sup>, or travel within<sup>4</sup>, the United Kingdom<sup>5</sup> of another person ('B') and either:

- 233 (1) he intends to do anything to or in respect of B, after his arrival or departure or during or after the journey, and in any part of the world, which if done will involve the commission of an applicable sexual offence<sup>6</sup>; or
- 234 (2) he believes that another person is likely to do something to or in respect of B, after his arrival or departure or during or after the journey, and in any part of the world, which if done will involve the commission of an applicable sexual offence<sup>7</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>8</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup>, to a fine not exceeding the statutory maximum<sup>10</sup>, or to both<sup>11</sup>.

1 For the territorial scope of these provisions and the persons by whom the offences may be committed see PARA 229 post.

2 Sexual Offences Act 2003 s 57(1).

3 Ibid s 58(1).

4 Ibid s 59(1).

5 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

6 Sexual Offences Act 2003 ss 57(1)(a), 58(1)(a), 59(1)(a). The applicable sexual offences for these purposes (referred to as 'relevant offences') are: (1) offences under Pt 1 (ss 1-79) (as amended) (s 60(1)(a)); (2) offences under the Protection of Children Act 1978 s 1(1)(a) (taking, permitting to be taken, or making an indecent photograph or pseudo-photograph of a child) (as amended) (see PARA 757 post) (Sexual Offences Act 2003 s 60(1)(b)) or corresponding offences under Northern Irish law (s 60(2)(d)); (3) offences listed in the Criminal Justice (Children) (Northern Ireland) Order 1998, SI 1998/1504 (NI 9) Sch 1 (eg rape, indecent assault, forcible abduction for sexual intercourse, buggery and unlawful carnal knowledge of a girl under 14 or of a girl under 17) (Sexual Offences Act 2003 s 60(1)(c)); and (4) anything done outside England and Wales and Northern Ireland which is not an offence within heads (1)-(3) supra but would be if done in England and Wales (s 60(2)(b) (e)).

7 Ibid s 57(1)(b), 58(1)(b), 59(1)(b).

8 Ibid s 57(2)(b), 58(2)(b), 59(2)(b).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

11 Sexual Offences Act 2003 ss 57(2)(a), 58(2)(a), 59(2)(a). An offence under any of these provisions is also a 'lifestyle offence' in respect of which the court may make a financial reporting order: see the Proceeds of Crime Act 2002 s 75, Sch 2 para 4(2) (as substituted); the Serious Organised Crime and Police Act 2005 s 76(3) (c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 476.

## **UPDATE**

### **228 Trafficking into, from or within the United Kingdom for sexual exploitation**

TEXT AND NOTES--See further Sexual Offences Act 2003 ss 60A-60C (added by Violent Crime Reduction Act 2006 s 54, Sch 4); and PARA 229A.

TEXT AND NOTE 2--In 2003 Act s 57(1) after 'the arrival in' add ', or the entry into': UK Borders Act 2007 s 31(3).

NOTE 6--2003 Act s 60(2) substituted; see PARA 229.

NOTE 8--As to the approach of the court when considering an appropriate term of imprisonment for an offence of trafficking into the United Kingdom for sexual exploitation, see *A-G's Reference (Nos 129 and 132 of 2006)* [2007] EWCA Crim 762, [2007] 2 Cr App Rep (S) 530.

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## **229. Scope of trafficking offences.**

The statutory offences concerning trafficking into, from or within the United Kingdom<sup>1</sup> for sexual exploitation<sup>2</sup> apply to anything done in the United Kingdom<sup>3</sup> by any person and to anything done outside the United Kingdom by a body incorporated under the law of a part of the United Kingdom or by an individual who is either a British citizen<sup>4</sup>, a British overseas territories citizen<sup>5</sup>, a British National (Overseas)<sup>6</sup>, a British overseas citizen<sup>7</sup>, a British subject<sup>8</sup> or a British protected person<sup>9</sup>.

1 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 Ie the Sexual Offences Act 2003 ss 57, 58, 59: see PARA 228 ante.

3 Ibid s 60(2)(a).

4 Ibid s 60(2)(b), (3)(a). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43.

5 Ibid s 60(3)(b). As to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 44-57.

6 Ibid s 60(3)(c). As to the status of British National (Overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 63-65.

7 Ibid s 60(3)(d). As to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 58-62.

8 Ibid s 60(3)(e). The reference in the text to a British subject is a reference to a person who is a British subject under the British Nationality Act 1981: see the Sexual Offences Act 2003 s 60(3)(e); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 66-71.

9 Ibid s 60(3)(f). The reference in the text to a British protected person is a reference to a person who is a British protected person within the meaning of the British Nationality Act 1981 s 50(1): see the Sexual Offences Act 2003 s 60(3)(f); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 72-76.

## **UPDATE**

### **229 Scope of trafficking offences**

TEXT AND NOTES--The 2003 Act ss 57-59 apply to anything done whether inside or outside the United Kingdom: s 60(2) (substituted, for s 60(2), (3) as originally enacted, by UK Borders Act 2007 s 31(4)).

See further Sexual Offences Act 2003 ss 60A-60C (added by Violent Crime Reduction Act 2006 s 54, Sch 4); and PARA 229A.

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## **229A. Forfeiture and detention of vehicles etc.**

### **1. Forfeiture of land vehicle, ship or aircraft**

The following provisions<sup>1</sup> apply if a person is convicted on indictment of a sex trafficking offence<sup>2</sup>. The court may order the forfeiture of a land vehicle<sup>3</sup> used or intended to be used in connection with the offence if the convicted person (1) owned the vehicle<sup>4</sup> at the time the offence was committed; (2) was at that time a director, secretary or manager of a company which owned the vehicle; (3) was at that time in possession of the vehicle under a hire-purchase agreement; (4) was at that time a director, secretary or manager of a company which was in possession of the vehicle under a hire-purchase agreement; or (5) was driving the vehicle in the course of the commission of the offence<sup>5</sup>. The court may order the forfeiture of a ship or aircraft used or intended to be used in connection with the offence if the convicted person (a) owned the ship or aircraft at the time the offence was committed; (b) was at that time a director, secretary or manager of a company which owned the ship or aircraft; (c) was at that time in possession of the ship or aircraft under a hire-purchase agreement; (d) was at that time a director, secretary or manager of a company which was in possession of the ship or aircraft under a hire-purchase agreement; (e) was at that time a charterer of the ship or aircraft; or (f) committed the offence while acting as captain<sup>6</sup> of the ship or aircraft<sup>7</sup>. Where a person who claims to have an interest in a land vehicle, ship or aircraft applies to a court to make representations on the question of forfeiture, the court may not make an order under the above provisions in respect of the vehicle, ship or aircraft unless the person has been given an opportunity to make representations<sup>8</sup>.

<sup>1</sup> Ie the Sexual Offences Act 2003 s 60A.

<sup>2</sup> Ie an offence under ibid ss 57-59 (see PARA 228): s 60A(1) (added by Violent Crime Reduction Act 2006 Sch 4 para 2).

<sup>3</sup> In the 2003 Act ss 60A-60C, unless the contrary intention appears 'land vehicle' means any vehicle other than a ship or aircraft; 'ship' includes every description of vessel used in navigation; 'aircraft' includes hovercraft: s 60C(1) (added by Violent Crime Reduction Act 2006 Sch 4 para 2).

<sup>4</sup> In the 2003 Act ss 60A and 60B, a reference to being an owner of a vehicle, ship or aircraft includes a reference to being any of a number of persons who jointly own it: s 60C(2).

<sup>5</sup> Ibid s 60A(2).

<sup>6</sup> In ibid ss 60A-60C, unless the contrary intention appears 'captain' means master (of a ship) or commander (of an aircraft): s 60C(1).

<sup>7</sup> Ibid s 60A(3).

But in a case to which head (a) or (b) in the TEXT does not apply, forfeiture may be ordered only (1) in the case of a ship, if s 60A(5) or (6) applies; (2) in the case of an aircraft, if s 60A(5) or (7) applies: s 60A(4). Section 60A(5) applies where a person who, at the time the offence was committed, owned the ship or aircraft or was a director, secretary or manager of a company which owned it, knew or ought to have known of the intention to use it in the course of the commission of an offence under ss 57-59: s 60A(5). Section 60A(6) applies where a ship's gross tonnage is less than 500 tons: s 60A(6). Section 60A(7) applies where the maximum weight at which an aircraft (which is not a hovercraft) may take off in accordance with its certificate of airworthiness is less than 5,700 kilogrammes: s 60A(7).

8 Ibid s 60A(8).

## 2. Detention of land vehicle, ship or aircraft

If a person has been arrested for an offence<sup>1</sup>, a constable or a senior immigration officer<sup>2</sup> may detain a relevant vehicle<sup>3</sup>, ship or aircraft (1) until a decision is taken as to whether or not to charge the arrested person with that offence; (2) if the arrested person has been charged, until he is acquitted, the charge against him is dismissed or the proceedings are discontinued; or (3) if he has been charged and convicted, until the court<sup>4</sup> decides whether or not to order forfeiture of the vehicle, ship or aircraft<sup>5</sup>. A person (other than the arrested person) may apply to the court for the release of a land vehicle, ship or aircraft on the grounds that (a) he owns the vehicle, ship or aircraft; (b) he was, immediately before the detention of the vehicle, ship or aircraft, in possession of it under a hire-purchase agreement; or (c) he is a charterer of the ship or aircraft<sup>6</sup>. The court to which an application is made<sup>7</sup> may, on such security or surety being tendered as it considers satisfactory, release the vehicle, ship or aircraft on condition that it is made available to the court if (i) the arrested person is convicted; and (ii) an order for its forfeiture is made<sup>8</sup>.

1 ie an offence under the Sexual Offences Act 2003 ss 57-59 (see PARA 228).

2 In ibid s 60B, 'senior immigration officer' means an immigration officer (appointed or employed as such under the Immigration Act 1971) not below the rank of chief immigration officer: 2003 Act s 60C(6) (added by Violent Crime Reduction Act 2006 Sch 4 para 2).

3 A vehicle, ship or aircraft is a relevant vehicle, ship or aircraft, in relation to an arrested person if it is a land vehicle, ship or aircraft which the constable or officer concerned has reasonable grounds for believing could, on conviction of the arrested person for the offence for which he was arrested, be the subject of an order for forfeiture made under the 2003 Act s 60A (see PARA 229A.1): s 60B(2). For the meaning of 'ship', 'aircraft' and 'land vehicle' see PARA 229A.1.

4 In ibid s 60B, 'court' means (1) in relation to England and Wales (a) if the arrested person has not been charged, or he has been charged but proceedings for the offence have not begun to be heard, a magistrates' court; (b) if he has been charged and proceedings for the offence are being heard, the court hearing the proceedings; (2) in relation to Northern Ireland (i) if the arrested person has not been charged, a magistrates' court for the county court division in which he was arrested; (ii) if he has been charged but proceedings for the offence have not begun to be heard, a magistrates' court for the county court division in which he was charged; (iii) if he has been charged and proceedings for the offence are being heard, the court hearing the proceedings: s 60B(5).

5 Ibid s 60B(1).

6 Ibid s 60B(3).

7 Under ibid s 60B(3).

8 Under ibid s 60A (see PARA 229A.1): s 60B(4).



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## **(8) PREPARATORY OFFENCES**

### **230. Administering a substance with intent.**

A person commits an offence if he intentionally administers a substance to, or causes a substance to be taken by<sup>1</sup>, another person knowing that that person does not consent<sup>2</sup> and with the intention of stupefying or overpowering him so as to enable any person to engage in a sexual<sup>3</sup> activity that involves him<sup>4</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years<sup>5</sup> and on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup>, to a fine not exceeding the statutory maximum<sup>7</sup>, or to both<sup>8</sup>.

1 See the Offences against the Person Act 1861 ss 23, 24; and PARA 124 ante.

2 Sexual Offences Act 2003 s 61(1)(a). As to consent, and the evidential presumptions applicable in sexual assault cases, see PARA 163 ante.

3 For the meaning of 'sexual' see PARA 162 ante.

4 Sexual Offences Act 2003 s 61(1)(b).

5 Ibid s 61(2)(b).

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

8 Sexual Offences Act 2003 s 61(2)(a).

## **UPDATE**

### **230 Administering a substance with intent**

NOTE 5--See *R v Wright* [2006] All ER (D) 228 (Oct), CA (victim suffered adverse reaction; sentence of five years' imprisonment).

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### **231. Committing an offence with intent to commit a sexual offence.**

A person commits an offence if he commits any offence with the intention of committing a relevant sexual offence<sup>1</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years<sup>2</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup>, to a fine not exceeding the statutory maximum<sup>4</sup>, or to both<sup>5</sup>. However, if the offence is committed by kidnapping or false imprisonment, the offender is liable on conviction on indictment to imprisonment for life<sup>6</sup>.

1 Sexual Offences Act 2003 s 62(1). A 'relevant sexual offence' is any offence under Pt 1 (ss 1-79) (as amended) (including an offence of aiding, abetting, counselling or procuring such an offence): ss 62(2), 63(2).

2 Ibid s 62(4)(b). For sentencing guidelines in respect of battery with intent to commit a sexual offence see *R v Wisniewski* [2004] EWCA Crim 3361, [2005] Crim LR 403.

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5 Sexual Offences Act 2003 s 62(4)(a).

6 Ibid s 62(3).

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### **232. Trespass with intent to commit a sexual offence.**

A person commits an offence if:

- 235 (1) he is a trespasser<sup>1</sup> on any premises<sup>2</sup>;
- 236 (2) he intends to commit a relevant sexual offence<sup>3</sup> on the premises<sup>4</sup>; and
- 237 (3) he knows that, or is reckless as to whether, he is a trespasser<sup>5</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years<sup>6</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup>, to a fine not exceeding the statutory maximum<sup>8</sup>, or to both<sup>9</sup>.

1 As to the nature of trespass on land see TORT vol 97 (2010) PARA 562 et seq.

2 Sexual Offences Act 2003 s 63(1)(a). For these purposes, 'premises' includes a structure or part of a structure; and 'structure' includes a tent, vehicle or vessel or other temporary or movable structure: s 63(2). In a legal sense, 'premises' means the subject-matter of the habendum in a lease. This covers any sort of property of which a lease can be granted: a building or land with a building on part of it or land without a building on it provided that it has a defined boundary: *Andrews v Andrews and Mears* [1908] 2 KB 567 at 570 ('premises' in workmen's compensation legislation); *Whitley v Stumbles* [1930] AC 544, HL; *Bracey v Read* [1963] Ch 88, [1962] 3 All ER 472 (landlord and tenant legislation).

3 For the meaning of 'relevant sexual offence' see PARA 231 note 1 ante.

4 Sexual Offences Act 2003 s 63(1)(b).

5 Ibid s 63(1)(c)

6 Ibid s 63(3)(b).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

9 Sexual Offences Act 2003 s 63(3)(a).

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## **(9) MISCELLANEOUS SEXUAL OFFENCES**

### **233. Exposure.**

A person commits an offence if he intentionally exposes his genitals<sup>1</sup> and intends that someone will see them and be caused alarm or distress<sup>2</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years<sup>3</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup>, to a fine not exceeding the statutory maximum<sup>5</sup>, or to both<sup>6</sup>. The indecent exposure of any part of the body can also constitute the common law offences of public nuisance<sup>7</sup> or outraging public decency<sup>8</sup>.

1 Sexual Offences Act 2003 s 66(1)(a). As to references to parts of the body generally see PARA 163 note 3 ante.

2 Ibid s 66(1)(b).

3 Ibid s 66(2)(b).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

6 Sexual Offences Act 2003 s 66(2)(a).

7 See NUISANCE vol 78 (2010) PARA 105.

8 See PARA 764 post.

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## **234. Voyeurism.**

A person commits an offence if:

- 238 (1) for the purpose of obtaining sexual gratification, he observes<sup>1</sup> another person doing a private act<sup>2</sup> and knows that the other person does not consent<sup>3</sup> to being observed for his sexual gratification<sup>4</sup>;
- 239 (2) he installs equipment, or constructs or adapts a structure<sup>5</sup> or part of a structure, with the intention of enabling himself or another person to commit the above offence<sup>6</sup>;
- 240 (3) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person doing a private act<sup>7</sup> and he knows that that third person does not consent to his operating equipment with that intention<sup>8</sup>; or
- 241 (4) he records another person doing a private act<sup>9</sup> and does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image<sup>10</sup> of that person doing the act<sup>11</sup>, and knowing that the person doing the act does not consent to his recording the act with that intention<sup>12</sup>.

A person guilty of any of these offences is liable on conviction on indictment to imprisonment for a term not exceeding two years<sup>13</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>14</sup>, to a fine not exceeding the statutory maximum<sup>15</sup>, or to both<sup>16</sup>.

1 As to references to 'observation' see PARA 175 note 3 ante.

2 Sexual Offences Act 2003 s 67(1)(a). For these purposes, a person is doing a private act if he is in a place which, in the circumstances, would reasonably be expected to provide privacy, and either his genitals, buttocks or breasts are exposed or covered only with underwear (s 68(1)(a)), he is using a lavatory (s 68(1)(b)), or he is doing a sexual act not of a kind ordinarily done in public (s 68(1)(c)).

3 As to consent see PARA 163 ante.

4 Sexual Offences Act 2003 s 67(1)(b).

5 'Structure' includes a tent, vehicle or vessel or other temporary or movable structure: *ibid* s 68(2).

6 *Ibid* s 67(4).

7 *Ibid* s 67(2)(a).

8 *Ibid* s 67(2)(b).

9 *Ibid* s 67(3)(a).

10 For the meaning of 'image' see PARA 175 note 3 ante; and as to an image of a person see PARA 176 note 3 ante.

11 Sexual Offences Act 2003 s 67(3)(b).

12 *Ibid* s 67(3)(c).

13 *Ibid* s 67(5)(b). For sentencing guidelines see *R v Turner* [2006] EWCA Crim 63, [2006] All ER (D) 95 (Jan).

14 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

15 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

16 Sexual Offences Act 2003 s 67(5)(a).

## **UPDATE**

### **234 Voyeurism**

NOTE 2--The mere obtaining of sexual gratification from observation does not create the necessary expectation of privacy; and 'breasts' under the 2003 Act s 68(1)(a) refers to female breasts, not the exposed male chest: *R v Bassett* [2008] EWCA Crim 1174, [2009] 1 WLR 1032, (2008) 172 JP 491. 'Underwear' under s 68(1)(a) does not include swimwear worn in its normal function: *Police Service for Northern Ireland v MacRitchie* [2008] NICA 26 (20 June 2008, unreported).

NOTE 13--See *R v Hodgson* [2008] EWCA Crim 1180; [2009] 1 Cr App Rep (S) 145, [2008] All ER (D) 64 (Jun) (sentence of imprisonment approved but varied to community order).

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### **235. Intercourse with an animal.**

A person commits an offence if:

- 242 (1) he intentionally performs an act of penetration<sup>1</sup> with his penis<sup>2</sup>;
- 243 (2) what is penetrated is the vagina or anus<sup>3</sup> of a living animal<sup>4</sup>; and
- 244 (3) he knows that, or is reckless as to whether, that is what is penetrated<sup>5</sup>.

A person ('A') commits an offence if:

- 245 (a) A intentionally causes<sup>6</sup>, or allows, A's vagina<sup>7</sup> or anus to be penetrated<sup>8</sup>;
- 246 (b) the penetration is by the penis of a living animal<sup>9</sup>; and
- 247 (c) A knows that, or is reckless as to whether, that is what A is being penetrated by<sup>10</sup>.

A person guilty of one of these offences is liable on conviction on indictment to imprisonment for a term not exceeding two years<sup>11</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>12</sup>, to a fine not exceeding the statutory maximum<sup>13</sup>, or to both<sup>14</sup>.

1 For the meaning of 'penetration' see PARA 162 note 3 ante.

2 Sexual Offences Act 2003 s 69(1)(a). As to references to parts of the body see PARA 163 note 3 ante.

3 In relation to an animal, references to the vagina or anus include references to any similar part: *ibid* s 79(1), (10).

4 *Ibid* s 69(1)(b).

5 *Ibid* s 69(1)(c).

6 As to the meaning of 'causes' see PARA 171 note 1 ante.

7 As to the meaning of 'vagina' see PARA 163 note 3 ante.

8 Sexual Offences Act 2003 s 69(2)(a).

9 *Ibid* s 69(2)(b).

10 *Ibid* s 69(2)(c).

11 *Ibid* s 69(3)(b).

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

13 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

14 Sexual Offences Act 2003 s 69(3)(a).

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### **236. Sexual penetration of a corpse.**

A person commits an offence if:

- 248 (1) he intentionally performs an act of penetration<sup>1</sup> with a part of his body<sup>2</sup> or anything else<sup>3</sup>;
- 249 (2) what is penetrated is a part of the body of a dead person<sup>4</sup>;
- 250 (3) he knows that, or is reckless as to whether, that is what is penetrated<sup>5</sup>; and
- 251 (4) the penetration is sexual<sup>6</sup>.

A person guilty of any of these offences is liable on conviction on indictment to imprisonment for a term not exceeding two years<sup>7</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>8</sup>, to a fine not exceeding the statutory maximum<sup>9</sup>, or to both<sup>10</sup>.

1 For the meaning of 'penetration' see PARA 162 note 3 ante.

2 As to references to parts of the body see PARA 163 note 3 ante.

3 Sexual Offences Act 2003 s 70(1)(a).

4 Ibid s 70(1)(b).

5 Ibid s 70(1)(c).

6 Ibid s 70(1)(d). For the meaning of 'sexual' see PARA 162 ante.

7 Ibid s 70(2)(b).

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

10 Sexual Offences Act 2003 s 70(2)(a).



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### **237. Sexual activity in a public lavatory.**

A person commits an offence if he is in a lavatory to which the public or a section of the public has or is permitted to have access, whether on payment or otherwise<sup>1</sup>, and he intentionally engages in an activity<sup>2</sup> which is sexual<sup>3</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup>, to a fine not exceeding level 5 on the standard scale<sup>5</sup>, or to both<sup>6</sup>. Sexual activity in any public place can also constitute the offence of outraging public decency<sup>7</sup> or the public order offence of causing harassment, alarm or distress<sup>8</sup>.

1 Sexual Offences Act 2003 s 71(1)(a). Whether a lavatory is one to which 'the public or any section of the public has or is permitted to have access' is a question of fact and degree: *R v Waters* (1963) 47 Cr App Rep 149, CCA (decided under the Road Traffic Act 1960 s 6 (repealed)). If the public or any section of it has access to a place by express or implied permission, it is irrelevant that the occupier of the premises has the right to refuse entry or restrict who may enter: *Lawrenson v Oxford* [1982] Crim LR 185, DC (decided under the Public Order Act 1936 s 5 (repealed)). If the public or a section of the public is not permitted to have access to a lavatory, it can nevertheless satisfy the present requirement (on the ground that the public or a section of it has access) if there is nothing to prevent access by it: see *Knox v Anderton* (1983) 76 Cr App Rep 156, 147 JP 340, DC (decided under the Prevention of Crime Act 1953 s 1).

It is sufficient that the public or any section of the public has or is permitted to have access to the lavatory at the material time. Thus a lavatory which is open for public use at certain times but closed at others is within the Sexual Offences Act 2003 s 71(1)(a) when it is open but not when it is closed: *Sandy v Martin* [1974] Crim LR 258, DC (decided under the Road Traffic Act 1972 s 6 (repealed)); *Marsh v Arscott* (1982) 75 Cr App Rep 211, DC (decided under the Public Order Act 1936 s 5 (repealed)).

2 Sexual Offences Act 2003 s 71(1)(b).

3 Ibid s 71(1)(c). For these purposes, an activity is sexual if a reasonable person would, in all the circumstances but regardless of any person's purpose, consider it to be sexual: s 71(2).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6 Sexual Offences Act 2003 s 71(3).

7 See PARA 764 post.

8 Ie an offence contrary to the Public Order Act 1986 s 5 (as amended) (see PARA 560 post).

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## **(10) PROTECTION OF ANONYMITY OF VICTIMS OF SEXUAL OFFENCES**

### **238. Protection of victims of sexual offences.**

Where allegations are made regarding the commission of certain sexual offences the alleged victims of those offences are entitled to have their identities protected<sup>1</sup>. The offences in relation to which this entitlement arises are rape<sup>2</sup> and other substantive offences under the Sexual Offences Act 2003<sup>3</sup>, that is to say, any of the statutory offences of sexual assault<sup>4</sup>, causing a person to engage in sexual activity without consent<sup>5</sup>, any of the offences involving rape and sexual assault of a child aged under 13<sup>6</sup> and other offences involving sexual activity with a child (including arranging or facilitating the commission of a child sex offence and meeting a child following sexual grooming)<sup>7</sup>, abuse of a position of trust<sup>8</sup>, familial child sex offences<sup>9</sup>, offences against mentally disordered persons (including offences by care workers)<sup>10</sup>, abuse of children through prostitution or pornography<sup>11</sup>, exploitation of prostitution<sup>12</sup>, trafficking<sup>13</sup>, administering a substance, committing an offence or trespassing with intent to commit a sexual offence<sup>14</sup>, exposure<sup>15</sup>, voyeurism<sup>16</sup>, sexual penetration of a corpse<sup>17</sup>. However, the offences relating to sex with an adult relative<sup>18</sup>, intercourse with an animal<sup>19</sup>, and sexual activity in a public lavatory<sup>20</sup> are excluded from protection under these provisions. The entitlement to anonymity also arises in respect of a number of offences which have been repealed<sup>21</sup>, in respect of any attempt<sup>22</sup>, conspiracy<sup>23</sup> or incitement of another<sup>24</sup> to commit, and aiding, abetting, counselling or procuring the commission of<sup>25</sup>, any of the offences or former offences in respect of which protection is afforded<sup>26</sup>, and in respect of corresponding service offences<sup>27</sup> and offences against the law of Northern Ireland<sup>28</sup>.

1 See the Sexual Offences (Amendment) Act 1992; the text and notes 2-28 *infra*; and PARAS 239-242 *post*.

2 *Ibid* s 2(1)(aa) (s 2(1)(aa), (ab), (h), (2)(n) added, s 2(3) substituted, by the Youth Justice and Criminal Evidence Act 1999 s 48, Sch 2 paras 6, 8(1), (2), (4)-(6)). As to the offence of rape see now the Sexual Offences Act 2003 s 1; and PARA 165 *ante*.

3 Sexual Offences (Amendment) Act 1992 s 2(1)(da) (s 2(1)(da) added by the Sexual Offences Act 2003 s 139, Sch 6 para 31(1), (2)).

4 *Ie* an offence of assault by penetration under the Sexual Offences Act 2003 s 2 (see PARA 167 *ante*) or sexual assault under s 3 (see PARA 169 *ante*).

5 *Ie* an offence under *ibid* s 4 (see PARA 171 *ante*).

6 *Ie* an offence under *ibid* ss 5-8 (see PARAS 166-172 *ante*).

7 *Ie* an offence under *ibid* ss 9-15 (see PARAS 173-179 *ante*).

8 *Ie* an offence under *ibid* ss 16-19 (see PARAS 180-183 *ante*).

9 *Ie* an offence under *ibid* ss 25, 26 (see PARA 191 *ante*).

10 *Ie* an offence under *ibid* ss 30-41 (see PARAS 197-214 *ante*).

11 *Ie* an offence under *ibid* ss 47-50 (see PARAS 215-216 *ante*).

12 le an offence under *ibid* ss 52, 53 (see PARA 217 ante).

13 le an offence under *ibid* ss 57-60 (see PARAS 228, 229 ante).

14 le an offence under *ibid* ss 61-63 (see PARAS 230-232 ante).

15 le an offence under *ibid* s 66 (see PARA 233 ante).

16 le an offence under *ibid* s 67 (see PARA 234 ante).

17 le an offence under *ibid* s 70 (see PARA 236 ante).

18 le an offence under *ibid* ss 64, 65 (see PARAS 188-190 ante).

19 le an offence under *ibid* s 69 (see PARA 235 ante).

20 le an offence under *ibid* s 71 (see PARA 237 ante).

21 le burglary with intent to rape (which has been abolished) (Sexual Offences (Amendment) Act 1992 s 2(1)(ab) (as added: see note 2 supra)), intercourse with a mentally handicapped person by hospital staff (ie an offence under the Mental Health Act 1959 s 128 (repealed)) (Sexual Offences (Amendment) Act 1992 s 2(1)(b)), any offence under the Indecency with Children Act 1960 s 1 (repealed) (indecent conduct towards young child) (Sexual Offences (Amendment) Act 1992 s 2(1)(c)), any offence under the Criminal Law Act 1977 s 54 (repealed) (incitement by man of his grand-daughter, daughter or sister under the age of 16 to commit incest with him) (Sexual Offences (Amendment) Act 1992 s 2(1)(d)), and any offence under the provisions of the Sexual Offences Act 1956 relating to intercourse by force or intimidation, intercourse with girls under 16 or defectives, incest, unnatural offences, assaults, and abduction of a woman by force (ie ss 2-7, 9-12, 14-17 (all repealed)) (Sexual Offences (Amendment) Act 1992 s 2(1)(a), (2)(a)-(n) (s 2(2)(n) as added: see note 2 supra)).

However, the anonymity provisions do not apply:

24 (1) to a woman against whom an offence under the Sexual Offences Act 1956 s 10 (repealed) (incest by a man), or an attempt to commit that offence, is alleged to have been committed if she is accused of having committed an offence under s 11 (repealed) (incest by a woman), or an attempt to commit that offence, against the man who is alleged to have committed the offence under s 10 (repealed) against her (Sexual Offences (Amendment) Act 1992 s 4(1), (2));

25 (2) to a man against whom an offence under the Sexual Offences Act 1956 s 11 (repealed), or an attempt, is alleged to have been committed if he is accused of having committed an offence under s 10 (repealed) against the woman who is alleged to have committed the offence under s 11 (repealed) against him (Sexual Offences (Amendment) Act 1992 s 4(3)); or

26 (3) to a person against whom an offence under the Sexual Offences Act 1956 s 12 (repealed) (buggery), or an attempt to commit that offence, is alleged to have been committed if that person is accused of having committed an offence under s 12 (repealed) against the person who is alleged to have committed the offence under s 12 (repealed) against him (Sexual Offences (Amendment) Act 1992 s 4(4)),

subject to the proviso that these provisions do not affect the operation of the Sexual Offences (Amendment) Act 1992 in relation to anything done at any time before the first-mentioned person is accused (s 4(5)-(7))). These provisions also apply in respect of corresponding service offences and offences under Northern Ireland law: see s 4(8) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 2 paras 6, 10; and amended by the Criminal Justice (Northern Ireland) Order 2003, SI 2003/1247, art 36(1), Sch 1 para 13); and the Sexual Offences (Amendment) Act 1992 s 4(9) (added by the Armed Forces Act 2001 s 34, Sch 6 para 2). 'Service offence' means an offence against the Army Act 1955 s 70, the Air Force Act 1955 s 70 or the Naval Discipline Act 1957 s 42 (as amended) (see ARMED FORCES vol 2(2) (Reissue) PARA 422).

22 Sexual Offences (Amendment) Act 1992 s 2(1)(e) (amended by the Youth Justice and Criminal Evidence Act 1999 Sch 2 paras 6, 8(1), (3); and the Sexual Offences Act 2003 s 139, Sch 6 para 31(1), (2)).

23 Sexual Offences (Amendment) Act 1992 s 2(1)(f) (s 2(1)(f), (g) added by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 52(2)).

24 Sexual Offences (Amendment) Act 1992 s 2(1)(g) (as added: see note 23 supra).

25 *Ibid* s 2(1)(h) (as added: see note 2 supra).

26 Where it is alleged or there is an accusation that an offence of conspiracy or incitement of another to commit either rape or one of the former offences in respect of which protection is afforded has been committed,

or that an offence of aiding, abetting, counselling or procuring the commission of an offence of incitement of another to commit such an offence has been committed, the person against whom the substantive offence is alleged to have been intended to be committed is to be regarded as the person against whom the conspiracy or incitement is alleged to have been committed: *ibid* s 6(2A) (added by the Criminal Justice and Public Order Act 1994 Sch 9 para 52(3)(a); and amended by the Youth Justice and Criminal Evidence Act 1999 Sch 2 paras 6, 12(1), (3)). 'The substantive offence' means the offence to which the alleged conspiracy or incitement related: Sexual Offences (Amendment) Act 1992 s 6(2A) (as so added). As to references to an accusation alleging an offence see PARA 239 note 2 post.

27 *Ibid* s 2(4) (added by the Armed Forces Act 2001 s 34, Sch 6 para 1). The Sexual Offences (Amendment) Act 1992 has effect with modifications in respect of service offences: see s 7 (as amended).

28 See *ibid* s 2(3) (as substituted (see note 2 *supra*); amended by the Sexual Offences Act 2003 s 139, Sch 6 para 31(1), (3), and by the Criminal Justice (Northern Ireland) Order 2003, SI 2003/1247, Sch 1 para 12(a)).

## UPDATE

### 238 Protection of victims of sexual offences

NOTE 21--Sexual Offences (Amendment) Act 1992 s 4(9) repealed: Armed Forces Act 2006 Sch 16 para 126, Sch 17. Definition of 'service offence' repealed: Armed Forces Act 2006 Sch 16 para 127, Sch 17. See Sexual Offences (Amendment) Act 1992 s 6(1A) (added by Armed Forces Act 2006 Sch 16 para 127). See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).

TEXT AND NOTES 24, 26, 28--See further Serious Crime Act 2007 Sch 6 para 20 (references to common law offence of incitement).

TEXT AND NOTE 27--Sexual Offences (Amendment) Act 1992 s 2(4) amended: Armed Forces Act 2006 Sch 16 para 124.

NOTE 27--Sexual Offences (Amendment) Act 1992 s 7 repealed: Armed Forces Act 2006 Sch 16 para 128, Sch 17.

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### **239. Victims' right to anonymity.**

Where an allegation has been made that a relevant sexual offence<sup>1</sup> has been committed against a person<sup>2</sup>, until such time as a person has been accused of the offence<sup>3</sup> no matter relating to the alleged victim<sup>4</sup> may during his lifetime be included in any publication<sup>5</sup> if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed<sup>6</sup>. Where a person is accused of such an offence, no matter likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed ('the complainant') may during the complainant's lifetime be included in any publication<sup>7</sup> (although this is subject to the power of a trial judge to give a direction lifting a victim's anonymity where so to do is in the public interest or is conducive to the conduct of the trial or where the protection of the victim's identity imposes a substantial and unreasonable restriction on the reporting of proceedings<sup>8</sup>). Violation of these provisions is an offence<sup>9</sup>.

1 As to the offences in respect of which the victim has a right to anonymity under the Sexual Offences (Amendment) Act 1992 see PARA 238 ante.

2 Where it is alleged that an offence to which the Sexual Offences (Amendment) Act 1992 applies has been committed, the fact that any person has consented to an act which, on any prosecution for that offence, would fall to be proved by the prosecution, does not prevent that person from being regarded as a person against whom the alleged offence was committed (s 6(2)(a)), and where a person is accused of an offence of incest or buggery (both now abolished), the other party to the act in question is taken to be a person against whom the offence was committed even though he consented to that act (s 6(2)(b)). For these purposes, a person is accused of an offence (other than a service offence) if an information is laid, or (in Northern Ireland) a complaint is made, alleging that he has committed the offence, he appears before a court charged with the offence, a court before which he is appearing sends him to the Crown Court for trial on a new charge alleging the offence, or a bill of indictment charging him with the offence is preferred before a court in which he may lawfully be indicted for the offence: s 6(3) (amended by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 52(3)(b); the Youth Justice and Criminal Evidence Act 1999 s 48, Sch 2 paras 6, 12(1), (4); the Armed Forces Act 2001 s 34, Sch 6 para 3(1), (3); and the Criminal Justice Act 2003 s 41, Sch 3 para 63). References in the Sexual Offences (Amendment) Act 1992 s 6(2A) (as added and amended) (see PARA 238 note 26 ante) and in s 3 (as amended) (see PARA 241 post) to an accusation alleging an offence are to be construed accordingly: s 6(3) (as so amended). For the meaning of 'service offence' see PARA 238 note 21 ante. A person is accused of a service offence if he is treated by the Army Act 1955 s 75(4) (as substituted), the Air Force Act 1955 s 75(4) (as substituted) or the Naval Discipline Act 1957 s 47A(4) (as added) (see ARMED FORCES vol 2(2) (Reissue) PARA 338) as charged with the offence; and references in the Sexual Offences (Amendment) Act 1992 s 3 (as amended) (see PARA 241 post) to an accusation alleging an offence are to be construed accordingly: s 6(3A) (added by the Armed Forces Act 2001 Sch 6 para 3(1), (4)). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

3 Sexual Offences (Amendment) Act 1992 s 1(3)(a) (ss 1(1), (2), 6(1) amended, and s 1(3) substituted, by the Youth Justice and Criminal Evidence Act 1999 Sch 2 paras 6, 7(1)-(4), 12(1), (2)).

4 As to the matters relating to alleged victims in respect of which these provisions apply see PARA 240 post.

5 'Publication' includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme is taken to be so addressed), but does not include an indictment or other document prepared for use in particular legal proceedings: Sexual Offences (Amendment) Act 1992 s 6(1) (as amended: see note 3 supra). 'Relevant programme' means a programme included in a programme service, within the meaning of the

Broadcasting Act 1990 (see s 201 (as amended); and TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328); Sexual Offences (Amendment) Act 1992 s 6(1) (as so amended).

6 Ibid s 1(1) (as amended: see note 3 supra).

7 Ibid s 1(2) (as amended: see note 3 supra).

8 Ibid s 1(3)(b) (as substituted: see note 3 supra). See PARA 241 post.

9 See PARA 242 post.

## **UPDATE**

### **239 Victims' right to anonymity**

NOTE 2--Sexual Offences (Amendment) Act 1992 s 6(3), (3A) further amended: Armed Forces Act 2006 Sch 16 para 127.

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**240. Matters in respect of which right to anonymity applies.**

The matters relating to a person in respect of which he has a right to anonymity<sup>1</sup> as the victim of an alleged sexual offence<sup>2</sup> include in particular:

- 252 (1) his name<sup>3</sup>;
- 253 (2) his address<sup>4</sup>;
- 254 (3) the identity of any school or other educational establishment attended by him<sup>5</sup>;
- 255 (4) the identity of any place of work<sup>6</sup>; and
- 256 (5) any still or moving picture<sup>7</sup> of him<sup>8</sup>.

Nothing in these provisions, however, prohibits the inclusion in a publication of matter consisting only of a report of criminal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the defendant is charged with the offence<sup>9</sup>.

1 He under the Sexual Offences (Amendment) Act 1992 s 1(1) or s 1(2) (as amended) (see PARA 239 ante), if the inclusion of those matters in any publication is likely to have the result mentioned in that provision. As to the meaning of 'publication' see PARA 239 note 5 ante.

2 As to the offences in respect of which the victim has a right to anonymity under the Sexual Offences (Amendment) Act 1992 see PARA 238 ante.

3 Ibid s 1(3A)(a) (s 1(3A) added, and s 1(4) amended, by the Youth Justice and Criminal Evidence Act 1999 s 48, Sch 2 paras 6, 7(1), (4), (5)).

4 Sexual Offences (Amendment) Act 1992 s 1(3A)(b) (as added: see note 3 supra).

5 Ibid s 1(3A)(c) (as added: see note 3 supra).

6 'Picture' includes a likeness however produced: ibid s 6(1).

7 Ibid s 1(3A)(d) (as added: see note 3 supra).

8 Ibid s 1(3A)(e) (as added: see note 3 supra).

9 Ibid s 1(4) (as amended: see note 3 supra).

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## **241. Power to displace anonymity.**

Where a person is charged with a relevant sexual offence<sup>1</sup> the judge<sup>2</sup> is in certain circumstances required to direct that the provisions relating to anonymity<sup>3</sup> are not, by virtue of the accusation alleging the offence in question<sup>4</sup>, to apply in relation to the complainant<sup>5</sup>. The judge is required to make such a direction if before the commencement of the trial<sup>6</sup> the defendant or another person against whom the complainant may be expected to give evidence at the trial applies to the judge for such a direction and satisfies him: (1) that the direction is required for the purpose of inducing persons who are likely to be needed as witnesses at the trial to come forward<sup>7</sup>; and (2) that the conduct of the applicant's defence at the trial is likely to be substantially prejudiced if the direction is not given<sup>8</sup>. The judge must also direct that the provisions relating to anonymity are not to apply to such matter as is specified in the direction if he is satisfied that the effect of those provisions is to impose a substantial and unreasonable restriction upon the reporting of proceedings at the trial<sup>9</sup> and that it is in the public interest to remove or relax the restriction<sup>10</sup>, although such a direction may not be given by reason only of the outcome of the trial<sup>11</sup>.

If a person who has been convicted of an offence and has given notice of an appeal against the conviction, or notice of an application for leave so to appeal, applies to the appellate court for a direction and satisfies the court: (a) that the direction is required for the purpose of obtaining evidence in support of the appeal<sup>12</sup>; and (b) that the applicant is likely to suffer substantial injustice if the direction is not given<sup>13</sup>, the court must direct that the provisions relating to anonymity<sup>14</sup> are not, by virtue of an accusation which alleges an offence<sup>15</sup> specified in the direction, to apply in relation to a complainant so specified<sup>16</sup>.

Any such direction does not affect the operation of the provisions relating to anonymity at any time before the direction is given<sup>17</sup>.

1 As to the offences in respect of which the victim has a right to anonymity under the Sexual Offences (Amendment) Act 1992 see PARA 238 ante.

2 'Judge' means: (1) in the case of an offence which is to be tried summarily or for which the mode of trial has not been determined, any justice of the peace (ibid s 3(6)(a) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 49)); and (2) in any other case, any judge of the Crown Court in England and Wales (Sexual Offences (Amendment) Act 1992 s 3(6)(b) (amended by the Youth Justice and Criminal Evidence Act 1999 s 48, Sch 2 paras 6, 9(1), (2))).

3 As to the provisions relating to anonymity see the Sexual Offences (Amendment) Act 1992 s 1 (as amended); and PARAS 239-240 ante.

4 As to references to an accusation alleging an offence see PARA 239 note 2 ante.

5 Sexual Offences (Amendment) Act 1992 s 3(1). As to the meaning of 'the complainant' see PARA 239 ante.

6 If, after the commencement of a trial at which a person is charged with an offence, a new trial of the person for that offence is ordered, the commencement of any previous trial is disregarded: ibid s 3(7).

7 Ibid s 3(1)(a).

8 Ibid s 3(1)(b).



- 9 Ibid s 3(2)(a).
- 10 Ibid s 3(2)(b).
- 11 Ibid s 3(3).
- 12 Ibid s 3(4)(a).
- 13 Ibid s 3(4)(b).
- 14 See note 3 supra.
- 15 Is an offence listed in the Sexual Offences (Amendment) Act 1992 s 2(1) (see PARA 238 ante).
- 16 Ibid s 3(4).
- 17 Ibid s 3(5).

## **UPDATE**

### **241 Power to displace anonymity**

NOTES--See Sexual Offences (Amendment) Act 1992 s 3(6B) (added by Armed Forces Act 2006 Sch 16 para 125).

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## **242. Offences relating to violation of anonymity provisions, and defences.**

If any matter<sup>1</sup> is included in a publication<sup>2</sup> in contravention of the provisions relating to anonymity<sup>3</sup>, any proprietor, editor and publisher of the newspaper or periodical<sup>4</sup>, any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included<sup>5</sup>, any person having functions in relation to the programme corresponding to those of an editor of a newspaper<sup>6</sup>, or any other person publishing the publication in question<sup>7</sup>, is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>8</sup>.

Where a person is charged with an offence of violating the anonymity provisions<sup>9</sup> it is a defence to prove<sup>10</sup>:

- 257 (1) that the publication in which the matter appeared was one in respect of which the person against whom the offence is alleged to have been committed had given written consent<sup>11</sup> to the appearance of matter of that description<sup>12</sup>;
- 258 (2) that at the time of the alleged offence he was not aware and neither suspected nor had reason to suspect that the publication included the matter in question<sup>13</sup>; or
- 259 (3) that at the time of the alleged offence he was not aware and neither suspected nor had reason to suspect that the allegation in question had been made<sup>14</sup>.

Proceedings for such an offence may be instituted only by or with the consent of the Attorney General<sup>15</sup>.

1 As to the matters relating to alleged victims in respect of which the provisions relating to anonymity apply see PARA 240 post. As to the offences in respect of which the victim has a right to anonymity under the Sexual Offences (Amendment) Act 1992 see PARA 238 ante.

2 As to the meaning of 'publication' see PARA 239 note 5 ante.

3 As to the provisions relating to anonymity see PARAS 239-240 ante.

4 Sexual Offences (Amendment) Act 1992 s 5(1)(a) (s 5(1) substituted, s 5(2)-(4) amended, and s 5(5A) added, by the Youth Justice and Criminal Evidence Act 1999 ss 48, 67(3), Sch 2 paras 6, 11(1)-(7), Sch 6). This provision applies only where the publication is in a newspaper or periodical: Sexual Offences (Amendment) Act 1992 s 5(1)(a) (as so substituted). A financial backer with no editorial input or knowledge is nonetheless a publisher for these purposes: see *Brown v DPP* (1998) 162 JP 333, 142 Sol Jo LB 132, DC.

5 Sexual Offences (Amendment) Act 1992 s 5(1)(b)(i) (as substituted: see note 4 supra). This provision applies only where the publication is in a relevant programme: s 5(1)(b)(i) (as so substituted). For the meaning of 'relevant programme' see PARA 239 note 5 ante.

6 Ibid s 5(1)(b)(ii) (as substituted: see note 4 supra). This provision applies only where the publication is in a relevant programme: s 5(1)(b)(ii) (as so substituted).

7 Ibid s 5(1)(c) (as substituted: see note 4 supra).

8 Ibid s 5(1) (as substituted: see note 4 supra). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate or a person purporting to act in any such capacity, he as well as the body corporate is guilty of an offence and liable to be proceeded against and punished accordingly: s 5(6). A 'director' means, in relation to a body corporate whose affairs are managed by its members, a member of the body corporate: s 5(7). See PARA 38 ante. The scheme in ss 1, 5 (both as amended) is not incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10 (freedom of expression): *O'Riordan v DPP* [2005] EWHC 1240 (Admin), (2005) Times, 31 May, DC. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

9 It is an offence under the Sexual Offences (Amendment) Act 1992 s 5 (as amended).

10 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the European Convention on Human Rights art 6(2) (the presumption of innocence), see PARA 1368 et seq post.

11 Written consent is not a defence if it is proved that any person interfered unreasonably with the peace or comfort of the person giving the consent, with intent to obtain it, or that the person was under the age of 16 when it was given: Sexual Offences (Amendment) Act 1992 s 5(3) (as amended: see note 4 supra).

12 Ibid s 5(2) (as amended: see note 4 supra).

13 Ibid s 5(5) (as amended: see note 4 supra).

14 Ibid s 5(5A) (as added: see note 4 supra).

15 Ibid s 5(4) (as amended: see note 4 supra). As to the effect of this limitation see PARA 1065 post.

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## **(11) OFFENCES COMMITTED ABROAD**

### **243. Sexual offences committed outside the United Kingdom.**

Any act done by a person in a country or territory outside the United Kingdom<sup>1</sup> which constituted an offence under the law in force in that country or territory<sup>2</sup> and would constitute a specified sexual offence under the law of England and Wales if it had been done in England and Wales<sup>3</sup> constitutes an offence under the law of England and Wales<sup>4</sup>. The offences are:

- 260 (1) where the victim of the offence was aged under 16 at the time of the offence<sup>5</sup>, any of the statutory offences of rape<sup>6</sup>, sexual assault<sup>7</sup>, causing a person to engage in sexual activity without consent<sup>8</sup>, and any of the offences involving abuse of a position of trust<sup>9</sup>, familial child sex offences<sup>10</sup>, offences against mentally disordered persons (including offences by care workers)<sup>11</sup>, abuse of children through prostitution or pornography<sup>12</sup>, and administering a substance with intent to commit a sexual offence<sup>13</sup>;
- 261 (2) any of the offences involving rape and sexual assault of a child aged under 13<sup>14</sup>, and other offences involving sexual activity with a child under 16 (including arranging or facilitating the commission of a child sex offence and meeting a child following sexual grooming)<sup>15</sup>;
- 262 (3) committing an offence, or trespassing, with intent to commit a sexual offence<sup>16</sup> against a person aged under 16<sup>17</sup>; and
- 263 (4) an offence relating to the taking, possession etc of indecent photographs of children<sup>18</sup>.

References to any of these offences include a reference to an attempt, conspiracy or incitement to commit that offence, or to aiding, abetting, counselling or procuring its commission<sup>19</sup>.

1 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 Sexual Offences Act 2003 s 72(1)(a). In the Crown Court the question whether this condition is met is to be decided by the judge alone (s 72(6)): otherwise, it is to be taken to be met unless, not later than rules of court may provide, the defendant serves on the prosecution a notice stating that, on the facts as alleged with respect to the act in question, the condition is not in his opinion met (s 72(4)(a)), showing his grounds for that opinion (s 72(4)(b)), and requiring the prosecution to prove that it is met (s 72(4)(c)), although the court may, if it thinks fit, permit the defendant to require the prosecution to prove that the condition is met without service of such a notice (s 72(5)). An act punishable under the law in force in any country or territory constitutes an offence under that law for these purposes, however it is described in that law: s 72(3). As to rules of court see PARA 65 note 1 ante.

3 Ibid s 72(1)(b).

4 Proceedings by virtue of these provisions may be brought only against a person who was on 1 September 1997, or has since become, a British citizen or resident in the United Kingdom: Sexual Offences Act 2003 s 72(2). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43. As to residence see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 134 et seq.

5 As to proof of age see PARA 1470 post. See also the Children and Young Persons Act 1933 s 99(2) (as amended) (which provides that where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243.

6 Ie an offence under the Sexual Offences Act 2003 s 1 (see PARA 165 ante): Sch 2 para 1(b).

7 Ie an offence of assault by penetration under ibid s 2 (see PARA 167 ante) or sexual assault under s 3 (see PARA 169 ante): Sch 2 para 1(b).

8 Ie an offence under ibid s 4 (see PARA 171 ante): Sch 2 para 1(b).

9 Ie an offence under ibid ss 16-19 (see PARAS 180-183 ante): Sch 2 para 1(b).

10 Ie an offence under ibid ss 25, 26 (see PARA 191 ante): Sch 2 para 1(b).

11 Ie an offence under ibid ss 30-41 (see PARAS 197-214 ante): Sch 2 para 1(b).

12 Ie an offence under ibid ss 47-50 (see PARAS 215-216 ante): Sch 2 para 1(b).

13 Ie an offence under ibid s 61 (see PARAS 215-216 ante): Sch 2 para 1(b).

14 Ie an offence under ibid ss 5-8 (see PARAS 166-172 ante): Sch 2 para 1(a).

15 Ie an offence under ibid ss 9-15 (see PARAS 173-179 ante): Sch 2 para 1(a).

16 Ie an offence under ibid s 62 or s 63 (see PARAS 231-232 ante): Sch 2 para 1(c).

17 Ibid Sch 2 para 1(c).

18 Ie an offence under the Protection of Children Act 1978 s 1 (as amended) (see PARA 757 post) or the Criminal Justice Act 1988 s 160 (as amended) (see PARA 758 post) in relation to a photograph or pseudo-photograph showing a child under 16: Sexual Offences Act 2003 Sch 2 para 1(d).

19 See ibid Sch 2 para 3. Where any act done by a person in England and Wales in respect of a child would amount to the offence of incitement to commit a specified sexual offence but for the fact that what he had in view would not be an offence triable in England and Wales (Sexual Offences (Conspiracy and Incitement) Act 1996 s 2(1)(a)), the whole or part of what he had in view was intended to take place in a country or territory outside the United Kingdom (s 2(1)(b)), and what he had in view would involve the commission of an offence under the law in force in that country or territory (s 2(1)(c)), then what he had in view is treated as that specified sexual offence for the purposes of any charge of incitement brought in respect of that act (s 2(2)(a)) and any such charge is accordingly triable in England and Wales (s 2(2)(b)).

The specified offences for these purposes are (by virtue of Schedule para 1(1)(b) (substituted by the Sexual Offences Act 2003 s 139, Sch 6 para 35)) any offence of:

27 (1) rape (ie an offence under the Sexual Offences Act 2003 s 1: see PARA 165 ante);

28 (2) assault by penetration (ie an offence under s 2: see PARA 167 ante);

29 (3) sexual assault (ie an offence under s 3: see PARA 169 ante);

30 (4) causing a person to engage in sexual activity without consent (ie an offence under s 4: see PARA 171 ante);

31 (5) rape of a child under 13 (ie an offence under s 5: see PARA 177 ante);

32 (6) assault of a child under 13 by penetration (ie an offence under s 6: see PARA 168 ante);

33 (7) sexual assault of a child under 13 (ie an offence under s 7: see PARA 170 ante);

34 (8) causing or inciting a child under 13 to engage in sexual activity (ie an offence under s 8: see PARA 172 ante);

35 (9) sexual activity with a child (ie an offence under s 9: see PARA 173 ante);

36 (10) causing or inciting a child to engage in sexual activity (ie an offence under s 10: see PARA 174 ante);

- 37 (11) engaging in sexual activity in the presence of a child (ie an offence under s 11: see PARA 175 ante);
- 38 (12) causing a child to watch a sexual act (ie an offence under s 12: see PARA 176 ante);
- 39 (13) arranging or facilitating the commission of a child sex offence (ie an offence under s 14: see PARA 178 ante);
- 40 (15) meeting a child following sexual grooming (ie an offence under s 15: see PARA 179 ante);
- 41 (16) any of the offences involving abuse of a position of trust (ie any offence under ss 16-19: see PARAS 180-183 ante); and
- 42 (17) familial child sex offences (ie any offence under ss 25, 26: see PARA 191 ante).

These provisions apply only where the victim of the offence has not attained the age of 16 years: Sexual Offences (Conspiracy and Incitement) Act 1996 s 5, Schedule para 1(2) (amended by the Sexual Offences Act 2003 Sch 6 para 35). In any proceedings in respect of any offence triable by virtue of these provisions it is immaterial to guilt whether or not the accused was a British citizen at the time of any act or other event proof of which is required for conviction of the offence: Sexual Offences (Conspiracy and Incitement) Act 1996 s 3(6) (s 3(1), (2), (6), (9) amended by the Criminal Justice (Terrorism and Conspiracy) Act 1998 s 9(1), (2), Sch 1 para 9(1), (2)(a), (b), (d), (f), Sch 2 Pt II). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43.

Any act of incitement by means of a message (however communicated) is treated as done in England and Wales if the message is sent or received in England and Wales: Sexual Offences (Conspiracy and Incitement) Act 1996 s 2(3). References to an offence of incitement to commit a specified sexual offence include an offence triable in England and Wales as such an incitement by virtue of these provisions (without prejudice to the Sexual Offences (Conspiracy and Incitement) Act 1996 s 2(2): s 3(8). This applies to references in any enactment, instrument or document (except those in s 2 and the Criminal Law Act 1977 Pt I (ss 1-5) (as amended) (see PARAS 67-71 ante)): Sexual Offences (Conspiracy and Incitement) Act 1996 s 3(9) (as so amended).

Conduct punishable under the law in force in any country or territory is an offence under that law for these purposes, however it is described in that law: s 3(1) (as so amended). In the Crown Court the question of whether what the person had in view would involve the commission of an offence under the law in force in the country or territory in question is to be decided by the judge alone (s 3(5)); otherwise, this condition is to be taken to be satisfied unless, not later than rules of court may provide, the defence serves on the prosecution a notice stating that, on the facts as alleged with respect to what the accused had in view, the condition is not in its opinion satisfied (s 3(2)(a) (as so amended)), showing the grounds for that opinion (s 3(2)(b)), and requiring the prosecution to show that it is satisfied (s 3(2)(c)), although the court may, if it thinks fit, permit the defence to require the prosecution to show that the condition is met without service of such a notice (s 3(4)). As to rules of court see PARA 65 note 1 ante.

## UPDATE

### 243 Sexual offences committed outside the United Kingdom

TEXT AND NOTES--2003 Act s 72 substituted, Sch 2 amended: Criminal Justice and Immigration Act 2008 s 72, Sch 28 Pt 5.

TEXT AND NOTE 19--1996 Act s 2(3) amended: Serious Crime Act 2007 Sch 6 para 60.

See further 2007 Act Sch 6 paras 30, 47 (references to common law offence of incitement).

## UPDATE

### 244-281 The notification requirements and relevant offenders ... Appeals against order for variation, renewal or discharge

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 360-367, and 496 et seq.



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## 4. OFFENCES AGAINST PROPERTY

### (1) THEFT

#### 282. Meaning of 'theft'.

A person is guilty of theft if he dishonestly<sup>1</sup> appropriates<sup>2</sup> property<sup>3</sup> belonging to another<sup>4</sup> with the intention of permanently depriving<sup>5</sup> the other of it<sup>6</sup>; and 'thief' and 'steal' are to be construed accordingly<sup>7</sup>.

It is immaterial whether the appropriation is made with a view to gain or is made for the thief's own benefit<sup>8</sup>.

A person guilty of theft is liable on conviction on indictment to imprisonment for a term not exceeding seven years, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the prescribed sum or to both<sup>10</sup>.

1 As to the meaning of 'dishonestly' see PARA 283 post. The Theft Act 1968 ss 2-6 (see PARAS 283-290 post) have effect as regards the interpretation and operation of s 1 and, except where otherwise provided by the Theft Act 1968, apply only for the purposes of s 1: s 1(3).

2 For the meaning of 'appropriation' see PARA 284 post.

3 As to property which is susceptible of theft see PARAS 285-288 post.

4 For the meaning of 'belonging to another' see PARA 289 post.

5 For the meaning of 'intention of permanently depriving' see PARA 290 post.

6 Theft Act 1968 s 1(1). Section 1(1) is not to be construed as though it contained the words 'without having the consent of the owner' or words to that effect: *Lawrence v Metropolitan Police Comr* [1972] AC 626, 55 Cr App Rep 471, HL; applied in *DPP v Gomez* [1993] AC 442, 96 Cr App Rep 359, HL. The offences of theft and obtaining property by deception (see PARA 310 post) are not mutually exclusive, and sometimes the same facts may support a charge of either offence: see *Lawrence v Metropolitan Police Comr* supra; *DPP v Gomez* supra. It is possible for a person to be acquitted on a charge of theft but convicted on a charge of false accounting (see PARA 316 post) where the charges are founded on the same facts: see *R v Eden* (1971) 55 Cr App Rep 193, CA. It is possible in law for a person to steal and dishonestly handle the same goods: *R v Dolan* (1975) 62 Cr App Rep 36 at 39, CA, per Scarman LJ. Theft and handling (see PARA 302 post) may be charged as alternatives where there is a real possibility that at the trial the evidence may support one rather than the other; the jury should be directed that the defendant may not be convicted of both offences on the same facts: *R v Shelton* (1986) 83 Cr App Rep 379 at 384, CA, per Lawton LJ. See also *R v Woods* [1969] 1 QB 447, 53 Cr App Rep 30, CA; *R v Smythe* (1980) 72 Cr App Rep 8, CA.

Evidence of dispatch or receipt may be given by statutory declaration in proceedings for theft of anything in the course of transmission, whether by post or otherwise: see PARA 1536 post.

Any number of persons may be charged in one indictment with the same theft: see PARA 1303 note 1 post; and see also PARA 1223 post. It is unnecessary for the prosecution to prove that all the articles specified in the particulars of offence in the indictment have been stolen, but the sentence should relate only to the articles proved to have been stolen: *Machent v Quinn* [1970] 2 All ER 255, DC. If on the trial of an indictment for theft the jury is not satisfied that the defendant committed theft but it is proved that he committed an offence under the Theft Act 1968 s 12(1) (taking a motor vehicle or other conveyance without authority: see PARA 298 post), the jury may find him guilty of the latter offence: see s 12(4); and PARA 298 post. As to the general power to bring in an alternative verdict see PARA 1335 post.



As to jurisdiction to prosecute offences of stealing a mail bag, postal packet etc in the course of transmission between places in different jurisdictions within the British postal area but outside England and Wales see PARA 292 post.

Theft is a specified offence for the purposes of the Police and Criminal Evidence Act 1984 s 1(2) (as amended) (power to search for prohibited articles): see PARA 860 et seq post.

7 Theft Act 1968 s 1(1). An offence under s 1 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(a). For the extended territorial scope of theft in connection with acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583. Theft is a penalty offence for the purposes of the Criminal Justice and Police Act 2001 Pt 1 (ss 1-49) (as amended): see PARA 586 post. Stealing is a constituent of certain other offences eg robbery (see PARA 293 post) and burglary (see PARA 294 post). As to the offence of going equipped for stealing etc see PARA 296 post.

8 See the Theft Act 1968 s 1(2).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

10 See the Theft Act 1968 s 7 (amended by the Criminal Justice Act 1991 s 26(1)); and the Magistrates' Courts Act 1980 ss 17, 32(1). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to the offence committed by a person who at the time of committing or being arrested for theft has in his possession a firearm or imitation firearm see PARA 677 ante.

For sentencing guidelines in cases of theft see *R v Barrick* (1985) 81 Cr App Rep 78, CA; *R v Trevor Clark* [1998] 2 Cr App Rep 137, CA; *R v Roach* [2001] EWCA Crim 992, [2002] 1 Cr App Rep (S) 43 (breach of trust); *R v Dhunay* (1986) 8 Cr App Rep (S) 107, CA (airport baggage handlers); *R v Stewart* [1987] 2 All ER 383, 85 Cr App Rep 66, CA; *R v Graham*, *R v Whatley* [2004] EWCA Crim 2755, [2005] 1 Cr App Rep (S) 640 (fraudulent obtaining of welfare benefits); *R v Page*, *R v Maher*, *R v Stewart* [2004] EWCA Crim 3358, (2004) Times, 23 December (shoplifting). As to disqualification for driving and endorsement of licence where the defendant is convicted of stealing or attempting to steal a motor vehicle see the Road Traffic Offenders Act 1988 ss 34(2), 97(2), Sch 2 Pt II (as amended); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1060.

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### 283. Dishonesty.

A person's appropriation<sup>1</sup> of property belonging to another is not to be regarded as dishonest if he appropriates it in the belief<sup>2</sup>: (1) that he has in law the right to deprive the other of it on behalf of himself or of a third person<sup>3</sup>; or (2) that he would have the other's consent if the other knew of the appropriation and the circumstances of it<sup>4</sup>; or (3) that the person to whom the property belongs cannot be discovered by taking reasonable steps<sup>5</sup>, except where the property came to him as a trustee or personal representative<sup>6</sup>.

In determining whether the defendant acted dishonestly in cases not involving a belief in head (1), (2) or (3) above, the test is: (a) whether his actions were dishonest according to the ordinary standards of reasonable and honest people; and (b) if so, whether he himself realised that his actions were, according to those standards, dishonest<sup>7</sup>.

A person's appropriation of property may be dishonest notwithstanding that he is willing to pay for the property<sup>8</sup>. Dishonesty must exist at the time of the appropriation<sup>9</sup>.

<sup>1</sup> For the meaning of 'appropriation' see PARA 284 post.

<sup>2</sup> If a belief in head (1), (2) or (3) in the text is alleged, it is irrelevant as a matter of law that it is unreasonable: *R v Holden* [1991] Crim LR 478, CA.

<sup>3</sup> Theft Act 1968 s 2(1)(a). The test of dishonesty is the mental element of belief; and if a person believes that he has a right within the meaning of s 2(1)(a), albeit there is none, no offence is committed: *R v Turner (No 2)* [1971] 2 All ER 441, 55 Cr App Rep 336, CA. If the defendant genuinely believes that he has the right in law to deprive another of the property, he cannot be convicted of theft even though he knows that he has no legal right to appropriate it in the way which he does, eg by the use of force: *R v Robinson* [1977] Crim LR 173, CA.

<sup>4</sup> Theft Act 1968 s 2(1)(b). A person is not to be regarded as acting dishonestly if he appropriates another's property believing that the other person, with full knowledge of the circumstances, agreed to the appropriation: *Lawrence v Metropolitan Police Comr* [1972] AC 626, 55 Cr App Rep 471, HL. However, the belief must be an honest one in a true consent, honestly obtained: *R v Lawrence* [1971] 1 QB 373 at 377, [1970] 3 All ER 933 at 936, CA; *A-G's Reference (No 2 of 1982)* [1984] QB 624 at 641, [1984] 2 All ER 216 at 224, CA.

<sup>5</sup> Theft Act 1968 s 2(1)(c). See also PARA 284 post. If a person finds property that has been lost, or is believed by him to have been lost, and appropriates it with the intent to take entire dominion over it, believing that the owner cannot be found, he lacks the mens rea for theft; but if he appropriates it with the like intent, but believing that the owner can be found, he commits theft.

<sup>6</sup> *Ibid* s 2(1)(c). Property which comes to a person acting in the capacity of a trustee or legal personal representative is held by him for the benefit of the beneficiaries of the trust or estate of the deceased and not for his own benefit. If the beneficiary cannot be discovered or dies intestate and leaves nobody in whom his interest can vest, his estate will vest in the Crown as bona vacantia, unless the trust instrument or the will clearly shows that the trustee or the personal representative is to take beneficially. Accordingly, if the trustee or personal representative appropriates bona vacantia when he knows he has no right to do so, he commits the offence of theft against the Crown: see TRUSTS vol 48 (2007 Reissue) PARA 1089 et seq. As to bona vacantia generally see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 933 et seq; CROWN PROPERTY vol 12(1) (Reissue) PARA 235 et seq.

<sup>7</sup> *R v Ghosh* [1982] QB 1053, 75 Cr App Rep 154, CA. This is a question of fact for the jury: *R v Feely* [1973] QB 530, 57 Cr App Rep 312, CA; *R v O'Connell* (1991) 94 Cr App Rep 39, CA. It is unnecessary, however, to give the jury a direction as to the meaning of 'dishonestly' in these terms unless the defendant raises the issue that he did not realise that his actions were, according to ordinary standards, dishonest: *R v Roberts* (1985) 84 Cr App Rep 117, CA (decided under the Theft Act 1968 s 22: see PARA 302 post); *R v Price* (1989) 90 Cr App Rep 409, CA, per Lord Lane CJ. Moreover, there is no need to give a direction including the second question in *R v*

*Ghosh* if the conduct is obviously dishonest: *R v Forrester* [1992] Crim LR 792, CA, or if the defendant does not raise the possibility that he thought that his conduct would be regarded as dishonest by reasonable people: *R v Brennan* [1990] Crim LR 118, CA. There is no need to give a direction if there is no dispute about whether ordinary people would have different views as to whether what he was doing was honest or not: *R v Wood* [2002] EWCA Crim 832, [2002] 4 Archbold News 3. A judge who has to give a direction involving the definition in *R v Ghosh* supra should use the exact words used by the Court of Appeal: *R v Hyam* [1997] Crim LR 439, CA.

8 Theft Act 1968 s 2(2). See also *Wheatley v Commissioner of Police of the British Virgin Islands* [2006] UKPC 24, [2006] 1 WLR 1683.

9 See *R v Hall* [1973] QB 126, 56 Cr App Rep 547, CA.

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## 284. Appropriation.

Any assumption by a person of the rights of an owner<sup>1</sup> amounts to an appropriation<sup>2</sup>, and this includes, where he has come by the property, innocently or not, without stealing it<sup>3</sup>, any later assumption of a right to it by keeping or dealing with it as an owner<sup>4</sup>.

Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring amounts to theft by reason of any defect in the transferor's title<sup>5</sup>.

1 There need not be an assumption of all the rights of an owner; an assumption of any of the right of the owner suffices: *R v Morris, Anderton v Burnside* [1984] AC 320, 77 Cr App Rep 309, HL; approved on this point in *DPP v Gomez* [1993] AC 442 at 458, 96 Cr App Rep 359 at 366, HL, per Lord Keith of Kinkel (giving the majority opinion). It follows that presenting a cheque or sending instructions to another's bank to draw on that person's account amounts to an appropriation, because such conduct is the exercise of one of the rights of the owner of the bank credit, the right to have his cheques or instructions relating to the account met, whether or not the account was in fact debited: *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, 90 Cr App Rep 281, DC (not following *R v Kohn* (1979) 69 Cr App Rep 395, CA ('completion of theft does not take place until the transaction has gone through to completion')); *R v Ngan* [1998] 1 Cr App Rep 331, CA. It is immaterial that such an assumption has no legally efficacious result: *Chan Man-sin v A-G of Hong Kong* [1988] 1 All ER 1, [1988] 1 WLR 196, PC (use of forged cheques an appropriation of debts by owners' bank to owners, even though bank had no authority to honour such cheques).

2 There may be an assumption of a right of the owner, and therefore an appropriation, even though the owner consents to or authorises the act in question: *DPP v Gomez* [1993] AC 442, 96 Cr App Rep 359, HL (applying *Lawrence v Metropolitan Police Comr* [1972] AC 626, 55 Cr App Rep 471, HL; and disapproving *R v Morris* supra on this point). The decision in *R v Gomez* supra applies whether or not the consent is induced by fraud: *R v Hinks* [2001] 2 AC 241 at 251, [2001] 1 Cr App Rep 252 at 262, HL, per Lord Steyn (giving the majority opinion).

It follows from *DPP v Gomez* supra that those who control a company can appropriate its property: *DPP v Gomez* supra at 496 and 397 per Lord Browne-Wilkinson. However, in most cases such people who deal with the company's property are not guilty of theft because their appropriation is not dishonest: *R (on the application of A) v Snaresbrook Crown Court* (2001) 165 JPN 495, DC.

'Appropriation' is an 'objective description done irrespective of the mental state' of the defendant: *DPP v Gomez* supra at 495 and 396 per Lord Browne-Wilkinson; and see also *R v Gallasso* (1992) 98 Cr App Rep 284, CA.

Appropriation may also occur when a person not in possession of property assumes the rights of an owner even though he does not take or touch it at all (see eg *R v Pitham, R v Hehl* (1976) 65 Cr App Rep 45, CA (offer to sell another's property held to amount to a completed theft)).

Where a person receives property simultaneously with his acquisition of another's full proprietary interest he appropriates it by taking physical possession of it; it is irrelevant that the other does not retain, beyond the instant of the alleged theft, some proprietary interest or the right to recover some proprietary interest in the property: *R v Hinks* supra at 253 and 265 per Lord Steyn.

A person can appropriate property simply by making a contract for the sale to him of goods which directly results in him obtaining the ownership (but not at that stage possession) of them: *Dobson v General Accident, Fire and Life Assurance Corp plc* [1990] 1 QB 274 at 280-281, [1989] 3 All ER 927 at 931, CA, per Parker LJ.

An act which is lawful in civil law may constitute an appropriation, and a person who has acquired an indefeasible right to property appropriates it by receiving it: *R v Hinks* supra.

Despite the decision in *R v Gomez* supra whereby any dishonest assumption of a right of the owner with the necessary intent is theft, an appropriation can be a continuous course of action: *R v Atakpu* [1994] QB 69, 98 Cr App Rep 254, CA; *R v Lockley* [1995] Crim LR 656, CA. It can be left to the common sense of the jury to decide that the appropriation could continue for so long as the thief can sensibly be regarded as in the act of stealing, ie so long as he is 'on the job': *R v Atakpu* supra.

A person cannot be convicted of theft unless it is proved that he appropriated a specific piece of property: *R v Navvabi* [1986] 3 All ER 102, [1986] 1 WLR 1311, CA (use of cheques backed by guarantee card resulted in bank being obliged to honour them; no theft of amount paid by bank because no assumption of rights of owner over that part of the bank's funds to which the cheques corresponded). Deceiving an owner into doing something with his property does not in itself amount to an appropriation of property: *R v Briggs (Linda)* [2003] EWCA Crim 3662, [2004] 1 Cr App Rep 451.

Other examples of appropriation include: removal of goods from supermarket shelf, since the right to move them is a right of the owner (*R v McPherson* (1972) 117 Sol Jo 13, CA; *DPP v Gomez* supra at 463 and 369-370, per Lord Keith of Kinkel); tugging someone's bag (*Corcoran v Anderton* (1980) 71 Cr App Rep 104, DC); underpricing employer's goods (*Pilgram v Rice-Smith* [1977] 2 All ER 658, 65 Cr App Rep 142, CA).

3 For these purposes, 'stealing' refers to theft in terms of English law whether or not the conduct occurred in England and Wales or abroad: *R v Atakpu* supra.

4 Theft Act 1968 s 3(1).

5 Ibid s 3(2). Thus where a person purchases property for value, in good faith, and it subsequently appears that the seller had no, or only a defective, title to it, eg because the seller or some other person had stolen the property, s 3(2) protects the buyer to the extent that he exercises rights over the property which he believes he had acquired.

An innocent purchaser who sells the property when he subsequently becomes aware that it has been stolen is not guilty of handling stolen property: *R v Bloxham* [1983] 1 AC 109, 74 Cr App Rep 279, HL. See further PARA 302 post.

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## 285. Property in general.

'Property' includes money and all other property, real or personal, including things in action and other intangible property<sup>1</sup>.

1 Theft Act 1968 s 4(1). As to land, growing plants and wild creatures see PARAS 286-288 post.

Section 4(1) applies generally for the purposes of the Theft Act 1968 as it applies for the purposes of s 1 (see PARA 282 ante): s 34(1). To be the subject of theft, the property must belong to another: see further PARA 289 post. As to things in action see CHOSES IN ACTION. A credit in a bank account is a thing in action (see *A-G's Reference (No 1 of 1983)* [1985] QB 182, 79 Cr App Rep 288, CA), so that someone who dishonestly draws and presents a forged cheque on another's account is guilty of the theft of the other's rights to the credit in his account (see *R v Kohn* (1979) 69 Cr App Rep 395, CA). The theft occurs at the time of presentation, and not when the account is debited: see *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, 90 Cr App Rep 281, DC, where a statement to the contrary in *R v Kohn* supra was not followed; and that statement has been said to be an obiter dictum (see *R v Navvabi* (1979) 69 Cr App Rep 395 at 407, CA). See also *R v Ngan* [1998] 1 Cr App Rep 331, CA. Similarly, someone who dishonestly obtains a cheque from P and presents it for payment appropriates the amount of P's bank credit represented by the cheque: *R v Williams* [2001] 1 Cr App Rep 362, CA. There would not, however, be an appropriation where someone simply procured a bank account holder (X) by deception to initiate the transfer from his (X's) bank account to another: *R v Caresana* [1996] Crim LR 667, CA; *R v Naviede* [1997] Crim LR 662, CA; *R v Briggs (Linda)* [2003] EWCA Crim 3662, [2004] 1 Cr App Rep 451, CA. However, an apparent credit balance in a bank account brought about by fraud which could immediately be defeated by a plea of fraud is not a thing in action and therefore not 'property': *R v Thompson* [1984] 3 All ER 565, 79 Cr App Rep 191, CA. See also *R v Tomsett* [1985] Crim LR 369, CA; *R v Shadrokh-Cigari* [1988] Crim LR 465, CA; *R v Davis* (1988) 88 Cr App Rep 347, CA.

Export quotas transferable for value are intangible property (*A-G of Hong Kong v Nai-Keung* [1987] 1 WLR 1339, 86 Cr App Rep 174, PC) but confidential information is not (*Oxford v Moss* (1978) 68 Cr App Rep 183, DC). For the meaning of 'personal property' see PERSONAL PROPERTY vol 35 (Reissue) PARA 1201 et seq.

Gas and water can be the subject of theft, but electricity is not 'property' within the meaning of the Theft Act 1968 s 4 (see *Low v Blease* [1975] Crim LR 513, DC) and has been provided for separately by the offence of abstracting electricity (see PARA 301 post).

Articles in which no person has any determinate proprietary right are not property and cannot be the subject of theft. For this reason, a human corpse, or a part of a corpse, is not property: *Haynes' Case* (1613) 12 Co Rep 113; *Dr Handyside's Case* (1749) 2 East PC 652; *R v Sharpe* (1857) 26 LJMC 47 at 48 per Erle CJ; *R v Kelly and Lindsay* [1999] QB 621 at 630, [1998] 3 All ER 741 at 749, CA. Theft may be committed in respect of the shroud in which the body is wrapped (see *Haynes' Case* supra) and the coffin (see *Handyside's Case* supra). In addition, where a corpse (or part of a corpse) has acquired different attributes by the application of human skill, such as embalming or dissection, for exhibition or teaching purposes, it becomes property: *Haynes' Case* supra; *R v Kelly and Lindsay* supra (applying *Doodeward v Spence* (1908) 6 CLR 406, Aust HC, and *Dobson v North Tyneside Health Authority* [1996] 4 All ER 474 at 479, [1997] 1 WLR 596 at 600, CA, per Peter Gibson LJ (a civil case)). Thus an anatomical or pathological specimen (eg a skeleton or cadaver) which has been embalmed or dissected for teaching purposes or exhibition is property. On the other hand, a body or part of a body which has been preserved at a post mortem, eg by fixing a brain in paraffin, is not property because such preservation is not on a par with embalming or dissecting a corpse or preserving an anatomical or pathological specimen for teaching purposes or an exhibition: *Dobson v North Tyneside Health Authority* supra. See CREMATION AND BURIAL vol 10 (Reissue) PARA 905. As to unauthorised disinterment see CREMATION AND BURIAL vol 10 (Reissue) PARA 1122.

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## 286. Land.

A person cannot steal land<sup>1</sup>, or things forming part of land and severed from it by him or by his directions, except in the following cases:

- 264 (1) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates<sup>2</sup> the land or anything forming part of it by dealing with it in breach of the confidence reposed in him<sup>3</sup>;
- 265 (2) when he is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed<sup>4</sup>;
- 266 (3) when he, being in possession of the land under a tenancy<sup>5</sup>, appropriates the whole or any part of any fixture or structure let to be used with the land<sup>6</sup>.

1 For these purposes, 'land' does not include incorporeal hereditaments: Theft Act 1968 s 4(2). Accordingly incorporeal hereditaments such as easements, profits à prendre, rentcharges and rights of common can be subject to theft. For the meaning of 'incorporeal hereditaments' see REAL PROPERTY vol 39(2) (Reissue) PARA 81. With regard to 'things forming part of land' the general maxim of law is that what is annexed to the land becomes part of the land, and what constitutes annexation sufficient for this purpose depends on the circumstances of each case including the degree, and object, of annexation: *Elitestone Ltd v Morris* [1997] 2 All ER 513, [1997] 1 WLR 687, HL. See also *Holland v Hodgson* (1872) LR 7 CP 328, Ex Ch. Contrast *Elitestone v Morris* supra (timber-framed bungalow resting on concrete blocks in the land which could only be moved by destroying it formed part of the land) with *Chelsea Yacht and Boat Club Ltd v Pope* [2001] 2 All ER 409, [2000] 1 WLR 1491, CA (houseboat attached to the river bed, a pontoon and the river wall by mooring lines did not form part of the land).

2 For the meaning of 'appropriate' see PARA 284 ante.

3 Theft Act 1968 s 4(2)(a).

4 Ibid s 4(2)(b).

5 For these purposes, 'tenancy' means a tenancy for years or any less period and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy; and 'let' is to be construed accordingly: ibid s 4(2). As to the subject matter of tenancy, an agreement for a tenancy, and the distinction between a tenancy and a licence see LANDLORD AND TENANT. As to statutory tenants see the Rent Act 1977; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 831 et seq. As to other instances where security of tenure is given to tenants whose tenancies are otherwise validly terminated see the Landlord and Tenant Act 1954 s 64 (business tenancies: see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARAS 701, 729); and the Rent Act 1977 s 155(3), Sch 24 para 6 (furnished tenancies: see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 879).

6 Theft Act 1968 s 4(2)(c).

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### **287. Wild plants and mushrooms.**

A person who picks mushrooms<sup>1</sup> growing wild on any land, or who picks flowers, fruit or foliage from a plant<sup>2</sup> growing wild on any land does not, although not in possession of the land, steal what he picks, unless he does it for reward or for sale or other commercial purpose<sup>3</sup>.

1 For these purposes, 'mushroom' includes any fungus: Theft Act 1968 s 4(3).

2 For these purposes, 'plant' includes any shrub or tree: *ibid* s 4(3). Taking the whole plant would, however, be theft since the exception relates only to picking flowers, fruit or foliage from a plant. A person who intentionally picks, uproots or destroys a protected wild plant is guilty of an offence under the Wildlife and Countryside Act 1981: see s 13, Sch 8 (as amended); and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1032.

3 Theft Act 1968 s 4(3).



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## **288. Wild creatures.**

Wild creatures, tamed or untamed, are regarded as property<sup>1</sup>; but a person cannot steal a wild creature not tamed or not ordinarily kept in captivity, or the carcase of any such creature, unless it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in course of reducing it into possession<sup>2</sup>.

1 As to the classification of animals into wild and domestic, and the property in such animals, see ANIMALS vol 2 (2008) PARA 708 et seq; and as to the protection of any wild bird or certain wild animals under the Wildlife and Countryside Act 1981 see ss 1, 9, Sch 5 (as amended); and ANIMALS vol 2 (2008) PARA 1015.

2 Theft Act 1968 s 4(4). Poaching in so far as it is concerned with taking or killing creatures is, in general, not the subject of theft although taking and destroying fish is dealt with in s 32, Sch 1 para 2 (as amended): see AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 841. As to the taking of deer see the Deer Act 1991 s 1; and ANIMALS vol 2 (2008) PARA 977.

The mere act of taking over an existing natural mussel bed does not amount to a reduction into possession of the mussels: *R v Howlett* [1968] Crim LR 222, CA. As to property in living fish see AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 839.

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## **289. Property belonging to another.**

Property is regarded as belonging to any person having possession or control of it, or having any proprietary right or interest in it, not being an equitable interest arising only from an agreement to transfer or grant an interest<sup>1</sup>.

Where property is subject to a trust, the persons to whom it belongs are regarded as including any person having a right to enforce the trust, and an intention to defeat the trust is regarded accordingly as an intention to deprive of the property any person having that right<sup>2</sup>.

Where a person receives property from or on account of another, and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds are regarded, as against him, as belonging to that other<sup>3</sup>.

Where a person gets property by another's mistake, and is under an obligation to make restoration, in whole or in part, of the property or its proceeds<sup>4</sup> or of its value, then to the extent of that obligation the property or proceeds are to be regarded, as against him, as belonging to the person entitled to restoration, and an intention not to make restoration is to be regarded accordingly as an intention to deprive that person of the property or proceeds<sup>5</sup>.

Property of a corporation sole is regarded as belonging to the corporation notwithstanding a vacancy<sup>6</sup>.

The Theft Act 1968 applies in relation to the parties to a marriage, and to property belonging to the wife or husband whether or not by reason of an interest derived from the marriage, as it would apply if they were not married and any such interest subsisted independently of the marriage<sup>7</sup>.

1 Theft Act 1968 s 5(1). Section 5(1) applies generally for the purposes of the Theft Act 1968: s 34(1). As to property which is susceptible of theft see PARAS 285-288 ante. Civil law principles are applied by the courts in determining questions relating to title to goods for the purposes of the Theft Act 1968: see *R v Walker* [1984] Crim LR 112, CA; *Dobson v General Accident, Fire and Life Assurance Corp'n plc* [1990] 1 QB 274 at 289-290, [1989] 3 All ER 927 at 937-938, CA, per Bingham LJ (a civil case); but cf *R v Morris*, *Anderton v Burnside* [1984] AC 320 at 334, 77 Cr App Rep 309 at 317, HL, per Lord Roskill.

The property must belong to another at the time of the alleged appropriation: see *Edwards v Ddin* [1976] 3 All ER 705, [1976] 1 WLR 942, DC (defendant not guilty of theft when he drove away from petrol station without paying after attendant had put petrol in tank; ownership of petrol had passed to defendant when petrol entered tank, so that petrol did not belong to another when defendant appropriated it by driving off). The appropriate charge in such a case is that of making off without payment contrary to the Theft Act 1978 s 3: see PARA 315 post.

There can be a conviction of theft of property belonging to a person unknown provided that it can be proved that the property must have belonged to someone other than the defendant: *R v Burton* (1854) Dears CC 282; *R v Mockford* (1868) 11 Cox CC 16; *Noon v Smith* [1964] 3 All ER 895, 49 Cr App Rep 55, DC.

An owner may steal his own goods if such goods are in the possession of his bailee and he has the intention either dishonestly to charge the bailee with the loss of the goods or, in cases where the bailee has a right to possession as against the owner, to deprive the bailee of his special property in the goods: see *R v Turner (No 2)* [1971] 2 All ER 441, 55 Cr App Rep 336, CA (owner of motor car left it with garage for repairs; surreptitiously and dishonestly he collected it without paying for the repairs; guilty of theft). It has been held that there is no ground for qualifying 'possession or control' in any way: *R v Turner (No 2)* supra. Partnership property can be stolen by a partner (*R v Bonner* [1970] 2 All ER 97n, [1970] 1 WLR 838, CA) and persons in control of a limited company are capable of stealing the company's property (*A-G's Reference (No 2 of 1982)* [1984] QB 624, 78 Cr App Rep 131, CA; *R v Phillipou* (1989) 89 Cr App Rep 290, CA). Cf *R v McHugh*, *R v Tringham* (1988) 88 Cr App

Rep 385, CA; *DPP v Gomez* [1993] AC 442 at 496, sub nom *R v Gomez* [1993] 1 All ER 1 at 40, HL, per Lord Browne-Wilkinson. If property has been abandoned by the owner, there can be no theft of it: see *R v Thurborn* (1849) 1 Den 387, CCR. However, the occupier of the land on which the abandoned property is found or in whose possession or control, actual or constructive, the property is can claim sufficient title to protect it from strangers: *R v Rowe* (1859) Bell CC 93 (canal company had sufficient property in iron found in canal); *Hibbert v McKiernan* [1948] 2 KB 142, [1948] 1 All ER 860, DC (golf club had special property in golf balls abandoned on course); *Williams v Phillips* (1957) 41 Cr App Rep 5, DC (local authority had constructive possession of rubbish collected by refuse collectors employed by authority); *R v Woodman* [1974] QB 754, [1974] 2 All ER 955, CA (company in control of disused factory site from which trespassers were excluded; company had control of articles on site of the existence of which it was unaware). As to what may amount to 'abandonment' by the owner see *R v Edwards*, *R v Stacey* (1877) 13 Cox CC 384, CCR (carcasses of animals buried by owner on his land with intention of not moving them; carcasses not abandoned); *Williams v Phillips* supra (refuse put out for collection by local authority not abandoned by original owner).

Where treasure within the meaning of the Treasure Act 1996 s 1 (see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1086) is found, it vests, subject to prior interests and rights, in the Crown (or the Crown's franchisee): see s 4. Thus a finder of treasure who appropriates it with the mens rea for theft may be convicted of stealing it from the Crown (or its franchisee) and from the owner of the land on which it was found (see *Waverley Borough Council v Fletcher* [1996] QB 334, [1995] 4 All ER 756, CA). As to treasure see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1084 et seq.

Where the subject matter of the offence is incorrectly stated in the indictment to be the property of a person, the indictment may be amended if no injustice is caused to the defendant: see *R v Tirado* (1974) 59 Cr App Rep 80, CA (bank draft stated in indictment to be the property of person who gave instructions for it to be drawn; amendment made to show draft as property of bank). However, an amendment may not be essential: see *Etim v Hatfield* [1975] Crim LR 234, DC. As to the amendment of indictments generally see further PARA 1227 post.

With the qualification below, a beneficial interest under a trust is a proprietary interest for the purposes of the Theft Act 1968 s 5(1). Whether there is a trust on given facts is a question of law: *R v Clowes (No 2)* [1994] 2 All ER 316 at 323, CA. An interest under a constructive trust (see EQUITY vol 16(2) (Reissue) PARA 852) is insufficient for a proprietary interest under the Theft Act 1968 s 5(1): *A-G's Reference (No 1 of 1985)* [1986] QB 491, 83 Cr App Rep 70, CA. But see *R v Shadrokh-Cigari* [1988] Crim LR 465, CA, where an equitable interest which could only have arisen under a constructive trust was held to be a proprietary interest for the purposes of the Theft Act 1968 s 5(1). See also *Re Holmes* infra.

Where an employee makes a secret profit for which he will be held accountable, the secret profit, if it can be described as subject to a constructive trust, does not belong to another under the Theft Act 1968 s 5(1), because that constructive trust is not such as to give the employer a proprietary right or interest for the purposes of s 5(1): *A-G's Reference (No 1 of 1985)* [1986] QB 491, 83 Cr App Rep 70, CA (public house manager selling own beer in breach of contract), applying *Lister & Co v Stubbs* (1890) 45 Ch D 1, CA. In *Lister & Co v Stubbs* supra it was held that an employee who receives a secret profit or bribe merely has to account to his employer for it and is not a constructive trustee of it. However, *Lister & Co v Stubbs* supra was held in *A-G for Hong Kong v Reid* [1994] 1 AC 324, [1994] 1 All ER 1, PC, to have been wrongly decided; such an employee, according to the Privy Council, is also a constructive trustee of the secret profit or bribe. In *Re Holmes* [2004] EWHC 2020 (Admin) at [24], [2005] 1 All ER 490 at [24], [2005] 1 Cr App Rep 229 at [24], the Divisional Court (obiter) took the provisional view that property subject to a constructive trust is to be regarded as belonging to the person entitled to the beneficial interest; it distinguished *A-G's Reference (No 1 of 1985)* supra on the ground that that case concerned a secret profit whereas *Re Holmes* supra was concerned with a fraudulent taking of property. A bribe received by an employee is not the property of his employers for the purposes of the Theft Act 1968 s 5: *Powell v MacRae* [1977] Crim LR 571, DC (decided before *A-G for Hong Kong v Reid* supra).

2 Theft Act 1968 s 5(2). In the case of a charitable trust, the Attorney General is the person entitled to enforce the trust: see CHARITIES vol 8 (2010) PARAS 4, 599 et seq.

3 Ibid s 5(3). The obligation referred to in s 5(3) is an obligation in law to retain and deal with the property or its proceeds in a particular way, and not just for a social or moral obligation: *R v Mainwaring* (1981) 74 Cr App Rep 99, CA; *Wakeman v Farrar* [1974] Crim LR 136, DC; *DPP v Huskinson* (1988) 20 HLR 562, DC; *R v Breaks*, *R v Huggan* [1998] Crim LR 349, CA. The defendant must have direct knowledge of the obligation and its extent: *R v Wills* (1990) 92 Cr App Rep 297, CA. It is a matter of law for the judge whether or not such an obligation existed in particular circumstances. However, whether or not those circumstances existed cannot be known until the facts have been established. It is for the jury to establish these circumstances if the facts are in dispute and, where they are, the judge must direct the jury to make its findings on the facts and then say to it: 'If you find the facts to be such-and-such, then I direct you as a matter of law that a legal obligation arose to which [the Theft Act 1968] s 5(3) applies': *R v Mainwaring* (1981) 74 Cr App Rep 99, CA. See also *R v Dubar* [1995] 1 All ER 781, [1994] 1 WLR 1484, C-MAC; *R v Clowes (No 2)* supra; *R v Breaks*, *R v Huggan* supra. Where the relevant facts are not in dispute, the judge should normally rule on them before, or at the commencement of, the trial: *R v Breaks*, *R v Huggan* supra. Statements in *R v Hall* infra and *R v Hayes* infra that it is for the jury to determine not only the facts but also whether, on those facts, an obligation arose have been disapproved and are not to be followed. For general observations on the Theft Act 1968 s 5(3), and, in particular, for consideration of 'obligation', see *R v Hall* [1973] QB 126, 56 Cr App Rep 547, CA (travel agent received money

from clients as deposits and payments for air trips, which he paid into his firm's general trading account; none of the flights took place and none of the money was refunded; it was not established either that the clients expected him 'to retain and deal with that property or its proceeds in a particular way', or that an 'obligation' to do so was undertaken by him; there was an absence of such a special arrangement between the defendant and his clients as would give rise to an 'obligation' within the Theft Act 1968 s 5(3)). Contrast *Re Kumar* [2000] Crim LR 504, DC (defendant travel agent contractually obliged to IATA to retain in its bank account moneys received for flight tickets sold on behalf of IATA members and pay it monthly to IATA (less commission); it was held that there was an obligation to retain and deal with money received on account of another in a particular way; moneys belonged to another under the Theft Act 1968 s 5(3)). See also *R v Wain* [1995] 2 Cr App Rep 660, CA (defendant raised money for a company which distributed money among charities; defendant paid what he had raised into a special bank account which he had opened and, thereafter, with the company's consent into his own account; defendant dishonestly dissipated the credit in his account; held obligation to retain proceeds of the money collected (the money credited to successive bank accounts) and to deal with them in a particular way (ie by handing them over to the company)), disapproving *Lewis v Lethbridge* [1987] Crim LR 59, DC. Whether a person is under an obligation to retain and deal with money received from a customer in a particular way so that it will be regarded under the Theft Act 1968 s 5(3) as belonging to that customer depends on the particular facts of each case: *R v Hall* supra; and see also *Wakeman v Farrar* [1974] Crim LR 136, DC; *R v Hayes* (1976) 64 Cr App Rep 82, CA; *R v Brewster* (1979) 69 Cr App Rep 375, CA; *Davidge v Bunnett* [1984] Crim LR 297, DC. There is a distinction between the type of case in *R v Hall* supra and eg the treasurer of a solitary fund, as for instance a holiday fund, where the treasurer is in law the owner of the property, but the Theft Act 1968 s 5(3) treats the property, as against him, as belonging to the persons to whom he owes the duty to retain and deal with the property as agreed: see *R v Hall* supra. In *R v Hall* supra the money was paid into the firm's general trading account but this was not itself decisive of the question whether or not an obligation under the Theft Act 1968 s 5(3) arose. Section 5(3) does not apply unless there is an obligation on the defendant to account for the particular property he has received or its proceeds. If he can do what he likes with the property having no obligation other than to account for a similar sum at a later date, there is no theft: see *DPP v Huskinson* [1988] Crim LR 620, DC (recipient of housing benefit under no obligation to use that benefit directly for payment of rent). Where an obligation under the Theft Act 1968 s 5(3) is assumed and the one who assumes it subsequently discovers that by reason of a prior fraud the obligation is legally unenforceable, he remains liable to be convicted of theft if he dishonestly fails to fulfil that obligation: *R v Meech* [1974] QB 549, 58 Cr App Rep 74, CA. A person selling his own goods on his employer's premises (eg a public house) in breach of contract does not receive the money paid for them on account of his employer within the Theft Act 1968 s 5(3): *A-G's Reference (No 1 of 1985)* [1986] QB 491, 83 Cr App Rep 70, CA. As to the prosecution's burden to prove breach of obligation see *R v Klineberg*, *R v Marsden* [1999] 1 Cr App Rep 427, CA.

4 Where the payee of a cheque exchanges that cheque with a third party for cash before the cheque is presented, the cash received represents the 'proceeds' of the cheque for these purposes: *R v Davis* (1988) 88 Cr App Rep 347, CA.

5 Theft Act 1968 s 5(4). The obligation must be an obligation in law; a social or moral obligation will not suffice: *R v Gilks* [1972] 3 All ER 280, 56 Cr App Rep 734, CA. See also *A-G's Reference (No 1 of 1983)* [1985] QB 182, 79 Cr App Rep 288, CA (money credited to employee's bank account by direct debit system under mistaken belief as to legal entitlement; employee aware of mistake but not repaying money; legal obligation to make restitution; money belonged to another under the Theft Act 1968 s 5(4)); *R v Shadrokh-Cigari* [1988] Crim LR 465, CA (banker's drafts issued by mistake as to legal entitlement; recipient legally obliged to restore either proceeds or value of the drafts; money belonged to another under the Theft Act 1968 s 5(4); moreover, because of the mistake the bank retained an equitable proprietary interest in the drafts within the meaning of s 5(1) (see the text and note 1 supra)).

6 Theft Act 1968 s 5(5). As to corporations sole see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1111 et seq.

7 Ibid s 30(1). As to the institution of proceedings for stealing or doing unlawful damage to the property of the defendant's spouse see PARA 291 post.

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## **290. Intention to deprive owner permanently.**

In every case of theft the dishonest appropriation must be accompanied by the intention of permanently depriving the owner of his property<sup>1</sup>. A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal<sup>2</sup>. Without prejudice to the generality of the above provisions, where a person, having possession or control, whether lawfully or not, of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this amounts, if done for purposes of his own and without the other's authority, to treating the property as his own to dispose of regardless of the other's right<sup>3</sup>.

1 See the Theft Act 1968 s 1(1); and PARA 282 ante. See also *R v Velumyl* [1989] Crim LR 299 (intention to return equivalent property to that appropriated does not negative an intention permanently to deprive the other 'of it', ie the property appropriated). If a person examines property to see whether it (or anything in it) is worth keeping, he does not thereby intend permanently to deprive the person to whom the property belongs and is not guilty of theft (*R v Easom* [1971] 2 QB 315, 55 Cr App Rep 410, CA), although he may be convicted on a suitably framed charge (see PARA 81 ante). For the meaning of 'dishonest' see PARA 283 ante; and for the meaning of 'appropriation' see PARA 284 ante.

2 Theft Act 1968 s 6(1). Section 6 applies for the purposes of s 15 (obtaining property by deception: see PARA 310 post) with any necessary adaptation of the reference to appropriating: see s 15(3). As to the meaning of 'outright taking or disposal' see *R v Coffey* [1987] Crim LR 498, CA.

The purpose of the Theft Act 1968 s 6 is to clarify, but not to restrict, the meaning of the phrase 'with the intention of permanently depriving' and is not meant to contain an exhaustive definition of those words but rather to give illustrations of what can amount to the intention required by s 1(1) (see note 1 supra): *R v Warner* (1970) 55 Cr App Rep 93, CA. See also *R v Bagshaw* [1988] Crim LR 321, CA. The Theft Act 1968 s 6(1) should be referred to in exceptional cases only, and in the vast majority of cases need not be referred to or considered at all: *R v Lloyd*, *R v Bhuee*, *R v Ali* [1985] QB 829 at 835, 81 Cr App Rep 182 at 187, CA, per Lord Lane CJ.

The first part of the Theft Act s 6(1) (ie 'A person appropriating . . . dispose of regardless of the other's rights') expresses the critical notion of s 6 as a whole: see *R v Fernandes* [1996] 1 Cr App Rep 175 at 188, CA. The second part of the Theft Act 1968 s 6(1) (ie 'and a borrowing . . . outright taking or disposal') and s 6(2) (see the text and note 3 infra) provide specific illustrations of that notion: see *R v Fernandes* supra. For examples of the operation of the first part of the Theft Act 1968 s 6(1) see *R v Downes* (1983) 77 Cr App Rep 260, CA (sale of Inland Revenue vouchers which could be used to obtain tax advantages by submission to the Inland Revenue; seller intended to treat voucher as his own to dispose of regardless of the Inland Revenue's rights); *R v Marshall*, *Coombes*, *Eren* [1998] 2 Cr App Rep 282, CA (re-sale of used, but still valid, Underground tickets which might ultimately find their way back into the Underground's possession; sellers had intent to treat tickets as their own to dispose of regardless of the rights of the Underground); *DPP v Lavender* [1994] Crim LR 297, DC (defendant surreptitiously removed doors from a nearby council house to replace doors in his council house; defendant had intended to treat the door as his own to dispose of regardless of the rights of the council). See also *Chan Man-siu v A-G of Hong Kong* [1988] 1 All ER 1, [1988] 1 WLR 196; *R v Hilton* [1997] 2 Cr App Rep 445, CA.

The second part of the Theft Act 1968 s 6(1) 'is intended to make clear that a mere borrowing is never enough to constitute the necessary mens rea unless the intention is to return the 'thing' in such a changed state that it can truly be said that all its goodness or virtue has gone': see *R v Lloyd*, *R v Bhuee*, *R v Ali* [1985] QB 829 at 836, 81 Cr App Rep 182 at 188, CA (thus its terms were not satisfied on the facts of that case, the borrowing of films for a few hours in order to make 'pirate' copies of them). It might have been thought that the test would be satisfied where the defendant appropriated a cheque, intending to present it for payment, but it has been

held that there would be 'no intention on the part of the defendant permanently to deprive the drawer of the cheque form, which would on presentation of the cheque for payment be returned to the drawer via his bank': see *R v Preddy and Slade*, *R v Dhillon* [1996] AC 815 at 836-837, [1996] 2 Cr App Rep 524 at 537, HL, per Lord Goff of Chieveley; regarded as binding and applied in *R v Clark* [2001] EWCA Crim 884, [2002] 1 Cr App Rep 141. See also, and contrast, *R v Arnold* [1997] 4 All ER 1, CA (the Theft Act 1968 s 6(1) applied if at the time of the appropriation of a bill of exchange the defendant intended that it should find its way back to the person by whom it had been transferred only after all the benefit to the transferor had been lost as a result of its use), which was not referred to by the Court of Appeal in *R v Clark* supra.

3 Theft Act 1968 s 6(2).

## **UPDATE**

### **290 Intention to deprive owner permanently**

NOTE 2--See also *R v Raphael* [2008] EWCA Crim 1014, [2008] All ER (D) 159 (May) (defendant demanded payment for return of vehicle to owner; defendant had intended to treat the vehicle as his own to dispose of regardless of the rights of the owner).

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## **291. Institution of proceedings for theft etc of property of defendant's spouse or civil partner.**

Proceedings may not be instituted against a person for any offence of stealing or doing unlawful damage to property which, at the time of the offence, belongs to that person's wife or husband or civil partner, or for any attempt, incitement or conspiracy to commit such an offence, unless the proceedings are instituted by or with the consent of the Director of Public Prosecutions<sup>1</sup>. These provisions do not apply, however, to proceedings against a person for an offence:

- 267 (1) if that person is charged with committing the offence jointly with his or her wife or husband or civil partner; or
- 268 (2) if, by virtue of any judicial decree or order (wherever made) that person and the husband or wife are at the time of the offence under no obligation to cohabit; or
- 269 (3) if an order (wherever made) is in force providing for the separation of that person and his or her civil partner<sup>2</sup>.

<sup>1</sup> See the Theft Act 1968 s 30(4) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 27). As to the effect of this limitation see PARA 1071 post. See also *R v Withers* [1975] Crim LR 647. The Theft Act 1968 applies in relation to the parties to a marriage, and to property belonging to the wife or husband whether or not by reason of an interest derived from the marriage, as it would apply if they were not married and any such interest subsisted independently of the marriage: s 30(1).

Notwithstanding the Prosecution of Offences Act 1985 s 25 (requirement of consent to institution of proceedings does not prevent arrest: see PARA 1071 post), the Theft Act 1968 s 30(4) (as amended) applies to an arrest, if without warrant, made by the wife or husband or civil partner, and to a warrant of arrest issued on an information laid by the wife or husband or civil partner: see s 30(5) (added by the Criminal Jurisdiction Act 1975 s 14(4), Sch 5 para 2(1); and amended by the Prosecution of Offences Act 1979 s 11(1), Sch 1; the Prosecution of Offences Act 1985 ss 25, 31(6), Sch 2; and the Civil Partnership Act 2004 s 261(1), Sch 27 para 27(1), (2)); and the Interpretation Act 1978 s 17(2)(a)). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

Subject to the Theft Act 1968 s 30(4) (as amended), a person has the same right to bring proceedings against his or her spouse for any offence (ie whether or not under that Act), as if they were not married: see s 30(2).

<sup>2</sup> See *ibid* s 30(4) proviso (as amended (see note 1 *supra*); and also amended by the Criminal Jurisdiction Act 1975 s 14(4), (5), Sch 5 para 2(2), Sch 6 Pt 1). 'Judicial decree or order' includes a non-molestation order: see *Woodley v Woodley* [1978] Crim LR 629, DC.

## **UPDATE**

### **291 Institution of proceedings for theft etc of property of defendant's spouse or civil partner**

TEXT AND NOTE 1--See further Serious Crime Act 2007 Sch 6 para 1 (references to common law offence of incitement).

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## **292. Thefts etc of mails from outside England and Wales.**

Where a person:

- 270 (1) steals or attempts to steal any mail bag<sup>1</sup> or postal packet<sup>2</sup> in the course of transmission<sup>3</sup> as such between places in different jurisdictions in the British postal area<sup>4</sup>, or any of the contents of such a mail bag or postal packet<sup>5</sup>; or
- 271 (2) in stealing or with intent to steal any such mail bag or postal packet or any of its contents, commits any robbery, attempted robbery or assault with intent to rob<sup>6</sup>,

then, notwithstanding that he does so outside England and Wales, he is guilty of committing or attempting to commit the offence against the Theft Act 1968 as if he had done so in England and Wales, and is accordingly liable to be prosecuted, tried and punished in England and Wales without proof that the offence was committed there<sup>7</sup>.

1 For these purposes, 'mail bag' includes any form of container or covering in which postal packets in the course of transmission by post are enclosed by a postal operator in the United Kingdom or a foreign postal administration for the purpose of conveyance by post, whether or not it contains any such packets: Postal Services Act 2000 s 125(1); definition applied by the Theft Act 1968 s 34(2)(c) (added by the Postal Services Act 2000 (Consequential Modifications) Order 2003, SI 2003/2908, art 3(1), Sch 1 para 1). As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 'Postal packet' means a letter, parcel, packet or other article transmissible by post: Postal Services Act 2000 s 125(1); definition applied by the Theft Act 1968 s 34(2)(c) (as added: see note 1 supra).

3 The Theft Act 1968 does not specify when a postal packet is in the course of transmission. See also PARA 540 note 4 post.

4 For these purposes, the reference to different jurisdictions in the British postal area is to be construed as referring to the several jurisdictions of England and Wales, of Scotland, of Northern Ireland, of the Isle of Man and of the Channel Islands: *ibid* s 14(2).

5 *Ibid* s 14(1)(a).

6 *Ibid* s 14(1)(b).

7 See *ibid* s 14(1).



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## (2) OTHER OFFENCES INVOLVING OR RELATED TO STEALING

### 293. Robbery.

A person is guilty of robbery if he steals<sup>1</sup>, and immediately before or at the time of<sup>2</sup> doing so, and in order to do so, he uses force on any person<sup>3</sup> or puts or seeks to put any person in fear of being then and there subjected to force<sup>4</sup>. A person guilty of robbery, or of an assault<sup>5</sup> with intent to rob, is liable on conviction on indictment to imprisonment for life or for any shorter term<sup>6</sup>.

1 For the meaning of 'steal' see PARA 282 ante.

2 The 'time' of the stealing lasts so long as the theft can be said to be still in progress in common sense terms, ie so long as the defendant is 'on the job': see *R v Hale* (1978) 68 Cr App Rep 415, CA; applied in *R v Lockley* [1995] Crim LR 656, CA.

3 This may include a person who has no proprietary right or interest in the property stolen.

4 Theft Act 1968 s 8(1). Stealing is an ingredient of robbery and, if the defendant believes that he has in law a claim of right to the property which he takes by force, the offence of robbery is not committed: *R v Skivington* [1968] 1 QB 166, 51 Cr App Rep 167, CA; *R v Robinson* [1977] Crim LR 173, CA. See also the Theft Act 1968 s 2(1)(a); and PARA 283 head (1) ante.

The use of force or the putting (or seeking to put) in fear is not sufficient to constitute robbery if its purpose is to enable the defendant to get away or to prevent the owner from recovering his property: 'The sole question is whether the defendant used force on any person in order to steal': *R v Dawson, R v James* (1976) 64 Cr App Rep 170 at 172, CA, per Lawton LJ. The force need not be used or threatened against the owner or possessor of the property stolen: *R v Taylor* [1996] 10 Archbold News 2, CA. See also *R v Clouden* [1987] Crim LR 56, CA (force need not be used on a person to overcome his resistance; sufficient to use force simply to get possession of property, eg wrenching a person's bag from his grasp); *R v Shendley* [1970] Crim LR 49, CA. The degree of violence need not be excessive nor need the injury be serious to constitute robbery: *R v Harrison* (1930) 22 Cr App Rep 82, CCA; *R v Dawson, R v James* supra (jostling a person so as to make him lose his balance may be sufficient to constitute robbery). A continuing threat of force may suffice: *R v Donaghy, R v Marshall* [1981] Crim LR 644.

Where a threat of force is involved the intention must be to put another in fear for himself; an intent to put someone in fear for another is not enough: *R v Taylor* supra.

As to jurisdiction to prosecute offences of stealing a mail bag, postal packet etc in the course of transmission between places in different jurisdictions within the British postal area but outside England and Wales involving robbery, attempted robbery etc see PARA 292 ante. As to the offence committed by a person who at the time of committing or being arrested for robbery has in his possession a firearm or imitation firearm see PARA 677 post. For the extended territorial scope of robbery or assault with intent to rob in connection with acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583.

5 For the meaning of 'assault' see PARA 147 ante.

6 Theft Act 1968 s 8(2). Offences under s 8 may not be tried summarily: Magistrates' Courts Act 1980 s 17, Sch 1 para 28(a). For sentencing guidelines in cases of robbery see *R v Edwards, R v Larter* (1987) Times, 3 February, CA (street robberies); *A-G's References (Nos 4 and 7 of 2002, R v Lobban and Sawyers, R v Q* [2002] EWCA Crim 127, [2002] 2 Cr App Rep (S) 345 (street robberies involving theft of mobile phones); *R v Allen* [2005] EWCA Crim 667, [2005] 2 Cr App Rep (S) 573 ('steaming' cases, ie cases where the victim is vulnerable by being trapped in a train or similar confined space); *R v Turner* (1975) 61 Cr App Rep 67, CA; *R v Adams, R v Harding* [2000] 2 Cr App Rep (S) 274, CA (armed robberies); *A-G's Reference (No 3 of 1990)* (1991) 92 Cr App

Rep 166, CA; *A-G's Reference (No 7 of 1992)* (1993) 14 Cr App Rep (S) 122, CA (robberies of sub-post offices, small shops and similar premises); *R v O'Driscoll* (1986) 8 Cr App Rep (S) 121, CA; *A-G's References (Nos 32 and 33 of 1995)*, *R v Pegg and Martin* [1996] 2 Cr App Rep (S) 346, CA (robberies in course of domestic burglaries); *A-G's References (Nos 7, 8, 9 and 10 of 2000)* [2001] 1 Cr App Rep (S) 166, CA (robbery of young persons on public transport). A person charged with robbery may be convicted of theft: *R v Shendley* [1970] Crim LR 49, CA. As to alternative verdicts see the Criminal Law Act 1967 s 6(3); and PARA 1335 post.

## UPDATE

### 293 Robbery

NOTE 4--See also *R v DPP; B v DPP* (2007) Times, 27 March, DC.

NOTE 6--The court is entitled to take into account progress made under a supervision order: *A-G's References Nos 125 and 126 of 2006 (Jake Tomney and Simon Tomney)* [2007] EWCA Crim 174, [2007] 2 Cr App Rep (S) 295.

For sentencing guidelines in the case of robbery see the Sentencing Guidelines Council Guideline *Robbery* (2006). See *R v Considine* [2008] EWCA Crim 1407, [2009] 1 Cr App Rep (S) 272, [2008] All ER (D) 99 (Aug) (case with all hallmarks of professionally planned and executed commercial robbery could be regarded as falling outside relevant part of guideline); *A-G's Reference (No 124 of 2008)*; *R v Doran* [2008] EWCA Crim 2820, [2009] 2 Cr App Rep (S) 215, [2008] All ER (D) 88 (Nov) (five to six years' imprisonment appropriate for non-violent robberies, without weapons, of elderly victims in their home); and *R v Roe* [2010] All ER (D) 228 (Feb), CA (sentence given at top of available range for offence because clear that what had raised level was marked impact of offence of victim).

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## 294. Burglary.

A person is guilty of burglary if:

- 272 (1) he enters<sup>1</sup> any building<sup>2</sup> or part of a building<sup>3</sup> as a trespasser<sup>4</sup> and with intent to steal<sup>5</sup> anything in the building or part of a building in question, or to inflict on any person in it any grievous bodily harm<sup>6</sup> in it, or to do unlawful damage<sup>8</sup> to the building or anything in it<sup>9</sup>; or
- 273 (2) having entered any building or part of a building as a trespasser, he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person in it any grievous bodily harm<sup>10</sup>.

A person guilty of burglary is liable on conviction on indictment to imprisonment for a term not exceeding 14 years where the offence was committed in respect of a building or part of a building which is a dwelling or ten years in any other case, or on summary conviction<sup>11</sup> to imprisonment for a term not exceeding six months<sup>12</sup> or to a fine not exceeding the prescribed sum or to both<sup>13</sup>.

Where:

- 274 (a) a person is convicted of a domestic burglary<sup>14</sup> committed after 30 November 1999<sup>15</sup>;
- 275 (b) at the time when that burglary was committed, he was 18 or over and had been convicted in England and Wales of two other domestic burglaries<sup>16</sup>; and
- 276 (c) one of those other burglaries was committed after he had been convicted of the other, and both of them were committed after 30 November 1999<sup>17</sup>,

the court must impose an appropriate custodial sentence for a term of at least three years except where the court is of the opinion that there are particular circumstances which: (i) relate to any of the offences or to the offender; and (ii) would make it unjust to do so in all the circumstances<sup>18</sup>.

1 See *R v Collins* [1973] QB 100, 56 Cr App Rep 554, CA ('effective and substantial entry' by the defendant required; and see the general observations on entry at 104 and 559). Cf *R v Brown* [1985] Crim LR 212, CA ('entry' does not require whole body to be in building; jury should be directed to consider only whether entry was 'effective'; 'substantial' in the dictum in *R v Collins* supra did not assist); followed in *R v Ryan* (1996) 160 JP 610, CA (appeal against conviction for burglary dismissed where appellant had become trapped in a window after only his head and right arm had been inserted).

2 For these purposes, references to a building apply also to an inhabited vehicle or vessel, and to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is: Theft Act 1968 s 9(4) (s 9(4) added by the Criminal Justice Act 1991 s 26(2)).

3 A physically marked-out area in a room from which the defendant is plainly excluded, eg a counter area in a shop, is part of a building for the purposes of the Theft Act 1968 s 9 (as amended): *R v Walkington* [1979] 2 All ER 716, 68 Cr App Rep 427, CA.

4 When entering the defendant must know at the material time (ie the time of entry) that he is a trespasser and nevertheless deliberately enter, or be reckless whether or not he is entering as a trespasser: *R v Collins* [1973] QB 100, 56 Cr App Rep 554, CA. A person who has a general permission to enter premises belonging to another is a trespasser if he enters knowing that, or being reckless whether, he is exceeding that permission: *R v Jones, R v Smith* [1976] 3 All ER 54, 63 Cr App Rep 47, CA. The common law doctrine of trespass ab initio has no application to burglary: *R v Collins* supra. As to the nature of trespass, trespass to land and trespass ab initio see TORT vol 97 (2010) PARAS 524 et seq, 562 et seq, 602. Because the entry must be as a trespasser, burglary cannot be committed by someone who enters lawfully but later becomes a trespasser, eg by exceeding his permission to be in the building: *R v Laing* [1995] Crim LR 395, CA.

5 For the meaning of 'steal' see PARA 282 ante. Where a person is charged with entry into a building or part of a building with intent to steal, and the indictment does not aver an intention to steal a specific or identified object, the defendant can be convicted if at the time of entry he had the necessary intent to steal something therein, even though he did not intend to steal a specific thing but merely intended to steal anything that he might find worth stealing, or even though there was in fact nothing there worth his while to steal: *R v Walkington* [1979] 2 All ER 716, 68 Cr App Rep 427, CA; *A-G's References (Nos 1 and 2 of 1979)* [1980] QB 180, 69 Cr App Rep 266, CA.

6 As to offences involving grievous bodily harm see the Offences against the Person Act 1861 s 18 (as amended) (wounding or causing grievous bodily harm with intent: see PARA 118 ante), s 20 (as amended) (unlawfully and maliciously inflicting grievous bodily harm: see PARA 120 ante), s 23 (as amended) (unlawfully and maliciously administering poison so as to inflict grievous bodily harm: see PARA 124 ante). For the meaning of 'grievous bodily harm' see PARA 119 ante.

8 As to criminal damage see PARA 333 et seq post.

9 See the Theft Act 1968 s 9(1)(a), (2) (s 9(2) amended by the Sexual Offences Act 2003 ss 139, 140 Sch 6 para 17, Sch 7). For the extended territorial scope of burglary in connection with acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583. As to the relationship between the Theft Act 1968 s 9(1)(a) and s 9(1)(b) see note 10 infra.

10 See the Theft Act 1968 s 9(1)(b). It is open to a jury on a charge under s 9(1)(b) to bring in a verdict under s 9(1)(a) (see the text and notes 1-9 supra): *R v Whiting* (1987) 85 Cr App Rep 78, CA (not following *R v Hollis* [1971] Crim LR 525, CA).

As to alternative verdicts see PARA 1335 post. As to the offence of going equipped for burglary, theft or cheat see PARA 296 post. Since electricity cannot be appropriated by switching on current and is not 'property' within the meaning of the Theft Act 1968 s 4, (see PARA 285 ante), entering premises and using the telephone is not burglary: *Low v Blease* [1975] Crim LR 513, DC. See also PARA 285 note 1 ante.

11 Burglary comprising the commission of, or an intention to commit, an offence which is triable only on indictment, and burglary in a dwelling if any person in the dwelling was subjected to violence or the threat of violence, may not be tried summarily: see the Magistrates' Courts Act 1980 s 17, Sch 1 para 28(b), (c). Schedule 1 para 28(c) applies to any case in which violence is offered in the course of the whole incident constituting the burglary; it therefore is wide enough to cover cases where violence is used in the course of attempts by the occupant of the building to prevent the defendant's escape: *R v McGrath* [2003] EWCA Crim 2062, 167 JP 554, CA. Where a person is charged with a domestic burglary which would otherwise be triable either way but the circumstances are such that he could be sentenced for it under the Powers of Criminal Courts (Sentencing) Act 2000 s 111(2) (see the text and note 18 infra), the burglary is triable only on indictment: s 111(4).

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

13 See the Theft Act 1968 s 9(3) (substituted by the Criminal Justice Act 1991 s 26(2)); and the Magistrates' Courts Act 1980 ss 17, 32(1). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to the minimum custodial sentence for a third domestic burglary see the Powers of Criminal Courts (Sentencing) Act 2000 s 111 (as amended); and PARA 294 post. Burglary is a specified offence for the purposes of the Police and Criminal Evidence Act 1984 s 1(2) (as amended) (power to search for prohibited articles: see PARA 860 et seq post). As to the offence committed by a person who at the time of committing or being arrested for burglary has in his possession a firearm or imitation firearm see PARA 677 ante. See also PARA 295 post. When the indictment alleges that goods have been stolen, it is not necessary for the prosecution to prove that all the goods referred to have been stolen: see PARA 282 note 6 ante.

For sentencing guidelines in cases of burglary see *R v Eastap, R v Curt, R v Thompson* [1997] 2 Cr App Rep (S) 55, CA (aggravated burglary involving elderly victim); *R v Brewster, R v Thorpe, R v Ishmael, R v Blanchard, R v*

*Woodhouse, R v H* [1998] 1 Cr App Rep 220, CA; *R v McInerney, R v Keating* [2002] EWCA Crim 3003, [2003] 1 Cr App Rep 627 (domestic burglary); *R v Azram* [2005] EWCA Crim 1457, [2006] All ER (D) 15 (Feb). Non-domestic burglary is regarded as less serious than domestic burglary: see *R v Carlton* [1993] Crim LR 981, CA; *R v Tetteh* [1993] Crim LR 629, CA; cf *R v Dorries* [1993] Crim LR 408, CA; *R v Anson* [1999] 1 Cr App Rep (S) 331, CA. In respect of both domestic and non-domestic burglaries see also *R v Stratton* (1988) Times, 15 January, CA.

14 le a burglary committed in respect of a building or part of a building which is a dwelling: Powers of Criminal Courts (Sentencing) Act 2000 s 111(5).

15 Ibid s 111(1)(a).

16 Ibid s 111(1)(b).

17 Ibid s 111(1)(c).

18 Ibid s 111(2). 'An appropriate custodial sentence' means: (1) in relation to a person who is 21 or over when convicted of the offence mentioned in head (a) in the text, a sentence of imprisonment; (2) in relation to a person who is under 21 at that time, a sentence of detention in a young offender institution: s 111(6) (prospectively repealed). As from a day to be appointed s 111(2) is amended so as to refer to a sentence of imprisonment instead of an appropriate custodial sentence: see s 111(2) (prospectively amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II paras 160, 191). At the date at which this volume states the law no such day had been appointed. As to a discount for a guilty plea see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 623. Where a sentence has been imposed under the Powers of Criminal Courts (Sentencing) Act 2000 s 111 (as amended) (see the text and notes 14-17 supra) and any previous conviction without which s 111 (as amended) would not have applied has subsequently been set aside on appeal, then notwithstanding the Criminal Appeal Act 1968 s 18 (see PARA 1863 post) notice may be given within 28 days from the date on which the previous conviction was set aside: Powers of Criminal Courts (Sentencing) Act 2000 s 112 (amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7). Where an offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it is to be taken for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 111 (as amended) to have been committed on the last of those days: s 115 (amended by the Criminal Justice Act 2003 Sch 37 Pt 7). As to certificates of conviction as evidence of a previous conviction (and the date of the offence) for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 111 (as amended) see s 113 (amended by the Criminal Justice Act 2003 Sch 37 Pt 7). As to offences under service law see the Powers of Criminal Courts (Sentencing) Act 2000 s 114 (amended by the Criminal Justice Act 2003 Sch 37 Pt 7).

Attempted burglary is not 'burglary' for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 111 (as amended): *R v Maguire* [2002] EWCA Crim 2689, [2003] 2 Cr App Rep (S) 40. A person who has indicated an intent to plead guilty to an offence of burglary and has been committed to the Crown Court for sentence has been 'convicted' for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 111 (as amended): *R v Webster* [2003] EWCA Crim 3597, [2004] 2 Cr App Rep (S) 126. For the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 111 (as amended) the offences and convictions must occur in the following sequence: commission of first offence; conviction of it; commission of second offence; conviction of it; commission of third offence; conviction of it: *R v Hoare* [2004] EWCA Crim 191, [2004] 2 Cr App Rep (S) 261.

## UPDATE

### 294 Burglary

NOTE 13--The Court of Appeal has revisited the sentencing guidelines on domestic burglary in *R v Saw* [2009] EWCA Crim 1, [2009] 2 All ER 1138.

NOTE 18--Powers of Criminal Courts (Sentencing) Act 2000 s 114 substituted: Armed Forces Act 2006 Sch 16 para 166.

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## **295. Aggravated burglary.**

A person who commits any burglary<sup>1</sup> and at the time<sup>2</sup> has with him<sup>3</sup> any firearm<sup>4</sup> or imitation firearm<sup>5</sup>, any weapon of offence<sup>6</sup>, or any explosive<sup>7</sup>, is guilty of aggravated burglary<sup>8</sup> and is liable on conviction on indictment to imprisonment for life or for any shorter term<sup>9</sup>.

1 For the meaning of 'burglary' see PARA 294 ante.

2 If the charge is one of entry with intent (see PARA 294 head (1) ante), it is axiomatic that the defendant must have with him the article of aggravation at the time of entering. However, if, having entered, the defendant is charged with committing or attempting to commit a specified offence (see PARA 294 head (2) ante), he must have had the article of aggravation with him at the time of the commission of the offence, unless entry is accompanied by one of the specified intents. If the defendant, having no such intent at the time of entry, discards his weapon, he is not guilty of aggravated burglary, but he would be if he re-armed himself for this purpose: *R v Francis* [1982] Crim LR 363, CA. See also *R v O'Leary* (1986) 82 Cr App Rep 341, CA (defendant, having entered house as a trespasser but unarmed, picked up a knife, proceeded upstairs and forced victim to hand over property; guilty of aggravated burglary).

3 'Ie 'knowingly has with him': see *R v Stones* [1989] 1 WLR 156, 89 Cr App Rep 26, CA; and see PARA 699 note 5 ante. If a firearm, weapon etc is carried not by a burglar but by an accomplice waiting outside the building, aggravated burglary is not committed: *R v Klass* [1998] 1 Cr App Rep 453, CA.

4 'Firearm' includes an air gun or air pistol: Theft Act 1968 s 10(1)(a).

5 'Imitation firearm' means anything which has the appearance of being a firearm, whether capable of being discharged or not: *ibid* s 10(1)(a).

6 'Weapon of offence' means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use: *ibid* s 10(1)(b). An article which the defendant did not have with him for the purpose of injury or incapacitation, or with which he has just armed himself, will become an article 'intended for such use' if, having formed the intention so to use it, he instantly uses it for such a purpose: *R v Kelly* (1992) 97 Cr App Rep 245, CA. It is not necessary that the defendant intended to use the article to injure or incapacitate someone in the course of the burglary itself. It suffices that he had it with him for such use on another occasion: *R v Stones* [1989] 1 WLR 156, 89 Cr App Rep 26, CA.

7 'Explosive' means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose: Theft Act 1968 s 10(1)(c).

8 *Ibid* s 10(1). As to the appropriate direction to the jury on a charge of aggravated burglary see *R v O'Sullivan and Lewis* [1989] Crim LR 506, CA. For the extended territorial scope of aggravated burglary in connection with acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583.

9 Theft Act 1968 s 10(2). Offences under the Theft Act 1968 s 10 may not be tried summarily: Magistrates' Courts Act 1980 s 17, Sch 1 para 28(a).

## **UPDATE**

### **295 Aggravated burglary**

NOTE 9--The absence of an intent to inflict serious harm does not preclude the court from imposing a lengthy custodial sentence where it is merited by the aggravating features of the case: *A-G's Reference (No 12 of 2009)*; *R v Graham* [2009] EWCA Crim

1438, [2010] 1 Cr App Rep (S) 339, [2009] All ER (D) 163 (Aug). See also *A-G's Reference (Nos 103, 104 and 105 of 2009)*; *R v Denley* [2010] All ER (D) 89 (Apr), CA.

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## **296. Going equipped for burglary, theft or cheat.**

A person is guilty of an offence if, when not at his place of abode<sup>1</sup>, he has with him<sup>2</sup> any article for use in the course of or in connection<sup>3</sup> with any burglary<sup>4</sup>, theft<sup>5</sup> or cheat<sup>6</sup>. Where a person is charged with such an offence, proof that he had with him any article made or adapted for use in committing a burglary, theft or cheat is evidence that he had it with him for such use<sup>7</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding three years or a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>8</sup> or to a fine not exceeding the prescribed sum or to both<sup>9</sup>.

1 Where a person lives, and drives around, in a car in which he keeps his tools for burglary, the car is his place of abode for the present purpose only when it is on a site where he intends to abide: *R v Bundy* [1977] 2 All ER 382, 65 Cr App Rep 239, CA.

2 In other offences the words 'has with him' mean 'knowingly has with him' and that the article should be near and readily accessible to the defendant: see PARAS 679 note 1, 699 note 5 post; but contrast on the latter point para 295 note 3 ante. The mere fact that a person was a passenger in a car containing such articles is not enough to constitute possession on his part: see *R v Lester*, *R v Byast* (1955) 39 Cr App Rep 157, CCA; *R v Harris* [1961] Crim LR 256, CCA; and see also *R v Harran* [1969] Crim LR 662, CA. Although such articles in the physical possession of one person may be held jointly with other persons, it would be difficult for a jury so to find if those others are wholly ignorant of the existence of the articles: see *R v Webley* (1967) 111 Sol Jo 111, CA. It is not necessary to prove that the defendant intended to use the article himself: *R v Ellames* [1974] 3 All ER 130, 60 Cr App Rep 7, CA; *Re McAngus* [1994] Crim LR 602, DC.

3 The connection between the burglary, theft or cheat and the use of the article must not be too remote: *R v Mansfield* [1975] Crim LR 101, CA (documents used to obtain a job which might provide defendant with opportunity to steal; use of documents too remote). The use of the article in connection with a burglary, theft or cheat before it came into the defendant's possession does not constitute a use contemplated by the Theft Act 1968 s 25(1) (see the text to note 6 infra): *R v Ellames* [1974] 3 All ER 130, 60 Cr App Rep 7, CA. However, it is not necessary to prove that the article is intended for use by the defendant in any particular burglary, theft or cheat (*R v Ellames* supra), although it must be proved that the defendant had a firm intention to use the thing for a burglary, theft or cheat, given the opportunity (*R v Hargreaves* [1985] Crim LR 243, CA).

4 For the meaning of 'burglary' see PARA 294 ante.

5 For the meaning of 'theft' see PARA 282 ante. For these purposes, an offence under the Theft Act 1968 s 12(1) (taking a conveyance without authority: see PARA 298 post) is treated as theft: s 25(5).

6 Ibid s 25(1). 'Cheat' means an offence under s 15 (see PARA 310 post): s 25(5). As to the position of an employee, not being at his place of abode, having in his possession articles of his own which dishonestly he intends to sell as his employer's contrary to s 15 see *R v Rashid* [1977] 2 All ER 237, 64 Cr App Rep 201, CA; *R v Doukas* [1978] 1 All ER 1061, 66 Cr App Rep 228, CA; *R v Corboz* [1984] Crim LR 629, CA; *R v Cooke* [1986] AC 909, 83 Cr App Rep 339, HL. As to the requisite direction to the jury where a person has counterfeit articles with him which he intends to sell in breach of copyright see *R v Whiteside*, *R v Antoniou* [1989] Crim LR 436, CA.

7 Theft Act 1968 s 25(3).

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.



9 Theft Act 1968 s 25(2); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to disqualification for driving and endorsement of licence where the defendant is convicted of an offence under the Theft Act 1968 s 25 (as amended) with reference to the theft or taking of motor vehicles see the Road Traffic Offenders Act 1988 ss 34(2), 97(4), Sch 2 Pt II (as amended); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1060.

## **UPDATE**

### **296 Going equipped for burglary, theft or cheat**

TEXT AND NOTES 6, 7--In Theft Act 1968 s 25(1) and (3) for 'burglary, theft or cheat' now read 'burglary or theft': Fraud Act 2006 Sch 1 para 8(a). Definition of 'cheat' in 1968 Act s 25(5) repealed: Fraud Act 2006 Sch 1 para 8(b), Sch 3.

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## **297. Removal of articles from places open to the public.**

Where the public has access to a building in order to view it<sup>1</sup> or part of it, or a collection<sup>2</sup> or part of a collection housed in it, any person who without lawful authority removes from the building or its grounds the whole or part of any article displayed or kept for display to the public in the building or that part of it or in its grounds is guilty of an offence<sup>3</sup> and liable on conviction on indictment to imprisonment for a term not exceeding five years, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup> or to a fine not exceeding the prescribed sum or to both<sup>5</sup>.

A person does not commit such an offence if he believes that he has lawful authority for the removal of the thing in question or that he would have it if the person entitled to give it knew of the removal and the circumstances of it<sup>6</sup>.

1 The purpose or purposes of those responsible for the public being given access, and not the purposes of individual visitors, are relevant in deciding whether the public has access in order to view: *R v Barr* [1978] Crim LR 244.

2 For these purposes, 'collection' includes one got together for a temporary purpose; but references to a collection do not apply to one made or exhibited for the purpose of effecting sales or other commercial dealings: Theft Act 1968 s 11(1).

3 Ibid s 11(1). For these purposes, it is immaterial that the public's access to a building is limited to a particular period or occasion; but, where anything removed from a building or its grounds is there otherwise than as forming part of, or being on loan for exhibition with, a collection intended for permanent exhibition to the public, the person removing it does not thereby commit the offence unless he removes it on a day when the public has access to the building: s 11(2). A 'collection intended for permanent exhibition to the public' is simply one intended to be permanently available for exhibition to the public: *R v Durkin* [1973] QB 786, 57 Cr App Rep 637, CA.

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES VOL 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 Theft Act 1968 s 11(4); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 141.

6 Theft Act 1968 s 11(3).

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## **298. Taking conveyance without authority.**

A person is guilty of an offence if, without having the consent<sup>1</sup> of the owner<sup>2</sup> or other lawful authority, he takes<sup>3</sup> any conveyance<sup>4</sup> for his own or another's use or, knowing that any conveyance has been taken without such authority<sup>5</sup>, drives<sup>6</sup> it or allows himself to be carried<sup>7</sup> in or on it<sup>8</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both<sup>9</sup>.

A person who, without having the consent of the owner or other lawful authority, takes a pedal cycle for his own or another's use, or rides a pedal cycle knowing it to have been taken without such authority, is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>10</sup>.

A person does not, however, commit either of the above offences by anything done in the belief that he has lawful authority to do it or that he would have the owner's consent if the owner knew of his doing it and the circumstances of it<sup>11</sup>.

1 A consent obtained by deception is nevertheless valid: *R v Peart* [1970] 2 QB 672, 54 Cr App Rep 374, CA (consent, although obtained by misrepresentation as to the destination and purpose of the journey, was not vitiated). See also *Whittaker v Campbell* [1983] 3 All ER 582, 77 Cr App Rep 267, DC (owner gave de facto consent; consent not vitiated by reason of its having been obtained by fraud); distinguished in *Singh v Rathour* [1988] 2 All ER 16, [1988] 1 WLR 422, CA (limited consent given by owner).

2 For these purposes, 'owner', in relation to a conveyance which is the subject of a hiring agreement or hire-purchase agreement, means the person in possession of the conveyance under that agreement: Theft Act 1968 s 12(7)(b).

3 Unauthorised assumption of possession of a vehicle is insufficient to constitute the offence; there must be some movement of the vehicle, however small: *R v Bogacki* [1973] QB 832, 57 Cr App Rep 593, CA. Where the vehicle is moved in a way which necessarily involves its use as a conveyance, the offence is made out and the taker's motive is irrelevant: *R v Bow* (1976) 64 Cr App Rep 54, CA (moving a vehicle causing obstruction). The offence is committed even though the vehicle has not been used as a conveyance if it is taken for later use as a conveyance: *R v Marchant*, *R v McCallister* (1984) 80 Cr App Rep 361, CA (vehicle pushed to another place to be used later as a conveyance). Unauthorised use of a conveyance by a person already in lawful possession or control of a conveyance may amount to a taking. An employee who uses his employer's lorry for his own purposes after the expiry of the period for which he is authorised to use it, usually the working day, thereby takes it: *R v Wibberley* [1966] 2 QB 214, [1965] 3 All ER 718, CCA (decided in relation to the Road Traffic Act 1960 s 217, which is the predecessor to the Theft Act 1968 s 12). So does an employee who, during the period for which he is authorised to use it, appropriates the employer's lorry to his own use in a manner which is inconsistent with the rights of the employer and shows that he has assumed control of it for his own purposes: *McKnight v Davies* [1974] RTR 4, DC. A similar principle applies to a bailee. A bailee of a conveyance takes it if he uses it for a purpose other than that for which he has been given permission after the end of the bailment: *R v Phipps and McGill* (1970) 54 Cr App Rep 300, CA. See also *Singh v Rathour* [1988] 2 All ER 16, [1988] 1 WLR 422, CA. If someone assumes possession of, and moves, a conveyance which has been taken without consent or other authority and then been abandoned, he can be convicted of taking it contrary to the Theft Act 1968 s 12 because there will be a fresh assumption of possession and therefore a 'taking': *DPP v Spriggs* [1994] RTR 1, DC.

4 For these purposes, 'conveyance' means any conveyance constructed or adapted for the carriage of a person or persons whether by land, water or air, except that it does not include a conveyance constructed or adapted for use only under the control of a person not carried in or on it; and 'drive' is to be construed accordingly: Theft Act 1968 s 12(7) (a). A horse is not a conveyance: *Neal v Gribble* (1978) 68 Cr App Rep 9, DC.

5 This includes knowledge that it has been stolen: *Tolley v Giddings* [1964] 2 QB 354, 48 Cr App Rep 105, DC.

6 A person does not drive a vehicle unless he is in the driving seat or in control of the steering wheel and also has something to do with the propulsion: *R v Roberts (No 2)* [1965] 1 QB 85, 48 Cr App Rep 296, CCA.

7 There must be some movement of the conveyance for the defendant to be carried in it: *R v Diggin* (1981) 72 Cr App Rep 204, CA (following *R v Bogacki* [1973] QB 832, 57 Cr App Rep 593, CA).

8 Theft Act 1968 s 12(1). As to interference with a vehicle see PARA 300 post. Section 12(1) does not apply in relation to pedal cycles: see s 12(5).

Proceedings for an offence under s 12(1) (but not proceedings of a kind falling within s 12(4) (as amended) in relation to a mechanically propelled vehicle: (1) may not be commenced after the end of the period of three years beginning with the day on which the offence was committed; but (2) subject to that, may be commenced at any time within the period of six months beginning with the relevant day: s 12(4A) (s 12(4A)-(4C) added by the Vehicles (Crime) Act 2001 s 37(1)). 'The relevant day' means: (a) in the case of a prosecution for an offence under the Theft Act s 12(1) by a public prosecutor, the day on which sufficient evidence to justify the proceedings came to the knowledge of any person responsible for deciding whether to commence any such prosecution; (b) in the case of a prosecution for an offence under s 12(1) which is commenced by a person other than a public prosecutor after the discontinuance of a prosecution falling within head (a) supra which relates to the same facts, the day on which sufficient evidence to justify the proceedings came to the knowledge of the person who has decided to commence the prosecution or (if later) the discontinuance of the other prosecution; (c) in the case of any other prosecution for an offence under s 12(1), the day on which sufficient evidence to justify the proceedings came to the knowledge of the person who has decided to commence the prosecution: s 12(4B) (as so added). For the purposes of head (2) supra, a certificate of a person responsible for deciding whether to commence a prosecution of a kind mentioned in head (a) supra as to the date on which such evidence as is mentioned in the certificate came to the knowledge of any person responsible for deciding whether to commence any such prosecution is conclusive evidence of that fact: s 12(4C) (as so added).

As to the power to join in an indictment a count for an offence under s 12(1) see PARA 1211 post. The offence under s 12(1) is a specified offence for the purposes of the Police and Criminal Evidence Act 1984 s 1(2) (as amended) (power to search for prohibited articles: see PARA 860 et seq post).

Possession of an article for use in committing an offence under the Theft Act 1968 s 12(1) or (5) is itself an offence: see s 25(1), (5); and PARA 296 ante.

If on the trial of an indictment for theft the jury is not satisfied that the defendant committed theft, but it is proved that the defendant committed an offence under s 12(1), the jury may find him guilty of the offence under s 12(1), and, if he is found guilty of it, he is liable as he would have been liable under s 12(2) (as amended) (see the text and note 9 infra) on summary conviction: s 12(4) (amended by the Criminal Justice Act 1988 s 37(1)(b)). For the purposes of the Criminal Law Act 1967 s 3 (alternative verdicts: see PARA 20 ante), an offence to which the Criminal Justice Act 1988 s 40 (as amended) (see PARA 148 ante) applies is an offence which falls within the jurisdiction of the Crown Court, even if a count charging it is not included in the indictment: Domestic Violence, Crime and Victims Act 2004 s 11.

As to the offence committed by a person who at the time of committing or being arrested for an offence under the Theft Act 1968 s 12(1) has in his possession a firearm or imitation firearm see PARA 677 post.

9 Ibid s 12(2) (amended by the Criminal Justice Act 1988 s 37(1)(a)). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to disqualification and endorsement of licence see the Road Traffic Offenders Act 1988 ss 34(2), 97(2), Sch 2 Pt II (as amended); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1060.

10 Theft Act s 12(5) (amended by the Criminal Justice Act 1982 ss 38, 46).

11 Theft Act 1968 s 12(6). If an issue arises as to the defendant's belief, the onus is on the prosecution to prove that the defendant did not have the relevant belief: *R v MacPherson* [1973] RTR 157, CA.

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## **299. Aggravated vehicle-taking.**

A person is guilty of aggravated taking of a vehicle if: (1) he commits an offence of taking a conveyance without authority<sup>1</sup> (referred to as 'a basic offence') in relation to a mechanically propelled vehicle; and (2) it is proved that, at any time after the vehicle was unlawfully taken (whether by him or another) and before it was recovered<sup>2</sup>, the vehicle was driven, or injury or damage was caused, in one or more specified circumstances<sup>3</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or, if it is proved that, owing to the driving of the vehicle, an accident occurred causing the death of the person concerned<sup>4</sup>, 14 years; or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the prescribed sum or to both<sup>6</sup>.

A person is not guilty of aggravated vehicle-taking if he proves that, as regards any proven driving, injury or damage<sup>7</sup>, either: (a) the driving, accident or damage<sup>8</sup> occurred before he committed the basic offence; or (b) he was neither in nor on nor in the immediate vicinity of the vehicle when that driving, accident or damage occurred<sup>9</sup>. If a person who is charged with an offence of aggravated vehicle-taking is found not guilty of that offence but it is proved that he committed a basic offence, he may be convicted of the basic offence<sup>10</sup>.

1    le an offence under the Theft Act 1968 s 12(1): see PARA 298 ante.

2    A vehicle is recovered when it is restored to its owner or to other lawful possession or custody; and 'owner' has the same meaning as in *ibid* s 12 (as amended) (see PARA 298 ante): s 12A(8) (s 12A added by the Aggravated Vehicle-Taking Act 1992 s 1).

3    Theft Act 1968 s 12A(1) (as added: see note 2 *supra*). The specified circumstances are: (1) that the vehicle was driven dangerously on a road or other public place; (2) that, owing to the driving of the vehicle, an accident occurred by which injury was caused to any person; (3) that, owing to the driving of the vehicle, an accident occurred by which damage was caused to any property, other than the vehicle; (4) that damage was caused to the vehicle: s 12A(2) (as so added). The most important of the circumstances is that given in head (1) *supra* because that concerns the culpability of the driver, whereas the incidents and severity of the injury or damage under heads (2)-(4) *supra* are to some extent a matter of chance: *R v Bird* (1992) 14 Cr App Rep (S) 343, CA. Head (4) *supra* does not require the damage caused to the vehicle to be caused by the driving of it: *Dawes v DPP* [1995] 1 Cr App Rep 65, [1994] RTR 209, DC (aggravated vehicle-taking committed where damage resulted from person attempting to escape from vehicle). A driver who takes a vehicle and is involved in an accident may be guilty of aggravated vehicle-taking under head (2) *supra* regardless of whether or not the accident was his fault: *R v Marsh* [1997] 1 Cr App Rep 67, 160 JP 721, CA. 'Accident' in this context can include a situation where a person has deliberately caused injury: *R v Branchflower* [2004] EWCA Crim 2042, [2005] 1 Cr App Rep 140.

A vehicle is driven dangerously if: (a) it is driven in a way which falls far below what would be expected of a competent and careful driver; and (b) it would be obvious to a competent and careful driver that driving the vehicle in that way would be dangerous: Theft Act 1968 s 12A(7) (as so added).

Because in a specified circumstance the maximum imprisonment is higher (14 years) if death results than in the case of the other specified circumstances whether or not death results (two years), the effect of s 12A (as added) is to create two offences; it is essential that an indictment makes it clear which offence is being charged: *R v Sherwood, R v Button* [1995] RTR 60, CA (applying *R v Courtie* [1984] AC 463, [1984] 1 All ER 740, HL).

4    See the Theft Act 1968 s 12A(2)(b), (4) (as added: see note 2 *supra*). See also note 3 head (2) *supra*.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

6 See the Theft Act 1968 s 12A(4) (as added (see note 2 supra); and amended by the Criminal Justice Act 2003 s 285(1)); the Aggravated Vehicle-Taking Act 1992 s 1(2); and the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. However, if the only aggravating feature alleged is damage to the vehicle or other property, the total value of which is under a specified sum, the offence is triable summarily only: s 22, Sch 2 (amended by the Aggravated Vehicle-Taking Act 1992 s 2(1), (2)). The specified sum is currently £5,000: Magistrates' Courts Act 1980 s 22(1) (amended by the Criminal Justice Act 1994 s 46). See further PARA 1114 post.

As to disqualification and endorsement of licence see the Road Traffic Offenders Act 1988 ss 34, 97(2), Sch 2 Pt II (as amended); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1060. The pre-planned hijacking of a car necessitates a lengthy custodial sentence since it the offence almost always involves at least two people, thereby increasing the fear and intimidation felt by the victim, especially if the car has first been rammed from behind: *R v Snowden* [2002] EWCA Crim 2347, (2002) Times, 11 November.

7 le as is referred to in head (2) in the text: Theft Act 1968 s 12A(3) (as added: see note 2 supra).

8 le the driving, accident or damage referred to in *ibid* s 12A(2) (as added) (see the text and note 3 supra): s 12A(3)(a) (as added: see note 2 supra).

9 *Ibid* s 12A(3) (as added: see note 2 supra). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

10 Theft Act 1968 s 12A(5) (as added: see note 2 supra). Section 12A(5) (as added) applies as much to a magistrates' court as to the Crown Court: *R (on the application of H) v Liverpool City Youth Court* [2001] Crim LR 487, DC. If, by virtue of the Theft Act 1968 s 12A(5) (as added), a person is convicted of a basic offence before the Crown Court, that court has the same powers and duties as a magistrates' court would have on convicting him of such an offence: s 12A(6) (as so added).

## UPDATE

### 299 Aggravated vehicle-taking

NOTE 6--See *R v Clifford* [2007] EWCA Crim 2442, [2008] 1 Cr App Rep (S) 593, [2007] All ER (D) 431 (Nov) (six months' imprisonment imposed where manner of offender's driving not cause of fatal accident).

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### **300. Interference with vehicles.**

A person is guilty of an offence if he interferes with a motor vehicle<sup>1</sup> or trailer<sup>2</sup> or with anything carried in or on a motor vehicle or trailer with the intention that the offence of: (1) theft of the vehicle or trailer or part of it; or (2) theft of anything carried in or on the vehicle or trailer; or (3) taking a conveyance without authority<sup>3</sup>, is committed by himself or some other person<sup>4</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>5</sup>.

1 'Motor vehicle' means, subject to the Chronically Sick and Disabled Persons Act 1970 (special provisions for invalid carriages), a mechanically propelled vehicle intended or adapted for use on roads: Road Traffic Act 1988 s 185(1); definition applied by the Criminal Attempts Act 1981 s 9(5) (amended by the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 3 para 23).

2 'Trailer' means a vehicle drawn by a motor vehicle: Road Traffic Act 1988 s 185(1); definition applied by the Criminal Attempts Act 1981 s 9(5) (as amended: see note 1 supra).

3 See PARA 298 ante.

4 Criminal Attempts Act 1981 s 9(1), (2). There is persuasive authority that merely looking into vehicles or even touching them does not necessarily amount to an interference within s 9 (as amended): *Reynolds and Warren v Metropolitan Police* [1982] Crim LR 831, Crown Ct. If it is shown that a person accused of such an offence intended that one of the offences in heads (1)-(3) in the text should be committed, it is immaterial that it cannot be shown which it was: Criminal Attempts Act 1981 s 9(2).

5 Ibid s 9(3) (amended by the Criminal Justice Act 1982 ss 38, 46). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks: see the Criminal Attempts Act 1981 s 9(3) (as so amended; prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 28). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

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### **301. Abstracting electricity.**

A person who dishonestly<sup>1</sup> uses<sup>2</sup> without due authority, or dishonestly causes to be wasted or diverted, any electricity<sup>3</sup>, is liable on conviction on indictment to imprisonment for a term not exceeding five years, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup> or to a fine not exceeding the prescribed sum or to both<sup>5</sup>.

1 The Theft Act 1968 s 2 (meaning of 'dishonestly': see PARA 283 ante) does not apply for the purposes of s 13: see s 1(3); and PARA 282 note 1 ante. 'Dishonesty' is a question of fact, to be judged according to the tests in *R v Ghosh* [1982] QB 1053, 75 Cr App Rep 154, CA (see PARA 283 ante). As to the approach to be taken by the judge when the offence is alleged against a number of occupants of the property in which the meter has been bypassed see *R v Hoar* [1982] Crim LR 606, CA; *Collins and Fox v Chief Constable of Merseyside* [1988] Crim LR 247.

2 The 'use' of any electricity means the consumption of electricity which would not occur but for the alleged user's act; it does not necessarily involve tampering with the meter: *R v McCreadie, R v Tume* (1992) 96 Cr App Rep 143, CA.

3 Electricity is not property and therefore cannot be the subject of theft under the general law: *Low v Blease* (1975) 119 Sol Jo 695, [1975] Crim LR 513, DC.

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 See the Theft Act 1968 s 13; and the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.



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### **(3) HANDLING STOLEN GOODS AND RELATED OFFENCES**

#### **(i) Handling Stolen Goods**

##### **302. Handling stolen goods.**

A person handles stolen goods<sup>1</sup> if (otherwise than in the course of the stealing<sup>2</sup>) knowing or believing<sup>3</sup> them to be stolen goods he dishonestly<sup>4</sup> receives<sup>5</sup> the goods, or dishonestly undertakes or assists in their retention<sup>6</sup>, removal, disposal or realisation<sup>7</sup> by or for the benefit of another person<sup>8</sup>, or if he arranges to do so<sup>9</sup>.

A person guilty of handling stolen goods is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, or on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup> or to a fine not exceeding the prescribed sum or to both<sup>11</sup>.

1 For the meaning of 'stolen goods' see PARA 303 post.

2 The prosecution is not normally required to prove that the defendant was not the thief or a party to the theft; but, where it is established that he was simply a party to the theft, he must not be convicted of handling: *R v Cash* [1985] QB 801, 80 Cr App Rep 314, CA. See also *R v Pitham*, *R v Hehl* (1977) 65 Cr App Rep 45, CA.

3 As to knowledge or belief see PARA 304 post.

4 The Theft Act 1968 s 2 (meaning of 'dishonestly': see PARA 283 ante) does not apply for the purposes of s 22: see s 1(3); and PARA 282 note 1 ante. 'Dishonesty' is a question of fact, to be judged according to the tests in *R v Ghosh* [1982] QB 1053, 75 Cr App Rep 154, CA (see PARA 283 ante). As to the appropriate direction where dishonesty is the principal issue see *R v Roberts* (1985) 84 Cr App Rep 117, CA.

5 Receiving involves the acquisition of exclusive control of the goods or of joint possession with the thief or another receiver: *Hobson v Impett* (1957) 41 Cr App Rep 138, DC; *R v Frost*, *R v Hale* (1964) 48 Cr App Rep 284, CCA. Actual manual possession by the defendant is not required (*R v Smith* (1855) Dears CC 494, CCA); it suffices that goods are received by his employee or agent with his authority (*R v Miller* (1854) 6 Cox CC 353). On the other hand, physically handling goods does not necessarily constitute possession: see *Hobson v Impett* supra. Where goods are found on premises occupied by the defendant, it must be shown that the goods came either by invitation or arrangement with him or that he had exercised control over them: *R v Cavendish* [1961] 2 All ER 856, 45 Cr App Rep 374, CCA. Acceptance of goods by an employee, acting without instructions or authority to take them, does not suffice for receiving by his employer: see *R v Cavendish* supra.

6 'Retention' corresponds with the dictionary definition of 'retain', namely 'keep possession of, not to lose, continue to have'; a defendant's conduct in permitting money to remain in his bank account after he learnt that it had been stolen constituted such retention: see *R v Pitchley* (1972) 57 Cr App Rep 30, CA (distinguishing *R v Brown* [1970] 1 QB 105, 53 Cr App Rep 527, CA). Assisting in the retention of stolen goods is more than the mere use of them; the defendant must be proved to have done some act, such as hiding them or making identification more difficult: see *R v Sanders* (1982) 75 Cr App Rep 84, CA. Verbal representations made to conceal that the goods were stolen may constitute the offence: *R v Kanwar* [1982] 2 All ER 528, 75 Cr App Rep 87, CA.

7 A purchase of goods is not a 'realisation' by the purchaser: *R v Bloxham* [1983] 1 AC 109 at 114, 74 Cr App Rep 279 at 283, HL, per Lord Bridge of Harwich; not following *R v Deakin* [1972] 3 All ER 803, 56 Cr App Rep 841, CA. Merely accepting the benefit of the disposition of stolen goods is insufficient to amount to assisting in the disposal of stolen goods: *R v Coleman* (1985) 150 JP 175, [1986] Crim LR 56, CA.

8 'By or for the benefit of another person' governs 'retention', 'removal', 'disposal' and 'realisation' and should be included in the particulars of the offence when a charge under the second part of the Theft Act 1968 s 22(1) is laid in an indictment: *R v Sloggett* [1972] 1 QB 430, 55 Cr App Rep 532, CA. A purchaser cannot be 'another person': *R v Bloxham* [1983] 1 AC 109, 74 Cr App Rep 279, HL (sale of stolen goods is not a realisation of them for the benefit of another). Nor can a co-defendant (*R v Gingell* [2000] 1 Cr App Rep 88, CA); although this restriction does not apply on a charge of conspiracy to commit one of these forms of handling (*R v Slater, R v Suddens* [1996] Crim LR 494, CA). 'Another person' includes someone who facilitates the disposal of stolen goods; the fact that the other may have been an innocent agent does not mean that he and the defendant are to be regarded as one person: *R v Tokeley-Parry* [1999] Crim LR 578, CA.

9 Theft Act 1968 s 22(1). In order to constitute such an arrangement the goods must have been stolen at the time the arrangement was made: *R v Park* (1987) 87 Cr App Rep 164, CA. Where an arrangement is made before the theft, the appropriate charge is conspiracy (see PARA 67 et seq ante): *R v Park* supra. Despite a dictum in a House of Lords decision that the Theft Act 1968 s 22(1) creates two distinct offences, one of receiving and one of dishonestly undertaking etc (see *R v Bloxham* [1983] 1 AC 109 at 113, 74 Cr App Rep 279 at 282, HL, per Lord Bridge of Harwich), the weight of authority indicates that the Theft Act 1968 s 22(1) creates only one offence which can be committed in any of the specified ways (see *Griffiths v Freeman* [1970] 1 All ER 1117, [1970] 1 WLR 659, DC; *R v Nicklin* [1977] 2 All ER 444, 64 Cr App Rep 205, CA). Particulars should be given to enable the defendant to understand the ingredients of the charge: *Griffiths v Freeman* supra; *R v Nicklin* supra. An indictment containing two separate counts, one in respect of receiving and one in respect of some or all the other forms of handling is not bad for duplicity: *R v Nicklin* supra; *R v Bloxham* supra. As to charging theft and handling as alternatives see PARA 282 note 6 ante. As to separate counts in an indictment see *R v Bellman* [1989] 1 All ER 22, 88 Cr App 252, HL; and PARA 1220 note 6 post. Where the defendant is found in possession of property stolen from a number of different burglaries or robberies which he is alleged to have received on separate occasions, each occasion should be the subject of a separate count: *R v Smythe* (1980) 72 Cr App Rep 8, CA. As to similar fact evidence on a charge of handling stolen goods see the Theft Act 1968 s 27(3); and PARA 1514 post. As to joint indictments see s 27(1), (2); and PARA 1303 note 1 post.

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

11 Theft Act 1968 s 22(2); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. An offence under the Theft Act 1968 s 22 (see the text and notes 1-9 supra) is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6 (as amended)) (see PARA 362 post): see s 1(2)(a). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. For sentencing guidelines in cases of handling stolen goods see *R v Webbe* [2001] EWCA Crim 1217, [2002] 1 Cr App Rep (S) 22.

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### **303. Meaning of 'stolen goods'.**

The provisions of the Theft Act 1968<sup>1</sup> relating to goods<sup>2</sup> which have been stolen apply whether the stealing occurred in England or Wales or elsewhere, provided that the stealing, if not an offence under the Act, amounted to an offence where and at the time when the goods were stolen; and references to stolen goods are to be construed accordingly<sup>3</sup>. For the purposes of those provisions<sup>4</sup>, goods obtained in England and Wales or elsewhere either by blackmail<sup>5</sup> or by deception<sup>6</sup> are to be regarded as stolen; and 'steal', 'theft' and 'thief' are to be construed accordingly<sup>7</sup>.

For the purposes of such provisions, references to stolen goods include money which is dishonestly withdrawn from an account to which a wrongful credit has been made, but only to the extent that the money derives from the credit<sup>8</sup>.

For the purposes of such provisions, references to stolen goods include, in addition to the goods originally stolen and parts of them (whether in their original state or not): (1) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of the thief as being the proceeds of any disposal or realisation<sup>9</sup> of the whole or part of the goods stolen or of goods so representing the stolen goods<sup>10</sup>; and (2) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of a handler of the stolen goods or any part of them as being the proceeds of any disposal or realisation of the whole or part of the stolen goods handled by him or of goods so representing them<sup>11</sup>.

It must be proved that the goods were stolen; the proof may be by direct evidence of the theft or the circumstances in which the defendant handled the goods may of themselves prove that the goods were stolen; there is no rule that there must be other evidence of the theft<sup>12</sup>. However, no goods are to be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody<sup>13</sup>, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the theft<sup>14</sup>. Thus where stolen goods are recovered by the prosecutor and subsequently returned to the thief for the purpose of trapping any person who might later handle them, a charge of handling stolen goods will fail<sup>15</sup>.

1    I.e. the Theft Act 1968 ss 22-24, 26-28, 32(2) (as amended): see PARAS 302 ante, 305-306, 1303, 1514, 1536 post. Sections 26, 27 (as amended) are expressly stated to be construed in accordance with s 24: ss 26(5), 27(5).

2    For the purposes of the Theft Act 1968, 'goods' includes, except in so far as the context otherwise requires, money and every other description of property except land, and includes things severed from the land by stealing: s 34(2)(b).

3    Ibid s 24(1).

4    I.e. the provisions referred to in note 1 supra. In ibid s 24(4) (see the text and notes 5-7 infra), those provisions are stated expressly to include s 24(1)-(3) (see the text and notes 1-3 supra, 5-14 infra).

5    See PARA 308 post.

6 le under the Theft Act 1968 s 15(1): see PARA 310 post.

7 Ibid s 24(4).

8 Ibid s 24A(8) (added by the Theft (Amendment) Act 1996 s 2). See PARA 307 post.

9 For the meaning of 'realisation' see PARA 302 note 7 ante.

10 Theft Act 1968 s 24(2)(a). The proceeds of any disposal or realisation may include cheques and bank account balances: *A-G's Reference (No 4 of 1979)* [1981] 1 All ER 1193, 71 Cr App Rep 341, CA.

11 Theft Act 1968 s 24(2)(b).

12 *R v Sbarra* (1918) 13 Cr App Rep 118, CCA; *R v Fuschillo* [1940] 2 All ER 489, 27 Cr App Rep 193, CCA. However, the defendant's knowledge or belief that a payment of money represented stolen goods is not conclusive evidence of that fact: *A-G's Reference (No 4 of 1979)* [1981] 1 All ER 1193, 71 Cr App Rep 341, CA. If the alleged thief of goods is a child under the age of criminal responsibility, a person handling the goods cannot be guilty of handling stolen goods although an indictment for theft may lie against him: see *Walters v Lunt* [1951] 2 All ER 645, 35 Cr App Rep 94, DC.

13 Whether goods are so restored depends primarily on the intention of the person allegedly restoring them and is a matter for the jury: *A-G's Reference (No 1 of 1974)* [1974] QB 744, 59 Cr App Rep 203, CA; *Greater London Metropolitan Police Comr v Streeter* (1980) 71 Cr App Rep 113, DC.

14 Theft Act 1968 s 24(3). As to restitution orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 388.

15 See *R v Dolan* (1855) 6 Cox CC 449; *R v Schmidt* (1866) LR 1 CCR 15; *R v Hancock and Baker* (1878) 14 Cox CC 119, CCR; *R v Villensky* [1892] 2 QB 597, CCR; and see also *Haughton v Smith* [1975] AC 476, 58 Cr App Rep 198, HL; cf *R v King* [1938] 2 All ER 662, CCA; *R v Curbishley* (1970) 55 Cr App Rep 310, CA.

## UPDATE

### 303 Meaning of 'stolen goods'

TEXT AND NOTE 3--See further Theft Act 1968 s 24(5) (added by Fraud Act 2006 Sch 1 para 6(2)).

TEXT AND NOTES 6, 7--1968 Act s 24(4) amended: 2006 Act Sch 1 para 6(1).

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### **304. Knowledge or belief that the goods have been stolen.**

Knowledge or belief that the goods have been stolen is an essential ingredient in a charge of handling stolen goods<sup>1</sup>. This knowledge or belief must exist at the time when the defendant received or otherwise handled the goods<sup>2</sup>. The test of knowledge or belief is subjective; but if there is evidence that the defendant deliberately shut his eyes to the obvious, the inference may be drawn that he did so because he knew or believed the goods to be stolen<sup>3</sup>. The circumstances in which the defendant handled the goods may show that he knew that they were stolen<sup>4</sup> but the fact that he lied to the police as to the manner in which the goods came into his possession is not necessarily evidence that he knew that they were stolen<sup>5</sup>.

The possession by a person of goods which have been recently stolen is some evidence, in the absence of a reasonable explanation by him as to how they came into his possession, that he either stole them or received them knowing them to be stolen depending on the particular circumstances<sup>6</sup>. The weight attributable to the evidence depends on the nature of the goods and the length of time which has elapsed from the time when they were stolen to the time when they are proved to have been in the possession of the defendant<sup>7</sup>. If a person is accused of receiving stolen goods and recent possession of them by him is established, he may be convicted of handling stolen goods in the absence of any explanation by him of the way in which they came into his possession which might reasonably be true, and which is consistent with innocence; but if he gives such an explanation, even though the jury is not convinced of its truth, the defendant is entitled to be acquitted in the absence of other evidence, because the prosecution has failed to discharge the duty of satisfying the jury that it is sure of the guilt of the defendant; that onus remains on the prosecution<sup>8</sup>. Evidence that a defendant charged with handling stolen goods has had in his possession stolen goods from any theft in the 12 months before the offence charged may be admitted and evidence of any convictions for theft or handling stolen goods in the previous five years may also be given<sup>9</sup>.

1 See PARA 302 ante. To secure a conviction it need not be shown that the defendant knew the nature of the goods which are the subject matter of the charge: *R v McCullum* (1973) 57 Cr App Rep 645, CA.

2 *R v Brook* [1993] Crim LR 455, CA.

3 *Atwal v Massey* [1971] 3 All ER 881, 56 Cr App Rep 6, DC; *R v Grainge* [1974] 1 All ER 928, 59 Cr App Rep 3, CA; *R v Griffiths* (1974) 60 Cr App Rep 14, CA. As to the difference between 'knowledge' and 'belief' see *R v Hall* (1985) 81 Cr App Rep 260, CA ('knowledge' is actual knowledge; 'belief', although short of actual knowledge, is appreciation that the goods must have been stolen in the absence of any reason to the contrary). See also *R v Forsyth* [1997] 2 Cr App Rep 299, CA. In most cases there is no need to give the jury any direction as to the meaning of 'knowledge or belief': *R v Harris* (1986) 84 Cr App Rep 75, CA. A mere suspicion, not amounting to knowledge or belief, is inadequate to constitute the offence: *R v Grainge* supra. An erroneous belief that the goods are stolen goods is irrelevant (*Haughton v Smith* [1975] AC 476, 58 Cr App Rep 198, HL); but a person who dishonestly handles goods in such a mistaken belief may be convicted for attempted handling (*R v Shivpuri* [1987] AC 1, 83 Cr App Rep 178, HL, overruling *Anderton v Ryan* [1985] AC 560, 81 Cr App Rep 166, HL). As to attempts see PARA 79 et seq ante.

4 *R v Sbarra* (1918) 13 Cr App Rep 118, CCA; *R v Fuschillo* [1940] 2 All ER 489, 27 Cr App Rep 193, CCA; and see PARA 303 note 12 ante.

5 See *Cohen v March* [1951] 2 TLR 402, DC; cf *R v Young* [1953] 1 All ER 21, 36 Cr App Rep 200, CCA.

6 *R v Langmead* (1864) Le & Ca 427, CCR. Guilty knowledge may similarly be inferred where the defendant has merely assisted in the disposal of the goods: *R v Ball*, *R v Winning* [1983] 2 All ER 1089, 77 Cr App Rep 131, CA.

7 *R v Schama*, *R v Abramovitch* (1914) 84 LJBK 396, 11 Cr App Rep 45, CCA; *R v Loughlin* (1951) 35 Cr App Rep 69, CCA; *R v Seymour* [1954] 1 All ER 1006, 38 Cr App Rep 68, CCA.

8 See *R v Schama*, *R v Abramovitch* (1914) 84 LJBK 396, 11 Cr App Rep 45, CCA; *R v Norris* (1916) 86 LJBK 810, 12 Cr App Rep 156, CCA; *R v Grinberg* (1917) 33 TLR 428, CCA; *R v Badash* (1917) 87 LJBK 732, 13 Cr App Rep 17, CCA; *R v Hamilton* (1917) 87 LJBK 734, 13 Cr App Rep 32, CCA; *R v Bailey* (1917) 13 Cr App Rep 27 at 31, CCA; *R v Brain* (1918) 13 Cr App Rep 197, CCA; *R v Ketteringham* (1926) 19 Cr App Rep 159, CCA; *R v Booth* (1946) 175 LT 306, CCA; *R v Garth* [1949] 1 All ER 773, 33 Cr App Rep 100, CCA; *R v Aves* [1950] 2 All ER 330, 34 Cr App Rep 159, CCA; *R v Hepworth and Fearnley* [1955] 2 QB 600, 39 Cr App Rep 152, CCA; *R v Smythe* (1980) 72 Cr App Rep 8, CA; *R v Cash* [1985] QB 801, 80 Cr App Rep 314, CA; *R v Raviraj* (1986) 85 Cr App Rep 93, CA. Failure to give an explanation after a caution may not, however, be relied upon as evidence of guilt: *R v Raviraj* supra at 101. As to the need for a careful direction to the jury in cases of handling stolen goods see *R v Currell* (1935) 25 Cr App Rep 116, CCA; *R v Smith* (1935) 25 Cr App Rep 119, CCA. As to directions on the burden of proof generally see PARA 1320 post.

9 See further PARA 1514 post.

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## **(ii) Advertising Rewards**

### **305. Advertising rewards.**

Where any public advertisement of a reward for the return of any goods which have been stolen<sup>1</sup> or lost uses any words to the effect that no questions will be asked, or that the person producing the goods will be safe from apprehension or inquiry, or that any money paid for the purchase of the goods or advanced by way of loan on them will be repaid, the person advertising the reward and any person who prints or publishes the advertisement is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>2</sup>.

1 For the meaning of 'stolen goods' see PARA 303 ante.

2 Theft Act 1968 s 23 (amended by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. The offence is one of strict liability in relation to the publication of such an advertisement, so that someone who publishes such an advertisement in a newspaper etc without knowledge of its inclusion can be convicted of the offence: see *Denham v Scott* (1983) 77 Cr App Rep 210, DC. As to strict liability see PARA 15 ante.

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### **(iii) Warrant to Search for Stolen Goods**

#### **306. Warrant to search for stolen goods.**

If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or possession or on his premises any stolen goods<sup>1</sup>, the justice may grant a warrant to search for and seize the same; but no such warrant may be addressed to a person other than a constable except under the authority of an enactment expressly so providing<sup>2</sup>. Where a person is so authorised to search premises for stolen goods, he may enter and search the premises accordingly, and may seize any goods he believes to be stolen goods<sup>3</sup>.

1 For the meaning of 'stolen goods' see PARA 303 ante.

2 Theft Act 1968 s 26(1). Section 26 (as amended) is to be construed in accordance with s 24 (see PARA 303 ante); s 26(5). As to the granting of warrants generally see PARA 871 et seq post.

3 Ibid s 26(3).



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#### **(iv) Dishonestly Retaining a Wrongful Credit**

##### **307. Dishonestly retaining a wrongful credit.**

A person is guilty of an offence if: (1) a wrongful credit<sup>1</sup> has been made to an account<sup>2</sup> kept by him or in respect of which he has any right or interest; (2) he knows or believes that the credit is wrongful; and (3) he dishonestly fails to take such steps as are reasonable in the circumstances to secure that the credit is cancelled<sup>3</sup>.

A credit to an account is wrongful if it is the credit side of a money transfer obtained by deception<sup>4</sup>. A credit to an account is also wrongful to the extent that it derives from: (a) theft<sup>5</sup>; (b) an offence of obtaining a money transfer by deception<sup>6</sup>; (c) blackmail<sup>7</sup>; or (d) stolen goods<sup>8</sup>. In determining whether a credit to an account is wrongful, it is immaterial whether the account is overdrawn before or after the credit is made<sup>9</sup>.

A person guilty of an offence of dishonestly retaining a wrongful credit is liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup> or to a fine not exceeding the prescribed sum or to both<sup>11</sup>.

1 References to a credit are references to a credit of an amount of money: Theft Act 1968 s 24A(2) (s 24A added by the Theft (Amendment) Act 1996 s 2).

2 'Account' is to be construed in accordance with the Theft Act 1968 s 15B (as added and amended) (see PARA 311 post): s 24A(9) (as added: see note 1 supra).

3 Ibid s 24A(1) (as added: see note 1 supra). An offence under s 24A (as added) is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(a) (amended by the Theft (Amendment) Act 1996 s 3(2), (3)). The Theft Act 1968 s 24A (as added) only applies to wrongful credits made on or after the day on which the Theft (Amendment) Act 1996 came into force (ie 18 December 1996): s 2(2).

4 It is obtained contrary to the Theft Act 1968 s 15A (as added) (see PARA 311 post): s 24A(3) (as added: see note 1 supra). 'Money' is to be construed in accordance with s 15B (as added and amended) (see PARA 311 post): s 24A(9) (as so added).

5 See PARA 282 ante.

6 See PARA 310 post.

7 See PARA 308 post.

8 Theft Act 1968 s 24A(4) (as added: see note 1 supra). As to stolen goods see PARA 303 ante.

9 Ibid s 24A(5) (as added: see note 1 supra).

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

11 Theft Act 1968 s 24A(6) (as added: see note 1 supra); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

## **UPDATE**

### **307 Dishonestly retaining a wrongful credit**

NOTES 2, 4--'Account' now means an account kept with (1) a bank; (2) a person carrying on a business which falls within the Theft Act 1968 s 24A(10); or (3) an issuer of electronic money (as defined for the purposes of the Financial Services and Markets Act 2000 Pt 2): 1968 Act s 24A(9) (substituted by Fraud Act 2006 Sch 1 para 7(3)). A business falls within the 1968 Act s 24A(10) if (a) in the course of the business money received by way of deposit is lent to others; or (b) any other activity of the business is financed, wholly or to any material extent, out of the capital of or the interest on money received by way of deposit: s 24A(10) (as added by 2006 Act Sch 1 para 7(3)). References in the 1968 Act s 24A(10) to a deposit must be read with (i) the Financial Services and Markets Act 2000 s 22; (ii) any relevant order under the 2000 Act s 22; and (iii) the 2000 Act Sch 2; but any restriction on the meaning of deposit which arises from the identity of the person making it is to be disregarded: 1968 Act s 24A(11) (as so added). For the purposes of s 24A(10) (A) all the activities which a person carries on by way of business must be regarded as a single business carried on by him; and (B) 'money' includes money expressed in a currency other than sterling: s 24A(12) (as so added).

NOTE 3--Theft (Amendment) Act 1996 s 3(2) repealed: 2006 Act Sch 3.

TEXT AND NOTES 4, 8--Theft Act 1968 s 24A(3), (4) omitted: 2006 Act Sch 1 para 7(1), Sch 3. A credit to an account is wrongful to the extent that it derives from (1) theft; (2) blackmail; (3) fraud (contrary to the 2006 Act s 1: see PARA 309A.1); or (4) stolen goods: Theft Act 1968 s 24A(2A) (added by 2006 Act Sch 1 para 7(1)).

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## (4) BLACKMAIL

### 308. Blackmail.

A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another<sup>1</sup>, he makes any unwarranted demand<sup>2</sup> with menaces<sup>3</sup>. For these purposes, a demand with menaces is unwarranted unless the person making it does so in the belief: (1) that he has reasonable grounds for making the demand; and (2) that the use of the menaces is a proper means of reinforcing the demand<sup>4</sup>. The nature of the act or omission demanded is immaterial; and it is also immaterial whether the menaces relate to action to be taken by the person making the demand<sup>5</sup>.

A person guilty of blackmail is liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>6</sup>.

1 For the purposes of the Theft Act 1968, 'gain' and 'loss' are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent: s 34(2)(a). 'Gain' includes a gain by keeping what one has, as well as a gain by getting what one has not; and 'loss' includes a loss by not getting what one might get, as well as a loss by parting with what one has: s 34(2)(a)(i), (ii). An unwarranted demand with menaces for a debt is made with a view to gain, because the person making the demand is endeavouring to get money which he has not got although it is legally due to him: *R v Parkes* [1973] Crim LR 358, Crown Ct; approved in *A-G's Reference (No 1 of 2001)* [2002] EWCA Crim 1768, [2002] 3 All ER 840, [2003] 1 Cr App Rep 131 (false accounting contrary to the Theft Act 1968 s 17(1) (see PARA 316 post)). It is not necessary that the defendant should be motivated by the desire to achieve economic gain or to cause economic loss: *R v Bevans* (1987) 87 Cr App Rep 64, CA (defendant in severe pain threatened to shoot a doctor if he did not inject defendant with morphine; guilty of blackmail).

2 The demand need not be in explicit or express terms but may be implicit in words or conduct: *R v Collister, R v Warhurst* (1955) 39 Cr App Rep 100, CCA. Thus a request imposing conditions may amount to a demand, although a mere request would not: *R v Studer* (1915) 85 LJB 1017, CCA. A demand contained in a letter is made when the letter is posted: *Treacy v DPP* [1971] AC 537 at 546, 55 Cr App Rep 113 at 117, HL.

3 Theft Act 1968 s 21(1). 'Menaces' is given a wide meaning: see *Thorne v Motor Trade Association* [1937] AC 797 at 817, 26 Cr App Rep 51 at 67, HL, per Lord Wright ('the word menace is to be liberally construed and not as limited to threats of violence, but as including threats of any action detrimental to or unpleasant to the person addressed. It may also include a warning that in certain events such action is intended'). To constitute 'menaces' the threats or conduct of the defendant must be of such a nature and extent that the mind of an ordinary person of normal stability and courage might be influenced or made apprehensive so as to accede unwillingly to the demand: *R v Clear* [1968] 1 QB 670, 52 Cr App Rep 58, CA. The term 'an ordinary person of normal stability and courage' in this context should be interpreted literally: see *R v Tomlinson* [1895] 1 QB 706 at 710, CCR, per Wills J; *R v Boyle, R v Merchant* [1914] 3 KB 339, CCA. A threat to injure property or character may amount to a menace: *R v Smith* (1850) 2 Car & Kir 882, CCR; *R v Taylor* (1859) 1 F & F 511; *R v Boyle, R v Merchant* supra. However, a threat to the person or property of another will suffice: *R v Tomlinson* supra. Similarly, a threat to charge a person with a crime (*R v Miard* (1844) 1 Cox CC 22; *R v Tomlinson* supra) or with misconduct not amounting to a crime (*R v Chalmers* (1867) 10 Cox CC 450, CCR; *R v Tomlinson* supra) or with arrest may amount to menaces (*R v Robertson* (1864) Le & Ca 483, CCR). Whether the threats or conduct in a particular case constitute menaces is a matter for the jury: *R v Clear* supra.

'Menaces' is an ordinary English word which a jury could be expected to understand: *R v Lawrence, R v Pomroy* (1971) 57 Cr App Rep 64, CA. See also *Treacy v DPP* [1971] AC 537 at 565, 55 Cr App Rep 113 at 146, HL, per Lord Diplock ('The Theft Act 1968 . . . is expressed in simple language as used and understood by ordinary literate men and women'); *R v Garwood* [1987] 1 All ER 1032, 85 Cr App Rep 85, CA. It follows that only rarely will a judge need to enter on a definition of 'menaces': *R v Lawrence, R v Pomroy* supra; *R v Garwood* supra. Two occasions where the judge may need to spell out the meaning of menaces are: (1) where, on the facts known to the defendant, his threats might have affected the mind of an ordinary person of normal stability,

although they did not affect the addressee, the jury should be told that they would amount to menaces; (2) where, although they would not have affected the mind of a person of normal stability, the threats affected the mind of the victim, the jury should be told that the menaces would be proved if the defendant was aware of the likely effect of his actions on the victim, eg because he knew of some unusual susceptibility on the victim's part: *R v Garwood* supra. See also *R v Lawrence*, *R v Pomroy* supra.

An offence under the Theft Act 1968 s 21 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(a). For extended territorial scope of blackmail in connection with acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983 s 1; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583.

As to threats to kill see also PARA 105 ante. As to blackmail where there is an international element see PARA 1058 et seq post.

4 Theft Act 1968 s 21(1). The test of the defendant's belief is subjective; but in relation to head (2) in the text 'no act which was not believed to be lawful could be believed to be proper within the meaning of s 21(1)': *R v Harvey*, *R v Ulyett*, *R v Plummer* (1980) 72 Cr App Rep 139 at 142, CA, per Bingham J. As to the proper direction to the jury on the question of belief see *R v Harvey*, *R v Ulyett*, *R v Plummer* supra. It is for the defence to raise the issue of belief; and, if it is not raised, there is no need for any direction on the question: *R v Lawrence*, *R v Pomroy* (1971) 57 Cr App Rep 64, CA; *R v Harvey*, *R v Ulyett*, *R v Plummer* supra at 142.

5 Theft Act 1968 s 21(2).

6 Ibid s 21(3). Offences under s 21 may not be tried summarily: see the Magistrates' Courts Act 1980 s 17, Sch 1 para 28(a). As to sentencing for blackmail see *R v Hadjou* (1989) 11 Cr App Rep (S) 29, CA. As to the offence committed by a person who at the time of committing or being arrested for blackmail has in his possession a firearm or imitation firearm see PARA 677 ante.

The provisions of the Theft Act 1968 relating to stolen goods apply to goods obtained by blackmail: see s 24(4); and PARA 303 ante. Similarly, restitution orders are applicable to goods obtained by blackmail: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 388.

An offence contrary to s 21 is a 'lifestyle offence' for the purposes of the Proceeds of Crime Act 2002 s 75 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 392-393): s 75(2)(a), Sch 2 para 9. A court may make a financial reporting order in respect of a lifestyle offence: see the Serious Organised Crime and Police Act 2005 s 76; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

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## **(5) FRAUD**

### **309. Prospective legislation relating to fraud.**

At the date at which this volume states the law, a Fraud Bill was before Parliament<sup>1</sup>. This government Bill was introduced in the House of Lords on 25 May 2005 and in the House of Commons on 29 March 2006.

The Bill provides for a general offence of fraud, which may be committed by false representation, by failing to disclose information, or by abuse of position<sup>2</sup>. It also creates offences of possessing, making or supplying articles for use in frauds<sup>3</sup>, an offence of obtaining services dishonestly<sup>4</sup>, and an offence of fraudulent trading applicable to non-corporate traders<sup>5</sup>; and it amends the penalty for participating in fraudulent business carried on by a company<sup>6</sup>. There are various supplementary<sup>7</sup> and transitional<sup>8</sup> provisions.

<sup>1</sup> The description of the proposed legislation given in the text is based on the Fraud Bill as ordered to be printed in the House of Commons on 29 March 2006.

<sup>2</sup> See the Fraud Bill clauses 1-5. This offence is to replace various deception offences contained in the Theft Act 1968 s 15 (see PARA 310 post), ss 15A, 15B (both as added) (see PARA 311 post), s 16 (see PARA 312 post), and in the Theft Act 1978 s 1 (see PARA 313 post), s 2 (see PARA 314 post). As to the proposed abolition of these offences see the Fraud Bill Schs 1, 3.

<sup>3</sup> See *ibid* clauses 6-8.

<sup>4</sup> See *ibid* clause 11.

<sup>5</sup> See *ibid* clause 9.

<sup>6</sup> See *ibid* clause 10.

<sup>7</sup> See *ibid* clauses 12-16.

<sup>8</sup> See *ibid* Sch 2.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **309 Prospective legislation relating to fraud**

TEXT AND NOTES--The Fraud Act 2006 received royal assent on 8 November 2006 and ss 15 and 16 came into force on that date. The remaining provisions came into force on 15 January 2007: see SI 2006/3200. See further PARA 309A.

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### **309A. Fraud and obtaining services dishonestly.**

The Fraud Act 2006 makes provision for, and in connection with, criminal liability for fraud and obtaining services dishonestly. For transition provisions and savings see s 14(2), Sch 2.

#### **1. General**

A person is guilty of fraud if he is in breach of any of the following provisions<sup>1</sup> which provide for different ways of committing the offence<sup>2</sup>. The provisions relate to (1) fraud by false representation<sup>3</sup>; (2) fraud by failing to disclose information<sup>4</sup>; and (3) fraud by abuse of position<sup>5</sup>. A person who is guilty of fraud is liable (a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum<sup>6</sup> (or to both); (b) on conviction on indictment, to imprisonment for a term not exceeding ten years or to a fine (or to both)<sup>7</sup>.

1    Ie the provisions listed in the Fraud Act 2006 s 1(2).

2    Ibid s 1(1).

3    See ibid s 2 and PARA 309A.2.

4    See ibid s 3 and PARA 309A.3.

5    See ibid s 4 and PARA 309A.4: s 1(2).

6    As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7    2006 Act s 1(3).

#### **2. Fraud by false representation**

A person is in breach of this provision<sup>1</sup> if he (1) dishonestly makes a false representation<sup>2</sup>, and (2) intends, by making the representation (a) to make a gain<sup>3</sup> for himself or another, or (b) to cause loss<sup>4</sup> to another or to expose another to a risk of loss<sup>5</sup>.

1    Ie the Fraud Act 2006 s 2.

2    A representation is false if (1) it is untrue or misleading, and (2) the person making it knows that it is, or might be, untrue or misleading: s 2(2). 'Representation' means any representation as to fact or law, including a representation as to the state of mind of (a) the person making the representation, or (b) any other person: s 2(3). A representation may be express or implied: s 2(4). For the purposes of s 2 a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention): s 2(5).

3    'Gain' includes a gain by keeping what one has, as well as a gain by getting what one does not have: ibid s 5(3). See further NOTE 5.

4    'Loss' includes a loss by not getting what one might get, as well as a loss by parting with what one has: ibid s 5(4). See further NOTE 5.

5 Ibid s 2(1). 'Gain' and 'loss' (1) extend only to gain or loss in money or other property; (2) include any such gain or loss whether temporary or permanent; and 'property' means any property whether real or personal (including things in action and other intangible property): s 5(2).

### 3. Fraud by failing to disclose information

A person is in breach of this provision<sup>1</sup> if he (1) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and (2) intends, by failing to disclose the information (a) to make a gain<sup>2</sup> for himself or another, or (b) to cause loss<sup>3</sup> to another or to expose another to a risk of loss<sup>4</sup>.

1 Ibid the Fraud Act 2006 s 3.

2 For the meaning of 'gain' see PARA 309A.2.

3 For the meaning of 'loss' see PARA 309A.2.

4 2006 Act s 3.

### 4. Fraud by abuse of position

A person is in breach of this provision<sup>1</sup> if he (1) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, (2) dishonestly abuses that position, and (3) intends, by means of the abuse of that position (a) to make a gain<sup>2</sup> for himself or another, or (b) to cause loss<sup>3</sup> to another or to expose another to a risk of loss<sup>4</sup>.

1 Ibid the Fraud Act 2006 s 4.

2 For the meaning of 'gain' see PARA 309A.2.

3 For the meaning of 'loss' see PARA 309A.2.

4 2006 Act s 4(1). A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act: s 4(2).

### 5. Possession etc of articles for use in frauds

A person is guilty of an offence if he has in his possession or under his control any article<sup>1</sup> for use in the course of or in connection with any fraud<sup>2</sup>. A person guilty of an offence under this provision<sup>3</sup> is liable (1) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum<sup>4</sup> (or to both); (2) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine (or to both)<sup>5</sup>.

1 For the purposes of (1) the Fraud Act 2006 ss 6 and 7 (see PARA 309A.6), and (2) the provisions listed in s 8(2), so far as they relate to articles for use in the course of or in connection with fraud, 'article' includes any program or data held in electronic form: s 8(1). The provisions are (a) the Police and Criminal Evidence Act 1984 s 1(7)(b), (b) the Armed Forces Act 2001 s 2(8)(b), and (c) the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341, art 3(7)(b); (meaning of 'prohibited articles' for the purposes of stop and search powers): 2006 Act s 8(2).

2 Ibid s 6(1).

3 Ibid s 6.

4 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5 2006 Act s 6(2). Head (1) in the text applies in relation to Northern Ireland as if the reference to 12 months were a reference to six months: s 6(3).

## **6. Making or supplying articles for use in frauds**

A person is guilty of an offence if he makes, adapts, supplies or offers to supply any article<sup>1</sup> (1) knowing that it is designed or adapted for use in the course of or in connection with fraud, or (2) intending it to be used to commit, or assist in the commission of, fraud<sup>2</sup>. A person guilty of an offence under this provision<sup>3</sup> is liable (a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum<sup>4</sup> (or to both); (b) on conviction on indictment, to imprisonment for a term not exceeding ten years or to a fine (or to both)<sup>5</sup>.

1 For the meaning of 'article' see PARA 309A.5.

2 Fraud Act 2006 s 7(1).

3 *Ibid* s 7.

4 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5 2006 Act s 7(2). Head (1) in the TEXT applies in relation to Northern Ireland as if the reference to 12 months were a reference to six months: s 7(3).

## **7. Participating in fraudulent business carried on by sole trader etc**

A person is guilty of an offence if he is knowingly a party to the carrying on of a business to which these provisions<sup>1</sup> apply (fraudulent trading)<sup>2</sup>. A person guilty of an offence under these provisions is liable (1) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum<sup>3</sup> (or to both); (2) on conviction on indictment, to imprisonment for a term not exceeding ten years or to a fine (or to both)<sup>4</sup>.

1 *Ibid* the Fraud Act 2006 s 9.

2 *Ibid* s 9(1). Section 9 applies to a business which is carried on (1) by a person who is outside the reach of the Companies Act 2006 s 993 (offence of fraudulent trading), and (2) with intent to defraud creditors of any person or for any other fraudulent purpose: Fraud Act 2006 s 9(2) (amended by the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194). 'Fraudulent purpose' has the same meaning as in the Companies Act 2006 s 993: Fraud Act 2006 s 9(5) (amended by SI 2007/2194). The following are within the reach of the Companies Act 2006 s 993 (a) a company (as defined in the Companies Act 2006 s 1(1)); (b) a person to whom the Companies Act 2006 s 993 applies (with or without adaptations or modifications) as if the person were a company; (c) a person exempted from the application of s 993: Fraud Act 2006 s 9(3) (amended by SI 2007/2194, SI 2009/1941).

3 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

4 Fraud Act 2006 s 9(6). Head (1) in the TEXT applies in relation to Northern Ireland as if the reference to 12 months were a reference to six months: s 9(7).

## **8. Obtaining services dishonestly**

A person is guilty of an offence under the following provisions<sup>1</sup> if he obtains services for himself or another (1) by a dishonest act, and (2) in breach of the provision below<sup>2</sup>. A person obtains services in breach of this provision if (a) they are made available on the basis that payment has been, is being or will be made for or in respect of them, (b) he obtains them without any payment having been made for or in respect of them or without payment having been made in full, and (c) when he obtains them, he knows (i) that they are being made available on the basis described in head (a) above, or (ii) that they might be, but intends that payment will not



be made, or will not be made in full<sup>3</sup>. A person guilty of an offence under these provisions is liable (A) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum<sup>4</sup> (or to both); (B) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine (or to both)<sup>5</sup>.

1    le the Fraud Act 2006 s 11.

2    le in breach of *ibid* s 11(2); s 11(1).

3    *Ibid* s 11(2).

4    As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5    2006 Act s 11(3). Head (A) in the TEXT applies in relation to Northern Ireland as if the reference to 12 months were a reference to six months: s 11(4).

## 9.    Liability of company officers for offences by company

The following provision<sup>1</sup> applies if an offence under the Fraud Act 2006 is committed by a body corporate<sup>2</sup>. If the offence is proved to have been committed with the consent or connivance of (1) a director, manager, secretary or other similar officer of the body corporate, or (2) a person who was purporting to act in any such capacity, he (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly<sup>3</sup>.

1    le the Fraud Act 2006 s 12(2).

2    *Ibid* s 12(1).

3    *Ibid* s 12(2). If the affairs of a body corporate are managed by its members, s 12(2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 12(3).

## 10.   Evidence

A person is not to be excused from (1) answering any question put to him in proceedings relating to property<sup>1</sup>, or (2) complying with any order made in proceedings relating to property, on the ground that doing so may incriminate him or his spouse or civil partner of an offence under the Fraud Act 2006 or a related offence<sup>2</sup>. But, in proceedings for an offence under the Fraud Act 2006 or a related offence, a statement or admission made by the person in (a) answering such a question, or (b) complying with such an order, is not admissible in evidence against him or (unless they married or became civil partners after the making of the statement or admission) his spouse or civil partner<sup>3</sup>.

1    'Proceedings relating to property' means any proceedings for (1) the recovery or administration of any property, (2) the execution of a trust, or (3) an account of any property or dealings with property, and 'property' means money or other property whether real or personal (including things in action and other intangible property): Fraud Act 2006 s 13(3).

2    *Ibid* s 13(1). 'Related offence' means (1) conspiracy to defraud; (2) any other offence involving any form of fraudulent conduct or purpose: s 13(4). See *Kensington International Ltd v Republic of Congo* [2007] EWCA Civ 1128, [2008] 1 All ER (Comm) 934; *JSC BTA Bank v Ablyazov* [2009] EWCA Civ 1124, [2010] 1 WLR 976, [2009] All ER (D) 292 (Oct); and *Cavell USA Inc v Seaton Insurance Co* [2009] EWCA Civ 1363, [2009] All ER (D) 181 (Dec).

3    2006 Act s 13(2).

## UPDATE

**309-332 Fraud**

As to the prevention of fraud see PARA 332A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/4. OFFENCES AGAINST PROPERTY/(5) FRAUD/310. Obtaining property by deception.

### 310. Obtaining property by deception.

A person who by any deception<sup>1</sup> dishonestly<sup>2</sup> obtains<sup>3</sup> property belonging to another<sup>4</sup>, with the intention of permanently depriving the other of it<sup>5</sup>, is guilty of an offence<sup>6</sup> and liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the prescribed sum or to both<sup>8</sup>.

1 For these purposes, 'deception' means any deception, whether deliberate or reckless, by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person: Theft Act 1968 s 15(4). A deception is 'deliberate' if the defendant knows his statement is false and will or may induce the person to whom it is addressed to believe that it is true: *Dip Kaur v Chief Constable for Hampshire* [1981] 2 All ER 430, 72 Cr App Rep 359, DC. A person makes a deception 'recklessly' if he knows that there is a risk that his statement is false and will or may induce that person to believe that it is true: see PARA 11 ante. Negligence is not enough; if a person unreasonably believes in the truth of a statement he is not reckless as to its falsity: *R v Staines* (1970) 61 Cr App Rep 160, CA. The deception may be by words or conduct: see eg *R v Harris* (1975) 62 Cr App Rep 28, CA (person who registered as hotel guest impliedly represented that he intended to pay the bill at end of stay); *R v Silverman* (1987) 86 Cr App Rep 213, CA (jobbing builder who had built a relationship of mutual trust with customers impliedly represented that the price charged was a fair and reasonable one). See also *R v Doukas* [1978] 1 All ER 1061, 66 Cr App Rep 228, CA (wine waiter impliedly represented that wine he offered was his employer's not his own; decided under the Theft Act 1968 s 25 (see PARA 296 ante)).

If a person makes a representation to another, expressly or by implication, which is true when made but to his knowledge becomes untrue before the relevant thing is obtained, and he fails to tell the addressee of the change, he thereby practices deception if by his conduct he continues in that representation: *DPP v Ray* [1974] AC 370, 58 Cr App Rep 130, HL. See also *R v Rai* [2001] 1 Cr App Rep 217, CA (a case of obtaining services by deception contrary to the Theft Act 1978 s 1 (as amended); 'conduct' in Theft Act 1968 s 15(4) covers acquiescence in letting services be provided while keeping quiet about the change of circumstances).

By giving a cheque, whether postdated or not, the drawer impliedly represents that the state of facts existing at the date of delivery is such that in the ordinary course of events the cheque will be met on presentation for payment on or after the date specified in it: *R v Gilmartin* [1983] QB 953, 76 Cr App Rep 238, CA; and see *Metropolitan Police Comr v Charles* [1977] AC 177 at 182, 63 Cr App Rep 252 at 260-261, HL, per Lord Diplock; *R v Hazelton* (1874) LR 2 CCR 134; *R v Page* [1971] 2 QB 330n at 333, 55 Cr App Rep 184 at 190, CA. Where a cheque is drawn to cover an application for a large allotment of shares in the knowledge that, if the whole number applied for is in fact allotted, there will not be sufficient funds to meet the cheque, but the drawer's expectation is that he will be allotted only a small proportion of the number of shares applied for, so that with the cheque he will receive in respect of the surplus he can provide a total credit balance to cover his own cheque ('stagging'), the representations implied in drawing the cheque thus constitute a deception: see *R v Greenstein* [1976] 1 All ER 1, 61 Cr App Rep 296, CA. A person who uses a cheque card (or credit card) impliedly represents by his conduct that he has actual authority from the bank (or credit card company) to use the card to make a contract with the payee on behalf of the bank (or credit card company) that it will honour the cheque (or transaction); if he has no such authority a deception is made as to his authority: see *Metropolitan Police Comr v Charles* supra (cheque cards); *R v Lambie* [1982] AC 449, 73 Cr App Rep 294, HL (credit cards).

A simple failure to reveal a fact is a deception if the defendant is under a legal duty to disclose it: *R v Firth* (1989) 91 Cr App Rep 217, CA; and see PARA 314 post.

2 'Dishonestly' in the Theft Act 1968 ss 15, 16, has replaced the phrase 'intent to defraud' in the pre-existing law and is of wider ambit: *R v Potger* (1970) 55 Cr App Rep 42 at 46, CA. The Theft Act 1968 s 2 (meaning of 'dishonestly': see PARA 283 ante) is limited to theft and does not apply for the purposes of s 15, s 15A (as added), s 16, s 17, s 20 (as amended) or to the Theft Act 1978 ss 1-3 (ss 1, 3 as amended): see the Theft Act 1968 s 1(3); and PARA 282 note 1 ante. However, the test of dishonesty under *R v Ghosh* [1982] QB 1053, 75 Cr App Rep 154, CA, applies throughout the Theft Act 1968 (*R v Melwani* [1989] Crim LR 565, CA), and also in other contexts including the Theft Act 1978. The questions for the court are: (1) whether the act was dishonest

according to the standards of reasonable and honest people; and (2) whether the defendant appreciated that what he was doing was by those standards dishonest: see *R v Ghosh* supra; *R v Woolven* (1983) 77 Cr App Rep 231, CA. As to the circumstances in which the direction in *R v Ghosh* supra should be given to the jury see PARA 283 note 7 ante.

3 For these purposes, a person is to be treated as obtaining property if he obtains ownership, possession or control of it; and 'obtain' includes obtaining for another or enabling another to obtain or to retain: Theft Act 1968 s 15(2). As to proof that the property was obtained see *Bogdal v Hall* [1987] Crim LR 500, DC. If the obtaining is for another, it is immaterial that the other is not a party to the deception: *R v Duru* [1973] 3 All ER 715, 58 Cr App Rep 151, CA (defendant deceiving local authority into granting loans for house purchase; cheques for the purpose sent to solicitors acting for both the authority and the applicants for loans; cheques 'obtained' within the Theft Act 1968 s 15(2)).

The deception must be an effective cause of: (1) obtaining property (see the Theft Act 1968 s 15); (2) obtaining a money transfer (see s 15A (as added); and PARA 311 post); (3) obtaining a pecuniary advantage (see s 16 (as amended); and PARA 312 post); (4) obtaining services (see the Theft Act 1978 s 1 (as amended); and PARA 313 post); (5) the evasion of a liability (see s 2; and PARA 314 post); or (6) procuring the execution of a valuable security (see the Theft Act 1968 s 20(2); and PARA 317 post). This requires: (a) that as a result of the words or conduct a person was deceived (ie led to believe that a thing is true which is false: *Re London and Globe Finance Corp Ltd* [1903] 1 Ch 728 at 723 per Buckley J, cited with approval in *DPP v Ray* supra by Lord Reid and Lord Morris), and it is apparent from *Metropolitan Police Comr v Charles* [1977] AC 177 and *R v Lambie* [1982] AC 449, 73 Cr App Rep 294, HL, that it suffices for this purpose if, although the addressee does not positively believe in the truth of the representation, he is ignorant of the truth and relies on the representation; and (b) that the deception must operate on the mind of the person deceived and be a cause of the relevant thing being obtained: *R v Lavery* [1970] 3 All ER 432, 54 Cr App Rep 495, CA; *R v Collis-Smith* [1971] Crim LR 716, CA; *R v Royle* [1971] 3 All ER 1359, 56 Cr App Rep 131, CA; *R v Kovacs* [1974] 1 All ER 1236, 58 Cr App Rep 412, CA; *R v King*, *R v Stockwell* [1987] QB 547, 84 Cr App Rep 357, CA. Otherwise there will only be an attempt to commit the offence: *R v Hensler* (1870) 11 Cox CC 570, CCR; *R v Light* (1915) 84 LJBK 865, 11 Cr App Rep 111, CCA. It follows from the requirement of an effective cause that the deception must precede obtaining the property or the pecuniary advantage or procuring the execution of a valuable security: *R v Collis-Smith* supra. The onus of showing that the property or the pecuniary advantage or the execution of the valuable security was procured by the deception falls on the prosecution and it should normally be proved by direct evidence (*R v Lavery* supra; *R v Tirado* (1974) 59 Cr App Rep 80, CA); but the inducement need not be proved by direct evidence if the facts are such that the alleged deception would have been the only reason why the defendant obtained property belonging to another (see *R v Lavery* supra; *R v Lambie* supra). Even where the prosecutor would not have parted with his money had he been aware that the representation made to him by the defendant was false, the deception is not necessarily an effective cause of obtaining the property or securing the advantage: see *R v Lucas* [1949] 2 KB 226, 33 Cr App Rep 136, CCA (bookmaker, induced by false representation to accept a large bet on credit, paying out on it; the effective cause of the payment was the backing of the winning horse). On the facts in *R v Lucas* supra, an offence under the Theft Act 1968 s 16 (as amended) might now be established. The deception does not necessarily have to be practised on the person suffering the resultant loss: *R v Kovacs* supra; applied in *Metropolitan Police Comr v Charles* supra (both decided under the Theft Act 1968 s 16). If, on the whole of the story, it can be said that the deception alleged caused the relevant thing to be obtained by the defendant, it is, or may be, irrelevant that at the final moment the victim suspected or even believed that he had been swindled: *R v Miller* (1992) 95 Cr App Rep 421, CA.

It is doubtful whether deception can be practised unless there is a human mind to deceive: see *Davies v Flackett* (1972) 116 Sol Jo 526, DC (driver avoiding payment at automatic barrier in car park); but making off without having paid as required or expected and with intent to avoid payment of the amount due is an offence under the Theft Act 1978 s 3 (see PARA 315 post). See also *Re Holmes* [2004] EWHC 2020 (Admin), [2005] 1 All ER 490, [2005] 1 Cr App Rep 229, DC.

4 For the meaning of 'property' see the Theft Act 1968 s 4(1); and PARA 285 ante. For the meaning of 'belonging to another' see s 5(1); and PARA 289 ante. See also *Etim v Hatfield* [1975] Crim LR 234, DC; *Levene v Pearcy* [1976] Crim LR 63, DC; *R v Thompson* [1984] 3 All ER 565, 79 Cr App Rep 191, CA; *R v Ashbee* [1989] 1 WLR 109, 88 Cr App Rep 357, CA; *Brady v IRC* [1989] STC 178, DC. A person who obtains a bank credit by deception does not obtain property belonging to another by deception, because the property which he obtains is a new thing in action constituted by the debt now owed to him by his bank, which did not come into existence until the debt so created was owed to him by his bank, and so never belonged to anyone else: *R v Preddy*, *R v Slade*, *R v Dhillon* [1996] AC 815, [1996] 2 Cr App Rep 524, HL. In such a case, the appropriate offence is that of obtaining a money transfer by deception contrary to the Theft Act 1968 s 15A (as added): see PARA 311 post.

5 Ibid s 6 (see PARA 290 ante) applies for the purposes of s 15, with the necessary adaptation of the reference to appropriating, as it applies for the purposes of s 1 (see PARA 282 ante): s 15(3).

6 Ibid s 15(1). As to the proposed repeal of s 15 see PARA 309 ante. Where an offence committed by a body corporate under ss 15, 16 (as amended) (see PARA 312 post) or s 17 (see PARA 316 post) is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate

is guilty of that offence and liable to be proceeded against and punished accordingly; and, where the affairs of a body corporate are managed by its members, these provisions apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: see s 18. Section 18 applies to offences under the Theft Act 1978 s 1 (as amended) (see PARA 313 post) or s 2 (see PARA 314 post): s 5(1). See also PARA 38 ante.

An offence under the Theft Act 1968 s 15 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(a). For the extended territorial scope of obtaining property by deception in connection with acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583.

Obtaining property by deception is a specified offence for the purposes of the Police and Criminal Evidence Act 1984 s 1(2) (as amended) (power to search for prohibited articles): see PARA 860 post.

The facts that constitute this offence may also constitute theft: see *Lawrence v Metropolitan Police Comr* [1972] AC 626, 55 Cr App Rep 471, HL; *DPP v Gomez* [1993] AC 442, 96 Cr App Rep 359, HL.

As to the offence of having with one an article for use in connection with an offence under the Theft Act 1968 s 25 when not at one's place of abode see PARA 296 ante. As to obtaining property by deception where there is an international element see PARA 1058 et seq post. As to obtaining a money transfer by deception see PARA 311 post; as to obtaining a pecuniary advantage by deception see PARA 312 post; as to obtaining services by deception see PARA 313 post; as to the evasion of liability by deception see PARA 314 post; and as to making off without payment see PARA 315 post.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

8 See the Theft Act 1968 s 15(1); and the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. For sentencing guidelines in cases of obtaining property by deception see *R v Barrick* (1985) 81 Cr App Rep 78, CA; *R v Stewart* [1987] 2 All ER 383, 85 Cr App Rep 66, CA. A court may make a financial reporting order in respect of offences under the Theft Act 1968 s 15: see the Serious Organised Crime and Police Act 2005 s 76; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

## UPDATE

### 309-332 Fraud

As to the prevention of fraud see PARA 332A.

### 310-314 Obtaining property by deception ... Evasion of liability by deception

Repealed: Fraud Act 2006 Sch 1 para 1(a), (b), Sch 3. See now PARA 309A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/4. OFFENCES AGAINST PROPERTY/(5) FRAUD/311. Obtaining a money transfer by deception.

### **311. Obtaining a money transfer by deception.**

A person is guilty of an offence if by any deception<sup>1</sup> he dishonestly<sup>2</sup> obtains<sup>3</sup> a money transfer for himself or another<sup>4</sup>.

A money transfer occurs when a debit<sup>5</sup> is made to one account<sup>6</sup>, and a credit<sup>7</sup> is made to another, and the credit results from the debit or the debit results from the credit<sup>8</sup>. It is immaterial whether: (1) the amount credited is the same as the amount debited; (2) the money transfer is effected on presentment of a cheque or by another method; (3) any delay occurs in the process by which the money transfer is effected; (4) any intermediate credits or debits are made in the course of the money transfer; or (5) either of the accounts is overdrawn before or after the money transfer is effected<sup>9</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup> or to a fine not exceeding the prescribed sum or to both<sup>11</sup>.

1 For the meaning of 'deception' see PARA 310 note 1 ante; definition applied by the Theft Act 1968 s 15B(1), (2) (s 15B added by the Theft (Amendment) Act 1996 s 1(1)). As to the proposed repeal of the Theft Act 1968 s 15B (as added) see PARA 309 ante.

2 As to the meaning of 'dishonestly' see PARA 310 note 2 ante.

3 As to causation see PARA 310 note 3 ante.

4 Theft Act 1968 s 15A(1) (ss 15A, 15B added by the Theft (Amendment) Act 1996 s 1(1)). As to the proposed repeal of the Theft Act 1968 s 15A (as added) see PARA 309 ante. An offence under s 15A (as added) is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(a) (amended by the Theft (Amendment) Act 1996 s 3(2), (3)).

5 References to a credit and to a debit are references to a credit of an amount of money and to a debit of an amount of money: Theft Act 1968 s 15A(3) (as added: see note 4 supra).

6 'Account' means an account kept with a bank, or a person carrying on a business which falls within *ibid* s 15B(4) (as added): s 15B(1), (3) (as added see note 4 supra). A business falls within s 15B(4) (as added) if in the course of the business money received by way of deposit is lent to others, or any other activity of the business is financed, wholly or to any material extent, out of the capital of or the interest on money received by way of deposit: see s 15B(1), (4) (s 15B as so added; and s 15B(4) amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 1). For these purposes, references to a deposit must be read with: (1) the Financial Services and Markets Act 2000 s 22; (2) any relevant order under s 22; and (3) Sch 2 (as amended), but any restriction on the meaning of deposit which arises from the identity of the person making it is to be disregarded: Theft Act 1968 s 15B(1), (4A) (s 15B as so added; and s 15B(4A) added by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 1). See further FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 89. For the purposes of the Theft Act 1968 s 15B(4) (as added and amended), all the activities which a person carries on by way of business must be regarded as a single business carried on by him; and 'money' includes money expressed in a currency other than sterling or in the European currency unit (as defined in EC Council Regulation 3320/94 (OJ L350, 31.12.94, p 27) or any Community instrument replacing it: Theft Act: 1968 s 15B(1), (5) (as so added).

7 See note 5 supra.

8 Theft Act 1968 s 15A(2) (as added: see note 4 supra). A bank account is not 'credited' for these purposes until it is unconditionally credited: *Re Holmes* [2004] EWHC 2020 (Admin), [2005] 1 All ER 490, [2005] 1 Cr App Rep 229. It is not necessary to identify which account has been debited or whether it was in credit at the time;

the court is entitled to take judicial notice of invariable banking and accounting practice; in practice a money transfer cannot be made by a bank without a bank account being debited with the amount of that transfer, and in such a case that debit and the credit to the transferee account must have been causally connected: see *R v Holmes* supra.

9 Theft Act 1968 s 15A(4) (as added: see note 4 supra).

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

11 Theft Act 1968 s 15A(5) (as added: see note 4 supra); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. See also PARA 1103 post. As to obtaining property by deception see PARA 310 ante; as to obtaining services by deception see PARA 313 post; as to the evasion of liability by deception see PARA 314 post; and as to making off without payment see PARA 315 post. A court may make a financial reporting order in respect of an offence under the Theft Act 1968 s 15A (as added): see the Serious Organised Crime and Police Act 2005 s 76; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **310-314 Obtaining property by deception ... Evasion of liability by deception**

Repealed: Fraud Act 2006 Sch 1 para 1(a), (b), Sch 3. See now PARA 309A.

### **311 Obtaining a money transfer by deception**

NOTE 11--See *R v Darwin* [2009] EWCA Crim 860, [2009] 2 Cr App Rep (S) 746, [2009] All ER (D) 276 (Mar).

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### **312. Obtaining pecuniary advantage by deception.**

A person who by any deception<sup>1</sup> dishonestly<sup>2</sup> obtains<sup>3</sup> for himself or another any pecuniary advantage commits an offence<sup>4</sup> and is liable on conviction on indictment to imprisonment for a term not exceeding five years, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the prescribed sum or to both<sup>6</sup>. The cases where a pecuniary advantage is to be regarded as so obtained for a person are cases where: (1) he is allowed to borrow by way of overdraft<sup>7</sup>, or to take out any policy of insurance or annuity contract, or he obtains an improvement of the terms on which he is allowed to do so<sup>8</sup>; or (2) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting<sup>9</sup>.

1 For these purposes, 'deception' has the same meaning as in the Theft Act 1968 s 15: see s 16(3); and PARA 310 note 1 ante.

2 As to the meaning of 'dishonestly' see PARA 310 note 2 ante.

3 As to causation see PARA 310 note 3 ante. The person deceived need not be the same person as the person from whom the pecuniary advantage is obtained: *R v Kovacs* [1974] 1 All ER 1236, 58 Cr App Rep 412, CA; approved in *Metropolitan Police Comr v Charles* [1977] AC 177, 63 Cr App Rep 252, HL.

4 Theft Act 1968 s 16(1). As to the proposed repeal of s 16 see PARA 309 ante. As to offences committed by a body corporate see PARA 310 note 6 ante. An offence under s 16 (as amended) is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(a). As to obtaining property by deception see PARA 310 ante; as to obtaining a money transfer by deception see PARA 311 ante; as to obtaining services by deception see PARA 313 post; as to the evasion of liability by deception see PARA 314 post; and as to making off without payment see PARA 315 post.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

6 Theft Act 1968 s 16(1); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. See also PARA 1103 post. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. A court may make a financial reporting order in respect of an offence under the Theft Act 1968 s 16 (as amended): see the Serious Organised Crime and Police Act 2005 s 76; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

7 A person who uses a cheque card and cheque book to run up an overdraft beyond the limits imposed by the bank, or to create an overdraft in the absence of a negotiated and agreed limit, is 'allowed to borrow by way of overdraft' for these purposes: *R v Waites* [1982] Crim LR 369, CA; *R v Bevan* (1986) 84 Cr App Rep 143, CA. See also *Metropolitan Police Comr v Charles* [1977] AC 177, 63 Cr App Rep 252, HL. A customer who is allowed to borrow from a bank on overdraft obtains a pecuniary advantage at the moment when the overdraft facility is granted to him without need for proof that he drew on that facility: *R v Watkins* [1976] 1 All ER 578.

8 See the Theft Act 1968 s 16(2)(b).

9 Ibid s 16(2)(c). 'Office or employment' does not mean that a person who by deception obtains the opportunity to earn remuneration under a contract for services, as opposed to a contract of service, cannot be convicted under s 16 (as amended) (see the text and notes 1-8 supra). The phrase is to be construed as a matter of ordinary language: *R v Callender* [1993] QB 303, 95 Cr App Rep 210, CA (defendant obtained accountancy work on self-employed, fee-earning basis by deception; conviction under the Theft Act 1968 s 16 (as amended) upheld because in the ordinary language of literate people he would be said to have been



'employed'). Contrast *R v McNiff* [1986] Crim LR 57, CA (obtaining by deception of the tenancy of a public house from a brewery was held not an offence under the Theft Act 1968 s 16 (as amended) because a tenancy is not an office or employment).

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **310-314 Obtaining property by deception ... Evasion of liability by deception**

Repealed: Fraud Act 2006 Sch 1 para 1(a), (b), Sch 3. See now PARA 309A.

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### 313. Obtaining services by deception.

A person who by any deception<sup>1</sup> dishonestly<sup>2</sup> obtains<sup>3</sup> services<sup>4</sup> from another is guilty of an offence<sup>5</sup> and liable on conviction on indictment to imprisonment for a term not exceeding five years, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup> or to a fine not exceeding the prescribed sum or to both<sup>7</sup>.

1 For these purposes, 'deception' has the same meaning as in the Theft Act 1968 s 15 (see PARA 310 note 1 ante): Theft Act 1978 s 5(1).

2 As to the meaning of 'dishonestly' see PARA 310 note 2 ante.

3 As to causation see PARA 310 note 3 ante.

4 The services may be obtained for the defendant or another: *R v Nathan* [1997] Crim LR 835, CA.

It is an obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for: Theft Act 1978 s 1(2). As to the proposed repeal of s 1 see PARA 309 ante. Without prejudice to the generality of s 1(2), it is an obtaining of services where the other is induced to make a loan, or to cause or permit a loan to be made, on the understanding that any payment (whether by way of interest or otherwise) will be or has been made in respect of the loan: s 1(3) (added by the Theft (Amendment) Act 1996 s 4(1)). The 'understanding' referred to in the Theft Act 1978 s 1(2), (3) (as amended) does not require an agreement, but there must be a mutual understanding that the benefit is conferred on the basis that it has been or will be paid for, or at least there must be a putative objective mutual understanding to this effect on the assumption that the inducement of the benefit was not dishonest: *R v Sofroniou* [2003] EWCA Crim 3681 at [37], [2004] QB 1218 at [37], [2004] 1 Cr App Rep 460 at [37] per May LJ. The references to payment in the Theft Act 1978 s 1(2), (3) are references to payment or payments made by or on behalf of the person obtaining the benefit to the person providing it: see *R v Sofroniou* supra at [37].

Even before the insertion of the Theft Act 1978 s 1(3), it was an obtaining of services to obtain a mortgage advance and credit facilities: *R v Graham*, *R v Kansal*, *R v Ali*, *R v Marsh* [1997] 1 Cr App Rep 302, CA; *R v Cooke* [1997] Crim LR 436, CA (overruling *R v Halai* [1983] Crim LR 624, CA). See also *R v Cummings-John* [1997] Crim LR 660, CA; *R v Naviede* [1997] Crim LR 662, CA. Obtaining professional services, commercial services or financial services is an obtaining of services within the Theft Act 1978 s 1 (as amended) (*R v Graham*, *R v Kansal*, *R v Ali*, *R v Marsh* supra); so is inducing a bank or similar organisation to open an account or to issue a credit card or operating a bank or similar account or using a credit card over a period provided that the benefit obtained is conferred on the understanding that an identifiable payment has or will be made for it by or on behalf of the person benefited by it to the person conferring the benefit (*R v Sofroniou* [2003] EWCA Crim 3681, [2004] QB 1218, [2004] 1 Cr App Rep 35). See also *R v Widdowson* (1985) 82 Cr App Rep 314, CA (obtaining goods on hire-purchase an obtaining of services).

5 Theft Act 1978 s 1(1). For the purposes of ss 1, 2 (s 1 as amended), the Theft Act 1968 s 18 (liability of company officers for offences by the company: see PARA 310 note 6 ante) applies as it applies to s 15 (see PARA 310 ante): see the Theft Act 1978 s 5(1). An offence under s 1 (as amended) is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(b). The Theft Act 1968 s 30(1) (husband and wife: see PARA 291 ante) and s 31(1) (as amended) (effect on civil proceedings: see PARA 1477 post), so far as they are applicable in relation to the Theft Act 1978, apply as they apply in relation to the Theft Act 1968: Theft Act 1978 s 5(2).

As to obtaining property by deception see PARA 310 ante; as to obtaining a money transfer by deception see PARA 311 ante; as to obtaining a pecuniary advantage by deception see PARA 312 ante; as to the evasion of liability by deception see PARA 314 post; and as to making off without payment see PARA 315 post.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post),

although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 Theft Act 1978 s 4 (amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 170). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

A court may make a financial reporting order in respect of an offence under the Theft Act 1978 s 1 (as amended): see the Serious Organised Crime and Police Act 2005 s 76; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **310-314 Obtaining property by deception ... Evasion of liability by deception**

Repealed: Fraud Act 2006 Sch 1 para 1(a), (b), Sch 3. See now PARA 309A.

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### **314. Evasion of liability by deception.**

Where a person by any deception<sup>1</sup>:

- 277 (1) dishonestly<sup>2</sup> secures<sup>3</sup> the remission<sup>4</sup> of the whole or part of any existing liability<sup>5</sup> to make a payment, whether his own liability or another's<sup>6</sup>; or
- 278 (2) with intent to make a permanent default in whole or in part on any existing liability<sup>7</sup> to make a payment, or with intent to let another do so, dishonestly induces<sup>8</sup> the creditor or any person claiming payment on behalf of the creditor to wait for payment (whether or not the due date for payment is deferred) or to forgo payment<sup>9</sup>; or
- 279 (3) dishonestly obtains<sup>10</sup> any exemption from or abatement of liability to make a payment<sup>11</sup>,

he is guilty of an offence<sup>12</sup> and liable on conviction on indictment to imprisonment for a term not exceeding five years, or on summary conviction to imprisonment for a term not exceeding six months<sup>13</sup> or to a fine not exceeding the prescribed sum or to both<sup>14</sup>.

1 For these purposes, 'deception' has the same meaning as in the Theft Act 1968 s 15 (see PARA 310 note 1 ante): Theft Act 1978 s 5(1).

2 As to the meaning of 'dishonestly' see PARA 310 note 2 ante.

3 As to causation see PARA 310 note 3 ante.

4 An agreement to accept payment by credit card involves the remission of the payer's liability to pay: *R v Jackson* [1983] Crim LR 617, CA.

5 For these purposes, 'liability' means legally enforceable liability and the Theft Act 1978 s 2(1) does not apply in relation to a liability that has not been accepted or established to pay compensation for a wrongful act or omission: s 2(2). As to the proposed repeal of s 2 see PARA 309 ante. There can be an existing liability to pay even though, as in the case of a liability under an improperly executed regulated consumer credit agreement, it can only be enforced by an order of the court: *R v Modupe* [1991] Crim LR 530, CA.

6 Theft Act 1978 s 2(1)(a).

7 The requirement of an intent to make a permanent default is unique to the offence under *ibid* s 2(1)(b) (see head (2) in the text). The provisions of s 2(1)(a)-(c) (see heads (1)-(3) in the text) thus create separate offences with substantial differences in the elements of each subsection, but these differences relate principally to the different situations in which the debtor-creditor relationship has arisen, and the features common to all three offences are: (1) the use of a deception to a creditor in relation to a liability; (2) dishonesty in the use of deception; and (3) the use of deception to gain some advantage in time or money. There may be situations in which the conduct of the debtor or his agent could fall under more than one of heads (1)-(3) in the text: *R v Holt* [1981] 2 All ER 854 at 856, 73 Cr App Rep 96 at 99, CA, per Lawson J.

8 For these purposes, a person induced to take in payment a cheque or other security for money by way of conditional satisfaction of a pre-existing liability is to be treated not as being paid but as being induced to wait for payment: Theft Act 1978 s 2(3).

9 *Ibid* s 2(1)(b).

10 For these purposes, 'obtains' includes obtaining for another or enabling another to obtain: *ibid* s 2(4).

11 Ibid s 2(1)(c). For an example of the operation of s 2(1)(c) (see head (3) in the text) see *R v Firth* (1989) 91 Cr App Rep 217, CA (the defendant, a consultant at an NHS hospital, obtained exemptions from liability for charges for services for his private patients by failing to comply with his contractual duty to notify the hospital that they were private patients; the defendant was held to have obtained by deception an exemption from a liability to make a payment). See also *R v Sibartie* [1983] Crim LR 470, CA.

12 Theft Act 1978 s 2(1). As to the liability of company officers for offences by a company see PARA 310 note 6 ante. An offence under s 2 (see the text and notes 1-11 supra) is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(b).

13 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

14 See the Theft Act 1978 s 4 (amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 170). A court may make a financial reporting order in relation to an offence under the Theft Act 1978 s 2: see the Serious Organised Crime and Police Act 2005 s 76; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to the application of the Theft Act 1968 s 30(1) (husband and wife: see PARA 291 ante), s 31(1) (as amended) (effect on civil proceedings: see PARA 1477 post) and s 34 (as amended) (interpretation) see PARA 313 note 5 ante. As to obtaining property by deception see PARA 310 ante; as to obtaining a money transfer by deception see PARA 311 ante; as to obtaining a pecuniary advantage by deception see PARA 312 ante; as to obtaining services by deception see PARA 313 ante; and as to making off without payment see PARA 315 post.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **310-314 Obtaining property by deception ... Evasion of liability by deception**

Repealed: Fraud Act 2006 Sch 1 para 1(a), (b), Sch 3. See now PARA 309A.

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### **315. Making off without payment.**

A person who, knowing that payment on the spot<sup>1</sup> for any goods supplied or services done<sup>2</sup> is required or expected from him, dishonestly makes off<sup>3</sup> without having paid as required or expected<sup>4</sup> and with intent to avoid payment<sup>5</sup> of the amount due is guilty of an offence<sup>6</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the prescribed sum or to both<sup>8</sup>.

1 For these purposes, 'payment on the spot' includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided: Theft Act 1978 s 3(2).

2 Ibid s 3(1) does not apply, however, where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable: s 3(3). See *Troughton v Metropolitan Police* [1987] Crim LR 138, DC (taxi driver broke away from route in breach of contract; defendant not liable for payment thereafter).

3 The words 'dishonestly makes off' should be applied in their natural meaning. 'Making off' involves a departure from the spot where payment is required; but if the defendant is stopped before passing that spot, he may be guilty of an attempt to commit the offence: *R v McDavitt* [1981] Crim LR 843, Crown Ct; *R v Brooks* (1983) 76 Cr App Rep 66, CA. As to the meaning of 'dishonestly' see PARA 283 ante. The Theft Act 1968 s 2 (see PARA 283 ante) does not apply to this offence: s 1(3).

4 He required or expected there and then: *R v Aziz* [1993] Crim LR 708, CA. A person does not make off without having paid as required or expected if the creditor (or his agent) has agreed that payment be postponed, even if that agreement has been procured by dishonest deception: *R v Vincent* [2001] EWCA Crim 295, [2001] 1 WLR 1172, [2001] 2 Cr App Rep 150.

5 'Intent to avoid payment' means an intent to avoid payment permanently: *R v Allen* [1985] AC 1029, 81 Cr App Rep 200, HL; and see *R v Hammond* [1982] Crim LR 611, Crown Ct.

6 Theft Act 1978 s 3(1).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 See the Theft Act 1978 ss 3(1), 4 (amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 170). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to the application of the Theft Act 1968 s 30(1) (husband and wife: see PARA 291 ante), s 31(1) (as amended) (effect on civil proceedings: see PARA 1477 post) and s 34 (as amended) (interpretation) see PARA 313 note 5 ante.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

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### 316. False accounting.

Where a person dishonestly<sup>1</sup>, with a view to gain for himself or another or with intent to cause loss<sup>2</sup> to another:

- 280 (1) destroys, defaces, conceals or falsifies<sup>3</sup> any account or any record<sup>4</sup> or document<sup>5</sup> made or required for any accounting purpose<sup>6</sup>; or
- 281 (2) in furnishing information for any purpose produces or makes use of any account, or any such record or document, which to his knowledge is or may be misleading, false or deceptive in a material particular<sup>7</sup>,

he is guilty of an offence<sup>8</sup> and liable on conviction on indictment to imprisonment for a term not exceeding seven years, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the prescribed sum or to both<sup>10</sup>.

1 As to the meaning of 'dishonestly' see PARA 310 note 2 ante. As to the circumstances in which the direction in *R v Ghosh* [1982] QB 1053, 75 Cr App Rep 154, CA, should be given see *R v Atkinson* [2003] EWCA Crim 3031, [2004] Crim LR 226.

2 For the meanings of 'gain' and 'loss' see PARA 308 note 1 ante. The offence of false accounting may be based on the intention to make a temporary gain: *R v Eden* (1971) 55 Cr App Rep 193, CA. Where, however, a document is falsified in order to postpone the enforcement of an existing obligation, obtaining the creditor's forbearance is not a 'gain' for the purposes of the Theft Act 1968 s 17: *R v Golechha*, *R v Choraria* [1989] 3 All ER 908, 90 Cr App Rep 241, CA.

It is not necessary to prove that the defendant had no legal entitlement to the property in question: *A-G's Reference (No 1 of 2001)* [2002] EWCA Crim 1768, [2002] 3 All ER 840, [2003] 1 Cr App Rep 131. Cf *Lee Cheung Wing v R* (1991) 94 Cr App Rep 355, PC (convictions for false accounting upheld because in seeking payments to which they were not entitled appellants had acted with a view to gain). Contrast the offence of blackmail: see PARA 308 note 1 ante.

3 For these purposes, a person who makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document: Theft Act 1968 s 17(2). A fraud which does not involve any entry or omission in an account or other document is not false accounting: *R v Cooke* [1986] AC 909 at 935, 83 Cr App Rep 339 at 357, HL, per Lord Mackay of Clashfern (British Rail steward intending to sell private catering supplies as if they were his employers'; such supplies would not show in the account).

4 The word 'record' should be given a wide meaning and includes a meter attached to a turnstile: *Edwards v Toombs* [1983] Crim LR 43, DC.

5 The document need not be made specifically for accounting purposes but it must be required for such purpose: *A-G's Reference (No 1 of 1980)* [1981] 1 All ER 366, 72 Cr App Rep 60, CA. If part of a document is required for an accounting purpose and part of the document is falsified, the fact that the two parts are not the same does not exonerate the person responsible for the falsification where the document constitutes one entire document: *A-G's Reference (No 1 of 1980)* supra. A form claiming entitlement to housing benefit which contains the only information used to calculate housing benefit is 'a document made or required for an accounting purpose': *Osinuga v DPP* (1998) 162 JP 120, DC (applying *A-G's Reference (No 1 of 1980)* supra). See also *R v Sundhers* [1998] Crim LR 497, CA (accounting practice held to fall outside the general experience of the jury; prosecution required to adduce evidence that insurance claim forms were documents made or required for accounting purposes). Cf *R v Manning* [1999] QB 980, [1998] 4 All ER 876, CA (jury is entitled to conclude that a document was required for an accounting purpose without specific evidence to that effect). Where there is a duty to complete one of a number of standard printed forms, one such form may be a document required for an

accounting purpose and failure to complete such a form in respect of a transaction may constitute falsification of a document for these purposes: *R v Shama* [1990] 2 All ER 602, 91 Cr App Rep 138, CA.

6 There is no need for the material particular to be directly connected with the accounting purpose of the document: *R v Mallett* [1978] 3 All ER 10, 67 Cr App Rep 239, CA.

7 See the Theft Act 1968 s 17(1)(b).

8 See *ibid* s 17(1). As to the liability of company officers for offences by a company see PARA 310 note 6 ante. An offence under s 17 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(a).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

10 Theft Act 1968 s 17(1); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **316 False accounting**

TEXT AND NOTES--Section 17 applies generally to the falsification of accounting documents for the purpose of obtaining financial gain or causing financial loss and does not require that such gain or loss should in fact result: *R v Lancaster* [2010] EWCA Crim 370, [2010] All ER (D) 31 (Mar).

NOTE 3--Although the words 'misleading, false or deceptive' are contained only in the first part of s 17(2), the subsection as a whole is concerned with documents which are or might be materially misleading: *R v Lancaster* [2010] EWCA Crim 370, [2010] All ER (D) 31 (Mar).



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### **317. Suppression etc of documents.**

A person who dishonestly<sup>1</sup>, with a view to gain for himself or another or with intent to cause loss to another<sup>2</sup>, destroys, defaces or conceals any valuable security<sup>3</sup>, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court of justice or any government department is guilty of an offence<sup>4</sup> and liable on conviction on indictment to imprisonment for a term not exceeding seven years, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the prescribed sum or to both<sup>6</sup>.

A person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another, by any deception<sup>7</sup> procures<sup>8</sup> the execution<sup>9</sup> of a valuable security<sup>10</sup> is guilty of an offence<sup>11</sup> and liable on conviction on indictment to imprisonment for a term not exceeding seven years, or on summary conviction to imprisonment for a term not exceeding six months<sup>12</sup> or to a fine not exceeding the prescribed sum or to both<sup>13</sup>.

1 As to the meaning of 'dishonestly' see PARA 310 note 2 ante.

2 For the meanings of 'gain' and 'loss' see PARA 308 note 1 ante. See also PARA 316 note 2 ante.

3 For these purposes, 'valuable security' means any document creating, transferring, surrendering or releasing any right to, in or over property, or authorising the payment of money or delivery of any property, or evidencing the creation, transfer, surrender or release of any such right, or the payment of money or delivery of any property, or the satisfaction of any obligation: Theft Act 1968 s 20(3). An irrevocable letter of credit is a valuable security within the meaning of s 20: *R v Benstead, R v Taylor* (1982) 75 Cr App Rep 276, CA.

4 See the Theft Act 1968 s 20(1).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

6 See the Theft Act 1968 s 20(1); and the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to concealment of documents in cases of serious fraud see PARA 1093 post.

7 For these purposes, 'deception' has the same meaning as in the Theft Act 1968 s 15: see s 20(3); and PARA 310 note 1 ante.

8 For these purposes, 'procures' bears the common meaning of 'causes' or 'brings about': *R v Beck* [1985] 1 All ER 571, 80 Cr App Rep 355, CA. The defendant is not required to intend to procure the execution of a valuable security; it suffices that he is reckless as to this being the consequence of his deception: *R v Aston, R v N'Wadiche* [1998] Crim LR 498, CA.

9 For the purposes of the Theft Act 1968 s 20(2) (see the text to notes 10-11 infra), the 'execution' of a valuable security contemplates acts done to or in connection with the document, and not the giving effect to the document by carrying out the instructions which it may contain, such as the delivery of goods or the payment of money: *R v Kassim* [1992] 1 AC 9, 93 Cr App Rep 391, HL.

The Theft Act 1968 s 20(2) applies also in relation to the making, acceptance, indorsement, alteration, cancellation or destruction in whole or in part of a valuable security, and in relation to the signing or sealing of any paper or other material in order that it may be made or converted into, or used or dealt with as, a valuable security, as if that were the execution of a valuable security: see s 20(2). The word 'acceptance' in s 20(2) is to

be given the meaning prescribed by the Bills of Exchange Act 1882 s 17 (ie the drawee's act of writing on the bill and signing his asset to the order of the drawer): *R v Kassim* supra. It does not merely mean 'taking into possession': see *R v Nanayakkara* [1987] 1 All ER 650, 84 Cr App Rep 125, CA.

In considering the application of the Theft Act 1968 s 20(2) and s 20(3) (see the text and notes 3, 7 supra) to a document, the court should approach the matter in three stages: (1) identifying what the document does; (2) in the light of that, asking whether the document falls within any part of the definition of valuable security as provided by s 20(3); and (3) if it does, asking (bearing in mind the wide terms of s 20(2)) whether, in the respect in which the document is a valuable security, it has been executed: *R v King* [1992] QB 20, 93 Cr App Rep 259, CA.

10 See note 2 supra. An irrevocable letter of credit is a valuable security within the Theft Act 1968 s 20(2) (see the text to notes 11-13 infra); so is a clearing house automated payment system order: *R v King* [1992] QB 20, 93 Cr App Rep 259, CA. A telegraphic transfer of a credit is not a valuable security within the Theft Act 1968 s 20(2): *R v Manjadhria* [1993] Crim LR 73, CA.

11 See the Theft Act 1968 s 20(2). An offence under s 20(2) is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(a). As to the degree of unanimity required of the jury where more than one false statement is alleged see *R v Agbim* [1979] Crim LR 171, CA.

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

13 See the Theft Act 1968 s 20(2); and the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 28. A court may make a financial reporting order in relation to an offence under the Theft Act 1968 s 20(2): see the Serious Organised Crime and Police Act 2005 s 76; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **317 Suppression etc of documents**

NOTE 7--Definition repealed: Fraud Act 2006 Sch 1 para 5, Sch 3.

TEXT AND NOTES 9-13--Theft Act 1968 s 20(2) repealed: 2006 Act Sch 1 para 1(a)(iv), Sch 3. See now PARA 309A.

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### **318. Fraudulent practices in connection with conveyancing.**

Any person disposing of property or any interest in it for money or money's worth to a purchaser, or the solicitor or agent of such a person, who with intent to defraud: (1) conceals from the purchaser any instrument or incumbrance material to the title; or (2) falsifies any pedigree upon which the title may depend in order to induce the purchaser to accept the title offered or produced, is guilty of an offence and is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both<sup>1</sup>.

A person commits an offence if in the course of proceedings relating to registration under the Land Registration Act 2002 he suppresses information with the intention of: (a) concealing a person's right or claim; or (b) substantiating a false claim<sup>2</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup> or to a fine not exceeding the statutory maximum or to both<sup>4</sup>.

A person commits an offence if he dishonestly induces another: (i) to change the register<sup>5</sup> of title or cautions register; or (ii) to authorise the making of such a change<sup>6</sup>. A person commits an offence if he intentionally or recklessly makes an unauthorised change in the register of title or cautions register<sup>7</sup>. A person guilty of such an offence<sup>8</sup> is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the statutory maximum or to both<sup>10</sup>.

1 See the Law of Property Act 1925 s 183. See also SALE OF LAND vol 42 (Reissue) PARA 149. No prosecution for such an offence may be commenced without the leave of the Attorney General; and, before leave to prosecute is granted, there must be given to the person intended to be prosecuted such notice of the application for leave to prosecute as the Attorney General may direct: s 183(4), (5). As to the effect of this limitation see PARA 1071 post. As to suppression of documents see PARA 317 ante.

2 Land Registration Act 2002 s 123(1). See also LAND REGISTRATION vol 26 (2004 Reissue) PARA 1136.

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4 See the Land Registration Act 2002 s 123(2). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5 In *ibid* s 124 (see the text and notes 6-10 *infra*), references to changing the register of title include changing a document referred to in it: s 124(4).

6 *Ibid* s 124(1). See also LAND REGISTRATION vol 26 (2004 Reissue) PARA 1137.

7 *Ibid* s 124(2).

8 *Ie* an offence under *ibid* s 124(1) or (2) (see the text and notes 5-7 *supra*).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 See the Land Registration Act 2002 s 124(3).

**UPDATE**

**309-332 Fraud**

As to the prevention of fraud see PARA 332A.

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### **319. Obtaining property by personation.**

The personation of another for the purpose of obtaining property for some other unlawful purpose, the personation of a person acting in a particular capacity and the personation of another for the purpose of practising deception are made offences under various statutes<sup>1</sup>.

<sup>1</sup> Eg the Representation of the People Act 1983 ss 60, 168(1) (as amended) (see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARAS 733, 885); the Pilotage Act 1987 s 3(8) (see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 567); and the Commissioners for Revenue and Customs Act 2005 s 30 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 926). See also the Official Secrets Act 1920 s 1 (as amended); and PARA 491 post. The common law offence of personation so far as it constituted cheating has been abolished: see the Theft Act 1968 s 32(1)(a). As to the common law offence of personation of a juror see PARA 730 post.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

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### **320. Obtaining property by false pretences etc.**

Specific acts of obtaining sums of money, benefits, grants, subsidies, licences etc or other property by knowingly or recklessly making false statements or representations are made offences under various statutes<sup>1</sup>.

<sup>1</sup> Eg the Agriculture Act 1957 s 7(3) (as amended); the Agriculture Act 1967 s 69(1) (as amended) (see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARAS 1080, 1344); the Docking and Nicking of Horses Act 1949 s 2(3), (4) (as amended) (see ANIMALS vol 2 (2008) PARA 1086); the Riding Establishments Act 1964 s 3(2) (see ANIMALS vol 2 (2008) PARA 942); the Animal Health Act 1981 s 4(1) (as amended) (see ANIMALS vol 2 (2008) PARA 1043); and the Social Security Administration Act 1992 s 112 (as amended) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 404). The constituents of the offence in each instance must be ascertained from the particular statute. In specific instances the making of false statements or provision of false information is itself an offence without there being any need to show that the statement was made or the information was provided for the purpose of obtaining any property: eg statements made in connection with betting duty (see the Betting and Gaming Duties Act 1981 s 12(2), Sch 1 para 13(3) (as amended); and LICENSING AND GAMBLING vol 68 (2008) PARA 757); false statements by a prospective immigrant in course of examination by an immigration officer (see the Immigration Act 1971 s 26(1)(c) (as amended); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 144, 208); fraudulently or negligently making incorrect tax returns (see the Taxes Management Act 1970 ss 95, 97-99 (as amended); and INCOME TAXATION vol 23(1) (Reissue) PARAS 1687, 1690); false statement in connection with applications under the Licensing Act 2003 (see s 158; and LICENSING AND GAMBLING vol 67 (2008) PARA 156); false written statements made with intent to deceive creditors of a body corporate or association (see the Theft Act 1968 s 19(1); and COMPANIES vol 14 (2009) PARA 314).

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **320 Obtaining property by false pretences etc**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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### **321. Corrupt transactions with agents.**

If:

- 282 (1) any agent<sup>1</sup> corruptly<sup>2</sup> accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration<sup>3</sup> as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's<sup>4</sup> affairs<sup>5</sup> or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business<sup>6</sup>; or
- 283 (2) any person corruptly gives, or agrees to give, or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business<sup>7</sup>; or
- 284 (3) any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal<sup>8</sup>,

such a person is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the statutory maximum or to both<sup>10</sup>.

1 For these purposes, 'agent' includes any person employed by or acting for another: Prevention of Corruption Act 1906 s 1(2). A person serving under the Crown or under any corporation or any borough, county or district council, or any board of guardians, is an agent within the meaning of the Prevention of Corruption Act 1906: s 1(3) (amended by the Local Authorities etc (Miscellaneous Provision) (No 2) Order 1974, SI 1974/595, art 3 (22), Sch 1 Pt I). In determining whether a person is a servant of the Crown, the question is not whether he is employed by the Crown or employed by any body or person; instead, the question is whether the duties he performs are performed by him on behalf of the Crown, it being necessary for the Crown to exercise its functions through some human agency: *R v Barrett* [1976] 3 All ER 895, [1976] 1 WLR 946, CA (additional superintendent registrar of births, deaths and marriages held to be a servant of the Crown even though not appointed, paid or liable to be dismissed by the Crown). A police officer serves under the Crown: *Fisher v Oldham Corpn* [1930] 2 KB 364. A person serving under a local or public authority of any description (including an authority existing in a country or territory outside the United Kingdom) is an agent within the meaning of the Prevention of Corruption Act 1906: Prevention of Corruption Act 1916 s 4(2). As from a day to be appointed this provision is amended so as also to apply to a person serving under a company which in accordance with the Local Government and Housing Act 1989 is under the control of one or more local authorities: Prevention of Corruption Act 1906 s 4(2) (prospectively amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 3). At the date at which this volume states the law no such day had been appointed. An employee who is an inspector for his employer and a convenor of shop stewards may be an agent of his employer when acting in relation to union affairs: see *Morgan v DPP* [1970] 3 All ER 1053, DC. See further *Secret Commissions and Bribery Prevention League (Incorporated) v Martin* (1913) 48 L Jo 183.

2 'Corruptly' in the Prevention of Corruption Act 1906 s 1 (as amended) does not involve an element of dishonesty; for the purposes of s 1 (as amended), 'corruptly' is to be construed as meaning deliberately offering money or other favours, with the intention that it should operate on the mind of the person to whom it was

made so as to encourage him to enter into a corrupt bargain: *R v Smith* [1960] 2 QB 423, [1960] 1 All ER 256, 44 Cr App Rep 55. See also *R v Godden-Wood* [2001] EWCA Crim 1586, [2001] Crim LR 810.

3 For these purposes, 'consideration' includes valuable consideration of any kind: Prevention of Corruption Act 1906 s 1(2). The word is used in its legal sense and connotes the existence of some kind of contract or bargain between the parties: *R v Braithwaite*, *R v Girdham* [1983] 2 All ER 87, 77 Cr App Rep 34, CA. See further PARA 530 note 3 post.

4 For these purposes, 'principal' includes an employer: Prevention of Corruption Act 1906 s 1(2).

5 'In relation to his principal's affairs' falls to be construed widely: *R v Dickinson and De Rable* (1948) 33 Cr App Rep 5 at 9, CCA; *Morgan v DPP* [1970] 3 All ER 1053, DC.

6 See the Prevention of Corruption Act 1906 s 1(1). It is not necessary to show that the recipient of the bribe did what the bribe was given to him to do: *R v Carr* [1956] 3 All ER 979n, 40 Cr App Rep 188. A bribe corruptly given may be innocently received: see *R v Millray Window Cleaning Co Ltd* [1962] Crim LR 99, CCA. A recipient who takes a gift knowing it is intended to be a bribe and intending to keep it enters into a corrupt bargain despite any mental reservation that he does not intend to carry out his side of the bargain: *R v Mills* (1978) 68 Cr App Rep 154, CA. However, if the gift is received in order to entrap the donor and the recipient does not intend to keep it, it plainly is not corrupt on the recipient's part: *R v Mills* supra. Contrast *R v Smith* [1960] 2 QB 423 at 428, 44 Cr App Rep 55 at 60-61, CCA; and see PARA 529 note 2 post.

7 See the Prevention of Corruption Act 1906 s 1(1).

8 See *ibid* s 1(1). It is an offence knowingly to give a false document to an agent with a view to deceiving his principal, even though the agent is not corrupted or intended to be corrupted or does not know that the document is false: *Sage v Eicholz* [1919] 2 KB 171. The offence under head (3) in the text applies only to documents intended to pass between a principal and a third party and does not cover documents such as trading sheets filled in by an agent for his principal, which were never intended to do so: *R v Tweedie* [1984] QB 729, 79 Cr App Rep 168, CA.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 See the Prevention of Corruption Act 1906 s 1(1) (amended by the Criminal Justice Act 1988 s 47(2)). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. For these purposes, it is immaterial if: (1) the principal's affairs or business have no connection with the United Kingdom and are conducted in a country or territory outside the United Kingdom; (2) the agent's functions have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom: Prevention of Corruption Act 1906 s 1(4) (added by the Anti-terrorism, Crime and Security Act 2001 s 108(2)). If a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and the act would, if done in the United Kingdom, constitute an offence under head (1) or head (2) supra, the act constitutes the offence concerned and proceedings for the offence may be taken in the United Kingdom: Anti-terrorism, Crime and Security Act 2001 s 109(1), (2), (3)(c). As to the meaning of 'United Kingdom' see PARA 45 note 2 ante. A national of the United Kingdom is an individual who is a British citizen, a British overseas territories citizen, a British National (Overseas) or a British overseas citizen, a person who under the British Nationality Act 1981 is a British subject, or a British protected person within the meaning of the British Nationality Act 1981: Anti-terrorism, Crime and Security Act 2001 s 109(4) (amended by the British Overseas Territories Act 2002 s 2(3)). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43; as to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 44-57; as to the status of British National (Overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 63-65; as to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 58-62; as to British subjects under the British Nationality Act 1981 see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 66-71; and as to British protected persons within the meaning of s 50(1) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 72-76.

A prosecution for an offence under the Prevention of Corruption Act 1906 may not be instituted without the consent of the Attorney General: s 2(1) (amended by the Law Officers Act 1997 s 3(2), Schedule). As to the effect of this limitation see PARA 1071 post. Every information for such an offence must be upon oath: Prevention of Corruption Act 1906 s 2(3). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As to the presumption of corruption in instances where the offence charged relates to any person employed by Her Majesty, or any government department or public body see PARA 530 ante.



A person aggrieved by a summary conviction under the Prevention of Corruption Act 1906 may appeal to the Crown Court: s 2(6) (amended by the Courts Act 1971 s 56(1), Sch 8 para 2, Table).

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **321 Corrupt transactions with agents**

NOTE 1--See Local Government and Public Involvement in Health Act 2007 ss 217(1)(a).

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### **322. Cheating the public revenue.**

It is an indictable offence at common law<sup>1</sup> for a person to practise a fraud on the public revenue<sup>2</sup>. Any such offence is punishable by fine and imprisonment at the discretion of the court<sup>3</sup>.

1 The common law offence of cheating the public revenue was preserved by the Theft Act 1968 s 32(1)(a) and remains indictable even though statutory offences could be charged on the facts: *R v Redford* (1988) 89 Cr App Rep 1, CA. See also *R v Mulligan* [1990] STC 220, CA. The common law offence of cheating is in practice reserved for serious and unusual offences rather than conventional cases; in such cases the court should not be inhibited by any statutory provisions from imposing or upholding what would otherwise be a proper sentence: *R v Mavji* [1987] 2 All ER 758, 84 Cr App Rep 34, CA. The common law offence of cheating the public revenue is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(d).

2 1 Hawk PC 322; 2 East PC 821; *R v Bembridge* (1783) 3 Doug KB 327; *R v Bradbury*, *R v Edlin* (1920) [1956] 2 QB 262n (affd on another point [1921] 1 KB 562, 15 Cr App Rep 76, CCA); *R v Hudson* [1956] 2 QB 252, 40 Cr App Rep 55, CCA. A fraud on the public revenue is indictable even though the particular fraud might not have been indictable had it been a fraud on one individual by another: *R v Bembridge* supra (as explained in *R v Hudson* supra at 260 and 60).

The offence may be committed eg by submitting to the inspector of taxes incorrect accounts and a certificate of disclosure, knowing them to be false, with intent to defraud the revenue, or eg by causing a false tax document to be delivered with such intent: see *R v Hudson* supra. The offence does not require any positive act of deception either by words or conduct, but may include any form of conduct (including an omission by the defendant to do what he was legally obliged to do) with intent to defraud the revenue which results in diverting money from the revenue and in depriving the revenue of money to which it is entitled: *R v Mavji* [1987] 2 All ER 758, 84 Cr App Rep 34, CA (conviction for cheating public revenue upheld where defendant had fraudulently failed to make VAT returns and to pay VAT due); applied in *R v Redford* (1988) 89 Cr App Rep 1, CA. The offence of cheating the public revenue is a 'conduct offence'; consequently the prosecution does not have to prove that the defendant caused actual loss: *R v Hunt* [1994] Crim LR 747, CA.

3 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/4. OFFENCES AGAINST PROPERTY/(5) FRAUD/323. Winning money etc by fraud at gaming.

### 323. Winning money etc by fraud at gaming.

A person who, by any fraud or unlawful device or ill practice<sup>1</sup>, wins from any other person to himself, or to any other or others, any sum of money or valuable thing<sup>2</sup>: (1) in playing at or with cards, dice, tables<sup>3</sup>, or other game; or (2) in bearing a part in the stakes, wagers, or adventures; or (3) in betting on the sides or hands of those who play; or (4) in wagering<sup>4</sup> on the event of any game, sport, pastime or other exercise<sup>5</sup>, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup> or to a fine not exceeding the prescribed sum or to both<sup>7</sup>.

1 Whether a particular incident in a game is a fraud, unlawful device or ill practice is a question of fact for the jury: *R v Moore* (1914) 10 Cr App Rep 54, CCA. The playing of the 'three card trick' is sleight of hand and does not amount to fraud, unlawful device or ill practice: *R v Governor of Brixton Prison, ex p Sjoland and Metzler* [1912] 3 KB 568, 77 JP 23, DC.

2 Where the victim of a card trick wrote his acceptance for the amount he had lost on a blank bill form provided by one of two confederates, and the bill was subsequently signed by that confederate as drawer, and indorsed by him and the other confederate, there was evidence on which the second confederate could be convicted of winning money in contravention of the Gaming Act 1845 s 17 (as amended): see *R v Governor of Brixton Prison, ex p Stallmann* [1912] 3 KB 424, DC. It is an essential ingredient of the offence that the money won should be obtained: *R v Harris, R v Turner* [1963] 2 QB 442, 47 Cr App Rep 125, CCA.

3 'Tables' was formerly the ordinary name for backgammon: see the Oxford English Dictionary (2nd Edn, 1989) vol XVII.

4 To place bets with a bookmaker intending to accept winnings but not to pay losses is fraudulent wagering within the Gaming Act 1845 s 17 (as amended): *R v Leon* [1945] KB 136, 30 Cr App Rep 120, CCA; *R v Lucas, R v O'Rourke* [1959] 1 All ER 438, 43 Cr App Rep 98, CCA. Attempting to get money on forged football pool coupons is attempting to win money by a fraud in wagering: see *R v Butler* (1954) 38 Cr App Rep 57, CCA (although the point that a transaction with a football pool might not be a wager was not taken).

5 Tossing with coins is a 'pastime' or 'exercise' if not a 'game': *R v O'Connor and Brown* (1881) 15 Cox CC 3, CCR. A bet over a sleight of hand or other trick does not fall within 'game, sport, pastime or other exercise': *R v Hudson* (1860) Bell CC 263, CCR. If several persons join together to defraud some other person, as by inducing that person by fraud to play in a game or by any other act which if done by one person is not within the mischief aimed at by the Gaming Act 1845, an indictment lies against the confederates for conspiracy to defraud: *R v Bailey* (1850) 4 Cox CC 390; and see also *R v Hudson* supra.

There must be some fraud or unlawful device or ill practice in the game, sport, pastime or exercise itself; it is not sufficient if fraud is resorted to in order to induce the prosecutor to play in the game: *R v Bailey* (1850) 4 Cox CC 390; *R v Governor of Brixton Prison, ex p Sjoland and Metzler* [1912] 3 KB 568, DC; *R v Moore* (1914) 10 Cr App Rep 54, CCA.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 Gaming Act 1845 s 17 (amended by the Theft Act 1968 s 33(2), Sch 2 Pt III; and the Magistrates' Courts Act 1980 s 32(2)). See also LICENSING AND GAMBLING vol 67 (2008) PARA 327. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

As from a day to be appointed the Gaming Act 1845 s 17 (as amended) is repealed and replaced by the Gambling Act 2005 s 42 (see PARA 324 post): ss 42, 356, Sch 17 (not yet in force). At the date at which this volume states the law no such day had been appointed.

It is not necessary to state in the indictment to whom the sum of money or valuable thing belongs (*R v Moss* (1856) Dears & B 104 at 108, CCR, per Pollock CB), but it would appear to be necessary for the indictment to contain an allegation to defraud a particular person. However, it does not seem necessary to state the name of the game.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **323 Winning money etc by fraud at gaming**

NOTE 7--Day now appointed: SI 2006/3272.

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### **324. Cheating.**

As from a day to be appointed<sup>1</sup>, a person commits an offence if he cheats<sup>2</sup> at gambling, or does anything for the purpose of enabling or assisting another person to cheat at gambling<sup>3</sup>. It is immaterial whether a person who cheats improves his chances of winning anything, or wins anything<sup>4</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding 51 weeks or to a fine not exceeding the statutory maximum or to both<sup>5</sup>.

1 The Gambling Act 2005 s 42 is to be brought into force by order made by the Secretary of State as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

2 Without prejudice to the generality of *ibid* s 42(1) cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with: (1) the process by which gambling is conducted; or (2) a real or virtual game, race or other event or process to which gambling relates: s 42(3). See note 1 *supra*.

3 *Ibid* s 42(1). See note 1 *supra*. See also LICENSING AND GAMBLING vol 68 (2008) PARA 618.

4 *Ibid* s 42(2). See note 1 *supra*.

5 *Ibid* s 42(4). See note 1 *supra*. As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **324 Cheating**

TEXT AND NOTE 1--Day now appointed: SI 2006/3272.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/4. OFFENCES AGAINST PROPERTY/(5) FRAUD/325. Fraudulent mediums.

### **325. Fraudulent mediums.**

Any person who: (1) with intent to deceive purports to act as a spiritualistic medium or to exercise any powers of telepathy, clairvoyance or other similar powers; or (2) in purporting to act as a spiritualistic medium or to exercise such powers, uses any fraudulent device, is guilty of an offence<sup>1</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding four months<sup>2</sup> or to a fine not exceeding the statutory maximum or to both<sup>3</sup>.

1 Fraudulent Mediums Act 1951 s 1(1). A person may not be convicted of an offence under this provision unless it is proved that he acted for reward; and for these purposes, a person is deemed to act for reward if any money is paid, or other valuable thing given, in respect of what he does, whether to him or to any other person: s 1(2). Nothing in s 1(1) applies, however, to anything done solely for the purpose of entertainment: s 1(5). No proceedings for such an offence may be brought except by or with the consent of the Director of Public Prosecutions: s 1(4). As to the effect of this limitation see PARA 1071 post.

2 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

3 Fraudulent Mediums Act 1951 s 1(3) (amended by the Criminal Law Act 1977 s 32(1); and the Magistrates' Courts Act 1980 s 32(2)). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **325 Fraudulent mediums**

TEXT AND NOTES--Fraudulent Mediums Act 1951 repealed: SI 2008/1277.

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### **326. Dishonestly obtaining electronic communications services.**

A person who: (1) dishonestly obtains an electronic communications service<sup>1</sup>; and (2) does so with intent to avoid payment of a charge applicable to the provision of that service, is guilty of an offence<sup>2</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup> or to a fine not exceeding the statutory maximum or to both<sup>4</sup>.

1    I.e. a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service: see the Communications Act 2003 ss 32(2), 405(1). For these purposes, a 'content service' means so much of any service as consists in one or both of the following: (1) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network; (2) the exercise of editorial control over the contents of signals conveyed by means of such a network: s 32(7). As to electronic communications services and electronic communications networks see TELECOMMUNICATIONS vol 97 (2010) PARA 60.

2    Ibid s 125(1). See also TELECOMMUNICATIONS vol 97 (2010) PARA 202. It is not an offence under this provision to obtain a service mentioned in the Copyright, Designs and Patents Act 1988 s 297(1) (as amended) (dishonestly obtaining a broadcasting or cable programme service provided from a place in the United Kingdom: see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARA 491): Communications Act 2003 s 125(2) (amended by the Copyright and Related Rights Regulations 2003, SI 2003/2498, reg 2, Sch 2).

3    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4    Communications Act 2003 s 125(3).

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/4. OFFENCES AGAINST PROPERTY/(5) FRAUD/327. Possession or supply of apparatus etc for dishonestly obtaining electronic communications services.

### **327. Possession or supply of apparatus etc for dishonestly obtaining electronic communications services.**

A person is guilty of an offence if, with an intention<sup>1</sup>:

- 285 (1) to use the thing to obtain an electronic communications service dishonestly<sup>2</sup>;
- 286 (2) to use the thing for a purpose connected with the dishonest obtaining of such a service<sup>3</sup>;
- 287 (3) dishonestly to allow the thing to be used to obtain such a service<sup>4</sup>; or
- 288 (4) to allow the thing to be used for a purpose connected with the dishonest obtaining of such a service<sup>5</sup>,

he has in his possession or under his control anything that may be used<sup>6</sup>: (a) for obtaining an electronic communications service<sup>7</sup>; or (b) in connection with obtaining such a service<sup>8</sup>.

A person is guilty of an offence if: (i) he supplies or offers to supply anything which may be so used<sup>9</sup>; and (ii) he knows or believes that the intentions in relation to that thing of the person to whom it is supplied or offered fall within heads (1) to (4) above<sup>10</sup>.

A person guilty of such an offence<sup>11</sup> is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>12</sup> or to a fine not exceeding the statutory maximum or to both<sup>13</sup>.

1 An intention does not fall within the Communications Act 2003 s 126(3) (see the text and notes 2-5 infra) if it relates exclusively to the obtaining of a service mentioned in the Copyright, Designs and Patents Act 1988 s 297(1) (as amended) (see PARA 326 note 2 ante): Communications Act 2003 s 126(4).

2 Ibid s 126(3)(a).

3 Ibid s 126(3)(b).

4 Ibid s 126(3)(c).

5 Ibid s 126(3)(d).

6 In ibid s 126, references, in the case of a thing used for recording data, to the use of that thing include references to the use of data recorded by it: s 126(6).

7 For the meaning of 'electronic communications service' see PARA 326 note 1 ante.

8 Communications Act 2003 s 126(1). See also TELECOMMUNICATIONS vol 97 (2010) PARA 202.

9 See note 6 supra.

10 Communications Act 2003 s 126(2).

11 I.e. an offence under ibid s 126(1) or (2): see the text and notes 1-10 supra.

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post),



although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

13 Communications Act 2003 s 126(5). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

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### **328. Making false statement to procure passport.**

A person who, for the purpose of procuring a passport, whether for himself or any other person, makes a statement which is to his knowledge untrue is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>1</sup> or to a fine not exceeding the prescribed sum or to both<sup>2</sup>.

1 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

2 See the Criminal Justice Act 1925 s 36(1) (amended by the Criminal Law Act 1977 s 32(1); and the Forgery and Counterfeiting Act 1981 s 30, Schedule Pt I); the Criminal Law Act 1967 s 1(1); and the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 19. See also PARA 1103 post. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 141. As to having custody or control of a false passport see PARA 351 post. Offences involving passports have the potential to undermine the immigration control system; a custodial sentence is appropriate even for a first offence: *R v Walker* [1999] 1 Cr App Rep (S) 42, CA.

Where, as a result of making a false statement, a passport is in fact obtained and subsequently used, the appropriate charge may be one of obtaining property by deception contrary to the Theft Act 1968 s 15(1) (see PARA 310 ante) or of a conspiracy to commit it: *R v Ashbee* [1989] 1 WLR 109, 88 Cr App Rep 357, CA. If such a charge is brought, the sentence is not limited to the maximum available under the Criminal Justice Act 1925 s 36(1) (as amended): *R v Ashbee* supra.

Where an attempt has been made to obtain a passport by deception but no passport has been obtained, a defendant may be charged under the Criminal Justice Act 1925 s 36(1) (as amended) or under the Criminal Attempts Act 1981 s 1(1) (see PARA 79 ante), but it is more appropriate to prefer a charge under the Criminal Justice Act 1925 s 36(1) (as amended) where no passport has been obtained: *R v Bunche* (1992) 96 Cr App Rep 274, CA.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

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### **329. Bankruptcy offences.**

Where the court has made a bankruptcy order<sup>1</sup> on a bankruptcy petition<sup>2</sup>, and whether or not the bankruptcy order is annulled<sup>3</sup>, a bankrupt may be liable under the Insolvency Act 1986 for specified offences<sup>4</sup> in respect of his wrongdoing before and after his bankruptcy, as may a person dealing fraudulently with a bankrupt<sup>5</sup>.

Proceedings for any such offence may not, however, be instituted after annulment<sup>6</sup>; nor may they be instituted except by the Secretary of State or by or with the consent of the Director of Public Prosecutions<sup>7</sup>.

1 As to bankruptcy orders see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 84, 195 et seq.

2 As to bankruptcy petitions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 124 et seq.

3 As to annulment of bankruptcy orders see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 610 et seq.

4 Ie under the Insolvency Act 1986 ss 353-360 (ss 354, 355, 360 as amended): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 708-721. As to the general provisions in respect of such offences see ss 350-352 (s 350, 351 as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 708 et seq.

5 Ie under ibid s 359(2): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 720, 842.

6 Ibid s 350(2).

7 Ibid s 350(5). As to the effect of this limitation see PARA 1071 post.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/4. OFFENCES AGAINST PROPERTY/(5) FRAUD/330. Offences in respect of corporate insolvency.

### **330. Offences in respect of corporate insolvency.**

When a company is being wound up, whether by the court or voluntarily, any person, being a past or present officer of the company may be liable under the Insolvency Act 1986 in respect of offences committed in anticipation of winding up<sup>1</sup>, for misconduct in the course of winding up<sup>2</sup>, for transactions in fraud of creditors<sup>3</sup>, for material omissions from the statement relating to a company's affairs<sup>4</sup> or for false representations to creditors<sup>5</sup>. Any officer or contributory may be liable under the Act for falsification of the company's books etc<sup>6</sup>.

Whether or not a company has been, or is in the course of being, wound up, if any business of a company is carried on with intent to defraud creditors of the company, every person who was knowingly a party to the carrying on of the business in that manner is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>.

Where it is proposed to wind up a company voluntarily and a director makes a declaration of solvency without having reasonable grounds for the opinion that the company will be able to pay its debts in full, together with interest at the official rate, within such period, not exceeding 12 months from the commencement of the winding up, as may be specified in the declaration, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the statutory maximum or to both<sup>10</sup>.

1    Ie under the Insolvency Act 1986 s 206 (as amended): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 905.

2    Ie under ibid s 208: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 906.

3    Ie under ibid s 207: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 908.

4    Ie under ibid s 210: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 909.

5    Ie under ibid s 211: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 910.

6    See ibid s 209; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 907.

7    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8    See the Companies Act 1985 ss 458, 730, Sch 24. As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

9    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10   See the Insolvency Act 1986 ss 89(1), (4), 430, Sch 10.

### **UPDATE**

**309-332 Fraud**

As to the prevention of fraud see PARA 332A.

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### **331. Insider dealing.**

Subject to various defences<sup>1</sup> an individual who has information as an insider<sup>2</sup> is guilty of insider dealing if, in specified circumstances<sup>3</sup>, he deals in<sup>4</sup> securities<sup>5</sup> that are price-affected securities in relation to the information<sup>6</sup>.

Subject to various defences, an individual who has information as an insider is also guilty of insider dealing if:

- 289 (1) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in specified circumstances<sup>7</sup>; or
- 290 (2) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person<sup>8</sup>.

An individual guilty of an offence of insider dealing is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the statutory maximum or to both<sup>10</sup>.

Proceedings for any such offence may not be instituted in England and Wales except by or with the consent of the Secretary of State or of the Director of Public Prosecutions<sup>11</sup>.

1 The Criminal Justice Act 1993 s 52 (see the text and notes 2-8 infra) has effect subject to the defences specified in s 53 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq): see s 52(4).; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq.

2 For the meaning of 'insider' see ibid s 57; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq.

3 If the acquisition or disposal in question occurs on a regulated market, or the person dealing relies on a professional intermediary or is himself acting as a professional intermediary: see ibid s 52(3); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq. For the meaning of 'professional intermediary' see s 59; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq. For the meaning of 'regulated market' see s 60(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq.

4 For the meaning of 'deals in' see ibid s 55; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq.

5 Ibid Pt V (ss 52-64) (as amended) applies to any security which falls within any paragraph of Sch 2 and satisfies any conditions applying to it under an order made by the Treasury: s 54. See FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq.

6 Ibid s 52(1). Section 52 does not apply to anything done by an individual acting on behalf of a public sector body in pursuit of monetary policies or policies with respect to exchange rates or the management of public debt or foreign exchange reserves: see s 63(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq.

7 See ibid s 52(2)(a); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq.

8 See ibid s 52(2)(b); and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574A et seq.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 Criminal Justice Act 1993 s 61(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

11 See *ibid* s 61(2). As to the effect of this limitation see PARA 1071 post.

## **UPDATE**

### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

### **331 Insider dealing**

NOTE 11--As to summary proceedings for an offence of insider dealing, see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 574N.

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### **332. Offences under the Financial Services and Markets Act 2000.**

A person who: (1) makes a statement misleading in a material particular or engages in a misleading practice<sup>1</sup>; or (2) gives an auditor or actuary appointed under or as a result of the Financial Services and Markets Act 2000 with information which is false or misleading in a material particular<sup>2</sup>; or (3) makes a statement false or misleading in a material particular in purported compliance with any requirement imposed by or under the Financial Services and Markets Act 2000<sup>3</sup>, may be guilty of an offence under the Act<sup>4</sup>.

1    Ie contrary to the Financial Services and Markets Act 2000 s 397 (as amended): see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 568.

2    Ie contrary to ibid s 346: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 768.

3    Ie contrary to ibid s 398: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 569.

4    As to the Financial Services and Markets Act 2000 generally see FINANCIAL SERVICES AND INSTITUTIONS.

#### **UPDATE**

#### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.



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### **332A. Prevention of fraud: sharing information with anti-fraud organisations.**

#### **1. Disclosure of information to prevent fraud**

A public authority may, for the purposes of preventing fraud or a particular kind of fraud, disclose information as a member of a specified anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation: Serious Crime Act 2007 s 68(1). 'Public authority' means any public authority within the meaning of the Human Rights Act 1998 s 6 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 104A.3); 'information' includes documents; 'specified' means specified by an order made by the Secretary of State; and 'an anti-fraud organisation' means any unincorporated association, body corporate or other person which enables or facilitates any sharing of information to prevent fraud or a particular kind of fraud or which has any of these functions as its purpose or one of its purposes: Serious Crime Act 2007 s 68(8). See the Serious Crime Act 2007 (Specified Anti-fraud Organisations) Order 2008, SI 2008/2353, which specifies anti-fraud organisations pursuant to the Serious Crime Act 2007 s 68(8). The information (1) may be information of any kind; and (2) may be disclosed to the specified anti-fraud organisation, any members of it or any other person to whom disclosure is permitted by the arrangements concerned: Serious Crime Act 2007 s 68(2). Disclosure under s 68 does not breach (a) any obligation of confidence owed by the public authority disclosing the information; or (b) any other restriction on the disclosure of information (however imposed) (s 68(3)), but nothing in s 68 authorises any disclosure of information which (i) contravenes the Data Protection Act 1998 (see CONFIDENCE AND DATA PROTECTION); or (ii) is prohibited by the Regulation of Investigatory Powers Act 2000 Pt 1 (ss 1-25) (see PARA 506 et seq) (Serious Crime Act 2007 s 68(4)). Section 68 does not limit the circumstances in which information may be disclosed apart from s 68: s 68(7).

#### **2. Offence for certain further disclosures of information**

A person ('B') commits an offence, subject as follows, if (1) B discloses protected information which has been disclosed by a public authority (a) as a result of the public authority being a member of a specified anti-fraud organisation; or (b) otherwise in accordance with any arrangements made by such an organisation; (2) the information (i) has been so disclosed by the public authority to B; or (ii) has come into B's possession as a result (whether directly or indirectly) of such a disclosure by the public authority to another person; and (3) B knows or suspects, or has reasonable grounds for suspecting, that the information is information of the kind mentioned in heads (1) and (2) above: Serious Crime Act 2007 s 69(1). In s 69 'protected information' means any revenue and customs information disclosed by Revenue and Customs and revealing the identity of the person to whom it relates; or any specified information disclosed by a specified public authority: s 69(5). As to 'revenue and customs information' see s 69(6). For the meaning of 'revenue and customs', 'specified information' and 'specified public authority' see s 69(7). 'Public authority' has the same meaning as in s 68 (see PARA 332A.1); and 'specified anti-fraud organisation' means any person which is a specified anti-fraud organisation for the purposes of s 68: s 69(7). Section 69(1) does not apply to a disclosure made by B (A) where B is acting (whether as an employee or otherwise) on behalf of the person to whom the information was disclosed by the public authority concerned and the disclosure by

B is to another person acting (whether as an employee or otherwise) on behalf of that person; (B) for the purposes of the detection, investigation or prosecution of an offence in the United Kingdom; (C) with the consent of the public authority concerned; or (D) in pursuance of a Community obligation or a duty imposed by an enactment; but it does apply to a disclosure made by B which does not fall within heads (A)-(D) but which (but for the offence) would have been permitted by a power conferred by an enactment: s 69(2). For the meaning of 'enactment' see s 69(7). It is a defence for a person charged with an offence under s 69 to prove that the person reasonably believed that the disclosure was lawful; or that the information had already and lawfully been made available to the public: s 69(4).

A person who commits an offence under s 69 is liable on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both; on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: Serious Crime Act 2007 s 70(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. For further provision relating to the prosecution of the above offence see s 70(2)-(6).

### **3. Code of practice for disclosure of information to prevent fraud**

The Secretary of State must prepare, and keep under review, a code of practice with respect to the disclosure, for the purposes of preventing fraud or a particular kind of fraud, of information by public authorities as members of specified anti-fraud organisations or otherwise in accordance with any arrangements made by such organisations: Serious Crime Act 2007 s 71(1). 'Information' and 'public authority' have the same meaning as in s 68 (see PARA 332A.1); and 'specified anti-fraud organisation' means any person which is a specified anti-fraud organisation for the purposes of s 68: s 71(6). Before preparing or altering the code, the Secretary of State must consult (1) any specified anti-fraud organisation; (2) the Information Commissioner; and (3) such other persons as the Secretary of State considers appropriate: s 71(2). A public authority must have regard to the code in (or in connection with) disclosing information, for the purposes of preventing fraud or a particular kind of fraud, as a member of a specified anti-fraud organisation or otherwise in accordance with any arrangements made by such an organisation: s 71(3). The Secretary of State must (a) lay a copy of the code, and of any alterations to it, before Parliament; and (b) from time to time publish the code as for the time being in force: s 71(5).

#### **UPDATE**

#### **309-332 Fraud**

As to the prevention of fraud see PARA 332A.

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## **(6) CRIMINAL DAMAGE TO PROPERTY**

### **(i) Introduction**

#### **333. Introduction.**

The Criminal Damage Act 1971 repealed and replaced various statutes relating to damage to property, in particular most of the provisions of the Malicious Damage Act 1861<sup>1</sup>. Where it appears to the Secretary of State that a local statutory provision<sup>2</sup> is inconsistent with or has become unnecessary in consequence of the Criminal Damage Act 1971, he may, after consultation with any person appearing to him to be concerned with that provision, by order<sup>3</sup> amend that provision so as to bring it into conformity with the Act or repeal it<sup>4</sup>.

The Crime and Disorder Act 1998 has introduced an offence of racially or religiously aggravated criminal damage<sup>5</sup>.

1 Where any enactment repealed by the Criminal Damage Act 1971 s 11(8), Schedule has been applied by or incorporated in any other Act, the repeal extends so as to repeal that enactment as so applied or incorporated: s 11(8). The repeal by s 11, or an order made under it (see the text to notes 2-4 infra), of any enactment relating to procedure or to the jurisdictional powers of any court does not affect the operation of that enactment in relation to offences committed before the repeal took effect or to proceedings for any such offence: s 11(11).

Certain provisions of the Malicious Damage Act 1861 were expressly saved: see the Criminal Damage Act 1971 s 11(8), Schedule. Those provisions were: the Malicious Damage Act 1861 ss 35, 36 (s 35 as amended) (injuries to railway carriages etc: see PARA 344 post); s 47 (subsequently repealed by the Merchant Shipping (Registration) Act 1993 s 8(4), Sch 5); the Malicious Damage Act 1861 s 48 (subsequently repealed by the Merchant Shipping (Registration) Act 1993 Sch 5); the Malicious Damage Act 1861 s 58 (malice against owner of property unnecessary: see PARA 344 note 1 post); and s 72 (as amended) (offences committed within the jurisdiction of the Admiralty: see PARA 1057 note 5 post).

In addition to the repeal of many statutory offences, the common law offence of arson was abolished: see the Criminal Damage Act 1971 s 11(1); and PARA 334 post.

2 For these purposes, 'local statutory provision' means a provision of a local Act, including an Act confirming a provisional order, or a provision of a public general Act passed with respect only to a particular area or a particular undertaking or a provision of an instrument made under any such local or public general Act or of an instrument in the nature of a local enactment made under any other Act: see *ibid* s 11(9).

3 An order so made must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: *ibid* s 11(10). Such orders are local in nature and are not recorded in this work. As to the effect of a repeal made by order see note 1 *supra*.

4 See *ibid* s 11(9).

5 As to this offence see PARA 335 post.

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## (ii) Destroying or Damaging Property Belonging to Another

### 334. Destroying or damaging property.

A person who without lawful excuse<sup>1</sup> destroys<sup>2</sup> or damages<sup>3</sup> any property<sup>4</sup> belonging to another<sup>5</sup> intending to destroy or damage any such property or being reckless<sup>6</sup> as to whether any such property would be destroyed or damaged is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction<sup>7</sup> to imprisonment for a term not exceeding six months<sup>8</sup> or to a fine not exceeding the prescribed sum or to both<sup>9</sup>.

An offence committed by destroying or damaging property belonging to another by fire<sup>10</sup> must be charged<sup>11</sup> as arson<sup>12</sup>. A person guilty of arson<sup>13</sup> is liable on conviction on indictment to imprisonment for life or for any shorter term, or on summary conviction to imprisonment for a term not exceeding six months<sup>14</sup> or a fine not exceeding the prescribed sum, or to both<sup>15</sup>.

1 For the meaning of 'lawful excuse' see PARA 341 post.

2 'Destroy' should be given its ordinary and natural meaning: see *Barnet London Borough Council v Eastern Electricity Board* [1973] 2 All ER 319, [1973] 1 WLR 430, DC (decided under the Town and Country Planning Act 1962 s 29(1)(a) (repealed)).

3 Property may be damaged if it suffers permanent or temporary physical harm or permanent or temporary impairment of its use or value: *Morphitis v Salmon* [1990] Crim LR 48, DC; *R v Whiteley* (1991) 93 Cr App Rep 25, CA. If part of a machine is removed, without which it cannot work, the machine (but not the part) may be damaged because its use is impaired (*R v Tacey* (1821) Russ & Ry 452; *R v Fisher* (1865) LR 1 CCR 7, 35 LJMC 57, CCR; *Getty v Antrim County Council* [1950] NI 114); likewise if the horizontal bars of scaffolding are removed from the vertical parts, the scaffolding (but not the parts removed) may be damaged (*Morphitis v Salmon* supra). On the other hand, simply to deprive someone of the use of property, for example, by wheel-clamping his car, does not amount to damage (*Stear v Scott* [1992] RTR 226n, DC; *Lloyd v DPP* [1992] 1 All ER 982, DC; *Drake v DPP* [1994] Crim LR 855, DC), apparently because there is no intrusion into the integrity of the property (*Drake v DPP* supra). A wall may be damaged if slogans are painted on it, as may milk if water is poured into it, because its value is impaired: *Roper v Knott* [1898] 1 QB 868, 67 LJQB 574, DC. Grass may be damaged by trampling on it (*Gayford v Chouler* [1898] 1 QB 316, 67 LJQB 404, DC), and land may be damaged by tipping loads of rubbish on it (*R v Henderson*, *R v Battley* (1984) unreported, CA); such conduct impairs the utility and value of the grass or land (in the latter case the cost of removing the rubbish reduces its present value) (*R v Henderson*, *R v Battley* supra).

The test of physical harm or impairment of the property's use or value does not conclude the matter since, if the harm or impairment is minimal, it is likely to be found that there is no damage for the purposes of the Act. Since it is not necessary that the effect of what has been done should be permanent, the fact that it is rectifiable does not prevent the property being damaged. However, where it is rectifiable the amount (and any cost) of rectification are relevant factors in determining whether there is damage (see *Cox v Riley* (1986) 83 Cr App Rep 54, DC); if these are minimal it may be found that what has occurred is not damage. The Divisional Court has held that graffiti smeared in mud could be damage, even though it could be washed off: *Roe v Kingerlee* [1986] Crim LR 735, DC. Contrast *A (A Juvenile) v R* [1978] Crim LR 689, Crown Ct (held on appeal, acquitting the defendant, that spitting on policeman's raincoat was not damage on the facts before the court). Whether what is done to property amounts to damage under the above principles is a question of fact for the jury or magistrates: *Roe v Kingerlee* supra; *R v Henderson*, *R v Battley* supra; *Cox v Riley* supra.

Any alteration or erasure of, or addition to, a program or data held in a computer, which is made by the operation of any function of a computer, is not to be regarded as damaging any computer or computer storage medium (such as a hard disc) unless its effect on that computer or medium impairs its physical condition: Computer Misuse Act 1990 s 3(6).

4 For the meaning of 'property' see PARA 339 post.

5 For the meaning of 'belonging to another' see PARA 340 post. No offence is committed under the Criminal Damage Act 1971 s 1(1) (see the text to note 9 infra), however, if the defendant honestly, albeit mistakenly, believes that the property is his own; the existence of that belief negatives the necessary mens rea; whether or not that belief is reasonable is irrelevant: *R v Smith* [1974] QB 354, 58 Cr App Rep 320, CA. Likewise, no offence is committed where the defendant, before he inflicts damage, has asserted custody and control over the property: *R v Judge* (1974) 138 JP 649, CA.

6 A person acts recklessly within the meaning of the Criminal Damage Act 1971 s 1 with respect to:

43 (1) a circumstance when he is aware of a risk that it existed or would exist;

44 (2) a result when he is aware of a risk that it would occur,

if it is, in the circumstances known to him, unreasonable to take the risk: *R v G, R v R* [2003] UKHL 50, [2004] 1 AC 1034, [2004] 1 Cr App Rep 237. Awareness of a risk of damage to property need not be the only or foremost risk in the defendant's mind when he takes the risk: *Booth v Crown Prosecution Service* [2006] EWHC 192 (Admin), [2006] All ER (D) 225 (Jan) (car damaged by defendant running on to road the result of defendant's recklessness). Intentional or reckless omission of the defendant to act to rectify an unintentional act or its consequences may amount to an intentional or reckless act: *R v Miller* [1983] 2 AC 161, 77 Cr App Rep 17, HL (failure to extinguish a fire started accidentally). As to omissions see PARA 6 ante.

7 As to the procedure where offences triable either way are to be tried summarily if the amount is small see PARA 1114 post; and as to the power to join in an indictment a count for an offence mentioned in the Magistrates' Courts Act 1980 Sch 2 column 1 (see PARA 1114 note 2 post) see PARA 1211 post.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see *ibid* s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

9 Criminal Damage Act 1971 ss 1(1), 4(2); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 29. See also PARA 1103 post. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. An offence committed under the Criminal Damage Act 1971 s 1 is a penalty offence for the purposes of the Criminal Justice and Police Act 2001 Pt 1 Ch 1 (ss 1-11) (as amended): see s 1 (as amended); and PARA 586 post. As to the offence committed by a person who at the time of committing or being arrested for an offence under the Criminal Damage Act 1971 s 1 has in his possession a firearm or imitation firearm see PARA 677 ante; and as to evidence in proceedings for an offence under the Criminal Damage Act 1971 see PARA 1478 post. As to the offence of causing or acting with intent to cause an explosion likely to endanger life or cause serious injury to property see the Explosive Substances Act 1883 ss 2, 3 (both as substituted; s 3 as amended); and PARAS 127-128 ante. An offence under the Criminal Damage Act 1971 s 1 is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents: see PARA 474 post). For the extended scope of an offence under the Criminal Damage Act 1971 s 1 in connection with acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583. An offence under the Criminal Damage Act 1971 may constitute an 'act of violence' to which the Aviation Security Act 1982 applies: see AIR LAW vol 2 (2008) PARA 331 et seq.

10 Actual damage by fire must be established but the damage need only be slight: *R v Parker* (1839) 9 C & P 45 (charring of floor sufficient to constitute arson); *R v Russell* (1842) Car & M 541 (scorching of floorboards but no part of the wood consumed by fire; insufficient for arson). Failure to extinguish a fire started accidentally may be arson: *R v Miller* [1983] 2 AC 161, 77 Cr App Rep 17, HL.

11 Ie notwithstanding that the common law offence of arson has been abolished: see the Criminal Damage Act 1971 s 1(1). The Criminal Damage Act 1971 creates two separate offences of destroying or damaging property belonging to another: simple criminal damage (see s 1(1)) and arson (see s 1(1), (3)): *R v Roberts, R v Taylor, R v Chapman, R v Daly* [1998] 1 Cr App Rep 441, 162 JP 169, CA; *R v Booth* [1999] Crim LR 144, CA.

12 Criminal Damage Act 1971 s 1(3). This provision means that destruction or damage by fire must be charged as arson, and not simply as 'criminal damage contrary to s 1(1) plus (3)': *R v Booth* [1999] Crim LR 144, CA. However, 'damage by fire' and 'arson' are synonymous for this purpose; the aim of the Criminal Damage Act 1971 s 1(3) is that the defendant should know that he is facing an allegation of damage by fire: *R v Drayton* [2005] EWCA Crim 2013, [2006] Crim LR 243, CA. Although it is not essential, it is good practice when charging a person with causing criminal damage by fire to use the word 'arson', partly to avoid any possible doubts and partly to ensure that it appeared on the record as arson: *R v Drayton* supra.

13 lie under the Criminal Damage Act 1971 s 1(1) and (3) (see the text and notes 1-12 supra).

14 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

15 Criminal Damage Act 1971 s 4(1); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 29. See also PARA 1103 post. The provision whereby the offence must be tried summarily if the amount is small, does not apply where the destruction or damage is by fire: see note 7 supra; and PARA 1103 post.

## **UPDATE**

### **334 Destroying or damaging property**

NOTE 3--Computer Misuse Act 1990 s 3 substituted: see PARA 360. For the purposes of the Criminal Damage Act 1971 a modification of the contents of a computer is not to be regarded as damaging any computer or computer storage medium unless its effect on that computer or computer storage medium impairs its physical condition: s 10(5) (added by the Police and Justice Act 2006 Sch 14 para 2).

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### **335. Racially or religiously aggravated criminal damage.**

A person is guilty of an offence if he commits an offence of destroying or damaging property belonging to another otherwise than by fire<sup>1</sup>, which is racially or religiously aggravated<sup>2</sup> and he is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup> or to a fine not exceeding the statutory maximum or to both<sup>4</sup>.

1    le an offence under the Criminal Damage Act 1971 s 1(1): see PARA 334 ante.

2    For the meaning of 'racially or religiously aggravated' see PARA 154 ante. For the purposes of the present offence the Crime and Disorder Act 1998 s 28(1)(a) (as amended) (see PARA 154 head (1) post) has effect as if the person to whom the property belongs for the purposes of the Criminal Damage Act 1971 (see PARAS 339-340 post) were the victim of the offence: Crime and Disorder Act 1998 s 30(3).

3    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4    Crime and Disorder Act 1998 s 30(1) (amended by the Anti-terrorism, Crime and Security Act s 39(5)(b), (6)(b)). For an example of sentencing for the offence see *R v O'Brien (Ronan Stephen)* [2003] EWCA Crim 302, [2003] 2 Cr App Rep (S) 390, CA. For sentencing for racially or religiously aggravated offences generally see *R v Saunders* [2000] 1 Cr App Rep 458, CA; *R v Morrison* [2001] 1 Cr App Rep (S) 5, CA.

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### **336. Destroying or damaging property with intent or recklessness as to endangering life.**

A person who without lawful excuse<sup>1</sup> destroys<sup>2</sup> or damages<sup>3</sup> any property<sup>4</sup>, whether belonging to himself or another, intending to destroy or damage any property or being reckless<sup>5</sup> as to whether any property would be destroyed or damaged, and intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered<sup>6</sup>, is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>7</sup>.

An offence committed under the above provision by destroying or damaging property by fire<sup>8</sup> is to be charged<sup>9</sup> as arson<sup>10</sup>, and a person guilty of this offence is liable on conviction on indictment to imprisonment for life or for any shorter term<sup>11</sup>.

1 The Criminal Damage Act 1971 s 5 (see PARA 341 post) does not apply to offences under s 1(2) (see the text and notes 2-7 infra): see s 5(1).

2 See PARA 334 note 2 ante.

3 See PARA 334 note 3 ante.

4 For the meaning of 'property' see PARA 339 post.

5 As to intention and recklessness see PARAS 10-11 ante.

6 The defendant must have intended to endanger life, or been reckless as to whether life would be endangered, by the destruction or damaging of property which he intended or was reckless about; it is not enough merely that he intended to endanger life, or was reckless as to whether life would be endangered, by the act which caused the destruction or damage: *R v Steer* [1988] AC 111, (1987) 85 Cr App Rep 352, HL; applied in *R v Webster*, *R v Warwick* [1995] 2 All ER 168, [1995] 1 Cr App Rep 492, CA; *R v Kelleher* [2003] EWCA Crim 3525, 147 Sol Jo LB 1395. It is irrelevant that no one's life was endangered by the destruction or damage caused: *R v Dudley* [1989] Crim LR 57, CA; *R v Parker* [1993] Crim LR 856, CA. The trial of a person accused of arson, being reckless as to whether life would be endangered, must be heard by a full-time judge: *R v Jones* (1999) Times, 20 May, CA.

On a charge of attempted aggravated criminal damage or arson it is sufficient to establish, in addition to a specific intent to cause damage by fire, that the defendant was reckless as to whether life would thereby be endangered: *A-G's Reference (No 3 of 1992)* [1994] 2 All ER 121, 98 Cr App Rep 383, CA.

7 See the Criminal Damage Act 1971 ss 1(2), 4(1). As to the offence committed by a person who at the time of committing or being arrested for an offence under s 1 has in his possession a firearm or imitation firearm see PARA 677 ante. As to evidence in proceedings for an offence under the Criminal Damage Act 1971 see PARA 1478 post. As to the offence of causing or acting with intent to cause an explosion likely to endanger life or cause serious injury to property see the Explosive Substances Act 1883 ss 2, 3 (both as substituted; s 3 as amended); and PARAS 127-128 ante. An offence under the Criminal Damage Act 1971 s 1 is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents: see PARA 474 post). For the extended scope of an offence under the Criminal Damage Act 1971 s 1 in connection with acts in relation to or by means of nuclear material see the Nuclear Material (Offences) Act 1983: see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583.

Where offences under the Criminal Damage Act 1971 s 1(1) (see PARA 334 ante) and s 1(2) are charged as alternatives in respect of the same incident and the jury convicts on the more serious charge, the jury should be



discharged from giving a verdict on the lesser charge: *R v Haddock* [1976] Crim LR 374, CA. As to joinder of offences see PARA 1221 post.

8 See PARA 334 notes 10-12 ante.

9 Notwithstanding that the common law offence of arson has been abolished: see the Criminal Damage Act 1971 s 11(1).

10 See *ibid* s 1(3).

11 *Ibid* s 4(1). See *R v Calladine* (1975) Times, 3 December, CA (unwise to sentence for arson without seeing psychiatric report); *R v Mitchell* (1998) Times, 4 September, CA (factors to be considered in sentencing). There are four separate aggravated offences under these provisions: criminal damage with intent to endanger life; criminal damage reckless as to whether life would be endangered; arson with intent to endanger life; and arson reckless as to whether life would be endangered: *R v Roberts*, *R v Taylor*, *R v Chapman*, *R v Daly* [1998] 1 Cr App Rep 441, CA. Where an offence under the Criminal Damage Act 1971 s 1(2) (see the text and notes 1-7 *supra*) is charged, there should be separate counts of criminal damage (or arson) with intent to endanger life and reckless criminal damage (or arson) so that, in relation to sentencing, the court has the verdict of the jury: *R v Hoof* (1980) 72 Cr App Rep 126, CA. An offence under the Criminal Damage Act 1971 s 1 (see the text and notes 1-7 *supra*) may constitute an 'act of violence' to which the Aviation Security Act 1982 applies: see AIR LAW vol 2 (2008) PARA 331.

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### **(iii) Other Offences under the Criminal Damage Act 1971**

#### **337. Threats to destroy or damage property.**

A person who without lawful excuse<sup>1</sup> makes to another a threat, intending that that other would fear it would be carried out: (1) to destroy<sup>2</sup> or damage<sup>3</sup> any property<sup>4</sup> belonging to that other<sup>5</sup> or to a third person<sup>6</sup>; or (2) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or of a third person, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the prescribed sum or to both<sup>8</sup>.

1 For the meaning of 'lawful excuse' see PARA 341 post. The Criminal Damage Act 1971 s 5 (see PARA 341 post) does not apply to offences under head (2) in the text: see s 5(1).

2 For the meaning of 'destroy' see PARA 334 note 2 ante.

3 For the meaning of 'damage' see PARA 334 note 3 ante.

4 For the meaning of 'property' see PARA 339 post.

5 For the meaning of 'property belonging to another' see PARA 340 post.

6 In relation to head (1) in the text, the threat to destroy or damage property must be considered objectively. The first issue is whether a threat was made. The second issue is whether the threat, objectively considered, was capable of amounting to a threat to destroy the property of another (a question of law, for the judge in the Crown Court). The third issue is whether it was, in fact, such a threat (a question of fact, for the jury in the Crown Court): *R v Cakmak*, *R v Cavvav*, *R v Talay*, *R v Cam*, *R v Karanaslan*, *R v Durukanoglu* [2002] EWCA Crim 500, [2002] 2 Cr App Rep 158. A similar approach applies in relation to head (2) in the text: *R v Cakmak*, *R v Cavvav*, *R v Talay*, *R v Cam*, *R v Karanaslan*, *R v Durukanoglu* supra.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

8 Criminal Damage Act 1971 ss 2, 4(2); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 29. See also PARA 1103 post. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to evidence see PARA 1478 post; as to bomb hoaxes see PARA 853 post; and as to threatening to contaminate or interfere with goods see PARA 819 post. An offence under the Criminal Damage Act 1971 s 2 is one of those specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents: see PARA 474 post).

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### **338. Possessing something with intent to destroy or damage property.**

A person who has anything in his custody or under his control<sup>1</sup> intending without lawful excuse<sup>2</sup> to use it or cause or permit<sup>3</sup> another to use it: (1) to destroy<sup>4</sup> or damage<sup>5</sup> any property<sup>6</sup> belonging to some other person<sup>7</sup>; or (2) to destroy or damage his own or the user's property in a way which he knows is likely to endanger the life<sup>8</sup> of some other person, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the prescribed sum or to both<sup>10</sup>.

1 'Custody' means physical custody; and 'control' imports the notion of the power to direct what is to be done with the property in question: see *Warner v Metropolitan Police Comr* [1969] 2 AC 256, 52 Cr App Rep 373, HL.

2 For the meaning of 'lawful excuse' see PARA 341 post.

3 To 'cause' a user involves the exercise of a capacity to control or influence the user's acts: *O'Sullivan v Truth and Sportsman Ltd* (1957) 96 CLR 220, Aust HC; approved in *A-G of Hong Kong v Tse Hung Lit* [1986] AC 876, [1986] 3 All ER 173, PC. See also *McLeod (or Houston) v Buchanan* [1940] 2 All ER 179 at 187, HL, per Lord Wright; *Shave v Rosner* [1954] 2 QB 113, [1954] 2 All ER 280, DC; *Shulton (Great Britain) Ltd v Slough Borough Council* [1967] 2 QB 471, [1967] 2 All ER 137, DC. 'Cause' requires proof of an act: *Price v Cromack* [1975] 2 All ER 113, [1975] 1 WLR 988, DC.

'Permit' is capable of having at least two types of meaning depending on its content: a narrow meaning ('allow', 'agree to' or 'authorise') and a wider one ('fail to take reasonable steps to prevent'), its meaning in any particular offence depending on its context: *Vehicle Inspectorate v Nuttall* [1999] 3 All ER 833, [1999] 1 WLR 629, HL. The use of 'cause or permit' in the Criminal Damage Act 1971 s 3 suggests that 'permit' in that provision bears the latter meaning. To 'permit' involves a general or particular permission; the permission may be express or implied: *McLeod (or Houston) v Buchanan* supra. A person cannot 'permit' unless he is in a position to forbid: *Goodbarne v Buck* [1940] 1 KB 771, [1940] 1 All ER 613, CA; *Lloyd v Singleton* [1953] 1 QB 357, [1953] 1 All ER 291, DC.

4 For the meaning of 'destroy' see PARA 334 note 2 ante.

5 For the meaning of 'damage' see PARA 334 note 3 ante.

6 For the meaning of 'property' see PARA 339 post.

7 For the meaning of 'property belonging to another' see PARA 340 post.

8 As to endangering life see PARA 336 note 6 ante.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

10 See the Criminal Damage Act 1971 ss 3, 4(2); and the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 29. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. An intention to use the article to cause damage at any time in the future or only if it becomes necessary is sufficient mens rea: *R v Buckingham* (1976) 63 Cr App Rep 159, CA. As to the issue of warrants to search for

things intended for use without lawful excuse to destroy or damage property see PARA 342 post; and as to evidence on proceedings for the offence see PARA 1478 post.

As to the offence of possessing an explosive substance with intent to endanger life or cause serious injury to property see the Explosive Substances Act 1883 s 3 (as substituted and amended); and PARA 128 ante. As to the offence of possessing material to be used for contaminating or interfering with goods see the Public Order Act 1986 s 38(3); and PARA 820 post.

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### **339. Meaning of 'property'.**

'Property'<sup>1</sup> means property of a tangible nature, whether real or personal, including money and: (1) including wild creatures<sup>2</sup> which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession; but (2) not including mushrooms<sup>3</sup> growing wild on any land or flowers, fruit or foliage of a plant<sup>4</sup> growing wild<sup>5</sup> on any land<sup>6</sup>.

1    Ie in the Criminal Damage Act 1971.

2    As to the application of the Criminal Damage Act 1971 to animals which fall within the scope of the Act see ANIMALS vol 2 (2008) PARA 740 et seq; and as to the prevention of cruelty to animals see ANIMALS vol 2 (2008) PARA 817 et seq. As to destroying fish see AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 841.

3    For these purposes, 'mushroom' includes any fungus: ibid s 10(1).

4    For these purposes, 'plant' includes any shrub or tree: ibid s 10(1).

5    Although wild plants are excluded from the Criminal Damage Act 1971, provision for the prevention of damage to them may be covered by byelaws made under legislation relating to the protection of the countryside: see eg the National Parks and Access to the Countryside Act 1949 s 90 (as amended); and OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 648. Certain wild plants are protected for the purposes of the Wildlife and Countryside Act 1981 and a person who intentionally picks, uproots or destroys such plants commits an offence: see s 13, Sch 8; and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1032.

6    See the Criminal Damage Act 1971 s 10(1).

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### **340. Meaning of 'belonging to another'.**

Property is to be treated as belonging to any person: (1) having the custody or control<sup>1</sup> of it; (2) having in it any proprietary right or interest, not being an equitable interest arising only from an agreement to transfer or grant an interest; or (3) having a charge on it<sup>2</sup>. Where property is subject to a trust, the persons to whom it belongs are to be so treated as including any person having a right to enforce the trust<sup>3</sup>. Property of a corporation sole is to be so treated as belonging to the corporation notwithstanding a vacancy in the corporation<sup>4</sup>.

1 As to custody and control see PARA 338 note 1 ante.

2 Criminal Damage Act 1971 s 10(2).

3 Ibid s 10(3).

4 Ibid s 10(4). As to corporations sole see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1111 et seq.

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### 341. Meaning of 'lawful excuse'.

A person charged with a specified offence<sup>1</sup> under the Criminal Damage Act 1971 is to be treated as having a lawful excuse, whether or not he would otherwise be so treated for the purposes of the Act:

- 291 (1) if at the time of the act or acts alleged to constitute the offence he believed<sup>2</sup> that the person or persons whom he believed to be entitled to consent to the destruction or damage to the property<sup>3</sup> in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances<sup>4</sup>; or
- 292 (2) if he destroyed or damaged or threatened to destroy or damage the property in question, or intended<sup>5</sup> to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property<sup>6</sup> which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed: (a) that the property, right or interest was in immediate need of protection; and (b) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances<sup>7</sup>.

1 The Criminal Damage Act 1971 s 5 (see the text and notes 2-7 *infra*) applies to any offence under s 1(1) (see PARA 334 *ante*), to any offence under s 2 (see PARA 337 *ante*) other than one involving a threat by the person charged to destroy or damage property in a way which he knows is likely to endanger the life of another, or to any offence under s 3 (see PARA 338 *ante*) other than one involving an intent by the person charged to use or cause or permit the use of something in his custody or under his control so to destroy or damage property: s 5(1). Section 5 is not to be construed, however, as casting doubt on any defence recognised by law as a defence to criminal charges: s 5(5). As to general defences recognised by law see PARA 16 *et seq ante*.

A person who damages property in the belief that he has the consent of God to do so does not have a lawful excuse because such a belief does not constitute a defence recognised by English law: *Blake v DPP* [1993] Crim LR 586, DC. See also *Hipperson v DPP* [1996] CLY 1445, DC. Nor does a motorist have a lawful excuse if he damages a wheel clamp to free his car, having parked on property with knowledge of the risk of being clamped, since his conduct does not fall within any recognised defence: *Lloyd v DPP* [1992] 1 All ER 982, DC; applied in *R v Mitchell (Carl)* [2003] EWCA Crim 2188, [2004] RTR 224.

2 For these purposes, it is immaterial whether a belief is justified or not if it is honestly held: Criminal Damage Act 1971 s 5(3). A belief may be honestly held for these purposes even if it is induced by intoxication: *Jaggard v Dickinson* [1981] QB 527, 72 Cr App Rep 33, CA.

3 For the meaning of 'property' see PARA 339 *ante*.

4 Criminal Damage Act 1971 s 5(2)(a). See further *R v Denton* [1982] 1 All ER 65, 74 Cr App Rep 81, CA; *Blake v DPP* [1993] Crim LR 586, DC.

5 In relation to an offence charged under the Criminal Damage Act 1971 s 3: see PARA 338 *ante*.

6 For these purposes, a right or interest in property includes any right or privilege in or over land, whether created by grant, licence or otherwise: *ibid* s 5(4).

7 *Ibid* s 5(2)(b). The test in s 5(2)(b) is partly subjective (in that it is applied on the basis of what was going on in the defendant's mind, including whether he believed that the property was in immediate need of protection and that the means of protection employed were reasonable) and partly objective (in that it has to be decided

whether, on the facts as believed by the defendant, the act done could be said to amount to something done to protect property): *R v Hunt* (1978) 66 Cr App Rep 105, CA (defendant set fire to bed in old people's flats to demonstrate that fire alarms were faulty; the defence set out in head (2) in the text was unavailable); *R v Hill, R v Hall* (1988) 89 Cr App Rep 74, CA (campaigners for nuclear disarmament charged with possession of hacksaw blades; intending to cut part of perimeter fence of United States naval base; protection of property from nuclear attack too remote an aim to constitute defence of lawful excuse). See also *Johnson v DPP* [1994] Crim LR 673, DC; *Blake v DPP* [1993] Crim LR 586, DC; *Chamberlain v Lindon* [1998] 2 All ER 538, [1998] 1 WLR 1252, DC. If there is no evidence of lawful excuse a judge is entitled to withdraw that defence from the jury, but if there is some evidence, however tenuous or nebulous, it must be left to the jury: *R v Wang* [2005] UKHL 9, [2005] 1 All ER 782, [2005] 2 Cr App Rep 136 (disapproving *R v Hill, R v Hall* supra on this point).

## UPDATE

### 341 Meaning of 'lawful excuse'

NOTE 7--See also *R v McCann* [2008] NICA 25 (9 June 2008, unreported) (evidence to challenge claim that purpose of criminal damage to protect property in Lebanon).



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### **342. Warrant to search for goods used to inflict criminal damage.**

If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody<sup>1</sup> or under his control<sup>1</sup> or on his premises anything which there is reasonable cause to believe has been used or is intended for use without lawful excuse to destroy or damage property belonging to another<sup>2</sup> or to destroy or damage any property in a way likely to endanger the life of another, the justice may grant a warrant authorising any constable to search for and seize that thing<sup>3</sup>. A constable who is so authorised to search premises for anything, may enter (if need be by force) and search the premises accordingly and may seize anything which he believes to have been so used or to be intended to be so used<sup>4</sup>.

1 For the meanings of 'custody' and 'control' see PARA 338 note 1 ante.

2 For the meaning of 'property belonging to another' see PARA 340 ante.

3 Criminal Damage Act 1971 s 6(1).

4 Ibid s 6(2). As to search warrants see PARA 871 et seq post.

The Police (Property) Act 1897 relating to disposal of property in the possession of the police (see POLICE vol 36(1) (2007 Reissue) PARA 520) applies to property which has come into the possession of the police under the Criminal Damage Act 1971 s 6 as it applies to property which has come into the possession of the police in circumstances mentioned in the Police (Property) Act 1897: Criminal Damage Act 1971 s 6(3).

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**343. Institution of proceedings for criminal damage to property of defendant's spouse or civil partner.**

Subject to certain exceptions, proceedings may not be instituted against a person for any offence of doing unlawful damage to property which, at the time of the offence, belongs to that person's wife, husband or civil partner unless the proceedings are instituted by or with the consent of the Director of Public Prosecutions<sup>1</sup>.

<sup>1</sup> See the Theft Act 1968 s 30(4) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 27(1), (2)). See PARA 291 ante. See also *R v Withers* [1975] Crim LR 647, Crown Ct.

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## (iv) Related Offences

### 344. Obstructing railways.

Any person who unlawfully and maliciously<sup>1</sup>: (1) puts, places, casts or throws upon or across any railway any wood, stone or other matter or thing; or (2) takes up, removes or displaces any rail, sleeper, or other matter or thing belonging to any railway; or (3) turns, moves, or diverts any points or other machinery belonging to any railway; or (4) makes or shows, hides or removes, any signal or light on or near to any railway; or (5) does or causes to be done any other matter or thing, with intent to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage or truck using the railway<sup>2</sup>, is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>3</sup>.

Any person who, by any unlawful act<sup>4</sup>, or by any wilful omission or neglect<sup>5</sup>, obstructs or causes to be obstructed any engine or carriage using any railway, or who aids or assists therein is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup> or to a fine not exceeding the prescribed sum or to both<sup>7</sup>.

1 The term 'maliciously' means wilfully or intentionally and without lawful excuse: *R v Solanke* [1969] 3 All ER 1383, [1970] 1 WLR 1, CA (stated in relation to the Offences against the Person Act 1861 s 16 (as substituted) but equally applicable, it is submitted, to the present offence). Malice may also be constituted by a wilful act performed mischievously or recklessly: see *R v Holroyd* (1841) 2 Mood & R 339; *R v Upton*, *R v Gutteridge* (1851) 5 Cox CC 298; *R v Welch* (1875) 1 QBD 23, CCR; *Re Borrowes* [1900] 2 IR 593. The precise meaning of the term depends on the context in which it is used: see PARA 8 note 4 ante. If an act which constitutes an offence occurs in a manner unintended and unforeseen, the defendant is guilty of the offence: see PARA 12 ante. As to drawing inferences about the intention or foresight of the defendant see PARA 1366 post.

Malice in its legal import does not necessitate spite or ill-will: see *Bromage v Prosser* (1825) 4 B & C 247; *M'Pherson v Daniels* (1829) 10 B & C 263 at 268 per Littledale J; *Roper v Knott* [1898] 1 QB 868. It is not a necessary ingredient of offences against the Malicious Damage Act 1861 that the act charged should have been committed from malice conceived against the owner of the property in respect of which the offence is committed: see s 58. See also *R v Newill* (1836) 1 Mood CC 458; *R v Davies* (1858) 1 F & F 69.

In an appropriate case, a claim of right made in good faith will negative malice: see *R v James* (1837) 8 C & P 131; *R v Matthews*, *R v Twigg* (1876) 14 Cox CC 5; *R v Twose* (1879) 14 Cox CC 327; *Leyson v Williams* (1890) 54 JP 631, DC; *R v Clemens* [1898] 1 QB 556, CCR; *Heaven v Crutchley* (1903) 68 JP 53, DC; *R v Rutter* (1908) 1 Cr App Rep 174, CCA; *R v Dyer* (1952) 36 Cr App Rep 155, CCA. However, the extent of the damage must be reasonably related to the right which is asserted: see *R v Clemens* supra; *Heaven v Crutchley* supra.

2 Ie whether a public or a private railway: *O'Gorman v Sweet* (1890) 54 JP 663, DC.

3 See the Malicious Damage Act 1861 s 35 (amended by the Criminal Justice Act 1948 s 83(3), Sch 10 Pt I); the Criminal Justice Act 1948 s 1(1); and the Criminal Law Act 1967 s 12(5)(a).

4 For these purposes, 'any unlawful act' includes each of the matters expressly mentioned in the Malicious Damage Act 1861 s 35 (as amended) (see the text and notes 1-3 supra): *R v Hadfield* (1870) LR 1 CCR 253; *R v Hardy* (1871) LR 1 CCR 278.

5 To be guilty of wilful neglect the defendant must know that his conduct involves the risk of an obstruction to the railway unless he takes reasonable care and yet deliberately fall short of exercising such care: *R v Gittins* [1982] RTR 363, CA, applying *R v Sheppard* [1981] AC 394, 72 Cr App Rep 82, HL. See also *A-G's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73, [2004] 2 Cr App Rep 366.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

7 Malicious Damage Act 1861 s 36; Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 s 1; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 4. See also PARA 1103 post. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

A person who, otherwise than by accident, leaves on a railway line any substance likely to cause an obstruction commits the offence even though his object may not have been to create an obstruction but merely to give the railway employees the trouble of removing the substance: *R v Holroyd* (1841) 2 Mood & R 339. The offence is committed even though the line has not been opened to the public and even if no actual obstruction took place: see *R v Bradford* (1860) 8 Cox CC 309, CCR; *R v Gatenby* [1960] Crim LR 195. The obstruction contemplated is not confined to physical obstruction; a person who improperly goes on a railway line and by raising his arms induces a driver to slow down commits the offence: *R v Hardy* (1871) LR 1 CCR 278. Similarly, the offence is committed where a train is caused to slow down by the unlawful alteration of signals: *R v Hadfield* (1870) LR 1 CCR 253. As to the offence of trespassing on the railway see the Railway Regulation Act 1840 s 16 (as amended); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 407. As to endangering passengers on the railway see PARAS 132-134 ante.

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### **345. Sale of aerosol paint to children.**

A person commits an offence if he sells an aerosol paint container<sup>1</sup> to a person under the age of 16<sup>2</sup>. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale<sup>3</sup>. It is a defence for a person charged with such an offence in respect of a sale to prove that he took all reasonable steps to determine the purchaser's age, and he reasonably believed that the purchaser was not under the age of 16<sup>4</sup>. Further, it is a defence for a person charged with such an offence in respect of a sale effected by another person to prove that he (the defendant) took all reasonable steps to avoid the commission of an offence<sup>5</sup>.

It is the duty of every local weights and measures authority<sup>6</sup>: (1) to consider, at least once in every period of 12 months, the extent to which it is appropriate for the authority to carry out in its area a programme of enforcement action in relation to the above provisions<sup>7</sup>; and (2) to the extent that it considers it appropriate to do so, to carry out such a programme<sup>8</sup>. For these purposes, a programme of enforcement action is a programme involving all or any of the following: (a) the bringing of prosecutions in respect of offences<sup>9</sup>; (b) the investigation of complaints in respect of alleged offences; and (c) the taking of other measures intended to reduce the incidence of offences<sup>10</sup>.

1 'Aerosol paint container' means a device which contains paint stored under pressure and is designed to permit the release of the paint as a spray: Anti-social Behaviour Act 2003 s 54(2).

2 Ibid s 54(1).

3 Ibid s 54(3). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

4 Ibid s 54(4). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

5 Anti-social Behaviour Act 2003 s 54(5).

6 As to local weights and measures authorities see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 20.

7 Ie the Anti-social Behaviour Act 2003 s 54 (see the text and notes 1-5 supra).

8 Ibid s 54A(1) (s 54A added by the Clean Neighbourhoods and Environment Act 2005 s 32).

9 Ie offences under the Anti-social Behaviour Act 2003 s 54 (see the text and notes 1-5 supra).

10 Ibid s 54A(2) (as added: see note 8 supra).

## **UPDATE**

### **345 Sale of aerosol paint to children**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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## **(7) FORGERY**

### **346. Meanings of 'false' and 'instrument'.**

For the purposes of the Forgery and Counterfeiting Act 1981, 'instrument' means:

- 293 (1) any document, whether of a formal or informal character<sup>1</sup>;
- 294 (2) any stamp<sup>2</sup> issued or sold by a postal operator<sup>3</sup>;
- 295 (3) any Inland Revenue stamp<sup>4</sup>; and
- 296 (4) any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means<sup>5</sup>.

A currency note<sup>6</sup> is not, however, an instrument<sup>7</sup>.

For these purposes, an instrument is false:

- 297 (a) if it purports<sup>8</sup> to have been made<sup>9</sup> in the form in which it is made by a person who did not in fact make it in that form<sup>10</sup>;
- 298 (b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form<sup>11</sup>;
- 299 (c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms<sup>12</sup>;
- 300 (d) if it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms<sup>13</sup>;
- 301 (e) if it purports to have been altered in any respect by a person who did not in fact alter it in that respect<sup>14</sup>;
- 302 (f) if it purports to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect<sup>15</sup>;
- 303 (g) if it purports to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances<sup>16</sup> in which, it was not in fact made or altered<sup>17</sup>; or
- 304 (h) if it purports to have been made or altered by an existing person but he did not in fact exist<sup>18</sup>.

1 Forgery and Counterfeiting Act 1981 s 8(1)(a).

2 A mark denoting payment of postage which a postal operator authorises to be used instead of an adhesive stamp is to be treated for these purposes as if it were a stamp issued by the postal operator concerned: *ibid* s 8(3) (amended by the Postal Services Act 2000 (Consequential Modifications No 1) Order 2001, SI 2001/1149, art 3, Sch 1 para 50(1), (3)). 'Postal operator' has the same meaning as in the Postal Services Act 2000 (see s 125(1); and POST OFFICE vol 36(2) (Reissue) PARA 10 et seq): Forgery and Counterfeiting Act 1981 s 8(3A) (added by the Postal Services Act 2000 (Consequential Modifications No 1) Order 2001, SI 2001/1149, Sch 1 para 50(1), (4)).

3 Forgery and Counterfeiting Act 1981 s 8(1)(b) (amended by the Postal Services Act 2000 (Consequential Modifications No 1) Order 2001, SI 2001/1149, Sch 1 para 50(1), (2)).

4 Forgery and Counterfeiting Act 1981 s 8(1)(c). For these purposes, 'Inland Revenue stamp' means a stamp as defined in the Stamp Duties Management Act 1891 s 27: Forgery and Counterfeiting Act 1981 s 8(4). See STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1106.

5 Ibid s 8(1)(d). Electronic impulses keyed in in the course of computer 'hacking' are not a 'device' within the meaning of s 8(1)(d) (see head (4) in the text), nor is the user segment of the databank; and information, such as a customer identification number and password, which is received, held for a moment while checking takes place and then expunged is not 'recorded and stored' within s 8(1)(d): *R v Gold, R v Schifreen* [1987] QB 1116, [1987] 3 All ER 618, CA; affd [1988] AC 1063, [1988] 2 All ER 186, HL. The practice of computer 'hacking', which was held to be outside the scope of the offence of forgery in *R v Gold; R v Schifreen*, is now covered by new offences created by the Computer Misuse Act 1990: see PARA 358 et seq post.

6 For the meaning of 'currency note' see PARA 544 note 2 ante.

7 Forgery and Counterfeiting Act 1981 s 8(2).

8 The consistent use of the word 'purports' throughout ibid s 9(1)(a)-(h) (see the text and notes 10-18 infra) imports a requirement that for an instrument to be false it must tell a lie about itself: *R v More* [1987] 3 All ER 825 at 830, [1987] 1 WLR 1578 at 1585, HL, per Lord Ackner.

9 A person is to be treated for these purposes as making a false instrument if he alters an instrument so as to make it false in any respect, whether or not it is false in some other respect apart from that alteration: Forgery and Counterfeiting Act 1981 s 9(2).

10 Ibid s 9(1)(a). Where documents which purport to have been made by a company come into existence after the company has been wound up, the documents are false within the meaning of s 9(1)(a): *R v Lack* (1987) 84 Cr App Rep 342, CA.

11 Forgery and Counterfeiting Act 1981 s 9(1)(b).

12 Ibid s 9(1)(c).

13 Ibid s 9(1)(d). A cheque signed on behalf of a company by various unknown individuals with no connection to the company, and without any authority to sign cheques on its behalf, is a 'false instrument' for these purposes: see *R v Atunwa* [2006] EWCA Crim 673, [2006] All ER (D) 133 (Mar).

14 Forgery and Counterfeiting Act 1981 s 9(1)(e).

15 Ibid s 9(1)(f).

16 The words 'otherwise in circumstances' in ibid s 9(1)(g) (see head (g) in the text) clearly include circumstances directly related to the making of the instrument, eg the presence of witnesses, but they have also been held to include cases where the falsity relates to some past fact required to exist before an instrument could be 'properly made or altered'; if that fact did not exist, the instrument will tell a lie about itself because it will say that it was made in circumstances which do not exist: *A-G's Reference (No 1 of 2000)* [2001] 1 WLR 331, [2001] 1 Cr App Rep 218, CA, applying (and interpreting) *R v Donnelly* [1984] 1 WLR 1017 at 1019, 79 Cr App Rep 76 at 78, CA (valuation certificate stating that jewellery had been examined; the jewellery did not exist and the certificate was a sham to defraud insurers; certificate was a false instrument); approved in *R v Jeraj* [1994] Crim LR 595, CA (bank manager signed document to the effect that he had received a letter of credit (when he had not, because it was non-existent) and had indorsed it; document a false instrument).

17 Forgery and Counterfeiting Act 1981 s 9(1)(g).

18 Ibid s 9(1)(h). A withdrawal form, signed in a false name by a person who has opened a building society account in that name, is not a false instrument within the meaning of s 9(1)(h): *R v More* [1987] 3 All ER 825, [1987] 1 WLR 1578, HL.



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### 347. Forgery.

If a person makes<sup>1</sup> a false instrument<sup>2</sup>, with the intention that he or another will use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice<sup>3</sup>, he is guilty of forgery<sup>4</sup> and liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

1 For the meaning of 'make a false instrument' see PARA 346 note 9 ante.

2 For the meanings of 'false' and 'instrument' see PARA 346 ante.

3 An intention that somebody should be induced to accept the instrument as genuine is not sufficient; there must also be an intention to induce the recipient to act or omit to act to his own or another person's prejudice: *R v Tobierre* [1986] 1 All ER 346, 82 Cr App Rep 212, CA (decided under the Forgery and Counterfeiting Act 1981 s 3 (see PARA 349 post)); *R v Garcia* [1988] Crim LR 115, CA. See also *R v Campbell* (1985) 80 Cr App Rep 47, CA. The intentions must exist when the defendant makes the false instrument: *R v Ondhia* [1998] 2 Cr App Rep 150, CA.

For the purposes of this offence, and of the offences described in PARAS 348-351 post, an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs: (1) will result (a) in his temporary or permanent loss of property; or (b) in his being deprived of an opportunity to earn remuneration or greater remuneration; or (c) in his being deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; or (2) will result in somebody being given an opportunity (a) to earn remuneration or greater remuneration from him; or (b) to gain a financial advantage from him otherwise than by way of remuneration; or (3) will be the result of his having accepted a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, in connection with his performance of any duty: Forgery and Counterfeiting Act 1981 s 10(1). For these purposes, 'loss' includes not getting what one might get as well as parting with what one has: s 10(5). An act which a person has an enforceable duty to do and an omission to do an act which a person is not entitled to do are to be disregarded for these purposes: s 10(2).

References to inducing somebody to accept a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, include references to inducing a machine to respond to the instrument or copy as if it were a genuine instrument or, as the case may be, a copy of a genuine one: s 10(3). Where s 10(3) applies, the act or omission intended to be induced by the machine responding to the instrument or copy is to be treated as an act or omission to a person's prejudice: s 10(4).

Dishonesty is not an element of the offence: *R v Campbell* (1984) 80 Cr App Rep 47, CA; *Horsev v Hutchings* (1984) Times, 8 November, DC. It follows, for example, that it is irrelevant that the defendant believed that he was legally entitled to a gain which he intended to make as a result of falsifying the instrument. Indeed, it is not a defence in itself that the defendant might have actually been entitled to have the property transferred to him if he had made a true claim (but not if he made a false statement). If, as would normally be the case, the maker of a false instrument is proved to have had the two intentions referred to above he can be convicted of forgery: *A-G's Reference (No 1 of 2001)* [2002] EWCA Crim 1768, [2002] 3 All ER 840, [2003] 1 Cr App Rep 131.

4 Computer 'hacking' does not constitute forgery: see *R v Gold*, *R v Schifreen* [1987] QB 1116, [1987] 3 All ER 618, CA (affd [1988] AC 1063, [1988] 2 All ER 186, HL); and see PARA 346 note 5 ante.

The Forgery and Counterfeiting Act 1981 abolished the offence of forgery at common law for all purposes not relating to offences committed before 28 October 1981: see ss 13, 33.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 See the Forgery and Counterfeiting Act 1981 ss 1, 6(1)-(3). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to the defence available under the Immigration and Asylum Act 1999 s 31 to a refugee charged with this offence see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 205. The offence is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(c). It is also one of those offences specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents: see PARA 474 post). As to evidence of handwriting in a false instrument see PARA 1488 post; and as to production of a false instrument in court see PARA 1465 post.

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### **348. Copying a false instrument.**

If a person makes a copy of an instrument<sup>1</sup> which is, and which he knows or believes to be, a false<sup>2</sup> instrument, with the intention that he or another will use it to induce somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice<sup>3</sup>, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup> or to a fine not exceeding the statutory maximum or to both<sup>5</sup>.

1 For the meaning of 'instrument' see PARA 346 ante.

2 For the meaning of 'false' see PARA 346 ante.

3 By analogy with the interpretation of the Forgery and Counterfeiting Act 1981 s 1 (see PARA 347 ante) and s 3 (see PARA 349 post), the defendant must have the intent that he or another will use the copy of the false instrument to induce somebody to accept it as a copy of a genuine instrument, and the intent to induce that person by reason of so accepting it to do or not to do some act to his own or any other person's prejudice. For the meanings of 'induce' and 'prejudice' see PARA 347 note 3 ante.

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 See the Forgery and Counterfeiting Act 1981 ss 2, 6(1)-(3). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to the defence available under the Immigration and Asylum Act 1999 s 31 to a refugee charged with this offence see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 205. An offence under the Forgery and Counterfeiting Act 1981 s 2 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2) (c). It is also one of those offences specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents: see PARA 474 post).

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### **349. Using a false instrument.**

If a person uses an instrument<sup>1</sup> which is, and which he knows or believes to be, false<sup>2</sup>, with the intention of inducing somebody<sup>3</sup> to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice<sup>4</sup>, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

1 For the meaning of 'instrument' see PARA 346 ante.

2 For the meaning of 'false' see PARA 346 ante.

3 It is not necessary that that person should be identifiable: *R v Johnson* [1997] 8 Archbold News 1, CA.

4 The defendant must be proved not only to have intended to induce somebody to accept the false instrument as genuine, but also to have intended to induce the victim by reason of so accepting it to do or not to do something to his or another's prejudice: *R v Tobierre* [1986] 1 All ER 346, 82 Cr App Rep 212, CA. For the meanings of 'induce' and 'prejudice' see PARA 347 note 3 ante.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Forgery and Counterfeiting Act 1981 ss 3, 6(1)-(3). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to the defence available under the Immigration and Asylum Act 1999 s 31 to a refugee charged with this offence see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 205. An offence under the Forgery and Counterfeiting Act 1981 s 3 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(c). It is also one of those offences specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents: see PARA 474 post). For sentencing guidance in relation to the use of a false passport see *R v Kolawole* [2004] EWCA Crim 3047, [2005] 2 Cr App Rep (S) 71.

## **UPDATE**

### **349 Using a false instrument**

NOTE 4--See *R v O* [2008] All ER (D) 07 (Sep), CA; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 137.

NOTE 6--See also *R v Omotade* (2008) Times, 10 September, CA; and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 527A.

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### **350. Using a copy of a false instrument.**

If a person uses a copy of an instrument which is, and which he knows or believes to be, a false instrument<sup>1</sup>, with the intention of inducing somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice<sup>2</sup>, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup> or to a fine not exceeding the statutory maximum or to both<sup>4</sup>.

1 For the meanings of 'false' and 'instrument' see PARA 346 ante.

2 By analogy with the interpretation of the Forgery and Counterfeiting Act 1981 s 1 (see PARA 347 ante) and s 3 (see PARA 349 ante), the defendant must have the intent that he or another will use the copy of the false instrument to induce somebody to accept it as a copy of a genuine instrument, and the intent to induce that person by reason of so accepting it to do or not to do some act to his own or any other person's prejudice. For the meanings of 'induce' and 'prejudice' see PARA 347 note 3 ante.

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4 See the Forgery and Counterfeiting Act 1981 ss 4, 6(1)-(3). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to the defence available under the Immigration and Asylum Act 1999 s 31 to a refugee charged with this offence see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 205. An offence under the Forgery and Counterfeiting Act 1981 s 4 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2) (c). It is also one of those offences specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents: see PARA 474 post).

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### **351. Money orders, share certificates, passports etc.**

If a person:

- 305 (1) has in his custody or under his control<sup>1</sup> a specified instrument<sup>2</sup> which is, and which he knows or believes to be, false<sup>3</sup>, with the intention that he or another will use it to induce<sup>4</sup> somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice<sup>5</sup>; or
- 306 (2) has in his custody or under his control, without lawful authority or excuse, a specified instrument which is, and which he knows or believes to be, false<sup>6</sup>; or
- 307 (3) makes or has in his custody or under his control a machine or implement, or paper or any other material, which to his knowledge is or has been specially designed or adapted for the making of a specified instrument, with the intention that he or another will make a specified instrument which is false and that he or another will use the instrument to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice<sup>7</sup>; or
- 308 (4) makes or has in his custody or under his control any such machine, implement, paper or material, without lawful authority or excuse<sup>8</sup>,

he is guilty of an offence and liable:

- 309 (a) in the case of an offence under heads (1) and (3) above, on conviction on indictment to imprisonment for a term not exceeding ten years, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the statutory maximum or to both<sup>10</sup>;
- 310 (b) in the case of an offence under heads (2) and (4) above, on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months<sup>11</sup> or to a fine not exceeding the statutory maximum or to both<sup>12</sup>.

1 'Custody' means physical custody; and 'control' imports the notion of the power to direct what is to be done with the property in question: see *Warner v Metropolitan Police Comr* [1969] 2 AC 256, 52 Cr App Rep 373, HL.

2 The instruments to which the Forgery and Counterfeiting Act 1981 s 5 (as amended) (see the text and notes 1-8 *infra*) applies are: (1) money orders; (2) postal orders; (3) United Kingdom postage stamps; (4) Inland Revenue stamps; (5) share certificates; (6) cheques and other bills of exchange; (7) travellers' cheques; (8) bankers' drafts; (9) promissory notes; (10) cheque cards; (11) debit cards; (12) credit cards; (13) certified copies relating to an entry in a register of births, adoptions, marriages, civil partnerships or deaths and issued by the Registrar General, the Registrar General for Northern Ireland, a registration officer or a person lawfully authorised to issue certified copies relating to such entries; and (14) certificates relating to entries in such registers: s 5(5) (amended by the Crime (International Co-operation) Act 2003 s 88(1)-(3); the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 3(1)-(3); the Civil Partnership Act 2004 s 261(1), Sch 27 para 67; and the Identity Cards Act 2006 s 44(2), Sch 2). For these purposes, 'share certificate' means an instrument entitling or evidencing the title of a person to a share or interest in any public stock, annuity, fund or debt of any government or state, including a state which forms part of another state, or in any stock, fund or debt of a body, whether corporate or unincorporated, established in the United Kingdom or elsewhere: see the Forgery and Counterfeiting Act 1981 s 5(6).

Section 5 (as amended) also applies to an instrument if it is a monetary instrument specified for these purposes by an order made by the Secretary of State: s 5(7) (s 5(7), (8) added by the Crime (International Co-operation) Act 2003 s 88(1), (3)). The power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Forgery and Counterfeiting Act 1981 s 5(8) (as so added).

3 For the meaning of 'false' see PARA 346 ante.

4 For the meaning of 'induce' see PARA 347 note 3 ante.

5 Forgery and Counterfeiting Act 1981 s 5(1). For the meaning of 'prejudice' see PARA 347 note 3 ante. An allegation of an offence contrary to s 5(1) probably amounts to or includes (expressly or by necessary implication) an allegation of an offence contrary to s 5(2) (see the text and note 6 infra) for the purposes of the Criminal Law Act 1967 s 6(3) (see PARA 1335 post) but it is advisable to charge the two offences in separate counts: *R v Fitzgerald* [2003] EWCA Crim 576 at [16]-[17], [2003] 2 Cr App Rep 269 at [16]-[17] per Pill LJ.

6 Forgery and Counterfeiting Act 1981 s 5(2). As to what may constitute 'lawful authority' see *Dickins v Gill* [1896] 2 QB 310, DC; *R v Wuyts* [1969] 2 QB 474, 53 Cr App Rep 417, CA; *R v Justice of the Peace for Peterborough, ex p Hicks* [1978] 1 All ER 225, [1977] 1 WLR 1371, DC; *R v Sunman* [1995] Crim LR 569, CA.

7 Forgery and Counterfeiting Act 1981 s 5(3).

8 *Ibid* s 5(4).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 Forgery and Counterfeiting Act 1981 s 6(1)-(3). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. For sentencing guidance where an offence under s 5(1) (see the text and notes 1-5 supra) involves a false passport see *R v Kolawole* [2004] EWCA Crim 3047, [2005] 2 Cr App Rep (S) 71. See note 12 infra.

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

12 Forgery and Counterfeiting Act 1981 s 6(1), (4). For the defence available to a refugee charged with these offences see the Immigration and Asylum Act 1999 s 31; and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 205, 238. An offence under the Forgery and Counterfeiting Act 1981 s 5 (as amended) is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 post): see s 1(2)(c). These offences are also specified in the Terrorism Act 2000 s 63B (as added) for the purposes of the extra-territorial jurisdiction provisions (terrorist acts abroad by United Kingdom nationals or residents: see PARA 474 post). As to forgery etc of statutory documents under the Mental Health Act 1983 see s 126 (as amended); and MENTAL HEALTH vol 30(2) (Reissue) PARA 765.

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### **352. Powers of search, forfeiture and seizure.**

If it appears to a justice of the peace, from information given to him on oath, that there is reasonable cause to believe that a person has in his custody or under his control<sup>1</sup>:

- 311 (1) any thing which he or another has used, or intends to use, for the making of any false instrument<sup>2</sup> or copy of a false instrument in contravention of the provisions<sup>3</sup> relating to forgery or copying a false instrument<sup>2</sup>; or
- 312 (2) any false instrument or copy of a false instrument which he or another has used, or intends to use, in contravention of the provisions<sup>4</sup> relating to using a false instrument or using a copy of a false instrument<sup>5</sup>; or
- 313 (3) any thing custody or control of which without lawful authority or excuse is an offence under the provisions<sup>6</sup> relating to offences in connection with specified instruments<sup>7</sup>,

the justice may issue a warrant authorising a constable to search for and to seize the object in question, and for that purpose to enter any premises specified in the warrant<sup>8</sup>.

At any time after the seizure of any object suspected of falling within any of heads (1) to (3) above (whether the seizure was effected by virtue of a warrant or otherwise), a constable may apply to a magistrates' court for an order with respect to the object; and the court, if it is satisfied both that the object in fact falls within any of heads (1) to (3) above and that it is conducive to the public interest to do so, may make such order as it thinks fit for the forfeiture of the object and its subsequent destruction or disposal<sup>9</sup>. The court by or before which a person is convicted of an offence under the above provisions<sup>10</sup> may order any object shown to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or dealt with in such other manner as the court may order<sup>11</sup>. The court may not, however, order any object to be forfeited under these provisions where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made<sup>12</sup>.

1 See PARA 351 note 1 ante.

2 Forgery and Counterfeiting Act 1981 s 7(1)(a). For the meanings of 'false' and 'instrument' see PARA 346 ante.

3 *Ibid* s 1 (see PARA 347 ante) or s 2 (see PARA 348 ante).

4 *Ibid* s 3 (see PARA 349 ante) or s 4 (see PARA 350 ante).

5 *Ibid* s 7(1)(b).

6 *Ibid* s 5 (as amended): see PARA 351 ante.

7 *Ibid* s 7(1)(c). See PARA 351 note 2 ante.

8 *Ibid* s 7(1). As to search warrants see PARA 871 *et seq post*. For the additional powers of seizure under the Criminal Justice and Police Act 2001 ss 50, 51 see PARA 890 *post*.

9 Forgery and Counterfeiting Act 1981 s 7(2).



10 le under ibid ss 1-5 (s 5 as amended): see PARAS 347-351 ante.

11 Ibid s 7(3).

12 Ibid s 7(4).

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### **353. Indictments under the Forgery and Counterfeiting Act 1981.**

In an indictment for an offence against the Forgery and Counterfeiting Act 1981 with reference to any instrument, it is sufficient to refer to the instrument, by any name or designation by which it is usually known, or by its purport, without setting out any copy or facsimile of the whole or part of it<sup>1</sup>.

It is usual in an indictment for forgery, where the facts so justify, to allege in one count a forgery and in a second count using a false instrument<sup>2</sup>.

1 Where the specific offence with which a defendant is charged in an indictment is one created by or under an enactment, the statement of offence must contain a reference to the section of the Act creating the offence; and the particulars must disclose the essential elements of the offence: see the Indictment Rules 1971, SI 1971/1253, r 6; and PARA 1218 post.

2 As to the offences of using false instruments and copies of false instruments see PARAS 349-350 ante.

#### **UPDATE**

### **353 Indictments under the Forgery and Counterfeiting Act 1981**

NOTE 1--SI 1971/1253 revoked: SI 2007/699.

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### **354. Fraudulent printing or mutilation of stamps etc.**

Any person who does, or causes or procures to be done, or knowingly aids, abets or assists in doing any of the following:

- 314 (1) fraudulently prints or makes an impression upon any material<sup>1</sup> from a genuine die<sup>2</sup>;
- 315 (2) fraudulently cuts, tears or in any way removes from any material any stamp<sup>3</sup> with intent that any use should be made of it or of any part of it <sup>4</sup>;
- 316 (3) fraudulently mutilates any stamp, with intent that any use should be made of any part of such stamp<sup>5</sup>;
- 317 (4) fraudulently fixes or places upon any material or upon any stamp, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn or in any way removed from any other material, or out of or from any other stamp<sup>6</sup>;
- 318 (5) fraudulently erases or otherwise really or apparently removes from any stamped material any name, sum, date or other matter or thing whatsoever written on it, with the intent that any use should be made of the stamp upon such material<sup>7</sup>;
- 319 (6) knowingly sells or exposes for sale or utters or uses any stamp which has been fraudulently printed or impressed from a genuine die<sup>8</sup>;
- 320 (7) knowingly, and without lawful excuse<sup>9</sup>, the proof whereof lies on the person accused, has in his possession any stamp which has been fraudulently printed or impressed from a genuine die, or any stamp or part of a stamp which has been fraudulently cut, torn or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date or other matter or thing has been fraudulently erased or otherwise either really or apparently removed<sup>10</sup>,

is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>11</sup> or to a fine not exceeding the prescribed sum or to both<sup>12</sup>.

1 For these purposes, 'material' includes every sort of material upon which words or figures can be expressed: see the Stamp Duties Management Act 1891 s 27.

2 Ibid s 13(3). For these purposes, 'die' includes any plate, type, tool or implement used under the direction of the Commissioners for Her Majesty's Revenue and Customs for expressing or denoting any duty, or rate of duty, or the fact that any duty or rate of duty or penalty has been paid, or that an instrument is duly stamped or is not chargeable with any duty, or for denoting any fee, and also any part of any such plate, type, tool or implement: s 27; Commissioners for Revenue and Customs Act 2005 s 50(1), (7). The Commissioners for Her Majesty's Revenue and Customs are appointed under the Commissioners for Revenue and Customs Act 2005 s 1 and have taken over the functions of the former Inland Revenue and Her Majesty's Customs and Excise: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 900 et seq; INCOME TAXATION. See also VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 13. All statutory and other references to the Commissioners of Customs and Excise and their officers are, in so far as it is appropriate, now to be taken as references to the Commissioners for Her Majesty's Revenue and Customs and their officers: see s 50(1), (2), (7).

3 For these purposes, 'stamp' means a stamp impressed by means of a die as well as an adhesive stamp for denoting any duty or fee: see the Stamp Duties Management Act 1891 s 27.

4 Ibid s 13(4). See also *R v Field* (1785) 1 Leach 383, CCR.

5 Stamp Duties Management Act 1891 s 13(5).

6 Ibid s 13(6).

7 Ibid s 13(7).

8 Ibid s 13(8) (amended by the Forgery Act 1913 s 20, Schedule). As to uttering forged stamps by delivery to an employee for forwarding see *R v Collicott* (1812) Russ & Ry 212, CCR. A person who sells a forged stamp commits an offence even though the stamp when sold bore a cancellation mark: *R v Lowden* [1914] 1 KB 144, 9 Cr App Rep 195, CCA.

9 Possession of a die to illustrate a stamp catalogue does not constitute a lawful excuse: *Dickins v Gill* [1896] 2 QB 310, DC. The innocent purchase of fictitious social security stamps from an unauthorised source does not constitute a lawful excuse for the possession of such stamps: *Winkle v Wiltshire* [1951] 1 KB 684, [1951] 1 All ER 479, DC.

10 Stamp Duties Management Act 1891 s 13(9) (amended by the Forgery Act 1913 Schedule).

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

12 Stamp Duties Management Act 1891 s 13(1), (2) (amended by the Forgery Act 1913 Schedule; and the Finance Act 1999 s 115, Sch 18 para 2); Criminal Law Act 1967 s 1; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 12. See also PARA 1103 post. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to uttering etc fictitious stamps see POST OFFICE vol 36(2) (Reissue) PARA 177.

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### **355. Forgery etc of proof marks on gunbarrels.**

Any person who:

- 321 (1) fraudulently erases, obliterates or defaces, or fraudulently causes to be erased, obliterated or defaced, from any barrel<sup>1</sup> any mark<sup>2</sup> of any stamp<sup>3</sup> or part of a stamp provided or used by either of the two companies<sup>4</sup> for marking barrels<sup>5</sup>; or
- 322 (2) knowingly<sup>6</sup> forges or counterfeits any stamp, or any part of a stamp, provided or used by either of the two companies for marking any barrel<sup>7</sup>; or
- 323 (3) knowingly sells or parts with the possession of any such forged or counterfeit stamp or part of a stamp<sup>8</sup>; or
- 324 (4) knowingly marks any barrel with any such forged or counterfeit stamp, or with any part of any such forged or counterfeit stamp<sup>9</sup>; or
- 325 (5) knowingly makes up any barrel so marked<sup>10</sup>; or
- 326 (6) knowingly has in his possession or sells or parts with the possession of any barrel so marked<sup>11</sup>; or
- 327 (7) knowingly forges, counterfeits, or by any means whatsoever produces upon any barrel an imitation of any mark of any stamp, or any part of a stamp, provided or used by either of the two companies for marking any barrel<sup>12</sup>; or
- 328 (8) knowingly sells or parts with the possession of any such mark<sup>13</sup>; or
- 329 (9) knowingly transposes or removes from any barrel to any other barrel, or from one part of a barrel to another part of the same barrel, any mark of any stamp, or any part of a stamp, provided or used by either of the two companies for marking any barrel<sup>14</sup>; or
- 330 (10) knowingly has in his possession or sells or parts with the possession of any mark so transposed or removed<sup>15</sup>; or
- 331 (11) knowingly has in his possession any such forged or counterfeit stamp or part of a stamp, or any such forged or counterfeit mark or imitation of a mark, or any such transposed or removed mark<sup>16</sup>; or
- 332 (12) knowingly cuts or severs from any barrel any mark of any stamp provided or used by either of the two companies for stamping any barrel, with intent that the mark be placed upon or joined or affixed to any other barrel or any other part of the barrel from which the mark is cut or severed<sup>17</sup>; or
- 333 (13) knowingly places upon or joins or affixes to any barrel any such mark so cut or severed<sup>18</sup>; or
- 334 (14) with intent to defraud uses any genuine stamp, or part of a genuine stamp, provided or used by either of the two companies for marking any barrel<sup>19</sup>,

commits an offence and is liable:

- 335 (a) in the case of head (1) above, on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum<sup>20</sup>; and
- 336 (b) in the case of heads (2) to (14) above, on conviction on indictment to imprisonment for a term not exceeding two years<sup>21</sup>.

<sup>1</sup> For the meaning of 'barrel' see PARA 129 note 2 ante.

2 'Mark' includes every mark and other impression of and made with any stamp (see note 3 infra), or produced by any other means, on any metal whatsoever: Gun Barrel Proof Act 1868 s 4.

3 'Stamp' includes every stamp, die, punch, tool and other instrument by means of which any mark can be made on any metal whatsoever: see ibid s 4.

4 'The two companies' means and includes the Gunmakers Company of the City of London and the Birmingham Proof House: see ibid s 4.

5 Ibid s 122(6) (amended by the Gun Barrel Proof Act 1978 s 8(2), Sch 4).

6 Where the person charged with an offence under the Gun Barrel Proof Act 1868 s 121(1) (as amended) (see heads (2)-(14) in the text) was at the time when the offence is alleged to have been committed a gunmaker, a gunbarrel maker, or a maker of or dealer in small arms or barrels (or any part of such), knowledge on his part is presumed until the contrary is shown: s 121(1) proviso (s 121(1) amended by the Gun Barrel Proof Act 1978 s 8(1), Sch 3 para 10).

7 Gun Barrel Proof Act 1868 s 121(1)(1) (as amended: see note 6 supra). Any person who, with respect to any stamp or mark, or any part of any stamp or mark of a foreign country, registered by either of the two companies, or with respect to any forgery, counterfeit or imitation of any such stamp or mark or part, or with respect to any barrel marked with any such forged or counterfeited stamp or part of a stamp, knowingly commits any such offence as is expressed in s 121(1) (as amended) (see heads 2-14 in the text) with respect to any stamp or any part of any stamp provided or used by either of the two companies for marking any barrel, or with respect to any mark of any such stamp or part of a stamp, is guilty of an offence: s 121(1)(14) (as so amended).

Any person who, with respect to: (1) any stamp or part of a stamp provided or used at any time by an official proof house of any foreign state for impressing upon any barrel a mark which is or at any time was a convention proof mark; (2) any mark of any such stamp or part of a stamp; (3) any forgery, counterfeit or imitation of any such stamp or part of a stamp or of any such mark; or (4) any barrel marked with any such forged or counterfeit stamp or part of a stamp, knowingly does anything which would be an offence under s 121(1) (as amended) (see heads 2-14 in the text) if done with respect to any stamp or any part of a stamp provided or used at any time by either of the two companies for marking any barrel, or with respect to any mark of any such stamp or part of a stamp, is guilty of an offence under s 121(1) (as amended): s 121(2) (added by the Gun Barrel Proof Act 1978 Sch 3 para 10(2)). For these purposes, 'convention proof mark' means any mark, sign or character of which a specimen is for the time being included in the register of proof marks published by the Permanent International Commission established under the Convention for the Reciprocal Recognition of Proof Marks on Small Arms (Brussels, 1 July 1969, TS 84 (1980); Cmd 8063), not being a mark, sign or character included in it as a United Kingdom proof mark: Gun Barrel Proof Act 1868 s 129(1) (substituted by the Gun Barrel Proof Act 1978 s 1(1), Sch 1).

8 Gun Barrel Proof Act 1868 s 121(1)(2) (as amended: see note 6 supra).

9 Ibid s 121(1)(3) (as amended: see note 6 supra).

10 Ibid s 121(1)(4) (as amended: see note 6 supra).

11 Ibid s 121(1)(5) (as amended: see note 6 supra).

12 Ibid s 121(1)(6) (as amended: see note 6 supra).

13 Ibid s 121(1)(7) (as amended: see note 6 supra).

14 Ibid s 121(1)(8) (as amended: see note 6 supra).

15 Ibid s 121(1)(9) (as amended: see note 6 supra).

16 Ibid s 121(1)(10) (as amended: see note 6 supra).

17 Ibid s 121(1)(11) (as amended: see note 6 supra).

18 Ibid s 121(1)(12) (as amended: see note 6 supra).

19 Ibid s 121(1)(13) (as amended: see note 6 supra).

20 See ibid s 122 (amended by the Gun Barrel Proof Act 1978 Sch 3 para 11). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) para 140.

21 See the Gun Barrel Proof Act 1868 s 121(1) (as amended: see note 6 supra). As to the counterfeiting etc of dies and marks under the Hallmarking Act 1973 see s 6 (as amended); and TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 481.

## **UPDATE**

### **355 Forgery etc of proof marks on gunbarrels**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **356. Destroying etc register of births etc.**

Any person who:

- 337 (1) unlawfully destroys, defaces or injures, or causes or permits to be destroyed, defaced or injured, any register of births, baptisms, marriages, deaths or burials authorised or required by law to be kept in England or Northern Ireland, or any part of any such register, or any certified copy of any such register or any part of it;
- 338 (2) knowingly and unlawfully inserts or causes or permits to be inserted in any such register, or in any certified copy of it, any false entry of any matter relating to any birth, baptism, marriage, death or burial;
- 339 (3) knowingly and unlawfully gives any false certificate relating to any birth, baptism, marriage, death or burial;
- 340 (4) certifies any writing to be a copy or extract from any such register, knowing such writing, or the part of the register from which the copy or extract is so given, to be false in any material particular;
- 341 (5) offers, utters, disposes of or puts off any such register, entry, certified copy or certificate, knowing the same to be false;
- 342 (6) offers, utters, disposes of or puts off any copy of any entry in any such register, knowing such entry to be false,

is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>1</sup>.

<sup>1</sup> See the Forgery Act 1861 s 36 (amended by the Statute Law Revision Act 1892; the Statute Law Revision (No 2) Act 1893; and the Forgery Act 1913 s 20, Schedule Pt 1); the Criminal Justice Act 1948 s 1; and the Criminal Law Act 1967 s 12(5)(a). As to the register of births etc see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 504 et seq.

As to the correction of errors notwithstanding the Forgery Act 1861 s 36 (as amended) see ECCLESIASTICAL LAW vol 14 PARAS 1034, 1116. It is not necessary that the entry should be made with intent to defraud, nor is it necessary (where the matter relates to a marriage register) that the marriage should be valid: *R v Asplin* (1873) 12 Cox CC 391. Making an entry in a register (eg as a witness to a marriage) in the name of another constitutes making a false entry: *R v Asplin* supra (where it was held that it was immaterial that a witness signing a marriage register in a false name was a third witness). Any person who wilfully inserts or causes to be inserted in a register or record any false entry of any birth or baptism, naming or dedication, death or burial, or marriage, or wilfully gives any false certificate, or certifies any writing to be an extract from any register or record knowing the register or record to be false in any part is guilty of an offence: see the Non-parochial Registers Act 1840 s 8 (amended by the Forgery Act 1913 s 20, Schedule; and the Criminal Damage Act 1971 s 11(8), Schedule Pt 1); and the Criminal Law Act 1967 s 12(5)(a).



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**357. Making false entries in copies of registers sent to registrars.**

Any person who:

- 343 (1) knowingly and wilfully inserts or causes or permits to be inserted in any copy of any register directed or required by law to be transmitted to any registrar or other officer any false entry of any matter relating to any baptism, marriage or burial;
- 344 (2) knowingly and wilfully signs or verifies any copy of any such register so directed or required to be transmitted, which copy is false in any part of it, knowing the same to be false;
- 345 (3) unlawfully destroys, defaces or injures or for any fraudulent purpose takes from its place of deposit or conceals any such copy of any register,

is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>1</sup>.

<sup>1</sup> Forgery Act 1861 s 37 (amended by the Statute Law Revision Act 1892; the Statute Law Revision (No 2) Act 1892; the Forgery Act 1913 s 20, Schedule Pt I; and the Forgery Act 1931 s 20, Schedule Pt 1); Criminal Justice Act 1948 s 1; Criminal Law Act 1967 s 12(5)(a).

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## **(8) COMPUTER MISUSE**

### **358. Unauthorised access to computer material.**

A person is guilty of an offence if: (1) he causes a computer to perform any function with intent<sup>1</sup> to secure access to any program or data held in any computer<sup>2</sup>; (2) the access he intends to secure is unauthorised<sup>3</sup>; and (3) he knows at the time when he causes the computer to perform the function that that is the case<sup>4</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both<sup>5</sup>.

It is immaterial whether any act or other event proof of which is required for conviction of the offence occurred in England and Wales<sup>6</sup>, or whether the defendant was in England and Wales at the time of the act or event<sup>7</sup>. However, at least one significant link<sup>8</sup> with domestic jurisdiction must exist in the circumstances of the case for the offence to be committed<sup>9</sup>. It is also immaterial to guilt whether or not the defendant was a British citizen at the time of any act, omission or other event proof of which is required for conviction of the offence<sup>10</sup>.

A search warrant may be issued by a circuit judge where he is satisfied by information on oath given by a constable that there are reasonable grounds for believing that the above offence has been or is about to be committed and that evidence that such an offence has been or is about to be committed is on those premises<sup>11</sup>; and the provisions creating the offence are deemed to have effect without prejudice to any enactment relating to powers of inspection, search or seizure<sup>12</sup>.

1 The intended access need not be directed at any particular program or data, a program or data of any particular kind, or a program or data held in any particular computer: Computer Misuse Act 1990 s 1(2).

2 A person secures access to any program or data held in a computer if, by causing a computer to perform any function, he: (1) alters or erases the program or data; (2) copies or moves it to another storage medium or to a different location in the storage medium where it is held; (3) uses it; or (4) has it output from the computer in which it is held (whether by having it displayed or in any other manner): *ibid* s 17(2). A person uses a program if the function he causes the computer to perform causes the program to be executed or is itself a function of the program: s 17(3). References to any program or data held in a computer include references to a program or data held in a disc or other or other removable storage medium for the time being in a computer: s 17(6).

3 Access of any kind by any person to any program held in a computer is unauthorised if he is not himself entitled to control access of the kind in question to the program or data, and he does not have consent to access by him of the kind in question to the program or data from any person so entitled: see *ibid* s 17(5). Authority to access one piece of data is not authority to access other pieces of data 'of the same kind' which the person concerned does not have authority to access: *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Government of the United States of America (No 2)* [2000] 2 AC 216, [1999] 4 All ER 1, HL (disapproving a dictum by Astill J in *DPP v Bignell* [1998] 1 Cr App Rep 1 at 12-13).

4 Computer Misuse Act 1990 s 1(1). The Computer Misuse Act 1990 does not require the use of one computer to gain unauthorised access to another: *A-G's Reference (No 1 of 1991)* [1993] QB 94, [1992] 3 All ER 897, CA. A person does not commit an offence under the Computer Misuse Act 1990 s 1 if he accesses a computer at an authorised level but for an unauthorised purpose: *DPP v Bignell* [1998] 1 Cr App Rep 1, DC. Proceedings for an offence under the Computer Misuse Act 1990 s 1 may be brought within a six-month period from the date on which evidence sufficient in the prosecutor's opinion to warrant the proceedings came to his knowledge: see s 11(2), (4), (5); and *Morgans v DPP* [1999] 1 WLR 968 (revsd on different grounds [2001] 1 AC

315, [2000] 2 All ER 522, HL). No such proceedings may be brought by virtue of the Computer Misuse Act 1990 s 1 more than three years after the commission of the offence: s 11(3).

5 Ibid s 1(3). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 142.

6 Computer Misuse Act 1990 s 4(6).

7 Ibid s 4(1)(a).

8 Either of the following is a significant link with the jurisdiction of England and Wales: (1) that the defendant was in England and Wales when he did the act which caused the computer to perform the function; or (2) that any computer containing any program or data to which the defendant secured or intended to secure unauthorised access by doing that act was in England and Wales at that time: ibid s 5(1), (2).

9 Ibid s 4(2).

10 See ibid s 9(1), (2)(a).

11 Ibid s 14(1). As from a day to be appointed such a warrant may also be issued by a district judge: see s 14(1) (prospectively amended by the Courts Act 2003 s 65, Sch 4 para 7). At the date at which this volume states the law no such day had been appointed. See also PARA 879 post.

The power conferred by the Computer Misuse Act 1990 s 14(1) does not extend to authorising a search for material of the kinds mentioned in the Police and Criminal Evidence Act 1984 s 9(2) (privileged, excluded and special procedure material: see PARA 874 post): Computer Misuse Act 1990 s 14(2). A warrant under s 14 (as amended) may authorise persons to accompany any constable executing the warrant; and it remains in force for three months from the date of its issue: s 14(3) (amended by the Serious Organised Crime and Police Act 2005 s 174, Sch 16 para 7). In executing a warrant issued under the Computer Misuse Act 1990 s 14 (as amended) a constable may seize an article if he reasonably believes that it is evidence that an offence under s 1 has been or is about to be committed: s 14(4). For these purposes, 'premises' includes land, buildings, movable structures, vehicles, vessels, aircraft and hovercraft: s 14(5).

12 See ibid s 10 (amended by the Criminal Justice and Public Order Act 1994 s 162(1)).

## UPDATE

### 358-361 Computer misuse

A person is guilty of an offence if he makes, adapts, supplies or offers to supply any article intending it to be used to commit, or to assist in the commission of, an offence under the Computer Misuse Act 1990 s 1 (see PARA 358) or s 3 (see PARA 360): s 3A(1) (s 3A added by the Police and Justice Act 2006 s 37). A person is guilty of an offence if he supplies or offers to supply any article believing that it is likely to be used to commit, or to assist in the commission of, an offence under the Computer Misuse Act 1990 s 1 or s 3: s 3A(2). A person is guilty of an offence if he obtains any article with a view to its being supplied for use to commit, or to assist in the commission of, an offence under s 1 or s 3: s 3A(3). In s 3A 'article' includes any program or data held in electronic form: s 3A(4). A person guilty of an offence under s 3A is liable (1) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both; and (2) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: s 3A(5).

As to transitional and saving provision see the Police and Justice Act 2006 s 38 (amended by the Serious Crime Act 2007 s 61(4)).

### 358 Unauthorised access to computer material

NOTE 2--Computer Misuse Act 1990 s 17(2) amended: Police and Justice Act 2006 Sch 14 para 29(2).

NOTE 4--Computer Misuse Act 1990 s 11 repealed: Police and Justice Act 2006 Sch 14 para 23. See *Burwell v DPP* [2009] EWHC 1069 (Admin), (2009) 173 JP 351, DC (prosecutor's certificate under 1990 Act s 11(4) must have relevant date rather than general statement that proceedings started from date at which prosecutor acquired evidence).

TEXT AND NOTE 5--A person guilty of an offence under the Computer Misuse Act 1990 s 1 is now liable (1) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both; and (2) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: s 1(3) (substituted by the Police and Justice Act 2006 s 35(3)).

NOTE 8--Computer Misuse Act 1990 s 5(2) amended: Police and Justice Act 2006 Sch 14 para 19(2).

TEXT AND NOTE 11--Computer Misuse Act 1990 s 14 repealed: Police and Justice Act 2006 Sch 14 para 26.

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### **359. Unauthorised access with intent to commit etc further offences.**

A person who commits an offence of unauthorised access<sup>1</sup> with intent to commit an offence ('a relevant offence') for which the sentence is fixed by law<sup>2</sup> or for which an offender of 21 or over (not previously convicted) may be sentenced<sup>3</sup> to a term of five years' imprisonment<sup>4</sup>, or with intent to facilitate the commission of such an offence (whether by himself or another), is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding five years<sup>5</sup> or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both<sup>6</sup>. It is immaterial whether the further offence is to be committed on the same occasion as the unauthorised access or on some future occasion<sup>7</sup>, and a person may be guilty of this offence even though the facts are such that the commission of the further offence is impossible<sup>8</sup>.

Provisions concerning jurisdiction are the same as those for the offence of unauthorised access<sup>9</sup>, with the exception that there is no need for a significant link to exist for the commission of the unauthorised access offence to be established in proof of an allegation to that effect in proceedings for an offence of unauthorised access with intent to commit or facilitate an offence<sup>10</sup>. Where a 'significant link'<sup>11</sup> does in fact exist in the case of an offence of unauthorised access and commission of that offence is alleged in proceedings for an offence of unauthorised access with intent to commit (or facilitate) an offence, the provisions relating to the latter offence apply as if anything which the defendant intended to do (or facilitate) in any place outside England and Wales which would be such an offence if it took place in England and Wales were the offence in question<sup>12</sup>, provided that what the defendant intended to do (or facilitate) would involve the commission of an offence under the law of the country where the whole or part of it was intended to take place<sup>13</sup>.

A person who on trial on indictment is found not guilty of this offence may nevertheless be convicted on the lesser charge of unauthorised access if he could have been found guilty of that offence within the time limits<sup>14</sup> applicable to such proceedings<sup>15</sup>.

1    I.e. the offence under Computer Misuse Act 1990 s 1: see PARA 358 ante.

2    See *ibid* s 2(2)(a).

3    Or might be sentenced but for the restrictions imposed by the Magistrates' Courts Act 1980 s 33 (as amended; prospectively amended): see PARA 1114 post.

4    See the Computer Misuse Act 1990 s 2(2)(b). As from a day to be appointed s 2(2)(b) applies to a person who has attained the age of 18 with no previous convictions: see s 2(2)(b) (prospectively amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 Pt II para 98). At the date at which this volume states the law no such day had been appointed.

5    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6    Computer Misuse Act 1990 s 2(1), (5). The intent is not limited to an intent to commit the further offence in England and Wales: see the text to note 8 *infra*. As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7 Ibid s 2(3).

8 Ibid s 2(4).

9 See PARA 358 ante.

10 Computer Misuse Act 1990 s 4(3).

11 See PARA 358 note 8 ante.

12 Computer Misuse Act 1990 s 4(4).

13 Ibid s 8(1). This condition is to be taken to be satisfied unless not later than rules of court may provide the defence serves on the prosecution a notice: (1) stating that, on the facts as alleged with respect to the relevant conduct (ie what the defendant intended to do), the condition is not in its opinion satisfied; (2) showing the grounds for that opinion; and (3) requiring the prosecution to show that it is satisfied: s 8(5), (6)(a). However, the court, if it thinks fit, may permit the defence to require the prosecution to show that the condition is satisfied without the prior service of such a notice: s 8(7). In the Crown Court the question whether the condition is satisfied is to be decided by the judge alone: s 8(9).

14 See PARA 358 note 4 ante.

15 See the Computer Misuse Act 1990 s 12; and PARA 1338 post.

## UPDATE

### 358-361 Computer misuse

A person is guilty of an offence if he makes, adapts, supplies or offers to supply any article intending it to be used to commit, or to assist in the commission of, an offence under the Computer Misuse Act 1990 s 1 (see PARA 358) or s 3 (see PARA 360): s 3A(1) (s 3A added by the Police and Justice Act 2006 s 37). A person is guilty of an offence if he supplies or offers to supply any article believing that it is likely to be used to commit, or to assist in the commission of, an offence under the Computer Misuse Act 1990 s 1 or s 3: s 3A(2). A person is guilty of an offence if he obtains any article with a view to its being supplied for use to commit, or to assist in the commission of, an offence under s 1 or s 3: s 3A(3). In s 3A 'article' includes any program or data held in electronic form: s 3A(4). A person guilty of an offence under s 3A is liable (1) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both; and (2) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: s 3A(5).

As to transitional and saving provision see the Police and Justice Act 2006 s 38 (amended by the Serious Crime Act 2007 s 61(4)).

### 359 Unauthorised access with intent to commit etc further offences

TEXT AND NOTES 5, 6--A person guilty of an offence under the Computer Misuse Act 1990 s 2 is now liable (1) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both; and (2) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both: s 2(5) (substituted by the Police and Justice Act 2006 Sch 14 para 17).

TEXT AND NOTES 14, 15--Computer Misuse Act 1990 s 12 repealed: Police and Justice Act 2006 Sch 14 para 24.



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### **360. Unauthorised modification of computer material.**

A person who does any act which causes an unauthorised<sup>1</sup> modification<sup>2</sup> of the contents of any computer, and at the time when he does the act has the requisite intent<sup>3</sup> and the requisite knowledge<sup>4</sup>, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

It is immaterial whether any act or other event proof of which is required for conviction of the offence occurred in England and Wales<sup>7</sup>, or whether the defendant was in England and Wales at the time of the act or event<sup>8</sup>. However, at least one significant link<sup>9</sup> with domestic jurisdiction must exist in the circumstances of the case for the offence to be committed<sup>10</sup>. It is also immaterial to guilt whether or not the defendant was a British citizen at the time of any act, omission or event proof of which is required for conviction of the offence<sup>11</sup>.

A person who is found not guilty of this offence, or any attempt to commit such an offence, may nevertheless be convicted on the lesser charge of unauthorised access if he could have been found guilty of that offence within the time limits applicable to such proceedings<sup>12</sup>.

1 Modification is 'unauthorised' if the person whose act causes it is not entitled to determine whether the modification should be made, and he does not have consent to the modification from any person who is so entitled: Computer Misuse Act 1990 s 17(8). See *DPP v Lennon* [2006] All ER (D) 147 (May).

2 A modification of the contents of a computer takes place if, by the operation of any function of the computer concerned or any other computer, any program or data held in the computer is altered or erased, or any program or data is added to its contents: see the Computer Misuse Act 1990 s 17(7). As to the meaning of 'program or data held in a computer' see PARA 358 note 2 ante. Any act which contributes towards causing a modification is regarded as causing it: see s 17(7).

3 I.e. an intent to cause a modification of the contents of any computer and by so doing to impair its operation, or to prevent or hinder access to any program or data held in it, or impair the operation of any such program or the reliability of any such data: *ibid* s 3(2). For the purposes of s 3(2), a computer's reliability is impaired if it is used to record information as deriving from a particular person when it is, in fact, derived from someone else: *Zezev and Yarimaka v Governor of Brixton Prison* [2002] EWHC 589 (Admin), [2002] 2 Cr App Rep 515. Although the Computer Misuse Act 1990 s 3(2) seems to require a double intent, *Zezev and Yarimaka v Governor of Brixton Prison* supra indicates that, where the modification necessarily impairs reliability, the two intents become telescoped; according to this decision, where a computer is caused to record information which shows that it came from one person, when it came from another, as where an e-mail is sent which purports to come from X when in fact it comes from Y, that causes an unauthorised modification of the computer's contents, and there is an intent to cause that modification and thereby to impair the reliability of the data in the computer: see *Zezev and Yarimaka v Governor of Brixton Prison* supra.

The requisite intent need not be directed at any particular computer, any particular program or data or a program or data of any particular kind, or any particular modification or a modification of any particular kind: Computer Misuse Act 1990 s 3(3).

It is immaterial whether an unauthorised modification or any intended effect of it is, or is intended to be, permanent or merely temporary: s 3(5).

4 I.e. knowledge that any modification he intends to cause is unauthorised: *ibid* s 3(4).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post),



although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 See the Computer Misuse Act 1990 s 3(1), (7). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7 See *ibid* s 4(6).

8 *Ibid* s 4(1).

9 For the purposes of this offence, either of the following is a significant link with the English and Welsh jurisdiction: (1) that the defendant was in England and Wales when he did the act which caused the unauthorised modification; or (2) that the unauthorised modification took place in England and Wales: *ibid* s 5(1), (3).

10 *Ibid* s 4(2). As to the extent to which external law is relevant see s 8 (amended by the Criminal Justice (Terrorism and Conspiracy) Act 1998 s 9(1), (2), Sch 1 para 6).

11 See the Computer Misuse Act 1990 s 9(1), (2)(a).

12 See *ibid* s 12; and PARA 1338 post.

## UPDATE

### 358-361 Computer misuse

A person is guilty of an offence if he makes, adapts, supplies or offers to supply any article intending it to be used to commit, or to assist in the commission of, an offence under the Computer Misuse Act 1990 s 1 (see PARA 358) or s 3 (see PARA 360): s 3A(1) (s 3A added by the Police and Justice Act 2006 s 37). A person is guilty of an offence if he supplies or offers to supply any article believing that it is likely to be used to commit, or to assist in the commission of, an offence under the Computer Misuse Act 1990 s 1 or s 3: s 3A(2). A person is guilty of an offence if he obtains any article with a view to its being supplied for use to commit, or to assist in the commission of, an offence under s 1 or s 3: s 3A(3). In s 3A 'article' includes any program or data held in electronic form: s 3A(4). A person guilty of an offence under s 3A is liable (1) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both; and (2) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: s 3A(5).

As to transitional and saving provision see the Police and Justice Act 2006 s 38 (amended by the Serious Crime Act 2007 s 61(4)).

### 360 Unauthorised modification of computer material

TEXT AND NOTES 1-6--Replaced. A person is guilty of an offence if (1) he does any unauthorised act in relation to a computer; (2) at the time when he does the act he knows that it is unauthorised; and (3) the Computer Misuse Act 1990 s 3(2) or (3) applies: s 3(1) (s 3 substituted by the Police and Justice Act s 36, and amended by the Serious Crime Act 2007 s 61(3)). The Computer Misuse Act 1990 s 3(2) applies if the person intends by doing the act to impair the operation of any computer, to prevent or hinder access to any program or data held in any computer, or to impair the operation of any such program or the reliability of any such data: s 3(2). Section 3(3) applies if the person is reckless as to whether the act will do any of the things mentioned in s 3(2): s 3(3). An act done in relation to a computer is unauthorised if the person doing the act, or causing it to be done is not himself a person who has responsibility for the computer and is entitled to determine whether the act may be done and does not have

consent to the act from any such person; for these purposes 'act' includes a series of acts: Computer Misuse Act 1990 s 17(8) (s 17(8) substituted by the Police and Justice Act 2006 Sch 14 para 29(4)).

The intention referred to in the Computer Misuse Act 1990 s 3(2) above, or the recklessness referred to in s 3(3), need not relate to any particular computer, any particular program or data, or a program or data of any particular kind: s 3(4). In s 3, (a) a reference to doing an act includes a reference to causing an act to be done; (b) 'act' includes a series of acts; and (c) a reference to impairing, preventing or hindering something includes a reference to doing so temporarily: s 3(5). A person guilty of an offence under s 3 is liable (i) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both and (ii) on conviction on indictment, to imprisonment for a term not exceeding ten years or to a fine or to both: s 3(6).

Computer Misuse Act 1990 s 17(7) repealed: Police and Justice Act 2006 Sch 14 para 29(3).

See *R v Waters* [2007] All ER (D) 298 (Jan), CA (value of computer surveillance operation to defendant valid factor in determining length of sentence).

NOTE 11--Computer Misuse Act 1990 s 9(2)(a) amended: Police and Justice Act 2006 Sch 14 para 22.

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### **361. Inchoate offences related to computer misuse offences.**

On a charge of conspiracy to commit a computer misuse offence<sup>1</sup>, it is immaterial to the defendant's guilt where any person became a party to the conspiracy, and whether any act, omission or event occurred in England and Wales<sup>2</sup>. On a charge of attempting to commit the offence of unauthorised modification of computer material<sup>3</sup>, it is immaterial to guilt where the attempt was made, and whether it had an effect in England and Wales<sup>4</sup>. On a charge of incitement to commit a computer misuse offence, the question where the incitement took place is immaterial to the defendant's guilt<sup>5</sup>.

If any act done by a person in England and Wales would amount to the offence of incitement to commit an offence under the Computer Misuse Act 1990 but for the fact that what he had in view would not be an offence triable in England and Wales, what he had in view is to be treated as such an offence for the purposes of any charge of incitement brought in respect of that act; and any such charge is to be accordingly triable in England and Wales<sup>6</sup>.

1    Ie under the Computer Misuse Act 1990 ss 1-3: see PARAS 358-360 ante.

2    Ibid ss 4(6), 6(1).

3    Ie under ibid s 3: see PARA 360 ante.

4    Ibid ss 4(6), 6(2).

5    Ibid ss 4(6), 6(3). As to the territorial scope of inchoate offences related to offences under external law corresponding to offences under the Computer Misuse Act 1990 see s 7(4) (see the text and note 6 infra); and PARAS 68, 79 ante.

6    See ibid s 7(4). A person is guilty of an offence triable by virtue of s 7(4) or by virtue of the Criminal Attempts Act 1981 s 1A (as added) (see PARA 79 ante) only if what he had in view would involve the commission of an offence under the law in force where the whole or any part of it was intended to take place: Computer Misuse Act 1990 s 8(3). This condition is to be taken to be satisfied unless not later than rules of court may provide the defence serves on the prosecution a notice: (1) stating that, on the facts as alleged with respect to the relevant conduct (ie what the defendant intended to do), the condition is not in its opinion satisfied; (2) showing the grounds for that opinion; and (3) requiring the prosecution to show that it is satisfied: s 8(5), (6)(c). However, the court, if it thinks fit, may permit the defence to require the prosecution to show that the condition is satisfied without the prior service of such a notice: s 8(7). In the Crown Court the question whether the condition is satisfied is to be decided by the judge alone: s 8(9).

## **UPDATE**

### **358-361 Computer misuse**

A person is guilty of an offence if he makes, adapts, supplies or offers to supply any article intending it to be used to commit, or to assist in the commission of, an offence under the Computer Misuse Act 1990 s 1 (see PARA 358) or s 3 (see PARA 360): s 3A(1) (s 3A added by the Police and Justice Act 2006 s 37). A person is guilty of an offence if he supplies or offers to supply any article believing that it is likely to be used to commit, or to assist in the commission of, an offence under the Computer Misuse Act 1990 s 1 or s 3: s 3A(2). A person is guilty of an offence if he obtains any article with a

view to its being supplied for use to commit, or to assist in the commission of, an offence under s 1 or s 3: s 3A(3). In s 3A 'article' includes any program or data held in electronic form: s 3A(4). A person guilty of an offence under s 3A is liable (1) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both; and (2) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: s 3A(5).

As to transitional and saving provision see the Police and Justice Act 2006 s 38 (amended by the Serious Crime Act 2007 s 61(4)).

### **361 Inchoate offences related to computer misuse offences**

TEXT AND NOTES 2, 5--Computer Misuse Act 1990 s 6(1), (3) amended: Police and Justice Act 2006 Sch 14 para 20(b).

TEXT AND NOTES 5, 6--Computer Misuse Act 1990 ss 6(3), 7(4) repealed, s 8(3) amended: Serious Crime Act 2007 Sch 6 para 59, Sch 14.

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## **(9) JURISDICTION**

### **362. Jurisdiction in relation to theft, offences of fraud and certain other offences.**

A person may be guilty of an offence, known as a Group A offence<sup>1</sup>, if any of the events which are relevant events<sup>2</sup> in relation to the offence occurred in England and Wales<sup>3</sup>. The Group A offences are: (1) an offence under the Theft Act 1968 of theft<sup>4</sup>, obtaining property by deception<sup>5</sup>, obtaining a money transfer by deception<sup>6</sup>, obtaining pecuniary advantage by deception<sup>7</sup>, false accounting<sup>8</sup>, false statements by company directors etc<sup>9</sup>, procuring execution of valuable security by deception<sup>10</sup>, blackmail<sup>11</sup>, handling stolen goods<sup>12</sup>, and retaining wrongful credits<sup>13</sup>; (2) an offence under the Theft Act 1978 of obtaining services by deception<sup>14</sup> and of evading liability by deception<sup>15</sup>; (3) an offence under the Forgery and Counterfeiting Act 1981 of forgery<sup>16</sup>, copying a false instrument<sup>17</sup>, using a false instrument<sup>18</sup>, using a copy of a false instrument<sup>19</sup>, and offences relating to money orders, share certificates, passports etc<sup>20</sup>, offences of counterfeiting notes and coins<sup>21</sup>, offences of passing etc counterfeit notes and coins<sup>22</sup>, offences involving the custody or control of counterfeit notes and coins<sup>23</sup>, offences involving the making or custody or control of counterfeiting materials and implements<sup>24</sup>, an offence against the prohibition of importation of counterfeit notes and coins<sup>25</sup>, an offence against the prohibition of exportation of counterfeit notes and coins<sup>26</sup>; (4) the common law offence of cheating in relation to the public revenue<sup>27</sup>.

A person may be guilty of a Group A offence whether or not he was a British citizen<sup>28</sup> at any material time<sup>29</sup>, and whether or not he was in England and Wales at any such time<sup>30</sup>.

For the purpose of determining whether a relevant event has occurred within England and Wales in relation to a Group A offence, there is an obtaining of property in England and Wales if the property is either despatched from or received at a place in England and Wales<sup>31</sup>; and there is a communication in England and Wales of any information, instruction, request, demand or other matter if it is sent by any means from a place in England and Wales to a place elsewhere, or from a place elsewhere to a place in England and Wales<sup>32</sup>.

1 See the Criminal Justice Act 1993 s 1(1)(a). As to Group B offences see note 27 infra.

The provisions in this paragraph came into force on June 1 1999: Criminal Justice Act 1993 (Commencement No 10) Order 1999, SI 1999/1189; Criminal Justice Act 1993 (Commencement No 11) Order 1999, SI 1999/1499. They do not apply to any act or event before that date: Criminal Justice Act 1993 s 78(5). The common law rules as to jurisdiction apply to acts etc before that date. As to those rules see PARA 1050 et seq post.

2 'Relevant event', in relation to any Group A offence, means any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence: *ibid* s 2(1). See also note 1 supra. For the purpose of determining whether or not a particular event is a relevant event in relation to a Group A offence, any question as to where it occurred is to be disregarded: s 2(2). See also the text and note 31 infra.

3 *Ibid* s 2(3).

4 *Ie* under the Theft Act 1968 s 1: see PARA 282 ante.

5 *Ie* under *ibid* s 15: see PARA 310 ante.

- 6    Ie under *ibid* s 15A (as added and amended): see PARA 311 post.
- 7    Ie under *ibid* s 16 (as amended): see PARA 312 ante.
- 8    Ie under *ibid* s 17: see PARA 316 ante.
- 9    Ie under *ibid* s 19: see COMPANIES vol 14 (2009) PARA 314.
- 10   Ie under *ibid* s 20(2): see PARA 317 ante.
- 11   Ie under *ibid* s 21: see PARA 308 ante.
- 12   Ie under *ibid* s 22: see PARA 302 ante.
- 13   Ie under *ibid* s 24A (as added): see PARA 307 ante.
- 14   Ie under the Theft Act 1978 s 1: see PARA 313 ante.
- 15   Ie under *ibid* s 2: see PARA 314 ante.
- 16   Ie under the Forgery and Counterfeiting Act 1981 s 1: see PARA 347 ante.
- 17   Ie under *ibid* s 2: see PARA 348 ante.
- 18   Ie under *ibid* s 3: see PARA 349 ante.
- 19   Ie under *ibid* s 4: see PARA 350 ante.
- 20   Ie under *ibid* s 5 (as amended): see PARA 351 ante.
- 21   Ie under *ibid* s 14: see PARA 544 post.
- 22   Ie under *ibid* s 15: see PARA 545 post.
- 23   Ie under *ibid* s 16: see PARA 546 post.
- 24   Ie under *ibid* s 17: see PARA 547 post.
- 25   Ie under *ibid* s 20: see PARA 551 post.
- 26   Ie under *ibid* s 21 (as amended): see PARA 551 post.

27    See the Criminal Justice Act 1993 s 1(2) (amended by the Theft (Amendment) Act 1996 s 3; and the Criminal Justice Act 1993 (Extension of Group A Offences) Order 2000, SI 2000/1878, art 1). An offence under the Identity Cards Act 2006 s 25 (possession of false identity documents) is also a Group A offence: see the Criminal Justice Act 1993 s 1(2) (as so amended; further amended by the Identity Cards Act 2006 s 30(1)).

The Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) lists four related offences ('Group B offences'): (1) conspiracy to commit a Group A offence (s 1(3)(a)); (2) conspiracy to defraud (s 1(3)(b)); (3) attempting to commit a Group A offence (s 1(3)(c)); and (4) incitement to commit a Group A offence (s 1(3)(d)). The Secretary of State may by order amend s 1(2) (as amended) or s 1(3) by adding or removing any offence: s 1(4). The power to make such an order is exercisable by statutory instrument but no order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 1(5), (6). As to the offence of cheating the public revenue see PARA 322 ante.

28    For the meaning of 'British citizen' see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 85.

29    Criminal Justice Act 1993 s 3(1)(a). This provision does not apply where jurisdiction is given to try the offence in question by an enactment which makes provision by reference to the nationality of the person charged: s 3(4). On a charge of conspiracy to commit a Group A offence, or on a charge of conspiracy to defraud in England and Wales, the defendant may be guilty of the offence whether or not: (1) he became a party to the conspiracy in England and Wales; (2) any act or omission or other event in relation to the conspiracy occurred in England and Wales: s 3(2). On a charge of attempting to commit a Group A offence, the defendant may be guilty of the offence whether or not: (a) the attempt was made in England and Wales; (b) it had an effect in England and Wales: s 3(3). See also note 30 *infra*.

30    *Ibid* s 3(1)(b). The provisions of s 3(1) are also applicable to Group B offences (see note 27 *supra*): see s 3(1). See also note 29 *supra*.

31 Ibid s 4(a). See also note 32 infra.

32 Ibid s 4(b). The provisions of s 4 are also applicable to Group B offences (see note 27 supra): see s 4.

## UPDATE

### **362 Jurisdiction in relation to theft, offences of fraud and certain other offences**

NOTE 2--Definition is now subject to Criminal Justice Act 1993 s 2(1A): s 2(1) (amended by Fraud Act 2006 Sch 1 para 25(2)). In relation to an offence under s 1 (see PARA 309A.1), 'relevant event' includes (1) if the fraud involved an intention to make a gain and the gain occurred, that occurrence; (2) if the fraud involved an intention to cause a loss or to expose another to a risk of loss and the loss occurred, that occurrence: 1993 Act s 2(1A) (added by 2006 Act Sch 1 para 25(3)).

NOTE 27--1993 Act s 1(2) further amended: 2006 Act Sch 1 para 24(1), (2), Sch 3. Group A offences now also include an offence under any of the following provisions (1) s 1 (see PARA 309A.1); (2) s 6 (see PARA 309A.5); (3) s 7 (see PARA 309A.6); (4) s 9 (see PARA 309A.7); (5) s 11 (see PARA 309A.8): 1993 Act s 1(2)(bb) (added by 2006 Act Sch 1 para 24(3)). See further PARA 309A.

See further Serious Crime Act 2007 Sch 6 para 21(a) (references to common law offence of incitement).

See *R v Ali* [2007] EWCA Crim 257, [2007] 1 WLR 1599.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(1) TREASON AND RELATED OFFENCES/363. Acts constituting treason.

## **5. OFFENCES AGAINST THE STATE OR SECURITY**

### **(1) TREASON AND RELATED OFFENCES**

#### **363. Acts constituting treason.**

By statute a person is guilty of treason who:

- 346 (1) levies war against the Sovereign in Her realm, or is adherent to the Sovereign's enemies in Her realm giving them aid and comfort in the realm, or elsewhere<sup>1</sup>;
- 347 (2) compasses or imagines the death of the Sovereign<sup>2</sup>;
- 348 (3) compasses or imagines the death of the King's wife or of the Sovereign's eldest son and heir<sup>3</sup>;
- 349 (4) violates the King's wife or the Sovereign's eldest daughter unmarried or the wife of the Sovereign's eldest son and heir<sup>4</sup>;
- 350 (5) endeavours to deprive or hinder any person who is next in succession to the Crown for the time being<sup>5</sup> from succeeding after the demise of the Sovereign to the Crown and the dominions and territories belonging to the Crown and attempts the same maliciously, advisedly and directly by overt act or deed; or, knowing such offence to be done, is an abettor, procurer and comforter of the offender<sup>6</sup>;

351 (6) slays the chancellor, treasurer, or the king's justices<sup>7</sup>, being in their places, doing their offices<sup>8</sup>.

Anyone who owes allegiance to the Crown may commit treason<sup>9</sup>.

A person convicted of treason is liable to life imprisonment or any shorter term<sup>10</sup>.

1 Treason Act 1351. The treason of levying war against the Sovereign in Her realm may be of two kinds: (1) express and direct, as where war is raised against the Sovereign or Her forces with a view to injure Her person or to imprison Her or to force Her to remove any of Her ministers or counsellors; or (2) constructive, as where there is a rising for some general public purpose, as opposed to a limited or local purpose: *Fost* 208, 210, 213; 1 *Hale* PC 131-133, 143, 149. It is the treasonable purpose which distinguishes treason from riot: *R v Hardie* (1820) 1 *State Tr* NS 609 at 765. Adherence must be evidenced by an overt act (see *PARA* 366 post) done with intent to aid and assist the Sovereign's enemies (ie foreign states in actual hostility against the Sovereign (see 1 *East* PC 77), and the subjects of a foreign state in amity with us who act against us without the commission of their Sovereign (1 *Hale* PC 162)): see *R v Ahlers* [1915] 1 *KB* 616, 11 *Cr App Rep* 63, CCA (jury not directed that it must consider whether German consul who was British subject acted with intention of assisting enemy or in belief that his duty was to assist German subjects; conviction quashed). A person is adherent to the Sovereign's enemies who does an act which strengthens or tends to strengthen the Sovereign's enemies in the conduct of a war against the Sovereign or which weakens or tends to weaken the power of the Sovereign and of the country to resist or attack the enemies of the Sovereign and the country (*R v Casement* [1917] 1 *KB* 98, 12 *Cr App Rep* 99, CCA); or who sends the Sovereign's enemies money or provisions or renders them any kind of aid or comfort which, when given to a rebel within the realm, would make the subject guilty of levying war (1 *East* PC 78; *Fost* 217); or who, in conjunction with the Sovereign's enemies, commits hostile acts upon an ally of the Sovereign who is also at war with the Sovereign's enemies (1 *East* PC 79; *Fost* 220). Communications with the Sovereign's enemies from which they may derive information to shape their attack or defence constitutes an adherence to the enemy: *Fost* 217; *R v Grahme* (1691) 12 *State Tr* 645; *R v Gregg* (1708) 14 *State Tr* 1371; *R v Tyrie* (1782) 21 *State Tr* 815; *R v Jackson* (1795) 25 *State Tr* 783; *R v Sheares* (1798) 27 *State Tr* 255.

2 Treason Act 1351. It is an overt act of compassing the Sovereign's death, wilfully to do or attempt anything whereby the Sovereign's life may be endangered or to conspire to carry out that purpose (*Fost* 195; *R v Rookwood* (1696) 13 *State Tr* 139) or to meet with others to kill the Sovereign though no agreement is then come to (1 *East* PC 59; *R v Despard* (1803) 28 *State Tr* 346 at 349-350). It is therefore an overt act of the treason of compassing the death of the Sovereign to enter into measures for deposing or imprisoning Her, or to agree with foreigners to invade Her dominions or to go into a foreign country to that end or to levy or conspire to levy war against Her or to raise an insurrection against Her or to destroy the constitution of the country: *Fost* 197, 210; 1 *Hale* PC 108-128 (where the earlier authorities are fully cited); *R v Hardy* (1794) 24 *State Tr* 199; *R v Horne Tooke* (1794) 25 *State Tr* 1; *R v Freind* (1696) 13 *State Tr* 1; *R v Charnock, King and Keyes* (1696) 12 *State Tr* 1377; *R v Rookwood* supra; *R v Ings* (1820) 33 *State Tr* 957. Arguments and words of advice or persuasion, uttered in contemplation of some traitorous purpose actually on foot or intended, and in prosecution of it, and consulting together for such a purpose, are also overt acts: *Fost* 200; *R v Charnock, King and Keyes* supra at 1452; *R v Parkyns* (1696) 13 *State Tr* 63 at 132. Cf *Pine's Case* (1628) 3 *State Tr* 359 ('loose words, not relative to any act or design . . . are not overt acts').

3 Treason Act 1351.

4 Treason Act 1351 (as amended).

5 Ie according to the Bill of Rights (1688) and the Act of Settlement (1700 or 1701): see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) *PARA* 38 et seq; CROWN AND ROYAL FAMILY vol 12(1) (Reissue) *PARA* 31. As to the citation of the Act of Settlement see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) *PARA* 35.

6 Treason Act 1702 s 3 (amended by the Crime and Disorder Act 1998 s 36(2)(c)).

7 'Chancellor' means the Lord Chancellor: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) *PARAS* 477-497. 'Treasurer' means the Lord High Treasurer; the office has been in commission since 1714: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) *PARA* 512 et seq. The Treason Act 1351 (as amended) refers to 'the King's justices of the one bench or the other, justices in eyre, or justices of assise, and all other justices assigned to hear and determine'. These descriptions of the Queen's justices are no longer applicable and it is not clear how the statute might now be held to apply.

8 Treason Act 1351 (as amended).

9 See *PARA* 364 post.



10 Treason Act 1702 s 3 (amended by the Crime and Disorder Act 1998 s 36(2)(c)); Treason Act 1814 s 1 (amended by the Crime and Disorder Act 1998 s 36(4)). As to disqualifications consequent upon a conviction for treason see PARA 1818 post.

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### **364. Duty of allegiance.**

The essence of the offence of treason lies in the violation of the allegiance owed to the Sovereign<sup>1</sup>. Natural allegiance is due from all British subjects<sup>2</sup> at all times wherever they may be<sup>3</sup>; local allegiance is owed by an alien under the protection of the Crown so long as he is resident within the realm and by a resident alien who goes abroad leaving his family or effects within the realm or goes abroad in possession of a British passport<sup>4</sup>. An alien enemy may also be convicted of treason if he has accepted British protection during a war<sup>5</sup>. An ambassador who is not a subject of the state to which he is accredited does not owe any temporary allegiance to that state<sup>6</sup>.

1 See *Joyce v DPP* [1946] AC 347 at 365, 31 Cr App Rep 57 at 85, HL, per Lord Jowitt LC.

2 'British subject' is the term used in the judgment from which this statement is taken, but this term is now used to refer only to a narrow class of British national. As to British nationality see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 7 et seq.

3 See *R v Casement* [1917] 1 KB 98 at 137, 12 Cr App Rep 99 at 119, CCA.

4 *Joyce v DPP* [1946] AC 347 at 367, 31 Cr App Rep 57 at 87-88, HL, per Lord Jowitt LC. An alien who goes abroad may withdraw from his allegiance, possibly even though he holds a passport; but an act of treason cannot itself constitute such a withdrawal: see *Joyce v DPP* supra at 371 and 89-90 per Lord Jowitt LC. The duty of allegiance is not dependent upon a person's having taken the oath of allegiance: see *R v Arrowsmith* [1975] 1 All ER 463 at 469, 60 Cr App Rep 211 at 216-217, CA. As to allegiance generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 29-32.

5 *Joyce v DPP* [1946] AC 347 at 374-375, 31 Cr App Rep 57 at 96-99, HL, per Lord Porter.

6 As to ambassadors and diplomatic agents generally see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 31. Ambassadors and persons attached to embassies are, it seems, amenable to the English laws of treason only if they are British subjects (see note 2 supra): see Fost 187; 1 Hale PC 96; 1 Hawk PC c 2 s 5; *Story's Case* (1571) 3 Dyer 300b; *R v Owen (alias Collins)* (1615) 1 Roll Rep 185.

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### **365. Misprision of treason.**

It is an offence at common law, punishable by fine and imprisonment at the discretion of the court<sup>1</sup>, for a person who knows<sup>2</sup> that treason is being planned or committed not to report it as soon as he can to a justice of the peace or other authority<sup>3</sup>.

1 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

2 He without being a party or consenting to the treason: 1 East PC 139; *R v Tonge* (1662) 6 State Tr 225.

3 1 Hale PC 372; 1 East PC 139. See *Regicides' Case* (1660) 5 State Tr 947 at 985; *R v Tonge* (1662) 6 State Tr 225; *R v Walcot* (1683) 9 State Tr 519 at 553; *R v Thistlewood* (1820) 33 State Tr 681 at 690-691. To constitute the offence there must be a knowledge of the persons concerned and of the design or offence; merely to be told that there will be a rising and to conceal the information is not misprision of treason: Kel 21; 1 East PC 139.

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### **366. Treason and misprision of treason; evidence and procedure.**

The procedure on trials for treason or misprision of treason is the same as that on trials for murder<sup>1</sup>. An indictment for treason or misprision of treason committed in any part of the United Kingdom must be signed within three years from the commission of the offence<sup>2</sup>, except in the case of the treason of designing, endeavouring or attempting the assassination of the Sovereign where there is no limitation of time<sup>3</sup>. Treason committed abroad may be tried in England<sup>4</sup>.

The treason alleged must be proved by overt acts<sup>5</sup>. It seems that the overt acts upon which it is intended to rely must be expressly alleged in the indictment<sup>6</sup> and that no evidence is admissible of any overt act that is not so alleged unless it affords direct proof of the overt acts that are laid<sup>7</sup>. Where the overt acts alleged in the indictment include acts of conspiracy, evidence may be given of acts committed by co-conspirators in execution of the common design even if committed after the date of the overt acts alleged and after the defendant's arrest<sup>8</sup>.

1 Criminal Law Act 1967 s 12(6). As to treason being an exception to the general rule of convicting for an offence other than that charged see PARA 1335 post.

2 See the Treason Act 1695 s 5; the Treason Act 1708 s 1; the Treason (Ireland) Act 1821; the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(8), Sch 2 para 1; and Fost 249. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 Treason Act 1695 s 6.

4 See PARA 367 post.

5 See 3 Co Inst 12.

6 Provision to this effect was contained in the Treason Act 1695 s 8 (repealed). Quaere whether overt acts must be alleged in order to comply with the Indictments Act 1915 s 3(1): see PARA 1212 post. If the overt acts alleged consist of words or documents, it is sufficient to set out their effect: *R v Francia* (1717) 15 State Tr 897; *R v Watson* (1817) 2 Stark 116 at 132; *Vaughan's Trial* (1696) 13 State Tr 485 at 498. Several overt acts may be laid in one count: see PARA 1220 note 5 post.

7 See *R v Rookwood* (1696) 13 State Tr 139 at 217; *R v Laver* (1722) 16 State Tr 94 at 223; *Deacon's Case* (1746) 18 State Tr 365; *R v Thistlewood* (1820) 33 State Tr 681 at 686 per Abbott CJ.

8 *R v Horne Tooke* (1794) 1 East PC 98; *R v Hardy* (1794) 1 East PC 99; *R v McCafferty* (1867) 10 Cox CC 603, CCA; *R v Stone* (1796) 25 State Tr 1155.

## **UPDATE**

### **366 Treason and misprision of treason; evidence and procedure**

NOTE 2--Administration of Justice (Miscellaneous Provisions) Act 1933 Sch 2 para 1 amended: Coroners and Justice Act 2009 s 116(1)(d), Sch 23 Pt 3.

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### 367. Treason felony.

Any person who:

- 352 (1) within the United Kingdom<sup>1</sup> or without, compasses, imagines, invents, devises or intends (a) to deprive or depose the Sovereign from the style, honour or royal name of the Crown of the United Kingdom or of any other of Her Majesty's dominions and countries<sup>2</sup>; or (b) to levy war<sup>3</sup> against Her Majesty within any part of the United Kingdom in order by force or constraint to compel Her to change Her measures or counsels or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament; or (c) to move or stir any foreigner or stranger with force to invade the United Kingdom or any other of Her Majesty's dominions or countries; and
- 353 (2) expresses, utters or declares such compassings etc by publishing any printing or writing or by any overt act<sup>4</sup> or deed,

is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>5</sup>.

1 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 *R v Mitchel* (1848) 6 State Tr NS 599; *R v Gallagher* (1883) 15 Cox CC 291; *Mulcahy v R* (1866) IR 1 CL 12 (affd (1868) LR 3 HL 306); *R v Davitt* (1870) 11 Cox CC 676.

3 *R v Gallagher* (1883) 15 Cox CC 291; *R v Mitchel* (1848) 6 State Tr NS 599; *R v Dowling* (1848) 3 Cox CC 509; *Mulcahy v R* (1866) IR 1 CL 12 (affd (1868) LR 3 HL 306).

4 Some overt act must be committed within the Sovereign's dominions: see *R v Meany* (1867) 10 Cox CC 506, CCR. Where the defendant has conspired with others to commit any offence under the Treason Felony Act 1848 and a co-conspirator commits acts within the Sovereign's dominions in furtherance of the common purpose, it is a sufficient overt act to allege the conspiracy: *R v Meany* supra. See also *Mulcahy v R* (1866) IR 1 CL 12 (affd (1868) LR 3 HL 306); *R v Davitt* (1870) 11 Cox CC 676; *R v Deasy* (1883) 15 Cox CC 334. Several overt acts may be alleged in one count: *Mulcahy v R* supra.

5 Treason Felony Act 1848 s 3 (amended by the Statute Law Revision Act 1891; and the Statute Law Revision Act 1892); Penal Servitude Act 1857 s 2 (amended by the Statute Law Revision Act 1892); Penal Servitude Act 1891 s 1; Criminal Justice Act 1948 s 1; Criminal Law Act 1967 s 12(5)(a). The Treason Felony Act 1848 does not lessen the force of, or in any manner affect anything enacted by, the Treason Act 1351 (see PARA 363 ante): Treason Felony Act 1848 s 6 (amended by the Statute Law Revision Act 1892). If matters alleged in an indictment or proved at the trial for any offence under the Treason Felony Act 1848 s 3 (as amended) amount in law to treason, this does not render the indictment defective or entitle the defendant to be acquitted; but an acquittal or conviction for any such offence is a bar to a prosecution for treason on the same facts: s 7; and see *R v Mitchel* (1848) 6 State Tr NS 599.

The Treason Felony Act 1848 s 3 (as amended) must be read so as not to cover the publication of articles advocating the peaceful abolition of the monarchy, in order to be compliant with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10 (freedom of expression): *R (on the application of Rusbridger) v A-G* [2003] UKHL 38, [2004] 1 AC 357 at [8] per Lord Steyn and at [40] per Lord Scott of Foscote. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.



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### **368. Assaults on the Sovereign.**

Any person who:

- 354 (1) with intent to injure the person of the Sovereign or to break public peace or whereby the public peace may be endangered or to alarm the Sovereign (a) wilfully discharges or attempts to discharge or points, aims, or presents at or near to the person of the Sovereign any gun, pistol or any other firearm or other arms, whether the same does or does not contain any explosive or destructive material, or discharges or causes to be discharged or attempts to discharge any explosive substance or material near to the Sovereign's person; (b) wilfully strikes or strikes at or attempts to strike or strike at the Sovereign with any offensive weapon or in any other manner whatsoever; (c) wilfully throws or attempts to throw any substance, matter or thing at or upon the person of the Sovereign; or
- 355 (2) wilfully produces or has near the person of the Sovereign any gun, pistol or any other description of firearm or other arms whatsoever, or any explosive, destructive, or dangerous matter or thing whatsoever, with intent to use the same to injure the person of the Sovereign or to alarm Her,

is guilty of high misdemeanour<sup>1</sup>, and liable on conviction on indictment to imprisonment for a term not exceeding seven years<sup>2</sup>.

<sup>1</sup> The anomalous term 'high misdemeanour' is not apparently affected by the Criminal Law Act 1967.

<sup>2</sup> Treason Act 1842 s 2 (amended by the Statute Law Revision (No 2) Act 1888; the Statute Law Revision Act 1892; the Criminal Administration Act 1914 s 44, Sch 4; and the Criminal Justice Act 1948 s 83(3), Sch 10 Pt II); Penal Servitude Act 1891 s 1; Criminal Justice Act 1948 s 1.

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### **369. Contempt of the Sovereign.**

Contempt of the Sovereign is an offence at common law<sup>1</sup>. It is triable only on indictment and punishable by fine and imprisonment at the discretion of the court<sup>2</sup>.

1 See 1 Hawk PC c 6; 2 Hawk PC c 25, s 4; 4 BI Com (14th Edn) 122; 3 Co Inst 140, where contempts against the King's palaces or courts of justice or against His person, title, prerogative or government are listed under the headings of 'contempts' or 'misprisions'. As to criminal contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 404 et seq. No prosecution for a contempt of the Sovereign appears to have been brought since 1840: see *R v Price* (1840) 11 Ad & El 727.

2 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.



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## (2) SEDITIOUS WORDS AND LIBEL

### 370. Seditious words and seditious libel.

It is an offence at common law, punishable with a fine or imprisonment at the discretion of the court<sup>1</sup>, to do an act or speak words which have a seditious tendency with a seditious intention<sup>2</sup> or to publish matter<sup>3</sup> which has a seditious tendency with a seditious intention. Free comment, criticism and censure must, however, be distinguished from seditious words or seditious libel<sup>4</sup>.

The defences of absolute<sup>5</sup> and qualified<sup>6</sup> privilege appear to apply to a charge of seditious libel. Qualified privilege ceases if the publication was made with malice<sup>7</sup>. It is uncertain whether the composition of a seditious writing with the intention that it should be published, but without actual publication, constitutes a seditious libel<sup>8</sup>.

1 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139. On a conviction for a seditious libel, the court may make an order for seizure of all copies of the libel: Criminal Libel Act 1819 s 1. As to powers of entry, search and seizure see PARA 869 et seq post.

2 For the meanings of 'seditious tendency' and 'seditious intention' see PARA 371 post.

3 The libel may be in writing or print or may be contained in a drawing or engraving, or painted picture, or sculpture, or any permanent representation: *R v Sullivan, R v Pigott* (1868) 11 Cox CC 44 at 55.

4 See *R v Sullivan, R v Pigott* (1868) 11 Cox CC 44 at 49 (the freest public discussion, comment, criticism, and censure, either at meetings or in the press, in relation to all political or party questions, all public acts of the servants of the Crown, all acts of the government, and all proceedings of courts of justice are permissible, and no narrow construction is to be put upon the expressions used in such discussion etc, but the criticism and censure must be without malignity, and must not impute corrupt or malicious motives). See also *R v Collins* (1839) 9 C & P 456 at 460-461 per Littledale J ('every man has a right to give every public matter a candid, full and free discussion; something must be allowed for feeling in men's minds and for some warmth of expression, but an intention to incite the people to take the power into their own hands and to provoke them to tumult and disorder is a seditious intention'); *R v Burdett* (1820) 1 State Tr NS 1 at 50; *R v Aldred* (1909) 74 JP 55, 22 Cox CC 1.

5 As to statements to which absolute privilege attaches see LIBEL AND SLANDER vol 28 (Reissue) PARA 94 et seq.

6 As to statements to which qualified privilege attaches see LIBEL AND SLANDER vol 28 (Reissue) PARA 109 et seq.

7 For the meaning of 'malice' see LIBEL AND SLANDER vol 28 (Reissue) PARA 149 et seq.

8 *R v Burdett* (1820) 1 State Tr NS 1 at 122, 138. In every case in which any verdict or judgment by default is had against any person for composing, printing or publishing any blasphemous libel (see PARA 826 post) or any seditious libel tending to bring into hatred or contempt the person of Her Majesty or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or to excite Her Majesty's subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means, it is lawful for the judge or the court before whom or in which such verdict has been given, or the court in which judgment by default is had, to make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in such order, of all copies of the libel which are in the possession of the person against whom such verdict or judgment has been had, or in the possession of any other person named in the order for his use, evidence upon oath having been previously given to the satisfaction of such court or judge that a copy or copies of such libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment has been so had: Criminal Libel Act 1819 s 1 (amended by the Statute Law Revision Act 1890). In every such case it is lawful for any justice of the

peace, or for any constable or other peace officer, acting under any such order, or for any person or persons acting with or in aid of any such justice of the peace, constable or other peace officer, to search for any copies of such libel in any house, building or other place whatsoever belonging to the person against whom any such verdict or judgment is had, or to any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment is had, are; and in case admission is refused or not obtained within a reasonable time after it has first been demanded, to enter by force by day into any such house, building or place whatsoever, and to carry away all copies of the libel there found, and to detain the same in safe custody until the same are restored under the Criminal Libel Act 1819, or disposed of according to any further order made in relation thereto: s 1. As to powers of entry, search and seizure see PARA 869 et seq post; and as to the power of a constable to use reasonable force see PARA 858 post.

If in any such case judgment is arrested or if, after judgment has been entered, the same is reversed upon any writ of error, all copies so seized must forthwith be returned to the person or persons from whom the same have been so taken free of all charge and expense, and without the payment of any fees whatever; and in every case in which final judgment is entered upon the verdict so found against the person or persons so charged with having composed, printed or published such libel, then all copies so seized must be disposed of as the court in which such judgment is given orders and directs: s 2. Writs of error were abolished by the Criminal Appeal Act 1907 s 20(1) (repealed). As to the right to apply to the court for judgment to be arrested see PARA 1349 post.

The Criminal Libel Act 1819 s 1 (as amended) appears to treat the composition, printing and publishing of a seditious libel as separate offences. As to evidence of publication see PARA 372 post.

## **UPDATE**

### **370 Seditious words and seditious libel**

NOTE 8--The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished and accordingly in the Criminal Libel Act 1819 s 1 the words 'any blasphemous libel, or' are omitted: Criminal Justice and Immigration Act 2008 s 79(1), (2), Sch 28 Pt 5.

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### 371. Seditious tendency and seditious intention.

Sedition in the common law consists of any act done, or words spoken or written and published, which has or have a seditious tendency and is done or are spoken or written and published with a seditious intention<sup>1</sup>. Words may be said to have a seditious tendency if they have any of the following tendencies or a person may be said to have a seditious intention if he has any of the following intentions and acts:

- 356 (1) to bring into hatred or contempt, or to excite disaffection against, the Sovereign or the government and constitution of the United Kingdom or either House of Parliament, or the administration of justice<sup>2</sup>; or
- 357 (2) to excite the Sovereign's subjects to attempt, otherwise than by lawful means, the alteration of any matter in church or state by law established; or
- 358 (3) to incite persons to commit any crime in disturbance of the peace; or
- 359 (4) to raise discontent or disaffection amongst the Sovereign's subjects; or
- 360 (5) to promote feelings of ill-will and hostility between different classes of those subjects<sup>3</sup>.

The act or words must also have a tendency to incite public disorder and violence<sup>4</sup>.

An intention is not seditious if the object is to show that the Sovereign has been misled or mistaken in Her measures, or to point out errors or defects in the government or constitution with a view to their reformation, or to excite the subjects to attempt by lawful means the alteration of any matter in church or state by law established, or to point out, with a view to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of the Sovereign's subjects<sup>5</sup>.

Seditious intention does not merely consist of an intention to bring about one of the five heads set out above. There must also be an intention to incite to violence or to create public disturbance or disorder against Her Majesty or the institutions of government. Thus proof of an intention to promote feelings of ill-will or hostility between different classes of subjects does not establish a seditious intention. Not only must there be an incitement to violence in this connection, but it must be violence or resistance or defiance for the purpose of disturbing constituted authority (that is some person or body holding public office or discharging some public function of the state)<sup>6</sup>.

The character of the words used may be good evidence of the nature of the intention<sup>7</sup>.

1 As to seditious words and seditious libel see PARA 370 ante. It is an offence for an alien to attempt to do any act calculated or likely to cause sedition: see the Aliens Restriction (Amendment) Act 1919 s 3(1) (as amended); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13. For these purposes, 'alien' does not include a British protected person: British Nationality Act 1948 s 3(3). For the meaning of 'British protected person' see the British Nationality Act 1981 s 50(1); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 72.

2 See *R v Lambert and Perry* (1810) 2 Camp 398; *R v Tutchin* (1704) 14 State Tr 1095, CCR; *R v Cobbett* (1804) 29 State Tr 1; *R v Wilkes* (1769) 4 Burr 2527, HL; *R v Harvey* (1823) 2 B & C 257; *R v M'Hugh* [1901] 2 IR 569.

3 *R v M'Hugh* [1901] 2 IR 569 at 578. As to offences relating to racial or religious hatred see PARA 562 et seq post.

4 *R v Burns* (1886) 16 Cox CC 355; *R v Aldred* (1909) 74 JP 55, 22 Cox CC 1.

5 The first two paragraphs in the text are derived from a passage in Stephen, Digest of the Criminal Law (9th Edn) 92. The corresponding passage, in substantially the same terms, in the first edition at 55-56, was adopted in *R v Burns* (1886) 16 Cox CC 355 at 359-360 per Cave J, and in *R v M'Hugh* [1901] 2 IR 569 at 578. See also *R v Sullivan*, *R v Pigott* (1868) 11 Cox CC 44. As to the difference between treason and sedition see 1 East PC 48.

6 *R v Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] 1 QB 429, (1990) 91 Cr App Rep 393, DC; *Boucher v R* [1951] 2 DLR 369, Can SC.

7 *R v M'Hugh* [1901] 2 IR 569 at 578. Formerly it was held that if the words used had a direct tendency to cause unlawful meetings and disturbances and to lead to a violation of the laws, they were seditious, as the defendant was taken to have intended the natural consequences of what he had done (*R v Lovett* (1839) 9 C & P 462 at 466 per Littledale J; *R v Sullivan*, *R v Pigott* (1868) 11 Cox CC 44 at 58; and see also *R v Horne* (1778) 20 State Tr 651 at 762, HL; *R v Aldred* (1909) 74 JP 55, 22 Cox CC 1); but as to the subjective test see now the Criminal Justice Act 1967 s 8; and PARA 1366 post.

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### **372. Indictment and evidence in cases of seditious words or seditious libel.**

In an indictment for seditious words or seditious libel, the words alleged to be seditious must be specified<sup>1</sup>. So much of the words alleged as will support the charge of sedition must be proved at the trial; but, if what is proved substantially constitutes sedition, it is immaterial that a portion is unproved<sup>2</sup>.

If the manuscript of a seditious libel is proved to be in the handwriting of the defendant, and it is also proved that the same libel was in fact published, this is *prima facie* evidence for the jury of a publication by the defendant, though no evidence is adduced that he directed the publication<sup>3</sup>. To prove that the publication was with an unlawful intent or was not accidental, evidence of the publication of other libels is admissible, provided they expressly refer to the subject matter of the libel which is charged in the indictment<sup>4</sup>. If words spoken or published are seditious, it is no defence that they are true, and evidence to prove their truth is inadmissible<sup>5</sup>.

1 See the opinion of the judges in *Sacheverell's Case* (1710) 15 State Tr 1 at 466; *R v Sparling* (1722) 1 Stra 497; *Bradlaugh v R* (1878) 3 QBD 607 at 619, CA. It is not essential that the indictment should allege that the words were spoken or published 'seditiously', if it alleges an intent which the law defines to be a seditious intention: *R v M'Hugh* [1901] 2 IR 569.

2 *R v Fussell* (1848) 3 Cox CC 291 at 294. If any part of the speech or writing varied or controlled the sense of the words alleged to be seditious, the onus is on the defendant to show it: see *R v Crowe* (1848) 3 Cox CC 123. Where an alleged seditious libel is contained in a newspaper, the defendant is entitled to have read in evidence any passage from the same newspaper tending to show his intention in publishing the passage complained of: *R v Lambert and Perry* (1810) 2 Camp 398.

3 *R v Lovett* (1839) 9 C & P 462; *R v Aldred* (1909) 74 JP 55, 22 Cox CC 1. As to what amounts to a publication see further LIBEL AND SLANDER vol 28 (Reissue) PARA 60 et seq.

4 *R v Pearce* (1791) Peake 106, where Lord Kenyon CJ admitted such evidence even to prove the fact of publication and that the defendant was the author of a libel; but see *Finnerty v Tipper* (1809) 2 Camp 72; *Chubb v Westley* (1834) 6 C & P 436; *Plunkett v Cobbett* (1804) 5 Esp 136; *Pearson v Lemaitre* (1843) 5 Man & G 700 at 719-720.

5 *R v Aldred* (1909) 74 JP 55, 22 Cox CC 1. The Libel Act 1843 s 6 (as amended) and the Newspaper Libel and Registration Act 1881 s 4 (see LIBEL AND SLANDER vol 28 (Reissue) PARAS 294, 296) do not apply to seditious libels: *R v Duffy* (1846) 2 Cox CC 45; *Ex p O'Brien* (1883) 15 Cox CC 180; *R v M'Hugh* [1901] 2 IR 569.

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### **(3) INCITING DISAFFECTION AMONG HER MAJESTY'S FORCES AND THE POLICE**

#### **373. Incitement to disaffection.**

Any person who maliciously and advisedly endeavours to seduce any member of Her Majesty's forces from his duty or allegiance to Her Majesty is guilty of an offence<sup>1</sup>.

Any person who, with intent so to commit, or to aid, abet, counsel or procure the commission of, such an offence, has in his possession or under his control any document of such a nature that the dissemination of copies among members of Her Majesty's forces would constitute such an offence, is guilty of an offence<sup>2</sup>.

No prosecution for either offence may take place without the consent of the Director of Public Prosecutions<sup>3</sup>. These offences are punishable on conviction on indictment by imprisonment for a term not exceeding two years or a fine or both, or on summary conviction by imprisonment for a term not exceeding four months<sup>4</sup> or a fine not exceeding the prescribed sum or both<sup>5</sup>. Where any person is convicted of such an offence, the court dealing with the case may order any documents connected with the offence to be destroyed or dealt with in such other manner as may be specified in the order, but no documents may be so destroyed before the expiration of the period within which an appeal may be lodged; and, if an appeal is lodged, no document may be destroyed until after the appeal has been heard and decided<sup>6</sup>.

A judge of the High Court, if satisfied by information on oath that there is reasonable ground for suspecting that such an offence<sup>7</sup> has been committed and that evidence of its commission is to be found at any premises or place specified in the information, may, on the application made by a police officer of a rank not lower than that of inspector, grant a warrant valid for three months authorising the entry into the premises or place, by force if necessary, the searching of them and of every person found there, and the seizing of anything found which is reasonably suspected to be evidence of the commission of that offence<sup>8</sup>.

1 Incitement to Disaffection Act 1934 s 1. Section 1 creates a single offence which is committed by a person who endeavours to seduce members of the forces with a particular intent. The intent may be to seduce them from their duty or from their allegiance or both. A count stating the intent in the alternative is not bad for duplicity: see the Indictment Rules 1971, SI 1971/1253, r 7; and PARA 1218 post. See also *R v Arrowsmith* [1975] 1 All ER 463, 60 Cr App Rep 211, CA. 'Maliciously' in the Incitement to Disaffection Act 1934 s 1 does not bear the meaning of spite or ill-will. It means 'something which is wilful or intentional: deliberate . . . wilfully and intentionally to do an unlawful act': *R v Arrowsmith* supra. There is no basis for reading the words 'without lawful excuse' into the Incitement to Disaffection Act 1934 s 1: *R v Arrowsmith* supra. As to causing disaffection amongst the police see PARA 377 post.

2 Incitement to Disaffection Act 1934 s 2(1).

3 Ibid s 3(2). As to the effect of this limitation see PARA 1071 post. Where the Director of Public Prosecutions is carrying on a prosecution under the Incitement to Disaffection Act 1934, a court of summary jurisdiction may not deal with the case summarily without his consent: s 3(3).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post),

although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 Incitement to Disaffection Act 1934 s 3(1) (amended by the Criminal Law Act 1977 s 32(1); and the Magistrates' Courts Act 1980 s 32(2)). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

6 Incitement to Disaffection Act 1934 s 3(4).

7 ie an offence under *ibid* s 1 or s 2(1).

8 *Ibid* s 2(2) (amended by the Serious Organised Crime and Police Act 2005 s 174(1), Sch 16 para 1). A warrant may only be issued in respect of an offence suspected to have been committed within the previous three months: Incitement to Disaffection Act 1934 s 2(2) proviso (a). If a warrant has been executed on any premises; the occupier must be notified that a search has taken place and of anything removed: s 2(2) proviso (b). No woman may be searched except by a woman: s 2(3). Anything seized may be retained for a period not exceeding one month or, if proceedings for an offence under s 1 or s 2(1) are commenced within that period, until the conclusion of those proceedings; and in relation to property which has come into the possession of the police under s 2(2), the Police (Northern Ireland) Act 1998 s 31 has effect subject to the provisions of the Incitement to Disaffection Act 1934 ss 2(4), 3(4): s 2(4) (amended by the Criminal Justice Act 1972 s 64(1), Sch 5; and by the Police (Northern Ireland) Act 1998 s 74, Sch 4 para 1). As to powers of entry, search and seizure see PARA 869 et seq post.

## **UPDATE**

### **373 Incitement to disaffection**

NOTE 1--SI 1971/1253 revoked: SI 2007/699.

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### **374. Procuring and assisting desertion from the Royal Navy.**

Every person who, whether within or without the United Kingdom<sup>1</sup> (1) procures or persuades any person subject to naval discipline<sup>2</sup> to commit an offence of desertion, of absenting himself without leave or of improperly leaving his ship; or (2) knowing that any such person is about to commit such an offence, assists him in so doing; or (3) knowing any such person to have committed such an offence, procures or persuades or assists him to remain a deserter, absentee without leave or improperly absent from his ship, or assists in his rescue from custody, is guilty of an offence<sup>3</sup>. Such an offence is punishable on conviction on indictment by imprisonment for a term not exceeding two years or a fine or both, or on summary conviction by imprisonment for a term not exceeding three<sup>4</sup> months or a fine not exceeding the statutory maximum or both<sup>5</sup>.

<sup>1</sup> For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

<sup>2</sup> As to persons subject to naval discipline see the Naval Discipline Act 1957 Pt IV (ss 111-139); and ARMED FORCES vol 2(2) (Reissue) PARA 302 et seq.

<sup>3</sup> Ibid s 97(1) (amended by the Armed Forces Act 1966 s 18(2); the Armed Forces Act 1971 s 77(1), Sch 4; and the Armed Forces Act 1976 s 15(2)).

<sup>4</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

<sup>5</sup> Naval Discipline Act 1957 s 97(2) (amended by the Criminal Law Act 1977 s 32(1); and the Magistrates' Courts Act 1980 s 32(2)). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.



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### **375. Procuring and assisting desertion from the army or Royal Air Force.**

Any person who<sup>1</sup> (1) procures or persuades any officer, warrant officer or non-commissioned officer of the regular forces<sup>2</sup> or the regular air force<sup>3</sup>, or any soldier of the regular forces or any airman of the regular air force to desert or to absent himself without leave; or (2) knowing that any such person is about to desert or absent himself without leave, assists him in so doing; or (3) knowing any person to be a deserter or absentee without leave from the regular forces or the regular air force, procures or persuades or assists him to remain such a deserter or absentee, or assists in his rescue from custody, is guilty of an offence<sup>4</sup>. Such an offence is punishable on conviction on indictment by imprisonment for a term not exceeding two years or a fine or both, or on summary conviction by imprisonment for a term not exceeding three<sup>5</sup> months or a fine not exceeding the prescribed sum or both<sup>6</sup>.

<sup>1</sup> I.e. whether within or without Her Majesty's dominions: see the Army Act 1955 s 192 (as amended), the Air Force Act 1955 s 192 (as amended); and the text and notes 2-6 *infra*.

<sup>2</sup> 'Regular forces' means any of Her Majesty's military forces other than the army reserve or the Territorial Army, and other than forces raised under the law of a colony, provided that an officer of any reserve of officers or an officer who is retired within the meaning of any Royal Warrant, is not to be treated for these purposes as a member of the regular forces save in so far as is expressly provided by the Army Act 1955: s 225(1) (amended by the Reserve Forces Act 1996 s 131(2), Sch 11).

The Army Act 1955 s 192 (as amended) has effect as if any reference to a member of the regular forces included a reference to a member of a visiting force or of a headquarters: see the Visiting Forces and International Headquarters (Application of Law) Order 1999, SI 1999/1736, arts 3, 18, Schs 1, 2; and ARMED FORCES vol 2(2) (Reissue) PARA 142. As to visiting forces see PARA 46 *ante*.

<sup>3</sup> 'Regular air force' means all of Her Majesty's air forces other than the air force reserve and the Royal Auxiliary Air Force, and other than forces raised under the law of a colony, provided that an officer who is retired within the meaning of any order under the Air Force (Constitution) Act 1917 s 2 is not to be treated for these purposes as a member of the regular air force save in so far as is expressly provided by the Air Force Act 1955: s 223(1).

<sup>4</sup> Army Act 1955 s 192(1); Air Force Act 1955 s 192(1) (both amended by the Armed Forces Act 1966 s 18(1)). See further ARMED FORCES vol 2(2) (Reissue) PARA 43.

<sup>5</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 *post*), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 *post*). At the date at which this volume states the law no such day had been appointed.

<sup>6</sup> Army Act 1955 s 192(2); Air Force Act 1955 s 192(2) (both amended by the Criminal Law Act 1977 s 32(1); and the Magistrates' Courts Act 1980 s 32(2)). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. See further ARMED FORCES vol 2(2) (Reissue) PARA 43.

## **UPDATE**

### **375 Procuring and assisting desertion from the army or Royal Air Force**

TEXT AND NOTES--Army Act 1955 and Air Force Act 1955 repealed: Armed Forces Act 2006 Sch 17. As to aiding and abetting desertion, see now the Armed Forces Act 2006 s 344.



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### **376. Obstructing members of regular forces in execution of duty; aiding malingering.**

Any person who<sup>1</sup> wilfully obstructs or otherwise interferes with any officer, warrant officer or non-commissioned officer of the regular forces<sup>2</sup> or the regular air force<sup>3</sup> or any soldier of the regular forces or any airman of the regular air force acting in the execution of his duty is guilty of an offence<sup>4</sup>. The offence is a summary one and is punishable by imprisonment for a term not exceeding three months or a fine not exceeding level 3 on the standard scale or both<sup>5</sup>.

Any person who<sup>6</sup>:

- 361 (1) produces in an officer, warrant officer, non-commissioned officer, soldier of the regular forces or airman of the regular air force any sickness or disability; or
- 362 (2) supplies to or for him any drug or preparation calculated or likely to render him, or lead to the belief that he is, permanently or temporarily unfit for service,

with a view to enabling him to avoid military service, whether permanently or temporarily, is guilty of an offence and liable on conviction on indictment by imprisonment for a term not exceeding two years or a fine or both, or on summary conviction by imprisonment for a term not exceeding three<sup>7</sup> months or a fine not exceeding the prescribed sum or both<sup>8</sup>.

1    Ie whether in the United Kingdom or any colony: see the Army Act 1955 s 193 (as amended), the Air Force Act 1955 s 193 (as amended); and the text and notes 2-8 infra. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2    For the meaning of 'regular forces' see PARA 375 note 2 ante.

3    For the meaning of 'regular air force' see PARA 375 note 3 ante.

4    Army Act 1955 s 193; Air Force Act 1955 s 193. See further ARMED FORCES vol 2(2) (Reissue) PARA 44.

5    Army Act 1955 s 193; Air Force Act 1955 s 193 (both amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As from a day to be appointed, the reference to imprisonment is removed and the punishment will simply be a fine not exceeding level 3 on the standard scale: see the Criminal Justice Act 2003 s 280(1), (3), Sch 25 paras 40, 47 (not yet in force). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6    Ie whether within or without Her Majesty's dominions: see the Army Act 1955 s 194 (as amended), the Air Force Act 1955 s 194 (as amended); and ARMED FORCES vol 2(2) (Reissue) PARA 45.

7    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8    Army Act 1955 s 194; Air Force Act 1955 s 194 (both amended by the Criminal Law Act 1977 s 32(1); and the Magistrates' Courts Act 1980 s 32(2)). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

### **UPDATE**

**376 Obstructing members of regular forces in execution of duty; aiding malingering**

TEXT AND NOTES--Army Act 1955 and Air Force Act 1955 repealed: Armed Forces Act 2006 Sch 17. As to obstructing persons subject to service law in the course of their duty, see now the Armed Forces Act 2006 s 346; and as to aiding malingering, see s 345. For supplementary provision see ss 347, 348.

NOTE 5--Criminal Justice Act 2003 Sch 25 paras 40, 47 repealed: Armed Forces Act 2006 Sch 17.

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### **377. Causing disaffection amongst the police.**

Any person who causes, or attempts to cause, or does any act calculated to cause, disaffection amongst the members of any police force<sup>1</sup>, or induces or attempts to induce, or does any act calculated to induce, any member of a police force to withhold his services is guilty of an offence<sup>2</sup>. The offence is punishable on conviction on indictment by imprisonment for a term not exceeding two years or a fine or both, or on summary conviction by imprisonment for a term not exceeding six<sup>3</sup> months or a fine not exceeding the statutory maximum or both<sup>4</sup>.

Any person who causes, or attempts to cause, or does any act calculated to cause, disaffection amongst the members of the Ministry of Defence Police, or induces or attempts to induce, or does any act calculated to induce, any member of the Ministry of Defence Police to withhold his services or to commit breaches of discipline, is guilty of an offence<sup>5</sup>. The offence is punishable on conviction on indictment by imprisonment for a term not exceeding two years or a fine or both, or on summary conviction by imprisonment for a term not exceeding six<sup>6</sup> months or a fine not exceeding the statutory maximum or both<sup>7</sup>.

<sup>1</sup> For the meaning of 'police force' see the Police Act 1996 s 101; and POLICE vol 36(1) (2007 Reissue) PARA 102.

<sup>2</sup> Ibid s 91(1). Section 91 (as amended) applies in the case of (1) special constables appointed for a police area; (2) members of the Civil Nuclear Constabulary; and (3) members of the British Transport Police Force, as it applies in the case of members of a police force: s 91(2) (substituted by the Energy Act 2004 s 68(3)). For the meaning of 'police area' see the Police Act 1996 s 101; and POLICE vol 36(1) (2007 Reissue) PARA 136.

<sup>3</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

<sup>4</sup> Police Act 1996 s 91(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

<sup>5</sup> Ministry of Defence Police Act 1987 s 6. See further POLICE vol 36(1) (2007 Reissue) PARA 120 et seq.

<sup>6</sup> See note 3 *supra*.

<sup>7</sup> Ministry of Defence Police Act 1987 s 6.

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## **(4) UNAUTHORISED WEARING OF NAVAL, MILITARY, AIR FORCE AND POLICE UNIFORMS**

### **378. Naval, military and air force uniforms.**

Any person not serving in Her Majesty's naval or military forces<sup>1</sup> or the air force, who (1) without Her Majesty's permission wears the uniform of any of those forces, or any dress having the appearance or bearing any of the regimental or other distinctive marks of any such uniform, in such manner or in such circumstances as to be likely to bring contempt upon that uniform; or (2) employs any other person so to wear that uniform or dress, is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding one month or a fine not exceeding level 3 on the standard scale<sup>2</sup>.

Any person not serving in Her Majesty's military forces or the air force who without Her Majesty's permission wears the uniform of any of those forces, or any dress having the appearance or bearing any regimental or other distinctive marks of any such uniform is guilty of an offence<sup>3</sup>. Such an offence is punishable on summary conviction by a fine not exceeding level 3 on the standard scale<sup>4</sup>.

There is a corresponding offence in respect of the wearing of the merchant navy uniform<sup>5</sup>.

1 'Her Majesty's naval forces' means the Royal Navy, the naval reserve forces, and such of the marine forces, and of the naval forces of a Commonwealth country or raised under the law of any colony, as are for the time being subject to the Naval Discipline Act 1957; and 'Her Majesty's military forces' does not include any Commonwealth force: Army Act 1955 s 225(1); Naval Discipline Act 1957 s 132(5) (amended by the Armed Forces Act 1976 s 4, Sch 2 para 4; the Armed Forces Act 1981 s 28(2) Sch 5; the Armed Forces Act 1996 Sch 7 Pt III; and the Armed Forces Act 2001 Sch 6 para 24, Sch 7 Pt 6); Uniforms Act 1894 s 4 (substituted by the Armed Forces Act 1981 s 20(1), Sch 3 para 5). See ARMED FORCES vol 2(2) (Reissue) PARA 20.

2 Uniforms Act 1894 s 3 (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). This provision is applied to the air force by the Air Force (Application of Enactments) (No 2) Order 1918, SR & O 1918/548 (amended by SI 1964/ 488). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

3 Uniforms Act 1894 s 2(1). This provision is applied to the air force by the Air Force (Application of Enactments) (No 2) Order 1918 (as amended: see note 2 supra). It is not an offence, however, to wear any uniform or dress in the course of a stage play performed in a place duly licensed or authorised for the public performance of stage plays, or in the course of a music hall or circus performance, or in the course of any bona fide military representation: Uniforms Act 1894 s 2(1) proviso.

4 Ibid s 2(2) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46).

5 See the Merchant Shipping Act 1995 s 57 (prospectively amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9; and prospectively repealed by the Merchant Shipping Act 1995 s 314(3), Sch 14 para 6). At the date at which this volume states the law no day had been appointed for the amendment or the repeal of this provision to come into effect. See further SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1161.

## **UPDATE**

### **378 Naval, military and air force uniforms**

NOTE 1--Definitions of 'Her Majesty's naval forces' and 'Her Majesty's military forces' amended: Armed Forces Act 2006 Sch 16 para 11.

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### **379. Police uniforms.**

Any person who, not being a constable, wears any article of police uniform<sup>1</sup> in circumstances where it gives him an appearance so nearly resembling that of a member or special constable of a police force (including a constable or special constable of the British Transport Police<sup>2</sup> and a member of the Civil Nuclear Constabulary<sup>3</sup>) as to be calculated to deceive<sup>4</sup>, is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>5</sup>. There is an identical offence in relation to those who are not members of the Ministry of Defence Police wearing an article of the uniform of the Ministry of Defence Police; it is triable and punishable in the same way<sup>6</sup>.

Any person who, not being a member of a police force<sup>7</sup> or a special constable, has in his possession any article of police uniform is, unless he proves<sup>8</sup> that he obtained possession of that article lawfully and has possession of it for a lawful purpose, guilty of a summary offence and liable to a fine not exceeding level 1 on the standard scale<sup>9</sup>. There is an identical offence in relation to those who are not members of the Ministry of Defence Police Force who have in their possession any article of uniform of that force<sup>10</sup>.

1 For these purposes, 'article of police uniform' means any article of uniform or any distinctive badge or mark or document of identification usually issued to members of police forces or special constables, or anything having the appearance of such an article, badge, mark or document; and 'special constable' means a special constable appointed for a police area: Police Act 1996 s 90(4)(a), (b). For the meaning of 'police area' see s 101; and POLICE vol 36(1) (2007 Reissue) PARA 136.

2 Railways and Transport Safety Act 2003 s 68(2).

3 Energy Act 2004 s 68(2).

4 The words 'calculated to deceive' mean 'likely or reasonably likely to deceive' and do not involve an intention to deceive: *Turner v Shearer* [1973] 1 All ER 397, [1972] 1 WLR 1387, DC.

5 Police Act 1996 s 90(2). See further POLICE vol 36(1) (2007 Reissue) PARA 481. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6 Ministry of Defence Police Act 1987 s 5(2). In relation to this offence, 'article of uniform' means any article of uniform or any distinctive badge or mark or document of identification usually issued to members of the Ministry of Defence Police, or any thing having the appearance of such an article, badge, mark or document: s 5(4).

7 'Member of a police force' includes a member of the British Transport Police Force: Police Act 1996 s 90(4) (aa) (added by the Anti-terrorism, Crime and Security Act 2001 s 101, Sch 7 paras 20, 25). 'Member or special constable of a police force' includes a constable or special constable of the British Transport Police: Railways and Transport Safety Act 2003 s 68(2). The Police Act 1996 s 90 has effect as if reference to a member of a police force included a member of the Civil Nuclear Constabulary: Energy Act 2004 s 68(2).

8 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

9 Police Act 1996 s 90(3). See further POLICE vol 36(1) (2007 Reissue) PARA 481.



10 Ministry of Defence Police Act 1987 s 5(3).

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## **(5) POLITICAL AND QUASI-MILITARY ORGANISATIONS**

### **380. Wearing political uniforms.**

Subject as otherwise provided<sup>1</sup>, any person who in any public place<sup>2</sup> or at any public meeting<sup>3</sup> wears uniform<sup>4</sup> signifying his association<sup>5</sup> with any political organisation or with the promotion of any political object is guilty of an offence<sup>6</sup>. The offence is punishable on summary conviction by imprisonment for a term not exceeding three months<sup>7</sup> or a fine not exceeding level 4 on the standard scale or both<sup>8</sup>.

Where any person is charged before a court with such an offence, no further proceedings in respect thereof may be taken against him, except such as are authorised by the Prosecution of Offences Act 1985<sup>9</sup>, without the consent of the Attorney General<sup>10</sup>. If such person is remanded in custody, he is entitled, after the expiration of a period of eight days from the date on which he was so remanded, to be released on bail without sureties unless within that period the Attorney General has consented to such further proceedings<sup>11</sup>.

1 If the chief officer of police is satisfied that the wearing of any such uniform on any ceremonial, anniversary or other special occasion will not be likely to involve risk of public disorder, he may, with the consent of a Secretary of State, by order permit the wearing of such uniform on that occasion either absolutely or subject to such conditions as may be specified in the order: Public Order Act 1936 s 1(1) proviso. Any such order may be revoked or varied by a subsequent order: see s 9(3) (amended by the Public Order Act 1986 s 40(3), Sch 3). 'Chief officer of police' means: (1) in relation to a police force maintained under the Police Act 1996 s 2 (see POLICE vol 36(1) (2007 Reissue) PARA 136), the chief constable; (2) in relation to the metropolitan police force, the Metropolitan Police Commissioner; and (3) in relation to the City of London police force, the City of London Police Commissioner: s 101(1); definition applied by the Interpretation Act 1978 s 5, Sch 1. See further POLICE vol 36(1) (2007 Reissue) PARA 105.

2 For these purposes, 'public place' includes any highway and any other premises or place to which at the material time the public has or is permitted to have access, whether on payment or otherwise: Public Order Act 1936 s 9(1) (definition substituted by the Criminal Justice Act 1972 s 33). Whether a place is a public place depends upon its status at the material time. Consequently a shop car park was not a public place at 11.30 pm when the shop was shut: *Marsh v Arscott* (1982) 75 Cr App Rep 211, DC (decided under the Public Order 1936 s 5 (repealed)). A public house was a public place even though the landlord could refuse entry to particular people: *Lawrenson v Oxford* [1982] Crim LR 185, DC (decided under the Public Order Act 1936 s 5 (repealed)). The front garden of a house is not a public place because people have access as lawful visitors and not as members of the public: *R v Edwards, R v Roberts* (1978) 67 Cr App Rep 228, CA (decided under the Public Order Act 1936 s 5 (repealed)). A 'public place' is public in its entirety though it contains areas to which the public is denied access: *Cawley v Frost* [1976] 3 All ER 743, [1976] 1 WLR 1207, DC (football ground) (decided under the Public Order Act 1936 s 5 (repealed)). Cf the Prevention of Crime Act 1953 s 1(4) (see PARA 699 note 5 post); the Firearms Act 1968 s 57(4) (see PARA 670 post); the Terrorism Act 2000 s 13 (see PARA 389 post).

3 'Public meeting' includes any meeting in a public place and any meeting which the public or any section of the public (as to which see PARA 563 note 2 post) is permitted to attend, whether on payment or otherwise; and 'meeting' means a meeting held for the purpose of the discussion of matters of public interest or for the purpose of expression of views on such matters: Public Order Act 1936 s 9(1).

4 See *O'Moran v DPP* [1975] QB 864, [1975] 1 All ER 473, DC ('uniform' may consist of particular articles of clothing (black berets) worn by each member of group to indicate that they are together and in association).

5 See *O'Moran v DPP* [1975] QB 864, [1975] 1 All ER 473, DC (proof may be by evidence (1) that the uniform in question had in the past been used as the uniform of a political organisation (and for that purpose it is not necessary to specify the particular organisation; it is sufficient to show that it had been associated with a

political organisation capable of identification in some manner); or (2) that a group of persons assembling together had worn uniform to indicate their association with each other and, furthermore, by their conduct had indicated that the uniform associated them with other activity of a political character).

6 Public Order Act 1936 s 1(1). A constable may enter and search any premises for the purpose of arresting a person for an offence under s 1 (as amended): see the Police and Criminal Evidence Act 1984 s 17(1)(c)(i) (as amended); and PARA 884 post.

As to wearing articles of dress indicating membership of a proscribed organisation under the Terrorism Act 2000 see PARA 389 post.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks: see the Public Order Act 1936 s 7(2) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 8). At the date at which this volume states the law no such day had been appointed.

8 Public Order Act 1936 s 7(2) (amended by the Public Order Act 1963 s 1(2); the Public Order Act 1986 s 40(3), Sch 3; and by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

9 le by the Prosecution of Offences Act 1985 s 25: see PARA 1071 post.

10 Public Order Act 1936 s 1(2) (amended by the Criminal Jurisdiction Act 1975 s 14(4), Sch 5 para 1); Interpretation Act 1978 s 17(2)(a). As to the effect of this limitation see PARA 1071 post.

11 Public Order Act 1936 s 1(2) (amended by the Bail Act 1976 s 12, Sch 2 para 10).

## **UPDATE**

### **380 Wearing political uniforms**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **381. Quasi-military organisations.**

If the members or adherents of any association of persons, whether incorporated or not, are:

- 363 (1) organised or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown; or
- 364 (2) organised and trained or organised and equipped either for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object, or in such a manner as to arouse reasonable apprehension<sup>1</sup> that they are organised and either trained or equipped for that purpose,

any person who takes part in the control or management of the association, or in so organising or training any members or adherents of it, is guilty of an offence<sup>2</sup>. The offence is punishable on conviction on indictment by imprisonment for a term not exceeding two years or a fine or both, or on summary conviction by imprisonment for a term not exceeding six<sup>3</sup> months or a fine not exceeding the prescribed sum or both<sup>4</sup>. No prosecution for such an offence may, however, be instituted without the consent of the Attorney General<sup>5</sup>.

In any criminal or civil proceedings under the provisions described above, proof of things done or of words written, spoken or published (whether or not in the presence of any party to the proceedings) by any person taking part in the control or management of the association or in organising, training or equipping members or adherents of an association is admissible as evidence of the purposes for which, or the manner in which, members or adherents of the association (whether those persons or others) were organised, or trained, or equipped<sup>6</sup>.

If satisfied by information on oath that there is reasonable ground for suspecting that such an offence has been committed, and that evidence of its commission is to be found at any premises or place specified in the information, a High Court judge may, on an application made by a police officer of a rank not lower than that of inspector, grant a search warrant authorising any such officer named in the warrant and any other police officers to enter the premises or place at any time within three months from the date of the warrant, if necessary by force, and to search the premises or place and every person<sup>7</sup> found there, and to seize anything found there or on any such person which the officer has reasonable ground for suspecting to be evidence of the commission of the offence<sup>8</sup>.

If, on the application of the Attorney General, it appears to the High Court that any association is an association of which members or adherents are organised, trained or equipped in contravention of the prohibition described above<sup>9</sup>, the court may:

- 365 (a) make such order as appears necessary to prevent any disposition without the leave of the court of property held by or for the association;
- 366 (b) direct an inquiry and report to be made as to any such property and as to the affairs of the association;
- 367 (c) make such further orders as appear to the court to be just and equitable for the application of such property in or towards (i) the discharge of liabilities of the association lawfully incurred before the date of the application or since that date

with the approval of the court; (ii) the repayment of moneys to persons who became subscribers or contributors to the association in good faith and without knowledge of any contravention of above prohibition; and (iii) any costs incurred in connection with any such inquiry and report or in winding up or dissolving the association; and

368 (d) order any property which is not directed to be so applied to be forfeited to the Crown<sup>10</sup>.

1 The mere fact that there is no evidence of specific training for attacks on opponents or plans for such attacks does not remove the grounds for reasonable apprehension: *R v Jordan, R v Tyndall* [1963] Crim LR 124, CCA. It need not be proved that the defendant intended the use or display of physical force; reasonable apprehension is the test: *R v Evans* (1969) unreported.

2 Public Order Act 1936 s 2(1). It is a defence for a person charged with an offence of taking part in the control or management of such an association to prove that he neither consented to nor connived at the organisation, training or equipment of members or adherents of the association in contravention of s 2: s 2(1) proviso. As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

Nothing in the Public Order Act 1936 s 2 is to be construed as prohibiting the employment of a reasonable number of persons as stewards to assist in the preservation of order at any public meeting held upon private premises, or the making of arrangements for that purpose or the instruction of the persons to be so employed in their lawful duties as such stewards, or their being furnished with badges or other distinguishing signs: s 2(6). 'Private premises' means premises to which the public has access (whether on payment or otherwise) only by permission of the owner, occupier, or lessee of the premises: s 9(1). For the meaning of 'public meeting' see PARA 380 note 3 ante.

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4 Public Order Act 1936 s 7(1) (amended by the Magistrates' Courts Act 1980 s 32(2); the Criminal Law Act 1977 s 3; and by virtue of the Criminal Justice Act 1982 ss 38, 46) As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

5 Public Order Act 1936 s 2(2). As to the effect of this limitation see PARA 1071 post.

6 Ibid s 2(4).

7 No woman may be searched except by a woman: ibid s 2(5) proviso.

8 Ibid s 2(5) (amended by the Serious Organised Crime and Police Act 2005 s 174(1), Sch 16 para 2). As to powers of entry, search and seizure see PARA 869 et seq post.

Application is in the Chancery Division by claim form and the defendants are such persons as the Attorney General determines: CPR Sch 1 RSC Ord 93 r 5(1), (2). The court or a judge may appoint the Official Solicitor to represent any interests not sufficiently represented: CPR Sch 1 RSC Ord 93 r 5(3).

9 Ie the Public Order Act 1936 s 2(1): see the text and notes 1-2 supra.

10 Ibid s 2(3).

## UPDATE

### 381 Quasi-military organisations

NOTE 8--CPR Sch 1 RSC Ord 93 r 5(2), (3) revoked: SI 2006/3435. CPR Sch 1 RSC Ord 93 r 5 revoked: SI 2007/2204.



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### **382. Meetings and assemblies for unlawful drilling.**

All meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled, to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from Her Majesty, or a Secretary of State, or any officer deputed by him for the purpose, are prohibited by law<sup>1</sup>.

Any person who attends or is present at such a meeting or assembly, for the purpose of training and drilling others to the use of arms or the practice of military exercise etc, or who trains or drills any other person to the use of arms, or the practice of military exercise etc, or who aids or assists therein, is guilty of an offence and liable on conviction to imprisonment for a term not exceeding seven years<sup>2</sup>.

Any person who attends or is present at any such meeting or assembly for the purpose of being so trained or drilled, or who is at any such meeting or assembly so trained or drilled, is guilty of an offence<sup>3</sup>. This offence is triable only on indictment and is punishable by a fine and imprisonment for a term not exceeding two years<sup>4</sup>.

No person may be prosecuted for any of the above offences unless such prosecution is commenced within six months after the commission of the offence<sup>5</sup>.

Any justice of the peace or any constable or peace officer has power to disperse any such unlawful meeting or assembly<sup>6</sup>.

1 Unlawful Drilling Act 1819 s 1.

2 Ibid s 1; Penal Servitude Act 1857 s 2; Criminal Justice Act 1948 s 1(1).

3 Unlawful Drilling Act 1819 s 1.

4 Ibid s 1.

5 Ibid s 7 (amended by the Statute Law Revision Act 1888).

6 Unlawful Drilling Act 1819 s 2 (amended by the Statute Law Revision Act 1888; the Courts Act 1971 s 56(4), Sch 11 Pt IV; the Serious Organised Crime and Police Act 2005 ss 111, 174(2), Sch 7 para 1, Sch 17 para 38).

### **UPDATE**

### **382 Meetings and assemblies for unlawful drilling**

TEXT AND NOTES--Unlawful Drilling Act 1819 repealed: Statute Law (Repeals) Act 2008.

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## **(6) PREVENTION OF TERRORISM**

### **(i) Introduction**

#### **383. Meaning of 'terrorism'.**

For the purposes of the legislation relating to terrorism<sup>1</sup>, 'terrorism' means the use or threat of action where:

- 369 (1) the action<sup>2</sup> involves serious violence against a person or serious damage to property<sup>3</sup>, or endangers a person's life (other than that of the person committing the action), or creates a serious risk to the health or safety of the public<sup>4</sup> or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system<sup>5</sup>;
- 370 (2) the use or threat of action is designed to influence the government<sup>6</sup> or an international governmental organisation or to intimidate the public or a section of the public<sup>7</sup>; and
- 371 (3) the use or threat of action is made for the purpose of advancing a political, religious or ideological cause<sup>8</sup>.

1 For these purposes, 'the legislation relating to terrorism' is the Terrorism Act 2000 and the Terrorism Act 2006 Pt 1 (ss 1-20) (see PARA 386 et seq post). The Terrorism Act 2000 received Royal Assent on 20 July 2000, on which date most of the provisions came into force. Remaining provisions were brought into force by the Terrorism Act 2000 (Commencement No 1) Order 2000, SI 2000/2800, the Terrorism Act 2000 (Commencement No 2) Order 2000, SI 2000/2944, and the Terrorism Act 2000 (Commencement No 3) Order 2001, SI 2001/421: see the Terrorism Act 2000 ss 128, 131. The Terrorism Act 2006 received Royal Assent on 30 March 2006 and was brought into force on 13 April 2006 (see the Terrorism Act 2006 (Commencement No 1) Order 2006, SI 2006/1013), except that the Terrorism Act 2006 ss 23-25 and the repeals in Sch 3 relating to the Terrorism Act 2000 Sch 8 para 36(1) and the Criminal Justice Act 2003 s 306(2), (3) came into force on 25 July 2006 (see the Terrorism Act 2006 s 39(2), (3); and the Terrorism Act 2006 (Commencement No 2) Order 2006, SI 2006/1936).

The legislation extends, with certain exceptions, to the whole of the United Kingdom: see the Terrorism Act 2000 s 130; and the Terrorism Act 2006 s 39(5). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. Her Majesty may by Order in Council direct that any provisions of the latter Act are to extend, with such modifications (which includes omissions, additions and alterations) as appear to Her Majesty to be appropriate, to any of the Channel Islands or the Isle of Man: s 39(6), (7). At the date at which this volume states the law no such order had been made.

As to the procedure for the Secretary of State to make orders and regulations under the Terrorism Act 2000 see s 123. As to directions given thereunder see s 124.

The Secretary of State has a duty to appoint a person to provide reports on the operation of both the Terrorism Act 2000 and the Terrorism Act 2006 (see the Terrorism Act 2006 s 36; and PARA 385 post). The Secretary of State also continues to be under a duty to lay before both Houses of Parliament at least once in every 12 months a report on the working of the Criminal Justice (Terrorism and Conspiracy) Act 1998 (s 8), even though the substantive provisions of that Act have been repealed.

2 'Action' includes action outside the United Kingdom: Terrorism Act 2000 s 1(4)(a).

3 The reference to 'person' or to 'property' is a reference to any person, or to any property, wherever situated: *ibid* s 1(4)(b).



5 Ibid s 1(1)(a), (2); Terrorism Act 2006 s 20(1).

4 'The public' includes the public of a country other than the United Kingdom: Terrorism Act 2000 s 1(4)(c).

6 'The government' means the government of the United Kingdom, of a part of the United Kingdom, or of a country other than the United Kingdom: ibid s 1(4)(d).

7 Ibid s 1(1)(b) (amended by the Terrorism Act 2006 s 34(a)). The use or threat of action falling within head (1) in the text which involves the use of firearms or explosives is terrorism whether or not head (2) is satisfied: Terrorism Act 2000 s 1(3).

8 Ibid s 1(1)(c).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **383 Meaning of 'terrorism'**

NOTE 1--1998 Act s 8 repealed: Criminal Justice and Immigration Act 2008 s 62, Sch 28 Pt 4.

NOTE 6--'The government' is not limited to countries governed by democratic or representative principles, and can include a tyranny, dictatorship, military junta or usurping or invading power: *R v F* [2007] EWCA Crim 243, [2007] 2 All ER 193.

TEXT AND NOTE 8--After 'religious' read ', racial': Terrorism Act 2000 s 1(1)(c) (amended by the Counter-Terrorism Act 2008 s 75(1), (2)(a)).

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### **384. Convention offences.**

The following offences are 'Convention offences':

- 372 (1) causing injury by explosions, causing explosions and handling or placing explosives<sup>1</sup>;
- 373 (2) causing an explosion likely to endanger life<sup>2</sup>;
- 374 (3) preparation of explosions<sup>3</sup>;
- 375 (4) procuring, counselling, aiding, abetting or being an accessory to the offence of causing an explosion likely to endanger life or the preparation of explosions<sup>4</sup>;
- 376 (5) development etc of biological weapons<sup>5</sup>;
- 377 (6) attacks against protected persons<sup>6</sup> committed outside the United Kingdom<sup>7</sup> which are committed (whether in the United Kingdom or elsewhere) in relation to a protected person<sup>8</sup>;
- 378 (7) attacks on relevant premises<sup>9</sup> etc<sup>10</sup> committed (whether in the United Kingdom or elsewhere) in connection with an attack on relevant premises or on a vehicle ordinarily used by a protected person<sup>11</sup>, and at a time when a protected person is in or on the premises or vehicle<sup>12</sup>;
- 379 (8) threats etc in relation to protected persons<sup>13</sup>;
- 380 (9) hostage-taking<sup>14</sup>;
- 381 (10) hijacking of ships or aircraft<sup>15</sup>;
- 382 (11) destroying, damaging or endangering the safety of aircraft<sup>16</sup>;
- 383 (12) other acts endangering or likely to endanger the safety of aircraft<sup>17</sup>;
- 384 (13) inducing or assisting the commission outside the United Kingdom<sup>18</sup> of any act which would<sup>19</sup> amount to the offence of hijacking an aircraft<sup>20</sup>, destroying, damaging or endangering the safety of aircraft<sup>21</sup>, or endangering or likely to endanger the safety of aircraft<sup>22</sup>;
- 385 (14) offences in relation to nuclear material<sup>23</sup> committed (whether in the United Kingdom or elsewhere) in relation to or by means of nuclear material<sup>24</sup>;
- 386 (15) offences involving preparatory acts and threats in relation to nuclear material<sup>25</sup>;
- 387 (16) endangering safety at aerodromes<sup>26</sup>;
- 388 (17) seizing or exercising control of fixed platforms<sup>27</sup>;
- 389 (18) destroying fixed platforms or endangering their safety<sup>28</sup>;
- 390 (19) other acts endangering or likely to endanger safe navigation<sup>29</sup>;
- 391 (20) offences involving threats to ships or fixed platforms<sup>30</sup>;
- 392 (21) a specified offence<sup>31</sup> committed in connection with an offence under any of heads (15), (27) to (29) above<sup>32</sup>;
- 393 (22) the use, development etc of chemical weapons<sup>33</sup>;
- 394 (23) terrorist fund-raising<sup>34</sup>;
- 395 (24) use or possession of terrorist funds<sup>35</sup>;
- 396 (25) funding arrangements for terrorism<sup>36</sup>;
- 397 (26) money laundering of terrorist funds<sup>37</sup>;
- 398 (27) directing a terrorist organisation<sup>38</sup>;
- 399 (28) the use, development etc of nuclear weapons<sup>39</sup>;
- 400 (29) conspiracy to commit a Convention offence<sup>40</sup>;

- 401 (30) inciting the commission of a Convention offence<sup>41</sup>;
- 402 (31) attempting to commit a Convention offence<sup>42</sup>; and
- 403 (32) aiding, abetting, counselling or procuring the commission of a Convention offence<sup>43</sup>.

The Secretary of State may by order modify this list of offences<sup>44</sup>.

1 Terrorism Act 2006 s 20(2), Sch 1 para 1(1). As to these offences see the Offences against the Person Act 1861 ss 28-30; and PARAS 125-126, 130 ante.

2 Terrorism Act 2006 Sch 1 para 1(2)(a). As to this offence see the Explosive Substances Act 1883 s 2 (as substituted); and PARA 127 ante.

3 Terrorism Act 2006 Sch 1 para 1(2)(b). As to this offence see the Explosive Substances Act 1883 s 3 (as substituted); and PARA 128 ante.

4 Terrorism Act 2006 Sch 1 para 1(2)(c). As to this offence see the Explosive Substances Act 1883 s 5; and PARA 711 post.

5 Terrorism Act 2006 Sch 1 para 2. As to this offence see the Biological Weapons Act 1974 s 1; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 469.

6 For the meaning of 'protected person' see PARA 477 note 3 post; definition applied by the Terrorism Act 2006 Sch 1 para 3(5).

7 Is an offence under the Internationally Protected Persons Act 1978 s 1(1)(a) (as amended) (see PARA 477 post). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

8 Terrorism Act 2006 Sch 1 para 3(1).

9 For the meaning of 'relevant premises' see PARA 477 note 5 post; definition applied by ibid Sch 1 para 3(5).

10 Is an offence under the Internationally Protected Persons Act 1978 s 1(1)(b) (see PARA 477 post).

11 Terrorism Act 2006 Sch 1 para 3(2)(a).

12 Ibid Sch 1 para 3(2)(b).

13 Ibid Sch 1 para 3(3). As to this offence see the Internationally Protected Persons Act 1978 s 1(3); and PARA 477 post.

14 Terrorism Act 2006 Sch 1 para 4. As to this offence see the Taking of Hostages Act 1982 s 1; and PARA 468 post.

15 Terrorism Act 2006 Sch 1 paras 5(a), 7(b). As to the offence of hijacking of aircraft see the Aviation Security Act 1982 s 1; and AIR LAW vol 2 (2008) PARA 624. As to the offence of hijacking of ships see the Aviation and Maritime Security Act 1990 s 9; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1210.

16 Terrorism Act 2006 Sch 1 para 5(b). As to this offence see the Aviation Security Act 1982 s 2; and AIR LAW vol 2 (2008) PARA 628.

17 Terrorism Act 2006 Sch 1 para 5(c). As to this offence see the Aviation Security Act 1982 s 3; and AIR LAW vol 2 (2008) PARA 629.

18 Is committing an offence under ibid s 6(2) (see AIR LAW vol 2 (2008) PARAS 624-625, 628-629).

19 Is but for ibid ss 1(2), 2(4), 3(5), (6) (see AIR LAW vol 2 (2008) PARAS 625, 628-629).

20 Is the offence under ibid s 1 (see AIR LAW vol 2 (2008) PARA 624).

21 Is the offence under ibid s 2 (see AIR LAW vol 2 (2008) PARA 628).

22 Terrorism Act 2006 Sch 1 para 5(d). The offence referred to in the text is the offence under the Aviation Security Act 1982 s 3 (see AIR LAW vol 2 (2008) PARA 629).

23     le an offence under the Nuclear Material (Offences) Act 1983 s 1(1) (see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583). For the meaning of 'nuclear material' see s 6; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583 (definition applied by the Terrorism Act 2006 Sch 1 para 6(3)).

24     Ibid Sch 1 para 6(1).

25     Ibid Sch 1 para 6(2). As to this offence see the Nuclear Material (Offences) Act 1983 s 2; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583.

26     Terrorism Act 2006 Sch 1 para 7(a). As to this offence see the Aviation and Maritime Security Act 1990 s 1; and AIR LAW vol 2 (2008) PARA 631.

27     Terrorism Act 2006 Sch 1 para 7(c). As to this offence see the Aviation and Maritime Security Act 1990 s 10; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1211.

28     Terrorism Act 2006 Sch 1 para 7(d). As to this offence see the Aviation and Maritime Security Act 1990 s 11; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1212.

29     Terrorism Act 2006 Sch 1 para 7(e). As to this offence see the Aviation and Maritime Security Act 1990 s 12; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1213.

30     Terrorism Act 2006 Sch 1 para 7(f). As to this offence see the Aviation and Maritime Security Act 1990 s 13; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1214.

31     le an offence specified in ibid s 14(2) (see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1215).

32     Terrorism Act 2006 Sch 1 para 7(g). As to this offence see the Aviation and Maritime Security Act 1990 s 14; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1215.

33     Terrorism Act 2006 Sch 1 para 8. As to this offence see the Chemical Weapons Act 1996 s 2; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 474.

34     Terrorism Act 2006 Sch 1 para 9(a). As to this offence see the Terrorism Act 2000 s 15; and PARA 390 post.

35     Terrorism Act 2006 Sch 1 para 9(b). As to this offence see the Terrorism Act 2000 s 16; and PARA 391 post.

36     Terrorism Act 2006 Sch 1 para 9(c). As to this offence see the Terrorism Act 2000 s 17; and PARA 392 post.

37     Terrorism Act 2006 Sch 1 para 9(d). As to this offence see the Terrorism Act 2000 s 18; and PARA 393 post.

38     Terrorism Act 2006 Sch 1 para 10. As to this offence see the Terrorism Act 2000 s 56; and PARA 441 post.

39     Terrorism Act 2006 Sch 1 para 11. As to this offence see the Anti-terrorism, Crime and Security Act 2001 s 47; and PARA 623 post.

40     Terrorism Act 2006 Sch 1 para 12(a).

41     Ibid Sch 1 para 12(b).

42     Ibid Sch 1 para 12(c).

43     Ibid Sch 1 para 12(d).

44     See ibid s 20(9), which provides that the Secretary of State may by order made by statutory instrument modify Sch 1 so as either to add an offence to the offences listed therein (s 20(9)(a)) or to remove an offence from the offences so listed (s 20(9)(b)), and that he may make supplemental, incidental, consequential or transitional provision in connection with the addition or removal of an offence (s 20(9)(c)). An order under s 20(9) may add an offence in or as regards Scotland to the offences listed in Sch 1 to the extent only that a provision creating the offence would be outside the legislative competence of the Scottish Parliament: s 20(10). The Secretary of State must not make an order containing (with or without other provision) any provision authorised by s 20(9) unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 20(11). At the date at which this volume states the law no such order had been made.

## UPDATE

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **384 Convention offences**

TEXT AND NOTES 23-25--Terrorism Act 2006 Sch 1 para 6(1) amended, para 6(2), (3) substituted: Criminal Justice and Immigration Act 2008 Sch 26 para 79(2)-(4). See also Terrorism Act 2006 Sch 1 para 6A (added by Criminal Justice and Immigration Act 2008 Sch 26 para 79(5)).

TEXT AND NOTE 41--See further Serious Crime Act 2007 Sch 6 para 52(b) (references to common law offence of incitement).

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### **385. Review of legislation relating to terrorism.**

The Secretary of State has a duty to appoint a person to review the operation of the provisions of the legislation relating to terrorism<sup>1</sup>. That person may from time to time carry out a review of those provisions and, where he does so, must send a report on the outcome of such review to the Secretary of State as soon as reasonably practicable after completing it<sup>2</sup>, and must carry out and report on such a review at least once in every 12-month period<sup>3</sup>. On receiving a report the Secretary of State must lay a copy of it before Parliament<sup>4</sup>.

1 Terrorism Act 2006 s 36(1). For these purposes, 'the legislation relating to terrorism' is the Terrorism Act 2000 and the Terrorism Act 2006 Pt 1 (ss 1-20): see PARA 383 note 1 ante; and see also PARA 386 et seq post. The Secretary of State may, out of money provided by Parliament, pay a person appointed to carry out such a review both his expenses and also such allowances as the Secretary of State determines: s 36(6).

The Secretary of State was also required to appoint a committee to conduct a review of the Anti-terrorism, Crime and Security Act 2001: see ss 122, 123. The *Privy Counsellor Review Committee Report on the Anti-terrorism, Crime and Security Act 2001 Review* (HC 100) was laid before Parliament on 18 December 2003.

2 Terrorism Act 2006 s 36(2). The appointed person must carry out and report on his first review under s 36 before the end of the period of 12 months after the laying before Parliament of the last report required to be so laid under the Terrorism Act 2000 s 126 (repealed) before 13 April 2006 (ie the date on which the Terrorism Act 2006 s 36 was brought into force by the Terrorism Act 2006 (Commencement No 1) Order 2006, SI 2006/1013): Terrorism Act 2006 s 36(3).

3 Ibid s 36(4). The reference in the text to 'every 12-month period' is a reference to every 12-month period ending with an anniversary of the end of the 12-month period mentioned in s 36(3) (see the text and note 2 supra): s 36(4).

4 Ibid s 36(5).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

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## (ii) Proscribed Organisations

### 386. Proscription.

An organisation is 'proscribed' if (1) it is listed in the Terrorism Act 2000<sup>1</sup>; or (2) it operates under the same name as an organisation so listed<sup>2</sup>. The Secretary of State has power by order to add an organisation to the list if he believes that it is concerned in terrorism<sup>3</sup> and also to provide that a name which is not specified in the list<sup>4</sup> is to be treated as another name for a listed organisation if he believes either that a listed organisation is operating wholly or partly under that non-specified name (whether as well as or instead of under the specified name)<sup>5</sup> or that an organisation that is operating under a name that is not so specified is otherwise for all practical purposes the same as an organisation so listed<sup>6</sup>. An organisation is 'concerned in terrorism' if it commits or participates in acts of terrorism<sup>7</sup>, prepares for terrorism<sup>8</sup>, promotes or encourages terrorism<sup>9</sup>, or is otherwise engaged in terrorism<sup>10</sup>.

An application may be made to the Secretary of State for the removal of an organisation from the list<sup>11</sup> or for a name to cease to be treated as a name for a listed organisation<sup>12</sup>. Where such an application is refused, an appeal lies to the Proscribed Organisations Appeal Commission<sup>13</sup>. A further appeal from a decision of the Commission may be made to the Court of Appeal on a question of law with the permission of the Commission or, if the Commission refuses permission, with the permission of the Court of Appeal<sup>14</sup>. If an appeal to the Commission is successful and an order has been made either deproscribing an organisation<sup>15</sup> or providing for a specified name to cease to be treated as a name for a particular organisation<sup>16</sup>, a person who has been convicted of an offence<sup>17</sup> in respect of the organisation<sup>18</sup> on the basis of activity which took place on or after the date of the refusal<sup>19</sup> may appeal against the conviction<sup>20</sup> to the Court of Appeal (if the conviction was on indictment)<sup>21</sup> or to the Crown Court (if the conviction was by a magistrates' court)<sup>22</sup>, and the Court of Appeal or the Crown Court (as the case may be) must allow the appeal<sup>23</sup>. An application may be made for compensation for miscarriage of justice in such a case<sup>24</sup>.

The Proscribed Organisations Appeal Commission is the appropriate tribunal to hear any proceedings under the Human Rights Act 1998<sup>25</sup> against the Secretary of State which allege that his refusal of a deproscription application is incompatible with a Convention right<sup>26</sup>.

The following types of evidence are inadmissible as evidence in proceedings for a range of specified terrorism offences<sup>27</sup>:

- 404 (a) evidence of anything done in relation to an application<sup>28</sup> to the Secretary of State for deproscription<sup>29</sup>;
- 405 (b) evidence of anything done in relation to proceedings before the Proscribed Organisations Appeal Commission<sup>30</sup>;
- 406 (c) evidence of anything done in relation to proceedings on further appeal<sup>31</sup>;
- 407 (d) any document submitted for the purposes of proceedings mentioned in heads (a) to (c) above<sup>32</sup>.

This does not, however, prevent evidence from being adduced on behalf of the defendant<sup>33</sup>.

1 le listed in the Terrorism Act 2000 s 3, Sch 2 (as amended). The following are listed as proscribed organisations: The Irish Republican Army (see *infra*); Cumann na mBan, Fianna na hEireann; The Red Hand Commando; Saor Eire; The Ulster Freedom Fighters; The Ulster Volunteer Force; The Irish National Liberation Army; The Irish People's Liberation Organisation; The Ulster Defence Association; The Loyalist Volunteer Force; The Continuity Army Council; The Orange Volunteers (see *infra*); The Red Hand Defenders; Al-Qa'ida; Egyptian Islamic Jihad; Al-Gama'at al-Islamiya; Armed Islamic Group (Groupe Islamique Armée) (GIA); Salafist Group for Call and Combat (Groupe Salafiste pour la Prédication et le Combat) (GSPC); Babbar Khalsa; International Sikh Youth Federation; Harakat Mujahideen; Jaish e Mohammed; Lashkar e Tayyaba; Liberation Tigers of Tamil Eelam (LTTE); Hizballah External Security Organisation; Hamas-Izz al-Din al-Qassem Brigades; Palestinian Islamic Jihad - Shaqaqi; Abu Nidal Organisation; Islamic Army of Aden; Mujaheddin e Khalq; Kurdistan Workers' Party (Partiya Karkeren Kurdistan) (PKK) (also known as Kongra Gele Kurdistan or KADEK); Revolutionary Peoples' Liberation Party - Front (Devrimci Halk Kurtulus Partisi-Cephesi) (DHKP-C); Basque Homeland and Liberty (Euskadi ta Askatasuna) (ETA); 17 November Revolutionary Organisation (N17); Abu Sayyaf Group; Asbat Al-Ansar; Islamic Movement of Uzbekistan; Jemaah Islamiyah (see *infra*); Al Ittihad Al Islamia; Ansar Al Islam; Ansar Al Sunna; Groupe Islamique Combattant Marocain; Harakat-ul-Jihad-ul-Islami (Bangladesh); Harakat-ul-Mujahideen/Alami; Hezb-e Islami Gulbuddin; Islamic Jihad Union; Jamaat ul-Furquan; Jundallah; Khuddam ul-Islam; Lashkar-e Jhangvi; Libyan Islamic Fighting Group; Sipah-e Sahaba Pakistan; Al-Ghurabaa; the Saved Sect; Baluchistan Liberation Army; Teyrebaz Azadiye Kurdistan: Sch 2 (amended by the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001, SI 2001/1261, art 2; the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2002, SI 2002/2724, art 1; the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2005, SI 2005/2892, art 1; and the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2006, SI 2006/2016, art 2; and by virtue of the Proscribed Organisations (Name Change) Order 2006, SI 2006/1919, art 2). The entry for The Orange Volunteers refers to the organisation which uses that name and in the name of which a statement described as a press release was published on 14 October 1998. The entry for Jemaah Islamiyah refers to the organisation using that name that is based in south-east Asia, members of which were arrested by the Singapore authorities in December 2001 in connection with a plot to attack United States and other Western targets in Singapore. The term 'Irish Republican Army' was intended to encompass splinter groups for the Irish Republican Army and thus includes the Real IRA, a group formed by dissident members of the IRA in 1997: *R v Z (A-G for Northern Ireland's Reference)* [2005] UKHL 35, [2005] 2 AC 645, [2005] 3 All ER 95.

2 Terrorism Act 2000 s 3(1). Head (2) in the text does not apply to an organisation listed in Sch 2 if its entry is subject to a note in that Schedule: s 3(2). 'Organisation' includes any association or combination of persons: s 121.

3 Ibid s 3(3)(a), (4). The Secretary of State may also by order remove an organisation from the list or amend the list in some other way: s 3(3)(b), (c). For the meaning of 'terrorism' see PARA 383 ante. An order under s 3(3) must be made by statutory instrument, and may contain savings and transitional provisions and make different provisions for different purposes: s 123(1). Such an order may not be made unless a draft has been laid before and approved by a resolution of each House of Parliament: s 123(4)(a). However, an order may be made without having been so approved if the Secretary of State is of the opinion that it is necessary by reason of urgency; in such a case the order must contain a declaration of the Secretary of State's opinion, and it ceases to have effect at the end of the period of 40 days beginning with the day of its making unless approved by a resolution of each House of Parliament: s 123(5).

4 le specified in *ibid* Sch 2 (as amended).

5 Ibid s 3(6)(a) (ss 3(5A)-(5C), (6)-(9), 5(5A), 7(1A), 9(4)(c) added, s 4(1) substituted, and ss 4(2)(b), 5(3)-(5), 7(2), (4)(a), (5), (7)(a), 9(2)(a), (4)(a), Sch 3 amended, by the Terrorism Act 2006 ss 21, 22, 37, Sch 3). Where an order under the Terrorism Act 2000 s 3(6) (as added) provides for a name to be treated as another name for an organisation, the Act has effect in relation to acts occurring while the order is in force and the organisation continues to be listed in Sch 2 (as amended) as if the organisation were listed in Sch 2 (as amended) under the other name, as well as under the name specified in Sch 2 (as amended): s 3(7) (as so added). The Secretary of State may at any time by order revoke an order under s 3(6) (as added) or otherwise provide for a name specified in such an order to cease to be treated as a name for a particular organisation: s 3(8) (as so added). Nothing in s 3(6)-(8) (as added) prevents any liability from being established in any proceedings by proof that an organisation is the same as an organisation listed in Sch 2 (as amended), even though it is or was operating under a name specified neither in Sch 2 (as amended) nor in an order under s 3(6) (as added): s 3(9) (as so added).

6 Ibid s 3(6)(b) (as added: see note 5 *supra*).

7 Ibid s 3(5)(a).

8 Ibid s 3(5)(b).



9 Ibid s 3(5)(c). The cases in which an organisation promotes or encourages terrorism for these purposes include any case in which activities of the organisation either include the unlawful glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism (s 3(5A)(a) (as added: see note 5 supra) or are carried out in a manner that ensures that the organisation is associated with statements containing any such glorification (s 3(5A)(b) (as so added)). For these purposes, 'statement' includes a communication without words consisting of sounds or images or both, and 'glorification' includes any form of praise or celebration (cognate expressions being construed accordingly) (s 3(5C) (as so added)); and the glorification of any conduct is unlawful for the purposes of s 3(5A) (as added) if there are persons who may become aware of it who could reasonably be expected to infer that what is being glorified, is being glorified as either conduct that should be emulated in existing circumstances (s 3(5B)(a) (as so added)) or conduct that is illustrative of a type of conduct that should be so emulated (s 3(5B)(b) (as so added)).

10 Ibid s 3(5)(d).

11 Ibid ss 3(3)(b), 4(1)(a) (s 4(1) as substituted: see note 5 supra). The application may be made by the proscribed organisation (s 4(2)(a)) or any person affected by the organisation's proscription or by the treatment of the name as a name for the organisation (s 4(2)(b) (as so amended)). As to the procedure for applications see the Proscribed Organisations (Applications for Deproscription) Regulations 2006, SI 2006/2299, made under the Terrorism Act 2000 s 4(3), (4).

12 Ibid s 4(1)(b) (as substituted: see note 5 supra).

13 Ibid s 5(1), (2). As to the constitution of the Commission see s 5(6), Sch 3 (as amended (see note 5 supra); further amended by the Regulation of Investigatory Powers Act 2000 s 82(1), (2), Sch 4 para 12(2), Sch 5; and the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 287, 289; and prospectively amended by the Constitutional Reform Act 2005 s 145, Sch 17 para 29). As to the practice and procedure to be followed see the Proscribed Organisations Appeal Commission (Procedure) Rules 2001, SI 2001/443; and the Court of Appeal (Appeals from Proscribed Organisations Appeal Commission) Rules 2002, SI 2002/1843. The Commission must allow an appeal against a refusal to deproscribe an organisation or to provide for a name to cease to be treated as a name for an organisation if it considers that the decision to refuse was flawed when considered in the light of the principles applicable to a judicial review application: Terrorism Act 2000 s 5(3) (as amended: see note 5 supra). Where the Commission allows an appeal it may make an order under s 5(4): s 5(4) (as so amended). Where such an order is made in respect of an appeal against a refusal to deproscribe an organisation, the Secretary of State must as soon as reasonably practicable either lay before Parliament a draft deproscription order under s 3(3)(b) in accordance with s 123(4) or, if of the opinion that the matter is one of urgency, a deproscription order; the former is subject to approval in resolution of each House of Parliament, and the latter requires the order to contain a declaration of the Secretary of State's opinion and ceases to have effect unless within 40 days of the making of the order by the Secretary of State each House of Parliament passes a resolution approving the order: s 5(5) (as so amended), s 123(4), (5). Where such an order is made in respect of an appeal against a refusal to provide for a name to cease to be treated as a name for an organisation, the Secretary of State must as soon as is reasonably practicable make an order under s 3(8) (see note 5 supra) providing that the name in question is to cease to be so treated in relation to that organisation: s 5(5A) (as so added). However, the Secretary of State is not required to take any action until the final determination or disposal of an appeal under s 6 (see the text and note 14 infra) (including any appeal to the House of Lords): s 6(3). As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords', by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt I. At the date at which this volume states the law no such day had been appointed.

14 Terrorism Act 2000 s 6(1), (2). The Court of Appeal is the appropriate court only if the appeal to the Commission was heard in England and Wales; if it was heard in Scotland or in Northern Ireland, the appropriate court is the Court of Session or the Court of Appeal in Northern Ireland respectively: see s 6(1). With regard to such appeal to the Court of Appeal, the Court of Appeal must secure that information is not disclosed contrary to the interests of national security: Court of Appeal (Appeals from Proscribed Organisations Appeal Commission) Rules 2002, SI 2002/1843, r 4(1). In particular, the Court of Appeal may exclude any party (other than the Secretary of State and his representative) from the whole or part of the proceedings before it: r 4(2), (3).

15 Terrorism Act 2000 s 7(1)(a), (b). Orders deproscribing an organisation are made under s 3(3)(b) (see the text and note 11 supra).

16 Ibid s 7(1A)(a), (b) (as added: see note 5 supra). Orders providing for a name to cease to be treated as a name for a particular organisation are made under s 3(8) (as added) (see note 5 supra).

17 Is an offence under ibid ss 11-13, 15-19, 56: see PARAS 387-394, 441 post.

18 Ibid s 7(1)(c), (1A)(c) (s 7(1A) as added: see note 5 supra).

19    le the refusal to deproscribe or to provide for a name to cease to be treated as a name for the organisation, against which the appeal was brought.

20    Terrorism Act 2000 s 7(1)(d), (1A)(d) (s 7(1A) as added: see note 5 supra). An appeal to the Court of Appeal must be brought within 28 days, and an appeal to the Crown Court must be brought within 21 days, beginning with the date of the order (see s 7(4)(a), (7)(a) (as so amended)) and is treated as an appeal under the Criminal Appeal Act 1968 s 1 (see PARA 1837 post), except that an appeal to the Court of Appeal does not require leave (Terrorism Act 2000 s 7(4)(b), (7)(b)). As to appeals in Northern Ireland see s 8.

21    Ibid s 7(2)(a) (s 7(2) as amended: see note 5 supra).

22    Ibid s 7(5)(a) (s 7(5) as amended: see note 5 supra).

23    Ibid s 7(2)(b), (5)(b) (s 7(2), (5) as amended: see note 5 supra).

24    See the Criminal Justice Act 1988 s 133 (amended by the Terrorism Act 2000 s 7(8)).

25    Human Rights Act 1998 s 7(1). See further CONSTITUTIONAL LAW AND HUMAN RIGHTS.

26    See the Terrorism Act 2000 s 9(1); and the Proscribed Organisations Appeal Commission (Human Rights Act 1998 Proceedings) Rules 2006, SI 2006/2290. The Terrorism Act 2000 ss 5(4), (5), (5A), 6, 7, Sch 3 paras 4-7 (as amended) apply to such proceedings: see s 9(2)(a)-(d)) (s 9(2)(a) as amended (see note 5 supra); and s 9(2)(d) amended by the Investigation of Regulatory Powers Act 2000 Sch 4 para 12(1)). In the application of those provisions a reference to the Commission allowing an appeal is taken as a reference to the Commission determining that an action of the Secretary of State is incompatible with a Convention right (Terrorism Act 2000 s 9(4)(a) (as so amended)), a reference to the refusal to deproscribe against which an appeal was brought is taken as a reference to the action of the Secretary of State which is found to be incompatible with a Convention right (s 9(4)(b)), and a reference to a refusal to provide for a name to cease to be treated as a name for an organisation is taken as a reference to the action of the Secretary of State which is found to be incompatible with a Convention right (s 9(4)(c) (as so added)). The Commission must decide proceedings in accordance with the principles applicable on an application for judicial review: s 9(3).

27    le in proceedings for an offence under the Terrorism Act 2000 ss 11-13, 15-19, 56 (see PARAS 387-394, 441 post).

28    le under ibid s 4 (as amended): see the text and notes 11-12 supra.

29    Ibid s 10(1)(a).

30    Ibid s 10(1)(b). The reference in the text is a reference to proceedings under s 5 (as amended) (see the text and note 13 supra) or the Human Rights Act 1998 s 7(1) (see the text and note 25 supra).

31    Terrorism Act 2000 s 10(1)(c). The reference in the text is a reference to proceedings under s 6 (including s 6 as applied by s 9(2): see note 26 supra).

32    Ibid s 10(1)(d).

33    Ibid s 10(2).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **386 Proscription**

NOTE 1--Mujaheddin e Khalq; Hizballah External Security Organisation omitted from, Jammāt-ul Mujahideen Bangladesh; Tehrik Nefaz-e Shari'at Muhammadi; the military wing of Hizballah including the Jihad Council and all units reporting to it (including the Hizballah External Security Organisation), Jama'at ud Da'wa (to be treated as another

name for Lashkar e Tayyaba), Al Shabaab added to, list of proscribed organisations: 2000 Act Sch 2 (amended by SI 2007/2184, SI 2008/1645, SI 2008/1931, SI 2010/611, and by virtue of SI 2009/578). Al Muhajiroun (ALM), Call to Submission, Islam4UK, Islamic Path, and London School of Sharia are to be treated as other names for both Al-Ghurabaa and The Saved Sect: Proscribed Organisations (Name Changes) Order 2010, SI 2010/34.

An organisation which has no capacity to carry on terrorist activities and is taking no steps to acquire such capacity or otherwise to promote or encourage terrorist activities cannot be said to be concerned in terrorism simply because its leaders have the contingent intention to resort to terrorism in the future: *Lord Alton of Liverpool v Secretary of State for the Home Department* [2008] EWCA Civ 443, [2008] 1 WLR 2341.

NOTE 13--SI 2001/4413 replaced: SI 2007/1286.

Appointed day is 1 October 2009: SI 2009/1604.

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### **387. Membership.**

A person commits an offence if he belongs or professes to belong to a proscribed organisation<sup>1</sup>. A person guilty of this offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>2</sup> months or to a fine not exceeding the statutory maximum or to both<sup>3</sup>.

It is a defence for a person charged with such an offence to prove<sup>4</sup>: (1) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member; and (2) that he has not taken part in the activities of the organisation at any time while it was proscribed<sup>5</sup>.

1 Terrorism Act 2000 s 11(1). Although s 11(1) does not have extra-territorial effect, a person who joined a proscribed organisation outside the jurisdiction is guilty of the present offence if he continues to be a member while in this country: *R v Hundal, R v Dhaliwal* [2004] EWCA Crim 389, [2004] 2 Cr App Rep 307. As to proscribed organisations see PARA 386 ante. As to the meaning of 'organisation' see PARA 386 note 2 ante.

Proceedings in England and Wales for the offence require the consent of the Director of Public Prosecutions: Terrorism Act 2000 s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

As to the inadmissibility of certain evidence see the Terrorism Act 2000 s 10; and PARA 386 ante. As to the additional right of appeal arising after a successful appeal against the Secretary of State's refusal to deproscribe a proscribed organisation see PARA 386 ante.

2 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

3 Terrorism Act 2000 s 11(3). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

4 This imposes an evidential burden only: *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450.

5 Terrorism Act 2000 s 11(2). For the purposes of this defence, 'proscribed' is not limited to 'proscribed' for the purposes of the Terrorism Act 2000 (see PARA 386 ante); it also means 'proscribed' for the purposes of the following Acts: the Northern Ireland (Emergency Provisions) Act 1996, the Northern Ireland (Emergency Provisions) Act 1991, the Prevention of Terrorism (Temporary Provisions) Act 1989, the Prevention of Terrorism (Temporary Provisions) Act 1984, the Northern Ireland (Emergency Provisions) Act 1978, the Prevention of Terrorism (Temporary Provisions) Act 1976, the Prevention of Terrorism (Temporary Provisions) Act 1974, and the Northern Ireland (Emergency Provisions) Act 1973 (all now repealed): see the Terrorism Act 2000 s 11(4). These Acts were predecessors of the Terrorism Act 2000, where the concept of 'proscribed organisation' was employed in anti-terrorism legislation.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **387 Membership**

NOTE 1--Where an offence under the Terrorism Act 2000 s 11 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

NOTE 1--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29).

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### **388. Support.**

A person commits an offence if he invites support for a proscribed organisation<sup>1</sup>, and the support is not, or is not restricted to, the provision of money or other property<sup>2</sup>.

A person commits an offence if he arranges, manages or assists in arranging or managing a meeting<sup>3</sup> which he knows is:

- 408 (1) to support a proscribed organisation<sup>4</sup>,
- 409 (2) to further the activities of a proscribed organisation<sup>5</sup>; or
- 410 (3) to be addressed by a person who belongs or professes to belong to a proscribed organisation<sup>6</sup>.

Where a person is charged with an offence under head (3) above in respect of a private meeting<sup>7</sup> it is a defence for him to prove<sup>8</sup> that he had no reasonable cause to believe that the address in question would support a proscribed organisation or further its activities<sup>9</sup>.

A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities<sup>10</sup>.

A person guilty of an offence under the above provisions is liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>11</sup> months or to a fine not exceeding the statutory maximum or to both<sup>12</sup>.

1 As to proscribed organisations see PARA 386 ante.

2 Terrorism Act 2000 s 12(1). Proceedings in England and Wales for the offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

As to the inadmissibility of certain evidence see the Terrorism Act 2000 s 10; and PARA 386 ante. For the additional right of appeal arising after a successful appeal against the Secretary of State's refusal to deproscribe a proscribed organisation see PARA 386 ante.

The reference to 'the provision of money or other property' is a reference to its being given, lent or otherwise made available, whether or not for consideration: s 15; applied by s 12(1)(b). 'Property' includes property wherever situated and whether real or personal, heritable or moveable, and things in action and other intangible or incorporeal property: s 121.

3 'Meeting' means a meeting of three or more persons, whether or not the public is admitted: *ibid* s 12(5)(a).

4 *Ibid* s 12(2)(a). The provisions of ss 10, 117 (see PARA 386 ante) apply to such an offence.

5 *Ibid* s 12(2)(b). See note 4 *supra*.

6 *Ibid* s 12(2)(c). See note 4 *supra*.

7 A meeting is private if the public is not admitted: *ibid* s 12(5)(b).

8 If the person adduces evidence which is sufficient to raise an issue with respect to the matter, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not: *ibid* s 118(1), (2), (5).

9 *Ibid* s 12(4).

10 *Ibid* s 12(3).

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

12 Terrorism Act 2000 s 12(6). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **388 Support**

NOTE 2--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). Where an offence under the Terrorism Act 2000 s 12 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

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### **389. Uniform.**

A person in a public place<sup>1</sup> commits an offence if he wears an item of clothing, or wears, carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation<sup>2</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six<sup>3</sup> months or to a fine not exceeding level 5 of the standard scale or to both<sup>4</sup>.

<sup>1</sup> ie a place to which members of the public have or are permitted to have access, whether or not for payment: Terrorism Act 2000 s 121.

<sup>2</sup> Ibid s 13(1). As to proscribed organisations see PARA 386 ante. As to the meaning of 'organisation' see PARA 386 note 2 ante.

Proceedings in England and Wales for the offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

As to the inadmissibility of certain evidence see the Terrorism Act 2000 s 10; and PARA 386 ante. For the additional right of appeal arising after a successful appeal against the Secretary of State's refusal to deproscribe a proscribed organisation see PARA 386 ante.

<sup>3</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

<sup>4</sup> Terrorism Act 2000 s 13(3). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **389 Uniform**

NOTE 2--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). Where an offence under the Terrorism Act 2000 s 13 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).





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### **(iii) Terrorist Property**

#### **390. Fund-raising for the purposes of terrorism.**

A person commits an offence if he: (1) invites another to provide money or other property<sup>1</sup>; and (2) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism<sup>2</sup>.

A person commits an offence if he: (a) receives money or other property<sup>3</sup>; and (b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism<sup>4</sup>.

A person commits an offence if he: (i) provides money or other property<sup>5</sup>; and (ii) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism<sup>6</sup>.

A person does not commit any of the above offences if he is acting in actual or intended co-operation with the police<sup>7</sup>.

A person guilty of an offence under these provisions is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>8</sup> months or to a fine not exceeding the statutory maximum or to both<sup>9</sup>.

1 Terrorism Act 2000 s 15(1)(a). For the meaning of 'property' see the para 388 note 2 ante. The reference in s 15 to the provision of money or other property is a reference to its being given, lent or otherwise made available, whether or not for consideration: s 15(4). Corresponding provision in relation to fund-raising for the purposes of terrorism is made for certain British overseas territories by the Anti-terrorism (Financial and Other Measures) (Overseas Territories) Order 2002, SI 2002/1822.

The provisions of the Terrorism Act 2000 ss 15-23 (see PARAS 390-398 post; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 482) and s 39 (see PARA 415 post) apply to the Director of Savings and any person employed by or otherwise engaged in the service of the Director in circumstances where the Director or such a person is carrying on a 'relevant business' within the meaning given by the Money Laundering Regulations 2003, SI 2003/3075, reg 2(2): see the Terrorism Act 2000 s 119(1); and the Terrorism Act 2000 (Crown Servants and Regulators) Regulations 2001, SI 2001/192, regs 2, 3 (both amended by SI 2003/3075).

2 Terrorism Act 2000 s 15(1)(b). For the meaning of 'terrorism' see PARA 383 ante. An action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation: s 1(5).

3 Ibid s 15(2)(a).

4 Ibid s 15(2)(b).

5 Ibid s 15(3)(a).

6 Ibid s 15(3)(b).

7 See PARA 396 post.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed. A

court may also make a forfeiture order under the Terrorism Act 2000 s 23: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 482. Proceedings in England and Wales for these offences require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears that the offence is committed for a purpose connected with the affairs of a country other than the United Kingdom, the relevant consent is that of the Attorney General: s 117(3). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. As to the effect of these restrictions see PARA 1071 post. For the special rule as to the admissibility of evidence see PARA 386 ante. As to extra-territorial jurisdiction see PARA 471 post. For the additional right of appeal arising after a successful appeal against the Secretary of State's refusal to deproscribe a proscribed organisation see PARA 386 ante.

9 Terrorism Act 2000 s 22. As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **390-393 Fund-raising for the purposes of terrorism ... Money laundering**

As to further defences to offences under the Terrorism Act 2000 ss 15-18 relating to arrangements with prior consent and disclosure after entering into arrangements, see the Terrorism Act 2000 ss 21ZA-21ZC; and PARA 396A; and as to disclosure by a constable to the Serious Organised Crime Agency, see s 21C; and PARA 396A.

### **390 Fund-raising for the purposes of terrorism**

NOTE 1--Terrorism Act 2000 s 119(1) amended: Counter-Terrorism Act 2008 Sch 3 para 4. SI 2001/192 reg 2 further amended: SI 2007/2157. SI 2002/1822 amended: Counter-Terrorism Act 2008 s 75(1), (2)(e).

NOTE 8--Where an offence under the Terrorism Act 2000 s 15 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iii) Terrorist Property/391. Use and possession of property for the purposes of terrorism.

### **391. Use and possession of property for the purposes of terrorism.**

A person commits an offence if he uses money or other property<sup>1</sup> for the purposes of terrorism<sup>2</sup>. A person commits an offence if he: (1) possesses money or other property<sup>3</sup>; and (2) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism<sup>4</sup>.

A person does not commit either of the above offences if he is acting in actual or intended co-operation with the police<sup>5</sup>.

A person guilty of an offence described above is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>6</sup> months or a fine not exceeding the statutory maximum or to both<sup>7</sup>.

1 For the meaning of 'property' see PARA 388 note 2 ante. An action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation: Terrorism Act 2000 s 1(5). As to proscribed organisations see PARA 386 ante. For the meaning of 'terrorism' see PARA 383 ante.

2 Ibid s 16(1). The offence is not incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10 (freedom of expression) or art 11 (freedom of association and assembly): see *R (on the application of O'Driscoll) v Secretary of State for the Home Department* [2002] EWHC 2477 (Admin), [2002] All ER (D) 327 (Nov). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

Corresponding provision in relation to the use and possession of property for the purposes of terrorism is made for certain British overseas territories by the Anti-terrorism (Financial and Other Measures) (Overseas Territories) Order 2002, SI 2002/1822.

3 Terrorism Act 2000 s 16(2)(a). As to the application of ss 15-23 to the Director of Savings see PARA 390 note 1 ante.

4 Ibid s 16(2)(b).

5 See PARA 396 post.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 Terrorism Act 2000 s 22. As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. A court may also make a forfeiture order under s 23: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 482.

Proceedings in England and Wales for these offences require the consent of the Director of Public Prosecutions: see s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. As to the effect of these restrictions see PARA 1071 post.

As to the inadmissibility of certain evidence see PARA 386 ante. As to extra-territorial jurisdiction see PARA 471 post. For the additional right of appeal arising after a successful appeal against the Secretary of State's refusal to deproscribe a proscribed organisation see PARA 386 ante.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **390-393 Fund-raising for the purposes of terrorism ... Money laundering**

As to further defences to offences under the Terrorism Act 2000 ss 15-18 relating to arrangements with prior consent and disclosure after entering into arrangements, see the Terrorism Act 2000 ss 21ZA-21ZC; and PARA 396A; and as to disclosure by a constable to the Serious Organised Crime Agency, see s 21C; and PARA 396A.

### **391 Use and possession of property for the purposes of terrorism**

NOTE 2--SI 2002/1822 amended: Counter-Terrorism Act 2008 s 75(1), (2)(e).

NOTE 7--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). Where an offence under the Terrorism Act 2000 s 16 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iii) Terrorist Property/392. Funding arrangements for the purposes of terrorism.

### **392. Funding arrangements for the purposes of terrorism.**

A person commits an offence if: (1) he enters into or becomes concerned in an arrangement as a result of which money or other property<sup>1</sup> is made available or is to be made available to another; and (2) he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism<sup>2</sup>.

A person does not commit such an offence if he is acting in actual or intended co-operation with the police<sup>3</sup>.

A person guilty of an offence under these provisions is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>4</sup> months or to a fine not exceeding the statutory maximum or to both<sup>5</sup>.

1 For the meaning of 'property' see PARA 388 note 2 ante.

2 Terrorism Act 2000 s 17. For the meaning of 'terrorism' see PARA 383 ante. An action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation: s 1(5).

Proceedings in England and Wales for such an offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. As to the effect of these restrictions see PARA 1071 post.

As to the inadmissibility of certain evidence see PARA 386 ante. As to extra-territorial jurisdiction see PARA 471 post. For the additional right of appeal arising after a successful appeal against the Secretary of State's refusal to deproscribe a proscribed organisation see PARA 386 ante.

As to the application of the Terrorism Act 2000 ss 15-23 to the Director of Savings see PARA 390 note 1 ante.

Corresponding provision in relation to funding arrangements for the purposes of terrorism is made for certain British overseas territories by the Anti-terrorism (Financial and Other Measures) (Overseas Territories) Order 2002, SI 2002/1822.

3 See PARA 396 post.

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 Terrorism Act 2000 s 22. As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. A court may also make a forfeiture order under s 23: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 482.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **390-393 Fund-raising for the purposes of terrorism ... Money laundering**

As to further defences to offences under the Terrorism Act 2000 ss 15-18 relating to arrangements with prior consent and disclosure after entering into arrangements, see the Terrorism Act 2000 ss 21ZA-21ZC; and PARA 396A; and as to disclosure by a constable to the Serious Organised Crime Agency, see s 21C; and PARA 396A.

### **392 Funding arrangements for the purposes of terrorism**

NOTE 2--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). SI 2002/1822 amended: Counter-Terrorism Act 2008 s 75(1), (2)(e). Where an offence under the Terrorism Act 2000 s 17 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iii) Terrorist Property/393. Money laundering.

### **393. Money laundering.**

A person commits an offence if he enters into or becomes concerned in an arrangement which facilitates the retention or control by or on behalf of another person of terrorist property: (1) by concealment; (2) by removal from the jurisdiction; (3) by transfer to nominees; or (4) in any other way<sup>1</sup>.

'Terrorist property' means:

- 411 (a) money or other property<sup>2</sup> which is likely to be used for the purposes of terrorism<sup>3</sup> (including any resources<sup>4</sup> of a proscribed organisation)<sup>5</sup>;
- 412 (b) proceeds<sup>6</sup> of the commission of acts of terrorism<sup>7</sup>; and
- 413 (c) proceeds of acts carried out for the purposes of terrorism<sup>8</sup>.

A person does not commit such an offence if he is acting in actual or intended co-operation with the police<sup>9</sup>. It is a defence for a person charged with such an offence to prove<sup>10</sup> that he did not know and had no reasonable cause to suspect that the arrangement related to terrorist property<sup>11</sup>.

A person guilty of an offence under these provisions is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>12</sup> months or to a fine not exceeding the statutory maximum or to both<sup>13</sup>.

1 Terrorism Act 2000 s 18(1). Proceedings in England and Wales for such an offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. As to the effect of these restrictions see PARA 1071 post.

As to the inadmissibility of certain evidence see PARA 386 ante. As to extra-territorial jurisdiction see PARA 471 post. For the additional right of appeal arising after a successful appeal against the Secretary of State's refusal to deproscribe a proscribed organisation see PARA 386 ante.

As to the application of the Terrorism Act 2000 ss 15-23 to the Director of Savings see PARA 390 note 1 ante.

Corresponding provision in relation to money laundering is made for certain British overseas territories by the Anti-terrorism (Financial and Other Measures) (Overseas Territories) Order 2002, SI 2002/1822.

2 For the meaning of 'property' see PARA 388 note 2 ante.

3 For the meaning of 'terrorism' see PARA 383 ante. 'Action taken for the purposes of terrorism' includes a reference to action taken for the benefit of a proscribed organisation: Terrorism Act 2000 s 1(5). As to proscribed organisations see PARA 386 ante.

4 The reference to an organisation's resources includes a reference to any money or other property which is applied or made available, or is to be applied or made available, for use by the organisation: *ibid* s 14(2)(b).

5 *Ibid* s 14(1)(a).



6 The reference to proceeds of an act includes a reference to any property which wholly or partly, and directly or indirectly, represents the proceeds of the act (including payments or other rewards in connection with its commission): *ibid* s 14(2)(a).

7 *Ibid* s 14(1)(b).

8 *Ibid* s 14(1)(c).

9 See PARA 396 post.

10 Note that this is not one of the defences to be proved by the defendant to which the Terrorism Act 2000 s 118 applies (which states that in relation to certain provisions of the Act where the defendant has the burden of proof that burden is only an evidential one): see s 118. It may therefore be inferred that the burden imposed on the defendant of proving the present defence is a legal (or persuasive) one, but that implication was not drawn in respect of the corresponding issue in the context of s 11 (see PARA 387 ante): see *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450. See further PARA 1368 et seq post.

11 Terrorism Act 2000 s 18(2).

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

13 Terrorism Act 2000 s 22. As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. A court may also make a forfeiture order under s 23: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 482.

## UPDATE

### 383-477 Prevention of terrorism

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### 390-393 Fund-raising for the purposes of terrorism ... Money laundering

As to further defences to offences under the Terrorism Act 2000 ss 15-18 relating to arrangements with prior consent and disclosure after entering into arrangements, see the Terrorism Act 2000 ss 21ZA-21ZC; and PARA 396A; and as to disclosure by a constable to the Serious Organised Crime Agency, see s 21C; and PARA 396A.

### 393 Money laundering

NOTE 1--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). Where an offence under the Terrorism Act 2000 s 18 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iii) Terrorist Property/394. Failure to disclose information.

### **394. Failure to disclose information.**

If a person (1) believes or suspects that another person has committed an offence relating to terrorist property under the Terrorism Act 2000<sup>1</sup>; and (2) bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business or employment, he commits an offence if he does not disclose to a constable<sup>2</sup> as soon as is reasonably practicable his belief or suspicion and the information on which it is based<sup>3</sup>. This does not apply if the information came to the person in the course of a business in the regulated sector<sup>4</sup>.

It is a defence for the defendant to prove<sup>5</sup> that he had a reasonable excuse for not making the disclosure<sup>6</sup>. In addition, where a person is in employment and his employer has established a procedure for making disclosures of his belief or suspicion and the information on which it is based, it is a defence for him to prove<sup>7</sup> that he disclosed those matters in accordance with the procedure<sup>8</sup>.

These provisions do not require disclosure by a professional legal adviser of information which he obtains in privileged circumstances, or a belief or suspicion based on information which he obtains in privileged circumstances<sup>9</sup>.

A person guilty of an offence under these provisions is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>10</sup> months or to a fine not exceeding the statutory maximum or to both<sup>11</sup>.

1     I.e. an offence under the Terrorism Act 2000 ss 15-18: see PARA 390 et seq ante. For the purposes of head (1) in the text, a person is treated as having committed an offence under ss 15-18 if he has taken an action or been in possession of a thing, and he would have committed an offence under one of those provisions if he had been in the United Kingdom at the time when he took the action or was in possession of the thing: s 19(7). 'Action' and 'act' include an omission: s 121. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2     The reference to a constable includes a reference to a member of the staff of the Serious Organised Crime Agency authorised for this purpose by the Director General of that Agency: *ibid* s 19(7B) (added by the Anti-terrorism, Crime and Security Act 2001 s 3, Sch 2 para 5(4); and amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 125, 126).

3     Terrorism Act 2000 s 19(1), (2).

In these circumstances a person may make disclosure to a constable (or a person authorised for this purpose by the Director General of the Serious Organised Crime Agency) notwithstanding any restriction on the disclosure of information imposed by statute or otherwise (eg by contract): see s 20(2), (3), (5) (as added and amended). See further s 20(4); and PARA 395 post.

Proceedings in England and Wales for these offences require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post.

As to the inadmissibility of certain evidence see PARA 386 ante. For the additional right of appeal arising after a successful appeal against the Secretary of State's refusal to deproscribe a proscribed organisation see PARA 386 ante.

As to the application of the Terrorism Act 2000 ss 15-23 to the Director of Savings see PARA 390 note 1 ante. However, s 19 (as amended) does not apply to the following persons: (1) the Bank of England; (2) the Financial Services Authority; (3) a designated professional body within the meaning of the Financial Services Act 1986 s 362(2) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 494); (4) the Council of Lloyds; (5) the Registrar of Credit Unions for Northern Ireland; (6) the Assistant Registrar of Credit Unions for Northern Ireland; and (7) any person who is employed by, or otherwise engaged in, the service of any person referred to above for the purpose of performing such functions: Terrorism Act 2000 s 119(2); Terrorism Act 2000 (Crown Servants and Regulators) Regulations 2001, SI 2001/192, reg 4 (amended by the SI 2002/1555).

Corresponding provision in relation to the failure to disclose information is made for certain British overseas territories by the Anti-terrorism (Financial and Other Measures) (Overseas Territories) Order 2002, SI 2002/1822.

4 Terrorism Act 2000 s 19(1A) (added by the Anti-terrorism Crime and Security Act 2001 s 3, Sch 2 para 5(1), (3)). As to business in the regulated sector see the Terrorism Act 2000 Sch 3A (as added) (see PARA 397 post): s 19(7A) (added by the Anti-terrorism, Crime and Security Act 2001 Sch 2 para 5(1), (4)).

5 Note that this is not one of the defences to be proved by the defendant to which the Terrorism Act 2000 s 118 applies (which states that in relation to certain provisions of the Act where the defendant has the burden of proof that burden is only an evidential one): see s 118. It may therefore be inferred that the burden imposed on the defendant of proving the present defence is a legal (or persuasive) one, but that implication was not drawn in respect of the corresponding issue in the context of s 11 (see PARA 387 ante): see *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450. See further PARA 1368 et seq post.

6 Terrorism Act 2000 s 19(3).

7 See note 5 supra.

8 Terrorism Act 2000 s 19(4).

9 Ibid s 19(5). For these purposes, information is obtained by an adviser in privileged circumstances if it comes to him, otherwise than with a view to furthering a criminal purpose: (1) from a client or a client's representative, in connection with the provision of legal advice by the adviser to the client; (2) from a person seeking legal advice from the adviser, or from the person's representative; or (3) from any person, for the purpose of actual or contemplated legal proceedings: s 19(6).

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

11 Terrorism Act 2000 s 19(8). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## UPDATE

### 383-477 Prevention of terrorism

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### 394 Failure to disclose information

NOTES 2, 7--In the Terrorism Act 2000 ss 19-21B 'employment' means any employment (whether paid or unpaid) and includes (1) work under a contract for services or as an office-holder, (2) work experience provided pursuant to a training course or programme or in the course of training for employment, and (3) voluntary work: s 22A(a) (added by the Counter-Terrorism Act 2008 s 77(3)). 'Employer' has a corresponding meaning: Terrorism Act 2000 s 22A(b). See also the Counter-Terrorism Act 2008 s 77(4).

NOTE 3--Where an offence under the Terrorism Act 2000 s 19 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

TEXT AND NOTE 3--Terrorism Act 2000 s 19(1) amended: Counter-Terrorism Act 2008 s 77(1).

NOTE 3--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iii) Terrorist Property/395. Permitted disclosure of information.

### **395. Permitted disclosure of information.**

The disclosure of information is permitted in two cases notwithstanding any restriction on its disclosure by statute or otherwise (for example, by contract)<sup>1</sup>.

The first case is where a person believes or suspects that another person has committed an offence relating to terrorist property under the Terrorism Act 2000<sup>2</sup>, and bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business or employment<sup>3</sup>. In this case he may disclose such information to a constable<sup>4</sup>.

The second case is that a person may disclose to a constable<sup>5</sup> (1) a suspicion or belief that any money or other property is terrorist property or is derived from terrorist property<sup>6</sup>; and (2) any matter on which the suspicion or belief is based<sup>7</sup>.

Where an employee's employer has established a procedure for the making of disclosures of the two kinds mentioned above<sup>8</sup>, these permissions to disclose have effect in relation to that person as if any reference to disclosure to a constable included a reference to disclosure in accordance with the procedure<sup>9</sup>.

Certain public authorities<sup>10</sup> are authorised to disclose information<sup>11</sup> for the following purposes:

- 414 (a) any criminal investigation<sup>12</sup> whatever which is being or may be carried out, whether in the United Kingdom or elsewhere;
- 415 (b) any criminal proceedings<sup>13</sup> whatever which have been or may be initiated, whether in the United Kingdom or elsewhere;
- 416 (c) the initiation or bringing to an end of any such investigation or proceedings;
- 417 (d) facilitating a determination of whether any such investigation or proceedings should be initiated or brought to an end<sup>14</sup>.

The Secretary of State<sup>15</sup> may give a direction prohibiting the disclosure of such information for the purposes of any overseas proceedings<sup>16</sup> if it appears to him that they relate to a matter in respect of which it would be more appropriate for any jurisdiction or investigation to be exercised or carried out by a court or other authority of the United Kingdom or of a third country<sup>17</sup>. A person who, knowing of any direction, discloses any information in contravention of that direction is guilty of an offence<sup>18</sup>.

1 Terrorism Act 2000 s 20(3).

2 ie an offence under *ibid* ss 15-18: see PARA 390 et seq ante.

3 See *ibid* ss 19(1), (2); and PARA 394 ante.

4 *Ibid* s 20(2). See PARA 395 ante.

5 The reference to a constable in *ibid* s 20 includes a reference to a member of the staff of the Serious Organised Crime Agency authorised for this purpose by the Director General of that Agency: s 20(5) (added by the Anti-terrorism, Crime and Security Act 2001 s 3, Sch 2 para 5(1), (5); and amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 125, 127).

6 For the meaning of 'terrorist property' see PARA 393 ante. For the meaning of 'property' see PARA 388 note 2 ante.

7 Terrorism Act 2000 s 20(1). As to the application of the Terrorism Act 2000 ss 15-23 to the Director of Savings see PARA 390 note 1 ante.

8 le disclosures of the kinds mentioned in *ibid* ss 19(2), 20(1).

9 *Ibid* s 20(4).

10 'Public authority' includes a court or tribunal and any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament: Human Rights Act 1998 s 6(3); definition applied by the Anti-terrorism, Crime and Security Act 2001 s 20(1). As to the disclosure of information held by revenue departments see s 19.

11 'Information' includes: (1) documents; and (2) in relation to a disclosure authorised by a provision to which *ibid* s 17 applies, anything that falls to be treated as information for the purposes of that provision: s 20(1). For the provisions to which s 17 applies see s 17(1), Sch 4 (amended by the Enterprise Act 2002 s 278(2), Sch 26; the Communications Act 2003 s 406(7), Sch 19(1); the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 119, 120; the Pensions Act 2004 s 320, Sch 13 Pt 1; and the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 25(1), Sch 2 para 31). As to codes and agreements about the retention of communications data see the Anti-terrorism, Crime and Security Act 2001 Pt 11 (ss 102-106); and PARA 429 ante.

12 'Criminal investigation' means an investigation of any criminal conduct, including an investigation of alleged or suspected criminal conduct and an investigation of whether criminal conduct has taken place: *ibid* s 20(1). 'Conduct' includes acts, omissions and statements; and 'criminal conduct' means any conduct which: (1) constitutes one or more criminal offences under the law of a part of the United Kingdom; or (2) is, or corresponds to, conduct which, if it all took place in a particular part of the United Kingdom, would constitute one or more offences under the law of that part of the United Kingdom: s 20(3). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

13 Proceedings outside the United Kingdom are not to be taken to be criminal proceedings for these purposes unless the conduct with which the defendant in those proceedings is charged is criminal conduct or conduct which, to a substantial extent, consists of criminal conduct: *ibid* s 20(2).

14 *Ibid* s 17(2). The Treasury may by order made by statutory instrument add any provision contained in any subordinate legislation to the provisions to which s 17 applies, provided a draft of it has been laid before Parliament and approved by a resolution of each House: s 17(3), (4). No disclosure of information may be made by virtue of s 17 unless the public authority by which the disclosure is made is satisfied that the making of the disclosure is proportionate to what is sought to be achieved by it: s 17(5). Nothing in s 17 is to be taken to prejudice any power to disclose information which otherwise exists: s 17(6). The information that may be disclosed by virtue of s 17 includes information obtained before the commencement of s 17: s 17(7).

15 See note 17 *infra*.

16 The following are overseas proceedings for these purposes: (1) criminal proceedings which are taking place, or will or may take place, in a country or territory outside the United Kingdom; (2) a criminal investigation which is being, or will or may be, conducted by an authority of any such country or territory: Anti-terrorism, Crime and Security Act 2001 s 18(7).

17 See *ibid* s 18(1)-(3), (8), (9). Section 18 applies to the disclosure of information obtained by or on behalf of the Director of the Assets Recovery Agency or the Lord Advocate under the Proceeds of Crime Act 2002 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 390 et seq) disclosed for the purposes of: (1) any criminal investigation which is being or may be carried out, whether in the United Kingdom or elsewhere; (2) any criminal proceedings which have been or may be started, whether in the United Kingdom or elsewhere: see s 442.

A direction under the Anti-terrorism, Crime and Security Act 2001 s 18 may not have the effect of prohibiting the making of any disclosure by a Minister of the Crown or by the Treasury or the making of any disclosure in pursuance of a Community obligation: s 18(4). A direction may prohibit the making of disclosures absolutely or in such cases, or subject to such conditions as to consent or otherwise, as may be specified in it; and must be published or otherwise issued by the Secretary of State in such manner as he considers appropriate for bringing it to the attention of persons likely to be affected by it: s 18(5).

18 *Ibid* s 18(6). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, and on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding the statutory maximum or to both: s 18(6). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **395 Permitted disclosure of information**

NOTES 3, 8--For the meaning of 'employment' and 'employer' see PARA 395 NOTES 2, 7.

NOTE 10--Anti-terrorism, Crime and Security Act 2001 s 19 amended: Counter-Terrorism Act 2008 Sch 1 para 1, Sch 9 Pt 2.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iii) Terrorist Property/396. Co-operation with the police.

### **396. Co-operation with the police.**

A person does not commit an offence under the Terrorism Act 2000<sup>1</sup> if he is acting with the express consent of a constable<sup>2</sup>. Nor does a person commit an offence<sup>3</sup> by involvement in a transaction or arrangement relating to money or other property<sup>4</sup> if he discloses to a constable (1) his suspicion or belief that the money or other property is terrorist property<sup>5</sup>; and (2) the information on which his suspicion or belief is based<sup>6</sup>. This exemption, however, only applies where a person makes a disclosure after he becomes concerned in the transaction concerned, on his own initiative, and as soon as is reasonably practicable<sup>7</sup>. Moreover, this exemption does not apply to a person if a constable forbids him to continue his involvement in the transaction or arrangement to which the disclosure relates, and he continues his involvement<sup>8</sup>.

It is a defence for a person charged with certain offences<sup>9</sup> to prove<sup>10</sup> that: (a) he intended to make a disclosure of his suspicion or belief that the money or other property was terrorist property, and the information on which his suspicion or belief was based, after becoming concerned in the transaction concerned, on his own initiative and as soon as reasonably practicable; and (b) there is a reasonable excuse for his failure to do so<sup>11</sup>.

Where a person is an employee and his employer has established a procedure for disclosures of the same kind as may be made to a constable as described above<sup>12</sup>, the above provisions have effect in relation to the employee as if any reference in them to a constable included a reference to disclosure in accordance with the procedure<sup>13</sup>.

1     Is an offence under the Terrorism Act 2000 ss 15-18: see PARA 390 et seq ante. As to the application of ss 15-23 to the Director of Savings see PARA 390 note 1 ante.

2     Ibid s 21(1). Corresponding provision in relation to co-operation with the police is made for certain British overseas territories by the Anti-terrorism (Financial and Other Measures) (Overseas Territories) Order 2002, SI 2002/1822.

3     See note 1 supra.

4     Including the use or possession of money or other property: Terrorism Act 2000 s 21(7). For the meaning of 'property' see PARA 388 note 2 ante.

5     For the meaning of 'terrorist property' see PARA 393 ante.

6     Terrorism Act 2000 s 21(2).

7     Ibid s 21(3).

8     Ibid s 21(4).

9     Is the offences under ibid s 15(2), (3) (see PARA 390 ante), ss 16-18 (see PARAS 391-393 ante).

10    Note that this is not one of the defences to be proved by the defendant to which the Terrorism Act 2000 s 118 applies (which states that in relation to certain provisions of the Act where the defendant has the burden of proof that burden is only an evidential one): see s 118. It may therefore be inferred that the burden imposed on the defendant of proving the present defence is a legal (or persuasive) one, but that implication was not drawn in respect of the corresponding issue in the context of s 11 (see PARA 387 ante): see *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450. See further PARA 1368 et seq post.



- 11 Terrorism Act 2000 s 21(5).
- 12 Ie under ibid s 21(2): see the text to note 6 supra.
- 13 Ibid s 21(6).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **396 Co-operation with the police**

TEXT AND NOTES--As to further defences to offences under the Terrorism Act 2000 ss 15-18 relating to arrangements with prior consent and disclosure after entering into arrangements, see the Terrorism Act 2000 ss 21ZA-21ZC; and PARA 396A; and as to disclosure by a constable to the Serious Organised Crime Agency, see s 21C; and PARA 396A.

NOTE 12--For the meaning of 'employer' see PARA 395 NOTES 2, 7.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iii) Terrorist Property/396A. Disclosure to the Serious Organised Crime Agency

### **396A. Disclosure to the Serious Organised Crime Agency**

It is a defence to the offences in the Terrorism Act 2000 ss 15-18, if the person has made a disclosure to an authorised officer before becoming involved in a transaction or an arrangement relating to money or other property and the person acts with the consent of the authorised officer: see the Terrorism Act 2000 s 21ZA (ss 21ZA-21ZC, 21C added by SI 2007/3398). The Terrorism Act 2000 s 21ZB provides a further defence to the offences in ss 15-18 to cover those who become involved in a transaction or an arrangement and then make a disclosure, so long as there is a reasonable excuse for failure to make a disclosure in advance. Section 21ZC provides a defence for those who have a reasonable excuse for failure to make a disclosure. For these purposes 'authorised officer' means a member of the staff of the Serious Organised Crime Agency authorised for these purposes by the Director General of that Agency: see ss 21ZA(5), 21ZB(4).

Where a disclosure is made to a constable under Pt III (ss 14-23) (see PARA 390 et seq), or under s 21 (see PARA 395), the constable must disclose it in full to an authorised member of staff of the Serious Organised Crime Agency: s 21C.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iii) Terrorist Property/397. Failure to disclose information obtained in the regulated sector.

### **397. Failure to disclose information obtained in the regulated sector.**

Special rules apply to the non-disclosure by a person of information or other matter which came to him in the course of a business in the regulated sector<sup>1</sup>. A business is in the regulated sector to the extent that it engages in any of the following activities in the United Kingdom<sup>2</sup>:

- 418 (1) a regulated activity<sup>3</sup>;
- 419 (2) the activities of the National Savings Bank<sup>4</sup>;
- 420 (3) any activity carried on for the purpose of raising money authorised to be raised under the National Loans Act 1968 under the auspices of the Director of Savings<sup>5</sup>;
- 421 (4) the business of operating a bureau de change, transmitting money (or any representation of monetary value) by any means or cashing cheques which are made payable to customers<sup>6</sup>;
- 422 (5) any of the specified activities in the Banking Consolidation Directive<sup>7</sup>, when carried on by way of business, ignoring an activity described in any of heads (1) to (4) above;
- 423 (6) estate agency work<sup>8</sup>;
- 424 (7) operating a casino by way of business<sup>9</sup>;
- 425 (8) the activities of a person appointed to act as an insolvency practitioner<sup>10</sup>;
- 426 (9) the provision by way of business of advice about the tax affairs of another person by a body corporate or unincorporate or, in the case of a sole practitioner, by an individual<sup>11</sup>;
- 427 (10) the provision by way of business of accountancy services by a body corporate or unincorporate or, in the case of a sole practitioner, by an individual<sup>12</sup>;
- 428 (11) the provision by way of business of audit services by a person who is eligible for appointment as a company auditor<sup>13</sup>;
- 429 (12) the provision by way of business of legal services by a body corporate or unincorporate or, in the case of a sole practitioner, by an individual and which involves participation in a financial or real property transaction (whether by assisting in the planning or execution of any such transaction or otherwise by acting for, or on behalf of, a client in any such transaction)<sup>14</sup>;
- 430 (13) the provision by way of business of services in relation to the formation, operation or management of a company or a trust<sup>15</sup>;
- 431 (14) the activity of dealing in goods of any description by way of business (including dealing as an auctioneer) whenever a transaction involves accepting a total cash payment of 15,000 euro or more<sup>16</sup>.

A business is not in the regulated sector to the extent that it engages in any of the following activities:

- 432 (a) the issue of withdrawable share capital within the limit set by the Industrial and Provident Societies Act 1965 by a society registered under that Act<sup>17</sup>;
- 433 (b) the acceptance of deposits from the public within the limit set by that Act by such a society<sup>18</sup>;

- 434 (c) the issue of withdrawable share capital within the limit set by the Industrial and Provident Societies Act (Northern Ireland) 1969 by a society registered under that Act<sup>19</sup>;
- 435 (d) the acceptance of deposits from the public within the limit set by that Act by such a society<sup>20</sup>;
- 436 (e) activities carried on by the Bank of England<sup>21</sup>;
- 437 (f) any activity in respect of which an exemption order under the Financial Services and Markets Act 2000 has effect if it is carried on by a person who is for the time being specified in the order or falls within a class of persons so specified<sup>22</sup>;
- 438 (g) the regulated activities of arranging deals in investments or advising on investments, in so far as the investment consists of rights under a regulated mortgage contract<sup>23</sup>;
- 439 (h) the regulated activities of dealing in investments as agent, arranging deals in investments, managing investments or advising on investments, in so far as the investment consists of rights under, or any right to or interest in, a contract of insurance which is not a qualifying contract of insurance<sup>24</sup>.

A person commits an offence<sup>25</sup> if: (i) he knows or suspects, or has reasonable grounds for knowing or suspecting, that another person has committed an offence relating to terrorist property under the Terrorism Act 2000<sup>26</sup>; (ii) the information or other matter on which his knowledge or suspicion, or which gives him reasonable grounds for such knowledge or suspicion, came to him in the course of a business in the regulated sector<sup>27</sup>; and (iii) he does not disclose the information or other matter to a constable<sup>28</sup> or a nominated officer<sup>29</sup> as soon as is practicable after it comes to him<sup>30</sup>.

A person does not commit such an offence if he has a reasonable excuse for the non-disclosure, or he is a professional legal adviser and the information or other matter came to him in privileged circumstances<sup>31</sup>.

In deciding whether a person committed such an offence the court must consider whether he followed any relevant guidance which was at the time concerned issued by a supervisory authority<sup>32</sup> or any other appropriate body<sup>33</sup>, approved by the Treasury, and published in a manner it approved as appropriate in its opinion to bring the guidance to the attention of persons likely to be affected by it<sup>34</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>35</sup> months or to a fine not exceeding the statutory maximum or to both<sup>36</sup>.

1 As to the disclosure of information obtained in the course of other trade, profession, business or employment see PARA 394 ante.

2 Terrorism Act 2000 s 21A(10), Sch 3A para 1 (1) (s 21A, Sch 3A both added by the Anti-terrorism, Crime and Security Act 2001 s 3, Sch 2 para 5(1), (2), (6); and the Terrorism Act 2000 Sch 3A Pt 1 substituted by the Terrorism Act 2000 (Business in the Regulated Sector and Supervisory Authorities) Order 2003, SI 2003/3076, art 2, Schedule). The Treasury has power to amend the Terrorism Act 2000 Sch 3A Pts 1, 2 (as added): see Sch 3A para 5(1) (as so added). Such an amendment must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Sch 3A para 5(2) (as so added). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

Corresponding provision in relation to the failure to disclose information obtained in the regulated sector is made for certain British overseas territories by the Anti-terrorism (Financial and Other Measures) (Overseas Territories) Order 2002, SI 2002/1822.

3 Terrorism Act 2000 Sch 3A para 1(1)(a) (as added and substituted: see note 2 supra). Regulated activities are: (1) accepting deposits; (2) effecting or carrying out contracts of long-term insurance when carried on by a person who has received official authorisation pursuant to the EC Directive concerning life assurance 2002/83 (OJ L345, 19.12.2002, p 1) art 4 or art 51; (3) dealing in investments as principal or agent; (4) arranging deals in

investments; (5) managing investments; (6) safeguarding and administering investments; (7) sending dematerialised instructions; (8) establishing (and taking other steps in relation to) collective investment schemes; (9) advising on investments; (10) issuing electronic money: Terrorism Act 2000 Sch 3A paras 1(2), 3(1), (4) (as added and substituted: see note 2 supra). Heads (1), (g), (h) in the text must be read in conjunction with the Financial Services and Markets Act 2000 s 22, Sch 2 and any relevant order under s 22 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 84-85): Terrorism Act 2000 Sch 3A para 3(1), (2) (as so added and substituted).

4 Ibid Sch 3A para 1(1)(b) (as added and substituted: see note 2 supra).

5 Ibid Sch 3A para 1(1)(c) (as added and substituted: see note 2 supra).

6 Ibid Sch 3A para 1(1)(d) (as added and substituted: see note 2 supra).

7 Ibid Sch 3A para 1(1)(e) (as added and substituted: see note 2 supra). The activities in question are those specified in the EC Directive relating to the taking up and pursuit of the business of credit institutions 2000/12 (OJ L126, 26.05.2000, p 1): see the Terrorism Act 2000 Sch 3A para 3(1), (3) (as so added and substituted).

8 Ibid Sch 3A para 1(1)(f) (as added and substituted: see note 2 supra). 'Estate agency work' has the meaning given by the Estate Agents Act 1979 s 1 (as amended) (see AGENCY vol 1 (2008) PARA 240) save for the omission of the words '(including a business in which he is employed)' in s 1(1); and includes a case where, in relation to a disposal or acquisition, the person acts as principal: Terrorism Act 2000 Sch 3A para 3(1), (5) (as so added and substituted).

9 Ibid Sch 3A para 1(1)(g) (as added and substituted: see note 2 supra).

10 Ibid Sch 3A para 1(1)(h) (as added and substituted: see note 2 supra).

11 Ibid Sch 3A para 1(1)(i) (as added and substituted: see note 2 supra).

12 Ibid Sch 3A para 1(1)(j) (as added and substituted: see note 2 supra).

13 Ibid Sch 3A para 1(1)(k) (as added and substituted: see note 2 supra).

14 Ibid Sch 3A para 1(1)(l) (as added and substituted: see note 2 supra).

15 Ibid Sch 3A para 1(1)(m) (as added and substituted: see note 2 supra).

16 Ibid Sch 3A para 1(1)(n) (as added and substituted: see note 2 supra). The reference to amounts in euro includes references to equivalent amounts in other currency: Sch 3A para 3(1), (6) (as so added and substituted). 'Cash' means notes, coins or traveller's cheques in any currency: Sch 3A para 3(1), (7) (as so added and substituted).

17 Ibid Sch 3A para 2(a) (as added and substituted: see note 2 supra). See the Industrial and Provident Societies Act 1965 s 6; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2447.

18 Terrorism Act 2000 Sch 3A para 2(b) (as added and substituted: see note 2 supra). See the Industrial and Provident Societies Act 1965 s 7(3); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2406.

19 Terrorism Act 2000 Sch 3A para 2(c) (as added and substituted: see note 2 supra). See the Industrial and Provident Societies Act (Northern Ireland) 1969 s 6; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2397.

20 Terrorism Act 2000 Sch 3A para 2(d) (as added and substituted: see note 2 supra). See the Industrial and Provident Societies Act (Northern Ireland) 1969 s 7(3); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2397.

21 Terrorism Act 2000 Sch 3A para 2(e) (as added and substituted: see note 2 supra).

22 Ibid Sch 3A para 2(f) (as added and substituted: see note 2 supra). See the Financial Services and Markets Act 2000 s 38; and FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 330.

23 Terrorism Act 2000 Sch 3A para 2(g) (as added and substituted: see note 2 supra). As from 6 April 2007 this provision is amended so as to refer also to rights under a regulated home reversion plan or rights under a regulated home purchase plan: see Sch 3A para 2(g) (as so added and substituted; and prospectively amended by the Terrorism Act 2000 (Business in the Regulated Sector) Order 2006, SI 2006/2384).

24 Terrorism Act 2000 Sch 3A para 2(h) (as added and substituted: see note 2 supra).

25 Ibid s 21A(1) (as added: see note 2 supra). Proceedings in England and Wales for such an offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of this limitation see PARA 1071 post.

As to the application of the Terrorism Act 2000 ss 15-23 to the Director of Savings see PARA 390 note 1 ante.

26 Ibid s 21A(1), (2) (as added: see note 2 supra). The offences in question are those under ss 15-18: see PARA 390 et seq ante. A person is to be taken to have committed such an offence if he has taken an action or been in possession of a thing, and he would have committed the offence if he had been in the United Kingdom at the time when he took the action or was in possession of the thing: s 21A(11) (as so added). For the meaning of 'action' see PARA 394 note 1 ante.

27 Ibid s 21A(1), (3).

28 The reference to a constable includes a reference to a member of the Serious Organised Crime Agency authorised for this purpose by the Director General of that Agency: ibid s 21A(14) (as added (see note 2 supra); and amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 125, 128).

29 A disclosure to a nominated officer is a disclosure which is made to a person nominated by the alleged offender's employer to receive disclosures under the Terrorism Act 2000 s 21A (as added), and is made in the course of the alleged offender's employment and in accordance with the procedure established by the employer for the purpose: s 21A(7) (as added: see note 2 supra).

30 Ibid s 21A(1), (4) (as added: see note 2 supra).

31 Ibid s 21A(5) (as added: see note 2 supra). Information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated or given to him: (1) by a client of his (or by a representative of a client) in connection with the giving by the adviser of legal advice to the client; (2) by a person (or by his representative) seeking legal advice from the adviser; or (3) by a person in connection with legal proceedings or contemplated legal proceedings: s 21A(8) (as so added). But this does not apply to information or other matter which is communicated or given with a view to furthering a criminal purpose: s 21A(9) (as so added).

32 Each of the following is a supervisory authority: the Bank of England; the Financial Services Authority; the Council of Lloyd's; the Office of Fair Trading; a body which is a designated professional body for the purposes of the Financial Services and Markets Act 2000 Pt 20 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 749); the Pensions Regulator; the Gambling Commission: Terrorism Act 2000 Sch 3A para 4(1) (Sch 3A as added (see note 2 supra); Sch 3A para 4 amended by the Enterprise Act 2002 s 278(1), Sch 25 para 41; the Pensions Act 2004 s 319(1), Sch 12 para 78; the Terrorism Act 2000 (Business in the Regulated Sector and Supervisory Authorities) Order 2003, SI 2003/3076, art 3; and the Gambling Act 2005 s 356(1), Sch 16 para 13).

The Secretary of State is also a supervisory authority in the exercise, in relation to a person carrying on a business in the regulated sector, of his functions under the Financial Services and Markets Act 2000: Terrorism Act 2000 Sch 3A para 4(2) (Sch 3A as so added). The Treasury is also a supervisory authority in the exercise, in relation to a person carrying on a business in the regulated sector, of its functions under the enactments relating to companies or insolvency or under the Financial Services and Markets Act 2000: Terrorism Act 2000 Sch 3A para 4(3) (Sch 3A as so added). As to the functions of the Secretary of State and the Treasury under the Financial Services and Markets Act 2000 see generally FINANCIAL SERVICES AND INSTITUTIONS.

33 An appropriate body is any body which regulates or is representative of any trade, profession, business or employment carried on by the alleged offender: Terrorism Act 2000 s 21A(13) (as added: see note 2 supra).

34 Ibid s 21A(6) (as added: see note 2 supra).

35 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

36 Terrorism Act 2000 s 21A(12) (as added: see note 2 supra). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## UPDATE

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **397 Failure to disclose information obtained in the regulated sector**

TEXT AND NOTES--Terrorism Act 2000 s 21A amended: SI 2007/3398.

As to tipping off in relation to information from the regulated sector, see the Terrorism Act 2000 s 21D; and PARA 397A. As to permitted disclosures, see ss 21E-21G; and PARA 397A.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTES 1-24--2000 Act Sch 3A paras 1-4 substituted: SI 2007/3288.

TEXT AND NOTE 12--2000 Act Sch 3A para 1(j) further substituted: SI 2008/948.

NOTE 25--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). Where an offence under the Terrorism Act 2000 s 21A is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

NOTES 29, 33--For the meaning of 'employment' and 'employer' see PARA 395 NOTES 2, 7.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iii) Terrorist Property/397A. Tipping off: information from the regulated sector.

**397A. Tipping off: information from the regulated sector.**

A person commits an offence if (1) the person discloses any matter about which he has made a disclosure under the Terrorism Act 2000 Pt III (ss 14-23) to a constable, the person's employer, a nominated officer or to an authorised member of staff of the Serious Organised Crime Agency; (2) the disclosure is likely to prejudice any investigation that might be conducted following the disclosure; and (3) the information on which the disclosure is based came to the person in the course of a business in the regulated sector (see PARA 397): see s 21D(1), (2) (ss 21D-21G added by SI 2007/3398). A person commits an offence if (a) the person discloses that an investigation into allegations that an offence under the Terrorism Act 2000 Pt III (ss 14-23) has been committed is being contemplated or is being carried out; (b) the disclosure is likely to prejudice that investigation; and (c) the information on which the disclosure is based came to the person in the course of a business in the regulated sector (see PARA 397): see s 21D(3). A person guilty of an offence under s 21D is liable on summary conviction to imprisonment for a term not exceeding three months, or to a fine not exceeding level five on the standard scale, or to both; or on conviction on indictment to imprisonment for a term not exceeding two years, or to a fine, or to both: see s 21D(4). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. Where an offence under s 21D is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

As to permitted disclosures, see Terrorism Act 2000 ss 21E-21G.

**UPDATE**

**383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iii) Terrorist Property/398. Protected disclosures of information.

### **398. Protected disclosures of information.**

A disclosure which satisfies all of the following conditions is not to be taken to breach any restriction on the disclosure of information (however imposed)<sup>1</sup>. The conditions are that:

- 440 (1) the information or other matter disclosed must have come to the person making the disclosure (the 'discloser') in the course of a business in the regulated sector<sup>2</sup>;
- 441 (2) the information or other matter must: (a) cause the discloser to know or suspect; or (b) give him reasonable grounds for knowing or suspecting, that another person has committed an offence relating to terrorist property under the Terrorism Act 2000<sup>3</sup>;
- 442 (3) the disclosure must be made to a constable<sup>4</sup> or a nominated officer<sup>5</sup> as soon as is practicable after the information or other matter comes to the discloser<sup>6</sup>.

1 Terrorism Act 2000 s 21B(1) (s 21B added by the Anti-terrorism, Crime and Security Act 2001 s 3, Sch 2 para 5(1), (2)). As to permitted disclosure see PARA 395 ante. As to disclosure by the regulated sector see PARA 397 ante.

2 Terrorism Act 2000 s 21B(2) (as added: see note 1 supra). 'Business in the regulated sector' has the meaning given by Sch 3A (as added and amended) ( see PARA 397 ante): s 21B(6).

As to the application of ss 15-23 to the Director of Savings see PARA 390 note 1 ante.

3 Ibid s 21B(3) (as added: see note 1 supra). The offences to which this applies are those under ss 15-18: see PARA 390 et seq ante.

4 The reference to a constable includes a reference to a member of the staff of the Serious Organised Crime Agency authorised for this purpose by the Director General of that Agency: *ibid* s 21B(7) (as so added (see note 1 supra); and amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 125, 129).

5 A disclosure to a nominated officer is a disclosure which is made to a person nominated by the discloser's employer to receive disclosures under the Terrorism Act 2000 s 21B (as added), and is made in the course of the discloser's employment and in accordance with the procedure established by the employer for the purpose: s 21B(5) (as so added: see note 1 supra).

6 Ibid s 21B(4) (as so added: see note 1 supra).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **398 Protected disclosures of information**

TEXT AND NOTE 3--Head (2)(b). Has committed or attempted to commit an offence: Terrorism Act 2000 s 21B(3) (amended by SI 2007/3398).

NOTE 5--For the meaning of 'employment' and 'employer' see PARA 395 NOTES 2, 7.

## **UPDATE**

### **399-406 Forfeiture on conviction for an offence relating to terrorist property ... Forfeiture in civil proceedings of terrorist cash**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 482-490, 541-548.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iv) Terrorist Investigations/A. CONDUCT OF INVESTIGATIONS/407. Meaning of 'terrorist investigation'.

## **(iv) Terrorist Investigations**

### **A. CONDUCT OF INVESTIGATIONS**

#### **407. Meaning of 'terrorist investigation'.**

For the purposes of the legislation relating to terrorism<sup>1</sup>, 'terrorist investigation' means an investigation of:

- 443 (1) the commission, preparation or instigation of acts<sup>2</sup> of terrorism<sup>3</sup>;
- 444 (2) an act which appears to have been done for the purposes of terrorism<sup>4</sup>;
- 445 (3) the resources of a proscribed organisation<sup>5</sup>;
- 446 (4) the possibility of making an order adding an organisation to the list of proscribed organisations, removing an organisation from the list, or amending the list in some other way<sup>6</sup>; or
- 447 (5) the commission, preparation or instigation of an offence under the legislation relating to terrorism<sup>7</sup>.

1 Ie the Terrorism Act 2000 and the Terrorism Act 2006 Pt 1 (ss 1-20) (see PARA 383 et seq ante).

2 For the meaning of 'act' see PARA 394 note 1 ante.

3 Terrorism Act 2000 s 32(a). For the meaning of 'terrorism' see PARA 383 ante.

4 Ibid s 32(b). 'Action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation': s 1(5). For the meaning of 'action' see PARA 394 note 1 ante.

5 Ibid s 32(c). As to proscribed organisations see PARA 386 ante.

6 Ibid s 32(d). The order referred to in the text is an order under s 3(3): see PARA 386 ante.

7 Ibid s 32(e) (amended by the Terrorism Act 2006 s 37(1)). An offence under the legislation relating to terrorism is an offence under the Terrorism Act 2000 or under the Terrorism Act 2006 Pt 1 other than an offence under s 1 or s 2 (encouragement of terrorism and dissemination of terrorist publications: see PARAS 448-450 post): Terrorism Act 2000 s 32(e) (as so amended).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iv) Terrorist Investigations/A. CONDUCT OF INVESTIGATIONS/408. Cordoned areas.

#### 408. Cordoned areas.

Police officers have the power, for a limited period, to designate and demarcate a specified area as a cordoned area for the purposes of a terrorist investigation<sup>1</sup>.

A designation of a cordoned area<sup>2</sup> may only be made if the person making it considers it expedient for the purposes of a terrorist investigation<sup>3</sup>. If it is made orally, the person making it must confirm it in writing as soon as reasonably practicable<sup>4</sup>. The person making the designation must arrange for the demarcation of the cordoned area, so far as reasonably practicable, by means of tape marked 'police', or in such other manner as a constable considers appropriate<sup>5</sup>.

Normally, a designation<sup>6</sup> may only be made, in an area wholly or partly within a police area, by an officer for the police area who is of at least the rank of superintendent<sup>7</sup>. Where, however, a constable who is not of that rank considers it necessary by reason of urgency to make a designation, he may do so<sup>8</sup>. A constable who makes a designation in such circumstances must as soon as reasonably practicable make a written record of the time at which the designation was made, and ensure that a police officer of at least the rank of superintendent is informed<sup>9</sup>. An officer who is so informed must confirm the designation or cancel it with effect from such time as he may direct; if he cancels the designation, he must make a written record of the cancellation and the reason for it<sup>10</sup>.

A designation<sup>11</sup> has effect during the period beginning at the time when it was made and ending with a date or at a time specified in the designation<sup>12</sup>. That date or time must not occur after the end of the 14-day period beginning with the date on which the designation is made<sup>13</sup>. However, the period during which a designation has effect may be extended in writing from time to time by the person who made it or by another police officer of at least the rank of superintendent<sup>14</sup>. An extension must specify the additional period during which the designation is to have effect<sup>15</sup>. A designation does not have effect after the end of a 28-day period beginning with the day on which it is made<sup>16</sup>.

A constable in uniform (or a community support officer designated for these purposes)<sup>17</sup> may:

- 448 (1) order a person in a cordoned area to leave it immediately<sup>18</sup>;
- 449 (2) order a person immediately to leave premises which are wholly or partly in or adjacent to a cordoned area<sup>19</sup>;
- 450 (3) order the driver or person in charge of a vehicle in a cordoned area to move it from the area immediately<sup>20</sup>;
- 451 (4) arrange for the removal of a vehicle from a cordoned area<sup>21</sup>;
- 452 (5) arrange for the movement of a vehicle within a cordoned area<sup>22</sup>;
- 453 (6) prohibit or restrict access to a cordoned area by pedestrians or vehicles<sup>23</sup>.

A person commits an offence if he fails to comply with such an order, prohibition or restriction<sup>24</sup>. It is, however, a defence for a person charged with an offence under this provision to prove<sup>25</sup> that he had a reasonable excuse for his failure<sup>26</sup>. Such an offence is punishable on summary conviction with imprisonment for a term not exceeding three months<sup>27</sup> or a fine not exceeding level 4 on the standard scale or both<sup>28</sup>.

1 See the Terrorism Act 2000 ss 33-36 (as amended); and the text and notes 2-28 infra.

2 le an area designated for the purposes of the Terrorism Act 2000 under s 33: see s 33(1).

3 Ibid s 33(2). For the meaning of 'terrorist investigation' see PARA 407 ante.

4 Ibid s 33(3).

5 Ibid s 33(4).

6 le a designation under ibid s 33.

7 Ibid s 34(1)(a) (amended by the Anti-terrorism, Crime and Security Act 2001 s 101, Sch 7 paras 29, 30(1), (2)).

A designation may be made in relation to an area (outside Northern Ireland) which is in a place specified in the Railways and Transport Safety Act 2003 s 31(1)(a)-(f) (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 283) by a member of the British Transport Police Force who is of at least the rank of superintendent: Terrorism Act 2000 s 34(1A) (added by the Anti-terrorism, Crime and Security Act 2001 Sch 7 para 30(3); and substituted by the British Transport Police (Transitional and Consequential Provisions) Order 2004, SI 2004/1573, art 12(6)(a)).

A designation may be made by a member of the Ministry of Defence police who is of at least the rank of superintendent in relation to an area: (1) if it is a place to which the Ministry of Defence Police Act 1987 s 2(2) (see POLICE vol 36(1) (2007 Reissue) PARA 120) applies; (2) if a request has been made under s 2(3A)(a), (b) or (d) (as added) (see POLICE vol 36(1) (2007 Reissue) PARA 120) in relation to a terrorist investigation and it is a place where he has the powers and privileges of a constable by virtue of that provision as a result of the request; or (3) if a request has been made under s 2(3A)(c) (as added) (see POLICE vol 36(1) (2007 Reissue) PARA 120) in relation to a terrorist investigation and it is a place described in the Terrorism Act 2000 s 34(1A) (as added): s 34(1B) (added by the Anti-terrorism, Crime and Security Act 2001 Sch 7 para 30(3); and amended by the British Transport Police (Transitional and Consequential Provisions) Order 2004, SI 2004/1573, art 12(6)(b)).

A designation may not, however, be made by a member of the British Transport Police Force or a member of the Ministry of Defence Police in any other case: Terrorism Act 2000 s 34(1C) (added by the Anti-terrorism, Crime and Security Act 2001 Sch 7 para 30(3)).

8 Terrorism Act 2000 s 34(2). See also s 34(1C) (as added); and note 7 supra.

9 Ibid s 34(3).

10 Ibid s 34(4).

11 le a designation under ibid s 33: see the text and notes 1-5 supra.

12 Ibid s 35(1).

13 Ibid s 35(2).

14 Ibid s 35(3).

15 Ibid s 35(4).

16 Ibid s 35(5).

17 Police Reform Act 2002 s 38, Sch 4 para 14.

18 Terrorism Act 2000 s 36(1)(a).

19 Ibid s 36(1)(b). 'Premises' includes any place and in particular includes a vehicle, an offshore installation within the meaning given in the Petroleum Act 1998 s 44 (see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1729), and a tent or moveable structure: Terrorism Act 2000 s 121. 'Vehicle' includes an aircraft, hovercraft, train or vessel: s 121.

20 Ibid s 36(1)(c).

21 Ibid s 36(1)(d).

22 Ibid s 36(1)(e).

23 Ibid s 36(1)(f). See also PARA 451 post.

24 Ibid s 36(2).

25 Note that this is not one of the defences to be proved by the defendant to which the Terrorism Act 2000 s 118 applies (which states that where the defendant has the burden of proof that burden is only an evidential one): see s 118. It may therefore be inferred that the burden imposed on the defendant of proving the present defence is a legal (or persuasive) one, but that implication was not drawn in respect of the corresponding issue in the context of s 11 (see PARA 387 ante): see *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450. See further PARA 1368 et seq post.

26 Terrorism Act 2000 s 36(3).

27 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks: see the Terrorism Act 2000 s 36(3) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 55(1), (2)). At the date at which this volume states the law no such day had been appointed.

28 Terrorism Act 2000 s 36(4). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(iv) Terrorist Investigations/A. CONDUCT OF INVESTIGATIONS/409. Information and evidence: search for material other than excluded or special procedure material.

**409. Information and evidence: search for material other than excluded or special procedure material.**

For the purposes of a terrorist investigation<sup>1</sup>, a constable may apply to a justice of the peace for the issue of a warrant authorising any constable<sup>2</sup>:

- 454 (1) to enter premises<sup>3</sup> specified in the application<sup>4</sup>;
- 455 (2) to search the premises and any person found there<sup>5</sup>; and
- 456 (3) to seize and retain any relevant material which is found on a search under head (2) above<sup>6</sup>.

For the purposes of head (3) above, material is relevant if the constable has reasonable grounds for believing that (a) it is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation; and (b) it must be seized in order to prevent it from being concealed, lost, damaged, altered or destroyed<sup>7</sup>.

The warrant does not authorise the seizure and retention of items subject to legal privilege<sup>8</sup>, or authorise a constable to require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves<sup>9</sup>.

A justice of the peace may grant an application for a warrant if satisfied:

- 457 (i) that the warrant is sought for the purposes of a terrorist investigation<sup>10</sup>;
- 458 (ii) that there are reasonable grounds for believing that there is material on premises to which the application relates which is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation and which does not consist of or include excepted material<sup>11</sup>;
- 459 (iii) that the issue of a warrant is likely to be necessary in the circumstances of the case<sup>12</sup>; and
- 460 (iv) in the case of an application for an all premises warrant, that it is not reasonably practicable to specify in the application all the premises which the person so specified occupies or controls and which might need to be searched<sup>13</sup>.

If, however, a justice is not satisfied that the issue of a warrant is likely to be necessary in the circumstances of the case, but is satisfied of the conditions in heads (i) and (ii) above, the justice may nevertheless grant an application for a specific premises warrant if the application is made by a police officer of at least the rank of superintendent and the application does not relate to residential premises<sup>14</sup>. Where a warrant is issued by virtue of this provision<sup>15</sup> the powers to enter and search referred to above are exercisable only within a 24-hour period beginning with the time when the warrant is issued<sup>16</sup>.

Where an application for an all premises warrant is made<sup>17</sup> by a police officer of at least the rank of superintendent<sup>18</sup> and the justice to whom the application is made is not satisfied that the issue of a warrant is likely to be necessary in the circumstances of the case<sup>19</sup>, the justice

may grant the application if satisfied of the other matters in relation to which he is required to be satisfied<sup>20</sup> before granting an application for a warrant<sup>21</sup>.

A police officer of at least the rank of superintendent may by a written authority signed by him authorise a search of specified premises wholly or partly within a cordoned area<sup>22</sup>. Where, however, a constable not of that rank considers it necessary by reason of urgency, the constable may authorise such a search<sup>23</sup>. An authorisation must not be given unless the person giving it has reasonable grounds for believing that there is material to be found on the premises which is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation, and does not consist of or include excepted material<sup>24</sup>. An authorisation authorises any constable: (A) to enter the premises specified in the authority; (B) to search the premises and any person found there; and (C) to seize and retain any relevant material which is found on such a search<sup>25</sup>.

The powers under head (A) or head (B) above may be exercised on one or more occasions, and at any time during the period when the designation of the cordoned area has effect<sup>26</sup>. An authorisation cannot authorise the seizure and retention of items subject to legal privilege, nor authorise a constable to require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves<sup>27</sup>. A person commits an offence if he wilfully obstructs a search under an authorisation<sup>28</sup>. The offence is punishable on summary conviction by imprisonment for a term not exceeding three months<sup>29</sup> or a fine not exceeding level 4 on the standard scale or both<sup>30</sup>.

1 For the meaning of 'terrorist investigation' see PARA 407 ante.

2 Terrorism Act 2000 s 37, Sch 5 para 1(1).

3 For the meaning of 'premises' see PARA 408 note 19 ante.

4 Terrorism Act 2000 Sch 5 para 1(2)(a) (Sch 5 paras 1(2)(a), (5)(b), (c), 2(1) amended, and Sch 5 paras 1(2A), (5)(d), 2A added, by the Terrorism Act 2006 ss 26(1)-(6), 37(5), Sch 3). The premises referred to in the Terrorism Act 2000 Sch 5 para 1(2)(a) (as amended) are either one or more sets of premises specified in the application (in which case the application is for a 'specific premises warrant') (Sch 5 para 1(2A)(a) (as so added)) or any premises occupied or controlled by a person specified in the application, including such sets of premises as are so specified (in which case the application is for an 'all premises warrant') (Sch 5 para 1(2A)(b) (as so added)). See also note 6 infra.

5 Ibid Sch 5 para 1(2)(b). See note 6 infra.

6 Ibid Sch 5 para 1(2)(c). The additional powers of seizure under the Criminal Justice and Police Act 2001 ss 50, 51 (see PARAS 890-891 post) apply to a seizure under the powers conferred by the Terrorism Act 2000 Sch 5 para 1: Criminal Justice and Police Act 2001 ss 50(5), 51(5), Sch 1 paras 71, 83. The obligation to return excluded and special procedure material under s 55 (see PARA 894 post) applies to the power of seizure under the Terrorism Act 2000 Sch 5 para 19, so far only as the power in question is conferred by reference to Sch 5 para 1: Criminal Justice and Police Act 2001 Sch 1 para 109. See also the Criminal Justice and Police Act 2001 s 60(5)(d); and PARA 899 post. As to police powers and powers to stop and search see PARAS 451-452 post.

7 Terrorism Act 2000 Sch 5 para 1(3).

8 For the meaning of 'items subject to legal privilege' see PARA 873 note 8 post; definition applied by ibid Sch 5 para 4(b).

9 Ibid Sch 5 para 1(4).

10 Ibid Sch 5 para 1(5)(a).

11 Ibid Sch 5 para 1(5)(b) (as amended: see note 4 supra). For the meaning of 'excluded material' see PARA 875 post; definition applied by Sch 5 para 4(a).

12 Ibid Sch 5 para 1(5)(c) (as amended: see note 4 supra).

13 Ibid Sch 5 para 1(5)(d) (as added: see note 4 supra).



14 Ibid Sch 5 para 2(1), (2) (Sch 5 para 2(1) as amended: see note 4 supra). For these purposes, 'residential premises' means any premises which the officer making the application has reasonable grounds for believing are used wholly or mainly as a dwelling: Sch 5 para 2(4).

15 Ie under ibid Sch 5 para 2.

16 Ibid Sch 5 para 2(3).

17 Ie under ibid Sch 5 para 1 (as amended) (see the text and notes 1-13 supra).

18 Ibid Sch 5 para 2A(1)(a) (as added: see note 4 supra).

19 Ibid Sch 5 para 2A(1)(b) (as added: see note 4 supra). As to this matter see Sch 5 para 1(5)(c) (as amended); and the text and note 12 supra.

20 Ie the matters referred to in ibid Sch 5 para 1(5)(a), (b), (d) (as amended) (see the text and notes 10-13 supra).

21 Ibid Sch 5 para 2A(2) (as added: see note 4 supra). Where a warrant under Sch 5 para 1 (as amended) is issued by virtue of Sch 5 para 2A (as added), the powers under Sch 5 para 1(2)(a), (b) (as amended) (see the text and notes 3-5 supra) are exercisable only in respect of premises which are not residential premises (Sch 5 para 2A(3)(a) (as so added)) and within the period of 24 hours beginning with the time when the warrant is issued (Sch 5 para 2A(3)(b) (as so added)). For this purpose, 'residential premises', in relation to a power under Sch 5 para 1(2)(a) or (b), means any premises which the constable exercising the power has reasonable grounds for believing are used wholly or mainly as a dwelling: Sch 5 para 2A(4) (as so added).

22 Ibid Sch 5 para 3(1). For the meaning of 'cordoned area' see PARA 408 ante.

23 Ibid Sch 5 para 3(2).

24 Ibid Sch 5 para 3(6).

25 Ibid Sch 5 para 3(3). The additional powers of seizure under the Criminal Justice and Police Act 2001 ss 50, 51 (see PARAS 890-891 post) apply to a seizure under the powers conferred by the Terrorism Act 2000 Sch 5 para 3: Criminal Justice and Police Act 2001 ss 50(5), 51(5), Sch 1 paras 71, 83. See also PARAS 451-452 post.

26 Terrorism Act 2000 Sch 5 para 3(4). As to the period when the cordoned area has effect see PARA 408 ante.

27 Ibid Sch 5 para 3(5).

28 Ibid Sch 5 para 3(7). Proceedings for this offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post.

29 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks: see the Terrorism Act 2000 Sch 5 para 3(8) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 55(1), (4)(a)). At the date at which this volume states the law no such day had been appointed.

30 Terrorism Act 2000 Sch 5 para 3(8). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## UPDATE

### 383-477 Prevention of terrorism

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

**409 Information and evidence: search for material other than excluded or special procedure material**

NOTE 28--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29).

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**410. Excluded material and special procedure material: order for production and access.**

A constable, for the purposes of a terrorist investigation<sup>1</sup>, may apply to a circuit judge<sup>2</sup> for an order (a 'production order') relating to particular material, or material of a particular kind, which consists of or includes excluded material or special procedure material<sup>3</sup>. An order may require a specified person:

- 461 (1) to produce to a constable within a specified period for seizure and retention any material which he has in his possession, custody or power and to which the application relates<sup>4</sup>;
- 462 (2) to give a constable access to any material of the kind mentioned in head (1) above within a specified period<sup>5</sup>;
- 463 (3) to state to the best of his knowledge and belief the location of material to which the application relates if it is not in, and it will not come into, his possession, custody or power within the period specified under head (1) or head (2) above<sup>6</sup>.

An order may specify a person only if he appears to the judge<sup>7</sup> to have in his possession, custody or power any of the material to which the application relates; and a period specified in an order must be the period of seven days beginning with the date of the order unless it appears to the judge that a different period would be appropriate in the particular circumstances of the application<sup>8</sup>. Where the judge<sup>9</sup> makes an order under head (2) above (that is, an order requiring a specified person to give access to specified material) in relation to material on any premises, he may, on the application of a constable, order any person who appears to the judge to be entitled to grant entry to the premises to allow any constable to enter the premises to obtain access to the material<sup>10</sup>.

A circuit judge<sup>11</sup> may grant an application for a production order if satisfied that the material to which the application relates consists of or includes excluded material or special procedure material, and does not include items subject to legal privilege<sup>12</sup>, and that the specified conditions are satisfied in respect of that material<sup>13</sup>. The conditions are:

- 464 (a) that the order is sought for the purposes of a terrorist investigation<sup>14</sup>, and there are reasonable grounds for believing that the material is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation<sup>15</sup>; and
- 465 (b) there are reasonable grounds for believing that it is in the public interest that the material should be produced or that access to it should be given, having regard to the benefit likely to accrue to a terrorist investigation if the material is obtained, and to the circumstances under which the person concerned has any of the material in his possession, custody or power<sup>16</sup>.

A production order may be made under the above provision in relation to: (i) material consisting of or including excluded or special procedure material which is expected to come

into existence within the period of 28 days beginning with the date of the order<sup>17</sup>; (ii) a person who the circuit judge<sup>18</sup> thinks is likely to have any of the material to which the application relates in his possession, custody or power within that period<sup>19</sup>.

In such a case, the order must require the specified person to notify a named constable as soon as is reasonably practicable after any material to which the application relates comes into his possession, custody or power<sup>20</sup>.

The requirement to produce material is converted into an obligation to produce the material referred to in head (i) above which comes into that person's possession, custody or power<sup>21</sup>; the requirement to state the location of material to which the application relates is a requirement to do so within a 28-day period beginning with the date of the order<sup>22</sup>; and the specified period for the performance of the requirements to produce material, give access to it and state its location set out above is a requirement to do so within the seven-day period beginning with the date of notification (as opposed to the order) unless it appears to the judge that a different period would be appropriate in the particular circumstances of the application<sup>23</sup>.

1 For the meaning of 'terrorist investigation' see PARA 407 ante.

2 Or, as from a day to be appointed, to a District Judge (Magistrates' Court): see the Terrorism Act 2000 s 37, Sch 5 paras 5-10 (prospectively amended by the Courts Act 2003 s 65, Sch 4 para 9). At the date at which this volume states the law no such day had been appointed.

3 Terrorism Act 2000 Sch 5 para 5(1), (2). The order does not confer any right to production of, or access to, items subject to legal privilege and has effect notwithstanding any restriction on the disclosure of information imposed by statute or otherwise: Sch 5 para 8(1). For the meaning of 'excluded material' see PARA 875 post; definition applied by Sch 5 para 4(a). For the meaning of 'special procedure material' see PARA 876 post; definition applied by Sch 5 para 4(c).

4 Ibid Sch 5 para 5(3)(a). See note 6 infra.

5 Ibid Sch 5 para 5(3)(b). See note 6 infra.

6 Ibid Sch 5 para 5(3)(c). Where the material consists of information contained in a computer an order for its production has effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible, and an order to give access has effect as an order to give access to the material in a form in which it is visible and legible: Sch 5 para 8(2).

An order may be made in relation to material in the possession, custody or power of a government department: Sch 5 para 9(1). If it is, it must be served as if the proceedings were civil proceedings against the department, and it may require any officer of the department, whether named in the order or not, who may for the time being have in his possession, custody or power the material concerned, to comply with the order: Sch 5 para 9(2). 'Government department' means an authorised government department for the purposes of the Crown Proceedings Act 1947 (see CROWN PROCEEDINGS AND CROWN PRACTICE): Terrorism Act 2000 Sch 5 para 9(3).

An order of a circuit judge (or, as from a day to be appointed, District Judge (Magistrates' Courts)) has effect as if it were an order of the Crown Court: Sch 5 para 10(1) (prospectively amended: see note 2 supra).

Criminal Procedure Rules may make provision about proceedings relating to an order, including the variation or discharge of an order: Terrorism Act 2000 Sch 5 para 10(2), (3) (amended by the Courts Act 2003 s 109(1), Sch 8 para 389(1), (3)).

7 See note 2 supra.

8 Terrorism Act 2000 Sch 5 para 5(4).

9 See note 2 supra.

10 Terrorism Act 2000 Sch 5 para 5(5).

11 See note 2 supra.

12 For the meaning of 'items subject to legal privilege' see PARA 873 note 8 post; definition applied by the Terrorism Act 2000 Sch 5 para 4(b).

- 13 Ibid Sch 5 para 6(1).
- 14 For the meaning of 'terrorist investigation' see PARA 407 ante.
- 15 Terrorism Act 2000 Sch 5 para 6(2).
- 16 Ibid Sch 5 para 6(3).
- 17 Ibid Sch 5 para 7(1)(a).
- 18 See note 2 supra.
- 19 Terrorism Act 2000 Sch 5 para 7(1)(b). Only that person may be specified in the order: Sch 5 para 7(3)(a).
- 20 Ibid Sch 5 para 7(2)(a).
- 21 Ibid Sch 5 para 7(2)(b).
- 22 Ibid Sch 5 para 7(2)(c).
- 23 Ibid Sch 5 para 7(3)(b).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **410 Excluded material and special procedure material: order for production and access**

NOTE 16--See *R (on the application of Malik) v Crown Court at Manchester* [2008] EWHC 1362 (Admin), [2008] 4 All ER 403, DC.

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#### **411. Search for excluded or special procedure material.**

For the purposes of a terrorist investigation<sup>1</sup>, a constable may apply to a circuit judge<sup>2</sup> for the issue of a warrant authorising any constable:

- 466 (1) to enter the premises specified in the application<sup>3</sup>;
- 467 (2) to search the premises and any person found there<sup>4</sup>; and
- 468 (3) to seize and retain any relevant material which is found on a search under head (2) above<sup>5</sup>.

Material is relevant for the purposes of head (3) above if the constable has reasonable grounds for believing that it is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation<sup>6</sup>.

The warrant does not authorise the seizure and retention of items subject to legal privilege<sup>7</sup> or authorise a constable to require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves<sup>8</sup>.

A circuit judge<sup>9</sup> may grant an application for a specific premises warrant if satisfied that an order<sup>10</sup> in relation to material on the premises specified in the application has not been complied with<sup>11</sup>. Such a judge<sup>12</sup> may also grant such an application if satisfied that there are reasonable grounds for believing that there is material on premises specified in the application which consists of or includes excluded material or special procedure material<sup>13</sup> but does not include items subject to legal privilege, and that the specified conditions are satisfied<sup>14</sup>.

The specified conditions are that the warrant is sought for the purposes of a terrorist investigation, and the material is likely to be of substantial value, whether by itself or together with other material, to a terrorist investigation<sup>15</sup>, and that it is not appropriate to make an order for the production of excluded material<sup>16</sup> in relation to the material because:

- 469 (a) it is not practicable to communicate with any person entitled to produce the material<sup>17</sup>;
- 470 (b) it is not practicable to communicate with any person entitled to grant access to the material or entitled to grant entry to the premises to which the application for the warrant relates<sup>18</sup>; or
- 471 (c) a terrorist investigation may be seriously prejudiced unless a constable can secure immediate access to the material<sup>19</sup>.

A circuit judge or a District Judge (Magistrates' Courts) may grant an application for an all premises warrant<sup>20</sup> if satisfied that an order for the production of excluded material<sup>21</sup> has not been complied with<sup>22</sup> and that the person specified in the application is also specified in the order<sup>23</sup>, or if satisfied that there are reasonable grounds for believing that there is material on premises to which the application relates which consists of or includes excluded material or special procedure material but does not include items subject to legal privilege<sup>24</sup> and that the conditions in connection with applications for specific premises warrants<sup>25</sup> are met<sup>26</sup>.

1 For the meaning of 'terrorist investigation' see PARA 407 ante.

2 Or, as from a day to be appointed, a District Judge (Magistrates' Courts): see the Terrorism Act 2000 s 37, Sch 5 paras 11, 12 (prospectively amended by the Courts Act 2003 s 65(2), Sch 4 para 9). At the date at which this volume states the law no such day had been appointed.

3 Terrorism Act 2000 Sch 5 para 11(1), (2)(a) (Sch 5 paras 11(2)(a), 12(1), (2), (4)(b) amended, and Sch 5 paras 11(3A), 12(2A), (2B) added, by the Terrorism Act 2006 s 26(1), (7)-(11)). For the meaning of 'premises' see PARA 408 note 19 ante. The premises referred to the Terrorism Act 2000 Sch 5 para 11(2)(a) (as amended) are either one or more sets of premises specified in the application (in which case the application is for a 'specific premises warrant') (Sch 5 para 11(3A)(a) (as so added)) or any premises occupied or controlled by a person specified in the application, including such sets of premises as are so specified (in which case the application is for an 'all premises warrant') (Sch 5 para 11(3A)(b) (as so added)). See also note 5 infra.

4 Ibid Sch 5 para 11(2)(b). See note 5 infra.

5 Ibid Sch 5 para 11(1)(c). The additional powers of seizure under the Criminal Justice and Police Act 2001 ss 50, 51 (see PARAS 890-891 post) apply to a seizure under the powers conferred by the Terrorism Act 2000 Sch 5 para 11: see the Criminal Justice and Police Act 2001 ss 50(5), 51(5), Sch 1 paras 71, 83. See also PARAS 451-452 post.

6 Terrorism Act 2000 Sch 5 para 11(4).

7 For the meaning of 'items subject to legal privilege' see PARA 873 note 8 post; definition applied by ibid Sch 5 para 4(b).

8 Ibid Sch 5 para 11(3).

9 See note 2 supra.

10 Ie an order under the Terrorism Act 2000 Sch 5 para 5: see PARA 410 ante.

11 Ibid Sch 5 para 12(1) (as amended: see note 3 supra).

12 See note 2 supra.

13 For the meaning of 'excluded material' see PARA 875 post; definition applied by the Terrorism Act 2000 Sch 5 para 4(a). For the meaning of 'special procedure material' see PARA 876 post; definition applied by Sch 5 para 4(c).

14 Ibid Sch 5 para 12(2) (as amended: see note 3 supra).

15 Ibid Sch 5 para 12(3).

16 Ie an order under ibid Sch 5 para 5 (see PARA 410 ante).

17 Ibid Sch 5 para 12(4)(a).

18 Ibid Sch 5 para 12(4)(b) (as amended: see note 3 supra).

19 Ibid Sch 5 para 12(4)(c).

20 Ie under ibid Sch 5 para 11 (as amended) (see the text and notes 1-8 supra).

21 Ie an order made under ibid Sch 5 para 5 (see PARA 410 ante).

22 Ibid Sch 5 para 12(2A)(a) (as added: see note 3 supra).

23 Ibid Sch 5 para 12(2A)(b) (as added: see note 3 supra).

24 Ibid Sch 5 para 12(2B)(a) (as added: see note 3 supra).

25 Ie the conditions set out in ibid Sch 5 para 12(3), (4) (as amended) (see the text and notes 15-19 supra).

26 Ibid Sch 5 para 12(2B)(b) (as added: see note 3 supra).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.



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#### **412. Explanation of material seized.**

A constable may apply to a circuit judge<sup>1</sup> for an order requiring any person specified in the order to provide an explanation of any material seized in pursuance of a warrant<sup>2</sup>, or produced or made available to a constable under the relevant provisions of the Terrorism Act 2000<sup>3</sup>. An order does not require any person to disclose any information which he would be entitled to refuse to disclose on grounds of legal professional privilege in proceedings in the High Court<sup>4</sup>.

A statement by a person in response to a requirement imposed by an order may be made orally or in writing, and may be used in evidence against him only on a prosecution for the offence described below<sup>5</sup>.

A person commits an offence if, in purported compliance with an order<sup>6</sup> requiring him to give information, he: (1) makes a statement which he knows to be false or misleading in a material particular; or (2) recklessly makes a statement which is false or misleading in a material particular<sup>7</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>8</sup> months or to a fine not exceeding the statutory maximum or to both<sup>9</sup>.

1 Or, as from a day to be appointed, a District Judge (Magistrates' Courts): see the Terrorism Act 2000 s 37, Sch 5 paras 13, 14 (prospectively amended by the Courts Act 2003 s 65(2), Sch 4 para 9). At the date at which this volume states the law no such day had been appointed.

2 I.e. a warrant under the Terrorism Act 2000 s 37, Sch 5 para 1 or 11: see PARAS 409, 411 ante.

3 Ibid Sch 5 para 13(1). The relevant provisions referred to in the text are those contained in Sch 5 para 5: see PARA 410 ante. Schedule 5 para 10 (prospectively amended) (see PARA 410 ante) applies to orders under Sch 5 para 13: Sch 5 para 13(5).

4 Ibid Sch 5 para 13(2). However, a lawyer may be required to provide the name and address of his client: Sch 5 para 13(3). For the meaning of 'items subject to legal privilege' see PARA 873 note 8 post; definition applied by Sch 5 para 4(b).

5 Ibid Sch 5 para 13(4). The offence referred to in the text is the offence under Sch 5 para 14: see the text and notes 7-9 infra.

6 I.e. an order under ibid Sch 5 para 13: see the text and notes 1-5 supra.

7 Ibid Sch 5 para 14(1). Proceedings for such an offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 Terrorism Act 2000 Sch 5 para 14(2). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 140.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **412 Explanation of material seized**

NOTE 7--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29).

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### **413. Urgent cases.**

If a police officer of at least the rank of superintendent has reasonable grounds for believing that the case is one of great emergency, and that immediate action is necessary, that officer may by a written<sup>1</sup> order signed by him give to any constable the authority which may be given by a search warrant under the relevant provisions of the Terrorism Act 2000<sup>2</sup>. Where an order is made particulars of the case must be notified as soon as is reasonably practicable to the Secretary of State<sup>3</sup>. A person commits an offence if he wilfully obstructs a search under such an order<sup>4</sup>. The offence is punishable on summary conviction by imprisonment for a term not exceeding three months<sup>5</sup> or a fine not exceeding level 4 on the standard scale or both<sup>6</sup>.

If a police officer of at least the rank of superintendent has reasonable grounds for believing that the case is one of great emergency he may by a written notice signed by him require any person specified in the notice to provide an explanation of any material seized in pursuance of an order described above<sup>7</sup>. A person commits an offence if he fails to comply with such a notice<sup>8</sup>. It is a defence for a defendant to show that he had a reasonable excuse for his failure<sup>9</sup>. The offence is punishable on summary conviction by imprisonment for a term not exceeding six months<sup>10</sup> or a fine not exceeding level 5 on the standard scale or both<sup>11</sup>.

1 Unless the contrary intention appears, 'writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are to be construed accordingly: Interpretation Act 1978 s 5, Sch 1.

2 Terrorism Act 2000 s 37, Sch 5 para 15(1), (2). The reference to a search warrant is a reference to a search warrant under Sch 5 para 1 or 11: see PARAS 409, 411 ante. The additional powers of seizure under the Criminal Justice and Police Act 2001 ss 50, 51 (see PARAS 890-891 post) apply to a seizure under the powers conferred by the Terrorism Act 2000: Criminal Justice and Police Act 2001 ss 50(5), 51(5), Sch 1 paras 71, 83. The obligation to return excluded and special procedure material under s 55 (see PARA 894 post) applies to the power of seizure under the Terrorism Act 2000 Sch 1 para 15, so far only as the power in question is conferred by reference to Sch 5 para 1 (see PARA 409 ante): Criminal Justice and Police Act 2001 Sch 1 para 109. See also s 60(5)(d); and PARA 899 post.

3 Terrorism Act 2000 Sch 5 para 15(3).

4 Ibid Sch 5 para 15(4). Proceedings for this offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks: see the Terrorism Act 2000 Sch 5 para 15(5) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 55(1), (4)(b)). At the date at which this volume states the law no such day had been appointed.

6 Terrorism Act 2000 Sch 5 para 15(5). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 Ibid Sch 5 para 16(1). The order referred to in the text is one under Sch 5 para 15: see the text and notes 1-6 supra. Schedule 5 paras 13(2)-(4), 14 (see PARA 412 ante) apply to a notice under Sch 5 para 16 as they apply to a notice under Sch 5 para 13 (see PARA 412 ante): Sch 5 para 16(2).

8 Ibid Sch 5 para 16(3). Proceedings for such an offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post.

9 Terrorism Act 2000 Sch 5 para 16(4). Note that this is not one of the defences to be proved by the defendant to which the Terrorism Act 2000 s 118 applies (which states that in relation to certain provisions of the Act where the defendant has the burden of proof that burden is only an evidential one): see s 118. It may therefore be inferred that the burden imposed on the defendant of proving the present defence is a legal (or persuasive) one, but that implication was not drawn in respect of the corresponding issue in the context of s 11 (see PARA 387 ante): see *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450. See further PARA 1368 et seq post.

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

11 Terrorism Act 2000 Sch 5 para 16(5).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **413 Urgent cases**

NOTES 4, 8--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29).

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#### **414. Obligation to disclose information about acts of terrorism.**

Where a person has information which he knows or believes might be of material assistance (1) in preventing the commission by another person of an act of terrorism<sup>1</sup>; or (2) in securing the apprehension, prosecution or conviction of another person, in the United Kingdom<sup>2</sup>, for an offence involving the commission, preparation or instigation of an act of terrorism, he commits an offence if he does not disclose the information as soon as reasonably practicable to a constable<sup>3</sup>. It is a defence for the defendant to prove that he had a reasonable excuse for not making the disclosure<sup>4</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>5</sup> months or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

1 For the meaning of 'terrorism' see PARA 383 ante.

2 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 Terrorism Act 2000 s 38B (1), (2), (3)(a) (s 38B added by the Anti-terrorism, Crime and Security Act 2001 s 117(1), (2)). Proceedings in England and Wales for this offence require the consent of the Director of Public Prosecutions: Terrorism Act 2000 s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post.

Proceedings for an offence under the Terrorism Act 2000 s 38B (as added) may be taken, and the offence may for the purposes of those proceedings be treated as having been committed, in any place where the person to be charged is or has at any time been since he first knew or believed that the information might be of material assistance as described: s 38B(6) (as so added).

4 Ibid s 38B(4) (as added: see note 3 supra). Note that this is not one of the defences to be proved by the defendant to which s 118 applies (which states that in relation to certain provisions of the Act where the defendant has the burden of proof that burden is only an evidential one): see s 118. It may therefore be inferred that the burden imposed on the defendant of proving the present defence is a legal (or persuasive) one, but that implication was not drawn in respect of the corresponding issue in the context of s 11 (see PARA 387 ante): see *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450. See further PARA 1368 et seq post.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Terrorism Act 2000 s 38B(5) (as added: see note 3 supra). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 140.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

#### **414 Obligation to disclose information about acts of terrorism**

NOTE 3--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). Where an offence under the Terrorism Act 2000 s 38B is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

NOTES 5, 6--As to the approach of the court when sentencing a defendant for failing to disclose information about acts of terrorism: see *R v Sherif* [2008] EWCA Crim 2653, [2009] 2 Cr App Rep (S) 235, [2008] All ER (D) 203 (Nov) and *R v Girma* [2009] EWCA Crim 912, [2009] All ER (D) 154 (May).

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#### **415. Disclosing information etc about a terrorist investigation.**

A person who knows or has reasonable cause to suspect that a constable is conducting or proposes to conduct a terrorist investigation<sup>1</sup> commits an offence if he discloses to another anything which is likely to prejudice the investigation, or interferes with material which is likely to be relevant to the investigation<sup>2</sup>.

A person who knows or has reasonable cause to suspect that a disclosure has been or will be made under any of a number of specified provisions<sup>3</sup> commits an offence if he discloses to another anything which is likely to prejudice an investigation resulting from the disclosure under that provision, or interferes<sup>4</sup> with material which is likely to be relevant to an investigation resulting from the disclosure under that provision<sup>5</sup>.

The above offences do not apply to a disclosure which is made by a professional legal adviser to his client or to his client's representative in connection with the provision of legal advice by the adviser to the client and not with a view to furthering a criminal purpose, or to any person for the purpose of actual or contemplated legal proceedings and not with a view to furthering a criminal purpose<sup>6</sup>.

It is a defence for a person charged with one of the above offences to prove: (1) that he did not know and had no reasonable cause to suspect that the disclosure or interference was likely to affect a terrorist investigation<sup>7</sup>; or (2) that he had a reasonable excuse for the disclosure or interference<sup>8</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>9</sup> months or to a fine not exceeding the statutory maximum or to both<sup>10</sup>.

1 For the meaning of 'terrorist investigation' see PARA 407 ante. A reference to 'conducting a terrorist investigation' includes a reference to taking part in the conduct of, or assisting, a terrorist investigation: Terrorism Act 2000 s 39(8)(a).

2 Ibid s 39(1), (2). Proceedings for an offence under s 39 (as amended) require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post.

As to the application of the Terrorism Act 2000 s 39 (as amended) to the Director of Savings see PARA 390 note 1 ante.

3 Ie ibid s 19 (as amended), s 20 (as amended), s 21 or s 38B (as added): see PARAS 394-396 ante.

4 A person interferes with material if he falsifies it, conceals it, destroys it or disposes of it, or if he causes or permits another to do any of those things: ibid s 39(8)(b).

5 Ibid s 39(3), (4) (s 39(3) amended by the Anti-terrorism, Crime and Security Act 2001 s 117(1), (3)).

6 Terrorism Act 2000 s 39(6).

7 Ibid s 39(5)(a). See note 8 infra.

8 Ibid s 39(5)(b). Section 39(5)(a) (see head (1) in the text) is one of the provisions to which s 118(2) applies: see s 118(1), (5). Section 118(2) provides that if the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not. The fact that s 118(2) is not applied to s 39(5)(b) (see head (2) in the text) implies that the defendant has the legal (or persuasive) burden of proof in respect of it. As to the burden of proof see further PARA 1368 et seq post.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 Terrorism Act 2000 s 39(7). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **415 Disclosing information etc about a terrorist investigation**

NOTE 2--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). Where an offence under the Terrorism Act 2000 s 39 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

## **UPDATE**

### **416-419 Requests for financial information**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 492-495.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(v) Counter-terrorist Powers/420. Arrest without warrant.

## **(v) Counter-terrorist Powers**

### **420. Arrest without warrant.**

A constable may arrest without warrant a person whom he reasonably suspects to be a terrorist<sup>1</sup>. The Terrorism Act 2000 contains provisions relating to the detention and treatment of persons so arrested<sup>2</sup>.

1 Terrorism Act 2000 s 41(1). In Pt V (ss 40-53), 'terrorist' means a person who (1) has committed an offence under any of ss 11, 12, 15-18, 54, 56-63 (see PARAS 387-388, 390-393 ante, 439-447, 469 post); or (2) is or has been concerned in the commission, preparation or instigation of acts of terrorism: s 40(1)(a), (b). As to the meaning of 'act' see PARA 394 note 1 ante. For the meaning of 'terrorism' see PARA 383 ante. The reference in head (2) supra to a person who has been concerned in the commission, preparation or instigation of acts of terrorism includes a reference to a person who has been, whether before or after the passing of the Terrorism Act 2000, concerned in the commission, preparation or instigation of acts of terrorism within the meaning given by s 1 (see PARA 383 ante): s 40(2).

A person who has the powers of a constable in one part of the United Kingdom may exercise this power of arrest in any part of the United Kingdom: s 41(9). See also PARA 451 post. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 See *ibid* s 41(2), Sch 8; and PARAS 421-423 post.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **420 Arrest without warrant**

NOTE 1--Reasonable suspicion is judged according to the knowledge of the arresting officer, not his superiors: *Raissi v Metropolitan Police Comr* [2008] EWCA Civ 1237, [2009] QB 564, [2009] 3 All ER 14 (fact that person was brother of terrorist suspect did not constitute reasonable suspicion).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(v) Counter-terrorist Powers/421. Treatment of persons detained.

#### **421. Treatment of persons detained.**

A constable who arrests a person whom he reasonably suspects to be a terrorist<sup>1</sup> must take him as soon as reasonably practicable to the police station which the constable considers the most appropriate<sup>2</sup>. The Terrorism Act 2000 contains provisions relating to the treatment of persons so detained (and to the treatment of persons detained under the provisions relating to port and border controls)<sup>3</sup>. Further detailed provision is made by Code H: Code of Practice in connection with the Detention, Treatment and Questioning by Police Officers of Persons under Section 41 of, and Schedule 8 to, the Terrorism Act 2000<sup>4</sup>.

An authorised person<sup>5</sup> may take any steps necessary for photographing the detained person, measuring him or identifying him<sup>6</sup>. Where an interview by a police officer of a person detained takes place at a police station, it must be audio recorded (in accordance with the Code of Practice on Audio Recording of Interviews by Police Officers of Persons Detained in a Police Station under the Terrorism Act 2000<sup>7</sup>) and video recorded<sup>8</sup>.

A person detained at a police station is entitled, if he so requests, to have one named person<sup>9</sup> informed as soon as reasonably practicable that he is being detained there<sup>10</sup>, and to consult a solicitor as soon as reasonably practicable, privately and at any time<sup>11</sup>. An officer of at least the rank of superintendent may authorise a delay in so informing the person named and in permitting such consultation<sup>12</sup>. However, that delay cannot exceed the period of 48 hours beginning with the time of the detained person's arrest<sup>13</sup>. An authorisation of delay may be given only if the officer concerned has reasonable grounds for believing:

- 472 (1) in the case of an authorisation delaying informing a named person, that informing the named person of the detained person's detention will have any of the consequences listed in heads (a) to (g) below<sup>14</sup>; or
- 473 (2) in the case of an authorisation delaying consultation with a solicitor, that the exercise of that right at the time when the detained person desires to exercise it will have any of the consequences listed in heads (a) to (g) below<sup>15</sup>.

Those consequences are:

- 474 (a) interference with or harm to evidence of a serious offence<sup>16</sup>;
- 475 (b) interference with or physical injury to any person<sup>17</sup>;
- 476 (c) the alerting of persons who are suspected of having committed a serious offence but who have not been arrested for it<sup>18</sup>;
- 477 (d) the hindering of the recovery of property obtained as a result of a serious offence or in respect of which a forfeiture order could be made<sup>19</sup>;
- 478 (e) interference with the gathering of information about the commission, preparation or instigation of acts of terrorism<sup>20</sup>;
- 479 (f) the alerting of a person and thereby making it more difficult to prevent an act of terrorism<sup>21</sup>; and
- 480 (g) the alerting of a person and thereby making it more difficult to secure a person's apprehension, prosecution or conviction in connection with the commission, preparation or instigation of an act of terrorism<sup>22</sup>.

An officer may also authorise such 48-hour delay if he has reasonable grounds for believing that the detained person has benefited from his criminal conduct, and that the recovery of the value of the property constituting the benefit will be hindered by informing the named person of the detained person's detention (in the case of an authorisation to delay informing a named person) or the exercise of the right to consult a solicitor (in the case of an authorisation delaying the exercise of that right)<sup>23</sup>. Where the reason for authorising delay ceases to subsist there may be no further delay in permitting the exercise of the right in the absence of a further authorisation of delay<sup>24</sup>.

A police officer of at least the rank of Commander or Assistant Chief Constable may direct that a person detained at a police station who wishes to exercise the above right to consult a solicitor may do so only in the sight and hearing of a qualified officer<sup>25</sup>. Such a direction may be given only if the officer giving it has reasonable grounds for believing that, unless it is given, the exercise of the right by the detained person will have any of the consequences set out at in heads (a) to (g) above or will hinder the recovery of the value of the benefit obtained from the offence by the detained person<sup>26</sup>. Such a direction ceases to have effect once the reason for giving it ceases to subsist<sup>27</sup>.

Fingerprints or a non-intimate sample<sup>28</sup> may be taken from the detained person only if taken by a constable with the appropriate consent<sup>29</sup> given in writing<sup>30</sup>, or without that consent only if he is detained at a police station and a police officer of at least the rank of superintendent authorises the fingerprints or sample to be taken, or if he has been convicted of a recordable offence<sup>31</sup> and, where a non-intimate sample is to be taken, he was convicted of the offence on or after 10 April 1995<sup>32</sup>.

An officer may give such an authorisation if the officer reasonably suspects that the person has been involved in a specified terrorist offence<sup>33</sup>, and the officer reasonably believes that the fingerprints or sample will tend to confirm or disprove his involvement, or if the officer is satisfied that the taking of the fingerprints or sample from the person is necessary in order to assist in determining whether he is or has been concerned in the commission, preparation or instigation of acts of terrorism<sup>34</sup>.

An officer may also give authorisation for the taking of fingerprints (but not of a non-intimate sample) without the appropriate consent if he is satisfied that the fingerprints of the detained person will facilitate the ascertainment of that person's identity, and that person has refused to identify himself or the officer has reasonable grounds for suspecting that that person is not who he claims to be<sup>35</sup>.

An intimate sample<sup>36</sup> may be taken from the detained person only if (i) he is detained at a police station; (ii) the appropriate consent is given in writing; (iii) a police officer of at least the rank of superintendent authorises the sample to be taken; and (iv) the sample is taken by a constable (except where it must be taken by a registered medical practitioner or registered dentist, as described below)<sup>37</sup>.

Before fingerprints or a sample are taken from a person<sup>38</sup>, he must be informed that the fingerprints or sample may be used for the purposes of specified provisions<sup>39</sup> relating to the checking of fingerprints and samples, and where the fingerprints or a non-intimate sample are to be taken with the appropriate consent, or on the basis that he has been convicted of a recordable offence, he must be informed of the reason for taking the fingerprints or sample<sup>40</sup>.

Before fingerprints or a sample are taken from a person upon an authorisation given by a superintendent<sup>41</sup>, he must be informed that the authorisation has been given, of the grounds upon which it has been given, and where relevant, of the nature of the offence in which it is suspected that he has been involved<sup>42</sup>.

After fingerprints or a sample are taken under these provisions<sup>43</sup> any of the following which apply must be recorded as soon as is reasonably practicable: (A) the fact that the person has

been informed as required<sup>44</sup>; (B) the reason for taking the fingerprints or sample to<sup>45</sup>; (C) the authorisation given<sup>46</sup>; (D) the grounds upon which that authorisation has been given<sup>47</sup>; and (E) the fact that the appropriate consent has been given<sup>48</sup>.

Where a sample of hair (other than pubic hair) is to be taken under the provisions described above, the sample may be taken either by cutting hairs or by plucking hairs with their roots so long as no more are plucked than the person taking the sample reasonably considers to be necessary for a sufficient sample<sup>49</sup>.

Where two or more non-intimate samples suitable for the same means of analysis have been taken from a person<sup>50</sup>, and those samples have proved insufficient<sup>51</sup>, and the person has been released from detention<sup>52</sup>, then an intimate sample may be taken from the person if the appropriate consent is given in writing, a police officer of at least the rank of superintendent authorises the sample to be taken, and the sample is taken by a constable (except where it must be taken by a registered medical practitioner or registered dentist as described below)<sup>53</sup>.

Where appropriate written consent to the taking of an intimate sample from a person<sup>54</sup> is refused without good cause, in any proceedings against that person for an offence, the court, in determining whether to commit him for trial or whether there is a case to answer, may draw such inferences from the refusal as appear proper, and the court or jury, in determining whether that person is guilty of the offence charged, may draw such inferences from the refusal as appear proper<sup>55</sup>.

An intimate sample (other than a sample of urine or a dental impression) may be taken<sup>56</sup> only by a registered medical practitioner acting on the authority of a constable<sup>57</sup>. An intimate sample which is a dental impression may be taken only by a registered dentist acting on the authority of a constable<sup>58</sup>.

Fingerprints or samples taken under the provisions described above<sup>59</sup>, and information derived from those samples, may be retained but may not be used by any person except for the purposes of a terrorist investigation<sup>60</sup> or for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution<sup>61</sup>. In particular, a check may not be made against them<sup>62</sup>, except for the purpose of a terrorist investigation or for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution<sup>63</sup>. Subject to this restriction on their use<sup>64</sup>, the fingerprints, samples or information may be checked against specified fingerprints, samples or information<sup>65</sup>.

1    le a constable who arrests a person under the Terrorism Act 2000 s 41: see PARA 420 ante. For the meaning of 'terrorist' see PARA 420 note 1 ante.

2    Ibid s 41(2), Sch 8 para 1(4). In Sch 8 (as amended), a reference to a 'police station' includes a reference to any place which the Secretary of State has designated under his duty under Sch 8 para 1(1) to designate places at which people may be detained under s 41 (see PARA 420 ante) or Sch 7 (port and border controls) (see PARAS 430-431 post): Sch 8 para 1(2).

Where a person is arrested in one part of the United Kingdom and all or part of his detention takes place in another part, the provisions of Sch 8 which apply to detention in a particular part of the United Kingdom apply in relation to him while he is detained in that part: Sch 8 para 1(6). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. For provisions relating to detention at a police station in Scotland see Sch 8 paras 16-20.

A detained person is deemed to be in legal custody throughout the period of his detention: Sch 8 para 5. See also PARA 451 post.

3    The provisions relating to the treatment of detained persons contained in ibid Sch 8 paras 1-20 (as amended) apply both to persons detained under s 41 (see PARA 420 ante) and to persons detained under Sch 7 (as amended) (see PARAS 430-431 post).

4    Code H: Code of Practice in connection with the Detention, Treatment and Questioning by Police Officers of Persons under Section 41 of, and Schedule 8 to, the Terrorism Act 2000 came into force on 25 July 2006: see the Police and Criminal Evidence Act 1984 (Code of Practice C and Code of Practice H) Order 2006, SI 2006/1938, arts 1, 3. Code H applies to any person arrested under the Terrorism Act 2000 s 41 (see PARA 420 ante) (Code H para 1.1) and who is in police detention after midnight on 24 July 2006, notwithstanding that he

may have been arrested before that time: Police and Criminal Evidence Act 1984 (Code of Practice C and Code of Practice H) Order 2006, SI 2006/1938, art 4. Code H ceases to apply at any point that a detainee is charged with an offence, or released without charge, or transferred to a prison: Code H para 1.2. Code H does not apply to detention of individuals under any other terrorism legislation; the provisions for the detention, treatment and questioning by police officers of persons other than those in police detention following arrest under the Terrorism Act 2000 s 41 are set out in Code of Practice C: Detention, Treatment and Questioning of Persons by Police Officers (see PARA 908 et seq post): Code H para 1.4.

Code H provides that all persons in custody must be dealt with expeditiously, and released as soon as the need for detention no longer applies: Code H para 1.5. There is no provision for bail prior to charge: Code H para 1.6. An officer must perform the assigned duties in the code as soon as practicable: Code H para 1.7. The code (the provisions of which include the Annexes but not the Notes for Guidance) must be readily available at all police stations for consultation: see Code H paras 1.8, 1.9, 1.14. Provision is made for the treatment of persons who appear to be mentally disordered or otherwise mentally vulnerable (see Code H para 1.10, Annex E), or who appear to be blind, seriously visually impaired, deaf, unable to read or speak (see Code H paras 1.12, 1.13, 3.14, 3.21, 13) and for the treatment of juveniles, that is anyone who appears to be under the age of 17 (see Code H paras 1.11, 3.15, 3.16). If the detainee is a juvenile, mentally disordered or otherwise mentally vulnerable, the custody officer must inform the appropriate adult and invite them to the police station: Code H paras 3.17-3.20.

Designated persons (ie persons, other than a police officer, designated under the Police Reform Act 2002 Pt 4 (ss 38-77) (as amended) who have specified powers and duties of police officers conferred or imposed on them) must have regard to the provisions of the code, and are entitled to use reasonable force in specified circumstances; and reference to a police officer includes a designated person acting in the exercise or performance of the powers and duties conferred or imposed on them by their designation: Code H para 1.17, 1.118, 1.20. Nothing in Code H prevents the custody officer (as to whom see Code H para 1.15), or other officer given custody of the detainee, from allowing police staff who are not designated persons to carry out individual procedures or tasks at the police station if the law allows; however, the officer remains responsible for making sure the procedures and tasks are carried out correctly in accordance with the codes of practice: Code H para 1.19.

When a person is brought to a police station under arrest, or is arrested under the Terrorism Act 2000 s 41 at the police station having attended there voluntarily, he should be brought before the custody officer as soon as practicable after his arrival at the station or, if appropriate, following arrest after attending the police station voluntarily: Code H para 2.1. A custody record must be opened and all information recorded under the code must be recorded in it as soon as practicable: see Code H paras 2.2-2.9. The custody officer must make sure the person is told clearly about his rights, which may be exercised at any stage during the period in custody; that is, he must be told about the right to have someone informed of his arrest (see the text and note 9 *infra*), about the right to consult privately with a solicitor and that free independent legal advice is available (see the text and note 11 *infra*), and about the right to consult the code of practice: Code H para 3.1. The detainee must also be given a written notice setting out those rights, the arrangements for obtaining legal advice, the right to a copy of the custody record and the caution (as to which see Code H para 10), together with an additional written notice briefly setting out the entitlements while in custody: Code H paras 3.2. A citizen of an independent Commonwealth country or a national of a foreign country, including the Republic of Ireland, must be informed as soon as practicable about his rights of communication with his high commission, embassy or consulate: see Code H paras 3.3, 7, Annex F.

The code specifies what information must be recorded in the custody record and interview record: see Code H paras 2.9, 3.4, 3.5, 3.22, 3.23, 4.4, 4.5, 5.9, 6.18, 6.19, 7.5, 8.11, 8.12, 9.17-9.19, 10.12, 11, 12.11, 12.12, 12.14, 12.15, 13.4, 14.11-14.15. The grounds for the person's detention must be recorded in the person's presence if practicable: Code H paras 3.22, 3.23.

The custody officer must initiate a risk assessment (which is an ongoing process) to consider whether the detainee is likely to present specific risks to himself or others, and is then responsible for the response to such an assessment: see Code H paras 3.6-3.10. The custody officer must ascertain the property a detainee has on his person and may search him if necessary: see Code H para 4, Annex A.

The code specifies the conditions of detention (including the heating and ventilation of cells, the provision of bedding, washing facilities and food, and the opportunity to exercise and to practise religious observance): see Code H para 8. Provision is made for the medical care and treatment of detainees, particularly in relation to fitness to be interviewed (see Code H para 9, Annex G) and the observation list (Annex H). Notwithstanding other requirements for medical attention, detainees who are held for more than 96 hours must be visited by a healthcare professional at least once every 24 hours: Code H para 9.1.

A person whom there are grounds to suspect of an offence must be cautioned before any questions about an offence (or further questions if the answers provide the grounds for suspicion) are put to him if either the suspect's answers or silence (ie failure or refusal to answer or answer satisfactorily) may be given in evidence to a court in a prosecution: Code H para 10.1. A person who is arrested, or further arrested, must be informed at the time, or as soon as practicable thereafter, that he is under arrest and the grounds for his arrest: Code H paras 3.4, 10.2. A person who is arrested, or further arrested, must also be cautioned unless it is impracticable to do so by reason of his condition or behaviour at the time, or he has already been cautioned immediately prior

to arrest: Code H paras 10.3, 10.7. Except where the restriction on drawing adverse inferences from silence applies (see Code H: Annex C), the caution is as follows (although minor deviations are permitted provided the sense is preserved): 'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence': Code H paras 10.4, 10.6. Where the restriction does so apply the caution is as follows: 'You do not have to say anything, but anything you do say may be given in evidence': see Code H para 10.5, Annex C para 2. The detainee should be informed of the consequences of failure to co-operate: see Code H para 10.18. When a suspect interviewed at a police station or authorised place of detention after arrest fails or refuses to answer certain questions, or to answer satisfactorily, after due warning, a court or jury may draw such inferences as appear proper under the Criminal Justice and Public Order Act 1994 ss 36, 37 (see PARAS 1553-1554 post): Code H paras 10.9, 10.10. Cautions to juveniles should be repeated in the presence of the appropriate adult: see Code H para 10.11.

An interview (ie the questioning of a person arrested on suspicion of being a terrorist) must be carried out under caution, must be recorded and must comply with the provisions of Code H para 11. Specific provision is made regarding interviews conducted at police stations, including provision for assessing the detainee's fitness to be interviewed, the breaks to be afforded to the detainee and the records that must be kept: see Code H para 12. Written statements under caution must follow the form and procedure set out in Code H Annex D. Interpreters must be provided where necessary: see Code H para 13.

5 An 'authorised person' means (1) a constable; (2) a prison officer; (3) a person authorised by the Secretary of State; or (4) an examining officer: Terrorism Act 2000 Sch 8 para 2(2). In respect of a constable see also PARA 451 post.

6 Ibid Sch 8 para 2(1); Code H para 3.12. But this does not confer the power to take fingerprints, non-intimate samples or intimate samples: Terrorism Act 2000 Sch 8 para 2(3)(a); Code H para 3.13.

7 See the Terrorism Act 2000 Sch 8 para 3(1); and the Terrorism Act 2000 (Code of Practice on Audio Recording of Interviews) (No 2) Order 2001, SI 2001/189, art 2. The code of practice was brought into effect on 19 February 2001 by the Terrorism Act 2000 (Code of Practice on Audio Recording of Interviews) Order 2001, SI 2001/159, art 2.

8 See the Terrorism Act 2000 Sch 8 paras 3(2)-(6); and the Terrorism Act 2000 (Video Recording of Interviews) Order 2000, SI 2000/3179, art 2. The Secretary of State is required to issue a code of practice about such video recording, if he makes such an order: see the Terrorism Act 2000 Sch 8 paras 3(7), 4. Any request to have video cameras switched off is to be refused: Code H para 11. Note that Code F: Code of Practice on Visual Recordings with Sound of Interview Suspects (see PARA 986 et seq post) does not apply to interviews under the Terrorism Act 2000 s 41: Code F para 3.2.

9 The person named must be a friend of the detained person, a relative, or a person who is known to the detained person or who is likely to take an interest in his welfare: Terrorism Act 2000 Sch 8 para 6(2); and see Code H para 5. The custody officer must make sure the detainee is told clearly about the right to have someone informed of his arrest: Code H para 3.1.

10 Terrorism Act 2000 Sch 8 para 6(1). Where a detained person is transferred from one police station to another, he is entitled to exercise this right in respect of the police station to which he is transferred: Sch 8 para 6(3).

11 Ibid Sch 8 para 7(1); and see Code H para 6. The custody officer must make sure the detainee (and any appropriate adult if necessary) is told clearly about the right to consult a solicitor: see Code H paras 3.1, 6.1, 6.2, 6.6. Where such a request is made, the request and the time at which it was made must be recorded: Terrorism Act 2000 Sch 8 para 7(2); Code H paras 6.18, 6.19.

Code H paras 6.7, 6.8 provide that a detainee who wants legal advice may not be interviewed or continue to be interviewed until he has received such advice unless:

- 45 (1) Annex B applies, when the restriction on drawing adverse inferences from silence in Annex C will apply because the detainee is not allowed an opportunity to consult a solicitor; or
- 46 (2) an officer of superintendent rank or above has reasonable grounds for believing that:
  1. (a) the consequent delay might lead to interference with, or harm to, evidence connected with an offence; lead to interference with, or physical harm to, other people; lead to serious loss of, or damage to, property; lead to alerting other people suspected of having committed an offence but not yet arrested for it; hinder the recovery of property obtained in consequence of the commission of an offence;

2. (b) when a solicitor, including a duty solicitor, has been contacted and has agreed to attend, awaiting his arrival would cause unreasonable delay to the process of investigation;
- 3
- 47 (3) the solicitor that the detainee has nominated or selected from a list:
  3. (a) cannot be contacted;
  - 4
  4. (b) has previously indicated he does not wish to be contacted; or
  - 5
  5. (c) having been contacted, has declined to attend,
  - 6
- 48 and the detainee has been advised of the Duty Solicitor Scheme but has declined to ask for the duty solicitor;
- 49 (4) the detainee changes his mind, about wanting legal advice.

It was held in *R v Chief Constable of the Royal Ulster Constabulary, ex p Begley, R v McWilliams* [1997] 4 All ER 833, [1997] 1 WLR 1475, HL, that the right to consult a solicitor privately does not extend to a right to have a solicitor present during interview (where persons suspected of having committed offences under the terrorism provisions in Northern Ireland were detained for questioning under the Prevention of Terrorism (Temporary Provisions) Act 1989 s 14(1) (repealed: see now the Terrorism Act 2000 s 41; and PARA 420 ante). Code H now provides that a detainee who has been permitted to consult a solicitor is entitled on request to have the solicitor present when he is interviewed unless one of the exceptions in Code H para 6.7 applies (see heads (1)-(4) supra): Code H para 6.9.

The solicitor (as to whom see Code H paras 6.13-6.17) may be requested to leave if his conduct is such that the interviewer is unable properly to put questions to the suspect: see Code H paras 6.10-6.12. No police officer should, at any time, do or say anything with the intention of dissuading a detainee from obtaining legal advice: Code H para 6.3.

12 Terrorism Act 2000 Sch 8 para 8(1); and see Code H paras 5.2, 6.4, Annex B. If an authorisation is given orally, the person giving it must confirm it in writing as soon as is reasonably practicable: Terrorism Act 2000 Sch 8 para 8(6). The detained person must be told the reason for the delay as soon as reasonably practicable, and the reason must be recorded as soon as is reasonably practicable: Sch 8 para 8(7).

13 Ibid s 41(3), Sch 8 para 8(2).

14 Ibid Sch 8 para 8(3)(a).

15 Ibid Sch 8 para 8(3)(b).

16 Ibid Sch 8 para 8(4)(a) (amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 48(1), (2)). References in the Terrorism Act 2000 Sch 8 para 8 (as amended) to a 'serious offence' are (in relation to England and Wales) references to an indictable offence, and (in relation to Northern Ireland) references to a serious arrestable offence within the meaning of the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (NI 12) art 87; but also include an offence under any of the provisions mentioned in the Terrorism Act 2000 s 40(1)(a) (see PARA 420 ante), and an attempt or conspiracy to commit an offence under any of those provisions: Sch 8 para 8(9) (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 48(1)).

17 Terrorism Act 2000 Sch 8 para 8(4)(b).

18 Ibid Sch 8 para 8(4)(c) (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 48(1), (2)).

19 Terrorism Act 2000 Sch 8 para 8(4)(d) (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 48(1), (2)). As to forfeiture orders under the Terrorism Act 2000 s 23 see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 482.

20 Ibid Sch 8 para 8(4)(e). For the meaning of 'terrorism' see PARA 383 ante.

21 Ibid Sch 8 para 8(4)(f).

22 Ibid Sch 8 para 8(4)(g).

23 Ibid Sch 8 para 8(5) (substituted by the Proceeds of Crime Act 2002 s 456, Sch 11 para 39(1), (2)). The question whether a person has benefited from his criminal conduct is to be decided in accordance with the Proceeds of Crime Act 2002 Pt 2 (ss 6-91) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391 et seq): Terrorism Act 2000 Sch 8 para 8(5A) (added by the Proceeds of Crime Act 2002 Sch 11 para 39(2)).

24 Terrorism Act 2000 Sch 8 para 8(8).

25 Ibid Sch 8 para 9(1), (2); Code H para 6.5. A 'qualified officer' means a police officer who (1) is of at least the rank of inspector; (2) is of the uniformed branch of the force of which the officer giving the direction is a member; and (3) in the opinion of the officer giving the direction, has no connection with the detained person's case: Terrorism Act 2000 Sch 8 para 9(4); Code H para 6.5.

26 Terrorism Act 2000 Sch 8 para 9(3).

27 Ibid Sch 8 para 9(5).

28 For the meaning of 'fingerprints' see PARA 1021 note 2 post; and for the meaning of 'non-intimate sample' see PARA 1027 post (definitions applied by ibid Sch 8 para 15(1)).

29 For the meaning of 'appropriate consent' see PARA 794 post; definition applied by ibid Sch 8 para 15(1).

30 For the meaning of 'writing' see PARA 413 note 1 ante.

31 For the meaning of 'recordable offence' see PARA 1049 post; definition applied by the Terrorism Act 2000 Sch 8 para 15(3).

32 Ibid Sch 8 para 10(1), (2), (3), (4). If an authorisation is given orally, the person giving it must confirm it in writing as soon as reasonably practicable: Sch 8 para 10(7). See also PARA 451 post.

33 Ie an offence under ibid s 11 (see PARA 387 ante), s 12 (see PARA 388 ante), ss 15-18 (see PARAS 390-393 ante), s 54 (see PARA 439 post), ss 56-63 (see PARAS 441-442, 447, 469-471 post).

34 Ibid Sch 8 para 10(6) (amended by the Anti-terrorism, Crime and Security Act 2001 s 89(1), (2)).

35 Terrorism Act 2000 Sch 8 para 10(6A) (Sch 8 para 10(6A), (6B) added by the Anti-terrorism, Crime and Security Act 2001 s 89(1), (2)). References in the Terrorism Act 2000 Sch 8 para 10(6A) (as added) to ascertaining a person's identity include references to showing that he is not a particular person: Sch 8 para 10(6B) (as so added).

36 For the meaning of 'intimate sample' see PARA 1027 post; definition applied by ibid Sch 8 para 15(1). The authorisation requirements and the procedure to be followed for intimate and strip searches is set out in Code H Annex A.

37 Terrorism Act 2000 Sch 8 para 10(5). If an authorisation is given orally, the person giving it must confirm it in writing as soon as is reasonably practicable: Sch 8 para 10(7).

38 Ie under the Terrorism Act 2000 Sch 8 para 10 (as amended): see the text and notes 32-37 supra.

39 Ie ibid Sch 8 para 14(4) (see note 65 infra), the Police and Criminal Evidence Act 1984 s 63A(1) (as added) (see PARA 1038 post) and the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (NI 12), art 63A(1) (as added): see the Terrorism Act 2000 Sch 8 para 11.

40 Ibid Sch 8 para 11(1).

41 Ie under ibid Sch 8 para 10(4) (see the text and note 32 supra) or Sch 8 para 10(5) (see the text and note 37 supra).

42 Ibid Sch 8 para 11(2).

43 Ie under ibid Sch 8 para 10 (as amended): see the text and notes 32-37 supra.

44 Ie in accordance with ibid Sch 8 para 11(1) and Sch 8 para 11(2) as appropriate (see the text to notes 40-42 supra): Sch 8 para 11(3)(a).

45 Ie under ibid Sch 8 para 11(1)(b) (see the text to note 40 supra): Sch 8 para 11(3)(b).

46 Ie under ibid Sch 8 para 10(4)(a) or Sch 8 para 10(5)(c): Sch 8 para 11(3)(c).



47 Ibid Sch 8 para 11(3)(d).

48 Ibid Sch 8 para 11(3)(e).

49 Ibid Sch 8 para 13(4). For the meaning of 'sufficient' see PARA 1021 note 9 post; definition applied by Sch 8 para 15(1).

50 Ie under ibid Sch 8 para 10 (as amended): see the text and notes 32-37 supra.

51 For the meaning of 'insufficient' see PARA 1021 note 9 post; definition applied by ibid Sch 8 para 15(1).

52 Ibid Sch 8 para 12(1).

53 Ibid Sch 8 para 12(2); and see Code H Annex A. The provisions relating to the authorisation of the taking of a sample, the information to be given before its taking and the record that must be made (ie the Terrorism Act 2000 Sch 8 para 10(6) (as amended) (see the text and note 34 supra), Sch 8 para 10(7) (see note 37 supra), Sch 8 para 11 (see the text and notes 38-48 supra)) apply to the taking of an intimate sample under Sch 8 para 12: Sch 8 para 12(3). A reference to a person detained under s 41 (see PARA 420 ante) is to be taken as a reference to a person who was detained under s 41 when the non-intimate samples mentioned in Sch 8 para 12(1) are taken: Sch 8 para 12(3).

54 Ie under ibid Sch 8 para 10 (see the text and notes 32-37 supra) or Sch 8 para 12 (see the text and notes 50-53 supra).

55 Ibid Sch 8 para 13(1).

56 Ie under ibid Sch 8 para 10 (see the text and notes 32-37 supra) or Sch 8 para 12 (see the text and notes 50-53 supra).

57 Ibid Sch 8 para 13(2); and see Code H Annex A.

58 Terrorism Act 2000 Sch 8 para 13(3).

59 Ie under ibid Sch 8 para 10 (see the text and notes 32-37 supra) or Sch 8 para 12 (see the text and notes 50-53 supra).

60 For the meaning of 'terrorist investigation' see PARA 407 ante.

61 Terrorism Act 2000 Sch 8 para 14(1), (2) (Sch 8 para 14(2) substituted by the Criminal Justice and Police Act 2001 s 84(1), (2)). In the Terrorism Act 2000 Sch 8 para 14 (as amended) a reference to crime includes a reference to any conduct which constitutes one or more criminal offences (whether under the law of a part of the United Kingdom or of a country or territory outside the United Kingdom), or is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom, would constitute one or more criminal offences: Sch 8 para 14(4A)(a) (Sch 8 para 14A added by the Criminal Justice and Police Act 2000 s 84(1), (4)). References to an investigation and to a prosecution include references to any investigation outside the United Kingdom of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside the United Kingdom: Terrorism Act 2000 Sch 8 para 14(4A)(b) (as so added).

62 Ie under the Police and Criminal Evidence Act 1984 s 63A(1) (as added) (checking of fingerprints and samples): see PARA 1038 post.

63 Terrorism Act 2000 Sch 8 para 14(3) (amended by the Criminal Justice and Police Act 2001 s 84(1), (3)).

64 Ie the restriction under the Terrorism Act 2000 Sch 8 para 14(1), (2) (as substituted): see the text and note 61 supra.

65 The fingerprints, samples or information may be checked against (1) other fingerprints or samples taken under ibid Sch 8 para 10 (see the text and notes 32-37 supra) or Sch 8 para 12 (see the text and notes 50-53 supra) or information derived from those samples; (2) relevant physical data or samples taken in Scotland by virtue of the Criminal Procedure (Scotland) Act 1995 s 18 (modified by the Terrorism Act 2000 Sch 8 para 20(2)); (3) any of the fingerprints, samples and information mentioned in the Police and Criminal Evidence Act 1984 s 63A(1)(a), (b) (as added), or the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (NI 12), art 63A(1)(a), (b) (as added) (see PARA 1038 post); and (4) fingerprints or samples taken under the Prevention of Terrorism (Temporary Provisions) Act 1989 s 15(9), Sch 5 para 7(5) or information derived from those samples: Terrorism Act 2000 Sch 8 paras 14(4)(a)-(e), 20.

The Prevention of Terrorism (Temporary Provisions) Act 1989 was repealed by the Terrorism Act 2000: see s 125, Sch 16. However, the provisions of Sch 8 para 14(1)-(3) (as amended) (see the text and notes 61-63 supra)

apply to fingerprints or samples taken under the Prevention of Terrorism (Temporary Provisions) Act 1989 s 15(9), Sch 5 para 7(5) (now repealed) and information derived from those samples as it applies to fingerprints or samples taken under the Terrorism Act 2000 Sch 8 para 10 or Sch 8 para 12 and information derived from them: Sch 8 para 14(5).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **421 Treatment of persons detained**

NOTES 2, 19--Terrorism Act 2000 Sch 8 paras 8(4)(d), 17 amended: Counter-Terrorism Act 2008 Sch 3 para 6.

TEXT AND NOTE 26--Terrorism Act 2000 Sch 8 para 9(3) substituted by the Counter-Terrorism Act 2008 s 82(1).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(v) Counter-terrorist Powers/422. Review of detention.

#### 422. Review of detention.

Where a person is arrested on suspicion of being a terrorist<sup>1</sup> his detention must be periodically reviewed by a review officer<sup>2</sup>. The first review must be carried out as soon as reasonably practicable after the time of the person's arrest<sup>3</sup>. Subsequent reviews must be carried out at intervals of not more than 12 hours<sup>4</sup>, but such a review may be postponed if at the latest time at which it may be carried out in accordance with the above requirement:

- 481 (1) the detained person is being questioned by a police officer and an officer is satisfied that an interruption of the questioning to carry out the review would prejudice the investigation in connection with which the person is being detained<sup>5</sup>;
- 482 (2) no review officer is readily available<sup>6</sup>; or
- 483 (3) it is not practicable for any other reason to carry out the review<sup>7</sup>.

Where a review is postponed it must be carried out as soon as reasonably practicable<sup>8</sup>.

A review officer may authorise a person's continued detention only if satisfied that it is necessary:

- 484 (a) to obtain relevant evidence whether by questioning him or otherwise<sup>9</sup>;
- 485 (b) to preserve relevant evidence<sup>10</sup>;
- 486 (c) pending a decision whether to apply to the Secretary of State for a deportation notice to be served on the detained person<sup>11</sup>;
- 487 (d) pending the making of an application to the Secretary of State for a deportation notice to be served on the detained person<sup>12</sup>;
- 488 (e) pending consideration by the Secretary of State whether to serve a deportation notice on the detained person<sup>13</sup>;
- 489 (f) pending a decision whether the detained person should be charged with an offence<sup>14</sup>; or
- 490 (g) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence<sup>15</sup>.

Before determining whether to authorise a person's continued detention, a review officer must give either the detained person or a solicitor representing him who is available at the time of the review an opportunity to make oral or written<sup>16</sup> representations about the detention<sup>17</sup>.

Where a review officer authorises continued detention he must inform the detained person of any of his rights to inform a named person of his detention and to consult a solicitor<sup>18</sup> which he has not yet exercised, and if the exercise of either of those rights is being delayed<sup>19</sup>, of the fact that it is being so delayed<sup>20</sup>.

Where a review of a person's detention is being carried out at a time when his exercise of the right to inform a named person of his detention or to consult a solicitor is being delayed, the review officer must consider whether the reason or reasons for which the delay was authorised

continue to subsist; and, if in his opinion the reason or reasons have ceased to subsist, he must inform the officer who authorised the delay of his opinion (unless he was that officer)<sup>21</sup>.

A review officer carrying out a review must make a written record of the outcome of the review and of any of the following which apply<sup>22</sup>:

- 491 (i) the grounds upon which continued detention is authorised<sup>23</sup>;
- 492 (ii) the reason for postponement of the review<sup>24</sup>;
- 493 (iii) the fact that the detained person has been informed of his rights<sup>25</sup>;
- 494 (iv) the officer's conclusion on whether the reason or reasons for the delay in exercising either of these rights continues to subsist<sup>26</sup>;
- 495 (v) if the reason or reasons have ceased to subsist, the fact that he has taken action to inform the officer who authorised the delay<sup>27</sup>; and
- 496 (vi) the fact that the detained person is being detained pending the making of an application for a warrant of further detention or pending the conclusion of proceedings on an application for such a warrant or an extension for it<sup>28</sup>.

With certain exceptions<sup>29</sup>, a person detained after being arrested on suspicion of being a terrorist must (unless detained under any other power) be released not later than the end of the period of 48 hours beginning with the time of his arrest, or, if he was being detained under the provisions relating to port and border controls<sup>30</sup> when he was so arrested, beginning with the time when his examination under the statutory provisions relating to port and border controls began<sup>31</sup>.

If on a review of a person's detention under the provisions described above<sup>32</sup> the review officer does not authorise continued detention, the person must be released (unless detained in accordance with the power to detain him pending an application for a warrant of continuing detention<sup>33</sup>, the power to detain him pending the conclusion of proceedings on such an application or an application for an extension of such a warrant<sup>34</sup>, or any other power)<sup>35</sup>.

1     Ie under the Terrorism Act 2000 s 41: see PARAS 420-421 ante. For the meaning of 'terrorist' see PARA 420 note 1 ante.

2     Ibid Sch 8 para 21(1). The review officer must be an officer who has not been directly involved in the investigation in connection with which the person is detained: Sch 8 para 24(1). In the case of a review carried out within the period of 24 hours beginning with the time of arrest, the review officer must be an officer of at least the rank of inspector: Sch 8 para 24(2). In the case of any other review, the review officer must be an officer of at least the rank of superintendent: Sch 8 para 24(3).

Where:

- 50     (1) the review officer is of a rank lower than superintendent;
- 51     (2) an officer of higher rank than the review officer gives directions relating to the detained person; and
- 52     (3) those directions are at variance with the performance by the review officer of a duty imposed on him under Sch 8,

the review officer must refer the matter at once to an officer of at least the rank of superintendent: Sch 8 para 25(1), (2).

A review officer should carry out his duties at the police station where the detainee is held, and be allowed such access to the detainee as is necessary for him to exercise those duties: Code H: Code of Practice in connection with the Detention, Treatment and Questioning by Police Officers of Persons under Section 41 of, and Schedule 8 to, the Terrorism Act para 14.1. For the purposes of reviewing a person's detention, no officer may put specific questions to the detainee regarding his involvement in any offence or in respect of any comments he may make when given the opportunity to make representations or in response to a decision to keep him in detention or extend the maximum period of detention: Code H para 14.2. Such an exchange could constitute an interview and would be subject to the associated safeguards in Code H para 11 (see PARA 421 ante): Code H para 14.2. As to the operation of Code H see PARA 421 note 4 ante.

No review of a person's detention may be carried out after a warrant extending his detention has been issued under the Terrorism Act 2000 Sch 8 paras 29-37 (as amended) (see PARA 423 post): Sch 8 para 21(4).

3 Ibid Sch 8 para 21(2).

4 Ibid Sch 8 para 21(3). For the purposes of ascertaining the time within which the next review is to be carried out, a postponed review is deemed to have been carried out at the latest time at which it could have been carried out in accordance with Sch 8 para 21: see Sch 8 para 22(3).

5 Ibid Sch 8 para 22(1)(a).

6 Ibid Sch 8 para 22(1)(b).

7 Ibid Sch 8 para 22(1)(c).

8 Ibid Sch 8 para 22(2).

9 Ibid Sch 8 para 23(1)(a). 'Relevant evidence' means evidence which relates to the commission by the detained person of an offence under any of the provisions described in s 40(1)(a) (ie ss 11 (see PARA 387 ante), 12 (see PARA 388 ante), 15-18 (see PARAS 390-393 ante), 54 (see PARA 439 post), 56-63 (see PARAS 441-442, 447, 469-471 post)), or indicates that the detained person is or has been concerned in the commission, preparation or instigation of acts of terrorism: Sch 8 para 23(4) (amended by the Terrorism Act 2006 s 24(4)). The amendments made by the Terrorism Act 2000 s 24 came into force on 25 July 2006 (see the Terrorism Act 2006 (Commencement No 2) Order 2006, SI 2006/1936, art 2) but they do not apply in a case in which either the arrest of the person detained under Terrorism Act 2000 s 41 (see PARAS 420-421 ante) took place before the commencement of the Terrorism Act 2006 s 24 (ie 25 July 2006) (s 24(6)(a)) or his examination under the Terrorism Act 2000 Sch 7 (see PARA 430 post) began before such commencement (Terrorism Act 2006 s 24(6)(b)). As to the meaning of 'act' see PARA 394 note 1 ante. For the meaning of 'terrorism' see PARA 383 ante.

The review officer may not authorise continued detention by virtue of head (a) in the text unless he is satisfied that the investigation in connection with which the person is detained is being conducted diligently and expeditiously: Terrorism Act 2000 Sch 8 para 23(2).

10 Ibid Sch 8 para 23(1)(b). The review officer may not authorise continued detention by virtue of head (b) in the text unless he is satisfied that the investigation in connection with which the person is detained is being conducted diligently and expeditiously: Sch 8 para 23(2).

11 Ibid Sch 8 para 23(1)(c). 'Deportation notice' means notice of a decision to make a deportation order under the Immigration Act 1971: Terrorism Act 2000 Sch 8 para 23(5).

The review officer may not authorise continued detention by virtue of heads (c)-(f) in the text unless he is satisfied that the process pending the completion of which detention is necessary is being conducted diligently and expeditiously: Sch 8 para 23(3).

12 Ibid Sch 8 para 23(1)(d). See note 11 supra.

13 Ibid Sch 8 para 23(1)(e). See note 11 supra.

14 Ibid Sch 8 para 23(1)(f). See note 11 supra.

15 Ibid Sch 8 para 23(1)(ba) (added by the Terrorism Act 2006 s 24(1)). Note that the Terrorism Act 2000 Sch 8 para 23(1)(ba) (as added) does not apply in a case in which either the arrest of the person detained under the Terrorism Act 2000 s 41 (see PARAS 420-421 ante) took place before the commencement of the Terrorism Act 2006 s 24 (ie 25 July 2006) (s 24(6)(a)) or his examination under the Terrorism Act 2000 Sch 7 (see PARA 430 post) began before such commencement (Terrorism Act 2006 s 24(6)(b)). See also note 11 supra.

16 Terrorism Act 2000 Sch 8 para 26(2). For the meaning of 'written' see PARA 413 note 1 ante. A review officer may refuse to hear oral representations from the detained person if he considers that he is unfit to make representations because of his condition or behaviour: Sch 8 para 26(3).

17 Ibid Sch 8 para 26(1).

18 Ie the rights under ibid Sch 8 paras 6, 7: see PARA 421 ante.

19 Ie under ibid Sch 8 para 8: see PARA 421 ante.

20 Ibid Sch 8 para 27(1).

21 Ibid Sch 8 para 27(2).

22 The review officer must make the record in the presence of the detained person, and inform him at that time whether the review officer is authorising continued detention, and if he is, of his grounds, unless at the time when the record is made the detained person is incapable of understanding what is said to him, or is violent or likely to become violent, or is in urgent need of medical attention: *ibid* Sch 8 para 28(2), (3).

23 *Ibid* Sch 8 para 28(1)(a).

24 *Ibid* Sch 8 para 28(1)(b).

25 *Ie* informed as required under *ibid* Sch 8 para 27(1) (see the text to note 20 *supra*): Sch 8 para 28(1)(c).

26 *Ibid* Sch 8 para 28(1)(d).

27 *Ibid* Sch 8 para 28(1)(e).

28 *Ibid* Sch 8 para 28(1)(f). As to warrants of further detention see *PARA* 423 *post*.

29 *Ie* *ibid* s 41(4) (see the text to note 35 *infra*), s 41(5)-(7) (see *PARA* 423 *post*).

30 *Ie* under *ibid* Sch 7: see *PARA* 430 *post*.

31 *Ibid* s 41(3).

32 *Ie* under *ibid* Sch 8 paras 21-28: see the text and notes 1-28 *supra*.

33 *Ie* under *ibid* Sch 8 para 29: see *PARA* 423 *post*.

34 *Ie* under *ibid* Sch 8 paras 29-36: see *PARA* 423 *post*.

35 *Ibid* s 41(4).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see *PARAS* 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(v) Counter-terrorist Powers/423. Extension of detention.

#### **423. Extension of detention.**

Where a person has been detained after being arrested on suspicion of being a terrorist<sup>1</sup>, a Crown Prosecutor (in England and Wales) or a police officer of at least the rank of superintendent (in any part of the United Kingdom)<sup>2</sup> may apply to a judicial authority<sup>3</sup> for the issue of a warrant of further detention<sup>4</sup>. Where an application for a warrant of further detention is granted in respect of a person's detention, he may be detained<sup>5</sup> during the period specified in the warrant<sup>6</sup>. A warrant of further detention must authorise the further detention of a specified person for a specified period, and state the time at which it was issued<sup>7</sup>.

Subject to the qualification set out below<sup>8</sup>, the specified period in relation to a person must be the period of seven days beginning with the relevant time (that is, the time of his arrest<sup>9</sup>, or, if he was being detained under the provisions relating to port and border controls<sup>10</sup> when he was arrested, with the time when his examination under those provisions began)<sup>11</sup>.

An application for a warrant of further detention must be made<sup>12</sup> during the 48-hour period beginning with the time of the person's arrest<sup>13</sup>, or, if he was being detained under the provisions relating to port and border controls, with the time when his examination under those provisions began<sup>14</sup>, or within six hours of the end of that period<sup>15</sup>.

The person to whom an application relates must be given an opportunity to make oral or written representations to the judicial authority about the application, and is entitled to be legally represented at the hearing<sup>16</sup>. Where the person to whom the application relates is not legally represented, and he is entitled to be legally represented, and he wishes to be so represented, a judicial authority must adjourn the hearing of the application to enable the person to obtain legal representation<sup>17</sup>. A judicial authority may exclude the person to whom the application relates or anyone representing him from any part of the hearing<sup>18</sup>.

A judicial authority may, after giving an opportunity for representations to be made by or on behalf of the applicant and the person to whom the application relates, direct (1) that the hearing of the application must be conducted; and (2) that all representations by or on behalf of a person for the purposes of the hearing must be made, by such means<sup>19</sup> (whether a live television link or other means) as may be specified in the direction and not in the presence (apart from by those means) of the applicant, of the person to whom the application relates or of any legal representative of that person<sup>20</sup>. If the person to whom the application relates wishes to make representations about whether such a direction<sup>21</sup> should be given, he must do so by using the facilities that will be used if the judicial authority decides to give such a direction<sup>22</sup>.

The person<sup>23</sup> who has made an application for a warrant of further detention may apply to the judicial authority for an order that specified information on which he intends to rely be withheld from the person to whom the application for the warrant relates, and anyone representing him<sup>24</sup>.

A judicial authority may issue a warrant of further detention only if satisfied that:

- 497 (a) there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary<sup>25</sup>; and

498 (b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously<sup>26</sup>.

A Crown prosecutor (in England and Wales) or a police officer of at least the rank of superintendent (in any part of the United Kingdom)<sup>27</sup> may apply<sup>28</sup> for the extension or further extension of the period specified in a warrant of further detention<sup>29</sup>. The period by which the specified period is extended or further extended must be the period which begins with the specified time<sup>30</sup> and ends with whichever is the earlier of the end of the period of seven days beginning with that time<sup>31</sup> and the end of the period of 28 days<sup>32</sup> beginning with the relevant time<sup>33</sup> (subject to the proviso that a judicial authority or senior judge<sup>34</sup> may extend or further extend the period specified in a warrant by a shorter period than is required<sup>35</sup> if either the application for the extension is an application for an extension by a period that is shorter than is so required<sup>36</sup> or the judicial authority or senior judge<sup>37</sup> is satisfied that there are circumstances that would make it inappropriate for the period of the extension to be as long as the period so required<sup>38</sup>). Where the period specified is extended, the warrant must be indorsed with a note stating the new specified period<sup>39</sup>.

Where an application for an extension of a warrant of further detention is granted in respect of a person's detention, he may be detained<sup>40</sup> during the period specified in the extension indorsed on it<sup>41</sup>.

If a person is detained by virtue of a warrant of further detention and his detention is not authorised by virtue of the fact that the application for the warrant is pending or proceedings on the application have not yet concluded<sup>42</sup>, then if it at any time appears to the police officer or other person in charge of his case that any of the matters mentioned in heads (a) and (b) above<sup>43</sup> on which the judicial authority or senior judge last authorised his further detention no longer apply, he must release him immediately (if he has custody of the detained person)<sup>44</sup> and immediately inform the person who does have custody of the detained person that those matters no longer apply in the detained person's case (if he does not have custody)<sup>45</sup>. A person with custody of the detained person who is thus<sup>46</sup> informed that those matters no longer apply in his case must release that person immediately<sup>47</sup>.

1     le under the Terrorism Act 2000 s 41: see PARAS 420-422 ante. For the meaning of 'terrorist' see PARA 420 note 1 ante.

2     In Northern Ireland it is the Director of Public Prosecutions for Northern Ireland who may apply: *ibid* Sch 8 para 29(1) (Sch 8 paras 29(1), (5), 32(1)(a), (2), 36(1), (4), (5) amended, Sch 8 paras 29(3A), 32(1A), 36(1A), (1B), (3A), (3AA), (7) added, and Sch 8 para 36(3) substituted, by the Terrorism Act 2006 ss 23, 24(2), (3), (5), 37(5), Sch 3). The amendments made to the Terrorism Act 2000 Sch 8 para 36 (as amended) do not apply in a case in which either the arrest of the person detained under Terrorism Act 2000 s 41 (see PARAS 420-421 ante) took place before the commencement of the Terrorism Act 2006 s 23 or s 24 (as the case may be) (ss 23(12) (a), 24(6)(a)) or his examination under the Terrorism Act 2000 Sch 7 (see PARA 430 post) began before such commencement (ss 23(12)(b), 24(6)(b)). Sections 23, 24 came into force on 25 July 2006: see the Terrorism Act 2006 (Commencement No 2) Order 2006, SI 2006/1936.

3     le a District Judge (Magistrates' Courts) who is designated for the present purpose by the Lord Chief Justice of England and Wales after consulting the Lord Chancellor: Terrorism Act 2000 Sch 8 para 29(4)(a) (amended by the Courts Act 2003 s 109(1), (3), Sch 8 para 391, Sch 10; and by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 287, 290(1), (2)(a)). The Lord Chief Justice may also nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4): see COURTS) to exercise his functions under these provisions: Terrorism Act 2000 Sch 8 para 29(5) (added by the Constitutional Reform Act 2005 Sch 4 paras 287, 290).

4     Terrorism Act 2000 Sch 8 para 29(1) (as amended: see note 2 supra); Code H para 14.3. As to the operation of Code H see PARA 421 note 4 ante. The refusal of an application for a warrant of further detention of a person does not prevent his continued detention in accordance with the Terrorism Act 2000 s 41: s 41(8).

Where a police officer intends to make an application for a warrant of further detention, the person may be detained pending the making of the application: s 41(5). Where such an application has been made, the person may be detained pending the conclusion of proceedings on the application: s 41(6).



When an application for a warrant of further or extended detention is sought under Sch 8 para 29 (as amended) or Sch 8 para 36 (see the text and note 29 *infra*), the detained person and his representative must be informed of his rights in respect of the application, and these include: (1) the right to a written or oral notice of the warrant; (2) the right to make oral or written representations to the judicial authority about the application; (3) the right to be present and legally represented at the hearing of the application, unless specifically excluded by the judicial authority; (4) the right to free legal advice (see Code H para 6; and PARA 421 *ante*): Code H para 14.4.

5     Ie subject to the Terrorism Act 2000 Sch 8 para 37: see the text and notes 46-48 *infra*.

6     Ibid s 41(7).

7     Ibid Sch 8 para 29(2).

8     Ie under *ibid* Sch 8 para 29(3A) (as added) or Sch 8 para 36 (as amended): Sch 8 para 29(3) (amended by the Criminal Justice Act 2003 s 306(1), (2); and the Terrorism Act 2006 s 23).

9     Ie under the Terrorism Act 2000 s 41: see PARA 421 *ante*.

10    Ie under *ibid* Sch 7: see PARA 430 *post*.

11    Ibid Sch 8 para 29(3) (as amended: see note 8 *supra*). A judicial authority may issue a warrant of further detention in relation to a person which specifies a shorter period as the period for which that person's further detention is authorised if either the application for the warrant is an application for a warrant specifying a shorter period (Sch 8 para 29(3A)(a) (as added: see note 2 *supra*)) or the judicial authority is satisfied that there are circumstances that would make it inappropriate for the specified period to be as long as the period of seven days mentioned in Sch 8 para 29(3) (as amended) (Sch 8 para 29(3A)(b) (as so added)).

12    An application for a warrant is made when written or oral notice of an intention to make the application is given to a judicial authority: *ibid* Sch 8 para 30(3). An application may not be heard unless the person to whom it relates has been given a notice stating that the application has been made, the time at which the application was made, the time at which it is to be heard, and the grounds upon which further detention is sought: Sch 8 para 31.

13    Ie under *ibid* s 41: see PARA 421 *ante*.

14    Ibid s 41(3), Sch 8 para 30(1)(a).

15    Ibid Sch 8 para 30(1)(b). The judicial authority hearing an application made within six hours of the end of the 48-hour period must dismiss the application if he considers that it would have been reasonably practicable to make it during the 48-hour period: Sch 8 para 30(2).

A judicial authority may adjourn the hearing of an application for a warrant only if the hearing was adjourned to a date before the expiry of the 48-hour period mentioned in s 41(3) (see the text and note 14 *supra*): Sch 8 para 35(1). This does not apply to an adjournment under Sch 8 para 33(2) (see the text and note 17 *infra*): see Sch 8 para 35(2).

16    Ibid Sch 8 para 33(1).

17    See *ibid* Sch 8 para 33(2). See note 12 *supra*. This provision applies to the hearing of representations about whether a direction should be given under Sch 8 para 33(4) in the case of any application as it applies to a hearing of the application: Sch 8 para 33(7) (Sch 8 para 33(4)-(9) added by the Criminal Justice and Police Act 2001 s 75). The limits on the period of an adjournment under the Terrorism Act 2000 Sch 8 paras 35(1) (see note 15 *supra*) and Sch 8 para 36(1) (see the text and note 29 *infra*) do not apply to an adjournment under Sch 8 para 33(2): see Sch 8 paras 35(2), 36(5).

18    Ibid Sch 8 para 33(3).

19    Ie means falling within *ibid* Sch 8 para 33(5) (as added). A means of conducting the hearing and of making representations falls within Sch 8 para 33(5) (as added) if it allows the person to whom the application relates and any legal representative of his (without being present at the hearing and to the extent that they are not excluded from it under Sch 8 para 33(3) (see the text and note 18 *supra*)): (1) to see and hear the judicial authority and the making of representations to it by other persons; and (2) to be seen and heard by the judicial authority: Sch 8 para 33(5) (as added: see note 17 *supra*).

20    Ibid Sch 8 para 33(4) (as added: see note 17 *supra*). A judicial authority must not give a direction under Sch 8 para 33(4) (as added) unless: (1) it has been notified by the Secretary of State that facilities are available at the place where the person to whom the application relates is held for the judicial authority to conduct a hearing by means falling within Sch 8 para 33(5) (as added) (see note 19 *supra*); and (2) that notification has

not been withdrawn: Sch 8 para 33(8) (as so added). If in a case where it has power to do so a judicial authority decides not to give a direction under Sch 8 para 33(4) (as added), it must state its reasons for not giving it: Sch 8 para 33(9) (as so added).

21 le a direction under ibid Sch 8 para 33(4) (as added) (see the text and note 20 supra).

22 Ibid Sch 8 para 33(6) (as added: see note 17 supra).

23 See note 2 supra.

24 Terrorism Act 2000 Sch 8 para 34(1) (as amended: see note 2 supra). A judicial authority may make such an order in relation to specified information only if satisfied that there are reasonable grounds for believing that if the information were disclosed:

- 53 (1) evidence of an offence under any of ss 11 (see PARA 387 ante), 12 (see PARA 388 ante), 15-18 (see PARAS 390-393 ante), 54 (see PARA 439 post), 54-63 (see PARAS 441-442, 447, 469-471 post) would be interfered with or harmed (Sch 8 para 34(2)(a));
- 54 (2) the recovery of property obtained as a result of an offence under any of those provisions would be hindered (Sch 8 para 34(2)(b));
- 55 (3) the recovery of property in respect of which a forfeiture order could be made under s 23 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 482) would be hindered (Sch 8 para 34(2)(c));
- 56 (4) the apprehension, prosecution or conviction of a person who is suspected of falling within s 40(1) (see PARA 420 ante) would be made more difficult as a result of his being alerted (Sch 8 para 34(2)(d));
- 57 (5) the prevention of an act of terrorism would be made more difficult as a result of a person being alerted (Sch 8 para 34(2)(e));
- 58 (6) the gathering of information about the commission, preparation or instigation of an act of terrorism would be interfered with (Sch 8 para 34(2)(f)); or
- 59 (7) a person would be interfered with or physically injured (Sch 8 para 34(2)(g)).

For the meaning of 'terrorism' see PARA 383 ante.

A judicial authority may also make an order in relation to specified information if satisfied that there are reasonable grounds for believing that: (a) the detained person has benefited from his criminal conduct; and (b) the recovery of the value of the property constituting the benefit would be hindered if the information were disclosed: Sch 8 para 34(3) (Sch 8 para 34(3), (3A) added by the Proceeds of Crime Act 2002 s 456, Sch 11 para 39(1), (5)). For the purpose of the Terrorism Act 2000 Sch 8 para 34(3) (as added), the question whether a person has benefited from his criminal conduct is to be decided in accordance with the Proceeds of Crime Act 2002 Pt 2 (ss 6-91) (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391 et seq) or Pt 3 (ss 92-155) (confiscation: Scotland) : Terrorism Act 2000 Sch 8 para 34(3A) (as so added).

The judicial authority must direct that the person to whom the application for a warrant relates and anyone representing him be excluded from the hearing of the application under Sch 8 para 34 (as amended): Sch 8 para 34(4).

25 Ibid Sch 8 para 32(1)(a). For these purposes, the judicial authority must be satisfied that there are reasonable grounds for believing that the further detention of a person to whom an application relates is necessary as mentioned in Sch 8 para 32(1A) (as added). The further detention of a person is necessary as mentioned in Sch 8 para 32(1A) (as added) if it is necessary (1) to obtain relevant evidence whether by questioning him or otherwise; (2) to preserve relevant evidence; or (3) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence (Sch 8 para 32(1)(a), (1A) (Sch 8 para 32(1)(a) as amended, and Sch 8 para 32(1A) added: see note 2 supra)). 'Relevant evidence' means, in relation to the person to whom the application relates, evidence which relates to his commission of an offence under any of s 11 (see PARA 387 ante), s 12 (see PARA 388 ante), ss 15-18 (see PARAS 390-393 ante), s 54 (see PARA 439 post), ss 56-63 (see PARAS 441-442, 447, 469-471 post), or indicates that the detained person is or has been concerned in the commission, preparation or instigation of acts of terrorism: s 40(1)(a), (b), Sch 8 para 32(2) (as amended: see note 2 supra).

26 Ibid Sch 8 para 32(1)(b).

27 See note 2 supra.

28 Applications are required to be made to a judicial authority only if the grant of the application otherwise than in accordance with the Terrorism Act 2000 Sch 8 para 36(3AA)(b) (as added) (see the text and notes 40-42 *infra*) would extend that period to a time that is no more than 14 days after the relevant time (Sch 8 para 36(1A)(a), (1B)(a) (as added: see note 2 *supra*)) and no application has previously been made to a senior judge in respect of that period (Sch 8 para 36(1B)(b) (as so added)), and may in any other case be made to in a senior judge (Sch 8 para 36(1A)(b) (as so added)) (except that where the maximum period of further detention is reduced to 14 days by virtue of the Terrorism Act 2006 s 25 (see note 32 *infra*), the application must in all cases be made to a judicial authority (see s 25(3)(b), (4)(a), (b))). 'Senior judge' means a judge of the High Court or of the High Court of Justiciary: Terrorism Act 2000 Sch 8 para 36(7) (as added: see note 2 *supra*). Schedule 8 paras 30(3), 31-34 (see the text and notes 13-27 *supra*) apply to an application under Sch 8 para 36 (as amended) as they apply to an application for a warrant of further detention, and in relation to an application made to a senior judge by virtue of Sch 8 para 36(1A)(b) (as added) (unless the maximum period of further detention is reduced to 14 days by virtue of the Terrorism Act 2006 s 25 (see note 32 *infra*) (see s 25(4)(d))), as if references to a judicial authority were references to a senior judge and references to the judicial authority in question were references to the senior judge in question: Terrorism Act 2000 Sch 8 para 36(4) (as amended: see note 2 *supra*).

29 *Ibid* Sch 8 para 36(1) (as amended: see note 2 *supra*). As to the procedure to be followed see note 4 *supra*. A judicial authority or senior judge may adjourn the hearing of an application under Sch 8 para 36(1) (as amended) only if the hearing is adjourned to a date before the expiry of the period specified in the warrant: Sch 8 para 36(5) (as so amended). A senior judge has no powers under Sch 8 para 36(5) (as amended) in a case where the maximum period of further detention is reduced to 14 days by virtue of the Terrorism Act 2006 s 25 (see note 32 *infra*): see s 25(4)(c).

30 Terrorism Act 2000 Sch 8 para 36(3)(a) (as substituted: see note 2 *supra*). The time referred to is the end of the period specified in the warrant (in the case of a warrant specifying a period which has not previously been extended under Sch 8 para 36 (as amended)) (Sch 8 para 36(3A)(a) (added by the Criminal Justice Act 2003 s 306(1), (3), (4); and substituted by the Terrorism Act 2006 s 23 (see note 2 *supra*))) and the end of the period for which the period specified in the warrant was last so extended (in any other case) (Terrorism Act 2000 Sch 8 para 36(3A)(b) (as so substituted)).

31 *Ibid* Sch 8 para 36(3)(b)(i) (as substituted: see note 2 *supra*).

32 At any time which is more than one year after the commencement of the Terrorism Act 2006 s 23 (ie 25 July 2006: see the Terrorism Act 2006 (Commencement No 2) Order 2006, SI 2006/1936, art 1) the reference in the text to '28 days' should be read, in relation to any further extension for a period beginning at such a time, as a reference to '14 days': Terrorism Act 2006 s 25(1)(a), (3)(a). The Secretary of State may by order made by statutory instrument disapply s 25 in relation to any period of not more than one year beginning with the coming into force of the order (s 25(2)), and the modifications contained in s 23 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 482) apply only to a time which does not fall within a period in relation to which s 25 is so disapplied (s 25(1)(b)). The Secretary of State may not make an order containing (with or without other provision) any provision disapplying s 25 in relation to any period unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 25(6). At the date at which this volume states the law no such order had been made.

33 Terrorism Act 2000 Sch 8 para 36(3)(b)(ii) (as substituted: see note 2 *supra*). 'The relevant time' is either the time of the person's arrest under s 41 (see PARAS 420-421 *ante*), or, if he was being detained under the provisions relating to port and border controls (ie under Sch 7: see PARA 430 *post*) when he was arrested, with the time when his examination under those provisions began): Sch 8 para 36(3B) (added by the Criminal Justice Act 2003 s 306(1), (3), (4)).

34 A senior judge has no powers under the Terrorism Act 2000 Sch 8 para 36(3AA) (as added) in a case where the maximum period of further detention is reduced to 14 days by virtue of the Terrorism Act 2006 s 25 (see note 32 *supra*): see s 25(4)(c).

35 *Ie* required by the Terrorism Act 2000 Sch 8 para 36(3) (as substituted) (see the text and notes 30-33 *supra*).

36 *Ibid* Sch 8 para 36(3AA)(a) (as added: see note 2 *supra*).

37 See note 34 *supra*.

38 Terrorism Act 2000 Sch 8 para 36(3AA)(b) (as added: see note 2 *supra*).

39 *Ibid* Sch 8 para 36(2).

40 *Ie* subject to *ibid* Sch 8 para 37 (as substituted): see the text and notes 42-47 *infra*.

Where a warrant is issued which authorises detention beyond a period of 14 days from the time of arrest (or if a person was being detained under the provisions relating to port and border controls under Sch 7, from the time at which the examination under Sch 7 began), the detainee must be transferred from detention in a police station to detention in a designated prison as soon as is practicable, unless: (1) the detainee specifically requests to remain in detention at a police station and that request can be accommodated; or (2) there are reasonable grounds to believe that transferring a person to a prison would: (a) significantly hinder a terrorism investigation; (b) delay charging of the detainee or his release from custody; or (c) otherwise prevent the investigation from being conducted diligently and expeditiously: Code H para 14.5. If a person remains in detention at a police station under a warrant of further detention he must be transferred to a prison as soon as practicable after the grounds listed in heads (2)(a)-(c) supra cease to apply: Code H para 14.6. Detainees should be moved to the most suitable prison for the purposes of the investigation and their welfare (see Code H para 14.7); and once they are transferred to prison then their detention will be governed by the Terrorism Act 2000 Sch 8 (as amended) (see PARAS 421-422 ante) and the Prison Rules (see PRISONS), and Code H will not apply during any period that the person remains in prison detention (Code H para 14.8). The investigating team and custody officer should provide as much information as necessary to enable the relevant prison authorities to provide appropriate facilities to detain an individual: see Code H para 14.9. As to the requirement to report the detainee's transfer to prison to the detainee's legal adviser, family and friends who have previously been informed and the person who was initially informed of the detainee's detention see Code H para 14.9.

41 Terrorism Act 2000 s 41(7).

42 Ie by virtue of *ibid* s 41(5) or s 41(6) (see note 4 supra) or otherwise apart from the warrant: Sch 8 para 37(1)(a), (b) (as substituted: see note 2 supra).

43 Ie the matters mentioned in *ibid* Sch 8 para 32(1)(a), (b): see the text and notes 25-26 supra.

44 *Ibid* Sch 8 para 37(2)(a) (as substituted: see note 2 supra). A senior judge has no powers under Sch 8 para 37(2) (as substituted) in a case where the maximum period of further detention is reduced to 14 days by virtue of the Terrorism Act 2006 s 25 (see note 32 supra): see s 25(4)(c).

45 Terrorism Act 2000 Sch 8 para 37(2)(b) (as substituted: see note 2 supra). See note 44 supra.

46 Ie in accordance with *ibid* Sch 8 para 37 (as substituted).

47 *Ibid* Sch 8 para 37(3) (as substituted: see note 2 supra). Where at a time when the maximum period of further detention is reduced to 14 days by virtue of the Terrorism Act 2006 s 25 (see note 32 supra) (1) a person is being detained by virtue of a further extension under the Terrorism Act 2000 Sch 8 para 36 (see the text and notes 27-39 supra); (2) his further detention was authorised (at a time to which the Terrorism Act 2006 s 25 did not apply) for a period ending more than 14 days after the relevant time; and (3) that 14 days has expired, then the person with custody of that individual must release him immediately: s 25(5), (7).

## UPDATE

### 383-477 Prevention of terrorism

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### 423 Extension of detention

NOTE 3--The consultation requirement no longer applies: Terrorism Act 2000 Sch 9 para 29(4)(a) (amended by the Counter-Terrorism Act 2008 s 82(2), Sch 9 Pt 4).

NOTE 18--See *Ward v Police Service of Northern Ireland* [2007] UKHL 50, [2007] 1 WLR 3013.

NOTE 24--In head (3), after 's 23' read 'or s 23B': Terrorism Act 2000 Sch 8 para 34(2)(c) (amended by the Counter-Terrorism Act 2008 Sch 3 para 6).

NOTE 32--2006 Act s 25 disappplied for a period of one year beginning with 25 July 2009: Terrorism Act 2006 (Disapplication of Section 25) Order 2009, SI 2009/1883, art 2.



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#### **424. Search of premises.**

A justice of the peace may on the application of a constable issue a warrant in relation to specified premises authorising any constable to enter and search the premises specified in the warrant for the purpose of arresting a person whom a police constable reasonably suspects to be a terrorist<sup>1</sup>. The justice of the peace must be satisfied that there are reasonable grounds for suspecting that a person whom the applicant constable reasonably suspects to be or to have been concerned in the commission, preparation or instigation of acts of terrorism is to be found on the premises<sup>2</sup>.

1 Terrorism Act 2000 s 42(1), (2). As to powers to stop and search see also PARA 452 post. For the meaning of 'terrorist' see PARA 420 note 1 ante. As to the power of arrest see s 41; and PARA 420 ante. See also PARA 451 post.

Ibid s 42(1). For the meaning of 'terrorism' see PARA 383 ante.

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(v) Counter-terrorist Powers/425. Search, seizure and forfeiture of terrorist publications.

#### **425. Search, seizure and forfeiture of terrorist publications.**

Provision is made for the search and seizure of terrorist publications intended for dissemination<sup>1</sup>. If a justice of the peace is satisfied that there are reasonable grounds for suspecting that relevant articles<sup>2</sup> are likely to be found on any premises<sup>3</sup>, he may issue a warrant<sup>4</sup> authorising a constable to enter and search the premises<sup>5</sup> and to seize anything found there which the constable has reason to believe is such an article<sup>6</sup>. An article seized under the authority of a warrant so issued may be removed by a constable to such place as he thinks fit<sup>7</sup> and must be retained there in the custody of a constable until returned or otherwise disposed of<sup>8</sup>. Notification of seizure must be given<sup>9</sup>.

An article<sup>10</sup> which is seized under these provisions<sup>11</sup> is liable to forfeiture<sup>12</sup> and is to be treated as forfeited<sup>13</sup> if, by the end of the period for the giving of a notice of claim in respect of it<sup>14</sup>, either no such notice has been given<sup>15</sup> or the requirements relating to the giving of such a notice<sup>16</sup> have not been complied with in relation to the only notice or notices of claim that have been given<sup>17</sup>. Where a notice of claim in respect of an article is duly given<sup>18</sup>, the relevant constable must decide whether to take proceedings to ask the court to condemn the article as forfeited<sup>19</sup>, and the court must, depending upon whether it finds that the article was or was not liable to forfeiture at the time of its seizure<sup>20</sup> and is or is not satisfied that its forfeiture would be inappropriate<sup>21</sup>, either condemn the article as forfeited<sup>22</sup> or order the return of the article to the person who appears to the court to be entitled to it<sup>23</sup>. Where an article is treated or condemned as forfeited under these provisions, the forfeiture is treated as having taken effect as from the time of the seizure<sup>24</sup> and the article may be destroyed or otherwise disposed of by a constable in whatever manner he thinks fit<sup>25</sup>.

In proceedings arising out of the seizure of an article the fact, form and manner of the seizure is to be taken, without further evidence and unless the contrary is shown, to have been as set forth in the process<sup>26</sup>. Neither the imposition of a requirement<sup>27</sup> to return an article to a person nor the return of an article to a person in accordance with such a requirement affects either the rights in relation to that article of any other person<sup>28</sup> or the right of any other person to enforce his rights against the person to whom it is returned<sup>29</sup>.

1 Terrorism Act 2006 s 28(2)(a). 'Terrorist publications intended for dissemination' means articles which are likely to be the subject of conduct falling within s 2(2)(a)-(e) and which would fall for the purposes of s 2 to be treated, in the context of the conduct to which it is likely to be subject, as a terrorist publication (see PARA 449 post): s 28(2)(b). For the meaning of 'article' see PARA 449 note 1 post; definition applied by s 28(9), Sch 2 para 18.

2 The articles to which *ibid* s 28 applies (see note 1 *supra*).

3 For the meaning of 'premises' see the Police and Criminal Evidence Act 1984 s 23; and PARA 872 note 5 post (definition applied by the Terrorism Act 2006 s 28(9)).

4 A person exercising a power conferred by a warrant under these provisions may use such force as is reasonable in the circumstances for exercising that power: *ibid* s 28(3).

5 *Ibid* s 28(1)(a).

6 *Ibid* s 28(1)(b). Nothing in the Police (Property) Act 1897 (property seized in the investigation of an offence: see POLICE vol 36(1) (2007 Reissue) PARA 520), or the corresponding Northern Ireland enactment (ie the Police

(Northern Ireland) Act 1998 s 31) applies to an article seized under the authority of a warrant under these provisions: Terrorism Act 2006 s 28(7).

7 Ibid s 28(4)(a).

8 Ibid s 28(4)(b). 'Otherwise disposed of' means otherwise disposed of in accordance with the Terrorism Act 2006.

9 Where an article has been seized under the authority of a warrant under these provisions (ibid s 28(8), Sch 2 para 1(a)) and is being retained in the custody of a constable ('the relevant constable') (Sch 2 para 1(b)), the relevant constable must give notice of the article's seizure to every person whom he believes to have been the owner of the article, or one of its owners, at the time of the seizure (Sch 2 para 2(1)(a)) and, if there is no such person or it is not reasonably practicable to give him notice, every person whom the relevant constable believes to have been an occupier at that time of the premises where the article was seized (Sch 2 para 2(1)(b)). The notice must set out what has been seized and the grounds for the seizure (Sch 2 para 2(2)) and may be given to a person only by either delivering it to him personally (Sch 2 para 2(3)(a)), addressing it to him and leaving it for him at the appropriate address (Sch 2 para 2(3)(b)), or addressing it to him and sending it to him at that address by post (Sch 2 para 2(3)(c)), although where it is not practicable to give a notice in accordance with these requirements, a notice given by virtue of Sch 2 para 2(1)(b) to the occupier of the premises where the article was seized may be given by addressing it to 'the occupier' of those premises, without naming him (Sch 2 para 2(4)(a)) and leaving it for him at those premises or sending it to him at those premises by post (Sch 2 para 2(4)(b)). For these purposes, 'the appropriate address', in relation to a person, means: (1) in the case of a body corporate, its registered or principal office in the United Kingdom (Sch 2 para 2(6)(a)); (2) in the case of a firm, the principal office of the partnership (Sch 2 para 2(6)(b)); (3) in the case of an unincorporated body or association, the principal office of the body or association (Sch 2 para 2(6)(c)); and (4) in any other case, his usual or last known place of residence in the United Kingdom or his last known place of business in the United Kingdom (Sch 2 para 2(6)(d)). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. In the case of a company registered outside the United Kingdom (Sch 2 para 2(7)(a)), a firm carrying on business outside the United Kingdom (Sch 2 para 2(7)(b)), or an unincorporated body or association with offices outside the United Kingdom (Sch 2 para 2(7)(c)), the references in Sch 2 para 2 to its 'principal office' include references to its principal office within the United Kingdom (if any) (Sch 2 para 2(7)).

10 I.e. an article to which ibid s 28 applies (see note 1 supra).

11 I.e. seized under the authority of a warrant issued under ibid s 28 on an information laid by or on behalf of the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland: s 28(5).

12 Ibid s 28(5)(a).

13 'Forfeited' means treated or condemned as forfeited under ibid Sch 2 (see the text and notes 14-29 infra); and 'forfeiture' is to be construed accordingly: s 28(9). An article may be treated as forfeited under Sch 2 only if either the requirements of Sch 2 para 2 (see note 9 supra) have been complied with in the case of that article (Sch 2 para 2(5)(a)) or it was not reasonably practicable for them to be complied with (Sch 2 para 2(5)(b)).

14 A person claiming that the seized article is not liable to forfeiture may give notice of his claim to a constable at any police station in the police area in which the premises where the seizure took place are located (ibid Sch 2 para 3(1)); oral notice is not sufficient for these purposes (Sch 2 para 3(2)). A notice of claim may not be given more than one month after the day of the giving of the notice of seizure (see note 9 supra) (Sch 2 para 4(1)(a)) or if no such notice has been given, the day of the seizure (Sch 2 para 4(1)(b)). In a case in which notice of the seizure was given to different persons on different days, the reference in Sch 2 para 4 to the day on which that notice was given is a reference to the day on which that notice was given to the person (in relation to a person to whom notice of the seizure was given) (Sch 2 para 4(4)(a)) and to the day on which notice of the seizure was given to the last person to be given such a notice (in relation to any other person) (Sch 2 para 4(4)(b)).

A notice of claim must specify the name and address of the claimant (Sch 2 para 4(2)(a)) and, in the case of a claimant who is outside the United Kingdom, the name and address of a solicitor in the United Kingdom who is authorised to accept service, and to act, on behalf of the claimant (Sch 2 para 4(2)(b)). Service upon a solicitor so specified is to be taken to be service on the claimant for the purposes of any proceedings by virtue of Sch 2: Sch 2 para 4(3).

15 Ibid Sch 2 para 5(a).

16 I.e. the requirements of ibid Sch 2 paras 3, 4 (see note 14 supra).

17 Ibid Sch 2 para 5(b).

18 I.e. give in accordance with the requirements of ibid Sch 2 paras 3, 4 (see note 14 supra).



19 Ibid Sch 2 para 6(1). The decision whether to take such proceedings must be made as soon as reasonably practicable after the giving of the notice of claim (Sch 2 para 6(2)), and if the relevant constable decides not to take proceedings for condemnation in a case in which a notice of claim has been given, he must return the article to the person who appears to him to be the owner of the article, or to one of the persons who appear to him to be owners of it (Sch 2 para 6(5)). An article required to be so returned must be returned as soon as reasonably practicable after the decision not to take proceedings for condemnation: Sch 2 para 6(6). If the article is (without having been returned) still in the custody of a constable after the end of the period of 12 months beginning with the day after the requirement to return it arose (Sch 2 para 13(1), (2)(a)), but it is not practicable to dispose of the article by returning it immediately to the person to whom it is required to be returned (Sch 2 para 13(2)(b)), the constable may dispose of it in any manner he thinks fit (Sch 2 para 13(2)).

Proceedings by virtue of Sch 2 are civil proceedings and, in England or Wales, may be instituted either in the High Court or in a magistrates' court: Sch 2 para 7(a). Proceedings in a magistrates' court may be instituted only if that court has jurisdiction in relation to the place where the article to which they relate was seized (Sch 2 para 8(a)), and either party may appeal against the court's decision to the Crown Court (Sch 2 para 10(1)); this does not affect any right to require the statement of a case for the opinion of the High Court (Sch 2 para 10(3)). Where proceedings are instituted in the High Court, the court may require the claimant to give such security for the costs of the proceedings as may be determined by the court (Sch 2 para 9(2)(a)) and the claimant must comply with any such requirement (Sch 2 para 9(2)(b)); failing compliance with these requirements the court must find against the claimant (Sch 2 para 9(3)).

In whichever court proceedings are instituted, the claimant or his solicitor must make his oath that, at the time of the seizure, the seized article was, or was to the best of his knowledge and belief, the property of the claimant (Sch 2 para 9(1)) (failing compliance with which requirement the court must find against the claimant (Sch 2 para 9(3))), and where an appeal has been made (whether by case stated or otherwise) against the decision of the court in proceedings by virtue of Sch 2 in relation to an article, the article is to be left in the custody of a constable pending the final determination of the matter (Sch 2 para 11).

Where, at the time of its seizure, an article was either the property of a body corporate (Sch 2 para 16(1)(a)), the property of two or more partners (Sch 2 para 16(1)(b)) or the property of more than five persons (Sch 2 para 16(1)(c)), the oath required by Sch 2 para 9, and any other thing required by Sch 2 or by rules of court to be done by an owner of the article, may be sworn or done by the secretary or some duly authorised officer of the body corporate (where the owner is a body corporate) (Sch 2 para 16(2)(a), (3)(a)), any one or more of the owners (where the owners are in partnership) (Sch 2 para 16(3)(b)), or any two or more of the owners acting on behalf of themselves and any of their co-owners who are not acting on their own behalf (where there are more than five owners and they are not in partnership) (Sch 2 para 16(3)(c)), or by a person authorised to act on behalf of such a person (Sch 2 para 16(2)(b)).

20 Ibid Sch 2 para 6(3)(a), (4)(a).

21 Ibid Sch 2 para 6(3)(b), (4)(b).

22 Ibid Sch 2 para 6(3). An article may be condemned as forfeited under Sch 2 only if either the requirements of Sch 2 para 2 (see note 9 supra) have been complied with in the case of that article (Sch 2 para 5(5)(a)) or it was not reasonably practicable for them to be complied with (Sch 2 para 5(5)(b)). In proceedings, the condemnation by a court of an article as forfeited under Sch 2 may be proved by the production of either the order of condemnation (Sch 2 para 15(a)) or a certified copy of the order purporting to be signed by an officer of the court by which the order was made (Sch 2 para 15(b)).

23 Ibid Sch 2 para 6(4). For provisions in connection with the return of a seized article see note 19 supra.

24 Ibid Sch 2 para 12.

25 Ibid s 28(5)(b).

26 Ibid Sch 2 para 14.

27 Ie by virtue of ibid Sch 2.

28 Ibid Sch 2 para 17(a).

29 Ibid Sch 2 para 17(b).

## UPDATE

### 383-477 Prevention of terrorism

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(v) Counter-terrorist Powers/426. Search of persons.

#### **426. Search of persons.**

A constable may stop and search a person whom he reasonably suspects to be a terrorist<sup>1</sup> to discover whether he has in his possession anything which may constitute evidence that he is a terrorist<sup>2</sup>. A constable may search a person arrested without warrant on reasonable suspicion of being a terrorist<sup>3</sup> to discover whether he has anything which may constitute evidence that he is a terrorist<sup>4</sup>.

A constable may seize and retain anything which he discovers in the course of a search of a person under either of these powers and which he reasonably suspects may constitute evidence that the person is a terrorist<sup>5</sup>.

1 For the meaning of 'terrorist' see PARA 420 note 1 ante. As to powers to stop and search see also PARA 452 post.

2 Terrorism Act 2000 s 43(1). A search of a person must be carried out by someone of the same sex: s 43(3). A person who has the powers of a constable in one part of the United Kingdom may exercise the power under s 43 in any part of the United Kingdom: s 43(5). The powers under ss 43, 44 (see PARA 427 post) allow a constable to search only for articles which could be used for terrorist purposes; however, this would not prevent a search being carried out under other powers if, in the course of exercising these powers, the officer formed reasonable grounds for suspicion: Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search para 2.26. See also PARAS 451-452 post.

3 Ibid under the Terrorism Act 2000 s 41: see PARA 420 ante.

4 Ibid s 43(2). A search of a person must be carried out by someone of the same sex: s 43(3). See also PARA 451 post.

5 Ibid s 43(4). The additional powers of seizure under the Criminal Justice and Police Act 2001 s 51 (see PARA 890 post) apply to the power of seizure under the Terrorism Act 2000 s 43(4): Criminal Justice and Police Act 2001 s 51(5), Sch 1 para 82. See also PARAS 451-452 post.

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(v) Counter-terrorist Powers/427. Authorisation to stop and search vehicles, their occupants and their contents and to stop and search pedestrians.

**427. Authorisation to stop and search vehicles, their occupants and their contents and to stop and search pedestrians.**

An authorisation to stop and search vehicles<sup>1</sup>, their occupants and their contents, and to stop and search pedestrians may be given:

- 499 (1) where the specified area or place is the whole or part of a police area<sup>2</sup> outside Northern Ireland other than one mentioned in head (2) or head (3) below, by a police officer for the area who is of at least the rank of assistant chief constable<sup>3</sup>;
- 500 (2) where the specified area or place is the whole or part of the metropolitan police district, by a police officer for the district who is of at least the rank of commander of the metropolitan police<sup>4</sup>;
- 501 (3) where the specified area or place is the whole or part of the City of London, by a police officer for the City who is of at least the rank of commander in the City of London police force<sup>5</sup>.

An authorisation authorises any constable in uniform to stop a vehicle in an area or at a place specified in the authorisation and to search (a) the vehicle; (b) the driver<sup>6</sup> of the vehicle; (c) a passenger in the vehicle; (d) anything in or on the vehicle or carried by the driver or a passenger<sup>7</sup>. An authorisation also authorises any constable in uniform to stop a pedestrian in an area or at a place specified in the authorisation and to search the pedestrian and anything carried by him<sup>8</sup>.

An authorisation<sup>9</sup> may be given only if the person giving it considers it expedient for the prevention of acts of terrorism<sup>10</sup>.

An authorisation has effect during the period (i) beginning at the time when the authorisation is given; and (ii) ending with a date or at a time specified in the authorisation<sup>11</sup>.

The person who gives an authorisation must inform the Secretary of State as soon as is reasonably practicable<sup>12</sup>. If an authorisation is not confirmed by the Secretary of State before the end of the period of 48 hours beginning with the time when it is given, it ceases to have effect at the end of that period, but its ceasing to have effect does not affect the lawfulness of anything done in reliance on it before the end of that period<sup>13</sup>. The Secretary of State may cancel an authorisation with effect from a specified time<sup>14</sup>. An authorisation may be renewed in writing by the person who gave it or a person who could have given it<sup>15</sup>.

The power of stop and search conferred by an authorisation<sup>16</sup> may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind<sup>17</sup>.

A constable may seize and retain an article<sup>18</sup> which he discovers in the course of a search by virtue of an authorisation and which he reasonably suspects is intended to be used in connection with terrorism<sup>19</sup>.

A person commits an offence if he:

- 502 (A) fails to stop a vehicle when required to do so by a constable in the exercise of the power to stop and search conferred by an authorisation<sup>20</sup>;
- 503 (B) fails to stop when required to do so by a constable in the exercise of the power conferred by an authorisation<sup>21</sup>;
- 504 (C) wilfully obstructs a constable in the exercise of the power conferred by an authorisation<sup>22</sup>.

The offence is punishable on summary conviction by imprisonment for a term not exceeding six<sup>23</sup> months or a fine not exceeding level 5 on the standard scale or both<sup>24</sup>.

1 As to the meaning of 'vehicle' see PARA 408 note 19 ante. As to powers to stop and search see also PARA 452 post.

2 For the meaning of 'police area' see the Interpretation Act 1978 s 5, Sch 1 (definition amended by the Police Act 1996 s 103, Sch 7 para 32); the Police Act 1996 s 101(1); and POLICE vol 36(1) (2007 Reissue) PARA 136.

3 Terrorism Act 2000 s 44(4)(a).

In a case within heads (1)-(3) in the text in which the specified area or place is a place described in s 34(1A) (as added and substituted) (see PARA 408 ante), an authorisation may also be given by a member of the British Transport Police Force who is of at least the rank of assistant chief constable: s 44(4A) (added by the Anti-terrorism, Crime and Security Act 2001 s 101, Sch 7 paras 29, 31; and substituted by the British Transport Police (Transitional and Consequential Provisions) Order 2004, SI 2004/1573, art 12(6)(c)); Railways and Transport Safety Act 2003 s 76, Sch 5 para 4. In a case in which the specified area or place is a place to which the Ministry of Defence Police Act 1987 s 2(2) (see POLICE vol 36(1) (2007 Reissue) PARA 120) applies, an authorisation may also be given by a member of the Ministry of Defence Police who is of at least the rank of assistant chief constable: Terrorism Act 2000 s 44(4B) (added by the Anti-terrorism, Crime and Security Act 2001 Sch 7 paras 29, 31). In a case in which the specified area or place is a place in which members of the Civil Nuclear Constabulary have the powers and privileges of a constable, an authorisation may also be given by a member of that constabulary who is at least of the rank of assistant chief constable: Terrorism Act 2000 s 44(4BA) (added by the Energy Act 2004 s 57(1), (2)(a)). See also note 10 infra. An authorisation may not, however, be given by a member of the British Transport Police Force, a member of the Ministry of Defence Police, or a member of the Civil Nuclear Constabulary, in any other case: Terrorism Act 2000 s 44(4C) (added by the Anti-terrorism, Crime and Security Act 2001 Sch 7 paras 29, 31; and amended by the Energy Act 2004 ss 57(1), (2)(b), 197(9), Sch 23 Pt 1). The 'British Transport Police' means the British Transport Police established under the Railways and Transport Safety Act 2003 Pt 3 (ss 18-77) (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 281 et seq): Terrorism Act 2000 s 121 (definition added by the Anti-terrorism, Crime and Security Act 2001 s 101, Sch 7 para 32); Railways and Transport Safety Act 2003 s 73, Sch 5 para 4.

The power of a person mentioned in the Terrorism Act 2000 s 44(4) to give an authorisation specifying an area or place so mentioned includes power to give such an authorisation specifying such an area or place together with either the internal waters adjacent to that area or place (s 44(4ZA)(a) (s 44(4ZA), (5A) added by the Terrorism Act 2006 s 30(1)-(3))) or such area of those internal waters as is specified in the authorisation (Terrorism Act 2000 s 44(4ZA)(b) (as so added)). 'Internal waters' means waters in the United Kingdom that are not comprised in any police area: s 44(5A) (as so added).

If an authorisation is given orally, the person giving it must confirm it in writing as soon as reasonably practicable: s 44(5).

When powers under s 44 (as amended) have been conferred by a chief officer on a community support officer on duty and in uniform, the exercise of this power must comply with the requirements of Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search (see PARA 859 et seq post), including the recording requirements: Code A para 2.24A.

As to powers of stop and search where the specified area or place is the whole or part of Northern Ireland see the Terrorism Act 2000 s 44(4)(d).

4 Ibid s 44(4)(b). See note 3 supra.

5 Ibid s 44(4)(c). See note 3 supra.

6 'Driver', in relation to an aircraft, hovercraft or vessel, means the captain, pilot or other person with control of the aircraft, hovercraft or vessel or any member of its crew and, in relation to a train, includes any member of its crew: *ibid* ss 44(5A), 45(7) (s 44(5A) as added: see note 3 *supra*).

7 *Ibid* s 44(1). See note 8 *infra*. When an authorisation under s 44 (as amended) is given, a constable in uniform may exercise the powers only for the purpose of searching for articles of a kind which could be used in connection with terrorism; whether or not there are any grounds for suspecting the presence of such articles: Code A para 2.24.

The selection of persons stopped under the Terrorism Act 2000 s 44 (as amended) should reflect an objective assessment of the threat posed by the various terrorist groups active in Great Britain. The powers must not be used to stop and search for reasons unconnected with terrorism. Officers must take particular care not to discriminate against members of minority ethnic groups in the exercise of these powers. There may be circumstances, however, where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat: Code A para 2.25. The stop and search powers under the Terrorism Act 2000 are lawful as a matter of domestic law and do not breach the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5 (right to liberty and security of the person), art 8 (right to respect for private and family life, home and correspondence), art 10 (freedom of expression) or art 11 (freedom of association and assembly): *R (on the application of Gillan) v Metropolitan Police Comr* [2006] UKHL 12, [2006] 2 WLR 537; affg *R (on the application of Gillan) v Metropolitan Police Comr, R (on the application of Quinton)* [2004] EWCA Civ 1067, [2005] QB 388, [2005] 1 All ER 970. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 *et seq*.

8 Terrorism Act 2000 s 44(2). Where a vehicle or pedestrian is stopped by virtue of s 44(1) (see the text and note 7 *supra*) or s 44(2), and the driver of the vehicle or the pedestrian applies (within a 12-month period beginning with the date on which the vehicle or pedestrian was stopped) for a written statement that the vehicle was stopped, or that he was stopped, by virtue of s 44(1) or s 44(2), the written statement must be provided: s 45(5), (6).

9 *Ie* an authorisation under *ibid* s 44(1) or s 44(2) (see the text and notes 7-8 *supra*).

10 *Ibid* s 44(3). As to the meaning of 'act' see PARA 394 note 1 *ante*. For the meaning of 'terrorism' see PARA 383 *ante*.

11 *Ibid* s 46(1). The date or time specified under head (ii) in the text must not occur after the end of the period of 28 days beginning with the day on which the authorisation is given: s 46(2). An authorisation under s 44(4BA) (as added) (see note 3 *supra*) does not have effect except in relation to times when the specified area or place is a place where members of the Civil Nuclear Constabulary have the powers and privileges of a constable: s 46(2A) (added by the Energy Act 2004 s 57(1), (3)).

12 Terrorism Act 2000 s 46(3). An officer who has authorised the use of powers under s 44 (as amended) must take immediate steps to send a copy of the authorisation to the National Joint Unit, Metropolitan Police Special Branch, who will forward it to the Secretary of State. The Joint Unit will inform the force concerned, within 48 hours of the authorisation being made, whether the Secretary of State has confirmed or cancelled or altered the authorisation: Code A Guidance note 14. See also Code A para 2.26.

13 Terrorism Act 2000 s 46(4). Where the Secretary of State confirms an authorisation he may substitute an earlier date or time for the date or time specified in the authorisation: s 46(5).

14 *Ibid* s 46(6).

15 *Ibid* s 46(7). If the authorisation is renewed, the provisions of s 46(1)-(6) apply as if a new authorisation were given on each occasion on which the authorisation is renewed: s 46(7).

16 *Ie* an authorisation under *ibid* s 44(1) or s 44(2) (see the text and notes 7-8 *supra*).

17 *Ibid* s 45(1). A constable exercising the power conferred by an authorisation may not require a person to remove any clothing in public except for headgear, footwear, an outer coat, a jacket or gloves: s 45(3).

Where a constable proposes to search a person or vehicle by virtue of s 44(1) or s 44(2) (see the text and notes 7-8 *supra*) he may detain the person or vehicle for such time as is reasonably required to permit the search to be carried out at or near the place where the person or vehicle is stopped: s 45(4). See also PARA 451 *post*.

18 'Article' includes substance or any other thing: *ibid* s 121.

19 *Ibid* s 45(2). See also PARA 451 *post*.

20 le an authorisation under ibid s 44(1) (see the text and note 7 supra): s 47(1)(a).

21 le an authorisation under ibid s 44(2) (see the text and note 8 supra): s 47(1)(b).

22 le an authorisation under ibid s 44(1) or s 44(2) (see the text and notes 7-8 supra): s 47(1)(c).

23 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

24 Terrorism Act 2000 s 47(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **427 Authorisation to stop and search vehicles, their occupants and their contents and to stop and search pedestrians**

NOTE 7--However, see Application 4158/05 *Gillan v United Kingdom* [2010] All ER (D) 40 (Jan), (2010) Times, 15 January, ECtHR (powers under the 2000 Act ss 44, 45 breached the European Convention on Human Rights art 8).

NOTES 20-22--Where an offence under the Terrorism Act 2000 s 47 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(v) Counter-terrorist Powers/428. Prohibition or restriction of parking.

#### **428. Prohibition or restriction of parking.**

An authorisation may be given which authorises any constable in uniform to prohibit or restrict the parking<sup>1</sup> of vehicles<sup>2</sup> on a road<sup>3</sup> specified in the authorisation<sup>4</sup>. Such an authorisation may be given:

- 505 (1) where the road specified is wholly or partly within a police area<sup>5</sup> other than one mentioned in head (2) or head (3) below, by a police officer for the area who is of at least the rank of assistant chief constable<sup>6</sup>;
- 506 (2) where the road specified is wholly or partly in the metropolitan police district, by a police officer for the district who is of at least the rank of commander of the metropolitan police<sup>7</sup>;
- 507 (3) where the road specified is wholly or partly in the City of London, by a police officer for the City who is of at least the rank of commander in the City of London police force<sup>8</sup>.

An authorisation<sup>9</sup> may be given only if the person giving it considers it expedient for the prevention of acts of terrorism<sup>10</sup>. It has effect during the period specified in it<sup>11</sup>; and that period must not exceed 28 days<sup>12</sup>. An authorisation may be renewed in writing by the person who gave it or by a person who could have given it<sup>13</sup>.

A person commits an offence if he parks a vehicle in contravention of a prohibition or restriction imposed by virtue of the provisions described above<sup>14</sup>. The offence is punishable on summary conviction with a fine not exceeding level 4 on the standard scale<sup>15</sup>.

A person commits an offence if (a) he is the driver<sup>16</sup> or other person in charge of a vehicle which has been permitted to remain at rest in contravention of any prohibition or restriction imposed by virtue of the above provisions; and (b) he fails to move the vehicle when ordered to do so by a constable in uniform<sup>17</sup>. This offence is punishable on summary conviction by imprisonment for a term not exceeding three months<sup>18</sup> or a fine not exceeding level 4 on the standard scale or both<sup>19</sup>.

It is, however, a defence to either offence for the defendant to prove that he had a reasonable excuse for the act or omission in question<sup>20</sup>.

1 'Parking' means leaving a vehicle or permitting it to remain at rest: Terrorism Act 2000 s 52.

2 For these purposes, 'vehicle' has the same meaning as in the Road Traffic Regulation Act 1984 s 99(5) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 870): Terrorism Act 2000 s 52.

3 'Road' has the same meaning as in the Road Traffic Act 1988 (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 206): Terrorism Act 2000 s 121.

4 Ibid s 48(1). The power conferred by an authorisation under s 48 must be exercised by placing a traffic sign on the road concerned: s 49(1). A constable exercising the power conferred by an authorisation under s 48 may suspend a parking place: s 49(2). Where a parking place is suspended under s 49(2), the suspension is treated as a restriction imposed by virtue of s 48 for the purposes of the Road Traffic Regulation Act 1984 s 99 (as amended) (removal of vehicles illegally parked etc) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 870) and of any regulations in force under that provision: Terrorism Act 2000 s 49(3)(a). 'Traffic sign' has the meaning



given by the Road Traffic Regulation Act 1984 s 142(1) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 830); Terrorism Act 2000 s 52.

5 For the meaning of 'police area' see the Interpretation Act 1978 s 5, Sch 1 (definition amended by the Police Act 1996 s 103, Sch 7 para 32); Police Act 1996 s 101(1); and POLICE vol 36(1) (2007 Reissue) PARA 136.

6 Terrorism Act 2000 s 48(3)(a). If an authorisation is given orally, the person giving it must confirm it in writing as soon as is reasonably practicable: s 48(4).

7 Ibid s 48(3)(b).

8 Ibid s 48(3)(c).

9 Ie under ibid s 48.

10 Ibid s 48(2). For the meaning of 'terrorism' see PARA 383 ante. As to the meaning of 'act' see PARA 394 note 1 ante.

11 Ibid s 50(1).

12 Ibid s 50(2).

13 Ibid s 50(3). The provisions of s 50(1), (2) (see the text and notes 11-12 supra) apply as if a new authorisation were given on each occasion on which the authorisation is renewed: s 50(3).

14 Ibid s 51(1).

15 Ibid s 51(5). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

16 'Driver' means, in relation to a vehicle which has been left on any road, the person who was driving it when it was left there: ibid s 52.

17 Ibid s 51(2).

18 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks: see ibid s 51 (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 55(1), (3)). At the date at which this volume states the law no such day had been appointed.

19 Terrorism Act 2000 s 51(6).

20 Ibid s 51(3). Note that this is not one of the defences to be proved by the defendant to which s 118 applies (which states that in relation to certain provisions of the Act where the defendant has the burden of proof that burden is only an evidential one): see s 118. It may therefore be inferred that the burden imposed on the defendant of proving the present defence is a legal (or persuasive) one, but that implication was not drawn in respect of the corresponding issue in the context of s 11 (see PARA 387 ante): see *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450. See further PARA 1368 et seq post.

Possession of a current disabled person's badge does not itself constitute a reasonable excuse for the purposes of the Terrorism Act 2000 s 51(3): s 51(4). 'Disabled person's badge' means a badge issued, or having effect as if issued, under any regulations for the time being in force under the Chronically Sick and Disabled Persons Act 1970 s 21 (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1071): Terrorism Act 2000 s 52.

## UPDATE

### 383-477 Prevention of terrorism

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### 428 Prohibition or restriction of parking

NOTES 14-20--Where an offence under the Terrorism Act 2000 s 51 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(v) Counter-terrorist Powers/429. Retention of communications data.

#### **429. Retention of communications data.**

The Secretary of State must issue a code of practice<sup>1</sup> relating to the retention by communications providers<sup>2</sup> of communications data<sup>3</sup> obtained by or held by them<sup>4</sup> and may enter into agreements about the retention of communications data<sup>5</sup>. The Secretary of State has power to issue directions about the retention of communications data<sup>6</sup>. Appropriate arrangements must be made by him for the payments to communications providers towards the costs incurred by them in complying with the provisions of any such code of practice, agreement or direction or as a consequence of the retention of any communications data in accordance with any such provisions<sup>7</sup>.

1 The code of practice must comply with the procedural provisions of the Anti-terrorism, Crime and Security Act 2001 s 103.

2 'Communications provider' means a person who provides a postal service or a telecommunications service: *ibid* s 107(1). For the meaning of 'postal service' see PARA 506 note 5 post. For the meaning of 'telecommunications service' see PARA 507 note 6 post.

3 'Communications data' has the same meaning as in the Regulation of Investigatory Powers Act 2000 Pt 1 Ch 2 (ss 21-25) (see PARA 521 note 3 post): Anti-terrorism, Crime and Security Act 2001 s 107.

4 See *ibid* s 102(1). For this purpose, the draft code of practice entitled 'Voluntary Retention of Communications Data under Part 11: Anti-terrorism, Crime and Security Act 2001 - Voluntary Code of Practice' has been brought into force: Retention of Communications Data (Code of Practice) Order 2003, SI 2003/3175.

5 See the Anti-terrorism, Crime and Security Act 2001 s 102(2).

6 See *ibid* s 104. Section 104 lapses unless periodically renewed by the Secretary of State: s 105. Initially, it would have lapsed at the end of two years from the date on which the Act was passed (ie 14 December 2001) but it was renewed for a period of two years by the Retention of Communications Data (Extension of Initial Period) Order 2003, SI 2003/3173, and further renewed for a period of two years expiring on 14 December 2007 by the Retention of Communications Data (Further Extension of Initial Period) Order 2005, SI 2005/3335.

7 See the Anti-terrorism, Crime and Security Act 2001 s 106.

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vi) Port and Border Controls/430. Power to stop, question and detain.

## **(vi) Port and Border Controls**

### **430. Power to stop, question and detain.**

For the purpose of determining whether he appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism<sup>1</sup>, an examining officer<sup>2</sup> may question:

- 508 (1) a person if he is at a port<sup>3</sup> or in the border area<sup>4</sup>, and the examining officer believes that the person's presence at the port or in the area is connected with his entering or leaving Great Britain<sup>5</sup> or Northern Ireland or his travelling by air within Great Britain or within Northern Ireland<sup>6</sup>; or
- 509 (2) a person on a ship<sup>7</sup> or aircraft which has arrived at any place in Great Britain or Northern Ireland (whether from within or outside Great Britain or Northern Ireland)<sup>8</sup>.

A person who is questioned under this power must:

- 510 (a) give the examining officer any information in his possession which the officer requests;
- 511 (b) give the examining officer on request either a valid passport which includes a photograph or another document which establishes his identity;
- 512 (c) declare whether he has with him documents of a kind specified by the examining officer;
- 513 (d) give the examining officer on request any document which he has with him and which is of a kind specified by the officer<sup>9</sup>.

For the purposes of exercising the power to question<sup>10</sup>, an examining officer may stop a person or vehicle; and may detain a person<sup>11</sup>. For the purpose of detaining a person, an examining officer may authorise the person's removal from a ship, aircraft or vehicle<sup>12</sup>. Where a person is detained under this power there are specific rules as to his treatment<sup>13</sup>.

Unless detained under any other power, a detained person must be released not later than the end of the period of nine hours beginning with the time when his examination begins<sup>14</sup>.

1 See the Terrorism Act 2000 s 40(1)(b); and PARA 420 ante. For the meaning of 'terrorism' see PARA 383 ante. As to the meaning of 'act' see PARA 394 note 1 ante.

2 An 'examining officer' means any of the following: (1) a constable; (2) an immigration officer (ie a person appointed for the purposes of the Immigration Act 1971 Sch 2 para 1 (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 140); Terrorism Act 2000 s 121); and (3) an officer of Revenue and Customs (ie an officer commissioned by the Commissioners for Her Majesty's Revenue and Customs under the Customs and Excise Management Act 1979 s 6(3) (as amended) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 901)) designated for the purposes of the Terrorism Act 2000 Sch 7 (as amended) by the Secretary of State and the Commissioners for Her Majesty's Revenue and Customs; Terrorism Act 2000 s 53, Sch 7 para 1; Commissioners for Revenue and Customs Act 2005 s 50(1), (2), (7). As to the Commissioners for Her Majesty's Revenue and Customs and officers of Revenue and Customs see PARA 354 note 2 ante.

3 'Port' includes an airport and a hoverport: Terrorism Act 2000 Sch 7 para 1(2). A place is to be treated as a port for the purposes of Sch 7 (as amended) in relation to a person if an examining officer believes that the person has gone there for the purpose of embarking on a ship or aircraft, or has arrived there on disembarking from a ship or aircraft: Sch 7 para 1(3).

4 Is a place in Northern Ireland which is no more than one mile from the border with the Irish Republic or the first place in Northern Ireland at which a train from the Republic stops to allow passengers to leave: *ibid* Sch 7 paras 1(2), 4. An examining officer may also question a person who is in the border area for the purpose of determining whether his presence in the area is connected with his entering or leaving Northern Ireland: Sch 7 para 3.

5 For the meaning of 'Great Britain' see PARA 45 note 2 ante.

6 Terrorism Act 2000 Sch 7 para 2(1), (2) (amended by the Anti-terrorism, Crime and Security Act 2001 s 118(1), (2)). See note 8 *infra*.

7 'Ship' includes a hovercraft: Terrorism Act 2000 Sch 7 para 1(2).

8 *Ibid* Sch 7 para 2(1), (3) (amended by the Anti-terrorism, Crime and Security Act 2001 s 118(1), (3)). An examining officer may exercise this power whether or not he has grounds for suspecting that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism: Terrorism Act 2000 s 40(1) (b), Sch 7 para 2(4).

The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, SI 2003/2818, provides for the exercise of immigration control by the authorities of the United Kingdom and France in each other's sea ports. Part 2 (arts 3-10) contains provisions relating to the exercise of immigration control by French officers in a control zone in the United Kingdom. Part 3 (arts 11-16) contains provisions relating to the exercise of immigration control by immigration officers in a control zone in France. The provisions of the Terrorism Act 2000 Sch 7 paras 2, 5-9, 12-17 (as amended) apply, with some significant variations, in a control zone in the ports of Calais, Boulogne and Dunkirk under the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, SI 2003/2818, art 11(1), Sch 2 para 2.

The powers conferred by the Terrorism Act 2000 Sch 7 (as amended) are exercisable notwithstanding the rights conferred by the Immigration Act 1971 s 1 (general principles regulating entry into and staying in the United Kingdom: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 84 et seq): Terrorism Act 2000 s 53(3).

9 *Ibid* Sch 7 para 5.

10 See under *ibid* Sch 7 para 2 or 3: see the text and notes 1-8 *supra*.

11 *Ibid* Sch 7 para 6(1). For these purposes, 'vehicle' includes a train: Sch 7 para 1(2).

An examining officer may enter a vehicle (which, for these purposes, includes an aircraft, hovercraft, train or vessel: s 121) for the purpose of exercising any of the functions conferred on him by virtue of Sch 7 (as amended), and may if necessary use reasonable force for the purpose of exercising a power conferred on him by virtue of those provisions (apart from Sch 7 paras 2, 3 (see the text and notes 1-8 *supra*)): see s 115, Sch 14 paras 2, 3.

Information acquired by an officer may be supplied (1) to the Secretary of State for use in relation to immigration; (2) to the Commissioners for Her Majesty's Revenue and Customs or an officer of Revenue and Customs; (3) to a constable; (4) to the Director General of the Serious Organised Crime Agency; (5) to a person specified by order of the Secretary of State for use of a kind specified in the order: Terrorism Act 2000 Sch 14 para 4(1) (amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 125, 130); Commissioners for Revenue and Customs 2005 s 50(1), (2), (7). Information may be supplied in accordance with the Terrorism Act 2000 Sch 14 para 4(2) only if the information has not been held solely in the exercise of functions relating to former Inland Revenue matters (within the meaning of the Commissioners for Revenue and Customs Act 2005 s 7): s 17, Sch 2 para 19.

Information acquired by an officer of Revenue and Customs or an immigration officer may be supplied to an examining officer: Terrorism Act 2000 Sch 14 para 4(2); Commissioners for Revenue and Customs 2005 s 50(1), (2), (7).

An officer must perform functions conferred on him by virtue of the terrorist cash provisions in accordance with the code of practice about the exercise by officers of those functions which has been issued by the Secretary of State: Terrorism Act 2000 Sch 14 paras 5, 6(1) (amended by the Anti-terrorism, Crime and Security Act 2001 s 2(6)). The Code of Practice for Examining Officers was brought into force by the Terrorism Act 2000 (Code of Practice for Examining Officers) Order 2001, SI 2001/427. The code has been extended with variations to examining officers in a control zone by the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, SI 2003/2818, art 11(1), Sch 2 para 3. The failure by an officer to observe a provision of the code

does not of itself make him liable to criminal or civil proceedings: Terrorism Act 2000 Sch 14 para 6(2). The code is admissible in evidence in criminal and civil proceedings, and is to be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant: Sch 14 para 6(3).

The procedure for making a code of practice for examining officers is laid down by Sch 14 para 7. Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects does not apply to interviews under the Terrorism Act 2000 Sch 7 (as amended): Code F para 3.2.

12 Terrorism Act 2000 Sch 7 para 6(2).

13 The provisions of *ibid* Sch 8 apply: see Sch 7 para 6(3). The provisions of Sch 8 have effect (with modification) in the control zone (ie including the ports of Calais, Boulogne and Dunkirk) established by the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, SI 2003/2818: see art 2.

14 Terrorism Act 2000 Sch 7 para 6(4).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see *PARAS 477A-477D*.

### **430 Power to stop, question and detain**

NOTES 8, 11--SI 2003/2818 art 11(1) amended: SI 2006/1003, SI 2006/2908.

NOTE 11--Revised Code of Practice for Examining Officers brought into force by Terrorism Act 2000 (Code of Practice for Examining Officers) (Revision) Order 2009, SI 2009/1593.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vi) Port and Border Controls/431. Treatment of persons detained under the provisions relating to port and border controls.

#### **431. Treatment of persons detained under the provisions relating to port and border controls.**

Where a person is detained for questioning under the provisions relating to port and border controls<sup>1</sup>, he may be taken in the custody of an examining officer<sup>2</sup> or of a person acting under an examining officer's authority to and from any place where his attendance is required for the purpose of:

- 514 (1) his examination<sup>3</sup>;
- 515 (2) establishing his nationality or citizenship<sup>4</sup>; or
- 516 (3) making arrangements for his admission to a country or territory outside the United Kingdom<sup>5</sup>.

The Terrorism Act 2000 contains further provisions relating to the treatment of persons so detained for questioning<sup>6</sup>.

1 The provisions relating to the treatment of detained persons contained in the Terrorism Act 2000 Sch 8 paras 1-20 (as amended) (see PARA 421 ante) apply both to persons detained under s 41 (see PARAS 420-421 ante) and to persons detained under Sch 7 (as amended) (port and border controls): Sch 7 para 6(3).

2 For the meaning of 'examining officer' see PARA 430 note 2 ante.

3 ie his examination under the Terrorism Act 2000 Sch 7 (as amended): Sch 8 para 1(3)(a).

4 Ibid Sch 8 para 1(3)(b).

5 Ibid Sch 8 para 1(3)(c). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

6 See note 1 supra.

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vi) Port and Border Controls/432. Searches.

#### 432. Searches.

For the purpose of satisfying himself whether there are any persons whom he may wish to question under the power relating to port and border controls<sup>1</sup>, an examining officer<sup>2</sup> may search a ship<sup>3</sup> or aircraft<sup>4</sup>, anything on a ship or aircraft<sup>5</sup>, or anything which he reasonably believes has been, or is about to be, on a ship or aircraft<sup>6</sup>.

For the purpose of determining whether a person is or has been concerned in the commission, preparation or instigation of acts of terrorism<sup>7</sup>, an examining officer who questions a person under this power<sup>8</sup> may:

- 517 (1) search the person<sup>9</sup>;
- 518 (2) search anything which he has with him, or which belongs to him, and which is on a ship or aircraft<sup>10</sup>;
- 519 (3) search anything which he has with him, or which belongs to him, and which the examining officer reasonably believes has been, or is about to be, on a ship or aircraft<sup>11</sup>;
- 520 (4) search a ship or aircraft for anything falling within head (2) above<sup>12</sup>;
- 521 (5) search a vehicle which is on a ship or aircraft<sup>13</sup>; and
- 522 (6) search a vehicle which the examining officer reasonably believes has been, or is about to be, on a ship or aircraft<sup>14</sup>.

For the purpose of determining whether they have been used in the commission, preparation or instigation of acts of terrorism, an examining officer may examine: (a) goods<sup>15</sup> which have arrived in or are about to leave Great Britain or Northern Ireland on a ship or a vehicle<sup>16</sup>; and (b) goods which have arrived at or are about to leave Great Britain or Northern Ireland on an aircraft (whether the place they have come from or are going to is within or outside Great Britain or Northern Ireland)<sup>17</sup>.

An examining officer may authorise any person to carry out on his behalf a search or examination under any of the provisions<sup>18</sup> described above<sup>19</sup>.

1 le under the Terrorism Act 2000 s 53, Sch 7 para 2: see PARA 430 ante.

2 For the meaning of 'examining officer' see PARA 430 note 2 ante.

3 For the meaning of 'ship' see PARA 430 note 7 ante.

4 Terrorism Act 2000 Sch 7 para 7(a). The search powers contained in Sch 7 paras 7, 8 are compulsory and the object of the search cannot object; and they do not contravene the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 (the presumption of innocence) because they are proportionate to the threat terrorism can create and are justified in the interests of security and for the safety of the public: *R v Hundal*; *R v Dhalilwal* [2004] EWCA Crim 389, [2004] 2 Cr App Rep 307. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

An examining officer may enter a vehicle to carry out a search (Terrorism Act 2000 Sch 14 para 2) and may, if necessary, use reasonable force to do so or to conduct the search (Sch 14 para 3). There is also a power to



search in respect of a vehicle where the examining officer questions a person in the border area: see Sch 7 para 8(2). As to the meaning of 'vehicle' see PARA 430 note 11 ante.

5 Ibid Sch 7 para 7(b). See note 4 supra.

6 Ibid Sch 7 para 7(c). See note 4 supra.

7 Ie for the purposes of determining whether he falls within ibid s 40(1)(b) (see PARA 420 ante). As to the meaning of 'act' see PARA 394 note 1 ante. For the meaning of 'terrorism' see PARA 383 ante.

8 Ie under ibid Sch 7 para 2: see PARA 430 ante.

9 Ibid Sch 7 para 8(1)(a). See note 4 supra. A search of a person must be carried out by someone of the same sex: Sch 7 para 8(3).

10 Ibid Sch 7 para 8(1)(b). See note 4 supra.

11 Ibid Sch 7 para 8(1)(c). See note 4 supra.

12 Ibid Sch 7 para 8(1)(d). See note 4 supra.

13 Ibid Sch 7 para 8(1)(e) (Sch 7 para 8(1)(e), (f) added by the Terrorism Act 2006 s 29). See note 4 supra.

14 Terrorism Act 2000 Sch 7 para 8(1)(f) (as added: see note 13 supra). See note 4 supra.

15 'Goods' include property of any description, and containers: ibid Sch 7 para 9(3).

16 Ibid Sch 7 para 9(1), (2)(a) (Sch 7 para 9(2) substituted by the Anti-terrorism, Crime and Security Act 2001 s 118(1), (4)).

17 Terrorism Act 2000 Sch 7 para 9(1), (2)(b) (as substituted: see note 16 supra). An examining officer may board a ship or aircraft or enter a vehicle for the purpose of determining whether to exercise his power under these provisions: Sch 7 para 9(4). An examining officer may enter a vehicle to carry out a search (Sch 14 para 2) and may use reasonable force to do so or to conduct the search (Sch 14 para 3).

18 Ie under ibid Sch 7 paras 7-9 (as amended): see the text and notes 1-17 supra.

19 Ibid Sch 7 para 10(1). A person so authorised is to be treated as an examining officer for the purposes of Sch 7 paras 9(4), 11 (see note 17 supra; and PARA 433 post) and Sch 14 paras 2, 3 (see note 7 supra): Sch 7 para 10(2).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vi) Port and Border Controls/433. Detention of property.

### **433. Detention of property.**

Where a thing is given on request to an examining officer<sup>1</sup> by a person who is being questioned by him<sup>2</sup>, or is searched or found on a search under the provisions described above<sup>3</sup>, or is examined under those provisions<sup>4</sup>, an examining officer may detain it:

- 523 (1) for the purpose of examination, for a period not exceeding seven days beginning with the day on which the detention commences<sup>5</sup>;
- 524 (2) while he believes that it may be needed for use as evidence in criminal proceedings<sup>6</sup>; or
- 525 (3) while he believes that it may be needed in connection with a decision by the Secretary of State whether to make a deportation order under the Immigration Act 1971<sup>7</sup>.

1 For the meaning of 'examining officer' see PARA 430 note 2 ante.

2 Ie in accordance with the Terrorism Act 2000 s 53, Sch 7 para 5(d): see PARA 430 head (d) ante.

3 Ie under ibid Sch 7 para 8: see PARA 432 ante.

4 Ie under ibid Sch 7 para 9: see PARA 432 ante.

5 Ibid Sch 7 para 11(1), (2)(a).

6 Ibid Sch 7 para 11(1), (2)(b).

7 Ibid Sch 7 para 11(1), (2)(c). As to deportation orders see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 160.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vi) Port and Border Controls/434. Designated ports.

#### **434. Designated ports.**

Where a ship<sup>1</sup> or aircraft is employed to carry passengers for reward on a journey:

- 526 (1) to Great Britain from the Republic of Ireland, Northern Ireland or any of the Islands<sup>2</sup>;
- 527 (2) from Great Britain to any of those places<sup>3</sup>;
- 528 (3) to Northern Ireland from Great Britain, the Republic of Ireland or any of the Islands<sup>4</sup>; or
- 529 (4) from Northern Ireland to any of those places<sup>5</sup>,

the owners or agents of the ship or aircraft must not arrange for it to call at a port in Great Britain or Northern Ireland for the purpose of disembarking or embarking passengers unless the port is a designated port<sup>6</sup>, or an examining officer approves the arrangement<sup>7</sup>.

Where an aircraft is employed on such a journey<sup>8</sup>, otherwise than to carry passengers for reward, the captain<sup>9</sup> of the aircraft may not permit it to call at or leave a port in Great Britain or Northern Ireland unless the port is a designated port, or he gives at least 12 hours' notice in writing to a constable for the police area in which the port is situated (or, where the port is in Northern Ireland, to a member of the Police Service of Northern Ireland)<sup>10</sup>.

1 For the meaning of 'ship' see PARA 430 note 7 ante.

2 Terrorism Act 2000 s 53, Sch 7 para 12(1)(a). 'The Islands' means the Channel Islands and the Isle of Man: s 121.

3 Ibid Sch 7 para 12(1)(b).

4 Ibid Sch 7 para 12(1)(c).

5 Ibid Sch 7 para 12(1)(d).

6 The designated ports are those specified in the Table in Sch 7: see Sch para 12(4). They are:

60 (1) Great Britain seaports: Ardrossan; Cairnryan; Campbeltown; Fishguard; Fleetwood; Heysham; Holyhead; Pembroke Dock; Plymouth; Poole Harbour; Port of Liverpool; Portsmouth Continental Ferry Port; Southampton; Stranraer; Swansea; Torquay; Troon; Weymouth;

61 (2) Great Britain airports: Aberdeen; Biggin Hill; Birmingham; Blackpool; Bournemouth (Hurn); Bristol; Cambridge; Cardiff; Carlisle; Coventry; East Midlands; Edinburgh; Exeter; Glasgow; Gloucester/Cheltenham (Staverton); Humberside; Leeds/Bradford; Liverpool; London-City; London-Gatwick; London-Heathrow; Luton; Lydd; Manchester; Manston; Newcastle; Norwich; Plymouth; Prestwick; Sheffield City; Southampton; Southend; Stansted; Teesside;

62 (3) Northern Ireland seaports: Ballycastle; Belfast; Larne; Port of Londonderry; Warrenpoint;

63 (4) Northern Ireland airports: Belfast City; Belfast International; City of Derry.

The Secretary of State may by order add an entry to, or remove an entry from, the Table: see Sch 7 para 12(5). The power so to make an order is exercisable by statutory instrument: s 123(1). At the date at which this volume states the law no such order had been made.

- 7 Ibid Sch 7 para 12(2).
- 8 ie a journey described in heads (1)-(4) in the text.
- 9 ie the commander of the aircraft: Terrorism Act 2000 Sch 7 para 1(2).
- 10 Ibid Sch 7 para 12(3) (amended by the Police (Northern Ireland) Act 2000 s 78(2)(c)).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vi) Port and Border Controls/435. Restrictions on embarkation and disembarkation.

#### **435. Restrictions on embarkation and disembarkation.**

The Secretary of State may by notice in writing to the owners or agents of ships<sup>1</sup> or aircraft designate control areas in any port<sup>2</sup> in the United Kingdom<sup>3</sup>, or specify conditions for or restrictions on the embarkation or disembarkation of passengers in a control area<sup>4</sup>. Where owners or agents of a ship or aircraft receive such a notice in relation to a port they must take all reasonable steps to ensure, in respect of the ship or aircraft, that passengers do not embark or disembark at the port outside a control area, and that any specified conditions are met and any specified restrictions are complied with<sup>5</sup>.

Where a ship employed to carry passengers for reward, or an aircraft:

- 530 (1) arrives in Great Britain from the Republic of Ireland, Northern Ireland or any of the Islands<sup>6</sup>;
- 531 (2) arrives in Northern Ireland from Great Britain, the Republic of Ireland or any of the Islands<sup>7</sup>;
- 532 (3) leaves Great Britain for the Republic of Ireland, Northern Ireland or any of the Islands<sup>8</sup>; or
- 533 (4) leaves Northern Ireland for Great Britain, the Republic of Ireland or any of the Islands<sup>9</sup>,

the captain<sup>10</sup> must ensure:

- 534 (a) that passengers and members of the crew do not disembark at a port in Great Britain or Northern Ireland unless either they have been examined by an examining officer<sup>11</sup> or they disembark in accordance with arrangements approved by an examining officer<sup>12</sup>;
- 535 (b) that passengers and members of the crew do not embark at a port in Great Britain or Northern Ireland except in accordance with arrangements approved by an examining officer<sup>13</sup>;
- 536 (c) where a person is to be examined on board the ship or aircraft, that he is presented for examination in an orderly manner<sup>14</sup>.

1 As to the meaning of 'ship' see PARA 430 note 7 ante.

2 As to the meaning of 'port' see PARA 430 note 3 ante.

3 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4 Terrorism Act 2000 s 53, Sch 7 para 13(1). The Secretary of State may by notice in writing to persons concerned with the management of a port in the United Kingdom ('the port managers') (1) designate control areas in the port; (2) require the port managers to provide at their own expense specified facilities in a control area for the purposes of the embarkation or disembarkation of passengers or their examination under Sch 7 (as amended); (3) require conditions to be met and restrictions to be complied with in relation to the embarkation or disembarkation of passengers in a control area; (4) require the port managers to display, in specified locations in control areas, notices containing specified information about the provisions of Sch 7 (as amended) in such form as may be specified: Sch 7 para 14(1).

5 Ibid Sch 7 para 13(2). Where port managers receive notice under Sch 7 para 14(1) (see note 4 supra), they must take all reasonable steps to comply with any requirement set out in the notice: Sch 7 para 14(2).

6 Ibid Sch 7 para 15(1)(a). For the meaning of 'the Islands' see PARA 434 note 2 ante.

7 Ibid Sch 7 para 15(1)(b).

8 Ibid Sch 7 para 15(1)(c).

9 Ibid Sch 7 para 15(1)(d).

10 Ie the master of the ship or commander of the aircraft: ibid Sch 7 para 1(2).

11 For the meaning of 'examining officer' see PARA 430 note 2 ante.

12 Terrorism Act 2000 Sch 7 para 15(2)(a). Where the Immigration Act 1971 Sch 2 para 27 (disembarkation requirements on arrival in the United Kingdom: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 145) applies, the requirements of head (a) in the text are in addition to the requirements of Sch 2 para 27: Terrorism Act 2000 Sch 7 para 15(3).

13 Ibid Sch 7 para 15(2)(b).

14 Ibid Sch 7 para 15(2)(c).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vi) Port and Border Controls/436. Carding.

#### **436. Carding.**

A person who:

- 537 (1) disembarks in Great Britain<sup>1</sup> from a ship<sup>2</sup> or aircraft which has come from the Republic of Ireland, Northern Ireland or any of the Islands<sup>3</sup>;
- 538 (2) disembarks in Northern Ireland from a ship or aircraft which has come from Great Britain, the Republic of Ireland or any of the Islands<sup>4</sup>;
- 539 (3) embarks in Great Britain on a ship or aircraft which is going to the Republic of Ireland, Northern Ireland or any of the Islands<sup>5</sup>; or
- 540 (4) embarks in Northern Ireland on a ship or aircraft which is going to Great Britain, the Republic of Ireland or any of the Islands<sup>6</sup>,

must, if so required by an examining officer<sup>7</sup>, complete and produce to the officer a card containing such information in such form as an order made by the Secretary of State specifies<sup>8</sup>.

1 As to the meaning of 'Great Britain' see PARA 45 note 2 ante.

2 As to the meaning of 'ship' see PARA 430 note 7 ante.

3 Terrorism Act 2000 s 53, Sch 7 para 16(3)(a). For the meaning of 'the Islands' see PARA 434 note 2 ante.

4 Ibid Sch 7 para 16(3)(b).

5 Ibid Sch 7 para 16(3)(c).

6 Ibid Sch 7 para 16(3)(d).

7 For the meaning of 'examining officer' see PARA 430 note 2 ante.

8 Terrorism Act 2000 Sch 7 para 16(1). The Secretary of State has made the Terrorism Act 2000 (Carding) Order 2001, SI 2001/426, the Schedule to which indicates the information which a person who disembarks (Schedule Pt 1) or embarks (Schedule Pt 2) must return on the card and also specifies the form of the card.

An order under the Terrorism Act 2000 Sch 7 para 16 may require the owners or agents of a ship or aircraft employed to carry passengers for reward to supply their passengers with cards in the form required by virtue of Sch 7 para 16(1): Sch 7 para 16(2). At the date at which this volume states the law no such requirement had been made. The Secretary of State may by order repeal Sch 7 para 16: see s 53(2). An order under Sch 7 para 16 or under s 53(2) must be made by statutory instrument (see s 123(1)) and may not be made unless a draft has been laid before and approved by a resolution of each House of Parliament (see s 123(4)(b), (i)).

#### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.





Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vi) Port and Border Controls/437. Provision of passenger information.

#### **437. Provision of passenger information.**

If an examining officer<sup>1</sup> gives the owners or agents of a ship<sup>2</sup> or aircraft which (1) arrives or is expected to arrive in any place in the United Kingdom<sup>3</sup> (whether from another place in the United Kingdom or from outside the United Kingdom); or (2) leaves or is expected to leave the United Kingdom, a written<sup>4</sup> request<sup>5</sup> to provide specified information, the owners or agents must comply with the request as soon as is reasonably practicable<sup>6</sup>.

A passenger or member of the crew on a ship or aircraft must give the captain<sup>7</sup> any information required for the purpose of enabling the owners or agents to comply with such a request<sup>8</sup>.

1 For the meaning of 'examining officer' see PARA 430 note 2 ante.

2 As to the meaning of 'ship' see PARA 430 note 7 ante.

3 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4 For the meaning of 'written' see PARA 413 note 1 ante.

5 A request to an owner or agent may relate to a particular ship or aircraft, to all ships or aircraft of the owner or agent to which this provision applies, or to specified ships or aircraft: Terrorism Act 2000 s 53, Sch 7 para 17(3). Information may be specified in a request only if it is of a kind which is prescribed by order of the Secretary of State and which relates to passengers, to crew, to vehicles belonging to passengers or crew, or to goods: Sch 7 para 17(4) (amended by the Anti-terrorism, Crime and Security Act 2001 s 119(1), (3)).

The Secretary of State has made the Schedule 7 to the Terrorism Act 2000 (Information) Order 2002, SI 2002/1945, the Schedule to which prescribes the information for the purposes of the Terrorism Act 2000 Sch 7 para 17(4). An order under Sch 7 para 17(4) must be made by statutory instrument (see s 123(1)) and is subject to annulment in pursuance of a resolution of either House of Parliament (see s 123(2)). As the first order under Sch 7 para 17(4), the Schedule 7 to the Terrorism Act 2000 (Information) Order 2002, SI 2002/1945, was subject to the Terrorism Act 2000 s 123(3).

6 Ibid Sch 7 para 17(1), (2) (Sch 7 para 17(1) substituted by the Anti-terrorism, Crime and Security Act 2001 s 119(1), (2)). This does not require the provision of information which is required to be provided under or by virtue of the Immigration Act 1971 Sch 2 para 27(2) or Sch 2 para 27B (as added) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 145): Terrorism Act 2000 Sch 7 para 17(6).

7 For the meaning of 'captain' see PARA 435 note 10 ante.

8 Terrorism Act 2000 Sch 7 para 17(5). This does not require the provision of information which is required to be provided under or by virtue of the Immigration Act 1971 Sch 2 para 27(2) or Sch 2 para 27B (as added) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 145): Terrorism Act 2000 Sch 7 para 17(6).

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vi) Port and Border Controls/438. Offences in relation to port and border controls.

#### **438. Offences in relation to port and border controls.**

A person commits an offence if he:

- 541 (1) wilfully fails to comply with a duty imposed under or by virtue of the provisions relating to port and border controls<sup>1</sup>;
- 542 (2) wilfully contravenes a prohibition imposed under or by virtue of those provisions<sup>2</sup>; or
- 543 (3) wilfully obstructs, or seeks to frustrate, a search or examination under or by virtue of those provisions<sup>3</sup>.

Such an offence is a summary one, and is punishable by imprisonment for a term not exceeding three months<sup>4</sup> or a fine not exceeding level 4 on the standard scale or both<sup>5</sup>.

1 Terrorism Act 2000 s 53, Sch 7 para 18(1)(a). The port and border control provisions are contained in Sch 7 (as amended): see PARA 430 et seq ante.

2 Ibid Sch 7 para 18(1)(b).

3 Ibid Sch 7 para 18(1)(c).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks: see ibid Sch 7 para 18(2) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 55(1), (5)). At the date at which this volume states the law no such day had been appointed.

5 Terrorism Act 2000 Sch 7 para 18(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

An act or omission which constitutes such an offence is also an offence if it takes place in a control zone in France (see PARA 430 ante): Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, SI 2003/2818, art 12(4).

#### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

#### **438 Offences in relation to port and border controls**

NOTES 1-3--Where an offence under the Terrorism Act 2000 Sch 7 para 18 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

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## **(vii) Terrorist Offences**

### ***A. TRAINING, PREPARING AND ORGANISING***

#### **439. Terrorist training.**

A person commits an offence if he provides instruction<sup>1</sup> or training in the making or use of:

- 544 (1) firearms<sup>2</sup>;
- 545 (2) radioactive material or weapons designed or adapted for the discharge of any radioactive material<sup>3</sup>;
- 546 (3) explosives<sup>4</sup>; or
- 547 (4) chemical<sup>5</sup>, biological<sup>6</sup> or nuclear weapons<sup>7</sup>.

A person also commits an offence if he provides instruction or training<sup>8</sup> in:

- 548 (a) the making, handling or use of a noxious substance<sup>9</sup>, or of substances of a description of such substances<sup>10</sup>;
- 549 (b) the use of any method or technique for doing anything else that is capable of being done for the purposes of terrorism<sup>11</sup>, in connection with the commission or preparation of an act of terrorism<sup>12</sup> or Convention offence<sup>13</sup> or in connection with assisting the commission or preparation by another of such an act or offence<sup>14</sup>; or
- 550 (c) the design or adaptation for the purposes of terrorism, or in connection with the commission or preparation of an act of terrorism or Convention offence, of any method or technique for doing anything<sup>15</sup>,

and at the time he provides the instruction or training he knows that a person receiving it intends to use the skills in which he is being instructed or trained for or in connection with the commission or preparation of acts of terrorism or Convention offences<sup>16</sup> or for assisting the commission or preparation by others of such acts or offences<sup>17</sup>. A person also commits an offence if he receives instruction or training in:

- 551 (i) the making or use of firearms<sup>18</sup>;
- 552 (ii) the making or use of radioactive material or weapons designed or adapted for the discharge of any radioactive material<sup>19</sup>;
- 553 (iii) the making or use of explosives<sup>20</sup>;
- 554 (iv) the making or use of chemical, biological or nuclear weapons<sup>21</sup>; or
- 555 (v) any of the skills mentioned in heads (a) to (c) above<sup>22</sup> intending at the time of the instruction or training to use the skills in which he is being instructed or trained for or in connection with the commission or preparation of acts of terrorism or Convention offences<sup>23</sup> or for assisting the commission or preparation by others of such acts or offences<sup>24</sup>.

A person also commits an offence if he invites another to receive instruction or training<sup>25</sup> and the receipt would constitute any of the offences referred to under heads (i) to (iv) above<sup>26</sup>, or would constitute that offence but for the fact that it is to take place outside the United Kingdom<sup>27</sup>.

It is a defence for a person charged with any of the offences in relation to instruction or training referred to under heads (1) to (4) and (i) to (iv) above to prove<sup>28</sup> that his action or involvement was wholly for a purpose other than assisting, preparing for or participating in terrorism<sup>29</sup>.

A person guilty of an offence under these provisions<sup>30</sup> is liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both<sup>31</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>32</sup> or to a fine not exceeding the statutory maximum or to both<sup>33</sup>.

A court by or before which a person is convicted of an offence referred to under heads (1) to (4) and (i) to (iv) above may order the forfeiture of anything which the court considers to have been in the person's possession for purposes connected with the offence<sup>34</sup>.

1 'The provision of instruction' includes making instruction available either generally or to one or more specific persons: Terrorism Act 2000 s 54(4)(a); Terrorism Act 2006 s 20(1).

2 Terrorism Act 2000 s 54(1)(a). 'Firearm' includes an air gun or air pistol: s 121. See further note 7 infra.

3 Ibid s 54(1)(aa) (s 54(1)(aa), (2)(aa) added by the Anti-terrorism, Crime and Security Act 2001 s 120(1)). 'Radioactive material' means radioactive material capable of endangering life or causing harm to human health: Terrorism Act 2000 s 55 (definition added by the Anti-terrorism, Crime and Security Act 2001 s 120(2)(b)). See further note 7 infra.

4 Terrorism Act 2000 s 54(1)(b). 'Explosive' means: (1) an article or substance manufactured for the purpose of producing a practical effect by explosion; (2) materials for making an article or substance within head (1) supra; (3) anything used or intended to be used for causing or assisting in causing an explosion; and (4) a part of anything within head (1) or head (3) supra: s 121. See further note 7 infra.

5 'Chemical weapon' has the meaning given by the Chemical Weapons Act 1996 s 1 (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 473); Terrorism Act 2000 s 55.

6 'Biological weapon' means a biological agent or toxin (within the meaning of the Biological Weapons Act 1974) in a form capable of being of use for hostile purposes or anything to which s 1(1)(b) applies (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 469); Terrorism Act 2000 s 55 (definition added by the Anti-terrorism, Crime and Security Act 2001 s 120(2)(b)).

7 Terrorism Act 2000 s 54(1)(c).

Proceedings for this offence, and for the offences under the Terrorism Act 2000 s 54(2), (3) (see the text and notes 18-21, 27 infra), require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post.

8 It is irrelevant for the purposes of the offences created by the Terrorism Act 2006 s 6(1), (2) whether any instruction or training that is provided is provided to one or more particular persons or generally: s 6(4)(a).

9 For these purposes, 'noxious substance' means either a dangerous substance within the meaning of the Anti-terrorism, Crime and Security Act 2001 Pt 7 (ss 58-75) (see s 58(4), (5); and PARA 622 post) or any other substance which is hazardous or noxious or which may be or become hazardous or noxious only in certain circumstances; and 'substance' includes any natural or artificial substance (whatever its origin or method of production and whether in solid or liquid form or in the form of a gas or vapour) and any mixture of substances: Terrorism Act 2006 s 6(7).

10 Ibid s 6(1)(a), (3)(a).

11 For the meaning of 'terrorism' see PARA 383 ante.

12 'Act of terrorism' includes anything constituting an action taken for the purposes of terrorism, within the meaning of the Terrorism Act 2000 (see s 1(5); and PARA 383 ante); Terrorism Act 2006 s 20(2). For the meaning of 'act' see PARA 394 note 1 ante; definition applied by s 20(1).

13 For the meaning of 'Convention offence' see PARA 384 ante.

14 Terrorism Act 2006 s 6(3)(b). It is irrelevant for the purposes of the offences created by s 6(1), (2) whether the acts or offences in relation to which a person intends to use skills in which he is instructed or trained consist of one or more particular acts of terrorism or Convention offences, or acts of terrorism or Convention offences of a particular description, or acts of terrorism or Convention offences generally (s 6(4)(b)), and whether assistance that a person intends to provide to others is intended to be provided to one or more particular persons or to one or more persons whose identities are not yet known (s 6(4)(c)).

15 Ibid s 6(3)(c).

16 Ibid s 6(1)(b)(i).

17 Ibid s 6(1)(b)(ii). As to the making of forfeiture orders in respect of offences under s 6 see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 491.

18 Terrorism Act 2000 s 54(2)(a). See further note 7 supra.

19 Ibid s 54(2)(aa) (as added: see note 3 supra). See further note 7 supra.

20 Ibid s 54(2)(b) (as added: see note 3 supra). See further note 7 supra.

21 Ibid s 54(2)(c) (as added: see note 3 supra). See further note 7 supra.

22 Terrorism Act 2006 s 6(2)(a).

23 Ibid s 6(2)(b)(i).

24 Ibid s 6(2)(b)(ii).

25 An invitation to receive instruction or training may be either general or addressed to one or more specific persons: Terrorism Act 2000 s 54(4)(b).

26 Ie under ibid s 54(2): see the text and notes 18-21 supra.

27 Ibid s 54(3). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

28 This is one of the provisions to which ibid s 118(2) applies: see s 118(1), (5). Section 118(2) provides that if the person adduces evidence which is sufficient to raise an issue with respect to the matter, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

29 Ibid s 54(5).

30 Proceedings for an offence under the Terrorism Act 2006 Pt 1 (ss 1-20) may be instituted in England and Wales only with the consent of the Director of Public Prosecutions (s 19(1)(a)) unless it appears to the Director of Public Prosecutions that an offence under Pt 1 has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, in which event his consent may be given only with the permission of the Attorney General (s 19(2)(a)).

Where an offence under Pt 1 is committed by a body corporate and is proved to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body corporate (s 18(1)(a)) or a person who was purporting to act in any such capacity (s 18(1)(b)), he (as well as the body corporate) is guilty of that offence and is liable to be proceeded against and punished accordingly (s 18(1)). For this purpose, 'director', in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate: s 18(3).

31 Terrorism Act 2000 s 54(6)(a); Terrorism Act 2006 s 6(5)(a).

32 As from a day to be appointed this maximum term of imprisonment is increased, in the case of the offences referred to under heads (1)-(4) and (i)-(iv) in the text, to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

In the case of an offence committed after the commencement of the Criminal Justice Act 2003 s 154(1) (see MAGISTRATES) and falling within heads (a)-(c) and (v) in the text, the reference to six months is to be read as a reference to 12 months: see the Terrorism Act 2006 s 6(5)(b), (6).

33 Terrorism Act 2000 s 54(6)(b); Terrorism Act 2006 s 6(5)(b), (6). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to extra-territorial jurisdiction see PARA 472 post.

34 Terrorism Act 2000 s 54(7). Before making an order under s 54(7), a court must give an opportunity to be heard to any person, other than the convicted person, who claims to be the owner of or otherwise interested in anything which can be forfeited under s 54(7): s 54(8). An order under s 54(7) does not come into force until there is no further possibility of it being varied, or set aside, on appeal (disregarding any power of a court to grant leave to appeal out of time): s 54(9).

Where court makes an order under s 54 (as amended) for the forfeiture of anything, it may also make such other provision as appears to it to be necessary for giving effect to the forfeiture: s 120A(1) (s 120A added by the Terrorism Act 2006 s 37(3)). That provision may include, in particular, provision relating to the retention, handling, disposal or destruction of what is forfeited: Terrorism Act 2000 s 120A(2) (as so added). Provision so made may be varied at any time by the court that made it: s 120A(3) (as so added).

## UPDATE

### 383-477 Prevention of terrorism

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### 439 Terrorist training

NOTES 1-29--Where an offence under the Terrorism Act 2000 s 54 or the Terrorism Act 2006 s 6 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a), (c).

NOTE 7--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29).

NOTE 30--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2006 s 19(2) (amended by the Counter-Terrorism Act 2008 s 29).

NOTE 34--Terrorism Act 2000 s 54(7)-(9) repealed, s 120A substituted by the Counter-Terrorism Act 2008 s 38(1), Sch 3 para 2, Sch 9 Pt 3.

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#### **440. Attendance at place used for terrorist training.**

A person commits an offence if:

- 556 (1) he attends at any place, whether in the United Kingdom<sup>1</sup> or elsewhere<sup>2</sup>;
- 557 (2) while he is at that place, instruction or training in terrorism<sup>3</sup> is provided there<sup>4</sup>;
- 558 (3) instruction or training is provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism<sup>5</sup> or Convention offences<sup>6</sup>; and
- 559 (4) either: (a) the person in question knows or believes that instruction or training is being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism or Convention offences<sup>7</sup>; or (b) a person attending at that place throughout the period of that person's attendance could not reasonably have failed to understand that instruction or training was being provided there wholly or partly for such purposes<sup>8</sup>.

It is immaterial for these purposes whether the person concerned receives the instruction or training himself<sup>9</sup> and whether the instruction or training is provided for purposes connected with one or more particular acts of terrorism or Convention offences, or acts of terrorism or Convention offences of a particular description, or acts of terrorism or Convention offences generally<sup>10</sup>.

A person guilty of an offence under these provisions<sup>11</sup> is liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both<sup>12</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>13</sup> or to a fine not exceeding the statutory maximum<sup>14</sup> or to both<sup>15</sup>.

1 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 Terrorism Act 2006 s 8(1)(a).

3 ie instruction or training of the type mentioned in ibid s 6(1) (see PARA 439 ante) or the Terrorism Act 2000 s 54(1) (see PARA 439 ante).

4 Terrorism Act 2006 s 8(1)(b). References in s 8 to instruction or training being provided include references to its being made available: s 8(6).

5 For the meaning of 'terrorism' see PARA 383 ante; and for the meaning of 'act of terrorism' see PARA 439 note 12 ante.

6 Terrorism Act 2006 s 8(1)(c). For the meaning of 'Convention offence' see PARA 384 ante.

7 Ibid s 8(1)(d), (2)(a).

8 Ibid s 8(2)(b).

9 Ibid s 8(3)(a).

10 Ibid s 8(3)(b).



11 As to the institution of proceedings, and the liability of company directors, in connection with offences under the Terrorism Act 2006 see PARA 439 note 30 ante.

12 Ibid s 8(4)(a).

13 In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 154(1) (not yet in force) (see MAGISTRATES), this is to be read as a reference to 12 months: see the Terrorism Act 2006 s 8(4), (b), (5).

14 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

15 Terrorism Act 2006 s 8(4)(b), (5).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **440 Attendance at place used for terrorist training**

NOTES 1-8--Where an offence under the Terrorism Act 2006 s 8 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(c). As to the relevant knowledge required for an offence contrary to the 2006 Act s 8 see *R v Da Costa* [2009] EWCA Crim 482, [2009] All ER (D) 288 (Feb).

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#### **441. Directing terrorist organisation.**

A person commits an offence if he directs, at any level, the activities of an organisation<sup>1</sup> which is concerned in the commission of acts<sup>2</sup> of terrorism<sup>3</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for life or a shorter term<sup>4</sup>.

1 For the meaning of 'organisation' see PARA 386 note 2 ante.

2 As to the meaning of 'act' see PARA 394 note 1 ante.

3 Terrorism Act 2000 s 56(1). For the meaning of 'terrorism' see PARA 383 ante.

The offence is a lifestyle offence for the purposes of the Proceeds of Crime Act 2002 s 75(2)(a), Sch 2 para 3. In respect of a lifestyle offence the court may make a financial reporting order under the Serious Organised Crime and Police Act 2005 s 76 (not yet in force): SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

Proceedings for an offence under the Terrorism Act 2000 s 56 require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post. As to extra-territorial jurisdiction see PARA 472 post. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4 Terrorism Act 2000 s 56(2).

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

#### **441 Directing terrorist organisation**

NOTE 3--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). Where an offence under the Terrorism Act 2000 s 56 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

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#### **442. Possession of article for terrorist purposes.**

A person commits an offence if he possesses<sup>1</sup> an article<sup>2</sup> in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism<sup>3</sup>.

It is a defence for the defendant to prove<sup>4</sup> that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism<sup>5</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding fifteen years or to a fine or to both<sup>6</sup>, or on summary conviction to imprisonment for a term not exceeding six<sup>7</sup> months or to a fine not exceeding the statutory maximum or to both<sup>8</sup>.

1 If it is proved that an article (1) was on any premises at the same time as the defendant; or (2) was on premises of which the defendant was the occupier or which he habitually used otherwise than as a member of the public, the court may assume that the defendant possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it: Terrorism Act 2000 s 57(3). This is one of the provisions to which s 118(4) applies: see s 118(3), (5). Section 118(4) provides that if evidence is adduced which is sufficient to raise an issue with respect to the matter mentioned the court must treat it as proved unless the prosecution disproves it beyond reasonable doubt. For the meaning of 'premises' see PARA 408 note 19 ante.

2 As to the meaning of 'article' see PARA 427 note 18 ante.

3 Terrorism Act 2000 s 57(1). As to the meaning of 'act' see PARA 394 note 1 ante. For the meaning of 'terrorism' see PARA 383 ante. Proceedings for this offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4 This is one of the provisions to which the Terrorism Act 2000 s 118(2) applies: see s 118(1), (5). Section 118(2) provides that if the person adduces evidence which is sufficient to raise an issue with respect to the matter, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

5 Ibid s 57(2).

6 Ibid s 57(4)(a) (amended by the Terrorism Act 2006 s 13(1)). The maximum term of imprisonment is 10 years where the offence was committed before 13 April 2006 (ie the date on which s 13 was brought into force by the Terrorism Act 2006 (Commencement No 1) Order 2006, SI 2006/1013): Terrorism Act 2006 s 13(2).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Terrorism Act 2000 s 57(4). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to extra-territorial jurisdiction see PARA 472 post.

#### **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

#### **442 Possession of article for terrorist purposes**

NOTE 2--A document or record is 'an article' for the purposes of the offence of possessing an article for terrorist purposes: *R v Rowe* [2007] EWCA Crim 635, [2007] QB 975, [2007] 3 All ER 36. In that respect there is also no difference between a book and a CD: *R v M* [2007] All ER (D) 87 (Feb), CA.

NOTE 3--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). Where an offence under the Terrorism Act 2000 s 57 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a). Once proof of possession gives rise to a reasonable suspicion that the possession is for a terrorist purpose, no further proof is required of what the purpose is: *R v G*; *R v J* [2009] UKHL 13, [2010] 1 AC 43, [2009] 2 All ER 409. There must be a direct connection between the object possessed and the act of terrorism: *R v Zafar* [2008] EWCA Crim 184, [2008] QB 810, [2008] 4 All ER 46.

NOTE 8--An article that is the subject matter of an offence under the Terrorism Act 2000 s 57 is liable to forfeiture: see s 120A (substituted by the Counter-Terrorism Act 2008 s 38(1)).

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#### **443. Preparation of terrorist acts.**

A person commits an offence if with the intention of either committing acts of terrorism<sup>1</sup> or assisting another to commit such acts<sup>2</sup> he engages in any conduct in preparation for giving effect to his intention. It is irrelevant for these purposes whether the intention and preparations relate to one or more particular acts of terrorism, or acts of terrorism of a particular description, or acts of terrorism generally<sup>3</sup>. A person guilty of this offence<sup>4</sup> is liable on conviction on indictment to imprisonment for life<sup>5</sup>.

1 Terrorism Act 2006 s 5(1)(a). For the meaning of 'terrorism' see PARA 383 ante; and for the meaning of 'act of terrorism' see PARA 439 note 12 ante.

2 Ibid s 5(1)(b).

3 Ibid s 5(2).

4 As to the institution of proceedings, and the liability of company directors, in connection with offences under the Terrorism Act 2006 see PARA 439 note 30 ante.

5 Ibid s 5(3).

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

#### **443 Preparation of terrorist acts**

NOTES 1-3--Where an offence under the Terrorism Act 2006 s 5 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(c).

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## ***B. OFFENCES INVOLVING RADIOACTIVE DEVICES AND NUCLEAR FACILITIES***

### **444. Making and possession of radioactive devices and materials.**

For these purposes, 'radioactive device' means a nuclear weapon or other nuclear explosive device<sup>1</sup>, a radioactive material dispersal device, or a radiation-emitting device<sup>2</sup>; and 'radioactive material' means nuclear material<sup>3</sup> or any other radioactive substance which contains nuclides of a specified type<sup>4</sup> and is capable, owing to its radiological or fissile properties, of causing serious bodily injury to a person, causing serious damage to property, endangering a person's life, or creating a serious risk to the health or safety of the public<sup>5</sup>.

A person commits an offence if he makes or has in his possession a radioactive device<sup>6</sup>, or has in his possession radioactive material<sup>7</sup>, with the intention of using the device or material in the course of or in connection with the commission or preparation of an act of terrorism<sup>8</sup> or for the purposes of terrorism, or of making it available to be so used<sup>9</sup>. It is irrelevant for these purposes whether the act of terrorism to which an intention relates is a particular act of terrorism, or an act of terrorism of a particular description, or an act of terrorism generally<sup>10</sup>. A person guilty of an offence under these provisions<sup>11</sup> is liable on conviction on indictment to imprisonment for life<sup>12</sup>.

1 For these purposes, 'device' includes any of the following, whether or not fixed to land, namely, machinery, equipment, appliances, tanks, containers, pipes and conduits: Terrorism Act 2006 s 9(5).

2 Ibid ss 9(4), 10(4), 11(5).

3 For the meaning of 'nuclear material' for these purposes see the Nuclear Material (Offences) Act 1983 s 6; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583 (definition applied by the Terrorism Act 2006 s 9(5)).

4 Ie nuclides that undergo spontaneous disintegration in a process accompanied by the emission of one or more types of ionising radiation, such as alpha radiation, beta radiation, neutron particles or gamma rays: ibid s 9(4).

5 Ibid ss 9(4), 10(4), 11(5).

6 Ibid s 9(1)(a).

7 Ibid s 9(1)(b).

8 For the meaning of 'terrorism' see PARA 383 ante; and for the meaning of 'act of terrorism' see PARA 439 note 12 ante.

9 Terrorism Act 2006 s 9(1).

10 Ibid s 9(2).

11 As to the institution of proceedings, and the liability of company directors, in connection with offences under the Terrorism Act 2006 see PARA 439 note 30 ante.

12 Ibid s 9(3).

**UPDATE****383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

**444-446 Offences involving radioactive devices and nuclear facilities**

A court by or before which a person is convicted of an offence under the Terrorism Act 2006 s 9, 10 or 11 may make a forfeiture order in respect of the radioactive device, radioactive material or nuclear facility: see s 11A (added by the Counter-Terrorism Act 2008 s 38(3)).

**444 Making and possession of radioactive devices and materials**

NOTES 1-10--Where an offence under the Terrorism Act 2006 s 9, 10 or 11 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(c).

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#### **445. Misuse of radioactive devices and materials and damage to facilities.**

A person commits an offence if:

- 560 (1) he uses a radioactive device<sup>1</sup> or radioactive material<sup>2</sup> in the course of or in connection with the commission of an act of terrorism<sup>3</sup> or for the purposes of terrorism<sup>4</sup>; or
- 561 (2) in the course of or in connection with the commission of an act of terrorism or for the purposes of terrorism he uses or damages a nuclear facility<sup>5</sup> in a manner which either causes a release of radioactive material<sup>6</sup> or creates or increases a risk that such material will be released<sup>7</sup>.

A person guilty of an offence under these provisions<sup>8</sup> is liable on conviction on indictment to imprisonment for life<sup>9</sup>.

1 For the meaning of 'radioactive device' see PARA 444 ante.

2 For the meaning of 'radioactive material' see PARA 444 ante.

3 For the meaning of 'terrorism' see PARA 383 ante; and for the meaning of 'act of terrorism' see PARA 439 note 12 ante.

4 Terrorism Act 2006 s 10(1).

5 For these purposes, 'nuclear facility' means either a nuclear reactor, including a reactor installed in or on any transportation device for use as an energy source in order to propel it or for any other purpose, or a plant or conveyance being used for the production, storage, processing or transport of radioactive material: *ibid* ss 10(4), 11(5). 'Transportation device' means any vehicle or any space object (within the meaning of the Outer Space Act 1986: see s 13(1); and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 211): Terrorism Act 2006 s 10(5). For the meaning of 'nuclear reactor' see the Nuclear Installations Act 1965 s 26; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1487 (definition applied by the Terrorism Act 2006 s 10(5)).

6 *Ibid* s 10(2)(a).

7 *Ibid* s 10(2)(b).

8 As to the institution of proceedings, and the liability of company directors, in connection with offences under the Terrorism Act 2006 see PARA 439 note 30 ante.

9 *Ibid* s 10(3).

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.



**444-446 Offences involving radioactive devices and nuclear facilities**

A court by or before which a person is convicted of an offence under the Terrorism Act 2006 s 9, 10 or 11 may make a forfeiture order in respect of the radioactive device, radioactive material or nuclear facility: see s 11A (added by the Counter-Terrorism Act 2008 s 38(3)).

**445 Misuse of radioactive devices and materials and damage to facilities**

NOTES 1-7--Where an offence under the Terrorism Act 2006 s 10 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(c).

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**446. Terrorist threats relating to devices, materials or facilities.**

A person commits an offence if, in the course of or in connection with the commission of an act of terrorism<sup>1</sup> or for the purposes of terrorism:

562 (1) he makes a demand for the supply to himself or to another of a radioactive device<sup>2</sup> or of radioactive material<sup>3</sup>, for a nuclear facility<sup>4</sup> to be made available to himself or to another<sup>5</sup>, or for access to such a facility to be given to himself or to another<sup>6</sup>;

563 (2) he supports the demand with a threat that he or another will take action if the demand is not met<sup>7</sup>; and

564 (3) the circumstances and manner of the threat are such that it is reasonable for the person to whom it is made to assume that there is real risk that the threat will be carried out if the demand is not met<sup>8</sup>.

A person also commits an offence if:

565 (a) he makes a threat to use radioactive material<sup>9</sup>, a threat to use a radioactive device<sup>10</sup> or a threat to use or damage a nuclear facility in a manner that releases radioactive material or creates or increases a risk that such material will be released<sup>11</sup> in the course of or in connection with the commission of an act of terrorism or for the purposes of terrorism<sup>12</sup>; and

566 (b) the circumstances and manner of the threat are such that it is reasonable for the person to whom it is made to assume that there is real risk that the threat will be carried out, or would be carried out if demands made in association with the threat are not met<sup>13</sup>.

A person guilty of an offence under these provisions<sup>14</sup> is liable on conviction on indictment to imprisonment for life<sup>15</sup>.

1 For the meaning of 'terrorism' see PARA 383 ante; and for the meaning of 'act of terrorism' see PARA 439 note 12 ante.

2 For the meaning of 'radioactive device' see PARA 444 ante.

3 Terrorism Act 2006 s 11(1)(a)(i). For the meaning of 'radioactive material' see PARA 444 ante.

4 For the meaning of 'nuclear facility' see PARA 445 note 5 ante.

5 Terrorism Act 2006 s 11(1)(a)(ii).

6 Ibid s 11(1)(a)(iii).

7 Ibid s 11(1)(b).

8 Ibid s 11(1)(c).

9 Ibid s 11(3)(a).

10 Ibid s 11(3)(b).

11 Ibid s 11(3)(c).

12 Ibid s 11(2)(a).

13 Ibid s 11(2)(b).

14 As to the institution of proceedings, and the liability of company directors, in connection with offences under the Terrorism Act 2006 see PARA 439 note 30 ante.

15 Ibid s 11(4).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **444-446 Offences involving radioactive devices and nuclear facilities**

A court by or before which a person is convicted of an offence under the Terrorism Act 2006 s 9, 10 or 11 may make a forfeiture order in respect of the radioactive device, radioactive material or nuclear facility: see s 11A (added by the Counter-Terrorism Act 2008 s 38(3)).

### **446 Terrorist threats relating to devices, materials or facilities**

NOTES 1-13--Where an offence under the Terrorism Act 2006 s 11 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(c).

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### ***C. PROMOTION AND ENCOURAGEMENT OF TERRORISM***

#### **447. Collection of information.**

A person commits an offence if he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act<sup>1</sup> of terrorism<sup>2</sup>, or he possesses a document or record<sup>3</sup> containing information of that kind<sup>4</sup>.

It is a defence for the defendant to prove<sup>5</sup> that he had a reasonable excuse for his action<sup>6</sup> or possession<sup>7</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>8</sup> months or to a fine not exceeding the statutory maximum or to both<sup>9</sup>.

1 As to the meaning of 'act' see PARA 394 note 1 ante.

2 For the meaning of 'terrorism' see PARA 383 ante.

3 'Record' includes a photographic or electronic record: Terrorism Act 2000 s 58(2).

4 Ibid s 58(1). Proceedings for this offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 This is one of the provisions to which the Terrorism Act 2000 s 118(2) applies: see s 118(1), (5). Section 118(2) provides that if the person adduces evidence which is sufficient to raise an issue with respect to the matter, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

6 As to the meaning of 'action' see PARA 394 note 1 ante.

7 Terrorism Act 2000 s 58(3).

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 Terrorism Act 2000 s 58(4). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to extra-territorial jurisdiction see PARA 472 post.

A court by or before which a person is convicted of an offence under s 58 may order the forfeiture of any document or record containing information of the kind likely to be useful to a person committing or preparing an act of terrorism: s 58(1)(a), (5). Before making such an order a court must give an opportunity to be heard to any person, other than the convicted person, who claims to be the owner of or otherwise interested in anything which can be forfeited under s 58(5): s 58(6). An order under s 58(5) does not come into force until there is no further possibility of it being varied, or set aside, on appeal (disregarding any power of a court to grant leave to appeal out of time): s 58(7).

Where court makes an order under s 58 for the forfeiture of anything, it may also make such other provision as appears to it to be necessary for giving effect to the forfeiture: s 120A(1) (s 120A added by the Terrorism Act 2006 s 37(3)). That provision may include, in particular, provision relating to the retention, handling, disposal or destruction of what is forfeited: Terrorism Act 2000 s 120A(2) (as so added). Provision so made may be varied at any time by the court that made it: s 120A(3) (as so added).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **447 Collection of information**

TEXT AND NOTES--A person commits an offence who elicits or attempts to elicit information about an individual who is or has been a member of Her Majesty's forces, a member of the Security Service, the Secret Intelligence Service or GCHQ, or a constable, where that information is of a kind likely to be useful to a person committing or preparing an act of terrorism: Terrorism Act 2000 s 58A(1)(a), (4) (s 58A added by the Counter-Terrorism Act 2008 s 76(1)). Any document or record containing such information is liable to forfeiture: see the Terrorism Act 2000 s 120A (substituted by the Counter-Terrorism Act 2008 s 38(1)). A person commits an offence who publishes or communicates any such information: Terrorism Act 2000 s 58A(1)(a). It is a defence for a person charged with an offence under s 58A to prove that he had a reasonable excuse for his action: s 58A(2). A person guilty of an offence under s 58A is liable on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine, or to both, or on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both: s 58A(3). In relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 154(1), the maximum term on summary conviction is six months' imprisonment: Counter-Terrorism Act 2008 s 76(2). See also the Terrorism Act 2000 s 118 (amended by the Counter-Terrorism Act 2008 s 76(3)). Supplementary provision is made by the Terrorism Act 2000 Sch 8A (added by the Counter-Terrorism Act 2008 Sch 8) to ensure compliance with European Parliament and EC Council Directive 2000/31. See further Coroners and Justice Act 2009 s 143 (implementation of E-Commerce and Services directives: penalties).

NOTE 4--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29). Where an offence under the Terrorism Act 2000 s 58 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a). A defendant can be convicted of an offence under the Terrorism Act 2000 s 58(1)(a) or s 58(1)(b) only if he knew of the nature of the information collected, recorded or possessed and had control of it: *R v G*; *R v J* [2009] UKHL 13, [2009] 2 All ER 409. The offence is only committed if the document concerned was of a kind that was likely to provide practical assistance to such a person, rather than simply encouraging the commission of terrorist acts: *R v K* [2008] EWCA Crim 185, [2008] QB 827, [2008] 3 All ER 526. The fact that a document might be useful to persons other than terrorists does not take it outside the scope of s 58 provided it is not in every day use by ordinary members of the public: *R v Muhammed* [2010] EWCA Crim 227, [2010] All ER (D) 227 (Feb). See also *R v S* [2008] EWCA Crim 2177, [2009] 1 All ER 716; and POLICE vol 36(1) (2007 Reissue) PARA 517.

NOTE 7--The test for a reasonable excuse is an objective one. As the Terrorism Act 2000 s 58(1) does not require the defendant to have a terrorist purpose, the fact that the defendant's actions do not relate to terrorism does not mean that they are reasonable: *R v G; R v J* [2009] UKHL 13, [2009] 2 All ER 409.

NOTE 9--Terrorism Act 2000 s 58(5)-(7) repealed, s 120A substituted by the Counter-Terrorism Act 2008 s 38(1), Sch 3 para 3, Sch 9 Pt 3.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vii) Terrorist Offences/C. PROMOTION AND ENCOURAGEMENT OF TERRORISM/448. Encouragement and glorification of terrorism.

#### **448. Encouragement and glorification of terrorism.**

A person commits an offence if he publishes a statement<sup>1</sup> likely to be understood<sup>2</sup> by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism<sup>3</sup> or Convention offences<sup>4</sup>, or causes another to publish such a statement<sup>5</sup>. For these purposes, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which glorifies<sup>6</sup> the commission or preparation (whether in the past, in the future or generally) of such acts or offences<sup>7</sup> and is a statement from which those members of the public could reasonably be expected to infer<sup>8</sup> that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances<sup>9</sup>.

The offence is committed only if at the time the person publishes it or causes it to be published he either intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences<sup>10</sup> or is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences<sup>12</sup>; however, it is irrelevant<sup>13</sup> whether any matter in issue<sup>14</sup> relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, or of acts of terrorism or Convention offences of a particular description, or of acts of terrorism or Convention offences generally<sup>15</sup>, and whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence<sup>16</sup>.

A person guilty of this offence<sup>17</sup> is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both<sup>18</sup>, or on summary conviction to imprisonment for a term not exceeding or six months<sup>19</sup> or to a fine not exceeding the statutory maximum<sup>20</sup> or to both<sup>21</sup>.

1 In the Terrorism Act 2006 Pt 1 (ss 1-20), references to a 'statement' are references to a communication of any description, including a communication without words consisting of sounds or images or both: s 20(1), (6). References to a person's 'publishing' a statement are references to his publishing it in any manner to the public (s 20(1), (4)(a)), his providing electronically any service by means of which the public has access to the statement (s 20(4)(b)), or his using a service provided to him electronically by another so as to enable or to facilitate access by the public to the statement (s 20(4)(c)). In connection with electronic publication see also s 3; and PARA 450 post. References to 'the public' are references to the public of any part of the United Kingdom or of a country or territory outside the United Kingdom, or any section of the public (s 20(1), (3)(a)), and (except in s 9(4) (see PARA 444 ante)) also include references to a meeting or other group of persons which is open to the public (whether unconditionally or on the making of a payment or the satisfaction of other conditions) (s 20(3)(b)). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 For these purposes, the question of how a statement is likely to be understood must be determined having regard both to the contents of the statement as a whole (ibid s 1(4)(a)) and to the circumstances and manner of its publication (s 1(4)(b)).

3 For the meaning of 'terrorism' see PARA 383 ante; and for the meaning of 'act of terrorism' see PARA 439 note 12 ante.

4 For the meaning of 'Convention offence' see PARA 384 ante.

5 Terrorism Act 2006 s 1(1), (2)(a).

6 'Glorification' includes any form of praise or celebration; and cognate expressions are to be construed accordingly: *ibid* s 20(1).

7 *Ibid* s 1(3)(a).

8 For these purposes, the question of what members of the public could reasonably be expected to infer from a statement must be determined having regard both to the contents of the statement as a whole (*ibid* s 1(4)(a)) and to the circumstances and manner of its publication (s 1(4)(b)).

9 *Ibid* s 1(3)(b). In *ibid* Pt 1, references to 'conduct that should be emulated in existing circumstances' include references to conduct that is illustrative of a type of conduct that should be so emulated: s 20(7).

10 *Ibid* s 1(2)(b)(i). In proceedings for an offence under s 1 against a person in whose case it is not proved that he intended the statement directly or indirectly to encourage or otherwise induce the commission, preparation or instigation of acts of terrorism or Convention offences, it is a defence for him to show that the statement neither expressed his views nor had his indorsement (whether by virtue of s 3 (see PARA 450 post) or otherwise) (s 1(6)(a)) and that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under s 3(3) (see PARA 450 post)) did not have his indorsement (s 1(6)(b)).

11 *Ibid* s 1(2)(b)(ii).

13 *Ie* for the purposes of *ibid* s 1(1)-(3) (see the text and notes 1-11 *supra*).

14 *Ie* anything mentioned in *ibid* s 1(1)-(3) (see the text and notes 1-11 *supra*).

15 *Ibid* s 1(5)(a).

16 *Ibid* s 1(5)(b).

17 As to the institution of proceedings, and the liability of company directors, in connection with offences under the Terrorism Act 2006 see PARA 439 note 30 *ante*.

18 *Ibid* s 1(7)(a).

19 In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 154(1) (not yet in force) (see MAGISTRATES), this is to be read as a reference to 12 months: see the Terrorism Act 2006 s 1(7)(b), (8).

20 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

21 Terrorism Act 2006 s 1(7)(b), (8).

## UPDATE

### 383-477 Prevention of terrorism

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### 448-449 Encouragement and glorification of terrorism; Disseminating terrorist publications

The offences under the 2006 Act s 1 (encouragement and glorification of terrorism) and s 2 (disseminating terrorist publications) are extended so that those offences apply to United Kingdom established information society service providers in EEA states other than the United Kingdom, but proceedings for such an offence against information society service providers established in an EEA state other than the United Kingdom is restricted: see the Electronic Commerce Directive (Terrorism Act 2006)



Regulations 2007, SI 2007/1550, regs 3, 4. An information society service provider is not capable of being guilty of an offence under the 2006 Act s 1 or 2 where it merely provides conduit, caching or hosting services: see SI 2007/1550 regs 5-7.

#### **448 Encouragement and glorification of terrorism**

NOTES 1-16--Where an offence under the Terrorism Act 2006 s 1 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(c).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vii) Terrorist Offences/C. PROMOTION AND ENCOURAGEMENT OF TERRORISM/449. Disseminating terrorist publications.

#### **449. Disseminating terrorist publications.**

A publication<sup>1</sup> is a 'terrorist publication'<sup>2</sup> if matter contained in it is likely to be understood, by some or all of the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism<sup>3</sup> or to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them<sup>4</sup>.

A person commits an offence if he:

- 567 (1) distributes or circulates a terrorist publication<sup>5</sup>;
- 568 (2) gives, sells or lends<sup>6</sup> such a publication<sup>7</sup>;
- 569 (3) offers such a publication for sale or loan<sup>8</sup>;
- 570 (4) provides a service<sup>9</sup> to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale or loan<sup>10</sup>;
- 571 (5) transmits the contents of such a publication electronically<sup>11</sup>; or
- 572 (6) has such a publication in his possession with a view to its becoming the subject of conduct falling within any of heads (1) to (5) above<sup>12</sup>.

For these purposes, matter that is likely to be understood by a person as indirectly encouraging the commission or preparation of acts of terrorism includes any matter which glorifies<sup>13</sup> the commission or preparation (whether in the past, in the future or generally) of such acts<sup>14</sup> and is matter from which that person could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by him in existing circumstances<sup>15</sup>.

The offence is committed only if at the time the person engages in the conduct in question he:

- 573 (a) intends an effect of his conduct<sup>16</sup> to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism<sup>17</sup>;
- 574 (b) intends an effect of his conduct to be the provision of assistance in the commission or preparation of such acts<sup>18</sup>; or
- 575 (c) is reckless as to whether his conduct has an effect mentioned in head (a) or head (b) above<sup>19</sup>,

although it is irrelevant for these purposes<sup>20</sup> whether any relevant matter<sup>21</sup> is in relation to the commission, preparation or instigation of one or more particular acts of terrorism, or of acts of terrorism of a particular description, or of acts of terrorism generally<sup>22</sup>; and it is also irrelevant, in relation to matter contained in any article, whether any person is in fact encouraged or induced by that matter to commit, prepare or instigate acts of terrorism<sup>23</sup> or in fact makes use of it in the commission or preparation of such acts<sup>24</sup>.

A person guilty of this offence<sup>25</sup> is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both<sup>26</sup>, or on summary conviction to imprisonment for a term not exceeding or six months<sup>27</sup> or to a fine not exceeding the statutory maximum<sup>28</sup> or to both<sup>29</sup>.

1 For these purposes, 'publication' means an article or record of any description that contains any of the following, or any combination of them: matter to be read; matter to be listened to; and matter to be looked at or watched: Terrorism Act 2006 s 2(13). For the meanings of 'publish' and 'publication' generally see PARA 448 note 1 ante. 'Article' includes anything for storing data; and 'record' means a record so far as not comprised in an article, including a temporary record created electronically and existing solely in the course of, and for the purposes of, the transmission of the whole or a part of its contents: s 20(1). In connection with electronic publication see also s 3; and PARA 450 post. In Pt 1 (ss 1-20), references to what is 'contained in an article or record' include references to anything that is embodied or stored in or on it (s 20(8)(a)) and to anything that may be reproduced from it using apparatus designed or adapted for the purpose (s 20(8)(b)).

2 le in relation to conduct falling within ibid s 2(2) (see the text and notes 5-12 infra).

3 Ibid s 2(3)(a). For the meaning of 'terrorism' see PARA 383 ante; and for the meaning of 'act of terrorism' see PARA 439 note 12 ante. The question whether a publication is a 'terrorist publication' in relation to particular conduct must be determined as at the time of that conduct (s 2(5)(a)) and having regard both to the contents of the publication as a whole and to the circumstances in which that conduct occurs (s 2(5)(b)).

4 Ibid s 2(3)(b).

5 Ibid s 2(2)(a).

6 'Lend' includes let on hire; and 'loan' is to be construed accordingly: ibid s 2(13).

7 Ibid s 2(2)(b).

8 Ibid s 2(2)(c).

9 In ibid Pt 1, references to 'providing a service' include references to making a facility available; and references to a service provided to a person are to be construed accordingly: s 20(5).

10 Ibid s 2(2)(d).

11 Ibid s 2(2)(e). In connection with electronic publication see also s 3; and PARA 450 post.

12 Ibid s 2(2)(f).

13 For the meaning of 'glorification' see PARA 448 note 6 ante.

14 Terrorism Act 2006 s 2(4)(a).

15 Ibid s 2(4)(b).

16 References to the effect of a person's conduct in relation to a terrorist publication include references to an effect of the publication on one or more persons to whom it is or may become available as a consequence of that conduct: ibid s 2(6).

17 Ibid s 2(1)(a). Where the publication to which a person's conduct relates contained matter by reference to which it was a terrorist publication by virtue of s 2(3)(a) (see the text and notes 1-4 supra) (s 2(10)(a)) and that person is not proved to have engaged in that conduct with the intention specified in s 2(1)(a) (s 2(10)(b)), then in proceedings for an offence under s 2 against a person in respect of such conduct it is a defence for him to show that the matter by reference to which the publication in question was a terrorist publication neither expressed his views nor had his indorsement (whether by virtue of s 3 (see PARA 450 post) or otherwise) (s 2(9)(a)) and that it was clear, in all the circumstances of the conduct, that that matter did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under s 3(3) (see PARA 450 post)) did not have his indorsement (s 2(9)(b)).

18 Ibid s 2(1)(b).

19 Ibid s 2(1)(c).

20 le for the purposes of ibid s 2.

- 21 le anything mentioned in *ibid* s 2(1)-(4) (see the text and notes 1-19 *supra*).
- 22 *Ibid* s 2(7).
- 23 *Ibid* s 2(8)(a).
- 24 *Ibid* s 2(8)(b).
- 25 As to the institution of proceedings, and the liability of company directors, in connection with offences under the Terrorism Act 2006 see PARA 439 note 30 *ante*.
- 26 *Ibid* s 2(11)(a).
- 27 In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 154(1) (not yet in force) (see *MAGISTRATES*), this is to be read as a reference to 12 months: see the Terrorism Act 2006 s 2(11)(b), (12).
- 28 As to the statutory maximum see *SENTENCING AND DISPOSITION OF OFFENDERS* vol 92 (2010) PARA 140.
- 29 Terrorism Act 2006 s 2(11)(b), (12).

## UPDATE

### 383-477 Prevention of terrorism

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### 448-449 Encouragement and glorification of terrorism; Disseminating terrorist publications

The offences under the 2006 Act s 1 (encouragement and glorification of terrorism) and s 2 (disseminating terrorist publications) are extended so that those offences apply to United Kingdom established information society service providers in EEA states other than the United Kingdom, but proceedings for such an offence against information society service providers established in an EEA state other than the United Kingdom is restricted: see the Electronic Commerce Directive (Terrorism Act 2006) Regulations 2007, SI 2007/1550, regs 3, 4. An information society service provider is not capable of being guilty of an offence under the 2006 Act s 1 or 2 where it merely provides conduit, caching or hosting services: see SI 2007/1550 regs 5-7.

### 449 Disseminating terrorist publications

NOTES 1-24--Where an offence under the Terrorism Act 2006 s 2 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(c).

TEXT AND NOTES 25-29--As to the approach of the court when sentencing a defendant for dissemination of a terrorist publication, see *R v Rahman; R v Mohammed* [2008] EWCA Crim 1465, [2008] 4 All ER 661.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(vii) Terrorist Offences/C. PROMOTION AND ENCOURAGEMENT OF TERRORISM/450. Dissemination of terrorism-related material via the Internet.

#### **450. Dissemination of terrorism-related material via the Internet.**

For these purposes, a statement<sup>1</sup> or an article or record<sup>2</sup> is 'unlawfully terrorism-related' if it constitutes, or if matter contained in the article or record constitutes, either:

- 576 (1) something that is likely to be understood<sup>3</sup>, by any one or more of the persons to whom it has or may become available, as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism<sup>4</sup> or Convention offences<sup>5</sup>; or
- 577 (2) information which is likely to be useful to any one or more of those persons in the commission or preparation of such acts<sup>6</sup> and is in a form or context in which it is likely to be understood by any one or more of those persons as being wholly or mainly for the purpose of being so useful<sup>7</sup>.

A constable who forms the opinion that a statement encouraging terrorism<sup>8</sup> which is published or caused to be published in the course of or in connection with the provision or use of a service provided electronically<sup>9</sup>, or conduct involving the dissemination of terrorist publications<sup>10</sup> which was in the course of or in connection with the provision or use of such a service<sup>11</sup>, is unlawfully terrorism-related may give a notice to that effect<sup>12</sup> requiring a person ('the relevant person') to secure that the statement or the article or record, so far as it is so related, is not available to the public or is modified so as no longer to be so related<sup>13</sup>, failing which that person will be regarded as indorsing the statement or the article or record to which the conduct relates<sup>14</sup>.

Where such a notice has been given to the relevant person in respect of a statement, article or record and he has complied with it<sup>15</sup>, but he subsequently publishes or causes to be published a statement which is, or is for all practical purposes, the same or to the same effect as the statement to which the notice related, or to matter contained in the article or record to which it related (a 'repeat statement')<sup>16</sup>, the repeat statement is to be regarded also as having his indorsement<sup>17</sup> unless in proceedings for a relevant offence<sup>18</sup> he shows that he has, before that time, taken every step he reasonably could to prevent a repeat statement from becoming available to the public and to ascertain whether it does<sup>19</sup>, and either was unaware at that time of the publication of the repeat statement<sup>20</sup> or, having become aware of its publication, has taken every step that he reasonably could to secure that it either ceased to be available to the public or was modified<sup>21</sup>.

1 For the meaning of 'statement' see PARA 448 note 1 ante.

2 For the meanings of 'article' and 'record' see PARA 449 note 1 ante.

3 As to the determination of the question of how a statement is likely to be understood see PARA 448 note 1 ante.

4 For the meaning of 'terrorism' see PARA 383 ante; and for the meaning of 'act of terrorism' see PARA 439 note 12 ante.

5 Terrorism Act 2006 s 3(7)(a). For the meaning of 'Convention offence' see PARA 384 ante. The reference in s 3(7) to something that is 'likely to be understood as an indirect encouragement to the commission or preparation of acts of terrorism or Convention offences' includes anything which is likely to be understood as the glorification of the commission or preparation (whether in the past, in the future or generally) of such acts or such offences (s 3(8)(a)) and a suggestion that what is being glorified is being glorified as conduct that should be emulated in existing circumstances (s 3(8)(b)). For the meaning of 'glorification' see PARA 448 note 6 ante.

6 Ibid s 3(7)(b)(i).

7 Ibid s 3(7)(b)(ii).

8 Ie a statement likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences: see *ibid* s 1(1); and PARA 448 ante. As to 'publishing' a statement, and as to references to 'the public', see PARA 448 note 1 ante.

9 Ibid s 3(1)(a). As to references to the 'provision' of a service see PARA 449 note 9 ante.

10 Ie conduct falling within *ibid* s 2(2) (see PARA 449 ante). For the meaning of 'terrorist publication' see PARA 449 ante.

11 Ibid s 3(1)(b).

12 Ibid s 3(3)(a). A notice under s 3(3) may be given to a person only by delivering it to him in person (s 4(1)(a)) or by sending it to him by means of a postal service providing for delivery to be recorded, at his last known address (s 4(1)(b)), except: (1) in the case of a notice to be given to a body corporate, which may be given only by delivering it to the secretary of that body in person (s 4(2)(a)) or by sending it to the appropriate person, by means of a postal service providing for delivery to be recorded, at the address of the registered or principal office of the body (s 4(2)(b)); (2) in the case of a notice to be given to a firm, which may be given only by either delivering it to a partner of the firm in person (s 4(3)(a)), so delivering it to a person having the control or management of the partnership business (s 4(3)(b)), or sending it to the appropriate person, by means of a postal service providing for delivery to be recorded, at the address of the principal office of the partnership (s 4(3)(c)); or (3) in the case of a notice to be given to an unincorporated body or association, which may be given only by delivering it to a member of its governing body in person (s 4(4)(a)) or by sending it to the appropriate person, by means of a postal service providing for delivery to be recorded, at the address of the principal office of the body or association (s 4(4)(b)).

In the case of a company registered outside the United Kingdom, a firm carrying on business outside the United Kingdom or an unincorporated body or association with offices outside the United Kingdom, references above to its 'principal office' include references to its principal office within the United Kingdom (if any): s 4(5). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. In s 4, 'the appropriate person' means the body itself or its secretary (in the case of a body corporate), the firm itself or a partner of the firm or a person having the control or management of the partnership business (in the case of a firm), and the body or association itself or a member of its governing body (in the case of an unincorporated body or association): s 4(6). In s 4, 'secretary', in relation to a body corporate, means the secretary or other equivalent officer of the body: s 4(8).

13 Ibid s 3(3)(b). The notice must also warn the person in question that a failure to comply with it within two working days will result in the statement, article or record being regarded as having his indorsement (s 3(3)(c)); and must explain how, under s 3(4) (see the text and notes 15-16 *infra*), he may become liable by virtue of the notice if the statement, article or record becomes available to the public after he has complied with the notice (s 3(3)(d)). 'Working day' means any day other than a Saturday or a Sunday, Christmas Day or Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321) in any part of the United Kingdom: Terrorism Act 2006 s 3(9). For the purposes of s 3, the time at which a notice under s 3(3) is to be regarded as given is either the time at which it is delivered to a person (where it is so delivered) or the time recorded as the time of its delivery (where it is sent by a postal service providing for delivery to be recorded): s 4(7).

14 Ibid s 3(2). The cases in which the statement, or the article or record to which the conduct relates, is to be regarded as having the indorsement of the relevant person at any time include a case in which: (1) a constable has given him a notice under s 3(3) (see the text and notes 6-13 *supra*) (s 3(2)(a)); (2) that time falls more than two working days after the day on which the notice was given (s 3(2)(b)); and (3) the relevant person has failed, without reasonable excuse, to comply with the notice (s 3(2)(c)).

15 Ibid s 3(4)(a).

16 Ibid s 3(4)(b).

17     le the requirements of *ibid* s 3(2)(a)-(c) (see note 14 *supra*) are to be regarded as satisfied in the case of the repeat statement in relation to the times of its subsequent publication by the relevant person: s 3(4).

18     le an offence under *ibid* s 1 (see PARA 448 *ante*) or s 2 (see PARA 449 *ante*).

19     *Ibid* s 3(5)(a).

20     *Ibid* s 3(5)(b), (6)(a).

## **UPDATE**

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(viii) Police Powers/451. Police powers.

## **(viii) Police Powers**

### **451. Police powers.**

A power conferred by virtue of the Terrorism Act 2000 on a constable is additional to powers which he has at common law or by virtue of any other enactment, and does not affect those powers<sup>1</sup>.

A constable may, if necessary, use reasonable force for the purpose of exercising a power conferred on him by virtue of the Act<sup>2</sup>.

Where anything is seized by a constable under a power conferred by virtue of the Act, it may (unless the contrary intention appears) be retained for so long as is necessary in the circumstances<sup>3</sup>.

1 Terrorism Act 2000 s 114(1).

2 Ibid s 114(2). This power is in addition to the power to use reasonable force under the Criminal Law Act 1967 s 3 (see PARA 20 ante) or the Police and Criminal Evidence Act 1984 s 117 (see PARA 857 post). Note that the Terrorism Act 2000 s 114(2) does not apply to the power of a constable (as an examining officer) under Sch 7 para 2 (see PARA 430 ante); s 114(2).

3 Ibid s 114(3).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(viii) Police Powers/452. Ancillary provisions relating to powers to stop and search.

#### **452. Ancillary provisions relating to powers to stop and search.**

A power to search premises conferred by virtue of the Terrorism Act 2000 includes power to search a container<sup>1</sup>.

A power conferred by virtue of the Act to stop a person includes power to stop a vehicle<sup>2</sup> (other than an aircraft which is airborne)<sup>3</sup>.

A person commits an offence if he fails to stop a vehicle when required to do so by virtue of this provision<sup>4</sup>. This offence is punishable on summary conviction by imprisonment for a term not exceeding six months<sup>5</sup> or a fine not exceeding level 5 on the standard scale or both<sup>6</sup>.

1 Terrorism Act 2000 s 116(1).

2 As to the meaning of 'vehicle' see PARA 408 note 19 ante.

3 Terrorism Act 2000 s 116(2).

4 Ibid s 116(3).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

6 Terrorism Act 2000 s 116(4). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

#### **452 Ancillary provisions relating to powers to stop and search**

NOTE 4--Where an offence under the Terrorism Act 2000 s 116 is committed in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom and the offence may for all incidental purposes be treated as having been committed at any such place: Counter-Terrorism Act 2008 s 28(1), (2)(a).

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## **(ix) Notices made by the Secretary of State**

### **453. Evidence.**

A document which purports to be a notice or direction given or order<sup>1</sup> made by the Secretary of State for the purposes of a provision of the Terrorism Act 2000, and signed by him or on his behalf, is to be received in evidence and is, until the contrary is proved, deemed to have been given or made by the Secretary of State<sup>2</sup>.

A document bearing a certificate which purports to be signed by or on behalf of the Secretary of State, and which states that the document is a true copy of a notice or direction given or order<sup>3</sup> made by the Secretary of State for the purposes of a provision of the Terrorism Act 2000, is evidence of the document in legal proceedings<sup>4</sup>.

<sup>1</sup> 'Order' does not include a reference to an order made by statutory instrument: Terrorism Act 2000 s 120(3).

<sup>2</sup> Ibid s 120(1). The Documentary Evidence Act 1868 applies to an authorisation given in writing by the Secretary of State for the purposes of the Terrorism Act 2000 as it applies to an order made by him: s 120(4).

<sup>3</sup> See note 1 *supra*.

<sup>4</sup> Terrorism Act 2000 s 120(2).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(x) Control Orders

## **(x) Control Orders**

### **UPDATE**

#### **454-465 Control orders**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 549.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(xi) Freezing Orders

## **(xi) Freezing Orders**

### **UPDATE**

#### **466 Power of the Treasury to make freezing orders**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 549.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(xii) Forfeiture Orders

## **(xii) Forfeiture Orders**

### **UPDATE**

#### **467 Forfeiture orders**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 491.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(xiii) Taking of Hostages/468. Taking of hostages.

### **(xiii) Taking of Hostages**

#### **468. Taking of hostages.**

A person, whatever his nationality, who, in the United Kingdom<sup>1</sup> or elsewhere, detains any other person ('the hostage') and, in order to compel a state, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage is guilty of an offence and liable on conviction on indictment to imprisonment for life or for any shorter term<sup>2</sup>.

<sup>1</sup> For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

<sup>2</sup> Taking of Hostages Act 1982 s 1. Proceedings for such an offence may not, however, be instituted except by or with the consent of the Attorney General: s 2(1)(a). As to the effect of this limitation see PARA 1071 post.

#### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

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## **(xiv) Jurisdiction**

### **469. Inciting terrorism overseas.**

A person commits an offence if:

578 (1) he incites another person to commit an act<sup>1</sup> of terrorism<sup>2</sup> wholly or partly outside the United Kingdom<sup>3</sup>; and

579 (2) the act would, if committed in England and Wales, constitute one of the following offences<sup>4</sup>:

1

1. (a) murder<sup>5</sup>;
2. (b) an offence of wounding with intent under the Offences against the Person Act 1861<sup>6</sup>;
3. (c) an offence of administering poison under that Act<sup>7</sup>;
4. (d) an offence of causing bodily harm by an explosion under that Act<sup>8</sup>;
5. (e) an offence of endangering life by damaging property under the Criminal Damage Act 1971<sup>9</sup>.

2

It is immaterial whether or not the person incited is in the United Kingdom at the time of the incitement<sup>10</sup>.

A person guilty<sup>11</sup> of such an offence is liable to any penalty to which he would be liable on conviction of the offence listed which corresponds to the act which he incites<sup>12</sup>.

1 As to the meaning of 'act' see PARA 394 note 1 ante.

2 For the meaning of 'terrorism' see PARA 383 ante.

3 Terrorism Act 2000 s 59(1)(a). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4 Ibid s 59(1)(b).

5 Ibid s 59(2)(a). As to the offence of murder see PARA 89 et seq ante.

6 Ibid s 59(2)(b). As to wounding with intent see the Offences against the Person Act 1861 s 18 (as amended); and PARA 118 ante.

7 Terrorism Act 2000 s 59(2)(c). As to maliciously administering poison see the Offences against the Person Act 1861 ss 23, 24 (both as amended); and PARA 124 ante.

8 Terrorism Act 2000 s 59(2)(d). As to causing bodily harm by explosion see the Offences against the Person Act 1861 ss 28, 29 (both as amended); and PARAS 125-126 ante.

9 Terrorism Act 2000 s 59(2)(e). As to endangering life by damaging property see the Criminal Damage Act 1971 s 1(2); and PARA 334 ante.

10 Terrorism Act 2000 s 59(4).

11 Nothing in *ibid* s 59 imposes criminal liability on any person acting on behalf of, or holding office under, the Crown: s 59(5).

12 *Ibid* s 59(3). Proceedings for this offence require the consent of the Director of Public Prosecutions: s 117(1), (2)(a). Where, however, it appears to the Director of Public Prosecutions that an offence to which s 117 (as amended) applies has been committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom, his consent for these purposes may be given only with the permission of the Attorney General: s 117(2A) (added by the Terrorism Act 2006 s 37(2)). As to the effect of these restrictions see PARA 1071 post. As to extra-territorial jurisdiction see PARA 472 post.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **469 Inciting terrorism overseas**

NOTE 12--After 'committed' read 'outside the United Kingdom or': Terrorism Act 2000 s 117(2A) (amended by the Counter-Terrorism Act 2008 s 29).



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#### **470. Jurisdiction over terrorist bombing offences.**

A person is guilty of an offence if:

- 580 (1) he does anything outside the United Kingdom<sup>1</sup> as an act<sup>2</sup> of terrorism<sup>3</sup> or for the purposes of terrorism<sup>4</sup>; and  
 581 (2) his action<sup>5</sup> would, if it had been done in the United Kingdom, have constituted the commission of one of the following offences<sup>6</sup>:

3

6. (a) an offence of causing explosions under the Explosive Substances Act 1883<sup>7</sup>;  
 7. (b) an offence relating to biological agents, toxins or weapons under the Biological Weapons Act 1974<sup>8</sup>; and  
 8. (c) an offence relating to the chemical weapons under the Chemical Weapons Act 1996<sup>9</sup>.

4

1 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 As to the meaning of 'act' see PARA 394 note 1 ante.

3 For the meaning of 'terrorism' see PARA 383 ante.

4 Terrorism Act 2000 s 62(1)(a).

5 As to the meaning of 'action' see PARA 394 note 1 ante.

6 Terrorism Act 2000 s 62(1)(b).

7 Ibid s 62(2)(a). The offences referred to in the text are those under the Explosive Substances Act 1883 s 2 (as substituted), s 3 (as substituted and amended), s 5: see PARAS 127-128 ante; and EXPLOSIVES vol 17(2) (Reissue) PARAS 1022-1023, 1025.

8 Terrorism Act 2000 s 62(2)(b). The offence referred to in the text is an offence under the Biological Weapons Act 1974 s 1: see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 469.

9 Terrorism Act 2000 s 62(2)(c). The offence referred to in the text is an offence under the Chemical Weapons Act 1996 s 2: see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 474.

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

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#### **471. Jurisdiction over terrorist finance offences.**

A person is guilty of an offence if:

- 582 (1) he does anything outside the United Kingdom<sup>1</sup>; and
- 583 (2) his action<sup>2</sup> would have constituted an offence relating to terrorist property under the Terrorism Act 2000<sup>3</sup> if it had been done in the United Kingdom<sup>4</sup>.

1 Terrorism Act 2000 s 63(1)(a). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 As to the meaning of 'action' see PARA 394 note 1 ante.

3 Ie an offence under the Terrorism Act 2000 ss 15-18: see PARA 390 et seq ante.

4 Ibid s 63(1)(b). For the purposes of head (2) in the text, s 18(1)(b) (see PARA 393 ante) is to be read as if for 'the jurisdiction' there were substituted 'a jurisdiction': s 63(2).

#### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(xiv) Jurisdiction/472. Jurisdiction over other offences under the Terrorism Act 2000.

#### **472. Jurisdiction over other offences under the Terrorism Act 2000.**

If:

584 (1) a United Kingdom national<sup>1</sup> or a United Kingdom resident<sup>2</sup> does anything outside the United Kingdom<sup>3</sup>; and

585 (2) his action<sup>4</sup>, if done in any part of the United Kingdom, would have constituted a specified offence under the Terrorism Act 2000<sup>5</sup>,

he is guilty in that part of the United Kingdom of the offence<sup>6</sup>.

1 For these purposes (and for the purposes of the Terrorism Act 2000 ss 63B, 63C (as added) (see PARAS 474-475 post)), 'United Kingdom national' means an individual who is: (1) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British overseas citizen; (2) a person who under the British Nationality Act 1981 is a British subject; or (3) a British protected person within the meaning of that Act: Terrorism Act 2000 s 63A(2) (s 63A added by the Crime (International Co-operation) Act 2003 s 52)). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43; as to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 44-57; as to the status of British National (Overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 63-65; as to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 58-62; as to British subjects under the British Nationality Act 1981 see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 66-71; and as to British protected persons within the meaning of s 50(1) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 72-76. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 For these purposes (and for the purposes of the Terrorism Act 2000 ss 63B, 63C (as added) (see PARAS 474-475 post)), 'United Kingdom resident' means an individual who is resident in the United Kingdom: s 63A(3) (as added: see note 1 supra).

3 Ibid s 63A(1)(a) (as added: see note 1 supra).

4 As to the meaning of 'action' see PARA 394 note 1 ante.

5 Terrorism Act 2000 s 63A(1)(b) (as added (see note 1 supra); and amended by the Terrorism Act 2006 s 37(5), Sch 3). The offences referred to in the text are those under the Terrorism Act 2000 s 56 (directing terrorist organisations: see PARA 441 ante), s 57 (possession for terrorist purposes: see PARA 442 ante), s 58 (collection of information: see PARA 447 ante), s 59 (inciting in England and Wales terrorism overseas: see PARA 469 ante), ss 60, 61 (offences of inciting in Northern Ireland or Scotland terrorism overseas).

6 Ibid s 63A(1) (as added: see note 1 supra).

### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

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#### **473. Commission of offences abroad.**

If a person does anything outside the United Kingdom<sup>1</sup> and his action, if done in a part of the United Kingdom, would constitute a specified terrorist offence<sup>2</sup>, he is guilty in that part of the United Kingdom of the offence<sup>3</sup>. This is so irrespective of whether the person is a British citizen<sup>4</sup> or, in the case of a company, a company incorporated in a part of the United Kingdom<sup>5</sup>.

If a specified terrorist offence is committed wholly or partly outside the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom<sup>6</sup> and the offence may for all incidental purposes be treated as having been committed at any such place<sup>7</sup>.

1 Terrorism Act 2006 s 17(1)(a). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 Ibid s 17(1)(a). The specified terrorist offences for these purposes are:

64 (1) an offence under s 1 (see PARA 448 ante) or s 6 (see PARA 439 ante) so far as it is committed in relation to any statement, instruction or training in relation to which s 1 or s 6 (as the case may be) has effect by reason of its relevance to the commission, preparation or instigation of one or more Convention offences (s 17(2)(a));

65 (2) an offence under any of ss 8-11 (see PARAS 440, 444-446 ante) (s 17(2)(b));

66 (3) an offence under the Terrorism Act 2000 s 11(1) (membership of proscribed organisations: see PARA 387 ante) (Terrorism Act 2006 s 17(2)(c));

67 (4) an offence under the Terrorism Act 2000 s 54 (weapons training: see PARA 439 ante) (Terrorism Act 2006 s 17(2)(d));

68 (5) conspiracy to commit any of these offences (s 17(2)(e));

69 (6) inciting a person to commit such an offence (s 17(2)(f));

70 (7) attempting to commit such an offence (s 17(2)(g)); and

71 (8) aiding, abetting, counselling or procuring the commission of such an offence (s 17(2)(h)).

For the meaning of 'statement' see PARA 448 note 1 ante. For the meaning of 'Convention offence' see PARA 384 ante.

3 Ibid s 17(2).

4 As to British citizens see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 23 et seq.

5 Terrorism Act 2006 s 17(3).

6 Ibid s 17(4)(a).

7 Ibid s 17(4)(b).

#### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

#### **473 Commission of offences abroad**

NOTE 2--Head (6). See further Serious Crime Act 2007 Sch 6 para 52(a) (references to common law offence of incitement).

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#### **474. Jurisdiction over terrorist attacks abroad by United Kingdom nationals or residents.**

If:

- 586 (1) a United Kingdom national<sup>1</sup> or a United Kingdom resident<sup>2</sup> does anything outside the United Kingdom<sup>3</sup> as an act<sup>4</sup> of terrorism<sup>5</sup> or for the purposes of terrorism<sup>6</sup>; and
- 587 (2) his action<sup>7</sup>, if done in any part of the United Kingdom, would have constituted an offence listed below<sup>8</sup>,

he is guilty in that part of the United Kingdom of the offence<sup>9</sup>. The listed offences, in relation to the law of England and Wales, are:

- 588 (a) murder, manslaughter, rape, kidnapping, abduction<sup>10</sup> or false imprisonment<sup>11</sup>;
- 589 (b) the following offences under the Offences against the Person Act 1861: soliciting to murder<sup>12</sup>, threatening to kill<sup>13</sup>, wounding etc with intent<sup>14</sup>, unlawful wounding etc<sup>15</sup>, attempting to choke etc with intent<sup>16</sup>, administering etc chloroform etc to commit an indictable offence<sup>17</sup>, administering etc poison etc so as to endanger life etc<sup>18</sup>, administering etc poison etc with intent to injure etc<sup>19</sup>, injuring a person by explosives<sup>20</sup>, using explosives or corrosives with intent to do grievous bodily harm<sup>21</sup>, placing explosives near buildings or ships with intent to do grievous bodily harm<sup>22</sup>, or making gunpowder etc to commit offences against the person<sup>23</sup>;
- 590 (c) the following offences under the Forgery and Counterfeiting Act 1981: forgery<sup>24</sup>, copying a false instrument<sup>25</sup>, using a false instrument<sup>26</sup>, using a copy of a false instrument<sup>27</sup>, custody or control of certain false instruments, and manufacture, custody or control of equipment or materials with which such instrument may be made<sup>28</sup>;
- 591 (d) the following offences under the Criminal Damage Act 1971: destroying or damaging property belonging to another or destroying or damaging property, intending or being reckless as to endangerment to life<sup>29</sup>, or threats to destroy or damage property<sup>30</sup>.

1 For the meaning of 'United Kingdom national' see PARA 472 note 1 ante.

2 For the meaning of 'United Kingdom resident' see PARA 472 note 2 ante.

3 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4 As to the meaning of 'act' see PARA 394 note 1 ante.

5 For the meaning of 'terrorism' see PARA 383 ante.

6 Terrorism Act 2000 s 63B(1)(a) (s 63B added by the Crime (International Co-operation) Act 2003 s 52).

7 As to the meaning of 'action' see PARA 394 note 1 ante.

8 Terrorism Act 2000 s 63B(1)(b) (as added: see note 6 supra). The English and Welsh offences are listed in s 63B(2) (as added) (see heads (a)-(d) in the text). The list in s 63B(2) (as added) also includes offences under the law of Northern Ireland and Scotland: see s 63B(2)(d), (f), (g), (h) (as so added).

9 Ibid s 63B(1) (as added: see note 6 supra).

Proceedings for an offence which (disregarding the Internationally Protected Persons Act 1978, the Suppression of Terrorism Act 1978, the Nuclear Material (Offences) Act 1983, and the United Nations Personnel Act 1997) would not be an offence apart from the Terrorism Act 2000 s 63B, s 63C or s 63D (all as added) (see PARAS 475-476 post) are not to be started except by or with the consent of the Attorney General: Terrorism Act 2000 s 63E(1), (2) (s 63E added by the Crime (International Security) Act 2003 s 52). As to the effect of this limitation see PARA 1071 post.

10 As to the offences of murder, manslaughter, rape, and kidnapping see PARAS 89 et seq, 136, 165 et seq ante. The offences of abduction under the Sexual Offences Act 1956 were repealed by the Sexual Offences Act 2003 s 140, Sch 7. The reference to 'abduction' in the list of specified offences is to be construed as not including an offence of child abduction under the Child Abduction Act 1984: s 11(3) (amended by the Crime (International Co-operation) Act 2003 s 91, Sch 5 paras 9, 10).

11 Terrorism Act 2000 s 63B(2)(a) (as added: see note 6 supra).

12 Ie under the Offences against the Person Act 1861 s 4 (as amended): see PARA 104 ante.

13 Ie under ibid s 16 (as substituted): see PARA 105 ante.

14 Ie under ibid s 18 (as amended): see PARA 118 ante.

15 Ie under ibid s 20 (as amended): see PARA 120 ante.

16 Ie under ibid s 21 (as amended): see PARA 121 ante.

17 Ie under ibid s 22 (as amended): see PARA 122 ante.

18 Ie under ibid s 23 (as amended): see PARA 124 ante.

19 Ie under ibid s 24 (as amended): see PARA 124 ante.

20 Ie under ibid s 28 (as amended): see PARA 125 ante.

21 Ie under ibid s 29 (as amended): see PARA 126 ante.

22 Ie under ibid s 30 (as amended): see PARA 130 ante.

23 Terrorism Act 2000 s 63B(2)(b) (as added: see note 6 supra). The offence referred to in the text is one under the Offences against the Person Act 1861 s 64 (as amended): see PARA 711 post.

24 Ie under the Forgery and Counterfeiting Act 1981 s 1: see PARA 347 ante.

25 Ie under ibid s 2: see PARA 348 ante.

26 Ie under ibid s 3: see PARA 349 ante.

27 Ie under ibid s 4: see PARA 350 ante.

28 Terrorism Act 2000 s 63B(2)(c) (as added: see note 6 supra). The offence referred to in the text is one under the Forgery and Counterfeiting Act 1981 s 5 (as amended): see PARA 351 ante.

29 Ie under the Criminal Damage Act 1971 s 1: see PARA 334 ante.

30 Terrorism Act 2000 s 63B(2)(e) (as added: see note 6 supra). The offence referred to in the text is one under the Criminal Damage Act 1971 s 2: see PARA 337 ante.

## UPDATE

### 383-477 Prevention of terrorism

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

**474 Jurisdiction over terrorist attacks abroad by United Kingdom nationals or residents**

NOTE 10--See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).



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**475. Jurisdiction over terrorist attacks abroad on United Kingdom nationals, residents and diplomatic staff etc.**

If:

- 592 (1) a person does anything outside the United Kingdom<sup>1</sup> as an act<sup>2</sup> of terrorism<sup>3</sup> or for the purposes of terrorism<sup>4</sup>;
- 593 (2) his action<sup>5</sup> is done to, or in relation to, a United Kingdom national<sup>6</sup>, a United Kingdom resident<sup>7</sup> or a protected person<sup>8</sup>; and
- 594 (3) his action, if done in any part of the United Kingdom, would have constituted a listed offence<sup>9</sup>,

he is guilty in that part of the United Kingdom of the offence<sup>10</sup>. The listed offences, in relation to the law of England and Wales, are:

- 595 (a) murder, manslaughter, rape, kidnapping, abduction<sup>11</sup> or false imprisonment<sup>12</sup>;
- 596 (b) the following offences under the Offences against the Person Act 1861: soliciting to murder<sup>13</sup>, threatening to kill<sup>14</sup>, wounding etc with intent<sup>15</sup>, unlawful wounding etc<sup>16</sup>, attempting to choke etc with intent<sup>17</sup>, administering etc chloroform etc to commit an indictable offence<sup>18</sup>, administering etc poison etc so as to endanger life etc<sup>19</sup>, administering etc poison etc with intent to injure etc<sup>20</sup>, injuring a person by explosives<sup>21</sup>, using explosives or corrosives with intent to do grievous bodily harm<sup>22</sup>, placing explosives near buildings or ships with intent to do grievous bodily harm<sup>23</sup>, or making gunpowder etc to commit offences against the person<sup>24</sup>;
- 597 (c) the following offences under the Forgery and Counterfeiting Act 1981: forgery<sup>25</sup>, copying a false instrument<sup>26</sup>, using a false instrument<sup>27</sup>, using a copy of a false instrument<sup>28</sup>, custody or control of certain false instruments, and manufacture, custody or control of equipment or materials with which such instrument may be made<sup>29</sup>.

1 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 As to the meaning of 'act' see PARA 394 note 1 ante.

3 For the meaning of 'terrorism' see PARA 383 ante.

4 Terrorism Act 2000 s 63C(1)(a) (s 63C added by the Crime (International Co-operation) Act 2003 s 52).

5 As to the meaning of 'action' see PARA 394 note 1 ante.

6 For the meaning of 'United Kingdom national' see PARA 472 note 1 ante.

7 For the meaning of 'United Kingdom resident' see PARA 472 note 2 ante.

8 Terrorism Act 2000 s 63C(1)(b) (as added: see note 4 supra). For these purposes and for the purposes of s 63D (as added) (see PARA 476 post), a person is a 'protected person' if: (1) he is a member of a United Kingdom diplomatic mission within the meaning of the Convention on Diplomatic Relations (Vienna, 2 March to 14 April

1961; Misc 6 (1961); Cmnd 1368) art 1(b) (as that article has effect in the United Kingdom by virtue of the Diplomatic Privileges Act 1964 s 2, Sch 1); (2) he is a member of a United Kingdom consular post within the meaning of the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmnd 5219) art 1(g) (as that article has effect in the United Kingdom by virtue of the Consular Relations Act 1968 s 1, Sch 1); (3) he carries out functions for the purposes of the European Medicines Agency; or (4) he carries out any functions for the purposes of a body specified in an order made by the Secretary of State: Terrorism Act 2000 s 63C(3) (as so added; and amended by the Medicines (Marketing Authorisations and Miscellaneous Amendments) Regulations 2004, SI 2004/3224, reg 4). As to the Convention on Diplomatic Relations see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 266 et seq; and as to the Convention on Consular Relations see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 290 et seq.

The Secretary of State may specify a body under head (4) *supra* only if it is established by or under the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) or the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485), and the principal place in which its functions are carried out is a place in the United Kingdom: Terrorism Act 2000 s 63C(4) (as so added).

If in any proceedings a question arises as to whether a person is or was a protected person, a certificate issued by or under the authority of the Secretary of State, and stating any fact relating to the question, is conclusive evidence of that fact: s 63C(5) (as so added).

9 Ibid s 63C(1)(c) (as added: see note 4 *supra*).

10 Ibid s 63C(1) (as added: see note 4 *supra*). It is immaterial whether a person knows that another person is a United Kingdom national or United Kingdom resident or a protected person: s 63E(3) (added by the Crime (International Co-operation) Act 2003 s 52). As to starting proceedings see PARA 474 *ante*.

The English and Welsh offences are listed in the Terrorism Act 2000 s 63C(2) (as added) (see heads (a)-(c) in the text). The list in s 63C(2) (as added) also includes offences under the law of Northern Ireland and Scotland: see s 63C(2)(a), (d) (as so added).

11 As to the offences of murder, manslaughter, rape, and kidnapping see PARAS 89 et seq, 136, 165 et seq *ante*. The offences of abduction under the Sexual Offences Act 1956 were repealed by the Sexual Offences Act 2003 s 140, Sch 7. The reference to 'abduction' in the list of specified offences is to be construed as not including an offence of child abduction under the Child Abduction Act 1984: s 11(3) (amended by the Crime (International Co-operation) Act 2003 s 91, Sch 5 paras 9, 10).

12 Terrorism Act 2000 s 63C(2)(a) (as added: see note 4 *supra*).

13 *Ie* under the Offences against the Person Act 1861 s 4 (as amended): see PARA 104 *ante*.

14 *Ie* under *ibid* s 16 (as substituted): see PARA 105 *ante*.

15 *Ie* under *ibid* s 18 (as amended): see PARA 118 *ante*.

16 *Ie* under *ibid* s 20 (as amended): see PARA 120 *ante*.

17 *Ie* under *ibid* s 21 (as amended): see PARA 121 *ante*.

18 *Ie* under *ibid* s 22 (as amended): see PARA 122 *ante*.

19 *Ie* under *ibid* s 23 (as amended): see PARA 124 *ante*.

20 *Ie* under *ibid* s 24 (as amended): see PARA 124 *ante*.

21 *Ie* under *ibid* s 28 (as amended): see PARA 125 *ante*.

22 *Ie* under *ibid* s 29 (as amended): see PARA 126 *ante*.

23 *Ie* under *ibid* s 30 (as amended): see PARA 130 *ante*.

24 Terrorism Act 2000 s 63C(2)(b) (as added: see note 4 *supra*). The offence referred to in the text is one under the Offences against the Person Act 1861 s 64 (as amended): see PARA 711 *post*.

25 *Ie* under the Forgery and Counterfeiting Act 1981 s 1: see PARA 347 *ante*.

26 *Ie* under *ibid* s 2: see PARA 348 *ante*.

27 *Ie* under *ibid* s 3: see PARA 349 *ante*.

28     le under *ibid* s 4: see PARA 350 ante.

29     Terrorism Act 2000 s 63C(2)(c) (as added: see note 6 *supra*). The offence referred to in the text is one under the Forgery and Counterfeiting Act 1981 s 5(1), (3): see PARA 351 ante.

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **475 Jurisdiction over terrorist attacks abroad on United Kingdom nationals, residents and diplomatic staff etc**

NOTE 11--See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(xiv) Jurisdiction/476. Jurisdiction over terrorist attacks and threats abroad in connection with United Kingdom diplomatic premises etc.

**476. Jurisdiction over terrorist attacks and threats abroad in connection with United Kingdom diplomatic premises etc.**

If:

- 598 (1) a person does anything outside the United Kingdom<sup>1</sup> as an act<sup>2</sup> of terrorism<sup>3</sup> or for the purposes of terrorism<sup>4</sup>;
- 599 (2) his action<sup>5</sup> is done in connection with an attack on relevant premises<sup>6</sup> or on a vehicle<sup>7</sup> ordinarily used by a protected person<sup>8</sup>;
- 600 (3) the attack is made when a protected person is on or in the premises or vehicle<sup>9</sup>; and
- 601 (4) his action, if done in any part of the United Kingdom, would have constituted a listed offence<sup>10</sup>,

he is guilty in that part of the United Kingdom of the offence<sup>11</sup>. For the purposes of the law of England and Wales the only offence listed is that of destroying or damaging property contrary to the Criminal Damage Act 1971<sup>12</sup>.

If:

- 602 (a) a person does anything outside the United Kingdom as an act of terrorism or for the purposes of terrorism<sup>13</sup>;
- 603 (b) his action consists of a threat of an attack on relevant premises or on a vehicle ordinarily used by a protected person<sup>14</sup>;
- 604 (c) the attack is threatened to be made when a protected person is, or is likely to be, on or in the premises or vehicle<sup>15</sup>; and
- 605 (d) his action, if done in any part of the United Kingdom, would have constituted a listed offence<sup>16</sup>,

he is guilty in that part of the United Kingdom of the offence<sup>17</sup>. For the purposes of the law of England and Wales the only offence listed is that of threatening to destroy or damage property contrary to the Criminal Damage Act 1971<sup>18</sup>.

1 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 As to the meaning of 'act' see PARA 394 note 1 ante.

3 For the meaning of 'terrorism' see PARA 383 ante.

4 Terrorism Act 2000 s 63D(1)(a) (s 63D added by the Crime (International Co-operation) Act 2003 s 52).

5 As to the meaning of 'action' see PARA 394 note 1 ante.

6 'Relevant premises' means premises at which a protected person resides or is staying, or premises which a protected person uses for the purpose of carrying out his functions as such a person: Terrorism Act 2000 s 63D(5) (as added: see note 4 supra). The definition of 'premises' in s 121 (see PARA 408 note 19 ante) does not

apply to s 63D (as added): see s 121 (definition amended by the Crime (International Co-operation) Act 2003 s 91(1), Sch 5 paras 75, 76).

7 As to the meaning of 'vehicle' see PARA 408 note 19 ante.

8 Terrorism Act 2000 s 63D(1)(b) (as added: see note 4 supra). For the meaning of 'protected person' see PARA 475 note 8 ante.

9 Ibid s 63D(1)(c) (as added: see note 4 supra).

10 Ibid s 63D(1)(d) (as added: see note 4 supra).

11 Ibid s 63D(1) (as added: see note 4 supra). It is immaterial whether a person knows that another person is a United Kingdom national or United Kingdom resident or a protected person: s 63E(3) (s 63E added by the Crime (International Co-operation) Act 2003 s 52). As to starting proceedings see PARA 474 ante.

The English and Welsh offences are listed in the Terrorism Act 2000 s 63D(2) (as added) (see the text to note 12 infra). The list in s 63D(2) (as added) also includes offences under the law of Northern Ireland and Scotland: see s 63D(2)(b), (c), (d) (as so added).

12 Ibid s 63D(2)(a) (as added: see note 4 supra). As to the offence of destroying or damaging property under the Criminal Damage Act 1971 s 1 see PARA 334 ante.

13 Terrorism Act 2000 s 63D(3)(a) (as added: see note 4 supra).

14 Ibid s 63D(3)(b) (as added: see note 4 supra).

15 Ibid s 63D(3)(c) (as added: see note 4 supra).

16 Ibid s 63D(3)(d) (as added: see note 4 supra).

17 Ibid s 63D(3) (as added: see note 4 supra). It is immaterial whether a person knows that another person is a United Kingdom national or United Kingdom resident or a protected person: s 63E(3) (as added: see note 11 supra). As to starting proceedings see PARA 474 ante.

The English and Welsh offences are listed in the Terrorism Act 2000 s 63D(4) (as added) (see the text to note 18 infra). The list in s 63D(4) (as added) also includes offences under the law of Northern Ireland and Scotland: see s 63D(4)(b), (c) (as so added).

18 Ibid s 63D(4)(a) (as added: see note 4 supra).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(xiv) Jurisdiction/477. Attacks and threats of attacks on protected persons.

#### **477. Attacks and threats of attacks on protected persons.**

If a person<sup>1</sup> does outside the United Kingdom (1) any act<sup>2</sup> to or in relation to a protected person<sup>3</sup> which, if he had done it in any part of the United Kingdom, would have made him guilty of a specified offence<sup>4</sup>; or (2) in connection with an attack on any relevant premises<sup>5</sup> or on any vehicle<sup>6</sup> ordinarily used by a protected person which is made when a protected person is on or in the premises or vehicle, any act which, if he had done it in any part of the United Kingdom, would have made him guilty of a specified offence<sup>7</sup>, he is in any part of the United Kingdom guilty of such offences of which the act would have made him guilty if he had done it there<sup>8</sup>.

If a person<sup>9</sup> in the United Kingdom or elsewhere (a) attempts to commit an offence which, by virtue of the above provisions, is an offence mentioned in head (1) above against a protected person or an offence mentioned in head (2) above in connection with an attack so mentioned; or (b) aids, abets, counsels or procures, or is art and part in, the commission of such an offence, he is in any part of the United Kingdom guilty of attempting to commit the offence in question or, as the case may be, of aiding, abetting, counselling or procuring, or being art and part in, the commission of the offence or attempt in question<sup>10</sup>.

If a person<sup>11</sup> in the United Kingdom or elsewhere (i) makes to another person a threat that any person will do any act which is an offence mentioned in head (a) above; or (ii) attempts to make or aids, abets, counsels or procures or is art and part in the making of such a threat to another person, with the intention that the other person shall fear that the threat will be carried out, the person who makes the threat or, as the case may be, who attempts to make it or aids, abets, counsels or procures it or is art and part in the making of it is in any part of the United Kingdom guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years and not exceeding the term of imprisonment to which a person would be liable for the offence constituted by doing the act threatened at the place where the conviction occurs and at the time of the offence to which the conviction relates<sup>12</sup>.

For the purposes of the above provisions it is immaterial whether a person knows that another person is a protected person<sup>13</sup>.

Proceedings for an offence which (disregarding the provisions of the Suppression of Terrorism Act 1978, the Nuclear Materials (Offences) Act 1983, the United Nations Personnel Act 1993 and the Terrorism Act 2000) would not be an offence apart from the provisions set out above must not be begun except by or with the consent of the Attorney General<sup>14</sup>.

1 The Internationally Protected Persons Act 1978 refers to a person 'whether a citizen of the United Kingdom and colonies or not'. Under the British Nationality Act 1981 this form of citizenship has been abolished: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 8, 16 et seq. As to British nationality generally see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 7 et seq. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 For these purposes, 'act' includes omission: Internationally Protected Persons Act 1978 s 1(5).

3 For these purposes, 'a protected person' means, in relation to an alleged offence, any of the following:

72 (1) a person who, at the time of the alleged offence, is a head of state, a member of a body which performs the functions of head of state under the constitution of the state, a head of

government or a minister for foreign affairs, and is outside the territory of the state in which he holds office (ibid s 1(5));

- 73 (2) a person who, at the time of the alleged offence, is a representative or official of a state or an official or agent of an international organisation of an inter-governmental character, is entitled under international law to special protection from attack on his person, freedom or dignity, and does not fall within head (1) supra (s 1(5));
- 74 (3) a person who, at the time of the alleged offence, is a member of the family of another person mentioned in either of heads (1) and (2) supra, and (a) if the other person is mentioned in head (1) supra, is accompanying him; (b) if the other person is mentioned in head (2) supra, is a member of his household (s 1(5)).

If in any proceedings a question arises as to whether a person is or was a protected person, a certificate issued by or under the authority of the Secretary of State and stating any fact relating to the question is conclusive evidence of that fact: s 1(5).

4 For the purposes of head (1) in the text, the specified offences are: murder (see PARA 89 et seq ante); manslaughter (see PARA 92 et seq ante); culpable homicide (an offence under Scottish law); assault occasioning actual bodily harm (see PARA 149 ante) or assault causing injury (an offence under Scottish law); kidnapping (see PARA 136 ante); abduction (see infra); false imprisonment (see PARA 135 ante) or plagium (an offence under Scottish law); or an offence under the Offences against the Person Act 1861 s 18 (as amended) (see PARA 118 ante), s 20 (as amended) (see PARA 120 ante), s 21 (as amended) (see PARA 121 ante), s 22 (as amended) (see PARA 122 ante), s 23 (as amended) (see PARA 124 ante), s 24 (as amended) (see PARA 124 ante), s 28 (as amended) (see PARA 125 ante), s 29 (as amended) (see PARA 126 ante), s 30 (as amended) (see PARA 130 ante) or the Explosive Substances Act 1883 s 2 (see PARA 127 ante) or an offence listed in the Internationally Protected Persons Act 1978 s 1(1A) (as added): s 1(1)(a) (amended by the Sexual Offences Act 2003, s 139 Sch 6 para 22). The Internationally Protected Persons Act 1978 s 1(1A) (as added) lists the following offences: in Scotland or Northern Ireland: rape; in England and Wales: an offence under the Sexual Offences Act 2003 s 1 or s 2 (see PARAS 165, 167 ante); an offence under s 4, where the activity caused involved penetration within s 4(4) (a)-(d) (see PARA 171 ante); an offence under s 5 or s 6 (see PARAS 166, 168 ante); an offence under s 8, where an activity involving penetration within s 8(3)(a)-(d) was caused (see PARA 172 ante); an offence under s 30, where the touching involved penetration within s 30(3)(a)-(d) (see PARA 201 ante); an offence under s 31, where an activity involving penetration within s 31(3)(a)-(d) was caused (see PARA 201 ante): Internationally Protected Persons Act 1978 s 1(1A) (added by the Sexual Offences Act 2003 Sch 6 para 22).

The offences of abduction under the Sexual Offences Act 1956 were repealed by the Sexual Offences Act 2003 s 140, Sch 7. The reference to 'abduction' in the list of specified offences is to be construed as not including an offence of child abduction under the Child Abduction Act 1984: see s 11(3).

5 'Relevant premises' means premises at which a protected person resides or is staying or which a protected person uses for the purpose of carrying out his functions as such a person: Internationally Protected Persons Act 1978 s 1(5).

6 'Vehicle' includes any means of conveyance: ibid s 1(5).

7 Ibid s 1(1)(b). For the purposes of head (2) in the text, the specified offences are offences under: the Explosive Substances Act 1883 s 2 (see PARA 127 ante); the Criminal Damage Act 1971 s 1 (see PARA 334 ante); the Criminal Damage (Northern Ireland) Order 1977, SI 1977/426, art 3; or the offence of wilful fire-raising (an offence under Scottish law): Internationally Protected Persons Act 1978 s 1(1)(b).

8 Ibid s 1(1).

9 See note 1 supra.

10 Internationally Protected Persons Act 1978 s 1(2). 'Art and part' is the equivalent under Scottish law of secondary liability under English criminal law.

11 See note 1 supra.

12 Internationally Protected Persons Act 1978 s 1(3).

13 Ibid s 1(4).

14 Ibid s 2(1)(a) (amended by the Nuclear Materials (Offences) Act 1983 s 4(1); the United Nations Personnel Act 1997 s 7, Sch para 2; and the Crime (International Co-operation) Act 2003 s 91(1), Sch 5 paras 1, 2). As to the effect of this limitation see PARA 1071 post.

Nothing in the Internationally Protected Persons Act 1978 prejudices any rule of law relating to attempts to commit offences, the Accessories and Abettors Act 1861 s 8 (as amended) (see PARA 49 ante) or any rule of law in Scotland relating to art and part guilt: Internationally Protected Persons Act 1978 s 2(3).

## **UPDATE**

### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

### **477 Attacks and threats of attacks on protected persons**

NOTE 4--See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(xiv) Jurisdiction/477A. Offences to which notification requirements apply.

**477A. Offences to which notification requirements apply.**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61) imposes notification requirements on persons dealt with in respect of certain offences and corresponding foreign offences, and provides for the imposition of foreign travel restriction orders on such persons: s 40. References to a person being dealt with for or in respect of an offence are to their being sentenced, or made subject to a hospital order, in respect of the offence: s 61(1). Part 4 applies to (1) an offence under any of the Terrorism Act 2000 ss 11, 12, 15-18, 38B, 54, 56-61 (see PARA 383 et seq); (2) an offence in respect of which there is jurisdiction by virtue of any of ss 62-63D (see PARAS 470-476); (3) an offence under the Anti-terrorism, Crime and Security Act 2001 s 113 (see PARA 123); (4) an offence under any of the Terrorism Act 2006 ss 1, 2, 5, 6, 8, 9, 10 and 11 (see PARA 439 et seq); (5) an offence in respect of which there is jurisdiction by virtue of s 17 (see PARA 473); (6) any ancillary offence in relation to an offence listed in heads (1)-(5) above; and (7) an offence as to which a court has determined under the Counter-Terrorism Act 2008 s 30 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 622) that the offence has a terrorist connection or an offence in relation to which s 31 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 622) applies: ss 41(1), (2), 42(1). An 'ancillary offence' means aiding, abetting, counselling or procuring the commission of the offence, an offence under the Serious Crime Act 2007 Pt 2 (ss 44-67) (see PARA 65A), or attempting or conspiring to commit the offence: Counter-Terrorism Act 2008 s 94. The Secretary of State may by order amend heads (1)-(5) above: see s 41(3)-(7). Provision is made for the application of Pt 4 to a person dealt with for an offence before the commencement of Pt 4 within heads (1) or (2) above: see s 43.

**UPDATE**

**383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(xiv) Jurisdiction/477B. Persons to whom notification requirements apply.

#### **477B. Persons to whom notification requirements apply.**

The notification requirements apply to a person who is aged 16 or over at the time of being dealt with for an offence to which the Counter-Terrorism Act 2008 Pt 4 (ss 40-61) applies (see PARA 477A), and is made subject in respect of the offence to a sentence or order within s 45 (see below): s 44. The notification requirements apply to a person who in England and Wales has been convicted of an offence to which Pt 4 applies and sentenced in respect of the offence to (1) imprisonment or custody for life; (2) imprisonment or detention in a young offender institution for a term of 12 months or more; (3) imprisonment or detention in a young offender institution for public protection under the Criminal Justice Act 2003 s 225 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 73 et seq); (4) detention for life or for a period of 12 months or more under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78); (5) a detention and training order for a term of 12 months or more under s 100 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89); (6) detention for public protection under the Criminal Justice Act 2003 s 226 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 82-83); or (7) detention during Her Majesty's pleasure (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 81): Counter-Terrorism Act 2008 s 45(1)(a), (4). The notification requirements also apply to a person who in England and Wales has been (a) convicted of an offence to which Pt 4 applies carrying a maximum term of imprisonment of 12 months or more; (b) found not guilty by reason of insanity of such an offence; or (c) found to be under a disability and to have done the act charged against them in respect of such an offence, and made subject in respect of the offence to a hospital order: s 45(1)(b), (4). Similar provision is made in relation to a person who has been sentenced or made the subject of a hospital order in Scotland or Northern Ireland: see s 45(2)-(4). The Secretary of State may by order amend the provisions of s 45 referring to a specified term or period of imprisonment or detention: see Counter-Terrorism Act 2008 s 46.

If a person to whom the notification requirements apply is absent from the United Kingdom for any period, then during the period of absence the period for which the notification requirements apply continues to run, but the applicability of ss 47-49, 53(7) is modified: see Counter-Terrorism Act 2008 s 55. Provision is also made in relation to a person to whom the notification requirements apply who returns to the United Kingdom after a period of absence: see Counter-Terrorism Act 2008 s 56.

Where a person has been dealt with outside the United Kingdom in respect of a corresponding foreign offence the chief officer of police may apply to the High Court for a notification order applying the notification requirements to that person: see Counter-Terrorism Act 2008 s 57, Sch 4. On an application by the chief officer of police, a magistrates' court may make a foreign travel restriction order, prohibiting travel to a specified country or countries, where the behaviour of a person subject to the notification requirements since the person was dealt with for the offence by virtue of which the notification requirements apply makes it necessary for such an order to be made to prevent the person from taking part in terrorism activity outside the United Kingdom: see Counter-Terrorism Act 2008 s 58, Sch 5. Provision is made for the application of Pt 4 to service offences and related matters: see ss 59, 95, Sch 6.

#### **UPDATE**

**383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PREVENTION OF TERRORISM/(xiv) Jurisdiction/477C. Notification requirements.

#### **477C. Notification requirements.**

A person to whom the notification requirements apply must notify the following information to the police within the period of three days beginning with the day on which the person is dealt with in respect of the offence in question: (1) date of birth; (2) national insurance number; (3) name on the date on which the person was dealt with in respect of the offence (where the person used one or more other names on that date, each of those names); (4) home address on that date; (5) name on the date on which notification is made (where the person uses one or more other names on that date, each of those names); (6) home address on the date on which notification is made; (7) address of any other premises in the United Kingdom at which, at the time the notification is made, the person regularly resides or stays; (8) any prescribed information: Counter-Terrorism Act 2008 s 47(1), (2). In determining the period within which such notification is to be made, there must be disregarded any time when the person is (a) remanded in or committed to custody by an order of a court; (b) serving a sentence of imprisonment or detention; (c) detained in a hospital; or (d) detained under the Immigration Acts: Counter-Terrorism Act 2008 s 47(4). The notification requirements do not apply to a person who is subject to the notification requirements in respect of another offence, and does not cease to be so subject before the end of the period within which notification is to be made, and has complied with s 57 in respect of that offence: s 47(5). A person to whom the notification requirements apply must re-notify the police of the specified information each year, and must notify the police of any relevant change of details within three days of the change: see Counter-Terrorism Act 2008 ss 48-51. The Secretary of State may by regulations make provision requiring a person to whom the notification requirements apply who leaves the United Kingdom to notify the police of their departure before they leave and to notify the police of their return if they subsequently return to the United Kingdom: Counter-Terrorism Act 2008 s 52. See the Counter-Terrorism Act 2008 (Foreign Travel Notification Requirements) Regulations 2009, SI 2009/2493. The notification requirements apply for either 30, 15 or 10 years, depending on the gravity of the sentence imposed: see Counter-Terrorism Act 2008 s 53.

#### **UPDATE**

#### **383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

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**477D. Offences in relation to notification.**

A person commits an offence who (1) fails without reasonable excuse to comply with the Counter-Terrorism Act 2008 s 47, 48, 49, 50(6), any regulations made under s 52(1), or s 56 (see PARAS 477B, 477C); or (2) notifies to the police in purported compliance with s 47, 48, 49, any regulations made under s 52(1), or s 56, any information that the person knows to be false: s 54(1). A person guilty of an offence under s 54 is liable, on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both, and on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both: s 54(2), (3).

**UPDATE**

**383-477 Prevention of terrorism**

The Counter-Terrorism Act 2008 Pt 4 (ss 40-61), Sch 4-6 impose notification requirements on persons dealt with in respect of specified offences relating to terrorism and corresponding foreign offences: see PARAS 477A-477D.

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## **(7) OFFICIAL SECRETS AND COMMUNICATION OF INFORMATION**

### **(i) Offences in respect of Official Secrets**

#### **478. Spying and sabotage.**

If any person for any purpose<sup>1</sup> prejudicial to the safety or interests of the state<sup>2</sup>:

- 606 (1) approaches, inspects, passes over or is in the neighbourhood of, or enters any prohibited place<sup>3</sup>; or
- 607 (2) makes any sketch<sup>4</sup>, plan, model<sup>5</sup>, or note which is calculated to be, or might be, or is intended to be, directly or indirectly useful to an enemy<sup>6</sup>; or
- 608 (3) obtains<sup>7</sup>, collects, records, or publishes, or communicates<sup>8</sup> to any other person any secret official code word, or pass word, or any sketch, plan, model, article, or note, or other document<sup>9</sup> or information<sup>10</sup> which is calculated to be, or might be, or is intended to be, directly or indirectly useful to an enemy,

he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>11</sup>.

1 'Purpose' within the meaning of the Official Secrets Act 1911 s 1 (as amended) is to be distinguished from the motive for doing an act; and 'any purpose' means or includes the achieving of the consequence which a person intended or desired to follow directly on his act, ie his direct or immediate purpose as opposed to his ultimate aim; and, even if a person had several purposes, his immediate purpose remained one of them and was within the words 'any purpose': *Chandler v DPP* [1964] AC 763, 46 Cr App Rep 347, HL. See also *R v Bettaney* [1985] Crim LR 104, CA (quality of information irrelevant in considering purpose for which it was communicated). As to proof of a purpose prejudicial to the safety or interests of the state see PARA 481 post.

2 In the phrase 'interests of the state', 'state' means 'the organised community' or 'the organs of government of a national community'; and 'interests of the state' means those interests according to the policies of the state as they in fact are, not as it might be argued that they ought to be: *Chandler v DPP* [1964] AC 763, 46 Cr App Rep 347, HL. In that case members of an organisation supporting nuclear disarmament had approached an air base belonging to Her Majesty which was a prohibited place with the admitted purpose of grounding all aircraft, immobilising the airfield and reclaiming the base for civilian purposes. It was held that, where a Secretary of State had declared places within the Official Secrets Act 1911 s 3 (as amended) (see PARA 479 post) to be prohibited places in which damage, destruction, obstruction or interference would be useful to an enemy, the defendant was not entitled to say or lead evidence to show that, although he had done that which would be useful to an enemy, yet his purpose was not prejudicial to the safety or interests of the state since the Crown (which was for present purposes 'the state') alone was entitled to decide the disposition and armament of the armed forces and the propriety of the decision on such matters could not be questioned in a court of law. Lord Devlin said: 'In a case like the present, it may be presumed that it is contrary to the interests of the Crown to have one of its airfields immobilised . . . The thing speaks for itself . . . But the presumption is not irrebuttable': see *Chandler v DPP* supra at 811 and 389-390. See also *R v Bettaney* [1985] Crim LR 104, CA.

3 For the meaning of 'prohibited place' see PARA 479 post.

4 'Sketch' includes any photograph or other mode of representing any place or thing: Official Secrets Act 1911 s 12.

5 'Model' includes design, pattern and specimen: *ibid* s 12.

6 'Enemy' includes a potential enemy with whom there might be war: *R v Parrott* (1913) 8 Cr App Rep 186, CCA.

7 Expressions referring to obtaining or retaining any sketch, plan, model, article, note, or document, include the copying or causing to be copied the whole or any part of any sketch, plan, model, article, note, or document: Official Secrets Act 1911 s 12.

8 Expressions referring to communicating include any communicating, whether in whole or in part, and whether the sketch, plan, model, article, note, document, or information itself or the substance, effect or description thereof only be communicated; and expressions referring to the communication of any sketch, plan, model, article, note or document include the transfer or transmission of the sketch, plan, model, article, note or document: *ibid* s 12 (definition amended by the Official Secrets Act 1989 s 16(4), Sch 2).

9 'Document' includes part of a document: Official Secrets Act 1911 s 12.

10 Where information is communicated, its truth or falsity is, it seems, immaterial: see *R v M* (1915) 32 TLR 1, 11 Cr App Rep 207, CCA (charge of attempting to communicate information to the enemy with the intention of assisting the enemy contrary to the Defence of the Realm (Consolidation) Act 1914 (repealed)).

11 Official Secrets Act 1911 s 1(1) (amended by the Official Secrets Act 1920 ss 10, 11(2), Schs 1, 2); Official Secrets Act 1920 s 8(1); Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 12(5). As to restrictions on prosecutions see PARA 503 post. As to sentencing see *R v Prime* (1983) 5 Cr App Rep (S) 127, CA (series of offences under the Official Secrets Act 1911 s 1(1) (c) (as amended) (see head (3) in the text); consecutive sentences of 14, 14 and seven years upheld having regard to the totality of the sentence); *R v Schulze, R v Schulze* (1986) 8 Cr App Rep (S) 463, CA (acts preparatory to commission of offence under the Official Secrets Act 1911 s 1(1)(c) (as amended); sentence of ten years' imprisonment upheld).

The Official Secrets Act 1911 s 1(1) (as amended) is not limited to offences of spying but extends to the saboteur as much as to the spy: *Chandler v DPP* [1964] AC 763, 46 Cr App Rep 347, HL. The Official Secrets Acts 1911, 1920 and 1939 are to be construed as one: see the Official Secrets Act 1920 s 11(1); and the Official Secrets Act 1939 s 2(1). Archives of a foreign embassy in England can be the subject of a charge under the Acts: See *R v AB* [1941] 1 KB 454, sub nom *R v Kent* (1941) 28 Cr App Rep 23, CCA. As to police powers to obtain information relating to offences under the Official Secrets Act 1911 s 1(1) (as amended) see PARA 482 post. As to the facts deemed to constitute evidence of obtaining information useful to an enemy see PARA 480 post.

## UPDATE

### 478 Spying and sabotage

NOTE 11--See also *R v James* [2009] EWCA Crim 1261, [2010] Cr App Rep (S) 362, [2009] All ER (D) 262 (Jun).

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#### **479. Meaning of 'prohibited place'.**

'Prohibited place' means:

- 609 (1) any work of defence, arsenal, naval or air force establishment or station, factory, dockyard, mine, minefield, camp, ship<sup>1</sup>, or aircraft belonging to or occupied by or on behalf of Her Majesty or any telegraph, telephone, wireless or signal station, or office so belonging or occupied, and any place belonging to or occupied by or on behalf of Her Majesty<sup>2</sup> and used for the purpose of building, repairing, making, or storing any munitions of war<sup>3</sup>, or any sketches<sup>4</sup>, plans, models<sup>5</sup>, or documents<sup>6</sup> relating thereto, or for the purpose of getting any metals, oil, or minerals of use in time of war<sup>7</sup>;
- 610 (2) any place not belonging to Her Majesty where any munitions of war, or any sketches, models, plans, or documents relating thereto, are being made, repaired, gotten, or stored under contract with, or with any person on behalf of, Her Majesty, or otherwise on behalf of Her Majesty<sup>8</sup>;
- 611 (3) any place belonging to or used for the purposes of Her Majesty which is for the time being declared by order of a Secretary of State to be a prohibited place on the ground that information with respect to it, or damage to it, would be useful to an enemy<sup>9</sup>;
- 612 (4) any railway, road, way, or channel, or other means of communication by land or water, including any works or structures being part thereof or connected therewith, or any place used for gas, water, or electricity works or other works for purposes of a public character, or any place where any munitions of war, or any sketches, models, plans, or documents relating thereto, are being made, repaired, or stored otherwise than on behalf of Her Majesty, which is for the time being declared by order of a Secretary of State to be a prohibited place, on the ground that information with respect thereto, or the destruction or obstruction thereof, or interference therewith, would be useful to an enemy<sup>10</sup>;
- 613 (5) any electronic communications station or office belonging to, or occupied by, the provider of a public electronic telecommunications service<sup>11</sup>.

For the purposes of head (3) above, any place belonging to or used for the purposes of the United Kingdom Atomic Energy Authority is deemed to be a place belonging to or used for the purposes of Her Majesty<sup>12</sup>; a place belonging to or used for the purpose of the Civil Aviation Authority is deemed to be a place belonging to Her Majesty<sup>13</sup>; and specified nuclear sites<sup>14</sup> are deemed to be a place belonging to or used for the purposes of Her Majesty<sup>15</sup>.

1 References in the Official Secrets Acts 1911 and 1920 to ships, vessels, or boats or activities or places connected with them include hovercraft: Hovercraft (Application of Enactments) Order 1972, SI 1972/971, art 4, Sch 1 Pt A.

2 'Place belonging to Her Majesty' includes a place belonging to any department of the government of the United Kingdom or of any British possessions, whether the place is or is not actually vested in Her Majesty: Official Secrets Act 1911 s 12. As to British possessions see COMMONWEALTH vol 13 (2009) PARA 703.



3 'Munitions of war' includes the whole or any part of any ship, submarine, aircraft, tank or similar engine, arms and ammunition, torpedo or mine, intended or adapted for use in war, and any other article, material or device, whether actual or proposed, intended for such use: *ibid* s 12 (definition added by the Official Secrets Act 1920 s 9(2)).

4 For the meaning of 'sketch' see PARA 478 note 4 ante.

5 For the meaning of 'model' see PARA 478 note 5 ante.

6 For the meaning of 'document' see PARA 478 note 9 ante.

7 Official Secrets Act 1911 s 3(a) (substituted by the Official Secrets Act 1920 s 10, Sch 1).

8 Official Secrets Act 1911 s 3(b) (amended by the Official Secrets Act 1920 Sch 1).

9 Official Secrets Act 1911 s 3(c) (amended by the Official Secrets Act 1920 Sch 1). As to the orders made under the Official Secrets Act 1911 s 3(c) (as amended) see the Official Secrets (Prohibited Place) Order 1955, SI 1955/1497; and the Official Secrets (Prohibited Places) Order 1994, SI 1994/968.

10 Official Secrets Act 1911 s 3(d) (amended by the Official Secrets Act 1920 Sch 1). At the date at which this volume states the law, no order had been made under the Official Secrets Act 1911 s 3(d) (as amended).

11 Communications Act 2003 s 406, Sch 17 para 2. See TELECOMMUNICATIONS AND BROADCASTING.

12 Atomic Energy Authority Act 1954 s 6(3). See also the Official Secrets (Prohibited Place) Order 1955, SI 1955/1497; and the Official Secrets (Prohibited Places) Order 1994, SI 1994/968, art 3, Sch 1 Pt II. Any right of entry upon a prohibited place, except by constables and specified officials, is exercisable only with the consent of the United Kingdom Atomic Energy Authority and subject to any conditions the Authority imposes: see the Atomic Energy Authority Act 1954 s 6(3). A right of entry may also be exercised by a person as an inspector of the International Atomic Energy Agency: s 6(3)(bb) (added by the Nuclear Safeguards and Electricity (Finance) Act 1978 s 2(3)). See also the Radioactive Substances Act 1960 s 12(3) proviso. On application by a person aggrieved by a refusal of consent or by conditions imposed, the Secretary of State may authorise the exercise of the right subject to conditions: Atomic Energy Authority Act 1954 s 6(3) proviso.

13 Civil Aviation Act 1982 ss 2(1), 18(2). As to the restrictions (which are similar to those set out in note 12 *supra*) upon the exercise of any right of entry upon a place which is a prohibited place see s 18(2)-(4).

14 In every site to which applies a permit granted by the Secretary of State to a body corporate in relation to which the Secretary of State has by order directed that the Nuclear Installations Act 1965 s 2, Sch 1 para 3(1) (as added) is to have effect: see the Nuclear Installations Act 1965 s 2(1)-(1D) (amended by the Atomic Energy Authority Act 1971 s 17; and the Official Secrets (Prohibited Places) Order 1994, SI 1994/968, art 3, Sch 1); and see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1489.

15 Nuclear Installations Act 1965 s 2, Sch 1 para 3(1) (Sch 1 added by the Atomic Energy Authority Act 1971 s 17(6), Schedule). See also the Official Secrets (Prohibited Places) Order 1994, SI 1994/968, Sch 1. As to the restrictions upon the exercise of any right of entry except with the consent of, and upon conditions imposed by, the body corporate specified in the Secretary of State's order, or with the authority of the Secretary of State (see note 14 *supra*) see the Nuclear Installations Act 1965 Sch 1 para 3(2) (as so added; and amended by the Nuclear Installations Act 1965 etc (Repeals and Modifications) Regulations 1974, SI 1974/2056, reg 2(1)(b), Sch 2 para 7; and the Nuclear Safeguards and Electricity (Finance) Act 1978 s 2(3)).

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#### **480. Evidence of obtaining information useful to an enemy.**

In any proceedings against a person for spying or sabotage<sup>1</sup> the fact that he has been in communication with, or attempted to communicate with, a foreign agent<sup>2</sup>, whether within or outside the United Kingdom, is evidence that he has, for a purpose prejudicial to the safety or interests of the state, obtained or attempted to obtain information which is calculated to be, or might be, or is intended to be, directly or indirectly useful to an enemy<sup>3</sup>. Unless he proves the contrary, a person is deemed, for the purpose of the above provisions, to have been in communication with a foreign agent if he has, either within or outside the United Kingdom, visited the address<sup>4</sup> of a foreign agent or consorted or associated with a foreign agent; or if, either within or outside the United Kingdom, the name or address of (or any other information regarding) a foreign agent has been found in his possession, or has been supplied by him to, or obtained by him from, any other person<sup>5</sup>.

1    le for an offence under the Official Secrets Act 1911 s 1: see PARA 478 ante.

2    'Foreign agent' includes any person who is or has been or is reasonably suspected of being or having been employed by a foreign power either directly or indirectly for the purpose of committing an act, either within or outside the United Kingdom, prejudicial to the safety or interests of the state, or who has or is reasonably suspected of having, either within or outside the United Kingdom, committed, or attempted to commit, such an act in the interests of a foreign power: Official Secrets Act 1920 s 2(2)(b). The jury must consider the activities of the alleged foreign agent as evidence against the defendant only in so far as those activities show that the alleged foreign agent was indeed a foreign agent and that the defendant was in communication with him: *R v Kent* as reported in (1941) 28 Cr App Rep 23 at 31, CCA.

3    Official Secrets Act 1920 s 2(1). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4    Any address, whether within or outside the United Kingdom, reasonably suspected of being an address used for the receipt of communications intended for a foreign agent, or any address at which a foreign agent resides, or to which he resorts for the purpose of giving or receiving communications, or at which he carries on any business, is deemed to be the address of a foreign agent, and communications addressed to such an address to be communications with a foreign agent: *ibid* s 2(2)(c).

5    *Ibid* s 2(2)(a). Section 2(2) is without prejudice to the generality of s 2(1) (see the text and notes 1-3 *supra*): s 2(2).

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#### **481. Proof of purpose prejudicial to the safety or interests of the state.**

On a prosecution for spying or sabotage<sup>1</sup> or for an offence<sup>2</sup> involving the proof of a purpose prejudicial to the safety or interests of the state, it is not necessary to show that the defendant was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the state; and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the state; and if any sketch<sup>3</sup>, plan, model<sup>4</sup>, article, note, document<sup>5</sup>, or information relating to or used in any prohibited place<sup>6</sup> or anything in such a place or any secret official code word or pass word, is made, obtained<sup>7</sup>, collected, recorded, published, or communicated<sup>8</sup> by any person other than a person acting under lawful authority, it is deemed to have been made, obtained, collected, recorded, published, or communicated for a purpose prejudicial to the safety or interests of the state unless the contrary is proved<sup>9</sup>.

1    Ie a prosecution under the Official Secrets Act 1911 s 1 (as amended): see PARA 478 ante.

2    Ie an offence under the Official Secrets Act 1920 s 1(1) (see PARA 491 post) or s 1(2)(a) (see PARA 492 post): see s 1(3).

3    For the meaning of 'sketch' see PARA 478 note 4 ante.

4    For the meaning of 'model' see PARA 478 note 5 ante.

5    For the meaning of 'document' see PARA 478 note 9 ante.

6    For the meaning of 'prohibited place' see PARA 479 ante.

7    For the meaning of 'obtain' see PARA 478 note 7 ante.

8    For the meaning of 'communicate' see PARA 478 note 8 ante.

9    Official Secrets Act 1911 s 1(2) (amended by the Official Secrets Act 1920 s 10, Sch 1). As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

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#### **482. Power of police to obtain information relating to spying or sabotage.**

Where a chief officer of police<sup>1</sup> is satisfied that there is reasonable ground for suspecting that an offence of spying or sabotage<sup>2</sup> has been committed and for believing that any person is able to furnish information as to the offence or suspected offence, he may apply to a Secretary of State for permission to exercise the powers described below; and, if such permission is granted, he may authorise a superintendent of police<sup>3</sup>, or any police officer not below the rank of inspector, to require the person believed to be able to furnish information to give any information in his power relating to the offence or suspected offence, and, if so required and on tender of his reasonable expenses, to attend at such reasonable time and place as may be specified by the superintendent or other officer<sup>4</sup>. Where a chief officer of police has reasonable grounds to believe that the case is one of great emergency and that in the interest of the state immediate action is necessary, he may give such authorisation without applying for or being granted the permission of a Secretary of State; but, if he does so, he must forthwith report the circumstances to the Secretary of State<sup>5</sup>.

A person who fails to comply with any such requirement or knowingly gives false information is guilty of an offence<sup>6</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding three months<sup>7</sup> or to a fine not exceeding the prescribed sum or to both<sup>8</sup>.

1 For the meaning of 'chief officer of police' see PARA 380 note 1 ante; definition applied by the Interpretation Act 1978 s 5, Sch 1. References in the Official Secrets Act 1920 s 6 (as substituted) to a chief officer of police are to be construed as including references to any other officer of police expressly authorised by a chief officer of police to act on his behalf for these purposes when by reason of illness, absence, or other cause he is unable to do so: s 6(3) (s 6 substituted by the Official Secrets Act 1939 s 1)).

2 I.e. under the Official Secrets Act 1911 s 1 (as amended): see PARA 478 ante.

3 'Superintendent of police' includes any police officer of like or superior rank and any person on whom the powers of a superintendent of police are for this purpose conferred by a Secretary of State: *ibid* s 12 (definition amended by the Official Secrets Act 1920 s 10, Sch 1); Official Secrets Act 1920 s 11(1).

4 Official Secrets Act 1920 s 6(1) (as substituted: see note 1 *supra*).

5 *Ibid* s 6(2) (as substituted: see note 1 *supra*).

6 *Ibid* s 6(1) (as substituted: see note 1 *supra*).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Official Secrets Act 1920 s 8(2) (amended by virtue of the Magistrates' Courts Act 1980 s 32(2)); Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 s 1. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to restrictions on prosecutions see PARA 503 post.

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#### **483. Disclosure of security or intelligence information etc.**

A person who is or has been (1) a member of the security and intelligence services; or (2) a person notified<sup>1</sup> that he is subject to these provisions, is guilty of an offence if without lawful authority<sup>2</sup> he discloses any information<sup>3</sup>, document or other article<sup>4</sup> relating to security or intelligence<sup>5</sup> which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force<sup>6</sup>.

A person who is or has been a Crown servant<sup>7</sup> or government contractor<sup>8</sup> is guilty of an offence if without lawful authority he makes a damaging<sup>9</sup> disclosure of any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position<sup>10</sup> as such<sup>11</sup>.

It is a defence for a person charged with either of the above offences to prove<sup>12</sup> that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question related to security or intelligence or that<sup>13</sup> the disclosure would be damaging<sup>14</sup>.

A person guilty of either such offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>15</sup> months or to a fine not exceeding the statutory maximum or to both<sup>16</sup>.

1 Notification that a person is subject to these provisions must be effected by a notice in writing served on the person by a Minister of the Crown; and such a notice may be served if, in the minister's opinion, the work undertaken by the person in question is or includes work connected with the security and intelligence services and its nature is such that the interests of national security require that he should be so subject: Official Secrets Act 1989 s 1(6). Such a notification is in force for the period of five years beginning with the day on which it is served, but may be renewed by further notices under s 1(6) for periods of five years at a time: s 1(7). However, such a notification may at any time be revoked by a further notice in writing served by the minister on the person concerned; and the minister must serve such further notice as soon as, in his opinion, the work undertaken by that person ceases to be such as is mentioned in s 1(6): s 1(8).

2 For the meaning of 'lawful authority' see PARA 489 post.

3 The reference to disclosing information relating to security or intelligence includes a reference to making any statement which purports to be a disclosure of such information or is intended to be taken by those to whom it is addressed as being such a disclosure: Official Secrets Act 1989 s 1(2).

4 'Disclose' and 'disclosure', in relation to a document or other article, include parting with possession of it: *ibid* s 13(1).

5 For these purposes, 'security or intelligence' means the work of, or in support of, the security and intelligence services or any part of them; and references to information relating to security or intelligence include references to information held or transmitted by those services or by persons in support of, or of any part of, them: *ibid* s 1(9).

6 *Ibid* s 1(1). A defendant is not entitled to be acquitted if he shows that it was, or he believed that it was, in the public or national interest to make the disclosure in question or if the jury concludes that it might have been, or that the defendant might have believed it to be, in the public or national interest to make the disclosure in question: *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [2002] 2 All ER 477. The offence is

compatible with the right to freedom of expression under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10: *R v Shayler* supra. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. According to the Court of Appeal in *R v Shayler* [2001] EWCA Crim 1977, [2001] 1 WLR 2206, the defence of duress of circumstances is applicable to a charge under the Official Secrets Act 1989 s 1 or s 4 (as amended) (see PARA 486 post); on appeal the House of Lords declined to consider the applicability of that defence, making clear that this was not to be taken as acceptance of what the Court of Appeal said on the matter.

As to the extent of the Official Secrets Act 1989 and the place of trial see PARA 502 post. As to restrictions on prosecutions see PARA 503 post. As to the exclusion of the public during a hearing see PARA 504 post. As to the power to grant a search warrant see PARA 500 post.

Any act done (1) by a British citizen or Crown servant; or (2) by any person in any of the Channel Islands or the Isle of Man or any colony, is, if it would be an offence by that person under any provision of the Official Secrets Act 1989 other than s 8(1), (4) or (5) (see PARA 490 post) when done by him in the United Kingdom, an offence under that provision: s 15(1). As to British citizens see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 23 et seq. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

7 'Crown servant' means (1) a Minister of the Crown; (2) a member of the Scottish Executive or a junior Scottish Minister; (3) any person employed in the civil service of the Crown, including Her Majesty's Diplomatic Service, Her Majesty's Overseas Civil Service, the civil service of Northern Ireland and the Northern Ireland Court Service; (4) any member of the naval, military or air forces of the Crown, including any person employed by an association established for the purposes of the Reserve Forces Act 1996 Pt XI (ss 110-119) (see ARMED FORCES); (5) any constable and any other person employed or appointed in or for the purposes of any police force (including the Police Service of Northern Ireland and the Police Service of Northern Ireland Reserve) or of the Serious Organised Crime Agency; (6) any person who is a member or employee of a prescribed body or a body of a prescribed class and either is prescribed for these purposes or belongs to a prescribed class of members or employees of any such body; (7) any person who is the holder of a prescribed office or who is an employee of such a holder and either is prescribed for these purposes or belongs to a prescribed class of such employees: Official Secrets Act 1989 s 12(1) (amended by the Reserve Forces Act 1996 s 131(1), Sch 10 para 22; the Police Act 1997 s 134(1), Sch 9 para 62; the Scotland Act 1998 s 125, Sch 8 para 26(1), (2); the Northern Ireland Act 1998 ss 74, 99, 100, Sch 4 para 17, Sch 13 paras 9(1), (2), 15; the Police (Northern Ireland) Act 2000 s 78(1), Sch 6 para 9; and the Serious Organised Crime and Police Act 2005 s 59, Sch 4 para 58). As from a day to be appointed 'Crown servant' also means the First Minister for Wales, a Welsh Minister appointed under the Government of Wales Act 2006 s 48, the Counsel General to the Welsh Assembly Government or a Deputy Welsh Minister: Official Secrets Act 1989 s 12(1) (prospectively amended by the Government of Wales Act 2006 s 160(1), Sch 10 para 34(a)). At the date at which this volume states the law no such day had been appointed.

In the Official Secrets Act 1989 s 12 (as amended and prospectively amended) the reference to a police force includes a reference to the Civil Nuclear Constabulary: s 12(4A) (added by the Energy Act 2004 s 69, Sch 14 para 6). For these purposes, 'prescribed' means prescribed by an order made by the Secretary of State: s 13(1). Any such power of the Secretary of State to make orders is exercisable by statutory instrument; and no order may be made by him for the purposes of s 7(5) (see PARA 489 post), s 8(9) (see PARA 490 post) or s 12 (as amended) unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament: s 14(1), (2). If, apart from these provisions, the draft of an order under any of ss 7(5), 8(9), 12 (as amended) would be treated for the purposes of the Standing Orders of either House of Parliament as a hybrid instrument, it must proceed in that House as if it were not such an instrument: s 14(3). So far as relates to Wales, functions under s 12 (as amended) have been transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, Sch 1 (as amended).

The Official Secrets Act 1989 (Prescription) Order 1990, SI 1990/200, art 2, Sch 1 (amended by SI 1993/847; SI 2003/1918) lists the bodies and the classes of members or employees of those bodies which are prescribed for the purposes of head (6) supra. The bodies listed and the corresponding classes of members or employees are as follows: British Nuclear Fuels plc (the employees of the company); the Board of British Nuclear Fuels plc (the members of the Board); the United Kingdom Atomic Energy Authority (the members, officers and employees of the Authority); Urenco Ltd (the employees of the company); the Board of Urenco Ltd (the members of the Board); Urenco (Capenhurst) Ltd (the employees of the company); the Board of Urenco (Capenhurst) Ltd (the members of the Board); Enrichment Technology Company Ltd (the employees of the company); the Board of Enrichment Technology Company Ltd (the members of the Board); Enrichment Technology UK Ltd (the employees of the company); the Board of Enrichment Technology UK Ltd (the members of the Board); Urenco Enrichment Company Ltd (the employees of the company); the Board of Urenco Enrichment Company Ltd (the members of the Board).

The Official Secrets Act 1989 (Prescription) Order 1990, SI 1990/200, art 3, Sch 2 (amended by SI 1999/1042; SI 2004/1823) lists the offices and the classes of employees of the holders of those offices which are prescribed for the purposes of head (7) supra. The offices and corresponding classes of employees are: Comptroller and Auditor General; member of staff of the National Audit Office; Comptroller and Auditor General for Northern Ireland; member of staff of the Northern Ireland Audit Office; Auditor General for Scotland; Parliamentary

Commissioner for Administration (the officers of the Commissioner who are not otherwise Crown servants); officer of the Health Service Commissioner for England or Wales being an officer who is authorised by the Parliamentary Commissioner for Administration to perform any of his functions and who is not otherwise a Crown servant; Northern Ireland Parliamentary Commissioner for Administration (the officers of the Commissioner who are not otherwise Crown servants); Scottish Public Services Ombudsman (the officers of the Ombudsman who are not otherwise Crown Servants); a private secretary to the Sovereign.

8 'Government contractor' means any person who is not a Crown servant but who provides, or is employed in the provision of, goods or services (1) for the purposes of any Minister of the Crown, of any office-holder in the Scottish Administration, of any of the services, forces or bodies mentioned in s 12(1) (see note 7 supra) or of the holder of any office prescribed under s 12(1); (2) until a day to be appointed, for the purposes of the National Assembly for Wales, and as from that day, for the purposes of the First Minister for Wales, a Welsh Minister appointed under the Government of Wales Act 2006 s 48, the Counsel General to the Welsh Assembly Government or a Deputy Welsh Minister; or (3) under an agreement or arrangement certified by the Secretary of State as being one to which the government of a state other than the United Kingdom or an international organisation is a party or which is subordinate to, or made for the purposes of implementing, any such agreement or arrangement: s 12(2) (amended by the Scotland Act 1998 s 125(1), Sch 8 para 26; and the Government of Wales Act 1998 s 125, Sch 12 para 30; prospectively amended by the Government of Wales Act 2006 s 163, Sch 10 para 34(b), Sch 12). At the date at which this volume states the law no such day had been appointed.).

Where an employee or class of employees of any body, or of any holder of an office, is prescribed by an order made for the purposes of the Official Secrets Act 1989 s 12(1) (see note 7 supra) (a) any employee of that body, or the holder of that office, who is not prescribed or is not within the prescribed class; and (b) any person who does not provide, or is not employed in the provision of, goods or services for the purposes of the performance of those functions of the body or the holder of the office in connection with which the employee or prescribed class of employees is engaged, is not a government contractor for the purposes of the Official Secrets Act 1989: s 12(3).

For these purposes, 'state' includes the government of a state and any organ of its government; and references to a state other than the United Kingdom include references to any territory outside the United Kingdom: s 13(1). 'International organisation' means an organisation of which only states are members and includes a reference to any organ of such an organisation: s 13(1). However, in s 12(2)(b) (see head (3) supra) the reference to an international organisation includes a reference to any such organisation whether or not one of which only states are members and includes a commercial organisation: s 13(2). In determining whether only states are members of an organisation, any member which is itself an organisation of which only states are members, or which is an organ of such an organisation, is to be treated as a state: s 13(3).

9 For these purposes, a disclosure is damaging if (1) it causes damage to the work of, or any part of, the security and intelligence services; or (2) it is of information or a document or other article which is such that its unauthorised disclosure would be likely to cause such damage or which falls within a class or description of information, documents or articles the unauthorised disclosure of which would be likely to have that effect: *ibid* s 1(4).

10 *Ie* otherwise than as mentioned in *ibid* s 1(1) (see the text and notes 1-6 supra).

11 *Ibid* s 1(3). See also note 6 supra.

12 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 *et seq post*. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 *et seq*.

13 *Ie* in the case of an offence under the Official Secrets Act 1989 s 1(3) (see the text and note 11 supra).

14 *Ibid* s 1(5).

15 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 *post*), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 *post*). At the date at which this volume states the law no such day had been appointed.

16 Official Secrets Act 1989 s 10(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## UPDATE

**483 Disclosure of security or intelligence information etc**

NOTE 7--SI 1990/200 art 2A (definition of 'subsidiary') added, art 2, Sch 1 amended: SI 2007/2148.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(7) OFFICIAL SECRETS AND COMMUNICATION OF INFORMATION/(i) Offences in respect of Official Secrets/484. Damaging disclosure of defence information etc.

#### **484. Damaging disclosure of defence information etc.**

A person who is or has been a Crown servant<sup>1</sup> or government contractor<sup>2</sup> is guilty of an offence if without lawful authority<sup>3</sup> he makes a damaging disclosure<sup>4</sup> of any information, document or other article<sup>5</sup> relating to defence<sup>6</sup> which is or has been in his possession by virtue of his position as such<sup>7</sup>. It is a defence for a person charged with such an offence to prove<sup>8</sup> that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question related to defence or that its disclosure would be damaging<sup>9</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>10</sup> months or to a fine not exceeding the statutory maximum or to both<sup>11</sup>.

1 For the meaning of 'Crown servant' see PARA 483 note 7 ante.

2 For the meaning of 'government contractor' see PARA 483 note 8 ante.

3 For the meaning of 'lawful authority' see PARA 489 post.

4 For these purposes, a disclosure is damaging if (1) it damages the capability of, or of any part of, the armed forces of the Crown to carry out their tasks or leads to loss of life or injury to members of those forces or serious damage to the equipment or installations of those forces; or (2) otherwise than as mentioned in head (1) supra, it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection by the United Kingdom of those interests or endangers the safety of British citizens abroad; or (3) it is of information or of a document or article which is such that its unauthorised disclosure would be likely to have any of those effects: Official Secrets Act 1989 s 2(2). As to British citizens see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 23 et seq. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 For the meaning of 'disclosure' in relation to a document or other article see PARA 483 note 4 ante.

6 For these purposes, 'defence' means (1) the size, shape, organisation, logistics, order of battle, deployment, operations, state of readiness and training of the armed forces of the Crown; (2) the weapons, stores or other equipment of those forces and the invention, development, production and operation of such equipment and research relating to it; (3) defence policy and strategy and military planning and intelligence; (4) plans and measures for the maintenance of essential supplies and services that are or would be needed in time of war: Official Secrets Act 1989 s 2(4).

7 Ibid s 2(1). As to the extent of the Official Secrets Act 1989 and place of trial see PARA 502 post. As to restrictions on prosecutions see PARA 503 post. As to the exclusion of the public during a hearing see PARA 504 post. As to the power to grant a search warrant see PARA 500 post.

8 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

9 Official Secrets Act 1989 s 2(3). For these purposes, 'damaging' means damaging within the meaning of s 2(1): see note 4 supra.

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

11 Official Secrets Act 1989 s 10(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **484 Damaging disclosure of defence information etc**

NOTE 9--The natural meaning of the 1989 Act s 2(3) is incompatible with the presumption of innocence guaranteed by the European Convention on Human Rights art 6, and therefore should be read down so as to treat the burden of proof imposed on the defendant as no more than an evidential burden: *R v Keogh* [2007] EWCA Crim 528, [2007] 3 All ER 789.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(7) OFFICIAL SECRETS AND COMMUNICATION OF INFORMATION/(i) Offences in respect of Official Secrets/485. Damaging disclosure of information etc relating to international relations.

#### **485. Damaging disclosure of information etc relating to international relations.**

A person who is or has been a Crown servant<sup>1</sup> or government contractor<sup>2</sup> is guilty of an offence if without lawful authority<sup>3</sup> he makes a damaging disclosure<sup>4</sup> of:

- 614 (1) any information, document or other article<sup>5</sup> relating to international relations<sup>6</sup>;  
or
- 615 (2) any confidential<sup>7</sup> information, document or other article which was obtained from a state other than the United Kingdom or an international organisation,

being information or a document or article which is or has been in his possession by virtue of his position as a Crown servant or government contractor<sup>8</sup>. It is a defence for a person charged with such an offence to prove<sup>9</sup> that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question was such information as is mentioned above<sup>10</sup> or that its disclosure would be damaging<sup>11</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>12</sup> months or to a fine not exceeding the statutory maximum or to both<sup>13</sup>.

1 For the meaning of 'Crown servant' see PARA 483 note 7 ante.

2 For the meaning of 'government contractor' see PARA 483 note 8 ante.

3 For the meaning of 'lawful authority' see PARA 489 post.

4 For these purposes, a disclosure is damaging if (1) it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection by the United Kingdom of those interests or endangers the safety of British citizens abroad; or (2) it is of information or of a document or article which is such that its unauthorised disclosure would be likely to have any of those effects: Official Secrets Act 1989 s 3(2). In the case of information or a document or article within s 3(1)(b) (see head (2) in the text), the fact that it is confidential, or its nature or contents, may be sufficient to establish for the purposes of s 3(2)(b) (see head (2) supra) that the information, document or article is such that its unauthorised disclosure would be likely to have any of those effects: s 3(3). As to British citizens see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 23 et seq. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 For the meaning of 'disclosure' in relation to a document or other article see PARA 483 note 4 ante.

6 For these purposes, 'international relations' means the relations between states, between international organisations or between one or more states and one or more such organisations and includes any matter relating to a state other than the United Kingdom or to an international organisation which is capable of affecting the relations of the United Kingdom with another state or with an international organisation: Official Secrets Act 1989 s 3(5). For the meaning of 'state', 'international organisation' and 'state other than the United Kingdom' see PARA 483 note 8 ante.

7 For these purposes, any information, document or article obtained from a state or organisation is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the state or organisation to expect that it would be so held: *ibid* s 3(6).

8 Ibid s 3(1). As to the extent of the Official Secrets Act 1989 and place of trial see PARA 502 post. As to restrictions on prosecutions see PARA 503 post. As to the exclusion of the public during a hearing see PARA 504 post. As to the power to grant a search warrant see PARA 500 post.

9 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

10 le such as is mentioned in Official Secrets Act 1989 s 3(1) (see the text and notes 1-8 supra).

11 Ibid s 3(4). 'Damaging' means damaging within the meaning of s 3(1) (see note 4 supra): s 3(4).

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

13 Official Secrets Act 1989 s 10(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(7) OFFICIAL SECRETS AND COMMUNICATION OF INFORMATION/(i) Offences in respect of Official Secrets/486. Disclosure of information etc related to crime and special investigation powers.

#### **486. Disclosure of information etc related to crime and special investigation powers.**

##### **UPDATE**

#### **485 Damaging disclosure of information etc relating to international relations**

NOTE 11--The natural meaning of the 1989 Act s 3(4) is incompatible with the presumption of innocence guaranteed by the European Convention on Human Rights art 6, and therefore should be read down so as to treat the burden of proof imposed on the defendant as no more than an evidential burden: *R v Keogh* [2007] EWCA Crim 528, [2007] 3 All ER 789.

A person who is or has been a Crown servant<sup>1</sup> or government contractor<sup>2</sup> is guilty of an offence if without lawful authority<sup>3</sup> he discloses any specified information, document or other article<sup>4</sup> which is or has been in his possession by virtue of his position as such<sup>5</sup>. The specified information, document or other article is any information, document or other article:

- 1 (1) the disclosure of which (a) results in the commission of an offence; or (b) facilitates an escape from legal custody<sup>6</sup> or the doing of any other act prejudicial to the safekeeping of persons in legal custody; or (c) impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders; or
- 2 (2) which is such that its unauthorised disclosure would be likely to have any of those effects<sup>7</sup>.

It is a defence for a person charged with such an offence (i) in respect of a disclosure falling within head (1) above to prove<sup>8</sup> that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the disclosure would have any of the effects there mentioned<sup>9</sup>; (ii) in respect of any other disclosure, to prove that at the time of the alleged offence he did not know, and had no reasonable cause to believe, that the information, document or article in question was information or a document or article to which the above provisions apply<sup>10</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>11</sup> months or to a fine not exceeding the statutory maximum or to both<sup>12</sup>.

1 For the meaning of 'Crown servant' see PARA 483 note 7 ante.

2 For the meaning of 'government contractor' see PARA 483 note 8 ante.

3 For the meaning of 'lawful authority' see PARA 489 post.

4 For the meaning of 'disclosure' in relation to a document or other article see PARA 483 note 4 ante.

5 Official Secrets Act 1989 s 4(1). A defendant is not entitled to be acquitted if he shows, that it was, or he believed that it was, in the public or national interest to make the disclosure in question or if the jury concludes that it might have been, or that the defendant might have believed it to be, in the public or national interest to make the disclosure in question: *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247, [2002] 2 All ER 477. The offence is compatible with the right to freedom of expression under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10: *R v Shayler* supra. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. According to the Court of Appeal in *R v Shayler* [2001] EWCA Crim 1977, [2001] 1 WLR 2206, the defence of necessity is applicable to a charge under the Official Secrets Act 1989 s 1 or s 4 (as amended); on appeal the House of Lords declined to consider the applicability of that defence, making clear that this was not to be taken as acceptance of what the Court of Appeal said on the matter.

As to the extent of the Official Secrets Act 1989 and place of trial see PARA 502 post. As to restrictions on prosecutions see PARA 503 post. As to the exclusion of the public during a hearing see PARA 504 post. As to the power to grant a search warrant see PARA 500 post.

6 For these purposes, 'legal custody' includes detention in pursuance of any enactment or any instrument made under an enactment: *ibid* s 4(6).

7 *Ibid* s 4(2). Section 4 also applies to: (1) any information obtained by reason of the interception of any communication in obedience to a warrant issued under the Interception of Communications Act 1985 s 2 (repealed) or under the authority of an interception warrant under the Regulation of Investigatory Powers Act 2000 s 5 (see PARA 509 post), any information relating to the obtaining of information by reason of any such interception and any document or other article which is or has been used or held for use in, or has been obtained by reason of, any such interception; or (2) any information obtained by reason of action authorised by a warrant issued under the Security Service Act 1989 s 3 (repealed) or under the Intelligence Services Act 1994 s 5 (as amended) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 474) or by an authorisation given under s 7 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 474), any information relating to the obtaining of information by reason of any such action and any document or other article which is or has been used or held for use in, or has been obtained by reason of, any such action: Official Secrets Act 1989 s 4(3) (amended by the Intelligence Services Act 1994 s 11(2), Sch 4 para 4; and the Regulation of Investigatory Powers Act 2000 s 82(1), Sch 4 para 5).

8 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the European Convention on Human Rights art 6(2) (the presumption of innocence), see PARA 1368 et seq post.

9 Official Secrets Act 1989 s 4(4).

10 *Ibid* s 4(5).

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

12 Official Secrets Act 1989 s 10(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

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**487. Disclosure of information etc resulting from unauthorised disclosures or entrusted in confidence.**

Where:

- 616 (1) any information, document or other article protected against disclosure<sup>1</sup> has come into a person's possession as a result of having been (a) disclosed<sup>2</sup>, whether to him or another, by a Crown servant<sup>3</sup> or government contractor<sup>4</sup> without lawful authority<sup>5</sup>; or (b) entrusted to him by a Crown servant or government contractor on terms requiring it to be held in confidence or in circumstances in which the Crown servant or government contractor could reasonably expect that it would be so held; or (c) disclosed, whether to him or another, without lawful authority by a person to whom it was so entrusted<sup>6</sup>; and
- 617 (2) the disclosure without lawful authority of the information, document or article by the person into whose possession it has come is not a specified offence<sup>7</sup>,

the person into whose possession the information, document or article has come is guilty of an offence if he discloses it without lawful authority knowing, or having reasonable cause to believe, that it is so protected against disclosure and that it has come into his possession as mentioned above<sup>8</sup>.

A person does not commit such an offence (i) in the case of information or a document or article protected against disclosure<sup>9</sup> unless the disclosure is damaging<sup>10</sup> and he makes it knowing, or having reasonable cause to believe, that it would be so damaging<sup>11</sup>; (ii) in respect of information or a document or other article which has come into his possession as a result of having been disclosed<sup>12</sup>, unless that disclosure was by a British citizen<sup>13</sup> or took place in the United Kingdom, in any of the Channel Islands or in the Isle of Man or a colony<sup>14</sup>.

A person is also guilty of an offence if without lawful authority he discloses any information, document or other article which he knows, or has reasonable cause to believe, to have come into his possession as a result of a contravention of the statutory prohibition<sup>15</sup> on spying and sabotage<sup>16</sup>.

A person guilty of any such offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>17</sup> months or to a fine not exceeding the statutory maximum or to both<sup>18</sup>.

1 For these purposes, information or a document or article is protected against disclosure if (1) it relates to security or intelligence, defence or international relations within the meaning of the Official Secrets Act 1989 ss 1-3 (see PARAS 483-485 ante) or is confidential information within s 3(1)(b) (see PARA 485 ante); or (2) it is information or a document or article to which s 4 (see PARA 486 ante) applies: s 5(5).

2 For the meanings of 'disclose' and 'disclosure' in relation to a document or other article see PARA 483 note 4 ante.

3 For the meaning of 'Crown servant' see PARA 483 note 7 ante.

4 For the meaning of 'government contractor' see PARA 483 note 8 ante.

5 For the meaning of 'lawful authority' see PARA 489 post.

6 Ie as mentioned in the Official Secrets Act 1989 s 5(1)(a)(ii): see head (1)(b) in the text.

7 Ibid s 5(1). The specified offences are those under ss 1-4 (see PARAS 483-486 ante).

8 Ibid s 5(2). As to the extent of the Official Secrets Act 1989 and place of trial see PARA 502 post. As to restrictions on prosecutions see PARA 503 post. As to the exclusion of the public during a hearing see PARA 504 post. As to the power to grant a search warrant see PARA 500 post.

9 Ie by ibid ss 1-3: see PARAS 483-485 ante. Information or a document or article is protected against disclosure by ss 1-3 if it falls within note 1 head (1) supra: s 5(5).

10 For these purposes, the question of whether a disclosure is damaging is to be determined as it would be in relation to a disclosure of that information, document or article by a Crown servant in contravention of ibid s 1(3) (see PARA 483 ante), s 2(1) (see PARA 484 ante) or s 3(1) (see PARA 485 ante): s 5(3).

11 Ibid s 5(3).

12 Ie as mentioned in ibid s 5(1)(a)(i) (see head (1)(a) in the text) by a government contractor, or as mentioned in s 5(1)(a)(iii) (see head (1)(c) in the text).

13 As to British citizens see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 23 et seq.

14 Official Secrets Act 1989 s 5(4). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

15 Ie the Official Secrets Act 1911 s 1 (as amended): see PARA 478 ante.

16 Official Secrets Act 1989 s 5(6). See also note 8 supra.

17 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

18 Official Secrets Act 1989 s 10(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.



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**488. Damaging disclosure of information entrusted in confidence to other states or international organisations.**

Where:

- 618 (1) any information, document or other article which (a) relates to security or intelligence<sup>1</sup>, defence<sup>2</sup> or international relations<sup>3</sup>; and (b) has been communicated in confidence<sup>4</sup> by or on behalf of the United Kingdom to another state<sup>5</sup> or to an international organisation<sup>6</sup>, has come into a person's possession as a result of having been disclosed, whether to him or another, without the authority of that state or organisation or, in the case of an organisation, of a member of it; and
- 619 (2) the disclosure without lawful authority of the information, document or article by the person into whose possession it has come is not an offence<sup>7</sup>,

the person into whose possession the information, document or other article has come is guilty of an offence if he makes a damaging disclosure of it<sup>8</sup> knowing, or having reasonable cause to believe, that it is such information, document or article as is mentioned in heads (1) and (2) above, that it has come into his possession as there mentioned, and that its disclosure would be damaging<sup>9</sup>.

A person does not commit such an offence if the information, document or article is disclosed by him with lawful authority<sup>10</sup> or has previously been made available to the public with the authority of the state or organisation concerned or, in the case of an organisation, of a member of it<sup>11</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>12</sup> months or to a fine not exceeding the statutory maximum or to both<sup>13</sup>.

1 For the meaning of 'security or intelligence' see PARA 483 note 5 ante; definition applied by the Official Secrets Act 1989 s 6(4).

2 For the meaning of 'defence' see PARA 484 note 6 ante; definition applied by ibid s 6(4).

3 For the meaning of 'international relations' see PARA 485 note 6 ante; definition applied by ibid s 6(4).

4 For these purposes, information or a document or article is communicated in confidence if it is communicated on terms requiring it to be held in confidence or in circumstances in which the person communicating it could reasonably expect that it would be so held: ibid s 6(5).

5 For the meanings of 'state' and 'state other than the United Kingdom' see PARA 483 note 8 ante. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

6 For the meaning of 'international organisation' see PARA 483 note 8 ante.

7 Is an offence under the Official Secrets Act 1989 ss 1-5: see PARAS 483-487 ante.

8 For the meanings of 'disclose' and 'disclosure' in relation to a document or other article see PARA 483 note 4 ante.

9 Official Secrets Act 1989 s 6(1), (2). For these purposes, the question whether a disclosure is damaging is to be determined as it would be in relation to a disclosure of the information, document or article in question by a Crown servant in contravention of s 1(3) (see PARA 483 ante), s 2(1) (see PARA 484 ante) or s 3(1) (see PARA 485 ante): s 6(4). As to the extent of the Official Secrets Act 1989 and place of trial see PARA 502 post. As to restrictions on prosecutions see PARA 503 post. As to the exclusion of the public during a hearing see PARA 504 post. As to the power to grant a search warrant see PARA 500 post.

10 For the meaning of 'lawful authority' see PARA 489 post.

11 Official Secrets Act 1989 s 6(3).

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

13 Official Secrets Act 1989 s 10(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

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#### **489. Authorised disclosures.**

A disclosure is made with lawful authority:

- 620 (1) by a Crown servant<sup>1</sup> if, and only if, it is made in accordance with his official duty<sup>2</sup>;
- 621 (2) by a person, not being a Crown servant or government contractor<sup>3</sup>, in whose case a notification<sup>4</sup> is in force if, and only if, it is made in accordance with his official duty<sup>5</sup>;
- 622 (3) by a government contractor if, and only if, it is made in accordance with an official authorisation<sup>6</sup>, or for the purposes of the functions by virtue of which he is a government contractor and without contravening an official restriction<sup>7</sup>;
- 623 (4) by any other person if, and only if, it is made to a Crown servant for the purposes of his functions as such, or in accordance with an official authorisation<sup>8</sup>.

It is a defence for a person charged with a relevant offence<sup>9</sup> to prove<sup>10</sup> that at the time of the alleged offence he believed that he had lawful authority to make the disclosure in question and had no reasonable cause to believe otherwise<sup>11</sup>.

1 For the meaning of 'Crown servant' see PARA 483 note 7 ante.

2 Official Secrets Act 1989 s 7(1)(a).

3 For the meaning of 'government contractor' see PARA 483 note 8 ante.

4 I.e. a notification for the purposes of the Official Secrets Act 1989 s 1(1): see PARA 483 ante.

5 Ibid s 7(1)(b).

6 For these purposes, 'official authorisation' means an authorisation duly given by a Crown servant or government contractor or by or on behalf of a prescribed body or a body of a prescribed class: ibid s 7(5). For these purposes, 'prescribed' means prescribed by an order made by the Secretary of State: s 13(1). As to the making of such orders see PARA 483 note 7 ante; and note 7 infra. If the disclosure is one falling within s 6 (see PARA 488 ante), 'official authorisation' includes an authorisation given by or on behalf of the state or organisation concerned or, in the case of an organisation, a member of it: s 7(6). For the meaning of 'state' see PARA 483 note 8 ante.

7 Ibid s 7(2). For these purposes, 'official restriction' means a restriction duly imposed by a Crown servant or government contractor or by or on behalf of a prescribed body or a body of a prescribed class: s 7(5). The Civil Aviation Authority and the Investigatory Powers Tribunal established under the Regulation of Investigatory Powers Act 2000 s 65 are prescribed bodies for the purposes of the Official Secrets Act 1989 s 7(5): see the Official Secrets Act 1989 (Prescription) Order 1990, SI 1990/200, art 4, Sch 3 (substituted by SI 2003/1918).

8 Official Secrets Act 1989 s 7(3).

9 I.e. an offence under ibid ss 1-6: see PARAS 483-488 ante.

10 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post.

The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

11 Official Secrets Act 1989 s 7(4).

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#### **490. Safeguarding of information.**

Where a Crown servant<sup>1</sup> or government contractor<sup>2</sup>, by virtue of his position as such, has in his possession or under his control<sup>3</sup> any document or other article which it would be an offence<sup>4</sup> for him to disclose<sup>5</sup> without lawful authority<sup>6</sup>, he is guilty of an offence if (1) being a Crown servant, he retains the document or article contrary to his official duty; or (2) being a government contractor, he fails to comply with an official direction<sup>7</sup> for the return or disposal of the document or article, or if he fails to take such care to prevent the unauthorised disclosure of the document or article as a person in his position may reasonably be expected to take<sup>8</sup>. It is a defence, however, for a Crown servant charged with an offence under head (1) above to prove<sup>9</sup> that at the time of the alleged offence he believed that he was acting in accordance with his official duty and had no reasonable cause to believe otherwise<sup>10</sup>.

Where a person has in his possession or under his control any document or other article which it would be an offence<sup>11</sup> for him to disclose without lawful authority, he is guilty of an offence if (a) he fails to comply with an official direction for its return or disposal; or (b) where he obtained it from a Crown servant or government contractor on terms requiring it to be held in confidence or in circumstances in which that servant or contractor could reasonably expect that it would be so held, he fails to take such care to prevent its unauthorised disclosure as a person in his position may reasonably be expected to take<sup>12</sup>.

Where a person has in his possession or under his control a document or other article which it would be an offence<sup>13</sup> for him to disclose without lawful authority, he is guilty of an offence if he fails to comply with an official direction for its return or disposal<sup>14</sup>.

A person guilty of any of the above offences is liable on summary conviction to imprisonment for a term not exceeding three months<sup>15</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>16</sup>.

A person is also guilty of an offence if he discloses any official information, document or other article<sup>17</sup> which can be used for the purpose of obtaining access to any information, document or other article protected against disclosure<sup>18</sup>, and the circumstances in which it is disclosed are such that it would be reasonable to expect that it might be used for that purpose without authority<sup>19</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>20</sup> months or to a fine not exceeding the statutory maximum or to both<sup>21</sup>.

1 For the meaning of 'Crown servant' see PARA 483 note 7 ante. In the Official Secrets Act 1989 s 8(1), (2) references to a Crown servant include any person, not being a Crown servant or government contractor, in whose case a notification for the purposes of s 1(1) (see PARA 483 ante) is in force: s 8(3).

2 For the meaning of 'government contractor' see PARA 483 note 8 ante.

3 As to the meanings of 'possession' and 'control' in relation to statutory offences see *Warner v Metropolitan Police Comr* [1969] 2 AC 256, 52 Cr App Rep 373, HL.

4 Ie under the Official Secrets Act 1989 ss 1-6: see PARAS 483-488 ante.

5 For the meanings of 'disclose' and 'disclosure' in relation to a document or other article see PARA 483 note 4 ante.

6 For the meaning of 'lawful authority' see PARA 489 ante.

7 For these purposes, 'official direction' means a direction duly given by a Crown servant or government contractor or by or on behalf of a prescribed body or a body of a prescribed class: Official Secrets Act 1989 s 8(9). For these purposes, 'prescribed' means prescribed by an order made by the Secretary of State: s 13(1). As to the making of such orders see PARA 483 note 7 ante. The Civil Aviation Authority is a prescribed body for the purposes of s 8(9): see the Official Secrets Act 1989 (Prescription) Order 1990, SI 1990/200, art 4, Sch 3 (substituted by SI 2003/1918).

8 Official Secrets Act 1989 s 8(1). As to the extent of the Official Secrets Act 1989 and place of trial see PARA 502 post. As to restrictions on prosecutions see PARA 503 post. As to the exclusion of the public during a hearing see PARA 504 post. As to the power to grant a search warrant see PARA 500 post.

9 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

10 Official Secrets Act 1989 s 8(2).

11 Ie an offence under ibid s 5: see PARA 487 ante.

12 Ibid s 8(4).

13 Ie an offence under ibid s 6: see PARA 488 ante.

14 Ibid s 8(5).

15 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks: see the Official Secrets Act 1989 s 10(2) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 39). At the date at which this volume states the law no such day had been appointed.

16 Official Secrets Act 1989 s 10(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

17 For these purposes, a person discloses information or a document or article which is official if (1) he has or has had it in his possession by virtue of his position as a Crown servant or government contractor; or (2) he knows or has reasonable cause to believe that a Crown servant or government contractor has or has had it in his possession by virtue of his position as such: ibid s 8(7).

18 Ie under ibid ss 1-7: see PARAS 483-489 ante.

19 Ibid s 8(6). For these purposes, information or a document or article is protected against disclosure by ss 1-4 (see PARAS 483-486 ante) if:

75 (1) it relates to security or intelligence, defence or international relations within the meaning of the Official Secrets Act 1989 ss 1-3 (see PARAS 483-485 ante) or is confidential information within s 3(1)(b) (see PARA 485 ante); or

76 (2) it is information or a document or article to which s 4 (see PARA 486 ante) applies,

and information or a document or article is protected against disclosure by ss 1-3 if it falls within head (1) supra: ss 5(5), 8(8).

20 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

21 Official Secrets Act 1989 s 10(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

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**491. Impersonation etc for gaining admission to prohibited places or other purpose prejudicial to the state.**

If any person for the purpose of gaining admission, or assisting any other person to gain admission, to a prohibited place<sup>1</sup> or for any other purpose prejudicial to the safety or interests of the state<sup>2</sup>:

- 624 (1) uses or wears, without lawful authority, any naval, military, air force, police, or other official uniform, or any uniform so nearly resembling it as to be calculated to deceive, or falsely represents himself to be a person who is or has been entitled to use or wear any such uniform<sup>3</sup>; or
- 625 (2) orally, or in writing in any declaration or application, or in any document signed by him or on his behalf, knowingly makes or connives at the making of any false statement or any omission<sup>4</sup>; or
- 626 (3) tampers with any official document<sup>5</sup> or has in his possession any forged, altered, or irregular official document<sup>6</sup>; or
- 627 (4) personates, or falsely represents himself to be a person holding, or in the employment of a person holding, office under Her Majesty<sup>7</sup>, or to be or not to be a person to whom an official document or secret official code word or pass word has been duly issued or communicated, or with intent to obtain an official document, secret official code word or pass word, whether for himself or any other person, knowingly makes any false statement<sup>8</sup>; or
- 628 (5) uses, or has in his possession or under his control, without the authority of the government department or the authority concerned, any die, seal, or stamp of or belonging to, or used, made or provided by any government department, or by any diplomatic, naval, military, or air force authority appointed by or acting under the authority of Her Majesty, or any die, seal or stamp so nearly resembling any such die, seal or stamp as to be calculated to deceive, or counterfeits any such die, seal or stamp, or uses, or has in his possession, or under his control, any such counterfeited die, seal or stamp<sup>9</sup>,

he is guilty of an offence<sup>10</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding three<sup>11</sup> months or to a fine not exceeding the prescribed sum or to both<sup>12</sup>.

1 For the meaning of 'prohibited place' see PARA 479 ante.

2 In the case of any prosecution under the Official Secrets Act 1920 s 1 (as amended) involving the proof of a purpose prejudicial to the safety or interests of the state, the Official Secrets Act 1911 s 1(2) (as amended) applies in like manner as it applies to prosecutions under the Official Secrets Act 1911 s 1 (as amended): Official Secrets Act 1920 s 1(3). As to proof of a purpose prejudicial to the safety or interests of the state see PARA 481 ante. See also PARA 478 ante.

3 Ibid s 1(1)(a).

4 Ibid s 1(1)(b).

5 'Official document' means any passport or any naval, military, air force, police, or official pass, permit, certificate, licence, or other document of a similar character: *ibid* s 1(1)(c).

6 *Ibid* s 1(1)(c) (amended by the Forgery and Counterfeiting Act 1981 s 30, Schedule Pt I).

7 'Office under Her Majesty' includes any office or employment in or under any department of the government of the United Kingdom or of any British possession: Official Secrets Act 1911 s 12. A police officer holds office under the Sovereign: *Lewis v Cattle* [1938] 2 KB 454, [1938] 2 All ER 368, DC. As to British possessions see COMMONWEALTH 13 (2009) PARA 703.

8 Official Secrets Act 1920 s 1(1)(d).

9 *Ibid* s 1(1)(e).

10 *Ibid* s 1(1).

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

12 Official Secrets Act 1920 s 8(2); Magistrates' Courts Act 1980 s 32(2); Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 s 1. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to restrictions on prosecutions see PARA 503 post.



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#### **492. Retention etc of official documents, code words, seals etc.**

If any person:

- 629 (1) retains<sup>1</sup> for any purpose prejudicial to the safety or interests of the state<sup>2</sup> any official document<sup>3</sup>, whether or not completed or issued for use, when he has no right to retain it, or when it is contrary to his duty to retain it, or fails to comply with any directions issued by any government department or any person authorised by such department with regard to its return or disposal<sup>4</sup>; or
- 630 (2) allows any other person to have possession of any official document issued for his use alone, or communicates<sup>5</sup> any secret official code word or pass word so issued, or, without lawful authority or excuse, has in his possession any official document or secret official code word or pass word issued for the use of some person other than himself, or on obtaining possession of any official document by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued, or to a police constable<sup>6</sup>; or
- 631 (3) without lawful authority or excuse, manufactures or sells or has in his possession for sale any die, seal or stamp<sup>7</sup>,

he is guilty of an offence<sup>8</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding three<sup>9</sup> months or to a fine not exceeding the prescribed sum or to both<sup>10</sup>.

1 For the meaning of 'retain' see PARA 478 note 7 ante.

2 See PARA 491 note 2 ante. As to proof of a purpose prejudicial to the safety or interests of the state see PARA 481 ante.

3 For the meaning of 'official document' see PARA 491 note 5 ante.

4 Official Secrets Act 1920 s 1(2)(a). As to wrongful retention of documents see also PARA 490 ante.

5 For the meaning of 'communicate' see PARA 478 note 8 ante.

6 Official Secrets Act 1920 s 1(2)(b). As to wrongful disclosure of information etc see PARAS 483-488 ante; and as to the safeguarding of information see PARA 490 ante.

7 Ibid s 1(2)(c). 'Any die, seal or stamp' means any die, seal or stamp referred to in s 1(1)(e) (see PARA 491 head (5) ante): s 1(2)(c).

8 Ibid s 1(2).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 Official Secrets Act 1920 s 8(2); Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 s 1. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to restrictions on prosecutions see PARA 503 post.

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#### **493. Communication of information acquired through Euratom.**

Where a person<sup>1</sup>, owing either (1) to his duties as a member of any Euratom<sup>2</sup> institution or committee, or as an officer or servant of Euratom; or (2) to his dealings in any capacity official or unofficial with any Euratom institution or installation or with any Euratom joint enterprise, has occasion to acquire, or obtain cognisance of, any classified information<sup>3</sup>, he is guilty of an offence if, knowing or having reason to believe that it is classified information, he communicates it to any unauthorised person or makes any public disclosure of it, whether in the United Kingdom or elsewhere, and whether before or after the termination of those duties or dealings<sup>4</sup>, and is liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding three months<sup>5</sup> or to a fine not exceeding the prescribed sum or to both<sup>6</sup>.

1 The European Communities Act 1972 refers to a person 'whether a British subject or not', but this term is now used to refer only to a narrow class of British national. As to British nationality see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 7 et seq.

2 'Euratom' means the European Atomic Energy Community: *ibid* s 1(2), Sch 1 Pt II.

3 For these purposes, 'classified information' means any facts, information, knowledge, documents or objects that are subject to the security rules of a member state or of any Euratom institution: *ibid* s 11(2). 'Member' in the expression 'member state' refers to membership of the European Communities: Sch 1 Pt II.

4 *Ibid* s 11(2). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. Section 11(2) is to be construed, and the Official Secrets Acts 1911 to 1939 are to have effect, as if the European Communities Act 1972 s 11(2) were contained in the Official Secrets Act 1911, but so that s 10(1)-(3) and s 11 (see PARA 501 post) do not apply: European Communities Act 1972 s 11(2). As to restrictions on prosecutions see PARA 503 post. As to communication of information concerning atomic energy plants see PARA 499 post.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Official Secrets Act 1920 s 8(2); Magistrates' Courts Act 1980 s 32(2); Criminal Law Act 1967 s 1. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

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#### **494. Prohibition of disclosures relating to nuclear industry.**

A person is guilty of an offence if he discloses<sup>1</sup> any information or thing the disclosure of which might prejudice the security of any nuclear site<sup>2</sup> or of any nuclear material<sup>3</sup> (1) with the intention of prejudicing that security; or (2) being reckless as to whether the disclosure might prejudice that security<sup>4</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>5</sup> months or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

Proceedings for such an offence may not be instituted in England and Wales, except by or with the consent of the Attorney General<sup>7</sup>.

The above provisions apply to acts done outside the United Kingdom, but only if they are done by a United Kingdom person<sup>8</sup>. Proceedings for an offence committed outside the United Kingdom may be taken, and the offence may for incidental purposes be treated as having been committed, in any place in the United Kingdom<sup>9</sup>.

1 'Disclose' and 'disclosure', in relation to a thing, include parting with possession of it: Anti-terrorism, Crime and Security Act 2001 s 79(4).

2 'Nuclear site' means a site in the United Kingdom (including a site occupied by or on behalf of the Crown) which is (or is expected to be) used for any purpose mentioned in the Nuclear Installations Act 1965 s 1(1) (see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1487); Anti-terrorism, Crime and Security Act 2001 s 79(4). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 'Nuclear material' has the same meaning as in the Energy Act 2004 Pt 1 Ch 3 (see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1528); Anti-terrorism, Crime and Security Act 2001 s 79(4) (definition substituted by the Energy Act 2004 s 69, Sch 14 para 10(2)).

4 Anti-terrorism, Crime and Security Act 2001 s 79(1). The reference in s 79(1) to nuclear material is a reference to: (1) nuclear material which is being held on any nuclear site; or (2) nuclear material anywhere in the world which is being transported to or from a nuclear site or carried on board a British ship (including nuclear material which is expected to be so held, transported or carried): s 79(2). For these purposes, 'British ship' means a ship (including a ship belonging to Her Majesty) which is registered in the United Kingdom: s 79(4). See further FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1562.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Anti-terrorism, Crime and Security Act 2001 s 79(3). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7 Ibid s 81(1)(a).

8 Ibid s 79(5). Nothing in s 79(5) affects any criminal liability arising otherwise than under that provision: s 79(7).

In ss 79, 80, 'United Kingdom person' means a United Kingdom national, a Scottish partnership or a body incorporated under the law of any part of the United Kingdom: s 81(2). For these purposes, a United Kingdom national is an individual who is: (1) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British overseas citizen; (2) a person who under the British Nationality Act 1981 is a British subject; or (3) a British protected person within the meaning of that Act: Anti-terrorism, Crime and Security Act 2001 s 81(3) (amended by virtue of the British Overseas Territories Act 2002 s 2(3)). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43; as to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 44-57; as to the status of British National (Overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 63-65; as to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 58-62; as to British subjects under the British Nationality Act 1981 see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 66-71; and as to British protected persons within the meaning of s 50(1) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 72-76.

9 Anti-terrorism, Crime and Security Act 2001 s 79(6).

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#### **495. Prohibition of disclosures of uranium enrichment technology.**

The Secretary of State may make regulations<sup>1</sup> prohibiting the disclosure<sup>2</sup> of information<sup>3</sup> about the enrichment of uranium<sup>4</sup>, or any information or thing which is, or is likely to be, used in connection with the enrichment of uranium<sup>5</sup>. A person who contravenes such a prohibition is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup> or to a fine not exceeding the statutory maximum or to both<sup>7</sup>. Proceedings for such an offence may not be instituted except by or with the consent of the Attorney General<sup>8</sup>.

1 The power to make the regulations is exercisable by statutory instrument: Anti-terrorism, Crime and Security Act 2001 s 80(6). The regulations may not be made unless a draft of the regulations has been laid before and approved by each House of Parliament: s 80(7). As to the terms of this regulation-making power see s 80(4), (5). As to the regulations made see the Uranium Enrichment Technology (Prohibition on Disclosure) Regulations 2004, SI 2004/1818.

2 'Disclosure', in relation to a thing, includes parting with possession of it: Anti-terrorism, Crime and Security Act 2001 s 80(8).

3 'Information' includes software: *ibid* s 80(8).

4 For these purposes, 'the enrichment of uranium' means any treatment of uranium that increases the proportion of the isotope 235 contained in the uranium: *ibid* s 80(1).

5 *Ibid* s 80(1), (2). See further FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1563.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 Anti-terrorism, Crime and Security Act 2001 s 80(3).

8 *Ibid* s 81(1).

#### **UPDATE**

#### **495 Prohibition of disclosures of uranium enrichment technology**

TEXT AND NOTES--See also Anti-terrorism, Crime and Security Act 2001 s 80A (added by Energy Act 2008 s 101), which relates to the securing of sensitive nuclear information pertaining to uranium enrichment.

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#### **496. Obstructing police or Her Majesty's forces in or near prohibited places.**

If any person in the vicinity<sup>1</sup> of any prohibited place<sup>2</sup> obstructs, knowingly misleads, or otherwise interferes with or impedes the chief officer<sup>3</sup> or a superintendent<sup>4</sup> or other officer of police, or a member of Her Majesty's forces engaged on guard, sentry, patrol or other similar duty in relation to the prohibited place, he is guilty of an offence<sup>5</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding three months<sup>6</sup> or to a fine not exceeding the prescribed sum or to both<sup>7</sup>.

1 'In the vicinity of' means 'in or in the vicinity of': *Adler v George* [1964] 2 QB 7, [1964] 1 All ER 628, DC.

2 For the meaning of 'prohibited place' see PARA 479 ante.

3 For the meaning of 'chief officer of police' see PARA 380 note 1 ante; definition applied by the Interpretation Act 1978 s 5, Sch 1.

4 For the meaning of 'superintendent of police' see PARA 482 note 3 ante.

5 Official Secrets Act 1920 s 3.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 Official Secrets Act 1920 s 8(2); Magistrates' Courts Act 1980 s 32(2); Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 s 1. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to restrictions on prosecutions see PARA 503 post. As to obstructing a police officer in the execution of his duty see PARA 735 post.

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#### **497. Attempts; incitement; preparatory acts.**

Any person who attempts<sup>1</sup> to commit any offence under the Official Secrets Act 1911 or the Official Secrets Act 1920, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and<sup>2</sup> does any act preparatory to the commission of an offence under those Acts<sup>3</sup> is guilty of an offence and liable on conviction to the same penalty and to be proceeded against in the same manner as if he had committed the corresponding substantive offence<sup>4</sup>.

1 As to attempts see PARA 79 et seq ante.

2 In order to produce an intelligible result, the words 'abets and does any act' must be read as if 'or' were substituted for 'and': *R v Oakes* [1959] 2 QB 350, 43 Cr App Rep 114, CCA. See also *R v Bingham* [1973] QB 870, 57 Cr App Rep 439, CA.

3 This (ie doing 'any act preparatory to the commission of an offence') is a very special kind of offence based on a provision which . . . contemplates something which is even more remote from the substantive offence than an attempt to commit it: *R v Bingham* [1973] QB 870 at 875, 57 Cr App Rep 439 at 443-444, CA (approach to foreign embassy by wife with a view to her husband supplying information). In a prosecution for this offence it is sufficient for the prosecution to prove that at the time of doing the act the defendant must have realised that the substantive offence might follow; it is not necessary for the prosecution to show that the defendant realised that it was a probable consequence of this act: *R v Bingham* supra.

4 Official Secrets Act 1920 s 7; Criminal Law Act 1967 ss 1, 12(5)(a). As to restrictions on prosecutions see PARA 503 post.



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#### **498. Harboursing offenders.**

If any person (1) knowingly harbours<sup>1</sup> any person whom he knows, or has reasonable grounds for supposing, to be a person who is about to commit or who has committed an offence under the Official Secrets Act 1911 or the Official Secrets Act 1920; or (2) knowingly permits any such persons to meet or assemble in premises in his occupation or under his control; or (3) having harboured any such person or permitted any such persons to meet or assemble in premises in his occupation or under his control, wilfully omits or refuses to disclose to a superintendent of police<sup>2</sup> any information which it is in his power to give in relation to any such person, he is guilty of an offence<sup>3</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding three months<sup>4</sup> or to a fine not exceeding the prescribed sum or to both<sup>5</sup>.

1 'Harbour' means to give shelter; an alleged harbourer need not have any interest in the relevant place (and may even be a trespasser there): *Darch v Weight* [1982] 2 All ER 245, 79 Cr App Rep 40, DC (harbouring escaped prisoner contrary to the Criminal Justice Act 1961 s 22(2)); and see also *R v Mistry, R v Asare* [1980] Crim LR 177, CA (harbouring illegal immigrants contrary to the Immigration Act 1971 s 25(2)).

2 For the meaning of 'superintendent of police' see PARA 482 note 3 ante.

3 Official Secrets Act 1911 s 7 (amended by the Official Secrets Act 1920 ss 10, 11(2), Schs 1, 2).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 Official Secrets Act 1920 s 8(2); Magistrates' Courts Act 1980 s 32(2); Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 s 1. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to restrictions on prosecutions see PARA 503 post.

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#### **499. Communication of information concerning atomic energy plants.**

Except as otherwise provided<sup>1</sup>, any person<sup>2</sup> who, without the consent of the Secretary of State<sup>3</sup>, communicates to any other person except an authorised person<sup>4</sup> any document, drawing, photograph, plan, model or other information whatsoever which to his knowledge describes, represents or illustrates (1) any existing or proposed plant<sup>5</sup> used or proposed to be used for the purpose of producing or using atomic energy<sup>6</sup>; (2) the purpose or method of operation of any such existing or proposed plant; or (3) any process operated or proposed to be operated in any such existing or proposed plant, is guilty of an offence<sup>7</sup> and liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine<sup>8</sup> or to both, or on summary conviction to imprisonment for a term not exceeding three months<sup>9</sup> or to a fine not exceeding the prescribed sum or to both<sup>10</sup>. Proceedings for such an offence may not be instituted except by or with the consent of the Director of Public Prosecutions<sup>11</sup>.

1 It is not an offence under the Atomic Energy Act 1946 s 11(1) to communicate information with respect to any plant of a type in use for purposes other than the production or use of atomic energy unless the information discloses that plant of that type is used or proposed to be used for the production or use of atomic energy: s 11(1) proviso. Where any information has been made available to the general public otherwise than in contravention of s 11(1), any subsequent communication of that information does not constitute an offence: s 11(4). The Secretary of State may by order grant exemption from s 11(1) in such classes of cases, and to such extent and subject to such conditions, as may be specified in the order: s 11(3). Any such order is subject to annulment by resolution of either House of Parliament within 40 days of the order being laid: see s 15(1). See also the Atomic Energy (Disclosure of Information) (No 1) Order 1947, SR & O 1947/100.

The Atomic Energy Act 1946 s 11 does not apply to anything done by or to the United Kingdom Atomic Energy Authority: Atomic Energy Authority Act 1954 ss 1(1), 6(4), Sch 3.

2 Where an offence has been committed by a body corporate, every person who at the time of the commission of the offence was a director, general manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capacity, is deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances: Atomic Energy Act 1946 s 14(3). As to the criminal capacity of corporations see PARA 38 ante.

3 The functions of the former Minister of Supply under the Atomic Energy Act 1946 are now exercised by the Secretary of State for Trade and Industry: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 507; FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 601. The Secretary of State may not withhold consent if satisfied that the information proposed to be communicated is not of importance for purposes of defence: s 11(2).

4 'Authorised person' means a person to whom, by virtue of a general authority granted by the Secretary of State, information on that subject may be communicated: *ibid* s 11(1).

5 'Plant' includes any machinery, equipment or appliance whether affixed to land or not: *ibid* s 18(1).

6 'Atomic energy' means the energy released from atomic nuclei as a result of any process, including the fission process, but does not include energy released in any process of natural transmutation or radioactive decay which is not accelerated or influenced by external means: *ibid* s 18(1). 'Production or use of atomic energy' includes the carrying out of any process preparatory or ancillary to such production or use: s 18(4).

7 *Ibid* s 11(1).

8 Where a person convicted on indictment of an offence under the Atomic Energy Act 1946 is a body corporate, the provisions of s 14(1) (as amended) limiting the amount of the fine which may be imposed do not apply and the body corporate is liable to a fine of such amount as the court thinks just: s 14(2).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 Atomic Energy Act 1946 s 14(1) (amended by the Criminal Justice Act 1948 s 1(1), (2); the Criminal Law Act 1977 s 32(1); and the Magistrates' Courts Act 1980 s 32(2)). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

11 Atomic Energy Act 1946 s 14(4). As to the effect of this limitation see PARA 1071 post. As to the communication of information acquired through Euratom see PARA 493 ante.

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## **(ii) Enforcement Powers**

### **500. Power to search premises.**

If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that an offence under the Official Secrets Act 1911 or (with some exceptions) the Official Secrets Act 1989<sup>1</sup> has been or is about to be committed, he may grant a search warrant authorising any constable to enter at any time any premises or place named in the warrant, if necessary by force, and to search the premises or place and every person found there and to seize any sketch<sup>2</sup>, plan, model<sup>3</sup>, article, note, or document<sup>4</sup> or anything of a like nature or anything which is evidence of an offence under the Act having been or being about to be committed, which he may find on the premises or place or on any such person, and with regard to or in connection with which he has reasonable ground for suspecting that an offence under the Act has been or is about to be committed<sup>5</sup>.

Where it appears to a superintendent of police<sup>6</sup> that the case is one of great emergency and that in the interests of the state immediate action is necessary, he may by a written order under his hand give to any constable the like authority as may be given by the warrant of a justice<sup>7</sup>.

1 See note 5 *infra*.

2 For the meaning of 'sketch' see PARA 478 note 4 *ante*.

3 For the meaning of 'model' see PARA 478 note 5 *ante*.

4 For the meaning of 'document' see PARA 478 note 9 *ante*.

5 Official Secrets Act 1911 s 9(1) (amended by the Police and Criminal Evidence Act 1984 ss 119(2), 120, Sch 7 Pt I). The Official Secrets Act 1911 s 9(1) (as amended) has effect as if references to offences under that Act included references to offences under any provision of the Official Secrets Act 1989 other than s 8(1), (4) or (5) (see PARA 490 *ante*); and the Police and Criminal Evidence Act 1984 s 9(2) (exclusion of items subject to legal privilege and certain material from powers of search conferred by previous enactments: see PARA 874 *post*), and s 9(1), Sch 1 para 3(b) (access conditions for the special procedure laid down in that Schedule: see PARA 878 *post*) apply to the Official Secrets Act 1911 s 9(1) (as amended) as extended by the Official Secrets Act 1989 s 11(3) as they apply to the Official Secrets Act 1911 s 9(1) as originally enacted: Official Secrets Act 1989 s 11(3). The Official Secrets Act 1911 s 9(1) (as amended) must be read subject to the Police and Criminal Evidence Act 1984 Pt II (ss 8-23) (as amended): see PARA 871 *et seq post*. As to additional powers of seizure from premises (and the obligations relating to them) see the Criminal Justice and Police Act 2001 s 50, s 55 (as amended), s 60 (as amended), s 66 (as amended), Sch 1 paras 3, 86; and PARA 890 *et seq post*.

6 For the meaning of 'superintendent of police' see PARA 482 note 3 *ante*.

7 Official Secrets Act 1911 s 9(2). Section 9(2), unlike s 9(1) (as amended), has not been extended to offences under the Official Secrets Act 1989.

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### **(iii) Proceedings and Evidence**

#### **501. Official Secrets Acts 1911-1920: extent and place of trial.**

The Official Secrets Acts 1911 to 1920 apply to all acts which are offences under them when committed in any part of Her Majesty's dominions<sup>1</sup>, or when committed by British officers or British nationals<sup>2</sup> elsewhere<sup>3</sup>. An offence under the Acts, if alleged to have been committed out of the United Kingdom, may be tried by any competent British court in the place where the offence was committed<sup>4</sup>, or in England<sup>5</sup>. For the purposes of the trial of a person for an offence under the Acts, the offence is deemed to have been committed either at the place where it was actually committed or at any place in the United Kingdom where the defendant may be found<sup>6</sup>.

If by any law made<sup>7</sup> by the legislature of any British possession<sup>8</sup> provisions are made which appear to Her Majesty to be of the like effect to those contained in the Official Secrets Acts 1911 to 1920, Her Majesty may, by Order in Council, suspend the operation of those Acts or any part of them within that British possession so long as that law continues in force there<sup>9</sup>; but such suspension may not extend to the holder of an office under Her Majesty<sup>10</sup> who is not appointed to the office by the government of that possession<sup>11</sup>.

1 As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707.

2 The Official Secrets Act 1911 refers to 'British subjects', but this term is now used to refer only to a narrow class of British national. As to British nationality see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 7 et seq.

3 Official Secrets Act 1911 s 10(1).

4 Such an offence may not, however, be tried by any court out of the United Kingdom which has not jurisdiction to try offences which involve the greatest penalty allowed by law: see *ibid* s 10(3) (amended by the Criminal Law Act 1967 s 10(2), Sch 3 Pt I). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 Official Secrets Act 1911 s 10(2) (amended by the Criminal Justice Act 1948 s 83(3), Sch 10 Pt I; and the Criminal Law Act 1967 s 10(2), Sch 3 Pt II).

6 Official Secrets Act 1920 s 8(3).

7 Ie whether before or after the passing of the Official Secrets Act 1911.

8 As to British possessions see COMMONWEALTH vol 13 (2009) PARA 703.

9 Official Secrets Act 1911 s 11. See also the Official Secrets (Commonwealth of Australia) Order in Council 1915, SR & O 1915/1199; and the Official Secrets (Jersey) Order in Council 1952, SI 1952/1034.

10 For the meaning of 'office under Her Majesty' see PARA 491 note 7 ante.

11 Official Secrets Act 1911 s 11 proviso.

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**502. Official Secrets Act 1989: extent and place of trial.**

Except as otherwise provided<sup>1</sup>, any act done by a British citizen<sup>2</sup> or Crown servant<sup>3</sup>, or done by any person in any of the Channel Islands or Isle of Man or any colony, is, if it would be a relevant offence<sup>4</sup> by that person when done by him in the United Kingdom, such an offence<sup>5</sup>. Proceedings for an offence under the Official Secrets Act 1989 may be taken in any place in the United Kingdom<sup>6</sup>.

1 The Official Secrets Act 1989 s 15(1) does not apply to offences under s 8(1), (4) or (5) (see PARA 490 ante); see s 15(1). As to the normal rules of jurisdiction see PARA 1054 et seq post.

2 As to British citizens see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 23 et seq.

3 For the meaning of 'Crown servant' see PARA 483 note 7 ante.

4 Ie an offence under any provision of the Official Secrets Act 1989 other than s 8(1), (4) or (5): see note 1 supra.

5 Ibid s 15(1). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

6 Ibid s 11(5).

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### **503. Prosecutions for offences under the Official Secrets Acts.**

Subject to one exception<sup>1</sup>, no prosecution for an offence under the Official Secrets Acts 1911 to 1989<sup>2</sup> may be instituted except by or with the consent of the Attorney General<sup>3</sup>.

Offences under the Official Secrets Acts 1911 to 1920 which are punishable on conviction on indictment or on summary conviction<sup>4</sup> may not be dealt with summarily except with the consent of the Attorney General<sup>5</sup>.

1 The Official Secrets Act 1989 s 9(1) does not apply to an offence in respect of any such information, document or article as is mentioned in s 4(2) (see PARA 486 ante); but no prosecution for such an offence may be instituted except by or with the consent of the Director of Public Prosecutions: s 9(2). As to the effect of this limitation see PARA 1071 post.

2 Ie the Official Secrets Acts 1911-1939 and the Official Secrets Act 1989: see s 16(2).

3 Official Secrets Act 1911 s 8 (amended by the Criminal Jurisdiction Act 1975 s 14(5), Sch 6 Pt I); Official Secrets Act 1989 s 9(1). As to the effect of this limitation see PARA 1071 post.

4 See the Official Secrets Act 1920 s 8(2) (amended by the Magistrates' Courts Act 1980 s 32(2)); and the Criminal Law Act 1967 s 1.

5 Official Secrets Act 1920 s 8(2) proviso; Criminal Law Act 1967 s 1.

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#### **504. Exclusion of public during hearing.**

In addition and without prejudice to any powers which a court may possess to order the exclusion of the public from any proceedings<sup>1</sup>, if, in the course of proceedings before a court against any person for an offence under the Official Secrets Acts 1911 to 1989 or the proceedings on appeal, or in the course of the trial of a person for any offence under the Acts, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the national safety, that all or any portion of the public be excluded during any part of the hearing, the court may make an order to that effect<sup>2</sup>. The passing of sentence must, however, in any case take place in public<sup>3</sup>.

1 See PARA 1300 post.

2 Official Secrets Act 1920 s 8(4); Criminal Law Act 1967 ss 1, 12(5)(a); Official Secrets Act 1989 s 11(4). See further PARA 1300 post. See also *A-G v Leveiler Magazine* [1979] AC 440, 68 Cr App Rep 342, HL; *R v Shayler* [2003] EWCA Crim 2218, [2003] All ER (D) 480 (Jul). As to appeals against such orders see PARAS 1934, 1936 post. The Official Secrets Act 1920 s 8(4) does not apply to offences under s 8(1), (4) or (5) (see PARA 490 ante): Official Secrets Act 1989 s 11(4).

3 Official Secrets Act 1920 s 8(4); Official Secrets Act 1989 s 11(4).



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### **505. Offences by corporations.**

Where the person guilty of an offence under the Official Secrets Acts 1911 to 1989 is a company or corporation, every director and officer of the company or corporation is guilty of the like offence, unless he proves<sup>1</sup> that the act or omission constituting the offence took place without his knowledge or consent<sup>2</sup>.

<sup>1</sup> As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

<sup>2</sup> Official Secrets Act 1920 s 8(5) (applied by the Official Secrets Act 1939 s 2(1) and by the Official Secrets Act 1989 s 16(2)). As to the criminal capacity of corporations see PARA 38 ante.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(8) INTERCEPTION, ACQUISITION AND DISCLOSURE OF COMMUNICATIONS/(i) Unlawful and Authorised Interception/506. Unlawful interception.

## **(8) INTERCEPTION, ACQUISITION AND DISCLOSURE OF COMMUNICATIONS**

### **(i) Unlawful and Authorised Interception**

#### **506. Unlawful interception.**

A person<sup>1</sup> who intentionally and without lawful authority intercepts<sup>2</sup>, at any place in the United Kingdom, a communication<sup>3</sup> in the course of its transmission<sup>4</sup> by means of a public postal service<sup>5</sup> or a public telecommunication system<sup>6</sup> is guilty of an offence<sup>7</sup>. A person who (1) intentionally and without lawful authority; and (2) otherwise than in circumstances in which his conduct is excluded<sup>8</sup> from criminal liability<sup>9</sup>, intercepts at any place in the United Kingdom, any communication in the course of its transmission by means of a private telecommunications system<sup>10</sup> is guilty of an offence<sup>11</sup>. A person who is guilty of either of these offences<sup>12</sup> is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to a fine not exceeding the statutory maximum<sup>13</sup>.

There is lawful authority for an interception if, and only if: (a) it is authorised by or under certain provisions of the Regulation of Investigatory Powers Act 2000<sup>14</sup>; or (b) it takes place in accordance with an interception warrant<sup>15</sup>; or (c) it is in exercise, in relation to any stored communication, of any statutory<sup>16</sup> power that is exercised<sup>17</sup> for the purpose of obtaining information or of taking possession of any document<sup>18</sup> or other property<sup>19</sup>.

Where the United Kingdom is a party to an international agreement which relates to the provision of mutual assistance in connection with, or in the form of, the interception of communications, and requires the issue of a warrant, order or equivalent instrument in cases in which assistance is given, and is designated for the purposes of this provision by an order made by the Secretary of State, it is the duty of the Secretary of State to secure that no request for assistance in accordance with the agreement is made on behalf of a person in the United Kingdom to the competent authorities of a country or territory outside the United Kingdom except with lawful authority<sup>20</sup>.

Any interception of a communication which is carried out at any place in the United Kingdom by, or with the express or implied consent of, a person having the right to control the operation or the use of a private telecommunication system is actionable in civil proceedings at the suit or instance of the sender or recipient, or intended recipient, of the communication if it is without lawful authority and is either (i) an interception of that communication in the course of its transmission by means of that private system; or (ii) an interception of that communication in the course of its transmission, by means of a public telecommunication system, to or from apparatus comprised in that private telecommunication system<sup>21</sup>.

1 For these purposes, 'person' includes any organisation and any association or combination of persons: Regulation of Investigatory Powers Act 2000 s 81(1).

2 For these purposes, a person intercepts a communication in the course of its transmission by means of a telecommunication system if, and only if, he:

- 77 (1) so modifies or interferes with the system, or its operation;
- 78 (2) so monitors transmissions made by means of the system; or
- 79 (3) so monitors transmissions made by wireless telegraphy to or from apparatus comprised in the system,

as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication: *ibid* s 2(2). For the meanings of 'wireless telegraphy' and 'interfere' see the Wireless Telegraphy Act 1949 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 227); definitions applied by the Regulation of Investigatory Powers Act 2000 s 81(1).

References to the interception of a communication do not include references to the interception of any communication broadcast for general reception: s 2(3). The interception of a communication takes place in the United Kingdom if, and only if, the modification, interference or monitoring or, in the case of a postal item, the interception, is effected by conduct within the United Kingdom and the communication is either intercepted in the course of its transmission by means of a public postal service (see note 5 *infra*; and POST OFFICE) or public telecommunication system, or intercepted in the course of its transmission by means of a private telecommunication system (see note 10 *infra*; and TELECOMMUNICATIONS AND BROADCASTING) in a case in which the sender or intended recipient of the communication is in the United Kingdom: s 2(4). For the meaning of 'United Kingdom' see PARA 45 note 2 *ante*.

For the purposes of s 2, references to the modification of a telecommunication system include references to the attachment of any apparatus to, or other modification of or interference with any part of the system, or any wireless telegraphy apparatus used for making transmissions to or from apparatus comprised in the system: s 2(6). In the Regulation of Investigatory Powers Act 2000, 'modification' includes alterations, additions and omissions; and cognate terms are to be construed accordingly: s 81(1).

For the purposes of s 2, the times while a communication is being transmitted by means of a telecommunication system must be taken to include any time when the system by means of which the communication is being, or has been, transmitted is used for storing it in a manner that enables the intended recipient to collect it or otherwise to have access to it: s 2(7).

For the purposes of s 2, the cases in which any contents of a communication are to be taken to be made available to a person while being transmitted include any case in which any of the contents of the communication, while being transmitted, are diverted or recorded so as to be available to a person subsequently: s 2(8).

References to the interception of a communication in the course of its transmission by means of a postal service or telecommunication system do not include references to: (a) any conduct that takes place in relation only to so much of the communication as consists in any traffic data comprised in or attached to a communication (whether by the sender or otherwise) for the purposes of any postal service or telecommunication system by means of which it is being or may be transmitted; or (b) any such conduct, in connection with conduct falling within head (a) *supra*, as gives a person who is neither the sender nor the intended recipient only so much access to a communication as is necessary for the purpose of identifying traffic data so comprised or attached: s 2(5). 'Traffic data', in relation to any communication, means:

- 80 (i) any data identifying, or purporting to identify, any person, apparatus or location to or from which the communication is or may be transmitted;
- 81 (ii) any data identifying or selecting, or purporting to identify or select, apparatus through which, or by means of which, the communication is or may be transmitted;
- 82 (iii) any data comprising signals for the actuation of apparatus used for the purposes of a telecommunication system for effecting (in whole or in part) the transmission of any communication; and
- 83 (iv) any data identifying the data or other data as data comprised in or attached to a particular communication,

and that expression includes data identifying a computer file or computer program access to which is obtained, or which is run, by means of the communication to the extent only that the file or program is identified by reference to the apparatus in which it is stored: s 2(9). 'Apparatus' includes any equipment, machinery or device and any wire or cable: s 81(1).

In s 2, references, in relation to traffic data comprising signals for the actuation of apparatus, to a telecommunication system by means of which a communication is being or may be transmitted include references to any telecommunication system in which that apparatus is comprised, and references to traffic data being attached to a communication include references to the data and the communication being logically associated with each other: s 2(10). In s 2, 'data', in relation to a postal item, means anything written on the

outside of the item (s 2(10)); and 'postal item' means any letter, postcard or other such thing in writing as may be used by the sender for imparting information to the recipient, or any packet or parcel (s 2(11)).

A telephone conversation tape recorded by one of the parties to the conversation, without the knowledge of the other party, does not amount to interception of a communication: *R v Hardy* [2002] EWCA Crim 3012, [2003] 1 Cr App Rep 494.

A recording of what a person says on the telephone, picked up by a surveillance device (which does not record any speech by the other party), is not an interception of a communication 'in the course of its transmission' within the Regulation of Investigatory Powers Act 2000: see s 2(2) (which phrase also appears in s 1(1), (2)). The natural meaning of the phrase denotes some interference with, or abstraction of, a signal during the process of transmission. The recording of a voice does not become an interception simply because the words spoken are then transmitted by a telecommunications system. Moreover, for the purposes of s 2(2), interception is concerned with what happens 'in the course of transmission' by a 'telecommunications system'; that system begins at the point a sound wave created by a speaker is converted into electromagnetic energy. What was recorded on the facts was independent of the telecommunications system; it was made at the same time as being transmitted but the transmission was not recorded, just the voice from the sound waves in the car where the surveillance device has been placed: *R v E* [2004] EWCA Crim 1243, [2004] 1 WLR 3279, [2004] 2 Cr App Rep 484.

3 'Communication' includes (except in the definition of 'postal service' in the Regulation of Investigatory Powers Act 2000 s 2(1) (see note 5 infra)) anything transmitted by means of a postal service, anything comprising speech, music, sounds, visual images or data of any description, and signals serving either for the impartation of anything between persons, between a person and a thing or between things or for the actuation or control of any apparatus: s 81(1).

4 See note 2 supra.

5 'Public postal service' means any postal service which is offered or provided to, or to a substantial section of, the public in any one or more parts of the United Kingdom: Regulation of Investigatory Powers Act 2000 s 2(1). 'Postal service' means any service which consists in the following, or in any one or more of them, namely, the collection, sorting, conveyance, distribution and delivery, whether in the United Kingdom or elsewhere, of postal items, and which is offered or provided as a service the main purpose of which, or one of the main purposes of which, is to make available, or to facilitate, a means of transmission from place to place of postal items containing communications: s 2(1).

6 'Public telecommunication system' means any such parts of a telecommunication system by means of which any public telecommunications service is provided as are located in the United Kingdom: *ibid* s 2(1). 'Telecommunication system' means any system (including the apparatus comprised in it) which exists (whether wholly or partly in the United Kingdom or elsewhere) for the purpose of facilitating the transmission of communications by any means involving the use of electrical or electro-magnetic energy: s 2(1).

7 *Ibid* s 1(1). Where an offence under any provision of the Regulation of Investigatory Powers Act 2000 other than a provision of Pt III (ss 49-56) (as amended) (see *POLICE* vol 36(1) (2007 Reissue) PARA 512 et seq) is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he (as well as the body corporate) is guilty of that offence and liable to be proceeded against and punished accordingly: s 79(1). Where an offence under any provision of that Act other than a provision of Pt III (as amended) is committed by a Scottish firm, and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner of the firm, he (as well as the firm) is guilty of that offence and liable to be proceeded against and punished accordingly: s 79(2). For these purposes, 'director', in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate: s 79(3). See PARA 38 ante.

Nothing in any of the provisions of the Regulation of Investigatory Powers Act 2000 by virtue of which conduct of any description is or may be authorised by any warrant, authorisation or notice, or by virtue of which information may be obtained in any manner, is to be construed: (1) as making it unlawful to engage in any conduct of that description which is not otherwise unlawful under that Act and would not be unlawful apart from that Act; (2) as otherwise requiring: (a) the issue, grant or giving of such a warrant, authorisation or notice; or (b) the taking of any step for or towards obtaining the authority of such a warrant, authorisation or notice, before any such conduct of that description is engaged in; or (3) as prejudicing any power to obtain information by any means not involving conduct that may be authorised under that Act: s 80.

8 *Ie* excluded by *ibid* s 1(6), which provides that the circumstances in which a person makes an interception of a communication in the course of its transmission by means of a private telecommunication system are such that his conduct is excluded from criminal liability under s 1(2) (see the text and note 11 infra) if: (1) he is a person with a right to control the operation or the use of the system; or (2) he has the express or implied consent of such a person to make the interception. 'Control' in s 1(6) means 'to authorise and forbid'; it does

not extend to a person who merely has the right to access or operate the system: see *R v Stanford* [2006] EWCA Crim 258, [2006] 1 WLR 1554.

9     Ie criminal liability under the Regulation of Investigatory Powers Act 2000 s 1(2) (see the text and note 11 *infra*).

10    'Private telecommunication system' means any telecommunication system which, without itself being a public telecommunication system, is a system in relation to which the following conditions are satisfied: (1) it is attached, directly or indirectly and whether or not for the purposes of the communication in question, to a public telecommunication system; and (2) there is apparatus comprised in the system which is both located in the United Kingdom and used (with or without other apparatus) for making the attachment to the public telecommunication system: *ibid* s 2(1).

11    *Ibid* s 1(2).

12    Ie under *ibid* s 1(1) or s 1(2): see the text and notes 1-11 *supra*.

13    *Ibid* s 1(7). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. No proceedings for an offence under s 1(1) or 1(2) may be instituted except by or with the consent of the Director of Public Prosecutions: s 1(8). For the effect of this limitation see PARA 1071 *post*.

14    Ie under *ibid* s 3 or s 4: see PARAS 507-508 *post*.

15    Ie under *ibid* s 5: see PARA 509 *post*.

16    'Statutory', in relation to any power or duty, means conferred or imposed by or under any enactment or subordinate legislation: *ibid* s 81(1). 'Enactment' includes an enactment passed after 28 July 2000: s 81(1).

17    Ie exercised apart from *ibid* s 1.

18    'Document' includes a map, plan, design, drawing, picture or other image: *ibid* s 81(1).

19    *Ibid* s 1(5). Conduct (whether or not prohibited by s 1) which has lawful authority for the purpose of s 1 by virtue of head (a) or (b) in the text is to be taken to be lawful for all other purposes: s 1(5). A person would have 'lawful authority' within head (c) in the text where his interception was done in order to comply with the Police and Criminal Evidence Act 1984 s 9, Sch 1 para 11 (see PARA 877 *post*) which required him not to destroy material to which an application for an order under Sch 1 para 4 related; consequently no offence under the Regulation of Investigatory Powers Act 2000 s 1(1) was committed by a telecommunications company, obliged to intercept emails (so as to avoid their destruction) by a notice of an application under the Police and Criminal Evidence Act 1984, because it had lawful authority to do so: *R (on the application of NTL Group Ltd) v Crown Court at Ipswich* [2002] EWHC 1585 (Admin), [2003] QB 131, [2003] 1 Cr App Rep 225.

20    Regulation of Investigatory Powers Act 2000 s 1(4). The Regulation of Investigatory Powers (Designation of an International Agreement) Order 2004, SI 2004/158, designates the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (Brussels, 29 May 2000; Misc 7 (2001); Cmd 5229) as a designated international agreement for the purposes of the Regulation of Investigatory Powers Act 2000 s 1(4).

The Regulation of Investigatory Powers Act 2000 complies with EC Council Directive 97/66 (OJ L24, 30.01.98, p 1) concerning the processing of personal data and the protection of privacy in the telecommunications sector, which requires member states to ensure the confidentiality of communications, and compatibility with the right to respect for private and family life under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8: *R v E* [2004] EWCA Crim 1243, [2004] 1 WLR 3279, [2004] 2 Cr App Rep 484. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 *et seq*.

21    Regulation of Investigatory Powers Act 2000 s 1(3).

## UPDATE

### 506 Unlawful interception

NOTE 2--Wireless Telegraphy Act 1949 consolidated in Wireless Telegraphy Act 2006.

NOTE 20--As to the compatibility of the Regulation of Investigatory Powers Act 2000 with the European Convention on Human Rights art 8 see also Application 26839/05 *Kennedy v United Kingdom* [2010] All ER (D) 224 (May), ECtHR.

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### **507. Lawful interception without an interception warrant.**

Conduct by any person<sup>1</sup> consisting in the interception of a communication<sup>2</sup> is authorised if the communication is one which, or which that person has reasonable grounds for believing, is both a communication sent by a person who has consented to the interception and a communication the intended recipient of which has so consented<sup>3</sup>.

Conduct by any person consisting in the interception of a communication is authorised if the communication is one sent by, or intended for, a person who has consented to the interception, and surveillance by means of that interception has been authorised under Part II of the Regulation of Investigatory Powers Act 2000<sup>4</sup>.

Conduct consisting in the interception of a communication is authorised if it is conduct by or on behalf of a person who provides a postal service<sup>5</sup> or a telecommunications service<sup>6</sup>, and it takes place for purposes connected with the provision or operation of that service or with the enforcement, in relation to that service, of any enactment<sup>7</sup> relating to the use of postal services or telecommunications services<sup>8</sup>.

Conduct by any person consisting in the interception of a communication in the course of its transmission by means of wireless telegraphy<sup>9</sup> is authorised if it takes place with the authority of a designated person<sup>10</sup> and for purposes connected with any of the following<sup>11</sup>: (1) the issue of licences under the Wireless Telegraphy Act 1949<sup>12</sup>; (2) the prevention or detection of anything which constitutes interference with wireless telegraphy<sup>13</sup>; and (3) the enforcement of any enactment contained in that Act or of any enactment not so contained that relates to such interference<sup>14</sup>.

1 For the meaning of 'person' see PARA 506 note 1 ante.

2 As to the meaning of 'interception of a communication' see PARA 506 note 2 ante. As to the meaning of 'communication' see PARA 506 note 3 ante.

3 Regulation of Investigatory Powers Act 2000 s 3(1).

4 Ibid s 3(2). As to authorisation see Pt II (ss 26-48); and POLICE vol 36(1) (2007 Reissue) PARA 489 et seq.

5 For the meaning of 'postal service' see PARA 506 note 5 ante.

6 'Telecommunications service' means any service that consists in the provision of access to, and of facilities for making use of, any telecommunication system (whether or not one provided by the person providing the service): Regulation of Investigatory Powers Act 2000 s 2(1). For the meaning of 'telecommunication system' see PARA 506 note 6 ante.

7 As to the meaning of 'enactment' see PARA 506 note 16 ante.

8 Regulation of Investigatory Powers Act 2000 s 3(3).

9 For the meaning of 'wireless telegraphy' see PARA 506 note 2 ante.

10 Ie under the Wireless Telegraphy Act 1949 s 5 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 571): Regulation of Investigatory Powers Act 2000 s 3(4)(a).

11 Ibid s 3(4)(b).

12 Ibid s 3(5)(a).

13 Ibid s 3(5)(b).

14 Ibid s 3(5)(c). The Regulation of Investigatory Powers (Interception of Communications: Code of Practice) Order 2002, SI 2002/1693, implemented a code of practice relating to the interception of communications under the Regulation of Investigatory Powers Act 2000 Pt I Ch 1 (ss 1-20), to which anyone exercising or performing a power or duty to which the code applies must have regard (see s 72(1)). Failure to comply with the code does not in itself result in criminal or civil liability: s 72(2). The code of practice was made under s 71, which requires the Secretary of State to issue one or more codes of practice in relation to the exercise and performance of powers and duties under Pts I-III (ss 1-48) (as amended), the Intelligence Services Act 1994 s 3 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 473-474) and the Police Act 1997 Pt III (ss 91-108) (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 483 et seq). As to the effect of codes of practice see the Regulation of Investigatory Powers Act 2000 s 72; and POLICE vol 36(1) (2007 Reissue) PARA 492. There is to be paid out of money provided by Parliament: (1) any expenditure incurred by the Secretary of State for or in connection with the carrying out of his functions under the Regulation of Investigatory Powers Act 2000; and (2) any increase attributable to that Act in the sums which are payable out of money so provided under any other Act: s 77.

## **UPDATE**

### **507 Lawful interception without an interception warrant**

NOTE 10--Now under the Wireless Telegraphy Act 2006 s 48: Regulation of Investigatory Powers Act 2000 s 3(4)(a) (amended by the 2006 Act Sch 7 para 22(2)).

TEXT AND NOTE 12--Wireless Telegraphy Act 1949 consolidated in the 2006 Act.

NOTE 14--The Regulation of Investigatory Powers (Investigation of Protected Electronic Information: Code of Practice) Order 2007, SI 2007/2200, has brought into force the code of practice entitled 'Investigation of Protected Electronic Information', laid before each House of Parliament in draft on 7 June 2007, relating to the investigation of protected electronic information under the 2000 Act Pt III (ss 49-56). The Regulation of Investigatory Powers (Acquisition and Disclosure of Communications Data: Code of Practice) Order 2007, SI 2007/2197, has brought into force the code of practice entitled 'Acquisition and Disclosure of Communications Data', laid before each House of Parliament in draft on 7 June 2007, relating to the acquisition and disclosure of communications data under the 2000 Act Pt 1 Ch 2 (ss 21-25).



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### **508. Power to provide for lawful interception.**

Conduct by any person<sup>1</sup> ('the interceptor') consisting in the interception of a communication in the course of its transmission by means of a telecommunication system<sup>2</sup> is authorised<sup>3</sup> if: (1) the interception is carried out for the purpose of obtaining information about the communications of a person who, or who the interceptor has reasonable grounds for believing, is in a country or territory outside the United Kingdom<sup>4</sup>; (2) the interception relates to the use of a telecommunications service<sup>5</sup> provided to persons in that country or territory which is either a public telecommunications service<sup>6</sup> or a telecommunications service that would be a public telecommunications service if the persons to whom it is offered or provided were members of the public in a part of the United Kingdom<sup>7</sup>; (3) the person who provides that service (whether the interceptor or another person) is required by the law of that country or territory to carry out, secure or facilitate the interception in question<sup>8</sup>; (4) the situation is one in relation to which such further conditions as may be prescribed by regulations made by the Secretary of State are required to be satisfied before conduct may be treated as authorised<sup>9</sup>; and (5) the conditions so prescribed are satisfied in relation to that situation<sup>10</sup>.

The Secretary of State may by regulations<sup>11</sup> authorise any such conduct described in the regulations as appears to him to constitute a legitimate practice reasonably required for the purpose, in connection with the carrying on of any business<sup>12</sup>, of monitoring or keeping a record of (a) communications by means of which transactions are entered into in the course of that business; or (b) other communications relating to that business or taking place in the course of its being carried on<sup>13</sup>. Nothing in any such regulations may authorise the interception of any communication except in the course of its transmission using apparatus<sup>14</sup> or services provided by or to the person carrying on the business for use wholly or partly in connection with that business<sup>15</sup>.

Conduct taking place in a prison<sup>16</sup> is authorised under specified circumstances<sup>17</sup>. Conduct taking place in any hospital premises<sup>18</sup> where high security psychiatric services<sup>19</sup> are provided is authorised if it is conduct in pursuance of, and in accordance with, any direction given under the National Health Service Act 1977<sup>20</sup> to the body providing those services at those premises<sup>21</sup>.

1 As to the meaning of 'person' see PARA 506 note 1 ante.

2 As to the interception of a communication in the course of its transmission by means of a telecommunication system, see the Regulation of Investigatory Powers Act 2000 s 2; and PARA 506 note 2 ante. As to the meaning of 'communication' see PARA 506 note 3 ante.

3 Is authorised by the Regulation of Investigatory Powers Act 2000 s 4.

4 Ibid s 4(1)(a). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 For the meaning of 'telecommunications service' see PARA 507 note 6 ante.

6 'Public telecommunications service' means any telecommunications service which is offered or provided to, or to a substantial section of, the public in any one or more parts of the United Kingdom: Regulation of Investigatory Powers Act 2000 s 2(1).

7 Ibid s 4(1)(b).

8 Ibid s 4(1)(c).

9 Ibid s 4(1)(d). The Secretary of State has prescribed the following conditions: (1) the interception must be carried out for the purposes of a criminal investigation; (2) that investigation must be being carried out in a country or territory that is party to an international agreement designated for the purposes of s 1(4) (see PARA 506 ante); see the Regulation of Investigatory Powers (Conditions for the Lawful Interception of Persons outside the United Kingdom) Regulations 2004, SI 2004/157, reg 3.

Any power of the Secretary of State to make any order, regulations or rules under any provision of the Regulation of Investigatory Powers Act 2000 is exercisable by statutory instrument: s 78(1), (2). Such a statutory instrument, apart from one which has been approved in draft form, is subject to annulment in pursuance of a resolution of either House of Parliament: see s 78(3), (4) (s 78(3) amended by the Crime (International Co-operation) Act 2003 s 91(1), Sch 5 paras 78, 80). Any order, regulations or rules may make different provisions for different cases and contain such incidental, supplemental, consequential and transitional provision as the Secretary of State thinks fit: Regulation of Investigatory Powers Act 2000 s 78(5).

10 Ibid s 4(1)(e).

11 As to the regulations that have been made see the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, SI 2000/ 2699.

Conduct is authorised if it consists of interception of a communication, in the course of its transmission by means of a telecommunication system, which is effected by or with the express or implied consent of the system controller for the purpose of:

- 84 (1) monitoring or keeping a record of communications (a) in order to establish the existence of facts, or in order to ascertain compliance with regulatory or self-regulatory practices or procedures which are applicable to the system controller in the carrying on of his business or applicable to another person in the carrying on of his business where that person is supervised by the system controller in respect of those practices or procedures, or in order to ascertain or demonstrate the standards which are achieved or ought to be achieved by persons using the system in the course of their duties; or (b) in the interests of national security; or (c) for the purpose of preventing or detecting crime; or (d) for the purpose of investigating or detecting the unauthorised use of that or any other telecommunication system; or (e) where that is undertaken in order to secure, or as an inherent part of, the effective operation of the system (including any monitoring or keeping of a record which would be authorised by the Regulation of Investigatory Powers Act 2000 s 3(3) if the conditions in s 3(3)(a), (b) were satisfied (see PARA 507 ante)) (Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, SI 2000/ 2699, reg 3(1)(a)); or
- 85 (2) monitoring communications for the purpose of determining whether they are communications relevant to the system controller's business which fall within reg 2(b)(i) (see *infra* (reg 3(1)(b))); or
- 86 (3) monitoring communications made to a confidential voice-telephony counselling or support service which is free of charge (other than the cost, if any, of making a telephone call) and operated in such a way that users may remain anonymous if they so choose (reg 3(1)(c)).

Conduct is authorised by heads (1)-(3) *supra* only if (i) the interception in question is effected solely for the purpose of monitoring or (where appropriate) keeping a record of communications relevant to the system controller's business; (ii) the telecommunication system in question is provided for use wholly or partly in connection with that business; (iii) the system controller has made all reasonable efforts to inform every person who may use the telecommunication system in question that communications transmitted by means of it may be intercepted; and (iv) in a case falling within head (1)(b) *supra*, the person by or on whose behalf the interception is effected is a person specified in the Regulation of Investigatory Powers Act 2000 s 6(2)(a)-(i) (see PARA 510 *post*), and in a case falling within head (2) *supra*, the communication is one which is intended to be received (whether or not it has been actually received) by a person using the telecommunication system in question: Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, SI 2000/2699, reg 3(2). Conduct falling within head (1)(a) *supra* is authorised only to the extent permitted by art 5 of EC Parliament and Council Directive 2002/58 (OJ L201, 31.07.2002, p 37) concerning the processing of personal data and the protection of privacy in the electronic communications sector: Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, SI 2000/ 2699, reg 3(3) (substituted by SI 2003/2426).

In the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, SI 2000/ 2699 (as amended), references to a business include references to activities of a government department, of any public authority or of any person or office holder on whom functions are conferred by or under any enactment: reg 2(a). A reference to a communication as relevant to a business is a reference to a communication by means of which a transaction is entered into in the course of that business, or which

otherwise relates to that business (reg 2(b)(i)), or to a communication which otherwise takes place in the course of the carrying on of that business (reg 2(b)(ii)). 'Regulatory or self-regulatory practices or procedures' means practices or procedures compliance with which is required or recommended by, under or by virtue of any provision of the law of a member state or other state within the European Economic Area, or any standard or code of practice published by or on behalf of a body established in such a state which includes among its objectives the publication of standards or codes of practice for the conduct of business, or practices and procedures which are otherwise applied for the purpose of ensuring compliance with anything so required or recommended: reg 2(c). 'System controller' means, in relation to a particular telecommunication system, a person with a right to control its operation or use: reg 2(d).

12 References to a business include references to any activities of a government department, of any public authority or of any person or office holder on whom functions are conferred by or under any enactment: Regulation of Investigatory Powers Act 2000 s 4(7). For these purposes, 'public authority' means any public authority within the meaning of the Human Rights Act 1998 s 6 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS) other than a court or tribunal: Regulation of Investigatory Powers Act 2000 s 81(1). 'Government department' includes any part of the Scottish Administration, a Northern Ireland department and the National Assembly for Wales: s 4(8). As to the meaning of 'enactment' see PARA 506 note 16 ante.

13 Ibid s 4(2).

14 As to the meaning of 'apparatus' see PARA 506 note 2 ante.

15 Regulation of Investigatory Powers Act 2000 s 4(3).

16 'Prison' means any prison, young offender institution, young offenders centre or remand centre which is under the general superintendence of, or is provided by, the Secretary of State under the Prison Act 1952, and includes any contracted out prison, within the meaning of the Criminal Justice Act 1991 Pt IV (ss 76-92) (see PRISONS vol 36(2) (Reissue) PARA 532) or the Criminal Justice and Public Order Act 1994 s 106(4) (Scotland): Regulation of Investigatory Powers Act 2000 s 4(9).

17 Ibid s 4(4). Such conduct is authorised if it is conduct in exercise of any power conferred by or under any rules made under the Prison Act 1952 s 47 (see PRISONS vol 36(2) (Reissue) PARA 501): see the Regulation of Investigatory Powers Act 2000 s 4(4).

18 'Hospital premises' has the same meaning as in the National Health Service Act 1977 s 4(3) (see HEALTH SERVICES vol 54 (2008) PARA 12): Regulation of Investigatory Powers Act 2000 s 4(8).

19 'High security psychiatric services' has the same meaning as in the National Health Service Act 1977 (see HEALTH SERVICES vol 54 (2008) PARA 12): Regulation of Investigatory Powers Act 2000 s 4(8).

20 In any direction given under the National Health Service Act 1977 s 17 (directions as to the carrying out of their functions by health bodies): see HEALTH SERVICES vol 54 (2008) PARAS 7, 16.

21 Regulation of Investigatory Powers Act 2000 s 4(5).

## UPDATE

### 508 Power to provide for lawful interception

NOTE 12--Definition of 'government department' amended: SI 2007/1388.

TEXT AND NOTES 18-21--2000 Act s 4(5), (8) amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 208.

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### **509. Interception warrants.**

The Secretary of State may<sup>1</sup> issue a warrant authorising or requiring the person<sup>2</sup> to whom it is addressed, by any such conduct as may be described in the warrant, to secure any one or more of the following: (1) the interception in the course of their transmission by means of a postal service<sup>3</sup> or telecommunication system<sup>4</sup> of the communications described in the warrant<sup>5</sup>; (2) the making, in accordance with an international mutual assistance agreement<sup>6</sup>, of a request for the provision of such assistance in connection with, or in the form of, an interception of communications as may be so described<sup>7</sup>; (3) the provision, in accordance with an international mutual assistance agreement, to the competent authorities of a country or territory outside the United Kingdom<sup>8</sup> of any such assistance in connection with, or in the form of, an interception of communications as may be so described<sup>9</sup>; (4) the disclosure, in such manner as may be so described, of intercepted material<sup>10</sup> obtained by any interception authorised or required by the warrant, and of related communications data<sup>11</sup>.

The Secretary of State may not issue an interception warrant<sup>12</sup> unless he believes that the warrant is necessary on specified grounds, and that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct<sup>13</sup>. The specified grounds are that it is necessary (a) in the interests of national security<sup>14</sup>; (b) for the purpose of preventing or detecting serious crime<sup>15</sup>; (c) for the purpose of safeguarding the economic well-being of the United Kingdom<sup>16</sup>; or (d) for the purpose, in specified circumstances<sup>17</sup>, of giving effect to the provisions of any international mutual assistance agreement<sup>18</sup>.

The conduct authorised by an interception warrant includes: (i) all such conduct (including the interception of communications not identified by the warrant) as it is necessary to undertake in order to do what is expressly authorised or required by the warrant<sup>19</sup>; (ii) conduct for obtaining related communications data<sup>20</sup>; and (iii) conduct by any person which is conduct in pursuance of a requirement imposed by or on behalf of the person to whom the warrant is addressed to be provided with assistance with giving effect to the warrant<sup>21</sup>.

1 This power of the Secretary of State is subject to the Regulation of Investigatory Powers Act 2000 ss 5-20 (see PARAS 510-520 post): s 5(1).

2 As to the meaning of 'person' see PARA 506 note 1 ante.

3 As to the interception of a communication in the course of its transmission by means of a postal service see PARA 506 note 2 ante. For the meaning of 'postal service' see PARA 506 note 5 ante.

4 As to the interception of a communication in the course of its transmission by means of a telecommunication system see PARA 506 note 2 ante. For the meaning of 'telecommunication system' see PARA 506 note 6 ante.

5 Regulation of Investigatory Powers Act 2000 s 5(1)(a).

6 'International mutual assistance agreement' means an international agreement designated for the purposes of ibid s 1(4) (see PARA 506 ante): s 20.

7 Ibid s 5(1)(b).

8 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

9 Regulation of Investigatory Powers Act 2000 s 5(1)(c).

10 'Intercepted material', in relation to an interception warrant, means the contents of any communications intercepted by an interception to which the warrant relates: *ibid* s 20.

11 *Ibid* s 5(1)(d). 'Related communications data', in relation to a communication intercepted in the course of its transmission by means of a postal service or telecommunication system, means so much of any communications data (within the meaning of Pt I Ch II (ss 21-25) (see PARAS 521-523 post)) as is obtained by, or in connection with, the interception, and relates to the communication or to the sender or recipient, or intended recipient, of the communication: s 20.

12 An 'interception warrant' is a warrant under *ibid* s 5: s 81(1).

13 *Ibid* s 5(2). The matters to be taken into account in considering whether the requirements of s 5(2) are satisfied in the case of any warrant must include whether the information which it is thought necessary to obtain under the warrant could reasonably be obtained by other means: s 5(4).

14 *Ibid* s 5(3)(a).

15 *Ibid* s 5(3)(b). References to crime are references to conduct which constitutes one or more criminal offences or is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom would constitute one or more criminal offences; and references to serious crime are references to crime that satisfies the tests in s 81(3)(a) or (b): s 81(2). Those tests are: (1) that the offence or one of the offences that is or would be constituted by the conduct is an offence for which a person who has attained the age of 21 (or, as from a day to be appointed, 18 in relation to England and Wales) and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more (s 81(3)(a) (prospectively amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 211)); (2) that the conduct involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose (Regulation of Investigatory Powers Act 2000 s 81(3)(b)). At the date at which this volume states the law no day had been appointed for the amendment in head (1) *supra* to come into force.

Detecting crime is taken to include establishing by whom, for what purpose, by what means and generally in what circumstances any crime was committed, and the apprehension of the person by whom any crime was committed; and any reference in the Regulation of Investigatory Powers Act 2000 to preventing or detecting serious crime is to be construed accordingly, except that, in Pt I Ch I (ss 1-20), it does not include a reference to gathering evidence for use in any legal proceedings: s 81(5). 'Legal proceedings' means civil or criminal proceedings in or before any court or tribunal: s 81(1). 'Civil proceedings' means any proceedings in or before any court or tribunal that are not criminal proceedings: s 81(1). 'Criminal proceedings' includes (a) proceedings in the United Kingdom or elsewhere before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957; (b) proceedings before the Courts-Martial Appeal Court; and (c) proceedings before a standing civilian court: Regulation of Investigatory Powers Act 2000 s 81(4) (amended by the Armed Forces Act 2001 s 38, Sch 7 Pt 1). References to criminal prosecutions are to be construed accordingly: Regulation of Investigatory Powers Act 2000 s 81(4) (as so amended). As to courts-martial see ARMED FORCES vol 2(2) (Reissue) PARAS 448 et seq, 480 et seq.

16 *Ibid* s 5(3)(c). A warrant is not be considered necessary on the ground falling within s 5(3)(c) unless the information which it is thought necessary to obtain is information relating to the acts or intentions of persons outside the British Islands: s 5(5). 'British Islands' means the United Kingdom, the Channel Islands and the Isle of Man: Interpretation Act 1978 s 5, Sch 1.

17 *Ie* in circumstances appearing to the Secretary of State to be equivalent to those in which he would issue a warrant by virtue of the Regulation of Investigatory Powers Act 2000 s 5(3)(b) (see head (b) in the text): see s 5(3)(d).

18 *Ibid* s 5(3)(d).

19 *Ibid* s 5(6)(a).

20 *Ibid* s 5(6)(b).

21 *Ibid* s 5(6)(c).

## UPDATE

### 509 Interception warrants

NOTE 15--Definition of 'legal proceedings' amended: Armed Forces Act 2006 Sch 16 para 175.

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### **510. Application for issue of an interception warrant.**

An interception warrant<sup>1</sup> must not be issued except on an application made by or on behalf of one of the following persons<sup>2</sup>: (1) the Director General of the Security Service<sup>3</sup>; (2) the Chief of the Secret Intelligence Service<sup>4</sup>; (3) the Director of GCHQ<sup>5</sup>; (4) the Director General of the Serious Organised Crime Agency<sup>6</sup>; (5) the Metropolitan Police Commissioner<sup>7</sup>; (6) the Chief Constable of the Police Service for Northern Ireland<sup>8</sup>; (7) the chief constable of any Scottish police force<sup>9</sup>; (8) the Commissioners for Her Majesty's Revenue and Customs<sup>10</sup>; (9) the Chief of Defence Intelligence; (10) a person who, for the purposes of any international mutual assistance agreement<sup>11</sup>, is the competent authority of a country or territory outside the United Kingdom<sup>12</sup>.

1 For the meaning of 'interception warrant' see PARA 509 note 12 ante.

2 Regulation of Investigatory Powers Act 2000 s 6(1). An application for the issue of an interception warrant must not be made on behalf of a person specified in any of heads (1)-(3), (5)-(10) in the text except by a person holding office under the Crown: s 6(3) (amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 131, 132(1), (3)). References to a person holding office under the Crown include references to any servant of the Crown and to any member of Her Majesty's forces: Regulation of Investigatory Powers Act 2000 s 81(6)(a). As to the meaning of 'person' see PARA 506 note 1 ante. 'Her Majesty's forces' has the same meaning as in the Army Act 1955 (see ARMED FORCES vol 2(2) (Reissue) PARA 20); Regulation of Investigatory Powers Act 2000 s 81(1).

3 As to the Director General of the Security Service see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 471.

4 As to the Chief of the Secret Intelligence Service see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 472.

5 'GCHQ' has the same meaning as in the Intelligence Services Act 1994 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS): Regulation of Investigatory Powers Act 2000 s 81(1).

6 As to the Director General of the Serious Organised Crime Agency see POLICE vol 36(1) (2007 Reissue) PARAS 436-437.

7 As to the Metropolitan Police Commissioner see POLICE vol 36(1) (2007 Reissue) PARA 183 et seq.

8 The body of constables known as the Royal Ulster Constabulary continues in being as the Police Service of Northern Ireland (incorporating the Royal Ulster Constabulary): Police (Northern Ireland) Act 2000 s 1.

9 Ie a police force maintained under or by virtue of the Police (Scotland) Act 1967.

10 As to the Commissioners for Her Majesty's Revenue and Customs see PARA 354 note 2 ante.

11 For the meaning of 'international mutual assistance agreement' see PARA 509 note 6 ante.

12 Regulation of Investigatory Powers Act 2000 s 6(2) (amended by the Police (Northern Ireland) Act 2000 s 78(2); and the Serious Organised Crime and Police Act 2005 Sch 4 paras 131, 132(1), (2)); Commissioners for Revenue and Customs Act 2005 s 50(1), (7).

### **UPDATE**

**510 Application for issue of an interception warrant**

NOTE 2--Definition of 'Her Majesty's forces' amended: Armed Forces Act 2006 Sch 16 para 175.

TEXT AND NOTE 12--2000 Act s 6(2) further amended: Serious Crime Act 2007 Sch 12 para 6.



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### **511. Issue of interception warrants.**

An interception warrant<sup>1</sup> may not be issued except under the hand of the Secretary of State, or, in specified cases, under the hand of a senior official<sup>2</sup>. The specified cases are: (1) an urgent case in which the Secretary of State has himself expressly authorised the issue of the warrant in that case<sup>3</sup>; and (2) a case in which the warrant is for the purposes of a request for assistance made under an international mutual assistance agreement<sup>4</sup> by the competent authorities of a country or territory outside the United Kingdom<sup>5</sup> and either it appears that the interception subject<sup>6</sup> is outside the United Kingdom, or the interception to which the warrant relates is to take place in relation only to premises outside the United Kingdom<sup>7</sup>.

An interception warrant must be addressed to the specified person<sup>8</sup> by whom, or on whose behalf, the application for the warrant was made, and, in the case of a warrant issued under the hand of a senior official, must contain, according to whatever is applicable, one of the relevant statements<sup>9</sup>.

1 For the meaning of 'interception warrant' see PARA 509 note 12 ante.

2 Regulation of Investigatory Powers Act 2000 s 7(1). 'Senior official' means a member of the Senior Civil Service or a member of the senior management structure of Her Majesty's Diplomatic Service: s 81(1). However, if it appears to the Secretary of State that it is necessary to do so in consequence of any changes to the structure or grading of the home civil service or diplomatic service, he may by order make such amendments of the definition of 'senior official' as appear to him appropriate to preserve, so far as practicable, the effect of that definition: s 81(7).

3 Ibid s 7(2)(a).

4 For the meaning of 'international mutual assistance agreement' see PARA 509 note 6 ante.

5 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

6 'The interception subject', in relation to an interception warrant, means the person about whose communications information is sought by the interception to which the warrant relates: Regulation of Investigatory Powers Act 2000 s 20.

7 Ibid s 7(2)(b).

8 Ie the person falling within ibid s 6(2) (see PARA 510 ante).

9 Ibid s 7(3). The statements referred to are (1) a statement that the case is an urgent case in which the Secretary of State has himself expressly authorised the issue of the warrant; (2) a statement that the warrant is issued for the purposes of a request for assistance made under an international mutual assistance agreement by the competent authorities of a country or territory outside the United Kingdom: s 7(4). If the warrant contains the statement set out in head (2) supra, it must also contain (a) a statement that the interception subject appears to be outside the United Kingdom; or (b) a statement that the interception to which the warrant relates is to take place in relation only to premises outside the United Kingdom: s 7(5).

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## **512. Contents of interception warrants.**

An interception warrant<sup>1</sup> must name or describe either one person<sup>2</sup> as the interception subject<sup>3</sup>, or a single set of premises as the premises in relation to which the interception<sup>4</sup> to which the warrant relates is to take place<sup>5</sup>. The provisions of an interception warrant describing communications the interception of which is authorised or required by the warrant must comprise one or more schedules setting out the addresses, numbers, apparatus<sup>6</sup> or other factors, or combination of factors, that are to be used for identifying the communications that may be or are to be intercepted<sup>7</sup>. Any factor or combination of factors so set out must be one that identifies communications which are likely to be or to include: (1) communications from, or intended for, the person named or described in the warrant; or (2) communications originating on, or intended for transmission to, the premises so named or described<sup>8</sup>.

These provisions do not apply to an interception warrant if (a) the description of communications to which the warrant relates confines the conduct authorised or required by the warrant to conduct falling within a specified type<sup>9</sup>; and (b) at the time of the issue of the warrant, a certificate (called a 'section 8(4) certificate') applicable to the warrant has been issued by the Secretary of State certifying<sup>10</sup>: (i) the descriptions of intercepted material the examination of which he considers necessary; and (ii) that he considers the examination of material of those descriptions necessary<sup>11</sup>. A certificate must not be issued except under the hand of the Secretary of State<sup>12</sup>.

1 For the meaning of 'interception warrant' see PARA 509 note 12 ante.

2 As to the meaning of 'person' see PARA 506 note 1 ante.

3 For the meaning of 'interception subject' see PARA 511 note 6 ante.

4 As to interception of communications see the Regulation of Investigatory Powers Act 2000 s 2; and PARA 506 note 2 ante.

5 Ibid s 8(1).

6 As to the meaning of 'apparatus' see PARA 506 note 2 ante.

7 Regulation of Investigatory Powers Act 2000 s 8(2).

8 Ibid s 8(3).

9 Ibid s 8(4)(a). The specified conduct is (1) the interception of external communications in the course of their transmission by means of a telecommunication system; and (2) any conduct authorised in relation to any such interception by s 5(6) (see PARA 509 ante): s 8(5). 'External communication' means a communication sent or received outside the British Islands: s 20. For the meaning of 'British Islands' see PARA 509 note 16 ante. As to the interception of a communication in the course of its transmission by means of a telecommunication system see PARA 506 ante. For the meaning of 'telecommunication system' see PARA 506 note 6 ante.

10 Ibid s 20. 'Certified', in relation to a section 8(4) certificate, means of a description certified by the certificate as a description of material the examination of which the Secretary of State considers necessary: s 20.

11 Ibid s 8(4)(b). The word 'necessary' in the text means 'necessary as mentioned in s 5(3)(a), (b) or (c)' (see PARA 509 ante): s 8(4)(b).

12 Ibid s 8(6).

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### **513. Duration, cancellation and renewal of interception warrants.**

An interception warrant<sup>1</sup> ceases to have effect at the end of the relevant period<sup>2</sup>, but may be renewed (at any time before the end of that period) by an instrument under the hand of the Secretary of State or, in specified cases<sup>3</sup>, under the hand of a senior official<sup>4</sup>. An interception warrant must not be renewed unless the Secretary of State believes that the warrant continues to be necessary<sup>5</sup>. The Secretary of State must cancel an interception warrant if he is satisfied that the warrant is no longer necessary<sup>6</sup>.

An instrument under the hand of a senior official that renews an interception warrant must contain: (1) a statement that the renewal is for the purposes of a request for assistance made under an international mutual assistance agreement<sup>7</sup> by the competent authorities of a country or territory outside the United Kingdom<sup>8</sup>; and (2) whichever of the following statements is applicable: (a) a statement that the interception subject appears to be outside the United Kingdom<sup>9</sup>; or (b) a statement that the interception to which the warrant relates is to take place in relation only to premises outside the United Kingdom<sup>10</sup>.

1 For the meaning of 'interception warrant' see PARA 509 note 12 ante.

2 'The relevant period' (1) in relation to an unrenewed warrant issued in a case falling within the Regulation of Investigatory Powers Act 2000 s 7(2)(a) (see PARA 511 ante) under the hand of a senior official, means the period ending with the fifth working day following the day of the warrant's issue (s 9(6)(a)); (2) in relation to an unrenewed warrant which is indorsed under the hand of the Secretary of State with a statement that the issue of the warrant is believed to be necessary on grounds falling within s 5(3)(a) or (c) (see PARA 509 ante), means the period of six months beginning with the day of the warrant's issue (s 9(6)(ab) (added by the Terrorism Act 2006 s 32(1), (2))); (3) in relation to a renewed warrant the latest renewal of which was by an instrument indorsed under the hand of the Secretary of State with a statement that the renewal is believed to be necessary on grounds falling within the Regulation of Investigatory Powers Act 2000 s 5(3)(a) or (c) (see PARA 509 ante), means the period of six months beginning with the day of the warrant's renewal (s 9(6)(b)); and (4) in all other cases, means the period of three months beginning with the day of the warrant's issue or, in the case of a warrant that has been renewed, of its latest renewal (s 9(6)(c)). For the meaning of 'senior official' see PARA 511 note 2 ante. 'Working day' means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom: Regulation of Investigatory Powers Act 2000 s 81(1). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 I.e. a case falling within *ibid* s 7(2)(b): see PARA 511 ante.

4 *Ibid* s 9(1).

5 *Ibid* s 9(2). The reference to 'necessary' in the text means 'necessary on grounds falling within s 5(3)' (see PARA 509 ante): s 9(2).

6 *Ibid* s 9(3). The reference to 'necessary' in the text means 'necessary on grounds falling within s 5(3)' (see PARA 509 ante): s 9(3).

The Secretary of State must cancel an interception warrant if, at any time before the end of the relevant period, he is satisfied in a case in which:

87 (1) the warrant is one which was issued containing the statement set out in s 7(5) that the interception subject appears to be outside the United Kingdom (see PARA 506 ante), or has been

renewed by an instrument containing the statement set out in s 9(5)(b)(i) (see head (a) in the text); and

- 88 (2) the latest renewal (if any) of the warrant is not a renewal by an instrument under the hand of the Secretary of State,

that the person named or described in the warrant as the interception subject is in the United Kingdom: s 9(4). As to the meaning of 'person' see PARA 506 note 1 ante. For the meaning of 'interception subject' see PARA 511 note 6 ante.

7 For the meaning of 'international mutual assistance agreement' see PARA 509 note 6 ante.

8 Regulation of Investigatory Powers Act 2000 s 9(5)(a).

9 Ibid s 9(5)(b)(i).

10 Ibid s 9(5)(b)(ii).

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#### **514. Modification of interception warrants and certificates.**

The Secretary of State may at any time modify the provisions of an interception warrant<sup>1</sup>, or modify a section 8(4) certificate<sup>2</sup> so as to include in the certified<sup>3</sup> material any material the examination of which he considers to be necessary<sup>4</sup>. If at any time the Secretary of State considers that any factor set out in a schedule to an interception warrant<sup>5</sup> is no longer relevant for identifying communications<sup>6</sup> which, in the case of that warrant, are likely to be or to include certain specified communications<sup>7</sup>, he must modify the warrant by the deletion of that factor<sup>8</sup>. If at any time the Secretary of State considers that the material certified by a section 8(4) certificate includes any material the examination of which is no longer necessary<sup>9</sup>, he must modify the certificate so as to exclude that material from the certified material<sup>10</sup>.

A warrant or certificate may not be modified under these provisions except by an instrument under the hand of the Secretary of State or of a senior official<sup>11</sup>. Unscheduled parts<sup>12</sup> of an interception warrant may not be modified under the hand of a senior official except in an urgent case in which the Secretary of State has himself expressly authorised the modification<sup>13</sup>, and a statement of that fact is indorsed on the modifying instrument<sup>14</sup>. A section 8(4) certificate may not be modified under the hand of a senior official except in an urgent case in which (1) the official in question holds a position in respect of which he is expressly authorised by provisions contained in the certificate to modify the certificate on the Secretary of State's behalf<sup>15</sup>; or (2) the Secretary of State has himself expressly authorised the modification and a statement of that fact is indorsed on the modifying instrument<sup>16</sup>.

Where modifications are expressly authorised by provision contained in the warrant, the scheduled parts of an interception warrant may, in an urgent case, be modified by an instrument under the hand of the person to whom the warrant is addressed, or a person holding any such position subordinate to that person as may be identified in the provisions of the warrant<sup>17</sup>. Where a warrant or certificate is modified by an instrument under the hand of a person other than the Secretary of State, and a statement<sup>18</sup> is indorsed on the instrument, or the modification is expressly authorised by provision contained in the warrant<sup>19</sup>, that modification ceases to have effect at the end of the fifth working day<sup>20</sup> following the day of the instrument's issue<sup>21</sup>.

1 Regulation of Investigatory Powers Act 2000 s 10(1)(a). For the meaning of 'interception warrant' see PARA 509 note 12 ante.

2 For the meaning of 'section 8(4) certificate' see PARA 512 ante.

3 For the meaning of 'certified' see PARA 512 note 10 ante.

4 Regulation of Investigatory Powers Act 2000 s 10(1)(b). The reference to 'necessary' in the text means 'necessary as mentioned in s 5(3)(a), (b) or (c)' (see PARA 511 ante): s 10(1)(b).

5 The scheduled parts of an interception warrant are any provisions of the warrant that are contained in a schedule of identifying factors comprised in the warrant for the purposes of *ibid* s 8(2) (see PARA 512 ante): s 10(10)(a). The modifications that are modifications of the scheduled parts of an interception warrant include the insertion of an additional such schedule in the warrant: s 10(10)(b). References in s 10 to unscheduled parts of an interception warrant, and to their modification, are to be construed accordingly: s 10(10).

6 For the meaning of 'communication' see PARA 506 note 3 ante.

7 The communications falling within the Regulation of Investigatory Powers Act 2000 s 8(3) (see PARA 512 ante).

8 Ibid s 10(2).

9 The reference to 'necessary' in the text means 'necessary on grounds falling within ibid s 5(3)(a)-(c)' (see PARA 509 ante): s 10(3).

10 Ibid s 10(3).

11 Ibid s 10(4). For the meaning of 'senior official' see PARA 511 note 2 ante. Section 10(4) authorises the modification of the scheduled parts of an interception warrant under the hand of a senior official who is either the person to whom the warrant is addressed (s 10(6)(a) (s 10(6) substituted, s 10(6A) added, and s 10(9) amended, by the Terrorism Act 2006 s 32(1), (3), (4))) or a person holding a position subordinate to that person (Regulation of Investigatory Powers Act 2000 s 10(6)(b) (as so substituted)), only if (1) in the case of an unexpired warrant, the warrant is indorsed with a statement that the issue of the warrant is believed to be necessary in the interests of national security, or, in the case of a renewed warrant, the instrument by which it was last renewed is indorsed with a statement that the renewal is believed to be necessary in the interests of national security (s 10(6A)(a), (b) (as so added)); and (2) a statement that the condition is satisfied is indorsed on the modifying instrument (s 10(6) (as so substituted)).

12 See note 5 supra.

13 Regulation of Investigatory Powers Act 2000 s 10(5)(a).

14 Ibid s 10(5)(b).

15 Ibid s 10(7)(a).

16 Ibid s 10(7)(b).

17 Ibid s 10(8).

18 The for the purposes of ibid s 10(5)(b) (see the text and note 14 supra), s 10(6) (see note 11 supra) or s 10(7)(b) (see the text and note 16 supra).

19 The modification is made under ibid s 10(8) (see the text and note 17 supra).

20 For the meaning of 'working day' see PARA 513 note 2 ante.

21 Regulation of Investigatory Powers Act 2000 s 10(9) (as amended: see note 11 supra).

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### **515. Implementation of interception warrants.**

Effect may be given to an interception warrant<sup>1</sup> either by the person<sup>2</sup> to whom it is addressed, or by that person acting through, or together with, such other persons as he may require<sup>3</sup> to provide him with assistance with giving effect to the warrant<sup>4</sup>. For the purpose of requiring any person to provide assistance in relation to an interception warrant, the person to whom it is addressed may serve a copy of the warrant on such persons as he considers may be able to provide such assistance, or make arrangements under which a copy of it is to be or may be so served<sup>5</sup>. The copy of an interception warrant that is so served on any person may, to the extent authorised by the person to whom the warrant is addressed, or by the arrangements made by him, omit any one or more of the schedules to the warrant<sup>6</sup>.

Where a copy of an interception warrant has been served by or on behalf of the person to whom it is addressed on (1) a person who provides a postal service<sup>7</sup>; (2) a person who provides a public telecommunications service<sup>8</sup>; or (3) a person who does not provide a public telecommunications service but who has control of the whole or any part of a telecommunication system<sup>9</sup> located wholly or partly in the United Kingdom<sup>10</sup>, that person must take all such steps for giving effect to the warrant as are notified to him by or on behalf of the person to whom the warrant is addressed<sup>11</sup>. A person who is obliged to take such steps cannot be required to take any steps which it is not reasonably practicable for him to take<sup>12</sup>.

1 For the meaning of 'interception warrant' see PARA 509 note 12 ante.

2 As to the meaning of 'person' see PARA 506 note 1 ante.

3 Ie whether under Regulation of Investigatory Powers Act 2000 s 11(2) (see the text and note 5 infra) or otherwise.

4 Ibid s 11(1). The provision of assistance with giving effect to an interception warrant includes any disclosure to the person to whom the warrant is addressed, or to persons acting on his behalf, of intercepted material obtained by any interception authorised or required by the warrant, and of any related communications data: s 11(9). For the meaning of 'intercepted material' see PARA 509 note 10 ante. For the meaning of 'related communications data' see PARA 509 note 11 ante.

5 Ibid s 11(2).

6 Ibid s 11(3).

7 Ibid s 11(4)(a). For the meaning of 'postal service' see PARA 506 note 5 ante.

8 Ibid s 11(4)(b). For the meaning of 'public telecommunications service' see PARA 508 note 6 ante.

9 For the meaning of 'telecommunication system' see PARA 506 note 6 ante.

10 Regulation of Investigatory Powers Act 2000 s 11(4)(c). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

11 Ibid s 11(4). A person who knowingly fails to comply with his duty under s 11(4) is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both: s 11(7). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS



vol 92 (2010) PARA 140. As from a day to be appointed the maximum term of imprisonment on summary conviction is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

A person's duty under the Regulation of Investigatory Powers Act 2000 s 11(4) to take steps for giving effect to a warrant is also enforceable by civil proceedings by the Secretary of State for an injunction or for any other appropriate relief: s 11(8). For the meaning of 'civil proceedings' see PARA 509 note 15 ante.

12 Ibid s 11(5). The steps which it is reasonably practicable for a person to take in a case in which obligations have been imposed on him by or under s 12 (see PARA 516 post) include every step which it would have been reasonably practicable for him to take had he complied with all the obligations so imposed on him: s 11(6).

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## **516. Maintenance of interception capability.**

The Secretary of State may by order provide for the imposition by him on persons<sup>1</sup> who are providing public postal services<sup>2</sup> or public telecommunications services<sup>3</sup>, or are proposing to do so, of such obligations as it appears to him reasonable to impose for the purpose of securing that it is and remains practicable for requirements to provide assistance in relation to interception warrants<sup>4</sup> to be imposed and complied with<sup>5</sup>. This power is exercisable by the giving, in accordance with the order, of a notice requiring the person who is to be subject to the obligations to take all such steps as may be specified or described in the notice<sup>6</sup>. The only steps that may be specified or described in a notice are steps appearing to the Secretary of State to be necessary for securing that that person has the practical capability of providing any assistance which he may be required to provide in relation to relevant interception warrants<sup>7</sup>. A person is not liable to have such an obligation imposed on him by reason only that he provides, or is proposing to provide, to members of the public a telecommunications service<sup>8</sup> the provision of which is or, as the case may be, will be no more than (1) the means by which he provides a service which is not a telecommunications service; or (2) necessarily incidental to the provision by him of a service which is not a telecommunications service<sup>9</sup>.

Where a notice is given to any person<sup>10</sup>, that person may, before the end of a period as specified in an order<sup>11</sup>, refer the notice to the Technical Advisory Board<sup>12</sup>. Where such a notice is referred to the Technical Advisory Board (a) there is no requirement for the person to comply<sup>13</sup> with any obligations imposed by the notice<sup>14</sup>; (b) the Board must consider the technical requirements and the financial consequences, for the person making the reference, of the notice referred to the Board and must report its conclusions on those matters to that person and to the Secretary of State<sup>15</sup>; and (c) the Secretary of State, after considering any report of the Board relating to the notice, may either withdraw the notice or give a further notice<sup>16</sup> confirming its effect, with or without modifications<sup>17</sup>.

It is the duty of a person to whom a notice is so given to comply with the notice<sup>18</sup>. The duty is enforceable by civil proceedings<sup>19</sup> by the Secretary of State for an injunction or for any other appropriate relief<sup>20</sup>.

1 As to the meaning of 'person' see PARA 506 note 1 ante.

2 For the meaning of 'public postal service' see PARA 506 note 5 ante.

3 For the meaning of 'public telecommunications service' see PARA 508 note 6 ante.

4 As to providing assistance in relation to interception warrants see PARA 515 ante.

5 Regulation of Investigatory Powers Act 2000 s 12(1). As to the obligations so prescribed see the Regulation of Investigatory Powers (Maintenance of Interception Capability) Order 2002, SI 2002/1931, art 2, Schedule.

Before making such an order the Secretary of State must consult with such of the following persons as he considers appropriate: (1) persons appearing to him to be likely to be subject to the obligations for which it provides; (2) the Technical Advisory Board; (3) persons representing persons falling within head (1) supra; and (4) persons with statutory functions (see PARA 506 note 16 ante) in relation to persons falling within head (1) supra: Regulation of Investigatory Powers Act 2000 s 12(9). The Secretary of State must not make such an

order unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 12(10).

6 Ibid s 12(2). Such a notice must specify such period as appears to the Secretary of State to be reasonable as the period within which the steps specified or described in the notice are to be taken: s 12(8). The specified or described steps are those steps appearing to the Secretary of State to be necessary for securing that the service provider has the practical capability of meeting the obligations set out in the Regulation of Investigatory Powers (Maintenance of Interception Capability) Order 2002, SI 2002/1931, Schedule: see art 3.

7 Regulation of Investigatory Powers Act 2000 s 12(3). 'Relevant interception warrant' means (1) in relation to a person providing a public postal service, an interception warrant relating to the interception of communications in the course of their transmission by means of that service; and (2) in relation to a person providing a public telecommunications service, an interception warrant relating to the interception of communications in the course of their transmission by means of a telecommunication system used for the purposes of that service: s 12(12). As to the interception of a communication in the course of its transmission by means of a postal service or of a telecommunication system see s 2; and PARA 506 note 2 ante.

The question whether a person has the practical capability of providing assistance in relation to relevant interception warrants is to include the question whether all such arrangements have been made as the Secretary of State considers necessary (a) with respect to the disclosure of intercepted material; (b) for the purpose of ensuring that security and confidentiality are maintained in relation to, and to matters connected with, the provision of any such assistance; and (c) for the purpose of facilitating the carrying out of any functions in relation to Pt I Ch I (ss 1-20) of the Interception of Communications Commissioner (see PARA 524 post): s 12(11). Before determining for the purposes of the making of any order, or the imposition of any obligation, under s 12 what arrangements he considers necessary for the purpose mentioned in head (c) supra, the Secretary of State must consult the Commissioner: s 12(11). For the meaning of 'intercepted material' see PARA 509 note 10 ante.

8 For the meaning of 'telecommunications service' see PARA 506 note 6 ante.

9 Regulation of Investigatory Powers Act 2000 s 12(4).

10 Ie under ibid s 12(2) (see the text and note 6 supra) and otherwise than by s 12(6)(c) (see the text and note 17 infra).

11 The period is 28 days from the date of the notice: Regulation of Investigatory Powers (Maintenance of Interception Capability) Order 2002, SI 2002/1931, art 4.

12 Regulation of Investigatory Powers Act 2000 s 12(5). The number, and distribution of membership, is provided by an order, made by the Secretary of State, a draft of which must have been laid before Parliament and approved by both Houses of parliament: s 13(1), (2), (3). The Technical Advisory Board consists of 13 persons: Regulation of Investigatory Powers (Technical Advisory Board) Order 2001, SI 2001/3734, art 2(1). Out of 12 of those persons: (1) six must be persons holding an office, rank or position with either a person on whom obligations may be imposed under the Regulation of Investigatory Powers Act 2000 s 12, or a body representing the interests of such persons; and (2) six must be persons holding an office, rank or position with either a person by or on whose behalf applications for interception warrants may be made, or a body representing the interests of such persons: Regulation of Investigatory Powers (Technical Advisory Board) Order 2001, SI 2001/3734, art 2(3). The remaining person, who does not fall within either head (1) or head (2) supra, is to be appointed chairman: art 2(2).

13 Ie except in pursuance of a further notice under the Regulation of Investigatory Powers Act 2000 s 12(6)(c) (see the text and note 17 infra).

14 Ibid s 12(6)(a).

15 Ibid s 12(6)(b).

16 Ie under ibid s 12(2) (see the text and note 6 supra).

17 Ibid s 12(6)(c).

18 Ibid s 12(7).

19 For the meaning of 'civil proceedings' see PARA 509 note 15 ante.

20 Regulation of Investigatory Powers Act 2000 s 12(7).

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### **517. Grants for interception costs.**

It is the duty of the Secretary of State to ensure that such arrangements are in force as are necessary for securing that a person<sup>1</sup> who provides a postal service<sup>2</sup> or a telecommunications service<sup>3</sup> receives such contribution as is, in the circumstances of that person's case, a fair contribution towards the costs incurred, or likely to be incurred, by that person in consequence of the following matters: (1) in relation to a person providing a postal service, the issue of interception warrants<sup>4</sup> relating to communications<sup>5</sup> transmitted by means of that postal service; (2) in relation to a person providing a telecommunications service, the issue of interception warrants relating to communications transmitted by means of a telecommunication system<sup>6</sup> used for the purposes of that service; (3) in relation to each description of person, the imposition on that person of obligations provided for by an order<sup>7</sup>.

1 As to the meaning of 'person' see PARA 506 note 1 ante.

2 For the meaning of 'postal service' see PARA 506 note 5 ante.

3 For the meaning of 'telecommunications service' see PARA 506 note 6 ante.

4 For the meaning of 'interception warrant' see PARA 509 note 12 ante.

5 For the meaning of 'communication' see PARA 506 note 3 ante.

6 For the meaning of 'telecommunication system' see PARA 506 note 6 ante.

7 Regulation of Investigatory Powers Act 2000 s 14(1), (2). The order referred to in the text is an order under s 12 (see PARA 516 ante). For the purpose of complying with his duty, the Secretary of State may make arrangements for payments to be made out of money provided by Parliament: s 14(3).

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### **518. Restrictions on use of intercepted material.**

It is the duty of the Secretary of State to ensure, in relation to all interception warrants<sup>1</sup>, that such arrangements are in force as he considers necessary for securing: (1) that both of two sets of specified requirements<sup>2</sup> are satisfied in relation to the intercepted material<sup>3</sup> and any related communications data<sup>4</sup>; and (2) in the case of warrants in relation to which there are section 8(4) certificates<sup>5</sup>, that the requirements in respect of extra safeguards<sup>6</sup> are also satisfied<sup>7</sup>.

The first set of specified requirements are satisfied in relation to the intercepted material and any related communications data if each of the following is limited to the minimum that is necessary for the authorised purposes: (a) the number of persons to whom any of the material or data is disclosed or otherwise made available; (b) the extent to which any of the material or data is disclosed or otherwise made available; (c) the extent to which any of the material or data is copied; and (d) the number of copies that are made<sup>8</sup>.

The second set of specified requirements are satisfied in relation to the intercepted material and any related communications data if each copy made of any of the material or data (if not destroyed earlier) is destroyed as soon as there are no longer any grounds for retaining it as necessary for any of the authorised purposes<sup>9</sup>.

1 For the meaning of 'interception warrant' see PARA 509 note 12 ante.

2 I.e. the requirements specified by the Regulation of Investigatory Powers Act 2000 s 15(2), (3) (see the text and notes 8-9 infra).

3 For the meaning of 'intercepted material' see PARA 509 note 10 ante.

4 For the meaning of 'related communications data' see PARA 509 note 11 ante.

5 For the meaning of 'section 8(4) certificate' see PARA 512 ante.

6 I.e. the requirements of the Regulation of Investigatory Powers Act 2000 s 16. Those requirements are that the intercepted material is read, looked at or listened to by the persons to whom it becomes available by virtue of the warrant to the extent only that it has been certified as material the examination of which is necessary as mentioned in s 5(3)(a), (b) or (c) (see PARA 509 ante), and falls within s 16(2): s 16(1). As to the meaning of 'person' see PARA 506 note 1 ante.

Intercepted material falls within s 16(2) so far only as it is selected to be read, looked at or listened to otherwise than according to a factor which (1) is referable to an individual who is known to be for the time being in the British Islands; and (2) has as its purpose, or one of its purposes, the identification of material contained in communications sent by him, or intended for him: s 16(2). As to the meaning of 'communication' see PARA 506 note 3 ante. For the meaning of 'British Islands' see PARA 511 note 16 ante.

Intercepted material falls within s 16(2), notwithstanding that it is selected by reference to any such factor as is mentioned in head (1) or head (2) supra, if (a) it is certified by the Secretary of State for the purposes of s 8(4) (see PARA 512 ante) that the examination of material selected according to factors referable to the individual in question is necessary as mentioned in s 5(3)(a), (b) or (c) (see PARA 509 ante) (s 16(3)(a)); and (b) the material relates only to communications sent during a period specified in the certificate that is no longer than the permitted maximum (s 16(3)(b) (s 16(3)(b), (5)(c) amended, and s 16(3A), (5A) added, by the Terrorism Act 2006 s 32(1), (5)-(7))). For this purpose, 'the permitted maximum' means either six months (in the case of material the examination of which is certified for the purposes of the Regulation of Investigatory Powers Act

2000 s 8(4) as necessary in the interests of national security) (s 16(3A)(a) (as so added)) or three months (in any other case) (s 16(3A)(b) (as so added)).

Intercepted material also falls within s 16(2), notwithstanding that it is selected by reference to any such factor as is mentioned in head (1) or head (2) supra, if (i) the person to whom the warrant is addressed believes, on reasonable grounds, that the circumstances are such that the material would fall within s 16(2); or (ii) the conditions set out in s 16(5) are satisfied in relation to the selection of the material: s 16(4). The conditions in s 16(5) are satisfied if: (A) it has appeared to the person to whom the warrant is addressed that there has been such a relevant change of circumstances as (but for head (ii) supra) would prevent the intercepted material from falling within s 16(2) (s 16(5)(a)); (B) since it first so appeared, a written authorisation to read, look at or listen to the material has been given by a senior official (s 16(5)(b)); and (c) the selection is made before the end of the permitted period (s 16(5)(c) (as so amended)). The reference to its appearing that there has been a relevant change of circumstances is a reference to its appearing either that the individual in question has entered the British Islands, or that a belief by the person to whom the warrant is addressed in the individual's presence outside the British Islands was in fact mistaken: s 16(6). 'The permitted period' means either the period ending with the end of the fifth working day after it first appeared as mentioned in s 16(5)(a) to the person to whom the warrant is addressed (in the case of material the examination of which is certified for the purposes of s 8(4) (see PARA 512 ante) as necessary in the interests of national security) (s 16(5A)(a) (as so added)) or the period ending with the end of the first working day after it first so appeared to that person (in any other case) (s 16(5A)(b) (as so added)). For the meaning of 'senior official' see PARA 511 note 2 ante. For the meaning of 'working day' see PARA 513 note 2 ante.

7 Ibid s 15(1). Arrangements in relation to interception warrants which are made for the purposes of s 15(1): (1) are not required to secure that the requirements of s 15(2), (3) (see the text and notes 8-9 infra) are satisfied in so far as they relate to any of the intercepted material or related communications data, or any copy of any such material or data, possession of which has been surrendered to any authorities of a country or territory outside the United Kingdom; but (2) are required to secure, in the case of every such warrant, that possession of the intercepted material and data and of copies of the material or data is surrendered to authorities of a country or territory outside the United Kingdom only if the requirements of s 15(7) are satisfied: s 15(6). 'Copy', in relation to intercepted material or related communications data, means any of the following, whether or not in documentary form:

- 89 (a) any copy, extract or summary of the material or data which identifies itself as the product of an interception; and
- 90 (b) any record referring to an interception which is a record of the identities of the persons to or by whom the intercepted material was sent, or to whom the communications data relates,

and 'copied' is to be construed accordingly: s 15(8). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

The requirements of s 15(7) are satisfied in the case of a warrant if it appears to the Secretary of State: (i) that requirements corresponding to those of s 15(2), (3) (see the text and notes 8-9 infra) will apply, to such extent (if any) as the Secretary of State thinks fit, in relation to any of the intercepted material or related communications data possession of which, or of any copy of which, is surrendered to the authorities in question; and (ii) that restrictions are in force which would prevent, to such extent (if any) as the Secretary of State thinks fit, the doing of anything in, for the purposes of or in connection with any proceedings outside the United Kingdom which would result in such a disclosure as, by virtue of s 17 (see PARA 519 post), could not be made in the United Kingdom: s 15(7).

8 Ibid s 15(2). For the purposes of s 15, something is necessary for the authorised purposes if, and only if: (1) it continues to be, or is likely to become, necessary as mentioned in s 5(3) (see PARA 509 ante); (2) it is necessary for facilitating the carrying out of any of the functions under Pt I Ch I (ss 1-20) of the Secretary of State; (3) it is necessary for facilitating the carrying out of any functions in relation to Pt I (ss 1-25) of the Interception of Communications Commissioner (see PARA 524 post) or of the Tribunal established under s 65, Sch 3 (as amended) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS); (4) it is necessary to ensure that a person conducting a criminal prosecution has the information he needs to determine what is required of him by his duty to secure the fairness of the prosecution; or (5) it is necessary for the performance of any duty imposed on any person by the Public Records Act 1958: Regulation of Investigatory Powers Act 2000 ss 15(4), 81(1). For the meaning of 'criminal prosecution' see PARA 509 note 15 ante. As to orders allocating proceedings to the Tribunal see s 66; as to exercise of the Tribunal's jurisdiction see s 67; as to Tribunal procedure see s 68 (as amended); and see further CONSTITUTIONAL LAW AND HUMAN RIGHTS. Its rules are set out in the Investigatory Powers Tribunal Rules 2000, SI 2000/2665, made under the Regulation of Investigatory Powers Act 2000 s 69.

The arrangements for the time being in force under s 15 for securing that the requirements of s 15(2) are satisfied in relation to the intercepted material or any related communications data must include such arrangements as the Secretary of State considers necessary for securing that every copy of the material or data that is made is stored, for so long as it is retained, in a secure manner: s 15(5).

9 Ibid s 15(3). As to what is necessary for any of the authorised purposes see s 15(4); and note 8 supra.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(8) INTERCEPTION, ACQUISITION AND DISCLOSURE OF COMMUNICATIONS/(i) Unlawful and Authorised Interception/519. Exclusion of matters from legal proceedings.

### **519. Exclusion of matters from legal proceedings.**

No evidence may be adduced, question asked, assertion or disclosure made or other thing done in or for the purposes of or in connection with any legal proceedings<sup>1</sup> which (in any manner) (1) discloses, in circumstances from which its origin in anything falling within the specified provision<sup>2</sup> may be inferred, any of the contents of an intercepted communication<sup>3</sup> or any related communications data<sup>4</sup>; or (2) tends, apart from any such disclosure, to suggest that anything falling within the specified provision<sup>5</sup> has or may have occurred or be going to occur<sup>6</sup>. The following fall within the specified provision: (a) conduct by a specified person<sup>7</sup> that was or would be an offence of unlawful interception<sup>8</sup>; (b) a breach by the Secretary of State of his duty under the Regulation of Investigatory Powers Act 2000<sup>9</sup>; (c) the issue of an interception warrant<sup>10</sup>; (d) the making of an application by any person for an interception warrant<sup>11</sup>; (e) the imposition of any requirement on any person to provide assistance with giving effect to an interception warrant<sup>12</sup>.

The above rule about the exclusion of evidence does not apply in relation to: (i) any proceedings for a relevant offence<sup>13</sup>; (ii) any civil proceedings for failure to give effect to an interception warrant<sup>14</sup>; (iii) any proceedings before the Tribunal<sup>15</sup>; (iv) any proceedings on an appeal or review of a decision of the Tribunal<sup>16</sup>; (v) any control order proceedings or any proceedings arising out of such proceedings<sup>17</sup>; (vi) any proceedings before the Special Immigration Appeals Commission or any proceedings arising out of proceedings before that Commission<sup>18</sup>; (vii) any proceedings before the Proscribed Organisations Appeal Commission<sup>19</sup> or any proceedings arising out of proceedings before that Commission<sup>20</sup>.

The above rule does not prohibit anything done in, for the purposes of, or in connection with, so much of any legal proceedings as relates to the fairness or unfairness of a dismissal on the grounds of any conduct constituting an offence<sup>21</sup>. Nor does it prohibit any such disclosure of any information that continues to be available for disclosure as is confined to (A) a disclosure to a person conducting a criminal prosecution<sup>22</sup> for the purpose only of enabling that person to determine what is required of him by his duty to secure the fairness of the prosecution; or (B) a disclosure to a relevant judge<sup>23</sup> in a case in which that judge has ordered the disclosure to be made to him alone; or (C) a disclosure to the panel of an inquiry held under the Inquiries Act 2005 in the course of which the panel has ordered the disclosure to be made to the panel alone<sup>24</sup>.

1 For the meaning of 'legal proceedings' see PARA 509 note 15 ante.

2 Ie falling within the Regulation of Investigatory Powers Act 2000 s 17(2): see the text and notes 7-12 infra.

3 'Intercepted communications' means any communication intercepted in the course of its transmission by means of a postal service or telecommunication system: *ibid* s 17(4). As to the meaning of 'communication' see PARA 506 note 3 ante. As to the interception of a communication in the course of its transmission by means of a postal service or by means of a telecommunication system see s 2; and PARA 506 note 2 ante. For the meaning of 'postal service' see PARA 506 note 5 ante; and for the meaning of 'telecommunication system' see PARA 506 note 6 ante. Section 17 covers both public and private telecommunication systems and covers events taking place before the Regulation of Investigatory Powers Act 2000 came into force: *A-G's Reference (No 5 of 2002)* [2003] EWCA Crim 1632, [2004] 1 Cr App Rep 11.



4 Regulation of Investigatory Powers Act 2000 s 17(1)(a). Section 17(1)(a) does not prohibit the disclosure of any of the contents of a communication if the interception of that communication was lawful by virtue of s 1(5) (c) (see PARA 506 ante), s 3 (see PARA 507 ante) or s 4 (see PARA 508 ante): s 18(4). Where any disclosure is proposed to be or has been made on the grounds that it is authorised by s 18(4), then s 17(1) does not prohibit the doing of anything in, or for the purposes of, so much of any proceedings as relates to the question whether that disclosure is or was so authorised: s 18(5) (amended by the Inquiries Act 2005 ss 48(1), 49(2), Sch 2 para 21, Sch 3). For the meaning of 'related communications data' see PARA 509 note 11 ante.

5 le falling within the Regulation of Investigatory Powers Act 2000 s 17(2): see the text and notes 7-12 infra.

6 Ibid s 17(1)(b). Section 17(1)(b) does not prohibit the doing of anything that discloses any conduct of a person for which he has been convicted of an offence under s 1(1) or s 1(2) (see PARA 506 ante), s 11(7) (see PARA 515 ante) or s 19 (see PARA 520 post), or the Interception of Communications Act 1985 s 1 (repealed): Regulation of Investigatory Powers Act 2000 s 18(6).

Section 17(1) does not operate in criminal proceedings to prevent evidence being adduced, questions asked, assertion or disclosure made or other thing done so as to ascertain whether a telecommunication system is a public or private one, irrespective of whether the evidence or question relates to events prior to the implementation of the Regulation of Investigatory Powers Act 2000: *A-G's Reference (No 5 of 2002)* [2004] UKHL 40, [2005] 1 AC 167, [2005] 1 Cr App Rep 307. It is also permissible in criminal proceedings, where an interception has taken place on a private system, to ask questions or adduce evidence that the interception carried out by or for the person with the right to control the operation or use of the system where the interception took place before implementation of the Regulation of Investigatory Powers Act 2000, and also, subject to the facts of the case, after its implementation: *A-G's Reference (No 5 of 2002)* supra.

7 As to the meaning of 'person' see PARA 506 note 1 ante. The specified persons are: (1) any person to whom a warrant under the Regulation of Investigatory Powers Act 2000 Pt I Ch I (ss 1-20) may be addressed; (2) any person holding office under the Crown (see PARA 510 ante); (3) any member of the Serious Organised Crime Agency (see POLICE vol 36(1) (2007 Reissue) PARA 430 et seq); (4) any person employed by or for the purposes of a police force; (5) any person providing a postal service (see PARA 506 note 5 ante) or employed for the purposes of any business of providing such a service; and (6) any person providing a public telecommunications service (see PARA 508 note 6 ante) or employed for the purposes of any business of providing such a service: s 17(3) (amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 131, 133). See *R v Sargent* [2001] UKHL 54, [2003] 1 AC 347, [2002] 1 Cr App Rep 305 (similar exclusion of evidence provisions in Interception of Communications Act 1985 s 9 (repealed) operated where public telecommunications employee acted outside scope of his employment).

'Police force' means any of the following: (a) any police force maintained under the Police Act 1996 s 2 (see POLICE vol 36(1) (2007 Reissue) PARA 136); (b) the metropolitan police force; (c) the City of London police force; (d) any police force maintained under or by virtue of the Police (Scotland) Act 1967 s 1; (e) the Police Service of Northern Ireland (see PARA 510 note 8 ante); (f) the Ministry of Defence Police; (g) the Royal Navy Regulating Branch; (h) the Royal Military Police; (i) the Royal Air Force Police; (j) the British Transport Police: Regulation of Investigatory Powers Act 2000 s 81(1). See further POLICE vol 36(1) (2007 Reissue) PARA 102.

8 Ibid s 17(2)(a). The offence referred to in the text is an offence under s 1(1) or s 1(2) (see PARA 506 ante) or under the Interpretation of Communications Act 1985 s 1 (repealed): see the Regulation of Investigatory Powers Act 2000 s 17(2)(a).

9 Ibid s 17(2)(b). The duty referred to in the text is the duty under s 1(4) (see PARA 506 ante): see s 17(2)(b).

10 Ibid s 17(2)(c). This also includes the issue of a warrant under the Interception of Communications Act 1985: see the Regulation of Investigatory Powers Act 2000 s 17(2)(c). For the meaning of 'interception warrant' see PARA 509 note 12 ante.

11 Ibid s 17(2)(d). This also includes applications for a warrant under the Interception of Communications Act 1985: see the Regulation of Investigatory Powers Act 2000 s 17(2)(d).

12 Ibid s 17(2)(e). As to the provision of assistance with giving effect to an interception warrant see PARA 515 ante.

13 'Relevant offence' means: (1) an offence under any provision of the Regulation of Investigatory Powers Act 2000; (2) an offence under the Interception of Communications Act 1985 s 1 (repealed); (3) an offence under the Wireless Telegraphy Act 1949 s 5 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARAS 567, 571); (4) an offence under the Postal Services Act 2000 s 83 or s 84 (see POST OFFICE); (5) an offence under the Official Secrets Act 1989 s 4 relating to any such information, document or article as is mentioned in s 4(3)(a) (see PARA 486 ante); (6) an offence under the Official Secrets Act 1911 s 1 or s 2 (see PARA 478 et seq ante) relating to any sketch, plan, model, article, note, document or information which incorporates or relates to the contents of any intercepted communication or any related communications data or tends to suggest as mentioned in the Regulation of Investigatory Powers Act 2000 s 17(1)(b) (see the text and note 6 supra); (7)

perjury committed in the course of any proceedings mentioned in s 18(1) (as amended) or s 18(3) (see the text and notes 20-21 *infra*); (8) attempting or conspiring to commit, or aiding, abetting, counselling or procuring the commission of, an offence falling within any of heads (1)-(7) *supra*; and (9) contempt of court committed in the course of, or in relation to, any proceedings mentioned in s 18(1) (as amended) or s 18(3): s 18(12) (amended by the Communications Act 2003 s 406(7), Sch 19; and the Postal Services Act 2000 (Consequential Modifications No 1) Order 2001, SI 2001/1149, art 3(2), Sch 2). As to the meaning of 'document' see PARA 506 note 18 *ante*. For these purposes, 'intercepted communication' has the same meaning as in the Regulation of Investigatory Powers Act 2000 s 17 (see note 3 *supra*): s 18(13).

14 The civil proceedings referred to in the text are those under *ibid* s 11(8) (see PARA 515 *ante*).

15 *Ie* the Tribunal established under *ibid* s 65, Sch 3 (as amended) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS): see s 81(1).

16 *Ie* proceedings for which provision is made by an order under *ibid* s 67(8) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS).

17 As to control order proceedings within the meaning of the Prevention of Terrorism Act 2005 see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 506.

18 As to the Special Immigration Appeals Commission see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 184).

19 As to the Proscribed Organisations Appeal Commission see PARA 386 note 13 *ante*.

20 Regulation of Investigatory Powers Act 2000 s 18(1) (amended by the Prevention of Terrorism Act 2005 s 11, Schedule para 9(1), (2)).

The Regulation of Investigatory Powers Act 2000 s 18(1) (as amended) does not authorise the disclosure of anything (1) in the case of any proceedings falling within head (v) in the text, to a person who is or was a relevant party to the control order proceedings or any person who for the purposes of any proceedings so falling (but otherwise than by virtue of an appointment under the Prevention of Terrorism Act 2005 Schedule para 7) represents such a person; (2) in the case of any proceedings falling within head (vi) in the text, to the appellant to the Special Immigration Appeals Commission, or to any person who for the purposes of any proceedings so falling (but otherwise than by virtue of an appointment under the Special Immigration Appeals Commission Act 1997 (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM)) represents that appellant; or (3) in the case of proceedings falling within head (vii) in the text, to the applicant to the Proscribed Organisations Appeal Commission, to the organisation concerned (if different), to any person designated under the Terrorism Act 2000 Sch 3 para 6 (see PARA 386 *ante*) to conduct proceedings so falling on behalf of that organisation, or to any person who for the purposes of any proceedings so falling (but otherwise than by virtue of an appointment under Sch 3 para 7 (see PARA 386 *ante*)) represents that applicant or that organisation: Regulation of Investigatory Powers Act 2000 s 18(2) (amended by the Prevention of Terrorism Act 2005 s 11, Sch para 9(1), (3), (4)).

21 Regulation of Investigatory Powers Act 2000 s 18(3). The reference in the text to an offence is a reference to an offence under s 1(1) or s 1(2) (see PARA 506 *ante*), s 11(7) (see PARA 515 *ante*) or s 19 (see PARA 520 *post*), or the Interception of Communications Act 1985 s 1 (repealed): Regulation of Investigatory Powers Act 2000 s 18(3).

22 For the meaning of 'criminal prosecution' see PARA 509 note 15 *ante*.

23 'A relevant judge' means in England and Wales: (1) any judge of the High Court or of the Crown Court or any circuit judge; (2) in relation to a court-martial, the judge advocate appointed in relation to that court-martial under the Army Act 1955 s 84B (as added) (see ARMED FORCES vol 2(2) (Reissue) PARA 484), the Air Force Act 1955 s 84B (as added) (see ARMED FORCES vol 2(2) (Reissue) PARA 484) or the Naval Discipline Act 1957 s 53B (as added) (see ARMED FORCES vol 2(2) (Reissue) PARA 453); or (3) any person holding any such judicial office as entitles him to exercise the jurisdiction of a judge falling within head (1) *supra*: Regulation of Investigatory Powers Act 2000 s 18(11).

24 *Ibid* s 18(7) (amended by the Inquiries Act 2005 s 48(1), Sch 2 para 21, Sch 3). A relevant judge must not order a disclosure under head (B) in the text except where he is satisfied that the exceptional circumstances of the case make the disclosure essential in the interests of justice: Regulation of Investigatory Powers Act 2000 s 18(8). The panel of an inquiry must not order a disclosure under head (C) in the text except where it is satisfied that the exceptional circumstances of the case make the disclosure essential to enable the inquiry to fulfil its terms of reference: s 18(8A) (added by the Inquiries Act 2005 Sch 2 para 21). Where in any criminal proceedings a relevant judge does order a disclosure under head (B) in the text, and in consequence of that disclosure he is of the opinion that there are exceptional circumstances requiring him to do so, he may direct the person conducting the prosecution to make for the purposes of the proceedings any such admission of fact as that judge thinks essential in the interests of justice: Regulation of Investigatory Powers Act 2000 s 18(9).

Nothing in any such direction can authorise or require anything to be done in contravention of s 17(1) (see the text and notes 1-6 supra): s 18(10).

## **UPDATE**

### **519 Exclusion of matters from legal proceedings**

TEXT AND NOTES 13-20--Add head (viii) any financial restrictions proceedings (ie proceedings in the High Court on an application under the Counter-Terrorism Act 2008 s 63 or on a claim arising from any matter to which such an application relates; see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 550A), or any proceedings arising out of such proceedings: Regulation of Investigatory Powers Act 2000 s 18(1) (amended by the Counter-Terrorism Act 2008 s 69(2)). The Regulation of Investigatory Powers Act 2000 s 18(1) does not authorise the disclosure of anything, in the case of proceedings falling within head (viii) above, to a person, other than the Treasury, who is or was a party to the proceedings, or any person who for the purposes of the proceedings (but otherwise than by virtue of appointment as a special advocate) represents such a person: s 18(2) (amended by the Counter-Terrorism Act 2008 s 69(3)).

NOTE 13--Now, head (3) an offence under the Wireless Telegraphy Act 2006 s 47 or 48: Regulation of Investigatory Powers Act 2000 s 18(12) (amended by the 2006 Act Sch 7 para 23).

NOTE 23--Definition of 'a relevant judge' amended: Armed Forces Act 2006 Sch 16 para 169.

TEXT AND NOTE 24--Now head (c) a disclosure to the panel of an inquiry held under the Inquiries Act 2005 or to a person appointed as counsel to such an inquiry where, in the course of the inquiry, the panel has ordered the disclosure to be made to the panel alone or, as the case may be, to the panel and the person appointed as counsel to the inquiry: Regulation of Investigatory Powers Act 2000 s 18(7) (amended by the Counter-Terrorism Act 2008 s 74(1)).

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## **520. Offence for unauthorised disclosures.**

Where an interception warrant<sup>1</sup> has been issued or renewed, it is the duty of every person<sup>2</sup> specified<sup>3</sup> to keep secret all the specified matters<sup>4</sup>.

The persons specified are: (1) the persons who may apply for an interception warrant<sup>5</sup>; (2) every person holding office under the Crown<sup>6</sup>; (3) every member of the Serious Organised Crime Agency<sup>7</sup>; (4) every person employed by or for the purposes of a police force<sup>8</sup>; (5) persons providing postal services or employed for the purposes of any business of providing such a service<sup>9</sup>; (6) persons providing public telecommunications services or employed for the purposes of any business of providing such a service<sup>10</sup>; (7) persons having control of the whole or any part of a telecommunication system located wholly or partly in the United Kingdom<sup>11</sup>.

The specified matters are: (a) the existence and contents of the warrant and of any section 8(4) certificate in relation to the warrant<sup>12</sup>; (b) the details of the issue of the warrant and of any renewal or modification of the warrant or of any such certificate<sup>13</sup>; (c) the existence and contents of any requirement to provide assistance with giving effect to the warrant<sup>14</sup>; (d) the steps taken in pursuance of the warrant or of any such requirement<sup>15</sup>; and (e) everything in the intercepted material<sup>16</sup>, together with any related communications data<sup>17</sup>.

A person who makes a disclosure to another of anything that he is required to keep secret under the provisions described above is guilty of an offence, and liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>18</sup> or to a fine not exceeding the statutory maximum or to both<sup>19</sup>.

It is a defence for the defendant to show<sup>20</sup> that he could not reasonably have been expected, after first becoming aware of the matter disclosed, to take steps to prevent the disclosure<sup>21</sup>. It is also a defence for the defendant to show<sup>22</sup> that (i) the disclosure was made by or to a professional legal adviser in connection with the giving, by the adviser to any client of his, of advice<sup>23</sup>; and (ii) the person to whom or, as the case may be, by whom it was made was the client or a representative of the client<sup>24</sup>.

It is a defence for the defendant to show<sup>25</sup> that the disclosure was made by a legal adviser (A) in contemplation of, or in connection with, any legal proceedings<sup>26</sup>; and (B) for the purposes of those proceedings<sup>27</sup>. It is a defence for the defendant to show<sup>28</sup> that the disclosure was confined to a disclosure made to the Interception of Communications Commissioner<sup>29</sup> or authorised by: (aa) that Commissioner; (bb) by the warrant or the person to whom the warrant is or was addressed; or (cc) by the terms of the requirement to provide assistance<sup>30</sup>.

1 For the meaning of 'interception warrant' see PARA 509 note 12 ante.

2 As to the meaning of 'person' see PARA 506 note 1 ante.

3 I.e. specified in the Regulation of Investigatory Powers Act 2000 s 19(2): see heads (1)-(7) in the text.

4 Ibid s 19(1). The matters are specified in s 19(3): see heads (a)-(e) in the text.

- 5 Ibid s 19(2)(a). Those persons are specified in s 6(2): see PARA 510 ante.
- 6 Ibid s 19(2)(b). As to persons holding office under the Crown see PARA 510 note 14 ante.
- 7 Ibid s 19(2)(c) (substituted by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 131, 134).
- 8 Regulation of Investigatory Powers Act 2000 s 19(2)(e). For the meaning of 'police force' see PARA 519 note 7 ante.
- 9 Ibid s 19(2)(f). For the meaning of 'postal service' see PARA 506 note 5 ante.
- 10 Ibid s 19(2)(g). For the meaning of 'public telecommunications services' see PARA 508 note 6 ante.
- 11 Ibid s 19(2)(h). For the meaning of 'telecommunication system' see PARA 506 note 6 ante.
- 12 Ibid s 19(3)(a). For the meaning of 'section 8(4) certificate' see PARA 512 ante.
- 13 Ibid s 19(3)(b).
- 14 Ibid s 19(3)(c).
- 15 Ibid s 19(3)(d).
- 16 For the meaning of 'intercepted material' see PARA 509 note 10 ante.
- 17 Regulation of Investigatory Powers Act 2000 s 19(3)(e). For the meaning of 'related communications data' see PARA 509 note 11 ante.
- 18 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.
- 19 Regulation of Investigatory Powers Act 2000 s 19(4). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.
- 20 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.
- 21 Regulation of Investigatory Powers Act 2000 s 19(5).
- 22 See note 20 supra.
- 23 Regulation of Investigatory Powers Act 2000 s 19(6)(a). The advice referred to in the text is advice about the effect of Pt I Ch I (ss 1-20) (see PARAS 506-519 ante): see s 19(6)(a). As to legal professional privilege see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARAS 452-453; CIVIL PROCEDURE vol 11 (2009) PARA 972; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741; LEGAL PROFESSIONS vol 66 (2009) PARA 1146.
- 24 Ibid s 19(6)(b). Section 19(6) does not apply in the case of a disclosure made with a view to furthering any criminal purpose: s 19(8).
- 25 See note 20 supra.
- 26 Regulation of Investigatory Powers Act 2000 s 19(7)(a). For the meaning of 'legal proceedings' see PARA 509 note 15 ante. Section s 19(7) does not apply in the case of a disclosure made with a view to furthering any criminal purpose: s 19(8).
- 27 Ibid s 19(7)(b). See note 26 supra.
- 28 See note 20 supra.
- 29 As to the Interception of Communications Commissioner see PARA 524 post.

30 Regulation of Investigatory Powers Act 2000 s 19(9). Alternatively, it is a defence to show that the disclosure was one authorised by s 11(9) (see PARA 515 ante): see s 19(9).

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## **(ii) Acquisition and Disclosure of Communications Data**

### **521. Lawful acquisition and disclosure of communications data.**

The Regulation of Investigatory Powers Act 2000 contains provisions relating to 'relevant conduct', that is: (1) any conduct in relation to a postal service<sup>1</sup> or telecommunication system<sup>2</sup> for obtaining communications data<sup>3</sup>, other than conduct consisting in the interception of communications in the course of their transmission by means of such a service or system<sup>4</sup>; and (2) the disclosure to any person of communications data<sup>5</sup>.

Relevant conduct is lawful for all purposes if (a) it is conduct in which any person is authorised or required to engage by an authorisation or notice<sup>6</sup>; and (b) the conduct is in accordance with, or in pursuance of, the authorisation or requirement<sup>7</sup>.

A person is not subject to any civil liability in respect of any conduct of his which is incidental to any conduct that is so lawful<sup>8</sup>, and is not itself conduct an authorisation or warrant for which is capable of being granted under a relevant enactment<sup>9</sup> and might reasonably have been expected to have been sought in the case in question<sup>10</sup>.

1 For the meaning of 'postal service' see PARA 506 note 5 ante.

2 For the meaning of 'telecommunication system' see PARA 506 note 6 ante.

3 In the Regulation of Investigatory Powers Act 2000 Pt Ch II (ss 21-25), 'communications data' means any of the following: (1) any traffic data comprised in or attached to a communication (whether by the sender or otherwise) for the purposes of any postal service or telecommunication system by means of which it is being or may be transmitted; (2) any information which includes none of the contents of a communication (apart from any information falling within head (1) supra) and is about the use made by any person (a) of any postal service or telecommunications service; or (b) in connection with the provision to or use by any person of any telecommunications service, of any part of a telecommunication system; (3) any information not falling within head (1) or head (2) supra that is held or obtained, in relation to persons to whom he provides the service, by a person providing a postal service or telecommunications service: ss 21(4), 25(1).

In s 21, 'traffic data', in relation to any communication, means: (i) any data identifying, or purporting to identify, any person, apparatus or location to or from which the communication is or may be transmitted; (ii) any data identifying or selecting, or purporting to identify or select, apparatus through which, or by means of which, the communication is or may be transmitted; (iii) any data comprising signals for the actuation of apparatus used for the purposes of a telecommunication system for effecting (in whole or in part) the transmission of any communication; and (iv) any data identifying the data or other data as data comprised in or attached to a particular communication: s 21(6). However, 'traffic data' includes data identifying a computer file or computer program access to which is obtained, or which is run, by means of the communication to the extent only that the file or program is identified by reference to the apparatus in which it is stored: s 21(6). As to the meaning of 'person' see PARA 506 note 1 ante; and as to the meaning of 'apparatus' see PARA 506 note 2 ante. In s 21, in relation to traffic data comprising signals for the actuation of apparatus, references to a telecommunication system by means of which a communication is being or may be transmitted include references to any telecommunication system in which that apparatus is comprised: s 21(7)(a). References in s 21 to traffic data being attached to a communication include references to the data and the communication being logically associated with each other: s 21(7)(b). In s 21, 'data', in relation to a postal item, means anything written on the outside of the item: s 21(7).

4 Ibid s 21(1)(a). As to the interception of communications in the course of their transmission by means of a postal system or telecommunications system see PARA 506 note 2 ante.

5 Ibid s 21(1)(b).

6 Ibid s 21(2)(a). The reference to authorisation or a notice is a reference to authorisation or a notice granted or given under Pt I Ch II (ss 21-25): see s 21(2)(a).

7 Ibid s 21(2)(b).

8 Is lawful under ibid s 21(2) (see the text and notes 6-7 supra): s 21(3)(a).

9 'Relevant enactment', in ibid s 21, means (1) an enactment contained in the Regulation of Investigatory Powers Act 2000; (2) the Intelligence Services Act 1994 s 5 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 474); or (3) an enactment contained in the Police Act 1997 Pt III (ss 91-108) (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 483 et seq): Regulation of Investigatory Powers Act 2000 s 21(5). As to the meaning of 'enactment' see PARA 506 note 16 ante.

10 Ibid s 21(3)(b).

## **UPDATE**

### **521 Lawful acquisition and disclosure of communications data**

NOTE 9--2000 Act s 21(5) amended: Serious Crime Act 2007 Sch 12 para 7.



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## **522. Obtaining and disclosing communications data: authorisations and notices.**

Where a designated person<sup>1</sup> believes that it is necessary on specified grounds<sup>2</sup> to obtain any communications data<sup>3</sup>, he may grant an authorisation for persons holding offices, ranks or positions with the same relevant public authority<sup>4</sup> as the designated person to engage in any relevant conduct<sup>5</sup>. Where a designated person believes that it is necessary on specified grounds<sup>6</sup> to obtain any communications data and it appears to the designated person that a postal or telecommunications operator<sup>7</sup> is or may be in possession of, or be capable of obtaining, any communications data, the designated person may, by notice to the postal or telecommunications operator, require the operator: (1) if the operator is not already in possession of the data, to obtain the data; and (2) in any case, to disclose all of the data in his possession or subsequently obtained by him<sup>8</sup>.

The designated person must not grant an authorisation, or give a notice, unless he believes that obtaining the data in question by the conduct authorised or required by the authorisation or notice is proportionate to what is sought to be achieved by so obtaining the data<sup>9</sup>.

1 The persons designated are the individuals holding such offices, ranks or positions with relevant public authorities as are prescribed by an order made by the Secretary of State: Regulation of Investigatory Powers Act 2000 s 25(1), (2). As to the meaning of 'person' see PARA 506 note 1 ante. The Secretary of State may by order impose restrictions (1) on the authorisations and notices under Pt I Ch II (ss 21-25) that may be granted or given by any individual holding an office, rank or position with a specified public authority; and (2) on the circumstances in which (or the purposes for which) such authorisations may be granted or notices given by any such individual: s 25(3). For persons so designated, and restrictions so imposed, see the Regulation of Investigatory Powers (Communications Data) Order 2003, SI 2003/3172, arts 1-11, Schs 1, 2 (amended by SI 2004/3168; SI 2005/1083; SI 2005/2060; SI 2005/2929; SI 2006/594; SI 2006/1878).

'Relevant public authority' means any of the following: (a) a police force (see PARA 519 note 7 ante); (b) the Serious Organised Crime Agency (see POLICE vol 36(1) (2007 Reissue) PARA 430 et seq); (c) the Commissioners for Her Majesty's Revenue and Customs (see PARA 354 note 2 ante); (d) any of the intelligence services (ie the Security Service, the Secret Intelligence Service or GCHQ); (e) any such public authority not falling within the heads listed supra as may be specified by an order made by the Secretary of State: Regulation of Investigatory Powers Act 2000 ss 25(1), 81(1) (s 25(1) amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 131, 135(1), (2)); Commissioners for Revenue and Customs Act 2005 s 50(1), (7). For public authorities specified under head (e) supra see the Regulation of Investigatory Powers (Communications Data) Order 2003, SI 2003/3172, art 3, Schs 1, 2 (as so amended). The Secretary of State may (i) by order remove any person from the list of persons who are for the time being relevant public authorities; and (ii) make such consequential amendments, repeals or revocations in the Regulation of Investigatory Powers Act 2000 or any other enactment as appear to him to be necessary or expedient: s 25(4) (substituted by the Serious Organised Crime and Police Act 2005 Sch 4 paras 131, 135(1), (4)). The Secretary of State may not make an order (A) that adds any person to the list of persons who are for the time being relevant public authorities for the purposes of the Regulation of Investigatory Powers Act 2000 Pt I Ch II (ss 21-25); or (B) that by virtue of head (ii) supra amends or repeals a provision of an Act, unless a draft of the order has been laid before Parliament and approved by a resolution of each House of Parliament: s 25(5) (substituted by the Serious Organised Crime and Police Act 2005 Sch 4 paras 131, 135(1), (4)). References in the Regulation of Investigatory Powers Act 2000 Pt I Ch II to an individual holding an office or position with the Serious Organised Crime Agency include references to any member of staff of that Agency: s 25(3A) (added by the Serious Organised Crime and Police Act 2005 Sch 4 paras 131, 135(1), (3)).

2 The specified grounds are that it is necessary: (1) in the interests of national security; (2) for the purpose of preventing or detecting crime or of preventing disorder; (3) in the interests of the economic well-being of the United Kingdom; (4) in the interests of public safety; (5) for the purpose of protecting public health; (6) for the

purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; (7) for the purpose, in an emergency, of preventing death or injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health; or (8) for any purpose, not falling within heads (1)-(7) supra, which is specified for the purposes of this provision by an order made by the Secretary of State: Regulation of Investigatory Powers Act 2000 s 22(2). For the purposes so specified see the Regulation of Investigatory Powers (Communications Data) Order 2003, SI 2003/3172, Schs 1, 2 (as amended: see note 1 supra). The Secretary of State must not make such an order unless a draft of the order has been laid before Parliament and approved by a resolution of each House: Regulation of Investigatory Powers Act 2000 s 22(9). An order under s 22 must be made by statutory instrument: s 78(1), (2). As to the prevention or detection of crime see PARA 509 note 15 ante.

3 Ibid s 22(1). For the meaning of 'communications data' see PARA 521 note 3 ante.

4 See note 1 supra.

5 Regulation of Investigatory Powers Act 2000 s 22(1), (3). As to the meaning of 'relevant conduct' see PARA 521 ante. As to the form and duration of authorisations see PARA 523 post.

6 See note 2 supra.

7 'Postal or telecommunications operator' means a person who provides a postal service or telecommunications service: Regulation of Investigatory Powers Act 2000 s 25(1). For the meaning of 'postal service' see PARA 506 note 5 ante. For the meaning of 'telecommunications service' see PARA 506 note 6 ante.

8 Ibid s 22(4). As to the form and duration of notices see PARA 523 post.

It is the duty of the postal or telecommunications operator to comply with the requirements of any notice given to him under s 22(4): s 22(6). A person who is under such a duty is not required to do anything in pursuance of that duty which it is not reasonably practicable for him to do: s 22(7). The duty under s 22(6) is enforceable by civil proceedings by the Secretary of State for an injunction or for any other appropriate relief: s 22(8). For the meaning of 'civil proceedings' see PARA 509 note 15 ante.

The Secretary of State is under a duty to ensure that such arrangements are in force as he thinks appropriate for requiring or authorising, in such cases as he thinks fit, the making to postal and telecommunications operators of appropriate contributions towards the costs incurred by them in complying with notices under s 22(4): s 24(1). For the purpose of complying with his duty, the Secretary of State may make arrangements for payments to be made out of money provided by Parliament: s 24(2).

9 Ibid s 22(5).

## UPDATE

### 522 Obtaining and disclosing communications data: authorisations and notices

NOTES 1, 2--SI 2003/3172 arts 1-11, Sch 1 further amended: SI 2006/635, SI 2006/1878. SI 2003/3172 Sch 2 further amended: SI 2006/635, SI 2006/1878, SI 2007/2128.

NOTE 1--Definition of 'relevant public authority' further amended: 2000 Act s 25(1) (amended by Serious Crime Act 2007 Sch 12 para 8).

NOTE 2--Head (8). The following additional purposes have been specified for the purposes of the 2000 Act s 22(2): (a) to assist investigations into alleged miscarriages of justice; and (b) for the purpose of (i) assisting in identifying any person who has died otherwise than as a result of crime or who is unable to identify himself because of a physical or mental condition, other than one resulting from crime, or (ii) obtaining information about the next of kin or other connected persons of such a person or about the reason for his death or condition: Regulation of Investigatory Powers (Communications Data) (Additional Functions and Amendment) Order 2006, SI 2006/1878, art 2.

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### **523. Form and duration of authorisations and notices.**

An authorisation<sup>1</sup> must (1) be granted in writing or (if not in writing) in a manner that produces a record of its having been granted<sup>2</sup>; (2) describe the relevant conduct that is authorised and the communications data in relation to which it is authorised<sup>3</sup>; (3) specify the matters<sup>4</sup> by reference to which it is granted<sup>5</sup>; and (4) specify the office, rank or position held by the person granting the authorisation<sup>6</sup>.

A notice requiring communications data to be disclosed or to be obtained and disclosed<sup>7</sup> must (a) be given in writing or (if not in writing) must be given in a manner that produces a record of its having been given<sup>8</sup>; (b) describe the communications data to be obtained or disclosed under the notice<sup>9</sup>; (c) specify the matters by reference to which the notice is given<sup>10</sup>; (d) specify the office, rank or position held by the person giving it<sup>11</sup>; and (e) specify the manner in which any disclosure required by the notice is to be made<sup>12</sup>. A notice must not require the disclosure of data to any person other than the person giving the notice, or such other person as may be specified in or otherwise identified by, or in accordance with, the provisions of the notice<sup>13</sup>.

An authorisation or notice (i) must not authorise or require any data to be obtained after the end of the period of one month beginning with the date on which the authorisation is granted or the notice given; and (ii) in the case of a notice, must not authorise or require any disclosure after the end of that period of any data not in the possession of, or obtained by, the postal or telecommunications operator<sup>14</sup> at a time during that period<sup>15</sup>. An authorisation or notice may be renewed at any time before the end of the period of one month applying<sup>16</sup> to that authorisation or notice<sup>17</sup>. Renewal is by the grant or giving of a further authorisation or notice<sup>18</sup>.

Where a person who has given a notice is satisfied that it is no longer necessary<sup>19</sup> for the requirements of the notice to be complied with, or that the conduct required by the notice is no longer proportionate to what is sought to be achieved by obtaining communications data to which the notice relates, he must cancel the notice<sup>20</sup>.

1    Ie an authorisation under the Regulation of Investigatory Powers Act 2000 s 22(3): see PARA 522 ante.

2    Ibid s 23(1)(a).

3    Ibid s 23(1)(b). As to the meaning of 'relevant conduct' see PARA 521 ante.

4    Ie the matters falling within ibid s 22(2): see PARA 522 ante.

5    Ibid s 23(1)(c).

6    Ibid s 23(1)(d).

7    Ie a notice under ibid s 22(4): see PARA 522 ante. For the meaning of 'communications data' see PARA 521 note 3 ante.

8    Ibid s 23(2)(a).

9    Ibid s 23(2)(b).

10   Ibid s 23(2)(c). The matters referred to in the text are matters falling within s 22(2): see PARA 522 ante.

11 Ibid s 23(2)(d).

12 Ibid s 23(2)(e).

13 Ibid s 23(3). The notice must not specify or otherwise identify another such person unless he holds an office, rank or position with the same relevant public authority as the person giving the notice: s 23(3). For the meaning of 'relevant public authority' see PARA 522 note 1 ante.

14 For the meaning of 'postal or telecommunications operator' see PARA 522 note 7 ante.

15 Regulation of Investigatory Powers Act 2000 s 23(4). Section 23(4) has effect in relation to a renewed authorisation or renewal notice as if the period of one month did not begin until the end of the period of one month applicable to the authorisation or notice that is current at the time of the renewal: s 23(7).

16 Ie in accordance with ibid s 23(4) or s 23(7): see note 15 supra.

17 Ibid s 23(5).

18 Ibid s 23(6).

19 Ie on grounds falling within ibid s 22(2): see PARA 522 ante.

20 Ibid s 23(8). The Secretary of State may by regulations provide for the person by whom any duty imposed by s 23(8) is to be performed in a case where it would otherwise fall on a person who is no longer available to perform it: s 23(9). Such regulations may provide for the person on whom the duty is to fall to be a person appointed in accordance with the regulations: s 23(9). Such regulations must be made by statutory instrument (s 78(1), (2)), subject to annulment in pursuance of a resolution of either House of Parliament (s 78(1), (4)).

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### (iii) The Interception of Communications Commissioner

#### 524. Appointment and functions of the Commissioner.

The Prime Minister must appoint a Commissioner to be known as the Interception of Communications Commissioner<sup>1</sup>, who must keep under review:

- 632 (1) the exercise and performance by the Secretary of State of certain of his statutory powers and duties in relation to the interception of communications<sup>2</sup>;
  - 633 (2) the exercise and performance, by the persons<sup>3</sup> on whom they are conferred or imposed, of powers and duties in relation to the acquisition and disclosure of communications data<sup>4</sup>;
  - 634 (3) the exercise and performance by the Secretary of State, in relation to information obtained under certain provisions<sup>5</sup>, of his powers and duties<sup>6</sup> in relation to the investigation of electronic data protected by encryption etc<sup>7</sup>; and
  - 635 (4) the adequacy of the arrangements by virtue of which:
- 5
- 9. (a) the duty imposed on the Secretary of State or the Scottish Ministers to ensure safeguards in relation to interception warrants<sup>8</sup>; and
  - 10. (b) so far as applicable to information obtained under Part I of the Regulation of Investigatory Powers Act 2000<sup>9</sup>, the duties imposed on specified authorities in relation to electronic data protected by encryption<sup>10</sup>,
- 6
- 636 are sought to be discharged<sup>11</sup>.

The Interception of Communications Commissioner must give the Tribunal<sup>12</sup> all such assistance (including his opinion as to any issue falling to be determined by the Tribunal) as the Tribunal may require in connection with the investigation of any matter by it, or otherwise for the purposes of its consideration or determination of any matter<sup>13</sup>.

It is not the function of the Commissioner to keep under review the exercise of any power of the Secretary of State to make, amend or revoke any subordinate legislation<sup>14</sup>.

A person may not be appointed as the Commissioner unless he holds or has held a high judicial office<sup>15</sup>. The Commissioner holds office in accordance with the terms of his appointment, and there must be paid to him out of money provided by Parliament such allowances as the Treasury may determine<sup>16</sup>.

The Secretary of State, after consultation with the Commissioner, must make such technical facilities available to him, and (subject to the approval of the Treasury as to numbers) provide him with such staff as are sufficient to secure that he is able properly to carry out his functions<sup>17</sup>.

1 Regulation of Investigatory Powers Act 2000 s 57(1). On the coming into force of s 57, the Commissioner holding office as the Commissioner under the Interception of Communications Act 1985 s 8 (repealed) took and held office as the Interception of Communications Commissioner as if appointed under the Regulation of

Investigatory Powers Act 2000 for the unexpired period of his term of office under the Interception of Communications Act 1985, and otherwise, on the terms of his appointment under that Act: Regulation of Investigatory Powers Act 2000 s 57(8). Section 57 came into force (except for s 57(2)(b)) on 2 October 2000 (see the Regulation of Investigatory Powers Act 2000 (Commencement No 1 and Transitional Provisions) Order 2000, SI 2000/2543); and the Regulation of Investigatory Powers Act 2000 s 57(2)(b) came into force on 5 January 2004 (see the Regulation of Investigatory Powers Act 2000 (Commencement No 3) Order 2003, SI 2003/3140). The Prime Minister must also appoint an Intelligence Services Commissioner to keep under review, so far as they are not required to be kept under review by the Interception of Communications Commissioner, the exercise by the Secretary of State of his powers in relation to warrants for interference with wireless telegraphy, entry and interference with property etc: see the Regulation of Investigatory Powers Act 2000 s 59 (as amended); and CONSTITUTIONAL LAW AND HUMAN RIGHTS. As to the duty to co-operate with the Intelligence Services Commissioner see s 60 (as amended); and CONSTITUTIONAL LAW AND HUMAN RIGHTS. An Investigatory Powers Commissioner for Northern Ireland must also be appointed by the Prime Minister: see s 61 (as amended); and CONSTITUTIONAL LAW AND HUMAN RIGHTS. The Chief Surveillance Commissioner is given extra functions under the Regulation of Investigatory Powers Act 2000 and Assistant Surveillance Commissioners may be appointed: see ss 62, 63; and CONSTITUTIONAL LAW AND HUMAN RIGHTS. Anything authorised or required by or under any enactment or any provision of an Act of the Scottish Parliament to be done by the Interception of Communications Commissioner, the Intelligence Services Commissioner, the Investigatory Powers Commissioner for Northern Ireland or any Surveillance Commissioner or Assistant Surveillance Commissioner may be done by any member of the staff of that Commissioner who is authorised for the purpose (whether generally or specifically) by that Commissioner: Regulation of Investigatory Powers Act 2000 s 64.

2 Ibid s 57(2)(a). The powers and duties referred to in the text are those conferred or imposed by or under ss 1-11 (see PARAS 506-515 ante).

The Commissioner must also keep under review the exercise and performance by the Scottish Ministers of certain of their powers and duties in relation to the interception of communications: s 57(2)(aa) (added by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) (No 2) Order 2000, SI 2000/3253, art 4(1), Sch 3 paras 3, 9).

3 As to the meaning of 'person' see PARA 506 note 1 ante.

4 Regulation of Investigatory Powers Act 2000 s 57(2)(b). The powers and duties referred to in the text are those conferred or imposed by or under Pt I Ch II (ss 21-25) (see PARAS 521-523 ante).

5 Ie under ibid Pt I (ss 1-25) (see PARAS 506-523 ante).

6 The powers and duties referred to in the text are those conferred or imposed on the Secretary of State by or under ibid Pt III (ss 49-56) (not yet in force) (see POLICE vol 36(1) (2007 Reissue) PARA 512 et seq).

7 Ibid s 57(2)(c) (not yet in force).

8 Ibid s 57(2)(d)(i). The duty of the Secretary of State referred to in the text is that under s 15 (see PARA 518 ante).

9 Ie ibid Pt 1.

10 Ie duties under ibid s 55 (see POLICE vol 36(1) (2007 Reissue) PARA 515).

11 Ibid s 57(2)(d)(ii).

12 Ie the Tribunal established under ibid s 65: see PARA 518 note 8 ante; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

13 Ibid s 57(3).

14 Ibid s 57(4).

15 Ibid s 57(5). The reference to high judicial office is a reference to high judicial office within the meaning of the Appellate Jurisdiction Act 1876 (see COURTS vol 10 (Reissue) PARA 365): Regulation of Investigatory Powers Act 2000 s 57(5). As from a day to be appointed, s 57(5) is amended so as to refer to high judicial office within the meaning of the Constitutional Reform Act 2005 Pt 3 (ss 23-60) (not yet in force), and so as to include reference to someone who is or has been a member of the Judicial Committee of the Privy Council: Regulation of Investigatory Powers Act 2000 s 57(5) (prospectively amended by the Constitutional Reform Act 2005 s 145, Sch 17 para 30). At the date at which this volume states the law no such day had been appointed.

16 Regulation of Investigatory Powers Act 2000 s 57(6).

17 Ibid s 57(7).

**UPDATE**

**524 Appointment and functions of the Commissioner**

NOTE 7--2000 Act s 57(2)(c) now in force: SI 2007/2196.

NOTE 15--Appointed day is 1 October 2009: SI 2009/1604.

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## **525. Co-operation with the Commissioner.**

It is the duty of the following persons to disclose or provide to the Interception of Communications Commissioner all such documents<sup>1</sup> and information as he may require for the purpose of enabling him to carry out his functions<sup>2</sup>: (1) every person holding office under the Crown<sup>3</sup>; (2) every member of the staff of the Serious Organised Crime Agency<sup>4</sup>; (3) every person employed by or for the purposes of a police force<sup>5</sup>; (4) every person required<sup>6</sup> to provide assistance with giving effect to an interception warrant<sup>7</sup>; (5) every person on whom an obligation to take any steps to maintain interception capability has been imposed<sup>8</sup>; (6) every person by or to whom an authorisation has been granted<sup>9</sup>; (7) every person to whom a notice to obtain and disclose communication data has been given<sup>10</sup>; (8) every person to whom a disclosure notice has been given<sup>11</sup>; and (9) every person who is or has been employed for the purposes of any business of a person falling within head (4), (5), (7) or (8) above<sup>12</sup>.

1 As to the meaning of 'documents' see PARA 506 note 18 ante.

2 The functions referred to in the text are those under the Regulation of Investigatory Powers Act 2000 s 57 (as amended) (see PARA 524 ante).

3 Ibid s 58(1)(a). As to persons holding office under the Crown see PARA 510 note 14 ante.

4 Ibid s 58(1)(b) (substituted by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 131, 150).

5 Regulation of Investigatory Powers Act 2000 s 58(1)(d). For the meaning of 'police force' see PARA 519 note 7 ante.

6 le for the purposes of ibid s 11 (see PARA 515 ante).

7 Ibid s 58(1)(e). For the meaning of 'interception warrant' see PARA 509 note 12 ante.

8 Ibid s 58(1)(f). The obligation referred to in the text is that imposed by s 12 (see PARA 516 ante).

9 Ibid s 58(1)(g). The authorisation referred to in the text is that under ibid s 22(3) (see PARA 522 ante).

10 Ibid s 58(1)(h). The notice referred to in the text is a notice under s 22(4) (see PARA 522 ante).

11 Ibid s 58(1)(i) (not yet in force). The notice referred to in the text is a notice under s 49 (see POLICE vol 36(1) (2007 Reissue) PARA 512).

12 Ibid s 58(1)(j).

## **UPDATE**

## **525 Co-operation with the Commissioner**

NOTE 11--2000 Act s 58(1)(i) now in force: SI 2007/2196.



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## **526. Reports by the Commissioner.**

If it at any time appears to the Interception of Communications Commissioner that there has been a contravention of the provisions of the Regulation of Investigatory Powers Act 2000 in relation to any matter with which the Commissioner is concerned, and that the contravention has not been the subject of a report made to the Prime Minister by the Tribunal<sup>1</sup>, he must make a report to the Prime Minister with respect to that contravention<sup>2</sup>. If it at any time appears to the Commissioner that any arrangements by reference to which certain duties<sup>3</sup> have sought to be discharged have proved inadequate in relation to any matter with which the Commissioner is concerned, he must make a report to the Prime Minister with respect to those arrangements<sup>4</sup>.

As soon as practicable after the end of each calendar year, the Commissioner must make a report to the Prime Minister with respect to the carrying out of his functions<sup>5</sup>. The Commissioner may also, at any time, make any such other report to the Prime Minister on any matter relating to the carrying out of his functions as the Commissioner thinks fit<sup>6</sup>.

1   Ie the Tribunal established under the Regulation of Investigatory Powers Act 2000 s 65: see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

2   Ibid s 58(2).

3   Ie the duties imposed by ibid s 15 (see PARA 518 ante) and s 55 (see POLICE vol 36(1) (2007 Reissue) PARA 515).

4   Ibid s 58(3).

5   Ibid s 58(4). The Prime Minister must lay before each House of Parliament a copy of every annual report made by the Commissioner under s 58(4), together with a statement as to whether any matter has been excluded from that copy in pursuance of s 58(7): s 58(6). If it appears to the Prime Minister, after consultation with the Commissioner, that the publication of any matter in an annual report would be contrary to the public interest or prejudicial to national security, the prevention or detection of serious crime (see PARA 509 ante), the economic well-being of the United Kingdom, or the continued discharge of the functions of any public authority (see PARA 508 note 12 ante) whose activities include activities that are subject to review by the Commissioner, the Prime Minister may exclude that matter from the copy of the report as laid before each House of Parliament: s 58(7).

6   Ibid s 58(5). The Commissioner may also make a report to the First Minister on any matter relating to the carrying out of the Commissioner's functions so far as they relate to the exercise by the Scottish Ministers of their powers under the Regulation of Investigatory Powers Act 2000: see s 58(5A), (6A) (added by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) (No 2) Order 2000, SI 2000/3253, art 1).

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## **(9) OFFENCES BY AND IN RESPECT OF PUBLIC OFFICERS**

### **(i) Bribery and Obstruction of Public Officers**

#### **527. Bribery of judges or other judicial officers.**

A person who offers or gives a judge, magistrate or other judicial officer, and any judge, magistrate or other judicial officer who takes, any gift or reward to influence his behaviour, or for anything done, in the conduct of his office commits an offence at common law<sup>1</sup>. Any such offence is punishable by imprisonment for life or any shorter term at the discretion of the court and by fine<sup>2</sup>, and, in the case of an offender who takes a bribe or reward, by loss of office<sup>3</sup>.

1 Bac Abr, Offices and Officers (N); 3 Co Inst 145; 1 Hawk PC c 27; 4 Bl Com (14th Edn) 138-139. See also *R v Gurney* (1867) 10 Cox CC 550. The offence is punishable whether the bribe is accepted or not: 3 Co Inst 147. As to bribery of public officers other than judicial officers see PARAS 528-529 post.

If a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and the act, if done in the United Kingdom, would constitute such an offence, the act constitutes the offence concerned and proceedings for the offence may be taken in the United Kingdom: Anti-terrorism, Crime and Security Act 2001 s 109(1), (2), (3). A national of the United Kingdom is an individual who is a British citizen, a British overseas territories citizen, a British National (Overseas) or a British overseas citizen, a person who under the British Nationality Act 1981 is a British subject, or a British protected person within the meaning of that Act: Anti-terrorism, Crime and Security Act 2001 s 109(4) (amended by virtue of the British Overseas Territories Act 2002 s 2(3)). As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43; as to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 44-57; as to the status of British National (Overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 63-65; as to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 58-62; as to British subjects under the British Nationality Act 1981 see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 66-71; and as to British protected persons within the meaning of s 50(1) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 72-76. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

For the purposes of any common law offence of bribery it is immaterial if the functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom: Anti-terrorism, Crime and Security Act 2001 s 108(1).

2 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

3 Bac Abr, Offices and Officers (N); 3 Co Inst 145, 147; 12 Hawk PC c 27.

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## **528. Bribery of public officers.**

It is an offence<sup>1</sup> at common law for any person to bribe a public officer<sup>2</sup>, or for a public officer to accept a bribe, as an inducement to act contrary to his duty or to show favour or forbear to show disfavour in the discharge of his duty<sup>3</sup>. Any such offence is punishable by imprisonment for life or any shorter term at the discretion of the court and by fine at the discretion of the court<sup>4</sup>.

1 If a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and the act, if done in the United Kingdom, would constitute such an offence, the act constitutes the offence concerned and proceedings for the offence may be taken in the United Kingdom: see the Anti-terrorism, Crime and Security Act 2001 ss 108(1), 109; and PARA 527 note 1 ante. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 A public officer is any officer who discharges any duty in the discharge of which the public is interested: see *R v Whitaker* [1914] 3 KB 1283, 10 Cr App Rep 245, CCA (where it was held that, where such an officer was described as 'a public and ministerial officer', the addition of the words 'and ministerial' did not affect the matter; every officer who is not a judicial officer is a ministerial officer). 'Public officer' includes an employee of a local authority: *R v Bowden* [1995] 4 All ER 505, [1996] 1 WLR 98, CA. See also PARA 536 note 1 post.

3 See *R v Whitaker* [1914] 3 KB 1283, 10 Cr App Rep 245, CCA, where the earlier authorities are reviewed, and where it was held that a colonel of a regiment is a ministerial public officer and was guilty at common law of bribery in accepting sums of money to show favour in the placing of a canteen contract. See also *R v Pollman* (1809) 2 Camp 229 (receipt of a bribe for procuring an appointment to a public office). The giving of bribes to, and the taking of bribes by, members or officers of public bodies is a statutory offence: see PARA 529 post.

4 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

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## **529. Bribery of members and officers of public bodies.**

A person<sup>1</sup> commits an offence who by himself or by or in conjunction with any other person (1) corruptly<sup>2</sup> solicits or receives, or agrees to receive, for himself, or for any other person, any gift, loan, fee, reward<sup>3</sup>, or advantage<sup>4</sup> whatever as an inducement to, or reward for, or otherwise on account of, any member, officer or servant of a public body<sup>5</sup> doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned; or (2) corruptly gives, promises, or offers any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for, or otherwise on account of, any member, officer, or servant of any public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned<sup>6</sup>.

A person guilty of any such offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>. In addition he is liable (a) to be ordered to pay to such public body the amount or value of any gift, loan, fee or reward received by him or any part thereof<sup>9</sup>; (b) to be adjudged incapable of being elected or appointed to any public office<sup>10</sup> for five years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction<sup>11</sup>; and (c) in the event of a second conviction for a like offence, in addition to the above penalties, to be adjudged to be for ever incapable of holding any public office, and to be incapable for five years of being registered as an elector, or voting at a parliamentary election or an election of members of any public body<sup>12</sup>. If he is an officer or servant in the employment of any public body upon such conviction, he is liable, at the discretion of the court, to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled<sup>13</sup>.

<sup>1</sup> 'Person' includes a body of persons, corporate or unincorporate: Public Bodies Corrupt Practices Act 1889 s 7.

<sup>2</sup> 'Corruptly' appears in both the Public Bodies Corrupt Practices Act 1889 s 1 and the Prevention of Corruption Act 1906 s 1 (as amended). These Acts, with the Prevention of Corruption Act 1916, may be cited together as the Prevention of Corruption Acts 1889-1916: see the Prevention of Corruption Act 1916 s 4(1). It has the same meaning in each Act: *R v Wellburn*, *R v Nurdin*, *R v Randel* (1979) 69 Cr App Rep 254 at 265, CA (decided under the Prevention of Corruption Act 1906); *R v Parker* (1985) 82 Cr App Rep 69 at 73-74, CA (decided under the Public Bodies Corrupt Practices Act 1889). 'Corruptly' denotes that the person making the offer did so deliberately and with the intention that it should operate on the mind of the offeree, so as to encourage him to enter into a corrupt bargain whether or not the offeror intended to follow it through: *R v Smith* [1960] 2 QB 423 at 428, 44 Cr App Rep 55 at 60-61, CCA (decided under the Public Bodies Corrupt Practices Act 1889); *R v Harvey* [1999] Crim LR 70, CA (decided in respect of the Prevention of Corruption Act 1906). In *R v Wellburn*, *R v Nurdin*, *R v Randel* supra, 'corruptly' was described as being a simple English adverb meaning purposefully doing an act which the law forbids as tending to corrupt. Dishonesty is not required: *R v Harvey* supra; *R v Godden-Wood* [2001] EWCA Crim 1586, [2001] Crim LR 810 (decided in respect of the Prevention of Corruption Act 1906). If a person accepts a gift, knowing that it is a bribe, and intends to keep it, he enters into a corrupt bargain even though he may not intend to carry out and does not carry out his corrupt act: *R v Carr* [1956] 3 All ER 979n, 40 Cr App Rep 188, CA; *R v Mills* (1978) 68 Cr App Rep 154 at 158-159, CA (both cases decided under the Prevention of Corruption Act 1906). If the bribe is innocently received, ie the recipient does not understand it to be a reward or inducement, the recipient does not act corruptly: *R v Millray Window Cleaning Co Ltd* [1962] Crim LR 99, CCA. If the money is received in order to entrap someone or to provide

evidence to a listening policeman, the person does not intend to keep the money and it would not be corrupt: *R v Mills* supra. Receipt of money for a past favour without there having been an agreement beforehand is part of the meaning of 'corruptly': *R v Parker* supra, applying *R v Wellburn* supra. There should be a link between the payment and the recipient doing something in pursuance of his public duty; not every payment is therefore unlawful: *R v Parker* supra. It is not a defence if a councillor thought that what he was doing was not against the interests of the authority: *R v Parker* supra.

As to the presumption of corruption in instances where the offence charged relates to a contract or proposed contract with Her Majesty, a government department or a public body see PARA 530 post.

Receipt of an extra payment from a public authority for extra duties would not constitute this offence: *Edwards v Salmon* (1889) 23 QBD 531, CA (decided under the Public Health Act 1875 s 189 (repealed)).

3 'Reward' includes the receipt of money for a past favour without any antecedent agreement: *R v Andrews Weatherfoil Ltd* [1972] 1 All ER 65, [1972] 1 WLR 118, CA.

4 'Advantage' includes any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined: Public Bodies Corrupt Practices Act 1889 s 7.

5 The Public Bodies Corrupt Practices Act 1889 defines 'public body' as any council of a county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, and includes any body which exists in a country or territory outside the United Kingdom and is equivalent to any body described above: s 7 (definition amended by the Anti-terrorism, Crime and Security Act 2001 s 108(3)). In addition to the bodies listed above, local and public authorities of all descriptions (including authorities existing in a country or territory outside the United Kingdom) are public bodies for the purposes of the Public Bodies Corrupt Practices Act 1889: Prevention of Corruption Act 1916 s 4(2) (amended by the Anti-terrorism, Crime and Security Act 2001 s 108(4)). As from a day to be appointed this definition will be extended to include companies which in accordance with the Local Government and Housing Act 1989 are under the control of one or more local authorities: see the Prevention of Corruption Act 1916 s 4(2) (prospectively amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 3). At the date at which this volume states the law no such day had been appointed. 'Public general Act' includes the Metropolitan Police Acts (as to police generally see *POLICE*): *R v Silbertson* (1899) 129 CC Ct Cas 372. For the purposes of the Prevention of Corruption Acts 1889-1916, the Civil Aviation Authority and the Housing Corporation are public bodies, as were the Gas Council (*R v Joy and Emmony* (1974) 60 Cr App Rep 132) and the Gas Board (*DPP v Holly*, *DPP v Manners* [1978] AC 43, 64 Cr App Rep 143, HL). The decision that the National Coal Board was not a public body (*R v Newbould* [1962] 2 QB 102, 46 Cr App Rep 247) is wrong and should not be followed: *DPP v Holly* supra. A public body is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit: *DPP v Holly* supra. The National Assembly for Wales (see CONSTITUTIONAL LAW AND HUMAN RIGHTS) is a public body for the purposes of the Prevention of Corruption Acts 1889-1916: Government of Wales Act 1998 s 79. 'Public body' in the Public Bodies Corrupt Practices Act 1889 s 7 does not include the Crown or any government department: *R v Natji* [2002] EWCA Crim 271, [2002] 2 Cr App Rep 302, [2002] 1 WLR 2337.

6 Public Bodies Corrupt Practices Act 1889 s 1; Criminal Law Act 1967 s 1. A person is not exempt from punishment under the Public Bodies Corrupt Practices Act 1889 s 1 by reason of the invalidity of the appointment or election of a person to a public office: s 3(2). A prosecution for an offence under s 1 may not be instituted except by or with the consent of the Attorney General: s 4 (amended by the Law Officers Act 1997 s 3(2), Schedule). As to the effect of this limitation see PARA 1071 post.

If a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and the act, if done in the United Kingdom, would constitute such an offence, the act constitutes the offence concerned and proceedings for the offence may be taken in the United Kingdom: see the Anti-terrorism, Crime and Security Act 2001 ss 108(1), 109; and PARA 527 note 1 ante.

It is not necessary to prove that any member, officer or servant of a public body was aware of what was going on when the improper offer was made or the bribe passed, provided that the apparent purpose of the transaction was to affect the conduct of such a person corruptly: *Singh v R* [2005] UKPC 35, [2005] 4 All ER 781 (case concerned with the Prevention of Corruption Act 1987 s 3 (Trinidad and Tobago) which is closely modelled on the Public Bodies Corrupt Practices Act 1889 s 1), following *R v Harrington* (28 September 2000, unreported), CA.

The giving of bribes to, and the taking of bribes by, public officers is also an offence at common law: see PARA 528 ante. An officer or employee of a local government authority who, under colour of his office or employment, accepts any fee or reward other than his proper remuneration is liable on summary conviction to a fine not

exceeding level 4 on the standard scale: see the Local Government Act 1972 s 117(2), (3); and LOCAL GOVERNMENT vol 69 (2009) PARA 441. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to bribery relating to official contracts see PARA 530 post.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Public Bodies Corrupt Practices Act 1889 s 2(a) (substituted by the Criminal Justice Act 1988 s 47(1)). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

9 Public Bodies Corrupt Practices Act 1889 s 2(b).

10 'Public office' means any office or employment of a person as a member, officer, or servant of such public body: *ibid* s 7.

11 *Ibid* s 2(c) (amended by the Representation of the People Act 1948 s 52(7)).

12 Public Bodies Corrupt Practices Act 1889 s 2(d) (amended by the Representation of the People Act 1948 s 52(7)). The enactments for preventing the voting and registration of persons declared by reason of corrupt practices to be incapable of voting (see the Representation of the People Act 1983; and ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) PARA 126) apply to a person so adjudged incapable of voting: see the Public Bodies Corrupt Practices Act 1889 s 2(d).

13 *Ibid* s 2(e).

## **UPDATE**

### **529 Bribery of members and officers of public bodies**

NOTE 5--See Local Government and Public Involvement in Health Act 2007 ss 217(1)(a).

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### **530. Bribery relating to official contracts.**

Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906<sup>1</sup> or the Public Bodies Corrupt Practices Act 1889<sup>2</sup>, it is proved that any money, gift, or other consideration<sup>3</sup> has been paid or given to or received by a person in the employment of Her Majesty or any government department or a public body<sup>4</sup> by or from a person, or agent<sup>5</sup> of a person, holding or seeking to obtain a contract from Her Majesty or any government department or public body, the money, gift or consideration is deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved<sup>6</sup>.

The presumption does not apply where the public body exists outside (and not inside) the United Kingdom or where the act which constitutes the corruption offence occurs in a country or territory outside the United Kingdom<sup>7</sup>.

1 See PARA 321 ante.

2 See PARA 529 ante.

3 'Consideration' has the same meaning as in the Prevention of Corruption Act 1906, which states that 'consideration' includes valuable consideration of any kind (see s 1(2); and PARA 321 ante): Prevention of Corruption Act 1916 s 4(3). 'Consideration' bears its legal meaning and connotes the existence of some kind of contract between the parties: *R v Braithwaite, R v Girdham* [1983] 2 All ER 87, 77 Cr App Rep 34, CA, where the court applied the classic definition in *Currie v Misa* (1875) LR 10 Exch 153 at 162 per Lush J delivering the judgment of the Court of Exchequer Chamber: 'A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other'.

4 For the meaning of 'public body' see PARA 529 note 5 ante.

5 'Agent' has the same meaning as in the Prevention of Corruption Act 1906 (see PARA 321 note 1 ante): Prevention of Corruption Act 1916 s 4(3).

6 Ibid s 2. The onus or proof that a payment was in fact not a corrupt payment lies upon the defendant; however, that onus is only to satisfy the jury of the probability of that which he was called upon to establish and, if he satisfies the jury that the probability is that the gift was made innocently, the statutory presumption is rebutted and he is entitled to be acquitted: *R v Carr-Briant* [1943] KB 607, 29 Cr App Rep 76, CCA.

The presumption does not apply to a charge of statutory conspiracy to commit an offence under the Public Bodies Corrupt Practices Act 1889 or to commit an offence under the Prevention of Corruption Act 1906; such a conspiracy is an offence under the Criminal Law Act 1977 s 1, and not under those Acts: *R v A-G, ex p Rockall* [1999] 4 All ER 312, [2000] 1 WLR 882, Admin Ct.

7 See the Anti-terrorism, Crime and Security Act 2001 s 110. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

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### **531. Bribery in connection with grant of honours.**

If any person:

- 637 (1) accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, for any purpose; or
- 638 (2) gives, or agrees or proposes to give, or offers to any person,

any gift, money or valuable consideration<sup>1</sup>, as an inducement or reward for procuring or assisting or endeavouring to procure the grant of a dignity or title of honour to any person, or otherwise in connection with such a grant, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding three months<sup>2</sup> or to a fine not exceeding the prescribed sum or to both; and, where the person convicted received any such gift, money or consideration which is capable of forfeiture, he is in addition to any other penalty liable to forfeit the same to Her Majesty<sup>3</sup>.

1 As to consideration see CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

2 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

3 Honours (Prevention of Abuses) Act 1925 s 1(1)-(3) (amended by virtue of the Criminal Law Act 1977 s 32(1); and the Magistrates' Courts Act 1980 s 32(2)); Criminal Law Act 1967 s 1. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.



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### 532. Bribery at elections.

Bribery at a parliamentary<sup>1</sup> or local<sup>2</sup> election was an indictable offence at common law punishable by fine and imprisonment. The common law offence has, however, been superseded by express statutory provisions<sup>3</sup>.

A person is guilty of a corrupt practice<sup>4</sup> if he is guilty of bribery<sup>5</sup>. A person is guilty of bribery:

639 (1) if he, directly or indirectly, by himself or by any other person on his behalf:

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11. (a) gives any money<sup>6</sup> or procures any office<sup>7</sup> to or for any voter<sup>8</sup> or to or for any other person on behalf of any voter or to or for any other person in order to induce any voter to vote or refrain from voting; or
12. (b) corruptly does any such act as mentioned in head (a) above on account of any voter having voted or refrained from voting; or
13. (c) makes any such gift or procurement to or for any person in order to induce that person to procure, or endeavour to procure, the return of any person at an election or the vote of any voter<sup>9</sup>; or

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640 (2) if upon or in consequence of any such gift or procurement he procures or engages, promises or endeavours to procure, the return of any person at an election or the vote of any voter<sup>10</sup>;

641 (3) if he advances or pays or causes to be paid any money to or for the use of any other person with the intent that that money or any part of it is to be expended in bribery at an election or knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election<sup>11</sup>;

642 (4) if, before or during an election, he directly or indirectly by himself or by any other person on his behalf receives, agrees, or contracts for any money, gift, loan or valuable consideration, office, place or employment for himself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting<sup>12</sup>;

643 (5) if, after an election, he directly or indirectly by himself or by any other person on his behalf receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting<sup>13</sup>.

A person guilty of a corrupt practice in the above cases is liable on conviction on indictment to imprisonment for a term not exceeding one year or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>14</sup> or to a fine not exceeding the statutory maximum or to both<sup>15</sup>.

Where on an election petition it is shown that corrupt practices<sup>16</sup> committed in reference to the election for the purpose of promoting or procuring the election of any person at that election have so extensively prevailed that they may reasonably be supposed to have affected the

result, his election, if he is elected, is void and he is incapable of being elected to fill the vacancy or any of the vacancies for which the election was held<sup>17</sup>.

1 *R v Pitt, R v Mead* (1762) 3 Burr 1335 at 1338.

2 See *R v Plympton* (1724) 2 Ld Raym 1377; *R v Lancaster and Worrall* (1890) 16 Cox CC 737.

3 See the text and notes 4-17 infra; and ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 712.

4 As to the offences constituting corrupt practices see the Representation of the People Act 1983 s 60 (personation: see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 733), s 75(5) (as amended) (expenses not authorised by election agent: see ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) PARA 284; ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARAS 680, 690, 710), s 82(6), Sch 4 para 5 (false declaration of expenses: see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 710), ss 113-115 (as amended) (bribery, treating and undue influence: see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 712 et seq).

5 Ibid s 113(1); and see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 712. The provisions of s 113(1)-(3) do not extend nor are they to be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses incurred in good faith at or concerning an election: s 113(4).

6 For these purposes, references to giving money include references to giving, lending, agreeing to give or lend, offering, promising, or promising to procure or endeavour to procure any money or valuable consideration: ibid s 113(2)(i).

7 For these purposes, references to procuring any office include references to giving, procuring, agreeing to give or procure, offering, promising, or promising to procure or to endeavour to procure any office, place or employment: ibid s 113(2)(ii).

8 For these purposes, 'voter' includes any person who has or claims to have a right to vote: ibid s 113(7); and see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 712.

9 Ibid s 113(2); and see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 712. See also note 5 supra. 'Election' means a parliamentary election, an Authority election (ie an election of the Mayor of London, or any election of a constituency member of the London Assembly or the election of the London members of the London Assembly at an ordinary election) or an election under the Local Government Act 1972: see the Representation of the People Act 1983 ss 202(1), 203(1) (definitions amended by the Greater London Authority Act 1999 s 17, Sch 3 paras 1, 38). The statutory provisions relating to bribery at elections apply with modifications to local authority referendums in England: see the Local Authority (Conduct of Referendums) (England) Regulations, SI 2001/1298. See further ELECTIONS AND REFERENDUMS.

References to procuring the return of any person at an election include, in the case of an election of the London members of the London Assembly at an ordinary election, references to procuring the return of candidates on a list of candidates submitted by a registered political party for the purposes of that election: Representation of the People Act 1983 s 113(2)(iii) (added by the Greater London Authority Act 1999 Sch 3 para 30).

Similar provisions to those in the Representation of the People Act 1983 s 113 (as amended) apply to elections to the European Parliament: see the European Parliamentary Elections Regulations 2004, SI 2004/293, reg 77. See further ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARAS 712, 720-722.

10 Representation of the People Act 1983 s 113(2); and see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 712.

11 Ibid s 113(3); and see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 720. See also note 5 supra.

12 Ibid s 113(5); and see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 722.

13 Ibid s 113(6); and see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 722.

14 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

15 Representation of the People Act 1983 s 168(1) (substituted by the Representation of the People Act 1985 s 23, Sch 3 para 8). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. If it appears to the court by which a person holding a licence or certificate under the Licensing Acts is convicted of the offence of bribery or treating that the offence was committed on licensed premises (1) the

court must direct the conviction to be entered in the proper register of licences; and (2) the entry must be taken into consideration by the licensing authority in determining whether or not it will grant a renewal of the licence or certificate, and may be a ground, if the authority thinks fit, for refusing its renewal: Representation of the People Act 1983 s 168(7). See ELECTIONS AND REFERENDUMS.

16 'Corrupt practices' includes bribery: see the text to note 5 supra. Ibid s 164 applies not only to corrupt practices but also to illegal practices or illegal payments, employments or hirings committed in reference to the election for the purpose of promoting or procuring the election of any person at an election: s 164(1). See ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 893.

17 Ibid s 164(1). An election is not liable to be avoided otherwise than under s 164 by reason of general corruption, bribery, treating or intimidation: s 164(2). An election under the Local Government Act 1972 may be questioned on the ground that it is avoided under the Representation of the People Act 1983 s 164: see ss 164(3), 203(1) (as amended); and ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 893.

## **UPDATE**

### **532 Bribery at elections**

NOTE 9--SI 2001/1298 replaced: Local Authorities (Conduct of Referendums) (England) Regulations 2007, SI 2007/2089.

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### **533. Obtaining information about spent convictions etc.**

Any person who obtains specified information<sup>1</sup> from any official record<sup>2</sup> by means of any fraud, dishonesty or bribe is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>4</sup>.

1 For these purposes, 'specified information' means information imputing that a named or otherwise identifiable rehabilitated living person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which is the subject of a spent conviction: Rehabilitation of Offenders Act 1974 s 9(1). For the meanings of 'rehabilitated person' and 'spent conviction' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 660-661.

2 For these purposes, 'official record' means a record kept for the purposes of its functions by any court, police force, government department, local or other public authority in Great Britain, or a record kept, in Great Britain or elsewhere, for the purposes of any of Her Majesty's forces, being in either case a record containing information about persons convicted of offences: *ibid* 9(1). For the meaning of references to a conviction in the Rehabilitation of Offenders Act 1974, however expressed, see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660.

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

4 Rehabilitation of Offenders Act 1974 s 9(4), (7) (amended by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

### **533 Obtaining information about spent convictions etc**

TEXT AND NOTES--Rehabilitation of Offenders Act 1974 amended so as to apply its provisions, with appropriate modifications, to spent cautions: see Rehabilitation of Offenders Act 1974 s 8A, Sch 2 (added by Criminal Justice and Immigration Act 2008 Sch 10 paras 3, 6). As to the unauthorised disclosure of spent cautions see Rehabilitation of Offenders Act 1974 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 10 para 4). For transitional provisions and savings see Criminal Justice and Immigration Act 2008 Sch 27 paras 19, 20.

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#### **534. Obstruction of public officers.**

It is an offence at common law to obstruct the execution of powers conferred by a statute<sup>1</sup>. Any such offence is punishable by fine and imprisonment for life or any shorter term at the discretion of the court<sup>2</sup>.

1 See *R v Smith* (1780) 2 Doug KB 441.

2 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

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## **(ii) Sale of Public Offices**

### **535. Sale or purchase of public offices.**

If any person sells, purchases, bargains or gives or receives any money or reward for any office, commission, place or employment in the gift of the Crown or in or under the appointment of any public department in the United Kingdom or in a British possession abroad or any participation in its profits, or if he gives or receives or contracts to give or receive any reward or profit for any interest or recommendation or pretended interest or recommendation concerning appointment to or resignation of any such office, commission, place or employment<sup>1</sup>, or, if he opens or keeps any office for negotiating any business relating to vacancies in, or the sale or purchase of, any offices, commissions, places or employments in or under any public department<sup>2</sup>, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years<sup>3</sup>, and forfeiture of, and permanent disqualification from holding, the office etc in question<sup>4</sup>.

1 See the Sale of Offices Act 1809 ss 3, 4; and the Criminal Law Act 1967 s 1. The Sale of Offices Act 1809 ss 3, 4 are expressed to apply to all offices specified or described in the Sale of Offices Act 1551, or the Sale of Offices Act 1809, or within the true intent and meaning of those Acts: see the Sale of Offices Act 1809 ss 1, 3, 4, 9. As to the construction of the Acts see *Hopkins v Prescott* (1847) 4 CB 578; *Graeme v Wroughton* (1855) 11 Exch 146; *Sterry v Clifton* (1850) 9 CB 110; *Samo v R* (1847) 2 Cox CC 178, Ex Ch. The Sale of Offices Act 1809 was extended to the air force by the Air Force (Application of Enactments) (No 2) Order 1918, SR & O 1918/548 (amended by SI 1964/488). It is also an indictable offence at common law to offer a bribe to procure, or to receive a reward for procuring, an appointment to an office: see PARA 528 ante. Purchase or sale of the office of under-sheriff, deputy sheriff, bailiff or any other office appertaining to the office of sheriff is prohibited by the Sheriffs Act 1887: see s 27 (as amended); and SHERIFFS vol 42 (Reissue) PARA 1113. As to bribery in connection with the grant of honours see PARA 531 ante. As to British possessions see COMMONWEALTH vol 13 (2009) PARA 703.

2 See the Sale of Offices Act 1809 s 5; and the Criminal Law Act 1967 s 1.

3 As no penalty is prescribed by the Sale of Offices Acts, the Powers of Criminal Courts (Sentencing) Act 2000 s 77 applies: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 31.

4 See the Sale of Offices Act 1551 s 1.

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### (iii) Misconduct in Public Office and Related Offences

#### 536. Misconduct in public office.

A public officer<sup>1</sup> commits the common law offence of misconduct in a public office if, acting as such, he wilfully neglects to perform his duty and/or wilfully misconducts himself<sup>2</sup>, to such a degree as to amount to an abuse of the public's trust in the office holder<sup>3</sup>, without reasonable excuse or justification<sup>4</sup>. The offence is punishable by imprisonment for life or any shorter term and by fine at the discretion of the court<sup>5</sup>.

1 A 'public officer' in this context includes a judicial officer (*R v Borron* (1820) 3 B & Ald 432 (magistrate); *R v Llewellyn-Jones* [1968] 1 QB 429, [1967] 3 All ER 225, CA (County Court Registrar)). In this context a 'public officer' is a person appointed to discharge a public duty who is paid compensation in whatever form, whether from the Crown or otherwise: *R v Bowden* [1995] 4 All ER 505, [1996] 1 WLR 98, CA. A local authority employee who was responsible for the upkeep of local authority housing and in that capacity was accountable for public money and who received a salary from public funds has been held to be a public officer in the present context (*R v Bowden* supra), and so has a constable (see *R v Dytham* [1979] QB 722, 69 Cr App Rep 387, CA).

2 There must be a breach of duty by the officer; it may consist of an act of commission or of an omission to fulfil a duty: *A-G's Reference (No 3 of 2003)* [2004] EWCA Crim 868 at [55], [2005] QB 73 at [55], [2005] 4 All ER 303 at [55], per Pill LJ. That wilful misconduct must be deliberate, rather than accidental, and accompanied by an awareness of the duty to act or subjective recklessness (ie the concept of recklessness approved in *R v G* [2003] UKHL 50, [2004] 1 AC 1034, [2004] 1 Cr App Rep 237) as to the existence of the duty: *A-G's Reference (No 3 of 2003)* supra at [28], [30], [45]. The recklessness test applies to the question whether in particular circumstances a duty arises at all as well as to the conduct of the defendant if it does, and it applies both to the legality of the act or omission and in relation to the consequences of the act or omission: *A-G's Reference (No 3 of 2003)* supra at [30].

3 'There must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. A mistake, even a serious one, will not suffice. The motive with which a public officer acts may be relevant to the decision whether the public's trust is abused by the conduct': *A-G's Reference (No 3 of 2003)* [2004] EWCA Crim 868 at [58], [2005] QB 73 at [58], [2005] 4 All ER 303 at [58]. The element of culpability 'must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment': see *R v Dytham* [1979] QB 722 at 727, 69 Cr App Rep 387 at 394, CA, per Lord Widgery CJ.

It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it (viewed subjectively as in *R v G* [2003] UKHL 50, [2004] 1 AC 1034, [2004] 1 Cr App Rep 237) will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer. A default where the consequences are likely to be trivial may not possess the criminal quality required; a similar default where the damage to the public or members of the public is likely to be great may do so. There will be some conduct which possesses the criminal quality even if serious consequences are unlikely but it is always necessary to assess the conduct in the circumstances in which it occurs: *A-G's Reference (No 3 of 1993)* supra at [58].

4 *A-G's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] QB 73, [2005] 4 All ER 303. See also *R v Bembridge* (1783) 3 Doug KB 327 at 332; *R v Borron* (1820) 3 B & Ald 432; *R v Dytham* [1979] QB 722, 69 Cr App Rep 387, CA; *R v Llewellyn-Jones* [1968] 1 QB 429, (1967) 51 Cr App Rep 204, CA.

The common law offences of extortion and false accounting by public officers were abolished by the Theft Act 1968 (see s 32(1)(a)) which also abolished the statutory offences of extortion by coroners and sheriffs (see ss

32(1)(b), 33(3), Sch 3 Pt I). As to acceptance of fees and rewards by officers of local government authorities see PARA 529 ante; and as to blackmail see PARA 308 ante.

5 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

## **UPDATE**

### **536 Misconduct in public office**

NOTE 3--Dishonesty is an essential ingredient of the offence where the misconduct involves the acquisition of property by theft or fraud: *R v W* [2010] EWCA Crim 372, (2010) Times, 19 March.



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### **537. Refusal to serve in public office.**

It is an indictable offence at common law for a duly qualified person to refuse to serve in a public office to which he has been appointed and in which he is by law required to serve<sup>1</sup>. Unless some other penalty is imposed by law<sup>2</sup>, the offence is punishable by imprisonment for life or any shorter term and by fine at the discretion of the court<sup>3</sup>. Payment of a fine imposed by statute for refusal to accept the office, unless the statute provides that the fine is payable in lieu of service, does not, it seems, affect the liability to indictment for the common law offence<sup>4</sup>.

1 Stephen, Digest of the Criminal Law (9th Edn) 118; and see *R v Bower* (1823) 1 B & C 585.

2 See Stephen, Digest of the Criminal Law (9th Edn) 118.

3 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

4 *R v Denison* (1758) 2 Keny 259 at 260; *R v Woodrow* (1788) 2 Term Rep 731; *R v Bower* (1823) 1 B & C 585.

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### **538. Disclosure of spent convictions etc.**

Any person who in the course of his official duties has, or at any time has had, the custody of or access to any official record (that is, a record containing information about persons convicted of offences)<sup>1</sup>, or the information contained therein, is guilty of an offence if, knowing or having reasonable cause to suspect that any specified information<sup>2</sup> he has obtained in the course of those duties is specified information, he discloses it to another person otherwise than in the course of those duties<sup>3</sup>; and he is liable on summary conviction to a fine not exceeding level 4 on the standard scale<sup>4</sup>.

Proceedings for such an offence may not be instituted except by or on behalf of the Director of Public Prosecutions<sup>5</sup>. In such proceedings it is a defence for the defendant to show that the disclosure was made (1) to the rehabilitated person<sup>6</sup> or to another person at the express request of the rehabilitated person; or (2) to a person whom he reasonably believed to be the rehabilitated person or to another person at the express request of a person whom he reasonably believed to be the rehabilitated person<sup>7</sup>.

The Secretary of State may by order<sup>8</sup> make such provision as appears to him to be appropriate for excepting the disclosure of specified information derived from an official record from the above provisions<sup>9</sup> in such cases or classes of case as may be specified in the order<sup>10</sup>.

1 For the meaning of 'official record' see PARA 533 note 2 ante.

2 For the meaning of 'specified information' see PARA 533 note 1 ante.

3 Information sent to Interpol, Paris is specified information, but the disclosure of convictions is in the course of official duties because transmission of such information is an obligation accepted by the United Kingdom in the suppression of international crime: *X v Metropolitan Police Comr* [1985] 1 All ER 890, [1985] 1 WLR 420.

4 Rehabilitation of Offenders Act 1974 s 9(2), (6) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

5 Rehabilitation of Offenders Act 1974 s 9(8). As to the effect of this limitation see PARA 1071 post.

6 For the meaning of 'rehabilitated person' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660.

7 Rehabilitation of Offenders Act 1974 s 9(3).

8 As to orders generally under the Rehabilitation of Offenders Act 1974 see SENTENCING AND DISPOSITION OF OFFENDERS.

9 *Ie* *ibid* s 9(2): see the text and notes 1-4 *supra*.

10 *Ibid* s 9(5). At the date at which this volume states the law no such order had been made.

## **UPDATE**

### **538 Disclosure of spent convictions etc**

TEXT AND NOTES--Rehabilitation of Offenders Act 1974 amended so as to apply its provisions, with appropriate modifications, to spent cautions: see Rehabilitation of Offenders Act 1974 s 8A, Sch 2 (added by Criminal Justice and Immigration Act 2008 Sch 10 paras 3, 6). As to the unauthorised disclosure of spent cautions see Rehabilitation of Offenders Act 1974 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 10 para 4). For transitional provisions and savings see Criminal Justice and Immigration Act 2008 Sch 27 paras 19, 20.

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### **539. Disclosure of information.**

Under a number of statutes the unauthorised disclosure of information obtained by public officers<sup>1</sup> in the exercise of any power conferred or duty imposed by or under the statute or for the purposes of any functions under the statute is an offence<sup>2</sup>.

1 For the meaning of 'public officer' see PARA 528 note 2 ante.

2 Such offences are dealt with elsewhere in this work, in the appropriate titles. As to disclosure of information by a member of the Serious Fraud Office see PARA 1094 post.

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#### **(iv) Offences by Particular Officers**

##### **540. Interfering with the mail: postal operators.**

A person engaged in the business of a postal operator<sup>1</sup> commits an offence if, contrary to his duty and without reasonable excuse, he intentionally delays or opens a postal packet<sup>2</sup> in the course of its transmission by post<sup>3</sup>, or intentionally opens a mail-bag<sup>4</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

The above offences do not apply to:

- 644 (1) the delaying or opening of a postal packet or the opening of a mail-bag under the authority of the Postal Services Act 2000 or any other enactment (including, in particular, in pursuance of a warrant issued under any other enactment), or any directly applicable Community provision<sup>7</sup>;
- 645 (2) the delaying or opening of a postal packet in accordance with any terms and conditions applicable to its transmission by post<sup>8</sup>;
- 646 (3) the delaying of a postal packet as a result of industrial action in contemplation or furtherance of a trade dispute<sup>9</sup>.

1 'Postal operator' means a person who provides the service of conveying postal packets from one place to another by post or any of the incidental services of receiving, collecting, sorting and delivering such packets: Postal Services Act 2000 s 125(1).

2 For the meaning of 'postal packet' see PARA 292 note 2 ante.

3 A postal packet is taken to be in course of transmission by post from the time of its being delivered to any post office or post office letter box to the time of its being delivered to the addressee: Postal Services Act 2000 s 125(3)(a). The delivery of a postal packet of any description to a letter carrier or other person authorised to receive postal packets of that description for the post or to a person engaged in the business of a postal operator to be dealt with in the course of that business is a delivery to a post office: s 125(3)(b). The delivery of a postal packet (1) at the premises to which it is addressed or redirected, unless they are a post office from which it is to be collected; (2) to any box or receptacle to which the occupier of those premises has agreed that postal packets addressed to persons at those premises may be delivered; or (3) to the addressee's agent or to any other person considered to be authorised to receive the packet, is a delivery to the addressee: s 125(3)(c).

4 Ibid s 83(1). See POST OFFICE. 'Mail-bag' includes any form of container or covering in which postal packets in the course of transmission by post are enclosed by a postal operator in the United Kingdom or a foreign postal administration for the purpose of conveyance by post, whether or not it contains any such packets: s 125(1). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Postal Services Act 2000 s 83(6). The Theft Act 1968 s 27(4) (see PARA 1536 post) applies to proceedings for an offence under the Postal Services Act 2000 s 83 as it applies to proceedings for the theft of anything in the course of transmission by post: s 109(2).

7 Ibid s 83(2).

8 Ibid s 83(3).

9 Ibid s 83(4). 'Trade dispute' has the meaning given by the Trade Union and Labour Relations (Consolidation) Act 1992 s 244 (see EMPLOYMENT vol 41 (2009) PARAS 1324-1326) and the reference to industrial action is to be construed in accordance with that Act: Postal Services Act 2000 s 83(5).

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#### **541. Sheriffs.**

If a person being a sheriff, under-sheriff, bailiff, or sheriff's officer is guilty of an offence against, or breach of, the Sheriffs Act 1887<sup>1</sup>, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding one year and a fine, or, if he is unable to pay a fine, to imprisonment for a term not exceeding three years<sup>2</sup>.

<sup>1</sup> See SHERIFFS.

<sup>2</sup> Sheriffs Act 1887 s 29(1) (amended by the Criminal Law Act 1967 ss 1, 10(2), Sch 3 Pt III; the Local Government Act 1972 s 272(1), Sch 30; and the Statute Law (Repeals) Act 1998). Proceedings must be commenced within two years after the alleged offence was committed: Sheriffs Act 1887 s 29(7).

Such an offence is also punishable summarily by the High Court or the Crown Court as for contempt (s 29(3) (amended by the Statute Law Revision Act 1908; and the Courts Act 1971 s 56(4), Sch 11 Pt IV)); proceedings must be taken before the end of the next sitting of the court (Sheriffs Act 1887 s 29(7)). See further SHERIFFS vol 42 (Reissue) PARAS 1151-1152. As to contempt of court see generally CONTEMPT OF COURT.

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## **(10) OFFENCES AFFECTING THE PROPERTY AND PREROGATIVE OF THE CROWN**

### **(i) Offences Relating to Government Marks and Stores**

#### **542. Offences relating to government marks.**

If any person with intent to conceal Her Majesty's property in any stores<sup>1</sup> takes out, destroys or obliterates, wholly or in part, any mark appropriated for use in or on Her Majesty's stores to denote Her Majesty's property in stores so marked<sup>2</sup> or any mark whatsoever denoting the property of Her Majesty in any stores, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding seven years, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup> or to a fine not exceeding the prescribed sum or to both<sup>4</sup>.

If any person without lawful authority, proof of which authority lies on the defendant<sup>5</sup>, applies any mark so appropriated in or on any stores, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years<sup>6</sup>.

1 For these purposes, 'stores' includes all goods and chattels, and any single store or article: Public Stores Act 1875 s 2. The Public Stores Act 1875 applies to all stores under the care, superintendence or control of a Secretary of State or any public department or office or any person in Her Majesty's service; and 'Her Majesty's stores' means such stores: s 3 (amended by the Defence (Transfer of Functions) (No 1) Order 1964, SI 1964/488, art 2, Sch 1 Pt II).

2 See the Public Stores Act 1875 s 4, Sch 1 (amended by the Statute Law (Repeals) Act 1993).

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4 Public Stores Act 1875 s 5; Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s 12(5)(a); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 8. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 161.

The Public Stores Act 1875 s 5 does not apply to stores issued as regimental or air force necessities: see s 13 (amended by the Territorial Army and Militia Act 1921 s 4(1), Sch 2; the Statute Law (Repeals) Act 1993); and the Air Force (Adaptation of Enactments) (No 2) Order 1918, SR & O 1918/548 (amended by SI 1964/488).

A constable of the metropolitan police force, and any constable, if deputed by a public department, may, within the limits for which he is constable, stop, search, and detain any vessel, boat or vehicle in or on which there is reason to suspect that any of Her Majesty's stores stolen or unlawfully obtained may be found, or any person reasonably suspected of having or conveying in any manner any of Her Majesty's stores stolen or unlawfully obtained: Public Stores Act 1875 s 6. For these purposes, a constable is deemed to be deputed by a public department if he is deputed by any writing signed by the person who is the head of such department, or who is authorised to sign documents on behalf of such department: s 6. As to powers to stop and search see further PARA 859 et seq post.

If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or possession or on his premises any stores in respect of which an offence against the Public Stores Act 1875 s 5 has been committed, the justice may issue a warrant to a



constable to search for and seize the stores as in the case of stolen goods (see PARA 306 ante): s 12(2) (substituted by the Theft Act 1968 s 33(2), Sch 2 Pt II). As to powers of entry, search and seizure see further PARA 869 et seq post.

5 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

6 Public Stores Act 1875 s 4; Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 s 1.

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### **543. Prohibition of sweepings etc near dockyards etc.**

Any person who without permission in writing from a public department or from some person authorised by a public department in that behalf, proof of which permission lies on the defendant, gathers or searches for stores<sup>1</sup>, or creeps, sweeps or dredges in the sea or any tidal water, within 100 yards from any vessel belonging to Her Majesty or in Her Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any moorings belonging to Her Majesty, or from any of Her Majesty's wharves, or dock victualling or steam factory yards, or within 1,000 yards from any battery or fort used for the practice of artillery either by the Royal Artillery or by volunteer artillery, or in or on any part of the spaces or distances, whether covered with water or not, from time to time marked out as ranges for artillery practice for the use of Her Majesty's ships, or marked out and appropriated for ranges under the provisions of the Artillery Ranges Act 1862 is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding two months<sup>2</sup> or to a fine not exceeding level 1 on the standard scale<sup>3</sup>.

1 For the meaning of 'stores' see PARA 542 note 1 ante.

2 As from a day to be appointed, the reference to two months' imprisonment is repealed: see the Public Stores Act 1875 s 8 (prospectively amended by the Criminal Justice Act 2003 ss 280(1), (3), 332, Sch 25 para 11, Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed.

3 Public Stores Act 1875 s 8 (amended by the Territorial Army and Militia Act 1921 s 4(1), Sch 2); Criminal Justice Act 1982 ss 38, 46; Criminal Justice Act 1948 s 1. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

References in the Public Stores Act 1875 to ships, vessels or boats or activities or places connected with them are extended to include hovercraft or activities or places connected with hovercraft: see the Hovercraft (Application of Enactments) Order 1972, SI 1972/971 (amended by SI 1982/715; SI 1983/769; SI 1989/1350). The Public Stores Act 1875 s 8 (as amended) is extended to the air force by the Air Force (Adaptation of Enactments) (No 2) Order 1918, SR & O 1918/548 (amended by SI 1964/488).

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## (ii) Coinage Offences

### 544. Making counterfeit coins.

If a person makes a counterfeit<sup>1</sup> of a currency note<sup>2</sup> or of a protected coin<sup>3</sup>, intending that he or another will pass or tender<sup>4</sup> it as genuine, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

If a person makes a counterfeit of a currency note or of a protected coin without lawful authority or excuse, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>.

1 For these purposes, a thing is a counterfeit of a currency note or of a protected coin (1) if it is not a currency note or a protected coin, but resembles a currency note or protected coin (whether on one side only or on both) to such an extent that it is reasonably capable of passing for a currency note or protected coin of that description; or (2) if it is a currency note or protected coin which has been so altered that it is reasonably capable of passing for a currency note or protected coin of some other description: Forgery and Counterfeiting Act 1981 s 28(1). For these purposes (a) a thing consisting of one side only of a currency note, with or without the addition of other material, is a counterfeit of such a note; (b) a thing consisting (i) of parts of two or more currency notes; or (ii) of parts of a currency note or of parts of two or more currency notes with the addition of other material, is capable of being a counterfeit of a currency note: s 28(2).

2 For these purposes, 'currency note' means (1) any note which (a) has been lawfully issued in England and Wales, Scotland, Northern Ireland, any of the Channel Islands, the Isle of Man or the Republic of Ireland; and (b) is or has been customarily used as money in the country where it was issued; and (c) is payable on demand; or (2) any note which has been lawfully issued in some country other than those mentioned in head (1)(a) supra and is customarily used as money in that country: *ibid* s 27(1).

3 For these purposes, 'protected coin' means any coin which is customarily used as money in any country, or is specified in an order made by the Treasury: *ibid* s 27(1). The power of the Treasury so to make an order is exercisable by statutory instrument: s 27(2). A statutory instrument containing such an order must be laid before Parliament after being made: s 27(3).

The following coins have been specified for the purposes of the Forgery and Counterfeiting Act 1981 Pt II (ss 14-28): (1) sovereign; half-sovereign; Krugerrand; any coin denominated as a fraction of a Krugerrand; Maria-Theresia thaler bearing the date of 1780: Forgery and Counterfeiting (Protected Coins) Order 1981, SI 1981/1505, art 2, Schedule; (2) any euro coin produced in accordance with EC Council Regulation 975/98 (OJ L139, 11.05.98, p 6) by or at the instance of a member state which has adopted the single currency: Forgery and Counterfeiting (Protected Coins) Order 1999, SI 1999/2095.

4 For these purposes, references to passing or tendering a counterfeit of a currency note or a protected coin are not to be construed as confined to passing or tendering it as legal tender: Forgery and Counterfeiting Act 1981 s 28(3). For the meaning of 'legal tender' see the Coinage Act 1971 s 2 (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1279.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Forgery and Counterfeiting Act 1981 ss 14(1), 22(1), (2)(a). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to powers of search, forfeiture etc see PARA 550 post.

An offence under s 14 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 ante): see s 1(2)(c) (amended by the Criminal Justice Act 1993 (Extension of Group A Offences) Order 2000, SI 2000/1878, art 2).

The offence under the Forgery and Counterfeiting Act 1981 s 14 is a lifestyle offence for the purposes of the Proceeds of Crime Act 2002 s 75(2)(a), Sch 2 para 6(a) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393 note 20). In respect of a lifestyle offence the court may make a financial reporting order under the Serious Organised Crime and Police Act 2005 s 76 (not yet in force): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Forgery and Counterfeiting Act 1981 ss 14(2), 22(3), (4)(a). As to the meaning of 'lawful authority' cf paras 160 note 9, 354 note 9 ante, 699 note 1 post.

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#### **545. Passing, tendering and delivering counterfeit notes and coins.**

If a person (1) passes or tenders<sup>1</sup> as genuine any thing which is, and which he knows or believes to be, a counterfeit<sup>2</sup> of a currency note<sup>3</sup> or of a protected coin<sup>4</sup>; or (2) delivers to another any thing which is, and which he knows or believes to be, such a counterfeit, intending that the person to whom it is delivered or another will pass or tender it as genuine, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

If a person delivers to another, without lawful authority or excuse<sup>7</sup>, any thing which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>8</sup> or to a fine not exceeding the statutory maximum or to both<sup>9</sup>.

1 As to references to passing or tendering a counterfeit of a currency note or a protected coin see PARA 544 note 4 ante.

2 For the meaning of 'counterfeit' see PARA 544 note 1 ante.

3 For the meaning of 'currency note' see PARA 544 note 2 ante.

4 For the meaning of 'protected coin' see PARA 544 note 3 ante.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Forgery and Counterfeiting Act 1981 ss 15(1), 22(1), (2)(b). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to powers of search, forfeiture etc see PARA 550 post.

An offence under s 15 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 ante): see s 1(2)(a). As to jurisdiction relating to such offences see PARA 362 ante.

The offence under the Forgery and Counterfeiting Act 1981 s 15 is a lifestyle offence for the purposes of the Proceeds of Crime Act 2002 s 75(2)(a), Sch 2 para 6(b) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393 note 21). In respect of a lifestyle offence the court may make a financial reporting order under the Serious Organised Crime and Police Act 2005 s 76 (not yet in force): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

7 As to the meaning of 'lawful authority or excuse' see PARAS 160 note 9, 354 note 9 ante, 699 note 1 post.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 Forgery and Counterfeiting Act 1981 ss 15(2), 22(3), (4)(b). See also note 6 supra.

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#### **546. Custody or control of counterfeit notes and coins.**

If a person has in his custody or under his control any thing which is, and which he knows or believes to be, a counterfeit<sup>1</sup> of a currency note<sup>2</sup> or of a protected coin<sup>3</sup>, intending either to pass or tender<sup>4</sup> it as genuine or to deliver it to another with the intention that he or another will pass or tender it as genuine, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

If a person has in his custody or under his control, without lawful authority or excuse<sup>7</sup>, any thing which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>8</sup> or to a fine not exceeding the statutory maximum or to both<sup>9</sup>.

1 For the meaning of 'counterfeit' see PARA 544 note 1 ante.

2 For the meaning of 'currency note' see PARA 544 note 2 ante.

3 For the meaning of 'protected coin' see PARA 544 note 3 ante.

4 As to references to passing or tendering a counterfeit of a currency note or a protected coin see PARA 544 note 4 ante.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Forgery and Counterfeiting Act 1981 ss 16(1), 22(1), (2)(c). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. For the purposes of s 16(1) and s 16(2) (see the text and note 9 infra), it is immaterial that a coin or note is not in a fit state to be passed or tendered or that the making or counterfeiting of a coin or note has not been finished or perfected: s 16(3). As to powers of search, forfeiture etc see PARA 550 post.

An offence under s 16 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 ante): see s 1(2)(c). As to jurisdiction relating to such offences see PARA 362 ante.

The offence under the Forgery and Counterfeiting Act 1981 s 16 is a lifestyle offence for the purposes of the Proceeds of Crime Act 2002 s 75(2)(a), Sch 2 para 6(c) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393 note 22). In respect of a lifestyle offence the court may make a financial reporting order under the Serious Organised Crime and Police Act 2005 s 76 (not yet in force): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

7 As to the meaning of 'lawful authority or excuse' see: *R v Sunman* [1995] Crim LR 569, CA (where a person has custody of counterfeit things, lawful excuse can only be based on settled intention to hand them in to appropriate authority). As to the meaning of 'lawful authority' cf paras 160 note 9, 354 note 9 ante, 699 note 1 post.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post),

although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 Forgery and Counterfeiting Act 1981 ss 16(2), 22(3), (4)(c). See also note 6 *supra*.

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#### **547. Making, custody or control of counterfeiting materials and implements.**

If a person makes, or has in his custody or under his control, any thing which he intends to use, or to permit any other person to use, for the purpose of making a counterfeit<sup>1</sup> of a currency note<sup>2</sup> or of a protected coin<sup>3</sup> with the intention that it be passed or tendered<sup>4</sup> as genuine, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

If a person without lawful authority or excuse<sup>7</sup> makes, or has in his custody or under his control, any thing which, to his knowledge<sup>8</sup>, is or has been specially designed or adapted for the making of a counterfeit of a currency note, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the statutory maximum or to both<sup>10</sup>.

If a person makes, or has in his custody or under his control, any implement which, to his knowledge, is capable of imparting to any thing a resemblance: (1) to the whole or part of either side of a protected coin; or (2) to the whole or part of the reverse of the image on either side of a protected coin, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>11</sup> or to a fine not exceeding the statutory maximum or to both<sup>12</sup>. It is, however, a defence for the defendant to show<sup>13</sup> (a) that he made the implement or, as the case may be, had it in his custody or under his control, with the written consent of the Treasury; or (b) that he had lawful authority otherwise than by virtue of head (a) above, or a lawful excuse, for making it or having it in his custody or under his control<sup>14</sup>.

1 For the meaning of 'counterfeit' see PARA 544 note 1 ante.

2 For the meaning of 'currency note' see PARA 544 note 2 ante.

3 For the meaning of 'protected coin' see PARA 544 note 3 ante.

4 As to references to passing or tendering a counterfeit of a currency note or a protected coin see PARA 544 note 4 ante.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Forgery and Counterfeiting Act 1981 ss 17(1), 22(1), (2)(d). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to powers of search, forfeiture etc see PARA 550 post.

Any thing used with the specified intention is caught by this provision, including all things used as part of the process of producing the counterfeit; consequently, a chromolin (a form of photograph used as a printer's proof) which is part of the printing process is covered by the present offence: *R v Maltman* [1995] 1 Cr App Rep 239, CA.



An offence under the Forgery and Counterfeiting Act 1981 s 17 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 ante); see s 1(2)(c). As to jurisdiction relating to such offences see PARA 362 ante.

The offence under the Forgery and Counterfeiting Act 1981 s 17 is a lifestyle offence for the purposes of the Proceeds of Crime Act 2002 s 75(2)(a), Sch 2 para 6(d) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393 note 23). In respect of a lifestyle offence the court may make a financial reporting order under the Serious Organised Crime and Police Act 2005 s 76 (not yet in force); see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476.

7 As to the meaning of 'lawful authority or excuse' cf paras 160 note 9, 354 note 9 ante, 699 note 1 post.

8 Evidence that the defendant had previously uttered counterfeit coins could be given in evidence for the purpose of proving that he knowingly and without lawful excuse had in his custody and possession a mould on which was impressed the figure and apparent resemblance of the obverse side of a half-crown: *R v Weeks* (1861) Le & Ca 18.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 Forgery and Counterfeiting Act 1981 ss 17(2), 22(3), (4)(d). See also note 6 supra.

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

12 Forgery and Counterfeiting Act 1981 ss 17(3), 22(3), (4)(e). See also note 6 supra.

13 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

14 Forgery and Counterfeiting Act 1981 s 17(4). It is an offence at common law to procure coining instruments with intent to make counterfeit coin (*R v Roberts* (1855) Dears CC 539, CCR) or to procure base coin with intent to make counterfeit coin (*R v Fuller*, *R v Robinson* (1816) Russ & Ry 308). Any such offence is punishable by imprisonment and by fine at the discretion of the court: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

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#### **548. Reproduction of British currency notes.**

Unless the relevant authority<sup>1</sup> has previously consented in writing<sup>2</sup>, if any person<sup>3</sup> reproduces on any substance whatsoever, and whether or not on the correct scale, any British currency note<sup>4</sup> or any part of a British currency note, he is guilty of an offence and liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum<sup>5</sup>.

1 For these purposes, 'the relevant authority', in relation to a British currency note of any particular description, means the authority empowered by law to issue notes of that description: Forgery and Counterfeiting Act 1981 s 18(2); and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1278.

2 For the meaning of 'writing' see PARA 413 note 1 ante.

3 Where an offence under the Forgery and Counterfeiting Act 1981 s 18 or s 19 (see PARA 549 post) which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and liable to be proceeded against and punished accordingly: s 25(1). Where the affairs of a body corporate are managed by its members, s 25(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 25(2). See PARA 38 ante.

4 For these purposes, 'British currency note' means any note which (1) has been lawfully issued in England and Wales, Scotland or Northern Ireland; and (2) is or has been customarily used as money in the country where it was issued; and (3) is payable on demand: *ibid* s 18(2).

5 *Ibid* ss 18(1), 22(5). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to powers of search, forfeiture etc see PARA 550 post.

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#### **549. Making etc imitation British coins.**

If a person<sup>1</sup>:

647 (1) makes an imitation British coin<sup>2</sup> in connection with a scheme intended to promote the sale of any product or the making of contracts for the supply of any service; or

648 (2) sells or distributes imitation British coins in connection with any such scheme, or has imitation British coins in his custody or under his control with a view to such sale or distribution,

he is guilty of an offence and liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum, unless the Treasury has previously consented in writing<sup>3</sup> to the sale or distribution of such imitation British coins in connection with that scheme<sup>4</sup>.

1 As to the position where an offence under the Forgery and Counterfeiting Act 1981 s 19 has been committed by a body corporate see PARA 548 note 1 ante.

2 For these purposes, 'British coin' means any coin which is legal tender in any part of the United Kingdom; and 'imitation British coin' means any thing which resembles a British coin in shape, size and the substance of which it is made: *ibid* s 19(2). For the meaning of 'legal tender' see the Coinage Act 1971 s 2 (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1279.

3 For the meaning of 'writing' see PARA 413 note 1 ante.

4 Forgery and Counterfeiting Act 1981 ss 19(1), 22(5). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to powers of search, forfeiture etc see PARA 550 post.

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### **550. Powers of search, forfeiture etc.**

If it appears to a justice of the peace, from information given him on oath, that there is reasonable cause to believe that a person has in his custody or under his control (1) any thing which is a counterfeit<sup>1</sup> of a currency note<sup>2</sup> or of a protected coin<sup>3</sup>, or which is a specified reproduction<sup>4</sup>; or (2) any thing which he or another has used<sup>5</sup>, or intends to use, for the making of any such counterfeit or the making of any such reproduction, the justice may issue a warrant authorising a constable to search for and seize the object in question, and for that purpose to enter any premises specified in the warrant<sup>6</sup>.

A constable may at any time after the seizure of any object suspected of falling within head (1) or head (2) above (whether the seizure was effected by virtue of such a warrant or otherwise) apply to a magistrates' court for an order with respect to the object; and the court, if it is satisfied both that the object in fact falls within head (1) or head (2) above and that it is conducive to the public interest to do so, may make such order as it thinks fit for the forfeiture of the object and its subsequent destruction or disposal<sup>7</sup>.

The court by or before which a person is convicted of a relevant offence<sup>8</sup> may order any thing shown to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or dealt with in such other manner as the court may order<sup>9</sup>.

The court may not, however, order any thing to be forfeited under the above provisions where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made<sup>10</sup>.

1 For the meaning of 'counterfeit' see PARA 544 note 1 ante.

2 For the meaning of 'currency note' see PARA 544 note 2 ante.

3 For the meaning of 'protected coin' see PARA 544 note 3 ante.

4 I.e. a reproduction made in contravention of the Forgery and Counterfeiting Act 1981 s 18 (see PARA 548 ante) or s 19 (see PARA 549 ante).

5 I.e. whether before or after 28 October 1981 (which is the date on which the Forgery and Counterfeiting Act 1981 came into force: see s 33).

6 Ibid s 24(1).

7 Ibid s 24(2). The powers conferred on the court by s 24(2) and s 24(3) (see the text and note 9 infra) include power to direct that any object is to be passed to an authority with power to issue notes or coins or to any person authorised by such an authority to receive the object: s 24(5).

8 I.e. an offence under ibid Pt II (ss 14-28): see PARA 544 et seq ante.

9 Ibid s 24(3). See also note 7 supra.

10 Ibid s 24(4).

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### **551. Prohibition of importation and exportation of counterfeit notes and coins.**

The importation, landing or unloading of a counterfeit<sup>1</sup> of a currency note<sup>2</sup> or of a protected coin<sup>3</sup> without the consent of the Treasury is prohibited<sup>4</sup>; and the exportation of a counterfeit or a currency note or of a protected coin without the consent of the Treasury is prohibited<sup>5</sup>. The fraudulent evasion or attempted evasion of either of these prohibitions is an offence under customs and excise legislation<sup>6</sup>.

1 For the meaning of 'counterfeit' see PARA 544 note 1 ante.

2 For the meaning of 'currency note' see PARA 544 note 2 ante.

3 For the meaning of 'protected coin' see PARA 544 note 3 ante.

4 Forgery and Counterfeiting Act 1981 s 20. An offence under the Forgery and Counterfeiting Act 1981 s 20 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (ss 1-6) (as amended) (see PARA 362 ante): see s 1(2)(c).

5 Forgery and Counterfeiting Act 1981 s 21(1). An offence under the Forgery and Counterfeiting Act 1981 s 21 is classified as a Group A offence within the Criminal Justice Act 1993 Pt I (as amended): see s 1(2)(c).

A counterfeit of a currency note or of a protected coin which is removed to the Isle of Man from the United Kingdom is deemed to be exported from the United Kingdom for the purposes of the Forgery and Counterfeiting Act 1981 s 20, and for the purposes of the Customs and Excise Acts, in their application to the prohibition imposed by the Forgery and Counterfeiting Act 1981 s 21: s 21(2). This is an exception to the general rule, under the Isle of Man Act 1979 s 9(1), that goods removed to the Isle of Man from the United Kingdom are deemed for the purpose of the Customs and Excise Acts not to be exported from the United Kingdom. For the meaning of 'United Kingdom' see PARA 45 note 2 ante. The expression 'the Customs and Excise Acts' is not defined in the Forgery and Counterfeiting Act 1981; but cf the definition of that expression in the Customs and Excise Management Act 1979 s 1(1) (see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 398).

6 See CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 994.

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### **(iii) Smuggling**

#### **552. Shooting at vessels etc engaged in preventing smuggling.**

Any person who fires upon any vessel<sup>1</sup>, aircraft or vehicle<sup>2</sup> in Her Majesty's service while it is engaged in the prevention of smuggling<sup>3</sup> is liable on conviction on indictment to imprisonment for a term not exceeding five years<sup>4</sup>.

1 For these purposes, 'vessel' includes any boat or other vessel whatsoever and any hovercraft: Customs and Excise Management Act 1979 ss 1(1), 2(1).

2 For these purposes, 'vehicle' includes any railway vehicle: *ibid* s 1(1).

3 'Smuggling' is not defined in the Customs and Excise Management Act 1979. See, however, *R v Hussain* [1969] 2 QB 567 at 572, 53 Cr App Rep 448 at 452, CA ('there is no reason to suppose the jury would associate the word 'smugglers' solely with those who seek to evade customs duty . . . in the ordinary use of language today the verb 'to smuggle' is used equally to apply to the importation of goods which are prohibited in import').

4 Customs and Excise Management Act 1979 s 85(2) (amended by virtue of the Criminal Justice Act 1982 s 46). Any person who, save for just and sufficient cause, interferes in any way with any ship, aircraft, vehicle, buoy, anchor, chain, rope or mark which is being used for the purposes of the Commissioners for Her Majesty's Revenue and Customs under the Customs and Excise Management Act 1979 Pts III-VII (ss 19-91) (as amended) is guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale: ss 1(1), 85(1) (s 1(1) amended by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 paras 20, 22(b)). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. 'Ship' and 'vessel' include any boat or other vessel whatsoever, and any hovercraft: Customs and Excise Management Act 1979 ss 1(1), 2(1). As to Her Majesty's Commissioners for Revenue and Customs see PARA 354 note 2 ante. See further CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1073. As to legal proceedings see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1197 et seq. As to the application of these provisions to certain Crown aircraft see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 899.

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### **553. Offering goods for sale as smuggled goods.**

If any person offers any goods<sup>1</sup> for sale as having been imported without payment of duty, or as having been otherwise unlawfully imported, then, whether or not the goods were so imported or were in fact chargeable with duty, the goods are liable to forfeiture and he is liable on summary conviction to a fine of three times the value of the goods or level 3 on the standard scale, whichever is the greater, and may be arrested<sup>2</sup>.

1 'Goods' includes stores and baggage: Customs and Excise Management Act 1979 s 1(1). As to goods the importation of which is subject to duty or is restricted or prohibited see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) PARA 1 et seq.

2 Ibid s 87 (amended by the Police and Criminal Evidence Act 1984 s 114(1); and by virtue of the Criminal Justice Act 1982 ss 38, 46). See further CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1074. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to arrest see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1152; and as to proceedings see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1197 et seq.

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## **(iv) Trespass on Designated or Nuclear Site**

### **554. Offence of trespassing on designated or nuclear site.**

A person commits an offence if he enters, or is on, any protected site<sup>1</sup> in England and Wales as a trespasser<sup>2</sup>. It is a defence for a person charged with such an offence to prove<sup>3</sup> that he did not know, and had no reasonable cause to suspect, that the site in relation to which the offence is alleged to have been committed was a protected site<sup>4</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding level 5 on the standard scale<sup>6</sup> or to both<sup>7</sup>.

1 A 'protected site' is defined as either a nuclear site or a designated site: Serious Organised Crime and Police Act 2005 s 128(1A) (s 128(1), (4), (7) amended, and s 128(1A)-(1C) added, by the Terrorism Act 2006 s 12(1), (2)). 'Nuclear site' means: (1) so much of any premises in respect of which a nuclear site licence (within the meaning of the Nuclear Installations Act 1965: see ss 1(1), 26(1); and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1487) is for the time being in force as lies within the outer perimeter of the protection provided for those premises (Serious Organised Crime and Police Act 2005 s 128(1B)(a) (as so added)); and (2) so much of any other premises of which premises falling within s 128(1B)(a) (as added) form a part as lies within that outer perimeter (s 128(1B)(b) (as so added)). For this purpose, the outer perimeter of the protection provided for any premises is the line of the outermost fences, walls or other obstacles provided or relied on for protecting those premises from intruders (s 128(1C)(a) (as so added)) and that line is determined on the assumption that every gate, door or other barrier across a way through a fence, wall or other obstacle is closed (s 128(1C)(b) (as so added)). 'Designated site' means a site which is specified or described (in any way) in an order made by the Secretary of State and is designated for these purposes by that order: s 128(2). The Secretary of State may designate a site for these purposes only if: (a) it is comprised in Crown land; (b) it is comprised in land belonging to Her Majesty in Her private capacity or to the immediate heir to the throne in his private capacity; or (c) it appears to the Secretary of State that it is appropriate to designate the site in the interests of national security: s 128(3). For the purposes of s 128 (as amended), 'site' means the whole or part of any building or buildings, or any land, or both; and 'Crown land' means land in which there is a Crown interest or a Duchy interest: s 128(8). For these purposes, 'Crown interest' means an interest belonging to Her Majesty in right of the Crown; and 'Duchy interest' means an interest belonging to Her Majesty in right of the Duchy of Lancaster or belonging to the Duchy of Cornwall: s 128(9). See further CROWN PROPERTY.

The Countryside and Rights of Way Act 2000 s 2(1) (rights of public in relation to access land: see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 583) does not apply to land in respect of which a designation order under the Serious Organised Crime and Police Act 2005 s 128 (as amended) is in force: s 131(1)(a), (5)(a). The Secretary of State may take such steps as he considers appropriate to inform the public of the effect of any designation order, including, in particular, displaying notices on or near the site to which the order relates: s 131(2). However, the Secretary of State may only display any such notice, or take any other steps under s 131(2), in or on any building or land if the appropriate person consents: s 131(3). The 'appropriate person' is (i) a person appearing to the Secretary of State to have a sufficient interest in the building or land to consent to the notice being displayed or the steps being taken; or (ii) a person acting on behalf of such a person: s 131(4).

The following sites are designated under s 128 (as amended): Her Majesty's Naval Base Clyde; Northwood Headquarters; RAF Brize Norton; RAF Croughton; RAF Fairford; RAF Feltwell; RAF Fylingdales; RAF Lakenheath; RAF Menwith Hill; RAF Mildenhall; RAF Welford; Royal Naval Armaments Depot Coulport; Sea Mounting Centre Marchwood: Serious Organised Crime and Police Act 2005 (Designated Sites) Order 2005, SI 2005/3447, art 2(1), Schedule.

2 Serious Organised Crime and Police Act 2005 s 128(1) (as amended: see note 1 supra). As to trespass to land see TORT vol 97 (2010) PARA 562 et seq. For the purposes of s 128 (as amended), a person who is on any protected site as a trespasser does not cease to be a trespasser by virtue of being allowed time to leave the site: s 128(7) (as so amended). No proceedings for an offence under s 128 (as amended) may be instituted



except by or with the consent of the Attorney General: s 128(6)(a). As to the effect of this limitation see PARA 1071 post.

3 As to whether this imposes a legal (or persuasive) burden of proof or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

4 Serious Organised Crime and Police Act 2005 s 128(4) (as amended: see note 1 supra).

5 After the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force), the reference to a maximum term of imprisonment of six months is to be read as if it were a reference to a maximum term of 51 weeks: see the Serious Organised Crime and Police Act 2005 ss 128(5), 175(1), (3).

6 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 Serious Organised Crime and Police Act 2005 ss 128(5), 175(1), (3).

## 6. Public Order Offences

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## **(1) RIOT, VIOLENT DISORDER, AFFRAY ETC**

### **555. Riot.**

Where 12 or more persons who are present together use or threaten unlawful violence<sup>1</sup> for a common purpose<sup>2</sup> and the conduct of them, taken together, is such as would cause a person of reasonable firmness<sup>3</sup> present at the scene<sup>4</sup> to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot<sup>5</sup>. A person convicted of riot is liable to imprisonment for a term not exceeding 10 years or to a fine or to both<sup>6</sup>. A person is, however, guilty of riot only if he intends to use violence or is aware that his conduct may be violent<sup>7</sup>.

1 It is immaterial whether or not the 12 or more use or threaten unlawful violence simultaneously: Public Order Act 1986 s 1(2). For the purposes of Pt 1 (ss 1-10) (as amended), 'violence' means any violent conduct, so that: (1) it includes violent conduct towards property as well as violent conduct towards persons; and (2) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (eg throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short): see s 8. The requirement that the violence be unlawful excludes from riot violence which is justified by law (eg on grounds of reasonable violence being used in self-defence or prevention of crime): *R v Rothwell, R v Barton* [1993] Crim LR 626, CA. In *I v DPP* [2001] UKHL 10, [2002] 1 AC 285, [2001] 2 Cr App Rep 216, an affray case, the House of Lords held that the overt possession of weapons can amount to a threat of violence, even though they are not waved or brandished.

2 The common purpose may be inferred from conduct: Public Order Act 1986 s 1(3). It is preferable for the common purpose to be specified in the indictment, but, if it is not, a conviction will be upheld if the prosecution case has clearly identified the common purpose and the judge's direction has been in terms of the need for the jury to be in no reasonable doubt that the purpose was proved: *R v Jefferson* [1994] 1 All ER 270, 99 Cr App Rep 13, CA.

3 See PARA 557 note 4 post.

4 No person of reasonable firmness need actually be, or be likely to be, present at the scene: Public Order Act 1986 s 1(4).

5 Ibid s 1(1). The offence of riot is perpetrated by those who use unlawful violence; those who merely threaten such violence can be convicted as accomplices if, with the appropriate mens rea for a secondary party, they encourage the unlawful use by others (or another): *R v Jefferson* [1994] 1 All ER 270, 99 Cr App Rep 13, CA. The common law offences of riot and rout have been abolished: Public Order Act 1986 s 9(1).

Riot may be committed in private as well as in public places: s 1(5).

No prosecution for an offence of riot or incitement to riot may be instituted except by or with the consent of the Director of Public Prosecutions: s 7(1). As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 1 creates one offence: s 7(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

6 Ibid s 1(6). As to the appropriate sentence for the participants of a serious riot see *R v Najeib* [2003] EWCA Crim 194, [2003] 2 Cr App Rep (S) 488.

7 Public Order Act 1986 s 6(1). It is important that this is made clear to the jury: *R v Blackwood* [2002] EWCA Crim 3102, [2003] All ER (D) 239 (Jan). The words 'only if he intends' in the Public Order Act 1986 s 6 do not exclude or cut down in relation to the relevant offence the liability of an aider and abettor: *R v Jefferson* [1994]

1 All ER 270, 99 Cr App Rep 13, CA. The Public Order Act 1986 s 6(1) does not affect the determination for the purposes of riot of the number of persons who use or threaten violence: s 6(7).

For the purposes of s 6 a person whose awareness is impaired by intoxication is to be taken to be aware of that of which he would be aware if not intoxicated, unless he shows either that his intoxication was not self-induced or that it was caused solely by the taking or administration of a substance in the course of medical treatment: s 6(5). 'Intoxication' means any intoxication, whether caused by drink, drugs or other means, or by a combination of means: s 6(6). As to whether 'he shows' imposes a legal (or persuasive) or evidential burden on the defendant, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

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### 556. Violent disorder.

Where three or more persons<sup>1</sup> who are present together use or threaten unlawful violence<sup>2</sup> and the conduct of them, taken together, is such as would cause a person of reasonable firmness<sup>3</sup> present at the scene<sup>4</sup> to fear for his personal safety, each of the persons using or threatening<sup>5</sup> unlawful violence is guilty of violent disorder<sup>6</sup> and liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>. A person is, however, guilty of violent disorder only if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence<sup>9</sup>.

1 No mention need be made of the three persons who have to be present in the indictment provided that: (1) there is evidence satisfying the jury that there were three or more persons involved in the criminal behaviour, though not necessarily those named in the indictment; and (2) the defence is apprised of what it is the defence has to meet, the best way of achieving this being by putting it in the indictment: *R v Mahroof* (1988) 88 Cr App Rep 317, CA. Where the only persons against whom there is evidence of using or threatening violence are those named in the indictment, the jury should be specifically directed that, if it cannot be sure that three or more of the defendants were using or threatening violence, it should acquit every defendant of violent disorder, even if satisfied that one or more particular defendant(s) was or were unlawfully fighting: *R v Fleming*, *R v Robinson* (1989) 153 JP 517, CA. The jury should be warned specifically that, if any one of the three defendants was acquitted, the other two must also be found not guilty, unless the jury is satisfied that some other person not charged was taking part in the violent disorder: *R v Worton* (1989) 154 JP 201, CA.

2 It is immaterial whether or not the three or more use or threaten unlawful violence simultaneously: Public Order Act 1986 s 2(2). For the meaning of 'unlawful violence' see PARA 555 note 1 ante.

3 See PARA 557 note 4 post.

4 No person of reasonable firmness need actually be, or be likely to be, present at the scene: Public Order Act 1986 s 2(3).

5 The Court of Appeal has held that there was a prima facie case of violent disorder against the defendant(s) where the defendant had been running in a populated area with a group, other members of which were armed and intent on violence, as the defendant knew (*R v Church* [2000] 4 Archbold News 3, CA) or where the defendants had been members of a group which stalked a man for three-quarters of a mile in the middle of the night, creating an aura of violence (*R v Brodie*, *R v Young*, *R v Mould* [2000] Crim LR 775, CA).

6 Public Order Act 1986 s 2(1). Violent disorder may be committed in private as well as in public places: s 2(4). For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 2 creates one offence: s 7(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed. If on the trial on indictment of a person charged with violent disorder the jury finds him not guilty of the offence charged, the jury may, without prejudice to the Criminal Law Act 1967 s 6(3) (see PARA 1335 post), find him guilty of an offence under the Public Order Act 1986 s 4 (see PARA 558 post): s 7(3); and see *R v Mahroof* (1988) 88 Cr App Rep 317, CA; *R v Fleming*, *R v Robinson* (1989) 153 JP 517, (1989) Times, 13 February, CA; *R v Carson* (1990) 92 Cr App Rep 236, CA; *R v O'Brien* (1992) 156 JP 925, CA; *R v Stanley* [1993] Crim LR 618, CA; *R v Perrins* [1995] Crim LR 432, CA. The Crown Court has the same powers and duties in relation to a person who is convicted of an offence under the Public Order Act 1986 s 4 by virtue of s 7(3) as a magistrates' court would have on convicting him of the offence: s 7(4).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post),

although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Public Order Act 1986 s 2(5). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. The common law offence of unlawful assembly has been abolished: s 9(1). As to sentencing for violent disorder see *R v Hebron, R v Spencer* (1989) 11 Cr App Rep (S) 226, (1989) Times, 12 May, CA; *R v Tomlinson* (1992) 157 JP 695, CA; *R v Tyler, R v Frost, R v Hester* (1992) 96 Cr App Rep 332, CA; *R v Green* [1997] 2 Cr App Rep (S) 191, CA (individual acts of a defendant not the essence of the offence; the essence is participation with others in the whole activity); *R v Chapman* [2002] EWCA Crim 2346, 146 Sol Jo LB 242 (case of serious disorder); *R v Rees* [2005] EWCA Crim 1857, (2005) Times, 22 July (where violent disorder is committed by young people who have been binge-drinking, offenders, even if they are of exemplary character, can expect to receive substantial sentences).

9 Public Order Act 1986 s 6(2). Section 6(2) does not affect the determination of the number of persons who use or threaten violence: s 6(7). As to the position where a person's awareness is impaired by intoxication see PARA 555 note 7 ante. As to liability for aiding and abetting see PARA 555 note 5 ante.

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### 557. Affray.

If a person uses or threatens<sup>1</sup> unlawful violence<sup>2</sup> towards another and his conduct<sup>3</sup> is such as would cause a person of reasonable firmness<sup>4</sup> present at the scene<sup>5</sup> to fear for his personal safety, he is guilty of affray<sup>6</sup> and liable on conviction on indictment to imprisonment for a term not exceeding three years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>. A person is, however, guilty of affray only if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence<sup>9</sup>.

1 For the purposes of the offence of affray, a threat cannot be made by the use of words alone: Public Order Act 1986 s 3(3). As to what can constitute a threat of violence see *I v DPP* [2001] UKHL 10, [2002] 1 AC 285, [2001] 2 Cr App Rep 216; and PARA 555 note 1 ante. See also *R v Dixon* [1993] Crim LR 579, CA.

In *I v DPP* supra, the House of Lords also held that affray requires that a threat of unlawful violence must have been directed towards a person or persons actually present at the scene.

2 For these purposes, 'violence' means any violent conduct towards persons (but not towards property), so that it is not restricted to conduct causing or intended to cause injury but includes any other violent conduct (eg throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short): Public Order Act 1986 s 8.

3 For these purposes, where two or more persons use or threaten violence, it is the conduct of them taken together that must be considered: *ibid* s 3(2). Where there has been a continuous course of conduct, as in the case of an indiscriminate mêlée, it is unnecessary for the prosecution to identify and prove particular incidents since the criminal character of the conduct depends on its general nature and effect, and not on particular incidents and events: *R v Smith* [1997] 1 Cr App Rep 14, CA.

4 It is not incumbent on the judge to direct the jury on the attributes of a person of reasonable firmness or to give examples of reasonable firmness: *R v Rafferty* [2004] EWCA Crim 968, [2004] All ER (D) 69 (Apr).

5 Ie someone other than the victim: *R v Sanchez* [1996] Crim LR 572, JP 321, CA; *R v Thind* [1999] Crim LR 842, CA. It is the hypothetical reasonable bystander who must be put in fear for his personal safety, not the victim himself: *R v Sanchez* supra. No person of reasonable firmness need actually be, or be likely to be, present at the scene: Public Order Act 1986 s 3(4).

6 *Ibid* s 3(1). The common law offence of affray has been abolished: s 9(1).

Affray may be committed in private as well as in public places: s 3(5).

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 3 creates one offence: s 7(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

If on the trial on indictment of a person charged with affray the jury finds him not guilty of the offence charged, the jury may, without prejudice to the Criminal Law Act 1967 s 6(3) (see PARA 1335 post), find him guilty of an offence under the Public Order Act 1986 s 4 (as amended) (see PARA 558 post): s 7(3); and see the cases referred to in respect of s 7(3) in PARA 556 note 6 ante. The Crown Court has the same powers and duties in relation to a person who is convicted of an offence under s 4 (as amended) by virtue of s 7(3) as a magistrates' court would have on convicting him of the offence: s 7(4).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Public Order Act 1986 s 3(7). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

9 Ibid s 6(2). As to the position where a person's awareness is impaired by intoxication see PARA 555 note 7 ante. As to liability for aiding and abetting see PARA 555 note 5 ante.

## **UPDATE**

### **557 Affray**

NOTE 5--The likelihood of there having been a bystander at the scene must not be small: *Leeson v DPP* [2010] All ER (D) 84 (Apr), DC.

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### 558. Fear or provocation of violence.

If a person:

- 649 (1) uses towards another person threatening, abusive or insulting<sup>1</sup> words or behaviour<sup>2</sup>; or
- 650 (2) distributes or displays to another person any writing<sup>3</sup>, sign or other visible representation which is threatening, abusive or insulting<sup>4</sup>,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence<sup>5</sup> by that person or another, or whereby that person<sup>6</sup> is likely<sup>7</sup> to believe that such violence<sup>8</sup> will be used or it is likely that such violence will be provoked, he is guilty of an offence<sup>9</sup>. The offence is punishable on summary conviction with imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both<sup>10</sup>. A person is, however, guilty of such an offence only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting<sup>11</sup>.

1 The words 'threatening, abusive or insulting' were contained in the Public Order Act 1936 s 5 (repealed). The decisions on the meaning of that phrase will continue to apply where the phrase appears in the Public Order Act 1986 s 4 (as amended) (see the text and notes 2-10 infra): *DPP v Clarke* (1991) 94 Cr App Rep 359, CA. 'Insulting' is to be given its ordinary meaning and the question whether words or behaviour are insulting is one of fact; this approach applies also to the other words in the phrase: *Brutus v Cozens* [1973] AC 854, 56 Cr App Rep 799, HL.

The fact that words such as 'threatening, abusive or insulting' involve a question of fact for the magistrates does not leave them with a completely free hand, since their decision on a question of fact can be overturned on appeal if no reasonable bench acquainted with the ordinary use of language could have reached that conclusion: *Bryan v Robinson* [1960] 2 All ER 173, [1960] 1 WLR 506, DC; *Brutus v Cozens* supra at 861 and 804 per Lord Reid; *Hudson v Chief Constable, Avon and Somerset Constabulary* [1976] Crim LR 451, DC. In deciding whether or not a conclusion about the use of language was one that a reasonable bench could reach, the High Court is able to offer guidance as to the limits of a term. The distinction between doing this and positively defining a term (ie making its meaning a question of law) is shown in *Brutus v Cozens* supra at 866-867 and 872 per Lord Kilbrandon: 'It would be unwise, in my opinion, to attempt to lay down any positive rules for the recognition of insulting behaviour as such, since the circumstances in which the application of the rules would be called for are almost infinitely variable; the most that can be done is to lay down limits . . . in order to ensure that the statute is not interpreted more widely than its terms will bear'.

The following limits appear from Divisional Court decisions in respect of the meaning of 'threatening, abusive or insulting'. Speech or behaviour is not threatening, abusive or insulting merely because it gives rise to a risk that immediate violence will be feared or provoked (*Brutus v Cozens* supra), nor simply because it gives rise to annoyance, anger, disgust or distress (*Parkin v Norman, Valentine v Lilley* [1983] QB 92, [1982] 2 All ER 583, DC), nor simply because it is vigorous, distasteful or unmannerly (*Brutus v Cozens* supra at 862 and 805 per Lord Reid) or offensive or rude (*R v Ambrose* (1973) 57 Cr App Rep 538, CA). Behaviour which is objectionable may be regarded by another person as insulting by suggesting that he was somebody who would find such conduct in public acceptable: *Masterson v Holden* [1986] 3 All ER 39, 83 Cr App Rep 302, DC (two homosexual men kissing and cuddling at bus stop; convictions upheld) (decided under the Metropolitan Police Act 1839 s 54(13) (repealed)); and see also *Parkin v Norman, Valentine v Lilley* supra (decided under the Public Order Act 1936 s 5 (repealed)). 'Insulting' must be given a meaning compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969): *Hammond v DPP* [2004] EWHC 69 (Admin), 168 JP 601, DC. The Convention is commonly referred to as the European



Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

If conduct is threatening, abusive or insulting, it does not matter whether or not anyone who witnessed it felt himself to be threatened, abused or insulted: *Parkin v Norman*, *Valentine v Lilley* supra at 99 and 587.

2 Public Order Act 1986 s 4(1)(a).

3 For the meaning of 'writing' see PARA 578 note 3 post.

4 Public Order Act 1986 s 4(1)(b).

5 'Immediate' does not mean 'instantaneous'; a relatively short period of time may elapse between the conduct which is threatening, abusive or insulting and the intended or likely unlawful violence. 'Immediate' connotes proximity in time and in causation; that it is likely that violence will result within a relatively short period of time and without any other intervening occurrence: *R v Horseferry Road Metropolitan Stipendiary Magistrates' Court, ex p Siadatan* [1991] 1 QB 260, 92 Cr App Rep 257, DC. See also *Valentine v DPP* [1997] COD 339, DC. 'Unlawful' refers to violence which is not justified in law on grounds of self-defence, prevention of crime or the like. For the meaning of 'violence' see PARA 555 note 1 ante.

6 It is the state of the victim's mind which is crucial rather than the statistical risk of violence actually occurring within a very short space of time: *DPP v Ramos* [2000] Crim LR 768, DC.

7 See *Parkin v Norman*, *Valentine v Lilley* [1983] QB 92, [1982] 2 All ER 583, DC.

8 I.e. immediate, unlawful violence: *R v Horseferry Road Metropolitan Stipendiary Magistrates' Court, ex p Siadatan* [1991] 1 QB 260, 92 Cr App Rep 257, DC.

9 See the Public Order Act 1986 s 4(1). A constable may enter and search any premises for the purpose of arresting a person for an offence under s 4 (as amended): see the Police and Criminal Evidence Act 1984 s 17(1)(c)(iii) (as added); and PARA 884 post.

An offence under the Public Order Act 1986 s 4(1) can be committed in four ways: (1) the defendant must intend the person against whom the conduct is directed to believe that immediate unlawful violence will be used against him or another by any person; (2) the defendant must intend to provoke the immediate use of unlawful violence by that person or another; (3) the defendant must be shown to have used threatening, abusive or insulting words or behaviour by which the person against whom the conduct is directed is likely to believe that such violence will be used; or (4) the defendant must have used such words or behaviour by which it is likely that such violence will be provoked: *Winn v DPP* (1992) 156 JP 881, DC.

An offence under the Public Order Act 1986 s 4 (as amended) may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling: s 4(2). 'Dwelling' means any structure or part of a structure occupied as a person's home or as other living accommodation, whether the occupation is separate or shared with others, but does not include any part not so occupied; and, for this purpose, 'structure' includes a tent, caravan, vehicle, vessel or other temporary or movable structure: see s 8. A communal landing in a block of flats has been held not to be a 'dwelling' for the purposes of s 8: *Rukwira v DPP* [1993] Crim LR 882, DC.

The words 'uses towards' require that the words or behaviour in question be used in the physical presence of and in the direction of another person directly; thus an offence is not committed under the Public Order Act 1986 s 4 (as amended) when the threat is made by a person in a dwelling against another person outside that dwelling who has not heard the threat and learned of it only through a third party not under the control or direction of the maker of the threat: *Atkin v DPP* (1989) 89 Cr App Rep 199, DC.

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), the Public Order Act 1986 s 4 (as amended) creates one offence: s 7(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed. As to proof of identification and participation under s 4 (as amended) see *Allen v Ireland* [1984] 1 WLR 903, 79 Cr App Rep 206, DC (decided under the Public Order Act 1936 s 5 (repealed)).

10 See the Public Order Act 1986 s 4(4). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

11 See the Public Order Act 1986 s 6(3). As to the position where a person's awareness is impaired by intoxication see PARA 555 note 7 ante. As to liability for aiding and abetting see PARA 555 note 5 ante.



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### **559. Causing intentional harassment, alarm or distress.**

If a person, with intent to cause a person harassment, alarm or distress: (1) uses threatening, abusive or insulting<sup>1</sup> words or behaviour, or uses disorderly behaviour; or (2) displays any writing<sup>2</sup>, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment<sup>3</sup>, alarm or distress, he is guilty of an offence<sup>4</sup>. The offence is punishable on summary conviction with imprisonment not exceeding six months or a fine not exceeding level 5 on the standard scale or both<sup>5</sup>.

It is a defence for the defendant to prove<sup>6</sup>: (a) that he was inside a dwelling<sup>7</sup> and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling; or (b) that his conduct was reasonable<sup>8</sup>.

1 For the meaning of 'threatening, abusive or insulting' see PARA 558 note 1 ante. A similar approach applies to 'disorderly', a term which does not require any element of violence, actual or apprehended, or any threatening, abusive or insulting conduct: *Chambers and Edwards v DPP* [1995] Crim LR 896, DC (a case under the Public Order Act 1986 s 5 (see PARA 560 post)).

2 For the meaning of 'writing' see PARA 578 note 3 post.

3 'Harassment' does not require any element of apprehension about one's personal safety: *Chambers and Edwards v DPP* [1995] Crim LR 896, DC.

4 Public Order Act 1986 s 4A(1) (added by the Criminal Justice and Public Order Act 1994 s 154). For the purpose of the rules against charging more than one offence in the same count or information (see PARA 1211 post), the Public Order Act 1986 s 4A (as added) creates one offence: s 7(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed. Such an offence may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling: s 4A(2) (as so added). For the meaning of 'dwelling' see PARA 558 note 9 ante.

Prosecutions for an offence such as that under s 4A (as added) may infringe the defendant's right to freedom of expression under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

The criminal law should not be involved unless and until it is established that the conduct which is the subject of the charge amounts to such a threat to public order to require the involvement of the criminal law, and not merely the civil law. The prosecution must demonstrate that the prosecution was being brought in pursuance of a legitimate aim and that the prosecution was the minimum necessary to achieve that aim. The court must carefully consider and set out the reasons why it had reached the conclusion that the prosecution had satisfied those requirements: *Dehal v DPP* [2005] EWHC 2154 (Admin), 169 JP 581, [2005] NLJR 1630, DC.

5 Public Order Act 1986 s 4A(5) (as added: see note 4 supra). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see PARA SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6 As to whether the burden of proof is a legal (persuasive) or evidential one, and, if the former, its compatibility with the European Convention on Human Rights art 6(2) (the presumption of innocence), see PARA 1368 et seq post.

7 For the meaning of 'dwelling' see PARA 558 note 9 ante.

8 Public Order Act 1986 s 4A(3) (as added: see note 4 supra). See also PARA 560 note 5 post.

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## **560. Harassment, alarm or distress.**

If a person:

- 651 (1) uses threatening, abusive or insulting words or behaviour, or disorderly<sup>1</sup> behaviour<sup>2</sup>; or
- 652 (2) displays any writing<sup>3</sup>, sign or other visible representation which is threatening, abusive or insulting<sup>4</sup>,

within the hearing or sight<sup>5</sup> of a person likely to be caused harassment, alarm or distress<sup>6</sup> thereby, he is guilty of an offence<sup>7</sup>. The offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale<sup>8</sup>. A person is, however, guilty of such an offence only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting or, as the case may be, he intends his behaviour to be or is aware that it may be disorderly<sup>9</sup>.

It is a defence for the defendant to prove<sup>10</sup> that:

- 653 (a) he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress<sup>11</sup>; or
- 654 (b) he was inside a dwelling<sup>12</sup> and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation, would be heard or seen by a person outside that or any other dwelling<sup>13</sup>; or
- 655 (c) his conduct was reasonable<sup>14</sup>.

1 For the meaning of 'threatening, abusive or insulting' see PARA 558 note 1 ante. See also *Vigon v DPP* [1998] Crim LR 289, DC (peeping at customers in market stall changing area via a partially concealed video camera capable of amounting to insulting behaviour). As to the meaning of 'disorderly' see PARA 559 note 1 ante.

2 See the Public Order Act 1986 s 5(1)(a). See note 5 infra.

3 For the meaning of 'writing' see PARA 578 note 3 post.

4 See the Public Order Act 1986 s 5(1)(b).

5 Some person must actually have seen the abusive or insulting words or behaviour; it is not enough that somebody might have seen or could possibly have seen or heard it: *Holloway v DPP* [2004] EWHC 2621 (Admin), 169 JP 14, DC; *Taylor v DPP* [2006] All ER (D) 271 (Apr). The court can infer that there were people who had heard or seen the offending behaviour where the evidence makes clear that it is proper and safe to do so: *Holloway v DPP* supra. For an offence under the Public Order Act 1986 s 5(1)(a) (see head (1) in the text) to be proved, there has to be evidence that someone was able to see or hear the words or conduct complained of, but the prosecution does not have to call evidence that the words or conduct were actually heard or seen: *Taylor v DPP* supra.

6 A police officer can be a person who is likely to be caused harassment, alarm or distress. However, that is not to say that every police officer is to be assumed to be a person who is caused harassment, alarm or distress: *DPP v Orum* [1988] 3 All ER 449, 88 Cr App Rep 261, DC (only persons present were defendant, girlfriend with whom defendant was having an argument and the two police constables). It is not necessary that

the person alarmed was concerned at physical danger to himself; it might be alarm about the safety of an unconnected third party: *Lodge v DPP* (1988) Times, 26 October, DC.

7 See the Public Order Act 1986 s 5(1). For the purpose of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 5 (as amended) creates one offence: s 7(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed. An offence committed under s 5 (as amended) is a penalty offence for the purposes of the Criminal Justice and Police Act 2001 Pt 1 Ch 1 (ss 1-11) (as amended): see s 1 (as amended); and PARAS 586-589 post. Conduct under the Public Order Act 1986 s 5 (as amended) does not have to be directed against another person: *R v Ball* (1989) 90 Cr App Rep 378, [1989] Crim LR 579, CA.

Such an offence may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling: Public Order Act 1986 s 5(2). For the meaning of 'dwelling' see PARA 558 note 9 ante. The deposit of a letter containing threatening, abusive or insulting words through a letter-box is not an offence under s 5(1)(a) or (b) (see the text and notes 1-4 supra) because it takes place within a dwelling; but it would be an offence under the Malicious Communications Act 1988 s 1(1) (see PARA 767 post): *Chappell v DPP* (1988) 89 Cr App Rep 82, DC.

8 See the Public Order Act 1986 s 5(6). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

9 Ibid s 6(4). A subjective test must be applied to determine a defendant's awareness: *DPP v Clarke* (1991) 94 Cr App Rep 359, DC. As to the position where a person's awareness is impaired by intoxication see PARA 555 note 7 ante. As to liability for aiding and abetting see PARA 555 note 5 ante.

10 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

11 Public Order Act 1986 s 5(3)(a).

12 For the meaning of 'dwelling' see PARA 558 note 9 ante.

13 Public Order Act 1986 s 5(3)(b).

14 Ibid s 5(3)(c). 'Reasonable conduct' means objectively reasonable conduct: *DPP v Clarke* (1991) 94 Cr App Rep 359, DC. In considering whether conduct was reasonable, the court must have regard to all the circumstances, and to the European Convention on Human Rights art 10(2), which sets out the grounds on which the freedom of expression may be interfered with: *Norwood v DPP* [2003] EWHC 1564 (Admin), [2003] Crim LR 888; *Percy v DPP* [2001] EWHC Admin 1125, (2001) 166 JP 93; *Hammond v DPP* [2004] EWHC 69 (Admin), 168 JP 601. See also *Morrow v DPP* [1994] Crim LR 58, DC.

## UPDATE

### 560 Harassment, alarm or distress

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 7--See *DPP v Johnson* [2008] All ER (D) 371 (Feb), DC.

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### **561. Racially or religiously aggravated public order offences.**

A person is guilty of an offence if he commits:

- 656 (1) an offence under the Public Order Act 1986 relating to creating fear of, or provoking, violence<sup>1</sup>;
- 657 (2) an offence under the Public Order Act 1986 relating to harassment, alarm or distress<sup>2</sup>; or
- 658 (3) an offence under the Public Order Act 1986 relating to intentional harassment, alarm or distress<sup>3</sup>,

which is racially or religiously aggravated<sup>4</sup>.

This provision creates three separate offences. The racially or religiously aggravated offences under the Public Order Act 1986 listed in heads (1) and (3) above are punishable on conviction on indictment with a maximum of two years' imprisonment or a fine or both, or on summary conviction with a maximum of six months' imprisonment<sup>5</sup> or with a fine not exceeding the statutory maximum or both<sup>6</sup>. The aggravated offence under the Public Order Act 1986 listed in head (2) above is punishable on summary conviction with a fine not exceeding level 4 on the standard scale<sup>7</sup>.

1    le an offence under the Public Order Act 1986 s 4 (as amended): see PARA 558 ante.

2    le an offence under *ibid* s 5 (as amended): see PARA 560 ante.

3    le an offence under *ibid* s 4A (as added and amended): see PARA 559 ante.

4    See the Crime and Disorder Act 1998 s 31(1) (amended by the Anti-terrorism, Crime and Security Act 2001 s 39). For the meaning of 'racially or religiously aggravated' see PARA 155 ante. For the purposes of the aggravated version of the offence under the Public Order Act 1986 s 5 (as amended) (see head (2) in the text), the Crime and Disorder Act 1998 s 28(1)(a) (as amended) (see PARA 154 ante) has effect as if the person likely to be caused harassment, alarm or distress were the victim of the offence: s 31(7).

If, on the trial on indictment of a person charged with an offence under head (1) or head (3) in the text, the jury finds him not guilty of the offence charged, it may find him guilty of the corresponding basic offence: s 31(6). See *R v Khela, R v Smith* [2005] EWCA Crim 3446, [2005] All ER (D) 191 (Nov).

5    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6    See the Crime and Disorder Act 1998 s 31(4). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7    See *ibid* s 31(5). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

### **561 Racially or religiously aggravated public order offences**

NOTE 4--See *R v Francis* (2007) Times, 17 January, CA (police cell not a home or other living accommodation for the purposes of a defence).



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## (2) INCITEMENT TO RACIAL HATRED

### 562. Use of words or behaviour or display of written material.

A person<sup>1</sup> who uses threatening, abusive or insulting<sup>2</sup> words or behaviour<sup>3</sup>, or displays any written material<sup>4</sup> which is threatening, abusive or insulting, is guilty of an offence if:

- 659 (1) he intends thereby to stir up racial hatred<sup>5</sup>; or
- 660 (2) having regard to all the circumstances racial hatred is likely to be stirred up thereby<sup>6</sup>.

A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>.

Such an offence may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling<sup>9</sup> and are not heard or seen except by other persons in that or another dwelling<sup>10</sup>. In proceedings for such an offence it is a defence for the defendant to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling<sup>11</sup>.

A person who is not shown to have intended to stir up racial hatred is not guilty of such an offence if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting<sup>12</sup>.

1 Where a body corporate is guilty of an offence under the Public Order Act 1986 Pt III (ss 17-29) (as amended) (see PARAS 563-568 post) and it is shown that the offence was committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly: s 28(1). Where the affairs of a body corporate are managed by its members, s 28(1) applies in relation to the acts and defaults of a member in connection with his functions of management as it applies to a director: s 28(2). See also PARA 38 ante.

2 For the meaning of 'threatening, abusive and insulting' see PARA 558 note 1 ante.

3 The Public Order Act 1986 s 18 (as amended) does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service: s 18(6) (amended by the Broadcasting Act 1990 s 164(1), (2)(a)). For the meaning of 'programme service' see PARA 566 note 2 post.

4 For the purposes of the Public Order Act 1986 Pt III (as amended), 'written material' includes any sign or other visible representation: see s 29. As to the meaning of 'writing' see PARA 578 note 3 post.

5 Ibid s 18(1)(a). For the purposes of Pt III (as amended), 'racial hatred' means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins: ss 17, 29 (s 17 amended by the Anti-terrorism, Crime and Security Act 2001 s 37, Sch 8 Pt 4).

6 Public Order Act 1986 s 18(1)(b). No proceedings for such an offence may be instituted in England and Wales except by or with the consent of the Attorney General: s 27(1). As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules in England and Wales against charging more than one offence in the same count or information (see PARA 1211 post), s 18 creates one offence: s 27(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt III (as amended): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

Nothing in the Public Order Act 1986 Pt III (as amended) applies to a fair and accurate report of proceedings in Parliament or, as from a day to be appointed, in the National Assembly for Wales: s 26(1) (prospectively amended by the Government of Wales Act 2006 s 160(1), Sch 10 para 19). At the date at which this volume states the law no such day had been appointed. Similarly, nothing in the Public Order Act 1986 Pt III (as amended) applies to a fair and accurate report of proceedings publicly heard before a court or tribunal exercising judicial authority where the report is published contemporaneously with the proceedings or, if it is not reasonably practicable or would be unlawful to publish a report of them contemporaneously, as soon as publication is reasonably practicable and lawful: s 26(2).

As to the court's power to order forfeiture see PARA 568 post.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Public Order Act 1986 s 27(3) (amended by the Anti-terrorism, Crime and Security Act 2001 s 40). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

9 For the purposes of the Public Order Act 1986 Pt III (as amended), 'dwelling' means any structure or part of a structure occupied as a person's home or other living accommodation, whether the occupation is separate or shared with others, but does not include any part not so occupied; and, for this purpose, 'structure' includes a tent, caravan, vehicle, vessel or other temporary or movable structure: see s 29.

10 Ibid s 18(2).

11 Ibid s 18(4).

12 Ibid s 18(5).

## UPDATE

### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

### **562 Use of words or behaviour or display of written material**

NOTE 6--Amendment of Public Order Act 1986 s 26(1) now in force: see Government of Wales Act 2006 ss 46, 161(4), (5).

NOTE 7--See *R v Javed* [2007] EWCA Crim 2692, [2008] 2 Cr App Rep (S) 70.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(2) INCITEMENT TO RACIAL HATRED/563. Publishing or distributing written material.

### **563. Publishing or distributing written material.**

A person<sup>1</sup> who publishes or distributes<sup>2</sup> written material<sup>3</sup> which is threatening, abusive or insulting<sup>4</sup> is guilty of an offence if:

- 661 (1) he intends thereby to stir up racial hatred<sup>5</sup>; or
- 662 (2) having regard to all the circumstances racial hatred is likely to be stirred up thereby<sup>6</sup>.

A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>.

In proceedings for such an offence it is a defence for a defendant who is not shown to have intended to stir up racial hatred to prove<sup>9</sup> that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting<sup>10</sup>.

1 As to offences by corporations see PARA 562 note 1 ante.

2 For these purposes, references to the publication or distribution of written material are references to its publication or distribution to the public or a section of the public: Public Order Act 1986 s 19(3). As to the meaning of 'section of the public' see *R v Britton* [1967] 2 QB 51, 51 Cr App Rep 107, CA (Race Relations Act 1965 s 6). See also *Charter v Race Relations Board* [1973] AC 868, [1973] 1 All ER 512, HL (Race Relations Act 1968 s 2). 'Distribute' and related expressions are to be construed in accordance with the Public Order Act 1986 s 19(3) and s 21(2) (recordings: see PARA 565 note 2 post); and 'publish' and related expressions, in relation to written material, are to be construed in accordance with s 19(3): see s 29.

3 For the meaning of 'written material' see PARA 562 note 4 ante.

4 For the meaning of 'threatening, abusive or insulting' see PARA 558 note 1 ante.

5 For the meaning of 'racial hatred' see PARA 562 note 5 ante.

6 Public Order Act 1986 s 19(1).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 See the Public Order Act 1986 s 27(3) (amended by the Anti-terrorism, Crime and Security Act 2001 s 40). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. No proceedings for such an offence in England and Wales may be instituted except by or with the consent of the Attorney General: see the Public Order Act 1986 s 27(1); and PARA 562 note 6 ante. As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 19 creates one offence: s 27(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added and prospectively amended) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt III (ss 17-29) (as amended): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

As to the savings for reports of parliamentary or judicial proceedings see PARA 562 note 6 ante; and as to the court's power to order forfeiture see PARA 568 post.

9 As to whether the burden of proof is a legal (or persuasive) or evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

10 Public Order Act 1986 s 19(2).

## **UPDATE**

### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

### **563 Publishing or distributing written material**

NOTE 2--Where publication is to a website hosted by a foreign server, the jurisdiction of the court is not precluded provided that a substantial measure of the activities constituting the offence took place within the jurisdiction: *R v Sheppard* [2010] EWCA Crim 65, [2010] 1 Cr App Rep 394, [2010] All ER (D) 204 (Jan).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(2) INCITEMENT TO RACIAL HATRED/564. Public performance of play.

#### **564. Public performance of play.**

If a public performance<sup>1</sup> of a play<sup>2</sup> is given which involves the use of threatening, abusive or insulting<sup>3</sup> words or behaviour, any person<sup>4</sup> who presents<sup>5</sup> or directs<sup>6</sup> the performance is guilty of an offence<sup>7</sup> if:

- 663 (1) he intends thereby to stir up racial hatred<sup>8</sup>; or
- 664 (2) having regard to all the circumstances, and, in particular, taking the performance as a whole, racial hatred is likely to be stirred up thereby<sup>9</sup>.

A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup> or to a fine not exceeding the statutory maximum or to both<sup>11</sup>.

If a person presenting or directing the performance is not shown to have intended to stir up racial hatred, it is a defence for him to prove<sup>12</sup>:

- 665 (a) that he did not know and had no reason to suspect that the performance would involve the use of the offending words or behaviour<sup>13</sup>; or
- 666 (b) that he did not know and had no reason to suspect that the offending words or behaviour were threatening, abusive or insulting<sup>14</sup>; or
- 667 (c) that he did not know and had no reason to suspect that the circumstances in which the performance would be given would be such that racial hatred would be likely to be stirred up<sup>15</sup>.

1 For these purposes, 'public performance' includes any performance in a public place within the meaning of the Public Order Act 1936 (see PARA 380 note 2 ante) and any performance which the public or any section of the public (see PARA 563 note 2 ante) is permitted to attend, whether on payment or otherwise: Theatres Act 1968 s 18(1); applied by the Public Order Act 1986 s 20(5).

Section s 20 (as amended) does not, however, apply to a performance given solely or primarily for one of the following purposes: (1) rehearsal; (2) making a recording of the performance; or (3) enabling the performance to be included in a programme service; but if it is proved that the performance was attended by persons other than those directly concerned with the giving of the performance or the doing in relation to it of the things mentioned in head (2) or head (3) supra, the performance is, unless the contrary is shown, to be taken not to have been given solely for the purposes mentioned above: s 20(3) (amended by the Broadcasting Act 1990 s 164(2)(b)). For the meaning of 'programme service' see PARA 566 note 2 post.

2 For these purposes, 'play' means: (1) any dramatic piece, whether involving improvisation or not, which is given wholly or in part by one or more persons actually present and performing and in which the whole or a major proportion of what is done by the person or persons performing, whether by way of speech, singing or acting, involves the playing of a role; and (2) any ballet given wholly or in part by one or more persons actually present and performing, whether or not it falls within head (1) supra: Theatres Act 1968 s 18(1); applied by the Public Order Act 1986 s 20(5).

3 For the meaning of 'threatening, abusive or insulting' see PARA 558 note 1 ante.

4 As to offences by corporations see PARA 562 note 1 ante.

5 For these purposes, a person is not to be treated as presenting a performance of a play by reason only of his taking part in it as a performer: Public Order Act 1986 s 20(4)(a).

6 For these purposes, a person is to be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance: *ibid* s 20(4)(c). A person taking part as a performer in a performance directed by another is to be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction: s 20(4)(b).

7 A person is not to be treated as aiding or abetting the commission of such an offence by reason only of his taking part in a performance as a performer: see *ibid* s 20(4).

8 *Ibid* s 20(1)(a). For the meaning of 'racial hatred' see PARA 562 note 5 ante.

9 *Ibid* s 20(1)(b). The Theatres Act 1968 s 9 (as amended) (script as evidence of what was performed: see PARA 756 post), s 10 (as amended) (power to make copies of script: see PARA 756 post), s 15 (as amended) (powers of entry and inspection: see LICENSING AND GAMBLING vol 67 (2008) PARA 251) apply in relation to an offence under the Public Order Act 1986 s 20 (as amended) as they apply to an offence under the Theatres Act 1968 s 2 (as amended) (see LICENSING AND GAMBLING vol 67 (2008) PARA 246); Public Order Act 1986 s 20(6).

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt III (ss 17-29) (as amended): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

No proceedings for such an offence may be instituted except by or with the consent of the Attorney General: Public Order Act 1986 s 27(1). As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 20 (as amended) creates one offence: s 27(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As to the savings for reports of parliamentary or judicial proceedings see PARA 562 note 6 ante.

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

11 Public Order Act 1986 s 27(3) (amended by the Anti-terrorism, Crime and Security Act 2001 s 40). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

12 As to whether the burden of proof is a legal (or persuasive) or evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

13 Public Order Act 1986 s 20(2)(a).

14 *Ibid* s 20(2)(b).

15 *Ibid* s 20(2)(c).

## UPDATE

### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(2) INCITEMENT TO RACIAL HATRED/565. Distributing, showing or playing a recording.

### **565. Distributing, showing or playing a recording.**

A person<sup>1</sup> who distributes, or shows or plays<sup>2</sup>, a recording<sup>3</sup> of visual images or sounds which are threatening, abusive or insulting<sup>4</sup> is guilty of an offence if:

- 668 (1) he intends thereby to stir up racial hatred<sup>5</sup>; or
- 669 (2) having regard to all the circumstances racial hatred is likely to be stirred up thereby<sup>6</sup>.

A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>.

In proceedings for such an offence it is a defence for a defendant who is not shown to have intended to stir up racial hatred to prove<sup>9</sup> that he was not aware of the content of the recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting<sup>10</sup>.

1 As to offences by corporations see PARA 562 note 1 ante.

2 For these purposes, references to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public: see the Public Order Act 1986 ss 21(2), 29. As to the meaning of 'section of the public' see PARA 563 note 2 ante.

3 For these purposes, 'recording' means any record from which visual images or sounds may, by any means, be reproduced; and 'play' and 'show', and related expressions, in relation to a recording, are to be construed accordingly: see *ibid* ss 21(2), 29. However s 21 (as amended) does not apply to the showing or playing of a recording solely for the purposes of enabling the recording to be included in a programme service: s 21(4) (amended by the Broadcasting Act 1990 s 164(2)(c)). For the meaning of 'programme service' see PARA 566 note 2 post.

4 For the meaning of 'threatening, abusive or insulting' see PARA 558 note 1 ante.

5 Public Order Act 1986 s 21(1)(a). For the meaning of 'racial hatred' see PARA 562 note 5 ante.

6 *Ibid* s 21(1)(b). No proceedings for such an offence may be instituted except by or with the consent of the Attorney General: s 27(1). As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 21 (as amended) creates one offence: s 27(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt III (ss 17-29) (as amended): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

As to the savings for reports of parliamentary or judicial proceedings see PARA 562 note 6 ante.

As to the court's power to order forfeiture see PARA 568 post.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Public Order Act 1986 s 27(3) (amended by the Anti-terrorism, Crime and Security Act 2001 s 40). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

9 As to whether the burden of proof is a legal (or persuasive) or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

10 Public Order Act 1986 s 21(3).

## **UPDATE**

### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(2) INCITEMENT TO RACIAL HATRED/566. Inclusion in programme service.

**566. Inclusion in programme service.**

If a programme involving threatening, abusive or insulting<sup>1</sup> visual images or sounds is included in a programme service<sup>2</sup>, each of the persons<sup>3</sup> providing the programme service, any person by whom the programme<sup>4</sup> is produced or directed, and any person by whom offending words or behaviour are used, is guilty of an offence<sup>5</sup> if:

- 670 (1) he intends thereby to stir up racial hatred<sup>6</sup>; or
- 671 (2) having regard to all the circumstances racial hatred is likely to be stirred up thereby<sup>7</sup>,

and is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>8</sup> or to a fine not exceeding the statutory maximum or to both<sup>9</sup>.

If the person providing the service, or a person by whom the programme was produced or directed is not shown to have intended to stir up racial hatred, it is a defence for him to prove<sup>10</sup> that:

- 672 (a) he did not know and had no reason to suspect that the programme would involve the offending material<sup>11</sup>; and
- 673 (b) having regard to the circumstances in which the programme was included in a programme service, it was not reasonably practicable for him to secure the removal of the material<sup>12</sup>.

It is a defence for a person by whom the programme was produced or directed who is not shown to have intended to stir up racial hatred to prove<sup>13</sup> that he did not know and had no reason to suspect:

- 674 (i) that the programme would be included in a programme service<sup>14</sup>; or
- 675 (ii) that the circumstances in which the programme would be so included would be such that racial hatred would be likely to be stirred up<sup>15</sup>.

It is a defence for a person by whom offending words or behaviour were used and who is not shown to have intended to stir up racial hatred to prove<sup>16</sup> that he did not know and had no reason to suspect:

- 676 (A) that a programme involving the use of offending material would be included in a programme service<sup>17</sup>; or
- 677 (B) that the circumstances in which a programme involving the use of the offending material would be so included, or in which a programme so included would involve the use of the offending material, would be such that racial hatred would be likely to be stirred up<sup>18</sup>.

A person who is not shown to have intended to stir up racial hatred is not guilty of such an offence if he did not know, and had no reason to suspect, that the offending material was threatening, abusive or insulting<sup>19</sup>.

1 For the meaning of 'threatening, abusive or insulting' see PARA 558 note 1 ante.

2 'Programme service' has the same meaning as in the Broadcasting Act 1990 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328): Public Order Act 1986 s 29 (amended by the Broadcasting Act 1990 ss 164(5), 203(3), Sch 21).

3 As to offences by corporations see PARA 562 note 1 ante.

4 For these purposes, 'programme' means any item which is included in a programme service: Public Order Act 1986 s 29 (as amended: see note 2 supra).

5 See *ibid* s 22(1), (2) (s 22(1)-(5) amended by the Broadcasting Act 1990 ss 164(3), 203(3), Sch 21).

6 Public Order Act 1986 s 22(1)(a). For the meaning of 'racial hatred' see PARA 562 note 5 ante.

7 *Ibid* s 22(1)(b). For the power to make copies of recordings of any matter included in a programme service in respect of a suspected offence under s 22 (as amended) see the Broadcasting Act 1990 s 167; and PARA 747 note 7 post.

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt III (ss 17-29) (as amended): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

No proceedings for such an offence may be instituted except by or with the consent of the Attorney General: see the Public Order Act 1986 s 27(1). As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 22 creates one offence: s 27(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As to the savings for reports of parliamentary or judicial proceedings see PARA 562 note 6 ante.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 Public Order Act 1986 s 27(3) (amended by the Anti-terrorism, Crime and Security Act 2001 s 40). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

10 As to whether the burden of proof is a legal (or persuasive) or evidential burden, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

11 Public Order Act 1986 s 22(3)(a).

12 *Ibid* s 22(3)(b) (as amended: see note 5 supra).

13 See note 10 supra.

14 Public Order Act 1986 s 22(4)(a) (as amended: see note 5 supra).

15 *Ibid* s 22(4)(b) (as amended: see note 5 supra).

16 See note 10 supra.

17 Public Order Act 1986 s 22(5) (as amended: see note 5 supra).

18 *Ibid* s 22(5) (as amended: see note 5 supra).

19 Ibid s 22(6).

### **UPDATE**

#### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(2) INCITEMENT TO RACIAL HATRED/567. Possession of racially inflammatory material.

### **567. Possession of racially inflammatory material.**

A person<sup>1</sup> who has in his possession written material<sup>2</sup> which is threatening, abusive or insulting<sup>3</sup>, or a recording<sup>4</sup> of visual images or sounds which are threatening, abusive or insulting, with a view to:

- 678 (1) in the case of written material, its being displayed, published<sup>5</sup>, distributed<sup>6</sup>, or included in a programme service<sup>7</sup>, whether by himself or another<sup>8</sup>; or
- 679 (2) in the case of a recording, its being distributed or included in a programme service, whether by himself or another<sup>9</sup>,

is guilty of an offence if he intends racial hatred<sup>10</sup> to be stirred up thereby or, having regard to all the circumstances, racial hatred is likely to be stirred up thereby<sup>11</sup>. A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>12</sup> or to a fine not exceeding the statutory maximum or to both<sup>13</sup>.

In proceedings for such an offence it is a defence for a defendant who is not shown to have intended to stir up racial hatred to prove<sup>14</sup> that he was not aware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting<sup>15</sup>.

If in England and Wales a justice of the peace is satisfied by information on oath laid by a constable that there are reasonable grounds for suspecting that a person has possession of such written material or recording, the justice may issue a warrant under his hand authorising any constable to enter and search<sup>16</sup> the premises<sup>17</sup> where it is suspected the material or recording is situated<sup>18</sup>.

1 As to offences by corporations see PARA 562 note 1 ante.

2 For the meaning of 'written material' see PARA 562 note 4 ante.

3 For the meaning of 'threatening, abusive or insulting' see PARA 558 note 1 ante.

4 For the meaning of 'recording' see PARA 565 note 3 ante.

5 For the meaning of 'publish' see PARA 563 note 2 ante.

6 For the meaning of 'distribute' see PARA 563 note 2 ante.

7 For the meaning of 'programme service' see PARA 566 note 2 ante.

8 See the Public Order Act 1986 s 23(1)(a) (s 23(1), (2) amended by the Broadcasting Act 1990 s 164(4)).

9 See the Public Order Act 1986 s 23(1)(b) (as amended: see note 8 supra).

10 For the meaning of 'racial hatred' see PARA 562 note 5 ante.

11 See the Public Order Act 1986 s 23(1) (as amended: see note 8 supra). For the purposes of s 23 (as amended) regard must be had to such display, publication, distribution, showing, playing or inclusion in a

programme service as the defendant has, or it may reasonably be inferred that he has, in view: s 23(2) (as so amended).

No proceedings for such an offence may be instituted except by or with the consent of the Attorney General: see s 27(1). As to the effect of this limitation see PARA 1071 post.

For the purpose of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 23 (as amended) creates one offence: s 27(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt III (ss 17-29) (as amended): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

As to the savings for reports of parliamentary or judicial proceedings see PARA 562 note 6 ante.

As to the court's power to order forfeiture see PARA 568 post.

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

13 Public Order Act 1986 s 27(3) (amended by the Anti-terrorism, Crime and Security Act 2001 s 40). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to sentencing see *R v Gray* [1999] 1 Cr App Rep (S) 50, CA.

14 As to whether the burden of proof is a legal (or persuasive) or evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

15 Public Order Act 1986 s 23(3).

16 A constable entering or searching premises in pursuance of a warrant issued under this power may use reasonable force if necessary: *ibid* s 24(3). As to powers of entry, search and seizure see PARA 869 et seq ante.

17 For these purposes, 'premises' means any place and, in particular, includes: (1) any vehicle, vessel, aircraft or hovercraft; (2) any offshore installation as defined in the Mineral Workings (Offshore Installations) Act 1971 s 1(3)(b) (repealed) (see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARAS 1677, 1681, 1684); and (3) any tent or movable structure: Public Order Act 1986 s 24(4) (amended by virtue of the Offshore Installations and Pipeline Works (Management and Administration) Regulations 1995, SI 1995/738, regs 3, 22(1), Sch 1 Pt I).

18 Public Order Act 1986 s 24(1).

## UPDATE

### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(2) INCITEMENT TO RACIAL HATRED/568. Power to order forfeiture.

### **568. Power to order forfeiture.**

A court by or before which a person is convicted of:

- 680 (1) an offence relating to the display of written material<sup>1</sup>; or
- 681 (2) an offence of publishing or distributing written material<sup>2</sup>, distributing, showing or playing a recording<sup>3</sup> or possessing racially inflammatory material<sup>4</sup>,

must order to be forfeited any written material<sup>5</sup> or recordings<sup>6</sup> produced to the court and shown to its satisfaction to be written material or a recording to which the offence relates<sup>7</sup>.

An order so made in proceedings in England and Wales does not take effect until the expiry of the ordinary time within which an appeal may be instituted or, where an appeal is duly instituted, until it is finally decided or abandoned<sup>8</sup>.

1    Ie under the Public Order Act 1986 s 18 (as amended): see PARA 562 ante.

2    Ie under ibid s 19: see PARA 563 ante.

3    Ie under ibid s 21 (as amended): see PARA 565 ante.

4    Ie under ibid s 23 (as amended): see PARA 567 ante.

5    For the meaning of 'written material' see PARA 562 note 4 ante.

6    For the meaning of 'recording' see PARA 565 note 3 ante.

7    Public Order Act 1986 s 25(1).

8    Ibid s 25(2)(a). For these purposes, an application for a case stated or for leave to appeal is to be treated as the institution of an appeal; and, where a decision on appeal is subject to a further appeal, the appeal is not finally determined until the expiry of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned: s 25(3). As to appeals generally see PARA 1837 et seq post.

### **UPDATE**

#### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(3) INCITEMENT TO RELIGIOUS HATRED/569. Use of words or behaviour or display of written material.

### **(3) INCITEMENT TO RELIGIOUS HATRED**

#### **569. Use of words or behaviour or display of written material.**

As from a day to be appointed<sup>1</sup>, a person<sup>2</sup> who uses threatening words or behaviour<sup>3</sup>, or displays any written material<sup>4</sup> which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred<sup>5</sup>. A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup> or to a fine not exceeding the statutory maximum or to both<sup>7</sup>.

Such an offence may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling<sup>8</sup> and are not heard or seen except by other persons in that or another dwelling<sup>9</sup>. In proceedings for such an offence it is a defence for the defendant to prove<sup>10</sup> that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling<sup>11</sup>.

1 The Public Order Act 1986 Pt IIIA (ss 29A-29N) is added by the Racial and Religious Hatred Act 2006 s 1, Schedule as from such day as the Secretary of State may appoint by statutory instrument: see s 3(2), (3). At the date at which this volume states the law no such day had been appointed.

2 Where a body corporate is guilty of an offence under the Public Order Act 1986 Pt IIIA (as added) and it is shown that the offence was committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly: s 29M(1) (as added: see note 1 supra). Where the affairs of a body corporate are managed by its members, the Public Order Act 1986 s 29M(1) (as added) applies in relation to the acts and defaults of a member in connection with his functions of management as it applies to a director: s 29M(2) (as so added). See also PARA 38 ante.

3 For the meaning of 'threatening' see PARA 558 note 1 ante. The Public Order Act 1986 s 29M (as added) (see note 1 supra) does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service: s 29B(5) (as added: see note 1 supra). For the meaning of 'programme service' see PARA 573 note 2 post.

4 'Written material' includes any sign or other visible representation: *ibid* s 29N (as added: see note 1 supra). As to the meaning of 'written' see PARA 578 note 3 post.

5 See *ibid* s 29B(1) (as added: see note 1 supra). For the purposes of Pt IIIA (as added), 'religious hatred' means hatred against a group of persons defined by reference to religious belief or lack of religious belief: s 29A (as so added).

No proceedings for such an offence may be instituted in England and Wales except by or with the consent of the Attorney General: s 29L(1) (as so added). As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules in England and Wales against charging more than one offence in the same count or information (see PARA 1211 post), s 29B (as added) creates one offence: s 29L(2) (as so added). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

A constable may arrest without warrant anyone he reasonably suspects is committing such an offence: s 29B(3) (as so added). Note, however, the wider, general powers of arrest of a constable: see PARA 910 et seq post. As

from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt IIIA (as added): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

Nothing in the Public Order Act 1986 Pt IIIA (as added) applies to a fair and accurate report of proceedings in Parliament (s 29K(1) (as so added)); nor does anything in Pt IIIA (as added) apply to a fair and accurate report of proceedings publicly heard before a court or tribunal exercising judicial authority where the report is published contemporaneously with the proceedings or, if it is not reasonably practicable or would be unlawful to publish a report of them contemporaneously, as soon as publication is reasonably practicable and lawful (s 29K(2) (as so added)).

As to the protection of freedom of expression see PARA 576 post. As to the court's power to order forfeiture see PARA 575 post.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 Public Order Act 1986 s 29L(3) (as added: see note 1 supra). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

8 For these purposes, 'dwelling' means any structure or part of a structure occupied as a person's home or other living accommodation, whether the occupation is separate or shared with others, but does not include any part not so occupied; and, for this purpose, 'structure' includes a tent, caravan, vehicle, vessel or other temporary or movable structure: see *ibid* s 29N (as added: see note 1 supra).

9 *Ibid* s 29B(2) (as added: see note 1 supra).

10 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 *et seq* post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 *et seq*.

11 Public Order Act 1986 s 29B(4) (as added: see note 1 supra).

## UPDATE

### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

### **569-576 Incitement to Religious Hatred or Hatred on the Grounds of Sexual Orientation**

Provision is made as to the liability of information society service providers who are established in England and Wales or other EEA states, to prosecution under the Public Order Act 1986 Pt 3A (ss 29A-29N): see the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010, SI 2010/894.

Public Order Act 1986 Pt 3A further amended to include provision relating to hatred on the grounds of sexual orientation: see Criminal Justice and Immigration Act 2008 Sch 16.

### **569 Use of words or behaviour or display of written material**



TEXT AND NOTES 5, 7--Public Order Act 1986 s 29B(3) repealed, ss 29K(1), 29L(1)-(3) amended, s 29L(4) added: Criminal Justice and Immigration Act 2008 Sch 16 paras 6(3), 15, 16, Sch 28 Pt 5.

TEXT AND NOTE 5--In the Public Order Act 1986 s 29B(1) after 'religious hatred' add 'or hatred on the grounds of sexual orientation': Criminal Justice and Immigration Act 2008 Sch 16 para 6(2). In the Public Order Act 1986 Pt 3A 'hatred on the grounds of sexual orientation' means hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both): Public Order Act 1986 s 29AB (added by Criminal Justice and Immigration Act 2008 Sch 16 para 4).

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### **570. Publishing or distributing written material.**

As from a day to be appointed<sup>1</sup>, a person<sup>2</sup> who publishes or distributes<sup>3</sup> written material<sup>4</sup> which is threatening<sup>5</sup> is guilty of an offence if he intends thereby to stir up religious hatred<sup>6</sup>. A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>.

1 The Public Order Act 1986 Pt IIIA (ss 29A-29N) is added by the Racial and Religious Hatred Act 2006 s 1, Schedule as from such day as the Secretary of State may appoint by statutory instrument: see s 3(2), (3). At the date at which this volume states the law no such day had been appointed.

2 As to offences by corporations see PARA 569 note 2 ante.

3 For these purposes, references to the publication or distribution of written material are references to its publication or distribution to the public or a section of the public: Public Order Act 1986 s 29C(2) (as added: see note 1 supra). In Pt IIIA (as added), 'distribute' and related expressions are to be construed in accordance with s 29C(2) (as added) and s 29E(2) (as added) (recordings: see PARA 572 note 3 post); and 'publish' and related expressions, in relation to written material, are to be construed in accordance with s 29C(2) (as added): s 29N (as so added). As to the meaning of 'section of the public' see PARA 563 note 2 ante.

4 For the meaning of 'written material' see PARA 569 note 4 ante.

5 For the meaning of 'threatening' see PARA 558 note 1 ante.

6 See the Public Order Act 1986 s 29C(1) (as added: see note 1 supra). For the meaning of 'religious hatred' see PARA 569 note 5 ante. No proceedings for such an offence in England and Wales may be instituted except by or with the consent of the Attorney General: s 29L(1) (as so added). As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 29C (as added) creates one offence: s 29L(2) (as so added). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt IIIA (as added): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

As to the savings for reports of parliamentary or judicial proceedings see PARA 569 note 5 ante. As to the protection of freedom of expression see PARA 576 post. As to the court's power to order forfeiture see PARA 575 post.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Public Order Act 1986 s 29L(3) (as added: see note 1 supra). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

### **UPDATE**

**562-576 Use of words or behaviour or display of written material ...  
Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

**569-576 Incitement to Religious Hatred or Hatred on the Grounds of Sexual Orientation**

Provision is made as to the liability of information society service providers who are established in England and Wales or other EEA states, to prosecution under the Public Order Act 1986 Pt 3A (ss 29A-29N): see the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010, SI 2010/894.

Public Order Act 1986 Pt 3A further amended to include provision relating to hatred on the grounds of sexual orientation: see Criminal Justice and Immigration Act 2008 Sch 16.

**570 Publishing or distributing written material**

TEXT AND NOTES 6, 8--Public Order Act 1986 s 29L(1)-(3) amended, s 29L(4) added: Criminal Justice and Immigration Act 2008 Sch 16 para 16, Sch 28 Pt 5.

TEXT AND NOTE 6--In the Public Order Act 1986 s 29C(1) after 'religious hatred' add 'or hatred on the grounds of sexual orientation': Criminal Justice and Immigration Act 2008 Sch 16 para 7. 'Hatred on the grounds of sexual orientation' has the meaning given by the Public Order Act 1986 s 29AB (see PARA 569): Public Order Act 1986 s 29N (amended by Criminal Justice and Immigration Act 2008 Sch 16 para 17).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(3) INCITEMENT TO RELIGIOUS HATRED/571. Public performance of play.

### **571. Public performance of play.**

As from a day to be appointed<sup>1</sup>, if a public performance of a play<sup>2</sup> is given which involves the use of threatening<sup>3</sup> words or behaviour, any person<sup>4</sup> who presents<sup>5</sup> or directs<sup>6</sup> the performance is guilty of an offence<sup>7</sup> if he intends thereby to stir up religious hatred<sup>8</sup>. A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the statutory maximum or to both<sup>10</sup>.

1 The Public Order Act 1986 Pt IIIA (ss 29A-29N) is added by the Racial and Religious Hatred Act 2006 s 1, Schedule as from such day as the Secretary of State may appoint by statutory instrument: see s 3(2), (3). At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'play' see PARA 564 note 2 ante; definition applied by the Public Order Act 1986 s 29D(4) (as added: see note 1 supra). For these purposes, 'public performance' includes any performance in a public place within the meaning of the Public Order Act 1936 (see PARA 380 note 2 ante) and any performance which the public or any section of the public (see PARA 563 note 2 ante) is permitted to attend, whether on payment or otherwise: Theatres Act 1968 s 18(1); applied by the Public Order Act 1986 s 29D(4) (as so added).

Section 29D (as added) does not, however, apply to a performance given solely or primarily for one of the following purposes:

- 91 (1) rehearsal;
- 92 (2) making a recording of the performance; or
- 93 (3) enabling the performance to be included in a programme service,

but if it is proved that the performance was attended by persons other than those directly concerned with the giving of the performance or the doing in relation to it of the things mentioned in head (2) or head (3) supra, the performance is, unless the contrary is shown, to be taken not to have been given solely for the purposes mentioned above: s 29D(2) (as so added). For the meaning of 'programme service' see PARA 573 note 2 post.

3 For the meaning of 'threatening' see PARA 558 note 1 ante.

4 As to offences by corporations see PARA 569 note 1 ante.

5 For these purposes, a person is not to be treated as presenting a performance of a play by reason only of his taking part in it as a performer: Public Order Act 1986 s 29D(3)(a) (as added: see note 1 supra).

6 For these purposes, a person is to be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance: *ibid* s 29D(3)(c) (as added: see note 1 supra). A person taking part as a performer in a performance directed by another is to be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction: s 29D(3)(b) (as so added).

7 A person is not to be treated as aiding or abetting the commission of such an offence by reason only of his taking part in a performance as a performer: see *ibid* s 29D(3) (as added: see note 1 supra).

8 *Ibid* s 29D(1) (as added: see note 1 supra). For the meaning of 'religious hatred' see PARA 569 note 5 ante.

The Theatres Act 1968 s 9 (as amended) (script as evidence of what was performed: see PARA 756 post), s 10 (as amended) (power to make copies of script: see PARA 756 post), s 15 (as amended) (powers of entry and inspection: see LICENSING AND GAMBLING vol 67 (2008) PARA 251) apply in relation to an offence under the Public Order Act 1986 s 29D (as added) as they apply to an offence under the Theatres Act 1968 s 2 (see LICENSING AND GAMBLING vol 67 (2008) PARA 246): Public Order Act 1986 s 29D(5) (as so added).

No proceedings for such an offence may be instituted except by or with the consent of the Attorney General: s 29L(1) (as added: see note 1 supra). As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 29D (as added) creates one offence: s 29L(2) (as so added). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt IIIA (as added): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

As to the savings for reports of parliamentary or judicial proceedings see PARA 569 note 5 ante. As to the protection of freedom of expression see PARA 576 post.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 Public Order Act 1986 s 29L(3) (as added: see note 1 supra). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

### **569-576 Incitement to Religious Hatred or Hatred on the Grounds of Sexual Orientation**

Provision is made as to the liability of information society service providers who are established in England and Wales or other EEA states, to prosecution under the Public Order Act 1986 Pt 3A (ss 29A-29N): see the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010, SI 2010/894.

Public Order Act 1986 Pt 3A further amended to include provision relating to hatred on the grounds of sexual orientation: see Criminal Justice and Immigration Act 2008 Sch 16.

### **571 Public performance of play**

TEXT AND NOTES 8, 10--Public Order Act 1986 s 29L(1)-(3) amended, s 29L(4) added: Criminal Justice and Immigration Act 2008 Sch 16 para 16, Sch 28 Pt 5.

TEXT AND NOTE 8--In the Public Order Act 1986 s 29D(1) after 'religious hatred' add 'or hatred on the grounds of sexual orientation': Criminal Justice and Immigration Act 2008 Sch 16 para 8. For the meaning of 'hatred on the grounds of sexual orientation' see PARA 569.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(3) INCITEMENT TO RELIGIOUS HATRED/572. Distributing, showing or playing a recording.

## **572. Distributing, showing or playing a recording.**

As from a day to be appointed<sup>1</sup>, a person<sup>2</sup> who distributes, or shows or plays<sup>3</sup>, a recording<sup>4</sup> of visual images or sounds which are threatening<sup>5</sup> is guilty of an offence if he intends thereby to stir up religious hatred<sup>6</sup>. A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup> or to a fine not exceeding the statutory maximum or to both<sup>7</sup>.

1 The Public Order Act 1986 Pt IIIA (ss 29A-29N) is added by the Racial and Religious Hatred Act 2006 s 1, Schedule as from such day as the Secretary of State may appoint by statutory instrument: see s 3(2), (3). At the date at which this volume states the law no such day had been appointed.

2 As to offences by corporations see PARA 569 note 1 ante.

3 For these purposes, references to the distribution, showing or playing of a recording are references to its distribution, showing or playing to the public or a section of the public: see the Public Order Act 1986 ss 29E(2), 29N (both as added: see note 1 supra). As to the meaning of 'section of the public' see PARA 563 note 2 ante.

4 For these purposes, 'recording' means any record from which visual images or sounds may, by any means, be reproduced: see *ibid* ss 29E(2), 29N (both as added: see note 1 supra). 'Play' and 'show' and related expressions, in relation to a recording, are to be construed in accordance with s 29E(2) (as added): s 29N (as so added). However, s 29E (as added) does not apply to the showing or playing of a recording solely for the purposes of enabling the recording to be included in a programme service: s 29E(3) (as so added). For the meaning of 'programme service' see PARA 573 note 2 post.

5 For the meaning of 'threatening' see PARA 558 note 1 ante.

6 Public Order Act 1986 s 29E(1) (as added: see note 1 supra). For the meaning of 'religious hatred' see PARA 569 note 5 ante. No proceedings for such an offence may be instituted except by or with the consent of the Attorney General: s 29L(1) (as so added). As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 29E (as added) creates one offence: s 29L(2) (as so added). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt IIIA (as added): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

As to the savings for reports of parliamentary or judicial proceedings see PARA 569 note 5 ante. As to the protection of freedom of expression see PARA 576 post. As to the court's power to order forfeiture see PARA 575 post.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Public Order Act 1986 s 29L(3) (as added: see note 1 supra). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

### **569-576 Incitement to Religious Hatred or Hatred on the Grounds of Sexual Orientation**

Provision is made as to the liability of information society service providers who are established in England and Wales or other EEA states, to prosecution under the Public Order Act 1986 Pt 3A (ss 29A-29N): see the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010, SI 2010/894.

Public Order Act 1986 Pt 3A further amended to include provision relating to hatred on the grounds of sexual orientation: see Criminal Justice and Immigration Act 2008 Sch 16.

### **572 Distributing, showing or playing a recording**

TEXT AND NOTES 6, 8--Public Order Act 1986 s 29L(1)-(3) amended, s 29L(4) added: Criminal Justice and Immigration Act 2008 Sch 16 para 16, Sch 28 Pt 5.

TEXT AND NOTE 6--In the Public Order Act 1986 s 29E(1) after 'religious hatred' add 'or hatred on the grounds of sexual orientation': Criminal Justice and Immigration Act 2008 Sch 16 para 9. For the meaning of 'hatred on the grounds of sexual orientation' see PARA 569.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(3) INCITEMENT TO RELIGIOUS HATRED/573. Inclusion in programme service.

### **573. Inclusion in programme service.**

As from a day to be appointed<sup>1</sup>, if a programme involving threatening<sup>2</sup> visual images or sounds is included in a programme service<sup>3</sup>, each of the persons<sup>4</sup> providing the programme service, any person by whom the programme<sup>5</sup> is produced or directed, and any person by whom offending words or behaviour are used, is guilty of an offence if he intends to stir up religious hatred<sup>6</sup>. A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>.

1 The Public Order Act 1986 Pt IIIA (ss 29A-29N) is added by the Racial and Religious Hatred Act 2006 s 1, Schedule as from such day as the Secretary of State may appoint by statutory instrument: see s 3(2), (3). At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'threatening' see PARA 558 note 1 ante.

3 'Programme service' has the same meaning as in the Broadcasting Act 1990 (see s 201 (as amended); and TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328): Public Order Act 1986 s 29N (as added: see note 1 supra).

4 As to offences by corporations see PARA 569 note 1 ante.

5 For these purposes, 'programme' means any item which is included in a programme service: see the Public Order Act 1986 s 29N (as added: see note 1 supra).

6 Ibid s 29F(1), (2) (as added: see note 1 supra). For the meaning of 'religious hatred' see PARA 569 note 5 ante. No proceedings for such an offence may be instituted except by or with the consent of the Attorney General: s 29L(1) (as so added). As to the effect of this limitation see PARA 1071 post.

For the purposes of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 29F (as added) creates one offence: s 29L(2) (as so added). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt IIIA (as added): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

As to the savings for reports of parliamentary or judicial proceedings see PARA 569 note 5 ante. As to the protection of freedom of expression see PARA 576 post.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Public Order Act 1986 s 29L(3) (as added: see note 1 supra). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

### **UPDATE**



**562-576 Use of words or behaviour or display of written material ...  
Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

**569-576 Incitement to Religious Hatred or Hatred on the Grounds of Sexual Orientation**

Provision is made as to the liability of information society service providers who are established in England and Wales or other EEA states, to prosecution under the Public Order Act 1986 Pt 3A (ss 29A-29N): see the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010, SI 2010/894.

Public Order Act 1986 Pt 3A further amended to include provision relating to hatred on the grounds of sexual orientation: see Criminal Justice and Immigration Act 2008 Sch 16.

**573 Inclusion in programme service**

TEXT AND NOTES 6, 8--Public Order Act 1986 s 29L(1)-(3) amended, s 29L(4) added: Criminal Justice and Immigration Act 2008 Sch 16 para 16, Sch 28 Pt 5.

TEXT AND NOTE 6--In the Public Order Act 1986 s 29F(1) after 'religious hatred' add 'or hatred on the grounds of sexual orientation': Criminal Justice and Immigration Act 2008 Sch 16 para 10. For the meaning of 'hatred on the grounds of sexual orientation' see PARA 569.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(3) INCITEMENT TO RELIGIOUS HATRED/574. Possession of religiously inflammatory material.

#### **574. Possession of religiously inflammatory material.**

As from a day to be appointed<sup>1</sup>, a person<sup>2</sup> who has in his possession written material<sup>3</sup> which is threatening<sup>4</sup>, or a recording<sup>5</sup> of visual images or sounds which are threatening, with a view to:

- 682 (1) in the case of written material, its being displayed, published<sup>6</sup>, distributed<sup>7</sup>, or included in a programme service<sup>8</sup>, whether by himself or another<sup>9</sup>; or
- 683 (2) in the case of a recording, its being distributed or included in a programme service, whether by himself or another<sup>10</sup>,

is guilty of an offence if he intends religious hatred<sup>11</sup> to be stirred up thereby<sup>12</sup>. A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>13</sup> or to a fine not exceeding the statutory maximum or to both<sup>14</sup>.

If in England and Wales a justice of the peace is satisfied by information on oath laid by a constable that there are reasonable grounds for suspecting that a person has possession of such written material or recording, the justice may issue a warrant under his hand authorising any constable to enter and search<sup>15</sup> the premises<sup>16</sup> where it is suspected the material or recording is situated<sup>17</sup>.

1 The Public Order Act 1986 Pt IIIA (ss 29A-29N) is added by the Racial and Religious Hatred Act 2006 s 1, Schedule as from such day as the Secretary of State may appoint by statutory instrument: see s 3(2), (3). At the date at which this volume states the law no such day had been appointed.

2 As to offences by corporations see PARA 569 note 1 ante.

3 For the meaning of 'written material' see PARA 569 note 4 ante.

4 For the meaning of 'threatening' see PARA 558 note 1 ante.

5 For the meaning of 'recording' see PARA 572 note 3 ante.

6 For the meaning of 'publish' see PARA 570 note 2 ante.

7 For the meaning of 'distribute' see PARA 570 note 2 ante.

8 For the meaning of 'programme service' see PARA 573 note 2 ante.

9 Public Order Act 1986 s 29G(1)(a) (as added: see note 1 supra).

10 Ibid s 29G(1)(b) (as added: see note 1 supra).

11 For the meaning of 'religious hatred' see PARA 569 note 5 ante.

12 See the Public Order Act 1986 s 29G(1) (as added: see note 1 supra). For the purposes of s 29G (as added), regard must be had to such display, publication, distribution, showing, playing or inclusion in a programme service as the defendant has, or it may reasonably be inferred that he has, in view: s 29G(2) (as so added).

No proceedings for such an offence may be instituted except by or with the consent of the Attorney General: s 29L(1) (as so added). As to the effect of this limitation see PARA 1071 post.

For the purpose of the rules against charging more than one offence in the same count or information (see PARA 1211 post), s 29G (as added) creates one offence: s 29L(2) (as so added). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed, the Police and Criminal Evidence Act 1984 provides that the powers of arrest possessed by persons other than constables under s 24A (as added) (see PARA 925 post) do not apply to an offence under the Public Order Act 1986 Pt IIIA (as added): Police and Criminal Evidence Act 1984 s 24A(5) (prospectively added by the Racial and Religious Hatred Act 2006 s 2). At the date at which this volume states the law no such day had been appointed.

As to the savings for reports of parliamentary or judicial proceedings see PARA 569 note 5 ante. As to the protection of freedom of expression see PARA 576 post. As to the court's power to order forfeiture see PARA 575 post.

13 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

14 Public Order Act 1986 s 29L(3) (as added: see note 1 supra). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

15 A constable entering or searching premises in pursuance of a warrant issued under this power may use reasonable force if necessary: *ibid* s 29H(3) (as added: see note 1 supra). As to powers of entry, search and seizure see PARA 869 et seq ante.

16 For these purposes, 'premises' means any place and, in particular, includes: (1) any vehicle, vessel, aircraft or hovercraft; (2) any offshore installation as defined in the Mineral Workings (Offshore Installations) Act 1971 s 12 (as added and substituted) (see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARAS 1677, 1681, 1684); and (3) any tent or movable structure: Public Order Act 1986 s 29H(4) (as added: see note 1 supra).

17 *Ibid* s 29H(1) (as added: see note 1 supra).

## UPDATE

### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

### **569-576 Incitement to Religious Hatred or Hatred on the Grounds of Sexual Orientation**

Provision is made as to the liability of information society service providers who are established in England and Wales or other EEA states, to prosecution under the Public Order Act 1986 Pt 3A (ss 29A-29N): see the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010, SI 2010/894.

Public Order Act 1986 Pt 3A further amended to include provision relating to hatred on the grounds of sexual orientation: see Criminal Justice and Immigration Act 2008 Sch 16.

### **574 Possession of religiously inflammatory material**

TEXT AND NOTES 11, 12--In the Public Order Act 1986 s 29G(1) for 'religious hatred to be stirred up thereby' substitute 'thereby to stir up religious hatred or hatred on the

grounds of sexual orientation': Criminal Justice and Immigration Act 2008 Sch 16 para 11. For the meaning of 'hatred on the grounds of sexual orientation' see PARA 569.

TEXT AND NOTES 12, 14--Public Order Act 1986 s 29L(1)-(3) amended, s 29L(4) added: Criminal Justice and Immigration Act 2008 Sch 16 para 16, Sch 28 Pt 5.

TEXT AND NOTE 17--Public Order Act 1986 s 29H(1) amended: Criminal Justice and Immigration Act 2008 Sch 16 para 12(2), Sch 28 Pt 5.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(3) INCITEMENT TO RELIGIOUS HATRED/575. Power to order forfeiture.

### **575. Power to order forfeiture.**

As from a day to be appointed<sup>1</sup>, a court by or before which a person is convicted of:

- 684 (1) an offence relating to the display of written material<sup>2</sup>; or
- 685 (2) an offence of publishing or distributing written material<sup>3</sup>, distributing, showing or playing a recording<sup>4</sup> or possessing religiously inflammatory material<sup>5</sup>,

must order to be forfeited any written material<sup>6</sup> or recordings<sup>7</sup> produced to the court and shown to its satisfaction to be written material or a recording to which the offence relates<sup>8</sup>.

An order so made in proceedings in England and Wales does not take effect until the expiry of the ordinary time within which an appeal may be instituted or, where an appeal is duly instituted, until it is finally decided or abandoned<sup>9</sup>.

1 The Public Order Act 1986 Pt IIIA (ss 29A-29N) is added by the Racial and Religious Hatred Act 2006 s 1, Schedule as from such day as the Secretary of State may appoint by statutory instrument: see s 3(2), (3). At the date at which this volume states the law no such day had been appointed.

2 Public Order Act 1986 s 29I(1)(a) (as added: see note 1 supra). See s 29B (as added); and PARA 569 ante.

3 *Ie* under *ibid* s 29C (as added): see PARA 570 ante.

4 *Ie* under *ibid* s 29E (as added): see PARA 572 ante.

5 *Ibid* s 29I(1)(b) (as added: see note 1 supra). See s 29G (as added); and PARA 574 ante.

6 For the meaning of 'written material' see PARA 569 note 4 ante.

7 For the meaning of 'recording' see PARA 572 note 3 ante.

8 See the Public Order Act 1986 s 29I(1) (as added: see note 1 supra).

9 *Ibid* s 29I(2) (as added: see note 1 supra). For these purposes, an application for a case stated or for leave to appeal is to be treated as the institution of an appeal; and, where a decision on appeal is subject to a further appeal, the appeal is not finally determined until the expiry of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned: s 29I(3) (as so added). As to appeals generally see PARA 1837 *et seq post*.

### **UPDATE**

#### **562-576 Use of words or behaviour or display of written material ... Protection of freedom of expression**

Amendments made by Racial and Religious Hatred Act 2006 now largely in force: SI 2007/2490.

#### **569-576 Incitement to Religious Hatred or Hatred on the Grounds of Sexual Orientation**

Provision is made as to the liability of information society service providers who are established in England and Wales or other EEA states, to prosecution under the Public Order Act 1986 Pt 3A (ss 29A-29N): see the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010, SI 2010/894.

Public Order Act 1986 Pt 3A further amended to include provision relating to hatred on the grounds of sexual orientation: see Criminal Justice and Immigration Act 2008 Sch 16.

### **575 Power to order forfeiture**

TEXT AND NOTE 9--Public Order Act 1986 s 29I(2) amended: Criminal Justice and Immigration Act 2008 Sch 16 para 13(2), Sch 28 Pt 5.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(3) INCITEMENT TO RELIGIOUS HATRED/576. Protection of freedom of expression.

## **576. Protection of freedom of expression.**

As from a day to be appointed<sup>1</sup>, nothing in the provisions relating to inciting religious hatred<sup>2</sup> is to be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system<sup>3</sup>.

1 The Public Order Act 1986 Pt IIIA (ss 29A-29N) is added by the Racial and Religious Hatred Act 2006 s 1, Schedule as from such day as the Secretary of State may appoint by statutory instrument: see s 3(2), (3). At the date at which this volume states the law no such day had been appointed.

2 In the Public Order Act 1986 Pt IIIA (as added): see PARAS 569-575 ante.

3 See *ibid* s 29J (as added: see note 1 *supra*).

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Provision is made as to the liability of information society service providers who are established in England and Wales or other EEA states, to prosecution under the Public Order Act 1986 Pt 3A (ss 29A-29N): see the Electronic Commerce Directive (Hatred against Persons on Religious Grounds or the Grounds of Sexual Orientation) Regulations 2010, SI 2010/894.

Public Order Act 1986 Pt 3A further amended to include provision relating to hatred on the grounds of sexual orientation: see Criminal Justice and Immigration Act 2008 Sch 16.

## **576 Protection of freedom of expression**

TEXT AND NOTES--See also Public Order Act 1986 s 29JA (added by Criminal Justice and Immigration Act 2008 Sch 16 para 14) (protection of freedom of expression (sexual orientation)).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(4) ALCOHOL CONSUMPTION IN PUBLIC PLACES/577. Alcohol consumption in designated public places.

#### **(4) ALCOHOL CONSUMPTION IN PUBLIC PLACES**

##### **577. Alcohol consumption in designated public places.**

If a constable reasonably believes that a person is, or has been, consuming alcohol<sup>1</sup> in a designated public place<sup>2</sup> or intends to consume alcohol in such a place, the constable may require<sup>3</sup> the person concerned: (1) not to consume in that place anything which is, or which the constable reasonably believes to be, alcohol; (2) to surrender anything in his possession which is, or which the constable reasonably believes to be, alcohol or a container for alcohol<sup>4</sup>.

A person who fails without reasonable excuse to comply with such a requirement commits an offence and is liable on summary conviction to a fine not exceeding level 2 on the standard scale<sup>5</sup>.

Subject to heads (a) to (d) below<sup>6</sup>, a place is a designated public place if it is a public place in the area of a local authority<sup>7</sup> and it is identified in an order made by that authority<sup>8</sup>. A local authority may for these purposes by order identify any public place in its area if it is satisfied that nuisance or annoyance to members of the public or a section of the public, or disorder, has been associated with the consumption of alcohol in that place<sup>9</sup>.

A place is not a designated public place or a part of such a place if it is: (a) premises in respect of which a premises licence or club premises certificate, within the meaning of the Licensing Act 2003, has effect; (b) a place within the curtilage of premises within head (a) above; (c) premises which by virtue of provisions of the Licensing Act 2003 relating to permitted temporary activities<sup>10</sup> may for the time being be used for the supply of alcohol<sup>11</sup> or which, by virtue of that Part, could have been so used within the last 20 minutes; and (d) a place where facilities or activities relating to the sale or consumption of alcohol are for the time being permitted by virtue of a permission granted<sup>12</sup> for the execution of works and use of objects in or over a highway<sup>13</sup>.

In so far as any byelaw which:

- 686 (i) prohibits, by the creation of an offence, the consumption in a particular public place of alcohol (including any liquor of a similar nature which falls within the byelaw); or
- 687 (ii) makes any incidental, supplementary or consequential provision (whether relating to the seizure or control of containers or otherwise),

would otherwise<sup>14</sup> have effect in relation to any designated public place, the byelaw ceases to have effect in relation to that place or, where it is made after the order in which it is identified as a public place under the provisions above, does not have effect in relation to that place<sup>15</sup>.

1 'Alcohol' has the same meaning as in the Licensing Act 2003 (see s 191 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 30); Criminal Justice and Police Act 2001 s 16(1) (definition added by the Licensing Act 2003 s 198(1), Sch 6 paras 119, 125(a)).

2 'Public place' means any place to which the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission: Criminal Justice and Police Act 2001 s 16(1).



Cf the Public Order Act 1936 s 9(1) (as amended) (see PARA 380 note 2 ante); the Firearms Act 1968 s 57(4) (see PARA 680 note 5 post); and the Criminal Justice Act 1988 s 139 (see PARA 700 note 1 post).

3 A constable who imposes a requirement on a person must inform the person concerned that failing without reasonable excuse to comply with the requirement is an offence: Criminal Justice and Police Act 2001 s 12(5).

4 Ibid s 12(1), (2) (s 12(2) amended by the Licensing Act 2003 ss 198(1), 155(2), Sch 6 paras 119, 121, Sch 7). An offence committed under the Criminal Justice and Police Act 2001 s 12 (as amended) is a penalty offence for the purposes of Pt 1 Ch 1 (ss 1-11) (as amended): see s 1; and PARAS 586-589 post. A constable may dispose of anything surrendered to him under head (2) in the text in such manner as he considers appropriate: s 12(3).

A constable's powers under s 12(2) (as amended) (power to require actions specified in heads (1) and (2) in the text) and s 12(3) may also be exercised by a community support officer designated for this purpose (see the Police Reform Act 2002 s 38(6), Sch 4 para 5), or by an accredited person (under a community safety accreditation scheme) (see s 41(3), Sch 5 para 4). As to community safety accreditation schemes generally see POLICE vol 36(1) (2007 Reissue) PARA 532.

At the date at which this volume states the law, the Violent Crime Reduction Bill was before Parliament: see PARA 707 post. Part 1 of the Bill contains provisions dealing with alcohol-related violence and disorder, including a power to direct a person to leave the locality, and the introduction of drink banning orders and alcohol disorder zones.

5 Criminal Justice and Police Act 2001 s 12(4). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6 le subject to ibid s 14(1) (as amended): see the text and notes 10-13 infra.

7 'Local authority' means: (1) in relation to England, a unitary authority or a district council so far as it is not a unitary authority; (2) in relation to Wales, a county council or a county borough council: ibid s 16(2). 'Unitary authority' means: (a) the council of a county so far as it is the council for an area for which there are no district councils; (b) the council of any district comprised in an area for which there is no county council; (c) a London borough council; (d) the Common Council of the City of London in its capacity as a local authority; (e) the Council of the Isles of Scilly: s 16(3).

8 Ibid s 13(1).

9 Ibid s 13(2) (amended by the Licensing Act 2003 Sch 6 paras 119, 122). The power conferred by the Criminal Justice and Police Act 2001 s 13(2) (as amended) includes power to identify a place either specifically or by description, and power to revoke or amend orders previously made: s 13(3).

The Secretary of State must make regulations prescribing the procedure to be followed in connection with the making of orders under s 13(2) (as amended): s 13(4). Regulations under s 13(4) must, in particular, include provision requiring local authorities to publicise the making and effect of orders under s 13(2): s 13(5). Regulations under s 13(4) (as amended) must be made by statutory instrument and are subject to annulment in pursuance to a resolution of either House of Parliament: s 13(6). The regulations prescribe that, before making an order, a local authority must consult: (1) the chief officer of police for the police area in which the public place proposed to be identified in the order is situated; (2) the parish or community council in whose area the public place is situated; (3) the chief officer of police, the local authority and the parish or community council for any area near to the public place which it considers may be affected by the designation; and (4) the premises licence holder, the club premises certificate holder or the premises user, as appropriate, in relation to premises in that place which it considers may be affected by the designation and which are premises in respect of which: (a) a premises licence granted under the Licensing Act 2003 Pt 3 (ss 11-59) (as amended) has effect; (b) a club premises certificate granted under Pt 4 (ss 60-97) (as amended) has effect; or (c) a temporary event notice has been given so that the premises may be used for a permitted temporary activity by virtue of Pt 5 (ss 98-110) (as amended): see the Local Authorities (Alcohol Consumption in Designated Public Places) Regulations 2001, SI 2001/2831, reg 3(1) (amended by SI 2005/3048). Before making an order, the local authority must also take reasonable steps to consult the owners or occupiers of any land proposed to be identified: Local Authorities (Alcohol Consumption in Designated Public Places) Regulations 2001, SI 2001/2831, reg 3(2). The local authority must consider any representations as to whether or not a particular public place should be identified in an order whether made as a result of consultation under reg 3 (as amended), in response to a notice under reg 5 or otherwise: reg 4.

Before making an order, the local authority must cause to be published in a newspaper circulating in its area a notice: (i) identifying specifically or by description the place proposed to be identified; (ii) setting out the effect of an order being made in relation to that place; and (iii) inviting representations as to whether or not an order should be made: reg 5. No order may be made until at least 28 days after the publication of the notice: reg 6.

After making an order and before it takes effect, the local authority must cause to be published in a newspaper circulating in its area a notice: (A) identifying the place which has been identified in the order; (B) setting out the effect of the order in relation to that place; and (C) indicating the date on which the order will take effect: reg 7.

Before an order takes effect, the local authority must cause to be erected in the place identified such signs as it considers sufficient to draw the attention of members of the public in that place to the effect of the order: reg 8. A copy of any order made must be sent to the Secretary of State: reg 9.

10 le under the Licensing Act 2003 Pt 5 (as amended): see LICENSING AND GAMBLING vol 67 (2008) PARAS 108-113.

11 'Supply of alcohol' has the meaning given by ibid s 14 (see LICENSING AND GAMBLING vol 67 (2008) PARA 53): Criminal Justice and Police Act 2001 s 16(1) (definition added by the Licensing Act 2003 Sch 6 paras 119, 125(c)).

12 le granted under the Highways Act 1980 s 115E (as added): see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 577.

13 See the Criminal Justice and Police Act 2001 s 14(1) (amended by the Licensing Act 2003 Sch 6 paras 119, 123).

14 le apart from Criminal Justice and Police Act 2001 s 15(2) (cessation or non-effect of byelaw: see the text and note 15 infra).

15 Ibid s 15(1), (2) (s 15(1) amended by the Licensing Act 2001 Sch 6 paras 119, 124). In so far as any byelaw made by a local authority and falling within head (i) or head (ii) in the text still had effect at the end of the period of five years beginning with 1 September 2001, it ceased to have effect at the end of that period in relation to any public place: Criminal Justice and Police Act 2001 s 15(3); Criminal Justice and Police Act 2001 (Commencement No 1) Order 2001, SI 2001/2223.

## UPDATE

### 577 Alcohol consumption in designated public places

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 4--For provision relating to alcohol related disorder in public places see PARA 577A. As to alcohol disorder zones see PARA 577B. As to drunkenness in public places see PARA 577C. As to drunkenness aggravated by disorderly behaviour see PARA 577D. As to arrest of incapable drunkards and the power to take to a treatment centre see PARAS 577E, 577F.

As to drinking banning orders see SENTENCING AND DISPOSITION OF OFFENDERS.

NOTE 9--SI 2001/2831 replaced: Local Authorities (Alcohol Consumption in Designated Public Places) Regulations 2007, SI 2007/806.

TEXT AND NOTE 13--2001 Act s 14(1) further amended, s 14(1A)-(1C) added: Violent Crime Reduction Act 2006 s 26.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(4) ALCOHOL CONSUMPTION IN PUBLIC PLACES/577A. Directions to individuals who represent a risk of disorder.

### **577A. Directions to individuals who represent a risk of disorder.**

If the test mentioned below<sup>1</sup> is satisfied in the case of an individual aged 16 or over who is in a public place<sup>2</sup>, a constable in uniform may give a direction to that individual (1) requiring him to leave the locality of that place; and (2) prohibiting the individual from returning to that locality for such period (not exceeding 48 hours) from the giving of the direction as the constable may specify<sup>3</sup>. That test is (a) that the presence of the individual in that locality is likely, in all the circumstances, to cause or to contribute to the occurrence of alcohol-related crime or disorder in that locality, or to cause or to contribute to a repetition or continuance there of such crime or disorder; and (b) that the giving of a direction under these provisions to that individual is necessary for the purpose of removing or reducing the likelihood of there being such crime or disorder in that locality during the period for which the direction has effect or of there being a repetition or continuance in that locality during that period of such crime or disorder<sup>4</sup>. A direction under these provisions (i) must be given in writing; (ii) may require the individual to whom it is given to leave the locality in question either immediately or by such time as the constable giving the direction may specify; (iii) must clearly identify the locality to which it relates; (iv) must specify the period for which the individual is prohibited from returning to that locality; (v) may impose requirements as to the manner in which that individual leaves the locality, including his route; and (vi) may be withdrawn or varied (but not extended so as to apply for a period of more than 48 hours) by a constable<sup>5</sup>. A constable may not give a direction under these provisions that prevents the individual to whom it is given (A) from having access to a place where he resides; (B) from attending at any place which he is required to attend for the purposes of any employment of his or of any contract of services to which he is a party; (C) from attending at any place which he is expected to attend during the period to which the direction applies for the purposes of education or training or for the purpose of receiving medical treatment; or (D) from attending at any place which he is required to attend by any obligation imposed on him by or under an enactment or by the order of a court or tribunal<sup>6</sup>. A constable who gives a direction under these provisions must make a record of (aa) the terms of the direction and the locality to which it relates; (bb) the individual to whom it is given; (cc) the time at which it is given; (dd) the period during which that individual is required not to return to the locality<sup>7</sup>. A person who fails to comply with a direction under the above provisions is guilty of an offence and is liable, on summary conviction, to a fine not exceeding level 4 on the standard scale<sup>8</sup>.

1    Ie the test mentioned in the Violent Crime Reduction Act 2006 s 27(2).

2    In *ibid* s 27 'public place' means (1) a highway; or (2) any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission; and for this purpose 'place' includes a place on a means of transport: s 27(8).

3    *Ibid* s 27(1).

4    *Ibid* s 27(2).

5    *Ibid* s 27(3).

6    *Ibid* s 27(4).

- 7 Ibid s 27(5).
- 8 Ibid s 27(6). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(4) ALCOHOL CONSUMPTION IN PUBLIC PLACES/577B. Alcohol disorder zones.

## **577B. Alcohol disorder zones.**

### **1. Power to impose charges on licence holders etc in zones**

The Secretary of State may, by regulations, make provision for the imposition by a local authority<sup>1</sup> of charges to be paid to the authority for each month by (1) persons who for the whole or a part of that month held premises licences authorising the use of premises in alcohol disorder zones<sup>2</sup> in the authority's area for the sale of alcohol by retail; and (2) clubs which for the whole or a part of that month were authorised by virtue of club premises certificates to use premises in such zones for the supply of alcohol to members or guests<sup>3</sup>. The Secretary of State may by regulations make provision requiring a local authority that impose charges by reference to an alcohol disorder zone to use sums received by them in respect of those charges for the purposes specified in or determined under the regulations<sup>4</sup>. The rates of charges fixed under these provisions must be such as the Secretary of State considers appropriate for securing that the funds that he considers appropriate are available (after the costs of the scheme have been met from the charges) to be used for any purposes specified or determined under the above provision<sup>5</sup>. Regulations under these provisions fixing the rates of charges may fix different rates for different descriptions of local authority, different descriptions of alcohol disorder zones and different descriptions of premises and may do so either (a) by setting out the different rates in the regulations; or (b) by specifying the methods of computing the different rates in the regulations<sup>6</sup>. Regulations fixing such rates (i) may authorise or require a local authority to grant discounts from the charges; and (ii) must provide for exemptions from the charges for the purpose mentioned below<sup>7</sup>. The only exemptions from charges for which regulations under these provisions may provide are exemptions for the purpose of securing that charges are not imposed in relation to premises where (A) the principal use to which the premises are put does not consist in or include the sale or supply of alcohol; and (B) the availability of alcohol on those premises is not the main reason, or one of the main reasons, why individuals enter or remain on those premises (whether generally or at particular times of the day or on particular days of the week, or both)<sup>8</sup>. Regulations providing for a discount or exemption from charges may make a discount or exemption subject to compliance with conditions which are set out in the regulations; or are specified by the local authority in accordance with provision made under the regulations; and those conditions may include conditions requiring approvals to be given in respect of premises by such persons, and in accordance with such scheme, as may be provided for in the regulations<sup>9</sup>. The Secretary of State may by regulations make provision about (aa) the payment, collection and enforcement of charges imposed in accordance with regulations under these provisions; (bb) the determination of questions about liability for such charges, about the rate of charge applicable in relation to a particular set of premises or about compliance with the conditions of any exemption or discount; and (cc) appeals against decisions determining such questions<sup>10</sup>. Such regulations may include provision for interest to be charged at such rate and in such manner as may be specified in or determined under the regulations on charges that are overdue; and for the suspension of premises licences and club premises certificates for non payment of a charge<sup>11</sup>.

1 In the Violent Crime Reduction Act 2006 Pt 1 Ch 2 (ss 15-20) 'local authority' means (1) a district council; (2) a county council for an area for which there are no district councils; (3) a London borough council; (4) the

Common Council of the City of London in its capacity as a local authority; (5) the Council of the Isles of Scilly; (6) a county council or a county borough council in Wales: s 20(1).

2 In *ibid* Pt 1 Ch 2 'alcohol disorder zone' means a locality designated as such a zone under s 16 (see PARA 577B.2): s 20(1). 'Locality' includes a part of a locality: s 20(1).

3 *Ibid* s 15(1). The powers of the Secretary of State to make regulations under Pt 1 Ch 2 is exercisable by statutory instrument: s 20(4). Those powers all include power (1) to make different provision for different cases; (2) to make provision subject to such exemptions and exceptions as the Secretary of State thinks fit; and (3) to make such incidental, supplemental, consequential and transitional provision as he thinks fit: s 20(5). Head (2) is subject to the restriction on exemptions contained in s 15(6): s 20(7). The Secretary of State must not make regulations containing (with or without other provision) any provision that he is authorised to make by Pt 1 Ch 2 unless a draft of the regulations has been laid before Parliament and approved by a resolution of each House: s 20(6). See the Local Authorities (Alcohol Disorder Zones) Regulations 2008, SI 2008/1430.

4 2006 Act s 15(2).

5 *Ie* under *ibid* s 15(2): s 15(3). In s 15(3) the reference, in relation to any charges, to the costs of the scheme is a reference to the costs of the arrangements made for or in connection with the imposition, collection and recovery of those charges: s 15(10).

6 *Ibid* s 15(4).

7 *Ie* for the purpose mentioned in *ibid* s 15(6): s 15(5).

8 *Ibid* s 15(6).

9 *Ibid* s 15(7).

10 *Ibid* s 15(8).

11 *Ibid* s 15(9).

Expressions used in Pt 1 Ch 2 and in the Licensing Act 2003 or in a Part of the 2003 Act have the same meanings in the 2006 Act Pt 1 Ch 2 as in the 2003 Act or Part: 2006 Act s 20(2).

## 2. Designation of alcohol disorder zones

A local authority<sup>1</sup> may by order designate a locality<sup>2</sup> in their area as an alcohol disorder zone<sup>3</sup> if they are satisfied (1) that there has been nuisance or annoyance to members of the public, or a section of the public, or disorder, in or near that locality; (2) that the nuisance, annoyance or disorder is associated with the consumption of alcohol in that locality or with the consumption of alcohol supplied at premises in that locality<sup>4</sup>; (3) that there is likely to be a repetition of nuisance, annoyance or disorder that is so associated; and (4) that specified provision<sup>5</sup> allows the making of the order<sup>6</sup>. Before designating a locality as an alcohol disorder zone, a local authority must publish a notice (a) setting out their proposal to designate the locality; and (b) inviting persons interested to make representations about the proposal, and about what might be included in the action plan<sup>7</sup>. That notice must require the representations to be made before the end of the period of 28 days beginning with the day after publication of the notice<sup>8</sup>. As soon as reasonably practicable after the end of the period for making representations about a proposal by a local authority to designate a locality, the local authority and the local chief officer of police<sup>9</sup> must (i) prepare a document ('the action plan') setting out the steps the taking of which would, in their opinion, make the designation of the locality unnecessary; (ii) publish the action plan in such manner as they consider appropriate for bringing it to the attention of persons likely to be interested in it; and (iii) send a copy of the plan to every person who holds (A) a premises licence authorising the use of premises in the locality for the sale of alcohol by retail; or (B) a club premises certificate by virtue of which authorisation is given to the use of premises in the locality for the supply of alcohol to members or guests<sup>10</sup>. The steps set out in the action plan may include the establishment and maintenance of a scheme for the making of payments to the local authority<sup>11</sup>. The action plan must also contain proposals by (aa) the local authority in whose area the locality to which the proposed designation relates is situated, and (bb) the local chief officer of police, about what action they will take in relation to that locality if

the plan is implemented<sup>12</sup>. The power of the Secretary of State to make regulations<sup>13</sup> is exercisable in relation to sums received by a local authority in accordance with a scheme established under an action plan as it is exercisable in relation to sums received by a local authority in respect of charges imposed by virtue of regulations<sup>14</sup>.

1 For the meaning of 'local authority' see PARA 577B.1.

2 For the meaning of 'locality' see PARA 577B.1.

3 For the meaning of 'alcohol disorder zone' see PARA 577B.1.

4 References in the Violent Crime Reduction Act 2006 Pt 1 Ch 2 (ss 15-20) to premises' being in a locality (however described) include references to their being partly in that locality: s 20(3).

5 *Ie* *ibid* s 16(8).

A local authority may only make an order designating a locality as an alcohol disorder zone if (1) the period of eight weeks beginning with the day after the publication of the action plan has expired without such steps for implementing the action plan having been taken as, in that authority's opinion, make the designation of the locality unnecessary; or (2) the local authority is satisfied (whether before or after the end of that period) that the plan will not be implemented, that the steps required by the plan are no longer being taken or that effect is no longer being given to arrangements made in accordance with the plan: s 15(8).

6 *Ibid* s 16(1).

7 *Ie* under *ibid* s 16(4): s 16(2).

8 *Ibid* s 16(3).

9 In *ibid* Pt 1 Ch 2 'local chief officer of police', in relation to the designation of a locality as an alcohol disorder zone, means the chief of police of the police force for the police area in which that locality is situated: s 20(1).

10 *Ibid* s 16(4).

11 *Ibid* s 16(5).

12 *Ibid* s 16(6).

13 Under *ibid* s 15(2) (see PARA 577B.1).

14 Under *ibid* s 15: s 16(7). See the Local Authorities (Alcohol Disorder Zones) Regulations 2008, SI 2008/1430.

### 3. Procedure for designation of zones

An order designating an alcohol disorder zone<sup>1</sup> must identify the locality<sup>2</sup> being designated either by name or, if appropriate, by describing its boundaries<sup>3</sup>. A local authority<sup>4</sup> who have designated a locality as an alcohol disorder zone may by order revoke the designation<sup>5</sup>. If a local authority consider that the locality designated by an alcohol disorder zone should be varied, they may (1) make a proposal<sup>6</sup> for a replacement order designating a locality that includes the whole or part of the locality already designated; and (2) in any designation order made to give effect to that proposal, revoke the previous designation with effect from the coming into force of the replacement order<sup>7</sup>. The local authority who have designated a locality as an alcohol disorder zone and the local chief officer of police<sup>8</sup> must (a) as soon as reasonably practicable after the end of three months from the coming into force of the designation, and (b) as soon as reasonably practicable after the end of each subsequent period of three months, together carry out a review of the need for the designation<sup>9</sup>. On each such review the local authority and local chief officer of police must consider whether it would be appropriate for any of the above powers<sup>10</sup> to be exercised<sup>11</sup>. The Secretary of State may make regulations which<sup>12</sup> prescribe additional procedures to be followed in relation to the making or revocation of orders

for the designation of a locality as an alcohol disorder zone<sup>13</sup>. Those regulations must include, in particular, provision requiring local authorities to publicise the making and effect of orders designating localities as alcohol disorder zones<sup>14</sup>.

- 1 For the meaning of 'alcohol disorder zone' see PARA 577B.1.
- 2 For the meaning of 'locality' see PARA 577B.1.
- 3 Violent Crime Reduction Act 2006 s 17(1).
- 4 For the meaning of 'local authority' see PARA 577B.1.
- 5 2006 Act s 17(2).
- 6 For the purposes of ibid s 16 (see PARA 577B.2).
- 7 Ibid s 17(3).
- 8 For the meaning of 'local chief officer of police' see PARA 577B.2.
- 9 2006 Act s 17(4).
- 10 ie the powers in ibid s 17(2) and (3).
- 11 Ibid s 17(5).
- 12 For the purpose of supplementing the provisions of ibid s 16 and s 17.
- 13 Ibid s 17(6). See the Local Authorities (Alcohol Disorder Zones) Regulations 2008, SI 2008/1430.
- 14 2006 Act s 17(7).

#### **4. Functions of local chief officer of police**

It is the duty of a local authority<sup>1</sup> to consider whether to make a proposal for the designation of a locality<sup>2</sup> as an alcohol disorder zone<sup>3</sup> if the local chief officer of police<sup>4</sup> applies to them to do so<sup>5</sup>. If on such an application the local authority decide not to make a proposal, they must (1) give notice of their decision (setting out their reasons) to the local chief officer of police; and (2) send a copy of that notice to the Secretary of State and to the police authority for the police area in which the locality to which the proposal relates is situated<sup>6</sup>. A local authority which (a) are proposing to designate a locality as an alcohol disorder zone, and (b) are not doing so on an application from the local chief officer of police, must consult that chief officer before publishing notice of their proposal<sup>7</sup>. The consent of the local chief officer of police is required for the making of (i) an order designating a locality as an alcohol disorder zone; or (ii) the making of an order<sup>8</sup>.

- 1 For the meaning of 'local authority' see PARA 577B.1.
- 2 For the meaning of 'locality' see PARA 577B.1.
- 3 For the meaning of 'alcohol disorder zone' see PARA 577B.1.
- 4 For the meaning of 'local chief officer of police' see PARA 577B.2.
- 5 Violent Crime Reduction Act 2006 s 18(1).
- 6 Ibid s 18(2).
- 7 Ibid s 18(3).



8     le an order under *ibid* s 17(2) (see PARA 577B.3): s 18(4). Where the local chief officer of police does not give a consent required by head (i) in the text, he must give notice of his decision (setting out his reasons) to the Secretary of State and to the police authority for his police area: s 18(5).

## **5. Guidance about the designation of zones**

The Secretary of State (1) must issue such guidance as he considers appropriate about the manner in which local authorities<sup>1</sup>, police authorities and chief officers of police are to exercise and perform their powers and duties by virtue of Chapter 2 of Part 1 of the Violent Crime Reduction Act 2006<sup>2</sup>; and (2) may from time to time revise that guidance<sup>3</sup>. The guidance must include guidance about what alternative steps should be considered before a proposal is made for the designation of a locality<sup>4</sup> as an alcohol disorder zone<sup>5</sup>. Before issuing or revising any guidance under these provisions, the Secretary of State must consult (a) persons he considers represent the interests of local authorities; (b) persons he considers represent the interests of chief officers of police; (c) persons he considers represent the interests of police authorities; (d) persons he considers represent the interests of holders of premises licences; (e) persons he considers represent the interests of holders of club premises certificates; and (f) such other persons as he thinks fit<sup>6</sup>. It is the duty of every local authority, police authority and chief officer of police, in exercising their powers and duties by virtue of Chapter 2 of Part 1 of the Violent Crime Reduction Act 2006, to have regard to the guidance for the time being in force under the above provisions<sup>7</sup>.

1     For the meaning of 'local authority' see PARA 577B.1.

2     le the Violent Crime Reduction Act 2006 ss 15-20.

3     *Ibid* s 19(1).

4     For the meaning of 'locality' see PARA 577B.1.

5     2006 Act s 19(2). For the meaning of 'alcohol disorder zone' see PARA 577B.1.

6     *Ibid* s 19(3).

7     *Ibid* s 19(4).

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### **577C. Drunkenness in public places.**

Every person found drunk<sup>1</sup> in any highway or other public place<sup>2</sup>, whether a building or not, or on any licensed premises<sup>3</sup>, is liable to a penalty not exceeding level 1 on the standard scale<sup>4</sup>.

Persons on licensed premises in their capacity as residents, such as the licensee and his lodger, cannot be convicted<sup>5</sup>, unless the premises are open to the public (although not necessarily open for the sale of intoxicating liquor) at the material time<sup>6</sup>. However, if a person enters licensed premises for the purpose of using them as such, and remains upon the premises until after closing time, and is then found drunk upon them, he may be convicted<sup>7</sup>.

It is an offence to be drunk on entry to or in a designated sports ground and a person guilty of such an offence is liable on summary conviction to a fine<sup>8</sup>.

1 As to the meaning of 'drunk' see *Neale v RMJE (A Minor)* [1984] Crim LR 485, 80 Cr App Rep 20, DC, where it was taken to mean having taken intoxicating liquor to an extent which affects steady self-control. See also *Lanham v Rickwood* (1984) 148 JP 737, 148 JPJo 733, DC. A conviction will not be bad if the word 'found' is omitted from the charge sheet: see *R v Governor of Holloway Prison* (1916) 85 LJB 689, DC. As to the arrest of such a person see PARA 577E; and as to treatment centres for persons drunk and incapable see PARA 577F.

The Criminal Justice and Police Act 2001 ss 12-16 (as amended) make provision for combating alcohol-related disorder in designated public places: see PARA 577. For provision relating to alcohol related disorder in public places see PARA 577A. As to alcohol disorder zones see PARA 577B. As to drinking banning orders see SENTENCING AND DISPOSITION OF OFFENDERS.

2 'Public place' includes any place to which the public has access, whether on payment or otherwise: Licensing Act 1902 s 8. It appears to include the public rooms in licensed premises: see *Cole v Coulton* (1860) 2 E & E 695.

3 As to the meaning of 'licensed premises' see *Stevens v Dickson* [1952] 2 All ER 246, DC, where a room in the licensed premises which had been hired out for a wedding reception and in which alcoholic liquor had been supplied was held to be part of the licensed premises.

4 See the Licensing Act 1872 s 12 (amended by the Statute Law Revision Act 1953; the Criminal Justice Act 1967 s 103(2), Sch 7 Pt I; and the Criminal Justice Act 1982 ss 38, 46). An offence committed under the Licensing Act 1872 s 12 is a penalty offence for the purposes of the Criminal Justice and Police Act 2001 Pt 1 Ch 1 (ss 1-11): see s 1.

As from a day to be appointed, the Licensing Act 1872 s 12 is further amended so as to refer to 51 weeks instead of one month: s 12 (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 2).

The provisions of the Licensing Act 1964 s 194(1), (2) apply to offences under the Licensing Act 1872 s 12 (as amended): Licensing Act 1964 s 195. As to drunkenness accompanied by disorderly conduct or other forms of aggravation see PARA 577D. As to being drunk in charge of a child see CHILDREN AND YOUNG PERSONS vol 5(3) (2008) PARA 632.

5 *Lester v Torrens* (1877) 2 QBD 403, DC; *Young v Gentle* [1915] 2 KB 661, DC (disapproving *Lester v Torrens* supra in so far as it was decided upon the ground that premises cease to be licensed premises for this purpose at times when they are not open to the public).

6 *Lewis v Dodd* [1919] 1 KB 1, DC; *Evans v Fletcher* (1926) 135 LT 153, DC.

7 *R v Pelly* [1897] 2 QB 33, DC.

8 See the Sporting Events (Control of Alcohol etc) Act 1985 ss 2(2), 8(c); and PARAS 597-599.

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### **577D. Drunkenness aggravated by disorderly behaviour.**

Any person who in any public place<sup>1</sup>, is guilty, while drunk<sup>2</sup>, of disorderly behaviour is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>3</sup>.

Every person who is drunk when in possession of any loaded firearms<sup>4</sup> may be apprehended, and is liable to a penalty not exceeding level 1 on the standard scale or, in the discretion of the court, to imprisonment for any term not exceeding one month<sup>5</sup>.

1 'Public place' includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise: Criminal Justice Act 1967 s 91(4).

2 As to the meaning of 'drunk' see *Neale v RMJE (A Minor)* [1984] Crim LR 485, 80 Cr App Rep 20, DC; and PARA 577C NOTE 1. It was further decided in that case that a person is not guilty of an offence under the Criminal Justice Act 1967 s 91(1) where intoxication is induced by sniffing glue. See also *Lanham v Rickwood* (1984) 148 JP 737, (1984) 148 JP 733, DC; *DPP v Kitching* (1989) 154 JP 293, [1990] Crim LR 394.

3 Criminal Justice Act 1967 s 91(1) (amended by the Criminal Justice Act 1982 ss 38, 46 and the Serious Organised Crime and Police Act 2005 Sch 7 para 15, Sch 17 Pt 2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. The Secretary of State may by order repeal any provision of a local Act which appears to him to be a provision corresponding to the Criminal Justice Act 1967 s 91(1) (as amended) or to impose a liability to imprisonment for an offence of drunkenness or of being incapable while drunk: s 91(3). As to the power to take persons arrested under s 91(1) (as amended) to a treatment centre see PARA 577F. As to powers of arrest without warrant generally, see now the Police and Criminal Evidence Act 1984 ss 24, 24A. See *R (on the application of H) v CPS* [2005] EWHC 2459 (Admin), (2005) 170 JP 4.

4 A loaded air rifle has been found to be a firearm: *Seamark v Prouse* [1980] 3 All ER 26, [1980] 1 WLR 698, DC.

5 Licensing Act 1872 s 12 (amended by the Statute Law Revision Act 1953; the Criminal Justice Act 1967 s 103(2), Sch 7 Pt I; and the Criminal Justice Act 1982 ss 38, 46). The Licensing Act 1872 s 12 applies also to persons drunk while in charge on any highway or other public place of any carriage, horse, cattle or steam engine: see ROAD TRAFFIC.

As from a day to be appointed, the Licensing Act 1872 s 12 is further amended so as to refer to 51 weeks instead of one month: s 12 (as so amended; and prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 2).

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**577E. Arrest of incapable drunkards.**

If a person is found drunk in any highway or other public place<sup>1</sup>, whether a building or not, or on any licensed premises, and appears to be incapable of taking care of himself, he may be dealt with according to law<sup>2</sup>.

1 For the meaning of 'public place' see PARA 577D NOTE 1.

2 Licensing Act 1902 s 1 (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 10(2), Sch 17 Pt 2). As to the power to take incapable drunkards to treatment centres see PARA 577F. As to powers of arrest without warrant generally, see now the Police and Criminal Evidence Act 1984 ss 24, 24A; and PARAS 924, 925.

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**577F. Power to take to treatment centre.**

On arresting a person who is drunk and incapable, or is guilty, while drunk, of disorderly behaviour in public places<sup>1</sup>, a constable may, if he thinks fit, take him to any place approved for these purposes by the Secretary of State as a treatment centre for alcoholics, and while a person is being so taken he is not deemed to be in lawful custody<sup>2</sup>. The person is not liable to be detained in any such centre to which he has been taken, but the exercise in his case of the power conferred by this provision does not preclude his being charged with any offence<sup>3</sup>.

1 He under the Licensing Act 1872 s 12 (see PARAS 577C-577D) or under the Criminal Justice Act 1967 s 91(1) (see PARA 577D).

2 Criminal Justice Act 1972 s 34(1) (amended by the Criminal Law Act 1977 s 65(4), (5), Sch 12, 13; and the Police and Criminal Evidence Act 1984 s 119(1), (2), Sch 6 para 21, Sch 7 Pt I). As to custody see PARA 1144 et seq.

3 Criminal Justice Act 1972 s 34(2).

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## **(5) PROCESSIONS AND ASSEMBLIES**

### **578. Advance notice of public processions.**

Except where the procession is one commonly or customarily<sup>1</sup> held in the police area<sup>2</sup> (or areas) in which it is proposed to be held or is a funeral procession organised by a funeral director acting in the normal course of his business, written<sup>3</sup> notice<sup>4</sup> must be given of any proposal to hold a public procession<sup>5</sup> intended:

- 688 (1) to demonstrate support for or opposition to the views or actions of any person or body of persons<sup>6</sup>;
- 689 (2) to publicise a cause or campaign<sup>7</sup>; or
- 690 (3) to mark or commemorate an event<sup>8</sup>,

unless it is not reasonably practicable to give any advance notice of the procession<sup>9</sup>.

Where a public procession is held, each of the persons organising it is guilty of an offence if: (a) the above requirements as to notice have not been satisfied; or (b) the date when it is held, the time when it starts, or its route, differs from the date, time or route specified in the notice<sup>10</sup>. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>11</sup>. It is, however, a defence for the defendant to prove<sup>12</sup> that he did not know of, and neither suspected nor had reason to suspect, the failure to satisfy the requirements or, as the case may be, the different date, time or route<sup>13</sup>; and, to the extent that an alleged offence turns on a difference of date, time or route, it is a defence for the defendant to prove<sup>14</sup> that the difference arose from circumstances beyond his control or from something done with the agreement of a police officer or by his direction<sup>15</sup>.

1 See *Kay v Metropolitan Police Comr* [2006] EWHC 1536 (Admin), [2006] All ER (D) 304 (Jun), (2006) Times, 3 July, DC.

2 For the meaning of 'police area' see the Interpretation Act 1978 s 5, Sch 1 (as amended); and POLICE vol 36(1) (2007 Reissue) PARA 136.

3 Unless the contrary intention appears, 'writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form; and expressions referring to writing are to be construed accordingly: see *ibid* Sch 1.

4 The notice must specify the date when it is intended to hold the procession, the time when it is intended to start it, its proposed route, and the name and address of the person (or of one of the persons) proposing to organise it: Public Order Act 1986 s 11(3). Such notice must be delivered to a police station: (1) in the police area in which it is proposed the procession will start; or (2) where it is proposed the procession will start in Scotland and cross into England, in the first police area in England on the proposed route: s 11(4). If delivered not less than six clear days before the date when the procession is intended to be held, the notice may be delivered by post by the recorded delivery service; but the Interpretation Act 1978 s 7 (document sent by post deemed to have been served when posted and to have been delivered in the ordinary course of post) does not apply: Public Order Act 1986 s 11(5). If not so delivered, the notice must be delivered by hand not less than six clear days before the date when the procession is intended to be held or, if that is not reasonably practicable, as soon as delivery is reasonably practicable: s 11(6).

5 For the purposes of *ibid* Pt II (ss 11-16) (as amended), 'public procession' means a procession in a public place; and 'public place' means: (1) any highway; and (2) any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission: see s 16. A 'procession' has been defined as follows: 'A procession is not a mere body of persons; it is a body of persons moving along a route': *Flockhart v Robinson* [1950] 2 KB 498 at 502, sub nom *Flockhart v Robertson* [1950] 1 All ER 1091 at 1093, DC, per Goddard LCJ. Although Lord Goddard's definition did not expressly require the body of persons to move in orderly succession, it is clear from the Divisional Court's decision that there is such a requirement. In that case, after a lawful procession had broken up to disperse, a group moved into an area where processions were prohibited. Initially, the group was in loose formation and not in ranks, and in the form of a rabble, but in due course it spontaneously adopted an orderly formation. The Divisional Court held that at that point it became a procession. See also *Kent v Metropolitan Police Comr* (1981) Times, 15 May, CA, where Lord Denning MR stated: 'A public procession is the act of a body of persons marching along in orderly succession . . . All kinds of processions take place every day up and down the country - carnivals, weddings, funerals, processions to the Houses of Parliament, marches to Trafalgar Square and so forth'.

6 Public Order Act 1986 s 11(1)(a).

7 *Ibid* s 11(1)(b).

8 *Ibid* s 11(1)(c).

9 See *ibid* s 11(1), (2). An obligation to notify the police of a procession is not in itself an infringement of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 11 (freedom of peaceful assembly and association): *Rassemblement Jurassien, Unité Jurassienne v Switzerland* 17 DR 93 (1979), E Comm HR. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

The absence of a planned route, or indeed any identifiable organiser, would not necessarily render the giving of notice 'not reasonably practicable' for these purposes: see *Kay v Metropolitan Police Comr* [2006] EWHC 1536 (Admin), [2006] All ER (D) 304 (Jun), (2006) Times, 3 July, DC.

10 Public Order Act 1986 s 11(7).

11 *Ibid* s 11(10). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

12 As to whether the burden of proof is a legal (or persuasive) or an evidential one, and, if the former, its compatibility with the European Convention on Human Rights art 6(2) (the presumption of innocence), see PARA 1368 et seq post.

13 Public Order Act 1986 s 11(8).

14 See note 12 *supra*.

15 Public Order Act 1986 s 11(9).

## UPDATE

### 578 Advance notice of public processions

NOTES 1, 9--*Kay*, cited, affirmed: [2008] UKHL 69, [2009] 2 All ER 935 (for purposes of Public Order Act 1986 s 11(2), fixed or known route not an essential characteristic of a procession commonly or customarily held).



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### **579. Imposing conditions on public processions.**

If the senior police officer<sup>1</sup>, having regard to the time or place at which and the circumstances in which any public procession<sup>2</sup> is being held or is intended to be held and to its route or proposed route, reasonably believes that: (1) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community; or (2) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do any act they have a right not to do, he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him to be necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place<sup>3</sup> specified in the directions<sup>4</sup>.

A person who organises a public procession and knowingly fails to comply with a condition so imposed is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both; but it is a defence for him to prove<sup>5</sup> that the failure arose from circumstances beyond his control<sup>6</sup>. A person who takes part in a public procession and knowingly fails to comply with such a condition is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale; but it is a defence for him to prove<sup>7</sup> that the failure arose from circumstances beyond his control<sup>8</sup>. A person who incites another to commit the latter offence is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>9</sup>.

1 For these purposes, 'the senior police officer' means: (1) in relation to a procession intended to be held in a case where persons are assembling with a view to taking part in it, the most senior in rank of the police officers present at the scene; and (2) in relation to a procession intended to be held in a case where head (1) supra does not apply, the chief officer of police: Public Order Act 1986 s 12(2). For the meaning of 'chief officer of police' see PARA 380 note 1 ante. A direction so given by a chief officer of police must be in writing: s 12(3). The chief officer of police may delegate, to such extent and subject to such conditions as he may specify, any of his functions under ss 12-14 (as amended) (see the text and notes 2-9 infra; and PARAS 580-581 post) and s 14A (as added and amended) (see PARA 582 post) to an assistant chief constable or, in the City of London and the metropolitan police district, an assistant commissioner of police: s 15 (amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 60; and the Police and Magistrates' Courts Act 1994 s 44, Sch 5 Pt II para 37). 'The City of London' means the City as defined for the purposes of the Acts relating to the City of London police; and 'the metropolitan police district' means that district as defined in the London Government Act 1963 s 76 (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 137): see the Public Order Act 1986 s 16. A deputy chief constable may exercise any power of the chief constable during any absence, incapacity or suspension of the chief constable, or during a vacancy in the office of chief constable, or, at any other time, with the consent of the chief constable: Police Act 1996 s 12A(1) (added by the Criminal Justice and Police Act 2001 s 124). See POLICE.

2 For the meaning of 'public procession' see PARA 578 note 5 ante.

3 For the meaning of 'public place' see PARA 578 note 5 ante.

4 Public Order Act 1986 s 12(1). The imposition of conditions on a peaceful procession or assembly engages the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, TS 71 (1953); Cmd 8969) art 11 (freedom of association and assembly), and therefore requires justification under art 11(2): *Rassemblement Jurassien, Unité Jurassienne v Switzerland* 17 DR 93 (1979), E Comm HR. The Convention

is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

5 As to whether the burden of proof is a legal (or persuasive) or evidential one, and, if the former its compatibility with the European Convention on Human Rights art 6(2) (the presumption of innocence), see PARA 1368 et seq post.

6 Public Order Act 1986 s 12(4), (8). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 12(8) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 37(1), (2)(b)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 See note 5 supra.

8 Public Order Act 1986 s 12(5), (9).

9 Ibid s 12(6), (10). As from a day to be appointed the Secretary of State may by order either provide that this offence is no longer punishable by imprisonment or extend the maximum term for this offence to a maximum term of 51 weeks: see the Criminal Justice Act 2003 s 281(1), (2), (7) (not yet in force). Any such order may make such supplementary, incidental, or consequential provision as the Secretary of State considers necessary or expedient, including provision amending any relevant enactment (s 281(3) (not yet in force)), but may not affect the penalty for any offence committed before the commencement of that order (s 281(6)(a) (not yet in force)). At the date at which this volume states the law no such day had been appointed. A person is liable under these provisions notwithstanding the Magistrates' Courts Act 1980 s 45(3) (inciter liable to same penalty as incited: see PARA 65 note 3 ante): see the Public Order Act 1986 s 12(10).

## **UPDATE**

### **579 Imposing conditions on public processions**

NOTE 9--1986 Act s 12(10) amended: Serious Crime Act 2007 Sch 6 para 58, Sch 14.

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## **580. Prohibiting public processions.**

If at any time the chief officer of police<sup>1</sup> reasonably believes that, because of particular circumstances existing in any district or part of a district, the powers to impose conditions on public processions<sup>2</sup> will not be sufficient to prevent the holding of public processions<sup>3</sup> in that district or part from resulting in serious public disorder, he must apply to the council of the district for an order prohibiting for such period not exceeding three months as may be specified in the application the holding of all public processions (or of any class of public processions so specified) in the district or part concerned<sup>4</sup>. On receiving such an application, a council may with the consent of the Secretary of State make an order either in the terms of the application or with such modifications as may be approved by the Secretary of State<sup>5</sup>.

A person who organises a public procession the holding of which he knows is prohibited by virtue of such an order<sup>6</sup> is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>7</sup>. A person who takes part in a public procession the holding of which he knows is prohibited by virtue of such an order<sup>8</sup> is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>9</sup>. A person who incites another to commit the latter offence is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>10</sup>.

1 For the meaning of 'chief officer of police' see PARA 380 note 1 ante. As to the chief officer of police's powers of delegation see PARA 579 note 1 ante.

2 I.e. the powers under the Public Order Act 1986 s 12 (as amended): see PARA 579 ante.

3 For the meaning of 'public procession' see PARA 578 note 5 ante.

4 Public Order Act 1986 s 13(1). Section 13(1) does not apply in the City of London or the metropolitan police district: s 13(3). If at any time the Commissioner of Police for the City of London or the Metropolitan Police Commissioner reasonably believes that, because of particular circumstances existing in his police area or part of it, the powers under s 12 (as amended) (see PARA 579 ante) will not be sufficient to prevent the holding of public processions in that area or part from resulting in serious public disorder, he may with the consent of the Secretary of State make an order prohibiting for such period not exceeding three months as may be specified in the order the holding of all public processions (or of any class of public procession so specified) in the area or part concerned: s 13(4). As to the commissioner's powers of delegation see PARA 579 note 1 ante; and as to the recording, revocation and variation of any such order see note 5 infra. For the meanings of 'the City of London' and 'the metropolitan police district' for these purposes see PARA 579 note 1 ante.

5 Ibid s 13(2). Any order made under s 13 (as amended) must, if not made in writing, be recorded in writing as soon as practicable after being made: s 13(5). Any such order may be revoked or varied by a subsequent order made in the same way, that is in accordance with s 13(1) and (2) or s 13(4) (see the text and notes 1-4 supra), as the case may be: s 13(5), (6). For the meaning of 'writing' see PARA 578 note 3 ante. The prohibition of a peaceful procession or assembly is not necessarily an infringement of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, TS 71 (1953); Cmd 8969) art 11 (freedom of association and assembly); it depends on whether the ban can be justified under art 11(2): see *Christians against Racism and Fascism v United Kingdom* 21 DR 138 (1980), E Comm HR; *Plattform 'Ärzte für das Leben' v Austria* (1988) 13 EHRR 204, ECtHR; *Ezelin v France* (1992) 14 EHRR 362, ECtHR; *Stankov v Bulgaria* (App 29225/95) (2 October 2001, unreported), ECtHR. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

6     le an order under the Public Order Act 1986 s 13(1) or s 13(4): see the text and notes 1-4 supra.

7     Ibid s 13(7), (11). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 13(11) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 37(1), 3(a)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

8     See note 6 supra.

9     Public Order Act 1986 s 13(8), (12).

10    Ibid s 13(9), (13). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 13(13) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 37(1), (3)(b)). At the date at which this volume states the law no such day had been appointed. A person is liable under these provisions notwithstanding the Magistrates' Courts Act 1980 s 45(3) (inciter liable to same penalty as incited: see PARA 65 note 3 ante): see the Public Order Act 1986 s 13(3).

## **UPDATE**

### **580 Prohibiting public processions**

NOTE 10--1986 Act s 13(13) amended: Serious Crime Act 2007 Sch 6 para 58, Sch 14.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(5) PROCESSIONS AND ASSEMBLIES/581. Imposing conditions on public assemblies.

### **581. Imposing conditions on public assemblies.**

If the senior police officer<sup>1</sup>, having regard to the time or place at which and the circumstances in which any public assembly<sup>2</sup> is being held or is intended to be held, reasonably believes that: (1) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community; or (2) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do any act they have a right not to do, he may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him to be necessary to prevent such disorder, damage, disruption or intimidation<sup>3</sup>.

A person who organises a public assembly and knowingly fails to comply with a condition so imposed is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both; but it is a defence for him to prove<sup>4</sup> that the failure arose from circumstances beyond his control<sup>5</sup>. A person who takes part in a public assembly and knowingly fails to comply with such a condition is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale; but it is a defence for him to prove<sup>6</sup> that the failure arose from circumstances beyond his control<sup>7</sup>. A person who incites another to commit the latter offence is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>8</sup>.

1 For these purposes, 'the senior police officer' means: (1) in relation to an assembly being held, the most senior in rank of the police officers present at the scene; and (2) in relation to an assembly intended to be held, the chief officer of police: Public Order Act 1986 s 14(2). A direction so given by a chief officer of police must be given in writing: s 14(3). For the meaning of 'writing' see PARA 578 note 3 ante. For the meaning of 'chief officer of police' see PARA 380 note 1 ante. As to the chief officer of police's powers of delegation see PARA 579 note 1 ante.

2 For these purposes, 'public assembly' means an assembly of two or more persons in a public place which is wholly or partly open to the air: see *ibid* s 16 (amended by the Anti-social Behaviour Act 2003 s 57). For the meaning of 'public place' see PARA 578 note 5 ante. An 'assembly' means no more than a gathering of persons, and one which could be stationary or in motion: *DPP v Roffey* [1959] Crim LR 283, 123 JP 241, DC.

3 Public Order Act 1986 s 14(1). Section 14 (as amended) does not apply in relation to a public assembly which is also a demonstration in a public place in the designated area in the vicinity of Parliament: see the Serious Organised Crime and Police Act 2005 s 132(6); and PARA 583 post. For the compatibility of this provision with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, TS 71 (1953); Cmd 8969) art 11 (freedom of association and assembly) see PARA 579 note 4 ante. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. The conditions of an order can continue to apply to an individual who leaves the main body of an assembly and is some distance from it; it depends on whether he can be regarded as still part of the assembly, which is a question of fact: *Broadwith v Chief Constable of Thames Valley Police* [2000] Crim LR 924, DC. When giving written directions imposing conditions on a public assembly the chief officer of police has to identify whether he reasonably believed that there was a risk of serious public disorder, serious damage to property or serious disruption to the life of the community, or whether he reasonably believed that the purpose of the person organising was the intimidation of others: *R (on the application of Brehony) v Chief Constable of Greater Manchester Police* [2005] EWHC 640 (Admin), (2005) Times, 15 April. Reasons for forming that belief do not

have to be given in great detail but should be sufficient to enable the demonstrators to understand why directions had been given and enable a court to assess whether that belief was reasonable: *R (on the application of Brehony) v Chief Constable of Greater Manchester Police* supra.

A direction to disperse under the Public Order Act 1986 s 14 (as amended) can include a direction to disperse by a specified route and to stay in a specified place for as long as necessary to enable the dispersal to take place safely and without disorder: *Austin v Metropolitan Police Comr* [2005] EWHC 480 (Admin), [2005] HRLR 20.

4 As to whether the burden of proof is a legal (or persuasive) or evidential one, and, if the former, its compatibility with the European Convention on Human Rights art 6(2) (the presumption of innocence), see PARA 1368 et seq post.

5 Public Order Act 1986 s 14(4), (8). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 14(8) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 37(1), (4)(a)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6 See note 4 supra.

7 Public Order Act 1986 s 14(5), (9).

8 Ibid s 14(6), (10) As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 14(10) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 37(1), (4)(b)). At the date at which this volume states the law no such day had been appointed. A person is liable under these provisions notwithstanding the Magistrates' Courts Act 1980 s 45(3) (inciter liable to same penalty as incited: see PARA 65 note 3 ante): see the Public Order Act 1986 s 14(10).

## UPDATE

### 581 Imposing conditions on public assemblies

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 3--*Austin*, cited, affirmed: [2009] UKHL 5, [2009] 3 All ER 455.

NOTE 8--1986 Act s 14(10) amended: Serious Crime Act 2007 Sch 6 para 58, Sch 14.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(5) PROCESSIONS AND ASSEMBLIES/582. Trespassory assemblies.

## **582. Trespassory assemblies.**

If at any time the chief officer of police<sup>1</sup> reasonably believes that an assembly<sup>2</sup> is intended to be held in any district at a place on land<sup>3</sup> to which the public<sup>4</sup> has no right of access or only a limited<sup>5</sup> right of access and that the assembly:

691 (1) is likely to be held without the permission of the occupier<sup>6</sup> of the land or to conduct itself in such a way as to exceed the limits of any such permission or the limits of the public's right of access<sup>7</sup>; and

692 (2) may result: (a) in serious disruption to the life of the community; or (b) where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument<sup>8</sup>,

he may apply to the council of the district for an order prohibiting for a specified period the holding of all trespassory assemblies in the district or a part of it, as specified<sup>9</sup>. On receiving such an application, a council may with the consent of the Secretary of State make an order either in the terms of the application or with such modifications as may be approved by the Secretary of State<sup>10</sup>.

An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which is: (i) held on land to which the public has no right of access or only a limited right of access; and (ii) takes place in the prohibited circumstances, that is, without the permission of the occupier of the land or so as to exceed the limits of any such permission or the limits of the public's right of access<sup>11</sup>.

No order prohibiting the holding of a trespassory assembly may prohibit the holding of assemblies for a period exceeding four days or in an area exceeding an area represented by a circle with a radius of five miles from a specified centre<sup>12</sup>.

A person who organises an assembly the holding of which he knows is prohibited by such an order is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>13</sup>. Similarly, a person who takes part in an assembly which he knows is prohibited by such an order is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>14</sup>; and a person who incites another to commit such an offence is also guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>15</sup>.

If a constable in uniform reasonably believes that a person is on his way to an assembly within the area to which an order prohibiting the holding of a trespassory assembly applies which the constable reasonably believes is likely to be an assembly which is prohibited by that order, he may stop that person, and direct him not to proceed in the direction of the assembly<sup>16</sup>. A person who fails to comply with such a direction which he knows has been given to him is guilty of a summary offence and liable to a fine not exceeding level 3 on the standard scale<sup>17</sup>.

1 For the meaning of 'chief officer of police' see PARA 380 note 1 ante. As to the chief officer of police's powers of delegation see PARA 579 note 1 ante.

2 ie an assembly of 20 or more persons: Public Order Act 1986 s 14A(9) (s 14A added by the Criminal Justice and Public Order Act 1994 s 70). As to the meaning of 'assembly' see PARA 581 note 2 ante.

3 ie land in the open air: Public Order Act 1986 s 14A(9) (as added: see note 2 supra).

4 'Public' includes a section of the public: ibid s 14A(9) (as added: see note 2 supra). As to the meaning of 'section of the public' see PARA 563 note 2 ante.

5 In relation to a right of access by the public to land, 'limited' means that the use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions: ibid s 14A(9) (as added: see note 2 supra).

6 'Occupier' means the person entitled to possession of the land by virtue of an estate or interest held by him; and for the purposes of ibid s 14A(1), (4) (as added) (see the text and note 9 infra), includes the person reasonably believed by the authority applying for or making the order to be the occupier: s 14A(9) (as added: see note 2 supra).

7 Ibid s 14A(1)(a) (as added: see note 2 supra).

8 Ibid s 14A(1)(b) (as added: see note 2 supra).

9 See ibid s 14A(1) as added: see note 2 supra). In Wales, the references to 'a district' and to the 'council of the district' are to be construed as references to a county or county borough and to the council of that county or county borough: s 14A(11) (as so added).

Section 14A(1) (as added) does not apply in the City of London or the metropolitan police district: s 14A(3) (as so added). If at any time the Commissioner of Police for the City of London or the Metropolitan Police Commissioner reasonably believes that an assembly is intended to be held at a place on land to which the public has no right of access or only a limited right of access in his police area and that the assembly:

94 (1) is likely to be held without the permission of the occupier of the land or to conduct itself in such a way as to exceed the limits of any such permission or the limits of the public's right of access; and

95 (2) may result: (a) in serious disruption to the life of the community; or (b) where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument,

he may with the consent of the Secretary of State make an order prohibiting for a specified period the holding of all trespassory assemblies in the area or a part of it, as specified: s 14A(4) (as so added). As to the commissioner's powers of delegation see PARA 579 note 1 ante. As to the recording, revocation and variation of any such order see note 10 infra. For the meanings of 'the City of London' and 'the metropolitan police district' see PARA 579 note 1 ante.

The public highway is a public place that the public may enjoy for any reasonable purpose and the holding of a peaceful, non-obstructive demonstration may fall within the purposes for which the public may use the highway: *DPP v Jones* [1999] 2 AC 240, [1999] 2 All ER 257, HL.

10 Public Order Act 1986 s 14A(2)(a) (as added: see note 2 supra). Any order made under s 14A (as added), if not made in writing, must be recorded in writing as soon as practicable after being made: s 14A(8) (as so added). An order may be revoked or varied by a subsequent order made in the same way (ie in accordance with s 14A(1), (2)(a), (4) (as added)): s 14A(7) (as so added). For the compatibility of the power to prohibit a trespassory assembly with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, TS 71 (1953); Cmd 8969) art 11(2) (freedom of association and assembly) see PARA 579 note 4 ante. See also Application 31416/96 *Pendragon v United Kingdom* (1999) 27 EHRR CD 179, E Comm HR. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

11 Public Order Act 1986 s 14A(5) (as added: see note 2 supra). It is not necessarily in excess of the public's right of access to the highway to assemble on the highway; an assembly there which does not amount to a public or private nuisance, and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and re-pass, is not in excess of the public's right of access, provided that it is a reasonable use of the highway (which is a matter for the justices to decide): *DPP v Jones* [1999] 2 AC 240, [1999] 2 Cr App Rep 348, HL.

12 Public Order Act 1986 s 14A(6) (as added: see note 2 supra).



13 Ibid s 14B(1), (5) (s 14B added by the Criminal Justice and Public Order Act 1994 s 70). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see the Public Order Act 1986 s 14B(5) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 37(1), (5)(a)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

14 Public Order Act 1986 s 14B(2), (6) (as added: see note 13 supra).

15 Ibid s 14B(3), (7) (as added: see note 13 supra). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 14B(7) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 37(1), (5)(b)). At the date at which this volume states the law no such day had been appointed. A person is liable under these provisions notwithstanding the Magistrates' Courts Act 1980 s 45(3) (inciter liable to same penalty as incited: see PARA 65 note 3 ante): see the Public Order Act 1986 s 14B(7).

16 Ibid s 14C(1) (s 14C added by the Criminal Justice and Public Order Act 1994 s 71). This power may only be exercised within the area to which the order applies: Public Order Act 1986 s 14C(2) (as so added).

17 Ibid s 14C(3), (5) (as added: see note 16 supra).

## **UPDATE**

### **582 Trespassory assemblies**

NOTE 15--1986 Act s 14B(7) amended: Serious Crime Act 2007 Sch 6 para 58, Sch 14.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(5) PROCESSIONS AND ASSEMBLIES/583. Demonstrations in vicinity of Parliament.

### **583. Demonstrations in vicinity of Parliament.**

Special provision is made in relation to demonstrations within the vicinity of Parliament. Any person who:

- 693 (1) organises<sup>1</sup> a demonstration in a public place<sup>2</sup> in a designated area surrounding the Houses of Parliament<sup>3</sup>; or
- 694 (2) takes part in<sup>4</sup> a demonstration in a public place in that area<sup>5</sup>; or
- 695 (3) carries on a demonstration by himself in a public place in that area<sup>6</sup>,

is guilty of an offence if, when the demonstration starts<sup>7</sup>, authorisation<sup>8</sup> for the demonstration has not been given<sup>9</sup>. It is a defence for a defendant to show<sup>10</sup> that he reasonably believed that authorisation had been given<sup>11</sup>. A person guilty of an offence under head (1) above is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>12</sup>. A person guilty of an offence under head (2) or head (3) above is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>13</sup>.

Each person who takes part in or organises a demonstration in the designated area is guilty of an offence if:

- 696 (a) he knowingly fails to comply with a condition<sup>14</sup> in an authorisation which is applicable<sup>15</sup> to him<sup>16</sup>; or
- 697 (b) he knows or should have known that the demonstration is carried on otherwise than in accordance with the particulars set out<sup>17</sup> in the authorisation<sup>18</sup>.

It is a defence for a defendant to show<sup>19</sup>:

- 698 (i) in head (a) above, that the failure to comply; or
- 699 (ii) in head (b) above, that the divergence from the particulars,

arose from circumstances beyond his control, or from something done with the agreement, or by the direction, of a police officer<sup>20</sup>. A person guilty of such an offence, if the offence was in relation to his capacity as organiser of the demonstration, is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both; otherwise, he is liable to a fine not exceeding level 3 on the standard scale<sup>21</sup>.

If the senior police officer<sup>22</sup> reasonably believes that it is necessary in order to prevent any of a number of specified<sup>23</sup> things:

- 700 (A) to impose additional conditions on those taking part in or organising an authorised<sup>24</sup> demonstration<sup>25</sup>; or
- 701 (B) to vary any condition imposed<sup>26</sup>,

the senior police officer may give directions to those taking part in or organising the demonstration imposing additional conditions or varying any condition already imposed<sup>27</sup>. A person taking part in or organising the demonstration who knowingly fails to comply with a condition which is applicable to him and which is imposed or varied by such a direction is guilty of an offence<sup>28</sup>. It is a defence for him to show<sup>29</sup> that the failure to comply arose from circumstances beyond his control<sup>30</sup>. A person guilty of such an offence, if the offence was in relation to his capacity as organiser of the demonstration, is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both; otherwise, he is liable to a fine not exceeding level 3 on the standard scale<sup>31</sup>.

A person who is guilty of the offence of inciting another to do anything which would constitute an offence mentioned in the above provisions<sup>32</sup>, or to fail to do anything where the failure would constitute such an offence, is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale<sup>33</sup>.

Subject to various exceptions<sup>34</sup>, a person who operates or permits the operation of a loudspeaker, at any time or for any purpose, in a street<sup>35</sup> in the designated area<sup>36</sup> commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale, together with a further fine not exceeding £50 for each day on which the offence continues after the conviction<sup>37</sup>.

1 References in the Serious Organised Crime and Police Act 2005 ss 132-136 (as amended) (see the text and notes 2-33 infra) to any person organising a demonstration include a person participating in its organisation (s 132(7)(c)) but do not include a person carrying on a demonstration by himself (s 132(7)(d)).

2 References in *ibid* ss 132-136 (as amended) to 'public place' mean any highway or any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission: s 132(7)(b).

3 *Ibid* s 132(1)(a). The 'designated area' for the purposes of ss 132-137 (as amended) (which may be specified by description, by reference to a map or in any other way, although no point in the area so specified may be more than one kilometre in a straight line from the point nearest to it in Parliament Square) is the area bounded by an imaginary line starting at the point where Hungerford Bridge crosses Victoria Embankment, continuing along Hungerford Bridge to the point where it crosses Belvedere Road, rightwards along Belvedere Road as far as Chicheley Street, leftwards along Chicheley Street as far as York Road, rightwards along York Road, crossing Westminster Bridge Road into Lambeth Palace Road, along Lambeth Palace Road as far as Lambeth Bridge, over Lambeth Bridge, leftwards along Millbank as far as Thorney Street, along Thorney Street as far as Horseferry Road, leftwards along Horseferry Road as far as Strutton Ground, along Strutton Ground crossing over Victoria Street into Broadway, along Broadway as far as Queen Anne's Gate, along Queen Anne's Gate as far as Birdcage Walk, rightwards along Birdcage Walk as far as Horse Guards Road, along Horse Guards Road as far as the Mall, rightwards along the Mall, across the north end of Whitehall as far as Northumberland Avenue, along Northumberland Avenue as far as Victoria Embankment, and leftwards along Victoria Embankment returning to the starting point: ss 132(7)(a), 138(1)-(3); Serious Organised Crime and Police Act 2005 (Designated Area) Order 2005, SI 2005/1537.

4 References in the Serious Organised Crime and Police Act 2005 ss 132-136 (as amended) to a person or persons taking part in a demonstration do not include in s 132(1) a person carrying on a demonstration by himself, but they do otherwise do include such a person: s 132(7)(e).

5 *Ibid* s 132(1)(b).

6 *Ibid* s 132(1)(c).

7 *Ibid* s 132(1), on its proper construction, includes demonstrations actually starting before its commencement (ie 1 August 2005: see the Serious Organised Crime and Police Act 2005 (Commencement No1, Transitional and Transitory Provisions) Order 2005, SI 2005/1521) as surely as those starting after: *R (on the application of Haw) v Secretary of State for the Home Department* [2006] EWCA Civ 532, [2006] All ER (D) 94 (May).

8 Ie an authorisation under the Serious Organised Crime and Police Act 2005 s 134(2). A person seeking authorisation for a demonstration in the designated area must give written notice to that effect to the Metropolitan Police Commissioner: s 133(1). The notice must be given, if reasonably practicable, not less than

six clear days before the day on which the demonstration is to start, or, if that is not reasonably practicable, then as soon as it is, and in any event not less than 24 hours before the time the demonstration is to start: s 133(2). The notice must be given, if the demonstration is to be carried on by more than one person, by any of the persons organising it, or, if it is to be carried on by a person by himself, by that person: s 133(3). The notice must state: (1) the date and time when the demonstration is to start; (2) the place where it is to be carried on; (3) how long it is to last; (4) whether it is to be carried on by a person by himself or not; (5) the name and address of the person giving the notice: s 133(4). Such a notice must be given by delivering it to a police station in the metropolitan police district, or sending it by post by recorded delivery to such a police station: s 133(5). The Interpretation Act 1978 s 7 (service of a document is deemed to have been effected at the time it would be delivered in the ordinary course of post) does not apply to such a notice: Serious Organised Crime and Police Act 2005 s 133(6).

The following provisions apply if a notice complying with the requirements of s 133 is received at a police station in the metropolitan police district by the time specified in s 133(2): s 134(1). The Commissioner must give authorisation for the demonstration to which the notice relates: s 134(2). In giving authorisation, the Commissioner may impose on the persons organising or taking part in the demonstration such conditions specified in the authorisation and relating to the demonstration as in the Commissioner's reasonable opinion are necessary for the purpose of preventing any of the following: (a) hindrance to any person wishing to enter or leave the Palace of Westminster; (b) hindrance to the proper operation of Parliament; (c) serious public disorder; (d) serious damage to property; (e) disruption to the life of the community; (f) a security risk in any part of the designated area; (g) risk to the safety of members of the public (including any taking part in the demonstration): s 134(1), (3). The conditions may, in particular, impose requirements as to: (i) the place where the demonstration may, or may not, be carried on; (ii) the times at which it may be carried on; (iii) the period during which it may be carried on; (iv) the number of persons who may take part in it; (v) the number and size of banners or placards used; (vi) maximum permissible noise levels: s 134(1), (4). The authorisation must specify the particulars of the demonstration given in the notice under s 133 pursuant to s 133(4), with any modifications made necessary by any condition imposed under s 134(3): s 134(1), (5). The Commissioner must give notice in writing of: (A) the authorisation; (B) any conditions imposed under s 134(3); and (C) the particulars mentioned in s 134(5), to the person who gave the notice under s 133: s 134(1), (6). Such notice may be sent by post to the person who gave the notice under s 133 at the address stated in that notice: s 134(9). If the person to whom the notice required by s 134(6) is to be given has agreed, it may be sent to him by email or by facsimile transmission at the address or number notified by him for the purpose to the Commissioner (and a notice so sent is 'in writing' for the purposes of s 134(6)): s 134(10).

9 Ibid s 132(1). Section 132(1) does not apply if the demonstration is a public procession of which notice is required to be given under the Public Order Act 1986 s 11(1) (see PARA 578 ante), or of which (by virtue of s 11(2)) notice is not required to be given, or it is a public procession for the purposes of s 12 or s 13 (see PARAS 579-580 ante): Serious Organised Crime and Police Act 2005 s 132(3). Section 132(1) also does not apply in relation to any conduct which is lawful under the Trade Union and Labour Relations (Consolidation) Act 1992 s 220 (right peacefully to picket a work place: see EMPLOYMENT vol 41 (2009) PARA 1349): Serious Organised Crime and Police Act 2005 s 132(4). If s 132(1) does not apply by virtue of s 132(3) or (4), nothing in ss 133-136 applies either: s 132(5).

10 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. This Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

11 Serious Organised Crime and Police Act 2005 s 132(2).

12 Ibid ss 136(1), 175(1), (3). In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) (alteration of penalties for summary offences), the reference to three months is to be read as a reference to 51 weeks: see the Serious Organised Crime and Police Act 2005 ss 136(1), 175(1), (3). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

13 Ibid s 136(2).

14 Ie under ibid s 134(3): see note 8 supra.

15 Ie except where it is varied under ibid s 135: see the text and notes 22-30 infra.

16 Ibid s 134(7)(a).

17 Ie by virtue of ibid s 134(5): see note 8 supra.

18 Ibid s 134(7)(b).

19 See note 10 supra.

20 Serious Organised Crime and Police Act 2005 s 134(8).

21 Ibid ss 136(3), 175(1), (3). In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) (alteration of penalties for summary offences), the reference to three months is to be read as a reference to 51 weeks: see the Serious Organised Crime and Police Act 2005 ss 136(3), 175(1), (3).

22 'The senior police officer' means the most senior in rank of the police officers present at the scene (or any one of them if there are more than one of the same rank): *ibid* s 135(5).

23 *le* specified in *ibid* s 134(3)(a)-(g): see note 8 *see heads (a)-(g) supra*.

24 *le* authorised under *ibid* s 134: see note 8 *supra*.

25 See *ibid* s 135(1)(a).

26 See *ibid* s 135(1)(b).

27 *Ibid* s 135(2).

28 *Ibid* s 135(3).

29 See note 10 *supra*.

30 Serious Organised Crime and Police Act 2005 s 135(4).

31 See *ibid* ss 136(3), 175(1), (3). In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) (alteration of penalties for summary offences), the reference to three months is to be read as a reference to 51 weeks: see the Serious Organised Crime and Police Act 2005 ss 136(3), 175(1), (3).

32 *le* *ibid* s 136(1), (2) or (3): see the text and notes 12, 13, 21 *supra*.

33 Ibid ss 136(4), 175(1), (3). A person is liable under these provisions notwithstanding the Magistrates' Courts Act 1980 s 45(3) (inciter liable to same penalty as incited: see PARA 65 note 3 *ante*): see the Serious Organised Crime and Police Act 2005 s 136(4). In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) (alteration of penalties for summary offences), the reference to three months is to be read as a reference to 51 weeks: see the Serious Organised Crime and Police Act 2005 ss 136(4), 175(1), (3).

34 *Ibid* s 137(1) (see the text and notes 35-37 *infra*) does not apply to the operation of a loudspeaker: (1) in case of emergency; (2) for police, fire and rescue authority or ambulance purposes; (3) by the Environment Agency, a water undertaker or a sewerage undertaker in the exercise of any of its functions; (4) by a local authority within its area; (5) for communicating with persons on a vessel for the purpose of directing the movement of that or any other vessel; (6) if the loudspeaker forms part of a public telephone system; (7) if the loudspeaker is in or fixed to a vehicle and s 137(3) applies; (8) otherwise than on a highway, by persons employed in connection with a transport undertaking used by the public, but only if the loudspeaker is operated solely for making announcements to passengers or prospective passengers or to other persons so employed; (9) in accordance with a consent granted by a local authority under the Noise and Statutory Nuisance Act 1993 Sch 2 (see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 842): Serious Organised Crime and Police Act 2005 s 137(2). The exception in head (7) *supra* applies if the loudspeaker is operated solely for the entertainment of or for communicating with the driver or a passenger of the vehicle (or, if the loudspeaker is or forms part of the horn or similar warning instrument of the vehicle, solely for giving warning to other traffic), and is so operated as not to give reasonable cause for annoyance to persons in the vicinity: s 137(3). For these purposes, 'local authority' means a London borough council (and, in head (4) *supra*, the Greater London Authority); and 'vessel' includes a hovercraft within the meaning of the Hovercraft Act 1968 (see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 381): Serious Organised Crime and Police Act 2005 s 137(5).

35 *le* a street within the meaning of the New Roads and Street Works Act 1991 s 48(1) (see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 9) which is for the time being open to the public: Serious Organised Crime and Police Act 2005 s 137(5).

36 *le* an area specified under *ibid* s 138 (see note 3 *supra*): s 137(5).

37 *Ibid* s 137(1), (4).

## UPDATE

### **583 Demonstrations in vicinity of Parliament**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 8--The Commissioner may delegate his powers under the 2005 Act s 34: *DPP v Haw* [2007] EWHC 1931 (Admin), [2008] 1 WLR 379, DC (conditions unenforceable for lack of clarity and workability).

TEXT AND NOTE 33--2005 Act s 136(4) now s 136(4), (4A) (substituted by Serious Crime Act 2007 Sch 6 para 64).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PUBLIC MEETINGS/584. Disturbances at public meetings.

## **(6) PUBLIC MEETINGS**

### **584. Disturbances at public meetings.**

Any person who at a lawful public meeting<sup>1</sup> acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together is guilty of an offence<sup>2</sup>. A person who incites others to commit such an offence is guilty of a like offence<sup>3</sup>. A person convicted of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both<sup>4</sup>.

If any constable reasonably suspects any person of committing such an offence, he may, if requested to do so by the chairman of the meeting, require that person to declare to him immediately his name and address and, if that person refuses or fails so to declare his name and address or gives a false name and address, he is guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale<sup>5</sup>.

1 The fact that a meeting is held on a highway is not in itself sufficient to make the meeting unlawful (*Burden v Rigler* [1911] 1 KB 337, DC) nor is the fact that disorderly opposition from other persons occurs (*Beatty v Gillbanks* (1882) 9 QBD 308, DC). See also *Duncan v Jones* [1936] 1 KB 218, DC.

2 Public Meeting Act 1908 s 1(1) (amended by the Representation of the People Act 1949 s 175(1), Sch 9; the Public Order Act 1963 s 1(2); and the Criminal Law Act 1977 ss 15(1), 30, Sch 1). The Public Meeting Act 1908 s 1 (as amended) does not, however, apply as respects meetings to which the Representation of the People Act 1983 s 97 (as amended) (see PARA 585 post) applies: Public Meeting Act 1908 s 1(4) (added by the Representation of the People Act 1983 s 206, Sch 8 para 1).

3 Public Meeting Act 1908 s 1(2).

4 *Ibid* s 1(1) (as amended: see note 2 supra); Criminal Justice Act 1982 ss 38, 46. As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

5 Public Meeting Act 1908 s 1(3) (added by the Public Order Act 1936 s 6; and amended by the Police and Criminal Evidence Act 1984 ss 26(1), 119(2), Sch 7 Pt I); Criminal Justice Act 1982 ss 38, 46. As to the right of the police to be present on private premises in which a public meeting is being held when the commission of any offence or a breach of the peace is anticipated see *Thomas v Sawkins* [1935] 2 KB 249, DC.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(6) PUBLIC MEETINGS/585. Disturbances at election meetings.

### **585. Disturbances at election meetings.**

Special provision is made in relation to election meetings. A person who at a lawful public meeting<sup>1</sup> acts, or incites others to act, in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called together is guilty of an illegal practice<sup>2</sup>. A person guilty of an illegal practice is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>3</sup>.

If a constable reasonably suspects any person of committing such an offence, he may, if requested to do so by the chairman of the meeting, require that person to declare to him immediately his name and address; and, if that person refuses or fails so to declare his name and address or gives a false name and address, he is guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale<sup>4</sup>.

1 For these purposes, 'lawful public meeting' means: (1) a political meeting held in any constituency between the date of the issue of a writ for the return of a member of Parliament for the constituency and the date at which a return to the writ is made (Representation of the People Act 1983 s 97(2)(a)); (2) a meeting held with reference to a local government election in the electoral areas for that election in the period beginning with the last date on which notice of the election may be published in accordance with the rules made under the Representation of the People Act 1983 s 36 (as amended) or regulations made under the Local Government Act 2000 s 44 (as amended) (see ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) PARA 26; LOCAL GOVERNMENT vol 69 (2009) PARA 320) and ending with the day of the election (see the Representation of the People Act 1983 s 97(2)(b) (amended by the Representation of the People Act 1985 s 24, Sch 4 para 39; and the Local Authorities (Mayoral Elections) (England and Wales) Regulations 2002, SI 2002/185, Sch 2)); (3) a meeting held in connection with a local authority referendum during the 'campaign period', which is a period of 25 days ending with the day before the date of the referendum (see the Representation of the People Act 1983 s 97(2), (2A) (s 97(2) substituted, and s 97(2A) added, by the Local Authorities (Conduct of Referendums) (England) Regulations 2001, SI 2001/1298, reg 8, Sch 3 Table 2; and by the Local Authorities (Conduct of Referendums) (Wales) Regulations 2004, SI 2004/870, reg 8, Sch 3 Table 2)); (4) a political meeting held in any European parliamentary constituency in connection with an election to the European Parliament between the last date on which notice of election may be published in accordance with the election rules and the date of the poll (European Parliamentary Elections Regulations 2004, SI 2004/293, reg 68(2)); (5) a meeting in connection with a referendum under the Regional Assemblies (Preparations) Act 2003 held by a permitted participant during the referendum period (see the Representation of the People Act 1983 s 97(2) (substituted by the Regional and Local Government Referendums Order 2004, SI 2004/1962, art 6, Sch 2 Pt 2)).

2 Representation of the People Act 1983 s 97(1); European Parliamentary Elections Regulations 2004, SI 2004/293, reg 68(1). As to the punishment of illegal practices see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 886.

3 Representation of the People Act 1983 s 169 (amended by the Representation of the People Act 1985 ss 23, 28(1), Sch 3 para 9, Sch 5). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

4 See the Representation of the People Act 1983 s 97(3) (amended by the Police and Criminal Evidence Act 1984 ss 26(1), 119(2), Sch 7 Pt 1); and the European Parliamentary Elections Regulations 2004, SI 2004/293 reg 68(3).

## **UPDATE**

### **585 Disturbances at election meetings**



NOTE 1--SI 2001/1298 replaced: Local Authorities (Conduct of Referendums) (England) Regulations 2007, SI 2007/2089. SI 2004/870 replaced: Local Authorities (Conduct of Referendums) (Wales) Regulations 2008, SI 2008/1848.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(7) ON THE SPOT PENALTIES FOR DISORDERLY BEHAVIOUR/586. Offences leading to penalties on the spot.

## **(7) ON THE SPOT PENALTIES FOR DISORDERLY BEHAVIOUR**

### **586. Offences leading to penalties on the spot.**

For the purposes of the provisions concerning on the spot penalties for disorderly behaviour<sup>1</sup>, 'penalty offence' means an offence<sup>2</sup> of: (1) being drunk in a highway, other public place or licensed premises<sup>3</sup>; (2) throwing fireworks in a thoroughfare<sup>4</sup>; (3) trespassing on a railway<sup>5</sup>; (4) throwing stones etc at trains or other things on railways<sup>6</sup>; (5) disorderly behaviour while drunk in a public place<sup>7</sup>; (6) wasting police time or giving false report<sup>8</sup>; (7) theft<sup>9</sup>; (8) destroying or damaging property<sup>10</sup>; (9) behaviour likely to cause harassment, alarm or distress<sup>11</sup>; (10) depositing and leaving litter<sup>12</sup>; (11) consuming alcohol in a designated public place<sup>13</sup>; (12) using a public electronic communications network in order to cause annoyance, inconvenience or needless anxiety<sup>14</sup>; (13) contravention of a prohibition or failure to comply with a requirement imposed by or under fireworks regulations or making a false statement<sup>15</sup>; (14) sale of alcohol to a person who is drunk<sup>16</sup>; (15) sale of alcohol to children<sup>17</sup>; (16) purchase of alcohol by or on behalf of children<sup>18</sup>; (17) buying or attempting to buy alcohol for consumption on licensed premises by a child<sup>19</sup>; (18) consumption of alcohol by children or allowing such consumption<sup>20</sup>; (19) delivering alcohol to children or allowing such delivery<sup>21</sup>; (20) knowingly giving a false alarm of fire<sup>22</sup>.

<sup>1</sup> I.e. the Criminal Justice and Police Act 2001 Pt 1 Ch 1 (ss 1-11) (as amended): see the text and notes 2-22 *infra*; and PARAS 587-588 *post*.

<sup>2</sup> See *ibid* s 1(1) (amended by the Communications Act 2003 s 406, Sch 17 para 169, Sch 19; the Licensing Act 2003 ss 198(1), 199, Sch 6 paras 119, 120, Sch 7; the Fire and Rescue Services Act 2004 ss 53(1), 54, Sch 1 para 97, Sch 2; the Criminal Justice and Police Act 2001 (Amendment) Order 2002, SI 2002/1934, art 2; the Criminal Justice and Police Act 2001 (Amendment) and Police Reform Act 2002 (Modification) Order 2004, SI 2004/2540, art 2; the Criminal Justice and Police Act 2001 (Amendment) Order 2005, SI 2005/1090, art 2; the Licensing Act 2003 (Consequential Amendments) Order 2005, SI 2005/3048, art 2), which lists in a Table the provisions under which offences described in heads (1)-(20) in the text are committed. The Secretary of State has power to make orders amending entries in the Table in the Criminal Justice and Police Act 2001 s 1(1) (as amended) or adding or removing entries: see s 1(2). Such an order, which is exercisable by statutory instrument, may make such amendment of any provision of Pt 1 Ch 1 (as amended) as the Secretary of State considers appropriate in consequence of any change in s 1(1) (as amended) made by the order: s 1(3), (4). No such order may be made under unless a draft of the order has been laid before and approved by a resolution of each House of Parliament: s 1(5).

<sup>3</sup> I.e. an offence committed under the Licensing Act 1872 s 12 (as amended).

<sup>4</sup> I.e. an offence committed under the Explosives Act 1875 s 80 (as amended): see EXPLOSIVES vol 17(2) (Reissue) PARA 1020. As from a day to be appointed s 80 is repealed by the Fireworks Act 2003 s 15, Schedule. At the date at which this volume states the law no such day had been appointed.

<sup>5</sup> I.e. an offence committed under the British Transport Commission Act 1949 s 55 (as amended): see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 407.

<sup>6</sup> I.e. an offence committed under *ibid* s 56 (as amended): see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 386.

<sup>7</sup> I.e. an offence committed under the Criminal Justice Act 1967 s 91 (as amended): see PARA 596 *post*.

- 8    le an offence committed under the Criminal Law Act 1967 s 5(2) (as amended): see PARA 739 post.
- 9    le an offence committed under the Theft Act 1968 s 1: see PARA 282 ante.
- 10   le an offence committed under the Criminal Damage Act 1971 s 1(1): see PARA 334 ante.
- 11   le an offence committed under the Public Order Act 1986 s 5 (as amended): see PARA 560 ante.
- 12   le an offence committed under the Environmental Protection Act 1990 s 87 (as amended): see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 721.
- 13   le an offence committed under the Criminal Justice and Police Act 2001 s 12 (as amended): see PARA 577 ante.
- 14   le an offence committed under the Communications Act 2003 s 127(2): see PARA 766 post; and TELECOMMUNICATIONS vol 97 (2010) PARA 203. For the meaning of 'public electronic communications network' see TELECOMMUNICATIONS vol 97 (2010) PARA 104.
- 15   le an offence committed under the Fireworks Act 2003 s 11: see EXPLOSIVES vol 17(2) (Reissue) PARA 1021.
- 16   le an offence committed under the Licensing Act 2003 s 141: see LICENSING AND GAMBLING vol 67 (2008) PARA 136.
- 17   le an offence committed under ibid s 146(1), (3): see LICENSING AND GAMBLING vol 67 (2008) PARA 143.
- 18   le an offence committed under ibid s 149: see LICENSING AND GAMBLING vol 67 (2008) PARA 147.
- 19   le an offence committed under ibid s 149(4): see LICENSING AND GAMBLING vol 67 (2008) PARA 147.
- 20   le an offence committed under ibid s 150: see LICENSING AND GAMBLING vol 67 (2008) PARA 148.
- 21   le an offence committed under ibid s 151: see LICENSING AND GAMBLING vol 67 (2008) PARA 149.
- 22   le an offence committed under the Fire and Rescue Services Act 2004 s 49: see FIRE SERVICES vol 18(2) (Reissue) PARA 80.

## **UPDATE**

### **586-587 Offences leading to penalties on the spot, Penalty notices and penalties**

Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

## **UPDATE**

### **586 Offences leading to penalties on the spot**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 2--Criminal Justice and Police Act 2001 s 1(1) further amended: SI 2009/110.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(7) ON THE SPOT PENALTIES FOR DISORDERLY BEHAVIOUR/587. Penalty notices and penalties.

### **587. Penalty notices and penalties.**

A constable who has reason to believe that a person aged 10 or over<sup>1</sup> has committed a penalty offence<sup>2</sup> may give him a penalty notice in respect of the offence<sup>3</sup>. 'Penalty notice' means a notice offering the opportunity<sup>4</sup> to discharge any liability to be convicted of the offence to which the notice relates<sup>5</sup>. Unless the notice is given in a police station, the constable giving it must be in uniform<sup>6</sup>. At a police station, a penalty notice may be given only by an authorised constable<sup>7</sup>.

The penalty payable in respect of a penalty offence is such amount as the Secretary of State may specify by order<sup>8</sup> but he may not specify an amount which is more than a quarter of the amount of the maximum fine for which a person is liable on conviction of the offence<sup>9</sup>. The specified fixed penalty for fixed penalty offences<sup>10</sup> is £80, or £40 in the case of a person under 16 at the time when he committed the offence, except in the case of the following offences:

- 702 (1) being drunk in a highway, other public place or licensed premises<sup>11</sup>;
- 703 (2) trespassing on a railway<sup>12</sup>;
- 704 (3) throwing stones etc at trains or other things on railways<sup>13</sup>;
- 705 (4) depositing and leaving litter<sup>14</sup>;
- 706 (5) consumption of alcohol in a designated public place<sup>15</sup>;
- 707 (6) purchase of alcohol by children<sup>16</sup>;
- 708 (7) consumption of alcohol by children or allowing such consumption<sup>17</sup>,

where the fixed penalty is £50, or £30 in the case of a person under 16 at the time that he committed the offence<sup>18</sup>. A penalty notice must be in the prescribed form<sup>19</sup>; state the alleged offence; give such particulars of the circumstances alleged to constitute the offence as are necessary to provide reasonable information about it; specify the suspended enforcement period<sup>20</sup> and explain its effect; state the amount of the penalty; state the designated officer for a local justice area to whom, and the address at which, the penalty may be paid; and inform the person to whom it is given of his right to ask to be tried for the alleged offence and explain how that right may be exercised<sup>21</sup>.

If a penalty notice is given to a person ('A')<sup>22</sup>, and A asks to be tried for the alleged offence, proceedings may be brought against him<sup>23</sup>. Such a request must be made, by a notice given by A in the manner specified in the penalty notice, before the end of the period of suspended enforcement<sup>24</sup>. A request so made is referred to as a 'request to be tried'<sup>25</sup>. If, by the end of the suspended enforcement period, the penalty has not been paid<sup>26</sup>, and A has not made a request to be tried, a sum equal to one and a half times the amount of the penalty may be registered<sup>27</sup> for enforcement against A as a fine<sup>28</sup>.

Proceedings for the offence to which a penalty notice relates may not be brought until the end of the period of 21 days beginning with the date on which the notice was given ('the suspended enforcement period')<sup>29</sup>. If the penalty is paid before the end of that period, no proceedings may be brought for the offence<sup>30</sup>.

The Secretary of State may issue guidance about the exercise of the discretion given<sup>31</sup> to constables, about the issuing of penalty notices, and with a view to encouraging good practice

in connection with the operation of provisions relating to the operation of the provisions<sup>32</sup> for on the spot penalties for disorderly behaviour<sup>33</sup>.

1 Under the Criminal Justice and Police Act 2001 s 2(1) (as originally enacted) a penalty notice could only be given to a person aged 18 or over. Section 2(1) was amended by the Anti-social Behaviour Act 2003 s 87(1), (2) so as to substitute the age of 16 for 18. However, the Secretary of State may by order:

96 (1) amend the Criminal Justice and Police Act 2001 s 2(1) by substituting for the age for the time being specified a different age which is not lower than 10 (s 2(6)(a) (s 2(6)-(9) added by the Anti-social Behaviour Act 2003 s 87)); and

97 (2) if that different age is lower than 16, make provision as follows:

6. (a) where a person whose age is lower than 16 is given a penalty notice, for a parent or guardian of that person to be notified of the giving of the notice (Criminal Justice and Police Act 2001 s 2(6)(b)(i) (as so added)); and

7

7. (b) for that parent or guardian to be liable to pay the penalty under the notice (s 2(6)(b)(ii) (as so added)).

8

The provision which may be made by virtue of head (2) supra includes provision amending, or applying (with or without modifications), Pt 1 Ch 1 (ss 1-11) (as amended) or any other enactment (whenever passed or made): s 2(7) (as so added).

The power conferred by s 2(6) (as added) is exercisable by statutory instrument: s 2(8) (as so added). No order may be made under s 2(6) (as added) unless a draft of the order has been laid before and approved by a resolution of each House of Parliament: s 2(9) (as so added).

Pursuant to s 2(6) (as added), the Secretary of State has made the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, under which the minimum age at which a person can be given a penalty notice under the Criminal Justice and Police Act 2001 s 2(1) is 10 (see the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 2; and PARA 589 post).

2 As to penalty offences see PARA 586 ante.

3 See the Criminal Justice and Police Act 2001 s 2(1) (amended by the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 2). Within the terms of the Police Reform Act 2002 s 38, Sch 4 (see PARA 408 ante; and POLICE vol 36(1) (2007 Reissue) PARA 529), a community support officer designated for the purpose may issue a fixed penalty notice except in relation to theft or to depositing and leaving litter contrary to the Environmental Protection Act 1990 s 87 (as amended) (see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 721): Police Reform Act 2002 Sch 4 para 1(2)(a), (2A) (s 1(2A) added by the Serious Organised Crime and Police Act 2005 s 122(1), (3)(a)). Within the terms of the Police Reform Act 2002 s 41, Sch 5 (see POLICE vol 36(1) (2007 Reissue) PARA 533), an accredited person under a community safety accreditation scheme may issue a penalty notice except in respect of theft, depositing and leaving litter contrary to the Environmental Protection Act 1990 s 87 (as amended), being drunk in a highway etc, being drunk and disorderly in a public place or criminal damage: see the Police Reform Act 2002 Sch 5 para 1(2)(aa) (added by the Anti-social Behaviour Act 2001 s 89(1), (5); and amended by the Serious Organised Crime and Police Act 2005 s 122(1), (4), (5)(a)); the Police Reform Act 2002 Sch 5 para 1(2A) (added by the Serious Organised Crime and Police Act 2005 ss 122(1), (4), (5)(b), 174(2), Sch 17 Pt 2); and the Criminal Justice and Police Act 2001 (Amendment) and Police Reform Act 2002 (Modification) Order 2004, SI 2004/2540, arts 4, 5. As to community support officers, accredited persons and community safety accreditation schemes generally see POLICE vol 36(1) (2007 Reissue) PARA 529 et seq.

4 le by paying a penalty in accordance with the Criminal Justice and Police Act 2001 Pt 1 Ch 1 (as amended): see PARA 586 ante.

5 Ibid s 2(4).

6 Ibid s 2(2).

7 Ibid s 2(3). 'Authorised constable' means a constable authorised, on behalf of the chief officer of police for the area in which the police station is situated, to give penalty notices: s 2(5).

8 Ibid s 3(1); and see the Penalties for Disorderly Behaviour (Amount of Penalty) Order 2002, SI 2002/1837 (amended by SI 2004/2468; SI 2004/3371; SI 2005/581; SI 2005/3048). An order under the Criminal Justice and Public Order Act 2001 s 3(1) must be made by statutory instrument and is subject to annulment in pursuance of

a resolution of either House of Parliament: s 3(5), (6). The Secretary of State may specify different amounts for persons of different ages: s 3(1A) (added by the Anti-social Behaviour Act 2003 s 87(4)).

9 Criminal Justice and Police Act 2001 s 3(2) (amended by the Criminal Justice and Police Act 2001 (Amendment) and the Police Reform Act 2002 (Modification) Order 2004, SI 2004/2540, art 3). As from a day to be appointed the Secretary of State may specify such an amount plus a half of the relevant surcharge: Criminal Justice and Police Act 2001 s 3(2) (as so amended; prospectively amended by the Domestic Violence, Crime and Victims Act 2004 s 15(1), (2)). The 'relevant surcharge', in relation to a person of a given age, is the amount payable by way of surcharge under the Criminal Justice Act 2003 s 161A (prospectively added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 158) by a person of that age who is fined the maximum amount for the offence: Criminal Justice and Police Act 2001 s 3(2A) (prospectively added by the Domestic Violence, Crime and Victims Act 2004 s 15(1), (3)). At the date at which this volume states the law no such day had been appointed.

10 See PARA 586 ante.

11 See PARA 586 head (1) ante.

12 See PARA 586 head (3) ante.

13 See PARA 586 head (6) ante.

14 See PARA 586 head (10) ante.

15 See PARA 586 head (11) ante.

16 See PARA 586 head (16) ante.

17 See PARA 586 head (18) ante.

18 See the Penalties for Disorderly Behaviour (Amount of Penalty) Order 2002, SI 2002/1837 (amended by SI 2004/2468; SI 2004/3371; SI 2005/581).

19 Is prescribed by regulations made by the Secretary of State: Criminal Justice and Police Act 2001 s 3(4). See the Penalties for Disorderly Behaviour (Form of Penalty Notice) Regulations 2002, SI 2002/1838 (amended by SI 2004/3169; SI 2005/617; SI 2005/630).

20 See the Criminal Justice and Police Act 2001 s 5; and the text and notes 29-30 infra.

21 Ibid s 3(3) (amended by the Courts Act 2003 s 109(1), Sch 8 para 397); and see the Penalties for Disorderly Behaviour (Form of Penalty Notice) Regulations 2002, SI 2002/1838 (as amended: see note 19 supra). Regulations under the Criminal Justice and Police Act 2001 s 3(3) (as amended) must be made by statutory instrument, and are subject to annulment in pursuance of a resolution of either House of Parliament: s 3(5), (6).

22 Is under ibid s 2 (as amended): see the text and notes 1-7 supra.

23 Ibid s 4(1), (2).

24 Ibid s 4(3). As to the period of suspended enforcement see s 5; and the text and notes 29-30 infra.

25 Ibid s 4(4).

26 Is in accordance with ibid Pt 1 Ch 1 (as amended).

27 Is under ibid s 8 (as amended): see PARA 588 post.

28 Ibid s 4(5). In its application to a young penalty recipient (see PARA 589 post), s 4(5) has effect as if, instead of referring to enforcement against A as a fine, it referred to enforcement as a fine against the parent or guardian of A who has been notified of the giving of the penalty notice under the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 3(1) or art 4(3): see art 6(1), (2); and PARA 589 post.

29 Criminal Justice and Police Act 2001 s 5(1). This does not apply if the person to whom the penalty notice was given has made a request to be tried: s 5(3). In its application to a young penalty recipient (see PARA 589 post), s 5(1) has effect as if, instead of the reference to the date on which the notice was given, there were substituted a reference to the date on which notification under the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 3(1) was served on the parent or guardian of the

person to whom the penalty notice was given or, if a notification under art 3(1) is cancelled under art 4(2), the date on which notification under art 4(3) was served on the parent or guardian of the person to whom the penalty notice was given: art 6(1), (3). As to arts 3(1), 4(2), (3) see PARA 589 post.

30 Criminal Justice and Police Act 2001 s 5(2).

31 *Ie* by *ibid* Pt 1 Ch 1 (as amended).

32 *Ie* the provisions of *ibid* Pt 1 Ch 1 (as amended).

33 *Ibid* s 6.

## **UPDATE**

### **587 Penalty notices and penalties**

NOTE 1--There is nothing in the Criminal Justice and Police Act 2001 which suggests that issue of a penalty notice asserting one offence, and the payment of the penalty, relieves the recipient of any possible further proceedings if and when it becomes apparent that a more serious, and in particular a non-penalty, offence has in fact been committed: see *R v Gore; R v Maher* [2009] EWCA Crim 1424, [2009] 1 WLR 2454, (2009) 173 JP 505 (all facts not known when penalty notice issued); and PARA 1225 NOTE 5.

NOTES 8, 18--SI 2002/1837 further amended: SI 2009/83.

TEXT AND NOTES 19, 21--The requirement for penalty notices to be in the prescribed form is repealed: Criminal Justice and Police Act 2001 s 3(3)-(5) (amended by SI 2010/64). SI 2002/1838 revoked: SI 2010/64.

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### **588. Procedure.**

If a person to whom a penalty notice<sup>1</sup> is given decides to pay the penalty, he must pay it to the designated officer specified in the notice<sup>2</sup>. Payment of the penalty may be made by properly addressing, pre-paying and posting a letter containing the amount of the penalty (in cash or otherwise)<sup>3</sup>. Unless the contrary is proved, payment is to be regarded as made at the time at which the letter would be delivered in the ordinary course of post<sup>4</sup>.

The chief officer of police<sup>5</sup> may, in respect of any registrable sum<sup>6</sup>, issue a certificate (a 'registration certificate')<sup>7</sup> stating that the sum is registrable for enforcement against the defaulter<sup>8</sup> as a fine<sup>9</sup>. If that officer issues a registration certificate, he must cause it to be sent to the designated officer for the local justice area in which the defaulter appears to him to reside<sup>10</sup>.

If the designated officer for a local justice area receives a registration certificate, he must register<sup>11</sup> the registrable sum for enforcement as a fine in that area by entering it in the register of a magistrates' court acting for that area<sup>12</sup>.

If, in any proceedings for enforcing a fine<sup>13</sup>, the defaulter claims that he was not the person to whom the penalty notice concerned was issued<sup>14</sup>, the court may adjourn the proceedings for a period of not more than 28 days for the purpose of allowing that claim to be investigated<sup>15</sup>. On the resumption of proceedings that have been so adjourned, the court must accept the defaulter's claim unless it is shown, on a balance of probabilities, that he was the recipient of the penalty notice<sup>16</sup>. The court may set aside a fine in the interests of justice<sup>17</sup>. If it does so, it must give such directions for further consideration of the case as it considers appropriate or direct that no further action is to be taken in respect of the allegation that gave rise to the penalty notice concerned<sup>18</sup>.

1 As to penalty notices see PARA 587 ante.

2 Criminal Justice and Police Act 2001 s 7(1) (amended by the Courts Act 2003 s 109(1), Sch 8 para 398). In its application to a young penalty recipient (see PARA 589 post), the Criminal Justice and Police Act 2001 s 7(1) (as amended) has effect as if, instead of referring to a person to whom a penalty notice is given, it referred a parent or guardian who has been notified of the giving of a penalty notice under the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 3(1) or art 4(3): art 6(1), (4).

3 Criminal Justice and Police Act 2001 s 7(2). This is not to be read as preventing the payment of a penalty by other means: s 7(5). A letter is properly addressed for the purposes of s 7(2) if it is addressed in accordance with the requirements specified in the penalty notice (see s 3(3) (as amended); and PARA 587 ante): s 7(6).

4 Ibid s 7(4). This applies if a person claims to have made payment by that method, and shows that his letter was posted: s 7(3).

5 For the meaning of 'chief officer of police' see PARA 380 note 1 ante. For these purposes, 'chief officer of police' includes the chief constable of the British Transport Police: see ibid s 11.

6 I.e a sum that may be registered under ibid s 8 (as amended) (see the text and notes 7-10 infra) as a result of s 4(5) (see PARA 587 ante): s 8(4).

7 A registration certificate must give particulars of the offence to which the penalty notice relates, and state the name and last known address of the defaulter and the amount of the registrable sum: ibid s 8(3).



8     le the person against whom the registrable sum may be registered: *ibid* s 8(5).

9     *Ibid* s 8(1).

10    *Ibid* s 8(2) (amended by the Courts Act 2003 s 109(1), Sch 8 para 399).

11    A designated officer registering a sum under the Criminal Justice and Police Act 2001 s 9 (as amended) (see the text and note 12 *infra*) for enforcement as a fine must give the defaulter notice of the registration: s 9(3) (s 9(1)-(3) amended by the Courts Act 2003 s 109(1), Sch 8 para 400). The notice must specify the amount of the sum registered, and give the information with respect to the offence, and the authority for registration, which was included in the registration certificate under the Criminal Justice and Police Act 2001 s 8 (as amended) (see the text and notes 7-10 *supra*): s 9(4).

12    *Ibid* s 9(1) (as amended: see note 11 *supra*). If it appears to that officer that the defaulter does not reside in that area, s 9(1) (as amended) does not apply to him but the officer must cause the certificate to be sent to the person appearing to him to be the designated officer for the local justice area in which the defendant resides: s 9(2) (as so amended).

If a sum is registered in a magistrates' court as a result of s 9 (as amended), any enactment referring (in whatever terms) to a fine imposed, or other sum adjudged to be paid, on conviction by such a court applies as if the registered sum were a fine imposed by that court on the conviction of the defaulter on the date on which the sum was registered: s 9(5).

13    'Fine' means a sum enforceable as a fine as a result of *ibid* s 9 (as amended) (see the text and notes 11-12 *supra*): s 10(1).

14    In its application to a young penalty recipient (see *PARA 589 post*), this provision has effect so that the court may adjourn proceedings for a claim to be investigated where in any proceedings the defaulter claims that: (1) he is not a parent or guardian of the person to whom the penalty notice concerned was issued; (2) he was not properly notified of the giving of the penalty notice concerned under the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 3(1) or art 4(3)(b) (see *PARA 589 post*): see art 6(1), (5).

15    Criminal Justice and Police Act 2001 s 10(2), (3).

16    *Ibid* s 10(4). In its application to a young penalty recipient (see *PARA 589 post*), s 10(4) is to have effect as if for 'that he was the recipient of the penalty notice' there were substituted 'to be incorrect': Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 6(1), (6).

17    Criminal Justice and Police Act 2001 s 10(5).

18    *Ibid* s 10(6).

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### **589. Special provisions relating to persons under 16.**

Where a penalty notice<sup>1</sup> has been given, the chief officer of police<sup>2</sup> must notify such parent or guardian<sup>3</sup> of a person under 16 who is given a penalty notice<sup>4</sup> (a 'young penalty recipient'<sup>5</sup>) as he thinks fit of the giving of the penalty notice concerned<sup>6</sup>. Such a notification may be served by giving it to the parent or guardian personally, or by sending it to the parent or guardian at his usual or last-known address by first-class post<sup>7</sup>. Such a notification must be served before the end of the period of 28 days beginning with the date on which the penalty notice was given<sup>8</sup>.

If a notification is served<sup>9</sup> and: (1) the chief officer of police decides that the notification should have been served on some other parent or guardian of the young penalty recipient; or (2) the chief officer of police discovers that the person on whom the notification was served is not a parent or guardian of the young penalty recipient, the chief officer of police may cancel the original notification at any time before the end of the period of 21 days beginning with the date on which it is served<sup>10</sup>. If the chief officer of police cancels the original notification he must: (a) as soon as reasonably practicable inform the recipient of the original notification in writing that the original notification has been cancelled; and (b) notify such other person who is a parent or guardian of the young penalty recipient as he thinks fit of the giving of the penalty notice<sup>11</sup>. A notification under head (b) above must be served before the end of the period of 14 days beginning with the date on which the original notification was cancelled<sup>12</sup>.

Where a parent or guardian of a young penalty recipient is notified<sup>13</sup> of the giving of a penalty notice and the notification is not cancelled<sup>14</sup>, or is notified under head (b) above of the giving of a penalty notice, that parent or guardian is liable to pay the penalty under the notice<sup>15</sup>.

1 As to penalty notices see PARA 587 ante.

2 I.e. the chief officer of police for the police area in which the offence to which the notice relates is alleged to have been committed or if the penalty notice was given by a member of the British Transport Police, the Chief Constable of the British Transport Police: see the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 1(2).

3 I.e. a person who has for the time being the care of a young penalty recipient, including a local authority which has parental responsibility for a young penalty recipient who is in its care or is provided with accommodation by it in the exercise of any social services functions: *ibid* art 1(2). 'Local authority' and 'parental responsibility' have the same meanings as in the Children Act 1989 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 134, 248): see the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 1(2). 'Social services function', in relation to a local authority, has the meaning given by the Local Authority Social Services Act 1970 s 1A (as added) (see LOCAL GOVERNMENT vol 69 (2009) PARA 588): see the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 1(2).

4 I.e. under the Criminal Justice and Police Act 2001 s 2(1) (as amended): see PARA 587 ante.

5 See the Penalties for Disorderly Behaviour (Amendment of Minimum Age) Order 2004, SI 2004/3166, art 1(2).

6 *Ibid* art 3(1). A notification under art 3(1) must be in writing and must include a copy of the penalty notice: art 3(2).

7 *Ibid* art 3(3).

8 Ibid art 3(4). Where a notification is sent to the parent or guardian by first-class post, service is deemed to have been effected on the second day after posting: art 3(5).

9 Ie under ibid art 3(1).

10 Ibid art 4(1), (2).

11 Ibid art 4(3). The provisions of art 3(2), (3), (5) (see the text and notes 6-8 supra) apply to a notification under head (b) in the text as they apply to a notification under art 3(1) (see the text and note 6 supra): art 4(5).

12 Ibid art 4(4).

13 Ie under ibid art 3(1): see the text and note 6 supra.

14 Ie under ibid art 4(2): see the text and note 10 supra.

15 Ibid art 5.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(8) COLLECTIVE TRESPASS OR NUISANCE ON LAND/590. Power to remove trespassers on land.

## **(8) COLLECTIVE TRESPASS OR NUISANCE ON LAND**

### **590. Power to remove trespassers on land.**

If the senior police officer present at the scene reasonably believes that two or more persons are trespassing<sup>1</sup> on land<sup>2</sup> and are present there with the common purpose of residing<sup>3</sup> there for any period, that reasonable steps have been taken by or on behalf of the occupier<sup>4</sup> to ask them to leave and: (1) that any of those persons has caused damage<sup>5</sup> to the land or to property<sup>6</sup> on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his; or (2) that those persons have between them six or more vehicles<sup>7</sup> on the land, he may direct those persons, or any of them, to leave the land and to remove any vehicles or other property they have with them on the land<sup>8</sup>. Where the persons in question are reasonably believed by the senior police officer to be persons who were not originally trespassers but have become trespassers on the land, the officer must reasonably believe that the other conditions specified above are satisfied after those persons became trespassers before he can exercise this power<sup>9</sup>.

If a person knowing that such a direction has been given which applies to him: (a) fails to leave the land as soon as reasonably practicable<sup>10</sup>; or (b) having left again enters the land as a trespasser within the period of three months beginning with the day on which the direction was given, he commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>11</sup>.

In proceedings for such an offence, it is a defence for the defendant to show<sup>12</sup> that he was not trespassing on the land, or that he had a reasonable excuse for failing to leave the land as soon as reasonably practicable or, as the case may be, for again entering the land as a trespasser<sup>13</sup>.

If a direction has been given under the above provisions and a constable reasonably suspects that any person to whom the direction applies has, without reasonable excuse: (i) failed to remove any vehicle on the land which appears to the constable to belong to him or to be in his possession or under his control; or (ii) entered the land as a trespasser with a vehicle within the period of three months beginning with the day on which the direction was given, the constable may seize and remove that vehicle<sup>14</sup>.

1 'Trespass' means trespass as against the occupier of the land; and 'trespassing' and 'trespasser' are to be construed accordingly: Criminal Justice and Public Order Act 1994 s 61(9). In its application to common land, s 61 (as amended) (see the text and notes 2-13 infra) has effect as if in s 61(1)-(6) (as amended) (see the text and notes 8-13 infra): (1) references to trespassing or trespassers were references to acts and persons doing acts which constitute either a trespass as against the occupier or an infringement of the commoners' rights; and (2) references to 'the occupier' included the commoners or any of them or, in the case of common land to which the public has access, the local authority as well as any commoner: Criminal Justice and Public Order Act 1994 s 61(7). 'Common land' means common land as defined in the Commons Registration Act 1965 s 22 (see COMMONS vol 13 (2009) PARA 407); 'commoner' means a person with rights of common as defined in the Commons Registration Act 1965 s 22 (see COMMONS vol 13 (2009) PARA 406); and 'local authority' means any local authority which has powers in relation to the land under the Commons Registration Act 1965 s 9 (as amended) (see COMMONS vol 13 (2009) PARA 430); see the Criminal Justice and Public Order Act 1994 s 61(9). As from a day to be appointed these definitions are amended so that 'common land' means land registered as common land in a register kept under the Commons Act 2006 Pt 1 (ss 1-25) and land to which Pt 1 does not apply and which is

subject to rights of common as defined in s 61(1); 'commoner' means a person with rights of common as so defined; and 'local authority' means any local authority which has powers in relation to the land under the Commons Act 2006 s 45: Criminal Justice and Public Order Act 1994 s 61(9) (prospectively amended by the Commons Act 2006 s 52, Sch 5 para 5). At the date at which this volume states the law no such day had been appointed.

The Criminal Justice and Public Order Act 1994 s 61(7) does not: (1) require action by more than one occupier; or (2) constitute persons trespassers as against any commoner or the local authority if they are permitted to be there by the other occupier: s 61(8).

2 'Land' does not include: (1) buildings other than: (a) agricultural buildings within the meaning of the Local Government Finance Act 1988 Sch 5 paras 3-8 (as amended) (see RATING AND COUNCIL TAX); or (b) scheduled monuments within the meaning of the Ancient Monuments and Archaeological Areas Act 1979 (see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 1010); (2) land forming part of a highway unless it falls within the classifications of the Wildlife and Countryside Act 1981 s 54 (prospectively repealed) or is a cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984 (see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARAS 64, 601): see the Criminal Justice and Public Order Act 1994 s 61(9). As from a day to be appointed head (2) supra is amended so as to provide that 'land' in s 61 (as amended) does not include land forming part of a highway unless it is a footpath, bridleway or byway open to all traffic within the meaning of the Wildlife and Countryside Act 1981 Pt III (ss 53-66) (as amended) (see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 591 et seq), is a restricted byway within the meaning of the Countryside and Rights of Way Act 2000 (see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 603) or is cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984: see the Criminal Justice and Public Order Act 1994 s 61(9) (prospectively amended by the Countryside and Rights of Way Act 2000 s 51, Sch 5 para 17). At the date at which this volume states the law no such day had been appointed.

3 A person may be regarded for the purposes of the Criminal Justice and Public Order Act 1994 s 61 (as amended) as having a purpose of residing in a place notwithstanding that he has a home elsewhere: see s 61(9).

4 le the person entitled to possession of the land by virtue of an estate or interest held by him: see ibid s 61(9).

5 'Damage' includes the deposit of any substance capable of polluting the land: see ibid s 61(9).

6 'Property', in relation to damage to property on land, means property within the meaning of the Criminal Damage Act 1971 s 10(1) (see PARA 339 ante): see the Criminal Justice and Public Order Act 1994 s 61(9).

7 'Vehicle' includes: (1) any vehicle, whether or not it is in a fit state for use on roads, and includes any chassis or body, with or without wheels, appearing to have formed part of such a vehicle, and any load carried by, and anything attached to, such a vehicle; and (2) a caravan as defined in the Caravan Sites and Control of Development Act 1960 s 29(1) (see PARA 610 note 1 post): see the Criminal Justice and Public Order Act 1994 s 61(9).

8 See ibid s 61(1). Such a direction, if not communicated to the persons in question by the police officer giving the direction, may be communicated to them by any constable at the scene: s 61(3). Such a direction can only be given after the trespassers have failed to comply with the occupier's request for them to leave: *R (on the application of Fuller) v Chief Constable of Dorset Police* [2001] EWHC (Admin) 1057, [2003] QB 480, [2002] 3 All ER 57.

9 Criminal Justice and Public Order Act 1994 s 61(2).

10 'Fail to leave' includes failure to remove a vehicle or other property which one has been directed to remove: *Kruppa v DPP* [1989] Crim LR 295, DC (which was concerned with the identical offence under the Public Order Act 1986 s 39 (repealed), which was replaced by the Criminal Justice and Public Order Act 1994 s 61). 'As soon as reasonably practicable' means that the trespassers must leave as soon as they objectively reasonably can, not when a reasonable police officer believes is practicable: *Kruppa v DPP* supra.

11 Criminal Justice and Public Order Act 1994 s 61(4). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 61(4) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 45(1), (4)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

12 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

13 Criminal Justice and Public Order Act 1994 s 61(6).

14 Ibid s 62(1). Any vehicles which have been seized and removed by a constable under s 62(1) (see PARA 591 post) may be retained in accordance with regulations made by the Secretary of State under s 67(3): s 67(1). As from a day to be appointed this provision extends to any vehicle seized and removed under s 62C(3) (as added) (see PARA 591 post): see s 67(1) (prospectively amended by the Anti-social Behaviour Act 2003 s 63(2)). At the date at which this volume states the law no such day had been appointed. As to such regulations see the Police (Retention and Disposal of Vehicles) Regulations 1995, SI 1995/723 (amended by SI 1997/2971).

## **UPDATE**

### **590-592 Collective Trespass or Nuisance on Land**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(8) COLLECTIVE TRESPASS OR NUISANCE ON LAND/591. Power to remove trespassers: alternative site available.

**591. Power to remove trespassers: alternative site available.**

If the senior police officer present at a scene reasonably believes that the following conditions<sup>1</sup> are satisfied in relation to a person and land:

- 709 (1) that the person and one or more others ('the trespassers') are trespassing<sup>2</sup> on the land<sup>3</sup>;
- 710 (2) that the trespassers have between them at least one vehicle on the land<sup>4</sup>;
- 711 (3) that the trespassers are present on the land with the common purpose of residing there for any period<sup>5</sup>;
- 712 (4) if it appears to the officer that the person has one or more caravans<sup>6</sup> in his possession or under his control on the land, that there is a suitable pitch on a relevant caravan site for that caravan or each of those caravans<sup>7</sup>;
- 713 (5) that the occupier of the land or a person acting on his behalf has asked the police to remove the trespassers from the land<sup>8</sup>,

he may direct the person: (a) to leave the land; (b) to remove any vehicle and other property he has with him on the land<sup>9</sup>.

If a police officer proposes to give such a direction<sup>10</sup> in relation to a person and land<sup>11</sup>, and it appears to him that the person has one or more caravans in his possession or under his control on the land<sup>12</sup>, the officer must consult every local authority<sup>13</sup> within whose area the land is situated as to whether there is a suitable pitch for the caravan or each of the caravans on a relevant caravan site which is situated in the local authority's area<sup>14</sup>.

A person commits an offence if he knows that such a direction has been given which applies to him and:

- 714 (i) he fails to leave the relevant land as soon as reasonably practicable<sup>15</sup>; or
- 715 (ii) he enters any land in the area of the relevant local authority<sup>16</sup> as a trespasser before the end of the relevant period<sup>17</sup> with the intention of residing there<sup>18</sup>.

A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>19</sup>.

In proceedings for such an offence it is a defence for the defendant to show<sup>20</sup>:

- 716 (A) that he was not trespassing on the land in respect of which he is alleged to have committed the offence<sup>21</sup>; or

- 717 (B) that he had a reasonable excuse:

9

- 14. (aa) for failing to leave the relevant land as soon as reasonably practicable<sup>22</sup>;
- or

- 15. (bb) for entering land in the area of the relevant local authority as a trespasser with the intention of residing there<sup>23</sup>; or

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718 (c) that, at the time the direction was given, he was under the age of 18 years and was residing with his parent or guardian<sup>24</sup>.

If such a direction<sup>25</sup> has been given and a constable reasonably suspects that a person to whom the direction applies has, without reasonable excuse, failed to remove any vehicle on the relevant land which appears to the constable to belong to him or to be in his possession or under his control, or entered any land in the area of the relevant local authority as a trespasser with a vehicle before the end of the relevant period<sup>26</sup> with the intention of residing there, the constable may seize and remove the vehicle<sup>27</sup>.

1     Ile the conditions specified by the Criminal Justice and Public Order Act 1994 s 62A(2) (as added): see heads (1)-(5) in the text.

2     For the meanings of 'trespassing', 'trespass' and 'trespasser' see PARA 590 note 1 ante.

In ibid ss 62A-62C (as added and amended), references to trespassing and trespassers have effect as if they were references to acts, and persons doing acts, which constitute a trespass as against the occupier, or an infringement of the commoners' rights: s 62D(1), (2) (s 62D added by the Anti-social Behaviour Act 2003 s 63). This does not require action by more than one occupier, or constitute persons trespassers as against any commoner or the local authority if they are permitted to be there by the other occupier: Criminal Justice and Public Order Act 1994 s 62D(1), (4) (as so added). References to the occupier, in the case of land to which the public has access, include the local authority and any commoner; and, in any other case, include the commoners or any of them: s 62D(1), (3) (as so added). For the meanings of 'common land', 'commoner' and 'local authority' see PARA 590 note 1 ante.

3     Ibid s 62A(2)(a) (s 62A added by the Anti-social Behaviour Act 2003 s 60). 'Land' does not include buildings other than: (1) agricultural buildings within the meaning of the Local Government Finance Act 1988 Sch 5 paras 3-8 (as amended) (see RATING AND COUNCIL TAX); or (2) scheduled monuments within the meaning of the Ancient Monuments and Archaeological Areas Act 1979 (see OPEN SPACES AND ANCIENT MONUMENTS vol 34 (Reissue) PARA 355): Criminal Justice and Public Order Act 1994 s 62E(1), (2) (s 62E added by the Anti-social Behaviour Act 2003 s 64).

4     Criminal Justice and Public Order Act 1994 s 62A(2)(b) (as added: see note 3 supra). For the meaning of 'vehicle' see PARA 590 note 7 ante.

5     Ibid s 62A(2)(c) (as added: see note 3 supra). A person may be regarded as having a purpose of residing in a place even if he has a home elsewhere: s 62E(1), (8) (as added: see note 3 supra).

6     'Caravan' and 'caravan site' have the same meanings as in the Caravan Sites and Control of Development Act 1960 Pt 1 (see s 29; and PARA 610 note 1 post): see the Criminal Justice and Public Order Act 1994 s 62A(6) (as added: see note 3 supra).

7     Ibid s 62A(2)(d) (as added: see note 3 supra). 'Relevant caravan site' means a caravan site which is: (1) situated in the area of a local authority within whose area the land is situated; and (2) managed by a relevant site manager: see s 62A(6) (as so added). 'Relevant site manager' means: (a) a local authority within whose area the land is situated; (b) a registered social landlord: see s 62A(6) (as so added). 'Registered social landlord' means a body registered as a social landlord under the Housing Act 1996 Pt 1 Ch 1 (ss 1-7) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 67 et seq): Criminal Justice and Public Order Act 1994 s 62A(6) (as so added). The Secretary of State may by order amend the definition of 'relevant site manager' in s 62A(6) (as added) by adding a person or description of person: s 62A(7) (as so added). Such an order must be made by statutory instrument and is subject to annulment in pursuance of a resolution of either House of Parliament: s 62A(8) (as so added). At the date at which this volume states the law no such order had been made.

8     Ibid s 62A(2)(e) (as added: see note 3 supra). For the meaning of 'occupier' see PARA 590 note 4 ante.

9     See ibid s 62A(1) (as added: see note 3 supra). Such a direction may be communicated to the person to whom it applies by any constable at the scene: s 62A(3) (as so added).

10    Ile a direction under ibid s 62A(1) (as added): see the text and note 9 supra.

11    Ibid s 62A(4)(a) (as added: see note 3 supra).

12    Ibid s 62A(4)(b) (as added: see note 3 supra).



13 'Local authority' means:

- 98 (1) in Greater London, a London borough or the Common Council of the City of London (ibid s 62E(3)(a) (as added: see note 3 supra));
- 99 (2) in England outside Greater London, a county council, a district council or the Council of the Isles of Scilly (s 62E(3)(b) (as so added));
- 100 (3) in Wales, a county council or a county borough council (s 62E(3)(c) (as so added)).

14 Ibid s 62A(4), (5) (as added: see note 3 supra).

15 Ibid s 62B(1)(a) (s 62B added by the Anti-social Behaviour Act 2003 s 61). 'The relevant land' means the land in respect of which a direction under the Criminal Justice and Public Order Act 1994 s 62A(1) (as added) (see the text and note 9 supra) is given: s 62E(1), (5) (as added: see note 3 supra).

16 'The relevant local authority' means:

- 101 (1) if the relevant land is situated in the area of more than one local authority (but is not in the Isles of Scilly), the district council or county borough council within whose area the relevant land is situated (ibid s 62E(6)(a) (as added: see note 3 supra));
- 102 (2) if the relevant land is situated in the Isles of Scilly, the Council of the Isles of Scilly (s 62E(6)(b) (as so added));
- 103 (3) in any other case, the local authority within whose area the relevant land is situated (s 62E(6)(c) (as so added)).

17 The relevant period is the period of three months starting with the day on which the direction is given: ibid s 62B(2) (as added: see note 15 supra).

18 Ibid s 62B(1)(b) (as added: see note 15 supra).

19 Ibid s 62B(3) (as added: see note 15 supra). As from a day to be appointed this maximum term of imprisonment is increased to 51 weeks: see s 62B(3) (as added) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 45(1), (5)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

20 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

21 Criminal Justice and Public Order Act 1994 s 62B(5)(a) (as added: see note 15 supra).

22 Ibid s 62B(5)(b)(i) (as added: see note 15 supra). See note 23 infra.

23 Ibid s 62B(5)(b)(ii) (as added: see note 15 supra). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the European Convention on Human Rights art 6(2), see PARA 1368 et seq post.

24 Criminal Justice and Public Order Act 1994 s 62B(5)(c) (as added: see note 15 supra).

25 Ie a direction under ibid s 62A (as added): see the text and notes 1-14 supra.

26 The 'relevant period' is the period of three months starting with the day on which the direction is given: ibid s 62C(1), (2) (s 62C added by the Anti-social Behaviour Act 2003 s 62).

27 Criminal Justice and Public Order Act 1994 s 62C(1), (3) (as added: see note 26 supra). Any vehicles seized and retained by a constable under s 62C(3) (as added) may be retained in accordance with regulations made by the Secretary of State: see PARA 590 note 14 ante.

## UPDATE

### 590-592 Collective Trespass or Nuisance on Land

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(8) COLLECTIVE TRESPASS OR NUISANCE ON LAND/592. Aggravated trespass.

## **592. Aggravated trespass.**

A person commits the offence of aggravated trespass if he trespasses on land<sup>1</sup> and, in relation to any lawful activity<sup>2</sup> which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect: (1) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity; (2) of obstructing that activity; or (3) of disrupting that activity<sup>3</sup>. Activity on any occasion on the part of a person or persons on land is 'lawful' for these purposes if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land<sup>4</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>5</sup>.

If the senior police officer present at the scene reasonably believes: (a) that a person is committing, has committed or intends to commit the offence of aggravated trespass on land; or (b) that two or more persons are trespassing on land and are present there with the common purpose of intimidating persons so as to deter them from engaging in a lawful activity<sup>6</sup> or of obstructing or disrupting a lawful activity, he may direct that person or those persons (or any of them) to leave the land<sup>7</sup>. If a person knowing that such a direction has been given which applies to him fails to leave the land as soon as practicable, or having left again enters the land as a trespasser within the period of three months beginning with the day on which the direction was given, he commits an offence and is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>8</sup>.

In proceedings for such an offence it is a defence for the defendant to show that he was not trespassing on the land, or that he had a reasonable excuse for failing to leave the land as soon as practicable or, as the case may be, for again entering the land as a trespasser<sup>9</sup>.

1 'Land' does not include the highways and roads excluded from the application of the Criminal Justice and Public Order Act 1994 by head (2) of the definition of 'land' (see PARA 590 note 2 head (2) ante): s 68(5)(a).

2 Conduct which might amount under customary international law to crimes against peace or crimes of aggression is not unlawful activity for these purposes: *R v Jones* [2006] UKHL 16, [2006] All ER 741, [2006] 2 WLR 772.

3 Criminal Justice and Public Order Act 1994 s 68(1) (amended by the Anti-social Behaviour Act 2003 ss 59(1), (2), 92, Sch 3). For the purposes of the rule against duplicity (see PARA 1220 post), the Criminal Justice and Public Order Act 1994 s 68(1) (as amended) creates one offence consisting of one piece of prohibited conduct with one or more of three intents: *Nelder v DPP* (1998) Times, 11 June, DC; *Winder v DPP* (1996) 160 JP 713, DC (defendant's conviction under the Criminal Justice and Public Order Act 1994 s 68(1) upheld where, with intent to disrupt a fox hunt, he had run towards the hunt in order to carry out that intention). A distinct and overt act which is intended to have the effect either of intimidating persons doing a lawful activity so as to deter them from engaging in it, or of disrupting or obstructing that activity, is required in addition to trespass on land to prove the offence of aggravated trespass: *DPP v Barnard* [2000] Crim LR 371, DC. The lawful activity must be carried out by persons present on the land at the time of the offence: *DPP v Tilly*, *Tilly v DPP* [2001] EWHC 821 (Admin), 166 JP 22. If a defendant raises an issue that his intention was to disrupt an unlawful activity, it will not assist the prosecution to limit the description in the charge to some lawful aspect of what was occurring on the land: *Ayliffe v DPP*, *Swain v DPP*, *Percy v DPP* [2005] EWHC 684 (Admin), [2006] QB 227, [2005] 3 All ER 330 (affd *R v Jones* [2006] UKHL 16, [2006] All ER 741, [2006] 2 WLR 772).

4 Criminal Justice and Public Order Act 1994 s 68(2). The words 'he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land' simply means that the activity is permitted, that is, that it is lawful when it is being carried out: *Ayliffe v DPP*, *Swain v DPP*, *Percy v DPP* [2005] EWHC 684 (Admin), [2006] QB 227, [2005] 3 All ER 330 (affd *R v Jones* [2006] UKHL 16, [2006] All ER 741, [2006] 2 WLR 772).

The mere fact that at some point during the defendant's prohibited conduct the activity of his opponents was incidentally unlawful does not prevent an offence being committed if that prohibited conduct with the prescribed intent occurred to an appreciable extent when that activity was lawful: *Nelder v DPP* supra (trespass by part of hunt at one stage during anti-hunt protest against a hunt which did not otherwise trespass did not prevent the hunt being a lawful activity, apart from the period of the trespass. As to hunting see now the Hunting Act 2004; and *ANIMALS* vol 2 (2008) PARA 1032 et seq. See also *Hibberd v DPP* [1997] CLY 1251, DC.

5 Criminal Justice and Public Order Act 1994 s 68(3). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 68(3) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 45(1), (7)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6 'Lawful activity' has the same meaning as in the Criminal Justice and Public Order Act 1994 s 68 (as amended; prospectively amended): s 69(6). See the text and note 4 supra.

7 Ibid s 69(1) (amended by the Anti-social Behaviour Act 2003 ss 59(1), (3), 92, Sch 3). Such a direction, if not communicated to the persons in question by the police officer giving the direction, may be communicated to them by any constable at the scene: Criminal Justice and Public Order Act 1994 s 69(2). The actual commission of an offence of aggravated trespass is not a pre-condition for a direction under s 69 (as amended): *Capon v DPP* (1998) Independent, 23 March, DC. Whether a valid direction has been given under the Criminal Justice and Public Order Act 1994 s 69 (as amended) depends on the substance of what is said, and not its form: see *Capon v DPP* supra. 'Land' has the same meaning as in the Criminal Justice and Public Order Act 1994 s 68 (as amended; prospectively amended) (see note 1 supra): s 69(6).

8 Ibid s 69(3). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 69(3) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 45(1), (8)). At the date at which this volume states the law no such day had been appointed.

9 Criminal Justice and Public Order Act 1994 s 69(4). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

As to the powers of the police in respect of 'raves' see the Criminal Justice and Public Order Act 1994 ss 63 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARAS 297-298.

## UPDATE

### 590-592 Collective Trespass or Nuisance on Land

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **(9) NUISANCES IN PUBLIC PLACES**

### **593. Offences relating to behaviour in the street and other public places.**

Offences relating to street occupations and certain other offences of behaviour are dealt with elsewhere in this work<sup>1</sup>.

<sup>1</sup> See PARAS 840-850 post.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/5. OFFENCES AGAINST THE STATE OR SECURITY/(9) NUISANCES IN PUBLIC PLACES/594. Offences of offering for sale etc profane material, use etc of profane language etc, in a public place etc.

**594. Offences of offering for sale etc profane material, use etc of profane language etc, in a public place etc.**

Every person<sup>1</sup> is liable to a fine<sup>2</sup> who, in any thoroughfare or public place<sup>3</sup> in the metropolitan police district or the City of London<sup>4</sup> or in any street<sup>5</sup> elsewhere in England and Wales, offers<sup>6</sup> for sale or distribution, or exhibits to public view, any profane book, paper, print, drawing, painting or representation, or sings any profane<sup>7</sup> or obscene song or ballad, or uses any profane or obscene language to the annoyance of the inhabitants or passengers<sup>8</sup>.

1 'Person' includes a corporation, whether aggregate or sole: Town Police Clauses Act 1847 s 3.

2 Under the Metropolitan Police Act 1839 s 54 (as amended) (see the text and notes 3-8 *infra*) or the City of London Police Act 1839 s 35, the fine is one not exceeding level 2 on the standard scale: Metropolitan Police Act 1839 s 54 (amended by the Statute Law Revision (No 2) Act 1888; the Criminal Law Act 1977 s 31, Sch 6; and the Criminal Justice Act 1982 ss 37, 46(1)); City of London Police Act 1839 s 35 (amended by the City of London (Various Powers) Act 1979 s 21). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. Under the Town Police Clauses Act 1847 s 28 (as amended) the fine is one not exceeding level 3 on the standard scale; or alternatively the offender may be committed to prison for a period not exceeding 14 days: Town Police Clauses Act 1847 s 28 (amended by the Criminal Justice Act 1982 ss 39(2), 46(1), (4), Sch 3). As from a day to be appointed an offence under these provisions is no longer punishable by imprisonment: see the Criminal Justice Act 2003 s 280(1), Sch 25 para 6 (not yet in force). At the date at which this volume states the law no such day had been appointed.

3 A place where members of the public go although they have no legal right, or where they are invited to go, is a public place: *R v Wellard* (1884) 14 QBD 63, CCR; *R v Collinson* (1931) 75 Sol Jo 491, CCA; *Elkins v Cartledge* [1947] 1 All ER 829, DC. Cf *Brannan v Peek* [1948] 1 KB 68, [1947] 2 All ER 572, DC. In the context of annoyance to passengers, 'public place' does not include a public house: *Russon v Dutton (No 2)* (1911) 75 JP 207, DC.

4 As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137; and as to the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31.

5 'Street' includes any road, square, court, alley and thoroughfare, or public passage: Town Police Clauses Act 1847 s 3. 'Street' includes the carriageway and footway at the sides. In addition, for the purposes of the present offence, any place of public resort or recreation ground belonging to or under the control of the local authority, and any unfenced ground adjoining or abutting upon any street, is deemed to be a 'street': see the Public Health Acts Amendment Act 1907 s 81; and the Local Government Act 1972 s 180, Sch 14 paras 23, 26.

6 Under the Metropolitan Police Act 1839 s 54(12) (as amended) or the City of London Police Act 1839 s 35(12) (as amended) (see the text to note 8 *infra*), sale or distribution is itself an offence, as well: see the Metropolitan Police Act 1839 s 54(12); and the City of London Police Act 1839 s 35(12). In the Town Police Clauses Act 1847 s 28 (as amended) (see the text to note 8 *infra*), 'publicly' is added before 'offers': see s 28.

7 The word 'indecent' is added in the Metropolitan Police Act 1839 s 54(12) and in the City of London Police Act 1839 s 35(12). Indecent displays visible from a public place comprise an offence under the Indecent Displays (Control) Act 1981 s 1 (as amended): see PARA 768 *post*.

8 Metropolitan Police Act 1839 s 54(12) (amended by the Indecent Displays (Control) Act 1981 s 5(2), Schedule); City of London Police Act 1839 s 35(12) (amended by the City of London (Various Powers) Act 1979 s 21); Town Police Clauses Act 1847 s 28 (amended by the Indecent Displays (Control) Act 1981 s 5(2), Schedule). The requirement of annoyance etc to the residents or passengers qualifies the whole of the Town Police Clauses Act 1847 s 28 (as amended). 'Residents' refers to occupiers of residential premises on the street, and 'passengers' to passers-by: *Woolley v Corbishley* (1860) 24 JP 773, DC; *Read v Perrett* (1876) 1 Ex D 349, DC. It is open to a court to find that a police officer who was a passer-by was annoyed at being abused by obscene

language: *Hoogstraten v Goward* [1967] Crim LR 590, DC. Evidence that two constables heard the indecent language is sufficient evidence of annoyance to passengers: *Brabham v Wookey* (1901) 18 TLR 99, DC. As to related offences see the Obscene Publications Act 1959; the Indecent Displays (Control) Act 1981; and PARA 747 et seq post.

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### **595. Noisy instruments and street musicians in London.**

Every person is liable to a penalty who in any thoroughfare or public place<sup>1</sup> in the metropolitan police district<sup>2</sup> blows any horn or uses any other noisy instrument<sup>3</sup>, for the purpose of calling persons together, or of announcing any show or entertainment, or for the purpose of hawking, selling, distributing or collecting any article, or of obtaining money or alms<sup>4</sup>. In the City of London a person is similarly liable if he persistently or continuously after warning by a constable cries or calls out or blows any horn or other noisy instrument, whether musical or not, for the same purposes<sup>5</sup>.

Any householder within the metropolitan police district may personally, or by a servant or constable, require<sup>6</sup> any street musician or street singer to depart from the neighbourhood of his house on account of the illness or the interruption of the ordinary occupations or pursuits of any inmate, or for other reasonable or sufficient cause<sup>7</sup>. A person who sounds or plays on any musical instrument or sings in any thoroughfare or public place near any such house, after being so required to depart, is liable to a penalty<sup>8</sup>.

1 As to the meaning of 'public place' see PARA 594 note 3 ante.

2 As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137.

3 Byelaws regulating behaviour in streets may prohibit the playing of musical instruments: see PARA 850 post. As to the control of the use of loudspeakers in streets see the Control of Pollution Act 1974 s 62 (as amended); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 841. See also PARA 583 ante.

4 Metropolitan Police Act 1839 s 54(14) (amended by the Post Office Act 1969 s 137(1), Sch 8 Pt I). As to the penalty for an offence under the Metropolitan Police Act 1839 s 54 see PARA 594 note 2 ante.

5 City of London Police Act 1839 s 35(14) (amended by the City of London (Various Powers) Act 1979 s 21). As to the penalty for an offence under the City of London Police Act 1839 s 35 (as amended) see PARA 594 note 2 ante.

6 The householder must give the reason for the requisition: *Shields v Howard* [1897] 1 QB 84, DC.

7 See the Metropolitan Police Act 1864 s 1 (amended by the Statute Law Revision Act 1893 s 1, Schedule).

8 See the Metropolitan Police Act 1864 s 1. The penalty is a fine not exceeding level 1 on the standard scale: see s 1 (amended by the Criminal Justice Act 1982 s 46). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. An offender may be imprisoned if he defaults in payment: see the Magistrates' Courts Act 1980 s 76 (as amended); *R v Hopkins* [1893] 1 QB 621, DC; and MAGISTRATES vol 29(2) (Reissue) PARA 865. A constable of the metropolitan police may arrest an offender without warrant if he is given into custody by the person making the charge: see the Metropolitan Police Act 1864 s 1, first proviso. The person making the charge must accompany the constable to the nearest station house and sign the charge sheet: see s 1, second proviso. See also the City of London Police Act 1839 s 40.

### **UPDATE**

### **595 Noisy instruments and street musicians in London**



NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 8--City of London Police Act 1839 s 40 repealed: Statute Law (Repeals) Act 2008.

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### **596. Persons found drunk and disorderly.**

Any person who, in any public place<sup>1</sup>, is guilty, while drunk<sup>2</sup>, of disorderly behaviour is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>3</sup>.

1 'Public place' includes any highway and any other premises or place to which at the material time the public has or is permitted to have access, whether on payment or otherwise: Criminal Justice Act 1967 s 91(4). The landing of a communal block of flats, to which access could be gained only by way of a key, security code, tenants' intercom or the caretaker has been held not to be a 'public place' for these purposes: *Williams v DPP* [1993] 3 All ER 365, 98 Cr App Rep 209, DC.

2 'Drunk' refers to a person who has taken intoxicating liquor to an extent which affects steady self-control; it does not apply to a person who has become disorderly as a result of glue-sniffing: *Neale v RMJE (A Minor)* (1983) 80 Cr App Rep 20, DC.

3 See the Criminal Justice Act 1967 s 91(1) (amended by the Criminal Justice Act 1982 ss 37, 38, 42; and the Serious Organised Crime and Police Act 2005 ss 111, 174(2), Sch 7 para 15, Sch 17 Pt 2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. Where a constable makes an arrest for such an offence, the constable may take the person arrested to a treatment centre for alcoholics: Criminal Justice Act 1972 s 34 (amended by the Criminal Law Act 1977 s 65(4), (5), Schs 12, 13; and the Police and Criminal Evidence Act 1984 s 119(1), (2), Sch 6 para 21, Sch 7).

An offence committed under the Criminal Justice Act 1967 s 91 (as amended) is a penalty offence for the purposes of the Criminal Justice and Police Act 2001 Pt 1 Ch 1 (ss 1-11) (as amended): see s 1; and PARA 586 ante.

At the date at which this volume states the law, the Violent Crime Reduction Bill was before Parliament: see PARA 707 post. Part 1 of the Bill contains provisions dealing with alcohol-related violence and disorder, including a power to direct a person to leave the locality, and the introduction of drink banning orders and alcohol disorder zones.

### **UPDATE**

### **596 Persons found drunk and disorderly**

NOTE 3--For provision relating to alcohol related disorder in public places see PARA 577A. As to alcohol disorder zones see PARA 577B. As to drinking banning orders see SENTENCING AND DISPOSITION OF OFFENDERS.

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## (10) SPORTING EVENTS

### 597. Alcohol on coaches and trains.

A person who knowingly causes or permits alcohol<sup>1</sup> to be carried on a public service vehicle<sup>2</sup> or railway passenger vehicle which is being used for the principal purpose of carrying passengers for the whole or part of a journey to or from a designated sporting event<sup>3</sup> is guilty of an offence if: (1) the vehicle is a public service vehicle and he is the operator<sup>4</sup> of the vehicle or the servant or agent of the operator; or (2) the vehicle is a hired vehicle and he is the person to whom it is hired or the servant or agent of that person<sup>5</sup>. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale<sup>6</sup>.

A person who has alcohol in his possession while on such a vehicle is guilty<sup>7</sup> of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 3 on the standard scale or to both<sup>8</sup>. A person who is drunk on such a vehicle is guilty of an offence<sup>9</sup> and liable on summary conviction to a fine not exceeding level 2 on the standard scale<sup>10</sup>.

1 For the meaning of 'alcohol' see the Licensing Act 2003 s 191 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 30 (definition applied by the Sporting Events (Control of Alcohol Etc) Act 1985 s 9(7) (substituted by the Licensing Act 2003 s 198(1), Sch 6 para 101)).

2 'Public service vehicle' has the same meaning as in the Public Passenger Vehicles Act 1981 (see ROAD TRAFFIC vol 40(3) (2007 Reissue) PARA 1136): Sporting Events (Control of Alcohol Etc) Act 1985 s 1(5).

3 'Designated sporting event': (1) means a sporting event or proposed sporting event for the time being designated, or of a class designated, by order made by the Secretary of State; and (2) includes a designated sporting event within the meaning of the Criminal Justice (Scotland) Act 1980 Pt V (ss 68-77), and an order so made may apply to events or proposed events outside Great Britain as well as those in England and Wales: see the Sporting Events (Control of Alcohol Etc) Act 1985 s 9(1), (3). Any power to make an order under s 9 (as amended) is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 9(8).

As to the events and classes so designated see the Sports Grounds and Sporting Events (Designation) Order 2005, SI 2005/3204, art 2(2), (3), Sch 2.

The Sporting Events (Control of Alcohol Etc) Act 1985 does not apply to any sporting event or proposed sporting event where all competitors are to take part otherwise than for reward, and to which all spectators are to be admitted free of charge: s 9(1), (6).

4 'Operator' has the same meaning as in the Public Passenger Vehicles Act 1981 (see ROAD TRAFFIC vol 40(3) (2007 Reissue) PARA 1136): Sporting Events (Control of Alcohol Etc) Act 1985 s 1(5).

5 Ibid ss 1(1), (2) (amended by the Licensing Act 2003 s 198(1), Sch 6 paras 96, 97). A constable may stop a public service vehicle or a motor vehicle to which the Sporting Events (Control of Alcohol Etc) Act 1985 s 1A (as added) (see PARA 598 post) applies and may search such a vehicle or a railway passenger vehicle if he has reasonable grounds to suspect that an offence under s 1 (as amended) or s 1A (as added) is being or has been committed in respect of the vehicle: s 7(3) (amended by the Public Order Act 1986 s 40(1), Sch 1 para 6).

6 See the Sporting Events (Control of Alcohol etc) Act 1985 s 8(a). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 Ibid s 1(1), (3) (amended by the Licensing Act 2003 s 198(1), Sch 6 paras 96, 97).

8 Sporting Events (Control of Alcohol Etc) Act 1985 s 8(b). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 8(b) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 36). At the date at which this volume states the law no such day had been appointed.

9 Sporting Events (Control of Alcohol Etc) Act 1985 s 1(1), (4).

10 See *ibid* s 8(c).

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### **598. Alcohol on certain other vehicles.**

A person who knowingly causes or permits alcohol<sup>1</sup> to be carried on a motor vehicle<sup>2</sup> which is not a public service vehicle<sup>3</sup> but is adapted to carry more than eight passengers, and is being used for the principal purpose of carrying two or more passengers for the whole or part of a journey to or from a designated sporting event<sup>4</sup> is guilty of an offence:

719 (1) if he is the driver<sup>5</sup>; or

720 (2) if he is not its driver but is its keeper<sup>6</sup>, the servant or agent of its keeper, a person to whom it is made available (by hire, loan or otherwise) by its keeper or the keeper's servant or agent, or the servant or agent of a person to whom it is so made available<sup>7</sup>,

and is liable on summary conviction to a fine not exceeding level 4 on the standard scale<sup>8</sup>.

A person who has alcohol in his possession while on such a motor vehicle is guilty of an offence<sup>9</sup> and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 3 on the standard scale or to both<sup>10</sup>. A person who is drunk on such a vehicle is guilty of an offence<sup>11</sup> and liable on summary conviction to a fine not exceeding level 2 on the standard scale<sup>12</sup>.

1 For the meaning of 'alcohol' see PARA 597 note 1 ante.

2 For these purposes, 'motor vehicle' means a mechanically propelled vehicle intended or adapted for use on roads: Sporting Events (Control of Alcohol Etc) Act 1985 s 1A(5) (s 1A added by the Public Order Act 1986 s 40(1), Sch 1 paras 1, 2).

3 For the meaning of 'public service vehicle' see PARA 597 note 2 ante.

4 For the meaning of 'designated sporting event' see PARA 597 note 3 ante.

5 Sporting Events (Control of Alcohol Etc) Act 1985 s 1A(1), (2)(a) (as added: see note 2 supra).

6 'Keeper', in relation to a vehicle, means the person having the duty to take out a licence under the Vehicle Excise and Registration Act 1994: Sporting Events (Control of Alcohol Etc) Act 1985 s 1A(5) (as added (see note 2 supra); and amended by the Vehicle Excise and Registration Act 1994 s 63, Sch 3 para 20).

7 Sporting Events (Control of Alcohol Etc) Act 1985 s 1A(1), (2)(b) (as added: see note 2 supra).

8 See *ibid* s 8(a) (amended by the Public Order Act 1986 Sch 1 paras 1, 7(2)). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to powers of enforcement see PARA 597 note 5 ante.

9 Sporting Events (Control of Alcohol Etc) Act 1985 s 1A(1), (3) (as added (see note 2 supra; and amended by the Licensing Act 2003 s 198(1), Sch 6 paras 96, 97)).

10 See the Sporting Events (Control of Alcohol etc) Act 1985 s 8(b) (amended by the Public Order Act 1986 Sch 1 paras 1, 7(3)). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see the Sporting Events (Control of Alcohol etc) Act 1985 s 8(b) (as amended) (prospectively further amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 36). At the date at which this volume states the law no such day had been appointed.

- 11 Sporting Events (Control of Alcohol Etc) Act 1985 s 1A(1), (4) (as added: see note 2 supra).
- 12 See *ibid* s 8(c) (amended by the Public Order Act 1986 Sch 1 paras 1, 7(4)).

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### **599. Possession of intoxicating liquor, containers etc at sports grounds.**

A person who has alcohol<sup>1</sup> or a specified article<sup>2</sup> in his possession: (1) at any time during the period of a designated sporting event<sup>3</sup> when he is in any area of a designated sports ground<sup>4</sup> from which the event may be directly viewed; or (2) while entering or trying to enter a designated sports ground at any time during the period of a designated sporting event at that ground, is guilty of an offence<sup>5</sup> and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 3 on the standard scale or to both<sup>6</sup>.

A person who is drunk in a designated sports ground at any time during the period of a designated sporting event at that ground or who is drunk while entering or trying to enter such a ground at any time during the period of a designated sporting event at that ground is guilty of an offence<sup>7</sup> and liable on summary conviction to a fine not exceeding level 2 on the standard scale<sup>8</sup>.

1 For the meaning of 'alcohol' see PARA 597 note 1 ante.

2 The Sporting Events (Control of Alcohol Etc) Act 1985 s 2 (as amended) applies to any article capable of causing injury to a person struck by it, being: (1) a bottle, can or other portable container (including such an article when crushed or broken) which is for holding any drink, and is of a kind which, when empty, is normally discarded or returned to, or left to be recovered by, the supplier; or (2) part of an article falling within head (1) supra; but does not apply to anything that is for holding any medicinal product within the meaning of the Medicines Act 1968 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 7): Sporting Events (Control of Alcohol Etc) Act 1985 s 2(3).

3 The period of a designated sporting event is the period beginning two hours before the start of the event or (if earlier) two hours before the time at which it is advertised to start and ending one hour after the end of the event; but: (1) where an event advertised to start at a particular time on a particular day is postponed to a later day, the period includes the period in the day on which it is advertised to take place beginning two hours before and ending one hour after that time; and (2) where an event advertised to start at a particular time on a particular day does not take place, the period is the period referred to in head (1) supra: *ibid* s 9(1), (4). For the meaning of 'designated sporting event' see PARA 597 note 3 ante.

4 'Designated sports ground' means any place:

104 (1) used (wholly or partly) for sporting events where accommodation is provided for spectators; and

105 (2) for the time being designated, or of a class designated, by order made by the Secretary of State,

and an order so made may include provision for determining the outer limit of any designated sports ground: *ibid* s 9(1), (2). As to the power to make such orders see PARA 597 note 3 ante.

As to the sports grounds and classes of sports grounds so designated see the Sports Grounds and Sporting Events (Designation) Order 2005, SI 2005/3204, art 2(1), Sch 1.

5 Sporting Events (Control of Alcohol Etc) Act 1985 s 2(1). A constable may, at any time during the period of a designated sporting event at any designated sports ground, enter any part of the ground for the purpose of enforcing the provisions of the Sporting Events (Control of Alcohol Etc) Act 1985: s 7(1). A constable may search a person he has reasonable grounds to suspect is committing or has committed an offence under the Sporting Events (Control of Alcohol Etc) Act 1985: s 7(2) (amended by the Serious Organised Crime and Police Act 2005 ss 111, 174(2), Sch 7 para 25, Sch 17 Pt 2).

6 See the Sporting Events (Control of Alcohol Etc) Act 1985 s 8(b). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see s 8(b) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 36). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 Sporting Events (Control of Alcohol Etc) Act 1985 s 2(2).

8 See *ibid* s 8(c).



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### **600. Possession of fireworks etc at sports grounds.**

A person is guilty of an offence if he has an article or specified substance<sup>1</sup> in his possession: (1) at any time during the period of a designated sporting event<sup>2</sup> when he is in any area of a designated sports ground<sup>3</sup> from which the event may be directly viewed; or (2) while entering or trying to enter a designated sports ground at any time during the period of a designated sporting event at that ground<sup>4</sup>, and is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 3 on the standard scale or to both<sup>5</sup>. It is a defence, however, for the defendant to prove that he had possession with lawful authority<sup>6</sup>.

1     ie a substance to which the Sporting Events (Control of Alcohol Etc) Act 1985 s 2A (as added) (see the text and notes 2-6 infra) applies, namely any article or substance whose main purpose is the emission of a flare for purposes of illuminating or signalling (as opposed to igniting or heating) or the emission of smoke or a visible gas; and in particular it applies to distress flares, fog signals, and pellets and capsules intended to be used as fumigators or for testing pipes, but not to matches, cigarette lighters or heaters: s 2A(3) (s 2A added by the Public Order Act 1986 s 40, Sch 1 para 3). The Sporting Events (Control of Alcohol Etc) Act 1985 s 2A (as added) also applies to any article which is a firework: s 2A(4) (as so added).

2     For the meaning of 'designated sporting event' see PARA 597 note 3 ante; and for the meaning of 'the period of a designated sporting event' see PARA 599 note 3 ante.

3     For the meaning of 'designated sports ground' see PARA 599 note 4 ante.

4     Sporting Events (Control of Alcohol Etc) Act 1985 s 2A(1) (as added: see note 1 supra). As to powers of enforcement see PARA 599 note 5 ante.

5     See *ibid* s 8(b) (amended by the Public Order Act 1986 Sch 1 para 7(3)). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see the Sporting Events (Control of Alcohol Etc) Act 1985 s 8(b) (as amended) (prospectively further amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 36). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6     Sporting Events (Control of Alcohol Etc) Act 1985 s 2A(2) (as added: see note 1 supra). As to whether this imposes a legal (or persuasive) burden or an evidential one and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

For other provisions relating to sporting events see THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARA 109 et seq; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 530 et seq.

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## **601. Football matches.**

It is an offence for a person at a designated football match<sup>1</sup>:

- 721 (1) without lawful authority or lawful excuse<sup>2</sup> to throw anything at or towards or go onto either the playing area or any area adjacent to the playing area to which spectators are not generally admitted<sup>3</sup>, or to throw anything at or towards any area in which spectators or other persons are or may be present<sup>4</sup>; or
- 722 (2) to engage or take part in chanting of an indecent or racist nature<sup>5</sup>.

For these purposes, a thing is regarded as done at a designated football match if it is done at the ground within the period beginning two hours before the start of the match or (if earlier) two hours before the time at which it is advertised to start and ending one hour after the end of the match<sup>6</sup>, or, where the match is advertised to start at a particular time on a particular day but does not take place on that day, if it is done within the period beginning two hours before and ending one hour after the advertised starting time<sup>7</sup>.

A person guilty of an offence under these provisions is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>8</sup>.

1 A 'designated football match' means an association football match designated, or of a description designated, for the purposes of the Football (Offences) Act 1991 by order of the Secretary of State, which must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 1(1). By virtue of the Football (Offences) (Designation of Football Matches) Order 2004, SI 2004/2410, a designated match is an association football match in which one or both of the participating teams represents a club which is for the time being a member (whether a full or associate member) of the Football League, the Football Association Premier League, the Football Conference or the League of Wales, or represents a country or territory.

2 Lawful authority or lawful excuse is for the person in question to prove: Football (Offences) Act 1991 ss 2, 4.

3 Ibid ss 2(a), 4.

4 Ibid s 2(b).

5 Ibid s 3(1) (s 3(1), (2)(a) amended by the Football (Offences and Disorder) Act 1999 s 9). 'Chanting' means the repeated uttering of any words or sounds (whether alone or in concert with one or more others) (Football (Offences) Act 1991 s 3(2)(a) (as so amended)); and 'of a racist nature' means consisting of or including matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins (s 3(2)(b)).

6 Ibid s 1(2)(a).

7 Ibid s 1(2)(b).

8 Ibid s 5(2).

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## **(11) CRIMINAL ENTRY AND TRESPASS**

### **602. Violence for securing entry.**

Any person who, without lawful authority<sup>1</sup>, uses or threatens violence<sup>2</sup> for the purpose of securing entry<sup>3</sup> into any premises<sup>4</sup> for himself or for any other person is guilty of an offence, provided that: (1) there is someone present on those premises at the time who is opposed to the entry which the violence is intended to secure; and (2) the person using or threatening the violence knows that this is the case<sup>5</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both<sup>6</sup>.

The offence does not apply to a person who is a displaced residential occupier<sup>7</sup> or a protected intending occupier<sup>8</sup> of the premises in question or who is acting on behalf of such an occupier<sup>9</sup>. This exemption does not have to be proved by the defendant: if he adduces sufficient evidence that he was, or was acting on behalf of, such an occupier he is presumed to be, or to be acting on behalf of, such an occupier unless the contrary is proved by the prosecution<sup>10</sup>.

1 For these purposes, the fact that a person has any interest in or right to possession or occupation of any premises does not constitute lawful authority for the use or threat of violence by him or anyone else for the purpose of securing his entry into those premises: see the Criminal Law Act 1977 s 6(2) (amended by the Criminal Justice and Public Order Act 1994 s 72(1), (3)).

2 For these purposes, it is immaterial whether the violence in question is directed against the person or against property: Criminal Law Act 1977 s 6(4)(a).

3 For these purposes, it is immaterial whether the entry which the violence is intended to secure is for the purpose of acquiring possession of the premises in question or for any other purpose: *ibid* s 6(4)(b).

4 For the purposes of *ibid* Pt II (ss 6-13) (as amended), 'premises' means any building, any part of a building under separate occupation, any land ancillary to a building, and the site comprising any building or buildings together with any land ancillary thereto: s 12(1)(a). References to a building apply also to any structure other than a movable one, and to any movable structure, vehicle or vessel designed or adapted for use for residential purposes: s 12(2). For these purposes: (1) part of a building is under separate occupation if anyone is in occupation or entitled to occupation of that part as distinct from the whole; and (2) land is ancillary to a building if it is adjacent to it and used, or intended for use, in connection with the occupation of that building or any part of it: s 12(2).

5 *Ibid* s 6(1). No rule of law ousting the jurisdiction of magistrates' courts to try offences where a dispute of title to property is involved precludes magistrates' courts from trying offences under s 6 (as amended): s 12(8).

6 *Ibid* s 6(5) (amended by the Criminal Justice Act 1982 ss 37, 38, 46). As from a day to be appointed the maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

A constable may enter and search any premises for the purpose of arresting a person for an offence under the Criminal Law Act 1977 s 6 (as amended), s 7 (as amended) (see PARA 603 post) or s 8 (as amended) (see PARA 604 post): see the Police and Criminal Evidence Act 1984 s 17(1)(c)(ii); and PARA 884 post.

7 For these purposes, any person who was occupying any premises as a residence immediately before being excluded from occupation by anyone who entered those premises, or any access to those premises, as a

trespasser is a displaced residential occupier of the premises so long as he continues to be excluded from occupation of the premises by the original trespasser or by any subsequent trespasser; and a person who is such a displaced residential occupier of any premises is to be regarded as a displaced residential occupier also of any access to those premises: see the Criminal Law Act 1977 ss 6(7), 12(3), (5). 'Access' means, in relation to any premises, any part of any site or building within which those premises are situated which constitutes an ordinary means of access to those premises, whether or not that is its sole or primary use: s 12(1)(b). However, a person who was himself occupying the premises in question as a trespasser immediately before being excluded from occupation is not a displaced residential occupier of the premises in question: see ss 6(7), 12(4). Section 12(6) provides that anyone who enters or is on or in occupation of any premises by virtue of any title derived from a trespasser, or any licence or consent given by a trespasser or by a person deriving title from a trespasser, is himself to be treated as a trespasser for the purposes of Pt II (as amended) (see PARAS 603-604 post); and phrases involving a reference to a trespasser are to be construed accordingly: see ss 6(7), 12(6). Anyone who is on any premises as a trespasser does not cease to be a trespasser by virtue of being allowed time to leave the premises, nor does anyone cease to be a displaced residential occupier of any premises by virtue of any such allowance of time to a trespasser: see ss 6(7), 12(7).

8 There are three types of 'protected intending occupier' ('PIO'). The first type is where, at the time of the request to leave:

- 106 (1) an individual has in the premises in question a freehold interest or leasehold interest with not less than two years still to run (ibid s 6(7) (amended by the Criminal Justice and Public Order Act 1994 s 72(3), (5)); Criminal Law Act 1977 s 12A(2)(a) (s 12A added by the Criminal Justice and Public Order Act 1994 s 74));
- 107 (2) an individual requires the premises for his own occupation as a residence (Criminal Law Act 1977 s 6(7) (as so amended); s 12A(2)(b) (as so added));
- 108 (3) an individual is excluded from occupation of them by a person who entered them, or any access to them, as a trespasser (s 6(7) (as so amended); s 12A(2)(c) (as so added)); and
- 109 (4) an individual holds, or a person acting on his behalf holds, a written statement, signed by him and witnessed by a justice of the peace or commissioner for oaths, which specifies his interest in the premises and states that he requires the premises for occupation as a residence for himself (s 6(7) (as so amended); s 12A(2)(d), (3) (as so added)).

The second type of protected intending occupier is where, at the time of the request to leave:

- 110 (a) an individual has a tenancy of the premises (other than a tenancy falling within head (1) supra or head (i) infra) or a licence to occupy them granted by a person with a freehold interest or a leasehold interest with not less than two years still to run in the premises (s 6(7) (as so amended); s 12A(4)(a) (as so added));
- 111 (b) an individual requires the premises for his own occupation as a residence (s 6(7) (as so amended); s 12A(4)(b) (as so added));
- 112 (c) an individual is excluded from occupation of the premises by a person who entered them, or any access to them, as a trespasser (s 6(7) (as so amended); s 12A(4)(c) (as so added)); and
- 113 (d) an individual holds, or a person acting on his behalf holds, a written statement which states that he has been granted a tenancy of those premises or a licence to occupy them, specifies the interest in the premises of the person who granted that tenancy or licence to occupy ('the landlord'), states that he requires the premises for occupation as a residence for himself, and is signed by the landlord and by the tenant or licensee and witnessed by a magistrate or commissioner for oaths (s 6(7) (as so amended); s 12A(4)(d), (5) (as so added)).

The third type of protected intending occupier is where, at the time of the request to leave:

- 114 (i) an individual has a tenancy of the premises in question (other than a tenancy falling within head (1) supra or head (a) supra) or a licence to occupy them granted by one of the following authorities: (A) any body mentioned in the Rent Act 1977 s 14 (as amended) (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 884); (B) the Housing Corporation (see HOUSING vol 22 (2006 Reissue) PARA 18); (C) a registered social landlord within the meaning of the Housing Act 1985 (see HOUSING vol 22 (2006 Reissue) PARA 66 et seq); and (D) the Secretary of State, if the tenancy or licence is granted by him under the Housing Associations Act 1985 Pt III (ss 74-102) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 18 et seq) (Criminal Law Act 1977 s 12A(6)(a) (as so added); s 12A(7) (as so added; and amended by the Government of Wales Act 1998 ss 140, 152, Sch 16 para 3(2), Sch 18; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5(1), Sch 2 para 8); Criminal Law Act 1977 s 12A(7A) (s 12A as so added; and s 12A(7A) added by the Government of Wales Act 1998 Sch 16 para 3(1), (3)));

- 115 (ii) an individual requires the premises for his own occupation as a residence (Criminal Law Act 1977 s 12A(6)(b) (as so added));
- 116 (iii) an individual is excluded from occupation of them by a person who entered them, or any access to them, as a trespasser (s 12A(6)(c) (as so added)); and
- 117 (iv) an individual has been issued by or on behalf of the authority referred to in head (i) above with a certificate stating that the authority is one to which these provisions apply and that he has been granted a licence or tenancy by it to occupy the premises as a residence (s 12A(6)(d) (as so added)).

If a person makes a statement for the purposes of head (4) or head (d) supra that he knows to be false in a material particular, or if he recklessly makes such a statement that is false in a material particular, he commits an offence (s 12A(8) (as so added)) and is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both: s 12A(10) (as so added). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

A protected intending occupier of premises is also a protected intending occupier of any access to those premises: Criminal Law Act 1977 s 6(7) (as so amended); s 12A(11) (as so added).

9 See *ibid* s 6(1A) (added by the Criminal Justice and Public Order Act 1994 s 72(1), (2)).

10 See the Criminal Law Act 1977 s 6(1A) (as added: see note 9 supra).

## **UPDATE**

### **602 Violence for securing entry**

NOTE 8--Head (i). See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### **603. Adverse occupation of residential premises.**

Any person who is on any premises<sup>1</sup> as a trespasser<sup>2</sup> after having entered as such is guilty of an offence if he fails to leave those premises on being required to do so by or on behalf of: (1) a displaced residential occupier<sup>3</sup> of the premises; or (2) an individual who is a protected intending occupier<sup>4</sup> of the premises<sup>5</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both<sup>6</sup>.

In any proceedings for such an offence it is a defence for the defendant to prove<sup>7</sup>:

- 723 (a) that he believed that the person requiring him to leave the premises was not a displaced residential occupier or protected intending occupier of the premises or a person acting on behalf of such an occupier<sup>8</sup>; or
- 724 (b) that the premises in question are or form part of premises used mainly for non-residential purposes and that he was not on any part of the premises used wholly or mainly for residential purposes<sup>9</sup>.

In any such proceedings where the defendant was requested to leave the premises by a person claiming to be or to act on behalf of a protected intending occupier of the premises it is a defence for the defendant to prove<sup>10</sup> that, although asked to do so by the defendant at the time the defendant was requested to leave, that person failed at that time to produce to the defendant a written statement<sup>11</sup> or certificate<sup>12</sup>.

1 For the meaning of 'premises' see PARA 602 note 4 ante. Any reference in the Criminal Law Act 1977 s 7(1)-(3) (as substituted) (see the text and notes 5-9 infra) to any premises includes a reference to any access to them, whether or not any such access itself constitutes premises: s 7(4) (s 7 substituted by the Criminal Justice and Public Order Act 1994 s 73). For the meaning of 'access' see PARA 602 note 7 ante.

2 Anyone who enters or is on or in occupation of any premises by virtue of: (1) any title derived from a trespasser; or (2) any licence or consent given by a trespasser or by a person deriving title from a trespasser, is himself to be treated as a trespasser, without prejudice to whether or not he would be a trespasser apart from this provision; and references to a person's entering or being on or occupying any premises as a trespasser are to be construed accordingly: Criminal Law Act 1977 s 12(6).

Anyone who is on any premises as a trespasser does not cease to be a trespasser for these purposes by virtue of being allowed time to leave the premises; nor does anyone cease to be a displaced residential occupier of any premises by virtue of any such allowance of time to a trespasser: s 12(7).

3 For the meaning of 'displaced residential occupier' see PARA 602 note 7 ante; definition applied by *ibid* s 7(7) (as substituted: see note 1 supra).

4 For the meaning of 'protected intending occupier' see PARA 602 note 8 ante; definition applied by *ibid* s 7(7) (as substituted: see note 1 supra).

5 *Ibid* s 7(1) (as substituted: see note 1 supra). No rule of law ousting the jurisdiction of magistrates' courts to try offences where a dispute of title to property is involved precludes magistrates' courts from trying offences under s 7 (as substituted): s 12(8).

6 *Ibid* s 7(5) (as substituted: see note 1 supra). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7)).

(not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6) (b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to entry to arrest see PARA 602 note 6 ante.

7 As to whether the burden of proof is a legal (or persuasive) one or an evidential one, and, if the former its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

8 Criminal Law Act 1977 s 7(2) (as substituted: see note 1 supra).

9 Ibid s 7(3) (as substituted: see note 1 supra).

10 See note 7 ante.

11 Ie a written statement under the Criminal Law Act 1977 s 12A(2)(d) (as added) or s 12A(4)(d) (as added): see PARA 602 note 8 heads (4), (d) ante.

12 Ibid s 12A(9)(a) (s 12A added by the Criminal Justice and Public Order Act 1994 s 74). As to the certificate see the Criminal Law Act 1994 s 12A(6)(d) (as added); and PARA 602 note 8 head (iv) ante. Any document purporting to be such a certificate must be received in evidence and, unless the contrary is proved, is deemed to have been issued by or on behalf of the authority stated in the certificate: s 12A(9)(b) (as so added).

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#### **604. Trespassing with a weapon of offence.**

A person who is on any premises<sup>1</sup> as a trespasser<sup>2</sup>, after having entered as such, is guilty of an offence if, without lawful authority or reasonable excuse, he has with him on the premises any weapon of offence<sup>3</sup>; and he is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale or to both<sup>4</sup>.

1 For the meaning of 'premises' see PARA 602 note 4 ante.

2 As to references to a trespasser see PARA 603 note 2 ante.

3 Criminal Law Act 1977 s 8(1). For these purposes, 'weapon of offence' means any article made or adapted for causing injury to or incapacitating a person, or intended by the person having it with him for such use: s 8(2). As to entry to arrest see PARA 602 note 6 ante. No rule of law ousting the jurisdiction of magistrates' courts to try offences where a dispute of title to property is involved precludes magistrates' courts from trying offences under s 8 (as amended): s 12(8).

4 Ibid s 8(1), (3) (amended by the Criminal Justice Act 1982 ss 38, 46). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.



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### **605. Trespassing on premises of foreign missions etc.**

A person who enters or is on any specified premises<sup>1</sup> as a trespasser<sup>2</sup> is guilty of an offence<sup>3</sup>. It is, however, a defence for the defendant to prove<sup>4</sup> that he believed that the premises in question were not specified premises<sup>5</sup>. A person convicted of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both<sup>6</sup>.

1 The Criminal Law Act 1977 s 9 (as amended) applies to any premises which are or form part of: (1) the premises of a diplomatic mission within the meaning of the definition in the Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965); Cmd 2565), art 1(i) as it has effect in the United Kingdom by virtue of the Diplomatic Privileges Act 1964 s 2, Sch 1 (see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 265 et seq); (2) the premises of a closed diplomatic mission within the meaning of the definition in the Vienna Convention on Diplomatic Relations art 45 as it has effect in the United Kingdom by virtue of the Diplomatic Privileges Act 1964 s 2, Sch 1 (see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 265 et seq); (3) consular premises within the meaning of the definition in the Vienna Convention on Consular Relations (Vienna, 24 April 1963; TS 14 (1973); Cmd 5219), art 1(1)(j) as it has effect in the United Kingdom by virtue of the Consular Relations Act 1968 s 1, Sch 1 (see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 290 et seq); (4) the premises of a closed consular post within the meaning of the definition in the Vienna Convention on Consular Relations art 27 as it has effect in the United Kingdom by virtue of the Consular Relations Act 1968 s 1, Sch 1 (see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 290 et seq); (5) any other premises in respect of which any organisation or body is entitled to inviolability by or under any enactment; and (6) any premises which are the private residence of a diplomatic agent, within the meaning of the Vienna Convention on Diplomatic Relations art 1(e), or of any other person who is entitled to inviolability of residence by or under any enactment: Criminal Law Act 1977 s 9(2), (2A) (s 9(2) amended, and s 9(2A) added, by the Diplomatic and Consular Premises Act 1987 s 7); and see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 270). For the meaning of 'premises' see PARA 602 note 4 ante. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

In any proceedings an offence under the Criminal Law Act 1977 s 9 (as amended), a certificate issued by or under the authority of the Secretary of State stating that any premises were or formed part of premises of any description mentioned in heads (1)-(6) supra at the time of the alleged offence is conclusive evidence that the premises were or formed part of premises of that description at that time: s 9(4).

2 As to references to a trespasser see PARA 603 note 2 ante.

3 See the Criminal Law Act 1977 s 9(1). Proceedings for such an offence may not be instituted against any person except by or with the consent of the Attorney General: s 9(6). As to the effect of this limitation see PARA 1071 post. No rule of law ousting the jurisdiction of magistrates' courts to try offences where a dispute of title to property is involved precludes magistrates' courts from trying offences under s 7 (as substituted and amended) (see PARA 603 ante): s 12(8).

4 As to whether the burden of proof is a legal (or persuasive) one or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

5 Criminal Law Act 1977 s 9(3).

6 Ibid s 9(5) (amended by the Criminal Justice Act 1982 ss 38, 46). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.



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## **(12) SQUATTERS: INTERIM POSSESSION ORDERS**

### **606. Trespassing during currency of order.**

Where a civil interim possession order has been made<sup>1</sup> in respect of any premises<sup>2</sup> and served in accordance with rules of court, a person who is present on the premises as a trespasser at any time during the currency of the order commits an offence<sup>3</sup>. No such offence is committed by a person if he leaves the premises within 24 hours of the time of service of the order and does not return; or a copy of the order was not fixed to the premises in accordance with rules of court<sup>4</sup>. A person who was in occupation of the premises at the time of service of the order but leaves them commits an offence if he re-enters the premises as a trespasser or attempts to do so after the expiry of the order but within the period of one year beginning with the day on which it was served<sup>5</sup>.

On summary conviction, a person is liable to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both<sup>6</sup>.

1    Ie an interim possession order made under rules of court for the bringing of summary proceedings for possession of premises which are occupied by trespassers under the Criminal Justice and Public Order Act 1994 s 75(4) (see PARA 607 post): s 76(8).

2    For the meaning of 'premises' see PARA 602 note 4 ante; definition applied by *ibid* s 76(8).

3    *Ibid* s 76(1), (2). A person who is in occupation of the premises at the time of service of the order is to be treated for the purposes of s 76 (as amended) as being present as a trespasser: s 76(6).

4    *Ibid* s 76(3).

5    *Ibid* s 76(4).

6    *Ibid* s 76(5). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

A constable may enter and search any premises for the purpose of arresting a person for an offence under the Criminal Justice and Public Order Act 1994 s 76 (as amended): see the Police and Criminal Evidence Act 1984 s 17(1)(c)(iv) (as added); and PARA 884 post.

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### **607. False or misleading statements.**

A person commits an offence if, for the purpose of obtaining an interim possession order<sup>1</sup>, he makes a statement<sup>2</sup> which he knows to be false or misleading in a material particular or recklessly makes a statement which is false or misleading in a material particular<sup>3</sup>. A person also commits an offence if, for the purpose of resisting the making of an interim possession order, he makes a statement which he knows to be false or misleading in a material particular or recklessly makes a statement which is false or misleading in a material particular<sup>4</sup>.

A person guilty of any such offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

1 See PARA 606 note 1 ante.

2 I.e. any statement, in writing or oral and whether as to fact or belief, made in or for the purposes of the proceedings: Criminal Justice and Public Order Act 1994 s 75(4).

3 Ibid s 75(1). A statement is false or misleading in a material particular if it is likely to affect the recipient of the information in taking or refraining from taking a course of action: *R v Mallett* [1978] 3 All ER 10, 67 Cr App Rep 239, CA (a case concerned with 'material particular' in the context of the Theft Act 1968 s 17).

4 Criminal Justice and Public Order Act 1994 s 75(2).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Criminal Justice and Public Order Act 1994 s 75(3). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

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## **(13) UNLAWFUL EVICTION AND HARASSMENT**

### **608. Unlawful eviction of occupier.**

If any person unlawfully deprives<sup>1</sup> the residential occupier<sup>2</sup> of any premises<sup>3</sup> of his occupation of the premises or any part of them, or attempts to do so, he is guilty of an offence, unless he proves<sup>4</sup> that he believed<sup>5</sup>, and had reasonable cause to believe, that the residential occupier had ceased to reside in the premises<sup>6</sup>; and he is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the prescribed sum or to both<sup>8</sup>.

1 Cases properly described as 'locking out' or not admitting the occupier on one or even more isolated occasions, so that in effect he continues to occupy the premises but is then unable to enter, do not fall within the offence under the Protection from Eviction Act 1977 s 1(2) (see the text to note 6 infra), but more appropriately within the offence under s 1(3) (as amended) (see PARA 609 post): *R v Yuthiwattana* (1984) 80 Cr App Rep 55, CA. See also *Costelloe v Camden London Borough Council* [1986] Crim LR 249, DC.

2 For these purposes, 'residential occupier', in relation to any premises, means a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises: Protection from Eviction Act 1977 s 1(1). 'Residential occupier' does not, however, include a contractual licensee whose licence has expired: *R v Blankley* [1979] Crim LR 166 (decided under the Rent Act 1965 s 30 (repealed)). 'Occupying the premises as a residence' has the same meaning as in the Rent Act 1977 (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 831): *Schon v Camden London Borough Council* (1986) 53 P & CR 361, DC.

3 'Premises' is to be given its normal wide meaning: *Thurrock UDC v Shina* (1972) 23 P & CR 205, DC (decided under the Rent Act 1965 s 30 (repealed)); single room may constitute 'premises').

4 This imposes a legal (or persuasive) burden on the defendant and is compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence): see *A-G's Reference (No 1 of 2004)*, *R v Edwards*, *R v Denton*, *R v Hendley*, *R v Crowley* [2004] EWCA Crim 1025, [2004] 1 WLR 2111, [2004] 2 Cr App Rep 424; and PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

5 The defendant's belief that a couple had ceased to reside in the house is a question for the jury to decide; and the trial judge errs if he takes away from the jury, and himself decides, the questions as to the time and existence of the defendant's belief: *R v Davidson-Acres* [1980] Crim LR 50, CA.

6 Protection from Eviction Act 1977 s 1(2). Proceedings under the Protection from Eviction Act 1977 may be instituted by councils of districts, London borough councils, councils of Welsh counties and county boroughs, the Common Council of the City of London, and the Council of the Isles of Scilly: s 6 (amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 4). Nothing in the Protection from Eviction Act 1977 s 1 (as amended) is to be taken to prejudice any liability or remedy to which a person guilty of such an offence may be subject in civil proceedings: s 1(5). As to the possibility of a civil action arising from a criminal offence under s 1(2) see *Ashgar v Ahmed* (1984) 17 HLR 25, CA; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 831. As to the payment of damages by a landlord for unlawfully depriving a residential occupier of any premises of his occupation of the whole or part of the premises see the Housing Act 1988 ss 27, 28 (as amended); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 654-655.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Protection from Eviction Act 1977 s 1(4) (amended by the Magistrates' Courts Act 1980 s 32(2)). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

Where an offence under the Protection from Eviction Act 1977 s 1 (as amended) committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager or secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and liable to be proceeded against and punished accordingly: s 1(6). See PARA 38 ante.

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### **609. Unlawful harassment of occupier.**

If any person with intent<sup>1</sup> to cause the residential occupier<sup>2</sup> of any premises: (1) to give up the occupation of the premises or any part of them<sup>3</sup>; or (2) to refrain from exercising any right or pursuing any remedy in respect of the premises or any part of them, does acts<sup>4</sup> likely to interfere with the peace or comfort of the residential occupier or members of his household, or persistently<sup>5</sup> withdraws or withholds services reasonably required for the occupation of the premises as a residence, he is guilty of an offence<sup>6</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the prescribed sum or to both<sup>8</sup>.

If the landlord<sup>9</sup> of a residential occupier or an agent of the landlord: (a) does acts likely to interfere with the peace or comfort of the residential occupier or members of his household; or (b) persistently withdraws or withholds services reasonably required for the occupation of the premises in question as a residence, and, in either case he knows, or has reasonable cause to believe, that that conduct is likely to cause the residential occupier to give up the occupation of the whole or part of the premises or to refrain from exercising any right or pursuing any remedy in respect of the whole or part of the premises, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup> or to a fine not exceeding the prescribed sum or to both<sup>11</sup>. A person is not guilty of such an offence, however, if he proves that he had reasonable grounds for doing the acts or withdrawing or withholding the services in question<sup>12</sup>.

1 A specific intent to cause the residential occupier either to give up the premises or to refrain from exercising some right in respect of the premises must be proved before the offence is complete; it is not sufficient to establish indifference to, and unconcern for, the tenant nor is it sufficient to establish a hopeful inactivity over services on the part of the landlord: *McCall v Abelesz* [1976] QB 585, [1976] 1 All ER 727, CA (decided under the Rent Act 1965 s 30 (repealed)). The facts of an earlier incident of harassment may be admissible eg to show animosity by the landlord to the tenant: *R v Shepherd* (1980) 124 Sol Jo 290, CA.

2 For the meaning of 'residential occupier' see PARA 608 note 2 ante. It must be proved that the defendant knew or believed that the person in question was a residential occupier: *R v Pheko* [1981] 3 All ER 84, 73 Cr App rep 107, CA.

3 The consequence of doing building work thus affecting the peace or comfort of the occupier is not to be equated with the intent to evict, which must be established: *R v AMK (Property Management) Ltd* [1985] Crim LR 600, CA. The effect upon the occupier (the actus reus) and the intention (the mens rea) must coincide in point of time: *R v AMK (Property Management) Ltd* supra. An intention to persuade the occupier to leave for a limited period of time in order to enable work to be done, and thereafter to allow her to return, is not an intent to cause her to give up the occupation of the premises; but it would be an intent falling within head (2) in the text: see *Schon v Camden London Borough Council* (1986) 53 P & CR 361, DC.

4 Although the plural is used, a single act suffices: *R v Evangelos Polycarpou* (1978) 9 HLR 129, CA (decided under the Rent Act 1965 s 30 (repealed)). It is not necessary that the acts in question should constitute a breach of contract or a tort: *R v Yuthiwattana* (1984) 80 Cr App Rep 55, CA (where it was sufficient that the defendant's act, a refusal to replace a missing door key for the occupier of a bed-sitting room in her house, was an act calculated to interfere with the occupier's peace and comfort and was an act intended to cause him to give up his occupation of the premises). The words 'does acts' refer to physical acts done: *R v AMK (Property Management) Ltd* [1985] Crim LR 600, CA. They do not impose a responsibility to rectify damage already

caused by an act done innocently without either of the necessary intentions in the offence: *R v Ahmad* (1986) 84 Cr App Rep 64, CA. As to acts of omission generally see PARA 6 ante. There was conduct in *R v Yuthiwattana* supra in addition to the refusal to provide a front door key and it seems not to have been argued that the failure to provide a key was a mere omission: *R v Ahmad* supra. Where a number of different acts are alleged in a single count in an indictment, each of which is sufficient to found a conviction, the jury must be unanimous as to at least one of them: *R v Mitchell* [1994] Crim LR 66, CA.

5 'Persistently' refers to the offence of withholding as well as to that of withdrawing services: *Westminster City Council v Peart* (1968) 19 P & CR 736, DC (decided under the Rent Act 1965 s 30 (repealed)). The prosecution must prove that there is an element of deliberate continuity in withholding the services, coupled with the necessary intent: *R v Abrol* [1972] Crim LR 318, CA (decided under the Rent Act 1965 s 30 (repealed)).

6 Protection from Eviction Act 1977 s 1(3) (amended by the Housing Act 1988 s 29(1)). As to offences committed by bodies corporate see PARA 608 note 7 ante. The Protection from Eviction Act 1977 s 1(3) (as amended) creates only one offence: *Schon v Camden London Borough Council* (1986) 53 P & CR 361, DC. If an act falls within the Protection from Eviction Act 1977 s 1(3) (as amended) it is irrelevant that it does not constitute an actionable civil wrong: *R v Burke* [1991] 1 AC 135, [1990] 2 All ER 385, HL (landlord who prevented a person from using a lavatory adjacent to his room guilty of harassment). As to the institution of proceedings see the Protection from Eviction Act 1977 s 6 (as amended); and PARA 608 note 6 ante.

Nothing in s 1 is to be taken to prejudice any liability or remedy to which a person guilty of such an offence may be subject in civil proceedings: s 1(5). As to the possibility of a civil action arising from a criminal offence under s 1(3) (as amended) see *Ashgar v Ahmed* (1984) 17 HLR 25, CA; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 831.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Protection from Eviction Act 1977 s 1(6) (amended by the Magistrates' Courts Act 1980 s 32(2); and the Housing Act 1988 s 29(1)). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

9 For these purposes, 'landlord', in relation to a residential occupier of any premises, means the person who, but for: (1) the residential occupier's right to remain in occupation of the premises; or (2) a restriction on the person's right to recover possession of the premises, would be entitled to occupation of the premises and any superior landlord under whom that person derives title: Protection from Eviction Act 1977 s 1(3C) (added by the Housing Act 1988 s 29(2)).

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

11 Protection from Eviction Act 1977 s 1(3A) (added by the Housing Act 1988 s 29(2)).

12 Protection from Eviction Act 1977 s 1(3B) (added by the Housing Act 1988 s 29(2)).



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#### **610. Residential occupiers of caravans.**

Statutory provision is made for the protection of residential occupiers of certain caravan sites against eviction and harassment<sup>1</sup>.

<sup>1</sup> See the Caravan Sites Act 1968 s 3 (as amended); and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 1283. 'Caravan' means any structure designed or adapted for human habitation which is capable of being moved from one place to another (whether by being towed, or by being transported on a motor vehicle or trailer) and any motor vehicle so designed or adapted, but does not include: (1) any railway rolling stock which is for the time being on rails forming part of a railway system; or (2) any tent: Caravan Sites and Control of Development Act 1960 s 29(1); definition applied by the Caravan Sites Act 1968 s 16.

#### **UPDATE**

#### **610 Residential occupiers of caravans**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **611. Offence of harassment etc of a person in his home.**

A person commits an offence if:

- 725 (1) that person is present outside or in the vicinity of any premises that are used by any individual ('the resident') as his dwelling<sup>1</sup>;
- 726 (2) that person is present there for the purpose (by his presence or otherwise) of representing to the resident or another individual (whether or not one who uses the premises as his dwelling), or of persuading the resident or such another individual:
  - 11 16. (a) that he should not do something that he is entitled or required to do<sup>2</sup>; or
  - 17. (b) that he should do something that he is not under any obligation to do<sup>3</sup>;
- 12 727 (3) that person:
  - 13 18. (a) intends his presence<sup>4</sup> to amount to the harassment of, or to cause alarm or distress to, the resident<sup>5</sup>; or
  - 19. (b) knows or ought to know<sup>6</sup> that his presence is likely to result in the harassment of, or to cause alarm or distress to, the resident<sup>7</sup>; and
- 14 728 (4) the presence of that person:
  - 15 20. (a) amounts to the harassment of, or causes alarm or distress to, any of the following persons<sup>8</sup>: the resident, a person in the resident's dwelling, or a person in another dwelling in the vicinity of the resident's dwelling<sup>9</sup>; or
  - 21. (b) is likely to result in the harassment of, or to cause alarm or distress to, any such person<sup>10</sup>.
- 16

A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 4 on the standard scale or to both<sup>11</sup>.

1 See the Criminal Justice and Police Act 2001 s 42A(1)(a) (s 42A added by the Serious Organised Crime and Police Act 2005 s 126(1)). For these purposes, 'dwelling' has the same meaning as in the Public Order Act 1986 Pt 1 (ss 1-10) (as amended) (see PARA 558 note 9 ante): Criminal Justice and Police Act 2001 s 42A(7) (as so added).

2 Ibid s 42A(1)(b)(i) (as added: see note 1 supra).

3 Ibid s 42A(1)(b)(ii) (as added: see note 1 supra).

4 The references in heads (3), (4) in the text to a person's presence are references to his presence either alone or together with that of any other persons who are also present: ibid s 42A(3) (as added: see note 1 supra).

5 Ibid s 42A(1)(c)(i) (as added: see note 1 supra). See note 4 supra.

6 For these purposes, a person ('A') ought to know that his presence is likely to result in the harassment of, or to cause alarm or distress to, a resident if a reasonable person in possession of the same information would think that A's presence was likely to have that effect: *ibid* s 42A(4) (as added: see note 1 *supra*).

7 *Ibid* s 42A(1)(c)(ii) (as added: see note 1 *supra*). See note 4 *supra*.

8 *Ie* persons falling within *ibid* s 42A(2) (as added): see the text to note 9 *infra*.

9 *Ibid* s 42A(1)(d)(i), (2) (as added: see note 1 *supra*). See note 4 *supra*.

10 *Ibid* s 42A(1)(d)(ii) (as added: see note 1 *supra*). See note 4 *supra*.

11 *Ibid* s 42A(5), (6) (as added: see note 1 *supra*). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) (alteration of penalties for summary offences), the reference to six months is to be read as a reference to 51 weeks: see the Criminal Justice and Police Act 2001 s 42A(5), (6) (as so added).

For other offences relating to harassment see PARA 152 *et seq ante*.

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## **612. Police directions stopping harassment etc of a person in his home.**

A constable who is at the scene may give a direction<sup>1</sup> to any person if:

- 729 (1) that person is present outside or in the vicinity of any premises that are used by any individual ('the resident') as his dwelling<sup>2</sup>;
- 730 (2) that constable believes, on reasonable grounds, that that person is present there for the purpose (by his presence or otherwise) of representing to the resident or another individual (whether or not one who uses the premises as his dwelling), or of persuading the resident or such another individual: (a) that he should not do something that he is entitled or required to do; or (b) that he should do something that he is not under any obligation to do<sup>3</sup>; and
- 731 (3) that constable also believes, on reasonable grounds, that the presence of that person (either alone or together with that of any other persons who are also present) amounts to, or is likely to result in, the harassment of the resident, or is likely to cause alarm or distress to the resident<sup>4</sup>.

Such a direction is a direction requiring the person to whom it is given to do all such things as the constable giving it may specify as the things he considers necessary to prevent one or both of: (i) the harassment of the resident; or (ii) the causing of any alarm or distress to the resident<sup>5</sup>. Such a direction may be given orally; and where a constable is entitled to give such a direction to each of several persons outside, or in the vicinity of, any premises, he may give that direction to those persons by notifying them of his requirements either individually or all together<sup>6</sup>.

The requirements that may be imposed by such a direction include:

- 732 (A) a requirement to leave the vicinity of the premises in question<sup>7</sup>; and
- 733 (B) a requirement to leave that vicinity and not to return to it within such period as the constable may specify, not being longer than three months<sup>8</sup>,

and (in either case) the requirement to leave the vicinity may be to do so immediately or after a specified period of time<sup>9</sup>. A direction may make exceptions to any requirement imposed by the direction, and may make any such exception subject to such conditions as the constable giving the direction thinks fit; and those conditions may include conditions as to the distance from the premises in question at which, or otherwise as to the location where, persons who do not leave their vicinity must remain; and conditions as to the number or identity of the persons who are authorised by the exception to remain in the vicinity of those premises<sup>10</sup>.

Any person who knowingly fails to comply with a requirement in such a direction (other than a requirement under head (B) above) is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both<sup>11</sup>.

Any person to whom a constable has given such a direction including a requirement under head (B) above commits an offence if he returns to the vicinity of the premises in question

within the period specified in the direction beginning with the date on which the direction is given, and does so for the purpose described in head (2) above<sup>12</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 4 on the standard scale or to both<sup>13</sup>.

1 Ibid under the Criminal Justice and Police Act 2001 s 42 (as amended): see the text and notes 2-13 *infra*. The power of a constable to give a direction under s 42 (as amended) does not include any power to give a direction at any time when there is a more senior-ranking police officer at the scene, or any power to direct a person to refrain from conduct that is lawful under the Trade Union and Labour Relations (Consolidation) Act 1992 s 220 (right peacefully to picket a work place: see EMPLOYMENT vol 41 (2009) PARA 1349); but it does include power to vary or withdraw a direction previously given under the Criminal Justice and Police Act 2001 s 42 (as amended): s 42(6).

2 Ibid s 42(1)(a). 'Dwelling' has the same meaning as in the Public Order Act 1986 Pt I (ss 1-10) (as amended) (see PARA 558 note 9 *ante*): Criminal Justice and Police Act 2001 s 42(9).

3 Ibid s 42(1)(b).

4 Ibid s 42(1)(c).

5 Ibid s 42(2).

6 Ibid s 42(3).

7 Ibid s 42(4)(a) (s 42(4) substituted by the Serious Organised Crime and Police Act 2005 s 127(1), (2)).

8 Criminal Justice and Police Act 2001 s 42(4)(b) (as substituted: see note 7 *supra*).

9 See *ibid* s 42(4) (as substituted: see note 7 *supra*).

10 Ibid s 42(5).

11 Ibid s 42(7) (amended by the Serious Organised Crime and Police Act 2005 s 127(1), (3)). As from a day to be appointed the maximum term of imprisonment is increased to 51 weeks: see the Criminal Justice and Police Act 2001 s 42(7) (as amended) (prospectively further amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 56(1), (3)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

12 Criminal Justice and Police Act 2001 s 42(7A) (added by the Serious Organised Crime and Police Act 2005 s 127(1), (4)).

13 Criminal Justice and Police Act 2001 s 42(7B), (7C) (added by the Serious Organised Crime and Police Act 2005 s 127(1), (4)). In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) (alteration of penalties for summary offences), the reference to six months is to be read as a reference to 51 weeks: see the Criminal Justice and Police Act 2001 s 42(7B), (7C) (as so added).

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## **(14) EXCLUSION ZONES**

### **613. Power to direct a person to leave a place.**

A constable may direct a person to leave a place<sup>1</sup> if he believes, on reasonable grounds, that the person is in the place at a time when he would be prohibited from entering it by virtue of:

- 734 (1) an order which was made, by virtue of any enactment, following the person's conviction of an offence, and which prohibits the person from entering the place or from doing so during a period specified in the order<sup>2</sup>; or
- 735 (2) a condition which was imposed, by virtue of any enactment, as a condition of the person's release from a prison in which he was serving a sentence of imprisonment<sup>3</sup> following his conviction of an offence, and which prohibits the person from entering the place or from doing so during a period specified in the condition<sup>4</sup>.

Such a direction may be given orally<sup>5</sup>.

Any person who knowingly contravenes such a direction is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding four months or to a fine not exceeding level 4 on the standard scale or to both<sup>6</sup>.

1 For these purposes, 'place' includes an area: Serious Organised Crime and Police Act 2005 s 112(9).

2 See *ibid* s 112(1)(a), (2).

3 'Sentence of imprisonment' includes: (1) a detention and training order; (2) a sentence of detention in a young offender institution; (3) a sentence of detention under the Powers of Criminal Courts (Sentencing) Act 2000 s 90 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 81); (4) a sentence of detention under s 91 (as amended; prospectively amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78); (5) a sentence of custody for life under s 93 (prospectively repealed) or s 94 (prospectively repealed) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 79); (6) a sentence of detention under the Criminal Justice Act 2003 s 226 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 82-83) or s 228 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84); and 'prison' is to be construed accordingly: Criminal Justice and Court Services Act 2000 s 62(5) (amended by the Criminal Justice Act 2003 s 304, Sch 32 Pt 1 paras 133, 136); definition applied by the Serious Organised Crime and Police Act 2005 s 112(8)(a). The reference in the text to a release from prison includes a reference to a temporary release: s 112(8)(b).

4 See *ibid* s 112(1b), (3). Section 112 (as amended) applies whether or not the order or condition mentioned in heads (1), (2) in the text was made or imposed before or after the commencement of s 112 (as amended): s 112(10).

5 *Ibid* s 112(4).

6 *Ibid* ss 112(5), 175(1), (3). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) (alteration of penalties for summary offences), the reference to four months is to be read as a reference to 51 weeks: see the Serious Organised Crime and Police Act 2005 ss 112(5), 175(1), (3).

## **UPDATE**

### **613 Power to direct a person to leave a place**

NOTE 3--Criminal Justice and Court Services Act 2000 s 62(5) further amended: Armed Forces Act 2006 Sch 16 para 184.

#### **UPDATE**

### **614-620 Anti-social Behaviour Orders and Related Orders**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 496-505.

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## **7. WEAPONS OFFENCES**

### **STOP PRESS: VIOLENT CRIME REDUCTION ACT**

The Violent Crime Reduction Act 2006 makes provision in relation to (1) reducing and dealing with the abuse of alcohol; (2) real and imitation firearms; (3) ammunition; and (4) knives and other weapons. The Act received the royal assent on 8 November 2006 and ss 25, 56, 60, 63 and 66 came into force on that date. Sections 42, 54, 55, 57 came into force on 12 February 2007; ss 23, 24, 26, 28-30, 31 (in part), 35, 49-53, 62, 65, Schs 1, 2 (in part), 3, 5 (in part) came into force on 6 April 2007; and ss 45, 46, 48, 51, 58, Sch 2 (in part) came into force on 31 May 2007: SI 2007/858. The 2006 Act s 27 came into force on 1 August 2007; and ss 21, 22, 32-34, 36-40, 43(1), (2), 44, 47, 64 and, so far as they are not already in force, ss 31, 50, 65 (in part), Sch 2 paras 4-8, 10, 12, 14, Sch 5 (in part) came into force on 1 October 2007: SI 2007/2180. The 2006 Act ss 1-5 and 9-14 (for certain purposes) come into force on 31 August 2009: SI 2009/1840. The remaining provisions come into force on a day or days to be appointed.

#### ***Part 1 (ss 1-27) Alcohol-related violence and disorder***

##### ***Chapter 1 (ss 1-14) Drinking banning orders***

Section 1 provides that a drinking banning order may impose prohibitions on an individual that are necessary for the purpose of protecting other persons from criminal or disorderly conduct by that individual while he is under the influence of alcohol. The period for which such an order may be in force must be not less than two months and not more than two years: s 2. The conditions for applying to a magistrates' court for an order are specified in s 3, and the right to apply for an order in county court proceedings is provided by s 4. Section 5 makes provision for the variation or discharge of orders under s 3 or 4. Under s 6, a criminal court may make a drinking banning order in relation to an individual where appropriate. Supplementary provision with regard to orders under s 6 is made by s 7, and provision for the variation or discharge of orders under s 6 is made by s 8. The court may make an interim drinking banning order while it is considering pursuant to s 6 whether the conditions for making a drinking banning order are satisfied: s 9. Section 10 entitles a person to appeal against an order made under s 3 or 6. By virtue of s 11, it is an offence to do anything prohibited by a drinking banning order. Provision may only be made for an order to cease to have effect on the completion by the subject of an approved course where the Secretary of State has approved the course: s 12. Under s 13, such a course is only to be regarded as completed if an appropriate certificate has been issued. Section 14 deals with interpretation.

##### ***Chapter 2 (ss 15-20) Alcohol disorder zones***

Section 15 empowers local authorities to impose charges on holders of premises licences allowing the sale by retail of alcohol. Local authorities are also entitled to designate, with the consent of the police, a locality as an alcohol disorder zone where there is a problem with alcohol-related nuisance and disorder in that area: s 16. The procedure for the designation of such a zone is prescribed by s 17. Section 18 specifies the functions of the local chief officer of police in relation to the designation of zones. Under s 19, the Secretary of State is required to



issue guidance about the manner in which local authorities, police authorities and chief officers of police are to exercise and perform their powers and duties in relation to alcohol disorder zones. Section 20 deals with interpretation.

### *Chapter 3 (ss 21-27) Other provisions*

Under ss 21 and 22, provision is made for an accelerated review of licensed premises by a licensing authority, and for the attaching of temporary conditions to a premises licence pending the full review of the licence. Section 23 creates a new offence of unlawfully selling alcohol to a person aged under 18 on three or more different occasions in a period of three consecutive months. A senior police officer or an inspector of weights and measures may make a closure notice where there is evidence that a person has committed such an offence: s 24. Where a premises licence requires persons to be present to undertake manned guarding activities, by virtue of s 25 the licence must only contain a mandatory condition that they be licensed by the Security Industry Authority if they are required to be licensed under the Private Security Industry Act 2001. The 2006 Act s 26 limits the circumstances in which premises licensed by local authorities cannot be designated public places where restrictions on public drinking apply. Under s 27, a police constable may issue an individual with a direction to leave a locality for up to 48 hours if the individual is likely to cause or contribute to the occurrence, repetition or continuance of alcohol-related crime or disorder in that locality and the direction is necessary to remove or reduce that likelihood.

### **Part 2 (ss 28-51) Weapons**

Section 28 creates a new offence of using another person to look after, hide or transport a dangerous weapon, and s 29 prescribes the penalties for committing such an offence. By virtue of s 30, the minimum sentences for unlawful possession of certain prohibited weapons also apply to other serious offences involving the possession and criminal use of such weapons. Anyone who wishes to sell air weapons by way of trade or business is required to register with the police as a firearms dealer (s 31); such sales must be made face to face (s 32). The minimum age for acquiring or possessing an air weapon is increased by s 33 from 17 to 18 years. By virtue of s 34, it is an offence to fire an air weapon beyond the boundary of any premise. It is also an offence to purchase or sell primers for ammunition unless the purchaser has a valid firearm certificate or otherwise has lawful authority (s 35), and to manufacture, import or sell realistic imitation firearms (s 36). Defences to a charge of an offence under s 36 are prescribed by s 37, and s 38 defines 'realistic imitation firearm' for the purposes of ss 36 and 37. Under s 39, it is an offence to manufacture, modify or import an imitation firearm which does not conform to specifications set out in regulations made by the Secretary of State. Section 40 makes it an offence to sell an imitation firearm to a person aged under 18, and for a person aged under 18 to purchase an imitation firearm. The maximum custodial sentence for carrying an imitation firearm in a public place without lawful authority or reasonable excuse is increased by s 41 from six months to twelve months. The maximum term of imprisonment for the offences of having an article with a blade or point in a public place, or of having such an article or another offensive weapon on school premises is increased by s 42 from two to four years. The offence of selling a knife or an article with a blade or point to a person aged under 16 is extended by s 43 to persons aged under 18. By virtue of s 44, the age at which a person may be sold or hired a crossbow, and at which a person may buy, hire or possess a crossbow, is increased from 17 to 18 years. A head teacher is enabled by s 45 to search or authorise the search of a pupil and his possessions where there is reason to suspect that he is carrying a knife or other offensive weapon. Equivalent provision is made by s 46 in relation to students of institutions in the further education sector, and by s 47 in relation to persons in attendance centres. Section 48 enables a constable to exercise his powers of entry and search of a school and persons on school premises for weapons where he has reasonable grounds for suspecting a relevant offence has been or is being committed. Section 49, Sch 1 make consequential

amendments relating to minimum sentences. Supplementary provision in connection with Pt 2 is made by s 50, and s 51, Sch 2 deal with Northern Ireland.

### ***Part 3 (ss 52-63) Miscellaneous***

Section 52, Sch 3 make various amendments to the Football (Disorder) Act 2000 and the Football Spectators Act 1989. The 2006 Act s 53 extends provisions on the sale and disposal of football match tickets by unauthorised persons to cover ticket touting on the internet and other practices associated with the unauthorised sale and distribution of tickets. Section 54, Sch 4 enable the court, when a person is convicted on indictment of trafficking a person for sexual exploitation, to order the forfeiture of a vehicle, ship or aircraft used or intended to be used in connection with the offence. Provision is made by s 55 to ensure the continuity of sexual offences law. Persons who have been or become subject to notification requirements in Scotland as a result of being convicted of a particular sexual offence involving a child are also to be subject to the notification requirements in England and Wales: s 56. By virtue of s 57, persons aged 18 or over who receive a sentence of imprisonment for public protection are required to notify the police of certain personal details for an indefinite period. Section 58 enables a magistrate to authorise the entry and search of the home of a person subject to notification requirements for the purposes of assessing the risks that he may pose to the community. The limitation period for anti-social behaviour orders is amended (s 59) and the power of the court to make a parenting order and a sexual offences prevention order in the same proceedings is also amended (s 60). Section 61 expands certain references to committing for trial to include sending for trial. By virtue of s 62, the offence of changing the unique International Mobile Equipment Identity number on a mobile telephone handset may be committed by offering or agreeing to change or interfere with the number or other unique device identifier. Section 63 exempts certain persons from the licensing requirement in the Private Security Industry Act 2001. The 2006 Act s 64 deals with expenses, s 65, Sch 5 make various repeals, and s 66 deals with the short title, commencement and extent.

### ***Amendments, repeals and revocations***

Subscribers should note that the lists below mention repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. This information may also be found in the COMMENCEMENT OF STATUTES table in the *Current Service* Noter-up binder. Please also note that these lists are not exhaustive.

The following Acts are repealed in full: Licensed Premises (Exclusion of Certain Persons) Act 1980; and Football (Disorder) (Amendment) Act 2002.

Specific provisions of a number of Acts are amended or repealed. These include: Firearms Act 1968 ss 3, 22-24, 51A, Sch 6; Crossbows Act 1987 ss 1-3; Criminal Justice Act 1988 ss 139, 139A, 141, 141A; Football Spectators Act 1989 ss 2-7; Criminal Justice and Public Order Act 1994 s 166; Football (Disorder) Act 2000 s 5(2); Criminal Justice and Police Act 2001 s 21; Licensing Act 2003 s 21; and Sexual Offences Act 2003 ss 82, 128, 129.

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## **(1) BIOLOGICAL, CHEMICAL AND NUCLEAR WEAPONS**

### **(i) Biological and Chemical Weapons**

#### **621. Prohibition on development etc of certain biological agents etc.**

Provision is made<sup>1</sup> prohibiting of the development, production, acquisition and possession of certain biological agents and toxins<sup>2</sup>, and the transfer, and making of agreements for the transfer, of certain biological agents and toxins to another person<sup>3</sup>. Corresponding provisions are made<sup>4</sup> prohibiting the use, development, production, possession, transfer etc of chemical weapons<sup>5</sup>, and provision is also made prohibiting the construction and alteration of premises, and the installation or construction of equipment, to be used for the production of chemical weapons<sup>6</sup>.

1 See the Biological Weapons Act 1974; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARAS 468-471.

2 See *ibid* s 1(1); and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARAS 468-469. As to offences relating to assisting or inducing certain weapon-related acts overseas in contravention of s 1 or the Chemical Weapons Act 1996 s 2 see PARA 629 post.

3 See the Biological Weapons Act 1974 s 1(1A) (as added); and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 469.

4 See the Chemical Weapons Act 1996 (as amended); and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 472 et seq.

5 See *ibid* s 2; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 474. See note 2 *supra*.

6 See *ibid* s 11; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 480.

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## **622. Security of pathogens and toxins.**

The occupier of any premises has a duty to give notice to the Secretary of State before keeping or using any dangerous substance<sup>1</sup>; and the occupier, where so required by notice, must provide the chief officer of police with information about the security of any dangerous substances kept or used in the premises<sup>2</sup>. Information about persons with access to dangerous substances may also be required to be given to the chief officer of police<sup>3</sup>; and the occupier has a duty to comply with any directions given by a constable for the security of any dangerous substance kept or used there<sup>4</sup> and with directions given by the Secretary of State for the disposal of any such substance where security arrangements are inadequate<sup>5</sup>. The Secretary of State may give directions, in the interests of national security, requiring that access by a specified person to dangerous substances or to premises where they are kept or used, be denied<sup>6</sup>. The police have power to enter premises in order to assess security measures in respect of any dangerous substances kept or used there<sup>7</sup>. A search warrant may be issued if there are reasonable grounds for believing that a dangerous substance is being kept or used in any premises where no notice is in force<sup>8</sup>, or that the occupier is failing to comply with any direction given to him<sup>9</sup>.

Failure without reasonable excuse by an occupier of premises to comply with any duty or direction imposed under these provisions is an offence<sup>10</sup> and a person providing information under these provisions who knowingly or recklessly makes a statement which is false or misleading in a material particular also commits an offence<sup>11</sup>. A person convicted of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>12</sup> or to a fine not exceeding the statutory maximum<sup>13</sup> or to both<sup>14</sup>.

The Secretary of State has power to extend the above provisions to animal or plant pathogens, pests or toxic chemicals<sup>15</sup>.

1 See the Anti-terrorism, Crime and Security Act 2001 s 59. Schedule 5 lists the pathogens and toxins which, together with anything infected with (or carried on) them, are referred to in Pt 7 (ss 58-75) as 'dangerous substances': see s 58(1), (4). The list contains four groups: viruses, rickettsiae, bacteria and toxins: see Sch 5. The Secretary of State may by order modify any provision of Sch 5: s 58(2). Something which otherwise falls within the definition of 'dangerous substances' is not to be regarded as a dangerous substance if it satisfies conditions prescribed in regulations or is kept or used in circumstances so prescribed: s 58(5). As to such regulations see the Security of Pathogens and Toxins (Exceptions to Dangerous Substances) Regulations 2002, SI 2002/1281.

The power to make an order or regulations under the Anti-terrorism, Crime and Security Act 2001 Pt 7 is exercisable by statutory instrument: s 73(1). A statutory instrument containing an order under s 58 must not be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 73(2). A statutory instrument containing an order under s 61 or regulations under s 58, 59 or 61 is subject to annulment in pursuance of a resolution of either House of Parliament: s 73(3).

2 See *ibid* s 60. Notices under Pt 7 may be given by post: s 72. An appeal against any such notice may be made to a magistrates' court and thence to the Crown Court: see s 71.

3 See *ibid* s 61.

4 See *ibid* s 62. An appeal against any directions under s 62 or s 63 may be made to a magistrates' court and thence to the Crown Court: see s 71.

5 See *ibid* s 63. As to an appeal against such a direction see note 4 *supra*.

6 See *ibid* s 64. Any person aggrieved by such directions may appeal to the Pathogens Access Appeal Commission and thence, with leave, to the Court of Appeal: see s 70(1)-(5). As to the constitution, administration and procedure of the Commission see s 70(6), Sch 6. As to the procedure on appeal to the Commission see the Pathogens Access Appeal Commission (Procedure) Rules 2002, SI 2002/1845; and as to the procedure on appeal from the Commission see the Court of Appeal (Appeals from Pathogens Access Appeal Commission) Rules 2002, SI 2002/1844.

7 Anti-terrorism, Crime and Security Act 2001 s 65.

8 *Ie* under *ibid* s 59 (see note 1 *supra*).

9 *Ibid* s 66. The text refers to a direction under s 62 (see note 4 *supra*) or s 63 (see note 5 *supra*).

10 *Ibid* s 67(1).

11 *Ibid* s 67(2). As to offences committed by bodies corporate see s 68 (liability of officer of corporate body (or other employee if in charge of any relevant premises or access to any dangerous substances there) if offence committed with consent or connivance of officer or employee, or attributable to neglect on his part). As to offences committed by partnerships and unincorporated associations see s 69 (proceedings for an offence alleged to have been committed by a partnership or unincorporated association must be brought in the name of the partnership or association (not that of any of its members); fine imposed must be paid out of funds of partnership or association).

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

13 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

14 Anti-terrorism, Crime and Security Act 2001 s 67(3).

15 *Ibid* s 75.

## **UPDATE**

### **622 Security of pathogens and toxins**

NOTES 1, 15--Subject to certain modifications, the 2001 Act Pt 7 (ss 58-75) applies to the animal pathogens of a description set out in Sch 5: see the Part 7 of the Anti-terrorism, Crime and Security Act 2001 (Extension to Animal Pathogens) Order 2007, SI 2007/926. As to a further order modifying the 2001 Act Sch 5 see the Schedule 5 to the Anti-terrorism, Crime and Security Act 2001 (Modification) Order 2007, SI 2007/929.

NOTE 1--See also the Security of Animal Pathogens (Exceptions to Dangerous Substances) Regulations 2007, SI 2007/932.

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## **(ii) Nuclear Weapons**

### **A. ANTI-TERRORISM, CRIME AND SECURITY ACT 2001**

#### **623. Nuclear weapons.**

It is an offence<sup>1</sup>: (1) knowingly to cause a nuclear weapon<sup>2</sup> explosion<sup>3</sup>; (2) to develop or produce, or participate in the development or production<sup>4</sup> of, a nuclear weapon<sup>5</sup>; (3) to possess a nuclear weapon<sup>6</sup>; (4) to participate in the transfer of a nuclear weapon<sup>7</sup>; or (5) to engage in military preparations, or in preparations of a military nature, intending to use, or threaten to use, a nuclear weapon<sup>8</sup>. Heads (1) to (5) apply to acts done outside the United Kingdom if they are done by a United Kingdom person<sup>9</sup>.

It is a defence to an offence of possessing, or participating in the transfer of, a nuclear weapon for the defendant to show that he did not know and had no reason to believe that the object was a nuclear weapon<sup>10</sup> or that, if he did so, he took all reasonable steps to inform the Secretary of State or a constable of his knowledge or belief<sup>11</sup>.

A person guilty of an offence under the above provisions is liable on conviction on indictment to imprisonment for life or a shorter term<sup>12</sup>.

Proceedings for such an offence may not be instituted except by or with the consent of the Attorney General<sup>13</sup>.

1    Ie subject to the exceptions and defences in the Anti-terrorism, Crime and Security Act 2001 ss 48, 49 (see notes 9-11 infra): s 47(2).

2    'Nuclear weapon' includes a nuclear explosive device that is not intended for use as a weapon: *ibid* s 47(6).

3    *Ibid* s 47(1)(a). As from a day to be appointed s 47(1)(a) ceases to have effect and provision in connection with offences for causing nuclear explosions is made by the Nuclear Explosions (Prohibition and Inspections) Act 1998 (see PARA 625 post): Anti-terrorism, Crime and Security Act 2001 s 47(9). The Nuclear Explosions (Prohibition and Inspections) Act 1998 is to come into force on such day as the Secretary of State may appoint by order made by statutory instrument: s 15(1). At the date at which this volume states the law no such day had been appointed. Her Majesty may by Order in Council make provision for extending any of the provisions of the Nuclear Explosions (Prohibition and Inspections) Act 1998, with such exceptions, adaptations or modifications as may be specified in the order, to any of the Channel Islands, the Isle of Man or any colony: s 15(3). At the date at which this volume states the law no such order had been made.

4    For these purposes, a person participates in the development or production of a nuclear weapon if he does any act which facilitates the development by another of the capability to produce or use a nuclear weapon, or facilitates the making by another of a nuclear weapon, knowing or having reason to believe that his act has, or will have, that effect: Anti-terrorism, Crime and Security Act 2001 s 47(3). See also FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1387.

5    *Ibid* s 47(1)(b).

6    *Ibid* s 47(1)(c).

7    *Ibid* s 47(1)(d). For these purposes, a person participates in the transfer of a nuclear weapon if he buys or otherwise acquires it or agrees with another to do so; he sells or otherwise disposes of it or agrees with another

to do so; or he makes arrangements under which another person either acquires or disposes of it or agrees with a third person so to do: s 47(4).

8 Ibid s 47(1)(e). Where an offence under s 47, s 50 (see PARA 629 post) or s 54(1) (see note 9 infra) committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against and punished accordingly: s 54(3). For these purposes, 'director', in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate: s 54(4). See PARA 38 ante.

It is an offence to assist or induce overseas an offence under s 47: see s 50(2)(c); and PARA 629 note 2 head (3) post.

9 Ibid s 47(7). See also s 51. Section 47(7) does not affect any criminal liability arising otherwise than under it: s 47(8). A justice of the peace may issue a warrant authorising an officer authorised by the Secretary of State to enter and search for evidence of the commission of an offence under s 47 or s 50 (see PARA 629 post) and obstructing an officer exercising this power, or failing to comply with a reasonable request by an officer exercising this power, is an offence: see s 52. It is an offence knowingly or recklessly to make a false or misleading statement for the purpose of obtaining, or opposing the variation or withdrawal of, authorisation for the purposes of s 47 or s 50 (see PARA 629 post): s 54(1). The penalty for this offence on conviction on indictment is imprisonment for a term not exceeding two years or a fine or both, and on summary conviction is a fine not exceeding the statutory maximum: s 54(2). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. 'United Kingdom person' means a United Kingdom national, a Scottish partnership or a body incorporated under the law of a part of the United Kingdom: s 56(1). For this purpose, a United Kingdom national is an individual who is: (1) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British overseas citizen; (2) a person who under the British Nationality Act 1981 is a British subject; or (3) a British protected person within the meaning of that Act: Anti-Terrorism, Crime and Security Act 2001 s 56(2) (amended by the British Overseas Territories Act 2002 s 2(3)). As to British citizenship, British overseas territories citizenship, British National (Overseas) status, British overseas citizenship, British subject status and British protected person status see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 23 et seq. As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

Acts authorised by the Secretary of State or done in the course of an armed conflict are excepted from Anti-terrorism, Crime and Security Act 2001 s 47: see s 48.

Her Majesty may by Order in Council direct that any of the provisions of Pt 6 (ss 43-57) (as amended) are to extend, with such exceptions and modifications as appear to be appropriate, to any of the Channel Islands, the Isle of Man or any British overseas territory: s 57. See the Chemical Weapons (Overseas Territories) Order 2005, SI 2005/854.

10 Anti-terrorism, Crime and Security Act 2001 s 49(1). The defendant will be taken to have shown that fact if sufficient evidence is adduced to raise an issue with respect to it and the contrary is not proved by the prosecution beyond reasonable doubt: s 49(2).

11 See *ibid* s 49(3). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

12 Anti-terrorism, Crime and Security Act 2001 s 47(5).

13 Ibid s 55(a). As to the effect of these limitations see PARA 1071 post. Subject to s 55(a), proceedings for a nuclear weapons offence (ie an offence under s 47 or s 50 (see PARA 629 post), including aiding, abetting, counselling, procuring or inciting the commission of, or attempting or conspiring to commit, such an offence) may be instituted by the Director of Revenue and Customs Prosecutions or by order of the Commissioners for Her Majesty's Revenue and Customs if the offence has involved the development or production outside the United Kingdom of a nuclear weapon or the movement of a nuclear weapon into or out of any country or territory or any proposal or attempt to do one of those things: s 53(1), (2) (amended by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 87(a)). Any proceedings for an offence which are instituted by order of the Commissioners under the Anti-terrorism, Crime and Security Act 2001 s 53(1) must be commenced in the name of an officer of Revenue and Customs, but may be continued by another officer: s 53(3) (amended by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 87(b)(i)). Where the Commissioners investigate, or propose to investigate, any matter with a view to determining whether there are grounds for believing that a nuclear weapons offence has been committed; or whether a person should be prosecuted for such an offence, that matter is treated as an assigned matter: s 53(4) (amended by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 87(c)). 'Assigned matter' means any

matter in relation to which the Commissioners, or officers of Revenue and Customs, have a power or duty: Anti-terrorism, Crime and Security Act 2001 s 53(4); Customs and Excise Management Act 1979 s 1(1) (amended by the Commissioners for Revenue and Customs Act 2005 50(6), Sch 4 paras 20, 22(a)). Nothing in the Anti-terrorism, Crime and Security Act 2001 s 53 (as amended) affects any other powers of any person, including any officer: s 53(5). The Director of Revenue and Customs Prosecutions is appointed under the Commissioners for Revenue and Customs Act 2005 s 34: see PARA 1068 post. As to the Commissioners for Revenue and Customs and their officers see PARA 354 note 2 ante.

## **UPDATE**

### **623 Nuclear weapons**

NOTE 13--See further Serious Crime Act 2007 Sch 6 para 43 (references to common law offence of incitement).



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#### **624. Nuclear security.**

The Secretary of State may make regulations in order to secure the security of the civil nuclear industry<sup>1</sup> including the creation of offences<sup>2</sup>. The disclosure of any information or thing which might prejudice the security of any nuclear site or of any nuclear material is an offence<sup>3</sup>; and the Secretary of State may make regulations prohibiting the disclosure of information or things concerning uranium enrichment technology<sup>4</sup>.

1 See the Anti-terrorism, Crime and Security Act 2001 s 77; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1544.

2 See *ibid* s 77(2)(d); the Nuclear Industries Security Regulations 2003, SI 2003/403; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1544 et seq.

3 See the Anti-terrorism, Crime and Security Act 2001 s 79; para 494 ante; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1562.

4 *Ibid* s 80; para 495 ante; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1563.

#### **UPDATE**

#### **624 Nuclear security**

NOTE 2--SI 2003/403 amended: SI 2006/2815.

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## ***B. NUCLEAR EXPLOSIONS (PROHIBITION AND INSPECTIONS) ACT 1998***

### **625. Nuclear weapon explosions.**

As from a day to be appointed<sup>1</sup>, any person who knowingly causes a nuclear weapon test explosion or any other nuclear explosion is guilty of an offence and liable on conviction on indictment to imprisonment for life<sup>2</sup>. This applies to acts done in the United Kingdom or elsewhere<sup>3</sup>; and proceedings for an offence committed outside the United Kingdom may be taken, and the offence may for incidental purposes be treated as having been committed, in any place in the United Kingdom<sup>4</sup>. The offence does not apply to a nuclear weapon explosion carried out in the course of an armed conflict<sup>5</sup>.

Proceedings may not be instituted except by or with the consent of the Attorney General<sup>6</sup>.

The court by or before which a person is convicted may order that anything shown to the court's satisfaction to relate to the offence is forfeited, and either destroyed or otherwise dealt with in such manner as the court may order; and, in particular, the court may order the thing to be dealt with as the Secretary of State may see fit and in such a case the Secretary of State may direct that it be destroyed or otherwise dealt with<sup>7</sup>.

<sup>1</sup> See PARA 623 note 3 ante.

<sup>2</sup> Nuclear Explosions (Prohibition and Inspections) Act 1998 s 1(1). Where such an offence is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against and punished accordingly: s 11(1). For these purposes, 'director', in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate: s 11(2). See PARA 38 ante.

The Nuclear Explosions (Prohibition and Inspections) Act 1998 gives effect to certain provisions of the Comprehensive Nuclear-Test Ban Treaty (New York, 10 September 1996; Cm 3665): Nuclear Explosions (Prohibition and Inspections) Act 1998 preamble, s 4. The Secretary of State may by order make such additions to, omissions from or other modifications to the Nuclear Explosions (Prohibition and Inspections) Act 1998 as he considers necessary or desirable to give effect to any amendment of the Comprehensive Nuclear-Test Ban Treaty made in pursuance of its provisions: Nuclear Explosions (Prohibition and Inspections) Act 1998 s 13(1), (5). The power to make such an order is exercisable by statutory instrument: s 13(2). Where such an order modifies the Act solely to give effect to an amendment or amendments made in accordance with the Comprehensive Nuclear-Test Ban Treaty art VII(8), the instrument containing the order is subject to annulment in pursuance of a resolution of either House of Parliament and, in any other case, the order must not be made unless a draft of it has been laid before and approved by resolution of each House of Parliament: Nuclear Explosions (Prohibition and Inspection) Act 1998 s 13(3), (4). The Nuclear Explosions (Prohibition and Inspections) Act 1998 binds the Crown and no contravention by the Crown of a provision made by or under that Act may make the Crown criminally liable; but the High Court may, on the application of a person appearing to the court to have an interest, declare unlawful any act or omission of the Crown which constitutes such a contravention: s 14(1), (2). Notwithstanding this provision, the provisions made by or under the Nuclear Explosions (Prohibition and Inspections) Act 1998 apply to persons in the public service of the Crown as they apply to other persons: s 14(3). Nothing in s 14 affects Her Majesty in her private capacity and this provision is to be construed as if the Crown Proceedings Act 1947 s 38(3) (meaning of 'Her Majesty in her private capacity': see CROWN AND ROYAL FAMILY vol 12(1) (Reissue) PARA 56) were contained in the Nuclear Explosions (Prohibition and Inspections) Act 1998: s 14(4).

3 Ibid s 2(1). So far as it applies to acts done outside the United Kingdom, s 1 applies to United Kingdom nationals, Scottish partnerships, and bodies incorporated under the law of any part of the United Kingdom: s 2(2). For these purposes, a United Kingdom national is an individual who is: (1) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British overseas citizen; (2) a person who under the British Nationality Act 1981 is a British subject; or (3) a British protected person within the meaning of that Act: Nuclear Explosions (Prohibition and Inspections) Act 1998 s 2(3) (amended by the British Overseas Territories Act 2002 s 2(3)). As to British citizenship, British overseas territories citizenship, British national (overseas) status, British overseas citizenship, British subject status and British protected person status see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 23 et seq. Her Majesty may by Order in Council extend the application of the Nuclear Explosions (Prohibition and Inspections) Act 1998 s 1, so far as it applies to acts done outside the United Kingdom, to bodies incorporated under the law of any of the Channel Islands, the Isle of Man or any colony: s 2(4). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4 Ibid s 2(5).

5 Ibid s 1(2). If in proceedings for an offence under s 1 any question arises as to whether a nuclear weapon explosion was or was not carried out in the course of an armed conflict, that question is to be determined by the Secretary of State and a certificate purporting to set out any such determination and to be signed by the Secretary of State will be received in evidence and be deemed to be so signed without further proof, unless the contrary is shown: s 1(3). See also ARMED FORCES vol 2(2) (Reissue) PARA 422; WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 496.

6 Ibid s 3(1)(a).

7 Ibid s 3(2), (3). Where the court proposes to order anything to be forfeited under s 3, and a person claiming to have an interest in it applies to be heard by the court, the court must not order it to be forfeited unless he has been given an opportunity to show cause why the order should not be made: s 3(4).

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## **626. On-site inspections.**

As from a day to be appointed<sup>1</sup>, the Secretary of State may issue an authorisation in respect of an on-site inspection<sup>2</sup> in the United Kingdom<sup>3</sup>. The authorisation must contain a description of the area ('the specified area')<sup>4</sup> in which the inspection is to be conducted<sup>5</sup> and state the names of the members of the inspection team<sup>6</sup>, the name of any observer<sup>7</sup> and the name of the UK representative or representatives<sup>8</sup>.

The authorisation has the effect of:

- 736 (1) authorising the inspection team to exercise within the specified area such rights of access, entry and unobstructed inspection as are conferred on it by the Treaty's inspection provisions<sup>9</sup>;
- 737 (2) authorising the inspection team to do such other things within that area in connection with the inspection as it is entitled to do by virtue of those provisions<sup>10</sup>;
- 738 (3) authorising the UK representative or representatives to accompany the inspection team in accordance with those provisions<sup>11</sup>;
- 739 (4) authorising any constable to give such assistance as a UK representative requests for the purpose of facilitating the conduct of the inspection in accordance with those provisions<sup>12</sup>; and
- 740 (5) authorising any observer to exercise within the specified area such rights of access and entry as are conferred on him by those provisions<sup>13</sup>.

The Secretary of State may reimburse any person in respect of expenditure incurred in connection with an on-site inspection<sup>14</sup>.

1 See PARA 623 note 3 ante.

2 'On-site inspection' means an on-site inspection carried out in accordance with the Treaty's inspection provisions: Nuclear Explosions (Prohibition and Inspections) Act 1998 s 4. 'The Treaty's inspection provisions' means the provisions of art IV of, and Pt II of the Protocol to, the Comprehensive Nuclear-Test Ban Treaty (New York, 10 September 1996; Cm 3665): Nuclear Explosions (Prohibition and Inspections) Act 1998 s 4.

3 Ibid s 5(1). The validity of any authorisation purporting to be issued under s 5 in respect of an on-site inspection will not be called in question in any court of law at any time before the conclusion of that inspection: s 6(2). Accordingly, where an authorisation purports to be issued under s 6 in respect of an on-site inspection, no proceedings, of whatever nature, are to be brought at any time before the conclusion of the inspection if they would, if successful, have the effect of preventing, delaying or otherwise affecting the carrying out of the inspection: s 6(3). As to offences committed in respect of on-site inspections see PARA 627 post. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4 The Secretary of State may issue an amendment varying the specified area and:

- 118 (1) from the time when an amendment is expressed to take effect, *ibid* s 5 applies as if the specified area were the area as varied (s 6(5)(a));
- 119 (2) the provisions of s 5(2) (notes 5-8 *infra*) apply to the amendment as they apply to the authorisation (s 6(5)(b)); and

- 120 (3) the Secretary of State may issue further amendments varying the specified area and in such a case heads (1) and (2) supra apply (s 6(5)(c)).

5 Ibid s 5(2)(a). The occupier of any premises (or a person acting on behalf of the occupier of any such premises):

- 121 (1) in relation to which it is proposed to exercise a right of entry in reliance on an authorisation under s 5; or

122 (2) on which an on-site inspection is being carried out in reliance on such an authorisation, is entitled to require a copy of the authorisation to be shown to him by any UK representative: s 6(1).

'UK representative', in relation to an on-site inspection, means a representative of the United Kingdom who, in accordance with the Treaty's inspection provisions, liaises with and accompanies the inspection team during the performance of its duties: s 4. 'Inspection team', in relation to an on-site inspection, means the team of inspectors and inspection assistants selected, in accordance with the Treaty's provisions, for the purposes of the inspection: s 4. If in any proceedings any question arises whether a person at any time was or was not a member of the inspection team, an observer or a UK representative, a certificate signed by or on behalf of the Secretary of State stating any fact relating to that question is conclusive evidence of that fact; and a certificate purporting to be so signed is deemed to be so signed without further proof unless the contrary is shown: s 6(4). 'Observer', in relation to an on-site inspection, means a representative of a party to the Comprehensive Nuclear-Test Ban Treaty, who in accordance with the Treaty's inspection provisions, is sent by that party to observe the conduct of the inspection: Nuclear Explosions (Prohibition and Inspections) Act 1998 s 4.

Members of inspection teams and observers enjoy the same privileges and immunities as are enjoyed by diplomatic agents in accordance with the Diplomatic Privileges Act 1964 s 2(1), Sch 1 art 29, art 30 paras 1, 2, art 31 paras 1-3, art 34: see the Nuclear Explosions (Prohibition and Inspections) Act 1998 s 8(1), (7). The Diplomatic Privileges Act 1964 sets out articles of the Vienna Convention on Diplomatic Relations (Vienna, 2 March to 14 April 1961; Misc 6 (1961); Cmnd 1368) having force of law in the United Kingdom. See the Nuclear Explosions (Prohibition and Inspections) Act 1998 s 8(7). See further INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 265 et seq. Such persons, in addition, enjoy the same privileges as are enjoyed by diplomatic agents in accordance with the Diplomatic Privileges Act 1964 Sch 1 art 36 para 1(b), except in relation to articles the importing or exporting of which is prohibited by law or controlled by the enactments relating to quarantine: Nuclear Explosions (Prohibition and Inspections) Act 1998 s 8(2). 'Enactment' includes an enactment comprised in subordinate legislation (ie within the meaning of the Interpretation Act 1978: see STATUTES vol 44(1) (Reissue) PARA 1232): Nuclear Explosions (Prohibition and Inspections) Act 1998 s 8(7). The privileges and immunities accorded to members of inspection teams and observers by virtue of s 8 are enjoyed by them at any time when they are in the United Kingdom in connection with the carrying out there of an on-site inspection, or while in transit to or from the territory of another party to the Comprehensive Nuclear-Test Ban Treaty in connection with the carrying out of such an inspection there: Nuclear Explosions (Prohibition and Inspections) Act 1998 s 8(4). Samples and approved equipment carried by members of an inspection team are inviolable and exempt from customs duties: s 8(3). 'Approved equipment' and 'samples' are to be construed in accordance with the Treaty's inspection provisions: s 8(7). If in any proceedings any question arises whether a person is or is not entitled to any privilege or immunity by virtue of s 8, a certificate signed by or on behalf of the Secretary of State stating any fact relating to that question is conclusive evidence of that fact; and a certificate purporting to be so signed is deemed to be so signed without further proof, unless the contrary is shown: s 8(6). If immunity from jurisdiction of a member of an inspection team is waived in accordance with Pt II para 30 of the Protocol to the Comprehensive Nuclear-Test Ban Treaty, and a notice made by the Secretary of State and informing the member of the waiver is delivered to him in person, then, from the time the notice is so delivered, the Nuclear Explosions (Prohibition and Inspections) Act 1998 s 8 does not have effect to confer that immunity on the member: s 8(5). The Secretary of State may, by order, apply s 8 with such modifications as he considers appropriate to the Director General and members of the staff of the Technical Secretariat established in accordance with the Treaty: s 8(8). Such an order must be made by statutory instrument and no such order may be made unless a draft has been laid before, and approved by a resolution of, each House of Parliament: s 8(9).

6 Ibid s 5(2)(b). See note 5 supra.

7 Ibid s 5(2)(c). See note 5 supra.

8 Ibid s 5(2)(d). See note 5 supra.

9 Ibid s 5(3)(a).

10 Ibid s 5(3)(b).

11 Ibid s 5(4)(a).

12 Ibid s 5(4)(b). Any constable giving assistance in accordance with head (4) in the text may use such reasonable force as he considers necessary for the purpose mentioned therein: s 5(5). As to offences that may be committed by refusing to comply with a constable see PARA 627 post.

13 Ibid s 5(4)(c).

14 Ibid s 9.

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## **627. Offences relating to on-site inspections.**

As from a day to be appointed<sup>1</sup>, if an authorisation has been issued in respect of an on-site inspection<sup>2</sup>, a person is guilty of an offence if he refuses without reasonable excuse to comply with any request made by a constable<sup>3</sup> or a UK representative<sup>4</sup> for the purpose of facilitating the conduct of that inspection in accordance with the Treaty's inspection provisions<sup>5</sup>, or if he wilfully obstructs a member of the inspection team<sup>6</sup>, an observer<sup>7</sup> or a UK representative in the performance of his functions under the Treaty's inspection provisions<sup>8</sup>. A person guilty of such an offence is liable on summary conviction to a fine of an amount not exceeding the statutory maximum<sup>9</sup> or on conviction on indictment to a fine<sup>10</sup>.

1 See PARA 623 note 3 ante.

2 Ie an authorisation issued under the Nuclear Explosions (Prohibition and Inspections) Act 1998 s 5 (see PARA 626 ante). For the meaning of 'on-site inspection' see PARA 626 note 2 ante.

3 As to the powers etc of a constable in respect of on-site inspections see PARA 626 ante.

4 For the meaning of 'UK representative' see PARA 626 note 5 ante.

5 Nuclear Explosions (Prohibition and Inspections) Act 1998 s 7(1)(a). For the meaning of 'the Treaty's inspections provisions' see PARA 626 note 2 ante. Where an offence is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against and punished accordingly: s 11(1). For the meaning of 'director' see PARA 625 note 2 ante.

6 For the meaning of 'inspection team' see PARA 626 note 5 ante.

7 For the meaning of 'observer' see PARA 626 note 5 ante.

8 Nuclear Explosions (Prohibition and Inspections) Act 1998 s 7(1)(b). See note 5 supra.

9 Ibid s 7(2)(a). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

10 Ibid s 7(2)(b).

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## **628. Power to search and obtain evidence.**

As from a day to be appointed<sup>1</sup>, if a justice of the peace is satisfied on information on oath that there is reasonable ground for suspecting that an offence under the Nuclear Explosions (Prohibition and Inspections) Act 1998 is being, has been or is about to be committed on any premises or that evidence of the commission of such an offence is to be found there, he may issue a warrant in writing authorising a person acting under the authority of the Secretary of State to enter the premises, if necessary by force, at any time within one month from the time of the issue of the warrant, and to search them<sup>2</sup>.

A person who enters the premises under the authority of the warrant may:

- 741 (1) take with him such other persons and such equipment as appear to him to be necessary<sup>3</sup>;
- 742 (2) inspect any document found on the premises which he has reasonable cause to believe may be required as evidence for the purposes of proceedings in respect of an offence under the Nuclear Explosions (Prohibition and Inspections) Act 1998<sup>4</sup>;
- 743 (3) take copies of or seize and remove, any such document<sup>5</sup>;
- 744 (4) inspect, seize and remove any device or equipment found on the premises which he has reasonable cause to believe may be required as such evidence<sup>6</sup>;
- 745 (5) inspect, sample, seize and remove any substance found on the premises which he has reasonable cause to believe may be required as such evidence<sup>7</sup>.

A constable who enters the premises under the authority of the warrant or by virtue of head (1) above, may search any person found on the premises whom he has reasonable cause to believe to be in possession of any document, device or substance which may be required as evidence for the purposes of proceedings in respect of an offence under the Nuclear Explosions (Prohibition and Inspection) Act 1998<sup>8</sup>.

1 See PARA 623 note 3 ante.

2 Nuclear Explosions (Prohibition and Inspections) Act 1998 s 10(1).

3 Ibid s 10(2)(a).

4 Ibid s 10(2)(b).

5 Ibid s 10(2)(c).

6 Ibid s 10(2)(d).

7 Ibid s 10(2)(e).

8 Ibid s 10(3). No constable may by virtue of s 10(3) search a person of the opposite sex: s 10(4). A person, other than a constable, who exercises powers conferred by a warrant under s 10 may, if the warrant so provides, do so only in the presence of a constable: s 10(5).



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### **(iii) Overseas Offences**

#### **629. Assisting or inducing certain weapons-related acts overseas.**

It is an offence for a United Kingdom person<sup>1</sup> to aid, abet, counsel or procure, or incite, a person who is not a United Kingdom person to do certain weapons-related acts overseas<sup>2</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for life<sup>3</sup>. The offence applies to acts done outside the United Kingdom, but only if they are done by a United Kingdom person<sup>4</sup>. Proceedings for such an offence may not be instituted except by or with the consent of the Attorney General<sup>5</sup>.

1 For the meaning of 'United Kingdom person' see PARA 623 note 9 ante. As to the commission of this offence by a body corporate see the Anti-terrorism, Crime and Security Act 2001 s 54(3); and PARA 623 note 8 ante.

2 Ibid s 50(1). For these purposes, a relevant act is an act that, if done by a United Kingdom person, would contravene any of the following provisions:

123 (1) the Biological Weapons Act 1974 s 1 (offences relating to biological agents and toxins: see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 469) (Anti-terrorism, Crime and Security Act 2001 s 50(2)(a));

124 (2) the Chemical Weapons Act 1996 s 2 (offences relating to chemical weapons: see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 474) (Anti-terrorism, Crime and Security Act 2001 s 50(2)(b)); or

125 (3) the Anti-terrorism, Crime and Security Act 2001 s 47 (offences relating to nuclear weapons: see PARA 623 ante) (s 50(2)(c)).

Nothing in s 50 applies to an act which relates to a relevant act which would contravene s 47 (see PARA 623 ante) and is authorised by the Secretary of State: s 50(3).

A justice of the peace may issue a warrant authorising an officer authorised by the Secretary of State to enter and search for evidence of the commission of an offence under s 50: see s 52; and PARA 623 ante.

A person accused of an offence under s 50 in relation to a relevant act which would contravene a provision mentioned in s 50(2) may raise any defence which would be open to a person accused of the corresponding offence ancillary to an offence under that provision: s 50(4).

Nothing in s 50 prejudices any criminal liability existing apart from s 50: s 50(7).

Her Majesty may by Order in Council direct that any of the provisions of Pt 6 (ss 43-57) (as amended) are to extend, with such exceptions and modifications as appear to be appropriate, to any of the Channel Islands, the Isle of Man or any British overseas territory: s 57. See the Chemical Weapons (Overseas Territories) Order 2005, SI 2005/854.

3 Anti-terrorism, Crime and Security Act 2001 s 50(5).

4 Ibid s 50(6). See also s 51.

5 Ibid s 55(a). See also PARA 623 note 9 ante.

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## **(2) FIREARMS, AMMUNITION AND AIR WEAPONS**

### **(i) Acquisition, Purchase and Possession**

#### **A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION**

##### **630. Meaning of 'firearm'.**

'Firearm' means a lethal<sup>1</sup> barrelled weapon of any description from which any shot, bullet or other missile can be discharged<sup>2</sup>, and includes: (1) any prohibited weapon<sup>3</sup>, whether it is such a lethal weapon or not<sup>4</sup>; and (2) any component part<sup>5</sup> of such a lethal or prohibited weapon<sup>6</sup>; and (3) any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon<sup>7</sup>.

1 'Lethal weapon' includes a weapon not designed to kill or inflict injury but capable of causing injury from which death might result: *Read v Donovan* [1947] KB 326, [1947] 1 All ER 37, DC (signal pistol, capable of killing at short range); *Muir v Cassidy* 1953 SLT 4, Ct of Sess (double-barrelled pistol with holes bored in the sides of the barrels; holes might be filled up so as to make it effective with live ammunition); *Moore v Gooderham* [1960] 3 All ER 575, [1960] 1 WLR 1308, DC (air gun capable, if misused, of causing injury from which death might result); *Herron v Flockhart* 1969 SLT (Sh Ct) 37 (air gun); *R v Thorpe* [1987] 2 All ER 108, 85 Cr App Rep 107, CA (six-chamber revolver, loaded with .177 air pellets, propelled by release of compressed carbon dioxide; when misused capable of causing injury from which death might result). In determining whether a particular weapon is a 'firearm' there are two issues: (1) whether it is a weapon from which any shot etc can be discharged or whether it can be adapted so as to discharge any such missile; (2) if so, whether it is a lethal barrelled weapon: *Grace v DPP* (1988) 153 JP 491, [1989] Crim LR 365, DC. The reported cases do not establish that a particular weapon is, as a matter of law, a lethal weapon: *Grace v DPP* supra. There must be evidence that the weapon is one from which any missile could be discharged or which could be adapted so as to be capable of discharging a missile: *Grace v DPP* supra. Expert evidence is not necessary; it can come from a person who has seen the weapon fired or from someone familiar with such a weapon who could indicate to the court not only that it did work but also what its observed effect was when it was fired: *Grace v DPP* supra. However, evidence of the observed effect of the firing of a weapon is not essential; a court need not and should not shut its eyes as to the knowledge and characteristics of the weapon in respect of which there was evidence that it was working properly: *Castle v DPP* (1998) Times, 3 April, DC (evidence from salesman that weapons were in normal working order, were capable of killing small vermin and of being used in target practice, but no evidence of observed effects of firing; justices entitled to find that they were 'lethal barrelled weapons').

2 It is presumed, unless the contrary is shown, that a firearm has been rendered incapable of discharging any shot, bullet or other missile, and has consequently ceased to be a firearm within the meaning of the Firearms Act 1968 and the Firearms (Amendment) Act 1988, if: (1) it bears a mark which has been approved by the Secretary of State for denoting that fact and which has been made either by one of the two companies mentioned in the Firearms Act 1968 s 58(1) (see PARA 634 note 1 post) or by such other person as may be approved by the Secretary of State for these purposes; and (2) that company or person has certified in writing that work has been carried out on the firearm in a manner approved by the Secretary of State for rendering it incapable of discharging any shot, bullet or other missile: Firearms (Amendment) Act 1988 s 8.

3 See PARA 661 post.

4 Firearms Act 1968 s 57(1)(a).

5 A weapon which, although incapable of discharging a missile, can be adapted or altered to do so is a component part: *R v Freeman* [1970] 2 All ER 413, [1970] 1 WLR 788, CA (starting pistol capable of discharging

bullets if barrel was drilled; barrel partially drilled; held to be a firearm); applying *Cafferata v Wilson* [1936] 3 All ER 149, DC (dummy revolver capable of conversion by drilling into weapon capable of killing man at a range of 5 ft; held to be a firearm).

6 Firearms Act 1968 s 57(1)(b).

7 Ibid s 57(1)(c). Where a judge determines that a weapon is capable of amounting to a firearm, he should leave to the jury the question whether it does so amount, since the matter is a question of mixed fact and law: *R v Singh* [1989] Crim LR 724, (1989) Times, 29 May, CA. Something which is an integral part of a weapon is not an accessory, albeit that it may increase the lethal qualities of the weapon: *Broome v Walter* [1989] Crim LR 725, DC (justices entitled to conclude that a detachable muzzle which acted as a silencer was not an accessory). Contrast *R v Buckfield* [1998] Crim LR 673, CA (whether silencer which is not an integral part of the weapon is an accessory as a question of fact; it is if it can be used with the weapon and the defendant had it for that purpose, even if it was manufactured for a different weapon).

## UPDATE

### 630-698 Firearms, Ammunition and Air Weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 630 Meaning of 'firearm'

NOTE 1--An electric stun gun is a firearm within the meaning of the 1968 Act s 57(1): *R v Weaver (appeal under s 58 of the Criminal Justice Act 2003)* [2007] All ER (D) 134 (Oct), CA.

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### **631. Imitation firearms.**

Certain offences under the Firearms Act 1968 are expressly committed in respect of an imitation firearm<sup>1</sup>. An imitation firearm is any thing which has the appearance of being a firearm, other than a specified prohibited weapon<sup>2</sup>, whether or not it is capable of discharging any shot, bullet or other missile<sup>3</sup>. In respect of most other offences under the Firearms Act 1968<sup>4</sup>, the Act applies to an imitation firearm, but only if it has the appearance of being a firearm requiring a firearm certificate<sup>5</sup>, and it is so constructed or adapted as to be readily convertible<sup>6</sup> into a firearm<sup>7</sup>. This definition does not apply to component parts or accessories<sup>8</sup>.

1 Ie the Firearms Act 1968 s 16A (as added): see PARA 675 post.

2 Ie other than any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing: see *ibid* s 5(1)(b); and PARA 661 head (8) post.

3 *Ibid* s 57(4).

4 For exceptions see note 7 *infra*.

5 Ie under the Firearms Act 1968 s 1 (as amended): see PARA 634 post.

6 For these purposes, an imitation firearm is to be regarded as readily convertible into a firearm if: (1) it can be so converted without any special skill on the part of the person converting it in the construction or adaptation of firearms of any description; and (2) the work involved in converting it does not require equipment or tools other than such as are in common use by persons carrying out works of construction and maintenance in their own homes: Firearms Act 1982 s 1(6).

7 *Ibid* s 1(1), (2). Subject to ss 1(3)-(6), 2(2), the Firearms Act 1968 applies in relation to an imitation firearm to which the Firearms Act 1982 applies as it applies in relation to a firearm to which the Firearms Act 1968 s 1 (as amended) (see PARA 634 post) applies: Firearms Act 1982 s 1(2), (3). References in the Firearms Act 1968, and in any order made under s 6 (see PARA 667 post) to firearms (without qualification) or to firearms to which s 1 (as amended) (see PARA 634 post) applies are to be read as including imitation firearms to which the Firearms Act 1982 applies: s 2(1). However, the following provisions of the Firearms Act 1968 do not apply by virtue of the Firearms Act 1982 to an imitation firearm to which that Act applies:

126 (1) the Firearms Act 1968 s 4(3), (4) (offence to convert anything having appearance of firearm into a firearm and aggravated offence under s 1 (as amended) involving a converted firearm: see PARA 678 post); and

127 (2) the provisions of the Firearms Act 1968 which relate to, or to the enforcement of control over, the manner in which a firearm is used or the circumstances in which it is carried (ie s 16 (as amended) (see PARA 674 post), s 16A (as added) (see PARA 675 post), s 17 (as amended) (see PARAS 676-677 post), s 18 (see PARA 679 post), s 19 (see PARA 680 post), s 20 (see PARA 681 post), s 47 (see PARA 694 post)),

but without prejudice, in the case of the provisions mentioned in head (2) *supra*, to the application to such an imitation firearm of such of those provisions as apply to imitation firearms apart from the Firearms Act 1982: s 2(2), (3). However, for the purposes of s 1 and the Firearms Act 1968 as it applies by virtue of the Firearms Act 1982 s 1, the definition of air weapon in the Firearms Act 1968 s 1(3)(b) (see PARA 633 post) has effect without the exclusion of any type declared by the Secretary of State to be specially dangerous (see PARA 633 note 3 post); and (b) the definition of firearm in s 57(1) (see PARA 630 ante) has effect without s 57(1)(b), (c) (component parts and accessories: see PARA 630 heads (2), (3) ante): Firearms Act 1982 s 1(4).

In any proceedings brought by virtue of the Firearms Act 1968 s 1 for an offence under that Act involving an imitation firearm to which the Firearms Act 1982 applies, it is a defence for the defendant to show that he did not know and had no reason to suspect that the imitation firearm was so constructed or adapted as to be readily convertible into a firearm to which the Firearms Act 1968 s 1 (as amended) applies: Firearms Act 1982 s 1(5).

The provisions of the Firearms (Amendment) Act 1988, other than s 15 (see PARA 651 post) and s 17 (see PARA 655 post), are to be treated as contained in the Firearms Act 1968 for the purposes of the Firearms Act 1982 (imitation firearms readily convertible into firearms to which the Firearms Act 1968 s 1 (as amended) applies): Firearms (Amendment) Act 1988 s 25(7). The provisions of the Firearm (Amendment) Act 1997 are also to be treated as contained in the Firearms Act 1968 for the purposes of the Firearms (Amendment) Act 1982: Firearms (Amendment) Act 1997 s 50(6).

8 Firearms Act 1982 s 1(4)(b).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

#### **631 Imitation firearms**

TEXT AND NOTES--The following provisions come into force on 1 October 2007: SI 2007/2180. It is an offence for a person under the age of 18 to purchase an imitation firearm: Firearms Act 1968 s 24A(1) (s 24A added by the Violent Crime Reduction Act 2006 s 40(1)). It is an offence to sell an imitation firearm to a person under the age of 18: 1968 Act s 24A(2) (s 24A as so added). In proceedings for an offence under s 24A(2) it is a defence to show that the person charged with the offence (1) believed the other person to be aged 18 or over; and (2) had reasonable ground for that belief: s 24A(3) (s 24A as so added). For the purposes of s 24A a person is taken to have shown the matters specified in s 24A(3) if (a) sufficient evidence of those matters is adduced to raise an issue with respect to them; and (b) the contrary is not proved beyond a reasonable doubt: s 24A(4) (s 24A as so added). See further 1968 Act Sch 6 Pt 1; and PARA 634.

For provision relating to the manufacture, import and sale of realistic imitation firearms under the 2006 Act see PARA 631A. As to the specification for imitation firearms under the 2006 Act see PARA 631B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/631A. Manufacture, import and sale of realistic imitation firearms.

### **631A. Manufacture, import and sale of realistic imitation firearms.**

The following provisions come into force on 1 October 2007: SI 2007/2180.

#### **1. Manufacture, import and sale of realistic imitation firearms**

A person is guilty of an offence if (1) he manufactures a realistic imitation firearm<sup>1</sup>; (2) he modifies an imitation firearm so that it becomes a realistic imitation firearm; (3) he sells a realistic imitation firearm; or (4) he brings a realistic imitation firearm into Great Britain or causes one to be brought into Great Britain<sup>2</sup>. The Secretary of State may by regulations (a) provide for exceptions and exemptions from the above offence<sup>3</sup>; and (b) provide for it to be a defence in proceedings for such an offence to show the matters specified or described in the regulations<sup>4</sup>. Such regulations may (i) frame any exception, exemption or defence by reference to an approval or consent given in accordance with the regulations; (ii) provide for approvals and consents to be given in relation to particular cases or in relation to such descriptions of case as may be specified or described in the regulations; and (iii) confer the function of giving approvals or consents on such persons specified or described in the regulations as the Secretary of State thinks fit<sup>5</sup>. The power of the Secretary of State to make regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament<sup>6</sup>. A realistic imitation firearm brought into Great Britain is liable to forfeiture under the customs and excise Acts<sup>7</sup>.

An offence under the above provisions is punishable, on summary conviction in England and Wales, with imprisonment for a term not exceeding 51 weeks or with a fine not exceeding level 5 on the standard scale<sup>8</sup>, or with both<sup>9</sup>.

1 In the Violent Crime Reduction Act 2006 s 36 'realistic imitation firearm' has the meaning given by s 38: s 36(11).

In ss 36 and 37 'realistic imitation firearm' means an imitation firearm which (1) has an appearance that is so realistic as to make it indistinguishable, for all practical purposes, from a real firearm; and (2) is neither a de-activated firearm nor itself an antique: s 38(1). 'Real firearm' means (a) a firearm of an actual make or model of modern firearm (whether existing or discontinued); or (b) something falling within a description which could be used for identifying, by reference to their appearance, the firearms falling within a category of actual modern firearms which, even though they include firearms of different makes or models (whether existing or discontinued) or both, all have the same or a similar appearance: s 38(7). In s 38(7) 'modern firearm' means any firearm other than one the appearance of which would tend to identify it as having a design and mechanism of a sort first dating from before the year 1870: s 38(8). 'De-activated firearm' means an imitation firearm that consists in something which (i) was a firearm; but (ii) has been so rendered incapable of discharging a shot, bullet or other missile as no longer to be a firearm: s 38(7). For the purposes of s 38, an imitation firearm is not (except by virtue of head (bb)) to be regarded as distinguishable from a real firearm for any practical purpose if it could be so distinguished only (A) by an expert; (B) on a close examination; or (C) as a result of an attempt to load or to fire it: s 38(2). In determining for the purposes of s 38 whether an imitation firearm is distinguishable from a real firearm (aa) the matters that must be taken into account include any differences between the size, shape and principal colour of the imitation firearm and the size, shape and colour in which the real firearm is manufactured; and (bb) the imitation is to be regarded as distinguishable if its size, shape or principal colour is unrealistic for a real firearm: s 38(3). 'Colour' is to be construed in accordance with s 38(9): s 38(7). References in s 38, in relation to an imitation firearm or a real firearm, to its colour include references to its being made of transparent material: s 38(9). The Secretary of State may by regulations provide

that, for the purposes of head (bb) the size of an imitation firearm is to be regarded as unrealistic for a real firearm only if the imitation firearm has dimensions that are less than the dimensions specified in the regulations; and a colour is to be regarded as unrealistic for a real firearm only if it is a colour specified in the regulations: s 38(4). The power of the Secretary of State to make regulations under s 38 is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 38(5). That power includes power to make different provision for different cases; to make provision subject to such exemptions and exceptions as the Secretary of State thinks fit; and to make such incidental, supplemental, consequential and transitional provision as he thinks fit: s 38(6). See Violent Crime Reduction Act 2006 (Realistic Imitation Firearms) Regulations 2007, SI 2007/2606.

The Firearms (Amendment) Act 1988 s 8 (under which firearms are deemed to be deactivated if they are appropriately marked) applies for the purposes of the 2006 Act s 38 as it applies for the purposes of the Firearms Act 1968: 2006 Act s 38(10).

2 Ibid s 36(1). Section 36(1) has effect subject to the defences in s 37 (see PARA 631A.2): s 36(2).

3 I.e. the offence under ibid s 36(1).

4 Ibid s 36(3). See SI 2007/2606.

5 2006 Act s 36(4).

6 Ibid s 36(5). That power includes power (1) to make different provision for different cases; (2) to make provision subject to such exemptions and exceptions as the Secretary of State thinks fit; and (3) to make such incidental, supplemental, consequential and transitional provision as he thinks fit: s 36(6).

7 Ibid s 36(7). In s 36(7) 'the customs and excise Acts' has the meaning given by the Customs and Excise Management Act 1979 s 1: 2006 Act s 36(8).

8 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

9 2006 Act s 36(9).

In relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 281(5), the reference in the 2006 Act s 36(9) to 51 weeks is to be read as a reference to six months: s 36(10).

## 2. Specific defences

It is a defence for a person charged with an offence<sup>1</sup> in respect of any conduct to show that the conduct was for the purpose only of making the imitation firearm in question available for one or more of the purposes specified below<sup>2</sup>. Those purposes are (1) the purposes of a museum or gallery<sup>3</sup>; (2) the purposes of theatrical performances and of rehearsals for such performances; (3) the production of films<sup>4</sup>; (4) the production of television programmes<sup>5</sup>; (5) the organisation and holding of historical re-enactments<sup>6</sup> organised and held by persons specified or described for the purposes of these provisions by regulations made by the Secretary of State; (6) the purposes of functions that a person has in his capacity as a person in the service of Her Majesty<sup>7</sup>.

It is also a defence for a person charged with an offence<sup>8</sup> in respect of conduct relating to the bringing of a realistic imitation firearm<sup>9</sup> into Great Britain or causing one to be brought into Great Britain<sup>10</sup> to show that the conduct (a) was in the course of carrying on any trade or business; and (b) was for the purpose of making the imitation firearm in question available to be modified in a way which would result in its ceasing to be a realistic imitation firearm<sup>11</sup>.

The power of the Secretary of State to make regulations under the above provisions is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament<sup>12</sup>.

1 I.e. an offence under the Violent Crime Reduction Act 2006 s 36: see PARA 631A.1.

2 I.e. specified in ibid s 37(2): s 37(1). See further NOTE 10.

3 In ibid s 37 'museum or gallery' includes any institution which (1) has as its purpose, or one of its purposes, the preservation, display and interpretation of material of historical, artistic or scientific interest; and (2) gives the public access to it: s 37(7).

4 Within the meaning of the Copyright, Designs and Patents Act 1988 Pt 1; see s 5B.

5 Within the meaning of the Communications Act 2003; see s 405(1).

6 In the 2006 Act s 37 'historical re-enactment' means any presentation or other event held for the purpose of re-enacting an event from the past or of illustrating conduct from a particular time or period in the past: s 37(7).

7 Ibid s 37(2). See Violent Crime Reduction Act 2006 (Realistic Imitation Firearms) Regulations 2007, SI 2007/2606.

8 Ie an offence under the 2006 Act s 36 (see PARA 631A.1).

9 For the meaning of 'realistic imitation firearm' see PARA 631A.1.

10 Ie conduct falling within the 2006 Act s 36(1)(d).

11 Ibid s 37(3). For the purposes of s 37 a person is taken to have shown a matter specified in s 37(1) or (3) if (1) sufficient evidence of that matter is adduced to raise an issue with respect to it; and (2) the contrary is not proved beyond a reasonable doubt: s 37(4).

12 Ibid s 37(5). That power includes power (1) to make different provision for different cases; (2) to make provision subject to such exemptions and exceptions as the Secretary of State thinks fit; and (3) to make such incidental, supplemental, consequential and transitional provision as he thinks fit: s 37(6).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/631B. Specification for imitation firearms.

### **631B. Specification for imitation firearms.**

The following provisions come into force on 1 October 2007: SI 2007/2180.

The Secretary of State may by regulations make provision requiring imitation firearms to conform to specifications which are (1) set out in the regulations; or (2) approved by such persons and in such manner as may be so set out<sup>1</sup>. A person is guilty of an offence if (a) he manufactures an imitation firearm which does not conform to the specifications required of it by regulations under these provisions; (b) he modifies an imitation firearm so that it ceases to conform to the specifications so required of it; (c) he modifies a firearm to create an imitation firearm that does not conform to the specifications so required of it; or (d) he brings an imitation firearm which does not conform to the specifications so required of it into Great Britain or causes such an imitation firearm to be brought into Great Britain<sup>2</sup>. An offence under these provisions is punishable, on summary conviction in England and Wales, with imprisonment for a term not exceeding 51 weeks or with a fine not exceeding level 5 on the standard scale<sup>3</sup>, or with both<sup>4</sup>. Regulations under these provisions may provide that, in proceedings for an offence under these provisions, it is to be presumed, unless the contrary is proved, that an imitation firearm conforms to the required specification if it, or the description of imitation firearms to which it belongs, has been certified as so conforming by a person who is (i) specified in the regulations; or (ii) determined for the purpose in accordance with provisions contained in the regulations<sup>5</sup>. An imitation firearm brought into Great Britain which does not conform to the specifications required of it by regulations under these provisions is liable to forfeiture under the customs and excise Acts<sup>6</sup>. The power of the Secretary of State to make regulations under these provisions is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament<sup>7</sup>.

1 Violent Crime Reduction Act 2006 s 39(1).

2 Ibid s 39(2).

3 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 142.

4 2006 Act s 39(3). In relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 281(5), the reference in s 39(3) to 51 weeks is to be read as a reference to six months: 2006 Act s 39(4).

5 Ibid s 39(5).

6 Ibid s 39(6). In s 39(6) 'the customs and excise Acts' has the meaning given by the Customs and Excise Management Act 1979 s 1: 2006 Act s 39(7).

7 Ibid s 39(8). That power includes power (1) to make different provision for different cases; (2) to make provision subject to such exemptions and exceptions as the Secretary of State thinks fit; and (3) to make such incidental, supplemental, consequential and transitional provision as he thinks fit: s 39(9).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/632. Meaning of 'shot gun'.

### **632. Meaning of 'shot gun'.**

'Shot gun' means a smooth-bore gun, not being an air gun, which: (1) has a barrel not less than 24 inches in length<sup>1</sup> and does not have any barrel with a bore exceeding two inches in diameter; (2) either has no magazine or has a non-detachable magazine incapable of holding more than two cartridges; and (3) is not a revolver<sup>2</sup> gun<sup>3</sup>. A gun which has been adapted to have such a magazine as is mentioned in head (2) above is not to be regarded as falling within that head unless the magazine bears a mark approved by the Secretary of State for denoting that fact and that mark has been made, and the adaptation has been certified in writing as having been carried out in a manner<sup>4</sup> approved by him<sup>5</sup>.

1 The length of the barrel of a firearm must be measured from the muzzle to the point at which the charge is exploded on firing: Firearms Act 1968 s 57(6)(a).

2 For these purposes, 'revolver', in relation to a smooth-bore gun, means a gun containing a series of chambers which revolve when the gun is fired: *ibid* s 57(2B) (added by the Firearms (Amendment) Act 1988 s 25(2)).

3 Firearms Act 1968 ss 1(3)(a), 57(4) (s 1(3)(a) substituted by the Firearms (Amendment) Act 1988 s 2(1), (2)). As to shot guns whose barrels have been shortened see PARA 678 post.

Any weapon which: (1) has at any time since 1 July 1989 been a weapon to which the Firearms Act 1968 s 1 (as amended) (see PARA 634 post) applies; or (2) would at any previous time have been such a weapon if those provisions had then been in force, and which has or at any time has had, a rifle barrel less than 24 inches in length, is to be treated as a weapon to which s 1 (as amended) applies notwithstanding anything done for the purpose of converting it into a shot gun or an air weapon: Firearms (Amendment) Act 1988 s 7(2). For these purposes, there is to be disregarded the shortening of a barrel by a registered firearms dealer for the sole purpose of replacing part of it so as to produce a barrel not less than 24 inches in length: s 7(3).

4 I.e. either by one of the two companies mentioned in the Firearms Act 1968 s 58(1) (see PARA 634 note 1 post) or by such other person as may be approved by the Secretary of State for that purpose.

5 *Ibid* s 1(3A) (added by the Firearms (Amendment) Act 1988 s 2(1), (3)).

### **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/633. Meaning of 'air weapon'.

### **633. Meaning of 'air weapon'.**

'Air weapon' means an air rifle, air gun or air pistol which is not a prohibited weapon<sup>1</sup> and which is not of a type declared by rules made by the Secretary of State<sup>2</sup> to be specially dangerous<sup>3</sup>.

1    le an air pistol which does not fall within the Firearms Act 1968 s 5(1) (see PARA 661 post).

2    le under ibid s 53. The Secretary of State may by statutory instrument make rules:

128   (1)   prescribing the form of certificates under the Firearms Acts 1968-1988, the register required under the Firearms Act 1968 s 40 (register of transactions: see PARA 692 post) and other documents;

129   (2)   prescribing any other thing which is to be prescribed; and

130   (3)   generally carrying the Firearms Acts 1968-1988 into effect,

and rules so made may make different provision for different cases: Firearms Act 1968 s 53; Firearms (Amendment) Act 1988 s 25(6). Rules so made may: (a) regulate the manner in which chief officers of police are to carry out their duties under the Firearms Act 1968 and the Firearms (Amendment) Act 1988; (b) enable all or any of the functions of a chief officer of police to be discharged by a deputy in the event of his illness or of a vacancy in the office of chief officer of police: Firearms Act 1968 s 55(1); Firearms (Amendment) Act 1988 s 25(6). Without prejudice to head (b) supra, the functions of a chief officer of police are so exercisable on any occasion by a person, or a person of a particular class, authorised by the chief officer of police to exercise that function on that occasion, or on occasions of that class or on all occasions: Firearms Act 1968 s 55(2); Firearms (Amendment) Act 1988 s 25(6). In exercise of the power to make rules, the Secretary of State has made the Firearms Rules 1998, SI 1998/1941, which came into force on 1 September 1998 (see r 1).

As to the Firearms Act 1968 ss 53, 55 see also PARA 634 note 1 post.

3    Ibid ss 1(3)(b), 57(4) (s 1(3)(b) amended by the Anti-social Behaviour Act 2003 s 39(1), (2)). This definition means that an 'air weapon' is not limited to an air weapon which is also a firearm (ie is not limited to a lethal barrelled air weapon): *DPP v Street* [2004] TLR 50, DC. An air weapon, that is to say an air rifle, air gun or air pistol: (1) capable of discharging a missile so that the missile has, on being discharged from the muzzle of the weapon, kinetic energy in excess, in the case of an air pistol, of 6 ft lb or, in the case of an air weapon other than an air pistol, of 12 ft lb; or (2) designed as another object, is declared to be specially dangerous, except where the weapon only falls within head (1) supra and is designed for use only when submerged in water: Firearms (Dangerous Air Weapons) Rules 1969, SI 1969/47, rr 2, 3 (r 2 substituted by SI 1993/1490). Any reference to an air rifle, air pistol or air gun in the Firearms Acts 1968-97, or in the Firearms (Dangerous Air Weapons) Rules 1969, SI 1969/47 (as amended), includes a reference to a rifle, pistol or gun powered by compressed carbon dioxide: Firearms (Amendment) Act 1997 s 48.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/634. Requirement of firearm certificate for possession, purchase or acquisition of firearms and ammunition for firearms.

**634. Requirement of firearm certificate for possession, purchase or acquisition of firearms and ammunition for firearms.**

Subject to any statutory exemption<sup>1</sup>, it is an offence for a person to have in his possession<sup>2</sup>, or to purchase or acquire<sup>3</sup>:

- 746 (1) any firearm<sup>4</sup>, except<sup>5</sup> a shot gun<sup>6</sup> or an air weapon<sup>7</sup>, without holding a firearm certificate<sup>8</sup> in force at the time, or otherwise than as authorised by such a certificate<sup>9</sup>;
- 747 (2) any ammunition<sup>10</sup> for a firearm, except:
  - 17
  - 22. (a) cartridges containing five or more shot, none of which exceeds .36 inch in diameter;
  - 23. (b) ammunition for an air gun, air rifle or air pistol; and
  - 24. (c) blank cartridges not more than one inch in diameter<sup>11</sup>,
  - 18
- 748 without holding a firearm certificate in force at the time, or otherwise than as authorised by such a certificate, or in quantities in excess of those so authorised<sup>12</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>13</sup> or to a fine not exceeding the prescribed sum<sup>14</sup> or to both<sup>15</sup>. However, on conviction on indictment a person guilty of such an offence in an aggravated form by having in his possession or purchasing or acquiring a shortened shot gun<sup>16</sup> or a converted firearm<sup>17</sup> without holding a firearm certificate authorising him to do so is liable to imprisonment for a term not exceeding seven years or to a fine or to both<sup>18</sup>.

It is an offence for a person to fail to comply with a condition subject to which a firearm certificate is held by him; and a person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>19</sup> or to a fine not exceeding level 5 on the standard scale<sup>20</sup> or to both<sup>21</sup>.

1. See under the Firearms Act 1968 s 7 (see PARA 646 post), s 8(1) (see PARA 647 post), s 9 (see PARA 648 post), s 10 (see PARA 649 post), s 11 (see PARA 650 post), s 12(1) (see PARA 656 post), s 13 (see PARA 657 post); and, by virtue of the Firearms (Amendment) Act 1988 s 25(4), under the Firearms (Amendment) Act 1988 s 15 (see PARA 651 post), s 16 (see PARA 652 post), s 16A (as added) (see PARA 653 post), s 16B (as added) (see PARA 654 post), s 17 (see PARA 655 post), s 18 (see PARA 658 post), s 19 (see PARA 660 post).

In so far as they relate to the purchase and acquisition of firearms, but not so far as they relate to possession of firearms, the Firearms Act 1968 ss 1, 2 (see PARA 635 post), ss 7-13 (as amended) (see PARAS 646-657 post), ss 26A-32 (as amended) (see PARA 682 et seq post) apply to persons in the service of Her Majesty in their capacity as such, except that such a person, if duly authorised in writing in that behalf, may purchase or acquire firearms and ammunition for the public service without holding a certificate under the Act: s 54(1), (2)(a) (amended by the Firearms Act 1997 s 52(1), Sch 2 paras 1, 10). For the purpose of the Firearms Act 1968 s 54, a member of a police force, an employee of a police authority under the direction and control of a chief officer of police, or a member of the staff of the Serious Organised Crime Agency is deemed to be a person in the service of Her

Majesty: s 54(3) (substituted by the Police and Magistrates' Courts Act 1994 s 42; and amended by the Police Act 1997 s 134(1), Sch 9 para 18; and the Serious Organised Crime and Police Act 2005 s 59, Sch 4 para 18). As to the Serious Organised Crime Agency see *POLICE* vol 36(1) (2007 Reissue) PARA 430 et seq. The Firearms Act 1968 s 54(3) has effect in relation to an officer belonging to the French Republic exercising his functions within a control zone in the United Kingdom as if the reference to a member of a police force included a reference to a member of a police force included a reference to such an officer: Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003, SI 2003/2818, art 9. For the meaning of 'control zone' see art 2, Sch 1. A person in the naval, military or air service of Her Majesty is entitled, if he satisfies the chief officer of police on an application under the Firearms Act 1968 s 26A (as added) (see PARA 682 post) that he is required to purchase a firearm or ammunition for his own use in his capacity as such, without payment of any fee, to the grant of a firearm certificate authorising the purchase or acquisition or, as the case may be, to the grant of a shot gun certificate: s 54(2)(b) (amended by the Firearms (Amendment) Act 1997 s 52, Sch 2 paras 1, 11). If a person possesses a firearm otherwise than in his capacity as a servant of Her Majesty or a police officer, a firearm certificate is necessary: *Heritage v Claxon* (1941) 85 Sol Jo 323, DC; *Tarttelin v Bowen* [1947] 2 All ER 837, DC. As to the application of the Firearms Act 1968 s 54(1), (2)(a) to members of a visiting force and headquarters see the Visiting Forces and International Headquarters (Application of Law) Order 1999, SI 1999/1736, arts 3, 12, Schs 5, 6 (amended by SI 2005/3048).

For the purposes of the Firearms Act 1968 s 54 (as amended) and of any rule of law whereby any provision of that Act does not bind the Crown: (1) a member of the Civil Nuclear Constabulary is deemed to be a person in the service of Her Majesty; and (2) references to the public service are deemed to include references to use by a person in the exercise and performance of his powers and duties as a member of the Civil Nuclear Constabulary: s 54(3AA) (added by the Energy Act 2004 s 69, Sch 14 para 3). As to the establishment of the Civil Nuclear Constabulary see *POLICE* vol 36(1) (2007 Reissue) PARA 128.

For the purposes of the Firearms Act 1968 s 54 (as amended) and any rule of law whereby any provision of the Act does not bind the Crown, the following persons are deemed to be in the naval, military or air service of Her Majesty, in so far as they are not otherwise in, or treated as being in, any such service: (a) members of any foreign force when they are serving with any of the naval, military or air forces of Her Majesty; (b) members of any cadet corps approved by the Secretary of State when: (i) they are engaged as members of the corps in, or in connection with, drill or target shooting; and (ii) in the case of possession of prohibited weapons or prohibited ammunition when engaged in target shooting, they are on service premises; and (c) persons providing instruction to any members of a cadet corps who fall within head (b) supra: s 54(4), (5) (s 54(4)-(6) added by the Armed Forces Act 1996 s 28(1); and the Firearms Act 1968 s 54(5) amended by the Firearms (Amendment) Act 1997 s 52, Sch 2 para 3, Sch 3). 'Foreign force' means any of the naval, military or air forces of a country other than the United Kingdom; and 'service premises' means premises, including any ship or aircraft, used for any purpose of any of the naval, military or air forces of Her Majesty: Firearms Act 1968 s 54(6) (as so added).

An appropriately authorised person who is either a member of the British Transport Police Force or an associated civilian employee does not commit any offence under the Firearms Act 1968 by reason of having in his possession, or purchasing or acquiring, for use by that force anything which is a prohibited weapon by virtue of s 5(1)(b) (see PARA 661 post), or ammunition containing or designed or adapted to contain any such noxious thing as is mentioned in s 5(1)(b): s 54(3A) (s 54(3A), (3B) added by the Anti-terrorism Crime and Security Act 2001 Sch 7 paras 8, 9). 'Appropriately authorised' means authorised in writing by the Chief Constable of the British Transport Police Force or, if he is not available, by a member of that force who is of at least the rank of assistant chief constable; and 'associated civilian employee' means a person employed by the British Transport Police Authority who is under the direction and control of the chief constable of the British Transport Police Force: Firearms Act 1968 s 54(3B) (s 54(3B) as so added; and amended by the British Transport Police (Transitional and Consequential Provisions) Order 2004, SI 2004/1573, art 12(1)(b)). 'British Transport Police Force' means the British Transport Police force established by the Railways and Transport Safety Act 2003 Pt 3 (ss 18-77) (as amended): Firearms Act 1968 s 57(4) (amended by virtue of the Railways and Transport Safety Act 2003 s 73(1), Sch 5 para 4(1)). As to the British Transport Police see *RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES* vol 39(1A) (Reissue) PARA 281 et seq.

Nothing in the Firearms Act 1968 applies to the proof houses of the Master, Wardens and Society of the Mystery of Gunmakers of the City of London and the Guardians of the Birmingham Proof House or the rifle range at Small Heath in Birmingham where firearms are sighted and tested, so as to interfere in any way with the operations of those two companies in proving firearms under the provisions of the Gun Barrel Proof Act 1868 (see PARA 355 post) or any other Acts for the time being in force, or to any person carrying firearms to or from any such proof house when being taken to such proof house for the purposes of proof or being removed from there after proof: Firearms Act 1968 s 58(1).

Nothing in the Firearms Act 1968 relating to firearms applies to an antique firearm which is sold, transferred, purchased, acquired or possessed as a curiosity or ornament: s 58(2). What is an antique firearm is a question of fact and degree depending upon the article in question: *Richards v Curwen* [1977] 3 All ER 426, 65 Cr App Rep 95, DC; *Bennett v Brown* (1980) 71 Cr App Rep 109, DC. This question is for the jury to decide: *R v Burke* (1978) 67 Cr App Rep 220, CA. The article must in fact be an antique weapon; it is not sufficient for the defendant to have an honest and reasonable belief that it is such: *R v Howells* [1977] QB 614, 65 Cr App Rep 86, CA.

The Firearms Act 1968 ss 53-55 (see PARA 633 note 2 ante), s 56 (see PARA 665 post), s 58 have effect as if the Firearms (Amendment) Act 1997 were contained in the Firearms Act 1968: Firearms (Amendment) Act 1997 s 50(5).

2 For the meaning of 'possession' see *Woodage v Moss* [1974] 1 All ER 584, [1974] 1 WLR 411, DC (firearm handed to defendant by unknown man to deliver to dealer as surrendered weapon; defendant in possession of the firearm); *Sullivan v Earl of Caithness* [1976] QB 966, 62 Cr App Rep 105, DC (owner in possession of firearms kept in another's custody; physical possession not necessary); *Hall v Cotton* [1987] QB 504, [1986] 3 All ER 332, DC (defendant does not have to have physical control or be physically present where firearms are in order to be in possession; cases depend upon their own facts; there can be custodial possession and physical possession residing in different persons); *R v Hussain* [1981] 2 All ER 287, 72 Cr App Rep 143, CA (defendant has firearm in possession if he knows that he has an article with him which in fact is a firearm) (applying *Warner v Metropolitan Police Comr* [1969] 2 AC 256, 52 Cr App Rep 373, HL (see PARA 338 ante)). A person in possession of a container in which there is a firearm or ammunition is also in possession of the firearm or ammunition, provided that he knows that there is something in the container: *R v Waller* [1991] Crim LR 381, CA.

3 For these purposes, 'acquire' means hire, accept as a gift or borrow; and 'acquisition' is to be construed accordingly: Firearms Act 1968 s 57(4). As to the restrictions on the manufacture of, and dealing in, firearms see s 3; and PARA 636 et seq post. See also PARA 631 ante.

4 For the meaning of 'firearm' see PARA 630 ante.

5 So much of the Firearms Act 1968 s 1 as excludes any description of firearm from the category of firearms to which s 1 applies is to be construed as excluding component parts of, and accessories to, firearms of that description: s 57(1).

6 For the meaning of 'shot gun' see PARA 632 ante.

7 For the meaning of 'air weapon' see PARA 633 ante.

8 'Firearm certificate' means a certificate granted by a chief officer of police under the Firearms Act 1968 in respect of any firearm or ammunition to which s 1 applies and includes a certificate granted in Northern Ireland under the Firearms (Northern Ireland) Order 2004, SI 2004/702 (NI 3): Firearms Act 1968 s 57(4); Interpretation Act 1978 s 17(2). A certificate for a firearm covers its component parts (eg a telescopic sight); the only accessory which must be separately mentioned is one designed or adapted to diminish the noise or flash caused by firing the weapon: *Watson v Herman* [1952] 2 All ER 70, DC. Component parts not made up so as to be part of a firearm may, it seems, be required to be covered by a certificate: *Watson v Herman* supra. See also *Broome v Walter* [1989] Crim LR 725, DC.

A firearm certificate is a specific, and not a general, certificate: see *Wilson v Coombe* [1989] 1 WLR 78, 88 Cr App Rep 322, DC. For the prescribed form of certificate see the Firearms Rules 1998, SI 1998/1941, r 3(6), Sch 1 Pt II.

As to a constable's power to require production of a certificate see PARA 695 post.

9 Firearms Act 1968 s 1(1)(a), (3). The interpretation of what is authorised by a particular certificate is a matter of law: *R v Paul* [1999] Crim LR 79, CA.

10 'Ammunition' means ammunition for any firearm and includes grenades, bombs and other like missiles, whether capable of use with a firearm or not, and also includes prohibited ammunition (see PARA 661 post): Firearms Act 1968 s 57(2). In deciding whether something is 'ammunition', the test appears to be whether it is capable of producing an explosive effect when the firearm is operated: *R v Stubbings* [1990] Crim LR 811, CA. Blank cartridges are within the definition of ammunition (*Burfitt v Kille* [1939] 2 KB 743, [1939] 2 All ER 372, DC), and so are primed cartridges (*R v Stubbings* supra) and flares (*R v Singh* [1989] Crim LR 724, CA).

The provisions of the Firearms Act 1968 relating to ammunition are in addition to, and not in derogation of, any concurrent enactment relating to the keeping or sale of explosives: s 58(3). The sale of certain ammunition to which s 1 does not apply is restricted: see PARA 645 post.

11 It is measured immediately in front of the rim or cannellure of the base of the cartridge.

12 Firearms Act 1968 s 1(1)(b), (4). The offence is one of strict liability and thus proof of mens rea as to the nature of the thing is unnecessary: *R v Howells* [1977] QB 614, 65 Cr App Rep 86, CA; *R v Hussain* [1981] 2 All ER 287, 72 Cr App Rep 143, CA; *R v Waller* [1991] Crim LR 381, CA; *R v Steele* [1993] Crim LR 298, CA. In *R v Vann*, *R v Davis* [1996] Crim LR 52, CA, it was held that the cases should not be re-considered. Possession etc of prohibited weapons requires an authority of the Secretary of State: see PARA 665 post. As to the requirement of shot gun certificates see PARA 635 post. As to possession etc of firearms by, and supply to, minors see PARA 668 et seq post.

A person residing in Great Britain who purchases or acquires firearms in other member states but fails to comply with requirements as to notice commits an offence: see the Firearms (Amendment) Act 1988 s 18A (as added); and PARA 659 post. As to restrictions on the transfer of firearms and ammunition see the Firearms (Amendment) Act 1997 ss 32-36; and PARA 638 post.

13 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

14 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

15 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (Sch 6 Pt I amended by, or by virtue of, the Criminal Justice Act 1972 s 28(1)-(4); the Magistrates' Courts Act 1980 s 32(2); the Criminal Justice Act 1982 ss 38, 46; the Criminal Justice Act 1988 s 44; the Firearms (Amendment) Act 1988 ss 13(5), 23(7); the Criminal Justice and Public Order Act 1994 s 157(3), (5)(a), Sch 8 Pt III; the Firearms (Amendment) Act 1994 ss 1(2), 2(3); the Firearms (Amendment) Act 1997 ss 43(3), 52, Sch 2 paras 1, 4(2), 14, Sch 3; the Anti-social Behaviour Act 2003 ss 37(2), 38(1), (5), 92, Sch 3; and the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, regs 3(6), 4(4), 5(3), 6(3), 7(5)). As to powers of search see PARA 693 post. As to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 post. For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA.

16 Is a shot gun which has been shortened contrary to the Firearms Act 1968 s 4(1): see PARA 678 post.

17 Is a firearm which has been converted as mentioned in *ibid* s 4(3) (see PARA 678 post), whether by a registered firearms dealer or not.

18 *Ibid* s 4(4), Sch 6 Pt I (as amended: see note 15 *supra*). This offence does not apply to imitation firearms to which the Firearms Act 1982 applies: s 2(2)(a).

19 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

20 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

21 Firearms Act 1968 s 1(2), Sch 6 Pt I (as amended: see note 15 *supra*).

## UPDATE

### 630-698 Firearms, Ammunition and Air Weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 634 Requirement of firearm certificate for possession, purchase or acquisition of firearms and ammunition for firearms

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 1--SI 1991/1736 Sch 6 amended: SI 2009/2054.

NOTE 15--1968 Act Sch 6 Pt 1 further amended: Violent Crime Reduction Act 2006 ss 30(4), (5), 33(6), 34(4), (5), 40(2), (3), 41.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/635. Requirement of shot gun certificate for possession, purchase or acquisition of shot guns.

### **635. Requirement of shot gun certificate for possession, purchase or acquisition of shot guns.**

Subject to any statutory exemption<sup>1</sup>, it is an offence for a person to have in his possession<sup>2</sup>, or to purchase or acquire<sup>3</sup>, a shot gun<sup>4</sup> without holding a shot gun certificate<sup>5</sup> authorising him to possess shot guns<sup>6</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum<sup>8</sup> or to both<sup>9</sup>.

It is also an offence for a person to fail to comply with a condition subject to which a shot gun certificate is held by him<sup>10</sup>; and a person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>11</sup> or to a fine not exceeding level 5 on the standard scale<sup>12</sup> or to both<sup>13</sup>.

1     le under the Firearms Act 1968 s 7 (see PARA 646 post), s 8(1) (see PARA 647 post), s 9 (see PARA 648 post), s 10 (see PARA 649 post), s 11 (see PARA 650 post), s 12(1) (see PARA 656 post), s 13 (see PARA 657 post), s 15 (see note 6 infra), s 54 (see PARA 634 note 1 ante), s 58 (see PARA 634 note 1 ante); and, by virtue of the Firearms (Amendment) Act 1988 s 25(4), under the Firearms (Amendment) Act 1988 s 17 (see PARA 655 post), s 18 (see PARA 658 post), s 19 (see PARA 660 post).

2     For the meaning of 'possession' in the context of the Firearms Act 1968 s 1 see PARA 634 note 2 ante.

3     For the meaning of 'acquire' see PARA 634 note 3 ante.

4     For the meaning of 'shot gun' see PARA 632 ante.

5     'Shot gun certificate' means a certificate granted by a chief officer of police under the Firearms Act 1968 and authorising a person to possess shot guns: s 57(4). As to applications for a shot gun certificate etc see PARA 682 et seq post. For the prescribed form of certificate see the Firearms Rules 1998, SI 1998/1941, r 5(6), Sch 2 Pt II (amended by SI 2005/3344). As to a constable's power to require production of a certificate see PARA 695 post.

6     Firearms Act 1968 s 2(1). Section 2(1) does not apply to a person holding a firearm certificate issued in Northern Ireland authorising him to possess a shot gun: s 15. As to possession etc of shot guns by, and supply of shot guns to, minors see PARA 669 post. As to sale of ammunition for smooth-bore guns see PARA 645 post. As to powers of search see PARA 693 post; as to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to order cancellation of certificates and forfeiture or disposal of firearms and ammunition see PARA 697 post.

7     As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8     As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

9     Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA. As to sentence for possession of sawn-off shot gun see *R v Ecclestone* (1995) 16 Cr App Rep (S) 9, CA; *R v Clarke* [1997] 1 Cr App Rep (S) 323, CA.

10 Firearms Act 1968 s 2(2).

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

12 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

13 Firearms Act 1968 Sch 6 Pt I (as amended: see PARA 634 note 15 ante).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/636. Trading in firearms without being registered as a firearms dealer.

### **636. Trading in firearms without being registered as a firearms dealer.**

A person commits an offence if, by way of trade or business, he:

- 749 (1) manufactures, sells, transfers<sup>1</sup>, repairs, tests or proves any specified firearm or ammunition<sup>2</sup>, or a shot gun<sup>3</sup>; or
- 750 (2) exposes for sale or transfer, or has in his possession for sale, transfer, repair, test or proof any such firearm or ammunition, or a shot gun,

without being registered<sup>4</sup> as a firearms dealer<sup>5</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup> or to a fine not exceeding the prescribed sum<sup>7</sup> or to both<sup>8</sup>.

1 For the purposes of the Firearms Act 1968, 'transfer' includes let on hire, give, lend and part with possession; and 'transferor' and 'transferee' are to be construed accordingly: s 57(4). See *Hall v Cotton* [1987] QB 504, [1986] 3 All ER 332, CA (shot guns left by X at Y's house for safekeeping while X and Y on holiday and for subsequent cleaning by Y on return; transfer within the Firearms Act 1968 s 58(4)). As to transfer of firearms and ammunition see PARA 638 et seq post.

2 Ie any firearm or ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.

3 For the meaning of 'shot gun' see PARA 632 ante.

4 'Registered', in relation to a firearms dealer (see note 5 infra), means registered in Great Britain under the Firearms Act 1968 s 33 (see PARA 688 post) or in Northern Ireland under corresponding legislation: s 57(4). For the meaning of 'Great Britain' see PARA 45 note 2 ante.

5 Ibid s 3(1). As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 post. 'Firearms dealer' means a person who, by way of trade or business, manufactures, sells, transfers, repairs, tests or proves firearms or ammunition to which the Firearms Act 1968 s 1 (as amended) (see PARA 634 ante) applies, or shot guns: s 57(4).

Section 3(1) has effect subject to any exemption under subsequent provisions of the Firearms Act 1968 Pt 1 (ss 1-25) (as amended): s 3(4). As to exemptions see PARA 646 et seq post.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

8 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA. An offence under the Firearms Act 1968 s 3(1) is a lifestyle offence for the purposes of the Proceeds of Crime Act 2002 s 75: see s 75, Sch 2 para 5(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393. A person convicted of such an offence is liable to a financial reporting order: see the Serious Organised Crime and Police Act 2005 s 76(1), (2), (3)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476. As to powers of search see PARA 693 post; as to the limitation period for summary

proceedings see PARA 696 post; and as to the court's power to order forfeiture or disposal of firearms see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **636 Trading in firearms without being registered as a firearms dealer**

TEXT AND NOTES 1-5--Or head (3) sells or transfers an air weapon, exposes such a weapon for sale or transfer or has such a weapon in his possession for sale or transfer: 1968 Act s 3(1) (amended by Violent Crime Reduction Act 2006 s 31(1), Sch 5) (in force 1 October 2007: SI 2007/2180). See also 2006 Act s 32; and PARA 636A.

NOTE 5--Definition of 'firearms dealer' amended: 2006 Act 2006 s 31(3) (in force 1 October 2007: SI 2007/858, SI 2007/2180).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/636A. Sales of air weapons by way of trade or business to be face to face.

**636A. Sales of air weapons by way of trade or business to be face to face.**

The following provisions come into force on 1 October 2007: SI 2007/2180.

The following provisions<sup>1</sup> apply where a person sells an air weapon by way of trade or business to an individual in Great Britain who is not registered as a firearms dealer<sup>2</sup>. A person is guilty of an offence if, for the purposes of the sale, he transfers possession of the air weapon to the buyer otherwise than at a time when both (1) the buyer, and (2) either the seller or a representative of his, are present in person<sup>3</sup>. A person guilty of an offence under these provisions is liable on summary conviction in England and Wales, to imprisonment for a term not exceeding 51 weeks or to a fine not exceeding level 5 on the standard scale<sup>4</sup>, or to both<sup>5</sup>.

1     Ie the Violent Crime Reduction Act 2006 s 32.

2     Ibid s 32(1).

3     Ibid s 32(2). The reference in s 32(2) to a representative of the seller is a reference to (1) a person who is employed by the seller in his business as a registered firearms dealer; (2) a registered firearms dealer who has been authorised by the seller to act on his behalf in relation to the sale; or (3) a person who is employed by a person falling within head (2) in his business as a registered firearms dealer: s 32(3).

4     As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

5     2006 Act s 32(4).

In relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 281(5), the reference in the 2006 Act s 32(4) to 51 weeks is to be read as a reference to six months: s 32(5).

**UPDATE**

**630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/637. Selling firearms to person without a certificate.

### **637. Selling firearms to person without a certificate.**

It is an offence for a person to sell or transfer<sup>1</sup> to any other person in the United Kingdom, other than a registered firearms dealer<sup>2</sup>, any specified firearm or ammunition<sup>3</sup>, or a shot gun<sup>4</sup>, unless that other produces a firearm certificate<sup>5</sup> authorising him to purchase or acquire<sup>6</sup> it or, as the case may be, his shot gun certificate<sup>7</sup>, or shows that he is entitled<sup>8</sup> to purchase or acquire it without holding a certificate<sup>9</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup> or to a fine not exceeding the prescribed sum<sup>11</sup> or to both<sup>12</sup>.

1 It is not an essential element of a sale that an immediate right to possession should pass by the transaction but there must be a contract whose effect is to transfer the ownership of the item to another: *Watts v Seymour* [1967] 2 QB 647, [1967] 1 All ER 1044, DC (contract of sale (ie ownership of firearm passes to buyer), subject to a restriction on buyer's possession; seller to keep firearm which would only be made available to buyer when at rifle club). As to the meaning of 'transfer' see PARA 636 note 1 ante.

2 For the meaning of 'registered' see PARA 636 note 4 ante; and for the meaning of 'firearms dealer' see PARA 636 note 5 ante.

3 Ie any firearm or ammunition specified in the Firearms Act 1968 s 1 (as amended): see PARA 634 ante.

4 For the meaning of 'shot gun' see PARA 632 ante.

5 For the meaning of 'firearm certificate' see PARA 634 note 8 ante. Whether a firearm certificate authorises the acquisition of a particular firearm depends not on the transferee's intended use of that firearm (and still less on the transferor's understanding of the transferee's intent as to use), but on whether that firearm comes within the description in the certificate, the construction of which is a matter of law: *R v Paul* [1999] Crim LR 79, CA.

6 For the meaning of 'acquire' see PARA 634 note 3 ante.

7 For the meaning of 'shot gun certificate' see PARA 635 note 5 ante.

8 Any reference in the Firearms Act 1968 to a person who is by virtue of that Act entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate includes a reference to a person who is so entitled by virtue of any provision of the Firearms (Amendment) Act 1988: s 25(4). Any reference in the Firearms Act 1968 to a person who is by virtue of that Act entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate includes a reference to a person who is so entitled by virtue of any provision of the Firearms (Amendment) Act 1997: s 50(3).

9 Firearms Act 1968 s 3(2). As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 post. For the meaning of 'United Kingdom' see PARA 45 note 2 ante. 'Certificate', except in a context relating to the registration of firearms dealers, means a firearm certificate or a shot gun certificate: Firearms Act 1968 s 57(4). A firearm certificate gives authority for a specific firearm by reference to name, type calibre and serial number; it does not, unless a variation order has been made, authorise the holder to acquire another firearm, even though it is a replacement; and a dealer exchanging a certificate holder's firearms for firearms of the same type and calibre commits an offence: *Wilson v Coombe* [1989] 1 WLR 78, 88 Cr App Rep 322, DC. The Firearms Act 1968 s 3(2) has effect subject to any exemption under subsequent provisions of the Firearms Act 1968 Pt 1 (ss 1-25) (as amended): s 3(4). As to exemptions see PARA 646 et seq post.

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post),

although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

11 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

12 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA. As to powers of search see PARA 693 post; as to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to order forfeiture or disposal of firearms see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/638. Transfers of firearms and ammunition.

### **638. Transfers of firearms and ammunition.**

The following provisions apply where, in Great Britain:

751 (1) a specified firearm or ammunition<sup>1</sup> is sold, let on hire, lent or given by any person; or

752 (2) a shot gun<sup>2</sup> is sold, let on hire or given, or lent for a period of more than 72 hours by any person,

to another person who is neither a registered firearms dealer<sup>3</sup> nor a person who is entitled to purchase or acquire the firearm or ammunition without holding a firearm<sup>4</sup> or shot gun certificate<sup>5</sup> or a visitor's<sup>6</sup> firearm or shot gun permit<sup>7</sup>.

Where a transfer to which these provisions apply takes place, the transferor or transferee commits an offence<sup>8</sup> if he does not comply with the following requirements: (a) the transferee must produce to the transferor the certificate or permit entitling him to purchase or acquire the firearm or ammunition being transferred; (b) the transferor must comply with any instructions contained in the certificate or permit produced by the transferee; and (c) the transferor must hand the firearm or ammunition to the transferee, and the transferee must receive it, in person<sup>9</sup>. An offence committed in relation to a transfer involving a specified firearm or ammunition<sup>10</sup> is punishable on conviction on indictment with imprisonment for a term not exceeding five years or a fine or both, or on summary conviction with imprisonment for a term not exceeding six months<sup>11</sup> or a fine not exceeding the statutory maximum<sup>12</sup> or both<sup>13</sup>. An offence committed in relation to a transfer or other event involving a shot gun is punishable on summary conviction with imprisonment for a term not exceeding six months<sup>14</sup> or a fine not exceeding level 5 on the standard scale<sup>15</sup> or both<sup>16</sup>.

1    le any firearm or ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante. Any expression used in the Firearms (Amendment) Act 1997 which is also used in the Firearms Act 1968 or the Firearms (Amendment) Act 1988 has the same meaning as in that Act: Firearms (Amendment) Act 1997 s 50(2). For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante. For meaning of 'ammunition' see PARA 634 note 10 ante.

2    For the meaning of 'shot gun' see PARA 632 ante.

3    For the meaning of 'registered firearms dealer' see PARA 636 notes 4, 5 ante.

4    For the meaning of 'firearm certificate' see PARA 634 note 8 ante.

5    For the meaning of 'shot gun certificate' see PARA 635 note 5 ante.

6    As to visitors' permits see PARA 655 post.

7    Firearms (Amendment) Act 1997 s 32(1). For the meaning of 'Great Britain' see PARA 45 note 2 ante. As to events taking place outside Great Britain see PARA 640 post.

8    Ibid s 32(3).

9    Ibid s 32(2).



10     le any firearm or ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.

11     As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed. As to the limitation period for summary proceedings see PARA 696 post.

12     As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

13     Firearms (Amendment) Act 1997 s 36(a).

14     As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

15     As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

16     Firearms (Amendment) Act 1997 s 36(b).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/639. Notification of transfers involving firearms.

### **639. Notification of transfers involving firearms.**

The following provisions apply where, in Great Britain, any specified firearm<sup>1</sup> is sold, let on hire, lent or given, or any shot gun<sup>2</sup> is sold, let on hire or given, or lent for a period of more than 72 hours<sup>3</sup>.

Any party to a transfer<sup>4</sup> to which these provisions apply who is the holder of a firearm<sup>5</sup> or shot gun certificate<sup>6</sup> or, as the case may be, a visitor's firearm or shot gun permit<sup>7</sup> which relates to the firearm in question must within seven days of the transfer give notice to the chief officer of police who granted his certificate or permit<sup>8</sup>. The notice must be sent by registered post or the recorded delivery service, and must contain a description of the firearm in question (giving its identification number, if any) and state the nature of the transaction and the name and address of the other party<sup>9</sup>. A failure by a party to a transaction to give the required notice is an offence<sup>10</sup>. An offence committed in relation to a transfer involving a specified firearm<sup>11</sup> is punishable on conviction on indictment with imprisonment for a term not exceeding five years or a fine or both, or on summary conviction with imprisonment for a term not exceeding six months<sup>12</sup> or a fine not exceeding the statutory maximum<sup>13</sup> or both<sup>14</sup>. An offence committed in relation to a transfer or other event involving a shot gun is punishable on summary conviction with imprisonment for a term not exceeding six months<sup>15</sup> or a fine not exceeding level 5 on the standard scale<sup>16</sup> or both<sup>17</sup>.

1    Ie any firearm or ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante. Any expression used in the Firearms (Amendment) Act 1997 which is also used in the Firearms Act 1968 or the Firearms (Amendment) Act 1988 has the same meaning as in that Act: Firearms (Amendment) Act 1997 s 50(2). For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

2    For the meaning of 'shot gun' see PARA 632 ante.

3    Firearms (Amendment) Act 1997 s 33(1). For the meaning of 'Great Britain' see PARA 45 note 2 ante. As to notification of events taking place outside Great Britain involving firearms see PARA 640 post.

4    For the meaning of 'transfer' see PARA 636 note 1 ante.

5    For the meaning of 'firearm certificate' see PARA 634 note 8 ante.

6    For the meaning of 'shot gun certificate' see PARA 635 note 5 ante.

7    As to visitors' permits see PARA 655 post.

8    Firearms (Amendment) Act 1997 s 33(2).

9    See *ibid* s 33(3).

10   *Ibid* s 33(4).

11   Ie any firearm to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.

12   As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in

force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed. As to the limitation period for summary proceedings see PARA 696 post.

13 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

14 Firearms (Amendment) Act 1997 s 36(a).

15 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

16 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

17 Firearms (Amendment) Act 1997 s 36(b).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/640. Notification of events taking place outside Great Britain involving firearms.

#### **640. Notification of events taking place outside Great Britain involving firearms.**

Where, outside Great Britain, any firearm<sup>1</sup> or shot gun<sup>2</sup> is sold or otherwise disposed of by a transferor<sup>3</sup> whose acquisition or purchase of the firearm or shot gun was authorised by a firearm certificate<sup>4</sup> or shot gun certificate<sup>5</sup>, the transferor must within 14 days of the disposal give notice of it to the chief officer of police who granted his certificate<sup>6</sup>. A failure to give such notice is an offence<sup>7</sup>.

Where, outside Great Britain, a firearm to which a firearm or shot gun certificate relates is deactivated<sup>8</sup>, destroyed or lost (whether by theft or otherwise), or any specified ammunition<sup>9</sup> to which a firearm certificate requirement applies and such a certificate relates is lost (whether by theft or otherwise), the certificate holder who was last in possession of the firearm or ammunition before that event must within 14 days of the event give notice of it to the chief officer of police who granted the certificate<sup>10</sup>. A failure, without reasonable excuse, to give the required notice is an offence<sup>11</sup>.

In either case, a notice<sup>12</sup> must contain a description of the firearm or ammunition in question (including any identification number), and must state the nature of the event and, in the case of a disposal, the name and address of the other party<sup>13</sup>. The notice must be sent within 14 days of the disposal or other event, and, if it is sent from a place in the United Kingdom, it must be sent by registered post or by the recorded delivery service<sup>14</sup> and, in any other case, it must be sent in such manner as most closely corresponds to the use of registered post or the recorded delivery service<sup>15</sup>.

An offence<sup>16</sup> committed in relation to a transfer or other event involving a specified firearm or specified ammunition<sup>17</sup> is punishable on conviction on indictment with imprisonment for a term not exceeding five years or a fine or both, or on summary conviction with imprisonment for a term not exceeding six months<sup>18</sup> or a fine not exceeding the statutory maximum<sup>19</sup> or both<sup>20</sup>. An offence committed in relation to a transfer or other event involving a shot gun is punishable on summary conviction with imprisonment for a term not exceeding six months<sup>21</sup> or a fine not exceeding level 5 on the standard scale<sup>22</sup> or both<sup>23</sup>.

1 Any expression used in the Firearms (Amendment) Act 1997 which is also used in the Firearms Act 1968 or the Firearms (Amendment) Act 1988 has the same meaning as in that Act: Firearms (Amendment) Act 1997 s 50(2). For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

2 For the meaning of 'shot gun' see PARA 632 ante.

3 For the meanings of 'transferor' and 'transfer' see PARA 636 note 1 ante.

4 For the meaning of 'firearm certificate' see PARA 634 note 8 ante.

5 For the meaning of 'shot gun certificate' see PARA 635 note 5 ante.

6 Firearms (Amendment) Act 1997 s 35(1). For the meaning of 'Great Britain' see PARA 45 note 2 ante. As to notification of transfers in Great Britain see PARA 639 ante.

7 Ibid s 35(2).

- 8 For the meaning of 'de-activate' see PARA 641 note 5 post.
- 9 Ie ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.
- 10 Firearms (Amendment) Act 1997 s 35(3). As to notification of de-activation, destruction or loss in Great Britain see PARA 641 post.
- 11 Ibid s 35(4).
- 12 Ie under ibid s 35(1) or s 35(3).
- 13 Ibid s 35(5).
- 14 Ibid s 35(6)(a). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.
- 15 Ibid s 35(6)(b).
- 16 Ie under ibid s 35(2) or s 35(4).
- 17 Ie a firearm or ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.
- 18 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed. As to the limitation period for summary proceedings see PARA 696 post.
- 19 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.
- 20 Firearms (Amendment) Act 1997 s 36(a).
- 21 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.
- 22 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.
- 23 Firearms (Amendment) Act 1997 s 36(b).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/A. RESTRICTIONS ON ACQUISITION, PURCHASE AND POSSESSION/641. Notification of de-activation, destruction or loss of firearms and ammunition.

#### **641. Notification of de-activation, destruction or loss of firearms and ammunition.**

Where, in Great Britain, a firearm<sup>1</sup> to which a firearm<sup>2</sup> or shot gun<sup>3</sup> certificate relates, or a firearm to which a visitor's firearm or shot gun permit<sup>4</sup> relates, is de-activated<sup>5</sup>, destroyed or lost (whether by theft or otherwise), the certificate holder who was last in possession of the firearm before that event must within seven days of that event give notice of it to the chief officer of police who granted the certificate or permit<sup>6</sup>. Where, in Great Britain, any specified ammunition<sup>7</sup> to which a firearm certificate or a visitor's firearm permit relates, is lost (whether by theft or otherwise), the certificate or permit holder who was last in possession of the ammunition before that event must within seven days of the loss give notice of it to the chief officer of police who granted the certificate or permit<sup>8</sup>. The notice must describe the firearm or ammunition in question (giving the identification number of the firearm, if any), state the nature of the event, and be sent by registered post or the recorded delivery service<sup>9</sup>.

A failure, without reasonable excuse, to give the required notice is an offence<sup>10</sup>. An offence involving a specified firearm or specified ammunition<sup>11</sup> is punishable on conviction on indictment with imprisonment for a term not exceeding five years or a fine or both, or on summary conviction with imprisonment for a term not exceeding six months<sup>12</sup> or a fine not exceeding the statutory maximum<sup>13</sup> or both<sup>14</sup>. An offence committed involving a shot gun is punishable on summary conviction with imprisonment for a term not exceeding six months<sup>15</sup> or a fine not exceeding level 5 on the standard scale or both<sup>16</sup>.

1 Any expression used in the Firearms (Amendment) Act 1997 which is also used in the Firearms Act 1968 or the Firearms (Amendment) Act 1988 has the same meaning as in that Act: Firearms (Amendment) Act 1997 s 50(2). For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

2 For the meaning of 'firearm certificate' see PARA 634 note 8 ante.

3 For the meaning of 'shot gun certificate' see PARA 635 note 5 ante.

4 As to visitors' permits see PARA 655 post.

5 For the purposes of the Firearms (Amendment) Act 1997 s 34 and s 35 (see PARA 640 ante), a firearm is de-activated if it would, by virtue of the Firearms (Amendment) Act 1988 s 8 (see PARA 630 ante), be presumed to be rendered incapable of discharging any shot, bullet or other missile: Firearms (Amendment) Act 1997 s 34(5).

6 Ibid s 34(1). For the meaning of 'Great Britain' see PARA 45 note 2 ante.

7 I.e. ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.

8 Firearms (Amendment) Act 1997 s 34(2).

9 Ibid s 34(3).

10 Ibid s 34(4).

11 I.e. a firearm or ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.

12 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in

force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed. As to the limitation period for summary proceedings see PARA 696 post.

13 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

14 Firearms (Amendment) Act 1997 s 36(a).

15 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

16 Firearms Act 1968 s 36(b). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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#### **642. Repair, test etc of firearm for person without a certificate.**

It is an offence for a person to undertake the repair, test or proof of a specified firearm or ammunition<sup>1</sup>, or of a shot gun<sup>2</sup>, for any other person in the United Kingdom other than a registered firearms dealer<sup>3</sup> as such, unless that other produces or causes to be produced a firearm certificate<sup>4</sup> authorising him to have possession of the firearm or ammunition or, as the case may be, his shot gun certificate<sup>5</sup>, or shows that he is entitled to have possession of it without holding a certificate<sup>6</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the prescribed sum<sup>8</sup> or to both<sup>9</sup>.

1    le a firearm or ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.

2    For the meaning of 'shot gun' see PARA 632 ante.

3    For the meaning of 'registered firearms dealer' see PARA 636 notes 4, 5 ante.

4    For the meaning of 'firearm certificate' see PARA 634 note 8 ante.

5    For the meaning of 'shot gun certificate' see PARA 635 note 5 ante.

6    Firearms Act 1968 s 3(3). As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 post. For the meaning of 'certificate' see PARA 637 note 9 ante. For the meaning of 'United Kingdom' see PARA 45 note 2 ante. As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante. As to powers of search see PARA 693 post; as to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

The Firearms Act 1968 s 3(3) has effect subject to any exemption under subsequent provisions of the Firearms Act 1968 Pt 1 (ss 1-25) (as amended): s 3(4). As to exemptions see PARA 646 et seq post.

7    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8    As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

9    Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA.

#### **UPDATE**

#### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.





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### **643. Falsifying certificate etc with view to acquisition of firearm.**

A person commits an offence if, with a view to purchasing or acquiring<sup>1</sup>, or procuring the repair, test or proof of, any specified firearm or ammunition<sup>2</sup>, or a shot gun<sup>3</sup>, he produces a false certificate<sup>4</sup> or a certificate in which any false entry has been made, or personates a person to whom a certificate has been granted, or knowingly or recklessly makes a statement false in any material particular<sup>5</sup>. Any person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup> or to a fine not exceeding the prescribed sum<sup>7</sup> or to both<sup>8</sup>.

1 For the meaning of 'acquire' see PARA 634 note 3 ante.

2 ie any firearm or ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.

3 For the meaning of 'shot gun' see PARA 632 ante.

4 For the meaning of 'certificate' see PARA 637 note 9 ante.

5 Firearms Act 1968 s 3(5) (amended by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 paras 1, 2(1)). As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 post.

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

7 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

8 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA. As to the limitation period for summary proceedings see PARA 696 post. As to the court's power to order cancellation of certificates and forfeiture or disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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#### **644. Pawnbroker taking firearm in pawn.**

It is an offence for a pawnbroker to take in pawn any specified firearm or ammunition<sup>1</sup>, or a shot gun<sup>2</sup>. A person who commits such an offence is liable on summary conviction to imprisonment for a term not exceeding three months<sup>3</sup> or to a fine not exceeding level 3 on the standard scale or to both<sup>4</sup>.

1    le a firearm or ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.

2    Ibid s 3(6). For the meaning of 'shot gun' see PARA 632 ante.

3    As from a day to be appointed this maximum term of imprisonment is increased to 51 weeks: see *ibid* s 51(1), (2), Sch 6 Pt I (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (2)). At the date at which this volume states the law no such day had been appointed.

4    Firearms Act 1968 Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to powers of search see PARA 693 post; as to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

### **UPDATE**

#### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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#### **645. Restriction on sale of ammunition for shot guns or smooth-bore guns.**

It is an offence for a person to sell specified ammunition<sup>1</sup> to another person in the United Kingdom who is neither a registered firearms dealer<sup>2</sup> nor a person who sells such ammunition by way of trade or business unless that other person: (1) produces a certificate authorising him to possess a shot gun or a smooth-bore gun<sup>3</sup>; or (2) shows that he is entitled<sup>4</sup> to have possession of such a gun without holding a certificate<sup>5</sup>; or (3) produces a certificate authorising another person to possess such a gun, together with that person's written authority to purchase the ammunition on his behalf<sup>6</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding level 5 on the standard scale<sup>8</sup> or to both<sup>9</sup>.

1 The ammunition to which the Firearms Act 1968 s 1 (as amended) (see PARA 634 note 10 ante) does not apply and which is capable of being used in a shot gun (see PARA 632 ante) or in a smooth-bore gun to which s 1 (as amended) applies.

2 For the meaning of 'registered firearms dealer' see PARA 636 notes 4, 5 ante.

3 The smooth-bore gun to which the Firearms Act 1968 (as amended) applies.

4 The under either the Firearms Act 1968 or the Firearms (Amendment) Act 1988.

5 As to exemptions see PARA 646 et seq post; and as to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

6 Firearms (Amendment) Act 1988 s 5(1), (2).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

8 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

9 Firearms Act 1968 s 5(3). As to the limitation period for summary proceedings see PARA 696 post. As to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

### **UPDATE**

#### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **B. EXEMPTIONS**

### **646. Holders of police permits.**

A person who has obtained from the chief officer of police for the area<sup>1</sup> in which he resides<sup>2</sup> a permit<sup>3</sup> may have in his possession, without holding a certificate<sup>4</sup>, a firearm<sup>5</sup> or ammunition<sup>6</sup> in accordance with the terms of the permit<sup>7</sup>.

It is an offence for a person knowingly or recklessly to make any statement false in a material particular for the purpose of procuring, whether for himself or for another person, the grant of such a permit<sup>8</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding level 5 on the standard scale<sup>10</sup> or to both<sup>11</sup>.

1 For these purposes, 'area' means police area: Firearms Act 1968 s 57(4). For the meaning of 'police area' see PARA 578 note 2 ante.

2 For the meaning of 'reside' see *Burditt v Joslin* [1981] 3 All ER 203, DC (decided under the Firearms Act 1968 s 26(1); it was held that a person does not reside at an address at a time when that address is let to others and therefore he does not have a right to occupy it).

3 The permit must be in the prescribed form: Firearms Act 1968 s 7(1). For the prescribed form of permit to possess a firearm and/or ammunition see the Firearms Rules 1998, SI 1998/1941, r 9(1)(a), Sch 4 Pt I; and for the prescribed form of permit to possess shot guns see r 9(1)(b), Sch 4 Pt II. A chief officer of police may not fetter his discretion in the granting of such permits: *R v Wakefield Crown Court, ex p Oldfield* [1978] Crim LR 164, DC.

4 For the meaning of 'certificate' see PARA 637 note 9 ante. As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

5 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

6 For the meaning of 'ammunition' see PARA 634 note 10 ante.

7 Firearms Act 1968 s 7(1).

8 *Ibid* s 7(2) (amended by the Firearms (Amendment) Act 1988 s 52(1), Sch 2 paras 1, 2(2)).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

10 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

11 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the limitation period for summary proceedings see PARA 696 post. As to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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#### **647. Authorised dealing with firearms.**

A person carrying on the business of a firearms dealer<sup>1</sup> and registered<sup>2</sup> as such, or a servant<sup>3</sup> of such a person may, without holding a certificate<sup>4</sup>, have in his possession, or purchase or acquire, a firearm<sup>5</sup> or ammunition<sup>6</sup> in the ordinary course of that business<sup>7</sup>. This provision applies to the possession, purchase or acquisition of a firearm or ammunition in the ordinary course of the business of a firearms dealer notwithstanding that the firearm or ammunition is in the possession of, or purchased or acquired by, the dealer or his servant at a place which is not a place of business of the dealer or which he has not registered as a place of business<sup>8</sup>.

It is not an offence<sup>9</sup> for a person:

753 (1) to part with the possession of any firearm or ammunition, otherwise than in pursuance of a contract of sale or hire or by way of gift or loan, to a person who shows he is entitled<sup>10</sup> to have possession of the firearm or ammunition without holding a certificate; or

754 (2) to return to another person a shot gun which he has lawfully undertaken to repair, test or prove for the other<sup>11</sup>.

1 For the meaning of 'firearms dealer' see PARA 636 note 5 ante.

2 For the meaning of 'registered' see PARA 636 note 4 ante.

3 In *Woodage v Moss* [1974] 1 All ER 584, [1974] 1 WLR 411, DC, it was held that a person who was under no obligation to carry out the request of a registered firearms dealer to accept a firearm, and received no remuneration for doing so, could not be described as the dealer's 'servant' for the purpose of the present provision.

4 For the meaning of 'certificate' see PARA 637 note 9 ante. As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

5 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

6 For the meaning of 'ammunition' see PARA 634 note 10 ante.

7 Firearms Act 1968 s 8(1). In *R v Bull* (1993) 99 Cr App Rep 193 at 202, CA, per Cresswell J, it was held that the exemption in Firearms Act 1968 s 8 applies to a person:

131 (1) carrying on the business of a firearms dealer;

132 (2) who is registered as such under s 33;

133 (3) who in order to be registered under s 33 has furnished the chief officer of police with the prescribed particulars (including particulars of every place of business at which he proposes to carry on business in the area as a firearms dealer);

134 (4) who has in his possession or purchases or acquires a firearm or ammunition in the ordinary course of that business.

It followed, the court held, that the exemption does not apply to the possession of a firearm or ammunition at a place of business whose address has not been furnished in accordance with head (3) supra. The possession is not in the ordinary course of the business registered as such under the Firearms Act 1968.

8 Ibid s 8(1A) (added by the Firearms (Amendment) Act 1988 s 42(1)). 'Not registered as a place of business' refers to not being so registered under the Firearms Act 1968 s 33 or 37 (see PARA 688 post).

9 Ie under ibid s 3(2): see PARA 637 ante.

10 Ie by virtue of the Firearms Act 1968.

11 Ibid s 8(2).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



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#### **648. Auctioneers, carriers and warehousemen.**

A person carrying on the business of an auctioneer, carrier or warehouseman, or a servant<sup>1</sup> of such a person, may have in his possession, without holding a certificate<sup>2</sup>, a firearm<sup>3</sup> or ammunition<sup>4</sup> in the ordinary course of that business<sup>5</sup>. It is an offence for an auctioneer, carrier or warehouseman: (1) to fail to take reasonable precautions for the safe custody of any such firearm or ammunition which he or any servant of his has in his possession without holding a certificate<sup>6</sup>; or (2) to fail to report forthwith to the police the loss or theft of any such firearm or ammunition<sup>7</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>8</sup> or to a fine not exceeding level 5 on the standard scale<sup>9</sup> or to both<sup>10</sup>.

It is not an offence<sup>11</sup> for an auctioneer to sell by auction, expose for sale by auction or have in his possession for sale by auction a firearm or ammunition without being registered<sup>12</sup> as a firearms dealer<sup>13</sup>, if he has obtained from the chief officer of police for the area<sup>14</sup> in which the auction is held a permit<sup>15</sup> for that purpose and complies with its terms<sup>16</sup>. It is, however, an offence for a person to knowingly or recklessly make a statement false in a material particular for the purpose of procuring the grant of such a permit, either for himself or for another person<sup>17</sup>; and a person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>18</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>19</sup>.

It is not an offence<sup>20</sup> for a carrier or warehouseman, or a servant of a carrier or warehouseman, to deliver any firearm or ammunition in the ordinary course of his business or employment as such<sup>21</sup>.

1 As to the meaning of 'servant' in the context of a similar exemption see *Woodage v Moss* [1974] 1 All ER 584, [1974] 1 WLR 411, DC; and PARA 647 note 3 ante.

2 For the meaning of 'certificate' see PARA 637 note 9 ante. As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

3 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

4 For the meaning of 'ammunition' see PARA 634 note 10 ante.

5 Firearms Act 1968 s 9(1).

6 Firearms (Amendment) Act 1988 s 14(1)(a).

7 Ibid s 14(1)(b).

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

9 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

10 Firearms (Amendment) Act 1988 s 14(2). As to the limitation period for summary proceedings see PARA 696 post.

- 11    le under the Firearms Act 1968 s 3(1): see PARA 636 ante.
- 12    For the meaning of 'registered' see PARA 636 note 4 ante.
- 13    For the meaning of 'firearms dealer' see PARA 636 note 5 ante.
- 14    For the meaning of 'area' see PARA 646 note 1 ante.
- 15    The permit must be in the prescribed form: Firearms Act 1968 s 9(2). For the prescribed form of an auctioneer's permit for firearms and ammunition to which s 1 (see PARA 634 ante) applies see the Firearms Rules 1998, SI 1998/1941, r 9(2), Sch 4 Pt III; and for the prescribed form of an auctioneer's shot gun permit see Sch 4 Pt IV.
- 16    Firearms Act 1968 s 9(2).
- 17    Ibid s 9(3) (amended by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 para 1, 2(2)).
- 18    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.
- 19    Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 post.
- 20    le under ibid s 3(2): see PARA 637 ante.
- 21    Ibid s 9(4).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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#### **649. Slaughter of animals.**

A person who is duly licensed<sup>1</sup> to slaughter horses, cattle, sheep, swine, or goats may, without holding a certificate<sup>2</sup>, have in his possession a slaughtering instrument<sup>3</sup> and ammunition for it in any slaughterhouse or knacker's yard in which he is employed<sup>4</sup>. The proprietor of a slaughterhouse or knacker's yard or a person appointed by him to take charge of slaughtering instruments and ammunition for the purpose of storing them in safe custody at that slaughterhouse or knacker's yard may, without holding a certificate, have in his possession a slaughtering instrument or ammunition for that purpose<sup>5</sup>.

1 Ibid under the Welfare of Animals (Slaughter or Killing) Regulations 1995, SI 1995/731: see FOOD vol 18(2) (Reissue) PARAS 486-487.

2 For the meaning of 'certificate' see PARA 637 note 9 ante. As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

3 'Slaughtering instrument' means a firearm which is specially designed or adapted for the instantaneous slaughter of animals or for the instantaneous stunning of animals with a view to the slaughtering of them: Firearms Act 1968 s 57(4).

4 Ibid s 10(1) (amended by the Welfare of Animals (Slaughter or Killing) Regulations 1995, SI 1995/731, reg 28(2), Sch 14 para 1). See further FOOD vol 18(2) (Reissue) PARA 486.

5 Firearms Act 1968 s 10(2).

#### **UPDATE**

#### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **650. Sports, athletics and other approved activities.**

Without himself holding a certificate<sup>1</sup>:

- 755 (1) a person conducting or carrying on a miniature rifle<sup>2</sup> range, whether for a rifle club or otherwise, or a shooting gallery at which no firearms<sup>3</sup> are used other than air weapons<sup>4</sup> or miniature rifles not exceeding .23 inch calibre may have in his possession<sup>5</sup> or purchase or acquire<sup>6</sup> such miniature rifles and ammunition<sup>7</sup> suitable for them<sup>8</sup>;
- 756 (2) any person may use any such miniature rifle as is described in head (1) above at such a range or gallery as there described<sup>9</sup>;
- 757 (3) a person carrying a firearm or ammunition belonging to another person holding a certificate may have in his possession that firearm or ammunition under instructions from, and for the use of, that other person for sporting purposes only<sup>10</sup>;
- 758 (4) a person may have a firearm in his possession at an athletic meeting for the purpose of starting races at that meeting<sup>11</sup>;
- 759 (5) a person may use a shot gun<sup>12</sup> at a time and place approved for shooting at artificial targets by the chief officer of police for the area<sup>13</sup> in which that place is situated<sup>14</sup>.

1 For the meaning of 'certificate' see PARA 637 note 9 ante. As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

2 'Rifle' includes carbine: Firearms Act 1968 s 57(4) (amended by the Firearms (Amendment) Act 1988 s 25(3)).

3 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

4 For the meaning of 'air weapon' see PARA 633 ante.

5 For the meaning of 'possession' in the context of the Firearms Act 1968 s 1 (as amended) see PARA 634 note 2 ante.

6 For the meaning of 'acquire' see PARA 634 note 3 ante.

7 For the meaning of 'ammunition' see PARA 634 note 10 ante.

8 Firearms Act 1968 s 11(4).

9 Ibid s 11(4).

10 Ibid s 11(1). Shooting rats is not shooting for sporting purposes only: *Morton v Chaney*, *Morton v Christopher* [1960] 3 All ER 632, [1960] 1 WLR 1312, DC.

11 Firearms Act 1968 s 11(2).

12 For the meaning of 'shot gun' see PARA 632 ante.

13 For the meaning of 'area' see PARA 646 note 1 ante.

14 Firearms Act 1968 s 11(6). As to possession of firearms on service premises see the Firearms (Amendment) Act 1988 s 16A (as added); and PARA 653 post.

**UPDATE**

**630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **651. Approved rifle and muzzle-loading pistol clubs.**

A member of a rifle club<sup>1</sup> approved by the Secretary of State<sup>2</sup> may, without holding a firearm certificate<sup>3</sup>, have in his possession a rifle<sup>4</sup> and ammunition<sup>5</sup> when engaged as a member of the club in connection with target shooting<sup>6</sup>. A constable or civilian officer<sup>7</sup> authorised in writing in that behalf by a chief officer of police may, on producing if required his authority, enter any premises<sup>8</sup> occupied or used by an approved rifle club<sup>9</sup> and inspect those premises, and anything on them, for the purpose of ascertaining whether this provision, and any limitations or conditions in the approval, are being complied with<sup>10</sup>. It is an offence for a person intentionally to obstruct a constable or civilian officer in the exercise of such powers; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>11</sup>.

The above provisions apply in relation to a muzzle-loading pistol club and its members as they apply to a rifle club and its members with the substitution for any reference to a rifle of a reference to a muzzle-loading pistol<sup>12</sup>.

1 'Rifle club' includes a miniature rifle club: Firearms (Amendment) Act 1988 s 15(10) (s 15 substituted by the Firearms (Amendment) Act 1997 s 45(1)).

2 Any such approval may be granted subject to such conditions as the Secretary of State may think fit, and may at any time be varied or withdrawn by the Secretary of State: Firearms (Amendment) Act 1988 s 15(5)(a), (b) (as substituted: see note 1 supra). An approval, unless withdrawn, continues in force for six years from the date on which it is granted but may be renewed for further periods of six years at a time: s 15(5)(c) (as so substituted). On the grant or renewal of an approval a fee of £84 is payable; but this sum may be amended by order under the Firearms Act 1968 s 43 (see PARA 683 post): Firearms (Amendment) Act 1988 s 15(6) (as so substituted). Any approval of a rifle or miniature rifle club or muzzle-loading pistol club under s 15 (as substituted) which was in force immediately before the commencement of the Firearms (Amendment) Act 1997 s 45 (ie 1 October 1997: see the Firearms (Amendment) Act 1997 (Commencement) (No 2) Order 1997, SI 1997/1535, art 3(c), Schedule Pt II) took effect as if it were an approval under the Firearms (Amendment) Act 1988 s 15 (as substituted): Firearms (Amendment) Act 1997 s 45(3). 'Muzzle-loading pistol club' means a club where muzzle-loading pistols are used for target shooting and a 'muzzle-loading pistol' means a pistol designed to be loaded at the muzzle end of the barrel or chamber with a loose charge and a separate ball (or other missile): Firearms (Amendment) Act 1988 s 15(12) (as so substituted).

3 For the meaning of 'firearm certificate' see PARA 634 note 8 ante; definition applied by virtue of *ibid* s 25(1). As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

4 As to the meaning of 'rifle' see PARA 650 note 2 ante; definition applied by virtue of *ibid* s 25(1).

5 For the meaning of 'ammunition' see PARA 634 note 10 ante; definition applied by virtue of *ibid* s 25(1).

6 Firearms (Amendment) Act 1988 s 15(1) (as substituted: see note 1 supra). Whatever might be the situation with regard to shorter lengths of time, it could not on any view possibly be said that the appellant was 'engaged' as a member of a club in or in connection with target practice one month after an intended day's shooting at Bisley: *R v Wilson* [1989] Crim LR 907, CA (decided under the Firearms Act 1968 s 11(3) (as originally enacted)). The application of the Firearms (Amendment) Act 1988 s 15(1) (as substituted) to members of an approved rifle club may: (1) be excluded in relation to the club; or (2) be restricted to target shooting with specified types of rifle, by limitations contained in the approval under s 15(1) (as substituted): s 15(4), (10) (as so substituted). Head (1) supra means that a club may be 'an approved rifle club', but its members may not be permitted by a limitation in the approval to have in their possession a rifle or ammunition. A rifle club may apply for approval, whether or not it is intended that any club members will, by virtue of s 15(1) (as substituted), have

rifles or ammunition in their possession without holding firearm certificates: s 15(2) (as so substituted). The Secretary of State may publish guidance to inform those seeking approval for a club of criteria that must be met before any application for approval will be considered: s 15(3) (as so substituted).

7 'Civilian officer' means a person employed by a police authority or the Corporation of the City of London who is under the direction and control of a chief officer of police: Firearms Act 1968 s 57(4) (definition added by the Firearms (Amendment) Act 1997 s 43(2); and amended by the Greater London Authority Act 1999 ss 325, 423, Sch 17 para 22, Sch 34 Pt VII); applied by virtue of the Firearms (Amendment) Act 1988 s 15(10) (as substituted: see note 1 supra).

8 For these purposes, 'premises' includes any land: Firearms Act 1968 s 57(4); definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1).

9 le approved under *ibid* s 15(1) (as substituted): s 15(10) (as substituted: see note 1 supra).

10 *Ibid* s 15(7) (as substituted: see note 1 supra). The power to inspect anything on club premises includes power to require any information kept on computer and accessible from the premises to be made available for inspection in a visible and legible form: s 15(8) (as so substituted).

11 *Ibid* s 15(9) (as substituted: see note 1 supra). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to the limitation period for summary proceedings see PARA 696 post.

12 *Ibid* s 15(11) (as substituted: see note 1 supra).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/B. EXEMPTIONS/652. Borrowed shot guns and rifles on private premises.

## **652. Borrowed shot guns and rifles on private premises.**

A person may, without holding a shot gun certificate<sup>1</sup>, borrow a shot gun<sup>2</sup> from the occupier of private premises<sup>3</sup> and use it on those premises in the occupier's presence<sup>4</sup>.

A person of or over the age of 17 may, without holding a firearm certificate<sup>5</sup>, borrow a rifle<sup>6</sup> from the occupier of private premises and use it on those premises in the presence either of the occupier or of a servant of the occupier if: (1) the occupier or servant in whose presence it is used holds a firearm certificate in respect of that rifle; and (2) the borrower's possession and use of it complies with any conditions as to those matters specified in the certificate<sup>7</sup>. A person so entitled to borrow and use a rifle may also, without holding a firearm certificate, purchase or acquire<sup>8</sup> ammunition<sup>9</sup> for use in the rifle and have it in his possession during the period for which the rifle is borrowed if: (a) the firearm certificate held by that other person authorises the holder to have in his possession at that time ammunition for the rifle of a quantity not less than that purchased or acquired by, and in the possession of, the borrower; and (b) the borrower's possession and use of the ammunition complies with any conditions as to those matters specified in the certificate<sup>10</sup>.

1 For the meaning of 'shot gun certificate' see PARA 635 note 5 ante. As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

2 For the meaning of 'shot gun' see PARA 632 ante.

3 As to the meaning of 'premises' see PARA 651 note 8 ante.

4 Firearms Act 1968 s 11(5).

5 For the meaning of 'firearm certificate' see PARA 634 note 8 ante; definition applied by virtue of the Firearm (Amendment) Act 1988 s 25(1).

6 As to the meaning of 'rifle' see PARA 650 note 2 ante; definition applied by virtue of *ibid* s 25(1).

7 *Ibid* s 16(1).

8 For the meaning of 'acquire' see PARA 634 note 3 ante; definition applied by virtue of *ibid* s 25(1).

9 For the meaning of 'ammunition' see PARA 634 note 10 ante; definition applied by virtue of *ibid* s 25(1).

10 *Ibid* s 16(2).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/B. EXEMPTIONS/653. Possession of firearms on service premises.

### **653. Possession of firearms on service premises.**

A person under the supervision of a member of the armed forces<sup>1</sup> may, without holding a certificate<sup>2</sup> or obtaining the authority of the Secretary of State<sup>3</sup>, have in his possession a firearm<sup>4</sup> and ammunition<sup>5</sup> on service premises<sup>6</sup>.

<sup>1</sup> 'Armed forces' means any of the naval, military or air forces of Her Majesty: Firearms (Amendment) Act 1988 s 16A(3) (s 16A added by the Armed Forces Act 1996 s 28(2)).

<sup>2</sup> For the meaning of 'certificate' see PARA 637 note 9 ante; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1). As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

<sup>3</sup> Is an authority under the Firearms Act 1968 s 5: see PARA 661 post.

<sup>4</sup> For the meaning of 'firearm' see PARA 630 ante; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1). See also PARA 631 ante.

<sup>5</sup> For the meaning of 'ammunition' see PARA 634 note 10 ante; definition applied by virtue of *ibid* s 25(1).

<sup>6</sup> *Ibid* s 16A(1) (as added: see note 1 *supra*). 'Service premises' means premises, including any ship or aircraft, used for any purpose of the armed forces: s 16A(3) (as so added). Section 16A(1) (as added) does not apply to a person while engaged in providing security protection on service premises: s 16A(2) (as so added).

### **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/B. EXEMPTIONS/654. Possession of firearms on Ministry of Defence Police premises.

#### **654. Possession of firearms on Ministry of Defence Police premises.**

A person who is being trained or assessed in the use of firearms<sup>1</sup> under the supervision of a member of the Ministry of Defence Police<sup>2</sup> may, without holding a certificate<sup>3</sup> or obtaining the authority of the Secretary of State<sup>4</sup>, have in his possession a firearm and ammunition<sup>5</sup> on relevant premises<sup>6</sup> for the purposes of the training or assessment<sup>7</sup>.

1 For the meaning of 'firearm' see PARA 630 ante; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1). See also PARA 631 ante.

2 As to the Ministry of Defence Police see POLICE vol 36(1) (2007 Reissue) PARA 120 et seq.

3 For the meaning of 'certificate' see PARA 637 note 9 ante; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1). As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

4 Is an authority under the Firearms Act 1968 s 5: see PARA 661 note 2 post.

5 For the meaning of 'ammunition' see PARA 634 note 10 ante; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1).

6 Is any premises used for any purpose of the Ministry of Defence Police: *ibid* s 16B(2) (s 16B added by the Police Reform Act 2002 s 81(1)).

7 Firearms (Amendment) Act 1988 s 16B(1) (as added: see note 6 *supra*).

### **UPDATE**

#### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/B. EXEMPTIONS/655. Visitors' permits.

### **655. Visitors' permits.**

The holder of a visitor's firearm permit<sup>1</sup> may, without holding a firearm certificate<sup>2</sup>, have in his possession a firearm<sup>3</sup>, and have in his possession, purchase or acquire<sup>4</sup> ammunition<sup>5</sup>.

The holder of a visitor's shot gun permit<sup>6</sup> may, without holding a shot gun certificate<sup>7</sup>, have shot guns<sup>8</sup> in his possession and purchase or acquire shot guns<sup>9</sup>. However, a visitor's shot gun permit does not authorise the purchase or acquisition by any person of a shot gun with a magazine except where:

- 760 (1) that person is for the time being the holder of a specified export licence, in respect of the exportation of that shot gun<sup>10</sup>;
- 761 (2) the shot gun is to be exported from Great Britain<sup>11</sup> to a place outside the member states<sup>12</sup> without first being taken to another member state<sup>13</sup>;
- 762 (3) the shot gun is acquired on terms which restrict that person's possession of the gun to the whole or a part of the period of his visit to Great Britain and preclude the removal of the gun from Great Britain<sup>14</sup>; or
- 763 (4) the shot gun is purchased or acquired by that person exclusively in connection with the carrying on of activities in respect of which that person, or the person on whose behalf he makes the purchase or acquisition, is recognised, for the purposes of the law of another member state relating to firearms, as a collector of firearms or a body concerned in the cultural or historical aspects of weapons<sup>15</sup>.

A person who sells, lets on hire, gives or lends a shot gun with a magazine to another person who: (a) shows that he is entitled to purchase or acquire the weapon as the holder of a visitor's shot gun permit<sup>16</sup>; but (b) fails to show that the purchase or acquisition falls within head (3) or head (4) above or that he resides outside the member states, must, within 48 hours of the transaction, send by registered post or the recorded delivery service notice of the transaction to the chief officer of police who granted that permit<sup>17</sup>.

It is an offence for a person:

- 764 (i) knowingly or recklessly to make a statement false in any material particular for the purpose of procuring the grant of a visitor's firearm or shot gun permit; or
- 765 (ii) to fail to comply with a condition subject to which such a permit is held by him,

and a person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>18</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>19</sup>.

1 The chief officer of police for an area may, on an application in the prescribed form made by a person resident in that area on behalf of a person specified in the application, grant a permit under the Firearms (Amendment) Act 1988 s 17 (as amended) to the specified person if satisfied that he is visiting or intending to visit Great Britain and: (1) in the case of a visitor's firearm permit, that he has a good reason for having each firearm and the ammunition to which the permit relates in his possession, or, as respects ammunition, for

purchasing or acquiring it, while he is a visitor in Great Britain; (2) in the case of a visitor's shot gun permit, that he has a good reason for having each shot gun to which the permit relates in his possession, or for purchasing or acquiring it, while he is such a visitor: s 17(2). For the meaning of 'area' see PARA 646 note 1 ante; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1). For the meaning of 'Great Britain' see PARA 45 note 2 ante.

No permit may be so granted if the chief officer of police has reason to believe that the visitor's possession of the weapons or ammunition in question would represent a danger to the public safety or to the peace, or that the visitor is prohibited by the Firearms Act 1968 from possessing them: Firearms (Amendment) Act 1988 s 17(3).

No permit may be so granted as respects any firearm unless:

- 135 (a) there is produced to the chief officer of police a document which has been issued in another member state under provisions corresponding to the provisions of the Firearms Act 1968 for the issue of European firearms passes, identifies that firearm as a firearm to which it relates, and is for the time being valid (Firearms (Amendment) Act 1988 s 17(3A)(a) (s 17(3A) added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 7));
- 136 (b) the applicant shows that the person specified in the application is a person who, by reason of his place of residence or any other circumstances, is not entitled to be issued with such a document in any of the other member states (Firearms (Amendment) Act 1988 s 17(3A)(b) (as so added)); or
- 137 (c) the applicant shows that the person specified in the application requires the permit exclusively in connection with the carrying on of activities in respect of which that person or the person on whose behalf he is proposing to make use of the authorisation conferred by the permit, is recognised, for the purposes of the law of another member state relating to firearms, as a collector of firearms or a body concerned in the cultural or historical aspects of weapons (s 17(3A)(c) (as so added)),

and a chief officer of police who grants a permit under s 17 (as amended) in a case where a document has been produced to him in pursuance of head (a) supra must indorse on the document a statement which identifies the permit and the firearm to which it relates and briefly describes the effect of the permit: s 17(3A) (as so added). For the meaning of 'member state' see the European Communities Act 1972 s 1(2), Sch 1 Pt II; and the Interpretation Act 1978 s 5, Sch 1; and see also note 12 infra.

A permit so granted must be in the prescribed form, must specify the conditions subject to which it is held and: (i) in the case of a visitor's firearm permit, must specify the number and description of the firearms to which it relates, including their identification numbers, and, as respects ammunition, the quantities authorised to be purchased or acquired and to be held at any one time; (ii) in the case of a visitor's shot gun permit, must specify the number and description of the shot guns to which it relates, including, if known, their identification numbers: s 17(4). The chief officer of police by whom a permit is so granted may by notice in writing to the holder vary the conditions subject to which the permit is held, but, in the case of a visitor's shot gun permit, no condition may be imposed or varied so as to restrict the premises where the shot gun or guns to which the permit relates may be used: s 17(5).

Such a permit comes into force on such date as is specified in it and continues in force for such period, not exceeding 12 months, as is so specified: s 17(6).

A single application (a 'group application') may be made under these provisions for the grant of not more than 20 permits to persons specified in the application if it is shown to the satisfaction of the chief officer of police that their purpose in having the weapons in question in their possession while visiting Great Britain is using them for sporting purposes on the same private premises during the same period, or participating in the same competition or other event or the same series of competitions or other events: s 17(7).

On the grant of such a permit a fee of £12 is payable except that, where six or more permits are granted on a group application, the fee is £60 in respect of those permits taken together: s 17(8). Such fee may be amended by an order under the Firearms Act 1968 s 43 (see PARA 683 post): Firearms (Amendment) Act 1988 s 17(9).

2 For the meaning of 'firearm certificate' see PARA 634 note 8 ante; definition applied by virtue of *ibid* s 25(1). As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

3 In any firearm to which the Firearms Act 1968 s 1 (as amended) (see PARA 634 ante) applies. For the meaning of 'firearm' see PARA 630 ante; definition applied by virtue of *ibid* s 25(1). See also PARA 631 ante.

4 For the meaning of 'acquire' see PARA 634 note 3 ante; definition applied by virtue of *ibid* s 25(1).

5 *Ibid* s 17(1). The text refers to any ammunition to which the Firearms Act 1968 s 1 (as amended) (see PARA 634 ante) applies.

6 See note 1 *supra*.

7 For the meaning of 'shot gun certificate' see PARA 635 note 5 *ante*; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1).

8 For the meaning of 'shot gun' see PARA 632 *ante*; definition applied by virtue of *ibid* s 25(1).

9 *Ibid* s 17(1).

10 *Ibid* s 17(1A)(a) (s 17(1A) added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 6(1)). A specified export licence is a licence granted for the purpose of any order made under the Import, Export and Customs Powers (Defence) Act 1939, in respect of the exportation of a shotgun.

11 For the meaning of 'Great Britain' see PARA 45 note 2 *ante*.

12 'Another member state' means another member state other than the United Kingdom; and 'other member states' is to be construed accordingly: Firearms Act 1968 s 57(4) (definition added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 5(2)); applied by virtue of the Firearms (Amendment) Act 1988 s 25(1).

13 *Ibid* s 17(1A)(b) (as added: see note 10 *supra*).

14 *Ibid* s 17(1A)(c) (as added: see note 10 *supra*).

15 *Ibid* s 17(1A)(d) (as added: see note 10 *supra*).

16 *Ie* a permit under *ibid* s 17 (see the text and notes 1-15 *supra*).

17 Firearms Act 1968 s 42A(1) (s 42A added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 6(2)). The notice must: (1) contain a description of the shot gun (giving the identification number if any); (2) state the nature of the transaction (giving the name of the person to whom the gun has been sold, let on hire, given or lent, his address in the member state where he resides and the number and place of issue of his passport, if any; and (3) set out the particulars of any licence granted for the purposes of an order made under the Import, Export and Customs Powers (Defence) Act 1939 s 1 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 996) by virtue of which the transaction is authorised under the Firearms (Amendment) Act 1988 s 17 (as amended): Firearms Act 1968 s 42A(2) (as so added). Failure to comply with s 42A (as added) is an offence: s 42A(3). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine of level 5 on the standard scale or to both: s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 *ante*). As from a day to be appointed this maximum term of imprisonment is increased to 51 weeks: see Sch 6 Pt I (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (8)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

18 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

19 Firearms (Amendment) Act 1988 s 17(10) (amended by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 para 19). As to the limitation period for summary proceedings see PARA 696 *post*. As to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 *post*.

## UPDATE

### 630-698 Firearms, Ammunition and Air Weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/B. EXEMPTIONS/656. Theatre and cinema.

### **656. Theatre and cinema.**

A person taking part in a theatrical performance or a rehearsal of such a performance, or in the production of a cinematograph film, may, without holding a certificate<sup>1</sup>, have a firearm<sup>2</sup> in his possession during, and for the purpose of, the performance, rehearsal or production<sup>3</sup>.

Where the Secretary of State is satisfied, on the application of a person in charge of a theatrical performance, a rehearsal of such a performance or the production of a cinematograph film, that a prohibited weapon<sup>4</sup> is required for the purpose of the performance, rehearsal or production, he may<sup>5</sup>, if he thinks fit, not only authorise that person to have possession of the weapon but also authorise such other persons as he may select to have possession of it while taking part in the performance, rehearsal or production<sup>6</sup>.

1 For the meaning of 'certificate' see PARA 637 note 9 ante. As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

2 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

3 Firearms Act 1968 s 12(1).

4 For the meaning of 'prohibited weapon' see PARA 661 post.

5 le under the Firearms Act 1968 s 5: see PARAS 661-666 post.

6 Ibid s 12(2) (amended by the Firearms (Amendment) Act 1988 s 23(2); and by the Transfer of Functions (Prohibited Weapons) Order 1968, SI 1968/1200).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/B. EXEMPTIONS/657. Equipment for ships and aircraft.

### **657. Equipment for ships and aircraft.**

Without holding a certificate<sup>1</sup>, a person:

- 766 (1) may have in his possession a firearm<sup>2</sup> or ammunition<sup>3</sup> on board a ship<sup>4</sup>, or a signalling apparatus or ammunition for it on board an aircraft or at an aerodrome, as part of the equipment of the ship, aircraft or aerodrome<sup>5</sup>;
- 767 (2) may remove a signalling apparatus or ammunition for it, being part of the equipment of an aircraft, from one aircraft to another at an aerodrome, or from or to an aircraft at an aerodrome to or from a place appointed for the storage of it in safe custody at that aerodrome, and keep any such apparatus or ammunition at such a place<sup>6</sup>; and
- 768 (3) if he has obtained from a constable a permit<sup>7</sup> for the purpose, may remove a firearm from or to a ship, or a signalling apparatus from or to an aircraft or aerodrome, to or from such place and for such purpose as may be specified on the permit<sup>8</sup>.

It is an offence for a person knowingly or recklessly to make a statement false in a material particular for the purpose of procuring the grant of a permit under head (3) above, either for himself or for any other person<sup>9</sup>; and a person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup> or to a fine not exceeding level 5 on the standard scale<sup>11</sup> or to both<sup>12</sup>.

1 For the meaning of 'certificate' see PARA 637 note 9 ante. As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

2 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

3 For the meaning of 'ammunition' see PARA 634 note 10 ante.

4 'Ship' includes hovercraft: Hovercraft (Application of Enactments) Order 1972, SI 1972/971, art 4, Sch 1 Pt A.

5 Firearms Act 1968 s 13(1)(a).

6 Ibid s 13(1)(b).

7 The permit must be in the prescribed form: ibid s 13(1)(c). For the prescribed form of permit see the Firearms Rules 1998, SI 1998/1941, r 9(3), Sch 4 Pt V.

8 Firearms Act 1968 s 13(1)(c) (amended by the Firearms (Amendment) Act 1988 s 23(3)).

9 Firearms Act 1968 s 13(2) (amended by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 paras 1, 2(2)). As to the limitation period for summary proceedings see PARA 696 post.

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

11 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

12 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/B. EXEMPTIONS/658. Firearms acquired for export.

### **658. Firearms acquired for export.**

A person may, without holding a firearm<sup>1</sup> or shot gun certificate<sup>2</sup>, purchase a firearm<sup>3</sup> from a registered firearms dealer<sup>4</sup> if: (1) that person has not been in Great Britain for more than 30 days in the preceding 12 months; and (2) the firearm is purchased for the purpose only of being exported from Great Britain<sup>5</sup> without first coming into that person's possession<sup>6</sup>.

A person is not entitled under the above provision to purchase any firearm of a specified type<sup>7</sup> unless he:

- 769 (a) produces to the dealer from whom he purchases it a document which:  
19
  - 25. (i) has been issued under provisions which, in the member state<sup>8</sup> where he resides, correspond to specified provisions<sup>9</sup>; and
  - 26. (ii) contains the prior agreement to the purchase of that firearm which is required<sup>10</sup>;
- 20
  - 770 (b) shows that he is purchasing the firearm exclusively in connection with the carrying on of activities in respect of which he, or the person on whose behalf he is purchasing the firearm, is recognised, for the purposes of the law of another member state<sup>11</sup> relating to firearms, as a collector of firearms or a body concerned in the cultural or historical aspects of weapons<sup>12</sup>; or
  - 771 (c) shows that he resides in the United Kingdom<sup>13</sup> or outside the member states<sup>14</sup>.

A registered firearms dealer who sells a firearm to a person who shows that he is so entitled<sup>15</sup> to purchase it without holding a certificate must within 48 hours from the transaction send a notice<sup>16</sup> of the transaction to the chief officer of police in whose register the premises<sup>17</sup> where the transaction took place are entered<sup>18</sup>. It is an offence for a registered firearms dealer to fail to comply with such requirement<sup>19</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>20</sup> or to a fine not exceeding level 5 on the standard scale<sup>21</sup> or to both<sup>22</sup>. However, where the failure to comply is confined to the omission from the notice of the particulars of an agreement contained in a document mentioned in head (a) above, the offence is punishable on summary conviction with imprisonment for a term not exceeding three months<sup>23</sup> or a fine not exceeding level 5 on the standard scale or both<sup>24</sup>.

1 For the meaning of 'firearm certificate' see PARA 634 note 8 ante; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1). As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

2 For the meaning of 'shot gun certificate' see PARA 635 note 5 ante; definition applied by virtue of ibid s 25(1).

3 For the meaning of 'firearm' see PARA 630 ante; definition applied by virtue of ibid s 25(1). See also PARA 631 ante.

4 For the meaning of 'registered firearms dealer' see PARA 636 notes 4, 5 ante; definitions applied by virtue of ibid s 25(1).

5 For the meaning of 'Great Britain' see PARA 45 note 2 ante.

6 Firearms (Amendment) Act 1988 s 18(1).

7 Ie one which falls within EC Council Directive 91/477 (OJ L256, 13.09.91, p 51) on the control of the acquisition and possession of weapons ('the Weapons Directive') Annex I, category B: Firearms (Amendment) Act 1988 s 18(1A) (added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 8(1)); Firearms Act 1968 s 57(4) (amended by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 5(2)).

8 For the meaning of 'member state' see the European Communities Act 1972 s 1(2), Sch 1 Pt II; and the Interpretation Act 1978 s 5, Sch 1.

9 Firearms (Amendment) Act 1988 s 18(1A)(a)(i) (as added: see note 7 supra). The specified provisions referred to in the text are provisions of the Firearms Act 1968 for the issue of Article 7 authorities: Firearms (Amendment) Act 1988 s 18(1A)(a)(i) (as so added). 'Article 7 authorities' means a document issued by virtue of the Firearms Act 1968 s 32A(1)(b) or (2) (as added) (see PARA 687 post): s 57(4) (definition added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 5(2)); applied by virtue of the Firearms (Amendment) Act 1988 s 25(1).

10 Ibid s 18(1A)(a)(ii) (as added: see note 7 supra). The required agreement referred to in the text is one required by Council Directive 91/477 (OJ L256, 13.09.91, p 51) art 7: Firearms (Amendment) Act 1988 s 18(1A) (as so added).

11 For the meaning of 'another member state' see PARA 655 note 12 ante; definition applied by virtue of ibid s 25(1).

12 Ibid s 18(1A)(b) (as added: see note 7 supra).

13 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

14 Firearms (Amendment) Act 1988 s 18(1A)(c) (as added: see note 7 supra).

15 Ie by virtue of ibid s 18(1).

16 The notice of such a transaction must contain the particulars of the transaction which the dealer is required to enter in the register kept by him under the Firearms Act 1968 s 40 (see PARA 692 post); and every notice must be sent by registered post or by the recorded delivery service: Firearms (Amendment) Act 1988 s 18(3). In the case of such a transaction, the particulars to be entered in the register so kept, and accordingly in the notice so served, must include the number and place of issue of the purchaser's passport, if any and, in a case where the transaction is one for the purposes of which a document such as is mentioned in s 18(1A)(a) (as added) (see head (a) in the text) is required to be produced, particulars of the agreement contained in that document: s 18(4) (amended by Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 8(2)).

17 As to the meaning of 'premises' see PARA 651 note 8 ante; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1).

18 Ibid s 18(2).

19 Ibid s 18(5). As to powers of search see PARA 693 post. As to the limitation period for summary proceedings see PARA 696 post.

20 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

21 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

22 Firearms (Amendment) Act 1988 s 18(5). As to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

23 As from a day to be appointed the Secretary of State may by order either provide that this offence is no longer punishable by imprisonment or extend the maximum term for this offence to a maximum term of 51 weeks: see the Criminal Justice Act 2003 s 281(1), (2), (7) (not yet in force). Any such order may make such supplementary, incidental, or consequential provision as the Secretary of State considers necessary or expedient, including provision amending any relevant enactment (s 281(3) (not yet in force)), but may not

affect the penalty for any offence committed before the commencement of that order (s 281(6)(a) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

24 See the Firearms (Amendment) Act 1988 s 18(5), (6) (added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 8(3)).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/B. EXEMPTIONS/659. Purchase or acquisition of firearms in other member states.

### **659. Purchase or acquisition of firearms in other member states.**

Where a person who resides in Great Britain<sup>1</sup> purchases or acquires<sup>2</sup> a firearm of a specified description<sup>3</sup> in another member state<sup>4</sup>, he must, within 14 days of the transaction, send notice of the transaction to the chief officer of police for the area<sup>5</sup> where he resides<sup>6</sup>. A person is not required to give such notice of a transaction under which he acquires a firearm on terms which: (1) restrict his possession of it to the whole or a part of the period of a visit to the member state where the transaction takes place<sup>7</sup>; and (2) preclude the removal of the firearm from that member state<sup>8</sup>. A person is not required to give such notice of a transaction under which he purchases or acquires a firearm if: (a) he is for the time being the holder of a certificate<sup>9</sup> relating to that firearm and containing, in relation to that firearm, a condition that he may have the firearm in his possession only for the purpose of its being kept or exhibited as part of a collection<sup>10</sup>; or (b) he would, if in Great Britain, be authorised by virtue of a licence<sup>11</sup> to have that firearm in his possession<sup>12</sup>.

A person who fails to comply with these provisions commits an offence and is punishable on summary conviction with imprisonment for a term not exceeding three months<sup>13</sup> or a fine not exceeding level 5 on the standard scale<sup>14</sup> or both<sup>15</sup>.

1 For the meaning of 'Great Britain' see PARA 45 note 2 ante.

2 For the meaning of 'acquire' see PARA 634 note 3 ante; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1).

3 I.e. a firearm which falls within EC Council Directive 91/477 (OJ L256, 13.09.91, p 51) on the control of the acquisition and possession of weapons ('the Weapons Directive') Annex I, category C: Firearms (Amendment) Act 1988 s 18A(1)(b) (s 18A added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 8(1)). For the meaning of 'firearm' see PARA 630 ante; definition applied by virtue of the Firearms (Amendment) Act 1988 s 25(1). See also PARA 631 ante.

4 For the meaning of 'member state' see the European Communities Act 1972 s 1(2), Sch 1 Pt II; and the Interpretation Act 1978 s 5, Sch 1. For the meaning of 'another member state' see PARA 655 note 12 ante; definition applied by virtue of *ibid* s 25(1).

5 For the meaning of 'area' see PARA 646 note 1 ante (definition applied by virtue of *ibid* s 25(1)).

6 *Ibid* s 18A(1) (as added: see note 3 supra). A notice under s 18A(1) (as added) must contain a description of the firearm (giving the identification number, if any) and state the nature of the transaction and the name and address in Great Britain of the person giving the notice: s 18A(4) (as so added). A notice which is sent from a place in Great Britain must be sent by registered post or by the recorded delivery service and, in any other case, must be sent in such manner as most closely corresponds to the use of registered post or the recorded delivery service: s 18A(5) (as so added).

7 *Ibid* s 18A(2)(a) (as added: see note 3 supra).

8 *Ibid* s 18A(2)(b) (as added: see note 3 supra).

9 I.e. a firearm certificate (see PARA 634 note 8 ante) or a shot gun certificate (see PARA 635 note 5 ante); definitions applied by virtue of *ibid* s 25(1).

10 *Ibid* s 18A(3)(a) (as added: see note 3 supra).

11 I.e. a licence under *ibid* s 19, Schedule: see PARA 660 post.

12 Ibid s 18A(3)(b) (as added: see note 3 supra).

13 As from a day to be appointed the Secretary of State may by order either provide that this offence is no longer punishable by imprisonment or extend the maximum term for this offence to a maximum term of 51 weeks: see the Criminal Justice Act 2003 s 281(1), (2), (7) (not yet in force). Any such order may make such supplementary, incidental, or consequential provision as the Secretary of State considers necessary or expedient, including provision amending any relevant enactment (s 281(3) (not yet in force)), but may not affect the penalty for any offence committed before the commencement of that order (s 281(6)(a) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

14 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

15 Firearms (Amendment) Act 1988 s 18A(6) (as added: see note 3 supra). As to the limitation period for summary proceedings see PARA 696 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(i) Acquisition, Purchase and Possession/B. EXEMPTIONS/660. Firearms and ammunition in museums.

## **660. Firearms and ammunition in museums.**

On an application in writing made on behalf of a museum<sup>1</sup>, the Secretary of State may grant a museum firearms licence<sup>2</sup> in respect of that museum<sup>3</sup>. While such a licence is in force, the persons responsible for the management of the museum<sup>4</sup> and their servants:

- 772 (1) may, without holding a firearm<sup>5</sup> or shot gun certificate<sup>6</sup>, have in their possession, and purchase or acquire<sup>7</sup>, for the purposes of the museum firearms<sup>8</sup> and ammunition<sup>9</sup> which are or are to be normally exhibited or kept on its premises or on such of them as are specified in the licence<sup>10</sup>; and
- 773 (2) if the licence so provides, may, without the authority of the Secretary of State<sup>11</sup>, have in their possession, purchase or acquire for those purposes any prohibited weapons<sup>12</sup> and ammunition<sup>13</sup> which are or are to be normally so exhibited or kept<sup>14</sup>.

It is an offence: (a) for a person knowingly or recklessly to make a statement false in a material particular for the purpose of procuring the grant, renewal<sup>15</sup> or variation<sup>16</sup> of such a licence<sup>17</sup>; (b) for the persons or any of the persons responsible for the management of a museum to fail to comply or to cause or permit another person to fail to comply with any condition specified in the licence held in respect of that museum<sup>18</sup>. A person guilty of either such offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>19</sup> or to a fine not exceeding level 5 on the standard scale<sup>20</sup> or to both<sup>21</sup>. In proceedings against any person for an offence under head (b) above, it is a defence, however, for him to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence<sup>22</sup>.

1    le a museum to which the Firearms (Amendment) Act 1988 s 19, Schedule applies, that is:

- 138 (1) the Armouries, HM Tower of London; the National Army Museum; the National Museum of Wales; the Royal Air Force Museum; the Science Museum; the Victoria and Albert Museum; the Royal Marines Museum; the Fleet Air Arm Museum; the Royal Navy Museum; the Royal Navy Submarine Museum; the British Museum; the Imperial War Museum; the National Maritime Museum; the National Museums of Scotland; the National Museums and Galleries on Merseyside; the Wallace Collection; and any other museum or similar institution in Great Britain which has as its purpose, or one of its purposes, the preservation for the public benefit of a collection of historical, artistic or scientific interest which includes or is to include firearms and which is maintained wholly or mainly out of money provided by Parliament or by a local authority (Schedule para 5(1) (amended by the Firearms (Amendment) Act 1997 s 47));
- 139 (2) any museum or similar institution in Great Britain which is of a description specified in an order made by the Secretary of State by statutory instrument and whose collection includes or is to include firearms (Firearms (Amendment) Act 1988 Schedule para 5(2), (4) (Schedule para 5(2)-(4) added by the Firearms (Amendment) Act 1997 s 47)).

An order under head (2) *supra* may specify any description of museum or similar institution which appears to the Secretary of State to have as its purpose, or one of its purposes, the preservation for the public benefit of a collection of historical, artistic or scientific interest: Firearms (Amendment) Act 1988 Schedule para 5(3) (as so added). As to orders made under Schedule para 5(2) (as added) see the Firearms (Museums) Order 1997, SI 1997/1692.

2 The Secretary of State (or the Scottish Ministers by virtue of provision made under the Scotland Act 1998 s 63) may not grant a licence in respect of a museum unless, after consulting the chief officer of police for the area in which the premises to which the licence is to apply are situated, he is (or they are) satisfied that the arrangements for exhibiting and keeping the firearms and ammunition in question are or will be such as not to endanger the public safety or the peace: Firearms (Amendment) Act 1988 Schedule para 1(3) (amended by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999, SI 1999/1750, art 1). Such a licence must be in writing and is subject to such conditions specified in it as the Secretary of State thinks (or the Scottish Ministers think) necessary for securing the safe custody of the firearms and ammunition in question: Firearms (Amendment) Act 1988 Schedule para 1(4) (amended by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999, SI 1999/1750, art 1).

The Secretary of State may by notice in writing to the persons responsible for the management of a museum revoke a licence held in respect of the museum if: (1) at any time, after consulting the chief officer of police for the area in which the premises to which it applies are situated, he is satisfied that the continuation of the exemption conferred by the licence would result in danger to the public safety or to the peace; or (2) those persons or any of them or any servant of theirs has been convicted of an offence under the Firearms (Amendment) Act 1988 Schedule para 4; or (3) those persons have failed to comply with a notice requiring them to deliver up the licence: Schedule para 2(3). Where a licence is so revoked, the Secretary of State must by notice in writing require the persons responsible for the management of the museum in question to surrender the licence to him: Schedule para 2(4). It is an offence for a person to fail to comply with a notice under Schedule para 2(4); and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: Schedule para 4(3). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

3 Ibid Schedule para 1(1). There is payable: (1) on the grant or renewal of a licence, a fee of £200 or of such lesser amount as the Secretary of State may in any particular case determine; (2) on the extension of a licence to additional premises, a fee of £75: Schedule para 3(1). Schedule para 3 is included in the provisions that may be amended by an order under the Firearms Act 1968 s 43 (see PARA 683 post): Firearms (Amendment) Act 1988 Schedule para 3(2).

4 For these purposes, references to the persons responsible for the management of a museum are references to the board of trustees, governing body or other person or persons (whether or not incorporated) exercising corresponding functions: ibid Schedule para 6.

5 For the meaning of 'firearm certificate' see PARA 634 note 8 ante; definition applied by virtue of ibid s 25(1). As to references to persons entitled to possess, purchase or acquire any weapon or ammunition without holding a certificate see PARA 637 note 8 ante.

6 For the meaning of 'shot gun certificate' see PARA 635 note 5 ante; definition applied by virtue of ibid s 25(1).

7 For the meaning of 'acquire' see PARA 634 note 3 ante; definition applied by virtue of ibid s 25(1).

8 For the meaning of 'firearm' see PARA 630 ante; definition applied by virtue of ibid s 25(1). See also PARA 631 ante.

9 For the meaning of 'ammunition' see PARA 634 note 10 ante; definition applied by virtue of ibid s 25(1).

10 Firearms (Amendment) Act 1988 Schedule para 1(2)(a).

11 Ie under the Firearms Act 1968 s 5 (as amended): see PARA 661 post.

12 For the meaning of 'prohibited weapon' see PARA 661 post.

13 For the meaning of 'prohibited ammunition' see PARA 661 post.

14 Firearms (Amendment) Act 1988 Schedule para 1(2)(b).

15 Unless previously revoked or cancelled, a licence continues in force for five years from the date on which it is granted but is renewable for further periods of five years at a time and the provisions of ibid Schedule para 1(3) (see note 2 supra) apply to the renewal of a licence as they apply to a grant: Schedule para 1(5). The Secretary of State may by order substitute for the periods so mentioned such longer or shorter periods as are specified in the order; and the power so to make an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Schedule para 1(6), (7).

16 The Secretary of State may by notice in writing to the persons responsible for the management of a museum vary the conditions specified in a licence held in respect of the museum, or vary the licence so as to extend or restrict the premises to which it applies: ibid Schedule para 2(1). A notice so given may require the persons in question to deliver up the licence to the Secretary of State (or the Scottish Ministers) within 21 days

of the date of the notice for the purpose of having it amended in accordance with the variation: Schedule para 2(2) (amended by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999, SI 1999/1750, art 1).

17 Firearms (Amendment) Act 1988 Schedule para 4(1)(a) (amended by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 para 19).

18 Firearms (Amendment) Act 1988 Schedule para 4(1)(b).

19 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

20 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

21 Firearms (Amendment) Act 1988 Schedule para 4(2). Where a person is convicted of any offence under this Schedule, no order may be made for the forfeiture of anything in his possession for the purposes of the museum in question: s 25(5). See further PARA 697 post. As to the limitation period for summary proceedings see PARA 696 post. Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and liable to be proceeded against and punished accordingly; and, where the affairs of a body corporate are managed by its members, that provision applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: Schedule para 4(5), (6). See PARA 38 ante.

22 Ibid Schedule para 4(4). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(ii) Prohibited Weapons and Ammunition/661. Prohibited weapons.

## **(ii) Prohibited Weapons and Ammunition**

### **661. Prohibited weapons.**

Subject to special exemptions the following provisions have effect<sup>1</sup>. A person commits an offence if, without the authority of the Secretary of State<sup>2</sup>, he has in his possession<sup>3</sup>, or purchases or acquires<sup>4</sup>, or manufactures, sells or transfers<sup>5</sup>:

- 774 (1) any firearm<sup>6</sup> which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger<sup>7</sup>;
- 775 (2) any self-loading or pump-action<sup>8</sup> rifled gun other than one which is chambered for .22 rim-fire cartridges<sup>9</sup>;
- 776 (3) any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon<sup>10</sup>, a muzzle-loading gun<sup>11</sup> or a firearm designed as signalling apparatus<sup>12</sup>;
- 777 (4) any self-loading or pump-action smooth-bore gun which is not an air weapon or not chambered for .22 rim-fire cartridges and either has a barrel less than 24 inches in length or is less than 40 inches in length overall<sup>13</sup>;
- 778 (5) any smooth-bore revolver<sup>14</sup> gun other than one which is chambered for 9mm rim-fire cartridges or a muzzle-loading gun<sup>15</sup>;
- 779 (6) any rocket launcher, or any mortar, for projecting a stabilised missile, other than a launcher or mortar designed for line-throwing or pyrotechnic purposes or as signalling apparatus<sup>16</sup>;
- 780 (7) any air rifle, air gun or air pistol which uses, or is designed or adapted for use with, a self-contained gas cartridge system<sup>17</sup>; and
- 781 (8) any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing<sup>18</sup>.

A person commits an offence if, without the authority of the Secretary of State, he has in his possession, or purchases or acquires or sells or transfers<sup>19</sup>:

- 782 (a) any firearm which is disguised as another object<sup>20</sup>; and
- 783 (b) any launcher or other projecting apparatus not falling with head (6) above<sup>21</sup> which is designed to be used with any rocket or ammunition of a specified type<sup>22</sup>.

1 See PARA 666 post.

2 As to the issue of such authorities see PARA 665 post. As to the exemptions from the requirement of an authority see PARA 666 post. The functions under the Firearms Act 1968 ss 5, 12(2) have been transferred to the Secretary of State and to the Scottish Ministers from the Defence Council: see the Transfer of Functions (Prohibited Weapons) Order 1968, SI 1968/1200; and the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999, SI 1999/1750, art 6(1), Sch 5 para 3(1), (2)(c), (d).

3 Where a person is knowingly in possession of a prohibited weapon, it is no defence for him to show, even in a 'container' case where the item is concealed by the container, that he neither knew nor could have reasonably suspected that it was such a prohibited weapon: *R v Bradish* [1990] 1 QB 981, [1990] 1 All ER 460, CA.

4 For the meaning of 'acquire' see PARA 634 note 3 ante.

5 Firearms Act 1968 s 5(1) (amended by the Transfer of Functions (Prohibited Weapons) Order 1968, SI 1968/1200, arts 2, 3; and the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999, SI 1999/1750, art 6(1), Sch 5 para 3(1), (2)(a)). As to the meaning of 'transfer' see PARA 636 note 1 ante. As to powers of search see PARA 693 post; as to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to cancel firearm and shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post. The Firearms Act 1968 s 5 (as amended) creates an offence of strict liability: *R v Bradish* [1990] 1 QB 981, [1990] 1 All ER 460, CA. As to strict liability see PARA 15 ante.

6 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

7 Firearms Act 1968 s 5(1)(a) (substituted by the Firearms (Amendment) Act 1988 s 1(2)).

If it appears to the Secretary of State that the provisions of the Firearms Act 1968 relating to prohibited weapons or ammunition should apply to: (1) any firearm (not being an air weapon) which is not for the time being specified in s 5(1) (as amended), was not lawfully on sale in Great Britain in substantial numbers at any time before 1988 and appears to him to be specially dangerous or wholly or partly composed of material making it not readily detectable by apparatus used for detecting metal objects; or (2) any air rifle, air gun or air pistol which is not for the time being specified in s 5(1) (as amended) but appears to him to be specially dangerous, he may by order add it to the weapons or ammunition specified in s 5(1) (as amended) whether by altering the description of any weapon or ammunition for the time being there specified or otherwise: Firearms (Amendment) Act 1988 s 1(4)(a), (c) (amended by the Anti-social Behaviour Act 2003 ss 39(1), (6)(a), 92, Sch 3). The power to make such an order is exercisable by statutory instrument; and no such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: Firearms (Amendment) Act 1988 s 1(5).

The following cases decided under the Firearms Act 1968 s 5(1)(a) (as originally enacted) may still have some relevance to the new provisions: *R v Pannell* (1982) 76 Cr App Rep 53, CA (although the three weapons were in parts, the defendant was in possession of all the parts of each of three weapons and was therefore in possession of the weapons which were still prohibited weapons since nothing had been done to convert them into weapons of a different kind); *R v Clarke* [1986] 1 All ER 846, 82 Cr App Rep 308, CA (a firearm which is designed so as to be capable of continuous fire is a prohibited weapon even though an essential component, such as the trigger, is missing; but note that it is no longer necessary for fire to be continuous (see the Firearms Act 1968 s 5(1)(a) (as substituted))).

In so far as these cases are concerned with conversion see now the Firearms (Amendment) Act 1988 s 7(1) (as amended), which provides that any weapon which: (a) has at any time, whether before or after 27 February 1997 (ie the date on which the Firearms (Amendment) Act 1997 received Royal Assent), been a prohibited weapon within the meaning of the Firearms Act 1968 s 5(1), (1A) (as added); and (b) is not a self-loading or pump-action smooth-bore gun which has at any such time been such a weapon by reason only of having had a barrel of less than 24 inches in length, is to be treated as a prohibited weapon notwithstanding anything done for the purposes of converting it into a weapon of a different kind: Firearms (Amendment) Act 1988 s 7(1) (amended by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 para 16).

The test in head (1) in the text is an objective one; the intention of the designer or adaptor is irrelevant; a weapon that is capable of burst-fire, albeit only in expert hands, falls within head (1) in the text, notwithstanding that the designer had not intended it to be used in such a manner: *R v Law* [1999] Crim LR 837, CA.

'Prohibited weapons' and 'prohibited ammunition' are weapons and ammunition specified in the Firearms Act 1968 s 5(1), (1A) (as added) (including, in the case of ammunition, any missiles falling within s 5(1A)(g) (as added) (see PARA 663 post)): see Firearms Act 1968 s 5(2) (definitions applied by virtue of the Firearms (Amendment) Act 1988 s 25(1)). Any component part of a prohibited weapon is a prohibited weapon: Firearms Act 1968 s 57(1)(b); *R v Clarke* [1986] 1 All ER 846, 82 Cr App Rep 308, CA.

For the scheme to compensate those who surrendered weapons which became prohibited weapons by the amendments made by the Firearms (Amendment) Act 1988 and Firearms (Amendment) Act 1997 and of which they had been lawfully entitled to (and had been) in possession at a specified time before the amendment see the Firearms (Amendment) Act 1988 s 21; and the Firearms (Amendment) Act 1997 ss 15-18.

8 'Self-loading' and 'pump-action', in relation to any weapon, mean respectively that it is designed or adapted (otherwise than as mentioned in the Firearms Act 1968 s 5(1)(a) (as substituted) (see note 7 supra)) so that it is automatically reloaded or that it is so designed or adapted that it is reloaded by the manual operation of the fore-end or forestock of the weapon: s 57(2A) (added by the Firearms (Amendment) Act 1988 s 25(2)).

9 Firearms Act 1968 s 5(1)(ab) (added by the Firearms (Amendment) Act 1988 s 1(2); and amended by the Firearms (Amendment) Act 1997 s 1(3)).

10 For the meaning of 'air weapon' see PARA 633 ante.

11 For the purposes of the Firearms Act 1968 s 5(1)(aba), (ac) (as added), 'muzzle-loading gun' means a gun which is designed to be loaded at the muzzle end of the barrel or chamber with a loose charge and separate ball (or other missile): s 5(9) (added by the Firearms (Amendment) Act 1997 s 1(6)).

12 Firearms Act 1968 s 5(1)(aba) (added by the Firearms (Amendment) Act 1997 s 1(2); and amended by the Firearms (Amendment) (No 2) Act 1997 ss 1, 2(7), Schedule). For these purposes, any detachable, folding, retractable or other movable butt-stock must be disregarded in measuring the length of any firearm: Firearms Act 1968 s 5(8) (added by the Firearms (Amendment) Act 1997 s 1(1), (6)). As to the measurement of the length of the barrel of a firearm for the purposes of the Firearms Act 1968 generally see PARA 632 note 1 ante.

13 Ibid s 5(1)(ac) (added by the Firearms (Amendment) Act 1988 s 1(2); and amended by the Firearms (Amendment) Act 1997 ss 1(4), 52, Sch 3). For these purposes, any detachable, folding, retractable or other movable butt-stock must be disregarded in measuring the length of any firearm: Firearms Act 1968 s 5(8) (as added: see note 12 supra).

14 For the meaning of 'revolver' see PARA 632 note 2 ante.

15 Firearms Act 1968 s 5(1)(ad) (added by the Firearms (Amendment) Act 1988 s 1(1), (2); and amended by the Firearms (Amendment) Act 1997 s 1(5)).

16 Firearms Act 1968 s 5(1)(ae) (added by the Firearms (Amendment) Act 1988 s 1(1), (2)).

17 Firearms Act 1968 s 5(1)(af) (added by the Anti-social Behaviour Act 2003 s 39(1), (3)). As from 20 January 2004 (ie the date on which the Anti-social Behaviour Act 2003 s 39(3) came into force: see the Anti-social Behaviour Act 2003 (Commencement No 1 and Transitional Provisions) Order 2003, SI 2003/3300), if a person has in his possession an air rifle, air gun or air pistol of the kind described in the Firearms Act 1968 s 5(1)(af) (as added):

- 140 (1) the provisions of s 5(1) do not prevent the person's continued possession of the air rifle, air gun or air pistol (Anti-social Behaviour Act 2003 s 39(4)(a));
- 141 (2) the Firearms Act 1968 s 1 (see PARA 634 ante) applies (Anti-social Behaviour Act 2003 s 39(4)(b)); and
- 142 (3) a chief officer of police may not refuse to grant or renew, and may not revoke or partially revoke, a firearm certificate under the Firearms Act 1968 Pt II (ss 26A-45) (as amended) on the ground that the person does not have a good reason for having the air rifle, air gun or air pistol in his possession (Anti-social Behaviour Act 2003 s 39(4)(c)).

This does not, however, apply to possession in the circumstances described in the Firearms Act 1968 s 8 (authorised dealing: see PARA 647 ante): Anti-social Behaviour Act 2003 s 39(5). As to the requirement for a firearm certificate see PARA 634 ante.

18 Firearms Act 1968 s 5(1)(b). The emission of electricity from a hand-held device, known as a 'lightning strike', is the discharge of something from it and therefore the device is capable of being a weapon designed to discharge a noxious thing, electricity being accepted before the courts as properly described, having regard to its effect on the victim, as a noxious thing, contrary to s 5(1)(b) (*Flack v Baldry* [1988] 1 All ER 673, [1988] 1 WLR 393, HL), even if it does not work properly because of an unknown fault (*Brown v DPP* (1992) Times, 27 March, DC). Water pistols are not weapons designed or adapted for the discharge of a noxious liquid (*R v Titus* [1971] Crim LR 279), nor is a detergent bottle containing acid (*R v Formosa, R v Upton* [1991] 2 QB 1, [1991] 1 All ER 131, CA). An offence is not committed by virtue of the Firearms Act 1968 s 5(1)(b) in respect of an appropriately authorised person: see s 54(3A), (3B) (as added); and PARA 634 ante. See also PARA 634 note 1 ante.

19 Ibid s 5(1A) (s 5(1A) added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 3(1)).

20 Firearms Act 1968 s 5(1A)(a) (as added: see note 19 supra).

21 Ie not falling within ibid s 5(1)(c) (as substituted): see PARA 663 post.

22 Ibid 1968 s 5(1A)(c) (as added: see note 19 supra). The text refers to any launcher or other projecting apparatus which is designed to be used with any rocket or ammunition falling under s 5(1A)(b) (as added) (see PARA 663 post) or with ammunition which would fall within s 5(1A)(b) (as added) but for its being ammunition falling within s 5(1)(c) (as substituted) (see PARA 663 post).

## UPDATE

## **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **661 Prohibited weapons**

NOTES 3-5--See *R v Ashton* [2007] All ER (D) 19 (Feb) (immaterial that component part of prohibited weapon came from deactivated weapon).

NOTE 18--See *R v Deyemi* [2007] All ER (D) 369 (Oct), CA (possession of stun gun crime of strict liability).

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## **662. Penalties in relation to prohibited weapons.**

For most offences<sup>1</sup> committed in relation to prohibited weapons<sup>2</sup> a person found guilty is liable on conviction on indictment to a term not exceeding ten years or to a fine or to both<sup>3</sup>. However, if the offence was committed on or after 22 January 2004<sup>4</sup> by an offender aged 16 or over<sup>5</sup> the court must impose an appropriate custodial sentence<sup>6</sup>, or order for detention, for a term of at least the required minimum term, with or without a fine, unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so<sup>7</sup>. The 'required minimum term' is five years if the offender was aged 18 or over when he committed the offence, and three years if he was under 18 at that time<sup>8</sup>.

For other offences committed in relation to prohibited weapons<sup>9</sup>, a person found guilty is liable on conviction on indictment to a term not exceeding ten years or to a fine or to both, or on summary conviction to a term not exceeding six months<sup>10</sup> or to a fine not exceeding the statutory maximum<sup>11</sup> or to both<sup>12</sup>.

1    le an offence under the Firearms Act 1968 s 5(1)(a) (as substituted), s 5(1)(ab), (aba), (ac)-(af) (as added) or s 5(1A)(a) (as added) (see PARA 661 ante).

2    For the meaning of 'prohibited weapons' see PARA 661 note 7 ante.

3    Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA.

4    le the date on which the Firearms Act 1968 s 51A (as added) came into force (see the Criminal Justice Act 2003 (Commencement No 2 and Saving Provisions) Order 2004, SI 2004/81, art 3(1), (2)(b)): Firearms Act 1968 s 51A(1)(b) (s 51A added by the Criminal Justice Act 2003 s 287). Where an offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it is taken for the purposes of the Firearms Act 1968 s 51A (as added) to have been committed on the last of those days: s 51A(3) (as so added).

5    The Secretary of State may by order substitute the age of 18 for that of 16: Criminal Justice Act 2003 s 291(1)(a).

6    'Appropriate custodial sentence' means, in the case of an offender who is aged 18 or over when convicted, a sentence of imprisonment, and in the case of an offender who is aged under 18 at that time, a sentence of detention under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78): Firearms Act 1968 s 51A(4) (as added: see note 4 supra). Pending the implementation of the reduction of the minimum age for the imposition of imprisonment from 21 to 18 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 11) the imposition of a sentence of imprisonment on an offender aged 18 or over but under 21 when convicted is prohibited. A judge is not required by s 51A (as added) to impose a sentence of detention in a young offender institution of the required minimum term on such an offender; the words 'or detention in a young offender institution' cannot be read into s 51A(4) (as added) as an alternative to imprisonment: *R v Campbell* [2006] EWCA Crim 726, [2006] All ER (D) 137 (Mar).

7    Firearms Act 1968 s 51A(1)(a), (2) (as added: see note 4 supra). Section 51A (as added) only applies if the indictment has a specific count alleging an offence under s 5 (as amended): *A-G's Reference (No 114 of 2004)*, *R v McDowell* [2004] EWCA Crim 2954, [2005] Crim LR 142. As for 'exceptional circumstances' see *R v Jordan*, *R v Alleyne*, *R v Redfern* [2004] EWCA Crim 3291, [2005] Crim LR 312 (cases where 'exceptional circumstances' arose would be rare; defendant thought that the firearm was a replica; Court of Appeal very doubtful that this could be an exceptional circumstance for the purpose of the Firearms Act 1968 s 51A (as added)). If the imposition of the mandatory minimum sentence would result in an arbitrary and disproportionate sentence this

amounts to 'exceptional circumstances': *R v Rehman*, *R v Wood* [2005] EWCA Crim 2056, (2005) Times, 27 September. Circumstances in combination may amount to 'exceptional circumstances': see *R v Rehman*, *R v Wood* supra. The fact that an offender was unfit to serve a five-year sentence or was of very advanced years may be relevant to the issue of 'exceptional circumstances': *R v Rehman*, *R v Wood* supra. See also *R v McEaney* [2005] EWCA Crim 431, [2005] Crim LR 579; *R v Blackall* [2005] EWCA Crim 1128, [2005] Crim LR 875; *R v Evans* [2005] EWCA Crim 1811, [2005] Crim LR 876; *R v Mehmet* [2005] EWCA Crim 2074, [2005] Crim LR 877; *R v Evans* [2006] EWCA Crim 87, [2006] All ER (D) 387 (Mar). Nothing in the Firearms Act 1968 s 51A (as added) prevents a court from making a hospital order under the Mental Health Act 1983 s 37(1): see s 37(1A) (as added); and MENTAL HEALTH vol 30(2) (Reissue) PARA 491.

8 Firearms Act 1968 s 51A(5) (as added: see note 4 supra). Section 51A (as added) does not permit a discount for a plea of guilty: *R v Jordan*, *R v Alleyne*, *R v Redfern* [2004] EWCA Crim 3291, [2005] Crim LR 312, CA.

9 Is an offence under the Firearms Act 1968 s 5(1)(b) or s 5(1A)(c) (as added) (see PARA 661 ante).

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

11 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

12 Firearms Act 1968 Sch 6 Pt I (as amended: see PARA 634 note 15 ante).

## UPDATE

### 630-698 Firearms, Ammunition and Air Weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 662 Penalties in relation to prohibited weapons

TEXT AND NOTES 4-8--1968 Act s 51A also applies where an individual is convicted of an offence under any of the provisions of the 1968 Act listed in s 51A(1A) in respect of a firearm or ammunition specified in s 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af) or (c) or s 5(1A)(a): s 51A(a)(iii) (added by Violent Crime Reduction Act 2006 s 30(2)). The provisions are (1) the 1968 Act 16 (possession of firearm with intent to injure); (2) s 16A (possession of firearm with intent to cause fear of violence); (3) s 17 (use of firearm to resist arrest); (4) s 18 (carrying firearm with criminal intent); (5) s 19 (carrying a firearm in a public place); (6) s 20(1) (trespassing in a building with firearm): s 51A(1A) (added by 2006 Act s 30(3)). The 2006 Act s 30 applies only to offences committed after the commencement of s 30 (ie 6 April 2007: see SI 2007/858): 2006 Act s 30(5).

NOTE 6--In relation to any time before the coming into force of the Criminal Justice and Court Services Act 2000 s 61 'appropriate custodial sentence' means, in the case of an offender who is aged 21 or over when convicted, a sentence of imprisonment, in the case of an offender who is aged at least 18 but under 21 at that time, a sentence of detention under the Powers of Criminal Courts (Sentencing) Act 2000 s 96 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 85), and in the case of an offender who is aged under 18 at that time, a sentence of detention under s 91 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78): 1968 Act s 51A(4) (modified by the Firearms (Sentencing) (Transitory Provisions) Order 2007, SI 2007/1324).

NOTE 8--The court must ensure that, where a consecutive term of imprisonment is to be served for another offence and the total term is reduced according to the principle of totality, the overall sentence does not render nugatory the mandatory minimum sentence for the firearms offence: *R v Raza* [2009] EWCA Crim 1413, [2010] Cr App Rep (S) 354, [2009] All ER (D) 253 (Nov).

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### **663. Prohibited ammunition.**

A person commits an offence if, without the authority of the Secretary of State<sup>1</sup>:

784 (1) he has in his possession, or purchases or acquires<sup>2</sup>, or manufactures, sells or transfers<sup>3</sup> any cartridge with a bullet designed to explode on or immediately before impact, any ammunition<sup>4</sup> containing or designed or adapted to contain any such noxious liquid, gas or other thing<sup>5</sup> and, if capable of being used with a firearm<sup>6</sup> of any description, any grenade, bomb (or other like missile), or rocket or shell designed to explode as aforesaid<sup>7</sup>;

785 (2) he has in his possession, or purchases or acquires or sells or transfers<sup>8</sup>:  
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27. (a) any rocket or ammunition not falling within head (1) above<sup>9</sup> which consists in or incorporates a missile designed to explode on or immediately before impact and is for military use<sup>10</sup>;

28. (b) any ammunition for military use which consists in or incorporates a missile designed so that a substance contained in the missile will ignite on or immediately before impact<sup>11</sup>;

29. (c) any ammunition for military use which consists in or incorporates a missile designed, on account of its having a jacket and hard-core, to penetrate armour plating, armour screening or body armour<sup>12</sup>;

30. (d) any ammunition which incorporates a missile designed or adapted to expand on impact<sup>13</sup>; and

31. (e) anything which is designed to be projected as a missile from any weapon and is designed to be, or has been, incorporated in any ammunition falling within any of heads (a) to (d) above or any ammunition which would fall within any of those heads but for its being specified in head (1) above<sup>14</sup>.

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1 As to the issue of such authorities see PARA 665 post. As to the exemptions from the requirement of an authority see PARA 666 post.

2 For the meaning of 'acquire' see PARA 634 note 3 ante.

3 Firearms Act 1968 s 5(1) (amended by the Transfer of Functions (Prohibited Weapons) Order 1968, SI 1968/1200; and the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999, SI 1999/1750, art 6, Sch 5 para 3(1), (2)(a)). As to the meaning of 'transfer' see PARA 636 note 1 ante. As to powers of search see PARA 693 post; as to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to cancel firearm and shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post. The Firearms Act 1968 s 5 (as amended) creates an offence of strict liability: *R v Bradish* [1990] 1 QB 981, [1990] 1 All ER 460, CA. As to strict liability see PARA 15 ante.

4 For the meaning of 'ammunition' see PARA 634 note 10 ante.

5 Ie any such noxious thing as is mentioned in the Firearms Act 1968 s 5(1)(b) (see PARA 661 ante).

6 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.



7 See the Firearms Act 1968 s 5(1)(c) (substituted by the Firearms (Amendment) Act 1988 s 1(3)). If it appears to the Secretary of State that the provisions of the Firearms Act 1968 relating to prohibited weapons or ammunition should apply to any ammunition which is not for the time being specified in s 5(1) (as amended) but appears to him to be specially dangerous, he may by order add it to the weapons or ammunition specified in s 5(1) (as amended) whether by altering the description of any weapon or ammunition for the time being there specified or otherwise: Firearms (Amendment) Act 1988 s 1(4). For the meanings of 'prohibited weapons' and 'prohibited ammunition' see PARA 661 note 7 ante.

8 Firearms Act 1968 s 5(1A) (added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 3(1)).

9 Is any rocket or ammunition not falling within the Firearms Act 1968 s 5(1)(c) (as substituted) (see the text and note 7 supra).

10 Ibid s 5(1A)(b) (as added: see note 8 supra). For the purposes of s 5 (as amended) and s 5A (as added) (see PARA 666 post), any rocket or ammunition which is designed to be capable of being used with a military weapon is to be taken to be for military use: s 5(7)(a) (s 5(7) added by Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 3(3)).

11 Firearms Act 1968 s 5(1A)(d) (as added: see note 8 supra). For the purposes of s 5 (as amended) and s 5A (as added) (see PARA 666 post), references to a missile designed so that a substance contained in the missile will ignite on or immediately before impact include references to any missile containing a substance that ignites on exposure to air: s 5(7)(b) (as added: see note 10 supra).

12 Ibid s 5(1A)(e) (as added: see note 8 supra).

13 Ibid s 5(1A)(f) (s 5(1A) as added (see note 8 supra); and s 5(1A)(f) substituted by the Firearm (Amendment) Act 1997 s 9). For the purposes of the Firearms Act 1968 s 5 (as amended) and s 5A (as added) (see PARA 666 post), references to a missile's expanding on impact include references to its deforming in any predictable manner on or immediately after impact: s 5(7)(c) (as added: see note 10 supra).

14 Ibid s 5(1A)(g) (as added: see note 8 supra).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **663 Prohibited ammunition**

TEXT AND NOTES--As to the restriction on sale and purchase of primers see PARA 663A.

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### **663A. Restriction on sale and purchase of primers.**

The following provisions<sup>1</sup> apply to a cap-type primer designed for use in metallic ammunition for a firearm<sup>2</sup>.

It is an offence for a person to sell to another either (1) a primer to which these provisions apply, (2) an empty cartridge case incorporating such a primer, unless that other person falls within the provision below<sup>3</sup>. A person falls within this provision if (a) he is a registered firearms dealer; (b) he sells by way of any trade or business either primers or empty cartridge cases incorporating primers, or both; (c) he produces a certificate authorising him to possess a firearm of a relevant kind<sup>4</sup>; (d) he produces a certificate authorising him to possess ammunition of a relevant kind<sup>5</sup>; (e) he shows that he is a person in the service of Her Majesty who is entitled<sup>6</sup> to acquire a primer to which these provisions apply; (f) he shows that he is entitled, by virtue of the Firearms Act 1968, the Firearms (Amendment) Act 1988 or any other enactment<sup>7</sup> and otherwise than by virtue of being a person in the service of Her Majesty, to have possession, without a certificate, of a firearm of a relevant kind or of ammunition of a relevant kind; (g) he produces a certificate authorising another person to have possession of such a firearm, or of such ammunition, together with that other person's authority to purchase the primer or empty cartridge case on his behalf; or (h) he shows that he is authorised by regulations made by the Secretary of State to purchase primers or cartridge cases of the type in question<sup>8</sup>.

It is an offence for a person to buy or to attempt to buy (i) a primer to which these provisions apply, or (ii) an empty cartridge case incorporating such a primer, unless he falls within the provision below<sup>9</sup>. A person falls within this provision if (A) he is a registered firearms dealer; (B) he sells by way of any trade or business either primers or empty cartridge cases incorporating primers, or both; (C) he holds a certificate authorising him to possess a firearm of a relevant kind; (D) he holds a certificate authorising him to possess ammunition of a relevant kind; (E) he is a person in the service of Her Majesty who is entitled<sup>10</sup> to acquire a primer to which these provisions apply; (F) he is entitled, by virtue of the Firearms Act 1968, the Firearms (Amendment) Act 1988 or any other enactment and otherwise than by virtue of being a person in the service of Her Majesty, to have possession, without a certificate, of a firearm of a relevant kind or of ammunition of a relevant kind; (G) he is in possession of a certificate authorising another person to have possession of such a firearm, or of such ammunition, and has that other person's authority to purchase the primer or empty cartridge case on his behalf; or (H) he is authorised by regulations made by the Secretary of State to purchase primers or cartridge cases of the type in question<sup>11</sup>.

An offence under the above provisions is punishable, on summary conviction in England and Wales, with imprisonment for a term not exceeding 51 weeks or with a fine not exceeding level 5 on the standard scale<sup>12</sup>, or with both<sup>13</sup>.

1    Ie the Violent Crime Reduction Act 2006 s 35.

2    Ibid s 35(1).

3    Ie within ibid s 35(3): s 35(2).

4 In *ibid* s 35 'firearm of a relevant kind' means a firearm other than a shot gun, an air weapon or a firearm chambered for rim-fire ammunition: s 35(11).

5 In *ibid* s 35 'ammunition of a relevant kind' means ammunition for a firearm of a relevant kind: s 35(11).

6 Under *ibid* s 35(6).

A person who is in the service of Her Majesty is entitled to acquire a primer to which s 35 applies if (1) he is duly authorised in writing to acquire firearms and ammunition for the public service; or (2) he is a person who is authorised to purchase a firearm or ammunition by virtue of a certificate issued in accordance with the Firearms Act 1968 s 54(2)(b) (certificates for persons in naval, military or air service of Her Majesty: see PARA 634): 2006 Act s 35(6).

7 In *ibid* s 35 'enactment' includes an enactment passed after the passing of the Violent Crime Reduction Act 2006 (ie 8 November 2006): s 35(11).

8 *Ibid* s 35(3). See further NOTE 11.

9 *Ie* within *ibid* s 35(5): s 35(4).

10 Under *ibid* s 35(6).

11 *Ibid* s 35(5).

The power of the Secretary of State to make regulations for the purposes of head (h) or (H) in the TEXT is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 35(9). That power includes power (1) to make different provision for different cases; (2) to make provision subject to such exemptions and exceptions as the Secretary of State thinks fit; and (3) to make such incidental, supplemental, consequential and transitional provision as he thinks fit: s 35(10).

12 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

13 2006 Act s 35(7). In relation to an offence committed before the commencement of the Criminal Justice Act 2003 s 281(5), the reference to 51 weeks is to be read as a reference to six months: 2006 Act s 35(8).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(ii) Prohibited Weapons and Ammunition/664. Penalties in relation to prohibited ammunition.

#### **664. Penalties in relation to prohibited ammunition.**

For most offences<sup>1</sup> committed in relation to prohibited ammunition<sup>2</sup> a person found guilty is liable on conviction on indictment to a term of imprisonment not exceeding ten years or to a fine or to both, or on summary conviction to a term not exceeding six months<sup>3</sup> or to a fine not exceeding the statutory maximum<sup>4</sup> or to both<sup>5</sup>.

For other offences committed in relation to prohibited ammunition<sup>6</sup> a person found guilty is liable on conviction on indictment to a term of imprisonment not exceeding ten years or to a fine or to both<sup>7</sup>. However, if the offence was committed on or after 22 January 2004<sup>8</sup> by an offender aged 16 or over<sup>9</sup> the court must impose an appropriate custodial sentence<sup>10</sup>, or order for detention, for a term of at least the required minimum term<sup>11</sup>, with or without a fine, unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so<sup>12</sup>.

1    le an offence under the Firearms Act 1968 s 5(1A)(b), (d)-(g) (as added) (see PARA 663 ante).

2    For the meaning of 'prohibited ammunition' see PARA 661 note 7 ante.

3    As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4    As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5    Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA. As to the limitation period for summary proceedings see PARA 696 post.

6    le under the Firearms Act 1968 s 5(1A)(a) (see PARA 662 ante).

7    Ibid Sch 6 Pt I (as amended: see PARA 634 note 15 ante).

8    le the date on which *ibid* s 51A (as added) came into force (see the Criminal Justice Act 2003 (Commencement No 2 and Saving Provisions) Order 2004, SI 2004/81, art 3(1), (2)(b)): Firearms Act 1968 s 51A(1)(b) (s 51A added by the Criminal Justice Act 2003 s 287). Where an offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it is taken for the purposes of s 51A (as added) to have been committed on the last of those days: Firearms Act 1968 s 51A(3) (as so added).

9    The Secretary of State may by order substitute the age of 18 for that of 16: Criminal Justice Act 2003 s 291(1)(a).

10   For the meaning of 'appropriate custodial sentence' see PARA 662 note 6 ante.

11   For the meaning of 'required minimum term' see PARA 662 ante.

12   Firearms Act 1968 s 51A(1)(a), (2) (as added: see note 8 supra). See also the cases cited in PARA 662 note 7 ante. As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 post.

#### **UPDATE**

## **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **664 Penalties in relation to prohibited ammunition**

TEXT AND NOTES--As to the penalties relating to the restriction on sale and purchase of primers see PARA 663A.

TEXT AND NOTES 8, 12--1968 Act s 51A(1) amended, s 51A(1A) added: Violent Crime Reduction Act 2006 s 30(2), (3), Sch 5. See further PARA 662.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(ii) Prohibited Weapons and Ammunition/665. Authority for prohibited weapons and ammunition.

### **665. Authority for prohibited weapons and ammunition.**

An authority given by the Secretary of State<sup>1</sup> in relation to prohibited weapons and ammunition<sup>2</sup> must be in writing and is subject to the conditions specified in it<sup>3</sup>. The conditions of the authority must include such as the Secretary of State<sup>4</sup>, having regard to the circumstances of each particular case, thinks fit to impose for the purpose of securing that the prohibited weapon or ammunition to which the authority relates will not endanger the public safety or the peace<sup>5</sup>. It is an offence for a person to whom an authority has been so given to fail to comply with any condition of the authority<sup>6</sup>; and a person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>8</sup>.

1 Or, by virtue of provision made under the Scotland Act 1998 s 63, the Scottish Ministers.

2 For the meanings of 'prohibited weapons' and 'prohibited ammunition' see PARA 661 note 7 ante.

3 See the Firearms Act 1968 s 5(3) (amended by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999, SI 1999/1750, art 6(1), Sch 5 para 3(1), (2)(c)).

4 Or the Scottish Ministers.

5 Firearms Act 1968 s 5(4) (amended by the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999, SI 1999/1750, art 6(1), Sch 5 para 3(1), (2)(d)). The Secretary of State may at any time, if he thinks fit, revoke the authority given to a person by notice in writing requiring him to deliver up the authority to such person as may be specified in the notice within 21 days from the date of the notice; and it is an offence for him to fail to comply with that requirement: Firearms Act 1968 s 5(6). A person guilty of such an offence is liable to a fine not exceeding level 3 on the standard scale: s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. Any notice required or authorised by the Firearms Act 1968 to be given to a person may be sent by registered post or by the recorded delivery service in a letter addressed to him at his last or usual place of abode or, in the case of a registered firearms dealer, at any place of business in respect of which he is registered: s 56. See PARA 634 note 1 ante.

6 Ibid s 5(5).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

8 Firearms Act 1968 Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the limitation period for summary proceedings see PARA 696 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(ii) Prohibited Weapons and Ammunition/666. Special exemptions.

#### **666. Special exemptions.**

The authority of the Secretary of State<sup>1</sup> is not required in respect of any firearm<sup>2</sup> which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon<sup>3</sup>, a muzzle-loading gun or a firearm designed as signalling apparatus<sup>4</sup>, for a person:

- 786 (1) to have in his possession, or to purchase or acquire<sup>5</sup>, or to sell or transfer<sup>6</sup>, a slaughtering instrument<sup>7</sup> if he is authorised by a firearm certificate (or a visitor's firearm permit)<sup>8</sup> to have the instrument in his possession, or to purchase or acquire it; or to have a slaughtering instrument in his possession if he is entitled<sup>9</sup> to have it in his possession without a firearm certificate (or a visitor's firearm permit)<sup>10</sup>;
- 787 (2) to have in his possession, or to purchase or acquire, or to sell or transfer, a firearm if he is authorised by a firearm certificate (including a visitor's firearm permit) to have the firearm in his possession, or to purchase or acquire it, subject to a condition that it is only for use in connection with the humane killing of animals<sup>11</sup>;
- 788 (3) to have in his possession, or to purchase or acquire, or to sell or transfer, a shot pistol<sup>12</sup> if he is authorised by a firearm certificate (including a visitor's firearm permit) to have the shot pistol in his possession, or to purchase or acquire it, subject to a condition that it is only for use in connection with the shooting of vermin<sup>13</sup>;
- 789 (4) to have a firearm in his possession at an athletic meeting for the purpose of starting races at that meeting; or to have in his possession, or to purchase or acquire, or to sell or transfer, a firearm if he is authorised by a firearm certificate (including a visitor's firearm permit) to have the firearm in his possession, or to purchase or acquire it, subject to a condition that it is only for use in connection with starting races at athletic meetings<sup>14</sup>;
- 790 (5) to have in his possession a firearm which was acquired as a trophy of war before 1 January 1946 if he is authorised by a firearm certificate (including a visitor's firearm permit) to have it in his possession<sup>15</sup>;
- 791 (6) to have in his possession, or to purchase or acquire, or to sell or transfer, a firearm which was manufactured before 1 January 1919 and is of a specified description<sup>16</sup>, if he is authorised by a firearm certificate (including a visitor's firearm permit) to have the firearm in his possession, or to purchase or acquire it, subject to a condition that he does so only for the purpose of its being kept or exhibited as part of a collection<sup>17</sup>;
- 792 (7) to have in his possession, or to purchase or acquire, or to sell or transfer, a firearm which is of particular rarity, aesthetic quality or technical interest, or is of historical importance, if he is authorised by a firearm certificate (including a visitor's firearm permit) to have the firearm in his possession subject to a condition requiring it to be kept and used only at a designated<sup>18</sup> place<sup>19</sup>.

The authority of the Secretary of State<sup>20</sup> is not required, in respect of certain prohibited weapons or ammunition<sup>21</sup>, for a person to have in his possession, or to purchase or acquire, or



to sell or transfer, any firearm, weapon or ammunition designed or adapted for the purpose of tranquillising or otherwise treating any animal, if he is authorised by a firearm certificate (including a visitor's firearm permit) to possess, or to purchase or acquire, the firearm, weapon or ammunition subject to a condition restricting its use to use in connection with the treatment of animals<sup>22</sup>.

The authority of the Secretary of State<sup>23</sup> is not required, in respect of certain prohibited weapons and ammunition<sup>24</sup>, for:

- 793 (a) a person to have in his possession, or to purchase, acquire, sell or transfer, any prohibited weapon or ammunition if he is authorised by a certificate<sup>25</sup> to possess, purchase or acquire that weapon or ammunition subject to a condition that he does so only for the purpose of its being kept or exhibited as part of a collection<sup>26</sup>;
- 794 (b) a person to have in his possession, or to purchase or acquire, any prohibited weapon or ammunition if his possession, purchase or acquisition is exclusively in connection with the carrying on of activities in respect of which that person, or the person on whose behalf he has possession, or makes the purchase or acquisition, is recognised, for the purposes of the law of another member state<sup>27</sup> relating to firearms, as a collector of firearms or a body concerned in the cultural or historical aspects of weapons<sup>28</sup>;
- 795 (c) a person to have in his possession, or to purchase or acquire, or to sell or transfer, any expanding ammunition<sup>29</sup> or the missile for any such ammunition if he is authorised by a firearm certificate or visitor's firearm permit to possess, or purchase or acquire, any expanding ammunition, and the certificate or permit is subject to a condition restricting the use of any expanding ammunition to use in connection with any one or more of the following, namely: (i) the lawful shooting of deer; (ii) the shooting of vermin or, in the course of carrying on activities in connection with the management of any estate, other wildlife; (iii) the humane killing of animals; (iv) the shooting of animals for the protection of other animals or humans<sup>30</sup>;
- 796 (d) a person to have in his possession any expanding ammunition or the missile for any such ammunition if he is entitled<sup>31</sup> to have a slaughtering instrument and the ammunition for it in his possession, and the ammunition or missile in question is designed to be capable of being used with a slaughtering instrument<sup>32</sup>;
- 797 (e) the sale or transfer of any expanding ammunition or the missile for any such ammunition to any person who produces a certificate by virtue of which he is authorised<sup>33</sup> to purchase or acquire it without the authority<sup>34</sup> of the Secretary of State<sup>35</sup>;
- 798 (f) a person carrying on the business of a firearms dealer<sup>36</sup>, or any servant of his, to have in his possession, or to purchase, acquire, sell or transfer, any expanding ammunition or the missile for any such ammunition in the ordinary course of that business<sup>37</sup>.

1 Or, by virtue of provision made under the Scotland Act 1998 s 63, the Scottish Ministers.

2 For the meaning of 'firearm' see PARA 630 ante; definition applied by virtue of the Firearms (Amendment) Act 1997 s 50(2).

3 For the meaning of 'air weapon' see PARA 633 ante; definition applied by virtue of ibid s 50(2).

4 Ie by virtue of the Firearms Act 1968 s 5(1)(aba) (as added): see PARA 661 ante.

5 For the meaning of 'acquire' see PARA 634 note 3 ante; definition applied by virtue of the Firearms (Amendment) Act 1997 s 50(2).

6 As to the meaning of 'transfer' see PARA 636 note 1 ante; definition applied by virtue of ibid s 50(2).

7 For the meaning of 'slaughtering instrument' see PARA 649 note 3 ante; definition applied by virtue of *ibid* s 50(2).

8 For the purposes of *ibid* ss 2-8 (see the text and notes 15-22 *infra*), any reference to a firearm certificate includes a reference to a visitor's firearm permit (see PARA 655 ante): s 1(8). For the meaning of 'firearm certificate' see PARA 634 note 8 ante; definition applied by virtue of s 50(2).

9 *Ie* under the Firearms Act 1968 s 10 (see PARA 649 ante).

10 Firearms (Amendment) Act 1997 s 2.

11 *Ibid* s 3.

12 For these purposes, 'shot pistol' means a smooth-bored gun which is chambered for .410 cartridges or 9 mm rim-fire cartridges: *ibid* s 4(2).

13 *Ibid* s 4(1).

14 *Ibid* s 5.

15 *Ibid* s 6.

16 For these purposes, the Secretary of State may by order made by statutory instrument specify a description of firearm if it appears to him that firearms of that description were manufactured before 1 January 1919, and ammunition for firearms of that type is not readily available: *ibid* s 7(2). As to descriptions of firearms so specified see Firearms (Amendment) Act 1997 (Firearms of Historic Interest) Order 1997, SI 1997/1537.

17 Firearms (Amendment) Act 1997 s 7(1) (amended by the Scotland Act 1998 (Transfer of Functions to Scottish Ministers etc) Order 1999, SI 1999/1750, art 6(1), Sch 5 para 18(1), (7)(a)). The Firearms (Amendment) Act 1997 s 7 (as amended) has effect without prejudice to the Firearms Act 1968 s 58(2) (see PARA 634 note 1 ante): Firearms (Amendment) Act 1997 s 7(4).

18 *Ie* designated by the Secretary of State (or the Scottish Ministers).

19 Firearms (Amendment) Act 1997 s 7(3) (amended by the Scotland Act 1998 (Transfer of Functions to Scottish Ministers etc) Order 1999, SI 1999/1750, art 6(1), Sch 5 para 18(1), (7)(b)). See also the Firearms (Amendment) Act 1997 (Transitional Provisions and Savings) Regulations 1997, SI 1997/1538, reg 2.

20 Or the Scottish Ministers.

21 *Ie* by virtue of the Firearms Act 1968 s 5(1)(aba) (as added), s 5(1)(b) or s 5(1)(c) (as substituted): see PARAS 661, 663 ante.

22 Firearms (Amendment) Act 1997 s 8 (amended by the Scotland Act 1998 (Transfer of Functions to Scottish Ministers etc) Order 1999, SI 1999/1750, art 6(1), Sch 5 para 18(1), (8)).

23 Or the Scottish Ministers.

24 *Ie* prohibited weapons and ammunition by virtue of the Firearms Act 1968 s 5(1A) (as added): see PARAS 661, 663 ante.

25 *Ie* under the Firearms Act 1968.

26 *Ibid* s 5A(1) (s 5A added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 3(4); and amended by the Scotland Act 1998 (Transfer of Functions to Scottish Ministers etc) Order 1999, SI 1999/1750, Sch 5 para 3(1), (3)(a)). No sale or transfer may be made under the Firearms Act 1968 s 5A(1) (as added) except to a person who produces the authority of the Secretary of State (or the Scottish Ministers) under the Firearms Act 1968 s 5 (as amended) for his purchase or acquisition, or who shows that he is, under the Firearms Act 1968 s 5A (as added and amended) or a licence under the Firearms (Amendment) Act 1988 Schedule (see PARA 660 ante), entitled to make the purchase or acquisition without the authority of the Secretary of State (or the Scottish Ministers): Firearms Act 1968 s 5A(2) (as so added and amended).

27 For the meaning of 'another member state' see PARA 655 note 12 ante.

28 Firearms Act 1968 s 5A(3) (as added and amended: see note 26 *supra*).

29 For the purposes of *ibid* s 5A (as added and amended), references to expanding ammunition are references to any ammunition which incorporates a missile which is designed to expand on impact and references to the missile for any such ammunition are references to anything which, in relation to any such ammunition, falls within s 5(1A)(g) (as added) (see PARA 663 ante): s 5A(8) (as added (see note 26 ante); and amended by the Firearms (Amendment) Act 1997 s 52, Sch 3). See also the Firearms Act 1968 s 5(7)(c) (as added); and PARA 663 note 13 ante.

30 *Ibid* s 5A(4) (as added and amended (see note 26 supra); and further amended by the Firearms (Amendment) Act 1997 s 10(2)).

31 *Ie* under the Firearms Act 1968 s 10 (see PARA 649 ante).

32 *Ibid* s 5A(5) (as added and amended: see note 26 supra).

33 *Ie* under *ibid* s 5A(4) (as added and amended) (see the text and note 30 supra).

34 Or the Scottish Ministers.

35 Firearms Act 1968 s 5A(6) (as added (see note 26 supra); and amended by the Scotland Act 1998 (Transfer of Functions to Scottish Ministers etc) Order 1999, SI 1999/1750, Sch 5 para 3(1), (3)(b)).

36 For the meaning of 'firearms dealer' see PARA 636 note 5 ante.

37 Firearms Act 1968 s 5A(7) (as added and amended: see note 26 supra).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(iii) Movement of Firearms and Ammunition/667. Control of movement of firearms and ammunition.

### **(iii) Movement of Firearms and Ammunition**

#### **667. Control of movement of firearms and ammunition.**

The Secretary of State may by order<sup>1</sup> prohibit the removal of firearms<sup>2</sup> or ammunition<sup>3</sup>: (1) from one place to another in Great Britain; or (2) for export from Great Britain, unless the removal is authorised by the chief officer of police for the area<sup>4</sup> from which they are to be removed, and unless such other conditions as may be specified in the order are complied with<sup>5</sup>. The Secretary of State may also by order prohibit the removal of firearms or ammunition from Great Britain to Northern Ireland unless: (a) the removal is authorised by the chief officer of police for the area from which they are to be removed and by the Chief Constable of the Police Service of Northern Ireland; and (b) such conditions as may be specified in the order or imposed by the chief officer of police or the Chief Constable are complied with<sup>6</sup>.

It is an offence to contravene any provision of: (i) an order made under the above provisions<sup>7</sup>; (ii) an order made under the Firearms Act 1920<sup>8</sup>; or (iii) any corresponding Northern Ireland order prohibiting the removal of firearms or ammunition from Northern Ireland to Great Britain<sup>9</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months<sup>10</sup> or, for each firearm or parcel of ammunition in respect of which the offence is committed, to a fine not exceeding level 3 on the standard scale or to both<sup>11</sup>.

1 An order made under the Firearms Act 1968 s 6 (as amended) may apply:

143 (1) either generally to all such removals, or to removals from and to particular localities specified in the order; and

144 (2) either to all firearms and ammunition or to firearms and ammunition of such classes and descriptions as may be so specified; and

145 (3) either to all modes of conveyance or to such modes of conveyance as may be so specified,

but no such order may prohibit the holder of a firearm certificate from carrying with him any firearm or ammunition authorised by the certificate to be so carried: s 6(2). Any such order must be made by statutory instrument and may be varied or revoked by a subsequent order made thereafter by the Secretary of State: s 6(4).

2 For the meaning of 'firearm' see PARA 630 ante. References in any order so made to firearms, without qualification, or to firearms to which *ibid* s 1 (as amended) (see PARA 634 ante) applies, are to be read as including imitation firearms to which the Firearms Act 1982 applies (see PARA 631 ante): s 2(1).

3 For the meaning of 'ammunition' see PARA 634 note 10 ante.

4 For the meaning of 'area' see PARA 646 note 1 ante.

5 Firearms Act 1968 s 6(1) (amended by the Firearms (Amendment) Act 1988 s 20(1), (3)). For the meaning of 'Great Britain' see PARA 45 note 2 ante.

6 Firearms Act 1968 s 6(1A) (added by the Firearms (Amendment) Act 1988 s 20(1), (2); and amended by the Police (Northern Ireland) Act 2000 s 78(2)(a)).

7 At the date at which this volume states the law no such orders were in force.

8 le the Firearms Act 1920 s 9 (repealed), which corresponded to the Firearms Act 1968 s 6 (as amended). See also the Order of the Secretary of State dated 16 November 1922, SR & O 1922/1263 (prohibition on removal of any firearms or ammunition by any form of conveyance to a ship for export except under licence).

9 Firearms Act 1968 s 6(3). A constable may search for and seize any firearms or ammunition which he has reason to believe are being removed, or to have been removed, in contravention of an order made under s 6 (as amended) or of a corresponding Northern Irish order within the meaning of s 6(3)(c); and a person having the control or custody of any firearms or ammunition in course of transit must, on demand by a constable, allow him all reasonable facilities for the examination and inspection thereof and must produce any documents in his possession relating thereto: s 49(1), (2) (amended by the Firearms (Amendment) Act 1988 s 23(3)). A person failing to comply with such a demand is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or, for each firearm or parcel of ammunition in respect of which the offence is committed, to a fine not exceeding level 3 on the standard scale or to both: Firearms Act 1968 s 49(3), Sch 6 Pt I (Sch 6 Pt I as amended: see PARA 634 note 15 ante). As from a day to be appointed the maximum term of three months is increased to 51 weeks: see Sch 6 Pt I (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (10)). At the date at which this volume states the law no such day had been appointed.

In the case of an offence against the Firearms Act 1968 s 6(3) or s 49(3), the court before which the offender is convicted may, if the offender is the owner of the firearms or ammunition, make such order as to the forfeiture of the firearms or ammunition as the court thinks fit: s 51(3), Sch 6 Pt II para 2.

It is also an offence to export small arms the barrels of which have not been duly proved and marked (Gun Barrel Proof Act 1868 s 122(3)) or to import such small arms other than for personal use unless due notice is given to the Proof Masters of the Gunmakers Company of the City of London or the Birmingham Proof House and the barrels duly delivered for proof (s 122(4)). A person guilty of any such offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: s 122(3), (4) (amended by the Gun Barrel Proof Act 1978 s 1(2), Sch 3 para 11). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. For the meanings of 'small arms' and 'barrel' see PARA 129 note 2 ante.

10 As from a day to be appointed this maximum term of imprisonment is increased to 51 weeks: see Sch 6 Pt I (as amended (see PARA 634 note 15 ante); prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (3)). At the date at which this volume states the law no such day had been appointed.

11 Firearms Act 1968 Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the limitation period for summary proceedings see PARA 696 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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#### **(iv) Possession and Acquisition of Firearms by and Supply of Firearms to Minors**

##### **668. Firearms and ammunition generally.**

It is an offence: (1) for a person under the age of 17 to purchase or hire any firearm<sup>1</sup> or ammunition<sup>2</sup>; (2) where a person under the age of 18 is entitled, as the holder of a certificate<sup>3</sup>, to have a firearm in his possession, for that person to use that firearm for a purpose not authorised by the Weapons Directive<sup>4</sup>; (3) for a person under the age of 14 to have in his possession any specified firearm<sup>5</sup> or ammunition<sup>3</sup> except in circumstances where he is entitled<sup>6</sup> to have possession of it without holding a firearm certificate<sup>7</sup>.

It is an offence for a person: (a) to sell or let on hire any firearm or ammunition to a person under the age of 17<sup>8</sup>; (b) to make a gift of or lend any specified firearm or ammunition<sup>9</sup> to a person under the age of 14<sup>10</sup>; or (c) to part with the possession of any specified firearm or ammunition<sup>11</sup> to a person under the age of 14, except in circumstances where he is entitled<sup>12</sup> to have possession of it without holding a firearm certificate<sup>13</sup>. In proceedings for an offence under heads (a) to (c) above it is a defence to prove that the person charged with the offence believed the other person to be of or over the age there mentioned and had reasonable ground for the belief<sup>14</sup>.

A person guilty of any such offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>15</sup> or to a fine not exceeding level 5 on the standard scale<sup>16</sup> or to both<sup>17</sup>, except that a person guilty of an offence under head (2) above is liable to imprisonment for a term not exceeding three months<sup>18</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>19</sup>.

1 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

2 Firearms Act 1968 s 22(1). As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 post. For the meaning of 'ammunition' see PARA 634 note 10 ante.

3 Ie under the Firearms Act 1968. See PARA 634 ante.

4 Ibid s 22(1A) (added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 4(1)). For the purposes of any reference in the Firearms Act 1968 to the use of any firearm or ammunition for a purpose not authorised by the Weapons Directive (ie EC Council Directive 91/477 (OJ L256, 13.09.91, p 51) on the control of the acquisition and possession of weapons), the Directive is to be taken to authorise: (1) the use of a firearm or ammunition as or with a slaughtering instrument; and (2) the use of a firearm and ammunition: (a) for sporting purposes; (b) for the shooting of vermin, or, in the course of carrying on activities in connection with the management of any estate, of other wildlife; and (c) for competition purposes and target shooting outside competitions: see the Firearms Act 1968 s 57(4A) (added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 3(5)); and see also the Firearms Act 1968 s 57(4) (amended by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2923, reg 5(2)). For the meaning of 'slaughtering instrument' see PARA 649 note 3 ante.

5 Ie any firearm or ammunition to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.

6 Ie under ibid s 11(1), (4) (see PARA 650 heads (2), (4) ante) or the Firearms (Amendment) Act 1988 s 15 (see PARA 651 ante).

7 Firearms Act 1968 s 22(2) (amended by the Firearms (Amendment) Act 1988 s 23(4)). For the meaning of 'firearm certificate' see PARA 634 note 8 ante.

8 Firearms Act 1968 s 24(1).

9 Ie any firearm or ammunition to which *ibid* s 1 applies: see PARA 634 ante.

10 *Ibid* s 24(2)(a).

11 Ie any firearm or ammunition to which *ibid* s 1 applies: see PARA 634 ante.

12 Ie under *ibid* s 11(1), (4) (see PARA 650 heads (2), (4) ante) or the Firearms (Amendment) Act 1988 s 15 (see PARA 651 ante).

13 Firearms Act 1968 s 24(2)(b) (amended by the Firearms (Amendment) Act 1988 s 23(4)).

14 Firearms Act 1968 s 24(5). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

15 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks: see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

16 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

17 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to powers of search see PARA 693 post; as to the limitation period for proceedings see PARA 696 post; and as to the court's powers to cancel firearm certificates and order forfeiture or disposal of firearms or ammunition see PARA 697 post.

18 As from a day to be appointed this maximum term of imprisonment is increased to 51 weeks: see *ibid* Sch 6 Pt I (as amended (see PARA 634 note 15 ante); prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (5)). At the date at which this volume states the law no such day had been appointed.

19 Firearms Act 1968 Sch 6 Pt I (as amended: see PARA 634 note 15 ante).

## UPDATE

### 630-698 Firearms, Ammunition and Air Weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 668 Firearms and ammunition generally

TEXT AND NOTES--See also 1968 Act s 24A (added by Violent Crime Reduction Act 2006 s 40(1)) (supplying imitation firearms to minors); and PARA 631.

TEXT AND NOTE 2--It is an offence for a person under the age of 18 to purchase or hire an air weapon or ammunition for an air weapon; (2) for a person under the age of 17 to purchase or hire a firearm or ammunition of any other description: 1968 Act s 22(1) (substituted by the 2006 Act s 33(2)) (in force 1 October 2007: SI 2007/2180).

TEXT AND NOTE 8--It is an offence (1) to sell or let on hire an air weapon or ammunition for an air weapon to a person under the age of 18; (2) to sell or let on hire a firearm or

ammunition of any other description to a person under the age of 17: 1968 Act s 24(1) (substituted by 2006 Act s 33(4)) (in force 1 October 2007: SI 2007/2180).

TEXT AND NOTES 17-19--Entry in 1968 Act Sch 6 Pt 1 relating to ss 22(1), 24(1) amended: Violent Crime Reduction Act 2006 s 33(6).



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### **669. Shot guns and ammunition.**

It is an offence: (1) for a person under the age of 15 to have with him an assembled shot gun<sup>1</sup> except while under the supervision of a person of or over the age of 21, or while the shot gun is so covered with a securely fastened gun cover that it cannot be fired<sup>2</sup>; or (2) for a person to make a gift of a shot gun or ammunition for a shot gun to a person under the age of 15<sup>3</sup>.

In proceedings for an offence under head (2) above it is, however, a defence to prove that the person charged with the offence believed the other person to be of or over the age there mentioned and had reasonable grounds for the belief<sup>4</sup>.

A person guilty of any such offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>5</sup>.

1 For the meaning of 'shot gun' see PARA 632 ante.

2 Firearms Act 1968 s 22(3). As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 post. The Firearms Act 1968 s 46 (as amended) (power of search with warrant: see PARA 693 note 1 ante), s 51(4) (as amended) (limitation period for summary proceedings: see PARA 696 note 1 ante), s 52 (as amended) (forfeiture of firearms etc: see PARA 697 note 1 ante) do not apply to offences under s 22(3).

3 Ibid s 24(3).

4 Ibid s 24(5). As to proof see PARA 668 note 14 ante.

5 Ibid s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

The court by which a person is convicted: (1) of an offence under s 22(3) (see the text and note 2 supra) may make such order as it thinks as to the forfeiture or disposal of any firearm or ammunition found in his possession; (2) of an offence under s 24(3) (see the text and note 3 supra) may make such order as it thinks fit as to the forfeiture or disposal of the shot gun or ammunition in respect of which the offence was committed: s 51(3), Sch 6 Pt II paras 7, 9. As to the limitation period for summary proceedings see PARA 696 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **670. Air weapons and ammunition.**

It is an offence for a person under the age of 17 to have with him an air weapon<sup>1</sup> or ammunition for an air weapon<sup>2</sup>. It is not, however, an offence for a person to have with him an air weapon or ammunition while he is under the supervision of a person of or over the age of 21; but where a person has with him an air weapon on any premises<sup>3</sup> in circumstances where he would be prohibited from having it with him but for this exception, it is an offence: (1) for him to use it for firing any missile beyond those premises; or (2) for the person under whose supervision he is to allow him so to use it<sup>4</sup>. Nor is it an offence for a person of or over the age of 14 to have with him an air weapon or ammunition on private premises with the consent of the occupier<sup>5</sup>; but where a person has with him an air weapon on premises in circumstances where he would be prohibited from having it with him but for this exception, it is an offence for him to use it for firing any missile beyond those premises<sup>6</sup>. It is also not an offence for a person to have with him an air weapon or ammunition at a time when, being a member of an approved<sup>7</sup> rifle club or an approved miniature rifle club, he is engaged as such a member in connection with target shooting, or he is using the weapon or ammunition at a shooting gallery where the only firearms used are either air weapons or miniature rifles not exceeding .23 inch calibre<sup>8</sup>.

It is an offence: (a) to make a gift of an air weapon or ammunition for an air weapon to a person under the age of 17; or (b) to part with the possession of an air weapon or ammunition for an air weapon to a person under the age of 17 except where<sup>9</sup> the person is not prohibited from having it with him<sup>10</sup>. In proceedings for an offence under heads (a) and (b) above it is a defence to prove that the person charged with the offence believed the other person to be of or over the age there mentioned and had reasonable grounds for the belief<sup>11</sup>.

A person guilty of any such offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>12</sup>.

1 For the meaning of 'air weapon' see PARA 633 ante.

2 Firearms Act 1968 s 22(4) (amended by the Anti-social Behaviour Act 2003 s 38(1), (2)). As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 post.

3 As to the meaning of 'premises' see PARA 651 note 8 ante.

4 Firearms Act 1968 s 23(1).

5 Ibid s 23(3) (added by the Anti-social Behaviour Act 2003 s 38(1), (3)).

6 Firearms Act 1968 s 23(4) (added by the Anti-social Behaviour Act 2003 s 38(1), (3)).

7 I.e. approved by the Secretary of State for the purposes of the Firearms Act 1968 s 23 (as amended) or the Firearms (Amendment) Act 1988 s 15 (see PARA 651 ante).

8 Firearms Act 1968 s 23(2) (amended by the Firearms (Amendment) Act 1988 s 23(4); and the Firearms (Amendment) Act 1997 s 52, Sch 2 paras 1, 3, Sch 3).

9 I.e. by virtue of the Firearms Act 1968 s 23 (as amended).

10 Ibid s 24(4) (amended by the Anti-social Behaviour Act 2003 s 38(1), (4)).

11 Firearms Act 1968 s 24(5). As to proof see PARA 668 note 14 ante.

12 Ibid s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

The court by which a person is convicted of an offence under s 22(4) (as amended) (see the text and note 2 supra), s 23(1) (see the text and note 4 supra), s 23(4) (as added) (see the text and note 6 supra) or s 24(4) (as amended) (see the text and note 10 supra) may make such order as it thinks fit as to the forfeiture or disposal of the air weapon or ammunition in respect of which the offence was committed and any firearm or ammunition found in his possession: s 51(3), Sch 6 Pt II paras 7, 8.

Section 46 (as amended) (power of search with warrant: see PARA 693 note 1 post), s 51(4) (as amended) (limitation period for summary proceedings: see PARA 696 note 1 post), s 52 (as amended) (forfeiture of firearms etc: see PARA 697 note 1 post) do not apply to offences under s 23(1) and s 24(4) (as amended) because they are offences relating specifically to air weapons.

## UPDATE

### 630-698 Firearms, Ammunition and Air Weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 670 Air weapons and ammunition

TEXT AND NOTES--The following provisions come into force on 1 October 2007: SI 2007/2180. A person commits an offence if (1) he has with him an air weapon on any premises; and (2) he uses it for firing a missile beyond those premises: Firearms Act 1968 s 21A(1) (added by Violent Crime Reduction Act 2006 s 34(2)). In proceedings against a person for an offence under the 1968 Act s 21A it is a defence for him to show that the only premises into or across which the missile was fired were premises the occupier of which had consented to the firing of the missile (whether specifically or by way of a general consent): s 21A(2) (as added).

As to the requirement for sales of weapons by way of trade or business to be face to face see the 2006 Act s 32; and PARA 636A.

As to the offence of supplying imitation firearms to minors see the 1968 Act s 24A; and PARA 631.

TEXT AND NOTE 1--Now refers to a person under the age of 18: 1968 Act s 22(4) (amended by the 2006 Act s 33(3) (in force 1 October 2007: SI 2007/2180)).

NOTES 2, 10--2003 Act s 38(2), (4) repealed: 2006 Act Sch 5 (in force 1 October 2007: SI 2007/2180).

TEXT AND NOTE 4--Heads (1) and (2) replaced. It is now an offence for the person under whose supervision he is to allow him to use it for firing any missile beyond those premises: 1968 Act s 23(1) (amended by the 2006 Act s 34(3)(a)) (in force 1 October 2007: SI 2007/2180). In proceedings against a person for an offence under the 1968 Act s 23(1) it is a defence for him to show that the only premises into or across which the missile was fired were premises the occupier of which had consented to the firing of the missile (whether specifically or by way of a general consent): s 23(1A) (added by the 2006 Act s 34(3)(b)) (in force 1 October 2007: SI 2007/2180).

TEXT AND NOTE 6--1968 Act s 23(4) omitted: 2006 Act s 34(3)(c), Sch 5 (in force 1 October 2007: SI 2007/2180).

TEXT AND NOTE 9--Heads (a) and (b) now refer to a person under the age of 18: 1968 Act s 24(4) (amended by the 2006 Act s 33(5) (in force 1 October 2007: SI 2007/2180)).

TEXT AND NOTE 12--Entry in 1968 Act Sch 6 Pt 1 relating to ss 22(4), 23(1), 24(4) amended: Violent Crime Reduction Act 2006 ss 33(6), 34(5).

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## **(v) Prevention of Crime and Preservation of Public Safety**

### **671. Supplying firearms or ammunition to persons drunk or of unsound mind.**

It is an offence for a person to sell or transfer<sup>1</sup> any firearm<sup>2</sup> or ammunition<sup>3</sup> to, or to repair, prove or test any firearm or ammunition for, another person whom he knows or has reasonable cause for believing to be drunk or of unsound mind<sup>4</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months<sup>5</sup> or to a fine not exceeding level 3 on the standard scale<sup>6</sup> or to both<sup>7</sup>.

1 As to the meaning of 'transfer' see PARA 636 note 1 ante.

2 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

3 For the meaning of 'ammunition' see PARA 634 note 10 ante.

4 Firearms Act 1968 s 25.

5 As from a day to be appointed this maximum term of imprisonment is increased to 51 weeks: see *ibid* s 51(1), (2), Sch 6 Pt I (as amended (see PARA 634 note 15 ante); prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (6)). At the date at which this volume states the law no such day had been appointed.

6 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 Firearms Act 1968 s Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to powers of search see PARA 693 post; as to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to cancel firearm and shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **672. Possession of firearms by persons previously convicted of crime.**

Unless an application for a removal of the prohibition has been granted<sup>1</sup>:

- 799 (1) a person who has been sentenced to custody for life<sup>2</sup> or to preventive detention<sup>3</sup> or to imprisonment or to corrective training<sup>4</sup> for a term of three years or more or to youth custody<sup>5</sup> or detention in a young offender institution<sup>6</sup> for such a term, or who has been sentenced to be detained for such a term in a young offenders institution in Scotland, must not at any time have a firearm<sup>7</sup> or ammunition<sup>8</sup> in his possession<sup>9</sup>;
- 800 (2) a person who has been sentenced to imprisonment for a term of three months or more but less than three years<sup>10</sup> or to youth custody or detention in a young offender institution for such a term, or who has been sentenced to be detained for such a term in a detention centre or in a young offenders institution in Scotland, or who has been subject to a secure training order<sup>11</sup> or a detention and training order<sup>12</sup>, must not at any time before the expiration of the period of five years from the date of his release<sup>13</sup> have a firearm or ammunition in his possession<sup>14</sup>;
- 801 (3) a person who is serving a sentence of imprisonment to which an intermittent custody order<sup>15</sup> relates must not during any specified licence period<sup>16</sup> have a firearm or ammunition in his possession<sup>17</sup>;
- 802 (4) a person who is the holder of a specified licence<sup>18</sup>, or who is subject to a recognisance to keep the peace or to be of good behaviour<sup>19</sup>, a condition of which is that he must not possess, use or carry a firearm, or is subject to a community order<sup>20</sup> containing a requirement that he must not possess, use or carry a firearm, must not, at any time during which he holds the licence or is so subject, have a firearm or ammunition in his possession<sup>21</sup>;
- 803 (5) a person who is prohibited in Northern Ireland<sup>22</sup> from having a firearm or ammunition in his possession is similarly prohibited in Great Britain<sup>23</sup>.

It is an offence for a person to contravene any of the above provisions<sup>24</sup>; and a person guilty of any such offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>25</sup> or to a fine not exceeding the prescribed sum<sup>26</sup> or to both<sup>27</sup>.

1    See under the Firearms Act 1968 s 21(6) (amended by the Courts Act 1971 s 56(2), Sch 9 Pt II; the Criminal Justice Act 1972 s 29; and the Criminal Justice Act 2003 s 304, Sch 32 paras 11, 12(6)). Application for removal of prohibition may be made to the Crown Court: Firearms Act 1968 s 21(6) (as so amended). As to the mode of application and the procedure see s 21(7), Sch 3 (amended by the Courts Act 1971 s 56(2), (4), Sch 9 Pt II, Sch 11 Pt IV).

2    As to custody for life see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 79 et seq.

3    See under the Criminal Justice Act 1948 s 21(2) (repealed). Such sentences were abolished by the Criminal Justice Act 1967 s 37(1) (repealed).

4     le under the Criminal Justice Act 1948 s 21(1) (repealed). Such sentences were abolished by the Criminal Justice Act 1967 s 37(1) (repealed).

5     Detention centre orders and youth custody orders were amalgamated into a single custodial sentence of detention in a young offender institution by the Criminal Justice Act 1982 s 1A (repealed).

6     See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 85 et seq.

7     For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

8     For the meaning of 'ammunition' see PARA 634 note 10 ante.

9     Firearms Act 1968 s 21(1) (amended by the Criminal Justice Act 1982 s 77, Sch 14 para 24; and the Criminal Justice Act 1988 s 123(6), Sch 8 para 6).

10    In relation to the Firearms Act 1968 s 21(2), 'imprisonment' does not include a suspended sentence: *R v Fordham* [1970] 1 QB 77, [1969] 3 All ER 532.

11    le under the Criminal Justice and Public Order Act 1994 s 1 (repealed).

12    le under the Powers of Criminal Courts (Sentencing) Act 2000 s 100 (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89.

13    For these purposes, 'the date of his release', means: (1) in the case of a person sentenced to imprisonment with an order under the Criminal Law Act 1977 s 47(1) (repealed) (prison sentence partly served, partly suspended) is the date on which he completes service of so much of the sentence as was by that order required to be served in prison; (2) in the case of a person who has been subject to a secure training order, the date on which he is released from detention under the order, the date on which he is released from detention under the Criminal Justice and Public Order Act 1994 s 4 (repealed), or the date halfway through the total period specified by the court in making the order, whichever is the later; (3) in the case of a person who has been subject to a detention and training order, the date on which he is released from detention under the order, the date on which he is released from detention ordered under the Powers of Criminal Courts (Sentencing) Act 2000 s 102 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 91), or the date of the halfway point of the term of the order, whichever is the later; (4) in the case of a person who has been subject to a sentence of imprisonment to which an intermittent custody order under the Criminal Justice Act 2003 s 183(1)(b) (as amended: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100) relates, the date of his final release: Firearms Act 1968 s 21(2A) (added by the Criminal Law Act 1977 s 47, Sch 9 para 9; substituted by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 24(1), (2)(b); and amended by the Crime and Disorder Act 1998 s 119, Sch 8 para 14(2); the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 31; and the Criminal Justice Act 2003 s 304, Sch 32 paras 11, 12(1), (2)).

14    Firearms Act 1968 s 21(2) (amended by the Criminal Justice Act 1982 s 77, Sch 14 para 24; the Criminal Justice Act 1988 ss 123(6), 170(2), Sch 8 para 6, Sch 16; the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 24(1), (2); and the Crime and Disorder Act 1998 s 119, Sch 8 para 14(1)).

15    le under the Criminal Justice Act 2003 s 183 (as amended).

16    le any licence period specified for the purposes of *ibid* s 183(1)(b)(i) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100).

17    Firearms Act 1968 s 21(2B) (added by the Criminal Justice Act 1003 s 304, Sch 32 paras 11, 12(1), (3)).

18    le a person released on licence after being sentenced to be detained under the Children and Young Persons Act 1933 s 53 (repealed) or the Children and Young Persons (Scotland) Act 1937 s 57 (repealed).

19    See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 151 et seq.

20    For the meaning of 'community order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163; definition applied by virtue of the Firearms Act 1968 s 21(3ZA) (added by the Criminal Justice Act 2003 s 304, Sch 32 para 11, 12(5)). In relation to an offence committed before 4 April 2005, the relevant order is a probation order, and not a community order: Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 2 para 5.

21    Firearms Act 1968 s 21(3) (amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 11, 12(4)).

22    le by the Firearms Act (Northern Ireland) 1969 s 19 (repealed) or by any other enactment for the time being in force in Northern Ireland and corresponding to the Firearms Act 1968 s 21 (as amended). See now the Firearms (Northern Ireland) Order 2004, SI 2004/702, art 63.

23 Firearms Act 1968 s 21(3A) (added by the Criminal Justice Act 1972 s 29). For the meaning of 'Great Britain' see PARA 45 note 2 ante.

24 Firearms Act 1968 s 21(4).

25 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

26 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

27 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA. See also *R v Hill* [1999] 2 Cr App Rep (S) 388, CA (offence of possession of firearm when prohibited a more serious offence than possession of firearm without certificate, despite same maximum punishment, and could draw a higher sentence; offence rightly classified in *R v Avis* supra as likely to attract a custodial term of considerable length). As to powers of search see PARA 693 post; as to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to cancel firearms certificates and to order forfeiture and disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **672 Possession of firearms by persons previously convicted of crime**

NOTE 20--Firearms Act 1968 s 21(3ZA) amended: Criminal Justice and Immigration Act 2008 Sch 4 para 6.



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### **673. Sale etc of firearms to persons who have been convicted of crime.**

It is an offence for a person to sell or transfer<sup>1</sup> a firearm<sup>2</sup> or ammunition<sup>3</sup> to, or to repair, test or prove a firearm or ammunition for a person whom he knows or has reasonable ground for believing to be prohibited<sup>4</sup> from having a firearm or ammunition in his possession<sup>5</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup> or to a fine not exceeding the prescribed sum<sup>7</sup> or to both<sup>8</sup>.

1 As to the meaning of 'transfer' see PARA 636 note 1 ante.

2 For the meaning of 'firearm' see PARA 630 ante. Also see PARA 631 ante.

3 For the meaning of 'ammunition' see PARA 634 note 10 ante.

4 I.e. by the Firearms Act 1968 s 21 (as amended): see PARA 672 ante.

5 Ibid s 21(5).

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

7 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

8 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA. As to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to cancel firearms certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(v) Prevention of Crime and Preservation of Public Safety/674. Possession of firearms with intent to endanger life.

#### **674. Possession of firearms with intent to endanger life.**

It is an offence for a person to have in his possession<sup>1</sup> any firearm<sup>2</sup> or ammunition<sup>3</sup> with intent<sup>4</sup> by means of it to endanger life or to enable another person by means of it to endanger life<sup>5</sup>, whether any injury to property has been caused or not<sup>6</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for life or a shorter term or to a fine or to both<sup>7</sup>.

1 For the meaning of 'possession' in the context of the Firearms Act 1968 s 1 (as amended) see PARA 634 note 2 ante.

2 For the meaning of 'firearm' see PARA 630 ante. A firearm for these purposes does not include an imitation firearm to which the Firearms Act 1982 applies: see s 2(2), (3); and PARA 631 ante.

3 For the meaning of 'ammunition' see PARA 634 note 10 ante.

4 The intent need not be immediate or unconditional, but the defendant must have possession of the firearm and ammunition with a view to using them if and when the occasion arises: *R v Bentham* [1973] QB 357, 56 Cr App Rep 618, CA. On a charge of possession of a firearm with intent to endanger life, it is a defence to show that the intent to endanger life had a lawful purpose, although cases where such a defence could be raised are rare: *R v Georgiades* [1989] 1 WLR 759, 89 Cr App Rep 206, CA (issue should have been left to the jury). The intent may be to endanger life outside the United Kingdom: *R v El-Hakkaoui* [1975] 2 All ER 146, [1975] 1 WLR 396, CA; and see note 6 infra.

As to whether a defendant can have the necessary intent and so be guilty of possession of a firearm under these provisions if he believes that the firearm he possesses is loaded with live ammunition where in fact it is not so loaded see *R v Anderson* [2006] EWCA Crim 738, [2006] All ER (D) 17 (Mar), CA.

5 The intention must be to endanger the life of another, not the defendant's own life: *R v Norton* [1977] Crim LR 478. It is not enough that the defendant intends to act in a way that will, objectively, endanger life; he must know that the way in which he intends to act will endanger life; but an intent to kill is not necessary: *R v Brown*, *R v Ciarla* [1995] Crim LR 328, CA. To establish that the defendant intended to enable another to endanger life by means of the firearm, it is not enough to prove that he intended that another person should be placed in possession of it in circumstances where the latter had the opportunity to endanger life; 'to enable another person' means more than to give him the opportunity; an intent that the firearm shall be used in a manner which endangers life as and when the occasion arises is needed: *R v Ivor Jones* [1997] QB 798, [1997] 2 WLR 792, CA.

6 Firearms Act 1968 s 16 (amended by the Criminal Damage Act 1971 s 11(8), Sch Pt I). See also *R v El-Hakkaoui* [1975] 2 All ER 146, [1975] 1 WLR 396, CA (the offence is established on proof that the defendant had a firearm in his possession in the United Kingdom and at the time of such possession intended by means of it to endanger life; where the intent would have been carried out is irrelevant); *R v Goluchowski* [2006] All ER (D) 56 (Jul) (the requisite intent need not be present immediately before the action in question takes place; the action becomes criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing act).

7 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA. As to powers of search see PARA 693 post; and as to the court's power to cancel firearm and shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

### **UPDATE**

#### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

#### **674 Possession of firearms with intent to endanger life**

NOTE 4--The effectiveness of legislation designed to prevent the carrying of firearms or offensive weapons would be seriously impaired if anyone who reasonably feared that he might at some time be unlawfully attacked was allowed to carry such a weapon: *R v Salih* [2007] EWCA Crim 2750, [2008] 2 All ER 319, doubting *Bentham*, cited.

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### **675. Possession of firearm or imitation firearm with intent to cause fear.**

It is an offence for a person to have in his possession<sup>1</sup> any firearm<sup>2</sup> or imitation firearm with intent by means thereof to cause, or to enable another person to cause, any person to believe that unlawful violence will be used against him or another person<sup>3</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both<sup>4</sup>.

1 For the meaning of 'possession' in the context of the Firearms Act 1968 s 1 (as amended) see PARA 634 note 2 ante.

2 For the meaning of 'firearm' see PARA 630 ante. A firearm for these purposes does not include an imitation firearm to which the Firearms Act 1982 applies: see s 2(2), (3); and PARA 631 ante. For these purposes, 'imitation firearm' means anything which has the appearance of being a firearm (other than such a weapon as is mentioned in s 5(1)(b): see PARA 661 head (8) ante), whether or not it is capable of discharging any shot, bullet or other missile: ss 17(4), 57(4). See the cases cited in PARA 676 note 2 post.

3 Firearms Act 1968 s 16A (added by the Firearms (Amendment) Act 1994 s 1(1)). As to powers of stop and search see PARA 693 post.

4 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA. As to the court's power to cancel firearm and shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **675 Possession of firearm or imitation firearm with intent to cause fear**

NOTE 4--See also *R v Snowden* [2007] All ER (D) 152 (Aug), CA.

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## **676. Use of firearm or imitation firearm to resist arrest or detention.**

It is an offence for a person to make or attempt to make any use whatsoever of a firearm<sup>1</sup> or imitation firearm<sup>2</sup> with intent to resist or prevent the lawful arrest or detention of himself or another person<sup>3</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for life or to a fine or to both<sup>4</sup>.

Where a person commits such an offence in respect of his lawful arrest or detention for any offence committed by him, he is liable to the above penalty in addition to any penalty to which he may be sentenced for that other offence<sup>5</sup>.

1 For the purposes of the Firearms Act 1968 s 17(1), (2), 'firearm' means a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, and includes any prohibited weapon (see PARA 661 ante) whether it is such a lethal weapon or not: ss 17(4), 57(1)(a). It does not include any component, or any accessory designed or adapted to diminish noise or flash. 'Firearm' does not include an imitation firearm to which the Firearms Act 1982 (see PARA 631 ante) applies: see s 2(2), (3); and PARA 631 ante.

2 For the purposes of the Firearms Act 1968 s 17(1), (2), 'imitation firearm' means anything which has the appearance of being a firearm (other than such as is mentioned in s 5(1)(b) (see PARA 661 head (8) ante)), whether or not it is capable of discharging any shot, bullet or other missile: ss 17(4), 57(4). The crucial question is whether the thing looked like a firearm at the time of the offence: *R v Morris, R v King* (1984) 79 Cr App Rep 104, CA. In considering whether the thing looked like a firearm at the time in question, the jury is entitled to have regard to the evidence of witnesses who actually saw the thing at the time, together with their observation of the thing itself: *R v Morris, R v King* supra. In *R v Bentham* [2005] UKHL 18, [2005] 2 All ER 65, it was held that fingers inside a jacket, forcing the material out so as to create the impression of a gun, were not in law capable of being an imitation firearm within the above definition because what must be possessed is a 'thing' and one cannot possess something unsevered from oneself. The offence is one of strict liability as to the circumstance that the thing in question is a firearm or imitation firearm within the meaning of the Firearms Act 1968: *R v Pierre* [1963] Crim LR 513, CCA.

3 Firearms Act 1968 s 17(1). The crucial issue is the defendant's intent; it is irrelevant whether or not someone is trying to arrest him at the time: *R v Mather* [1998] Crim LR 821, CA. On the trial of a person for an offence under the Firearms Act 1968 s 17(1), the jury, if it is not satisfied that he is guilty of that offence, but is satisfied that he is guilty of an offence under s 17(2) (see PARA 677 post), may find him guilty of the offence under s 17(2): Sch 6 Pt II para 5.

4 Ibid s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis, R v Barton, R v Thomas, R v Torrington, R v Marquez, R v Goldsmith* [1998] 1 Cr App Rep 420, CA. Where there is an issue as to whether the offence was committed with a firearm, it should be determined by the jury: *R v Eubank* [2001] EWCA Crim 891, [2002] 1 Cr App Rep (S) 11, CA; *R v Murphy* [2002] EWCA Crim 1624, [2003] 1 Cr App Rep (S) 181. As to the court's powers to cancel firearm or shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

5 Firearms Act 1968 Sch 6 Pt II para 4.

Where a person who has attained the age of 17 years is charged before a magistrates' court with an offence listed in the Magistrates' Courts Act 1980 s 17(1), Sch 1 (offences triable either way: see PARA 1103 post) ('the listed offence'), and is also charged before that court with an offence under the Firearms Act 1968 s 17(1) or (2) (see PARA 677 post), the court must proceed as if the listed offence were triable only on indictment and the Magistrates' Courts Act 1980 ss 18-23 (as amended) (procedure for determining mode of trial of offences triable either way: see PARAS 1109-1115 post) do not apply in relation to that offence: Firearms Act 1968 Sch 6 Pt II para 3(1), (2) (substituted by the Criminal Law Act 1977 s 65(4), Sch 12; and amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 73). As from a day to be appointed these provisions are repealed by the

Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 2 para 45, Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

If the court determines not to commit the defendant for trial in respect of the offence under the Firearms Act 1968 s 17(1) or (2), or if proceedings before the court for that offence are otherwise discontinued, Sch 6 Pt II para 3(2) (as substituted and amended; prospectively repealed) ceases to apply as from the time when this occurred and: (1) if at that time the court has not yet begun to inquire into the listed offence as examining justices, the court must, in the case of the listed offence, proceed in the ordinary way in accordance with the Magistrates' Courts Act 1980 ss 18-23 (as amended) (see PARA 1109 et seq post); but (2) if at that time the court has begun so to inquire into the listed offence, ss 18-23 (as amended) continue not to apply and the court must proceed with its inquiry into that offence as examining justices, but has power in accordance with s 25(3), (4) (as amended) (see PARA 1119 post) to change to summary trial with the defendant's consent: Firearms Act 1968 Sch 6 Pt II paras 3(1), (3) (substituted by the Criminal Law Act 1977 s 65(4), Sch 12; and amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 73). As from a day to be appointed these provisions are prospectively repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 2 para 45, Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **677. Possession of firearms while committing offences.**

If a person, at the time of his committing or being arrested for a specified offence<sup>1</sup>, has in his possession<sup>2</sup> a firearm<sup>3</sup> or imitation firearm<sup>4</sup>, he is guilty of an offence unless he shows that he had it in his possession for a lawful object<sup>5</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for life or for any shorter term or to a fine or to both<sup>6</sup>; and the punishment to which a person is so liable is in addition to any punishment to which he may be liable for the offence he was committing or for which he was being arrested<sup>7</sup>.

1 The specified offences are:

- 146 (1) offences under the Criminal Damage Act 1971 s 1 (destroying or damaging property: see PARA 334 ante) (Firearms Act 1968 s 17(2), Sch 1 para 1 (substituted by the Criminal Damage Act 1971 s 11(7)));
- 147 (2) offences under any of the Offences against the Person Act 1861 ss 20-22 (inflicting bodily injury; garrotting; criminal use of stupefying drugs: see PARAS 120-122 ante), s 30 (laying explosive to building etc: see PARA 130 ante), s 32 (endangering railway passengers by tampering with track: see PARA 132 ante), s 38 (assault with intent to resist arrest: see PARAS 150 ante, 737 post), s 47 (as amended) (assault occasioning actual bodily harm: see PARA 149 ante) (Firearms Act 1968 Sch 1 para 2 (amended by the Child Abduction Act 1984 s 11(5)(c)));
- 148 (3) offences under the Child Abduction Act 1984 Pt I (ss 1-5) (see PARAS 137-141 ante) (Firearms Act 1968 Sch 1 para 2A (added by the Child Abduction Act 1984 s 11(2)));
- 149 (4) theft (see PARA 282 et seq ante), robbery (see PARA 293 ante), burglary (see PARA 294 ante), blackmail (see PARA 308 ante) and any offence under the Theft Act 1968 s 12(1) (taking motor vehicle or other conveyance without owner's consent: see PARA 298 ante) (Firearms Act 1968 Sch 1 para 4 (substituted by the Theft Act 1968 s 33(2), Sch 2 Pt III; and amended by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 8(a)));
- 150 (5) offences under the Police Act 1996 s 89(1) (assaulting a constable in the execution of his duty: see PARA 735 ante) (Firearms Act 1968 Sch 1 para 5 (amended by the Police Act 1996 s 103, Sch 7 para 16));
- 151 (6) an offence under the Criminal Justice Act 1991 s 90(1) (assaulting a prison custody officer: see PRISONS vol 36(2) (Reissue) PARA 528) (Firearms Act 1968 Sch 1 para 5A (Sch 1 paras 5A, 5B added by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 8(b)));
- 152 (7) an offence under the Criminal Justice and Public Order Act 1994 s 13(1) (assaulting a secure training centre custody officer: see PRISONS vol 36(2) (Reissue) PARA 670) (Firearms Act 1968 Sch 1 para 5A (as so added));
- 153 (8) offences under any of the following provisions of the Sexual Offences Act 2003: s 1 (rape: see PARA 165 ante); s 2 (assault by penetration: see PARA 167 ante); s 4 (causing a person to engage in sexual activity without consent: see PARA 171 ante), where the activity caused involved penetration within s 4(4)(a)-(d); s 5 (rape of a child under 13: see PARA 166 ante); s 6 (assault of a child under 13 by penetration: see PARA 168 ante); s 8 (causing or inciting a child under 13 to engage in sexual activity: see PARA 172 ante), where an activity involving penetration within s 8(3)(a)-(d) was caused; s 30 (sexual activity with a person with a mental disorder impeding choice: see PARA 197 ante), where the touching involved penetration within s 30(3)(a)-(d); s 31 (causing or inciting a person with such a mental disorder to engage in sexual activity: see PARA 198 ante), where an activity involving penetration within s 31(3)(a)-(d) was caused

(Firearms Act 1968 Sch 1 para 6 (substituted by the Sexual Offences Act 2003 s 139, Sch 6 para 16));

- 154 (9) aiding and abetting the commission of any of the offences in the Firearms Act 1968 Sch 1 paras 1-6 (as amended) (see heads (1)-(8) supra) (Sch 1 para 8 (amended by the Theft Act 1968 s 33(2), Sch 2 Pt III));
- 155 (10) attempting to commit any of the offences in the Firearms Act 1968 Sch 1 paras 1-6 (as amended) (see heads (1)-(8) supra) (Sch 1 para 9 (amended by the Criminal Damages Act 1971 s 11(8), Schedule Pt I)).

As from a date to be appointed, an offence under the Immigration and Asylum Act 1999 Sch 11 para 4 (assaulting a detainee custody officer: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 158) is also included in the above list of specified offences (and heads (9) and (10) supra apply to any such offence): Firearms Act 1968 s 17(2), Sch 1 para 5C (prospectively added by the Immigration and Asylum Act 1999 s 169(1), Sch 14 paras 34, 35). At the date at which this volume states the law no such day had been appointed.

2 'Possession' does not require physical possession; it bears the same meaning as in the Firearms Act 1968 s 1 (see PARA 634 note 2 ante): *R v North* [2001] EWCA Crim 544, [2001] Crim LR 746.

3 For the meaning of 'firearm' for these purposes see PARA 676 note 1 ante.

4 For the meaning of 'imitation firearm' for these purposes see PARA 676 note 2 ante. For these purposes it does not include an imitation firearm to which the Firearms Act 1982 applies: see s 2(2), (3); and PARA 631 ante.

5 Firearms Act 1968 s 17(2). As to whether 'shows' imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. On a charge of possessing a firearm or imitation firearm on arrest for an offence specified in the Firearms Act 1968 Sch 1, it is not necessary for the prosecution to prove that the defendant actually committed the specified offence; it is only necessary to prove that the defendant was in possession of the firearm or imitation firearm when lawfully arrested for a specified offence: *R v Jones* (2000) 164 JP 293, CA; *R v Nelson* [2001] QB 55, [2001] 2 Cr App Rep 160, CA (not following *R v Baker* [1962] 2 QB 530, [1961] 3 All ER 703, CCA). If a defendant has not actually committed the specified offence for which he is lawfully arrested, he should find it correspondingly easier to show that he had the firearm in his possession for a lawful object (*R v North* [2001] EWCA Crim 544, [2001] Crim LR 746); if he cannot do so the sentencing process can take into account his innocence of the offence for which he was arrested, as well as any conclusion it reaches as to his object in possessing the firearm (*R v North* supra). As to the procedure where a person who has attained the age of 17 years is charged before a magistrates' court with an offence triable either way and is also charged before that court with an offence under the Firearms Act 1968 s 17(2) see Sch 6 Pt II para 3 (as substituted and amended; prospectively repealed); and PARA 676 note 5 ante. A person is guilty of aggravated burglary if he commits any burglary and at the time has with him, inter alia, any firearm or imitation firearm: see PARA 295 ante.

6 Ibid s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the court's power to cancel firearm and shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

7 Ibid Sch 6 Pt II para 6. A consecutive sentence is the norm because the carrying of arms constitutes an aggravating feature in respect of which Parliament requires that a separate, additional (although not necessarily consecutive) sentence be imposed: *R v McGrath* [1987] Crim LR 143, CA. For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA.

## UPDATE

### 630-698 Firearms, Ammunition and Air Weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 677 Possession of firearms while committing offences



NOTE 7--See also *A-G's Reference (No 13 of 2008)*; *R v Woodall* [2008] All ER (D) 26 (Jun), CA.

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### **678. Shortening or converting weapon.**

It is an offence: (1) to shorten the barrel of a shot gun<sup>1</sup> to a length<sup>2</sup> less than 24 inches<sup>3</sup>; or (2) to shorten to a length less than 24 inches the barrel of any specified smooth-bore gun<sup>4</sup> other than one which has a barrel with a bore exceeding two inches in diameter<sup>5</sup>; or (3) for a person other than a registered firearms dealer<sup>6</sup> to convert into a firearm<sup>7</sup> anything which, though having the appearance of being a firearm, is so constructed as to be incapable of discharging any missile through its barrel<sup>8</sup>.

It is not, however, an offence under heads (1) and (2) above for a registered firearms dealer so to shorten the barrel of a shot gun or a gun for the sole purpose of replacing a defective part of the barrel so as to produce a barrel not less than 24 inches in length<sup>9</sup>.

A person guilty of an offence under head (1) or head (3) above is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup> or to a fine not exceeding the prescribed sum<sup>11</sup> or to both<sup>12</sup>; and a person guilty of an offence under head (2) above is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>13</sup> or to a fine not exceeding the statutory maximum<sup>14</sup> or to both<sup>15</sup>.

1 For the meaning of 'shot gun' see PARA 632 ante.

2 As to the measurement of the length of the barrel see PARA 632 note 1 ante. See also PARA 632 note 3 ante.

3 Firearms Act 1968 s 4(1). Such an offence exists because such a weapon has little or no functional use other than to aid serious crime. Mere possession constitutes such an offence without the necessity of an intention to commit serious crime. Public policy requires the imposition of a custodial sentence for such an offence: *R v Cook* (1987) 9 Cr App Rep (S) 71, CA.

4 I.e. a smooth-bore gun to which the Firearms Act 1968 s 1 (as amended) applies: see PARA 634 ante.

5 Firearms (Amendment) Act 1988 s 6(1).

6 For the meaning of 'registered' see PARA 636 note 4 ante; and for the meaning of 'firearms dealer' see PARA 636 note 5 ante.

7 For the meaning of 'firearm' see PARA 630 ante.

8 Firearms Act 1968 s 4(3). This offence does not apply to imitation firearms to which the Firearms Act 1982 applies: see s 2(2)(a); and PARA 631 note 7 ante.

9 Firearms Act 1968 s 4(2); Firearms (Amendment) Act 1988 s 6(2). As to the conversion of a prohibited weapon not affecting classification of the weapon see PARA 661 ante; as to the conversion of a weapon to which the Firearms Act 1968 s 1 (as amended) applies not affecting classification of the weapon see PARA 634 ante; and as to the deactivation of firearms see PARA 630 note 2 ante.

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

11 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

12 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante).

13 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

14 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

15 Firearms (Amendment) Act 1988 s 6(1)(a), (b). As to powers of search see PARA 693 post; as to the limitation period for summary proceedings see PARA 696 post; and as to the court's power to cancel firearms certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(v) Prevention of Crime and Preservation of Public Safety/679. Carrying firearms or imitation firearms with criminal intent.

### **679. Carrying firearms or imitation firearms with criminal intent.**

It is an offence for a person to have with him<sup>1</sup> a firearm<sup>2</sup> or imitation firearm<sup>3</sup> with intent to commit<sup>4</sup> an indictable offence<sup>5</sup>, or to resist arrest or prevent the arrest of another, while he has a firearm or imitation firearm with him<sup>6</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for life or to a fine or to both<sup>7</sup>.

1 A person may have a firearm with him even though he is not carrying it, provided that in the circumstances it is near to him and readily accessible to him: *R v Pawlicki* [1992] 3 All ER 902, [1992] 1 WLR 827, CA.

2 For the meaning of 'firearm' see PARA 630 ante. 'Firearm' does not include an imitation firearm to which the Firearms Act 1968 applies: see s 2(2), (3); and PARA 631 ante.

3 For the meaning of 'imitation firearm' for these purposes see PARA 676 note 2 ante. The relevant question for a jury considering a charge of carrying an imitation firearm with intent to commit an indictable offence is whether it is are sure that the thing that had been carried by the defendant had had the appearance of a firearm at the relevant time and, in that regard, evidence of witnesses that they had believed that the item had been a firearm was not dispositive; it was a matter for the jury to consider on all the evidence: *R v Williams* [2006] All ER (D) 24 (Jun) (defendant robbed a supermarket with a bottle in a plastic bag telling the victim that he had a gun).

4 It is not essential for the intent to have been formed before the defendant pulled the imitation firearm out of the holster: *R v Houghton* [1982] Crim LR 112, CA.

5 For the meaning of 'indictable offence' see PARA 1102 note 1 post.

6 Firearms Act 1968 s 18(1). There are three elements to this offence:

156 (1) that the defendant had with him a firearm;

157 (2) that he intended to have it with him; and

158 (3) that at the same time he had the intention to commit an indictable offence or to resist or prevent arrest,

and elements (2) and (3) are distinct rather than composite elements of the offence: *R v Stoddart* [1998] 2 Cr App Rep 25, CA. Thus the prosecution does not have to prove an intention to use or carry the firearm or imitation firearms in furtherance of the indictable offence. Proof that the defendant had a firearm or imitation firearm with him and intended to commit an offence, or to resist or prevent an arrest, is evidence that he intended to have it with him while doing so: Firearms Act 1968 s 18(2). As to a constable's powers to stop and search a person suspected of committing an offence under s 18(2) see PARA 694 post.

7 Ibid s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis*, *R v Barton*, *R v Thomas*, *R v Torrington*, *R v Marquez*, *R v Goldsmith* [1998] 1 Cr App Rep 420, CA. The sentence for the firearms offence should normally be consecutive to the sentence for the other offence, subject to the totality of the overall sentence: *R v Faulkner* (1972) 56 Cr App Rep 594, CA; *R v French* (1982) 75 Cr App Rep 1, 4 Cr App Rep (S) 57, CA. As to the court's power to cancel firearm and shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(v) Prevention of Crime and Preservation of Public Safety/680. Carrying firearms in a public place.

## **680. Carrying firearms in a public place.**

A person commits an offence if without lawful authority<sup>1</sup> or reasonable excuse<sup>2</sup>, the proof whereof lies on him<sup>3</sup>, he has with him<sup>4</sup> in a public place<sup>5</sup> a loaded shot gun<sup>6</sup>, an air weapon<sup>7</sup> (whether loaded or not), any other firearm<sup>8</sup> (whether loaded or not) together with ammunition suitable for use in that firearm<sup>9</sup>, or an imitation firearm<sup>10</sup>. A person guilty of such an offence involving an imitation firearm or an air weapon is liable on summary conviction to imprisonment for a term not exceeding six months<sup>11</sup> or to a fine not exceeding the prescribed sum<sup>12</sup> or to both<sup>13</sup>. A person guilty of such an offence (except in the case of an imitation firearm or an air weapon) is liable on summary conviction to imprisonment for a term not exceeding six months<sup>14</sup> or to a fine not exceeding the prescribed sum or to both<sup>15</sup>, or on conviction on indictment to a term of imprisonment not exceeding seven years<sup>16</sup>.

1 It is not lawful authority for a person who has a firearm and ammunition, or a loaded shot gun, in a public place to be the holder of a valid firearm, or shot gun, certificate (see PARAS 634-635 ante) to which no conditions were attached prohibiting such a use: *Ross v Collins* [1982] Crim LR 368, DC. Consequently, a mistaken belief that an invalid certificate is valid and is lawful authority cannot constitute a reasonable excuse: *R v Jones* [1995] QB 235, [1995] 3 All ER 139, CA. Where there is a mistaken belief in facts which, if true, would have constituted lawful authority, it is capable of being a reasonable excuse, and the judge should so direct the jury, leaving the jury to determine whether the defendant has proved his belief in the requisite facts and whether in the circumstances that belief amounts to a reasonable excuse: *R v Jones* supra.

2 See *Taylor v Mucklow* (1973) 117 Sol Jo 792, DC (quarrel between house-owner and builder; builder thereupon demolishing part of new extension to house; house-owner attempting to stop builder's action by pointing loaded air gun at him from roadway; no reasonable excuse); *Ross v Collins* [1982] Crim LR 368, DC (belief that River Thames was not a public place was not a reasonable excuse because that reason could not amount to an excuse in law). See also *R v Jones* [1995] QB 235, [1995] 3 All ER 139, CA; and note 1 supra.

3 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

4 For the meaning of 'has with him' see PARA 679 note 1 ante.

5 'Public place' includes any highway and any other premises or place to which at the material time the public has or is permitted to have access, whether on payment or otherwise: Firearms Act 1968 s 57(4). Cf the Prevention of Crime Act 1953 s 1(4) (as amended) (see PARA 699 note 5 ante); the Public Order Act 1986 s 16 (see PARA 579 note 1 ante); the Criminal Justice Act 1988 s 139(7) (see PARA 700 note 1 ante).

6 Firearms Act 1968 s 19(a) (s 19(a)-(d) substituted by the Anti-social Behaviour Act 2003 s 37(1)). For the meaning of 'shot gun' see PARA 632 ante. A shot gun is to be deemed to be loaded if there is ammunition in the chamber or barrel or in any magazine or other device which is in such a position that the ammunition can be fed into the chamber or barrel by the manual or automatic operation of some part of the gun or weapon: Firearms Act 1968 s 57(6)(b). See *R v Harrison*, *R v Francis* [1996] 1 Cr App Rep 138, CA; and note 10 infra.

7 Firearms Act 1968 s 19(b) (as substituted: see note 6 supra). For the meaning of 'air weapon' see PARA 633 ante. Since 'air weapon' for these purposes means any air weapon it therefore includes an air weapon which, being low powered, is not a lethal barrelled weapon and therefore is not a 'firearm' within the Firearms Act 1968 s 57(1) (see PARA 630 ante): *DPP v Street* [2004] EWHC 86 (Admin), (2004) Times, 23 January, DC.

8 For the meaning of 'firearm' see PARA 630 ante. For these purposes, it does not include an imitation firearm to which the Firearms Act 1982 applies: see s 2(2), (3); and PARA 631 ante.

9 Firearms Act 1968 s 19(c) (as substituted: see note 6 supra).

10 Ibid s 19(d) (as substituted: see note 6 supra). For the meaning of 'imitation firearm' for these purposes see PARA 676 note 2 ante. As to the limitation period for summary proceedings see PARA 696 post. The offence is one of strict liability as to whether, in the case of shotgun, the shotgun is loaded or, indeed, a firearm at all: *R v Harrison, R v Francis* [1996] 1 Cr App Rep 138, CA. The position is similar in respect of the other types of offence under the Firearms Act 1968 s 19 (as amended). An offence under s 19 (as amended) is one of strict liability as to whether what the defendant has with him is a firearm (or ammunition): *R v Vann, R v Davis* [1996] Crim LR 52, CA.

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

12 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

13 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). For sentencing guidelines see *R v Avis, R v Barton, R v Thomas, R v Torrington, R v Marquez, R v Goldsmith* [1998] 1 Cr App Rep 420, CA. As to the court's power to cancel firearm and shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

14 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

15 Firearms Act 1968 Sch 6 Pt I (as amended: see PARA 634 note 15 ante).

16 Ibid Sch 6 Pt I (as amended: see PARA 634 note 15 ante).

## UPDATE

### 630-698 Firearms, Ammunition and Air Weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 680 Carrying firearms in a public place

TEXT AND NOTES 13-16--Entry in 1968 Act Sch 6 Pt 1 relating to s 19 amended: Violent Crime Reduction Act 2006 ss 30(4), (5), 41(1). See further s 41(2), (3).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(v) Prevention of Crime and Preservation of Public Safety/681. Trespassing with firearm.

### **681. Trespassing with firearm.**

A person commits an offence if, while he has a firearm<sup>1</sup> or imitation firearm<sup>2</sup> with him<sup>3</sup>, he enters or is in any building or part of a building as a trespasser and without reasonable excuse, the proof whereof lies on him<sup>4</sup>. A person guilty of such an offence involving an imitation firearm or an air weapon is liable on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the prescribed sum<sup>6</sup> or to both<sup>7</sup>. A person guilty of such an offence (except in the case of an imitation firearm or an air weapon) is liable on summary conviction to imprisonment for a term not exceeding six months<sup>8</sup> or to a fine not exceeding the prescribed sum or to both, or on conviction on indictment to a term of imprisonment not exceeding seven years or to a fine or to both<sup>9</sup>.

A person commits an offence if, while he has a firearm, or imitation firearm, with him, he enters or is on any land<sup>10</sup> as a trespasser and without reasonable excuse, the proof whereof lies on him<sup>11</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months<sup>12</sup> or to a fine not exceeding level 4 on the standard scale<sup>13</sup> or to both<sup>14</sup>.

1 For the meaning of 'firearm' see PARA 630 ante. A firearm for these purposes does not include an imitation firearm to which the Firearms Act 1982 applies: see s 2(2), (3); and PARA 631 ante.

2 For the meaning of 'imitation firearm' for these purposes see PARA 675 note 2 ante.

3 For the meaning of 'has with him' see PARA 679 note 1 ante.

4 Firearms Act 1968 s 20(1) (amended by the Firearms (Amendment) Act 1994 s 2(1)). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

As to a constable's power to stop and search a person suspected of committing such an offence see PARA 694 post.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

6 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

7 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante).

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 Firearms Act 1968 Sch 6 Pt I (as amended: see PARA 634 note 15 ante).

10 For these purposes, 'land' includes land covered with water: *ibid* s 20(3).



11 Ibid s 20(2). As to limitation of time for summary proceedings see PARA 696 post.

12 As from a day to be appointed this maximum term of imprisonment is increased to 51 weeks: see *ibid* Sch 6 Pt I (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (4)). At the date at which this volume states the law no such day had been appointed.

13 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

14 Firearms Act 1968 Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the court's power to cancel firearm and shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **681 Trespassing with firearm**

TEXT AND NOTES 7-14--Entry in 1968 Act Sch 6 Pt 1 relating to s 20(1) amended: Violent Crime Reduction Act 2006 s 30(4), (5).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vi) Regulation of Firearms and Ammunition/682. Application for firearm or shot gun certificate.

## **(vi) Regulation of Firearms and Ammunition**

### **682. Application for firearm or shot gun certificate.**

An application for the grant of a firearm certificate<sup>1</sup> must be made in the prescribed form<sup>2</sup> to the chief officer of police for the area<sup>3</sup> in which the applicant resides<sup>4</sup> and must state such particulars as may be required by the form<sup>5</sup>.

An application for the grant of a shot gun certificate must be made in the prescribed form<sup>6</sup> to the chief officer of police for the area in which the applicant resides and must state such particulars as may be required by the form<sup>7</sup>.

It is an offence for a person knowingly or recklessly to make any statement which is false in any material particular for the purpose of procuring (whether for himself or another) the grant or renewal of such a certificate<sup>8</sup>. The offence is punishable on summary conviction with six months<sup>9</sup> imprisonment or a fine of level 5 on the standard scale or both<sup>10</sup>.

1 For the meaning of 'firearm certificate' see PARA 634 note 8 ante.

2 For the prescribed form see the Firearms Rules 1998, SI 1998/1941, r 3(1), Sch 1 Pt I. See also *Ogston v Miller* (1980) Times, 31 October, DC.

3 For the meaning of 'area' see PARA 646 note 1 ante.

4 Ownership of property which does not carry with it the right of occupation is not sufficient to show that an applicant for a certificate resides within the area in which he applies for the certificate: *Burditt v Joslin* [1981] 3 All ER 203, DC.

5 Firearms Act 1968 s 26A(1) (s 26A added by the Firearms (Amendment) Act 1997 s 37). Rules made by the Secretary of State under the Firearms Act 1968 s 53 (see PARA 633 note 2 ante) may require any application for a firearm certificate to be accompanied by up to four photographs of the applicant and by the names and addresses of two persons who have agreed to act as referees: s 26A(2) (as so added). The rules may require that, before considering an application for a firearm certificate, the chief officer of police has the following from each referee nominated by the applicant, namely: (1) verification in the prescribed manner of any prescribed particulars and of the likeness to the applicant of the photographs submitted with the application; (2) a statement in the prescribed form to the effect that he knows of no reason why the applicant should not be permitted to possess a firearm; and (3) such other statements or information in connection with the application or the applicant as may be prescribed: s 26A(3) (as so added). See the Firearms Rules 1998, SI 1998/1941, rr 3, 4, 7. As to visitors' firearm and shotgun permits see r 8, Sch 3 Pt I.

6 For the prescribed form see *ibid* r 5(1), Sch 2 Pt I.

7 Firearms Act 1968 s 26B(1) (s 26B added by the Firearms (Amendment) Act 1997 s 37). Rules made by the Secretary of State under the Firearms Act 1968 s 53 (see PARA 633 note 2 ante) may: (1) require any application for a certificate to be accompanied by up to four photographs of the applicant; (2) require the verification in the prescribed manner of any prescribed particulars and of the likeness of those photographs to the applicant; and (3) require any application for a certificate to be accompanied by a statement by the person verifying the matters mentioned in head (2) to the effect that he knows of no reason why the applicant should not be permitted to possess a shot gun: s 26B(2) (as so added).

The information given on the application form must be verified by a statement signed by a resident of Great Britain (other than a member of the applicant's family) who has known him for at least two years and is a member of Parliament, justice of the peace, minister of religion, doctor, lawyer, established civil servant, bank officer or person of similar standing: Firearms Rules 1998, SI 1998/1941, r 6. The person must also verify that

he knows of no reason why the applicant should not be permitted to possess a firearm: r 5(3). See also rr 5, 7, 8.

8 Firearms Act 1968 s 28A(7) (s 28A added by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 para 4(1)). As to limitations of time for summary proceedings see PARA 696 post.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

10 Firearms Act 1968 s 51(1), (2), Sch 6 Pt 1 (as amended: see PARA 634 note 15 ante). As to the court's power to cancel firearm and shot gun certificates and to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vi) Regulation of Firearms and Ammunition/683. Grant and renewal of firearm or shot gun certificate.

### **683. Grant and renewal of firearm or shot gun certificate.**

A firearm certificate<sup>1</sup> must be granted where the chief officer of police is satisfied: (1) that the applicant is fit to be entrusted with a firearm<sup>2</sup> and is not a person prohibited<sup>3</sup> from possessing<sup>4</sup> such a firearm; (2) that he has a good reason<sup>5</sup> for having in his possession, or for purchasing or acquiring<sup>6</sup>, the firearm or ammunition in respect of which the application is made; and (3) that in all the circumstances the applicant can be permitted to have the firearm or ammunition in his possession without danger to the public safety or to the peace<sup>7</sup>. A firearm certificate must be in the prescribed form and must specify the conditions, if any, subject to which it is held, the nature and number of the firearms to which it relates, including if known their identification numbers, and, as respects ammunition, the quantities authorised to be purchased or acquired and to be held at any one time<sup>8</sup>. These provisions also apply to the renewal of a firearm certificate<sup>9</sup>.

If a chief officer of police is satisfied, on an application for the grant or renewal of a firearm certificate in relation to any rifle<sup>10</sup> or muzzle-loading pistol<sup>11</sup> which is not a prohibited weapon<sup>12</sup>, that the applicant's only reason for having it in his possession is to use it for target shooting, any certificate which may be granted to the applicant or, as the case may be, renewed must be held subject to the following conditions, in addition to any other condition, namely that: (a) the rifle or pistol is only to be used for target shooting; and (b) the holder must be a member of an approved rifle club or, as the case may be, muzzle-loading pistol club<sup>13</sup> specified in the certificate<sup>14</sup>.

A shot gun certificate must be granted or, as the case may be, renewed by the chief officer of police if he is satisfied that the applicant can be permitted to possess a shot gun without danger to the public safety or to the peace<sup>15</sup>, but no such certificate may be granted or renewed if the chief officer of police: (i) has reason to believe that the applicant is prohibited<sup>16</sup> from possessing a shot gun; or (ii) is satisfied that the applicant does not have a good reason for possessing, purchasing or acquiring one<sup>17</sup>. A shot gun certificate must be in the prescribed form and must be granted or renewed subject to any prescribed conditions and no others, and must specify the conditions, if any, subject to which it is granted or renewed<sup>18</sup>. The certificate must specify the description of the shot guns to which it relates including, if known, the identification numbers of the guns<sup>19</sup>.

Unless previously revoked or cancelled, a certificate<sup>20</sup> continues in force for five years (or such other period as may be prescribed<sup>21</sup>) from the date when it was granted or last renewed, but is renewable for a further period of five years by the chief officer of police for the area<sup>22</sup> in which the holder resides<sup>23</sup>. A person aggrieved by the refusal of a chief officer of police to grant or to renew a certificate may appeal against the refusal<sup>24</sup>. It is an offence for a person knowingly or recklessly to make any statement which is false in any material particular for the purpose of procuring (whether for himself or another) the grant or renewal of a certificate<sup>25</sup>. The offence is punishable on summary conviction with six months<sup>26</sup> imprisonment or a fine of level 5 on the standard scale or both<sup>27</sup>.

Subject to certain exceptions, fees are payable on the grant or renewal of a certificate<sup>28</sup>.

If the holder wishes to exchange the firearm for another, however similar, he must apply for variation of the certificate<sup>29</sup>.

A central register is established of all persons who have applied for a firearm or shot gun certificate or to whom a firearm or shot gun certificate has been granted or whose certificate has been renewed<sup>30</sup>. The register must record a suitable identifying number for each person to whom a certificate is issued, and must be kept by means of a computer which provides access online to all police forces<sup>31</sup>.

1 For the meaning of 'firearm' see PARA 630 ante; and for the meaning of 'firearm certificate' see PARA 634 note 8 ante.

2 Is a firearm to which the Firearms Act 1968 s 1 (see PARA 634 ante) applies.

3 As to such persons see PARAS 668, 672 ante.

4 For the meaning of 'possession' see PARA 634 note 2 ante.

5 For these purposes, a person under the age of 18 is capable of having good reason for having a firearm or ammunition in his possession, or for purchasing or acquiring it, only if he has no intention of using the firearm or ammunition at any time before he attains that age for a purpose not authorised by EC Council Directive 91/477 (OJ L256, 13.09.91, p 51) on the control of the acquisition and possession of weapons ('the Weapons Directive'): Firearms Act 1968 s 27(1A) (s 27(1A) added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 4(2)). For the meaning of 'ammunition' see PARA 634 note 10 ante.

6 For the meaning of 'acquire' see PARA 634 note 3 ante.

7 Firearms Act 1968 s 27(1) (substituted by the Firearms (Amendment) Act 1997 s 38). As to danger to the peace see *Ackers v Taylor* [1974] 1 All ER 771, [1974] 1 WLR 405, DC. It has been stated that the chief officer of police must decide in each case whether the reason given for possession of a particular firearm is in itself a good one and not whether general objections can be taken to it: *Anderson v Neilans* 1940 SLT (Sh Ct) 13; *Hughson v Lerwick Police* 1956 SLT (Sh Ct) 18.

8 Firearms Act 1968 s 27(2) (amended by the Firearms (Amendment) Act 1988 s 23(5)). As to the prescribed form see the Firearms Rules 1998, SI 1998/1941, r 3(6), Sch 1 Pt II. A firearm certificate must be granted or renewed subject to the following conditions, whether or not in addition to any other conditions, namely that: (1) the holder must, on receipt of the certificate, sign it in ink with his usual signature; (2) the holder of the certificate must inform the chief officer of police by whom the certificate was granted within seven days of the theft, loss or destruction in Great Britain of the certificate; (3) the holder of the certificate must, without undue delay, inform the chief officer of police by whom the certificate was granted of any change in his permanent address; (4)(a) the firearms and ammunition to which the certificate relates must at all times, except in the circumstances set out in head (b) below, be stored securely so as to prevent, so far as is reasonably practicable, access to the firearms or ammunition by an unauthorised person; (b) where a firearm or ammunition to which the certificate relates is in use or the holder of the certificate has the firearm with him for the purpose of cleaning, repairing or testing it or for some other purpose connected with its use, transfer or sale, or the firearm or ammunition is in transit to or from a place in connection with its use or any such purpose, reasonable precautions must be taken for the safe custody of the firearm or the ammunition: r 3(4). See also r 3(5). As to the onus of proving that it is not reasonably practicable to prevent access to firearms by an unauthorised person see *R v Chelmsford Crown Court, ex p Farrer* [2000] 1 WLR 1468, CA.

9 Firearms Act 1968 s 27(3).

10 As to the meaning of 'rifle' see PARA 650 note 2 ante; definition applied by virtue of the Firearms (Amendment) Act 1997 s 50(2).

11 For these purposes, 'muzzle-loading pistol' means a pistol designed to be loaded at the muzzle end of the barrel or chamber with a loose charge and a separate ball, or other missile: *ibid* s 44(2).

12 For the meaning of 'prohibited weapons' see PARA 661 note 7 ante; definition applied by virtue of *ibid* s 50(2). As to firearms certificates in respect of prohibited weapons and ammunition see PARA 686 post.

13 As to approved rifle and muzzle-loading pistol clubs see PARA 651 ante.

14 Firearms (Amendment) Act 1997 s 44(1).

15 Firearms Act 1968 s 28(1) (substituted by Firearms (Amendment) Act 1988 s 3(1)).

16 See PARAS 669, 672 ante.

17 Firearms Act 1968 s 28(1A) (added by Firearms (Amendment) Act 1988 s 3(1)). For the purpose of head (ii) in the text, an applicant must, in particular, be regarded as having a good reason if the gun is intended to be used for sporting or competition purposes or for shooting vermin; and an application may not be refused by virtue of head (ii) in the text merely because the applicant intends neither to use the gun himself nor to lend it for anyone else to use: Firearms Act 1968 s 28(1B) (added by Firearms (Amendment) Act 1988 s 3(1)). A person under the age of 18 is regarded as not having a good reason for possessing, purchasing or acquiring a shot gun if it is his intention to use the shot gun at any time before he attains that age for a purpose not authorised by the Weapons Directive: Firearms Act 1968 s 28(1C) (s 28(1C) added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 4(3)).

18 Firearms Act 1968 s 28(2). As to the prescribed form see the Firearms Rules 1998, SI 1998/1941, Sch 2 Pt II (amended by SI 2005/3344). A shotgun certificate must be granted or renewed subject to the following conditions, and no others, namely that: (1) the holder must, on receipt of the certificate, sign it in ink with his usual signature; (2) the holder of the certificate must inform the chief officer of police by whom the certificate was granted within seven days of the theft, loss or destruction in Great Britain of the certificate; (3) the holder of the certificate must, without undue delay, inform the chief officer of police by whom the certificate was granted of any change in his permanent address; and (4)(a) the shotguns to which the certificate relates must at all times (except in the circumstances set out in head (b) *infra*) be stored securely so as to prevent, so far as is reasonably practicable, access to the guns by an unauthorised person; and (b) where a shotgun to which the certificate relates is in use or the holder of the certificate has the shotgun with him for the purpose of cleaning, repairing or testing it or for some other purpose connected with its use, transfer or sale, or the gun is in transit to or from a place in connection with its use or any such purpose, reasonable precautions must be taken for the safe custody of the gun: r 5(4). Where a shotgun which is disguised as another object, is possessed, purchased or acquired by the holder of the certificate for the purpose only of its being kept or exhibited as part of a collection, the certificate must be subject to an additional condition restricting the use of that shotgun to use for that purpose: r 5(5). See *R v Chelmsford Crown Court, ex p Farrer* [2000] 1 WLR 1468, CA; and note 8 *supra*.

19 Firearms Act 1968 s 28(2A) (added by the Firearms (Amendment) Act 1988 s 3(2)).

20 Ie a firearm certificate or shot gun certificate: Firearms Act 1968 s 57(4).

21 Ie by regulations under *ibid* s 53 (see PARA 633 note 2 *ante*): s 57(4).

22 For the meaning of 'area' see PARA 646 note 1 *ante*.

23 Firearms Act 1968 s 28A(1), (3)-(5) (s 28A added by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 para 4(1)). The provisions of the Firearms Act 1968 apply to the renewal of a certificate as they apply to a grant; but, subject to that, a certificate granted or last renewed in Northern Ireland may not continue in force for a period longer than that for which it was so granted or last renewed: s 28A(2) (as so added). The prescribed period may be adjusted so as to ensure that, where both firearm and shot gun certificates are held, they take effect and cease to be in force at the same time: see the Firearms (Amendment) Act 1988 s 11 (amended by the Firearms (Amendment) Act 1997 Sch 2 para 17; and the Firearms (Variation of Fees) Order 2000, SI 2000/3148, art 6).

24 Firearms Act 1968 s 28A(6) (as added: see note 23 *supra*). The appeal must be in accordance with s 44 (as amended) (see PARA 691 *post*): s 28A(6).

25 *Ibid* s 28A(7) (as added: see note 23 *supra*). As to limitation on time for summary proceedings see PARA 696 *post*.

26 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

27 Firearms Act 1968 s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 *ante*).

28 See *ibid* s 32(1) (substituted by the Firearms (Variation of Fees) Order 1994, SI 1994/2615, art 4, Sch 1 Pt I; and amended by the Firearms (Variation of Fees) Order 2000, SI 2000/3148, art 3). The Secretary of State may by order made by statutory instrument vary any sum specified under the Firearms Act 1968 s 32 (as amended) and s 35 (see PARA 689 *post*) or provide that any sum payable thereunder ceases to be so payable: see the Firearms Act 1968 s 43. No fee is payable on the grant to a responsible officer of a rifle club, miniature rifle club or muzzle-loading pistol club which is approved under the Firearms (Amendment) Act 1988 s 15 (see PARA 651 *ante*) of a firearm certificate in respect of rifles, miniature rifles or muzzle-loading pistols, or ammunition, to be used solely for target shooting by the members of the club, or on the variation or renewal of a certificate so granted: Firearms Act 1968 s 32(2) (substituted by the Firearms (Amendment) Act 1997 Sch 2 para 5). However, this exemption does not apply if the operation of the Firearms (Amendment) Act 1988 s 15(1) is excluded in relation to the club by a limitation in the approval: Firearms Act 1968 s 32(2A)(a) (s 32(2A) added

by the Firearms (Amendment) Act 1997 Sch 2 para 5). In addition, if the operation of the Firearms (Amendment) Act 1988 s 15(1) in relation to the club is limited by the approval to target shooting with specified types of rifles, miniature rifles or muzzle-loading pistols, the Firearms Act 1968 s 32(2) (as substituted) only applies to a certificate in respect of rifles, miniature rifles or pistols of those types: s 32(2A)(b) (as so added). No fee is payable on the grant or renewal of a firearm certificate relating solely to a firearm which is shown to the satisfaction of the chief officer of police to be kept by the applicant as a trophy of war, or on any variation of a certificate the sole effect of which is to add such a firearm as aforesaid to the firearms to which the certificate relates, if the certificate is granted, renewed or varied subject to the condition that the applicant must not use the firearm: s 32(4). No fee is payable on the grant, variation or renewal of a firearm certificate if the chief officer of police is satisfied that the certificate relates solely to and, in the case of a variation, will continue when varied to relate solely to: (1) a firearm or ammunition which the applicant requires as part of the equipment of a ship; or (2) a signalling apparatus, or ammunition for it, which the applicant requires as part of the equipment of an aircraft or aerodrome; or (c) a slaughtering instrument, or ammunition for it, which the applicant requires for the purpose of the slaughter of animals: s 32(3). No fee is payable on the grant, variation or renewal of a firearm certificate which relates solely to and, in the case of a variation, will continue when varied to relate solely to, a signalling device which, when assembled and ready to fire, is not more than eight inches long and which is designed to discharge a flare, or to ammunition for such a device: s 32(3A) (added by the Firearms (Variation of Fees) Order 1968, SI 1968/1753; substituted by the Firearms (Variation of Fees) Order 1980, SI 1980/574; and further substituted by virtue of the Firearms (Variation of Fees) Order 1994, SI 1994/2615, art 4, Sch 1 Pt II).

29 *Wilson v Coombe* [1989] 1 WLR 78, 88 Cr App Rep 332, DC.

30 Firearms (Amendment) Act 1997 s 39(1).

31 *Ibid* s 39(2).

## UPDATE

### 630-698 Firearms, Ammunition and Air Weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vi) Regulation of Firearms and Ammunition/684. Variation of firearm certificate on holder's application.

#### **684. Variation of firearm certificate on holder's application.**

On the application of the holder of a firearm certificate, the chief officer of police of the area<sup>1</sup> in which the holder for the time being resides may vary the certificate<sup>2</sup>. Where the variation increases the number of firearms to which the certificate relates, a fee is normally payable<sup>3</sup>. It is an offence for a person knowingly or recklessly to make a statement false in any material particular for the purpose of procuring the variation of a firearm certificate for himself or another person<sup>4</sup>. The offence is punishable on summary conviction with imprisonment for a term not exceeding six months<sup>5</sup> or a fine not exceeding level 5 on the standard scale<sup>6</sup> or both<sup>7</sup>.

1 For the meaning of 'area' see PARA 646 note 1 ante.

2 Firearms Act 1968 s 29(2). A person aggrieved by a refusal to vary a certificate may appeal under s 44 (as amended) (see PARA 691 post): s 29(2). The right of appeal to the Crown Court under ss 29(2), 44, does not extend to a decision of a chief officer of police not to vary the conditions on a firearm certificate: *R v Crown Court at Cambridge, ex p Buckland* [1998] 32 LS Gaz R 29, DC.

3 See the Firearms Act 1968 s 32(1)(c) (as amended); and PARA 683 ante.

4 Ibid s 29(3) (amended by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 para 2(2)). As to limitation on time for summary proceedings see PARA 696 post.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

6 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 Firearms Act 1968 s 51(1), (2), Sch 6 Pt 1 (as amended: see PARA 634 note 15 ante). As to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

#### **UPDATE**

#### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vi) Regulation of Firearms and Ammunition/685. Compulsory variation and revocation of certificate.

### **685. Compulsory variation and revocation of certificate.**

The chief officer of police in whose area<sup>1</sup> the holder of a firearm certificate for the time being resides may at any time, by written notice, vary the conditions (other than the prescribed mandatory conditions) subject to which the certificate is held and require the delivery up of it within 21 days for the purpose of its amendment<sup>2</sup>.

A firearm certificate may be revoked by the chief officer of police for the area in which the holder resides on any of the following grounds<sup>3</sup>: (1) if the chief officer of police has reason to believe that the holder is of intemperate habits or unsound mind or is otherwise unfitted to be entrusted with a firearm, or that the holder can no longer be permitted to have the firearm or ammunition to which the certificate relates in his possession without danger to the public safety or to the peace<sup>4</sup>; (2) if the chief officer of police is satisfied that the holder is prohibited<sup>5</sup> from possessing a firearm to which the Firearms Act 1968<sup>6</sup> applies<sup>7</sup>; (3) if the chief officer of police is satisfied that the holder no longer has a good reason for having in his possession, or for purchasing or acquiring, the firearm or ammunition which he is authorised by virtue of the certificate to have in his possession or to purchase or acquire<sup>8</sup>; or (4) if the holder fails to comply with a notice<sup>9</sup> requiring him to deliver up the certificate<sup>10</sup>. A person aggrieved by the revocation of a certificate under head (1), (2) or (3) above may appeal against the revocation<sup>11</sup>.

The chief officer of police for the area in which the holder of a firearm certificate resides may partially revoke the certificate, that is to say, he may revoke the certificate in relation to any firearm or ammunition which the holder is authorised by virtue of the certificate to have in his possession or to purchase or acquire<sup>12</sup>. A firearm certificate may be partially revoked only if the chief officer of police is satisfied that the holder no longer has a good reason for having in his possession, or for purchasing or acquiring, the firearm or ammunition to which the partial revocation relates<sup>13</sup>. A person aggrieved by the partial revocation of a certificate may appeal against the partial revocation<sup>14</sup>.

A shot gun certificate may be revoked by the chief officer of police for the area in which the holder resides if he is satisfied that the holder is prohibited by the Firearms Act 1968 from possessing a shot gun<sup>15</sup> or cannot be permitted to possess a shot gun without danger to the public safety or to the peace<sup>16</sup>. A person aggrieved by the revocation of a shot gun certificate may appeal against the revocation<sup>17</sup>.

Where a firearm or shot gun certificate is revoked the chief officer of police must by notice in writing require the holder to surrender the certificate<sup>18</sup>. Where a firearm certificate is partially revoked the chief officer of police must by notice in writing require the holder to deliver up the certificate for the purpose of amending it<sup>19</sup>. It is an offence for the holder of a certificate to fail to comply with a notice requiring surrender or delivery within 21 days<sup>20</sup>. The offence is punishable with a maximum fine of level 3 on the standard scale<sup>21</sup>.

If an appeal is brought against a revocation or partial revocation these provisions do not apply to that revocation or partial revocation unless the appeal is abandoned or dismissed; and they then apply with the substitution, for the reference to the date of the notice, of a reference to the date on which the appeal was abandoned or dismissed<sup>22</sup>.

These provisions do not apply in relation to the revocation of a firearm certificate on any ground mentioned in head (1), (2) or (3) above, or to the revocation of a shot gun certificate, if

the chief officer of police serves a notice on the holder<sup>23</sup> requiring him to surrender forthwith his certificate and any firearms and ammunition in his possession by virtue of the certificate<sup>24</sup>.

1 For the meaning of 'area' see PARA 646 note 1 ante.

2 See the Firearms Act 1968 s 29(1). As to the prescribed conditions see PARA 683 ante. An appeal cannot be made to the Crown Court against the decision to vary the conditions subject to which a firearm certificate is held; a challenge to it must be by way of judicial review: *R v Cambridge Crown Court, ex p Buckland* [1998] 32 LS Gaz R 29, 142 Sol Jo LB 206.

3 Firearms Act 1968 s 30A(1) (ss 30A-30D added by the Firearms (Amendment) Act 1997 s 40).

4 Firearms Act 1968 s 30A(2) (as added: see note 3 supra). See note 16 infra.

5 le by the Firearms Act 1968. See PARAS 668, 672 ante.

6 le ibid s 1 (see PARA 634 ante).

7 Ibid s 30A(3) (as added: see note 3 supra). See PARAS 668, 672 ante.

8 Ibid s 30A(4) (as added: see note 3 supra).

9 le a notice under ibid s 29(1).

10 Ibid s 30A(5) (as added: see note 3 supra).

11 Ibid s 30A(6) (as added: see note 3 supra). See PARA 691 post.

12 Ibid s 30B(1) (as added: see note 3 supra).

13 Ibid s 30B(2) (as added: see note 3 supra).

14 Ibid s 30B(3) (as added: see note 3 supra). See PARA 691 post.

15 See PARAS 669, 672 ante.

16 Firearms Act 1968 s 30C(1) (as added: see note 3 supra). 'Danger to the peace' is not limited to danger of violence; all that is necessary is that there should be a danger that the gun might be used in such a way that good order is disturbed; carrying a gun for the purpose of poaching would constitute a disturbance of 'the peace' in the sense of disturbance of good order: *Ackers v Taylor* [1974] 1 All ER 771, [1974] 1 WLR 405, DC (revocation of shot gun certificate under identical wording of the Firearms Act 1968 s 30(1) (repealed)). The danger to the peace which must be considered is a danger involving the use of the gun, a matter to be decided with reference to facts occurring before the licence was first granted, as well as after it: *Spencer-Stewart v Chief Constable of Kent* (1988) 89 Cr App Rep 307, DC (revocation under the Firearms Act 1968 s 30(2) (repealed)). Where the husband of the holder of a shot gun certificate had convictions for drug offences, and he and the holder still associated with drug-users, it was held that there was some danger to the public and that the requirements for revocation of the certificate had been satisfied: *Dabek v Chief Constable of Devon and Cornwall* (1990) 155 JP 55, DC (revocation under the Firearms Act 1968 s 30(2) (repealed)). Likewise, it has been held that a chief constable is entitled in the exercise of his discretion to take account of irresponsible and uncontrolled conduct not involving a shotgun but analogous to it: *Chief Constable of Essex v Germain* (1991) 156 JP 109, DC (revocation under the Firearms Act 1968 s 30(2) (repealed)).

17 Firearms Act 1968 s 30C(2) (as added: see note 3 supra). The appeal must be in accordance with s 44 (as amended) (see PARA 691 post): s 30C(2) (as so added).

18 Ibid s 30D(1) (as added: see note 3 supra).

19 Ibid s 30D(2) (as added: see note 3 supra).

20 Ibid s 30D(3) (as added: see note 3 supra). As to the limitation of time for summary proceedings see PARA 696 post.

21 Ibid s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 supra). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to the court's power to order forfeiture or disposal of firearms and ammunition see PARA 697 post.

22 Ibid s 30D(4) (as added: see note 3 supra).

23     le a notice under the Firearms (Amendment) Act 1988 s 12 (as amended). Where a certificate is revoked under the Firearms Act 1968 s 30A(2), (3) or (4) (as added) or s 30C (as added), the chief officer of police may, by written notice, require the holder to surrender forthwith the certificate and any firearms and ammunition which are in the holder's possession by virtue of that certificate: Firearms (Amendment) Act 1988 s 12(1) (amended by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 paras 15, 18). Failure to comply is an offence punishable on summary conviction by imprisonment not exceeding 3 months or a fine not exceeding level 4 on the standard scale or both: Firearms (Amendment) Act 1988 s 12(2). As from a day to be appointed the Secretary of State may by order either provide that this offence is no longer punishable by imprisonment or extend the maximum term for this offence to a maximum term of 51 weeks: see the Criminal Justice Act 2003 s 281(1), (2), (7) (not yet in force). Any such order may make such supplementary, incidental, or consequential provision as the Secretary of State considers necessary or expedient, including provision amending any relevant enactment (s 281(3) (not yet in force)), but may not affect the penalty for any offence committed before the commencement of that order (s 281(6)(a) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

24     Firearms Act 1968 s 30D(5) (as added: see note 3 supra).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vi) Regulation of Firearms and Ammunition/686. Firearm certificates in respect of prohibited weapons and ammunition.

#### **686. Firearm certificates in respect of prohibited weapons and ammunition.**

Without the authority of the Secretary of State it is an offence to possess, purchase, acquire<sup>1</sup>, manufacture, sell or transfer<sup>2</sup> certain weapons and ammunition, referred to as 'prohibited weapons' and 'prohibited ammunition'<sup>3</sup>.

In the case of a person authorised to possess any prohibited weapon or ammunition, the chief officer of police concerned is precluded from refusing to grant or renew, and from revoking, a firearm certificate in respect of the weapon or ammunition in question<sup>4</sup>; but if the authority is withdrawn, the certificate must be revoked or varied accordingly<sup>5</sup>.

1 For the meaning of 'acquire' see PARA 634 note 3 ante.

2 As to the meaning of 'transfer' see PARA 636 note 1 ante.

3 See the Firearms Act 1968 s 5 (as amended); and PARA 661 et seq ante.

4 Ibid s 31(1) (s 31 amended by Transfer of Functions (Prohibited Weapons) Order 1968, SI 1968/1200).

5 See the Firearms Act 1968 s 31(2) (as amended: see note 4 supra).

#### **UPDATE**

#### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vi) Regulation of Firearms and Ammunition/687. European firearms documents.

### **687. European firearms documents.**

Where a person is granted, or is the holder of, a certificate<sup>1</sup> under the Firearms Act 1968, he is entitled to be issued by the chief officer of police for the area<sup>2</sup> in which he resides with:

- 804 (1) a document ('a European firearms pass') containing the required particulars<sup>3</sup>; and
- 805 (2) a document stating that, for certain purposes<sup>4</sup>, the holder of the certificate has the agreement of the United Kingdom authorities, for so long as the certificate remains in force, to any purchase or acquisition by him in another member state<sup>5</sup> of any firearm or ammunition to which the certificate relates,

and an application for the issue of a document falling within head (1) or head (2) above may be made at the same time as any application for a certificate the grant of which will entitle him to the issue of the document or subsequently while the certificate is in force<sup>6</sup>.

Where: (a) a person who resides in Great Britain<sup>7</sup> is proposing to purchase or acquire any firearm or ammunition in another member state<sup>8</sup>; (b) that person is not for the time being the holder of a certificate<sup>9</sup> relating to that firearm or ammunition<sup>10</sup>; (c) the firearm falls within a specified category<sup>11</sup> or the ammunition is capable of being used with such a firearm<sup>12</sup>; and (d) that person satisfies the chief officer of police for the area where he resides that he is not proposing to bring that firearm or ammunition into the United Kingdom<sup>13</sup>, the chief officer of police may, if he thinks fit, issue that person with a document stating that, for certain purposes<sup>14</sup>, that person has the agreement of the United Kingdom authorities to any purchase or acquisition by him in another member state of that firearm or ammunition<sup>15</sup>.

The period specified in a European firearms pass as the period for which it is to be valid is whichever is the shorter of: (i) the period until the earliest time when a certificate relating to a firearm identified in the pass expires; and (ii) the maximum period for the duration of that pass<sup>16</sup>.

On an application for the renewal by a chief officer of police of a certificate relating to a firearm identified in a European firearms pass, the holder of the certificate may apply to the chief officer of police for the renewal of the pass<sup>17</sup>. Where a certificate relating to a firearm identified in a European firearms pass is to expire without being renewed, but a certificate relating to another firearm identified in that pass will continue in force after the other certificate expires, the holder of the pass may apply to the chief officer of police for the area in which he resides for the renewal of the pass subject to the deletion of the reference to any firearm to which the expiring certificate relates<sup>18</sup>. Where a European firearms pass ceases to be valid without being renewed, the chief officer of police for the area in which the person to whom it was issued resides may, by notice in writing, require that person, within 21 days of the date of the notice, to surrender the pass to him<sup>19</sup>. It is an offence for a person to fail to comply with such a notice<sup>20</sup>. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>21</sup>.

Where: (A) a certificate relating to a firearm identified in a European firearms pass or a certificate in respect of which a specified authority<sup>22</sup> has been issued is varied<sup>23</sup>, revoked or

cancelled<sup>24</sup>; (b) the Secretary of State gives notice that any European firearms pass needs to be modified by the addition or variation of a specified statement<sup>25</sup>; or (c) the holder of a European firearms pass applies to have particulars of another firearm added to the pass<sup>26</sup>, the chief officer of police for the area in which the holder of the pass or authority resides must make such variations of the pass or authority as are appropriate in consequence of the variation, revocation, cancellation, notice or application or, where appropriate, to cancel it<sup>27</sup>.

Where a person is for the time being the holder of an Article 7 authority<sup>28</sup> issued by the chief officer of police for any area, the chief officer of police for that area may, if he thinks fit, at any time revoke that authority, and by notice in writing require that person, within 21 days of the date of the notice, to surrender that authority to him<sup>29</sup>. Where a firearm identified in a European firearms pass which is for the time being valid is lost or stolen, the holder of the pass must immediately inform the chief officer of police for the area in which he resides about the loss or theft, and produce the pass to that chief officer for him to indorse particulars of that loss or theft on the pass<sup>30</sup>. It is an offence for a person to fail to comply with such an obligation<sup>31</sup>. The offence is punishable with imprisonment for a term not exceeding three months<sup>32</sup> or a fine not exceeding level 5 on the standard scale or both<sup>33</sup>.

1   le a firearm certificate or a shot gun certificate: Firearms Act 1968 s 57(4).

2   For the meaning of 'area' see PARA 646 note 1 ante.

3   Firearms Act 1968 s 32A(1)(a) (ss 32A-32C added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 5). The required particulars, in relation to a person issued with a European firearms pass, are:

159   (1)   particulars identifying that person (Firearms Act 1968 s 32A(4)(a) (as so added));

160   (2)   particulars identifying every firearm which that person has applied to have included in a European firearms pass, and which is a firearm in relation to which a certificate granted to that person is for the time being in force (s 32A(4)(b) (as so added));

161   (3)   a statement in relation to every firearm identified in the pass as to the category into which it falls for the purposes of EC Council Directive 91/477 (OJ L256, 13.09.91, p 51) on the control of the acquisition and possession of weapons ('the Weapons Directive') (Firearms Act 1968 s 32A(3)(c) (as so added); s 57(4) (amended by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 5(2)));

162   (4)   the date of the issue of the pass and the period from its issue for which the pass is to be valid (Firearms Act 1968 s 32A(3)(d) (as so added));

163   (5)   the statements required by the Weapons Directive Annex II(f) (statements as to travel in the member states with the firearms identified in the pass) (Firearms Act 1968 s 32A(3)(e) (as so added); s 57(4) (as so amended)).

The particulars of the firearms to which a shot gun certificate relates which are to be contained in a European firearms pass are: (a) a description of the shot guns to which that certificate relates; and (b) any identification numbers specified in or entered on that certificate in pursuance of s 28(2A) (as added) (see PARA 683 ante) or in consequence of any person's compliance, in accordance with the Firearms (Amendment) Act 1997 s 32(2)(b) (requirements relating to transfers of firearms: see PARA 638 ante), with any instructions contained in the certificate, and, accordingly, references to a firearm identified in such a pass include references to any shot gun of a description specified in that pass: Firearms Act 1968 s 32A(4) (s 32A as so added; and s 32A(4) amended by the Firearms (Amendment) Act 1997 s 52, Sch 2 para 6).

4   le for the purposes of the Weapons Directive art 7.

5   For the meaning of 'another member state' see PARA 655 note 12 ante.

6   Firearms Act 1968 s 32A(1) (as added: see note 3 supra).

7   For the meaning of 'Great Britain' see PARA 45 note 2 ante.

8   Firearms Act 1968 s 32A(2)(a) (as added: see note 3 supra).

9   For the meaning of 'certificate' see PARA 637 note 9 ante.

- 10 Firearms Act 1968 s 32A(2)(b) (as added: see note 3 supra).
- 11 I.e. firearms that fall within the Weapons Directive Annex I category B.
- 12 Firearms Act 1968 s 32A(2)(c) (as added: see note 3 supra).
- 13 Ibid s 32A(2)(d) (as added: see note 3 supra). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.
- 14 I.e. for the purposes of the Weapons Directive art 7.
- 15 Firearms Act 1968 s 32A(2) (as added: see note 3 supra). A European firearms pass must contain space for the making of entries by persons authorised to do so under the law of any member state: s 32A(5) (as so added).
- 16 Ibid s 32A(6) (as added: see note 3 supra). For these purposes, the maximum period for the duration of a European firearms pass is in the case of a pass identifying only a firearm or firearms stated in the pass to fall within the Weapons Directive Annex I, category D, 10 years, and in any other case, 5 years: Firearms Act 1968 s 32A(7) (as so added).
- 17 Ibid s 32B(1) (as added: see note 3 supra). Where, on an application under s 32B(1) (as added) or s 32B(2) (as added) the pass in question is produced to the chief officer of police, and a certificate relating to a firearm identified in the pass is renewed or will continue in force after the time when the pass would (apart from its renewal) have ceased to be valid, he must renew that pass, subject to any appropriate deletion, from that time for whichever is the shorter of the periods specified in heads (i) and (ii) in the text: s 32B(3) (as so added).
- 18 Ibid s 32B(2) (as added: see note 3 supra). See also note 17 supra.
- 19 Ibid s 32B(4) (as added: see note 3 supra). See also note 17 supra.
- 20 Ibid s 32B(5) (as added: see note 3 supra). As to the limitation of time for summary proceedings see PARA 696 post. See also note 17 supra.
- 21 Ibid s 51(1), (2), Sch 6 Pt 1 (as amended: see PARA 634 note 15 ante). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.
- 22 I.e. an authority for the purposes of the Weapons Directive art 7.
- 23 For the purposes of the Firearms Act 1968 s 32C (as added), the variation of a certificate includes a reference to the making of any entry on a shot gun certificate in pursuance of the requirement under the Firearms (Amendment) Act 1997 s 32(2)(b) (requirements relating to transfers of firearms: see PARA 683 ante) to comply with instructions contained in the certificate: Firearms Act 1968 s 32C(7) (as added: see note 3 supra).
- 24 Ibid s 32C(1)(a) (as added: see note 3 supra).
- 25 Ibid s 32C(1)(b) (as added: see note 3 supra). A specified statement is one mentioned in note 3 head (5) supra.
- 26 Ibid s 32C(1)(c) (as added: see note 3 supra).
- 27 Ibid s 32C(1) (as added: see note 3 supra). For these purposes, the chief officer of police for the area in which any person who is or has been the holder of any certificate resides may, by notice in writing, require that person, within 21 days of the date of the notice, to produce or surrender to him any European firearms pass or Article 7 authority (see note 28 infra) issued to that person: s 32C(2) (as so added). It is an offence for any person to fail to comply with such a notice: s 32C(6) (as so added). The offence is punishable with imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale or both: s 51(1), (2), Sch 6 Pt 1 (as amended: see PARA 634 note 15 ante). As from a day to be appointed the maximum term is increased from three months to 51 weeks: see Sch 6 Pt 1 (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (7)). At the date at which this volume states the law no such day had been appointed.
- 28 I.e. a document issued by virtue of the Firearms Act 1968 s 32A(2) (as added) (see notes 2-15 supra): s 32C(3) (as added: see note 3 supra); s 57(4) (amended by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 5(2)).

29 Firearms Act 1968 s 32C(3) (as added: see note 3 supra). It is an offence for any person to fail to comply with such a notice: s 32C(6) (as so added). The offence is punishable with imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale or both: Sch 6 Pt 1 (as amended: see PARA 634 note 15 ante). As from a day to be appointed the maximum term is increased from three months to 51 weeks: see Sch 6 Pt 1 (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (7)). At the date at which this volume states the law no such day had been appointed.

30 Firearms Act 1968 s 32C(4) (as added: see note 3 supra). Where a firearm to which such an indorsement relates is returned to the possession of the holder of the pass in question, the chief officer of police for the area in which that person resides may, on the production to him of that pass, make such further indorsement on that pass as may be appropriate: s 32C(5) (as so added).

31 Ibid s 32C(6) (as added: see note 3 supra). As to the limitation of time for summary proceedings see PARA 696 post.

32 As from a day to be appointed this maximum term of imprisonment is increased from three months to 51 weeks: see ibid Sch 6 Pt 1 (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (7)). At the date at which this volume states the law no such day had been appointed.

33 Firearms Act 1968 Sch 6 Pt 1 (as amended: see PARA 634 note 15 ante).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vi) Regulation of Firearms and Ammunition/688. Registration of firearms dealers.

### **688. Registration of firearms dealers.**

The chief officer of police for every area<sup>1</sup> is required to keep in a prescribed form a register of firearms dealers<sup>2</sup>. Except as provided to the contrary<sup>3</sup>, the chief officer must enter in the register the name of any person who, having or proposing to have a place of business in his area, applies for registration<sup>4</sup> and, if a person is registered as a firearms dealer, his place of business is to be entered on the register<sup>5</sup>. In order to be registered, an applicant must provide certain prescribed particulars<sup>6</sup>.

A firearms dealer must not be registered if registration is prohibited by order of a court in either Great Britain or Northern Ireland<sup>7</sup>. The chief officer of police may refuse to register an applicant unless he is satisfied that the applicant will engage in business as a firearms dealer to a substantial extent or as an essential part of another trade, business or profession<sup>8</sup>. Further, registration may be refused if the chief officer of police is satisfied that the applicant cannot be permitted to carry on business as a firearms dealer without danger to the public safety or to the peace<sup>9</sup>, but he may not refuse registration on these grounds in the case of an applicant authorised by the Secretary of State<sup>10</sup> to manufacture, sell or transfer prohibited weapons or ammunition<sup>11</sup>. The chief officer of police may in any case refuse registration on the ground that the place of business is such that the applicant cannot be permitted to carry on business there without danger to the public safety or the peace<sup>12</sup>.

Registration is subject to such conditions as the chief officer of police may at any time impose and, either of his own motion or on the application of the firearms dealer, he may at any time vary or revoke an existing condition<sup>13</sup>.

A person who is registered in any area as a firearms dealer who proposes to carry on business as such at a place of business in that area which is not entered in the register must notify the chief officer of police for the area and furnish him with the required particulars, whereupon the chief officer must enter that place in the register<sup>14</sup> unless he is satisfied that the place is such that the applicant cannot be permitted to carry on such business there without danger to the public safety or to the peace<sup>15</sup>.

1 For the meaning of 'area' see PARA 646 note 1 ante.

2 Firearms Act 1968 s 33(1). For the prescribed form of register and the prescribed particulars to be furnished on an application for registration see the Firearms Rules 1998, SI 1998/1941, r 10(1), (3), Sch 5 Pts I, III. For the meaning of 'firearms dealer' see PARA 636 note 5 ante.

3 Ie by the Firearms Act 1968 s 34 (as amended) (see the text and notes 7-12 infra).

4 Ibid s 33(2).

5 Ibid s 33(3) (amended by the Firearms (Amendment) Act 1997 s 42(2)).

6 Firearms Act 1968 s 33(3) (as amended: see note 5 supra). These particulars must include particulars of every place of business at which the applicant proposes to carry on business in the area as a firearms dealer: s 33(3) (as so amended). As to the prescribed particulars see the Firearms Rules 1998, SI 1998/1941, r 10(2), Sch 5 Pt II. It is an offence knowingly or recklessly to make a statement false in a material particular to procure registration: see the Firearms Act 1968 s 39(1) (amended by the Firearms (Amendment) Act 1997 s 52, Sch 2 para 2(3)). An offence under the Firearms Act 1968 s 39(1) (as amended) is punishable on summary conviction

with imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both: s 51(1), (2), Sch 6 Pt 1 (as amended: see PARA 634 note 15 ante). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to the limitation of time for summary proceedings see PARA 696 post. A person aggrieved by a refusal to register him or to enter a place of business in the register may appeal under the Firearms Act 1968 s 44 (as amended) (see PARA 691 post): s 34(5).

7 See *ibid* s 34(1). The order referred to in the text is one made under s 45 (see PARA 698 post) or corresponding Northern Ireland legislation: s 34(1). For the meaning of 'Great Britain' see PARA 45 note 2 ante.

8 Firearms Act 1968 s 34(1A) (added by the Firearms (Amendment) Act 1988 s 13(2)).

9 Firearms Act 1968 s 34(2). As to the meaning of 'danger to the public safety or to the peace' see PARA 685 note 16 ante.

10 As to the transfer of functions to the Secretary of State from the Defence Council see PARA 661 note 2 ante.

11 See the Firearms Act 1968 s 34(3) (amended by virtue of the Transfer of Functions (Prohibited Weapons) Order 1968, SI 1968/1200). As to prohibited weapons and ammunition see PARAS 661 et seq, 686 ante.

12 Firearms Act 1968 s 34(4). It is an offence to carry on business at a place not entered in the register: see s 39(2). An offence under s 39(2) is punishable on summary conviction with imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both: Sch 6 Pt 1 (as amended: see PARA 634 note 15 ante). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

13 See the Firearms Act 1968 s 36(1). The chief officer must specify the conditions in the certificate and must give written notice of any condition imposed, varied or revoked during the currency of the certificate: see s 36(2). A person aggrieved by the imposition or variation of a condition, or a refusal to vary or revoke one, may appeal under s 44 (as amended) (see PARA 691 post): s 36(3). Failure to comply with a condition is an offence: see s 39(3). An offence under s 39(3) is punishable on summary conviction with imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both: Sch 6 Pt 1 (as amended: see PARA 634 note 15 ante). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

14 Firearms Act 1968 s 37(1).

15 *Ibid* s 37(2). A person aggrieved by a refusal to enter a place of business in the register may appeal under s 44 (as amended) (see PARA 691 post): s 37(3).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vi) Regulation of Firearms and Ammunition/689. Certificates of registration.

### **689. Certificates of registration.**

A person entered on the register of firearms dealers must be granted a certificate of registration<sup>1</sup>, but he must surrender his certificate to the chief officer of police on or before the expiration of the period of three years from the grant of the certificate and apply in the prescribed form for a new certificate<sup>2</sup>. Provided that the requisite fee has been paid and that the dealer's name has not been removed from the register, such certificates are granted as of right<sup>3</sup>.

The certificate must specify the conditions for the time being affecting registration and, on any change being made in those conditions<sup>4</sup>, the holder must be given written notice of them<sup>5</sup> and required to deliver up his certificate within 21 days for the purpose of its amendment<sup>6</sup>.

A fee is normally payable<sup>7</sup> on the initial registration of a firearms dealer<sup>8</sup> and on the grant of a new certificate<sup>9</sup>.

1 See the Firearms Act 1968 s 33(4). As to registration see PARA 688 ante.

2 See *ibid* s 33(5) (amended by the Firearms (Amendment) Act 1988 s 13(1)).

3 See the Firearms Act 1968 s 33(5) (as amended: see note 2 *supra*).

4 *Ibid* s 36(2). As to the imposition of conditions see PARA 688 ante.

5 See *ibid* s 36(2)(a). As to appeals see PARA 691 post.

6 See *ibid* s 36(2)(b).

7 However, no fee is payable if the chief officer is satisfied that the only place of business covered by the application either has, by reason of boundary alterations, become one in his area and was previously entered in the register for another area, or is one to which the applicant proposes to transfer his business from a place entered in the register for another area: *ibid* s 35(2). A reduced fee, currently set at £12, is payable if the chief officer of police for the area in which the applicant has applied to be registered is satisfied that the only place of business in respect of which the application is made is at a game fair, trade fair or exhibition, agricultural show or an event of a similar character, and that the applicant's principal place of business is entered in the register for another area: see s 35(1A) (added by the Firearms (Variation of Fees) Order 1986, SI 1986/986, art 7; and amended by the Firearms (Variation of Fees) Order 1994, SI 1994/2615, art 7, Sch 2 Pt II).

8 Firearms Act 1968 s 35(1). The fees under s 35 (as amended) may be amended by order by the Secretary of State: see s 43. The current fee is £150: see s 35(1) (amended by the Firearms (Variation of Fees) Order 2000, SI 2000/3148, art 4).

9 See the Firearms Act 1968 s 35(3) (substituted by the Firearms (Variation of Fees) Order 1994, SI 1994/2615, art 6, Sch 2 Pts I, III). The current fee is £150: see the Firearms Act 1968 s 35(3) (amended by the Firearms (Variation of Fees) Order 2000, SI 2000/3148, art 5).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vi) Regulation of Firearms and Ammunition/690. Removal from the register by the chief officer of police.

### **690. Removal from the register by the chief officer of police.**

If, after giving a person whose name is on the register reasonable notice, the chief officer of police is satisfied that the person concerned either no longer carries on business as a firearms dealer<sup>1</sup> or has ceased to have a place of business in the police area<sup>2</sup>, that person's name may be removed from the register<sup>3</sup>. It may also be removed if, after giving such notice, he is satisfied that the person cannot be permitted to carry on business as a firearms dealer without danger to the public safety or to the peace<sup>4</sup>, unless the person concerned is authorised<sup>5</sup> to manufacture, sell or transfer prohibited weapons or ammunition<sup>6</sup>.

If a person so desires, his name must be removed from the register<sup>7</sup>. The name of a person who fails in any year to apply for a new certificate of registration<sup>8</sup> must also be removed from the register if he does not apply within 21 days of being required, by written notice, to apply, or within such longer period as in special circumstances may be allowed<sup>9</sup>.

A place of business may be removed from the register if the chief officer of police is satisfied that it is one at which the firearms dealer concerned cannot be permitted to carry on business as such without danger to the public safety or to the peace<sup>10</sup>.

A person's name or place of business may also be removed from the register if the chief officer of police is satisfied that a registered firearms dealer has failed to comply with the conditions of registration<sup>11</sup>.

Where a person's name is removed from the register, the chief officer of police must give him written notice requiring him to surrender his certificate of registration, and the register of transactions kept<sup>12</sup> by him or, if the register is kept by means of a computer, a copy of the information comprised in that register in a visible and legible form<sup>13</sup>. If that person fails to do so within 21 days from the date of the notice<sup>14</sup>, he commits an offence<sup>15</sup> and is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>16</sup>.

A person aggrieved by the removal of his name from the register or by the removal from the register of a place of business of his may appeal<sup>17</sup> against the removal<sup>18</sup>.

1 Firearms Act 1968 s 38(1)(a).

2 Ibid s 38(1)(b).

3 Ibid s 38(1).

4 Ibid s 38(1)(c). As to the meaning of 'danger to the public safety or to the peace' see PARA 685 note 16 ante. As to a registered firearms dealer's name being removed by the court where the dealer is convicted of an offence or employs a convicted dealer etc see PARA 698 post.

5 Ie under ibid s 5: see PARA 661 et seq ante.

6 See ibid s 38(2) (amended by virtue of the Transfer of Functions (Prohibited Weapons) Order 1968, SI 1968/1200). As to prohibited weapons and ammunition see also PARA 661 ante.

7 See the Firearms Act 1968 s 38(5).

8 Ie under ibid s 33(5): see PARA 689 ante.

- 9 See *ibid* s 38(6).
- 10 See *ibid* s 38(4).
- 11 *Ibid* s 38(3). The conditions referred to in the text are those under s 36: see PARA 688 ante.
- 12 *Ie* under *ibid* s 40 (as amended): see PARA 692 post.
- 13 *Ibid* s 38(8) (amended by the Firearms (Amendment) Act 1988 s 13(3); and the Firearms (Amendment) Act 1997 s 52(1), Sch 2 para 7).
- 14 If an appeal is brought, the Firearms Act 1968 s 38(8) (as amended) applies only if the appeal is abandoned or dismissed, in which case the reference to the date of the notice is to be read as a reference to the date on which the appeal was abandoned or dismissed: s 38(8) proviso.
- 15 *Ibid* s 38(8) (as amended: see note 13 ante). As to the limitation of time for summary proceedings see PARA 696 post.
- 16 *Ibid* s 51(1), (2), Sch 6 Pt 1 (as amended: see PARA 634 note 15 ante). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.
- 17 *Ie* under *ibid* s 44 (as amended): see PARA 691 post.
- 18 *Ibid* s 38(7).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vi) Regulation of Firearms and Ammunition/691. Appeals to the courts.

## **691. Appeals to the courts.**

A person aggrieved by the decision of the chief officer of police has a right of appeal to the Crown Court<sup>1</sup> where: (1) the grant or renewal of a firearm or shot gun certificate is refused<sup>2</sup>; (2) an application for the variation of a firearm certificate is refused<sup>3</sup>; (3) a firearm certificate is revoked, or partially revoked, or a shot gun certificate is revoked<sup>4</sup>; (4) the registration of a firearms dealer is refused<sup>5</sup>; (5) a change in the conditions of registration of a firearms dealer is made or refused<sup>6</sup>; (6) entry in the register of firearms dealers of a new place of business is refused<sup>7</sup>; or (7) a person's name, or a particular place of business, is removed from that register<sup>8</sup>.

Notice of appeal<sup>9</sup> must be given to the appropriate officer of the Crown Court and to the chief officer of police<sup>10</sup> within 21 days after the appellant received notice of the decision of the chief officer<sup>11</sup>. The appeal must be determined on merits (and not by way of review)<sup>12</sup>. On the hearing of the appeal, on which the chief officer of police may appear and be heard<sup>13</sup>, the Crown Court may either dismiss the appeal or give the chief officer of police such directions as it thinks fit as respects the certificate or register which is the subject of the appeal<sup>14</sup>.

1 Firearms Act 1968 s 44(1) (s 44 substituted by the Firearms (Amendment) Act 1997 s 41(1)). The court hearing such an appeal may consider any evidence or other matter, whether or not it was available when the decision of the chief officer was taken: Firearms Act 1968 s 44(3) (substituted by the Firearms (Amendment) Act 1997 s 41(1)). The Crown Court is not bound by the ordinary rules of evidence but is entitled to take into account all the matters, including hearsay evidence, which were before the chief officer of police: *Kavanagh v Chief Constable of Devon and Cornwall* [1974] QB 624, [1974] 2 All ER 697, CA. See also *R v Crown Court at Aylesbury, ex p Farrer* (1988) Times, 9 March, CA.

2 Ie under the Firearms Act 1968 s 28A(6) (as added): see PARA 683 ante. The question whether or not a person has good reason for having a firearm or ammunition in his possession is a matter of discretion for the Crown Court whose decision will not be set aside save for an error in law: *Greenly v Lawrence* [1949] 1 All ER 241, DC (case decided under the Firearms Act 1937 s 2 (repealed)). See also *Dabek v Chief Constable of Devon and Cornwall* (1990) 155 JP 55, DC (revocation of shotgun certificate justified where holder was the wife of a man with old drug convictions who still associated with drug users).

3 Ie under the Firearms Act 1968 s 29(2): see PARA 684 ante.

4 Ie under *ibid* ss 30A(6), 30B(3), 30C(2) (all as added): see PARA 685 ante.

5 Ie under *ibid* s 34(5): see PARA 688 ante.

6 Ie under *ibid* s 36(3): see PARA 688 ante.

7 Ie under *ibid* s 37(3): see PARA 688 ante.

8 Ie under *ibid* s 38(7): see PARA 690 ante. An appeal must be determined on the merits and not by way of review: s 44(2). The court hearing the appeal may consider any evidence or other matter, whether or not it was available when the decision of the chief officer was taken: s 44(3).

9 The notice of appeal must be signed by the appellant or by his agent on his behalf and must state the general grounds of the appeal: *ibid* s 44(5), Sch 5 Pt II para 1 (s 44(5) as substituted: see note 1 *supra*).

10 See *ibid* Sch 5 Pt II para 1.

11 See *ibid* Sch 5 Pt II para 2. As to the extension of time limits see CrimPR 63.1-63.2. On receipt of the notice of appeal, the appropriate officer then enters the appeal and gives notice to the appellant and the chief officer of police of the date, time and place fixed for the hearing: Firearms Act 1968 Sch 5 Pt II para 3. The appellant may at any time, not less than two clear days before the date so fixed, abandon his appeal by giving written notice to the appropriate officer of the court and to the chief officer of police: Sch 5 Pt II para 4 (amended by the Crown Court Rules 1971, SI 1971/1292).

12 Firearms Act 1968 s 44(2) (substituted by the Firearms (Amendment) Act 1997 s 41(1)).

13 Firearms Act 1968 Sch 5 Pt II para 5.

14 *Ibid* Sch 5 Pt II para 7.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **691 Appeals to the courts**

NOTE 1--A decision as to whether an applicant resides in the area of the chief officer of police, as opposed to a decision to grant or refuse a certificate, is not a decision within the meaning of the Firearms Act 1968 s 44 applies, and so may be challenged only by way of judicial review: *R (on the application of Beck) v Chief Constable of Hertfordshire* [2008] All ER (D) 94 (Jul), DC.

NOTE 11--CrimPR 63.1-63.2 now Criminal Procedure Rules 2010, SI 2010/60, r 63.1-63.2.



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## **692. Register and notice of transactions in firearms.**

Every person who by way of trade or business manufactures, sells<sup>1</sup> or transfers<sup>2</sup> firearms<sup>3</sup> or ammunition<sup>4</sup> must provide and keep a register of transactions and must enter or cause to be entered in it prescribed particulars<sup>5</sup> within 24 hours after the transaction took place<sup>6</sup>. In the case of such a sale or transfer, every seller or transferor<sup>7</sup> must at the time of the transaction require any purchaser or transferee who is not known to him to furnish particulars of identification which must immediately be entered in the register<sup>8</sup>.

A person keeping such a register of transactions must on demand allow a constable or a civilian officer, duly authorised in writing in that behalf by the chief officer of police<sup>9</sup>, to enter and inspect all stock-in-hand and must on request by a constable or a civilian officer so authorised or an officer of Revenue and Customs produce the register, or if the register is kept by means of a computer, a copy of the information comprised in that register in a visible and legible form, for inspection<sup>10</sup>.

Every person keeping such a register of transactions must, unless required to surrender the register<sup>11</sup>, keep it for such a period that each entry will be available for inspection for at least five years from the date on which it was made<sup>12</sup>.

Every person keeping a register by means of a computer must secure that the information comprised in the register can readily be produced in a form in which it is visible and legible and can be taken away<sup>13</sup>.

1 Nothing in the Firearms Act 1968 s 40 applies to the sale of firearms or ammunition by auction in accordance with the terms of a permit issued under s 9(2) (see PARA 648 ante): s 40(6).

2 As to the meaning of 'transfer' see PARA 637 note 1 ante.

3 This reference, and the reference in the Firearms Act 1968 Sch 4, is to be construed as not including references to air weapons or component parts of, or accessories to, air weapons: s 40(2). For the meaning of 'air weapon' see PARA 633 ante. A chief officer of police may, if he thinks fit, by notice in writing, exempt transactions in certain parts and accessories for shot guns, so long as the notice is in force, from all or any of the requirements of s 40(1), Sch 4, if it appears to him that: (1) a person required to be registered as a firearms dealer (see PARA 688 ante) carries on a trade or business in the course of which he manufactures, tests or repairs component parts or accessories for shot guns but does not manufacture, test or repair complete shot guns; and (2) it is impossible to assemble a shot gun from the parts likely to come into that person's possession in the course of that trade or business: see s 41.

4 Any reference in *ibid* s 40(1), Sch 4 to ammunition is to be construed as not including:

164 (1) cartridges containing five or more shot, none of which exceeds .36 inch in diameter (s 40(2)(a));

165 (2) ammunition for an air gun, air rifle or air pistol (s 40(2)(b)); or

166 (3) blank cartridges not more than 1 inch in diameter measured immediately in front of the rim or cannellure of the base of the cartridge (s 40(2)(c)).

For the meaning of 'ammunition' within the Firearms Act 1968 generally see PARA 634 note 10 ante.

5 *Ibid* s 40(1). The prescribed particulars are the quantities and descriptions of firearms and ammunition:

- 167 (1) manufactured and the dates thereof (Sch 4 para 1);
- 168 (2) purchased or acquired, with the sellers' or transferors' names and addresses (Sch 4 para 2);
- 169 (3) accepted for sale, repair, test, proof, cleaning, storage, destruction or other purpose, with the transferors' names and addresses and the dates of the several transactions (Sch 4 para 3);
- 170 (4) sold or transferred, with the purchasers' or transferees' names and addresses and (except where the purchaser or transferee is a registered firearms dealer) the police areas in which the firearms certificates were issued, and the dates of the several transactions (Sch 4 para 4 (substituted by the Firearms Rules 1998, SI 1998/1941, r 10(5)); and
- 171 (5) in possession for sale or transfer at the date of the last stocktaking or such other date in such each year as is specified in the register (Firearms Act 1968 Sch 4 para 5).

Schedule 4 may be amended by rules made by the Secretary of State under s 53 (see PARA 633 ante): see s 40(7).

6 See *ibid* s 40(3). Failure to comply with any provision of s 40 (as amended) or knowingly to make any false entry in the register is an offence: s 40(5). Such an offence is punishable on summary conviction by imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both: see s 51, Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. As to the limitation of time for summary proceedings see PARA 696 post.

7 As to the meanings of 'transferor' and 'transferee' see PARA 636 note 1 ante.

8 Firearms Act 1968 s 40(3).

9 For the meaning of 'civilian officer' see PARA 651 note 7 ante. The authority must be produced on demand: *ibid* s 40(4) proviso.

10 *Ibid* s 40(4) (amended by the Firearms (Amendment) Act 1988 s 23(3); and the Firearms (Amendment) Act 1997 s 52(1), Sch 2 para 8(a)); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). As to officers of Revenue and Customs see PARA 354 note 2 ante.

11 *Ie* under the Firearms Act 1968 s 38(8): see PARA 690 ante.

12 *Ibid* s 40(3A) (added by the Firearms (Amendment) Act 1988 s 13(4)).

13 Firearms Act 1968 s 40(4A) (added by the Firearms (Amendment) Act 1997 s 52(1), Sch 2 para 8(b)).

## UPDATE

### 630-698 Firearms, Ammunition and Air Weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 692 Register and notice of transactions in firearms

NOTE 3--1968 Act s 40(2) amended: Violent Crime Reduction Act 2006 s 31(2), Sch 5 (in force 1 October 2007: SI 2007/2180).

NOTE 5--1968 Act Sch 4 paras 1-5 now Sch 4 Pt 1 paras 1-5; and as to particulars relating to air weapons, see the 1968 Act Sch 4 Pt 2 paras 1-3 (Sch 4 amended by the Firearms (Amendment) Rules 2007, SI 2007/2605).

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## **(vii) Enforcement**

### **693. Power of search with warrant.**

If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that a relevant offence<sup>1</sup> has been, is being, or is about to be, committed, or that, in connection with a firearm<sup>2</sup> or ammunition<sup>3</sup>, there is a danger to the public safety or to the peace<sup>4</sup>, he may grant a warrant authorising a constable or a civilian officer<sup>5</sup> for any of the following purposes<sup>6</sup>:

- 806 (1) to enter at any time any premises<sup>7</sup> or place named in the warrant, if necessary by force, and to search the premises or place and every person found there<sup>8</sup>;
- 807 (2) to seize and detain anything which he may find on the premises or place, or on any such person, in respect of which or in connection with which he has reasonable ground for suspecting:
  - 23 32. (a) that a relevant offence has been, is being or is about to be committed<sup>9</sup>; or
  - 33. (b) that in connection with a firearm, imitation firearm<sup>10</sup> or ammunition there is a danger to the public safety or to the peace<sup>11</sup>.
- 24

The power of a constable or civilian officer under head (2)(b) above to seize and detain anything found on any premises or place includes power to require any information which is stored in any electronic form and is accessible from the premises or place to be produced in a form in which it can readily be produced in a visible and legible form and can be taken away<sup>12</sup>.

It is an offence for any person intentionally to obstruct a constable or civilian officer in the exercise of the above powers<sup>13</sup>. The offence is punishable on summary conviction with imprisonment for a term not exceeding six months<sup>14</sup> or a fine not exceeding level 5 on the standard scale or both<sup>15</sup>.

1 The offences relevant for these purposes are all offences under the Firearms Act 1968 except an offence under s 22(3) (see PARA 669 ante) or an offence relating specifically to air weapons: s 46(4) (s 46 substituted by the Firearms (Amendment) Act 1997 s 43). For these purposes (and for the purposes of the Firearms Act 1968 s 45 (see PARA 698 post), s 51(4) (see PARA 696 post) and s 52 (see PARA 697 post)), the offences under ss 22(4), 23(1), 24(4) (see PARA 670 ante) are offences relating specifically to air weapons: s 57(3). The provisions of s 46 (as substituted and amended) (and s 51(4) (see PARA 696 post), s 52 (see PARA 697 post)) apply also to offences under the Firearms (Amendment) Act 1988 and the Firearms (Amendment) Act 1997: see the Firearms (Amendment) Act 1988 s 25(5); and the Firearms (Amendment) Act 1997 s 50(4). For the meaning of 'air weapon' see PARA 633 ante.

2 For the meaning of 'firearm' see PARA 630 ante.

3 For the meaning of 'ammunition' see PARA 634 note 10 ante.

4 As to the meaning of 'danger to the peace' see PARA 685 note 16 ante.

- 5 For the meaning of 'civilian officer' see PARA 651 note 7 ante.
- 6 Firearms Act 1968 s 46(1) (as substituted: see note 1 supra).
- 7 As to the meaning of 'premises' see PARA 651 note 8 ante. The power of entry conferred by *ibid* Pt III (ss 46-52) (as amended) is without prejudice to any power of entry which may exist apart from that Act: see s 58(4). As to powers of entry, search and seizure see PARA 869 et seq post.
- 8 *Ibid* s 46(2)(a) (as substituted: see note 1 supra).
- 9 *Ibid* s 46(2)(a)(i) (as substituted: see note 1 supra).
- 10 For the meaning of 'imitation firearm' see PARA 631 ante.
- 11 Firearms Act 1968 s 46(2)(a)(ii) (as substituted: see note 1 supra).
- 12 *Ibid* s 46(3) (s 46 as substituted (see note 1 supra); and s 46(3) amended by the Criminal Justice and Police Act 2001 s 70, Sch 2, PARA 15). The additional powers of seizure provided by the Criminal Justice and Police Act 2001 s 50 and s 51 (see PARAS 890-891 post), and the obligation to return excluded and special procedure material under s 55 (see PARA 894 post), apply to the power of seizure under the Firearms Act 1968 s 46 (as substituted and amended): Criminal Justice and Police Act 2001 ss 50(5), 51(5), 55(4), Sch 1 paras 8, 76, 91.
- 13 Firearms Act 1968 s 46(5) (as substituted: see note 1 supra). As to the limitation of time for summary proceedings see PARA 696 post.
- 14 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.
- 15 Firearms Act 1968 s 51(1), (2), Sch 6 Pt 1(as amended: see PARA 634 note 15 ante). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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#### **694. Powers of constable to stop and search.**

A constable may require any person whom he has reasonable cause to suspect:

- 808 (1) of having a firearm<sup>1</sup>, with or without ammunition<sup>2</sup>, with him in a public place<sup>3</sup>;  
or
- 809 (2) to be committing or about to commit, elsewhere than in a public place, a relevant offence<sup>4</sup>,

to hand over the firearm or any ammunition for examination by the constable<sup>5</sup>.

If a person having a firearm or ammunition with him fails to hand it over when required to do so, he is guilty of an offence<sup>6</sup> and liable on summary conviction to imprisonment for a term not exceeding three months<sup>7</sup> or to a fine not exceeding level 4 on the standard scale or to both<sup>8</sup>.

If a constable has reasonable cause to suspect a person of having a firearm with him in a public place, or to be committing or about to commit, elsewhere than in a public place, a relevant offence, the constable may search that person and may detain him for the purpose of doing so<sup>9</sup>.

If a constable has reasonable cause to suspect that there is a firearm in a vehicle in a public place, or that a vehicle is being or is about to be used in connection with the commission of a relevant offence elsewhere than in a public place, he may search the vehicle and for that purpose require the person driving or in control of it to stop it<sup>10</sup>.

For the purpose of exercising the above powers a constable may enter any place<sup>11</sup>.

1 For the meaning of 'firearm' see PARA 630 ante. For these purposes it does not include an imitation firearm to which the Firearms Act 1982 applies: see the Firearms Act 1982 s 2(2), (3); and PARA 631 ante.

2 For the meaning of 'ammunition' see PARA 634 note 10 ante.

3 Firearms Act 1968 s 47(1)(a). For the meaning of 'public place' see PARA 680 note 5 ante.

4 Ibid s 47(1)(b). The offences relevant for these purposes are those under s 18(1), (2) (see PARA 679 ante), s 20 (see PARA 681 ante): s 47(6).

5 Ibid s 47(1). As to powers of stop and search see PARA 859 et seq post.

6 See ibid s 47(2).

7 As from a day to be appointed this maximum term of imprisonment is increased to 51 weeks: see ibid s 51(1), (2), Sch 6 Pt I (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 20(1), (9)). At the date at which this volume states the law no such day had been appointed. As to the limitation of time for summary proceedings see PARA 696 post.

8 Firearms Act 1968 Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

9 Ibid s 47(3).

10 Ibid s 47(4).

11 Ibid s 47(5).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### **695. Production of certificates.**

A constable may demand, from any person whom he believes to be in possession of a firearm<sup>1</sup> or ammunition<sup>2</sup>, or of a shot gun<sup>3</sup>, the production of his firearm certificate<sup>4</sup> or, as the case may be, his shot gun certificate<sup>5</sup>.

Where a person upon whom such a demand has been made by a constable and whom the constable believes to be in possession of a firearm fails:

- 810 (1) to produce a firearm certificate or, as the case may be, a shot gun certificate<sup>6</sup>;
- 811 (2) to show that he is a person who, by reason of his place of residence or any other circumstances, is not entitled to be issued with a document identifying that firearm under any of the provisions which in the other member states<sup>7</sup> correspond to the provisions of the Firearms Act 1968 for the issue of European firearms passes<sup>8</sup>; or
- 812 (3) to show that he is in possession of the firearm exclusively in connection with the carrying on of activities in respect of which he or the person on whose behalf he has possession of the firearm, is recognised, for the purposes of the law of another member state relating to firearms, as a collector of firearms or a body concerned in the cultural or historical aspects of weapons<sup>9</sup>,

the constable may demand from that person the production of a document which has been issued to that person in another member state under any such corresponding provisions, identifies that firearm as a firearm to which it relates, and is for the time being valid<sup>10</sup>.

If a person upon whom such a demand is so made fails to produce the certificate or document or to permit the constable to read it, or fails to show that he is entitled<sup>11</sup> to have the firearm, ammunition or shot gun in his possession without holding a certificate, the constable may seize and detain the firearm, ammunition or shot gun and may require the person to declare to him immediately his name and address<sup>12</sup>. If a person is so required to declare to a constable his name and address and he refuses to declare it or fails to give his true name and address, he is guilty of an offence<sup>13</sup> and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>14</sup>.

Where a person who is in possession of a firearm fails to comply with a demand to produce a document issued to him in another member state when a constable demands its production<sup>15</sup>, he commits an offence<sup>16</sup> and is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>17</sup>.

1 For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

2 For the meaning of 'ammunition' see PARA 634 note 10 ante.

3 For the meaning of 'shot gun' see PARA 632 ante.

4 For the meaning of 'firearm certificate' see PARA 634 note 8 ante.

- 5 Firearms Act 1968 s 48(1). For the meaning of 'shot gun certificate' see PARA 635 note 5 ante.
- 6 Ibid s 48(1A)(a) (s 48(1A), (4) added by the Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 7(2)).
- 7 For the meaning of 'other member state' see PARA 655 note 12 ante.
- 8 Firearms Act 1968 s 48(1A)(b) (as added: see note 6 supra). For the meaning of 'European firearms pass' see PARA 687 ante.
- 9 Ibid s 48(1A)(c) (as added: see note 6 supra).
- 10 Ibid s 48(1A) (as added: see note 6 supra).
- 11 Ie by virtue of the Firearms Act 1968 or (by virtue of the Firearms (Amendment) Act 1988 s 25(4)) the Firearms (Amendment) Act 1988.
- 12 Firearms Act 1968 s 48(2) (amended by Firearms Acts (Amendment) Regulations 1992, SI 1992/2823, reg 7(3)).
- 13 See the Firearms Act 1968 s 48(3). As to the limitation of time for summary proceedings see PARA 696 post.
- 14 Ibid s 51(1), (2), Sch 6 Pt I (as amended: see PARA 634 note 15 ante). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.
- 15 Ie under ibid s 48(1A) (as added): see the text and notes 6-10 supra.
- 16 See ibid s 48(4) (as added: see note 6 supra). See PARA 696 post.
- 17 Ibid Sch 6 Pt I (as amended: see PARA 634 note 15 ante).

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



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#### **696. Limitation period for summary proceedings.**

Subject to certain exceptions<sup>1</sup>, summary proceedings for an offence under the Firearms Act 1968, the Firearms (Amendment) Act 1988 or the Firearms (Amendment) Act 1997 may be instituted<sup>2</sup> at any time within four years after the commission of the offence<sup>3</sup>; but such proceedings may not be instituted after the expiration of six months after the commission of the offence unless instituted by, or by the direction of, the Director of Public Prosecutions<sup>4</sup>.

1 The proceedings for an offence under the Firearms Act 1968 s 22(3) (see PARA 669 ante) or an offence relating specifically to air weapons (see PARA 693 note 1 ante): s 51(4). For the meaning of 'air weapon' see PARA 633 ante.

2 The notwithstanding the Magistrates' Courts Act 1980 s 127(1) (limitation of time for taking proceedings: see MAGISTRATES vol 29(2) (Reissue) PARA 589).

3 Firearms Act 1968 s 51(4) (amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 72); Firearms (Amendment) Act 1988 s 25(5); Firearms (Amendment) Act 1997 s 50(4).

4 Firearms Act 1968 s 51(4) proviso. As to the effect of this limitation see PARA 1071 post.

#### **UPDATE**

#### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vii) Enforcement/697. Forfeiture of firearms; cancellation of certificates.

### **697. Forfeiture of firearms; cancellation of certificates.**

Where a person:

- 813 (1) is convicted of an offence under the Firearms Act 1968 or the Firearms (Amendment) Act 1988<sup>1</sup>, or is convicted of an offence for which he is sentenced to imprisonment or detention in a young offender institution or in a young offenders' institution in Scotland, or is subject to a detention and training order<sup>2</sup>; or
- 814 (2) has been ordered to enter into a recognisance to keep the peace or to be of good behaviour<sup>3</sup>, a condition of which is that he must not possess, use or carry a firearm<sup>4</sup>; or
- 815 (3) is subject to a community order<sup>5</sup> containing a requirement that he must not possess, use or carry a firearm<sup>6</sup>,

the court by or before which he is convicted, or by which the order is made, may make such order as to the forfeiture or disposal of any firearm or ammunition<sup>7</sup> found in his possession as the court thinks fit and may cancel any firearm certificate<sup>8</sup> or shot gun certificate<sup>9</sup> held by him<sup>10</sup>.

1 Is other than an offence under the Firearms Act 1968 s 22(3) (see PARA 669 ante), or an offence relating specifically to air weapons (see PARA 693 note 1 ante): Firearms Act 1968 s 52(1).

2 Ibid s 52(1)(a) (amended by the Criminal Justice Act 1988 ss 123(6), 170(2), Sch 8 Pt I, Sch 16; the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 24(3); and the Crime and Disorder Act 1998 s 168(2), Sch 8 para 15). A detention and training order is one made under the Powers of Criminal Courts (Sentencing) Act 2000 s 100: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89. As from a day to be appointed the Firearms Act 1968 s 52(1)(a) (as amended) no longer includes a person sentenced to detention in a young offender institution: s 52(1)(a) (as so amended; prospectively amended by the Criminal Justice and Court Services Act 2000 s 75, Sch 8). At the date at which this volume states the law no such day had been appointed. As to detention in a young offender institution see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 85 et seq.

3 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 151. This refers only to the common law powers and not to the power under the Justices of the Peace Act 1361 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 151): *Goodlad v Chief Constable of South Yorkshire* [1979] Crim LR 51.

4 Firearms Act 1968 s 52(1)(b). For the meaning of 'firearm' see PARA 630 ante. See also PARA 631 ante.

5 Is a community order within the meaning of the Criminal Justice Act 2003 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163) made in England and Wales, or a probation order made in Scotland: Firearms Act 1968 s 52(1A) (added by the Criminal Justice Act 2003 s 304, Sch 32 paras 11, 13(1), (3)).

6 Firearms Act 1968 s 52(1)(c) (amended by the Criminal Justice Act 2003 Sch 32 paras 11, 13(1), (2)).

7 For the meaning of 'ammunition' see PARA 634 note 10 ante.

8 For the meaning of 'firearm certificate' see PARA 634 note 8 ante.

9 For the meaning of 'shot gun certificate' see PARA 635 note 5 ante.

10 Firearms Act 1968 s 52(1). Where the court so cancels a certificate, it must cause notice to be sent to the chief officer of police by whom the certificate was granted and the chief officer of police must by notice in writing require the holder of the certificate to surrender it: s 52(2)(a), (b). A holder who fails to surrender a

certificate within 21 days from the date of the notice given him by the chief officer of police is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale: ss 51(1), (2), 52(2)(c), Sch 6 Pt I (Sch 6 Pt I as amended: see PARA 634 note 15 ante). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to the limitation of time for summary proceedings see PARA 696 ante. A constable may seize and detain any firearm or ammunition which may be the subject of an order for forfeiture under s 52 (as amended) (s 52(3)); and a magistrates' court may, on the application of the chief officer of police, order any such firearm or ammunition so seized and detained to be destroyed or otherwise disposed of (s 52(4)). Where, however, a person is convicted of an offence under the Firearms (Amendment) Act 1988 s 19, Schedule (see PARA 660 ante), no order may be made for the forfeiture of anything in his possession for the purposes of the museum in question: s 25(5). The Firearms Act 1968 s 52(3) is not to be taken as prejudicing the power of a constable, when arresting a person for an offence, to seize property found in his possession or any other power of a constable to seize firearms, ammunition or other property, being a power exercisable apart from s 52(3): s 58(4). As to the restrictions on the possession of firearms or ammunition by persons who have been convicted of crime see PARA 672 ante; and as to the power to order deprivation of property used for crime see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 481.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **697 Forfeiture of firearms; cancellation of certificates**

NOTE 5--Firearms Act 1968 s 52(1A) amended: Criminal Justice and Immigration Act 2008 Sch 4 para 7.

TEXT AND NOTE 7--In the 1968 Act s 52 references to ammunition include references to a primer to which the Violent Crime Reduction Act 2006 s 35 (see PARA 663A) applies and to an empty cartridge case incorporating such a primer: 1968 Act s 52(5) (added by Violent Crime Reduction Act 2006 s 50(5)).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(2) FIREARMS, AMMUNITION AND AIR WEAPONS/(vii) Enforcement/698. Powers on conviction of registered firearms dealer.

### **698. Powers on conviction of registered firearms dealer.**

Where a registered firearms dealer<sup>1</sup> is convicted of a relevant offence<sup>2</sup>, the court may order:

- 816 (1) that the dealer's name be removed from the register<sup>3</sup>;
- 817 (2) that neither the dealer nor any person who acquires the dealer's business, nor any person who took part in the management of the business and was knowingly a party to the offence, is registered as a firearms dealer<sup>4</sup>;
- 818 (3) that any person who, after the date of the order, knowingly employs in the management of his business the dealer convicted of the offence or any person who was knowingly a party to the offence, is not to be registered as a firearms dealer or, if so registered, is liable to be removed from the register<sup>5</sup>; and
- 819 (4) that any stock-in-hand of the business is to be disposed of by sale or otherwise in accordance with the directions contained in the order<sup>6</sup>.

A person aggrieved by such an order may appeal against it in the same manner as against the conviction; and the court may, if it thinks fit, suspend the operation of the order pending the appeal<sup>7</sup>.

1 For the meaning of 'registered' see PARA 636 note 4 ante; and for the meaning of 'firearms dealer' see PARA 636 note 5 ante.

2 I.e. an offence relevant for the purposes of the Firearms Act 1968 s 45. The relevant offences are: (1) all offences under the Firearms Act 1968 except an offence under s 2 (see PARA 635 ante), s 22(3) (see PARA 669 ante), s 24(3) (see PARA 669 ante), or an offence relating specifically to air weapons (see PARA 693 note 1 ante); (2) offences against the enactments for the time being in force relating to revenue and customs in respect of the import or export of firearms or ammunition to which s 1 (as amended) (see PARA 634 ante), applies, or of shot guns: s 45(2) (amended by the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 12, Table Pt I); Commissioners for Revenue and Customs Act 2005 s 50(1), (7). For the meaning of 'air weapon' see PARA 633 ante.

3 Firearms Act 1968 s 45(1)(a). As to removal from the register by the chief officer of police see PARA 690 ante.

4 Ibid s 45(1)(b).

5 Ibid s 45(1)(c).

6 Ibid s 45(1)(d).

7 Ibid s 45(3). As to appeal on conviction on indictment see PARA 1837 et seq post; and as to appeal on summary conviction see PARA 1980 et seq post.

## **UPDATE**

### **630-698 Firearms, Ammunition and Air Weapons**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(3) OFFENSIVE WEAPONS/699. Carrying offensive weapons in a public place.

### (3) OFFENSIVE WEAPONS

#### 699. Carrying offensive weapons in a public place.

Any person who, without lawful authority<sup>1</sup> or reasonable excuse<sup>2</sup>, the proof whereof lies on him<sup>3</sup>, has with him<sup>4</sup> in any public place<sup>5</sup> any offensive weapon<sup>6</sup> is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding four years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the prescribed sum or to both<sup>8</sup>.

Where a person is convicted of such an offence, the court may make an order for the forfeiture or disposal of any weapon in respect of which the offence was committed<sup>9</sup>.

1 'Lawful authority' covers persons whose duty it is to carry offensive weapons: *Bryan v Mott* (1975) 62 Cr App Rep 71, DC; and see also *Crafter v Kelly* [1941] SASR 237 at 243. However, there is no lawful authority for security guards to carry truncheons as part of their uniforms: see *R v Spanner, Poulter and Ward* [1973] Crim LR 704, CA. 'Lawful authority' is to be distinguished from a lawful excuse: *Wong Pooh Yin v Public Prosecutor* [1955] AC 93 at 101, [1954] 3 All ER 31 at 34, PC.

2 'Reasonable excuse' is to be identified with the carrying of the weapon and not with its use: *R v Jura* [1954] 1 QB 503, 38 Cr App Rep 53, CCA; *R v Dayle* [1973] 3 All ER 1151, 58 Cr App Rep 100, CA. The expression 'reasonable excuse' is intended to cover the particular moment at which a weapon is carried: see *Evans v Wright* [1964] Crim LR 466, DC. Whether there is a reasonable excuse depends on whether a reasonable person would think it excusable in the circumstances to carry the weapon in question: *Bryan v Mott* (1975) 62 Cr App Rep 71, DC. However, whether an excuse is capable of being a reasonable excuse is a question of law, and as a matter of law limitations have been imposed on what a reasonable person might think in this context: *Bryan v Mott* supra. Where a weapon is carried by a person for self-defence if attacked, for the defence of reasonable excuse to be successful it must be shown that there was an imminent particular threat affecting the particular circumstances in which the weapon was carried; constant carrying of a weapon on account of some enduring threat or danger is, however, insufficient: *Evans v Hughes* [1972] 3 All ER 412, 56 Cr App Rep 813, DC (weapon carried seven days after attack could constitute excuse), applying *Evans v Wright* supra (weapon for self-defence when collecting wages; carrying weapon two days after wages last collected not a reasonable excuse) and *Grieve v MacLeod* 1967 JC 32 (continuing fear of assault not a reasonable excuse for taxi-driver to carry cash). See also *Pittard v Mahoney* [1977] Crim LR 169, DC (defendant failed to show the kind of imminent danger which could possibly justify the carrying of an offensive weapon; the nature of the weapon had to be taken into account in deciding whether the carrying was justified); *R v Peacock* [1973] Crim LR 639, CA ('it must be very rare that someone not under immediate fear of attack could claim to be entitled to carry a weapon for self-defence on the off chance of being attacked'); *Bradley v Moss* [1974] Crim LR 430, DC (previous threats but no assault; no defence of reasonable excuse available for carrying four weapons for self-defence); *Bryan v Mott* supra (defendant's intended suicide so remote from the carrying of the offensive weapon that it was not a reasonable excuse); *Malnik v DPP* [1989] Crim LR 451, DC (ordinarily people may not legitimately arm themselves with an offensive weapon to repel unlawful violence which an individual knowingly and deliberately brought about by creating a situation in which violence was liable to be inflicted; but the situation is quite different where the carrying of offensive weapons is by people concerned with security and law enforcement). The fact that the defendant had forgotten that he had the weapon with him is not in itself capable of being a reasonable excuse: *R v McCalla* (1988) 87 Cr App Rep 372, CA. However, if such forgetfulness is coupled with particular circumstances relating to the original acquisition of the weapon, the combination of the original acquisition and the subsequent forgetfulness of possessing it may, given sufficient facts, be a reasonable excuse for having the weapon with him; an example would be where the defendant had retrieved a police truncheon from the gutter in order to return it to the nearest police station, but then forgotten about it and retained it: *R v McCalla* supra. See also *R v Glidewell* (1999) 163 JP 557, CA.

Where a weapon, offensive per se, is carried merely as a theatrical property, as part and parcel of a fancy dress worn by a person going to or from a fancy dress party, that does constitute a reasonable excuse for carrying

that particular prop: *Houghton v Chief Constable of Greater Manchester* (1987) 84 Cr App Rep 319, CA (wearing police truncheon solely as part of a police uniform for a fancy dress party was a reasonable excuse).

Where a weapon, offensive per se, is carried in order to obtain food for wild birds kept under licence, that may be a reasonable excuse: see *Southwell v Chadwick* (1986) 85 Cr App Rep 235, CA (machete knife in scabbard and catapult for use in killing grey squirrels).

Possession originally unlawful and without excuse may, it seems, by a change of circumstances become possession with reasonable excuse: *Wong Pooh Yin v Public Prosecutor* [1955] AC 93, [1954] 3 All ER 31, PC.

Ignorance that the thing which the defendant knowingly has with him is an offensive weapon is not capable of amounting to a reasonable excuse: *R v Densu* [1998] 1 Cr App Rep 400, CA. On the other hand, a mistaken belief in facts which, if true, would constitute lawful authority is so capable: *R v Jones* [1995] QB 235, [1995] 3 All ER 139, CA.

3 The defendant must satisfy the jury only on a balance of probabilities and not beyond a reasonable doubt: *R v Brown* (1971) 55 Cr App Rep 478, CA; and see PARA 1368 post. As to the compatibility of this with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence) see PARA 1368 post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. The question of lawful authority or reasonable excuse does not arise until it has been established that the defendant had with him an offensive weapon: *R v Petrie* [1961] 1 All ER 466, 45 Cr App Rep 72, CCA.

4 This offence is concerned with a person who with no excuse goes out with an offensive weapon: *R v Jura* [1954] 1 QB 503, 38 Cr App Rep 53, CCA (defendant, on payment, obtained possession of an air rifle at a shooting gallery for the purposes of firing at a target, but, losing his temper, he fired at and hit a woman who was with him; it was held that he had a reasonable excuse for his possession of the air rifle, and the unlawful use of it did not bring him within the Prevention of Crime Act 1953 s 1 (as amended); but it could have been an offence under the Offences against the Person Act 1861 (see PARA 118 et seq ante)). This offence is also concerned with a person who, while out, deliberately selects an offensive weapon with the intent of using it without lawful authority or reasonable excuse: *R v Dayle* [1973] 3 All ER 1151, 58 Cr App Rep 100, CA.

The offence is not, however, committed where the defendant arms himself with a weapon for instant attack on his victim; the offence is concerned with a person who, possessed of a weapon, forms the necessary intent before an occasion to use actual violence has arisen. The offence is concerned not with the actual use but with the carrying of a weapon with intent to use it if the occasion arises. The defendant does not have to have the intention from the moment he set out on his expedition: *Ohlson v Hylton* [1975] 2 All ER 490, [1975] 1 WLR 724, DC (workman attacked fellow passenger with hammer with him for work purposes; no offence under the Prevention of Crime Act 1953 s 1 (as amended)); and see also *R v Humphreys* [1977] Crim LR 225, CA (if person happens to have penknife and uses it in desperation, no offence, because not carried in a public place with necessary intent to cause injury). The purport of the Prevention of Crime Act 1953 is to cover the situation where a defendant has with him and is carrying an offensive weapon intending that it shall be used, if necessary, for offensive purposes. Actual use is better dealt with by a substantive offence: *Bates v Bulman* [1979] 3 All ER 170, 68 Cr App Rep 21, DC. See also *R v Veasey* [1999] Crim LR 158, CA; *C (A Juvenile) v DPP* [2001] EWHC 1093 (Admin), [2001] All ER (D) 396 (Dec), DC. The distinction between an innocent weapon subsequently used with the intention of an assault and which is being carried innocently, and a similar article which is acquired either by borrowing from somebody else or fortuitously by being picked up in the street, is a rather academic and overly-analytical approach: *Bates v Bulman* supra. Cf *Harrison v Thornton* (1966) 68 Cr App Rep 28, DC (defendant picked up a stone and threw it at another person who was fighting with the defendant's friend; offence committed); but this case was not followed in *Ohlson v Hylton* supra nor in *Bates v Bulman* supra where the court cast doubt on it.

5 'Has with him in any public place' means 'knowingly has with him in a public place' and the prosecution must establish knowledge: *R v Cugullere* [1961] 2 All ER 343, 45 Cr App Rep 108, CCA. A person who forgets he has possession of an offensive weapon continues to have it 'with him': *R v McCalla* (1988) 87 Cr App Rep 372, CA.

If the defendant has with him a car in a public place, he also has with him in a public place an article which is inside the car: *Bates v DPP* (1993) 157 JP 1004, DC. Also see PARAS 679 note 1 ante, 700 note 4 post.

Where two or more persons are jointly charged with possession of an offensive weapon, the prosecution must establish that each knew of weapons carried by the other or others and that there was a common purpose: *R v Edmonds* [1963] 2 QB 142, 47 Cr App Rep 114, CCA.

For these purposes, 'public place' includes any highway and any other premises or place to which at the material time the public has or is permitted to have access, whether on payment or otherwise: Prevention of Crime Act 1953 s 1(4). Justices are entitled to find that premises where there are no barriers or notices restricting access, such as the upper level of a block of flats which could be entered by members of the public without hindrance, are a public place: *Knox v Anderton* (1983) 76 Cr App Rep 156, DC; and see also *Sandy v Martin* [1974] Crim LR 258, DC. On the other hand, the landing of a communal block of flats, to which access

could be gained only by way of a key, security code, tenants' intercom or the caretaker has been held not to be a 'public place' because only those admitted by or with the implied consent of an occupier of the flats had access; people with access were, therefore, not present as members of the public: *Williams v DPP* (1992) 95 Cr App Rep 415, DC. Cf the Public Order Act 1936 s 9(1) (see PARA 380 note 2 ante) and the Criminal Justice Act 1988 s 139 (see PARA 700 note 1 post). See also *R v Powell* [1963] Crim LR 511, CCA (part of hospital grounds where visitors to the hospital and their friends were permitted to enter was held to be a public place); *R v Mehmed* [1963] Crim LR 780, CCA (pistol produced by the defendant in a private dwelling house; held that the jury, having regard to the defendant's defence, was entitled to infer that he brought it to, or took it away from, the house through public streets and had accordingly been in possession of it in a public place).

6 'Offensive weapon' means any article made or adapted for use for causing injury to the person or intended by the person having it with him for such use by him or by some other person: Prevention of Crime Act 1953 s 1(4) (amended by the Public Order Act 1986 s 40(2), Sch 2 para 2).

There are three possible categories of offensive weapon: (1) weapons made for use for causing injury to the person, ie a weapon offensive per se eg a bayonet, a stiletto or a gun; (2) a weapon adapted for such a purpose eg a bottle deliberately broken in order that the jagged end may be inserted into the victim's face; (3) an object not so made or adapted but one which the person carrying intends to use for the purpose of causing injury to the person: *R v Simpson* [1983] 3 All ER 789, 78 Cr App Rep 115, CA. Weapons within heads (1) and (2) supra are described as offensive weapons per se.

A flick knife is an offensive weapon per se: *Gibson v Wales* [1983] 1 All ER 869, 76 Cr App Rep 60, DC (a flick knife is made for the purpose of causing injury to the person; the defendant has the burden of proving that it was possessed for wholly innocent purposes (see note 3 supra)); and see also *R v Allamby*, *R v Medford* [1974] 3 All ER 126, [1974] 1 WLR 1494, CA; *R v Lawrence*, *R v Pomroy* (1971) 57 Cr App Rep 64, CA. Judicial notice may be taken of the fact that a flick knife is an offensive weapon per se: *R v Simpson* supra. A sword stick is also an offensive weapon per se: *R v Butler* [1988] Crim LR 695, CA, affg *Davis v Alexander* (1970) 54 Cr App Rep 398, DC. The conclusion that a rice flail was a weapon offensive per se was legitimately reached in accordance with the evidence because the only evidence found acceptable was that such an implement is used as a weapon: *Copus v DPP* [1989] Crim LR 577, DC. In *DPP v Hynde* [1998] 1 All ER 649, [1998] 1 WLR 1222, DC, where judicial notice was taken that a butterfly knife is made for use for causing injury, the Divisional Court was influenced by the fact that such knives are listed in the Criminal Justice Act 1988 (Offensive Weapons) Order 1988, SI 1988/2019, art 2, Schedule (see PARA 702 post) as a weapon to which the offence of manufacture or sale etc of specified weapons, contrary to the Criminal Justice Act 1988 s 141 (see PARA 702 post), applies.

Whether an article is adapted to cause injury to a person is a matter of fact for the magistrates or jury: *R v Williamson* (1977) 67 Cr App Rep 35, CA (question of fact whether a sheath knife an offensive weapon); *R v Simpson* supra (explaining *R v Williamson* supra; not possible to classify all sheath knives as offensive per se unlike flick knives). Where the weapon is offensive per se, intention to use it to cause injury need not be proved: *Davis v Alexander* supra.

In relation to head (3) supra, in *Bryan v Mott* (1975) 62 Cr App Rep 71, DC, the decision of the Crown Court that 'injury to the person' included the defendant's own person was not challenged in the Divisional Court. Cf *R v Fleming* [1989] Crim LR 71 (intention to harm oneself cannot sensibly be held to be offensive). See also *Patterson v Block* [1984] LS Gaz R 2458, DC (defendant had with him a lock knife (not an offensive weapon per se); the only evidence against him was his statement to the police that he carried the knife for his self-defence; it was held that the justices could properly draw the inference that for the purposes of defending himself he would, if necessary, use the knife to cause injury to the person). Cf *R v Byrne* [2003] EWCA Crim 3253, [2004] Crim LR 582 (possession of article not offensive per se; it was held that being reckless as to how it might be used on a future occasion was insufficient). The burden of proving intention to use the weapon to cause injury lies on the prosecution throughout: *R v Petrie* [1961] 1 All ER 466, 45 Cr App Rep 72, CCA. The use made of the weapon may, but does not necessarily, establish the required intent: see *Harrison v Thornton* (1966) 68 Cr App Rep 28, DC; *R v Dayle* [1973] 3 All ER 1151, 58 Cr App Rep 100, CA; *Ohlson v Hylton* [1975] 2 All ER 490, [1975] 1 WLR 724, DC. It must be proved that, at the time and place charged, the defendant had the intent to use the article offensively at some time in the future; proof that he had the intention at some time previously when in possession of the article is insufficient: *R v Allamby*, *R v Medford* supra. An intention to frighten is not sufficient; an intention to intimidate is more appropriate as a description when the intention was to cause injury by shock; such circumstances are exceedingly rare: *R v Rapier* (1979) 70 Cr App Rep 17, CA. See also *R v Snooks*, *R v Sergeant* [1997] Crim LR 230, CA.

Any experiment intended to assist in determining the use of a weapon must take place in open court and not in the jury's retiring room: *R v Higgins* (1989) Times, 16 February, CA. See PARA 1332 post. As to the meaning of 'open court' see PARA 90 note 10 ante.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.



8 Prevention of Crime Act 1953 s 1(1) (amended by the Criminal Law Act 1977 s 32(1); the Magistrates' Courts Act 1980 s 32(2); the Criminal Justice Act 1988 s 46(1), (3); and the Offensive Weapons Act 1996 s 2(1), (4)). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. For a consideration of the relevant sentencing guidelines to be taken into account for an offence under the Prevention of Crime Act 1953 s 1(1) see *R v Poulton*, *R v Cellaire* [2002] EWCA Crim 2487, [2003] 4 All ER 869, [2003] 1 Cr App Rep (S) 610.

An indictment need not contain two counts, one to cover the weapon's being offensive per se and one referring to a weapon being offensive because of the intent: *R v Flynn* (1985) 150 JP 112, CA.

9 Prevention of Crime Act 1953 s 1(2). An order may be so made even though an offender is placed on probation or discharged absolutely or conditionally: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 41.

## UPDATE

### 699 Carrying offensive weapons in a public place

NOTE 8--See also *R v R* (prosecution application under s 58 of the Criminal Justice Act 2003) [2007] All ER (D) 245 (Nov), CA; *R v Povey*; *R v McGreary*; *R v Pownall*; *R v Bleazard* [2008] EWCA Crim 1261, (2009) 173 JP 109; and *A-G's Reference (No 6 of 2009)* [2009] EWCA Crim 1132, [2009] 2 Cr App Rep (S) 707.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(3) OFFENSIVE WEAPONS/700. Having article with blade or point in public place.

### **700. Having article with blade or point in public place.**

Any person who has with him in a public place<sup>1</sup> an article which has a blade<sup>2</sup> or is sharply pointed, except a folding pocketknife<sup>3</sup>, is guilty of an offence<sup>4</sup> and liable on conviction on indictment to a term of imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>. It is a defence, however, for a person charged with such an offence to prove<sup>7</sup> that: (1) he had good reason or lawful authority for having the article with him in a public place<sup>8</sup>; or (2) without prejudice to the generality of head (1) above, he had the article with him for use at work, for religious reasons or as part of any national costume<sup>9</sup>.

1 For these purposes, 'public place' includes any place to which at the material time the public has or is permitted access, whether on payment or otherwise: Criminal Justice Act 1988 s 139(7). 'Public place' in s 139(7) does not embrace land adjacent to areas where the public has access, even if harm against which the offence is designed to provide protection can be inflicted from that place; for this reason a defendant's front garden has been held not to be a public place within s 139(7): *R v Roberts* [2003] EWCA Crim 2753, [2004] 1 WLR 181, (2003) 167 JP 675. See also *Harriott v DPP* [2005] EWHC 965 (Admin), [2006] Crim LR 440, DC. Cf the definitions of 'public place' in the Prevention of Crime Act 1953 s 1(4) (see PARA 699 note 5 ante) and the Public Order Act 1936 s 9(1) (as amended) (see PARA 380 note 2 ante). It is also an offence to have an article with a blade or point (or offensive weapon) on school premises: see PARA 701 post.

2 A screwdriver is not a bladed article for this purpose because, although it has a blade, the present provision is limited to instruments within the same broad category as a knife or sharply pointed instrument: *R v Davis* [1998] Crim LR 564, CA. A butter knife without a handle and with no cutting edge and no point has been held to be a bladed article within the Criminal Justice Act 1988 s 139(2): *Brooker v DPP* [2005] EWHC 1132 (Admin), 169 JP 368, DC.

3 The Criminal Justice Act 1988 s 139 applies to a folding pocketknife if the cutting edge of its blade exceeds three inches: s 139(3). To be a folding pocketknife, the knife has to be immediately foldable at all times simply by the folding process: *Harris v DPP*, *Fehmi v DPP* [1993] 1 All ER 562, [1993] 1 WLR 82, DC. A locking knife, whether it folds or not, is not a folding pocketknife: *R v Deegan* [1998] 2 Cr App Rep 121, [1998] Crim LR 562, CA. However, a locking knife whose locking mechanism is not in working order and is unable to lock the blade in the extended position, so that the blade is immediately foldable, is a folding pocketknife: *McAuley v Brown* 2003 SLT 736, High Ct of Justiciary.

4 Criminal Justice Act 1988 s 139(1), (2). For the meaning of 'has with him' for the purposes of related offences see PARAS 679 ante, 699 ante. A person who believes that an instrument is somewhere in his vehicle, but who does not know precisely where, does not have it with him: *R v Daubney* (2000) 164 JP 519, CA. As to a constable's power to stop and search see PARA 860 post.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Criminal Justice Act 1988 s 139(6) (amended by the Offensive Weapons Act 1996 s 3). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7 This provision places the legal (or persuasive) burden on the defendant, but this does not contravene the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence) (see PARA 1368 et seq post): *L v DPP* [2001] EWHC Admin 882, [2003] QB 137, [2002] 2 All ER 854; *R v Matthews* [2003] EWCA Crim 813, [2004] QB 690. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

8 Criminal Justice Act 1988 s 139(4). As to the meaning of 'lawful authority' see PARA 699 note 1 ante. A judge may withdraw a defence under s 139(4) or (5) from the jury only if there is no evidence to support it; if there is some evidence, however tenuous or nebulous, the defence should be left to the jury: *R v Wang* [2005] UKHL 9, [2005] 1 All ER 782, [2005] 1 WLR 661 (impliedly disapproving *R v Bown* [2003] EWCA Crim 1989, [2004] 1 Cr App Rep 151). It has been held that forgetfulness that one has the article with one is not a good reason (*DPP v Gregson* (1992) 96 Cr App Rep 240, DC; *R v Hargreaves* [2000] 1 Archbold News 2, CA), but that forgetfulness combined with another reason may afford a good reason (*R v Jolie* [2003] EWCA Crim 1543, [2004] 1 Cr App Rep 44, (2003) 167 JP 313). It has also been held that self-defence can be a good reason where there is a fear of imminent attack: *R v Emmanuel* [1998] Crim LR 347, CA. If the jury rejects or the justices reject a defendant's explanation of carrying a knife with good reason, they are bound to convict even if the prosecution calls no evidence to disprove it: *Godwin v DPP* (1993) 157 JP 197, DC. Having with one out of habit an article with a bladed part but also with other features which are not bladed (eg a multi-purpose utility tool) is not in itself a good reason: *R v Giles* [2003] EWCA Crim 1287, 5 Archbold News 3.

9 Criminal Justice Act 1988 s 139(5). 'For use at work' is a matter for the jury to determine in the context of the case and does not require judicial definition: *R v Manning* [1998] Crim LR 198, CA. As to withdrawal of the defence from the jury see note 8 supra.

## UPDATE

### 700 Having article with blade or point in public place

TEXT AND NOTE 6--In 1988 Act s 139(6) for 'two' read 'four': Violent Crime Reduction Act 2006 s 42(1)(a). Section 42 applies only to offences committed after the commencement of s 42 (ie 12 February 2007: see SI 2007/74): 2006 Act s 42(2).

NOTE 8--It is for jury to determine how imminent, how soon, how likely and how serious anticipated attack must be to constitute good reason for possession: *R v McAuley* [2009] EWCA Crim 2130, (2009) 173 JP 585.

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### **701. Offence of having an article with a blade or point or an offensive weapon on school premises.**

Any person who has with him on school premises<sup>1</sup> an article which has a blade or is sharply pointed except a folding pocketknife<sup>2</sup> is guilty of an offence<sup>3</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup> or to a fine not exceeding the statutory maximum<sup>5</sup> or to both<sup>6</sup>.

Any person who has with him on school premises an offensive weapon<sup>7</sup> is guilty of an offence<sup>8</sup> and liable on conviction on indictment to imprisonment for a term not exceeding four years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the statutory maximum or to both<sup>10</sup>.

It is a defence for a person charged with an offence under the above provisions to prove that he had good reason or lawful authority for having the article or weapon with him on the premises in question<sup>11</sup>. It is also a defence for a person charged with any such offence to prove that he had the article or weapon in question with him for use at work, for educational purposes, for religious reasons, or as part of any national costume<sup>12</sup>.

A constable may enter school premises and search those premises and any person on those premises for any article or offensive weapon mentioned above<sup>13</sup>, if he has reasonable grounds for believing that an offence under the above provisions is being, or has been, committed<sup>14</sup>. If, in the course of a search, a constable discovers an article or weapon which he has reasonable grounds for suspecting to be an article or weapon of a kind mentioned above, he may seize and retain it<sup>15</sup>. The constable may use reasonable force, if necessary, in the exercise of such a power of entry<sup>16</sup>.

1 'School premises' means land used for the purposes of a school excluding any land occupied solely as a dwelling by a person employed at the school; and 'school' has the meaning given by the Education Act 1996 s 4(1) (see EDUCATION vol 15(1) (2005 Reissue) PARA 81); Criminal Justice Act 1988 s 139A(6) (s 139A added by the Offensive Weapons Act 1996 s 4(1); and the Criminal Justice Act 1988 s 139A(6) amended by the Education Act 1996 s 582(1), Sch 37 para 69).

2 Ie an article to which the Criminal Justice Act 1988 s 139 applies (see PARA 700 ante); s 139A(1) (as added: see note 1 supra).

3 Ibid s 139A(1) (as added: see note 1 supra).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

6 Criminal Justice Act 1988 s 139A(5)(a) (as added: see note 1 supra).

7 Ie a weapon within the meaning of the Prevention of Crime Act 1953 s 1 (see PARA 699 note 6 ante).

8 Criminal Justice Act 1988 s 139A(2) (as added: see note 1 supra).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

10 Criminal Justice Act 1988 s 139A(5)(b) (as added: see note 1 supra).

11 Ibid s 139A(3) (as added: see note 1 supra). By analogy with the offence discussed in PARA 700 ante, the defendant has the legal (or persuasive) burden: see PARA 699 note 6 ante. As to the meaning of 'lawful authority' see PARA 699 note 1 ante; and as to the meaning of 'good reason' see PARA 700 note 8 ante.

12 Ibid s 139A(4) (as added: see note 1 supra). Section 139A(4) (as added) is without prejudice to the generality of s 139A(3) (as added) (see the text and note 11 supra): s 139A(4) (as so added). As to the meaning of 'prove' see note 11 supra. See also PARA 700 note 8 ante.

13 Ie an article referred to in the text and notes 2, 7 supra: ibid s 139B(1) (s 139B added by the Offensive Weapons Act 1996 s 4(1)).

14 Criminal Justice Act 1988 s 139B(1) (as added: see note 13 supra).

15 Ibid s 139B(2) (as added: see note 13 supra).

16 Ibid s 139B(3) (as added: see note 13 supra).

## UPDATE

### **701 Offence of having an article with a blade or point or an offensive weapon on school premises**

TEXT AND NOTE 6--In 1988 Act s 139A(5)(a) for 'two' read 'four': Violent Crime Reduction Act 2006 s 42(1)(b). Section 42 applies only to offences committed after the commencement of s 42 (ie 12 February 2007: see SI 2007/74): 2006 Act s 42(2).

TEXT AND NOTE 14--In 1988 Act s 139B(1) for 'believing' read 'suspecting': Violent Crime Reduction Act 2006 s 48.

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## **702. Manufacture, sale, hire etc of specified weapons.**

Any person who manufactures, sells or hires, or offers for sale or hire, exposes or has in his possession for the purpose of sale or hire, or lends or gives to any other person, a specified weapon<sup>1</sup> is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months<sup>2</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>3</sup>. It is a defence, however, for any person charged in respect of any conduct of his relating to such a weapon to prove that his conduct was only for the purposes of functions carried out on behalf of the Crown or of a visiting force<sup>4</sup>. It is also a defence for any person charged in respect of any conduct of his relating to such a weapon to prove that the conduct in question was only for the purposes of making the weapon available to a museum or gallery<sup>5</sup>; and if a person acting on behalf of such a museum or gallery is charged with hiring or lending such a weapon, it is a defence for him to prove that he had reasonable grounds for believing that the person to whom he lent or hired it would use it only for cultural, artistic or educational purposes<sup>6</sup>.

<sup>1</sup> The Secretary of State may by order made by statutory instrument direct that the Criminal Justice Act 1988 s 141 is to apply to any description of weapon specified in the order except: (1) any weapon subject to the Firearms Act 1968 (see PARA 630 et seq ante); or (2) crossbows (see PARAS 708-710 post): Criminal Justice Act 1988 s 141(2). A statutory instrument containing such an order may not be made unless a draft of the instrument has been laid before Parliament and has been approved by a resolution of each House of Parliament: s 141(3). The importation of such weapons is prohibited: s 141(4); and see CUSTOMS AND EXCISE.

Section 141 applies to the following descriptions of weapons, other than weapons of those descriptions which are antiques:

- 172 (1) a knuckleduster, that is, a band of metal or other hard material worn on one or more fingers, and designed to cause injury, and any weapon incorporating a knuckleduster (Criminal Justice Act 1988 (Offensive Weapons) Order 1988, SI 1988/2019, art 2, Schedule para 1(a));
- 173 (2) a swordstick, that is, a hollow walking-stick or cane containing a blade which may be used as a sword (Schedule para 1(b));
- 174 (3) the weapon sometimes known as a 'handclaw', being a band of metal or other hard material from which a number of sharp spikes protrude and worn around the hand (Schedule para 1(c));
- 175 (4) the weapon sometimes known as a 'belt buckle knife', being a buckle which incorporates or conceals a knife (Schedule para 1(d));
- 176 (5) the weapon sometimes known as a 'push dagger', being a knife the handle of which fits within a clenched fist and the blade of which protrudes from between two fingers (Schedule para 1(e));
- 177 (6) the weapon sometimes known as a 'hollow kubotan', being a cylindrical container containing a number of sharp spikes (Schedule para 1(f));
- 178 (7) the weapon sometimes known as a 'footclaw', being a bar of metal or other hard material from which a number of sharp spikes protrude, and worn strapped to the foot (Schedule para 1(g));
- 179 (8) the weapon sometimes known as a 'shruiken', 'shaken' or 'death star', being a hard non-flexible plate having three or more sharp radiating points and designed to be thrown (Schedule para 1(h));

- 180 (9) the weapon sometimes known as a 'balisong' or 'butterfly knife', being a blade enclosed by its handle, which is designed to split down the middle, without the operation of a spring or other mechanical means, to reveal the blade (Schedule para 1(i));
- 181 (10) the weapon sometimes known as a 'telescopic truncheon', being a truncheon which extends automatically by hand pressure applied to a button, spring or other device in or attached to its handle (Schedule para 1(j));
- 182 (11) the weapon sometimes known as a 'blowpipe' or 'blow gun', being a hollow tube out of which hard pellets or darts are shot by the use of breath (Schedule para 1(k));
- 183 (12) the weapon sometimes known as a 'kusari gama', being a length of rope, cord, wire or chain fastened at one end to a sickle (Schedule para 1(l));
- 184 (13) the weapon sometimes known as a 'kyoketsu shoge', being a length of rope, cord, wire or chain fastened at one end to a hooked knife (Schedule para 1(m));
- 185 (14) the weapon sometimes known as a 'manrikigusari' or 'kusari', being a length of rope, cord or wire or chain fastened at each end to a hard weight or hand grip (Schedule para 1(n));
- 186 (15) a disguised knife, that is any knife which has a concealed blade or concealed sharp point and is designed to appear to be an everyday object of a kind commonly carried on the person or in a handbag, briefcase, or other hand luggage (such as a comb, brush, writing instrument, cigarette lighter, key, lipstick or telephone) (Schedule para 1(o) (added by SI 2002/1668));
- 187 (16) a stealth knife, that is a knife or spike, which has a blade, or sharp point, made from a material that is not readily detectable by apparatus used for detecting metal and which is not designed for domestic use or for use in the processing, preparation or consumption of food or as a toy (Criminal Justice Act 1988 (Offensive Weapons) Order 1988, SI 1988/2019, Schedule para 1(p) (added by SI 2004/1271));
- 188 (17) a straight, side-handled or friction-lock truncheon (sometimes known as a baton) (Criminal Justice Act 1988 (Offensive Weapons) Order 1988, SI 1988/2019, Schedule para 1(q) (added by SI 2004/1271)).

For these purposes, a weapon is an antique if it was manufactured more than 100 years before the date of any offence alleged to have been committed in respect of that weapon under the Criminal Justice Act 1988 s 141(1) or the Customs and Excise Management Act 1979 s 50(2) or (3) (improper importation: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 994): Criminal Justice Act 1988 (Offensive Weapons) Order 1988, SI 1988/2019, Schedule para 2.

2 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

3 Criminal Justice Act 1988 s 141(1). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing: (1) that there are on premises specified in the application knives such as are mentioned in the Restriction of Offensive Weapons Act 1959 s 1(1) (as amended) (see PARA 705 post) or weapons to which the Criminal Justice Act 1988 s 141 applies; and (2) that an offence under the Restriction of Offensive Weapons Act 1959 s 1 (as amended) or the Criminal Justice Act 1988 s 141 has been or is being committed in relation to them; and (3) that any of the specified conditions applies, he may issue a warrant authorising a constable to enter and search the premises: s 142(1). The specified conditions are: (a) that it is not practicable to communicate with any person entitled to grant entry to the premises; (b) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the knives or weapons to which the application relates; (c) that entry to the premises will not be granted unless a warrant is produced; (d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them: s 142(3). A constable may seize and retain anything for which a search has been authorised under s 142(1): s 142(2).

4 Ibid s 141(5)(a). It is also a defence for any person charged in respect of any conduct of his relating to such a weapon with an offence under the Customs and Excise Management Act 1979 s 50(2) or (3) (improper importation: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 994) to prove that his conduct was only for the purposes of functions carried out on behalf of the Crown or of a visiting force: Criminal Justice Act 1988 s 141(5)(b). As to whether s 141(5)(a) or (b) imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms

(Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

For these purposes, the reference to the Crown includes the Crown in right of Her Majesty's government in Northern Ireland; and 'visiting force' means any body, contingent or detachment of the forces of a country: (1) mentioned in the Visiting Forces Act 1952 s 1(1)(a) (see ARMED FORCES vol 2(2) (Reissue) PARA 138); or (2) designated for the purposes of any provision of that Act by Order in Council under s 1(2) (see ARMED FORCES vol 2(2) (Reissue) PARA 138), which is present in the United Kingdom, including United Kingdom territorial waters, or in any place on, under or above an installation in a designated area within the meaning of the Continental Shelf Act 1964 s 1(7) (as amended) or any waters within 500 metres of such an installation, on the invitation of Her Majesty's government in the United Kingdom: Criminal Justice Act 1988 s 141(6), (7). As to designated areas within the meaning of the Continental Shelf Act 1964 s 1(7) (as amended) see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1636. As to United Kingdom territorial waters see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARAS 124-126; WATER AND WATERWAYS vol 100 (2009) PARA 31. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 Criminal Justice Act 1988 s 141(8)(a). It is also a defence for any person charged in respect of any conduct of his relating to such a weapon with an offence under the Customs and Excise Management Act 1979 s 50(2) or (3) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 994) to prove that the conduct in question was only for the purposes of making the weapon available to a museum or gallery: Criminal Justice Act 1988 s 141(8)(b).

Section 141(8) applies to a museum or gallery only if it does not distribute profits: s 141(10). For these purposes, 'museum or gallery' includes any institution which has as its purpose, or one of its purposes, the preservation, display and interpretation of material of historical, artistic or scientific interest and gives the public access to it: s 141(11).

As to proof in respect of the defence under s 141(8) see note 4 supra.

6 Ibid s 141(9). As to proof in respect of the defence under s 141(9) see note 4 supra.

## UPDATE

### **702-704 Manufacture, sale, hire etc of specified weapons ... Publication of material relating to the marketing of knives**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **702 Manufacture, sale, hire etc of specified weapons**

TEXT AND NOTES--See also 1988 Act s 141(11A)-(11E) (added by Violent Crime Reduction Act 2006 s 43(4)). See further s 43(5).

NOTE 1--1988 Act s 141(3) repealed: 2006 Act Sch 5. SI 1988/2019 Schedule paras 1(r), 3-6) added: SI 2008/973.

TEXT AND NOTES 4-6--1988 Act s 141(5), (8), (9) amended: 2006 Act s 43(3).



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### **703. Unlawful marketing of knives.**

A person is guilty of an offence if he markets a knife<sup>1</sup> in a way which indicates, or suggests that, it is suitable for combat<sup>2</sup>, or is otherwise likely to stimulate or encourage violent behaviour<sup>3</sup> involving the use of the knife as a weapon<sup>4</sup>. Such a person is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

It is a defence for a person charged with such an offence to prove<sup>7</sup> that the knife was marketed for use by the armed forces of any country, or as an antique or curio, or as falling within such other category (if any) as may be prescribed<sup>8</sup>, and that it was reasonable for the knife to be marketed in that way, and that there were no reasonable grounds for suspecting that a person into whose possession the knife might come in consequence of the way in which it was marketed would use it for an unlawful purpose<sup>9</sup>. It is also a defence for a person charged with such an offence to prove that he did not know or suspect, and had no reasonable grounds for suspecting, that the way in which the knife was marketed amounted to an indication or suggestion that the knife was suitable for combat or was likely to stimulate or encourage violent behaviour involving the use of the knife as a weapon<sup>10</sup>. Lastly, it is a defence for a person charged with such an offence to prove that he took all reasonable precautions and exercised all due diligence to avoid committing the offence<sup>11</sup>.

If, on an application by a constable, a justice of the peace is satisfied that there are reasonable grounds for suspecting that a person has committed an offence under the above provisions in relation to knives of a particular description, and that knives of that description and in the person's possession or under his control are to be found on particular premises, he may issue a warrant authorising a constable to enter those premises, search for knives and seize and remove any that he finds<sup>12</sup>. Where a person is convicted of such an offence in relation to a knife of a particular description, the Crown Court or a magistrates' court may make an order for forfeiture in respect of any knives of that description which have been seized under such a warrant, or were in the offender's possession or under his control at the time of his arrest for the offence or at the time of the issue of a summons in respect of it<sup>13</sup>. A person who claims property to which a forfeiture order applies, but who is not the offender, may apply, within six months of the date of the forfeiture order, for the return of the property to himself under a recovery order<sup>14</sup>. Such a person must satisfy the court that he had not consented to the offender having possession of the property and that he did not know, and had no reason to suspect, that the offence was likely to be committed<sup>15</sup>.

1 A 'knife' is an instrument which has a blade or is sharply pointed: Knives Act 1997 s 10. A person 'markets a knife' if he sells or hires it, offers or exposes it for sale or hire, or has it in his possession for the purpose of sale or hire: s 1(4).

2 'Suitable for combat' means suitable for use as a weapon for inflicting injury on a person or causing a person to fear injury: *ibid* ss 1(2), 10. An indication or suggestion that a knife is suitable for combat may, in particular, be given or made by a name or description applied to the knife, on the knife or on any packaging in which it is contained, or included in any advertisement which, expressly or by implication, relates to the knife: s 1(3).

3 'Violent behaviour' means an unlawful act inflicting injury on a person or causing a person to fear injury: *ibid* ss 1(2), 10.

4 Ibid s 1(1). Where the offence is committed by a body corporate and is proved to have been committed with the consent or connivance of an officer or to be attributable to neglect on his part, he as well as the body corporate is guilty of the offence and liable to prosecution: s 9(1). 'Officer' means a director, manager, secretary or other similar officer of the body, or a person purporting to act in such a capacity: s 9(2). Where a body corporate is managed by its members, such members are liable as if they were directors: s 9(3). See PARA 38 ante.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Criminal Justice Act 1988 s 1(5). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7 As to whether 'prove' as used in these provisions imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

8 'Prescribed' means prescribed by regulations made by the Secretary of State: Knives Act 1997 s 3(3). The power to make regulations under ss 3, 7, 11 is exercisable by statutory instrument: s 11(5). A statutory instrument made under ss 3, 7 is subject to annulment in pursuance of a resolution of either House of Parliament: s 11(6). At the date at which this volume states the law no such regulations had been made under ss 3, 11. As to regulations made under s 7 see note 15 infra.

9 Ibid s 3(1).

10 Ibid s 4(1).

11 Ibid s 4(3).

12 Ibid s 5(1). 'Premises' includes any place and, in particular, any vehicle, vessel, aircraft or hovercraft and any tent or movable structure: s 5(6). Reasonable force may be used by a constable in the exercise of powers under the warrant: s 5(3). Any knives seized and removed by a constable under the warrant may be retained until the person is found guilty and sentenced or otherwise dealt with for the offence or is acquitted, or the proceedings are discontinued, or a decision is made not to prosecute him: s 5(4), (5).

13 Ibid s 6(1), (5). The power to make a forfeiture order is in addition to the power to deal with the offender in any other way and is unfettered by any existing statutory restrictions on forfeiture: see s 6(3). When considering whether to make a forfeiture order, the court must have regard to the value of the property and the financial implications for the offender of such an order, taken together with any other order that the court contemplates making: s 6(4). Forfeiture deprives the offender of any rights that he might have had in relation to the property to which it relates: s 7(1). The property to which the forfeiture relates must be taken into the possession of the police: see s 7(2).

14 Ibid s 7(3), (5).

15 Ibid s 7(6). If a person has a right to recover property which is in the possession of another in pursuance of a recovery order, that right is not affected by the making of the recovery order at any time before the end of the period of six months beginning with the date on which the order is made, but is lost at the end of that period: s 7(7). Knives subject to a forfeiture where either no application for a recovery order has been made within six months of the making of the order or an application for such an order has been unsuccessful may be disposed of, and the proceeds applied, in the prescribed manner: see s 7(8)-(10); and the Knives (Forfeited Property) Regulations 1997, SI 1997/1907 (amended by SI 2000/1549).

## UPDATE

### **702-704 Manufacture, sale, hire etc of specified weapons ... Publication of material relating to the marketing of knives**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

**703-704 Unlawful marketing of knives, Publication of material relating to the marketing of knives**

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

**703 Unlawful marketing of knives**

NOTE 3--1988 Act s 142(3) amended: Police and Justice Act 2006 Sch 14 para 14.

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#### **704. Publication of material relating to the marketing of knives.**

A person is guilty of an offence if he publishes any written, pictorial or other material in connection with the marketing of any knife<sup>1</sup> and that material indicates, or suggests, that it is suitable for combat<sup>2</sup>, or is otherwise likely to stimulate or encourage violent behaviour<sup>3</sup> involving the use of the knife as a weapon<sup>4</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

It is a defence for the person charged with such an offence to prove<sup>7</sup> that the material was published in connection with marketing a knife for use by the armed forces of any country, or as an antique or curio, or as falling within such other category as may be prescribed<sup>8</sup>, and that it was reasonable for the knife to be marketed in that way, and that there were no reasonable grounds for suspecting that a person into whose possession the knife might come in consequence of the publishing of the material would use it for an unlawful purpose<sup>9</sup>. It is also a defence for a person charged with such an offence to prove that he did not know or suspect, and had no reasonable grounds for suspecting, that the material amounted to an indication or suggestion that the knife was suitable for combat or was likely to stimulate or encourage violent behaviour involving the use of the knife as a weapon<sup>10</sup>, or to prove that he took all reasonable precautions and exercised all due diligence to avoid committing the offence<sup>11</sup>.

If, on an application by a constable, a justice of the peace is satisfied that there are reasonable grounds for suspecting that a person has committed an offence under the above provisions in relation to particular material and that publications<sup>12</sup> consisting of or containing that material and in the suspect's possession or under his control are to be found on particular premises<sup>13</sup>, he may issue a warrant authorising a constable to enter those premises, search for the publications and seize and remove any that he finds<sup>14</sup>. Where a person is convicted of such an offence in relation to particular material, the Crown Court or a magistrates' court may make an order for forfeiture in respect of any publications consisting of or containing that material which have been seized under such a warrant, or were in the offender's possession or under his control at the time of his arrest for the offence or at the time of the issue of a summons in respect of it<sup>15</sup>. A person who claims property to which a forfeiture order applies, but who is not the offender, may apply, within six months of the date of the forfeiture order, for the return of the property to himself under a recovery order<sup>16</sup>. Such a person must satisfy the court that he had not consented to the offender having possession of the property and that he did not know, and had no reason to suspect, that the offence was likely to be committed<sup>17</sup>.

1 For the meanings of 'marketing' and 'knife' see PARA 703 note 1 ante.

2 For the meaning of 'suitable for combat' see PARA 703 note 2 ante.

3 For the meaning of 'violent behaviour' see PARA 703 note 3 ante.

4 Knives Act 1997 s 2(1). As to offences committed by bodies corporate see s 9; and PARA 703 note 4 ante.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post),

although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Criminal Justice Act 1988 s 2(2). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7 As to the meaning of 'prove' see PARA 703 note 7 ante.

8 For the meaning of 'prescribed' see PARA 703 note 8 ante. At the date at which this volume states the law no such category had been prescribed.

9 Knives Act 1997 s 3(2).

10 Ibid s 4(2).

11 Ibid s 4(3).

12 'Publication' includes a publication in electronic form and, in the case of a publication which is, or may be, produced from electronic data, any medium on which the data are stored: ibid s 10.

13 For the meaning of 'premises' see PARA 703 note 12 ante.

14 Knives Act 1997 s 5(2). The provisions of s 5(3)-(5) apply to publications searched for, etc under s 5(2): see PARA 703 note 12 ante.

15 Ibid s 6(2), (5)(a). The provisions of s 6(3), (4) apply to publications in respect of which a forfeiture order has been made under s 6(2): see PARA 703 note 13 ante.

16 Ibid s 7(3), (5).

17 Ibid s 7(6). For further provisions relating to recovery orders see PARA 703 note 15 ante.

## UPDATE

### **702-704 Manufacture, sale, hire etc of specified weapons ... Publication of material relating to the marketing of knives**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **703-704 Unlawful marketing of knives, Publication of material relating to the marketing of knives**

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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### **705. Manufacture and sale etc of arms and offensive weapons.**

Any person who manufactures, sells or hires, or offers for sale or hire, or exposes or has in his possession for the purpose of sale or hire, or lends or gives to any other person:

- 820 (1) any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, sometimes known as a 'flick knife' or 'flick gun'; or
- 821 (2) any knife which has a blade which is released from the handle or sheath by the force of gravity or the application of centrifugal force and which, when released, is locked in place by means of a button, spring, lever, or other device, sometimes known as a 'gravity knife',

is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months<sup>1</sup> or to a fine not exceeding level 5 on the standard scale<sup>2</sup> or to both<sup>3</sup>.

It is an indictable offence at common law punishable by fine and imprisonment at the discretion of the court<sup>4</sup> to make or sell arms knowing that they are to be used for an unlawful purpose<sup>5</sup>.

<sup>1</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed

<sup>2</sup> As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

<sup>3</sup> Restriction of Offensive Weapons Act 1959 s 1(1) (amended by the Restriction of Offensive Weapons Act 1961 s 1; and the Criminal Justice Act 1988 s 46(2)). The importation of any such knife is also prohibited: Restriction of Offensive Weapons Act 1959 s 1(2). As to warrants to enter and search premises for such knives, and as to a constable's power to seize and retain knives for which a search has been so authorised, see PARA 702 note 3 ante.

<sup>4</sup> See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

<sup>5</sup> *R v Knowles* (1820) 1 State Tr NS 497; *R v Morris* (1820) 1 State Tr NS 521 at 526. As to the control of firearms see also PARA 630 et seq ante.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/7. WEAPONS OFFENCES/(3) OFFENSIVE WEAPONS/706. Sale of certain articles with blade or point to persons under sixteen.

### **706. Sale of certain articles with blade or point to persons under sixteen.**

Any person who sells to a person under the age of 16 years any knife, knife blade or razor blade, any axe, and any other article which has a blade or which is sharply pointed and which is made or adapted for use for causing injury to the person, is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months<sup>1</sup> or to a fine not exceeding level 5 on the standard scale<sup>2</sup> or to both<sup>3</sup>.

It is a defence for a person charged with such an offence to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence<sup>4</sup>.

1 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

2 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

3 Criminal Justice Act 1988 s 141A(1), (2) (added by the Offensive Weapons Act 1996 s 6(1)). As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 post. The Criminal Justice Act 1988 s 141A (as added) does not apply to any article described in the Restriction of Offensive Weapons Act 1959 s 1 (see PARA 705 ante), in an order made under the Criminal Justice Act 1988 s 141(2) (see PARA 702 ante), or in an order made by the Secretary of State under s 141A (as added): Criminal Justice Act 1988 s 141A(3) (as so added). The power to make an order under s 141A (as added) is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 141A(5) (as so added). A folding pocket-knife with a blade less than 7.62 cm (or 3 inches), and a razor blade permanently enclosed in a cartridge or housing, have been so exempted: Criminal Justice Act 1988 (Offensive Weapons) (Exemption) Order 1996, SI 1996/3064, art 2.

4 Criminal Justice Act 1988 s 141A(4) (as added: see note 3 supra). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

## **UPDATE**

### **706 Sale of certain articles with blade or point to persons under [eighteen]**

TEXT AND NOTE 1--Now refers to a person under the age of 18: 1988 Act s 141A(1) (amended by the Violent Crime Reduction Act 2006 s 43(2)).

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### **706A. Using someone to mind a weapon.**

A person is guilty of an offence if (1) he uses another to look after, hide or transport a dangerous weapon<sup>1</sup> for him; and (2) he does so under arrangements or in circumstances that facilitate, or are intended to facilitate, the weapon's being available to him for an unlawful purpose<sup>2</sup>.

Provision is made<sup>3</sup> with respect to penalties for an offence under the above provisions<sup>4</sup>.

1 In the Violent Crime Reduction Act 2006 'dangerous weapon' means (1) a firearm other than an air weapon or a component part of, or accessory to, an air weapon; or (2) a weapon to which the Criminal Justice Act 1988 s 141 (see PARA 702) or 141A (see PARA 706) applies: Violent Crime Reduction Act 2006 s 28(3).

2 Ibid s 28(1). For the purposes of s 28 the cases in which a dangerous weapon is to be regarded as available to a person for an unlawful purpose include any case where (1) the weapon is available for him to take possession of it at a time and place; and (2) his possession of the weapon at that time and place would constitute, or be likely to involve or to lead to, the commission by him of an offence: s 28(3).

3 Ie under ibid s 29.

4 Ie under ibid s 28: s 29(1).

Where the dangerous weapon in respect of which the offence was committed is a weapon to which the Criminal Justice Act 1988 s 141 or 141A applies, the offender is liable, on conviction on indictment, to imprisonment for a term not exceeding four years or to a fine, or to both: s 29(2). Where (1) at the time of the offence, the offender was aged 16 or over, and (2) the dangerous weapon in respect of which the offence was committed was a firearm mentioned in Firearms Act 1968 s 5(1)(a)-(af) or (c) or s 5(1A)(a) (firearms possession of which attracts a minimum sentence: see PARA 661), the offender is liable, on conviction on indictment, to imprisonment for a term not exceeding ten years or to a fine, or to both: 2006 Act s 29(3). On a conviction in England and Wales, where (a) s 29(3) applies, and (b) the offender is aged 18 or over at the time of conviction, the court must impose (with or without a fine) a term of imprisonment of not less than five years, unless it is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so: s 29(4). In relation to times before the commencement of the Criminal Justice and Court Services Act 2000 Sch 7 para 180, the reference in the 2006 Act s 29(4) to a sentence of imprisonment, in relation to an offender aged under 21 at the time of conviction, is to be read as a reference to a sentence of detention in a young offender institution: s 29(5). On a conviction in England and Wales, where s 29(3) applies, and the offender is aged under 18 at the time of conviction, the court must impose (with or without a fine) a term of detention under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 of not less than three years, unless it is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so: 2006 Act s 29(6). In any case not mentioned in s 29(2) or (3), the offender is liable, on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both: s 29(10). Where (i) a court is considering for the purposes of sentencing the seriousness of an offence under s 28, and (ii) at the time of the offence the offender was aged 18 or over and the person used to look after, hide or transport the weapon was not, the court must treat the fact that that person was under the age of 18 at that time as an aggravating factor (that is to say, a factor increasing the seriousness of the offence): s 29(11). Where a court treats a person's age as an aggravating factor in accordance with s 29(11), it must state in open court that the offence was aggravated as mentioned in s 29(11): s 29(12). Where (A) an offence under s 28 of using another person for a particular purpose is found to have involved that other person's having possession of a weapon, or being able to make it available, over a period of two or more days, or at some time during a period of two or more days, and (B) on any day in that period, an age requirement was satisfied, the question whether s 29(3) applies or (as the case may be) the question whether the offence was aggravated under s 29 is to be determined as if the offence had been committed on that day: s 29(13). In s 29(13) the reference to an age requirement is a reference to either of the following (aa) the requirement of s 29(3) that the offender was aged 16 or over at the time of the offence; (bb) the requirement of s 29(11) that the offender was aged 18 or over at that time and that the other person was not: s 29(14).



The Secretary of State may by order amend s 29(3) by substituting for the word '16' the word '18': Criminal Justice Act 2003 s 291(1)(aa) (added by 2006 Act Sch 1 para 9(7)).

For the purposes of the 2003 Act Pt 12 (ss 142-305) a sentence falls to be imposed under the 2006 Act s 29(4) or (6) if it is required by that provision and the court is not of the opinion there mentioned: 2003 Act s 305(4) (ba) (added by 2006 Act Sch 1 para 9(8)).

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### **707. Prospective legislation relating to weapons and the reduction of crime.**

At the date at which this volume states the law, a government Bill known as the Violent Crime Reduction Bill was before Parliament, having been introduced in the House of Commons on 8 June 2005<sup>1</sup>.

The Bill contains provisions relating to air weapons and imitation firearms; restricts the sale and purchase of primers; introduces a power to search pupils, students and persons in attendance centres for weapons; and creates an offence of using someone to mind a weapon<sup>2</sup>. It also amends provisions of the Firearms Act 1968<sup>3</sup>, and certain provisions of the Criminal Justice Act 1988<sup>4</sup> and the Crossbows Act 1987<sup>5</sup> relating to the sale of knives and other weapons and crossbows.

1 The description of the proposed legislation given in the text is based on the Bill as ordered to be printed in the House of Lords on 22 May 2006.

In addition to provisions relating to weapons, the Bill contains provisions relating to alcohol-related violence and disorder (see Pt 1) and sexual offences (see Pt 3). As to alcohol-related violence and disorder see PARA 577 ante. As to sexual offences see PARA 162 et seq ante. The Bill also contains miscellaneous amending provisions.

2 The clauses relating to weapons are contained in the Violent Crime Reduction Bill Pt 2.

3 See eg the Firearms Act 1968 s 3 (as amended) (see PARAS 636-644 ante), ss 22, 24 (both as amended) (see PARAS 668-670 ante), s 51A (as added) (see PARA 664 ante).

4 See the Criminal Justice Act 1988 s 141A (as added); and PARA 706 ante.

5 See the Crossbows Act 1987 ss 1-3; and PARAS 708-710 post.

### **UPDATE**

#### **707-711 Prospective legislation relating to weapons and the reduction of crime ... Possessing explosive substances etc**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **707 Prospective legislation relating to weapons and the reduction of crime**

TEXT AND NOTES--The Violent Crime Reduction Act 2006 received the royal assent on 8 November 2006.

NOTE 2--As to the restriction on sale and purchase of primers see PARA 663A. As to the offence of using someone to mind a weapon see PARA 706A.

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## **(4) CROSSBOWS**

### **708. Person under seventeen having with him a crossbow.**

Unless he is under the supervision of a person who is 21 years of age or older, a person under the age of 17 who has with him a crossbow<sup>1</sup> which is capable of discharging a missile, or parts of a crossbow which together (and without any other parts) can be assembled to form a crossbow capable of discharging a missile, is guilty of an offence<sup>2</sup> and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>3</sup>.

1 The Crossbows Act 1987 does not apply to crossbows with a draw weight of less than 1.4 kilograms: s 5.

2 Ibid s 3. As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 ante.

If a constable suspects with reasonable cause that a person is committing or has committed an offence under the Crossbows Act 1987 s 3, the constable may: (1) search that person for a crossbow or part of a crossbow; (2) search any vehicle, or anything in or on a vehicle, in or on which the constable suspects with reasonable cause there is a crossbow, or part of a crossbow, connected with the offence; and a constable may detain a person or vehicle for the purpose of such a search: s 4(1), (2). For the purposes of exercising the powers conferred by s 4, a constable may enter any land other than a dwelling-house: s 4(4). A constable may seize and retain for the purpose of proceedings for an offence under the Crossbows Act 1987 anything discovered by him in the course of a search under s 4(1) which appears to him to be a crossbow or part of a crossbow: s 4(3).

3 Ibid s 6(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. The court by which a person is convicted of an offence under the Crossbows Act 1987 may make such order as it thinks fit as to the forfeiture or disposal of any crossbow or part of a crossbow in respect of which the offence was committed: s 6(3).

## **UPDATE**

### **707-711 Prospective legislation relating to weapons and the reduction of crime ... Possessing explosive substances etc**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **708 Person under [eighteen] having with him a crossbow**

TEXT AND NOTE 1--Now refers to a person under the age of 18: Crossbows Act 1987 s 3 (amended by the Violent Crime Reduction Act 2006 s 44 (in force 1 October 2007: SI 2007/2180)).

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### **709. Person under seventeen buying or hiring a crossbow.**

A person under the age of 17 who buys or hires a crossbow<sup>1</sup> or a part of a crossbow is guilty of an offence<sup>2</sup> and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>3</sup>.

<sup>1</sup> For the meaning of 'crossbow' see PARA 708 note 1 ante.

<sup>2</sup> Crossbows Act 1987 s 2. As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 ante.

<sup>3</sup> Crossbows Act 1987 s 6(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to possession of a crossbow see PARA 708 ante. As to the court's powers of forfeiture or disposal of crossbows or parts of crossbows see PARA 708 note 3 ante.

### **UPDATE**

#### **707-711 Prospective legislation relating to weapons and the reduction of crime ... Possessing explosive substances etc**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **709 Person under [eighteen] buying or hiring a crossbow**

TEXT AND NOTE 1--Now refers to a person under the age of 18: Crossbows Act 1987 s 2 (amended by the Violent Crime Reduction Act 2006 s 44 (in force 1 October 2007: SI 2007/2180)).

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### **710. Sale and letting on hire of crossbows to persons under seventeen.**

A person who sells or lets on hire a crossbow<sup>1</sup> or a part of a crossbow to a person under the age of 17 is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months<sup>2</sup> or to a fine not exceeding level 5 on the standard scale<sup>3</sup> or to both, unless he believes that person to be 17 years of age or older and has reasonable ground for the belief<sup>4</sup>.

1 For the meaning of 'crossbow' see PARA 708 note 1 ante.

2 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

3 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

4 Crossbow Act 1987 ss 1, 6(1). As to the amendments proposed by the Violent Crime Reduction Bill see PARA 707 ante. As to possession of crossbows see PARA 708 ante. As to the court's powers of forfeiture or disposal of crossbows or parts of crossbows see PARA 708 note 3 ante.

### **UPDATE**

#### **707-711 Prospective legislation relating to weapons and the reduction of crime ... Possessing explosive substances etc**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **710 Sale and letting on hire of crossbows to persons under [eighteen]**

TEXT AND NOTE 4--The Crossbows Act 1987 s 1 (amended by the Violent Crime Reduction Act 2006 s 44 (in force 1 October 2007: SI 2007/2180)) now refers to a person under the age of 18.

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## **(5) EXPLOSIVE SUBSTANCES ETC**

### **711. Possessing explosive substances etc.**

Any person who knowingly has in his possession, or makes or manufactures, any gunpowder, explosive substance<sup>1</sup>, or any dangerous or noxious thing, or any machine, engine, instrument or thing, with intent by means of it to commit, or for the purpose of enabling any other person to commit, any of certain offences<sup>2</sup> is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years<sup>3</sup>.

Any person who makes<sup>4</sup> or knowingly<sup>5</sup> has in his possession or under his control any explosive substance<sup>6</sup>, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object<sup>7</sup>, is, unless he can show<sup>8</sup> that he made it or had it in his possession or under his control for a lawful object, guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding 14 years, and the explosive substance must be forfeited<sup>9</sup>. A person charged with an offence under these provisions<sup>10</sup> may plead self-defence as a defence to any such charge<sup>11</sup>.

Other offences involving explosives are dealt with elsewhere in this work<sup>12</sup>.

1 As to the meaning of 'explosive substance' in relation to another offence under the Offences against the Person Act 1861 see PARA 126 ante.

2 The offences specified are the felonies mentioned in the Offences against the Person Act 1861 and any other offence there mentioned for which a person (not previously convicted) may be tried on indictment otherwise than at his own instance: s 64; Criminal Law Act 1967 s 10(1), Sch 2 para 8 (amended by the Criminal Damage Act 1971 s 11(8), Schedule). All distinctions between felonies and misdemeanours were abolished by the Criminal Law Act 1967 s 1(1), and any earlier enactment creating an offence by directing it to be a felony is to be read as directing it to be an offence: s 12(5)(a). Nothing in Pt I (ss 1-12) affects the operation of any reference to an offence in earlier enactments specially relating to that offence by reason only of the reference being in terms which are no longer applicable: s 12(5)(a).

The extant provisions of the Offences against the Person Act 1861 (not all of which are relevant for this purpose) which declare offences to be felonies or so triable on indictment are: ss 4, 5, 16-18, 20-24, 27-33, 35-38, 47, 57-60. To these provisions s 1 (whosoever shall be convicted of murder shall suffer death as a felon) must be added: the repeal of s 1 was expressed to be 'without prejudice to the operation of' ss 64, 65, 68: see the Murder (Abolition of Death Penalty) Act 1965 s 3(2), Schedule. The Offences against the Person Act 1861 ss 64, 65, in so far as they relate to offences mentioned in ss 48, 52-55, 61-63 (all repealed), have been specifically repealed: see the Sexual Offences Act 1956 s 51, Sch 4.

3 Offences against the Person Act 1861 s 64 (amended by the Statute Law Revision (No 2) Act 1893; and the Criminal Justice Act 1948 s 83(3), Sch 10 Pt I). This offence is one of those specified in the Terrorism Act 2000 s 63B (as added) (terrorist acts abroad by United Kingdom nationals or residents) for the purposes of the extra-territorial jurisdiction provisions: see PARA 474 ante.

As to the partial repeal of the Offences against the Person Act 1861 s 64 (as amended) by the Sexual Offences Act 1956 s 51, Sch 4 see note 2 supra.

4 The offence of making explosives requires mens rea (ie knowledge as to the explosive nature of the substance, as defined by the Explosive Substances Act 1883 s 9 (see PARA 127 ante)): *R v Berry (No 3)* [1994] 2 All ER 913, 99 Cr App Rep 88, CA.

5 The defendant must know that he is in possession of the substance and that it is an explosive substance, as defined by Explosive Substances Act 1883 s 9 (see PARA 127 ante): *R v Hallam* [1957] 1 QB 569, 41 Cr App Rep 111, CCA. If there is evidence that the defendant had an explosive substance in his possession, and that

the defendant's possession was in such circumstances as to give rise to a reasonable suspicion that he did not have it in his possession or control for a lawful object, the jury is entitled to infer knowledge that the substance was explosive: *R v Hallam* supra.

6 For the meaning of 'explosive substance' see PARA 127 note 7 ante.

7 'Lawful object' is not confined to a purpose which takes place in the United Kingdom and the lawfulness of which is to be defined by English law; thus if a defendant is charged with manufacturing in England timers for time bombs to be exploded abroad and cannot show on the balance of probabilities that the timers were to be used for a lawful purpose outside the United Kingdom, he is liable to conviction of an offence: *R v Berry* [1985] AC 246, [1984] 3 All ER 1008, HL.

8 This imposes the legal (or persuasive) burden on the defendant: *A-G's Reference (No 2 of 1983)* [1984] QB 456, 78 Cr App Rep 183, CA. As to this burden see PARA 1368 et seq post.

9 Explosive Substances Act 1883 s 4(1); Criminal Justice Act 1948 s 1(1), (2); Criminal Law Act 1967 s 12(5) (a). Any person who within or (being a subject of Her Majesty) without Her Majesty's dominions by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever, procures, counsels, aids, abets, or is accessory to, the commission of any crime under the Explosive Substances Act 1883 is guilty of an offence and liable to be tried and punished for that crime, as if he had been guilty as a principal: s 5. Notwithstanding s 5 there may be a conviction under s 4 on the basis of aiding and abetting the commission of an offence contrary to that provision: *R v McCarthy* [1964] 1 All ER 95, 48 Cr App Rep 111, CCA. The Explosives Act 1875 ss 73-75, 89, 96 (search for, seizure and detention of explosive substances, the forfeiture thereof, and the disposal of explosive substances seized or forfeited) apply as if a crime or forfeiture under the Explosive Substances Act 1883 were an offence or forfeiture under the Explosives Act 1875: Explosive Substances Act 1883 s 8(1). No proceedings for an offence under the Explosive Substances Act 1883 may be instituted except by or with the consent of the Attorney General: see s 7(1) (amended by the Criminal Jurisdiction Act 1975 s 14(5), Sch 6 Pt I). As to the effect of this limitation see PARA 1071 post.

10 It is an offence under the Explosive Substances Act 1883 s 4: see note 9 supra.

11 *A-G's Reference (No 2 of 1983)* [1984] QB 456, 78 Cr App Rep 183, CA (person making petrol bomb with the lawful object of protection against imminent apprehended attack). Once the imminence has passed, however, possession of the explosive substance may cease to be lawful: *A-G's Reference (No 2 of 1983)* supra.

12 See PARAS 125-130 ante, 841, 860, 1061 post.

## UPDATE

### **707-711 Prospective legislation relating to weapons and the reduction of crime ... Possessing explosive substances etc**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## 8. OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE

### (1) PERJURY AND OFFENCES AKIN TO PERJURY

#### (i) Perjury

##### 712. Meaning of 'perjury'.

If any person lawfully sworn<sup>1</sup> as a witness<sup>2</sup> or as an interpreter in a judicial proceeding<sup>3</sup> wilfully<sup>4</sup> makes a statement<sup>5</sup>, material<sup>6</sup> in that proceeding, which he knows to be false or does not believe to be true<sup>7</sup>, he is guilty of perjury and liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both<sup>8</sup>.

1 For the meaning of 'lawfully sworn' see PARA 713 post.

2 A person who is not a competent witness, but is sworn by mistake, cannot be indicted for perjury: *R v Clegg* (1868) 19 LT 47. As to competence of witnesses in criminal proceedings see PARA 1401 post.

3 For the meaning of 'judicial proceeding' and as to statements which must be treated as made in a judicial proceeding see PARA 714 post.

4 The statement must be made deliberately and not inadvertently or by mistake: *R v Millward* [1985] QB 519, [1985] 1 All ER 859, CA. See also 1 Hawk PC c 27(4) s 2; *R v Mawbey* (1796) 6 Term Rep 619; *R v Stollady* (1859) 1 F & F 518. Cf *R v London* (1871) 24 LT 232, CCR. The prosecution does not have to prove that the witness knew or believed the statement to be material: *R v Millward* supra.

5 An expression of opinion, if not genuinely held, can found a charge of perjury: *R v Pedley* (1784) 1 Leach 325 per Lord Mansfield; *R v Schlesinger* (1847) 10 QB 670. Cf *R v Crespigny* (1795) 1 Esp 280 per Kenyon CJ (perjury cannot be assigned on evidence stating the opinion of the witness as to the construction of a deed).

6 As to material statements see PARA 715 post.

7 Swearing to a fact without knowing at the time whether it was true or false has been held to be perjury: see *R v Mawbey* (1796) 6 Term Rep 619 at 637. It seems that it is sufficient if the person does not believe the statement to be true, even if, in fact, it is true: 1 Hawk PC c 27(4) s 6; 3 Co Inst 166; *Ockley and Whitleybyes Case* (1622) Palm 294; *Allen v Westley* (1629) Het 97; *R v Rider* (1986) 83 Cr App Rep 207, [1986] Crim LR 626, CA.

8 Perjury Act 1911 s 1(1); Criminal Justice Act 1948 s 1(1), (2). Offences under the Perjury Act 1911 s 1 may not be tried summarily: Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 14(a). See PARA 1103 post. See also *R v Simmonds* (1969) 53 Cr App Rep 488 at 489, CA, per Parker LCJ ('perjury is a very serious offence . . . and . . . attracts a severe penalty'); *R v Davies* [1974] Crim LR 613, CA; *R v Shamji* (1989) 11 Cr App Rep (S) 587, CA; *R v Mitchel* [2004] EWCA Crim 1516, [2005] 1 Cr App Rep (S) 193 (save in a most exceptional case, an immediate custodial sentence should be imposed for perjury). Factors to be taken into account when considering the appropriate level of sentence for perjury and related offences include: (1) the number of offences committed; (2) the time scale over which the offences were committed; (3) whether the offences were planned or spontaneous; (4) whether the offences were persistent; (5) whether the lies told had any impact on the proceedings; (6) whether the defendant involved others in his activities; and (7) the nature of the relationship between the defendant and any others drawn into the conduct: *R v Archer* [2002] EWCA Crim 1996, [2003] 1 Cr App Rep (S) 446.

A child who wilfully gives unsworn false evidence is liable to punishment on summary conviction: see the Youth Justice and Criminal Evidence Act 1999 s 57; and PARA 1404 note 8 post. A person who aids, abets etc perjury



may be proceeded against as if he were a principal: see PARA 720 post. As to false written statements tendered in evidence in criminal proceedings see PARA 719 post; and as to false statements on oath made otherwise than in a judicial proceeding see PARA 716 post. A person, whether a British citizen or not, who, in sworn evidence before the Court of Justice of the European Communities or any court attached to it, makes any statement which he knows to be false or does not believe to be true is guilty of an offence and may be proceeded against and punished in England and Wales as for an offence under the Perjury Act 1911 s 1(1): European Communities Act 1972 s 11(1)(a). The Perjury Act 1911 s 1 applies in relation to a person acting as an intermediary under the Youth Justice and Criminal Evidence Act 1999 s 29 (see PARA 1427 post) as it applies to a person lawfully sworn as an interpreter in a judicial proceeding; and for this purpose, where a person acts as an intermediary in any proceeding which is not a judicial proceeding for the purposes of the Perjury Act 1911 s 1, that proceeding is to be taken to be part of the judicial proceeding in which the witness's evidence is given: Youth Justice and Criminal Evidence Act 1999 s 29(7). Where any statement made by a person on oath in any proceeding which is not a judicial proceeding is received in evidence in pursuance of a special measures direction under the Youth Justice and Criminal Evidence Act 1999, that proceeding is to be taken for the purposes of the Perjury Act 1911 s 1 to be part of the judicial proceeding in which the statement is so received in evidence: Youth Justice and Criminal Evidence Act 1999 s 31(6). As to special measures directions see PARA 1417 et seq post.

A claim does not lie for damages for injury suffered by conviction upon perjured evidence: *Hargreaves v Bretherton* [1959] 1 QB 45, [1958] 3 All ER 122.

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### **713. Meaning of 'lawfully sworn'.**

The forms and ceremonies used in administering an oath<sup>1</sup> are immaterial<sup>2</sup>, if the court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question<sup>3</sup>, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection, or has declared to be binding on him<sup>4</sup>.

1 'Oath' includes 'affirmation' and 'declaration'; and the expression 'swear' includes 'affirm' and 'declare': Perjury Act 1911 s 15(2) (amended by the Criminal Justice Act 1967 s 10(2), Sch 3 Pt III; and the Administration of Justice Act 1977 ss 8(3), 32(4), Sch 5 Pt III).

As to the making of an affirmation see the Oaths Act 1978 ss 5, 6; and CIVIL PROCEDURE vol 11 (2009) PARA 1023.

2 Immaterial for the purposes of the Perjury Act 1911.

3 Every court, judge, justice, officer, commissioner, arbitrator or other person having by law or by consent of parties authority to hear, receive, and examine evidence, is empowered to administer an oath to all such witnesses as are legally called before them: Evidence Act 1851 s 16. As to persons empowered to administer oaths see further the County Courts Act 1984 s 58 (as amended); and CIVIL PROCEDURE vol 11 (2009) PARA 1026.

4 Perjury Act 1911 s 15(1). See also *R v Shaw* (1911) 104 LT 112, CCA (justices sitting at informal meeting not authorised by statute; no authority to administer oath; defendant not lawfully sworn); *R v Wheeler* [1917] 1 KB 283, 12 Cr App Rep 159, CA (defendant giving evidence on oath in mitigation of sentence after pleading guilty; defendant lawfully sworn); and see PARA 712 note 2 ante.

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#### **714. Statements made in judicial proceedings.**

A judicial proceeding includes a proceeding before any court, tribunal or person having by law power to hear, receive and examine evidence on oath<sup>1</sup>.

Where a statement made for the purposes of a judicial proceeding is not made before the tribunal itself, but is made on oath before a person authorised by law to administer an oath to the person who makes the statement, and to record or authenticate the statement, it is to be treated<sup>2</sup> as having been made in a judicial proceeding<sup>3</sup>.

A statement made by a person lawfully sworn in England for the purposes of a judicial proceeding:

- 822 (1) in another part of Her Majesty's dominions<sup>4</sup>; or
- 823 (2) in a British tribunal lawfully constituted in any place by sea or land outside Her Majesty's dominions<sup>5</sup>; or
- 824 (3) in a tribunal of any foreign state,

is to be treated as a statement made in a judicial proceeding in England<sup>6</sup>.

Except where otherwise provided<sup>7</sup>, where, for the purposes of a judicial proceeding in England and Wales, a person is lawfully sworn under the authority of an Act of Parliament:

- 825 (a) in any other part of Her Majesty's dominions; or
- 826 (b) before a British tribunal or a British officer in a foreign country, or within the Admiralty jurisdiction<sup>8</sup>,

a statement made by such person so sworn is to be treated as having been made in the judicial proceeding in England for the purposes of which it was made<sup>9</sup>.

1 Perjury Act 1911 s 1(2). Special Commissioners sitting to hear an income tax appeal have been held to constitute a tribunal: *R v Hood-Barrs* [1943] 1 KB 455, 29 Cr App Rep 55, CCA. An action brought against a fictitious person on a fictitious claim may constitute a judicial proceeding: *R v Castiglione and Porteous* (1912) 7 Cr App Rep 233, 106 LT 1023, CCA.

2 Ie for the purposes of the Perjury Act 1911 s 1: see PARA 712 ante.

3 Ibid s 1(3).

4 Ibid s 1(4)(a). For the meaning of 'Her Majesty's dominions' see COMMONWEALTH vol 13 (2009) PARA 707.

5 Ibid s 1(4)(b).

6 Ibid 1911 s 1(4). As to the power to make Orders in Council directing that s 1(4) is to have effect in relation to international proceedings see the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 6(2); and CIVIL PROCEDURE vol 11 (2009) PARA 1055. An Order in Council has been made extending the provisions of the Perjury Act 1911 to the Court of Justice of the European Communities: see the Evidence (European Court) Order 1976, SI 1976/428.

A statement made on oath by a witness outside the United Kingdom and given through a television link by virtue of the Criminal Justice Act 1988 s 32 (see PARA 1414 post) is to be treated for the purposes of the Perjury Act 1911 s 1 as having been made in the proceedings in which it is given in evidence: Criminal Justice Act 1988 s 32(3).

Where a person in the United Kingdom gives evidence through a live television link, or by the telephone, in criminal proceedings before a court in a country outside the United Kingdom, any statement on oath made by him in England and Wales is treated for the purposes of the Perjury Act 1911 s 1 as made in proceedings before the court nominated by the Secretary of State as the court where the witness may be heard in the proceedings in question through a live television link, or by telephone, as the case may be: Crime (International Co-operation) Act 2003 ss 30(5), 31(6). See PARAS 1431-1432 post.

7     le unless the Act of Parliament under which a statement was made specifically provides otherwise.

8     As to the Admiralty jurisdiction see PARA 1062 et seq post; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 85 et seq.

9     Perjury Act 1911 s 1(5); Interpretation Act 1978 ss 22, 23, Sch 2 para 5(a).

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### **715. Materiality of statement.**

The question whether a statement which forms the subject of proceedings for perjury was material is a question of law to be determined by the trial court<sup>1</sup>.

<sup>1</sup> Perjury Act 1911 s 1(6). The test for materiality is whether a statement might have affected the outcome of the proceedings, not that it would have done: *R v Lavey* (1850) 3 Car & Kir 26 at 30; *R v Millward* [1985] QB 519, 80 Cr App Rep 280, CA (disapproving *R v Sweet-Escott* (1971) 55 Cr App Rep 316 on this point). The prosecution does not have to prove that the witness knew or believed the statement to be material: *R v Millward* supra. A statement may be material, although it relates to a mere circumstance, if it induces the court to believe the substantial part of the witness's evidence (*R v Tyson* (1867) LR 1 CCR 107) or a more material part (Bac Abr, Perjury (A); 1 Hawk PC c 27(4) s 8). Evidence may be material if it induces the court to admit other material evidence (*R v Phillpotts* (1851) 21 LJMC 18, CCR) even though that evidence was not strictly admissible (*R v Yates* (1841) Car & M 132) or was withdrawn by counsel (*R v Phillpotts* supra; *R v Gibbon* (1862) Le & Ca 109, CCR). A statement going solely to a witness's credit, as opposed to the issue to be determined, may be material: see *R v Gripe* (1697) 1 Ld Raym 256; *R v Overton* (1843) 4 QB 83; *R v Baker* [1895] 1 QB 797, CCR (defendant's statement as to plea on previous charge); *R v Lavey* supra (claimant's denial of ever having been convicted). Evidence on oath by a convicted person in mitigation of sentence is material: *R v Hewitt* (1913) 9 Cr App Rep 192, CCA; *R v Wheeler* [1917] 1 KB 283, CCA. As to material statements see also *R v Courtney* (1856) 7 Cox CC 111 (evidence at coroner's inquest as to deceased's conduct not relevant to cause of death); *R v Mullany* (1865) Le & Ca 593, CCR (defendant's denial that his Christian names were those given in a summons for debt). As to immaterial statements see *R v Townsend* (1866) 4 F & F 1089 (evidence of truth of alleged criminal libel; truth irrelevant to charge at common law); *R v Tate* (1871) 12 Cox CC 7 (charge of assault; evidence of adultery by defendant's wife). Denial of an agreement void under the Statute of Frauds (1677) has been held immaterial: see *R v Benesech* (1796) Peake Add Cas 93; *R v Dunston* (1824) Ry & M 109. Evidence so collateral as to be almost irrelevant is insufficient to found a charge of perjury: see *R v Holden* (1872) 12 Cox CC 166; *R v Atlass* (1844) 1 Cox CC 17; *R v Southwood* (1858) 1 F & F 356.

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## **(ii) Offences akin to Perjury**

### **716. False statements on oath made otherwise than in a judicial proceeding.**

If any person:

- 827 (1) being required or authorised by law to make any statement on oath for any purpose<sup>1</sup>, and being lawfully sworn<sup>2</sup> (otherwise than in a judicial proceeding<sup>3</sup>), wilfully makes a statement which is material for that purpose and which he knows to be false or does not believe to be true<sup>4</sup>; or
- 828 (2) wilfully uses any false affidavit for the purposes of the Bills of Sale Act 1878<sup>5</sup>,

he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>6</sup> or to a fine not exceeding the prescribed sum<sup>7</sup> or to both<sup>8</sup>.

1 As to false oaths with reference to marriage see the Perjury Act 1911 s 3(1) (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 184; REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 533. As to false statements etc with reference to civil partnerships see the Civil Partnership Act 2004 s 80; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 185. As to the meaning of 'oath' see PARA 713 note 1 ante.

2 For the meaning of 'lawfully sworn' see PARA 713 ante.

3 As to the meaning of 'judicial proceeding' see PARA 714 ante.

4 Perjury Act 1911 s 2(1).

5 Ibid s 2(2). The reference in the text to the Bills of Sale Act 1878 relates to that Act as amended by any subsequent enactment (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1630 et seq); Perjury Act 1911 s 2(2).

6 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

7 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

8 Perjury Act 1911 s 2; Criminal Justice Act 1948 s 1(1), (2); Criminal Law Act 1967 s 1; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 14. See PARA 1103 post. See *R v Stokes* [1988] Crim LR 110, CA. As to false statements without oath see PARA 717 post.

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### **717. False statutory declarations and other false statements without oath.**

If any person knowingly and wilfully makes, otherwise than on oath<sup>1</sup>, a statement false in a material particular, and the statement is made:

- 829 (1) in a statutory declaration<sup>2</sup>; or
- 830 (2) in an abstract, account, balance sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return, or other document which he is authorised or required to make, attest, or verify by any statute for the time being in force<sup>3</sup>; or
- 831 (3) in any oral declaration or oral answer which he is required to make by, under, or in pursuance of any statute for the time being in force<sup>4</sup>,

he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the prescribed sum<sup>6</sup> or to both<sup>7</sup>.

If any person, in giving any testimony, either orally or in writing, otherwise than on oath, where required to do so by an order under the Evidence (Proceedings in Other Jurisdictions) Act 1975<sup>8</sup>, makes a statement which he knows to be false in a material particular or which is false in a material particular and which he does not believe to be true, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the prescribed sum or to both<sup>10</sup>.

1 As to the meaning of 'oath' see PARA 713 note 1 ante.

2 Perjury Act 1911 s 5(a). 'Statutory declaration' means a declaration made by virtue of the Statutory Declarations Act 1835, or of any Act, Order in Council, rule or regulation applying or extending the provisions of that Act (see CIVIL PROCEDURE vol 11 (2009) PARA 1024); Perjury Act 1911 s 15(2) (amended by the Criminal Law Act 1967 s 10(2), Sch 3 Pt III). A false statement in writing by a personal representative that he has not made any assent or conveyance renders him liable as if the statement had been contained in a statutory declaration: see the Administration of Estates Act 1925 s 36(6); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 446, 567.

3 Perjury Act 1911 s 5(b).

4 Ibid s 5(c).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

6 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

7 Perjury Act 1911 s 5; Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 s 1; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 14. See PARA 1103 post. The motive for the statement and whether or not there was an active intention to deceive are irrelevant: *R v Sood* [1998] 2 Cr App Rep 355, [1999] Crim LR 85, CA.

As to false statements etc with reference to marriages see the Perjury Act 1911 s 3 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 184; REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 533. As to false statements etc with reference to births or deaths see the Perjury Act 1911 s 4 (as amended); and REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 534. As to false declarations etc relating to professional registration see PARA 718 post. Any statute under which the making of a false statement for any purpose connected with its subject matter is made punishable is dealt with in the relevant title in this work. As to the mens rea required in such cases see *Bloomfield v Williams* [1970] RTR 184, DC.

8 Ie an order under the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 2 (orders by the High Court for obtaining evidence for proceedings in other jurisdictions: see CIVIL PROCEDURE vol 11 (2009) PARA 1058).

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

10 Perjury Act 1911 s 1A (added by the Evidence (Proceedings in Other Jurisdictions) Act 1975 s 8(1), Sch 1); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 14. See PARA 1103 post.



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### **718. False declarations etc relating to professional registration.**

If any person:

- 832 (1) procures or attempts to procure himself to be registered on any register or roll<sup>1</sup> of persons qualified by law to practise any vocation or calling<sup>2</sup>; or
- 833 (2) procures or attempts to procure a certificate of the registration of any person on any such register or roll<sup>3</sup>,

by wilfully making or producing or causing to be made or produced, either verbally or in writing, any declaration, certificate, or representation which he knows to be false or fraudulent, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding 12 months or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup> or to a fine not exceeding the prescribed sum<sup>5</sup> or to both<sup>6</sup>.

1 He kept under or in pursuance of any public general Act of Parliament for the time being in force.

2 Perjury Act 1911 s 6(a).

3 Ibid s 6(b).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

6 Perjury Act 1911 s 6; Criminal Law Act 1967 s 1; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 14. See PARA 1103 post.

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## **719. False written statements tendered in evidence in criminal proceedings.**

If any person in a written statement<sup>1</sup> tendered in evidence in criminal proceedings<sup>2</sup>, or in proceedings before a court-martial<sup>3</sup>, wilfully makes a statement material<sup>4</sup> in those proceedings which he knows to be false or does not believe to be true, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the prescribed sum<sup>6</sup> or to both<sup>7</sup>.

Until a day to be appointed<sup>8</sup>, if any person in a written statement tendered in evidence in committal proceedings<sup>9</sup> wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup> or to a fine not exceeding the prescribed sum or to both<sup>11</sup>.

1 The Criminal Justice Act 1967 s 89 applies to written statements made in Scotland or Northern Ireland as well as to written statements made in England and Wales: see the Criminal Justice Act 1972 s 46(1) (amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 114(a); and the Criminal Procedure and Investigations Act 1996 ss 47, 80, Sch 1 Pt II para 22(1), (2), Sch 1 Pt III para 39, Sch 5).

2 Ie by virtue of the Criminal Justice Act 1967 s 9 (as amended): see PARA 1535 post.

3 Ie by virtue of *ibid* s 9 (as amended) (see PARA 1535 post) as extended by s 12 or by the Army Act 1955 s 99A (as added and amended) or the Air Force Act 1955 s 99A (as added and amended). See ARMED FORCES vol 2(2) (Reissue) PARA 376.

4 As to materiality of statements see PARA 715 ante.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

6 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

7 Criminal Justice Act 1967 s 89(1) (amended by the Armed Forces Act 1976 s 22(5), Sch 9 para 15; and the Magistrates' Courts Act 1980 s 154(3), Sch 9); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 14.

The Perjury Act 1911 has effect as if the Criminal Justice Act 1967 s 89 (as amended) were contained in that Act: s 89(2). Section 89(2) has the effect of making the offence triable either way by virtue of the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 14. See PARA 1103 post.

8 As from a day to be appointed *ibid* s 106 (as amended) is repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 2 para 51(1), (6)(c), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

9 Ie under the Magistrates' Courts Act 1980 s 102 (repealed).

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see *ibid* s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1));

and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

11 Magistrates' Courts Act 1980 s 106(1) (amended by the Criminal Procedure and Investigations Act 1996 s 47, Sch 1 para 12); Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 14. See note 8 *supra*.

The Perjury Act 1911 has effect as if the Magistrates' Courts Act 1980 s 106 (as amended) were contained in that Act: s 106(2). Section 106(2) has the effect of making the offence triable either way by virtue of ss 17, 32(1), Sch 1 para 14. See PARA 1103 *post*.

## **UPDATE**

### **719 False written statements tendered in evidence in criminal proceedings**

NOTE 7--Criminal Justice Act 1967 s 89(1) further amended: Armed Forces Act 2006 Sch 17.

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### **(iii) Aiding, Abetting and Inciting**

#### **720. Aiders and abettors.**

Every person who aids, abets, counsels, procures, or suborns<sup>1</sup> another person to commit an offence against the Perjury Act 1911 is liable to be proceeded against, tried and punished as a principal offender<sup>2</sup>.

<sup>1</sup> At common law subornation of perjury was the procuring of a man to take a false oath amounting to perjury and the actual taking of such oath by that man: 1 Hawk PC 27(4) s 10.

<sup>2</sup> Perjury Act 1911 s 7(1). As to aiding and abetting generally see PARA 49 et seq ante.

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## **721. Incitement.**

Every person who incites another person to commit an offence against the Perjury Act 1911 is guilty of an offence and liable on conviction on indictment to imprisonment<sup>1</sup> or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>2</sup> or to a fine not exceeding the prescribed sum<sup>3</sup> or to both<sup>4</sup>.

<sup>1</sup> The term of imprisonment may not exceed two years: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 31.

<sup>2</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

<sup>3</sup> As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

<sup>4</sup> Perjury Act 1911 s 7(2) (amended by the Criminal Attempts Act 1981 s 10, Schedule Pt I); Criminal Law Act 1967 s 1; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 14. See PARA 1103 post. As to incitement generally see PARA 65 ante.

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## **(iv) Procedure**

### **722. Indictment.**

In an indictment for an offence under the Perjury Act 1911 it is sufficient to set out the substance of the offence charged and before which court or person (if any) the offence was committed, without setting out the proceedings or any part of the proceedings in the course of which the offence was committed and the authority of any court or person before whom the offence was committed<sup>1</sup>.

In an indictment for aiding, abetting, counselling, suborning<sup>2</sup> or procuring any other person, or for conspiring with any other person, to commit any offence within the Act, it is sufficient: (1) where such offence has been committed, to allege that offence and then to allege that the defendant procured its commission<sup>3</sup>; and (2) where such offence has not been committed, to set forth the substance of the offence charged against the defendant without setting forth anything which it is unnecessary to aver in the case of an indictment for such offence<sup>4</sup>.

1 Perjury Act 1911 s 12(1). As to joinder of defendants in a single indictment see PARA 1223 post. See also *R v Assim* [1966] 2 QB 249 at 255, [1966] 2 All ER 881 at 884, CCA.

2 As to the meaning of 'suborn' see PARA 720 note 1 ante.

3 Perjury Act 1911 s 12(2)(a) (s 12 amended by the Criminal Attempts Act 1981 s 10, Schedule Pt I).

4 Perjury Act 1911 s 12(2)(b) (as amended: see note 2 supra).

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### 723. Evidence.

A person may not be convicted of any offence under the Perjury Act 1911, or of any offence declared by any other Act to be perjury or subornation of perjury<sup>1</sup> or to be punishable as such, solely upon the evidence of one witness as to the falsity of any statement alleged to be false<sup>2</sup>. It is not essential to have more than one witness, however, if there is something else which confirms his testimony<sup>3</sup>. This requirement would appear not to apply where there is a formal admission either made before the trial or on evidence at the trial by the defendant that the statement was false<sup>4</sup>. Nor does the requirement apply in the very rare cases where the prosecution proceeds on the basis that the truth or falsity of the statement forms no part of its case<sup>5</sup>.

On a prosecution for perjury alleged to have been committed on a trial on indictment or for procuring or suborning the commission of perjury on any such trial, the fact of the former trial is sufficiently proved by the production of a certificate containing the substance and effect, omitting the formal parts, of the indictment and trial, purporting to be signed by the appropriate officer of the Crown Court or other person having the custody of the court records or either's deputy, without proof of the signature or official character of the person appearing to have signed it<sup>6</sup>.

There is no bar to the admission in a subsequent prosecution for perjury of evidence given at the first trial directed to establishing a perjury at that trial, even though that evidence, if accepted at the second trial, would lead to the inference that the defendant was guilty of the offence of which he was acquitted at the first trial; the doctrine of issue estoppel has no application in criminal proceedings<sup>7</sup>.

1 As to the meaning of 'suborn' see PARA 720 note 1 ante.

2 Perjury Act 1911 s 13. This requirement only relates to the issue of falsity; it does not relate to proof that the defendant knew that what he was saying was false: *R v O'Connor* [1980] Crim LR 43, CA. Where the defendant is alleged to have confessed before the trial, the evidence of two witnesses to the confession on the same occasion is sufficient for the purposes of the Perjury Act 1911 s 13; it is not necessary that they should have witnessed confessions on different occasions: *R v Peach* [1990] 2 All ER 966, 91 Cr App Rep 279, CA.

3 *R v Threlfall* (1914) 10 Cr App Rep 112 at 114, CCA; *R v Carroll, Perkins and Dickerson* (1993) 99 Cr App Rep 381, [1993] Crim LR 613, CA. A letter written by the defendant contradicting his sworn evidence may be sufficient (*R v Mayhew* (1834) 6 C & P 315; *R v Threlfall* supra), or clear statements made by him directly contrary to his sworn evidence (*R v Hook* (1858) Dears & B 606, CCR; *R v Knill* (1822) 5 B & Ald 929n). The judge is required in directing a jury in any case where the Perjury Act 1911 applies to refer to s 13 and the need for the jury to have before it evidence which it accepts of more than one witness, ie one or more other witnesses, or supporting evidence (eg by way of confession) which supplements that of a single witness: *R v Carroll, Perkins and Dickerson* supra. Statements in a deposition before a magistrate differing from the defendant's evidence at the trial are not in themselves sufficient: *R v Wheatland* (1838) 8 C & P 238; *R v Hughes* (1844) 1 Car & Kir 519; *R v Jackson* (1823) 1 Lew CC 270. As to what constitutes sufficient corroboration of a single witness at common law see *Champney's Case* (1836) 2 Lew CC 258; *R v Parker* (1842) Car & M 639; cf *R v Yates* (1841) Car & M 132. As to corroboration generally see PARA 1449 et seq post.

4 *R v Rider* (1986) 83 Cr App Rep 207, CA; *R v Stokes* [1988] Crim LR 110, CA.

5 See *R v Rider* (1986) 83 Cr App Rep 207, CA (appellant obtained divorce by filling in and forging her husband's signature on the acknowledgment of service document intended for him: per curiam there is no

contradiction between the Perjury Act 1911 s 1(1) (a witness who wilfully makes a false statement is guilty of perjury: see PARA 714 ante) and the s 13 requirement for more than one witness as to the falsity of a statement *alleged to be false*).

6 Ibid s 14 (amended by the Criminal Law Act 1967 s 10(2), Sch 3 Pt III; and the Courts Act 1971 s 56(1), Sch 8 para 2(1) Table).

7 *DPP v Humphrys* [1977] AC 1, 63 Cr App Rep 95, HL. See further PARA 1277 note 1 post.

## **UPDATE**

### **723 Evidence**

NOTE 3--Business records prepared by a witness that he uses to refresh his memory does not corroborate evidence given by him at trial: *R v Cooper* [2010] EWCA Crim 979, (2010) 174 JP 265.



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#### **724. Offences committed abroad.**

Where an offence against the Perjury Act 1911 or any offence punishable under any other Act as perjury or subornation of perjury<sup>1</sup> is committed in any place either on sea or land outside the United Kingdom, the offender may be proceeded against, indicted, tried and punished in England<sup>2</sup>.

1 As to the meaning of 'suborn' see PARA 720 note 1 ante.

2 Perjury Act 1911 s 8 (amended by the Criminal Law Act 1967 s 10(2), Sch 3 Pt III). This provision deals with the powers of a court to try an offence, and not whether given conduct abroad is capable of amounting to an offence under English jurisdiction. As to jurisdiction generally see PARA 1050 et seq post.

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### **725. Liability apart from the Perjury Act 1911.**

Where the making of a false statement is not only an offence under the Perjury Act 1911 but also by virtue of some other Act is a corrupt practice<sup>1</sup> or subjects the offender to any forfeiture or disqualification or to any penalty other than imprisonment or fine, the offender's liability under the Perjury Act 1911 is in addition to, and not in substitution for, his liability under such other Act<sup>2</sup>. In general<sup>3</sup>, where the making of a false statement is made punishable by any other Act on summary conviction, proceedings may be taken either under such other Act or under the Perjury Act 1911<sup>4</sup>.

1 See ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 707 et seq.

2 Perjury Act 1911 s 16(1).

3 Where an offence is by any Act passed before the Perjury Act 1911, as originally enacted, made punishable only on summary conviction, it remains only so punishable: s 16(3) proviso.

4 Ibid s 16(3). Any Act under which the making of a false statement for any purpose connected with its subject matter is made punishable is dealt with in the appropriate title in this work. As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

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## **(2) OFFENCES RELATING TO WITNESSES, JURIES AND OTHERS**

### **(i) Intimidation of Witnesses, Jurors etc and Harming or Threatening to Harm such Persons**

#### **726. Intimidation, etc of witnesses, jurors and others in proceedings for a criminal offence.**

A person commits an offence if:

- 834 (1) he does an act which intimidates<sup>1</sup>, and is intended to intimidate, another person ('the victim')<sup>2</sup>;
- 835 (2) he does the act knowing or believing that the victim is assisting in the investigation of an offence<sup>3</sup> or is a witness or potential witness or a juror or potential juror<sup>4</sup> in proceedings for an offence<sup>5</sup>; and
- 836 (3) he does it intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with<sup>6</sup>.

If it is proved that the defendant did an act falling within head (1) above with the knowledge or belief required by head (2) above, he is to be presumed, unless the contrary is proved<sup>7</sup>, to have done the act with the intention required by head (3) above<sup>8</sup>.

A person commits an offence if:

- 837 (a) he does an act which harms, and is intended to harm, another person or, intending to cause another person to fear harm, he threatens to do an act which would harm that other person<sup>9</sup>;
- 838 (b) he does or threatens to do the act knowing or believing that the person harmed or threatened to be harmed ('the victim'), or some other person, has assisted in an investigation into an offence or has given evidence or particular evidence in proceedings for an offence, or has acted as a juror or concurred in a particular verdict in proceedings for an offence<sup>10</sup>; and
- 839 (c) he does or threatens to do it because of that knowledge or belief<sup>11</sup>.

For these purposes it is immaterial that the act is or would be done, or that the threat is made, otherwise than in the presence of the victim, or to a person other than the victim<sup>12</sup>. The harm that may be done or threatened may be financial as well as physical (whether to the person or a person's property) and similarly as respects an intimidatory act which consists of threats<sup>13</sup>. If it is proved that within the relevant period<sup>14</sup>:

- 840 (i) the defendant did an act which harmed, and was intended to harm, another person<sup>15</sup>; or

841 (ii) intending to cause another person fear or harm, he threatened to do an act which would harm that other person<sup>16</sup>,

and that he did the act, or (as the case may be) threatened to do the act, with the knowledge or belief required by head (b) above, he is to be presumed, unless the contrary is proved, to have done the act or (as the case may be) threatened to do the act with the motive required by head (c) above<sup>17</sup>.

A person guilty of one of the above offences is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, and on summary conviction to imprisonment for a term not exceeding six months<sup>18</sup> or to a fine not exceeding the statutory maximum<sup>19</sup> or to both<sup>20</sup>.

1 For these purposes, a person does 'an act which intimidates' another person not only if he puts the victim in fear, but also if he seeks to deter the victim from some relevant action by threat or violence; a threat unaccompanied by violence may be sufficient, and the threat need not necessarily be a threat of violence, but mere pressure is insufficient: *R v Patrascu* [2004] EWCA Crim 2417, [2004] 4 All ER 1066, [2005] 1 WLR 3344. The pressure must put the victim in some fear, or, if it does not, there must be an element of threat or violence such that the pressure was improper pressure: *R v Patrascu* supra.

2 Criminal Justice and Public Order Act 1994 s 51(1)(a) (s 51(1)-(3) substituted by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 paras 21, 22(1), (2)).

3 'Investigation into an offence' means such an investigation by the police or other person charged with the duty of investigating offences or charging offenders; and 'offence' includes an alleged or suspected offence: Criminal Justice and Public Order Act 1994 s 51(9). There must be an investigation under way at the time of the alleged act: *R v Singh* [2000] 1 Cr App Rep 31, [1999] Crim LR 681, CA.

4 'Potential', in relation to a juror, means a person who has been summoned for jury service at the court at which proceedings for the offence are pending: Criminal Justice and Public Order Act 1994 s 51(9).

5 Ibid s 51(1)(b) (as substituted: see note 2 supra).

6 Ibid s 51(1)(c) (as substituted: see note 2 supra). The threat may be made through a third party: *A-G's Reference (No 1 of 1999)* [2000] QB 365, [1999] 2 Cr App Rep 418, CA (a decision relating to the Criminal Justice and Public Order Act 1994 s 51(1) as originally enacted).

The intention required by head (3) in the text need not be the only or the predominating intention with which the act is done: s 51(5).

7 'Proved' imposes a legal (or persuasive) burden on the defendant which is compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence): see *A-G's Reference (No 1 of 2004)*, *R v Edwards*, *R v Denton and Jackson*, *R v Hendley*, *R v Crowley* [2004] EWCA Crim 1025, [2004] 1 WLR 2111, [2004] 2 Cr App Rep 424; and PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

8 Criminal Justice and Public Order Act 1994 s 51(7).

9 Ibid s 51(2)(a) (as substituted: see note 2 supra).

10 Ibid s 51(2)(b) (as substituted: see note 2 supra).

11 Ibid s 51(2)(c) (as substituted: see note 2 supra). The motive required by head (c) in the text need not be the only or the predominating motive with which the act is threatened: s 51(5).

12 Ibid s 51(3) (as substituted: see note 2 supra).

13 Ibid s 51(4). 'Physical harm' bears its ordinary meaning: *R v Normanton* [1998] Crim LR 220, DC.

14 Criminal Justice and Public Order Act 1994 s 51(8) (amended by the Youth Justice and Criminal Evidence Act 1999 Sch 4 paras 21, 22(1), (3)(b)).

'The relevant period' means: (1) in relation to a witness or juror in any proceedings for an offence, means the period beginning with the institution of the proceedings and ending with the first anniversary of the conclusion of the trial or, if there is an appeal or a reference under the Criminal Appeal Act 1995 s 9 or s 11 (see PARAS 1963, 1982 post), of the conclusion of the appeal; (2) in relation to a person who has, or is believed by the defendant to have, assisted in an investigation into an offence, but was not also a witness in proceedings for an offence, the period of one year beginning with any act of his, or any act believed by the defendant to be an act of his, assisting in the investigation; and (3) in relation to a person who has, or is believed by the defendant to have, assisted in the investigation into an offence and was a witness in proceedings for the offence, the period beginning with any act of his, or any act believed by the defendant to be an act of his, assisting in the investigation and ending with the anniversary mentioned in head (1) supra: Criminal Justice and Public Order Act 1994 s 51(9) (definition amended by the Criminal Appeal Act 1995 s 29, Sch 2 para 19). For these purposes:

189 (a) proceedings for an offence are instituted at the earliest of the following times:

8. (i) when a justice of the peace issues a summons or warrant under the Magistrates' Courts Act 1980 s 1 (see MAGISTRATES vol 29(2) (Reissue) PARA 522) in respect of the offence (Criminal Justice and Public Order Act 1994 s 51(10)(a)(i));

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9. (ii) when a person is charged with the offence after being taken into custody without a warrant (s 51(10)(a)(ii)); or

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10. (iii) when a bill of indictment is preferred by virtue of the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(b) (see PARA 1206 post) (Criminal Justice and Public Order Act 1994 s 51(10)(a)(iii));

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190 (b) proceedings at a trial of an offence are concluded with the occurrence of any of: (A) the discontinuance of the prosecution; (B) the discharge of the jury without a finding (otherwise than in circumstances where the proceedings are continued without a jury); (C) the acquittal of the defendant; or (D) the sentencing of or other dealing with the defendant for the offence of which he was convicted (s 51(10)(b) (amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 62, 64));

191 (c) proceedings on an appeal are concluded on the determination of the appeal or the abandonment of the appeal (Criminal Justice and Public Order Act 1994 s 51(10)(c)).

As from a day to be appointed, there is a fourth alternative to be included in head (a) supra, namely, when a public prosecutor issues a written charge and requisition in respect of the offence (s 51(10)(a)(ia) (prospectively added by the Criminal Justice Act 2003 s 331, Sch 36 para 11(1), (3)). For these purposes, 'public prosecutor', 'requisition' and 'written charge' have the same meanings as in the Criminal Justice Act 2003 s 29 (see PARAS 912, 915 post): Criminal Justice and Public Order Act 1994 s 51(9) (prospectively added by the Criminal Justice Act 2003 Sch 36 para 11(1), (2)). At the date at which this volume states the law no such day had been appointed.

15 Criminal Justice and Public Order Act 1994 s 51(8)(a) (s 51(8) amended by the Youth Justice and Criminal Evidence Act 1999 Sch 4 paras 21, 22(1), (3)(b)).

16 Criminal Justice and Public Order Act 1994 s 51(8)(b) (as amended: see note 15 supra).

17 Ibid s 51(8) (as amended: see note 15 supra).

18 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

19 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

20 Criminal Justice and Public Order Act 1994 s 51(6). Section 51 is in addition to, and not in derogation of, any subsisting common law offence: s 51(11).

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**727. Intimidation of witnesses, etc, in proceedings other than for a criminal offence.**

A person commits an offence if: (1) he does an act<sup>1</sup> which intimidates, and is intended to intimidate, another person ('the victim')<sup>2</sup>; (2) he does the act: (a) knowing or believing that the victim is or may be a witness<sup>3</sup> in any relevant proceedings<sup>4</sup>; and (b) intending, by his act, to cause the course of justice to be obstructed, perverted or interfered with<sup>5</sup>; and (3) the act is done after the commencement of those proceedings<sup>6</sup>. It is immaterial whether or not the act that is done is done in the presence of the victim, or whether that act is done to the victim himself or to another person<sup>7</sup>. If it is proved that the defendant did any act that intimidated, and was intended to intimidate, another person, and that he did that act knowing or believing that that other person was or might be a witness in any relevant proceedings that had already commenced, he is to be presumed, unless the contrary is shown, to have done the act with the intention of causing the course of justice to be obstructed, perverted or interfered with<sup>8</sup>.

A person commits an offence if, in specified circumstances: (i) he does an act which harms, and is intended to harm, another person<sup>9</sup>; or (ii) intending to cause another person to fear harm, he threatens to do an act which would harm that other person<sup>10</sup>. Those circumstances are that: (A) the person doing or threatening to do the act does so knowing or believing that some person (whether or not the person harmed or threatened or the person against whom harm is threatened) has been a witness<sup>11</sup> in relevant proceedings<sup>12</sup>; and (B) he does or threatens to do that act because of that knowledge or belief<sup>13</sup>. If it is proved that, within the relevant period<sup>14</sup>, the defendant did an act which harmed, and was intended to harm, another person or, intending to cause another person to fear harm, he threatened to do an act which would harm that other person, and that in either case he did the act, or (as the case may be) threatened to do the act, with the knowledge or belief required by head (A) above, he is to be presumed, unless the contrary is shown, to have done the act, or (as the case may be) threatened to do the act, because of that knowledge or belief<sup>15</sup>. For these purposes, it is immaterial whether or not the act that is done or threatened, or the threat that is made, is or would be done or is made in the presence of the person who is or would be harmed or of the person who is threatened, or whether the harm that is done or threatened is physical or financial or is harm to a person or to his property<sup>16</sup>.

A person guilty of any one of the above offences is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both<sup>17</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>18</sup> or to a fine not exceeding the statutory maximum<sup>19</sup> or to both<sup>20</sup>.

1 References in the Criminal Justice and Police Act 2001 s 39 to doing an act include references to issuing any threat (whether against a person or his finances or property or otherwise), or making any other statement: s 39(6).

2 Ibid s 39(1)(a).

3 References in ibid s 39 to a witness, in relation to any proceedings, include references to a person who provides, or is able to provide, any information or any document or other thing which might be used as evidence in those proceedings or which (whether or not admissible as evidence in those proceedings): (1) might

tend to confirm evidence which will be or might be admitted in those proceedings (s 39(5)(a)); (2) might be referred to in evidence given in those proceedings by another witness (s 39(5)(b)); or (3) might be used as the basis for any cross examination in the course of those proceedings (s 39(5)(c)).

4 Ibid s 39(1)(b)(i). A reference in s 39 or s 40 to relevant proceedings is a reference to any proceedings in or before the Court of Appeal, the High Court, the Crown Court or any county court or magistrates' court which are not proceedings for an offence and were commenced after 1 August 2001 (ie the date on which ss 39, 40 came into force: Criminal Justice and Police Act 2001 (Commencement No 1) Order 2001, SI 2001/2223); Criminal Justice and Police Act 2001 s 41(1).

5 Ibid s 39(1)(b)(ii).

6 Ibid s 39(1)(c). For the purposes of any reference in s 39, s 40 or s 41 to the commencement of any proceedings, relevant proceedings are commenced (subject to s 41(5) (see note 14 infra)) at the earliest time at which one of the following occurs: (1) an information is laid or an application, claim form, complaint, petition, summons or other process is made or issued for the purpose of commencing the proceedings (s 41(2)(a)); (2) any other step is taken by means of which the subject matter of the proceedings is brought for the first time (whether as part of the proceedings or in anticipation of them) before the court (s 41(2)(b)). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

7 Ibid s 39(2)(a), (b). It is also immaterial whether or not the intention to cause the course of justice to be obstructed, perverted or interfered with is the predominating intention of the person doing the act in question: s 39(2)(c).

8 Ibid s 39(3).

9 Ibid s 40(1)(a).

10 Ibid s 40(1)(b).

11 References in ibid s 40 to a witness, in relation to any proceedings, include references to a person who has provided any information or any document or other thing which was or might have been used as evidence in those proceedings or which (whether or not it was admissible as evidence in those proceedings): (1) tended to confirm or might have tended to confirm any evidence which was or could have been given in those proceedings; (2) was or might have been referred to in evidence given in those proceedings by another witness; or (3) was or might have been used as the basis for any cross examination in the course of those proceedings: s 40(7).

12 Ibid s 40(2)(a). As to relevant proceedings see s 41(1); and note 4 supra.

13 Ibid s 40(2)(b).

14 For these purposes, 'the relevant period', in relation to an act done, or threat made, with the knowledge or belief that a person has been a witness in any relevant proceedings, means the period that begins with the commencement of those proceedings and ends one year after they are finally concluded: ibid s 40(6). As to the commencement of relevant proceedings see s 41(2); note 6 supra.

Relevant proceedings are finally concluded: (1) if proceedings for an appeal against, or an application for a review of, those proceedings or of any decision taken in those proceedings are brought or is made, at the time when proceedings on that appeal or application are finally concluded; (2) if the proceedings are withdrawn or discontinued, at the time when they are withdrawn or discontinued; and (3) in any other case, when the court in or before which the proceedings are brought finally disposes of all the matters arising in those proceedings: s 41(3). However, relevant proceedings are not to be taken to be finally concluded by virtue of head (1) supra where: (a) the matters to which the appeal or application relate are such that the proceedings in respect of which it is brought or made continue or resume after the making of any determination on that appeal or application; or (b) a determination made on that appeal or application requires those proceedings to continue or to be resumed: s 41(4). Where, after having appeared to be finally concluded, any relevant proceedings continue by reason of: (i) the giving of permission to bring an appeal after a fixed time for appealing has expired; (ii) the lifting of any stay in the proceedings; (iii) the setting aside, without an appeal, of any judgment or order; or (iv) the revival of any discontinued proceedings, ss 39-41 have effect as if the proceedings had concluded when they appeared to, but as if the giving of permission, the lifting of the stay, the setting aside of the judgment or order or, as the case may be, the revival of the discontinued proceedings were the commencement of new relevant proceedings: s 41(5).

15 Ibid s 40(3).

16 Ibid s 40(4)(a), (c). It is also immaterial whether or not the motive mentioned in head (b) in the text is the predominating motive for the act or threat: s 40(4)(b).

17 Ibid ss 39(4)(a), 40(5)(a).

18 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

19 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

20 Criminal Justice and Police Act 2001 ss 39(4)(b), s 40(5)(b). Sections 39, 40 are in addition to, and not in derogation of, any subsisting common law offence: ss 39(7), 40(8).



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## **728. Threatening etc witnesses at public inquiries.**

Every person who threatens or in any way punishes, damnifies or injures or attempts to punish, damnify or injure any person for having given evidence upon any inquiry<sup>1</sup>, or on account of the evidence which he has given upon any such inquiry, unless such evidence was given in bad faith, is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months<sup>2</sup> or to a fine not exceeding level three on the standard scale<sup>3</sup>. The offender may also be ordered to pay compensation to the person injured<sup>4</sup>.

1 'Inquiry' means any inquiry held under the authority of any Royal Commission or by any committee of either House of Parliament, or pursuant to any statutory authority, whether the evidence of such inquiry is or is not given on oath, but does not include any inquiry by any court of justice: Witnesses (Public Inquiries) Protection Act 1892 s 1.

2 As from a day to be appointed this maximum term is increased to 51 weeks: see *ibid* s 2 (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 4). At the date at which this volume states the law no such day had been appointed.

3 Witnesses (Public Inquiries) Protection Act 1892 ss 2, 3 (amended by the Criminal Law Act 1977 ss 15(3) (d), 65(5), Sch 13; and the Criminal Justice Act 1982 ss 38, 46); Criminal Law Act 1967 s 1. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

4 See the Witnesses (Public Inquiries) Protection Act 1892 ss 4, 5 (amended by the Statute Law (Repeals) Act 1993 Sch 1 Pt I).

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## **(ii) Embracery**

### **729. Embracery.**

Embracery is an indictable offence at common law and is committed by any person<sup>1</sup> who attempts to corrupt, influence, or instruct a jury or to incline a jury to favour one side more than the other, whether by money, promises, letters, threats, or persuasion, or by any means other than by evidence and arguments in open court at the trial<sup>2</sup>. To give jurors money after their verdict constitutes embracery, even though there was no previous promise to pay<sup>3</sup>. The offence of embracery is obsolescent: conduct covered by it is more appropriately dealt with as perversion of the course of justice or contempt of court<sup>4</sup> or intimidation of jurors<sup>5</sup>.

It is also an indictable offence at common law for any person by improper means to procure himself or others to be sworn on a jury for the purpose of giving a verdict favourable to one of the parties<sup>6</sup> or for any person to induce a juror not to appear<sup>7</sup>.

The above offences are punishable by fine and imprisonment for life or any shorter term at the discretion of the court<sup>8</sup>.

1 The offence may be committed as well by one of the jury as by a party to the cause or any person acting on his behalf: 1 Hawk PC c 27(8) ss 1-4.

2 1 Hawk PC c 27(8); *Jepps v Tunbridge and Wiseman* (1611) Moore KB 815. The offence of embracery was not abolished by the Criminal Law Act 1967: see s 13(1)(a). As to the meaning of 'open court' see PARA 90 note 10 ante.

3 1 Hawk PC c 27(8) s 3.

4 *R v Owen* [1976] 3 All ER 239, 63 Cr App Rep 199, CA.

5 As to perversion of the course of justice see PARA 731 post; as to contempt of court see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 434; and as to intimidation of jurors see PARA 726 ante.

6 1 Hawk PC c 27(8) s 4; *R v Opie and Dodge* (1670) 1 Wms Saund 300; *Hussey v Cooke* (1621) Hob 294. It is an offence under the Juries Act 1974 for a person, knowing he is ineligible or disqualified for jury service, to serve on a jury: see s 20(5)(d); and JURIES vol 61 (2010) PARA 811. As to personating a juror see PARA 730 post.

7 1 Hawk PC c 27(8) s 5; *Hussey v Cooke* (1621) Hob 294.

8 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139. A sentence of immediate imprisonment is appropriate unless the circumstances are wholly exceptional: *R v Owen* [1976] 3 All ER 239, 63 Cr App Rep 199, CA.

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### **(iii) Personating a Juror**

#### **730. Personating a juror.**

It is an indictable offence at common law to personate a juror<sup>1</sup>. It is not necessary to prove that the defendant had any corrupt motive or any specific intention to deceive other than that which is involved in going into the jury box and taking the oath in another's name<sup>2</sup>. It is no answer that he did not know he was doing wrong<sup>3</sup>. Where a person who is not called as a juror personates a juror and sits in his place, the trial is a nullity<sup>4</sup>. The offence is punishable by fine and imprisonment for life or any shorter term at the discretion of the court<sup>5</sup>.

1 *R v Clark* (1918) 82 JP 295. Such personation is also contempt of court: see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 434.

2 *R v Clark* (1918) 82 JP 295.

3 *R v Clark* (1918) 82 JP 295.

4 Juries Act 1974 s 18(3); *R v Wakefield* [1918] 1 KB 216, 13 Cr App Rep 56, CCA; and see JURIES vol 61 (2010) PARA 853.

5 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

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### (3) OBSTRUCTING THE COURSE OF JUSTICE

#### 731. Perversion of the course of justice.

It is an indictable offence at common law to pervert the course of justice<sup>1</sup>. The offence is otherwise referred to as obstructing or interfering with the administration of justice and defeating the due course or the ends of justice<sup>2</sup>. The offence consists of an act, or a series of acts,<sup>3</sup> or conduct which has the tendency<sup>4</sup> and is intended<sup>5</sup> to pervert the course<sup>6</sup> of justice<sup>7</sup>. The course of justice may be perverted by discontinuing a criminal prosecution in return for payment<sup>8</sup>; making false statements to police officers investigating an offence<sup>9</sup>; making a false complaint to the police capable of being taken seriously, whether or not it identifies particular individuals<sup>10</sup>; doing an act calculated to assist another to avoid arrest<sup>11</sup>; interfering with a witness<sup>12</sup> or a juror<sup>13</sup>; a witness deliberately absenting himself from proceedings in return for payment<sup>14</sup>; producing fabricated evidence<sup>15</sup>; publishing articles calculated to interfere with the course of justice<sup>16</sup>; improperly aborting a prosecution<sup>17</sup>; or frustrating a statutory procedure which would or could otherwise lead to a prosecution<sup>18</sup>.

The offence is punishable by fine and imprisonment at the discretion of the court<sup>19</sup>.

1 *R v Vreones* [1891] 1 QB 360, CCR; *R v Rowell* [1978] 1 All ER 665, 65 Cr App Rep 174, CA; *R v Machin* [1980] 3 All ER 151, 71 Cr App Rep 166, CA; *R v Selvage*, *R v Morgan* [1982] 1 All ER 96, 73 Cr App Rep 333, CA; *R v Bassi* [1985] Crim LR 671, CA. It will only be appropriate to charge this offence if police time has been wasted or where innocent persons who have been named have been arrested or if there are other aggravating factors: *R v Sookoo* (2000) Times, 10 April, CA.

2 *R v Machin* [1980] 3 All ER 151, 71 Cr App Rep 166, CA.

3 *R v Rowell* [1978] 1 All ER 665, 65 Cr App Rep 174, CA. Some positive act is required: *R v Headley* (1996) 160 JP 25, CA (defendant acquiesced in trial at which convicted in absence for offence committed by brother; defendant made no representations about false allegations that he had been the driver; simply acquiesced in trial and failed to attend; not offence of perverting course of justice); and see also *R v Clark* [2003] EWCA Crim 991, [2003] 2 Cr App Rep 363 (defendant involved in road traffic accident under influence of alcohol; drove home and only reported accident when sober the next day; not an offence of perverting the course of justice because no positive act of concealment of drink-driving offence).

4 The gist of the offence is conduct which may lead and is intended to lead to a miscarriage of justice whether or not a miscarriage actually occurs. Proof of intention alone is not sufficient: *R v Machin* [1980] 3 All ER 151, 71 Cr App Rep 166, CA; *R v Bassi* [1985] Crim LR 671, CA. There must be evidence that what the defendant has done is enough for there to be a risk, without further action by him, that injustice will result. In other words, there must be a possibility that what he has done without more might lead to injustice: *R v Murray* [1982] 2 All ER 225, 75 Cr App Rep 58, CA. The prosecution does not have to prove that the tendency in fact materialised: *R v Machin* supra; *R v Murray* supra.

5 The Crown has to prove that each of the defendants intended by the act or acts that the course of justice should be interfered with; it cannot be right to say that the only intent which has to be proved is the intent to do the act which may or may not be held to have a tendency to pervert: *R v Selvage*, *R v Morgan* [1982] QB 372, [1982] 1 All ER 96, CA (relying on *R v Vreones* [1891] 1 QB 360, CCR; *R v Machin* [1980] 3 All ER 151, 71 Cr App Rep 166, CA). The law distinguishes between the *course* of justice and the *ends* of justice; if the defendant's conduct tends, and is intended, to pervert the course of justice, it is irrelevant that he acts with the motive of promoting the ends of justice: *A-G's Reference (No 1 of 2002)* [2002] EWCA Crim 2392, [2003] Crim LR 410. Thus a person who presents false evidence in order to secure the conviction of someone he believes to be guilty can be convicted of perverting the course of justice: *A-G's Reference (No 1 of 2002)* supra.

6 The offence is not limited to matters directly concerning proceedings already in being; nor need proceedings of some kind in a court or judicial tribunal be imminent; nor is it necessary that investigations which could result in proceedings are in progress. Provided that there is the requisite tendency and the requisite intention, the offence can be committed after the perpetration of a crime but before investigations into it have begun: *R v Rafique* [1993] QB 843, [1993] 4 All ER 1, CA (disposal of gun after accidental shooting, but before start of police investigation which led to criminal charges, capable of amounting to offence of perverting course of justice), distinguishing *R v Selva*, *R v Morgan* [1982] QB 372, [1982] 1 All ER 96, CA (the mere act of altering X's records of endorsements on licences could not by itself be a perversion of the course of justice, because no proceedings were in the contemplation of the defendant or X; the defendant was merely acting against the possibility of the commission at some time in the future of a road traffic offence (in which case it was intended that X's previous road traffic convictions would not be taken into account in sentencing him)). Indeed, the offence can be committed even though a crime has not been committed (or cannot be proved) if the defendant believes that there may be an investigation which could result in judicial proceedings: *R v Kiffin* [1994] Crim LR 449, CA. Thus a person who, in order to prevent the detection of the offender, destroys the only evidence of a crime before an investigation can begin can be convicted of the present offence, since such conduct clearly has a tendency to pervert the course of justice and he would act with intent to pervert that course, and the same would be true if he mistakenly believes that it is the only evidence of a non-existent crime.

7 The offence is sometimes described as 'attempting to pervert the course of justice'. The use of 'attempt' is misleading because the offence is a substantive offence (which can itself be attempted), and not an attempt, contrary to the Criminal Attempts Act 1981, to commit a substantive offence: *R v Rowell* [1978] 1 All ER 665, (1977) 65 Cr App Rep 174, CA; *R v Williams* (1990) 92 Cr App Rep 158, CA. See also *R v Vreones* [1891] 1 QB 360, CCR; *R v Grimes* [1968] 3 All ER 179n; *R v Panayiotou* [1973] 1 WLR 1032, 57 Cr App Rep 762, CA (approving *R v Grimes* supra); *R v Andrews* [1973] QB 422, 57 Cr App Rep 254, CA; *R v Thomas* [1979] QB 326; sub nom *R v Thomas*, *R v Ferguson* (1978) 68 Cr App Rep 275, CA; *R v Machin* [1980] 3 All ER 151, 71 Cr App Rep 166, CA; *R v Selva*, *R v Morgan* [1982] QB 372, [1982] 1 All ER 96, CA; *R v Murray* [1982] 2 All ER 225, 75 Cr App Rep 58, CA; *R v Bassi* [1985] Crim LR 671, CA.

As to related offences see the Criminal Law Act 1967 s 4 (as amended) (see PARA 58 ante), s 5 (see PARAS 734, 739 post). As to perjury and embracery see PARAS 712 et seq, 729 ante.

8 *R v Kranze*, *R v Duffy* (1913) 77 JP Jo 316 (conspiracy to pervert the course of public justice (see now also the Criminal Law Act 1977 s 1 (as amended); and PARA 67 ante)). See also *R v Toney*, *R v Ali* [1993] 2 All ER 409, [1993] 1 WLR 364, CA (no distinction between bribery and pressure by bribery).

9 *R v Field* [1965] 1 QB 402 at 417, [1964] 3 All ER 269 at 279, CCA; *Tsang Ping-Nam v R* [1981] 1 WLR 1462, 74 Cr App Rep 139, PC. It is immaterial that proceedings have not been commenced: *R v Sharpe* [1938] 1 All ER 48, 26 Cr App Rep 122, CCA. As to the statutory offence of causing wasteful employment of the police see PARA 739 post.

10 *R v Rowell* [1978] 1 All ER 665, 65 Cr App Rep 174, CA; *R v Cotter* [2002] EWCA Crim 1033, [2003] QB 951. Where a complaint is so generalised that there is no risk, or only a minimal risk, of anyone being arrested or prosecuted, it may be more appropriate to charge the offence of causing wasteful employment of the police (see PARA 739 post): *R v Cotter* supra. If the named individual is, unknown to the defendant, dead there can be a conviction for attempting to pervert the course of justice: *R v Brown* [2004] EWCA Crim 744, [2004] Crim LR 665.

11 *R v Thomas* [1979] QB 326, 68 Cr App Rep 275, CA (appellants provided S with the registration numbers of unmarked police cars so that he could avoid being arrested; interference did not have to be dishonest, corrupt or threatening; cf the requirements in relation to improperly interfering with a witness (see note 12 infra)).

12 At one time this was thought to be a separate indictable offence, but it is now clear that it is an example of the offence of perverting the course of justice: *R v Grimes* [1968] 3 All ER 179n; *R v Kellett* [1976] QB 372, [1975] 3 All ER 468, CA (threat to bring proceedings for slander; intention to deter witness from giving evidence in divorce suit). The offence is not necessarily committed by a person who tried to persuade a false witness, or even a witness believed to be false, to speak the truth or to refrain from giving false evidence: *R v Kellett* supra. It is not necessary that an attempt at persuasion should involve improper means, such as a threat, bribe or undue pressure: *R v Toney*, *R v Ali* [1993] 2 All ER 409, [1993] 1 WLR 264, CA. The exercise of a legal right or the threat of exercising it does not excuse interfering with the administration of justice by deterring a witness from giving evidence which he wishes to give before he has given it: *R v Kellett* supra (right to sue for slander). There may be a material difference if the person interfered with is a litigant and not a witness: *R v Kellett* supra; *Webster v Bakewell RDC* [1916] 1 Ch 300; *A-G v Times Newspapers Ltd* [1974] AC 273 at 319, [1973] 3 All ER 54 at 80, HL, per Lord Simon of Glaisdale. 'Witness' includes a potential witness: *R v Grimes* supra. The question whether a person is to be treated as a witness can only be answered by having regard to the proceedings contemplated. Where a person has made a statement to the police and the decision not to prosecute will be made by the police, that person, although the complainant, is to be regarded as a witness: *R v Panayiotou*

[1973] 3 All ER 112, 57 Cr App Rep 762, CA. See also *R v Lady Lawley* (1731) 2 Stra 904; *R v Loughlin* (1839) 1 Craw & D 79; *Shaw v Shaw* (1861) 31 LJPM & A 35; *Re Hooley, Rucker's Case* (1898) 79 LT 306; *R v Greenberg* (1919) 121 LT 288, CCA; *R v Steventon* (1802) 2 East 362; *R v Hamp* (1852) 6 Cox CC 167. The offence is not committed by a person who seeks to persuade a witness to tell the truth, provided he does not use improper means such as a threat, bribe or undue pressure: *R v Toney*, *R v Ali* supra at 414 and 370 per Lloyd LJ.

13 *R v Mickleburgh* [1995] 1 Cr App Rep 297, CA.

14 *R v Bassi* [1985] Crim LR 671, CA.

15 *R v Vreones* [1891] 1 QB 360, CCR; *R v Andrews* [1973] QB 422, 57 Cr App Rep 254, CA (appellant offered in consideration for a reward to make a false statement; incitement to pervert the course of justice charged; producing false evidence to pervert the course of justice held to be a substantive offence); *R v Machin* [1980] 3 All ER 151, 71 Cr App Rep 166, CA; *R v Murray* [1982] 2 All ER 225, 75 Cr App Rep 58, CA (interfering with second blood sample held to have a tendency to pervert the course of justice since it was a practical certainty that that information would be communicated either to the solicitor or to the prosecuting authority or to the police). See also *Omealy v Newell* (1807) 8 East 364 (making use of false affidavit). An agreement to produce evidence known to be false is an indictable conspiracy: *R v Mawbey* (1796) 6 Term Rep 619 at 635.

15 *R v Tibbits and Windust* [1902] 1 KB 77 at 90, CCR (newspaper articles about character and conduct of defendant published during course of trial).

16 *R v Coxhead* [1986] RTR 411, CA (there is a prosecutorial discretion which may be properly exercised in favour of non-prosecution in trivial cases such as riding a bicycle without lights, failing to switch on car sidelights when leaving a car park at night, failure to sign a driving licence or to have the road fund licence on display when fallen to floor, but there is no such discretion in the most serious of cases, such as murder, and it is a matter for the jury to decide where in the scale a particular case fell; police sergeant exercised discretion in favour of son of station inspector who had heart condition that sergeant thought would be affected by prosecution of son; conviction not unsafe or unsatisfactory).

17 *R v Britton* [1973] RTR 502, CA (successful use of the 'hip-flask' defence to the Road Safety Act 1967 s 1(1) (repealed); conviction of attempting to defeat the course of justice upheld). See now the Road Traffic Act 1988 s 4; and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 975. The statutory formulation of the 'hip-flask' defence appears to exclude the possibility of such a conviction now: see *R v Britton* supra at 507.

18 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139. See also *R v Field* [1965] 1 QB 402 at 417, [1964] 3 All ER 269 at 279, CCA. As to the factors to be taken into account when considering the appropriate level of sentence see *R v Archer* [2002] EWCA Crim 1996, [2003] 1 Cr App Rep (S) 446; and PARA 712 note 8 ante.

## UPDATE

### 731 Perversion of the course of justice

NOTE 10--See also *R v Carrington-Jones* (2008) Times, 1 January, CA (false allegations of serious sexual offence in most cases constituted an offence of attempting to pervert the course of justice).

NOTE 12--See also *R v Hall* [2007] EWCA Crim 195, [2007] 2 Cr App (S) 268.

NOTES 15-18--Second 'NOTE 15' should be numbered 'NOTE 16' and 'NOTES 16-18' should be numbered 'NOTES 17-19'.

NOTE 18--See also *R v Britton* [2009] All ER (D) 129 (Sep), CA (custodial sentence for false complaints of serious offences wasting 7,000 hours of police time).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/8. OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE/(3) OBSTRUCTING THE COURSE OF JUSTICE/732. Unlawful disposal of a dead body.

### **732. Unlawful disposal of a dead body.**

It is an indictable offence at common law to prevent the lawful burial of a dead body<sup>1</sup> and it is also an offence at common law to obstruct a coroner by disposing of a dead body in order to prevent an inquest being held upon it<sup>2</sup>. Both of these offences are punishable by fine and imprisonment at the discretion of the court<sup>3</sup>.

1 *R v Hunter* [1974] QB 95, 57 Cr App Rep 772, CA; *R v Swindell* (1981) 3 Cr App Rep (S) 255, CA; *R v Black* [1995] Crim LR 640, CA.

2 *R v Stephenson* (1884) 13 QBD 331, CCR; *R v Purcy* (1933) 24 Cr App Rep 70, CCA. See also CORONERS vol 9(2) (2006 Reissue) PARA 949; CREMATION AND BURIAL vol 10 (Reissue) PARA 904.

3 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139. Such offences are serious and will attract substantial custodial sentences even where there are mitigating circumstances: *R v Hunter* [1974] QB 95, 57 Cr App Rep 772, CA. Sentences of life imprisonment were imposed on each of three counts of preventing lawful burial in *R v Black* [1995] Crim LR 640, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/8. OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE/(3) OBSTRUCTING THE COURSE OF JUSTICE/733. Acknowledging recognisance etc in name of another.

### **733. Acknowledging recognisance etc in name of another.**

Any person who, without lawful authority or excuse<sup>1</sup>, acknowledges in the name of any other person any recognisance<sup>2</sup> or bail or any cognovit actionem<sup>3</sup> or judgment or any deed or other instrument before any court, judge or other person lawfully authorised in that behalf<sup>4</sup> is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding seven years<sup>5</sup>.

1 Proof of lawful authority or excuse lies on the defendant: Forgery Act 1861 s 34. See also PARA 1370 post. As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

2 'Any recognisance' refers to a valid recognisance into which a person may lawfully be required to enter and a recognisance imposing an obligation for which there is no authority is not within the Forgery Act 1861 s 34: *R v McKenzie* [1971] 1 All ER 729, 55 Cr App Rep 294.

3 Ie a written instrument by which the claimant acknowledges the justness of the defendant's claim. It has been superseded by orders of the court made by consent and is now obsolete.

4 This includes a commissioner for oaths: see the Commissioners for Oaths Act 1889 s 1(2); and CIVIL PROCEDURE vol 11 (2009) PARA 1026.

5 Forgery Act 1861 s 34; Criminal Justice Act 1948 s 1(1); Criminal Law Act 1967 s (5)(a).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/8. OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE/(4) OFFENCES RELATING TO THE EXECUTION OF CIVIL OR CRIMINAL PROCESS/734. Concealing offences.

## **(4) OFFENCES RELATING TO THE EXECUTION OF CIVIL OR CRIMINAL PROCESS**

### **734. Concealing offences.**

Where a person has committed a relevant offence<sup>1</sup>, any other person who, knowing or believing that the offence or some other relevant offence<sup>2</sup> has been committed, and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction<sup>3</sup> to imprisonment for a term not exceeding six months<sup>4</sup> or to a fine not exceeding the prescribed sum<sup>5</sup> or to both<sup>6</sup>.

Proceedings for such an offence may not be instituted except by or with the consent of the Director of Public Prosecutions<sup>7</sup>.

1 For these purposes, and the purposes of the Criminal Law Act 1967 s 4 (see PARAS 58 ante, 1337 post), 'relevant offence' means: (1) an offence for which the sentence is fixed by law; and (2) an offence for which a person of 18 years or over (not previously convicted) may be sentenced to imprisonment for a term of five years (or might be so sentenced but for the restrictions imposed by the Magistrates' Courts Act 1980 s 33 (as amended) (see PARA 1114 post): Criminal Law Act 1967 s 4(1A) (added by the Police and Criminal Evidence Act 1984 s 119, Sch 6 para 17; and substituted by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 40(1), (2)).

2 See note 1 supra.

3 The offence is triable either way where the offence to which it relates is triable either way: Magistrates' Courts Act 1980 s 17 Sch 1 para 26(b).

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

6 Criminal Law Act 1967 s 5(1); Magistrates' Courts Act 1980 s 32(1). See PARA 1103 post. The compounding of an offence other than treason is not an offence otherwise than under the Criminal Law Act 1967 s 5: s 5(5). Nor is misprision an offence except in the case of treason (see PARA 365 ante), the common law offence of misprision of felony having ceased to exist with the abolition of the distinctions between felony and misdemeanour (see s 1; and PARA 49 ante). However, as to advertising rewards on certain terms for the return of lost or stolen goods see PARA 305 ante.

7 Ibid s 5(3). As to the effect of this limitation see PARA 1071 post.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/8. OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE/(4) OFFENCES RELATING TO THE EXECUTION OF CIVIL OR CRIMINAL PROCESS/735. Assaulting or obstructing a constable.

### **735. Assaulting or obstructing a constable.**

Any person who assaults a constable<sup>1</sup> in the execution of his duty, or a person assisting a constable in the execution of his duty<sup>2</sup>, is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup> or to a fine not exceeding level five on the standard scale<sup>4</sup> or to both<sup>5</sup>. A person does not commit such an offence, however, unless the constable was acting in the execution of his duty, that is to say that he was acting strictly within the limits of his powers and legal duty<sup>6</sup>. The justification of self-defence is available to a defendant charged with assaulting a constable where the assault occurred in resisting an act on the constable's part which was technically an assault<sup>7</sup>.

Any person who resists or wilfully obstructs<sup>8</sup> a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding one month<sup>9</sup> or to a fine not exceeding level three on the standard scale or to both<sup>10</sup>.

1 As to the office of constable see POLICE vol 36(1) (2007 Reissue) PARA 101 et seq. The constable's appointment need not be proved: *Berryman v Wise* (1791) 4 Term Rep 366. Every prison officer while acting as such has all the powers, authority, protection and privileges of a constable: see the Prison Act 1952 s 8; and PRISONS vol 36(2) (Reissue) PARA 516. See also *Pointing v Wilson* [1927] 1 KB 382. A constable or any other person required or authorised by virtue of the Mental Health Act 1983 to take any person into custody, or to convey or detain any person, has, for the purposes of taking him into custody or conveying or detaining him, all the powers, authorities, protection and privileges which a constable has within the area for which he acts as constable: see s 137(2); and MENTAL HEALTH vol 30(2) (Reissue) PARA 446. The Police Act 1996 s 89 also applies to a constable who is a member of a police force maintained in Scotland or Northern Ireland when he is executing a warrant or otherwise acting in England or Wales under a statutory power to do so: s 89(3). Section 89 also applies to a constable of the British Transport Police Force in the same way as it applies to other constables in England and Wales: see the Railways and Transport Safety Act 2003 s 68(1); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 283. A person carrying out surveillance in England and Wales under the Regulation of Investigatory Powers Act 2000 s 76A (as added and amended) (see POLICE vol 36(1) (2007 Reissue) PARA 498) is treated as if he were acting as a constable in the execution of his duty: Crime (International Co-operation) Act 2003 s 84(1).

2 For these purposes, 'a person assisting a constable in the execution of his duty' includes a reference to any person who is neither a constable nor in the company of a constable but who is a member of an international joint investigation team (ie an investigation team established under an international framework) led by a member of a police force and is carrying out his functions as a member of that team: Police Act 1996 s 89(4) (added by the Police Reform Act 2002 s 104; and amended by the Serious Organised Crime and Police Act 2005 ss 59, 174(2), Sch 4 paras 68, 81, Sch 17 Pt 2).

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

4 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

5 Police Act 1996 s 89(1). As to the offence committed by a person who at the time of committing or being arrested for an offence under the Police Act 1964 s 51(1) (as amended) has in his possession a firearm or imitation firearm see PARA 677 ante; and as to assault with intent to resist arrest see PARA 737 post.

Knowledge that the person assaulted was a police officer is not necessary; the offence consists in assaulting a constable being in the execution of his duty, not in knowing him to be in the execution of his duty: *R v Forbes*, *R v Webb* (1865) 10 Cox CC 362; *R v Maxwell and Clanchy* (1909) 2 Cr App Rep 26, CCA; *Albert v Lavin* [1982] AC

546, 74 Cr App Rep 150, HL. See also *McBride v Turnock* [1964] Crim LR 456, DC. However, if the defendant, not knowing that his victim is a constable, and believing that he is under attack, applies force to a constable, who is exercising one of his powers, and that force would be reasonable if the victim had not been a constable (because he would not have the power in question), the defendant does not commit an offence under the Police Act 1996 s 89(1). The reason is that he lacks the mens rea required for the assault (ie battery) part of the offence, since he does not intend to apply unlawful force to his victim and he is not reckless as to the risk of such force being applied: *Blackburn v Bowering* [1994] 3 All ER 380, [1994] 1 WLR 1324, DC. On the other hand, if the defendant knows that his victim is a constable but mistakenly believes that the constable is acting in excess of his powers, he is not excused; it has been held that his mistake is not one of fact but one of criminal law relating to the powers of the constable: *R v Fennell* [1971] 1 QB 428, [1970] 3 All ER 215, CA. The correctness of this is open to doubt where the mistake about the excess of the constable's powers is based on a mistaken belief that the facts do not satisfy the requirements for the exercise of the power.

6 Where a defendant is charged with assaulting an officer in the execution of his duty, the onus is on the prosecution to prove that the officer was so acting: *Chapman v DPP* (1988) 89 Cr App Rep 190, CA. Where an arrest is made by a police officer for assault in the execution of his duty, arising from the arrest of a third party, it is an essential for the later arrest to be lawful that the prior arrest was lawful; and where, therefore, justices are not told of the reason for the prior arrest, it is not open to them to find that the officer was acting in the execution of his duty: *Riley v DPP* (1989) 154 JP 453, DC.

The cardinal principle is that that which is officially done must be done in accordance with the law: *Arthur Yates & Co (Property) Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 66, Aust HC, per Sir John Latham CJ. Thus if an arrest is not lawful, a constable is not acting in the execution of his duty: *Wershof v Metropolitan Police Comr* [1978] 3 All ER 540, 68 Cr App Rep 82; *Grant v Gorman* [1980] RTR 119, DC; *G v Chief Superintendent of Police, Stroud* (1986) 86 Cr App Rep 92, DC; *Nicholas v Parsonage* [1987] Crim LR 474, DC. Where a person is arrested upon a warrant, the fact that the constable making the arrest is not in possession of the warrant at the time does not necessarily mean he is not acting in the execution of his duty: *Jones v Kelsey* (1987) 85 Cr App Rep 226, DC. If a search is not lawful, a constable is not acting in the execution of his duty: *Lindley v Rutter* [1981] QB 128, 72 Cr App Rep 1, DC; *Brazil v Chief Constable of Surrey* [1983] 3 All ER 537, 77 Cr App Rep 237, DC. The fact that at the time of search the searching officer had been following instructions requiring all arrested persons to be searched without having given consideration to the individual circumstances of each case did not, of itself, render the search unlawful: *Middleweek v Chief Constable of Merseyside* [1992] 1 AC 179n, [1990] 3 All ER 662, CA. A police officer is not acting in the execution of his duty if he detains a person in the mistaken belief that the person has already been arrested: *Kerr v DPP* (1994) 158 JP 1048, [1995] Crim LR 394, DC. A police officer is not acting in the execution of his duty if he searches a person without supplying details of his name and station: *Osman v DPP* (1999) 163 JP 725, DC. There is no express or implied duty on a custody officer to inquire into the legality of an arrest, and therefore the fact that the arrest was unlawful does not in itself prevent a custody officer acting in the exercise of his duty: *DPP v L* [1999] Crim LR 752, DC. As to a constable's power of arrest see PARA 924 et seq post; and as to powers of search and entry see PARA 869 et seq post. As to the duties of a constable see *Rice v Connolly* [1966] 2 QB 414 at 419, [1966] 2 All ER 649 at 651, DC, per Lord Parker CJ ('... it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime and for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they further include the duty to detect crime and to bring an offender to justice'). See also *Coffin v Smith* (1980) 71 Cr App Rep 221, DC (a constable's duty is to be a keeper of the peace and to take all necessary steps with that in view; it was held that the constable in this case was acting in the execution of his duty because he thought his presence would assist in the keeping of the peace). Cf *R v Waterfield* [1964] 1 QB 164, [1963] 3 All ER 659, CCA.

As to a constable's duty to prevent, and otherwise deal with, a breach of the peace see *Duncan v Jones* [1936] 1 KB 218; *Thomas v Sawkins* [1935] 2 KB 249, DC; *McGowan v Chief Constable of Kingston upon Hull* [1967] Crim LR 34, DC; *King v Hodges* [1974] Crim LR 424, DC; *Hickman v O'Dwyer* [1979] Crim LR 309, DC (constable must apprehend a breach of the peace otherwise action not justified); *Read v Jones* (1983) 77 Cr App Rep 246, DC; *R v Howell* [1982] QB 416, 73 Cr App Rep 31, CA; *R (on the application of Laporte) v Chief Constable of Gloucestershire* [2004] EWCA Civ 1639, [2005] QB 678, [2005] 1 All ER 473. A constable who becomes a trespasser is no longer acting in execution of his duty: *Davis v Lisle* [1936] 2 KB 434, [1936] 2 All ER 213; *McArdle v Wallace* [1964] Crim LR 467, DC; *Robson v Hallett* [1967] 2 QB 939, 51 Cr App Rep 307, DC; *Pamplin v Fraser* [1981] RTR 494, DC; *McLorie v Oxford* [1982] QB 1290, 74 Cr App Rep 137, DC. See also *R v Thornley* (1980) 72 Cr App Rep 302, CA (constable on premises at invitation of occupier entitled to remain on premises for reasonable time to investigate complaint; still acting in execution of duty despite request by occupier to leave).

Unless expressly authorised by statute, a constable has no power, short of arrest, of detaining a person for questioning: *Rice v Connolly* supra. As to powers to stop and search see PARA 859 et seq post; and as to powers of arrest see PARA 910 et seq post. A constable who detains a person against his will without arresting him is acting outside the course of his duty: *Ludlow v Burgess* (1971) 75 Cr App Rep 227n, DC. However, not every trivial interference with a person's liberty amounts to a course of conduct sufficient to be outside the course of a constable's duty: *Donnelly v Jackman* [1970] 1 All ER 987, [1970] 1 WLR 562, DC; *Squires v Botwright* [1973] Crim LR 106, DC; *Daniel v Morrison* (1979) 70 Cr App Rep 142, DC; *Pedro v Diss* [1981] 2 All ER 59, 72 Cr App

Rep 193, DC; *Bentley v Brudzinski* (1982) 75 Cr App Rep 217, DC (whether detention by constable short of arrest is unlawful is a question of fact depending on the circumstances which precede it and the degree of force used); *McBean v Parker* [1983] Crim LR 399, DC; *Collins v Wilcock* [1984] 3 All ER 374, 79 Cr App Rep 229, DC (the word 'detaining' can be used in more than one sense. It is a commonplace that one person may request another to stop and speak to him; whether the latter stops willingly or unwillingly, the first person may be said to be 'stopping and detaining' the latter. There is nothing unlawful in such an act. If a police officer so 'stops and detains' another person, he commits no unlawful act, despite the fact that his uniform may give his request certain authority and so render it more likely to be complied with; the police force officer cannot use force; that would be a battery); *Weight v Long* [1986] Crim LR 746, DC. As to whether a constable is in the execution of his duty when detaining a car after arresting the driver, particularly as part of the duty to ensure that the car is properly looked after, see *Stunt v Bolton* [1972] RTR 435, DC; *Liepins v Spearman* [1986] RTR 24, DC.

If a constable is exceeding his authority, an assault is not within the Police Act 1996 s 89(1): see *R v Marsden* (1868) LR 1 CCR 131; *R v Mabel* (1840) 9 C & P 474; *Chapman v DPP* (1988) 89 Cr App Rep 190, DC.

Where reasonably necessary for the protection of life or property, a constable has the power to direct other persons to disobey traffic regulations; in giving such a direction in such circumstances he is acting in the execution of his duty and a refusal to obey constitutes a wilful obstruction: *Johnson v Phillips* [1975] 3 All ER 682, [1976] 1 WLR 65, DC.

7 *Kenlin v Gardiner* [1967] 2 QB 510, [1966] 3 All ER 931, DC; *R v Williams* [1987] 3 All ER 411, 78 Cr App Rep 276, CA. As to self-defence and defence of others see PARA 21 ante. See also *R v Fennell* [1971] 1 QB 428, [1970] 3 All ER 215, CA.

8 *Bastable v Little* [1907] 1 KB 59; *Betts v Stevens* [1910] 1 KB 1; *Duncan v Jones* [1936] 1 KB 218, DC; *Piddington v Bates* [1960] 3 All ER 660, [1961] 1 WLR 162, DC; *Tynan v Balmer* [1967] 1 QB 91, [1966] 2 All ER 133, DC; *Stunt v Bolton* [1972] RTR 435, DC. To 'obstruct' is to do any act (or, if there is a legal duty to do an act, to fail to do that act) which makes it more difficult for the police to carry out their duty: *Hinchcliffe v Sheldon* [1955] 3 All ER 406, [1955] 1 WLR 1207, DC; *Rice v Connolly* [1966] 2 QB 414 at 419, [1966] 2 All ER 649 at 651, DC; *Dibble v Ingleton* [1972] 1 QB 480 at 487, sub nom *Ingleton v Dibble* [1972] 1 All ER 275 at 278, DC; *Ricketts v Cox* (1981) 74 Cr App Rep 298, DC (whether silence can amount to obstruction must be approached in a realistic manner); *Moore v Green* [1983] 1 All ER 663, DC; *Lewis v Cox* [1985] QB 509, 80 Cr App Rep 1, DC; *Bennett v Bale* [1986] Crim LR 404, DC. The obstruction must be wilful, that is to say deliberate and intentional, in order to come within the Police Act 1996 s 89(3): *Rice v Connolly* supra; *Willmott v Attack* [1977] QB 498, [1976] 3 All ER 794, DC (need for criminal intention to obstruct constable); *Hills v Ellis* [1983] QB 680, 76 Cr App Rep 217, DC; *Lewis v Cox* supra (act need not be 'aimed at' or 'hostile to' the police; defendant must intend conduct to prevent police from carrying out their duty or to make it more difficult to do so). Motive is irrelevant: *Hills v Ellis* supra; *Lewis v Cox* supra. There cannot be a conviction for wilful obstruction unless the defendant knew or believed that that person was a constable: *Ostler v Elliott* [1980] Crim LR 584, DC.

In *DPP v Glendinning* [2005] EWHC 2333 (Admin), [2005] All ER (D) 130 (Oct), the court held (following *Bastable v Little* supra) that no offence of wilful obstruction is committed where the defendant warns other motorists of a police speed trap ahead, unless it is established that those warned were already speeding or were likely to be speeding at the location of the speed trap.

9 As from a day to be appointed this maximum term of imprisonment is increased to 51 weeks: see the Police Act 1996 s 89(2) (prospectively amended by the Criminal Justice Act 2003 s 280(2), Sch 26 para 47). At the date at which this volume states the law no such day had been appointed.

10 Police Act 1996 s 89(2). As to aiding and abetting such an offence see *Smith v Reynolds*, *Smith v Hancock*, *Smith v Lowe* [1986] Crim LR 559, DC; and PARA 49 ante. As to a constable's general powers of arrest see PARA 910 post. As to obstructing an officer in or near a prohibited place within the meaning of the Official Secrets Acts 1911 and 1920 see PARA 479 ante.

## UPDATE

### 735 Assaulting or obstructing a constable

NOTE 6--*Laporte*, cited, reversed in part: [2006] UKHL 55, [2007] 2 All ER 529. The police officer must say his name and police station before searching a defendant, not merely if it is reasonable for him to do so: *R v Bristol* [2007] EWCA Crim 3214, (2008) 172 JP 161. See also *B v DPP* [2008] EWHC 1655 (Admin), (2008) 172 JP 449.

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### **736. Assault or obstruction of designated person.**

A person commits an offence if he assaults a designated person<sup>1</sup> acting in the exercise of a relevant power<sup>2</sup>, or a person who is assisting a designated person in the exercise of such a power<sup>3</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup> or to a fine not exceeding level five on the standard scale<sup>5</sup> or to both<sup>6</sup>.

A person commits an offence if he resists or wilfully obstructs a designated person acting in the exercise of a relevant power, or a person who is assisting a designated person in the exercise of such a power<sup>7</sup>. A person guilty of this offence is liable on summary conviction to imprisonment for a term not exceeding one month<sup>8</sup> or to a fine not exceeding level three on the standard scale or to both<sup>9</sup>.

1    Ie a person for the time being designated by the Director General of the Serious Organised Crime Agency under the Serious Organised Crime and Police Act 2005 s 43 (see POLICE vol 36(1) (2007 Reissue) PARA 470): s 54(1).

2    Ibid 51(1)(a). For these purposes, 'relevant power', in relation to a designated person, means a power or privilege exercisable by that person by virtue of the designation under s 43 (see POLICE vol 36(1) (2007 Reissue) PARA 470): s 51(6).

3    Ibid s 51(1)(b).

4    In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) the reference to six months is to be read as a reference to 51 weeks: see the Serious Organised Crime and Police Act 2005 ss 51(4), 175(1), (3).

5    As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6    Serious Organised Crime and Police Act 2005 ss 51(4), 175(1), (3).

7    Ibid s 51(2).

8    In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) the reference to one month is to be read as a reference to 51 weeks: see the Serious Organised Crime and Police Act 2005 ss 51(5), 175(1), (3).

9    Ibid ss 51(5), 175(1), (3).

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### **737. Assault with intent to resist or prevent arrest.**

Any person who assaults<sup>1</sup> another with intent to resist or prevent the lawful apprehension<sup>2</sup> or detainer of himself or of any other person for any offence<sup>3</sup>, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six<sup>4</sup> months or to a fine not exceeding the prescribed sum<sup>5</sup> or to both<sup>6</sup>.

1 As to assault see PARA 147 ante.

2 As to powers of apprehension (ie arrest) see PARA 910 et seq post. It must be proved that the person assaulted had the right to apprehend or detain the defendant for an offence: *R v Self* [1992] 3 All ER 476, 95 Cr App Rep 42 CA; *R v Lee* [2000] Crim LR 991, [2001] 1 Cr App Rep 293, CA. A defendant will intend to resist lawful apprehension if the arrest is lawful and, knowing that the victim of the assault is trying to arrest him, he intends to resist that arrest: *R v Lee* supra. He must also have the mens rea for assault. The fact that he is mistaken as to the arrestee's power (ie authority) to arrest him, so that he thinks the arrest is unlawful, is a mistake of criminal law and irrelevant: *R v Fennell* [1971] 1 QB 428, [1970] 3 All ER 215, CA. So, it has been held, is a mistaken belief which leads the defendant to think that the facts do not satisfy the requirements for a lawful arrest, as where he knows or believes he has not committed an offence: *R v Lee* supra. See also *R v Ball* (1990) 90 Cr App Rep 378, CA. On the other hand, if (because of a mistake as to the victim's capacity (eg that he is a police constable) or conduct) the defendant does not know that he is being arrested, for example because he thinks he is being attacked by a robber or a thug, he will lack the mens rea of assault and the intent to resist a lawful arrest. Here, the mistake is one of fact which prevents him knowing that he is being arrested: *R v Brightling* [1991] Crim LR 364, CA; *R v Lee* supra.

3 Consequently, it is not an offence under the present provision to assault someone with intent to resist an arrest for a breach of the peace or in civil process (a breach of the peace is not in itself an offence under English law): *Davies v Griffiths* [1937] 2 All ER 671, DC; *Williamson v Chief Constable of West Midlands Police* [2003] EWCA Civ 337, [2004] 1 WLR 14.

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

6 Offences against the Person Act 1861 s 38 (amended by the Police Act 1964 s 64(3), Sch 10 Pt I; and the Criminal Law Act 1967 s 10(2), Sch 3 Pt III); Criminal Justice Act 1948 s 1(2); Criminal Law Act 1967 s 1; Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 5(g). See PARA 1103 post. An assault with intent to resist arrest is not part of the offence for which the victim is attempting to arrest the offender and should be visited with a consecutive sentence: *R v Wellington* (1988) 10 Cr App Rep (S) 384, CA. As to the offence committed by a person who at the time of committing or being arrested for an offence under the Offences against the Person Act 1861 s 38 (as amended) has in his possession a firearm or imitation firearm see PARA 677 ante. A person charged with an offence under s 38 (as amended) may be convicted on indictment of common assault (see PARA 147 ante): see the Criminal Justice Act 1967 s 6 (as amended) (see PARA 1335 post); the Criminal Justice Act 1988 s 40; and *R v Wilson* [1955] 1 All ER 744, 39 Cr App Rep 12, CCA. As to assaulting a constable see PARA 735 ante.

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### **738. Refusing to assist a constable.**

A person commits an indictable offence at common law if he refuses, without lawful excuse, to assist a constable who sees a breach of the peace committed or who is assaulted or obstructed when making an arrest, and who, where there is reasonable necessity to do so, calls upon that person to assist him<sup>1</sup>. It is no defence that the assistance, if given, would have been useless<sup>2</sup>.

The offence is punishable by imprisonment and fine at the discretion of the court<sup>3</sup>.

1 *R v Brown* (1841) Car & M 314; *R v Sherlock* (1866) LR 1 CCR 20.

2 *R v Brown* (1841) Car & M 314.

3 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

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### **739. False reports causing wasteful employment of police.**

Any person who causes any wasteful employment of the police by knowingly making to any person a false report tending to show that an offence has been committed, or to give rise to apprehension for the safety of any persons or property, or tending to show that he has information material to any police inquiry, is liable on summary conviction to imprisonment for a term not exceeding six months<sup>1</sup> or to a fine not exceeding level four on the standard scale<sup>2</sup> or to both<sup>3</sup>.

Proceedings for such an offence may be instituted only by or with the consent of the Director of Public Prosecutions<sup>4</sup>.

1 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

2 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

3 Criminal Law Act 1967 s 5(2) (amended by the Criminal Justice Act 1982 ss 38, 46). An offence under the Criminal Law Act 1967 s 5(2) (as amended) is a 'penalty offence' for the purposes of the Criminal Justice and Police Act 2001 Pt 1 (ss 1-11): see s 1; and PARA 586 ante.

4 Criminal Law Act 1967 s 5(3). As to the effect of this limitation see PARA 1071 post.



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#### **740. Obstruction of enforcement officers and court officers executing High Court or county court process.**

If a person resists or intentionally obstructs any person who is an enforcement officer<sup>1</sup>, or who is acting under the authority of an enforcement officer, and who is engaged in executing a writ issued from the High Court, he is guilty of an offence<sup>2</sup>.

If a person resists or intentionally obstructs any person who is in fact an officer of a court<sup>3</sup> engaged in executing any process issued by the High Court or any county court for the purpose of enforcing any judgment or order<sup>4</sup> for the recovery of any premises<sup>5</sup> or for the delivery of possession of any premises, he is guilty of an offence<sup>6</sup>.

A person guilty of one of the above offences is liable on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding level five on the standard scale<sup>8</sup> or to both<sup>9</sup>. In any proceedings for such an offence it is, however, a defence for the defendant to prove<sup>10</sup> that he believed that the person he was resisting or obstructing was not an enforcement officer, a person acting under the authority of an enforcement officer or an officer of a court (as the case may be)<sup>11</sup>.

1 For these purposes, 'enforcement officer' means an individual who is authorised to act as an enforcement officer under the Courts Act 2003 (see COURTS): Criminal Law Act 1977 s 10(6) (substituted by the Courts Act 2003 s 109(1), Sch 8 para 189(1), (5)).

2 Criminal Law Act 1977 s 10(A1) (added by the Courts Act 2003 Sch 8 para 189(1), (2)). An enforcement officer or any officer of a court may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, guilty of committing an offence under the Criminal Law Act 1977 s 10 (as amended): s 10(5) (amended by the Courts Act 2003 Sch 8 para 189(1), (4); and the Serious Organised Crime and Police Act 2005 ss 111, 174(2), Sch 7 para 19(1), (6), Sch 17 Pt 2). A constable may enter and search any premises for the purpose of arresting a person for an offence under the Criminal Law Act 1977 s 10 (as amended): see the Police and Criminal Evidence Act 1984 s 17(1)(c)(ii); and PARA 884 post.

3 For these purposes, 'officer of a court' means: (1) any sheriff, under sheriff, deputy sheriff, bailiff or officer of a sheriff; and (2) any bailiff or other person who is an officer of a county court within the meaning of the County Courts Act 1984 (as amended) (see COURTS vol 10 (Reissue PARAS 726, 731): Criminal Law Act 1977 s 10(6) (as substituted: see note 1 supra).

4 Ibid s 10(1) does not apply unless the judgment or order in question was given or made in proceedings brought under any provisions of rules of court applicable only in circumstances where the person claiming possession of any premises alleges that the premises in question are occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation of the premises without the licence or consent of the person claiming possession or any predecessor in title of his: s 10(2).

5 For the purposes of ibid Pt II (ss 6-13), 'premises' means any building, any part of a building under separate occupation, any land ancillary to a building, the site comprising any building or buildings together with any land ancillary thereto, and any other place: s 12(1)(a). For the meanings of 'building', 'building under separate occupation' and 'land ancillary to a building' see PARA 602 note 4 ante.

6 Ibid s 10(1). Section s 10(1) is without prejudice to the Sheriffs Act 1887 s 8(2) (see SHERIFFS vol 42 (Reissue) PARA 1130): Criminal Law Act 1977 s 10(1). No rule of law ousting the jurisdiction of magistrates' courts to try offences where a dispute of title to property is involved will preclude magistrates' courts from trying offences under s 10 (as amended): s 12(8).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

8 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

9 Criminal Law Act 1977 s 10(4).

10 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

11 Criminal Law Act 1977 s 10(3) (amended by the Courts Act 2003 Sch 8 para 189(1), (3)).

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## **(5) OFFENCES RELATING TO ESCAPE ETC**

### **(i) Offences Relating to Prisons**

#### **741. Breach of prison.**

Breach of prison is an indictable offence at common law and is committed by a person who, while in lawful custody for any cause, whether civil or criminal, escapes by the use of force<sup>1</sup> from the prison or other place in which he is confined<sup>2</sup>. Breach of prison is punishable by fine and imprisonment at the discretion of the court<sup>3</sup>.

The offence of breach of prison is an offence in itself. It is therefore no answer to a charge that the defendant was not guilty of the principal offence; the outcome of the principal offence cannot affect the lawfulness of the custody<sup>4</sup>.

1 To constitute the offence there must be an actual breaking; merely getting over walls or passing through a door is an escape (see PARA 742 post) and not a breach of prison (2 Hawk PC c 18 s 9) but the breaking need not be intentional (see *R v Haswell* (1821) Russ & Ry 458, CCR, where accidental breaking in the course of escape was held to be a breach of prison). If a prisoner breaks out to save his life, as in a case of fire, he is not guilty of prison breach, unless he himself started the fire: 1 Hale PC 611. An escape without the use of force constitutes the common law offence of escape: see PARA 742 post. On an indictment for prison breach it is, it seems, open to the jury to find an alternative verdict of escape when no force is used: see the Criminal Law Act 1967 s 6(3); and PARA 1335 post.

2 2 Hawk PC c 18 ss 1, 4. If a defendant has been convicted of escape (see PARA 742 post), it appears that he cannot subsequently be prosecuted for breach of prison on the same facts (*R v Miles* (1890) 24 QBD 423, 6 TLR 186, CCR); but, where an escape involving the use of force has been dealt with and punished as a matter of prison discipline, this is not a bar to an indictment for breach of prison (*R v Hogan*, *R v Tomkins* [1960] 2 QB 513, 44 Cr App Rep 255, CCA). A defendant may be convicted of breach of prison before being tried for the offence for which he was committed (2 Co Inst 592) but not, it seems, after being tried on indictment and acquitted (1 Hale PC 611). See, however, *R v Frascati* (1981) 73 Cr App Rep 28 at 30, CA, where the latter proposition is doubted. Where examining justices dismiss a charge, the defendant may subsequently be convicted of breach of prison committed while he was on remand: *R v Waters* (1873) 12 Cox CC 390. It has been doubted whether there can be a conviction for breach of prison where no offence has in fact been committed by anyone (2 Hawk PC c 18 s 15; 1 Hale PC 610), but see the text to note 4 infra. It is immaterial whether the prisoner is actually within a gaol, or is only in the constable's house or a lock-up, provided that he is lawfully imprisoned or restrained of his liberty: 2 Hawk PC c 18 s 21.

3 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

4 *R v Frascati* (1981) 73 Cr App Rep 28, CA.

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## **742. Escape.**

Escape is an indictable offence at common law, punishable by imprisonment and fine at the discretion of the court<sup>1</sup>.

Escape is committed by a person who, without the use of force<sup>2</sup>, escapes from lawful custody<sup>3</sup>. There are four requirements for this type of offence: it must be proved that:

- 842 (1) the defendant was in custody;
- 843 (2) the defendant knew that he was in custody (or at least was reckless as to whether or not he was);
- 844 (3) the custody was lawful; and
- 845 (4) the defendant intentionally escaped from that lawful custody<sup>4</sup>.

Escape is also committed by a person who, having a person in his lawful custody<sup>5</sup>, voluntarily or negligently permits him to escape<sup>6</sup>.

The offence of escape is an offence in itself. It is, therefore, no answer to a charge that the defendant was not guilty of the principal offence; the outcome of the principal offence cannot affect the lawfulness of the custody<sup>7</sup>.

1 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139. Where an offender at the time of his escape from prison is serving a sentence of determinate length, a consecutive sentence will generally be imposed with regard to the escape; but, if he is serving a life sentence, the new sentence will be imposed concurrently, although it ought to be of such a length as if the offender had been serving a determinate sentence: *R v Coughtrey* [1997] 2 Cr App Rep (S) 269, CA.

2 A person who escapes from prison, using force, commits breach of prison: see PARA 741 ante. On an indictment for escape it is, it seems, open to the jury to find an alternative verdict of prison breach where force is used: see the Criminal Law Act 1967 s 6(3); and PARA 1335 post.

3 2 Hawk PC c 17 s 5; *R v Allan* (1841) Car & M 295; *R v Frascati* (1981) 73 Cr App Rep 28, CA. 'Custody' bears its ordinary and natural meaning (ie 'confinement, imprisonment, durance'); for a person to be in custody his liberty must be subject to such restriction that he can be said to be confined by another in the sense that his immediate freedom of movement is under the direct control of another: *E v DPP* [2002] EWHC 433 (Admin), [2002] Crim LR 737. See also *H v DPP* [2003] EWHC 878 (Admin), 167 JP 486, [2003] Crim LR 560. A person on bail is not in custody (*R v Reader* (1986) 84 Cr App Rep 294, CA); but a person on bail who surrenders to the court is thereby in lawful custody, even if he is not under the direct control of anyone (no dock officer or security officer being present) (*R v Rumble* [2003] EWCA Crim 770, [2003] 1 Cr App Rep (S) 618). The custody may be as part of civil process (*R v Allan* supra) or of a criminal process. In respect of the latter a person may be in custody following arrest (*R v Timmis* [1976] Crim LR 129) or pending trial or sentence or while serving a sentence (*R v Hinds* (1957) 41 Cr App Rep 143, CCA), or while in transit to or from a prison, court etc (*R v Moss*, *R v Harte* (1986) 82 Cr App Rep 116, CA). The lawfulness of the custody must be proved by the prosecution; there is no presumption that the arrest was lawful: *Dillon v R* [1982] AC 484, 74 Cr App Rep 274, PC (in this case, the offence charged was that of a constable negligently permitting a prisoner to escape out of his custody).

4 *R v Dhillon* [2005] EWCA Crim 2996, [2006] 1 WLR 1535.

5 A private person who lawfully arrests another must hand him over to a constable; thereupon his liability ceases: see 1 Hale PC 595; 2 Hawk PC c 20. As to a private person's power of arrest see PARA 925 post. To render an officer liable for escape, there must have been actual and lawful arrest; if the arrest was of a nature

that the prisoner would have been justified in escaping, the officer is justified in releasing him: 2 Hawk PC c 19 ss 2, 3.

6 An officer who voluntarily permits a prisoner guilty of treason to escape is, it seems, guilty of treason; in other cases he was formerly guilty of being an accessory after the fact of felony or for a misdemeanour according to whether the prisoner was guilty of a felony or misdemeanour; with the abolition of the distinction between felonies and misdemeanours (see the Criminal Law Act 1967 s 1(1); and PARA 49 ante), he is, it seems, guilty of an offence punishable by imprisonment and fine at the discretion of the court (see 1 Hale PC 593; 2 Hawk PC c 19 ss 22, 25). An officer who negligently permits his prisoner to escape is liable only to be fined: 1 Hale PC 603; 2 Hawk PC c 19 ss 31, 33. A private person is punishable in the same way as the officer: 1 Hale PC 595; 2 Hawk PC c 20. At common law, a head gaoler could be fined when an escape took place through the negligence or voluntary act of his subordinate: 2 Hawk PC c 19 ss 27, 29. At common law an officer is entitled to recapture a prisoner who has escaped by reason of his negligence and, if he does so upon fresh pursuit and without losing sight of him, the officer is not to be convicted of escape, since the law will assume that the prisoner never left his custody: 1 Hale PC 602; 2 Hawk PC c 19 ss 6, 13. As to the recapture of a prisoner by an officer who voluntarily permits his escape see 2 Hawk PC c 19 s 12. As to the statutory offence committed by a person who aids a prisoner to escape from prison see PARA 744 post.

7 *R v Frascati* (1981) 73 Cr App Rep 28, CA.

## **UPDATE**

### **742 Escape**

NOTE 1--See *R v Golding* [2007] EWCA Crim 118, [2007] 2 Cr App Rep (S) 309 (prisoner absconded after returning from day release; sentenced to 10 months' imprisonment).

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### **743. Rescue.**

Rescue<sup>1</sup> at common law consists in the forcible freeing of a person from lawful arrest or custody<sup>2</sup>, whether that of a constable or other officer or that of a private person; but, where a person is freed from private custody, the rescuer incurs criminal liability only if he knew the person freed was in custody on a criminal charge<sup>3</sup>. In general, rescue is punishable on indictment by a fine and imprisonment at the discretion of the court<sup>4</sup>; but a person who rescues a prisoner he knows to be guilty of treason is himself guilty of treason and liable to the punishment for that offence<sup>5</sup>.

1 Or 'rescous': see Co Litt 160b.

2 See, however, *R v Almey*, *R v Spencer* (1857) 3 Jur NS 750.

3 2 Hawk PC c 21 ss 1, 2; 1 Hale PC 606. The person freed must be tried before the rescuer is tried for the rescue: see 1 Hale PC 598-599. As to the offence committed by a prisoner who escapes by the use of force see PARA 741 ante; and as to the statutory offence committed by a person who aids a prisoner to escape see PARA 744 post. See also PARAS 374-375 ante.

4 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

5 2 Hawk PC c 21 s 7. See also *Bensted's Case* (1640) Cro Car 583 (knowledge that the prisoner was guilty of treason held not to be essential). As to the punishment for treason see PARA 363 ante.

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#### **744. Aiding a prisoner to escape.**

Any person who: (1) aids any prisoner in escaping or attempting to escape from a prison<sup>1</sup>; or (2) with intent to facilitate the escape of any prisoner, conveys any thing<sup>2</sup> into a prison or to a prisoner or sends any thing (by post or otherwise) into a prison or to a prisoner or places anywhere outside a prison with a view to its coming into the possession of a prisoner is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years<sup>3</sup>.

1 'Prison' does not include a naval, military or air force prison: Prison Act 1952 s 53(1). As to escape from a naval, military or air force prison see ARMED FORCES vol 2(2) (Reissue) PARA 410. Subject to such adaptations and modifications as may be specified in rules made by the Secretary of State, s 39 applies to remand centres and young offender institutions: see s 43(4), (5) (s 43 substituted by the Criminal Justice Act 1982 s 11; and amended by the Criminal Justice and Public Order Act 1994 s 5; and by virtue of the Criminal Justice Act 1988 s 123(6), Sch 8 Pt 1 para 1). As from a day to be appointed this provision is amended so as no longer to refer to remand centres: see the Prison Act 1952 s 43(5) (as so substituted and amended; prospectively amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 10). At the date at which this volume states the law no such day had been appointed. See also PRISONS vol 36(2) (Reissue) PARA 643. An escape by a remand prisoner from a police station yard or from a magistrates' court is not an escape from prison: *Nicoll v Catron* (1985) 81 Cr App Rep 339, DC; *R v Moss and Harte* (1986) 82 Cr App Rep 116, CA. An escape by a prisoner working outside the prison is an escape from prison: *R v Abbott* [1956] Crim LR 337.

2 Cf *R v Payne* (1866) LR 1 CCR 27 ('any article or thing' under the Prison Act 1865 s 37 (repealed) included a crowbar).

A person commits a summary offence if, contrary to the regulations of a prison, he brings or attempts to bring in etc any alcoholic drink or tobacco, or places any such drink or any tobacco anywhere outside the prison with intent that it will come into the possession of any prisoner, or conveys or attempts to convey any letter or other things into or out of the prison, or so places it with such intent; so does a prison officer if he allows such drink or tobacco to be sold or used in the prison: see the Prison Act 1952 ss 40, 41 (as amended); and PRISONS vol 36(2) (Reissue) PARA 604. As to the application of ss 40, 41 (as amended) to remand centres and youth custody centres see s 43(5) (as substituted); and note 1 supra.

3 Ibid s 39 (amended by the Criminal Justice Act 1961 ss 22(1), 41(1), Sch 4; the Criminal Law Act 1967 s 12(5)(a); and the Prison Security Act 1992 s 2(1)). As to forcibly freeing a prisoner see PARA 743 ante.

As to offences committed by assisting persons liable to be detained in a hospital or subject to guardianship under the Mental Health Act 1983 to absent themselves without leave see MENTAL HEALTH vol 30(2) (Reissue) PARA 770.

#### **UPDATE**

#### **744 Aiding a prisoner to escape**

TEXT AND NOTES--1952 Act s 39 substituted: Offender Management Act 2007 s 21.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/8. OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE/(5) OFFENCES RELATING TO ESCAPE ETC/(i) Offences Relating to Prisons/745. Harboursing an escaped prisoner.

### **745. Harboursing an escaped prisoner.**

If any person: (1) knowingly harbours a person who has escaped from a prison or other institution<sup>1</sup> or who, having been sentenced in any part of the United Kingdom or in any of the Channel Islands or the Isle of Man to imprisonment or detention, is otherwise unlawfully at large; or (2) gives to any such person any assistance with intent to prevent, hinder or interfere with his being taken into custody, he is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>2</sup> or to a fine not exceeding the prescribed sum<sup>3</sup> or to both<sup>4</sup>.

1   le an institution to which the Prison Act 1952 s 39 (as amended) applies: see PARA 744 note 1 ante.

2   As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

3   As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

4   Criminal Justice Act 1961 s 22(2) (amended by the Magistrates' Courts Act 1980 s 32(2); and the Prison Security Act 1992 s 2(2)). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. Some positive act to provide shelter must be proved in order to establish that an escaped prisoner has been harboured: *Darch v Weight* [1984] 2 All ER 245, 79 Cr App Rep 40, DC. As to offences committed by harboursing a patient who is absent without leave or otherwise at large and liable to be retaken under the Mental Health Act 1983 see MENTAL HEALTH vol 30(2) (Reissue) PARA 771.

## **UPDATE**

### **745 Harboursing an escaped prisoner**

TEXT AND NOTES--The reference in the Criminal Justice Act 1961 s 22(2) to a person who has been sentenced as mentioned there includes (1) a person on whom a custodial sentence within the meaning of the Armed Forces Act 2006 has been passed (anywhere) in respect of a service offence within the meaning of that Act (see ARMED FORCES vol 2(2) (Reissue) PARA 451); (2) a person in respect of whom an order under s 214 (detention for commission of offence during currency of order) (see ARMED FORCES vol 2(2) (Reissue) PARA 432) has been made: Criminal Justice Act 1961 s 22(2A) (substituted for s 22(3) by the Armed Forces Act 2006 Sch 16 para 46).



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## **(ii) Pound Breach**

### **746. Pound breach.**

Pound breach is an indictable offence at common law<sup>1</sup> consisting in the removal of goods impounded upon a distress for rent<sup>2</sup> or damage feasant<sup>3</sup> from the pound against the will of the person impounding them<sup>4</sup> or in forcibly releasing cattle or other animals lawfully placed in a proper pound or forcibly damaging or destroying the pound with that object<sup>5</sup>. The offence is punishable by imprisonment and fine at the discretion of the court<sup>6</sup>.

1 See Co Litt 47b; 2 Hawk PC c 10 s 56; *R v Butterfield* (1893) 17 Cox CC 598.

2 As to distress for rent see DISTRESS vol 13 (2007 Reissue) PARA 905 et seq.

3 The common law right to seize and detain any animal by way of distress damage feasant has been abolished: see the Animals Act 1971 s 7(1); and ANIMALS vol 2 (2008) PARA 758. The common law remedy of distress damage feasant is, however, still available in the case of goods.

4 *R v Butterfield* (1893) 17 Cox CC 598 (pound breach of cattle distrained for rent); *R v Nicholson and King* (1901) 65 JP 298. It is doubtful whether an indictment lies in such a case if a person retakes his own goods which have been unlawfully seized: *R v Walshe* (1876) IR 10 CL 511; *R v Knight* (1908) 1 Cr App Rep 186, CCA.

5 *R v Bradshaw* (1835) 7 C & P 233; *Green v Duckett* (1883) 11 QBD 275, DC. In certain circumstances, a person who releases or attempts to release an animal seized for the purposes of being impounded commits a summary offence: see the Town Police Clauses Act 1847; and ANIMALS vol 2 (2008) PARA 761.

6 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/(1) OBSCENE PUBLICATIONS/747. Publishing an obscene article or having an obscene article for publication for gain.

## 9. OFFENCES AGAINST DECENCY AND MORALITY

### (1) OBSCENE PUBLICATIONS

#### 747. Publishing an obscene article or having an obscene article for publication for gain.

Except as otherwise provided<sup>1</sup>, any person who: (1) publishes<sup>2</sup> whether for gain or not, an obscene<sup>3</sup> article<sup>4</sup>; or (2) who has an obscene article for publication<sup>5</sup> for gain<sup>6</sup> (whether gain to himself or gain to another) is guilty of an offence<sup>7</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding three years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>8</sup> or to a fine not exceeding the prescribed sum<sup>9</sup>. A person publishing an article may not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene<sup>10</sup>.

1 See PARAS 749-750 post.

2 For these purposes, a person publishes an article who: (1) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire; or (2) in the case of an article containing or embodying matter to be looked at or a record, shows, plays or projects it or, where the matter is stored electronically, transmits that data: Obscene Publications Act 1959 s 1(3) (amended by the Criminal Law Act 1977 s 53; the Broadcasting Act 1990 ss 162, 203, Sch 21; and the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 3). As to the groups into which publication under the Obscene Publications Act 1959 s 1(3)(a) (see head (1) in the text) falls see *R v Barker* [1962] 1 All ER 748, [1962] 1 WLR 349, CCA. The development and printing and return to the customer of a photographic film depicting obscene acts can constitute an act of publication within head (1) supra: *R v Taylor* [1995] 1 Cr App Rep 131, 158 JP 317, CA. The fact that the customer owns the copyright in the photographs is immaterial: *R v Taylor* supra. The uploading or downloading of a web page constitutes publication within the Obscene Publications Act 1959 s 1(3)(b) (as amended) (see head (2) supra): *R v Wasson* [2000] All ER (D) 502, CA; *R v Perrin* [2002] EWCA Crim 747, [2002] All ER (D) 359 (Mar); *R v Fellows*, *R v Arnold* [1997] 2 All ER 548, [1997] 1 Cr App Rep 244, CA. For these purposes, a person also publishes an article to the extent that any matter recorded on it is included by him in a programme included in a programme service: Obscene Publications Act 1959 s 1(4) (s 1(4)-(6) added by the Broadcasting Act 1990 s 162(1)(b)). Where the inclusion of any matter in a programme so included would, if that matter were recorded matter, constitute the publication of an obscene article for the purposes of the Obscene Publications Act 1959 by virtue of s 1(4) (as added), the Act has effect in relation to the inclusion of that matter in that programme as if it were recorded matter: s 1(5) (as so added). Where: (a) any matter is included by any person in a relevant programme in circumstances falling within s 1(5) (as added); and (b) that matter has been provided, for inclusion in that programme, by some other person, the Act has effect as if that matter had been included in that programme by that other person (as well as by the person referred to in head (a) supra): Broadcasting Act 1990 s 160(2), Sch 15 para 2. 'Programme' and 'programme service' have the same meanings as in the Broadcasting Act 1990 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 353): Obscene Publications Act 1959 s 1(6) (as so added). A 'relevant programme' means a programme included in a programme service: Broadcasting Act 1990 Sch 15 para 1.

3 As to the test of obscenity see PARA 748 post.

4 For these purposes, 'article' means any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures: Obscene Publications Act 1959 s 1(2). A video cassette is an article within s 1(2) (see *A-G's Reference (No 5 of 1980)* [1980] 3 All ER 816, 72 Cr App Rep 71, CA), as is a computer disk (see *R v Fellows*, *R v Arnold* [1997] 2 All ER 548, [1997] 1 Cr App Rep 244, CA). The Obscene Publications Act 1959 applies to anything which is intended to be used, either

alone or as one of a set, for the reproduction or manufacture therefrom of articles containing or embodying matter to be read, looked at or listened to as if it were an article containing or embodying that matter so far as that matter is to be derived from it or from the set: Obscene Publications Act 1964 s 2(1).

5 An article is deemed to be had or kept for publication if it is had or kept for the reproduction or manufacture therefrom of articles for publication: *ibid* s 2(2).

6 A person is deemed to have an article for publication for gain if with a view to such publication he has the article in his ownership, possession or control: *ibid* s 1(2). The words 'such publication' refer back to 'publication for gain': *R v Levy* [2004] EWCA Crim 1141, [2004] All ER (D) 321 (Apr). 'Publication for gain' applies to any publication with a view to gain, whether the gain is to accrue by way of consideration for the publication or in any other way: Obscene Publications Act 1964 s 1(5). A person who has an obscene article in his ownership, possession or control with a view to the matter recorded on it being included in a relevant programme is to be taken to have that article for publication for gain: Broadcasting Act 1990 Sch 15 para 3.

7 See the Obscene Publications Act 1959 s 2(1) (amended by the Obscene Publications Act 1964 s 1(1)). It is no defence that the items were held at a sex establishment licensed with the local authority: see the Local Government (Miscellaneous Provisions) Act 1982 s 2, Sch 3 para 1; and LICENSING AND GAMBLING vol 67 (2008) PARA 306.

Proceedings for such an offence may not be instituted except by or with the consent of the Director of Public Prosecutions in any case where the article in question is a moving picture film of a width of not less than 16 millimetres and the relevant publication or the only other publication which followed or could reasonably have been expected to follow from the relevant publication took place or, as the case may be, was to take place in the course of an exhibition of a film: Obscene Publications Act 1959 s 2(3A) (added by the Criminal Law Act 1977 s 53(2); and amended by the Licensing Act 2003 s 198, Sch 6 para 28). As to the effect of this limitation see PARA 1071 post. For these purposes, 'the relevant publication' means: (1) in the case of any proceedings under the Obscene Publications Act 1959 s 2 (as amended) for publishing an obscene article, the publication in respect of which the defendant would be charged if the proceedings were brought; and (2) in the case of proceedings under s 2 (as amended) for having an obscene article for publication for gain, the publication which, if the proceedings were brought, the defendant would be alleged to have had in contemplation: s 2(3A) (as so added and amended). For these purposes, 'exhibition of a film' means any exhibition of moving pictures: Licensing Act 2003 Sch 1 para 15; definition applied by the Obscene Publications Act 1959 s 2(7) (added by the Criminal Law Act 1977 s 53; and substituted by the Licensing Act 2003 Sch 6 para 28(1), (3)). Except by or with the consent of the Director of Public Prosecutions, proceedings for an offence under the Obscene Publications Act 1959 s 2 (as amended) relating to the publishing of an obscene article may not be instituted in any case where the relevant publication, or the only other publication which followed from the relevant publication, took place in the course of the inclusion of a programme in a programme service: Broadcasting Act 1990 Sch 15 para 4(1). As to the effect of this limitation see PARA 1071 post. For these purposes, 'the relevant publication' means the publication in respect of which the accused would be charged if the proceedings were brought: Sch 15 para 4(1). Proceedings for the offence under the Obscene Publications Act 1959 s 2 (as amended) of having an obscene article for publication for gain may not be instituted except by or with the consent of the Director of Public Prosecutions in any case where the relevant publication or the only other publication which could reasonably have been expected to follow from the relevant publication was to take place in the course of the inclusion of a programme in a programme service; and for these purposes 'the relevant publication' means the publication which, if proceedings were brought, the defendant would be alleged to have had in contemplation: Broadcasting Act 1990 Sch 15 para 4(2). As to the effect of this limitation see PARA 1071 post.

Where articles are seized under the Obscene Publications Act 1959 s 3 (as amended) (see PARA 751 post) and a person is convicted of having them for publication for gain, the court on his conviction must order their forfeiture: Obscene Publications Act 1964 s 1(4). An order for forfeiture so made, including an order so made on appeal, may not take effect until the expiration of the ordinary time within which an appeal in the matter of the proceedings in which the order was made may be instituted or, where an appeal is instituted, until it is fully decided or abandoned; and for this purpose an application for a case to be stated or for leave to appeal is to be treated as the institution of an appeal and, where a decision on appeal is subject to further appeal, the appeal is not to be deemed to be finally decided until the expiration of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned: s 1(4) proviso. As to appeal on conviction on indictment see PARA 1837 et seq post; and as to appeal on summary conviction see PARA 1980 et seq post.

If a justice of the peace is satisfied by information on oath laid by a constable that there is reasonable ground for suspecting that an offence under the Obscene Publications Act 1959 s 2 (as amended) or the Public Order Act 1986 s 22 (as amended) (see PARA 566 ante) has been committed by any person in respect of a programme included in a programme service, he may make an order authorising any constable to require that person: (a) to produce to the constable a visual or sound recording of any matter included in that programme, if and so far as that person is able to do so; and (b) on the production of such a recording, to afford the constable an opportunity of causing a copy of it to be made: Broadcasting Act 1990 s 167(1). Such an order must describe the programme to which it relates in a manner sufficient to enable the programme to be identified: s 167(2). No order may be made under s 167(1) in respect of any recording in respect of which a warrant could be granted

under the Obscene Publications Act 1959 s 3 (as amended) (see PARA 751) or the Public Order Act 1986 s 24 (see PARA 567 ante): Broadcasting Act 1990 s 167(4)(a), (b). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As to publishing etc magazines, books, etc tending to corrupt children and young persons see PRESS, PRINTING AND PUBLISHING vol 36(2) (Reissue) PARA 419 et seq; and as to the taking, making, distribution, possession etc of indecent photographs or pseudo-photographs of children see PARAS 757-760 post.

The offences under the Obscene Publications Act 1959 s 2(1) (as amended) are not incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 10 (right to freedom of expression) because the interference is justified under art 10(2) notwithstanding the uncertainty in the definition of obscenity, they are sufficiently well-defined to be 'prescribed by law', they serve a legitimate purpose within art 10(2) and are necessary in a democratic society for that purpose; it has been held that there is nothing in the Convention requiring that there should only be a prosecution in the country where the 'major steps' in publication took place: *R v Perrin* [2002] EWCA Crim 747, [2002] All ER (D) 359. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 See the Obscene Publications Act 1959 s 2(1); and the Magistrates' Courts Act 1980 s 32(2). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. A sentence of imprisonment is appropriate where the offence arises out of the commercial exploitation of pornography: see *R v Holloway* (1982) 4 Cr App Rep (S) 128, CA; *R v Zampa* (1984) 6 Cr App Rep (S) 110, CA; *R v Hamilton-Grant* (1984) 6 Cr App Rep (S) 438, CA; *R v Singh* [1999] 2 Cr App Rep (S) 160, CA (these cases all concerned the offence of having an obscene publication for gain). It will not always be necessary to impose a custodial sentence, particularly in relation to a first offence: *R v Tunnicliffe*, *R v Greenwood* [1999] 2 Cr App Rep (S) 88, CA. A prosecution may not be commenced more than two years after the commission of the offence: Obscene Publications Act 1959 s 2(3) (amended by the Criminal Law Act 1977 s 65(5), Sch 13). See also *R v Barton* [1976] Crim LR 514, CA.

10 Obscene Publications Act 1959 s 2(4). Section 2(4) does not apply to an article which is 'indecent' or 'obscene' in a sense not within the meaning of 'obscene' under the Obscene Publications Act 1959 s 1(1) (see PARA 748 post): *R v Gibson*, *R v Sylveire* [1990] 2 QB 619, [1991] 1 All ER 439, CA (conviction of curator of art gallery, and of artist concerned, for outraging public decency (see PARA 764 post) with display of earrings made from freeze-dried human foetuses; while the exhibition of the earrings might well have offended recognised standards of propriety or decency, it had not been suggested that anyone was likely to be depraved or corrupted by them). See also PARA 753 note 2 post. Without prejudice to the Obscene Publications Act 1959 s 2(4), a person may not be proceeded against for an offence at common law in respect of an exhibition of a film or anything said or done in the course of an exhibition of a film, where it is of the essence of the common law offence that the exhibition or what was said or done is obscene, indecent, offensive, disgusting or injurious to morality; nor may a person be proceeded against for an offence at common law in respect of an agreement to give an exhibition of a film or to cause anything to be said or done in the course of such an exhibition, where the common law offence consists of conspiring to corrupt public morals or to do any act contrary to public morals or decency: s 2(4A) (added by the Criminal Law Act 1977 s 53; and amended by the Licensing Act 2003 Sch 6 para 28(1), (2)). A person may not be proceeded against for an offence at common law in respect of a relevant programme or anything said or done in the course of such a programme, where it is of the essence of the common law offence that the programme or (as the case may be) what was said or done was obscene, indecent, offensive, disgusting or injurious to morality, or in respect of an agreement to cause a programme to be included in a programme service or to cause anything to be said or done in the course of a programme which is to be so included, where the common law offence consists of conspiring to corrupt public morals or to do any act contrary to public morals or decency: Broadcasting Act 1990 Sch 15 para 6. As to conspiracy to corrupt public morals and to outrage public decency see PARAS 74-75 ante.

## UPDATE

### 747-769 Offences against Decency and Morality

As to the new offence of possession of extreme pornographic images see PARA 769A.

**747 Publishing an obscene article or having an obscene article for publication for gain**

NOTE 7--1990 Act s 167(4)(b) amended: Criminal Justice and Immigration Act 2008 Sch 26 para 28(2).

TEXT AND NOTE 9--In Obscene Publications Act 1959 s 2(1) for 'three years' read 'five years': Criminal Justice and Immigration Act 2008 s 71. For transitional provision see Criminal Justice and Immigration Act 2008 Sch 27 para 25.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/(1) OBSCENE PUBLICATIONS/748. Test of obscenity.

#### **748. Test of obscenity.**

An article<sup>1</sup> is deemed to be obscene for the purposes of the Obscene Publications Acts 1959 and 1964<sup>2</sup> if its effect or (where the article comprises two or more distinct items) the effect of any one of its items<sup>3</sup> is, if taken as a whole, such as to tend to deprave and corrupt<sup>4</sup> persons who are likely<sup>5</sup>, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it<sup>6</sup>.

In proceedings against a person for publishing an obscene article<sup>7</sup>, the question as to whether the article is obscene must be determined without regard to any publication by another person unless it could reasonably have been expected that the publication by that other person would follow from publication by the person charged<sup>8</sup>. In proceedings against a person for having an obscene article for publication for gain<sup>9</sup>, the question whether the article is obscene must be determined by reference to such publication for gain of the article as in the circumstances it may reasonably be inferred he had in contemplation and to any further publication that could reasonably be expected to follow from it, but not to any other publication<sup>10</sup>.

The issue of obscenity is one for the jury and expert evidence on the issue is not ordinarily admissible although in exceptional cases a jury may require the assistance of such evidence<sup>11</sup>.

1 For the meaning of 'article' see PARA 747 note 4 ante.

2 See PARAS 747 ante, 751-752 post. As to the test of obscenity at common law and under the Theatres Act 1968 see PARAS 753-754 note 2 post. Cf the test under the Postal Services Act 2000 s 85: see PARA 765 note 2 post.

3 It is a question of law whether an article comprises two or more distinct items: *R v Goring* [1999] Crim LR 670, CA. Where the article comprises a number of separate items, the individual items must be considered separately; and, if one is obscene, that is sufficient to make the whole obscene: *R v Anderson* [1972] 1 QB 304, 56 Cr App Rep 115, CA.

4 See *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435 at 456, 56 Cr App Rep 633 at 641, HL, per Lord Reid ('The Obscene Publications Act [1959] appears to use the words 'deprave' and 'corrupt' as synonymous, as I think they are. To deprave and corrupt does not merely mean to lead astray morally'). 'Deprave' and 'corrupt' refer to the effect of a pornographic publication on the mind, including the emotions; it is not necessary that any physical (or 'overt') sexual activity should result: *DPP v Whyte* [1972] AC 849, 57 Cr App Rep 74, HL.

Depravity and corruption are not, however, confined to sexual depravity and corruption: see *John Calder (Publications) Ltd v Powell* [1965] 1 QB 509, [1965] 1 All ER 159, DC (drug taking); and see also *DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159, [1967] 2 All ER 504, DC; *R v Calder and Boyars Ltd* [1969] 1 QB 151, 52 Cr App Rep 706, CA. An article is not necessarily obscene for the purposes of the Obscene Publications Act 1959 because it is repulsive, filthy, loathsome or lewd: *R v Anderson* [1972] 1 QB 304, 56 Cr App Rep 115, CA. It is open to a defendant to show that an article is so unpleasant or disgusting that it would not corrupt and deprave but cause persons to revolt from the activity it describes: *R v Calder and Boyars Ltd* supra; *R v Anderson* supra. The Obscene Publications Act 1959 is not merely concerned with the corruption of the innocent but protects equally the less innocent from further corruption and the addict from feeding his addiction; the proposition that readers whose morals are already in a state of depravity or corruption are incapable of being further depraved or corrupted is fallacious: *DPP v Whyte* supra. The test of obscenity depends on the article and not upon there being an intention on the part of the author or publisher to corrupt: *Shaw v DPP* [1962] AC 220, sub nom *R v Shaw* [1961] 1 All ER 330, CCA; and see also *R v Penguin Books Ltd* [1961] Crim LR 176. The tendency to deprave and corrupt must be determined by reference to the publication (see the Obscene Publications Act 1959 s 1(3) (as amended); and PARA 747 ante) of the article: *A-G's Reference (No 2 of 1975)* [1976] 2 All ER 753, [1976] 1 WLR 710, CA.

5 Unless the offence involves circumstances where there is no possibility of a public good defence (see PARA 749 post), the reference to a tendency to deprave and corrupt persons likely to read etc the matter is a reference to a significant proportion of those likely to read it (*R v Calder and Boyars Ltd* [1969] 1 QB 151, 52 Cr App Rep 706, CA); but it is not appropriate to consider only the largest category of 'most likely' readers; other categories of persons may be 'likely' readers and should be disregarded only if they are numerically negligible (*DPP v Whyte* [1972] AC 849, 57 Cr App Rep 74, HL; *DPP v Jordan* [1977] AC 699, 64 Cr App Rep 33, HL; *Gold Star Publications v DPP* [1981] 2 All ER 257, 73 Cr App Rep 141, HL (readership abroad)).

6 Obscene Publications Act 1959 s 1(1). This definition retains in substance the test laid down by Cockburn J in *R v Hicklin* (1868) LR 3 QB 360 at 371. Evidence that other publications are also available anywhere else in the world, which are similar to, or not materially different from, the article in question is not admissible in respect of whether that article is obscene under the test in the Obscene Publications Act 1959 s 1(1): *R v Reiter* [1954] 2 QB 16, 38 Cr App Rep 62, CCA; *R v Elliott* [1996] 1 Cr App Rep 432, CA.

7 See PARA 747 ante.

8 Obscene Publications Act 1959 s 2(6).

9 See PARA 747 ante.

10 Obscene Publications Act 1964 s 1(3)(b). The question whether an article had or kept for the reproduction or manufacture from it of articles for publication is obscene must be determined as if any reference in s 1(3)(b) to publication of the article were a reference to publication of articles reproduced or manufactured from it: s 2(2)(a).

11 *R v Anderson* [1972] 1 QB 304, 56 Cr App Rep 115, CA, distinguishing *DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159, [1967] 2 All ER 504, DC (where expert evidence as to the effect of the publication on children was held admissible); *DPP v Jordan* [1977] AC 699, 64 Cr App Rep 33, HL (in general no evidence, psychological or medical, may be admitted; there are, however, exceptions such as *DPP v A and BC Chewing Gum Ltd* supra). If expert evidence is not aimed at establishing the tendency to deprave and corrupt but is scientific evidence which is essential to ensure that the members of the jury have the necessary information, it is admissible: *R v Skirving*, *R v Grossman* [1985] QB 819, 81 Cr App Rep 9, CA. The opinion of experts is admissible in relation to the defence of public good: see PARA 749 post. As to the issues for the jury where publication is to an individual see *R v Barker* [1962] 1 All ER 748, 46 Cr App Rep 227, CCA.

## UPDATE

### 747-769 Offences against Decency and Morality

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/(1) OBSCENE PUBLICATIONS/749. Defence of public good.

### **749. Defence of public good.**

A person may not be convicted of publishing an obscene article or of having an obscene article for publication for gain<sup>1</sup>, and an order for forfeiture may not be made<sup>2</sup>, if it is proved<sup>3</sup> that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning<sup>4</sup>, or of other objects of general concern<sup>5</sup>.

The opinion of experts as to the literary, artistic, scientific or other merits<sup>6</sup> of an article may be admitted in any proceedings either to establish or negative such a ground<sup>7</sup>.

1    le under the Obscene Publications Act 1959 s 2(1) (as amended): see PARA 747 ante.

2    le under ibid s 3 (as amended): see PARA 752 post.

3    As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

4    'Learning' is a noun meaning the product of scholarship, something with intrinsic value coming from the work of a scholar: *A-G's Reference (No 3 of 1977)* [1978] 3 All ER 1166, 67 Cr App Rep 393, CA.

5    See the Obscene Publications Act 1959 s 4(1). If the article is a moving picture film or soundtrack, the publication must be proved instead to be justified as being for the public good on the ground that it is in the interests of drama, opera, ballet or any other art or of literature or learning: s 4(1A) (added by the Criminal Law Act 1977 s 53(6)). Where the publication in issue consists of the inclusion of any matter in a relevant programme (see PARA 747 note 2 ante), it must be proved instead that the inclusion of the matter in question in a relevant programme is justified as being for the public good on the ground that it is in the interests of drama, opera, ballet or any other art, science, literature or learning, or any other objects of general concern: Broadcasting Act 1990 s 162, Sch 15 para 5(2). Cf the Theatres Act 1968 s 3: see PARA 755 post.

A decision must first be made on the obscenity and only then does the question of public good fall for decision: *R v Calder and Boyars Ltd* [1969] 1 QB 151, 52 Cr App Rep 706, CA; *Olympia Press Ltd v Hollis* [1974] 1 All ER 108, [1973] 1 WLR 1520, DC. As to the order of witnesses, and the proper direction to the jury, see *R v Calder and Boyars Ltd* supra. In considering the defence, the jury should consider on the one hand the number of readers who it believes would tend to be depraved and corrupted by the publication, the strength of the tendency to deprave and corrupt and the nature of the depravity or corruption; on the other hand it should assess the strength of the literary, sociological or ethical merit which it considers the book to possess. Weighing up all these factors, it is required to decide whether on balance the publication is proved to be justified as being for the public good: *R v Calder and Boyars Ltd* supra at 172 and 716. Any 'other objects of general concern' must fall within the same range of considerations as 'science, literature, art or learning': *DPP v Jordan* [1977] AC 699, 64 Cr App Rep 33, HL.

6    'Other merits' includes ethical merits (*R v Penguin Books Ltd* [1961] Crim LR 176), but does not include therapeutic value (*DPP v Jordan* [1977] AC 699, 64 Cr App Rep 33, HL).

7    See the Obscene Publications Act 1959 s 4(2). Section 4(2) applies for the purposes of the Broadcasting Act 1990 Sch 15 para 5(2): Sch 15 para 5(3). The evidence is restricted to this question and is not admissible on the issue of obscenity: see PARA 748 text and note 11 ante. See also *DPP v Jordan* [1977] AC 699, 64 Cr App Rep 33, HL (expert evidence of therapeutic qualities of sexually explicit material held inadmissible as evidence going to the issue of obscenity). Evidence relating to other books may be admitted to establish 'the climate of literature' in order to assess the literary merit of the article in question: *R v Penguin Books Ltd* [1961] Crim LR 176.



**UPDATE**

**747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/(1) OBSCENE PUBLICATIONS/750. No reasonable cause to believe article obscene.

### **750. No reasonable cause to believe article obscene.**

A person may not be convicted of publishing an obscene article, or of having an obscene article for publication for gain<sup>1</sup> if he proves that he had not examined the article in respect of which he is charged and had no reasonable cause to suspect that it was such that his publication of it or his having it, as the case may be, would make him liable to be convicted of such an offence<sup>2</sup>.

<sup>1</sup> See under the Obscene Publications Act 1959 s 2: see PARA 747 ante.

<sup>2</sup> Ibid s 2(5); Obscene Publications Act 1964 s 1(3)(a). Where the publication in issue consists of the inclusion of any matter in a relevant programme (see PARA 747 note 2 ante) the defendant must prove instead that he did not know and had no reason to suspect that the programme would include matter rendering him liable to be convicted of such an offence: Broadcasting Act 1990 s 162, Sch 15 para 5(1). As to proof see PARA 749 note 3 ante.

## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/(1) OBSCENE PUBLICATIONS/751. Obscene articles for publication for gain; powers of search and seizure.

### **751. Obscene articles for publication for gain; powers of search and seizure.**

If a justice of the peace is satisfied by information<sup>1</sup> on oath that there is reasonable ground for suspecting that, in any premises, or on any stall or vehicle, being premises or a stall or vehicle specified in the information, obscene<sup>2</sup> articles<sup>3</sup> are, or are from time to time, kept for publication for gain<sup>4</sup>, he may issue a warrant<sup>5</sup> empowering any constable to enter (if need be by force) and search the premises, stall or vehicle and to seize and remove any articles found therein or thereon which the constable has reason to believe to be obscene articles and to be kept for publication for gain<sup>6</sup>.

1 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'obscene' see PARA 748 ante.

3 For the meaning of 'article' see PARA 747 note 4 ante.

4 For the meaning of 'publication for gain' see PARA 747 note 6 ante.

5 A justice of the peace may not issue a warrant under the Obscene Publications Act 1959 s 3(1) except on an information laid by or on behalf of the Director of Public Prosecutions or by a constable: Criminal Justice Act 1967 s 25.

6 Obscene Publications Act 1959 s 3(1) (amended by the Police and Criminal Evidence Act 1984 s 119(2), Sch 7 Pt I; and the Courts Act 2003 s 109(1), Sch 8 para 106(1), (2)). As to powers of entry, search and seizure see PARA 869 et seq post.

Articles seized must be brought before a justice of the peace: see PARA 752 post. If any obscene articles are so seized, the warrant also empowers the seizure and removal of any documents found in the premises or, as the case may be, on the stall or vehicle which relate to a trade or business carried on at the premises or from the stall or vehicle: Obscene Publications Act 1959 s 3(2).

The additional powers of seizure under the Criminal Justice and Police Act 2001 s 50 (see PARA 890 post) apply to each of the powers of seizure conferred by the Obscene Publications Act 1959 s 3(1), (2) (s 3(1) as amended): Criminal Justice and Police Act 2001 s 58(5), Sch 1 para 5.

A warrant issued under the Obscene Publications Act 1959 s 3(1) (as amended) authorises only one entry, search and seizure of goods; and, when that is carried out, the warrant is spent: *R v Adams* [1980] QB 575, 70 Cr App Rep 149, CA. However, where the police act more than once on the same warrant, the judge does not necessarily have a discretion to exclude the articles seized on any subsequent occasion as the Obscene Publications Act 1959 s 2(1) (as amended) (see PARA 747 ante) does not require strict compliance with s 3(1) (as amended) as a condition of conviction under s 2(1) (as amended): *R v Adams* supra (the manner in which the evidence there had been obtained under one warrant could not be said to have been oppressive merely because the police had made an error regarding the validity of the warrant for the purpose of entry on the second occasion). Items for publication outside the jurisdiction may be seized: *Gold Star Publications Ltd v DPP* [1981] 2 All ER 257, 73 Cr App Rep 141, HL.

A warrant which purported to empower seizure of 'any other material of a sexually explicit nature' has been held bad in law; the Obscene Publications Act 1959 s 3 (as amended) refers to 'obscene' articles; articles of a sexually explicit nature are not necessarily obscene, the former being a far wider category of articles: *Darbo v DPP* [1992] Crim LR 56, DC.

### **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/(1) OBSCENE PUBLICATIONS/752. Obscene articles for publication for gain; summary procedure for forfeiture.

## **752. Obscene articles for publication for gain; summary procedure for forfeiture.**

Except as otherwise provided<sup>1</sup>, any articles seized under a search warrant<sup>2</sup> must be brought before a justice of the peace acting in the local justice area in which the articles were seized and the justice may thereupon issue a summons<sup>3</sup> to the occupier of the premises or, as the case may be, the user of the stall or vehicle to appear on a day specified in the summons before a magistrates' court acting in that local justice area to show cause why the articles or any of them should not be forfeited<sup>4</sup>. If the court is satisfied, as respects any of the articles, that at the time when they were seized they were obscene articles<sup>5</sup> kept for publication for gain<sup>6</sup>, the court must<sup>7</sup> order those articles to be forfeited<sup>8</sup>. However, if the person summoned does not appear, the court may not make such an order unless service of the summons is proved<sup>9</sup>. In addition to the person summoned, any other person being the owner, author or maker of any of the articles brought before the court, or any other person through whose hands they had passed before being seized, is entitled to appear before the court on the day specified in the summons to show cause<sup>10</sup> why they should not be forfeited<sup>11</sup>.

1 The provisions as to forfeiture do not apply in relation to any article seized under the Obscene Publications Act 1959 s 3(1) (as amended) (see PARA 751 ante) which is returned to the occupier of the premises or, as the case may be, to the user of the stall or vehicle in or on which it was found: s 3(3) proviso (added by the Criminal Law Act 1977 s 65(4), Sch 12).

Without prejudice to the duty of the court to make an order for the forfeiture of an article where the Obscene Publications Act 1964 s 1(4) (orders made on conviction: see PARA 747 ante) applies, in a case where by virtue of the Obscene Publications Act 1959 s 2(3A) (as added and amended) (see PARA 747 ante) proceedings under s 2 (as amended) for having an article for publication for gain could not be instituted except by or with the consent of the Director of Public Prosecutions, no order for the forfeiture of the article may be so made unless the warrant under which the article was seized was issued on an information laid by or on behalf of the Director of Public Prosecutions: s 3(3A) (added by the Criminal Law Act 1977 s 53(5)). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

2 See PARA 751 ante.

3 Under the corresponding provisions of the Obscene Publications Act 1857 it was held that the summons should be issued within a reasonable time after the complaint leading to the issue of the warrant had been made: *Cox v Stinton* [1951] 2 KB 1021, [1951] 2 All ER 637, DC. A justice to whom articles are shown for the purpose of issuing a summons is not then precluded from hearing the case: *Morgan v Bowker* [1964] 1 QB 507, [1963] 1 All ER 691, DC.

4 See the Obscene Publications Act 1959 s 3(3) (amended by the Criminal Law Act 1977 ss 53, 65(4), Sch 12; and the Courts Act 2003 s 109(1), Sch 8 para 106(1), (3)). The Obscene Publications Act 1959 s 3(3) (as amended) applies in relation to an item seized under the Criminal Justice and Police Act 2001 s 50 (additional powers of seizure from premises: see PARA 890 post) as if the item had been seized under the Obscene Publications Act 1959 s 3(1) (as amended) (see PARA 751 ante): Criminal Justice and Police Act 2001 s 70, Sch 2 para 10. It is the duty of the Director of Public Prosecutions to take over the conduct of all proceedings begun by summons issued under the Obscene Publications Act 1959 s 3 (as amended): Prosecution of Offences Act 1985 s 3(2)(d). See PARA 1080 post.

5 For these purposes, the question whether an article is obscene must be determined on the assumption that copies of it would be published in any manner likely having regard to the circumstances in which it was found, but in no other manner: Obscene Publications Act 1959 s 3(7). The question whether an article had or kept for the reproduction or manufacture from it of articles for publication is obscene must for the purposes of s 3 (as amended) be determined on the assumption that articles reproduced or manufactured from it would be

published in any manner likely having regard to the circumstances in which it was found, but in no other manner: Obscene Publications Act 1964 s 2(2)(b). The intention of the defendant is immaterial, but the nature of the business and the method by which it was carried on, just as much as the nature of the premises, are relevant circumstances for the purposes of the Obscene Publications Act 1959 s 3(7): *Morgan v Bowker* [1964] 1 QB 507, [1963] 1 All ER 691, DC. See also *Straker v DPP* [1963] 1 QB 926, [1963] 1 All ER 697, DC. For the meaning of 'obscene' see PARA 748 ante. As to the defence of public good see PARA 749 ante. It is the duty of the magistrates to read or look at the articles themselves and the onus is on the occupier or user to show cause why the publications should not be forfeited: *Thomson v Chain Libraries Ltd* [1954] 2 All ER 616, [1954] 1 WLR 999, DC. See also *Olympia Press Ltd v Hollis* [1974] 1 All ER 108, [1973] 1 WLR 1520, DC (magistrates should make themselves fully acquainted with a book, but need not read the whole); *R v Crown Court at Snaresbrook, ex p Metropolitan Police Comr* (1984) 79 Cr App Rep 184, DC (on an appeal from conviction by magistrates, a Crown Court judge has the jurisdiction to decline to inspect each article which is said to be obscene and may order that the police divide the offending material into categories of pornographic behaviour or sexual perversions; the judge may then take examples at random from each category); *R v Croydon Metropolitan Stipendiary Magistrate, ex p Richman* (1985) Times, 8 March, DC, following *R v Crown Court at Snaresbrook, ex p Metropolitan Police Comr* supra (a magistrate may inspect a sample but cannot decline to inspect the material or a part of the material and rely on the evidence of a police officer as to whether the articles are obscene). An article is obscene even though only part of it is obscene and an order may be made to forfeit the whole: *Paget Publications Ltd v Watson* [1952] 1 All ER 1256.

6 For the meaning of 'publication for gain' see PARA 747 note 6 ante.

7 On a conviction for having, for publication for gain, obscene articles which have been seized by virtue of a warrant issued under the Obscene Publications Act 1959 s 3 (as amended), forfeiture of those articles must be ordered: Obscene Publications Act 1964 s 1(4); and see PARA 747 ante.

8 Obscene Publications Act 1959 s 3(3) (as amended: see note 4 supra). Such a power of forfeiture extends to articles kept for publication outside the jurisdiction of the English courts: *Gold Star Publications Ltd v DPP* [1981] 2 All ER 257, 73 Cr App Rep 141, HL. Where such an order for forfeiture is made, any person who appeared, or who was entitled to appear, to show cause against the making of the order may appeal to the Crown Court: see the Obscene Publications Act 1959 s 3(5) (amended by the Courts Act 1971 s 56(2), Sch 9 Pt I). See also *Burke v Copper* [1962] 2 All ER 14, [1962] 1 WLR 700, DC (informant entitled to appeal by way of case stated against refusal of forfeiture). No such order may take effect until the expiration of the period within which notice of appeal to the Crown Court may be given against the order, or, if before the expiration thereof notice of appeal is duly given or application made for the statement of a case for the opinion of the High Court, until the final determination or abandonment of the proceedings on the appeal or case: see the Obscene Publications Act 1959 s 3(5) (amended by the Courts Act 1971 s 56(2), Sch 8 para 37). If as respects any articles brought before it the magistrates' court does not order forfeiture, it may if it thinks fit order the person on whose information the warrant for the seizure of the articles was issued to pay such costs as the court thinks reasonable to any person who has appeared before the court to show cause why those articles should not be forfeited; and costs so ordered are enforceable as a civil debt: Obscene Publications Act 1959 s 3(6).

9 Ibid s 3(3) proviso. As to service of summonses and proof of service see PARAS 912-914 post.

10 As to the defence of public good see PARA 749 ante.

11 Obscene Publications Act 1959 s 3(4).

## UPDATE

### 747-769 Offences against Decency and Morality

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/(1) OBSCENE PUBLICATIONS/753. Obscene libel at common law.

### **753. Obscene libel at common law.**

It is an indictable offence at common law to publish obscene matter<sup>1</sup>. However, a person publishing an article may not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene<sup>2</sup>. Obscene matter at common law is matter having the tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose hands such publication may fall<sup>3</sup>. It is also an indictable offence at common law to procure obscene prints or libels with intent to publish them<sup>4</sup>.

A person guilty of any such offence is liable on conviction on indictment to a fine and imprisonment at the discretion of the court<sup>5</sup>.

1 *R v Curl* (1727) 2 Stra 788. See also *R v De Marny* [1907] 1 KB 388, CCR (liability of a newspaper proprietor or editor in relation to the insertion of advertisements for the sale of obscene books and photographs).

2 Obscene Publications Act 1959 s 2(4). The effect of s 2(4) is to supersede the common law offence of obscene libel unless the common law definition of obscenity is wider than the one under the Obscene Publications Act 1959, which is probably not the case: see note 3 infra; and PARA 748 note 6 ante. 'The obvious purpose of s 2(4) is to make available, where the essence of the offence is tending to deprave and corrupt, the defences which are set out in the Act': *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435 at 456, 56 Cr App Rep 633 at 637, HL, per Lord Reid. As to such defences see PARAS 749-750 ante. See also the wider provisions in respect of film exhibitions and programme services: para 747 note 8 ante.

The Obscene Publications Act 1959 s 2(4) does not apply to common law conspiracy to corrupt public morals since such conspiracy consists of the agreement to corrupt public morals by publishing, rather than simply publishing. Common law conspiracy to corrupt public morals is an offence, however, only where the agreement entered into would not constitute a statutory conspiracy: see the Criminal Law Act 1977 s 5(3); and PARA 74 ante. It is apprehended that all obscene libels are likely to involve the commission of a substantive offence and that no proceedings could therefore be brought in respect of an agreement to publish an obscene article as a common law conspiracy to corrupt public morals.

The law officers through the then Solicitor General (Sir Peter Rawlinson) gave undertakings to the House of Commons on 3 June 1964 (see 695 HC Official Report (5th series) col 1212) and 7 July 1964 (see 698 HC Official Report (5th series) col 314) that conspiracies to corrupt public morals would not be charged so as to circumvent the statutory defence under the Obscene Publications Act 1959 s 4 (see PARA 749 ante).

3 The test of obscenity laid down in *R v Hicklin* (1868) LR 3 QB 360 at 371. The test was applied in *R v Reiter* [1954] 2 QB 16 at 18-19, 38 Cr App Rep 62 at 64. See also *R v Martin Secker Warburg Ltd* [1954] 2 All ER 683 at 685, 38 Cr App Rep 124 at 126 (the test should be applied according to current standards). As to matters to be taken into account in determining obscenity at common law see *R v Reiter* supra at 20-21 and at 65; *Steele v Brannan* (1872) LR 7 CP 261; *R v Thomson* (1900) 64 JP 456. The motive for publication is irrelevant: *R v Hicklin* supra; *Steele v Brannan* supra; but see also *R v De Montalk* (1932) 23 Cr App Rep 182, CCA (that publication was made for the public good may be a defence).

4 *Dugdale v R* (1853) 1 E & B 435, CCR. Mere possession, even with intent to publish, is not an offence at common law: *Dugdale v R* supra; *R v Rosenstein* (1826) 2 C & P 414.

5 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.



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## **(2) OBSCENE PERFORMANCES OF PLAYS**

### **754. Obscene performances of plays.**

Subject to certain exceptions<sup>1</sup>, if an obscene performance<sup>2</sup> of a play<sup>3</sup> is given, whether in public<sup>4</sup> or in private, any person<sup>5</sup> who (whether for gain or not) presented or directed the performance<sup>6</sup> is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding three years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the prescribed sum<sup>8</sup>. Proceedings for such an offence may be instituted only by or with the consent of the Attorney General<sup>9</sup>.

Proceedings may not be brought against a person: (1) in respect of a performance of a play or anything said or done in the course of such a performance for an offence at common law where it is of the essence of the offence that the performance or what was said or done was obscene, indecent, offensive, disgusting or injurious to morality; or (2) for an offence at common law of conspiring to corrupt public morals, or to do any act contrary to public morals or decency, in respect of an agreement to present or give a performance of a play, or to cause anything to be said or done in the course of such a performance<sup>10</sup>.

1 The exceptions are a performance of a play: (1) justified as being for the public good (see PARA 755 post); (2) given on a domestic occasion in a private dwelling (Theatres Act 1968 s 7(1)); (3) given solely or primarily for the purpose of rehearsal, or to enable a record or cinematograph film to be made from or by means of the performance, or to enable the performance to be broadcast, or to enable the performance to be included in a programme service (ie within the meaning of the Broadcasting Act 1990: see ss 201, 202 (as amended); and TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328), but, if it is proved that the performance was attended by persons other than persons directly connected with the giving of the performance or the recording, broadcast or inclusion, the performance must be taken not to have been given solely or primarily for such a purpose unless the contrary is shown (Theatres Act 1968 s 7(2) (amended by the Public Order Act 1986 s 40, Sch 3; and the Broadcasting Act 1990 s 203(1), Sch 20 para 13)). See also LICENSING AND GAMBLING vol 67 (2008) PARA 233.

2 A performance of a play is deemed to be obscene if, taken as a whole, its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all the relevant circumstances, to attend it: Theatres Act 1968 s 2(1). As to the test of obscenity under the Obscene Publications Act 1959 and at common law see PARAS 748, 753 ante. Cf the test under the Postal Services Act 2000 s 85: see PARA 765 note 2 post.

3 'Play' means: (1) any dramatic piece, whether involving improvisation or not, which is given wholly or in part by one or more persons actually present and performing and in which the whole or a major proportion of what is done by the person or persons performing, whether by way of speech, singing or action, involves the playing of a role; and (2) any ballet given wholly or in part by one or more persons actually present and performing, whether or not it falls within head (1) supra: Theatres Act 1968 s 18(1).

4 'Public performance' includes any performance in a public place within the meaning of the Public Order Act 1936 (see PARA 380 note 2 ante), and any performance which the public or any section of the public is permitted to attend, whether on payment or otherwise: see the Theatres Act 1968 s 18(1).

5 Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly: *ibid* s 16. See PARA 38 ante.

6 A person is not to be treated as presenting a performance by reason only of his taking part in the play as a performer; a person taking part as a performer in a performance of a play directed by another person is to be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction; and a person is to be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during that performance: *ibid* s 18(2). A person is not to be treated as aiding and abetting the commission of an offence under s 2 (as amended) in respect of a performance of a play by reason only of his taking part as a performer: see s 18(2) (amended by the Public Order Act 1986 Sch 3).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post)), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Theatres Act 1968 s 2(2) (amended by the Magistrates' Courts Act 1980 s 32(2)). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to powers of entry and inspection see the Theatres Act 1968 s 15 (as amended); and LICENSING AND GAMBLING vol 67 (2008) PARA 251.

9 *Ibid* s 8 (amended by the Public Order Act 1986 Sch 3). As to the effect of this limitation see PARA 1071 post. A prosecution on indictment may not be commenced more than two years after the commission of the offence: Theatres Act 1968 s 2(3). As to scripts as evidence see PARA 756 post.

10 See *ibid* s 2(4) (amended by the Indecent Displays (Control) Act 1981 s 5(2), Schedule). As to indecent displays see PARA 768 post; and as to conspiracy to corrupt public morals and to outrage public decency see PARAS 74-75 ante.

## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/ (2) OBSCENE PERFORMANCES OF PLAYS/755. Defence of public good.

### **755. Defence of public good.**

A person may not be convicted of presenting or directing an obscene performance of a play<sup>1</sup> if it is proved that the giving of the performance in question was justified as being for the public good on the ground that it was in the interests of drama, opera or any other art, or of literature or learning<sup>2</sup>. The opinion of experts as to the artistic, literary or other merits of a performance of a play may be admitted in any proceedings for an offence either to establish or negative such ground<sup>3</sup>.

1     Ie under the Theatres Act 1968 s 2(2) (as amended): see PARA 754 ante.

2     Ibid s 3(1). Cf the Obscene Publications Act 1959 s 4(1): see PARA 749 ante.

3     Theatres Act 1968 s 3(2). Cf the Obscene Publications Act 1959 s 4(2): see PARA 749 ante. As to cases decided under s 4 (as amended) see PARA 749 notes 4-7 ante.

### **UPDATE**

#### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/ (2) OBSCENE PERFORMANCES OF PLAYS/756. Scripts as evidence.

## **756. Scripts as evidence.**

Where a performance of a play<sup>1</sup> was based on a script<sup>2</sup>, then, in proceedings for an offence under the Theatres Act 1968<sup>3</sup> alleged to have been committed in respect of that performance, an actual script on which the performance was based or a copy of such script made by virtue of an order relating to that performance<sup>4</sup> is admissible as evidence of what was performed and of the manner in which the performance or any part of it was given<sup>5</sup>. If such a script or copy is given in evidence on behalf of any party to the proceedings, the performance is to be taken to have been given in accordance with that script, except in so far as the contrary is shown by evidence given on behalf of the same or any other party<sup>6</sup>.

1 For the meaning of 'play' see PARA 754 note 3 ante.

2 'Script', in relation to the performance of a play, means the text of the play (whether expressed in words or in musical or other notation) together with any stage or other directions for its performance, whether contained in a single document or not: Theatres Act 1968 s 9(2).

3 See under ibid s 2 (as amended) (see PARA 754 ante) or s 6 (as amended) (public performance of a play provoking a breach of the peace: see LICENSING AND GAMBLING vol 67 (2008) PARA 249).

4 A police officer of or above the rank of superintendent, who has reasonable grounds for suspecting that any such offence has been committed by any person in respect of the performance of a play, or that a performance of a play is to be given and that any such offence is likely to be committed by a person in respect of it, may make a written order in relation to that person and that performance: ibid s 10(1) (amended by the Public Order Act 1986 s 40, Sch 3). The order must be signed by the police officer by whom it is made, must name the person to whom it relates, and must describe the performance to which it relates in a manner sufficient to enable that performance to be identified: Theatres Act 1968 s 10(2). Where such an order has been made any police officer, on production of the order if so required, may require the person named in it to produce, if such a thing exists, an actual script on which the performance was or will be based, and, if such a script is produced, may require that person to afford him an opportunity of causing a copy to be made: s 10(3). Any person who without reasonable excuse fails to comply with any such requirement is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 10(4) (amended by the Criminal Justice 1982 ss 38, 46). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

5 See the Theatres Act 1968 ss 9(1)(a), 10(5) (s 9(1)(a) amended by the Public Order Act 1986 Sch 3).

6 See the Theatres Act 1968 ss 9(1)(b), 10(5). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/ (3) INDECENT PHOTOGRAPHS AND PSEUDO-PHOTOGRAPHS OF CHILDREN/757. Taking, making and distributing indecent photographs or pseudo-photographs of children.

### **(3) INDECENT PHOTOGRAPHS AND PSEUDO-PHOTOGRAPHS OF CHILDREN**

#### **757. Taking, making and distributing indecent photographs or pseudo-photographs of children.**

It is an offence for a person<sup>1</sup>:

- 846 (1) to take<sup>2</sup>, or permit to be taken, or to make<sup>3</sup> any indecent<sup>4</sup> photograph<sup>5</sup> or pseudo-photograph<sup>6</sup> of a child<sup>7</sup>; or
- 847 (2) to distribute<sup>8</sup> or show<sup>9</sup> such indecent photographs or pseudo-photographs<sup>10</sup>; or
- 848 (3) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others<sup>11</sup>; or
- 849 (4) to publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or pseudo-photographs, or intends to do so<sup>12</sup>.

Proceedings for any such offence may not be instituted except by or with the consent of the Director of Public Prosecutions<sup>13</sup>. A person guilty of any such offence is liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>14</sup> or to a fine not exceeding the prescribed sum or to both<sup>15</sup>.

Where in proceedings for an offence of taking or making an indecent photograph under head (1) above, the defendant proves<sup>16</sup> that the photograph was of a child aged 16 or over, and that at the time of the offence charged the child and he were married or civil partners of each other or lived together as partners in an enduring family relationship, and sufficient evidence is adduced to raise an issue as to whether the child consented to the photograph being taken or made, or as to whether the defendant reasonably believed that the child so consented, the defendant is not guilty of the offence unless it is proved that the child did not so consent and that the defendant did not reasonably believe that the child so consented<sup>17</sup>.

In proceedings for an offence under head (1) above of making an indecent photograph or pseudo-photograph, the defendant is not guilty if he proves<sup>18</sup> that:

- 850 (a) it was necessary for him to make the photograph or pseudo-photograph for the purposes of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings, in any part of the world<sup>19</sup>;
- 851 (b) at the time of the offence charged he was a member of the Security Service, and it was necessary for him to make the photograph or pseudo-photograph for the exercise of any of the functions of the Service<sup>20</sup>; or
- 852 (c) at the time of the offence charged he was a member of GCHQ, and it was necessary for him to make the photograph or pseudo-photograph for the exercise of any of the functions of GCHQ<sup>21</sup>.

Where a person is charged with an offence under head (2) or head (3) above, it is a defence for him to prove<sup>22</sup>: (i) that he had a legitimate reason for distributing or showing the photographs or pseudo-photographs or, as the case may be, having them in his possession; or (ii) that he had not himself seen the photographs or pseudo-photographs and did not know, nor had any cause to suspect, them to be indecent<sup>23</sup>.

Where in proceedings for an offence under head (2) above relating to an indecent photograph, the defendant proves<sup>24</sup> that the photograph was of a child aged 16 or over, and at the time of the offence charged, or at the time when he obtained the photograph, the child and he were married or civil partners of each other or lived together as partners in an enduring family relationship, the defendant is not guilty of the offence unless it is proved that the showing or distributing was to someone other than the child<sup>25</sup>.

Where in proceedings for an offence under head (3) above relating to an indecent photograph, the defendant proves<sup>26</sup> that the photograph was of a child aged 16 or over, and that at the time of the offence (that is, the possession) charged, or at the time when he obtained the photograph, the child and he were married or civil partners of each other or lived together as partners in an enduring family relationship, and sufficient evidence is adduced to raise an issue both: (A) as to whether the child consented to the photograph being in the defendant's possession, or as to whether the defendant reasonably believed that the child so consented; and (B) as to whether the defendant had the photograph in his possession with a view to its being distributed or shown to anyone other than the child, the defendant is not guilty of the offence unless it is proved either that the child did not so consent and that the defendant did not reasonably believe that the child so consented, or that the defendant had the photograph in his possession with a view to its being distributed or shown to a person other than the child<sup>27</sup>.

Where any of the offences described above<sup>28</sup> is committed abroad<sup>29</sup> by British citizens or residents<sup>30</sup> it also constitutes an offence under the law of England and Wales if it would have constituted an offence under the law thereof had the activity constituting the offence been done in England and Wales<sup>31</sup>.

1 Where a body corporate is guilty of an offence under the Protection of Children Act 1978 and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other officer of the body, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is deemed to be guilty of that offence and is liable to be proceeded against and punished accordingly: s 3(1). Where the affairs of a body corporate are managed by its members, s 3(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 3(2). See PARA 38 ante.

2 The defendant must deliberately and intentionally take the photograph: *R v Graham-Kerr* [1988] 1 WLR 1098, 88 Cr App Rep 302, CA.

3 'Making' does not require an original act of creation of a photograph or pseudo-photograph; it can include the production of negatives of photographs etc or copies of them: *R v Bowden* [2001] QB 88, [2000] 2 All ER 418, CA. 'Making' also covers the opening of an attachment to an e-mail, which contains an indecent photograph etc (*R v Smith, R v Jayson* [2002] EWCA Crim 683, [2003] 1 Cr App Rep 212); or downloading it from the Internet so that it is displayed by an Internet browser on the computer screen (*R v Bowden* supra). An opened attachment or downloaded image is automatically temporarily stored on the computer hard disk by the operation of the browser. A downloaded photograph etc need not be stored, in the sense of being retained for future use, before it can be said to be 'made'; nor is it necessary that there is an intention to store the photograph for later retrieval: *R v Smith, R v Jayson* supra. 'Making' also covers printing out a photograph etc stored on a computer: *R v Bowden* supra. It is irrelevant that the original originated from outside the jurisdiction if the making of the copy (eg the downloading or printing) is in the jurisdiction: *R v Bowden* supra.

The mens rea for 'making' is that the act of 'making' should be a 'deliberate and intentional act with knowledge that the image made was, or was likely to be, an indecent photograph or pseudo-photograph of a child': *R v Smith, R v Jayson* supra. An unintended copying or storing of an image does not constitute the offence of 'making' it: *Atkins v DPP, Goodland v DPP* [2000] 2 All ER 425, [2000] 2 Cr App Rep 248, DC. Consequently, someone who opens a doubtful e-mail attachment (which turns out to be an indecent photograph) or whose computer automatically saves it on its 'cache' is not guilty of making those photographs: *Atkins v DPP, Goodland v DPP* supra. Nor will he be in possession of them while they are stored on the 'cache' if he is unaware of the existence and effect of the cache, although he will be in possession of them in respect of their transient

downloading onto the computer's screen (and would be guilty under the Criminal Justice Act 1988 s 160 (as amended): see PARA 758 post): *Atkins v DPP*, *Goodland v DPP* supra.

4 It is for the jury to decide whether the photograph or pseudo-photograph is indecent: *R v Owen* [1988] 1 WLR 134, 86 Cr App Rep 291, CA; *R v Graham-Kerr* [1988] 1 WLR 1098, 88 Cr App Rep 302, CA. 'Indecent' in the context of these offences relating to photographs and pseudo-photographs means offending against the recognised standard of propriety, upon which the jury must decide by looking at the material in question: *R v Stamford* [1972] 2 QB 391, 56 Cr App Rep 398, CA (applied in *R v Owen* supra; *R v Graham-Kerr* supra). This is judged objectively; the defendant's purpose is irrelevant: *R v Smethurst* [2001] EWCA Crim 772, [2002] 1 Cr App Rep 50. This approach does not fall foul of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 (right to respect for private life) or art 10 (right to freedom of expression) because it can be justified under arts 8(2) and 10(2) as necessary in a democratic society for the prevention of crime, for the protection of morals and in particular for the protection of children from being exploited: *R v Smethurst* supra. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

In determining whether a photograph is indecent, evidence of the circumstances in which it came to be taken or the motivation of the photographer are irrelevant to the issue of indecency, though they may be relevant if the issue is raised as to whether the photographer intended to take the photographs or intended to take them in the form in which they appeared (as where it is claimed that the photograph was taken accidentally or the photographer inadvertently included the indecent matter). The only evidence that is relevant to the issue of indecency is the photographs themselves: *R v Graham-Kerr* supra, applying *R v Stamford* supra (decided under the Post Office Act 1953 s 11 (repealed: see now the Postal Services Act 2000 s 85; and PARA 765 post)); distinguishing *R v Court* [1989] AC 28, 87 Cr App Rep 144, HL. In the case of a photograph, the jury must know the age of the child and is entitled to have regard to that age when answering the question, 'is this an indecent photograph of a child?': *R v Owen* supra. Something abstracted from a decent set of images can be indecent: see *R v Murray* [2004] EWCA Crim 2211, [2005] Crim LR 387 (edited and slowed down version of video-recorded medical documentary which concentrated, with sound removed, on sequence where doctor manipulated boy's penis held capable of being indecent, even though documentary was not; jury was being asked to look at a quite separate set of images from those in the documentary and was entitled to look at the images independently of the documentary and to determine whether, objectively speaking, those images were indecent).

5 For these purposes, references to an indecent photograph include an indecent film, a copy of an indecent photograph or film, and an indecent photograph comprised in a film: Protection of Children Act 1978 s 7(1), (2). Photographs, including those comprised in a film, are to be treated, if they show children and are indecent, for all purposes of the Act as indecent photographs of children and so as respects pseudo-photographs: s 7(1), (3) (amended by the Criminal Justice and Public Order Act 1994 s 84(1), (3)(a)).

References to a photograph include the negative as well as the positive version, and data stored on a computer disk or other electronic means which is capable of conversion into a photograph; and 'film' includes any form of video-recording: Protection of Children Act 1978 s 7(1), (4), (5) (s 7(4) substituted by the Criminal Justice and Public Order Act 1994 s 84(1), (3)(b)).

6 'Pseudo-photograph' means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph: Protection of Children Act 1978 s 7(7) (added by the Criminal Justice and Public Order Act 1994 s 84(1), (3)(c)). An image made by an exhibit which obviously consists of parts of two different photographs taped together cannot be said to 'appear to be a photograph' and is therefore not a 'pseudo-photograph', although if it was itself photocopied it could: *Atkins v DPP*, *Goodland v DPP* [2000] 2 All ER 425, [2000] 1 WLR 1427, DC. References to an indecent pseudo-photograph include a copy of an indecent pseudo-photograph, and data stored on a computer disk or by other electronic means which is capable of conversion into a pseudo-photograph: Protection of Children Act 1978 s 7(9) (added by the Criminal Justice and Public Order Act 1994 s 84(1), (3)(c)).

7 Protection of Children Act 1978 s 1(1)(a) (s 1(1) amended by the Criminal Justice and Public Order Act 1994 s 84(1), (2)(a), (b); and the Protection of Children Act 1978 s 1(1)(a) amended by the Criminal Justice and Public Order Act 1994 s 168(3), Sch 11). In the case of a photograph, 'child' means a person under the age of 18: Protection of Children Act 1978 s 7(1), (6) (s 7(6)-(9) added by the Criminal Justice and Public Order Act 1994 s 84(1), (3)(c); and the Protection of Children Act 1978 s 7(6) amended by the Sexual Offences Act 2003 s 45(2)). Expert evidence is inadmissible: *R v Land* [1999] QB 65, [1998] 1 All ER 403, CA. In proceedings under the Protection of Children Act 1978 relating to indecent photographs of children, a person is to be taken as having been a child at any material time if it appears from the evidence as a whole that he was then under the age of 18: Protection of Children Act 1978 s 2(3) (amended by the Sexual Offences Act 2003 s 45(1), (2); and the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 37(2)). If the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-photograph must be treated for all purposes of this Act as showing a child and so must a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult: Protection of Children Act 1978 s 7(8) (as so added).

8 For these purposes, a person is to be regarded as distributing an indecent photograph or pseudo-photograph if he parts with possession of it to, or exposes or offers it for acquisition by, another person: *ibid* s 1(2) (amended by the Criminal Justice and Public Order Act 1994 s 84(2)(c), (d)). For a conspiracy to distribute indecent photographs etc the conspiracy must relate to distribution to one or more persons outside the conspiracy: *R v Barker* [1998] 5 Archbold News 1, CA.

9 'Showing' includes 'making available', as where a person gives to another a password to a computer enabling him to access an indecent photograph stored on it: *R v Fellows, R v Arnold* [1997] 2 All ER 548, [1997] 1 Cr App Rep 244, CA.

10 Protection of Children Act 1978 s 1(1)(b) (as amended: see note 7 *supra*).

11 *Ibid* s 1(1)(c) (as amended: see note 7 *supra*). The defendant must have a view to showing the photographs etc to another or others, and not simply to himself: *R v ET* (1999) 163 JP 349, CA. A person possesses an indecent photograph etc with a view to it being distributed or shown by him to others only if one reason (not necessarily the primary reason) for possessing it is that it would be distributed or shown to others; thus a person who allows files containing indecent photographs etc to remain in his shared electronic folder, where they can be accessed and downloaded into the shared folders of other members of a file-sharing system, possesses those files with a view to their being shown or distributed only if one of his reasons, but not necessarily the primary reason, for doing so was to enable others to use them or download them: *R v Dooley* [2005] EWCA Crim 3093, [2006] 1 WLR 775, (2005) Times, 10 November.

12 Protection of Children Act 1978 s 1(1)(d) (as amended: see note 7 *supra*). As to the application of notification requirements under the Sexual Offences Act 2003 to an offence under the Protection of Children Act 1978 s 1 (as amended) see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 557 et seq. With the apparent exception of an offence of 'making' (see *R v Smith, R v Jayson* [2002] EWCA Crim 683, [2003] 1 Cr App Rep 212), proof that the defendant knew that the subject of a photograph was a child (as defined) is not required (*R v Land* [1999] QB 65, [1998] 1 All ER 403, CA). An offence under the Protection of Children Act 1978 s 1(1) (as amended) committed outside the United Kingdom is triable in England and Wales if the requirements of the Sexual Offences Act 2003 s 72 are satisfied: see PARA 243 ante. Nothing in the Local Government (Miscellaneous Provisions) Act 1982 s 2, Sch 3 (as amended) (control of sex establishments: see LICENSING AND GAMBLING vol 67 (2008) PARA 306) affords a defence to a charge in respect of any offence at common law or under any enactments other than Sch 3 (as amended): Sch 3 para 1(a). As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

As to jurisdiction where the photograph or pseudo-photograph shows a child under 16 see PARA 758 post. As to the offence of possession of indecent photographs of children see PARA 758 post; as to entry, search and seizure see PARA 759 post; as to forfeiture of such photographs see PARA 760 post; and as to the competence and compellability of the defendant's spouse as a witness see PARA 1405 post. As to procedural provisions applying to offences under the Protection of Children Act 1978 s 1(1)(a) (as amended) see PARA 1164 post.

13 *Ibid* s 1(3). As to the effect of this limitation see PARA 1071 post.

14 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

15 Protection of Children Act 1978 s 6 (amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 171; and the Criminal Justice and Court Services Act 2000 s 41(1)). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to sentencing guidelines see *R v Oliver, R v Hartrey, R v Baldwin* [2002] EWCA Crim 2766, [2003] 1 Cr App Rep 463. Two primary factors determinative of the seriousness of an offence are the nature of the material and the nature and degree of the offender's involvement with it. Such material should be graded in five categories: (1) images depicting erotic posing with no sexual activity; (2) sexual activity between children or solo masturbation; (3) non-penetrative sexual activity involving an adult; (4) penetrative activity with an adult; and (5) sadism or bestiality: see *R v Oliver, R v Hartrey, R v Baldwin* *supra*. In *R v Saunders* [2004] EWCA Crim 777, [2004] 2 Cr App Rep (S) 459, it was stated that *R v Oliver, R v Hartrey, R v Baldwin* *supra* was a valuable case where images had been downloaded from the Internet but that the taking of photographs and making of videotapes gave rise to serious considerations for sentencing and fell outside the guidelines in that case.

16 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the European Convention for Human Rights art 6(2) (the presumption of innocence), see PARA 1368 et seq post.

17 See the Protection of Children Act 1978 s 1A(1), (4) (s 1A added by the Sexual Offences Act 2003 s 45(1), (3); and the Protection of Children Act 1978 s 1A(1), (2) amended by the Civil Partnership Act 2004 s 261(1),



Sch 27 para 60). These provisions apply whether the photograph showed the child alone or with the defendant, but not if it showed any other person: Protection of Children Act 1978 s 1A(3) (as so added).

18 See note 16 supra.

19 Protection of Children Act 1978 s 1B(1)(a) (s 1B added by the Sexual Offences Act 2003 s 46).

20 Protection of Children Act 1978 s 1B(1)(b) (as added: see note 19 supra).

21 Ibid s 1B(1)(c) (as added: see note 19 supra). 'GCHQ' has the same meaning as in the Intelligence Services Act 1994 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 473): Protection of Children Act 1978 s 1B(2) (as so added).

22 See note 16 supra.

23 Protection of Children Act 1978 s 1(4) (amended by the Criminal Justice and Public Order Act 1994 s 84(2) (c), (d)). An example, given in *R v Land* [1999] QB 65 at 70, [1998] 1 All ER 403 at 406, would be where a police officer shows an indecent photograph to the Crown Prosecution Service with a view to the possible prosecution of the taker. See also PARA 758 note 10 post.

24 See note 16 supra.

25 Protection of Children Act 1978 s 1A(1), (2), (5) (s 1A as added, and s 1A(1), (2) as amended: see note 17 supra). These provisions apply whether the photograph showed the child alone or with the defendant, but not if it showed any other person: s 1A(3) (as so added).

26 See note 16 supra.

27 Protection of Children Act 1978 s 1A(1), (6) (s 1A as added, and s 1A(1) as amended: see note 17 supra). These provisions apply whether the photograph showed the child alone or with the defendant, but not if it showed any other person: s 1A(3) (as so added).

28 Is an offence under *ibid* s 1 (as amended) (see the text and notes 1-13 supra).

29 Is in a country or territory outside the United Kingdom in which the relevant act constituted an offence under the law in force in that country or territory: see the Sexual Offences Act 2003 s 72(1)(a); and PARA 243 ante.

30 As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43. As to residence see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 134 et seq. Proceedings by virtue of these provisions may be brought only against a person who was on 1 September 1997, or has since become, a British citizen or resident in the United Kingdom: see *ibid* s 72(2); and PARA 243 ante.

31 See *ibid* s 72(1), Sch 2 para 1(d)(i); and PARA 243 ante.

## UPDATE

### 747-769 Offences against Decency and Morality

As to the new offence of possession of extreme pornographic images see PARA 769A.

### 757 Taking, making and distributing indecent photographs or pseudo-photographs of children

NOTE 5--References to a photograph also include (1) a tracing or other image, whether made by electronic or other means (of whatever nature) (a) which is not itself a photograph or pseudo-photograph, but (b) which is derived from the whole or part of a photograph or pseudo-photograph (or a combination of either or both); and (2) data stored on a computer disc or by other electronic means which is capable of conversion into an image within head (1); and the 1978 Act s 7(8) applies in relation to such an image as it applies in relation to a pseudo-photograph: s 7(4A) (added by Criminal Justice and Immigration Act 2008 s 69(3)). For transitional provisions and savings see Sch 27 para 24(1).

NOTE 6--1978 Act s 7(9) amended: Criminal Justice and Immigration Act 2008 s 69(4).

TEXT AND NOTE 20--1978 Act s 1B(1)(b) amended: Criminal Justice and Immigration Act 2008 s 69(2).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/ (3) INDECENT PHOTOGRAPHS AND PSEUDO-PHOTOGRAPHS OF CHILDREN/758. Possession of indecent photographs or pseudo-photographs of children.

### **758. Possession of indecent photographs or pseudo-photographs of children.**

It is an offence for a person<sup>1</sup> to have any indecent photograph<sup>2</sup> or pseudo-photograph of a child<sup>3</sup> in his possession<sup>4</sup>. Proceedings for any such offence may not be instituted except by or with the consent of the Director of Public Prosecutions<sup>5</sup>.

A person guilty of such an offence is liable on conviction on indictment to a term of imprisonment not exceeding five years or to a fine or to both<sup>6</sup>, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>8</sup>.

Where a person is charged with such an offence, it is a defence for him to prove<sup>9</sup>:

- 853 (1) that he had a legitimate reason for having the photograph or pseudo-photograph in his possession<sup>10</sup>; or
- 854 (2) that he had not himself seen the photograph or pseudo-photograph and did not know, nor had any cause to suspect, it to be indecent<sup>11</sup>; or
- 855 (3) that the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time<sup>12</sup>.

Where a person charged with such an offence relating to a photograph proves<sup>13</sup> that the photograph was of a child aged 16 or over, and that at the time of the offence charged, or at the time when he obtained the photograph, the child and he were married or civil partners of each other or lived together as partners in an enduring family relationship, and sufficient evidence is adduced to raise an issue as to whether the child consented to the photograph being in the defendant's possession, or as to whether the defendant reasonably believed that the child so consented, the defendant is not guilty of the offence unless it is proved that the child did not so consent and that the defendant did not reasonably believe that the child so consented<sup>14</sup>.

Where such an offence relating to possession of an indecent photograph<sup>15</sup> is committed abroad<sup>16</sup> by British citizens or residents<sup>17</sup> it also constitutes an offence under the law of England and Wales if it would have constituted an offence under the law thereof had the activity constituting the offence been done in England and Wales<sup>18</sup>.

1 Where a body corporate is guilty of an offence under the Criminal Justice Act 1988 s 160 (as amended) and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other officer of the body, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is deemed to be guilty of that offence and is liable to be proceeded against and punished accordingly: Protection of Children Act 1978 s 3(1); applied by the Criminal Justice Act 1988 s 160(4). Where the affairs of a body corporate are managed by its members, the Protection of Children Act 1978 s 3(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 3(2); applied by the Criminal Justice Act 1988 s 160(4). See PARA 38 ante.

2 The provisions in the Protection of Children Act 1978 s 7 (as amended) relating to 'photographs' and 'pseudo-photographs' (see PARA 757 ante) have effect in relation to the Criminal Justice Act 1988 s 160 (as amended): s 160(4).

3 The provisions of the Protection of Children Act 1978 s 2(3), (7) relating to the meaning of 'child' (see PARA 757 note 7 ante) have effect in relation to the Criminal Justice Act 1988 s 160 (as amended) : see s 160(4).

4 Ibid s 160(1) (amended by the Criminal Justice and Public Order Act 1994 s 84(1), (4)(a)). The offence is not committed unless the defendant knew that he had, or once had, the photograph or pseudo-photograph in his possession: *Atkins v DPP, Goodland v DPP* [2000] 2 All ER 425, [2000] 2 Cr App Rep 248, DC. Accordingly, a defendant cannot be convicted of possessing an indecent photograph in the 'cache' of his computer, a temporary information store created automatically by an Internet browser programme when accessing an Internet site, if he cannot be shown to have been aware of the existence of the cache: *Atkins v DPP, Goodland v DPP* supra. A person is in possession of an indecent photograph in respect of its transient downloading by him on to a computer screen: *Atkins v DPP, Goodland v DPP* supra. 'Possession' of a photograph on a computer includes control or custody of it, having regard to the defendant's skill and knowledge: *R v Porter* [2006] EWCA Crim 560, 150 Sol Jo LB 396. It is not necessary for the prosecution to prove any mens rea on the defendant's part as to the indecency of the photograph or pseudo-photograph: *R v Smethurst* [2001] EWCA Crim 772, [2002] 1 Cr App Rep 50. Proof by the prosecution that the defendant knew that the subject of a photograph was a child (ie under 18) is not required: *R v Land* [1999] QB 65, [1998] 1 All ER 403, CA. A defendant who proves that he had not seen the photograph etc and did not know or have reason to suspect that it was an indecent photograph etc of a child has a defence: *R v Collier* [2004] EWCA Crim 1411, [2005] 1 WLR 843, [2005] 1 Cr App Rep 129; and see head (2) in the text and note 11 infra. For guidelines about the drafting of indictments for the offence see *R v Thompson* [2004] EWCA Crim 669, [2004] 2 Cr App Rep 262. As to the application of notification requirements to this offence under the Sexual Offences Act 2003 see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 557 et seq.

5 Protection of Children Act 1978 s 1(3); applied by the Criminal Justice Act 1988 s 160(4). As to the effect of this limitation see PARA 1071 post.

6 Protection of Children Act 1978 s 160(2A) (added by the Criminal Justice and Court Services Act 2000 s 41(3)). As to the custody threshold see *R v Wild (No 2)* [2001] EWCA Crim 1433, [2002] 1 Cr App Rep (S) 162.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post)), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Criminal Justice Act 1988 s 160(3) (amended by the Criminal Justice and Public Order Act 1994 s 86). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

9 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

10 Criminal Justice Act 1988 s 160(2)(a) (s 160(2) amended by the Criminal Justice and Public Order Act 1994 s 84(1), (4)(b)). The Criminal Justice Act 1988 s 160(2)(a) (as amended) and s 160(2)(c) (as amended) (see the text to note 12 infra) proceed on the assumption that the defendant is aware that the photograph etc is an indecent photograph of a child and that either he has a legitimate reason for possessing it or it has been sent to him without prior request and he did not keep it for an unreasonable time: *R v Collier* [2004] EWCA Crim 1411 at [19], [2005] 1 WLR 843 at [19], [2005] 1 Cr App Rep 134 at [19], per Hooper LJ. The question of what constitutes a legitimate reason is a question of fact in each case: *Atkins v DPP, Goodland v DPP* [2000] 2 All ER 425, [2000] 1 WLR 1427, DC. 'The central question where the defence is legitimate research will be whether the defendant is essentially a person of unhealthy interests in possession of indecent photographs, or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession. In other cases there will be other categories of legitimate reasons advanced. They will each have to be considered on their own facts': *Atkins v DPP, Goodland v DPP* supra at 432-433 and 1435 per Simon Brown LJ (with whom Blofield J agreed).

11 Criminal Justice Act 1988 s 160(2)(b) (as amended: see note 10 supra). The word 'it' in s 160(2)(b) (as amended) refers to the indecent photograph etc with the possession of which the defendant is charged, and the defence under s 160(2)(b) (as amended) is available if the defendant proves that he has not seen the photograph etc and did not know or have cause to suspect it to be an indecent photograph of a child: *R v Collier* [2004] EWCA Crim 1411 at [19], [2005] 1 WLR 843 at [19], [2005] 1 Cr App Rep 129 at [19], per Hooper LJ.

12 Criminal Justice Act 1988 s 160(2)(c) (as amended: see note 10 supra).

13 See note 9 *supra*.

14 See the Criminal Justice Act 1988 s 160A(1), (2), (4) (s 160A added by the Sexual Offences Act 2003 s 45(1), (4); and the Criminal Justice Act 1988 s 160A(1), (2) amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 127). The exception applies whether the photograph showed the child alone or with the defendant, but not if it showed any other person: Criminal Justice Act 1988 s 160A(3) (as so added).

15 *Ie* under *ibid* s 160 (as amended): see the text and notes 1-12 *supra*.

16 *Ie* in a country or territory outside the United Kingdom in which the relevant act constituted an offence under the law in force in that country or territory: see the Sexual Offences Act 2003 s 72(1)(a); and PARA 243 *ante*. As to the meaning of 'United Kingdom' see PARA 45 note 2 *ante*.

17 As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43. As to residence see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 134 *et seq*. Proceedings by virtue of these provisions may be brought only against a person who was on 1 September 1997, or has since become, a British citizen or resident in the United Kingdom: see *ibid* s 72(2); and PARA 243 *ante*.

18 See *ibid* s 72(1), Sch 2 para 1(d)(ii); and PARA 243 *ante*.

## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

### **758 Possession of indecent photographs or pseudo-photographs of children**

TEXT AND NOTE 4--1988 Act s 160(1) further amended: Criminal Justice and Immigration Act 2008 Sch 26 para 24.

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### **759. Entry, search and seizure.**

Where a justice of the peace is satisfied by information<sup>1</sup> on oath, laid by or on behalf of the Director of Public Prosecutions or by a constable, that there is reasonable ground for suspecting that there is in any premises<sup>2</sup> an indecent photograph or pseudo-photograph of a child<sup>3</sup>, the justice may issue a warrant under his hand authorising any constable to enter (if need be by force) and search the premises and to seize and remove any articles which he believes, with reasonable cause, to be or include indecent photographs or pseudo-photographs of children<sup>4</sup>.

Articles seized under the authority of the warrant and not returned to the occupier of the premises must be brought before a justice of the peace in the local justice area in which the articles were seized<sup>5</sup>.

1 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

2 The Protection of Children Act 1978 ss 4, 5 (both as amended) (see PARA 760 post) apply in relation to any stall or vehicle as they apply in relation to premises, with the necessary modifications of references to premises and the substitution of references to use for references to occupation: see s 4(4).

3 See PARAS 757-758 ante.

4 See the Protection of Children Act 1978 s 4(1), (2) (amended by the Criminal Justice Act 1988 s 170, Sch 15 paras 60, 61, Sch 16; the Criminal Justice and Public Order Act 1994 s 168(1), (2), (3), Sch 9 para 23, Sch 10 para 37, Sch 11; and the Courts Act 2003 s 109(1), Sch 8 para 199(1), (2)). As to powers of entry, search and seizure see PARA 869 et seq post.

5 Protection of Children Act 1978 s 4(3) (amended by the Courts Act 2003 Sch 8 para 199(1), (3)). The additional powers of seizure under the Criminal Justice and Police Act 2001 s 50 (see PARA 890 post) apply to the power of seizure under the Protection of Children Act 1978 s 4(3) (as amended): Criminal Justice and Police Act 2001 s 50(5), Sch 1 para 21. The Protection of Children Act 1978 s 4(3) (as amended) applies in relation to an item seized under the Criminal Justice and Police Act 2001 s 50 (see PARA 890 post) as if the item had been seized under the authority of the warrants under the Protection of Children Act 1978 s 4(2) (as amended) (see the text and note 4 supra): Criminal Justice and Police Act 2001 s 70, Sch 2 para 10.

## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

### **759 Entry, search and seizure**

TEXT AND NOTE 2--In the Protection of Children Act 1978 s 4 'premises' has the same meaning as in the Police and Criminal Evidence Act 1984 (see s 23; and PARA 872): Protection of Children Act 1978 s 4(4) (substituted by the Police and Justice Act 2006 s 39(2)(b)).

TEXT AND NOTE 5--Protection of Children Act 1978 s 4(3) repealed: Police and Justice Act 2006 s 39(2)(a), Sch 15 Pt 4.



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## **760. Forfeiture of indecent photographs or pseudo-photographs of children.**

The justice before whom any articles are brought<sup>1</sup> may issue a summons to the occupier of premises<sup>2</sup> to appear on a day specified in the summons before a magistrates' court acting in that local justice area to show cause why such articles should not be forfeited<sup>3</sup>. If the court is satisfied that the articles are in fact indecent photographs or pseudo-photographs of children, the court must order them to be forfeited; but if the person summoned does not appear, the court may not make an order unless service of the summons is proved<sup>4</sup>. In addition to the person summoned, any other person being the owner of the articles brought before the court, or the persons who made them, or any other person through whose hands they had passed before being seized, is or are entitled to appear before the court on the day specified in the summons to show cause why such articles should not be forfeited<sup>5</sup>. Where any of the articles are ordered so to be forfeited, any person who appears, or was entitled to appear, to show cause against the making of the order may appeal to the Crown Court<sup>6</sup>.

If as respects any articles brought before it the court does not order forfeiture, the court may, if it thinks fit, order the person on whose information the warrant for their seizure was issued to pay such costs as the court thinks reasonable to any person who has appeared before it to show cause why the photographs or pseudo-photographs should not be forfeited; and costs so ordered to be paid are recoverable as a civil debt<sup>7</sup>.

Where indecent photographs or pseudo-photographs of children are seized<sup>8</sup>, and a person is convicted of offences<sup>9</sup> in respect of those photographs, the court must order them to be forfeited<sup>10</sup>.

A forfeiture order so made<sup>11</sup> (including an order made on appeal) does not take effect until the expiration of the ordinary time within which an appeal may be instituted, or, where there is an appeal, until it is finally decided or abandoned<sup>12</sup>.

1    Ie in pursuance of the Protection of Children Act 1978 s 4 (as amended): see PARA 759 ante.

2    As to the application of *ibid* s 5 (as amended) to any stall or vehicle see PARA 759 note 2 ante.

3    *Ibid* s 5(1) (amended by the Courts Act 2003 s 109(1), Sch 8 para 200).

4    Protection of Children Act 1978 s 5(2) (amended by the Criminal Justice Act 1988 s 170, Sch 15 paras 60, 62(1), Sch 16; and the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 37).

5    Protection of Children Act 1978 s 5(3).

6    *Ibid* s 5(4).

7    *Ibid* s 5(5) (amended by the Criminal Justice and Public Order Act 1994 Sch 10 para 37).

8    Ie under the Protection of Children Act 1978 s 4 (as amended): see PARA 759 ante.

9    Ie under *ibid* s 1(1) (as amended) (see PARA 757 ante) or the Criminal Justice Act 1988 s 160 (as amended) (see PARA 758 ante).



10 Protection of Children Act 1978 s 5(6) (amended by the Criminal Justice Act 1988 Sch 15 paras 60, 62(2); and the Criminal Justice and Public Order Act 1994 Sch 10 para 37).

11 Ie under the Protection of Children Act 1978 s 5(2) (as amended) (see the text and note 4 supra) or s 5(6) (as amended) (see the text and note 10 supra).

12 Ibid s 5(7). For these purposes: (1) an application for a case to be stated or for leave to appeal is to be treated as the institution of an appeal; and (2) where a decision on appeal is subject to a further appeal, the appeal is not finally decided until the expiration of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned: s 5(7). As to appeal on conviction on indictment see PARA 1837 et seq post; and as to appeal on summary conviction see PARA 1980 et seq post.

Section 5 (as amended) applies in relation to an item seized under the Criminal Justice and Police Act 2001 s 50 (see PARA 890 post) as if the item had been seized under the Protection of Children Act 1978 s 4 (as amended) (see PARA 759 ante): Criminal Justice and Police Act 2001 s 70, Sch 2 para 10.

## UPDATE

### 747-769 Offences against Decency and Morality

As to the new offence of possession of extreme pornographic images see PARA 769A.

### 760 Forfeiture of indecent photographs or pseudo-photographs of children

TEXT AND NOTES--Replaced. The Protection of Children Act 1978 Schedule (added by the Police and Justice Act 2006 s 39(4), Sch 11) makes provision about the forfeiture of indecent photographs and pseudo-photographs: Protection of Children Act 1978 s 5 (substituted by the Police and Justice Act 2006 s 39(3)).

The Protection of Children Act 1978 Schedule applies where (1) property which has been lawfully seized in England and Wales is in the custody of a constable; (2) ignoring the Schedule, there is no legitimate reason for the constable to retain custody of the property; (3) the constable is satisfied that there are reasonable grounds for believing that the property is or is likely to be forfeitable property; and (4) ignoring the Schedule, the constable is not aware of any person who has a legitimate reason for possessing the property or any readily separable part of it: Schedule para 1(1). 'Forfeitable property' is (a) any indecent photograph or pseudo-photograph of a child; (b) any property which it is not reasonably practicable to separate from any property within head (a) above: Schedule para 1(2). For these purposes, a part of any property is a 'readily separable part' of the property if, in all the circumstances, which include the time and costs involved in separating the property, it is reasonably practicable for it to be separated from the remainder of that property, and it is reasonably practicable for a part of any property to be separated from the remainder if it is reasonably practicable to separate it without prejudicing the remainder of the property or another part of it: Schedule para 1(3), (4). The property must be retained in the custody of a constable until it is returned or otherwise disposed of in accordance with the Schedule: Schedule para 2(1). Nothing in the Police (Property) Act 1897 (see POLICE vol 36(1) (2007 Reissue) PARAS 520-522) applies to property held under the Protection of Children Act 1978 Schedule: Schedule para 2(2). The relevant officer (ie the constable who for the time being has custody of the property) must give notice of the intended forfeiture of the property ('notice of intended forfeiture') to (i) every person whom he believes to have been the owner of the property, or one of its owners, at the time of the seizure of the property; (ii) where the property was seized from premises, every person whom the relevant officer believes to have been an occupier of the premises at that time; and (iii) where the property was seized as a result of a search of any person, that person: Schedule paras 3, 4(1). For the meaning of 'premises' see PARA 759. The notice of intended forfeiture must set out a description of the property and how a person may

give a notice of claim under the Schedule and the period within which such a notice must be given: Schedule para 4(2). The notice must be served in accordance with the Schedule para 4(3)-(7). A person claiming that he has a legitimate reason for possessing the property or a part of it may give notice of his claim to a constable at any police station in the police area in which the property was seized: see Schedule para 5. A notice of claim may not be given more than one month after the date of the giving of the notice of intended forfeiture, or if no such notice has been given, the date on which the property began to be retained under the Schedule: see Schedule para 6. If the property is unclaimed it is treated as forfeited: see Schedule para 7. Where a notice of claim in respect of the property, or part of it, is duly given in accordance with Schedule paras 5, 6, the relevant officer must decide whether to take proceedings to ask the court to condemn the property or a part of it as forfeited: see Schedule para 8. If, in a case in which a notice of claim has been given, the relevant officer decides not to take proceedings for condemnation of the property, or not to take proceedings for condemnation of a part of the property, he must return the property or part to the person who appears to him to have a legitimate reason for possessing the property or, if there is more than one such person, to one of those persons: see Schedule para 9. If, in a case in which a notice of claim has been given, the relevant officer decides to take proceedings for condemnation of the property or a part of it ('the relevant property'), the court must condemn the relevant property if it is satisfied that the relevant property is forfeitable property and that no-one who has given a notice of claim has a legitimate reason for possessing the relevant property: see Schedule para 10. Where the court condemns property in such a way it may order the relevant officer to take such steps in relation to the property or any part of it as it thinks appropriate and where it orders a step to be taken, it may make that order conditional on specified costs relating to the taking of that step being paid by a specified person within a specified period: see Schedule para 11. Proceedings by virtue of the Schedule are civil proceedings and may be instituted in a magistrates' court which has jurisdiction in relation to the place where the property to which the proceedings relate was seized; and 'the court', in the Schedule, is to be construed accordingly: Schedule para 12, 21(1). As to appeals against the decision of the magistrates' court see the Schedule paras 13, 14. See also Schedule para 15 (effect of forfeiture), Schedule paras 16, 17 (disposal of property which is not returned) and Schedule paras 18, 19 (provisions as to proof). As to the circumstances in which a person has a legitimate reason for possessing an indecent photograph of a child see Schedule para 21(2).

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## **(4) VIDEO RECORDINGS AND PROGRAMME SERVICES**

### **761. Supplying video recording of unclassified work.**

A person who supplies<sup>1</sup> or offers to supply a video recording<sup>2</sup> containing<sup>3</sup> a video work<sup>4</sup> in respect of which no classification certificate<sup>5</sup> has been issued is guilty of an offence, unless the supply is an exempted supply<sup>6</sup> (or would be if it took place) or the video work is an exempted work<sup>7</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>8</sup> or to a fine not exceeding £20,000 or to both<sup>9</sup>.

It is a defence to a charge of committing such an offence to prove<sup>10</sup> that the defendant believed on reasonable grounds: (1) that the video work concerned or, if the video recording contained more than one work to which the charge relates, each of those works was either an exempted work or a work in respect of which a classification certificate had been issued; or (2) that the supply was, or would if it took place be, an exempted<sup>11</sup> supply<sup>12</sup>.

It is also a defence to prove<sup>13</sup>: (a) that the commission of the offence was due to the act or default of a person other than the defendant; and (b) that the defendant took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by anyone under his control<sup>14</sup>.

1 For these purposes, 'supply' means supply in any manner, whether or not for reward, and it therefore includes supply by way of sale, letting on hire, exchange or loan; and references to a supply are to be interpreted accordingly: Video Recordings Act 1984 s 1(1), (4).

2 For these purposes, 'video recording' means any disc, magnetic tape or any other device capable of storing data electronically containing information by the use of which the whole or a part of a video work may be produced: *ibid* s 1(1), (3) (s 1(3) amended by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 22, Sch 11).

3 For these purposes, a video recording contains a video work if it contains information by the use of which the whole or a part of the work may be produced; but where a video work includes any extract from another video work, that extract is not to be regarded for these purposes as a part of that other work: Video Recordings Act 1984 s 22(2).

4 For these purposes, 'video work' means any series of visual images (with or without sound): (1) produced electronically by the use of information contained on any disc, magnetic tape or any other device capable of storing data electronically; and (2) shown as a moving picture: *ibid* s 1(1), (2) (s 1(2) amended by the Criminal Justice and Public Order Act 1994 Sch 9 para 22, Sch 11).

5 For these purposes, 'classification certificate' means a certificate issued in respect of a video work in pursuance of arrangements made by the designated authority and satisfying the prescribed requirements: Video Recordings Act 1984 s 7(1). As to classification certificates and the designated authority see LICENSING AND GAMBLING vol 67 (2008) PARA 279.

6 *Ie* an exempted supply within the meaning of *ibid* s 3 (as amended): see LICENSING AND GAMBLING vol 67 (2008) PARA 278.

7 *Ibid* s 9(1). An 'exempted work' means a work exempted under s 3 (as amended): see LICENSING AND GAMBLING vol 67 (2008) PARA 284. Where an offence under the Video Recordings Act 1984 committed by a body

corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of the offence and is liable to be proceeded against and punished accordingly: s 16(1). Where the affairs of a body corporate are managed by its members, s 16(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 16(2). See PARA 38 ante. No prosecution may be brought for an offence under the Video Recordings Act 1984 after the expiry of the period of three years beginning with the date of the commission of the offence or one year beginning with the date of the discovery by the prosecutor, whichever is earlier: s 15(1) (substituted by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 52(3)). As to forfeiture see PARA 763 post. See further LICENSING AND GAMBLING vol 67 (2008) PARAS 290-291. As to supplying a video recording of a classified work in breach of the classification see LICENSING AND GAMBLING vol 67 (2008) PARA 286; as to the supply of specified video recordings otherwise than in a sex shop see LICENSING AND GAMBLING vol 67 (2008) PARA 287; and as to breach of labelling etc requirements see LICENSING AND GAMBLING vol 67 (2008) PARA 288.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post)), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 Video Recordings Act 1984 s 9(3) (added by the Criminal Justice and Public Order Act 1994 s 88(1), (2)).

10 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

11 Is exempted by virtue of the Video Recordings Act 1984 s 3(4) or (5): see LICENSING AND GAMBLING vol 67 (2008) PARA 278.

12 Ibid s 9(2).

13 See note 10 supra.

14 Video Recordings Act 1984 s 14A (added by the Video Recordings Act 1993 s 2). A defendant can rely on this defence, even though he has not taken any positive steps to avoid the commission of the offence, since it is enough under head (b) in the text for the retailer merely to prove that he acted without negligence: *R (on the application of Bilon) v WH Smith Trading Ltd* [2001] EWHC Admin 469, [2001] Crim LR 850 (not negligent in circumstances for defendant retailer to have relied on reputable supplier with whom defendant had dealt for 20 years without any cause for concern).

## UPDATE

### 747-769 Offences against Decency and Morality

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/ (4) VIDEO RECORDINGS AND PROGRAMME SERVICES/762. Possession of video recording of unclassified work for the purposes of supply.

## **762. Possession of video recording of unclassified work for the purposes of supply.**

Where a video recording<sup>1</sup> contains<sup>2</sup> a video work<sup>3</sup> in respect of which no classification certificate<sup>4</sup> has been issued, a person<sup>5</sup> who has the recording in his possession for the purposes of supplying<sup>6</sup> it is guilty of an offence unless he has it in his possession for the purpose only of a supply which, if it took place, would be an exempted supply<sup>7</sup> or the video work is an exempted work<sup>8</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to a term of imprisonment not exceeding six months<sup>9</sup> or to a fine not exceeding £20,000 or to both<sup>10</sup>.

It is a defence to a charge of committing such an offence to prove<sup>11</sup>:

- 856 (1) that the accused believed on reasonable grounds that the video work concerned or, if the video recording contained more than one work to which the charge relates, each of those works was either an exempted work or a work in respect of which a classification certificate had been issued<sup>12</sup>;
- 857 (2) that the accused had the video recording in his possession for the purpose only of a supply which he believed on reasonable grounds would, if it took place, be an exempted<sup>13</sup> supply<sup>14</sup>; or
- 858 (3) that the accused did not intend to supply the video recording until a classification certificate had been issued in respect of the video work concerned<sup>15</sup>.

It is also a defence to prove that the commission of the offence was due to the act or default of a person other than the defendant, and that the defendant took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by anyone under his control<sup>16</sup>.

1 For the meaning of 'video recording' see PARA 761 note 2 ante.

2 As to when a video recording contains a video work see PARA 761 note 3 ante.

3 For the meaning of 'video work' see PARA 761 note 4 ante.

4 For the meaning of 'classification certificate' see PARA 761 note 5 ante.

5 As to offences by bodies corporate see PARA 761 note 7 ante.

6 For the meaning of 'supply' see PARA 761 note 1 ante.

7 I.e. an exempted supply within the meaning of the Video Recordings Act 1984 s 3 (as amended): see LICENSING AND GAMBLING vol 67 (2008) PARA 278.

8 Ibid s 10(1). As to 'exempted work' and the time limit on prosecutions see PARA 761 note 7 ante. As to forfeiture see PARA 763 post. See further LICENSING AND GAMBLING vol 67 (2008) PARA 285.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post)), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

- 10 Video Recordings Act 1984 s 10(3) (added by the Criminal Justice and Public Order Act 1994 s 88(4), (7)).
- 11 See PARA 761 ante.
- 12 See the Video Recordings Act 1984 s 10(2)(a).
- 13 le by virtue of ibid s 3(4) or (5): see LICENSING AND GAMBLING vol 67 (2008) PARA 278.
- 14 See ibid s 10(2)(b).
- 15 See ibid s 10(2)(c).
- 16 See ibid s 14A (added by the Video Recording Act 1993 s 2). See PARA 761 note 14 ante.

## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/ (4) VIDEO RECORDINGS AND PROGRAMME SERVICES/763. Forfeiture.

### **763. Forfeiture.**

Where a person is convicted of an offence of supplying a video recording of an unclassified work or of possessing a video recording of an unclassified work for the purposes of supply<sup>1</sup>, the court may order any video recording produced to the court, and shown to the satisfaction of the court to relate to the offence, to be forfeited<sup>2</sup>. The court may not order any video recording to be so forfeited if a person claiming to be the owner of it or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made<sup>3</sup>. An order may not take effect until the expiration of the ordinary time within which an appeal may be instituted or, where such an appeal is duly instituted, until the appeal is finally decided or abandoned<sup>4</sup>.

1     Ie the offences described in PARAS 761-762 ante, or any other offence under the Video Recordings Act 1984. See LICENSING AND GAMBLING vol 67 (2008) PARA 276 et seq.

2     See *ibid* s 21(1). References in s 21 to a video recording include a reference to any spool, case or other thing on or in which the recording is kept: s 21(3).

3     *Ibid* s 21(2).

4     *Ibid* s 21(4). For these purposes: (1) an application for a case to be stated or for leave to appeal must be treated as the institution of an appeal; and (2) where a decision on appeal is subject to a further appeal, the appeal is not finally decided until the expiration of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned: s 21(4).

## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/9. OFFENCES AGAINST DECENCY AND MORALITY/ (5) OUTRAGING PUBLIC DECENCY/764. Outraging public decency.

## (5) OUTRAGING PUBLIC DECENCY

### 764. Outraging public decency.

It is an indictable offence at common law<sup>1</sup> for a person to commit in public<sup>2</sup> an act of such a lewd, obscene or disgusting nature as to amount to an outrage to public decency, whether or not it tends to deprave and corrupt those who see it<sup>3</sup>. The offence is punishable on conviction on indictment by imprisonment or fine or both at the discretion of the court, or on summary conviction by imprisonment for a term not exceeding six months<sup>4</sup> or a fine not exceeding the prescribed sum or both<sup>5</sup>.

1 As to the restrictions on prosecutions for common law offences contained in the Obscene Publications Act 1959 s 2(4), (4A) (as added and amended), the Theatres Act 1968 s 2(4) (as amended) and the Broadcasting Act 1990 s 162(2), Sch 15 para 6 see PARAS 355, 362 ante.

2 'In public' means that the conduct or matter must occur in a place where there was a real possibility at the time that at least two members of the general public might see it, although not necessarily simultaneously: *R v Walker* [1996] 1 Cr App Rep 111, CA; *Kneller (Printing, Publishing and Promotions) Ltd v DPP* [1973] AC 435 at 494, [1972] 3 All ER 898 at 935-936 per Lord Simon of Glaisdale (with whose speech Lord Kilbrandon agreed). See also *R v Watson* (1847) 2 Cox CC 376; *R v Webb* (1848) 3 Cox CC 183; *R v Farrell* (1862) 9 Cox CC 446; *R v Mayling* [1963] 2 QB 717, 47 Cr App Rep 102, CCA; *R v May* (1989) 91 Cr App Rep 157, CA. If one person is proved to have seen the act and others might have seen it, that is sufficient (*R v May* supra) but the offence is not made out if only one person saw, or could have seen, the act in question (*Rose v DPP* [2006] EWHC 852 (Admin), [2006] All ER (D) 225 (Mar)).

3 *R v Mayling* [1963] 2 QB 717, 47 Cr App Rep 102, CCA; *R v May* (1989) 91 Cr App Rep 157, CA. See also *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, 56 Cr App Rep 633, HL; *Shaw v DPP* [1962] AC 220 at 281, 45 Cr App Rep 113 at 151, HL, per Lord Reid. It is not necessary for the prosecution to prove actual disgust or annoyance on the part of any observer: *R v Mayling* supra. It is sufficient if the act is calculated to have that effect: *R v May* supra. Exposure of the naked person or any other lewd act in public is within the ambit of the offence: *R v Sidney* (1663) 1 Sid 168; *R v Harris* (1871) LR 1 CCR 282 (contrast *R v Walker* [1996] 1 Cr App Rep 111, CA, where indecent exposure to two young girls in defendant's own home was not an outrage to public decency because it was not 'in public'); *R v Mayling* supra (homosexual conduct); *R v Crunden* (1809) 2 Camp 89; *R v Reed* (1871) 12 Cox CC 1 (men bathing nude); *R v May* supra (simulated sexual intercourse). The offence is not limited to acts involving a sexual element: see *R v Lynn* (1788) 2 Term Rep 733 (disinterring a corpse); *R v Saunders* (1875) 1 QBD 15, CCR (showing an indecent exhibition in a booth at Epsom races; public admitted on payment); *R v Gibson*, *R v Sylveire* [1990] 2 QB 619, [1991] 1 All ER 439, CA (public exhibition of earrings made from freeze-dried human fetuses). If the defendant's conduct does not in itself result in an outrage to public decency the offence is not committed, regardless of the defendant's motive or ultimate intent: *R v Rowley* [1991] 4 All ER 649, [1981] 1 WLR 1020, CA. As to conspiracy to outrage public decency see PARA 75 ante. As to indecent displays see also PARA 768 post.

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 1A (added by the Criminal Justice Act 2003 s 320(1)). See also SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139. An offence committed before 20 January 2004 is triable only on indictment: see the Criminal Justice Act 2003 s 320(2); and the Criminal Justice Act 2003 (Commencement No 2 and Saving Provisions) Order 2004, SI 2004/81, art 2.



## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

### **764 Outraging public decency**

NOTE 2--*Rose*, cited, considered: *R v Hamilton* [2007] EWCA Crim 2062, [2008] 1 All ER 1103.

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## **(6) INDECENT MATTER SENT BY POST OR TELEPHONE**

### **765. Sending indecent or obscene prints etc by post.**

A person commits an offence if he sends a postal packet<sup>1</sup> which encloses any indecent or obscene<sup>2</sup> print, painting, photograph, lithograph, engraving, cinematograph film or other record of a picture or pictures, book, card or written communication, or any other indecent or obscene article (whether or not of a similar kind to those described above)<sup>3</sup>. A person commits an offence if he sends by post a postal packet which has on the packet, or on its cover, any words, marks, or designs which are of an indecent or obscene character<sup>4</sup>.

If a person commits an offence under these provisions, he is liable on conviction on indictment to imprisonment for a term not exceeding 12 months or to a fine or to both, or on summary conviction to a fine not exceeding the statutory maximum<sup>5</sup>.

<sup>1</sup> For the meaning of 'postal packet' see PARA 292 note 2 ante.

<sup>2</sup> For the purposes of these provisions, the words 'indecent or obscene' convey one idea, namely offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper end: *R v Stanley* [1965] 2 QB 327, 49 Cr App Rep 175, CCA. This case, like all the other cases referred to in this note which pre-date the enactment of the Postal Services Act 2000, was decided in relation to the Post Office Act 1953 s 11 (repealed) (on which the Postal Services Act 2000 s 85 is closely modelled). The words 'indecent or obscene' are ordinary words of the English language which are readily understood and it is unnecessary, and potentially misleading, to give them an interpretation using other words as that could either narrow or enlarge the meaning of the words of the Postal Services Act 2000 s 85: *R v Kirk* [2006] EWCA Crim 725, [2006] All ER (D) 129 (Mar). Thus 'obscene' in the present provisions bears its ordinary or dictionary meaning; it includes things which are shocking, lewd, indecent and so on: *R v Anderson* [1972] 1 QB 304, 56 Cr App Rep 115, CA; *R v Kirk* supra. The test of obscenity is objective and the character of the addressee is immaterial: *R v Straker* [1965] Crim LR 239, CCA. Cf the test of obscenity under the Obscene Publications Act 1959 (see PARA 748 ante) and the Theatres Act 1968 (see PARA 754 ante) and at common law (see PARA 753 ante). The issue of obscenity or indecency is entirely for the jury to decide and evidence on the issue is not admissible; although the issue is to be determined in relation to recognised standards of propriety, which may vary from age to age, it is entirely for the jury to determine and safeguard the current standards, and evidence as to the current standards to be applied is not admissible: *R v Stamford* [1972] 2 QB 391, 56 Cr App Rep 398, CA. Indecency is to be determined solely by considering the article; the surrounding circumstances are relevant only in mitigation: *Kosmos Publications Ltd v DPP* [1975] Crim LR 345, DC.

<sup>3</sup> Postal Services Act 2000 s 85(3). Insertion of advertisements of indecent books etc obtainable on postal application may constitute the offence: see *R v De Marny* [1907] 1 KB 388, CCR (decided under the Post Office Act 1953 s 11 (repealed)). Where an offence under the Postal Services Act 2000 committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate, or a person purporting to act in such a capacity, he as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly: s 120(1). Where the affairs of a body corporate are managed by its members, s 120(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 120(2). See PARA 38 ante.

<sup>4</sup> See *ibid* s 85(4). See also s 120; and note 3 supra.

<sup>5</sup> See *ibid* s 85(5). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

**747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

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## **766. Improper use of public electronic communications network.**

A person is guilty of an offence if he sends by means of a public electronic communications network<sup>1</sup> a message or other matter that is grossly offensive<sup>2</sup> or of an indecent, obscene<sup>3</sup> or menacing character, or causes any such message or matter to be sent<sup>4</sup>.

A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he sends by such means a message that he knows to be false<sup>5</sup>, causes such a message to be sent, or persistently makes use of a public electronic communications network<sup>6</sup>.

A person guilty of an offence under these provisions is liable on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>8</sup>.

1 For the purposes of the Communications Act 2003, 'electronic communications network' means: (1) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; (2) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals: (a) apparatus comprised in the system; (b) apparatus used for the switching or routing of the signals; and (c) software and stored data: see the Communications Act 2003 ss 32(1), 405(1); and TELECOMMUNICATIONS vol 97 (2010) PARA 60.

2 For these purposes, what is an offensive message, and thus what is a grossly offensive message, has to be judged in the context of the message and by the standards of an open and just multi-racial society (ie via the application of reasonably enlightened, but not perfectionist, contemporary standards): *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223, [2006] All ER (D) 249 (Jul). Whether a message falls into the category of grossly offensive depends on whether it is couched in terms liable to cause gross offence to those to whom it relates, and for an offence to be committed the defendant has to intend his words to be grossly offensive to those to whom they relate, or be aware that they might be taken to be so: *DPP v Collins* supra.

3 See PARA 765 note 2 ante.

4 Communications Act 2003 s 127(1). Where a body corporate is guilty of an offence under the Communications Act 2003 and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and liable to be proceeded against and punished accordingly: s 404(1). Where the affairs of a body corporate are managed by its members, 'director' means a member of the body corporate: s 404(3). The provisions of s 127(1), (2) (see the text and notes 5, 6 infra) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990): see the Communications Act 2003 s 127(4); and TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARAS 328; TELECOMMUNICATIONS vol 97 (2010) PARA 196. As to threatening telephone calls see also PARA 105 ante; and as to harassment by telephone calls see PARA 152 ante.

5 As to bomb hoaxes see PARA 853 post.

6 Communications Act 2003 s 127(2). See also ss 127(4), 404(1), (3); and note 4 supra.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

8 See the Communications Act 2003 s 127(3). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

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### **767. Malicious, including indecent, communications.**

Any person who sends<sup>1</sup> to another person:

- 859 (1) a letter, electronic communication<sup>2</sup> or article of any description which conveys<sup>3</sup>:
- 25
- 34. (a) a message which is indecent<sup>4</sup> or grossly offensive<sup>5</sup>;
  - 35. (b) a threat<sup>6</sup>; or
  - 36. (c) information which is false and known or believed to be false by the sender<sup>7</sup>;
- or
- 26
- 860 (2) any article or electronic communication which is, in whole or in part, of an indecent or grossly offensive nature<sup>8</sup>,

is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within head (1) or head (2) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated<sup>9</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>10</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>11</sup>.

A person is not guilty of an offence under head (1)(b) above, however, if he shows: (i) that the threat was used to reinforce a demand made by him on reasonable grounds; and (ii) that he believed and had reasonable grounds for believing that the use of the threat was a proper means of reinforcing the demand<sup>12</sup>.

1 For these purposes, references to sending include references to delivering or transmitting and causing to be sent or delivered or transmitted; and 'sender' is to be construed accordingly: Malicious Communications Act 1988 s 1(3) (amended by the Criminal Justice and Police Act 2001 s 43(4)).

2 For these purposes, 'electronic communication' includes: (1) any oral or other communication by means of an electronic communication network (see TELECOMMUNICATIONS vol 97 (2010) PARA 60); and (2) any communication (however sent) that is in electronic form: *ibid* s 1(2A) (added by the Criminal Justice and Police Act 2001 s 43(3); and amended by the Communications Act 2003 s 406(1), Sch 17 para 90).

3 See the Malicious Communications Act 1988 s 1(1)(a) (amended by the Criminal Justice and Police Act 2001 s 43(1)(a)).

4 See PARA 765 note 2 ante.

5 Malicious Communications Act 1988 s 1(1)(a)(i). See PARA 766 note 2 ante.

6 *Ibid* s 1(1)(a)(ii). As to threats to kill see PARA 105 ante.

7 *Ibid* s 1(1)(a)(iii).

8 *Ibid* s 1(1)(b).

9 See *ibid* s 1(1).

10 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

11 Malicious Communications Act 1988 s 1(4) (amended by the Criminal Justice and Police Act 2001 s 43(5)). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

12 Malicious Communications Act 1988 s 1(2) (amended by the Criminal Justice and Police Act 2001 s 43(2)). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

## UPDATE

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

### **767-768 Malicious, including indecent, communications, Indecent displays**

Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **767 Malicious, including indecent, communications**

NOTE 5--A communication which is educational or political in nature may be indecent or grossly offensive within the meaning of the 1988 Act s 1(1): *Connolly v DPP* [2007] EWHC 237 (Admin), [2007] 2 All ER 1012.

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## **(7) INDECENT DISPLAYS**

### **768. Indecent displays.**

If any indecent<sup>1</sup> matter<sup>2</sup> is publicly displayed<sup>3</sup>, the person making the display and any person causing or permitting the display to be made is guilty of an offence<sup>4</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to a fine not exceeding the statutory maximum<sup>5</sup>.

Nothing in these provisions applies, however, in relation to any matter:

- 861 (1) included in a television broadcasting service or other television programme service<sup>6</sup> by any person<sup>7</sup>; or
- 862 (2) included in the display of an art gallery or museum and visible only from within the gallery or museum<sup>8</sup>; or
- 863 (3) displayed by or with the authority of, and visible only from within a building occupied by, the Crown or any local authority<sup>9</sup>; or
- 864 (4) included in a performance of a play<sup>10</sup>; or
- 865 (5) included in an exhibition of a film<sup>11</sup>: (a) given in a place which as regards that exhibition is required to be licensed<sup>12</sup> or which in specified circumstances<sup>13</sup> is not required to be so licensed; or (b) which is an exhibition<sup>14</sup> given by an exempted<sup>15</sup> organisation<sup>16</sup>.

A constable may seize any article which he has reasonable grounds for believing to be or to contain indecent matter and to have been used in the commission of an offence under these provisions<sup>17</sup>. A justice of the peace, if satisfied on information on oath that there are reasonable grounds for suspecting that such an offence has been or is being committed on any premises, may issue a warrant authorising any constable to enter the premises specified in the information (if need be by force) to seize any article which the constable has reasonable grounds for believing to be or to contain indecent matter and to have been used in the commission of such an offence<sup>18</sup>.

1 For these purposes, in determining whether any displayed matter is indecent: (1) there is to be disregarded any part of that matter which is not exposed to view; and (2) account may be taken of the effect of juxtaposing one thing with another: Indecent Displays (Control) Act 1981 s 1(5).

2 For these purposes, 'matter' includes anything capable of being displayed, except that it does not include an actual human body or part thereof: *ibid* s 1(5).

3 For these purposes, any matter which is displayed in or so as to be visible from any public place is deemed to be publicly displayed: *ibid* s 1(2). 'Public place', in relation to the display of any matter, means any place to which the public has or is permitted to have access (whether on payment or otherwise) while that matter is displayed except: (1) a place to which the public is permitted to have access only on payment which is or includes payment for that display; or (2) a shop or any part of a shop to which the public can only gain access by passing beyond an adequate warning notice, but the exclusions in heads (1), (2) *supra* only apply where persons under the age of 18 years are not permitted to enter while the display in question is continuing: s 1(3). A warning notice is not adequate unless it complies with the following requirements:



- 192 (a) the warning notice must contain the following words, and no others: 'WARNING Persons passing beyond this notice will find material on display which they may consider indecent. No admittance to persons under 18 years of age' (s 1(6)(a));
- 193 (b) the word 'WARNING' must appear as a heading (s 1(6)(b));
- 194 (c) no pictures or other matter may appear on the notice (s 1(6)(c));
- 195 (d) the notice must be so situated that no one could reasonably gain access to the shop or part of the shop in question without being aware of the notice, and it must be easily legible by any person gaining such access (s 1(6)(d)).

4 Ibid s 1(1). Where a body corporate is guilty of an offence under the Indecent Displays (Control) Act 1981 and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other officer of the body, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is deemed to be guilty of such an offence and is liable to be proceeded against and punished accordingly: s 3(1). Where the affairs of a body corporate are managed by its members, s 3(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 3(2). See PARA 38 ante.

5 Ibid s 4(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

6 Ie within the meaning of the Broadcasting Act 1990 Pt 1 (as amended): see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARAS 262, 269.

7 See the Indecent Displays (Control) Act 1981 s 1(4)(a) (substituted by the Broadcasting Act 1990 s 203(1), Sch 20 para 30).

8 Indecent Displays (Control) Act 1981 s 1(4)(b).

9 Ibid s 1(4)(c).

10 See ibid s 1(4)(d) (substituted by the Licensing Act 2003 s 198(1), Sch 6 para 80(a)). 'Performance of a play' means a performance, including rehearsal, of any dramatic piece (whether involving improvisation or not): (1) which is given wholly or in part by one or more persons actually present and performing; and (2) in which the whole or a major proportion of what is done by the person or persons performing (whether by way of speech, singing or action) involves the playing of a role: Licensing Act 2003 s 1, Sch 1 para 14(1).

11 'Exhibition of a film' means any exhibition of moving pictures: ibid Sch 1 para 15.

12 Ie licensed under ibid s 1 (as amended): see LICENSING AND GAMBLING vol 67 (2008) PARA 26 et seq.

13 Ie by virtue only of the Cinemas Act 1985 s 5 (repealed) (exhibitions in private dwelling houses), s 7 (repealed) (exhibitions in premises used occasionally) or s 8 (repealed) (exhibitions in movable buildings etc).

14 Ie an exhibition to which ibid s 6 (repealed) (other non-commercial exhibitions) applies.

15 For the meaning of 'exempted organisation' see ibid s 6(6) (repealed).

16 Indecent Displays (Control) Act 1981 s 1(4)(e) (amended by the Licensing Act 2003 Sch 6 para 80(b)).

17 Indecent Displays (Control) Act 1981 s 2(2).

18 Ibid s 2(3) (amended by the Police and Criminal Evidence Act 1984 s 119(2), Sch 7 Pt I). As to powers of entry, search and seizure see PARA 869 et seq post. As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

## UPDATE

### 747-769 Offences against Decency and Morality

As to the new offence of possession of extreme pornographic images see PARA 769A.

### 767-768 Malicious, including indecent, communications, Indecent displays

Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **(8) UNSOLICITED PUBLICATIONS ON HUMAN SEXUAL TECHNIQUES**

### **769. Unsolicited matter describing or illustrating human sexual techniques.**

A person who sends<sup>1</sup> or causes to be sent to another person any book, magazine or leaflet (or advertising material for any such publication)<sup>2</sup> which he knows or ought reasonably to know is unsolicited<sup>3</sup> and which describes or illustrates human sexual techniques, is guilty of an offence<sup>4</sup>. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>5</sup>.

Proceedings for such an offence may not be instituted except by or with the consent of the Director of Public Prosecutions<sup>6</sup>.

1 For these purposes, 'send' includes deliver: Unsolicited Goods and Services Act 1971 s 6(1).

2 The offence is committed even though the advertising material does not itself describe or illustrate human sexual techniques: *DPP v Beate Uhse (UK) Ltd* [1974] QB 158, [1974] 1 All ER 753, DC.

3 For these purposes, 'unsolicited', in relation to goods sent to any person, means that they are sent without any prior request made by him or on his behalf: Unsolicited Goods and Services Act 1971 s 6(1).

4 Ibid s 4(1). Where such an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary, or other similar officer of the body corporate, or of any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and liable to be proceeded against and punished accordingly: s 5(1). Where the affairs of a body corporate are managed by its members, s 5(1) applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 5(2). See PARA 38 ante.

5 Ibid s 4(2) (amended by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

6 Unsolicited Goods and Services Act 1971 s 4(3). As to the effect of this limitation see PARA 1071 post.

## **UPDATE**

### **747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

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### **769A. Possession of extreme pornographic images.**

It is an offence for a person to be in possession of an extreme pornographic image: Criminal Justice and Immigration Act 2008 s 63(1). An 'extreme pornographic image' is an image which is both pornographic, and an extreme image: s 63(2). An image is 'pornographic' if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal: s 63(3). Where (as found in the person's possession) an image forms part of a series of images, the question whether the image is of such a nature as is mentioned in s 63(3) is to be determined by reference to (1) the image itself, and (2) (if the series of images is such as to be capable of providing a context for the image) the context in which it occurs in the series of images: s 63(4). So, for example, where (a) an image forms an integral part of a narrative constituted by a series of images, and (b) having regard to those images as a whole, they are not of such a nature that they must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal, the image may, by virtue of being part of that narrative, be found not to be pornographic, even though it might have been found to be pornographic if taken by itself: s 63(5). An 'extreme image' is an image which falls within s 63(7), and is grossly offensive, disgusting or otherwise of an obscene character: s 63(6). An image falls within s 63(7) if it portrays, in an explicit and realistic way, any of the following (i) an act which threatens a person's life, (ii) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals, (iii) an act which involves sexual interference with a human corpse, or (iv) a person performing an act of intercourse or oral sex with an animal (whether dead or alive), and a reasonable person looking at the image would think that any such person or animal was real: s 63(7). In s 63 'image' means (A) a moving or still image (produced by any means); or (B) data (stored by any means) which is capable of conversion into an image within head (A): s 63(8). In s 63 references to a part of the body include references to a part surgically constructed (in particular through gender reassignment surgery): s 63(9). Proceedings for an offence under s 63 may not be instituted in England and Wales, except by or with the consent of the Director of Public Prosecutions: s 63(10).

Section 63 does not apply to excluded images (images which form part of a series of images contained in a recording of the whole or part of a classified work): see Criminal Justice and Immigration Act 2008 s 64.

A series of defences to the offence of possession of extreme pornographic images is set out: see Criminal Justice and Immigration Act 2008 s 65. Provision is also made for an additional defence relating to the participation in consensual acts: see Criminal Justice and Immigration Act 2008 s 66.

The penalties that will apply to persons found guilty of an offence under s 63 are set out: see Criminal Justice and Immigration Act 2008 s 67. For transitional provision see Criminal Justice and Immigration Act 2008 Sch 27 para 23.

Special provision is made in connection with the operation of s 63 in relation to persons providing information society services: see Criminal Justice and Immigration Act 2008 s 68, Sch 14.

### **UPDATE**

**747-769 Offences against Decency and Morality**

As to the new offence of possession of extreme pornographic images see PARA 769A.

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## 10. OFFENCES RELATING TO CONTROLLED DRUGS ETC

### (1) CONTROLLED DRUGS

#### 770. Unlawful possession of a controlled drug.

It is an offence<sup>1</sup> for a person: (1) to have a controlled drug<sup>2</sup> in his possession<sup>3</sup> unlawfully<sup>4</sup>; or (2) to incite another to commit an offence under head (1) above<sup>5</sup>. A person guilty of such an offence is liable on conviction on indictment or on summary conviction to imprisonment or to a fine or to both; the maximum penalties vary to some extent, dependent upon the controlled drug in relation to which the offence was committed<sup>6</sup>.

In any proceedings for an offence under head (1) above in which it is proved that the defendant had a controlled drug in his possession, it is a defence for him to prove<sup>7</sup> that, knowing or suspecting it to be a controlled drug:

- 866 (a) he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and, as soon as possible after taking possession of it, took all such steps as were reasonably open to him to destroy<sup>8</sup> the drug or to deliver it into the custody of a person lawfully entitled to take custody of it<sup>9</sup>; or
- 867 (b) he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and, as soon as possible after taking possession of it, took all such steps as were reasonably open to him to deliver it into the custody of such a person<sup>10</sup>.

1 On the authority of *R v Courtie* [1984] AC 463, 78 Cr App Rep 292, HL it is submitted that there is more than one offence, because of the difference in penalties imposed: see note 7 infra. *R v Courtie* supra has been applied to the Customs and Excise Management Act 1979 s 170 (as amended): see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1232. Cf the statement in *R v Leeson* [2000] 1 Cr App Rep 233 at 238, CA, per Roch LJ: 'The only relevance of the different classes of drug . . . is that that factor affects the sentence that can be passed on conviction'. This statement was made without reference to *R v Courtie* supra.

Where any offence under the Misuse of Drugs Act 1971 or the Criminal Justice (International Co-operation) Act 1990 Pt II (ss 12-24) (as amended) committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against accordingly: Misuse of Drugs Act 1971 s 21 (amended by the Criminal Justice (International Co-operation) Act 1990 s 23(3); the Drug Trafficking Act 1994 s 65(1), Sch 1 para 3; and the Proceeds of Crime Act 2002 s 457, Sch 12). See PARA 38 ante.

As to the power of the Secretary of State to make grants in relation to combating drug misuse and drug trafficking see the Criminal Justice Act 1993 s 73.

2 'Controlled drug' means any substance or product for the time being specified in the Misuse of Drugs Act 1971 s 2(1)(a), Sch 2 Pt I, II or III (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 239-241): s 2(1)(a). Her Majesty may by Order in Council amend Sch 2: see s 2(2)-(5). The list of controlled drugs divides them into three classes: Class A, Class B and Class C. The expressions 'Class A drug', 'Class B drug' and 'Class C drug' mean any of the substances and products for the time being specified respectively in Sch 2 Pts I, II and III (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 239-241): s 2(1)(b). This classification is relevant in terms of the maximum punishments for some offences under the Misuse of Drugs Act 1971. In addition, some

statutory provisions (in other statutes) only apply to Class A drugs. Unlawful possession of any controlled drug described in Sch 2 by its scientific name is not established by proof of possession of naturally occurring material of which the described drug is one of the unseparated constituents; and this is so whether or not the naturally occurring material is also included as another item in the list of controlled drugs: *DPP v Goodchild* [1978] 2 All ER 161, 67 Cr App Rep 56, HL. As to the admissibility as evidence of an admission by a defendant that the substance in his possession is a controlled drug see *R v Chatwood* [1980] 1 All ER 467, sub nom *R v Chatwood, R v Egan, R v Flaherty, R v Proctor, R v Walker* (1979) 70 Cr App Rep 39, CA.

3 For these purposes, the things which a person has in his possession are to be taken to include any thing subject to his control which is in the custody of another: Misuse of Drugs Act 1971 s 37(3). It is for the prosecution to prove basic possession: *R v McNamara* (1988) 87 Cr App Rep 246, CA. As to possession see PARA 771 post.

4 Ie in contravention of the Misuse of Drugs Act 1971 s 5(1). For these purposes, 'contravention' includes failure to comply; and 'contravene' has a corresponding meaning: s 37(1). Subject to any regulations under s 7 for the time being in force (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 259), it is not lawful for a person to have a controlled drug in his possession: s 5(1). As to the statutory defences see the text and notes 7-10 infra; and PARA 778 post.

The Secretary of State may by regulations made by statutory instrument make provision for excluding in such cases as may be prescribed the application of any provision of the Act which creates an offence: see ss 22(a)(i), 31(1)-(3); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 242-243.

Notwithstanding anything in the Magistrates' Courts Act 1980 s 127(1) (limitation of time: see MAGISTRATES vol 29(2) (Reissue) PARA 589), a magistrates' court may try an information for an offence under the 1971 Act if the information was laid at any time within 12 months from the commission of the offence: Misuse of Drugs Act 1971 s 25(4) (amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 103). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 post. At the date at which this volume states the law no such day had been appointed.

As to possession of a controlled drug with intent to supply another unlawfully see PARA 772 post.

Transporting or storing a controlled drug where possession contravenes the Misuse of Drugs Act 1971 s 5(1) is drug trafficking for the purposes of the Drug Trafficking Act 1994 ss 55-59 (as amended) (see PARA 784 et seq post): s 59A(4)(b) (s 59A added by the Proceeds of Crime Act 2002 s 456, Sch 11 paras 1, 25(1), (4)).

5 Misuse of Drugs Act 1971 ss 5(2), 19 (amended by the Criminal Attempts Act 1981 ss 10, 11, Sch Pt I). See also note 4 supra. The Misuse of Drugs Act 1971 s 19 (as amended) applies to an incitement to commit any offence under the Misuse of Drugs Act 1971: *R v Marlow* [1998] 1 Cr App Rep (S) 273, [1997] Crim LR 897, CA.

An offence of incitement under the Misuse of Drugs Act 1971 s 19 (as amended) is punishable on summary conviction, on indictment or in either way according to whether, under Sch 4 (as amended) (see note 6 infra), the substantive offence is punishable on summary conviction, on indictment or in either way; and the penalties which may be imposed on a person so convicted are the same as those which under Sch 4 (as amended) may be imposed on a person convicted of the substantive offence (ie the offence to which the incitement mentioned in s 19 (as amended) was directed): s 25(3) (amended by the Criminal Attempts Act 1981 ss 10, 11, Schedule Pt I). As to incitement see PARA 65 ante.

Except where a charge is brought against a person under 17 and subject to the Bail Act 1976 s 4 (see PARA 1169 post), where a person is brought before a magistrates' court on a charge of an offence against the Misuse of Drugs Act 1971 s 5(2) or a drug trafficking offence and the court has power to remand him, it may, if it considers it appropriate to do so, remand him to the custody of an officer of Revenue and Customs or a constable for a period not exceeding 192 hours: see the Criminal Justice Act 1988 s 152(1), (1A), (2) (s 152(1A) added by the Drugs Act 2005 s 8(b)); and the Commissioners for Revenue and Customs Act 2005 s 50(2), (7). As to officers of Revenue and Customs see PARA 354 note 2 ante.

6 Misuse of Drugs Act 1971 s 25(1), (2), Sch 4 (amended by the Criminal Law Act 1977 ss 27, 28, Sch 5; the Magistrates' Courts Act 1980 ss 31, 32; and the Criminal Justice and Public Order Act 1994 s 157(2), Sch 8 Pt II). In the case of a Class A drug the maxima are, on conviction on indictment, imprisonment for seven years or a fine or both, or, on summary conviction, imprisonment for six months or a fine of the prescribed sum or both; in the case of a Class B drug the maxima are, on conviction on indictment, imprisonment for five years or a fine or both, or, on summary conviction, imprisonment for three months or a fine of £2,500 or both; and in the case of a Class C drug the maxima are, on conviction on indictment, imprisonment for two years or a fine or both, or, on summary conviction, imprisonment for three months or a fine of £1,000 or both: see the Misuse of Drugs Act 1971 Sch 4 (as so amended). As from a day to be appointed the maximum terms of imprisonment on summary conviction are increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

As to the power to order forfeiture of anything shown to relate to the offence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 480.

7 In *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, [2001] 3 All ER 577, it was held that 'prove' in the Misuse of Drugs Act 1971 s 28 (defence of lack of knowledge etc) simply placed an evidential burden on the defendant, rather than the legal (or persuasive) burden: see PARA 1368 et seq post. The House of Lords did not deal with the meaning of 'prove' in s 5(4) but the same interpretation might be expected to apply.

8 It is not enough for the defendant simply to show that he left the drug to be destroyed by the forces of nature (eg by burying it); what is required are reasonable steps by the defendant to destroy the drug by his own acts: *R v Murphy* [2002] EWCA Crim 1587, [2003] 1 WLR 422, [2003] 1 Cr App Rep 276.

9 Misuse of Drugs Act 1971 s 5(4)(a). See also note 10 infra.

10 Ibid s 5(4)(b). Nothing in s 5(4) prejudices any defence which it is open to a person charged with an offence under s 5 to raise apart from s 5(4): s 5(6) (amended by the Criminal Attempts Act 1981 s 10, Schedule Pt I). As to the statutory defence available to a person charged with an offence under the Misuse of Drugs Act 1971 s 5(2) (see the text to note 5 supra) see PARA 778 post.

The right to private life under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 does not include a right to possess a controlled drug, and, even if it did, a prosecution under the Misuse of Drugs Act 1971 s 5(2) would be a proportionate interference within the terms of art 8(2) of the Convention: *R v Morgan* [2002] EWCA Crim 721. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. On the ground of public policy, freedom of religion is no defence to the unlawful possession of a drug; and even if it were the case that a prosecution under the Misuse of Drugs Act 1971 s 5(2) interferes with the right to freedom of religion under the art 9 of the Convention, that interference would be justified under art 9(2): *R v Taylor* [2001] EWCA Crim 2263, [2002] 1 Cr App Rep 519. As to freedom of religion see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 156-157.



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### 771. Meaning of 'possession'.

The question of what constitutes possession is an illusive concept at common law<sup>1</sup>. A person has a controlled drug<sup>2</sup> in his possession when he has physical control or custody of a thing plus knowledge that he has it in his custody and control. He may possess a controlled drug without knowing or comprehending its nature; but he does not possess it unless he knows he has it<sup>3</sup>.

The quantity of the drug is important in two respects: (1) whether the quantity is sufficient to enable the court to find as a matter of fact that it amounts to something<sup>4</sup>; (2) if the quantity is minute, whether the defendant knew that he possessed something<sup>5</sup>. It is no defence that the presence of the drug has been forgotten<sup>6</sup>; nor will ignorance or mistake as to the quality of a substance prevent the defendant from being in possession of it if that substance turns out to be a controlled drug<sup>7</sup>.

If the defendant orders a controlled drug and directs that it be sent by post to his address, he is in possession of such drug from the time it arrives through the letter box<sup>8</sup>.

If the drug is in a container, the defendant does not automatically possess the drug, although he possesses the container<sup>9</sup>.

Where several drugs are specified in the particulars of charge, proof of any of them is sufficient<sup>10</sup>. Where defendants are jointly charged, joint possession must be established; mere knowledge of the existence of the drugs on the part of a defendant does not amount to possession by him<sup>11</sup>.

1 *R v Lewis* (1988) 87 Cr App Rep 270 at 275 per LJ May, CA.

2 For the meaning of 'controlled drug' see PARA 770 note 2 ante.

3 *R v Boyesen* [1982] AC 768, 75 Cr App Rep 51, HL; *Warner v Metropolitan Police Comr* [1969] 2 AC 256, 52 Cr App Rep 373, HL; *R v Lewis* (1988) 87 Cr App Rep 270, CA; *R v Conway* [1994] Crim LR 826, CA.

4 If it is visible, touchable and measurable, it is certainly something: *R v Boyesen* [1982] AC 768, 75 Cr App Rep 51, HL, explaining *Bocking v Roberts* [1974] QB 307, [1973] 3 All ER 962, DC. See also *R v Worsell* [1969] 2 All ER 1183, 53 Cr App Rep 322, CA; *R v Graham* [1969] 2 All ER 1181, [1970] 1 WLR 113n, CA (scrappings in defendant's pockets sufficient to be measured).

5 See *Police v Emirali* [1976] 1 NZLR 286; *R v Colyer* [1974] Crim LR 243; *R v Hierowski* [1978] Crim LR 563; *R v Boyesen* [1982] AC 768, 75 Cr App Rep 51, HL (overruling *R v Carver* [1978] QB 472, 67 Cr App Rep 352, CA). A small trace of a drug may prove earlier possession (*R v Worsell* [1969] 2 All ER 1183, 53 Cr App Rep 322, CA; *R v Graham* [1969] 2 All ER 1181, [1970] 1 WLR 113n, CA), but care must be taken in bringing charges (*R v Pragliola* [1977] Crim LR 612 (pipe contained drug trace; pipe returned to defendant; defendant charged with possession of drug; charge oppressive and not justifiable)). A defendant is not in possession of a drug when a trace of amphetamine powder is found in a urine sample, because of the changed character of the substance; but a sample may prove possession at an earlier time: *Hambleton v Callinan* [1968] 2 QB 427, [1968] 2 All ER 943, DC. The admissibility as evidence of a urine sample required by the police, to determine possession, is at the discretion of the trial judge depending on the facts of the particular case: *R v Beet* (1977) 66 Cr App Rep 188, CA; and see PARA 1365 post. If a man smokes cannabis resin, he does have cannabis resin in his possession at the time of the smoking: *Chief Constable of Cheshire Constabulary v Hunt* (1983) 147 JP 567, DC.

6 *R v Martindale* [1986] 3 All ER 25, 84 Cr App Rep 31, CA, following *R v Buswell* [1972] 1 All ER 75, CA, and not following *R v Russell* (1984) 81 Cr App Rep 315, CA.

7 *Searle v Randolph* [1972] Crim LR 779, DC; *Lockyer v Gibb* [1967] 2 QB 243, [1966] 2 All ER 653, DC; *R v Marriott* [1971] 1 All ER 595, 55 Cr App Rep 82, CA; *R v McNamara* (1988) 87 Cr App Rep 246, CA; *R v Lewis* (1988) 87 Cr App Rep 270, CA.

8 *R v Peaston* (1978) 69 Cr App Rep 203, CA.

9 *Warner v Metropolitan Police Comr* [1969] 2 AC 256, 52 Cr App Rep 373, HL. Possession of the container leads to a strong inference that the defendant was in possession of the contents: *R v McNamara* (1988) 87 Cr App Rep 246, CA. It would appear that the defendant is not in possession of a drug in a container when: (1) he is completely mistaken as to the nature of the contents of the container (confirmed in *R v McNamara* supra); (2) he does not suspect that there is anything wrong with those contents: *Warner v Metropolitan Police Comr* supra (decided under the Drugs (Prevention of Misuse) Act 1964 s 1(1) (repealed)); *R v Wright* (1975) 62 Cr App Rep 169, CA (not in possession when drug was in tin which the defendant was handed; he did not know or suspect what it contained and, having been told to throw it away, he did so immediately); *R v Ashton-Rickardt* [1978] 1 All ER 173, 65 Cr App Rep 67, CA; *R v Peaston* (1978) 69 Cr App Rep 203, CA.

The prosecution has the initial burden of proving that the defendant had, and knew that he had, the box in his control and also that the box contained something. That establishes the necessary possession. The prosecution must also prove that the box in fact contained the drug alleged: *R v McNamara* supra. As to the statutory defence which may then arise see PARA 778 post. Cf the approach to possession of drugs in a house rather than a container: see *R v Lewis* (1988) 87 Cr App Rep 270, CA. A man does not possess something put into his house or pocket without his knowledge: *R v McNamara* supra.

10 *R v Leeson* [2000] 1 Cr App Rep 233, [2000] Crim LR 195, CA. See also *R v Peevey* (1973) 57 Cr App Rep 554, CA.

11 *R v Searle* [1971] Crim LR 592, CA. An appropriate direction would be to invite the jury to consider whether the drugs formed a common pool from which all had the right to draw at will and whether there was a joint enterprise to consume drugs together because then the possession of drugs by one in pursuance of that common enterprise might well be possession on the part of all: *R v Searle* supra. See also *R v Wright* (1975) 119 Sol Jo 825, CA; *R v Strong*, *R v Berry* [1989] 10 LS Gaz R 41, CA (mere presence in the same vehicle as the drug and in particular where there was no evidence of knowledge cannot amount to evidence from which the jury can properly infer possession, whether individual or joint).

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**772. Unlawful production or supply of controlled drugs; possession with intent to supply unlawfully.**

It is an offence for a person<sup>1</sup>:

- 868 (1) to produce<sup>2</sup> a controlled drug<sup>3</sup> unlawfully<sup>4</sup> or to be concerned in the production of such a drug unlawfully<sup>5</sup>;
- 869 (2) to supply<sup>6</sup> or offer to supply<sup>7</sup> a controlled drug<sup>8</sup> to another<sup>9</sup> unlawfully<sup>10</sup> or to be concerned<sup>11</sup> in the supplying of such a drug to another unlawfully or to be concerned in the making to another unlawfully of an offer to supply such a drug<sup>12</sup>;
- 870 (3) to have a controlled drug in his possession<sup>13</sup>, whether lawfully or not, with intent to supply<sup>14</sup> it to another unlawfully<sup>15</sup>;
- 871 (4) to incite another to commit an offence under head (1), (2) or (3) above<sup>16</sup>.

A person guilty of any such offence is liable on conviction on indictment or on summary conviction to imprisonment or to a fine or to both; the maximum penalties vary to some extent, dependent upon the controlled drug in relation to which the offence was committed<sup>17</sup>.

Where a court is considering the seriousness of an offence under head (2) above<sup>18</sup>, and at the time the offence was committed the offender had attained the age of 18<sup>19</sup>, then if either of the two conditions set out below is met the court: (a) must treat the fact that the condition is met as an aggravating factor (that is to say, a factor that increases the seriousness of the offence)<sup>20</sup>; and (b) must state in open court that the offence is so aggravated<sup>21</sup>. The first condition is that the offence was committed on or in the vicinity of school premises at a relevant time<sup>22</sup>. The second condition is that in connection with the commission of the offence the offender used a courier who, at the time the offence was committed, was under the age of 18<sup>23</sup>.

1 Unless the contrary intention appears, this includes a body of persons corporate or unincorporate: Interpretation Act 1978 s 5, Sch 1. As to the liability of directors and officers where an offence is committed by a body corporate see the Misuse of Drugs Act 1971 s 21 (as amended); and PARA 770 note 1 ante. As to the manufacture and supply of substances to be used in the supply of a controlled drug see PARA 773 post.

2 For these purposes, 'produce', where the reference is to producing a controlled drug, means producing it by manufacture, cultivation or any other method; and 'production' has a corresponding meaning: Misuse of Drugs Act 1971 s 37(1). See also *R v Russell* (1991) 94 Cr App Rep 351, CA (conversion of cocaine hydrochloride into free base cocaine constituted 'production'); *R v Harris*, *R v Cox* [1996] 1 Cr App Rep 369, CA ('production' of cannabis includes stripping cannabis plants (which are themselves controlled drugs) after they have been cut and harvested in order to produce that part which is a controlled drug; in those circumstances, the 'other method' involves discarding the parts of the plant which are not usable, and putting together the parts which are).

3 For the meaning of 'controlled drug' see PARA 770 note 2 ante.

4 ie in contravention of the Misuse of Drugs Act 1971 s 4(1)(a). For the meaning of 'contravention' see PARA 770 note 4 ante. Subject to any regulations under s 7 for the time being in force (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 259), it is not lawful for a person: (1) to produce a controlled drug; or (2) to supply or offer to supply a controlled drug to another: s 4(1).

Producing or supplying a controlled drug where the production or supply contravenes s 4(1) is drug trafficking for the purposes of the Drug Trafficking Act 1994 ss 55-59 (as amended) (see PARA 784 et seq post): s 59A(4)(a) (s 59A added by the Proceeds of Crime Act 2002 s 456, Sch 11 paras 1, 25(1), (4)).

5 Misuse of Drugs Act 1971 s 4(2). As to the statutory defence see PARA 778 post. The Secretary of State may by regulations made by statutory instrument make provision for excluding in such cases as may be prescribed the application of any provision of the Act which creates an offence: see ss 22(a)(i), 31(1)-(3); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 242-243.

An offence contrary to s 4(2) or s 4(3) (see head (2) in the text) or s 5(3) (see head (3) in the text) is a 'lifestyle offence' for the purposes of the Proceeds of Crime Act 2002 s 75 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393): s 75(2)(a), Sch 2 para 1(1)(a), (b). In respect of a 'lifestyle offence', the court may make a financial reporting order under the Serious Organised Crime and Police Act 2005 s 76 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-476).

6 For these purposes, 'supplying' includes distributing: Misuse of Drugs Act 1971 s 37(1). The word 'supply' appears in s 4(1)(b) which is referred to for the purposes of creating the offences under heads (2) and (3) in the text. The meaning of the word is, therefore, the same for both offences. 'Supplying' must be given its ordinary natural meaning: *Holmes v Chief Constable Merseyside Police* [1976] Crim LR 125, DC; *R v Maginnis* [1987] AC 303, 85 Cr App Rep 127, HL. The word 'supply' in its ordinary natural meaning conveys the idea of furnishing or providing to another something which is wanted or required in order to meet the wants or requirements of that other. It connotes more than the mere transfer of physical control of some chattel or object from one person to another. The additional concept is that of enabling the recipient to apply the thing handed over to purposes for which he desires or has a duty to apply it: *R v Maginnis* supra. A person who places drugs in temporary custody with another person is not supplying, because the person having custody of them will not use the drugs for his own use: *R v Maginnis* supra, approving *R v Dempsey* (1985) 82 Cr App Rep 291, CA (defendant, a registered drug addict, asked the other defendant to hold some drugs for him while he went to the toilet; defendant's conviction for supplying other defendant quashed). On the other hand, the person having custody (even if involuntary: *R v Panton* [2001] EWCA Crim 611, [2001] All ER (D) 134 (Mar)) supplies when he hands back the controlled drugs to the person who had deposited them with him so as to enable those persons to apply the drugs to their own purposes: *R v Maginnis* supra, approving *R v Delgado* [1984] 1 All ER 449, 78 Cr App Rep 175, CA (defendant had drugs in a holdall; said he had them for safe-keeping; defendant did intend to transfer the drugs to another at an agreed time; thus he had committed offence contrary to the Misuse of Drugs Act 1971 s 5(3)) and *Donnelly v HM Advocate* 1985 SLT 243. Likewise, someone who sells drugs to a drugs dealer so that the latter can re-sell them supplies the dealer: *R v X* [1994] Crim LR 827, CA. Injecting another with a drug in the latter's possession is not 'supplying': *R v Harris* [1968] 2 All ER 49n, 52 Cr App Rep 277, CA. The division of drugs in joint possession may be a supply: *Holmes v Chief Constable Merseyside Police* supra. Distribution of drugs purchased after pooling of money is a supply: *R v Buckley*, *R v Lane* (1979) 69 Cr App Rep 371, approving *Holmes v Chief Constable Merseyside Police* supra. Where the defendant offered two girls a reefer cigarette to smoke, it was held that there was an offer to supply: *R v Moore* [1979] Crim LR 789. There is, however, no possession with intent to supply when the defendant makes reefer cigarettes which are passed round a group of people, because taking a puff and passing on a cigarette does not amount to a supply: *R v King* [1978] Crim LR 228. It is not a necessary element in the conception of supply that the provision should be made out of the personal resources of the person who does the supplying: *R v Maginnis* supra.

7 Offering to supply a substance which the defendant believes is a controlled drug is sufficient, even though the substance is not a controlled drug: *Haggard v Mason* [1976] 1 All ER 337, [1976] 1 WLR 187, DC. A person who offers to supply a controlled drug can be convicted on the basis of 'offering to supply' a controlled drug, even though (to the offeror's knowledge or belief) the thing offered is in reality not a controlled drug or even though he does not intend to carry out his offer: *R v Goodard* [1992] Crim LR 588, CA; *R v Mitchell* [1992] Crim LR 723, CA; *R v Gill* (1993) 97 Cr App Rep 215, CA; *R v Prior (Neil)* [2004] EWCA Crim 1147, [2004] Crim LR 849. Contrast the offence of conspiring to offer to supply a controlled drug, where it must be proved that the conspirators intended that the controlled drug be supplied: *R v Gill* supra. Where an offer is not genuine and the offeree knows this, as where the offer is made to an undercover police officer who knows the truth, there can nevertheless be an offer for the purpose of the Misuse of Drugs Act 1971 s 4(3), except possibly where the 'offer' was so obviously a joke or charade that it cannot be regarded as an offer in any real sense: *R v Kray* (10 November 1998) Lexis, CA. In determining whether there has been an offer, the principles of the law of contract about 'offer and acceptance' are irrelevant, including the rule that an offer, once accepted, cannot be regarded as continuing to constitute an offer: *R v Dhillon* [2000] Crim LR 760, CA. Likewise, unlike contract law, an offer cannot be withdrawn before acceptance: *R v Prior* supra.

The question whether the words uttered, or the manner of their utterance, amounted, in ordinary parlance, to an offer to supply a controlled drug is essentially a matter of fact for the jury. What is important is the effect of the words, having regard to any other relevant circumstances apparent to the offeree at the time: *R v Prior* supra. There can be an offer to supply despite the fact that it is an offer of a future supply at an unspecified date and place: *R v Prior* supra. It is immaterial whether it is the offeror or offeree who has taken the initiative: *R v Prior* supra.

8 As to supply of intoxicating substances other than controlled drugs see PARA 788 post. As to offences relating to the supply of articles for administering controlled drugs see the Misuse of Drugs Act 1971 s 9A (as added); and PARA 776 post.

9 The other person may be a defendant charged in another count of the indictment, but may not be a co-defendant in the same count: *R v Connelly* (1992) 156 JP 406, CA (distinguishing *R v Lubren*, *R v Adepoju* [1988] Crim LR 378, CA).

10 le in contravention of the Misuse of Drugs Act 1971 s 4(1)(b).

11 It is the duty of the judge to assist the jury as to the meaning of the word 'concerned': *R v Hughes* (1985) 81 Cr App Rep 344, CA. A person may be concerned by being involved at a distance in making an offer to supply a controlled drug: *R v Blake*, *R v O'Connor* (1978) 68 Cr App Rep 1, CA.

12 Misuse of Drugs Act 1971 s 4(3). See also note 6 supra. In *R v Hughes* (1985) 81 Cr App Rep 344, CA, the three ingredients of the offence were listed as: (1) the supply of a drug to another, or as the case may be, the making of an offer to supply the drug to another; (2) participation by the defendant in an enterprise involving such a supply or, as the case may be, such an offer to supply; and (3) knowledge by the defendant of the nature of the enterprise, either knowledge that it is a venture to supply or to make an offer to supply the drug in question.

13 For the meaning of 'possession' see PARA 771 ante.

14 'Intent to supply' predicates that it should be the intent by the possessor of the drugs and not the intent of some other person: *R v Greenfield* (1983) 78 Cr App Rep 179n, CA. A person has an intention to supply a controlled drug to another if his intention is to return the drug to the person who deposited it with him: *R v Maginnis* [1987] AC 303, 85 Cr App Rep 127, HL (the intention to supply therefore relies upon the meaning of 'supply': see note 6 supra). Provided that he intended unlawfully to supply to another the substance proved to have been in his possession, it need not be proved that the defendant knew the identity of the substance, even though the type of drug which it is proved to be is relevant to the maximum sentence available: *R v Leeson* [2000] 1 Cr App Rep 233, [2000] Crim LR 195, CA. A mistaken belief as to its nature will only excuse the defendant if the defence under the Misuse of Drugs Act 1971 s 28 (see PARA 778 post) is established: *R v Leeson* supra. Where a person is in joint possession of a drug but does not intend personally to supply it, he can be convicted as an accomplice of the present offence if he knows that his co-possessor intends to supply and he intentionally assists or encourages his co-possessor: *R v Downes* [1984] Crim LR 552, [1984] LS Gaz R 2216, CA. See also *R v Greenfield* supra.

See *R v Taylor (Paul)* [2001] EWCA Crim 2263, [2002] 1 Cr App Rep 519 (assuming that a prosecution under the Misuse of Drugs Act 1971 s 5(3) of someone in possession of a controlled drug with intent to supply it for religious purposes interfered with his right to freedom of religion under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 9, that interference would be justified under art 9(2)). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

As from a day to be appointed, in any proceedings for an offence under the Misuse of Drugs Act 1971 s 5(3), if it is proved that the defendant had an amount of a controlled drug in his possession which is not less than the prescribed amount, the court or jury must assume that he had the drug in his possession with the intent to supply it to another unlawfully: s 5(4A) (s 5(4A)-(4C) prospectively added by the Drugs Act 2005 s 2(1), (2)). At the date at which this volume states the law, no such day had been appointed. The Misuse of Drugs Act 1971 s 5(4A) (prospectively added) does not apply if evidence is adduced which is sufficient to raise an issue that the defendant may not have had the drug in his possession with that intent: s 5(4B) (as so prospectively added). Regulations under s 5(4A) (prospectively added) have effect only in relation to proceedings for an offence committed after the regulations came into force: s 5(4C) (as so prospectively added). At the date at which this volume states the law, no such regulations had been made.

Evidence of current large amounts of money or of a current extravagant lifestyle, prima facie explicable only if derived from drug dealing, is admissible in cases of possession of drugs with intent to supply, and is of probative significance to an issue in the case, even if the defendant gives an explanation for the money etc. If the judge decides that such evidence is admissible in law he must then decide whether or not to admit it in his discretion, having regard to its probative value and prejudicial effect. If such evidence is admitted, the judge must tell the jury what its probative significance can be and make it clear that it is for the jury to decide whether or not it has probative significance. He must warn the members of the jury that, if they conclude that the defendant is a drugs dealer this is not of itself evidence of possession on a particular occasion or a basis for disbelieving the defendant: *R v Morris* [1995] 2 Cr App Rep 69, 159 JP 1, CA. Evidence of past amounts of money or a past extravagant lifestyle is irrelevant and inadmissible because it can only found an inference of past drug dealing: *R v Gordon* [1995] 2 Cr App Rep 61, [1995] Crim LR 142, CA.

Although evidence of current large amounts of money or of a current extravagant lifestyle is not automatically excluded where the issue is whether the defendant was in possession, as opposed to whether he intended to

supply (see *R v Guney* [1998] 2 Cr App Rep 242, [1999] Crim LR 485, CA; *R v Edwards* [1998] Crim LR 207, CA; *R v Griffiths* [1998] Crim LR 567, CA), it will rarely be relevant and admissible.

15 Misuse of Drugs Act 1971 s 5(3). See also note 5 supra. As to possession of controlled drugs see PARA 770 ante.

16 Ibid s 19 (amended by the Criminal Attempts Act 1981 s 10, Schedule Pt I). As to incitement see PARA 65 ante. See *R v Marlow* [1998] 1 Cr App Rep (S) 273, [1997] Crim LR 897, CA (writing and publishing a book on the cultivation and production of cannabis constituted incitement to commit an offence under the Misuse of Drugs Act 1971, contrary to s 19).

As to conspiracy to supply a controlled drug see *R v Drew* [2000] 1 Cr App Rep 91, [1999] Crim LR 581, CA; *R v Jackson* [2000] 1 Cr App Rep 97n, CA (where a conspiracy to supply 'another' is alleged, the 'other' must be taken to relate to someone other than a conspirator; however, it is permissible to allege a conspiracy to supply one of the conspirators; in such a case this must be made clear in the particulars of offence in the indictment).

17 Misuse of Drugs Act 1971 s 25(1), (2), Sch 4 (amended by the Criminal Law Act 1977 ss 27, 28, Sch 5; the Magistrates' Courts Act 1980 ss 31, 32; the Controlled Drugs (Penalties) Act 1985 s 1(1); the Criminal Justice and Public Order Act 1994 s 157(2), Sch 8 Pt II; and the Criminal Justice Act 2003 s 284, Sch 28 para 1). In the case of a Class A drug the maxima are, on conviction on indictment, life imprisonment or a fine or both, or, on summary conviction, six months or a fine of the prescribed sum or both; in the case of a Class B drug the maxima are, on conviction on indictment, imprisonment for 14 years or a fine or both, or, on summary conviction, imprisonment for six months or a fine of the prescribed sum or both; and in the case of a Class C drug the maxima are, on conviction on indictment, imprisonment for 14 years or a fine or both, or, on summary conviction, imprisonment for three months or a fine of £2,500 or both: see the Misuse of Drugs Act 1971 Sch 4 (as so amended). As from a day to be appointed the maximum terms of imprisonment on summary conviction are increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

For the meanings of 'Class A drug', 'Class B drug' and 'Class C drug' see PARA 770 note 2 ante. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to the penalties for incitement see PARA 770 note 5 ante.

Conviction for a third Class A drug trafficking offence carries a minimum sentence of seven years. Where: (1) a person is convicted of a Class A drug trafficking offence committed after 30 September 1997; (2) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of two other Class A drug trafficking offences; and (3) one of those other offences was committed after he had been convicted of the other, the court must impose an appropriate custodial sentence for a term of at least seven years except where the court is of the opinion that there are particular circumstances which: (a) relate to any of the offences or to the offender; and (b) would make it unjust to do so in all the circumstances: Powers of Criminal Courts (Sentencing) Act 2000 s 110(1), (2). As from a day to be appointed, these provisions are amended so as to refer to a term of imprisonment instead of a custodial sentence: see s 110(1), (2) (prospectively amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 para 190). At the date at which this volume states the law no such day had been appointed. For these purposes, 'an appropriate custodial sentence' means: (i) in relation to a person who is 21 or over when convicted of the offence mentioned in head (1) supra, a sentence of imprisonment; and (ii) in relation to a person who is under 21 at that time, a sentence of detention in a young offender institution: Powers of Criminal Courts (Sentencing) Act 2000 s 110(6) (prospectively repealed by the Criminal Justice and Court Services Act 2000 ss 74, 75, Sch 7 paras 160, 190, Sch 8).

Where a person is charged with a Class A drug trafficking offence (which otherwise would be triable either way), and the circumstances are such that, if he were convicted of the offence, he could be sentenced for it under the Powers of Criminal Courts (Sentencing) Act 2000 s 110(2) (prospectively amended), the offence is triable only on indictment: s 110(4).

In s 110 (as amended), 'Class A drug trafficking offence' means a drug trafficking offence committed in respect of a Class A drug; and for this purpose 'Class A drug' has the same meaning as in the Misuse of Drugs Act 1971 (see note 2 supra): Powers of Criminal Courts (Sentencing) Act 2000 s 110(5). 'Drug trafficking offence' means any of the following offences: (A) an offence under the Misuse of Drugs Act 1971 s 4(2) or s 4(3) (unlawful production or supply of controlled drugs: see PARA 772 post), s 5(3) (possession of controlled drug with intent to supply: see PARA 772 post), s 8 (permitting certain activities relating to controlled drugs: see PARA 777 post), s 20 (assisting in or inducing the commission outside the United Kingdom of an offence punishable under a corresponding law: see PARA 779 post), or an offence under the Customs and Excise Management Act 1979 s 50(2) or s 50(3) (improper importation of goods), s 68(2) (exportation of prohibited or restricted goods) or s 170 (fraudulent evasion) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1232) if committed in connection with a prohibition or restriction on importation or exportation which has effect by virtue of the Misuse of Drugs Act 1971 s 3, or an offence under the Criminal Justice (International Co-operation) Act 1990 s 12 (manufacture or supply of a specified substance: see PARA 773 post) or s 19 (using a ship for illicit traffic in controlled drugs:

see PARA 780 post); (B) an offence of attempting, conspiring or inciting the commission of an offence listed in head (A) supra or an offence of aiding, abetting, counselling or procuring the commission of such an offence: Powers of Criminal Courts (Sentencing) Act 2000 s 110(5) (definition substituted by the Proceeds of Crime Act 2002 s 456, Sch 11 para 37(1), (2)); Proceeds of Crime Act 2002 s 75, Sch 2 paras 1, 10. Anything which would constitute a drug trafficking offence if done on land in any part of the United Kingdom also constitutes that offence if done on a British ship: Criminal Justice (International Co-operation) Act 1990 s 18. For the meaning of 'British ship' see PARA 780 note 1 post.

As to the discount for a guilty plea see the Criminal Justice Act 2003 s 144(2); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 623. Where a sentence has been imposed under the Powers of Criminal Courts (Sentencing) Act 2000 s 110 (as amended) and any previous conviction without which s 110 (as amended) would not have applied has subsequently been set aside on appeal, then notwithstanding the Criminal Appeal Act 1968 s 18 (see PARA 1863 post) notice of appeal against the sentence may be given within 28 days from the date on which the previous conviction was set aside: Powers of Criminal Courts (Sentencing) Act 2000 s 112. Where an offence is found to have been committed over a period of two or more days, or at some time during a period of two or more days, it is to be taken for the purposes of s 110 (as amended) to have been committed on the last of those days: s 115. Where the court certifies that a person has been convicted of a Class A drug trafficking offence, the certificate is evidence of the previous conviction (and the date of the offence) for the purposes of s 110 (as amended): see s 113. As to offences under service law see s 114.

The object of s 110 (as amended) plainly is to require courts to impose a sentence of at least seven years in circumstances where, but for s 110, they would not or might not do so: *R v Harvey* [2000] 1 Cr App Rep (S) 368, CA.

As to the power to order forfeiture of anything shown to relate to the offence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 480. As to the power to make a travel restriction order see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 372.

For sentencing guidelines see *R v Aramah* (1983) 76 Cr App Rep 190, [1983] Crim LR 271, CA; *R v Bilinski* (1987) 9 Cr App Rep (S) 360, [1987] Crim LR 782, CA; *R v Singh* (1988) 10 Cr App Rep (S) 402, [1989] Crim LR 162, CA; *R v Aranguren* (1994) 99 Cr App Rep 347, [1994] Crim LR 695, CA; *R v Djahit* [1999] 2 Cr App Rep (S) 142, CA. See also *R v Afonso*, *R v Sajid*, *R v Andrews* [2004] EWCA Crim 2342, [2005] 1 Cr App Rep (S) 560 (guidance when sentencing for low-level supply by unemployed drug addicts, whose sole motive in supplying drugs was to feed their own addiction); *R v Evans* (2005) 149 Sol Jo LB 1222, CA (comments in *R v Afonso*, *R v Sajid*, *R v Andrews* supra were intended for those with no criminal record). For sentencing guidelines in cases of conspiracy to supply heroin see *A-G's References (Nos 13, 14, 15, 16, 17 and 18 of 2004)* [2004] EWCA Crim 1885, [2005] 1 Cr App Rep (S) 300. Where a defendant convicted of supplying drugs is made the subject of a confiscation order, that order may be adjusted to take into account the fact that the drugs were supplied in bulk and at a discount: *R v Berry* [2000] 1 Cr App Rep (S) 352, CA.

18    Ie under the Misuse of Drugs Act 1971 s 4(3).

19    Ibid s 4A(1) (s 4A added by the Drugs Act 2005 s 1(1)).

20    Misuse of Drugs Act 1971 s 4A(2)(a) (as added: see note 19 supra).

21    Ibid s 4A(2)(b) (as added: see note 19 supra). As to the meaning of 'open court' see PARA 90 note 10 ante.

22    Ibid s 4A(3) (as added: see note 19 supra). 'School premises' means land used for the purposes of a school excluding any land occupied solely as a dwelling by a person employed at the school; and 'school' has the same meaning in England and Wales as in the Education Act 1996 s 4 (see EDUCATION vol 15(1) (2006 Reissue) PARA 81); Misuse of Drugs Act 1971 s 4A(8) (as so added). For the purposes of s 4A(3) (as added), a relevant time is: (1) any time when the school premises are in use by persons under the age of 18; (2) one hour before the start and one hour after the end of any such time: s 4A(5) (as so added).

23    Ibid s 4A(4) (as added: see note 19 supra). For the purposes of s 4A(4) (as added), a person uses a courier in connection with an offence under s 4(3) if he causes or permits another person (the courier) to deliver a controlled drug to a third person, or to deliver a drug related consideration to himself or a third person: s 4A(6) (as so added). For these purposes, a drug related consideration is a consideration of any description which is obtained in connection with the supply of a controlled drug, or is intended to be used in connection with obtaining a controlled drug: s 4A(7) (as so added). Section 4A (as added) does not apply to an offence committed before 1 January 2006: Drugs Act 2005 s 1(2); Drugs Act 2005 (Commencement No 3) Order 2005, SI 2005/3053.

## UPDATE

### **772 Unlawful production or supply of controlled drugs; possession with intent to supply unlawfully**

NOTE 6--*R v Hussain* [2010] All ER (D) 183 (Jan), CA (defendant in possession of controlled drugs did not commit offence as intended to supply outside jurisdiction).

NOTE 12--If a defendant introduces someone who he knows to want illegal drugs to a supplier and that person obtains and pays for them, it is open to a jury to convict the defendant for being concerned in supply of drugs: *R v Baker* [2009] All ER (D) 268 (Feb), CA.

NOTE 14--See *R v Rogers* [2007] EWCA Crim 1630, [2007] All ER (D) 13 (Sep); *R v Ashtari* [2007] EWCA Crim 1259, [2007] All ER (D) 154 (Aug).

TEXT AND NOTE 16--1971 Act s 19 further amended: Serious Crime Act 2007 Sch 6 para 53.

NOTE 17--As to the approach of the court when considering the appropriate levels of sentencing in cases involving the large scale commercial cultivation and production of cannabis, see *R v Xiong* [2007] EWCA Crim 3129, [2007] All ER (D) 364 (Dec); and *R v Xu* (2008) Times, 14 February 2008, CA. As to the reduction of sentence on the ground of totality where a consecutive minimum term is to be served for a firearms offence see *R v Raza* [2009] EWCA Crim 1413, [2010] Cr App Rep (S) 354, [2009] All ER (D) 253 (Nov); and PARA 662. See also *R v Dechausay* [2008] All ER (D) 154 (Aug), CA (sentence reduced to bring it into line with sentence of co-accused); and *A-G's Reference (No 61 of 2008)*; *R v Burns* [2009] EWCA Crim 1123, [2009] 2 Cr App Rep (S) 517 (sentence of person who was integral to drugs being transported following importation increased from 8 to 14 years' imprisonment). *Aramah*, cited, applied: *R v Valentas* [2010] EWCA Crim 200, [2010] All ER (D) 77 (Feb).



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### **773. Manufacture and supply of scheduled substances.**

It is an offence to manufacture or supply a scheduled substance<sup>1</sup> knowing or suspecting that the substance is to be used in or for the unlawful production of a controlled drug<sup>2</sup>. However, a person does not commit such an offence if he manufactures or, as the case may be, supplies the scheduled substance with the express consent of a constable<sup>3</sup>.

A person guilty of such an offence is liable, on conviction on indictment, to a term of imprisonment not exceeding 14 years or to a fine or to both, or, on summary conviction, to imprisonment for a term not exceeding six<sup>4</sup> months or a fine not exceeding the statutory maximum or both<sup>5</sup>.

Regulations may make provision: (1) imposing requirements as to the documentation of transactions involving scheduled substances; (2) requiring the keeping of records and the furnishing of information with respect to such substances; (3) for the inspection of records kept pursuant to the regulations; and (4) for the labelling of consignments of scheduled substances<sup>6</sup>.

1     I.e. a substance specified in the Criminal Justice (International Co-operation) Act 1990 s 12(5), Sch 2 (amended by the Criminal Justice (International Co-operation) Act 1990 (Modification) Order 1992, SI 1992/2873; and the Criminal Justice (International Co-operation) Act 1990 (Modification) Order 2001, SI 2001/3933); Criminal Justice (International Co-operation) Act 1990 s 12(4). The Schedule may be amended by Order in Council: see s 12(5).

2     Ibid s 12(1). 'Controlled drug' has the same meaning as in the Misuse of Drugs Act 1971 (see PARA 770 note 2 ante); Criminal Justice (International Co-operation) Act 1990 s 12(3). 'Unlawful production of a controlled drug' means the production of such a drug which is unlawful by virtue of the Misuse of Drugs Act 1971 s 4(1)(a) (see PARA 772 ante); Criminal Justice (International Co-operation) Act 1990 s 12(3). As to the application of the Criminal Justice (International Co-operation) Act 1990 to Anguilla see the Criminal Justice (International Co-operation) (Anguilla) Order 1994, SI 1994/1635.

As to the liability of directors and officers where an offence is committed by a body corporate see the Misuse of Drugs Act 1971 s 21 (as amended); and PARA 770 note 1 ante.

The powers to search and obtain evidence under s 23(3) (as amended) (excluding s 23(3)(a)) (see PARA 781 post) apply to the offence under the Criminal Justice (International Co-operation) Act 1990 s 12 (as amended): Misuse of Drugs Act 1971 s 23(3A) (added by the Criminal Justice (International Co-operation) Act 1990 s 23(1), (4); and amended by the Drug Trafficking Act 1994 s 65, Sch 1 para 4).

Manufacturing or supplying a scheduled substance within the meaning of the Criminal Justice (International Co-operation) Act 1990 s 12 (as amended) where the manufacture or supply is an offence under s 12 (as amended) or would be such an offence if it took place in England and Wales is drug trafficking for the purposes of the Drug Trafficking Act 1994 ss 55-59 (as amended) (see PARA 784 et seq post): s 59A(4)(d) (s 59A added by the Proceeds of Crime Act 2002 s 456, Sch 11 paras 1, 25(1), (4)).

3     Criminal Justice (International Co-operation) Act 1990 s 12(1A) (added by the Criminal Justice (International Co-operation) (Amendment) Act 1998 s 1).

4     As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4); (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5     Criminal Justice (International Co-operation) Act 1990 s 12(2).

As to special provisions relating to the minimum sentence and mode of trial for a third Class A drug trafficking offence see the Powers of Criminal Courts (Sentencing) Act 2000 ss 110, 112-115 (as amended); and PARA 772 note 17 ante. As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. An offence contrary to s 12 (as amended) is a 'lifestyle offence' for the purposes of the Proceeds of Crime Act 2002 s 75 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393): s 75(2)(a), Sch 2 para 1(3)(a). In respect of a 'lifestyle offence', the court may make a financial reporting order under the Serious Organised Crime and Police Act 2005 s 76 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 475 et seq). As to forfeiture see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 480.

6 See the Criminal Justice (International Co-operation) Act 1990 s 13 (amended by the Proceeds of Crime Act 2002 ss 456, 457, Sch 11 paras 1, 21, Sch 12). The Controlled Drugs (Substances Useful for Manufacture) Regulations 1991, SI 1991/1285 (amended by SI 1992/2914) implement EC Council Regulation 3677/90 (OJ L357, 20.12.1990, p 1) laying down measures to be taken to discourage the diversion of certain substances to the illicit manufacture of narcotic drugs and psychotropic substances (as amended), under which member states are required to adopt, within the framework of domestic law, measures enabling competent authorities to obtain information on orders for or operations involving scheduled substances and to enter operators' business premises to obtain evidence of irregularities. The Controlled Drugs (Substances Useful for Manufacture) (Intra-Community Trade) Regulations 1993, SI 1993/2166 (amended by SI 2001/3683; SI 2004/850) implement EC Council Directive 92/109 (OJ L370, 19.12.1992, p 76) on the manufacture and placing on the market of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances (as amended), and provide that the requirements of certain Community provisions are to be treated as if they were requirements of regulations made under the Criminal Justice (International Co-operation) Act 1990 s 13 (as amended).

## **UPDATE**

### **773 Manufacture and supply of scheduled substances**

NOTE 6--SI 1993/2166 revoked: see now the Controlled Drugs (Drug Precursors) (Intra-Community Trade) Regulations 2008, SI 2008/295. SI 1991/1285 (as amended) revoked: see now the Controlled Drugs (Drug Precursors) (Community External Trade) Regulations 2008, SI 2008/296.

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#### **774. Cultivation of cannabis.**

It is an offence<sup>1</sup> for a person: (1) to cultivate any plant of the genus *Cannabis*<sup>2</sup> unlawfully<sup>3</sup>; or (2) to incite another to commit an offence under head (1) above<sup>4</sup>.

A person guilty of any such offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>5</sup> months or to a fine not exceeding the prescribed sum or to both<sup>6</sup>.

1 As to the liability of directors and officers where an offence is committed by a body corporate see the Misuse of Drugs Act 1971 s 21 (as amended); and PARA 770 note 1 ante.

2 Except in so far as the context otherwise requires, 'cannabis', except in the expression 'cannabis resin', means any plant of the genus *Cannabis* or any part of any such plant, by whatever name designated, except that it does not include cannabis resin or any of the following products after separation from the rest of the plant, namely: (1) mature stalk of any such plant; (2) fibre produced from mature stalk of any such plant; and (3) seed of any such plant: *ibid* s 37(1) (definition substituted by the Criminal Law Act 1977 s 52). 'Cannabis resin' means the separated resin, whether crude or purified, obtained from any plant of the genus *Cannabis*: Misuse of Drugs Act 1971 s 37(1).

3 *Ibid* s 6(2). Subject to any regulations under s 7 for the time being in force (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 259), it is not lawful for a person to cultivate any plant of the genus *Cannabis*: s 6(1). The prosecution does not have to prove that the defendant knew that the plant being cultivated was cannabis: *R v Champ* (1981) 73 Cr App Rep 367, CA. As to the statutory defence see PARA 778 post.

The Secretary of State may by regulations made by statutory instrument make provision for excluding in such cases as may be prescribed the application of any provision of the Misuse of Drugs Act 1971 which creates an offence: see ss 22(a)(i), 31(1)-(3); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 242-243.

See PARA 770 note 4 ante.

4 *Ibid* s 19 (amended by the Criminal Attempts Act 1981 ss 10, 11, Schedule Pt I). See further note 3 supra. See *R v Marlow* [1998] 1 Cr App Rep (S) 273, [1997] Crim LR 897, CA; and PARA 770 note 5 ante. As to incitement see PARA 65 ante.

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Misuse of Drugs Act 1971 s 25(1), (2), Sch 4 (amended by the Criminal Law Act 1977 ss 27, 28, Sch 5; and the Magistrates' Courts Act 1980 ss 31(1)-(3), 32). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to the penalties for incitement see PARA 770 note 6 ante. In terms of sentencing there is a distinction between cases where an element of supply was involved and those where personal use alone was involved: *R v Herridge* [2005] EWCA Crim 1410, [2006] 1 Cr App Rep (S) 252, [2005] Crim LR 806. As to the power to order forfeiture of anything shown to relate to the offence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 480.

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### **775. Activities relating to opium.**

It is an offence<sup>1</sup> for a person:

- 872 (1) to smoke or otherwise use prepared opium<sup>2</sup>; or
- 873 (2) to frequent a place used for the purpose of opium smoking<sup>3</sup>; or
- 874 (3) to have in his possession<sup>4</sup>: (a) any pipes or other utensils made or adapted for use in connection with the smoking of opium, being pipes or utensils which have been used by him or with his knowledge and permission in that connection or which he intends to use or permit others to use in that connection; or (b) any utensils which have been used by him or with his knowledge and permission in connection with the preparation of opium for smoking<sup>5</sup>; or
- 875 (4) to incite another to commit an offence under head (1), (2) or (3) above<sup>6</sup>.

A person guilty of any such offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>7</sup> months or to a fine not exceeding the prescribed sum or to both<sup>8</sup>.

1 As to the liability of directors and officers where an offence is committed by a body corporate see the Misuse of Drugs Act 1971 s 21 (as amended); and PARA 770 note 1 ante.

2 Ibid s 9(a). 'Prepared opium' means opium prepared for smoking and includes dross and any other residues remaining after opium has been smoked: s 37(1). As to the statutory defence see PARA 778 post. The Secretary of State may by regulations made by statutory instrument make provision for excluding in such cases as may be prescribed the application of any provision of the Misuse of Drugs Act 1971 which creates an offence: see ss 22(a)(i), 31(1)-(3); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 242-243.

See PARA 770 ante.

3 Ibid s 9(b). See note 2 supra.

4 For the meaning of 'possession' see PARA 771 ante.

5 Misuse of Drugs Act 1971 s 9(c)(i), (ii). See note 2 supra.

6 Ibid s 19 (amended by the Criminal Attempts Act 1981 ss 10, 11, Schedule Pt I). See *R v Marlow* [1998] 1 Cr App Rep (S) 273, [1997] Crim LR 897, CA; and PARA 770 note 5 ante. As to incitement see PARA 65 ante.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Misuse of Drugs Act 1971 s 25(1), (2), Sch 4 (amended by the Criminal Law Act 1977 ss 27, 28, Sch 5; and the Magistrates' Courts Act 1980 ss 31(1)-(3), 32). As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to the penalties for incitement see PARA 770 note 6 ante. As to the power to order forfeiture of anything shown to relate to the offence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 480.

### **UPDATE**

**775 Activities relating to opium**

TEXT AND NOTE 6--1971 Act s 19 further amended: Serious Crime Act 2007 Sch 6 para 53.

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## **776. Prohibition of supply etc of articles for administering or preparing controlled drugs.**

A person<sup>1</sup> who:

- 876 (1) supplies or offers to supply any article<sup>2</sup> which may be used or adapted to be used (whether by itself or in combination with another article or other articles) in the administration by any person of a controlled drug<sup>3</sup> to himself<sup>4</sup> or another, believing that the article (or the article as adapted) is to be so used in circumstances where the administration is unlawful<sup>5</sup>; or
- 877 (2) supplies or offers to supply any article which may be used to prepare a controlled drug for administration by any person to himself or another believing that the article is to be so used in circumstances where the administration is unlawful<sup>6</sup>; or
- 878 (3) incites another to commit an offence under head (1) or head (2) above<sup>7</sup>,

is guilty of an offence<sup>8</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>10</sup>.

1 As to the liability of directors and officers where an offence is committed by a body corporate see the Misuse of Drugs Act 1971 s 21 (as amended); and PARA 770 note 1 ante.

2 It is not an offence under *ibid* s 9A(1) (as added) (see head (1) in the text) to supply or offer to supply a hypodermic syringe, or any part of one: s 9A(2) (s 9A added by the Drug Trafficking Offences Act 1986 s 34).

3 For the meaning of 'controlled drug' see PARA 770 note 2 ante.

4 For these purposes, references to administration by any person of a controlled drug to himself include a reference to his administering it to himself with the assistance of another: Misuse of Drugs Act 1971 s 9A(5) (as added: see note 2 supra).

5 *Ibid* s 9A(1) (as added: see note 2 supra). For these purposes, any administration of a controlled drug is unlawful except: (1) the administration by any person of a controlled drug to another in circumstances where the administration of the drug is not unlawful under s 4(1) (see PARA 772 ante); or (2) the administration by any person of a controlled drug to himself in circumstances where having the controlled drug in his possession is not unlawful under s 5(1) (see PARA 770 ante): s 9A(4) (as so added).

6 *Ibid* s 9A(3) (as added: see note 2 supra).

7 *Ibid* s 19 (amended by the Criminal Attempts Act 1981 ss 10, 11, Schedule Pt I). See *R v Marlow* [1998] 1 Cr App Rep (S) 273, [1997] Crim LR 897, CA; and PARA 770 note 6 ante. As to incitement see PARA 65 ante.

8 See PARA 770 note 5 ante.

9 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

10 Misuse of Drugs Act 1971 s 25(1), (2), Sch 4 (amended by the Criminal Law Act 1977 ss 27, 28, Sch 5; the Magistrates' Courts Act 1980 ss 31(1)-(3), 32; the Criminal Attempts Act 1981 ss 10, 11, Sch Pt I; and the Drug Trafficking Offences Act 1986 s 34(2)). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. As to the penalties for incitement see PARA 770 note 6 ante. As to the power to order forfeiture of anything shown to relate to the offence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 480.

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### **777. Offences by occupiers or managers of premises.**

A person commits an offence<sup>1</sup> if, being the occupier<sup>2</sup> or concerned in the management<sup>3</sup> of any premises, he knowingly<sup>4</sup> permits or suffers<sup>5</sup> any of the following activities to take place on those premises: (1) producing<sup>6</sup> or attempting to produce a controlled drug<sup>7</sup> unlawfully<sup>8</sup>; (2) supplying<sup>9</sup> or attempting to supply a controlled drug to another unlawfully, or offering to supply a controlled drug to another unlawfully; (3) preparing opium for smoking; (4) smoking cannabis<sup>10</sup>, cannabis resin<sup>11</sup> or prepared opium<sup>12</sup>. It is also an offence to incite another to commit an offence under head (1), (2), (3) or (4) above<sup>13</sup>.

A person guilty of any such offence is liable on conviction on indictment or on summary conviction to imprisonment or a fine, or to both; in the case of summary conviction, the maximum fine is dependent upon the controlled drug in relation to which the offence was committed<sup>14</sup>.

1 As to the liability of directors and managers where an offence is committed by a body corporate see the Misuse of Drugs Act 1971 s 21 (as amended); and PARA 770 note 1 ante.

2 The phrase 'the occupier' should be given a commonsense interpretation. A person 'in occupation' such that he has the requisite degree of control over the premises to exclude from them those who might otherwise smoke cannabis, or engage in other activity is covered by this provision. A person can have exclusive possession without being a tenant or having an estate in the land: *R v Tao* [1977] QB 141, 63 Cr App Rep 163, CA (undergraduate had an exclusive contractual licence from college which gave him not merely a right to use but a sufficient exclusivity of possession; he was an occupier; appeal against conviction dismissed), disapproving the principle in, but agreeing with the decision on the facts of *R v Mogford* [1970] 1 WLR 988, 63 Cr App Rep 168n (for persons to be 'occupiers' under the Dangerous Drugs Act 1965 s 5 (repealed) they had to have legal possession of and control over the premises; two daughters not occupiers for the purposes of the Act when parents temporarily away on holiday). See also *R v Coid* [1998] Crim LR 199, CA.

3 If the defendant is managing the premises in the sense that he is running them, organising them and planning them, the fact that he has no lawful right or title to be on the premises and is a mere squatter does not prevent him from coming within the terms of the Misuse of Drugs Act 1971 s 8: *R v Josephs*, *R v Christie* (1977) 65 Cr App Rep 253, CA.

4 Knowledge can be either actual or inferred from wilful blindness, but not mere suspicion: *R v Thomas*, *R v Thompson* (1976) 63 Cr App Rep 65, CA. It is enough simply to prove on a charge of permitting premises to be used for the production or supply of a controlled drug that the defendant knew that a controlled drug was being produced or supplied there; proof of knowledge of the precise nature of the drug in question is not required, even though the particular drug is specified in the indictment or information: *R v Bett* [1999] 1 All ER 600, [1999] 1 Cr App Rep 361, CA.

5 Mere acquiescence in one of the prohibited activities does not amount to permitting (or, presumably, suffering) it; assistance or encouragement is required: *R v Bradbury* [1996] Crim LR 808, CA. This decision might be considered doubtful, since neither of the authorities relied on was actually relevant to the issue, and in ordinary language one who has the right to prevent something but acquiesces in it would be said to 'permit' or 'suffer' it; cf the later Court of Appeal decision in *R v Brock* [2001] 1 WLR 1159, [2001] 2 Cr App Rep 31, CA ('permit' (or presumably 'suffer') requires proof of unwillingness to prevent the prohibited activity in question, which could be inferred from failure to take reasonable steps readily available to prevent it; 'reasonable steps' in this context are to be judged in the light of the defendant's level of knowledge of the prohibited activity, but the fact that the defendant believed that he had taken reasonable steps was irrelevant). 'Suffer' does not add anything to 'permits': *R v Thomas*, *R v Thompson* (1976) 63 Cr App Rep 65, CA.



6 For the meaning of 'produce' see PARA 772 note 2 ante. An occupier permitting another to cultivate cannabis plants is permitting or suffering their production: *Taylor v Chief Constable of Kent* [1981] 1 WLR 606, 72 Cr App Rep 318, DC. As to cultivation of cannabis see PARA 774 ante.

7 For the meaning of 'controlled drug' see PARA 770 note 2 ante.

8 In contravention of the Misuse of Drugs Act 1971 s 4(1): see PARA 772 ante.

9 For the meaning of 'supply' see PARA 772 note 6 ante.

10 For the meaning of 'cannabis' see PARA 774 note 2 ante.

11 For the meaning of 'cannabis resin' see PARA 774 note 2 ante.

12 Misuse of Drugs Act 1971 s 8. Cf *R v Ashdown* (1974) 59 Cr App Rep 193, CA (co-tenant permitting another co-tenant to smoke cannabis is guilty of the offence). For the meaning of 'prepared opium' see PARA 775 note 2 ante. One of the prohibited activities allegedly permitted or suffered must actually take place on the premises; merely giving tacit approval in advance is insufficient: *R v Auguste* [2003] EWCA Crim 3929, [2004] 4 All ER 373, [2004] 2 Cr App Rep 173.

The Secretary of State may by regulations made by statutory instrument make provision for excluding in such cases as may be prescribed the application of any provision of the Misuse of Drugs Act 1971 which creates an offence: see ss 22(a)(i), 31(1)-(3); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 242-243.

See PARA 770 note 5 ante.

13 Ibid s 19 (amended by the Criminal Attempts Act 1981 ss 10, 11, Schedule Pt I). See *R v Marlow* [1998] 1 Cr App Rep (S) 273, [1997] Crim LR 897, CA; and PARA 770 note 6 ante. As to incitement see PARA 65 ante.

14 Misuse of Drugs Act 1971 s 25(1), (2), Sch 4 (amended by the Criminal Law Act 1977 ss 27, 28, Sch 5; the Magistrates' Courts Act 1980 ss 31(1)-(3), 32; the Criminal Justice and Public Order Act 1994 s 157(2), Sch 8 Pt II; and the Criminal Justice Act 2003 s 284(1), Sch 28 para 1). Whichever class of drug is involved, the maxima, on conviction on indictment, are imprisonment for 14 years or a fine or both; in the case of a Class A drug or Class B drug the maxima, on summary conviction, are six months or the prescribed sum or both; in the case of a Class C drug the maximum, on summary conviction, is three months or a fine of £2,500 or both: see the Misuse of Drugs Act 1971 Sch 4 (as so amended). As from a day to be appointed the maximum terms of imprisonment on summary conviction are increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed. The maximum of 14 years on conviction on indictment (increased from five years in respect of a Class C drug) only applies to offences involving a Class C drug committed on or after 29 January 2004: Criminal Justice Act 2003 s 284(2); Criminal Justice Act 2003 (Commencement No 2 and Saving Provisions) Order 2004, SI 2004/81.

As to special provisions relating to the minimum sentence and mode of trial for a third Class A drug trafficking offence see the Powers of Criminal Courts (Sentencing) Act 2000 ss 110, 112-115 (as amended); and PARA 772 note 17 ante. For the meanings of 'Class A drug', 'Class B drug' and 'Class C drug' see PARA 770 note 2 ante. Opium is a Class A drug and cannabis and cannabis resin are Class C drugs: see s 2, Sch 2 Pts I, II (amended by the Misuse of Drugs Act 1971 (Modification) (No 2) Order 2003, SI 2003/3201, art 2). See also MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 239-240.

As to the penalties for incitement see PARA 770 note 6 ante. As to the power to order forfeiture of anything shown to relate to the offence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 480. An offence contrary to the Misuse of Drugs Act 1971 s 8 is a 'lifestyle offence' for the purposes of the Proceeds of Crime Act 2002 s 75 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393): s 75(2)(a), Sch 2 para 1(1)(c). In respect of a 'lifestyle offence', the court may make a financial reporting order under the Serious Organised Crime and Police Act 2005 s 76 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 475 et seq).

## UPDATE

### 777 Offences by occupiers or managers of premises

NOTE 14--Cannabis and cannabis resin now Class B drugs: Misuse of Drugs Act 1971 s 2, Sch 2 Pt II (amended by SI 2008/3130).

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### **778. Defence of lack of knowledge in proceedings for certain offences.**

Where in any specified proceedings<sup>1</sup> it is necessary, if the defendant is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug<sup>2</sup> which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the defendant must be acquitted if he proves<sup>3</sup>: (1) that he neither believed nor suspected nor had reason to suspect<sup>4</sup> that the substance or product in question was a controlled drug<sup>5</sup>; or (2) that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any specified offence<sup>6</sup>; but he must not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged<sup>7</sup>. However, in any proceedings for a specified offence it is a defence for the defendant to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged<sup>8</sup>.

1 In proceedings in respect of offences under the Misuse of Drugs Act 1971 ss 4(2), (3), 5(3) (see PARA 772 ante), s 5(2) (see PARA 770 ante), s 6(2) (see PARA 774 ante), s 9 (see PARA 775 ante): s 28(1). The defence also applies to an offence under the Criminal Justice (International Co-operation) Act 1990 s 19 (as amended) (see PARA 780 post): s 19(5). Nothing in s 28 prejudices any defence which it is open to a person charged with an offence to which s 28 applies to raise apart from s 28: s 28(4).

2 For the meaning of 'controlled drug' see PARA 770 note 2 ante.

3 This merely imposes an evidential burden; the imposition of the legal (or persuasive) burden would be incompatible with the presumption of innocence under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2): see *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, [2001] 3 All ER 577; approved in *A-G's Reference (No 4 of 2002)*, *Sheldrake v DPP* [2004] UKHL 43 at [30], [2005] 1 AC 264 at [30], [2005] 1 Cr App Rep 450 at [30], per Lord Bingham of Cornhill. See also PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

4 The test of whether the defendant had no 'reason to suspect' the substance was a controlled drug is objective and not subjective; voluntary intoxication (see PARA 28 ante) which makes the defendant unable to hold a belief or register a suspicion is not a relevant consideration in the exercise of this statutory defence: *R v Young* [1984] 2 All ER 164, 78 Cr App Rep 288, C-MAC.

5 Misuse of Drugs Act 1971 s 28(3)(b)(i).

6 Ibid s 28(3)(b)(ii). As to the specified offences see note 1 supra.

7 Ibid s 28(3)(a).

8 Ibid s 28(2). On a charge of possession or possession with intent to supply, the burden of proving the requisite knowledge of the article required for possession rests on the prosecution; this is not affected by s 28(2): *R v Ashton-Rickardt* [1978] 1 All ER 173, 65 Cr App Rep 67, CA. Once the prosecution has proved that the defendant had control of a box, knew that he had control and knew that the box contained something which was in fact the drug alleged, the burden is cast upon the defendant to bring himself within the Misuse of Drugs

Act 1971 s 28: *R v McNamara* (1988) 87 Cr App Rep 246, CA. The burden on the defendant under the Misuse of Drugs Act 1971 s 28(2) is merely evidential: see note 3 supra.

The Misuse of Drugs Act 1971 s 28 does not apply to offences of conspiracy (*R v McGowan* [1990] Crim LR 399, CA), nor does it apply to an offer to supply a substance which the offeror knows or believes not to be a controlled drug at all (*R v Mitchell* [1992] Crim LR 723, CA).

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**779. Assisting in or inducing commission outside the United Kingdom of an offence punishable under a corresponding law.**

A person commits an offence<sup>1</sup> if: (1) in the United Kingdom<sup>2</sup> he assists in or induces<sup>3</sup> the commission<sup>4</sup> in any place outside the United Kingdom of an offence punishable under the provisions of a corresponding law<sup>5</sup> in force in that place<sup>6</sup>; or (2) he incites another to commit the offence in head (1) above<sup>7</sup>.

A person guilty of any such offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>8</sup> months or to a fine not exceeding the prescribed sum or to both<sup>9</sup>.

1 As to the liability of directors and officers where an offence is committed by a body corporate see the Misuse of Drugs Act 1971 s 21 (as amended); and PARA 397 note 1 ante.

2 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 'Assisting or inducing' is to be construed in its natural broad sense: *R v Vickers* [1975] 2 All ER 945, 61 Cr App Rep 48, CA; *R v Evans* (1976) 64 Cr App Rep 237, CA; *R v Panayi*, *R v Karte* (1987) 86 Cr App Rep 261, CA.

4 On the true construction of this provision a person cannot be guilty of assisting in or inducing an offence in a place outside the United Kingdom unless the offence outside the United Kingdom was committed: *R v Panayi*, *R v Karte* (1987) 86 Cr App Rep 261, CA. If an offence is committed in a place outside the United Kingdom and the defendant has in the United Kingdom assisted in or induced its commission, it is irrelevant that it is not possible to identify the principal offender, or that the final act of commission was effected by an innocent third party: *R v Ahmed* [1990] Crim LR 648, CA.

5 For these purposes, 'corresponding law' means a law stated in a certificate purporting to be issued by or on behalf of the government of a country outside the United Kingdom to be a law providing for the control and regulation in that country of the production, supply, use, export and import of drugs and other substances in accordance with the provisions of the Single Convention on Narcotic Drugs (New York, 30 March 1961; Misc 1 (1962); Cmnd 1580), or a law providing for the control and regulation in that country of the production, supply, use, export and import of dangerous or otherwise harmful drugs in pursuance of any treaty, convention or other agreement or arrangement to which the government of that country and Her Majesty's government in the United Kingdom are for the time being parties: Misuse of Drugs Act 1971 s 36(1). A statement in any such certificate to the effect that any facts constitute an offence against the law mentioned in the certificate is evidence of the matters stated: s 36(2).

6 Ibid s 20. The offence is not one of strict liability: *R v Vickers* [1975] 2 All ER 945, 61 Cr App Rep 48, CA. It must be proved that the defendant was aware that he was assisting in or inducing the commission of an offence under a corresponding law; it is not necessary to prove that the defendant intended that that offence be committed in the actual country where it was committed: *R v Ahmed* [1990] Crim LR 648, CA (defendant assisted in course of conduct which resulted in drugs being imported illegally into Belgium, though the final act of importation was by an innocent third party; defendant had intended drug to be imported illegally into the Netherlands; defendant's conviction for offence under the Misuse of Drugs Act 1971 s 20 upheld).

The Secretary of State may by regulations made by statutory instrument make provision for excluding in such cases as may be prescribed the application of any provision of the Act which creates an offence: see the Misuse of Drugs Act 1971 ss 22(a)(i), 31(1)-(3); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 242-243.

See PARA 770 note 5 ante.

7 Ibid s 19 (amended by the Criminal Attempts Act 1981 ss 10, 11, Schedule Pt I). As to incitement see PARA 65 ante.

8 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

9 Misuse of Drugs Act 1971 s 25(1), (2), Sch 4 (amended by the Criminal Law Act 1977 ss 27, 28, Sch 5; and the Magistrates' Courts Act 1980 ss 31(1)-(3), 32).

As to special provisions relating to the minimum sentence and mode of trial for a third Class A drug trafficking offence see the Powers of Criminal Courts (Sentencing) Act 2000 ss 110, 112-115 (as amended); and PARA 772 note 17 ante. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141. As to the penalties for incitement see PARA 770 note 6 ante. As to the power to order forfeiture of anything shown to relate to the offence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 480.

An offence contrary to the Misuse of Drugs Act 1971 s 20 is a 'lifestyle offence' for the purposes of the Proceeds of Crime Act 2002 s 75 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393); s 75(2)(a), Sch 2 para 1(1)(d). In respect of a 'lifestyle offence', the court may make a financial reporting order under the Serious Organised Crime and Police Act 2005 s 76 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 475 et seq).

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## **780. Ships used for illicit traffic.**

A person is guilty of an offence if on a specified ship<sup>1</sup>, wherever it may be, he: (1) has a controlled drug<sup>2</sup> in his possession; or (2) is in any way knowingly concerned in the carrying or concealing of a controlled drug on a ship, knowing or having reasonable grounds to suspect that the drug is intended to be imported or has been exported contrary to the Misuse of Drugs Act 1971<sup>3</sup> or the law of any state other than the United Kingdom<sup>4</sup>. A certificate purporting to be issued by or on behalf of the government of any state to the effect that the importation or export of a controlled drug is prohibited by the law of that state is evidence that it is so prohibited<sup>5</sup>. Proceedings in respect of the offence may be taken in the United Kingdom<sup>6</sup>, but no such proceedings are to be instituted in England and Wales without the consent of the Director of Public Prosecutions or the Director of Revenue and Customs Prosecutions<sup>7</sup>.

1    I.e. a British ship, a ship registered in a state other than the United Kingdom which is a party to the United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988, TS 26 (1992); Cmd 1927), or a ship not registered in any country or territory: Criminal Justice (International Co-operation) Act 1990 ss 19(1), 24. 'British ship' means a ship registered in the United Kingdom or a colony; and 'ship' includes any vessel used in navigation: s 24. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2    'Controlled drug' and references to controlled drugs of a specified class have the same meaning as in the Misuse of Drugs Act 1971 (see PARA 770 note 2 ante): Criminal Justice (International Co-operation) Act 1990 s 19(5).

3    I.e. contrary to the Misuse of Drugs Act 1971 s 3(1): see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 248.

4    Criminal Justice (International Co-operation) Act 1990 s 19(2). The defence under the Misuse of Drugs Act 1971 s 28 (see PARA 778 ante) applies to this offence: Criminal Justice (International Co-operation) Act 1990 s 19(5). As to the liability of directors and officers when an offence is committed by a body corporate see the Misuse of Drugs Act 1971 s 21 (as amended); and PARA 770 note 1 ante.

A person guilty of the offence is liable, in the case of a Class A drug, on conviction on indictment to imprisonment for life or a fine or both, and on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; in the case of a Class B drug, on conviction on indictment to imprisonment for a term not exceeding 14 years or a fine or both, and on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; in the case of a Class C drug, on conviction on indictment to imprisonment for a term not exceeding 14 years or a fine or both, and on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum or both: Criminal Justice (International Co-operation) Act 1990 s 19(4) (amended by the Criminal Justice Act 2003 s 284, Sch 28 para 3). As from a day to be appointed the maximum terms of imprisonment on summary conviction are increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

Where drugs have been intercepted on the high seas and those drugs were destined for a country other than England and Wales, the maximum sentence available in that country is irrelevant to sentence: *R v Wagenaar, R v Pronk* [1997] 1 Cr App Rep (S) 178, [1996] Crim LR 839, CA; *R v Maguire* [1997] 1 Cr App Rep (S) 130, CA. As to special provisions relating to the minimum sentence and mode of trial for a third Class A drug trafficking offence see the Powers of Criminal Courts (Sentencing) Act 2000 ss 110, 112-115 (as amended); and PARA 772 note 17 ante. As to powers of enforcement see the Criminal Justice (International Co-operation) Act 1990 s 20, Sch 3 (both amended by the Criminal Justice Act 1993 s 23(2)(a), (3)); and the Criminal Justice (International Co-operation) Act 1990 (Enforcement Officers) Order 1992, SI 1992/77.

An offence contrary to the Criminal Justice (International Co-operation) Act 1990 s 19 is a 'lifestyle offence' for the purposes of the Proceeds of Crime Act 2002 s 75 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393): s 75(2)(a), Sch 2 para 1(3)(b). In respect of a 'lifestyle offence' the court may make a financial reporting order under the Serious Organised Crime and Police Act 2005 s 76 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 475 et seq). It is also a drug trafficking offence for the purposes of the Drug Trafficking Act 1994 ss 55-59 (as amended) (see PARA 784 et seq post): s 59A(4)(e) (s 59A added by the Proceeds of Crime Act 2002 s 456, Sch 11 paras 1, 25(1), (4)).

5 Criminal Justice (International Co-operation) Act 1990 s 19(3).

6 Ibid s 21(1).

7 Ibid s 21(2) (amended by the Commissioners for Revenue and Customs Act 2005 s 50, Sch 4 para 41). The Director of Revenue and Customs Prosecutions is appointed under the Commissioners for Revenue and Customs Act 2005 s 34: see PARA 1068 post.

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### **781. Powers of search and seizure.**

If a constable has reasonable grounds to suspect that any person is in possession<sup>1</sup> of a controlled drug<sup>2</sup> in contravention of the Misuse of Drugs Act 1971 or of any regulations made thereunder, the constable may:

- 879 (1) search that person, and detain him for the purpose of searching him<sup>3</sup>;
- 880 (2) search any vehicle or vessel<sup>4</sup> in which the constable suspects that the drug may be found, and for that purpose require the person in control of the vehicle or vessel to stop it<sup>5</sup>;
- 881 (3) seize and detain, for the purpose of proceedings under the Act, anything found in the course of the search which appears to the constable to be evidence of an offence under the Act<sup>6</sup>.

If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting:

- 882 (a) that any controlled drugs are, in contravention of the Act or any regulations made thereunder, in the possession of a person on any premises; or
- 883 (b) that a document directly or indirectly relating to, or connected with, a transaction or dealing which was, or an intended transaction or dealing which would if carried out be, an offence under the Act, or in the case of a transaction or dealing carried out or intended to be carried out in a place outside the United Kingdom<sup>7</sup>, an offence against the provisions of a corresponding law<sup>8</sup> in force in that place, is in the possession of a person on any premises,

he may grant a warrant authorising any constable<sup>9</sup> to enter and search<sup>10</sup> the premises named in it and any person found there and, if there is reasonable ground for suspecting that an offence under the Act has been committed in relation to any controlled drugs found on the premises or in the possession of any such person, or that a document is such as is mentioned under head (b) above, to seize and detain those controlled drugs or that document, as the case may be<sup>11</sup>.

A person who intentionally obstructs a person in the exercise of the above powers of search and seizure is guilty of an offence<sup>12</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>13</sup> months or to a fine not exceeding the prescribed sum or to both<sup>14</sup>.

1 For the meaning of 'possession' see PARA 771 ante.

2 For the meaning of 'controlled drug' see PARA 770 note 2 ante.

3 Misuse of Drugs Act 1971 s 23(2)(a). This power does not, however, authorise a search by a constable of a person in police detention at a police station or an intimate search of a person by a constable: see the Police and Criminal Evidence Act 1984 s 53(1); and PARA 1006 post.



The Misuse of Drugs Act 1971 s 23(2) is without prejudice to any other power of search or any power to seize or detain property which is exercisable by a constable: s 23(2). As to powers of stop and search see further PARA 859 et seq post. The additional powers of seizure from the person under the Criminal Justice and Police Act 2001 s 51 apply: see s 51(5), Sch 1 Pt 2 para 77; and PARA 891 post.

As to the power of constables and other duly authorised persons to enter premises of a person carrying on business as a producer or supplier of any controlled drugs see the Misuse of Drugs Act 1971 s 23(1), (4)(b), (c); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 279-280.

4 For these purposes, 'vessel' includes a hovercraft within the meaning of the Hovercraft Act 1968 (see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 381); Misuse of Drugs Act 1971 s 23(2).

5 Ibid s 23(2)(b). See note 3 supra.

6 Ibid s 23(2)(c). See note 3 supra.

7 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

8 For the meaning of 'corresponding law' see PARA 779 note 5 ante.

9 Ie any constable acting for the police area in which the premises are situated. A warrant naming the wrong police officer as having been examined before the magistrates granting the application has been held not invalid: *Whyte v Vannet* 1997 SLT 1208, High Ct of Justiciary Appeal.

10 Such a warrant authorises entry, if need be by force, and search at any time or times within one month from the date of the warrant: Misuse of Drugs Act 1971 s 23(3).

11 Ibid s 23(3). Excluding s 23(3)(a) (see head (a) in the text), s 23(3) also applies to offences under the Criminal Justice (International Co-operation) Act 1990 ss 12, 13 (see PARA 773 ante), taking references in the Misuse of Drugs Act 1971 s 23(2)(b) to controlled drugs as references to scheduled substances within the meaning of the Criminal Justice (International Co-operation) Act 1990 Pt II (ss 12-24) (as amended): Misuse of Drugs Act 1971 s 23(3A) (added by the Criminal Justice (International Co-operation) Act 1990 s 23(1), (4); and amended by the Drug Trafficking Act 1994 s 65, Sch 1 para 4; and the Proceeds of Crime Act 2002 s 457, Sch 12). The additional powers of seizure from premises and from the person under the Criminal Justice and Police Act 2001 ss 50, 51 apply: see ss 50(5), 51(5), Sch 1 Pt 1 para 14, Pt 2 para 77; and PARA 890 post.

Money seized under the Misuse of Drugs Act 1971 s 23 (as amended) cannot be retained by the police if the person entitled to possession of the money is not convicted of a drug trafficking offence: *Webb v Chief Constable of Merseyside Police*, *Porter v Chief Constable of Merseyside Police* [2000] QB 427, [2000] 1 All ER 209, CA. The procedural requirements of the Misuse of Drugs Act 1971 s 23(3) (as amended) ensure that an independent judicial figure considers the particular circumstances of the case: *Birse v HM Advocate* 2000 SLT 869, High Court of Justiciary (no breach of human rights where correct procedure followed). As to the requirement to give reasons when granting a warrant see *R (on the application of Cronin) v Sheffield Justices* [2002] EWHC 2568 (Admin), [2003] 1 WLR 752. See *Hepburn v Chief Constable of Thames Valley Police* [2002] EWCA Civ 1841, (2002) Times, 19 December (warrant only authorised police officers to enter and search premises, not to stop and search claimant; subsequent assault on claimant as he tried to leave building not lawful). See also *DPP v Meaden* [2003] EWHC 3005 (Admin), [2004] 4 All ER 75, [2004] Crim LR 587 (the Misuse of Drugs Act 1971 conferred the power to detain people on the premises to search them and the Police and Criminal Evidence Act 1984 authorised police officers to use reasonable force to restrict the movement of persons to one room while another room was being searched, by using no more force than was necessary). The warrant authorises entry only to the premises described in it: *R v Atkinson* [1976] Crim LR 307 (wrong flat number stated in warrant; held warrant did not authorise entry etc in relation to flat intended). However, misspelling or trivial errors will not necessarily invalidate a warrant: *R v Atkinson* supra.

12 Misuse of Drugs Act 1971 s 23(4)(a). A person only commits the offence if he knows that the constable is acting for the purposes of a search under s 23 (as amended) and if the obstruction was intentional, ie if his conduct viewed objectively (through the eyes of a bystander) did obstruct the constable's detention or search, and the defendant himself intended to bring about that objective obstructive result: *R v Forde* (1985) 81 Cr App Rep 19, [1985] Crim LR 323, CA.

13 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

14 Misuse of Drugs Act 1971 s 25(1), (2), Sch 4. As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/10. OFFENCES RELATING TO CONTROLLED DRUGS ETC/(1) CONTROLLED DRUGS/782. Closure of premises where drugs used unlawfully.

## **782. Closure of premises where drugs used unlawfully.**

A police officer not below the rank of superintendent ('the authorising officer') may authorise<sup>1</sup> the issue of a closure notice<sup>2</sup> in respect of premises<sup>3</sup> if he has reasonable grounds for believing:

- 884 (1) that at any time during the relevant period<sup>4</sup> the premises have been used in connection with the unlawful use, production or supply of a Class A controlled drug<sup>5</sup>; and
- 885 (2) that the use of the premises is associated with the occurrence of disorder or serious nuisance to members of the public<sup>6</sup>,

and he is satisfied: (a) that the local authority<sup>7</sup> for the area in which the premises are situated has been consulted; and (b) that reasonable steps have been taken to establish the identity of any person who lives on the premises or who has control of or responsibility for or an interest in the premises<sup>8</sup>.

If a closure notice has been issued, a constable must apply to a magistrates' court for the making of a closure order<sup>9</sup> requiring that the premises in respect of which the order is made are to be closed to all persons for such period (not exceeding three months) as the court decides<sup>10</sup>. The application must be heard by the magistrates' court not later than 48 hours after the notice was served<sup>11</sup>.

The magistrates' court may make a closure order if and only if it is satisfied<sup>12</sup> that each of the following applies:

- 886 (i) the premises in respect of which the closure notice was issued have been used in connection with the unlawful use, production or supply of a Class A controlled drug<sup>13</sup>;
- 887 (ii) the use of the premises is associated with the occurrence of disorder or serious nuisance to members of the public<sup>14</sup>;
- 888 (iii) the making of the order is necessary to prevent the occurrence of such disorder or serious nuisance for the period specified in the order<sup>15</sup>.

A constable or an authorised person<sup>16</sup> may enter the premises in respect of which the order is made, and do anything reasonably necessary to secure the premises against entry by any person<sup>17</sup>. A constable or authorised person may also enter the premises at any time while the order has effect for the purpose of carrying out essential maintenance of or repairs to the premises<sup>18</sup>.

At any time before the end of the period for which a closure order is made or extended a constable may make a complaint to a justice of the peace for an extension or further extension of the period for which it has effect<sup>19</sup>. A complaint, however, must not be made unless it is authorised by a police officer not below the rank of superintendent who has reasonable grounds for believing that it is necessary to extend the period for which the closure order has effect for the purpose of preventing the occurrence of disorder or serious nuisance to members of the public, and who is satisfied that the local authority has been consulted about the

intention to make the complaint<sup>20</sup>. If the court is satisfied that the order is necessary to prevent the occurrence of disorder or serious nuisance for a further period it may extend the period for which the order has effect by a period not exceeding three months<sup>21</sup>. A closure order must not have effect for more than six months<sup>22</sup>. A closure order can be discharged by a magistrates' court on complaint to a justice of the peace by a specified person<sup>23</sup>, but the court must not make an order discharging a closure order unless it is satisfied that the closure order is no longer necessary to prevent the occurrence of disorder or serious nuisance to members of the public<sup>24</sup>.

Where a closure order<sup>25</sup> is made, extended or discharged, or a court decides not to make an order or not to extend or discharge it, an appeal against the order or decision must be brought to the Crown Court before the end of the period of 21 days beginning with the day on which the order or decision is made<sup>26</sup>. On such an appeal the Crown Court may make such order as it thinks appropriate<sup>27</sup>.

It is an offence to remain on or enter premises in contravention of a closure notice<sup>28</sup>. A person also commits an offence if:

- 889 (A) he obstructs a constable or an authorised person acting under the power<sup>29</sup> to fix copies of a closure notice or to give a copy of the notice to specified persons or under the power<sup>30</sup> to enter premises in respect of which a closure order has been made and to take reasonable steps to secure them<sup>31</sup>;
- 890 (B) he remains on premises in respect of which a closure order has been made<sup>32</sup>; or
- 891 (C) he enters the premises<sup>33</sup>.

A person does not commit an offence by remaining on or entering premises<sup>34</sup> in contravention of a closure notice<sup>35</sup>, or by remaining on premises in respect of which a closure order has been made<sup>36</sup>, or by entering the premises<sup>37</sup>, if he has a reasonable excuse for entering or being on the premises (as the case may be)<sup>38</sup>.

A person guilty of an offence mentioned above is liable on summary conviction to imprisonment for a period not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both such imprisonment and fine<sup>39</sup>.

The court which made the closure order may, on application by a police authority or local authority, make an order that the owner<sup>40</sup> of the premises reimburse any expenditure incurred by the applicant authority in clearing, securing or maintaining the premises in respect of which the order has effect<sup>41</sup>.

A constable is not liable for relevant damages<sup>42</sup> in respect of anything done or omitted to be done by him in the performance or purported performance of his functions under the above provisions<sup>43</sup>. Nor is a chief officer of police liable for relevant damages in respect of anything done or omitted to be done by a constable under his direction or control in the performance or purported performance of the constable's functions under the above provisions<sup>44</sup>. These exemptions do not apply in certain circumstances<sup>45</sup>.

Compensation may be paid out of central funds, on application by a person who incurs financial loss in consequence of the issue of a closure notice or of a closure order having effect, by the magistrates' court which considered the application for the order or by the Crown Court if the closure order was made or extended by that court on an appeal<sup>46</sup>.

1 An authorisation may be given orally or in writing, but if it is given orally the authorising officer must confirm it in writing as soon as it is practicable: Anti-social Behaviour Act 2003 s 1(3).

2 'Closure notice' means a notice issued under *ibid* s 1 (as amended): s 11(4). A closure notice must: (1) give notice that an application will be made under s 2 for the closure of the premises (see the text and notes 9-15

infra); (2) state that access to the premises by any person other than a person who habitually resides in the premises or the owner of the premises is prohibited; (3) specify the date and time when and the place at which the application will be heard; (4) explain the effects of an order made in pursuance of s 2; (5) state that failure to comply with the notice amounts to an offence; (6) give information about relevant advice providers: s 1(4). Information about relevant advice providers is information about the names of and means of contacting persons and organisations in the area that provide advice about housing and legal matters: s 1(11).

The closure notice must be served by a constable: s 1(5). Service is effected by: (a) fixing a copy of the notice to at least one prominent place on the premises (s 1(6)(a)); (b) fixing a copy of the notice to each normal means of access to the premises (s 1(6)(b)); (c) fixing a copy of the notice to any outbuildings which appear to the constable to be used with or as part of the premises (s 1(6)(c)); (d) giving a copy of the notice to at least one person who appears to the constable to have control of or responsibility for the premises (s 1(6)(d)); and (e) giving a copy of the notice to the persons identified in pursuance of head (b) in the text and to any other person appearing to the constable to be a person of a description mentioned in that head (s 1(6)(e)). For the purpose of head (a) supra, a constable may enter any premises to which s 1 (as amended) applies, using reasonable force if necessary: s 1(7A) (added by the Drugs Act s 23, Sch 1 para 7).

The closure notice must also be served on any person who occupies any other part of the building or other structure in which the premises are situated if the constable reasonably believes at the time of serving the notice that the person's access to the other part of the building or structure will be impeded if a closure order is made: Anti-social Behaviour Act 2003 s 1(7).

3 'Premises' includes any land or other place (whether enclosed or not), and any outbuildings which are or are used as part of the premises: *ibid* s 11(3). The Secretary of State may by regulations specify premises or descriptions of premises to which s 1 (as amended) does not apply: s 1(9). At the date at which this volume states the law no such regulations had been made.

Subordinate legislation under the Anti-social Behaviour Act 2003 (ie an order of the Secretary of State or the National Assembly for Wales (s 94(1)(a)) and regulations (s 94(1)(b))) may make different provision for different purposes, different cases and different areas (s 94(2)(a)) and may include incidental, supplemental, consequential, saving or transitional provisions (including provisions applying, with or without modification, provision contained in an enactment) (s 94(2)(b)). A power to make subordinate legislation is exercisable by statutory instrument (s 94(3)), and that instrument is subject to annulment in pursuance of a resolution of either House of Parliament if it contains subordinate legislation made by the Secretary of State other than regulations under s 81 or s 83 (s 94(4)(a)) or an order under s 93 (s 94(4)(b)). No regulations may be made by the Secretary of State under s 81 or s 83 (whether alone or with other provisions) unless a draft of the statutory instrument containing the regulations has been laid before, and approved by a resolution of, each House of Parliament: s 94(5).

4 The relevant period is the period of three months ending with the day on which the authorising officer considers whether to authorise the issue of a closure notice in respect of the premises: *ibid* s 1(10).

5 *Ibid* s 1(a). The reference to a 'controlled drug' is a reference to a Class A drug within the meaning of the Misuse of Drugs Act 1971 s 2 (see PARA 770 note 2 ante): Anti-social Behaviour Act 2003 s 11(2).

6 *Ibid* s 1(b).

7 For these purposes (1) each of the following is a local authority in relation to England: a district council, a London borough council, a county council for an area for which there is no district council, the Common Council of the City of London in its capacity as a local authority, and the Council of the Isles of Scilly; and (2) each of the following is a local authority in relation to Wales: a county council and a county borough council: s 11(6), (7). The reference to the local authority is a reference to the local authority for the area in which the premises to which the closure notice applies are situated: s 11(8)(a). As to areas and authorities in England and Wales see further LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq.

8 *Ibid* s 1(2). It is immaterial whether any person has been convicted of an offence relating to the use, production or supply of a controlled drug (see PARA 770 et seq ante): s 1(8). References to the production or supply of a controlled drug are to be construed in accordance with the Misuse of Drugs Act 1971 (see PARA 772 ante): Anti-social Behaviour Act 2003 s 11(1).

9 *Ibid* s 2(1). A 'closure order' is an order that the premises in respect of which the order is made are to be closed to all persons for such period (not exceeding three months) as the court decides: s 2(4). As well as being used for an order made under s 2, it is also the term used to describe an order extended under s 5 (see the text and notes 19-24 infra) and an order made or extended under s 6 (see the text and notes 25-27 infra) which has the like effect as an order made or extended under s 2 or s 5 as the case may be: s 11(5).

Proceedings for the making of such an order are civil proceedings; they engage a person's rights under the Human Rights Act 1998 Sch 1 Pt I and the relevant provisions must be read in a way which is compatible with that Act: *Metropolitan Police Comr v Hooper* [2005] EWHC 340 (Admin), [2005] 4 All ER 1095, [2005] 1 WLR 1995.

10 Anti-social Behaviour Act 2003 s 2(4). The order may include such provision as the court thinks appropriate relating to access to any part of the building or structure of which the premises form part: s 2(5). A closure order may be made in respect of all or any part of the premises in respect of which the closure notice was issued: s 2(8).

A person who occupies or owns any part of a building or structure in which closed premises (ie premises in respect of which a closure order has effect) are situated, and in respect of which the closure order does not have effect, may apply for an order in relation to any access to his part of the building or structure: ss 7(1), (2), 11(9). Such a person may at any time while a closure order has effect apply to the magistrates' court in respect of an order made under s 2 or s 5, or to the Crown Court in respect of an order made under s 6 (see the text and notes 25-27 *infra*): s 7(2). If such an application is made, notice of the date, time and place of the hearing to consider the application must be given to every person mentioned in s 5(6) (as amended) (see note 23 *infra*): s 7(3). On such an application the court may make such order as it thinks appropriate in relation to access to any part of a building or structure in which closed premises are situated: s 7(4). It is immaterial whether any provision has been made as mentioned in s 2(5): s 7(5).

11 *Ibid* s 2(2). 'Served' in this context means served in pursuance of s 1(6)(a), ie by fixing a copy to at least one prominent place on the premises: s 2(2).

The magistrates' court may adjourn the hearing on the application for a period of not more than 14 days to enable:

- 196 (1) the occupier of the premises;
- 197 (2) the person who has control of or responsibility for the premises; or
- 198 (3) any other person with an interest in the premises,

to show why a closure order should not be made: s 2(6). If the magistrates' court adjourns the hearing it may order that the closure notice is to continue in effect until the end of the period of the adjournment: s 2(7).

Note that the Anti-social Behaviour Act 2003 does not expressly or impliedly exclude the operation of the Magistrates' Courts Act 1980 s 54 (adjournment of hearing of complaint: see *MAGISTRATES* vol 29(2) (Reissue) PARA 707) so that in exceptional circumstances the power to adjourn is available over and above the express statutory power in the Anti-social Behaviour Act 2003 s 2(6). The power under the Magistrates' Courts Act 1980 s 54 should not be used to frustrate the statutory purpose; it should be exercised only when there is no other way to avoid a breach of a person's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) and consideration should always be given to the statutory purpose of closing down premises by way of a speedy procedure. Furthermore, if the power to adjourn under the Magistrates' Courts Act 1980 s 54 is exercised, the express power to order that the closure notice should continue until the end of the period of adjournment is not available. Magistrates should have in mind the possibility of adjourning the case to another bench if, due to lack of availability, it would not be possible to continue within the statutory timeframe: *Metropolitan Police Comr v Hooper* [2005] EWHC 340 (Admin), [2005] 4 All ER 1095, [2005] 1 WLR 1995. The phrase 'exceptional circumstances' in the Magistrates' Courts Act 1980 s 54 encompasses circumstances, however frequent or infrequent, that are so compelling as to make it necessary in the interests of justice to override Parliament's clear intention, expressed in the Anti-social Behaviour Act 2003 s 2(6), that closure order proceedings should be concluded speedily: *R (on the application of Turner) v Highbury Corner Magistrates' Court* [2005] EWHC 2568 (Admin), 170 JP 93.

The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see *CONSTITUTIONAL LAW AND HUMAN RIGHTS* vol 8(2) (Reissue) PARA 122 *et seq*.

12 The standard of proof applicable is the civil standard (ie the balance of probabilities): *Chief Constable of Merseyside Police v Harrison (Secretary of State for the Home Department intervening)* [2006] EWHC 1106 (Admin), [2006] 3 WLR 171, (2006) Times, 14 April, DC.

13 Anti-social Behaviour Act 2003 s 2(3)(a). It is immaterial whether any person has been convicted of an offence relating to the use, production or supply of a controlled drug (see PARA 770 *et seq ante*): s 2(9).

14 *Ibid* s 2(3)(b). See note 13 *supra*.

15 *Ibid* s 2(3)(c). See note 13 *supra*.

16 Ie a person authorised by the chief officer of police for the area in which the premises are situated: *ibid* s 3(1), (6).

17 *Ibid* s 3(2). A person acting under s 3(2) may use reasonable force: s 3(3). However, a constable or authorised person seeking to enter the premises for the purposes of s 3(2) must, if required to do so by or on

behalf of the owner, occupier or other person in charge of the premises, produce evidence of his identity and authority before entering the premises: s 3(4).

18 Ibid s 3(5).

19 Ibid s 5(1) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 98). If such a complaint is made, the justice may issue a summons directed to: (1) the persons on whom the closure notice relating to the closed premises was served under s 1(6)(d) or s 1(6)(e) or s 1(7) (see note 2 supra); (2) any other person who appears to the justice to have an interest in the closed premises but on whom the closure notice was not served, requiring such person to appear before the magistrates' court to answer to the complaint: s 5(3).

If a summons is issued in accordance with s 5(3), a notice stating the date, time and place at which the complaint will be heard must be served on: (a) the persons to whom the summons is directed; (b) such constable as the justice thinks appropriate (unless he is the complainant); (c) the local authority (unless it is the complainant): see s 5(9). The reference to a local authority in respect of a closure order is a reference to the local authority for the area in which the premises in respect of which a closure order has effect are situated: s 11(8)(b).

20 Ibid s 5(2).

21 Ibid s 5(4).

22 Ibid s 5(5).

23 Ibid s 5(6) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, Schedule para 98). The following persons are specified for these purposes: a constable; the local authority; a person on whom the closure notice relating to the closed premises was served under the Anti-social Behaviour Act 2003 s 1(6)(d) or s 1(6)(e) or s 1(7) (see note 2 supra); a person who has an interest in the closed premises but on whom the closure notice was not served: s 5(6)(a)-(d). If a complaint is made by a person other than a constable the justice may issue a summons directed to such constable as he thinks appropriate requiring the constable to appear before the magistrates' court to answer to the complaint: s 5(7). If a summons is issued in accordance with s 5(7), a notice stating the date, time and place at which the complaint will be heard must be served on: (1) the persons mentioned in s 1(6)(c) or s 1(6)(d) (see note 2 supra) (except the complainant); (2) such constable as the justice thinks appropriate (unless he is the complainant); (3) the local authority (unless it is the complainant): see s 5(9); and note 19 supra.

24 Ibid s 5(8).

25 Ie an order under ibid s 2 or s 5: s 6(1).

26 Ibid s 6(1), (2). An appeal against the making or extension of a closure order may be brought by a person on whom the closure notice relating to the closed premises was served under s 1(6)(d) or s 1(6)(e) (see note 2 supra), or by a person who has an interest in the closed premises but on whom the closure notice was not served: s 6(3). An appeal against the decision of a court not to make such an order may be brought by a constable or by the local authority: s 6(4).

27 Ibid s 6(5).

28 Ibid s 4(1).

29 Ie the power under ibid s 1(6) (see note 2 supra).

30 Ie the power under ibid s 3(2) (see the text to note 17 supra).

31 Ibid s 4(2)(a).

32 Ibid s 4(2)(b).

33 Ibid s 4(2)(c).

34 See note 3 supra.

35 Ie the offence under the Anti-social Behaviour Act 2003 s 4(1): see the text to note 26 supra.

36 Ie the offence under ibid s 4(2)(b): see head (b) in the text.

37 Ie the offence under ibid s 4(2)(c): see head (c) in the text.

38 Ibid s 4(4).

39 Ibid s 4(3). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

40 A person is the owner of premises if he is either: (1) a person (other than a mortgagee not in possession) who is for the time being entitled to dispose of the fee simple in the premises, whether in possession or in reversion; or (2) a person who holds or is entitled to the rents and profits of the premises under a lease which (when granted) was for a term of not less than three years: Anti-social Behaviour Act 2003 s 11(10).

41 Ibid s 8(1), (2). An application under s 8 must be served on the police authority for the area in which the premises are situated if the application is made by the local authority (and vice versa), and on the owner of the premises: s 8(4). Such an application must not be entertained unless it is made not later than the end of the period of three months starting with the day the closure order ceases to have effect: s 8(3).

42 Relevant damages are damages in proceedings for judicial review or for the tort of negligence or misfeasance in public duty: ibid s 9(5). As to judicial review see JUDICIAL REVIEW. As to negligence see generally NEGLIGENCE. As to misfeasance in public duty see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 188; TORT vol 97 (2010) PARA 719.

43 Ibid s 9(1). Section 9 does not affect any other exemption from liability for damages (whether at common law or otherwise): s 9(4). As to damages generally see DAMAGES.

44 Ibid s 9(2).

45 The exemptions contained in ibid s 9(1), (2) do not apply if the act or omission is shown to have been in bad faith; nor do they apply so as to prevent an award of damages made in respect of an act or omission on the ground that it was unlawful by virtue of the Human Rights Act 1998 s 6(1): Anti-social Behaviour Act 2003 s 9(3). The Human Rights Act 1998 s 6 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right: see s 6(1); and JUDICIAL REVIEW vol 61 (2010) PARA 651.

46 Anti-social Behaviour Act 2003 s 10(1), (2). 'On an appeal' refers to an appeal under s 6: see s 10(2). An application under s 10 must not be entertained unless it is made not later than the end of the period of three months starting with whichever is the later of: (1) the day the court decides not to make a closure order; (2) the day the Crown Court dismisses an appeal against a decision not to make a closure order; (3) the day a closure order ceases to have effect: s 10(3). On such an application the court may order the payment of compensation out of central funds if it is satisfied:

- 199 (a) that the person had no connection with the use of the premises as mentioned in s 1(1) (see the text and notes 1-6 supra) (s 10(4)(a));
- 200 (b) if the person is the owner or occupier of the premises, that he took reasonable steps to prevent the use (s 10(4)(b));
- 201 (c) that the person has incurred financial loss in consequence of the issue of a closure notice or the closure order having effect (s 10(4)(a)); and
- 202 (d) having regard to all the circumstances it is appropriate to order payment of compensation in respect of that loss (s 10(4)(d)).

For these purposes, 'central funds' has the same meaning as in enactments providing for the payment of costs: s 10(5). See PARA 2058 note 13 post.

## UPDATE

### 782 Closure of premises where drugs used unlawfully

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 12--*Chief Constable of Merseyside Police*, cited, reported at [2007] QB 79.

NOTE 21--A court should simply ask whether it has been proved that an extension is necessary and proportionate to prevent the occurrence of further disorder or serious nuisance and, if so, how long the extension should be: *R (on the application of Smith) v Crown Court at Snaresbrook* [2008] EWHC 1282 (Admin), [2009] 1 All ER 547.

NOTE 26--There is no power to extend the time for appeal: *Hampshire Police Authority v Smith* [2009] EWHC 174 (Admin), [2009] 4 All ER 316, DC.



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### **783. Misuse of controlled drugs.**

Offences in connection with the Secretary of State's powers to prevent the misuse of controlled drugs<sup>1</sup> are dealt with elsewhere in this work<sup>2</sup>.

1     le under the Misuse of Drugs Act 1971 ss 10-17, 22.

2     See MEDICINAL PRODUCTS AND DRUGS.

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Orders to make material available.

## **(2) INVESTIGATION OF DRUG TRAFFICKING**

### **784. Orders to make material available.**

A constable<sup>1</sup> may, for the purpose of an investigation into drug trafficking<sup>2</sup>, apply to a circuit judge for an order in relation to particular material or material of a particular description<sup>3</sup>. If on such an application the judge is satisfied that the prescribed conditions are fulfilled, he may make an order that the person who appears to him to be in possession of the material to which the application relates must: (1) produce it to a constable for him to take away<sup>4</sup>; or (2) give a constable access to it<sup>5</sup>, within such period<sup>6</sup> as the order may specify<sup>7</sup>.

The prescribed conditions are:

- 892 (a) that there are reasonable grounds for suspecting that a specified person has carried on drug trafficking<sup>8</sup>;
- 893 (b) that there are reasonable grounds for suspecting that the material to which the application relates:
  - 27 37. (i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made<sup>9</sup>; and
  - 38. (ii) does not consist of or include items subject to legal privilege<sup>10</sup> or excluded material<sup>11</sup>; and
- 28 894 (c) that there are reasonable grounds for believing that it is in the public interest (having regard to the benefit likely to accrue to the investigation if the material is obtained, and to the circumstances under which the person in possession of the material holds it) that the material should be produced or that access to it should be given<sup>12</sup>.

Where any such order has been made by the Crown Court, any person affected by it may apply<sup>13</sup> in writing to the court officer for the order to be discharged or varied; and on hearing such an application a circuit judge may discharge the order or make such variations to it as he thinks fit<sup>14</sup>.

1 'Constable' includes a person commissioned as an officer by the Commissioners for Her Majesty's Revenue and Customs (see PARA 354 note 2 ante): see the Drug Trafficking Act 1994 s 59A(1), (2) (s 59A added by the Proceeds of Crime Act 2002 s 456, Sch 11 para 25(1), (4)); and the Commissioners for Revenue and Customs Act 2005 s 50(1), (2), (7).

2 For these purposes, 'drug trafficking' means doing or being concerned in any of the following (whether in England and Wales or elsewhere):

203 (1) producing or supplying a controlled drug where the production or supply contravenes the Misuse of Drugs Act 1971 s 4(1) (see PARA 772 ante) or a corresponding law (Drug Trafficking Act 1994 s 59A(4)(a) (as added: see note 1 supra));

- 204 (2) transporting or storing a controlled drug where possession of the drug contravenes the Misuse of Drugs Act 1971 s 5(1) (see PARA 770 ante) or a corresponding law (Drug Trafficking Act 1994 s 59A(4)(b) (as so added));
- 205 (3) importing or exporting a controlled drug where the importation or exportation is prohibited by the Misuse of Drugs Act 1971 s 3(1) (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 248) or a corresponding law (Drug Trafficking Act 1994 s 59A(4)(c) (as so added));
- 206 (4) manufacturing or supplying a scheduled substance within the meaning of the Criminal Justice (International Co-operation) Act 1990 s 12 (see PARA 773 ante) where the manufacture or supply is an offence under that provision or would be such an offence if it took place in England and Wales (Drug Trafficking Act 1994 s 59A(4)(d) (as so added));
- 207 (5) using any ship for illicit traffic in controlled drugs in circumstances which amount to the commission of an offence under the Criminal Justice (International Co-operation) Act 1990 s 19 (see PARA 780 ante) (Drug Trafficking Act 1994 s 59A(4)(e) (as so added)).

In s 59A(4) (as added), 'corresponding law' has the same meaning as in the Misuse of Drugs Act 1971 (see PARA 779 note 5 ante): Drug Trafficking Act 1994 s 59A(5) (as so added). For the purposes of the Police and Criminal Evidence Act 1984 ss 21, 22 (see PARAS 888-889 post), an investigation into drug trafficking is to be treated as if it were an investigation of or in connection with an offence: Drug Trafficking Act 1994 s 57(1)(a). Where material produced under s 55 (as amended) (see PARA 784 post) is retained under the Police and Criminal Evidence Act 1984 s 22, the constable retaining it may make information contained in the material available to a foreign law enforcement agency: *R v Crown Court at Southwark, ex p Customs and Excise Comrs* [1990] 1 QB 650, [1989] 3 All ER 673, DC (decision in respect of the Drug Trafficking Offences Act 1986 s 27 (repealed), which is almost identical to the Drug Trafficking Act 1994 s 55).

As to the power of the Secretary of State to make grants in relation to combating drug misuse and drug trafficking see the Criminal Justice Act 1993 s 73.

3 Drug Trafficking Act 1994 s 55(1). An application under s 55(1) may be made without notice to the person apparently in possession of the material to a judge in private: s 55(6). An order of a circuit judge made under s 55 (as amended) has effect as if it were an order of the Crown Court: s 55(8). Provision may be made by the Criminal Procedure Rules as to the discharge and variation of orders under the Drug Trafficking Act 1994 s 55 (as amended) and proceedings relating to such orders: s 55(7) (amended by the Courts Act 2003 s 109(1), Sch 8 para 364). See the text and notes 13, 14 *infra*.

The power to make an order under the Drug Trafficking Act 1994 s 55(1) is not limited to an investigation conducted by officers of Revenue and Customs in the United Kingdom; but an information laid in support of an application for such an order made solely or partly to assist an investigation by a foreign law enforcement agency must so indicate on its face: *R v Crown Court at Southwark, ex p Customs and Excise Comrs* [1990] 1 QB 650, [1989] 3 All ER 673, DC (decided under the Drug Trafficking Offences Act 1986 s 27 (now repealed)).

4 Drug Trafficking Act 1994 s 55(2)(a). Where the material to which such an application relates consists of information contained in a computer, an order under s 55(2)(a) has effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible: s 55(9)(a). For the purposes of the Police and Criminal Evidence Act 1984 ss 21, 22 (see PARAS 888-889 post), material produced in pursuance of an order under the Drug Trafficking Act 1994 s 55(2)(a) is to be treated as if it were material seized by a constable: s 57(1)(b).

If the prescribed conditions for making a production order are satisfied, the judge has a discretion whether to make such an order; but only in exceptional circumstances is it appropriate to require undertakings from the applicant before making an order: *R v Crown Court at Southwark, ex p Customs and Excise Comrs* [1990] 1 QB 650, [1989] 3 All ER 673, DC (decided under the Drug Trafficking Offences Act 1986 s 27 (now repealed)).

5 Drug Trafficking Act 1994 s 55(2)(b). Where the material to which such an application relates consists of information contained in a computer, an order under s 55(2)(b) has effect as an order to give access to the material in a form in which it is visible and legible: s 55(9)(b). Where the judge makes an order under s 55(2)(b) in relation to material on any premises, he may, on the application of a constable, order any person who appears to him to be entitled to grant entry to the premises to allow a constable to enter the premises to obtain access to the material: s 55(5). An application under s 55(5) may be made without notice to the person apparently in possession of the material to a judge in private: s 55(6).

6 The period to be specified must be seven days unless it appears to the judge that a longer or shorter period would be appropriate in the particular circumstances of the application: *ibid* s 55(3).

7 *Ibid* s 55(2). Section 55(2) is subject to s 59(11) (see PARA 786 post): s 55(2).

An order under s 55(2) does not confer any right to production of, or access to, items subject to legal privilege (see note 10 *infra*) or excluded material (see note 11 *infra*): s 55(10)(a). It has effect notwithstanding any

obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise: s 55(10)(b). It may be made in relation to material in the possession of an authorised government department: s 55(10)(c). For these purposes, 'authorised government department' means a government department which is an authorised department for the purposes of the Crown Proceedings Act 1947 (see CROWN PROCEEDINGS AND CROWN PRACTICE): Drug Trafficking Act 1994 s 55(10).

8 Ibid s 55(4)(a) (amended by the Proceeds of Crime Act 2002 ss 456, 457, Sch 11 paras 1, 25(1), (2)(b), Sch 12).

9 Drug Trafficking Act 1994 s 55(4)(b)(i).

10 For these purposes, 'item subject to legal privilege' has the same meaning as in the Police and Criminal Evidence Act 1984 (see PARA 873 note 8 post): Drug Trafficking Act 1994 s 57(2).

11 Ibid s 55(4)(b)(ii). For these purposes, 'excluded material' has the same meaning as in the Police and Criminal Evidence Act 1984 (see PARA 875 post): Drug Trafficking Act 1994 s 57(2).

12 Ibid s 55(4)(c).

13 Where a person proposes so to make an application, he must give a copy of the application, not later than 48 hours before the making of the application, to a constable at the police station specified in the order, together with a notice indicating the time and place at which the application for discharge or variation is to be made: CrimPR 56.4(2). For these purposes, 'constable' includes a person commissioned as an officer by the Commissioners for Her Majesty's Revenue and Customs (see PARA 354 note 2 ante); and 'police station' includes a place for the time being occupied by Her Majesty's Revenue and Customs: see CrimPR 56.4(4); and the Commissioners for Revenue and Customs Act 2005 s 50(1), (2), (7). A circuit judge may, however, direct that CrimPR 56.4(2) need not be complied with if he is satisfied that the person making the application has good reason to seek a discharge or variation of the order as soon as possible and it is not practicable to comply with CrimPR 56.4(2): see CrimPR 56.4(3).

14 CrimPR 56.4(1). 'Appropriate officer' has the same meaning as in the Proceeds of Crime Act 2002 s 378 (see PARA 804 note 2 post): CrimPR 56.4(4).

## **UPDATE**

### **784 Orders to make material available**

NOTES 13, 14--CrimPR 56.4 now Criminal Procedure Rules 2010, SI 2010/60, r 56.4.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/10. OFFENCES RELATING TO CONTROLLED DRUGS ETC/(2) INVESTIGATION OF DRUG TRAFFICKING/785.  
Authority for search.

### **785. Authority for search.**

A constable<sup>1</sup> may, for the purpose of an investigation into drug trafficking<sup>2</sup>, apply to a circuit judge for a warrant in relation to specified premises<sup>3</sup>. On such an application the judge may issue a warrant authorising a constable to enter and search the premises if he is satisfied that an order made<sup>4</sup> in relation to material on the premises has not been complied with, or that either of the two sets of prescribed conditions<sup>5</sup> is fulfilled<sup>6</sup>.

The first set of prescribed conditions is:

- 895 (1) that there are reasonable grounds for suspecting that a specified person has carried on drug trafficking<sup>7</sup>; and
  - 896 (2) that the statutory conditions<sup>8</sup> are fulfilled in relation to any material on the premises<sup>9</sup>; and
  - 897 (3) that it would not be appropriate to make an order to make material available because:
- 29
- 39. (a) it is not practicable to communicate with any person entitled to produce the material<sup>10</sup>; or
  - 40. (b) it is not practicable to communicate with any person entitled to grant access to the material or entitled to grant entry to the premises on which the material is situated<sup>11</sup>; or
  - 41. (c) the investigation for the purpose of which the application is made might be seriously prejudiced unless a constable could secure immediate access to the material<sup>12</sup>.
- 30

The second set of prescribed conditions is:

- 898 (i) that there are reasonable grounds for suspecting that a specified person has carried on drug trafficking<sup>13</sup>; and
  - 899 (ii) that there are reasonable grounds for suspecting that there is on the premises material relating to the specified person or to drug trafficking which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, but that the material cannot at the time of the application be particularised<sup>14</sup>; and
  - 900 (iii) that:
- 31
- 42. (A) it is not practicable to communicate with any person entitled to grant entry to the premises<sup>15</sup>; or
  - 43. (B) entry to the premises will not be granted unless a warrant is produced<sup>16</sup>; or
  - 44. (C) the investigation for the purpose of which the application is made might be seriously prejudiced unless a constable arriving at the premises could secure immediate entry to them<sup>17</sup>.
- 32

Where a constable has entered premises in the execution of a warrant so issued, he may seize and retain any material, other than items subject to legal privilege<sup>18</sup> and excluded material<sup>19</sup>, which is likely to be of substantial value, whether by itself or together with other material, to the investigation for the purpose of which the warrant was issued<sup>20</sup>.

1 For the meaning of 'constable' see PARA 784 note 1 ante.

2 For the meaning of 'drug trafficking' see PARA 784 note 2 ante.

3 Drug Trafficking Act 1994 s 56(1). For these purposes, 'premises' has the same meaning as in the Police and Criminal Evidence Act 1984 (see PARA 872 note 5 post): Drug Trafficking Act 1994 s 57(2).

4 Ie an order under ibid s 55 (as amended): see PARA 784 ante.

5 Ie the conditions in ibid s 56(3) or s 56(4): see the text and notes 7-17 infra.

6 Ibid s 56(2).

7 Ibid s 56(3)(a) (amended by the Proceeds of Crime Act 2002 ss 456, 457, Sch 11 para 25(1), (2), Sch 12).

8 Ie the conditions in the Drug Trafficking 1994 s 55(4)(b), (c): see PARA 784 ante.

9 Ibid s 56(3)(b).

10 Ibid s 56(3)(c)(i).

11 Ibid s 56(3)(c)(ii).

12 Ibid s 56(3)(c)(iii).

13 Ibid s 56(4)(a) (amended by the Proceeds of Crime Act 2002 Sch 11 para 25(1), (2), Sch 12).

14 Drug Trafficking Act 1994 s 56(4)(b).

15 Ibid s 56(4)(c)(i).

16 Ibid s 56(4)(c)(ii).

17 Ibid s 56(4)(c)(iii).

18 For these purposes, 'item subject to legal privilege' has the same meaning as in the Police and Criminal Evidence Act 1984 (see PARA 873 note 8 post): Drug Trafficking Act 1994 s 57(2).

19 For these purposes, 'excluded material' has the same meaning as in the Police and Criminal Evidence Act 1984 (see PARA 875 post): Drug Trafficking Act 1994 s 57(2).

20 Ibid s 56(5).

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Disclosure of information held by government departments.

#### **786. Disclosure of information held by government departments.**

In the case of material in the possession of an authorised government department<sup>1</sup>, an order for its production<sup>2</sup> may require any officer of the department (whether named in the order or not) who may for the time being be in possession of the material concerned to comply with it, and such an order must be served as if the proceedings were proceedings against the department<sup>3</sup>. The person on whom such an order is served:

901 (1) must take all reasonable steps to bring it to the attention of the officer concerned; and

902 (2) if the order is not brought to that officer's attention within a specified period<sup>4</sup>, must report the reasons for the failure to the court,

and it is the duty of any other officer of the department in receipt of the order to take such steps as are mentioned in head (1) above<sup>5</sup>.

1 'Authorised government department' means a government department which is an authorised department for the purposes of the Crown Proceedings Act 1947 (see CROWN PROCEEDINGS AND CROWN PRACTICE); Drug Trafficking Act 1994 s 59(13).

2 ie an order made under *ibid* s 55(2): see PARA 784 ante.

3 *Ibid* s 59(11) (amended by the Proceeds of Crime Act 2002 ss 456, 457, Sch 11 para 25(1), (2), Sch 12).

4 ie the period specified in an order under the Drug Trafficking Act 1994 s 55(2): see PARA 784 ante.

5 *Ibid* s 59(12) (amended by the Proceeds of Crime Act 2002 Sch 11 para 25(1), (3)).

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### **787. Prejudicing investigation.**

Where, in relation to an investigation into drug trafficking<sup>1</sup>, an order<sup>2</sup> to make material available has been made or has been applied for and has not been refused, or a warrant<sup>3</sup> to enter and search has been issued, a person who, knowing or suspecting that the investigation is taking place, makes any disclosure which is likely to prejudice the investigation is guilty of an offence<sup>4</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six<sup>5</sup> months or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

In proceedings against a person for such an offence it is a defence to prove that he did not know or suspect that the disclosure was likely to prejudice the investigation or that he had lawful authority or reasonable excuse for making the disclosure<sup>7</sup>.

1 For the meaning of 'drug trafficking' see PARA 784 note 2 ante.

2 Ie under the Drug Trafficking Act 1994 s 55 (as amended): see PARA 784 ante.

3 Ie under ibid s 56: see PARA 785 ante.

4 Ibid s 58(1). Nothing in s 58(1) makes it an offence for a professional legal adviser to disclose any information or other matter: (1) to, or to a representative of, a client of his in connection with the giving by the legal adviser of legal advice to the client; or (2) to any person in contemplation of, or in connection with, legal proceedings, and for the purposes of those proceedings: s 58(3). However, s 58(3) does not apply in relation to any information or other matter which is disclosed with a view to furthering a criminal purpose: s 58(4).

The Secretary of State may by regulations made by statutory instrument provide that, in such circumstances as may be prescribed, s 58 is to apply to such persons in the public service of the Crown, or such categories of person in that service, as may be prescribed: s 61(1), (6) (s 61(1) amended by the Proceeds of Crime Act 2002 s 456, Sch 11 para 25(1), (6)). Any such instrument is subject to annulment in pursuance of a resolution of either House of Parliament: Drug Trafficking Act 1994 s 61(7). 'The Crown' includes the Crown in right of Her Majesty's government in Northern Ireland; and 'prescribed' means prescribed by regulations made by the Secretary of State: s 61(5). See the Drug Trafficking Offences Act 1986 (Crown Servants and Regulators etc) Regulations 1994, SI 1994/1757 (amended by SI 1998/1129, SI 2001/3649). These regulations have continued effect under the Drug Trafficking Act 1994: see s 66(1), (3), Sch 2 para 3.

Proceedings for an offence under s 58 or for any attempt, conspiracy or incitement to commit any such offence may be instituted by the Director of Revenue and Customs Prosecutions (see PARA 1068 post) or by order of the Commissioners for Her Majesty's Revenue and Customs (see PARA 354 note 2 ante): s 60(1), (6) (s 60(1), (2), (5) (b), (6) amended by the Commissioners for Revenue and Customs Act 2005 ss 50(6), 52(2), Sch 4 para 59(a), (b), (d), (e), Sch 5; and the Drug Trafficking Act 1994 s 60(6) further amended, and s 60(6A), (6B) added, by the Proceeds of Crime Act 2002 ss 456, 457, Sch 11 para 25(1), (2), (5), Sch 12).

Proceedings for an offence are instituted: (a) when a justice of the peace issues a summons or warrant under the Magistrates' Courts Act 1980 s 1 (issue of summons to, or warrant for arrest of, accused: see MAGISTRATES vol 29(2) (Reissue) PARAS 522-523) in respect of the offence (Drug Trafficking Act 1994 s 60(6A)(a) (as so added)); (b) when a person is charged with the offence after being taken into custody without a warrant (s 60(6A)(b) (as so added)); (c) when a bill of indictment is preferred under the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2 (see PARA 1206 post) in a case falling within s 2(2)(b) (preference by direction of the criminal division of the Court of Appeal or by direction, or with the consent, of a High Court judge) (Drug Trafficking Act 1994 s 60(6A)(c) (as so added)); (d) when a public prosecutor issues a written charge and requisition in respect of the offence (s 60(6A)(aa) (s 60(6A) as so added; s 60(6A)(aa) prospectively added by the Criminal Justice Act 2003 s 331, Sch 36 para 12(1), (3))). Head (d) supra is added with effect as from a day to be appointed. At the date at which this volume states the law no such day had been appointed. Where the



application of the Drug Trafficking Act 1994 s 60(6A) (as added and amended) would result in there being more than one time for the institution of proceedings, they must be taken to have been instituted at the earliest of those times: s 60(6B) (as so added). Any proceedings for such an offence which are instituted by order of the Commissioners must be commenced in the name of an officer of Revenue and Customs: s 60(2) (as so amended).

Where the Commissioners investigate, or propose to investigate, any matter with a view to determining whether there are grounds for believing that a specified offence has been committed (s 60(4)(a)) or whether a person should be prosecuted for a specified offence (s 60(4)(b)), that matter must be treated as an assigned matter within the meaning of the Customs and Excise Management Act 1979 (see s 1(1); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 903).

Nothing in the Drug Trafficking Act 1994 s 60 (as amended) is to be taken either to prevent any person (including any officer) who has power to arrest, detain or prosecute any person for a specified offence from doing so (s 60(5)(a)) or to prevent a court from proceeding to deal with a person brought before it following his arrest by an officer for a specified offence, even though the proceedings have not been instituted in accordance with s 60 (s 60(5)(b) (as so amended)).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 Drug Trafficking Act 1994 s 58(5). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7 Ibid s 58(2). As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

## **UPDATE**

### **787 Prejudicing investigation**

NOTE 4--See further Serious Crime Act 2007 Sch 6 para 25 (references to common law offence of incitement).

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### **(3) INTOXICATING SUBSTANCES**

#### **788. Supply of intoxicating substances.**

If a person supplies or offers to supply a substance other than a controlled drug<sup>1</sup>:

- 903 (1) to a person under the age of 18 whom he knows, or has reasonable cause to believe, to be under that age; or
- 904 (2) to a person who is acting on behalf of a person under that age and whom he knows, or has reasonable cause to believe, to be so acting,

he is guilty of an offence, if he knows or has reasonable cause to believe that the substance is, or its fumes are, likely to be inhaled by the person under the age of 18 for the purposes of causing intoxication<sup>2</sup>. Such a person is liable on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup> or to a fine not exceeding level 5 on the standard scale or to both<sup>4</sup>.

In proceedings against any person for such an offence it is a defence for him to show<sup>5</sup> that at the time he made the supply or offer he was under the age of 18 and was acting otherwise than in the course or furtherance of a business<sup>6</sup>.

<sup>1</sup> For these purposes, 'controlled drug' has the same meaning as in the Misuse of Drugs Act 1971 (see PARA 770 note 2 ante): Intoxicating Substances (Supply) Act 1985 s 1(4).

<sup>2</sup> Ibid s 1(1).

<sup>3</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (see s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

<sup>4</sup> Intoxicating Substances (Supply) Act 1985 s 1(3) (amended by the Statute Law (Repeals) Act 1993). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

<sup>5</sup> As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

<sup>6</sup> Intoxicating Substances (Supply) Act 1985 s 1(2).

### **UPDATE**

#### **788 Supply of intoxicating substances**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement

and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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## **11. MISCELLANEOUS OFFENCES**

### **(1) MONEY LAUNDERING OFFENCES**

#### **(i) Introduction**

#### **789. The Proceeds of Crime Act 2002.**

The Proceeds of Crime Act 2002<sup>1</sup> reformed, repealed and replaced the previous provisions relating to money laundering<sup>2</sup>, other than those relating to terrorist funds<sup>3</sup>. The relevant provisions of the Act can be grouped as follows:

- 905 (1) the three principal money laundering<sup>4</sup> offences<sup>5</sup>;
- 906 (2) offences involving a failure to disclose<sup>6</sup>;
- 907 (3) the offence of tipping-off<sup>7</sup>.

In addition, regulations have been made under the Act which oblige financial institutions to have systems to detect and prevent money laundering<sup>8</sup>.

Guidance notes on money laundering have been produced by various bodies<sup>9</sup>.

1 le the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (as amended): see PARAS 790-803 post.

2 le the Drug Trafficking Act 1994 ss 49-54 (repealed) (proceeds of drug trafficking); and the Criminal Justice Act 1988 ss 93A-93D (repealed) (proceeds of other criminal conduct).

3 le the Terrorism Act 2000 s 18: see PARA 393 ante.

4 For the purposes of the Proceeds of Crime Act 2002 Pt 7 (as amended), 'money laundering' is an act which:

- 208 (1) constitutes an offence under s 327, s 328 or s 329 (see PARAS 791-793 post) (s 340(11)(a));
- 209 (2) constitutes an attempt, conspiracy or incitement to commit such an offence (see PARAS 65-67, 79 ante) (s 340(11)(b));
- 210 (3) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in head (1) supra (see PARAS 791-793 ante) (s 340(11)(c)); or
- 211 (4) would constitute an offence specified in head (1), (2) or (3) supra if done in the United Kingdom (s 340(11)(d)).

For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 See ibid ss 327-329 (as amended); and PARAS 791-793 post. The principal money laundering offences under ss 327-329 (as amended) do not have effect where the conduct constituting an offence under those provisions began before 24 February 2003 and ended on or after that date and the old principal money laundering offences (ie under the Criminal Justice Act 1988 ss 93A-93C (repealed); the Drug Trafficking Act 1994 ss 49-51 (repealed); and the Criminal Justice (International Co-operation) Act 1990 s 14 (repealed)) continue to have

effect in such circumstances: Proceeds of Crime Act 2002 (Commencement No 4, Transitional Provisions and Savings) Order 2003, SI 2003/120, arts 1, 3 (amended by SI 2003/333).

6 See the Proceeds of Crime Act 2002 ss 330-332 (as amended); and PARAS 797-799 post. The failure to disclose offences under ss 330-332 do not have effect where the information or other matter on which knowledge or suspicion that another person is engaged in money laundering is based, or which gives reasonable grounds for such knowledge or suspicion, came to a person before 24 February 2003; and the old failure to disclose offence under the Drug Trafficking Act 1994 s 52 (repealed) continues to have effect in such circumstances: Proceeds of Crime Act 2002 (Commencement No 4, Transitional Provisions and Savings) Order 2003, SI 2003/120, arts 1, 4.

7 See the Proceeds of Crime Act 2002 s 333; and PARA 803 post.

Proceedings for an offence under Pt 7 (as amended), or for attempt, conspiracy or incitement to commit any such offence, or aiding, abetting, counselling or procuring any such offence, may be started by the Director of Revenue and Customs Prosecutions or by order of the Commissioners for Revenue and Customs: see s 451(1), (6)(a), (c), (d) (amended by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 99(a)). Where proceedings are so instituted by the Commissioners, the proceedings must be brought in the name of an officer of Revenue and Customs: Proceeds of Crime Act 2002 s 451(2) (substituted by the Commissioners for Revenue and Customs Act 2005 Sch 4 para 99(b)). See also the Proceeds of Crime Act 2002 s 451(4), (5) (amended by the Commissioners for Revenue and Customs Act 2005 Sch 4 para 99(d)). As to the Commissioners for Revenue and Customs see PARA 354 note 2 ante. The Director of Revenue and Customs Prosecutions is appointed under the Commissioners for Revenue and Customs Act 2005 s 34: see PARA 1068 post.

The Secretary of State may by regulations provide that any of the offences under the Proceeds of Crime Act 2002 Pt 7 (as amended) are to apply to persons in the public service of the Crown: s 452(1), (2)(a). Any subordinate legislation (ie any Order in Council, order or regulations) made under the Proceeds of Crime Act 2002 may make different provision for different purposes and may include supplementary, incidental, saving or transitional provisions: see s 459(1), (2). Any power to make such subordinate legislation is exercisable by statutory instrument (s 459(3)) and (except in the case of an order under s 75(7) or (8) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 392), s 223(7) or (8), s 282 (see PARA 2161 post), s 292(4) (see PARA 2165 post), s 309 (see PARA 2149 post), s 339A(7) (as added) (see PARA 791 post), s 364(4) (see PARA 814 post), s 377(4) (see PARA 818 post), s 436(6), s 438(9) or s 458) is subject to annulment in pursuance of a resolution of either House of Parliament (s 459(4)(a) (amended by the Serious Organised Crime and Police Act 2005 s 103(1), (7))). No order may be made by the Secretary of State under the Proceeds of Crime Act 2002 s 75(7) or (8), s 223(7) or (8), s 282, s 292(4), s 309, s 339A(7) (as added), s 364(4), s 377(4), s 436(6) or s 438(9) unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 459(6)(a) (amended by the Serious Organised Crime and Police Act 2005 s 103(1), (7)). Provision is also made in connection with the making of subordinate legislation by the Scottish Ministers and in connection with the making of subordinate legislation which makes provision only in relation to Scotland: see the Proceeds of Crime Act 2002 s 459(4)(b), (c), (5), (6)(b), (7).

The offences in Pt 7 (as amended) apply to the Director of Savings appointed under the National Debt Act 1972 s 1 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 810) and any person employed or otherwise engaged in his service: Proceeds of Crime Act 2002 (Crown Servants) Regulations 2003, SI 2003/173. For savings in relation to prosecutions and as to offences committed before 24 February 2003 see the Proceeds of Crime Act 2002 (Commencement No 4, Transitional Provisions and Savings) Order 2003, SI 2003/120, art 6.

In respect of tipping-off, the Proceeds of Crime Act 2002 s 342 (see PARA 804 post) does not have effect where the conduct constituting an offence under s 342 began before 24 February 2003 and ended on or after that date, and the tipping-off offences under the Criminal Justice Act 1988 s 93D(1) (repealed) and the Drug Trafficking Act 1994 s 53(1) (repealed) and s 58 continue to have effect in such circumstances: Proceeds of Crime Act 2002 (Commencement No 4, Transitional Provisions and Savings) Order 2003, SI 2003/120, arts 1, 5(1). The tipping-off offences under the Criminal Justice Act 1988 s 93D(2), (3) (repealed) continue to have effect where the disclosure mentioned in s 93D(2)(a) (repealed) or s 93D(3)(a) (repealed), as the case may be, was made before 24 February 2003, and the provisions of the Drug Trafficking Act 1994 s 52(2), (3) (repealed) continue to have effect where the disclosure mentioned in s 52(2)(a) (repealed) or s 53(3)(a) (repealed), as the case may be, was made before 24 February 2003: Proceeds of Crime Act 2002 (Commencement No 4, Transitional Provisions and Savings) Order 2003, SI 2003/120, arts 1, 5(2), (3).

8 Money Laundering Regulations 2003, SI 2003/3075 (amended by SI 2006/308). These regulations, which replace the Money Laundering Regulations 1993, SI 1993/1933, and the Money Laundering Regulations 2001, SI 2001/3641, implement EC Council Directive 91/308/EEC (OJ L166, 28.06.1991, p 77) on prevention of the use of the financial system for the purpose of money laundering (amended by European Parliament and EC Council Directive 2001/97 (OJ L344, 28.12.01, p 76)). The Money Laundering Regulations 2003, SI 2003/3075 (as amended) also revoke the Financial Services and Markets Act 2000 (Regulations Relating to Money Laundering) Regulations 2001, SI 2001/1819.

Where business relationships are formed, or one-off transactions are carried out, in the course of relevant business (defined in the Money Laundering Regulations 2003, SI 2003/3075, reg 2), the persons carrying out such relevant business are required to maintain certain identification procedures (see reg 4), record-keeping procedures (see reg 6) and internal reporting procedures (see reg 7 (amended by SI 2006/308; SI 2006/594) and to establish other appropriate procedures for the purpose of forestalling or preventing money laundering (see the Money Laundering Regulations 2003, SI 2003/3075, reg 3(1)(b)). They are also required to train their employees in those procedures and, more generally, in the recognition of money laundering transactions and the law relating to money laundering; see reg 3(1)(c). A person who fails to maintain the procedures or carry out the training is guilty of a criminal offence and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to a fine not exceeding the statutory maximum: reg 3(2). In deciding whether a person has committed such an offence, the court must consider whether he followed any relevant guidance which was at the time concerned: (1) issued by a supervisory authority or any other appropriate body (reg 3(3)(a)); (2) approved by the Treasury (reg 3(3)(b)); and (3) published in a manner approved by the Treasury as appropriate in its opinion to bring the guidance to the attention of persons likely to be affected by it (reg 3(3)(c)). See note 9 *infra*; and PARA 797 note 1 *post*.

Casino operators must obtain satisfactory evidence of the identity of all people using their gaming facilities (see reg 8).

The Commissioners for Revenue and Customs are required to keep a register of money service operators and a register of high value dealers and may charge a fee for registration: see regs 2, 9, 14; Commissioners for Revenue and Customs Act 2005 s 50(1), (7). A person who acts as a money service operator or as a high value dealer is required to be registered and to provide the Commissioners with specified information: see the Money Laundering Regulations 2003, SI 2003/3075, regs 10, 11. Registration may be refused or cancelled by the Commissioners: see regs 12, 13. The Commissioners have certain powers in relation to money service operators and high value dealers, including a power to enter and inspect premises: see regs 15-19. Where there are reasonable grounds for believing that an offence under the Money Laundering Regulations 2003, SI 2003/3075 (as amended) is being, has been or is about to be committed by a money service operator or high value dealer, the Commissioners may seek a court order requiring any person in possession of certain information to allow them access to it: see reg 16. The Commissioners may also obtain a warrant to enter premises, to search persons and to take away documents: see reg 19. Under certain circumstances the Commissioners may impose a civil penalty (not exceeding £20,000): see reg 20. There is a mechanism for a formal review by the Commissioners of their decisions: see regs 21, 22. Offences under the Money Laundering Regulations 2003, SI 2003/3075 (as amended) may be instituted by the Commissioners: see reg 23. Fees and penalties imposed may be recovered as a civil debt: see reg 24.

People who are operating a bureaux de change must inform the Financial Services Authority ('the FSA') before they operate: see reg 25.

Supervisory authorities (defined in reg 2) and various other people who obtain information indicative of money laundering are required to inform a constable: see reg 26. The Treasury may direct any people who carry on relevant business to refrain from doing business with people in certain non-EEA states: see reg 28.

9 Eg by the financial services industry's Joint Money Laundering Steering Group (2001), the Bar Council, the Law Society, and the Institute of Chartered Accountants in England and Wales. See also PARA 797 note 1 *post*.

## UPDATE

### 789 The Proceeds of Crime Act 2002

NOTES 4, 7--See further Serious Crime Act 2007 Sch 6 para 44(a), (d) (references to common law offence of incitement).

NOTE 7--2002 Act s 459 further amended: 2007 Act Sch 8 para 119, Sch 11 para 15.

NOTE 8--SI 2003/3075 further amended: SI 2006/3221, SI 2007/108.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11. MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(i) Introduction/790. Criminal property.

## **790. Criminal property.**

For the purposes of the money laundering provisions of the Proceeds of Crime Act 2002<sup>1</sup>, property is criminal property if:

- 908 (1) it constitutes a person's benefit from criminal conduct<sup>2</sup> or it represents such a benefit<sup>3</sup>, in whole or part and whether directly or indirectly<sup>4</sup>; and
- 909 (2) the alleged offender knows or suspects that it constitutes or represents such a benefit<sup>5</sup>.

1 Ie the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (as amended): s 340(1).

2 For the purposes of ibid Pt 7 (as amended), 'criminal conduct' is conduct which: (1) constitutes an offence in any part of the United Kingdom; or (2) would constitute an offence in any part of the United Kingdom if it occurred there: s 340(2). It is immaterial: (a) who carried out the conduct; (b) who benefited from it; (c) whether the conduct occurred before or after 24 July 2002 (ie the passing of the Proceeds of Crime Act 2002): s 340(4). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 A person 'benefits from conduct' if he obtains property as a result of or in connection with the conduct: ibid s 340(5). If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage: s 340(6). References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained in both that connection and some other: s 340(7). If a person benefits from conduct his benefit is the property obtained as a result of or in connection with the conduct: s 340(8).

'Property' is all property wherever situated and includes: (1) money (s 340(9)(a)); (2) all forms of property, real or personal, heritable or moveable (s 340(9)(b)); (3) things in action and other intangible or incorporeal property (s 340(9)(c)).

The following rules apply in relation to property:

- 212 (a) property is obtained by a person if he obtains an interest in it (s 340(10)(a));
- 213 (b) references to an interest, in relation to land in England and Wales or Northern Ireland, are references to any legal estate or equitable interest or power (s 340(10)(b));
- 214 (c) references to an interest, in relation to land in Scotland, are references to any estate, interest, servitude or other heritable right in or over land, including a heritable security (s 340(10)(c));
- 215 (d) references to an interest, in relation to property other than land, include references to a right (including a right to possession) (s 340(10)(d)).

4 Ibid s 340(3)(a).

5 Ibid s 340(3)(b).

## **UPDATE**

## **790 Criminal property**

NOTE 2--It is generally necessary to specify the class of offence committed: *Prosecution Appeal (No 11 of 2007)*; *R v W* [2008] EWCA Crim 2, [2008] 3 All ER 533. As to proof that relevant property derived from crime see *R v Anwoir* [2008] EWCA Crim 1354, [2008] 4 All ER 582 (irresistible inference that property so derived).

NOTE 3--The value of the property is to be judged by its market value, not the cost of acquiring the property: *R v Pattison* [2007] EWCA Crim 1536, [2008] 1 Cr App Rep (S) 287. See *R v K* [2007] EWCA Crim 491, [2007] 1 WLR 2262 (failing to declare profits to Inland Revenue constituted pecuniary advantage).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11. MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(ii) Principal Money Laundering Offences/791. Concealing etc criminal property.

## **(ii) Principal Money Laundering Offences**

### **791. Concealing etc criminal property.**

A person commits an offence if he conceals<sup>1</sup>, disguises, converts or removes<sup>2</sup> criminal property<sup>3</sup>. Such an offence is a 'lifestyle offence' in respect of a which the court may make a financial reporting order<sup>4</sup>.

A person does not commit such an offence if: (1) he makes an authorised disclosure<sup>5</sup> and, if the disclosure is made before he does the act mentioned<sup>6</sup>, he has the appropriate consent<sup>7</sup>; (2) he intended to make such a disclosure but had a reasonable excuse for not doing so<sup>8</sup>; (3) the act he does is done in carrying out a function he has relating to the enforcement of any provision of the Proceeds of Crime Act 2002 or of any other enactment relating to criminal conduct or benefit from criminal conduct<sup>9</sup>.

A deposit-taking body<sup>10</sup> that converts or transfers criminal property<sup>11</sup> does not commit an offence if it does the act in operating an account maintained with it, and the value of the criminal property concerned is less than the threshold amount determined<sup>12</sup> for the act<sup>13</sup>.

It is also provided that if a person conceals, disguises, converts or removes criminal property<sup>14</sup>, he does not commit an offence, if: (a) he knows, or believes on reasonable grounds, that the relevant criminal conduct<sup>15</sup> occurred in a particular country or territory outside the United Kingdom<sup>16</sup>; and (b) the relevant criminal conduct was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and is not of a description prescribed by an order made by the Secretary of State<sup>17</sup>.

1 Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it: Proceeds of Crime Act 2002 s 327(3). As to the institution of proceedings for offences under Pt 7 (ss 327-340) (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see PARA 789 note 7 ante. See also *R v Montila* [2004] UKHL 50, [2005] 1 All ER 113 (decided under the Criminal Justice Act 1988 s 93C and the Drug Trafficking Act 1994 s 49(2) (both repealed)).

2 This includes removing property from England and Wales or from Scotland or from Northern Ireland: see the Proceeds of Crime Act 2002 s 327(1)(d).

3 Ibid s 327(1). For the penalty for such an offence see PARA 796 post. For the meaning of 'criminal property' see PARA 790 ante. The natural meaning of s 327(1) is that the property concealed, disguised, converted or transferred has to be criminal property at the time that it is concealed, disguised, converted or transferred, so that, in a case of transfer, the offence of transferring criminal property will not be committed if the property is not criminal property at the time of the transfer: *R v Loizou* [2005] EWCA Crim 1579, [2005] 2 Cr App Rep 618, [2005] Crim LR 885. It cannot be said that property acquired legitimately would become criminal property within the Proceeds of Crime Act 2002 s 340 (see PARA 790 ante) if a person formed an intention to use it for criminal purposes: *R v Loizou* supra.

4 See the Proceeds of Crime Act 2002 s 75(2)(a), Sch 2 para 2(a); the Serious Organised Crime and Police Act 2005 s 76(3)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 476.

5 Ie under the Proceeds of Crime Act 2002 s 338 (as amended): see PARA 795 post.

6 Ie an act mentioned in ibid s 327(1): see the text to notes 1-3 supra.



7 Ibid s 327(2)(a). As to the meaning of 'appropriate consent' see PARA 794 post.

8 Ibid s 327(2)(b).

9 Ibid s 327(2)(c). As to when a person benefits from criminal conduct and the meaning of 'criminal conduct' see PARA 790 notes 2-3 ante.

10 For the purposes of ibid Pt 7 (as amended), 'deposit-taking body' means: (1) a business which engages in the activity of accepting deposits; or (2) the National Savings Bank (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 810): s 340(14) (added by the Serious Organised Crime and Police Act 2005 s 103(1), (6)).

11 It does an act mentioned in the Proceeds of Crime Act 2002 s 327(1)(c) or (d).

12 It determined under ibid s 339A (as added), which applies for the purposes of s 327(2C) (as added) (see the text to note 13 infra), s 328(5) (as added) (see PARA 792 post), s 329(2C) (as added) (see PARA 793 post): s 339A(1) (s 339A added by the Serious Organised Crime and Police Act 2005 s 103(1), (5)).

The threshold amount for acts done by a deposit-taking body in operating an account is £250 unless a higher amount is specified under the provisions of the Proceeds of Crime Act 2002s 339A (as added) (in which event it is that higher amount): s 339A(2) (as so added). The Secretary of State may by order vary the amount for the time being specified in s 339A(2) (as added): s 339A(7) (as so added). As to orders made under the Proceeds of Crime Act 2002 see further PARA 789 note 7 ante.

An officer of Revenue and Customs, or a constable, may specify the threshold for acts done by a deposit-taking body in operating an account: (1) when he gives consent, or gives notice of refusing consent, to the deposit-taking body's doing of an act mentioned in s 327(1), s 328(1) or s 329(1) in opening, or operating, the account or a related account; or (2) on a request from the deposit-taking body: s 339A(3) (as so added); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). As to officers of Revenue and Customs see PARA 354 note 2 ante.

Where the threshold amount for acts done in operating an account is specified under the Proceeds of Crime Act 2002 s 339A(3) or (4) (as added), an officer of Revenue and Customs, or a constable, may vary the amount (whether on a request from the deposit-taking body or otherwise) by specifying a different amount: s 339A(4) (as so added); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). Different threshold amounts may be specified under the Proceeds of Crime Act 2002 s 339A(3), (4) (as added) for different acts done in operating the same account: s 339A(5) (as so added). The amount specified under s 339A(3) or (4) (as added) as the threshold amount for acts done in operating an account must, when specified, not be less than the amount specified in s 339A(2) (as added): s 339A(6) (as so added).

For the purposes of s 339A (as added), an account is related to another if each is maintained with the same deposit-taking body and there is a person who, in relation to each account, is the person or one of the persons, entitled to instruct the body as respects the operation of the account: s 339A(8) (as so added).

References to a constable include references to a person authorised by the Director General of the Serious Organised Crime Agency: s 340(13) (amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 168, 174). As to the establishment of the Serious Organised Crime Agency and the appointment of the Director General of the Serious Crime Agency see the Serious Organised Crime and Police Act 2005 s 1, Sch 1; and POLICE vol 36(1) (2007 Reissue) PARA 430 et seq.

13 Proceeds of Crime Act 2002 s 327(2C) (added by the Serious Organised Crime and Police Act 2005 s 103(1), (2)).

14 It is an offence under the Proceeds of Crime Act 2002 s 327(1): see the text to notes 1-3 supra.

15 For these purposes, 'the relevant criminal conduct' is the criminal conduct by reference to which the property concerned is criminal property: ibid s 327(2B) (s 327(2A), (2B) added by the Serious Organised Crime and Police Act 2005 s 102(1), (2)).

16 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

17 Proceeds of Crime Act 2002 s 327(2A) (as added: see note 15 supra). For these purposes, the Secretary of State has prescribed conduct which would constitute an offence punishable by imprisonment for a maximum term in excess of 12 months in any part of the United Kingdom if it occurred there, other than an offence under the Gaming Act 1968 (repealed), an offence under the Lotteries and Amusements Act 1976 or an offence under the Financial Services and Markets Act 2000 s 23 or s 25 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 80, 225): Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006, SI 2006/1070, art 2. As to the making of orders under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante.

## UPDATE

### **791 Concealing etc criminal property**

NOTE 2--A person converts criminal property where he permits another to lodge, receive, retain or withdraw money which constitutes criminal property from his bank account: *R v Faza* [2009] EWCA Crim 1697, [2010] 1 Cr App Rep 97, [2009] All ER (D) 74 (Jun).

NOTE 12--2002 Act s 340(13) further amended: Serious Crime Act 2007 Sch 8 para 130.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11. MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(ii) Principal Money Laundering Offences/792. Arrangements.

## 792. Arrangements.

A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates, by whatever means, the acquisition, retention, use or control of criminal property<sup>1</sup> by or on behalf of another person<sup>2</sup>. Such an offence is a 'lifestyle offence' in respect of a which the court may make a financial reporting order<sup>3</sup>.

A person does not commit such an offence if: (1) he makes an authorised disclosure<sup>4</sup> and, if the disclosure is made before he does the act of entering into or becoming concerned in such an arrangement, he has the appropriate consent<sup>5</sup>; (2) he intended to make such a disclosure but had a reasonable excuse for not doing so<sup>6</sup>; (3) the act he does is done in carrying out a function he has relating to the enforcement of any provision of the Proceeds of Crime Act 2002 or of any other enactment relating to criminal conduct or benefit from criminal conduct<sup>7</sup>. A deposit-taking body<sup>8</sup> that does an act of entering into or becoming concerned in such an arrangement does not commit such an offence if it does the act in operating an account maintained with it and the arrangement facilitates the acquisition, retention, use or control of criminal property of a value that is less than the threshold amount determined<sup>9</sup> for the act<sup>10</sup>.

It is also provided that a person does not commit such an offence if he knows, or believes on reasonable grounds, that the relevant criminal conduct<sup>11</sup> occurred in a particular country or territory outside the United Kingdom<sup>12</sup>, and the relevant criminal conduct was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and is not of a description prescribed by an order made by the Secretary of State<sup>13</sup>.

1 For the meaning of 'criminal property' see PARA 790 ante.

2 Proceeds of Crime Act 2002 s 328(1). See PARA 789 text and notes 8-9 ante. For the penalty for such an offence see PARA 796 post. Section 328 was not intended to cover or affect the ordinary conduct of litigation by legal professionals, which includes any step taken by them in litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment; it could not have been intended that proceedings or steps taken by lawyers in order to determine or secure legal rights and remedies for their clients should involve them in becoming concerned in an arrangement which facilitates the acquisition, retention, use or control of criminal property: *Bowman v Fels* [2005] EWCA Civ 226, [2005] 4 All ER 609, [2005] 2 Cr App Rep 243 (disapproving *P v P (Ancillary Relief)* [2003] EWHC 226 (Fam) at [48-51], [67], [2004] Fam 1 at [48-51], [67], [2003] 4 All ER 843 at [48-51], [67], per Butler-Sloss P). As to the Proceeds of Crime Act 2002 s 328(1) see also *Squirrell Ltd v National Westminster Bank plc* [2005] EWHC 664 (Ch), [2005] 2 All ER 784.

As to the institution of proceedings for offences under the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see PARA 789 note 7 ante.

3 See *ibid* s 75(2)(a), Sch 2 para 2(b); the Serious Organised Crime and Police Act 2005 s 76(3)(c); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 476.

4 *Ie* under the Proceeds of Crime Act 2002 s 338 (as amended): see PARA 795 post.

5 *Ibid* s 328(2)(a). As to the meaning of 'appropriate consent' see PARA 794 post.

6 *Ibid* s 328(2)(b).

7 *Ibid* s 328(2)(c). As to when a person benefits from criminal conduct see PARA 790 note 3 ante; and for the meaning of 'criminal conduct' see PARA 790 note 2 ante.

8 For the meaning of 'deposit-taking body' see PARA 791 note 10 ante.

9 As to the threshold amount see PARA 791 note 12 ante.

10 Proceeds of Crime Act 2002 s 328(5) (added by the Serious Organised Crime and Police Act 2005 s 103(1), (3)).

11 For these purposes, 'the relevant criminal conduct' is the criminal conduct by reference to which the property concerned is criminal property: Proceeds of Crime Act 2002 s 328(4) (s 328(3), (4) added by the Serious Organised Crime and Police Act 2005 s 102(1), (3)).

12 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

13 Proceeds of Crime Act 2002 s 328(3) (as added: see note 11 supra). For these purposes, the Secretary of State has prescribed conduct which would constitute an offence punishable by imprisonment for a maximum term in excess of 12 months in any part of the United Kingdom if it occurred there, other than an offence under the Gaming Act 1968 (repealed), an offence under the Lotteries and Amusements Act 1976 or an offence under the Financial Services and Markets Act 2000 s 23 or s 25 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 80, 225): Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006, SI 2006/1070, art 2. As to the making of orders under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante.

## UPDATE

### 792 Arrangements

NOTE 2--See *R v Da Silva* [2006] EWCA Crim 1654, [2006] 4 All ER 900; *K Ltd v National Westminster Bank plc (Revenue and Customs Prosecution Office and Serious Organised Crime Agency intervening)* [2006] EWCA Civ 1039, [2006] 4 All ER 907. *R v Mehta*; *R v Sharman*; *R v Reardon*; *R v Ratcliff* (2008) Times, 3 October, CA (money launderers who provide services to criminals are sometimes more culpable than criminals generating money, and often more culpable than those handling proceeds of fraud); and *R v Khanani* [2009] All ER (D) 228 (Jan), CA.

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### **793. Acquisition, use and possession.**

A person commits an offence if he acquires, uses or has possession of criminal property<sup>1</sup>. A person does not commit such an offence if: (1) he makes an authorised disclosure<sup>2</sup> and, if the disclosure is made before he does the act mentioned<sup>3</sup>, he has the appropriate consent<sup>4</sup>; (2) he intended to make such a disclosure but had a reasonable excuse for not doing so; (3) he acquired or used or had possession of the property for adequate consideration<sup>5</sup>; (4) the act he does is done in carrying out a function he has relating to the enforcement of any provision of the Proceeds of Crime Act 2002 or of any other enactment relating to criminal conduct or benefit from criminal conduct<sup>6</sup>. Nor does a deposit-taking body<sup>7</sup> commit such an offence if it does the act in operating an account maintained with it, and the value of the criminal property concerned is less than the threshold amount determined<sup>8</sup> for the act<sup>9</sup>.

It is also provided that a person does not commit such an offence if he knows, or believes on reasonable grounds, that the relevant criminal conduct<sup>10</sup> occurred in a particular country or territory outside the United Kingdom<sup>11</sup>, and the relevant criminal conduct was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and is not of a description prescribed by an order made by the Secretary of State<sup>12</sup>.

1 Proceeds of Crime Act 2002 s 329(1). For the meaning of 'criminal property' see PARA 790 ante. See PARA 789 text and notes 8-9 ante. For the penalty for such an offence see PARA 796 post. As to the instigation of proceedings for offences under Pt 7 (ss 327-340) (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see PARA 789 note 7 ante. See also *R v Gabriel* [2006] EWCA Crim 229, [2006] All ER (D) 26 (Feb) (as to whether money obtained from legitimate trading but not declared to the inland revenue or department of works is criminal property).

2 Ie under the Proceeds of Crime Act 2002 s 338 (as amended): see PARA 795 post.

3 Ie an act mentioned in ibid s 329(1): see the text and note 1 supra.

4 As to the meaning of 'appropriate consent' see PARA 794 post.

5 For these purposes, a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property; a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or possession; and the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration: Proceeds of Crime Act 2002 s 329(3).

6 Ibid s 329(2). As to the instigation of proceedings for offences under Pt 7 (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see PARA 789 note 7 ante.

7 For the meaning of 'deposit-taking body' see PARA 791 note 10 ante.

8 As to the threshold amount see PARA 791 note 12 ante.

9 Proceeds of Crime Act 2002 s 329(2C) (added by the Serious Organised Crime and Police Act 2005 s 103(1), (4)).

10 For these purposes, 'the relevant criminal conduct' is the criminal conduct by reference to which the property concerned is criminal property: Proceeds of Crime Act 2002 s 329(2B) (s 329(2A), (2B) added by the Serious Organised Crime and Police Act 2005 s 102(1), (4)).

11 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

12 Proceeds of Crime Act 2002 s 329(2A) (as added: see note 10 supra). For these purposes, the Secretary of State has prescribed conduct which would constitute an offence punishable by imprisonment for a maximum term in excess of 12 months in any part of the United Kingdom if it occurred there, other than an offence under the Gaming Act 1968 (repealed), an offence under the Lotteries and Amusements Act 1976 or an offence under the Financial Services and Markets Act 2000 s 23 or s 25 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 80, 225); Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006, SI 2006/1070, art 2. As to the making of orders under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante.

## **UPDATE**

### **793 Acquisition, use and possession**

NOTE 5--Once a defendant has raised the issue that consideration has been paid in respect of the criminal property in his possession, it is for the prosecution to prove to the criminal standard that the consideration paid is not adequate: *Hogan v DPP* [2007] 1 WLR 2944, (2008) 172 JP 57. See also *R v Craig* [2007] EWCA Crim 2913, [2008] All ER (D) 386 (Apr).

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#### **794. Appropriate consent.**

Certain offences under the Proceeds of Crime Act 2002 are not committed if carried out with the 'appropriate consent'<sup>1</sup>. The appropriate consent is: (1) the consent of a nominated officer<sup>2</sup> to do a prohibited act if an authorised disclosure<sup>3</sup> is made to the nominated officer; (2) the consent of a constable<sup>4</sup> to do a prohibited act if an authorised disclosure is made to a constable; (3) the consent of an officer of Revenue and Customs to do a prohibited act if an authorised disclosure is made to an officer of Revenue and Customs<sup>5</sup>.

A person must be treated as having the appropriate consent if he makes an authorised disclosure to a constable or an officer of Revenue and Customs, and the first or second condition below is satisfied<sup>6</sup>. The first condition is that before the end of the notice period he does not receive notice from a constable or an officer of Revenue and Customs that consent to the doing of the act is refused<sup>7</sup>. The second condition is that before the end of the notice period he receives notice from a constable or an officer of Revenue and Customs that consent to the doing of the act is refused and the moratorium period has expired<sup>8</sup>.

The notice period is the period of seven working days<sup>9</sup> starting with the first working day after the person makes the disclosure<sup>10</sup>. The moratorium period is the period of 31 days starting with the day on which the person receives notice that consent to the doing of the act is refused<sup>11</sup>.

1 See the Proceeds of Crime Act 2002 ss 327-329; and PARAS 791-793 ante.

2 A nominated officer is a person nominated to receive disclosures under *ibid* s 338 (as amended) (see PARA 795 post): ss 335(9), 336(11). A nominated officer must not give the appropriate consent to the doing of a prohibited act unless:

- 216 (1) he makes a disclosure that property is criminal property to a person authorised for the purposes of Pt 7 (ss 327-340) (as amended) by the Director General of the Serious Organised Crime Agency and such a person gives consent to the doing of the act (s 336(1), (2) (s 336(2)(a), (3)(a), (4)(a) amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 168, 173));
- 217 (2) he makes a disclosure that property is criminal property to a person authorised for the purposes of the Proceeds of Crime Act 2002 Pt 7 (as amended) by the Director General of the Serious Organised Crime Agency, and before the end of the notice period he does not receive notice from such a person that consent to the doing of the act is refused (s 336(3) (as so amended)); or
- 218 (3) he makes a disclosure that property is criminal property to a person authorised for the purposes of Pt 7 (as amended) by the Director General of the Serious Organised Crime Agency, and before the end of the notice period he receives notice from such a person that consent to the doing of the act is refused, and the moratorium period has expired (s 336(4) (as so amended)).

As to the establishment of the Serious Organised Crime Agency and the appointment of the Director General of the Serious Crime Agency see the Serious Organised Crime and Police Act 2005 s 1, Sch 1; and POLICE vol 36(1) (2007 Reissue) PARA 430 et seq.

The notice period is the period of seven working days starting with the first working day after the nominated officer makes the disclosure: s 336(7). A working day is a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321) in the part of the United Kingdom in which the person is when he makes the disclosure: s

336(9). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. The moratorium period is the period of 31 days starting with the first working day after the nominated officer is given notice that consent to the doing of the act is refused: s 336(8).

A person who is a nominated officer commits an offence if he gives consent to a prohibited act in circumstances where none of the conditions in heads (1)-(3) supra is satisfied, and he knows or suspects that the act is a prohibited act: s 336(5).

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both: s 336(6). As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed. As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. As to the instigation of proceedings for offences under the Proceeds of Crime Act 2002 Pt 7 (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see PARA 789 note 7 ante.

3 See the Proceeds of Crime Act 2002 s 338 (as amended); and PARA 795 post.

4 As to the meaning of 'constable' see PARA 791 note 12 ante.

5 Proceeds of Crime Act 2002 s 335(1); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). The provisions of the Proceeds of Crime Act 2002 s 335(1)-(4) apply for the purposes of Pt 7 (as amended): s 335(10). As to officers of Revenue and Customs see PARA 354 note 2 ante.

6 Ibid s 335(2); Commissioners for Revenue and Customs Act 2005 s 50(2), (7).

7 Proceeds of Crime Act 2002 s 335(3); Commissioners for Revenue and Customs Act 2005 s 50(2), (7).

8 Proceeds of Crime Act 2002 s 335(4); Commissioners for Revenue and Customs Act 2005 s 50(2), (7).

9 A working day is a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321) in the part of the United Kingdom in which the person is when he makes the disclosure: Proceeds of Crime Act 2002 s 335(7).

10 Ibid s 335(5).

11 Ibid s 335(6).

## UPDATE

### 794 Appropriate consent

NOTE 2--2002 Act s 336(2)(a), (3)(a), (4)(a) further amended: Serious Crime Act 2007 Sch 8 para 129.

NOTE 11--See *R (on the application of UMBS Online Ltd) v Serious Organised Crime Agency* [2007] EWCA Civ 406, [2008] 1 All ER 465 (Serious Organised Crime Agency's refusal to reconsider refusal to allow ordinary banking business unlawful).



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### **795. Authorised disclosure.**

A disclosure is authorised<sup>1</sup> if it is a disclosure to a constable<sup>2</sup>, an officer of Revenue and Customs or a nominated officer<sup>3</sup> by the alleged offender that property is criminal property; and the first, second or third condition set out below is satisfied<sup>4</sup>. The first condition is that the disclosure is made before the alleged offender does the prohibited act<sup>5</sup>. The second condition is that the disclosure is made while the alleged offender is doing the prohibited act, and he began to do the act at a time when, because he did not then know or suspect that the property constituted or represented a person's benefit from criminal conduct, the act was not a prohibited act, and the disclosure is made on his own initiative and as soon as is practicable after he first knows or suspects that the property constitutes or represents a person's benefit from criminal conduct<sup>6</sup>. The third condition is that the disclosure is made after the alleged offender does the prohibited act, and there is a good reason for his failure to make the disclosure before he did the act, and the disclosure is made on his own initiative and as soon as it is practicable for him to make it<sup>7</sup>.

An authorised disclosure is not to be taken to breach any restriction on the disclosure of information, however imposed<sup>8</sup>.

1     Ile for the purposes of the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (as amended). As to the form and manner of disclosure see PARA 802 post.

2     As to the meaning of 'constable' see PARA 791 note 12 ante.

3     A disclosure to a nominated officer is a disclosure which is made to a person nominated by the alleged offender's employer to receive authorised disclosures, and is made in the course of the alleged offender's employment: Proceeds of Crime Act 2002 s 338(5) (amended by the Serious Organised Crime and Police Act 2005 ss 105, 174, Sch 17 Pt 2). For the purposes of a disclosure to a nominated officer, references to a person's employer include any body, association or organisation (including a voluntary organisation) in connection with whose activities the person exercises a function (whether or not for gain or reward); and references to employment must be construed accordingly: Proceeds of Crime Act 2002 s 340(12).

4     Ibid s 338(1) (amended by the Serious Organised Crime and Police Act 2005 ss 105(1), (4), 106(1), (4), 174, Sch 17 Pt 2); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). As to the officers of the Revenue and Customs see PARA 354 note 2 ante.

5     Proceeds of Crime Act 2002 s 338(2). References to the prohibited act are references to an act mentioned in s 327(1) (see PARA 791 ante), s 328(1) (see PARA 792 ante) or s 329(1) (see PARA 793 ante) (as the case may be): s 338(6).

6     Ibid s 338(2A) (added by the Serious Organised Crime and Police Act 2005 s 106(1), (5)).

7     Proceeds of Crime Act 2002 s 338(3) (amended by the Serious Organised Crime and Police Act 2005 s 106(1), (6)).

8     Proceeds of Crime Act 2002 s 338(4).

## **UPDATE**

### **795 Authorised disclosure**

NOTE 7--Proceeds of Crime Act 2002 s 338(3) further amended: SI 2007/3398.

NOTE 8--Where a banker is compelled to make an authorised disclosure before proceeding with a transaction he cannot be in breach of contract by doing so: *Shah v HSBC Private Bank (UK) Ltd* [2009] EWHC 79 (QB), [2009] 1 Lloyd's Rep 328, [2009] All ER (D) 204 (Jan) (affirmed in part: [2010] EWCA Civ 31, [2010] All ER (D) 45 (Feb)).

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### **796. Penalty for principal money laundering offences.**

A person guilty of a principal money laundering offence<sup>1</sup> is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>2</sup> or to a fine not exceeding the statutory maximum or to both<sup>3</sup>.

<sup>1</sup> See under the Proceeds of Crime Act 2002 s 327, s 328 or s 329 (as amended); see PARAS 791-793 ante. For the meaning of 'money laundering' see PARA 789 note 4 ante.

<sup>2</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

<sup>3</sup> Proceeds of Crime Act 2002 s 334(1). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 140.

### **UPDATE**

### **796 Penalty for principal money laundering offences**

NOTE 2--See *R v William Abbott* [2008] EWCA Crim 1203, [2009] 1 Cr App Rep (S) 201.

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MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/ (iii) Offences Involving Failure to Disclose/797. Failure to disclose: regulated sector.

### **(iii) Offences Involving Failure to Disclose**

#### **797. Failure to disclose: regulated sector.**

A person commits an offence if the following conditions are satisfied<sup>1</sup>:

- 910 (1) he knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering<sup>2</sup>;
- 911 (2) the information or other matter on which his knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, came to him in the course of a business in the regulated sector<sup>3</sup>;
- 912 (3) he can identify the other person mentioned in head (1) above or the whereabouts of any of the laundered property; or he believes, or it is reasonable to expect him to believe, that the information or other matter mentioned in head (2) above will or may assist in identifying that other person or the whereabouts of any of the laundered property<sup>4</sup>;
- 913 (4) that he does not make the required disclosure<sup>5</sup> to a nominated officer<sup>6</sup> or a person authorised<sup>7</sup> by the Director General of the Serious Organised Crime Agency<sup>8</sup>, as soon as is practicable after the information or other matter mentioned in head (2) above comes to him<sup>9</sup>.

He does not, however, commit such an offence if:

- 914 (a) he has a reasonable excuse for not making the required disclosure<sup>10</sup>;
- 915 (b) he is a professional legal adviser or other relevant professional adviser<sup>11</sup> and:
  - (i) if he knows the identity of the other person mentioned in head (1) above or the whereabouts of the laundered property, he knows the thing because of information or other matter mentioned in head (2) above that came to him in privileged circumstances; or (ii) the information or other matter came to him in privileged circumstances<sup>12</sup>;
- 916 (c) he does not know or suspect that another person is engaged in money laundering, and he has not been provided by his employer with such training as is specified<sup>13</sup> by the Secretary of State<sup>14</sup>; or
- 917 (d) he is employed by, or is in partnership with, a professional legal adviser or a relevant professional adviser to provide the adviser with assistance or support, the information or other relevant matter<sup>15</sup> comes to the person in connection with the provisions of such assistance or support, and the information or other matter came to the adviser in privileged circumstances<sup>16</sup>.

It is also provided that a person does not commit such an offence if he knows, or believes on reasonable grounds, that the money laundering is occurring in a particular country or territory outside the United Kingdom<sup>17</sup>, and the money laundering is not unlawful under the criminal law applying in that country or territory, and is not of a description prescribed in an order made by the Secretary of State<sup>18</sup>.

1 Proceeds of Crime Act 2002 s 330(1) (amended by the Serious Organised Crime and Police Act 2005 s 104(1), (2)). See PARA 789 text and notes 8-9. For the penalty for the offence see PARA 801 post. As to the instigation of proceedings for offences under the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see PARA 789 note 7 ante. In deciding whether a person committed an offence under s 330 (as amended), the court must consider whether he followed any relevant guidance which was at the time concerned: (1) issued by a supervisory authority or any other appropriate body; (2) approved by the Treasury; and (3) published in a manner it approved as appropriate in its opinion to bring the guidance to the attention of persons likely to be affected by it: s 330(8). Schedule 9 para 4 (as amended) has effect for the purpose of determining what is a 'supervisory authority': see s 330(12)(b). It lists a number of authorities, including the Bank of England and the Financial Services Authority, as supervisory authorities: see Sch 9 para 4 (amended by the Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2003, SI 2003/3074, art 3). The Proceeds of Crime Act 2002 Sch 9 (as amended) may be amended by the Treasury by order: see Sch 9 para 5; and the Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2003, SI 2003/3074. An 'appropriate body' is any body which regulates or is representative of any trade, profession, business or employment carried on by the alleged offender: Proceeds of Crime Act 2002 s 330(13). The guidance of the Joint Money Laundering Steering Group (see PARA 789 note 9 ante) has been approved by the Treasury.

2 Ibid s 330(2). For the meaning of 'money laundering' see PARA 789 note 4 ante.

3 Ibid s 330(3). The provisions of Sch 9 paras 1-3 have effect for the purpose of determining what is a business in the regulated sector: s 330(12)(a). As from 6 April 2007 Sch 9 para 2 is amended by the Proceeds of Crime Act 2002 (Business in the Regulated Sector) Order 2006, SI 2006/2385. The terms of the Proceeds of Crime Act 2002 Sch 9 (as amended) are identical to those of the Terrorism Act 2001 Sch 3A (as added and amended) (see PARA 397 ante). The Proceeds of Crime Act 2002 ss 330, 331 (see PARA 798 post) do not have effect in relation to a person who engages in any of the activities mentioned in the provisions of Sch 9 para 1(1) (f)-(n) (as substituted) (which are identical to heads (6)-(14) in PARA 397 ante) where the information or other matter on which knowledge or suspicion that another person is engaged in money laundering is based, or which gives reasonable grounds for such knowledge or suspicion, came to that person before 1 March 2004: Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2003, SI 2003/3074, art 4.

4 Proceeds of Crime Act 2002 s 330(3A) (s 330(3A), (5A) added by the Serious Organised Crime and Police Act 2005 s 104(1), (3)). The laundered property is the property forming the subject-matter of that money laundering that he knows or suspects, or has reasonable grounds for knowing or suspecting, that other person to be engaged in: Proceeds of Crime Act 2002 s 330(5A) (as so added).

5 The required disclosure is a disclosure of the identity of the other person mentioned in head (1) in the text, if he knows it; the whereabouts of the laundered property, so far as he knows it; and the information or other matter mentioned in head (2) in the text: ibid s 330(5) (substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (3)).

6 A disclosure to a nominated officer is a disclosure which: (1) is made to a person nominated by the alleged offender's employer to receive disclosures under these provisions; and (2) is made in the course of the alleged offender's employment: Proceeds of Crime Act 2002 s 330(9) (amended by the Serious Organised Crime and Police Act 2005 ss 105(1), (2), 174, Sch 17 Pt 2).

A disclosure which satisfies heads (1) and (2) supra is not, however, to be taken as a disclosure to a nominated officer if the person making the disclosure: (a) is a professional legal adviser or other relevant professional adviser (see note 11 infra); (b) makes it for the purpose of obtaining advice about making a disclosure under the Proceeds of Crime Act 2002 s 330 (as amended); and (c) does not intend it to be a disclosure under s 330 (as amended): s 330(9A) (added by the Serious Organised Crime and Police Act 2005 s 106(1), (2); and amended by the Proceeds of Crime Act 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006, SI 2006/308, art 2(1), (2)).

For the purposes of a disclosure to a nominated officer, references to a person's employer include any body, association or organisation (including a voluntary organisation) in connection with whose activities the person exercises a function (whether or not for gain or reward); and references to employment must be construed accordingly: Proceeds of Crime Act 2002 s 340(12).

7 Ie for the purposes of ibid Pt 7 (as amended).

8 As to the establishment of the Serious Organised Crime Agency and the appointment of the Director General of the Serious Crime Agency see the Serious Organised Crime and Police Act 2005 s 1, Sch 1; and POLICE vol 36(1) (2007 Reissue) PARA 430 et seq.

9 Proceeds of Crime Act 2002 s 330(4) (substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (5)). As to the form and manner of disclosures see the Proceeds of Crime Act 2002 s 339 (as amended); and PARA 802 post. As to the institution of proceedings for offences under Pt 7 (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see PARA 789 note 7 ante.

10 Ibid s 330(6)(a) (s 330(6) substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (3)).

11 'Relevant professional adviser' means an accountant, auditor or tax adviser who is a member of a professional body which is established for accountants, auditors or tax advisers (as the case may be) and which makes provision for: (1) testing the competence of those seeking admission to membership of such a body as a condition for such admission; and (2) imposing and maintaining professional and ethical standards for its members, as well as imposing sanctions for non-compliance with those standards: Proceeds of Crime Act 2002 s 330(14) (added by the Proceeds of Crime Act 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006, SI 2006/308, art 2(1), (5)).

12 Proceeds of Crime Act 2002 s 330(6)(b) (as substituted (see note 9 supra); and amended by the Proceeds of Crime Act 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006, SI 2006/308, art 2(1), (2)). Information or other matter comes to a professional legal adviser or other relevant professional adviser in privileged circumstances if it is communicated or given to him: (1) by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client; (2) by (or by a representative of) a person seeking legal advice from the adviser; or (3) by a person in connection with legal proceedings or contemplated legal proceedings: Proceeds of Crime Act 2002 s 330(10) (amended by the Proceeds of Crime Act 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006, SI 2006/308, art 2(1), (2)). However, s 330(10) (as amended) does not apply to information or other matter which is communicated or given with the intention of furthering a criminal purpose: Proceeds of Crime Act 2002 s 330(11).

13 Ie by order for the purposes of ibid s 330 (as amended). As to the specified training see the Proceeds of Crime Act 2002 (Failure to Disclose Money Laundering: Specified Training) Order 2003, SI 2003/171 (amended by SI 2003/3075); and the Money Laundering Regulations 2003, SI 2003/3075, reg 3(1)(c)(ii). As to the making of orders under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante.

14 Proceeds of Crime Act 2002 s 330(6)(c), (7) (as substituted: see note 9 supra).

15 Ie a matter mentioned in ibid s 330(3): see the text and note 3 supra.

16 Ibid s 330(7B) (added by the Proceeds of Crime Act 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006, SI 2006/308, art 2(1), (4)).

17 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

18 Proceeds of Crime Act 2002 s 330(7A) (added by the Serious Organised Crime and Police Act 2005 s 102(1), (5)). At the date at which this volume states the law no such order had been made.

## UPDATE

### 797 Failure to disclose: regulated sector

NOTES 1, 3--Proceeds of Crime Act 2002 Sch 9 paras 1-4 substituted: SI 2007/3287.

TEXT AND NOTES 6, 12--2002 Act s 330(6)(b), (9A), (10) further amended: SI 2007/3398.

TEXT AND NOTE 9--2002 Act s 330(4) amended: Serious Crime Act 2007 Sch 8 para 126.

NOTE 12--EEC Council Directive 91/308, which places an obligation on lawyers to inform the authorities of any information or suspicion they might have with regard to money laundering, does not infringe a client's right to a fair trial as it does not apply to transactions in a judicial context: Case C-305/05 *Ordre des barreaux francophones et germanophones v Conseil des Ministres* [2007] All ER (EC) 953, ECJ.

NOTE 13--SI 2003/171 further amended: SI 2007/2157. SI 2003/3075 replaced: Money Laundering Regulations 2007, SI 2007/2157 (amended by SI 2009/209).

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MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/ (iii) Offences Involving Failure to Disclose/798. Failure to disclose: nominated officers in the regulated sector.

### **798. Failure to disclose: nominated officers in the regulated sector.**

A person nominated to receive disclosures concerning money-laundering in the regulated sector<sup>1</sup> commits an offence<sup>2</sup> if the following conditions are satisfied<sup>3</sup>:

- 918 (1) he knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering<sup>4</sup>;
- 919 (2) the information or other matter on which his knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, came to him in consequence of a disclosure<sup>5</sup>;
- 920 (3) (a) he knows the identity of the other person mentioned in head (1) above or the whereabouts of any of the laundered property<sup>6</sup>, in consequence of such a disclosure<sup>7</sup>; (b) that other person, or the whereabouts of any of the laundered property, can be identified from the information or other matter mentioned in head (2) above; or (c) he believes, or it is reasonable to expect him to believe, that the information or other matter will or may assist in identifying that other person or the whereabouts of any of the laundered property<sup>8</sup>;
- 921 (4) he does not make the required disclosure<sup>9</sup> to a person authorised<sup>10</sup> by the Director General of the Serious Organised Crime Agency<sup>11</sup> as soon as is practicable after the information or other matter mentioned in head (2) above comes to him<sup>12</sup>.

A person does not commit such an offence if he has a reasonable excuse for not making the required disclosure<sup>13</sup>.

It is also provided that a person does not commit such an offence if he knows, or believes on reasonable grounds, that the money laundering is occurring in a particular country or territory outside the United Kingdom<sup>14</sup>, and the money laundering is not unlawful under the criminal law applying in that country or territory, and is not of a description prescribed in an order made by the Secretary of State<sup>15</sup>.

1 He under the Proceeds of Crime Act 2002 s 330 (as amended): see PARA 797 ante.

2 In deciding whether a person committed an offence under *ibid* s 331 (as amended) the court must consider whether he followed any relevant guidance which was at the time concerned: (1) issued by a supervisory authority or any other appropriate body; (2) approved by the Treasury; and (3) published in a manner it approved as appropriate in its opinion to bring the guidance to the attention of persons likely to be affected by it: s 331(7). See further PARA 797 note 1 ante. Schedule 9 para 4 (as amended) (see PARA 797 note 1 ante) has effect for the purpose of determining what is a 'supervisory authority': see s 331(8). An 'appropriate body' is a body which regulates or is representative of a trade, profession, business or employment: s 331(9).

3 *Ibid* s 331(1). See PARA 789 text and notes 8, 9 ante. For the meaning of 'money laundering' see PARA 789 note 4 ante. For the penalty for the offence see PARA 801 post.

4 *Ibid* s 331(2).

5 *Ibid* s 331(3). The disclosure is one made under s 330 (as amended): see PARA 797 ante.

6 The laundered property is the property forming the subject-matter of that money laundering that he knows or suspects, or has reasonable grounds for knowing or suspecting, that other person to be engaged in: *ibid* s 331(5A) (substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (4)).

7 *Ie* a disclosure made under the Proceeds of Crime Act 2002 s 330 (as amended): see *PARA 797 ante*.

8 *Ibid* s 331(3A) (substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (4)).

9 The required disclosure is a disclosure of: (1) the identity of the other person mentioned in head (1) in the text, if disclosed to him under the Proceeds of Crime Act 2002 s 330 (as amended) (see *PARA 797 ante*); (2) the whereabouts of the laundered property, so far as disclosed to him under s 330 (as amended); and (3) the information or other matter mentioned in head (2) in the text: s 331(5) (substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (4)).

10 *Ie* a person authorised for the purposes of the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (as amended).

11 As to the establishment of the Serious Organised Crime Agency and the appointment of the Director General of the Serious Crime Agency see the Serious Organised Crime and Police Act 2005 s 1, Sch 1; and *POLICE vol 36(1) (2007 Reissue) PARA 430 et seq*.

12 Proceeds of Crime Act 2002 s 331(4) (substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (4)). As to the form and manner of disclosures see s 339 (as amended); and *PARA 802 post*.

13 Proceeds of Crime Act 2002 s 331(6) (substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (4)). As to the instigation of proceedings for offences under the Proceeds of Crime Act 2002 Pt 7 (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see *PARA 789 note 7 ante*.

14 For the meaning of 'United Kingdom' see *PARA 45 note 2 ante*.

15 Proceeds of Crime Act 2002 s 331(6A) (added by the Serious Organised Crime and Police Act 2005 s 102(1), (6)). At the date at which this volume states the law no such order had been made. As to the making of orders under the Proceeds of Crime Act 2002 see *PARA 789 note 7 ante*.

## **UPDATE**

### **798 Failure to disclose: nominated officers in the regulated sector**

TEXT AND NOTE 12--2002 Act s 331(4) amended: Serious Crime Act 2007 Sch 8 para 127.



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MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/ (iii) Offences Involving Failure to Disclose/799. Failure to disclose: other nominated officers.

### **799. Failure to disclose: other nominated officers.**

A person nominated to receive disclosures concerning money-laundering (other than those made pursuant to the provisions concerning money-laundering in the regulated sector)<sup>1</sup> commits an offence if the following conditions are satisfied<sup>2</sup>:

- 922 (1) he knows or suspects that another person is engaged in money laundering<sup>3</sup>;
- 923 (2) the information or other matter on which his knowledge or suspicion is based came to him in consequence of a disclosure made under the applicable section<sup>4</sup>;
- 924 (3) (a) he knows the identity the other person mentioned in head (1) above, or the whereabouts of any of the laundered property<sup>5</sup>, in consequence of a disclosure made under the applicable section; (b) that other person, or the whereabouts of any of the laundered property, can be identified from the information or other matter mentioned in head (2) above; or (c) he believes, or it is reasonable to expect him to believe, that the information or other matter will or may assist in identifying that other person or the whereabouts of any of the laundered property<sup>6</sup>;
- 925 (4) he does not make the required disclosure<sup>7</sup> to a person authorised<sup>8</sup> by the Director General of the Serious Organised Crime Agency<sup>9</sup>, as soon as is practicable after the information or other matter mentioned in head (2) above comes to him<sup>10</sup>.

A person does not commit such an offence if he has a reasonable excuse for not making the required disclosure<sup>11</sup>. Nor does a person commit such an offence if he knows, or believes on reasonable grounds, that the money laundering is occurring in a particular country or territory outside the United Kingdom<sup>12</sup>, and the money laundering is not unlawful under the criminal law applying in that country or territory, and is not of a description prescribed in an order made by the Secretary of State<sup>13</sup>.

1 He under the Proceeds of Crime Act 2002 s 337 (as amended) (see PARA 800 post) or s 338 (as amended) (see PARA 795 ante).

2 Ibid s 332(1). See PARA 789 text and notes 8-9 ante. For the penalty for the offence see PARA 801 post.

3 Ibid s 332(2). As to the meaning of 'money laundering' see PARA 789 note 4 ante.

4 Ibid s 332(3) (amended by the Serious Organised Crime and Police Act 2005 s 104(1), (5)). The 'applicable section' is the Proceeds of Crime Act 2002 s 337 (as amended) or, as the case may be, s 338 (as amended): s 332(5B) (substituted by the Serious Organised Crime and Police Act 2005 s 104(1)(6)).

5 The laundered property is the property forming the subject-matter of the money laundering that he knows or suspects that other person to be engaged in: Proceeds of Crime Act 2002 s 332(5A) (added by the Serious Organised Crime and Police Act 2005 s 104(1), (6)).

6 Proceeds of Crime Act 2002 s 332(3A) (added by the Serious Organised Crime and Police Act 2005 s 104(1), (6)).

7 The required disclosure is a disclosure of:

- 219 (1) the identity of the other person mentioned in head (1) in the text, if disclosed to him under the applicable section (s 332(5)(a) (s 332(5) substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (6)));
- 220 (2) the whereabouts of the laundered property, so far as disclosed to him under the applicable section (Proceeds of Crime Act 2002 s 332(5)(b) (as so amended)); and
- 221 (3) the information or other matter mentioned in head (2) in the text (s 332(5)(c) (as so amended)).

8 le authorised for the purposes of *ibid* Pt 7 (ss 327-340) (as amended).

9 As to the establishment of the Serious Organised Crime Agency and the appointment of the Director General of the Serious Crime Agency see the Serious Organised Crime and Police Act 2005 s 1, Sch 1; and *POLICE* vol 36(1) (2007 Reissue) *PARA* 430 et seq.

10 Proceeds of Crime Act 2002 s 332(4) (substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (6)). As to the form and manner of disclosures see the Proceeds of Crime Act 2002 s 339 (as amended); and *PARA* 802 post. As to the instigation of proceedings for offences under Pt 7 (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see *PARA* 789 note 7 ante.

11 *Ibid* s 332(6) (substituted by the Serious Organised Crime and Police Act 2005 s 104(1), (6)).

12 For the meaning of 'United Kingdom' see *PARA* 45 note 2 ante.

13 Proceeds of Crime Act 2002 s 332(7) (added by the Serious Organised Crime and Police Act 2005 s 102(1), (7)). At the date at which this volume states the law no such order had been made. As to the making of orders under the Proceeds of Crime Act 2002 see *PARA* 789 note 7 ante.

## **UPDATE**

### **799 Failure to disclose: other nominated officers**

TEXT AND NOTE 10--2002 Act s 332(4) amended: Serious Crime Act 2007 Sch 8 para 128.

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## **800. Protected disclosures.**

A disclosure which satisfies the following three conditions (a 'protected disclosure') is not to be taken to breach any restriction on the disclosure of information, however imposed<sup>1</sup>. The first condition is that the information or other matter disclosed came to the person making the disclosure ('the discloser') in the course of his trade, profession, business or employment<sup>2</sup>. The second condition is that the information or other matter causes the discloser to know or suspect, or gives him reasonable grounds for knowing or suspecting, that another person is engaged in money laundering<sup>3</sup>. The third condition is that the disclosure is made to a constable<sup>4</sup>, an officer of Revenue and Customs or a nominated officer<sup>5</sup> as soon as is practicable after the information or other matter comes to the discloser<sup>6</sup>.

Where a disclosure consists of a disclosure so protected<sup>7</sup> and a disclosure of either or both of:

- 926 (1) the identity of the other person mentioned in the second condition; and
- 927 (2) the whereabouts of property forming the subject-matter of the money laundering that the discloser knows or suspects, or has reasonable grounds for knowing or suspecting, that other person to be engaged in,

the disclosure of the thing mentioned in head (1) or head (2) above, as well as the disclosure so protected, is not to be taken to breach any restriction on the disclosure of information, however imposed<sup>8</sup>.

1 Proceeds of Crime Act 2002 s 337(1).

2 Ibid s 337(2).

3 Ibid s 337(3).

4 For the meaning of 'constable' see PARA 791 note 12 ante.

5 A disclosure to a nominated officer is a disclosure which: (1) is made to a person nominated by the discloser's employer to receive disclosures under the Proceeds of Crime Act 2002 s 330 (as amended) or s 337 (as amended); and (2) is made in the course of the discloser's employment: s 337(5) (amended by the Serious Organised Crime and Police Act 2005 ss 105, 106(1), (3), 174, Sch 17 Pt 2). See also the Proceeds of Crime Act 2002 s 340(12); and PARA 797 note 6 ante.

6 Ibid s 337(4); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). As to officers of Revenue and Customs see PARA 354 note 2 ante.

7 I.e. protected under the Proceeds of Crime Act 2002 s 337(1): see the text and note 1 supra.

8 Ibid s 337(4A) (added by the Serious Organised Crime and Police Act 2005 s 104(1), (7)).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11.

MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/ (iii) Offences Involving Failure to Disclose/801. Penalty for non-disclosure offence.

### **801. Penalty for non-disclosure offence.**

A person guilty of an offence<sup>1</sup> involving a failure to disclose is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>2</sup> or to a fine not exceeding the statutory maximum or to both<sup>3</sup>.

<sup>1</sup> See under the Proceeds of Crime Act 2002 s 330 (as amended) (see PARA 797 ante), s 331 (as amended) (see PARA 798 ante), s 332 (as amended) (see PARA 799 ante) or s 333 (see PARA 803 ante).

<sup>2</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

<sup>3</sup> Proceeds of Crime Act 2002 s 334(2). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 140.

### **UPDATE**

### **801 Penalty for non-disclosure offence**

NOTE 3--Proceeds of Crime Act 2002 s 334(2) amended: SI 2007/3398.

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MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/ (iii) Offences Involving Failure to Disclose/802. Form and manner of disclosures.

## **802. Form and manner of disclosures.**

The Secretary of State may by order<sup>1</sup> prescribe the form and manner in which disclosure<sup>2</sup> must be made<sup>3</sup>. A person commits an offence if he makes a disclosure<sup>4</sup> otherwise than in the form so prescribed or otherwise than in the manner so prescribed<sup>5</sup>. But a person does not commit such an offence if he has a reasonable excuse for making the disclosure otherwise than in the form so prescribed or, as the case may be, otherwise than in the manner so prescribed<sup>6</sup>. A person guilty of such an offence is liable on summary conviction to a fine not exceeding level five on the standard scale<sup>7</sup>.

1 The power to prescribe the form in which a disclosure must be made includes power to provide for the form to include a request to the person making a disclosure that the person provide information specified or described in the form if he has not provided it in making the disclosure: Proceeds of Crime Act 2002 s 339(2) (substituted by the Serious Organised Crime and Police Act 2005 s 105(1), (5)). Where under the Proceeds of Crime Act 2002 s 339(2) (as substituted) a request is included in a form prescribed under s 339(1), the form must state that there is no obligation to comply with the request and explain the protection conferred by s 339(4) on a person who complies with the request: s 339(3) (substituted by the Serious Organised Crime and Police Act 2005 s 105(1), (5)). A disclosure in pursuance of a request under the Proceeds of Crime Act 2002 s 339(2) (as substituted) is not to be taken to breach any restriction on the disclosure of information, however imposed: s 339(4). Section 339(2) (as substituted) does not apply to a disclosure made to a nominated officer: s 339(7). As to the making of orders under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante.

2 *Ie* under *ibid* s 330 (as amended) (see PARA 797 ante), s 331 (as amended) (see PARA 798 ante), s 332 (as amended) (see PARA 799 ante) or s 338 (as amended) (see PARA 795 ante).

3 *Ibid* s 339(1).

4 *Ie* under *ibid* s 330 (as amended) (see PARA 797 ante), s 331 (as amended) (see PARA 798 ante), s 332 (as amended) (see PARA 799 ante) or s 338 (as amended) (see PARA 795 ante).

5 *Ibid* s 339(1A) (added by the Serious Organised Crime and Police Act 2005 s 105(1), (5)). As to the instigation of proceedings for offences under the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see PARA 789 note 7 ante.

6 *Ibid* s 339(1B) (added by the Serious Organised Crime and Police Act 2005 s 105(1), (5)).

7 Proceeds of Crime Act 2002 s 334(3) (substituted by the Serious Organised Crime and Police Act 2005 s 105(1), (3)). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

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MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/ (iii) Offences Involving Failure to Disclose/802A. Disclosures to the Serious Organised Crime Agency.

**802A. Disclosures to the Serious Organised Crime Agency.**

Where a disclosure is made to a constable or an officer of Her Majesty's Revenue and Customs, the constable or officer must disclose it in full to a person authorised by the Director General of the Serious Organised Crime Agency: see the Proceeds of Crime Act 2002 s 339ZA (added by SI 2007/3398).

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## **(iv) Tipping Off**

### **803. Offence of tipping off.**

A person commits an offence if:

- 928 (1) he knows or suspects that a protected or authorised disclosure<sup>1</sup> has been made<sup>2</sup>; and
- 929 (2) he makes a disclosure which is likely to prejudice any investigation which might be conducted following the disclosure referred to in head (1) above<sup>3</sup>.

A person does not commit such an offence if:

- 930 (a) he did not know or suspect that the disclosure was likely to be prejudicial as so mentioned<sup>4</sup>;
- 931 (b) the disclosure is made in carrying out a function he has relating to the enforcement of any provision of the Proceeds of Crime Act 2002 or of any other enactment relating to criminal conduct or benefit from criminal conduct<sup>5</sup>;
- 932 (c) he is a professional legal adviser and the disclosure is to, or to a representative of, a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client; or to any person in connection with legal proceedings or contemplated legal proceedings<sup>6</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>.

<sup>1</sup> I.e. a disclosure falling within the Proceeds of Crime Act 2002 s 337 (as amended) (see PARA 800 ante) or s 338 (as amended) (see PARA 795 ante).

<sup>2</sup> Ibid s 333(1)(a).

<sup>3</sup> Ibid s 333(1)(b). As to the instigation of proceedings for offences under Pt 7 (ss 327-340) (as amended) and as to the application of such offences to the Crown and the Director of Savings and persons employed in his service see PARA 789 note 7 ante.

<sup>4</sup> Ibid s 333(2)(a).

<sup>5</sup> Ibid s 333(2)(b).

<sup>6</sup> Ibid s 333(2)(c), (3). A disclosure does not fall within head (c) in the text if it is made with the intention of furthering a criminal purpose: s 333(4). For guidance as to the course of action to be pursued by a bank and the Serious Fraud Office where the bank knows that an account-holder is subject to police investigation see *Governor and Company of the Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 WLR 751; *Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit* [2003] EWHC 703 (Comm), [2003] 4 All ER 1225, [2003] 1 WLR 2711. For guidance where compliance with an order to disclose

information, which would reveal money laundering, would cause a financial institution to commit the offence of tipping off see *C v S* [1999] 2 All ER 343, [1999] 1 WLR 1551, CA.

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Proceeds of Crime Act 2002 s 334(2). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **803 Offence of tipping off**

TEXT AND NOTES--Repealed: SI 2007/3398. As to tipping off in relation to information from the regulated sector, see PARA 803A.



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MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/ (iv) Tipping Off/803A  
Tipping off: information from the regulated sector.

### **803A Tipping off: information from the regulated sector.**

A person commits an offence if (1) the person discloses any matter about which he has made a disclosure under the Proceeds of Crime Act 2002 Pt 7 (ss 327-340), an officer of Her Majesty's Revenue and Customs, a nominated officer or to an authorised member of staff of the Serious Organised Crime Agency; (2) the disclosure is likely to prejudice any investigation that might be conducted following the disclosure; and (3) the information on which the disclosure is based came to the person in the course of a business in the regulated sector (see PARA 797): see the Proceeds of Crime Act 2002 s 333A(1), (2) (ss 333A-333E added by SI 2007/3398). A person commits an offence if (a) the person discloses that an investigation into allegations that an offence under the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) has been committed is being contemplated or is being carried out; (b) the disclosure is likely to prejudice that investigation; and (c) the information on which the disclosure is based came to the person in the course of a business in the regulated sector (see PARA 797): see the Proceeds of Crime Act 2002 s 333A(3). A person guilty of an offence under the Proceeds of Crime Act 2002 s 333A is liable (i) on summary conviction to imprisonment for a term not exceeding three months, or to a fine not exceeding level five on the standard scale, or to both; (ii) on conviction on indictment to imprisonment for a term not exceeding two years, or to a fine, or to both: see the Proceeds of Crime Act 2002 s 333A(4).

As to permitted disclosures, see the Terrorism Act 2000 ss 333A-333D.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11.

MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(v) Money Laundering Investigations, Confiscation Investigations and Civil Recovery Investigations/A. OFFENCES/804. Offences prejudicing investigation.

## **(v) Money Laundering Investigations, Confiscation Investigations and Civil Recovery Investigations**

### **A. OFFENCES**

#### **804. Offences prejudicing investigation.**

The following provisions<sup>1</sup> apply if a person knows or suspects that an appropriate officer<sup>2</sup> is acting, or proposing to act, in connection with a confiscation investigation<sup>3</sup>, a civil recovery investigation<sup>4</sup> or a money laundering investigation<sup>5</sup> which is being or is about to be conducted<sup>6</sup>.

The person commits an offence if he makes a disclosure which is likely to prejudice the investigation<sup>7</sup>. However, a person does not commit such an offence if:

- 933 (1) he does not know or suspect that the disclosure is likely to prejudice the investigation<sup>8</sup>;
- 934 (2) the disclosure is made in the exercise of a function under the Proceeds of Crime Act 2002 or any other enactment relating to criminal conduct or benefit from criminal conduct or in compliance with a requirement imposed under or by virtue of the Proceeds of Crime Act 2002<sup>9</sup>; or
- 935 (3) he is a professional legal adviser and the disclosure is to, or to a representative of, a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or to any person in connection with legal proceedings or contemplated legal proceedings<sup>10</sup>.

The person also commits an offence if he falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, documents which are relevant to the investigation<sup>11</sup>. However, a person does not commit such an offence if he does not know or suspect that the documents are relevant to the investigation or he does not intend to conceal any facts disclosed by the documents from any appropriate officer carrying out the investigation<sup>12</sup>.

A person guilty of an offence under these provisions is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>13</sup> or to a fine not exceeding the statutory maximum<sup>14</sup> or to both<sup>15</sup>.

<sup>1</sup> ie the Proceeds of Crime Act 2002 s 342.

<sup>2</sup> For these purposes, 'appropriate officer' is to be construed in accordance with *ibid* s 378 (as amended): s 342(8)(a). In relation to a confiscation investigation (see note 3 *infra*), the Director of the Assets Recovery Agency, an accredited financial investigator, a constable, and an officer of Revenue and Customs, are appropriate officers: ss 1(2), 378(1); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). In relation to a civil recovery investigation (see note 4 *infra*), the Director of the Assets Recovery Agency, and only the Director, is an appropriate officer: Proceeds of Crime Act 2002 s 378(3)(a) (amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 168, 175). In relation to a money laundering investigation (see

note 5 infra), an accredited financial investigator, a constable, and an officer of Revenue and Customs, are appropriate officers: Proceeds of Crime Act 2002 s 378(4); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). For the purposes of the Proceeds of Crime Act 2002 s 342, in relation to a money laundering investigation, a person authorised for the purposes of money laundering investigations by the Director General of the Serious Organised Crime Agency is also an appropriate officer: ss 1(2), 378(5). As to the establishment of the Serious Organised Crime Agency and the appointment of the Director General of the Serious Crime Agency see the Serious Organised Crime and Police Act 2005 s 1, Sch 1; and POLICE vol 36(1) (2007 Reissue) PARA 430 et seq. However, a person is not an appropriate officer in relation to a money laundering investigation if he is a member of staff of the Assets Recovery Agency, or a person providing services under arrangements made by the Director of that Agency: Proceeds of Crime Act 2002 ss 1(1), 378(7).

The Proceeds of Crime Act 2002 (Investigations in England and Wales and Northern Ireland: Code of Practice) Order 2003, SI 2003/334 (made under the Proceeds of Crime Act 2002 s 377: see PARA 818 post) brought into operation a code of practice as to the exercise of functions under ss 343-379 (see PARAS 805-817 post) by the Director, members of staff of the Assets Recovery Agency, accredited financial investigators and officers of Revenue and Customs. As to the officers and Commissioners for Revenue and Customs see PARA 354 note 2 ante.

3 For the purposes of ibid Pt 8 (ss 341-416), a 'confiscation investigation' is an investigation into whether a person has benefited from his criminal conduct, or the extent or whereabouts of his benefit from his criminal conduct: s 341(1).

4 For the purpose of ibid Pt 8, a 'civil recovery investigation' is an investigation into whether property is recoverable property or associated property, who holds the property, or its extent or whereabouts: s 341(2). But an investigation is not a civil recovery investigation if: (1) proceedings for a recovery order have been started in respect of the property in question; (2) an interim receiving order applies to the property in question; (3) an interim administration order applies to the property in question; or (4) the property in question is detained under s 295 (see PARA 2166 post): s 341(3).

'Property' is all property wherever situated and includes: (1) money; (2) all forms of property, real or personal, heritable or moveable; (3) things in action and other intangible or incorporeal property: s 414(1). For the meaning of 'recoverable property' see PARA 2149 post.

5 For the purpose of ibid Pt 8, 'money laundering investigation' is an investigation into whether a person has committed a money laundering offence: s 341(4). For the meaning of 'money laundering' see PARA 789 note 4 ante.

6 Ibid s 342(1).

7 Ibid s 342(2)(a). Proceedings for an offence under s 342 may be started by the Director of Revenue and Customs Prosecutions or by order of the Commissioners for Revenue and Customs: see s 451(1), (6)(b) (amended by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 99(a)). Where proceedings are so instituted by the Commissioners, the proceedings must be brought in the name of an officer of Revenue and Customs: Proceeds of Crime Act 2002 s 451(2) (substituted by the Commissioners for Revenue and Customs Act 2005 Sch 4 para 99(b)). See also the Proceeds of Crime Act 2002 s 451(4), (5) (amended by the Commissioners for Revenue and Customs Act 2005 Sch 4 para 99(d)). The Director of Revenue and Customs Prosecutions is appointed under the Commissioners for Revenue and Customs Act 2005 s 34: see PARA 1068 post.

The Secretary of State may by regulations provide that any of the offences under the Proceeds of Crime Act 2002 s 342 apply to persons in the public service of the Crown: s 452(1), (2)(b). The offences in s 342 apply to the Director of Savings appointed under the National Debt Act 1972 s 1 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 810) and any person employed or otherwise engaged in his service: Proceeds of Crime Act 2002 (Crown Servants) Regulations 2003, SI 2003/173. As to the making of orders and regulations under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante.

8 Ibid s 342(3)(a).

9 Ibid s 342(3)(b).

10 Ibid s 342(3)(c), (4). Such a disclosure does not include one made with the intention of furthering a criminal purpose: see s 342(5).

11 Ibid s 342(2)(b).

12 Ibid s 342(6).

13 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post),

although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

14 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

15 Proceeds of Crime Act 2002 s 342(7). Provision may be made by Order in Council creating offences in relation to an investigation by an overseas authority, or enabling orders to be issued for the purposes of an investigation by such an authority, which are equivalent to those under Pt 8: s 445 (amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 168, 178).

## **UPDATE**

### **804 Offences prejudicing investigation**

NOTE 2--2002 Act s 378 further amended: Serious Crime Act 2007 s 80(7), (8), Sch 8 para 116, Sch 10 para 13, Sch 14.

TEXT AND NOTE 6--2002 Act s 342(1) amended to include detained cash investigations: 2007 Act Sch 10 para 2.

TEXT AND NOTE 9--See also the Proceeds of Crime Act 2002 s 342(3)(ba) (added by SI 2007/3398).

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## **B. PRODUCTION ORDERS**

### **805. Production orders.**

A judge<sup>1</sup> may, on an application made to him by an appropriate officer<sup>2</sup>, make a production order in relation to a money laundering, confiscation or civil recovery investigation<sup>3</sup> if he is satisfied that each of the requirements for the making of the order is fulfilled<sup>4</sup>. A production order is an order either requiring the person that the application for the order specifies as appearing to be in possession or control of material to produce it to an appropriate officer for him to take away, or requiring that person to give an appropriate officer access to the material, within the period stated in the order<sup>5</sup>.

A production order does not require a person to produce, or give access to, privileged material<sup>6</sup>. Nor does it require a person to produce, or give access to, excluded material<sup>7</sup>. However, it does have effect in spite of any restriction on the disclosure of information, however imposed<sup>8</sup>.

An appropriate officer may take copies of any material which is produced, or to which access is given, in compliance with a production order<sup>9</sup>. Material produced in compliance with a production order may be retained for so long as it is necessary to retain it, as opposed to copies of it, in connection with the investigation for the purposes of which the order was made<sup>10</sup>. But if an appropriate officer has reasonable grounds for believing that the material may need to be produced for the purposes of any legal proceedings, and it might otherwise be unavailable for those purposes, it may be retained until the proceedings are concluded<sup>11</sup>.

Provision may be made by Order in Council to enable equivalent orders to be made for the purposes of an external investigation<sup>12</sup>.

1 For the purposes of the Proceeds of Crime Act 2002 ss 343-379, in relation to an application for the purposes of: (1) a money laundering investigation or a confiscation investigation, a judge is a judge entitled to exercise the jurisdiction of the Crown Court; (2) a civil recovery investigation, a judge is a judge of the High Court: see the Proceeds of Crime Act 2002 s 343. For the meanings of 'money laundering investigation', 'confiscation investigation' and 'civil recovery investigation' see PARA 804 notes 3-5 ante.

An application for a production order may be made ex parte to a judge in chambers: s 351(1). As to the application procedure and the grounds for making an order see PARA 806 post.

2 For the meaning of 'appropriate officer' see PARA 804 note 2 ante.

3 Where:

222 (1) an appropriate officer makes an application under the Proceeds of Crime Act 2002 ss 345, 363 (customer information orders: see PARA 814 post) or s 370 (account monitoring orders: see PARA 816 post) for the purposes of a confiscation investigation or a money laundering investigation; or

223 (2) the Director of the Assets Recovery Agency makes an application under the Proceeds of Crime Act 2002 s 357 (disclosure orders: see PARA 812 post) for the purposes of a confiscation investigation,

then, subject to the Proceeds of Crime Act 2002 s 449 (which makes provision for members of staff of the Assets Recovery Agency to use pseudonyms), the appropriate officer or the Director of the Assets Recovery

agency, as the case may be, must provide the judge with proof of his identity and, if he is an accredited financial investigator, his accreditation under s 3: CrimPR 62.3.

4 See the Proceeds of Crime Act 2002 s 345(1). As to applications see *Practice Direction--Civil Recovery Proceedings* paras 8.1-13.5.

5 Proceeds of Crime Act 2002 ss 345(4), 416(2), (9). The period stated in a production order must be a period of seven days beginning with the day on which the order is made, unless it appears to the judge by whom the order is made that a longer or shorter period would be appropriate in the particular circumstances: s 345(5).

Where any of the material specified in an application for a production order consists of information contained in a computer the following provisions apply: s 349(1).

If the order is an order requiring a person to produce the material to an appropriate officer for him to take away, it has effect as an order to produce the material in a form in which it can be taken away by him and in which it is visible and legible: s 349(2).

If the order is an order requiring a person to give an appropriate officer access to the material, it has effect as an order to give him access to the material in a form in which it is visible and legible: s 349(3).

As to the enforcement in Scotland or Northern Ireland of an English or Welsh production order, and the enforcement in England and Wales of a Scottish or Northern Irish production order, see the Proceeds of Crime Act 2002 s 443(1)(d), (3), (4); and the Proceeds of Crime Act 2002 (Investigations in different parts of the United Kingdom) Order 2003, SI 2003/425.

6 Ibid s 348(1). Privileged material is any material which the person would be entitled to refuse to produce on grounds of legal professional privilege in proceedings in the High Court: s 348(2). As to legal professional privilege see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARAS 452-453; CIVIL PROCEDURE vol 11 (2009) PARA 972; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741; LEGAL PROFESSIONS vol 66 (2009) PARA 1146.

7 Ibid s 348(3). For the meaning of 'excluded material' see the Police and Criminal Evidence Act 1984 s 11; and PARA 875 post (definition applied by the Proceeds of Crime Act 2002 s 379).

8 Ibid s 348(4).

9 Ibid s 348(5).

10 Ibid s 348(6).

11 Ibid s 348(7).

12 An 'external investigation' is an investigation by an overseas authority into whether property has been obtained as a result of or in connection with criminal conduct, the extent or whereabouts of property obtained as a result of or in connection with criminal conduct, or whether a money laundering offence has been committed: ibid s 447(3) (amended by the Serious Organised Crime and Police Act 2005 ss 108(1), (4), 174(2), Sch 17 Pt 2). An 'overseas authority' is an authority which has responsibility in a country or territory outside the United Kingdom for making a request to an authority in another country or territory (including the United Kingdom) to prohibit dealing with relevant property, for carrying out an investigation into whether property has been obtained as a result of or in connection with criminal conduct, or for carrying out an investigation into whether a money laundering offence has been committed: Proceeds of Crime Act 2002 s 447(11). Her Majesty may by Order in Council make provision: (1) to enable orders equivalent to those under Pt 8 (ss 341-416) to be made, and warrants equivalent to those under Pt 8 to be issued, for the purposes of an external investigation (s 445(1)(a)); and (2) creating offences in relation to external investigations which are equivalent to offences created by Pt 8 (s 445(1)(b)). Such an order may include provision corresponding to any provision of Pt 8 (subject to any specified modifications) (s 445(2)(a)), provision about the functions of the Secretary of State, the Lord Advocate, the Scottish Ministers, the Director of the Assets Recovery Agency, the Director General of the Serious Organised Crime Agency, the Director of the Serious Fraud Office, constables and officers of Revenue and Customs (s 445(2)(b) (amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 168, 178); Commissioners for Revenue and Customs Act 2005 s 50(2), (7)) and provision about evidence (including evidence required to establish whether an investigation is being carried out in a country or territory outside the United Kingdom) (Proceeds of Crime Act 2002 s 445(2)(c)), but such an order must not provide for a disclosure order to be made for the purposes of an external investigation into whether a money laundering offence has been committed (s 445(3)). At the date at which this volume states the law no such order had been made. As to the establishment of the Serious Organised Crime Agency and the appointment of the Director General of the Serious Crime Agency see the Serious Organised Crime and Police Act 2005 s 1, Sch 1; and POLICE vol 36(1) (2007 Reissue) PARA 430 et seq. As to officers of Revenue and Customs see PARA 354 note 2 ante.

Rules of court may make such provision as is necessary or expedient to give effect to an Order in Council made under the Proceeds of Crime Act 2002 Pt 8 (including provision about the exercise of functions of a judge conferred or imposed by the order): s 446.

## **UPDATE**

### **805 Production orders**

NOTE 1--2002 Act s 343 amended to include detained cash investigations: Serious Crime Act 2007 Sch 10 para 3.

NOTE 3--CrimPR Pt 62 now Criminal Procedure Rules 2010, SI 2010/60, Pt 6.

NOTES 5, 12--2002 Act ss 443, 445 amended: 2007 Act Sch 8 paras 137, 139.

NOTE 5--SI 2003/425 amended: SI 2008/298.

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## **806. Application.**

The application for a production order must state that:

- 936 (1) a person specified in the application is subject to a confiscation investigation or a money laundering investigation, or that property specified in the application is subject to a civil recovery investigation<sup>1</sup>;
- 937 (2) the order is sought for the purposes of the investigation<sup>2</sup>;
- 938 (3) the order is sought in relation to material, or material of a description, specified in the application<sup>3</sup>;
- 939 (4) a person specified in the application appears to be in possession or control of the material<sup>4</sup>.

In order to exercise the power to make a production order, the judge must be satisfied that each of the requirements for its making is fulfilled<sup>5</sup>. The requirements are that there must be reasonable grounds:

- 940 (a) for suspecting that, in the case of a confiscation investigation, the person that the application for the order specifies as being subject to the investigation has benefited from his criminal conduct<sup>6</sup>;
- 941 (b) for suspecting that, in the case of a civil recovery investigation, the property<sup>7</sup> that the application for the order specifies as being subject to the investigation is recoverable property<sup>8</sup> or associated property<sup>9</sup>;
- 942 (c) for suspecting that, in the case of a money laundering investigation, the person that the application for the order specifies as being subject to the investigation has committed a money laundering offence<sup>10</sup>;
- 943 (d) for believing that the person the application specifies as appearing to be in possession or control of the material so specified is in possession or control of it<sup>11</sup>;
- 944 (e) for believing that the material is likely to be of substantial value, whether or not by itself, to the investigation for the purposes of which the order is sought<sup>12</sup>;
- 945 (f) for believing that it is in the public interest for the material to be produced or for access to it to be given, having regard to the benefit likely to accrue to the investigation if the material is obtained, and to the circumstances under which the person that the application specifies as appearing to be in possession or control of the material holds it<sup>13</sup>.

1 Proceeds of Crime Act 2002 s 345(2). For the meanings of 'confiscation investigation', 'money laundering investigation' and 'civil recovery investigation' see PARA 804 notes 3-5 ante.

2 Ibid s 345(3)(a).

3 Ibid s 345(3)(b).

4 Ibid s 345(3)(c).

5 Ibid ss 345(1), 346(1).



6 Ibid s 346(2)(a). 'Criminal conduct' means conduct which constitutes an offence in any part of the United Kingdom, or would constitute an offence in any part of the United Kingdom if it occurred there: ss 413(1), 416(9). A person benefits from conduct if he obtains property or a pecuniary advantage as a result of or in connection with the conduct: ss 413(2), 416(9). References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained in both that connection and some other: ss 413(3), 416(9). If a person benefits from conduct his benefit is the property or pecuniary advantage obtained as a result of or in connection with the conduct: ss 413(4), 416(9). It is immaterial whether conduct occurred before or after the passing of the Proceeds of Crime Act 2002, and whether property or a pecuniary advantage constituting a benefit from conduct was obtained before or after the passing of that Act: ss 413(5), 416(9). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

7 For the meaning of 'property' see PARA 804 note 4 ante.

8 For the meaning of 'recoverable property' see PARA 2149 post.

9 Proceeds of Crime Act 2002 s 346(2)(b). For the meaning of 'associated property' para 2150 note 6 post.

10 Ibid s 346(2)(c). An offence under s 327, s 328 or s 329 (see PARAS 791-793 ante) is a money laundering offence: ss 415(1), 416(9). Each of the following is a money laundering offence: (1) an attempt, conspiracy or incitement to commit an offence under s 327, s 328 or s 329; and (2) aiding, abetting, counselling or procuring the commission of an offence under s 327, s 328 or s 329: s 415(2), 416(9).

11 Ibid s 346(3).

12 Ibid s 346(4).

13 Ibid s 346(5).

## **UPDATE**

### **806 Application**

TEXT AND NOTE 1--After 'a civil recovery investigation' add 'or a detained cash investigation': 2002 Act s 345(2) (amended by Serious Crime Act 2007 s 75(2)). For the meaning of 'detained cash investigation' see 2002 Act s 341(3A) (added by 2007 Act s 75(1)).

TEXT AND NOTES 6-10--2002 Act s 346(2) amended to include provision relating to detained cash investigations: 2007 Act s 75(3).

NOTE 10--See further 2007 Act Sch 6 para 44(b) (references to common law offence of incitement).

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### **807. Order to grant entry.**

If a judge makes a production order<sup>1</sup> requiring a person to give an appropriate officer<sup>2</sup> access to material on any premises<sup>3</sup>, the judge may, on an application made to him by an appropriate officer and specifying the premises, make an order to grant entry in relation to the premises<sup>4</sup>. An order to grant entry is an order requiring any person who appears to an appropriate officer to be entitled to grant entry to the premises to allow him to enter the premises to obtain access to the material<sup>5</sup>.

1 For the meaning of 'production order' see PARA 805 ante.

2 For the meaning of 'appropriate officer' see PARA 804 note 2 ante.

3 For the meaning of 'premises' see the Police and Criminal Evidence Act 1984 s 23; and PARA 872 note 5 post (definition applied by the Proceeds of Crime Act 2002 s 379).

4 Ibid s 347(1), (2). An application for an order to grant entry may be made ex parte to a judge in chambers: s 351(1).

5 Ibid s 347(3).

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### **808. Government departments.**

A production order<sup>1</sup> may be made in relation to material in the possession or control of an authorised government department<sup>2</sup>. An order so made may require any officer of the department, whether named in the order or not, who may for the time being be in possession or control of the material to comply with it<sup>3</sup>.

An order containing such a requirement must be served as if the proceedings were civil proceedings against the department<sup>4</sup>.

If an order contains such a requirement:

- 946 (1) the person on whom it is served must take all reasonable steps to bring it to the attention of the officer concerned<sup>5</sup>;
- 947 (2) any other officer of the department who is in receipt of the order must also take all reasonable steps to bring it to the attention of the officer concerned<sup>6</sup>.

If the order is not brought to the attention of the officer concerned within the period stated in the order<sup>7</sup> the person on whom it is served must report the reasons for the failure to:

- 948 (a) a judge entitled to exercise the jurisdiction of the Crown Court, in the case of an order made for the purposes of a confiscation investigation or a money laundering investigation<sup>8</sup>;
- 949 (b) a High Court judge, in the case of an order made for the purposes of a civil recovery investigation<sup>9</sup>.

1 For the meaning of 'production order' see PARA 805 ante.

2 Proceeds of Crime Act 2002 s 350(1). An authorised government department is a government department, or a Northern Ireland department, which is an authorised department for the purposes of the Crown Proceedings Act 1947 (see CROWN PROCEEDINGS AND CROWN PRACTICE): s 350(6).

3 Proceeds of Crime Act 2002 s 350(2).

4 Ibid s 350(3).

5 Ibid s 350(4)(a).

6 Ibid s 350(4)(b).

7 Ie in pursuance of ibid s 345(4) (see PARA 805 text and note 5 ante).

8 Ibid s 350(5)(a). For the meanings of 'confiscation investigation' and 'money laundering investigation' see PARA 804 notes 3, 5 ante.

9 Ibid s 350(5)(b). For the meaning of a 'civil recovery investigation' see PARA 804 note 4 ante.

### **UPDATE**

**808 Government departments**

TEXT AND NOTE 9--2002 Act s 350(5)(b) amended to include detained cash investigations:  
Serious Crime Act 2007 Sch 10 para 5.

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MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(v) Money Laundering Investigations, Confiscation Investigations and Civil Recovery Investigations/B. PRODUCTION ORDERS/809. Supplementary provisions relating to production orders and orders to grant entry.

### **809. Supplementary provisions relating to production orders and orders to grant entry.**

Rules of court may make provision as to the practice and procedure to be followed in connection with proceedings relating to production orders and orders to grant entry<sup>1</sup>.

An application to discharge or vary a production order or an order to grant entry may be made to the court<sup>2</sup> by the person who applied for the order, or by any person affected by the order<sup>3</sup>. The court may discharge the order or may vary it<sup>4</sup>. If an accredited financial investigator<sup>5</sup>, a constable or an officer of Revenue and Customs applies for a production order or an order to grant entry, an application to discharge or vary the order need not be made by the same accredited financial investigator, constable or an officer of Revenue and Customs<sup>6</sup>.

Production orders and orders to grant entry have effect as if they were orders of the court<sup>7</sup>.

These provisions<sup>8</sup> do not apply to orders made in England and Wales for the purposes of a civil recovery investigation<sup>9</sup>.

1 Proceeds of Crime Act 2002 s 351(2). As to production orders and orders to grant entry see PARAS 805, 807 ante.

2 References to the court are references to: (1) the Crown Court, in relation to an order for the purposes of a confiscation investigation or a money laundering investigation; (2) the High Court, in relation to an order for the purposes of a civil recovery investigation: *ibid* s 344.

3 *Ibid* s 351(3). References to a person who applied for a production order or an order to grant entry must be construed accordingly: s 351(6). Where a procedural order has been made, the person required to comply with it may apply in writing to the appropriate officer of the Crown Court for the order to be discharged or varied; and on hearing such an application a circuit judge may discharge the order or make such variations to it as he thinks fit: CrimPR 56.4(1). For the meaning of 'appropriate officer' see PARA 804 note 2 ante. Where a person proposes so to make an application, he must give a copy of the application, not later than 48 hours before the making of the application, to a constable at the police station specified in the order, together with a notice indicating the time and place at which the application for discharge or variation is to be made: CrimPR 56.4(2). For these purposes, 'constable' includes a person commissioned by the Commissioners for Revenue and Customs; and 'police station' includes a place for the time being occupied by Her Majesty's Revenue and Customs: CrimPR 56.4(4); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). A circuit judge may, however, direct that CrimPR 56.4(2) need not be complied with if he is satisfied that the person making the application has good reason to seek a discharge or variation of the order as soon as possible and it is not practicable to comply with CrimPR 56.4(2): see CrimPR 56.4(2). As to the Commissioners for Revenue and Customs see PARA 354 note 2 ante.

4 Proceeds of Crime Act 2002 s 351(4).

5 See *ibid* s 453.

6 *Ibid* s 351(5); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). As to officers of Revenue and Customs see PARA 354 note 2 ante.

7 Proceeds of Crime Act 2002 s 351(7).

8 *Id* *ibid* s 351(2)-(7).

9 Ibid s 351(8). For the meaning of 'civil recovery investigation' see PARA 804 note 4 ante.

## **UPDATE**

### **809 Supplementary provisions relating to production orders and orders to grant entry**

NOTE 2--2002 Act s 344 amended to include detained cash investigations: Serious Crime Act 2007 Sch 10 para 4.

NOTE 3--CrimPR 56.4 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), r 56.4. Provision relating to the 2002 Act is now contained in CrimPR Pt 6.

TEXT AND NOTE 6--2002 Act s 351(5) amended: 2007 Act Sch 8 para 104.

TEXT AND NOTE 9--2002 Act s 351(8) amended to include detained cash investigations: 2007 Act Sch 10 para 6.

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## **C. SEARCH AND SEIZURE WARRANTS**

### **810. Search and seizure warrants.**

A judge<sup>1</sup> may, on an application made to him by an appropriate officer<sup>2</sup>, issue a search and seizure warrant if he is satisfied that either of the requirements for the issuing of the warrant is fulfilled<sup>3</sup>.

The application for a search and seizure warrant must state:

- 950 (1) that a person specified in the application is subject to a confiscation investigation<sup>4</sup> or a money laundering investigation<sup>5</sup>, or that property specified in the application is subject to a civil recovery investigation<sup>6</sup>;
- 951 (2) that the warrant is sought for the purposes of the investigation<sup>7</sup>;
- 952 (3) that the warrant is sought in relation to the premises<sup>8</sup> specified in the application<sup>9</sup>;
- 953 (4) that the warrant is sought in relation to material specified in the application, or that there are reasonable grounds for believing that there is material falling within specified provisions<sup>10</sup> on the premises<sup>11</sup>.

A search and seizure warrant is a warrant authorising an appropriate person to enter and search the premises specified in the application for the warrant, and to seize and retain any material found there which is likely to be of substantial value, whether or not by itself, to the investigation for the purposes of which the application is made<sup>12</sup>.

An appropriate person is:

- 954 (a) a constable or an officer of Revenue and Customs, if the warrant is sought for the purposes of a confiscation investigation or a money laundering investigation<sup>13</sup>;
- 955 (b) a named member of the staff of the Assets Recovery Agency<sup>14</sup>, if the warrant is sought for the purposes of a civil recovery investigation<sup>15</sup>.

A search and seizure warrant does not confer the right to seize privileged material<sup>16</sup> or excluded material<sup>17</sup>.

Provision may be made by Order in Council to enable equivalent warrants to be issued for the purposes of an external investigation<sup>18</sup>.

1 See PARA 805 note 1 ante.

2 For the meaning of 'appropriate officer' see PARA 804 note 2 ante.

3 Proceeds of Crime Act 2002 s 352(1). As to applications see *Practice Direction--Civil Recovery Proceedings* paras 8.1-12.4, 14.1-14.9. As to the requirements see PARA 811 post.

4 For the meaning of 'confiscation investigation' see PARA 804 note 3 ante.

5 For the meaning of 'money laundering investigation' see PARA 804 note 5 ante.

6 Proceeds of Crime Act 2002 s 352(2). For the meaning of 'civil recovery investigation' see PARA 804 note 4 ante.

7 Ibid s 352(3)(a).

8 For the meaning of 'premises' see the Police and Criminal Evidence Act 1984; and PARA 872 note 5 post (definition applied by the Proceeds of Crime Act 2002 s 379).

9 Ibid s 352(3)(b).

10 Ie ibid s 353(6), (7) or (8).

11 Ibid s 352(3)(c).

12 Ibid s 352(4). The Proceeds of Crime Act 2002 (Application of Police and Criminal Evidence Act 1984 and Police and Criminal Evidence (Northern Ireland) Order 1989) Order 2003, SI 2003/174 (which is made under the Proceeds of Crime Act 2002 s 355) applies, with specified modifications, the Police and Criminal Evidence Act 1984 s 15 (see PARA 872 post), s 16 (see PARA 880 post), s 21 (see PARA 888 post), s 22 (see PARA 889 post) to search and seizure warrants under the Proceeds of Crime Act 2002 s 352 for the purposes of a confiscation investigation or money laundering investigation and powers of seizure under them: see s 355(1)-(3); and the Proceeds of Crime Act 2002 (Application of Police and Criminal Evidence Act 1984 and Police and Criminal Evidence (Northern Ireland) Order 1989) Order 2003, SI 2003/174, arts 1-4.

The Proceeds of Crime Act 2002 s 356 makes further provision in respect of search and seizure warrants under s 352 sought for the purposes of civil recovery investigations: s 356(1). An application for a warrant may be made ex parte to a judge in chambers: s 356(2). A warrant may be issued subject to conditions: s 356(3). A warrant continues in force until the end of the period of one month starting with the day on which it is issued: s 356(4). A warrant authorises the person it names to require any information which is held in a computer and is accessible from the premises specified in the application for the warrant, and which the named person believes relates to any matter relevant to the investigation, to be produced in a form in which it can be taken away, and in which it is visible and legible: s 356(5). If the Director of the Assets Recovery Agency gives written authority for members of staff of the Agency to accompany the person a warrant names when executing it, and a warrant is issued, the authorised members have the same powers under it as the person it names: ss 1(1), 356(6). A warrant may include provision authorising a person who is exercising powers under it to do other things which are specified in the warrant, and need to be done in order to give effect to it: s 356(7). Copies may be taken of any material seized under a warrant: s 356(8). Material seized under a warrant may be retained for so long as it is necessary to retain it (as opposed to copies of it) in connection with the investigation for the purposes of which the warrant was issued: s 356(9). But if the Director has reasonable grounds for believing that the material may need to be produced for the purposes of any legal proceedings, and that it might otherwise be unavailable for those purposes, it may be retained until the proceedings are concluded: s 356(10).

As to the enforcement in Scotland or Northern Ireland of an English or Welsh search and seizure warrant, and the enforcement in England and Wales of a Scottish search warrant or Northern Irish search and seizure warrant, see the Proceeds of Crime Act 2002 s 443(1)(e), (3), (4); and the Proceeds of Crime Act 2002 (Investigations in different parts of the United Kingdom) Order 2003, SI 2003/425.

13 Proceeds of Crime Act 2002 s 352(5)(a); Commissioners for Revenue and Customs Act 2005 s 50(1), (7). As to officers of Revenue and Customs see PARA 354 note 2 ante.

14 See POLICE vol 36(1) (2007 Reissue) PARA 430 et seq.

15 Proceeds of Crime Act 2002 s 352(5)(b).

16 Ibid s 354(1). Privileged material is any material which a person would be entitled to refuse to produce on grounds of legal professional privilege in proceedings in the High Court: s 354(2). As to legal professional privilege see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARAS 452-453; CIVIL PROCEDURE vol 11 (2009) PARA 972; LEGAL PROFESSIONS vol 65 (2008) PARAS 740-741; LEGAL PROFESSIONS vol 66 (2009) PARA 1146.

17 Ibid s 354(3). For the meaning of 'excluded material' see the Police and Criminal Evidence Act 1984 s 11; and PARA 875 post (definition applied by the Proceeds of Crime Act 2002 s 379).

18 See PARA 805 note 12 ante.

## UPDATE



## **810 Search and seizure warrants**

TEXT AND NOTE 6--2002 Act s 352(2) amended to refer to detained cash investigations: Serious Crime Act 2007 s 76(1).

TEXT AND NOTES 11-15--2002 Act s 352 further amended: 2007 Act s 80(1), (2), Sch 8 para 105, Sch 10 para 7.

NOTE 12--2002 Act s 356 amended and repealed in part: 2007 Act s 80(5), (6), Sch 8 para 107, Sch 10 para 9, Sch 14. 2002 Act s 443 amended: 2007 Act Sch 8 para 137. SI 2003/425 amended: SI 2008/298.

TEXT AND NOTE 14--The Assets Recovery Agency is now part of the Serious Organised Crime Agency: see the Serious Crime Act 2007 Sch 8.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11. MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(v) Money Laundering Investigations, Confiscation Investigations and Civil Recovery Investigations/C. SEARCH AND SEIZURE WARRANTS/811. Requirements for the issue of a search and seizure warrant.

### **811. Requirements for the issue of a search and seizure warrant.**

There are alternative requirements for the issue of a search and seizure warrant<sup>1</sup>.

The first alternative is that a production order<sup>2</sup> made in relation to material has not been complied with and there are reasonable grounds for believing that the material is on the premises specified in the application for the warrant<sup>3</sup>.

The second alternative requirement is satisfied if there are reasonable grounds for suspecting that:

- 956 (1) in the case of a confiscation investigation<sup>4</sup>, the person specified in the application for the warrant has benefited from his criminal conduct<sup>5</sup>;
- 957 (2) in the case of a civil recovery investigation<sup>6</sup>, the property<sup>7</sup> specified in the application for the warrant is recoverable property<sup>8</sup> or associated property<sup>9</sup>;
- 958 (3) in the case of a money laundering investigation<sup>10</sup>, the person specified in the application for the warrant has committed a money laundering offence<sup>11</sup>,

and either the first or second set of the following conditions apply<sup>12</sup>.

The first set of conditions is that there are reasonable grounds for believing that any material on the premises<sup>13</sup> specified in the application for the warrant is likely to be of substantial value, whether or not by itself, to the investigation for the purposes of which the warrant is sought; it is in the public interest for the material to be obtained, having regard to the benefit likely to accrue to the investigation if the material is obtained; and it would not be appropriate to make a production order for any one or more of specified reasons<sup>14</sup>.

The second set of conditions is that there are reasonable grounds for believing that there is material on the premises specified in the application for the warrant and that the material falls within specified provisions<sup>15</sup>; there are reasonable grounds for believing that it is in the public interest for the material to be obtained, having regard to the benefit likely to accrue to the investigation if the material is obtained; and that any one or more of the following requirements is met<sup>16</sup>. Those requirements are: (a) that it is not practicable to communicate with any person entitled to grant entry to the premises<sup>17</sup>; (b) that entry to the premises will not be granted unless a warrant is produced<sup>18</sup>; (c) that the investigation might be seriously prejudiced unless an appropriate person<sup>19</sup> arriving at the premises is able to secure immediate entry to them<sup>20</sup>.

1 For the meaning of 'search and seizure warrant' see PARA 810 ante.

2 For the meaning of 'production order' see PARA 805 ante.

3 Proceeds of Crime Act 2002 s 352(6)(a).

4 For the meaning of 'confiscation investigation' see PARA 804 note 3 ante.

5 For the meaning of 'criminal conduct' see PARA 806 note 6 ante.

- 6 For the meaning of 'civil recovery investigation' see PARA 804 note 4 ante.
- 7 For the meaning of 'property' see PARA 804 note 4 ante.
- 8 For the meaning of 'recoverable property' see PARA 2149 post.
- 9 For the meaning of 'associated property' see PARA 2150 note 6 post.
- 10 For the meaning of 'money laundering investigation' see PARA 804 note 5 ante.
- 11 For the meaning of 'money laundering offence' see PARA 806 note 10 ante.
- 12 Proceeds of Crime Act 2002 ss 352(6)(b), 353(1), (2).
- 13 For the meaning of 'premises' see the Police and Criminal Evidence Act 1984; and PARA 872 note 5 post (definition applied by the Proceeds of Crime Act 2002 s 379).
- 14 Ibid s 353(3). The specified reasons are:
  - 224 (1) that it is not practicable to communicate with any person against whom the production order could be made (s 353(4)(a));
  - 225 (2) that it is not practicable to communicate with any person who would be required to comply with an order to grant entry to the premises (s 353(4)(b)); and
  - 226 (3) that the investigation might be seriously prejudiced unless an appropriate person is able to secure immediate access to the material (s 353(4)(c)).
- 15 Ie material falling within ibid s 353(6)-(8).

In the case of a confiscation investigation, material falls within s 353(6) if it cannot be identified at the time of the application but it: (1) relates to the person specified in the application, the question whether he has benefited from his criminal conduct, or any question as to the extent or whereabouts of his benefit from his criminal conduct; and (2) is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the warrant is sought: s 353(6).

In the case of a civil recovery investigation, material falls within s 353(7) if it cannot be identified at the time of the application but it: (a) relates to the property specified in the application, the question whether it is recoverable property or associated property, the question as to who holds any such property, any question as to whether the person who appears to hold any such property holds other property which is recoverable property, or any question as to the extent or whereabouts of any such property; and (b) is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the warrant is sought: s 353(7).

In the case of a money laundering investigation, material falls within s 353(8) if it cannot be identified at the time of the application but it: (i) relates to the person specified in the application or the question whether he has committed a money laundering offence; and (ii) is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the warrant is sought: s 353(8).
- 16 Ibid s 353(5).
- 17 Ibid s 353(9)(a).
- 18 Ibid s 353(9)(b).
- 19 An appropriate person is: (1) a constable or an officer of Revenue and Customs, if the warrant is sought for the purposes of a confiscation investigation or a money laundering investigation; (2) a member of the staff of the Assets Recovery Agency, if the warrant is sought for the purposes of a civil recovery investigation: s 353(10); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). See PARA 809 ante. As to officers of Revenue and Customs see PARA 354 note 2 ante.
- 20 Proceeds of Crime Act 2002 s 353(9)(c).

## UPDATE

### 811 Requirements for the issue of a search and seizure warrant

TEXT AND NOTES 12, 15--2002 Act s 353(2) amended, s 353(7A), (7B) added: Serious Crime Act 2007 s 76(2), (3) (use of search warrants for detained cash investigations).

TEXT AND NOTE 16--2002 Act s 353(5) amended: 2007 Act Sch 10 para 8(2).

NOTE 19--2002 Act s 353(10) amended, s 353(11) added so as to extend powers to accredited financial investigators: 2007 Act s 80(3), (4). 2002 Act s 353(10) further amended: 2007 Act Sch 8 para 106, Sch 10 para 8(3).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11. MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(v) Money Laundering Investigations, Confiscation Investigations and Civil Recovery Investigations/D. DISCLOSURE ORDERS/812. Disclosure orders.

## ***D. DISCLOSURE ORDERS***

### **812. Disclosure orders.**

A disclosure order is an order authorising the Director of the Assets Recovery Agency<sup>1</sup> to give to any person the Director considers has relevant information<sup>2</sup> notice in writing requiring him to do, with respect to any matter relevant to the investigation for the purposes of which the order is sought, any or all of the following:

- 959 (1) answer questions, either at a time specified in the notice or at once, at a place so specified;
- 960 (2) provide information specified in the notice, by a time and in a manner so specified; and
- 961 (3) produce documents<sup>3</sup>, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified<sup>4</sup>.

A judge<sup>5</sup> may, on an application made to him by the Director of the Assets Recovery Agency, make a disclosure order if he is satisfied that each of the requirements for the making of the order is fulfilled<sup>6</sup>. No application for a disclosure order may be made in relation to a money laundering investigation<sup>7</sup>.

The application for a disclosure order must state that a person specified in the application is subject to a confiscation investigation<sup>8</sup> which is being carried out by the Director and the order is sought for the purposes of the investigation; or that property<sup>9</sup> specified in the application is subject to a civil recovery investigation<sup>10</sup> and the order is sought for the purposes of the investigation<sup>11</sup>.

The requirements for the making of a disclosure order are that:

- 962 (a) there must be reasonable grounds for suspecting that, in the case of a confiscation investigation, the person specified in the application for the order has benefited from his criminal conduct<sup>12</sup>; or, in the case of a civil recovery investigation, the property specified in the application for the order is recoverable property<sup>13</sup> or associated property<sup>14</sup>;
- 963 (b) there must be reasonable grounds for believing that information which may be provided in compliance with a requirement imposed under the order is likely to be of substantial value, whether or not by itself, to the investigation for the purposes of which the order is sought<sup>15</sup>;
- 964 (c) there must be reasonable grounds for believing that it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained<sup>16</sup>.

With specified exceptions<sup>17</sup>, a statement made by a person in response to a requirement imposed on him under a disclosure order may not be used in evidence against him in criminal proceedings<sup>18</sup>.

An application to discharge or vary a disclosure order, other than one made for the purposes of a civil recovery investigation<sup>19</sup>, may be made to the court by the Director of the Assets Recovery Agency or any person affected by the order<sup>20</sup>. The court may discharge or vary the order<sup>21</sup>.

Provision may be made by Order in Council to enable equivalent orders to be made for the purposes of an external investigation<sup>22</sup>.

1 As to the Director of the Assets Recovery Agency see POLICE vol 36(1) (2007 Reissue) PARA 430 et seq.

2 Relevant information is information, whether or not contained in a document, which the Director considers to be relevant to the investigation: Proceeds of Crime Act 2002 s 357(5).

3 'Document' means anything in which information of any description is recorded: Police and Criminal Evidence Act 1984 s 118(1); definition applied by the Proceeds of Crime Act 2002 ss 379, 416(2), (9).

4 Ibid ss 1(2), 357(4). A person is not bound to comply with a requirement imposed by a notice given under a disclosure order unless evidence of authority to give the notice is produced to him: s 357(6).

A disclosure order does not confer the right to require a person to answer any privileged question, provide any privileged information or produce any privileged document, except that a lawyer may be required to provide the name and address of a client of his: s 361(1). A privileged question is a question which the person would be entitled to refuse to answer on grounds of legal professional privilege in proceedings in the High Court: s 361(2). Privileged information is any information which the person would be entitled to refuse to provide on grounds of legal professional privilege in proceedings in the High Court: s 361(3). Privileged material is any material which the person would be entitled to refuse to produce on grounds of legal professional privilege in proceedings in the High Court: s 361(4). A disclosure order does not confer the right to require a person to produce excluded material: s 361(5).

A disclosure order has effect in spite of any restriction on the disclosure of information (however imposed): s 361(6).

The Director of the Assets Recovery Agency may take copies of any documents produced in compliance with a requirement to produce them which is imposed under a disclosure order: s 361(7). Documents so produced may be retained for so long as it is necessary to retain them (as opposed to a copy of them) in connection with the investigation for the purposes of which the order was made (s 361(8)); however, if the Director has reasonable grounds for believing that the documents may need to be produced for the purposes of any legal proceedings, and they might otherwise be unavailable for those purposes, they may be retained until the proceedings are concluded (s 361(9)). Rules of court may make provision as to the practice and procedure to be followed in connection with proceedings relating to disclosure orders: s 362(2).

As to the enforcement in Scotland or Northern Ireland of an English or Welsh disclosure order, and the enforcement in England and Wales of a Scottish or Northern Irish disclosure order, see the Proceeds of Crime Act 2002 s 443(1)(d), (3), (4); and the Proceeds of Crime Act 2002 (Investigations in different parts of the United Kingdom) Order 2003, SI 2003/425.

5 See PARA 805 note 1 ante. An application for a disclosure order may be made ex parte to a judge in chambers: Proceeds of Crime Act 2002 s 362(1).

6 Ibid s 357(1). As to applications see CrimPR 62.3; and PARA 805 note 3 ante. See also *Practice Direction-- Civil Recovery Proceedings* paras 8.1-12.4, 15.1-15.3.

7 Proceeds of Crime Act 2002 s 357(2). For the meaning of 'money laundering investigation' see PARA 804 note 5 ante.

8 For the meaning of 'confiscation investigation' see PARA 804 note 3 ante.

9 For the meaning of 'property' see PARA 804 note 4 ante.

10 For the meaning of 'civil recovery investigation' see PARA 804 note 4 ante.

11 Proceeds of Crime Act 2002 s 357(3).

12 For the meaning of 'criminal conduct' see PARA 806 note 6 ante.

13 For the meaning of 'recoverable property' see PARA 2149 post.

- 14 Ibid s 358(1), (2). For the meaning of 'associated property' see PARA 2150 note 6 post.
- 15 Ibid s 358(1), (3).
- 16 Ibid s 358(1), (4).
- 17 Ibid s 360(1) does not apply:
- 227 (1) in the case of proceedings under Pt 2 (ss 6-91) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391 et seq) (s 360(2)(a));
- 228 (2) on a prosecution for an offence under s 359(1) or (3) (see PARA 813 post) (s 360(2)(b));
- 229 (3) on a prosecution for an offence under the Perjury Act 1911 s 5 (see PARA 717 ante) (Proceeds of Crime Act 2002 s 360(2)(c)); or
- 230 (4) on a prosecution for some other offence where, in giving evidence, the person makes a statement inconsistent with the statement mentioned in s 360(1) (s 360(2)(d)).
- A statement may not be used by virtue of head (4) supra against a person unless evidence relating to it is adduced, or a question relating to it is asked, by him or on his behalf in the proceedings arising out of the prosecution: s 360(3).
- 18 See ibid s 360(1).
- 19 Ibid s 362(5).
- 20 Ibid s 362(3).
- 21 Ibid s 362(4).
- 22 See PARA 805 note 12 ante.

## UPDATE

### 812 Disclosure orders

TEXT AND NOTES--2002 Act ss 357, 361, 362 amended: Serious Crime Act 2007 Sch 8 paras 108-110 (transfer of investigation functions).

TEXT AND NOTE 1--The Assets Recovery Agency is now part of the Serious Organised Crime Agency: see the Serious Crime Act 2007 Sch 8.

NOTE 4--2002 Act s 443 amended: 2007 Act Sch 8 para 137. SI 2003/425 amended: SI 2008/298.

NOTE 6--See *Serious Organised Crime Agency v Perry* [2009] EWHC 1960 (Admin), [2010] 1 WLR 910, [2009] All ER (D) 337 (Jul) (even though judge had not recorded reasoning for making order, not difficult to see why he had concluded that criteria had been met).

TEXT AND NOTE 7--2002 Act s 357(2) amended: 2007 Act Sch 10 para 10.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11. MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(v) Money Laundering Investigations, Confiscation Investigations and Civil Recovery Investigations/D. DISCLOSURE ORDERS/813. Offences.

### **813. Offences.**

A person commits an offence if without reasonable excuse he fails to comply with a requirement imposed on him under a disclosure order<sup>1</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>2</sup> or to a fine not exceeding level five on the standard scale or to both<sup>3</sup>.

A person commits an offence if, in purported compliance with a requirement imposed on him under a disclosure order, he: (1) makes a statement which he knows to be false or misleading in a material particular; or (2) recklessly makes a statement which is false or misleading in a material particular<sup>4</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

<sup>1</sup> Proceeds of Crime Act 2002 s 359(1). For the meaning of 'disclosure order' see s 357(4); and PARA 812 ante (definition applied by s 416(2), (9)).

<sup>2</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

<sup>3</sup> Proceeds of Crime Act 2002 s 359(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

<sup>4</sup> Ibid s 359(3).

<sup>5</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

<sup>6</sup> Proceeds of Crime Act 2002 s 359(4). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11. MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(v) Money Laundering Investigations, Confiscation Investigations and Civil Recovery Investigations/E. CUSTOMER INFORMATION ORDERS/814. Customer information orders.

## ***E. CUSTOMER INFORMATION ORDERS***

### **814. Customer information orders.**

A customer information order is an order that a financial institution<sup>1</sup> covered by the application for the order must, on being required to do so by notice in writing given by an appropriate officer<sup>2</sup>, provide any such customer information<sup>3</sup> as it has relating to the person specified in the application<sup>4</sup>.

A judge<sup>5</sup> may, on an application made to him by an appropriate officer, make a customer information order if he is satisfied that each of the requirements for the making of the order is fulfilled<sup>6</sup>.

The application for a customer information order must state that a person specified in the application is subject to a confiscation investigation<sup>7</sup> or a money laundering investigation<sup>8</sup>; or that property specified in the application is subject to a civil recovery investigation<sup>9</sup> and a person specified in the application appears to hold the property<sup>10</sup>. The application must also state that the order is sought for the purposes of the investigation, and that the order is sought against the financial institution or financial institutions specified in the application<sup>11</sup>. An application for a customer information order may specify all financial institutions; a particular description, or particular descriptions, of financial institutions; or a particular financial institution or particular financial institutions<sup>12</sup>.

A financial institution which is required to provide information under a customer information order must provide the information to an appropriate officer in such manner, and at or by such time, as an appropriate officer requires<sup>13</sup>. If a financial institution on which a requirement is imposed by a notice given under a customer information order requires the production of evidence of authority to give the notice, it is not bound to comply with the requirement unless evidence of the authority has been produced to it<sup>14</sup>.

The requirements for a customer information order are as follows<sup>15</sup>.

In the case of a confiscation investigation, there must be reasonable grounds for suspecting that the person specified in the application for the order has benefited from his criminal conduct<sup>16</sup>.

In the case of a civil recovery investigation, there must be reasonable grounds for suspecting that the property specified in the application for the order is recoverable property<sup>17</sup> or associated property<sup>18</sup>, and that the person specified in the application holds all or some of the property<sup>19</sup>.

In the case of a money laundering investigation, there must be reasonable grounds for suspecting that the person specified in the application for the order has committed a money laundering offence<sup>20</sup>.

In the case of any investigation, there must be reasonable grounds for believing that: (1) customer information which may be provided in compliance with the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the

order is sought; (2) it is in the public interest for the customer information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained<sup>21</sup>.

With specified exceptions<sup>22</sup>, a statement made by a financial institution in response to a customer information order may not be used in evidence against it in criminal proceedings<sup>23</sup>.

An application to discharge or vary a customer information order, other than one made for the purposes of a civil recovery investigation<sup>24</sup>, may be made to the court by the person who applied for the order or by any person affected by the order<sup>25</sup>. The court may discharge<sup>26</sup> or vary the order<sup>27</sup>. If an accredited financial investigator<sup>28</sup>, a constable or an officer of Revenue and Customs applies for a customer information order, an application to discharge or vary the order need not be made by the same accredited financial investigator, constable or officer<sup>29</sup>. An accredited financial investigator, a constable or an officer of Revenue and Customs may not make an application for a customer information order or an application to vary such an order unless he is a senior appropriate officer<sup>30</sup> or he is authorised to do so by a senior appropriate officer<sup>31</sup>.

As from a day to be appointed<sup>32</sup> similar provisions apply where the Secretary of State receives a request from an authority in a participating country<sup>33</sup> for customer information<sup>34</sup> to be obtained in relation to a person who appears to him to be subject to an investigation in a participating country into serious criminal conduct<sup>35</sup>.

Provision may also be made by Order in Council to enable equivalent orders to be made for the purposes of an external investigation<sup>36</sup>.

1 'Financial institution' means a person carrying on a business in the regulated sector: Proceeds of Crime Act 2002 s 416(4), (9). As to what constitutes a business in the regulated sector see PARA 797 ante; definition applied by s 416(6). However, a person who ceases to carry on a business in the regulated sector (whether by virtue of Sch 9 (see PARA 797 ante) or otherwise) is to continue to be treated as a financial institution for the purposes of any requirement under a customer information order or an account monitoring order (see PARA 816 post) to provide information which relates to a time when the person was a financial institution: s 416(5).

2 For the meaning of 'appropriate officer' see PARA 804 note 2 ante.

3 'Customer information', in relation to a person and a financial institution, is information whether the person holds, or has held, an account or accounts (whether solely or jointly with another) and (if so) information as to: (1) the matters specified in the Proceeds of Crime Act 2002 s 364(2) if the person is an individual; (2) the matters specified in s 364(3) if the person is a company or limited liability partnership or a similar body incorporated or otherwise established outside the United Kingdom: s 364(1). The matters referred to in head (1) supra are:

- 231 (a) the account number or numbers (s 364(2)(a));
- 232 (b) the person's full name (s 364(2)(b));
- 233 (c) his date of birth (s 364(2)(c));
- 234 (d) his most recent address and any previous addresses (s 364(2)(d));
- 235 (e) the date or dates on which he began to hold the account or accounts and, if he has ceased to hold the account or any of the accounts, the date or dates on which he did so (s 364(2)(e));
- 236 (f) such evidence of his identity as was obtained by the financial institution under or for the purposes of any legislation relating to money laundering (s 364(2)(f));
- 237 (g) the full name, date of birth and most recent address, and any previous addresses, of any person who holds, or has held, an account at the financial institution jointly with him (s 364(2)(g)); and
- 238 (h) the account number or numbers of any other account or accounts held at the financial institution to which he is a signatory and details of the person holding the other account or accounts (s 364(2)(h)).

The matters referred to in head (2) supra are:

- 239 (i) the account number or numbers or the numbers of any safe deposit box (s 364(3)(a) (amended by the Criminal Justice (Northern Ireland) Order 2005, SI 2005/1965, art 14(1), (4)(a));
- 240 (ii) the person's full name (Proceeds of Crime Act 2002 s 364(3)(b));
- 241 (iii) a description of any business which the person carries on (s 364(3)(c));
- 242 (iv) the country or territory in which it is incorporated or otherwise established and any number allocated to it under the Companies Act 1985 (see COMPANIES) or the Companies (Northern Ireland) Order 1986, SI 1986/1032, or corresponding legislation of any country or territory outside the United Kingdom (Proceeds of Crime Act 2002 s 364(3)(d));
- 243 (v) any number assigned to it for the purposes of value added tax in the United Kingdom (s 364(3)(e));
- 244 (vi) its registered office, and any previous registered offices, under the Companies Act 1985 or the Companies (Northern Ireland) Order 1986, SI 1986/1032, or anything similar under corresponding legislation of any country or territory outside the United Kingdom (Proceeds of Crime Act 2002 s 364(3)(f));
- 245 (vii) its registered office, and any previous registered offices, under the Limited Liability Partnerships Act 2000 (see PARTNERSHIP) or anything similar under corresponding legislation of any country or territory outside Great Britain (Proceeds of Crime Act 2002 s 364(3)(g));
- 246 (viii) the date or dates on which it began to hold the account or accounts and, if it has ceased to hold the account or any of the accounts, the date or dates on which it did so (s 364(3)(h));
- 247 (ix) such evidence of its identity as was obtained by the financial institution under or for the purposes of any legislation relating to money laundering (s 364(3)(i)); and
- 248 (x) the full name, date of birth and most recent address and any previous addresses of any person who is a signatory to the account or any of the accounts (s 364(3)(j)).

The Secretary of State may by order provide for information of a description specified in the order to be customer information, or no longer to be customer information: s 364(4). As to the making of orders under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante.

For the above purposes, money laundering is an act which constitutes an offence under s 327 (see PARA 791 ante), s 328 (see PARA 792 ante) or s 329 (see PARA 793 ante) or the Terrorism Act 2000 s 18 (see PARA 393 ante), or which constitutes an offence specified in the Proceeds of Crime Act 2002 s 415(1A) (as added), or which would constitute an offence under such provisions if done in the United Kingdom: s 364(5) (amended by the Serious Organised Crime and Police Act 2005 s 107(1), (2)). Each of the following is a money laundering offence under the Proceeds of Crime Act 2002 s 415(1A) (as added): (A) an offence under the Criminal Justice Act 1988 s 93A, s 93B or s 93C (all repealed); (B) an offence under the Drug Trafficking Act 1994 s 49, s 50 or s 51 (all repealed); (C) an offence under the Criminal Law (Consolidation) (Scotland) Act 1995 s 37 or s 38 (both repealed); and (D) an offence under the Proceeds of Crime (Northern Ireland) Order 1996, SI 1996/1299 (revoked): Proceeds of Crime Act 2002 s 415(1A) (added by the Serious Organised Crime and Police Act 2005 s 107(1), (4)).

4 Proceeds of Crime Act 2002 s 363(5). A customer information order has effect in spite of any restriction on the disclosure of information (however imposed): s 368; Crime (International Co-operation) Act 2003 s 32(7) (not yet in force).

As from a day to be appointed, where a customer information order is requested for use abroad under the Crime (International Co-operation) Act 2003 s 32 (see the text and notes 32-35 infra), it is defined as an order made by a judge entitled to exercise the jurisdiction of the Crown Court that a financial institution specified in the application for the order must, on being required to do so by notice in writing given by the applicant for the order, provide any such customer information as it has relating to the person specified in the application: ss 32(4), 46(2), (5). For these purposes, 'financial institution' means a person who is carrying on business in the regulated sector and, in relation to a customer information order or an account monitoring order (see PARA 816 post), includes a person who was carrying on business in the regulated sector at a time which is the time to which any requirement for him to provide information under the order is to relate: s 46(4). 'Business in the regulated sector' is interpreted in accordance with the Proceeds of Crime Act 2002 Sch 9 (as amended) (see PARA 797 ante): Crime (International Co-operation) Act 2003 s 46(4). At the date at which this volume states the law no such day had been appointed.

As to the enforcement in Scotland or Northern Ireland of an English or Welsh customer information order, and the enforcement in England and Wales of a Scottish or Northern Irish customer information order, see the Proceeds of Crime Act 2002 s 443(1)(d), (3), (4); and the Proceeds of Crime Act 2002 (Investigations in different

parts of the United Kingdom) Order 2003, SI 2003/425. Rules of court may make provision as to the practice and procedure to be followed in connection with proceedings relating to customer information orders: Proceeds of Crime Act 2002 s 369(2). As to such rules see CrimPR 62.2, 62.3.

As from a day to be appointed it is provided that where a financial institution is specified in a customer information order made in any part of the United Kingdom (Crime (International Co-operation) Act 2003 s 42(1) (a)), and the institution, or an employee of the institution, discloses the information that the request to obtain customer information has been received (s 42(3)(a)), the information that the investigation to which the request relates is being carried out (s 42(3)(b)), or the information that, in pursuance of the request, information has been given to the authority which made the request (s 42(3)(c)), the institution or (as the case may be) the employee is guilty of an offence (s 42(2)). An institution guilty of this offence is liable on conviction on indictment to a fine (s 42(4)(b)) and on summary conviction to a fine not exceeding the statutory maximum (s 42(4)(a)); and any other person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both (s 42(5)(b)), or on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both (s 42(5)(a)). At the date at which this volume states the law no such day had been appointed. As from a day to be appointed the maximum term of imprisonment specified under s 42(5)(a) is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 See PARA 805 note 1 ante. An application for a customer information order may be made ex parte to a judge in chambers: Proceeds of Crime Act 2002 s 369(1).

6 Ibid s 363(1). As to applications see the CrimPR 62.3; and PARA 805 note 3 ante. See also *Practice Direction--Civil Recovery Proceedings* paras 8.1-12.4, 16.1-16.3.

7 For the meaning of 'confiscation investigation' see PARA 804 note 3 ante.

8 Proceeds of Crime Act 2002 s 363(2)(a). For the meaning of 'money laundering investigation order' see PARA 804 note 5 ante.

9 For the meaning of 'civil recovery investigation' see PARA 804 note 4 ante.

10 Proceeds of Crime Act 2002 s 363(2)(b). For the meaning of 'property' see PARA 804 note 4 ante.

11 Ibid s 363(3).

12 Ibid s 363(4).

13 Ibid s 363(6).

14 Ibid s 363(7).

15 Ibid s 365(1).

16 Ibid s 365(2). For the meaning of 'criminal conduct' see PARA 806 note 2 ante.

17 For the meaning of 'recoverable property' see PARA 2149 post.

18 For the meaning of 'associated property' see PARA 2150 note 6 ante.

19 Proceeds of Crime Act 2002 s 365(3).

20 Ibid s 365(4).

21 Ibid s 365(5), (6).

22 A statement by a financial institution in response to a customer information order may be used as evidence against it in criminal proceedings: (1) in the case of proceedings under ibid Pt 2 (ss 6-91) (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391 et seq); (2) on a prosecution under s 366(1) or (3) (see PARA 815 post); (3) on a prosecution for some other offence where, in giving evidence, the financial institution makes a statement inconsistent with the statement made by it in response to a customer information order: s 367(2).

A statement may not be used by virtue of head (3) supra against a financial institution unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of the financial institution in the proceedings arising out of the prosecution: s 367(3).

23 Ibid s 367(1).

24 Ibid s 369(8).

25 Ibid s 369(3). Where any person other than the person who applied for the customer information order (see s 369(5), (6); and the text and note 30 *infra*) proposes to make an application under s 369(3) for the discharge or variation of a customer information order, he must, not later than 48 hours before the application is to be made, give a copy of the proposed application to a police officer at the police station specified in the customer information order, or where the application for the customer information order was not made by a constable, to the office of the appropriate officer who made the application, as specified in the customer information order, in either case together with a notice indicating the time and place at which the application for a discharge or variation is to be made: CrimPR 62.2(1).

26 Proceeds of Crime Act 2002 s 369(4)(a).

27 Ibid s 369(4)(b).

28 See POLICE vol 36(1) (2007 Reissue) PARA 430 et seq.

29 Proceeds of Crime Act 2002 s 369(5); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). References to a person who applied for a customer information order must be construed accordingly: s 369(6). As to the officers and Commissioners for Revenue and Customs see PARA 354 note 2 *ante*.

30 Senior appropriate officers are:

249 (1) in relation to a confiscation investigation:

11. (a) the Director of the Assets Recovery Agency (ibid s 378(2)(a));

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12. (b) a police officer who is not below the rank of superintendent (s 378(2)(b));

13

13. (c) an officer of Revenue and Customs who is not below such grade as is designated by the Commissioners for Her Majesty's Revenue and Customs as equivalent to that rank (s 378(2)(c); Commissioners for Revenue and Customs Act 2005 s 50(1), (7)); and

14

14. (d) an accredited financial investigator who falls within a description specified in an order made for these purposes by the Secretary of State under the Proceeds of Crime Act 2002 s 453 (s 378(2)(d));

15

250 (2) in relation to a civil recovery investigation, the Director of the Assets Recovery Agency, and only the Director (s 378(3));

251 (3) in relation to a money laundering investigation:

15. (a) a police officer who is not below the rank of superintendent (s 378(6)(a));

16

16. (b) an officer of Revenue and Customs who is not below such grade as is designated by the Commissioners for Revenue and Customs as equivalent to that rank (s 378(6)(b); Commissioners for Revenue and Customs Act 2005 s 50(1), (7)); and

17

17. (c) an accredited financial investigator who falls within a description specified in an order made for these purposes by the Secretary of State under s 453 (Proceeds of Crime Act 2002 s 378(6)(c)).

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However, a person is not a senior appropriate officer in relation to a money laundering investigation if he is a member of staff of the Assets Recovery Agency, or a person providing services under arrangements made by the Director of that Agency: s 378(7).

31 Ibid s 369(7); Commissioners for Revenue and Customs Act 2005 s 50(2), (7).

32 The Crime (International Co-operation) Act 2003 ss 32-34 (see the text and notes 32-35 *infra*; and PARA 815 *post*) are to be brought into force as from a day to be appointed by order made under s 94. At the date at which this volume states the no such day had been appointed.

33 For the meaning of 'country' see PARA 916 note 2 *post*; and for the meaning of 'participating country' see PARA 917 note 14 *post*. The authority referred to in the text is the authority in the participating country making the request which appears to the Secretary of State to have the function of making requests of the kind to which *ibid* s 32 (as amended) applies: s 32(2). See note 33 *supra*.

34 For the purposes of *ibid* s 32 (as amended), 'customer information' carries the meaning specified in note 3 *supra*, except that in these circumstances it does not include such evidence of the identity of the relevant individual, incorporated body or partnership (as the case may be) as was obtained by the financial institution under or for the purposes of any legislation relating to money laundering (ie information required pursuant to the Proceeds of Crime Act 2002 s 364(2)(f), (3)(i) (see PARA 814 *ante*)): Crime (International Co-operation) Act 2003 s 32(6). See note 33 *supra*.

35 *Ibid* s 32(1). See notes 4, 33 *supra*. 'Serious criminal conduct' means conduct which constitutes an offence to which the Protocol to the Mutual Legal Assistance Convention, established by Council Act of 16 October 2001 (2001/C326/01) art 1 para 3 (request for information on bank accounts) applies or an offence specified in an order made by the Secretary of State for the purpose of giving effect to any decision of the Council of the European Union under art 1 para 6: Crime (International Co-operation) Act 2003 s 46(2), (3). For the meaning of 'the Mutual Legal Assistance Convention' see PARA 916 note 4 *post*. In these circumstances the Secretary of State may direct a senior police officer to apply, or arrange for a constable to apply, or direct a senior officer of Revenue and Customs to apply, or arrange for an officer of Revenue and Customs to apply, for a customer information order: s 32(3); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). The application may be made *ex parte* to a judge in chambers (Crime (International Co-operation) Act 2003 s 33(2)); and it may specify all financial institutions (s 33(3)(a)), a particular description, or particular descriptions, of financial institutions (s 33(3)(b)), or a particular financial institution or particular financial institutions (s 33(3)(c)). A judge may make a customer information order, on an application made to him pursuant to a direction under s 32(3) if he is satisfied that the person specified in the application is subject to an investigation in the country in question (s 33(1)(a)), the investigation concerns conduct which is serious criminal conduct (s 33(1)(b)), the conduct constitutes an offence in England and Wales or (as the case may be) Northern Ireland, or would do were it to occur there (s 33(1)(c)), and the order is sought for the purposes of the investigation (s 33(1)(d)). A financial institution which is required to provide information under a customer information order must provide the information to the applicant for the order in such manner, and at or by such time, as the applicant requires (s 32(5)); customer information obtained in pursuance of a customer information order is to be given to the Secretary of State and sent by him to the authority which made the request (s 32(6)).

The court may discharge or vary a customer information order on an application made by the person who applied for the order (s 33(4)(a)), a senior police officer (s 33(4)(b)), a constable authorised by a senior police officer to make the application (s 33(4)(c)), a senior officer of Revenue and Customs (s 33(4)(d); Commissioners for Revenue and Customs Act 2005 s 50(2), (7)), or an officer of Revenue and Customs authorised by a senior officer of Revenue and Customs to make the application (Crime (International Co-operation) Act 2003 s 33(4)(e); Commissioners for Revenue and Customs Act 2005 s 50(1), (2), (7)).

'Senior police officer' means a police officer who is not below the rank of superintendent and 'senior officer of Revenue and Customs' means an officer of Revenue and Customs who is not below the grade designated by the Commissioners for Her Majesty's Revenue and Customs as equivalent to that rank (Crime (International Co-operation) Act 2003 s 46(1); Commissioners for Revenue and Customs Act 2005 s 50(1), (2), (7)); and 'officer of Revenue and Customs' means an officer commissioned by the Commissioners for Her Majesty's Revenue and Customs (see the Crime (International Co-operation) Act 2003 s 51(1); and the Commissioners for Revenue and Customs Act 2005 s 50(1), (2), (7)). As to the Commissioners for, and officers of, Her Majesty's Revenue and Customs see PARA 354 note 2 *ante*.

36 See PARA 805 note 12 *ante*.

## UPDATE

### 814 Customer information orders

NOTE 3--Proceeds of Crime Act 2002 s 364(3(d), (f) amended: SI 2009/1941.

NOTES 4, 25--CrimPR Pt 62 now Criminal Procedure Rules 2010, SI 2010/60, Pt 6.

NOTES 4, 32--Day now appointed: SI 2006/2811.

NOTE 4--2002 Act s 443 amended: Serious Crime Act 2007 Sch 8 para 137. SI 2003/425 amended: SI 2008/298.

TEXT AND NOTE 6--See further 2002 Act s 363(1A) (added by 2007 Act Sch 10 para 11).

TEXT AND NOTES 29, 31--2002 Act s 369(5), (7) amended: 2007 Act Sch 8 para 111.

NOTE 30--2002 Act s 378 further amended: 2007 Act s 80(7), (8), Sch 8 para 116, Sch 10 para 13, Sch 14.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11. MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(v) Money Laundering Investigations, Confiscation Investigations and Civil Recovery Investigations/E. CUSTOMER INFORMATION ORDERS/815. Offences.

## **815. Offences.**

A financial institution<sup>1</sup> commits an offence if without reasonable excuse it fails to comply with a requirement imposed on it under a customer information order<sup>2</sup>. A financial institution guilty of such an offence is liable on summary conviction to a fine not exceeding level five on the standard scale<sup>3</sup>.

A financial institution commits an offence if, in purported compliance with a customer information order, it:

- 965 (1) makes a statement which it knows to be false or misleading in a material particular<sup>4</sup>; or
- 966 (2) recklessly makes a statement which is false or misleading in a material particular<sup>5</sup>.

A financial institution guilty of such an offence is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum<sup>6</sup>.

1 For the meaning of 'financial institution' see PARA 814 notes 1, 4 ante.

2 Proceeds of Crime Act 2002 s 366(1); Crime (International Co-operation) Act 2003 s 34(1). Section 34 is to come into force as from a day to be appointed: see PARA 814 note 33 ante. At the date at which this volume states the law no such day had been appointed. For the meaning of 'customer information order' see PARA 814 ante.

3 Proceeds of Crime Act 2002 s 366(2); Crime (International Co-operation) Act 2003 s 34(2). See note 2 supra. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

4 Proceeds of Crime Act 2002 s 366(3)(a); Crime (International Co-operation) Act 2003 s 34(3)(a). See note 2 supra.

5 Proceeds of Crime Act 2002 s 366(3)(b); Crime (International Co-operation) Act 2003 s 34(3)(b). See note 2 supra.

6 Proceeds of Crime Act 2002 s 366(4); Crime (International Co-operation) Act 2003 s 34(4). See note 2 supra. As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

## **UPDATE**

### **815 Offences**

NOTE 2--Day now appointed: SI 2006/2811.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/11. MISCELLANEOUS OFFENCES/(1) MONEY LAUNDERING OFFENCES/(v) Money Laundering Investigations, Confiscation Investigations and Civil Recovery Investigations/F. ACCOUNT MONITORING ORDERS/816. Account monitoring orders.

## ***F. ACCOUNT MONITORING ORDERS***

### **816. Account monitoring orders.**

An account monitoring order is an order that the financial institution<sup>1</sup> specified in the application for the order must, for the period stated in the order, provide account information<sup>2</sup> of the description specified in the order to an appropriate officer<sup>3</sup> in the manner, and at or by the time or times, stated in the order<sup>4</sup>. The period stated in an account monitoring order must not exceed the period of 90 days beginning with the day on which the order is made<sup>5</sup>.

A judge<sup>6</sup> may, on an application made to him by an appropriate officer, make an account monitoring order if he is satisfied that each of the requirements for the making of the order is fulfilled<sup>7</sup>.

The application for an account monitoring order must state that a person specified in the application is subject to a confiscation investigation<sup>8</sup> or a money laundering investigation<sup>9</sup>, or that property<sup>10</sup> specified in the application is subject to a civil recovery investigation<sup>11</sup> and a person specified in the application appears to hold the property<sup>12</sup>. The application must also state that the order is sought for the purposes of the investigation, and that the order is sought against the financial institution specified in the application in relation to account information of the description so specified<sup>13</sup>. The application for an account monitoring order may specify information relating to:

- 967 (1) all accounts held by the person specified in the application for the order at the financial institution so specified<sup>14</sup>;
- 968 (2) a particular description, or particular descriptions, of accounts so held<sup>15</sup>; or
- 969 (3) a particular account, or particular accounts, so held<sup>16</sup>.

The requirements for an account monitoring order are as follows<sup>17</sup>.

In the case of a confiscation investigation, there must be reasonable grounds for suspecting that the person specified in the application for the order has benefited from his criminal conduct<sup>18</sup>.

In the case of a civil recovery investigation, there must be reasonable grounds for suspecting that:

- 970 (a) the property specified in the application for the order is recoverable property or associated property<sup>19</sup>;
- 971 (b) the person specified in the application holds all or some of the property<sup>20</sup>.

In the case of a money laundering investigation, there must be reasonable grounds for suspecting that the person specified in the application for the order has committed a money laundering offence<sup>21</sup>.

In the case of any investigation, there must be reasonable grounds for believing that account information which may be provided in compliance with the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought<sup>22</sup>; and that it is in the public interest for the account information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained<sup>23</sup>.

A statement made by a financial institution in response to an account monitoring order may not be used in evidence against it in criminal proceedings<sup>24</sup>.

An application to discharge or vary an account monitoring order may be made to the court by the person who applied for the order, or by any person affected by the order<sup>25</sup>. The court may discharge<sup>26</sup> or vary the order<sup>27</sup>. If an accredited financial investigator<sup>28</sup>, a constable or an officer of Revenue and Customs applies for an account monitoring order, an application to discharge or vary the order need not be by the same accredited financial investigator, constable or officer<sup>29</sup>.

As from a day to be appointed<sup>30</sup> similar provisions apply where the Secretary of State receives a request from an authority in a participating country<sup>31</sup> for account information<sup>32</sup> to be obtained in relation to an investigation in a participating country into criminal conduct<sup>33</sup> and where a judicial authority<sup>34</sup> or prosecuting authority<sup>35</sup> in the United Kingdom makes a request to a participating country for assistance in the provision of banking information in connection with a criminal investigation in the United Kingdom<sup>36</sup>.

Provision may also be made by Order in Council to enable equivalent orders to be made for the purposes of an external investigation<sup>37</sup>.

1 For the meaning of 'financial institution' see PARA 814 notes 1, 4 ante.

2 Account information is information relating to an account or accounts held at the financial institution specified in the application by the person so specified (whether solely or jointly with another): Proceeds of Crime Act 2002 s 370(4); Crime (International Co-operation) Act 2003 s 35(5) (not yet in force).

3 For the meaning of 'appropriate officer' see PARA 804 note 2 ante.

4 Proceeds of Crime Act 2002 s 370(6). An account monitoring order has effect in spite of any restriction on the disclosure of information (however imposed): Proceeds of Crime Act 2002 s 374; Crime (International Co-operation) Act 2003 s 35(6) (not yet in force). Account monitoring orders have effect as if they were orders of the court: Proceeds of Crime Act 2002 s 375(6); Crime (International Co-operation) Act 2003 s 36(5) (not yet in force).

As from a day to be appointed, where an account monitoring order is requested for use abroad under the Crime (International Co-operation) Act 2003 s 35 (see the text and notes 30-36 infra), it is defined as an order made by a judge entitled to exercise the jurisdiction of the Crown Court that a financial institution specified in the application for the order must, for the period stated in the order, provide account information of the description specified in the order to the applicant in the manner, and at or by the time or times, stated in the order: ss 35(4), 46(2), (5). At the date at which this volume states the law no such day had been appointed. For the meaning of 'financial institution' for these purposes see PARA 814 note 4 ante.

As to the enforcement in Scotland or Northern Ireland of an English or Welsh account monitoring order, and the enforcement in England and Wales of a Scottish or Northern Irish account monitoring order, see the Proceeds of Crime Act 2002 s 443(1)(d), (3), (4); and the Proceeds of Crime Act 2002 (Investigations in different parts of the United Kingdom) Order 2003, SI 2003/425. For account monitoring orders in respect of terrorist investigations see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 494 et seq.

As from a day to be appointed it is provided that where a financial institution is specified in an account monitoring order made in any part of the United Kingdom (Crime (International Co-operation) Act 2003 s 42(1)(a)), and the institution, or an employee of the institution, discloses the information that the request to obtain account information has been received (s 42(3)(a)), the information that the investigation to which the request relates is being carried out (s 42(3)(b)), or the information that, in pursuance of the request, information has been given to the authority which made the request (s 42(3)(c)), the institution or (as the case may be) the employee is guilty of an offence (s 42(2)). An institution guilty of this offence is liable on conviction on indictment to a fine (s 42(4)(b)), and on summary conviction to a fine not exceeding the statutory maximum (s 42(4)(a)); and any other person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both (s 42(5)(b)), and on summary conviction to

imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both (s 42(5)(a)). At the date at which this volume states the law no such day had been appointed. As from a day to be appointed the maximum term of imprisonment specified under s 42(5)(a) is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 Proceeds of Crime Act 2002 s 370(7).

6 See PARA 805 note 1 ante. Rules of court may make provision as to the practice and procedure to be followed in connection with proceedings relating to account monitoring orders: *ibid* s 375(1). An application for an account monitoring order may be made ex parte to a judge in chambers: s 373. See also *Practice Direction-- Civil Recovery Proceedings* paras 8.1-12.4, 17.1-17.3.

7 Proceeds of Crime Act 2002 s 370(1). As to applications for an account monitoring order see CrimPR 62.3; and PARA 805 note 3 ante.

8 For the meaning of 'confiscation investigation' see PARA 804 note 3 ante.

9 Proceeds of Crime Act 2002 s 370(2)(a). For the meaning of 'money laundering investigation' see PARA 804 note 5 ante.

10 For the meaning of 'property' see PARA 804 note 4 ante.

11 For the meaning of 'civil recovery investigation' see PARA 804 note 4 ante.

12 Proceeds of Crime Act 2002 s 370(2)(b).

13 *Ibid* s 370(3).

14 *Ibid* s 370(5)(a).

15 *Ibid* s 370(5)(b).

16 *Ibid* s 370(5)(c).

17 *Ibid* s 371(1).

18 *Ibid* s 371(2). For the meaning of 'criminal conduct' see PARA 806 note 6 ante.

19 *Ibid* s 371(3)(a). For the meaning of 'recoverable property' see PARA 2149 post. For the meaning of 'associated property' see PARA 2150 note 6 post.

20 *Ibid* s 371(3)(b).

21 *Ibid* s 371(4).

22 *Ibid* s 371(5).

23 *Ibid* s 371(6).

24 *Ibid* s 372(1). Section 372(1) does not apply: (1) in the case of proceedings under Pt 2 (ss 6-91) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391 et seq); (2) in the case of proceedings for contempt of court (see CONTEMPT OF COURT); or (3) on a prosecution for an offence where, in giving evidence, the financial institution makes a statement inconsistent with the statement mentioned in s 372(1): s 372(2).

A statement may not be used by virtue of head (3) *supra* against a financial institution unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of the financial institution in the proceedings arising out of the prosecution: s 372(3).

25 *Ibid* s 375(2). Where a person other than the person who applies for the order proposes to make an application under s 375(2), he must give a copy of the proposed application, not later than 48 hours before the application is to be made: (1) to a police officer at the police station specified in the account monitoring order; or (2) where the application for the account monitoring order was not made by a constable, to the office of the appropriate officer who made the application, as specified in the account monitoring order, in either case together with a notice indicating the time and place at which the application for discharge or variation is to be made: CrimPR 62.1(2). The Proceeds of Crime Act 2002 s 375 does not apply to orders made in England and Wales for the purpose of a civil recovery investigation: s 375(7).

26 Ibid s 375(3)(a).

27 Ibid s 375(3)(b).

28 See POLICE vol 36(1) (2007 Reissue) PARA 430 et seq.

29 Proceeds of Crime Act 2002 s 375(4); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). References to a person who applied for an account monitoring order must be construed accordingly: s 375(5). As to officers of Revenue and Customs see PARA 354 note 2 ante.

30 The Crime (International Co-operation) Act 2003 ss 35, 36, 43-45 (see the text and notes 32-36 infra) are to be brought into force as from a day to be appointed by order made under s 94. At the date at which this volume states the no such day had been appointed.

31 For the meaning of 'country' see PARA 916 note 2 post; and for the meaning of 'participating country' see PARA 917 note 14 post. The authority referred to in the text is the authority in the participating country making the request which appears to the Secretary of State to have the function of making requests of the kind to which the Crime (International Co-operation) Act 2003 s 35 applies: s 35(2). See note 31 supra.

32 See note 2 supra.

33 Ibid s 35(1). See notes 4, 31 supra. In these circumstances the Secretary of State may direct a senior police officer to apply, or arrange for a constable to apply, or direct a senior officer of Revenue and Customs to apply, or arrange for an officer of Revenue and Customs to apply, for an account monitoring order: s 35(3); Commissioners for Revenue and Customs Act 2005 s 50(2), (7)). The application may be made ex parte to a judge in chambers (Crime (International Co-operation) Act 2003 s 36(2)); and may specify information relating to all accounts held by the person specified in the application for the order at the financial institution so specified (s 36(3)(a)), a particular description, or particular descriptions, of accounts so held (s 36(3)(b)), or a particular account, or particular accounts, so held (s 36(3)(c)). A judge may make an account monitoring order, on an application made to him pursuant to a direction under s 35(3) if he is satisfied that there is an investigation in the country in question into criminal conduct (s 36(1)(a)) and the order is sought for the purposes of the investigation (s 36(1)(b)). Account information obtained in pursuance of an account monitoring order is to be given to the Secretary of State and sent by him to the authority which made the request (s 35(7)).

The court may discharge or vary an account monitoring order on an application made by the person who applied for the order (s 35(4)(a)), a senior police officer (s 35(4)(b)), a constable authorised by a senior police officer to make the application (s 35(4)(c)), a senior officer of Revenue and Customs (s 35(4)(d); Commissioners for Revenue and Customs Act 2005 s 50(2), (7)), or an officer of Revenue and Customs authorised by a senior officer of Revenue and Customs to make the application (Crime (International Co-operation) Act 2003 s 35(4)(e); Commissioners for Revenue and Customs Act 2005 s 50(2), (7)).

For the meanings of 'senior police officer', 'senior officer of Revenue and Customs', and 'officer of Revenue and Customs' see PARA 814 note 36 ante. As to officers of Her Majesty's Revenue and Customs see PARA 354 note 2 ante.

34 Ie, in relation to England and Wales, any judge or justice of the peace: Crime (International Co-operation) Act 2003 ss 43(2)(a), 44(2)(a). See note 31 supra.

35 Ie, in relation to England and Wales, a prosecuting authority designated by an order made by the Secretary of State: ibid ss 43(4)(a), 44(4)(a). See note 31 supra. At the date at which this volume states the law no such order had been made. As to the making of orders under Pt 1 (ss 1-51) see PARA 917 note 14 post.

36 The assistance that may be so requested is any assistance in obtaining from a participating country:

252 (1) information as to whether the person in question holds any accounts at any banks situated in the participating country (ibid s 43(5)(a)), details of any such accounts (s 43(5)(b)), and details of transactions carried out in any period specified in the request in respect of any such accounts (s 43(5)(c)); and

253 (2) details of transactions to be carried out in any period specified in the request in respect of any accounts at banks situated in the participating country (s 44(5)).

For these purposes, a person 'holds an account' if either the account is in his name or it is held for his benefit (s 43(7)(a)) or he has a power of attorney in respect of the account (s 43(7)(b)). See note 31 supra.

A prosecuting authority, or a judicial authority on the application of a prosecuting authority:

254 (a) may request the first category of assistance (see head (1) supra) if it appears to it that a person is subject to an investigation in the United Kingdom into serious criminal conduct (s 43(1)(a), (3)), that the person holds, or may hold, an account at a bank which is situated in a

participating country (s 43(1)(b)), and the information which the applicant seeks to obtain is likely to be of substantial value for the purposes of the investigation (s 43(1)(c)); and

- 255 (b) may request the second category of assistance (see head (2) supra) if it appears to it that the information which it (or, where the judicial authority makes the request, the applicant) seeks to obtain is relevant to an investigation in the United Kingdom into criminal conduct (s 44(1), (3)).

A request for the first category of assistance must state the grounds on which the authority making the request thinks that the person in question may hold any account at a bank which is situated in a participating country and (if possible) specify the bank or banks in question (s 43(6)(a)), state the grounds on which the authority making the request considers that the information sought to be obtained is likely to be of substantial value for the purposes of the investigation (s 43(6)(b)), and include any information which may facilitate compliance with the request (s 43(6)(c)).

A request for either category of assistance is to be sent to the Secretary of State for forwarding either to a Crown Court specified in the request and exercising jurisdiction in the place where the information is to be obtained (s 44(1)(a)) or to any authority recognised by the participating country in question as the appropriate authority for receiving requests for assistance of the kind to which these provisions apply (s 44(1)(b)), although in cases of urgency the request may be sent to a Crown Court specified in the request and exercising jurisdiction in the place where the information is to be obtained (s 44(1)(c)).

37 See PARA 805 note 12 ante.

## **UPDATE**

### **816 Account monitoring orders**

NOTES 2, 4--Crime (International Co-operation) Act 2003 s 35 now in force: SI 2006/2811.

NOTES 4, 30--Day now appointed: SI 2006/2811.

NOTE 4--2002 Act s 443 amended: Serious Crime Act 2007 Sch 8 para 137. SI 2003/425 amended: SI 2008/298.

TEXT AND NOTE 7--See further 2002 Act s 370(1A) (added by 2007 Act Sch 10 para 12).

NOTE 25--CrimPR Pt 62 now Criminal Procedure Rules 2010, SI 2010/60, Pt 6.

TEXT AND NOTE 29--2002 Act s 375(4) amended: 2007 Act Sch 8 para 112.

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## **G. EVIDENCE OVERSEAS**

### **817. Evidence overseas.**

The following provisions apply if the Director of the Assets Recovery Agency<sup>1</sup> is carrying out a confiscation investigation<sup>2</sup>.

A judge<sup>3</sup> on the application of the Director or a person subject to the investigation may issue a letter of request<sup>4</sup> if he thinks that there is evidence<sup>5</sup> in a country or territory outside the United Kingdom<sup>6</sup> that such a person has benefited from his criminal conduct<sup>7</sup>; or of the extent or whereabouts of that person's benefit from his criminal conduct<sup>8</sup>.

The Director may issue a letter of request if he thinks that there is evidence in a country or territory outside the United Kingdom that a person subject to the investigation has benefited from his criminal conduct<sup>9</sup>; or of the extent or whereabouts of that person's benefit from his criminal conduct<sup>10</sup>.

The person issuing a letter of request may send it to a court or tribunal which is specified in the letter and which exercises jurisdiction in the place where the evidence is to be obtained<sup>11</sup>; or to an authority recognised by the government of the country or territory concerned as the appropriate authority for receiving letters of request<sup>12</sup>.

Alternatively, the person issuing the letter of request may send it to the Secretary of State for forwarding to the court, tribunal or authority so mentioned<sup>13</sup>. In a case of urgency, the person issuing the letter of request may send it to the International Criminal Police Organisation<sup>14</sup>, or to any body or person competent to receive it under any provisions adopted under the Treaty on European Union<sup>15</sup>, for forwarding to the court, tribunal or authority so mentioned<sup>16</sup>.

Evidence obtained in pursuance of a letter of request must not be used by any person other than the Director or a person subject to the investigation<sup>17</sup>, or for any purpose other than that for which it is obtained<sup>18</sup>.

1 See POLICE vol 36(1) (2007 Reissue) PARA 430 et seq.

2 Proceeds of Crime Act 2002 s 376(1). For the meaning of 'confiscation investigation' see PARA 804 note 3 ante.

3 See PARA 805 note 1 ante.

4 A letter of request is a letter requesting assistance in obtaining outside the United Kingdom such evidence as is specified in the letter for use in the investigation: Proceeds of Crime Act 2002 s 376(4).

5 Evidence includes documents and other articles: *ibid* s 376(10). For the meaning of 'document' see PARA 812 note 3 ante.

6 *Ibid* s 376(2). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

7 *Ibid* s 376(2)(a). For the meaning of 'criminal conduct' see PARA 806 note 6 ante.

8 Ibid s 376(2)(b). Rules of court may make provision as to the practice and procedure to be followed in connection with proceedings relating to the issue of letters of request by a judge under s 376 (as amended): s 376(11). At the date at which this volume states the law no such rules had been made.

9 Ibid s 376(3)(a).

10 Ibid s 376(3)(b).

11 Ibid s 376(6)(a) (amended by the Crime (International Co-operation) Act 2003 s 91(1), Sch 5 paras 82, 83).

12 Proceeds of Crime Act 2002 s 376(6)(b).

13 Ibid s 376(7) (substituted by the Crime (International Co-operation) Act 2003 Sch 5 paras 82, 83).

14 Proceeds of Crime Act 2002 s 376(7A)(a) (s 376(7A) added by the Crime (International Co-operation) Act 2003 Sch 5 paras 82, 83).

15 Proceeds of Crime Act 2002 s 376(7A)(b) (as added: see note 14 supra).

16 Ibid s 376(7A).

17 Ibid s 376(8)(a).

18 Ibid s 376(8)(b). Section 376(8) does not apply if the authority mentioned in s 376(8)(b) consents to the use: s 376(9).

## **UPDATE**

### **817 Evidence overseas**

TEXT AND NOTES--2002 Act s 376 repealed: Serious Crime Act 2007 Sch 8 para 113, Sch 14.

TEXT AND NOTE 1--The Assets Recovery Agency is now part of the Serious Organised Crime Agency: see the Serious Crime Act 2007 Sch 8.

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## **H. CODE OF PRACTICE**

### **818. Code of practice.**

The Secretary of State has prepared a code of practice<sup>1</sup> as to the exercise of functions under the provisions relating to production orders<sup>2</sup>, search and seizure warrants<sup>3</sup>, disclosure orders<sup>4</sup>, customer information orders<sup>5</sup> and account monitoring orders<sup>6</sup>. The code of practice applies to:

- 972 (1) the Director of the Assets Recovery Agency<sup>7</sup>;
- 973 (2) members of staff of the Agency<sup>8</sup>;
- 974 (3) accredited financial investigators<sup>9</sup>;
- 975 (4) constables<sup>10</sup>;
- 976 (5) officers of Revenue and Customs<sup>11</sup>.

Such a person must comply with the code in the exercise of any function which he has under these provisions<sup>12</sup>. If such a person fails so to comply he is not by reason only of that failure liable in any criminal or civil proceedings<sup>13</sup>. However, the code is admissible in evidence in such proceedings and a court may take account of any failure to comply with its provisions in determining any question in the proceedings<sup>14</sup>.

1 The Secretary of State was required to prepare such a code by the Proceeds of Crime Act 2002 s 377(1). The code of practice under s 377 was brought into force by the Proceeds of Crime Act 2002 (Investigations in England, Wales and Northern Ireland: Code of Practice) Order 2003, SI 2003/334. As to the preparation and bringing into operation of the code see the Proceeds of Crime Act 2002 s 377(2)-(4). The Secretary of State may amend the code: see s 377(8). The provisions of s 377(2)-(7) apply to a revised code as they apply to the code first prepared: see s 377(8). The Police and Criminal Evidence Act 1984 s 67(9) (see PARA 856 note 27 post) does not apply to an appropriate officer in the exercise of functions under the Proceeds of Crime Act 2002 Pt 8 Ch 2 (ss 343-379): s 377(9).

2 See PARA 805 et seq ante.

3 See PARAS 810-811 ante.

4 See PARA 812 ante.

5 See PARAS 814-815 ante.

6 See PARA 816 ante.

7 Proceeds of Crime Act 2002 s 377(1)(a).

8 Ibid s 377(1)(b).

9 Ibid s 377(1)(c).

10 Ibid s 377(1)(d). For the meaning of 'constable' see PARA 809 note 3 ante.

11 Ibid s 377(1)(e); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). As to officers of Revenue and Customs see PARA 354 note 5 ante.



12 Proceeds of Crime Act 2002 s 377(5).

13 Ibid s 377(6).

14 Ibid s 377(7).

## **UPDATE**

### **818 Code of practice [of Secretary of State etc]**

TEXT AND NOTES--See also 2002 Act s 377A (added by Serious Crime Act 2007 Sch 8 para 115) (Code of Practice of Attorney General). In exercise of the powers conferred by the 2002 Act s 377A, the Attorney General has made the Proceeds of Crime Act 2002 (Investigative Powers of Prosecutors in England, Wales and Northern Ireland: Code of Practice) Order 2008, SI 2008/1978.

NOTE 1--See the Proceeds of Crime Act 2002 (Investigation in England, Wales and Northern Ireland: Code of Practice) Order 2008, SI 2008/946, which gives effect to a revised code of practice effective from 1 April 2008.

2002 Act s 377(9) amended: 2007 Act Sch 8 para 114(4).

TEXT AND NOTES 7, 8--2002 Act s 377(1)(a), (b) amended: 2007 Act Sch 8 para 114(3).

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MISCELLANEOUS OFFENCES/ (2) CONTAMINATION OF OR INTERFERENCE WITH GOODS/819.  
Contamination of or interference with goods with intention of causing public alarm or anxiety etc.

## **(2) CONTAMINATION OF OR INTERFERENCE WITH GOODS**

### **819. Contamination of or interference with goods with intention of causing public alarm or anxiety etc.**

A person who: (1) contaminates or interferes with goods<sup>1</sup>; or (2) makes it appear that goods have been contaminated or interfered with; or (3) places goods which have been contaminated or interfered with, or which appear to have been contaminated or interfered with, in a place where goods of that description are consumed, used, sold or otherwise supplied with the intention:

- 977 (a) of causing public alarm or anxiety;
- 978 (b) of causing injury to members of the public consuming or using the goods;
- 979 (c) of causing economic loss to any person by reason of the goods being shunned by members of the public; or
- 980 (d) of causing economic loss to any person by reason of steps taken to avoid any such alarm or anxiety, injury or loss,

is guilty of an offence<sup>2</sup> and liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup> or to a fine not exceeding the statutory maximum or to both<sup>4</sup>.

A person who, with any such intention as is mentioned in head (a), (c) or (d) above, threatens that he or another will do, or claims that he or another has done<sup>5</sup>, any of the acts mentioned in heads (1) to (3) above is also guilty of an offence<sup>6</sup> and liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum or to both<sup>8</sup>.

1 For these purposes, 'goods' includes substances whether natural or manufactured and whether or not incorporated in or mixed with other goods: Public Order Act 1986 s 38(5).

2 Ibid s 38(1).

3 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

4 Public Order Act 1986 s 38(4). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5 The reference in ibid s 38(2) to a person claiming that certain acts have been committed does not include a person who in good faith reports or warns that such acts have been, or appear to have been, committed: s 38(6).

6 Ibid s 38(2).

7 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 Public Order Act 1986 s 38(4).

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MISCELLANEOUS OFFENCES/ (2) CONTAMINATION OF OR INTERFERENCE WITH GOODS/820. Possession of articles with a view to committing an offence in relation to contamination of or interference with goods etc.

**820. Possession of articles with a view to committing an offence in relation to contamination of or interference with goods etc.**

A person who is in possession<sup>1</sup> of any of the following articles:

- 981 (1) materials to be used for contaminating or interfering with goods<sup>2</sup> or making it appear that goods have been contaminated or interfered with; or
- 982 (2) goods which have been contaminated or interfered with, or which appear to have been contaminated or interfered with,

with a view to the commission of an offence of contamination of or interference with goods with the intention of causing public alarm or anxiety etc<sup>3</sup>, is guilty of an offence<sup>4</sup> and liable on conviction on indictment to imprisonment for a term not exceeding ten years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum or to both<sup>6</sup>.

<sup>1</sup> As to the meaning of 'possession' in relation to statutory offences see *Warner v Metropolitan Police Comr* [1969] 2 AC 256, 52 Cr App Rep 373, HL.

<sup>2</sup> For the meaning of 'goods' see PARA 819 note 1 ante.

<sup>3</sup> Ie an offence under the Public Order Act 1986 s 38(1): see PARA 819 ante.

<sup>4</sup> Ibid s 38(3).

<sup>5</sup> As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

<sup>6</sup> Public Order Act 1986 s 38(4). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

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### **(3) PROTECTION OF ACTIVITIES OF CERTAIN ORGANISATIONS**

#### **821. Interference with contractual relationships so as to harm animal research organisations.**

A person ('A') commits an offence if, with the intention of harming<sup>1</sup> an animal research organisation<sup>2</sup>, he does a relevant act, or threatens that he or somebody else will do a relevant act, in circumstances in which that act or threat is intended or likely to cause a second person ('B') to take any of the following steps<sup>3</sup>. Those steps are:

- 983 (1) not to perform any contractual obligation owed by B to a third person ('C'), whether or not such non-performance amounts to a breach of contract<sup>4</sup>;
- 984 (2) to terminate any contract B has with C<sup>5</sup>; and
- 985 (3) not to enter into a contract with C<sup>6</sup>.

For these purposes, a 'relevant act' is: (a) an act amounting to a criminal offence<sup>7</sup>; or (b) a tortious act causing B to suffer loss or damage of any description<sup>8</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>9</sup> or to a fine not exceeding the statutory maximum<sup>10</sup> or to both<sup>11</sup>.

1 For these purposes, to 'harm' an animal research organisation means: (1) to cause the organisation to suffer loss or damage of any description; or (2) to prevent or hinder the carrying out by the organisation of any of its activities: Serious Organised Crime and Police Act 2005 s 145(5).

2 For the purposes of ibid ss 145, 146 (see PARA 822 post), 'animal research organisation' means any person or organisation falling within s 148(2) or (3): s 148(1). A person or organisation falls within s 148(2) if he or it is the owner, lessee or licensee of premises constituting or including:

- 256 (1) a place specified in a licence granted under the Animals (Scientific Procedures) Act 1986 s 4 or s 5 (see ANIMALS vol 2 (2008) PARAS 878-879) (Serious Organised Crime and Police Act 2005 s 148(2)(a));
- 257 (2) a scientific procedure establishment designated under the Animals (Scientific Procedures) Act 1986 s 6 (see ANIMALS vol 2 (2008) PARA 880) (Serious Organised Crime and Police Act 2005(s 148(2)(b)); or
- 258 (3) a breeding or supplying establishment designated under the Animals (Scientific Procedures) Act 1986 s 7 (see ANIMALS vol 2 (2008) PARA 881) (Serious Organised Crime and Police Act 2005 s 148(2)(c)).

A person or organisation falls within s 148(3) if he or it employs, or engages under a contract for services, any of the following in his capacity as such:

- 259 (a) the holder of a personal licence granted under the Animals (Scientific Procedures) Act 1986 s 4 (Serious Organised Crime and Police Act 2005 s 148(3)(a));
- 260 (b) the holder of a project licence granted under the Animals (Scientific Procedures) Act 1986 s 5 (Serious Organised Crime and Police Act 2005 s 148(3)(b));

- 261 (c) a person specified under the Animals (Scientific Procedures) Act 1986 s 6(5) (Serious Organised Crime and Police Act 2005 s 148(3)(c)); or
- 262 (d) a person specified under the Animals (Scientific Procedures) Act 1986 s 7(5) (Serious Organised Crime and Police Act 2005 s 148(3)(d)).

For these purposes, 'organisation' includes any institution, trust, undertaking or association of persons; 'premises' includes any place within the meaning of the Animals (Scientific Procedures) Act 1986 (see ANIMALS), and 'regulated procedures' has the meaning given by s 2 (see ANIMALS vol 2 (2008) PARA 876): Serious Organised Crime and Police Act 2005 s 148(5).

The Secretary of State may by order amend s 148 so as to include a reference to any description of persons whom he considers to be involved in, or to have a direct connection with persons who are involved in, the application of regulated procedures: s 148(4). Any power of the Secretary of State to make an order or regulations under the Serious Organised Crime and Police Act 2005, is exercisable by statutory instrument: s 172(1).

Any such power may be exercised so as to make different provision for different cases or descriptions of case or different purposes or areas, and includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision as the Secretary of State considers appropriate: s 172(2). Orders or regulations made by the Secretary of State under the Serious Organised Crime and Police Act 2005 are subject to annulment in pursuance of a resolution of either House of Parliament: s 172(3). However, s 172(3) does not apply to any order under s 1(3), s 161(4) or s 178: see s 172(4). Nor does s 172(3) apply to an order under:

- 263 (i) s 33(2)(f) (see POLICE vol 36(1) (2007 Reissue) PARA 462) (s 172(5)(a));
- 264 (ii) s 52 (see POLICE vol 36(1) (2007 Reissue) PARA 476) (s 172(5)(b));
- 265 (iii) s 61(4) (see PARA 1086 post) (s 172(5)(c));
- 266 (iv) s 76(4) (see PARA 1809 post) (s 172(5)(d));
- 267 (v) s 82(6) (see PARA 2101 post) (s 172(5)(e));
- 268 (vi) s 87(5) (see PARA 2104 post) (s 172(5)(f));
- 269 (vii) s 89(5) (see PARA 2105 post) (s 172(5)(g));
- 270 (viii) s 96(1) (see PARA 2151 post) (s 172(5)(h));
- 271 (ix) s 97(1) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391) (s 172(5)(i));
- 272 (x) s 146(6), s 148(4) or s 149 (see PARA 823 post) (s 172(5)(j));
- 273 (xi) s 173 (which amends or repeals any provision of an Act) (s 172(5)(k)),

and no order under heads (i)-(xi) supra may be made by the Secretary of State (whether alone or with other provisions) unless a draft of the statutory instrument containing the order has been laid before, and approved by a resolution of, each House of Parliament: s 172(5).

3 Ibid s 145(1). No proceedings may be instituted except by or with the consent of the Director of Public Prosecutions: s 147(2). As to the effect of this limitation see PARA 1071 post. Section 145 does not apply to any act done wholly or mainly in contemplation or furtherance of a trade dispute: s 145(6). For these purposes, 'trade dispute' has the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992 s 218 (see EMPLOYMENT vol 41 (2009) PARA 1181) except that s 218 is to be read as if it made provision corresponding to s 244(4) (see EMPLOYMENT vol 41 (2009) PARA 1326); and in s 218(5), the definition of 'worker' included any person falling within the definition of 'worker' in s 244(5)(b) (see EMPLOYMENT vol 41 (2009) PARA 1324): Serious Organised Crime and Police Act 2005 s 145(7).

4 Ibid s 145(2)(a). For the purpose of s 145, 'contract' includes any other arrangement; and 'contractual' is to be read accordingly: s 145(4).

5 Ibid s 145(2)(b).

6 Ibid s 145(2)(c).

7 Ibid s 145(3)(a).

8 Ibid s 145(3)(b). However, s 145(3)(b) does not include an act which is actionable on the ground only that it induces another person to break a contract with B: s 145(3).

9 In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 154(1) (not yet in force) the reference to a maximum term of imprisonment on summary conviction of six months is to be read as a reference to a maximum term of 12 months: see the Serious Organised Crime and Police Act 2005 ss 147(1), 175(1), (2).

10 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

11 Serious Organised Crime and Police Act 2005 ss 147(1), 175(1), (2).

## **UPDATE**

### **821 Interference with contractual relationships so as to harm animal research organisations**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTES 9, 11--See *R v Harris* [2006] EWCA Crim 3303, [2007] 2 Cr App Rep (S) 238.

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## **822. Intimidation of persons connected with animal research organisation.**

A person ('A') commits an offence if, with the intention of causing a second person ('B') to abstain from doing something which B is entitled to do, or to do something which B is entitled to abstain from doing:

- 986 (1) A threatens B that A or somebody else will do a relevant act<sup>1</sup>; and  
 987 (2) A does so wholly or mainly because B is a person falling within the following list<sup>2</sup>:
- 33
- 45. (a) an employee or officer<sup>3</sup> of an animal research organisation<sup>4</sup>;
  - 46. (b) a student at an educational establishment that is an animal research organisation<sup>5</sup>;
  - 47. (c) a lessor or licensor of any premises occupied by an animal research organisation<sup>6</sup>;
  - 48. (d) a person with a financial interest in, or who provides financial assistance to, an animal research organisation<sup>7</sup>;
  - 49. (e) a customer or supplier of an animal research organisation<sup>8</sup>;
  - 50. (f) a person who is contemplating becoming someone within head (c), (d) or (e) above<sup>9</sup>;
  - 51. (g) a person who is, or is contemplating becoming, a customer or supplier of someone within head (c), (d), (e) or (f) above<sup>10</sup>;
  - 52. (h) an employee or officer of someone within head (c), (d), (e), (f) or (g) above<sup>11</sup>;
  - 53. (i) a person with a financial interest in, or who provides financial assistance to, someone within head (c), (d), (e), (f) or (g) above<sup>12</sup>;
  - 54. (j) a spouse, civil partner, friend or relative of, or a person who is known personally to, someone within any of heads (a) to (i) above<sup>13</sup>;
  - 55. (k) a person who is, or is contemplating becoming, a customer or supplier<sup>14</sup> of someone within head (a), (b), (h), (i) or (j) above<sup>15</sup>; or
  - 56. (l) an employer of someone within head (j) above<sup>16</sup>.

34

For these purposes, a 'relevant act' is: (i) an act amounting to a criminal offence<sup>17</sup>; or (ii) a tortious act causing B or another person to suffer loss or damage of any description<sup>18</sup>.

A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>19</sup> or to a fine not exceeding the statutory maximum<sup>20</sup> or to both<sup>21</sup>.

1 Serious Organised Crime and Police Act 2005 s 146(1)(a).

2 Ibid s 146(1)(b). The Secretary of State may by order amend s 146 so as to include within s 146(2) (see heads (a)-(l) in the text) any description of persons framed by reference to their connection with an animal



research organisation, or any description of persons for the time being mentioned in s 146(2): s 146(6). For the meaning of 'animal research organisation' see PARA 821 note 2 ante.

No proceedings for an offence under s 146 may be instituted except by or with the consent of the Director of Public Prosecutions: s 147(2). As to the effect of this limitation see PARA 1071 post. Section 146 does not apply to any act done wholly or mainly in contemplation or furtherance of a trade dispute: s 146(7). For the meaning of 'trade dispute' see s 145(7); and PARA 821 note 3 ante (definition applied by s 146(8)).

3 For these purposes, an 'officer' of an animal research organisation or a person includes:

274 (1) where the organisation or person is a body corporate, a director, manager or secretary (s 146(3)(a));

275 (2) where the organisation or person is a charity, a charity trustee (within the meaning of the Charities Act 1993: see CHARITIES vol 8 (2010) PARA 1) (Serious Organised Crime and Police Act 2005 s 146(3)(b)); and

276 (3) where the organisation or person is a partnership, a partner (s 146(3)(c)).

4 Ibid s 146(2)(a). See PARA 821 note 2 ante.

5 Ibid s 146(2)(b).

6 Ibid s 146(2)(c).

7 Ibid s 146(2)(d).

8 Ibid s 146(2)(e).

9 Ibid s 146(2)(f).

10 Ibid s 146(2)(g).

11 Ibid s 146(2)(h).

12 Ibid s 146(2)(i).

13 Ibid s 146(2)(j).

14 For these purposes: (1) a person is a customer or supplier of another person if he purchases goods, services or facilities from, or (as the case may be) supplies goods, services or facilities to, that other; and (2) 'supplier' includes a person who supplies services in pursuance of any enactment that requires or authorises such services to be provided: *ibid* s 146(4).

15 Ibid s 146(2)(k).

16 Ibid s 146(2)(l).

17 Ibid s 146(5)(a).

18 Ibid s 146(5)(b).

19 In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 154(1) (not yet in force) the reference to a maximum term of imprisonment on summary conviction of six months is to be read as a reference to a maximum term of 12 months: see the Serious Organised Crime and Police Act 2005 ss 147(1), 175(1), (2).

20 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

21 Serious Organised Crime and Police Act 2005 ss 147(1), 175(1), (2).

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### **823. Extension.**

The Secretary of State may by order provide for the provisions relating to the offences in relation to animal research organisations<sup>1</sup> to apply to persons or organisations<sup>2</sup> of a description specified in the order as they apply in relation to animal research organisations<sup>3</sup>. The Secretary of State may, however, only make such an order if satisfied that a series of acts has taken place and:

- 988 (1) that those acts were directed at persons or organisations of the description specified in the order or at persons having a connection with them<sup>4</sup>; and
- 989 (2) that, if those persons or organisations had been animal research organisations, those acts would have constituted offences under the provisions relating to offences in relation to animal research organisations<sup>5</sup>.

1 Ie the Serious Organised Crime and Police Act 2005 ss 145, 146, 147 (see PARAS 821-822 ante).

2 For the meaning of 'organisation' see *ibid* s 148; and PARA 821 note 2 ante (definition applied by s 149(3)).

3 *Ibid* s 149(1). For the meaning of 'animal research organisation' see s 148; and PARA 821 note 2 ante (definition applied by s 149(3)).

4 *Ibid* s 149(2)(a).

5 *Ibid* s 149(2)(b). Provisions relating to offences in relation to animal research organisations are those under s 145 (see PARA 821 ante) or s 146 (see PARA 822 ante).

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## **(4) SLAVERY**

### **824. Slave-dealing.**

Any person who:

- 990 (1) deals or trades in slaves<sup>1</sup> or persons intended to be dealt with as slaves; or carries away, imports into any place whatsoever or ships slaves or persons to be dealt with as slaves; or equips, lets or hires any ship for any operation in connection with the slave trade; or contracts to do any of these things;
- 991 (2) knowingly and wilfully makes any loan, secures any loan, guarantees any agent or ships any goods, to be used or employed for any operation in connection with the slave trade; knowingly and wilfully insures any slaves or anything to be used for any operation in connection with the slave trade; or knowingly and wilfully contracts to do any of these things;
- 992 (3) acts or contracts to act as master, mate, surgeon or supercargo<sup>2</sup> of a ship knowing it is used or intended to be used in any operation in connection with the slave trade;
- 993 (4) procures, counsels, aids or abets a person who commits any of the offences in heads (1) to (3) above,

is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding 14 years<sup>3</sup>.

<sup>1</sup> All operations in connection with the slave trade are declared to be illegal: see the Slave Trade Act 1824 s 2 (amended by the Statute Law Revision (No 2) Act 1988; and the Statute Law Revision Act 1980). As to slavery and trade in slaves see also CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 125; EXTRADITION vol 17(2) (Reissue) PARA 1159. As to the offence of trafficking in people for exploitation see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 199.

<sup>2</sup> A 'supercargo' is an officer in a merchant ship who manages the sale etc of cargo.

Seamen and persons other than those set out in the Slave Trade Act 1824 s 10 (as amended) who serve or contract to serve on a ship, knowing it is employed or intended to be employed in connection with the slave trade, are guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years: see s 11 (amended by the Statute Law Revision (No 2) Act 1888; the Statute Law Revision Act 1890; the Criminal Law Act 1967 s 1; and the Statute Law (Repeals) Act 1998 s 1(2), Sch 2).

<sup>3</sup> See the Slave Trade Act 1824 s 10 (amended by the Penal Servitude Act 1857 s 2; the Penal Servitude Act 1891 s 1; the Forgery Act 1913 s 20, Schedule; the Criminal Justice Act 1948 s 1(1); the Criminal Law Act 1967 s 12(5)(a); and the Statute Law (Repeals) Act 1998 Sch 2). As to acts committed abroad see PARA 825 post.

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### **825. Liability for acts committed abroad.**

All the provisions of the Slave Trade Act 1824<sup>1</sup> are deemed to extend and to apply to British nationals<sup>2</sup> wheresoever residing or being and whether within the dominions of Her Majesty or of any foreign country; and all the several matters and things prohibited by that Act, when committed by British nationals, whether within Her Majesty's dominions or in any foreign country, are deemed and taken to be offences committed against that Act and are to be dealt with and punished accordingly<sup>3</sup>.

<sup>1</sup> See PARA 824 ante.

<sup>2</sup> The Slave Trade Act 1843 refers to 'British subjects', but this is now a very narrow class of person: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 66 et seq. As to British nationality generally see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 5 et seq.

<sup>3</sup> Ibid s 1 (amended by the Statute Law Revision Act 1891; the Statute Law Revision (No 2) Act 1893; and the Statute Law (Repeals) Act 1998).

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## (5) OFFENCES AGAINST RELIGION

### 826. Blasphemy and blasphemous libel.

Blasphemy is an indictable offence at common law consisting in a publication of contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, the Bible or the formularies of the Church of England<sup>1</sup>. The publisher must intend to publish, but he need not intend that the words amount to blasphemy<sup>2</sup>. It is immaterial whether the words are spoken or written<sup>3</sup>; but, if written, they constitute blasphemous libel<sup>4</sup>. The offence is punishable by fine and imprisonment at the discretion of the court<sup>5</sup>.

1 *Whitehouse v Gay News Ltd, R v Lemon* [1979] AC 617 at 665, 68 Cr App Rep 381 at 410, HL, per Lord Scarman. It is not blasphemy to attack any religion except Christianity: *Whitehouse v Gay News Ltd, R v Lemon* supra; *R v Gathercole* (1838) 2 Lew CC 237; *R v Chief Metropolitan Magistrate, ex p Choudhury* [1991] 1 QB 429, [1991] 1 All ER 306, DC (attack on Islamic religion not covered by common law offence of blasphemy). The present formulation is to be compared with what appeared to be the formulation prior to *Whitehouse v Gay News Ltd, R v Lemon* supra, namely the publication of words attacking the Christian religion or the Bible so violent, scurrilous or ribald as to pass the limits of decent controversy and tend to lead to a breach of the peace: *R v Ramsay and Foote* (1883) 48 LT 733; *Bowman v Secular Society Ltd* [1917] AC 406, HL; *R v Waddington* (1822) 1 B & C 26; *R v Hetherington* (1841) 4 State Tr NS 563; *R v Boulter* (1908) 72 JP 188; *R v Gott* (1922) 16 Cr App Rep 87, CCA.

The prohibition of blasphemy is not inconsistent with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 10 (freedom of expression): *Wingrove v United Kingdom* (Application 17419/90) (1996) 24 EHRR 1, ECtHR. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

2 *Whitehouse v Gay News Ltd, R v Lemon* [1979] AC 617, 68 Cr App Rep 381, HL. See also the decision of the Court of Appeal sub nom *R v Gays News Ltd* at [1979] QB 10, 67 Cr App Rep 70, CA.

3 *R v Boulter* (1908) 72 JP 188; *R v Gott* (1922) 16 Cr App Rep 87, CCA.

4 If the defendant pleads not guilty to the publication of a (blasphemous) libel, he may rebut evidence of publication where done by the act of another person by his authority on proof of evidence that such publication was made without his authority, consent or knowledge, and that the publication did not arise from want of due care or caution on his part: Libel Act 1843 s 7; and see LIBEL AND SLANDER vol 28 (Reissue) PARA 300. A criminal prosecution against any proprietor, editor or any person responsible for the publication of a newspaper for any libel published in it may not be commenced without the order of a judge in chambers: see the Law of Libel Amendment Act 1888 s 8; and LIBEL AND SLANDER vol 28 (Reissue) PARA 303. However, s 8 does not apply to a prosecution for an offence under the Criminal Procedure and Investigations Act 1996 s 60 (offences in respect of reporting of assertions): see s 61(5); and LIBEL AND SLANDER vol 28 (Reissue) PARA 303. Nothing in the Law of Libel Amendment Act 1888 s 3 (newspaper reports of proceedings in court privileged) authorises the publication of any blasphemous matter: see s 3 proviso; and LIBEL AND SLANDER vol 28 (Reissue) PARA 299. Nothing in the Criminal Procedure and Investigations Act 1996 s 58 or s 59 (orders in respect of, and restrictions on reporting of, assertions) affects the Law of Libel Amendment Act 1888 s 3 (privilege of newspaper reports of court proceedings): see the Criminal Procedure and Investigations Act 1996 s 61(4); and LIBEL AND SLANDER vol 28 (Reissue) PARA 302.

As to the power to search for and seize a blasphemous libel, and as to the disposal of any blasphemous libel so seized, see the Criminal Libel Act 1819 ss 1, 2; and PARA 370 note 8 ante.

5 See *R v Taylor* (1676) 1 Vent 293; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 31, 139.

## **UPDATE**

### **826 Blasphemy and blasphemous libel**

TEXT AND NOTES--The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished and accordingly Criminal Libel Act 1819 s 1 and Law of Libel Amendment Act 1888 s 3 amended: Criminal Justice and Immigration Act 2008 s 79, Sch 28 Pt 5.

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## **827. Obstructing ministers of religion.**

Any person who: (1) by threats or force obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting house or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place; or (2) strikes or offers any violence to, or arrests upon any civil process or under the pretence of executing such process, any clergyman or other minister who is engaged in or to the knowledge of the offender is about to engage in any of these rites or duties, or who to his knowledge is going to or returning from their performance, is guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months<sup>1</sup> or to a fine not exceeding the prescribed sum<sup>2</sup> or to both<sup>3</sup>.

1 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

2 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

3 See the Offences against the Person Act 1861 s 36; the Criminal Justice Act 1948 s 1(2); the Criminal Law Act 1967 s 1; and the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 5(f). As to riotous or indecent behaviour in places of worship etc see ECCLESIASTICAL LAW vol 14 paras 1048, 1050; and as to disturbances at burial services see CREMATION AND BURIAL vol 10 (Reissue) PARAS 1086, 1175-1176.

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## **(6) BIGAMY**

### **828. Bigamy.**

Any person who, being married<sup>1</sup>, marries any other person during the life of the former husband or wife, whether the second marriage<sup>2</sup> takes place in England or Northern Ireland or elsewhere<sup>3</sup>, is guilty of an offence and liable on conviction on indictment to imprisonment for any term not exceeding seven years, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup> or to a fine not exceeding the prescribed sum<sup>5</sup> or to both<sup>6</sup>.

The above provisions do not, however, extend to: (1) any second marriage contracted elsewhere than in England and Northern Ireland by any other than a British national<sup>7</sup>; (2) any person marrying a second time whose husband or wife has been continually absent from such person for the space of seven years then last past and has not been known by such person to be living within that time<sup>8</sup>; (3) any person who, at the time of such second marriage, has been divorced from the bond of the first marriage<sup>9</sup>; or (4) any person whose former marriage has been declared void<sup>10</sup> by any court of competent jurisdiction<sup>11</sup>.

The partner to a bigamous marriage who knows at the time of such marriage that the other person is married, may, it seems, be convicted of counselling the offence<sup>12</sup>.

1 For the meaning of 'being married' see PARA 829 post; and as to evidence of being married see PARA 832 post. The place of the marriage is immaterial: 1 Hale PC 192.

2 'Second marriage' means the bigamous marriage charged in the indictment and may be a third or subsequent marriage: see *R v Taylor* [1950] 2 KB 368, 34 Cr App Rep 138, CCA. As to the second marriage see further PARA 830 post.

3 'Elsewhere' is not limited to the Queen's dominions, but includes any foreign country: *R v Earl Russell* [1901] AC 446, HL; but see also note 7 infra.

4 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Magistrates' Courts Act 1980 s 32(1), Sch 1 (s 32(1) prospectively amended by the Criminal Justice Act 2003 s 282(1)); and MAGISTRATES vol 29(2) (Reissue) PARAS 655-656), although this does not affect the penalty for any offence committed before that day (see the Criminal Justice Act 2003 s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

5 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

6 See the Offences against the Person Act 1861 s 57; the Criminal Justice Act 1925 s 49, Sch 3; the Criminal Law Act 1967 s 10(2), Sch 3 Pt III; the Criminal Justice Act 1948 s 1(1); and the Magistrates' Courts Act 1980 ss 17, 32(1), Sch 1 para 5(i). See PARA 1103 post.

7 See *R v Topping* (1856) 25 LJMC 72, CCR (British subject: both marriages in Scotland; guilty of bigamy). This case refers to 'British subjects', but this is now a very narrow class of person: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 66 et seq. As to British nationality generally see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 5 et seq.

8 See PARA 831 post.

9 See PARA 829 post.

10 See PARA 829 post.



11 Offences against the Person Act 1861 s 57 proviso. As to sentencing for bigamy see *R v Carter* (1967) 52 Cr App Rep 117, CA; *R v Smith (James)* (1993) 15 Cr App Rep (S) 407, CA; *R v Cairns* [1997] 1 Cr App Rep (S) 118, CA.

12 *R v Brawn* (1843) 1 Car & Kir 144. As to offences in connection with the solemnisation or registration of marriage see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 180 et seq; REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 535.

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## **829. Meaning of 'being married'.**

For a person to be within the meaning of the words 'being married' there must be a valid marriage subsisting at the date of the second marriage<sup>1</sup>; if the first marriage is void<sup>2</sup> or, at the date of the second marriage, has been declared void by a court of competent jurisdiction<sup>3</sup> or has been dissolved<sup>4</sup>, the second marriage is not bigamous. The second marriage is bigamous if the first marriage is voidable and has not been avoided at the date of the second marriage<sup>5</sup>, or if at that date a decree nisi of nullity or divorce has not been made absolute<sup>6</sup>. Although the first marriage must be monogamous, a potentially polygamous marriage may become monogamous in character, either by the operation of a relevant foreign law or by the acquisition of an English domicile; if a potentially polygamous marriage has become monogamous at the date of the second marriage, the parties to the first marriage are within the meaning of the words 'being married'<sup>7</sup>.

An honest belief, held on reasonable grounds, that the first marriage had been dissolved at the date of the second marriage, or that the first marriage was invalid, is a defence to an indictment for bigamy<sup>8</sup>.

1 For the meaning of 'second marriage' see PARA 828 note 2 ante. As to the defence of seven years' absence see PARA 831 post.

2 *R v Chadwick* (1847) 11 QB 173 at 205, 235; *R v Willshire* (1881) 6 QBD 366, CCR; *R v Millis* (1844) 10 CI & Fin 534, HL. See also *R v Lamb* (1934) 150 LT 519, CCA (giving notice to the superintendent registrar in a false name is not of itself sufficient to render invalid a marriage contracted in pursuance of it). As to the grounds which render marriages void and voidable see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 344 et seq. As to the validity of foreign marriages see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 208 et seq. A marriage entered into at any time outside England and Wales by a person domiciled in England and Wales which is not actually polygamous is not void on the ground that it is entered into under a law permitting polygamy: see Private International (Miscellaneous Provisions) Law Act 1995 s 5, 6(1); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 240. For exceptions see s 6(2), (3); and CONFLICT OF LAWS vol 8(3) (Reissue) PARA 240.

3 See PARA 828 text to note 11 ante. A decree of nullity before 1 August 1971 in respect of a voidable marriage put the parties retrospectively in the position of never having been married to each other; a decree after 31 July 1971 operates to annul the marriage only as respects any time after the decree has been made absolute: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 319. As to recognition of foreign decrees of nullity see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 242 et seq.

4 As to dissolution of marriage see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 317 et seq; and as to the recognition of foreign decrees of divorce see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 242 et seq.

5 3 Co Inst 88; *R v Jacobs* (1826) 1 Mood CC 140, CCR; *B v B* (1891) 27 LR Ir 587 at 608; *R v Algar* [1954] 1 QB 279 at 287, 37 Cr App Rep 200 at 208, CCA, per Lord Goddard CJ. See also note 3 supra.

6 See *Wiggins v Wiggins (otherwise Brooks) and Ingram* [1958] 2 All ER 555, [1958] 1 WLR 1013 (nullity); *Norman v Villars* (1877) 2 Ex D 359, CA; *Stanhope v Stanhope* (1886) 11 PD 103 at 109, CA (divorce).

7 *R v Sagoo* [1975] QB 885, [1975] 2 All ER 926, CA.

8 *R v Gould* [1968] 2 QB 65, 52 Cr App Rep 152, CA (dissolution); *R v King* [1964] 1 QB 285, 48 Cr App Rep 17, CCA (invalid). See also *R v Connatty* (1919) 83 JP 292; *R v Dolman* [1949] 1 All ER 813, 33 Cr App Rep 128.

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### **830. The second marriage.**

It is immaterial that the second marriage<sup>1</sup> would have been invalid apart from its bigamous nature; it is the appearing to contract a second marriage and the going through a form of ceremony known to and recognised by the law as capable of producing a valid marriage which constitute the offence<sup>2</sup>.

1 For the meaning of 'second marriage' see PARA 828 note 2 ante.

2 *R v Allen* (1872) LR 1 CCR 367 at 376 (marriage within the prohibited degrees of consanguinity); and see also *R v Brawn* (1843) 1 Car & Kir 144 (consanguinity); *R v Rea* (1872) LR 1 CCR 365 (false name); *R v Robinson* [1938] 1 All ER 301, 26 Cr App Rep 129, CCA (consanguinity). Cf *Burt v Burt* (1860) 2 Sw & Tr 88 (marriage in Australia in form not recognised as legal by the local law).

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### **831. Absence for seven years.**

Where continuous absence for the seven years preceding the second marriage<sup>1</sup> has been shown<sup>2</sup>, the onus is on the prosecution to prove that the defendant knew the other party to the first marriage to be alive within that period<sup>3</sup>. It is not sufficient to prove that he had the means of such knowledge<sup>4</sup>.

Even if the period of seven years has not elapsed, an honest belief at the time of the second marriage that the husband or wife was dead, provided it was based on reasonable grounds, is a defence to an indictment for bigamy<sup>5</sup>.

1 For the meaning of 'second marriage' see PARA 828 note 2 ante.

2 See PARA 828 ante. The onus of showing seven years' absence is, it seems, on the defendant: *R v Jones* (1883) 11 QBD 118, CCR (second marriage 17 years after first; no evidence of separation or as to when, if separated, husband and wife last saw each other; held, presumption that cohabitation continued, and this not displaced). As to presumptions in criminal law see PARA 1374 et seq post. The defence is available even though the absence was due to the defendant's wilful desertion: *R v Faulkes* (1903) 19 TLR 250.

3 *R v Cullen* (1840) 9 C & P 681; *R v Heaton* (1863) 3 F & F 819; *R v Curgerwen* (1865) LR 1 CCR 1; *R v Lund* (1921) 16 Cr App Rep 31, CCA; *R v Peake* (1922) 17 Cr App Rep 22, CCA; and see also *R v Jones* (1842) Car & M 614.

4 *R v Briggs* (1856) Dears & B 98, CCR.

5 *R v Tolson* (1889) 23 QBD 168, CCR.

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### **832. Evidence of being married.**

The prosecution must prove the celebration of the first marriage and the identity of the parties; evidence of cohabitation with the reputation of being husband and wife is not sufficient<sup>1</sup>. If a certified copy of an entry in a marriage register book is produced<sup>2</sup>, the defendant's identity with the person named in it may be proved by any means and a witness to the register need not be called<sup>3</sup>. It is not, however, essential to prove registration; it is sufficient to call a person who was present at and can describe the ceremony and identify the parties<sup>4</sup>. If the first marriage is proved, its validity will be presumed in the absence of evidence to the contrary<sup>5</sup>; but in the case of a foreign marriage expert evidence of validity is necessary<sup>6</sup>.

The prosecution must also prove that the first husband or wife was alive at the date of the second marriage<sup>7</sup>; where there is evidence only that he or she was alive at some time before that marriage, the question whether he or she was alive at the relevant date is one for the jury, and the law makes no presumption as to the continuance of life<sup>8</sup>.

In proceedings for bigamy, the defendant's wife or husband may be called as a witness for the prosecution or defence and without the consent of the defendant<sup>9</sup>.

1 *Morris v Miller* (1767) 4 Burr 2057; *Catherwood v Caslon* (1844) 13 M & W 261 at 265. Cf *R v Wilson* (1862) 3 F & F 119 (evidence of prior cohabitation with reputation sufficient where defence alleges invalidity of first marriage). However, see also *R v Naguib* [1917] 1 KB 359, 12 Cr App Rep 187, CCA (prior foreign marriage; held expert evidence necessary).

2 A certified copy of an entry in a marriage register book purporting to be sealed or stamped with the seal of the General Register Office is receivable as evidence of the marriage to which it related without any further or other proof of such entry: see the Marriage Act 1949 s 65(3).

3 *R v Tolson* (1864) 4 F & F 103 per Willes J (photograph of defendant identified by persons present at wedding); *R v Birtles* (1911) 75 JP 288, CCA (proof from the register of marriage of persons with names of defendant and wife, and evidence of subsequent cohabitation and acknowledgment by defendant of the other party to the marriage as his wife).

4 *R v Allison (alias Wilkinson)* (1806) Russ & Ry 109, CCR; *R v Mainwaring* (1856) Dears & B 132, CCR.

5 *R v Cresswell* (1876) 1 QBD 446, CCR. The members of the jury should be directed that, if they have any doubt as to the validity of the first marriage, the defendant must be acquitted: *R v Morrison* [1938] 3 All ER 787, 27 Cr App Rep 1, CCA.

6 *R v Naguib* [1917] 1 KB 359 at 361, 12 Cr App Rep 187 at 190, CCA. The evidence must be given by a professional lawyer or by a person who is deemed by virtue of his office to be an expert in the law of the country in question: *R v Moscovitch* (1927) 138 LT 183, 20 Cr App Rep 121, CCA.

7 For the meaning of 'second marriage' see PARA 828 note 2 ante. Except where there has been seven years' absence (see PARA 831 ante), it is not necessary to prove affirmatively that the defendant knew the other party to the first marriage was alive: *R v Ellis* (1858) 1 F & F 309; *R v Jones* (1869) 11 Cox CC 358, CCR.

8 *R v Lumley* (1869) LR 1 CCR 196; *R v Willshire* (1881) 6 QBD 366, CCR. As to presumptions in criminal law see PARA 1374 et seq post.

9 See PARA 1405 post.

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MISCELLANEOUS OFFENCES/(7) THE VAGRANCY ACTS 1824-1935/833. Idle and disorderly persons.

## **(7) THE VAGRANCY ACTS 1824**

### **833. Idle and disorderly persons.**

Every person wandering abroad, or placing himself in any public<sup>1</sup> place, street, highway, court, or passage, to beg or gather alms<sup>2</sup>, is deemed to be an idle and disorderly person and is liable on summary conviction to a fine not exceeding level three on the standard scale<sup>3</sup> or, if the person is convicted before one justice, a fine of £1 may be imposed<sup>4</sup>.

Every person causing or procuring or encouraging any child or children to wander abroad, or place himself in any public place, street, highway, court, or passage, to beg or gather alms<sup>5</sup>, is deemed to be an idle and disorderly person and is liable on summary conviction to imprisonment for a term not exceeding one month<sup>6</sup> or to a fine not exceeding level three on the standard scale in lieu of imprisonment<sup>7</sup>, or, if convicted before one justice, to imprisonment for a term not exceeding 14 days or a fine of £1 in lieu of imprisonment<sup>8</sup>.

1 Any place of public resort or recreation ground belonging to, or under the control of, the local authority, and any unfenced ground adjoining or abutting upon any street in an urban district, is deemed to be an open and public space: Public Health Acts Amendment Act 1907 s 81.

2 This does not include a person who collects alms in an orderly manner for a specific purpose: *Pointon v Hill* (1884) 12 QBD 306 (workmen on strike seeking assistance, not begging); *Mathers v Penfold* [1915] 1 KB 514, DC. If the defendant offers something in return for the money given by passers-by, it could not be regarded as begging or gathering alms: *Gray v Chief Constable of Greater Manchester* [1983] Crim LR 45 (busking).

3 Vagrancy Act 1824 s 3 (amended by the Statute Law Revision (No 2) Act 1888; the National Assistance Act 1948 s 62, Sch 7 Pt I; the Criminal Justice Act 1948 s 1(2); the Criminal Justice Act 1982 s 77, Sch 14 para 1; and the Statute Law (Repeals) Act 1989 Sch 1; and prospectively amended by the Criminal Justice Act 1982 s 304, Sch 34 para 145); Magistrates' Courts Act 1980 s 34(3)(b), Sch 4 para 1 (amended by the Criminal Penalties etc (Increase) Order 1984, SI 1984/447; and the Criminal Justice Act 1991 s 17(3), Sch 4 Pt II); Criminal Justice Act 1982 s 70(1) (prospectively repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

4 Magistrates' Courts Act 1980 s 121(5) (amended by the Courts Act 2003 s 109(1), Sch 8 para 237(5)).

5 As to begging by children see the Children and Young Persons Act 1933 s 4 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 619. As to age and appearance of a child see *R v Viasani* (1867) 31 JP 260.

6 As from a day to be appointed this offence is no longer to be punishable with imprisonment: see the Criminal Justice Act 2003 s 280(1), Sch 25 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed.

7 Vagrancy Act 1824 s 3 (amended by the National Assistance Act 1948 s 62, Sch 7 Pt I; the Criminal Justice Act 1948 s 1(2); the Criminal Justice Act 1982 s 77, Sch 14 para 1; the Magistrates' Courts Act 1980 s 34(3)(b); and the Statute Law (Repeals) Act 1989 Sch 1). As from a day to be appointed the power to impose a sentence of imprisonment is abolished but the fine which may be imposed for this offence will remain a fine not exceeding level 3 on the standard scale: see the Vagrancy Act 1824 s 3 (prospectively amended by the Criminal Justice Act 2003 s 304, Sch 34 para 145); and the Criminal Justice Act 1982 s 70(1) (prospectively repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed.

8 Magistrates' Courts Act 1980 s 121(5) (amended by the Courts Act 2003 s 109(1), Sch 8 para 237(5)). Note that this power to imprison will cease to exist when the offence cease to be punishable with imprisonment: see note 7 *supra*.

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### **834. Rogues and vagabonds etc.**

The following provisions have effect until a day to be appointed<sup>1</sup>. The following persons are deemed to be rogues and vagabonds:

- 994 (1) every person committing an offence for which the offender is deemed to be an idle and disorderly person<sup>2</sup>, having been previously convicted as an idle and disorderly person;
- 995 (2) every person apprehended as an idle and disorderly person and violently resisting any constable or other peace officer so apprehending him, and being subsequently convicted of the offence for which he or was apprehended;
- 996 (3) every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;
- 997 (4) every person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms;
- 998 (5) every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon<sup>3</sup>, and not giving a good account of himself;
- 999 (6) every person found in or upon any dwelling house, warehouse, coach-house, stable, or outhouse, or in any enclosed yard, garden, or area for any unlawful purpose<sup>4</sup>.

A person committing any of these offences is liable on summary conviction to imprisonment for a term not exceeding three months, or, if convicted before one justice, for a term not exceeding 14 days, save that, where a person is convicted of wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, and not giving a good account of himself, or of wandering abroad, and endeavouring by the exposure of wounds and deformities to obtain and gather alms, the court may not sentence him to imprisonment but has power to fine him<sup>5</sup>. A fine not exceeding level three on the standard scale<sup>6</sup>, or, if the person is convicted before one justice, a fine of £1, may be imposed in lieu of imprisonment<sup>7</sup>.

As from a day to be appointed<sup>8</sup> every person falling within heads (1) to (6) above commits an offence<sup>9</sup>. It is lawful for any justice of the peace to impose on any person who commits such an offence, being convicted thereof before him by the confession of such person, or by the evidence on oath of one or more credible witnesses:

- 1000 (a) in the case of a person convicted of the offence mentioned in head (5) above, a fine not exceeding level one on the standard scale<sup>10</sup>; and
- 1001 (b) in the case of a person convicted of any of the other offences mentioned in heads (1) to (4) and head (6) above, a fine not exceeding level three on the standard scale<sup>11</sup>.

In either case if the person is convicted before one justice a fine of £1 may be imposed<sup>12</sup>.



1 At the date at which this volume states the law, no day had been appointed for the commencement of the prospective amendments made to the Vagrancy Act 1824 s 4 (see the text and notes 8-12 *infra*).

2 As to idle and disorderly persons see PARA 833 *ante*.

3 The reference to a person lodging under a tent or in a cart or waggon is not to be deemed to include a person lodging under a tent or in a cart or waggon with or in which he travels: Vagrancy Act 1935 s 1(4). A person wandering abroad and lodging as described is not to be deemed a rogue and vagabond within the meaning of the Vagrancy Act 1824 s 4 (as amended) unless it is proved:

- 277 (1) that in relation to the occasion on which he so lodged, he had been directed to a reasonably accessible place of shelter and failed to apply for, or refused, accommodation there (Vagrancy Act 1935 s 1(3)(a));
- 278 (2) that he is a person who persistently wanders abroad and, notwithstanding that a place of shelter is reasonably accessible, lodges or attempts so to lodge (s 1(3)(b)); or
- 279 (3) that by, or in the course of, so lodging, he caused damage to property, infection with vermin, or other offensive consequence, or that he so lodged in such circumstances as to appear to be likely so to do (s 1(3)(c)).

For these purposes, 'a place of shelter' means a place where provision is regularly made for giving, free of charge, accommodation for the night to such persons as apply for it: s 1(3).

4 Vagrancy Act 1824 s 4 (amended by the Criminal Justice Act 1925 ss 42, 49(4), Sch 3; the Vagrancy Act 1935 s 1(2); the National Assistance Act 1948 s 62, Sch 7 Pt I; the Criminal Justice Act 1948 s 1(2); the Theft Act 1968 s 33(3), Sch 3 Pt I; the Indecent Displays (Control) Act 1981 s 5(2), Schedule; the Criminal Attempts Act 1981 ss 8, 10, Schedule Pt II; the Criminal Justice Act 1982 s 77, Sch 14 para 1; the Public Order Act 1986 s 40(3), Sch 3; the Statute Law (Repeals) Act 1989 Sch 1; and the Sexual Offences Act 2003 ss 139, 140, Sch 6 para 1, Sch 7). It is not necessary to constitute a person a rogue and vagabond that he should lead a wandering and vagabond life: *Monck v Hilton* (1877) 2 Ex D 268, 41 JP 214. There must be a purpose to commit an offence punishable as a crime, and not a mere offence against, eg, morality: *Hayes v Stevenson* (1860) 3 LT 296; *Smith v Chief Superintendent, Woking Police Station* (1983) 76 Cr App Rep 234, DC (unlawful purpose; assault in criminal cause; victim in terror of some immediate violence; defendant in enclosed garden staring through window of bed-sitting room). Actual arrest on the premises etc is not necessary to constitute being 'found': *Moran v Jones* (1911) 27 TLR 421; *R v Goodwin* [1944] KB 518, [1944] 1 All ER 506, CCA (decided under the Prevention of Crimes Act 1871). 'Found' means discovered or seen: *R v Goodwin* *supra*. See also *R v Parkin* [1950] 1 KB 155, 34 Cr App Rep 1, CCA; *R v Lumsden* [1951] 2 KB 513, 35 Cr App Rep 57, CCA (both cases decided under the Larceny Act 1916 s 28(4) (repealed)).

'Dwelling house' includes the common hall of a block of flats: *Hollyhomes v Hind* [1944] KB 571, [1944] 2 All ER 8, DC. For the meaning of 'warehouse' see *Holloran v Haughton* (1976) 120 Sol Jo 116, DC. 'Enclosed yard, garden or area' connotes an area which is in the open air; thus a room within a building is not an 'enclosed area' for these purposes: *Talbot v DPP* [2000] 1 WLR 1102, sub nom *Talbot v Oxford City Magistrates Court* [2000] 2 Cr App Rep 60, DC. 'Area' has been held to mean that part of the basement of a house which is open to the air for the purpose of lighting the basement: *Knott v Blackburn* [1944] KB 77, [1944] 1 All ER 116, DC. A railway yard enclosed on all sides except across the tracks is not an enclosed area: *Knott v Blackburn* *supra*; *Quatromini v Peck* [1972] 3 All ER 521, [1972] 1 WLR 1318, DC. The essential feature of a 'yard' is that it should be a relatively small area ancillary to a building: *Quatromini v Peck* *supra*. A yard may be an enclosed area even though there are gaps in the surrounding walls etc: *Goodhew v Morton* [1962] 2 All ER 771, [1962] 1 WLR 210, DC. The fact that a place is described as a railway yard, shipyard etc does not make it a 'yard' for the purposes of the Vagrancy Act 1824 s 4 (as amended): *Quatromini v Peck* *supra* at 525 and 1322.

5 Vagrancy Act 1824 s 4 (as amended: see note 4 *supra*); Magistrates' Courts Act 1980 s 121(5) (amended by the Courts Act 2003 s 109(1), Sch 8 para 237(5)); Criminal Justice Act 1982 s 70(1).

6 See the Magistrates' Courts Act 1980 s 34(3)(b), Sch 4 para 1 (amended by the Criminal Penalties etc (Increase) Order 1984, SI 1984/447, art 2(2), Sch 2; and the Criminal Justice Act 1991 s 17(3), Sch 4 Pt II); and MAGISTRATES VOL 29(2) (Reissue) PARA 865. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 142.

7 Magistrates' Courts Act 1980 s 121(5) (amended by the Courts Act 2003 s 109(1), (3), Sch 8 para 237(1), (4), Sch 10). As from a day to be appointed the offences under heads (2), (3) and (6) in the text are no longer to be punishable with imprisonment: see the Criminal Justice Act 2003 s 280(1), Sch 25 para 2 (not yet in force). At the date at which this volume states the law no such day had been appointed.

8 See note 1 *supra*.

9 Vagrancy Act 1824 s 4(1) (as amended (see note 4 supra); prospectively renumbered and amended by the Criminal Justice Act 2003 s 304, Sch 32 para 146(1), (3)).

10 Vagrancy Act 1824 s 4(2)(a) (s 4(2) prospectively added by the Criminal Justice Act 2003 Sch 2 para 146(1), (3)).

11 Vagrancy Act 1824 s 4(2)(b) (prospectively added: see note 10 supra).

12 Magistrates' Courts Act 1980 s 121(5) (as amended: see note 7 supra).

## **UPDATE**

### **834 Rogues and vagabonds etc**

NOTE 4--See also *JL (A Youth) v DPP* (2007) Times, 8 October, DC; *Akhurst v DPP* [2009] EWHC 806 (Admin), (2009) 173 JP 499, DC (university campus was not 'enclosed area').

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### 835. Incurrable rogues.

Until a day to be appointed<sup>1</sup> every person committing any offence which subjects him to be dealt with as a rogue and vagabond<sup>2</sup>, such person having been at some former time adjudged so to be, and duly convicted thereof<sup>3</sup>, is deemed to be an incurrable rogue and on conviction of any such offence may be committed, in custody or on bail, to the Crown Court for sentence<sup>4</sup>.

However, if a person deemed a rogue and a vagabond is thereafter:

- 1002 (1) convicted<sup>5</sup> of wandering abroad, or placing himself in any public place, street, highway, court, or passage, to beg or gather alms<sup>6</sup>; or
- 1003 (2) convicted<sup>7</sup>: (a) of wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, and not giving a good account of himself<sup>8</sup>; or (b) of wandering abroad, and endeavouring by the exposure of wounds and deformities to obtain or gather alms<sup>9</sup>,

he must be convicted of that offence and accordingly is not deemed to be an incurrable rogue and may not be committed to the Crown Court by reason only of that conviction<sup>10</sup>.

When a person has been committed to the Crown Court as an incurrable rogue, the court may examine into the circumstances of the case<sup>11</sup> and, if it thinks fit, may order that the offender be imprisoned for a term not exceeding one year from the time of making such order<sup>12</sup>. Subject to one exception<sup>13</sup>, this is the only order the court has power to make<sup>14</sup>.

1 The Criminal Justice Act 1982 s 70 is repealed by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9 as from a day to be appointed under s 80(2). At the date at which this volume states the law no such day had been appointed.

2 In any offence under the Vagrancy Act 1824 s 4 (as amended): see PARA 834 ante.

3 There must be a previous conviction under *ibid* s 4 (as amended). Previous convictions as an idle and disorderly person (see PARA 833 ante) are insufficient: *R v Johnson* [1909] 1 KB 439, 2 Cr App Rep 13, CCA. However, on the conviction under the Vagrancy Act 1824 s 4 (as amended) a person need not have been expressly adjudged a rogue or vagabond: *R v Teesdale* (1927) 138 LT 160, 20 Cr App Rep 113, CCA.

4 Vagrancy Act 1824 s 5 (amended by the Criminal Justice Act 1948 s 83(3), Sch 10; the Criminal Justice Act 1967 s 103, Sch 6 para 1; the Courts Act 1971 s 56(1), Sch 8 Pt II para 5; the Criminal Justice Act 1982 s 77, Sch 14 para 1(b); and the Statute Law (Repeals) Act 1989 Sch 1). For procedural rules see CrimPR 43.1; and see PARA 1123 post.

5 In under the Vagrancy Act 1824 s 3 (as amended) or s 4 (as amended): see PARAS 833-834 ante.

6 Criminal Justice Act 1982 s 70(1)(a), (2).

7 In under the Vagrancy Act 1824 s 4 (as amended): see PARA 834 ante.

8 Criminal Justice Act 1982 s 70(1)(b)(i), (2).

9 *Ibid* s 70(1)(b)(ii), (2).

10 *Ibid* s 70(2).

11 The court must satisfy itself that the offender has been convicted of an offence under the Vagrancy Act 1824 s 5 (as amended) (see the text and note 4 supra) (*R v Evans* [1915] 2 KB 762, 11 Cr App Rep 178, CCA) and should inquire into the circumstances of the conviction (*R v Holding* (1934) 104 LJBK 28, 25 Cr App Rep 28, CCA). The Crown Court, however, has no power to decide whether the defendant is an incorrigible rogue; that will have been decided by the magistrates' court: *R v Evans* supra. The examination into the circumstances of the case must take place in the offender's presence (*R v Cope* (1925) 94 LJBK 662, 18 Cr App Rep 181, CCA) and he should be given an opportunity of cross-examining any witness called by the Crown and of addressing the court (*R v Holding* supra).

12 Vagrancy Act 1824 s 10 (amended by the Criminal Justice Act 1948 s 83(3), Sch 10; the Criminal Justice Act 1967 s 103(2), Sch 7 Pt I; the Courts Act 1971 s 56(1), Sch 8 Pt II para 5(b); and the Statute Law (Repeals) Act 1989 Sch 1); Criminal Justice Act 1948 s 1(2).

13 Where the court would have power to make a hospital order if the offender had been convicted before the court, ie where the requirements of the Mental Health Act 1983 s 37 (as amended) (see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332-333) are satisfied, it may make a hospital order, with or without a restriction order: see s 43(5); and MENTAL HEALTH vol 30(2) (Reissue) PARA 498. As to restriction orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 337.

14 See *R v Jackson* [1974] QB 517, 59 Cr App Rep 23, CA. The offender must be sentenced as an incorrigible rogue and not for the offences for which he was convicted: *R v Walters* [1969] 1 QB 255, 53 Cr App Rep 9, CA. It is open to the court to make no order at all: *R v Jackson* supra.

## **UPDATE**

### **835 Incorrigible rogues**

NOTE 4--CrimPR 43.1 now Criminal Procedure Rules 2010, SI 2010/60, r 43.1.

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### **836. Appeals.**

An appeal against a conviction under the Vagrancy Act 1824<sup>1</sup> lies to the Crown Court<sup>2</sup>. An appeal against a sentence imposed by the Crown Court on a person adjudged to be an incorrigible rogue<sup>3</sup> lies to the Court of Appeal<sup>4</sup>.

1 See PARAS 833-835 ante.

2 See the Vagrancy Act 1824 s 14 (amended by the Courts Act 1971 s 56(1), Sch 8 Pt II para 5(c)). As to appeals to the Crown Court see PARA 1980 et seq post.

3 See PARA 835 ante.

4 See SENTENCING AND DISPOSITION OF OFFENDERS.

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## **(8) INTIMIDATION AND HARASSMENT**

### **837. Intimidation.**

A person who, with a view to compelling<sup>1</sup> any other person to abstain from doing, or to do, any act which that person<sup>2</sup> has a legal right to do or abstain from doing, wrongfully<sup>3</sup> and without legal authority:

- 1004 (1) uses violence to or intimidates<sup>4</sup> that person or his spouse or civil partner or children, or injures his property<sup>5</sup>; or
- 1005 (2) persistently follows<sup>6</sup> such other person about from place to place<sup>7</sup>; or
- 1006 (3) hides any tools, clothes or other property owned or used by that person, or deprives him of or hinders him in the use thereof<sup>8</sup>; or
- 1007 (4) watches or besets the house or other place where that person resides, works, or carries on business or happens to be, or the approach to such house or place<sup>9</sup>; or
- 1008 (5) follows such other person with two or more other persons in a disorderly manner in or through any street or road<sup>10</sup>,

is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months<sup>11</sup> or to a fine not exceeding level five on the standard scale or to both<sup>12</sup>.

1 It does not matter whether the compulsion was effective: *Agnew v Munro* 1891 28 SLR 335. A person acts 'with a view to compelling' something for these purposes when it is his purpose or aim to achieve it: *J Lyons & Sons v Wilkins* [1899] 1 Ch 255 at 270, CA. Purpose must be distinguished from motive (ie the reason why someone acts): *J Lyons & Co Ltd v Wilkins* supra; *DPP v Fidler* [1992] 1 WLR 91, 94 Cr App Rep 286, DC. It is insufficient to act simply with the purpose of persuading someone to abstain from doing something which he has a right to do, and vice versa; the defendant must act with a view to compelling someone to abstain etc: *DPP v Fidler* supra.

2 Ie any other person: *J Lyons & Sons v Wilkins* [1899] 1 Ch 255, CA.

3 The conduct must amount to a civil wrong separately from the existence of the statutory offence: *Ward, Lock & Co Ltd v Operative Printers' Assistants' Society* (1906) 22 TLR 327, CA; *Fowler v Kibble* [1922] 1 Ch 487, CA; *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20, [1985] 2 All ER 1. Cf *J Lyons & Sons v Wilkins* [1896] 1 Ch 811, CA.

4 'Intimidate' includes putting persons in fear by the exhibition of force or violence or the threat of force or violence; there is no limitation restricting the meaning of 'intimidate' to cases of violence or threats of violence to the person: *R v Jones* [1974] ICR 310, CA (considering *Judge v Bennett* (1887) 52 JP 247; *Connor v Kent*, *Gibson v Lawson*, *Curran v Treleaven* [1891] 2 QB 545, CCR). Abuse, swearing and jostling may constitute intimidation if such threats are serious and taken seriously by those who receive them: *News Group Newspapers Ltd v SOGAT 82 (No 2)* [1987] ICR 181 at 204.

5 Trade Union and Labour Relations (Consolidation) Act 1992 s 241(1)(a) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 1).

6 Whether following is persistent is a question of fact: *Smith v Thomasson* (1891) 16 Cox CC 740; *Elsay v Smith* [1983] IRLR 292, High Court of Justiciary.

7 Trade Union and Labour Relations (Consolidation) Act 1992 s 241(1)(b).

8 Ibid s 241(1)(c). As to deprivation of property see *Fowler v Kibble* [1922] 1 Ch 487, CA.

9 Trade Union and Labour Relations (Consolidation) Act 1992 s 241(1)(d). See *J Lyons & Sons v Wilkins* [1899] 1 Ch 255, CA; *Charnock v Court* [1899] 2 Ch 35; *Walters v Green* [1899] 2 Ch 696; *Farmer v Wilson* (1900) 69 LQB 496, DC; *Ward, Lock & Co Ltd v Operative Printers' Assistants' Society* (1906) 22 TLR 327, CA; *Hubbard v Pitt* [1976] QB 142, [1975] 3 All ER 1, CA; *Galt v Philp* [1984] IRLR 156, High Court of Justiciary. See also *R v Bonsall* [1985] Crim LR 150.

10 Trade Union and Labour Relations (Consolidation) Act 1992 s 241(1)(e). See *R v McKenzie* [1892] 2 QB 519, DC; *Elsev v Smith* [1983] IRLR 292, High Court of Justiciary.

11 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

12 Trade Union and Labour Relations (Consolidation) Act 1992 s 241(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. It is lawful for a person in contemplation or furtherance of a trade dispute to attend: (1) at or near his own place of work; or (2) if he is an official of a trade union, at or near the place of work of a member of that union whom he is accompanying and whom he represents, for the purpose in either case of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working: s 220(1). See further EMPLOYMENT vol 41 (2009) PARA 1349 et seq.

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### **838. Harassment of debtors.**

If a person, with the object of coercing another person to pay money claimed from the other as a debt due under a contract:

- 1009 (1) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation<sup>1</sup>;
- 1010 (2) falsely represents, in relation to the money claimed, that criminal proceedings lie for failure to pay it<sup>2</sup>;
- 1011 (3) falsely represents himself to be authorised in some official capacity to claim or enforce payment<sup>3</sup>; or
- 1012 (4) utters a document falsely represented by him to have some official character or purporting to have some official character which he knows it has not<sup>4</sup>,

he is guilty of an offence<sup>5</sup> and liable on summary conviction to a fine not exceeding level five on the standard scale<sup>6</sup>.

A person may be guilty of an offence by virtue of head (1) above if he concert with others in the taking of such action as is there described, notwithstanding that his own course of conduct does not by itself amount to harassment<sup>7</sup>. Head (1) above does not apply, however, to anything done by a person which is reasonable, and otherwise permissible in law, for the purpose of: (a) securing the discharge of an obligation due, or believed by him to be due, to himself or to persons for whom he acts, or protecting himself or them from future loss<sup>8</sup>; or (b) the enforcement of any liability by legal process<sup>9</sup>.

1 Administration of Justice Act 1970 s 40(1)(a). An offence under s 40 is one to which the Enterprise Act 2002 s 230 applies (notice by local authority to Office of Fair Trading of intended prosecution: see COMPETITION vol 18 (2009) PARA 359); Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provisions) Order 2003, SI 2003/1376, art 2, Schedule.

2 Administration of Justice Act 1970 s 40(1)(b).

3 Ibid s 40(1)(c).

4 Ibid s 40(1)(d).

5 Ibid s 40(1).

6 Ibid s 40(4) (amended by the Criminal Justice Act 1982 ss 35, 38, 46). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

7 Administration of Justice Act 1970 s 40(2).

8 Ibid s 40(3)(a).

9 Ibid s 40(3)(b).

### **UPDATE**



**838 Harassment of debtors**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTES 8, 9--Administration of Justice Act 1970 s 40(1) does not apply to anything done by a person to another in circumstances where what is done is a commercial practice within the meaning of the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, and the other is a consumer in relation to that practice: Administration of Justice Act 1970 s 40(3A) (added by SI 2008/1277).

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## **(9) ALCOHOL CONSUMPTION**

### **839. Offences relating to the consumption of alcohol, etc.**

Offences may be committed in relation to: (1) consuming alcohol in a place which is a designated public place<sup>1</sup>; (2) permitting the carrying of alcohol on vehicles used to transport persons to and from a designated sporting event<sup>2</sup>; and (3) disorderly behaviour whilst drunk<sup>3</sup>.

1 See the Criminal Justice and Police Act 2001 s 12; and PARA 577 ante.

2 See the Sporting Events (Control of Alcohol Etc) Act 1985; and PARAS 597-598 ante.

3 See the Criminal Justice Act 1967 s 91(1); and PARA 596 ante.

## **UPDATE**

### **839 Offences relating to the consumption of alcohol, etc**

TEXT AND NOTES--For provision relating to alcohol related disorder in public places see PARA 577A. As to alcohol disorder zones see PARA 577B. As to drinking banning orders see SENTENCING AND DISPOSITION OF OFFENDERS.

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MISCELLANEOUS OFFENCES/(10) OFFENCES RELATING TO BEHAVIOUR IN STREETS/840.  
Introduction.

## **(10) OFFENCES RELATING TO BEHAVIOUR IN STREETS**

### **840. Introduction.**

In addition to the Road Traffic Regulation Act 1984<sup>1</sup> and other modern legislation regulating behaviour in highways<sup>2</sup>, there are several other enactments, mainly contained in the Town Police Clauses Act 1847<sup>3</sup> and equivalent London legislation of 1839<sup>4</sup>, which regulate behaviour and occupations in streets by creating offences<sup>5</sup>.

Where a person persistently breaks the law and there is no other sufficient sanction to prevent the breach, the High Court may, in its discretion, grant an injunction at the suit of the Attorney General<sup>6</sup>.

1 See ROAD TRAFFIC.

2 See eg the Road Vehicles Lighting Regulations 1989, SI 1989/1796 (as amended) (lighting of vehicles: see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 378 et seq); and the Highways Act 1980 (see HIGHWAYS, STREETS AND BRIDGES). For the meaning of 'highway' see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARAS 7-8.

3 See PARA 848 post.

4 Ie the Metropolitan Police Act 1839 and the City of London Police Act 1839: see PARA 849 post.

5 See eg the Metropolitan Police Act 1839 s 54 (see PARA 594 post), the Town Police Clauses Act 1847 s 28 (see PARA 841 et seq post), and the Street Offences Act 1959 s 1 (see PARA 224 ante). For offences under the Town Police Clauses Act 1847 see PARA 594 ante.

6 See eg *A-G v Harris* [1961] 1 QB 74, [1960] 3 All ER 207, CA; and CIVIL PROCEDURE vol 11 (2009) PARA 491. See also *Manchester Corp'n v Penson* [1970] 1 All ER 646, [1970] 1 WLR 204, DC, where a street trader's licence was revoked where the irresistible inference from the period and number of previous convictions was that he intended to trade in the streets by flouting the law regularly.

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MISCELLANEOUS OFFENCES/(10) OFFENCES RELATING TO BEHAVIOUR IN STREETS/841.

Offences relating to fires, firearms, games etc.

#### **841. Offences relating to fires, firearms, games etc.**

A person is guilty of an offence and is liable on summary conviction to a penalty<sup>1</sup> if:

- 1013 (1) without lawful authority or excuse, he lights any fire, or discharges any firearm or firework, within 50 feet from the centre of a highway<sup>2</sup> which consists of or comprises a carriageway<sup>3</sup>, and in consequence thereof the highway is damaged<sup>4</sup>;
- 1014 (2) without lawful authority or excuse, he lights any fire on or over a highway which consists of or comprises a carriageway, or discharges any firearm or firework within 50 feet from the centre of such a highway, and in consequence a user of the highway is injured, interrupted or endangered<sup>5</sup>;
- 1015 (3) in any thoroughfare or public place in the metropolitan police district or the City of London<sup>6</sup>, he wantonly discharges any firearm, or throws or discharges any stone or other missile, to the damage or danger of any person, or makes any bonfire, or throws or sets fire to any firework<sup>7</sup>;
- 1016 (4) in any street<sup>8</sup> in England and Wales outside the metropolitan police district and the City of London, to the obstruction, annoyance or danger of the residents or passengers<sup>9</sup>, he wantonly discharges any firearm, or throws or discharges any stone or other missile, or makes any bonfire, or throws or sets fire to any firework<sup>10</sup>;
- 1017 (5) he plays at football or any other game<sup>11</sup> on a highway<sup>12</sup> to the annoyance<sup>13</sup> of a highway user<sup>14</sup>;
- 1018 (6) in any thoroughfare or public place in the metropolitan police district or the City of London, or in any street elsewhere in England and Wales, he flies any kite to the annoyance of the inhabitants or passengers<sup>15</sup>;
- 1019 (7) in any thoroughfare or public place in the metropolitan police district or the City of London, he makes or uses any slide on ice or snow to the common danger of the passengers<sup>16</sup>; or
- 1020 (8) in any street outside the metropolitan police district or the City of London, he makes or uses any slide on ice or snow to the obstruction, annoyance or danger of the residents or passengers<sup>17</sup>.

1 These offences are punishable on summary conviction: Metropolitan Police Act 1839 s 76 (amended by the Statute Law (Repeals) Act 1988); City of London Police Act 1839 ss 97, 100; Public Health Act 1875 s 251 (which, although repealed by the Public Health Act 1936 s 346, Sch 3 Pt I (itself repealed), remains effective for present purposes); Public Health Act 1936 s 316; Highways Act 1980 s 310. However, for restrictions on proceedings under the Town Police Clauses Act 1847 s 28 see PARA 848 post.

2 For the meaning of 'highway' see the Highways Act 1980 s 328(1), (2); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 7.

3 For the meaning of 'carriageway' see *ibid* s 329(1); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 64.

4 Highways Act 1980 s 131(1)(d). The penalty is a fine not exceeding level 3 on the standard scale: s 131(3); Criminal Justice Act 1982 ss 35, 38(1), (6), (8), 46(1), (4). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

5 Highways Act 1980 s 161(2) (substituted by the Highways (Amendment) Act 1986 s 1(1), (2)). The penalty is a fine not exceeding level 3 on the standard scale: Highways Act 1980 s 161(2) (as so substituted).

6 As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137; and as to the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31.

7 Metropolitan Police Act 1839 s 54(15); City of London Police Act 1839 s 35(15). As to the fine for an offence under the Metropolitan Police Act 1839 s 54 see PARA 849 note 4 post. Under the City of London Police Act 1839 s 35, the fine is one not exceeding level 2 on the standard scale: s 35; Criminal Justice Act 1967 s 92(1), Sch 3 Pt I; City of London (Various Powers) Act 1979 s 21; Criminal Justice Act 1982 s 46(1), (4).

8 'Street' includes any road, square, court, alley and thoroughfare, or public passage: Town Police Clauses Act 1847 s 3. 'Street' includes the carriageway and footway at the sides: see *A-G v Beynon* [1970] Ch 1, [1969] 2 All ER 263; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARAS 9, 202. In addition, for the purposes of this offence, any place of public resort or recreation ground belonging to or under the control of the local authority, and any unfenced ground adjoining or abutting upon any street, is deemed to be a 'street': Public Health Acts Amendment Act 1907 s 81; Local Government Act 1972 s 180(2), Sch 14 paras 23, 26.

9 The requirement of annoyance etc to the residents or passengers qualifies the whole of the Town Police Clauses Act 1847 s 28. Evidence that two constables heard the indecent language is sufficient evidence of annoyance to passengers: *Brabham v Wookey* (1901) 18 TLR 99, DC. 'Residents' refers to occupiers of residential premises in the street, and 'passengers' to passers-by: *Woolley v Corbishley* (1860) 24 JP 773, DC; *Read v Perrett* (1876) 1 Ex D 349, DC. It is open to a court to find that a police officer who was a passer-by was annoyed at being abused by obscene language: *Hoogstraten v Goward* [1967] Crim LR 590, DC.

10 Town Police Clauses Act 1847 s 28 (as applied: see PARA 848 post). As to the penalty see PARA 848 post.

See also the Explosives Act 1875 s 80 (as amended) (throwing fireworks in highways etc); and EXPLOSIVES vol 17(2) (Reissue) PARA 1020. The penalty for this offence is a fine not exceeding level 3 on the standard scale: see s 80; the Criminal Justice Act 1967 s 92(1), Sch 3 Pt I; and the Criminal Justice Act 1982 ss 38(1), (6), (8), 41(1), (4). See *R v Meade* (1903) 19 TLR 540 (common law offence of discharging arms in a public place).

11 Eg a mock 'stag hunt' where people in fancy dress chase a man dressed like a stag: *Pappin v Maynard* (1863) 9 LT 327, DC.

12 See note 2 supra.

13 The evidence of a constable is sufficient to prove annoyance: *Woolley v Corbishley* (1860) 24 JP 773, DC (horses frightened by football).

14 Highways Act 1980 s 161(3). The penalty is a fine not exceeding level 1 on the standard scale: s 161(3); Criminal Justice Act 1982 s 46(1), (4).

It is an offence to play a game in any thoroughfare or public place in the metropolitan police district or the City of London to the annoyance of the inhabitants or passengers: Metropolitan Police Act 1839 s 54(17); City of London Police Act 1839 s 35(17). As to the fine under the Metropolitan Police Act 1839 see PARA 849 note 4 post; and as to the fine under the City of London Police Act 1839 see note 7 supra.

15 Metropolitan Police Act 1839 s 54(17); City of London Police Act 1839 s 35(17); Town Police Clauses Act 1847 s 28. As to the fine under the Metropolitan Police Act 1839 see PARA 849 note 4 post; as to the fine under the City of London Police Act 1839 see note 7 supra; and as to the fine under the Town Police Clauses Act 1847 see PARA 848 post.

16 Metropolitan Police Act 1839 s 54(17); City of London Police Act 1839 s 35(17). As to the fine under the Metropolitan Police Act 1839 see PARA 849 note 4 post; and as to the fine under the City of London Police Act 1839 see note 7 supra.

17 Town Police Clauses Act 1847 s 28. As to the fine see PARA 848 post.

It is also an offence, to the obstruction, annoyance or danger of the residents or passengers in any street: (1) to fix or place a flowerpot or box, or other heavy article, in an upper window without sufficiently guarding it against being blow down; (2) to throw from the roof or any part of a house or building any slate, brick, wood, rubbish or other thing, except snow thrown so as not to fall on any passenger; or (3) for an occupier of a house or other building, or other person, to order or permit a person in his service to stand on a window sill in order to clean, paint or perform any other operation on the outside of the window or on any house or other building, unless the window is in the sunk or basement storey: s 28. See also *West Riding Cleaning Co Ltd v Jowett* [1938] 4 All ER 21, DC, where the provision was applied to a window cleaning contractor. As to the penalty see PARA 848 post.

## UPDATE

**841 Offences relating to fires, firearms, games etc**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **842. Ringing door bells and extinguishing lamps.**

A person is liable on summary conviction to a penalty who, in any thoroughfare or public place in the metropolitan police district or the City of London<sup>1</sup>, wilfully and wantonly<sup>2</sup> disturbs any inhabitant by pulling or ringing any door bell or knocking at any door without lawful excuse, or who in any such place wilfully and unlawfully extinguishes the light of any lamp<sup>3</sup>.

Outside the metropolitan police district and the City of London, a person is liable on summary conviction to a penalty who in any street<sup>4</sup> in England and Wales, to the obstruction, annoyance or danger of the residents or passengers<sup>5</sup>, wilfully and wantonly disturbs any inhabitants by pulling or ringing any doorbell, or knocking at any door, or wilfully and unlawfully extinguishes the light of any lamp<sup>6</sup>.

1 As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137; and as to the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31.

2 Even though a person is instructed to deliver papers, his manner of doing so and his conduct may yet bring him within these provisions: *Clarke v Hoggins* (1862) 11 CBNS 545. 'Wantonly' means not having reasonable cause, and 'wantonness' consists in the doing of that which will annoy another and which the party doing it knows will produce no results to himself: *Clarke v Hoggins* supra at 551 per Willes J.

3 Metropolitan Police Act 1839 s 54(16); City of London Police Act 1839 s 35(16). As to the fine under the Metropolitan Police Act 1839 see PARA 849 note 4 post; and as to the fine under the City of London Police Act 1839 see PARA 841 note 7 ante. See PARA 848 post.

4 As to the meaning of 'street' see PARA 841 note 8 ante.

5 See PARA 841 note 9 ante.

6 Town Police Clauses Act 1847 s 28. As to the fine see PARA 848 post.

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MISCELLANEOUS OFFENCES/(10) OFFENCES RELATING TO BEHAVIOUR IN STREETS/843.  
Advertisements, placards, defacement of walls etc in London.

### **843. Advertisements, placards, defacement of walls etc in London.**

Within the City of London and the metropolitan police district<sup>1</sup> no person may carry about on foot, on horseback or on any motor vehicle, trailer or carriage in any thoroughfare or public place, to the obstruction or annoyance of the inhabitants or passengers, any picture, placard, notice or advertisement, whether written, printed or painted on or posted or attached to any part of the vehicle or carriage or on any board or otherwise<sup>2</sup>.

In such parts of the City of London and the area enclosed in a circle of which the centre is Charing Cross, and the radii are six miles in length as measured in a straight line from Charing Cross, no picture, print, board, placard or notice, except in such form and manner as may be approved<sup>3</sup> by the commissioner of police<sup>4</sup>, may be carried or distributed by way of advertisement<sup>5</sup> in any street by any person on foot or riding in any vehicle<sup>6</sup> or on horseback, although this does not apply to the sale of newspapers<sup>7</sup>.

The Secretary of State may make regulations for restricting the use of vehicles and animals, and of sandwichmen and other persons, in streets<sup>8</sup> in Greater London for the purposes of advertisement of such a nature or in such a manner as to be likely to be a source of danger or to cause obstruction to traffic including foot passengers<sup>9</sup>.

A person who without lawful authority defaces the surface of a street in Greater London, or a structure on it or a building adjacent to it, is liable on summary conviction to a fine<sup>10</sup>. A person who in any thoroughfare or public place in the metropolitan police district or the City of London, without the consent of the owner or occupier, affixes any posting bill or other paper against or on any building, wall, fence or pale with chalk or paint or in any other way whatsoever is also liable on summary conviction to a fine<sup>11</sup>.

<sup>1</sup> As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137; and as to the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31.

<sup>2</sup> London Hackney Carriage Act 1853 ss 16, 20 (amended by the Greater London Authority Act 1999 s 253, Sch 20 para 3(4)). Contravention is punishable by a fine not exceeding level 1 on the standard scale: London Hackney Carriage Act 1853 s 19; Summary Jurisdiction Act 1884 s 4, Schedule (repealed); Criminal Justice Act 1967 s 92(1), Sch 3 Pt I; Statute Law (Repeals) Act 1976 s 1(1), Sch 1 Pt XVII; Criminal Justice Act 1982 ss 38(1), (6), (8), 46(1), (4). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

<sup>3</sup> There must be actual approval; there cannot be approval by intendment: *Fulton v Kelly* (1889) 5 TLR 325, DC.

<sup>4</sup> 'Commissioner of police', beyond the limits of the City of London and its liberties, means the Metropolitan Police Commissioner, and within such limits means the City of London Police Commissioner: see the Metropolitan Streets Act 1867 s 3.

<sup>5</sup> This does not apply to handbills which are advertisements, but a publication of news, even if their object is to advertise: *Gage v Brealey* (1898) 67 LJQB 457, DC.

<sup>6</sup> A bicycle is a vehicle for this purpose: *Ellis v Nott-Bower* (1896) 60 JP 760, DC.

<sup>7</sup> Metropolitan Streets Act 1867 s 9 (amended by the Statute Law (Repeals) Act 1993 Sch 1, Sch 2 para 16). Contravention is punishable by a penalty not exceeding level 1 on the standard scale: Metropolitan Streets Act 1867 s 9 (as so amended); Criminal Justice Act 1967 s 92(1), Sch 3 Pt I; Criminal Justice Act 1982 ss 38(1), (6), (8), 46(1), (4).



8 'Street' includes any highway, any bridge carrying a highway and any lane, mews, footway, square, court, alley or passage whether a thoroughfare or not: Road Traffic Regulation Act 1984 s 6(6).

9 Ibid s 6(1), (2), Sch 1 para 17 (amended by the New Roads and Street Works Act 1991 s 168(1), Sch 8 para 21(2)).

10 See the London County Council (General Powers) Act 1954 s 20. The fine is one not exceeding level 3 on the standard scale: s 20 (amended by the Greater London Council (General Powers) Act 1983 s 3, Schedule); Criminal Justice Act 1982 ss 38(1), (6), (8), 46(1), (4). See also HIGHWAYS, STREETS AND BRIDGES.

11 Metropolitan Police Act 1839 s 54(10); City of London Police Act 1839 s 35(10). As to the fine under the Metropolitan Police Act 1839 see PARA 849 note 4 post; and as to the fine under the City of London Police Act 1839 see PARA 841 note 7 ante.

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#### **844. Lines and poles across streets.**

Every person who, to the obstruction, annoyance or danger of the residents or passengers<sup>1</sup>, places any line, cord or pole across any street<sup>2</sup> outside the metropolitan police district and the City of London, or hangs or places any clothes on it, commits a summary offence<sup>3</sup>.

1 See PARA 841 note 9 ante.

2 As to the meaning of 'street' see PARA 841 note 7 ante.

3 Town Police Clauses Act 1847 s 28. As to the penalty see PARA 848 post. See also the Highway Act 1980 s 162; the Criminal Justice Act 1982 ss 38(1), (6), (8), 46(1), (4); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 374.

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MISCELLANEOUS OFFENCES/(10) OFFENCES RELATING TO BEHAVIOUR IN STREETS/845. Work done to casks, timber, lime, cork etc and carpet beating.

#### **845. Work done to casks, timber, lime, cork etc and carpet beating.**

Every person is liable on summary conviction to a penalty who, in any street<sup>1</sup> in England and Wales outside the metropolitan police district and the City of London and to the obstruction, annoyance or danger of the residents or passengers, or in any thoroughfare in the metropolitan police district or the City of London<sup>2</sup>: (1) cleanses, hoops, fires, washes or scalds any cask or tub; (2) hews, saws, bores or cuts any timber or stone; (3) slacks, sifts or screens any lime<sup>3</sup>; or (4) beats or shakes any carpet, rug or mat, except door mats beaten or shaken before 8 am<sup>4</sup>.

A person is also liable on summary conviction to a fine if he burns, dresses or cleanses any cork in a thoroughfare in the metropolitan police district or the City of London<sup>5</sup>.

1 As to the meaning of 'street' see PARA 841 note 7 ante.

2 As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137; and as to the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31.

3 Metropolitan Police Act 1839 s 60(1); City of London Police Act 1839 s 41(1); Town Police Clauses Act 1847 s 28. As to the fine under the Metropolitan Police Act 1839 see PARA 849 note 4 post. The penalty under the City of London Police Act 1839 is a fine not exceeding level 1 on the standard scale: s 41; Criminal Law Act 1977 s 31(5)(a), (6)(a), (9); Criminal Justice Act 1982 s 46(1), (4). As to the penalty under the Town Police Clauses Act 1847 see PARA 848 post. As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

4 Metropolitan Police Act 1839 s 60(3); City of London Police Act 1839 s 41(3); Town Police Clauses Act 1847 s 28. As to the penalties see note 3 supra.

5 Metropolitan Police Act 1839 s 60(1); City of London Police Act 1839 s 41(1). As to the fines see note 3 supra.

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MISCELLANEOUS OFFENCES/(10) OFFENCES RELATING TO BEHAVIOUR IN STREETS/846.

Animals in streets, repair of vehicles etc.

#### **846. Animals in streets, repair of vehicles etc.**

A person is liable on summary conviction to a penalty if: (1) in any thoroughfare or public place<sup>1</sup> in the metropolitan police district or the City of London<sup>2</sup>, to the annoyance of the inhabitants or passengers; or (2) in any street<sup>3</sup> elsewhere in England and Wales, to the obstruction, annoyance or danger of the residents or passengers, he: (a) exposes for show or sale<sup>4</sup> (except in a market<sup>5</sup> lawfully appointed for that purpose) any horse or other animal; (b) shows any caravan containing any animal<sup>6</sup> or any other show or public entertainment; (c) shoes, bleeds or farries any horse or animal (except in cases of accident); (d) cleans, dresses, exercises, trains or breaks any horse or animal; or (e) makes or repairs any part of any motor vehicle, trailer, cart or carriage (except in cases of accident where repair on the spot<sup>7</sup> is necessary)<sup>8</sup>. In the metropolitan police district and the City of London these restrictions extend to feeding or foddering animals and to cleaning any part of a motor vehicle, trailer, cart or carriage<sup>9</sup>.

It is also an offence, punishable on summary conviction with a penalty, for a person in any such place<sup>10</sup> to turn loose<sup>11</sup> horses or cattle<sup>12</sup>, to suffer any unmuzzled ferocious dog to be at large there, and to set on or urge animals to attack, worry or put in fear persons or animals<sup>13</sup>. For this to be an offence outside the metropolitan police district and the City of London obstruction, annoyance or danger to the residents or passengers must be caused<sup>14</sup>.

1 A place where members of the public go although they have no legal right, or where they are invited to go, is a public place.

2 As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137; and as to the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31.

3 For the meaning of 'street' see PARA 841 note 8 ante.

4 Where the Town Police Clauses Act 1847 s 28 applies, hire is included: s 28.

5 Where ibid s 28 applies, market places and fairs are included: see s 28.

6 Where ibid s 28 applies, the reference to 'shows any caravan containing any animals' is omitted; instead s 28 refers to 'exhibits in a caravan or otherwise any show or public entertainment': see s 28.

7 Where a vehicle is pushed into a less important street for repair this defence is not available, at least if it can be pushed further: *Chapman v Rawlings* (1909) 73 JP 512, DC.

8 Metropolitan Police Act 1839 s 54(1); City of London Police Act 1839 s 35(1); Town Police Clauses Act 1847 s 28. As to the fine under the Metropolitan Police Act 1839 see PARA 849 note 4 post; as to the fine under the City of London Police Act 1839 see PARA 841 note 5 ante; and as to the penalty under the Town Police Clauses Act 1847 see PARA 848 post.

9 See the Metropolitan Police Act 1839 s 54(1); the City of London Police Act 1839; and note 8 supra.

10 In any thoroughfare or public place in the metropolitan police district or the City of London, and any street elsewhere in England and Wales. 'Street', for these purposes, bears the extended meaning referred to in PARA 841 note 8 ante.

11 Cattle turned out under the care of an employee to keep them from wandering on the highway are not turned loose: *Sherborn v Wells* (1863) 3 B & S 784.

12 The Town Police Clauses Act 1847 s 28 is expressed to apply to any animal.

13 Metropolitan Police Act 1839 s 54(2); City of London Police Act 1839 s 35(2); Town Police Clauses Act 1847 s 28. As to the penalties see note 8 *supra*. For this to be an offence under s 28, obstruction, annoyance or danger to the residents or passengers must be caused. As to dogs see further ANIMALS vol 2 (2008) PARA 902 et seq. Findings that a dog is dangerous under the Dogs Act 1871 s 2 (repealed), but not ferocious under the Metropolitan Police Act 1839 s 54, are not inconsistent: *Keddle v Payn* [1964] 1 All ER 189, [1964] 1 WLR 262, DC. As to the control of cattle see the Metropolitan Police Act 1839 s 54(3); and the City of London Police Act 1839 s 35(3).

14 Town Police Clauses Act 1847 s 28.

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MISCELLANEOUS OFFENCES/(10) OFFENCES RELATING TO BEHAVIOUR IN STREETS/847.  
Slaughtering animals.

#### **847. Slaughtering animals.**

Any person who in any street<sup>1</sup> outside the metropolitan police district or the City of London, to the obstruction, annoyance or danger of the residents or passengers, slaughters or dresses any cattle<sup>2</sup>, or any part thereof, except in the case of any cattle overdriven which may have met with any accident, and which for the public safety or other reasonable cause ought to be killed on the spot, is liable on summary conviction to a penalty<sup>3</sup>.

1 For the meaning of 'street' for the purposes of this offence see PARA 841 note 8 ante.

2 'Cattle' includes horses, asses, mules, sheep, goats and swine: Town Police Clauses Act 1847 s 3.

3 Ibid s 28. As to the penalty see PARA 848 post. For provisions generally applicable to the slaughter of animals see FOOD vol 18(2) (Reissue) PARA 489 et seq.

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#### **848. Offences under the Town Police Clauses Act 1847.**

The provisions of the Town Police Clauses Act 1847 for the prevention of obstructions and nuisances in streets<sup>1</sup> apply throughout England and Wales outside the metropolitan police district and the City of London<sup>2</sup>.

Every person who commits certain offences<sup>3</sup> in any street to the obstruction, annoyance or danger of the residents or passengers is liable for each offence of which he is convicted to a fine not exceeding level three on the standard scale<sup>4</sup> or, in the discretion of the magistrates before whom he is convicted, may be committed to prison for a period not exceeding 14 days<sup>5</sup>. The magistrates must decide whether the act done or the thing placed in a street is such as to be an obstruction, annoyance or danger, there being no obstruction unless there is unreasonable use of the street; but it is unnecessary to show that any person was actually obstructed, annoyed or endangered<sup>6</sup>. In the case of words or noise it is sufficient to show merely that one person was annoyed<sup>7</sup>, and the evidence of a police constable suffices<sup>8</sup>.

The magistrates must determine whether the place is a street, even if dedication as a highway is disputed<sup>9</sup>. However, evidence of a claim to limited dedication, subject to the right to place things in the street, may raise a bona fide claim of title which prevents the magistrates from convicting, but the evidence must be of a cogent character<sup>10</sup>.

Offences under these provisions may be prosecuted before a magistrates' court<sup>11</sup>; but proceedings must not be taken by any person other than by a party aggrieved, or by the local authority of the district in which the offence is committed, without the written consent of the Attorney General<sup>12</sup>.

1 As to betting in streets see PARA 850 note 8 post. As to offences with regard to the sale, use and carriage of fireworks and explosives in streets see EXPLOSIVES vol 17(2) (Reissue) PARA 971 et seq. As to dangerous dogs in streets see ANIMALS vol 2 (2008) PARA 911 et seq. As to highway offences see also HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 340 et seq.

2 Public Health Act 1875 s 171(1) (which incorporates these provisions of the Town Police Clauses Act 1847 into the public health legislation); Local Government Act 1972 s 180(2), Sch 14 paras 23, 26(a). As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137; and as to the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31.

3 I.e any offence under the Town Police Clauses Act 1847 s 28: see PARA 841 et seq ante.

4 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

5 Town Police Clauses Act 1847 s 28; Criminal Justice Act 1967 s 92(1), Sch 3 Pt I; Criminal Justice Act 1982 ss 39(2), 46(1), (4), Sch 3. As from a day to be appointed, a person guilty of such an offence may no longer be committed to prison: see the Town Police Clauses Act 1847 s 28 (prospectively amended by the Criminal Justice Act 2003 s 304, Sch 32 para 149). At the date at which this volume states the law no such day had been appointed. See also the Criminal Justice Act 2003 s 280(1), Sch 25 para 6 (not yet in force).

6 *Gabriel v St James's, Westminster, Vestry* (1859) 23 JP Jo 372; *Woolley v Corbishley* (1860) 24 JP 773, DC; *Read v Perrett* (1876) 1 Ex D 349; *R v Fernaugh Justices* (1883) 14 LR 1r 50; *M'Kee v M'Grath* (1892) 30 LR 1r 41; *Dunn v Holt* (1904) 68 JP 271, DC; *Smith v Perry* [1906] 1 KB 262, DC; *Hindle v Evans* (1906) 70 JP 548, DC; *Gill v Carson and Nield* [1917] 2 KB 674, DC; *Raymond v Cook* [1958] 3 All ER 407, [1958] 1 WLR 1098, DC; *Wolverton UDC v Willis* [1962] 1 All ER 243, [1962] 1 WLR 205, DC. Cf *Lees v Stone* (1919) 88 LJKB 1159, DC. Cf also para 850 note 5 post. In *West Riding Cleaning Co Ltd v Jowett* [1938] 4 All ER 21, DC, the court appeared to

consider the commission of an offence in view of a constable as alternative to danger etc. In *Dunning v Trainer* (1909) 73 JP 400, DC, where a minor obstruction was caused in common with others who were not prosecuted, a dismissal under the Probation of Offenders Act 1907 s 1(1) (repealed) was upheld.

7 *Innes v Newman* [1894] 2 QB 292, DC. Cf *Booth v Howell* (1889) 53 JP 678, DC.

8 *Brabham v Wookey* (1901) 18 TLR 99, DC; *Raymond v Cook* [1958] 3 All ER 407, [1958] 1 WLR 1098, DC. See also *Woolley v Corbishley* (1860) 24 JP 773, DC.

9 *Williams v Adams* (1862) 2 B & S 312; *R v Young and White* (1883) 52 LJM 55, DC. Cf *Hitchman v Watt* (1894) 58 JP 720, DC. See also HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 908. An embayment between bow windows is not necessarily a street, even if pedestrians habitually go there: *Piggot v Goldstraw* (1901) 65 JP 259, DC. See also *Openshaw v Pickering* (1912) 77 JP 27, DC (40 years' user); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 108 et seq.

10 *Whittaker v Rhodes* (1881) 46 JP 182, DC; *Jones v Matthews* (1885) 1 TLR 482, DC; *Leicester Urban Sanitary Authority v Holland* (1888) 57 LJM 75, DC; *Hitchman v Watt* (1894) 58 JP 720, DC; *R (Christie) v Londonderry Justices* [1902] 2 IR 266. If the obstruction began after dedication there is no evidence of limited dedication: *Spice v Peacock* (1875) 39 JP 581, DC. See also MAGISTRATES vol 29(2) (Reissue) PARA 667.

11 See the Public Health Act 1875 s 251, which, although repealed, remains effective for this purpose. As to summary proceedings generally see MAGISTRATES vol 29(2) (Reissue) PARA 653 et seq.

12 See *Sheffield Corp v Kitson* [1929] 2 KB 322, DC (not following *Jobson v Henderson* (1900) 64 JP 425, DC). Notwithstanding anything in the Public Health Act 1875 s 253 (summary proceedings for offences, penalties etc), or the Public Health Act 1936 s 298 (costs of provisional orders), or any other enactment, a constable may take proceedings in respect of an offence against a byelaw made by a relevant local authority under any enactment without the consent of the Attorney General: Local Government (Miscellaneous Provisions) Act 1982 s 12(1). 'Relevant local authority' means a local authority as defined in the Local Government Act 1972 s 270 (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARAS 23, 658), and any body which was the predecessor of a local authority as so defined: Local Government (Miscellaneous Provisions) Act 1982 s 12(2)(a), (b). It is immaterial that a byelaw was made after the passing of the Act: s 12(3).



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#### **849. Offences under the Metropolitan Police Act 1839.**

A person who, within the limits of the metropolitan police district<sup>1</sup>, commits any offence under certain provisions<sup>2</sup> in any thoroughfare or public place<sup>3</sup> is liable to a fine<sup>4</sup>.

Whenever any person having charge of any motor vehicle or trailer, horse, cart, carriage or boat, or any other animal or thing, is taken into custody<sup>5</sup>, it is lawful for any constable to take charge of the vehicle etc and to deposit it in a place of safe custody as security for payment of any penalty to which that person may become liable, and of any expenses necessarily incurred for taking charge of and keeping it, and the magistrate may order it to be sold to satisfy the penalty and expenses in default of payment as if it had been distrained<sup>6</sup>.

Nothing in the Metropolitan Police Act 1839 prevents any person from being indicted for any indictable offence made punishable on summary conviction by that Act or from being liable under any other Act to any other or higher penalty or punishment than is provided for the offence by that Act<sup>7</sup>.

<sup>1</sup> As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137.

<sup>2</sup> I.e the Metropolitan Police Act 1839 ss 54, 60. The same applies under the City of London Police Act 1839 ss 35, 41: see PARA 594 et seq ante.

<sup>3</sup> Under the Metropolitan Police Act 1839 s 60, the wording is 'any street or public place'. It is not certain how far these are words of limitation. Section 60(4) (repealed) applied to acts done in premises abutting on a street: *Howard v Daniels* (1905) 93 LT 669, DC.

<sup>4</sup> Metropolitan Police Act 1839 ss 54, 60. The fine under s 54 is one not exceeding level 2 on the standard scale: s 54; Criminal Justice Act 1967 s 92(1), Sch 3 Pt I; Criminal Law Act 1977 s 31(1), Sch 6; Criminal Justice Act 1982 s 46(1), (4). The fine under the Metropolitan Police Act 1839 s 60 is one not exceeding level 1 on that scale: s 60; Criminal Law Act 1977 s 31(5)(a), (6)(a), (9); Criminal Justice Act 1982 s 46(1), (4). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. These offences are punishable summarily: see the Metropolitan Police Act 1839 s 76. See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139. A private person aggrieved may prosecute (*R v Francis, ex p Walton* (1899) 67 JP 469, DC), and so may an officer acting on behalf of a local authority (*Allman v Hardcastle* (1903) 67 JP 440, DC (inspector of streets on behalf of borough council)).

<sup>5</sup> I.e by any constable under the Metropolitan Police Act 1839.

<sup>6</sup> See *ibid* s 68.

<sup>7</sup> This might be construed as referring to any indictable offence made punishable on summary conviction. See, however, *Keep v St Mary's, Newington, Vestry* [1894] 2 QB 524 at 532, 537, 541, CA.

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MISCELLANEOUS OFFENCES/(10) OFFENCES RELATING TO BEHAVIOUR IN STREETS/850.

Byelaws regulating behaviour in streets.

## **850. Byelaws regulating behaviour in streets.**

Byelaws for good rule and government and for the prevention and suppression of nuisances may be made in England by the council of a district or London borough, and in Wales by the council of a principal area (that is, a county or county borough)<sup>1</sup>. Under these provisions, byelaws are frequently made which regulate behaviour in streets. Such byelaws may prohibit the playing of musical instruments or singing in a street after being required by a constable to stop, and in this case need not be confined to cases where the playing or singing causes annoyance to householders<sup>2</sup>. However, an absolute prohibition of music has been held to be unreasonable<sup>3</sup>.

The byelaws may prohibit swearing or the use of indecent or obscene language under such circumstances as to be an annoyance to the people passing along the highway<sup>4</sup>. However, in this case the byelaw is bad if there is no requirement of annoyance<sup>5</sup>. A byelaw providing that 'no person shall wilfully annoy passengers in the street' is void for uncertainty<sup>6</sup>.

A byelaw may deal with a nuisance already punishable by statute<sup>7</sup>. However, a byelaw prohibiting an act which is prohibited by statute is repugnant to the general law if it purports to exclude an exception contained in the statute or takes away a defence available under it<sup>8</sup>.

A byelaw prohibiting the distribution of any paper wholly or mainly devoted to giving information as to the probable results of races is bad, because it is framed too widely<sup>9</sup>, as is a byelaw prohibiting, without qualification, street trading by children at night<sup>10</sup>.

A byelaw prohibiting an act except under licence may be held to be bad<sup>11</sup>.

1 See the Local Government Act 1972 s 235(1); and the Local Government (Wales) Act 1994 s 66(5), Sch 15 para 49. As respects the City of London, the Common Council may make byelaws (although this power refers only to the 'suppression' and not the prevention of nuisances): City of London (Various Powers) Act 1961 s 39(1); Local Law (City of London) Order 1965, SI 1965/508, art 4, Sch 2. As to the making of byelaws in London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 10. The confirming authority in relation to byelaws made under the Local Government Act 1972 s 235 is the Secretary of State (s 235(2)); in Wales the Secretary of State's function is exercisable by him concurrently with the National Assembly for Wales: Government of Wales Act 1998 s 22(1); National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672. Byelaws must not be made under the Local Government Act 1972 s 235 for any purpose as respects any area if provision for that purpose as respects that area is made or may be made by or under any other enactment: s 235(3). As to the making and confirmation of byelaws see LOCAL GOVERNMENT vol 69 (2009) PARA 553 et seq. Byelaws must be *intra vires*, not repugnant to general law, certain, and reasonable: see LOCAL GOVERNMENT vol 69 (2009) PARA 560 et seq.

2 *R v Powell* (1884) 48 JP 740, DC; *Kruse v Johnson* [1898] 2 QB 91, DC (where a full court was convened consequently on the disagreement of the judges in *Brownscombe v Johnson* (1898) 62 JP 326, DC). Where a byelaw prohibited the use of any noisy instrument 'so as to cause annoyance to the inhabitants', and the justices were satisfied that the instrument was likely to cause annoyance, it was not necessary that there should be any evidence whether one or more people were in fact annoyed: *Raymond v Cook* [1958] 3 All ER 407, [1958] 1 WLR 1098, DC.

3 *Johnson v Croydon Corpn* (1886) 16 QBD 708, DC. See also *Munro v Watson* (1887) 51 JP 660, DC (licence from mayor required); and note 11 *infra*.

4 *Mantle v Jordan* [1897] 1 QB 248, DC.

5 *Strickland v Haynes* [1896] 1 QB 290, DC. This is because the provisions of the Town Police Clauses Act 1847 s 28 (see PARA 848 ante), dealing with precisely the same subject requires annoyance to be proved: *Strickland v Haynes* supra, as explained and distinguished in *Burnett v Berry* [1896] 1 QB 641, DC; *Thomas v Sutters* [1900] 1 Ch 10, CA; *Gentel v Rapps* [1902] 1 KB 160, DC. The latter two cases were in turn distinguished in *Powell v May* [1946] KB 330, [1946] 1 All ER 444, DC (see the text and note 8 infra). See also *Teale v Harris* (1896) 60 JP 744, DC; *Kruse v Johnson* [1898] 2 QB 91, DC; *White v Morley* [1899] 2 QB 34, DC.

6 *Nash v Finlay* (1901) 66 JP 183, DC.

7 *Batchelor v Sturley* (1905) 69 JP 398, DC (where street traders were prohibited from throwing down and leaving waste etc).

8 *Powell v May* [1946] KB 330, [1946] 1 All ER 444, DC (where the byelaw prohibited frequenting streets or public places for the purposes of betting). Cf *Burnett v Berry* [1896] 1 QB 641, DC; *White v Morley* [1899] 2 QB 34, DC; *Thomas v Sutters* [1900] 1 Ch 10, CA (which were decided before frequenting a street etc for betting was made a statutory offence). As to betting in streets and on racecourses see LICENSING AND GAMBLING.

9 *Scott v Pilliner* [1904] 2 KB 855, DC.

10 Such a byelaw is neither for good rule and government, nor for the prevention of nuisances: *Macdonald v Lochrane* (1887) 51 JP 629, DC.

11 Eg on the ground that under the terms of the byelaw: (1) three householders (who may be rival traders) can prevent the grant of the licence (*Elwood v Bullock* (1844) 6 QB 383); or (2) discretion is given to the mayor in a case where the byelaw is for the prevention of nuisances (*Munro v Watson* (1887) 51 JP 660, DC).

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## (11) STREET COLLECTIONS

### 851. Regulations as to street collections.

Until a day to be appointed<sup>1</sup> certain authorities<sup>2</sup> may make regulations with respect to the places where and the conditions under which persons may be permitted in any street<sup>3</sup> or public place<sup>4</sup> within their areas to collect money<sup>5</sup> or sell articles for the benefit of charitable or other purposes<sup>6</sup>. However, such regulations cannot apply to the selling of articles where the articles are sold in the ordinary course of trade, for the purpose of earning a livelihood, and no representation is made by or on behalf of the seller that any part of the proceeds of sale will be devoted to any charitable purpose<sup>7</sup>. Any person who acts in contravention of any such regulations is liable on summary conviction to a fine not exceeding level one on the standard scale<sup>8</sup>.

Regulations which must be observed by all persons within the metropolitan police district<sup>9</sup> relate to the places where and the conditions under which persons may collect money in any street for any charitable or other purpose<sup>10</sup>.

1 The Police, Factories, &c (Miscellaneous Provisions) Act 1916 is repealed by the Charities Act 1992 ss 78(2), 79(7), Sch 7 as from a day to be appointed under s 79(2). At the date at which this volume states the law no such day had been appointed.

2 The Common Council of the City of London (see LONDON GOVERNMENT vol 29(2) (Reissue) PARAS 51-55), the police authority for the metropolitan police district (see POLICE vol 36(1) (2007 Reissue) PARA 137) and the council of each district: Police, Factories, &c (Miscellaneous Provisions) Act 1916 s 5(1A) (added by the Local Government Act 1972 s 251(2), Sch 29 para 22). However, any regulations made by a district council do not affect any part of its area which also falls within the area covered by the metropolitan police district: see the Police, Factories, &c (Miscellaneous Provisions) Act 1916 s 5(1A) (as so added).

3 'Street' includes any highway and any public bridge, road, lane, footway, square, court, alley or passage, whether a thoroughfare or not: *ibid* s 5(4).

4 'Public place' is not defined by the Police, Factories &c (Miscellaneous Provisions) Act 1916. In the context of other statutes where 'public place' has been left undefined, 'public place' has been construed as meaning a place to which members of the public, whether on payment or otherwise, are admitted or have access at the material time: *R v Wellard* (1884) 14 QBD 63, CCR; *R v Collinson* (1931) 75 Sol Jo 491, CCA; *Elkins v Cartledge* [1947] 1 All ER 829, DC. Cf *Brannan v Peek* [1948] 1 KB 68, [1947] 2 All ER 572, DC. The absence of a physical obstruction or of a notice forbidding entry does not of itself mean that the public has access: *R v Spence* [1999] RTR 353, CA. It is irrelevant that the public could have had access; the question is whether the public has actually had access to the place in question: *R v Spence* *supra*. If the public has had access, the fact that it has been in defiance of an express prohibition is irrelevant: *R v DPP, ex p Taussik* [2000] 9 Archbold News 2, DC (where this was assumed). Access by virtue of possessing a special qualification, eg that of being an employee at the premises in question or a member of a club whose premises are in question (*DPP v Vivier* [1991] 4 All ER 18, DC) is not access as a member of the public.

5 Street collections under these powers are to be distinguished from house-to-house collections for charity, as to which see CHARITIES vol 8 (2010) PARA 461 *et seq*.

6 Police, Factories, &c (Miscellaneous Provisions) Act 1916 s 5(1) (amended by the Local Government Act 1972 s 251, Sch 29 para 22). The regulations do not come into operation until they have been confirmed by the Secretary of State, and published for such time and in such manner as he may direct: Police, Factories, &c (Miscellaneous Provisions) Act 1916 s 5(1) proviso (a). With the exception of the regulations referred to in note 10 *infra*, such regulations are not made as statutory instruments. A person making a collection in good faith for

a charitable object is not begging within the meaning of the Vagrancy Act 1824 s 3 (as amended): *Mathers v Penfold* [1915] 1 KB 514, DC.

7 Police, Factories, &c (Miscellaneous Provisions) Act 1916 s 5(1) proviso (b).

8 Ibid s 5(1); Criminal Law Act 1977 s 31(5)(a), (6)(a), (9); Criminal Justice Act 1982 s 46(1), (4). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

9 As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137.

10 See the Street Collections (Metropolitan Police District) Regulations 1979, SI 1979/1230 (amended by SI 1986/1696) (made pursuant to the Police, Factories, &c (Miscellaneous Provisions) Act 1916 s 5(1)); and PARA 852 post.

## UPDATE

### **851-852 Regulations as to street collections, Street collections in London**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **851 Regulations as to street collections**

TEXT AND NOTES 1-6--1916 Act s 5(1) amended: Charities Act 2006 s 75, Sch 8 para 15(2) (not yet in force).

NOTE 6--Now confirmed by the Secretary of State or the Minister for the Cabinet Office: 1916 Act s 5 proviso (a) (amended by SI 2006/2951).

TEXT AND NOTE 7--1916 Act s 5(1) proviso (b) amended: Charities Act 2006 s 75, Sch 8 para 15(3) (not yet in force).

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## **852. Street collections in London.**

The following provisions apply in the metropolitan police district<sup>1</sup>, and any person who acts in contravention of them is liable on summary conviction to a fine<sup>2</sup>.

No collection<sup>3</sup> may be made in any street<sup>4</sup> or public place<sup>5</sup> within that district unless the society, committee or other body of persons responsible for the collection has obtained from the Metropolitan Police Commissioner of the a permit<sup>6</sup> for the collection<sup>7</sup>. No collection may be made except on the day and between the hours stated in the permit<sup>8</sup>, which may limit the collection to such districts, streets or public places or such parts of them as the Commissioner thinks fit<sup>9</sup>. No person may assist or take part in any collection unless in possession of a written authority signed on behalf of the chief promoter<sup>10</sup>, and every authorised person must produce that authority forthwith for inspection by any constable on request<sup>11</sup>.

While collecting, a collector must remain stationary, and one or two collectors together must not be nearer to another collector than 25 metres<sup>12</sup>. No collection may be made in any part of the carriageway of any street<sup>13</sup>; nor may it be made in such a manner as to cause, or be likely to cause, danger, obstruction, inconvenience or annoyance to any person<sup>14</sup>. No collector may importune any person to the annoyance of that person<sup>15</sup>, or be accompanied by any animal<sup>16</sup>. No person under the age of 16 may act or be permitted to act as a collector<sup>17</sup>.

Every collector must carry a collecting box<sup>18</sup>. All such boxes must be numbered consecutively and be securely closed and sealed in such a way as to prevent them being opened without the seal being broken<sup>19</sup>. All money received from contributions<sup>20</sup> must immediately be placed in a collecting box<sup>21</sup>, and every collector must deliver, unopened, all collecting boxes in his possession to a promoter<sup>22</sup>. A collector must not carry or use any collecting box, receptacle or tray which does not bear displayed prominently on it the name of the charity or fund which is to benefit, or any collecting box which is not duly numbered<sup>23</sup>.

A collecting box must be opened in the presence of a promoter and another responsible person<sup>24</sup>, although a collecting box delivered unopened to a bank may be opened by a bank official<sup>25</sup>. As soon as a collecting box has been opened the person opening it must count the contents and enter the amount with the number of the box on a list which he must certify<sup>26</sup>.

No payment by way of reward may be made to a collector, and no payment may be made out of the proceeds of a collection, either directly or indirectly, to any other person connected with its promotion or conduct for or in respect of services connected with it except any shown in the application and approved by the Commissioner<sup>27</sup>.

Within three months after the date of a collection, the chief promoter must forward to the Commissioner a statement of receipts and expenditure<sup>28</sup> certified by two of the persons responsible for the collection<sup>29</sup> and by a qualified accountant<sup>30</sup>, and lists showing the names of the collectors and the amounts contained in each collecting box; and must, if required by the Commissioner, satisfy him as to the proper application of the proceeds<sup>31</sup>. The chief promoter must also, within the same period, at his own expense and after any certification required, publish in such newspaper or newspapers as the Commissioner may direct a statement showing specified details in connection with the collection<sup>32</sup>.

These provisions are simplified in respect of carol singing collections<sup>33</sup>.

1 As to the metropolitan police district see POLICE vol 36(1) (2007 Reissue) PARA 137.

2 See the Police, Factories, &c (Miscellaneous Provisions) Act 1916 s 5(1). As to the prospective repeal of the Police, Factories, &c (Miscellaneous Provisions) Act 1916 see PARA 851 note 1 ante. As to the fine see PARA 851 ante. The Street Collections (Metropolitan Police District) Regulations 1979, SI 1979/1230 (amended by SI 1986/1696) (which are made in pursuance of the Police, Factories, &c (Miscellaneous Provisions) Act 1916 s 5 (see PARA 851 ante)), do not apply in respect of a collection taken at a meeting in the open air, or to the sale of articles in the course of trade: Street Collections (Metropolitan Police District) Regulations 1979, reg 3.

3 'Collection' means a collection of money or a sale of articles in any street or public place within the metropolitan police district for the benefit of charitable or other purposes; and 'collector' is to be construed accordingly: *ibid* reg 2.

4 For the meaning of 'street' see PARA 851 note 3 ante.

5 As to the meaning of 'public place' see PARA 851 note 4 ante.

6 'Permit' means a permit for collection: Street Collections (Metropolitan Police District) Regulations 1979, SI 1979/1230, reg 2.

7 See *ibid* regs 2, 4. Every application for a permit must be made in writing to the Commissioner in the form set out in Sch 1 not later than the first day of the month preceding the month in which it is proposed to hold the collection, although where there are special reasons he may consider an application made later: reg 5(1). The application must be made by a society, committee or other body consisting of not less than three members acting through not less than three members who are jointly responsible for the collection: reg 5(2). The Commissioner must refer the application to an advisory committee appointed by him with the approval of the Secretary of State, and he may have regard to its recommendations: reg 5(3).

8 *Ibid* reg 6.

9 *Ibid* reg 7.

10 *Ibid* reg 8(1). 'Chief promoter' means a society, committee or other body consisting of not less than three persons to which a permit has been granted: reg 2.

11 *Ibid* reg 8(2).

12 *Ibid* reg 12(a), (b). The Commissioner may waive these requirements in respect of an authorised collection in connection with a procession: reg 12 proviso.

13 *Ibid* reg 9. The Commissioner may allow a collection with a procession to take place on such a carriageway: reg 9 proviso.

14 *Ibid* reg 10.

15 *Ibid* reg 11.

16 *Ibid* reg 14.

17 See *ibid* reg 13. However, in the case of a collection in connection with a procession, the Commissioner may authorise the chief promoter to permit persons aged under 16 but not under 14 years to act as collectors after receipt of a written assurance by such chief promoter that each such person will at all times be accompanied by a responsible able-bodied adult: reg 13 proviso.

18 *Ibid* reg 15(1). 'Collecting box' means a box or other receptacle for the reception of money from contributors: reg 2.

19 *Ibid* reg 15(2).

20 'Contributor' means a person who contributes to a collection, and includes a purchaser of articles for sale for the benefit of charitable or other purposes: *ibid* reg 2.

21 *Ibid* reg 15(3).

22 *Ibid* reg 15(4). 'Promoter' means a person (authorised in that behalf by the chief promoter) who causes others to act as collectors: reg 2.

23 *Ibid* reg 16.

- 24 Ibid reg 17(1).
- 25 Ibid reg 17(2).
- 26 Ibid reg 17(3).
- 27 Ibid reg 18.
- 28 For the form of the statement see ibid Sch 2.
- 29 Ie two of the persons referred to in ibid reg 5(2): see note 7 supra.
- 30 Ibid reg 19(1)(a). 'A qualified accountant' means a member of one or more of the following bodies: (1) the Institute of Chartered Accountants in England and Wales; (2) the Institute of Chartered Accountants in Scotland; (3) the Association of Certified Accountants; (4) the Institute of Chartered Accountants in Ireland: reg 19(4). If a collection results in a sum of £400 or less being collected, the Commissioner may waive the requirement for certification by a qualified accountant and substitute for it a requirement for certification by an independent responsible person unless, after examination of the statement, he decides that it should be certified by a qualified accountant: reg 19(1)(a) proviso (amended by SI 1986/1696).
- 31 Street Collections (Metropolitan Police District) Regulations 1979, SI 1979/1230, reg 19(1)(b), (c).
- 32 See ibid reg 19(2). Not later than seven days after the publication of a newspaper containing this statement, the chief promoter must send a copy to the Commissioner: reg 19(3).
- 33 See ibid reg 20 (amended by SI 1986/1696). The Chief Superintendent in charge of the police division may issue a certificate to the person appearing to him to be principally concerned in promoting a collection to be made, in accordance with the certificate, in the period from 1 December to 24 December in connection with the singing or playing (including the reproduction of recordings) of Christmas carols by two or more persons assembled together: Street Collections (Metropolitan Police District) Regulations 1979, SI 1979/1230, reg 20(1), (2) (as so amended). In the case of such a collection, regs, 4, 5, 12(b), 17 and 19 and (so far as they relate to numbering collecting boxes) regs 15(2), 16, do not apply, and other regulations are modified appropriately: see reg 20(3).

## UPDATE

### **851-852 Regulations as to street collections, Street collections in London**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.



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## **(12) HOAXES**

### **853. Bomb hoaxes.**

Any person who places any article<sup>1</sup> in any place whatever, or dispatches any article by post, rail or any other means whatever of sending things from one place to another, with the intention, in either case, of inducing in some other person a belief that it is likely to explode or ignite and thereby cause personal injury or damage to property is guilty of an offence<sup>2</sup>.

A person who communicates any information which he knows or believes to be false to another person with the intention of inducing in him or any other person a false belief that a bomb or other thing liable to explode or ignite is present in any place or location whatever is guilty of an offence<sup>3</sup>.

A person guilty of such an offence<sup>4</sup> is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the prescribed sum<sup>6</sup> or to both<sup>7</sup>.

For a person to be guilty of such an offence<sup>8</sup>, it is not necessary for him to have any particular person in mind as the person in whom he intends to induce the requisite belief<sup>9</sup>.

1 For these purposes, 'article' includes substance: Criminal Law Act 1977 s 51(1).

2 Ibid s 51(1).

3 Ibid s 51(2). The information need not be specific: see *R v Webb* (1995) Times, 19 June, CA (emergency call, saying 'there is a bomb'; held sufficient for an offence under the Criminal Law Act 1977 s 51(2)).

4 Ie an offence under the Criminal Law Act 1977 s 51(1) or (2).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

7 Criminal Law Act 1977 s 51(4) (amended by the Magistrates' Courts Act 1980 s 32(2); and the Criminal Justice Act 1991 s 26(4)); Powers of Criminal Courts (Sentencing) Act 2000 s 127. For sentencing guidelines see *R v Wilburn* (1992) 13 Cr App Rep (S) 309, CA; *R v Harrison* [1997] 2 Cr App Rep (S) 174, CA; *R v Bosworth* [1998] 1 Cr App Rep (S) 356, CA.

8 Ie under the Criminal Law Act 1977 s 51(1) or (2).

9 Ibid s 51(3). As to threatening to contaminate or interfere with goods see PARA 819 ante; and as to threatening to destroy or damage property see PARA 337 post.

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#### **854. Hoaxes involving noxious things or substances.**

A person is guilty of an offence if he places any substance<sup>1</sup> or other thing in any place, or sends any substance or other thing from one place to another, by post, rail or any other means whatever, with the intention of inducing in a person anywhere in the world a belief that it is likely to be, or contain, a noxious substance or other noxious thing and thereby endanger human life or create a serious risk to human health<sup>2</sup>.

A person is guilty of an offence if he communicates any information which he knows or believes to be false with the intention of inducing in a person anywhere in the world a belief that a noxious substance or other noxious thing is likely to be present, whether at the time the information is communicated or later, in any place and thereby endanger human life or create a serious risk to human health<sup>3</sup>.

A person guilty of such an offence<sup>4</sup> is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>5</sup> or to a fine not exceeding the statutory maximum<sup>6</sup> or to both<sup>7</sup>.

For a person to be guilty of such an offence<sup>8</sup> it is not necessary for him to have any particular person in mind as the person in whom he intends to induce the belief in question<sup>9</sup>.

1 As to the meaning of 'substance' see PARA 123 note 1 ante.

2 Anti-terrorism, Crime and Security Act 2001 s 114(1).

3 Ibid s 114(2).

4 Ie under ibid s 114(1) or (2).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

6 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

7 Anti-terrorism, Crime and Security Act 2001 s 114(3).

8 Ie under ibid s 114(1) or (2).

9 Ibid s 115(2).

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ENFORCEMENT PROCEDURES/(1) CRIME AND DISORDER STRATEGIES/855. Crime and disorder strategies.

## **12. ENFORCEMENT PROCEDURES**

### **(1) CRIME AND DISORDER STRATEGIES**

#### **855. Crime and disorder strategies.**

The functions conferred<sup>1</sup> in respect of the formulation and implementation of strategies for the reduction of crime and disorder in a local government area<sup>2</sup> are exercisable in relation to that area by the responsible authorities, that is to say: (1) the council for the area and, where the area is a district and the council is not a unitary authority, the council for the county which includes the district; (2) every chief officer of police any part of whose police area lies within the area; (3) every police authority any part of whose police area so lies; (4) every fire and rescue authority any part of whose area so lies; (5) if the local government area is in England, every primary care trust the whole or any part of whose area so lies; and (6) if the local government area is in Wales, every health authority the whole or any part of whose area so lies<sup>3</sup>.

In exercising those functions, the responsible authorities must act in co-operation with:

- 1021 (a) every local probation board any part of whose area lies within the area;
- 1022 (b) every person or body of a description which is for the time being prescribed by order of the Secretary of State<sup>4</sup>; and
- 1023 (c) where they are acting in relation to an area in Wales, every person or body which is of a description which is for the time being prescribed by order<sup>5</sup> of the National Assembly for Wales,

and it is the duty of those persons and bodies to co-operate in the exercise by the responsible authorities of those functions<sup>6</sup>. The responsible authorities must also invite the participation in their exercise of those functions of at least one person or body of each description which is for the time being prescribed by order<sup>7</sup> of the Secretary of State and, in the case of the responsible authorities for an area in Wales, of any person or body of a description for the time being prescribed by an order<sup>8</sup> of the National Assembly for Wales<sup>9</sup>.

For each relevant period<sup>10</sup>, the responsible authorities for a local government area must formulate and implement in accordance with the provisions above, in the case of an area in England, a strategy for the reduction of crime and disorder in the area and a strategy for combating the misuse of drugs in the area, and, in the case of an area in Wales, a strategy for the reduction of crime and disorder in the area and a strategy for combating substance misuse in the area<sup>11</sup>. Before formulating a strategy, the responsible authorities must: (i) carry out, taking due account of the knowledge and experience of persons in the area, a review, in the case of an area in England, of the levels and patterns of crime and disorder in the area and of the level and patterns of the misuse of drugs in the area, and, in the case of an area in Wales, of the levels and patterns of crime and disorder in the area and of the level and patterns of substance misuse in the area; (ii) prepare an analysis of the results of that review; (iii) publish in the area a report of that analysis; and (iv) obtain the views on that report of persons or bodies in the area<sup>12</sup>, whether by holding public meetings or otherwise<sup>13</sup>.

A strategy must include objectives to be pursued by the responsible authorities, by co-operating persons or bodies<sup>14</sup> or, under agreements with the responsible authorities, by other persons or bodies, and long-term and short-term performance targets for measuring the extent to which such objectives are achieved<sup>15</sup>. After formulating a strategy, the responsible authorities must publish in the area a document which includes details of: (A) co-operating persons and bodies; (B) the review carried out under head (i) above; (C) the report published under head (iii) above; and (D) the strategy, including in particular the objectives mentioned above and, in each case, the authorities, persons or bodies by whom they are to be pursued, and the performance targets mentioned above<sup>16</sup>. While implementing a strategy, the responsible authorities must keep it under review with a view to monitoring its effectiveness and making any changes to it that appear necessary or expedient<sup>17</sup>.

The Secretary of State may, by order, require the responsible authorities for local government areas to formulate any strategy<sup>18</sup> for the reduction of crime and disorder so as to include, in particular, provision for the reduction of crime of a description specified in the order, or disorder of a description so specified, and, in relation to local government areas in England, to prepare any strategy for combating the misuse of drugs so as to include in it a strategy for combating, in the area in question, such other forms of substance misuse as may be specified or described in the order<sup>19</sup>. After formulating any such strategy (whether in a case in which there has been an order under this provision or in any other case), the responsible authorities for a local government area must send both a copy of the strategy, and a copy of the document which they propose to publish<sup>20</sup>, to the Secretary of State<sup>21</sup>. It is the duty of the responsible authorities, when preparing any such document to be published<sup>22</sup>, to have regard to any guidance issued by the Secretary of State as to the form and content of the documents to be so published<sup>23</sup>. If the responsible authorities for a local government area propose to make any changes to a strategy, they must send copies of the proposed changes to the Secretary of State<sup>24</sup>.

The responsible authorities for a local government area, whenever so required by the Secretary of State, must submit to him a report on such matters connected with the exercise of their functions as may be specified in the requirement<sup>25</sup>.

Without prejudice to any other obligation imposed on them, it is the duty of local authorities<sup>26</sup>, joint authorities<sup>27</sup>, the London Fire and Emergency Planning Authority<sup>28</sup>, a fire and rescue authority<sup>29</sup>, a police authority<sup>30</sup>, a national park authority<sup>31</sup> and the Broads Authority, to exercise their various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in their areas<sup>32</sup>. Pursuant to the promotion of the prevention of crime or the welfare of the victims of crime, local authorities<sup>33</sup> are also empowered, subject to consultation with the chief officer of police, to provide maintain and operate, or arrange for the provision, maintenance and operation of, closed-circuit television systems in their areas<sup>34</sup>. Further, the Secretary of State may, with the consent of the Treasury, make such payments, or pay such grants, to such persons as he considers appropriate in connection with measures intended to prevent crime or reduce the fear of crime<sup>35</sup>.

1 le by the Crime and Disorder Act 1998 s 6 (as amended): see the text and notes 10-17 infra.

2 'Local government area' means: (1) in relation to England, a district or London borough, the City of London, the Isle of Wight and the Isles of Scilly; (2) in relation to Wales, a county or county borough: *ibid* s 5(4). For these purposes, the Inner Temple and the Middle Temple form part of the City of London: s 18(5).

3 *Ibid* s 5(1) (amended by the Police Reform Act 2002 ss 97(2), 107(2), Sch 8; and the Fire and Rescue Services Act 2004 s 53(1), Sch 1 para 89(1), (2)(a)). For these purposes, 'police authority' means any police authority established under the Police Act 1996 s 3 (see *POLICE* vol 36(1) (2007 Reissue) PARA 139), or the Metropolitan Police Authority; and 'fire and rescue authority' means a fire and rescue authority constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 or a scheme to which s 4 applies, any metropolitan county fire and civil defence authority, or the London Fire and Emergency Planning Authority: Crime and Disorder Act 1998 s 5(5) (added by the Police Reform Act 2002 s 97(6); and amended by the Civil Contingencies

Act 2004 s 32(1), Sch 2 Pt 1 para 10; and the Fire and Rescue Services Act 2004 s 53(1), Sch 1 para 89(1), (2) (b)). The Crime and Disorder Act 1998 s 5(1) (as amended) has effect in relation to a local government area in England at any time when that area or a part of it comprises or contains an area that is not included in the area of a primary care trust, as if the reference to a primary care trust the whole or part of whose area lies within the local government area included a reference to any health authority or strategic health authority whose area comprises or includes the area for which there is no primary care trust: Police Reform Act 2002 s 97(15).

The Secretary of State may by order provide in relation to any two or more local government areas in England that the functions conferred by the Crime and Disorder Act 1998 ss 6, 7 (s 6 as amended) (see the text and notes 10-17, 25 *infra*) are to be carried out in relation to those areas taken together as if they constituted only one area, and that the persons who for these purposes are to be taken to be responsible authorities in relation to the combined area are the persons who comprise every person who (apart from the order) would be a responsible authority in relation to any one or more of the areas included in the combined area: s 5(1A) (s 5(1A), (1B) added by the Police Reform Act 2002 s 97(3)). The Secretary of State must not make an order under the Crime and Disorder Act 1998 s 5(1A) (as added) unless an application for the order has been made jointly by all the persons who would be the responsible authorities in relation to the combined area or the Secretary of State has first consulted those persons, and he considers it would be in the interests of reducing crime and disorder, or of combating the misuse of drugs, to make the order: s 5(1B) (as so added). As to the orders that have been made see the Crime and Disorder Act 1998 (Responsible Authorities) Order 2005, SI 2005/1789; and the Crime and Disorder Act 1998 (Responsible Authorities) (No 2) Order 2005, SI 2005/3343.

Provision is made for the disclosure of information to relevant authorities where such disclosure is necessary or expedient for the purposes of the Crime and Disorder Act 1998: see s 115 (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 paras 150, 151; the Police Reform Act 2002 s 97(1), (14)(a), (b); the Housing Act 2004 s 219; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, arts 2(1), 3(1), Sch 1 para 35(1), (7); and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, reg 4, Sch 1 para 25(1), (6)).

4    Ie prescribed under the Crime and Disorder Act 1998 s 5(2) (as amended): see the text to note 6 *infra*. See the Crime and Disorder Strategies (Prescribed Descriptions) Order 1998, SI 1998/2452, art 2 (amended by SI 1998/2513; SI 2000/300; revoked so far as it applied to England by SI 2004/118); and the Crime and Disorder Strategies (Prescribed Descriptions) (England) Order 2004, SI 2004/118, art 2 (amended by SI 2004/696).

5    Ie prescribed under the Crime and Disorder Act 1998 s 5(2) (as amended): see the text to note 6 *infra*.

6    Ibid s 5(2) (amended by Police Reform Act 2002 s 97(4)). As to primary care trusts see HEALTH SERVICES vol 54 (2008) PARAS 111-135.

7    Ie prescribed under the Crime and Disorder Act 1998 s 5(3) (as amended): see the text to note 9 *infra*.

8    Ie prescribed under ibid s 5(3) (as amended): see the text to note 9 *infra*.

9    Ibid s 5(3) (amended by the Police Reform Act 2002 s 97(5)). See the Crime and Disorder Strategies (Prescribed Descriptions) Order 1998, SI 1998/2452, art 3 (amended by SI 1998/2513; SI 1999/483; SI 2005/617; SI 2005/2929; revoked so far as it applied to England by SI 2004/118); and the Crime and Disorder Strategies (Prescribed Descriptions) (England) Order 2004, SI 2004/118, art 3 (amended by SI 2004/865; SI 2005/617).

10   Ie the period of three years beginning with 1 April 1999, and each subsequent period of three years: see the Crime and Disorder Act 1998 s 6(7); and the Crime and Disorder Act 1998 (Commencement No 3 and Appointed Day) Order 1998, SI 1998/3263.

11   Crime and Disorder Act 1998 s 6(1) (amended by the Police Reform Act 2002 s 97(7)). In determining what matters to include or not to include in a strategy for combating substance misuse, the responsible authorities for an area in Wales must have regard to any guidance issued for these purposes by the National Assembly for Wales: Crime and Disorder Act 1998 s 6(1A) (added by the Police Reform Act 2002 s 97(8)). 'Substance misuse' includes the misuse of drugs or alcohol: Crime and Disorder Act 1998 s 6(7) (amended by the Police Reform Act 2002 s 97(11)).

12   Ie including those of a description prescribed by order under the Crime and Disorder Act 1998 s 5(3) (as amended) (see the text and notes 7-9 *supra*): s 6(2)(d).

13   Ibid s 6(2) (amended by the Police Reform Act 2002 s 97(9)). As from a day to be appointed, the review of crime and disorder is to include anti-social and other behaviour adversely affecting the local environment: see the Crime and Disorder Act 1998 s 6(2) (as so amended; prospectively amended by the Clean Neighbourhoods and Environment Act 2005 s 1). At the date at which this volume states the law no such day had been appointed.

In formulating a strategy, the responsible authorities must have regard to the analysis prepared under head (ii) in the text and the views obtained under head (iv) in the text: Crime and Disorder Act 1998 s 6(3).

14    Ie persons or bodies co-operating in the exercise of the responsible authorities' functions under ibid s 6 (as amended): see s 6(7).

15    Ibid s 6(4).

16    Ibid s 6(5).

17    Ibid s 6(6). Within one month of the end of each reporting period, the responsible authorities must submit a report on the implementation of their strategies during that period, in the case of a report relating to the strategies for an area in England, to the Secretary of State, and, in the case of a report relating to the strategies for an area in Wales, to the Secretary of State and to the National Assembly for Wales: s 6(6A) (added by the Police Reform Act 2002 s 97(10)). 'Reporting period' means every period of one year which falls within a relevant period and which begins, in the case of the first reporting period in the relevant period, with the day on which the relevant period begins, and, in any other case, with the day after the day on which the previous reporting period ends: see the Crime and Disorder Act 1998 s 6(7) (amended by the Police Reform Act 2002 s 97(11)).

18    Ie a strategy to be formulated under the Crime and Disorder Act 1998 s 6(1) (as amended): see the text and notes 10-11 supra.

19    Ibid s 6A(1) (s 6A added by the Police Reform Act 2002 s 98).

20    Ie under ibid s 6(5): see the text and note 16 supra.

21    Ibid s 6A(2) (as added: see note 19 supra). For these purposes and for the purposes of s 6A(3)-(4) (as added), references to the Secretary of State, in relation to responsible authorities for local government areas in Wales have effect as references to the Secretary of State and the National Assembly for Wales, and, accordingly, guidance issued for the purposes of s 6A(3) (as added) in relation to local government areas in Wales must be issued by the Secretary of State and that Assembly acting jointly: s 6A(5) (as so added).

22    Ie under ibid s 6(5): see the text and note 16 supra.

23    Ibid s 6A(3) (as added: see note 19 supra).

24    Ibid s 6A(4) (as added: see note 19 supra).

25    Ibid s 7(1). A requirement may specify the form in which a report is to be given: s 7(2). The Secretary of State may arrange, or require the responsible authorities to arrange, for a report to be published in such manner as appears to him to be appropriate: s 7(3).

26    For this purpose, 'local authority' means a local authority within the meaning given by the Local Government Act 1972 s 270(1) (see LOCAL GOVERNMENT vol 69 (2009) PARA 23) or the Common Council of the City of London (see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq): Crime and Disorder Act 1998 s 17(3).

27    Ie within the meaning of the Local Government Act 1985 (see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq): Crime and Disorder Act 1998 s 17(3).

28    As to the London Fire and Emergency Planning Authority see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

29    Ie a fire and rescue authority constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 (see FIRE SERVICES) or a scheme to which s 4 (see FIRE SERVICES) applies.

30    As to police authorities see POLICE vol 36(1) (2007 Reissue) PARA 139 et seq.

31    Ie an authority established under the Environment Act 1995 s 63: see the Crime and Disorder Act 1998 s 17(3). As to national park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526 et seq.

32    Ibid s 17(1), (2) (s 17(2) amended by the Greater London Authority Act 1999 s 328, Sch 29 para 63; and the Fire and Rescue Services Act 2004 s 53(1), Sch 1 para 89(1), (3)).

33    For this purpose, 'local authority' means, in relation to England, a county council or a district council and, in relation to Wales, a county council or a county borough council: Criminal Justice and Public Order Act 1994 s 163(4). As to local government areas and authorities in England and Wales see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq.

34 See *ibid* s 163 (amended by the Communications Act 2003 s 406(1), Sch 17 para 130).

35 See the Criminal Justice and Public Order Act 1994 s 169.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### 855 Crime and disorder strategies

TEXT AND NOTES--A relevant authority is under a duty to disclose to all other relevant authorities any information held by the authority which is of a prescribed description, at such intervals and in such form as may be prescribed: Crime and Disorder Act 1998 s 17A(1) (s 17A added by the Police and Justice Act 2006 Sch 9 para 5). In the Crime and Disorder Act 1998 s 17A(1) 'prescribed' means prescribed in regulations made by the Secretary of State: s 17A(2) (s 17A as so added). See the Crime and Disorder (Prescribed Information) Regulations 2007, SI 2007/1831 (amended by SI 2008/1406, SI 2010/656). The Secretary of State may only prescribe descriptions of information which appears to him to be of potential relevance in relation to the reduction of crime and disorder in any area of England and Wales, including anti-social or other behaviour adversely affecting the local environment in that area: Crime and Disorder Act 1998 s 17A(3). Nothing in s 17A requires a relevant authority to disclose any personal data, within the meaning of the Data Protection Act 1998 (see CONFIDENCE AND DATA PROTECTION): Crime and Disorder Act 1998 s 17A(4) (s 17A as so added). In s 17A 'relevant authority' means an authority in England and Wales which is for the time being a relevant authority for the purposes of s 115: s 17A(5).

TEXT AND NOTES 1-3--Every local authority must ensure that it has a crime and disorder committee with power (1) to review or scrutinise decisions made, or other action taken, in connection with the discharge by the responsible authorities of their functions conferred by or under the Crime and Disorder Act 1998 s 6; (2) to make reports or recommendations to the local authority with respect to the discharge of those functions: Police and Justice Act 2006 s 19(1). For this purpose, 'local authority' means, in relation to England, a county council, a district council, a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly and, in relation to Wales, a county council or a county borough council: s 19(11). A local authority must ensure that its crime and disorder committee has power to make a report or recommendations to the local authority with respect to any matter which is a local crime and disorder matter in relation to a member of the authority, and must make arrangements which enable any member of the authority who is not a member of the crime and disorder committee to refer any local crime and disorder matter to the committee: see s 19(3)-(8), (8A), (8B), (11) (s 19(3)-(8), substituted, s 19(8A), (8B) added, s 19(9), (11) amended by the Local Government and Public Involvement in Health Act 2007 s 126(1)-(4)). Further provision is made in relation to local authorities not operating executive arrangements under the Local Government Act 2000 Pt 2 (ss

10-48) by the Police and Justice Act 2006 s 19(10), Sch 8, and in relation to local authorities operating such arrangements by s 19(9).

The Secretary of State (or in relation to Wales, after consulting the Secretary of State, the National Assembly for Wales) may issue guidance to local authorities, members of those authorities, and crime and disorder committees of those authorities, with regard to the exercise of their functions under or by virtue of s 19: s 20(1), (2) (s 20(1), (2), (5), (7) amended, s 20(6A) added by the Local Government and Public Involvement in Health Act 2007 ss 121(2), (3) 126(1), (5)-(7), Sch 18 Pt 6). The Secretary of State may by regulations make provision supplementing that made by the Police and Justice Act 2006 s 19 in relation to local authorities (in relation to local authorities in Wales the Secretary of State must first consult the National Assembly for Wales): see s 20(3)-(6), (6A), (7). See the Crime and Disorder (Overview and Scrutiny) Regulations 2009, SI 2009/942 (amended by SI 2010/616).

TEXT AND NOTE 3--Crime and Disorder Act 1998 s 5(1) further amended: Police and Justice Act 2006 Sch 9 para 2(2); References to Health Authorities Order 2007, SI 2007/961. The appropriate national authority may by order amend the 1998 Act by (1) adding an entry for any person or body to the list of authorities in s 5(1), (2) altering or repealing an entry for the time being included in the list, or (3) adding, altering or repealing provisions for the interpretation of entries in the list: s 5(6) (s 5(6)-(8) added by the Police and Justice Act 2006 Sch 9 para 2(5)). In the Crime and Disorder Act 1998 s 5 the 'appropriate national authority', in relation to a person or body means (a) the National Assembly for Wales, if all the functions of the person or body are devolved Welsh functions; (b) the Secretary of State and the Assembly acting jointly, if the functions of the person or body include devolved Welsh functions and other functions; and (c) the Secretary of State, if none of the functions of the person or body are devolved Welsh functions: Crime and Disorder Act 1998 s 5(7) (as so added). In s 5(7), 'devolved Welsh functions' means functions which are dischargeable only in relation to Wales and relate to matters in relation to which the National Assembly has functions: s 5(8) (as so added).

NOTE 3--An order under the Crime and Disorder Act 1998 s 5(1A) (1) may require the councils for the local government areas in question to appoint a joint crime and disorder committee and to arrange for crime and disorder scrutiny functions in relation to any (or all) of those councils to be exercisable by that committee; (2) may make provision applying any of the Police and Justice Act 2006 ss 19-21, Sch 8, and any regulations made under s 20 (see TEXT AND NOTES 1-3), with or without modifications, in relation to a joint crime and disorder committee: Crime and Disorder Act 1998 s 5(1C), (1D) (added by the Police and Justice Act 2006 s 21). 'Crime and disorder scrutiny functions', in relation to a council, means functions that are, or, but for an order under the Crime and Disorder Act 1998 s 5(1A), would be, exercisable by the crime and disorder committee of the council under the Police and Justice Act 2006 s 19: Crime and Disorder Act 1998 s 5(1D).

See also the Crime and Disorder Act 1998 (Responsible Authorities) (No 2) Order 2007, SI 2007/1839, and the Crime and Disorder Act 1998 (Responsible Authorities) Order 2009, SI 2009/1033, made under the Crime and Disorder Act 1998 s 5(1A) (amended by the Police and Justice Act 2006 Sch 9 para 2(3)). For 'drugs' read 'drugs, alcohol and other substance': Crime and Disorder Act 1998 s 5(1B) (amended by the 2006 Act Sch 9 para 2(4)). Crime and Disorder Act 1998 s 115 further amended: Police and Justice Act 2006 Sch 9 para 7; SI 2008/912.

NOTES 4, 9--SI 1998/2452 (as amended) revoked in relation to Wales: SI 2009/3050.

TEXT AND NOTE 6--1998 Act s 5(2) further amended: SI 2008/912.



TEXT AND NOTES 10-24--The responsible authorities for a local government area must, in accordance with the 1998 Act s 5 (TEXT AND NOTES 1-3) and with regulations made under s 6(2), formulate and implement (1) a strategy for the reduction of crime and disorder in the area, including anti-social and other behaviour adversely affecting the local environment; and (2) a strategy for combating the misuse of drugs, alcohol and other substances in the area: s 6(1) (s 6(1)-(9) substituted by the 2006 Act Sch 9 para 3). The appropriate national authority may by regulations make further provision as to the formulation and implementation of a strategy under s 6: s 6(2)). Regulations under s 6(2) may in particular make provision for or in connection with (a) the time by which a strategy must be prepared and the period to which it is to relate (b) the procedure to be followed by the responsible authorities in preparing and implementing a strategy, including requirements as to the holding of public meetings and other consultation; (c) the conferring of functions on any one or more of the responsible authorities in relation to the formulation and implementation of a strategy; (d) matters to which regard must be had in formulating and implementing a strategy; (e) objectives to be addressed in strategy and performance targets in respect of those objectives; (f) the sharing of information between responsible authorities; (g) the publication and dissemination of a strategy; (h) the preparation of reports on the implementation of a strategy: s 6(3). The provision which may be made under s 6(2) includes provision for or in connection with the conferring of functions on a committee of, or a particular member or officer of, any of the responsible authorities: s 6(4). The matters referred to in head (d), may in particular include guidance given by the appropriate national authority in connection with the formulation or implementation of a strategy: s 6(5). Provision under head (e) may require a strategy to be formulated so as to address, in particular, the reduction of crime or disorder of a particular description or the combating of a particular description of misuse of drugs, alcohol or other substances: s 6(6). Regulations under s 6 may make different provision for different local government areas or supplementary or incidental provision: s 6(7). For the purposes of s 6 any reference to the implementation of a strategy includes keeping it under review for the purposes of monitoring its effectiveness and making any changes to it that appear necessary or expedient: s 6(8). In s 6 the 'appropriate national authority' is (i) the Secretary of State, in relation to strategies for areas in England; (ii) the National Assembly for Wales, in relation to strategies for combating the misuse of drugs, alcohol or other substances in areas in Wales; (iii) the Secretary of State and the Assembly acting jointly, in relation to strategies for combating crime and disorder in areas in Wales: s 6(9). See the Substance Misuse (Formulation and Implementation of Strategy) (Wales) Regulations 2007, SI 2007/3078.

TEXT AND NOTES 10-16--See the Crime and Disorder (Formulation and Implementation of Strategy) Regulations 2007, SI 2007/1830 (amended by SI 2010/647) ; and the Crime and Disorder (Formulation and Implementation of Strategy) (Wales) Regulations 2007, SI 2007/3076 (amended by SI 2010/648).

TEXT AND NOTES 26-32--The 1998 Act s 17 applies to each of the following: (1) a local authority; (2) a joint authority; (3) a combined authority established under the Local Democracy, Economic Development and Construction Act 2009 s 103; (4) the London Fire and Emergency Planning Authority; (5) a fire and rescue authority constituted by a scheme under the 2004 Act s 2 or a scheme to which s 4 applies; (6) a metropolitan county fire authority; (7) a police authority; (8) a National Park authority; (9) the Broads Authority; (10) the Greater London Authority; (11) the London Development Agency; and (12) Transport for London: 1998 Act s 17(2) (s 17(2) substituted by the 2006 Act Sch 9 para 4(3); and amended by SI 2008/78, Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 90). The appropriate national authority may by order amend the 1998 Act s 17 by (a) adding an entry for any person or body to the list of authorities in s 17(2); (b) altering or repealing any entry for the

time being included in the list; or (c) adding, altering or repealing provisions for the interpretation of entries in the list: s 17(4) (s 17(4), (5) added by the 2006 Act Sch 9 para 4(4)). In the 1998 Act s 17(4) 'the appropriate national authority' has the same meaning as in s 5 (see TEXT AND NOTE 3): s 17(5).

TEXT AND NOTE 32--For 'crime and disorder in their areas' read 'crime and disorder in their areas, including anti-social and other behaviour adversely affecting the local environment and the misuse of drugs, alcohol and other substances in their areas': 1998 Act s 17(1) (amended by the 2006 Act Sch 9 para 4(2)).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(2) INTRODUCTION TO POLICE POWERS/856. Introduction.

## **(2) INTRODUCTION TO POLICE POWERS**

### **856. Introduction.**

The statutory powers to stop and search<sup>1</sup>, of entry, search and seizure<sup>2</sup>, arrest<sup>3</sup>, detention<sup>4</sup>, questioning and treatment by the police<sup>5</sup> are contained in the Police and Criminal Evidence Act 1984<sup>6</sup> and the codes of practice made under it<sup>7</sup>. The Secretary of State must issue codes of practice in connection with<sup>8</sup>:

- 1024 (1) the exercise by police officers of statutory powers to search a person without first arresting him, or to search a vehicle without making an arrest, or to arrest a person<sup>9</sup>;
- 1025 (2) the detention, treatment, questioning<sup>10</sup> and identification<sup>11</sup> of persons by police officers<sup>12</sup>;
- 1026 (3) searches of premises by police officers<sup>13</sup>; and
- 1027 (4) the seizure of property found by police officers on persons or premises<sup>14</sup>.

It is also the duty of the Secretary of State:

- 1028 (a) to issue a code of practice in connection with the tape-recording of interviews of persons suspected of the commission of criminal offences which are held by police officers at police stations<sup>15</sup>; and
- 1029 (b) to make an order<sup>16</sup> requiring the tape-recording of interviews of persons suspected of the commission of criminal offences, or of such description of criminal offences as may be specified in the order, which are so held, in accordance with the code as it has effect for the time being<sup>17</sup>.

In addition, the Secretary of State has power:

- 1030 (i) to issue a code of practice<sup>18</sup> for the visual recording of interviews held by police officers at police stations<sup>19</sup>; and
- 1031 (ii) to make an order requiring the visual recording of interviews so held, and requiring the visual recording to be in accordance with the code for the time being in force<sup>20</sup>.

The Secretary of State may at any time revise the whole or part of any such code<sup>21</sup>. A code may be made, or revised, so as to apply only in relation to one or more specified areas, have effect only for a specified period, or apply only in relation to specified offences or descriptions of offender<sup>22</sup>.

Before issuing a code, or any revision of such a code, the Secretary of State must consult: (A) persons whom he considers to represent the interests of police authorities; (B) persons whom he considers to represent the interests of chief officers of police; (C) the General Council of the Bar; (D) the Law Society of England and Wales; (E) the Institute of Legal Executives; and (F) such other persons as he thinks fit<sup>23</sup>.

Such a code, or a revision of a code, does not come into operation until the Secretary of State by order made by statutory instrument so provides<sup>24</sup>. An order bringing a code into operation may not be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House of Parliament<sup>25</sup>.

Persons other than police officers who are charged with the duty of investigating offences<sup>26</sup> or charging offenders must in the discharge of that duty have regard to any relevant provision of a code<sup>27</sup>. Police authority employees on whom police powers are conferred by any designation<sup>28</sup> or by any accreditation under a community safety accreditation scheme<sup>29</sup> must have regard to any relevant provision of a code in the exercise or performance of the powers and duties conferred or imposed on them by that designation or accreditation<sup>30</sup>.

A failure on the part: (aa) of a police officer to comply with any provision of such a code; (bb) of any person other than a police officer who is charged with the duty of investigating offences or charging offenders to have regard to any relevant provision of such a code in the discharge of that duty; or (cc) of a person so designated or so accredited<sup>31</sup> to have regard to any relevant provision of a code in the exercise or performance of the powers and duties conferred or imposed on him by that designation or accreditation, does not of itself render him liable to any criminal or civil proceedings<sup>32</sup>.

1 See the Police and Criminal Evidence Act 1984 Pt I (ss 1-7) (as amended); and PARA 860 et seq post.

2 See *ibid* Pt II (ss 8-23) (as amended); and PARA 873 et seq post.

3 See *ibid* Pt III (ss 24-33) (as amended); and PARA 924 et seq post.

4 See *ibid* Pt IV (ss 34-51) (as amended); and PARA 938 et seq post.

5 See *ibid* Pt V (ss 53-65) (as amended); and PARAS 952, 1006-1007, 1021 et seq post.

6 The Treasury may by order direct that any provision of the Police and Criminal Evidence Act 1984 relating to investigations of offences by police officers or to persons detained by the police is to apply, subject to any modifications specified in the order, to investigations conducted by officers of Revenue and Customs which relate to assigned matters, as defined in the Customs and Excise Management Act 1979 s 1 (as amended) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 900), or to persons detained by such persons: see the Police and Criminal Evidence Act 1984 s 114(2); and the Commissioners for Revenue and Customs Act 2005 s 50(2), (7). As to the order that has been made see the Police and Criminal Evidence Act 1984 (Application to Customs and Excise) Order 1985, SI 1985/1800 (amended by SI 1987/439; SI 1995/3217; SI 1996/1860; SI 2005/3389). As to the list of provisions applied to Customs and Excise see the Police and Criminal Evidence Act 1984 (Application to Customs and Excise) Order 1985, SI 1985/1800, Sch 1 (amended by SI 1987/439; SI 1995/3217; SI 2005/3389). As to officers of Revenue and Customs see PARA 354 note 2 ante. As to the application of the Police and Criminal Evidence Act 1984 to Department of Trade and Industry investigations see PARA 878 note 1 post.

7 The codes of practice have undergone revision and replacement on various occasions. The codes in operation at the date at which this volume states the law came into force on either 1 January 2006 (in the case of Codes A, B, D, E, F, G) or 25 July 2006 (in the case of Code C): Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2005, SI 2005/3503, arts 2, 3; Police and Criminal Evidence Act 1984 (Code of Practice C and Code of Practice H) Order 2006, SI 2006/1938, art 2. The codes are Crown copyright and are reproduced by permission of the Controller of Her Majesty's Stationery Office.

8 See the Police and Criminal Evidence Act 1984 s 66(1). Codes must (in particular) include provisions in connection with the exercise by police officers of powers under s 63B (as added and amended) (see PARA 1031 post): s 66(2) (added by the Criminal Justice and Court Services Act 2000 s 57(4)).

9 See the Police and Criminal Evidence Act 1984 s 66(1)(a) (amended by the Serious Organised Crime and Police Act 2005 ss 110(3), 174(2), Sch 17 Pt 2). See Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search (see PARA 859 et seq post) and Code G: Code of Practice for the Statutory Power of Arrest by Police Officers (see PARA 908 et seq post).

10 See Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers; and PARA 908 et seq post. See also Code H: Code of Practice in connection with the Detention, Treatment and Questioning by Police Officers of Persons under Section 41 of, and Schedule 8 to, the Terrorism Act 2000; and PARA 421 et seq ante.

11 See Code D: Code of Practice for the Identification of Persons by Police Officers; and PARA 1010 et seq post.

12 Police and Criminal Evidence Act 1984 s 66(1)(b).

13 Ibid s 66(1)(c). See Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises; and PARA 869 et seq post.

14 Police and Criminal Evidence Act 1984 s 66(1)(d). See Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises; and PARA 869 et seq post.

15 Police and Criminal Evidence Act 1984 s 60(1)(a). See Code E: Code of Practice on Tape-recording; and PARA 971 et seq post.

16 An order under the Police and Criminal Evidence Act 1984 s 60(1) must be made by statutory instrument and is subject to annulment in pursuance of a resolution of either House of Parliament: s 60(2).

17 Ibid s 60(1)(b).

18 See Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects; and PARA 986 et seq post.

19 Police and Criminal Evidence Act 1984 s 60A(1)(a) (s 60A added by the Criminal Justice and Police Act 2001 s 76(1)).

20 Police and Criminal Evidence Act 1984 s 60A(1)(b) (as added: see note 19 supra). A requirement imposed by an order under s 60A (as added) may be imposed in relation to such cases or police stations in such areas, or both, as may be specified or described in the order: s 60A(2) (as so added). An order under s 60A(1) (as added) must be made by statutory instrument and is subject to annulment in pursuance of a resolution of either House of Parliament: s 60A(3) (as so added). In s 60A(1) (as added), references to any interview are references to an interview of a person suspected of a criminal offence, and references to a visual recording include references to a visual recording in which an audio recording is comprised: s 60A(4) (as so added).

21 Ibid s 67(2) (s 67(1)-(7) substituted, and s 67(7A)-(7D) added, by the Criminal Justice Act 2003 s 11(1)). 'Code' in the Police and Criminal Evidence Act 1984 s 67 (as amended) means a code of practice under s 60, s 60A (as added) or s 66 (as amended) (see the text and notes 1-20 supra): see s 67(1) (as so substituted).

22 Ibid s 67(3) (as substituted: see note 21 supra).

23 Ibid s 67(4) (as substituted: see note 21 supra).

24 Ibid s 67(5), (6) (as substituted: see note 21 supra). An order bringing a revision of such a code into operation must be laid before Parliament if the order has been made without a draft having been so laid and approved by a resolution of each House: s 67(7A) (as added: see note 21 supra). When an order or draft of an order is laid under s 67 (as amended), the code or revision of a code to which it relates must also be laid: s 67(7B) (as added: see note 21 supra). No order or draft of an order may be laid until the consultation required by s 67(4) (as substituted) (see the text to note 23 supra) has taken place: s 67(7C) (as added: see note 21 supra). An order bringing such a code, or a revision of such a code, into operation may include transitional or saving provisions: s 67(7D) (as added: see note 21 supra).

25 Ibid s 67(7) (as substituted: see note 21 supra). See also s 67(7B), (7C), (7D) (as added); and note 24 supra.

26 Civil penalty proceedings do not involve an 'offence' for these purposes; 'offence' in the Police and Criminal Evidence Act 1984 means an offence prosecuted in the criminal courts: *Khan (t/a Greyhound Dry Cleaners) v Customs and Excise Commissioners* [2005] EWHC 653, [2005] STC 1271.

27 Police and Criminal Evidence Act 1984 s 67(9) (amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 1). This includes officers of Revenue and Customs investigating an offence (*R v Okafar* (1994) 99 Cr App Rep 97, CA; *R v Weendesteyn* [1995] 1 Cr App Rep 405; *R v Gill* [2003] EWCA Crim 2256, [2003] 4 All ER 681) and Serious Fraud Office officers (*R v Director of Serious Fraud Office, ex p Saunders* [1988] Crim LR 837, DC). A store detective may be a person charged with investigating offences under the Police and Criminal Evidence Act 1984 s 67(9) (as amended) but it is a question of fact in each case depending on his terms of employment: *R v Bayliss* (1993) 98 Cr App Rep 235, CA. It has been assumed by the Divisional Court that an RSPCA inspector falls within the Police and Criminal Evidence Act 1984 s 67(9) (as amended): *RSPCA v Eager* [1995] Crim LR 59, DC. See also *Joy v Federation against Corynpit Theft Ltd* [1993] Crim LR 588, DC; *R v Twaites, R v Brown* (1990)

92 Cr App Rep 106, CA. As to those who have been held not to have a duty of investigating or charging see *R v Seeling*, *R v Lord Spens* (1992) 94 Cr App Rep 17, CA (DTI inspectors conducting an inquiry under the Companies Act 1985 ss 432, 434); *R v Smith* (1994) 99 Cr App Rep 223, CA (Bank of England manager exercising supervisory powers under the Banking Act 1987); *DPP v G* (1997) Times, 24 November, DC (head teacher, in absence of contractual duty to investigate etc). See also *R v Ristic* [2004] EWCA Crim 2107, (2004) 148 Sol Jo LB 492 (prison support officer whose function was to search visitors was not a person charged with the duty of investigating offences; but a prison officer who overheard an incriminating remark by a prisoner was in an analogous position to a police officer who, while not involved in investigation, overheard a remark by the suspect, and, like such a police officer, should comply with the provisions of Code C (see PARA 908 et seq post) and record the remark as soon as possible).

28     Ie under the Police Reform Act 2002 ss 38, 39 (s 38 as amended): see POLICE vol 36(1) (2007 Reissue) PARAS 529, 531.

29     Ie under ibid s 41: see POLICE vol 36(1) (2007 Reissue) PARA 533.

30     Police and Criminal Evidence Act 1984 s 67(9A) (added by the Police Reform Act 2002 s 107(1), Sch 7 para 9(7); and amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 1). A police officer may be liable to disciplinary proceedings for a failure to comply with any provision of such a code: see POLICE vol 36(1) (2007 Reissue) PARA 273.

31     See the text and notes 28-29 supra.

32     Police and Criminal Evidence Act 1984 s 67(10) (amended by the Police Reform Act 2002 s 107(1), (2), Sch 7 para 9(8), Sch 8; and the Criminal Justice Act 2003 s 332, Sch 37 Pt 1). For these purposes, 'criminal proceedings' includes: (1) proceedings in the United Kingdom or elsewhere before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957; (2) proceedings before the Courts-Martial Appeal Court; and (c) proceedings before a standing civilian court: Police and Criminal Evidence Act 1984 s 67(12) (amended by the Armed Forces Act 2001 s 38, Sch 7 Pt 1). Breach of a code may render inadmissible any evidence to which the breach relates: see PARAS 1457, 1540 et seq post. As to the admissibility in evidence of any such code see PARA 1550 et seq post.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### 856 Introduction

NOTE 6--Police and Criminal Evidence Act 1984 s 114(2) amended: Finance Act 2007 s 82. SI 1985/1800 (as amended) replaced: Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007, SI 2007/3175 (amended by SI 2010/360).

NOTES 7, 9-15--Revised Codes A, B, C, D, E came into operation on 1 February 2008: Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2008, SI 2008/167.

TEXT AND NOTE 23--Now, head (A) the Association of Police Authorities, and head (B) the Association of Chief Police Officers of England, Wales and Northern Ireland: 1984 Act s 67(4) (amended by Police and Justice Act 2006 Sch 4 para 1).

NOTE 32--Police and Criminal Evidence Act 1984 s 67(12), (13) substituted for s 67(12): Armed Forces Act 2006 Sch 16 para 101.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(2) INTRODUCTION TO POLICE POWERS/857. Power of constable to use reasonable force.

### **857. Power of constable to use reasonable force.**

Where any provision of the Police and Criminal Evidence Act 1984<sup>1</sup> confers a power on a constable<sup>2</sup>, and does not provide that the power may only be exercised with the consent of some person, other than a police officer, the officer may use reasonable force<sup>3</sup>, if necessary, in the exercise of the power<sup>4</sup>.

<sup>1</sup> See PARA 860 et seq post.

<sup>2</sup> Every police officer holds the office of constable: *Lewis v Cattle* [1938] 2 KB 454 at 457, [1938] 2 All ER 368 at 370, DC.

<sup>3</sup> Whether the force used was reasonable depends on the facts and has to be gauged in the context of the purpose for which the force was being used: *DPP v Meaden* [2003] EWHC 3005 (Admin), [2004] 4 All ER 75, [2004] 1 WLR 945. As to the use of 'reasonable force' see note 4 infra; and PARAS 20 ante, 926 post.

<sup>4</sup> Police and Criminal Evidence Act 1984 s 117. Persons who have specified powers and duties of police officers conferred or imposed on them ('designated persons') are entitled to use reasonable force at certain times, for example: (1) when at a police station carrying out the duty to keep detainees for whom they are responsible under control and to assist any other police officer or designated person to keep any detainee under control and to prevent his escape; (2) when securing or assisting any other police officer in securing the detention of a person at police station; (3) when escorting, or assisting any other police officer or designated person in escorting, a detainee within a police station; (4) for the purpose of saving life or limb; or (5) preventing serious damage to property: see Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 1.13, 1.14.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(2) INTRODUCTION TO POLICE POWERS/858. Delegation of authority by police officers.

### **858. Delegation of authority by police officers.**

For the purpose of any provision of the Police and Criminal Evidence Act 1984 or any other Act under which a power in respect of the investigation of offences<sup>1</sup> or the treatment of persons in police custody<sup>2</sup> is exercisable only by or with the authority of a police officer of at least the rank of superintendent, an officer of the rank of chief inspector is to be treated as holding the rank of superintendent if he has been authorised by an officer holding a rank above the rank of superintendent to exercise the power or, as the case may be, to give his authority for its exercise or if he is acting during the absence of an officer holding the rank of superintendent who has authorised him, for the duration of that absence, to exercise the power or, as the case may be, to give his authority for its exercise<sup>3</sup>.

For the purpose of any provision of the Police and Criminal Evidence Act 1984 or any other Act under which any such power is exercisable only by or with the authority of a police officer a police officer of at least the rank of inspector, an officer of the rank of sergeant is to be treated as holding the rank of inspector if he has been authorised by an officer of at least the rank of superintendent to exercise the power or, as the case may be, to give his authority for its exercise<sup>4</sup>.

1 See PARA 860 et seq post.

2 See PARA 938 et seq post.

3 Police and Criminal Evidence Act 1984 s 107(1) (s 107 amended by the Police and Magistrates' Courts Act 1994 s 44, Sch 5 Pt II para 35(1), (2)). The holder of an acting rank is to be treated as if he were the holder of the substantive rank, unless his appointment to the acting rank is a colourable pretence: *R v Alladice* (1988) 87 Cr App Rep 380, CA.

4 Police and Criminal Evidence Act 1984 s 107(2) (as amended: see note 3 supra). This provision is applied in Code B: Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises para 2.7; Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 1.9A; Code D: Code of Practice for the Identification of Persons by Police Officers para 2.9.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(3) CODE OF PRACTICE TO STOP AND SEARCH/859. Code of practice.

### **(3) CODE OF PRACTICE TO STOP AND SEARCH**

#### **859. Code of practice.**

A constable's powers to stop and search persons, vehicles etc are governed by the Police and Criminal Evidence Act 1984<sup>1</sup> and by Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search<sup>2</sup>.

<sup>1</sup> The Police and Criminal Evidence Act 1984 Pt I (ss 1-7) (as amended): see PARA 860 et seq post. As to powers of search under the Terrorism Act 2000 ss 43-45 (as amended) see PARAS 426-427 ante.

<sup>2</sup> The version of Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search current at the date at which this volume states the law applies only to any search by a police officer which commenced after midnight on 31 December 2005 (see the Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2005, SI 2005/3503, art 2) and governs the exercise by police officers of statutory powers to search a person without first arresting him or to search a vehicle without making an arrest (see Code A general introduction). Code A must be readily available at all police stations for consultation by police officers, detained persons and members of the public: see Code A general introduction. Code A has been modified: see the Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Code A) Order 2006, SI 2006/2165.

As to the main stop and search powers to which Code A applies, which were in existence at the time when the Code was prepared, see Code A general introduction, Annex A. The powers listed are a number of powers requiring reasonable suspicion, including the power under the Police and Criminal Evidence Act 1984 s 1 (as amended) (see PARA 860 post) and those set out in PARA 861 post and the powers to stop and search under an authorisation given under the Criminal Justice and Public Order Act 1994 s 60 (as amended) (see PARA 862 post) or the Terrorism Act 2000 s 44(1) or (2) (see PARA 427 ante). They also apply to a search by an examining officer under the Terrorism Act 2000 Sch 7 paras 7, 8 (see PARA 432 ante). The list in Code A Annex A should not, however, be regarded as definitive: see Code A general introduction.

Code A also applies to powers to search a person who has not been arrested in the exercise of a power to search premises (see Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 2.4; and PARA 869 post): Code A para 2.1. Code A also covers requirements for police officers and police staff to record encounters not governed by statutory powers: see Code A general introduction.

Code A does not apply: (1) to the powers of stop and search under the Aviation Security Act 1982 s 27(2) (see AIR LAW vol 2 (2008) PARA 327) and the Police and Criminal Evidence Act 1984 s 6(1) (powers of constables employed by statutory undertakers on the premises of those undertakers: see PARA 868 post); or (2) searches carried out for the purposes of examination under the Terrorism Act 2000 Sch 7 (as amended) and to which the Code of Practice issued under the Terrorism Act 2000 Sch 14 para 6 (as amended) applies (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 545): see Code A general introduction.

The notes for guidance included in Code A are not provisions of the Code, but are guidance to police officers and others about its application and interpretation: Code A general introduction. Provisions in the Annexes to Code A are, however, provisions of the Code: see Code A general introduction.

Code A sets out the following principles governing stop and search:

- 280 (a) Powers to stop and search must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination. The Race Relations (Amendment) Act 2000 (see DISCRIMINATION vol 13 (2007 Reissue) PARA 455) makes it unlawful for police officers to discriminate on the grounds of race, colour, ethnic origin, nationality or national origins when using their powers (Code A para 1.1).

- 281 (b) The intrusion on the liberty of the person stopped or searched must be brief and detention for the purposes of a search must take place at or near the location of the stop (Code A para 1.2).
- 282 (c) If these fundamental principles are not observed the use of powers to stop and search may be drawn into question. Failure to use the powers in the proper manner reduces their effectiveness. Stop and search can play an important role in the detection and prevention of crime, and using the powers fairly makes them more effective (Code A para 1.3).
- 283 (d) The primary purpose of stop and search powers is to enable officers to allay or confirm suspicions about individuals without exercising their power of arrest. Officers may be required to justify the use or authorisation of such powers, in relation both to individual searches and the overall pattern of their activity in this regard, to their supervisory officers or in court. Any misuse of the powers is likely to be harmful to policing and lead to mistrust of the police. Officers must also be able to explain their actions to the member of the public searched. The misuse of these powers can lead to disciplinary action (Code A para 1.4).
- 284 (e) An officer must not search a person, even with his consent, where no power to search is applicable. Even where a person is prepared to submit to a search voluntarily, the person must not be searched unless the necessary legal power exists, and the search must be in accordance with the relevant power and the provisions of the Code. The only exception, where an officer does not require a specific power, applies to searches of persons entering sports grounds or other premises carried out with their consent given as a condition of entry (Code A para 1.5).

Code A does not affect the ability of an officer to speak to or question a person in the ordinary course of the officer's duties without detaining the person or exercising any element of compulsion. It is not the purpose of the code to prohibit such encounters between the police and the community with the co-operation of the person concerned and neither does it affect the principle that all citizens have a duty to help police officers to prevent crime and discover offenders. This is a civic rather than a legal duty; but when a police officer is trying to discover whether, or by whom, an offence has been committed he may question any person from whom useful information might be obtained, subject to the restrictions imposed by Code C (see PARA 908 et seq post). A person's unwillingness to reply does not alter this entitlement, but in the absence of a power to arrest, or to detain in order to search, the person is free to leave at will and cannot be compelled to remain with the officer. See Code A Guidance note 1.

As to the codes of practice made under the Police and Criminal Evidence Act 1984 generally see PARA 856 ante.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **859 Code of practice**

NOTE 2--Revised Code A came into operation on 1 February 2008 (see SI 2008/167 art 2) and has been further modified (see SI 2008/2638; SI 2008/3146).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(3) CODE OF PRACTICE TO STOP AND SEARCH/860. Powers of constable to stop and search persons, vehicles etc.

### **860. Powers of constable to stop and search persons, vehicles etc.**

A constable<sup>1</sup> may exercise any of the following powers to stop and search:

- 1032 (1) in any place to which at the time when he proposes to exercise the power the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission<sup>2</sup>; or
- 1033 (2) in any other place to which people have ready access at the time when he proposes to exercise the power but which is not a dwelling<sup>3</sup>.

A constable may search any person or vehicle<sup>4</sup> and anything which is in or on a vehicle for stolen or prohibited articles<sup>5</sup> or any specified article<sup>6</sup> or firework<sup>7</sup>, and may detain a person or vehicle for the purpose of such a search<sup>8</sup>. The above provisions do not, however, give a constable power to search a person or vehicle or anything in or on a vehicle unless he has reasonable grounds for suspecting<sup>9</sup> that he will find stolen or prohibited articles or a specified article or firework<sup>10</sup>.

If a person is in a garden or yard occupied with and used for the purposes of a dwelling or on other land so occupied and used, a constable may not search him in the exercise of the above power unless the constable has reasonable grounds for believing that he does not reside in the dwelling, and that he is not in the place in question with the express or implied permission of a person who resides in the dwelling<sup>11</sup>.

If a vehicle is in a garden or yard occupied with and used for the purposes of a dwelling or on other land so occupied and used, a constable may not search the vehicle or anything in or on it in the exercise of the above power unless he has reasonable grounds for believing that the person in charge of the vehicle does not reside in the dwelling, and that the vehicle is not in the place in question with the express or implied permission of a person who resides in the dwelling<sup>12</sup>.

If in the course of such a search a constable discovers an article which he has reasonable grounds for suspecting to be a stolen or prohibited article or a specified article or firework, he may seize it<sup>13</sup>.

1 See PARA 857 note 2 ante.

2 Police and Criminal Evidence Act 1984 s 1(1)(a).

3 Ibid s 1(1)(b).

4 Ibid s 1 (as amended) and s 2 (see PARA 864 post) apply to vessels, aircraft and hovercraft as they apply to vehicles: s 2(10). For these purposes, 'vessel' means any ship, boat, raft or other apparatus constructed or adapted for floating on water: s 118(1).

5 An article is prohibited for these purposes if it is: (1) an offensive weapon; or (2) an article made or adapted for use in the course of, or in connection with, a specified offence or intended by the person having it with him for such use by him or by some other person: *ibid* s 1(7). The offences specified are: (a) burglary (see PARA 294 ante); (b) theft (see PARA 282 ante); (c) offences under the Theft Act 1968 s 12 (as amended) (taking motor vehicle or other conveyance without authority: see PARA 298 ante); (d) offences under s 15 (obtaining

property by deception: see PARA 310 ante); (e) offences under the Criminal Damage Act 1971 s 1 (destroying or damaging property: see PARA 334 ante): Police and Criminal Evidence Act 1984 s 1(8) (amended by the Criminal Justice Act 2003 ss 1(2), 332, Sch 37 Pt 1). For these purposes, 'offensive weapon' means any article: (i) made or adapted for use for causing injury to persons; or (ii) intended by the person having it with him for such use by him or by some other person: Police and Criminal Evidence Act 1984 s 1(9).

6     le an article in relation to which a person has committed, or is committing or is going to commit an offence under the Criminal Justice Act 1988 s 139 (as amended) (having an article with a blade or point in a public place: see PARA 700 ante): Police and Criminal Evidence Act 1984 s 1(8A) (added by the Criminal Justice Act 1988 s 140(1)(c)).

7     le a firework which a person possesses in contravention of a prohibition imposed by fireworks regulations: Police and Criminal Evidence Act 1984 s 1(8B) (added by the Serious Organised Crime and Police Act 2005 s 115(1), (5)). For these purposes, 'firework' must be construed in accordance with the definition of 'fireworks' in the Fireworks Act 2003 s 1(1); and 'firework regulations' has the same meaning as in that Act (see EXPLOSIVES vol 17(2) (Reissue) PARA 908): Police and Criminal Evidence Act 1984 s 1(8C) (added by the Serious Organised Crime and Police Act 2005 s 115(1), (5)).

8     Police and Criminal Evidence Act 1984 s 1(2) (amended by the Criminal Justice Act 1988 s 140(1)(a); the Serious Organised Crime and Police Act 2005 s 115(1), (2)). As to a constable's power to seize a stolen or prohibited article see PARA 865 post.

9     For the meaning of 'reasonable grounds for suspicion' see PARA 861 post.

10    Police and Criminal Evidence Act 1984 s 1(3) (amended by the Criminal Justice Act 1988 s 140(1)(a); and the Serious Organised Crime and Police Act 2005 s 115(1), (3)).

11    Police and Criminal Evidence Act 1984 s 1(4).

12    Ibid s 1(5).

13    Ibid s 1(6) (amended by the Criminal Justice Act 1988 s 140(1)(b); and the Serious Organised Crime and Police Act 2005 s 115(1), (4)).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **860-862 Powers of constable to stop and search persons, vehicles etc ... Powers of police to stop and search in anticipation of [, or after] violence**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **860 Powers of constable to stop and search persons, vehicles etc**

NOTE 5--For head (d) now read 'fraud (contrary to the Fraud Act 2006 s 1)': 1984 Act s 1(8)(d) (substituted by Fraud Act 2006 Sch 1 para 21).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12.

ENFORCEMENT PROCEDURES/(3) CODE OF PRACTICE TO STOP AND SEARCH/861. Reasonable grounds for suspicion.

### **861. Reasonable grounds for suspicion.**

The exercise of the power under the Police and Criminal Evidence Act 1984 to stop and search<sup>1</sup> and of a number of other statutory powers of stop and search<sup>2</sup> requires reasonable grounds for suspicion that articles of a particular kind are being carried<sup>3</sup>.

Reasonable grounds for suspicion depend on the circumstances in each case<sup>4</sup>. There must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind<sup>5</sup>. Reasonable suspicion can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour by the person concerned. For example, a person's race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity; a person's religion cannot be considered as reasonable grounds for suspicion and should never be considered as a reason to stop or stop and search an individual<sup>6</sup>.

Reasonable suspicion can sometimes exist without specific information or intelligence and on the basis of some level of generalisation stemming from the behaviour of a person<sup>7</sup>. However, reasonable suspicion should normally be linked to accurate and current intelligence or information, such as information describing an article being carried, a suspected offender, or a person who has been seen carrying a type of article known to have been stolen recently from premises in the area. Searches based on accurate and current intelligence or information are more likely to be effective<sup>8</sup>.

1    le the power of stop and search under the Police and Criminal Evidence Act 1984 s 1 (as amended); see Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search; and PARA 860 ante.

2    le under the Poaching Prevention Act 1862 s 2 (as amended) (see ANIMALS vol 2 (2008) PARA 795); the Public Stores Act 1875 s 6 (see PARA 542 ante); the Firearms Act 1968 s 47 (see PARA 694 ante); the Conservation of Seals Act 1970 s 4 (as amended) (see AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 1098); the Misuse of Drugs Act 1971 s 23 (as amended) (see PARA 781 ante); the Customs and Excise Management Act 1979 s 163 (as amended) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1149); the Wildlife and Countryside Act 1981 s 19 (as amended); the Aviation Security Act 1982 s 27(1) (see AIR LAW vol 2 (2008) PARA 327); the Sporting Events (Control of Alcohol etc) Act 1985 s 7 (as amended) (see PARA 597 ante); the Crossbows Act 1987 s 4 (see PARA 708 ante); the Criminal Justice Act 1988 s 139B (as added) (see PARA 701 ante); the Deer Act 1991 s 12 (as amended) (see ANIMALS vol 2 (2008) PARA 982); the Protection of Badgers Act 1992 s 11 (see ANIMALS vol 2 (2008) PARA 989); and the Terrorism Act 2000 s 43 (see PARA 426 ante).

3    See Code A para 2.2.

4    See Code A para 2.2.

5    Or, in the case of searches under the Terrorism Act 2000 s 43 (see PARA 426 ante) to the likelihood that the person is a terrorist.

6    See Code A para 2.2.

7 See Code A para 2.3. For example, if an officer encounters someone on the street at night who is obviously trying to hide something, the officer may (depending on the other surrounding circumstances) base such suspicion on the fact that this kind of behaviour is often linked to stolen or prohibited articles being carried. Similarly, for the purposes of the Terrorism Act 2003 s 43 (see PARA 426 ante), suspicion that a person is a terrorist may arise from the person's behaviour at or near a location which has been identified as a potential target for terrorists: see Code A para 2.3.

8 See Code A para 2.4. Targeting searches in a particular area at specified crime problems increases their effectiveness and minimises inconvenience to law-abiding members of the public. It also helps in justifying the use of searches both to those who are searched and to the public. This does not however prevent stop and search powers being exercised in other locations where such powers may be exercised and reasonable suspicion exists: see Code A para 2.4.

Searches are more likely to be effective, legitimate, and secure public confidence when reasonable suspicion is based on a range of factors. The overall use of these powers is more likely to be effective when up to date and accurate intelligence or information is communicated to officers and they are well-informed about local crime patterns: Code A para 2.5.

Where there is reliable information or intelligence that members of a group or gang habitually carry knives unlawfully or weapons or controlled drugs, and wear a distinctive item of clothing or other means of identification to indicate their membership of the group or gang, that distinctive item of clothing or other means of identification may provide reasonable grounds to stop and search a person: Code A para 2.6. Other means of identification might include jewellery, insignias, tattoos or other features which are known to identify members of the particular gang or group: Code A Guidance note 9.

A police officer may have reasonable grounds to suspect that a person is in innocent possession of a stolen or prohibited article or other item for which he is empowered to search. In that case the officer may stop and search the person even though there would be no power of arrest: Code A para 2.7.

Under the Terrorism Act 2000 s 43(1) (see PARA 426 ante), a constable may stop and search a person whom the officer reasonably suspects to be a terrorist to discover whether the person is in possession of anything which may constitute evidence that the person is a terrorist. These searches may only be carried out by an officer of the same sex as the person searched: Code A para 2.8.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **860-862 Powers of constable to stop and search persons, vehicles etc ... Powers of police to stop and search in anticipation of [, or after] violence**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **861 Reasonable grounds for suspicion**

TEXT AND NOTES 1-7--Code A paras 2.2, 2.3 modified: see SI 2008/3146.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(3) CODE OF PRACTICE TO STOP AND SEARCH/862. Powers of police to stop and search in anticipation of violence.

## **862. Powers of police to stop and search in anticipation of violence.**

If a police officer of or above the rank of inspector reasonably believes<sup>1</sup>: (1) that incidents involving serious violence may take place in any locality in his police area<sup>2</sup>, and that it is expedient to give an authorisation<sup>3</sup> to prevent their occurrence; or (2) that persons are carrying dangerous instruments<sup>4</sup> or offensive weapons<sup>5</sup> in any locality in his police area without good reason, he may give an authorisation that stop and search powers conferred by the relevant provisions<sup>6</sup> are to be exercisable at any place within that locality<sup>7</sup> for a specified period not exceeding 24 hours<sup>8</sup>. If an inspector gives such an authorisation he must, as soon as it is practicable to do so, cause an officer of or above the rank of superintendent to be informed<sup>9</sup>. If it appears to an officer of or above the rank of superintendent that it is expedient to do so, having regard to offences which have, or are reasonably suspected to have, been committed in connection with any activity falling within the authorisation, he may direct<sup>10</sup> that the authorisation is to continue in being for a further 24 hours<sup>11</sup>.

The relevant provisions confer power on any constable in uniform: (a) to stop any pedestrian and search him or anything carried by him for offensive weapons or dangerous instruments; (b) to stop any vehicle<sup>12</sup> and search the vehicle, its driver and any passenger for offensive weapons or dangerous instruments<sup>13</sup>. A constable may, in the exercise of these powers<sup>14</sup>, stop any person or vehicle and make any search he thinks fit whether or not he has any grounds for suspecting that the person or vehicle is carrying weapons or articles of that kind<sup>15</sup>. If in the course of such a search a constable discovers a dangerous instrument or an article which he has reasonable grounds for suspecting to be an offensive weapon, he may seize it<sup>16</sup>.

A person who fails to stop, or to stop a vehicle, when required to do so by a constable in the exercise of his powers under the provisions above is liable on summary conviction to imprisonment for a term not exceeding one month<sup>17</sup> or to a fine not exceeding level 3 on the standard scale or to both<sup>18</sup>.

Any things seized by a constable under the provisions above may be retained in accordance with regulations made by the Secretary of State<sup>19</sup>.

1 There must be an objective basis for the officer's belief, for example: intelligence or relevant information such as a history of antagonism and violence between particular groups; previous incidents of violence at, or connected with, particular events or locations; a significant increase in knife-point robberies in a limited area; reports that individuals are regularly carrying weapons in a particular locality; or in the case of the Criminal Justice and Public Order Act 1994 s 60AA (as added; prospectively amended) (see PARA 863 post) previous incidents of crimes being committed while wearing face coverings to conceal identity: Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search Guidance note 11.

2 The Criminal Justice and Public Order Act 1994 s 60(1)-(9) (as amended), so far as it relates to an authorisation by a member of the British Transport Police Force (including one who for the time being has the same powers and privileges as a member of a police force for a police area), has effect as if the references to a locality in his police area were references to a place specified in the Railways and Transport Safety Act 2003 s 31(1)(a)-(f) (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 283): Criminal Justice and Public Order Act 1994 s 60(9A) (added by the Anti-terrorism, Crime and Security Act 2001 s 101, Sch 7 para 16(2); and amended by the British Transport Police (Transitional and Consequential Provisions) Order 2004, SI 2004/1573, art 12(3)). 'British Transport Police Force' means the British Transport Police Force established by the Railways and Transport Safety Act 2003 Pt 3 (ss 18-77) (as amended) (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 281): Criminal Justice and Public Order Act 1994

s 60(11) (definition added by the Anti-terrorism, Crime and Security Act 2001 Sch 7 para 16(3)(a); and amended by the Railways and Transport Safety Act 2003 s 73, Sch 5 para 4(1), (2)).

3 Any such authorisation must be in writing signed by the officer giving it and must specify the grounds on which it is given and the locality in which and the period during which the powers conferred by the Criminal Justice and Public Order Act 1994 s 60 (as amended) are exercisable: s 60(9) (amended by the Knives Act 1997 s 8(6)).

4 'Dangerous instruments' means instruments which have a blade or are sharply pointed: Criminal Justice and Public Order Act 1994 s 60(11).

5 'Offensive weapon' has the meaning given by the Police and Criminal Evidence Act 1984 s 1(9) (see PARA 860 note 5 ante): see Criminal Justice and Public Order Act 1994 s 60(11). For the purposes of s 60 (as amended), a person carries a dangerous instrument or an offensive weapon if he has it in his possession: s 60(11A) (added by the Knives Act 1997 s 8(10)).

6 I.e. the powers conferred by the Criminal Justice and Public Order Act 1994 s 60 (as amended).

7 The authorising officer may wish to take into account factors such as the nature and venue of the anticipated incident, the number of people who may be in the immediate area of any possible incident, their access to surrounding areas and the anticipated level of violence. The officer should not set a geographical area which is wider than that he believes necessary for the purpose of preventing anticipated violence, the carrying of knives or offensive weapons, or, in the case of *ibid* s 60AA (as added and amended) (see PARA 863 post), the prevention of commission of offences. It is particularly important to ensure that constables exercising such powers are fully aware of where they may be used. If the area specified is smaller than the whole force area, the officer giving the authorisation should specify either the streets which form the boundary of the area or a divisional boundary within the force area. If the power is to be used in response to a threat or incident that straddles police force areas, an officer from each of the forces concerned will need to give an authorisation: Code A Guidance note 13.

8 Criminal Justice and Public Order Act 1994 s 60(1) (amended by the Knives Act 1997 s 8(2)). The period authorised must be no longer than appears reasonably necessary to prevent, or seek to prevent incidents of serious violence, or to deal with the problem of carrying dangerous instruments or offensive weapons: Code A para 2.13. The officer should set the minimum period he considers necessary to deal with the risk of violence, the carrying of knives or offensive weapons: Code A Guidance note 12. The powers conferred by the Criminal Justice and Public Order Act 1994 s 60 (as amended) are in addition to and not in derogation of, any power otherwise conferred: s 60(12).

9 *Ibid* s 60(3A) (added by the Police Act 1997 s 8(5)).

10 Any such direction must be given in writing or, where that is not practicable, recorded in writing as soon as it is practicable to do so: Criminal Justice and Public Order Act 1994 s 60(9).

11 *Ibid* s 60(3) (amended by the Knives Act 1997 s 8(4)). Such a direction may be given only once. Thereafter further use of the powers of stop and search under the Criminal Justice and Public Order Act 1994 s 60 (as amended) requires a new authorisation: Code A Guidance note 12. The powers under the Criminal Justice and Public Order Act 1994 s 60 (as amended) are separate from and additional to the normal stop and search powers which require reasonable grounds to suspect an individual of carrying an offensive weapon or other article. Their overall purpose is to prevent serious violence and the widespread carrying of weapons which might lead to persons being seriously injured by disarming potential offenders in circumstances where other powers would not be sufficient. They should not therefore be used to replace or circumvent the normal powers for dealing with routine crime problems: Code A Guidance note 10.

12 'Vehicle' includes a caravan as defined in the Caravan Sites and Control of Development Act 1960 s 29(1) (see PARA 610 note 1 ante): see the Criminal Justice and Public Order Act 1994 s 60(11). The provisions of s 60 (as amended) apply (with the necessary modifications) to ships, aircraft and hovercraft as they apply to vehicles: s 60(7).

13 *Ibid* s 60(4). As to the exercise of these powers of stop and search see Code A; and PARAS 859 ante, 864-866 post.

14 I.e. the powers conferred by *ibid* s 60(4): see the text and note 13 supra.

15 *Ibid* s 60(5) (amended by the Crime and Disorder Act 1998 s 25(2)). Where a vehicle is stopped by a constable under the Criminal Justice and Public Order Act 1994 s 60 (as amended), the driver is entitled to obtain a written statement that the vehicle was stopped under the powers conferred by s 60 (as amended) if he applies for such a statement not later than the end of the period of 12 months from the day on which the vehicle was stopped: s 60(10) (amended by the Knives Act 1997 s 8(7)). A person who is searched by a



constable under the Criminal Justice and Public Order Act 1994 s 60 (as amended) is entitled to obtain a written statement that he was searched under the powers conferred by s 60 (as amended) if he applies for such a statement not later than the end of the period of 12 months from the day on which he was searched: s 60(10A) (added by the Knives Act 1997 s 8(8)).

16 Criminal Justice and Public Order Act 1994 s 60(6).

17 As from a day to be appointed this maximum term of imprisonment is increased from three months to 51 weeks: *ibid* s 60(8) (prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 45(1), (2)). At the date at which this volume states the law no such day had been appointed.

18 Criminal Justice and Public Order Act 1994 s 60(8) (amended by the Crime and Disorder Act 1998 s 25(3); and the Anti-terrorism, Crime and Security Act 2001 s 125, Sch 8 Pt 6). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

19 Criminal Justice and Public Order Act 1994 s 60A (added by the Crime and Disorder Act 1998 s 26; and amended by the Anti-terrorism, Crime and Security Act 2001 s 94(2)). See the Police (Retention and Disposal of Items Seized) Regulations 2002, SI 2002/1372.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **860-862 Powers of constable to stop and search persons, vehicles etc ... Powers of police to stop and search in anticipation of [, or after] violence**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **862 Powers of police to stop and search in anticipation of [, or after,] violence**

TEXT AND NOTES--1994 Act s 60 further amended so as to extend powers to include the circumstance where a serious violent incident has occurred, and the police believe that the weapon used in the incident is being carried in the locality and it is expedient to give an authorisation to find the weapon: Serious Crime Act 2007 s 87.

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(3) CODE OF PRACTICE TO STOP AND SEARCH/863. Powers to require removal of disguises.

### **863. Powers to require removal of disguises.**

Where an authorisation<sup>1</sup> to stop and search in anticipation of violence is for the time being in force in relation to any locality<sup>2</sup> for any period, or an authorisation<sup>3</sup> that the powers<sup>4</sup> mentioned below to require the removal of disguises are to be exercisable at any place in a locality is in force for any period, those powers are exercisable at any place in that locality at any time in that period<sup>5</sup>. Powers are conferred<sup>6</sup> on any constable<sup>7</sup> in uniform: (1) to require any person to remove any item which the constable reasonably believes that person is wearing wholly or mainly for the purpose of concealing his identity; (2) to seize any item which the constable reasonably believes any person intends to wear wholly or mainly for that purpose<sup>8</sup>. The exercise of these powers is not subject to the preliminary procedure for a stop and search, conduct of searches or action after searches<sup>9</sup> because they do not involve a search<sup>10</sup>.

If a police officer of or above the rank of inspector<sup>11</sup> reasonably believes that activities may take place in any locality in his police area<sup>12</sup> that are likely (if they take place) to involve the commission of offences, and that it is expedient, in order to prevent or control the activities, to give an authorisation that the powers conferred by this provision are exercisable at any place within that locality for a specified period not exceeding 24 hours, he may give such an authorisation<sup>13</sup>. If an inspector gives such an authorisation<sup>14</sup>, he must, as soon as it is practicable to do so, cause an officer of or above the rank of superintendent to be informed<sup>15</sup>. If it appears to an officer of or above the rank of superintendent that it is expedient to do so, having regard to offences which have been committed in connection with the activities in respect of which the authorisation was given, or are reasonably suspected to have been so committed, he may direct that the authorisation is to continue in force for a further 24 hours<sup>16</sup>.

A person who fails to remove an item worn by him when required to do so by a constable in the exercise of his power under the provisions above is liable on summary conviction to imprisonment for a term not exceeding one month<sup>17</sup> or to a fine not exceeding level 3 on the standard scale or to both<sup>18</sup>.

Any things seized by a constable under the provisions above may be retained in accordance with regulations made by the Secretary of State<sup>19</sup>.

1    Ie under the Criminal Justice and Public Order Act 1994 s 60 (as amended): see PARA 862 ante.

2    Ibid s 60AA(1)-(7) (as added; prospectively amended), so far as it relates to an authorisation by a member of the British Transport Police Force (including one who for the time being has the same powers and privileges as a member of a police force for a police area), has effect as if references to a locality or to a locality in his police area were references to any locality in or in the vicinity of any policed premises, or to the whole or any part of any such premises: s 60AA(8) (s 60AA added by the Anti-terrorism, Crime and Security Act 2001 s 94(1)). For these purposes, 'British Transport Police Force' has the same meaning as in the Criminal Justice and Public Order Act 1994 s 60 (as amended) (see PARA 862 note 2 ante): s 60AA(9) (as so added).

3    Ie under ibid s 60AA(3) (as added): see the text and notes 9-13 infra. The powers conferred by s 60AA (as added; prospectively amended) are in addition to, and not in derogation of, any power otherwise conferred: s 60AA(10) (as added: see note 2 supra).

4    Ie conferred by ibid s 60AA(2) (as added): see the text to note 8 infra.

5    Ibid s 60AA(1) (as added: see note 2 supra).

6 le by *ibid* s 60AA(2) (as added): see the text to note 8 *infra*.

7 See PARA 857 note 2 *ante*.

8 Criminal Justice and Public Order Act 1994 s 60AA(2) (as added: see note 2 *supra*).

9 See PARAS 864-866 *post*.

10 *DPP v Avery* [2001] EWCA Admin 748, [2002] 1 Cr App Rep 49 (case concerned the Criminal Justice and Public Order Act 1994 s 60(4A) (repealed), replaced in essentially identical terms by the Criminal Justice and Public Order Act 1994 s 60AA(2) (as added)).

11 See PARA 858 *ante*.

12 See note 2 *supra*.

13 Criminal Justice and Public Order Act 1994 s 60AA(3) (as added: see note 2 *supra*). Any authorisation under s 60AA (as added; prospectively amended) must be in writing and signed by the officer giving it; and must specify the grounds on which it is given, the locality in which the powers conferred are exercisable, and the period during which those powers are exercisable: s 60AA(6) (as so added). The period authorised must be no longer than appears reasonably necessary to prevent, or seek to prevent, the commission of offences: Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search para 2.17. See also Code A Guidance notes 10-13; and PARA 862 *ante*.

14 le under the Criminal Justice and Public Order Act 1994 s 60AA(3) (as added): see the text and notes 9-13 *supra*.

15 *Ibid* s 60AA(5) (as added: see note 2 *supra*).

16 *Ibid* s 60AA(4) (as added: see note 2 *supra*). A direction under s 60AA(4) (as added) must be given in writing or, where that is not practicable, recorded in writing as soon as it is practicable to do so: s 60AA(6) (as so added).

17 As from a day to be appointed this maximum term is increased from three months to 51 weeks: see the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 45(1), (3)). At the date at which this volume states the law no such day had been appointed.

18 Criminal Justice and Public Order Act 1994 s 60AA(7) (as added: see note 2 *supra*). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

19 *Ibid* s 60A (added by the Crime and Disorder Act 1998 s 26; and amended by the Anti-terrorism, Crime and Security Act 2001 s 94(2)). See the Police (Retention and Disposal of Items Seized) Regulations 2002, SI 2002/1372.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(3) CODE OF PRACTICE TO STOP AND SEARCH/864. Stop and search: preliminary procedure.

#### **864. Stop and search: preliminary procedure.**

Where a search requires reasonable grounds for suspicion an officer who has the reasonable grounds for suspicion<sup>1</sup> necessary to exercise a power of stop and search<sup>2</sup> may detain the person concerned in order to carry out a search<sup>3</sup>. There is no power to stop or detain a person against his will in order to find grounds for a search<sup>4</sup>.

Before carrying out a search the officer may question the person about his behaviour or his presence in circumstances which gave rise to the suspicion<sup>5</sup>, since he may have a satisfactory explanation which will make a search unnecessary<sup>6</sup>. If, as a result of any questioning preparatory to a search, or other circumstances which come to the attention of the officer, there cease to be reasonable grounds for suspecting that an article is being carried of a kind for which there is a power of stop and search, no search may take place<sup>7</sup>.

As a result of questioning the detained person the reasonable grounds for suspicion which are necessary for the exercise of the initial power to detain may be confirmed or eliminated, or such questioning may reveal reasonable grounds to suspect the possession of a different kind of unlawful article from that originally suspected; but the reasonable grounds for suspicion without which any search or detention for the purposes of a search is unlawful cannot be retrospectively provided by such questioning during his detention or by his refusal to answer any question put to him<sup>8</sup>.

If a constable contemplates a search<sup>9</sup>, other than a search of an unattended vehicle<sup>10</sup>, it is his duty to take reasonable steps before he commences his search to bring to the attention of the appropriate person<sup>11</sup>:

1034 (1) if the constable is not in uniform, documentary evidence<sup>12</sup> that he is a constable<sup>13</sup>; and

1035 (2) whether he is in uniform or not: (a) his name and the name of the police station to which he is attached; (b) the object of the proposed search; (c) his grounds for proposing to make it; and (d) the effect of certain statutory rights<sup>14</sup>, as may be appropriate<sup>15</sup>,

and the constable may not commence the search until he has performed that duty<sup>16</sup>. A failure to fulfil this duty means that a subsequent search will not be a lawful search, and the constable will not be acting in the execution of his duty<sup>17</sup>.

Before the search takes place the officer must inform the person (or the owner or person in charge of the vehicle that is to be searched) of his entitlement to a copy of the record of the search, including his entitlement to a record of the search if an application is made within 12 months, if it is wholly impracticable to make a record at the time. If a record is not made at the time the person should also be told how a copy can be obtained. The person should also be given information about police powers to stop and search and the individual's rights in these circumstances<sup>18</sup>. If the person to be searched, or in charge of a vehicle to be searched, does not appear to understand what is being said, or there is any doubt about his ability to understand English, the officer must take reasonable steps to bring the above information to his attention<sup>19</sup>. If the person is deaf or cannot understand English and has someone with him, then the officer

must establish whether that person can interpret or otherwise help the officer to give the required information<sup>20</sup>.

1 For the meaning of 'reasonable grounds for suspicion' see PARA 861 ante.

2 As to the statutory power of stop and search see PARA 860 ante.

3 Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search para 2.9.

4 Code A para 2.11.

5 In some circumstances preparatory questioning may be unnecessary; but in general a brief conversation or exchange will be desirable not only as a means of avoiding unsuccessful searches but to explain the grounds for the stop/search, to gain co-operation and reduce any tension there might be surrounding the stop/search: Code A Guidance note 2. Where a person is lawfully detained for the purpose of a search, but no search in the event takes place, the detention will not thereby have been rendered unlawful: Code A Guidance note 3.

6 Code A para 2.9. A constable who detains a person or vehicle in the exercise of the power conferred by the Police and Criminal Evidence Act 1984 s 1 (as amended) (see PARA 860 ante) or of any other power: (1) to search a person without first arresting him; or (2) to search a vehicle without making an arrest, need not conduct a search if it appears to him subsequently that no search is needed or that a search is impracticable: Police and Criminal Evidence Act 1984 s 2(1).

7 Code A para 2.10. In the absence of any other lawful power to detain, the person is free to leave at will and must be so informed: Code A para 2.10.

8 Code A para 2.9.

9 In the exercise of the power conferred by the Police and Criminal Evidence Act 1984 s 1 (as amended) (see PARA 860 ante) or of any other power, whether or not it requires a reasonable suspicion on the part of the officer contemplating making the search, except the power conferred by s 6 (as amended) (see PARA 868 post) and the power conferred by the Aviation Security Act 1982 s 27(2) (see AIR LAW vol 2 (2008) PARA 327).

10 The Police and Criminal Evidence Act 1984 s 2 applies to vessels, aircraft and hovercraft as it applies to vehicles: s 2(10). For the meaning of 'vessel' see PARA 860 note 4 ante.

11 For these purposes, 'the appropriate person' means: (1) if the constable proposes to search a person, that person; and (2) if he proposes to search a vehicle, or anything in or on a vehicle, the person in charge of the vehicle: *ibid* s 2(5).

12 If the officer is not in uniform, he must show his warrant card: Code A para 3.9.

13 Police and Criminal Evidence Act 1984 s 2(i).

14 In the effect of *ibid* s 3(7) or s 3(8) (see PARA 866 post). A constable need not bring the effect of s 3(7) or s 3(8) to the attention of the appropriate person if it appears to the constable that it will not be practicable to make the record in s 3(1) (see PARA 866 post): s 2(4).

15 *Ibid* s 2(2), (3).

16 See *ibid* s 2(2). Before a search the constable must take reasonable steps to give the appropriate person the following information: (1) that he is being detained for the purposes of a search; (2) the officer's name (except in the case of inquiries linked to the investigation of terrorism, or otherwise where the officer reasonably believes that giving his name might put him in danger, in which case the warrant or other identification number must be given) and the name of the police station to which the officer is attached; (3) the legal search power which is being exercised; and (4) a clear explanation of: (a) the purpose of the search in terms of the article or articles for which there is a power to search; and (b) the grounds for his reasonable suspicion (where the search power requires such suspicion) or the nature of the search power and of any necessary authorisation, and that it has been given (where the search power does not require reasonable suspicion): Code A para 3.8.

17 *Osman v DPP* (1999) 163 JP 725, DC.

18 See Code A para 3.10.

19 See Code A para 3.11.

20 See Code A para 3.11.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **864 Stop and search: preliminary procedure**

NOTE 17--The police officer must say his name and police station before searching a defendant, not merely if it is reasonable for him to do so: *R v Bristol* [2007] EWCA (Crim) 3214, (2008) 172 JP 161.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(3) CODE OF PRACTICE TO STOP AND SEARCH/865. Conduct of the search.

### **865. Conduct of the search.**

All stops and searches must be carried out with courtesy, consideration and respect for the person concerned<sup>1</sup>. Every reasonable effort must be made to reduce to the minimum the embarrassment that a person being searched may experience<sup>2</sup>.

The co-operation of the person to be searched must be sought in every case, even if the person initially objects to the search<sup>3</sup>. A forcible search may be made only if it has been established that the person is unwilling to co-operate or resists<sup>4</sup>. Reasonable force may be used as a last resort if necessary to conduct a search or to detain a person or vehicle for the purposes of a search<sup>5</sup>.

The length of time for which a person or vehicle may be detained must be reasonable and kept to a minimum. Where the exercise of the power requires reasonable suspicion, the thoroughness and extent of a search must depend on what is suspected of being carried, and by whom<sup>6</sup>. If the suspicion relates to a particular article which is seen to be slipped into a person's pocket, then, in the absence of other grounds for suspicion or an opportunity for the article to be moved elsewhere, the search must be confined to that pocket<sup>7</sup>. In the case of a small article which can readily be concealed, such as a drug, and which might be concealed anywhere on the person, a more extensive search may be necessary<sup>8</sup>.

The search must be conducted at the place where the person or vehicle was first detained or nearby<sup>9</sup>.

With two exceptions<sup>10</sup> there is no power to require a person to remove any clothing in public, other than an outer coat, jacket or gloves<sup>11</sup>. Searches in public of clothing which has not been removed must be restricted to superficial examination of outer garments<sup>12</sup>. This does not, however, prevent an officer from placing his hand inside the pockets of the outer clothing, or feeling round the inside of collars, socks and shoes if this is reasonably necessary in the circumstances to look for the object of the search or to remove and examine any item reasonably suspected to be the object of the search<sup>13</sup>. Where on reasonable grounds it is considered necessary to conduct a more thorough search, for example by requiring someone to take off a T-shirt, this should be done out of public view, for example, in a police van<sup>14</sup> or a nearby police station if there is one<sup>15</sup>. Any search involving the removal of more than an outer coat, jacket, gloves, headgear or footwear may only be made by an officer of the same sex as the person searched and may not be made in the presence of anyone of the opposite sex unless the person being searched expressly requests it<sup>16</sup>. Searches involving exposure of intimate parts of the body must not be conducted as a routine extension of a less thorough search, simply because nothing is found in the course of the initial search. Searches involving exposure of intimate parts of the body may be carried out only at a nearby police station or other nearby location which is out of public view (but not a police vehicle)<sup>17</sup>.

<sup>1</sup> Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search para 3.1.

<sup>2</sup> See Code A para 3.1. Many people customarily cover their heads or faces for religious reasons, eg Muslim women, Sikh men, Sikh or Hindu women, or Rastafarian men or women. A police officer cannot order the removal of a head or face covering except where there is reason to believe that the item is being worn by the individual wholly or mainly for the purpose of disguising identity, not simply because it disguises identity.

Where there may be religious sensitivities about ordering the removal of such an item, the officer should permit the item to be removed out of public view. Where practicable, the item should be removed in the presence of an officer of the same sex as the person and out of sight of anyone of the opposite sex: Code A Guidance note 4.

3 See Code A para 3.2.

4 See Code A para 3.2.

5 See Code A para 3.2; and PARA 857 ante.

6 See Code A para 3.3. The time for which a person or vehicle may be detained for the purposes of a search is such time as is reasonably required to permit a search to be carried out either at the place where the person or vehicle was first detained or nearby: Police and Criminal Evidence Act 1984 s 2(8). A search of a person in public should be completed as soon as possible: Code A Guidance note 5.

7 See Code A para 3.3.

8 See Code A para 3.3. In the case of searches authorised under the Criminal Justice and Public Order Act 1994 s 60 (as amended) (see PARA 862 ante) or the Terrorism Act 2000 s 44(1), (2) (see PARA 427 ante) or of a search of a person who has not been arrested in the exercise of a power to search premises, which searches do not require reasonable grounds for suspicion, officers may make any reasonable search to look for items for which they are empowered to search: see Code A para 3.3.

9 Code A para 3.4. A person may be detained under a stop and search power at a place other than where the person was first detained, only if that place, be it a police station or elsewhere, is nearby. Such a place should be located within a reasonable travelling distance using whatever mode of travel on foot or by car is appropriate. This applies to all searches under stop and search powers, whether or not they involve the removal of clothing or exposure of intimate parts of the body (see Code A paras 3.6, 3.7; and the text and notes 14-17 infra) or take place in or out of public view. It means, for example, that a search under the stop and search power in the Misuse of Drugs Act 1971 s 23 (as amended) (see PARA 781 ante) which involves the compulsory removal of more than a person's outer coat, jacket or gloves cannot be carried out unless a place which is both nearby the place they were first detained and out of public view is available. If a search involves exposure of intimate parts of the body and a police station is not nearby, particular care must be taken to ensure that the location is suitable in that it enables the search to be conducted in accordance with the requirements of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officer Annex A para 11 (see PARA 1009 post): Code A Guidance note 6.

10 See the Terrorism Act 2000 s 45(3) (power of constable conducting search under s 44 (as amended) to require removal of headgear and footwear in public: see PARA 427 ante); and the Criminal Justice and Public Order Act 1994 s 60AA (as added; prospectively amended) (see PARA 863 ante).

11 See Code A para 3.5.

12 See Code A para 3.5.

13 See Code A para 3.5.

Neither the power conferred by the Police and Criminal Evidence Act 1984 s 1 (as amended) (see PARA 860 ante) nor any other power to detain and search a person without first arresting him or to detain and search a vehicle without making an arrest is to be construed: (1) as authorising a constable to require a person to remove any of his clothing in public other than an outer coat, jacket or gloves; or (2) as authorising a constable not in uniform to stop a vehicle: Police and Criminal Evidence Act 1984 s 2(9). Subject to the restrictions on the removal of headgear, a person's hair may also be searched in public: see Code A para 3.5. Although there is no power to require a person to do so, there is nothing to prevent an officer from asking a person voluntarily to remove more than an outer coat, jacket or gloves in public: see Code A Guidance note 7.

14 Ie unless Code A para 3.7 applies: see the text and note 17 infra.

15 Code A para 3.6. A search in the street itself should be regarded as being in public for the purposes of Code A para 3.6 and Code A para 3.7 (see the text to note 17 infra), even though it may be empty at the time a search begins: Code A Guidance note 7.

16 See Code A para 3.6. A search in the street itself should be regarded as being in public for the purposes of Code A para 3.6 and Code A para 3.7 (see the text and note 17 infra), even though it may be empty at the time a search begins. Although there is no power to require a person to do so, there is nothing to prevent an officer from asking a person voluntarily to remove more than an outer coat, jacket or gloves (and headgear or footwear under the Terrorism Act 2000 s 45(3): see PARA 427 ante) in public: Code A Guidance note 7. Where there may be religious sensitivities about asking someone to remove headgear using a power under the



Terrorism Act 2000 s 45(3), the police officer should offer to carry out the search out of public view (eg in a police van or police station if there is one nearby): see Code A Guidance note 8.

17 See Code A para 3.7. See also note 16 supra. These searches must be conducted in accordance with Code C Annex A para 11 (see PARA 1009 post) except that an intimate search mentioned in Code C Annex A para 11(f) may not be authorised or carried out under any stop and search powers. The other provisions of Code C do not apply to the conduct and recording of searches of persons detained at police stations in the exercise of stop and search powers: see Code A para 3.7.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(3) CODE OF PRACTICE TO STOP AND SEARCH/866. Action after search.

### **866. Action after search.**

Where a constable<sup>1</sup> has carried out a search in exercise of any specified power<sup>2</sup>, he must make a record of it in writing unless it is not practicable to do so<sup>3</sup>.

If a constable is so required to make a record of a search but it is not practicable to make the record on the spot<sup>4</sup>, he must make it as soon as practicable after the completion of the search<sup>5</sup>.

The record of a search of a person must include a note of his name, if the constable knows it; but a constable may not detain a person to find out his name<sup>6</sup>. If a constable does not know the name of a person whom he has searched, the record of the search must include a note otherwise describing that person<sup>7</sup>. The record of a search of a vehicle<sup>8</sup> must include a note describing the vehicle<sup>9</sup>.

The record of a search of a person or a vehicle:

- 1036 (1) must state:
  - 35
  - 57. (a) the object of the search<sup>10</sup>;
  - 58. (b) the grounds for making it<sup>11</sup>;
  - 59. (c) the date and time when it was made<sup>12</sup>;
  - 60. (d) the place where it was made<sup>13</sup>;
  - 61. (e) whether anything, and if so what, was found<sup>14</sup>;
  - 62. (f) whether any, and if so what, injury to a person or damage to property appears to the constable to have resulted from the search<sup>15</sup>; and
  - 36
- 1037 (2) must identify the constable making it<sup>16</sup>.

If a constable who conducted a search of a person made a record of it, the person who was searched is entitled to a copy of the record if he asks for one before the end of the period of 12 months beginning with the date on which the search was made<sup>17</sup>; and, if the owner of a vehicle which has been searched or the person who was in charge of the vehicle at the time when it was searched asks for a copy of the record of the search before the end of the period of 12 months beginning with the date on which the search was made and the constable who conducted the search made a record of it, the person who made the request is entitled to a copy<sup>18</sup>.

On completing a search of an unattended vehicle or anything in or on such a vehicle, an officer must leave a notice<sup>19</sup>:

- 1038 (i) stating that he has searched it<sup>20</sup>;
- 1039 (ii) giving the name of the police station to which he is attached<sup>21</sup>;
- 1040 (iii) stating where an application for compensation for any damage caused by the search may be directed<sup>22</sup>; and
- 1041 (iv) stating where a copy of the record of the search may be obtained<sup>23</sup>.

The vehicle must, if practicable, be left secure<sup>24</sup>.

When an officer requests a person in a public place to account for himself (that is, his actions, behaviour, presence in an area or possession of anything), a record of the encounter must be completed at the time and a copy given to the person who has been questioned<sup>25</sup>. The record must identify the name of the officer who has made the stop and conducted the encounter<sup>26</sup>. This requirement to complete a record does not apply to general conversations such as when giving directions to a place, or when seeking witnesses<sup>27</sup>. It also does not include occasions on which an officer is seeking general information or questioning people to establish background to incidents which have required officers to intervene to keep the peace or resolve a dispute<sup>28</sup>.

1 See PARA 857 note 2 ante.

2 le under any power such as is mentioned in the Police and Criminal Evidence Act 1984 s 2(1) (see PARA 864 note 6 ante), other than a search under s 6 (as amended) (see PARA 868 post) or under the Aviation Security Act 1982 s 27(2) (see AIR LAW vol 2 (2008) PARA 327): Police and Criminal Evidence Act 1984 s 3(1).

3 Ibid s 3(1); and see Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search para 4.1. There may be situations where it is not practicable to obtain the information necessary to complete a record, but the officer should make every effort to do so: see Code A para 4.1. In situations where it is not practicable to provide a written record of the stop or stop and search at the time, the officer should consider providing the person with details of the police station at which the person may attend for a record. This may take the form of a simple business card, adding the date of the stop or stop and search: Code A Guidance note 21. Failure to record a search does not render it unlawful: *Basher v DPP* [1993] COD 372, DC.

Every annual report made under the Police Act 1996 s 22 (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 191) or made by the Metropolitan Police Commissioner must contain information about searches recorded under the Police and Criminal Evidence Act 1984 s 3 which have been carried out in the area to which the report relates during the period to which it relates: s 5(1)(b)(i) (s 5(1)(a) substituted by the Police Act 1996 s 103, Sch 8 para 34). Such information must not include information about specific searches but must include: (1) the total number of searches in each month during the period to which the report relates for stolen articles, offensive weapons and other prohibited articles or specified articles; (2) the total number of persons arrested in each such month in consequence of searches of each of such descriptions: Police and Criminal Evidence Act 1984 s 5(2) (amended by the Criminal Justice Act 1988 s 140(2)). For the meaning of 'prohibited article' see PARA 860 note 5 ante. As to specified articles see PARA 860 ante.

Supervising officers must monitor the use of stop and search powers and should consider in particular whether there is any evidence that they are being exercised on the basis of stereotyped images or inappropriate generalisations. Supervising officers should satisfy themselves that the practice of officers under their supervision in stopping, searching and recording is fully in accordance with Code A. Supervisors must also examine whether the records reveal any trends or patterns which give cause for concern, and if so take appropriate action to address this: see Code A para 5.1. Senior officers with area or force-wide responsibilities must also monitor the broader use of stop and search powers and, where necessary, take action at the relevant level: Code A para 5.2. Supervision and monitoring must be supported by the compilation of comprehensive statistical records of stops and searches at force, area and local level. Any apparently disproportionate use of the powers by particular officers or groups of officers or in relation to specific sections of the community should be identified and investigated: Code A para 5.3. In order to promote public confidence in the use of the powers, forces in consultation with police authorities must make arrangements for the records to be scrutinised by representatives of the community, and to explain the use of the powers at a local level: Code A para 5.4. Arrangements for public scrutiny of records should take account of the right to confidentiality of those stopped and searched. Anonymised forms and/or statistics generated from records should be the focus of the examinations by members of the public: Code A Guidance note 19.

4 Eg in situations involving public disorder or when the officer's presence is urgently required elsewhere: see Code A para 4.1.

5 Police and Criminal Evidence Act 1984 s 3(2).

6 Ibid s 3(3). The officer must ask for the name, address and date of birth of the person searched, but under the search procedures there is no obligation on a person to provide these details and there is no power to detain him if he is unwilling to do so: see Code A para 4.2.

7 Police and Criminal Evidence Act 1984 s 3(4).

8 The requirements imposed by ibid s 3 with regard to records of searches of vehicles apply also to records of searches of vessels, aircraft and hovercraft: s 3(10). For the meaning of 'vessel' see PARA 860 note 4 ante.

9 Ibid s 3(5).

- 10 Ibid s 3(6)(a)(i).
- 11 Ibid s 3(6)(a)(ii).
- 12 Ibid s 3(6)(a)(iii).
- 13 Ibid s 3(6)(a)(iv).
- 14 Ibid s 3(6)(a)(v).
- 15 Ibid s 3(6)(a)(vi).
- 16 Ibid s 3(6)(b). The following information must always be included in the record of a search even if the person does not wish to provide any personal details:
  - 285 (1) The name of the person searched, or (if it is withheld) a description of him (Code A para 4.3(i)).
  - 286 (2) A note of the person's self-defined ethnic group (Code A para 4.3(ii)). Officers should record the self-defined ethnicity of every person stopped according to the categories used in the 2001 census question listed in Code A Annex B. Respondents should be asked to select one of the five main categories representing broad ethnic groups and then a more specific cultural background from within this group. The ethnic classification should be coded for recording purposes using the coding system in Code A Annex B. An additional 'Not stated' box is available but should not be offered to respondents explicitly. Officers should be aware and explain to members of the public, especially where concerns are raised, that this information is required to obtain a true picture of stop and search activity and to help improve ethnic monitoring, tackle discriminatory practice, and promote effective use of the powers. If the person gives what appears to the officer to be an 'incorrect' answer (eg a person who appears to be white states that he is black), the officer should record the response that has been given. Officers should also record their own perception of the ethnic background of every person stopped and this must be done by using the PNC/Phoenix classification system. If the 'Not stated' category is used the reason for this must be recorded on the form (Code A Guidance note 18).
  - 287 (3) When a vehicle is searched, its registration number (unless it has not been allocated such a number, eg as in the case of a rally car or a trials bike (Code A para 4.3(iii), Guidance note 16).
  - 288 (4) The date, time, and place that the person or vehicle was first detained (Code A para 4.3(iv)).
  - 289 (5) The date, time and place the person or vehicle was searched (if different from head (4) supra (Code A para 4.3(v)).
  - 290 (6) The purpose of the search (Code A para 4.3(vi)).
  - 291 (7) The grounds for making it, or in the case of searches authorised under the Criminal Justice and Public Order Act 1994 s 60 (as amended) (see PARA 862 ante) or the Terrorism Act 2000 s 44(1) or (2) (see PARA 427 ante), the nature of the power and of any necessary authorisation and the fact that it has been given (Code A para 4.3(vii)). It is important for monitoring purposes to specify whether the authority for exercising a stop and search power was given under the Criminal Justice and Public Order Act 1994 s 60 (as amended) or under the Terrorism Act 2000 s 44(1) or (2) (Code A Guidance note 17).
  - 292 (8) Its outcome (Code A para 4.3(viii)).
  - 293 (9) A note of any injury or damage to property resulting from it (Code A para 4.3(ix)).
  - 294 (10) Subject to Code A para 3.8(b) (see PARA 864 note 16 head (1) ante), the identity of the officer making the search (Code A para 4.3(x)). Where a search is made by more than one officer, the identity of all officers engaged in the search must be recorded on the search record (Code A Guidance note 15).

Nothing in head (10) supra or in Code A para 4.10A (see note 24 infra) requires the names of police officers to be shown on the search record or any other record required to be made under this Code in the case of inquiries linked to the investigation of terrorism or otherwise where an officer reasonably believes that recording names might endanger the officers. In such cases the record must show the officer's warrant or other identification number and duty station: Code A para 4.4.

Where officers detain an individual with a view to performing a search, but the search is not carried out due to the grounds for suspicion being eliminated as a result of questioning the person detained, a record must still be made in accordance with the procedure outlined in Code A para 4.12 (see the text and note 25 *infra*): Code A para 4.7.

A record is required for each person and each vehicle searched; if a person is in a vehicle and both are searched, and the object and grounds of the search are the same, only one record need be completed: see Code A para 4.5. If more than one person in a vehicle is searched, separate records for each search of a person must be made: see Code A para 4.5. If only a vehicle is searched, the name of the driver and his self-defined ethnic background must be recorded, unless the vehicle is unattended: see Code A para 4.5. The record of the grounds for making a search must, briefly but informatively, explain the reason for suspecting the person concerned, whether by reference to his behaviour and/or other circumstances: see Code A para 4.6.

17 Police and Criminal Evidence Act 1984 s 3(7), (9).

18 *Ibid* s 3(8), (9).

19 The notice must be left in the vehicle, or on the vehicle if things in it or on it have been searched without opening it: see Code A para 4.8.

20 See Code A para 4.8.

21 See Code A para 4.9.

22 See Code A para 4.9.

23 See Code A para 4.9.

24 See Code A para 4.10. When an officer makes a record of the stop electronically and is unable to produce a copy of the form at the time, the officer must explain how the person can obtain a full copy of the record of the stop or search and give the person a receipt which contains: (1) a unique reference number and guidance on how to obtain a full copy of the stop and search; (2) the name of the officer who carried out the stop or search (unless Code A para 4.4 applies: see the text and note 16 *supra*); and (3) the power used to stop and search him: Code A para 4.10A. See also Code A Guidance note 21; and note 3 *supra*.

25 Code A para 4.12. This does not apply in the exceptional circumstances outlined in Code A para 4.1 (see note 3 *supra*).

A separate record need not be completed when stopping a person in a vehicle when an HORT/1 form, a Vehicle Defence Rectification Scheme Notice, or a fixed penalty notice is issued. It also does not apply when a specimen of breath is required under the Road Traffic Act 1988 s 6 (as substituted) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARAS 979-985), or when stopping a person when a penalty notice is issued for an offence: Code A para 4.14.

Officers must inform the person of his entitlement to a copy of a record of the encounter: Code A para 4.15.

The provisions of Code A para 4.4 (see note 16 *supra*) apply equally when the encounters described in Code A para 4.12 and Code A para 4.13 (see the text and notes 27-28 *infra*) are recorded: Code A para 4.16.

The following information must be included in the record: (1) the date, time and place of the encounter; (2) if the person is in a vehicle, the registration number; (3) the reason why the officer questioned that person; (4) a note of the person's self-defined ethnic background; (5) the outcome of the encounter: Code A para 4.17.

There is no power to require the person questioned to provide personal details. If a person refuses to give his self-defined ethnic background, a form must still be completed, which includes a description of the person's ethnic background: Code A para 4.18.

A record of an encounter must always be made when the criteria set out in Code A para 4.12 have been met. If the criteria are not met but the person requests a record, the officer should provide a copy of the form but record on it that the encounter did not meet the criteria. The officer can refuse to issue the form if he reasonably believes that the purpose of the request is deliberately aimed at frustrating or delaying legitimate police activity: Code A para 4.19. Where an officer engages in conversation which is not pertinent to the actions or whereabouts of the individual (eg it does not relate to why the person is there, what they are doing or where they have been or are going) then issuing a form would not meet the criteria set out in Code A para 4.12. Situations designed to impede police activity may arise, eg in public order situations where individuals engage in dialogue with the officer but the officer does not initiate or engage in contact about the person's individual circumstances: Code A Guidance note 20.

For these purposes, all references to officers include police staff designated as community support officers under the Police Reform Act 2002 s 38 (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 529): Code A para 4.20.

26 See Code A para 4.12.

27 See Code A para 4.13.

28 See Code A para 4.13.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

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### **866 Action after search**

NOTES 24-26--Code A paras 4.10A, 4.12A, 4.18, 4.19 modified: see SI 2008/3146.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(3) CODE OF PRACTICE TO STOP AND SEARCH/867. Road checks.

### **867. Road checks.**

The following provisions have effect in relation to the conduct of road checks<sup>1</sup> by police officers for the purpose of ascertaining whether a vehicle is carrying:

- 1042 (1) a person who has committed an offence other than a road traffic offence or a vehicles excise offence<sup>2</sup>;
- 1043 (2) a person who is a witness to such an offence<sup>3</sup>;
- 1044 (3) a person intending to commit such an offence<sup>4</sup>; or
- 1045 (4) a person who is unlawfully at large<sup>5</sup>.

There may only be such a road check if a police officer of the rank of superintendent or above<sup>6</sup> authorises it in writing<sup>7</sup>.

An officer may only so authorise a road check:

- 1046 (a) for the purpose specified in head (1) above, if he has reasonable grounds:
  - (i) for believing that the offence is an indictable offence; and (ii) for suspecting that the person is, or is about to be, in the locality in which vehicles would be stopped if the road check were authorised<sup>8</sup>;
- 1047 (b) for the purpose specified in head (2) above, if he has reasonable grounds for believing that the offence is an indictable offence<sup>9</sup>;
- 1048 (c) for the purpose specified in head (3) above, if he has reasonable grounds:
  - (i) for believing that the offence would be an indictable offence; and (ii) for suspecting that the person is, or is about to be, in the locality in which vehicles would be stopped if the road check were authorised<sup>10</sup>;
- 1049 (d) for the purpose specified in head (4) above, if he has reasonable grounds for suspecting that the person is, or is about to be, in that locality<sup>11</sup>.

An officer below the rank of superintendent may, however, authorise such a road check if it appears to him that it is required as a matter of urgency for one of the purposes specified in heads (1) to (4) above<sup>12</sup>. If an authorisation is so given, it is the duty of the officer who gives it to make a written record of the time at which he gives it, and to cause an officer of the rank of superintendent or above to be informed that it has been given<sup>13</sup>. An officer to whom a report is so made may, in writing, authorise the road check to continue<sup>14</sup>. If such an officer considers that the road check should not continue, he must record in writing the fact that it took place and the purpose for which it took place<sup>15</sup>.

An officer giving an authorisation under the above provisions must specify the locality in which vehicles are to be stopped<sup>16</sup>; and an officer of the rank of superintendent or above so giving an authorisation must specify a period, not exceeding seven days, during which the road check may continue and may direct that the road check is to be continuous, or is to be conducted at specified times, during that period<sup>17</sup>.

If it appears to an officer of the rank of superintendent or above that a road check ought to continue beyond the period for which it has been authorised, he may, from time to time, in writing specify a further period, not exceeding seven days, during which it may continue<sup>18</sup>.

Where a vehicle is stopped in a road check, the person in charge of the vehicle at the time when it is stopped is entitled to obtain a written statement of the purpose of the road check if he applies for such a statement not later than the end of the period of 12 months from the day on which the vehicle was stopped<sup>19</sup>.

1 For these purposes, a road check consists of the exercise in a locality of the power conferred by the Road Traffic Act 1988 s 163 (as amended) (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 646) in such a way as to stop, during the period for which its exercise in that way in that locality continues, all vehicles or vehicles selected by any criterion: Police and Criminal Evidence Act 1984 s 4(2) (amended by the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 3 para 27(1)). Where a designation under the Police Reform Act 2002 s 38 (prospectively amended) (see POLICE vol 36(1) (2007 Reissue) PARA 529) applies a constable's powers under the Police and Criminal Evidence Act 1984 s 4 (as amended) (see the text and notes 2-19 *infra*) to a community support officer, that person has the power to carry out any road check the carrying out of which is authorised under that provision: see the Police Reform Act 2002 s 38(6), Sch 4 para 13(1); and POLICE vol 36(1) (2007 Reissue) PARA 529.

2 Police and Criminal Evidence Act 1984 s 4(1)(a); and see note 5 *infra*.

3 *Ibid* s 4(1)(b); and see note 5 *infra*.

4 *Ibid* s 4(1)(c); and see note 5 *infra*.

5 *Ibid* s 4(1)(d). Nothing in s 4 (as amended) affects the exercise by police officers of any power to stop vehicles for purposes other than those specified in s 4(1): s 4(16). For other police powers to stop vehicles see the Road Traffic Act 1988 s 163 (as amended) (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 646); the Criminal Justice and Public Order Act 1994 s 60(4) (see PARA 862 *ante*); and the Terrorism Act 2000 s 44 (as amended) (see PARA 427 *ante*). See also the common law power to stop and turn back vehicles on the ground of a reasonable apprehension of the real possibility of an imminent breach of the peace: *Moss v McLachlan* (1984) 149 JP 167; *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary* [2004] EWCA Civ 1639, [2005] QB 678, [2005] 1 All ER 473.

Every annual report made under the Police Act 1996 s 22 (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 191) or made by the Metropolitan Police Commissioner must contain information about road checks authorised in that area during that period under the Police and Criminal Evidence Act 1984 s 4 (as amended): s 5(1)(b)(ii) (s 5(1)(a) substituted by the Police Act 1996 s 103, Sch 7 para 34). Such information must include information about the reason for authorising each road check and about the result of each of them: Police and Criminal Evidence Act 1984 s 5(3).

6 See PARA 858 *ante*.

7 Police and Criminal Evidence Act 1984 s 4(3). Every written authorisation under s 4 (as amended) must specify: (1) the name of the officer giving it; (2) the purpose of the road check; and (3) the locality in which vehicles are to be stopped: s 4(13). The duties to specify the purposes of a road check imposed by s 4(9) (see the text to note 15 *infra*) and s 4(13) include duties to specify any relevant indictable offence: s 4(14) (amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (2)(b)). For the meaning of 'indictable offence' see PARA 1102 note 1 *post*.

8 Police and Criminal Evidence Act 1984 s 4(4)(a) (s 4(4)(a)-(c) amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (2)(a)).

9 Police and Criminal Evidence Act 1984 s 4(4)(b) (as amended: see note 8 *supra*).

10 *Ibid* s 4(4)(c) (as amended: see note 8 *supra*).

11 *Ibid* s 4(4)(d).

12 *Ibid* s 4(5).

13 *Ibid* s 4(6). The duties imposed by s 4(6) must be performed as soon as it is practicable to do so: s 4(7). See also note 7 *supra*.

14 *Ibid* s 4(8). See also note 7 *supra*.



15 Ibid s 4(9). See also note 7 supra.

16 Ibid s 4(10).

17 Ibid s 4(11).

18 Ibid s 4(12).

19 Ibid s 4(15).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **867 Road checks**

NOTE 5--*Laporte*, cited, reversed in part: [2006] UKHL 55, [2007] 2 All ER 529.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(3) CODE OF PRACTICE TO STOP AND SEARCH/868. Statutory undertakers etc.

### **868. Statutory undertakers etc.**

A constable<sup>1</sup> employed by statutory undertakers<sup>2</sup> may stop, detain and search any vehicle before it leaves a goods area<sup>3</sup> included in the premises of the statutory undertakers<sup>4</sup>.

1 See PARA 857 note 2 ante.

2 For these purposes, 'statutory undertakers' means persons authorised by any enactment to carry on any railway, light railway, road transport, water transport, canal, inland navigation, dock or harbour undertaking: Police and Criminal Evidence Act 1984 s 7(3).

3 For these purposes, 'goods area' means any area used wholly or mainly for the storage or handling of goods: see *ibid* s 6(2).

4 *Ibid* s 6(1). Without prejudice to any powers under s 6(1), a constable employed by the British Transport Police Authority may stop, detain and search any vehicle before it leaves a goods area which is included in the premises of any successor of the British Railways Board and is used wholly or mainly for the purposes of a relevant undertaking: s 6(1A) (added by the Railways Act 1993 (Consequential Modifications) Order 1999, SI 1999/1998; and amended by the Transport Act 2000 s 217(1), Sch 18 para 5; and the British Transport Police (Transitional and Consequential Provisions) Order 2004, SI 2004/1573, art 12(1)(e)). 'Successor to the British Railways Board' and 'relevant undertaking' have the same meanings as in the Railways Act 1993 (Consequential Modifications) Order 1999, SI 1999/1998: see the Police and Criminal Evidence Act 1984 s 6(2) (amended by the Railways Act 1993 (Consequential Modifications) Order 1999, SI 1999/1998, art 5(2)).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(i) Code of Practice/869. Code of practice.

## **(4) POWERS OF ENTRY, SEARCH AND SEIZURE**

### **(i) Code of Practice**

#### **869. Code of practice.**

A constable's power to search premises and to seize and retain property found by him on persons or premises is governed by the Police and Criminal Evidence Act 1984<sup>1</sup> and by Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises<sup>2</sup>.

Any reference to a police officer in Code B includes a designated person<sup>3</sup> acting in the exercise or performance of the powers and duties conferred or imposed on him by his designation<sup>4</sup>.

A person authorised to accompany police officers or designated persons in the execution of a warrant has the same powers as a constable in the execution of the warrant and the search and seizure of anything related to the warrant. These powers must be exercised in the company and under the supervision of a police officer<sup>5</sup>.

1    le the Police and Criminal Evidence Act 1984 Pt II (ss 8-23) (as amended): see PARA 870 et seq post.

2    The Code must be readily available at all police stations for consultation by police officers, police staff, detained persons and members of the public: Code B para 2.1. The version of Code B current at the date at which this volume states the law applies to applications for warrants made after 31 December 2005 and to searches and seizures taking place after midnight on 31 December 2005: see the Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2005, SI 2005/3503, arts 2(e), 6.

Code B deals with police powers to search premises and to detain and retain property found on premises and persons: Code B para 1.1. These powers may be used to find property and material relating to a crime, wanted persons, or children who abscond from local authority accommodation where they have been remanded or committed by a court: Code B para 1.1A.

Code B applies to the following searches of premises:

- 295 (1) searches of premises undertaken by police for the purposes of an investigation into an alleged offence, with the occupier's consent, other than routine scenes of crime searches, calls to a fire or burglary made by or on behalf of an occupier or searcher following the activation of fire or burglar alarms or discovery of insecure premises; searches when it is unnecessary to secure consent if this would cause disproportionate inconvenience to the person concerned (see PARA 870 note 4 post); and bomb threat calls (Code B para 2.3(a));
- 296 (2) searches under the powers conferred by the Police and Criminal Evidence Act 1984 s 17 (as amended) (entry for purpose of arrest etc: see PARA 884 post), s 18 (as amended) (entry and search after arrest: see PARA 885 post) and s 32 (as amended) (search upon arrest: see PARA 936 post) (Code B para 2.3(b));
- 297 (3) searches of premises undertaken in pursuance of a search warrant issued in accordance with the Police and Criminal Evidence Act 1984 s 15 (as amended) (see PARAS 872, 880 post) and s 16 (as amended) (see PARAS 880-882 post) (Code B para 2.3(c));
- 298 (4) under any other power given to police to enter premises with or without a search warrant for any purpose connected with the investigation into an alleged or suspected offence (see Code B para 2.3(d)).

As to codes of practice generally see PARA 856 ante. Code B does not apply to the exercise of a statutory power to enter premises or to inspect goods, equipment or procedures if the exercise of that power is not dependent on the existence of grounds for suspecting that an offence may have been committed and the person exercising the power has no reasonable grounds for such suspicion: Code B para 2.5.

The notes for guidance included in Code B are not provisions of the Code: Code B para 2.2.

The right to privacy and respect for personal property are key principles of the Human Rights Act 1998: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 149, 165. Powers of entry, search and seizure should be fully and clearly justified before use because they may significantly interfere with the occupier's privacy. Officers should consider if the necessary objectives can be met by less intrusive means: Code B para 1.3.

In all cases, police should exercise their powers courteously and with respect for persons and property, and only use reasonable force when this is considered necessary and proportionate to the circumstances: Code B para 1.4. A person who has not been arrested but is searched during a search of premises should be searched in accordance with Code A: Code of Practice for the Exercise by Police Officers of Statutory Stop and Search Powers (see PARA 859 et seq ante): Code B para 2.4.

The Criminal Justice Act 1988 s 139B (as added) (see PARA 701 ante) provides that a constable who has reasonable grounds to believe an offence under the Criminal Justice Act 1988 s 139A (as added and amended) (see PARA 701 ante) has or is being committed may enter school premises and search the premises and any persons on the premises for any bladed or pointed article or offensive weapon. Persons may be searched under a warrant issued under the Misuse of Drugs Act 1971 s 23(3) (see PARA 781 ante) to search premises for drugs or documents only if the warrant specifically authorises the search of persons on the premises: see Code B Guidance note 2C.

Examples of the powers referred to in head (4) supra include: (a) the Road Traffic Act 1988 s 6E(1) (as added) giving police power to enter premises to require a person to provide a specimen of breath, or to arrest a person following a positive breath test or failure to provide a specimen of breath (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 984); (b) the Transport and Works Act 1992 s 30(4) giving police powers to enter premises mirroring the powers in head (a) supra in relation to specified persons working on transport systems to which the Act applies (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARAS 378, 382); (c) the Criminal Justice Act 1988 s 139B (as added) giving police power to enter and search school premises for offensive weapons, bladed or pointed articles (see PARA 701 ante); (d) the Terrorism Act 2000 Sch 5 paras 3, 15 (prospectively amended) empowering a superintendent in urgent cases to give written authority for police to enter and search premises for the purposes of a terrorist investigation (see PARA 413 ante); (e) the Explosives Act 1875 s 73(b) empowering a superintendent to give written authority for police to enter premises, examine and search them for explosives (see EXPLOSIVES vol 17(2) (Reissue) PARA 1027); (f) search warrants and production orders (see PARA 871 et seq post) or the equivalent issued in Scotland or Northern Ireland indorsed under the Summary Jurisdiction (Process) Act 1881 or the Petty Sessions (Ireland) Act 1851 respectively for execution in England and Wales: see Code B Guidance note 2B.

Head (4) supra is subject to Code B para 2.6, whereby it does not affect any directions of a search warrant or order lawfully executed in England or Wales that any item or evidence seized under that warrant or order be handed over to a police force, court, tribunal, or other authority outside England or Wales (eg warrants and orders issued in Scotland or Northern Ireland): Code B para 2.6.

For the purposes of Code B, 'premises' as defined in the Police and Criminal Evidence Act 1984 s 23 (as amended) (see PARA 872 note 5 post) includes any place, vehicle, vessel, aircraft, hovercraft, tent or movable structure and any offshore installation as defined in the Mineral Workings (Offshore Installations) Act 1971 (see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1681): see Code B para 2.3.

The Immigration Act 1971 Pt III (ss 24-28L) (as amended) and Sch 2 (as amended) (see BRITISH NATIONALITY, ASYLUM AND IMMIGRATION vol 4(2) (2002 Reissue) PARA 197 et seq) gives immigration officers powers to enter and search premises, and seize and retain property, with and without a search warrant. These are similar to the powers available to police under search warrants issued by a justice of the peace and without a warrant under the Police and Criminal Evidence Act 1984 ss 17, 18, 19 and 32 (as amended) (see PARAS 884-886, 936 post) except they only apply to specified offences under the Immigration Act 1971 and immigration control powers. For certain types of investigations and inquiries these powers avoid the need for the immigration service to rely on police officers becoming directly involved. When exercising these powers, immigration officers are required by the Immigration and Asylum Act 1999 s 145 (as amended) (see BRITISH NATIONALITY, ASYLUM AND IMMIGRATION vol 4(2) (2002 Reissue) PARAS 206-207) to have regard to the corresponding provisions in Code B. When immigration officers are dealing with persons or property at police stations, police officers should give appropriate assistance to help them discharge their specific duties and responsibilities: Code B Guidance note 2D.

3 'Designated person' means a person other than a police officer, designated under the Police Reform Act 2002 Pt 4 (ss 38-77) (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 529) who has specified powers and duties of police officers conferred or imposed on him: Code B para 2.11(a). An officer of the rank of inspector or

above may direct a designated investigating officer not to wear a uniform for the purposes of a specific operation: Code B Guidance note 2G.

4 Code B para 2.11(b).

5 Code B para 12.11(c). See Guidance note 3C; and PARA 872 note 7 post.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **869 Code of practice**

TEXT AND NOTES--Revised Code of Practice B came into operation on 1 February 2008: Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2008, SI 2008/167.

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12.

ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(ii) Search with Consent/870. Search with consent.

## **(ii) Search with Consent**

### **870. Search with consent.**

If it is proposed to search premises with the consent of a person entitled to grant entry to the premises, the consent must, if practicable, be given in writing on the Notice of Powers and Rights before the search<sup>1</sup>. Before seeking consent, the officer in charge must state the purpose of the proposed search and its extent. This information must be as specific as possible, particularly regarding the articles or persons being sought and the parts of the premises to be searched. The person concerned must be clearly informed that he is not obliged to consent and that anything seized may be produced in evidence. If at the time the person is not suspected of an offence, the officer must say this when stating the purpose of the search<sup>2</sup>. An officer cannot enter and search or continue to search premises if consent is given under duress or withdrawn before the search is completed<sup>3</sup>.

It is unnecessary to seek consent if this would cause disproportionate inconvenience to the person concerned<sup>4</sup>.

1 Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 5.1. As to the Notice of Powers and Rights see PARA 881 post. The officer must make any necessary inquiries to be satisfied that the person is in a position to give such consent: Code B para 5.1. In a lodging house or similar accommodation, every reasonable effort should be made to obtain the consent of the tenant, lodger or occupier. A search should not be made solely on the basis of the landlord's consent unless the tenant, lodger or occupier is unavailable and the matter is urgent: Code B Guidance note 5A. If the intention is to search premises under the authority of a warrant or a power of entry and search without warrant, and the occupier of the premises co-operates in accordance with Code B para 6.4 (see PARA 881 post), there is no need to obtain written consent: Code B Guidance note 5B.

2 Code B para 5.2.

3 Code B para 5.3.

4 Code B para 5.4. Code B para 5.4 is intended to apply when it is reasonable to assume that innocent occupiers would agree to police taking, and expect police to take, the proposed action, for example if: (1) a suspect has fled the scene of a crime or to evade arrest and it is necessary quickly to check surrounding gardens and readily accessible places to see if the suspect is in hiding; or (2) police have arrested someone in the night after a pursuit and it is necessary to make a brief check of gardens along the pursuit route to see if stolen or incriminating articles have been discarded: Code B Guidance note 5C.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(iii) Search Warrants and Production Orders: Preliminary Procedure/871. Action before making application for search warrant or production order.

### **(iii) Search Warrants and Production Orders: Preliminary Procedure**

#### **871. Action before making application for search warrant or production order.**

When information appears to justify an application, the officer must take reasonable steps to check that the information is accurate, recent and has not been provided maliciously or irresponsibly<sup>1</sup>. An application may not be made on the basis of information from an anonymous source if corroboration has not been sought<sup>2</sup>. The officer must ascertain as specifically as possible the nature of the articles concerned and their location<sup>3</sup>.

The officer must make reasonable inquiries to establish: (1) if anything is known about the likely occupier of the premises and the nature of the premises themselves, and whether they have been previously searched and, if so, how recently; and (2) to obtain any other information relevant to the application<sup>4</sup>.

An application:

- 1050 (a) for a search warrant or for a production order<sup>5</sup> must be supported by a signed written authority from an officer of inspector rank or above (except that, if the case is an urgent application to a justice of the peace and an inspector or above is not readily available, the next most senior officer on duty can give the written authority)<sup>6</sup>;
- 1051 (b) to a circuit judge under the terrorism legislation<sup>7</sup> for a production order, search warrant, or an order requiring an explanation of material seized or produced under such a warrant or production order must be supported by a signed written authority from an officer of superintendent rank or above<sup>8</sup>.

Except in a case of urgency, if there is reason to believe that a search might have an adverse effect on relations between the police and the community, the officer in charge must consult the local police/community liaison officer before the search or, in urgent cases, as soon as possible after the search<sup>9</sup>.

1 Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 3.1.

2 See Code B para 3.1.

3 See Code B para 3.2.

4 See Code B para 3.3.

5 Ie under the Police and Criminal Evidence Act 1984 s 9, Sch 1 (as amended): see PARA 874 et seq post.

6 See Code B para 3.4(a).

7 Ie under the Terrorism Act 2000 s 37, Sch 5 (as amended): see PARA 409 et seq ante.

8 See Code B para 3.4(b).



9 Code B para 3.5.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(iii) Search Warrants and Production Orders: Preliminary Procedure/872. Application for search warrant.

## **872. Application for search warrant.**

Where a constable<sup>1</sup> applies for any search warrant<sup>2</sup>, it is his duty:

- 1052 (1) to state: (a) the ground on which he makes the application<sup>3</sup>; and (b) the enactment under which the warrant would be issued; and (c) if the application is for a warrant authorising entry and search on more than one occasion, the ground on which he applies for such a warrant, and whether he seeks a warrant authorising an unlimited number of entries, or (if not) the maximum number of entries desired<sup>4</sup>;
- 1053 (2) to specify certain prescribed matters relating to the premises which it is desired to enter and search<sup>5</sup>; and
- 1054 (3) to identify, so far as is practicable, the articles or persons to be sought<sup>6</sup>.

An application for such a warrant must be made *ex parte* and supported by an information in writing<sup>7</sup>.

The constable must answer on oath any question that the justice of the peace or judge hearing the application asks him<sup>8</sup>.

If an application is refused, no further application may be made for a warrant to search those premises unless supported by additional grounds<sup>9</sup>.

1 See PARA 857 note 2 ante. A suitably designated investigating officer may apply for and be granted a search warrant under the Police and Criminal Evidence Act 1984; certain related powers and obligations are also extended to such a person: see the Police Reform Act 2002 s 38(6), Sch 4 paras 16-20 (as amended); and POLICE vol 36(1) (2007 Reissue) PARA 529.

2 The Police and Criminal Evidence Act 1984 ss 15, 16 (both as amended) (see the text and notes 3-8 infra; and PARAS 880-881 post) have effect in relation to the issue to constables under any enactment, including an enactment contained in an Act passed after the Police and Criminal Evidence Act 1984, of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless it complies with ss 15, 16 (both as amended): s 15(1). As to the meaning of 'it' see *R v Longman* [1988] 1 WLR 619 at 622, [1989] 88 Cr App Rep 148 at 152, CA, per Lord Lane CJ (court inclined to view that 'it' most probably refers to the warrant but it left the matter unresolved). In *R v Central Criminal Court, ex p AJD Holdings Ltd* [1992] Crim LR 669, DC, the court, referring to *R v Longman* supra, did not accept that that case left it open to the court in *R v Central Criminal Court, ex p AJD Holdings* supra to hold that the invalidity of the warrant did not render the search unlawful.

3 The documents or information upon the strength of which a search warrant is obtained are protected by public interest immunity: *Taylor v Anderton* (1986) Times, 21 October. See PARA 1480 post; and CIVIL PROCEDURE vol 11 (2009) PARA 574 et seq.

4 See the Police and Criminal Evidence Act 1984 s 15(2)(a) (amended by the Serious Organised Crime and Police Act 2005 ss 114(1), (3), (4), 174(2), Sch 17 Pt 2).

5 See the Police and Criminal Evidence Act 1984 s 15(2)(b) (substituted by the Serious Organised Crime and Police Act 2005 s 113(1), (5), (6)). The prescribed matters are:

299 (1) if the application relates to one or more sets of premises specified in the application, each set of premises which it is desired to enter and search (Police and Criminal Evidence Act 1984 s 15(2A)(a) (s 15(2A) added by the Serious Organised Crime and Police Act 2005 s 115(1), (5), (7);

and the Police and Criminal Evidence Act 1984 s 15(2A)(a) substituted by the Serious Organised Crime and Police Act 2005 (Amendment) Order 2005, SI 2005/3496, art 7(1), (2)(a));

- 300 (2) if the application relates to any premises occupied or controlled by a person specified in the application: (a) as many sets of premises which it is desired to enter and search as it is reasonably practicable to specify; (b) the person who is in occupation or control of those premises and any others which it is desired to enter and search; (c) why it is necessary to search more premises than those specified under head (a) supra; and (d) why it is not reasonably practicable to specify all the premises which it is desired to enter and search (Police and Criminal Evidence Act 1984 s 15(2A)(b) (as so added; and amended by the Serious Organised Crime and Police Act 2005 (Amendment) Order 2005, SI 2005/3496, art 7(1), (2)(b))).

For these purposes, 'premises' includes any place and, in particular, includes: (1) any vehicle, vessel, aircraft or hovercraft; (2) any offshore installation; (3) any renewable energy installation; (4) any tent or movable structure: see the Police and Criminal Evidence Act 1984 s 23 (amended by the Energy Act 2004 ss 103(2), 197(9), Sch 23 Pt 1). For the meaning of 'offshore installation' see the Mineral Workings (Offshore Installations) Act 1971 s 12 (as amended); the Offshore Installations and Pipeline Works (Management and Administration) Regulations 1995, SI 1995/738, reg 3 (as amended); and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1681 (definition applied by the Police and Criminal Evidence Act 1984 s 23 (amended by virtue of the Offshore Installations and Pipeline Works (Management and Administration) Regulations 1995, SI 1995/738, regs 3, 22(1), Sch 1 Pt 1)). As to offshore workings and installations see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1677 et seq. 'Renewable energy installation' has the same meaning as in the Energy Act 2004 Pt 2 Ch 2 (see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1311); see the Police and Criminal Evidence Act 1984 s 23 (amended by the Energy Act 2004 s 103(2)). When a constable wishes to search only a part of premises divided into separate dwellings, he must make it clear to the justices in the information that the application is so limited: *R v South Western Magistrates' Court, ex p Cofie* [1997] 1 WLR 885, 161 JP 69, DC.

6 Police and Criminal Evidence Act 1984 s 15(2)(c).

7 Ibid s 15(3). An application for a search warrant must be supported in writing, specifying: (1) the enactment under which the application is made; (2) whether the warrant is to authorise entry and search of one set of premises or, if the application is under s 8 (see PARA 873 post) or Sch 1 para 12 (see PARA 879 post), more than one set of premises or all premises occupied or controlled by a specified person, and the premises to be searched; (3) the object of the search; (4) the grounds for the application, including, when the purpose of the proposed search is to find evidence of an alleged offence, an indication of how the evidence relates to the investigation; (5) where the application is under s 8 or Sch 1 para 12 for a single warrant to enter and search: (a) more than one set of specified premises, the officer must specify each set of premises which it is desired to enter and search; (b) all premises occupied or controlled by a specified person, the officer must specify: (i) as many sets of premises which it is desired to enter and search as it is reasonably practicable to specify; (ii) the person who is in occupation or control of those premises and any others which it is desired to search; (iii) why it is necessary to search more premises than those which can be specified; (iv) why it is not reasonably practicable to specify all the premises which it is desired to enter and search; (6) whether an application under s 8 (see PARA 873 post) is for a warrant authorising entry and search on more than one occasion, and if so, the officer must state the grounds for this and whether the desired number of entries authorised is unlimited or a specified maximum; (7) there are no reasonable grounds to believe the material to be sought, when making application to a: (A) justice of the peace or a judge, consists of or includes items subject to legal privilege; (B) justice of the peace, consists of or includes excluded material or special procedure material (note that this does not affect the additional powers of seizure in the Criminal Justice and Police Act 2001 Pt 2 (ss 50-70) (as amended) (see PARAS 890-900 post)); (8) if applicable, a request for the warrant to authorise a person or persons to accompany the officer who executes the warrant: Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 3.6.

The information supporting a search warrant application should be as specific as possible, particularly in relation to the articles or persons being sought and where in the premises it is suspected they may be found: Code B Guidance note 3B. For the meaning of 'items subject to legal privilege' see the Police and Criminal Evidence Act 1984 s 10 (see PARA 873 post); for the meaning of 'special procedure material' see s 14 (see PARA 876 post); and for the meaning of 'excluded material' see s 11 (see PARA 875 post) (definitions applied by Code B Guidance note 3B).

Under the Police and Criminal Evidence Act 1984 s 16(2) (see PARA 880 post), a search warrant may authorise persons other than police officers to accompany the constable who executes the warrant. This includes, for example, any suitably qualified or skilled person or an expert in a particular field whose presence is needed to help accurately identify the material sought or to advise where certain evidence is most likely to be found and how it should be dealt with. It does not give him any right to force entry, but it gives him the right to be on the premises during the search and to search for and seize property without the occupier's permission: see Code B Guidance note 3C. An application for a search warrant under the Police and Criminal Evidence Act 1984 Sch 1 para 12(a) (as amended) (see PARA 879 post) must also, if appropriate, indicate why it is believed that service of notice of an application for a production order (see PARA 877 post) may seriously prejudice the investigation: Code B para 3.7. Applications for search warrants under the Terrorism Act 2000 Sch 5 para 11 (prospectively

amended) (see PARA 411 ante) must indicate why a production order would not be appropriate: see Code B para 3.7.

The identity of an informant need not be disclosed when making an application, but the officer concerned should be prepared to deal with any questions the magistrate or judge may have about the accuracy of previous information from that source or any other related matters: Code B Guidance note 3A.

8 Police and Criminal Evidence Act 1984 s 15(4).

9 Code B para 3.8.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(iv) Issue of Search Warrants and Production Orders/A. STANDARD PROCEDURE/873. Power of justice of the peace to authorise entry and search.

#### **(iv) Issue of Search Warrants and Production Orders**

##### **A. STANDARD PROCEDURE**

##### **873. Power of justice of the peace to authorise entry and search.**

If, on an application<sup>1</sup> made by a constable<sup>2</sup>, a justice of the peace is satisfied that there are reasonable grounds for believing:

- 1055 (1) that an indictable offence has been committed<sup>3</sup>; and
- 1056 (2) that there is material on premises<sup>4</sup> specified<sup>5</sup> which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence<sup>6</sup>; and
- 1057 (3) that the material is likely to be relevant evidence<sup>7</sup>; and
- 1058 (4) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material<sup>8</sup>; and
- 1059 (5) that any of the specified conditions<sup>9</sup> applies in relation to each set of premises specified in the application<sup>10</sup>,

he may issue a warrant authorising a constable to enter and search the premises<sup>11</sup>. If the application is for an all premises warrant, the justice of the peace must also be satisfied:

- 1060 (a) that because of the particulars of the offence referred to in head (1) above, there are reasonable grounds for believing that it is necessary to search premises occupied or controlled by the person in question which are not specified in the application in order to find the material referred to in head (2) above<sup>12</sup>; and
- 1061 (b) that it is not reasonably practicable to specify in the application all the premises which he occupies or controls and which might need to be searched<sup>13</sup>.

The warrant may authorise entry to and search of premises on more than one occasion if, on the application, the justice of the peace is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which he issues the warrant<sup>14</sup>. If it authorises multiple entries, the number of entries authorised may be unlimited, or limited to a maximum<sup>15</sup>.

A constable may seize and retain anything for which a search has been authorised<sup>16</sup>.

<sup>1</sup> See PARA 872 ante.

<sup>2</sup> See PARA 857 note 2 ante. An investigating officer may now apply as if he were a constable for a warrant under the Police and Criminal Evidence Act 1984 s 8 (as amended); see the Police Reform Act 2002 s 38(6), Sch 4 para 16 (as amended); and POLICE vol 36(1) (2007 Reissue) PARA 529.

<sup>3</sup> Police and Criminal Evidence Act 1984 s 8(1)(a) (amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (3)). For the meaning of 'indictable offence' see PARA 1102 note 1 post. The Police and Criminal Evidence Act 1984 Pt 2 (ss 8-23) (as amended) (powers of entry, search and seizure: see PARAS

874-889 post) is to have effect as if references to indictable offences in s 8 (as amended) included any conduct which: (1) constitutes an offence under the law of a country outside the United Kingdom; and (2) would, if it occurred in England and Wales, constitute an indictable offence: Crime (International Co-operation) Act 2003 s 16(1) (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 51(1), (2)). An application for a warrant or order by virtue of the Crime (International Co-operation) Act 2003 s 16(1) (as amended) may be made only: (a) in pursuance of a direction given under s 13 (see PARA 904 post); or (b) if it is an application for a warrant or order under the Police and Criminal Evidence Act 1984 s 8 (as amended), by a constable for the purposes of an investigation by an international joint investigation team of which he is a member: Crime (International Co-operation) Act 2003 s 16(2).

4 For the meaning of 'premises' see the Police and Criminal Evidence Act 1984 s 23 (as amended); and PARA 872 note 5 ante.

5 le: (1) one or more sets of premises specified in the application (in which case the application is for a 'specific premises warrant'); or (2) any premises occupied or controlled by a person specified in the application, including such sets of premises as are so specified (in which case the application is for an 'all premises warrant'): *ibid* s 8(1A) (added by the Serious Organised Crime and Police Act 2005 s 113(1), (2), (4)).

6 Police and Criminal Evidence Act 1984 s 8(1)(b) (amended by the Serious Organised Crime and Police Act 2005 s 113(1), (2), (3)(a)).

7 Police and Criminal Evidence Act 1984 s 8(1)(c). For these purposes, 'relevant evidence', in relation to an offence, means anything that would be admissible in evidence at a trial for the offence: s 8(4).

8 *Ibid* s 8(1)(d). For these purposes, 'items subject to legal privilege' means:

- 301 (1) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client (ss 10(1)(a), 118(1));
- 302 (2) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings (ss 10(1)(b), 118(1)); and
- 303 (3) items enclosed with or referred to in such communications and made: (a) in connection with the giving of legal advice; or (b) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, when they are in the possession of a person who is entitled to possession of them (ss 10(1)(c), 118(1)).

The actual conveyance of a house, and records showing how the transaction was financed, are not subject to legal privilege within the meaning of s 10 (see heads (1)-(3) *supra*, although correspondence as to how the transaction is to be financed and completed may be: *R v Crown Court at Inner London Sessions, ex p Baines and Baines (a firm)* [1988] QB 579, 87 Cr App Rep 111, DC. See also *R v Guildhall Magistrates' Court, ex p Primlaks Holdings Co (Panama) Inc* [1990] 1 QB 261, 89 Cr App Rep 215, DC (pre-existing documents sent to solicitors under cover of correspondence not subject to legal privilege unless made in accordance with head (3) *supra*).

Forged documents made for the purposes of supporting a civil claim are not made in connection with legal proceedings; 'made in connection with legal proceedings' means 'lawfully made': *R v Leeds Magistrates' Court, ex p Dumbleton* [1993] Crim LR 866, DC. A blood sample provided by the defendant to his doctor for a DNA test which his solicitors had requested has been held to be an item covered by head (3) *supra*: *R v R* [1994] 4 All ER 260, [1995] 1 Cr App Rep 183, CA.

Records of time spent with a client on attendance notes, time sheets or fee records are not communications made in connection with legal advice and are therefore not subject to legal privilege: *R v Manchester Crown Court, ex p Rogers* [1999] 4 All ER 35, [1994] 2 Cr App Rep 267, DC.

Items held with the intention of furthering a criminal purpose are not items subject to legal privilege: Police and Criminal Evidence Act 1984 s 10(2). On the true construction of s 10(2) items which would otherwise come within the definition of 'items subject to legal privilege' contained in s 10(1) are excluded from that definition if they are held with the intention of either the holder or any other person furthering a criminal purpose, whether the purpose be that of the client, the solicitor or any other person: *R v Central Criminal Court, ex p Francis and Francis (a firm)* [1989] AC 346, 88 Cr App Rep 213, HL, disapproving the reasoning in *R v Crown Court at Snaresbrook, ex p DPP* [1988] QB 532, 86 Cr App Rep 227, DC. If, *prima facie*, legal privilege is lost by virtue of the Police and Criminal Evidence Act 1984 s 10(2), that result does not mean that no express or implied undertaking to hold in confidence can exist; but such undertaking cannot prevent an order being made pursuant to an application under s 9 (as amended) (see PARA 874 *et seq post*) by a judge who will consider the matter *inter partes* and in circumstances in which the matter can be fully ventilated: *R v Guildhall Magistrates' Court, ex p Primlaks Holdings Co (Panama) Inc* *supra*.

Legal privilege does not apply to protect material in the hands of a solicitor from being disclosed where there is evidence of an agreement to pervert the course of justice, which is free-standing and independent in the sense that it does not require any judgment to be reached in relation to the issues to be tried in the pending proceedings: *R (on the application of Hallinan Blackburn-Gittings & Nott (a firm)) v Middlesex Guildhall Crown Court* [2004] EWHC 2726 (Admin), [2005] 1 WLR 766. See also *Kuwait Airways Corp v Iraqi Airways Co* [2005] EWCA Civ 286, [2005] 1 WLR 2734, (2005) Times, 25 April.

For the meaning of 'excluded material' see PARA 875 post. For the meaning of 'special procedure material' see PARA 876 post.

9 The specified conditions are:

- 304 (1) that it is not practicable to communicate with any person entitled to grant entry to the premises (Police and Criminal Evidence Act 1984 s 8(3)(a));
- 305 (2) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence (s 8(3)(b));
- 306 (3) that entry to the premises will not be granted unless a warrant is produced (s 8(3)(c));
- 307 (4) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them (s 8(3)(d)).

10 Ibid s 8(1)(e) (amended by the Serious Organised Crime and Police Act 2005 ss 111, 113(1), (2), (3)). The information supporting a search warrant application should be as specific as possible, particularly in relation to the article or persons being sought and where in the premises it is suspected they may be found: Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises Guidance note 3B.

11 See the Police and Criminal Evidence Act 1984 s 8(1). The criteria in s 8(1) (as amended) (see the text and notes 1-10 supra) are directed to the justice's state of mind when he is being asked to issue the warrant; the justice must consider whether the application raises the issue of legal privilege, and if the applicant police officer does not volunteer information on that issue, the justice should ask whether the material sought consists of or includes items subject to legal privilege; if there are reasonable grounds for believing that it does so consist or include, the targeted material should be redefined so as to enable the justice to be satisfied that there are no longer reasonable grounds for so believing, otherwise the justice cannot issue the warrant sought: *R v Chesterfield Justices, ex p Bramley* [2000] QB 576, [2000] 1 Cr App Rep 486, DC. For further guidance see *R v Southampton Crown Court, ex p J and P* [1993] Crim LR 962, DC.

The Police and Criminal Evidence Act 1984 s 8 (as amended) confers a Draconian power and it is for the justice to satisfy himself that there are reasonable grounds for believing the matters set out; the fact that a police officer states that there are reasonable grounds is not enough: *R v Guildhall Magistrates' Court, ex p Primlaks Holdings Co (Panama) Inc* [1990] 1 QB 261, 89 Cr App Rep 215, DC. Where the justice cannot be so satisfied that the material sought does not include any items which are prima facie subject to legal privilege or special procedure material, he should refuse the application and leave the applicant to proceed under the Police and Criminal Evidence Act 1984 s 9 (see PARA 874 et seq post): *R v Guildhall Magistrates' Court, ex p Primlaks Holdings Co (Panama) Inc* supra. It is not a pre-condition to the grant of a warrant under the Police and Criminal Evidence Act 1984 s 8 (as amended) that other methods of obtaining material have been tried without success, or have not been tried because they were bound to fail: *R v Billericay Justices and Doblyn, ex p Frank Harris (Coaches) Ltd* [1991] Crim LR 472, DC. It is not a bar to the issue or execution of a warrant that the police may have to sift material and may encounter material which is subject to legal privilege or is special procedure material; such material would be outside the scope of the search: *R v Leeds Magistrates' Court, ex p Dumbleton* [1993] Crim LR 866, DC.

The Police and Criminal Evidence Act 1984 s 8 (as amended) applies in relation to a relevant offence (as defined in the Immigration Act 1971 s 28D (as added and amended): see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 207) as it applies to an indictable offence: Police and Criminal Evidence Act 1984 s 8(6) (added by the Immigration and Asylum Act 1999 s 169(1), Sch 14 para 80(1), (2); and amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 43(1), (3)). The power under the Police and Criminal Evidence Act 1984 s 8(1) (as amended) to issue a warrant is in addition to any such power otherwise conferred: s 8(5).

As to search warrants issued under the Terrorism Act 2000 s 37, Sch 5 (as amended) see PARAS 409-413 ante. As to powers of search for material relevant to an overseas investigation see PARA 904 post.

12 Police and Criminal Evidence Act 1984 s 8(1B)(a) (s 8(1B) added by the Serious Organised Crime and Police Act 2005 s 113(1), (2), (4)).

13 Police and Criminal Evidence Act 1984 s 8(1B)(b) (as added: see note 12 supra).

14 Ibid s 8(1C) (added by the Serious Organised Crime and Police Act 2005 s 114(1), (2)).

15 Police and Criminal Evidence Act 1984 s 8(1D) (added by the Serious Organised Crime and Police Act 2005 s 114(1)).

16 Police and Criminal Evidence Act 1984 s 8(2). As to computerised information see PARA 887 post. Those executing a warrant issued under s 8 (as amended) must not lose sight of the requirement that, even though material may fall within the description in the warrant, its seizure must fall within what is permitted by s 8(1), (2) (as amended): *R v Chief Constable of Warwickshire Constabulary, ex p Fitzpatrick* [1998] 1 All ER 65, [1999] 1 WLR 564, DC. In order to determine how much of the available material falls within the description in the warrant, the officer must examine documents to ascertain whether any of them consists of special procedure or legally privileged material: *R v Chesterfield Justices, ex p Bramley* [2000] QB 576, [2000] 1 Cr App Rep 486, DC. An officer is not obliged to accept at face value a claim to privilege: *R v Chesterfield Justices, ex p Bramley* supra. If an officer seizes material which later transpires to be legally privileged, its seizure will not have been unlawful unless the officer had reasonable grounds to believe at the time of the seizure that it was so privileged (see the Police and Criminal Evidence Act 1984 s 19(6); and PARA 886 post): *R v Chesterfield Justices, ex p Bramley* supra; *Gross v Southwark Crown Court* [1998] COD 445, DC (in both cases the Divisional Court dissented from a decision to the contrary in *R v Customs and Excise Comrs, ex p Popely* [1999] STC 1016, DC (warrant obtained under the Police and Criminal Evidence Act 1984 s 9, a point on which 'nothing seems to turn' (*R v Chesterfield Justices, ex p Bramley* supra at 588 and 498 per Kennedy LJ))).

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### 873 Power of justice of the peace to authorise entry and search

NOTE 8--See *R (on the application of Bates) v Chief Constable of the Avon and Somerset Police* [2009] EWHC 942 (Admin), [2009] All ER (D) 59 (May) (seizure of material from computer owned by person who regularly acted as expert witness illegal as material likely to be privileged).

NOTES 9, 11--A failure to identify which of the conditions in the 1984 Act s 8(3) is being relied on invalidates the warrant: *Redknapp v City of London Police Comr* [2008] EWHC 1177 (Admin), [2009] 1 All ER 229, DC.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12.

ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(iv) Issue of Search Warrants and Production Orders/B. SPECIAL PROCEDURE/874. Special provisions as to access.

## **B. SPECIAL PROCEDURE**

### **874. Special provisions as to access.**

A constable<sup>1</sup> may obtain access to excluded material<sup>2</sup> or special procedure material<sup>3</sup> for the purposes of a criminal investigation by making an application in accordance with the statutory provisions<sup>4</sup>.

1 See PARA 857 note 2 ante.

2 For the meaning of 'excluded material' see PARA 875 post.

3 For the meaning of 'special procedure material' see PARA 876 post.

4 Police and Criminal Evidence Act 1984 s 9(1). The statutory provisions referred to in the text are those contained in Sch 1 (as amended): see PARAS 877-879 post. As to the procedure for making an application see PARA 877 et seq post. Any Act (including a local Act) passed before the Police and Criminal Evidence Act 1984 under which a search of premises for the purposes of a criminal investigation could be authorised by the issue of a warrant to a constable has ceased to have effect so far as it relates to the authorisation of searches: (1) for items subject to legal privilege; or (2) for excluded material; or (3) for special procedure material consisting of documents or records other than documents: s 9(2). For the meaning of 'items subject to legal privilege' see PARA 873 note 8 ante. Section 9(2) does not apply to prevent the authorisation and execution in England of a search warrant issued in Scotland in respect of a Scottish crime: *R v Manchester Stipendiary Magistrate and the Lord Advocate, ex p Granada Television Ltd* [2001] 1 AC 300, [2000] 1 All ER 135, HL. The Summary Jurisdiction (Process) Act 1881 s 4 which includes provision for the execution of process of English courts in Scotland, and the Petty Sessions (Ireland) Act 1851 s 29 which makes equivalent provision for execution in Northern Ireland, each apply to any process issued by a circuit judge under the Police and Criminal Evidence Act 1984 Sch 1 (as amended) as it applies to process issued by a magistrates' court under the Magistrates' Courts Act 1980: Police and Criminal Evidence Act 1984 s 9(2A) (added by the Criminal Justice and Police Act 2001 s 86(1)). As from a day to be appointed this provision is amended so as to refer to a judge instead of a circuit judge: see the Police and Criminal Evidence Act 1984 s 9(2A) (as so added; prospectively amended by the Courts Act 2003 s 65, Sch 4 para 5). At the date at which this volume states the law no such day had been appointed. For the meaning of 'judge' see PARA 878 note 2 post.

As to the procedure for gaining access to such material for the purposes of a terrorist investigation see PARA 411 ante.

The statutory provisions relating to excluded and special procedure material are to safeguard the confidence of the maker or holder of such material and not that of the suspected person, and therefore the holders of such records can disclose the material voluntarily, but, if they choose not to, the statutory procedure must be followed: *R v Singleton* [1995] 1 Cr App Rep 431, CA.

## **UPDATE**

### **855-907 Enforcement Procedures**

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The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the

public from the current risk of serious violent harm posed by a qualifying offender: see  
PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(iv) Issue of Search Warrants and Production Orders/B. SPECIAL PROCEDURE/875. Meaning of 'excluded material'.

### **875. Meaning of 'excluded material'.**

'Excluded material' means:

- 1062 (1) personal records<sup>1</sup> which a person has acquired or created in the course of any trade, business, profession or other occupation or for the purposes of any paid or unpaid office and which he holds in confidence<sup>2</sup>;
- 1063 (2) human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence<sup>3</sup>;
- 1064 (3) journalistic material<sup>4</sup> which a person holds in confidence and which consists of documents<sup>5</sup> or of records other than documents<sup>6</sup>.

A person holds material other than journalistic material in confidence for these purposes if he holds it subject:

- 1065 (a) to an express or implied undertaking to hold it in confidence<sup>7</sup>; or
- 1066 (b) to a restriction on disclosure or an obligation of secrecy contained in any enactment, including an enactment contained in an Act passed after the Police and Criminal Evidence Act 1984<sup>8</sup>.

A person holds journalistic material in confidence for these purposes if:

- 1067 (i) he holds it subject to such an undertaking, restriction or obligation<sup>9</sup>; and
- 1068 (ii) it has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism<sup>10</sup>.

1 For these purposes, 'personal records' means documentary and other records concerning an individual (whether living or dead) who can be identified from them and relating: (1) to his physical or mental health; (2) to spiritual counselling or assistance given or to be given to him; or (3) to counselling or assistance given or to be given to him, for the purposes of his personal welfare, by any voluntary organisation or by any individual who: (a) by reason of his office or occupation, has responsibilities for his personal welfare; or (b) by reason of an order of a court, has responsibilities for his supervision: Police and Criminal Evidence Act 1984 s 12. Hospital records of patients' admissions and discharges are personal records because they relate to the physical or mental health of persons who could be identified from them: *R v Cardiff Crown Court, ex p Kellam* (1993) Times, 3 May, DC.

2 Police and Criminal Evidence Act 1984 s 11(1)(a).

3 Ibid s 11(1)(b).

4 For these purposes, 'journalistic material' means material acquired or created for the purposes of journalism: ibid s 13(1). Material is only journalistic material for these purposes if it is in the possession of a person who acquired or created it for the purposes of journalism: s 13(2). A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes: s 13(3).

5 'Document' means anything in which information of any description is recorded: *ibid* s 118(1) (substituted by the Civil Evidence Act 1995 s 15(1), Sch 1 para 9(1), (3)).

6 Police and Criminal Evidence Act 1984 s 11(1)(c).

7 *Ibid* s 11(2)(a).

8 *Ibid* s 11(2)(b).

9 *Ibid* s 11(3)(a).

10 *Ibid* s 11(3)(b).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

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### **876. Meaning of 'special procedure material'.**

'Special procedure material' means specified material<sup>1</sup> and journalistic material<sup>2</sup>, other than journalistic material which is excluded material<sup>3</sup>.

For these purposes, specified material means material, other than items subject to legal privilege<sup>4</sup> and excluded material, in the possession of a person who:

- 1069 (1) acquired or created it in the course of any trade, business, profession or other occupation or for the purpose of any paid or unpaid office<sup>5</sup>; and
- 1070 (2) holds it subject: (a) to an express or implied undertaking to hold it in confidence; or (b) to a restriction on disclosure or an obligation of secrecy contained in any enactment, including an enactment contained in an Act passed after the Police and Criminal Evidence Act 1984<sup>6</sup>.

Where material is acquired:

- 1071 (i) by an employee from his employer and in the course of his employment<sup>7</sup>; or
- 1072 (ii) by a company from an associated company<sup>8</sup>,

it is only special procedure material if it was special procedure material immediately before the acquisition<sup>9</sup>.

Where material is created by an employee in the course of his employment, it is only special procedure material if it would have been special procedure material had his employer created it<sup>10</sup>.

Where material is created by a company on behalf of an associated company, it is only special procedure material if it would have been special procedure material had the associated company created it<sup>11</sup>.

<sup>1</sup> The material to which the Police and Criminal Evidence Act 1984 s 14(2) applies: see the text to notes 4-6 *infra*.

<sup>2</sup> For the meaning of 'journalistic material' see PARA 875 note 4 *ante*.

<sup>3</sup> Police and Criminal Evidence Act 1984 s 14(1). For the meaning of 'excluded material' see PARA 875 *ante*.

<sup>4</sup> For the meaning of 'items subject to legal privilege' see PARA 873 note 8 *ante*.

<sup>5</sup> Police and Criminal Evidence Act 1984 s 14(2)(a).

<sup>6</sup> *Ibid* s 14(2)(b). See *R v Crown Court at Bristol, ex p Bristol Press and Picture Agency Ltd* (1986) 85 Cr App Rep 190, DC (press photographs of riots were special procedure material). See also *R v Leeds Crown Court, ex p Dumbleton* [1993] Crim LR 866, DC (documents forged by a solicitor to support a civil claim or supplied to him by a dishonest client are not acquired or created in the course of the profession of a solicitor, nor can the dishonest solicitor be said to hold the forged documents subject to an express or implied undertaking to hold it in confidence).

7 Police and Criminal Evidence Act 1984 s 14(3)(a).

8 Ibid s 14(3)(b). For these purposes, a company is to be treated as another's associated company if it would be so treated under the Income and Corporation Taxes Act 1988 s 416 (as amended) (see INCOME TAXATION vol 23(1) (Reissue) PARAS 1297, 1299); Police and Criminal Evidence Act 1984 s 14(6); Interpretation Act 1978 s 17(2)(a).

9 See the Police and Criminal Evidence Act 1984 s 14(3).

10 Ibid s 14(4).

11 Ibid s 14(5).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

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### **877. Notice of making of application for order.**

An application<sup>1</sup> for an order for production or access<sup>2</sup> must be made inter partes<sup>3</sup>; and notice of an application for such an order may be served on a person either by delivering it to him or by leaving it at his proper address or by sending it by post to him in a registered letter or by the recorded delivery service<sup>4</sup>. Such notice may be served on a body corporate by serving it on the body's secretary or clerk or other similar officer and on a partnership by serving it on one of the partners<sup>5</sup>.

Where notice of an application for an order has been served on a person, he may not conceal, destroy, alter or dispose of the material to which the application relates except with the leave of a judge or with the written permission of a constable, until the application is dismissed or abandoned or he has complied with an order for production or access made on the application<sup>6</sup>.

1 Before making such an application, police officers must give careful consideration to what material it is hoped a search might reveal; the application must make clear that the material sought relates to the crime under investigation: *R v Central Criminal Court, ex p AJD Holdings Ltd* [1992] Crim LR 669, DC.

2 Ie under the Police and Criminal Evidence Act 1984 s 9(1), Sch 1 para 4 (prospectively amended): see PARA 878 post. Such an application is an application in a 'criminal cause or matter': *Carr v Atkins* [1987] QB 963, 85 Cr App Rep 343, CA; *R v Crown Court at Bristol, ex p Bristol Press and Picture Agency Ltd* (1986) 85 Cr App Rep 190, DC.

3 See the Police and Criminal Evidence Act 1984 Sch 1 para 7. A suspect has no statutory right to be heard, but the judge has a discretion to hear the suspect where this appears likely to be helpful: *R v Crown Court at Lewes, ex p Hill* (1991) 93 Cr App Rep 60, DC. The Police and Criminal Evidence Act 1984 Sch 1 para 7 applies to the police and the person or institution in whose custody special procedure material is believed to be held; there is thus no requirement under Sch 1 para 8 (see the text and note 4 infra) to give notice of the proceedings to the defendant or suspected person: *R v Crown Court at Leicester, ex p DPP* [1987] 3 All ER 654, 86 Cr App Rep 254, DC.

4 Police and Criminal Evidence Act 1984 Sch 1 para 8. It is incumbent on the applicant to set out in the notice a description of all that is sought to be produced since failure to do so may lead the recipient of the notice to destroy the material unwittingly in breach of his obligations under Sch 1 para 11 (see the text and note 6 infra): *R v Central Criminal Court, ex p Adegbesan* [1986] 3 All ER 113, 84 Cr App Rep 219, DC. It may, however, suffice if the information is given orally to the person affected, either at the time the notice is served or beforehand (*R v Crown Court at Manchester, ex p Taylor* [1988] 2 All ER 769, [1988] 1 WLR 705, DC; *Barclays Bank plc v Taylor, Trustee Savings Bank of Wales and Border Counties v Taylor* [1989] 3 All ER 563, [1989] 1 WLR 1066, CA), but it is essential that the respondent knows before the order is made what he has to produce or allow access to, as well as the nature of the offence under investigation (*R v Crown Court at Manchester, ex p Taylor* supra).

The police are not obliged to give the respondent advance notice of the evidence upon which they propose to rely: *R v Crown Court at Inner London Sessions, ex p Baines and Baines (a firm)* [1988] QB 579, 87 Cr App Rep 111, DC. Where, however, the application is accompanied by evidence, the party against whom the order is sought should be provided with that evidence before the hearing, or given an opportunity to seek an adjournment of the hearing if evidence is given which cannot adequately be responded to there and then: *R v Crown Court at Inner London Sessions, ex p Baines and Baines (a firm)* supra.

5 Police and Criminal Evidence Act 1984 Sch 1 para 9. For these purposes, and for the purposes of the Interpretation Act 1978 s 7 in its application to the Police and Criminal Evidence Act 1984 Sch 1 (as amended), the proper address of a person, in the case of the secretary or clerk or other similar officer of a body corporate, is that of the registered or principal office of that body, and in the case of a partner of a firm it is that of the

principal office of the firm, and in any other case it is the last known address of the person to be served: Sch 1 para 10. Where the police are proceeding to obtain information from an unincorporated body they ought to name an officer of that body as the person against whom they are moving by way of application: *R v Central Criminal Court, ex p Adegbesan* [1986] 3 All ER 113, 84 Cr App Rep 219, DC.

6 Police and Criminal Evidence Act 1984 Sch 1 para 11. It is implicit in the terms of Sch 1 para 11 that the body subject to an order has the power to intercept communications by e-mail so as to comply with the order notwithstanding that such action would otherwise constitute a criminal offence: *R (on the application of NTL Group Ltd) v Ipswich Crown Court* [2002] EWHC 1585 (Admin), [2003] QB 131, [2003] 1 Cr App Rep 225.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.



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### **878. Making of order by judge.**

If on an application made by a constable<sup>1</sup> a circuit judge<sup>2</sup> is satisfied<sup>3</sup> that one or other of the sets of access conditions is fulfilled, he may make an order<sup>4</sup>.

The first set of access conditions is fulfilled if:

- 1073 (1) there are reasonable grounds for believing:
  - 37
  - 63. (a) that an indictable offence has been committed<sup>5</sup>;
  - 64. (b) that there is material which consists of special procedure material<sup>6</sup> or includes special procedure material and does not also include excluded material<sup>7</sup> on premises<sup>8</sup> specified in the application, or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify)<sup>9</sup>;
  - 65. (c) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made<sup>10</sup>; and
  - 66. (d) that the material is likely to be relevant evidence<sup>11</sup>;
  - 38
- 1074 (2) other methods of obtaining the material:
  - 39
  - 67. (a) have been tried without success<sup>12</sup>; or
  - 68. (b) have not been tried because it appeared that they were bound to fail<sup>13</sup>; and
  - 40
- 1075 (3) it is in the public interest, having regard:
  - 41
  - 69. (a) to the benefit likely to accrue to the investigation if the material is obtained<sup>14</sup>; and
  - 70. (b) to the circumstances under which the person in possession of the material holds it<sup>15</sup>,
  - 42
- 1076 that the material should be produced or that access to it should be given<sup>16</sup>.

The second set of access conditions is fulfilled if:

- 1077 (i) there are reasonable grounds for believing that there is material which consists of or includes excluded material or special procedure material on premises specified in the application, or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify)<sup>17</sup>;
- 1078 (ii) but for the statutory provision<sup>18</sup>, a search of such premises for that material could have been authorised<sup>19</sup> by the issue of a warrant to a constable<sup>20</sup>; and

1079 (iii) the issue of such a warrant would have been appropriate<sup>21</sup>.

An order so made is an order that the person who appears to the circuit judge to be in possession of the material to which the application relates must produce it to a constable for him to take away<sup>22</sup> or give a constable access to it<sup>23</sup>, not later than the end of the period of seven days from the date of the order or the end of such longer period as the order may specify<sup>24</sup>.

If a person fails to comply with such an order, a circuit judge may deal with him as if he had committed a contempt of the Crown Court<sup>25</sup>.

1 See PARA 857 note 2 ante. The special procedure material provisions of the Police and Criminal Evidence Act 1984 Sch 1 (as amended) (see PARA 876) may be extended to investigations of indictable offences conducted by the department of the Secretary of State for Trade and Industry or a person acting on his behalf: see s 114A (added by the Criminal Justice and Police Act 2001 s 85; and amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (11)). See the Police and Criminal Evidence Act 1984 (Department of Trade and Industry Investigations) Order 2002, SI 2002/2326 (amended by SI 2005/3389).

2 As from a day to be appointed the Police and Criminal Evidence Act 1984 Sch 1 (as amended) is further amended so as to refer to a judge instead of a circuit judge: see Sch 1 para 1 (prospectively amended by the Courts Act 2003 s 65, Sch 4 para 6(1)). 'Judge' means a circuit judge or a District Judge (Magistrates' Courts): see the Police and Criminal Evidence Act 1984 Sch 1 para 17 (prospectively added by the Courts Act 2003 Sch 4 para 6(1)). At the date at which this volume states the law no such day had been appointed. As from a day to be appointed this definition is amended so as to provide that 'judge' means a judge of the High Court, a circuit judge, a Recorder or a District Judge (Magistrates' Courts): see the Police and Criminal Evidence Act 1984 Sch 1 para 17 (prospectively added; and prospectively amended by the Serious Organised Crime and Police Act 2005 s 114(1), (9)). At the date at which this volume states the law no such day had been appointed.

3 Before a judge can make an order, he must be given sufficient information upon which to form a reliable judgment as to whether the specific matters listed in one of the two access conditions are fulfilled; it is not enough for a constable simply to assert that they have been met: *R v Crown Court at Lewes, ex p Hill* (1991) 93 Cr App Rep 60, DC.

4 See the Police and Criminal Evidence Act 1984 Sch 1 para 1. Such an order is made under Sch 1 para 4: see the text and notes 22-24 infra. The judge may hear the application in chambers or in open court at his discretion: *R v Central Criminal Court, ex p DPP* (1988) Times, 1 April, DC. As to the meaning of 'open court' see PARA 90 note 10 ante.

5 Police and Criminal Evidence Act 1984 Sch 1 para 2(a)(i) (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 43(1), (3)). For the meaning of 'indictable offence' see PARA 1102 note 1 post.

The Police and Criminal Evidence Act 1984 Pt 2 (ss 8-23) (as amended) (powers of entry, search and seizure) is to have effect as if references to indictable offences in Sch 1 (as amended) included any conduct which:

308 (1) constitutes an offence under the law of a country outside the United Kingdom (Crime (International Co-operation) Act 2003 s 16(1)(a) (s 16 amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 51)); and

309 (2) would, if it occurred in England and Wales, constitute an indictable offence (Crime (International Co-operation) Act 2003 s 16(1)(b) (as so amended)).

However, an application for a warrant or order by virtue of s 16(1) (as amended) may be made only: (a) in pursuance of a direction given under s 13 (requests from overseas authorities: see PARA 904 post); or (b) if it is an application for a warrant or order under the Police and Criminal Evidence Act 1984 Sch 1 (as amended) by a constable for the purposes of an investigation by an international joint investigation team of which he is a member: Crime (International Co-operation) Act 2003 s 16(2).

6 For the meaning of 'special procedure material' see PARA 876 ante.

7 For the meaning of 'excluded material' see PARA 875 ante.

8 For the meaning of 'premises' see PARA 872 note 5 ante.

9 Police and Criminal Evidence Act 1984 Sch 1 para 2(a)(ii) (amended by the Serious Organised Crime and Police Act 2005 ss 111, 113(1), (10), (11)).

10 Police and Criminal Evidence Act 1984 Sch 1 para 2(a)(iii).

11 Ibid Sch 1 para 2(a)(iv). For the meaning of 'relevant evidence' see PARA 873 note 7 ante.

12 Ibid Sch 1 para 2(b)(i).

13 See ibid Sch 1 para 2(b)(ii). In the absence of evidence as to the conditions laid down in head (2) in the text, the access conditions cannot be fulfilled: *R v Crown Court at Inner London Sessions, ex p Baines and Baines (a firm)* [1988] QB 579 at 585, 87 Cr App Rep 111 at 116, DC, per Watkins LJ.

14 Police and Criminal Evidence Act 1984 Sch 1 para 2(c)(i).

15 Ibid Sch 1 para 2(c)(ii).

16 See ibid Sch 1 para 2(c); and see *R v Crown Court at Bristol, ex p Bristol Press and Picture Agency Ltd* (1986) 85 Cr App Rep 190, DC.

Where these conditions are fulfilled, the fact that compliance with an order may involve the person subject to it in self-incrimination is not per se a reason for not making the order: *R v Central Criminal Court, ex p Bright* [2001] 2 All ER 244, [2001] 1 WLR 662, DC.

Although it has been stated that it is inconsistent for a judge who has concluded that there are reasonable grounds for believing that an indictable offence has been committed to refuse an application for access to material by finding that it is not in the public interest that access should be given (*R v Crown Court at Northampton, ex p DPP* (1991) 93 Cr App Rep 376, DC), this does not mean that the judge does not have a discretion where he finds the access conditions satisfied not to make the order, eg because of the apparent disproportion between what might be obtained by the production of the material and the offence to which it relates, and (in the case of journalistic material) the potential stifling of debate and the risk of imposing an obligation requiring the individual to whom the order is directed to incriminate himself (*R v Central Criminal Court, ex p Bright* supra).

17 Police and Criminal Evidence Act 1984 Sch 1 para 3(a) (Sch 1 para 3(a), (b) amended by the Serious Organised Crime and Police Act 2005 s 113(1), (10)-(12)).

18 Ie the Police and Criminal Evidence Act 1984 s 9(2): see PARA 874 note 4 ante.

19 Ie under an enactment other than ibid Sch 1 (as amended).

20 Ibid Sch 1 para 3(b) (as amended: see note 17 supra).

21 Ibid Sch 1 para 3(c).

22 For the purposes of ibid ss 21, 22 (as amended) (see PARAS 888-889 post), material produced in pursuance of an order so made is to be treated as if it were material seized by a constable: Sch 1 para 6. Where the material consists of information stored in any electronic form, an order so made has effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form: Sch 1 para 5(a) (Sch 1 para 5 amended by the Criminal Justice and Police Act 2001 s 70, Sch 2 Pt 2 para 14).

23 Where the material consists of information stored in any electronic form, an order so made has effect as an order to give a constable access to the material in a form in which it is visible and legible: Police and Criminal Evidence Act 1984 Sch 1 para 5(b) (as amended: see note 22 supra).

24 Ibid Sch 1 para 4. As from a day to be appointed this provision is amended so as to refer to a judge instead of a circuit judge: see Sch 1 para 4 (prospectively amended by the Courts Act 2003 Sch 4 para 6(1)). At the date at which this volume states the law no such day had been appointed. See note 2 supra. As to the judge's responsibility for ensuring that the special procedure is not abused see *R v Crown Court at Maidstone, ex p Waitt* [1988] Crim LR 384, DC. As to costs see PARA 879 post. Once an order has been made it cannot be rescinded; an application by the aggrieved party for judicial review is the proper approach: *R v Liverpool Crown Court, ex p Wimpey plc* [1991] Crim LR 635, DC.

25 Police and Criminal Evidence Act 1984 Sch 1 para 15(1). As from a day to be appointed this provision is amended so as to refer to a judge instead of a circuit judge: see Sch 1 para 15(1) (prospectively amended by the Courts Act 2003 Sch 4 para 6(1)). At the date at which this volume states the law no such day had been appointed. See note 2 supra.

Any enactment relating to contempt of the Crown Court has effect in relation to such a failure as if it were such a contempt: Police and Criminal Evidence Act 1984 Sch 1 para 15(2).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **878 Making of order by judge**

NOTE 1--For 'Trade and Industry' read 'Business, Innovation and Skills': Police and Criminal Evidence Act 1984 s 114A (amended by SI 2009/2748). SI 2002/2326 further amended: SI 2005/3389, SI 2009/2748.

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### **879. Issue of warrant by judge.**

If, on an application made by a constable<sup>1</sup>, a circuit judge:

1080 (1) is satisfied that either set of access conditions<sup>2</sup> is fulfilled and that any of the further specified conditions<sup>3</sup> is also fulfilled in relation to each set of premises specified in the application<sup>4</sup>; or

1081 (2) is satisfied that the second set of access conditions is fulfilled and that an order<sup>5</sup> relating to the material has not been complied with<sup>6</sup>,

he may issue a warrant authorising a constable to enter and search the premises or (as the case may be) all premises occupied or controlled by the person specified in the application for the order<sup>7</sup>, including such sets of premises as are specified in the application (an 'all premises warrant')<sup>8</sup>. The judge may not issue an all premises warrant unless he is satisfied:

1082 (a) that there are reasonable grounds for believing that it is necessary to search premises occupied or controlled by the person in question which are not specified in the application, as well as those which are, in order to find the material in question<sup>9</sup>; and

1083 (b) that it is not reasonably practicable to specify all the premises which he occupies or controls which might need to be searched<sup>10</sup>.

A constable may seize and retain anything for which a search has been authorised<sup>11</sup>.

The costs of any application under the special procedure and of anything done or to be done in pursuance of an order are in the discretion of the judge<sup>12</sup>.

1 See PARA 857 note 2 ante.

2 I.e. the access conditions contained in the Police and Criminal Evidence Act 1984 s 9(1), Sch 1 paras 2, 3 (as amended): see PARA 878 ante.

3 The further specified conditions mentioned in head (1) in the text are:

310 (1) that it is not practicable to communicate with any person entitled to grant entry to the premises (ibid Sch 1 para 14(a) (amended by the Serious Organised Crime and Police Act 2005 s 113(1), (10), (15)));

311 (2) that it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the material (Police and Criminal Evidence Act 1984 Sch 1 para 14(b));

312 (3) that the material contains information which is subject to a restriction or obligation such as is mentioned in s 11(2)(b) (see PARA 875 head (b) ante) and is likely to be disclosed in breach of it if a warrant is not issued (Sch 1 para 14(c));

313 (4) that service of notice of an application for an order under Sch 1 para 4 (as amended) (see PARA 878 ante) may seriously prejudice the investigation (Sch 1 para 14(d)).

4 See *ibid* Sch 1 para 12(a) (amended by the Serious Organised Crime and Police Act 2005 s 113(1), (10), (13)).

5 *Ie* under *ibid* Sch 1 para 4 (as amended): see PARA 878 ante.

6 See *ibid* Sch 1 para 12(b).

7 *Ie* the person referred to in PARA 878 head (1)(b) or head (i) ante.

8 See the Police and Criminal Evidence Act 1984 Sch 1 para 12 (amended by the Serious Organised Crime and Police Act 2005 s 113(1), (10), (13)). As from a day to be appointed this provision is further amended so as to refer to a judge instead of a circuit judge: see the Police and Criminal Evidence Act 1984 Sch 1 para 12 (as so amended; prospectively amended by the Courts Act 2003 s 65, Sch 4 para 6(1)). At the date at which this volume states the law no such day had been appointed. For the meaning of 'judge' see PARA 878 note 2 ante. Applications under the Police and Criminal Evidence Act 1984 Sch 1 para 12 (as amended) should never become a matter of common form; the preferred method of obtaining material for a police investigation is by way of *inter partes* orders under Sch 1 para 4 (see PARA 878 ante): *R v Maidstone Crown Court, ex p Waitt* [1988] Crim LR 384, DC.

9 Police and Criminal Evidence Act 1984 Sch 1 para 12A(a) (s 12A added by the Serious Organised Crime and Police Act 2005 s 113(1), (10), (14)).

10 Police and Criminal Evidence Act 1984 Sch 1 para 12A(b) (as added: see note 9 *supra*).

11 *Ibid* Sch 1 para 13. As to information stored in electronic form see PARA 887 post.

12 *Ibid* Sch 1 para 16.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

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## **(v) Effect of and Execution of Warrants**

### **880. The warrant.**

Unless it specifies that it authorises multiple entries, a warrant authorises an entry on one occasion only<sup>1</sup>; and it:

- 1084 (1) must specify: (a) the name of the person who applies for it; (b) the date on which it is issued; (c) the enactment under which it is issued; and (d) each set of premises<sup>2</sup> to be searched, or (in the case of an all premises warrant) the person who is in occupation or control of premises to be searched, together with any premises under his occupation or control which can be specified and which are to be searched<sup>3</sup>; and
- 1085 (2) must identify, so far as is practicable, the articles or persons to be sought<sup>4</sup>.

Two copies must be made of a warrant which specifies only one set of premises and does not authorise multiple entries; and as many copies as are reasonably required may be made of any other kind of warrant<sup>5</sup>. The copies must be clearly certified as copies<sup>6</sup>.

A warrant to enter and search premises may be executed by any constable<sup>7</sup>; and such a warrant may authorise persons to accompany any constable who is executing it<sup>8</sup>. Entry and search under a warrant must be within three months from the date of its issue and at a reasonable hour unless this might frustrate the purpose of the search<sup>9</sup>. If the warrant is an all premises warrant, no premises which are not specified in it may be entered or searched unless a police officer of at least the rank of inspector has in writing authorised them to be entered<sup>10</sup>. No premises may be entered or searched for the second or any subsequent time under a warrant which authorises multiple entries unless a police officer of at least the rank of inspector has in writing authorised that entry to those premises<sup>11</sup>.

The officers executing a search warrant authorising a search of premises and their occupants may lawfully restrict the movement of persons to one room while another room is searched<sup>12</sup>.

1 See the Police and Criminal Evidence Act 1984 s 15(5) (amended by the Serious Organised Crime and Police Act 2005 s 114(1), (3), (5)). A warrant under the Police and Criminal Evidence Act 1984 s 8 (as amended) (see PARA 873 ante) may authorise entry to and search of premises on more than one occasion if, on the application, the justice of the peace is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which the warrant is issued. No premises may be entered or searched on any subsequent occasions without the prior written authority of an officer of the rank of inspector who is not involved in the investigation. All other warrants authorise entry on one occasion only: Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 6.3A. If the warrant specifies that it authorises multiple entries, it must also specify whether the number of entries authorised is unlimited, or limited to a specified maximum: Police and Criminal Evidence Act 1984 s 15(5A) (added by the Serious Organised Crime and Police Act 2005 s 114(1), (3), (6)). Where a warrant under the Police and Criminal Evidence Act 1984 s 8 (as amended) (see PARA 873 ante) or Sch 1 para 12 (as amended) (see PARA 879 ante) authorises entry to and search of all premises occupied or controlled by a specified person, no premises which are not specified in the warrant may be entered and searched without the prior written authority of an officer of the rank of inspector who is not involved in the investigation: Code B para 3B. As to the application of the Police and Criminal Evidence Act 1984 ss 15, 16 (both as amended) see PARA 872 note 2 ante. When the extent or complexity of a search means that it is likely to take a long time, the

officer in charge of the search may consider using the seize and sift powers referred to in PARA 890 et seq post: see Code B para 6.3.

2 For the meaning of 'premises' see PARA 872 note 5 ante.

3 See the Police and Criminal Evidence Act 1984 s 15(6)(a) (amended by the Serious Organised Crime and Police Act 2005 s 113(1), (8)). See *R (on the application of Paul da Costa & Co (a firm)) v Thames Magistrates' Court* [2002] STC 267, DC.

4 Police and Criminal Evidence Act 1984 s 15(6)(b).

5 Ibid s 15(7) (amended by the Serious Organised Crime and Police Act 2005 s 114(1), (3), (7); and by the Serious Organised Crime and Police Act 2005 (Amendment) Order 2005, SI 2005/3496, art 7). The making of copies, and their certification under the Police and Criminal Evidence Act 1984 s 15(8) (see the text and note 6 infra) should be carried out by the justice or judge who issues the warrant, although he can delegate the issuing process to court staff: *R v Chief Constable of Lancashire, ex p Parker* [1993] QB 577, 97 Cr App Rep 90, DC.

6 Police and Criminal Evidence Act 1984 s 15(8).

7 Ibid s 16(1). As to the meaning of 'constable' see PARA 857 note 2 ante. The warrant must be executed by a constable; there is no power for the police to delegate the task to a government agency: *R v Chief Constable of Avon and Somerset and Intervention Board for Agricultural Produce, ex p South West Meat Ltd* [1992] Crim LR 672, DC.

8 Police and Criminal Evidence Act 1984 s 16(2). A person so authorised has the same powers as the constable whom he accompanies in respect of the execution of the warrant, and the seizure of anything to which the warrant relates; but he may exercise those powers only in the company, and under the supervision, of a constable: s 16(2A), (2B) (added by the Criminal Justice Act 2003 s 2).

9 See the Police and Criminal Evidence Act 1984 s 16(3) (amended by the Serious Organised Crime and Police Act 2005 s 114(1), (8)(a)); and Code B paras 6.1, 6.2.

10 Police and Criminal Evidence Act 1984 s 16(3A) (added by the Serious Organised Crime and Police Act 2005 s 113(1), (9)(a)).

11 Police and Criminal Evidence Act 1984 s 16(3B) (added by the Serious Organised Crime and Police Act 2005 s 114(1), (8)(b)).

12 *DPP v Meaden* [2003] EWHC 3005 (Admin), [2004] 4 All ER 75, [2004] 1 WLR 945, DC.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### 880 The warrant

NOTE 3--The practice of police officers completing a box on each copy warrant specifying the sets of premises to be searched and the person who is in occupation or control of the premises, although in accordance with Home Office guidance, is unlawful: *R (on the application of Bhatti) v Croydon Magistrates' Court* [2010] EWHC 522 (Admin), (2010) 174 JP 213, DC.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(v) Effect of and Execution of Warrants/881. Preliminary procedure.

### **881. Preliminary procedure.**

The officer in charge must first try to communicate with the occupier, or any other person entitled to grant access to the premises, explain the authority under which entry is sought and ask the occupier to allow entry, unless:

- 1086 (1) the premises to be searched are known to be unoccupied<sup>1</sup>;
- 1087 (2) the occupier and any other person entitled to grant access are absent<sup>2</sup>; or
- 1088 (3) there are reasonable grounds for believing that alerting the occupier or any other person entitled to grant access would frustrate the object of the search or endanger officers or other people<sup>3</sup>.

Where the occupier of premises<sup>4</sup> which are to be entered and searched is present at the time when a constable seeks to execute a warrant to enter and search them, the constable must:

- 1089 (a) identify himself to the occupier and, if not in uniform, produce to him documentary evidence<sup>5</sup> that he is a constable<sup>6</sup>;
- 1090 (b) produce the warrant<sup>7</sup> to him<sup>8</sup>; and
- 1091 (c) supply him with a copy of it<sup>9</sup>.

Where the occupier of such premises is not present at the time when a constable seeks to execute such a warrant, but some other person who appears to the constable to be in charge of the premises is present, the above provision<sup>10</sup> has effect as if any reference to the occupier were a reference to that other person<sup>11</sup>.

If there is no person present who appears to the constable to be in charge of the premises, he must leave a copy of the warrant in a prominent place on the premises<sup>12</sup>.

Reasonable and proportionate force may be used if necessary to enter premises if the officer in charge is satisfied that the premises are those specified in any warrant, or in the exercise of powers to enter and search to make an arrest<sup>13</sup>, to enter and search premises where a person was arrested (or was immediately before arrest)<sup>14</sup>, or to enter and search premises occupied or controlled by an arrested person<sup>15</sup>, if:

- 1092 (i) the occupier or any other person entitled to grant access has refused a request to allow entry to his premises<sup>16</sup>;
- 1093 (ii) it is impossible to communicate with the occupier or any other person entitled to grant access<sup>17</sup>; or
- 1094 (iii) any of the specified conditions in heads (1) to (3) above applies<sup>18</sup>.

If an officer conducts a search<sup>19</sup> the officer must, unless it is impracticable to do so, provide the occupier with a copy of a Notice of Powers and Rights in a standard format:

- 1095 (A) specifying whether the search is made under warrant, with consent, or in the exercise of powers to enter and search to make an arrest, to enter and search

- premises where a person was arrested (or was immediately before arrest), or to enter and search premises occupied or controlled by an arrested person<sup>20</sup>;
- 1096 (B) summarising the extent of the powers of search and seizure conferred by the Police and Criminal Evidence Act 1984<sup>21</sup>;
- 1097 (C) explaining the rights of the occupier, and the owner of the property seized<sup>22</sup>;
- 1098 (D) explaining that compensation may be payable in appropriate cases for damage caused entering and searching premises, and giving the address to which to send a compensation application<sup>23</sup>;
- 1099 (E) stating that Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises is available at any police station<sup>24</sup>.

If the occupier is present, copies of the Notice and warrant must, if practicable, be given to him before the search begins, unless the officer in charge of the search reasonably believes this would frustrate the object of the search or endanger officers or other people. If the occupier is not present, copies of the Notice and warrant must be left in a prominent place on the premises or appropriate part of the premises and indorsed<sup>25</sup> with the name of the officer in charge of the search, the date and time of the search. The warrant must be indorsed to show this has been done<sup>26</sup>.

1 Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 6.4(i).

2 Code B para 6.4(ii).

3 Code B para 6.4(iii).

4 For the meaning of 'premises' see PARA 872 note 5 ante.

5 Unless head (3) in the text applies, where the premises are occupied, the officer must, before the search begins: (1) identify himself, show his warrant card, if not in uniform, and state the purpose of and grounds for the search; (2) identify and introduce any person (who should carry identification for production on request) accompanying the officer on the search and briefly describe that person's role in the process: Code B para 6.5.

Code B para 6.5 is subject to Code B para 2.9 which provides that nothing in Code B requires the identity of officers, or anyone accompanying them during a search of premises, to be recorded or disclosed: (a) in the case of inquiries linked to the investigation of terrorism; or (b) if officers reasonably believe recording or disclosing their names might put them in danger. In these cases officers should use warrant or other identification numbers and the name of their police station; and police staff should use any identification number provided to them by the police force: Code B para 2.9. The purpose of head (b) *supra* is to protect those involved in serious organised crime investigations or arrests of particularly violent suspects when there is reliable information that those arrested or their associates may threaten or cause harm to the officers or anyone accompanying them during a search of premises. In cases of doubt, an officer of inspector rank or above should be consulted: Code B Guidance note 2E.

6 Police and Criminal Evidence Act 1984 s 16(5)(a).

7 The occupier must be given an opportunity to inspect the warrant and not merely be shown that the officer has a warrant: *R v Longman* [1988] 1 WLR 619, 88 Cr App Rep 148, CA.

8 Police and Criminal Evidence Act 1984 s 16(5)(b).

9 *Ibid* s 16(5)(c). Where there are reasonable grounds to believe that to alert the occupier would frustrate the object of the search, the constable is not required to fulfil the obligation in heads (a)-(c) in the text before entering the premises, but at the very earliest opportunity after entry and before search he should comply with the requirements of those heads: see *R v Longman* [1988] 1 WLR 619, 88 Cr App Rep 148, CA.

10 *Ie* under the Police and Criminal Evidence Act 1984 s 16(5): see the text and notes 4-9 *supra*.

11 *Ibid* s 16(6).

- 12 Ibid s 16(7).
- 13 Ie under ibid s 17 (as amended): see PARA 884 post.
- 14 Ie under ibid s 32 (as amended): see PARA 936 post.
- 15 Ie under ibid s 18 (as amended): see PARA 885 post.
- 16 See Code B para 6.6(i); and PARA 857 ante.
- 17 See Code B para 6.6(ii); and PARA 857 ante.
- 18 See Code B para 6.6(iii); and PARA 857 ante. In such circumstances entry may also be effected by the use of a subterfuge: *R v Longman* [1988] 1 WLR 619, 88 Cr App Rep 148, CA.
- 19 Ie a search to which Code B applies.
- 20 Code B para 6.7(i). The notice format must provide for authority or consent to be indicated: Code B para 6.7(i).
- 21 Code B para 6.7(ii).
- 22 Code B para 6.7(iii).
- 23 Code B para 6.7(iv). Whether compensation is appropriate depends on the circumstances in each case. Compensation for damage caused when effecting entry is unlikely to be appropriate if the search was lawful, and the force used can be shown to be reasonable, proportionate and necessary to effect entry. If the wrong premises are searched by mistake everything possible should be done at the earliest opportunity to allay any sense of grievance and there should normally be a strong presumption in favour of paying compensation: Code B Guidance note 6A.
- 24 Code B para 6.7(v).
- 25 Ie subject to Code B para 2.9: see note 5 supra.
- 26 Code B para 6.8.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(v) Effect of and Execution of Warrants/882. Conduct of searches; standard procedure.

## **882. Conduct of searches; standard procedure.**

A search under a warrant may only be a search to the extent required for the purpose for which the warrant was issued, having regard to the size and nature of whatever is sought<sup>1</sup>. A search under warrant may not continue under the authority of that warrant once all the things specified in it have been found, and a search may not continue under any other power once the object of that search has been achieved<sup>2</sup>. No search may continue once the officer in charge of the search<sup>3</sup> is satisfied that whatever is being sought is not on the premises<sup>4</sup>. This does not prevent a further search of the same premises if additional grounds come to light supporting a further application for a search warrant or exercise or further exercise of another power; for example, when, as a result of new information, it is believed articles previously not found or additional articles are on the premises<sup>5</sup>. Searches must be conducted with due consideration for the property and privacy of the occupier of the premises searched, and with no more disturbance than necessary<sup>6</sup>. Reasonable force may be used when necessary and proportionate because the co-operation of the occupier cannot be obtained or is insufficient for the purpose<sup>7</sup>.

A friend, neighbour or other person must be allowed to witness the search if the occupier wishes unless the officer in charge of the search has reasonable grounds for believing the presence of the person asked for would seriously hinder the investigation or endanger officers or other people. A search need not be unreasonably delayed for this purpose<sup>8</sup>.

If premises have been entered by force, the officer in charge of the search must, before leaving them, make sure that they are secure either by arranging for the occupier or his agent to be present or by any other appropriate means<sup>9</sup>.

1 See the Police and Criminal Evidence Act 1984 s 16(8); and Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 6.9. Judicial review is usually an unsatisfactory tool for determining whether material has been seized unlawfully under a warrant; a person complaining of excessive seizure under the Police and Criminal Evidence Act 1984 s 16(8) should ordinarily rely on a private law remedy: *R v Chief Constable of the Warwickshire Constabulary, ex p Fitzpatrick* [1998] 1 All ER 65, [1999] 1 WLR 564, DC. The service of pre-prepared questionnaires when executing a search warrant may breach the Police and Criminal Evidence Act 1984 s 16(8) if the warrant is only an excuse to enable the investigator to contact witnesses who might not otherwise be traced; the approval for such a course of action should be obtained from the judge at the time of the application for the warrant or, at least, before it is executed: *R (on the application of Paul Da Costa & Co) v Thames Magistrates' Court* [2002] EWHC 40 (Admin), [2002] STC 267, DC.

2 Code B para 6.9A.

3 The 'officer in charge of the search' means the officer assigned specific duties and responsibilities under Code B. Whenever there is a search of premises to which Code B applies one officer must act as the officer in charge of the search: Code B para 2.10. For the purposes of Code B para 2.10, the officer in charge of the search should normally be the most senior officer present. Some exceptions are:

- 314 (1) a supervising officer who attends or assists at the scene of a premises search may appoint an officer of lower rank as officer in charge of the search if that officer is more conversant with the facts, or a more appropriate officer to be in charge of the search (Code B Guidance note 2F(a));
- 315 (2) when all officers in a premises search are the same rank, the supervising officer if available must make sure one of them is appointed officer in charge of the search, or otherwise the

officers themselves must nominate one of their number as the officer in charge (Code B Guidance note 2F(b));

- 316 (3) a senior officer assisting in a specialist role, who need not be regarded as having a general supervisory role over the conduct of the search or be appointed or expected to act as the officer in charge of the search (Code B Guidance note 2F(c)).

Except in head (3) *supra*, none of the above diminishes the role and responsibilities of a supervisory officer who is present at the search or knows of a search taking place: Code B Guidance note 2F.

4 Code B para 6.9B. It is important that, when possible, all those involved in a search are fully briefed about any powers to be exercised and the extent and limits within which it should be conducted: Code B Guidance note 6B.

5 Code B para 6.9B.

6 See Code B para 6.10; *R v Marylebone Magistrates' Court and Metropolitan Police Comr, ex p Amdrell Ltd (t/a Get Stuffed)* (1998) 162 JP 719, DC (presence of a film crew deplorable, although warrant was not invalidated); and PARA 857 *ante*.

7 See Code B para 6.10. In all cases the number of officers and other persons involved in executing the warrant should be determined by what is reasonable and necessary according to the particular circumstances: Code B Guidance note 6C.

8 Code B para 6.11. A record of the action taken should be made on the premises search record including the grounds for refusing the occupier's request: see Code B para 6.11.

A person is not required to be cautioned prior to being asked questions that are solely necessary for the purpose of furthering the proper and effective conduct of a search: see Code B para 6.12; and see Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers; and PARA 908 *et seq post*. Examples of such questions are questions to discover the occupier of specified premises, to find a key to open a locked drawer or cupboard or to otherwise seek co-operation during the search or to determine if a particular item is liable to be seized: see Code B para 6.12.

If questioning goes beyond what is necessary for the purpose of the exemption in Code C, the exchange is likely to constitute an interview as defined by Code C para 11.1A (see PARA 960 *post*) and would require the associated safeguards included in Code C para 10 (see PARA 959 *post*): Code B para 6.12A.

9 Code B para 6.13.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(v) Effect of and Execution of Warrants/883. Conduct of searches; special procedure.

### **883. Conduct of searches; special procedure.**

An officer must be appointed as the officer in charge of any search under a warrant for the production of excluded material or special procedure material<sup>1</sup> or any search under a warrant in respect of terrorist investigations<sup>2</sup>. He is responsible for ensuring that the search is conducted with discretion and in such manner as to cause the least possible disruption to any business or other activities carried on in the premises<sup>3</sup>. Once the officer in charge of the search<sup>4</sup> is satisfied that material may not be taken from the premises without his knowledge, he must ask for the documents or other records concerned. He may also ask to see the index to files held on the premises, and the officers conducting the search may inspect any files which, according to the index, appear to contain any of the material sought<sup>5</sup>. A more extensive search of the premises may be made only: (1) if the person responsible for them refuses to produce the material sought, or to allow access to the index; (2) if it appears that the index is inaccurate or incomplete; or (3) if for any other reason the officer in charge has reasonable grounds for believing that such a search is necessary in order to find the material sought<sup>6</sup>.

<sup>1</sup> ie a warrant under the Police and Criminal Evidence Act 1984 s 9(1), Sch 1 para 12 (as amended): see PARA 879 ante.

<sup>2</sup> 'Warrant in respect of terrorist investigations' means a warrant under the Terrorism Act 2000 s 37, Sch 5 (as amended): see PARA 409 ante.

<sup>3</sup> Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 6.14.

<sup>4</sup> See PARA 882 note 3 ante.

<sup>5</sup> See Code B para 6.15.

<sup>6</sup> See Code B para 6.15.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

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## **(vi) Entry and Search Without Search Warrant**

### **884. Entry for purpose of arrest etc.**

A constable<sup>1</sup> may<sup>2</sup> enter and search any premises<sup>3</sup> for the purpose:

- 1100 (1) of executing: (a) a warrant of arrest<sup>4</sup> issued in connection with or arising out of criminal proceedings; or (b) a warrant of commitment<sup>5</sup> issued under the Magistrates' Courts Act 1980<sup>6</sup>;
  - 1101 (2) of arresting a person for an indictable offence<sup>7</sup>;
  - 1102 (3) of arresting a person for certain other specified offences<sup>8</sup>;
  - 1103 (4) of arresting<sup>9</sup> any child or young person who has been remanded or committed<sup>10</sup> to local authority accommodation<sup>11</sup>;
  - 1104 (5) of arresting a person for an offence to which the powers of arrest as to rabies<sup>12</sup> applies<sup>13</sup>;
  - 1105 (6) of recapturing any person who is, or is deemed for any purpose to be, unlawfully at large while liable to be detained:
- 43
- 71. (a) in a prison, remand centre, young offender institution or secure training centre<sup>14</sup>, or
  - 72. (b) in pursuance of provisions<sup>15</sup> dealing with children and young persons guilty of grave crimes, in any other place<sup>16</sup>;
- 44
- 1106 (4) of recapturing any person whatever who is unlawfully at large and whom he is pursuing<sup>17</sup>; or
  - 1107 (5) of saving life or limb or preventing serious damage to property<sup>18</sup>.

Except for the purpose specified in head (5) above, such powers of entry and search:

- 1108 (i) are only exercisable if the constable has reasonable grounds for believing that the person whom he is seeking is on the premises<sup>19</sup>; and
- 1109 (ii) are limited, in relation to premises consisting of two or more separate dwellings, to powers to enter and search: (A) any parts of the premises which the occupiers of any dwelling comprised in the premises use in common with the occupiers of any other such dwelling; and (B) any such dwelling in which the constable has reasonable grounds for believing that the person whom he is seeking may be<sup>20</sup>.

The power of search is only a power to search to the extent that is reasonably required for the purpose for which the power of entry is exercised<sup>21</sup>.

1 See PARA 857 note 2 ante.

2 le subject to the Police and Criminal Evidence Act 1984 s 17(2)-(6) (as amended) (see the text and notes 8, 18-21 infra) and without prejudice to any other enactment.

3 For the meaning of 'premises' see PARA 872 note 5 ante.

4 As to warrants of arrest see PARA 918 et seq post.

5 It is issued under the Magistrates' Courts Act 1980 s 76 (as amended): see MAGISTRATES vol 29(2) (Reissue) PARA 860.

6 Police and Criminal Evidence Act 1984 s 17(1)(a); Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 4.1.

7 Police and Criminal Evidence Act 1984 s 17(1)(b) (amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (4)); Code B para 4.1. For the meaning of 'indictable offence' see PARA 1102 note 1 post. The power of entry under this provision is exercisable only where a constable not only has reasonable grounds for suspecting or believing, but does in fact suspect or believe, that an indictable offence has been committed: see *Chapman v DPP* (1988) 89 Cr App Rep 190 at 196, DC, per Bingham LJ.

8 See the Police and Criminal Evidence Act 1984 s 17(1)(c) (amended by the Public Order Act 1986 s 40(2), (3), Sch 2 para 7, Sch 3; the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 53(a); and the Serious Organised Crime and Police Act 2005 Sch 7 para 58(a)); Code B para 4.1.

The specified offences are offences under: (1) the Public Order Act 1936 s 1 (as amended) (prohibition of uniforms in connection with political objects: see PARA 380 ante); (2) the Criminal Law Act 1977 ss 6-8 or s 10 (as amended) (entering and remaining on property: see PARA 602 et seq ante); (3) the Public Order Act 1986 s 4 (as amended) (fear or provocation of violence: see PARA 558 ante); (4) the Road Traffic Act 1988 s 4 (as amended) (driving when under the influence of drink or drugs: see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 975) or s 163 (as amended) (failure to stop when required to do so by a constable in uniform: see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 646); (5) the Transport and Works Act 1992 s 27 (offences involving drink or drugs: see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 377); or (6) the Criminal Justice and Public Order Act 1994 s 76 (as amended) (failure to comply with interim possession order: see PARA 606 ante). The powers of search conferred by the Police and Criminal Evidence Act 1984 s 17 (as amended) are only exercisable for the purposes of an offence under the Criminal Law Act 1977 ss 6-8 or s 10 (as amended) or the Criminal Justice and Public Order Act 1994 s 76 (as amended) by a constable in uniform: Police and Criminal Evidence Act 1984 s 17(3) (amended by the Criminal Justice and Public Order Act 1994 Sch 10 para 53(b)).

9 It is in pursuance of the Children and Young Persons Act 1969 s 32(1A) (as added and amended): see PARA 927 post.

10 It is under *ibid* s 23(1) (as substituted and amended): see PARA 1200 post.

11 Police and Criminal Evidence Act 1984 s 17(1)(ca) (added by the Prisoners (Return to Custody) Act 1995 s 2(1)); Code B para 4.1.

12 It is an offence to which the Animal Health Act 1981 s 61 (as amended) applies: see ANIMALS vol 2 (2008) PARA 1058.

13 Police and Criminal Evidence Act 1984 s 17(1)(caa) (added by the Serious Organised Crime and Police Act 2005 Sch 7 para 58(b)); Code B para 4.1.

14 Police and Criminal Evidence Act 1984 s 17(1)(cb)(i) (s 17(1)(cb) added by the Prisoners (Return to Custody) Act 1995 s 2(1)); Code B para 4.1.

15 It is the Powers of Criminal Courts (Sentencing) Act 2000 s 92: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78.

16 Police and Criminal Evidence Act 1984 s 17(1)(cb)(ii) (as added (see note 14 supra); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 95); Code B para 4.1.

17 Police and Criminal Evidence Act 1984 s 17(1)(d) (amended by the Prisoners (Return to Custody) Act 1995 s 2(1)); Code B para 4.1. A constable cannot exercise the power of entry and search under this head unless the pursuit is almost contemporaneous with the entry into the premises, since there must be an act of pursuit, ie a chase, however short in time and distance, before the power of entry and search under this head can be exercised; it is insufficient for the police to form an intention to arrest and to put it into practice by resorting to the premises where they believe that the person sought might be found: *D'Souza v DPP* [1992] 4 All ER 545, 96 Cr App Rep 278, HL. A person absent without leave from a hospital where he has been detained under the Mental Health Act 1983 is 'unlawfully at large' for the purposes of head (4) in the text: *D'Souza v DPP* supra.



18 Police and Criminal Evidence Act 1984 s 17(1)(e); Code B para 4.1. Unless the circumstances make it impossible, impracticable or undesirable, a police officer exercising his power to enter premises by the use of reasonable force pursuant to the Police and Criminal Evidence Act 1984 s 17 (as amended) and s 117 (see PARA 857 ante) should give any occupant present the reason for exercising that power: *O'Loughlin v Chief Constable of Essex* [1998] 1 WLR 374, CA. Where the real reason is to arrest someone inside for an indictable offence (see head (2) in the text), it is insufficient for the constable to tell the occupant that he wishes to 'speak to' that person about the offence: *O'Loughlin v Chief Constable of Essex* supra. All the rules of common law under which a constable has power to enter premises without a warrant have been abolished: Police and Criminal Evidence Act 1984 s 17(5). However, nothing in s 17(5) affects any power of entry to deal with or prevent a breach of the peace: s 17(6). As to arrest for breach of the peace see PARA 930 post. Section 17 (as amended) applies to entry and search in the absence of consent; if police officers are invited onto premises by an occupier or other person with authority to do so, who has been told by them of the reason for their entry, they are lawfully on the premises and do not have to comply with s 17 (as amended): *Riley v DPP* (1990) 91 Cr App Rep 14, DC; *Hobson v Chief Constable of Cheshire Constabulary* [2003] EWHC 3011 (Admin), 168 JP 111.

19 Police and Criminal Evidence Act 1984 s 17(2)(a).

20 Ibid s 17(2)(b).

21 Ibid s 17(4).

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### 884 Entry for purpose of arrest etc

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 8--Or head (7) any of the Animal Welfare Act 2006 ss 4, 5, 6(1) and (2), 7 and 8(1) and (2) (offences relating to the prevention of harm to animals): 1984 Act s 17(1)(c) (amended by Animal Welfare Act 2006 s 24).

NOTE 18--See *Syed v DPP* [2010] EWHC 81 (Admin), (2010) 174 JP 97, DC (test not satisfied despite reports of disturbance).

NOTE 20--See *Thomas v DPP* [2009] All ER (D) 245 (Oct), DC.

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### **885. Entry and search after arrest.**

A constable<sup>1</sup> may<sup>2</sup> enter and search any premises<sup>3</sup> occupied or controlled by a person who is under arrest for an indictable offence<sup>4</sup> if he has reasonable grounds for suspecting that there is on the premises evidence, other than items subject to legal privilege<sup>5</sup>, that relates to that offence or to some other indictable offence which is connected with or similar to that offence<sup>6</sup>. A constable may seize and retain anything for which he may so search<sup>7</sup>.

Such power to search is only a power to search to the extent that is reasonably required for the purpose of discovering such evidence<sup>8</sup>. Such powers to enter, seize and retain may not be exercised unless an officer of the rank of inspector or above<sup>9</sup> has authorised them in writing<sup>10</sup>; except that a constable may conduct such a search before the person is taken to a police station or released on bail<sup>11</sup> without obtaining such an authorisation, if the presence of the person at a place (other than a police station) is necessary for the effective investigation of the offence<sup>12</sup>. If a constable conducts such a search without authorisation, he must inform an officer of the rank of inspector or above that he has made the search as soon as practicable after he has made it<sup>13</sup>.

An officer who authorises a search or who is so informed of a search must make a record in writing of the grounds for the search and of the nature of the evidence that was sought<sup>14</sup>.

If the person who was in occupation or control of the premises at the time of the search is in police detention at the time the record is to be made, the officer must make the record as part of his custody record<sup>15</sup>.

1 See PARA 857 note 2 ante.

2 Ie subject to the Police and Criminal Evidence Act 1984 s 18(2)-(8) (as amended): see the text and notes 7-15 infra.

3 For the meaning of 'premises' see PARA 872 note 5 ante.

4 For the meaning of 'indictable offence' see PARA 1102 note 1 post.

5 For the meaning of 'items subject to legal privilege' see PARA 873 note 8 ante.

6 See the Police and Criminal Evidence Act 1984 s 18(1) (amended by the Serious Organised Crime and Police Act 2005 111, Sch 7 para 43(1), (5)); and Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 4.3. The powers under the Police and Criminal Evidence Act 1984 s 18 (as amended) and s 19 (as amended) (see PARA 886 post) are limited to domestic offences but the common law power to search the entire house where a person arrested under an arrest warrant is at the time, and to seize any articles providing evidence against him, has not been abolished and can be applied in respect of a non-domestic (ie extradition) crime: *R (on the application of Rottman) v Metropolitan Police Comr* [2002] UKHL 20, [2002] 2 AC 692, [2002] 2 All ER 665.

7 Police and Criminal Evidence Act 1984 s 18(2). The powers of seizure conferred on the police by s 18(2) and s 19(3) (see PARA 886 notes 4-6 post) extend to the seizure of the whole premises where it is physically possible to seize and retain the premises in their totality, and enables the police to remove premises such as tents, vehicles or caravans to a police station for the purpose of preserving evidence: *Cowan v Metropolitan Police Comr* [2000] 1 All ER 504, sub nom *Cowan v Condon* [2000] 1 WLR 254, CA. Money seized under the Police and Criminal Evidence Act 1984 s 19 (as amended) (see PARA 886 post) in relation to suspected drug dealing must be returned if the person entitled to possession is not convicted of a drug trafficking offence:

*Webb v Chief Constable of Merseyside, Porter v Chief Constable of Merseyside* [2000] QB 427, [2000] 1 All ER 209, CA. As to information stored in electronic form see PARA 887 post.

8 Police and Criminal Evidence Act 1984 s 18(3).

9 See PARA 858 ante.

10 Police and Criminal Evidence Act 1984 s 18(4). A constable in possession of such an authorisation who proposes to enter premises by force must, so far as practicable, explain to the occupier the reason why he intends to do so: *Linehan v DPP* [2000] Crim LR 861, DC. 'Authorised in writing' means more than a mere record of verbal authority. It must be an independent document, ie a proper authority in writing. Although nothing is said in the Police and Criminal Evidence Act 1984, such authority should go with the police officers to the premises to be searched: *R v Badham* [1987] Crim LR 202. Authority should only be given when the authorising officer is satisfied the necessary grounds exist; if possible the authorising officer should record the authority on the Notice of Powers and Rights and, subject to Code B para 2.9 (see PARA 881 note 5 ante), sign the Notice: Code B para 4.3.

11 If released on bail under the Police and Criminal Evidence Act 1984 s 30A (as added): see PARA 933 post.

12 Ibid s 18(5), (5A) (s 5 substituted, and s 5A added, by the Criminal Justice Act 2003 s 12, Sch 1 paras 1, 2).

13 Police and Criminal Evidence Act 1984 s 18(6).

14 Ibid s 18(7). Non-compliance with s 18(7) does not automatically invalidate the search: *Krohn v DPP* [1997] COD 345, DC. The record of the grounds for the search and the nature of the evidence sought should be made in the custody record if there is one, or otherwise in the officer's pocket book or in the search record: Code B para 4.3.

15 Police and Criminal Evidence Act 1984 s 18(8); Code B para 4.3.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### 885 Entry and search after arrest

NOTE 6--The powers of entry and search can only be used where the premises are in fact occupied or controlled by a person under arrest, not where the police merely have a reasonable belief that the suspect occupies or controls the premises: *Khan v Metropolitan Police Comr* [2008] All ER (D) 27 (Jun), CA.

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## **(vii) Seizure and Retention of Property**

### **886. Seizure of property.**

A constable<sup>1</sup> who is lawfully on any premises<sup>2</sup> may seize anything which is on the premises if he has reasonable grounds for believing: (1) that it has been obtained in consequence of the commission of an offence; and (2) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed<sup>3</sup>.

A constable who is lawfully on any premises may also seize anything which is on the premises if he has reasonable grounds for believing:

- 1110 (a) that it is evidence in relation to an offence<sup>4</sup> which he is investigating or any other offence<sup>5</sup>; and
- 1111 (b) that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed<sup>6</sup>.

A constable who is lawfully on any premises may require any information which is stored in any electronic form and is accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form if he has reasonable grounds for believing<sup>7</sup>:

- 1112 (i) that it is evidence in relation to an offence which he is investigating or any other offence<sup>8</sup>; or
- 1113 (ii) it has been obtained in consequence of the commission of an offence<sup>9</sup>,

and that it is necessary to do so in order to prevent it being concealed, lost, tampered with or destroyed<sup>10</sup>.

The above provisions are in addition to any power otherwise conferred<sup>11</sup>. No power of seizure conferred on a constable under any enactment (including an enactment contained in an Act passed after the Police and Criminal Evidence Act 1984) is, however, to be taken to authorise the seizure of an item which the constable exercising the power has reasonable grounds for believing to be subject to legal privilege<sup>12</sup> other than under the provisions relating to additional powers of seizure<sup>13</sup>.

An officer who decides that it is not appropriate to seize property because of an explanation given by the person holding it, but who has reasonable grounds for believing that it has been obtained in consequence of the commission of an offence by some person, should identify the property to the holder, inform the holder of his suspicions, and explain that, if he disposes of, alters or destroys the property, the holder may be liable to civil or criminal proceedings<sup>14</sup>.

1 See PARA 857 note 2 ante.

2 Ie under any statutory power or with the consent of the occupier. For the meaning of 'premises' see PARA 872 note 5 ante.

3 See the Police and Criminal Evidence Act 1984 s 19(1), (2); Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 7.1. Anything covered by a warrant may also be seized, and so may property covered by the powers in the Criminal Justice and Police Act 2001 Pt 2 (ss 50-70) (as amended) (see PARA 890 et seq post): Code B para 7.1. An officer may arrange to photograph, image or copy any document or other article he has the power to seize in accordance with Code B para 7.1: see Code B para 7.5. This is subject to specific restrictions on the examination, imaging or copying of certain property seized under the Criminal Justice and Police Act 2001 Pt 2 (as amended) (see PARA 891 post): see Code B para 7.5. An officer must have regard to his statutory obligation to retain an original document or other article only when a photograph or copy is not sufficient: see Code B para 7.5. The powers of seizure conferred by the Police and Criminal Evidence Act 1984 s 18(2) (see PARA 885 note 7 ante) and s 19(3) (see the text and notes 4-6 infra) extend to the seizure of the whole premises when it is physically possible to seize and retain the premises in their totality and practical considerations make seizure desirable; eg police may remove premises such as tents, vehicles or caravans to a police station for the purpose of preserving evidence: Code B Guidance note 7B.

4 'Offence' in this provision is confined to a domestic offence: *R (on the application of Rottman) v Metropolitan Police Comr* [2002] UKHL 20, [2002] 2 AC 692, [2002] 2 All ER 865. See also PARA 885 note 6 ante.

5 See the Police and Criminal Evidence Act 1984 s 19(1), (3)(a); and Code B para 7.1. See also PARA 885 note 6 ante.

6 See the Police and Criminal Evidence Act 1984 s 19(1), (3)(b); and Code B para 7.1. See also PARA 885 note 6 ante.

7 See the Police and Criminal Evidence Act 1984 s 19(1), (4) (s 19(4) amended by the Criminal Justice and Police Act 2001 s 70, Sch 2 para 13(1), (2)); and Code B para 7.6. See also PARA 887 post.

8 Police and Criminal Evidence Act 1984 s 19(1), (4)(a)(i).

9 Ibid s 19(1), (4)(a)(ii).

10 See ibid s 19(1), (4)(b).

11 Ibid s 19(5).

12 See ibid s 19(6); and Code B para 7.2. For the meaning of 'items subject to legal privilege' see PARA 873 note 8 ante. As to seizure of property for the purposes of terrorist investigations see PARA 411 ante; and as to seizure of property for the purposes of investigations into drug trafficking see PARA 785 ante.

13 Ie under the Criminal Justice and Police Act 2001 Pt 2 (as amended) (see PARA 890 et seq post): Code B para 7.2.

14 Code B para 7.4.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

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### **887. Computerised information.**

Every power of seizure which is conferred by:

- 1114 (1) any enactment contained in an Act passed before the Police and Criminal Evidence Act 1984<sup>1</sup>;
- 1115 (2) specified provisions<sup>2</sup> of the Police and Criminal Evidence Act 1984<sup>3</sup>;
- 1116 (3) any enactment contained in an Act passed after the Police and Criminal Evidence Act 1984<sup>4</sup>,

on a constable<sup>5</sup> who has entered premises<sup>6</sup> in the exercise of a power conferred by an enactment is to be construed as including a power to require any information stored in any electronic form and accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible or from which it can readily be produced in a visible and legible form<sup>7</sup>.

1 Police and Criminal Evidence Act 1984 s 20(2)(a).

2 *Ibid* s 8 (as amended) (see PARA 873 ante), s 18 (as amended) (see PARA 885 ante) and s 9, Sch 1 para 13 (see PARA 879 ante).

3 *Ibid* s 20(2)(b), (c).

4 *Ibid* s 20(2)(d).

5 See PARA 857 note 2 ante.

6 For the meaning of 'premises' see PARA 872 note 5 ante.

7 See the Police and Criminal Evidence Act 1984 s 20(1) (amended by the Criminal Justice and Police Act 2001 s 70, Sch 2 para 13(1), (2)).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

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### **888. Access and copying.**

A constable<sup>1</sup> who seizes anything in the exercise of a power conferred by any enactment, including an enactment contained in an Act passed after the Police and Criminal Evidence Act 1984, must, if so requested by a person showing himself:

- 1117 (1) to be the occupier of premises<sup>2</sup> on which it was seized<sup>3</sup>; or
- 1118 (2) to have had custody or control of it immediately before the seizure<sup>4</sup>,

provide that person with a record of what he seized<sup>5</sup>. The officer must provide the record within a reasonable time from the making of the request for it<sup>6</sup>.

If a request for permission to be granted access to anything which:

- 1119 (a) has been seized by a constable<sup>7</sup>; and
- 1120 (b) is retained by the police for the purpose of investigating an offence<sup>8</sup>,

is made to the officer in charge of the investigation by a person who had custody or control of the thing immediately before it was so seized or by someone acting on behalf of such a person, the officer must<sup>9</sup> allow the person who made the request access to it under the supervision of a constable<sup>10</sup>.

If a request for a photograph or copy of any such thing is made to the officer in charge of the investigation by a person who had custody or control of the thing immediately before it was so seized, or by someone acting on behalf of such a person, the officer must<sup>11</sup> allow the person who made the request access to it under the supervision of a constable for the purpose of photographing or copying it; or must photograph or copy it, or cause it to be photographed or copied, and supply the photograph or copy to the person who made the request<sup>12</sup>. The photograph or copy must be so supplied within a reasonable time from the making of the request<sup>13</sup>, and at the person's own expense<sup>14</sup>.

A constable may also photograph or copy, or have photographed or copied, anything which he has power to seize, without a request being so made<sup>15</sup>.

There is no duty under the above provisions to grant access to, or to supply a photograph or copy of, anything if the officer in charge of the investigation for the purposes of which it was seized has reasonable grounds for believing that to do so would prejudice:

- 1121 (i) that investigation<sup>16</sup>;
- 1122 (ii) the investigation of an offence other than the offence for the purposes of investigating which the thing was seized<sup>17</sup>; or
- 1123 (iii) any criminal proceedings which may be brought as a result of the investigation of which he is in charge or any such investigation as is mentioned in head (ii) above<sup>18</sup>.

<sup>1</sup> See PARA 857 note 2 ante. The references to a constable in the Police and Criminal Evidence Act 1984 s 21(1), (2), (3), (5) (see the text and notes 2-10 infra) include a person authorised under s 16(2) to accompany a

person executing a warrant (see PARA 880 note 8 ante): s 21(9) (added by the Criminal Justice Act 2003 s 12, Sch 1 paras 1, 3).

2 For the meaning of 'premises' see PARA 872 note 5 ante.

3 Police and Criminal Evidence Act 1984 s 21(1)(a); and see Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 7.16.

4 Police and Criminal Evidence Act 1984 s 21(1)(b); and see Code B para 7.16.

5 See the Police and Criminal Evidence Act 1984 s 21(1); and see Code B para 7.16.

6 Police and Criminal Evidence Act 1984 s 21(2); and see Code B para 7.16.

7 Police and Criminal Evidence Act 21(3)(a); and see Code B para 7.17.

8 Police and Criminal Evidence Act 21(3)(b); and see Code B para 7.17.

9 Is subject to the Police and Criminal Evidence Act 1984 s 21(8): see the text and notes 16-18 infra.

10 See *ibid* s 21(3); and Code B para 7.17.

11 Is subject to the Police and Criminal Evidence Act 1984 s 21(8): see the text and notes 16-18 infra.

12 *Ibid* s 21(4), (6); and see Code B para 7.17. As to access to, and copying of, material seized or produced in the course of a terrorist investigation see PARA 411 ante; and as to access to, and copying of, material seized or produced in the course of an investigation into drug trafficking see PARA 784 ante.

13 Police and Criminal Evidence Act 1984 s 21(7).

14 See Code B para 7.17.

15 Police and Criminal Evidence Act 1984 s 21(5); and see Code B para 7.5.

16 Police and Criminal Evidence Act 1984 s 21(8)(a); and see Code B para 7.17. See note 18 infra.

17 Police and Criminal Evidence Act 1984 s 21(8)(b); and see Code B para 7.17. See note 18 infra.

18 Police and Criminal Evidence Act 1984 s 21(8)(c); and see Code B para 7.17. In any such case under the Police and Criminal Evidence Act 1984 s 21(8), a record of the grounds must be made: see Code B para 7.17. Any such refusal may be challenged by way of judicial review: *Allen v Chief Constable of Cheshire Constabulary* (1988) Times, 16 July, CA.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.



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### **889. Retention of property.**

Anything which has been seized by a constable<sup>1</sup> or taken away by a constable<sup>2</sup> may be retained<sup>3</sup> so long as is necessary in all the circumstances<sup>4</sup>. Without prejudice to the generality of the above provision:

- 1124 (1) anything seized for the purposes of a criminal investigation may be retained for use as evidence at a trial for an offence<sup>5</sup> or for forensic examination or for investigation in connection with an offence<sup>6</sup>; and
- 1125 (2) anything may be retained in order to establish its lawful owner, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence<sup>7</sup>.

Nothing seized on the ground that it may be used:

- 1126 (a) to cause physical injury to any person<sup>8</sup>;
- 1127 (b) to damage property<sup>9</sup>;
- 1128 (c) to interfere with evidence<sup>10</sup>; or
- 1129 (d) to assist in escape from police detention or lawful custody<sup>11</sup>,

may be retained when the person from whom it was seized is no longer in police detention or the custody of a court or is in the custody of a court but has been released on bail<sup>12</sup>.

1 The reference in the Police and Criminal Evidence Act 1984 s 22(1) (see the text to note 4 infra) to anything seized by a constable includes anything seized by a person authorised under s 16(2) (see PARA 880 note 8 ante) to accompany a constable executing a warrant: s 22(7) (added by the Criminal Justice Act 2003 s 12, Sch 1 paras 1, 4).

2 The following a requirement made by virtue of the Police and Criminal Evidence Act 1984 s 19 or s 20 (as amended): see PARAS 886-887 ante.

3 See *R v Southwark Crown Court, ex p Customs and Excise Comrs* [1990] 1 QB 650, [1989] 3 All ER 673, DC.

4 Police and Criminal Evidence Act 1984 s 22(1); and see Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 7.14. The police hold property under the Police and Criminal Evidence Act 1984 s 22 (as amended) only for the purposes authorised; they owe a duty to maintain the confidentiality of materials seized, subject only to their power to use them for police purposes, but this duty may be overridden where a court orders the police to produce material, which is admissible in evidence in other proceedings: *Marcel v Metropolitan Police Comr* [1992] Ch 225, [1992] 1 All ER 72, CA. Nothing in the Police and Criminal Evidence Act 1984 s 22 (as amended) affects any power of a court to make an order under the Police (Property) Act 1897 s 1 (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 520): Police and Criminal Evidence Act 1984 s 22(5); and see Code B Guidance note 7A. Where appropriate, a person should be advised of this procedure: see Code B Guidance note 7A.

If property is retained, the person who had custody or control of it immediately before seizure must, on request, be provided with a list or description of the property within a reasonable time: Code B para 7.16. That person or his representative must be allowed supervised access to the property to examine it or have it photographed or copied, or must be provided with a photograph or copy, in either case within a reasonable time of any request and at his own expense, unless the officer in charge of an investigation has reasonable grounds for believing

this would: (1) prejudice the investigation of any offence or criminal proceedings; or (2) lead to the commission of an offence by providing access to unlawful material such as pornography: Code B para 7.17. A record of the grounds must be made when access is denied: Code B para 7.17.

The Police and Criminal Evidence Act 1984 s 22 (as amended) also applies to anything retained by the police under the Immigration Act 1971 s 28H(5) (as added) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 208); Police and Criminal Evidence Act 1984 s 22(6) (added by the Immigration and Asylum Act 1999 s 169(1), Sch 14 para 18(1), (3)).

5 As to the meaning of 'trial for an offence' see *R v Southwark Crown Court, ex p Customs and Excise Comrs* [1990] 1 QB 650, [1989] 3 All ER 673, DC.

6 Police and Criminal Evidence Act 1984 s 22(2)(a); and see Code B para 7.14. The Police and Criminal Evidence Act 1984 s 22(a) does not entitle the police to retain documents obtained by unlawful entry and search: *R v Chief Constable of Lancashire, ex p Parker* [1993] QB 577, 97 Cr App Rep 90, DC. Nothing may be retained for either of the purposes mentioned in head (1) in the text if a photograph or copy would be sufficient for that purpose: Police and Criminal Evidence Act 1984 s 22(4); and see Code B para 7.15.

7 Police and Criminal Evidence Act 1984 s 22(2)(b); and see Code B para 7.14. The Police and Criminal Evidence Act 1984 s 22(2)(b) (see head (2) in the text) does not provide a statutory justification for the retention of property if the police have ceased to investigate the ownership of the property: *Gough v Chief Constable of West Midlands Police* [2004] EWCA Civ 206, (2004) Times, 4 March. Head (1) in the text applies if inextricably linked material is seized under the Criminal Justice and Police Act 2001 s 50 or s 51 (see PARAS 890-891 post). 'Inextricably linked material' is material it is not reasonably practicable to separate from other linked material without prejudicing the use of that other material in any investigation or proceedings. Eg it may not be possible to separate items of data held on computer disk without damaging their evidential integrity. Inextricably linked material must not be examined, imaged, copied or used for any purpose other than for proving the source and/or integrity of the linked material: Code B Guidance note 7H.

8 Police and Criminal Evidence Act 1984 s 22(3)(a).

9 Ibid s 22(3)(b).

10 Ibid s 22(3)(c).

11 Ibid s 22(3)(d).

12 See *ibid* s 22(3). As to the retention of material seized or produced in the course of a terrorist investigation see PARA 411 ante; and as to the retention of material seized or produced in the course of an investigation into drug trafficking see PARA 784 ante.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### 889 Retention of property

NOTE 4--See *Chief Constable of Wiltshire Constabulary v McDonagh* [2008] EWHC 654 (QB), [2008] All ER (D) 202 (Apr) (effect of seizure of caravan, home to pregnant woman, capable of constituting relevant circumstance).

NOTE 6--The Police and Criminal Evidence Act 1984 s 22(2) does not preclude the police from retaining property for the purpose of assisting a private prosecution: *Scopelight Ltd v Chief Constable of Northumbria Police* [2009] EWCA Civ 1156, [2010] 2 All ER 431.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(viii) Additional Powers of Seizure/890. Additional powers of seizure from premises.

### **(viii) Additional Powers of Seizure**

#### **890. Additional powers of seizure from premises.**

Where:

- 1130 (1) a person who is lawfully on any premises<sup>1</sup> finds anything on those premises that he has reasonable grounds for believing may be or may contain something for which he is authorised to search on those premises<sup>2</sup>;
  - 1131 (2) a relevant power of seizure<sup>3</sup> or the power described below<sup>4</sup> would entitle him, if he found it, to seize<sup>5</sup> whatever it is that he has grounds for believing that thing to be or to contain<sup>6</sup>; and
  - 1132 (3) in all the circumstances, it is not reasonably practicable for it to be determined, on those premises:
- 45
- 73. (a) whether what he has found is something that he is entitled to seize<sup>7</sup>; or
  - 74. (b) the extent to which what he has found contains something that he is entitled to seize<sup>8</sup>,
- 46

that person's powers of seizure include power to seize so much of what he has found as it is necessary to remove from the premises to enable that to be determined<sup>9</sup>.

Where:

- 1133 (i) a person who is lawfully on any premises finds anything on those premises ('the seizable property') which he would be entitled to seize but for its being comprised in something else that he has<sup>10</sup> no power to seize<sup>11</sup>;
- 1134 (ii) the power under which that person would have power to seize the seizable property is a power to which this provision<sup>12</sup> applies<sup>13</sup>; and
- 1135 (iii) in all the circumstances it is not reasonably practicable for the seizable property to be separated, on those premises, from that in which it is comprised<sup>14</sup>,

that person's power of seizure includes power to seize both the seizable property and that from which it is not reasonably practicable to separate it<sup>15</sup>.

The factors to be taken into account in considering<sup>16</sup> whether or not it is reasonably practicable on particular premises for something to be determined, or for something to be separated from something else, are confined to the following:

- 1136 (A) how long it would take to carry out the determination or separation on those premises<sup>17</sup>;
- 1137 (B) the number of persons that would be required to carry out that determination or separation on those premises within a reasonable period<sup>18</sup>;
- 1138 (C) whether the determination or separation would (or would if carried out on those premises) involve damage to property<sup>19</sup>;

- 1139 (D) the apparatus or equipment that it would be necessary or appropriate to use for the carrying out of the determination or separation<sup>20</sup>; and
- 1140 (E) in the case of separation, whether the separation would be likely, or if carried out by the only means that are reasonably practicable on those premises would be likely, to prejudice the use of some or all of the separated seizable property for a purpose for which something seized under the power in question is capable of being used<sup>21</sup>.

Where a person exercises such a power of seizure<sup>22</sup>, it is his duty<sup>23</sup>, on doing so, to give to the occupier of the premises a written notice<sup>24</sup>:

- 1141 (aa) specifying what has been seized in reliance on the powers conferred<sup>25</sup>;
- 1142 (bb) specifying the grounds on which those powers have been exercised<sup>26</sup>;
- 1143 (cc) setting out the effect of specified remedies and safeguards<sup>27</sup>;
- 1144 (dd) specifying the name and address of the person to whom notice of an application<sup>28</sup> to the appropriate judicial authority in respect of any of the seized property must be given<sup>29</sup>; and
- 1145 (ee) specifying the name and address of the person to whom an application may be made to be allowed to attend the initial examination required by any arrangements<sup>30</sup> which have been made<sup>31</sup>.

Where it appears to the person exercising such a power of seizure on any premises that the occupier of the premises is not present on the premises at the time of the exercise of the power, but that there is some other person present on the premises who is in charge of the premises, the requirement to give a written notice has effect as if it required the notice to be given to that other person<sup>32</sup>.

Where it appears to the person exercising such a power of seizure that there is no one present on the premises to whom he may give a notice<sup>33</sup>, he must instead, before leaving the premises, attach such a notice in a prominent place to the premises<sup>34</sup>.

1 'Premises' includes any vehicle, stall or moveable structure (including an offshore installation) and any other place whatever, whether or not occupied as land: Criminal Justice and Police Act 2001 s 66(1). 'Vehicle' includes any vessel, aircraft or hovercraft: s 66(1). 'Offshore installation' has the same meaning as in the Mineral Workings (Offshore Installations) Act 1971 (see s 12 (as amended); and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1681); Criminal Justice and Police Act 2001 s 66(1).

2 Ibid s 50(1)(a).

3 I.e. a power of seizure to which ibid s 50 applies. Those powers are: (1) each of the powers of seizure conferred by the provisions of the Police and Criminal Evidence Act 1984 Pt 2 (ss 8-23) (as amended) (see PARA 873 et seq ante) or Pt 3 (ss 24-32) (as amended) (see PARA 924 et seq post); (2) the power of seizure conferred by the Official Secrets Act 1911 s 9(1) (as amended) (see PARA 500 ante); (3) the power of seizure conferred by the Children and Young Persons (Harmful Publications) Act 1955 s 3(1) (as amended) (see PRESS, PRINTING AND PUBLISHING vol 36(2) (Reissue) PARA 422); (4) each of the powers of seizure conferred by the Obscene Publications Act 1959 s 3(1), (2) (as amended) (see PARA 751 ante); (5) the power of seizure conferred by the Betting, Gaming and Lotteries Act 1963 s 51 (as amended); (6) the power of seizure conferred by the Firearms Act 1968 s 46 (as added and amended) (see PARA 693 ante); (7) each of the powers of seizure conferred by the Trade Descriptions Act 1968 s 28(1)(c), (d) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 509); (8) the power of seizure conferred by the Theft Act 1968 s 26(3) (see PARA 306 ante); (9) the power of seizure conferred by the Gaming Act 1968 s 43(5); (10) the power of seizure conferred by the Taxes Management Act 1970 s 20C (as added and amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1706); (11) each of the powers of seizure conferred by the provisions of the Misuse of Drugs Act 1971 s 23(2), (3) (see PARA 781 ante); (12) each of the powers of seizure conferred by the provisions of the Immigration Act 1971 ss 28D(3), 28E(5), 28F(6) (as added) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 207); (13) each of the powers of seizure conferred by the provisions of the Fair Trading Act 1973 s 29(1)(c), (d); (14) each of the powers of seizure conferred by the provisions of the Biological Weapons Act 1974 s 4(1)(b)-(d) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 471); (15) each of the powers of seizure conferred by the provisions of the Prices Act 1974 Schedule para 9(2) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005

Reissue) PARA 698); (16) each of the powers of seizure conferred by the provisions of the Consumer Credit Act 1974 s 162(1)(c), (d) (see CONSUMER CREDIT vol 9(1) (Reissue) PARA 306); (17) the power of seizure conferred by the Lotteries and Amusements Act 1976 s 19 (as amended); (18) the power of seizure conferred by the Protection of Children Act 1978 s 4(2) (as amended) (see PARA 759 ante); (19) the power of seizure conferred by the Customs and Excise Management Act 1979 s 118C(4) (as added and amended) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 642); (20) the power of seizure conferred by the Estate Agents Act 1979 s 11(1)(c) (see AGENCY vol 1 (2008) PARA 279); (21) the power of seizure conferred by the Indecent Displays (Control) Act 1981 s 2(3) (as amended) (see PARA 768 ante); (22) each of the powers of seizure conferred by the provisions of the Forgery and Counterfeiting Act 1981 s 7(1) (see PARA 352 ante) and s 24(1) (see PARA 550 ante); (23) the power of seizure conferred by the Betting and Gaming Duties Act 1981 Sch 1 para 16(2) (see LICENSING AND GAMBLING); (24) the power of seizure conferred by the Betting and Gaming Duties Act 1981 Sch 3 para 17(2) (see LICENSING AND GAMBLING); (25) the power of seizure conferred by the Betting and Gaming Duties Act 1981 Sch 4 para 17(2) (as amended) (see LICENSING AND GAMBLING vol 68 (2008) PARA 781); (26) the power of seizure conferred by the Video Recordings Act 1984 s 17(2) (see LICENSING AND GAMBLING vol 67 (2008) PARA 291); (27) the power of seizure conferred by the Companies Act 1985 s 448(3) (as substituted) (see COMPANIES vol 15 (2009) PARA 1559); (28) the power of seizure conferred by the Weights and Measures Act 1985 s 79(2)(b) (see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 27); (29) the power of seizure conferred by the Weights and Measures Act 1985 Sch 8 para 4 (see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 216); (30) the power of seizure conferred by the Protection of Military Remains Act 1986 s 6(3) (see ARMED FORCES vol 2(2) (Reissue) PARA 116); (31) any power of seizure conferred by virtue of the Greater London Council (General Powers) Act 1986 s 12 (see LICENSING AND GAMBLING vol 67 (2008) PARA 307); (32) the power of seizure conferred by the Criminal Justice Act 1987 s 2(5) (see PARA 1091 post); (33) each of the powers of seizure conferred by the provisions of the Consumer Protection Act 1987 s 29(4)-(6) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 557); (34) the powers of seizure conferred by the Copyright, Designs and Patents Act 1988 s 109(4) (as amended), s 200(3A) (as added and amended), s 297B (as added) (see COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARAS 441, 493, 720); (35) the power of seizure conferred by the Food Safety Act 1990 s 32(6) (as amended) (see FOOD vol 18(2) (Reissue) PARA 261); (36) the power of seizure conferred by the Computer Misuse Act 1990 s 14(4) (see PARA 358 ante); (37) the power of seizure conferred by the Human Fertilisation and Embryology Act 1990 s 40(2) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 290); (38) the power of seizure conferred by the Property Misdescriptions Act 1991 Schedule para 3(3) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 797); (39) the power of seizure conferred by the Dangerous Dogs Act 1991 s 5(2) (see ANIMALS vol 2 (2008) PARA 912); (40) the power of seizure conferred by the Timeshare Act 1992 Sch 2 para 3(2) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 883); (41) the power of seizure conferred by the Finance Act 1994 Sch 7 para 4(3) (see INSURANCE vol 25 (2003 Reissue) PARA 852); (42) the power of seizure conferred by the Value Added Tax Act 1994 Sch 11 para 10(3) (see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 337); (43) the power of seizure conferred by the Trade Marks Act 1994 s 92A(4) (as added) (see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 145); (44) the power of seizure conferred by the Drug Trafficking Act 1994 s 56(5) (see PARA 785 ante); (45) each of the powers of seizure conferred by the provisions of the Chemical Weapons Act 1996 s 29(2)(c)-(e) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 491); (46) the power of seizure conferred by the Finance Act 1996 Sch 5 para 5(2) (repealed) (47) the power of seizure conferred by the Knives Act 1997 s 5(2) (see PARA 704 ante); (48) each of the powers of seizure conferred by the provisions of the Nuclear Explosions (Prohibitions and Inspections) Act 1998 s 10(2)(c)-(e) (see PARA 628 ante); (49) the power of seizure conferred by the Data Protection Act 1998 Sch 9 para 1 (as amended) (see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 575); (50) each of the powers of seizure conferred by the provisions of the Landmines Act 1998 s 18(3)(c)-(e) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 501); (51) each of the powers of seizure conferred by the Competition Act 1998 s 28(2) (as amended) (see COMPETITION vol 18 (2009) PARA 131) (but note that nothing in the Criminal Justice and Police Act 2001 s 50 so far as it has effect by reference to the power to take copies of documents under the Competition Act 1998 s 28(2)(b), is to be taken to confer any power to seize any document: Criminal Justice and Police Act 2001 s 50(6)); (52) the power of seizure conferred by the Nuclear Safeguards Act 2000 s 8(2) (as amended) (see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1579); (53) the power of seizure conferred by the Financial Services and Markets Act 2000 s 176(5) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 454); (54) each of the powers of seizure conferred by the provisions of the Terrorism Act 2000 s 37, Sch 5 paras 1, 3, 11, 15 (as amended) (see PARAS 409, 411, 413 ante); (55) the power of seizure conferred by the Finance Act 2000 s 30, Sch 6 para 130(2) (see FUEL AND ENERGY vol 19(1) (2007 Reissue) PARA 697); (56) the power of seizure conferred by the Freedom of Information Act 2000 Sch 3 para 1 (see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 613); (57) the power of seizure conferred by the International Criminal Court Act 2001 Sch 5 para 9 (see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 449); (58) the power of seizure conferred by the Proceeds of Crime Act 2002 s 352(4) (see PARA 810 ante); (59) the power of seizure conferred by the Enterprise Act 2002 s 194(2) (see COMPETITION vol 18 (2009) PARA 322); (60) the power of seizure conferred by the Crime (International Co-operation) Act 2003 ss 17, 22 (s 17 as amended) (see PARA 904 post); (61) the powers of seizure conferred by the Extradition Act 2003 ss 156(5), 160(5), 161(4), 162(6), (7), 164(6), (7) (see EXTRADITION vol 17(2) (Reissue) PARAS 1513, 1515, 1517-1518, 1520); (62) each of the powers of seizure conferred by the Human Tissue Act 2004 Sch 5 para 5(1), (2) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 275); (63) the power of seizure conferred by the Serious Organised Crime and Police Act 2005 s 66 (see PARA 1088 post); (64) the power of seizure conferred by the Licensing Act 2003 s 90 (see LICENSING AND GAMBLING vol 67 (2008) PARA 105); (65) each of the powers of seizure conferred by the General Product Safety Regulations 2005, SI 2005/1803, reg 22(4)-(6) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 565); and (66) the

power of seizure conferred by the Terrorism Act 2006 s 28 (see PARA 425 ante): Criminal Justice and Police Act 2001 s 50(5), Sch 1 Pt 1 (amended by the Enterprise Act 2002 s 194(5); the Proceeds of Crime Act 2002 Sch 11 para 40(6), Sch 12; the Crime (International Co-operation) Act 2003 ss 26(3), 91, Sch 6; the Extradition Act 2003 s 165(2); the Licensing Act 2003 ss 198, 199, Sch 6 para 128, Sch 7; the Human Tissue Act 2004 s 56, Sch 6 para 5(1), (4); the Serious Organised Crime and Police Act 2005 s 68; the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 364(e); the Criminal Justice and Police Act 2001 (Powers of Seizure) Order 2003, SI 2003/934, arts 2(1), (2), (4); and the General Product Safety Regulations 2005, SI 2005/1803, reg 47(2), (4)). Head (66) supra is added as from a day to be appointed: see the Criminal Justice and Police Act 2001 Sch 1 Pt 1 (as so amended; prospectively amended by the Terrorism Act 2006 s 28(6)(a)). At the date at which this volume states the law no such day had been appointed. As from a day to be appointed the Criminal Justice and Police Act 2001 Sch 1 Pt 1 (as amended) is further amended so that heads (5), (9) and (17) supra are repealed and replaced by reference to the powers conferred by the Gambling Act 2005 s 317 (not yet in force): see the Criminal Justice and Police Act 2001 Sch 1 Pt 1 (as so amended; prospectively amended by the Gambling Act 2005 s 356(1), (4), Sch 16 para 18(1)(a), (b), Sch 17). At the date at which this volume states the law no such day had been appointed.

The Secretary of State may by order: (a) provide for any power designated by the order to be added to those specified in the Criminal Justice and Police Act 2001 Sch 1 (as amended) or s 63(2) (as amended) (see note 5 infra); (b) make any modification of the provisions of Pt 2 (ss 50-70) (as amended) which the Secretary of State considers appropriate in consequence of any provision made by virtue of head (a) supra; (c) make any modification of any enactment making provision in relation to seizures, or things seized, under a power designated by an order under s 69(1) which the Secretary of State considers appropriate in consequence of any provision made by virtue of head (a) supra: see s 69(1). The power to make an order under s 69(1) is exercisable by statutory instrument; and no such order may be made unless a draft of it has been laid before Parliament and approved by a resolution of each House: s 69(3). In s 69, 'modification' includes any exclusion, extension or application: s 69(4).

4     Ibid under ibid s 50(2): see the text and notes 10-15 infra.

5     'Seize' is to be construed in accordance with ibid s 63(1) and s 66(5) (as amended) (see PARA 893 note 6 post): see s 66(1). 'Seize' includes 'take a copy of'; and cognate expressions are to be construed accordingly: ss 63(1)(a), 66(1). Part 2 (as amended) applies as if any copy taken under any power to which any provision of Pt 2 (as amended) applies were the original of that of which it is a copy: ss 63(1)(b), 66(1). For the purposes of Pt 2 (as amended), except s 50 and s 51 (see PARA 891 post), the powers mentioned in s 63(2) (as amended) (powers to obtain hard copies etc of information which is stored in electronic form) are to be treated as powers of seizure; and references to seizure and to seized property are to be construed accordingly: s 63(1)(c). The powers mentioned in s 63(1)(c) are any powers which are conferred by: (1) the Police and Criminal Evidence Act 1984 ss 19(4), 20 (as amended) (see PARAS 886-887 ante); (2) the Firearms Act 1968 s 46(3) (as added and amended) (see PARA 693 ante); (3) the Gaming Act 1968 s 43(5)(aa) (as added and amended); (4) the Taxes Management Act 1970 s 20C(3A) (as added and amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1706); (5) the Food Safety Act 1990 s 32(6)(b) (as amended) (see FOOD vol 18(2) (Reissue) PARA 261); (6) the Competition Act 1998 s 28(2)(f) (as amended) (see COMPETITION vol 18 (2009) PARA 131); and (7) the Nuclear Safeguards Act 2000 s 8(2)(c) (as amended) (see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1579): see the Criminal Justice and Police Act 2001 s 63(2). As from a day to be appointed head (3) above is repealed: see the Criminal Justice and Police Act 2001 s 63(2) (prospectively amended by the Gambling Act 2005 s 356, Sch 17). At the date at which this volume states the law no such day had been appointed. The Criminal Justice and Police Act 2001 s 63(1) does not apply to s 50(6) (see note 9 infra) or s 57 (as amended) (see PARA 896 post): s 63(3).

6     Ibid s 50(1)(b).

7     Ibid s 50(1)(c)(i).

8     Ibid s 50(1)(c)(ii).

9     See ibid s 50(1). Without prejudice to any power conferred by s 50 to take a copy of any document, nothing in s 50, so far as it has effect by reference to the power to take copies of documents under the Competition Act 1998 s 28(2)(b) (see COMPETITION vol 18 (2009) PARA 131), is to be taken to confer any power to seize any document: Criminal Justice and Police Act 2001 s 50(6).

The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (see PARA 856 ante) (application of provisions relating to police officers to officers of Revenue and Customs) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (as amended) as they have effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

The Criminal Justice and Police Act 2001 Pt 2 (as amended) gives officers limited powers to seize property from premises or persons so they can sift or examine it elsewhere. Officers must be careful they only exercise these powers when it is essential and they do not remove any more material than necessary. The removal of large volumes of material, much of which may not ultimately be retainable, may have serious implications for the

owners, particularly when they are involved in business or activities such as journalism or the provision of medical services. Officers must carefully consider if removing copies or images of relevant material or data would be a satisfactory alternative to removing originals. When originals are taken, officers must be prepared to facilitate the provision of copies or images for the owners when reasonably practicable: see Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 7.7.

When an officer exercises a power of seizure conferred by the Criminal Justice and Police Act 2001 s 50 or s 51 (see PARA 891 post) he must provide the occupier of the premises or the person from whom the property is being seized with a written notice: (1) specifying what has been seized under the powers so conferred; (2) specifying the grounds for those powers; (3) setting out the effect of ss 59-61 (see PARAS 898-899 post) covering the grounds for a person with a relevant interest in seized property to apply to a judicial authority for its return and the duty of officers to secure property in certain circumstances when an application is made; (4) specifying the name and address of the person to whom notice of an application to the appropriate judicial authority in respect of any of the seized property must be given, or to whom an application may be made to allow attendance at the initial examination of the property: Code B para 7.12. For the meaning of 'appropriate judicial authority' see PARA 898 note 6 *infra*.

If the occupier is not present but there is someone in charge of the premises, the notice should be given to him. If no suitable person is available, so that the notice will easily be found it should either be left in a prominent place on the premises or attached to the exterior of the premises: Code B para 7.13.

10    *Ie* which he has apart from the Criminal Justice and Police Act 2001 s 50(2): see the text and notes 11-15 *infra*.

11    *Ibid* s 50(2)(a).

12    *Ie* under *ibid* s 50.

13    *Ibid* s 50(2)(b).

14    *Ibid* s 50(2)(c).

15    See *ibid* s 50(2). The Police and Criminal Evidence Act 1984 s 19(6) (see PARA 886 note 12 *ante*) does not apply to the power of seizure conferred by the Criminal Justice and Police Act 2001 s 50(2): s 50(4).

16    *Ie* for the purposes of *ibid* s 50.

17    *Ibid* s 50(3)(a).

18    *Ibid* s 50(3)(b).

19    *Ibid* s 50(3)(c).

20    *Ibid* s 50(3)(d).

21    *Ibid* s 50(3)(e).

22    *Ie* a power of seizure conferred by *ibid* s 50(1), (2): see the text and notes 1-15 *supra*.

23    *Ie* subject to *ibid* s 50(2), (3): see the text and notes 10-21 *supra*.

24    The Secretary of State may by regulations made by statutory instrument, after consultation with the Scottish Ministers, provide that a person who exercises a power of seizure conferred by *ibid* s 50 (see the text and notes 1-21 *supra*) must give a notice such as is mentioned in s 52(1) to any person, or send it to any place, described in the regulations: s 52(5). Such regulations may make different provisions for different cases: s 52(6). A statutory instrument containing such regulations is subject to annulment in pursuance of a resolution of either House of Parliament: s 52(7). At the date at which this volume states the law no such regulations had been made.

25    *Ibid* s 52(1)(a).

26    *Ibid* s 52(1)(b).

27    *Ibid* s 52(1)(c). As to the remedies and safeguards see ss 59-61; and PARAS 898-899 post.

28    *Ie* under *ibid* s 59(1), (2): see PARA 898 post.

29    *Ibid* s 52(1)(d). For the meaning of 'appropriate judicial authority' see PARA 898 note 6 post.



- 30    le made for the purposes of *ibid* s 53(2): see PARA 892 post.
- 31    *Ibid* s 52(1)(e).
- 32    *Ibid* s 52(2).
- 33    le for the purpose of complying with *ibid* s 50(1): see the text and notes 1-9 *supra*.
- 34    *Ibid* s 52(3).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **890-892 Additional powers of seizure from premises ... Examination and return of property seized under additional powers of seizure**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **890 Additional powers of seizure from premises**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 1--Definition of 'premises' in Criminal Justice and Police Act 2001 s 66(1) amended: Marine and Coastal Access Act 2009 s 253(6)(b).

NOTE 3--Day now appointed in relation to heads (5), (9) and (17): SI 2006/3272.

Head (20) now refers to Estate Agents Act 1979 s 11(1B); head (29) the power of seizure conferred by the Weights and Measures (Packaged Goods) Regulations 2006, SI 2006/659, Sch 5 para 4; Criminal Justice and Police Act 2001 Sch 1 Pt 1 (amended by Consumers, Estate Agents and Redress Act 2007 Sch 7 para 22(b); SI 2006/659).

Head (37) now refers to each of the powers of seizure conferred by the provisions of the Human Fertilisation and Embryology Act 1990 Sch 3B para 7(1) and (2); Criminal Justice and Police Act 2001 Sch 1 Pt 1 (amended by the Human Fertilisation and Embryology Act 2008 Sch 7 para 21).

Also, heads (67) the power of seizure conferred by the Animal Welfare Act 2006 Sch 2 para 10(2)(j) (see ANIMALS vol 2 (2008) PARA 844); (68) the power of seizure conferred by the Enterprise Act 2002 s 227C (see COMPETITION vol 18 (2009) PARA 357); (69) the power of seizure conferred by the Charities Act 1993 s 31A(3) (see CHARITIES vol 8 (2010) PARA 559); (70) the power of seizure conferred by the Money Laundering Regulations 2007, SI 2007/2157, reg 39(6) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48

(2008) PARA 561); (71) each of the powers of seizure conferred by the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276, reg 23(1)(c) and (d); (72) the power of seizure conferred by the Transfer of Funds (Information on the Payer) Regulations 2007, SI 2007/3298, reg 9(6) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 449); (73) the power of seizure conferred by the Consumer Credit Act 1974 s 36D(3) (see CONSUMER CREDIT); and (74) each of the powers of seizure conferred by the Marine and Coastal Access Act 2009 s 252(1) and (3) (see WATER AND WATERWAYS): Criminal Justice and Police Act 2001 Sch 1 Pt 1 (amended by Animal Welfare Act 2006 Sch 3 para 14(3); Charities Act 2006 s 26(2); Consumer Credit Act 2006 s 51(7); Marine and Coastal Access Act 2009 s 253(7); SI 2006/3363; SI 2007/2157; SI 2008/1277).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(viii) Additional Powers of Seizure/891. Additional powers of seizure from the person.

### **891. Additional powers of seizure from the person.**

Where:

- 1146 (1) a person carrying out a lawful search of any person finds something that he has reasonable grounds for believing may be or may contain something for which he is authorised to search<sup>1</sup>;
  - 1147 (2) a relevant power of seizure<sup>2</sup> or the power described below<sup>3</sup> would entitle him, if he found it, to seize<sup>4</sup> whatever it is that he has grounds for believing that thing to be or to contain<sup>5</sup>; and
  - 1148 (3) in all the circumstances it is not reasonably practicable for it to be determined, at the time and place of the search:
- 47
- 75. (a) whether what he has found is something that he is entitled to seize<sup>6</sup>; or
  - 76. (b) the extent to which what he has found contains something that he is entitled to seize<sup>7</sup>,
- 48

that person's powers of seizure include power to seize so much of what he has found as it is necessary to remove from that place to enable that to be determined<sup>8</sup>.

Where:

- 1149 (i) a person carrying out a lawful search of any person finds something ('the seizable property') which he would be entitled to seize but for its being comprised in something else that he has<sup>9</sup> no power to seize<sup>10</sup>;
- 1150 (ii) the power under which that person would have power to seize the seizable property is a power to which this provision<sup>11</sup> applies<sup>12</sup>; and
- 1151 (iii) in all the circumstances it is not reasonably practicable for the seizable property to be separated, at the time and place of the search, from that in which it is comprised<sup>13</sup>,

that person's powers of seizure include power to seize both the seizable property and that from which it is not reasonably practicable to separate it<sup>14</sup>.

The factors to be taken into account in considering<sup>15</sup> whether or not it is reasonably practicable, at the time and place of a search, for something to be determined, or for something to be separated from something else, are confined to the following

- 1152 (A) how long it would take to carry out the determination or separation at that time and place<sup>16</sup>;
- 1153 (B) the number of persons that would be required to carry out that determination or separation at that time and place within a reasonable period<sup>17</sup>;
- 1154 (C) whether the determination or separation would (or would if carried out on those premises) involve damage to property<sup>18</sup>;

- 1155 (D) the apparatus or equipment that it would be necessary or appropriate to use for the carrying out of the determination or separation<sup>19</sup>; and
- 1156 (E) in the case of separation, whether the separation would be likely, or if carried out by the only means that are reasonably practicable at that time and place would be likely, to prejudice the use of some or all of the separated seizable property for a purpose for which something seized under the power in question is capable of being used<sup>20</sup>.

Where a person exercises such a power of seizure<sup>21</sup>, it is his duty, on doing so, to give a written notice to the person from whom the seizure is made:

- 1157 (aa) specifying what has been seized in reliance on the powers conferred<sup>22</sup>;
- 1158 (bb) specifying the grounds on which those powers have been exercised<sup>23</sup>;
- 1159 (cc) setting out the effect of specified safeguards and remedies<sup>24</sup>;
- 1160 (dd) specifying the name and address of the person to whom notice of any application<sup>25</sup> to the appropriate judicial authority in respect of any of the seized property must be given<sup>26</sup>; and
- 1161 (ee) specifying the name and address of the person to whom an application may be made to be allowed to attend the initial examination required by any arrangements made<sup>27</sup>.

1 Criminal Justice and Police Act 2001 s 51(1)(a).

2 Ie a power of seizure to which *ibid* s 51 applies. Those powers are: (1) each of the powers of seizure conferred by the provisions of the Police and Criminal Evidence Act 1984 Pt 3 (ss 24-33) (as amended) (see PARAS 924-936 post); (2) the power of seizure conferred by the Firearms Act 1968 s 46 (as added and amended) (see PARA 693 ante); (3) each of the powers of seizure conferred by the provisions of the Misuse of Drugs Act 1971 s 23(2), (3) (see PARA 781 ante); (4) the power of seizure conferred by the Immigration Act 1971 s 28G(7) (as added) (see BRITISH NATIONALITY, ASYLUM AND IMMIGRATION vol 4(2) (2002 Reissue) PARA 208); (5) each of the powers of seizure conferred by the provisions of the Biological Weapons Act 1974 s 4(1)(b), (c), (d) (as amended) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 471); (6) the power of seizure conferred by the Criminal Justice and Public Order Act 1994 s 139(10) (see PARA 937 post); (7) the power of seizure conferred by the Terrorism Act 2000 s 43(4) (see PARA 426 ante); (8) each of the powers of seizure conferred by the provisions of the Terrorism Act 2000 Sch 5 paras 1, 3, 11, 15, 19 (as amended) (see PARAS 409, 411, 413 ante); (9) the powers of seizure conferred by the Extradition Act 2003 s 163(6), (7) (see EXTRADITION vol 17(2) (Reissue) PARA 1519); Criminal Justice and Police Act 2001 s 51(5), Sch 1 Pt 2 (amended by the Extradition Act 2003 s 165(1), (3)). The Secretary of State may add further powers of seizure to those listed in the Criminal Justice and Police Act 2001 Sch 1 (as amended): see s 69; and PARA 890 note 3 ante.

3 Ie *ibid* s 51(2): see the text and notes 9-14 *infra*.

4 See PARA 890 note 5 ante.

5 Criminal Justice and Police Act 2001 s 51(1)(b).

6 *Ibid* s 51(1)(c)(i).

7 *Ibid* s 51(1)(c)(ii).

8 See *ibid* s 51(1); Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 7.7; and PARA 890 note 9 ante.

The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (application of provisions relating to police officers to officers of Revenue and Customs: see PARA 856 note 6 ante) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (ss 50-70) (as amended) as they have effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

9 Ie which he has apart from *ibid* s 51(2): see the text and notes 10-14 *infra*.

10 *Ibid* s 51(2)(a).

11 le under ibid s 51.

12 Ibid s 51(2)(b).

13 Ibid s 51(2)(c).

14 See ibid s 51(2). The Police and Criminal Evidence Act 1984 s 19(6) (see PARA 886 note 12 ante) does not apply to the power of seizure conferred by the Criminal Justice and Police Act 2001 s 51(2): s 51(4). See PARA 890 note 9 ante.

15 le for the purposes of ibid s 51(1), (2): see the text and notes 1-14 supra.

16 Ibid s 51(3)(a).

17 Ibid s 51(3)(b).

18 Ibid s 51(3)(c).

19 Ibid s 51(3)(d).

20 Ibid s 51(3)(e).

21 le a power of seizure conferred by ibid s 51(1), (2): see the text and notes 1-14 supra.

22 Ibid s 52(4)(a).

23 Ibid s 52(4)(b).

24 Ibid s 52(4)(c). As to the remedies and safeguards see ss 59-61; and PARAS 898-899 post.

25 le under ibid s 59(1), (2): see PARA 898 post.

26 Ibid s 52(4)(d). For the meaning of 'appropriate judicial authority' see PARA 898 note 6 post.

27 Ibid s 52(4)(e). The arrangements referred to in the text are any arrangements made for the purposes of s 53(2) (see PARA 892 post): s 52(4).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **890-892 Additional powers of seizure from premises ... Examination and return of property seized under additional powers of seizure**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(ix) Return or Retention of Seized Property/892. Examination and return of property seized under additional powers of seizure.

## **(ix) Return or Retention of Seized Property**

### **892. Examination and return of property seized under additional powers of seizure.**

Where anything has been seized<sup>1</sup> under one of the additional powers of seizure<sup>2</sup>, it is the duty of the person for the time being<sup>3</sup> in possession of the seized property in consequence of the exercise of that power to secure that there are arrangements in force which<sup>4</sup> ensure:

1162 (1) that an initial examination of the property is carried out as soon as reasonably practicable<sup>5</sup> after the seizure<sup>6</sup>;

1163 (2) that that examination is confined to whatever is necessary for determining how much of the property:

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77. (a) is property for which the person seizing it had power to search when he made the seizure but is not property the return<sup>7</sup> of which is required<sup>8</sup>;

78. (b) is property the retention of which is authorised<sup>9</sup>; or

79. (c) is something which, in all the circumstances, it will not be reasonably practicable, following the examination, to separate<sup>10</sup> from property falling within head (a) or head (b) above<sup>11</sup>;

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1164 (3) that anything which is found, on that examination, not to fall within heads (a) to (c) above is separated from the rest of the seized property and is returned as soon as reasonably practicable after the examination of all the seized property has been completed<sup>12</sup>; and

1165 (4) that, until the initial examination of all the seized property has been completed and anything which does not fall within heads (a) to (c) has been returned, the seized property is kept separate from anything seized under any other power<sup>13</sup>.

1 See PARA 890 note 5 ante.

2 Ie under the Criminal Justice and Police Act 2001 s 50 or s 51: see PARAS 890-891 ante.

3 In ibid Pt 2 (ss 50-70) (as amended), in relation to a time when seized property is in any person's possession in consequence of a seizure ('the relevant time'), references to something for which the person making the seizure had power to search are to be construed:

317 (1) where the seizure was made on the occasion of a search carried out on the authority of a warrant, as including anything of the description of things the presence or suspected presence of which provided grounds for the issue of the warrant (s 66(2)(a));

318 (2) where the property was seized in the course of a search on the occasion of which it would have been lawful for the person carrying out the search to seize anything which on that occasion was believed by him to be, or appeared to him to be, of a particular description, as including anything which at the relevant time is believed by the person in possession of the seized property, or (as the case may be) appears to him, to be of that description, and anything which is in fact of that description (s 66(2)(b));

- 319 (3) where the property was seized in the course of a search on the occasion of which it would have been lawful for the person carrying out the search to seize anything which there were on that occasion reasonable grounds for believing was of a particular description, as including anything which there are at the relevant time reasonable grounds for believing is of that description, and anything which is in fact of that description (s 66(2)(c));
- 320 (4) where the property was seized in the course of a search to which neither head (2) nor head (3) supra applies, as including anything which is of a description of things which, on the occasion of the search, it would have been lawful for the person carrying it out to seize otherwise than under s 50 (see PARA 890 ante) or s 51 (see PARA 891 ante) (s 66(2)(d)); and
- 321 (5) where the property was seized on the occasion of a search authorised under the Terrorism Act 2000 s 82 (seizure of items suspected to have been, or to be intended to be, used in commission of certain offences in Northern Ireland), as including anything:
18. (a) which is or has been, or is or was intended to be, used in the commission of an offence such as is mentioned in s 82(3)(a) or (b) (Criminal Justice and Police Act 2001 s 66(2)(e)(i)); or
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19. (b) which at the relevant time the person who is in possession of the seized property reasonably suspects is something falling within head (a) supra (s 66(2)(e)(ii)).
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For the purpose of determining in accordance with s 66(2), in relation to any time, whether or to what extent property seized on the occasion of a search authorised under the Official Secrets Act 1911 s 9 (as amended) (seizure of evidence of offences under that Act having been or being about to be committed: see PARA 500 ante) is something for which the person making the seizure had power to search, s 9(1) (as amended) is to be construed:

- 322 (i) as if the reference in s 9(1) (as amended) to evidence of an offence under that Act being about to be committed were a reference to evidence of such an offence having been, at the time of the seizure, about to be committed (Criminal Justice and Police Act 2001 s 66(3)(a)); and
- 323 (ii) as if the reference in the Official Secrets Act 1911 s 9(1) (as amended) to reasonable ground for suspecting that such an offence is about to be committed were a reference to reasonable ground for suspecting that at the time of the seizure such an offence was about to be committed (Criminal Justice and Police Act 2001 s 66(3)(b)).

References in s 66(2) to a search include references to any activities authorised by virtue of any of: the Trade Descriptions Act 1968 s 28(1) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 509); the Fair Trading Act 1973 s 29(1); the Prices Act 1974 Sch para 9 (as amended) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 676-677); the Consumer Credit Act 1974 s 162(1) (see CONSUMER CREDIT vol 9(1) (Reissue) PARAS 306-307); the Estate Agents Act 1979 s 11(1) (see AGENCY vol 1 (2008) PARA 279); the Weights and Measures Act 1985 s 79 (as amended) and Sch 8 (see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 27); the Consumer Protection Act 1987 s 29 (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 557); the Food Safety Act 1990 s 32(5) (see FOOD vol 18(2) (Reissue) PARA 261); the Property Misdescriptions Act 1991 Schedule para 3 (as amended) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 815); the Timeshare Act 1992 Sch 2 para 3 (as amended) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 725); the Human Tissue Act 2004 Sch 5 para 2 (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 275); and the General Product Safety Regulations 2005, SI 2005/1803, reg 22 (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 565); Criminal Justice and Police Act 2001 s 66(4) (amended by the Human Tissue Act 2004 s 56, Sch 6 para 5(1), (3)); and the General Product Safety Regulations 2005, SI 2005/1803, reg 47(2), (3)).

4 le subject to the Criminal Justice and Police Act 2001 s 61: see PARA 899 post.

5 In determining the earliest practicable time for the carrying out of an initial examination of the seized property, due regard must be had to the desirability of allowing the person from whom it was seized, or a person with an interest in that property, an opportunity of being present or (if he chooses) of being represented at the examination: see *ibid* s 53(4); and Code B: Code of Practice for Searches by Police Officers and the Seizure of Property found by Police Officers on Persons or Property para 7.8.

All reasonable steps should be taken to accommodate an interested person's request to be present, provided the request is reasonable and subject to the need to prevent harm to, interference with, or unreasonable delay to the investigatory process. If an examination proceeds in the absence of an interested person who asked to attend or his representative, the officer who exercised the relevant seizure power must give that person a written notice of why the examination was carried out in those circumstances. If it is necessary for security reasons or to maintain confidentiality, officers may exclude interested persons from decryption or other processes which facilitate the examination but do not form part of it: Code B para 7.8A.

What constitutes a relevant interest in specific material may depend on the nature of that material and the circumstances in which it is seized. Anyone with a reasonable claim to ownership of the material and anyone entrusted with its safe keeping by the owner should be considered: Code B Guidance note 7D.

6 Criminal Justice and Police Act 2001 s 53(1), (2)(a). See note 13 infra.

7 References to 'return' in relation to seized property, and cognate terms, are to be construed in accordance with *ibid* s 58 (see PARA 897 post): s 66(1).

8 *Ibid* s 53(1), (2)(b), (3)(a). As to the requirement to return see s 54; and PARA 893 post. See note 13 infra.

9 *Ibid* s 53(1), (2)(b), (3)(b). As to the authorisation to retain see s 56; and PARA 895 post. See note 13 infra.

10 References to whether or not it is reasonably practicable to separate part of the seized property from the rest of it are references to whether or not it is reasonably practicable to do so without prejudicing the use of the rest of that property, or a part of it, for purposes for which (disregarding the part to be separated) the use of the whole or of a part of the rest of the property, if retained, would be lawful: *ibid* s 53(5).

11 *Ibid* s 53(1), (2)(b), (3)(c). See note 13 infra.

12 *Ibid* s 53(1), (2)(c). See note 13 infra. It is the responsibility of the officer in charge of the investigation to make sure property is returned in accordance with the Criminal Justice and Police Act 2001 ss 53-55. Material which there is no power to retain must be separated from the rest of the seized property, and returned as soon as reasonably practicable after examination of all the seized property: Code B para 7.9.

Delay is only warranted if very clear and compelling reasons exist, eg the unavailability of the person to whom the material is to be returned, or the need to agree a convenient time to return a large volume of material: Code B para 7.9A.

13 Criminal Justice and Police Act 2001 s 53(1), (2)(d). Property seized under s 50 or s 51 (see PARAS 890-891 ante) must be kept securely and separately from any material seized under other powers: Code B para 7.8.

The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (see PARA 856 note 6 ante) (application of provisions relating to police officers to officers of Revenue and Customs) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (as amended) as they have effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### 890-892 Additional powers of seizure from premises ... Examination and return of property seized under additional powers of seizure

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 892 Examination and return of property seized under additional powers of seizure

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6



(meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 3--Reference to Estate Agents Act 1979 s 11(1) now to s 11(1)-(1C); reference to Weights and Measures Act 1985 Sch 8 now to Weights and Measures (Packaged Goods) Regulations 2006, SI 2006/659, Sch 7; references to Animal Welfare Act 2006 ss 26(1), 27(1), 28(1) and 29(1), Enterprise Act 2002 s 227C (see COMPETITION vol 18 (2009) PARA 357), Human Fertilisation and Embryology Act 1990 Sch 3B para 5, Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276, reg 23 and Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, reg 21 added: 2001 Act s 66(4) (amended by Animal Welfare Act 2006 Sch 3 para 14(2); Consumers, Estate Agents and Redress Act 2007 Sch 7 para 22(a); Human Fertilisation and Embryology Act 2008 Sch 7 para 20(a); SI 2006/659; SI 2006/3363; SI 2008/1277).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(ix) Return or Retention of Seized Property/893. Obligation to return items subject to legal privilege.

### **893. Obligation to return items subject to legal privilege.**

Where, at any time after a seizure<sup>1</sup> of anything has been made in exercise of:

- 1166 (1) one of the additional powers of seizure<sup>2</sup>;
- 1167 (2) any of the powers of seizure to which the additional powers of seizure apply<sup>3</sup>;
- 1168 (3) any other power of seizure conferred on a constable by or under any enactment<sup>4</sup>,

and:

- 1169 (a) it appears to the person for the time being<sup>5</sup> having possession of the seized property<sup>6</sup> in consequence of the seizure that the property is an item subject to legal privilege<sup>7</sup>, or has such an item comprised in<sup>8</sup> it<sup>9</sup>; and
- 1170 (b) in a case where the item is comprised in something else which has been lawfully seized, it is not comprised in property of a specified<sup>10</sup> type<sup>11</sup>,

it is the duty of that person to secure that the item is returned<sup>12</sup> as soon as reasonably practicable after the seizure<sup>13</sup>.

Property in which an item subject to legal privilege is comprised is of a specified type for the purposes of head (b) above if:

- 1171 (i) the whole or part of the rest of the property is property: (A) for which the person seizing it had power to search when he made the seizure, but is not property which is required to be returned under the obligation to return items subject to legal privilege or the obligation<sup>14</sup> to return excluded and special procedure material<sup>15</sup>; or (B) in respect of which there are reasonable grounds for believing that it was obtained in consequence of the commission of an offence, or that it is evidence in relation to any offence, and that it is necessary for it to be retained in order to prevent it being concealed, lost, damaged, altered or destroyed<sup>16</sup>; and
- 1172 (ii) in all the circumstances, it is not reasonably practicable for that item to be separated from the rest of that property (or, as the case may be, from that part of it) without prejudicing the use of the rest of that property, or that part of it, for purposes for which (disregarding that item) its use, if retained, would be lawful<sup>17</sup>.

<sup>1</sup> See PARA 890 note 5 ante.

<sup>2</sup> Criminal Justice and Police Act 2001 s 54(4)(a). As to the additional powers of seizure see ss 50, 51; and PARAS 890-891 ante.

<sup>3</sup> Ibid s 54(4)(b). These powers of seizure are listed in Sch 1 Pts 1, 2 (as amended): see PARAS 890-891 ante.

4 Ibid s 54(4)(c). This includes an enactment passed after the Criminal Justice and Police Act 2001: s 54(4)(c).

5 See PARA 892 note 3 ante.

6 'Seized property' in the Criminal Justice and Police Act 2001 Pt 2 (ss 50-70) (as amended), in relation to any exercise of a power of seizure, means (subject to s 66(5) (as amended)) anything seized in exercise of that power: s 66(1). References in Pt 2 (as amended) to a power of seizure include references to each of the powers to take possession of items under: (1) the Companies Act 1985 s 448(3) (as substituted) (see COMPANIES vol 15 (2009) PARA 1559); (2) the Criminal Justice Act 1987 s 2(5) (see PARA 1091 post); (3) the Human Fertilisation and Embryology Act 1990 s 40(2) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 290); (4) the Competition Act 1998 s 28(2)(c) (see COMPETITION vol 18 (2009) PARA 131); and (5) the Financial Services and Markets Act 2000 s 176(5) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 454): see the Criminal Justice and Police Act 2001 s 66(5) (amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 364(c)).

7 In the Criminal Justice and Police Act 2001 Pt 2 (as amended), 'items subject to legal privilege' is to be construed in accordance with s 65 (as amended): s 66(1). Subject to s 65(2)-(4), (6)-(9), references in Pt 2 (as amended) to an item subject to legal privilege are to be construed for the purposes of the application of that Part to England and Wales in accordance with the Police and Criminal Evidence Act 1984 s 10 (see PARA 873 ante): Criminal Justice and Police Act 2001 s 65(1)(a).

In relation to property which has been seized in exercise, or purported exercise, of: (1) the power of seizure conferred by the Competition Act 1998 s 28(2) (as amended) (see COMPETITION vol 18 (2009) PARA 131); or (2) so much of any power of seizure conferred by the Criminal Justice and Police Act 2001 s 50 (see PARA 890 ante) as is exercisable by reference to that power, references in Pt 2 (as amended) to an item subject to legal privilege are to be read as reference to a privileged communication within the meaning of the Competition Act 1998 s 30 (see COMPETITION vol 18 (2009) PARA 132): Criminal Justice and Police Act 2001 s 65(2).

In relation to property which has been seized in exercise, or purported exercise, of: (a) the power of seizure conferred by the Taxes Management Act 1970 s 20(C) (as added and amended); or (b) so much of any power of seizure conferred by the Criminal Justice and Police Act 2001 s 50 (see PARA 890 ante) as is exercisable by reference to that power, references in Pt 2 (as amended) to an item subject to legal privilege are to be construed in accordance with the Taxes Management Act 1970 s 20C(4A) (as added): see the Criminal Justice and Police Act 2001 s 65(3); and INCOME TAXATION vol 23(2) (Reissue) PARA 1706.

In relation to property which has been seized in exercise, or purported exercise, of: (i) the power of seizure conferred by the Proceeds of Crime Act 2002 s 352(4); or (ii) so much of any power of seizure conferred by the Criminal Justice and Police Act 2001 s 50 (see PARA 890 ante) as is exercisable by reference to that power, references in Pt 2 (as amended) to an item subject to legal privilege are to be read as references to privileged material within the meaning of the Proceeds of Crime Act 2002 s 354(2): see the Criminal Justice and Police Act 2001 s 65(3A) (added by the Proceeds of Crime Act 2001 s 456 Sch 11 para 40(5)); and PARA 810 ante.

An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of the power of seizure conferred by the Companies Act 1985 s 448(3) (as substituted) (see COMPANIES vol 15 (2009) PARA 1559) is to be taken for the purposes of the Criminal Justice and Police Act 2001 Pt 2 (as amended) to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of the Companies Act 1985 s 452(2) (as substituted) (see COMPANIES vol 15 (2009) PARA 1564): Criminal Justice and Police Act 2001 s 65(4).

An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of the power of seizure conferred by the Timeshare Act 1992 s 2, Sch 2 para 3(2) is to be taken for the purposes of the Criminal Justice and Police Act 2001 Pt 2 (as amended) to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of the Timeshare Act 1992 Sch 2 para 3(4): see the Criminal Justice and Police Act 2001 s 65(6); and see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 725.

An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of the power of seizure conferred by the Data Protection Act 1998 Sch 9 para 1 (prospectively amended) is to be taken for the purposes of the Criminal Justice and Police Act 2001 Pt 2 (as amended) to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of the Data Protection Act 1998 Sch 9 para 9: see the Criminal Justice and Police Act 2001 s 65(7); and see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 576.

An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of the power of seizure conferred by the Freedom of Information Act 2000 Sch 3 para 1 (prospectively amended) is to be taken for the purposes of the Criminal Justice and Police Act 2001 Pt 2 (as amended) to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of the Freedom of Information Act 2000 Sch 3 para 9: see the Criminal Justice and Police Act 2001 s 65(8); and see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 613.

An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of so much of any power of seizure conferred by s 50 (see PARA 890 ante) as is exercisable by reference to a power of seizure conferred by: (A) the Companies Act 1985 s 448(3) (as substituted); (B) the Timeshare Act 1992 Sch 2 para 3(2); (C) the Data Protection Act 1998 Sch 9 para 1; or (D) the Freedom of Information Act 2000 Sch 3 para 1, is to be taken for the purposes of the Criminal Justice and Police Act 2001 Pt 2 (as amended) to be an item subject to legal privilege if, and only if, the item would have been taken for the purposes of Pt 2 (as amended) to be an item subject to legal privilege had it been seized under the power of seizure by reference to which the power conferred by s 50 was exercised: see s 65(9).

8 References in *ibid* Pt 2 (as amended) to any item or material being comprised in other property include references to its being mixed with that other property: s 66(8).

9 *Ibid* s 54(1)(a).

10 *Ie* property falling within *ibid* s 54(2): see the text and notes 14-17 *infra*.

11 *Ibid* s 54(1)(b).

12 See PARA 897 *post*.

13 See the Criminal Justice and Police Act 2001 s 54(1), (4); Code B: Code of Practice for Searches by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises paras 7.9, 7.9A; and PARA 892 note 12 *ante*. Legally privileged, excluded or special procedure material which cannot be retained must be returned as soon as reasonably practicable without waiting for the whole examination: Code B para 7.9B.

The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (see PARA 856 note 6 *ante*) (application of provisions relating to police officers to officers of Revenue and Customs) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (as amended) as they have effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

14 *Ie* under *ibid* s 55 (as amended): see PARA 894 *post*.

15 See *ibid* s 54(2)(a), (3).

16 See *ibid* s 54(2)(a); and PARA 896 *post*.

17 *Ibid* s 54(2)(b).

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### 893 Obligation to return items subject to legal privilege

NOTE 6--Criminal Justice and Police Act 2001 s 66(5) amended: Human Fertilisation and Embryology Act 2008 Sch 7 para 20(b), Sch 8 Pt 1; SI 2009/1941.

NOTE 7--An item which is, or is comprised in, property which has been seized in exercise, or purported exercise, of the power of seizure conferred by the Enterprise Act 2002 s 227C (see COMPETITION vol 18 (2009) PARA 357) is to be taken for the purposes of the Criminal Justice and Police Act 2001 Pt 2 to be an item subject to legal privilege if, and only if, the seizure of that item was in contravention of the 2002 Act s 227B(4) (privileged items): 2001 Act s 65(8A) (added by SI 2006/3363).

Also, head (E) the 2002 Act s 227C: 2001 Act s 65(9) (amended by SI 2006/3363).

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#### **894. Obligation to return excluded and special procedure material.**

Where, at any time after a seizure<sup>1</sup> of anything has been made in the exercise of a specified power of seizure<sup>2</sup>:

- 1173 (1) it appears to the person for the time being<sup>3</sup> having possession of the seized property<sup>4</sup> in consequence of the seizure that the property is excluded material<sup>5</sup> or special procedure material<sup>6</sup>, or has any excluded material or any special procedure material comprised in it<sup>7</sup>;
- 1174 (2) its retention is not authorised<sup>8</sup>; and
- 1175 (3) in a case where the material is comprised<sup>9</sup> in something else which has been lawfully seized, it is not comprised in property falling within head (a) or head (b) below<sup>10</sup>,

it is the duty of that person to secure that the item is returned<sup>11</sup> as soon as reasonably practicable after the seizure<sup>12</sup>.

For the purpose of head (3) above, property is excepted if it is property in which any excluded or special procedure material is comprised and:

- 1176 (a) the whole or a part of the rest of the property is property for which the person seizing it had power to search when he made the seizure but is not property the return of which is required by the above provisions or by provisions relating to legal privilege<sup>13</sup>, and, in all the circumstances, it is not reasonably practicable for that material to be separated from the rest of that property (or, as the case may be, from that part of it) without prejudicing the use of the rest of that property, or that part of it, for purposes for which (disregarding that material) its use, if retained, would be lawful<sup>14</sup>; or
- 1177 (b) the whole or a part of the rest of the property is property the retention of which is authorised by specified provisions<sup>15</sup>, and, in all the circumstances, it is not reasonably practicable for that material to be separated from the rest of that property (or, as the case may be, from that part of it) without prejudicing the use of the rest of that property, or that part of it, for purposes for which (disregarding that material) its use, if retained, would be lawful<sup>16</sup>.

1 See PARA 890 note 5 ante.

2 Is a power to which the Criminal Justice and Police Act 2001 s 55 (as amended) applies, namely: (1) the power of seizure conferred by the Police and Criminal Evidence Act 1984 s 8(2) (see PARA 873 ante); (2) the power of seizure conferred by the Official Secrets Act 1911 s 9(1) (see PARA 500 ante); (3) the power of seizure conferred by the Children and Young Persons (Harmful Publications) Act 1955 s 3(1) (as amended) (see PRESS, PRINTING AND PUBLISHING (Reissue) vol 36(2) PARA 422); (4) each of the powers of seizure conferred by the Obscene Publications Act 1959 s 3(1), (2) (as amended) (see PARA 751 ante); (5) the power of seizure conferred by the Betting, Gaming and Lotteries Act 1963 s 51 (as amended); (6) the power of seizure conferred by the Firearms Act 1968 s 46 (as added and amended) (see PARA 693 ante); (7) the power of seizure conferred by the Theft Act 1968 s 26(3) (see PARA 306 ante); (8) the power of seizure conferred by the Gaming Act 1968 s 43(5); (9) the power of seizure conferred by the Immigration Act 1971 s 28D(3) (as added) (see BRITISH NATIONALITY, IMMIGRATION

AND ASYLUM vol 4(2) (Reissue) PARA 207); (10) each of the powers of seizure conferred by the provisions of the Biological Weapons Act 1974 s 4(1)(b)-(d) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 471); (11) the power of seizure conferred by the Lotteries and Amusements Act 1976 s 19 (as amended); (12) the power of seizure conferred by the Protection of Children Act 1978 s 4(2) (as amended) (see PARA 759 ante); (13) the power of seizure conferred by the Indecent Displays (Control) Act 1981 s 2(3) (as amended) (see PARA 768 ante); (14) each of the powers of seizure conferred by the provisions of the Forgery and Counterfeiting Act 1981 s 7(1) (see PARA 352 ante), s 24(1) (see PARA 550 ante); (15) the power of seizure conferred by the Video Recording Act 1984 s 17(2) (see LICENSING AND GAMBLING vol 67 (2008) PARA 291); (16) each of the powers of seizure conferred by the Copyright, Designs and Patents Act 1988 s 109(4) (as amended), s 200(3A) (as added and amended), s 297B (as added) (see COPYRIGHT, DESIGN RIGHTS AND RELATED RIGHTS vol 9(2) (2006 Reissue) PARAS 441, 493, 720); (17) the power of seizure conferred by the Computer Misuse Act 1990 s 14(4) (see PARA 358 ante); (18) the power of seizure conferred by the Trade Marks Act 1994 s 92A(4) (as added) (see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 145); (19) the power of seizure conferred by the Drug Trafficking Act 1994 s 56(5) (see PARA 785 ante); (20) each of the powers of seizure conferred by the Terrorism Act 2000 Sch 5 paras 1, 3 (prospectively amended) (see PARA 409 ante); (21) each of the powers of seizure conferred by the Terrorism Act 2000 Sch 5 paras 15, 19 (prospectively amended), so far only as the power in question is conferred by reference to Sch 5 para 1 (see PARA 409 ante); (22) the power of seizure conferred by the Proceeds of Crime Act 2002 s 352(4) (see PARA 810 ante); (23) the power of seizure conferred by the Licensing Act 2003 s 90 (see LICENSING AND GAMBLING vol 67 (2008) PARA 105): see the Criminal Justice and Police Act 2001 s 55(4), Sch 1 Pt 3 (amended by the Proceeds of Crime Act 2002 ss 456, 457, Sch 11 para 40(7), Sch 12; the Licensing Act 2003 ss 198, 199, Sch 6 paras 119, 128, Sch 7; and the Criminal Justice and Police Act 2001 (Powers of Seizure) Order 2003, SI 2003/934, art 3). As from a day to be appointed the Criminal Justice and Police Act 2001 Sch 1 Pt 3 (as amended) is further amended so that heads (5) and (11) above are repealed and replaced with reference to the powers conferred by the Gambling Act 2005 s 317 (not yet in force): see the Criminal Justice and Police Act 2001 Sch 1 Pt 3 (as so amended; prospectively further amended by the Gambling Act 2005 s 356, Sch 16 para 18(1), Sch 17). At the date at which this volume states the law no such day had been appointed.

The Secretary of State may add further powers of seizure to those listed in the Criminal Justice and Police Act 2001 Sch 1 (as amended): see s 69; and PARA 890 note 3 ante.

3 See PARA 892 note 3 ante.

4 See PARA 893 note 6 ante.

5 References to excluded material in the Criminal Justice and Police Act 2001 Pt 2 (ss 50-70) (as amended) are to be construed in accordance with the Police and Criminal Evidence Act 1984 s 12 (see PARA 875 ante): Criminal Justice and Police Act 2001 s 66(6)(a).

6 References to special procedure material in *ibid* Pt 2 (as amended) are to be construed in accordance with the Police and Criminal Evidence Act 1984 s 14 (see PARA 876 ante): Criminal Justice and Police Act 2001 s 66(6)(b). In its application to the powers of seizure conferred by the Drug Trafficking Act 1994 s 56(5) (see PARA 785 ante) or the Proceeds of Crime Act 2002 s 352(4) (see PARA 810 ante), the Criminal Justice and Police Act 2001 has effect with the omission of every reference to special procedure material: s 55(5) (amended by the Proceeds of Crime Act 2002 ss 546, 547, Sch 11 para 40(2), Sch 12). In the Criminal Justice and Police Act 2001 s 55 (as amended), except in its application to: (1) the power of seizure conferred by the Police and Criminal Evidence Act 1984 s 8(2) (see PARA 873 ante); (2) each of the powers of seizure conferred by the provisions of the Terrorism Act 2000 Sch 5 paras 1, 3 (Sch 5 para 3 prospectively amended) (see PARA 409 ante); (3) the power of seizure conferred by the Terrorism Act 2000 Sch 5 paras 15, 19 (prospectively amended) so far only as the power in question is conferred by reference to Sch 5 para 1 (see PARA 413 ante), 'special procedure material' means special procedure material consisting of documents or records other than documents: Criminal Justice and Police Act 2001 s 55(6).

7 *Ibid* s 55(1)(a).

8 *Ibid* s 55(1)(b). As to authorisation see s 56 (as amended); and PARA 895 post.

9 See PARA 893 note 7 ante.

10 Criminal Justice and Police Act 2001 s 55(1)(c).

11 See PARA 892 note 7 ante.

12 See the Criminal Justice and Police Act 2001 s 55(1). See Code B: Code of Practice for Searches by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises paras 7.9, 7.9A, 7.9B; and PARAS 892 note 12, 893 note 13 ante.

The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (see PARA 856 note 6 ante) (application of provisions relating to police officers to officers of Revenue and Customs) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (as amended) as they have

effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

13    Ie under ibid s 54: see PARA 893 ante.

14    Ibid s 55(2).

15    Ie under ibid s 56 (as amended): see PARA 895 post.

16    Ibid s 55(3).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **894 Obligation to return excluded and special procedure material**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--Day now appointed: SI 2006/3272.



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ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(ix) Return or Retention of Seized Property/895. Property seized by constables etc.

### **895. Property seized by constables etc.**

The retention of:

- 1178 (1) property seized<sup>1</sup> on any premises<sup>2</sup> by a constable<sup>3</sup> who was lawfully on the premises<sup>4</sup>;
- 1179 (2) property seized on any premises by a relevant person who was on the premises accompanied by a constable<sup>5</sup>; and
- 1180 (3) property seized by a constable carrying out a lawful search of any person<sup>6</sup>,

is authorised to the extent that there are reasonable grounds for believing: (a) that it is property obtained in consequence of the commission of an offence, and that it is necessary for it to be retained in order to prevent its being concealed, lost, damaged, altered or destroyed<sup>7</sup>; or (b) that it is evidence in relation to any offence, and that it is necessary for it to be retained in order to prevent its being concealed, lost, altered or destroyed<sup>8</sup>.

1 See PARA 890 note 5 ante.

2 For the meaning of 'premises' see PARA 890 note 1 ante.

3 See PARA 857 note 2 ante.

4 Criminal Justice and Police Act 2001 s 56(1)(a). This includes property seized on any premises: (1) by a person authorised under the Police and Criminal Evidence Act 1984 s 16(2) (see PARA 880 note 8 ante) to accompany a constable executing a warrant; or (2) by a person accompanying a constable under the Criminal Justice Act 1987 s 2(6) (see PARA 1091 note 6 post) in the execution of a warrant under s 2(4) (see PARA 1091 note 4 post): Criminal Justice and Police Act 2001 s 56(4A) (added by the Criminal Justice Act 2003 s 12, Sch 1 para 14). See note 8 infra.

5 Criminal Justice and Police Act 2001 s 56(1)(b). The reference to a relevant person's being on any premises accompanied by a constable is a reference only to a person who was so on the premises under the authority of a warrant under the Companies Act 1985 s 448 (as substituted) (see COMPANIES vol 15 (2009) PARA 1559) authorising him to exercise together with a constable the powers conferred by s 448(3) (as substituted): see the Criminal Justice and Police Act 2001 s 56(5). See note 8 infra.

6 Ibid s 56(1)(c).

7 Ibid s 56(2).

8 Ibid s 56(3). Nothing in s 56 (as amended) authorises the retention (subject to s 54(2)) of anything at a time when its return is required by s 54 (see PARA 893 ante): s 56(4).

The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (see PARA 856 note 6 ante) (application of provisions relating to police officers to officers of Revenue and Customs) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (ss 50-70) (as amended) as they have effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **895 Property seized by constables etc**

NOTE 5--Criminal Justice and Police Act 2001 s 56(5) amended: SI 2009/1941.

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ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(ix) Return or Retention of Seized Property/896. Retention of seized items.

## **896. Retention of seized items.**

Specified provisions<sup>1</sup> ('the relevant provisions') about the retention of property which has been seized apply in relation to any property seized<sup>2</sup> in exercise of an additional power<sup>3</sup> as if the property had been seized under the power of seizure by reference to which the additional power of seizure was exercised in relation to that property<sup>4</sup>.

1 The specified provisions to which the relevant provisions apply are: (1) the Police and Criminal Evidence Act 1984 s 22 (as amended) (see PARA 889 ante); (2) the Taxes Management Act 1970 s 20CC(3) (as added) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1707); (3) the Companies Act 1985 s 448(6) (as substituted) (see COMPANIES vol 15 (2009) PARA 1559); (4) the Weights and Measures Act 1985 Sch 8 para 4 (see WEIGHTS AND MEASURES vol 50 (2005 Reissue) PARA 216); (5) the Human Fertilisation and Embryology Act 1990 s 40(4) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 290); (6) the Knives Act 1997 s 5(4) (see PARA 703 ante); (7) the Data Protection Act 1998 Sch 9 para 7(2) (see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 575); (8) the Competition Act 1998 s 28(7) (see COMPETITION vol 18 (2009) PARA 131); (9) the Financial Services and Markets Act 2000 s 176(8) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 454); (10) the Freedom of Information Act 2000 Sch 3 para 7(2) (see CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 613); (11) the Human Tissue Act 2004 Sch 5 para 5(4): see the Criminal Justice and Police Act 2001 s 57(1) (amended by the Human Tissue Act 2004 s 56, Sch 6 para 5(1), (2); and the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 364).

2 For the meaning of 'seized' see PARA 890 note 5 ante.

3 Ie under a power of seizure conferred by the Criminal Justice and Police Act 2001 s 50 or s 51: see PARAS 890-891 ante.

4 See *ibid* s 57(1), (2) (s 57(1) as amended: see note 1 *supra*). Nothing in ss 53-56 (ss 55, 56 as amended) (see PARAS 892-895 ante) authorises the retention of any property at any time when its retention would not, apart from the provisions of Pt 2 (ss 50-70) (as amended), be authorised by the relevant provisions: s 57(3). Nothing in any of the relevant provisions authorises the retention of anything after an obligation to return it has arisen under Pt 2 (as amended): s 57(4).

The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (see PARA 856 note 6 ante) (application of provisions relating to police officers to officers of Revenue and Customs) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (as amended) as they have effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

## **896 Retention of seized items**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 1--Head (2) omitted; in head (3) reference to Weights and Measures Act 1985 Sch 8 now to Weights and Measures (Packaged Goods) Regulations 2006, SI 2006/659, Sch 7; head (5) amended; and additional heads (12) the Animal Welfare Act 2006 Sch 2 para 12(3); and (13) the Enterprise Act 2002 s 227F (see COMPETITION vol 18 (2009) PARA 358); Criminal Justice and Police Act 2001 s 57(1) (amended by Animal Welfare Act 2006 Sch 3 para 14(1); Finance Act 2007 Sch 22 para 13(1)(a), Sch 27 Pt 5(1); Human Fertilisation and Embryology Act 2008 Sch 7 para 19; SI 2006/659; SI 2006/3363; and SI 2009/1941).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(ix) Return or Retention of Seized Property/897. Person to whom seized property is to be returned.

### **897. Person to whom seized property is to be returned.**

Where anything has been seized<sup>1</sup> in exercise of any power of seizure, and there is an obligation under the specified provisions<sup>2</sup> for the whole or any part of the seized property<sup>3</sup> to be returned, the obligation to return it is an obligation to return it to the person from whom it was seized<sup>4</sup>. However, where:

- 1181 (1) any person is obliged under the specified provisions to return anything that has been seized to the person from whom it was seized<sup>5</sup>; and
- 1182 (2) the person under that obligation is satisfied that some other person has a better right to that thing than the person from whom it was seized<sup>6</sup>,

his duty to return it is, instead, a duty to return it to that other person or, as the case may be, to the person appearing to him to have the best right to the thing in question<sup>7</sup>.

Where different persons claim to be entitled to the return of anything that is required to be returned under the specified provisions, that thing may be retained for as long as is reasonably necessary for the determination<sup>8</sup> of the person to whom it must be returned<sup>9</sup>.

1 For the meaning of 'seized' see PARA 890 note 5 ante.

2 Ie under the Criminal Justice and Police Act 2001 Pt 2 (ss 50-70) (as amended).

3 See PARA 893 note 6 ante.

4 Criminal Justice and Police Act 2001 s 58(1). References in Pt 2 (as amended) to the person from whom something has been seized, in relation to a case in which the power of seizure was exercisable by reason of that thing's having been found on any premises, are references to the occupier of the premises at the time of the seizure: s 58(4). For the meaning of 'premises' see PARA 890 note 1 ante. References in s 58 to the occupier of any premises at the time of a seizure, in relation to a case in which: (1) a notice in connection with the entry or search of the premises in question, or with the seizure, was given to a person appearing in the occupier's absence to be in charge of the premises; and (2) it is practicable, for the purpose of returning something that has been seized, to identify that person but not to identify the occupier of the premises, are references to that person: s 58(5).

The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (see PARA 856 note 6 ante) (application of provisions relating to police officers to officers of Revenue and Customs) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (as amended) as they have effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

5 Ibid s 58(2)(a).

6 Ibid s 58(2)(b).

7 See ibid s 58(2).

8 Ie in accordance with ibid s 58(2): see the text and notes 5-7 supra.

9 Ibid s 58(3). Material must be returned to the person from whom it was seized, except when it is clear that some other person has a better right to it: Code B: Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises para 7.9C. Requirements to secure

and return property apply equally to all copies, images or other material created because of seizure of the original property: Code B Guidance note 7E.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(x) Remedies and Safeguards/898. Application to the appropriate judicial authority.

## **(x) Remedies and Safeguards**

### **898. Application to the appropriate judicial authority.**

Where anything has been seized<sup>1</sup> in exercise, or purported exercise, of a relevant power of seizure, namely:

- 1183 (1) one of the additional powers of seizure<sup>2</sup>;
- 1184 (2) any of the powers of seizure to which the additional powers apply<sup>3</sup>;
- 1185 (3) any other power of seizure conferred on a constable by or under any enactment<sup>4</sup>,

any person with a relevant interest<sup>5</sup> in the seized property may apply to the appropriate judicial authority<sup>6</sup> for the return<sup>7</sup> of the whole or part of the seized property on one or more of the following grounds<sup>8</sup>:

- 1186 (a) that there was no power to make the seizure<sup>9</sup>;
- 1187 (b) that the seized property is or contains an item subject to legal privilege that is not comprised in<sup>10</sup> property inextricably linked<sup>11</sup> to other seizable property<sup>12</sup>;
- 1188 (c) that the seized property is or contains any excluded material or special procedure material which:

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- 80. (i) has been seized under a power to which the obligation to return excluded and special procedure material<sup>13</sup> applies<sup>14</sup>;
- 81. (ii) is not comprised in property in respect of which the obligation to return does not apply<sup>15</sup>; and
- 82. (iii) is not property whose retention is authorised by the provisions relating to property seized by a constable or a relevant person accompanying him<sup>16</sup>;

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- 1189 (d) that the seized property is or contains something seized under an additional power of seizure<sup>17</sup> which is not inextricably linked to property which the police may retain<sup>18</sup>.

On such an application, the appropriate judicial authority must, if satisfied as to any of the matters mentioned in heads (a) to (d) above, order the return of so much of the seized property as is property in relation to which the authority is so satisfied; and to the extent that that authority is not so satisfied, it must dismiss the application<sup>19</sup>.

On an application: (A) by a person with a relevant interest; or (B) on an application by the person for the time being<sup>20</sup> having possession of anything in consequence of its seizure under a relevant power of seizure; or (C) on an application by a person with a relevant interest in anything seized under an additional power of seizure<sup>21</sup>, made on the grounds that the requirements to secure arrangements for the initial examination of seized property and for the separation and subsequent return of property not inextricably linked with it have not been or are not being complied with<sup>22</sup>, the appropriate judicial authority may give such directions as the

authority thinks fit as to the examination, retention, separation or return of the whole or any part of the seized property<sup>23</sup>.

On any such application<sup>24</sup>, the appropriate judicial authority may authorise the retention of any property which has been seized in exercise, or purported exercise, of a relevant power of seizure, and would otherwise fall to be returned, if that authority is satisfied that the retention of the property is justified<sup>25</sup> on grounds that (if the property were returned) it would immediately become appropriate:

- 1190 (aa) to issue, on the application of the person who is in possession of the property at the time of the application under this provision, a warrant in pursuance of which, or of the exercise of which, it would be lawful to seize the property<sup>26</sup>; or
- 1191 (bb) to make an order under specified provisions<sup>27</sup> under which the property would fall to be delivered up or produced to the person mentioned in head (aa) above<sup>28</sup>.

If a person fails to comply with any order or direction made or given by a judge of the Crown Court in exercise of any jurisdiction under these provisions, the authority may deal with him as if he had committed a contempt of the Crown Court; and any enactment relating to contempt of the Crown Court has effect in relation to the failure as if it were such a contempt<sup>29</sup>.

1 See PARA 890 note 5 ante.

2 I.e. the powers of seizure conferred by the Criminal Justice and Police Act 2001 ss 50, 51, and the powers of seizure conferred by Sch 1 Pts 1, 2 (as amended) (see PARAS 890-891 ante): s 59(10)(a).

3 Ibid s 59(10)(b). These powers of seizure are listed in Sch 1 Pts 1, 2 (as amended): see PARAS 890-891 ante.

4 Ibid s 59(1), (10)(c). This includes an enactment passed after the Criminal Justice and Police Act 2001: s 59(1), (10)(c).

5 References in ibid s 59 to a person with a relevant interest in seized property are references to: (1) the person from whom it was seized; (2) any person with an interest in the property; or (3) any person who had custody or control of the property immediately before the seizure: s 59(1), (11). For the purposes of head (2) *supra*, the persons who have an interest in seized property are, in the case of property which is or which contains an item subject to legal privilege, taken to include the person in whose favour that privilege is conferred: s 59(1), (12).

6 I.e. in England and Wales, a judge of the Crown Court, except in relation to the seizure of items (and in relation to items seized) under:

324 (1) the powers of seizure conferred by the Companies Act 1985 s 448(3) (as substituted) (see COMPANIES vol 15 (2009) PARA 1559) or the Competition Act 1998 s 28(2) (as amended) (see COMPETITION vol 18 (2009) PARA 131);

325 (2) the power of seizure conferred by the Proceeds of Crime Act 2002 s 352(4), if the power is exercisable for the purposes of a civil recovery investigation (see PARAS 804, 810 ante);

326 (3) any power of seizure conferred by the Criminal Justice and Police Act 2001 s 50 (see PARA 890 ante), so far as that power is exercisable by reference to any power mentioned in head (1) *supra*,

in which cases the appropriate judicial authority in relation to England and Wales is a judge of the High Court: ss 64(1)-(3), 66(1) (s 64(3) amended by the Proceeds of Crime Act 2002 ss 456, 457, Sch 11 para 40(4), Sch 12).

7 See PARA 892 note 7 ante.

8 Criminal Justice and Police Act 2001 s 59(1), (2).

The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (see PARA 856 note 6 ante) (application of provisions relating to police officers to officers of Revenue and Customs) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (ss 50-70) (as amended) as



they have effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

9 Ibid s 59(1), (3)(a).

10 See PARA 893 note 8 ante.

11 It is not comprised in property falling within the Criminal Justice and Police Act 2001 s 54(2): see PARA 893 ante.

12 Ibid s 59(3)(b).

13 See PARAS 875-876 ante.

14 Criminal Justice and Police Act 2001 s 59(1), (3)(c)(i). As to the obligation to return such material see s 55 (as amended); and PARA 894 ante.

15 Ibid s 59(1), (3)(c)(ii). See s 55(2), (3); and PARA 894 ante.

16 Ibid s 59(1), (3)(c)(iii). See s 56 (as amended); and PARA 895 ante.

17 It is under ibid s 50 or s 51: see PARAS 890-891 ante.

18 Ibid s 59(1), (3)(d). Head (d) in the text refers to property which does not fall within s 53(3): see PARA 892 ante. As to procedural rules in relation to applications under s 59 see the Crown Court Rules 1982, SI 1982/1109, r 39 (amended by SI 2003/639; SI 2003/1664).

When an officer involved in the investigation has reasonable grounds to believe a person with a relevant interest in property seized under the Criminal Justice and Police Act 2001 s 50 or s 51 (see PARAS 890-891 ante) intends to make an application under s 59 for the return of any legally privileged, special procedure or excluded material, the officer in charge of the investigation should be informed as soon as practicable and the material seized should be kept secure in accordance with s 61 (see PARA 899 post): Code B: Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons and Premises para 7.10. Officers should consider reaching agreement with owners and/or other interested parties on the procedure for examining a specific set of property, rather than awaiting the judicial authority's determination; agreement can sometimes give a quicker and more satisfactory route for all concerned and minimise costs and legal complexities: Code B Guidance note 7C.

19 Criminal Justice and Police Act 2001 s 59(1), (4).

20 See PARA 892 note 3 ante.

21 It is a power under the Criminal Justice and Police Act 2001 s 50 or s 51: see PARAS 890-891 ante.

22 It is the requirement under ibid s 53(2): see PARA 892 ante.

23 Ibid s 59(1), (5).

24 It is any application under ibid s 55 (as amended): see PARA 894 ante.

25 See ibid s 59(1), (6).

26 See ibid s 59(7)(a); and note 28 infra.

27 It is an order under the Police and Criminal Evidence Act 1984 s 9, Sch 1 para 4 (prospectively amended) (see PARA 878 note 24 ante); the Taxes Management Act 1970 s 20BA (as added) (see INCOME TAX vol 23(1) (Reissue) PARA 1704); or the Terrorism Act 2000 s 37, Sch 5 para 5 (prospectively amended) (see PARA 410 ante).

28 Criminal Justice and Police Act 2001 s 59(1), (7)(b). Where any property which has been seized in exercise, or purported exercise, of a relevant power of seizure has parts ('part A' and 'part B') comprised in it such that:

327 (1) it would be inappropriate, if the property were returned, to take any action such as is mentioned in s 59(7) in relation to part A (s 59(8)(a));

328 (2) it would (or would but for the facts mentioned in head (1) supra) be appropriate, if the property were returned, to take such action in relation to part B (s 59(8)(b)); and

329 (3) in all the circumstances, it is not reasonably practicable to separate part A from part B without prejudicing the use of part B for purposes for which it is lawful to use property seized under the power in question (s 59(8)(c)),

the facts mentioned in head (1) supra are not to be taken into account by the appropriate judicial authority in deciding whether the retention of the property is justified on grounds falling within s 59(1), (7): see s 59(1), (8).

29 Ibid s 59(1), (9).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **898 Application to the appropriate judicial authority**

NOTE 6--2001 Act s 64(3) further amended: Serious Crime Act 2007 Sch 10 para 27.

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### **899. Duty to secure.**

Where property has been seized<sup>1</sup> in exercise, or purported exercise, of any additional power of seizure<sup>2</sup>, a duty to secure arises<sup>3</sup> in relation to the seized property if:

- 1192 (1) a person entitled to do so makes an application<sup>4</sup> for the return of the property<sup>5</sup>;
  - 1193 (2) notice of the application is given to a relevant person<sup>6</sup>;
  - 1194 (3) at least one of the following two conditions is satisfied:
- 53
- 83. (a) the application is made on the grounds that the seized property<sup>7</sup> is or contains an item subject to legal privilege that is not comprised in<sup>8</sup> inextricably linked property<sup>9</sup>;
  - 84. (b) the seized property was seized by a person who had, or purported to have, power<sup>10</sup> to seize it by virtue only of one or more of the specified powers<sup>11</sup>, and the application: (i) is made on the ground that the seized property is or contains something which is not of a specified type<sup>12</sup>; and (ii) states that the seized property is or contains special procedure material<sup>13</sup> or excluded material<sup>14</sup>.
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In relation to property seized by a person who had, or purported to have, power under an additional power to seize it by virtue only of one or more of the powers of seizure conferred by certain Acts, the condition in head (b) above is satisfied only if the application states that the seized property is or contains excluded material (or, in some cases, special procedure material consisting of documents or records other than documents)<sup>15</sup>.

The duty to secure<sup>16</sup> is a duty of the person for the time being having possession<sup>17</sup>, in consequence of the seizure, of the seized property to secure that arrangements are in force that ensure that the seized property (without being returned) is not, at any time after the giving of the notice of the application<sup>18</sup> for the return of the property, either examined or copied, or put to any use to which its seizure would otherwise<sup>19</sup> entitle it to be put, except with the consent of the applicant or in accordance with the directions of the appropriate judicial authority<sup>20</sup>. Nothing in any such arrangements<sup>21</sup> is to be taken to prevent the giving of a notice<sup>22</sup> for the disclosure of material protected by encryption etc in respect of any information contained in the seized material<sup>23</sup>.

1 See PARA 890 note 5 ante.

2 Ie a power conferred by the Criminal Justice and Peace Act 2001 s 50 or s 51: see PARAS 890-891 ante.

3 Ie under ibid s 61: see the text and notes 16-23 infra.

4 Ie under ibid s 59: see PARA 898 ante.

5 Ibid s 60(1)(a).

6 Ibid s 60(1)(d). 'A relevant person' means any one of the following: (1) the person who made the seizure; (2) the person for the time being having possession, in consequence of the seizure, of the seized property; (3)

the person named for the purposes of s 52(1)(d) (see PARA 890 head (D) ante) or s 52(4)(d) (see PARA 891 head (D) ante) in any notice given under s 52 with respect to the seizure: s 60(7).

7 See PARA 890 note 5 ante.

8 See PARA 893 note 8 ante.

9 Criminal Justice and Police Act 2001 s 60(1)(b), (2). See s 54(2); and PARA 893 note 13 ante. See note 14 infra.

10 Ie under ibid Pt 2 (ss 50-70) (as amended).

11 Ie the powers specified in ibid s 60(6) (as amended), namely:

330 (1) the powers of seizure specified in Sch 1 Pt 3 (as amended) (see s 60(6)(a); and PARA 894 note 2 ante);

331 (2) the powers of seizure conferred by the provisions of the Police and Criminal Evidence Act 1984 Pt 2 (ss 8-23) (as amended), Pt 3 (ss 24-51) (as amended) except s 8(2) (see the Criminal Justice and Police Act 2001 s 60(6)(b); and PARA 873 et seq ante);

332 (3) the powers of seizure conferred by the provisions of the Terrorism Act 2000 Sch 5 para 11 (prospectively amended) (see the Criminal Justice and Police Act 2001 s 60(6)(d); and PARA 411 ante); and

333 (4) the powers of seizure conferred by the Terrorism Act 2000 Sch 5 paras 15, 19 (prospectively amended) so far as they are conferred by reference to Sch 5 para 11 (prospectively amended) (see the Criminal Justice and Police Act 2001 s 60(6)(e); and PARA 413 ante).

12 Ie does not fall within ibid s 53(3); see PARA 892 head (2)(a)-(c) ante.

13 For the meaning of 'special procedure material' see PARA 876 ante.

14 Criminal Justice and Police Act 2001 s 60(1), (3). For the meaning of 'excluded material' see PARA 875 ante. The officer in charge of the investigation is responsible for making sure property is properly secured. Securing involves making sure the property is not examined, copied, imaged or put to any other use except at the request, or with the consent, of the applicant or in accordance with the directions of the appropriate judicial authority. Any request, consent or directions must be recorded in writing and signed by both the initiator and the officer in charge of the investigation: Code B: Code of Practice for Searches of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 7.11. The mechanics of securing property vary according to the circumstances; 'bagging up', ie placing material in sealed bags or containers and strict subsequent control of access is the appropriate procedure in many cases: Code B Guidance note 7F. When material is seized under the powers of seizure conferred by the Police and Criminal Evidence Act 1984, the duty to retain it under the code of practice issued under the Criminal Procedure and Investigations Act 1994 is subject to the provisions on retention of seized material in the Police and Criminal Evidence Act 1984 s 22 (as amended) (see PARA 889 ante): Code B Guidance note 7G.

The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (see PARA 856 note 6 ante) (application of provisions relating to police officers to officers of Revenue and Customs) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (ss 50-70) (as amended) as they have effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

15 In relation to property seized by a person who had, or purported to have, power under ibid Pt 2 (as amended) to seize it by virtue only of one or more of the powers of seizure conferred by the Drug Trafficking Act 1994 s 56(5) (see PARA 785 ante) or the Proceeds of Crime Act 2002 s 352(4) (see PARA 810 ante) the condition in head (b) in the text is satisfied only if the application states that the seized property is or contains excluded material: Criminal Justice and Police Act 2001 s 60(4) (amended by the Proceeds of Crime Act 2002 s 456, 457, Sch 11 para 40(3), Sch 12).

In relation to property seized by a person who had, or purported to have, power under the Criminal Justice and Police Act 2001 Pt 2 (as amended) to seize it by virtue only of one or more of the powers of seizure specified in Sch 1 Pt 3 (as amended) (see PARA 894 note 2 ante) but not by virtue of:

334 (1) the power of seizure conferred by the Police and Criminal Evidence Act 1984 s 8(2) (Criminal Justice and Police Act 2001 s 60(5)(a); and see PARA 873 ante);

335 (2) either of the powers of seizure conferred by the Terrorism Act 2000 Sch 5 paras 1, 3 (prospectively amended) (Criminal Justice and Police Act 2001 s 60(5)(c); and see PARA 409 ante);

336 (3) either of the powers of seizure conferred by the Terrorism Act 2000 Sch 5 paras 15, 19 (prospectively amended) so far as they are conferred by reference to Sch 5 para 1 (Criminal Justice and Police Act 2001 s 60(5)(a); and see PARA 413 ante),

the condition in head (b) in the text is satisfied only if the application states that the seized property is or contains excluded material or special procedure material consisting of documents or records other than documents: see s 60(5).

'Documents' includes information recorded in any form: see s 66(1).

16 le the duty that arises under *ibid* s 61: see the text and notes 17-23 *infra*.

17 See PARA 892 note 3 ante.

18 le an application under the Criminal Justice and Police Act 2001 s 60(1): see the text and notes 1-14 *supra*.

19 le apart from *ibid* s 61(1).

20 *Ibid* s 61(1). For the meaning of 'appropriate judicial authority' see PARA 898 note 6 ante. Section 61(1) does not have effect in relation to any time after the withdrawal of the application to which the notice relates: s 61(2).

21 le arrangements for the purposes of *ibid* s 61(1): see the text and notes 16-20 *supra*.

22 le under the Regulation of Investigatory Powers Act 2000 s 49 (prospectively amended): see POLICE vol 36(1) (2007 Reissue) PARA 512.

23 Criminal Justice and Police Act 2001 s 61(3). However, s 61(1) (see the text and notes 16-20 *supra*) applies to anything disclosed for the purpose of complying with such a notice as it applies to the seized material in which the information in question is contained: see s 61(3). Section 59(9) (see PARA 898 text and note 29 ante) applies in relation to any jurisdiction conferred on the appropriate judicial authority by s 61 as it applies in relation to the jurisdiction conferred by s 59: s 61(4).

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

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### **900. Use of inextricably linked property.**

There are special provisions which apply to property, other than property which is for the time being required to be secured<sup>1</sup>, if it has been seized under an additional power of seizure<sup>2</sup> or a specified power of seizure<sup>3</sup>, and is inextricably linked property<sup>4</sup>. It is the duty of the person for the time being having possession<sup>5</sup>, in consequence of the seizure, of the inextricably linked property to ensure that arrangements are in force which secure that that property (without being returned) is not at any time, except with the consent of the person from whom it was seized, either examined or copied, or put to any other use<sup>6</sup>. However, this does not require that such arrangements should prevent inextricably linked property from being put to any use to the extent that such use is necessary for facilitating the use, in any investigation or proceedings, of property in which the inextricably linked material is comprised<sup>7</sup>.

1    Ie under the provisions of the Criminal Justice and Police Act 2001 s 61: see PARA 899 ante.

2    Ie if it has been seized under any power conferred by ibid s 50 or s 51: see PARAS 890-891 ante.

3    Ie under a power specified in ibid Sch 1 Pt 1 or Sch 1 Pt 2 (as amended): see PARAS 890-891 ante.

4    Ibid s 62(1). Property is inextricably linked property for the purposes of s 62 if it falls within s 62(6)-(8): s 62(5).

Property falls within s 62(6) if: (1) it has been seized under a power conferred by s 50 or s 51 (see PARAS 890-891 ante); and (2) but for s 53(3)(c) (see PARA 892 head (2)(c) ante), arrangements under s 53(2) (see PARA 892 heads (1)-(4) ante) in relation to the property would be required to ensure the return of the property as mentioned in s 53(2)(c) (see PARA 892 head (3) ante): see s 62(6); and PARA 892 ante.

Property falls within s 62(7) if: (a) it has been seized under a power to which s 54 (see PARA 893 ante) applies; and (b) but for s 54(1)(b) (see PARA 893 head (b) ante), the person for the time being having possession of the property would be under a duty to secure its return as mentioned in s 54(1): see s 62(7); and PARA 893 ante.

Property falls within s 62(8) if: (i) it has been seized under a power of seizure to which s 55 (as amended) (see PARA 894 ante) applies; and (ii) but for s 55(1)(c) (see PARA 894 head (3) ante), the person for the time being having possession of the property would be under a duty to secure its return as mentioned in s 55(1): see s 62(8); and PARA 894 ante.

5    See PARA 892 note 3 ante.

6    Criminal Justice and Police Act 2001 s 62(2). The powers conferred by the Police and Criminal Evidence Act 1984 s 114(2) (prospectively amended) (see PARA 856 note 6 ante) (application of provisions relating to police officers to officers of Revenue and Customs) have effect in relation to the provisions of the Criminal Justice and Police Act 2001 Pt 2 (ss 50-70) (as amended) as they have effect in relation to the provisions of the Police and Criminal Evidence Act 1984: see the Criminal Justice and Police Act 2001 s 67.

7    Ibid s 62(3), (4).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

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## **(xi) Action Following Search**

### **901. Action following search.**

Where premises have been searched<sup>1</sup>, the officer in charge of the search must<sup>2</sup>, on arrival at a police station, make or have made a record of the search<sup>3</sup>. The record must include:

- 1195 (1) the address of the premises searched<sup>4</sup>;
- 1196 (2) the date, time and duration of the search<sup>5</sup>;
- 1197 (3) the authority under which the search was made: where the search was made in the exercise of a statutory power to search premises without warrant<sup>6</sup>, the record must include the power under which the search was made; and, where the search was made under warrant<sup>7</sup>, or with written consent<sup>8</sup>, a copy of the warrant and the written authority to apply for it<sup>9</sup>, or the written consent, must be appended to the record or the record must show the location of the copy warrant or consent<sup>10</sup>;
- 1198 (4) the names of the officer(s) in charge of the search and of all other officers and authorised persons who conducted the search<sup>11</sup>;
- 1199 (5) the names of any persons on the premises if they are known<sup>12</sup>;
- 1200 (6) any grounds for refusing the occupier's request to have someone present during the search<sup>13</sup>;
- 1201 (7) a list of any articles seized or the location of such a list and, if not covered by a warrant, the grounds for their seizure<sup>14</sup>;
- 1202 (8) whether force was used, and the reason<sup>15</sup>;
- 1203 (9) details of any damage caused during the search, and the circumstances<sup>16</sup>;
- 1204 (10) if applicable, the reason why it was not practicable:
- 55
- 85. (a) to give the occupier a copy of the Notice of Powers and Rights<sup>17</sup>,
- 86. (b) before the search to give the occupier a copy of the Notice of Powers and Rights<sup>18</sup>;
- 56
- 1205 (11) when the occupier was not present, the place where copies of the Notice of Powers and Rights and search warrants were left on the premises<sup>19</sup>.

A search register must be maintained at each sub-divisional or equivalent police station; and all search records which are required to be made must be made, copied or referred to in the register<sup>20</sup>.

<sup>1</sup> ie in circumstances to which the Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises applies.

<sup>2</sup> ie unless the exception in Code B para 2.3(a) applies: see PARA 869 note 2 head (1) ante.

<sup>3</sup> Code B para 8.1. Written records required under Code B not made in the search record must, unless otherwise specified, be made in the recording officer's pocket book (which includes any official report book issued to police officers) or on forms provided for the purpose: Code B para 2.8.



- 4 Code B para 8.1(i).
- 5 Code B para 8.1(ii).
- 6 See PARA 884 et seq ante.
- 7 See PARA 873 et seq ante.
- 8 See PARA 870 ante.
- 9 See Code B para 3.4; and PARA 871 ante.
- 10 Code B para 8.1(iii).
- 11 Code B para 8.1(iv). This is subject to Code B para 2.9: see PARA 881 note 5 ante.
- 12 Code B para 8.1(v).
- 13 Code B para 8.1(vi). See also Code B para 6.11; and PARA 882 note 8 ante.
- 14 Code B para 8.1(vii).
- 15 Code B para 8.1(viii).
- 16 Code B para 8.1(ix).
- 17 Code B para 8.1(x)(a). See also Code B para 6.7; and PARA 881 note 20 ante.
- 18 Code B para 8.1(x)(b). See also Code B para 6.8; and PARA 881 note 26 ante.
- 19 Code B: para 8.1(xi). See also Code B para 6.8; and PARA 881 note 26 ante.
- 20 See Code B para 9.1. Code B para 9.1 also applies to search records made by immigration officers. In these cases, a register must also be maintained at an immigration office: Code B Guidance note 9A.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(4) POWERS OF ENTRY, SEARCH AND SEIZURE/(xi) Action Following Search/902. Indorsements on, and return of, warrants.

## **902. Indorsements on, and return of, warrants.**

A constable executing a search warrant must make an indorsement on it stating:

- 1206 (1) whether the articles or persons sought were found<sup>1</sup>;
- 1207 (2) whether any articles were seized, other than articles which were sought and, unless the warrant is a warrant specifying one set of premises only, he must do so separately in respect of each set of premises entered and searched, which he must in each case state in the indorsement<sup>2</sup>.

In addition, on each occasion when premises are searched under a warrant, the warrant authorising the search on that occasion must be indorsed to show:

- 1208 (a) the date and time at which it was executed and, if present, the name of the occupier or if the occupier is not present the name of the person in charge of the premises<sup>3</sup>;
- 1209 (b) the names of the officers who executed it and any authorised persons who accompanied them<sup>4</sup>; and
- 1210 (c) whether a copy, together with a copy of the Notice of Powers and Rights, was handed to the occupier or indorsed<sup>5</sup> and left on the premises and, if so, where<sup>6</sup>.

A warrant must be returned to the appropriate person<sup>7</sup>:

- 1211 (i) when it has been executed<sup>8</sup>; or
- 1212 (ii) in the case of a specific premises warrant which has not been executed, or an all premises warrant, or any warrant authorising multiple entries, upon the expiry of the specified period of three months from the date of the warrant's issue or sooner<sup>9</sup>.

The appropriate person is: (A) if the warrant was issued by a justice of the peace<sup>10</sup>, the designated officer for the local justice area in which the justice was acting when he issued the warrant; and (B) if it was issued by a judge<sup>11</sup>, the appropriate officer of the court from which he issued it<sup>12</sup>.

A warrant which is so returned must be retained for 12 months from its return by the designated officer for the local justice area, if it was returned under head (i) above, and by the appropriate officer of the court, if it was returned under head (ii) above<sup>13</sup>.

If during the period for which a warrant is to be retained the occupier of premises<sup>14</sup> to which it relates asks to inspect it, he must be allowed to do so<sup>15</sup>.

1 Police and Criminal Evidence Act 1984 s 16(9)(a); Code B: Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises para 8.2(i). The warrant must also be indorsed to show the address where such articles were found: Code B para 8.2(i).

2 Police and Criminal Evidence Act 1984 s 16(9)(b) (amended by the Serious Organised Crime and Police Act 2005 s 113(1), (9)(b); and the Serious Organised Crime and Police Act 2005 (Amendment) Order 2005, SI 2005/3496, art 8).

3 See Code B para 8.2(iii).

4 Code B para 8.2(iv). This provision is subject to Code B para 2.9: see PARA 881 note 5 ante.

5 Is indorsed as required by Code B para 6.8: see PARA 881 note 26 ante.

6 Code B para 8.2(v).

7 See the text to notes 10-12 infra.

8 Police and Criminal Evidence Act 1984 s 16(10)(a) (s 16(10) substituted by the Serious Organised Crime and Police Act 2005 s 114(1), (8)(c)).

9 Police and Criminal Evidence Act 1984 s 16(3), (10)(b) (as substituted: see note 8 supra). See Code B para 8.3; and PARA 880 ante.

10 Is under the Police and Criminal Evidence Act 1984 s 8 (as amended): see PARA 873 ante.

11 Is under ibid s 9(1), Sch 1 para 12 (as amended): see PARA 879 ante.

12 Ibid s 16(10A) (added by the Serious Organised Crime and Police Act 2005 s 114(1), (8)(c)).

13 Police and Criminal Evidence Act 1984 s 16(11) (amended by the Courts Act 2003 s 109(1), Sch 8 para 281(1), (3)).

14 For the meaning of 'premises' see PARA 872 note 5 ante.

15 Police and Criminal Evidence Act 1984 s 16(12) (amended by the Serious Organised Crime and Police Act 2005 s 113(1), (9)(c)).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12.

ENFORCEMENT PROCEDURES/(5) INTERNATIONAL CO-OPERATION AND MUTUAL PROVISION OF EVIDENCE/903. Assistance in obtaining evidence abroad.

## **(5) INTERNATIONAL CO-OPERATION AND MUTUAL PROVISION OF EVIDENCE**

### **903. Assistance in obtaining evidence abroad.**

If it appears to a judicial authority<sup>1</sup> in the United Kingdom<sup>2</sup>: (1) that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed; and (2) that proceedings in respect of the offence have been instituted or that the offence is being investigated, the judicial authority may request assistance<sup>3</sup> in obtaining outside the United Kingdom any evidence<sup>4</sup> specified in the request for use in the proceedings or investigation<sup>5</sup>.

A designated prosecuting authority<sup>6</sup> may itself request assistance under these provisions if: (a) it appears to the authority that an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed; and (b) the authority has instituted proceedings in respect of the offence in question or it is being investigated<sup>7</sup>.

A request for assistance may be sent to a court exercising jurisdiction in the place where the evidence is situated, or to any authority recognised by the government of the country in question as the appropriate authority for receiving requests of that kind<sup>8</sup>. Alternatively, if it is a request by a judicial authority or a designated prosecuting authority it may be sent to the Secretary of State for forwarding to the relevant court or authority<sup>9</sup>. In cases of urgency, a request for assistance may be sent to the International Criminal Police Organisation, or to any body or person competent to receive it under any provisions adopted under the Treaty on European Union, for forwarding to the relevant court or authority<sup>10</sup>.

Evidence obtained pursuant to a request for assistance<sup>11</sup> may not, without the consent of the appropriate overseas authority<sup>12</sup>, be used for any purpose other than that specified in the request<sup>13</sup>. When the evidence is no longer required for that purpose (or for any other purpose for which such consent has been obtained), it must be returned to the appropriate overseas authority, unless that authority indicates that it need not be returned<sup>14</sup>.

As from a day to be appointed, the following provisions have effect<sup>15</sup>. If it appears to a judicial authority in the United Kingdom, on an application made by a constable<sup>16</sup>, that: (i) proceedings in respect of a listed offence have been instituted or such an offence is being investigated; (ii) there are reasonable grounds to believe that there is evidence in a participating country which satisfies the statutory requirements<sup>17</sup>; and (iii) a request has been made, or will be made, for the evidence to be sent to the authority making the request, then the judicial authority may make a domestic freezing order in respect of the evidence<sup>18</sup>. A domestic freezing order is an order for protecting evidence which is in the participating country pending its transfer to the United Kingdom<sup>19</sup>.

1 The judicial authorities are: (1) in relation to England and Wales, any judge or justice of the peace; (2) in relation to Northern Ireland, any judge or resident magistrate: Crime (International Co-operation) Act 2003 s 7(4).

2 In relation to England and Wales and Northern Ireland, by a prosecuting authority; (2) where proceedings have

been instituted, by the person charged in those proceedings: s 7(3). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 Ibid s 7(1); CrimPR 32.1-32.3.

4 'Evidence' for this purpose includes information in any form and articles, and giving evidence includes answering a question or producing any information or article: Crime (International Co-operation) Act 2003 s 51(1).

5 Ibid s 7(2).

6 'Designated' means designated by an order made by the Secretary of State: *ibid* s 7(5). See the Crime (International Co-operation) Act 2003 (Designation of Prosecuting Authorities) Order 2004, SI 2004/1034 (amended by SI 2004/1747; SI 2005/1130). As to the making of orders under the Crime (International Co-operation) Act 2003 Pt 1 (ss 1-51) (as amended) see PARA 917 note 14 post.

7 Ibid s 7(5). If a request for assistance is made in reliance on art 2 of the Protocol to the Mutual Legal Assistance Convention, established by Council Act of 16 October 2001 (2001/C326/01) (requests for information on banking transactions) in connection with the investigation of an offence, the request must state the grounds on which the person making the request considers the evidence specified in it to be relevant for the purposes of the investigation: Crime (International Co-operation) Act 2003 ss 7(7), 51(1). As to the Mutual Legal Assistance Convention see PARA 916 note 4 post.

8 Crime (International Co-operation) Act 2003 s 8(1).

9 Ibid s 8(2).

10 Ibid s 8(3).

11 Ibid s 9(1). Such requests are made under s 7: see the text and notes 1-7 *supra*.

12 For these purposes, the appropriate overseas authority means the authority recognised by the government of the country in question as the appropriate authority for receiving requests of the kind in question: *ibid* s 9(6).

13 Ibid s 9(2).

14 Ibid s 9(3).

15 The provisions of *ibid* ss 10-12 are to come into force on a day to be appointed by order under s 94. At the date at which this volume states the law no such day had been appointed.

16 Ibid s 10(4). See note 15 *supra*. As to the judicial authorities see s 10(5); and see note 1 *supra*.

The Treasury may by order provide for any function conferred on a constable under ss 10, 11, 13-26 to be exercisable instead in prescribed circumstances by an officer of Her Majesty's Revenue and Customs or a person acting under the direction of such an officer: see s 27(1)(b); the Commissioners for Revenue and Customs Act 2005 s 50(1), (2), (7); and the Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2005, SI 2005/425, arts 9-12. The Secretary of State may by order provide for any function conferred on a constable under the Crime (International Co-operation) Act 2003 ss 13-26 (except s 16(2)(b), (4)(b)) to be exercisable instead in prescribed circumstances by a prescribed person: s 27(2)(b), (3). At the date at which this volume states the law no such order had been made.

17 The requirements are that the evidence: (1) is on premises specified in the application in the participating country; (2) is likely to be of substantial value (whether by itself or together with other evidence) to the proceedings or investigation; (3) is likely to be admissible in evidence at a trial for the offence; and (4) does not consist of or include items subject to legal privilege: *ibid* s 10(3). See note 15 *supra*.

18 Ibid s 10(1). As to the procedure for forwarding the freezing order see s 11. Freezing orders may be varied or revoked: see s 12. See note 15 *supra*.

19 Ibid s 10(2). See note 15 *supra*. As to overseas freezing orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 486.

## UPDATE

### 855-907 Enforcement Procedures

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **903 Assistance in obtaining evidence abroad**

NOTE 3--CrimPR 32.1-32.3 now Criminal Procedure Rules 2010, SI 2010/60, rr 32.1-32.3.

NOTE 6--SI 2004/1034 further amended: SI 2007/3224, SI 2009/2748.

NOTE 15--Day appointed is 19 October 2009: SI 2009/2605.

NOTE 16--Crime (International Co-operation) Act 2003 s 27(1)(b) amended: Criminal Justice and Immigration Act 2008 s 97(1)(b). The functions conferred on a constable under the Crime (International Co-operation) Act 2003 ss 17 and 19 may be exercised, in specified circumstances, by a general customs official or a customs revenue official: Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2009, SI 2009/3021.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12.

ENFORCEMENT PROCEDURES/(5) INTERNATIONAL CO-OPERATION AND MUTUAL PROVISION OF EVIDENCE/904. Assisting overseas authorities to obtain evidence.

#### **904. Assisting overseas authorities to obtain evidence.**

Where a request for assistance in obtaining evidence in a part of the United Kingdom<sup>1</sup> is received by the territorial authority<sup>2</sup> for that part, the authority may, if specified conditions<sup>3</sup> are met, arrange for the evidence to be obtained<sup>4</sup>; or direct that a search warrant be applied for<sup>5</sup>. The request for assistance may be made only by: (1) a court exercising criminal jurisdiction, or a prosecuting authority, in a country outside the United Kingdom; (2) any other authority in such a country which appears to the territorial authority to have the function of making such requests for assistance; (3) any international authority<sup>6</sup>.

As from a day to be appointed<sup>7</sup> where an overseas freezing order<sup>8</sup> made by a court or authority in a participating country is received<sup>9</sup> by the territorial authority for the part of the United Kingdom in which the evidence to which the order relates is situated, the following provisions apply<sup>10</sup>.

In relation to England and Wales, the Secretary of State must<sup>11</sup>:

- 1213 (a) by a notice nominate a court in England and Wales to give effect to the overseas freezing order<sup>12</sup>;
- 1214 (b) send a copy of the overseas freezing order to the nominated court and to the chief officer of police for the area in which the evidence is situated<sup>13</sup>; and
- 1215 (c) tell the chief officer which court has been nominated<sup>14</sup>.

The nominated court is to consider the overseas freezing order on its own initiative within a period prescribed by rules of court<sup>15</sup>. Before giving effect to the freezing order the nominated court must give the chief officer of police an opportunity to be heard<sup>16</sup>. The court may decide not to give effect to the freezing order only if in its opinion one of the following conditions is met<sup>17</sup>. The first condition is that if the person whose conduct is in question were charged in the participating country with the offence to which the overseas freezing order relates or in the United Kingdom with a corresponding offence, he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction<sup>18</sup>. The second condition is that giving effect to the overseas freezing order would be incompatible with any of the Convention rights<sup>19</sup>.

The nominated court is to give effect to the overseas freezing order by issuing a warrant authorising a constable to enter the premises to which the overseas freezing order relates and search the premises to the extent reasonably required for the purpose of discovering any evidence to which the order relates and to seize and retain any evidence for which he is authorised to search<sup>20</sup>. So far as the overseas freezing order relates to excluded material<sup>21</sup> or special procedure material<sup>22</sup> the court is to give effect to the order by making a production order<sup>23</sup>. The constable may take away any material produced to him under a production order<sup>24</sup>. Where a person fails to comply with a production order the court may<sup>25</sup> issue a warrant<sup>26</sup> in respect of the material to which the production order relates<sup>27</sup>.

The nominated court may postpone giving effect to an overseas freezing order in respect of any evidence in order to avoid prejudicing a criminal investigation which is taking place in the United Kingdom, or if, under an order made by a court in criminal proceedings in the United Kingdom, the evidence may not be removed from the United Kingdom<sup>28</sup>.

Any evidence seized by or produced to the constable<sup>29</sup> is to be retained by him until he is given a notice<sup>30</sup> or authorised to release it<sup>31</sup>. If the overseas freezing order was accompanied by a request for the evidence to be sent to a specified court or authority<sup>32</sup> or the territorial authority subsequently receives such a request, the territorial authority may by notice require the constable to send the evidence to the court or authority that made the request<sup>33</sup>.

On an application made by a specified person<sup>34</sup> the nominated court may authorise the release of any evidence retained by a constable<sup>35</sup> if in its opinion either of the conditions specified above is met or the overseas freezing order has ceased to have effect in the participating country<sup>36</sup>. If the territorial authority decides not to give a notice in respect of any evidence retained by a constable<sup>37</sup>, the authority must give the constable a notice authorising him to release the evidence<sup>38</sup>.

1 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 The territorial authority in relation to evidence in England and Wales (or Northern Ireland), is the Secretary of State: Crime (International Co-operation) Act 2003 s 28(9). The Treasury may by order provide for any function conferred on the Secretary of State (whether or not in terms) under ss 10, 11, 13-26 to be exercisable instead in prescribed circumstances by the Commissioners for Her Majesty's Revenue and Customs: see s 27(1)(a); the Commissioners for Revenue and Customs Act 2005 s 50(1), (2), (7); and the Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2005, SI 2005/425, arts 3-8. The Secretary of State may by order provide for any function conferred on him under the Crime (International Co-operation) Act 2003 ss 13-26 to be exercisable instead in prescribed circumstances by a prescribed person: s 27(2)(a). At the date at which this volume states the law no such order had been made.

As from a day to be appointed it is provided that where the Secretary of State receives a request under s 13 for evidence to be obtained from a financial institution in connection with the investigation of an offence in reliance on the Protocol to the Mutual Legal Assistance Convention, established by Council Act of 16 October 2001 (2001/C326/01), art 2 (requests for information on banking transactions) (Crime (International Co-operation) Act 2003 s 42(1)(b)), and the institution, or an employee of the institution, discloses the information that the request mentioned in s 42(1)(b) has been received (s 42(3)(a)), the information that the investigation to which the request relates is being carried out (s 42(3)(b)), or the information that, in pursuance of the request, information has been given to the authority which made the request (s 42(3)(c)), the institution or (as the case may be) the employee is guilty of an offence (s 42(2)). An institution guilty of this offence is liable on conviction on indictment to a fine (s 42(4)(b)), and on summary conviction to a fine not exceeding the statutory maximum (s 42(4)(a)); and any other person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both (s 42(5)(b)), and on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both (s 42(5)(a)). At the date at which this volume states the law no such day had been appointed. As from a day to be appointed the maximum term of imprisonment specified under s 42(5)(a) is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed. For the meaning of 'financial institution' see PARA 814 note 1 ante. As to the Mutual Legal Assistance Convention see PARA 916 note 4 post.

3 Ie the conditions in the Crime (International Co-operation) Act 2003 s 14: see PARA 905 post.

4 Ibid s 13(1)(a). As to the obtaining of evidence under s 15 see PARA 906 post.

5 Ibid s 13(1)(b). As to the power to obtain search warrants under or by virtue of s 16 or s 17 see PARA 907 post.

6 Ibid s 13(2). The international authorities are: (1) the International Criminal Police Organisation; (2) any other body or person competent to make a request of the kind to which s 13 applies under any provisions adopted under the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485): Crime (International Co-operation) Act 2003 s 13(3).

7 The provisions of ibid ss 20-25 (overseas freezing orders: see the text and notes 8-38 infra) are to be brought into force as from a day to be appointed by the Secretary of State by order made by statutory instrument under s 94(1). At the date at which this volume states the law no such day had been appointed.

8 Ie an order for protecting, pending its transfer to the participating country, evidence which is in the United Kingdom and may be used in any proceedings or investigation in the participating country and in respect of which the following requirements (ie those of ibid s 20(3)-(7)) are met: s 20(2). See note 7 supra.



The order must have been made by: (1) a court exercising criminal jurisdiction in the country; (2) a prosecuting authority in the country; (3) any other authority in the country which appears to the territorial authority to have the function of making such orders: s 20(3). The order must relate to: (a) criminal proceedings instituted in the participating country in respect of a listed offence; (b) a criminal investigation being carried on there into such an offence: s 20(4). The order must be accompanied by a certificate which gives the specified information, but a certificate may be treated as giving any specified information which is not given in it if the territorial authority has the information in question: s 20(5). The certificate must: (i) be signed by or on behalf of the court or authority which made or confirmed the order; (ii) include a statement as to the accuracy of the information given in it; (iii) if it is not in English, include a translation of it into English, or if appropriate, Welsh: see s 20(6). The signature may be an electronic signature: see s 20(6). The order must be accompanied by a request for the evidence to be sent to a court or authority mentioned in s 13(2) (see heads (1)-(3) in the text) unless the certificate indicates when such a request is expected to be made: s 20(7). References to an overseas freezing order include its accompanying certificate: s 20(8). As to domestic freezing orders see s 10 (not yet in force); and PARA 903 ante.

9     Ie received from the court or authority which made or confirmed the order: see *ibid* s 20(1). See note 7 *supra*.

10    *Ibid* s 20(1). See also ss 21-25; and the text and notes 11-38 *infra*. See note 7 *supra*.

11    Ie where *ibid* s 21 applies: see the text and notes 12-19 *infra*. See note 7 *supra*.

12    *Ibid* s 21(1)(a). See note 7 *supra*.

13    *Ibid* s 21(1)(b). See note 7 *supra*.

14    *Ibid* s 21(1)(c). See note 7 *supra*.

15    *Ibid* s 21(3). See note 7 *supra*.

16    *Ibid* s 21(4). See note 7 *supra*.

17    *Ibid* s 21(5). See note 7 *supra*.

18    *Ibid* s 21(6). See note 7 *supra*.

19    *Ibid* s 21(7). See note 7 *supra*. 'Convention rights' means the Convention rights as defined in the Human Rights Act 1998: see the Crime (International Co-operation) Act 2003 s 21(7); and DISCRIMINATION vol 13 (2007 Reissue) PARA 303.

20    *Ibid* s 22(1). See note 7 *supra*. As to the delegation of a constable's functions see PARA 903 note 16 *ante*.

21    As to excluded material see PARA 875 *ante*.

22    As to special procedure material see PARA 876 *ante*.

23    Crime (International Co-operation) Act 2003 s 22(2). A production order is an order for the person who appears to the court to be in possession of the material to produce it to a constable before the end of the period of seven days beginning with the date of the production order or such longer period as the production may specify: s 22(3). See note 7 *supra*.

24    See *ibid* s 22(4). Material so taken is treated for the purposes of the Police and Criminal Evidence Act 1984 s 21 (as amended) (see PARA 888 *ante*) as if it had been seized by the constable: see the Crime (International Co-operation) Act 2003 s 22(4). See note 7 *supra*.

25    Ie whether or not the court deals with the matter as a contempt of court: see *ibid* s 22(5). See note 7 *supra*.

26    Ie under *ibid* s 22(1): see the text to note 20 *supra*. See note 7 *supra*.

27    *Ibid* s 22(5). See note 7 *supra*.

28    *Ibid* s 23. See note 7 *supra*.

29    Ie under *ibid* s 22: see the text and notes 21-23 *supra*. See note 7 *supra*.

30    Ie under *ibid* s 24(2): see the text and notes 32-33 *infra*. See note 7 *supra*.

- 31 Ibid s 24(1). See note 7 supra. As to the release of evidence see s 25; and the text and notes 34-38 infra.
- 32 le specified in ibid s 13(2): see heads (1)-(3) in the text.
- 33 Ibid s 24(2). See note 7 supra.
- 34 In relation to England and Wales (and Northern Ireland) the specified persons are: (1) the chief officer of police to whom a copy of the order was sent; (2) the constable; (3) any other person affected by the order: ibid s 25(2). See note 7 supra.
- 35 le under ibid s 24: see the text and notes 29-33 supra. See note 7 supra.
- 36 Ibid s 25(1). See note 7 supra.
- 37 le under ibid s 24(2): see the text and notes 32-33 supra. See note 7 supra.
- 38 Ibid s 25(4). See note 7 supra.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **904 Assisting overseas authorities to obtain evidence**

NOTE 2--Crime (International Co-operation) Act 2003 s 27(1)(a) amended: Criminal Justice and Immigration Act 2008 s 97(1)(a). Day appointed in relation to Crime (International Co-operation) Act 2003 s 42 is 1 November 2006: SI 2006/2811.

TEXT AND NOTES 7-14--A court nominated under these provisions to give effect to an overseas freezing order must follow the procedure set out in Criminal Procedure Rules 2010, SI 2010/60, r 32.10.

NOTE 7--Day appointed is 19 October 2009: SI 2009/2605.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12.

ENFORCEMENT PROCEDURES/(5) INTERNATIONAL CO-OPERATION AND MUTUAL PROVISION OF EVIDENCE/905. Powers to arrange for evidence to be obtained.

### **905. Powers to arrange for evidence to be obtained.**

The territorial authority<sup>1</sup> may arrange for evidence to be obtained<sup>2</sup> if the request for assistance in obtaining the evidence is made in connection with: (1) criminal proceedings or a criminal investigation, being carried on outside the United Kingdom<sup>3</sup>; (2) administrative proceedings, or an investigation into an act punishable in such proceedings, being carried on there; (3) clemency proceedings, or proceedings on an appeal before a court against a decision in administrative proceedings, being carried on, or intended to be carried on, there<sup>4</sup>. In a case within head (1) or head (2) above, the authority may arrange for the evidence to be so obtained only if the authority is satisfied: (a) that an offence under the law of the country in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed; and (b) that proceedings in respect of the offence have been instituted in that country or that an investigation into the offence is being carried on there<sup>5</sup>.

The territorial authority is to regard as conclusive a certificate as to the matters mentioned in heads (a) and (b) above issued by any authority in the country in question which appears to be the appropriate authority to do so<sup>6</sup>. If it appears to the territorial authority that the request for assistance relates to a fiscal offence in respect of which proceedings have not yet been instituted, the authority may not arrange for the evidence to be so obtained unless: (i) the request is from a country which is a member of the Commonwealth or is made pursuant to a treaty to which the United Kingdom is a party; or (ii) the authority is satisfied that if the conduct constituting the offence were to occur in a part of the United Kingdom, it would constitute an offence in that part<sup>7</sup>.

1 As to the territorial authority, and the delegation of the authority's powers, see PARA 904 note 2 ante.

2 Ie under the Crime (International Co-operation) Act 2003 s 15: see PARA 906 post. As to the power to assist overseas authorities to obtain evidence in the United Kingdom see PARA 904 ante.

3 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4 Crime (International Co-operation) Act 2003 s 14(1).

5 Ibid s 14(2). An offence includes an act punishable in administrative proceedings: s 14(2).

6 Ibid s 14(3).

7 Ibid s 14(4).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the

public from the current risk of serious violent harm posed by a qualifying offender: see  
PARA 907B.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(5) INTERNATIONAL CO-OPERATION AND MUTUAL PROVISION OF EVIDENCE/906. Nominating a court etc to receive evidence.

### **906. Nominating a court etc to receive evidence.**

Where evidence is in England and Wales, the Secretary of State may by a notice<sup>1</sup> nominate a court to receive any evidence to which a request for assistance relates which appears to the court to be appropriate for the purpose of giving effect to the request<sup>2</sup>. But if it appears to the Secretary of State that the request relates to an offence involving serious or complex fraud, he may refer the request (or any part of it) to the Director of the Serious Fraud Office for the Director to obtain any evidence to which the request or part relates which appears to him to be appropriate for the purpose of giving effect to the request or part<sup>3</sup>. Further provision is made in relation to proceedings of a court nominated to receive evidence<sup>4</sup>.

1 For these purposes, 'notice' means a notice in writing: Crime (International Co-operation) Act 2003 s 28(1).

2 Ibid s 15(1). As to the power to assist overseas authorities to obtain evidence in the United Kingdom (and the delegation of the Secretary of State's powers in this regard) see PARA 904 ante.

3 Ibid s 15(2).

4 Ibid Sch 1 contains provisions relating to the conduct of proceedings before a nominated court: s 15(5). It makes provision for securing the attendance of witnesses (see Sch 1 para 1), the power to administer oaths (Sch 1 para 3), proceedings (Sch 1 para 4), privilege of witnesses (Sch 1 para 5), and forwarding evidence (Sch 1 para 6). See also CrimPR 32.5. As to the persons entitled to appear and take part in proceedings before a nominated court see CrimPR 32.4.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **906 Nominating a court etc to receive evidence**

NOTE 2--When considering evidence relating to the rights conferred by the European Convention on Human Rights art 8(1), it is for the court nominated under the 2003 Act s 15 to decide on the appropriate procedure where a decision has to be made as to the application of the Convention art 8(2): *R (on the application of Hafner) v City of Westminster Magistrates' Court* [2008] EWHC 524 (Admin), [2009] 1 WLR 1005, [2008] All ER (D) 52 (Mar), DC.

NOTE 4--CrimPR 32.4, 32.5 now Criminal Procedure Rules 2010, SI 2010/60, rr 32.4, 32.5.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12.

ENFORCEMENT PROCEDURES/(5) INTERNATIONAL CO-OPERATION AND MUTUAL PROVISION OF EVIDENCE/907. Extension of statutory search powers and issue of warrants.

### **907. Extension of statutory search powers and issue of warrants.**

The powers of entry, search and seizure under Part 2 of the Police and Criminal Evidence Act 1984<sup>1</sup> are extended so as to apply in relation to any conduct which: (1) constitutes an offence under the law of a country outside the United Kingdom<sup>2</sup>; and (2) would, if it occurred in England and Wales, constitute an indictable offence<sup>3</sup>.

A justice of the peace may issue a warrant<sup>4</sup> if he is satisfied, on an application made by a constable, that<sup>5</sup>: (a) criminal proceedings have been instituted against a person in a country outside the United Kingdom or a person has been arrested in the course of a criminal investigation carried on there<sup>6</sup>; (b) the conduct constituting the offence which is the subject of the proceedings or investigation would, if it occurred in England and Wales, constitute an indictable offence<sup>7</sup>; and (c) there are reasonable grounds for suspecting that there is on premises<sup>8</sup> in England and Wales occupied or controlled by that person evidence relating to the offence<sup>9</sup>.

Such a warrant may authorise a constable: (i) to enter the premises in question and search the premises to the extent reasonably required for the purpose of discovering any evidence relating to the offence; (ii) to seize and retain any evidence for which he is authorised to search<sup>10</sup>. Any evidence seized by a constable<sup>11</sup> is to be sent to the court or authority which made the request for assistance or to the territorial authority for forwarding to that court or authority<sup>12</sup>. So far as may be necessary in order to comply with the request for assistance, where the evidence consists of a document, the original or a copy is to be sent, and where the evidence consists of any other article, the article itself or a description, photograph or other representation of it is to be sent<sup>13</sup>.

1    Ie under the Police and Criminal Evidence Act 1984 Pt 2 (ss 8-23) (as amended): see PARA 873 et seq ante.

2    For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3    Crime (International Co-operation) Act 2003 s 16(1) (amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 51(1), (2)(a), (4)); and see PARA 873 ante. An application for a warrant or order by virtue of the Crime (International Co-operation) Act 2003 s 16(1) (as amended) may be made only: (1) in pursuance of a direction given under s 13 (see PARA 904 ante); or (2) if it is an application for a warrant or order under the Police and Criminal Evidence Act 1984 s 9, Sch 1 (as amended) (see PARA 874 et seq ante) by a constable for the purposes of an investigation by an international joint investigation team of which he is a member: Crime (International Co-operation) Act 2003 s 16(2). 'International joint investigation team' has the meaning given by the Police Act 1996 s 88(7) (see POLICE vol 36(1) (2007 Reissue) PARA 105): Crime (International Co-operation) Act 2003 s 16(5). As to the extension of powers of entry, search and seizure in Northern Ireland see the Crime (International Co-operation) Act 2003 s 16(3), (4). As to the delegation of a constable's functions see PARA 903 note 16 ante.

4    Ie under *ibid* s 17.

5    *Ibid* s 17(1). A justice of the peace may not issue a warrant under s 17 in respect of any evidence unless the justice has reasonable grounds for believing that it does not consist of or include items subject to legal privilege, excluded material or special procedure material: s 26(1). For the meaning of 'items subject to legal privilege' see PARA 873 note 8 ante; for the meaning of 'excluded material' see PARA 875 ante; and for the meaning of 'special procedure material' see PARA 876 ante (definitions applied by s 26(3)).

6    *Ibid* s 17(3)(a).

7 Ibid s 17(3)(b) (substituted by the Serious Organised Crime and Police Act 2005 Sch 7 para 51(1), (3), (4)).

8 For the meaning of 'premises' see PARA 872 note 5 ante; definition applied by the Crime (International Co-operation) Act 2003 s 28(1).

9 Ibid s 17(3)(c). An application for a warrant under s 17(1) may be made only in pursuance of a direction given under s 13 (see PARA 904 ante); s 17(2).

10 Ibid s 17(4).

11 References to evidence seized by a person by virtue of or under any provision of *ibid* Pt 1 Ch 2 include evidence seized by a person by virtue of the Criminal Justice and Police Act 2001 s 50 (see PARA 890 ante), if it is seized in the course of a search authorised by a warrant issued by virtue of or under the provision in question: Crime (International Co-operation) Act 2003 s 26(4). However, this does not require any evidence to be sent to the territorial authority or to any court or authority: (1) before it has been found, on the completion of any examination required to be made by arrangements under the Criminal Justice and Police Act 2001 s 53(2) (see PARA 892 ante), to be property within s 53(3); or (2) at a time when it constitutes property in respect of which a person is required to ensure that arrangements such as are mentioned in s 61(1) (see PARA 899 ante) are in force: Crime (International Co-operation) Act 2003 s 26(5).

12 Ibid s 19(1). Section 19 does not apply to evidence seized under or by virtue of s 16(2)(b) or s 16(4)(b) (see note 3 supra): s 19(3).

13 Ibid s 19(2).

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12.

ENFORCEMENT PROCEDURES/(5) INTERNATIONAL CO-OPERATION AND MUTUAL PROVISION OF EVIDENCE/907A Serious crime prevention orders.

## **907A Serious crime prevention orders.**

### **1. General**

The High Court in England and Wales may make an order if (1) it is satisfied that a person has been involved in serious crime (whether in England and Wales or elsewhere: see further Serious Crime Act 2007 s 2(4)-(7)); and (2) it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales; and such an order may contain (a) such prohibitions, restrictions or requirements; and (b) such other terms as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person concerned in serious crime in England and Wales: see Serious Crime Act 2007 s 1. 'The public' includes a section of the public or a particular member of the public: s 42. The powers of the court in respect of an order under s 1 are subject to ss 6-15 (safeguards: see PARAS 907A.2, 907A.3).

For the purposes of the Serious Crime Act 2007 Pt 1 (ss 1-43), a person has been involved in serious crime in England and Wales if he (i) has committed a serious offence in England and Wales; (ii) has facilitated the commission by another person of a serious offence in England and Wales; or (iii) has conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence in England and Wales (whether or not such an offence was committed): s 2(1). 'Conduct' includes omissions and statements: s 42. In Pt 1 'a serious offence in England and Wales' means an offence under the law of England and Wales which, at the time when the court is considering the application or matter in question (A) is specified, or falls within a description specified, in Sch 1 Pt 1; or (B) is one which, in the particular circumstances of the case, the court considers to be sufficiently serious to be treated for the purposes of the application or matter as if it were so specified: s 2(2). For the purposes of Pt 1, involvement in serious crime in England and Wales is any one or more of the following (aa) the commission of a serious offence in England and Wales; (bb) conduct which facilitates the commission by another person of a serious offence in England and Wales; (cc) conduct which is likely to facilitate the commission, by the person whose conduct it is or another person, of a serious offence in England and Wales (whether or not such an offence is committed): s 2(3).

As to applications for and relating to serious crime prevention orders see CPR Pt 77 (added by SI 2007/3543).

Supplementary provision is made with respect to the involvement in serious crime (Serious Crime Act 2007 s 4) and examples of the type of provision that may be made by a serious crime prevention order are set out (s 5).

### **2. General safeguards in relation to orders**

An individual under the age of 18 may not be the subject of a serious crime prevention order: Serious Crime Act 2007 s 6. A person may not be the subject of a serious crime prevention order if the person falls within a description specified by order of the Secretary of State: s 7. A serious crime prevention order may be made only on an application by (1) the Director of

Public Prosecutions; (2) the Director of Revenue and Customs Prosecutions; or (3) the Director of the Serious Fraud Office: s 8. A safeguard is provided where the making, variation or discharge of an order or not making a variation to an order or discharging it would be likely to have a significant adverse effect on someone who is not the subject of the order; the court has the power to allow such persons to make representations at the hearing in relation to the making, variation or discharge of an order: s 9. Provision is also made to ensure that the subject of the serious crime prevention order has notice of its existence: s 10. See further CPR 77.2 and CPR 77.3 (added by SI 2007/3543).

### **3. Information safeguards**

A serious crime prevention order may not require a person to answer questions, or provide information, orally: Serious Crime Act 2007 s 11. A serious crime prevention order may not require a person (1) to answer any privileged question; (2) to provide any privileged information; or (3) to produce any privileged document; but this does not prevent an order from requiring a lawyer to provide the name and address of a client of his: s 12. Restrictions are placed on the extent to which an order can require the production of excluded material and banking information: s 13. A serious crime prevention order may not require a person (a) to answer any question; (b) to provide any information; or (c) to produce any document; if the disclosure concerned is prohibited under any other enactment: s 14. A statement made by a person in response to a requirement imposed by a serious crime prevention order may not be used in evidence against him in any criminal proceedings unless condition A or B is met: Serious Crime Act 2007 s 15(1). Condition A is that the criminal proceedings relate to an offence under s 25 (see PARA 907A.7): s 15(2). Condition B is that (i) the criminal proceedings relate to another offence; (ii) the person who made the statement gives evidence in the criminal proceedings; (iii) in the course of that evidence, the person makes a statement which is inconsistent with the statement made in response to the requirement imposed by the order; and (iv) in the criminal proceedings evidence relating to the statement made in response to the requirement imposed by the order is adduced, or a question about it is asked, by the person or on his behalf: s 15(3).

### **4. Duration, variation and discharge of orders**

A serious crime prevention order (1) must specify when it is to come into force and when it is to cease to be in force, (2) is not to be in force for more than five years beginning with the coming into force of the order and (3) can specify different times for the coming into force, or ceasing to be in force, of different provisions of the order: Serious Crime Act 2007 s 16. An order may be varied either on application by the relevant application authority (for which see s 10(4)), by the subject of the order or by a third party: s 17. Similarly, an order may be discharged either on application by the relevant application authority, by the subject of the order or by a third party: s 18. See further CPR 77.3 and CPR 77.4 (added by SI 2007/3543).

### **5. Extension of jurisdiction to Crown Court**

Where the Crown Court in England and Wales is dealing with a person who (1) has been convicted by or before a magistrates' court of having committed a serious offence in England and Wales and has been committed to the Crown Court to be dealt with; or (2) has been convicted by or before the Crown Court of having committed a serious offence in England and Wales, the Crown Court may, in addition to dealing with the person in relation to the offence, make an order if it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales: Serious Crime Act 2007 s 19(1), (2). For the meaning of 'the public' see PARA 907A.1. Such an order may contain (a) such prohibitions, restrictions or requirements; and (b)

such other terms as the court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the person concerned in serious crime in England and Wales: s 19(5). The powers of the court in respect of an order under s 19 are subject to ss 6-15 (safeguards: see PARAS 907A.2, 907A.3): s 19(6). An order must not be made under s 19 except (i) in addition to a sentence imposed in respect of the offence concerned; or (ii) in addition to an order discharging the person conditionally: s 19(7). An order under s 19 is also called a serious crime prevention order: s 19(8). See *R v Hancox* [2010] EWCA Crim 102, [2010] All ER (D) 41 (Feb).

Provision is made for the two cases in which the Crown Court can vary the terms of a serious crime prevention order, namely on the conviction for a serious offence of a person already subject to an order (Serious Crime Act 2007 s 20), or the conviction of a person for breach of an order (s 21). The fact that a serious crime prevention order has been made or varied by the High Court does not prevent it from being varied by the Crown Court in accordance with Pt 1 (ss 1-43); and the fact that a serious crime prevention order has been made or varied by the Crown Court does not prevent it from being varied or discharged by the High Court in accordance with Pt 1: s 22(1), (2). A refusal by the Crown Court to make or vary an order does not preclude an application to the High Court to make or vary an order in relation to the same offence: s 22(3), (4).

## **6. Appeals**

An appeal may be made to the Court of Appeal in relation to a decision of the High Court (1) to make a serious crime prevention order; (2) to vary, or not to vary, such an order; or (3) to discharge or not to discharge such an order by any person who was given an opportunity to make representations in the proceedings concerned by virtue of the Serious Crime Act 2007 s 9 (see PARA 907A.2); and this is without prejudice to the rights of other persons to make appeals, by virtue of the Senior Courts Act 1981 s 16, in relation to any judgments or orders of the High Court about serious crime prevention orders: Serious Crime Act 2007 s 23. Detailed provision is also made relating to the rights of appeal against a decision of the Crown Court: s 24. See also Serious Crime Act 2007 (Appeals under Section 24) Order 2008, SI 2008/1863.

## **7. Enforcement**

A person who, without reasonable excuse, fails to comply with a serious crime prevention order commits an offence: Serious Crime Act 2007 s 25(1). A person who commits an offence under s 25 is liable (1) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both; (2) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both: s 25(2). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. In proceedings for an offence under s 25, a copy of the original order or any variation of it, certified as such by the proper officer of the court which made it, is admissible as evidence of its having been made and of its contents to the same extent that oral evidence of those things is admissible in those proceedings: s 25(4).

The court before which a person is convicted of an offence under s 25 may order the forfeiture of anything in his possession at the time of the offence which the court considers to have been involved in the offence: s 26.

The Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions or the Director of the Serious Fraud Office may present a petition to the court for the winding up of a company, partnership or relevant body if (a) the company, partnership or relevant body has been convicted of an offence under s 25 in relation to a serious crime prevention order; and (b) the Director concerned considers that it would be in the public interest for the company, partnership or (as the case may be) relevant body to be wound up: s 27 (amended by SI

2009/1941). Supplementary provision relating to the power to wind up companies is made: Serious Crime Act 2007 s 29.

## **8. Particular types of persons**

Provision is made with respect to the application of serious crime prevention order provisions to particular types of persons, namely bodies corporate including limited liability partnerships (Serious Crime Act 2007 s 30); other partnerships (s 31); unincorporated associations (s 32); overseas bodies (s 33); and providers of information society services (s 34).

## **9. Supplementary**

Proceedings before the High Court in relation to serious crime prevention orders are civil proceedings; one consequence of this is that the standard of proof to be applied by the court in such proceedings is the civil standard of proof: Serious Crime Act 2007 s 35. Proceedings before the Crown Court arising by virtue of s 19, 20 or 21 (see PARA 907A.5) are civil proceedings; one consequence of this is that the standard of proof to be applied by the court in such proceedings is the civil standard of proof and two other consequences of this are that the court (1) is not restricted to considering evidence that would have been admissible in the criminal proceedings in which the person concerned was convicted; and (2) may adjourn any proceedings in relation to a serious crime prevention order even after sentencing the person concerned: s 36.

The functions of the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions and the Director of the Serious Fraud Office under Pt 1 (ss 1-43) are set out: Serious Crime Act 2007 s 37, Sch 2.

A person who complies with a requirement imposed by a serious crime prevention order to answer questions, provide information or produce documents does not breach (a) any obligation of confidence; or (b) any other restriction on making the disclosure concerned (however imposed); but see ss 11-14 (PARA 907A.3) (which limit the requirements that may be imposed by serious crime prevention orders in connection with answering questions, providing information or producing documents): s 38.

A serious crime prevention order against a body corporate, partnership or unincorporated association may authorise a law enforcement agency to enter into arrangements with (i) a specified person; or (ii) any person who falls within a specified description of persons to perform specified monitoring services or monitoring services of a specified description: s 39. Provision is also made with respect to costs in relation to authorised monitors: s 40.

Law enforcement officers are provided with powers to take copies of and retain documents: s 41.

## **UPDATE**

### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

**UPDATE**

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/12. ENFORCEMENT PROCEDURES/(5) INTERNATIONAL CO-OPERATION AND MUTUAL PROVISION OF EVIDENCE/907B Violent offender orders.

## **907B Violent offender orders.**

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) provides for a new civil order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender. For transitional provisions and savings see Criminal Justice and Immigration Act 2008 Sch 27 paras 31, 32.

### **1. General**

A violent offender order is an order made in respect of a qualifying offender which (1) contains such prohibitions, restrictions or conditions authorised by the Criminal Justice and Immigration Act 2008 s 102 (see PARA 907B.3) as the court making the order considers necessary for the purpose of protecting the public from the risk of serious violent harm caused by the offender, and (2) has effect for such period of not less than two, nor more than five, years as is specified in the order (unless renewed or discharged under the Criminal Justice and Immigration Act 2008 s 103 (see PARA 907B.3)): Criminal Justice and Immigration Act 2008 s 98(1). 'Qualifying offender' has the meaning given by the Criminal Justice and Immigration Act 2008 s 99(1) (see PARA 907B.2): Criminal Justice and Immigration Act 2008 s 117(1). 'The offender', in relation to a violent offender order or an interim violent offender order, means the person in respect of whom the order is made: s 117(1). 'Interim violent offender order' means an order made under the Criminal Justice and Immigration Act 2008 s 104 (see PARA 907B.3); s 117(1). For the purposes of the Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) any reference to protecting the public from the risk of serious violent harm caused by a person is a reference to protecting (a) the public in the United Kingdom, or (b) any particular members of the public in the United Kingdom, from a current risk of serious physical or psychological harm caused by that person committing one or more specified offences s 98(2). In Pt 7 'specified offence' means (i) manslaughter; (ii) an offence under the Offences against the Person Act 1861 s 4 (soliciting murder); (iii) an offence under the Offences against the Person Act 1861 s 18 (wounding with intent to cause grievous bodily harm); (iv) an offence under the Offences against the Person Act 1861 s 20 (malicious wounding); (v) attempting to commit murder or conspiracy to commit murder; or (vi) a relevant service offence (see Criminal Justice and Immigration Act 2008 s 98(4), (5)): s 98(3).

### **2. Qualifying offenders**

In the Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) 'qualifying offender' means a person aged 18 or over who is within the Criminal Justice and Immigration Act 2008 s 99(2) or (4): s 99(1). A person is within s 99(2) if (whether before or after the commencement of Pt 7 (ie 3 August 2009: see SI 2009/1842)) (1) the person has been convicted of a specified offence and either a custodial sentence of at least 12 months was imposed for the offence, or a hospital order was made in respect of it (with or without a restriction order), (2) the person has been found not guilty of a specified offence by reason of insanity and the Criminal Justice and Immigration Act 2008 s 99(3) applies, or (3) the person has been found to be under a disability and to have done the act charged in respect of a specified offence and s 99(3) applies: s 99(2). For the meaning of 'specified offence' see PARA 907B.1. For the meaning of 'custodial sentence',

'hospital order' and 'restriction order' see Criminal Justice and Immigration Act 2008 s 117(1), (2). Section 99(3) applies in the case of a person head (2) or (3) if the court made in respect of the offence (a) a hospital order (with or without a restriction order), or (b) a supervision order: s 99(3). For the meaning of 'supervision order' see s 117(1). A person is within s 99(4) if, under the law in force in a country outside England and Wales (and whether before or after the commencement of Pt 7) (i) the person has been convicted of a relevant offence and either (A) a sentence of imprisonment or other detention for at least 12 months was imposed for the offence, or (B) an order equivalent to that mentioned in head (a) was made in respect of it, (ii) a court exercising jurisdiction under that law has made in respect of a relevant offence a finding equivalent to a finding that the person was not guilty by reason of insanity, and has made in respect of the offence an order equivalent to one mentioned in s 99(3), or (iii) such a court has, in respect of a relevant offence, made a finding equivalent to a finding that the person was under a disability and did the act charged in respect of the offence, and has made in respect of the offence an order equivalent to one mentioned in s 99(3): s 99(4). 'Country' includes territory: s 117(1). As to 'relevant offence' for these purposes see s 99(5)-(8).

### **3. Applications for and making of violent offender orders**

Provision is made setting out who may apply for a violent offender order to be made, and in what circumstances: see Criminal Justice and Immigration Act 2008 s 100. As to violent offender orders generally see PARA 907B.1. The conditions which must be met before a court can make a violent offender order are set out: see Criminal Justice and Immigration Act 2008 s 101. A violent offender order may contain prohibitions, restrictions or conditions preventing the offender (1) from going to any specified premises or any other specified place (whether at all, or at or between any specified time or times); (2) from attending any specified event; (3) from having any, or any specified description of, contact with any specified individual: see Criminal Justice and Immigration Act 2008 s 102. For the meaning of 'the offender' see PARA 907B.1. The offender subject to a violent offender order or various specified chief officers of police may apply for an order to be varied, renewed or discharged, subject to the five year maximum limit: see Criminal Justice and Immigration Act 2008 s 103. The court may make an interim order when an application for a violent offender order is made (or has been made) under s 100: see Criminal Justice and Immigration Act 2008 s 104. As to provision for the form in which applications for violent offender orders and interim violent offender orders must be made see the Magistrates' Courts (Violent Offender Orders) Rules 2009, SI 2009/2197. Provision is made with respect to notice of applications: see Criminal Justice and Immigration Act 2008 s 105. Appeals may be made to the Crown Court against the making of a violent offender order or an interim order, or against a decision to make or refuse an order varying or discharging a violent offender order or an interim order: see Criminal Justice and Immigration Act 2008 s 106.

### **4. Notification requirements**

All offenders subject to full or interim violent offender orders (see PARA 907B.1) will also be subject to notification requirements: see Criminal Justice and Immigration Act 2008 s 107. The information the offender needs to supply to the police when he or she first makes a notification and the timescales within which he or she is required to provide that information are set out: see Criminal Justice and Immigration Act 2008 s 108. For the meaning of 'the offender' see PARA 907B.1. The requirements on a relevant offender to notify the police when there are changes to his notified details are set out: see Criminal Justice and Immigration Act 2008 s 109. An offender must re-notify the police of the details set out in s 108 within a defined period of each notification date, unless during this period he re-notifies, because of a change of circumstances, under s 109: see Criminal Justice and Immigration Act 2008 s 110. The Secretary of State may make regulations setting out notification requirements for relevant offenders who travel outside the United Kingdom: see Criminal Justice and Immigration Act

2008 s 111. See the Criminal Justice and Immigration Act 2008 (Violent Offender Orders) (Notification Requirements) Regulations 2009, SI 2009/2019, which relate to determination of proposed point of arrival (reg 3); notification to be given before leaving the United Kingdom (reg 4); additional information to be disclosed (reg 5); timing of a notification (reg 6); change to information disclosed in a notification (reg 7); notification to be given on return to the United Kingdom (reg 8); information to be disclosed in a notification (reg 9); giving a notification (reg 10); and frequency of notification under the Criminal Justice and Immigration Act 2008 s 110 (SI 2009/2019 reg 11). Provision is made with respect to the method of notification: see Criminal Justice and Immigration Act 2008 s 112.

## **5. Supplementary**

The failure, without reasonable excuse, to comply with any prohibition, restriction or condition of a full or interim violent offender order (see PARA 907B.1) is a criminal offence; and a failure to comply with a notification requirement, without reasonable excuse, is also an offence: see Criminal Justice and Immigration Act 2008 s 113. Provision is made as to the supply of information to the Secretary of State (see Criminal Justice and Immigration Act 2008 s 114) and the supply of information by the Secretary of State (see Criminal Justice and Immigration Act 2008 s 115). The Secretary of State may make regulations requiring those who are responsible for an offender while he is being detained (ie serving a sentence of imprisonment or a term of service detention, or detained in a hospital) to notify other relevant authorities of the fact that they have become so responsible, of his release or transfer to another institution: see Criminal Justice and Immigration Act 2008 s 116. 'Service detention' has the meaning given by the Armed Forces Act 2006 s 374: Criminal Justice and Immigration Act 2008 s 117(1).

### **UPDATE**

#### **855-907 Enforcement Procedures**

The Serious Crime Act 2007 Pt 1 (ss 1-43) creates a new civil order aimed at preventing serious crime: see PARA 907A.

The Criminal Justice and Immigration Act 2008 Pt 7 (ss 98-117) makes provision for a new civil preventative order, a violent offender order, which is designed to protect the public from the current risk of serious violent harm posed by a qualifying offender: see PARA 907B.

### **UPDATE**



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## **13. ARREST AND DETENTION**

### **(1) CODES OF PRACTICE**

#### **908. Codes of practice.**

A constable's powers relating to the arrest, detention, treatment and questioning of persons, and to identification procedures, are governed by the Police and Criminal Evidence Act 1984<sup>1</sup> and by the following codes of practice: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers<sup>2</sup>; Code D: Code of Practice for the Identification of Persons by Police Officers<sup>3</sup>; Code E: Code of Practice on Audio Recording Interviews with Suspects; Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects; and Code G: Code of Practice for the Statutory Power of Arrest by Police Officers<sup>4</sup>. These codes apply to any arrest made by a police officer after midnight on 31 December 2005<sup>5</sup>, to identification procedures and interviews carried out after midnight on 31 December 2005<sup>6</sup>, and to persons in police detention after midnight on 24 July 2006<sup>7</sup>; and, except in the case of identification procedures, they apply to procedures and periods of detention notwithstanding that such procedures or periods of detention may have commenced before that time<sup>8</sup>. Codes D, E, F, G came into operation on 1 January 2006, and Code C came into operation on 25 July 2006<sup>9</sup>.

Whenever Code C requires a person to be given certain information, he does not have to be given it if at the time he is incapable of understanding what is said to him, is violent or may become violent, or is in urgent need of medical attention, but he must be given it as soon as practicable<sup>10</sup>. Code C applies<sup>11</sup> to persons in custody at police stations whether or not they have been arrested<sup>12</sup>, and to those removed to a police station as a place of safety under the legislation relating to mental health<sup>13</sup>; persons detained under the legislation relating to terrorism<sup>14</sup> are not, however, subject to any part of Code C<sup>15</sup>.

1     le the Police and Criminal Evidence Act 1984 Pts III-V (ss 24-65) (as amended): see PARA 909 et seq post.

Nothing in Pt IV (ss 34-52) (as amended) (detention) affects:

- 337   (1)   the powers conferred on immigration officers by the Immigration Act 1971 s 4, Sch 2 (as amended) (administrative provisions as to control on entry etc: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 140 et seq) (Police and Criminal Evidence Act 1984 s 51(a));
- 338   (2)   the powers conferred by or by virtue of the Terrorism Act 2000 s 41, Sch 7 (powers of arrest and detention and control of entry and procedure for removal: see PARA 430 et seq ante) (Police and Criminal Evidence Act 1984 s 51(b) (substituted by the Terrorism Act 2000 s 125(1), Sch 15 para 5(1), (4)));
- 339   (3)   any duty of a police officer under the Army Act 1955 ss 129, 190, 202 (as amended) or the Air Force Act 1955 ss 129, 190, 202 (as amended) (duties of governors of prisons and others to receive prisoners, deserters, absentees and persons under escort: see ARMED FORCES vol 2(2) (Reissue) PARA 515; PRISONS vol 36(2) (Reissue) PARA 638) (Police and Criminal Evidence Act 1984 s 51(c)(i), (ii));

- 340 (4) any duty of a police officer under the Naval Discipline Act 1957 s 107 (duties of governors of civil prisons etc: see ARMED FORCES vol 2(2) (Reissue) PARA 478; PRISONS vol 36(2) (Reissue) PARA 638) (Police and Criminal Evidence Act 1984 s 51(c)(iii)); or
- 341 (5) any right of a person in police detention to apply for a writ of habeas corpus or other prerogative remedy (s 51(d)).

2 A reference to a police officer in Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers includes a designated person acting in the exercise or performance of the powers and duties conferred or imposed on him by his designation (Code C para 1.13(b)); a 'designated person' is a person other than a police officer designated under the Police Reform Act 2002 Pt 4 (ss 38-77) (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 529) who has specified powers and duties of police officers conferred or imposed on him (Code C para 1.13(a)).

The provisions of Code C do not apply to persons in custody:

- 342 (1) arrested on warrants issued in Scotland by officers under the Criminal Justice and Public Order Act 1994 s 136(2) (as amended) (see PARA 921 post), or arrested or detained without warrant by officers from a police force in Scotland under s 137(2) (see PARA 928 post); in these cases, police powers and duties and the person's rights and entitlements whilst at a police station in England or Wales are the same as those in Scotland (Code C para 1.12(i));
- 343 (2) arrested under the Immigration and Asylum Act 1999 s 142(3) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 150) in order to have their fingerprints taken (Code C para 1.12(ii));
- 344 (3) whose detention is authorised by an immigration officer under the Immigration Act 1971 (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 156 et seq) (Code C para 1.12(iii));
- 345 (4) who are convicted or remanded prisoners held in police cells on behalf of the Prison Service under the Imprisonment (Temporary Provisions) Act 1980 (see PRISONS vol 36(2) (Reissue) PARA 538) (Code C para 1.12(iv));
- 346 (5) detained for searches under stop and search powers except as required by Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search (see PARA 859 et seq ante) (Code C para 1.12(vi)).

Special provision in connection with the detention, treatment and questioning of terror suspects corresponding to that made by Code C is made by Code H: Code of Practice in connection with the Detention, Treatment and Questioning by Police Officers of Persons under Section 41 of, and Schedule 8 to, the Terrorism Act 2000: see PARA 421 et seq ante.

Nothing in Code C prevents a custody officer, or other officer given custody of a detainee, from allowing police staff who are not designated persons to carry out individual procedures or tasks at the police station if the law allows: Code C para 1.15. However, the officer remains responsible for making sure the procedures and tasks are carried out correctly in accordance with the codes of practice. Any such person must be:

- 347 (a) a person employed by a police authority maintaining a police force and under the control and direction of the chief officer of that force (Code C para 1.15(a));
- 348 (b) a person employed by a person with whom a police authority has a contract for the provision of services relating to persons arrested or otherwise in custody (Code C para 1.15(b)).

As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

3 Code D: Code of Practice for the Identification of Persons by Police Officers concerns the principal methods used by police to identify persons in connection with the investigation of offences and the keeping of accurate and reliable criminal records: Code D para 1.1.

4 Code G: Code of Practice for the Statutory Power of Arrest by Police Officers deals with statutory police powers to arrest persons suspected of involvement in a criminal offence: Code G para 1.1(b).

5 Code G commencement.

6 Code D commencement; Code E commencement; Code F commencement.

7 Code C commencement.

8 Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2005, SI 2005/3503, art 4(1), (2), (4), (5); Police and Criminal Evidence Act 1984 (Code of Practice C and Code of Practice H) Order 2006, SI 2006/1938, art 4(1). Code C does not apply to any person in police detention following arrest under the Terrorism Act 2000 s 41 (see PARA 420 ante) (Police and Criminal Evidence Act 1984 (Code of Practice C and Code of Practice H) Order 2006, SI 2006/1938, art 4(1)), in relation to whom special provision is made by Code H (see PARA 421 et seq ante).

9 Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2005, SI 2005/3503, arts 2(a), (b), (d), 3; Police and Criminal Evidence Act 1984 (Code of Practice C and Code of Practice H) Order 2006, SI 2006/1938, art 2. The codes must be readily available at all police stations for consultation by police officers, police staff, detained persons and members of the public: see Code C para 1.2; Code D para 2.1; Code E para 1.1; Code F para 1.1; Code G para 1.5. The notes for guidance included in the codes are not provisions of the codes (Code C para 1.3; Code D para 2.2; Code E para 1.2; Code F para 1.2; Code G para 1.6). Provisions in the Annexes to Code C and Code D are provisions of the code: Code C para 1.3; Code D para 2.2.

10 Code C para 1.8.

11 le except for Code C paras 15.1-15.16, which apply solely to persons in police detention (that is, those brought to a police station under arrest or arrested at a police station after going there voluntarily): see PARA 1001 post. See also Code C para 1.12; and note 2 supra.

12 Code C para 1.10.

13 Code C para 1.10. For these purposes, the legislation relating to mental health is the Mental Health Act 1983 ss 135, 136 (as amended) (see MENTAL HEALTH vol 30(2) (Reissue) PARAS 549-550).

14 le persons detained under the Terrorism Act 2000 s 41, Sch 8 (see PARA 420 et seq ante) and other provisions of that Act: Code C para 1.11.

15 Code C para 1.11. Such persons are subject to Code H (see PARA 421 et seq ante): Code C para 1.11.

## **UPDATE**

### **908 Codes of practice**

NOTE 1--Police and Criminal Evidence Act 1984 s 51(c) repealed: Armed Forces Act 2006 Sch 17.

NOTE 9--Revised Codes of Practice C, D and E came into operation on 1 February 2008: Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2008, SI 2008/167.

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## **(2) VOLUNTARY ATTENDANCE AT POLICE STATION**

### **909. Voluntary attendance at police station.**

Where for the purpose of assisting with an investigation a person attends voluntarily at a police station or at any other place where a constable<sup>1</sup> is present or accompanies a constable to a police station or any such other place without having been arrested<sup>2</sup> he is entitled to leave at will unless he is placed under arrest<sup>3</sup> and he must be informed at once that he is under arrest if a decision is taken by a constable to prevent him from leaving at will<sup>4</sup>. If he is so informed, he should be brought as soon as practicable before the custody officer, who is responsible for making sure that he is notified of his rights in the same way as other detainees<sup>5</sup>; and, if he is not placed under arrest but is cautioned<sup>6</sup>, the officer who gives the caution must at the same time inform him that he is not under arrest, that he is not obliged to remain at the police station but that, if he remains at the police station, he may obtain legal advice if he wishes<sup>7</sup>. He must be told that the right to legal advice includes the right to speak with a solicitor on the telephone and he must be asked if he wants to do so<sup>8</sup>.

1 Every police officer holds the office of constable: see PARA 857 note 2 ante.

2 Although certain sections of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (see eg Code C para 9; and PARA 958 post) apply specifically to persons in custody at police stations, those there voluntarily to assist with an investigation should be treated with no less consideration, eg they should be offered refreshments at appropriate times, and they enjoy an absolute right to obtain legal advice or communicate with any person outside the police station: Code C Guidance note 1A.

3 Police and Criminal Evidence Act 1984 s 29(a); Code C para 3.21. Code C does not affect the principle that all citizens have a duty to help police officers to prevent crime and discover offenders. This is a civic rather than a legal duty; but when a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person from whom he thinks useful information can be obtained, subject to the restrictions imposed by Code C. A person's declaration that he is unwilling to reply does not alter this entitlement: Code C Guidance note 1K.

4 Police and Criminal Evidence Act 1984 s 29(b); Code C para 3.21.

5 See PARA 948 post.

6 Ie under Code C para 10: see PARA 959 post.

7 Code C para 3.21. If a person who is attending a police station voluntarily asks about his entitlement to legal advice, he must be given a copy of the notice explaining the arrangements for obtaining legal advice: Code C para 3.22. As to the notice see Code C para 3.2; and PARA 948 post.

8 Code C para 3.21.

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### **(3) ARREST**

#### **(i) In general**

##### **910. Meaning of 'arrest'.**

Arrest<sup>1</sup> consists in the seizure or touching of a person's body with a view to his restraint; words may, however, amount to arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion<sup>2</sup>.

An arrest may be effected with or without a warrant<sup>3</sup>.

1 There is nothing in the Police and Criminal Evidence Act 1984 to indicate that those acts which served to effect an arrest at common law have either been changed or abolished: *R v Brosch* [1988] Crim LR 743, CA. Whether an arrest once made is to be treated as valid or not is a separate matter and is addressed by the Police and Criminal Evidence Act 1984 s 28 (see PARA 931 post): *R v Brosch* supra. As to voluntary attendance at a police station see PARA 909 ante.

2 *Alderson v Booth* [1969] 2 QB 216, 53 Cr App Rep 301, DC. Whether on the facts of a particular case it has been made clear to a person that he is under arrest is a matter of fact for the jury: see *R v Inwood* [1973] 2 All ER 645, 57 Cr App Rep 529, CA.

3 As to arrest with warrant see PARA 918 et seq post; and as to arrest without warrant see PARA 924 et seq post.

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### **911. Privilege from arrest.**

No person, except the Queen<sup>1</sup>, a foreign head of state<sup>2</sup> and, in certain circumstances, a foreign ambassador<sup>3</sup>, is privileged from arrest on a criminal charge<sup>4</sup>.

No place affords any protection from arrest<sup>5</sup>.

1 See PARA 41 ante.

2 See PARA 43 ante.

3 See PARA 42 ante.

4 Members of Parliament are not privileged from criminal process (see *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639); nor are advocates, witnesses etc (see *Re Freston* (1883) 11 QBD 545, CA; *Ex p Lyne* (1822) 3 Stark 132).

5 The privilege of sanctuary was abolished by 21 Jac 1 (Continuance of Acts) (1623-24) s 7 (repealed). See also Erskine May *Parliamentary Practice* (23rd Edn, 2004) p 119-121; and PARLIAMENT vol 78 (2010) PARA 1085.

As to royal palaces and courts of justice see *Fitzpatrick v Kelly* (1781) cited in 3 Term Rep 740; *R v Stobbs* (1790) 3 Term Rep 735; and COURTS vol 10 (Reissue) PARA 119 et seq; CROWN AND ROYAL FAMILY vol 12(1) (Reissue) PARA 146.

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## **(ii) Summonses and Warrants of Arrest; Written Charges and Requisitions**

### **912. Issue of summons to defendant or warrant of arrest.**

On an information<sup>1</sup> being laid before a justice of the peace that a person has, or is suspected of having, committed an offence, the justice may issue:

- 1216 (1) a summons directed to that person requiring him to appear before a magistrates' court to answer the information<sup>2</sup>; or
- 1217 (2) a warrant to arrest that person and bring him before a magistrates' court<sup>3</sup>.

No warrant may be so issued unless the information is in writing<sup>4</sup>; nor may a warrant be issued for the arrest of any person who has attained the age of 18 unless the offence to which the warrant relates is an indictable offence<sup>5</sup> or is punishable with imprisonment<sup>6</sup> or the person's address is not sufficiently established for a summons to be served on him<sup>7</sup>. Where the offence charged is an indictable offence, a warrant may be issued at any time notwithstanding that a summons<sup>8</sup> has previously been issued<sup>9</sup>.

A warrant or summons issued by a justice of the peace does not cease to have effect by reason of his death or his ceasing to be a justice of the peace<sup>10</sup>.

<sup>1</sup> An information is a statement by which a justice of the peace is informed of an alleged offence (*R v Hughes* (1879) 4 QBD 614 at 633, CCR, per Huddleston B) and may be laid by the prosecutor, in person, or by his solicitor or counsel or other person authorised in that behalf (CrimPR 7.1). Failure to name the police officer laying the information does not invalidate it where it is clear that a police officer has laid the information and that officer's identity is easily ascertainable: *Rubin v DPP* [1990] QB 80, 89 Cr App Rep 44, DC. Subject to any provision of the Magistrates' Courts Act 1980 and any other enactment, an information need not be in writing or on oath: CrimPR 7.2.

An information, other than one substantiated on oath, may be laid before the justices' clerk: Justices' Clerks Rules 2005, SI 2005/545, r 2, Schedule para 1. An information, other than one substantiated on oath, may also be laid before an assistant clerk, provided that that person has been specifically authorised by the justices' clerk for this purpose: r 3(1), Schedule para 1.

Generally speaking, any person may lay the information and make the charge before a justice of the peace, except where a statutory provision restricts the power of making a charge to certain persons, or makes the consent or order of some person a condition precedent to the institution of proceedings: *R v Kennedy* (1902) 86 LT 753; *R v Granatelli* (1849) 7 State Tr NS 979; and see also PARAS 1071-1072 post. As from a day to be appointed, however, a public prosecutor does not have the power to lay an information for the purpose of obtaining the issue of a summons under these provisions: Criminal Justice Act 2003 s 29(4). Sections 29, 30 are to be brought into force as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. 'Public prosecutor' means: (1) a police force or a person authorised by a police force to institute criminal proceedings (s 29(5)(a)); (2) the Director of the Serious Fraud Office or a person authorised by him to institute criminal proceedings (s 29(5)(b)); (3) the Director of Public Prosecutions or a person authorised by him to institute criminal proceedings (s 29(5)(c)); (4) the Director of Revenue and Customs Prosecutions or a person authorised by him to institute criminal proceedings (s 29(5)(ca) (added by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 130)); (5) the Director General of the Serious Organised Crime Agency or a person authorised by him to institute criminal proceedings (Criminal Justice Act 2003 s 29(5)(cb) (added by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 para 196)); (6) the Attorney General or a person authorised by him to institute criminal proceedings (Criminal Justice Act

2003 s 29(5)(d)); (7) a Secretary of State or a person authorised by a Secretary of State to institute criminal proceedings (s 29(5)(e)); (8) the Commissioners for Her Majesty's Revenue and Customs or a person authorised by them to institute criminal proceedings (s 29(5)(f), (g); Commissioners for Revenue and Customs Act 2005 s 50(1), (7)); or (9) a person specified in an order made by the Secretary of State for these purposes or a person authorised by such a person to institute criminal proceedings (s 29(5)(h)). At the date at which this volume states the law no order had been made for the purposes of s 29(5)(h) (see head (9) supra). 'Police force' in head (1) supra has the meaning given by the Prosecution of Offences Act 1985 s 3(3) (see PARA 1080 note 5 post): Criminal Justice Act 2003 s 29(6). As to the institution of criminal proceedings by a public prosecutor see PARA 915 post. Nothing in s 29 (as amended) affects: (a) the power of a public prosecutor to lay an information for the purpose of obtaining the issue of a warrant under the Magistrates' Courts Act 1980 s 1 (as amended) (Criminal Justice Act 2003 s 30(4)(a)); (b) the power of a person who is not a public prosecutor to lay an information for the purpose of obtaining the issue of a summons or warrant under the Magistrates' Courts Act 1980 s 1 (as amended) (Criminal Justice Act 2003 s 30(4)(b)); or (c) any power to charge a person with an offence whilst he is in custody (s 30(4)(c)).

2 Magistrates' Courts Act 1980 s 1(1)(a) (s 1(1) substituted by the Courts Act 2003 s 43(1)). A justice of the peace may issue a summons or warrant under the Magistrates' Courts Act 1980 s 1 (as amended) upon an information being laid before him notwithstanding any enactment requiring the information to be laid before two or more justices: s 1(7). A warrant is not normally issued if a summons will effect the purpose: *O'Brien v Brabner* (1885) 49 JP Jo 227; *Dumbell v Roberts* [1944] 1 All ER 326, CA.

Although a proposed defendant to a summons has no locus standi to be heard, when a justice of the peace considers an application for the issue of a summons against him, the justice may, in exercising his discretion whether to issue the summons, hear representations from the proposed defendant if he considers it necessary to do so in order to reach a decision on the issue of the summons: see *R v West London Justices, ex p Klahn* [1979] 2 All ER 221, [1979] 1 WLR 933, DC; and MAGISTRATES vol 29(2) (Reissue) PARA 687.

3 Magistrates' Courts Act 1980 s 1(1)(b) (as substituted: see note 2 supra). A warrant of arrest must require the persons to whom it is directed to arrest the relevant person: CrimPR 18.5.

4 Magistrates' Courts Act 1980 s 1(3) (amended by the Criminal Justice Act 2003 ss 31(1), 332, Sch 7 Pt 12). As from a day to be appointed it is instead provided that no warrant may be so issued upon an information being laid unless the information is in writing: Magistrates' Courts Act 1980 s 1(3) (as so amended; prospectively further amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 7, 8(1), (2)). At the date at which this volume states the law no such day had been appointed.

5 See PARA 1102 post.

6 Magistrates' Courts Act 1980 s 1(4)(a) (s 1(4) amended by the Criminal Justice Act 1991 s 68, Sch 8 para 6(1)(a)).

7 Magistrates' Courts Act 1980 s 1(4)(b) (as amended: see note 6 supra). As from a day to be appointed the grounds upon which a warrant may be issued for the arrest of any person who has attained the age of 18 also include the ground that his address is not sufficiently established for a written charge or requisition to be served on him: s 1(4)(b) (as so amended; prospectively further amended by the Criminal Justice Act 2003 Sch 36 para 8(3)). At the date at which this volume states the law no such day had been appointed.

8 Or, as from a day to be appointed, a written charge or requisition: Magistrates' Courts Act 1980 s 1(6) (prospectively amended by the Criminal Justice Act 2003 Sch 36 para 8(4)). At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed it is provided that where the offence charged is an indictable offence and a written charge and requisition have previously been issued, a warrant may be issued under the Magistrates' Courts Act 1980 s 1 (as amended) by a justice of the peace upon a copy of the written charge (rather than an information) being laid before the justice by a public prosecutor (s 1(6A) (prospectively added by the Criminal Justice Act 2003 Sch 36 para 8(5))) and that for these purposes a copy of a written charge may be laid before, and a warrant under the Magistrates' Courts Act 1980 s 1 (as amended) may be issued by, a single justice of the peace (s 1(7A) (prospectively added by the Criminal Justice Act 2003 Sch 36 para 8(6))). At the date at which this volume states the law no such day had been appointed.

9 Magistrates' Courts Act 1980 s 1(6). As to warrants issued by a justice of the peace see further PARA 918 et seq post. As to the issue of summonses and warrants by the Crown Court see PARA 1261 post.

10 See *ibid* s 124.

## UPDATE

### 912 Issue of summons to defendant or warrant of arrest



NOTE 1--CrimPR Pt 7 now Criminal Procedure Rules 2010, SI 2010/60, Pt 7. Criminal Justice Act 2003 ss 29(1)-(3), (5), (6), 30 in force for certain purposes: SI 2007/1999, SI 2008/1424, SI 2009/2879.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(3) ARREST/(ii) Summonses and Warrants of Arrest; Written Charges and Requisitions/913. The summons.

### **913. The summons.**

A summons must either be signed by the justice issuing it or state his name and be authenticated by the signature of the clerk of a magistrates' court<sup>1</sup>. A summons requiring a person to appear before a magistrates' court to answer an information must state shortly the matter of the information and must state the time and place at which the accused is required by the summons to appear<sup>2</sup>.

A single summons may be issued against a person in respect of several informations; but the summons must state the matter of each information separately and has effect as several summonses, each issued in respect of one information<sup>3</sup>.

<sup>1</sup> CrimPR 7.7(1). A summons may be issued by a justices' clerk in his own right: Justices' Clerks Rules 2005, SI 2005/545, r 2, Schedule para 2. A summons may also be issued by an assistant clerk, provided that that person has been specifically authorised by the justices' clerk for this purpose: r 3(1), Schedule para 2. Where a summons is issued by a justice, his facsimile rubber stamp signature may be affixed to it either by the justice or by an employee of the justices' clerk with the justice's general authority: *R v Brentford Justices, ex p Catlin* [1975] QB 455, [1975] 2 All ER 201, DC. An electronic signature incorporated into the document satisfies the requirement for a signature: CrimPR 7.7(4). The issue of a summons by a justice, justices' clerk or assistant clerk authorised by the justices' clerk is a 'judicial function'; each information must be considered and each summons individually authorised by a justice, justices' clerk or authorised assistant clerk, and a summons cannot be issued on the authority of anyone other than the particular justice, justices' clerk or authorised assistant clerk who has considered the information on which it is based: *R v Gateshead Justices, ex p Tesco Stores Ltd* [1981] QB 470, [1981] 1 All ER 1027, DC.

<sup>2</sup> CrimPR 7.7(2).

<sup>3</sup> CrimPR 7.7(3).

## **UPDATE**

### **913 The summons**

TEXT AND NOTES--CrimPR Pt 7 now Criminal Procedure Rules 2010, SI 2010/60, Pt 7.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(3) ARREST/(ii) Summonses and Warrants of Arrest; Written Charges and Requisitions/914. Service of summonses.

#### **914. Service of summonses.**

Service of a summons issued by a justice of the peace on a person other than a corporation may be effected by either:

- 1218 (1) delivering it to the person to whom it is directed<sup>1</sup>;
- 1219 (2) leaving it for him with some person at his last known or usual place of abode<sup>2</sup>; or
- 1220 (3) sending it by post in a letter addressed to him at his last known or usual place of abode<sup>3</sup>.

Service of a summons issued by a justice of the peace on a corporation may be effected by delivering it at, or sending it by post to, the registered office of the corporation, if that office is in the United Kingdom<sup>4</sup> or, if there is no registered office in the United Kingdom, any place in the United Kingdom where the corporation trades or conducts its business<sup>5</sup>.

A summons requiring a person to appear before a court in England and Wales may, in such manner as may be prescribed<sup>6</sup>, be served on him in Scotland or Northern Ireland<sup>7</sup>.

1 CrimPR 4.1(1)(a). Voluntary attendance at the court by the defendant cures any lack of process or irregularity in service: *R v Hughes* (1879) 4 QBD 614, CCR. Cf *Pearks, Gunston and Tee Ltd v Richardson* [1902] 1 KB 91, DC (attendance to point out an irregularity in service followed by withdrawal from case does not amount to waiver of irregularity). See also *R v Essex Justices, ex p Perkins* [1927] 2 KB 475, DC (when he attends court the defendant should be informed of the irregularity and of his right to object; without such knowledge there can be no waiver). The justices cannot require the adoption of one method over another: *R (on the application of Durham County Council) v North Durham Justices* [2004] EWHC 1073 (Admin), 168 JP 269.

2 CrimPR 4.1(1)(b). See note 1 *supra*. Where CrimPR 4.1 or any other of the Criminal Procedure Rules provides that a summons may be sent by post to a person's last known or usual place of abode, that rule has effect as if it provided also for the summons to be sent in the specified manner to an address given by that person for that purpose: CrimPR 4.1(6).

3 CrimPR 4.1(1)(c). See notes 1, 2 *supra*.

4 For the meaning of 'United Kingdom' see PARA 45 note 2 *ante*.

5 CrimPR 4.1(2).

6 As to rules of court see PARA 65 note 1 *ante*.

7 See the Criminal Law Act 1977 s 39(1) (as substituted); and MAGISTRATES vol 29(2) (Reissue) PARA 529.

#### **UPDATE**

#### **914 Service of summonses**

TEXT AND NOTES 1-5--CrimPR Pt 4 now Criminal Procedure Rules 2010, SI 2010/60, Pt 4.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(3) ARREST/(ii) Summonses and Warrants of Arrest; Written Charges and Requisitions/915. Written charges and requisitions.

### **915. Written charges and requisitions.**

As from a day to be appointed<sup>1</sup> a public prosecutor<sup>2</sup> is empowered to institute criminal proceedings against a person by issuing a document (a 'written charge') which charges the person with an offence<sup>3</sup>. Where a public prosecutor issues a written charge, there must at the same time be issued a document (a 'requisition') which requires the person to appear before a magistrates' court to answer the written charge<sup>4</sup>. The written charge and requisition must be served on the person concerned, and a copy of both must be served on the court named in the requisition<sup>5</sup>. Where the offence charged is an indictable offence and a written charge and requisition have previously been issued, a warrant of arrest may be issued<sup>6</sup> by a justice of the peace upon a copy of the written charge being laid before the justice by a public prosecutor<sup>7</sup>.

1 The Criminal Justice Act 2003 ss 29, 30 are to be brought into force, and the Crime (International Co-operation) Act 2003 ss 4A, 4B are added, by the Criminal Justice Act 2003 s 331, Sch 36 para 16, as from a day to be appointed by order under s 336(3). At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'public prosecutor' see PARA 912 note 1 ante.

3 Criminal Justice Act 2003 s 29(1). See note 1 supra. Except where the context otherwise requires, in any enactment contained in an Act passed before the Criminal Justice Act 2003, any reference (however expressed) which is or includes a reference to an information within the meaning of the Magistrates' Courts Act 1980 s 1 (as amended) (or to the laying of such an information) is to be read as including a reference to a written charge (or to the issue of a written charge): Criminal Justice Act 2003 s 30(5)(a). As to informations see PARA 912 note 1 ante. The Criminal Justice Act 2003 was passed (ie received the Royal Assent) on 20 November 2003. The reference in s 30(5) to an enactment contained in an Act passed before the Criminal Justice Act 2003 includes a reference to an enactment contained in that Act as a result of an amendment to that Act made by the Criminal Justice Act 2003 or by any other Act passed in the same session as the Criminal Justice Act 2003: s 30(7). See further MAGISTRATES. The written charge may be issued in spite of the fact that the person on whom it is to be served is outside the United Kingdom: Crime (International Co-operation) Act 2003 s 4A(1)(a), (2) (prospectively added: see note 1 supra).

4 Criminal Justice Act 2003 s 29(2). See note 1 supra. Except where the context otherwise requires, in any enactment contained in an Act passed before the Criminal Justice Act 2003, any reference (however expressed) which is or includes a reference to a summons under the Magistrates' Courts Act 1980 s 1 (as amended) (or to a justice of the peace issuing such a summons) is to be read as including a reference to a requisition (or to a public prosecutor issuing a requisition): Criminal Justice Act 2003 s 30(5)(b). See further note 3 supra. The requisition may be issued in spite of the fact that the person on whom it is to be served is outside the United Kingdom: Crime (International Co-operation) Act 2003 s 4A(1)(b), (2) (prospectively added: see note 1 supra).

5 Criminal Justice Act 2003 s 29(3). See note 1 supra. Where the written charge or requisition is to be served outside the United Kingdom and the prosecutor believes that the person on whom it is to be served does not understand English, the written charge or requisition must be accompanied by a translation of it in an appropriate language (Crime (International Co-operation) Act 2003 s 4A(3) (prospectively added: see note 1 supra)); a written charge or requisition served outside the United Kingdom must in any case be accompanied by a notice giving any information required to be given by rules of court (s 4A(4) (prospectively added: see note 1 supra)). If a requisition is served outside the United Kingdom, no obligation under the law of England and Wales to comply with the requisition is imposed by virtue of the service (s 4A(5) (prospectively added: see note 1 supra)) and, accordingly, failure to comply with the requisition is not a ground for issuing a warrant to secure the attendance of the person in question (s 4A(6) (prospectively added: see note 1 supra)), although the requisition may subsequently be served on the person in question in the United Kingdom (with the usual consequences for non-compliance) (s 4A(7) (prospectively added: see note 1 supra)).

A written charge or requisition within the meaning of these provisions may, instead of being served by post, be served on a person outside the United Kingdom in accordance with arrangements made by the Secretary of State (s 4B(1) (prospectively added: see note 1 supra)), although where the person is in a participating country (see PARA 917 note 14 post) the written charge or requisition may be served in accordance with those arrangements only if either the correct address of the person is unknown (s 4B(2), (3)(a) (prospectively added: see note 1 supra)) or it has not been possible to serve the written charge or requisition by post (s 4B(3)(b) (prospectively added: see note 1 supra)) or there are good reasons for thinking that service by post will not be effective or is inappropriate (s 4B(3)(c) (prospectively added: see note 1 supra)).

6     Ie under the Magistrates' Courts Act 1980 s 1 (as amended).

7     Ibid s 1(6A) (prospectively added by the Criminal Justice Act 2003 s 331, Sch 36 paras 7, 8); and see PARA 912 notes 8, 9 ante.

## **UPDATE**

### **915 Written charges and requisitions**

TEXT AND NOTE 1--Criminal Justice Act 2003 ss 29(1)-(3), (5), (6), 30 in force for certain purposes in specified areas: SI 2007/1999, SI 2008/1424.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(3) ARREST/(ii) Summonses and Warrants of Arrest; Written Charges and Requisitions/916. Service of overseas process in the United Kingdom.

## **916. Service of overseas process in the United Kingdom.**

Provision is made in connection with the service of:

- 1221 (1) any process<sup>1</sup> issued or made in a country<sup>2</sup> outside the United Kingdom for the purposes of criminal proceedings<sup>3</sup>;
- 1222 (2) any document issued or made by an administrative authority in a country outside the United Kingdom in administrative proceedings<sup>4</sup>;
- 1223 (3) any process issued or made for the purposes of any proceedings on an appeal before a court in a country outside the United Kingdom against a decision in administrative proceedings<sup>5</sup>; and
- 1224 (4) any document issued or made by an authority in a country outside the United Kingdom for the purposes of clemency proceedings<sup>6</sup>.

Where the Secretary of State receives any such process or other document from the government of, or other authority in, a country outside the United Kingdom, together with a request for the process or document to be served on a person in the United Kingdom<sup>7</sup>, he may cause the process or document to be served by post or, if the request is for personal service, direct the chief officer of police<sup>8</sup> for the area in which that person appears to be to cause it to be personally served on him<sup>9</sup>.

Where any process which is served in a part of the United Kingdom by virtue of these provisions<sup>10</sup> requires a person to appear as a party or attend as a witness<sup>11</sup>, no obligation under the law of that part of the United Kingdom to comply with the process is imposed by virtue of its service<sup>12</sup>. Any such process must be accompanied by a notice stating the effect of this provision<sup>13</sup>, indicating that the person on whom it is served may wish to seek advice as to the possible consequences of his failing to comply with the process under the law of the country where it was issued or made<sup>14</sup>, and indicating that under that law he may not be accorded the same rights and privileges as a party or as a witness as would be accorded to him in proceedings in the part of the United Kingdom in which the process is served<sup>15</sup>.

Where a chief officer of police causes any process or document to be served<sup>16</sup>, he must at once tell the Secretary of State when and how it was served<sup>17</sup> and (if possible) provide him with a receipt signed by the person on whom it was served<sup>18</sup>. Where the chief officer of police is unable to cause any process or document to be served as directed, he must at once inform the Secretary of State of that fact and of the reason<sup>19</sup>.

1 For these purposes, 'process', means any summons or order issued or made by a court and includes any other document issued or made by a court for service on parties or witnesses (Crime (International Co-operation) Act 2003 s 51(3)(a)) and any document issued by a prosecuting authority outside the United Kingdom for the purposes of criminal proceedings (s 51(3)(b)). 'Court' includes a tribunal: s 51(1). 'Criminal proceedings' include criminal proceedings outside the United Kingdom in which a civil order may be made: s 51(1). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 'Country' includes territory: *ibid* s 51(1).

3 *Ibid* s 1(2)(a).

4 Ibid s 1(2)(b). 'Administrative proceedings' means proceedings outside the United Kingdom to which the Convention on Mutual Assistance in Criminal Matters established by Council Act of 29 May 2000 (2000/C197/01) ('the Mutual Legal Assistance Convention') art 3(1) (proceedings brought by administrative authorities in respect of administrative offences where a decision in the proceedings may be the subject of an appeal before a court) applies: Crime (International Co-operation) Act 2003 s 51(1).

5 Ibid s 1(2)(c).

6 Ibid s 1(2)(d). 'Clemency proceedings' means proceedings in a country outside the United Kingdom, not being proceedings before a court exercising criminal jurisdiction, for the removal or reduction of a penalty imposed on conviction of an offence: s 51(1).

7 Ibid s 1(1).

8 As to chief officers of police and their functions see POLICE vol 36(1) (2007 Reissue) PARA 178 et seq.

9 Crime (International Co-operation) Act 2003 s 1(3).

10 Ie by virtue of ibid s 1 (see the text and notes 1-9 supra).

11 Ibid s 2(1).

12 Ibid s 2(2).

13 Ibid s 2(3)(a).

14 Ibid s 2(3)(b).

15 Ibid s 2(3)(c).

16 Ie under ibid s 1 (see the text and notes 1-9 supra).

17 Ibid s 2(4)(a).

18 Ibid s 2(4)(b).

19 Ibid s 2(5).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(3) ARREST/(ii) Summonses and Warrants of Arrest; Written Charges and Requisitions/917. Service of United Kingdom process abroad.

### **917. Service of United Kingdom process abroad.**

Any process<sup>1</sup> issued or made for the purposes of criminal proceedings<sup>2</sup> by a court<sup>3</sup> in England and Wales may be issued or made in spite of the fact that the person on whom it is to be served is outside the United Kingdom<sup>4</sup>. Where the process is to be served outside the United Kingdom and the person at whose request it is issued or made believes that the person on whom it is to be served does not understand English, he must inform the court of that fact<sup>5</sup> and provide the court with a copy of the process, or of so much of it as is material, translated into an appropriate language<sup>6</sup>. Process served outside the United Kingdom requiring a person to appear as a party or attend as a witness must not include notice of a penalty<sup>7</sup> and must be accompanied by a notice giving any information required to be given by rules of court<sup>8</sup>. If process requiring a person to appear as a party or attend as a witness is served outside the United Kingdom, no obligation to comply with the process under the law of the part of the United Kingdom in which the process is issued or made is imposed by virtue of the service<sup>9</sup>. Accordingly, failure to comply with the process does not constitute contempt of court and is not a ground for issuing a warrant to secure the attendance of the person in question<sup>10</sup>. However, the process may subsequently be served on the person in question in the United Kingdom (with the usual consequences for non-compliance)<sup>11</sup>.

Process<sup>12</sup> may, instead of being served by post, be served on a person outside the United Kingdom in accordance with arrangements made by the Secretary of State<sup>13</sup>. Where, however, the person is in a participating country<sup>14</sup>, the process may be served in accordance with those arrangements only if either the correct address of the person is unknown<sup>15</sup>, or it has not been possible to serve the process by post<sup>16</sup>, or there are good reasons for thinking that service by post will not be effective or is inappropriate<sup>17</sup>.

1 For the meaning of 'process' see PARA 916 note 1 ante.

2 As to the meaning of 'criminal proceedings' see PARA 916 note 1 ante.

3 As to the meaning of 'court' see PARA 916 note 1 ante.

4 Crime (International Co-operation) Act 2003 s 3(1), (2). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 Ibid s 3(3)(a).

6 Ibid s 3(3)(b).

7 Ibid s 3(4)(a).

8 Ibid s 3(4)(b). Provision may be made by rules of court as to the practice and procedure to be followed in connection with proceedings under Pt 1 (ss 1-51) (as amended): s 49(1). The power to make rules of court under s 49 does not prejudice any existing power to make rules: s 49(3). For the appropriate rules see CrimPR 32.1; and the Crown Court Rules 1982, SI 1982/1109, r 30 (substituted by SI 2004/1047).

9 Crime (International Co-operation) Act 2003 s 3(5).

10 Ibid s 3(6).

11 Ibid s 3(7).



12 le process to which *ibid* s 3 (see the text and notes 1-11 *supra*) applies.

13 *Ibid* s 4(1). For the arrangements referred to see *CrimPR* 32.2; and the Crown Court Rules 1982, SI 1982/1109, r 31 (substituted by SI 2004/1047).

14 For the purposes of any provision of the Crime (International Co-operation) Act 2003 Pt 1 (as amended), a 'participating country' is a country other than the United Kingdom which is a member state on a day appointed for the commencement of that provision (s 51(2)(a)) and any other country designated by an order made by the Secretary of State (s 51(2)(b)). At the date at which this volume states the law no such order had been made. Any power to make an order conferred by Pt 1 (as amended) on the Secretary of State or the Treasury is exercisable by statutory instrument (s 50(1)) which is subject to annulment in pursuance of a resolution of either House of Parliament (s 50(3)). An order may make different provision for different purposes: s 50(2). A statutory instrument containing an order under s 51(2)(b) designating a country other than a member state is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament: s 50(5)(a).

Section 4 was brought into force on 28 April 2004 by the Crime (International Co-operation) Act 2003 (Commencement No 1) Order 2004, SI 2004/786.

15 Crime (International Co-operation) Act 2003 s 4(2), (3)(a).

16 *Ibid* s 4(3)(b).

17 *Ibid* s 4(3)(c).

## **UPDATE**

### **917 Service of United Kingdom process abroad**

NOTES 8, 13--*CrimPR* 32.1, 32.2 now Criminal Procedure Rules 2010, SI 2010/60, rr 32.1, 32.2.

NOTE 14--As to orders made under these provisions see the Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (England, Wales and Northern Ireland) Order 2008, SI 2008/2156; the Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (England, Wales and Northern Ireland) Order 2009, SI 2009/613; the Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (England, Wales and Northern Ireland) (No 2) Order 2009, SI 2009/1764; and the Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (England, Wales and Northern Ireland) Order 2010, SI 2010/36.

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### **918. Warrants issued when the court office is closed.**

If a warrant is issued when the court office<sup>1</sup> is closed, the applicant must: (1) serve on the court officer any information on which that warrant is issued<sup>2</sup>; and (2) do so within 72 hours of that warrant being issued<sup>3</sup>.

1 For these purposes, the court office is the office for the local justice area in which the justice is acting when he issues the warrant: CrimPR 18.3(2).

2 CrimPR 18.3(1)(a).

3 CrimPR 18.3(1)(b).

### **UPDATE**

### **918 Warrants issued when the court office is closed**

TEXT AND NOTES--CrimPR 18.3 now Criminal Procedure Rules 2010, SI 2010/60, r 18.3.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(3) ARREST/(ii) Summonses and Warrants of Arrest; Written Charges and Requisitions/919. Warrant indorsed for bail.

### **919. Warrant indorsed for bail.**

On issuing a warrant for the arrest of any person, a justice of the peace may grant him bail by indorsing the warrant for bail, that is to say, by indorsing the warrant with a direction stating that the person arrested is to be released on bail subject to a duty to appear before such magistrates' court and at such time as may be specified in the indorsement<sup>1</sup>. The indorsement must fix the amounts in which any sureties are to be bound<sup>2</sup>.

Where a warrant has been so indorsed:

1225 (1) where the person arrested is to be released on bail on his entering into a recognisance without sureties, it is not necessary to take him to a police station; but, if he is so taken, he must be released from custody on his entering into the recognisance<sup>3</sup>; and

1226 (2) where he is to be released on his entering into a recognisance with sureties, he must be taken to a police station on his arrest, and the custody officer<sup>4</sup> there must (subject to his approving any surety tendered in compliance with the indorsement) release him from custody as directed in the indorsement<sup>5</sup>.

1 Magistrates' Courts Act 1980 s 117(1), (2)(a).

2 Ibid s 117(2).

3 Ibid s 117(3)(a) (s 117(3) substituted by the Police and Criminal Evidence Act 1984 s 47(7)(b)).

4 As to custody officers see PARA 939 post.

5 Magistrates' Courts Act 1980 s 117(3)(b) (as substituted: see note 3 supra).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(3) ARREST/(ii) Summonses and Warrants of Arrest; Written Charges and Requisitions/920. Execution of warrant.

## 920. Execution of warrant.

A warrant of arrest issued by a justice of the peace remains in force until it is executed or withdrawn or it ceases to have effect in accordance with rules of court<sup>1</sup>. A warrant so issued may be executed anywhere in England and Wales by the persons to whom it was directed<sup>2</sup> or by:

- 1227 (1) a constable<sup>3</sup> acting in his own police area<sup>4</sup>;
- 1228 (2) where the warrant is of a specified type<sup>5</sup>, a civilian enforcement officer<sup>6</sup>;
- 1229 (3) where the warrant is of a specified type<sup>7</sup>, an individual who is, or is the director, partner or employee of, an approved enforcement agency<sup>8</sup>.

A person executing a warrant of arrest must, upon arresting the relevant person<sup>9</sup>:

- 1230 (a) either: (i) if he has the warrant with him, show it to the relevant person<sup>10</sup>; or (ii) otherwise, tell the relevant person where the warrant is and what arrangements may be made to let that person inspect it<sup>11</sup>;
- 1231 (b) explain, in ordinary language, the charge and the reason for the arrest<sup>12</sup>; and
- 1232 (c) unless he is a constable in uniform, show documentary proof of his identity<sup>13</sup>.

A warrant so issued may be executed at any time of the day or night<sup>14</sup>.

1 Magistrates' Courts Act 1980 s 125(1) (amended by the Access to Justice Act 1999 s 97(4); and by the Courts Act 2003 s 109(1), Sch 8 para 238). It seems that a justice of the peace may withdraw his own warrant, and in a proper case the Queen's Bench Division of the High Court has power to order the withdrawal of a warrant: *R v Crossman, ex p Chetwynd* (1908) 98 LT 760. The death or cessation in office of a justice does not affect the validity of a warrant: see PARA 912 ante.

2 Magistrates' Courts Act 1980 s 125(2) (amended by the Access to Justice Act 1999 s 95(1)).

3 Every police officer holds the office of constable: see PARA 857 note 2 ante.

4 Magistrates' Courts Act 1980 s 125(2) (as amended: see note 2 supra); CrimPR 18.10(a), (b)(i). As to police areas see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

5 I.e. a warrant to which the Magistrates' Courts Act 1980 s 125A (as added) applies, that is, a warrant issued under any provision specified by an order made by the Lord Chancellor and the Secretary of State (s 125A(3)(a) (s 125A added by the Access to Justice Act 1999 s 92)) or for the enforcement of a court order of any description so specified (Magistrates' Courts Act 1980 s 125A(3)(b) (as so added)). The relevant order is the Magistrates' Courts Warrants (Specification of Provisions) Order 2000, SI 2000/3278 (amended by SI 2004/1835). See further MAGISTRATES vol 29(2) (Reissue) PARA 861.

6 Magistrates' Courts Act 1980 s 125A(1) (as added: see note 5 supra). As to civilian enforcement officers for these purposes see s 125A(2) (as added); and MAGISTRATES vol 29(2) (Reissue) PARA 861.

7 See note 5 supra.

8 Magistrates' Courts Act 1980 s 125(2) (as amended: see note 2 supra); s 125A(1) (as added: see note 5 supra); s 125B(1) (s 125B added by the Access to Justice Act 1999 s 93); CrimPR 18.10(a), (b)(ii). See further (in particular as regards approved enforcement agencies) MAGISTRATES vol 29(2) (Reissue) PARA 861. The provisions referred to in this note deal not only with warrants of arrest, but also with warrants of commitment, warrants of detention and warrants of distress: Magistrates' Courts Act 1980 s 125(2) (as so amended).

9 For the purposes of CrimPR Pt 18, the 'relevant person' is the person against whom the warrant is being issued: CrimPR 18.1(3).

10 CrimPR 18.11(1)(a)(i).

11 CrimPR 18.11(1)(a)(ii).

12 CrimPR 18.11(1)(b).

13 CrimPR 18.11(1)(c).

14 See 2 Hale PC 113. As to the execution of warrants see further MAGISTRATES vol 29(2) (Reissue) PARA 861.

## **UPDATE**

### **920 Execution of warrant**

NOTE 5--Reference to Secretary of State omitted: 1980 Act s 125A(3)(a) (amended by SI 2007/2128). SI 2000/3278 further amended: SI 2007/3011.

TEXT AND NOTES 4-13--CrimPR 18.10, 18.11 now Criminal Procedure Rules 2010, SI 2010/60, rr 18.10, 18.11.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(3) ARREST/(ii) Summonses and Warrants of Arrest; Written Charges and Requisitions/921. Cross-border execution of warrants.

## **921. Cross-border execution of warrants.**

A warrant issued in England, Wales or Northern Ireland for the arrest of a person charged with an offence<sup>1</sup> may be executed in Scotland, a warrant issued in Scotland or Northern Ireland for the arrest of a person charged with an offence may be executed in England or Wales, and a warrant issued in England or Wales or Scotland for the arrest of a person charged with an offence may be executed in Northern Ireland, by any constable of any police force of the country of issue, by a constable of the British Transport Police Force<sup>2</sup> (except in the case of a warrant being executed in Northern Ireland), or by a constable of the country of execution as well as by any other persons within the directions in the warrant<sup>3</sup>. A person so arrested in pursuance of a warrant must be taken, as soon as reasonably practicable, to any place to which he is committed by, or may be conveyed under, the warrant<sup>4</sup>.

Any other person within the directions in a warrant executing that warrant under these provisions has the same powers and duties, and the person arrested has the same rights, as he would have had if execution had been in the country of issue by the person within those directions<sup>5</sup>.

These provisions apply: (1) as respects a warrant of commitment and a warrant to arrest a witness issued by a judicial authority<sup>6</sup> in England, Wales or Northern Ireland as they apply to a warrant for arrest<sup>7</sup>; (2) as respects a warrant for committal, a warrant to imprison (or to apprehend and imprison) and a warrant to arrest a witness issued by a judicial authority in Scotland as they apply to a warrant for arrest<sup>8</sup>; and (3) as respects a warrant for the arrest of an offender referred back to the court by a youth offender panel<sup>9</sup> as they apply to a warrant issued in England or Wales for the arrest of a person charged with an offence<sup>10</sup>.

1 See *McGrath v Chief Constable of the Royal Ulster Constabulary* [2001] UKHL 39, [2001] 2 AC 731, [2001] 4 All ER 334.

2 Is a constable of the British Transport Police Force established by the Railways and Transport Safety Act 2003 Pt 3 (ss 18-77) (as amended): see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 281.

3 Criminal Justice and Public Order Act 1994 s 136(1)-(3) (s 136(1), (2) amended by the Anti-terrorism, Crime and Security Act 2001 s 101, Sch 7 paras 15, 17; and the Railways and Transport Safety Act 2003 s 73(1), Sch 5 para 4(1)). In each case the warrant may be executed without any indorsement: Criminal Justice and Public Order Act 1994 s 136(1)-(3) (as so amended). A constable executing a warrant issued in England and Wales or Northern Ireland may use reasonable force and has the powers of search conferred by the Criminal Justice and Public Order Act 1994 s 139 (as amended) (see PARA 937 post) (s 136(5)(a)), while a constable executing a warrant issued in Scotland has the same powers and duties, and the person arrested the same rights, as he would have had if execution had been in Scotland by a constable of a police force in Scotland (s 136(5)(b)). Any reference to a part of the United Kingdom in which a warrant may be executed includes a reference to the adjacent sea and other waters within the seaward limits of the territorial sea: s 136(8).

4 Ibid s 136(4).

5 Ibid s 136(6).

6 Is any justice of the peace or the judge of any court exercising jurisdiction in criminal proceedings: ibid s 136(8).

7 Ibid s 136(7)(a).

8 Ibid s 136(7)(b).

9 le under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 1 para 3(2): see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1302.

10 Criminal Justice and Public Order Act 1994 s 136(7A) (added by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 paras 21, 23; and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 161).

## **UPDATE**

### **921 Cross-border execution of warrants**

TEXT AND NOTE 10--Criminal Justice and Public Order Act 1994 s 136(7A) further amended: Criminal Justice and Immigration Act 2008 Sch 4 para 42.

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## **922. Statement of offence.**

Every information<sup>1</sup>, summons<sup>2</sup> or warrant<sup>3</sup> laid or issued is sufficient if it describes the specific offence with which the defendant is charged in ordinary language avoiding so far as possible the use of technical terms<sup>4</sup> and gives such particulars as may be necessary to provide reasonable information about the nature of the charge<sup>5</sup>. It is not necessary for the document to state all the elements of the offence<sup>6</sup> or negative any matter upon which the defendant may rely<sup>7</sup>.

If the offence is one created by or under an Act, the description of the offence must contain a reference to the section of the Act or, as the case may be, the rule, order, regulation, byelaw or other instrument creating the offence<sup>8</sup>.

1 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante.

2 See PARA 913 ante.

3 See PARA 918 ante.

4 CrimPR 7.2(1)(a).

5 CrimPR 7.2(1)(b). See *Waring v Wheatley* [1951] WN 569, DC (omission of 'wilfully'; information bad); but cf *Lomas v Peek* [1947] 2 All ER 574, DC (omission of 'knowingly and wilfully'; information not bad because words were technical). See also *Atterton v Browne* [1945] KB 122, DC (omission of reference to section of Act); *Stephenson v Johnson* [1954] 1 All ER 369, [1954] 1 WLR 375, DC (omission of particulars necessary to give defendant reasonable information of nature of charge; information defective).

If process does not give sufficient particulars, that of itself does not render the proceedings a nullity or any resulting conviction unsafe, provided that the requisite information was given to the defendant in good time for him to be able to meet the case against him fairly: *Nash v Birmingham Crown Court* [2005] EWHC 338 (Admin), 169 JP 157. An application for particulars may be made at any time after the charge is preferred: *R v Aylesbury Justices, ex p Wisbey* [1965] 1 All ER 602, [1965] 1 WLR 339, DC; cf *Hickmott v Curd* [1971] 2 All ER 1399, 55 Cr App Rep 461, DC.

6 CrimPR 7.2(2)(a).

7 CrimPR 7.2(2)(b).

8 CrimPR 7.2(3). See also *R v Pollock, R v Divers* [1967] 2 QB 195 at 211, 50 Cr App Rep 149 at 161-162, CCA, per Veale J.

## **UPDATE**

### **922 Statement of offence**

TEXT AND NOTES--CrimPR Pt 7 now Criminal Procedure Rules 2010, SI 2010/60, Pt 7.



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### **923. Discretion of justices to issue summons or warrant of arrest.**

If application is made to a justice of the peace to issue a summons or a warrant of arrest, he must exercise a judicial discretion in deciding whether to grant or refuse it<sup>1</sup>. If he declines jurisdiction or refuses to grant a summons for a reason which is bad in law, judicial review by way of a mandatory order may issue to compel him to hear and determine the matter<sup>2</sup>. The discretion whether a more serious charge should be preferred or not in particular circumstances must be left to the prosecutor<sup>3</sup>. If the justice exercises a proper discretion over the application to him, the court will not grant judicial review of his decision refusing to issue a summons<sup>4</sup>. If he refuses to grant a summons or warrant of arrest and assigns several reasons for his refusal, some of which are bad in law, but others good, the court will not grant judicial review<sup>5</sup>.

1 As to the impropriety of a justice authorising the issue of a summons without having applied his mind to the information see *R v Brentford Justices, ex p Catlin* [1975] QB 455 at 464, [1975] 2 All ER 201 at 207, DC, per Lord Widgery CJ. See also *R v Highbury Corner Justices, ex p Tawfik* [1994] COD 106, DC. A clerk or justice is entitled to make inquiries before issuing a summons, but there is no duty to do so: *R v Clerk to the Bradford Justices, ex p Sykes and Shoesmith* (1999) 163 JP 224, DC.

2 *R v Byrde and Pontypool Gas Co, ex p Williams* (1890) 60 LJMC 17.

3 *R v Nuneaton Justices, ex p Parker* [1954] 3 All ER 251, [1954] 1 WLR 1318, DC.

4 *R v Bros* (1901) 85 LT 581; *R v Kennedy* (1902) 86 LT 753. Cf *R v Chertsey Justices, ex p Tannock* (1966) 111 Sol Jo 18, DC (justices' clerk had no power to refuse to issue a summons without first referring the matter to a justice).

5 *R v Kennedy* (1902) 86 LT 753. As to when a mandatory order will issue see JUDICIAL REVIEW vol 61 (2010) PARA 703 et seq.

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### **(iii) Arrest Without Warrant**

#### **924. Constables' power of arrest without warrant.**

A constable<sup>1</sup> may arrest without a warrant<sup>2</sup>:

- 1233 (1) anyone who is about to commit an offence<sup>3</sup>;
- 1234 (2) anyone who is in the act of committing an offence<sup>4</sup>;
- 1235 (3) anyone whom he has reasonable grounds for suspecting to be about to commit an offence<sup>5</sup>; and
- 1236 (4) anyone whom he has reasonable grounds for suspecting to be committing an offence<sup>6</sup>.

If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it<sup>7</sup>. If an offence has been committed<sup>8</sup>, a constable may arrest without a warrant anyone who is guilty of the offence<sup>9</sup> and anyone whom he has reasonable grounds for suspecting to be guilty of it<sup>10</sup>.

The power of summary arrest conferred on constables by these provisions<sup>11</sup> is exercisable only if the constable has reasonable grounds for believing that for one of the following reasons it is necessary to arrest the person in question<sup>12</sup>:

- 1237 (a) to enable the name or address of that person to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name or address, or has reasonable grounds for doubting whether a name or address given by the person as his name or address is his real name or address)<sup>13</sup>;
- 1238 (b) to prevent the person in question:
  - 57
  - 87. (i) causing physical injury to himself or any other person<sup>14</sup>;
  - 88. (ii) suffering physical injury<sup>15</sup>;
  - 89. (iii) causing loss of or damage to property<sup>16</sup>;
  - 90. (iv) committing an offence against public decency<sup>17</sup>; or
  - 91. (v) causing an unlawful obstruction of the highway<sup>18</sup>;
  - 58
- 1239 (c) to protect a child or other vulnerable person from the person in question<sup>19</sup>;
- 1240 (d) to allow the prompt and effective investigation of the offence or of the conduct of the person in question<sup>20</sup>; or
- 1241 (e) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question<sup>21</sup>.

1 Every police officer holds the office of constable: see PARA 857 note 2 ante.

2 A lawful arrest requires two elements: a person's involvement or suspected or attempted involvement in the commission of a criminal offence and reasonable grounds for believing that the person's arrest is necessary: Code G: Code of Practice for the Statutory Power of Arrest by Police Officers para 2.1. Where a constable has to

make a spur of the moment decision in an emergency, this is a surrounding circumstance for which allowance must be made: *G v Chief Superintendent of Police, Stroud* (1988) 86 Cr App Rep 92, DC (arrest on reasonable suspicion that breach of peace was likely (see PARA 930 post)).

3 Police and Criminal Evidence Act 1984 s 24(1)(a) (s 24 substituted by the Serious Organised Crime and Police Act 2005 s 110(1)); Code G para 2.3. The substitution of the Police and Criminal Evidence Act 1984 s 24 has effect in relation to any offence whenever convicted: s 110(4).

4 Ibid s 24(1)(b) (as substituted: see note 3 supra); Code G para 2.3.

5 Police and Criminal Evidence Act 1984 s 24(1)(c) (as substituted: see note 3 supra); Code G para 2.3.

6 Police and Criminal Evidence Act 1984 s 24(1)(d) (as substituted: see note 3 supra); Code G para 2.3.

7 Police and Criminal Evidence Act 1984 s 24(2) (as substituted: see note 3 supra); Code G para 2.3. Whether there are reasonable grounds for suspecting a person to be guilty of an offence is to be determined objectively: *Castorina v Chief Constable of Surrey* [1988] NLJR 180, CA. As to reasonable suspicion see *Hussien (Shaabin Bin) v Chong Fook Kam* [1970] AC 942, [1969] 3 All ER 1626, PC; and *Holgate-Mohammed v Duke* [1984] AC 437, 79 Cr App Rep 120, HL; *Ward v Chief Constable of Avon and Somerset Constabulary* (1986) Times, 26 June, CA; *Holtham v Metropolitan Police Comr* (1987) Times, 28 November, CA (all decided under the Criminal Law Act 1967 s 2 (repealed)). See also *Al Fayed v Metropolitan Police Comr* [2004] EWCA Civ 1579, [2005] 1 Archbold News 1. The constable need not have in mind the specific statutory provision, or mentally identify specific offences with technicality or precision, but he must reasonably suspect the existence of facts amounting to an offence of a kind which he has in mind; otherwise he cannot comply with his obligation under the Police and Criminal Evidence Act 1984 s 28(3) (see PARA 931 post): *Chapman v DPP* (1988) 89 Cr App Rep 190, DC; and see also *Mossop v DPP* [2003] EWHC 126 (Admin), [2003] 6 Archbold News 1, DC. The constable's suspicion need not be based on his own observations but can be based on what he has been told, or on information given to him anonymously; it is not necessary for him to prove what was known to his informant or that any of the facts on which he based his suspicion were in fact true; whether such information provides reasonable grounds for the constable's suspicion depends on the source and context, viewed in the light of the surrounding circumstances: *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, [1997] 1 All ER 129, HL. However, the mere fact that an arresting constable has been instructed by a superior officer to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion: *O'Hara v Chief Constable of the Royal Ulster Constabulary* supra.

8 See *R v Self* [1992] 3 All ER 476, 95 Cr App Rep 42, CA.

9 Police and Criminal Evidence Act 1984 s 24(3)(a) (as substituted: see note 3 supra); Code G para 2.3.

10 Police and Criminal Evidence Act 1984 s 24(3)(b) (as substituted: see note 3 supra); Code G para 2.3.

11 Ie by the Police and Criminal Evidence Act 1984 s 24(1)-(3) (as substituted).

12 Ibid s 24(4) (as substituted: see note 3 supra); Code G para 2.4. It is an operational decision at the discretion of the arresting officer as to what action he may take at the point of contact with an individual, the necessity criteria or criteria specified in s 24(5) (see heads (a)-(e) in the text) (if any) which apply to the individual, and whether to arrest, report for summons, grant street bail, issue a fixed penalty notice or take any other action that is open to the officer: Code G paras 2.4, 2.7. In applying the criteria the arresting officer has to be satisfied that at least one of the reasons supporting the need for arrest is satisfied: Code G para 2.5. In considering the individual circumstances, the constable must take into account the situation of the victim, the nature of the offence, the circumstances of the suspect and the needs of the investigative process: Code G para 2.8.

13 Police and Criminal Evidence Act 1984 s 24(5)(a), (b) (as substituted: see note 3 supra); Code G paras 2.4, 2.9(a), (b). An address is a satisfactory address for service of summons if the person will be at it for a sufficiently long period for it to be possible to serve him with a summons, or if some other person at that address specified by the person will accept service of the summons on his behalf: Code G para 2.9.

14 Police and Criminal Evidence Act 1984 s 24(5)(c)(i) (as substituted: see note 3 supra); Code G para 2.9(c)(i).

15 Police and Criminal Evidence Act 1984 s 24(5)(c)(ii) (as substituted: see note 3 supra); Code G para 2.9(c)(ii).

16 Police and Criminal Evidence Act 1984 s 24(5)(c)(iii) (as substituted: see note 3 supra); Code G para 2.9(c)(iii).

17 Police and Criminal Evidence Act 1984 s 24(5)(c)(iv) (as substituted: see note 3 supra); Code G para 2.9(c)(iv). This provision applies only where members of the public going about their normal business cannot reasonably be expected to avoid the person in question: Police and Criminal Evidence Act 1984 s 24(6) (as so substituted); Code G para 2.9(c)(iv).

18 Police and Criminal Evidence Act 1984 s 24(5)(c)(v) (as substituted: see note 3 supra); Code G para 2.9(c)(v).

19 Police and Criminal Evidence Act 1984 s 24(5)(d) (as substituted: see note 3 supra); Code G para 2.9(d).

20 Police and Criminal Evidence Act 1984 s 24(5)(e) (as substituted: see note 3 supra); Code G para 2.9(e). This may include: (1) where there are reasonable grounds to believe that the person has made false statements, has made statements which cannot be readily verified, has presented false evidence, may steal or destroy evidence, may make contact with co-suspects or conspirators, or may intimidate, threaten or make contact with witnesses, or where it is necessary to obtain evidence by questioning; (2) where in considering arrest in connection with an indictable offence there is a need to enter and search any premises occupied or controlled by a person, search the person, prevent contact with others, or take fingerprints, footwear impressions, samples or photographs of the suspect; or (3) for ensuring compliance with statutory drug testing requirements: Code G para 2.9(e)(i)-(iii).

The power of arrest must be exercised for a proper purpose, but this does not prevent an arrest on a holding charge, so as to facilitate the investigation of another, more serious offence, provided that the terms of a relevant power of arrest are satisfied: *R v Chalkley*, *R v Jeffries* [1998] QB 848, [1998] 2 Cr App Rep 79, CA. If the arresting constable knows that there is no possibility of a charge being made, the arrest is unlawful because the constable has acted on an irrelevant consideration or for an improper purpose: *Plange v Chief Constable of South Humberside Police* (1992) Times, 23 March, CA.

21 Police and Criminal Evidence Act 1984 s 24(5)(f) (as substituted: see note 3 supra); Code G para 2.9(f). This may arise if there are reasonable grounds for believing that if the person is not arrested he will fail to attend court or that street bail after arrest would be insufficient to deter the suspect from trying to evade prosecution: Code G para 2.9(f).

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## **925. Arrest without warrant: other persons.**

Other than in relation to the statutory offences of incitement to racial hatred and of incitement to religious hatred<sup>1</sup>, a person other than a constable<sup>2</sup> may arrest without a warrant anyone who is in the act of committing an indictable offence<sup>3</sup> and anyone whom he has reasonable grounds for suspecting to be committing an indictable offence<sup>4</sup>. Where an indictable offence has been committed<sup>5</sup>, a person other than a constable may arrest without a warrant anyone who is guilty of the offence<sup>6</sup> and anyone whom he has reasonable grounds for suspecting to be guilty of it<sup>7</sup>.

The power of summary arrest conferred by these provisions<sup>8</sup> on persons other than constables is exercisable only if:

- 1242 (1) the person making the arrest has reasonable grounds for believing that it is necessary to arrest the person in question in order to prevent him from:
- 59
- 92. (a) causing physical injury to himself or any other person<sup>9</sup>;
  - 93. (b) suffering physical injury<sup>10</sup>;
  - 94. (c) causing loss of or damage to property<sup>11</sup>; or
  - 95. (d) making off before a constable can assume responsibility for him<sup>12</sup>; and
- 60
- 1243 (2) it appears to the person making the arrest that it is not reasonably practicable for a constable to make it instead<sup>13</sup>.

1 Police and Criminal Evidence Act 1984 s 24A(5) (s 24A added by the Serious Organised Crime and Police Act 2005 s 110(1); Police and Criminal Evidence Act 1984 s 24A(5) prospectively added by the Racial and Religious Hatred Act 2006 s 2). The Police and Criminal Evidence Act 1984 s 24A(5) (as added) is to come into force as from a day to be appointed. At the date at which this volume states the law no such day had been appointed. Section 24A (as added) has effect in relation to any offence whenever committed: s 110(4). For the statutory offences of racial or religious hatred see the Public Order Act 1986 Pt 3 (ss 17-29) (as amended) (see PARAS 562-568 ante) or Pt 3A (ss 29A-29M) (as added) (see PARAS 569-576 ante).

2 Every police officer holds the office of constable: see PARA 857 note 2 ante.

3 Police and Criminal Evidence Act 1984 s 24A(1)(a) (as added: see note 1 supra). For the meaning of 'indictable offence' see PARA 1102 note 1 post. As from a day to be appointed, it is provided that s 24A (as added) does not permit a person other than a constable to arrest inside a polling station a person who commits or is suspected of committing an offence under the Representation of the People Act 1983 s 60 (see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 733): see the Electoral Administration Act 2006 s 71 (not yet in force). At the date at which this volume states the law no such day had been appointed.

4 Police and Criminal Evidence Act 1984 s 24A(1)(b) (as added: see note 1 supra). See note 3 supra.

5 If the person arrested is subsequently acquitted of the alleged offence for which he was arrested, an arrest will not have been lawful for these purposes because no offence has been committed: *R v Self* [1992] 3 All ER 476, 95 Cr App Rep 42, CA (decided under the Police and Criminal Evidence Act 1984 s 24 (as originally enacted)).

6 Police and Criminal Evidence Act 1984 s 24A(2)(a) (as added: see note 1 supra).

7 Ibid s 24A(2)(b) (as added: see note 1 supra).

8 Ie by ibid s 24A(1), (2) (as added) (see the text and notes 1-7 supra).

9 Ibid s 24A(3)(a), (4)(a) (as added: see note 1 supra).

10 Ibid s 24A(4)(b) (as added: see note 1 supra).

11 Ibid s 24A(4)(c) (as added: see note 1 supra).

12 Ibid s 24A(4)(d) (as added: see note 1 supra).

13 Ibid s 24A(3)(b) (as added: see note 1 supra).

## **UPDATE**

### **925 Arrest without warrant: other persons**

NOTE 1--Day now appointed: SI 2007/2490.

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## **926. Use of force in making arrest.**

A person<sup>1</sup> may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large<sup>2</sup>.

A person arrested may be handcuffed if he attempts to escape or if it is necessary to prevent his escaping<sup>3</sup>.

A person who assaults any other person with intent to resist or prevent his own arrest or that of another or who causes grievous bodily harm with intent to prevent arrest commits an offence<sup>4</sup>. Where a person uses force in order to escape from arrest, and death results, he may be guilty of manslaughter<sup>5</sup>.

1 As to the use of reasonable force by a constable see PARA 857 ante.

2 Criminal Law Act 1967 s 3(1). Section 3(1) replaces the rules of common law on the question when force used for a purpose mentioned in s 3(1) is justified by that purpose: s 3(2).

3 *Osborn v Veitch* (1858) 1 F & F 317; *Levy v Edwards* (1823) 1 C & P 40 at 43; *Wright v Court* (1825) 4 B & C 596; *Leigh v Cole* (1853) 6 Cox CC 329; *R v Taylor* (1895) 59 JP 393.

4 See PARAS 735, 737 ante. Obstructing the arrest of a person may constitute an offence: see PARA 58 ante. As to escape from lawful custody see PARA 742 ante.

5 *R v Porter* (1873) 12 Cox CC 444. As to the circumstances in which such action will amount to murder see PARA 84 et seq ante.

## **UPDATE**

### **926 Use of force in making arrest**

TEXT AND NOTE 2--See Criminal Justice and Immigration Act 2008 s 76 (reasonable force for purposes of self-defence etc). For transitional provisions and savings see Criminal Justice and Immigration Act 2008 Sch 27 para 27.

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## 927. Former statutory powers of arrest.

Subject to certain exceptions<sup>1</sup>, so much of any Act (including a local Act) passed before the Police and Criminal Evidence Act 1984 as enabled a constable<sup>2</sup>: (1) to arrest a person for an offence without a warrant<sup>3</sup>; or (2) to arrest a person otherwise than for an offence without a warrant or an order of a court<sup>4</sup>, has ceased to have effect<sup>5</sup>.

1 By virtue of the Police and Criminal Evidence Act 1984 s 26(2), Sch 2 (amended by the Representation of the People Act 1985 s 25(1); the Road Traffic (Consequential Provisions) Act 1988 s 3, Sch 1 Pt 1; the Prevention of Terrorism (Temporary Provisions) Act 1989 s 25(2), Sch 9 Pt I; the Children Act 1989 s 108(5)-(7), Sch 13 para 55, Sch 15; the Reserve Forces Act 1996 s 131(2), Sch 11; the Civil Contingencies Act 2004 s 32(2), Sch 3; and the Serious Organised Crime and Police Act 2005 ss 111, 174, Sch 7 para 24(1), (4), Sch 17 Pt 2), nothing in the Police and Criminal Evidence Act 1984 s 26(1) (see the text and notes 2-5 *infra*) affects:

- 349 (1) the Prison Act 1952 s 49 (as amended) (see PRISONS vol 36(2) (Reissue) PARA 540);
- 350 (2) the Visiting Forces Act 1952 s 13 (as amended) (see ARMED FORCES vol 2(2) (Reissue) PARA 62);
- 351 (3) the Army Act 1955 s 186 (as amended), s 190B (as added) (see ARMED FORCES vol 2(2) (Reissue) PARAS 62-63, 65);
- 352 (4) the Air Force Act 1955 ss 186, 190B (as amended and added) (see ARMED FORCES vol 2(2) (Reissue) PARAS 62-63, 65);
- 353 (5) the Naval Discipline Act 1957 ss 104, 105 (s 105 as amended) (see ARMED FORCES vol 2(2) (Reissue) PARAS 62-63, 65);
- 354 (6) the Children and Young Persons Act 1969 s 32 (as amended) (see PARA 933 *post*);
- 355 (7) the Immigration Act 1971 s 24(2), Sch 2 paras 17, 24, 33, Sch 3 para 7 (Sch 2 para 17 as amended; Sch 3 para 7 as added) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 156, 166, 213, 215);
- 356 (8) the Bail Act 1976 s 7 (as amended) (see PARA 1200 *post*);
- 357 (9) the Representation of the People Act 1983 Sch 1 r 36 (see ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARA 405);
- 358 (10) the Mental Health Act 1983 ss 18, 35(10), 36(8), 38(7), 136(1), 138 (s 18 as amended) (see MENTAL HEALTH vol 30(2) (Reissue) PARAS 447, 489, 494, 507, 550); or
- 359 (11) the Repatriation of Prisoners Act 1984 s 5(5) (see PRISONS vol 36(2) (Reissue) PARA 559).

2 Every police officer holds the office of constable: see PARA 857 note 2 *ante*.

3 Police and Criminal Evidence Act 1984 s 26(1)(a). Section 26 applies only to Acts giving powers to constables to arrest without warrant; consequently it does not apply to an Act which confers a power of arrest on any person: *Gapper v Chief Constable of Avon and Somerset Constabulary* [2000] QB 29, [1998] 4 All ER 248, CA. See also *DPP v Kitching* (1990) 154 JP 293, DC.

4 Police and Criminal Evidence Act 1984 s 26(1)(b). See note 3 *supra*.

5 *Ibid* s 26(1).



**UPDATE**

**927 Former statutory powers of arrest**

NOTE 1--Heads (3), (4), (5) omitted: Police and Criminal Evidence Act 1984 Sch 2 (amended by the Armed Forces Act 2006 Sch 17). Head (9) omitted: Police and Criminal Evidence Act 1984 Sch 2 (amended by the Electoral Administration Act 2006 Sch 2).

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## **928. Cross-border powers of arrest.**

Any constable<sup>1</sup> of a police force in England and Wales who has reasonable grounds for suspecting that an offence has been committed or attempted in England or Wales and that the suspected person is in Scotland or in Northern Ireland may arrest without a warrant the suspected person, wherever he is in Scotland or in Northern Ireland, provided that it appears to the constable that it would have been lawful for him to have arrested the suspected person without warrant had he been in England and Wales<sup>2</sup>. Any constable of a police force in Scotland who has reasonable grounds for suspecting that an offence has been committed or attempted in Scotland and that the suspected person is in England or Wales or in Northern Ireland may, as respects the suspected person, wherever he is in England or Wales or in Northern Ireland, exercise the same powers of arrest or detention as it would be competent for him to exercise were the person in Scotland provided that it appears to him that it would have been lawful for him to have exercised those powers had the suspected person been in Scotland<sup>3</sup>. Any constable of a police force in Northern Ireland<sup>4</sup> who has reasonable grounds for suspecting that an offence has been committed or attempted in Northern Ireland and that the suspected person is in England or Wales or in Scotland may arrest without a warrant the suspected person, wherever he is in England or Wales or in Scotland, if the suspected offence is an arrestable offence<sup>5</sup> or if, in the case of any other offence, it appears to the constable that service of a summons is for any specified reason<sup>6</sup> impracticable or inappropriate<sup>7</sup>.

It is the duty of a constable<sup>8</sup> who has arrested or, as the case may be, detained a person under these provisions:

- 1244 (1) if he arrested the person in Scotland, to take him to the nearest convenient designated police station<sup>9</sup> in England or in Northern Ireland or to a designated police station in a police area<sup>10</sup> in England, Wales or Northern Ireland in which the offence is being investigated<sup>11</sup>;
- 1245 (2) if he arrested the person in England or Wales, to take him to the nearest convenient police station in Scotland or to a police station within a sheriffdom in which the offence is being investigated or to the nearest convenient designated police station in Northern Ireland or to a designated police station in Northern Ireland in which the offence is being investigated<sup>12</sup>;
- 1246 (3) if he detained the person in England or Wales, to take the person detained to the nearest convenient police station in Scotland or to a police station within a sheriffdom in which the offence is being investigated or to the nearest convenient designated police station in England or Wales<sup>13</sup>;
- 1247 (4) if he arrested the person in Northern Ireland, to take him to the nearest convenient designated police station in England or Wales or to a designated police station in a police area in England or Wales in which the offence is being investigated or to the nearest convenient police station in Scotland or to a police station within a sheriffdom in which the offence is being investigated<sup>14</sup>; and
- 1248 (5) if he detained the person in Northern Ireland, to take him to the nearest convenient police station in Scotland or to a police station within a sheriffdom in which the offence is being investigated or to the nearest convenient designated police station in Northern Ireland<sup>15</sup>.

These provisions do not prejudice any other power of arrest<sup>16</sup>.

1 Every police officer holds the office of constable: see PARA 857 note 2 ante. The powers conferred on constables by the Criminal Justice and Public Order Act 1994 s 137(1), (2) (see the text and notes 2-3 infra) may be exercised by a constable appointed under the British Transport Commission Act 1949 s 53 (see POLICE vol 36(1) (2007 Reissue) PARA 129): Criminal Justice and Public Order Act 1994 s 137(2A) (added by the Anti-Terrorism, Crime and Security Act 2001 s 101, Sch 7 paras 15, 18).

2 Criminal Justice and Public Order Act 1994 s 137(1), (4) (s 137(1) amended, and s 137(4) added, by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 47(1), (2)(a), (b), (5)). A constable arresting a person under the Criminal Justice and Public Order Act 1994 s 137(1) (as amended) may use reasonable force and has the powers of search conferred by s 139 (as amended) (see PARA 937 post): s 137(8)(a).

3 Ibid s 137(2), (5). A constable arresting a person under s 137(2) has the same powers and duties, and the person arrested has the same rights, as he would have had if the arrest had been in Scotland (s 137(8)(b)); and a constable detaining a person under s 137(2) must act in accordance with the Criminal Procedure (Scotland) Act 1995 ss 14(2)-(8), 15(1), (2), (4)-(6), 18, as modified by the Criminal Justice and Public Order Act 1994 s 138(6) (ss 137(8)(c), 138(1), (2), (6) (s 138(2), (6) amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 s 5, Sch 4 para 93(6))).

4 'Constable of a police force', in relation to Northern Ireland, means a member of the Police Service of Northern Ireland or the Police Service of Northern Ireland Reserve: Criminal Justice and Public Order Act 1994 s 137(9) (amended by the Police (Northern Ireland) Act 2000 s 78(2)(c), (d)).

5 Criminal Justice and Public Order Act 1994 s 137(3), (6)(a). 'Arrestable offence' has the same meaning as in the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (NI 12): Criminal Justice and Public Order Act 1994 s 137(9) (definition added by the Serious Organised Crime and Police Act 2005 Sch 7 para 47(2)(c)).

6 The specified reasons are set out in the Criminal Justice and Public Order Act 1994 s 138(3)-(5) (s 138(3) amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 47(1), (3), (5)).

7 Criminal Justice and Public Order Act 1994 s 137(6)(b).

8 The constable must discharge this duty as soon as is reasonably practicable: *ibid* s 137(7).

9 For the meaning of 'designated police station', in relation to England and Wales, or Scotland, see the Police and Criminal Evidence Act 1984 s 35 (as amended); and PARA 938 post (definition applied by the Criminal Justice and Public Order Act 1994 s 137(9) (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 47(2)(c))). In relation to Northern Ireland, 'designated police station' has the same meaning as in the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (NI 12): Criminal Justice and Public Order Act 1994 s 137(9) (as so amended).

10 As to police areas see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

11 Criminal Justice and Public Order Act 1994 s 137(7)(a).

12 *Ibid* s 137(7)(b).

13 *Ibid* s 137(7)(c).

14 *Ibid* s 137(7)(d).

15 *Ibid* s 137(7)(e).

16 *Ibid* s 137(10).

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## **929. Reciprocal powers of arrest.**

Where a constable<sup>1</sup> of a police force in England and Wales would, in relation to an offence, have power to arrest a person in England or Wales<sup>2</sup>, a constable of a police force in Scotland or Northern Ireland has the like power of arrest in England and Wales<sup>3</sup>. Where a constable of a police force in Scotland or Northern Ireland<sup>4</sup> arrests a person in England or Wales by virtue of that power<sup>5</sup>, the constable is subject to requirements to inform the arrested person that he is under arrest and of the grounds for it<sup>6</sup> and to a requirement to take the arrested person to a police station<sup>7</sup>; and the constable also has powers<sup>8</sup> to search the arrested person<sup>9</sup>.

Where a constable of a police force in Scotland would, in relation to an offence, have power to arrest a person in Scotland, a constable of a police force in England and Wales or in Northern Ireland has the like power of arrest in Scotland<sup>10</sup>. Where a constable of a police force in England or Wales or in Northern Ireland arrests a person in Scotland by virtue of this provision<sup>11</sup>, the arrested person has the same rights and the constable the same powers and duties as he would have were the constable a constable of a police force in Scotland<sup>12</sup>.

Where a constable of a police force in Northern Ireland would, in relation to an offence, have power to arrest a person in Northern Ireland<sup>13</sup>, a constable of a police force in England and Wales or Scotland has the like power of arrest in Northern Ireland<sup>14</sup>. Where a constable of a police force in England and Wales or in Scotland arrests a person in Northern Ireland by virtue of this provision<sup>15</sup>, the constable is subject to requirements to inform the arrested person that he is under arrest and of the grounds for it<sup>16</sup> and to a requirement to take the arrested person to a police station<sup>17</sup>; and the constable also has powers<sup>18</sup> to search the arrested person<sup>19</sup>.

1 Every police officer holds the office of constable: see PARA 857 note 2 ante. The references to 'constables' in the Criminal Justice and Public Order Act 1994 s 140(1)-(4) (as amended) (see the text and notes 2-12 infra) include references to constables appointed under the British Transport Commission Act 1949 s 53 (see POLICE vol 36(1) (2007 Reissue) PARA 129); Criminal Justice and Public Order Act 1994 s 140(6A) (added by the Anti-Terrorism, Crime and Security Act 2001 s 101, Sch 7 paras 15, 19).

2 Ie under the Police and Criminal Evidence Act 1984 s 24 (as substituted) (see PARA 924 ante).

3 Criminal Justice and Public Order Act 1994 s 140(1) (amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 47(1), (4), (5)).

4 'Constable of a police force', in relation to Northern Ireland, means a member of the Police Service of Northern Ireland or the Police Service of Northern Ireland Reserve: Criminal Justice and Public Order Act 1994 s 140(7) (amended by the Police (Northern Ireland) Act 2000 s 78(2)(c), (d)).

5 Ie under the Criminal Justice and Public Order Act 1994 s 140(1) (as amended) (see the text and notes 1-3 supra).

6 Ibid s 140(2)(a). The requirements in question correspond to those imposed by the Police and Criminal Evidence Act 1984 s 28 (see PARA 931 post).

7 Criminal Justice and Public Order Act 1994 s 140(2)(b). The requirement in question corresponds to that imposed by the Police and Criminal Evidence Act 1984 s 30 (as amended) (see PARA 933 post).

8 Ie powers corresponding to those conferred by ibid s 32 (as amended) (see PARA 936 post).

9 Criminal Justice and Public Order Act 1994 s 140(2)(c).

- 10 Ibid s 140(3).
- 11 Ie under ibid s 140(3).
- 12 Ibid s 140(4).
- 13 Ie under the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (NI 12), art 26(6), art 26(7) or art 27 (arrestable offences and non-arrestable offences in certain circumstances).
- 14 Criminal Justice and Public Order Act 1994 s 140(5).
- 15 Ie under ibid s 140(5) (see the text and note 14 supra).
- 16 Ibid s 140(6)(a). The requirements in question correspond to those imposed by the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (NI 12), art 30.
- 17 Criminal Justice and Public Order Act 1994 s 140(6)(b). The requirement in question corresponds to that imposed by the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (NI 12), art 32 (and related requirements).
- 18 Ie powers corresponding to those conferred by ibid art 34.
- 19 Criminal Justice and Public Order Act 1994 s 140(6)(c).

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### **930. Common law power of arrest to deal with or prevent breaches of the peace.**

A breach of the peace is not a criminal offence in English law<sup>1</sup>.

A constable<sup>2</sup> or an ordinary citizen may at common law arrest without warrant: (1) a person committing a breach of the peace in his presence; (2) a person who he reasonably believes<sup>3</sup> will commit such a breach of the peace in the immediate future, even though at the time of the arrest such person has not committed any breach; and (3) a person who has committed a breach of the peace where it is reasonably believed that a renewal of the breach is threatened<sup>4</sup>. There is no breach of the peace unless an act is done or threatened to be done which: (a) actually harms a person or, in his presence, his property; (b) is likely to cause such harm; or (c) puts a person in fear of such harm<sup>5</sup>. A breach of the peace can occur on private premises, and can do so even if the only people likely to be affected by the conduct are on the premises<sup>6</sup>. The power to arrest for breach of the peace extends to arresting a person whose behaviour is not unlawful but threatens to provoke a breach of the peace by another, provided that his behaviour is unreasonable, that it clearly interferes with the rights of others and that its natural consequence must be not wholly unreasonable violence by the other<sup>7</sup>.

Nothing in the Public Order Act 1986 affects this common law power of arrest<sup>8</sup>.

1 *R v County of London Quarter Sessions Appeals Committee, ex p Metropolitan Police Comr* [1948] 1 KB 670 at 676, [1948] 1 All ER 72 at 75, DC, per Lord Goddard CJ; *Williamson v Chief Constable of the West Midlands* [2003] EWCA Civ 337, [2004] 1 WLR 14. Detention of a person who has been arrested for a breach of the peace is consequently not subject to the Police and Criminal Evidence Act 1984 Pt IV (ss 34-51) (as amended) or the Bail Act 1976 (see PARAS 1165-1201 post) because these provisions are respectively concerned with the detention of persons arrested for an offence, and bail in relation to those accused or convicted of an offence: *Williamson v Chief Constable of the West Midlands* supra. Breach of the peace can be regarded as a criminal offence for certain purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (see art 5(1)(c); and *Steel v United Kingdom* (1998) 28 EHRR 603, ECtHR), but this does not mean that it must also be an 'offence' for the purposes of the Police and Criminal Evidence Act 1984 (*Williamson v Chief Constable of the West Midlands* supra). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

2 Every police officer holds the office of constable: see PARA 857 note 2 ante.

3 Where the power of arrest is exercised on the basis of a belief that a breach of the peace is imminent, not only must the belief be honest, albeit mistaken, but it must be founded on reasonable grounds: *R v Howell* [1982] QB 416, 73 Cr App Rep 31, CA.

4 *R v Howell* [1982] QB 416, 73 Cr App Rep 31, CA, applied in *Foulkes v Chief Constable of Merseyside Police* [1998] 3 All ER 705, CA; *R v Ramsell* (1999) unreported, CA. An apprehended renewal of a breach of the peace must be 'about to occur' (ie 'imminent'): *Foulkes v Chief Constable of Merseyside Police* supra; *R v Ramsell* supra. As to restraint falling short of arrest see *Albert v Lavin* [1982] AC 546, 74 Cr App Rep 150, HL.

A person makes a valid arrest when he reasonably believes a breach of the peace is about to be committed if he says merely, 'I am arresting you for a breach of the peace', and is not to be taken in such a case as referring only to the actual commission of a breach: *R v Howell* supra.

5 *R v Howell* [1982] QB 416, 73 Cr App Rep 31, CA, applied in *Parkin v Norman* [1983] QB 92, [1982] 2 All ER 583, DC; *G v Chief Superintendent of Police, Stroud* (1988) 86 Cr App Rep 92, DC; *Percy v DPP* [1995] 3 All ER 124, [1995] 1 WLR 1382, DC; *Sutton v Metropolitan Police Comr* (1998) unreported, DC. A disturbance which does not relate to violence cannot in itself constitute a breach of the peace: *R v Howell* supra. See also *Wooding*

*v Oxley* (1839) 9 C & P 1 (disturbance by noise at a public meeting not a breach of the peace); *Jordan v Gibbon* (1863) 8 LT 391 (disturbance caused by quarrel between spouses not a breach of the peace unless violence or threatened violence); *Lewis v Chief Constable of Greater Manchester* (1991) Independent, 23 October, CA (loud music and screaming not a breach of the peace); *Jarrett v Chief Constable of West Midlands Police Force* [2003] EWCA Civ 397, [2003] 14 LS Gaz R 29 (agitation or excitement including hysterical waving of handbag not a breach of the peace); *R (on the application of Hawkes) v DPP* [2005] EWHC 3046 (Admin) (verbal abuse not a breach of the peace; there must be a connection with violence on the part of the defendant). For the purposes of the definition of 'breach of the peace' in *R v Howell* supra, 'harm' 'must be unlawful harm'; consequently harm resulting from the use of reasonable force to resist an unlawful police search did not constitute a breach of the peace: *McBean v Parker* [1983] Crim LR 399, DC. Cf *R v Chief Constable of Devon and Cornwall, ex p Central Electricity Generating Board* [1982] QB 458 at 471, [1981] 3 All ER 826 at 832, CA, per Lord Denning MR (there is a breach of the peace whenever a person lawfully carrying out his work is unlawfully and physically prevented by another from doing it), applied in *Addison v Chief Constable of the West Midlands Police* [2004] 1 WLR 29n, CA. The concept of 'breach of the peace' and the power of arrest associated with it are sufficiently precise to be 'lawful' and 'prescribed by law' for the purposes of the European Convention on Human Rights art 5 (right to liberty) and art 10 (freedom of expression): *Steel v United Kingdom* (1998) 28 EHRR 603, ECtHR.

6 *McConnell v Chief Constable of Greater Manchester Police* [1990] 1 All ER 423, 91 Cr App Rep 88, CA, applied in *Chief Constable of Humberside Police v McQuade* [2001] EWCA Civ 1330, [2002] 1 WLR 1347.

7 *Nicol v DPP* (1996) 160 JP 155, DC; *Redmond-Bate v DPP* [1999] Crim LR 998, (1999) Times, 28 July, DC; *Bibby v Chief Constable of Essex Police* (2000) 164 JP 297, CA.

8 Public Order Act 1986 s 40(4). As to a constable's power of arrest without warrant under s 5 see PARA 560 ante. As to the general function of a constable to preserve the Queen's peace see POLICE vol 36(1) (2007 Reissue) PARA 478.

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## **(iv) Procedure Following Arrest**

### **931. Information to be given on arrest.**

Where a person is arrested, otherwise than by being informed that he is under arrest, the arrest is not lawful unless the person arrested is informed that he is under arrest as soon as is practicable after his arrest<sup>1</sup>. No arrest is lawful unless the person arrested is informed of the ground<sup>2</sup> for the arrest at the time of<sup>3</sup>, or as soon as is practicable after, the arrest<sup>4</sup>. Where a person is arrested by a constable<sup>5</sup>, these provisions apply regardless of whether the ground for the arrest is obvious<sup>6</sup>. However, nothing in these provisions is to be taken to require a person to be informed either that he is under arrest<sup>7</sup> or of the ground for the arrest<sup>8</sup> if it was not reasonably practicable for him to be so informed by reason of his having escaped from arrest before the information could be given<sup>9</sup>.

A person who is arrested, or further arrested, must be cautioned unless it is impracticable to do so by reason of his condition or behaviour at the time, or he has already been cautioned immediately prior to arrest<sup>10</sup>.

1 Police and Criminal Evidence Act 1984 s 28(1); Code G: Code of Practice for the Statutory Power of Arrest by Police Officers paras 2.2, 3.3; and see *R v Brosch* [1988] Crim LR 743, CA (Police and Criminal Evidence Act 1984 s 28 reflects position at common law as set out in *Christie v Leachinsky* [1947] AC 573, [1947] 1 All ER 567, HL). See also *Chapman v DPP* (1988) 89 Cr App Rep 190 at 197, DC, per Buplan LJ; *Taylor v Chief Constable of Thames Valley Police* [2004] EWCA Civ 858, [2004] 3 All ER 503, [2004] 1 WLR 3155.

2 Arresting officers are required to inform the person arrested of the relevant circumstances of the arrest in relation to that person's involvement, suspected involvement or attempted involvement in the commission of an offence and in relation to the reasonable grounds for believing that that person's arrest is necessary: Code G para 2.2.

3 'At the time' of the arrest comprehends a short but reasonable period of time around the moment of arrest, both before and after; whether words were spoken at the time of arrest or not is a question of fact: *Nicholas v Parsonage* [1987] RTR 199, DC. It is not sufficient to tell a person that he is being arrested because he has not given his name and address as required; there must be an indication in some words of an offence for which the arrest is being made: *Nicholas v Parsonage* supra. See also *Dawes v DPP* [1995] 1 Cr App Rep 65, [1994] RTR 209, DC (suspect trapped inside car by automatic activation of device set by police; held he was arrested at the moment that he was so trapped).

4 Police and Criminal Evidence Act 1984 s 28(3); Code G para 3.3. An arrested person must be given sufficient information to enable him to understand that he has been deprived of his liberty and the reason he has been arrested, eg when a person is arrested on suspicion of committing an offence he must be informed of the suspected offence's nature, when and where it was committed. The suspect must also be informed of the reason or reasons why arrest is considered necessary: Code G Guidance note 3. Vague or technical language should be avoided: Code G Guidance note 3. A person arrested without warrant must be given adequate information of the reason for his arrest; but the question whether a police officer has complied with this obligation must be answered taking into account all the background circumstances; and the officer's conduct must be judged bearing in mind that he is not required to do more than is reasonable in those circumstances: *Abbassy v Metropolitan Police Comr* [1990] 1 All ER 193, 90 Cr App Rep 250, CA. The reason for the arrest may be given by an officer other than the arresting officer: *Dhesi v Chief Constable of West Midlands Police* (2000) Times, 9 May, CA.

An arresting officer is under a duty to maintain arrest until it is possible to inform the person arrested of the ground of arrest, but subsequent failure to give this information does not retrospectively make the officer's acts in the intermediate period unlawful: *DPP v Hawkins* [1988] 3 All ER 673, 88 Cr App Rep 166, DC. An arrest which



is unlawful because no reason has been given may subsequently become lawful arrest from the moment that reasons are given: *Lewis v Chief Constable of the South Wales Constabulary* [1991] 1 All ER 206, CA. A collateral motive for an arrest (as in the case of an arrest to enable an investigation into a more serious offence) on otherwise good and stated grounds does not make it unlawful: *R v Chalkley, R v Jeffries* [1998] QB 848 at 872-873, [1998] 2 Cr App Rep 79 at 103, CA.

5 Every police officer holds the office of constable: see PARA 857 note 2 ante.

6 Police and Criminal Evidence Act 1984 s 28(2), (4); Code G para 2.2.

7 Police and Criminal Evidence Act 1984 s 28(5)(a).

8 Ibid s 28(5)(b).

9 Ibid s 28(5).

10 Code G para 3.4. Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 10.1-10.5, 10.7, 10.9 (see PARA 959 post) are applied by Code G paras 3.1-3.7. Nothing in Code G requires a caution to be given or repeated when informing a person not under arrest that he may be prosecuted for an offence, but a court will not be able to draw any adverse inferences under the Criminal Justice and Public Order Act 1994 s 34 (see PARA 1552 post) if the person was not cautioned: Code G Guidance note 4. If it appears that a person does not understand the caution, the person giving it should explain it in his own words: Code G Guidance note 5.

## **UPDATE**

### **931 Information to be given on arrest**

NOTE 1--See also *Wood v DPP* [2008] EWHC 1056 (Admin), [2008] All ER (D) 162 (May), (2008) Times, 23 May, DC.

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### **932. Records of arrest.**

The arresting officer is required to record in his pocket book or by other methods used for recording information the nature and circumstances of the offence leading to the arrest; the reason or reasons why arrest was necessary; the giving of the caution; and anything said by the person at the time of arrest<sup>1</sup>. Such a record should be made at the time of the arrest unless impracticable to do so<sup>2</sup>. If not made at that time, the record should be completed as soon as possible thereafter<sup>3</sup>.

On arrival at the police station, the custody officer<sup>4</sup> must open the custody record<sup>5</sup>. The information given by the arresting officer on the circumstances and reason or reasons for arrest must be recorded as part of the custody record<sup>6</sup>. Alternatively, a copy of the record made by the officer in accordance with the provision described above must be attached as part of the custody record<sup>7</sup>.

The custody record will serve as a record of the arrest<sup>8</sup>.

1 Code G: Code of Practice for the Statutory Power of Arrest by Police Officers para 4.1.

2 Code G para 4.2.

3 Code G para 4.2.

4 See PARA 939 post.

5 Code G para 4.3. As to the custody record see PARA 940 post.

6 Code G para 4.3.

7 Code G para 4.3. See Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 3.4, 10.3; and PARAS 948, 959 post.

8 Code G para 4.4. Copies of the custody record must be provided in accordance with Code C paras 2.4, 2.5 (see PARA 940 post) and access for inspection of the original record in accordance with Code C para 2.5 (see PARA 940 post).

Records of interview, significant statements or silences will be treated in the same way as set out in Code C paras 10.1-10.13, 11.1A-11.20 (see PARAS 959-963 post) and in Code E: Code of Practice on Audio Recording Interviews with Suspects (see PARA 971 et seq post).

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### **933. Arrest elsewhere than at police station.**

Where a person is, at any place other than a police station, arrested by a constable for an offence<sup>1</sup> or taken into custody by a constable after being arrested for an offence by a person other than a constable<sup>2</sup>, he must be taken to a police station by a constable as soon as practicable after the arrest<sup>3</sup>. This duty is, however, subject to two qualifications:

- 1249 (1) a constable may release on bail a person who is arrested or taken into custody in these circumstances<sup>4</sup>; and
- 1250 (2) a person arrested by a constable at any place other than a police station must be released without bail if, at any time before the arrested person reaches a police station, a constable is satisfied that there are no grounds for keeping him under arrest or releasing him<sup>5</sup> on bail<sup>6</sup>.

A constable who is working in a locality covered by a police station which is not a designated police station<sup>7</sup> and a constable who belongs to a body of constables maintained by an authority other than a police authority<sup>8</sup> may take an arrested person to any police station unless it appears to the constable that it may be necessary to keep the arrested person in police detention for more than six hours<sup>9</sup>.

Any constable may take an arrested person to any police station if:

- 1251 (a) either the constable has arrested him without the assistance of any other constable and no other constable is available to assist him<sup>10</sup> or the constable has taken him into custody from a person other than a constable without the assistance of any other constable and no other constable is available to assist him<sup>11</sup>; and
- 1252 (b) it appears to the constable that he will be unable to take the arrested person to a designated police station without the arrested person injuring himself, the constable or some other person<sup>12</sup>.

If the first police station to which an arrested person is taken after his arrest is not a designated police station, he must be taken to a designated police station not more than six hours after his arrival at the first police station unless he is released previously<sup>13</sup>.

1 Police and Criminal Evidence Act 1984 s 30(1)(a) (s 30(1), (7), (10), (11) substituted, ss 30(1A), (1B), (7A), (10A), 30A-30D added, and s 30(2), (12) amended, by the Criminal Justice Act 2003 s 4). For these purposes, an arrest for failure to answer police bail under s 46A (as added and amended) (see PARA 941 post) is to be treated as an arrest for an offence: s 46A(3)(a) (added by the Criminal Justice and Public Order Act 1994 s 29(2)). This is subject to the obligation in the Police and Criminal Evidence Act 1984 s 46A(2) (as added) (see PARA 941 post): s 46A(3)(a) (as so added).

2 Ibid s 30(1)(b) (as substituted: see note 1 supra).

3 Ibid s 30(1A) (as added: see note 1 supra). Subject to s 30(3), (5) (see the text and notes 7-12 infra), the police station to which an arrested person is taken under s 30(1A) (as added) must be a designated police station: s 30(2) (as amended: see note 1 supra). As to designated police stations see PARA 938 post. The persons who may take an arrested person to a police station include suitably designated escort officers: see the

Police Reform Act 2002 s 38(6), Sch 4 para 34 (as amended); and POLICE vol 36(1) (2007 Reissue) PARA 529. Where there is any delay the reasons for the delay must be recorded when the arrested person first arrives at a police station or (as the case may be) is released on bail: s 30(11) (as substituted: see note 1 supra).

Nothing in s 30(1A) (as added) or s 30A (as added) (see the text and note 4 infra) prevents a constable delaying taking a person to a police station or releasing him on bail if the presence of that person at a place other than a police station is necessary in order to carry out such investigations as it is reasonable to carry out immediately (s 30(10), (10A) (s 30(10) as substituted and s 30(10A) as added: see note 1 supra), although this does not affect the Immigration Act 1971 s 4, Sch 2 para 18(3) (power to take into custody for purpose of ascertaining immigration status: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 156): Police and Criminal Evidence Act 1984 s 30(13). Even where a constable is justified in delaying taking a person to a police station, he is not entitled to ask a lengthy series of questions which ought properly to be asked at a police station where the relevant provisions of the Police and Criminal Evidence Act 1984 and the codes of practice apply; if he does, he risks having the answers excluded under s 78 (see PARA 1365 post): *R v Khan* [1993] Crim LR 54, CA.

Also, nothing in the Police and Criminal Evidence Act 1984 s 30(1A) (as added) or s 30A (as added) is to be taken to affect: (1) the Immigration Act 1971 Sch 2 paras 16(3) or 18(1) (detention at places other than police stations: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 156) (Police and Criminal Evidence Act 1984 s 30(12)(a) (as amended: see note 1 supra)); (2) the Criminal Justice Act 1972 s 34(1) (as amended) (power of constable to take drunken offender to treatment centre: see PARA 596 ante) (Police and Criminal Evidence Act 1984 s 30(12)(b) (as so amended)); or (3) any provision of the Terrorism Act 2000 (Police and Criminal Evidence Act 1984 s 30(12)(c) (s 30(12) as so amended; and s 30(12)(c) added by the Terrorism Act 2000 s 125(1), Sch 15 para 5(1), (2))).

Every police officer holds the office of constable: see PARA 857 note 2 ante.

4 Police and Criminal Evidence Act 1984 ss 30(1B), 30A(1) (as added: see note 1 supra). Such bail is commonly described as 'street bail'. A person may be released on bail under s 30A(1) (as added) at any time before he arrives at a police station (s 30A(2) (as so added)) and must be required to attend a police station (s 30A(3) (as so added)). No other requirement may be imposed on the person as a condition of bail: s 30A(4) (as so added). The police station which the bailed person is required to attend may be any police station: s 30A(5) (as so added). Nothing in the Bail Act 1976 (see PARA 1165 et seq post) applies in relation to bail under the Police and Criminal Evidence Act 1984 s 30A (as added): s 30C(3) (as so added).

Where a constable grants bail to a person under s 30A (as added) he must give that person a notice in writing before he is released (s 30B(1) (as so added)) stating the offence for which he was arrested (s 30B(2)(a) (as so added)) and the ground on which he was arrested (s 30B(2)(b) (as so added)) and informing him that he is required to attend a police station (s 30B(3) (as so added)). The notice may also specify the police station which the person is required to attend and the time when he is required to attend (s 30B(4) (as so added)), and if it does not include such information the person must subsequently be given a further notice in writing which does contain it (s 30B(5) (as so added)). The person may be required to attend a different police station from that specified in the notice under s 30B(1) or (5) (as added) or to attend at a different time (s 30B(6) (as so added)); and he must be given notice in writing of any such change, although more than one such notice may be given to him (s 30B(7) (as so added)).

A person who has been required to attend a police station is not required to do so if he is given notice in writing that his attendance is no longer required: s 30C(1) (as so added). If a person is required to attend a police station which is not a designated police station he must be either released (s 30C(2)(a) (as so added)) or taken to a designated police station (s 30C(2)(b) (as so added)) not more than six hours after his arrival (s 30C(2) (as so added)).

Nothing in ss 30A-30C (as added) prevents the re-arrest without a warrant of a person released on bail under s 30A (as added) if new evidence justifying a further arrest has come to light since his release: s 30C(4) (as so added).

A constable may arrest without a warrant a person who has been released on bail under s 30A (as added) subject to a requirement to attend a specified police station (s 30D(1)(a) (as so added)) but who fails to attend the police station at the specified time (s 30D(1)(b) (as so added)). For these purposes, 'specified' means specified in a notice under s 30B(1) or (5) (as added) or, if notice of change has been given under s 30B(7) (as added), in that notice (s 30D(3) (as so added)). A person so arrested must be taken to a police station (which may be the specified police station or any other police station) as soon as practicable after the arrest: s 30D(2) (as so added). For the purposes of s 30 (as added) (subject to the obligation in s 30D(2) (as added)) and s 31 (see PARA 934 post), an arrest under s 30D (as added) is to be treated as an arrest for an offence: s 30D(4) (as so added).

5 le under *ibid* s 30A (as added) (see the text and note 4 supra).

6 *Ibid* s 30(7) (as substituted: see note 1 supra); s 30(7A) (as added: see note 1 supra). A constable who so releases a person must record the fact that he has done so (s 30(8)) and must make that record as soon as is practicable after the release (s 30(9)).

- 7 Ibid s 30(4)(a).
- 8 Ibid s 30(4)(b).
- 9 Ibid s 30(3).
- 10 Ibid s 30(5)(a)(i).
- 11 Ibid s 30(5)(a)(ii).
- 12 Ibid s 30(5)(b).
- 13 Ibid s 30(6).

## **UPDATE**

### **933 Arrest elsewhere than at police station**

NOTE 4--1984 Act s 30A(4) replaced by s 30A(3A), (3B), (4) (substituted by the Police and Justice Act 2006 Sch 6 para 2). Where a constable releases a person on bail under the 1984 Act s 30A(1) no recognisance for the person's surrender to custody must be taken from the person, no security for the person's surrender to custody must be taken from the person or from anyone else on the person's behalf, the person must not be required to provide a surety or sureties for his surrender to custody and no requirement to reside in a bail hostel may be imposed as a condition of bail: s 30A(3A) (as so substituted). Subject to s 30A(3A), where a constable releases a person on bail under s 30A(1) the constable may impose, as conditions of the bail, such requirements as appear to the constable to be necessary to secure that the person surrenders to custody, to secure that the person does not commit an offence while on bail, to secure that the person does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person or for the person's own protection or, if the person is under the age of 17, for the person's own welfare or in the person's own interests: s 30A(3B) (as so substituted). Where a person is released on bail under s 30A(1), a requirement may be imposed on the person as a condition of bail only under s 30A(1)-(3): s 30A(4) (as so substituted).

If the person referred to in s 30B is granted bail subject to conditions under s 30A(3B), the notice also must specify the requirements imposed by those conditions, must explain the opportunities under ss 30CA(1), 30CB(1) for the variation of those conditions, and if it does not specify the police station at which the person is required to attend, must specify a police station at which the person may make a request under s 30CA(1)(b): s 30B(4A) (added by the 2006 Act Sch 6 para 3).

Where a person released on bail under the 1984 Act s 30A(1) is on bail subject to conditions, a relevant officer at the police station at which the person is required to attend, or where no notice under s 30B specifying that police station has been given to the person, a relevant officer at the police station specified under s 30B(4A)(c), may, at the request of the person but subject to s 30A(2), vary the conditions: s 30CA(1) (ss 30CA, 30CB added by the 2006 Act Sch 6 para 4). On any subsequent request made in respect of the same grant of bail, s 30CA(1) confers power to vary the conditions of the bail only if the request is based on information that, in the case of the previous request or each previous request, was not available to the relevant officer considering that previous request when he was considering it: s 30CA(2) (as so added). Where conditions of bail granted to a person under s 30A(1) are varied under s 30CA(1), (1) s 30A(3A) applies; (2) requirements imposed by the conditions as so varied must be requirements that appear to the relevant officer varying the conditions to be necessary for any of the purposes mentioned in s 30A(3B); and (3) the relevant officer who varies

the conditions must give the person notice in writing of the variation: s 30CA(3) (as so added). Power under s 30CA(1) to vary conditions is, subject to heads (1), (2), power to vary or rescind any of the conditions and impose further conditions: s 30CA(4) (as so added). 'Relevant officer', in relation to a designated police station, means a custody officer but, in relation to any other police station (a) means a constable, or a person designated as a staff custody officer under the Police Reform Act 2002 s 38 (see POLICE vol 36(1) (2007 Reissue) PARA 529), who is not involved in the investigation of the offence for which the person making the request under s 30CA(1) was under arrest when granted bail under s 30A(1), if such a constable or officer is readily available; and (b) if no such constable or officer is readily available, means a constable other than the one who granted bail to the person, if such a constable is readily available and, if no such constable is readily available, means the constable who granted bail: s 30CA(5) (as so added).

Where a person released on bail under s 30A(1) is on bail subject to conditions, a magistrates' court may, on an application by or on behalf of the person, vary the conditions if (i) the conditions have been varied under s 30CA(1) since being imposed under s 30A(3B); (ii) a request for variation under s 30CA(1) of the conditions has been made and refused; or (iii) a request for variation under s 30CA(1) of the conditions has been made and the period of 48 hours beginning with the day when the request was made has expired without the request having been withdrawn or the conditions having been varied in response to the request: s 30CB(1) (as so added). In proceedings on an application for a variation under s 30CB(1), a ground may not be relied on unless in a case falling within head (i) above, the ground was relied on in the request in response to which the conditions were varied under s 30CA(1) or in a case falling within head (ii) or (iii) above, the ground was relied on in the request mentioned in that head, but this does not prevent the court, when deciding the application, from considering different grounds arising out of a change in circumstances that has occurred since the making of the application: s 30CB(2) (as so added). Where conditions of bail granted to a person under s 30A(1) are varied under s 30CB(1), (A) s 30A(3A) applies; (B) requirements imposed by the conditions as so varied must be requirements that appear to the court varying the conditions to be necessary for any of the purposes mentioned in s 30A(3B); and (c) that bail does not lapse but continues subject to the conditions as so varied: s 30CB(3) (as so added). Power under s 30CB(1) to vary conditions is, subject to heads (A), (B), power to vary or rescind any of the conditions and to impose further conditions: s 30CB(4) (as so added).

A person who has been released on bail under s 30A may be arrested without a warrant by a constable if the constable has reasonable grounds for suspecting that the person has broken any of the conditions of bail: s 30D(2A) (s 30D(2A), (2B) added, s 30D(4) amended by the 2006 Act Sch 6 para 5). A person arrested under the 1984 Act s 30D(2A) must be taken to a police station, which may be the specified police station mentioned in s 30D(1) or any other police station, as soon as practicable after the arrest: s 30D(2B) (as so added). Reference to obligation in s 30D(2) is now to obligations in s 30D(2), (2B): s 30D(4) (as so amended).

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#### **934. Arrest for further offence.**

Where:

1253 (1) a person has been arrested for an offence<sup>1</sup> and is at a police station in consequence of that arrest<sup>2</sup>; and

1254 (2) it appears to a constable<sup>3</sup> that, if he were released from that arrest, he would be liable to arrest for some other offence<sup>4</sup>,

he must be arrested for that other offence<sup>5</sup>.

1 Police and Criminal Evidence Act 1984 s 31(a)(i). For these purposes, an arrest under s 46A (as added and amended) (power to arrest for failure to answer police bail: see PARA 941 post) is treated as an arrest for an offence (s 46A(3)(b) (added by the Criminal Justice and Public Order Act 1994 s 29(2))); however, an arrest for breach of an injunction with a power of arrest under what is now the Family Law Act 1996 is not an arrest for an offence (*Wheeldon v Wheeldon* [1997] 3 FCR 769, [1998] 1 FLR 463, CA).

2 Police and Criminal Evidence Act 1984 s 31(a)(ii).

3 Every police officer holds the office of constable: see PARA 857 note 2 ante.

4 Police and Criminal Evidence Act 1984 s 31(b).

5 Ibid s 31. The purpose of s 31 is to prevent the release and immediate re-arrest of the accused; there is nothing to prevent the constable delaying arrest under s 31 until such time as the accused's release is imminent: *R v Samuel* [1988] QB 615 at 622, 87 Cr App Rep 232 at 238, CA, per Hodgson J (obiter); and see also *Wheeldon v Wheeldon* [1997] 3 FCR 769, [1998] 1 FLR 463, CA. A constable's powers under the Police and Criminal Evidence Act 1984 s 31 may also be exercised by a suitably designated investigating officer: see the Police Reform Act 2002 s 38(6), Sch 4 para 21; and POLICE vol 36(1) (2007 Reissue) PARA 529.

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### **935. Bail after arrest.**

A release on bail<sup>1</sup> of a person under the Police and Criminal Evidence Act 1984<sup>2</sup> is a release on bail granted in accordance with specified provisions in the Bail Act 1976<sup>3</sup>; but nothing in the Bail Act 1976 prevents the re-arrest<sup>4</sup> without warrant of a person released on bail subject to a duty to attend at a police station if new evidence justifying a further arrest has come to light since his release<sup>5</sup>.

Where a custody officer<sup>6</sup> grants bail to a person subject to a duty to appear before a magistrates' court, he must appoint for the appearance either:

- 1255 (1) a date which is not later than the first sitting of the court after the person is charged with the offence<sup>7</sup>; or
- 1256 (2) where he is informed by the designated officer for the relevant local justice area that the appearance cannot be accommodated until a later date, that later date<sup>8</sup>.

Where a custody officer has granted bail to a person subject to a duty to appear at a police station, the custody officer may give notice in writing to that person that his attendance at the police station is not required<sup>9</sup>.

1 For these purposes, references to 'bail' are references to bail subject to a duty either to appear before a magistrates' court at such time and such place, or to attend at such police station at such time, as the custody officer (see PARA 939 post) may appoint: Police and Criminal Evidence Act 1984 s 47(3) (amended by the Crime and Disorder Act 1998 s 46(1)). The Police and Criminal Evidence Act 1984 s 47(3) (as amended) is subject to s 47(3A), (4) (s 47(3A) as added) (see the text and notes 7-9 infra): s 47(3) (as so amended).

2 le under ibid Pt IV (ss 34-51) (as amended): see PARA 938 et seq post.

3 Ibid s 47(1) (amended by the Criminal Justice and Public Order Act 1994 s 27(1); and by the Criminal Justice Act 2003 s 28, Sch 2 paras 1, 6(1)-(3)). The specified provisions are the Bail Act 1976 s 3 (as amended), s 3A (as added and amended), s 5 (as amended), s 5A (as added and amended) (see PARAS 1167-1168, 1174 post) as they apply to bail granted by a constable: Police and Criminal Evidence Act 1984 s 47(1) (as so amended).

The normal powers to impose conditions of bail are available to the custody officer where he releases a person on bail under s 37(7)(a) (as substituted) (see PARA 941 post) or s 38(1) (as amended) (see PARA 944 post) (including that provision as applied by s 40(10) (as amended) (see PARA 944 post)), but not in any other case: s 47(1A) (added by the Criminal Justice and Public Order Act 1994 s 27(1)(b); and amended by the Criminal Justice Act 2003 Sch 2 paras 1, 6(3)). For the meaning of 'the normal powers to impose conditions of bail' see the Bail Act 1976 s 3(6) (as amended); and PARA 1167 note 19 post (definition applied by Police and Criminal Evidence Act 1984 s 47(1A) (as so added)). No application may be made under the Bail Act 1976 s 5B (as added and amended) (see PARA 1175 post) if a person is released on bail under the Police and Criminal Evidence Act 1984 s 37(7)(a) (as substituted) or s 37C(2)(b) (as added) (see PARAS 941, 943 post): s 47(1B) (s 47(1B)-(1F) added by the Criminal Justice Act 2003 Sch 2 para 6(4)).

Where a person released on bail under the Police and Criminal Evidence Act 1984 s 37(7)(a) (as substituted) or s 37C(2)(b) (as added) is on bail subject to conditions:

360 (1) he is not entitled to make an application under the Magistrates' Courts Act 1980 s 43B (as added) (power to grant bail where police bail has been granted: see PARA 1185 post) (Police and Criminal Evidence Act 1984 s 47(1C), (1D) (as so added));



361 (2) a magistrates' court may, on an application by or on his behalf, vary the conditions of bail (s 47(1E) (as so added)); and

362 (3) where a magistrates' court so varies the conditions of bail, that bail will not lapse but continues subject to the conditions as so varied (s 47(1F) (as so added)).

For the meaning of 'vary' see the Bail Act 1976 s 2(2); and PARA 1167 note 35 post (definition applied by the Police and Criminal Evidence Act 1984 s 47(1E) (as so added)).

4 Where a person who was released on bail under *ibid* Pt IV (as amended) subject to a duty to attend at a police station is re-arrested, the provisions of Pt IV (as amended) apply to him as they apply to a person arrested for the first time (s 47(7) (amended by the Criminal Justice and Public Order Act 1994 s 29(4)(e); and the Criminal Justice Act 2003 Sch 2 para 10(b))), although this does not apply to a person who is arrested under the Police and Criminal Evidence Act 1984 s 46A (as added and amended) (power to arrest for failure to answer police bail: see PARA 941 post) or who has attended a police station in accordance with the grant of bail (and who accordingly is deemed by s 34(7) (see PARA 945 post) to have been arrested for an offence) (s 47(7) (as so amended)).

5 As to custody officers see PARA 939 post.

6 Police and Criminal Evidence Act 1984 s 47(2). Where a person who has been granted bail under Pt IV (as amended) and either has attended at the police station in accordance with the grant of bail or has been arrested under s 46A (as added and amended) (see PARA 941 post) is detained at any police station, any time during which he was in police detention prior to being granted bail is to be included as part of any period which falls to be calculated under Pt IV (as amended): s 47(6) (amended by the Criminal Justice and Public Order Act 1994 s 29(4)(d); and the Criminal Justice Act 2003 Sch 2 para 10(a)). For the meaning of 'in police detention' see PARA 939 note 9 post.

7 Police and Criminal Evidence Act 1984 s 47(3A)(a) (s 47(3A) added by the Crime and Disorder Act 1998 s 46(2)).

8 Police and Criminal Evidence Act 1984 s 47(3A)(b) (as added (see note 7 *supra*); and amended by the Courts Act 2003 s 109(1), Sch 8 para 283).

9 Police and Criminal Evidence Act 1984 s 47(4). As to the modifications to s 47 when a person is charged with an offence in accordance with the Criminal Justice Act 2003 s 87(4) (re-trial for serious offences) see PARA 1945 post.

## UPDATE

### 935 Bail after arrest

NOTE 1--References to 'bail' are references to bail subject to a duty (1) to appear before a magistrates' court at such time and such place as the custody officer may appoint; (2) to attend at such police station as the custody officer may appoint at such time as he may appoint for the purposes of (a) proceedings in relation to a live link direction under the Crime and Disorder Act 1998 s 57C (see PARA 1259); and (b) any preliminary hearing in relation to which such a direction is given; or (3) to attend at such police station as the custody officer may appoint at such time as he may appoint for purposes other than those mentioned in head (2) above: 1984 Act s 47(3) (amended by Police and Justice Act 2006 s 46(5)) (in force in specified local justice areas: SI 2007/709, SI 2008/2785).

NOTE 3--Reference to 1984 Act s 37(7)(a) is now to s 37: s 47(1A) (amended by 2006 Act Sch 6 para 6). Reference to 1984 Act s 37(7)(a) or s 37C(2)(b) is now to s 37, 37C(2)(b) or 37CA(2)(b): 1984 Act s 47(1B), (1C) (amended by 2006 Act Sch 6 para 11).

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#### **(4) SEARCH UPON ARREST**

##### **936. Search upon arrest.**

A constable may search an arrested person, in any case where the person to be searched has been arrested at a place other than a police station, if the constable has reasonable grounds for believing that the arrested person may present a danger to himself or others<sup>1</sup>.

A constable also has power in any such case:

1257 (1) to search the arrested person for anything which he might use to assist him to escape from lawful custody<sup>2</sup> or which might be evidence relating to an offence<sup>3</sup>; and

1258 (2) if the offence for which he has been arrested is an indictable offence<sup>4</sup>, to enter and search any premises<sup>5</sup> in which he was when arrested or immediately before he was arrested for evidence relating to the offence<sup>6</sup>.

The power to search conferred by these provisions is only a power to search to the extent that is reasonably required for the purpose of discovering any such thing or any such evidence<sup>7</sup>; and the powers so conferred to search a person are not to be construed as authorising a constable to require a person to remove any of his clothing in public other than an outer coat, jacket or gloves (although they do authorise a search of a person's mouth)<sup>8</sup>.

A constable may not search a person in the exercise of the power conferred by head (1) above unless he has reasonable grounds for believing that the person to be searched may have concealed on him anything for which a search is so permitted<sup>9</sup>; nor may a constable search premises in the exercise of the power conferred by head (2) above unless he has reasonable grounds for believing that there is evidence for which a search is so permitted on the premises<sup>10</sup>.

In so far as the power of search conferred by head (2) above relates to premises consisting of two or more separate dwellings, it is limited to a power to search:

1259 (a) any dwelling in which the arrest took place or in which the person arrested was immediately before his arrest<sup>11</sup>; and

1260 (b) any parts of the premises which the occupier of any such dwelling uses in common with the occupiers of any other dwellings comprised in the premises<sup>12</sup>.

1 Police and Criminal Evidence Act 1984 s 32(1). Nothing in s 32 (as amended) is to be taken to affect the power conferred by the Terrorism Act 2000 s 43 (search: see PARA 426 ante): Police and Criminal Evidence Act 1984 s 32(10) (amended by the Terrorism Act 2000 s 125(1), Sch 15 para 5(1), (3)).

A constable searching a person in the exercise of this power may seize and retain anything he finds, if he has reasonable grounds for believing that the person searched might use it to cause physical injury to himself or to any other person: Police and Criminal Evidence Act 1984 s 32(8). For the additional powers of seizure where a search is made under s 32 (as amended) see the Criminal Justice and Police Act 2001 s 51; and PARA 891 ante.

Every police officer holds the office of constable: see PARA 857 note 2 ante.

2 Police and Criminal Evidence Act 1984 s 32(2)(a)(i). A constable searching a person in the exercise of the power conferred by s 32(2)(a) may seize and retain anything he finds, other than an item subject to legal privilege, if he has reasonable grounds for believing either that the person might use it to assist him to escape from lawful custody (s 32(9)(a)) or that it is evidence of an offence or has been obtained in consequence of the commission of an offence (s 32(9)(b)). For the meaning of 'items subject to legal privilege' see PARA 873 note 8 ante.

3 Ibid s 32(2)(a)(ii). See *R v Churchill* [1989] Crim LR 226, CA (car keys of person arrested on suspicion of burglary were not evidence relating to the suspected offence of burglary); and see also *R v Beckford* (1991) 94 Cr App Rep 43, CA (question of fact, where the Police and Criminal Evidence Act 1984 s 32 is relied on to justify a search, whether the search was genuinely for one of the stated purposes).

4 For the meaning of 'indictable offence' see PARA 1102 note 1 post.

5 For the meaning of 'premises' see PARA 872 note 5 ante.

6 Police and Criminal Evidence Act 1984 s 32(2)(b) (substituted by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (6)).

7 Police and Criminal Evidence Act 1984 s 32(3).

8 Ibid s 32(4) (amended by the Criminal Justice and Public Order Act 1994 s 59(2)).

9 Police and Criminal Evidence Act 1984 s 32(5). See *Middleweek v Chief Constable of Merseyside Police* [1992] 1 AC 179n, [1990] 3 All ER 662, CA (although a police officer must have good reason to search a detained person, the fact that at that time the officer was simply acting in accordance with standard procedure does not in itself render the search unlawful if there are good reasons for it).

10 Police and Criminal Evidence Act 1984 s 32(6).

11 Ibid s 32(7)(a).

12 Ibid s 32(7)(b).

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### **937. Powers of search available after arrest under cross-border powers.**

Particular search powers are available to a constable in relation to a person arrested in Scotland pursuant to a warrant issued in England, Wales or Northern Ireland<sup>1</sup>, a person arrested in England or Wales pursuant to a warrant issued in Northern Ireland<sup>2</sup>, a person arrested in Northern Ireland pursuant to a warrant issued in England or Wales<sup>3</sup>, a person arrested by an English constable in Scotland or Northern Ireland<sup>4</sup> and a person arrested by a Northern Irish constable in England, Wales or Scotland<sup>5</sup>. A constable may search the person if he has reasonable grounds for believing that the person may present a danger to himself or others<sup>6</sup>. A constable may search the person for anything which he might use to assist him to escape from lawful custody<sup>7</sup> or which might be evidence relating to an offence<sup>8</sup>, and may enter and search any premises<sup>9</sup> in which the person was when, or immediately before, he was arrested for evidence relating to the offence for which he was arrested<sup>10</sup>, but this power to search is limited to the extent that is reasonably required for the purpose of discovering any such thing or any such evidence<sup>11</sup>.

The powers conferred by these provisions to search a person are not to be construed as authorising a constable to require a person to remove any of his clothing in public other than an outer coat, jacket, headgear, gloves or footwear but they do authorise a search of a person's mouth<sup>12</sup>.

1    Ie under the Criminal Justice and Public Order Act 1994 s 136(1) (as amended): see PARA 921 ante.

2    Ie under *ibid* s 136(2)(b) (as amended): see PARA 921 ante.

3    Ie under *ibid* s 136(3)(a): see PARA 921 ante.

4    Ie under *ibid* s 137(1) (as amended): see PARA 928 ante.

5    Ie under *ibid* s 137(3): see PARA 928 ante. Every police officer holds the office of constable: see PARA 857 note 2 ante.

6    *Ibid* s 139(1), (2). A constable searching a person pursuant to this power may seize and retain anything he finds, if he has reasonable grounds for believing that the person searched might use it to cause physical injury to himself or to any other person: s 139(9). Nothing in s 139 affects the power conferred by the Terrorism Act 2000 s 43 (search: see PARA 426 ante): Criminal Justice and Public Order Act 1994 s 139(11) (amended by the Terrorism Act 2000 s 125(1), Sch 15 para 9).

7    Criminal Justice and Public Order Act 1994 s 139(3)(a)(i). A constable may not search a person in the exercise of the powers conferred by s 139(3)(a) unless he has reasonable grounds for believing that the person to be searched may have concealed on him anything for which a search is permitted thereunder: s 139(6). A constable searching a person in the exercise of the power conferred by s 139(3)(a) may seize and retain anything he finds, other than an item subject to legal privilege, if he has reasonable grounds for believing that the person might use it to assist him to escape from lawful custody (s 139(10)(a)) or that it is evidence of an offence, or has been obtained in consequence of the commission of an offence (s 139(10)(b)). For the meaning of 'item subject to legal privilege', as respects anything in the possession of a person searched in England and Wales, see the Police and Criminal Evidence Act 1984 s 10; and PARA 873 note 8 ante (definition applied by the Criminal Justice and Public Order Act 1994 s 139(12)). For the meaning of 'item subject to legal privilege', as respects anything in the possession of a person searched in Scotland, see the Proceeds of Crime Act 2002 s 412; definition applied by the Criminal Justice and Public Order Act 1994 s 139(12) (amended by the Proceeds of Crime Act 2002 s 456, Sch 11 paras 1, 24). For the meaning of 'item subject to legal privilege', as respects anything in the possession of a person searched in Northern Ireland, see the Police and Criminal Evidence

(Northern Ireland) Order 1989, SI 1989/1341 (NI 12) art 12; definition applied by the Criminal Justice and Public Order Act 1994 s 139(12).

8 Criminal Justice and Public Order Act 1994 s 139(3)(a)(ii). See note 7 *supra*.

9 'Premises' includes any place and, in particular, includes any vehicle, vessel, aircraft or hovercraft, any offshore installation, and any tent or movable structure: *ibid* s 139(12). For the meaning of 'offshore installation' see the Mineral Workings (Offshore Installations) Act 1971 s 1 (definition applied by the Criminal Justice and Public Order Act 1994 s 139(12)).

10 *Ibid* s 139(3)(b). A constable may not search premises in the exercise of this power unless he has reasonable grounds for believing that there is evidence for which a search is permitted thereunder: s 139(7). In so far as the power of search conferred by s 139(3)(b) relates to premises consisting of two or more separate dwellings, it is limited to a power to search any dwelling in which the arrest took place or in which the person arrested was immediately before his arrest (s 139(8)(a)) and any parts of the premises which the occupier of any such dwelling uses in common with the occupiers of any other dwellings comprised in the premises (s 139(8)(b)).

11 *Ibid* s 139(4).

12 *Ibid* s 139(5).

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## **(5) DETENTION**

### **938. Meaning of 'designated police station'.**

The chief officer of police<sup>1</sup> for each police area<sup>2</sup> must designate the police stations in his area which<sup>3</sup> are to be the stations in that area to be used for the purpose of detaining arrested persons<sup>4</sup>. A chief officer's duty is to designate police stations appearing to him to provide enough accommodation for that purpose<sup>5</sup>. A chief officer may<sup>6</sup> designate a station which was not previously designated and may direct that a designation of a station previously made is to cease to operate<sup>7</sup>.

'Designated police station' means a police station for the time being designated under these provisions<sup>8</sup>.

1 As to chief officers of police and their functions see POLICE vol 36(1) (2007 Reissue) PARA 178 et seq.

2 As to police areas see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

3 le subject to the Police and Criminal Evidence Act 1984 ss 30(3), (5), 30A(5), 30D(2) (ss 30A, 30D as added): see PARA 933 ante.

4 Ibid s 35(1) (amended by the Criminal Justice Act 2003 s 12, Sch 1 paras 1,6).

5 Police and Criminal Evidence Act 1984 s 35(2). The Chief Constable of the British Transport Police Force may designate police stations which (in addition to those designated under the Police and Criminal Evidence Act 1984 s 35(1) (as amended)) may be used for the purpose of detaining arrested persons: see s 35(2A) (added by the Anti-terrorism, Crime and Security Act 2001 s 101, Sch 7 paras 11, 12); and the Railways and Transport Safety Act 2003 s 73, Sch 5 para 4(1), (2). As to the British Transport Police Force see Pt 3 (ss 18-77); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 281 et seq.

6 le without prejudice to the Interpretation Act 1978 s 12 (continuity of duties): see STATUTES vol 44(1) (Reissue) PARA 1343.

7 Police and Criminal Evidence Act 1984 s 35(3).

8 Ibid ss 35(4), 118(1).

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### **939. Custody officers.**

One or more custody officers<sup>1</sup> must be appointed for each designated police station<sup>2</sup>. A custody officer for a designated police station must be appointed either:

- 1261 (1) by the chief officer of police<sup>3</sup> for the area<sup>4</sup> in which the designated police station is situated<sup>5</sup>; or
- 1262 (2) by such other police officer as the chief officer of police for that area may direct<sup>6</sup>.

No officer may be appointed a custody officer unless he is of at least the rank of sergeant<sup>7</sup>. However, an officer of any rank may perform the functions of a custody officer at a designated police station if a custody officer is not readily available to perform them<sup>8</sup>.

None of the functions of a custody officer in relation to a person may be performed by an officer who at the time when the function falls to be performed is involved in the investigation of an offence for which that person is in police detention<sup>9</sup> at that time<sup>10</sup>; but nothing in this provision is to be taken to prevent a custody officer:

- 1263 (a) performing any function assigned to custody officers by the Police and Criminal Evidence Act 1984<sup>11</sup> or by a code of practice issued under the Act<sup>12</sup>;
- 1264 (b) carrying out the statutory duty<sup>13</sup> imposed on custody officers<sup>14</sup>;
- 1265 (c) doing anything in connection with the identification of a suspect<sup>15</sup>; or
- 1266 (d) doing anything under specified provisions<sup>16</sup> of the Road Traffic Act 1988<sup>17</sup>.

Where an arrested person is taken to a police station which is not a designated police station, or where a person attends a police station which is not a designated station to answer to bail<sup>18</sup>, the functions in relation to him which at a designated police station would be the functions of a custody officer must be performed:

- 1267 (i) by an officer who is not involved in the investigation of an offence for which he is in police detention, if such an officer is readily available<sup>19</sup>; and
- 1268 (ii) if no such officer<sup>20</sup> is readily available, by the officer who took him to the station<sup>21</sup> or any other officer<sup>22</sup>.

Where<sup>23</sup> an officer of a force maintained by a police authority who took an arrested person to a police station is to perform the functions of a custody officer in relation to him, the officer must inform an officer who is attached to a designated police station<sup>24</sup>, and is of at least the rank of inspector<sup>25</sup>, that he is to do so<sup>26</sup>. This duty must be performed as soon as it is practicable to perform it<sup>27</sup>.

1 A custody officer must perform the functions in Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers as soon as practicable, although a custody officer will not be in breach of the code if delay is justifiable and reasonable steps are taken to prevent unnecessary delay: Code C para 1.1A. The custody record must show when a delay has occurred and the reason: Code C para 1.1A. This provision is intended to cover delays which may occur in processing detainees, eg if a large number of suspects

are brought into the station simultaneously to be placed in custody, or if interview rooms are all being used, or if there are difficulties contacting an appropriate adult, solicitor or interpreter: Code C Guidance note 1H. For the meaning of 'appropriate adult' see PARA 940 note 9 post.

2 Police and Criminal Evidence Act 1984 s 36(1). For the meaning of 'designated police station' see PARA 938 ante.

3 As to chief officers of police and their functions see POLICE vol 36(1) (2007 Reissue) PARA 178 et seq.

4 As to police areas see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

5 Police and Criminal Evidence Act 1984 s 36(2)(a) (s 36(2) amended, and s 36(2A) added, by the Anti-terrorism, Crime and Security Act 2001 s 101, Sch 7 paras 11, 13(1)-(3)). A custody officer for a police station designated under the Police and Criminal Evidence Act 1984 s 35(2A) (as added) (see PARA 938 ante) must be appointed by the Chief Constable of the British Transport Police Force (s 36(2A)(a) (as so added)) or by such other member of that force as that Chief Constable may direct (s 36(2A)(b) (as so added)). See also the Railways and Transport Safety Act 2003 s 73, Sch 5 para 4(1), (2). See *Vince v Chief Constable of Dorset* [1993] 2 All ER 321, [1993] 1 WLR 415, CA (chief constable's duty is to appoint one custody officer for each designated police station, with discretion (which must be exercised reasonably) to appoint more than one custody officer).

6 Police and Criminal Evidence Act 1984 s 36(2)(b) (as amended: see note 5 supra).

7 Ibid s 36(3). As from a day to be appointed it is instead provided that no person may be appointed a custody officer unless he is either a police officer of at least the rank of sergeant or he is a staff custody officer: s 36(3)(a), (b) (s 36(3) prospectively substituted, and s 36(11) prospectively added, by the Serious Organised Crime and Police Act 2005 s 121(1), (2), (6)). For these purposes, 'staff custody officer' means a person who has been designated as such under the Police Reform Act 2002 s 38 (see POLICE vol 36(1) (2007 Reissue) PARA 529): Police and Criminal Evidence Act 1984 s 36(11) (as so added). At the date at which this volume states the law no such day had been appointed. As to the delegation of authority by police officers see further PARA 858 ante.

8 Ibid s 36(4). The provision in s 36(4) that any officer can perform the custody officer's duties if one is not 'readily' available does not mean that any officer can perform the custody officer's duties if one is not 'normally' or 'ordinarily' available but that he can do so only if a custody officer is not actually at the station and cannot, without much difficulty, be fetched there: see *Vince v Chief Constable of Dorset* [1993] 2 All ER 321, [1993] 1 WLR 415, CA. References to a custody officer in the Police and Criminal Evidence Act 1984 ss 37-122 (as amended) include references to an officer other than a custody officer who is performing the functions of a custody officer by virtue of s 36(4): s 36(8). As from a day to be appointed this provision is amended so that, instead of the reference to an officer other than a custody officer who is performing the functions of a custody officer, there is a reference to a person other than a custody officer who is performing those functions: see s 36(8) (prospectively amended by the Serious Organised Crime and Police Act 2005 s 121(1), (5)). At the date at which this volume states the law no such day had been appointed.

References in Code C to a custody officer include any police officer, or any designated staff custody officer acting in the exercise or performance of the powers and duties conferred or imposed on him by his designation, performing the functions of a custody officer: Code C para 1.9.

9 A person is 'in police detention' if:

363 (1) he has been taken to a police station after being arrested for an offence or after being arrested under the Terrorism Act 2000 s 41 (see PARA 420 ante) (Police and Criminal Evidence Act 1984 s 118(2)(a) (s 118(2) amended by the Police Reform Act 2002 s 107, Sch 7 para 9(9); and the Police and Criminal Evidence Act 1984 s 118(2)(a) substituted by the Terrorism Act 2000 s 125, Sch 15 para 5(1), (12)); or

364 (2) he is arrested at a police station after attending voluntarily at the station or accompanying a constable to it (Police and Criminal Evidence Act 1984 s 118(2)(b)),

and in either case he is detained there or is detained elsewhere in the charge of a constable (except that a person who is at a court after being charged is not in police detention for these purposes) (s 118(2) (as so amended)). As to voluntary attendance at a police station see PARA 909 ante. Where a person is in another's lawful custody by virtue of the Police Reform Act 2002 Sch 4 para 22, 34(1) or 35(3) (see POLICE vol 36(1) (2007 Reissue) PARAS 529, 531) he is treated as in police detention: Police and Criminal Evidence Act 1984 s 118(2A) (added by the Police Reform Act 2002 s 107, Sch 7 para 9(9)).

An individual detained under the Prevention of Terrorism Act 2005 s 5 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 519) is deemed to be in legal custody throughout the period of his detention and, after having been taken to a designated place, is deemed to be in police detention for the purposes of the Police and Criminal Evidence Act 1984, subject to the Prevention of Terrorism Act 2005 s 5(8) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 519): s 5(7)(a), (b)(i).



Persons detained under the legislation relating to terrorism (ie the Terrorism Act 2000 s 41, Sch 8 (see PARA 420 et seq ante) and other provisions thereof) are not subject to any part of Code C: Code C para 1.11. Such persons are subject to Code H (see PARA 421 et seq ante): Code C para 1.11.

10 Police and Criminal Evidence Act 1984 s 36(5). As from a day to be appointed this provision is amended so as to provide that none of the functions of a custody officer in relation to a person may be performed by an individual who at the time when the function falls to be performed is involved in the investigation of an offence for which that person is in police detention at that time: see s 36(5) (prospectively amended by the Serious Organised Crime and Police Act 2005 s 121(1), (3)). At the date at which this volume states the law no such day had been appointed.

This provision is subject to the Police and Criminal Evidence Act 1984s 36(6)-(10) (as amended; prospectively amended) (see the text and notes 11-27 infra) and s 39(2) (see PARA 946 post).

11 Ibid s 36(6)(a)(i).

12 Ibid s 36(6)(a)(ii). As to codes of practice under the Police and Criminal Evidence Act 1984 see further PARA 908 ante.

13 Ie the duty imposed on custody officers by ibid s 39 (as amended): see PARA 946 post.

14 Ibid s 36(6)(b).

15 Ibid s 36(6)(c).

16 Ie the Road Traffic Act 1988 ss 7, 8 (as amended): see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 986.

17 Police and Criminal Evidence Act 1984 s 36(6)(d) (amended by the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 3 para 27(3)).

18 Police and Criminal Evidence Act 1984 s 36(7A) (s 36(7A), (7B) added by the Criminal Justice Act 2003 s 12, Sch 1 paras 1, 7). The reference in the text to attending a police station which is not a designated station to answer to bail is a reference to attending such a station to answer to bail under the Police and Criminal Evidence Act 1984 s 30A (as added) (see PARA 933 ante) as it applies where a person is taken to such a station: s 36(7A) (as so added).

19 Ibid s 36(7)(a). As from a day to be appointed functions which would be the functions of a custody officer may also be performed under this provision by a staff custody officer: see s 36(7)(a) (s 36(7) prospectively amended by the Serious Organised Crime and Police Act 2005 s 121(1), (4)).

20 As from a day to be appointed this provision is amended so as to refer to a person instead of an officer: see the Police and Criminal Evidence Act 1984 s 36(7)(b) (prospectively amended: see note 19 supra).

21 Where ibid s 36(7) (prospectively amended) applies because of s 36(7A) (as added) (see the text and note 18 supra), the reference to the officer who took him to the station is to be read as a reference to the officer who granted him bail: s 36(7B) (as added: see note 18 supra).

22 Ibid s 36(7)(b) (prospectively amended: see note 19 supra). See also note 20 supra.

23 Ie by virtue of ibid s 36(7) (prospectively amended): see the text and notes 19-22 supra.

24 Ibid s 36(9)(a).

25 Ibid s 36(9)(b).

26 Ibid s 36(9).

27 Ibid s 36(10).

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#### **940. Custody records.**

When a person is brought to a police station under arrest, is arrested at the police station having attended there voluntarily, or attends a police station to answer bail, he should be brought before the custody officer<sup>1</sup> as soon as practicable after his arrival at the station or, if appropriate, following arrest after attending the police station voluntarily<sup>2</sup>.

A separate custody record must be opened as soon as practicable for each person who is brought to a police station under arrest or is arrested at the police station having attended there voluntarily to answer street bail<sup>3</sup>. All information recorded<sup>4</sup> must be recorded as soon as practicable in the custody record unless otherwise specified<sup>5</sup>. In the case of any action requiring the authority of an officer of a specified rank, his name and rank must be noted in the custody record<sup>6</sup>.

The custody officer is responsible for the accuracy and completeness of the custody record and for ensuring that the record or a copy of the record accompanies a detainee if he is transferred to another police station<sup>7</sup>. The record must show the time of, and reason for, transfer and the time a person is released from detention<sup>8</sup>.

A solicitor or appropriate adult<sup>9</sup> must be permitted to consult a detainee's custody record as soon as practicable after his arrival at the station and at any other time whilst the person is detained<sup>10</sup>. Arrangements for this access must be agreed with the custody officer and may not unreasonably interfere with his duties<sup>11</sup>. When a detainee leaves police detention or is taken before a court he, his legal representative or the appropriate adult must be given, on request, a copy of the custody record as soon as practicable<sup>12</sup>.

All entries in custody and written interviews records must be timed and signed by the maker; and records on a computer must be timed and contain the operator's identification<sup>13</sup>.

1 As to custody officers see PARA 939 ante.

2 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 2.1A. This applies to designated and non-designated police stations: Code C para 2.1A. As to designated police stations see PARA 938 ante. A person is deemed to be 'at a police station' for these purposes if he is within the boundary of any building or enclosed yard which forms part of that police station: Code C para 2.1A. As to codes of practice under the Police and Criminal Evidence Act 1984 see further PARA 908 ante.

3 Code C para 2.1. 'Street bail' means bail granted under the Police and Criminal Evidence Act 1984 s 30A (as added) (see PARA 933 ante).

4 Ie under Code C.

5 Code C para 2.1. Any audio or video recording made in the custody area is not part of the custody record: Code C para 2.1. When a person is answering street bail, the custody officer should link any documentation held in relation to arrest with the custody record; and any further action must be recorded on the custody record: Code C para 3.25.

6 Code C para 2.2. This is subject to Code C para 2.6A: see note 13 infra.

7 Code C para 2.3.

8 Code C para 2.3.

9 In the case of a juvenile, the 'appropriate adult' is:

- 365 (1) his parent, guardian or, if he is in local authority or voluntary organisation care, or is otherwise being looked after under the Children Act 1989, a person representing that authority or organisation (Code C para 1.7(a)(i));
- 366 (2) a social worker of a local authority (Code C para 1.7(a)(ii)); or
- 367 (3) failing either of the above, some other responsible adult aged 18 or over who is not a police officer or employed by the police (Code C para 1.7(a)(iii)).

In the case of a person who is mentally disordered or mentally vulnerable, the 'appropriate adult' is:

- 368 (a) a relative, guardian or other person responsible for his care or custody (Code C para 1.7(b)(iv));
- 369 (b) someone experienced in dealing with mentally disordered or mentally vulnerable persons but who is not a police officer or employed by the police (Code C para 1.7(b)(v)); or
- 370 (c) failing either of the above, some other responsible adult aged 18 or over who is not a police officer or employed by the police (Code C para 1.7(b)(vi)).

'Mentally vulnerable' applies to any detainee who, because of his mental state or capacity, may not understand the significance of what is said, of questions or their replies: Code C Guidance note 1G. For the meaning of 'mental disorder' see the Mental Health Act 1983 s 1(2); and MENTAL HEALTH vol 30(2) (Reissue) PARA 402 (definition applied by Code C Guidance note 1G). When the custody officer has any doubt about the mental state or capacity of a detainee, that detainee should be treated as mentally vulnerable and an appropriate adult called: Code C Guidance note 1G. For further provision in connection with the rights of mentally disordered and mentally vulnerable persons see Code C Annex E.

A person, including a parent or guardian, should not be an appropriate adult if he is suspected of involvement in the offence, is the victim, is a witness, or is involved in the investigation, or if he has received admissions prior to attending to act as the appropriate adult: Code C Guidance note 1B.

If a juvenile's parent is estranged from the juvenile, the parent should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to his presence: Code C Guidance note 1B: see *DPP v Blake* [1989] 1 WLR 432, 89 Cr App Rep 179, DC (justices entitled to find that juvenile's estranged father was not an appropriate adult). 'The appropriate adult cannot be a person with whom the juvenile had no empathy': *DPP v Blake* supra at 440 and 187 per Mann LJ. If a juvenile admits an offence to, or in the presence of, a social worker or member of a youth offending team other than during the time that person is acting as the juvenile's appropriate adult, another appropriate adult should be appointed in the interest of fairness: Code C Guidance note 1C.

In the case of persons who are mentally disordered or otherwise mentally vulnerable, it may be more satisfactory if the appropriate adult is someone experienced or trained in their care rather than a relative lacking such qualifications; however, if the detainee prefers a relative to a better qualified stranger or objects to a particular person, his wishes should, if practicable, be respected: Code C Guidance note 1D. A detainee should always be given an opportunity, when an appropriate adult is called to the police station, to consult privately with a solicitor in the appropriate adult's absence if the detainee wants: Code C Guidance note 1E. An appropriate adult is not subject to legal privilege: Code C Guidance note 1E.

The police do not owe a general duty of care to protect an appropriate adult from mental or psychological harm: *Leach v Chief Constable of Gloucester Constabulary* [1999] 1 All ER 215, [1999] 1 WLR 1421, CA.

10 Code C para 2.4.

11 Code C para 2.4.

12 Code C para 2.4A. This entitlement lasts for a period of 12 months after a person's release: Code C para 2.4A. The detainee, the appropriate adult or the legal representative must be permitted to inspect the original custody record after the detainee has left police detention provided he gives reasonable notice of the request; and any such inspection must be noted in the custody record: Code C para 2.5.

13 Code C para 2.6. Nothing in Code C requires the identity of officers or other police staff to be recorded or disclosed if they reasonably believe recording or disclosing their names might put them in danger: Code C para 2.6A(b). In these cases, they must use their warrant or other identification numbers and the name of their police station: Code C para 2.6A.

The fact and time of a refusal by a detainee to sign a custody record, when asked to do so under Code C, must also be recorded: Code C para 2.7.



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#### **941. Duties of custody officer before charge.**

Where a person is arrested for an offence<sup>1</sup> either without a warrant<sup>2</sup> or under a warrant not indorsed for bail<sup>3</sup>, the custody officer<sup>4</sup> at each police station where he is detained after his arrest must determine whether he has before him sufficient evidence to charge that person with the offence for which he was arrested and may detain him at the police station for such period as is necessary to enable him to do so<sup>5</sup>.

If the custody officer determines that he does not have such evidence before him, the person arrested must be released either on bail or without bail<sup>6</sup>, unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him<sup>7</sup>. If the custody officer has reasonable grounds for so believing he may authorise the person arrested to be kept in police detention<sup>8</sup>. Where a custody officer authorises a person who has not been charged to be kept in police detention, he must, as soon as is practicable, make a written record of the grounds for the detention<sup>9</sup>.

If the custody officer determines that he has before him sufficient evidence to charge the person arrested with the offence for which he was arrested, the person arrested:

- 1269 (1) must be released without charge and on bail<sup>10</sup> for the purpose of enabling the Director of Public Prosecutions<sup>11</sup> to make a decision<sup>12</sup> whether or not to charge or caution the arrested person<sup>13</sup>;
- 1270 (2) must be released without charge and on bail but not for that purpose<sup>14</sup>;
- 1271 (3) must be released without charge and without bail<sup>15</sup>; or
- 1272 (4) must be charged<sup>16</sup>.

If the person arrested is not in a fit state to be so dealt with, he may be kept in police detention until he is<sup>17</sup>. These provisions are subject to the proviso that, in general<sup>18</sup>, a person who at the expiry of 24 hours after the relevant time is in police detention and has not been charged must be released at that time either on bail or without bail<sup>19</sup>. The decision as to how a person is to be dealt with under these provisions must be that of the custody officer<sup>20</sup>.

1 The provisions of the Police and Criminal Evidence Act 1984 s 37(1)-(6) (as amended) (see the text and notes 2-9 *infra*) also have effect in relation to a person who has not been charged at the time of review of police detention, and references in s 37(1)-(6) to the person arrested are for those purposes to be read as references to the person whose detention is under review: s 40(8), (8A)(a) (s 40(8) amended, and s 40(8A) added, by the Police Reform Act 2002 s 52(1), (2)). Where, however, a person has been kept in police detention by virtue of the Police and Criminal Evidence Act 1984 s 37(9) (see the text and note 17 *infra*) or s 37D(5) (as added) (see PARA 943 *post*), the provisions of s 37(1)-(6) do not have effect in relation to him, but it is the duty of the review officer to determine whether he is yet in a fit state: s 40(9). See also the Criminal Justice Act 2003 s 87; and PARA 1945 *post*.

2 Police and Criminal Evidence Act 1984 s 37(1)(a)(i).

3 *Ibid* s 37(1)(a)(ii). For these purposes, 'indorsed for bail' means indorsed with a direction for bail in accordance with the Magistrates' Courts Act 1980 s 117(2) (see PARA 919 *ante*): Police and Criminal Evidence Act 1984 s 37(15).

4 As to custody officers see PARA 939 ante. In the application of these provisions in relation to a person who has not been charged at the time of the review (see note 1 supra), this is a reference to the review officer: *ibid* s 40(8A)(b) (as added: see note 1 supra).

5 *Ibid* s 37(1) (amended by the Criminal Justice and Public Order Act 1994 ss 29(1), (4)(a), (5), 168(3), Sch 11). The duty imposed on the custody officer under the Police and Criminal Evidence Act 1984 s 37(1) (as amended) must be carried out by him as soon as practicable after the person arrested arrives at the police station or, in the case of a person arrested at the police station, as soon as practicable after the arrest: s 37(10).

While a custody officer is to act as an independent filter on decisions to continue detention without charge, he is not required to inquire into the legality of the arrest: *DPP v L* [1999] Crim LR 752, DC. The Police and Criminal Evidence Act 1984 s 37(2), (3) (see the text and notes 7, 8 *infra*) would be unworkable if, in a complicated investigation, a custody officer was required to ask for full details of the evidence or information that had prompted an officer to make an arrest before determining to authorise continued detention without charge: *Al Fayed v Metropolitan Police Comr* [2004] EWCA Civ 1579, [2004] All ER (D) 391 (Nov).

6 If the offence for which the person is arrested is one in relation to which a sample could be taken under the Police and Criminal Evidence Act 1984 s 63B (as added) (testing for presence of Class A drugs: see PARA 1031 post) and the custody officer is required in pursuance of this provision to release the person arrested and decides to release him on bail, the detention of the person may be continued to enable a sample to be taken under s 63B (as added): s 37(8A)(a), (8B) (s 37(8A), (8B) added by the Drugs Act 2005 s 23, Sch 1 paras 1, 2). This does not however permit a person to be detained for a period of more than 24 hours after the relevant time: Police and Criminal Evidence Act 1984 s 37(8B) (as so added).

7 *Ibid* s 37(2). As to bail after arrest see PARA 935 ante. See also the Criminal Justice Act 2003 s 87; and PARA 1945 post.

8 Police and Criminal Evidence Act 1984 s 37(3). For the meaning of 'in police detention' see PARA 939 note 9 ante. See also the Criminal Justice Act 2003 s 87; and PARA 1945 post.

9 Police and Criminal Evidence Act 1984 s 37(4). The written record must be made in the presence of the person arrested who must at that time be informed by the custody officer of the grounds for his detention (s 37(5)), although this does not apply where the person arrested is, at the time when the written record is made either incapable of understanding what is said to him (s 37(6)(a)), violent or likely to become violent (s 37(6)(b)), in urgent need of medical attention (s 37(6)(c)), or, in relation to a person who has not been charged at the time of review of detention (see note 1 supra), where the person is asleep (ss 37(6)(aa), 40(8A)(c) (as added: see note 1 supra)). As to the application of s 37(1)-(6) to a person whose detention is under review see PARA 1001 note 4 post.

10 If the offence for which the person is arrested is one in relation to which a sample could be taken under *ibid* s 63B (as added) (testing for presence of Class A drugs: see PARA 1031 post) and the custody officer decides in pursuance of s 37(7)(a) or (b) (as substituted) (see the text and notes 13, 14 *infra*) to release the person without charge and on bail, the detention of the person may be continued to enable a sample to be taken under s 63B (as added): s 37(8A)(b), (8B) (as added: see note 6 supra). This does not, however, permit a person to be detained for a period of more than 24 hours after the relevant time: s 37(8B) (as so added).

A constable may arrest without a warrant any person who, having been released on bail under Pt IV (ss 34-51) (as amended) subject to a duty to attend at a police station, fails to attend at that police station at the time appointed for him to do so: s 46A(1). A person who has been released on bail pursuant to s 37(7)(a) (see the text and note 13 *infra*) may be arrested without warrant by a constable if the constable has reasonable grounds for suspecting that the person has broken any of the conditions of bail: s 46A(1A) (s 46A added by the Criminal Justice and Public Order Act 1994 s 29(2); and the Police and Criminal Evidence Act 1984 s 46A(1A) added by the Criminal Justice Act 2003 s 28, Sch 2 paras 1, 5). A person who is so arrested must be taken to the police station appointed as the place at which he is to surrender to custody as soon as practicable after the arrest: Police and Criminal Evidence Act 1984 s 46A(2) (as so added).

11 Where a person is arrested following a criminal investigation by the Revenue and Customs, references to the Director of Public Prosecutions in *ibid* s 37 (as amended) and ss 37A, 37B (as added) (see note 13 *infra*) are to be read as references to the Director of Revenue and Customs Prosecutions: see the Commissioners for Revenue and Customs Act 2005 s 50, Sch 4 para 30; and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 900.

12 *Ie* under a decision under the Police and Criminal Evidence Act 1984 s 37B (as added) (see PARA 942 post).

13 *Ibid* s 37(7)(a) (s 37(7)(a)-(d) substituted, s 37(7A), (7B) and s 37A added, and s 37(8) amended, by the Criminal Justice Act 2003 s 28, Sch 2 paras 1-3). Where a person is released under the Police and Criminal Evidence Act 1984 s 37(7)(a) (as substituted), it is the duty of the custody officer to inform him that he is being

released to enable the Director of Public Prosecutions to make a decision under s 37B (as added) (see PARA 942 post): s 37(7B) (as so added).

A police officer carrying out the duties imposed on him by s 37 (as amended) and s 38 (as amended) (see PARA 944 post) when charging an arrested person has no power to perform those duties on behalf of a private individual; where such an officer does charge someone, the Director of Public Prosecutions is obliged to take over the conduct of proceedings by virtue of the Prosecution of Offences Act 1985 s 3(2) (as amended) (see PARA 1080 post): *R v Ealing Justices, ex p Dixon* [1990] 2 QB 91, sub nom *R v Ealing Magistrates' Court, ex p Dixon* [1989] 2 All ER 1050, DC. This decision was not, however, followed in *R v Stafford Justices, ex p Customs and Excise Comrs* [1991] 2 QB 339, [1991] 2 All ER 201, DC, where it was held that a customs officer investigating an offence, who arrested a person and took him to a police station to be charged by a custody officer under the Police and Criminal Evidence Act 1984 s 37, did not thereby surrender the conduct of the prosecution because the charging process is neutral and proceedings can be said to have been 'instituted on behalf of a police force' for the purposes of the Prosecution of Offences Act 1985 s 3 (as amended) only if the police have carried out the investigation and made the arrest.

The Director of Public Prosecutions may issue guidance for the purpose of enabling custody officers to decide how persons should be dealt with under the Police and Criminal Evidence Act 1984 s 37(7) (as substituted) (s 37A(1)(a) (as so added)), to which custody officers must have regard in deciding how persons should be dealt with under s 37(7) (as substituted) (s 37A(3) (as so added)). The Director of Public Prosecutions may from time to time revise guidance under s 37A (as added): s 37A(2) (as so added). A report under the Prosecution of Offences Act 1985 s 9 (report by Director of Public Prosecutions to Attorney General: see PARA 1073 post) must set out the provisions of any guidance issued, and any revisions to guidance made, in the year to which the report relates: Police and Criminal Evidence Act 1984 s 37A(4) (as so added). The Director of Public Prosecutions must publish in such manner as he thinks fit any guidance issued under s 37A (as added) (s 37A(5) (a) (as so added)) and any revisions made to such guidance (s 37A(5)(b) (as so added)). Guidance under s 37A (as added) may make different provision for different cases, circumstances or areas: s 37A(6) (as so added).

A person released on bail under s 37(7)(a) (as substituted) must be released on bail subject to the same conditions (if any) which applied immediately before his arrest: s 37C(4) (as so added). Where a person is so released without charge on bail for the purpose of enabling the Director of Public Prosecutions to make a decision about whether or not to charge or caution him or is released on bail under s 37(7)(a) (as substituted), a custody officer may subsequently appoint a different time, or an additional time, at which the person is to attend at the police station to answer bail: s 37D(1) (as so added). The custody officer must give the person notice in writing of the exercise of such power: s 37D(2) (as so added). The exercise of this power does not affect the conditions (if any) to which bail is subject: s 37D(3) (as so added). Where a person so released on bail returns to a police station to answer bail or is otherwise in police detention at a police station, he may be kept in police detention to enable him to be dealt with in accordance with s 37B (as added) or s 37C (as added) (see PARAS 942-943 post) or to enable the power under s 37D(1) (as added) (see PARA 943 post) to be exercised: s 37D(4) (as so added).

If the person is not in a fit state to enable him to be dealt with under these provisions or to enable the power under s 37D(1) (as added) to be exercised, he may be kept in police detention until he is: s 37D(5) (as so added).

Where a person is kept in police detention by virtue of s 37D(4) or (5) (as added), the provisions of s 37(1)-(3), (7) (as amended) and s 40(8) so far as it relates to s 37(1)-(3) (see note 1 supra) do not apply to the offence in connection with which he was released on bail under s 37(7)(a) (as substituted): s 37D(6) (as so added).

14 Ibid s 37(7)(b) (as substituted: see note 13 supra). See notes 10, 13 supra. Where a person is released under s 37(7)(b) (as substituted) or s 37(7)(c) (as substituted) (see the text and note 15 infra) and at the time of his release a decision whether he should be prosecuted for the offence for which he was arrested has not been taken, it is the duty of the custody officer so to inform him: s 37(8) (as amended: see note 13 supra).

15 Ibid s 37(7)(c) (as substituted: see note 13 supra). See note 13 supra.

16 Ibid s 37(7)(d) (as substituted: see note 13 supra). See note 13 supra.

17 Ibid s 37(9).

18 Ie subject to *ibid* ss 42, 43 (both as amended) (see PARAS 1003-1004 post): s 41(8).

19 See *ibid* s 41(7); and PARA 1000 post.

20 See *ibid* s 37(7A) (as added: see note 13 supra).

## UPDATE

### 941 Duties of custody officer before charge

TEXT AND NOTES 10, 11--In head (1) for 'must be released ... purpose' read 'must be released without charge and on bail, or kept in police detention, for the purpose': 1984 Act s 37(7)(a) (amended by Police and Justice Act 2006 s 11).

NOTE 10--The reference in the 1984 Act s 46A(1) to a person who fails to attend at a police station at the time appointed for him to do so includes a reference to a person who (1) attends at a police station to answer to bail granted subject to the duty mentioned in s 47(3)(b) (see PARA 935), but (2) leaves the police station at any time before the beginning of proceedings in relation to a live link direction under the Crime and Disorder Act 1998 s 57C (see PARA 1259) in relation to him, without informing a constable that he does not intend to give his consent to the direction: 1984 Act s 46A(1ZA) (added by 2006 Act s 46(4) (in force in specified local justice areas: SI 2007/709, SI 2008/2785)). Reference to 1984 Act s 37(7)(a) is now to s 37: s 46A(1A) (amended by 2006 Act Sch 6 para 7).

NOTES 13-16--The custody officer has no power to postpone the charging decision under the 1984 Act s 37(7) and detain the suspect while seeking advice as to the appropriate charges: *R (on the application of G) v Chief Constable of West Yorkshire Police* [2008] EWCA Civ 28, [2008] 4 All ER 594.

NOTE 13--The courts should be reluctant to entertain a challenge by way of judicial review to a decision to caution a person which is inconsistent with a stated police policy: *R (on the application of Mondelly) v Metropolitan Police Comr* [2006] EWHC 2370 (Admin), (2007) 171 JP 121. 1984 Act s 37(7B) amended: 2006 Act Sch 14 para 9. 1984 Act s 37A(1)(a), (3) amended: 2006 Act Sch 6 para 8(2). 1984 Act s 37D(1) amended: 2006 Act Sch 6 para 9. Where a person released on bail under the 1984 Act s 37(7)(b) or s 37CA(2)(b) returns to a police station to answer bail or is otherwise in police detention at a police station, he may be kept in police detention to enable him to be dealt with in accordance with s 37CA or to enable the power under s 37D(1) to be exercised: s 37D(4A) (s 27D(4A), (5) substituted by 2006 Act Sch 6 para 10(2)). If the person mentioned in the 1984 Act s 37D(4) or (4A) is not in a fit state to enable him to be dealt with as therein mentioned or to enable the power under s 37D(1) to be exercised, he may be kept in police detention until he is: s 37D(5). Section 37D(6) amended: 2006 Act Sch 6 para 10(3).

TEXT AND NOTE 14--The 1984 Act s 37CA applies where a person released on bail under s 37(7)(b) or s 37CA(2)(b) is arrested under s 46A in respect of that bail and is being detained following that arrest at the police station mentioned in s 46A(2): s 37CA(1) (s 37CA added by 2006 Act Sch 6 para 8(1)). The person arrested (1) must be charged; or (2) must be released without charge, either on bail or without bail: 1984 Act s 37CA(2). The decision as to how a person is to be dealt with under s 37CA(2) is to be that of a custody officer: s 37CA(3). A person released on bail under head (2) above, must be released on bail subject to the same conditions, if any, which applied immediately before his arrest: s 37CA(4).



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#### **942. Consultation with the Director of Public Prosecutions.**

Where a person is released without charge and on bail for the purpose of enabling the Director of Public Prosecutions<sup>1</sup> to make a decision about whether or not to charge or caution the arrested person<sup>2</sup>, an officer involved in the investigation of the offence must, as soon as practicable, send specified information<sup>3</sup> to the Director<sup>4</sup>. The Director must then decide whether there is sufficient evidence to charge the person with an offence<sup>5</sup>; and if he decides that there is sufficient evidence so to charge the person he must decide: (1) whether or not the person should be charged<sup>6</sup> and, if so, the offence with which he should be charged<sup>7</sup>; and (2) whether or not the person should be given a caution<sup>8</sup> and, if so, the offence in respect of which he should be given a caution<sup>9</sup>.

The Director must give written notice of his decision to an officer involved in the investigation of the offence<sup>10</sup>. If his decision is that there is not sufficient evidence to charge the person with an offence<sup>11</sup>, or that there is sufficient evidence to charge the person with an offence but that the person should not be charged with an offence or given a caution in respect of an offence<sup>12</sup>, a custody officer must give the person notice in writing that he is not to be prosecuted<sup>13</sup>. If the Director's decision is that the person should be charged with an offence, or given a caution in respect of an offence, the person must be charged or cautioned accordingly<sup>14</sup>. If, however, his decision is that the person should be given a caution in respect of the offence and it proves not to be possible to give the person such a caution, he must instead be charged with the offence<sup>15</sup>.

1 Or, as the case may be, the Director of Revenue and Customs Prosecutions: see PARA 941 note 11 ante.

2 Ie released under the Police and Criminal Evidence Act 1984 s 37(7)(a) (as substituted) for such purpose: see PARA 941 ante.

3 Ie such information as the Director of Public Prosecutions may specify in guidance issued under *ibid* s 37A (as added): see s 37A(1)(b) (ss 37A, 37B(1)-(7), (9) added, and s 37B(8) prospectively added, by the Criminal Justice Act 2003 s 28, Sch 2 paras 1, 3). As to the revision and publication of guidance see PARA 941 note 13 ante.

4 Police and Criminal Evidence Act 1984 s 37B(1) (as added: see note 3 supra).

5 *Ibid* s 37B(2) (as added: see note 3 supra).

6 As from a day to be appointed it is provided that a person is to be charged with an offence for these purposes either when he is in police detention after returning to a police station to answer bail or is otherwise in police detention at a police station or in accordance with the Criminal Justice Act 2003 s 29 (see PARA 915 ante): Police and Criminal Evidence Act 1984 s 37B(8)(a), (b) (prospectively added: see note 3 supra). At the date at which this volume states the law no such day had been appointed.

7 *Ibid* s 37B(3)(a) (as added: see note 3 supra).

8 For the purposes of *ibid* s 37B (as added), 'caution' includes a conditional caution within the meaning of the Criminal Justice Act 2003 Pt 3 (ss 22-27) (see PARA 1044 post) (Police and Criminal Evidence Act 1984 s 37B(9)(a) (as added: see note 3 supra)) and a warning or reprimand under the Crime and Disorder Act 1998 s 65 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1235) (Police and Criminal Evidence Act 1984 s 37B(9)(a) (as so added)).

9 *Ibid* s 37B(3)(b) (as added: see note 3 supra).

10 *Ibid* s 37B(4) (as added: see note 3 supra).

- 11 Ibid s 37B(5)(a) (as added: see note 3 supra).
- 12 Ibid s 37B(5)(b) (as added: see note 3 supra).
- 13 Ibid s 37B(5) (as added: see note 3 supra).
- 14 Ibid s 37B(6) (as added: see note 3 supra).
- 15 Ibid s 37B(7) (as added: see note 3 supra).

## **UPDATE**

### **942 Consultation with the Director of Public Prosecutions**

NOTE 2--For 'released' read 'dealt with': 1984 Act s 37B(1) (amended by Police and Justice Act 2006 Sch 14 para 10(1)).

NOTE 6--For 'after returning ... at a police station' read 'at a police station (whether because he has returned to answer bail, because he is detained under s 37(7)(a) (see PARA 941) or for some other reason)': 1984 Act s 37B(8)(a) (substituted by 2006 Act Sch 14 para 10(5)). Day now appointed in relation to 1984 Act s 37B(8)(b) (ie 'in accordance with the Criminal Justice Act 2003 s 29'): SI 2007/2874.

NOTE 8--1984 Act s 37B(9) amended: Criminal Justice and Immigration Act 2008 Sch 26 para 20(1) (in force in relation to specified police areas: see SI 2009/2780).

TEXT AND NOTE 10--Word 'written' omitted: 1984 Act s 37B(4) (amended by 2006 Act Sch 14 para 10(3)). Notice under the 1984 Act s 37B(4) must be in writing, but in the case of a person kept in police detention under s 37(7)(a) (see PARA 941) it may be given orally in the first instance and confirmed in writing subsequently: s 37B(4A) (added by 2006 Act Sch 14 para 10(4)).

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**943. Subsequent detention of person released without charge on bail for the purpose of enabling the Director of Public Prosecutions to make a decision about whether or not to charge or caution.**

Where a person who has been released without charge on bail for the purpose of enabling the Director of Public Prosecutions<sup>1</sup> to make a decision about whether or not to charge or caution him<sup>2</sup> is arrested<sup>3</sup> in respect of that bail<sup>4</sup>, and at the time of his detention following that arrest at the relevant police station<sup>5</sup> the requisite notice<sup>6</sup> has not been given<sup>7</sup>, he must either be charged<sup>8</sup> or released without charge, either on bail or without bail<sup>9</sup>. The decision as to how a person is to be so dealt with must be that of a custody officer<sup>10</sup>.

1 Or, as the case may be, the Director of Revenue and Customs Prosecutions: see PARA 941 note 11 ante.

2 He has been released under the Police and Criminal Evidence Act 1984 s 37(7)(a) (as substituted) (see PARA 941 ante) for such purposes.

3 He under *ibid* s 46A (as added and amended) (power to arrest for failure to answer police bail): see PARA 941 ante.

4 *Ibid* s 37C(1)(a) (ss 37C, 37D added by the Criminal Justice Act 2003 s 28, Sch 2 paras 1, 3).

5 He the police station specified under the Police and Criminal Evidence Act 1984 s 46A(2) (as added): see PARA 941 ante.

6 He under *ibid* s 37B(4) (as added): see PARA 942 ante.

7 *Ibid* s 37C(1)(b) (as added: see note 4 supra). The provisions of s 37C (as added) also apply where such a person, having been so arrested has then been released without charge on bail under s 37C(2)(b) (as added) (see the text and note 9 infra) and subsequently arrested under s 46A (as added) in respect of that bail and at the time of his detention following that arrest at the relevant police station the requisite notice has not been given: s 37C(1) (as so added).

8 *Ibid* s 37C(2)(a) (as added: see note 4 supra).

9 *Ibid* s 37C(2)(b) (as added: see note 4 supra). A person released on bail under s 37C(2)(b) (as added) must be released on bail subject to the same conditions (if any) which applied immediately before his arrest: s 37C(4) (as so added). Where a person is so released without charge on bail for the purpose of enabling the Director to make a decision about whether or not to charge or caution him or is released on bail under s 37C(2)(b) (as added), a custody officer may subsequently appoint a different time, or an additional time, at which the person is to attend at the police station to answer bail: s 37D(1) (as so added). The custody officer must give the person notice in writing of the exercise of such power: s 37D(2) (as so added). The exercise of this power does not affect the conditions (if any) to which bail is subject: s 37D(3) (as so added). Where a person so released on bail returns to a police station to answer bail or is otherwise in police detention at a police station, he may be kept in police detention to enable him to be dealt with in accordance with s 37B (as added) or s 37C (as added) (see PARAS 941-942 ante) or to enable the power under s 37D(1) (as added) to be exercised: s 37D(4) (as so added).

If the person is not in a fit state to enable him to be dealt with under these provisions or to enable the power under s 37D(1) (as added) to be exercised, he may be kept in police detention until he is: s 37D(5) (as so added).

Where a person is kept in police detention by virtue of s 37D(4) or (5) (as added), the provisions of s 37(1)-(3), (7) (as amended) and s 40(8) so far as it relates to s 37(1)-(3) (see PARA 941 ante) do not apply to the offence in connection with which he was released on bail under s 37C(2)(b): s 37D(6) (as so added).

A person who has been released on bail pursuant to this provision may be arrested without warrant by a constable if the constable has reasonable grounds for suspecting that the person has broken any of the conditions of bail: s 46A(1A) (s 46A added by the Criminal Justice and Public Order Act 1994 s 29(2); and the Police and Criminal Evidence Act 1984 s 46A(1A) added by the Criminal Justice Act 2003 s 28, Sch 2 paras 1, 5). A person who is so arrested must be taken to the police station appointed as the place at which he is to surrender to custody as soon as practicable after the arrest: Police and Criminal Evidence Act 1984 s 46A(2) (as so added).

10 Ibid s 37C(3) (as added: see note 4 supra).

## **UPDATE**

### **943 Subsequent detention of person released without charge on bail for the purpose of enabling the Director of Public Prosecutions to make a decision about whether or not to charge or caution**

NOTE 9--1984 Act s 37D(1) amended: Police and Justice Act 2006 Sch 6 para 9. 1984 Act s 37D(6) amended: 2006 Act Sch 6 para 10(3). 1984 Act s 46(1A) amended: 2006 Act Sch 6 para 7.

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#### **944. Duties of custody officer after charge.**

Where a person arrested for an offence<sup>1</sup> otherwise than under a warrant indorsed for bail<sup>2</sup> is charged with an offence, the custody officer<sup>3</sup> must<sup>4</sup> order his release from police detention, either on bail or without bail, unless:

- 1273 (1) if the person arrested is not an arrested juvenile<sup>5</sup>:
- 61
- 96. (a) his name or address cannot be ascertained or the custody officer has reasonable grounds for doubting whether a name or address furnished by him as his name or address is his real name or address<sup>6</sup>;
  - 97. (b) the custody officer has reasonable grounds for believing that the person arrested will fail to appear in court to answer to bail<sup>7</sup>;
  - 98. (c) in the case of a person arrested for an imprisonable offence<sup>8</sup>, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from committing an offence<sup>9</sup>;
  - 99. (d) in a case where a sample may be taken from the person under the provisions relating to the taking of samples<sup>10</sup>, the custody officer has reasonable grounds for believing that the detention of the person is necessary to enable the sample to be taken from him<sup>11</sup>;
  - 100. (e) in the case of a person arrested for an offence which is not an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from causing physical injury to any other person or from causing loss of or damage to property<sup>12</sup>;
  - 101. (f) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him from interfering with the administration of justice or with the investigation of offences or of a particular offence<sup>13</sup>; or
  - 102. (g) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection<sup>14</sup>;
- 62
- 1274 (2) if he is an arrested juvenile<sup>15</sup>:
- 63
- 103. (a) any of the above requirements is satisfied (and, in the case of the requirement relating to the taking of samples<sup>16</sup>, the arrested juvenile has attained the minimum age)<sup>17</sup>; or
  - 104. (b) the custody officer has reasonable grounds for believing that the arrested person ought to be detained in his own interests<sup>18</sup>.
- 64

If the release of an arrested person is not so required, the custody officer may authorise him to be kept in police detention<sup>19</sup>. In taking the decisions required by the considerations set out above (except those relating to the ascertainment of the person's name and address and to the detention of a person for his own protection or in his own interests<sup>20</sup>), the custody officer must have regard to the same considerations as those to which a court is required to have regard to in taking the corresponding decisions in considering the matter of bail<sup>21</sup>. Where a custody

officer authorises a person who has been charged to be kept in police detention, he must, as soon as practicable, make a written record of the grounds for the detention<sup>22</sup>. The written record must be made in the presence of the person charged who must at that time be informed by the custody officer of the grounds for his detention<sup>23</sup>.

1    Ie lawfully arrested: *Hutt v Metropolitan Police Comr* [2003] EWCA Civ 1911, (2003) Times, 5 December. See also, however, PARA 945 note 3 post. The provisions of the Police and Criminal Evidence Act 1984 s 38(1)-(6) (as amended), s 38(6A) (as added and substituted) and s (6B) (as added) (see the text and notes 2-23 infra) also have effect in relation to a person whose detention is under review and who has been charged before the time of the review, and references in those provisions to the person arrested or the person charged are for those purposes to be read as references to the person whose detention is under review: s 40(10), (10A)(a) (s 40(10) amended, and s 40(10A) added, by the Police Reform Act 2002 s 52(3), (4)).

2    For the meaning of 'indorsed for bail' see PARA 941 note 3 ante.

3    As to custody officers see PARA 939 ante.

4    Ie subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended) (no bail for defendants charged with or convicted of homicide or rape after previous conviction for such offences): see PARA 1170 post.

5    For these purposes, 'arrested juvenile' means a person arrested with or without a warrant who appears to be under the age of 17: Police and Criminal Evidence Act 1984 s 37(15).

6    Ibid s 38(1)(a)(i) (s 38(1) amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 54).

7    Police and Criminal Evidence Act 1984 s 38(1)(a)(ii) (s 38(1)(a)(ii), (iii) substituted, and s 38(1)(a)(iv)-(vi), (2A), (7A) added, by the Criminal Justice and Public Order Act 1994 s 28(2)-(4)).

8    As to the meaning of 'imprisonable offence' for these purposes see the Bail Act 1976 Sch 1 (as amended); and PARA 1170 post (definition applied by the Police and Criminal Evidence Act 1984 s 38(7A) (as added: see note 7 supra)).

9    Ibid s 38(1)(a)(iii) (as substituted: see note 7 supra).

10   Ie under ibid s 63B (as added and amended): see PARA 1031 post.

11   Ibid s 38(1)(a)(iiia) (added by the Criminal Justice and Court Services Act 2000 s 57(1), (3)(a); and substituted by the Drugs Act 2005 s 23(1), Sch 1 paras 1, 3(a)).

12   Police and Criminal Evidence Act 1984 s 38(1)(a)(iv) (as added: see note 7 supra).

13   Ibid s 38(1)(a)(v) (as added: see note 7 supra).

14   Ibid s 38(1)(a)(vi) (as added: see note 7 supra).

15   Where a custody officer authorises an arrested juvenile to be kept in police detention pursuant to these provisions, the custody officer must, unless he certifies:

371   (1)   that, by reason of such circumstances as are specified in the certificate, it is impracticable for him to do so (ibid s 38(6)(a) (s 38(6) substituted by the Criminal Justice Act 1991 s 59)); or

372   (2)   in the case of an arrested juvenile who has attained the age of 12 years, that no secure accommodation is available and that keeping him in other local authority accommodation would not be adequate to protect the public from serious harm from him (Police and Criminal Evidence Act 1984 s 38(6)(b) (as so substituted; amended by the Criminal Justice and Public Order Act 1994 s 24)),

secure that the arrested juvenile is moved to local authority accommodation (Police and Criminal Evidence Act 1984 s 38(6) (as so substituted)). For the duty of local authorities to receive juveniles in these circumstances see the Children Act 1989 s 21(2)(b); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 863. See further *R (on the application of M) v Gateshead Council* [2006] EWCA Civ 221, 150 Sol Jo LB 397. In relation to an arrested juvenile charged with a violent offence (ie murder or an offence specified in the Criminal Justice Act 2003 Sch 15 Pt 1 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 70)) or a sexual offence (ie an offence specified in Sch 15 Pt 2 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 71)), the reference to protecting the public from serious harm from him is to be construed as a reference to protecting

members of the public from death or serious personal injury, whether physical or psychological, occasioned by further such offences committed by him: Police and Criminal Evidence Act 1984 s 38(6A) (added by the Children Act 1989 s 108(5), Sch 13 para 53(2); substituted by the Criminal Justice Act 1991 s 59; and amended by the Criminal Justice Act 2003 s 304, Sch 32 para 44).

A certificate so made in respect of an arrested juvenile must be produced to the court before which he is first brought thereafter: Police and Criminal Evidence Act 1984 s 38(7). See also Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 16(7); *R v Chief Constable of Cambridgeshire, ex p M* [1991] 2 QB 499, 91 Cr App Rep 325, DC (if the custody officer is dissatisfied as to the security of the proposed accommodation, he may refuse transfer to local authority care). For these purposes, 'local authority accommodation' means the accommodation provided by or on behalf of a local authority within the meaning of the Children Act 1989 (see ss 20, 21 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 863 et seq) (Police and Criminal Evidence Act 1984 s 38(6A) (as so added and substituted)); and 'secure accommodation' means accommodation provided for the purpose of restricting liberty (s 38(6A) (as so added and substituted)). For the purposes of Pt IV (ss 34-51) (as amended), 'local authority' has the same meaning as in the Children Act 1989 (see s 105(1) (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 138); Police and Criminal Evidence Act 1984 s 38(8) (amended by the Children Act 1989 s 108(5), Sch 13 para 53(3)).

Where an arrested juvenile is moved to local authority accommodation under the Police and Criminal Evidence Act 1984 s 38(6) (as substituted), it is lawful for any person acting on behalf of the local authority to detain him: s 38(6B) (added by the Children Act 1989 Sch 13 para 53(2)).

As to bail after arrest see PARA 935 ante.

16 le the requirements of the Police and Criminal Evidence Act 1984 s 38(1)(a)(iia) (as added): see the text and notes 10-11 supra.

17 Ibid s 3(1)(b)(i) (amended by the Criminal Justice Act 2003 s 51(1), (2)(a)(ii)). For the meaning of 'minimum age' see the Police and Criminal Evidence Act 1984 s 63B(3)(b) (as added and substituted); and PARA 1031 post (definition applied by s 38(6A) (as added and substituted (see note 15 supra); and amended by the Criminal Justice Act 2003 s 5(1), (2)(b); and the Drugs Act 2005 Sch 1 para 3(b))).

18 Police and Criminal Evidence Act 1984 s 38(1)(b)(ii).

19 Ibid s 38(2). A custody officer may not, however, authorise a person to be kept in police detention by virtue of s 38(1)(a)(iia) (as added) (see the text and notes 10-11 supra) after the end of the period of six hours beginning when he was charged with the offence: s 38(2) (amended by the Criminal Justice and Court Services Act 2000 s 57(1), (3)(b)). For the meaning of 'in police detention' see PARA 939 note 9 ante.

20 le the considerations set out in the Police and Criminal Evidence Act 1984 s 38(1)(a)(i), (vi), (b)(ii): see the text and notes 4-6, 14, 18 supra.

21 Ibid s 38(2A) (as added (see note 7 supra); and amended by the Criminal Justice Act 2003 s 331, Sch 36 para 5). As to the corresponding decisions in considering the matter of bail see the Bail Act 1976 Sch 1 Pt 1 para 2(1) (disregarding Sch 1 para 2(2)); and PARA 1170 post.

22 Police and Criminal Evidence Act 1984 s 38(3).

23 Ibid s 38(4). This does not, however, apply where the person charged is, at the time when the written record is made, incapable of understanding what is said to him (s 38(5)(a)), violent or likely to become violent (s 38(5)(b)), in urgent need of medical attention (s 38(5)(c)), or, in relation to a person whose detention is under review and who has been charged before the time of the review (see note 1 supra), where the person is asleep (ss 38(5)(aa), 40(10A)(b) (as added: see note 1 supra)).

As to the application of s 38(1)-(6) (as amended) to persons whose detention is under review see PARA 1001 note 4 post. As to the modification of s 38 (as amended) in relation to a person charged with an offence in accordance with the Criminal Justice Act 2003 s 87(4) (re-trial of serious offences) see s 88; and PARA 1946 post.

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#### **945. Limitations on police detention.**

A person arrested for an offence<sup>1</sup> may not be kept in police detention<sup>2</sup> except in accordance with the relevant statutory provisions<sup>3</sup>. All persons in custody must be dealt with expeditiously, and released as soon as the need for detention no longer applies<sup>4</sup>.

If at any time a custody officer<sup>5</sup>:

- 1275 (1) becomes aware, in relation to any person in police detention, that the grounds for the detention of that person have ceased to apply<sup>6</sup>; and
- 1276 (2) is not aware of any other grounds on which the continued detention of that person could be justified under the statutory provisions<sup>7</sup>,

it is the duty of the custody officer to order his immediate release from custody<sup>8</sup>, although a person who appears to the custody officer to have been unlawfully at large when he was arrested is not to be so released<sup>9</sup>.

No person in police detention may be released except on the authority of a custody officer at the police station where his detention was authorised or, if it was authorised at more than one station, a custody officer at the station where it was last authorised<sup>10</sup>.

A person whose release is ordered<sup>11</sup> must be released without bail unless it appears to the custody officer either:

- 1277 (a) that there is need for further investigation of any matter in connection with which he was detained at any time during the period of his detention<sup>12</sup>; or
- 1278 (b) that, in respect of any such matter, proceedings may be taken against him or he may be reprimanded or warned<sup>13</sup>,

and, if it so appears, he must be released on bail<sup>14</sup>.

1 A breach of the peace is not an offence for these purposes: *Williamson v Chief Constable of West Midlands Police* [2003] EWCA Civ 337, [2004] 1 WLR 14.

2 For the meaning of 'in police detention' see PARA 939 note 9 ante.

3 Police and Criminal Evidence Act 1984 s 34(1). The relevant statutory provisions are Pt IV (ss 34-51) (as amended) (see PARAS 938 et seq ante, 946 et seq post).

For the purposes of Pt IV (as amended), a person arrested under the Road Traffic Act 1988 s 6D (as added and amended) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 983) or the Transport and Works Act 1992 s 30(2) (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 378) is arrested for an offence (Police and Criminal Evidence Act 1984 s 34(6) (amended by the Police Reform Act 2002 s 53(1); and the Railways and Transport Safety Act 2003 s 107, Sch 7 para 12)); and a person who attends a police station to answer bail granted under the Police and Criminal Evidence Act 1984 s 30A (as added) (see PARA 933 ante), returns to a police station to answer to bail granted under Pt IV (as amended), or is arrested under s 30D (as added) (see PARA 933 ante) or s 46A (as added and amended) (see PARA 941 ante) is to be treated as arrested for an offence and that offence is the offence in connection with which he was granted bail: s 34(7) (added by the Criminal Justice and Public Order Act 1994 s 29(1), (3)).



4 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 1.1.

5 As to custody officers see PARA 939 ante.

6 Police and Criminal Evidence Act 1984 s 34(2)(a).

7 Ibid s 34(2)(b).

8 Ibid s 34(2).

9 Ibid s 34(4).

10 Ibid s 34(3).

11 Ie under ibid s 34(2): see the text and notes 5-7 supra.

12 Ibid s 34(5)(a).

13 Ibid s 34(5)(b) (substituted by the Criminal Justice and Court Services Act 2000 s 56(2)). The reference in the text to a person being reprimanded or warned is a reference to his being reprimanded or warned under the Crime and Disorder Act 1998 s 65 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1235): Police and Criminal Evidence Act 1984 s 34(5)(b) (as so substituted).

14 Ibid s 34(5). As to bail after arrest see PARA 935 ante.

## **UPDATE**

### **945 Limitations on police detention**

NOTE 3--The 1984 Act s 34(7) does not apply in relation to a person who is granted bail subject to the duty mentioned in s 47(3)(b) (see PARA 935) and who either (1) attends a police station to answer to such bail, or (2) is arrested under s 46A (see PARA 941) for failing to do so, provision as to the treatment of such persons for the purposes of Pt IV (ss 34-51) (see PARA 938 et seq) being made by s 46ZA (see PARA 945A): s 34(8) (added by Police and Justice Act 2006 s 46(2) (in force in specified local justice areas: SI 2007/709, SI 2008/2785)).

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#### **945A. Persons granted live link bail.**

The following provisions are in force in specified local justice areas: SI 2007/709, SI 2008/2785.

An accused person who attends a police station to answer to live link bail is not to be treated as in police detention for the purposes of the Police and Criminal Evidence Act 1984<sup>1</sup>. This does not apply in relation to an accused person if (1) at any time before the beginning of proceedings in relation to a live link direction<sup>2</sup> in relation to him, he informs a constable that he does not intend to give his consent to the direction; (2) at any such time, a constable informs him that a live link will not be available for his use for certain purposes<sup>3</sup>; (3) proceedings in relation to a live link direction under certain provisions<sup>4</sup> have begun but he does not give his consent to the direction; or (4) the court determines for any other reason not to give such a direction<sup>5</sup>. If heads (1)-(4) above apply in relation to a person, he is to be treated for certain purposes<sup>6</sup> (a) as if he had been arrested for and charged with the offence in connection with which he was granted bail; and (b) as if he had been so charged at the time when that head first applied to him<sup>7</sup>. An accused person who is arrested<sup>8</sup> for failing to attend at a police station to answer to live link bail, and who is brought to a police station, is to be treated<sup>9</sup> (i) as if he had been arrested for and charged with the offence in connection with which he was granted bail; and (ii) as if he had been so charged at the time when he is brought to the station<sup>10</sup>.

1 Police and Criminal Evidence Act 1984 s 46ZA(2) (s 46ZA added by Police and Justice Act 2006 s 46(3)). The 1984 Act s 46ZA applies in relation to bail granted under Pt IV (ss 34-51) (see PARA 938 et seq) subject to the duty mentioned in s 47(3)(b) (see PARA 935): s 46ZA(1).

2 Ie a live link direction under the Crime and Disorder Act 1998 s 57C: see PARA 1259.

3 Ie for the purposes of *ibid* s 57C.

4 Ie for the purposes of *ibid* s 57C.

5 *Ibid* s 46ZA(3).

6 Ie those of *ibid* Pt IV.

7 *Ibid* s 46ZA(4). Nothing in s 46ZA(4) or (5) affects the operation of s 47(6) (see PARA 935): s 46ZA(6).

8 Ie under *ibid* s 46A: see PARA 941.

9 Ie for the purposes of *ibid* Pt IV.

10 *Ibid* s 46ZA(5). See also NOTE 7.

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## **(6) TREATMENT OF DETAINED PERSONS**

### **(i) Initial Procedure**

#### **946. Responsibilities in relation to persons detained.**

It is the duty of the custody officer<sup>1</sup> at a police station to ensure:

- 1279 (1) that all persons in police detention<sup>2</sup> at that station are treated in accordance with the Police and Criminal Evidence Act 1984 and any code of practice<sup>3</sup> issued under it and relating to the treatment of persons in police detention<sup>4</sup>; and
- 1280 (2) that all matters relating to such persons which are required by the Act or by such codes of practice to be recorded are recorded in the custody records relating to such persons<sup>5</sup>.

If the custody officer, in accordance with any code of practice issued under the Act, transfers or permits the transfer of a person in police detention:

- 1281 (a) to the custody of a police officer investigating an offence for which that person is in police detention<sup>6</sup>; or
- 1282 (b) to the custody of an officer who has charge of that person outside the police station<sup>7</sup>,

the custody officer ceases in relation to that person to be subject to the duty relating to the treatment of detained persons<sup>8</sup>; and it is the duty of the officer to whom the transfer is made to ensure that the person is treated in accordance with the provisions of the Act and of any such codes of practice<sup>9</sup>.

If the person detained is subsequently returned to the custody of the custody officer, it is the duty of the officer investigating the offence to report to the custody officer as to the manner in which these provisions and the codes of practice have been complied with while that person was in his custody<sup>10</sup>.

If an arrested juvenile<sup>11</sup> is moved<sup>12</sup> to local authority accommodation<sup>13</sup>, the custody officer ceases in relation to that person to be subject to the duties relating to treatment and the recording of relevant matters<sup>14</sup>.

Where:

- 1283 (i) an officer of higher rank than the custody officer<sup>15</sup> gives directions relating to a person in police detention<sup>16</sup>; and
- 1284 (ii) the directions are at variance with any decision made or action taken by the custody officer in the performance of a duty<sup>17</sup> or with any decision or action which would but for the directions have been made or taken by him in the performance of such a duty<sup>18</sup>,

the custody officer must refer the matter at once to an officer of the rank of superintendent or above<sup>19</sup> who is responsible for the police station for which the custody officer is acting as custody officer<sup>20</sup>.

1 As to custody officers see PARA 939 ante.

2 For the meaning of 'in police detention' see PARA 939 note 9 ante.

3 As to codes of practice under the Police and Criminal Evidence Act 1984 see further PARA 908 ante.

4 Ibid s 39(1)(a).

5 Ibid s 39(1)(b). As to custody records see PARA 940 ante. It is the duty of every police authority to make arrangements for persons detained in a police station within its area to be visited by independent custody visitors: see PARA 947 post.

6 Ibid s 39(2)(a).

7 Ibid s 39(2)(b).

8 Ie the duty set out in ibid s 39(1)(a): see the text and notes 1-4 supra.

9 Ibid s 39(2). As to the transfer of persons in police detention into the custody of suitably designated investigating officers or escort officers see the Police Reform Act 2002 s 38(6), Sch 4 paras 22, 35 (Sch 4 para 22 as amended); and POLICE vol 36(1) (2007 Reissue) PARA 529.

10 Police and Criminal Evidence Act 1984 s 39(3).

11 For the meaning of 'arrested juvenile' see PARA 944 note 5 ante.

12 Ie in pursuance of arrangements made under the Police and Criminal Evidence Act 1984 s 38(6) (as amended): see PARA 944 ante.

13 For the meaning of 'local authority accommodation' see PARA 944 note 15 ante.

14 Police and Criminal Evidence Act 1984 s 39(4) (amended by the Children Act 1989 s 108(5), Sch 13 para 54). The duties referred to in the text are those set out in the Police and Criminal Evidence Act 1984 s 39(1): see the text and notes 1-5 supra.

15 As from a day to be appointed these provisions also apply where a staff custody officer is given directions by any police officer or any police employee: see the Police and Criminal Evidence Act 1984 s 39(6)(a) (s 39(6)(a) prospectively amended by the Serious Organised Crime and Police Act 2005 s 121(7)). At the date at which this volume states the law no such day had been appointed. For the meaning of 'staff custody officer' for these purposes see the Police Reform Act 2002 Sch 4A para 35A (prospectively added); and POLICE vol 36(1) (2007 Reissue) PARA 529 (definition applied by the Police and Criminal Evidence Act 1984 s 39(7)(b) (s 39(7) prospectively added by the Serious Organised Crime and Police Act 2005 s 121(7))). 'Police employee' means a person employed under the Police Act 1996 s 15 (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 168); definition applied by the Police and Criminal Evidence Act 1984 s 39(7)(a) (as so added).

16 Ibid s 39(6)(a) (prospectively amended: see note 15 supra).

17 Ibid s 39(6)(b)(i). The reference in the text to the performance of a duty is a reference to the performance of a duty under Pt IV (ss 34-51) (as amended).

18 Ibid s 39(6)(b)(ii).

19 See PARA 858 ante.

20 Police and Criminal Evidence Act 1984 s 39(6).

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#### **947. Independent custody visitors for places of detention.**

Every police authority<sup>1</sup> must make arrangements<sup>2</sup> for detainees<sup>3</sup> to be visited by persons appointed under those arrangements<sup>4</sup>. Such persons are referred to as 'independent custody visitors'<sup>5</sup> and the arrangements:

- 1285 (1) must secure that the independent custody visitors are independent of both the police authority<sup>6</sup> and the chief officer of police<sup>7</sup> of the police force maintained by that authority<sup>8</sup>;
- 1286 (2) may confer on independent custody visitors such powers as the police authority considers necessary to enable them to carry out their functions under the arrangements<sup>9</sup>;
- 1287 (3) may include provision for access to a detainee to be denied to independent custody visitors<sup>10</sup>.

The Secretary of State must issue, and may from time to time revise, a code of practice as to the carrying out by police authorities and independent custody visitors of their functions under the arrangements<sup>11</sup>. Police authorities and independent custody visitors must have regard to the code of practice for the time being in force in the carrying out of their functions under these provisions<sup>12</sup>.

1 As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

2 Police authorities must keep such arrangements under review and from time to time revise them as they think fit: Police Reform Act 2002 s 51(1)(b).

3 For these purposes, 'detainee', in relation to arrangements made under *ibid* s 51, means a person detained in a police station in the police area of the police authority: s 51(10).

4 *Ibid* s 51(1)(a). Police authorities must keep such arrangements under review and from time to time revise them as they think fit: s 51(1)(b).

5 *Ibid* s 51(1)(a).

6 *Ibid* s 51(2)(a).

7 As to chief officers of police and their functions see POLICE vol 36(1) (2007 Reissue) PARA 178 et seq.

8 Police Reform Act 2002 s 51(2)(b).

9 *Ibid* s 51(3). Pursuant to this, arrangements may, in particular, confer on independent custody visitors powers: (1) to require access to be given to each police station (s 51(3)(a)); (2) to examine records relating to the detention of persons there (s 51(3)(b)); (3) to meet detainees there for the purposes of a discussion about their treatment and conditions while detained (s 51(3)(c)); and (4) to inspect the facilities there including, in particular, cell accommodation, washing and toilet facilities, and the facilities for the provision of food (s 51(3)(d)).

10 *Ibid* s 51(4). Arrangements may include provision for access to a detainee to be denied to independent custody visitors if: (1) it appears to an officer of or above the rank of inspector that there are grounds for denying access at the time it is requested (s 51(4)(a)); (2) the grounds are grounds specified for those purposes in the arrangements (s 51(4)(b)); and (3) the procedural requirements imposed by the arrangements in relation

to a denial of access are complied with (s 51(4)(c)). Grounds must not be specified in any arrangements for these purposes unless they are grounds for the time being set out for such purposes in the code of practice issued by the Secretary of State under s 51(6) (see the text and note 11 *infra*): s 51(5).

11 *Ibid* s 51(6). Before issuing or revising such a code, the Secretary of State must consult with persons whom he considers to represent the interests of police authorities (s 51(7)(a)), persons whom he considers to represent the interests of chief officers of police (s 51(7)(b)), and such other persons as he thinks fit (s 51(7)(c)). The Secretary of State must lay the code, and any revisions of it, before Parliament: s 51(8).

12 *Ibid* s 51(9).

## **UPDATE**

### **947 Independent custody visitors for places of detention**

NOTE 11--For 'persons ... police authorities' read 'the Association of Police Authorities' and for 'persons ... chief officers of police' read 'the Association of Chief Police Officers': 2002 Act s 51(a), (b) (substituted by the Police and Justice Act 2006 Sch 4 para 16).

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#### **948. Detained persons; normal procedure.**

When a person is brought to a police station under arrest or is arrested at the police station having attended there voluntarily, the custody officer<sup>1</sup> must make sure the person is told clearly:

- 1288 (1) about the right to have someone informed of his arrest<sup>2</sup>;
- 1289 (2) about the right to consult privately with a solicitor<sup>3</sup> and that free independent legal advice is available<sup>4</sup>;
- 1290 (3) about the right to consult the codes of practice<sup>5</sup>.

These are rights which may be exercised at any stage during the period in custody<sup>6</sup>. The detainee must also be given a written notice setting out these rights, the arrangements for obtaining legal advice, the right to a copy of the custody record<sup>7</sup> and the caution in the prescribed terms<sup>8</sup>, and an additional written notice briefly setting out his entitlements while in custody<sup>9</sup>. The detainee must be asked to sign the custody record to acknowledge receipt of these notices<sup>10</sup>.

The custody officer must:

- 1291 (a) record on the custody record<sup>11</sup> the offence or offences for which the detainee has been arrested and the reason or reasons for the arrest<sup>12</sup>;
- 1292 (b) note on the custody record any comment the detainee makes in relation to the arresting officer's account<sup>13</sup>;
- 1293 (c) note any comment the detainee makes in respect of the decision to detain him<sup>14</sup>;
- 1294 (d) not put specific questions to the detainee regarding his involvement in any offence, nor in respect of any comments he may make in response to the arresting officer's account or the decision to place him in detention<sup>15</sup>;
- 1295 (e) ask the detainee whether at this time he would like legal advice<sup>16</sup> and wants someone informed of his detention<sup>17</sup>, and to sign the custody record to confirm his decisions in these matters<sup>18</sup>; and
- 1296 (f) determine whether the detainee is, or might be, in need of medical treatment or attention<sup>19</sup>, or whether he requires an appropriate adult<sup>20</sup>, or help to check documentation or an interpreter<sup>21</sup>, and record the decision<sup>22</sup>.

When determining the detainee's needs regarding legal advice, representation or assistance<sup>23</sup> the custody officer is responsible for initiating an assessment to consider whether the detainee is likely to present specific risks to custody staff or himself<sup>24</sup>.

Risk assessments must follow a structured process which clearly defines the categories of risk to be considered and the results must be incorporated in the detainee's custody record<sup>25</sup>. The custody officer is responsible for making sure those responsible for the detainee's custody are appropriately briefed about the risks<sup>26</sup>. If no specific risks are identified by the assessment, that should be noted in the custody record<sup>27</sup>. The custody officer is responsible for implementing the response to any specific risk assessment, for example by reducing opportunities for self-harm,

calling a health care professional, or increasing levels of monitoring or observation<sup>28</sup>. Risk assessment is an ongoing process and assessments must always be subject to review if circumstances change<sup>29</sup>.

1 As to custody officers see PARA 939 ante.

2 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 3.1(i). As to an arrested person's right to have someone informed of his arrest see Code C paras 5.1-5.8; and PARA 952 post.

3 Ie in accordance with Code C paras 6.1-6.17; and PARA 953 post.

4 Code C para 3.1(ii).

5 Code C para 3.1(iii). As to the codes of practice (ie under the Police and Criminal Evidence Act 1984) see further PARA 908 ante. The right to consult the codes of practice does not entitle the person concerned to delay unreasonably necessary investigative or administrative action while he does so: Code C Guidance note 3D. Examples of action which need not be delayed unreasonably include: procedures requiring the provision of breath, blood or urine specimens under the Road Traffic Act 1988 or the Transport and Works Act 1992; searching detainees at the police station; and taking fingerprints, footwear impressions or non-intimate samples without consent for evidential purposes: see Code C Guidance note 3D.

6 Code C para 3.1.

7 Ie in accordance with Code C para 2.4A: see PARA 940 ante.

8 Ie the terms prescribed by Code C para 10: see PARA 959 post.

9 Code C para 3.2. The notice of entitlements should list the entitlements in Code C, including those relating to visits and contact with outside parties (including special provisions for Commonwealth citizens and foreign nationals), reasonable standards of physical comfort, adequate food and drink, access to toilets and washing facilities, clothing, medical attention, and exercise when practicable; and should mention the provisions relating to the conduct of interviews and the circumstances in which an appropriate adult should be available to assist the detainee and his statutory rights to make representation whenever the period of his detention is reviewed: Code C Guidance note 3A.

In addition to notices in English, translations should be made available in Welsh, the main minority ethnic languages and the principal European languages, whenever they are likely to be helpful: Code C Guidance note 3B. Audio versions of the notice should also be made available: Code C Guidance note 3B.

A citizen of an independent Commonwealth country or a national of a foreign country, including the Republic of Ireland, must be informed as soon as practicable about his rights of communication with his high commission, embassy or consulate (see PARA 954 post): Code C para 3.3.

10 Code C para 3.2. Any refusal must be recorded on the custody record: Code C para 3.2.

11 As to the custody record see PARA 940 ante.

12 Code C para 3.4.

13 Code C para 3.4. The custody officer must not invite comment: Code C para 3.4. If the arresting officer is not physically present when the detainee is brought to a police station, his account must be made available to the custody officer remotely or by a third party on the arresting officer's behalf: Code C para 3.4. If the custody officer authorises a person's detention, the detainee must be informed of the grounds as soon as practicable and before he is questioned about any offence: Code C para 3.4. See also Code G: Code of Practice for the Statutory Power of Arrest by Police Officers para 2.2; and PARA 931 ante.

14 Code C para 3.4. The custody officer must not invite comment: Code C para 3.4.

15 Code C para 3.4. Such an exchange is likely to constitute an interview and require the associated safeguards (as to which see PARAS 11.1A-11.20; and PARAS 960-963 post): Code C para 3.4.

16 Code C para 3.5(a)(i). See further Code C para 6.5; and PARA 953 post.

17 Code C para 3.5(a)(ii). See further Code C paras 5.1-5.8; and PARA 952 post.

18 Code C para 3.5(b).



19 Code C para 3.5(c)(iii).

20 For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

21 Code C para 3.5(c)(iv).

22 Code C para 3.5(d).

23 Ie the needs referred to in Code C para 3.5: see the text and notes 16-22 supra.

24 Code C para 3.6. Chief officers should ensure that arrangements for proper and effective risk assessments required by Code C para 3.6 are implemented in respect of all detainees at police stations in their area: Code C para 3.7. Such assessments should always include a check on the police national computer, to be carried out as soon as practicable, to identify any risks highlighted in relation to the detainee: Code C para 3.6. Although such assessments are primarily the custody officer's responsibility, it may be necessary for him to consult and involve others, for example the arresting officer or an appropriate health care professional: Code C para 3.6; and see further PARA 957 post. Reasons for delaying the initiation or completion of the assessment must be recorded: Code C para 3.6.

25 Code C para 3.8.

26 Code C para 3.8.

27 Code C para 3.8. Home Office Circular 32/2000 provides more detailed guidance on risk assessment and identifies key risk areas which should always be considered: Code C Guidance note 3E. See also Code C para 9.14; and PARA 958 post.

28 Code C para 3.9.

29 Code C para 3.10. If video cameras are installed in the custody area, notices must be prominently displayed showing that cameras are in use: Code C para 3.11. Any request to have video cameras switched off must be refused: Code C para 3.11.

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#### **949. Detained persons; special groups.**

If the detainee appears deaf or there is doubt about his hearing or speaking ability<sup>1</sup> or ability to understand English, and the custody officer<sup>2</sup> cannot establish effective communication with him, the custody officer must, as soon as practicable, call an interpreter<sup>3</sup> for assistance<sup>4</sup>.

If the detainee is a juvenile<sup>5</sup>, mentally disordered or otherwise mentally vulnerable<sup>6</sup>, the custody officer must as soon as practicable inform the appropriate adult<sup>7</sup>, who in the case of a juvenile may or may not be a person responsible for the juvenile's welfare, of the grounds for the detainee's detention and his whereabouts, and ask the adult to come to the police station to see the detainee<sup>8</sup>. It is imperative that a mentally disordered or otherwise mentally vulnerable person, detained under the statutory power for a constable to remove to a place of safety a mentally disordered person found in a public place<sup>9</sup>, be assessed as soon as possible<sup>10</sup>. If that assessment is to take place at the police station, an approved social worker and a registered medical practitioner<sup>11</sup> must be called to the station as soon as possible in order to interview and examine the detainee<sup>12</sup>. Once the detainee has been interviewed, examined and suitable arrangements made for his treatment or care, he can no longer be detained under those provisions: a detainee must be immediately discharged from detention under those provisions if a registered medical practitioner, having examined him, concludes that he is not mentally disordered for those purposes<sup>13</sup>.

If the appropriate adult is already at the police station, the normal procedure for detained persons<sup>14</sup> must be complied with in the appropriate adult's presence; and if the appropriate adult is not at the police station when those provisions are complied with, they must be complied with again in his presence when he arrives<sup>15</sup>.

The detainee must be advised that the duties of the appropriate adult include giving advice and assistance and that he can consult privately with the appropriate adult at any time<sup>16</sup>. If the detainee, or appropriate adult on his behalf, asks for a solicitor to be called to give legal advice, the relevant provisions<sup>17</sup> apply<sup>18</sup>.

If the detainee is blind, seriously visually impaired or unable to read, the custody officer must make sure that his solicitor, relative, appropriate adult or some other person likely to take an interest in him and not involved in the investigation is available to help in checking any documentation<sup>19</sup>. Where written consent or signification is required<sup>20</sup>, the person assisting may be asked to sign instead if the detained person prefers<sup>21</sup>.

Action taken under these provisions must be recorded<sup>22</sup>.

1 If a person appears to be blind, seriously visually impaired, deaf, unable to read or speak, or has difficulty orally because of a speech impediment, he must, in the absence of clear evidence to the contrary, be treated as such for the purposes of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers: see Code C para 1.6. See further *R v Clarke* [1989] Crim LR 892, CA.

2 As to custody officers see PARA 939 ante.

3 As to interpreters see PARA 967 et seq post.

4 Code C para 3.12. The provisions in connection with which assistance will be given are Code C paras 3.1-3.5: see PARA 948 ante.

5 If anyone appears to be under the age of 17, he must be treated as a juvenile for these purposes in the absence of clear evidence to show that he is older: Code C para 1.5.

6 For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante. If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable, in the absence of clear evidence to dispel that suspicion, that person must be treated as such for these purposes: see Code C para 1.4; and *R v Lamont* [1989] Crim LR 813, CA.

7 For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

8 Code C para 3.15.

9 Ie under the Mental Health Act 1983 s 136: see MENTAL HEALTH vol 30(2) (Reissue) PARA 550.

10 Code C para 3.16.

11 As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 4.

12 Code C para 3.16.

13 Code C para 3.16.

14 Ie the provisions of Code C paras 3.1-3.5: see PARA 948 ante.

15 Code C para 3.17.

16 Code C para 3.18.

17 Ie the provisions of Code C paras 6.1-6.17: see PARA 953 post.

18 Code C para 3.19.

19 Code C para 3.20. Code C para 3.20 does not require an appropriate adult to be called solely to assist in checking and signing documentation for a person who is not a juvenile, or mentally disordered or otherwise mentally vulnerable: Code C para 3.20

20 Ie by Code C.

21 Code C para 3.20.

22 Code C para 3.24.

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### **950. Additional rights of children and young persons.**

Where a child<sup>1</sup> or young person<sup>2</sup> is in police detention<sup>3</sup>, such steps as are practicable must be taken to ascertain the identity of a person responsible<sup>4</sup> for his welfare<sup>5</sup>.

If it is practicable so to ascertain the identity of a person responsible for the welfare of a child or young person, that person<sup>6</sup> must, unless it is not practicable to do so, be informed<sup>7</sup>:

- 1297 (1) that the child or young person has been arrested<sup>8</sup>;
- 1298 (2) why he has been arrested<sup>9</sup>; and
- 1299 (3) where he is being detained<sup>10</sup>.

If it appears that at the time of a child or young person's arrest a supervision order<sup>11</sup> is in force in respect of him, the person responsible for his supervision must also be informed as soon as it is reasonably practicable to do so<sup>12</sup>; and if it appears that at the time of his arrest the child or young person is being provided with the accommodation provided by or on behalf of a local authority<sup>13</sup>, the local authority must also be so informed as soon as it is reasonably practicable to do so<sup>14</sup>.

The rights conferred by these provisions are in addition to the right<sup>15</sup> not to be held incommunicado<sup>16</sup>.

1 For the meaning of 'child' see PARA 143 note 2 ante.

2 For these purposes, 'young person' means a person who has attained the age of 14 and is under the age of 17 years: Children and Young Persons Act 1933 s 107(1); Criminal Justice Act 1991 (Commencement No 3) Order 1992, SI 1992/333, art 2(4) (providing that the substitution of this definition effected by the Criminal Justice Act 1991 s 68, Sch 8 para 3 (whereby the upper age was raised to 18: see PARA 143 note 2 ante) does not apply in relation to the Children and Young Persons Act 1933 s 34 (see the text and notes 3-16 infra)). This definition (as saved for these purposes) is re-enacted for the purposes of the Children and Young Persons Act 1933 ss 31, 34: see s 31(2) (added by the Criminal Justice Act 1991 Sch 8 para 1(1)). The Children and Young Persons Act 1933 s 34(2)-(11) (as added and amended) (see the text and notes 3-16 infra) do not apply, however, to children over the age of 17 years: *Re B (A Minor)* [1990] FCR 469. As to the position where the child or young person is a ward of court see note 14 infra.

3 For these purposes, the reference to a child or young person who is in police detention includes a reference to a child or young person who has been detained under the terrorism provisions: Children and Young Persons Act 1933 s 34(10) (s 34(2) substituted, and s 34(3)-(11) added, by the Police and Criminal Evidence Act 1984 s 57). For the meaning of 'terrorism provisions' see the Police and Criminal Evidence Act 1984 s 65 (as amended); and PARA 952 note 4 post (definition applied by the Children and Young Persons Act 1933 s 34(11) (as so added)).

4 For these purposes, the persons who may be responsible for the welfare of a child or young person are his parent or guardian (*ibid* s 34(5)(a) (as added: see note 3 supra)) or any other person who has for the time being assumed responsibility for his welfare (s 34(5)(b) (as so added)). In the case of a child or young person in the care of a local authority (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 844et seq), the reference to a parent or guardian is a reference to that authority: s 34(8) (as so added; and amended by the Children Act 1989 s 108(7), Sch 15). As to adoptive parents see the Adoption and Children Act 2002 ss 67, 68; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 377-378.

5 Children and Young Persons Act 1933 s 34(2) (as substituted: see note 3 supra); Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 3.13. The person responsible

for the juvenile's welfare may be: the parent or guardian; if the juvenile is in local authority or voluntary organisation care, or is otherwise being looked after under the Children Act 1989, a person appointed by that authority or organisation to have responsibility for the juvenile's welfare; or any other person who has, for the time being, assumed responsibility for the juvenile's welfare: Code C para 3.13.

6    Ie the person or persons specified in note 5 supra.

7    Where information falls to be given under these provisions, it must be given as soon as it is practicable to do so: Children and Young Persons Act 1933 s 34(4) (as added: see note 3 supra). If it is practicable to give a person responsible for the welfare of the child or young person the information so required, that person must be given it as soon as it is practicable to do so: s 34(6) (as so added).

8    Ibid s 34(3)(a) (as added: see note 3 supra); Code C para 3.13. For these purposes, 'arrest' includes detention under the terrorism provisions (see note 3 supra): see the Children and Young Persons Act 1933 s 34(10) (as so added).

9    Ibid s 34(3)(b) (as added: see note 3 supra); Code C para 3.13.

10   Children and Young Persons Act 1933 s 34(3)(c) (as added: see note 3 supra); Code C para 3.13.

11   Ie an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 63 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250) or the Children Act 1989 Pt IV (ss 31-42) (as amended): see CHILDREN AND YOUNG PERSONS.

12   Children and Young Persons Act 1933 s 34(7) (as added (see note 3 supra); and amended by the Children Act 1989 s 108(5), Sch 13 para 6(2); and the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 1). If a juvenile is known to be subject to a court order under which a person or organisation is given any degree of statutory responsibility to supervise or otherwise monitor him, reasonable steps must also be taken to notify that person or organisation (the 'responsible officer'). The responsible officer will normally be a member of a youth offending team, except for a curfew order which involves electronic monitoring when the contractor providing the monitoring will normally be the responsible officer: Code C para 3.14. As to youth offending teams see PARA 1703 post. As to curfew orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 231.

13   Ie under the Children Act 1989 s 20 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 863 et seq.

14   Children and Young Persons Act 1933 s 34(7A) (added by the Children Act 1989 Sch 13 para 6(3)). If the juvenile is in the care of a local authority or a voluntary organisation but is living with his parents or other adults responsible for his welfare then, although there is no legal obligation on the police to inform them, they as well as the authority or organisation should normally be contacted unless suspected of involvement in the offence concerned: Code C Guidance note 3C. Even if the juvenile is not living with his parents, consideration should be given to informing them as well: Code C Guidance note 3C.

As to the appropriate procedure where the juvenile is a ward of court see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at I.5.1, CA. It is not necessary, however, to inform the wardship court of the arrest or detention of a ward of court who is over the age of 17 years; nor is it necessary for a police authority to seek leave to interview a ward or to seek subsequent approval of the wardship court for interviews which have already taken place between the police and a ward of court over the age of 17: *Re B (A Minor)* [1990] FCR 469.

15   Ie under the Police and Criminal Evidence Act 1984 s 56 (as amended): see PARA 952 post.

16   Children and Young Persons Act 1933 s 34(9) (as added: see note 3 supra). As to the detention of children and young persons see also PARA 949 ante.

## UPDATE

### 950 Additional rights of children and young persons

TEXT AND NOTES 12, 14--Children and Young Persons Act 1933 s 34(7) further amended, s 34(7B) added, Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 1 repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 2, Sch 28 Pt 1.

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### **951. Detained persons' property.**

The custody officer<sup>1</sup> is responsible for ascertaining what property a detainee has with him when he comes to the police station<sup>2</sup> or might have acquired for an unlawful or harmful purpose while in custody<sup>3</sup>, and for the safekeeping of any property which is taken from him and which remains at the police station<sup>4</sup>. The custody officer may search the detainee or authorise his being searched to the extent that he considers necessary, provided that a search of intimate parts of the body or involving the removal of more than outer clothing may only be made in accordance with the prescribed procedure<sup>5</sup>. A search may be carried out only by an officer of the same sex as the detainee<sup>6</sup>.

Detainees may retain clothing and personal effects<sup>7</sup> at their own risk unless the custody officer considers that they may use them to cause harm to themselves or others, interfere with evidence, damage property or effect an escape or that they are needed as evidence<sup>8</sup>.

It is a matter for the custody officer to determine whether a record should be made of the property a detained person has with him or had taken from him on arrest<sup>9</sup>. Any record made is not required to be kept as part of the custody record but the custody record should be noted as to where such a record exists<sup>10</sup>. Whenever a record is made, the detainee must be allowed to check and sign the record of property as correct<sup>11</sup>. If a detainee is not allowed to keep any article of clothing or personal effects the reason must be recorded<sup>12</sup>.

1 As to custody officers see PARA 939 ante.

2 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 4.1(a)(i). This applies to the property a detainee has with him when he comes to the police station whether on arrest or re-detention on answering to bail, on commitment to prison custody on the order or sentence of a court, on lodgement at the police station with a view to his production in court from such custody, on transfer from detention at another station or from hospital, on detention under the Mental Health Act 1983 s 135 (as amended) or s 136 (see MENTAL HEALTH vol 30(2) (Reissue) PARAS 549-550), or on remand into police custody on the order of a court: Code C para 4.1(a)(i).

3 Code C para 4.1(a)(ii).

4 Code C para 4.1(b).

5 Code C para 4.1. For the prescribed procedure see Code C Annex A; and PARA 1007 post. As to the searching of detained persons see the Police and Criminal Evidence Act 1984 s 54 (as amended); and PARA 1006 et seq post. Section 54 (as amended) and Code C para 4.1 require a detainee to be searched when it is clear that the custody officer will have continuing duties in relation to that detainee or when that detainee's behaviour or offence makes an inventory appropriate: Code C Guidance note 4A. They do not require every detainee to be searched (eg if it is clear that a person will be detained only for a short period and is not to be placed in a cell, the custody officer may decide not to search the person): Code C Guidance note 4A. In such a case, the custody record will be indorsed 'not searched', Code C para 4.4 (see the text and note 9 infra) will not apply, and the detainee will be invited to sign the entry: Code C Guidance note 4A. If the detainee refuses to sign, the custody officer will be obliged to ascertain what property the detainee has in accordance with Code C para 4.1: Code C Guidance note 4A.

6 Code C para 4.1.

7 For these purposes, 'personal effects' are those items which a person may lawfully need, use or refer to while in detention but do not include cash and other items of value: Code C para 4.3.

8 Code C para 4.2. If the custody officer so considers he may withhold such articles as he considers necessary and he must tell the person why: Code C para 4.2.

9 Code C para 4.4. This does not require the custody officer to record on the custody record property in the detainee's possession on arrest if, by virtue of its nature, quantity or size, it is not practicable to remove it to the police station: Code C Guidance note 4B. This provision also does not require items of clothing worn by the person be recorded unless withheld by the custody officer as in Code C para 4.2 (see the text and note 8 *supra*): Code C Guidance note 4C.

10 Code C para 4.4.

11 Code C para 4.4. Any refusal to sign must be recorded: Code C para 4.4.

12 Code C para 4.5.

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## **(ii) Rights of Detained Persons**

### **952. Right not to be held incommunicado.**

Where a person has been arrested and is being held in custody<sup>1</sup> in a police station or other premises<sup>2</sup> he is entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable (except to the extent that delay is permitted<sup>3</sup>) and at public expense, that he has been arrested and is being detained there<sup>4</sup>. If the person cannot be contacted, the detainee may choose up to two alternatives, and if they too cannot be contacted the person in charge of detention or the investigation has a discretion to allow further attempts until the information has been conveyed<sup>5</sup>. In any case the person in custody must be permitted to exercise such right within 36 hours from the relevant time<sup>6</sup>.

The rights so conferred<sup>7</sup> on a person detained at a police station or other premises are exercisable whenever he is transferred from one place to another; and they apply to each subsequent occasion on which they are exercisable as they apply to the first such occasion<sup>8</sup>.

The person may receive visits at the custody officer's discretion<sup>9</sup>.

If a friend, relative or person with an interest in the detainee's welfare inquires about his whereabouts, this information must be given if the detainee agrees and the power to delay notification of arrest or to allow access to legal advice<sup>10</sup> does not apply<sup>11</sup>.

The detainee must be given writing materials on request and be allowed to telephone one person for a reasonable time<sup>12</sup>. Either or both these privileges may be denied or delayed if an officer of inspector rank or above considers that sending a letter or making a telephone call may result in any of specified<sup>13</sup> consequences<sup>14</sup>.

Before any letter or message is sent, or telephone call is made, the detainee must be informed that what he says in any letter, call or message (other than in the case of a communication to a solicitor) may be read or listened to and may be given in evidence<sup>15</sup>. A telephone call may be terminated if it is being abused<sup>16</sup>. The costs can be at public expense at the discretion of the custody officer<sup>17</sup>.

Any delay or denial of these rights should be proportionate and should last no longer than necessary<sup>18</sup>.

A record must be kept of: (1) any request made under these provisions and the action taken on it<sup>19</sup>; (2) any letters, messages or telephone calls made or received or visit received<sup>20</sup>; and (3) any refusal by the detainee to have information about himself given to an outside inquirer<sup>21</sup>. The detainee must be asked to countersign the record accordingly, and any refusal must be recorded<sup>22</sup>.

1 See PARA 953 note 2 post.

2 See PARA 872 note 5 ante.

3 Ie by the Police and Criminal Evidence Act 1984 s 56 (as amended) (see PARA 955 post). The exercise of such right in respect of each of the persons nominated may be delayed only in accordance with Code C: Code of



Practice for the Detention, Treatment and Questioning of Persons by Police Officers Annex B (see PARA 955 post): Code C para 5.2.

4 Police and Criminal Evidence Act 1984 s 56(1); Code C para 5.1. Nothing in the Police and Criminal Evidence Act 1984 s 56 (as amended) applies to a person arrested or detained under the terrorism provisions: s 56(10) (substituted by the Terrorism Act 2000 s 125(1), Sch 14 para 5(1), (5)). 'The terrorism provisions' means the Terrorism Act 2000 s 41 and provisions of Sch 7 (see PARA 430 et seq ante) conferring a power of detention: Police and Criminal Evidence Act 1984 s 65 (amended by the Terrorism Act 2000 Sch 14 para 5(1), (10)). As to special provisions relating to persons arrested or detained under the terrorism provisions see PARA 421 ante.

As to the custody officer's duty to inform a person of this right under the Police and Criminal Evidence Act 1984 s 56(1) see PARA 948 ante. If the detainee does not know anyone to contact for advice or support or cannot contact a friend or relative, the custody officer should bear in mind any local voluntary bodies or other organisations who might be able to offer help: Code C Guidance note 5C. If it is specifically legal advice that is wanted, then Code C para 6.1 (see PARA 953 post) applies: Code C Guidance note 5C. In some circumstances it may not be appropriate to use the telephone to disclose information under Code C para 5.1: Code C Guidance note 5D. As to custody officers see PARA 939 ante.

5 Code C para 5.1.

6 Police and Criminal Evidence Act 1984 s 56(3). For the meaning of 'the relevant time' see PARA 1000 post.

7 *Ie* by *ibid* s 56 (as amended).

8 *Ibid* s 56(8); Code C para 5.3.

9 Code C para 5.4. At the custody officer's discretion visits should be allowed when possible, subject to having sufficient personnel to supervise a visit and any possible hindrance to the investigation: Code C Guidance note 5B.

10 See Code C Annex B; and PARAS 955-956 post.

11 Code C para 5.5. In some circumstances it may not be appropriate to use the telephone to disclose information under Code C para 5.5: Code C Guidance note 5D.

12 Code C para 5.6. A person may request an interpreter to interpret a telephone call or translate a letter: Code C Guidance note 5A. The telephone call is in addition to any communication under Code C para 5.1 (see the text and notes 1-4 *supra*) and Code C para 6.1 (see PARA 953 post): Code C Guidance note 5E.

13 *Ie* the consequences in Code C Annex B paras 1, 2 (where the person is detained in connection with an indictable offence): Code C para 5.6. As to Code C Annex B see PARAS 955-956 post.

14 Code C para 5.6. Nothing in Code C para 5.6 permits the restriction or denial of the rights in Code C para 5.1 (see the text and notes 1-4 *supra*) and Code C para 6.1 (see PARA 953 post): Code C para 5.6.

15 Code C para 5.7.

16 Code C para 5.7.

17 Code C para 5.7.

18 Code C para 5.7A.

19 Code C para 5.8(a).

20 Code C para 5.8(b).

21 Code C para 5.8(c).

22 Code C para 5.8(c).

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### **953. Right to legal advice.**

A person arrested<sup>1</sup> and held in custody<sup>2</sup> in a police station or other premises<sup>3</sup> is entitled, if he so requests, to consult a solicitor<sup>4</sup> privately at any time<sup>5</sup>. No police officer should, at any time, do or say anything with the intention of dissuading a detainee from obtaining legal advice<sup>6</sup>. In the case of a juvenile, an appropriate adult<sup>7</sup> should consider whether legal advice from a solicitor is required<sup>8</sup>. If the juvenile indicates that he does not want legal advice, the appropriate adult has the right to ask for a solicitor to attend if this would be in the best interests of the person<sup>9</sup>. However, the detained person cannot be forced to see the solicitor if he is adamant that he does not wish to do so<sup>10</sup>.

A request to consult a solicitor privately and the time at which it was so made must be recorded in the custody record<sup>11</sup>; but such a request need not be recorded in the custody record of a person who makes it at a time while he is at court after being charged with an offence<sup>12</sup>. If a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable<sup>13</sup> except to the extent that delay is permitted<sup>14</sup>. In any case he must be permitted to consult a solicitor within 36 hours from the relevant time<sup>15</sup>.

If a solicitor arrives at the station to see a particular person, that person must, unless the provisions<sup>16</sup> about delay in allowing access to legal advice apply, be so informed whether or not he is being interviewed and asked if he would like to see the solicitor<sup>17</sup>.

A detainee who wants legal advice may not be interviewed<sup>18</sup> or continue to be interviewed until he has received such advice unless:

1300 (1) the provisions about delay in allowing access to legal advice<sup>19</sup> apply, when the restrictions on drawing adverse inferences from silence<sup>20</sup> will apply because the detainee is not allowed an opportunity to consult a solicitor<sup>21</sup>; or

1301 (2) an officer of the rank of superintendent<sup>22</sup> or above has reasonable grounds for believing<sup>23</sup> that:

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105. (a) the consequent delay might: (i) lead to interference with, or harm to, evidence connected with an offence; (ii) lead to interference with, or physical harm to, other persons; (iii) lead to serious loss of, or damage to, property; (iv) lead to alerting other persons suspected of having committed an offence but not yet arrested for it; (v) hinder the recovery of property obtained in consequence of the commission of an offence<sup>24</sup>; or

106. (b) when a solicitor, including a duty solicitor, has been contacted and has agreed to attend, awaiting his arrival would cause unreasonable delay to the process of investigation<sup>25</sup>; or

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1302 (3) the solicitor the detainee has nominated or selected from a list:

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107. (a) cannot be contacted<sup>26</sup>;

108. (b) has previously indicated he does not wish to be contacted<sup>27</sup>; or

109. (c) having been contacted, has declined to attend<sup>28</sup>;

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- 1303 and the detainee has been advised of the Duty Solicitor Scheme, but has declined to ask for the duty solicitor<sup>29</sup>; or
- 1304 (4) the detainee changes his mind about wanting legal advice<sup>30</sup>.

A detainee who has been permitted to consult a solicitor is entitled on request to have the solicitor present while he is interviewed unless one of these exceptions<sup>31</sup> applies<sup>32</sup>. The solicitor may be required to leave the interview only if his conduct is such that the investigating officer is unable properly to put questions to the suspect<sup>33</sup>. If the interviewer considers that a solicitor is acting in such a way, he will stop the interview and consult an officer not below superintendent rank, if one is readily available, and otherwise an officer not below inspector rank who is not connected with the investigation<sup>34</sup>. After speaking to the solicitor, the officer consulted must decide if the interview should continue in the presence of that solicitor; and if he decides that it should not, the suspect must be given the opportunity to consult another solicitor before the interview continues and that solicitor must be given an opportunity to be present at the interview<sup>35</sup>.

If the inspector refuses access to an accredited or probationary representative or a decision is taken that such a person should not be permitted to remain at an interview, the inspector must notify the solicitor on whose behalf the representative was acting and give him an opportunity of making alternative arrangements<sup>36</sup>. The detainee must be informed and the custody record noted<sup>37</sup>.

A record must be made in the interview record if a detainee asks for legal advice and an interview is begun either in the absence of a solicitor or his representative, or the solicitor or his representative has been required to leave an interview<sup>38</sup>.

A detained person must be permitted to consult a solicitor for a reasonable time before any court hearing<sup>39</sup>.

1 Nothing in the Police and Criminal Evidence Act 1984 s 58 (as amended) applies to a person arrested or detained under the terrorism provisions: s 58(12) (substituted by the Terrorism Act 2000 s 125(1), Sch 14 para 5(1), (6)). For the meaning of 'the terrorism provisions' see PARA 952 note 4 ante. As to special provisions in respect of such persons see PARA 421 ante.

2 A person is 'held in custody' for the purposes of the Police and Criminal Evidence Act 1984 s 56 (as amended) (see PARA 955 post) and s 58 (as amended) (see the text and notes 3-15 infra) only where the stage of proceedings has been reached where his detention in custody has been authorised (ie in the straightforward arrest situation where the suspect has been taken to a designated police station and the custody officer is satisfied that the statutory conditions for detention are made out): *R v Kerawalla* [1991] Crim LR 451, CA.

3 For the meaning of 'premises' see PARA 872 note 5 ante.

4 For these purposes, 'solicitor' means a solicitor who holds a current practising certificate and an accredited or probationary representative included in the register of representatives maintained by the Legal Services Commission: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 6.12.

An accredited or probationary representative sent to provide advice by, and on behalf of, a solicitor must be admitted to the police station for this purpose unless an officer of the rank of inspector or above considers that such a visit will hinder the investigation of crime and directs otherwise: Code C para 6.12A. 'Hindering the investigation' does not include giving proper legal advice to a detainee, as in Code C Guidance note 6D (see note 33 infra): Code C para 6.12A. Once an accredited or probationary representative has been admitted to the police station, Code C paras 6.6-6.10 (see the text and notes 18-34 infra) apply: Code C para 6.12A.

In exercising his discretion under Code C para 6.12A, the officer should take into account in particular: (1) whether the identity and status of the accredited or probationary representative have been satisfactorily established and he is of suitable character to provide legal advice (eg a person with a criminal record is unlikely to be suitable unless the conviction was for a minor offence and not recent); and (2) any other matters in any written letter of authorisation provided by the solicitor on whose behalf the person is attending the police station: Code C para 6.13. A chief constable is not entitled to impose a blanket ban on a probationary police station representative attending at a police station to perform his duty because the role of the police is limited to a consideration of whether the investigation of a specific offence will be hindered and this can only be

undertaken on a case by case basis: *R (on the application of Thompson) v Chief Constable of Northumbria Constabulary* [2001] EWCA Civ 321, [2001] 4 All ER 354, [2001] 1 WLR 1342, approving *R v Chief Constable of Avon and Somerset Constabulary, ex p Robinson* [1989] 2 All ER 15, [1989] 1 WLR 793, DC. The chief constable can, however, advise that the character of a particular representative is likely to hinder an investigation and an officer can reach a decision, in the light of that advice, as to whether the attendance of a representative at a station might hinder a particular investigation: *R (on the application of Thompson) v Chief Constable of Northumbria Constabulary supra*. The police have a duty to ensure that arrested persons detained at a police station have access to legal advice but they are not required to concern themselves with the quality of that advice: *R (on the application of Thompson) v Chief Constable of Northumbria Constabulary supra*.

If an officer of at least inspector rank considers a particular solicitor or firm of solicitors is persistently sending probationary representatives who are unsuited to provide legal advice, he should inform an officer of at least superintendent rank, who may wish to take the matter up with the Law Society: Code C Guidance note 6F.

The right to consult a solicitor is the detainee's right alone; a solicitor has no corresponding right to enter a police station to see a detainee: *Rixon v Chief Constable of Kent* (2000) Times, 11 April, CA.

5 Police and Criminal Evidence Act 1984 s 58(1). Subject to the application of Code C Annex B (see PARAS 955-956 post), all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available from the duty solicitor: Code C para 6.1. A poster advertising the right to legal advice must be prominently displayed in the charging area of every police station: Code C para 6.3. In addition to a poster in English, a poster or posters containing translations into Welsh, the main minority ethnic languages and the principal European languages should be displayed wherever they are likely to be helpful and it is practicable to do so: Code C Guidance note 6H.

See *R v Chief Constable of South Wales, ex p Merrick* [1994] 2 All ER 560, [1994] 1 WLR 663, DC (the Police and Criminal Evidence Act 1984 s 58 (as amended) does not generally apply to a person remanded in custody in the cells of a magistrates' court, although such a person has a common law right to consult a solicitor). The Police and Criminal Evidence Act 1984 s 58 (as amended) does not apply to a person interviewed by a trading standards officer in relation to alleged criminal offences under the Protection of Animals Act 1911: *R (on the application of Beale) v South East Wiltshire Magistrates* [2002] EWHC 2961 (Admin), 167 JP 41, DC. As to the exclusion at trial of evidence obtained in breach of the right to legal advice see PARA 1545 note 7 post.

A detainee who asks for legal advice should be given an opportunity to consult a specific solicitor or another solicitor from that solicitor's firm or the duty solicitor: Code C Guidance note 6B. If advice is not available by these means, or he does not wish to consult the duty solicitor, the detainee should be given an opportunity to choose a solicitor from a list of those willing to provide legal advice: Code C Guidance note 6B. If this solicitor is unavailable, the detainee may choose up to two alternatives: Code C Guidance note 6B. If these attempts are unsuccessful, the custody officer has discretion to allow further attempts until a solicitor has been contacted and agrees to provide legal advice: Code C Guidance note 6B. Apart from carrying out these duties, an officer must not advise the suspect about any particular firm of solicitors: Code C Guidance note 6B.

6 Code C para 6.4.

7 For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

8 Code C para 6.5A.

9 Code C para 6.5A.

10 Code C para 6.5A.

11 Police and Criminal Evidence Act 1984 s 58(2). Any request for legal advice and the action taken on it must be recorded: Code C para 6.16. As to custody records see PARA 940 ante.

12 Police and Criminal Evidence Act 1984 s 58(3).

13 Whenever a detainee exercises his fundamental right to legal advice by consulting or communicating with a solicitor, he must be allowed to do so in private: Code C Guidance note 6J. If the requirement for privacy is compromised because what is said or written by the detainee or solicitor for the purpose of giving and receiving legal advice is overheard, listened to, or read by others without the informed consent of the detainee, the right will effectively have been denied: Code C Guidance note 6J. When a detainee chooses to speak to a solicitor on the telephone, he should be allowed to do so in private unless this is impractical because of the design and layout of the custody area or the location of telephones: Code C Guidance note 6J. However, the normal expectation should be that facilities will be available, unless they are being used, at all police stations to enable detainees to speak in private to a solicitor either face to face or over the telephone: Code C Guidance note 6J.

14 Police and Criminal Evidence Act 1984 s 58(4). The exercise of the right of access to legal advice may be delayed only as in Code C Annex B (see PARAS 955-956 post): Code C para 6.5. Whenever legal advice is requested, and unless Code C Annex B applies, the custody officer must act without delay to secure the provision of such advice; and if, on being informed or reminded of this right, the detainee declines to speak to a solicitor in person, the officer should point out that the right includes the right to speak with a solicitor on the telephone: Code C para 6.5. If the detainee continues to waive this right the officer should ask him why and any reasons should be recorded on the custody record or the interview record as appropriate: Code C para 6.5. Reminders of the right to legal advice must be given as in Code C para 3.5 (see PARA 948 ante), PARA 11.2 (see PARA 960 post), PARA 15.4 (see PARA 1001 ante), PARAS 16.4, 16.5 (see PARA 1042 post), Annex A para 2B (see PARA 1007 post) and Annex K para 3 (see PARA 1008 post) and Code D: Code of Practice on the Identification of Persons by Police Officers para 3.17(ii) (see PARA 1014 post) and PARA 6.3 (see PARA 1028 post): Code C para 6.5. Once it is clear that a detainee does not want to speak to a solicitor in person or by telephone he should cease to be asked his reasons: Code C para 6.5. A detainee is not obliged to give reasons for declining legal advice and should not be pressed to do so: Code C Guidance note 6K.

15 Police and Criminal Evidence Act 1984 s 58(5). For the meaning of 'the relevant time' see PARA 1000 post.

16 In Code C Annex B: see PARAS 955-956 post.

17 Code C para 6.15. This applies even if the detainee has declined legal advice or, having requested it, has subsequently agreed to be interviewed without receiving advice: Code C para 6.15. The solicitor's attendance and the detainee's decision must be noted in the custody record: Code C para 6.15.

18 A person who refuses to supply a specimen unless he can first consult a solicitor does not have a reasonable excuse for the purposes of the Road Traffic Act 1988 s 7(6) (offence of failing to provide a specimen of breath, blood or urine: see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 988) (*DPP v Billington* [1988] 1 All ER 435, 87 Cr App Rep 68, DC; followed in *DPP v Whalley* [1991] RTR 161, [1991] Crim LR 211, DC), unless the consultation will not delay the taking of the specimen to any significant extent (*Kennedy v CPS* [2002] EWHC 2297 (Admin), [2004] RTR 77). See also *Campbell v DPP* [2002] EWHC 1314 (Admin), [2004] RTR 64; *Kirkup v DPP* [2003] EWHC 2354 (Admin), 168 JP 255; *Causey v DPP* [2004] EWHC 3164 (Admin), 169 JP 331.

19 In Code C Annex B: see PARAS 955-956 post.

20 In under Code C Annex C: see PARA 1042 post.

21 Code C para 6.6(a).

22 See PARA 858 ante.

23 In considering whether Code C para 6.6(b) applies, the officer should, if practicable, ask the solicitor for an estimate of how long it will take to come to the station and relate this to the time detention is permitted, the time of day (ie whether the rest period under Code C para 12.2 (see PARA 964 post) is imminent) and the requirements of other investigations: Code C Guidance note 6A. If the solicitor is on his way or is to set off immediately, it will not normally be appropriate to begin an interview before he arrives; if it appears necessary to begin an interview before the solicitor's arrival, he should be given an indication of how long the police would be able to wait before these provisions apply so that there is an opportunity to make arrangements for someone else to provide legal advice: Code C Guidance note 6A.

24 Code C para 6.6(b)(i). If this provision applies, once sufficient information has been obtained to avert the risk, questioning must cease until the detainee has received legal advice unless Code C para 6.6(a), (b)(ii), (c) or (d) applies: Code C para 6.7.

25 Code C para 6.6(b)(ii).

26 Code C para 6.6(c)(i).

27 Code C para 6.6(c)(ii).

28 Code C para 6.6(c)(iii).

29 Code C para 6.6(c). In these circumstances the interview may be started or continued without further delay provided that an officer of inspector rank or above has agreed to the interview proceeding: Code C para 6.6(c). The restriction on drawing adverse inferences from silence in Code C Annex C will not apply because the detainee is allowed an opportunity to consult the duty solicitor: Code C para 6.6(c).

30 Code C para 6.6(d). In these circumstances the interview may be started or continued without delay provided that the detainee agrees to do so, in writing or on the interview record made in accordance with Code E: Code of Practice on Audio Recording Interviews with Suspects or Code F: Code of Practice on Visual Recording

with Sound of Interviews with Suspects, and an officer of inspector rank or above has inquired about the detainee's reasons for his change of mind and gives authority for the interview to proceed: Code C para 6.6(d). Confirmation of the detainee's agreement, his change of mind, the reasons for it if given and, subject to Code C para 2.6A (see PARA 940 ante), the name of the authorising officer must be recorded in the recorded or written interview record: Code C para 6.6. Code C para 6.6(d) requires the authorisation of an officer of inspector rank or above to the continuation of an interview when a detainee who wanted legal advice changes his mind; and it is permissible for such authorisation to be given over the telephone, if the authorising officer is able to satisfy himself about the reason for the detainee's change of mind and is satisfied that it is proper to continue the interview in those circumstances: Code C Guidance note 6I. In these circumstances the restriction on drawing adverse inferences from silence in Code C Annex C will not apply because the detainee is allowed an opportunity to consult a solicitor if he wishes: Code C para 6.6.

31     le one of the exceptions in Code para 6.6: see the text and notes 16-29 supra.

32     Code C para 6.8. The right to consult a solicitor conferred by the Northern Ireland equivalent of the Police and Criminal Evidence Act 1984 s 58 (as amended) does not, in the case of a person detained under the Prevention of Terrorism (Temporary Provisions) Act 1989 s 14(1) (repealed: see now the Terrorism Act 2000 s 41; and PARA 430 et seq ante), extend to the right to the solicitor's attendance during interview, merely to private consultation: *R v Chief Constable of the Royal Ulster Constabulary, ex p Begley, R v McWilliams* [1997] 4 All ER 833, [1997] 1 WLR 1475, HL.

33     Code C para 6.9. See Code C Guidance note 6D and Code C Guidance note 6E.

Code C Guidance note 6D provides that a detainee has a right to free legal advice and to be represented by a solicitor. The solicitor's only role in the police station is to protect and advance the legal rights of their client. On occasions this may require the solicitor to give advice which has the effect of the client avoiding giving evidence which strengthens a prosecution case. The solicitor may intervene in order to seek clarification, challenge an improper question to his client or the manner in which it is put, advise his client not to reply to particular questions, or if he wishes to give his client further legal advice. Code C para 6.9 only applies if the solicitor's approach or conduct prevents or unreasonably obstructs proper questions being put to the suspect or the suspect's response being recorded. Examples of unacceptable conduct include answering questions on a suspect's behalf or providing written replies for the suspect to quote.

Code C Guidance note 6E provides that an officer who takes the decision to exclude a solicitor must be in a position to satisfy the court the decision was properly made. In order to do this he may need to witness what is happening.

34     Code C para 6.10.

35     Code C para 6.10. See Code C Guidance note 6E; and note 33 supra. The removal of a solicitor from an interview is a serious step and, if it occurs, the officer of superintendent rank or above who took the decision must consider whether the incident should be reported to the Law Society: Code C para 6.11. If the decision to remove the solicitor has been taken by an officer below superintendent rank, the facts must be reported to an officer of superintendent rank or above who must similarly consider whether a report to the Law Society would be appropriate: Code C para 6.11. When the solicitor concerned is a duty solicitor, the report should be both to the Law Society and to the Legal Services Commission: Code C para 6.11.

36     Code C para 6.14.

37     Code C para 6.14.

38     Code C para 6.17. As to interview records see PARA 961 post.

39     Code C Annex B para 7.

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#### **954. Rights of citizens of independent Commonwealth countries or foreign nationals.**

Any citizen of an independent Commonwealth country or a national of a foreign country, including the Republic of Ireland, may communicate at any time with his high commission, embassy or consulate<sup>1</sup>. The detainee must be informed as soon as practicable of this right, and of his right, upon request, to have his high commission, embassy or consulate told of his whereabouts and the grounds for his detention; any such request should be acted upon as soon as practicable<sup>2</sup>.

If a detainee is a citizen of a country with which a bilateral consular convention or agreement is in force requiring notification of arrest, the appropriate high commission, embassy or consulate must be informed as soon as practicable<sup>3</sup>.

Consular officers may visit one of their nationals who is in police detention to talk to him and, if required, to arrange for legal advice; and such visits must take place out of the hearing of a police officer<sup>4</sup>.

Notwithstanding the provisions of consular conventions, if the detainee is a political refugee whether for reasons of race, nationality, political opinion or religion, or is seeking political asylum, consular officers must not be informed of the arrest of one of their nationals or given access or information about them except at the detainee's express request<sup>5</sup>.

A record must be made when a detainee is informed of his rights<sup>6</sup> and of any communications with a high commission, embassy or consulate<sup>7</sup>.

1 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 7.1. The exercise of the rights in Code C para 7 (see the text and notes 2-7 infra) may not be interfered with even though Code C Annex B (see PARAS 955-956 post) applies: Code C Guidance note 7A; Annex B Guidance note B2.

2 Code C para 7.1.

3 Code C para 7.2. This obligation is subject to Code C para 7.4 (see the text and note 5 infra). The countries to which Code C para 7.2 applies are: Armenia; Austria; Azerbaijan; Belarus; Belgium; Bosnia-Herzegovina; Bulgaria; China; Croatia; Cuba; Czech Republic; Denmark; Egypt; France; Georgia; German Federal Republic; Greece; Hungary; Italy; Japan; Kazakhstan; Macedonia; Mexico; Moldova; Mongolia; Norway; Poland; Romania; Russia; Slovak Republic; Slovenia; Spain; Sweden; Tajikistan; Turkmenistan; Ukraine; USA; Uzbekistan; and Yugoslavia: Code C Annex F. In the case of China, police are required to inform Chinese officials of arrest or detention in the Manchester consular district (which comprises Derbyshire, Durham, Greater Manchester, Lancashire, Merseyside, North, South and West Yorkshire, and Tyne and Wear) only: Code C Annex F.

4 Code C para 7.3.

5 Code C para 7.4.

6 See under Code C para 7.

7 Code C para 7.5.

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### **955. Grounds for delay in notifying arrest.**

Where a person has been arrested<sup>1</sup> and is being held in custody<sup>2</sup> in a police station or other premises, delay in the exercise of his right to have another person informed that he has been arrested and is being detained there<sup>3</sup> is permitted only in the case of a person who is in police detention for an indictable offence<sup>4</sup> and if an officer of at least the rank of inspector<sup>5</sup> authorises it<sup>6</sup>. An officer may give such an authorisation orally or in writing but, if he gives it orally, he must confirm it in writing as soon as is practicable<sup>7</sup>. In any case the detained person must be permitted to exercise his right within 36 hours from the relevant time<sup>8</sup>.

An officer may authorise delay where he has reasonable grounds for believing:

- 1305 (1) that telling the named person of the arrest will lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons<sup>9</sup>;
- 1306 (2) that telling the named person of the arrest will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it<sup>10</sup>;
- 1307 (3) that telling the named person of the arrest will hinder the recovery of any property obtained as a result of such an offence<sup>11</sup>; or
- 1308 (4) that the person detained for the indictable offence has benefited from<sup>12</sup> his criminal conduct<sup>13</sup> and that the recovery of the value of the property constituting the benefit will be hindered by telling the named person of the arrest<sup>14</sup>.

If delay is so authorised, the detained person must be told the reason for it<sup>15</sup> and the reason must be noted on his custody record<sup>16</sup>; and these duties must be performed as soon as is practicable<sup>17</sup>.

Once the reason for authorising the delay ceases to subsist, there may be no further delay in permitting the exercise of the right to have someone informed when arrested<sup>18</sup>.

1 As to references to a person who has been arrested see PARA 953 note 1 ante.

2 See PARA 953 note 2 ante.

3 I.e. the right conferred by the Police and Criminal Evidence Act 1984 s 56 (as amended): see PARA 952 ante. For the meaning of 'in police detention' see PARA 939 note 9 ante.

4 Ibid s 56(2)(a) (amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (9)); Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Annex B para 1.

5 See PARA 858 ante.

6 Police and Criminal Evidence Act 1984 s 56(2)(b) (amended by the Criminal Justice and Police Act 2001 s 74); Code C Annex B para 1. Even if Code C Annex B applies in the case of a juvenile, or a person who is mentally disordered or otherwise mentally vulnerable, action to inform the appropriate adult and the person responsible for a juvenile's welfare if that is a different person must nevertheless be taken in accordance with Code C paras 3.13, 3.15 (see PARA 949 ante): Code C Guidance note B1. For the meaning of 'mentally



vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante. For the meaning of 'appropriate adult' see PARA 940 note 9 ante. As to the provisions applicable to Commonwealth citizens and foreign nationals see PARA 954 ante. In relation to persons detained under the Terrorism Act 2000 see PARA 421 ante.

7 Police and Criminal Evidence Act 1984 s 56(4).

8 Ibid s 56(3); Code C Annex B para 6. For the meaning of 'the relevant time' see PARA 1000 post. If the grounds on which delay may be authorised (see the text and notes 9-14 infra) cease to apply within the relevant time, the detainee must, as soon as practicable, be asked if he wishes to exercise his right, the custody record must be noted accordingly, and the appropriate action must be taken in accordance with Code C: Code C Annex B para 6. Any reply given by the detainee must be recorded and the detainee must be asked to indorse the record in relation to whether he wants to receive legal advice at this point: Code C Annex B para 14.

9 Police and Criminal Evidence Act 1984 s 56(5)(a) (s 56(5) amended by the Drug Trafficking Offences Act 1986 s 32; and the Police and Criminal Evidence Act 1984 s 56(5)(a) amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 43(1), (9)); Code C Annex B para 1(i). Code C Annex B para 1 applies if the person detained has not yet been charged with an offence (Code C Annex B para 1); and 'an offence' means 'any offence' and not 'that offence' (*R v Samuel* [1988] QB 615, 87 Cr App Rep 232, CA).

10 Police and Criminal Evidence Act 1984 s 56(5)(b); Code C Annex B para 1(ii).

11 Police and Criminal Evidence Act 1984 s 56(5)(c); Code C Annex B para 1(iii).

12 The question whether a person has benefited from his criminal conduct is to be decided in accordance with the Proceeds of Crime Act 2002 Pt 2 (ss 6-91) (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391 et seq); Police and Criminal Evidence Act 1984 s 56(5B) (added by the Proceeds of Crime Act 2002 s 456, Sch 11 para 14(1), (2)).

13 Police and Criminal Evidence Act 1984 s 56(5A)(a) (s 56(5A) added by the Drug Trafficking Offences Act 1986 s 32(1); and substituted by the Proceeds of Crime Act 2002 Sch 11 para 14(1), (2); and the Police and Criminal Evidence Act 1984 s 56(5A)(a) amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 43(1), (9)).

14 Police and Criminal Evidence Act 1984 s 56(5A)(b) (as added: see note 12 supra); Code C Annex B para 2(i).

15 Police and Criminal Evidence Act 1984 s 56(6)(a); Code C Annex B para 13. As to custody records see PARA 940 ante.

16 Police and Criminal Evidence Act 1984 s 56(6)(b); Code C Annex B para 13.

17 Police and Criminal Evidence Act 1984 s 56(7); Code C Annex B para 13.

18 Police and Criminal Evidence Act 1984 s 56(9).

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#### **956. Delay in allowing access to legal advice.**

Where a person has been arrested<sup>1</sup> and is being held in custody<sup>2</sup> in a police station or other premises, his right to consult a solicitor privately at any time<sup>3</sup> may be delayed only in the case of a person who is in police detention<sup>3</sup> for an indictable offence<sup>4</sup> and if an officer of at least the rank of superintendent<sup>5</sup> authorises it<sup>6</sup>. An officer may give such authorisation orally or in writing but, if he gives it orally, he must confirm it in writing as soon as is practicable<sup>7</sup>.

An officer may authorise delay where he has reasonable grounds for believing that the exercise of the right to consult a solicitor privately at the time when the person detained desires to exercise it:

- 1309 (1) will lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons<sup>8</sup>;
- 1310 (2) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it<sup>9</sup>; or
- 1311 (3) will hinder the recovery of any property obtained as a result of such an offence<sup>10</sup>.

An officer may also authorise delay where he has reasonable grounds for believing that:

- 1312 (a) the person detained for the indictable offence has benefited from his criminal conduct<sup>11</sup>; and
- 1313 (b) the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right to consult a solicitor privately at any time<sup>12</sup>.

Authority to delay a detainee's right to consult privately with a solicitor may be given only if the authorising officer has reasonable grounds to believe that the solicitor whom the detainee wants to consult will, inadvertently or otherwise, pass on a message from the detainee or act in some other way which will have any of the consequences specified above<sup>13</sup>; and in these circumstances the detainee must be allowed to choose another solicitor<sup>14</sup>.

If the detainee wishes to see a solicitor, access to that solicitor may not be delayed on the grounds that the solicitor might advise the detainee not to answer questions or that the solicitor was initially asked to attend the police station by someone else<sup>15</sup>.

If delay is so authorised, the detained person must be told the reason for it<sup>16</sup> and the reason must be noted on his custody record<sup>17</sup>; and these duties must be performed as soon as is practicable<sup>18</sup>.

Once the reason for authorising the delay ceases to subsist, there may be no further delay in permitting the exercise of the right to consult a solicitor privately at any time<sup>19</sup>; and in any case the detained person must be permitted to exercise his right within 36 hours from the relevant time<sup>20</sup>.

When a suspect detained at a police station is interviewed during any period for which access to legal advice has been delayed, the court or jury may not draw adverse inferences from his silence<sup>21</sup>.

A detained person must be permitted to consult a solicitor for a reasonable time before any court hearing<sup>22</sup>.

1 See PARA 953 note 1 ante.

2 See PARA 953 note 2 ante.

3 The right conferred by the Police and Criminal Evidence Act 1984 s 58 (as amended): see PARA 953 ante.

3 For the meaning of 'in police detention' see PARA 939 note 9 ante.

4 Police and Criminal Evidence Act 1984 s 58(6)(a) (amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (10)); Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Annex B para 1. For the meaning of 'indictable offence' see PARA 1102 note 1 post. Even if Code C Annex B applies in the case of a juvenile, or a person who is mentally disordered or otherwise mentally vulnerable, action to inform the appropriate adult and the person responsible for a juvenile's welfare if that is a different person must nevertheless be taken in accordance with Code C paras 3.13, 3.15 (see PARA 949 ante); Code C Annex B Guidance note 1. For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante. For the meaning of 'appropriate adult' see PARA 940 note 9 ante. As to the provisions applicable to Commonwealth citizens and foreign nationals see PARA 954 ante. Code C Annex B para 1 applies where the person detained has not yet been charged with an offence (Code C Annex B para 1); and 'an offence' means 'any offence' (*R v Samuel* [1988] QB 615, 87 Cr App Rep 232, CA). In relation to persons detained under the Terrorism Act 2000 (as amended) see PARA 421 ante.

5 See PARA 858 ante.

6 Police and Criminal Evidence Act 1984 s 58(6)(b); Code C Annex B para 1. As to the exercise of a superintendent's power to delay access to a solicitor see *R v Samuel* [1988] QB 615, 87 Cr App Rep 232, CA; *R v Alladice* (1988) 87 Cr App Rep 380, CA.

7 Police and Criminal Evidence Act 1984 s 58(7).

8 Ibid s 58(8)(a) (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 43(1), (10)); Code C Annex B para 1(i).

9 Police and Criminal Evidence Act 1984 s 58(8)(b); Code C Annex B para 1(ii).

10 Police and Criminal Evidence Act 1984 s 58(8)(c); Code C Annex B para 1(iii).

11 Police and Criminal Evidence Act 1984 s 58(8) (amended by the Drug Trafficking Offences Act 1986 s 32(2)); Police and Criminal Evidence Act 1984 s 58(8A)(a) (s 58(8A) added by the Drug Trafficking Offences Act 1986 s 32(2); and substituted by the Proceeds of Crime Act 2002 s 456, Sch 11 paras 1, 14(1), (3); and the Police and Criminal Evidence Act 1984 s 58(8A)(a) amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 43(1), (10)); Code C Annex B para 2(i). The question whether a person has benefited from his criminal conduct is to be decided in accordance with the Proceeds of Crime Act 2002 Pt 2 (ss 6-91) (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391 et seq); Police and Criminal Evidence Act 1984 s 58(8B) (s 58(8B) added by the Proceeds of Crime Act 2002 Sch 11 paras 1, 14(1), (3)).

12 Police and Criminal Evidence Act 1984 s 58(8A)(b) (as added and substituted: see note 11 supra); Code C Annex B para 2(ii).

13 The consequences set out in the Police and Criminal Evidence Act 1984 s 58(8) (as amended), s 58(8A) (as added, substituted and amended) and in Code C Annex B paras 1, 2 (see the text and notes 8-12 supra).

14 Code C Annex B para 3. A decision to delay access to a specific solicitor is likely to be a rare occurrence and only when it can be shown that the suspect is capable of misleading that particular solicitor and there is more than a substantial risk that the suspect will succeed in causing information to be conveyed which will lead to one or more of the specified consequences: Code C Annex B Guidance note 3.

15 Code C Annex B para 4. In the latter case the detainee must be told that the solicitor has come to the police station at another person's request, and must be asked to sign the custody record to signify whether he wants to see the solicitor: Code C Annex B para 4. The fact the grounds for delaying notification of arrest may

be satisfied does not automatically mean the grounds for delaying access to legal advice will also be satisfied: Code C Annex B para 5.

16 Police and Criminal Evidence Act 1984 s 58(9)(a); Code C Annex B para 13.

17 Police and Criminal Evidence Act 1984 s 58(9)(b); Code C Annex B para 13. As to custody records see PARA 940 ante.

18 Police and Criminal Evidence Act 1984 s 58(10); Code C Annex B para 13.

19 Police and Criminal Evidence Act 1984 s 58(11). If the grounds for authorising delay cease to apply within the permitted period of delay (see the text and note 20 *infra*), the detainee must, as soon as practicable, be asked if he wants to exercise his right to consult a solicitor privately at any time, the custody record must be noted accordingly, and the appropriate action must be taken in accordance with Code C: Code C Annex B para 6. Any reply given by a detainee must be recorded and the detainee asked to indorse the record in relation to whether he wants to receive legal advice at this point: Code C Annex B para 14.

20 Police and Criminal Evidence Act 1984 s 58(5); Code C Annex B para 6. For the meaning of 'the relevant time' see PARA 1000 post.

21 Code C Annex B para 15.

22 Code C Annex B para 7.

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### **(iii) Conditions of Detention; Care and Treatment of Detained Persons**

#### **957. Conditions of detention.**

So far as is practicable, not more than one person may be detained in each cell<sup>1</sup>. Cells in use must be adequately heated, cleaned and ventilated; and they must be adequately lit, subject to such dimming as is compatible with safety and security to allow persons detained overnight to sleep<sup>2</sup>. No additional restraints may be used within a locked cell unless absolutely necessary, and then only restraint equipment, approved for use in that police force by the chief constable, which is reasonable and necessary in the circumstances having regard to the detainee's demeanour and with a view to ensuring his safety and the safety of others<sup>3</sup>. The use of any restraints on a detainee whilst in a cell, the reasons for it and, if appropriate, the arrangements for enhanced supervision of the detainee while so restrained, must be recorded<sup>4</sup>. Blankets, mattresses, pillows and other bedding supplied must be of a reasonable standard and in a clean and sanitary condition<sup>5</sup>. Access to toilet and washing facilities must be provided<sup>6</sup>.

If it is necessary to remove a detainee's clothes for the purposes of investigation, for hygiene or health reasons or for cleaning, replacement clothing of a reasonable standard of comfort and cleanliness must be provided<sup>7</sup>. A detainee may not be interviewed unless adequate clothing has been offered to him<sup>8</sup>. At least two light meals and one main meal should be offered in any 24-hour period<sup>9</sup>. Drinks should be provided at meal times and upon reasonable request between meals<sup>10</sup>. Whenever necessary, advice should be sought from the appropriate health care professional<sup>11</sup> on medical or dietary matters; and, as far as practicable, meals provided must offer a varied diet and meet any specific dietary needs or religious beliefs that the detainee may have<sup>12</sup>. The detainee may, at the custody officer's discretion, have meals supplied by his family or friends at their expense<sup>13</sup>.

Brief outdoor exercise must be offered daily if practicable<sup>14</sup>.

A juvenile must not be placed in a police cell unless no other secure accommodation is available and the custody officer considers that it is not practicable to supervise him if he is not placed in a cell or that a cell provides more comfortable accommodation than other secure accommodation in the station<sup>15</sup>. A juvenile may not be placed in a cell with a detained adult<sup>16</sup>.

A record must be kept of replacement clothing and meals offered<sup>17</sup>; and, if a juvenile is placed in a cell, the reason must be recorded<sup>18</sup>.

1 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 8.1. The provisions on conditions of detention and treatment in PARAS 8.1-9.17 (see the text and notes 2-18 *infra*; and PARA 958 *post*) must be considered as the minimum standards of treatment for such detainees: Code C para 1.12.

2 Code C para 8.2.

3 Code C para 8.2. If a detainee is deaf, mentally disordered or otherwise mentally vulnerable, particular care must be taken when deciding whether to use any form of approved restraints: Code C para 8.2. For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 *ante*.

4 Code C para 8.11. See also Code C para 3.9; and PARA 948 *ante*.

5 Code C para 8.3. The provisions in Code C paras 8.3, 8.6 (see the text and notes 9-13 *infra*) regarding bedding and diet are of particular importance in the case of a person likely to be detained for an extended period: Code C Guidance note 8A.

6 Code C para 8.4.

7 Code C para 8.5.

8 Code C para 8.5.

9 Code C para 8.6. See note 5 *supra*. Meals should, so far as practicable, be offered at recognised meal times, or at other times that take account of when the detainee last had a meal: Code C Guidance note 8B.

10 Code C para 8.6.

11 A 'health care professional' means a clinically qualified person working within the scope of practice as determined by the relevant professional body: Code C Guidance note 9A. Whether a health care professional is 'appropriate' depends on the circumstances of the duties he carries out at the time: Code C Guidance note 9A.

12 Code C para 8.6.

13 Code C para 8.6. In deciding whether to allow meals to be supplied by family or friends, the custody officer is entitled to take account of the risk of items being concealed in any food or package and the officer's duties and responsibilities under food handling legislation: Code C Guidance note 8A.

14 Code C para 8.7.

15 Code C para 8.8.

16 Code C para 8.8.

17 Code C para 8.9.

18 Code C para 8.10.

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### **958. Care and treatment of detained persons.**

Detainees should be visited at least every hour, but, if no reasonably foreseeable risk was identified in a risk assessment<sup>1</sup>, there is no need to wake a sleeping detainee<sup>2</sup>. Those suspected of being intoxicated through drink or drugs, or of having swallowed drugs<sup>3</sup>, or whose level of consciousness causes concern must, subject to any clinical directions given by the appropriate health care professional<sup>4</sup>, be visited and roused at least every half hour, have their condition assessed in accordance with the prescribed observation list<sup>5</sup>, and have clinical treatment arranged if appropriate<sup>6</sup>.

When arrangements are made to secure clinical attention for a detainee, the custody officer must make sure all relevant information which might assist in the treatment of the detainee's condition is made available to the responsible health care professional; and this applies whether or not the health care professional asks for such information<sup>7</sup>. Any officer or police staff with relevant information must inform the custody officer as soon as practicable<sup>8</sup>.

The custody officer must make sure that a detainee receives appropriate clinical attention as soon as reasonably practicable<sup>9</sup> if the person:

- 1314 (1) appears to be suffering from physical illness<sup>10</sup>;
- 1315 (2) is injured<sup>11</sup>;
- 1316 (3) appears to be suffering from mental disorder<sup>12</sup>; or
- 1317 (4) appears to need clinical attention<sup>13</sup>.

This applies even if the detainee makes no request for clinical attention and whether or not he has already received clinical treatment elsewhere<sup>14</sup>. If the need for attention appears urgent, the nearest available health care professional or an ambulance must be called immediately<sup>15</sup>.

If it appears to the custody officer, or he is told, that a person brought to the police station under arrest may be suffering from an infectious disease or condition, the custody officer must take reasonable steps to safeguard the health of the detainee and others at the station<sup>16</sup>. In deciding what action to take, advice must be sought from an appropriate health care professional<sup>17</sup>. The custody officer has discretion to isolate the person and his property until clinical directions have been obtained<sup>18</sup>.

If a detainee requests a clinical examination, an appropriate health care professional must be called as soon as practicable to assess the detainee's clinical needs<sup>19</sup>. If a safe and appropriate care plan cannot be provided, the police surgeon's advice must be sought<sup>20</sup>. The detainee may also be examined by a medical practitioner of his own choice at his expense<sup>21</sup>. A record must be made in the custody record of any such request for a clinical examination, and of any arrangements made in response<sup>22</sup>.

If a detainee is required to take or apply any medication in compliance with clinical directions prescribed before his detention, the custody officer must contact the appropriate health care professional before the use of the medication<sup>23</sup>. Any such consultation and its outcome must be noted in the custody record<sup>24</sup>. The custody officer is responsible for the safe keeping of any medication and for making sure that the detainee is given the opportunity to take or apply prescribed or approved medication<sup>25</sup>. No police officer may administer or supervise the self-

administration of medically prescribed controlled drugs of specified types and forms<sup>26</sup>. A detainee may self-administer such drugs only under the personal supervision of the registered medical practitioner<sup>27</sup> authorising their use<sup>28</sup>. Other specified drugs<sup>29</sup> may be distributed by the custody officer for self-administration if he has consulted the registered medical practitioner authorising their use, which may be done by telephone, and both parties are satisfied that self-administration will not expose the detainee, police officers or anyone else to the risk of harm or injury<sup>30</sup>.

If a detainee has in his possession, or claims to need, medication relating to a heart condition, diabetes, epilepsy or a condition of comparable potential seriousness then, even though these provisions may not apply, the advice of the appropriate health care professional must be obtained<sup>31</sup>.

Whenever the appropriate health care professional is called in accordance with these provisions to examine or treat a detainee, the custody officer must ask for his opinion about any risks or problems which police need to take into account when making decisions about the detainee's continued detention, when to carry out an interview (if applicable), and the need for safeguards<sup>32</sup>.

When clinical directions are given by the appropriate health care professional, whether orally or in writing, and the custody officer has any doubts or is in any way uncertain about any aspect of them, the custody officer must ask for clarification<sup>33</sup>.

In addition to the records already referred to, a record must be made in the custody record of: the injury, ailment, condition or other reason which made it necessary to make arrangements for medical attention<sup>34</sup>; any clinical directions and advice, including any further clarifications, given to police by a health care professional concerning the care and treatment of the detainee in connection with any arrangements<sup>35</sup>; and, if applicable, the responses received when attempting to rouse a person using the procedure in the prescribed observation list<sup>36</sup>.

If a health care professional does not record his clinical findings in the custody record, the record must show where they are recorded<sup>37</sup>, but information which is necessary to custody staff to ensure the effective ongoing care and well being of the detainee must be recorded openly in the custody record<sup>38</sup>.

Subject to the provisions relating to the detainee's property<sup>39</sup>, the custody record must include a record of all medication a detainee has in his possession on arrival at the police station; and a note of any such medication that he claims to need but does not have with him<sup>40</sup>.

Nothing in these provisions prevents the police from calling the police surgeon or, if appropriate, some other health care professional, to examine a detainee for the purposes of obtaining evidence relating to any offence in which the detainee is suspected of being involved<sup>41</sup>.

If a complaint is made by or on behalf of a detainee about his treatment since his arrest, or it comes to notice that a detainee may have been treated improperly, a report must be made as soon as practicable to an officer of inspector rank or above who is not connected with the investigation<sup>42</sup>. If the matter concerns a possible assault or the possibility of the unnecessary or unreasonable use of force, an appropriate health care professional must also be called as soon as practicable<sup>43</sup>.

1 See Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 3.6-3.10; and PARA 948 ante.

2 Code C para 9.3.

3 The provisions of Code C para 9.3 would apply to a person in police custody by order of a magistrates' court under the Criminal Justice Act 1988 s 152 (as amended) (remands of suspected drug offenders to detention: see PARA 770 ante) to facilitate the recovery of evidence after being charged with drug possession or



drug trafficking and suspected of having swallowed drugs: Code C Guidance note 9CA. In the case of the healthcare needs of a person who has swallowed drugs, the custody officer, subject to any clinical directions, should consider the necessity for rousing every half hour (although this does not negate the need for regular visiting of the suspect in the cell): Code C Guidance note 9CA. As to custody officers see PARA 939 ante.

4 See Code C para 9.13; and the text and note 32 infra. For the meaning of 'health care professional', and as to whether a health care professional is 'appropriate', see PARA 957 note 11 ante.

5 The observation list is contained in Code C Annex H, which provides that when assessing the level of rousability, consideration should be given to rousability, response to questions and response to commands: Code C Annex H para 2. In assessing the level of rousability, Code C Annex H requires the custody officer to consider whether the detainee can be woken by going into the cell, calling his name and shaking him gently; to consider whether the detainee can give appropriate answers to questions such as 'what is your name?', 'where do you live?', and 'where do you think you are?'; and to consider whether he can respond appropriately to commands such as 'open your eyes!' and 'lift one arm, now the other arm!': Code C Annex H para 2. Custody officers are also required to remember to take into account the possibility or presence of other illnesses, injury, or mental condition and that a person who is drowsy and smells of alcohol may also have diabetes, epilepsy, head injury, drug intoxication or overdose, or stroke: Code C Annex H para 3. If any detainee fails to meet any of these criteria, an appropriate health care professional or an ambulance must be called: Code C Annex H para 1.

6 Code C para 9.3. Whenever possible juveniles and mentally vulnerable detainees should be visited more frequently: Code C Guidance note 9B. A detainee who appears drunk or behaves abnormally may be suffering from illness or the effects of drugs or may have sustained injury, particularly a head injury which is not apparent. A detainee needing or dependent on certain drugs, including alcohol, may experience harmful effects within a short time of being deprived of his supply. In these circumstances, when there is any doubt, police should always act urgently to call an appropriate health care professional or an ambulance: Code C Guidance note 9C. The purpose of recording a person's responses when attempting to rouse him using the procedure in Code C Annex H is to enable any change in the individual's consciousness level to be noted and clinical treatment arranged if appropriate: Code C Guidance note 9H.

7 Code C para 9.4.

8 Code C para 9.4.

9 A record must be made in the custody record of any arrangements made in accordance with Code C para 9.5 (see the text and notes 10-13 infra): Code C para 9.15(b). This provision does not require any information about the cause of any injury, ailment or condition to be recorded on the custody record if it appears capable of providing evidence of an offence: Code C Guidance note 9G.

10 Code C para 9.5(a). Code C para 9.5 does not apply to minor ailments or injuries which do not need attention; but all such ailments or injuries must be recorded in the custody record and any doubt must be resolved in favour of calling the appropriate health care professional: Code C Guidance note 9C.

11 Code C para 9.5(b). See note 10 supra.

12 Code C para 9.5(c). As to the meaning of 'mental disorder' see PARA 940 note 9 ante. Code C para 9.5 is not meant to prevent or delay the transfer to a hospital if necessary of a person detained under the Mental Health Act 1983 s 136 (see MENTAL HEALTH VOL 30(2) (Reissue) PARA 550): Code C para 9.6. Whenever practicable, arrangements should be made for persons detained for assessment under the Mental Health Act 1983 s 136 to be taken to a hospital: Code C Guidance note 9D. There is no power under the Mental Health Act 1983 to transfer a person detained under s 136 from one place of safety to another place of safety for assessment: Code C Guidance note 9D. When an assessment under the Mental Health Act 1983 takes place at a police station (see Code C para 3.16; and PARA 949 ante), the custody officer must consider whether an appropriate health care professional should be called to conduct an initial clinical check on the detainee: Code C para 9.6. This applies particularly when there is likely to be any significant delay in the arrival of a suitably qualified medical practitioner: Code C para 9.6.

13 Code C para 9.5(d). See note 10 supra.

14 Code C para 9.5A. The custody officer must also consider the need for clinical attention as set out in Code C Guidance note 9C in relation to detainees suffering the effects of alcohol or drugs: Code C para 9.5B.

15 Code C para 9.5A. See also Code C Guidance note 9C.

16 Code C para 9.7.

- 17 Code C para 9.7. It is important to respect a person's right to privacy, and information about his health must be kept confidential and disclosed only with his consent or in accordance with clinical advice when it is necessary to protect the detainee's health or that of others who come into contact with him: Code C Guidance note 9E.
- 18 Code C para 9.7.
- 19 Code C para 9.8.
- 20 Code C para 9.8.
- 21 Code C para 9.8.
- 22 Code C para 9.15(c). This provision does not require any information about the cause of any injury, ailment or condition to be recorded on the custody record if it appears capable of providing evidence of an offence: Code C Guidance note 9G.
- 23 Code C para 9.9.
- 24 Code C para 9.9.
- 25 Code C para 9.9.
- 26 Code C para 9.10. The specified controlled drugs are those of the types and forms listed in the Misuse of Drugs Regulations 2001, SI 2001/3998, Sch 2 (as amended) or Sch 3 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 249-251).
- 27 As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 4.
- 28 Code C para 9.10.
- 29 Ie those listed in the Misuse of Drugs Regulations 2001, SI 2001/3998, Sch 4 (as amended) or Sch 5 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARAS 249-251).
- 30 Code C para 9.10. When appropriate health care professionals administer drugs or other medications, or supervise their self-administration, it must be within current medicines legislation see (MEDICINAL PRODUCTS AND DRUGS) and the scope of practice as determined by the relevant professional body: Code C para 9.11.
- 31 Code C para 9.12.
- 32 Code C para 9.13.
- 33 Code C para 9.14. It is particularly important that directions concerning the frequency of visits are clear, precise and capable of being implemented: Code C para 9.14. The custody officer should always seek to clarify directions that the detainee requires constant observation or supervision and should ask the appropriate health care professional to explain precisely what action needs to be taken to implement such directions: Code C Guidance note 9F.
- 34 Code C para 9.15(d). This provision does not require any information about the cause of any injury, ailment or condition to be recorded on the custody record if it appears capable of providing evidence of an offence: Code C Guidance note 9G.
- 35 Code C para 9.15(e). See Code C Guidance note 9F; and the text and note 33 supra.
- 36 Code C para 9.15(f). As to the prescribed observation list see Code C Annex H; and note 5 supra. The purpose of recording a person's responses when attempting to rouse them using the procedure in Code C Annex H is to enable any change in the individual's consciousness level to be noted and clinical treatment arranged if appropriate: Code C Guidance note 9H.
- 37 This provision does not require any information about the cause of any injury, ailment or condition to be recorded on the custody record if it appears capable of providing evidence of an offence: Code C Guidance note 9G.
- 38 Code C para 9.16. See Code C para 3.8, Annex G para 7; and PARAS 948 ante, 963 post.
- 39 Ie Code C paras 4.1-4.5: see PARA 951 ante.
- 40 Code C para 9.17.

41 Code C para 9.1.

42 Code C para 9.2. All officers dealing with detained persons are, of course, under a duty to observe not only these provisions but also those set out in Code C para 9 and Guidance note 9D (see note 12 *supra*).

43 Code C para 9.2. A record must be made in the custody record of the arrangements made for an examination by an appropriate health care professional under Code C para 9.2 and of any complaint reported thereunder, together with any relevant remarks by the custody officer: Code C para 9.15(a).

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#### **(iv) Cautions**

##### **959. Cautions.**

A person whom there are grounds to suspect of an offence<sup>1</sup> must be cautioned before any questions about an offence, or further questions if the answers provide grounds for suspicion, are put to him if the suspect's answers or silence<sup>2</sup> may be given in evidence to a court in a prosecution<sup>3</sup>. A person need not be cautioned if questions are for other necessary purposes, for example:

- 1318 (1) solely to establish his identity or ownership of any vehicle<sup>4</sup>;
- 1319 (2) to obtain information in accordance with any relevant statutory requirement<sup>5</sup>;
- 1320 (3) in furtherance of the proper and effective conduct of a search<sup>6</sup>; and
- 1321 (4) to seek verification of a written record of comments made by a suspect outside the context of an interview<sup>7</sup>.

Whenever a person not under arrest is initially cautioned, or reminded that he is under caution, he must at the same time be told that he is not under arrest and is free to leave if he wants to<sup>8</sup>. A person who is arrested, or further arrested, must be informed at the time, or as soon as practicable thereafter, of the fact that he is under arrest and of the grounds for his arrest<sup>9</sup>. A person who is arrested, or further arrested, must also be cautioned<sup>10</sup> unless either:

- 1322 (a) it is impracticable to do so by reason of his condition or behaviour at the time<sup>11</sup>; or
- 1323 (b) he has already been cautioned<sup>12</sup> immediately prior to arrest<sup>13</sup>.

The caution which must be given on arrest<sup>14</sup>, and on all other occasions before a person is charged or informed that he may be prosecuted<sup>15</sup>, should, unless the restriction on drawing adverse inferences from silence<sup>16</sup> applies, be in the following terms: 'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.'<sup>17</sup> Minor deviations from the words of a caution<sup>18</sup> do not constitute a breach of this requirement provided that the sense of the relevant caution is preserved<sup>19</sup>.

After any break in questioning under caution, the person being interviewed must be made aware that he remains under caution; and if there is any doubt, the caution should be given again in full when the interview resumes<sup>20</sup>.

When, despite being cautioned, a person fails to co-operate or to answer particular questions which may affect his immediate treatment<sup>21</sup>, he should be informed of any relevant consequences and that those consequences are not affected by the caution<sup>22</sup>.

When a suspect interviewed at a police station or authorised place of detention after arrest fails or refuses to answer certain questions, or to answer satisfactorily, after due warning<sup>23</sup>, a court or jury may draw such inferences as appear proper under the relevant statutory provisions<sup>24</sup>. Such inferences may be drawn only when:

- 1324 (i) the restriction on drawing adverse inferences from silence<sup>25</sup> does not apply<sup>26</sup>;
- 1325 (ii) the suspect is arrested by a constable and fails or refuses to account for any objects, marks or substances, or marks on such objects, found on his person, in or on his clothing or footwear, otherwise in his possession, or in the place where he was arrested<sup>27</sup>; and
- 1326 (iii) the arrested suspect was found by a constable at a place at or about the time the offence for which that officer has arrested him is alleged to have been committed, and the suspect fails or refuses to account for his presence there<sup>28</sup>.

When the restriction on drawing adverse inferences from silence applies, the suspect may still be asked to account for any of the matters referred to in head (ii) or head (iii) above but the special warning<sup>29</sup> will not apply and must not be given<sup>30</sup>.

For an inference to be drawn when a suspect fails or refuses to answer a question about one of these matters or to answer it satisfactorily, the suspect must first be told in ordinary language what offence is being investigated<sup>31</sup>, what fact he is being asked to account for<sup>32</sup>, that such fact may be due to him taking part in the commission of the offence<sup>33</sup>, that a court may draw a proper inference if he fails or refuses to account for that fact<sup>34</sup>, and that a record is being made of the interview and may be given in evidence if he is brought to trial<sup>35</sup>.

If a juvenile or a person who is mentally disordered or otherwise mentally vulnerable<sup>36</sup> is cautioned in the absence of the appropriate adult<sup>37</sup>, the caution must be repeated in the adult's presence<sup>38</sup>.

A record must be made when a caution is given, either in the interviewer's pocket book or in the interview record<sup>39</sup>.

1 There must be some reasonable, objective grounds for the suspicion, based on known facts or information which are relevant to the likelihood that the offence has been committed and that the person to be questioned committed it: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Guidance note 10A.

2 The failure or refusal to answer or answer satisfactorily: Code C para 10.1.

3 Code C para 10.1. In *R v Gill* [2003] EWCA Crim 2256, [2003] 4 All ER 681, [2004] 1 WLR 469, it was held that Code C applied to 'Hansard interviews' conducted by Special Compliance Officers of the Inland Revenue (now Revenue and Customs). A failure to caution is not an abuse of the process of the court: *R v Bow Street Metropolitan Stipendiary Magistrate, ex p DPP* (1992) 95 Cr App Rep 9, DC. Where a person is informally questioned without a caution at a time when there are no grounds to suspect him of an offence, any evidence given by him will not be excluded under the Police and Criminal Evidence Act 1984 s 78 (as amended) (see PARA 1365 post): *R v James* [1996] Crim LR 650, CA. See also *R v Nelson* [1998] 2 Cr App Rep 399, CA (customs officer ought to have administered caution before asking traveller questions about baggage); *R v Senior* [2004] EWCA Crim 454, [2004] 3 All ER 9, [2004] 2 Cr App Rep 215.

4 Code C para 10.1(a).

5 Code C para 10.1(b). For the relevant statutory requirement see Code C para 10.9; and the text and notes 21-22 *infra*.

6 Code C para 10.1(c). Examples of questioning in furtherance of the proper and effective conduct of a search are questioning to determine the need to search in the exercise of powers of stop and search or to seek co-operation while carrying out a search: Code C para 10.1(c).

7 Code C para 10.1(d). As to verification of a written record see Code C para 11.13; and PARA 961 post.

8 Code C para 10.2. The restriction on drawing inferences from silence (see Code C Annex C para 1; and PARA 1042 post) does not apply to a person who has not been detained and who therefore cannot be prevented from seeking legal advice if he wants: Code C Guidance note 10C. See also Code C para 3.21; and PARA 909 ante.

9 Code C para 10.3. An arrested person must be given sufficient information to enable him to understand that he has been deprived of his liberty and the reason why he has been arrested (eg when a person is arrested on suspicion of committing an offence he must be informed of the suspected offence's nature, and when and where it was committed): Code C Guidance note 10B. The grounds for arrest must include an explanation of the conditions which make the arrest necessary, and the suspect must also be informed of the reason or reasons why the arrest is considered necessary; vague or technical language should be avoided: Code C Guidance note 10B. See also Code G: Code of Practice for the Statutory Power of Arrest by Police Officers para 2.2, 4.3; and PARAS 931-932 ante.

10 le as required by Code G: Code of Practice for the Statutory Power of Arrest by Police Officers paras 3.1-3.7.

11 Code C para 10.4(a).

12 le in accordance with Code C para 10.1: see the text and notes 1-8 supra.

13 Code C para 10.4(b).

14 Code C para 10.5(a).

15 Code C para 10.5(b). As to the charging of detained persons see Code C paras 16.1-16.10; and PARA 1042 post.

16 See Code C Annex B; and PARAS 955-956 ante.

17 Code C para 10.5. Nothing in Code C requires a caution to be given or repeated when informing a person not under arrest that he may be prosecuted for an offence: however, a court will not be able to draw any inferences under the Criminal Justice and Public Order Act 1994 s 34 (as amended) (see PARA 1552 post) if the person was not cautioned: Code C Guidance note 10G. Code C Annex C para 2 (see PARA 1042 post) sets out the alternative terms of the caution to be used when the restriction on drawing adverse inferences from silence applies: Code C para 10.6.

18 le a caution given in accordance with Code C.

19 Code C para 10.7. If it appears a person does not understand the caution, the person giving it should explain it in his own words: Code C Guidance note 10D.

20 Code C para 10.8. It may be necessary to show to the court that nothing occurred during an interview break or between interviews which influenced the suspect's recorded evidence: Code C Guidance note 10E. After a break in an interview or at the beginning of a subsequent interview, the interviewing officer should summarise the reason for the break and confirm this with the suspect: Code C Guidance note 10E. Where a person is asked further questions in a police car on the way to the police station after his arrest, failure to caution him prior to the questioning is a breach of Code C para 10.8: *R v Kingsley Brown* [1989] Crim LR 500.

21 Examples are when a person's refusal to provide his name and address when charged may make him liable to detention, or when a person's refusal to provide particulars and information in accordance with a statutory requirement (for example the Road Traffic Act 1988) may amount to an offence or may make the person liable to a further arrest: Code C para 10.9.

22 Code C para 10.9.

23 The Criminal Justice and Public Order Act 1994 ss 36, 37 (as amended) (effect of accused's failure to account for objects, substances or marks or for presence at a particular place: see PARAS 1553-1554 post) apply only to suspects who have been arrested by a constable or an officer of Revenue and Customs and are given the relevant warning by the police or such an officer who made the arrest or who is investigating the offence; they do not apply to any interviews with suspects who have not been arrested: Code C Guidance note 10F; Commissioners for Revenue and Customs Act 2005 s 50(2), (7). Every police officer holds the office of constable: see PARA 857 note 2 ante. As to officers of Revenue and Customs see PARA 354 note 2 ante.

24 Code C para 10.10. The relevant statutory provisions are the Criminal Justice and Public Order Act 1994 ss 36, 37 (as amended) (see PARAS 1553-1554 post).

25 See Code C Annex C; and PARA 1042 post.

26 Code C para 10.10(a).

27 Code C para 10.10(b).

28 Code C para 10.10(c).

29 Ie the warning described in Code C para 10.11: see the text and notes 31-35 infra.

30 Code C para 10.10.

31 Code C para 10.11(a).

32 Code C para 10.11(b).

33 Code C para 10.11(c).

34 Code C para 10.11(d).

35 Code C para 10.11(e).

36 For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante.

37 For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

38 Code C para 10.12.

39 Code C para 10.13. References to pocket books include any official report book issued to police officers or civilian support staff: Code C para 1.17.

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## **(v) Interviews**

### **A. GENERAL PROVISIONS**

#### **960. In general.**

An interview is the questioning of a person regarding his involvement or suspected involvement in a criminal offence or offences which<sup>1</sup> must be carried out under caution<sup>2</sup>. Whenever a person is interviewed he must be informed of the nature of the offence or further offence<sup>3</sup>. Procedures relating to the provision of specimens for analysis under the drink-drive legislation and related legislation<sup>4</sup> do not constitute interviewing for these purposes<sup>5</sup>.

Following a decision to arrest a suspect, he must not be interviewed about the relevant offence except at a police station or other authorised place of detention, unless the consequent delay would be likely to:

- 1327 (1) lead to interference with, or harm to, evidence connected with an offence<sup>6</sup>;
- 1328 (2) lead to interference with, or physical harm to, other people<sup>7</sup>;
- 1329 (3) lead to serious loss of, or damage to, property<sup>8</sup>;
- 1330 (4) lead to alerting other people suspected of committing an offence but not yet arrested for it<sup>9</sup>; or
- 1331 (5) hinder the recovery of property obtained in consequence of the commission of an offence<sup>10</sup>.

Interviewing in any of these circumstances must cease once the relevant risk has been averted or the necessary questions have been put in order to attempt to avert that risk<sup>11</sup>.

Immediately prior to the commencement or recommencement of any interview at a police station or other authorised place of detention, the interviewer should remind the suspect of his entitlement to free legal advice and that the interview can be delayed for legal advice to be obtained, unless one of the specified exceptions<sup>12</sup> applies; it is the interviewer's responsibility to make sure that all reminders are recorded in the interview record<sup>13</sup>.

At the beginning of an interview the interviewer, after cautioning the suspect<sup>14</sup>, must put to him any significant statement or silence<sup>15</sup> which occurred in the presence and hearing of a police officer or other police staff before the start of the interview and which have not been put to the suspect in the course of a previous interview<sup>16</sup>. The interviewer must ask the suspect whether he confirms or denies that earlier statement or silence and if he wants to add anything<sup>17</sup>.

No interviewer may try to obtain answers to questions or to elicit a statement by the use of oppression<sup>18</sup>. No interviewer may<sup>19</sup> indicate, except in answer to a direct question, what action will be taken on the part of the police if the person being questioned answers questions, makes a statement or refuses to do either<sup>20</sup>. If the person asks directly what action will be taken if he answers questions, makes a statement or refuses to do either, the interviewer may inform him what action the police propose to take provided that that action is itself proper and warranted<sup>21</sup>.



The interview or further interview of a person about an offence with which that person has not been charged or for which he has not been informed he may be prosecuted, must cease when:

- 1332 (a) the officer in charge of the investigation is satisfied that all the questions he considers relevant to obtaining accurate and reliable information about the offence have been put to the suspect, including allowing the suspect an opportunity to give an innocent explanation and asking questions to test if the explanation is accurate and reliable<sup>22</sup>;
- 1333 (b) the officer in charge of the investigation has taken account of any other available evidence<sup>23</sup>; and
- 1334 (c) the officer in charge of the investigation, or in the case of a detained suspect, the custody officer<sup>24</sup>, reasonably believes there is sufficient evidence to provide a realistic prospect of conviction for that offence if the person was prosecuted for it<sup>25</sup>.

1     le under Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 10.1: see PARA 959 ante.

2     Code C para 11.1A. The questioning need not be formal; an informal conversation can amount to an interview for these purposes: *R v Sparks* [1991] Crim LR 128, CA. One question (and one answer) can amount to an interview for these purposes: *R v Ward* (1993) 98 Cr App Rep 337, CA; *R v Miller* [1998] Crim LR 209, CA. Where a person, even if he is a suspect in a police station, volunteers information to investigating officers without any form of questioning and the officers merely make a note of what is said, that does not amount to an 'interview' for the purposes of Code C: *R v Menard* [1995] 1 Cr App Rep 306, CA.

3     Code C para 11.1A.

4     le under the Road Traffic Act 1988 s 7 (as amended) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 986) or the Transport and Works Act 1992 s 31 (as amended) (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 379): Code C para 11.1A. See also *DPP v Rous*, *DPP v D (A Juvenile)* (1992) 94 Cr App Rep 185, DC (procedure for obtaining specimens under the Road Traffic Act 1988 ss 7, 8 not an interview for the purposes of Code C).

5     Code C para 11.1A.

6     Code C para 11.1(a).

7     Code C para 11.1(a).

8     Code C para 11.1(a).

9     Code C para 11.1(b).

10    Code C para 11.1(c).

11    Code C para 11.1.

12    le one of the exceptions in Code C para 6.6: see PARA 953 ante.

13    Code C para 11.2.

14    le under the provisions in Code C paras 10.1-10.13: see PARA 959 ante.

15    A significant statement is one which appears capable of being used in evidence against the suspect, in particular a direct admission of guilt: Code C para 11.4A. A significant silence is a failure or refusal to answer a question or to answer satisfactorily when under caution, which might, allowing for the restriction on drawing adverse inferences from silence (see Code C Annex C; and PARA 1042 post) give rise to an inference under the Criminal Justice and Public Order Act 1994 Pt III (ss 32-53) (as amended) (see PARA 1449 et seq post): Code C para 11.4A.

16    Code C para 11.4. This does not prevent the interviewer from putting significant statements and silences to a suspect again at a later stage or a further interview: Code C Guidance note 11A.

17    Code C para 11.4.

18 Code C para 11.5. Questions which are deliberately asked with the intention of producing a disordered state of mind will amount to oppression; but the mere fact that questions addressed to the suspect trigger off hallucinations is not indicative of oppression: *R v Miller* [1986] 3 All ER 119, [1986] 1 WLR 1191, CA. As to the admissibility of confessions obtained by oppression see PARA 1540 post; and as to the trial judge's discretion to exclude confessions obtained in breach of the relevant code of practice see PARAS 1365, 1545 post.

19 Ie except as provided by Code C para 10.9: see PARA 959 ante.

20 Code C para 11.5. An offer to an arrested person that, if he is willing to give evidence against a co-defendant, he will be used as a prosecution witness and not prosecuted himself may, on rare occasions, be justified; but the arrested person must be given full opportunity to discuss the matter with a solicitor before coming to a decision: *R v Mathias* (1989) Times, 24 August, CA.

21 Code C para 11.5.

22 Code C para 11.6(a). Examples of questions to test if the explanation is accurate and reliable are questions to clear up ambiguities or clarify what the suspect said: Code C para 11.6(a). Code C para 11.6 does not prevent officers in revenue cases or acting under the confiscation provisions of the Criminal Justice Act 1988 (repealed), the Drug Trafficking Act 1994 (repealed) or the Proceeds of Crime Act 2002 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391 et seq) from inviting suspects to complete a formal question and answer record after the interview is concluded: Code C para 11.6. Nothing in Code C prevents a police officer from asking questions at or near the scene of a suspected crime to elicit an explanation which, if true or accepted, would exculpate a suspect: *R v Maguire* (1990) 90 Cr App Rep 115, [1989] Crim LR 815, CA.

23 Code C para 11.6(b). See note 22 supra.

24 See Code C para 16.1; and PARA 1042 post. As to custody officers see PARA 939 ante.

25 Code C para 11.6(c). See note 22 supra. In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect: Code C Guidance note 11B. What is reasonable will depend on the particular circumstances; interviewers should keep this in mind when deciding what questions to ask in an interview: Code C Guidance note 11B.

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## **961. Interview records.**

An accurate record must be made of each interview, whether or not the interview takes place at a police station<sup>1</sup>. The record must state the place of interview, the time it begins and ends, any interview breaks and<sup>2</sup> the names of all those present; and must be made either on the forms provided for this purpose, or in the interviewer's pocket book, or in accordance with the relevant codes of practice for the audio or visual recording of interviews<sup>3</sup>.

Any written record must be made and completed during the course of the interview, unless this would not be practicable or would interfere with the conduct of the interview, and must constitute either a verbatim record of what has been said or, failing this, an account of the interview which adequately and accurately summarises it<sup>4</sup>. If a written interview record is not made during the course of the interview, it must be made as soon as practicable after the interview's completion<sup>5</sup>. Written interview records must be timed and signed by the maker<sup>6</sup>. If a written interview record is not completed during the interview, the reason must be recorded in the interview record<sup>7</sup>.

Unless it is impracticable, the person interviewed must be given the opportunity to read the interview record and to sign it as correct or to indicate how he considers it inaccurate<sup>8</sup>. If the person interviewed cannot read or refuses to read the record or sign it, the senior interviewer present must read it to him and ask whether he would like to sign it as correct or make his mark or to indicate how he considers it inaccurate<sup>9</sup>. The interviewer must certify on the interview record itself what has occurred<sup>10</sup>.

If the appropriate adult or the person's solicitor is present during the interview, that person should also be given an opportunity to read and sign the interview record or any written statement taken down during the interview<sup>11</sup>.

A written record must be made of any comments made by a suspect, including unsolicited comments, which are outside the context of an interview but which might be relevant to the offence; any such record must be timed and signed by the maker<sup>12</sup>. When practicable the suspect must be given the opportunity to read that record and to sign it as correct or to indicate how he considers it inaccurate<sup>13</sup>.

Any refusal by a person to sign an interview record when asked to do so must itself be recorded<sup>14</sup>.

1 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 11.7(a). A statement made under caution is confidential, although the confidentiality is ended by it being read out at trial: *Bunn v British Broadcasting Corp* [1998] 3 All ER 552, [1998] EMLR 846.

2 Ie subject to Code C para 2.6A: see PARA 940 ante.

3 Code C para 11.7(b). The relevant codes of practice for the audio or visual recording of interviews are Code E: Code of Practice on Audio Recording Interviews with Suspects (see PARA 971 et seq post) and Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects (see PARA 986 et seq post).

4 Code C para 11.7(c). The importance of the rules relating to contemporaneous noting of interviews can scarcely be over-emphasised: *R v Canale* [1990] 2 All ER 187, 91 Cr App Rep 1, CA, per Lord Lane CJ (case involving 'flagrant, deliberate and cynical' breaches of the rules by police officers conducting interviews).

- 5 Code C para 11.8.
- 6 Code C para 11.9.
- 7 Code C para 11.10.
- 8 Code C para 11.11.
- 9 Code C para 11.11.
- 10 Code C para 11.11. See Code C Guidance note 11E; and notes 12, 13 infra.
- 11 Code C para 11.12.
- 12 Code C para 11.13. Significant statements described in Code C paras 11.4, 11.4A (see PARA 960 ante) will always be relevant to the offence and must be recorded: Code C Guidance note 11E.
- 13 Code C para 11.13. When a suspect agrees to read records of interviews and other comments and sign them as correct, he should be asked to indorse the record with, for example, 'I agree that this is a correct record of what was said' and add his signature: Code C Guidance note 11E. If the suspect does not agree with the record, the interviewer should record the details of any disagreement and ask the suspect to read these details and sign them to the effect that they accurately reflect his disagreement: Code C Guidance note 11E. Any refusal to sign should be recorded: Code C Guidance note 11E.
- 14 Code C para 11.14.

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## **962. Interviews of juveniles and mentally disordered or otherwise mentally vulnerable persons.**

A juvenile or person who is mentally disordered or otherwise mentally vulnerable<sup>1</sup> must not<sup>2</sup> be interviewed regarding his involvement or suspected involvement in a criminal offence or offences, or asked to provide or sign a written statement under caution or record of interview, in the absence of the appropriate adult<sup>3</sup>.

Juveniles may be interviewed at their place of education only in exceptional circumstances and only when the principal or his nominee agrees<sup>4</sup>. Every effort should be made to notify the parent or parents or other person responsible for the juvenile's welfare and the appropriate adult, if this is a different person, that the police want to interview the juvenile; and reasonable time should be allowed to enable the appropriate adult to be present at the interview<sup>5</sup>. If awaiting the appropriate adult would cause unreasonable delay, and unless the juvenile is suspected of an offence against the educational establishment, the principal of the educational establishment or his nominee can act as the appropriate adult for the purposes of the interview<sup>6</sup>.

If an appropriate adult is present at an interview he must be informed that he is not expected to act simply as an observer<sup>7</sup> and that the purpose of his presence is to:

- 1335 (1) advise the person being interviewed<sup>8</sup>;
- 1336 (2) observe whether the interview is being conducted properly and fairly<sup>9</sup>; and
- 1337 (3) facilitate communication with the person being interviewed<sup>10</sup>.

1 For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante. Although juveniles or persons who are mentally disordered or otherwise mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Guidance note 11C. Special care should always be taken when questioning such a person, and the appropriate adult should be involved if there is any doubt about a person's age, mental state or capacity: Code C Guidance note 11C. Because of the risk of unreliable evidence it is also important to obtain corroboration of any facts admitted whenever possible: Code C Guidance note 11C. For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

2 Ie unless Code C para 11.1 (see PARA 960 ante) or Code C paras 11.18-11.20 (see PARA 963 post) apply.

3 Code C para 11.15. See note 1 supra.

4 Code C para 11.16. Juveniles should not be arrested at their place of education unless this is unavoidable; and when a juvenile is so arrested the principal or his nominee must be informed: Code C Guidance note 11D.

5 Code C para 11.16.

6 Code C para 11.16.

7 See also *DPP v Blake* [1989] 1 WLR 432, 89 Cr App Rep 179, DC (the appropriate adult has an important role to play in any interview which he attends; the juvenile's estranged father was not an appropriate adult for these purposes).

- 8 Code C para 11.17.
- 9 Code C para 11.17.
- 10 Code C para 11.17.

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### **963. Urgent interviews of vulnerable suspects at police stations.**

For these purposes, a 'vulnerable suspect' is:

- 1338 (1) a juvenile or person who is mentally disordered or otherwise mentally vulnerable<sup>1</sup> if at the time of the interview the appropriate adult<sup>2</sup> is not present<sup>3</sup>;
- 1339 (2) any other person who at the time of the interview appears unable to appreciate the significance of questions and his answers or understand what is happening because of the effects of drink, drugs or any illness, ailment or condition<sup>4</sup>; and
- 1340 (3) a person who has difficulty understanding English or has a hearing disability, if at the time of the interview an interpreter is not present<sup>5</sup>.

Vulnerable suspects may not be interviewed unless an officer of superintendent rank or above considers delay will:

- 1341 (a) lead to interference with, or harm to, evidence connected with an offence<sup>6</sup>;
- 1342 (b) lead to interference with, or physical harm to, other people<sup>7</sup>;
- 1343 (c) lead to serious loss of, or damage to, property<sup>8</sup>;
- 1344 (d) lead to alerting other people suspected of committing an offence but not yet arrested for it<sup>9</sup>; or
- 1345 (e) hinder the recovery of property obtained in consequence of the commission of an offence<sup>10</sup>,

and is satisfied the interview would not significantly harm the person's physical or mental state<sup>11</sup>. Such interviews may not continue once sufficient information has been obtained to avert the consequences in heads (a) to (e) above<sup>12</sup>. A record must be made of the grounds for any decision to interview a person under these provisions<sup>13</sup>.

1 For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante.

2 For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

3 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 11.18(a).

4 Code C para 11.18(b).

5 Code C para 11.18(c).

6 Code C paras 11.1(a), 11.18.

7 Code C paras 11.1(a), 11.18.

8 Code C paras 11.1(a), 11.18.

9 Code C paras 11.1(b), 11.18.

10 Code C paras 11.1(c), 11.18.

11 Code C para 11.18. Code C Annex G contains general guidance to help police officers and health care professionals assess whether a detainee might be at risk in an interview: Code C Annex G para 1. A detainee may be at risk in an interview if it is considered that:

- 373 (1) conducting the interview could significantly harm the detainee's physical or mental state (Code C Annex G para 2(a)); or
- 374 (2) anything the detainee says in the interview about his involvement or suspected involvement in the offence about which he is being interviewed might be considered unreliable in subsequent court proceedings because of his physical or mental state (Code C Annex G para 2(b)).

In assessing whether the detainee should be interviewed, the following must be considered:

- 375 (a) how the detainee's physical or mental state might affect his ability to understand the nature and purpose of the interview, to comprehend what is being asked and to appreciate the significance of any answers given and to make rational decisions about whether he wants to say anything (Code C Annex G para 3(a));
- 376 (b) the extent to which the detainee's replies may be affected by his physical or mental condition rather than representing a rational and accurate explanation of his involvement in the offence (Code C Annex G para 3(b)); and
- 377 (c) how the nature of the interview, which could include particularly probing questions, might affect the detainee (Code C Annex G para 3(c)).

It is essential that health care professionals who are consulted consider the functional ability of the detainee rather than simply relying on a medical diagnosis; for example it is possible for a person with severe mental illness to be fit for interview: Code C Annex G para 4. Health care professionals should advise on the need for an appropriate adult to be present, on whether reassessment of the person's fitness for interview may be necessary if the interview lasts beyond a specified time, and on whether a further specialist opinion may be required: Code C Annex G para 5. When a health care professional identifies risks he should be asked to quantify the risks: he should inform the custody officer whether the person's condition is likely to improve, and whether it will require or be amenable to treatment, and should indicate how long it may take for such improvement to take effect: Code C Annex G para 6. The role of the health care professional is to consider the risks and advise the custody officer of the outcome of that consideration: his determination and any advice or recommendations should be made in writing and form part of the custody record: Code C Annex G para 7. Once the health care professional has provided that information, it is a matter for the custody officer to decide whether or not to allow the interview to go ahead and, if the interview is to proceed, to determine what safeguards are needed: Code C Annex G para 8. Nothing prevents safeguards being provided in addition to those required under Code C: Code C Annex G para 8. For example, an appropriate health care professional might be present during the interview, in addition to an appropriate adult, in order constantly to monitor the person's condition and how it is being affected by the interview: Code C Annex G para 8.

For the meaning of 'health care professional', and as to whether a health care professional is 'appropriate', see PARA 957 note 11 ante. As to custody officers see PARA 939 ante.

12 Code C para 11.19.

13 Code C para 11.20.



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#### **964. Interviews in police stations; in general.**

If a police officer wants to interview or conduct inquiries which require the presence of a detainee, the custody officer<sup>1</sup> is responsible for deciding whether to deliver the detainee into the officer's custody<sup>2</sup>.

In any period of 24 hours<sup>3</sup> a detainee must be allowed a continuous period of at least eight hours for rest, free from questioning, travel or any interruption in connection with the investigation concerned; and this period should normally be at night or other appropriate time which takes account of when the detainee last slept or rested<sup>4</sup>. The period of rest may not be interrupted or delayed except:

- 1346 (1) when there are reasonable grounds for believing that not delaying or interrupting the period would involve a risk of harm to people or serious loss of, or damage to, property<sup>5</sup>, would delay unnecessarily the person's release from custody<sup>6</sup>, or would otherwise prejudice the outcome of the investigation<sup>7</sup>;
- 1347 (2) at the request of the detainee, his appropriate adult<sup>8</sup> or legal representative<sup>9</sup>;
- 1348 (3) when a delay or interruption is necessary in order to comply with the legal obligations and duties arising under the provisions relating to reviews and extensions of detention<sup>10</sup> or in order to take action required under the provisions relating to the care and treatment of detained persons<sup>11</sup> or in accordance with medical advice<sup>12</sup>.

If the period is interrupted in accordance with head (1) above, a fresh period must be allowed<sup>13</sup>. Interruptions under head (2) or head (3) above do not require a fresh period to be allowed<sup>14</sup>.

Before a detainee is interviewed the custody officer, in consultation with the officer in charge of the investigation and appropriate health care professionals<sup>15</sup> as necessary, must assess whether the detainee is fit enough to be interviewed<sup>16</sup>. The custody officer must not allow a detainee to be interviewed if he considers that it would cause significant harm to the detainee's physical or mental state<sup>17</sup>. Vulnerable suspects<sup>18</sup> must be treated as always being at some risk during an interview and these persons may not be interviewed except in accordance with the special provision made in respect of them<sup>19</sup>.

As far as practicable interviews must take place in interview rooms which must be adequately heated, lit and ventilated<sup>20</sup>.

A suspect whose detention without charge has been authorised<sup>21</sup> because the detention is necessary for an interview to obtain evidence of the offence for which he has been arrested may choose not to answer questions, although the police do not require the suspect's consent or agreement to interview him for this purpose<sup>22</sup>. If a suspect takes steps to prevent himself being questioned or further questioned<sup>23</sup> he must be advised that his consent or agreement to interview is not required<sup>24</sup>. The suspect must be cautioned<sup>25</sup> and informed that, if he fails or refuses to co-operate, the interview may take place in the cell and that his failure or refusal to co-operate may be given in evidence<sup>26</sup>. The suspect must then be invited to co-operate and go into the interview room<sup>27</sup>.

Persons being questioned or making statements must not be required to stand<sup>28</sup>.

Before the commencement of an interview each interviewer must<sup>29</sup> identify himself and any other persons present to the interviewee<sup>30</sup>.

Breaks from interviewing should be made at recognised meal times or at other times that take account of when an interviewee last had a meal; and short refreshment breaks must also be provided at intervals of approximately two hours<sup>31</sup>, subject to the interviewer's discretion to delay a break<sup>32</sup> if there are reasonable grounds for believing that it would:

- 1349 (a) involve a risk of harm to people or serious loss of, or damage to, property<sup>33</sup>;
- 1350 (b) unnecessarily delay the interviewee's release<sup>34</sup>; or
- 1351 (c) otherwise prejudice the outcome of the investigation<sup>35</sup>.

If during the interview a complaint is made by or on behalf of the interviewee<sup>36</sup>, the interviewer should record it in the interview record and inform the custody officer, who is then responsible for dealing<sup>37</sup> with it<sup>38</sup>.

1 As to custody officers see PARA 939 ante.

2 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 12.1.

3 If a person is arrested at a police station after going there voluntarily, the period of 24 hours runs from the time of his arrest and not the time of arrival at the police station: Code C para 12.2. As to voluntary attendance at a police station see PARA 909 ante.

4 Code C para 12.2.

5 Code C para 12.2(a)(i).

6 Code C para 12.2(a)(ii).

7 Code C para 12.2(a)(iii).

8 For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

9 Code C para 12.2(b).

10 Code C para 12.2(c)(i). For the provisions relating to reviews and extensions of detention see Code C paras 15.1-15.16; and PARA 1001 et seq post.

11 For the provisions relating to the care and treatment of detained persons see Code C paras 9.1-9.17; and PARA 958 ante.

12 Code C para 12.2(c)(ii).

13 Code C para 12.2.

14 Code C para 12.2.

15 For the meaning of 'health care professional', and as to whether a health care professional is 'appropriate', see PARA 957 note 11 ante.

16 Code C para 12.3. This means determining and considering the risks to the detainee's physical and mental state if the interview took place and determining what safeguards are needed to allow the interview to take place (see Code C Annex G; and PARA 963 note 11 ante): Code C para 12.3.

17 Code C para 12.3.

18 For the meaning of 'vulnerable suspect' see PARA 963 ante.

- 19 Code C para 12.3. For the special provision made in connection with the interviewing of vulnerable suspects see PARA 963 ante.
- 20 Code C para 12.4.
- 21 Ie under the Police and Criminal Evidence Act 1984 s 37(2), (3) (see PARA 941 ante).
- 22 Code C para 12.5.
- 23 Eg by refusing to leave his cell to go to a suitable interview room or by trying to leave the interview room: Code C para 12.5.
- 24 Code C para 12.5.
- 25 Ie in accordance with Code C paras 10.1-10.13 (see PARA 959 ante).
- 26 Code C para 12.5.
- 27 Code C para 12.5.
- 28 Code C para 12.6.
- 29 Ie subject to Code C para 2.6A (see PARA 940 ante).
- 30 Code C para 12.7.
- 31 Meal breaks should normally last at least 45 minutes and shorter breaks after two hours should last at least 15 minutes: Code C Guidance note 12B. If there is a short interview, and another short interview is contemplated, the length of the break may be reduced if there are reasonable grounds to believe this is necessary to avoid any of the consequences set out in the text and notes 33-35 infra: Code C Guidance note 12B.
- 32 If the interviewer delays a break in accordance with these provisions and prolongs the interview, a longer break should be provided: Code C Guidance note 12B. As to the length of breaks see note 31 supra.
- 33 Code C para 12.8(i).
- 34 Code C para 12.8(ii).
- 35 Code C para 12.8(iii).
- 36 Ie concerning the provisions of Code C.
- 37 Ie in accordance with Code C paras 9.1-9.17 (see PARA 958 ante),
- 38 Code C para 12.9. As to interview records see PARAS 961 ante, 965 post.

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### **965. Interviews in police stations; records.**

A record must be made of the times a detainee is not in the custody of the custody officer<sup>1</sup>, and why; and of the reason for any refusal to deliver him out of that custody<sup>2</sup>. A record must also be made<sup>3</sup> of the reasons why it was not practicable to use an interview room<sup>4</sup> and of any action taken<sup>5</sup> in the event of the suspect taking steps to prevent himself being questioned or further questioned<sup>6</sup>. Any decision to delay a break in an interview must be recorded, with reasons, in the interview record<sup>7</sup>.

All written statements made at police stations under caution must be written on forms provided for the purpose<sup>8</sup>; and all written statements made under caution must be taken in accordance with the prescribed procedure<sup>9</sup>. Before a person makes a written statement under caution at a police station he must be reminded about the right to legal advice<sup>10</sup>.

1 As to custody officers see PARA 939 ante.

2 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 12.10.

3 This record must be made on the custody record, or in the interview record, in respect of action taken whilst an interview record is being kept (with a brief reference to this effect in the custody record): Code C para 12.11.

4 Code C para 12.11(a).

5 ie as in Code C para 12.5 (see PARA 964 ante).

6 Code C para 12.11(b).

7 Code C para 12.12. As to breaks from interviewing see PARA 964 ante.

8 Code C para 12.13.

9 Code C para 12.14. The prescribed procedure for written statements made under caution is provided by Code C Annex D (see PARA 966 post).

10 Code C para 12.14. It is not normally necessary to ask for a written statement if the interview was recorded at the time and the record signed by the interviewee in accordance with Code C para 11.11 (see PARA 961 ante) or audibly or visually recorded in accordance with Code E: Code of Practice on Audio Recording Interviews with Suspects (see PARA 971 et seq post) or Code F: Code of Practice on Visual Recordings with Sound of Interview with Suspects (see PARA 986 et seq post): Code C Guidance note 12A. Statements under caution should normally be taken in these circumstances only at the person's express wish, although a person may be asked if he wants to make such a statement: Code C Guidance note 12A.

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#### **966. Written statements under caution.**

A person must always be invited to write down himself what he wants to say<sup>1</sup>.

A person who has not been charged with, or informed that he may be prosecuted for, any offence to which the statement he wants to write relates must be asked to write out and sign, before writing what he wants to say, either:

- 1352 (1) 'I make this statement of my own free will. I understand that I do not have to say anything but that it may harm my defence if I do not mention when questioned something which I later rely on in court. This statement may be given in evidence' (unless the statement is made at a time when the restriction on drawing adverse inferences from silence<sup>2</sup> applies)<sup>3</sup>; or
- 1353 (2) 'I make this statement of my own free will. I understand that I do not have to say anything. This statement may be given in evidence' (if the statement is made at a time when the restriction on drawing adverse inferences from silence applies)<sup>4</sup>.

When a person, on the occasion of being charged with or informed that he may be prosecuted for any offence, asks to make a statement which relates to any such offence and wants to write it, he must be asked to write out and sign, before writing what he wants to say, either:

- 1354 (a) 'I make this statement of my own free will. I understand that I do not have to say anything but that it may harm my defence if I do not mention when questioned something which I later rely on in court. This statement may be given in evidence' (unless the restriction on drawing adverse inferences from silence applied when he was so charged or informed he may be prosecuted)<sup>5</sup>; or
- 1355 (b) 'I make this statement of my own free will. I understand that I do not have to say anything. This statement may be given in evidence' (if the restriction on drawing adverse inferences from silence applied when he was so charged or informed that he may be prosecuted)<sup>6</sup>.

When a person who has already been charged with or informed that he may be prosecuted for any offence asks to make a statement which relates to any such offence and wants to write it, he must be asked to write out and sign, before writing what he wants to say: 'I make this statement of my own free will. I understand that I do not have to say anything. This statement may be given in evidence'<sup>7</sup>.

Any person writing his own statement must be allowed to do so without any prompting except that a police officer or other police staff may indicate to him which matters are material or question any ambiguity in the statement<sup>8</sup>.

If a person says that he would like someone to write the statement for him, a police officer or other police staff must write the statement<sup>9</sup>. If the person has not been charged with, or informed that he may be prosecuted for, any offence to which the statement he wants to make relates, he must, before starting, be asked to sign or make his mark to either:

- 1356 (i) 'I, . . . , wish to make a statement. I want someone to write down what I say. I understand that I do not have to say anything but that it may harm my defence if I do not mention when questioned something which I later rely on in court. This statement may be given in evidence' (unless the statement is made at a time when the restriction on drawing adverse inferences from silence applies)<sup>10</sup>; or
- 1357 (ii) 'I, . . . , wish to make a statement. I want someone to write down what I say. I understand that I do not have to say anything. This statement may be given in evidence' (if the statement is made at a time when the restriction on drawing adverse inferences from silence applies)<sup>11</sup>.

If, on the occasion of being charged with or informed that he may be prosecuted for any offence, the person asks to make a statement which relates to any such offence, and says that he would like someone to write it for him<sup>12</sup>, he must before starting be asked to sign or make his mark to either:

- 1358 (A) 'I, . . . , wish to make a statement. I want someone to write down what I say. I understand that I do not have to say anything but that it may harm my defence if I do not mention when questioned something which I later rely on in court. This statement may be given in evidence' (unless the restriction on drawing adverse inferences from silence applied when he was so charged or informed that he may be prosecuted)<sup>13</sup>; or
- 1359 (B) 'I, . . . , wish to make this statement. I want someone to write down what I say. I understand that I do not have to say anything. This statement may be given in evidence' (if the restriction on drawing adverse inferences from silence applied when he was so charged or informed that he may be prosecuted)<sup>14</sup>.

If, having already been charged with or informed that he may be prosecuted for any offence, a person asks to make a statement which relates to any such offence, and says that he would like someone to write it for him<sup>15</sup>, he must before starting, be asked to sign or make his mark to: 'I, . . . , wish to make a statement. I want someone to write down what I say. I understand that I do not have to say anything. This statement may be given in evidence'<sup>16</sup>.

The person writing the statement must take down the exact words spoken by the person making it and must not edit or paraphrase it; any questions that are necessary, for example to make it more intelligible, and the answers given must be recorded at the same time on the statement form<sup>17</sup>. When the writing of a statement is finished, the person making it must be asked to read it and to make any corrections, alterations or additions he wishes<sup>18</sup>. When he has finished reading it, he must be asked to write and sign or make his mark on the following certificate at the end of the statement: 'I have read the above statement, and I have been able to correct, alter or add anything I wish. This statement is true. I have made it of my own free will'<sup>19</sup>. If the person making the statement cannot read, or refuses to read it, or to write the above-mentioned certificate at the end of it or to sign it, the person taking the statement must read it to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end<sup>20</sup>. The person taking the statement must certify on the statement itself what has occurred<sup>21</sup>.

1 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Annex D para 1.

2 See Code C Annex C; and PARA 1042 post.

3 Code C Annex D para 2(a).

4 Code C Annex D para 2(b).

- 5 Code C Annex D para 3(a).
- 6 Code C Annex D para 3(b).
- 7 Code C Annex D para 4.
- 8 Code C Annex D para 5.
- 9 Code C Annex D para 6.
- 10 Code C Annex D para 7(a).
- 11 Code C Annex D para 7(b).
- 12 See the text and note 9 supra.
- 13 Code C Annex D para 8(a).
- 14 Code C Annex D para 8(b).
- 15 See the text and note 9 supra.
- 16 Code C Annex D para 9.
- 17 Code C Annex D para 10.
- 18 Code C Annex D para 11.
- 19 Code C Annex D para 11.
- 20 Code C Annex D para 12.
- 21 Code C Annex D para 12.

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## ***B. INTERPRETERS***

### **967. Interpreters; in general.**

Chief officers are responsible for making sure appropriate arrangements are in place for the provision of suitably qualified interpreters for persons who are deaf or who do not understand English<sup>1</sup>.

In relation to detained persons, all reasonable attempts should be made to make the detainee understand that interpreters will be provided at public expense<sup>2</sup>. Where the right to access to legal advice exists<sup>3</sup> and the detainee cannot communicate with the solicitor because of language, hearing or speech difficulties, an interpreter must be called<sup>4</sup>. The interpreter may not be a police officer or any other police staff when interpretation is needed for the purposes of obtaining legal advice<sup>5</sup>. In all other cases a police officer or other police staff may interpret only if the detainee and the appropriate adult<sup>6</sup>, if applicable, give their agreement in writing or if the interview is audibly recorded<sup>7</sup> or visually recorded<sup>8</sup> in accordance with the prescribed procedure<sup>9</sup>. When the custody officer<sup>10</sup> cannot establish effective communication with a person charged with an offence who appears deaf or there is doubt about his ability to hear, speak or understand English, arrangements must be made as soon as practicable for an interpreter to explain the offence concerned and any other information given by the custody officer<sup>11</sup>. Action so taken to call an interpreter and any agreement to be interviewed in the absence of an interpreter must be recorded<sup>12</sup>.

1 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 13.1. As to interpreters of foreign languages see PARA 968 post; and as to interpreters for the deaf see PARA 969 post. Whenever possible, interpreters should be drawn from the National Register of Public Service Interpreters (NRPSI) or the Council for the Advancement of Communication with Deaf People (CACDP) Directory of British Sign Language/English Interpreters: Code C para 13.1.

2 Code C para 13.8.

3 Ie where Code C para 6.1 applies (see PARA 953 ante).

4 Code C para 13.9.

5 Code C para 13.9.

6 For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

7 As to audibly recorded interviews see Code E: Code of Practice on Audio Recording Interviews with Suspects; and PARA 971 et seq post.

8 As to visually recorded interviews see Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects; and PARA 986 et seq post.

9 Code C para 13.9.

10 As to custody officers see PARA 939 ante.

11 Code C para 13.10.



12 Code C para 13.11.

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### **968. Interpreters; foreign languages.**

Except in the case of urgent interviews<sup>1</sup>, a person must not be interviewed in the absence of a person capable of interpreting if:

- 1360 (1) he has difficulty in understanding English<sup>2</sup>;
- 1361 (2) the interviewer cannot speak the person's own language<sup>3</sup>; or
- 1362 (3) the person wants an interpreter to be present<sup>4</sup>.

The interviewer must make sure that the interpreter makes a note of the interview at the time in the language of the person being interviewed for use in the event of the interpreter being called to give evidence, and certifies its accuracy<sup>5</sup>. The interviewer should allow sufficient time for the interpreter to note each question and answer after each is put, given and interpreted<sup>6</sup>. The person should be allowed to read the record or have it read to him and sign it as correct or indicate the respects in which he considers it inaccurate<sup>7</sup>. If the interview is audibly recorded<sup>8</sup> or visually recorded<sup>9</sup> the arrangements set out in the relevant code of practice apply<sup>10</sup>.

In the case of a person making a statement to a police officer or other police staff other than in English:

- 1363 (a) the interpreter must record the statement in the language in which it is made<sup>11</sup>;
- 1364 (b) the person must be invited to sign it<sup>12</sup>; and
- 1365 (c) an official English translation must be made in due course<sup>13</sup>.

1 Unless Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 11.1, 11.18-11.20 (see PARAS 960, 962 ante) apply: Code C para 13.2.

2 Code C para 13.2(a).

3 Code C para 13.2(b).

4 Code C para 13.2(c).

5 Code C para 13.3.

6 Code C para 13.3.

7 Code C para 13.3.

8 As to audibly recorded interviews see Code E: Code of Practice on Audio Recording Interviews with Suspects; and PARA 971 et seq post.

9 As to visually recorded interviews see Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects; and PARA 986 et seq post.

10 Code C para 13.3.

11 Code C para 13.4(a).

12 Code C para 13.4(b).

13 Code C para 13.4(c).

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### **969. Interpreters; deaf persons and persons with speech difficulties.**

Except in the case of urgent interviews<sup>1</sup>, if a person appears to be deaf or there is doubt about his hearing or speaking ability, he must not be interviewed in the absence of an interpreter unless he agrees in writing to be interviewed without one<sup>2</sup>.

An interpreter should also be called if a juvenile is interviewed and the parent or guardian present as the appropriate adult<sup>3</sup> appears to be deaf or there is doubt about his hearing or speaking ability, unless that person agrees in writing to the interview proceeding without one or it is urgent<sup>4</sup>.

The interviewer must make sure that the interpreter is allowed to read the interview record and certify its accuracy in the event of the interpreter being called to give evidence<sup>5</sup>. If the interview is audibly recorded<sup>6</sup> or visually recorded<sup>7</sup>, the arrangements set out in the relevant code of practice apply<sup>8</sup>.

<sup>1</sup> ie unless Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 11.1, 11.18-11.20 (see PARAS 960, 962 ante) apply: Code C para 13.5.

<sup>2</sup> Code C para 13.5. If police officers are not aware that a person is deaf, it cannot be shown that there has been a breach of Code C para 13.5; it is for the officers to decide whether there is a doubt about his hearing ability, but, if a doubt arises during an interview, it would be a breach of Code C para 13.5 to continue with the interview: *R v Clarke* [1989] Crim LR 892, CA.

<sup>3</sup> For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

<sup>4</sup> Code C para 13.6. An urgent interview is one to which Code C paras 11.1, 11.18-11.20 (see PARAS 960, 962 ante) apply.

<sup>5</sup> Code C para 13.7.

<sup>6</sup> As to audibly recorded interviews see Code E: Code of Practice on Audio Recording Interviews with Suspects; and PARA 971 et seq post.

<sup>7</sup> As to visually recorded interviews see Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects; and PARA 986 et seq post.

<sup>8</sup> Code C para 13.7.

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### ***C. SPECIAL RESTRICTIONS***

#### **970. Questioning; special restrictions.**

If a person has been arrested by one police force on behalf of another and the lawful period of detention in respect of that offence has not yet commenced<sup>1</sup>, no questions may be put to him about the offence while he is in transit between the forces except in order to clarify any voluntary statement made by him<sup>2</sup>. If a person is in police detention at a hospital he may not be questioned without the agreement of a responsible doctor<sup>3</sup>.

<sup>1</sup> le in accordance with the Police and Criminal Evidence Act 1984 s 41 (as amended) (see PARA 1000 post).

<sup>2</sup> Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 14.1.

<sup>3</sup> Code C para 14.2. If questioning takes place at a hospital under Code C para 14.2, or on the way to or from a hospital, the period concerned counts towards the total period of detention permitted: Code C Guidance note 14A.

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## ***D. AUDIO RECORDING OF INTERVIEWS***

### **971. Code of practice.**

The audio recording of interviews at police stations with suspected persons is governed by the Police and Criminal Evidence Act 1984<sup>1</sup> and Code E: Code of Practice on Audio Recording Interviews with Suspects<sup>2</sup>, which is made under that Act. Code E does not apply to those persons excluded from the application of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers<sup>3</sup>.

1 The Police and Criminal Evidence Act 1984 s 60, which provides that it is the duty of the Secretary of State to issue a code of practice in connection with the tape recording of interviews of persons suspected of the commission of criminal offences which are held by police officers at police stations (s 60(1)(a)) and to make an order requiring the tape recording of interviews of persons suspected of the commission of criminal offences, or of such descriptions of criminal offences as may be specified in the order, which are so held, in accordance with the code as it has effect for the time being (s 60(1)(b)). Such an order must be made by statutory instrument and is subject to annulment in pursuance of a resolution of either House of Parliament: s 60(2). As to codes of practice under the Police and Criminal Evidence Act 1984 see further PARA 908 ante.

2 As to Code E: Code of Practice on Audio Recording Interviews with Suspects see PARA 972 et seq post. The notes for guidance included in Code E are not provisions of Code E: Code E para 1.2. Nothing in Code E is to be taken as detracting from the requirements of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (see PARA 908 et seq ante): Code E para 1.3. Code E must be readily accessible for consultation by police officers, police staff, detained persons, and members of the public: Code E para 1.1. As to the commencement and scope of Code E see PARA 908 ante.

3 Code E para 1.4. As to the persons so excluded see Code C para 1.12; and PARA 908 ante.

## **UPDATE**

### **971 Code of practice**

TEXT AND NOTES--Revised Code of Practice E came into operation on 1 February 2008: Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2008, SI 2008/167.

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## **972. Interviews to be audio recorded.**

Audio recording must be used at police stations for any interview:

- 1366 (1) with a person cautioned<sup>1</sup> in respect of any indictable offence<sup>2</sup>, including an offence triable either way<sup>3</sup>;
- 1367 (2) which takes place as a result of an interviewer exceptionally putting further questions to a suspect about such an offence after he has been charged with, or told that he may be prosecuted for, that offence<sup>4</sup>; or
- 1368 (3) when an interviewer wants to tell a person<sup>5</sup>, after he has been charged with, or informed that he may be prosecuted for an offence described in head (1) above, about any written statement or interview with another person<sup>6</sup>.

The custody officer<sup>7</sup> may authorise the interviewer not to audio record the interview when it is:

- 1369 (a) not reasonably practicable to do so because of equipment failure or the unavailability of a suitable interview room or recorder and the authorising officer considers, on reasonable grounds, that the interview should not be delayed<sup>8</sup>; or
- 1370 (b) clear from the outset that there will not be a prosecution<sup>9</sup>.

If a person refuses to go into or remain in a suitable interview room<sup>10</sup>, and the custody officer considers, on reasonable grounds, that the interview should not be delayed, the interview may, at the custody officer's discretion, be conducted in a cell using portable recording equipment or, if none is available, recorded in writing<sup>11</sup>; the reasons for this decision must be recorded<sup>12</sup>.

The whole of each interview must be audio recorded, including the taking and reading back of any statement<sup>13</sup>.

1 In accordance with Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 10.1-10.12 (see PARA 959 ante).

2 For the meaning of 'indictable offence' see PARA 1102 note 1 post.

3 Code E: Code of Practice on Audio Recording Interviews with Suspects para 3.1(a). For the meaning of 'triable either way' see PARA 1102 note 4 post. Nothing in Code E is intended to preclude audio recording at police discretion of interviews at police stations with persons cautioned in respect of offences not covered by Code E para 3.1, or responses made by interviewees after they have been charged with, or informed that they may be prosecuted for, an offence, provided that Code E is complied with: Code E Guidance note 3A. The Terrorism Act 2000 makes separate provision for a code of practice for the audio recording of interviews by police officers of persons arrested under s 41 or detained under Sch 7 (see PARA 430 et seq ante); see Code E para 3.2; and see the Terrorism Act 2000 (Code of Practice on Audio Recording of Interviews) Order 2001, SI 2001/159; the Terrorism Act 2000 (Code of Practice on Audio Recording of Interviews) (No 2) Order 2001, SI 2001/189; and PARA 421 ante. Code E does not apply to such interviews: Code E para 3.2.

4 Code E para 3.1(b). See note 3 supra. Circumstances in which a suspect may be questioned about an offence after being charged with it are set out in Code C para 16.5 (see PARA 1042 post).

5 Procedures to be followed when a person's attention is drawn after charge to a statement made by another person are set out in Code C para 16.4 (see PARA 1042 post).

6 Code E para 3.1(c). See note 3 supra.

7 As to custody officers see PARA 939 ante. References in Code E to a custody officer, as in Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 1.9 (see PARA 939 note 8 ante), include those performing the functions of a custody officer: Code E para 1.11.

Any reference in Code E to a police officer includes a designated person (ie a person other than a police officer designated under the Police Reform Act 2002 Pt 4 (ss 38-77) (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 529) who has specified powers and duties of police officers conferred or imposed on him) acting in the exercise or performance of the powers and duties conferred or imposed on him by his designation: Code E para 1.6. If a power conferred on a designated person allows reasonable force to be used when exercised by a police officer, a designated person exercising that power has the same entitlement to use force: Code E para 1.7(a). If a power conferred on a designated person includes power to use force to enter any premises, that power is not exercisable by that designated person except either in the company, and under the supervision, of a police officer (Code E para 1.7(b)(i)) or for the purpose of saving life or limb, or preventing serious damage to property (Code E para 1.7(b)(ii)).

Nothing in Code E prevents the custody officer, or other officer given custody of the detainee, from allowing police staff who are not designated persons to carry out individual procedures or tasks at the police station if the law allows: Code E para 1.8. However, the officer remains responsible for making sure the procedures and tasks are carried out correctly in accordance with the codes of practice: Code E para 1.8. Any such police staff must be either a person employed by a police authority maintaining a police force and under the control and direction of the chief officer of that force (Code E para 1.8(a)) or employed by a person with whom a police authority has a contract for the provision of services relating to persons arrested or otherwise in custody (Code E para 1.8(b)). As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

8 Code E para 3.3(a). In these cases the interview should be recorded in writing in accordance with Code C paras 11.7-11.14 (see PARA 961 ante): Code E para 3.3. A decision not to audio record an interview for any reason may be the subject of comment in court; and the authorising officer should therefore be prepared to justify his decision: Code E Guidance note 3B. In all cases the custody officer must record the specific reasons for not audio recording: Code E para 3.3.

9 Code E para 3.3(b). See note 8 supra.

10 See Code C para 12.5; and PARA 964 ante.

11 Code E para 3.4.

12 Code E para 3.4.

13 Code E para 3.5.



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### **973. Recording and sealing of master recordings.**

Audio recording of interviews must be carried out openly to instil confidence in its reliability as an impartial and accurate record of the interview<sup>1</sup>. One recording, 'the master recording', will be sealed in the suspect's presence; and a second recording will be used as a working copy<sup>2</sup>. The master recording is either of the two recordings used in a twin-deck/drive machine or the only recording used in a single deck/drive machine<sup>3</sup>. The working copy is either the second/third recording used in a twin/triple deck/drive machine or a copy of the master recording made by a single deck/drive machine<sup>4</sup>.

1 Code E: Code of Practice on Audio Recording Interviews with Suspects para 2.1.

2 Code E para 2.2. The purpose of sealing the master recording in the suspect's presence is to show that the recording's integrity is preserved: Code E Guidance note 2A. If a single deck/drive machine is used, the working copy of the master recording must be made in the suspect's presence and without the master recording leaving his sight: Code E Guidance note 2A. The working copy must be used for making further copies if needed: Code E Guidance note 2A.

3 Code E para 2.2.

4 Code E para 2.2.

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#### **974. The interview; in general.**

The relevant provisions of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers<sup>1</sup> apply to the conduct of interviews to which Code E: Code of Practice on Audio Recording Interviews with Suspects applies<sup>2</sup>.

<sup>1</sup> See Code C paras 10.1-10.13 (cautions: see PARA 959 ante) and Code C paras 11.1A-11.20 (interviews: see PARAS 960-963 ante); Code E: Code of Practice on Audio Recording Interviews with Suspects para 4.1. The applicable notes of guidance also apply: Code E para 4.1. Code C paras 11.7-11.14 (see PARA 961 ante) apply only where a written record is needed: Code E para 4.1.

<sup>2</sup> Code E Para 4.1. Code C paras 10.10, 10.11 (see PARA 959 ante) and Code C Annex C (see PARA 1042 post) describe the restriction on drawing adverse inferences from a suspect's failure or refusal to say anything about his involvement in the offence when interviewed or after being charged or informed that he may be prosecuted, and how it affects the terms of the caution and determines if and by whom a special warning under the Criminal Justice and Public Order Act 1994 ss 36, 37 (as amended) (effect of defendant's failure to account for objects, substances or marks or for presence at a particular place: see PARAS 1553-1554 post) can be given: Code E para 4.2.

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### **975. Commencement of interview.**

When the suspect is brought into the interview room, the interviewer must, without delay but in the suspect's sight, load the recorder with new recording media<sup>1</sup> and set it to record<sup>2</sup>. The recording media must be unwrapped or opened in the suspect's presence<sup>3</sup>. The interviewer should tell the suspect about the recording process; and he must:

- 1371 (1) say that the interview is being audibly recorded<sup>4</sup>;
- 1372 (2) give his name and rank and the name and rank of any other interviewer present<sup>5</sup>;
- 1373 (3) ask the suspect and any other party present (for example, a solicitor<sup>6</sup>) to identify themselves<sup>7</sup>;
- 1374 (4) state the date, time of commencement and place of the interview<sup>8</sup>; and
- 1375 (5) state that the suspect will be given a notice about what will happen to the copies of the recording<sup>9</sup>.

The interviewer must then caution the suspect<sup>10</sup>, and remind him of his entitlement<sup>11</sup> to free legal advice<sup>12</sup>. The interviewer must put to the suspect any significant statement or silence<sup>13</sup>.

1 'Recording media' means any removable, physical audio recording medium (such as magnetic tape, optical disc or solid state memory) which can be played and copied: Code E: Code of Practice on Audio Recording Interviews with Suspects para 1.6(aa).

2 Code E para 4.3.

3 Code E para 4.3.

4 Code E para 4.4(a).

5 Code E para 4.4(b). Nothing in Code E requires the identity of officers or police staff conducting interviews to be recorded or disclosed: (1) in the case of inquiries linked to the investigation of terrorism (Code E para 2.3(a)); or (2) if the interviewer reasonably believes recording or disclosing his name might put him in danger (Code E para 2.3(b)). In these cases interviewers should use warrant or other identification numbers and the name of their police station: Code E para 2.3. The purpose of head (2) supra is to protect those involved in serious organised crime investigations or arrests of particularly violent suspects when there is reliable information that those arrested or their associates may threaten or cause harm to those involved: Code E Guidance note 2C. In cases of doubt, an officer of inspector rank or above should be consulted: Code E Guidance note 2C.

6 For the meaning of 'solicitor' see PARA 953 note 4 ante; definition applied by Code E para 1.5.

7 Code E para 4.4(c). The purpose of this requirement is voice identification: Code E Guidance note 4A.

8 Code E para 4.4(d).

9 Code E para 4.4(e).

10 See Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 10.1-10.13; and PARA 959 ante.

11 See under Code C para 11.2 (see PARA 960 ante).

- 12 Code E para 4.5.
- 13 Code E para 4.6. See Code C para 11.4; and PARA 960 ante.

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## **976. Interviews with the deaf.**

If the suspect is deaf or is suspected of having impaired hearing, the interviewer must make a written note of the interview<sup>1</sup>, at the same time as audio recording it<sup>2</sup>.

<sup>1</sup> See in accordance with Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 11.1-11.20 (see PARAS 960-963 ante).

<sup>2</sup> Code E: Code of Practice on Audio Recording Interviews with Suspects para 4.7. The reference in the text to audio recording the interview is a reference to audio recording it in accordance with Code E: Code E para 4.7. This provision is intended to give a person who is deaf or has impaired hearing equivalent rights of access to the full interview record as far as this is possible using audio recording: Code E Guidance note 4B. The provisions of Code C paras 13.1-13.11 (interpreters for deaf persons or for interviews with suspects who have difficulty in understanding English: see PARAS 967-969 ante) continue to apply: Code E Guidance note 4C. However, in an audibly recorded interview the requirement on the interviewer to make sure that the interpreter makes a separate note of the interview applies only to Code E para 4.7 (interview with deaf person): Code E Guidance note 4C.

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### **977. Objections and complaints by the suspect.**

If the suspect objects to the interview being audibly recorded at the outset, during the interview or during a break, the interviewer must explain that the interview is being audibly recorded and that the code of practice<sup>1</sup> requires that the suspect's objections be recorded on the audio recording<sup>2</sup>. When any objections have been audibly recorded or the suspect has refused to have his objections recorded, the interviewer must say that he is turning off the recorder and give his reasons and then turn off the recorder<sup>3</sup>. The interviewer must then make a written record<sup>4</sup> of the interview<sup>5</sup>. If, however, the interviewer reasonably considers that he may proceed to question the suspect with the audio recording still on, he may do so<sup>6</sup>. This procedure also applies in cases where the suspect has previously objected to the interview being visually recorded<sup>7</sup>, and the investigating officer has decided to audibly record the interview<sup>8</sup>.

If in the course of an interview a complaint is made<sup>9</sup> by or on behalf of the person being questioned, the interviewer must act in the prescribed<sup>10</sup> manner<sup>11</sup>.

If the suspect indicates that he wants to tell the interviewer about matters not directly connected with the offence of which he is suspected and that he is unwilling for these matters to be audio recorded, he should be given the opportunity to tell the interviewer about these matters at the end of the formal interview<sup>12</sup>.

1    Ie Code E: Code of Practice on Audio Recording Interviews with Suspects.

2    Code E para 4.8.

3    Code E para 4.8.

4    Ie in accordance with Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 11.7-11.14 (see PARA 961 ante).

5    Code E para 4.8.

6    Code E para 4.8. The interviewer should remember that a decision to continue recording against the wishes of the suspect may be the subject of comment in court: Code E Guidance note 4D.

7    Ie under Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects para 4.8 (see PARA 992 post).

8    Code E para 4.8. See Code E Guidance note 4D; and note 6 supra.

9    Ie a complaint concerning the provisions of Code E or Code C.

10   Ie in accordance with Code C para 12.9 (see PARA 964 ante). If the custody officer is called to deal with the complaint, the recorder should, if possible, be left on until the custody officer has entered the room and spoken to the person being interviewed: Code E Guidance note 4E. Continuation or termination of the interview should be at the interviewer's discretion pending action by an inspector under Code C para 9.2 (see PARA 958 ante): Code E Guidance note 4E. If the complaint is about a matter not connected with Code E or Code C, the decision to continue is at the interviewer's discretion: Code E Guidance note 4F. When the interviewer decides to continue the interview, he must tell the suspect that the complaint will be brought to the custody officer's attention at the conclusion of the interview: Code E Guidance note 4F. When the interview is concluded the

interviewer must, as soon as practicable, inform the custody officer about the existence and nature of the complaint made: Code E Guidance note 4F. As to custody officers see PARAS 939, 972 note 7 ante.

11 Code E para 4.9.

12 Code E para 4.10.

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### **978. Changing recording media.**

When the recorder shows that the recording media<sup>1</sup> have only a short time left, the interviewer must tell the suspect that the recording media are coming to an end and round off that part of the interview<sup>2</sup>. If the interviewer leaves the room for a second set of recording media, the suspect must not be left unattended<sup>3</sup>. The interviewer will remove the recording media from the recorder and insert the new recording media which must be unwrapped or opened in the suspect's presence<sup>4</sup>. The recorder should be set to record on the new media<sup>5</sup>. To avoid confusion between the recording media, the interviewer must mark the media with an identification number immediately they are removed from the recorder<sup>6</sup>.

1 For the meaning of 'recording media' see PARA 975 note 1 ante.

2 Code E: Code of Practice on Audio Recording Interviews with Suspects para 4.11.

3 Code E para 4.11.

4 Code E para 4.11.

5 Code E para 4.11.

6 Code E para 4.11.



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### **979. Taking a break during interview.**

When a break is to be taken, the fact that a break is to be taken, the reason for it and the time must be recorded on the audio recording<sup>1</sup>. When the break is taken and the interview room vacated by the suspect, the recording media<sup>2</sup> must be removed from the recorder and the prescribed procedures for the conclusion of an interview<sup>3</sup> followed<sup>4</sup>.

When a break is a short one and both the suspect and an interviewer remain in the interview room, the recording may be stopped; there is no need to remove the recording media and, when the interview recommences, the recording should continue on the same recording media<sup>5</sup>. The time at which the interview recommences must be recorded on the audio recording<sup>6</sup>.

After any break in the interview, the interviewer must, before resuming the interview, remind the person being questioned that he remains under caution or, if there is any doubt, give the caution in full again<sup>7</sup>.

1 Code E: Code of Practice on Audio Recording Interviews with Suspects para 4.12.

2 For the meaning of 'recording media' see PARA 975 note 1 ante.

3 I.e. the procedure set out in Code E para 4.18 (see PARA 982 post).

4 Code E para 4.12A.

5 Code E para 4.13.

6 Code E para 4.13.

7 Code E para 4.14. The interviewer should remember that it may be necessary to show to the court that nothing occurred during a break or between interviews which influenced the suspect's recorded evidence: Code E Guidance note 4G. After a break or at the beginning of a subsequent interview, the interviewer should consider summarising on the record the reason for the break and confirming this with the suspect: Code E Guidance note 4G.

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### **980. Failure of recording equipment.**

If there is an equipment failure which can be rectified quickly, for example by inserting new recording media<sup>1</sup>, the interviewer must follow the prescribed procedures<sup>2</sup>; and, when the recording is resumed, must explain what has happened and record the time at which the interview recommences<sup>3</sup>. If, however, it will not be possible to continue recording on that recorder and no replacement recorder is readily available, the interview may continue without being audibly recorded<sup>4</sup>. If this happens, the interviewer must seek the authority<sup>5</sup> of the custody officer<sup>6</sup>.

1 For the meaning of 'recording media' see PARA 975 note 1 ante.

2 I.e. the procedure set out in Code E: Code of Practice on Audio Recording Interviews with Suspects para 4.11 (see PARA 978 ante).

3 Code E para 4.15. Where the interview is being recorded and the media or the recording equipment fails, the officer conducting the interview should stop the interview immediately: Code E Guidance note 4H. Where part of the interview is unaffected by the error and is still accessible on the media, that media must be copied and sealed in the suspect's presence and the interview recommenced using new equipment or media as required: Code E Guidance note 4H. Where the content of the interview has been lost in its entirety the media should be sealed in the suspect's presence and the interview begun again: Code E Guidance note 4H. If the recording equipment cannot be fixed or no replacement is immediately available the interview should be recorded in accordance with Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 11.7-11.14 (see PARA 961 ante): Code E Guidance note 4H.

4 Code E para 4.15.

5 I.e. as in Code E para 3.3 (see PARA 972 ante).

6 Code E para 4.15. As to custody officers see PARAS 939, 972 note 7 ante.

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**981. Removing recording media from the recorder.**

When recording media<sup>1</sup> are removed from the recorder during the interview, they must be retained and the prescribed procedures<sup>2</sup> followed<sup>3</sup>.

1 For the meaning of 'recording media' see PARA 975 note 1 ante.

2 Ie the procedure set out in Code E: Code of Practice on Audio Recording Interviews with Suspects para 4.18 (see PARA 982 post).

3 Code E para 4.16.

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## **982. Conclusion of interview.**

At the conclusion of the interview, the suspect must be offered the opportunity to clarify anything he has said and asked if there is anything that he wants to add<sup>1</sup>. At the conclusion of the interview, including the taking and reading back of any written statement, the time must be recorded and the recording stopped<sup>2</sup>. The interviewer must seal the master recording<sup>3</sup> with a master recording label and treat it as an exhibit in accordance with police force standing orders<sup>4</sup>. The interviewer must sign the label and ask the suspect and any third party present to sign it<sup>5</sup>. If the suspect or third party refuses to sign the label, an officer of at least inspector rank, or if not available the custody officer<sup>6</sup>, must be called into the interview room and asked<sup>7</sup> to sign it<sup>8</sup>.

The suspect must be handed a notice which explains: (1) how the audio recording will be used; (2) the arrangements for access to it; and (3) that if he is charged or informed that he will be prosecuted, a copy of the audio recording will be supplied as soon as practicable or as otherwise agreed between him and the police<sup>9</sup>.

1 Code E: Code of Practice on Audio Recording Interviews with Suspects para 4.17.

2 Code E para 4.18.

3 For the meaning of 'the master recording' see PARA 973 ante.

4 Code E para 4.18.

5 Code E para 4.18.

6 As to custody officers see PARAS 939, 972 note 7 ante.

7 This is subject to Code E para 2.3 (see PARA 975 ante).

8 Code E para 4.18.

9 Code E para 4.19.

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### **983. Procedure after interview.**

The interviewer must make a note in his pocket book<sup>1</sup> that the interview has taken place, that it was audibly recorded, and its time, duration and date and the master recording's<sup>2</sup> identification number<sup>3</sup>. If no proceedings follow in respect of the person whose interview was recorded, the recording media<sup>4</sup> must be kept<sup>5</sup> securely<sup>6</sup>.

1 For these purposes, 'pocket book' includes any official report book issued to police officers or police staff: Code E: Code of Practice on Audio Recording Interviews with Suspects para 1.10.

2 For the meaning of 'the master recording' see PARA 973 ante.

3 Code E para 5.1. Any written record of an audibly recorded interview should be made in accordance with national guidelines approved by the Secretary of State: Code E Guidance note 5A. Those guidelines are contained in Home Office Circular 26/1995, published in (1995) 159 JPN 303.

4 For the meaning of 'recording media' see PARA 975 note 1 ante.

5 Ie in accordance with Code E para 6.1 and Code E Guidance note 6A (see PARA 984 post).

6 Code E para 5.2.

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#### **984. Media security.**

The officer in charge of each police station at which interviews with suspects are recorded must make arrangements for master recordings<sup>1</sup> to be kept securely and their movements accounted for on the same basis as material which may be used for evidential purposes, in accordance with police force standing orders<sup>2</sup>.

A police officer has no authority to break the seal on a master recording which is required for criminal trial or appeal proceedings<sup>3</sup>. If it is necessary to gain access to the master recording, the police officer must arrange for its seal to be broken in the presence of a representative of the Crown Prosecution Service<sup>4</sup>. The defendant or his legal adviser should be informed and given a reasonable opportunity to be present<sup>5</sup>. If the defendant or his legal representative is present, he must be invited to reseal and sign the master recording<sup>6</sup>. If either refuses or neither is present this should be done by the representative of the Crown Prosecution Service<sup>7</sup>.

If no criminal proceedings result, or the criminal trial and, if applicable, appeal proceedings to which the interview relates have been concluded, the chief officer of police<sup>8</sup> is responsible for establishing arrangements for the breaking of the seal on the master recording, if necessary<sup>9</sup>.

When the master recording seal is broken, a record must be made of the procedure followed, including the date, time and place and persons present<sup>10</sup>.

1 For the meaning of 'the master recording' see PARA 973 ante.

2 Code E: Code of Practice on Audio Recording Interviews with Suspects para 6.1. Code E paras 6.1-6.4 are concerned with the security of the master recording sealed at the conclusion of the interview: Code E Guidance note 6A. Care must be taken of working copies of recordings because their loss or destruction may lead unnecessarily to the need to access master recordings: Code E Guidance note 6A. For the meaning of 'working copy' see PARA 973 ante.

3 Code E para 6.2.

4 Code E para 6.2. If the tape has been delivered to the Crown Court for keeping after committal, the Crown Prosecutor will apply to the chief clerk of the Crown Court centre for the release of the tape for unsealing by the Crown prosecutor: Code E Guidance note 6B. For these purposes, reference to the Crown Prosecution Service or to the Crown prosecutor is taken to mean any other body or person with a statutory responsibility for prosecution for whom the police conduct any audibly recorded interviews: Code E Guidance note 6C. As to the Crown Prosecution Service see PARA 1079 et seq post.

5 Code E para 6.2.

6 Code E para 6.2.

7 Code E para 6.2.

8 As to chief officers of police and their functions see POLICE vol 36(1) (2007 Reissue) PARA 178 et seq.

9 Code E para 6.3.

10 Code E para 6.4.

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### **985. Preparing audio recorded evidence for the Crown Court.**

Where the prosecution intends to adduce evidence of the interview, and agreement between the parties has not been reached about the record, sufficient notice must be given to allow consideration of any amendment to the record of interview or the preparation of any transcript of the interview or any editing<sup>1</sup> of a recording for the purpose of playing it back in court<sup>2</sup>. To that end, the following practice should be followed:

- 1376 (1) where the defence is unable to agree a record of interview or transcript (where one is already available) the prosecution should be notified<sup>3</sup> no more than 21 days<sup>4</sup> from the date of committal or date of transfer<sup>5</sup> or at the plea and directions hearing if earlier, with a view to securing agreement to amend; and a copy of such notice should be supplied to the court within the 21-day period<sup>6</sup>;
- 1377 (2) if agreement is not reached and it is proposed that the recording or part of it be played in court, notice should be given to the prosecution by the defence no more than 14 days<sup>7</sup> after the expiry of the period in head (1) above, or as ordered at the plea and directions hearing, in order that counsel for the parties may agree those parts of the recording that should not be adduced and that arrangements may be made, by editing or in some other way, to exclude that material; and a copy of such notice should be supplied to the court within the 14-day period<sup>8</sup>;
- 1378 (3) notice of any agreement reached under head (1) or head (2) above should be supplied to the court by the prosecution as soon as is practicable<sup>9</sup>;
- 1379 (4) alternatively, if, in any event, prosecuting counsel proposes to play the recording or part of it, the prosecution should within 28 days<sup>10</sup> of the date of committal or date of transfer or, if earlier, at the plea and directions hearing, notify the defence and the court<sup>11</sup>; the defence should notify the prosecution and the court within 14 days<sup>12</sup> of receiving the notice if it objects to the production of the recording on the basis that a part of it should be excluded; if the objections raised by the defence are accepted, the prosecution should prepare an edited recording or make other arrangements to exclude the material part and should notify the court of the arrangements made<sup>13</sup>;
- 1380 (5) whenever editing or amendment of a record of interview or of a recording or of a transcript takes place, the following general principles should be followed: (a) where a defendant has made a statement which includes an admission of one or more other offences, the portion relating to other offences should be omitted unless it is or becomes admissible in evidence<sup>14</sup>; and (b) where the statement of one defendant contains a portion which is partly in his favour and partly implicative of a co-defendant in the trial, the defendant making the statement has the right to insist that everything relevant which is in his favour goes before the jury<sup>15</sup>, and in such a case the judge must be consulted about how best to protect the position of the co-defendant<sup>16</sup>.

If there is a failure to agree between counsel under heads (1) to (5) above, or there is a challenge to the integrity of the master recording<sup>17</sup>, notice and particulars should be given to

the court and to the prosecution by the defence as soon as is practicable; the court may then, at its discretion, order a pre-trial review or give such other directions as may be appropriate<sup>18</sup>.

If a recording is to be adduced during proceedings before the Crown Court, it should be produced and proved by the interviewing officer or any other officer<sup>19</sup> who was present at the interview at which the recording was made; and the prosecution should ensure that such an officer will be available for this purpose<sup>20</sup>. In order to avoid the necessity for the court to listen to lengthy or irrelevant material before the relevant part of a recording is reached, counsel should indicate to the machine-operator<sup>21</sup> those parts of a recording which it may be necessary to play<sup>22</sup>.

Once a trial has begun, if, by reason of faulty preparation or for some other cause these procedures have not been properly complied with, and an application is made to amend the record of interview or transcript or to edit the recording, as the case may be, thereby making necessary an adjournment for the work to be carried out, the court may make at its discretion an appropriate award of costs<sup>23</sup>.

1 As to the editing of a defendant's statements see also PARA 1546 post; and as to the editing of witness statements generally see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.24.6, CA. This practice direction must be read in conjunction with Code E: Code of Practice on Audio Recording Interviews with Suspects (see PARAS 971-984 ante): *Practice Direction (Criminal Proceedings: Consolidation)* supra at IV.43.10. See also Home Office Circular 26/1995; and PARA 983 note 3 ante.

2 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2, CA.

3 The notice should specify the part of the recording to which objection is taken or the part omitted which the defence considers should be included: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2, CA.

4 Where a case is listed for hearing on a date which falls within the time limits set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2, CA, it is the responsibility of the parties to ensure that all the necessary steps are taken to comply with the required procedure within such shorter period as is available: *Practice Direction (Criminal Proceedings: Consolidation)* supra at IV.43.8.

5 I.e. the date on which notice of transfer is given in accordance with the Criminal Justice Act 1987 s 4(1)(c) (see PARA 1105 ante): *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.9, CA.

6 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2(a), CA. See also Home Office Circular 76/1988.

7 See note 4 supra.

8 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2(b), CA.

9 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2(c), CA.

10 See note 4 supra.

11 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2(d), CA.

12 See note 4 supra.

13 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2(d), CA.

14 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2(e)(i), CA.



15 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2(e)(ii), CA.

16 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.2(e), CA.

17 As to the master recording see PARA 973 ante.

18 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.3, CA.

19 Where such officer is unable to act as the recording-machine operator, it is for the prosecution to make some other arrangement: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.5, CA.

20 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.4, CA.

21 See the text and note 19 supra. Such an indication should, so far as possible, be expressed in terms of the time track or other identifying process used by the interviewing police force and should be given in time for the operator to have located those parts by the appropriate point in the trial: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.6, CA.

22 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.6, CA.

23 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.43.7, CA. As to costs see PARA 2058 et seq post; and CIVIL PROCEDURE vol 12 (2009) PARA 1729 et seq.

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## ***E. VISUAL RECORDING OF INTERVIEWS***

### **986. Code of practice.**

The visual recording of interviews at police stations with suspected persons is governed by the Police and Criminal Evidence Act 1984<sup>1</sup> and Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects<sup>2</sup>. Under these provisions references to an interview are references to an interview of a person suspected of a criminal offence<sup>3</sup> and references to a visual recording include references to a visual recording in which an audio recording is comprised (a 'visual recording with sound')<sup>4</sup>.

1 The Police and Criminal Evidence Act 1984 s 60A (added by the Criminal Justice and Police Act 2001 s 76(1)). This provides that the Secretary of State may issue a code of practice for the visual recording of interviews held by police officers at police stations (Police and Criminal Evidence Act 1984 s 60A(1)(a) (as so added)) and may make an order requiring the visual recording of interviews so held, and requiring the visual recording to be in accordance with the code for the time being in force under these provisions (s 60A(1)(b) (as so added)). A requirement imposed by such an order may be imposed in relation to such cases or police stations in such areas, or both, as may be specified or described in the order: s 60A(2) (as so added). An order under these provisions must be made by statutory instrument and is subject to annulment in pursuance of a resolution of either House of Parliament: s 60A(3) (as so added). At the date at which this volume states the law no such orders were in effect. As to codes of practice under the Police and Criminal Evidence Act 1984 see further PARA 908 ante.

2 See PARA 987 et seq post. The notes for guidance included in Code F are not provisions of Code F: Code F para 1.2. They form guidance to police officers and others about its application and interpretation: Code F para 1.2. Nothing in Code F is to be taken as detracting in any way from the requirements of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers: Code F para 1.3. Code F must be readily available for consultation by police officers and other police staff, detained persons and members of the public: Code F para 1.1. As to the commencement and scope of Code F see PARA 908 ante.

3 Police and Criminal Evidence Act 1984 s 60A(4)(a) (as added: see note 1 supra).

4 Ibid s 60A(4)(b) (as added: see note 1 supra); Code F para 1.6. At the date at which this volume states the law there is no requirement on any police force to make visual recordings of interviews, but interviewing officers who choose to make such recordings must have regard to the provisions of Code F: Code F transitional arrangements.

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### **987. Interviews to be visually recorded.**

If an interviewing officer decides to make a visual recording<sup>1</sup>, the areas where it might be appropriate<sup>2</sup> are:

- 1381 (1) in an interview with a suspect in respect of an indictable offence (including an offence triable either way)<sup>3</sup>;
- 1382 (2) in an interview which takes place as a result of an interviewer exceptionally putting further questions to a suspect about an offence described in head (1) above after he has been charged with, or informed that he may be prosecuted for, that offence<sup>4</sup>;
- 1383 (3) in an interview in which an interviewer wishes to bring to the notice of a person, after that person has been charged with, or informed that he may be prosecuted for an offence described in head (1) above, any written statement made by another person, or the content of an interview with another person<sup>5</sup>;
- 1384 (4) in an interview with, or in the presence of, a deaf or deaf/blind or speech impaired person who uses sign language to communicate<sup>6</sup>;
- 1385 (5) in an interview with, or in the presence of, anyone who requires an appropriate adult<sup>7</sup>; or
- 1386 (6) in any case where the suspect or his representative requests that the interview be recorded visually<sup>8</sup>.

The custody officer<sup>9</sup> may authorise the interviewing officer not to record the interview visually:

- 1387 (a) where it is not reasonably practicable to do so because of failure of the equipment, or the non-availability of a suitable interview room or recorder, and the authorising officer considers on reasonable grounds that the interview should not be delayed until the failure has been rectified or a suitable room or recorder becomes available<sup>10</sup>;
- 1388 (b) where it is clear from the outset that no prosecution will ensue<sup>11</sup>;
- 1389 (c) where it is not practicable to do so because at the time the person resists being taken to a suitable interview room or other location which would enable the interview to be recorded, or otherwise fails or refuses to go into such a room or location, and the authorising officer considers on reasonable grounds that the interview should not be delayed until these conditions cease to apply<sup>12</sup>.

In all cases the custody officer must make a note in the custody record of the reasons for not taking a visual record<sup>13</sup>.

When a person who is voluntarily attending the police station is required to be cautioned<sup>14</sup> prior to being interviewed, the subsequent interview must be recorded, unless the custody officer gives authority<sup>15</sup> for the interview not to be so recorded<sup>16</sup>.

The whole of each interview must be recorded visually, including the taking and reading back of any statement<sup>17</sup>.

1 For the meaning of 'visual recording' see PARA 986 ante.

2 Nothing in Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects is intended to preclude visual recording at police discretion of interviews at police stations with persons cautioned in respect of offences not covered by Code F para 3.1 (see the text and notes 2-8 infra), or responses made by interviewees after they have been charged with or informed they may be prosecuted for an offence, provided that Code F is complied with: Code F Guidance note 3A. Attention is drawn to the provisions set out in Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers about the matters to be considered when deciding whether a detained person is fit to be interviewed (see PARA 960 et seq ante): Code F Guidance note 3B.

The Terrorism Act 2000 makes separate provision for a code of practice for the video recording of interviews by police officers of persons arrested under s 41 or detained under Sch 7 (see PARA 420 et seq ante); see Code F para 3.2; and see also the Terrorism Act 2000 (Video Recording of Interviews) Order 2000, SI 2000/3179; and PARA 421 ante. Code F does not apply to such interviews: Code F para 3.2. When it becomes clear only during the course of an interview which is being visually recorded that the interviewee may have committed an offence to which Code F para 3.2 applies, the interviewing officer should turn off the recording equipment and the interview should continue in accordance with the provisions of the Terrorism Act 2000: Code F Guidance note 3E.

3 Code F paras 1.4, 3.1(a). For the meaning of 'indictable offence' see PARA 1102 note 1 post; and for the meaning of 'offence triable either way' see PARA 1102 note 4 post.

4 Code F para 3.1(b). Code C sets out the circumstances in which a suspect may be questioned about an offence after being charged with it (see PARA 960 et seq ante): Code F Guidance note 3C.

5 Code F para 3.1(c). Code C sets out the procedures to be followed when a person's attention is drawn after charge, to a statement made by another person (see Code C para 16.4; and PARA 1042 post): Code F Guidance note 3D. One method of bringing the content of an interview with another person to the notice of a suspect may be to play him a recording of that interview: Code F Guidance note 3D.

6 Code F para 3.1(d).

7 Code F para 3.1(e). For the meaning of 'appropriate adult' see PARA 940 note 9 ante; definition applied by Code F para 1.5.

8 Code F para 3.1(f).

9 As to custody officers see PARA 939 ante. As in Code C para 1.9 (see PARA 939 note 8 ante), references in Code F to a custody officer include those performing the functions of a custody officer: Code F Guidance note 1A.

10 Code F para 3.3(a). In such cases the custody officer may authorise the interviewing officer to audio record the interview in accordance with the guidance set out in Code E: Code of Practice on Audio Recording Interviews with Suspects (see PARA 971 et seq ante): Code F para 3.3(a).

11 Code F para 3.3(b).

12 Code F para 3.3(c).

13 Code F para 3.3. A decision not to record an interview visually for any reason may be the subject of comment in court, and the authorising officer should therefore be prepared to justify his decision in each case: Code F Guidance note 3F.

14 Ie in accordance with Code C. See Code C para 10; and PARA 959 ante.

15 Ie in accordance with Code F para 3.3 (see the text and notes 9-13 supra).

16 Code F para 3.4.

17 Code F para 3.5. A visible illuminated sign or indicator will light and remain on at all times when the recording equipment is activated or capable of recording or transmitting any signal or information: Code F para 3.6.

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### **988. Recording and sealing of master tapes.**

The visual recording<sup>1</sup> of interviews must be carried out openly to instil confidence in its reliability as an impartial and accurate record of the interview<sup>2</sup>. The camera or cameras must be placed in the interview room so as to ensure coverage of as much of the room as is practicably possible whilst the interviews are taking place<sup>3</sup>. The certified recording medium must be of a high quality, new and previously unused<sup>4</sup>.

One copy of the certified recording medium ('the master copy') must be sealed before it leaves the presence of the suspect; and a second copy will be used as a working copy<sup>5</sup>.

Nothing in the provisions relating to the visual recording of interviews with suspects<sup>6</sup> requires the identity of an officer to be recorded or disclosed:

- 1390 (1) if the interview or record relates to a person detained under the law relating to terrorism<sup>7</sup>; or
- 1391 (2) otherwise, where the officer reasonably believes that recording or disclosing his name might put him in danger<sup>8</sup>.

In these cases, the officer will have his back to the camera and must use his warrant or other identification number and the name of the police station to which he is attached<sup>9</sup>. Such instances and the reasons for them must be recorded in the custody record<sup>10</sup>.

1 For the meaning of 'visual recording' see PARA 986 ante.

2 Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects para 2.1. Interviewing officers will wish to arrange that, as far as possible, visual recording arrangements are unobtrusive, but it must be clear to the suspect that there is no opportunity to interfere with the recording equipment or the recording media: Code F Guidance note 2A.

3 Code F para 2.2.

4 Code F para 2.3. In this context, the certified recording media must be of either a VHS or digital CD format and should be capable of having an image of the date and time superimposed upon them as they record the interview: Code F Guidance note 2B. When the certified recording medium is placed in the recorder and switched on to record, the correct date and time, in hours, minutes and seconds will be superimposed automatically, second by second, during the whole recording: Code F para 2.3.

5 Code F para 2.4. The purpose of sealing the master copy before it leaves the presence of the suspect is to establish his confidence that the integrity of the copy is preserved: Code F Guidance note 2C. The recording of the interview may be used for identification procedures in accordance with Code D: Code of Practice for the Identification of Person by Police Officers para 3.21 (see PARA 1019 post) or Code D Annex E (see PARA 1013 post): Code F Guidance note 2D.

6 ie Code F.

7 Code F para 2.5(a). For these purposes, 'the law relating to terrorism' means the Terrorism Act 2000 (see PARA 383 et seq ante): Code F para 2.5(a). The purpose of Code F para 2.5 is to protect police officers and others involved in the investigation of serious organised crime or the arrest of particularly violent suspects when there is reliable information that those arrested or their associates may threaten or cause harm to the officers, their families or their personal property: Code F Guidance note 2E.

8 Code F para 2.5(b). See note 7 *supra*.

9 Code F para 2.5.

10 Code F para 2.5.

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### **989. The interview; general.**

The provisions relating to cautions<sup>1</sup> and interviews<sup>2</sup> and the guidance notes applicable to them apply to the conduct of interviews to which the provisions relating to the visual recording<sup>3</sup> of interviews<sup>4</sup> apply<sup>5</sup>.

1    Ie the provisions of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 10.1-10.13 (see PARA 959 ante).

2    Ie Code C paras 11.1A-11.20 (see PARAS 960-963 ante).

3    For the meaning of 'visual recording' see PARA 986 ante.

4    Ie Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects.

5    Code F para 4.1. Particular attention is drawn to those parts of Code C that describe the restrictions on drawing adverse inferences from a suspect's failure or refusal to say anything about his involvement in the offence when interviewed or after being charged or informed that he may be prosecuted and how those restrictions affect the terms of the caution and determine whether a special warning (ie under the Criminal Justice and Public Order Act 1994 ss 36, 37 (as amended) (effect of accused's failure to account for objects, substances or marks or for presence at a particular place: see PARA 1042 post)) can be given: Code F para 4.2. See Code C para 10.5, 10.10, 11.4, 11.4A; and PARAS 959-960 ante.

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## **990. Commencement of interviews.**

When the suspect is brought into the interview room the interviewer must without delay, but in sight of the suspect, load the recording equipment and set it to record<sup>1</sup>. The recording media must be unwrapped or otherwise opened in the presence of the suspect<sup>2</sup>. The interviewer must then tell the suspect formally about the visual recording<sup>3</sup>. The interviewer must:

- 1392 (1) explain that the interview is being visually recorded<sup>4</sup>;
- 1393 (2) give his or her name and rank, and that of any other interviewer present<sup>5</sup>;
- 1394 (3) ask the suspect and any other party present (for example, his solicitor<sup>6</sup>) to identify themselves<sup>7</sup>;
- 1395 (4) state the date, time of commencement and place of the interview<sup>8</sup>; and
- 1396 (5) state that the suspect will be given a notice about what will happen to the recording<sup>9</sup>.

The interviewer must then caution the suspect<sup>10</sup> and remind him of his entitlement to free and independent legal advice and that he can speak to a solicitor on the telephone<sup>11</sup>. The interviewer must then put to the suspect any significant statement or silence<sup>12</sup> (that is, failure or refusal to answer a question or to answer it satisfactorily) which occurred before the start of the interview, and must ask the suspect whether he wishes to confirm or deny that earlier statement or silence or whether he wishes to add anything<sup>13</sup>.

1 Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects para 4.3.

2 Code F para 4.3. The interviewer should attempt to estimate the likely length of the interview and ensure that an appropriate quantity of certified recording media and labels with which to seal master copies are available in the interview room: Code F Guidance note 4A.

3 Code F para 4.4. For the meaning of 'visual recording' see PARA 986 ante.

4 Code F para 4.4(a).

5 Code F para 4.4(b). This is subject to Code F para 2.5 (see PARA 988 ante).

6 For the meaning of 'solicitor' see PARA 953 note 4 ante; definition applied by Code F para 1.5.

7 Code F para 4.4(c).

8 Code F para 4.4(d).

9 Code F para 4.4(e).

10 The caution should follow that set out in Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 10.1-10.13 (see PARA 959 ante): Code F para 4.5.

11 Code F para 4.5.

12 For the meaning of 'significant' statement or silence see PARA 960 note 15 ante; definition applied by Code F para 4.6.

13 Code F para 4.6.





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### **991. Interviews with the deaf.**

If the suspect is deaf or there is doubt about his hearing ability, the requirements relating to the provision on interpreters for the deaf or for interviews with suspects who have difficulty in understanding English<sup>1</sup> continue to apply<sup>2</sup>.

1     le the provisions of Code C: Code of Practice on the Detention, Treatment and Questioning of Persons by Police Officers paras 13.1-13.10 (see PARAS 967-969 ante).

2     Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects para 4.7.

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## **992. Objections and complaints by the suspect.**

If the suspect raises objections to the interview being visually recorded<sup>1</sup> either at the outset or during the interview or during a break in the interview, the interviewer must explain that the interview is being visually recorded and that the code of practice<sup>2</sup> requires that the suspect's objections must be recorded on the visual recording<sup>3</sup>. If in the course of an interview a complaint<sup>4</sup> is made by the person being questioned, or on his behalf, the interviewer must act in the prescribed manner<sup>5</sup>, record the complaint in the interview record and inform the custody officer<sup>6</sup>.

If the suspect indicates that he wishes to tell the interviewer about matters not directly connected with the offence of which he is suspected and that he is unwilling for these matters to be recorded, the suspect must be given the opportunity to tell the interviewer about these matters after the conclusion of the formal interview<sup>7</sup>.

1 For the meaning of 'visual recording' see PARA 986 ante.

2 Ie Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects.

3 Code F para 4.8. When any objections have been visually recorded or the suspect has refused to have his objections recorded, the interviewer must say that he is turning off the recording equipment, give his reasons and turn it off: Code F para 4.8. If a separate audio recording is being maintained the interviewer must ask the person to record the reasons for refusing to agree to visual recording of the interview: Code F para 4.8. Code E para 4.8 (see PARA 977 ante) applies if the person objects to audio recording of the interview: Code F para 4.8. The interviewer must then make a written record of the interview: Code F para 4.8. If the interviewer reasonably considers that he may proceed to question the suspect with the visual recording still on, he may do so: Code F para 4.8. The interviewer should be aware that a decision to continue recording against the wishes of the suspect may be the subject of comment in court: Code F Guidance para 4G.

4 Ie concerning the provisions of Code F or of Code C: Code of Practice on the Detention, Treatment and Questioning of Persons by Police Officers (see PARA 931 et seq ante).

5 Ie in accordance with Code C.

6 Code F para 4.9. As to custody officers see PARAS 939, 987 note 9 ante. Where the custody officer is called immediately to deal with the complaint, whenever possible the recording equipment should be left to run until the custody officer has entered the interview room and spoken to the person being interviewed; continuation or termination of the interview should be at the discretion of the interviewing officer pending action by an inspector as set out in Code C: Code F Guidance note 4B.

Where the complaint is about a matter not connected with Code F or Code C, the decision to continue with the interview is at the discretion of the interviewing officer: Code F Guidance note 4C. Where the interviewing officer decides to continue with the interview, the person being interviewed must be told that the complaint will be brought to the attention of the custody officer at the conclusion of the interview: Code F Guidance note 4C. When the interview is concluded, the interviewing officer must, as soon as practicable, inform the custody officer of the existence and nature of the complaint made: Code F Guidance note 4C.

7 Code F para 4.10.

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### **993. Changing the recording media.**

In instances where the recording media are not of sufficient length to record all of the interview with the suspect, further certified recording media must be used<sup>1</sup>. When the recording equipment indicates that the recording media has only a short time left to run, the interviewer must advise the suspect and round off that part of the interview<sup>2</sup>. If the interviewer wishes to continue the interview but does not already have further certified recording media with him, he must obtain a set<sup>3</sup>. The suspect should not be left unattended in the interview room<sup>4</sup>. The interviewer will remove the recording media from the recording equipment and insert the new ones which have been unwrapped or otherwise opened in the suspect's presence<sup>5</sup>. The recording equipment must then be set to record<sup>6</sup>. Care must be taken, particularly when a number of sets of recording media have been used, to ensure that there is no confusion between them (for example, by marking the sets of recording media with consecutive identification numbers)<sup>7</sup>.

1 Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects para 4.11.

2 Code F para 4.11.

3 Code F para 4.11.

4 Code F para 4.11.

5 Code F para 4.11.

6 Code F para 4.11.

7 See Code F para 4.11.

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#### **994. Taking a break during the interview.**

When a break is to be taken during the course of an interview and the interview room is to be vacated by the suspect, the fact that a break is to be taken, the reason for it and the time must be recorded<sup>1</sup>. The recording equipment must be turned off and the recording media removed; and the procedures for the conclusion of an interview<sup>2</sup> should be followed<sup>3</sup>.

When a break is to be a short one, and both the suspect and a police officer are to remain in the interview room, the fact that a break is to be taken, the reasons for it and the time must be recorded on the recording media<sup>4</sup>. The recording equipment may be turned off, but there is no need to remove the recording media<sup>5</sup>. When the interview is recommenced the recording must continue on the same recording media and the time at which the interview recommences must be recorded<sup>6</sup>.

When there is a break in questioning under caution, the interviewing officer must ensure that the person being questioned is aware that he remains under caution<sup>7</sup>. If there is any doubt the caution must be given again in full when the interview resumes<sup>8</sup>.

1 Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects para 4.12.

2 See Code F para 4.19; and PARA 997 post.

3 Code F para 4.12.

4 Code F para 4.13.

5 Code F para 4.13.

6 Code F para 4.13.

7 Code F para 4.14.

8 Code F para 4.14. In considering whether to caution again after a break, the officer should bear in mind that he may have to satisfy a court that the person understood that he was still under caution when the interview resumed: Code F Guidance note 4D. The officer should bear in mind that it may be necessary to satisfy the court that nothing occurred during a break in an interview or between interviews which influenced the suspect's recorded evidence: Code F Guidance note 4E. On the recommencement of an interview, the officer should consider summarising on the tape or CD the reason for the break and confirming this with the suspect: Code F Guidance note 4E.

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### **995. Failure of recording equipment.**

If there is a failure of equipment which can be rectified quickly, the procedures required to be followed when a break is to be taken during an interview<sup>1</sup> must be followed; and when the recording is resumed the interviewer must explain what has happened and record the time the interview recommences<sup>2</sup>. If, however, it is not possible to continue recording on that particular recorder and no alternative equipment is readily available, the interview may continue without being recorded visually<sup>3</sup>. In such circumstances, the procedures for seeking the authority of the custody officer<sup>4</sup> will be followed<sup>5</sup>.

1    Ie the procedures set out in Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects para 4.12 (see PARA 994 ante).

2    Code F para 4.15.

3    Code F para 4.15.

4    Ie those set out in Code F para 3.3 (see PARA 987 ante). As to custody officers see PARAS 939, 987 note 9 ante.

5    Code F para 4.15. If any part of the recording media breaks or is otherwise damaged during the interview, it should be sealed as a master copy in the presence of the suspect and the interview resumed where it left off: Code F Guidance note 4F. The undamaged part should be copied and the original sealed as a master copy in the suspect's presence, if necessary after the interview: Code F Guidance note 4F. If equipment for copying is not readily available, both parts should be sealed in the suspect's presence and the interview begun again: Code F Guidance note 4F. For the meaning of 'the master copy' see PARA 988 ante.

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**996. Removing used recording media from recording equipment.**

Where used recording media are removed from the recording equipment during the course of an interview, they must be retained and the specified procedures<sup>1</sup> followed<sup>2</sup>.

<sup>1</sup> I.e. the procedures specified in Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects para 4.18 (see PARA 997 post).

<sup>2</sup> Code F para 4.16.

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### **997. Conclusion of interview.**

Before the conclusion of the interview, the suspect must be offered the opportunity to clarify anything that he has said and asked if there is anything he wishes to add<sup>1</sup>.

At the conclusion of the interview, including the taking and reading back of any written statement, the time must be recorded and the recording equipment switched off; and the master tape or CD<sup>2</sup> must be removed from the recording equipment, sealed with a master copy label and treated as an exhibit in accordance with the police force standing orders<sup>3</sup>. The interviewer must sign the label and also ask the suspect and any appropriate adult<sup>4</sup> or other third party present during the interview to sign it<sup>5</sup>. If the suspect or third party refuses to sign the label, an officer of at least the rank of inspector or, if one is not available, the custody officer<sup>6</sup> must be called into the interview room and asked to sign it<sup>7</sup>.

The suspect must be handed a notice which explains the use which will be made of the recording and the arrangements for access to it<sup>8</sup>. The notice will also advise the suspect that a copy of the tape will be supplied as soon as practicable if the person is charged or informed that he will be prosecuted<sup>9</sup>.

1 Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects para 4.17.

2 See PARA 988 text and note 4 ante.

3 Code C para 4.18. For the meaning of 'the master copy' see PARA 988 ante.

4 For the meaning of 'appropriate adult' see PARA 940 note 9 ante; definition applied by Code F para 1.5.

5 Code F para 4.18.

6 As to custody officers see PARAS 939, 987 note 9 ante.

7 Code F para 4.18.

8 Code F para 4.19.

9 Code F para 4.19.



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# **998. After the interview.**

The interviewer must make a note in his pocket book<sup>1</sup> of the fact that the interview has taken place and has been recorded, and its time, duration and date and the identification number of the master copy<sup>2</sup> of the recording media<sup>3</sup>. Where no proceedings follow in respect of the person whose interview was recorded, the recording media must nevertheless be kept securely in accordance with specified provisions<sup>4</sup>.

1 'Pocket book' includes any official report book issued to police officers: Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects para 1.7.

2 For the meaning of 'the master copy' see PARA 988 ante.

3 Code F para 5.1. Any written record of a recorded interview must be made in accordance with national guidelines approved by the Secretary of State, and with regard to the advice contained in the Manual of Guidance for the preparation, processing and submission of files: Code F Guidance note 5A.

4 Code F para 5.2. The specified provisions are the provisions of Code F para 6.1 and Code F Guidance note 6A (see PARA 999 post): Code F para 5.2.

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### **999. Master copy security.**

The officer in charge of the police station at which interviews with suspects are recorded must make arrangements for the master copies<sup>1</sup> to be kept securely and their movements accounted for on the same basis as other material which may be used for evidential purposes, in accordance with police force standing orders<sup>2</sup>.

A police officer has no authority to break the seal on a master copy which is required for criminal trial or appeal proceedings<sup>3</sup>. If it is necessary to gain access to the master copy, the police officer must arrange for its seal to be broken in the presence of a representative of the Crown Prosecution Service<sup>4</sup>. The defendant or his legal adviser must be informed and given a reasonable opportunity to be present<sup>5</sup>. If the defendant or his legal representative is present he must be invited to reseal and sign the master copy<sup>6</sup>. If either refuses or neither is present, this must be done by the representative of the Crown Prosecution Service<sup>7</sup>.

The chief officer of police is responsible for establishing arrangements for breaking the seal of the master copy where either no criminal proceedings result or the criminal proceedings to which the interview relates have been concluded and it becomes necessary to break the seal<sup>8</sup>. These arrangements should be those which the chief officer considers are reasonably necessary to demonstrate to the person interviewed and any other party who may wish to use or refer to the interview record that the master copy has not been tampered with and that the interview record remains accurate<sup>9</sup>. A representative of each party must<sup>10</sup> be given a reasonable opportunity to be present when the seal is broken, the master copy copied and resealed<sup>11</sup>. If one or more of the parties is not present when the master copy seal is broken because he cannot be contacted or refuses to attend<sup>12</sup>, arrangements should be made for an independent person, such as a custody visitor<sup>13</sup>, to be present; alternatively, or as an additional safeguard, arrangements should be made for a film or photographs to be taken of the procedure<sup>14</sup>. This does not, however, require a person to be present when:

- 1397 (1) it is necessary to break the master copy seal for the proper and effective further investigation of the original offence or the investigation of some other offence<sup>15</sup>; or
- 1398 (2) the officer in charge of the investigation has reasonable grounds to suspect that allowing an opportunity might prejudice any such an investigation or criminal proceedings which may be brought as a result or endanger any person<sup>16</sup>.

When the master copy seal is broken, copied and resealed, a record must be made of the procedure followed, including the date, time and place and persons present<sup>17</sup>.

1 For the meaning of 'the master copy' see PARA 988 ante.

2 Code F: Code of Practice on Visual Recordings with Sound of Interviews with Suspects para 6.1. Code F paras 6.1-6.7 (see the text and notes 3-17 infra) are concerned with the security of the master copy which will have been sealed at the conclusion of the interview, but care should be taken of working copies (see PARA 988 ante) since their loss or destruction may lead unnecessarily to the need to have access to master copies: Code F Guidance note 6A.

3 Code F para 6.2.

4 Code F para 6.2. If the master copy has been delivered to the Crown Court for keeping after committal for trial the Crown prosecutor will apply to the chief clerk of the Crown Court centre for its release for unsealing by the Crown prosecutor: Code F Guidance note 6B. Reference to the Crown Prosecution Service or to the Crown prosecutor in Code F paras 6.1-6.7 is to be taken to include any other body or person with a statutory responsibility for prosecution for whom the police conduct any recorded interviews: Code F Guidance note 6C.

5 Code F para 6.2.

6 Code F para 6.2.

7 Code F para 6.2.

8 Code F para 6.3.

9 Code F para 6.3. The most common reasons for needing access to master copies that are not required for criminal proceedings arise from civil actions and complaints against police and civil actions between individuals arising out of allegations of crime investigated by police: Code F Guidance note 6D.

10 Is subject to Code F para 6.6 (see the text and notes 15-16 *infra*).

11 Code F para 6.4.

12 Or because Code F para 6.6 (see the text and notes 15-16 *infra*) applies.

13 As to independent custody visitors see *PARA 947 ante*.

14 Code F para 6.5.

15 Code F para 6.6(a). Code F para 6.6 could apply, for example, when one or more of the outcomes or likely outcomes of the investigation might be: (1) the prosecution of one or more of the original suspects (Code F Guidance note 6E(i)); (2) the prosecution of a person previously not suspected, including a person who was originally a witness (Code F Guidance note 6E(ii)); and (3) any original suspect being treated as a prosecution witness (Code F Guidance note 6E(iii)), and when premature disclosure of any police action, particularly through contact with any parties involved, could lead to a real risk of compromising the investigation and endangering witnesses (Code F Guidance note 6E).

16 Code F para 6.6(b). See note 15 *supra*.

17 Code F para 6.7.

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## **(vi) Limits on Detention**

### **1000. Limits on period of detention without charge.**

A person may not<sup>1</sup> be kept in police detention<sup>2</sup> for more than 24 hours<sup>3</sup> without being charged<sup>4</sup>. The time from which the period of detention of a person is to be calculated ('the relevant time') is:

- 1399 (1) in the case of a person whose arrest<sup>5</sup> is sought in one police area in England and Wales<sup>6</sup>, who is arrested in another police area<sup>7</sup>, and who is not questioned in the area in which he is arrested in order to obtain evidence in relation to an offence for which he is arrested<sup>8</sup>, whichever is the earlier of the time at which he arrives at the relevant police station<sup>9</sup> or the time 24 hours after the time of his arrest<sup>10</sup>;
- 1400 (2) in the case of a person arrested outside England and Wales, whichever is the earlier of the time at which he arrives at the first police station to which he is taken in the police area in England or Wales in which the offence for which he was arrested is being investigated<sup>11</sup> or the time 24 hours after the time of his entry into England and Wales<sup>12</sup>;
- 1401 (3) in the case of a person who attends voluntarily at a police station<sup>13</sup> or accompanies a constable to a police station without having been arrested<sup>14</sup>, and is arrested at the police station, the time of his arrest<sup>15</sup>;
- 1402 (4) in the case of a person who attends a police station to answer to street bail<sup>16</sup>, the time when he arrives at the police station<sup>17</sup>;
- 1403 (5) in any other case<sup>18</sup>, the time at which the person arrested arrives at the first police station to which he is taken after his arrest<sup>19</sup>.

If:

- 1404 (a) a person is in police detention in a police area in England and Wales ('the first area')<sup>20</sup>;
- 1405 (b) his arrest for an offence is sought in some other police area in England and Wales ('the second area')<sup>21</sup>; and
- 1406 (c) he is taken to the second area for the purposes of investigating that offence, without being questioned in the first area in order to obtain evidence in relation to it<sup>22</sup>,

the relevant time is whichever is the earlier of the time 24 hours after he leaves the place where he is detained in the first area<sup>23</sup> or the time at which he arrives at the first police station to which he is taken in the second area<sup>24</sup>.

When a person who is in police detention is removed to hospital because he is in need of medical treatment, any time during which he is being questioned in hospital or on the way there or back by a police officer for the purpose of obtaining evidence relating to an offence is

to be included in any period which falls to be calculated for these purposes, but any other time while he is in hospital or on his way there or back is not to be so included<sup>25</sup>.

A person who at the expiry of 24 hours after the relevant time is in police detention and has not been charged must be released at that time either on bail or without bail<sup>26</sup>, but this provision does not apply to a person whose detention for more than 24 hours after the relevant time has been authorised or is otherwise permitted<sup>27</sup>. A person so released<sup>28</sup> may not be re-arrested without a warrant for the offence for which he was previously arrested unless new evidence justifying a further arrest has come to light since his release<sup>29</sup>.

1     Ie subject to the Police and Criminal Evidence Act 1984 s 41(2)-(9) (as amended) (see the text and notes 2-29 infra), s 42 (as amended) (see PARA 1003 post) and s 43 (as amended) (see PARA 1004 post): s 41(1).

2     For the meaning of 'in police detention' see PARA 939 note 9 ante.

3     Any reference in the Police and Criminal Evidence Act 1984 Pt IV (ss 34-51) (as amended) (see PARAS 938 et seq ante, 1001 et seq post) to a period of time or a time of day is to be treated as approximate only: s 45(2).

4     Ibid s 41(1).

5     Ibid s 41(2) (as amended) (see the text and notes 9-19 infra) has effect in relation to a person arrested under s 31 (arrest for a further offence: see PARA 934 ante) as if every reference in it to that person's arrest or his being arrested were a reference to his arrest or his being arrested for the offence for which he was originally arrested: s 41(4).

6     Ibid s 41(3)(a). As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

7     Ibid s 41(3)(b).

8     Ibid s 41(3)(c).

9     Ibid s 41(2)(a)(i). For these purposes, 'the relevant police station' means the first police station to which he is taken in the police area in which his arrest was sought: s 41(3).

10    Ibid s 41(2)(a)(ii).

11    Ibid s 41(2)(b)(i).

12    Ibid s 41(2)(b)(ii).

13    Ibid s 41(2)(c)(i). As to voluntary attendance at a police station see PARA 909 ante.

14    Ibid s 41(2)(c)(ii).

15    Ibid s 41(2)(c).

16    Ie bail granted under ibid s 30A (as added) (see PARA 933 ante).

17    Ibid s 41(2)(ca) (added by the Criminal Justice Act 2003 s 12, Sch 1 paras 1, 8).

18    Ie except where the Police and Criminal Evidence Act 1984 s 41(5) (see the text and notes 20-24 infra) applies.

19    Ibid s 41(2)(d).

20    Ibid s 41(5)(a).

21    Ibid s 41(5)(b).

22    Ibid s 41(5)(c).

23    Ibid s 41(5)(i).

24    Ibid s 41(5)(ii).

25 Ibid s 41(6).

26 Ibid s 41(7).

27 Ibid s 41(8). A person's detention for more than 24 hours may be authorised or otherwise permitted under s 42 (as amended) (see PARA 1003 post) and s 43 (as amended) (see PARA 1004 post).

28 Ie under ibid s 41(7).

29 Ibid s 41(9). This does not, however, prevent an arrest under s 46A (as added and amended) (power to arrest for failure to answer police bail: see PARA 941 ante): s 41(9) (amended by the Criminal Justice and Public Order Act 1994 s 29(1), (4)(b)).

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### **1001. Review of police detention.**

Reviews of the detention of each person in police detention<sup>1</sup> in connection with the investigation of an offence must be carried out periodically in accordance with the following provisions:

- 1407 (1) in the case of a person who has been arrested and charged, by the custody officer<sup>2</sup>; and
- 1408 (2) in the case of a person who has been arrested but not charged, by an officer of at least the rank of inspector<sup>3</sup> who has not been directly involved in the investigation<sup>4</sup>.

The person to whom it falls to carry out the review ('the review officer'<sup>5</sup>) is responsible for determining whether the detainee's detention, before or after charge, continues to be necessary<sup>6</sup>. This requirement continues throughout the detention period and, unless a telephone review is carried out<sup>7</sup>, the person conducting the review must be present at the police station holding the detainee<sup>8</sup>.

The first review must be not later than six hours<sup>9</sup> after the detention was first authorised<sup>10</sup>. The second review must be not later than nine hours after the first<sup>11</sup>; and subsequent reviews must be at intervals of not more than nine hours<sup>12</sup>. A review may, however, be postponed:

- 1409 (a) if, having regard to all the circumstances prevailing at the latest time for it, it is not practicable to carry out the review at that time<sup>13</sup>;
- 1410 (b) without prejudice to the generality of head (a) above, if at that time the person in detention is being questioned by a police officer and the review officer is satisfied that an interruption of the questioning for the purpose of carrying out the review would prejudice the investigation in connection with which he is being questioned<sup>14</sup>, or if at that time no review officer is readily available<sup>15</sup>.

If a review is so postponed, it must be carried out as soon as practicable after the latest time specified for it<sup>16</sup>; and, if a review is carried out after such a postponement, the fact that it was so carried out does not affect any statutory requirement<sup>17</sup> as to the time at which any subsequent review is to be carried out<sup>18</sup>. The review officer must record the reasons for any postponement of a review in the custody record<sup>19</sup>.

Where an officer of higher rank than the review officer gives directions relating to a person in police detention<sup>20</sup> and the directions are at variance either with any decision made or action taken by the review officer in the performance of a duty imposed on him<sup>21</sup> or with any decision or action which would but for the directions have been made or taken by him in the performance of such a duty<sup>22</sup>, the review officer must refer the matter at once to an officer of the rank of superintendent or above who is responsible for the police station for which the review officer is acting as review officer in connection with the detention<sup>23</sup>.

Before determining whether to authorise a person's continued detention the review officer must give that person (unless he is asleep)<sup>24</sup> or any solicitor representing him who is available

at the time of the review<sup>25</sup>, an opportunity to make representations to him about the detention<sup>26</sup>; and the person whose detention is under review or his solicitor may make such representations either orally or in writing<sup>27</sup>. However, the review officer may refuse to hear oral representations from the person whose detention is under review if he considers that he is unfit to make such representations by reason of his condition or behaviour<sup>28</sup>.

1 For the meaning of 'in police detention' see PARA 939 note 9 ante.

2 Police and Criminal Evidence Act 1984 s 40(1)(a). As to custody officers see PARA 939 ante. The officer to whom it falls to carry out a review is referred to as a 'review officer': s 40(2). Where the person whose detention is under review has been charged before the time of the review, the provisions of s 38(1)-(6), (6A), (6B) (as amended) have effect, subject to specified modifications, in relation to him: see s 40(10) (as amended), s 40(10A) (as added); and PARA 944 ante.

3 See PARA 858 ante.

4 Police and Criminal Evidence Act 1984 s 40(1)(b); Code C: Code of Practice on the Detention, Treatment and Questioning of Persons by Police Officers Guidance note 15A. Where the person whose detention is under review has not been charged before the time of the review, the provisions of the Police and Criminal Evidence Act 1984 s 37(1)-(6) (as amended) have effect, subject to specified modifications, in relation to him: see s 40(8) (as amended), s 40(8A) (as added); and PARA 941 ante.

Before conducting a review or determining whether to extend the maximum period of detention without charge, the officer responsible must make sure the detainee is reminded of his entitlement to free legal advice (see PARA 953 ante), unless in the case of a review the person is asleep: Code C para 15.4. It is the officer's responsibility to make sure that all such reminders given under this provision are noted in the custody record: Code C para 15.12.

A detainee who is asleep at a review and whose continued detention is authorised must be informed about the decision and reason as soon as practicable after waking: Code C para 15.7. A record must be made of when the person was informed and by whom: Code C para 15.16. If, after considering any representations, the officer decides to keep the detainee in detention or to extend the maximum period for which he may be detained without charge, any comment made by the detainee must be recorded: Code C para 15.5. If applicable, the review officer must be informed of the comment as soon as practicable: Code C para 15.5. See also Code C paras 11.4, 11.13; and PARAS 960-961 ante.

No officer may put specific questions to the detainee regarding his involvement in any offence or in respect of any comments he may make either when given the opportunity to make representations or in response to a decision to keep him in detention or extend the maximum period of detention: Code C para 15.6. Such an exchange could constitute an interview as in Code C para 11.1A (see PARA 960 ante) and would be subject to the associated safeguards in Code C paras 11.1A-11.20 (see PARAS 960-963 ante) and, in respect of a person who has been charged, Code C para 16.5 (see PARA 1042 post). See also Code C para 11.13; and PARA 961 ante.

A review under the Police and Criminal Evidence Act 1984 s 40(1)(b) may be carried out by means of a discussion, conducted by telephone, with one or more persons at the police station where the arrested person is held (s 40A(1) (s 40A added by the Criminal Justice and Police Act 2001 s 73(1), (2); and the Police and Criminal Evidence Act 1984 s 40A(1), (2) substituted by the Criminal Justice Act 2003 s 6); Code C para 15.9), unless the review is of a kind authorised by regulations made under the Police and Criminal Evidence Act 1984 s 45A (as added and amended) (see PARA 1002 post) to be carried out using video-conferencing facilities (s 40A(2)(a) (as so added and substituted); Code C para 15.9B) and it is reasonably practicable to carry it out (Police and Criminal Evidence Act 1984 s 40A(2)(b) (as so added and substituted); Code C para 15.9B). For the meaning of 'video-conferencing facilities' see the Police and Criminal Evidence Act 1984 s 45A (as added and amended); and PARA 1002 post (definition applied by s 40A(5) (as so added)). When a telephone review is carried out, a record must be made of the reason the review officer did not attend the station holding the detainee (Code C para 15.14(a)), the place the review officer was (Code C para 15.14(b)), and the method by which representations, oral or written, were made to the review officer (Code C para 15.14(c)).

The decision on whether the review takes place in person or by telephone or by video-conferencing is a matter for the review officer: Code C para 15.3C. In determining the form the review may take, the review officer must always take full account of the needs of the person in custody: Code C para 15.3C. The benefits of carrying out a review in person should always be considered, based on the individual circumstances of each case with specific additional consideration if: (1) the person is a juvenile (and the age of the juvenile must be considered) (Code C para 15.3C(a)); (2) the person is mentally vulnerable (Code C para 15.3C(b)); (3) the person has been subject to medical attention for other than routine minor ailments (Code C para 15.3C(c)); or (4) there are presentational or community issues around the person's detention (Code C para 15.3C(d)). For the meaning of 'mentally vulnerable' see PARA 940 note 9 ante. The use of video-conferencing facilities for decisions about detention under the Police and Criminal Evidence Act 1984 s 45A (as added and amended) is subject to the introduction of regulations by the Secretary of State: Code C Guidance note 15G.



The review officer can decide at any stage that a telephone review or a review by video-conferencing should be terminated and that the review will be conducted in person, and the reasons for doing so should be noted in the custody record: Code C para 15.9C.

5 Police and Criminal Evidence Act 1984 s 40(2).

6 Code C para 15.1. The detention of persons in police custody not subject to the statutory review requirement should still be reviewed periodically as a matter of good practice: Code C Guidance note 15B. Such reviews can be carried out by an officer of the rank of sergeant or above: Code C Guidance note 15B. The purpose of such reviews is to check that the particular power under which a detainee is held continues to apply, any associated conditions are complied with and to make sure appropriate action is taken to deal with any changes: Code C Guidance note 15B. This includes the detainee's prompt release when the power no longer applies, or his transfer if the power requires the detainee be taken elsewhere as soon as the necessary arrangements are made: Code C Guidance note 15B. Examples include: (1) persons arrested on warrant because they failed to answer bail to appear at court (Code C Guidance note 15B); (2) persons arrested under the Bail Act 1976 s 7(3) (see PARA 1200 post) for breaching a condition of bail granted after charge (Code C Guidance note 15B); (3) persons in police custody for specific purposes and periods under the Crime (Sentences) Act 1997 Sch 1 (see PRISONS vol 36(2) (Reissue) PARAS 548-554) (Code C Guidance note 15B); (4) persons convicted, or remand prisoners, held in police stations on behalf of the prison service under the Imprisonment (Temporary Provisions) Act 1980 s 6 (see PRISONS vol 36(2) (Reissue) PARA 538) (Code C Guidance note 15B); (5) persons being detained to prevent them causing a breach of the peace (Code C Guidance note 15B); (6) persons detained at police stations on behalf of the immigration service (Code C Guidance note 15B); and (7) persons detained by order of a magistrates' court under the Criminal Justice Act 1988 s 152 (as amended) (see PARA 770 ante) to facilitate the recovery of evidence after being charged with drug possession or drug trafficking and suspected of having swallowed drugs (Code C Guidance note 15B).

The detention of persons remanded into police detention by order of a court under the Magistrates' Courts Act 1980 s 128 (see PARA 1144 post) is subject to a statutory requirement to review that detention: Code C Guidance note 15B. This is to make sure that the detainee is taken back to court no later than the end of the period authorised by the court or when the need for his detention by police ceases, whichever is the sooner: Code C Guidance note 15B.

Before deciding whether to authorise continued detention the officer responsible under the Police and Criminal Evidence Act 1984 s 40 (as amended) or s 42 (as amended) (see PARA 1003 post) must give an opportunity to the detained person himself to make representations, unless, in the case of a review under s 40, he is asleep (Code C para 15.3(a)), and to his solicitor (Code C para 15.3(b)) or the appropriate adult (Code C para 15.3(c)) if available at the time. When a telephone review is carried out this requirement will be satisfied: (a) if facilities exist for the immediate transmission of written representations to the review officer, eg fax or email message, by giving the detainee an opportunity to make representations either orally by telephone (Code C para 15.11(a)(i)) or in writing using those facilities (Code C para 15.11(a)(ii)); and (b) in all other cases, by giving the detainee an opportunity to make his representations orally by telephone (Code C para 15.11(b)). Other persons having an interest in the person's welfare may make representations at the review officer's discretion: Code C para 15.3A. Any written representations must be retained: Code C para 15.15. For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

In the case of a review of detention, the detainee need not be woken for the review: Code C Guidance note 15C. However, if the detainee is likely to be asleep, eg during a period of rest allowed as in Code C para 12.2 (see PARA 964 ante), at the latest time a review may take place, the officer should, if the legal obligations and time constraints permit, bring forward the procedure to allow the detainee to make representations: Code C Guidance note 15C. A detainee not asleep during the review must be present when the grounds for his continued detention are recorded and must at the same time be informed of those grounds unless the review officer considers the person is incapable of understanding what is said, or is violent or likely to become violent or in urgent need of medical attention: Code C Guidance note 15C.

7 See note 4 supra.

8 Code C para 15.1. See *R v Chief Constable of Kent Constabulary, ex p Kent Police Federation Joint Branch Board* [2000] 2 Cr App Rep 196, DC (review must be conducted in physical presence of detainee; it could not be conducted by video link); but see s 40A (as added and amended); note 4 supra; and PARA 1002 post.

9 As to time periods under the Police and Criminal Evidence Act 1984 see PARA 1000 note 3 ante.

10 Ibid s 40(3)(a).

11 Ibid s 40(3)(b).

12 Ibid s 40(3)(c).

13 Ibid s 40(4)(a).

14 Ibid s 40(4)(b).

15 Ibid s 40(4)(c).

16 Ibid s 40(5).

17 Ie any requirement of ibid s 40 (as amended).

18 Ibid s 40(6). Where a person's detention has not been reviewed in accordance with the provisions of s 40 (as amended), his continued detention is unlawful and constitutes false imprisonment, even if there are grounds to justify his continued detention: *Roberts v Chief Constable of Cheshire Constabulary* [1999] 2 All ER 326, [1999] 2 Cr App Rep 243, CA. As to the tort of false imprisonment see TORT vol 97 (2010) PARA 542 et seq.

19 Police and Criminal Evidence Act 1984 s 40(7); Code C para 15.13. As to custody records see PARA 940 ante. Where any review is carried out by telephone under the Police and Criminal Evidence Act 1984 s 40A (as added and amended) by an officer not present at the station where the arrested person is held, any obligation of the review officer to make a record in connection with the carrying out of the review has effect as an obligation to cause another officer to make the record (s 40A(3)(a) (as added: see note 4 supra); Code C para 15.10) and any requirement for the record to be made in the presence of the arrested person applies to the making of the record by that other officer (Police and Criminal Evidence Act 1984 s 40A(3)(b) (as so added); Code C para 15.10). The review officer must also cause the other officer to give the detainee information about the review: Code C para 15.10.

20 Police and Criminal Evidence Act 1984 s 40(11)(a).

21 Ibid s 40(11)(b)(i). The reference in the text to a duty imposed on an officer is a reference to a duty imposed under Pt IV (ss 34-51) (as amended).

22 Ibid s 40(11)(b)(ii).

23 Ibid s 40(11)(b).

24 Ibid s 40(12)(a).

25 Ibid s 40(12)(b).

26 Ibid s 40(12). See note 27 infra. A record must be made as soon as practicable of the outcome of each review or determination whether to extend the maximum detention period without charge or an application for a warrant of further detention or its extension: Code C para 15.16.

27 Police and Criminal Evidence Act 1984 s 40(13). Where any review is carried out by telephone under s 40A (as added and amended) by an officer not present at the station where the arrested person is held, the requirements under s 40(12) (see the text and notes 24-26 supra) and s 40(13) for the arrested person, or a solicitor representing him, to be given an opportunity to make representations (whether in writing or orally) to that officer have effect as a requirement for that person, or such a solicitor, to be given an opportunity to make representations in a manner authorised as follows: s 40A(3)(c) (as added: see note 4 supra). Such representations are authorised: (1) in a case where facilities exist for the immediate transmission of written representations to the officer carrying out the review, if they are made either orally by telephone to that officer (s 40A(4)(a)(i) (as so added)) or in writing to that officer by means of those facilities (s 40A(4)(a)(ii) (as so added)); and (2) in any other case, if they are made orally by telephone to that officer (s 40A(4)(b) (as so added)).

28 Ibid s 40(14).

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## **1002. Use of video-conferencing facilities for decisions about detention.**

The Secretary of State may by regulations<sup>1</sup> provide that, in the case of an arrested person who is held in a police station, some or all of the functions in relation to an arrested person taken to a police station that is not a designated police station<sup>2</sup> which, in the case of an arrested person taken to, or answering to bail at, a police station that is a designated police station, are functions of a custody officer<sup>3</sup> under specified provisions<sup>4</sup>, and the function of carrying out a review<sup>5</sup> by an officer of at least the rank of inspector of the detention of person arrested but not charged<sup>6</sup>, may be performed by an officer who is not present in that police station<sup>7</sup> but has access to the use of video-conferencing facilities<sup>8</sup> that enable him to communicate with persons in that station<sup>9</sup>.

Where any of these functions are performed in a manner so authorised by regulations:

- 1411 (1) any obligation of the officer performing those functions to make a record in connection with the performance of those functions is to have effect as an obligation to cause another officer to make the record<sup>10</sup>; and
- 1412 (2) any requirement for the record to be made in the presence of the arrested person is to apply to the making of that record by that other officer<sup>11</sup>.

1 Any such regulations may make different provision for different cases and may be made so as to have effect in relation only to the police stations specified or described in the regulations: Police and Criminal Evidence Act 1984 s 45A(8) (s 45A added by the Criminal Justice and Police Act 2001 s 73(1), (3)). Regulations are to be made by statutory instrument and are subject to annulment in pursuance of a resolution of either House of Parliament: Police and Criminal Evidence Act 1984 s 45A(9) (as so added). The Police and Criminal Evidence Act 1984 (Remote Reviews of Detention) (Specified Police Stations) Regulations 2003, SI 2003/2397, under which the conduct of reviews under the Police and Criminal Evidence Act 1984 s 40(1)(b) (see PARA 1001 ante) by way of video-conferencing facilities was being piloted in two police stations in Hampshire, was revoked by the Police and Criminal Evidence Act 1984 (Remote Reviews of Detention) (Specified Police Stations) (Revocation) Regulations 2004, SI 2004/1503, art 2. At the date at which this volume states the law no further regulations had been made pursuant to this power.

2 For the meaning of 'designated police station' see PARA 938 ante.

3 As to custody officers see PARA 939 ante.

4 Police and Criminal Evidence Act 1984 s 45A(2)(a) (as added (see note 1 supra); and amended by the Criminal Justice Act 2003 s 12, Sch 1 paras 1, 9). The specified provisions are the Police and Criminal Evidence Act 1984 ss 37, 38, 40 (as amended) (see PARAS 941, 944, 1001 ante): s 45A(2)(a) (as so added and amended).

5 Ie under ibid s 40(1)(b) (see PARA 1001 ante).

6 Ibid s 45A(2)(b) (as added: see note 1 supra). Where the functions mentioned in s 45A(2)(b) (as added) are performed in a manner authorised by regulations, the requirements under s 40(12), (13) (see PARA 1001 ante) for the arrested person (s 45A(6)(a) (as so added)) or a solicitor representing him (s 45A(6)(b) (as so added)) to be given an opportunity to make representations (whether in writing or orally) to the person performing those functions are to have effect as a requirement for that person, or such a solicitor, to be given an opportunity to make representations:

378 (1) in a case where facilities exist for the immediate transmission of written representations to the officer performing the functions, if they are made either orally to that officer by means of the video-conferencing facilities used by him for performing those functions (s 45A(7)(a)(i) (as so

added)) or in writing to that officer by means of the facilities available for the immediate transmission of the representations (s 45A(7)(a)(ii) (as so added)); and

379 (2) in any other case if they are made orally to that officer by means of the video-conferencing facilities used by him for performing the functions (s 45A(7)(b) (as so added)).

7 Ibid s 45A(1)(a) (as added: see note 1 supra). Regulations may not authorise the performance of any of the functions mentioned in s 45A(1)(a) (as added) by such an officer as is mentioned in s 45A(1) (as added) unless he is a custody officer for a designated police station: s 45A(4) (as so added).

8 Any reference in ibid s 45A (as added and amended) to video-conferencing facilities is a reference to any facilities (whether a live television link or other facilities) by means of which the functions may be performed with the officer performing them, the person in relation to whom they are performed and any legal representative of that person all able to both see and hear each other: s 45A(10) (as so added).

9 Ibid s 45A(1)(b) (as added: see note 1 supra). Regulations under s 45A (as added and amended) must specify the use to be made in the performance of the functions mentioned in s 45A(2) (as added and amended) (see the text and notes 1-6 supra) of the facilities mentioned in s 45A(1) (as added): s 45A(3) (as so added).

10 Ibid s 45A(5)(a) (as added: see note 1 supra).

11 Ibid s 45A(5)(b) (as added: see note 1 supra).

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### **1003. Authorisation of continued detention.**

Where a police officer of the rank of superintendent or above<sup>1</sup> who is responsible for the police station at which a person is detained has reasonable grounds for believing that:

- 1413 (1) the detention of that person without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him<sup>2</sup>;
- 1414 (2) an offence for which he is under arrest is an indictable offence<sup>3</sup>; and
- 1415 (3) the investigation is being conducted diligently and expeditiously<sup>4</sup>,

he may authorise the keeping of that person in police detention<sup>5</sup> for a period expiring at or before 36 hours<sup>6</sup> after the relevant time<sup>7</sup>.

Where such an officer has so authorised the keeping of a person in police detention for a period expiring less than 36 hours after the relevant time, such an officer may authorise the keeping of that person in police detention for a further period expiring not more than 36 hours after that time if the conditions specified in heads (1) to (3) above are still satisfied when he gives the authorisation<sup>8</sup>.

If it is proposed to transfer a person in police detention to another police area<sup>9</sup>, the officer determining whether or not to authorise keeping him in detention<sup>10</sup> must have regard to the distance and the time the journey would take<sup>11</sup>.

Where an officer authorises the keeping of a person in police detention<sup>12</sup> it is his duty to inform that person of the grounds for his continued detention<sup>13</sup> and to record the grounds in that person's custody record<sup>14</sup>.

Before determining whether to authorise the keeping of a person in detention<sup>15</sup> an officer must give that person<sup>16</sup> or any solicitor representing him who is available at the time when it falls to the officer to determine whether to give the authorisation<sup>17</sup> an opportunity to make representations<sup>18</sup> to him about the detention; and the person in detention or his solicitor may make representations either orally or in writing<sup>19</sup>. The officer to whom it falls to determine whether to give the authorisation may, however, refuse to hear oral representations from the person in detention if he considers that he is unfit to make such representations by reason of his condition or behaviour<sup>20</sup>.

Where an officer authorises the keeping<sup>21</sup> of a person in detention<sup>22</sup> and at the time of the authorisation he has not yet exercised his statutory rights to have someone informed of his whereabouts and to legal advice<sup>23</sup>, the officer must:

- 1416 (a) inform him of that right<sup>24</sup>;
- 1417 (b) decide whether he should be permitted to exercise it<sup>25</sup>;
- 1418 (c) record the decision in his custody record<sup>26</sup>; and
- 1419 (d) if the decision is to refuse to permit the exercise of the right, also record the grounds for the decision in that record<sup>27</sup>.

Where an officer has authorised the keeping of a person who has not been charged in detention<sup>28</sup>, he must be released from detention<sup>29</sup>, either on bail or without bail, not later than 36 hours after the relevant time, unless he has been charged with an offence<sup>30</sup> or his continued detention is authorised or otherwise permitted<sup>31</sup>. A person so released may not be re-arrested without a warrant for the offence for which he was previously arrested<sup>32</sup> unless new evidence justifying a further arrest has come to light since his release<sup>33</sup>.

1 See PARA 858 ante. The officer responsible for the police station holding the detainee includes a superintendent or above who, in accordance with his force's operational policy or police regulations, is given that responsibility on a temporary basis whilst the appointed long-term holder is off duty or otherwise unavailable: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Guidance note 15E. See the Criminal Justice Act 2003 s 87(8); and PARA 1945 post.

2 Police and Criminal Evidence Act 1984 s 42(1)(a).

3 Ibid s 42(1)(b) (substituted by the Criminal Justice Act 2003 s 7; and amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (7)).

4 Police and Criminal Evidence Act 1984 s 42(1)(c).

5 For the meaning of 'in police detention' see PARA 939 note 9 ante.

6 As to time periods under the Police and Criminal Evidence Act 1984 see PARA 1000 note 3 ante.

7 Ibid s 42(1); Code C para 15.2. See also *R v Taylor* [1991] Crim LR 541, CA. Detaining a juvenile or mentally vulnerable person for longer than 24 hours will be dependent on the circumstances of the case and with regard to: (1) the person's special vulnerability (Code C para 15.2A(a)); (2) the legal obligation to provide an opportunity for representations to be made prior to a decision about extending detention (Code C para 15.2A(b)); (3) the need to consult and consider the views of any appropriate adult (Code C para 15.2A(c)); and (4) any alternatives to police custody (Code C para 15.2A(d)). See also PARA 1001 note 4 ante. For the meaning of 'the relevant time' see PARA 1000 ante. For the meaning of 'mentally vulnerable' see PARA 940 note 9 ante. For the meaning of 'appropriate adult' see PARA 940 note 9 ante. No authorisation under the Police and Criminal Evidence Act 1984 s 42(1) (as amended) may be given, however, in respect of any person: (a) more than 24 hours after the relevant time (s 42(4)(a)); or (b) before the second review of his detention under s 40 (see PARA 1001 ante) has been carried out (s 42(4)(b)).

8 Ibid s 42(2).

9 Ie under ibid s 42(1) (see the text and notes 1-7 supra).

10 As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

11 Police and Criminal Evidence Act 1984 s 42(3).

12 Ie under ibid s 42(1) (see the text and notes 1-7 supra).

13 Ibid s 42(5)(a).

14 Ibid s 42(5)(b). As to custody records see PARA 940 ante.

15 Ie under ibid s 42(1) or s 42(2) (see the text and notes 1-8 supra).

16 Ibid s 42(6)(a).

17 Ibid s 42(6)(b).

18 As to representations see PARA 1001 notes 26-27 ante.

19 Police and Criminal Evidence Act 1984 s 42(7).

20 Ibid s 42(8).

21 Ie under ibid s 42(1) (see the text and notes 1-7 supra).

22 Ibid s 42(9)(a). If the detainee is likely to be asleep (eg during a period of rest allowed as in Code C para 12.2 (see PARA 964 ante)) at the latest time an authorisation to extend detention may take place, the officer

should, if the legal obligations and time constraints permit, bring forward the procedure to allow the detainee to make representations at an earlier time: Code C Guidance note 15C.

23 Police and Criminal Evidence Act 1984 s 42(9)(b). The right to have someone informed of a person's whereabouts is conferred by s 56 (as amended) (see PARA 955 ante) and the right to legal advice is conferred by s 58 (as amended) (see PARAS 953, 956 ante).

24 Ibid s 42(9)(i).

25 Ibid s 42(9)(ii).

26 Ibid s 42(9)(iii). If an authorisation of continued detention is given under s 42 (as amended) the record must state the number of hours and minutes by which the detention period is extended or further extended: Code C para 15.16.

27 Police and Criminal Evidence Act 1984 s 42(9)(iv).

28 Ie under ibid s 42(1) or s 42(2) (see the text and notes 1-8 supra).

29 Warrants of further detention may be issued under ibid s 43: see PARA 1004 post.

30 Ibid s 42(10)(a).

31 Ibid s 42(10)(b).

32 This does not prevent an arrest under ibid s 46A (as added and amended) (power to arrest for failure to answer police bail: see PARA 941 ante): s 42(11) (amended by the Criminal Justice and Public Order Act 1994 s 29(1), (4)(b)).

33 Police and Criminal Evidence Act 1984 s 42(11).

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#### **1004. Warrants of further detention.**

Where, on an application on oath made by a constable and supported by an information<sup>1</sup>, a magistrates' court<sup>2</sup> is satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is justified, it may issue a warrant of further detention authorising the keeping of that person in police detention<sup>3</sup>. A court may not hear an application for such a warrant, however, unless the person to whom the application relates has been furnished with a copy of the information<sup>4</sup> and has been brought before the court for the hearing<sup>5</sup>.

The person to whom the application relates is entitled to be legally represented at the hearing and, if he is not so represented but wishes to be so represented, the court must adjourn the hearing to enable him to obtain representation<sup>6</sup> and he may be kept in police detention during the adjournment<sup>7</sup>.

A person's further detention is only so justified<sup>8</sup> if:

- 1420 (1) his detention without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him<sup>9</sup>;
- 1421 (2) an offence for which he is under arrest is an indictable offence<sup>10</sup>; and
- 1422 (3) the investigation is being conducted diligently and expeditiously<sup>11</sup>.

An application for a warrant of further detention may be made either at any time before the expiry of 36 hours<sup>12</sup> after the relevant time<sup>13</sup> or (if it is not practicable for the magistrates' court to which the application will be made to sit at the expiry of 36 hours after the relevant time<sup>14</sup> but the court will sit during the six hours following the end of that period<sup>15</sup>) at any time before the expiry of such period of six hours<sup>16</sup>.

The court must dismiss an application for a warrant of further detention if it is made after the expiry of 36 hours after the relevant time<sup>17</sup> and it appears to the court that it would have been reasonable for the police to make it before the expiry of that period<sup>18</sup>. Where on such an application a magistrates' court is not satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is justified, it is its duty either to refuse the application<sup>19</sup> or to adjourn the hearing of it until a time not later than 36 hours after the relevant time<sup>20</sup>. The person to whom the application relates may be kept in police detention during the adjournment<sup>21</sup>. A warrant of further detention must state the time at which it is issued<sup>22</sup> and authorise the keeping in police detention of the person to whom it relates for the period stated in it<sup>23</sup>. The period so stated must be such period as the magistrates' court thinks fit, having regard to the evidence before it<sup>24</sup>; but the period may not be longer than 36 hours<sup>25</sup>.

If it is proposed to transfer a person in police detention to a police area<sup>26</sup> other than that in which he is detained when the application for a warrant of further detention is made, the court hearing the application must have regard to the distance and the time the journey would take<sup>27</sup>.

Where an application for a warrant of further detention is refused, the person to whom the application relates must forthwith be charged or released, either on bail or without bail<sup>28</sup>.



However, a person need not be so released either before the expiry of 24 hours after the relevant time<sup>29</sup> or before the expiry of any longer period for which his continued detention is or has been authorised<sup>30</sup>. Where an application is refused, no further application may be made in respect of the person to whom the refusal relates, unless supported by evidence which has come to light since the refusal<sup>31</sup>.

Where a warrant of further detention is issued, the person to whom it relates must be released from police detention, either on bail or without bail, upon or before the expiry of the warrant unless he is charged<sup>32</sup>. A person so released may not be re-arrested without a warrant for the offence for which he was previously arrested<sup>33</sup> unless new evidence justifying a further arrest has come to light since his release<sup>34</sup>.

1 Any information submitted in support of such an application must state:

- 380 (1) the nature of the offence for which the person to whom the application relates has been arrested (Police and Criminal Evidence Act 1984 s 43(14)(a));
- 381 (2) the general nature of the evidence on which that person was arrested (s 43(14)(b));
- 382 (3) what inquiries relating to the offence have been made by the police and what further inquiries are proposed by them (s 43(14)(c)); and
- 383 (4) the reasons for believing the continued detention of that person to be necessary for the purposes of such further inquiries (s 43(14)(d)).

2 For these purposes, 'magistrates' court' means a court consisting of two or more justices of the peace sitting otherwise than in open court: *ibid* s 45(1). As to the meaning of 'open court' see PARA 90 note 10 ante.

3 *Ibid* s 43(1). For the meaning of 'in police detention' see PARA 939 note 9 ante. Every police officer holds the office of constable: see PARA 857 note 2 ante.

An application for a warrant of further detention, or its extension (see PARA 1005 post), should be made between 10 am and 9 pm and, if possible, during normal court hours: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Guidance note 15D. It will not usually be practicable to arrange for a court to sit specially outside the hours of 10 am and 9 pm: Code C Guidance note 15D. If it appears possible that a special sitting may be needed, outside normal court hours but between 10 am and 9 pm, the clerk to the justices should be given notice and informed of this possibility, while the court is sitting if possible: Code C Guidance note 15D.

4 Police and Criminal Evidence Act 1984 s 43(2)(a).

5 *Ibid* s 43(2)(b).

6 *Ibid* s 43(3)(a).

7 *Ibid* s 43(3)(b).

8 *Ibid* for the purposes of *ibid* s 43 (as amended) or s 44 (see PARA 1005 post).

9 *Ibid* s 43(4)(a).

10 *Ibid* s 43(4)(b) (amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (8)).

11 Police and Criminal Evidence Act 1984 s 43(4)(c).

12 As to time periods under the Police and Criminal Evidence Act 1984 see PARA 1000 note 3 ante.

13 *Ibid* s 43(5)(a). For the meaning of 'the relevant time' see PARA 1000 ante.

14 *Ibid* s 43(5)(b)(i).

15 *Ibid* s 43(5)(b)(ii).

16 Ibid s 43(5)(b). In such a case the person to whom the application relates may be kept in police detention until the application is heard (s 43(6)(a)) and the custody officer must make a note in that person's custody record of the fact that he was kept in police detention for more than 36 hours after the relevant time (s 43(6)(b)(i)) and of the reason why he was so kept (s 43(6)(b)(ii)). As to custody officers see PARA 939 ante; and as to custody records see PARA 940 ante.

Section 43(5)(b) is not limited to a situation in which the 36 hour period expires at a time when the magistrates are not sitting; where the court is already sitting, the justices have a discretion, on being notified of a constable's intention to make an application, either to hear it straight away or to wait for no longer than six hours after the end of the 36 hours: *R v Slough Magistrates' Court, ex p Stirling* (1987) 151 JP 603, DC.

17 Police and Criminal Evidence Act 1984 s 43(7)(a).

18 Ibid s 43(7)(b). The requirements of s 43(7) are mandatory; thus where an information to support an application was drafted eight minutes before the 36-hour period expired and the court clerk advised that it was not practicable to hear the application at that time and it was adjourned, the application should not in those circumstances have been granted because it could not be said that it would have been unreasonable for the police to draft the information earlier so as to ensure that the application was heard before the end of the 36-hour period: *R v Slough Magistrates' Court, ex p Stirling* (1987) 151 JP 603, DC.

19 Police and Criminal Evidence Act 1984 s 43(8)(a).

20 Ibid s 43(8)(b).

21 Ibid s 43(9).

22 Ibid s 43(10)(a).

23 Ibid s 43(10)(b).

24 Ibid s 43(11).

25 Ibid s 43(12). If a warrant for further detention, or extension (see PARA 1005 post), is granted under s 43 (as amended) or s 44 (see PARA 1005 post), the record must state the detention period authorised by the warrant and the date and time it was granted: Code C para 15.16.

26 As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

27 Police and Criminal Evidence Act 1984 s 43(13).

28 Ibid s 43(15).

29 Ibid s 43(16)(a).

30 Ibid s 43(16)(b). 'Authorised' means authorised under s 42 (as amended) (see PARA 1003 ante): s 43(16).

31 Ibid s 43(17).

32 Ibid s 43(18).

33 This does not prevent an arrest under ibid s 46A (as added and amended) (power to arrest for failure to answer police bail: see PARA 941 ante): s 43(19) (amended by the Criminal Justice and Public Order Act 1994 s 29(1), (4)(b)).

34 Police and Criminal Evidence Act 1984 s 43(19).

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### **1005. Extension of warrants of further detention.**

On an application on oath made by a constable and supported by an information<sup>1</sup> a magistrates' court<sup>2</sup> may extend a warrant of further detention<sup>3</sup> if it is satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is justified<sup>4</sup>. A court may not hear an application for an extension, however, unless the person to whom the application relates has been furnished with a copy of the information<sup>5</sup> and has been brought before the court for the hearing<sup>6</sup>.

The person to whom the application relates is entitled to be legally represented at the hearing and, if he is not so represented but wishes to be so represented, the court must adjourn the hearing to enable him to obtain representation<sup>7</sup> and he may be kept in police detention during the adjournment<sup>8</sup>.

A person's further detention is only so justified<sup>9</sup> if:

- 1423 (1) his detention without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him<sup>10</sup>;
- 1424 (2) an offence for which he is under arrest is an indictable offence<sup>11</sup>; and
- 1425 (3) the investigation is being conducted diligently and expeditiously<sup>12</sup>.

The period for which a warrant of further detention may be extended is such period as the court thinks fit, having regard to the evidence before it<sup>13</sup>; but the period may not be longer than 36 hours<sup>14</sup> or end later than 96 hours after the relevant time<sup>15</sup>.

Where a warrant of further detention has been extended<sup>16</sup> or further extended<sup>17</sup> for a period ending before 96 hours after the relevant time, a magistrates' court may<sup>18</sup> further extend the warrant if it is satisfied that there are reasonable grounds for believing that the further detention of the person to whom the application relates is justified<sup>19</sup>. A warrant of further detention must, if extended or further extended, be indorsed with a note of the period of the extension<sup>20</sup>.

Where an application under these provisions is refused, the person to whom the application relates must forthwith be charged or released, either on bail or without bail<sup>21</sup>. However, a person need not be so released before the expiry of any period for which a warrant of further detention issued in relation to him has been extended or further extended on an earlier application so made<sup>22</sup>.

1 Any information submitted in support of such an application must state:

384 (1) the nature of the offence for which the person to whom the application relates has been arrested (Police and Criminal Evidence Act 1984 ss 43(14)(a), 44(6));

385 (2) the general nature of the evidence on which that person was arrested (ss 43(14)(b), 44(6));

386 (3) what inquiries relating to the offence have been made by the police and what further inquiries are proposed by them (ss 43(14)(c), 44(6)); and

387 (4) the reasons for believing the continued detention of that person to be necessary for the purposes of such further inquiries (s 43(14)(d)).

2 For the meaning of 'magistrates' court' for these purposes see PARA 1004 note 2 ante.

3 Ie a warrant issued under the Police and Criminal Evidence Act 1984 s 43 (as amended) (see PARA 1004 ante).

4 Ibid s 44(1). Every police officer holds the office of constable: see PARA 857 note 2 ante.

5 Ibid ss 43(2)(a), 44(6).

6 Ibid ss 43(2)(b), 44(6).

7 Ibid ss 43(3)(a), 44(6).

8 Ibid ss 43(3)(b), 44(6).

9 Ie for the purposes of ibid s 43 (as amended) or s 44 (see the text and notes 13-22 infra).

10 Ibid s 43(4)(a).

11 Ibid s 43(4)(b) (amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 43(1), (8)).

12 Police and Criminal Evidence Act 1984 s 43(4)(c).

13 Ibid s 44(2).

14 Ibid s 44(3)(a). As to time periods under the Police and Criminal Evidence Act 1984 see PARA 1000 note 3 ante.

15 Ibid s 44(3)(b). For the meaning of 'the relevant time' see PARA 760 ante.

16 Ie under ibid s 44(1) (see the text and notes 1-4 supra).

17 Ie under ibid s 44(4) (see the text and notes 18-19 infra).

18 Ie on an application on oath made by a constable and supported by information.

19 Ibid s 44(4). The provisions of s 44(2), (3) (see the text and notes 13-15 supra) apply to such further extension as they apply to extensions under s 44(1): s 44(4).

20 Ibid s 44(5).

21 Ibid s 44(7). As to release on bail see PARA 935 ante.

22 Ibid s 44(8).

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## **(vii) Searches of Detained Persons**

### **1006. Searches of detained persons.**

The custody officer<sup>1</sup> at a police station must ascertain everything which a person has with him<sup>2</sup> when he is: (1) brought to the station after being arrested elsewhere or after being committed to custody by an order or sentence of a court<sup>3</sup>; or (2) arrested at the station or detained<sup>4</sup> there<sup>5</sup>. The custody officer may record or cause to be recorded all or any of the things which he so ascertains<sup>6</sup>; and in the case of an arrested person the record must be made as part of his custody record<sup>7</sup>.

A custody officer may seize and retain any such thing or cause any such thing to be seized and retained<sup>8</sup>. However, clothes and personal effects may be seized only if the custody officer:

- 1426 (a) believes that the person from whom they are seized may use them to cause physical injury to himself or any other person<sup>9</sup>, to damage property<sup>10</sup>, to interfere with evidence<sup>11</sup> or to assist him to escape<sup>12</sup>; or
- 1427 (b) has reasonable grounds for believing that they may be evidence relating to an offence<sup>13</sup>.

Where anything is so seized, the person from whom it is seized must be told the reason for the seizure unless he is violent or likely to become violent<sup>14</sup> or is incapable of understanding what is said to him<sup>15</sup>. A person may be searched if the custody officer considers it necessary for him to carry out his duty of ascertainment<sup>16</sup> and to the extent that the custody officer considers it necessary for that purpose<sup>17</sup>.

A person who is in custody at a police station or is in police detention<sup>18</sup> otherwise than at a police station may at any time be searched in order to ascertain whether he has with him anything which he could use for the purposes of causing physical injury to himself or any other person, damaging property, interfering with evidence or assisting him to escape<sup>19</sup>. A constable may seize and retain, or cause to be seized and retained, anything found on such a search<sup>20</sup>. However, a constable may seize clothes and personal effects only if he believes that the person from whom they are seized may use them to cause physical injury to himself or any other person, to damage property, to interfere with evidence or to assist him to escape, or if he has reasonable grounds for believing that they may be evidence relating to an offence<sup>21</sup>. A search under these provisions must be carried out by a constable<sup>22</sup>; and the constable carrying out the search must be of the same sex as the person searched<sup>23</sup>. An intimate search<sup>24</sup> may not, however, be conducted under any of these provisions<sup>25</sup>.

1 As to custody officers see PARA 939 ante.

2 As to the exercise of a constable's powers under these provisions by detention officers and escort officers see the Police Reform Act 2002 s 38(6), Sch 4 paras 26, 34(2), 35(4); and POLICE vol 36(1) (2007 Reissue) PARAS 529, 531. Any Act, including a local Act, passed before the Police and Criminal Evidence Act 1984 has ceased to have effect in so far as it authorised any search by a constable of a person in police detention at a police station (s 53(1)(a)) or an intimate search of a person by a constable (s 53(1)(b)); and any rule of common law which authorised such a search is abolished (s 53(1)).

- 3 Ibid s 54(1)(a) (s 54(1) amended by the Criminal Justice Act 2003 ss 8(1), 332, Sch 37 Pt 1).
- 4 le as a person falling within the Police and Criminal Evidence Act 1984 s 34(7) (as added) (see PARA 945 ante).
- 5 Ibid s 54(1)(b) (substituted by the Criminal Justice Act 1988 s 147(a); and amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 55).
- 6 Police and Criminal Evidence Act 1984 s 54(2) (s 54(2) substituted, and s 54(2A) added, by the Criminal Justice Act 2003 s 8(2)).
- 7 Police and Criminal Evidence Act 1984 s 54(2A) (as added: see note 6 supra). As to custody records see PARA 940 ante.
- 8 Ibid s 54(3).
- 9 Ibid s 54(4)(a)(i).
- 10 Ibid s 54(4)(a)(ii).
- 11 Ibid s 54(4)(a)(iii).
- 12 Ibid s 54(4)(a)(iv).
- 13 Ibid s 54(4)(b).
- 14 Ibid s 54(5)(a).
- 15 Ibid s 54(5)(b).
- 16 le under ibid s 54(1) (as amended) (see the text and notes 1-5 supra).
- 17 Ibid s 54(6). As to the use of reasonable force see PARA 857 ante.
- 18 For the meaning of 'in police detention' see PARA 939 note 9 ante.
- 19 Police and Criminal Evidence Act 1984 s 54(6A) (s 54(6A)-(6C) added by the Criminal Justice Act 1988 s 147(b)).
- 20 Police and Criminal Evidence Act 1984 s 54(6B) (as added: see note 19 supra).
- 21 Ibid s 54(6C) (as added: see note 19 supra).
- 22 Ibid s 54(8).
- 23 Ibid s 54(9). For these purposes, a transsexual person has the sexual identity of the gender to which he has been reassigned: *A v Chief Constable of West Yorkshire Police* [2004] UKHL 21, [2005] 1 AC 51, [2004] 3 All ER 145.
- 24 For the meaning of 'intimate search' see PARA 1007 note 9 post.
- 25 Police and Criminal Evidence Act 1984 s 54(7). As to intimate searches see PARA 1007 post.

## UPDATE

### 1006 Searches of detained persons

NOTE 4--Or as a person to whom the 1984 Act s 46ZA(4) or (5) (see PARA 945A) applies: s 54(1)(b) (amended by Police and Justice Act 2006 s 46(6) (in force in specified local justice areas: SI 2007/709, SI 2008/2785)).

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### **1007. Intimate searches.**

If an officer of at least the rank of inspector<sup>1</sup> has reasonable cause for believing:

- 1428 (1) that a person who has been arrested and is in police detention<sup>2</sup> may have concealed on him anything which he could use to cause physical injury to himself or to others<sup>3</sup> and he might so use while he is in police detention or in the custody of a court<sup>4</sup>; or
- 1429 (2) that such a person has a Class A drug<sup>5</sup> concealed on him<sup>6</sup> and was in possession of it with the appropriate criminal intent<sup>7</sup> before his arrest<sup>8</sup>,

he may authorise an intimate search<sup>9</sup> of that person<sup>10</sup>. An officer may give such an authorisation orally or in writing but, if he gives it orally, he must confirm it in writing as soon as practicable<sup>11</sup>. However, an officer may not authorise an intimate search of a person for anything unless he has reasonable grounds for believing that it cannot be found without his being intimately searched<sup>12</sup>. Before the search begins, a police officer, designated detention officer or staff custody officer must inform the detainee that the authority to carry out the search has been given<sup>13</sup> and tell the detainee the grounds for giving the authorisation and for believing that the article cannot be removed without an intimate search<sup>14</sup>.

A drug offence search under head (2) above<sup>15</sup> may not be carried out unless the appropriate consent has been given in writing<sup>16</sup>. Where it is proposed that a drug offence search be carried out, an appropriate officer<sup>17</sup> must inform the person who is to be subject to it of the giving of the authorisation for it<sup>18</sup> and of the grounds for giving the authorisation<sup>19</sup>.

An intimate search may be carried out only by a registered medical practitioner<sup>20</sup> or registered nurse<sup>21</sup>, unless an officer of at least the rank of inspector considers that this is not practicable and the search is to take place under head (1) above<sup>22</sup>. An intimate search under head (1) above may take place only at a police station<sup>23</sup>, a hospital<sup>24</sup>, a registered medical practitioner's surgery<sup>25</sup> or some other place used for medical purposes<sup>26</sup>. A search under head (2) above may not be carried out at a police station but may take place only at a hospital, surgery or other medical premises<sup>27</sup>.

An intimate search at a police station of a juvenile or a mentally disordered or mentally vulnerable<sup>28</sup> person may take place only in the presence of the appropriate adult<sup>29</sup> of the same sex, unless the detainee specifically requests a particular adult of the opposite sex who is readily available<sup>30</sup>. In the case of a juvenile, the search may take place in the absence of the appropriate adult only if the juvenile signifies in the presence of the appropriate adult that he does not want the adult present during the search and the appropriate adult agrees<sup>31</sup>.

Where an intimate search under head (1) above is carried out by a police officer, the officer must be of the same sex as the person searched<sup>32</sup>. A minimum of two persons other than the detainee must be present during the search<sup>33</sup>. No person of the opposite sex who is not a medical practitioner or nurse may be present; nor may any person whose presence is unnecessary<sup>34</sup>. The search must be conducted with proper regard to the sensitivity and vulnerability of the detainee<sup>35</sup>.

If an intimate search of a person is carried out, the custody record relating to him must state which parts of his body were searched<sup>36</sup> and why<sup>37</sup>. If the intimate search is a drug offence search, the custody record relating to that person must also state the authorisation by virtue of which the search was carried out<sup>38</sup>, the grounds for giving the authorisation<sup>39</sup> and the fact that the appropriate consent was given<sup>40</sup>. In any case, the authorisation for carrying out the search, the grounds for giving the authorisation, the grounds for believing the article could not be removed without an intimate search, which parts of the detainee's body were searched, who carried out the search, who was present, and the result of the search, must be recorded<sup>41</sup>. Where the search is a drug offence search under head (2) above, the giving of the warning<sup>42</sup> and the fact that the appropriate consent was given or (as the case may be) refused, and if refused the reason, if any, for the refusal, must also be recorded<sup>43</sup>. All of this information must be recorded as soon as possible after the completion of the search<sup>44</sup>.

The custody officer<sup>45</sup> at a police station may seize and retain anything which is found on an intimate search of a person, or cause any such thing to be seized and retained, if he believes that the person from whom it was seized may use it to cause physical injury to himself or any other person<sup>46</sup>, to damage property<sup>47</sup>, to interfere with evidence<sup>48</sup> or to assist him to escape<sup>49</sup>, or if he has reasonable grounds for believing that it may be evidence relating to an offence<sup>50</sup>. Where anything is so seized, the person from whom it is seized must be told the reason for the seizure unless he is violent or likely to become violent<sup>51</sup> or is incapable of understanding what is said to him<sup>52</sup>.

1 See PARA 858 ante.

2 For the meaning of 'in police detention' see PARA 939 note 9 ante.

3 Police and Criminal Evidence Act 1984 s 55(1)(a)(i).

4 Ibid s 55(1)(a)(ii).

5 For the meaning of 'Class A drug' see PARA 770 note 2 ante; and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 239 (definition applied by ibid s 55(17)).

6 Ibid s 55(1)(b)(i).

7 For these purposes, 'the appropriate criminal intent' means an intent to commit an offence under the Misuse of Drugs Act 1971 s 5(3) (possession of controlled drug with intent to supply to another: see PARA 772 ante) or the Customs and Excise Management Act 1979 s 68(2) (exportation etc with intent to evade a prohibition or restriction: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1029): Police and Criminal Evidence Act 1984 s 55(17).

8 Ibid s 55(1)(b)(ii).

9 For these purposes, 'intimate search' means a search which consists of the physical examination of a person's body orifices other than the mouth: ibid s 65(1) (definition added by the Criminal Justice and Public Order Act 1994 s 59(1)). See also *R v Hughes* [1994] 1 WLR 876, 99 Cr App Rep 160, CA (some form of physical intrusion is required; mere visual examination in order to attempt to cause a person to extrude something from an orifice is not an intimate search). The intrusive nature of such searches means that the actual and potential risks associated with intimate searches must never be underestimated: Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Annex A para 1.

10 Police and Criminal Evidence Act 1984 s 55(1) (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 paras 97, 99; and the Criminal Justice and Police Act 2001 s 79); Code C Annex A para 2.

Every annual report under the Police Act 1996 s 22 (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 191) or made by the Metropolitan Police Commissioner must contain information about searches under the Police and Criminal Evidence Act 1984 s 55 (as amended) which have been carried out in the area to which the report relates during the period to which it relates: s 55(14) (amended by the Police Act 1996 s 103(1), Sch 7 para 36). As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq. The information about such searches must include: (1) the total number of searches (s 55(15)(a)); (2) the number of searches conducted by way of examination by a suitably qualified person (s 55(15)(b)); (3) the number of searches not so conducted but conducted in the presence of such a person (s 55(15)(c)); and (4) the result of the searches



carried out (s 55(15)(d)). The information must also include, as separate items, the total number of drug offence searches (s 55(16)(a)) and the result of those searches (s 55(16)(b)).

11 Ibid s 55(3).

12 Ibid s 55(2).

13 Code C Annex A para 2A(a).

14 Code C Annex A para 2A(b).

15 Is an intimate search for a Class A drug which an officer has authorised by virtue of the Police and Criminal Evidence Act 1984 s 55(1)(b) (see the text and notes 5-8 supra): s 55(17).

16 Ibid s 55(3A) (s 55(3A), (3B), (10A), (13A) added, and s 55(11) amended, by the Drugs Act 2005 s 3). For these purposes, 'appropriate consent' means: (1) in relation to a person who has attained the age of 17 years, the consent of that person; (2) in relation to a person who has not attained that age but has attained the age of 14 years, the consent of that person and his parent or guardian; and (3) in relation to a person who has not attained the age of 14 years, the consent of his parent or guardian: Police and Criminal Evidence Act 1984 s 65(1). Where the appropriate consent to a drug offence search of any person is refused without good cause, in any proceedings against that person for an offence: (1) the court, in determining whether there is a case to answer (s 55(13A)(a) (as so added)); (2) a judge, in deciding whether to grant an application made by the defendant under the Crime and Disorder Act 1998 Sch 3 para 2 (applications for dismissal: see PARA 1138 post) (Police and Criminal Evidence Act 1984 s 55(13A)(b) (as so added)); and (3) the court or jury, in determining whether that person is guilty of the offence charged (s 55(13A)(c) (as so added)), may draw such inferences from the refusal as appear proper (s 55(13A) (as so added)).

Before a detainee is asked to give appropriate consent to a drug offence search he must be warned that if he refuses without good cause his refusal may harm his case if it comes to trial: Code C Annex A para 2B. The following form of words may be used 'You do not have to allow yourself to be searched, but I must warn you that if you refuse without good cause, your refusal may harm your case if it comes to trial': Code C Annex A Guidance note A6). Such warning may be given by a police officer or a member of police staff: Code C Annex A para 2B. A detainee who is not legally represented must be reminded of his entitlement to have free legal advice (see Code C para 6.5; and PARA 953 ante) and the reminder noted in the custody record: Code C Annex A para 2B. As to the custody record see PARA 940 ante.

17 'Appropriate officer' means a constable, a person who is designated as a detention officer in pursuance of the Police Reform Act 2002 s 38 (see POLICE vol 36(1) (2007 Reissue) PARA 529) if his designation applies Sch 4 para 33D (as added) (see POLICE vol 36(1) (2007 Reissue) PARA 529) or a person who is designated as a staff custody officer in pursuance of s 38 if his designation applies Sch 4 para 35C (as added) (see POLICE vol 36(1) (2007 Reissue) PARA 529): Police and Criminal Evidence Act 1984 s 55(17) (definition added by the Drugs Act 2005 s 3).

18 Police and Criminal Evidence Act 1984 s 55(3B)(a) (as added: see note 16 supra); Code C Annex A para 2A(a).

19 Police and Criminal Evidence Act 1984 s 55(3B)(b) (as added: see note 16 supra); Code C Annex A para 2A(b).

20 As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 4.

21 As to the registration of nurses see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 716 et seq.

22 Police and Criminal Evidence Act 1984 s 55(5) (amended by the Criminal Justice and Police Act 2001 s 79); Code C Annex A para 3. An intimate search which is only a drug offence search must be by way of examination by a registered medical practitioner or registered nurse (a 'suitably qualified person'): Police and Criminal Evidence Act 1984 s 55(4), (17). An intimate search which is not carried out as mentioned in s 55(5) must be carried out by a constable: s 55(6). A constable's powers under s 55(6) to carry out an intimate search may now also be exercised by a suitably designated detention officer: see the Police Reform Act 2002 s 38(6), Sch 4 para 28; and POLICE vol 36(1) (2007 Reissue) PARA 529. If an intimate search is carried out by a police officer, the reason why it is impracticable for a registered medical practitioner or registered nurse to conduct it must be recorded: Code C Annex A para 8.

Any proposal for a search under head (1) in the text to be carried out by a person other than a registered medical practitioner or registered nurse must be considered only as a last resort and when the authorising officer is satisfied the risks associated with allowing the item to remain with the detainee outweigh the risks associated with removing it: Code C Annex A para 3A.

Before authorising any intimate search, the authorising officer must make every reasonable effort to persuade the detainee to hand the article over without a search; and if the detainee agrees, a registered medical practitioner or registered nurse should whenever possible be asked to assess the risks involved and, if necessary, attend to assist the detainee: Code C Annex A Guidance note A1.

If the detainee does not agree to hand the article over without a search, the authorising officer must carefully review all the relevant factors before authorising an intimate search; in particular, the officer must consider whether the grounds for believing an article may be concealed are reasonable: Code C Annex A Guidance note A2.

If authority is given for a search under head (1) in the text, a registered medical practitioner or registered nurse must be consulted whenever possible: Code C Annex A Guidance note A3. The presumption should be that the search will be conducted by the registered medical practitioner or registered nurse and the authorising officer must make every reasonable effort to persuade the detainee to allow the medical practitioner or nurse to conduct the search: Code C Annex A Guidance note A3.

A constable should be authorised to carry out a search only as a last resort and when all other approaches have failed: Code C Annex A Guidance note A4. In these circumstances, the authorising officer must be satisfied the detainee might use the article for one or more of the purposes in head (1) in the text and the physical injury likely to be caused is sufficiently severe to justify authorising a constable to carry out the search: Code C Annex A Guidance note A4.

If an officer has any doubts whether to authorise an intimate search by a constable, the officer should seek advice from an officer of superintendent rank or above: Code C Annex A Guidance note A5.

23 Police and Criminal Evidence Act 1984 s 55(8)(a); Code C Annex A para 4.

24 Police and Criminal Evidence Act 1984 s 55(8)(b); Code C Annex A para 4.

25 Police and Criminal Evidence Act 1984 s 55(8)(c); Code C Annex A para 4.

26 Police and Criminal Evidence Act 1984 s 55(8)(d); Code C Annex A para 4.

27 Police and Criminal Evidence Act 1984 s 55(9); Code C Annex A para 4.

28 For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante.

29 For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

30 Code C Annex A para 5.

31 Code C Annex A para 5. A record must be made of the juvenile's decision and signed by the adult: Code C Annex A para 5.

32 Police and Criminal Evidence Act 1984 s 55(7); Code C Annex A para 6. As to the use of reasonable force by police officers see PARA 857 ante.

33 Code C Annex A para 6.

34 Code C Annex A para 6.

35 Code C Annex A para 6.

36 Police and Criminal Evidence Act 1984 s 55(10)(a).

37 Ibid s 55(10)(b).

38 Ibid s 55(10A)(a) (as added: see note 16 supra).

39 Ibid s 55(10A)(b) (as added: see note 16 supra).

40 Ibid s 55(10A)(c) (as added: see note 16 supra).

41 Code C Annex A para 7(a).

42 Ie the warning required to be given by Code C Annex A para 2B (see note 16 supra).

43 Code C Annex A para 7(b).

- 44 Police and Criminal Evidence Act 1984 s 55(11) (as amended: see note 16 supra).
- 45 As to custody officers see PARA 939 ante.
- 46 Police and Criminal Evidence Act 1984 s 55(12)(a)(i).
- 47 Ibid s 55(12)(a)(ii).
- 48 Ibid s 55(12)(a)(iii).
- 49 Ibid s 55(12)(a)(iv).
- 50 Ibid s 55(12)(b).
- 51 Ibid s 55(13)(a).
- 52 Ibid s 55(13)(b).

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### **1008. X-rays and ultrasound scans.**

An officer of at least the rank of inspector<sup>1</sup> may authorise an x-ray to be taken of, or an ultrasound scan to be carried out on<sup>2</sup>, a person who has been arrested for an offence and is in police detention<sup>3</sup>, if he has reasonable grounds for believing that that person may have swallowed a Class A drug<sup>4</sup> and was in possession of it with the appropriate criminal intent<sup>5</sup> before his arrest<sup>6</sup>. An x-ray must not be taken of a person and an ultrasound scan must not be carried out on him unless the appropriate consent has been given in writing<sup>7</sup>. If it is proposed that an x-ray is to be taken or an ultrasound scan is to be carried out, an appropriate officer<sup>8</sup> must inform the person who is to be subject to it of the giving of the authorisation for it<sup>9</sup> and of the grounds for giving the authorisation<sup>10</sup>. An x-ray may be taken or an ultrasound scan carried out only by a suitably qualified person<sup>11</sup> and only at a hospital<sup>12</sup>, a registered medical practitioner's<sup>13</sup> surgery<sup>14</sup>, or some other place used for medical purposes<sup>15</sup>.

The custody record of the person subjected to this procedure must state the authorisation by virtue of which the x-ray was taken or the ultrasound scan was carried out<sup>16</sup>, the grounds for giving the authorisation<sup>17</sup>, the giving of the required warning<sup>18</sup>, the fact that the appropriate consent was given<sup>19</sup>, where the x-ray or ultrasound was taken or carried out<sup>20</sup>, who took it or carried it out<sup>21</sup>, who was present<sup>22</sup>, and the result<sup>23</sup>. The information so required to be recorded must be recorded as soon as practicable after the x-ray has been taken or ultrasound scan carried out (as the case may be)<sup>24</sup>.

1 See PARA 858 ante.

2 Every annual report under the Police Act 1996 s 22 (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 191) or made by the Metropolitan Police Commissioner must contain information about x-rays which have been taken and ultrasound scans which have been carried out under these provisions in the area to which the report relates during the period to which it relates: Police and Criminal Evidence Act 1984 s 55A(7) (s 55A added by the Drugs Act 2005 s 5(1)). As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq. The information about such x-rays and ultrasound scans must be presented separately and must include: (1) the total number of x-rays (Police and Criminal Evidence Act 1984 s 55A(8)(a) (as so added)); (2) the total number of ultrasound scans (s 55A(8)(b) (as so added)); (3) the results of the x-rays (s 55A(8)(c) (as so added)); and (4) the result of the ultrasound scans (s 55A(8)(d) (as so added)).

3 For the meaning of 'in police detention' see PARA 939 note 9 ante.

4 Police and Criminal Evidence Act 1984 s 55A(1)(a) (as added: see note 2 supra). For the meaning of 'Class A drug' see PARA 770 note 2 ante; and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 239 (definition applied by the Police and Criminal Evidence Act 1984 ss 55(17), 55A(10) (s 55A as so added)).

5 For the meaning of 'the appropriate criminal intent' see PARA 1007 note 7 ante; definition applied by the Police and Criminal Evidence Act 1984 s 55A(10) (as added: see note 2 supra).

6 Ibid s 55A(1)(b) (as added: see note 2 supra).

7 Ibid s 55A(2) (as added: see note 2 supra). For the meaning of 'appropriate consent' see PARA 1007 note 16 ante. Where the appropriate consent is refused without good cause, in any proceedings against that person for an offence: (1) the court, in determining whether there is a case to answer; (2) a judge, in deciding whether to grant an application made by the defendant under the Crime and Disorder Act 1998 Sch 3 para 2 (applications for dismissal: see PARA 1138 post); and (3) the court or jury, in determining whether that person is guilty of the offence charged, may draw such inferences from the refusal as appear proper: Police and Criminal Evidence Act 1984 s 55A(9)(a)-(c) (as so added).

8 For the meaning of 'appropriate officer' see PARA 1007 note 16 ante; definition applied by *ibid* s 55A(10) (as added: see note 2 supra).

9 *Ibid* s 55A(3)(a) (as added: see note 2 supra); Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, Annex K para 2(a).

10 *Ibid* s 55A(3)(b) (as added: see note 2 supra); Code C Annex K para 2(b). Before a detainee is asked to give appropriate consent to an x-ray or an ultrasound scan, he must be warned that if he refuses without good cause his refusal may harm his case if it comes to trial: Code C Annex K para 3. If authority is given for an x-ray to be taken or an ultrasound scan to be carried out (or both), consideration should be given to asking a registered medical practitioner or registered nurse to explain to the detainee what is involved and to allay any concerns the detainee might have about the effect which taking an x-ray or carrying out an ultrasound scan might have on him: Code C Annex K Guidance note K1. If appropriate consent is not given, evidence of the explanation may, if the case comes to trial, be relevant to determining whether the detainee had a good cause for refusing: Code C Annex K Guidance note K1. In warning a detainee who is asked to consent to an x-ray being taken or an ultrasound scan being carried out (or both), as in Code C Annex K para 3, the following form of words may be used: 'You do not have to allow an x-ray of you to be taken or an ultrasound scan to be carried out on you, but I must warn you that if you refuse without good cause, your refusal may harm your case if it comes to trial': Code C Annex K Guidance note K2. The giving of the warning must be recorded as soon as practicable in the detainee's custody record: Code C Annex K para 5(c). The warning may be given by a police officer or member of police staff: Code C Annex K para 3. A detainee who is not legally represented must be reminded of his entitlement to have free legal advice (see Code C para 6.5; and PARA 953 ante) and an appropriate adult (see PARA 940 note 9 ante) should be present when consent is sought: Code C Annex K para 5.

11 For the meaning of 'suitably qualified person' see PARA 1007 note 22 ante (definition applied by the Police and Criminal Evidence Act 1984 s 55A(10) (as added: see note 2 supra)); Code C Annex K para 4.

12 Police and Criminal Evidence Act 1984 s 55A(4)(a) (as added: see note 2 supra); Code C Annex K para 4.

13 As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 4.

14 Police and Criminal Evidence Act 1984 s 55A(4)(b) (as added: see note 2 supra); Code C Annex K para 4.

15 Police and Criminal Evidence Act 1984 s 55A(4)(c) (as added: see note 2 supra); Code C Annex K para 4.

16 Police and Criminal Evidence Act 1984 s 55A(5)(a) (as added: see note 2 supra); Code C Annex K para 5(a).

17 Police and Criminal Evidence Act 1984 s 55A(5)(b) (as added: see note 2 supra); Code C Annex K para 5(b).

18 Code C Annex K para 5(c).

19 Police and Criminal Evidence Act 1984 s 55A(5)(c) (as added: see note 2 supra); Code C Annex K para 5(d). If consent is refused this must be recorded in the detainee's custody record, as must the reason (if any) given for the refusal: Code C Annex K para 5(d).

20 Code C Annex K para 5(e).

21 Code C Annex K para 5(e).

22 Code C Annex K para 5(e).

23 Code C Annex K para 5(e).

24 Police and Criminal Evidence Act 1984 s 55A(6) (as added: see note 2 supra); Code C Annex K para 5.

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### **1009. Strip searches.**

A strip search is a search involving the removal of more than outer clothing<sup>1</sup>. A strip search may take place only if it is considered necessary to remove an article which a detainee would not be allowed to keep, and the officer reasonably considers that the detainee might have concealed such an article<sup>2</sup>. Strip searches must not be routinely carried out if there is no reason to consider that articles are concealed<sup>3</sup>.

When strip searches are conducted:

- 1430 (1) a police officer carrying out a strip search must be the same sex as the detainee<sup>4</sup>;
- 1431 (2) the search must take place in an area where the detainee cannot be seen by anyone who does not need to be present, nor by a member of the opposite sex except an appropriate adult<sup>5</sup> who has been specifically requested by the detainee<sup>6</sup>;
- 1432 (3) except in cases of urgency, where there is risk of serious harm to the detainee or to others, whenever a strip search involves exposure of intimate body parts, there must be at least two persons present other than the detainee, and if the search is of a juvenile or mentally disordered or otherwise mentally vulnerable person<sup>7</sup>, one of those persons must be the appropriate adult<sup>8</sup>;
- 1433 (4) except in urgent cases as above, a search of a juvenile may take place in the absence of the appropriate adult only if the juvenile signifies in the presence of the appropriate adult that he does not want the adult to be present during the search and the adult agrees<sup>9</sup>;
- 1434 (5) the search must be conducted with proper regard to the sensitivity and vulnerability of the detainee in these circumstances and every reasonable effort must be made to secure the detainee's co-operation and minimise embarrassment<sup>10</sup>;
- 1435 (6) if necessary to assist the search, the detainee may be required to hold his arms in the air or to stand with his legs apart and bend forward so a visual examination may be made of the genital and anal areas provided that no physical contact is made with any body orifice<sup>11</sup>;
- 1436 (7) if articles are found, the detainee must be asked to hand them over<sup>12</sup>; and
- 1437 (8) a strip search must be conducted as quickly as possible and the detainee allowed to dress as soon as the procedure is complete<sup>13</sup>.

A record must be made on the custody record of a strip search including the reason why it was considered necessary, those present and any result<sup>14</sup>.

1 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Annex A para 9. 'Outer clothing' includes shoes and socks: Code C Annex A para 9.

2 Code C Annex A para 10.

3 Code C Annex A para 10.

4 Code C Annex A para 11(a).

- 5 For the meaning of 'appropriate adult' see PARA 940 note 9 ante.
- 6 Code C Annex A para 11(b).
- 7 For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante.
- 8 Code C Annex A para 11(c).
- 9 Code C Annex A para 11(c). A record must be made of the juvenile's decision and signed by the appropriate adult: Code C Annex A para 11(c). The presence of more than two persons, other than an appropriate adult, is permitted only in the most exceptional circumstances: Code C Annex A para 11(c).
- 10 Code C Annex A para 11(d). Detainees who are searched may not normally be required to remove all their clothes at the same time, for example a person should be allowed to remove clothing above the waist and re-dress before removing further clothing: Code C Annex A para 11(d).
- 11 Code C Annex A para 11(e).
- 12 Code C Annex A para 11(f). If articles are found within any body orifice other than the mouth, and the detainee refuses to hand them over, their removal would constitute an intimate search, which must be carried out in accordance with the rules relating to such a search (see PARA 1007 ante): Code C Annex A para 11(f).
- 13 Code C Annex A para 11(g).
- 14 Code C Annex A para 12.

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## **(viii) Identification**

### **A. CODE OF PRACTICE**

#### **1010. Code of practice.**

A constable's powers relating to the identification of persons are governed by the Police and Criminal Evidence Act 1984<sup>1</sup> and Code D: Code of Practice for the Identification of Persons by Police Officers<sup>2</sup>. Identification by witnesses arises, for example, if the offender is seen committing the crime and a witness is given an opportunity to identify the suspect in a video identification, identification parade or similar procedure<sup>3</sup>. The procedures are designed both to test the witness' ability to identify the person he saw on a previous occasion and to provide safeguards against mistaken identification<sup>4</sup>. While Code D concentrates on visual identification procedures, it does not preclude the police making use of aural identification procedures, such as a 'voice identification parade', where they judge that appropriate<sup>5</sup>. Identification by fingerprints applies when a person's fingerprints are taken to compare with fingerprints found at the scene of a crime, to check and prove convictions, and to help to ascertain a person's identity<sup>6</sup>. Identification by body samples and impressions includes taking samples such as blood or hair to generate a DNA profile for comparison with material obtained from the scene of a crime or a victim<sup>7</sup>. Taking photographs of arrested persons applies to recording and checking identity and locating and tracing persons who are wanted for offences and fail to answer their bail<sup>8</sup>. Another method of identification involves searching and examining detained suspects to find, for example, marks such as tattoos or scars which may help establish the person's identity or whether they have been involved in committing an offence<sup>9</sup>.

The relevant provisions of the Police and Criminal Evidence Act 1984 and Code D are designed to make sure that fingerprints, samples, impressions and photographs are taken, used and retained, and identification procedures carried out, only when justified and necessary for preventing, detecting or investigating crime<sup>10</sup>.

Where a record is made under Code D of any action requiring the authority of an officer of specified rank, his name and rank must be included in the record<sup>11</sup>; and all records must be timed and signed by the maker<sup>12</sup>. Records must be made in the custody record<sup>13</sup> unless otherwise specified<sup>14</sup>.

If a person is blind, seriously visually impaired or unable to read, the custody officer<sup>15</sup> or identification officer must make sure that his solicitor<sup>16</sup>, relative, appropriate adult<sup>17</sup> or some other person likely to take an interest in him and not involved in the investigation is available to help check any documentation<sup>18</sup>. When Code D requires written consent or signing, the person assisting may be asked to sign instead, if the detainee prefers<sup>19</sup>. If any person appears to be blind, seriously visually impaired, deaf, unable to read or speak or has difficulty orally because of a speech impediment, he must be treated as such for the purposes of Code D in the absence of clear evidence to the contrary<sup>20</sup>.

In the case of any procedure requiring a person's consent, the consent of a mentally disordered or otherwise mentally vulnerable person is valid only if given in the presence of the appropriate adult; and in the case of a juvenile<sup>21</sup> is valid only if the consent of his parent or guardian is also obtained, unless the juvenile is under 14, in which case the consent of his parent or guardian is



sufficient in its own right<sup>22</sup>. In the case of any procedure requiring information to be given to or sought from a suspect, it must be given or sought in the presence of the appropriate adult if the suspect is mentally disordered, otherwise mentally vulnerable or a juvenile<sup>23</sup>. If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable, in the absence of clear evidence to dispel that suspicion, the person must be treated as such for the purposes of Code D<sup>24</sup>. If the suspect appears deaf or there is doubt about his hearing ability, speaking ability or ability to understand English, and effective communication cannot be established, the information must be given or sought through an interpreter<sup>25</sup>.

Any procedure involving the participation of a suspect who is mentally disordered, otherwise mentally vulnerable or a juvenile must take place in the presence of the appropriate adult<sup>26</sup>. Any procedure involving the participation of a witness who is mentally disordered, otherwise mentally vulnerable or a juvenile must take place in the presence of a pre-trial support person; however the support person must not be allowed to prompt any identification of a suspect by a witness<sup>27</sup>.

1    le the Police and Criminal Evidence Act 1984 ss 61-65 (as amended) (see PARA 1021 et seq post).

2    As to Code D: Code of Practice for the Identification of Persons by Police Officers see PARAS 908 ante, 1011 et seq post. As to codes of practice under the Police and Criminal Evidence Act 1984 see further PARA 908 ante. Code D must be readily available at all police stations for consultation by police officers and police staff, detained persons and members of the public: Code D para 2.1. The provisions of Code D include the Annexes to it but do not include the Guidance notes: Code D para 2.2. Except as described by the code, nothing in Code D affects the powers and procedures:

388   (1)   for requiring and taking samples of breath, blood and urine in relation to driving offences etc when under the influence of drink or drugs or excess alcohol under the Road Traffic Act 1988 ss 4-11 (as amended) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 975 et seq), the Road Traffic Offenders Act 1988 ss 15, 16 (as amended) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 991) or the Transport and Works Act 1992 ss 26-38 (as amended) (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 377 et seq; ROAD TRAFFIC vol 40(3) (2007 Reissue) PARA 1626) (Code D para 2.17(i));

389   (2)   for taking photographs or fingerprints under the Immigration Act 1971 Sch 2 para 18 (as amended) of persons detained under Sch 2 para 16 (as amended) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 156), for taking fingerprints in accordance with the Immigration and Asylum Act 1999 s 141 (as amended) and s 142(3) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 150), or other methods for collecting information about a person's external characteristics provided for by regulations under s 144 (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 150) (Code D para 2.17(ii));

390   (3)   for taking photographs, fingerprints, skin impressions, body samples or impressions under the Terrorism Act 2000 Sch 8 (as amended) (see PARA 421 et seq ante) from persons arrested under s 41 or detained for examination under Sch 7 (as amended) (see PARA 430 et seq ante) and to whom the code of practice issued under Sch 14 para 6 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 545) applies (Code D para 2.17(iii)); or

391   (4)   for taking photographs, fingerprints, skin impressions, body samples or impressions from people arrested on warrants issued in Scotland or arrested or detained without warrant by officers from a Scottish police force under the Criminal Justice and Public Order Act 1994 ss 136(2), 137(2) (see PARAS 921, 928 ante) (in which cases, police powers and duties and the arrested person's rights and entitlements whilst at a police station in England and Wales are the same as if he had been arrested in Scotland by a Scottish police officer (Code D para 2.17(iv)).

3    Code D para 1.2. As to video identifications see PARA 1016 post. As to identification parades see PARA 1017 post.

4    Code D para 1.2.

5    Code D para 1.2.

6 Code D para 1.3. Identification using footwear impressions applies when a person's footwear impressions are taken to compare with impressions found at the scene of a crime: Code D para 1.3A.

7 Code D para 1.4.

8 Code D para 1.5.

9 Code D para 1.6.

10 Code D para 1.7. If these provisions are not observed, the application of the relevant procedures in particular cases may be open to question: Code D para 1.7.

11 Code D para 2.8. However, nothing in Code D requires the identity of officers or civilian support staff to be recorded or disclosed either in the case of inquiries linked to the investigation of terrorism (Code D para 2.18(a)) or if the officers or police staff reasonably believe that recording or disclosing their names might put them in danger (Code D para 2.18(b)). In these cases, officers and staff must use warrant or other identification numbers and the name of their police station: Code D para 2.18. The purpose of the exclusion relating to officers or police staff reasonably believing that recording or disclosing their names might put them in danger is to protect those involved in serious organised crime investigations or arrests of particularly violent suspects when there is reliable information that those arrested or their associates may threaten or cause harm to the officers: Code D Guidance note 2D. In cases of doubt, an officer of inspector rank or above should be consulted: Code D Guidance note 2D.

12 Code D para 2.10. This is subject to Code D para 2.18 (see note 11 *supra*): Code D para 2.10.

13 As to custody records see PARA 940 *ante*.

14 Code D para 2.11.

15 As to custody officers see PARA 939 *ante*. References in Code D to custody officers include those performing the functions of a custody officer: Code D para 2.7.

Any reference in Code D to a police officer includes a designated person (ie a person other than a police officer designated under the Police Reform Act 2002 Pt 4 (ss 38-77) (as amended) (see POLICE vol 36(1) (2007 Reissue) PARA 529) who has specified powers and duties of police officers conferred or imposed on him) acting in the exercise or performance of the powers and duties conferred or imposed on him by his designation: Code D para 2.19. If a power conferred on a designated person allows reasonable force to be used when exercised by a police officer, a designated person exercising that power has the same entitlement to use force: Code D para 2.20(a). If a power conferred on a designated person includes power to use force to enter any premises, that power is not exercisable by that designated person except in the company, and under the supervision, of a police officer (Code D para 2.20(b)(i)) or for the purpose of saving life or limb, or preventing serious damage to property (Code D para 2.20(b)(ii)).

Nothing in Code D prevents the custody officer, or other officer given custody of the detainee, from allowing police staff who are not designated persons to carry out individual procedures or tasks at the police station if the law allows: Code D para 2.21. However, the officer remains responsible for making sure the procedures and tasks are carried out correctly in accordance with the codes of practice: Code D para 2.21. Any such police staff must be either a person employed by a police authority maintaining a police force and under the control and direction of the chief officer of that force (Code D para 2.21(a)) or employed by a person with whom a police authority has a contract for the provision of services relating to persons arrested or otherwise in custody (Code D para 2.21(b)). As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 *et seq*. Designated persons and other police staff must have regard to any relevant provisions of the codes of practice: Code D para 2.22.

16 For the meaning of 'solicitor' see PARA 953 note 4 *ante*; definition applied by Code D para 2.6.

17 For the meaning of 'appropriate adult' see PARA 940 note 9 *ante*; definition applied by Code D para 2.6.

18 Code D para 2.13.

19 Code D para 2.13. Persons who are seriously visually impaired or unable to read may be unwilling to sign police documents; the alternative, ie their representative signing on their behalf, seeks to protect the interests of both police and suspects: Code D Guidance note 2B. Code D para 2.13 does not require an appropriate adult to be called solely to assist in checking and signing documentation for a person who is not a juvenile, or mentally disordered or otherwise mentally vulnerable: Code D para 2.13. See also Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 3.15; and PARA 949 *ante*. For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', for the purposes of Code C see PARA 940 note 9 *ante*.

20 Code D para 2.5.

21 If any person appears to be under the age of 17, he must be treated as a juvenile for the purposes of Code D in the absence of clear evidence to show that he is older: Code D para 2.4.

22 Code D para 2.12. For these purposes, consent required from a parent or guardian may be given, in the case of a juvenile in the care of a local authority or voluntary organisation, by that authority or organisation: Code D Guidance note 2A. In the case of a juvenile, nothing in Code D para 2.12 requires the parent, guardian or representative of a local authority or voluntary organisation to be present to give his consent, unless he is acting as the appropriate adult under Code D para 2.14 (see the text and notes 23, 25 *infra*) or Code D para 2.15 (see the text and note 26 *infra*), but it is important that a parent or guardian not present is fully informed before being asked to consent: Code D Guidance note 2A. Such a person must be given the same information about the procedure and the juvenile's suspected involvement in the offence as the juvenile and appropriate adult, and must also be allowed to speak to the juvenile and the appropriate adult if he wishes: Code D Guidance note 2A. Provided the consent is fully informed and is not withdrawn, it may be obtained at any time before the procedure takes place: Code D Guidance note 2A.

23 Code D para 2.14. If the appropriate adult is not present when the information is first given or sought the procedure must be repeated in the presence of the appropriate adult when he arrives: Code D para 2.14.

24 Code D para 2.3.

25 Code D para 2.14. As to interpreters see PARAS 967-969 *ante*.

26 Code D para 2.15.

27 Code D para 2.15A. A pre-trial support person (who should not be, or be likely to be, a witness in the investigation) should accompany a vulnerable witness during any identification procedure: Code D Guidance note 2AB.

## **UPDATE**

### **1010 Code of practice**

TEXT AND NOTES--Revised Code of Practice D came into operation on 1 February 2008: Police and Criminal Evidence Act 1984 (Codes of Practice) Order 2008, SI 2008/167.

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## ***B. IDENTIFICATION BY WITNESS***

### **1011. In general.**

A record must be made of the suspect's description as first given by a potential witness<sup>1</sup>. This record must:

- 1438 (1) be made and kept in a form which enables details of that description to be accurately produced from it, in a visible and legible form, which can be given to the suspect or the suspect's solicitor<sup>2</sup> in accordance with Code D: Code of Practice for the Identification of Persons by Police Officers<sup>3</sup>; and
- 1439 (2) unless otherwise specified, be made before the witness takes part in any specified identification procedures<sup>4</sup>.

A copy of the record must, where practicable, be given to the suspect or his solicitor before any of the specified procedures are carried out<sup>5</sup>.

1 Code D: Code of Practice for the Identification of Persons by Police Officers para 3.1.

2 For the meaning of 'solicitor' see PARA 953 note 4 ante; definition applied by Code D para 2.6.

3 Code D para 3.1(a).

4 Code D para 3.1(b). The specified procedures are those under Code D paras 3.5-3.10 (suspect known and available: video identification; identification parade; and group identification: see PARAS 1016-1018 post) and Code D para 3.21 or 3.23 (suspect known but not available: identification; confrontation: see PARA 1019 post): Code D para 3.1(b).

5 Code D para 3.1. When it is proposed to show photographs to a witness in accordance with Code D Annex E (see PARA 1013 post) it is the responsibility of the officer in charge of the investigation to confirm to the officer responsible for supervising and directing the showing that the first description of the suspect given by that witness has been recorded: Code D Guidance note 3E. If this description has not been recorded, the procedure under Code D Annex E must be postponed: Code D Guidance note 3E. See also Code D Annex E para 2; and PARA 1013 post. In Code D, 'photographs', 'films', 'negatives' and 'copies' include relevant visual images recorded, stored or reproduced through any medium: Code D para 2.16.

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### **1012. Cases when the suspect's identity is not known.**

In cases when the suspect's identity is not known, a witness may be taken to a particular neighbourhood or place to see whether he can identify the person he saw<sup>1</sup>. Although the number, age, sex, race, general description and style of clothing of other persons present at the location and the way in which any identification is made cannot be controlled, the principles applicable to the formal procedures<sup>2</sup> must be followed as far as practicable<sup>3</sup>. For example:

- 1440 (1) where it is practicable to do so, a record should be made<sup>4</sup> of the witness' description of the suspect before asking him to make an identification<sup>5</sup>;
- 1441 (2) care must be taken not to direct the witness' attention to any individual unless, taking into account all the circumstances, this cannot be avoided<sup>6</sup>;
- 1442 (3) where there is more than one witness, every effort should be made to keep them separate and witnesses should be taken to see whether they can identify a person independently<sup>7</sup>;
- 1443 (4) once there is sufficient information to justify the arrest of a particular individual for suspected involvement in the offence (for example, after a witness makes a positive identification), the provisions relating to cases where the suspect is known and available<sup>8</sup> apply for any other witnesses in relation to that individual<sup>9</sup>; and
- 1444 (5) the officer or police staff accompanying the witness must record the action taken in his pocket book<sup>10</sup>.

A witness must not be shown photographs<sup>11</sup>, computerised or artist's composite likenesses or similar likenesses or pictures (including e-fit images) if the identity of the suspect is known to the police and the suspect is available to take part in a video identification<sup>12</sup>, an identification parade<sup>13</sup> or a group identification<sup>14</sup>. If the suspect's identity is not known, the showing of such images to a witness to obtain identification evidence must be done in accordance with the prescribed procedure<sup>15</sup>.

<sup>1</sup> Code D: Code of Practice for the Identification of Persons by Police Officers para 3.2. See *R v El-Hannacki* [1998] 2 Cr App Rep 226, CA.

<sup>2</sup> *Ie* under Code D paras 3.5-3.10: see PARAS 1016-1018 *post*.

<sup>3</sup> Code D para 3.2.

<sup>4</sup> *Ie* as in Code D para 3.1(a): see PARA 1011 *ante*.

<sup>5</sup> Code D para 3.2(a).

<sup>6</sup> Code D para 3.2(b). This does not, however, prevent a witness being asked to look carefully at the persons around at the time or to look towards a group or in a particular direction, if this appears necessary to make sure that the witness does not overlook a possible suspect simply because he is looking in the opposite direction and also to enable the witness to make comparisons between any suspect and others who are in the area: Code D para 3.2(b). The admissibility and value of identification evidence obtained when carrying out the procedure under Code D para 3.2 may be compromised if before a person is identified, the witness' attention is specifically

drawn to that person (Code D Guidance note 3F(a)) or the suspect's identity becomes known before the procedure (Code D Guidance note 3F(b)).

7 Code D para 3.2(c).

8 le the provisions of Code D para 3.4 et seq: see PARAS 1014-1018 post.

9 Code D para 3.2(d). Subject to Code D paras 3.12, 3.13 (see PARA 1014 post), it is not necessary for the witness who makes such a positive identification to take part in a further procedure: Code D para 3.2(d).

10 Code D para 3.2(e). 'Pocket book' includes any official report book issued to police officers or police staff: Code D para 2.11. The action taken must be recorded as soon as, and in as much detail as, possible: Code D para 3.2(e). The record should include the date, time and place of the relevant occasion the witness claims to have previously seen the suspect; where any identification was made; how it was made and the conditions at the time (eg the distance the witness was from the suspect, the weather and the light); if the witness's attention was drawn to the suspect; the reason for this; and anything said by the witness or the suspect about the identification or the conduct of the procedure: Code D para 3.2(e).

11 As to the meaning of 'photographs' see PARA 1011 note 5 ante.

12 As to video identifications see PARA 1016 post.

13 As to identification parades see PARA 1017 post.

14 Code D para 3.3. As to group identifications see PARA 1018 post.

15 Code D para 3.3. For the prescribed procedure see Code D Annex E; and PARA 1013 post.

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### **1013. Prescribed procedure for showing photographs.**

An officer of sergeant rank or above must be responsible for supervising and directing the showing of photographs<sup>1</sup>, although the actual showing may be done by another officer or police staff<sup>2</sup>. The supervising officer must confirm that the first description of the suspect given by the witness has been recorded before the witness is shown the photographs; and if the supervising officer is unable to confirm the description has been recorded he must postpone showing the photographs<sup>3</sup>.

Only one witness may be shown photographs at any one time; and each witness must be given as much privacy as practicable and must not be allowed to communicate with any other witness in the case<sup>4</sup>. The witness must be shown no fewer than 12 photographs at a time, which must, as far as possible, all be of a similar type<sup>5</sup>.

When the witness is shown the photographs, he must be told that the photograph of the person he saw may, or may not, be amongst them and that if he cannot make a positive identification, he should say so<sup>6</sup>. The witness must also be told that he should not make a decision until he has viewed at least 12 photographs<sup>7</sup>. The witness must not be prompted or guided in any way but must be left to make any selection without help<sup>8</sup>.

If a witness makes a positive identification from photographs, and unless the person identified is otherwise eliminated from inquiries or is not available, other witnesses may not be shown photographs, but both they, and the witness who has made the identification, must be asked to attend a video identification<sup>9</sup>, an identification parade<sup>10</sup> or group identification<sup>11</sup> unless there is no dispute about the suspect's identification<sup>12</sup>.

If the witness makes a selection but is unable to confirm the identification, the person showing the photographs must ask him how sure he is that the photograph he has indicated is the person he saw on the specified earlier occasion<sup>13</sup>.

When the use of a computerised or artist's composite or similar likeness has led to there being a known suspect who can be asked to participate in a video identification, appear on an identification parade or participate in a group identification, that likeness must not be shown to other potential witnesses<sup>14</sup>.

When a witness attending a video identification, an identification parade or group identification has previously been shown photographs or computerised or artist's composite or similar likeness (and it is the responsibility of the officer in charge of the investigation to make the identification officer aware that this is the case), the suspect and his solicitor<sup>15</sup> must be informed of this fact before the identification procedure takes place<sup>16</sup>.

None of the photographs shown may be destroyed<sup>17</sup>, whether or not an identification is made, since they may be required for production in court<sup>18</sup>. The photographs must be numbered and a separate photograph taken of the frame or part of the album from which the witness made an identification as an aid to reconstituting it<sup>19</sup>.

Whether or not identification is made, a record must be kept of the showing of photographs on forms provided for the purpose, including anything said by the witness about any identification or the conduct of the procedure, any reasons why it was not practicable to comply with any of

the provisions<sup>20</sup> governing the showing of photographs and the name and rank of the supervising officer<sup>21</sup>.

The supervising officer must inspect and sign the record as soon as practicable<sup>22</sup>.

- 1 As to the meaning of 'photographs' see PARA 1011 note 5 ante.
- 2 Code D: Code of Practice for the Identification of Persons by Police Officers Annex E para 1. See Code D para 3.11; and PARA 1014 post.
- 3 Code D Annex E para 2. See Code D Guidance note 3E; and PARA 1011 note 5 ante.
- 4 Code D Annex E para 3.
- 5 Code D Annex E para 4.
- 6 Code D Annex E para 5.
- 7 Code D Annex E para 5.
- 8 Code D Annex E para 5.
- 9 As to video identifications see PARA 1016 post.
- 10 As to identification parades see PARA 1017 post.
- 11 As to group identifications see PARA 1018 post.
- 12 Code D Annex E para 6.
- 13 Code D Annex E para 7.
- 14 Code D Annex E para 8.
- 15 For the meaning of 'solicitor' see PARA 953 note 4 ante; definition applied by Code D para 2.6.
- 16 Code D Annex E para 9.
- 17 As to the destruction of images see PARA 1041 post.
- 18 Code D Annex E para 10.
- 19 Code D Annex E para 10.
- 20 Ie the provisions of Code D.
- 21 Code D Annex E para 11.
- 22 Code D Annex E para 12.



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#### **1014. Cases when the suspect is known and available.**

If the suspect's identity is known<sup>1</sup> to the police, and he is available<sup>2</sup>, the arrangements for, and conduct of, the three principal identification procedures<sup>3</sup> and the circumstances in which an identification procedure must be held are<sup>4</sup> the responsibility of an officer not below inspector rank who is not involved with the investigation ('the identification officer')<sup>5</sup>. Unless otherwise specified, this officer may allow another officer or police staff<sup>6</sup> to make arrangements for, and conduct, any of these identification procedures<sup>7</sup>. In delegating these procedures, the identification officer must be able to supervise effectively and either intervene or be contacted for advice<sup>8</sup>. No officer or any other person involved with the investigation of the case against the suspect, beyond the extent required by these procedures, may take any part in these procedures or act as the identification officer<sup>9</sup>. When an identification procedure is required, in the interest of fairness to suspects and witnesses, it must be held as soon as practicable<sup>10</sup>.

Whenever a witness has identified a suspect or purported to have identified him prior to any of the three identification procedures having been held<sup>11</sup>, or there is a witness available who expresses an ability to identify the suspect, or where there is a reasonable chance of the witness being able to do so, and he has not been given an opportunity to identify the suspect in any of the three procedures<sup>12</sup>, and the suspect disputes being the person the witness claims to have seen, an identification procedure must be held unless it is not practicable or it would serve no useful purpose<sup>13</sup> in proving or disproving whether the suspect was involved in committing the offence<sup>14</sup>. Such a procedure may also be held if the officer in charge of the investigation considers it would be useful<sup>15</sup>.

If an identification procedure is to be held, the suspect must initially be offered a video identification unless:

- 1445 (1) a video identification is not practicable<sup>16</sup>;
- 1446 (2) an identification parade is both practicable and more suitable than a video identification<sup>17</sup>; or
- 1447 (3) the officer in charge of the investigation considers a group identification is the most suitable of the three procedures and the identification officer considers it practicable to arrange<sup>18</sup>.

The identification officer and the officer in charge of the investigation must consult each other to determine which option is to be offered<sup>19</sup>. An identification parade may not be practicable because of factors relating to the witnesses, such as their number, state of health, availability and travelling requirements<sup>20</sup>. A video identification would normally be more suitable if it could be arranged and completed sooner than an identification parade<sup>21</sup>.

A suspect who refuses the identification procedure first offered must be asked to state his reason for refusing and may get advice from his solicitor<sup>22</sup> and/or, if present, his appropriate adult<sup>23</sup>. The suspect, solicitor and/or appropriate adult must be allowed to make representations about why another procedure should be used<sup>24</sup>. A record should be made of the reasons for refusal and any representations made<sup>25</sup>. After considering any reasons given, and representations made, the identification officer must, if appropriate, arrange for the suspect to be offered an alternative which the officer considers suitable and practicable<sup>26</sup>. If the officer

decides that it is not suitable and practicable to offer an alternative identification procedure, the reasons for that decision must be recorded<sup>27</sup>. A group identification may initially be offered if the officer in charge of the investigation considers it is more suitable than a video identification or an identification parade and the identification officer considers it practicable to arrange<sup>28</sup>.

A record must be made of the video identification, identification parade or group identification on forms provided for the purpose<sup>29</sup>. If the identification officer considers that it is not practicable to hold a video identification or identification parade requested by the suspect, the reasons must be recorded and explained to the suspect<sup>30</sup>. A record must be made of a person's failure or refusal to co-operate in a video identification, identification parade or group identification<sup>31</sup>.

Before any of the three identification procedures is arranged, the provisions about notice to suspects<sup>32</sup> must<sup>33</sup> be satisfied<sup>34</sup>.

1 References to a suspect being 'known' mean that there is sufficient information known to the police to justify the arrest of a particular person for suspected involvement in the offence: Code D: Code of Practice for the Identification of Persons by Police Officers para 3.4.

2 A suspect being 'available' means that he is immediately available or will be within a reasonably short time and willing to take an effective part in at least one of the following which it is practicable to arrange: (1) video identification; (2) identification parade; or (3) group identification: Code D para 3.4. As to video identifications see PARA 1016 post. As to identification parades see PARA 1017 post. As to group identifications see PARA 1018 post.

3 In video identifications, identification parades and group identifications: see Code D paras 3.5-3.10; and PARAS 1016-1018 post.

4 In subject to Code D para 3.19 (see PARA 1015 post).

5 Code D para 3.11.

6 See Code D para 2.21; and PARA 1010 note 15 ante.

7 Code D para 3.11.

8 Code D para 3.11.

9 Code D para 3.11. This does not prevent the identification officer from consulting the officer in charge of the investigation to determine which procedure to use: Code D para 3.11. See *R v Gall* (1989) 90 Cr App Rep 64, CA.

10 Code D para 3.11.

11 Code D para 3.12(i).

12 Code D para 3.12(ii).

13 Eg when it is not disputed that the suspect is already well known to the witness who claims to have seen him commit the crime: Code D para 3.12.

14 Code D para 3.12. See *R v Conway* (1990) 91 Cr App Rep 143, CA.

15 Code D para 3.13.

16 Code D para 3.14(a).

17 Code D para 3.14(b).

18 Code D para 3.14(c). This is a reference to the case where Code D para 3.16 (see the text and note 28 infra) applies: Code D para 3.14(c).

19 Code D para 3.14.

20 Code D para 3.14.

21 Code D para 3.14.

22 For the meaning of 'solicitor' see PARA 953 note 4 ante; definition applied by Code D para 2.6.

23 Code D para 3.15. For the meaning of 'appropriate adult' see PARA 940 note 9 ante; definition applied by Code D para 2.6.

24 Code D para 3.15.

25 Code D para 3.15.

26 Code D para 3.15.

27 Code D para 3.15.

28 Code D para 3.16.

29 Code D para 3.25.

30 Code D para 3.26.

31 Code D para 3.27.

32 Ie the provisions of Code D para 3.17(i)-(xiii) (see PARA 1015 post).

33 Ie unless Code D para 3.20 (see PARA 1016 post) applies.

34 Code D para 3.17.

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### **1015. Notice to suspect.**

Before a video identification<sup>1</sup>, identification parade<sup>2</sup> or group identification<sup>3</sup> is arranged, there must<sup>4</sup> be explained to the suspect:

- 1448 (1) the purposes of the video identification, identification parade or group identification<sup>5</sup>;
- 1449 (2) his entitlement to free legal advice<sup>6</sup>;
- 1450 (3) the procedures for holding the identification, including the suspect's right to have a solicitor<sup>7</sup> or friend present<sup>8</sup>;
- 1451 (4) that he does not have to consent to or co-operate in a video identification, identification parade or group identification<sup>9</sup>;
- 1452 (5) that if he does not consent to, and co-operate in, a video identification, identification parade or group identification, his refusal may be given in evidence in any subsequent trial and the police may proceed covertly without his consent or make other arrangements to test whether a witness can identify him<sup>10</sup>;
- 1453 (6) whether, for the purposes of the video identification procedure, images of him have previously been obtained<sup>11</sup> and, if so, that he may co-operate in providing further, suitable images to be used instead<sup>12</sup>;
- 1454 (7) if appropriate, the special arrangements for juveniles<sup>13</sup>;
- 1455 (8) if appropriate, the special arrangements for mentally disordered or otherwise mentally vulnerable persons<sup>14</sup>;
- 1456 (9) that if he significantly alters his appearance between being offered an identification procedure and any attempt to hold one, this may be given in evidence if the case comes to trial, and the identification officer<sup>15</sup> may then consider other forms of identification<sup>16</sup>;
- 1457 (10) that a moving image or photograph<sup>17</sup> may be taken of him when he attends for any identification procedure<sup>18</sup>;
- 1458 (11) whether, before his identity became known, the witness was shown photographs, a computerised or artist's composite likeness or similar likeness or image by the police<sup>19</sup>;
- 1459 (12) that if he changes his appearance before an identification parade, it may not be practicable to arrange one on the day or subsequently and, because of the appearance change, the identification officer may consider alternative methods of identification<sup>20</sup>; and
- 1460 (13) that he or his solicitor will be provided with details of the description of the suspect as first given by any witnesses who are to attend the video identification, identification parade, group identification or confrontation<sup>21</sup>.

This information must also be recorded in a written notice handed to the suspect; and the suspect must be given a reasonable opportunity to read the notice, after which he should be asked to sign a second copy to indicate if he is willing to co-operate with the making of a video or to take part in the identification parade or group identification<sup>22</sup>.

The duties<sup>23</sup> of the identification officer may be performed by the custody officer<sup>24</sup> or other officer not involved in the investigation if either:

- 1461 (a) it is proposed to release the suspect in order that an identification procedure can be arranged and carried out and an inspector is not available to act as the identification officer before the suspect leaves the station<sup>25</sup>; or
- 1462 (b) it is proposed to keep the suspect in police detention whilst the procedure is arranged and carried out and waiting for an inspector to act as the identification officer would cause unreasonable delay to the investigation<sup>26</sup>.

The officer concerned must inform the identification officer of the action taken and give him the signed copy of the notice<sup>27</sup>.

If the identification officer and officer in charge of the investigation suspect, on reasonable grounds, that if the suspect was given the information and notice<sup>28</sup> he would then take steps to avoid being seen by a witness in any identification procedure, the identification officer may arrange for images of the suspect suitable for use in a video identification procedure to be obtained before giving the information and notice<sup>29</sup>. If the suspect's images are obtained in these circumstances, the suspect may, for the purposes of a video identification procedure, co-operate in providing suitable new images to be used instead<sup>30</sup>.

- 1 As to video identifications see PARA 1016 post.
- 2 As to identification parades see PARA 1017 post.
- 3 As to group identifications see PARA 1018 post.
- 4 Ie unless Code D: Code of Practice for the Identification of Persons by Police Officers para 3.20 (see the text and notes 28-30 infra) applies.
- 5 Code D para 3.17(i).
- 6 Code D para 3.17(ii). As to a suspect's entitlement to free legal advice see Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 6.5; and PARA 953 ante.
- 7 For the meaning of 'solicitor' see PARA 953 note 4 ante; definition applied by Code D para 2.6.
- 8 Code D para 3.17(iii).
- 9 Code D para 3.17(iv).
- 10 Code D para 3.17(v). See Code D para 3.21; and PARA 1019 post.
- 11 See Code D para 3.20; and the text and notes 28-30 infra.
- 12 Code D para 3.17(vi).
- 13 Code D para 3.17(vii). As to the special arrangements for juveniles see PARA 1010 ante.
- 14 Code D para 3.17(viii). As to the special arrangements for mentally disordered or otherwise mentally vulnerable persons see PARA 1010 ante.
- 15 As to the identification officer see PARA 1014 ante.
- 16 Code D para 3.17(ix). See Code D para 3.21; and PARA 1019 post.
- 17 As to the meaning of 'photograph' see PARA 1011 note 5 ante.
- 18 Code D para 3.17(x).
- 19 Code D para 3.17(xi). When a witness attending an identification procedure has previously been shown photographs, or been shown or provided with computerised or artist's composite likenesses, or similar likenesses or pictures, it is the responsibility of the officer in charge of the investigation to make the identification officer aware of this: Code D Guidance note 3B.

- 20 Code D para 3.17(xii).
- 21 Code D para 3.17(xiii). See Code D para 3.1; and PARA 1011 ante. As to confrontations see PARA 1019 post.
- 22 Code D para 3.18. The signed copy must be retained by the identification officer: Code D para 3.18.
- 23 Ie under Code D paras 3.17, 3.18 (see the text and notes 1-22 supra).
- 24 As to custody officers see PARAS 939, 1010 note 15 ante.
- 25 Code D para 3.19(a). The purpose of Code D para 3.19 is to avoid or reduce delay in arranging identification procedures by enabling the required information and warnings to be given at the earliest opportunity: Code D Guidance note 3C.
- 26 Code D para 3.19(b). See note 25 supra.
- 27 Code D para 3.19.
- 28 Ie under Code D paras 3.17, 3.18 (see the text and notes 1-22 supra).
- 29 Code D para 3.20. A record must be made of the grounds for obtaining images in accordance with Code D para 3.20: Code D para 3.27.
- 30 Code D para 3.20. See Code D para 3.17(vi); and the text and notes 11-12 supra.

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### **1016. Video identification.**

A 'video identification' is when the witness is shown moving images<sup>1</sup> of a known suspect, together with similar images of others who resemble the suspect<sup>2</sup>. Video identifications must be carried out in accordance with a specified procedure<sup>3</sup>. The arrangements for obtaining and ensuring the availability of a suitable set of images to be used in a video identification must be the responsibility of an identification officer<sup>4</sup> who has no direct involvement with the case<sup>5</sup>.

The set of images must include the suspect and at least eight other people who, so far as possible, resemble the suspect in age, height, general appearance and position in life<sup>6</sup>. Only one suspect may appear in any set unless there are two suspects of roughly similar appearance, in which case they may be shown together with at least 12 other people<sup>7</sup>. The images used to conduct a video identification must, as far as possible, show the suspect and other persons in the same positions or carrying out the same sequence of movements<sup>8</sup>. They must also show the suspect and other persons under identical conditions unless the identification officer reasonably believes that because of the suspect's failure or refusal to co-operate or other reasons, it is not practicable for the conditions to be identical<sup>9</sup>, and that any difference in the conditions would not direct a witness' attention to any individual image<sup>10</sup>. The reasons why identical conditions are not practicable must be recorded on forms provided for the purpose<sup>11</sup>.

Provision must be made for each person shown to be identified by number<sup>12</sup>. If police officers are shown, any numerals or other identifying badges must be concealed<sup>13</sup>. If a prison inmate is shown, either as a suspect or not, then either all, or none of, the persons shown should be in prison clothing<sup>14</sup>.

The suspect or his solicitor<sup>15</sup>, friend, or appropriate adult<sup>16</sup> must be given a reasonable opportunity to see the complete set of images before it is shown to any witness<sup>17</sup>. If the suspect has a reasonable objection to the set of images or any of the participants, he must be asked to state the reasons for the objection and steps must, if practicable, be taken to remove the grounds for objection<sup>18</sup>. If this is not practicable, the suspect and/or his representative must be told why his objections cannot be met and the objection, the reason given for it and why it cannot be met must be recorded on forms provided for the purpose<sup>19</sup>.

Before the images are so shown<sup>20</sup>, the suspect or his solicitor must be provided with details of the first description of the suspect by any witnesses who are to attend the video identification<sup>21</sup>. When a broadcast or publication is made<sup>22</sup>, the suspect or his solicitor must also be allowed to view any material released to the media by the police for the purpose of recognising or tracing the suspect, provided that it is practicable and would not unreasonably delay the investigation<sup>23</sup>.

The suspect's solicitor, if practicable, must be given reasonable notification of the time and place at which the video identification is to be conducted so that a representative may attend on behalf of the suspect<sup>24</sup>. If a solicitor has not been instructed, this information must be given to the suspect<sup>25</sup>. The suspect may not be present when the images are shown to the witness or witnesses<sup>26</sup>. In the absence of the suspect's representative, the viewing itself must be recorded on video<sup>27</sup>. No unauthorised persons may be present<sup>28</sup>.

The identification officer is responsible for making the appropriate arrangements to make sure, before they see the set of images, that witnesses are not able to communicate with each other about the case, or see any of the images which are to be shown, or see, or be reminded of, any photograph<sup>29</sup> or description of the suspect or given any other indication as to the suspect's identity, or overhear a witness who has already seen the material<sup>30</sup>. There must be no discussion with a witness about the composition of the set of images and he must not be told whether a previous witness has made any identification<sup>31</sup>.

Only one witness may see the set of images at a time<sup>32</sup>. Immediately before the images are shown, the witness must be told that the person he saw on a specified earlier occasion may, or may not, appear in the images he is shown and that if he cannot make a positive identification he should say so<sup>33</sup>. The witness must be advised that at any point he may ask to see a particular part of the set of images or to have a particular image frozen for him to study<sup>34</sup>. Furthermore, it should be pointed out to the witness that there is no limit on how many times he can view the whole set of images or any part of them<sup>35</sup>. However, he should be asked not to make any decision as to whether the person he saw is on the set of images until he has seen the whole set at least twice<sup>36</sup>.

Once the witness has seen the whole set of images at least twice and has indicated that he does not want to view the images, or any part of them, again, he must be asked to say whether the individual he saw in person on a specified earlier occasion has been shown and, if so, to identify him by number of the image<sup>37</sup>. The witness will then be shown that image to confirm the identification<sup>38</sup>.

Care must be taken not to direct the witness' attention to any one individual image or give any indication of the suspect's identity<sup>39</sup>. Where a witness has previously made an identification by photographs, or a computerised or artist's composite or similar likeness, he must not be reminded of such a photograph or composite likeness once a suspect is available for identification by other means<sup>40</sup>. Nor must the witness be reminded of any description of the suspect<sup>41</sup>.

After the procedure, each witness must be asked whether he has seen any broadcast or published films or photographs, or any description of suspects relating to the offence and his reply must be recorded<sup>42</sup>.

Arrangements must be made for all relevant material containing sets of images used for specific identification procedures to be kept securely and their movements accounted for<sup>43</sup>. In particular, no person involved in the investigation may be permitted to view the material prior to it being shown to any witness<sup>44</sup>.

A record must be made of all those participating in, or seeing, the set of images whose names are known to the police<sup>45</sup>. A record of the conduct of the video identification must be made on forms provided for the purpose<sup>46</sup>.

1 For the circumstances in which still images may be used see Code D: Code of Practice for the Identification of Persons by Police Officers para 3.21; and PARA 1019 post. Moving images must be used unless the suspect is known but not available (see Code D para 3.21) or, in accordance with Code D Annex A para 2A (see note 6 infra) the identification officer does not consider that replication of a physical feature can be achieved or that it is not possible to conceal the location of the feature on the image of the suspect: Code D para 3.5. The identification officer may then decide to make use of video identification but using still images: Code D para 3.5.

2 Code D para 3.5.

3 Code D para 3.6. The procedure is set out in Code D Annex A: see the text and notes 4-46 infra.

4 As to the identification officer see PARA 1014 ante.

5 Code D Annex A para 1.



6 Code D Annex A para 2. If the suspect has an unusual physical feature (eg a facial scar, tattoo or distinctive hairstyle or hair colour) which does not appear on the images of the other persons that are available to be used, steps may be taken to conceal the location of the feature on the images of the suspect and the other persons (Code D Annex A para 2A(a)) or to replicate that feature on the images of the other persons (Code D Annex A para 2A(b)). For these purposes, the feature may be concealed or replicated electronically or by any other method which it is practicable to use to ensure that the images of the suspect and the other persons resemble each other: Code D Annex A para 2A. The identification officer has discretion to choose whether to conceal or replicate the feature and the method to be used: Code D Annex A para 2A. If an unusual physical feature has been described by the witness the identification officer should, if practicable, have that feature replicated; if it has not been described, concealment may be more appropriate: Code D Annex A para 2A. A video identification procedure using unmasked images of persons bearing an insufficient resemblance to a suspect in age and appearance, used where a witness had been unable to make an identification from images which masked differences in appearance, was unlawful: *R v Marcus* [2004] EWCA Crim 3387, [2005] Crim LR 384. If the identification officer decides that a feature should be concealed or replicated, the reason for the decision and whether the feature was concealed or replicated in the images shown to any witness should be recorded: Code D Annex A para 2B. If the witness requests to view an image where an unusual physical feature has been concealed or replicated without the feature being concealed or replicated he may be allowed to do so: Code D Annex A para 2C.

7 Code D Annex A para 2.

8 Code D Annex A para 3.

9 Code D Annex A para 3(a).

10 Code D Annex A para 3(b).

11 Code D Annex A para 4.

12 Code D Annex A para 5.

13 Code D Annex A para 6.

14 Code D Annex A para 6. If a prison inmate is required for identification, and there are no security problems about the person leaving the establishment, he may be asked to participate in a video identification: Code D Annex B para 4.

15 For the meaning of 'solicitor' see PARA 953 note 4 ante (definition applied by Code D para 2.6).

16 For the meaning of 'appropriate adult' see PARA 940 note 9 ante; definition applied by Code D para 2.6.

17 Code D Annex A para 7.

18 Code D Annex A para 7.

19 Code D Annex A para 7.

20 Ie in accordance with Code D Annex A para 7 (see the text and notes 15-19 supra).

21 Code D Annex A para 8. When a witness attending a video identification has previously been shown photographs or computerised or artist's composite or similar likeness the suspect and his solicitor must be informed of this fact before the identification procedure takes place: see Code D Annex E para 9; and PARA 1013 ante.

22 Ie as in Code D para 3.28 (see PARA 1020 post).

23 Code D Annex A para 8.

24 Code D Annex A para 9.

25 Code D Annex A para 9.

26 Code D Annex A para 9.

27 Code D Annex A para 9.

28 Code D Annex A para 9.

- 29 As to the meaning of 'photograph' see PARA 1011 note 5 ante.
- 30 Code D Annex A para 10.
- 31 Code D Annex A para 10.
- 32 Code D Annex A para 11.
- 33 Code D Annex A para 11.
- 34 Code D Annex A para 11.
- 35 Code D Annex A para 11.
- 36 Code D Annex A para 11.
- 37 Code D Annex A para 12.
- 38 Code D Annex A para 12. See Code D Annex A para 17; and the text and note 46 infra.
- 39 Code D Annex A para 13.
- 40 Code D Annex A para 13. 'Other means' refers to other means in accordance with the code: Code D Annex A para 13.
- 41 Code D Annex A para 13.
- 42 Code D Annex A para 14.
- 43 Code D Annex A para 15.
- 44 Code D Annex A para 15. As appropriate Code D para 3.30 or 3.31 (see PARA 1041 post) applies to the destruction or retention of relevant sets of prints: Code D Annex A para 16.
- 45 Code D Annex A para 17.
- 46 Code D Annex A para 18. This record must include anything said by the witness about any identifications or the conduct of the procedure and any reasons why it was not practicable to comply with any of the provisions governing the conduct of video identifications: Code D Annex A para 18.

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### **1017. Identification parade.**

An 'identification parade' is when the witness sees the suspect in a line of others who resemble the suspect<sup>1</sup>. A suspect must be given a reasonable opportunity to have a solicitor<sup>2</sup> or friend present, and must be asked to indicate on a second copy of the notice to suspect<sup>3</sup> whether or not he wishes to do so<sup>4</sup>. An identification parade may take place either in a normal room or in one equipped with a screen permitting witnesses to see members of the identification parade without being seen<sup>5</sup>. The procedures for the composition and conduct of the identification parade are the same in both cases<sup>6</sup> (except that an identification parade involving a screen may take place only when the suspect's solicitor, friend or appropriate adult<sup>7</sup> is present or the identification parade is recorded on video<sup>8</sup>).

Before the identification parade takes place, the suspect or his solicitor must be provided with details of the first description of the suspect by any witnesses who are attending the parade<sup>9</sup>. When a broadcast or publication is made<sup>10</sup>, the suspect or his solicitor should also be allowed to view any material released to the media by the police for the purpose of recognising or tracing the suspect, provided it is practicable to do so and would not unreasonably delay the investigation<sup>11</sup>.

If a prison inmate is required for identification, and there are no security problems about the person leaving the establishment, he may be asked to participate in an identification parade<sup>12</sup>. An identification parade may be held in a prison department establishment but must be conducted, as far as practicable, under normal identification parade rules<sup>13</sup>. Members of the public may make up the identification parade unless there are serious security, or control, objections to their admission to the establishment, in which case, or if a group identification<sup>14</sup> or video identification<sup>15</sup> is arranged within the establishment, other inmates may participate<sup>16</sup>. If an inmate is the suspect, he is not required to wear prison clothing for the identification parade unless the other persons taking part are other inmates in similar clothing, or are members of the public who are prepared to wear prison clothing for the occasion<sup>17</sup>.

Immediately before the identification parade, the suspect must be reminded of the procedures governing its conduct and cautioned<sup>18</sup>. All unauthorised persons must be excluded from the place where the parade is held<sup>19</sup>. Once the parade has been formed, everything afterwards, in respect of it, must take place in the presence and hearing of the suspect and any interpreter, solicitor, friend or appropriate adult who is present (unless the parade involves a screen, in which case everything said to, or by, any witness at the place where the parade is held must be said in the hearing and presence of the suspect's solicitor, friend or appropriate adult or be recorded on video)<sup>20</sup>.

The identification parade must consist of at least eight persons (in addition to the suspect) who, so far as possible, resemble the suspect in age, height, general appearance and position in life<sup>21</sup>. Only one suspect may be included in a parade unless there are two suspects of roughly similar appearance, in which case they may be paraded together with at least 12 other persons<sup>22</sup>. In no circumstances may more than two suspects be included in one parade; and where there are separate parades they must be made up of different persons<sup>23</sup>. If the suspect has an unusual physical feature, for example a facial scar, tattoo or distinctive hairstyle or hair colour which cannot be replicated on other members of the parade, steps may be taken to conceal the location of that feature on the suspect and the other members of the parade (for

example, by use of a plaster or a hat, so that all members of the parade resemble each other in general appearance) if the suspect and his solicitor, or appropriate adult, agree<sup>24</sup>.

When all members of a similar group are possible suspects, separate identification parades must be held for each unless there are two suspects of similar appearance when they may appear on the same parade with at least 12 other members of the group who are not suspects<sup>25</sup>. When police officers in uniform form a parade any numerals or other identifying badges must be concealed<sup>26</sup>.

When the suspect is brought to the place where the parade is to be held, he must be asked if he has any objection to the arrangements for the parade or to any of the other participants in it and to state the reasons for the objection; and the suspect may obtain advice from his solicitor, or friend, if present, before the parade proceeds<sup>27</sup>. If the suspect has a reasonable objection to the arrangements or any of the participants, steps must, if practicable, be taken to remove the grounds for objection<sup>28</sup>. When it is not practicable to do so, the suspect must be told why his objections cannot be met, and the objection, the reason given for it and why it cannot be met must be recorded on forms provided for the purpose<sup>29</sup>.

The suspect may select his own position in the line, but may not otherwise interfere with the order of the people forming the line<sup>30</sup>. When there is more than one witness the suspect must be told, after each witness has left the room, that he can, if he wishes, change position in the line<sup>31</sup>. Each position in the line must be clearly numbered, whether by means of a number laid on the floor in front of each parade member or by other means<sup>32</sup>.

Appropriate arrangements must be made to make sure, before witnesses attend the identification parade, that they are not able to:

- 1463 (1) communicate with each other about the case or overhear a witness who has already seen the parade<sup>33</sup>;
- 1464 (2) see any member of the parade<sup>34</sup>;
- 1465 (3) see, or be reminded of, any photograph<sup>35</sup> or description of the suspect or be given any other indication as to the suspect's identity<sup>36</sup>; or
- 1466 (4) see the suspect before or after the parade<sup>37</sup>.

The person conducting a witness to an identification parade must not discuss with him the composition of the parade and, in particular, must not disclose whether a previous witness has made any identification<sup>38</sup>.

Witnesses must be brought in one at a time<sup>39</sup>. Immediately before the witness inspects the parade, he must be told that the person he saw on a specified earlier occasion may, or may not, be present and that if he cannot make a positive identification he should say so<sup>40</sup>. The witness must also be told that he should not make any decision about whether the person he saw is on the parade until he has looked at each member at least twice<sup>41</sup>.

When the officer or police staff<sup>42</sup> conducting the identification procedure is satisfied that the witness has properly looked at each member of the parade, he must ask the witness whether the person he saw on a specified earlier occasion is on the parade and, if so, to indicate the number of the person concerned<sup>43</sup>. If the witness wishes to hear any parade member speak, adopt any specified posture or move, he must first be asked whether he can identify any person or persons on the parade on the basis of appearance only<sup>44</sup>. When the request is to hear members of the parade speak, the witness must be reminded that the participants in the parade have been chosen on the basis of physical appearance only<sup>45</sup>. Members of the parade may then be asked to comply with the witness' request to hear them speak, see them move or adopt any specified posture<sup>46</sup>. If the witness requests that the person whom he has indicated remove anything used to conceal the location of an unusual physical feature<sup>47</sup>, that person may be asked to remove it<sup>48</sup>.

If the witness makes an identification after the identification parade has ended, the suspect and, if present, his solicitor, interpreter or friend must be informed; and consideration should be given to allowing the witness a second opportunity to identify the suspect<sup>49</sup>.

After the procedure, each witness must be asked whether he has seen any broadcast or published films or photographs, or any description of suspects relating to the offence and his reply must be recorded<sup>50</sup>.

When the last witness has left, the suspect must be asked whether he wishes to make any comments on the conduct of the parade<sup>51</sup>.

A video recording must normally be taken of the identification parade; and if that is impracticable, a colour photograph must be taken<sup>52</sup>. A copy of the video recording or photograph must be supplied, on request, to the suspect or his solicitor within a reasonable time<sup>53</sup>. If any person is asked to leave a parade because he was interfering with its conduct, the circumstances must be recorded<sup>54</sup>. A record must be made of all those present at a parade whose names are known to the police<sup>55</sup>. If prison inmates make up a parade, the circumstances must be recorded<sup>56</sup>. A record of the conduct of the parade must be made on forms provided for the purpose<sup>57</sup>.

1 Code D: Code of Practice for the Identification of Persons by Police Officers para 3.7. A parade must be carried out in accordance with Code D Annex B: Code D para 3.8.

2 For the meaning of 'solicitor' see PARA 953 note 4 ante; definition applied by Code D para 2.6.

3 As to the notice to suspect see PARA 1015 ante.

4 Code D para 3.8; Code D Annex B para 1.

5 Code D Annex B para 2.

6 Is subject to Code D Annex B para 8 (see the text and note 20 infra).

7 For the meaning of 'appropriate adult' see PARA 940 note 9 ante; definition applied by Code D para 2.6.

8 Code D Annex B para 2.

9 Code D Annex B para 3. When a witness attending an identification parade has previously been shown photographs or computerised or artist's composite or similar likeness the suspect and his solicitor must be informed of this fact before the identification procedure takes place: see Code D Annex E para 9; and PARA 1013 ante.

10 Is as in Code D para 3.28 (see PARA 1020 post).

11 Code D Annex B para 3.

12 Code D Annex B para 4.

13 Code D Annex B para 5.

14 As to group identifications see PARA 1018 post.

15 As to video identifications see PARA 1016 ante.

16 Code D Annex B para 5.

17 Code D Annex B para 5.

18 Code D Annex B para 6. The caution must be in the terms of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 10.5 or 10.6 (see PARA 959 ante), as appropriate: Code D Annex B para 6.

19 Code D Annex B para 7.

20 Code D Annex B para 8. See *R v Marrin* [2002] EWCA Crim 251, (2002) Times, 5 March. Cf *R v Hutton* [1999] Crim LR 74, CA.

21 Code D Annex B para 9.

22 Code D Annex B para 9.

23 Code D Annex B para 9.

24 Code D Annex B para 10.

25 Code D Annex B para 11.

26 Code D Annex B para 11.

27 Code D Annex B para 12.

28 Code D Annex B para 12.

29 Code D Annex B para 12.

30 Code D Annex B para 13.

31 Code D Annex B para 13.

32 Code D Annex B para 13.

33 Code D Annex B para 14(i).

34 Code D Annex B para 14(ii).

35 As to the meaning of 'photograph' see PARA 1011 note 5 ante.

36 Code D Annex B para 14(iii).

37 Code D Annex B para 14(iv).

38 Code D Annex B para 15.

39 Code D Annex B para 16.

40 Code D Annex B para 16.

41 Code D Annex B para 16.

42 See Code D para 3.11; and PARA 1014 ante.

43 Code D Annex B para 17. See *R v Marrin* [2002] EWCA Crim 251, (2002) Times, 5 March.

44 Code D Annex B para 18.

45 Code D Annex B para 18.

46 Code D Annex B para 18.

47 Ie used for the purpose of Code D Annex B para 10 (see the text and note 24 supra).

48 Code D Annex B para 19.

49 Code D Annex B para 20.

50 Code D Annex B para 21.

51 Code D Annex B para 22.

52 Code D Annex B para 23. 'Taking a photograph' includes the use of any process to produce a single, still or moving, visual image; and 'photographing a person' is to be construed accordingly: Code D para 2.16.

53 Code D Annex B para 23. As appropriate, Code D para 3.30 or 3.31 (see PARA 1041 post) applies to any such photograph or video taken: Code D Annex B para 24.

54 Code D Annex B para 25.

55 Code D Annex B para 26.

56 Code D Annex B para 27.

57 Code D Annex B para 28. This record must include anything said by the witness about any identifications or the conduct of the procedure, and any reasons why it was not practicable to comply with any of the relevant provisions: Code D Annex B para 28.

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### **1018. Group identification.**

A 'group identification' is when the witness sees the suspect in an informal group of persons<sup>1</sup>. Group identifications must be carried out in accordance with a specified procedure<sup>2</sup>, the purpose of which is to make sure, as far as possible, that group identifications follow the principles and procedures for identification parades<sup>3</sup> so that the conditions are fair to the suspect in the way they test the witness' ability to make an identification<sup>4</sup>.

Group identifications may take place either with the suspect's consent and co-operation or covertly without his consent<sup>5</sup>. The location of the group identification is a matter for the identification officer<sup>6</sup>, although the officer may take into account any representations made by the suspect, appropriate adult<sup>7</sup>, his solicitor<sup>8</sup> or friend<sup>9</sup>. The place where the group identification is held should be one where other persons are either passing by or waiting around informally, in groups such that the suspect is able to join them and be capable of being seen by the witness at the same time as others in the group<sup>10</sup>. If the group identification is to be held covertly, the choice of locations will be limited by the places where the suspect can be found and the number of other persons present at that time<sup>11</sup>.

Although the number, age, sex, race and general description and style of clothing of other persons present at the location cannot be controlled by the identification officer, in selecting the location the officer must consider the general appearance and numbers of persons likely to be present<sup>12</sup>. In particular the officer must reasonably expect that over the period the witness observes the group, he will be able to see, from time to time, a number of others whose appearance is broadly similar to that of the suspect<sup>13</sup>. A group identification need not be held if the identification officer believes, because of the unusual appearance of the suspect, that none of the locations it would be practicable to use satisfy such requirements<sup>14</sup> necessary to make the identification fair<sup>15</sup>.

Immediately after a group identification procedure has taken place (with or without the suspect's consent), a colour photograph<sup>16</sup> or video should be taken<sup>17</sup> of the general scene, if practicable, to give a general impression of the scene and the number of persons present, or, if it is practicable, the group identification may be video recorded<sup>18</sup>. If it is not practicable so to take the photograph or video, a photograph or film<sup>19</sup> of the scene should be taken later at a time determined by the identification officer if he considers it practicable to do so<sup>20</sup>.

Before the group identification takes place, the suspect or his solicitor must be provided with details of the first description of the suspect by any witnesses who are to attend the identification<sup>21</sup>. When a broadcast or publication is made<sup>22</sup>, the suspect or his solicitor should also be allowed to view any material released by the police to the media for the purpose of recognising or tracing the suspect, provided that it is practicable and would not unreasonably delay the investigation<sup>23</sup>.

After the procedure, each witness must be asked whether he has seen any broadcast or published films or photographs or any descriptions of suspects relating to the offence and his reply recorded<sup>24</sup>.

Where the identification takes place with the consent of the suspect:



- 1467 (1) the suspect must be given a reasonable opportunity to have a solicitor or friend present, and must be asked to indicate on a second copy of the notice to suspect<sup>25</sup> whether or not he wishes to do so<sup>26</sup>;
- 1468 (2) the witness, the person carrying out the procedure and the suspect's solicitor, appropriate adult or friend or any interpreter for the witness, may be concealed from the sight of the individuals in the group he is observing, if the person carrying out the procedure considers this assists the conduct of the identification<sup>27</sup>;
- 1469 (3) the person conducting a witness to a group identification must not discuss with him the forthcoming group identification and, in particular, must not disclose whether a previous witness has made any identification<sup>28</sup>;
- 1470 (4) anything said to, or by, the witness during the procedure about the identification should be said in the presence and hearing of those present at the procedure<sup>29</sup>;
- 1471 (5) appropriate arrangements must be made to make sure that, before witnesses attend the group identification, they are not able to communicate with each other about the case or overhear a witness who has already been given an opportunity to see the suspect in the group<sup>30</sup>, or see the suspect<sup>31</sup>, or see, or be reminded of, any photographs or description of the suspect or be given any other indication as to the suspect's identity<sup>32</sup>; and
- 1472 (6) witnesses must be brought one at a time to the place where they are to observe the group<sup>33</sup>.

When the group in which the suspect is to appear is moving (for example, leaving an escalator), then:

- 1473 (a) if two or more suspects consent to a group identification, each should be the subject of separate identification procedures, which may be conducted consecutively on the same occasion<sup>34</sup>;
- 1474 (b) the person conducting the procedure must tell the witness to observe the group and ask him to point out any person he thinks he saw on the specified earlier occasion<sup>35</sup>;
- 1475 (c) once the witness has been so informed, the suspect should be allowed to take whatever position in the group he wishes<sup>36</sup>;
- 1476 (d) when the witness so points out a person he must, if practicable, be asked to take a closer look at the person to confirm the identification; if this is not practicable, or he cannot confirm his identification, he must be asked how sure he is that the person he has indicated is the relevant person<sup>37</sup>; and
- 1477 (e) the witness should continue to observe the group for the period which the person conducting the procedure reasonably believes is necessary in the circumstances for him to be able to make comparisons between the suspect and other individuals of broadly similar<sup>38</sup> appearance to the suspect<sup>39</sup>.

When the group in which the suspect is to appear is stationary (for example, persons waiting in a queue), then:

- 1478 (i) if two or more suspects consent to a group identification, each should be subject to separate identification procedures unless they are of broadly similar appearance when they may appear in the same group; and when separate group identifications are held, the groups must be made up of different persons<sup>40</sup>;
- 1479 (ii) the suspect may take whatever position in the group he wishes; and if there is more than one witness, the suspect must be told, out of the sight and hearing of any witness, that he can, if he wishes, change position in the group<sup>41</sup>;

- 1480 (iii) the witness must be asked to pass along, or amongst, the group and to look at each person in the group at least twice, taking as much care and time as possible according to the circumstances, before making an identification, and once the witness has done this he must be asked whether the person he saw on the specified earlier occasion is in the group and to indicate any such person by whatever means the person conducting the procedure considers appropriate in the circumstances<sup>42</sup>;
- 1481 (iv) when the witness makes an indication, arrangements should be made, if practicable, for the witness to take a closer look at the person to confirm the identification; if this is not practicable, or the witness is unable to confirm the identification, he must be asked how sure he is that the person he has indicated is the relevant person<sup>43</sup>.

In any group identification, if the suspect unreasonably delays joining the group, or having joined the group, deliberately conceals himself from the sight of the witness, this may be treated as a refusal to co-operate in a group identification<sup>44</sup>.

If the witness identifies a person other than the suspect, that person should be informed what has happened and asked if he is prepared to give his name and address, but there is no obligation upon any member of the public to give these details<sup>45</sup>. There is no duty to record any details of any other member of the public present in the group or at the place where the procedure is conducted<sup>46</sup>. When the group identification has been completed, the suspect must be asked whether he wishes to make any comments on the conduct of the procedure<sup>47</sup>; and, if the suspect has not been previously informed, he must be told of any identifications made by the witnesses<sup>48</sup>.

Group identifications held covertly without the suspect's consent should, as far as practicable, follow the rules for conduct of group identification by consent<sup>49</sup>. A suspect has no right to have a solicitor, appropriate adult or friend present as the identification will take place without the knowledge of the suspect<sup>50</sup>. Any number of suspects may be identified at the same time<sup>51</sup>.

Group identifications should take place only in police stations for reasons of safety, security or because it is not practicable to hold them elsewhere<sup>52</sup>. A group identification may take place either in a room equipped with a screen permitting witnesses to see members of the group without being seen, or anywhere else in the police station that the identification officer considers appropriate<sup>53</sup>. Any of the additional safeguards applicable to identification parades should be followed at a group identification in a police station if the identification officer considers it is practicable to do so in the circumstances<sup>54</sup>.

A group identification involving a prison inmate may be arranged only in the prison or at a police station<sup>55</sup>. When a group identification takes place involving a prison inmate, whether in a prison or in a police station, the arrangements should follow those in respect of group identifications in a police station<sup>56</sup>. If a group identification takes place within a prison, other inmates may participate<sup>57</sup>. If an inmate is the suspect, he does not have to wear prison clothing for the group identification unless the other participants are wearing the same clothing<sup>58</sup>.

When a photograph or video is taken<sup>59</sup>, a copy<sup>60</sup> of the photograph or video must be supplied on request to the suspect or his solicitor within a reasonable time<sup>61</sup>. A record of the conduct of the group identification must be made on forms provided for the purpose<sup>62</sup>.

1 Code D: Code of Practice for the Identification of Persons by Police Officers para 3.9. An identification carried out in accordance with these provisions remains a group identification even though, at the time of being seen by the witness, the suspect was on his own rather than in a group: Code D Annex C para 10.

2 Code D para 3.10. The procedure is set out in Code D Annex C (see the text and notes 4-62 *infra*).

3 As to identification parades see PARA 1017 *ante*.

- 4 Code D Annex C para 1.
- 5 Code D Annex C para 2.
- 6 As to the identification officer see PARA 1014 ante.
- 7 For the meaning of 'appropriate adult' see PARA 940 note 9 ante; definition applied by Code D para 2.6.
- 8 For the meaning of 'solicitor' see PARA 953 note 4 ante; definition applied by Code D para 2.6.
- 9 Code D Annex C para 3.
- 10 Code D Annex C para 4. Examples of such situations are persons leaving an escalator, pedestrians walking through a shopping centre, passengers on railway or bus stations, waiting in queues or groups or where persons are standing or sitting in groups in other public places: Code D Annex C para 4.
- 11 Code D Annex C para 5. In these cases, suitable locations might be along regular routes travelled by the suspect, including buses or trains or public places frequented by him: Code D Annex C para 5.
- 12 Code D Annex C para 6.
- 13 Code D Annex C para 6.
- 14 Ie the requirements of Code D Annex C para 6 (see the text and notes 12-13 supra).
- 15 Code D Annex C para 7.
- 16 As to the meaning of 'photograph' see PARA 1011 note 5 ante.
- 17 As to 'taking' a photograph and 'photographing a person' see PARA 1017 note 52 ante.
- 18 Code D Annex C para 8. As appropriate, Code D para 3.30 or 3.31 (see PARA 1041 post) applies when a photograph or film taken in accordance with Code D Annex C para 8 or Code D para 9 includes the suspect: Code D Annex C para 43.
- 19 As to the meaning of 'film' see PARA 1011 note 5 ante.
- 20 Code D Annex C para 9. See note 18 supra.
- 21 Code D Annex C para 11. When a witness attending a group identification has previously been shown photographs or computerised or artist's composite or similar likeness, the suspect and his solicitor must be informed of this fact before the identification procedure takes place: see Code D Annex E para 9; and PARA 1013 ante.
- 22 See Code D para 3.28; and PARA 1020 post.
- 23 Code D Annex C para 11.
- 24 Code D Annex C para 12.
- 25 As to the notice to suspect see PARA 1015 ante.
- 26 Code D Annex C para 13.
- 27 Code D Annex C para 14.
- 28 Code D Annex C para 15.
- 29 Code D Annex C para 16.
- 30 Code D Annex C para 17(i).
- 31 Code D Annex C para 17(ii).
- 32 Code D Annex C para 17(iii).

33 Code D Annex C para 18. Immediately before the witness is asked to look at the group, the person conducting the procedure must tell him that the person he saw may, or may not, be in the group and that if he cannot make a positive identification he should say so: Code D Annex C para 18. The witness must be asked to observe the group in which the suspect is to appear; and the way in which the witness should do this will depend on whether the group is moving or stationary: Code D Annex C para 18.

34 Code D Annex C paras 19, 20.

35 Code D Annex C para 21.

36 Code D Annex C para 22.

37 Code D Annex C para 23.

38 Ie as in Code D Annex C para 6 (see the text and notes 12-13 supra).

39 Code D Annex C para 24.

40 Code D Annex C paras 25, 26.

41 Code D Annex C para 27.

42 Code D Annex C para 28. If this is not practicable, the witness must be asked to point out any person whom he thinks he saw on the earlier occasion: Code D Annex C para 28.

43 Code D Annex C para 29.

44 Code D Annex C para 30.

45 Code D Annex C para 31.

46 Code D Annex C para 31.

47 Code D Annex C para 32.

48 Code D Annex C para 33.

49 Code D Annex C para 34. As to the rules for conduct of group identification by consent see Code D Annex C paras 13-18; and the text to notes 25-33 supra.

50 Code D Annex C para 35.

51 Code D Annex C para 36.

52 Code D Annex C para 37.

53 Code D Annex C para 38.

54 Code D Annex C para 39.

55 Code D Annex C para 40.

56 Code D Annex C para 41. As to the arrangements in respect of group identifications in a police station see Code D Annex C paras 37-39; and the text to notes 52-54 supra.

57 Code D Annex C para 41.

58 Code D Annex C para 41.

59 Ie as in Code D Annex C paras 8, 9 (see the text and notes 16-20 supra).

60 As to the meaning of 'copy' see PARA 1011 note 5 ante.

61 Code D Annex C para 42.

62 Code D para 3.25; Code D Annex C para 44. This record must include anything said by the witness or suspect about any identifications or the conduct of the procedure and any reasons it was not practicable to comply with any of the provisions governing the conduct of group identifications: Code D Annex C para 44.



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### **1019. Cases when the suspect is known but not available.**

When a known suspect is not available or has ceased to be available<sup>1</sup>, the identification officer may make arrangements for a video identification<sup>2</sup>. If necessary, the identification officer<sup>3</sup> may follow the video identification procedures<sup>4</sup> but using still images<sup>5</sup>. Any suitable moving or still images may be used and these may be obtained covertly if necessary<sup>6</sup>. Alternatively, the identification officer may make arrangements for a group identification<sup>7</sup>. These provisions may also be applied to juveniles where the consent of their parent or guardian is either refused or reasonable efforts to obtain that consent have failed<sup>8</sup>. Any covert activity should be strictly limited to that necessary to test the ability of the witness to identify the suspect<sup>9</sup>.

The identification officer may arrange for the suspect to be confronted by the witness if none of the options of video identification, identification parade, group identification or still images<sup>10</sup> is practicable<sup>11</sup>. A 'confrontation' is when the suspect is directly confronted by the witness; it does not require the suspect's consent<sup>12</sup>. Before a confrontation takes place, the witness must be told that the person he saw may, or may not, be the person he is to confront and that if he is not that person, then the witness should say so<sup>13</sup>, and the suspect or his solicitor<sup>14</sup> must be provided with details of the first description of the suspect given by any witness who is to attend<sup>15</sup>.

When a broadcast or publication is made<sup>16</sup>, the suspect or his solicitor should also be allowed to view any material released to the media for the purposes of recognising or tracing the suspect, provided that it is practicable to do so and would not unreasonably delay the investigation<sup>17</sup>.

Force may not be used to make the suspect's face visible to the witness<sup>18</sup>. Confrontation must take place in the presence of the suspect's solicitor, interpreter or friend unless this would cause unreasonable delay<sup>19</sup>. The suspect must be confronted independently by each witness, who must be asked 'Is this the person?'<sup>20</sup>. If the witness identifies the person but is unable to confirm the identification, he must be asked how sure he is that the person is the one he saw on the earlier occasion<sup>21</sup>.

The confrontation should normally take place in the police station, either in a normal room or in one equipped with a screen permitting a witness to see the suspect without being seen<sup>22</sup>. In both cases, the procedures are the same except that a room equipped with a screen may be used only when the suspect's solicitor, friend or appropriate adult<sup>23</sup> is present or the confrontation is recorded on video<sup>24</sup>.

After the procedure, each witness must be asked whether he has seen any broadcast or published films or photographs<sup>25</sup> or any descriptions of suspects relating to the offence and his reply must be recorded<sup>26</sup>.

A record must be made of the confrontation on forms provided for the purpose<sup>27</sup>.

1 See Code D: Code of Practice for the Identification of Persons by Police Officers para 3.4; and PARA 1014 ante. These provisions (ie Code D para 3.21: see the text and notes 2-8 infra) would apply when a known suspect deliberately makes himself 'unavailable' in order to delay or frustrate arrangements for obtaining identification evidence: Code D Guidance note 3D. They also apply when a suspect refuses or fails to take part in a video identification (see PARA 1016 ante), an identification parade (see PARA 1017 ante) or a group identification (see PARA 1018 ante), or refuses or fails to take part in the only practicable options from that list: Code D Guidance note 3D. The process enables any suitable images of the suspect, moving or still, which are

available or can be obtained (eg images from custody and other closed circuit television systems and from visually recorded interview records (see Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects Guidance note 2D, which provides that the recording of an interview may be used for an identification purposes)): Code D Guidance note 3D. As to the visual recording of interviews see PARA 986 et seq ante.

2 Code D para 3.21.

3 As to the identification officer see PARA 1014 ante.

4 See PARA 1016 ante.

5 Code D para 3.21.

6 Code D para 3.21.

7 Code D para 3.21.

8 Code D para 3.21. See Code D para 2.12; and PARA 1010 ante.

9 Code D para 3.22.

10 Ie the options referred to in Code D paras 3.5-3.10 (see PARAS 1016-1018 ante) or Code D para 3.21 (see the text and notes 1-8 supra).

11 Code D para 3.23.

12 Code D para 3.23. Confrontations must be carried out in accordance with Code D Annex D (see the text and notes 13-26 infra); Code D para 3.23.

13 Code D Annex D para 1.

14 For the meaning of 'solicitor' see PARA 953 note 4 ante; definition applied by Code D para 2.6.

15 Code D Annex D para 2. Requirements for information to be given to, or sought from, a suspect or for the suspect to be given an opportunity to view images before they are shown to a witness, do not apply if the suspect's lack of co-operation prevents the necessary action: Code D para 3.24.

16 Ie as in Code D para 3.28 (see PARA 1020 post).

17 Code D Annex D para 2.

18 Code D Annex D para 3. See *R v Jones (Derek)*, *R v Nelson (Gary)* [1999] 18 LS Gaz R 33, CA.

19 Code D Annex D para 4.

20 Code D Annex D para 5.

21 Code D Annex D para 5.

22 Code D Annex D para 6.

23 For the meaning of 'appropriate adult' see PARA 940 note 9 ante; definition applied by Code D para 2.6.

24 Code D Annex D para 6.

25 As to the meanings of 'films' and 'photographs' see PARA 1011 note 5 ante.

26 Code D Annex D para 7.

27 Code D para 3.25.

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### **1020. Showing films and photographs of incidents and information released to the media.**

Nothing in Code D: Code of Practice for the Identification of Suspects by Police Officers inhibits showing films or photographs<sup>1</sup> to the public through the national or local media, or to police officers for the purposes of recognition and tracing suspects, but, when such material is shown to potential witnesses, including police officers<sup>2</sup>, to obtain identification evidence, it must be shown on an individual basis to avoid any possibility of collusion, and, as far as possible, the showing must follow the principles for video identification<sup>3</sup> if the suspect is known, or identification by photographs<sup>4</sup> if the suspect is not known<sup>5</sup>.

When a broadcast or publication is so made, a copy of the relevant material released to the media for the purposes of recognising or tracing the suspect must be kept<sup>6</sup>. The suspect or his solicitor<sup>7</sup> must be allowed to view such material before any procedure<sup>8</sup> involving video identification<sup>9</sup>, an identification parade<sup>10</sup>, a group identification<sup>11</sup> or a confrontation<sup>12</sup> is carried out, provided it is practicable and would not unreasonably delay the investigation<sup>13</sup>.

Each witness involved in the procedure must be asked, after he has taken part, whether he has seen any broadcast or published films or photographs relating to the offence or any description of the suspect and his replies must be recorded<sup>14</sup>.

1 As to the meanings of 'films' and 'photographs' see PARA 1011 note 5 ante.

2 Except for the provisions of Code D: Code of Practice for the Identification of Persons by Police Officers Annex E para 1 (see PARA 1013 ante), a police officer who is a witness for the purposes of Code D para 3 is subject to the same principles and procedures as a civilian witness: Code D Guidance note 3A.

3 As to video identifications see PARA 1016 ante.

4 See PARA 1013 ante.

5 Code D para 3.28.

6 Code D para 3.29.

7 For the meaning of 'solicitor' see PARA 953 note 4 ante; definition applied by Code D para 2.6.

8 I.e. any procedures under Code D paras 3.5-3.10 (see PARAS 1016-1018 ante) or Code D para 3.21 (see PARA 1019 ante).

9 As to video identifications see PARA 1016 ante.

10 As to identification parades see PARA 1017 ante.

11 As to group identifications see PARA 1018 ante.

12 As to confrontations see PARA 1019 ante.

13 Code D para 3.29.



14 Code D para 3.29. Code D para 3.29 does not affect any separate requirement under the Criminal Procedure and Investigations Act 1996 to retain material in connection with criminal investigations (see PARA 1385 post): Code D para 3.29.

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### ***C. FINGERPRINTS AND FOOTWEAR IMPRESSIONS***

#### **1021. Identification by fingerprints.**

Subject to specified exceptions<sup>1</sup> no person's fingerprints<sup>2</sup> may be taken without the appropriate consent<sup>3</sup>. Consent to the taking of a person's fingerprints must be in writing if it is given at a time when he is at a police station<sup>4</sup>.

The fingerprints of a person detained at a police station<sup>5</sup> may be taken without the appropriate consent<sup>6</sup> if he is detained in consequence of his arrest for a recordable offence<sup>7</sup>, or if he has been charged with a recordable offence or informed that he will be reported for such an offence<sup>8</sup>, and he has not had his fingerprints taken in the course of the investigation of the offence by the police<sup>9</sup>. The fingerprints of a person who has answered to bail at a court or police station may be taken without the appropriate consent at the court or station if the court<sup>10</sup>, or an officer of at least the rank of inspector<sup>11</sup>, authorises them to be taken<sup>12</sup>. Any person's fingerprints may be taken without the appropriate consent if he has been convicted of a recordable offence<sup>13</sup>, he has been given a caution<sup>14</sup> in respect of a recordable offence which, at the time of the caution, he has admitted<sup>15</sup>, or he has been warned or reprimanded for a recordable offence<sup>16</sup>.

If a person has been convicted of, or given a caution, reprimand or warning in respect of<sup>17</sup>, a recordable offence<sup>18</sup>, has not at any time been in police detention for the offence<sup>19</sup> and has not had his fingerprints taken<sup>20</sup> either in the course of the investigation of the offence by the police<sup>21</sup> or since his conviction<sup>22</sup>, any constable may at any time not later than one month after the date of the conviction require him to attend a police station in order that his fingerprints may be taken<sup>23</sup>. Any constable may arrest without warrant a person who has failed to comply with such<sup>24</sup> a requirement<sup>25</sup>.

As from a day to be appointed a constable may take a person's fingerprints without the appropriate consent if he reasonably suspects that the person is committing or attempting to commit an offence, or has committed or attempted to commit an offence<sup>26</sup>, and either the name of the person is unknown to, and cannot be readily ascertained by, the constable<sup>27</sup>, or the constable has reasonable grounds for doubting whether a name furnished by the person as his name is his real name<sup>28</sup>. Fingerprints so taken may be checked against other fingerprints to which the person seeking to check has access and which are held by or on behalf of any one or more relevant law enforcement authorities<sup>29</sup> or which are held in connection with or as a result of an investigation of an offence<sup>30</sup>.

In any of the above cases, other than that of a person answering to bail<sup>31</sup>, where a person's fingerprints are taken without the appropriate consent he must be told the reason before his fingerprints are taken<sup>32</sup> and the reason must be recorded as soon as is practicable after the fingerprints are taken<sup>33</sup>.

If a person's fingerprints are taken at a police station (or, as from a day to be appointed, where they are taken at a place other than a police station on the grounds that the person's identity is in question<sup>34</sup>), whether with or without the appropriate consent, then:

- 1482 (1) before the fingerprints are taken, an officer<sup>35</sup> must inform him that they may be the subject of a speculative search<sup>36</sup>;
- 1483 (2) the fact that the person has been informed of this possibility must be recorded as soon as possible after the fingerprints have been taken<sup>37</sup>; and
- 1484 (3) the person must be informed that if his fingerprints are required to be destroyed, he may witness their destruction<sup>38</sup>.

If a person is detained at a police station when his fingerprints are taken, the reason for taking them must be recorded on his custody record<sup>39</sup>.

As from a day to be appointed it is provided that where a person's fingerprints are taken electronically, they must be taken in such a manner, and using such devices, as the Secretary of State has approved for the purposes of electronic fingerprinting<sup>40</sup>.

The power to take the fingerprints of a person detained at a police station without the appropriate consent is exercisable by any constable<sup>41</sup>.

1 See the text and notes 5-30 *infra*.

2 'Fingerprints' in relation to any person, means a record (in any form and produced by any method) of the skin pattern and other physical characteristics or features of: (1) any of that person's fingers; or (2) either of his palms: Police and Criminal Evidence Act 1984 s 65(1) (definition substituted by the Criminal Justice and Police Act 2001 s 78(8)); Code D: Code of Practice for the Identification of Persons by Police Officers para 4.1.

3 Police and Criminal Evidence Act 1984 s 61(1); Code D para 4.2. For the meaning of 'appropriate consent' see PARA 1007 note 16 *ante*. Nothing in the Police and Criminal Evidence Act 1984 s 61 (as amended) (see the text and notes 4-41 *infra*) affects any power conferred by the Immigration Act 1971 s 4, Sch 2 para 18(2) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 156), the Immigration and Asylum Act 1999 s 141 (as amended) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 150) or regulations made under s 144 (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 150) (Police and Criminal Evidence Act 1984 s 61(9)(a) (amended by the Immigration and Asylum Act 1999 s 169(1), Sch 14 para 80(1), (4))) or applies to a person arrested or detained under the terrorism provisions (Police and Criminal Evidence Act 1984 s 61(9)(b) (substituted by the Terrorism Act 2000 s 125(1), Sch 15 para 5(1), (7))). For the meaning of 'the terrorism provisions' see PARA 952 note 4 *ante*. Nothing in the Police and Criminal Evidence Act 1984 s 61 (as amended) applies to a person arrested under an extradition arrest power: s 61(10) (added by the Extradition Act 2003 s 169(3)). 'Extradition arrest power' means any of: a Part 1 warrant (within the meaning given by the Extradition Act 2003 s 2) in respect of which a certificate under s 2 has been issued; s 5; a warrant issued under s 71; and a provisional warrant (ie a warrant issued under s 73(3): see s 216(12)): Police and Criminal Evidence Act 1984 s 65(1) (definition added by the Extradition Act 2003 s 169(1), (6)). As to the Extradition Act 2003 see EXTRADITION.

4 Police and Criminal Evidence Act 1984 s 61(2); Code D para 4.2. A person's fingerprints may be taken, under the Police and Criminal Evidence Act 1984 s 27 (see the text and notes 17-25 *infra*) and s 61, electronically: Code D para 4.5.

5 The words 'detained at' a police station in *ibid* s 61(3) include a person detained temporarily there after having been remanded in custody by a magistrates' court: *R v Seymour* [1995] 9 Archbold News 1, CA.

6 A record must as soon as possible be made of the reason for taking a person's fingerprints without consent: Code D para 4.8. Reasonable force may be used, if necessary, to take a person's fingerprints without his consent under the powers in the Police and Criminal Evidence Act 1984 s 61(3), (4), (4A), (6) (s 61(3), (4) as substituted; s 61(4A) as added) (see the text and notes 7-16 *infra*): s 117; Code D para 4.6. If force is used, a record must be made of the circumstances and those present: Code D para 4.8.

7 Police and Criminal Evidence Act 1984 s 61(3)(a) (s 61(3), (4) substituted, and s 61(5), (7) amended, by the Criminal Justice Act 2003 s 9(1), (2), (4), (5)); Code D para 4.3(a). For these purposes, 'recordable offence' means any offence to which regulations under the Police and Criminal Evidence Act 1984 s 27 (as amended) apply: s 118(1); Code D Guidance note 4A. As to recordable offences see PARA 1049 *post*.

8 Police and Criminal Evidence Act 1984 s 61(4)(a) (as substituted: see note 7 *supra*); Code D para 4.3(b).

9 Police and Criminal Evidence Act 1984 s 61(3)(b), (4)(b) (as substituted: see note 7 *supra*); Code D para 4.3(a), (b). Where such a person has already had his fingerprints taken in the course of the investigation of the offence by the police, that fact must be disregarded for these purposes if either the fingerprints taken on the

previous occasion do not constitute a complete set of his fingerprints (s 61(3A)(a) (s 61(3A), (4A), (4B) added, and s 61(6)(a)-(c) substituted, by the Criminal Justice and Police Act 2001 s 78(3), (4), (6); and the Police and Criminal Evidence Act 1984 s 61(3A) amended by the Criminal Justice Act 2003 s 9(1), (3))) or some or all of the fingerprints taken on the previous occasion are not of sufficient quality to allow satisfactory analysis, comparison or matching (whether in the case in question or generally) (Police and Criminal Evidence Act 1984 s 61(3A)(b) (as so added and amended)).

In relation to a sample, 'sufficient' and 'insufficient' means sufficient or insufficient (in point of quantity or quality) for the purpose of enabling information to be produced by the means of analysis used or to be used in relation to the sample: s 65(1) (definition added by the Criminal Justice and Public Order Act 1994 s 58(1), (4); and amended by the Criminal Justice and Police Act 2001 s 80(5)(d)). This is subject to the proviso that references in the Police and Criminal Evidence Act 1984 Pt V (ss 53-65) (as amended) to a sample's proving insufficient include references to where the sample has become unavailable or insufficient for the purpose of enabling information, or information of a particular description, to be obtained by means of analysis of the sample, as a consequence of either the loss, destruction or contamination of the whole or any part of the sample (s 65(2)(a) (s 65(2) added by the Criminal Justice and Police Act 2001 s 80(6)); Code D Guidance note 6B(a)), any damage to the whole or a part of the sample (Police and Criminal Evidence Act 1984 s 65(2)(b) (as so added); Code D Guidance note 6B(a)) or the use of the whole or a part of the sample for an analysis which produced no results or which produced results some or all of which must be regarded, in the circumstances, as unreliable (Police and Criminal Evidence Act 1984 s 65(2)(c) (as so added); Code D Guidance note 6B(a)). An unsuitable sample is one which, by its nature, is not suitable for a particular form of analysis: Code D Guidance note 6B(b).

10 Police and Criminal Evidence Act 1984 s 61(4A)(a) (as added: see note 9 supra); Code D para 4.3(c).

11 Police and Criminal Evidence Act 1984 s 61(4A)(b) (as added: see note 9 supra). See PARA 858 ante.

12 An officer may give such an authorisation orally or in writing but, if he gives it orally, he must confirm it in writing as soon as is practicable: *ibid* s 61(5) (as amended: see note 7 supra). A court or officer may give such an authorisation only if either the person who has answered to bail has answered to it for a person whose fingerprints were taken on a previous occasion and there are reasonable grounds for believing that he is not the same person (s 61(4B)(a) (as added: see note 9 supra); Code D para 4.3(c)(i)) or the person who has answered to bail claims to be a different person from a person whose fingerprints were taken on a previous occasion (Police and Criminal Evidence Act 1984 s 61(4B)(b) (as so added); Code D para 4.3(c)(ii)). Where the Police and Criminal Evidence Act 1984 s 61(4A) (as added) applies, before any fingerprints are taken, with or without consent, the person must be informed of the grounds on which the relevant authority has been given: Code D para 4.7(b).

13 Police and Criminal Evidence Act 1984 s 61(6)(a) (as substituted: see note 9 supra); Code D para 4.3(d)(i).

14 As to cautions see PARA 959 ante.

15 Police and Criminal Evidence Act 1984 s 61(6)(b) (as substituted: see note 9 supra); Code D para 4.3(d)(ii).

16 Police and Criminal Evidence Act 1984 s 61(6)(c) (as substituted: see note 9 supra); Code D para 4.3(d)(iii). As to reprimands and warnings see the Crime and Disorder Act 1998 s 65 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1235.

17 The Police and Criminal Evidence Act 1984 s 27(1), (1A) (as added) (see the text and notes 18-23 *infra*) apply where a person has been given a caution in respect of a recordable offence which, at the time of the caution, he has admitted (s 27(1B)(a) (s 27(1A), (1B) added by the Criminal Justice and Police Act 2001 s 78(1))) or where a person has been warned or reprimanded under the Crime and Disorder Act 1998 s 65 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1235) for a recordable offence (Police and Criminal Evidence Act 1984 s 27(1B)(b) (as so added)) as they apply where a person has been convicted of an offence; and references to a conviction are to be construed accordingly (s 27(1B)).

18 *Ibid* s 27(1)(a).

19 *Ibid* s 27(1)(b); Code D para 4.4(a)(i).

20 Where a person convicted of a recordable offence has already had his fingerprints taken as mentioned in the Police and Criminal Evidence Act 1984 s 27(1)(c), that fact (together with any time when he has been in police detention for the offence) must be disregarded for these purposes if either the fingerprints taken on the previous occasion do not constitute a complete set of his fingerprints (s 27(1A)(a) (as added: see note 17 supra); Code D para 4.4(a)(ii)) or some or all of the fingerprints taken on the previous occasion are not of sufficient quality to allow satisfactory analysis, comparison or matching (Police and Criminal Evidence Act 1984

s 27(1A)(b) (as so added); Code D para 4.4(a)(ii)). This provision also applies to a person cautioned, warned or reprimanded as specified in note 17 supra: Police and Criminal Evidence Act 1984 s 27(1B) (as so added).

21 Ibid s 27(1)(c)(i); Code D para 4.4(a)(i).

22 Police and Criminal Evidence Act 1984 s 27(1)(c)(ii).

23 Ibid s 27(1); Code D para 4.4(a). Such requirement so made must give the person a period of at least seven days within which he must so attend (Police and Criminal Evidence Act 1984 s 27(2)(a)) and may direct him so to attend at a specified time of day or between specified times of day (s 27(2)(b)). Every police officer holds the office of constable: see PARA 857 note 2 ante.

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## **1022. Impressions of footwear.**

Where a person is detained at a police station<sup>1</sup>, an impression of his footwear may be taken without the appropriate consent<sup>2</sup> only if:

- 1485 (1) he is detained in consequence of his arrest for a recordable offence<sup>3</sup>, or has been charged with a recordable offence, or informed that he will be reported for a recordable offence<sup>4</sup>; and
- 1486 (2) he has not had an impression taken of his footwear in the course of the investigation of the offence by the police<sup>5</sup>.

Subject to this, no impression of a person's footwear may be taken without the appropriate consent<sup>6</sup>. Consent to the taking of an impression of a person's footwear must be in writing if it is given at a time when he is at a police station<sup>7</sup>.

If an impression of a person's footwear is taken at a police station, whether with or without the appropriate consent:

- 1487 (a) before it is taken, an officer must inform him that it may be the subject of a speculative search<sup>8</sup>; and
- 1488 (b) the fact that the person has been informed of this possibility must be recorded as soon as is practicable after the impression has been taken, and if he is detained at a police station, the record must be made on his custody record<sup>9</sup>.

In a case where an impression of a person's footwear is taken<sup>10</sup> without the appropriate consent, he must be told the reason before it is taken<sup>11</sup> and the reason must be recorded on his custody record as soon as is practicable after the impression is taken<sup>12</sup>.

The power to take an impression of the footwear of a person detained at a police station without the appropriate consent is exercisable by any constable<sup>13</sup>.

Before any footwear impression is taken (with or without consent), the person must be informed that if his footwear impressions are required to be destroyed he may witness their destruction<sup>14</sup>.

1 Cf para 1021 note 5 ante.

2 For the meaning of 'appropriate consent' see PARA 1007 note 16 ante. A record must be made as soon as possible of the reason for taking the impression without consent: Code D: Code of Practice for the Identification of Persons by Police Officers para 4.20.

3 As to recordable offences see PARA 1049 post.

4 Police and Criminal Evidence Act 1984 s 61A(3)(a) (s 61A added by the Serious Organised Crime and Police Act 2005 s 118(1), (2)). Where a person has already had an impression taken of his footwear in the course of the investigation of the offence by the police, that fact must be disregarded for these purposes if the impression taken previously is incomplete (Police and Criminal Evidence Act 1984 s 61A(4)(a) (as so added)) or is not of

sufficient quality to allow satisfactory analysis, comparison or matching (whether in the case in question or generally) (s 61A(4)(b) (as so added)). For the meaning of 'sufficient' see PARA 1021 note 9 ante.

5 Ibid s 61A(3)(b) (as added: see note 4 supra). Reasonable force may be used, if necessary, to take a footwear impression from a detainee without consent under the power in s 61A (as added): Code D para 4.18. If force is used a record must be made of the circumstances and those present: Code D para 4.20.

6 Police and Criminal Evidence Act 1984 s 61A(1) (as added: see note 4 supra). Nothing in s 61A (as added) applies to any person arrested or detained under the terrorism provisions (s 61A(8)(a) (as so added)) or arrested under an extradition arrest power (s 61A(8)(b) (as so added)). For the meaning of 'the terrorism provisions' see PARA 952 note 4 ante. For the meaning of 'extradition arrest power' see PARA 1021 note 3 ante.

7 Ibid s 61A(2) (as so added).

8 Ibid s 61A(5)(a) (as added: see note 4 supra); Code D para 4.19(b). For the meaning of 'speculative search' see PARA 1021 note 36 ante; and as to speculative searches generally see PARA 1038 post. As to speculative searches of footwear impressions see PARA 1021 note 36 ante. When a person has been informed of the possibility that footwear impressions may be the subject of a speculative search, a record must be made: Code D para 4.21.

9 Police and Criminal Evidence Act 1984 s 61A(5)(b) (as added: see note 4 supra). As to custody records see PARA 940 ante.

10 Ie by virtue of ibid s 61A(3) (as added) (see the text and notes 1-5 supra).

11 Ibid s 61A(6)(a) (as added: see note 4 supra); Code D para 4.19(a). A person must also be told of the reason before a footwear impression is taken with his consent: Code D para 4.19(a).

12 Police and Criminal Evidence Act 1984 s 61A(6)(b) (as added: see note 4 supra).

13 Ibid s 61A(7) (as added: see note 4 supra). Every police officer holds the office of constable: see PARA 857 note 2 ante.

14 Code D para 4.19(c). As to the destruction of footwear impressions see PARA 1039 post.

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### **1023. Searches and examination to ascertain identity.**

If an officer of at least the rank of inspector<sup>1</sup> authorises it, a person who is detained in a police station<sup>2</sup> may be searched or examined, or both:

- 1489 (1) for the purpose of ascertaining whether he has any mark<sup>3</sup> that would tend to identify him as a person involved in the commission of an offence<sup>4</sup>; or
- 1490 (2) for the purpose of facilitating the ascertainment of his identity<sup>5</sup>.

An officer may authorise a search or examination for the purpose of ascertaining whether a person has any mark that would tend to identify him as a person involved in the commission of an offence<sup>6</sup> only if the appropriate consent<sup>7</sup> to a search or examination that would reveal whether the mark in question exists has been withheld<sup>8</sup> or it is not practicable to obtain such consent<sup>9</sup>. In any other case<sup>10</sup>, an officer may give such an authorisation only if the person in question has refused to identify himself<sup>11</sup> or the officer has reasonable grounds for suspecting that that person is not who he claims to be<sup>12</sup>.

An officer may give an authorisation orally or in writing but, if he gives it orally, he must confirm it in writing as soon as is practicable<sup>13</sup>.

Any identifying mark<sup>14</sup> found on such a search or examination may be photographed<sup>15</sup> either with the appropriate consent<sup>16</sup> or, if the appropriate consent is withheld or it is not practicable to obtain it, without it<sup>17</sup>.

Where such a search or examination may be carried out, or a photograph may be so taken, the only persons entitled to carry out the search or examination, or to take the photograph, are constables<sup>18</sup>. A person may not carry out such a search or examination of a person of the opposite sex or take a photograph of any part of the body of a person of the opposite sex<sup>19</sup>; and an intimate search<sup>20</sup> may not be carried out<sup>21</sup>.

A photograph taken pursuant to these provisions may be used by, or disclosed to, any person for any purpose related to the prevention or detection of crime<sup>22</sup>, the investigation of an offence or the conduct of a prosecution<sup>23</sup> by, or on behalf of, police and other law enforcement and prosecuting authorities inside and outside the United Kingdom<sup>24</sup>, and after being so used or disclosed may be retained<sup>25</sup>, but may not be used or disclosed except for a purpose so related<sup>26</sup>.

If it is established that a person is unwilling to co-operate sufficiently to enable a search and/or examination to take place or a suitable photograph to be taken, an officer may use reasonable force to search and/or examine a detainee, and photograph any identifying marks, without his consent<sup>27</sup>.

The thoroughness and extent of any search or examination carried out in accordance with these powers<sup>28</sup> must be no more than the officer considers necessary to achieve the required purpose<sup>29</sup>. Any search or examination which involves the removal of more than the person's outer clothing must be conducted in accordance with Code C: Code of Practice on the Questioning, Treatment and Detention of Persons by Police Officers<sup>30</sup>.

<sup>1</sup> See PARA 858 ante.



2 Cf para 1021 note 5 ante. Nothing in the Police and Criminal Evidence Act 1984 s 54A (as added and amended) (see the text and notes 3-26 *infra*) applies to a person arrested under an extradition arrest power: s 54A(13) (s 54A added by the Anti-terrorism, Crime and Security Act 2001 s 90(1); and the Police and Criminal Evidence Act 1984 s 54A(13) added by the Extradition Act 2003 s 169(2)). For the meaning of 'extradition arrest power' see PARA 1021 note 3 ante. A person detained at a police station to be searched under a stop and search power is not a detainee for these purposes: Code D: Code of Practice for the Identification of Persons by Police Officers para 5.1.

3 In the Police and Criminal Evidence Act 1984 s 54A (as added and amended), 'mark' includes features and injuries; and a mark is an identifying mark for these purposes if its existence in any person's case facilitates the ascertainment of his identity or his identification as a person involved in the commission of an offence: s 54A(12) (as added: see note 2 *supra*).

4 *Ibid* s 54A(1)(a) (as added: see note 2 *supra*); Code D para 5.1(a).

5 Police and Criminal Evidence Act 1984 s 54A(1)(b) (as added: see note 2 *supra*); Code D para 5.1(b). References in the Police and Criminal Evidence Act 1984 s 54A (as added and amended) to ascertaining a person's identity include references to showing that he is not a particular person: s 54A(11)(a) (as so added).

The conditions in which fingerprints may be taken to assist in establishing a person's identity are described in PARA 1021 ante: Code D Guidance note 5A.

6 *Ie* a search or examination for the purpose mentioned in the Police and Criminal Evidence Act 1984 s 54A(1)(a) (as added) (see the text and notes 1-4 *supra*).

7 For the meaning of 'the appropriate consent' see PARA 1007 note 16 ante.

8 Police and Criminal Evidence Act 1984 s 54A(2)(a) (as added: see note 2 *supra*); Code D para 5.2. As to the giving of consent in the case of a juvenile or a mentally disordered person see Code D para 2.12; and PARA 1010 ante.

9 Police and Criminal Evidence Act 1984 s 54A(2)(b) (as added: see note 2 *supra*); Code D para 5.2. Examples of when it would not be practicable to obtain a detainee's consent to a search, examination or the taking of a photograph of an identifying mark include:

392 (1) when the person is drunk or otherwise unfit to give consent (Code D Guidance note 5D(a));

393 (2) when there are reasonable grounds to suspect that if the person became aware a search or examination was to take place or an identifying mark was to be photographed, he would take steps to prevent this happening (eg by violently resisting, covering or concealing the mark etc) and it would not otherwise be possible to carry out the search or examination or to photograph any identifying mark (Code D Guidance note 5D(b));

394 (3) in the case of a juvenile, if the parent or guardian cannot be contacted in sufficient time to allow the search or examination to be carried out or the photograph to be taken (Code D Guidance note 5D(c)).

10 *Ie* a case in which the Police and Criminal Evidence Act 1984 s 54A(2) (as added) (see the text and notes 6-9 *supra*) does not apply.

11 *Ibid* s 54A(3)(a) (as added: see note 2 *supra*); Code D para 5.3.

12 Police and Criminal Evidence Act 1984 s 54A(3)(b) (as added: see note 2 *supra*); Code D para 5.2.

13 Police and Criminal Evidence Act 1984 s 54A(4) (as added: see note 2 *supra*); Code D para 5.8. A separate authority is required for each purpose referred to in the Police and Criminal Evidence Act 1984 s 54A(1) (as added) which applies: Code D para 5.8.

14 Any marks that assist in establishing the detainee's identity, or his identification as a person involved in the commission of an offence, are identifying marks: Code D para 5.4.

15 In the Police and Criminal Evidence Act 1984 s 54A (as added and amended), references to 'taking a photograph' include references to using any process by means of which a visual image may be produced; and references to 'photographing' a person are to be construed accordingly: s 54A(11)(b) (as so added). For the meaning of 'photograph' for the purposes of Code D see PARA 1011 note 5 ante; and as to 'taking a photograph' for those purposes see PARA 1017 note 52 ante.

16 Police and Criminal Evidence Act 1984 s 54A(5)(a) (as added: see note 2 supra); Code D para 5.4. See also Code D Guidance note 5D; and note 9 supra.

17 Police and Criminal Evidence Act 1984 s 54A(5)(b) (as added: see note 2 supra); Code D para 5.4.

18 Police and Criminal Evidence Act 1984 s 54A(6) (as added (see note 2 supra); and amended by the Police Reform Act 2002 s 107, Sch 7 para 9(2)). Every police officer holds the office of constable: see PARA 857 note 2 ante.

19 Police and Criminal Evidence Act 1984 s 54A(7) (as added: see note 2 supra); Code D para 5.5.

20 For the meaning of 'intimate search' see PARA 1007 note 9 ante.

21 Police and Criminal Evidence Act 1984 s 54A(8) (as added: see note 2 supra); Code D para 5.11.

22 The reference to 'crime' includes a reference to any conduct which constitutes one or more criminal offences (whether under the law of a part of the United Kingdom or of a country or territory outside the United Kingdom) (Police and Criminal Evidence Act 1984 s 54A(10)(a)(i) (as added: see note 2 supra)) or is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom, would constitute one or more criminal offences (s 54A(10)(a)(ii) (as so added)). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

Examples of purposes related to the prevention or detection of crime, the investigation of offences or the conduct of prosecutions include:

- 395 (1) checking the photograph against other photographs held in records or in connection with, or as a result of, an investigation of an offence to establish whether the person is liable to arrest for other offences (Code D Guidance note 5B(a));
- 396 (2) when the person is arrested at the same time as other persons, or at a time when it is likely that other persons will be arrested, using the photograph to help establish who was arrested, at what time and where (Code D Guidance note 5B(b));
- 397 (3) when the real identity of the person is not known and cannot be readily ascertained or there are reasonable grounds for doubting a name and other personal details given by the person are his real name and personal details (in these circumstances, using or disclosing the photograph to help to establish or verify a person's real identity or determine whether he is liable to arrest for some other offence, eg by checking it against other photographs held in records or in connection with, or as a result of, an investigation of an offence) (Code D Guidance note 5B(c));
- 398 (4) when it appears that any procedure relating to identification by witnesses may need to be arranged for which the person's photograph would assist (Code D Guidance note 5B(d));
- 399 (5) when the person's release without charge may be required, and if the release is: (a) on bail to appear at a police station, using the photograph to help verify the person's identity when he answers his bail and if the person does not answer his bail, to assist in arresting him (Code D Guidance note 5B(e)(i)); or (b) without bail, using the photograph to help verify his identity or assist in locating him for the purposes of serving him with a summons to appear at court in criminal proceedings (Code D Guidance note 5B(e)(ii));
- 400 (6) when the person has answered to bail at a police station and there are reasonable grounds for doubting he is the person who was previously granted bail, using the photograph to help establish or verify his identity (Code D Guidance note 5B(f));
- 401 (7) when the person arrested on a warrant claims to be a different person from the person named on the warrant and a photograph would help to confirm or disprove his claim (Code D Guidance note 5B(g)); and
- 402 (8) when the person has been charged with, reported for, or convicted of, a recordable offence and his photograph is not already on record as a result of heads (1)-(6) supra or his photograph is on record but his appearance has changed since it was taken and the person has not yet been released or brought before a court (Code D Guidance note 5B(h)).

23 Police and Criminal Evidence Act 1984 s 54A(9)(a) (as added: see note 2 supra); Code D para 5.6. References to an investigation and to a prosecution include references, respectively, to any investigation outside the United Kingdom of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside the United Kingdom: Police and Criminal Evidence Act 1984 s 54A(10)(b)

(as so added). For examples of purposes related to the investigation of offences or the conduct of prosecutions see note 22 supra.

24 Code D para 5.6.

25 The powers of retention in the Police and Criminal Evidence Act 1984 s 54A(1) (a added) do not affect any separate requirement under the Criminal Procedure and Investigations Act 1996 to retain material in connection with criminal investigations: Code D para 5.7.

26 Police and Criminal Evidence Act 1984 s 54A(9)(b) (as added: see note 2 supra); Code D para 5.6.

27 Code D para 5.9.

28 le the powers in the Police and Criminal Evidence Act 1984 s 54A (as added) (see the text and notes 1-26 supra).

29 Code D para 5.10.

30 Code D para 5.10. Any such search or examination must be conducted in accordance with Code C Annex A para 11 (see PARA 1009 ante): Code D para 5.10.

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## ***D. EXAMINATIONS TO ESTABLISH IDENTITY AND THE TAKING OF PHOTOGRAPHS***

### **(A) PERSONS OTHER THAN THOSE VOLUNTARILY AT POLICE STATIONS WHO ARE NOT DETAINEES**

#### **1024. Photographing of suspects.**

A person who is detained at a police station<sup>1</sup> (or, under certain circumstances, who is not<sup>2</sup>) may be photographed<sup>3</sup> either with the appropriate consent<sup>4</sup> or, if the appropriate consent is withheld or it is not practicable to obtain it<sup>5</sup>, without it<sup>6</sup>.

A person proposing so to take<sup>7</sup> a photograph of any person:

- 1491 (1) may, for the purpose of doing so, require the removal of any item or substance worn on or over the whole or any part of the head or face of the person to be photographed<sup>8</sup>; and
- 1492 (2) if the requirement is not complied with, may remove the item or substance himself<sup>9</sup>.

If it is established that the detainee is unwilling to co-operate sufficiently to enable a suitable photograph to be taken and it is not reasonably practicable to take the photograph covertly, an officer may use reasonable force to take the person's photograph without his consent<sup>10</sup> and, for the purpose of taking the photograph, remove any item or substance worn on, or over, all, or any part of, the person's head or face which he has failed to remove when asked<sup>11</sup>.

Where a photograph may be so taken, the only persons entitled to take the photograph are constables<sup>12</sup>.

A photograph so taken:

- 1493 (a) may be used by, or disclosed to, any person for any purpose related to the prevention or detection of crime<sup>13</sup>, the investigation of an offence or the conduct of a prosecution<sup>14</sup> or the enforcement of a sentence<sup>15</sup>; and
- 1494 (b) after being so used or disclosed, may be retained but may not be used or disclosed except for a purpose so related<sup>16</sup>.

A photograph may be obtained<sup>17</sup> without the person's consent by making a copy of an image of him taken at any time on a camera system installed anywhere in the police station<sup>18</sup>.

<sup>1</sup> Cf para 1021 note 5 ante. Nothing in the Police and Criminal Evidence Act 1984 s 64A (as added and amended) (see the text and notes 2-16 infra) applies to a person arrested under an extradition arrest power: s 64A(7) (s 64A added by the Anti-terrorism, Crime and Security Act 2001 s 92; and the Police and Criminal

Evidence Act 1984 s 64A(7) added by the Extradition Act 2003 s 169(1), (5)). For the meaning of 'extradition arrest power' see PARA 1021 note 3 ante.

2 The circumstances are that the person has been:

- 403 (1) arrested by a constable for an offence (Police and Criminal Evidence Act 1984 s 64A(1B)(a) (s 64A as added (see note 1 supra); and s 64A(1A), (1B), (4)(c) added, and s 64A(4)(a) amended, by the Serious Organised Crime and Police Act 2005 s 116(1)-(4)); Code D: Code of Practice for the Identification of Persons by Police Officers para 5.12(b)(i));
- 404 (2) taken into custody by a constable after being arrested for an offence by a person other than a constable (Police and Criminal Evidence Act 1984 s 64A(1B)(b) (as so added); Code D para 5.12(b)(ii));
- 405 (3) made subject to a requirement to wait with a community support officer under the Police Reform Act 2002 Sch 4 para 2(3) or Sch 4 para 2(3B) (see POLICE vol 36(1) (2007 Reissue) PARA 529) (Police and Criminal Evidence Act 1984 s 64A(1B)(c) (as so added); Code D para 5.12(b)(iii));
- 406 (4) given a penalty notice by a constable in uniform under the Criminal Justice and Police Act 2001 Pt 1 Ch 1 (ss 1-11) (on the spot penalties for disorderly behaviour: see PARAS 587-589 ante), a penalty notice by a constable under the Education Act 1996 s 444A (as added and amended) (penalty notice in respect of failure to secure regular school attendance: see EDUCATION vol 15(1) (2006 Reissue) PARA 523), or a fixed penalty notice by a constable in uniform under the Road Traffic Offenders Act 1988 s 54 (as amended) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1097) (Police and Criminal Evidence Act 1984 s 64A(1B)(d) (as so added); Code D para 5.12(b)(iv));
- 407 (5) given a notice in relation to a relevant fixed penalty offence (within the meaning of the Police Reform Act 2002 Sch 4 para 1: see POLICE vol 36(1) (2007 Reissue) PARA 529) by a community support officer by virtue of a designation applying Sch 4 para 1 to him (Police and Criminal Evidence Act 1984 s 64A(1B)(e) (as so added); Code D para 5.12(b)(v)); or
- 408 (6) given a notice in relation to a relevant fixed penalty offence (within the meaning of the Police Reform Act 2002 Sch 5 para 1: see POLICE vol 36(1) (2007 Reissue) PARA 533) by an accredited person by virtue of accreditation specifying that Sch 5 para 1 applies to him (Police and Criminal Evidence Act 1984 s 64A(1B)(f) (as so added); Code D para 5.12(b)(vi)).

3 In the Police and Criminal Evidence Act 1984 s 64A (as added), a 'photograph' includes a moving image, and corresponding expressions are to be construed accordingly (s 64A(6A) (s 64A as added (see note 1 supra); and s 64A(6A) added by the Serious Organised Crime and Police Act 2005 s 116(1), (5)); and references to 'taking a photograph' include references to using any process by means of which a visual image may be produced, and references to photographing a person are to be construed accordingly (Police and Criminal Evidence Act 1984 s 64A(6) (as so added)). For the meaning of 'photograph' for the purposes of Code D see PARA 1011 note 5 ante; and as to 'taking a photograph' for those purposes see PARA 1017 note 52 ante. The officer proposing to take a detainee's photograph may, for this purpose, require the person to remove any item or substance worn on, or over, all, or any part of, his head or face: Code D para 5.13. If he does not comply with such a requirement, the officer may remove the item or substance: Code D para 5.13.

4 Police and Criminal Evidence Act 1984 s 64A(1)(a), (1A)(a) (as added: see notes 1, 2 supra); Code D paras 5.12(a), (b), 5.12A(a). For the meaning of 'the appropriate consent' see PARA 1007 note 16 ante. As to the giving of consent in the case of a juvenile or a mentally disordered person see Code D para 2.12; and PARA 1010 ante.

5 Examples of when it would not be practicable to obtain the person's consent to a photograph being taken include:

- 409 (1) when the person is drunk or otherwise unfit to give consent (Code D Guidance note 5E(a));
- 410 (2) when there are reasonable grounds to suspect that if the person became aware that a photograph, suitable to be used or disclosed for the use and disclosure to any person for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution (as to which see PARA 1023 note 22 ante), was to be taken, he would take steps to prevent it being taken (eg by violently resisting, covering or distorting his face etc) and it would not otherwise be possible to take a suitable photograph (Code D Guidance note 5E(b));
- 411 (3) when, in order to obtain a suitable photograph, it is necessary to take it covertly (Code D Guidance note 5E(c)); and

412 (4) in the case of a juvenile, if the parent or guardian cannot be contacted in sufficient time to allow the photograph to be taken (Code D Guidance note 5E(d)).

6 Police and Criminal Evidence Act 1984 s 64A(1)(b), (1A)(b) (as added: see notes 1, 2 supra); Code D paras 5.12(a), (b), 5.12A(a).

7 le under the Police and Criminal Evidence Act 1984 s 64A (as added and amended).

8 Ibid s 64A(2)(a) (as added: see note 1 supra).

9 Ibid s 64A(2)(b) (as added: see note 1 supra).

10 Code D para 5.14(a). The use of reasonable force to take the photograph of a suspect elsewhere than at a police station must be carefully considered: Code D Guidance note 5F. In order to obtain a suspect's consent and co-operation to remove an item of religious headwear to take their photograph, a constable should consider whether in the circumstances of the situation the removal of the headwear and the taking of the photograph should be by an officer of the same sex as the person: Code D Guidance note 5F. It would be appropriate for these actions to be conducted out of public view: Code D Guidance note 5F.

11 Code D para 5.14(b). See note 10 supra.

12 Police and Criminal Evidence Act 1984 s 64A(3) (as added (see note 1 supra); and amended by the Police Reform Act 2002 s 107(1), Sch 7 para 9(5)). Every police officer holds the office of constable: see PARA 857 note 2 ante.

13 The reference to 'crime' includes a reference to any conduct which either constitutes one or more criminal offences (whether under the law of a part of the United Kingdom or of a country or territory outside the United Kingdom) (Police and Criminal Evidence Act 1984 s 64A(5)(a)(i) (as added: see note 1 supra)) or is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom, would constitute one or more criminal offences (s 64A(5)(a)(ii) (as so added)). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

14 References to an investigation and to a prosecution include references, respectively, to any investigation outside the United Kingdom of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside the United Kingdom: ibid s 64A(5)(b) (as added: see note 1 supra). For examples of purposes related to the investigation of offences or the conduct of prosecutions see PARA 1023 note 22 supra.

15 Ibid s 64A(4)(a) (as added and amended: see notes 1, 2 supra); Code D para 5.12A(b). For these purposes, 'sentence' includes any order made by a court in England and Wales when dealing with an offender in respect of his offence: Police and Criminal Evidence Act 1984 s 64A(5)(c) (as so added).

16 Ibid s 64A(4)(b) (as added: see note 1 supra); Code D para 5.12A(b).

17 le for the purposes of Code D.

18 Code D para 5.15.

## UPDATE

### 1024 Photographing of suspects

NOTE 2--Add: (3a) given a direction by a constable under the Violent Crime Reduction Act 2006 s 27: 1984 Act s 64A(1B)(ca) (added by 2006 Act s 27(7)). Head (5) 1984 Act s 64A(1B)(e) amended: Police and Justice Act 2006 Sch 15 Pt 2. Add: (7) given a notice in relation to a relevant fixed penalty offence (within the meaning of the 2002 Act Sch 5A (see POLICE) by an accredited inspector by virtue of accreditation specifying that Sch 5A para 1 applies to him: 1984 Act s 64A(1B)(g) (added by 2006 Act Sch 14 para 11).

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### **1025. Information to be given; records.**

When a person is to be searched or examined<sup>1</sup>, or photographed<sup>2</sup>, or where his photograph is obtained without his consent by making a copy of an image<sup>3</sup>, he must be informed of:

- 1495 (1) the purpose of the search, examination or photograph<sup>4</sup>;
- 1496 (2) the grounds on which the relevant authority, if applicable, has been given<sup>5</sup>;  
and
- 1497 (3) the purposes for which the photograph may be used, disclosed or retained<sup>6</sup>.

This information must be given before the search or examination commences or the photograph is taken, unless the photograph is to be taken covertly<sup>7</sup> or obtained without the person's consent by making a copy of an image, in which case the person must be informed as soon as practicable after the photograph is taken or obtained<sup>8</sup>.

A record must be made when a detainee is searched, examined, or a photograph of the person, or any identifying marks found on him, are taken<sup>9</sup>. The record must include:

- 1498 (a) the identity<sup>10</sup> of the officer carrying out the search or examination or taking the photograph<sup>11</sup>;
- 1499 (b) the purpose of the search, examination or photograph and the outcome<sup>12</sup>;
- 1500 (c) the detainee's consent to the search, examination or photograph, or the reason the person was searched, examined or photographed without consent<sup>13</sup>;
- 1501 (d) the giving of any authority<sup>14</sup>, the grounds for giving it and the authorising officer<sup>15</sup>.

If force is used when searching, examining or taking a photograph in accordance with these provisions, a record must be made of the circumstances and those present<sup>16</sup>.

<sup>1</sup> See as in Code D: Code of Practice for the Identification of Persons by Police Officers para 5.1 (see PARA 1023 ante).

<sup>2</sup> See as in Code D para 5.12 (see PARA 1024 ante). For the meaning of 'photograph' for these purposes see PARA 1011 note 5 ante; and as to 'taking a photograph' for these purposes see PARA 1017 note 52 ante.

<sup>3</sup> See as in Code D para 5.15 (see PARA 1024 ante).

<sup>4</sup> Code D para 5.16(a).

<sup>5</sup> Code D para 5.16(b).

<sup>6</sup> Code D para 5.16(c).

<sup>7</sup> Code D para 5.16(i).

- 8 Code D para 5.16(ii).
- 9 Ibid para 5.17.
- 10 This is subject to Code D para 2.18 (see PARA 1010 ante).
- 11 Code D para 5.17(a).
- 12 Code D para 5.17(b).
- 13 Code D para 5.17(c).
- 14 Is an authority under Code D para 5.2 or Code D para 5.3 (see PARA 1023 ante).
- 15 Code D para 5.17(d).
- 16 Code D para 5.18.



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## (B) PERSONS VOLUNTARILY AT POLICE STATIONS WHO ARE NOT DETAINEES

### **1026. Examinations and photograph-taking.**

When there are reasonable grounds for suspecting the involvement of a person in a criminal offence, but that person is at a police station voluntarily and is not detained, the provisions relating to the searching, examination and photographing of detainees<sup>1</sup> apply subject to modifications reflecting the fact that the person in question is not detained<sup>2</sup>.

Where a person is at a police station voluntarily and is not detained, force may not be used to:

- 1502 (1) search and/or examine him either to discover whether he has any marks that would tend to identify him as a person involved in the commission of an offence<sup>3</sup> or to establish his identity<sup>4</sup>;
- 1503 (2) take photographs<sup>5</sup> of any identifying marks<sup>6</sup>; or
- 1504 (3) take a photograph of the person<sup>7</sup>.

The photographs or images of persons not detained, or of their identifying marks, must be destroyed<sup>8</sup> (together with any negatives and copies<sup>9</sup>) unless the person:

- 1505 (a) is charged with, or informed that he may be prosecuted for, a recordable offence<sup>10</sup>;
- 1506 (b) is prosecuted for a recordable offence<sup>11</sup>;
- 1507 (c) is cautioned for a recordable offence or given a warning or reprimand<sup>12</sup> for a recordable offence<sup>13</sup>; or
- 1508 (d) gives informed consent, in writing, for the photograph or image to be retained<sup>14</sup>.

When the destruction of any photograph or image is required<sup>15</sup>, the person must be given an opportunity to witness the destruction or to have a certificate confirming the destruction provided that he so requests the certificate within five days of being informed that the destruction is required<sup>16</sup>.

1    le the provisions of Code D: Code of Practice for the Identification of Persons by Police Officers paras 5.1-5.18 (see PARAS 1023-1025 ante).

2    Code D para 5.19. Pursuant to this, references in Code D paras 5.1-5.18 to the 'person being detained' are omitted for these purposes: Code D para 5.20.

3    Code D para 5.21(a)(i). Thus the powers to search or examine a person to establish either their identity or whether they have any identifying marks, features or injuries (see Code D para 5.1; and PARA 1023 ante) are inapplicable in respect of a person who is at a police station voluntarily and is not detained: Code D para 5.20.

4    Code D para 5.21(a)(ii). See note 3 supra. As to the conditions in which fingerprints may be taken to assist in establishing a person's identity see PARA 1021 ante; applied by Code D Guidance note 5A.

5 For the meaning of 'photograph' for these purposes see PARA 1011 note 5 ante; and as to 'taking a photograph' for these purposes see PARA 1017 note 52 ante.

6 Code D para 5.21(b). See Code D para 5.4; and PARA 1023 ante.

7 Code D para 5.21(c).

8 As to the destruction of photographs see PARA 1041 post.

9 As to the meanings of 'negatives' and 'copies' for these purposes see PARA 1011 note 5 ante.

10 Code D para 5.22(a).

11 Code D para 5.22(b).

12 As to reprimands and warnings see the Crime and Disorder Act 1998 s 65 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1235.

13 Code D para 5.22(c).

14 Code D para 5.22(d). The powers of retention in Code D para 5.22 do not affect any separate requirement under the Criminal Procedure and Investigations Act 1996 to retain material in connection with criminal investigations: Code D para 5.24.

15 le under Code D para 5.22 (see the text and notes 8-14 supra).

16 Code D para 5.23.

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## ***E. IDENTIFICATION BY BODY SAMPLES***

### **1027. Intimate samples, non-intimate samples and skin impressions.**

'Intimate sample' means:

- 1509 (1) a sample of blood, semen or any other tissue fluid, urine or pubic hair<sup>1</sup>;
- 1510 (2) a dental impression<sup>2</sup>;
- 1511 (3) a swab taken from any part of a person's genitals (including pubic hair) or from a person's body orifice other than the mouth<sup>3</sup>.

'Non-intimate sample' means:

- 1512 (a) a sample of hair other than pubic hair<sup>4</sup>;
- 1513 (b) a sample taken from a nail or from under a nail<sup>5</sup>;
- 1514 (c) a swab taken from any part of a person's body other than a part from which a swab would be an intimate sample<sup>6</sup>;
- 1515 (d) saliva<sup>7</sup>;
- 1516 (e) a skin impression<sup>8</sup>.

'Skin impression', in relation to any person, means any record (other than a fingerprint) which is a record (in any form and produced by any method) of the skin pattern and other physical characteristics or features of the whole or any part of his foot or of any other part of his body<sup>9</sup>.

1 Police and Criminal Evidence Act 1984 s 65(1) (definition substituted by the Criminal Justice and Public Order Act 1994 s 58(1), (2); and amended by the Serious Organised Crime and Police Act 2005 s 119(1)-(3)).

2 Police and Criminal Evidence Act 1984 s 65(1) (as amended: see note 1 supra).

3 Ibid s 65(1) (as amended: see note 1 supra).

4 Ibid s 65(1) (definition substituted by the Criminal Justice and Public Order Act 1994 s 58(1), (3); and amended by the Criminal Justice and Police Act 2001 s 80(5)(b)).

5 Police and Criminal Evidence Act 1984 s 65(1) (as amended: see note 4 supra).

6 Ibid s 65(1) (as amended: see note 4 supra).

7 Ibid s 65(1) (as amended: see note 4 supra).

8 Ibid s 65(1) (as amended: see note 4 supra).

9 Ibid s 65(1) (definition added by the Criminal Justice and Police Act 2001 s 80(5)(c)).

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### **1028. Taking intimate samples.**

An intimate sample<sup>1</sup> may<sup>2</sup> be taken from a person in police detention<sup>3</sup> only:

- 1517 (1) if a police officer of at least the rank of inspector<sup>4</sup> authorises it to be taken<sup>5</sup>;  
and
- 1518 (2) if the appropriate consent<sup>6</sup> is given<sup>7</sup>.

An intimate sample may be taken from a person who is not in police detention but from whom, in the course of the investigation of an offence, two or more non-intimate samples<sup>8</sup> suitable for the same means of analysis<sup>9</sup> have been taken which have proved insufficient<sup>10</sup>:

- 1519 (a) if a police officer of at least the rank of inspector authorises it to be taken<sup>11</sup>;  
and
- 1520 (b) if the appropriate consent is given<sup>12</sup>.

Nothing in these provisions prevents samples being taken for elimination purposes with the consent of the person concerned<sup>13</sup>.

An officer may give an authorisation<sup>14</sup> only if he has reasonable grounds for suspecting the involvement of the person from whom the sample is to be taken in a recordable offence<sup>15</sup> and for believing that the sample will tend to confirm or disprove his involvement<sup>16</sup>. An officer may give such an authorisation orally or in writing but, if he gives it orally, he must confirm it in writing as soon as is practicable<sup>17</sup>. The appropriate consent must be given in writing<sup>18</sup>.

Where such an authorisation has been given<sup>19</sup> and it is proposed that an intimate sample be taken in pursuance thereof<sup>20</sup>, an officer must inform the person from whom the sample is to be taken of the giving of the authorisation<sup>21</sup> and the grounds for giving it<sup>22</sup>.

If an intimate sample is taken from a person:

- 1521 (i) the authorisation by virtue of which it was taken<sup>23</sup>;
- 1522 (ii) the grounds for giving the authorisation<sup>24</sup>; and
- 1523 (iii) the fact that the appropriate consent was given<sup>25</sup>,

must be recorded as soon as is practicable after the sample is taken<sup>26</sup>. If an intimate sample is taken from a person at a police station, before the sample is taken an officer must inform the person that it may be the subject of a speculative search<sup>27</sup>; and the fact that the person has been informed of this possibility must be recorded as soon as practicable after the sample has been taken<sup>28</sup>.

An intimate sample which is a dental impression may be taken from a person only by a registered dentist<sup>29</sup>. In the case of any other form of intimate sample, except a sample of urine, the sample may be taken from a person only by a registered medical practitioner<sup>30</sup> or a registered health care professional<sup>31</sup>.

Where the appropriate consent to the taking of an intimate sample from a person was refused without good cause, in any proceedings against that person for an offence the court, in determining either whether there is a case to answer<sup>32</sup> or (until a day to be appointed) whether to commit the person for trial<sup>33</sup>, may draw such inferences from the refusal as appear proper. A judge may also draw such inferences in deciding whether to grant an application<sup>34</sup> for dismissal<sup>35</sup>; and a court or jury may draw them in determining whether that person is guilty of the offence charged<sup>36</sup>.

1 For the meaning of 'intimate sample' see PARA 1027 ante. Before a suspect is asked to provide an intimate sample under these provisions he must be warned that if he refuses without good cause his refusal may harm his case if it comes to trial: Code D: Code of Practice for the Identification of Persons by Police Officers para 6.3. In warning a person who is asked to provide an intimate sample, the following form of words may be used: 'You do not have to provide this sample/allow this swab or impression to be taken, but I must warn you that if you refuse without good cause, your refusal may harm your case if it comes to trial.': Code D Guidance note 6D. If the suspect is in police detention and not legally represented, he must also be reminded of his entitlement to have free legal advice (see Code C: Code of Practice for the Questioning, Treatment and Detention of Persons by Police Officers para 6.5; and PARA 953 ante) and the reminder must be noted in the custody record: Code D para 6.3. If the Police and Criminal Evidence Act 1984 s 62(1A) (as added and amended) (see the text and notes 8-12 infra) applies and the person is attending a police station voluntarily, his entitlement to free legal advice as in Code C para 3.21 (see PARA 909 ante) must be explained to him: Code D para 6.3. A record must be made of a warning given as required by Code D para 6.3: Code D para 6.11.

2 ie subject to the Police and Criminal Evidence Act 1984 s 63B (as added and amended) (see PARA 1031 post).

3 For the meaning of 'in police detention' see PARA 939 note 9 ante.

4 See PARA 858 ante.

5 Police and Criminal Evidence Act 1984 s 62(1)(a) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 paras 76, 78; and by the Criminal Justice and Police Act 2001 s 80(1)); Code D para 6.2(a)(i).

6 For the meaning of 'the appropriate consent' see PARA 1007 note 16 ante.

7 Police and Criminal Evidence Act 1984 s 62(1)(b); Code D para 6.2(a)(ii). Nothing in the provisions relating to the taking of intimate samples (ie the Police and Criminal Evidence Act 1984 s 62 (as amended)) applies to:

413 (1) the taking of a specimen for the purposes of any of the provisions for requiring and taking samples of breath, blood and urine in relation to driving offences etc when under the influence of drink or drugs or excess alcohol under the Road Traffic Act 1988 ss 4-11 (as amended) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 975 et seq) or the Transport and Works Act 1992 ss 26-38 (as amended) (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 377 et seq; ROAD TRAFFIC vol 40(3) (2007 Reissue) PARA 1626) (Police and Criminal Evidence Act 1984 s 62(11) (amended by the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 3 para 27(4); and by the Police Reform Act 2002 s 53(2))); or

414 (2) a person arrested or detained under the terrorism provisions (Police and Criminal Evidence Act 1984 s 62(12) (added by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 62(4)(a); and substituted by the Terrorism Act 2000 s 125(1), Sch 15 para 5(1), (8)).

For the meaning of 'the terrorism provisions' see PARA 952 note 4 ante.

Where any power to take a sample is exercisable in relation to a person the sample may be taken in a prison or other institution to which the Prison Act 1952 (see PRISONS) applies: Police and Criminal Evidence Act 1984 s 63A(3) (s 63A added by the Criminal Justice and Public Order Act 1994 s 56).

8 For the meaning of 'non-intimate sample' see PARA 1027 ante. These provisions (ie the Police and Criminal Evidence Act 1984 s 62(1A) (as added and amended) (see the text and notes 8-12 infra)) do not apply where the non-intimate samples were taken under the Terrorism Act 2000 Sch 8 para 10 (see PARA 421 ante); Police and Criminal Evidence Act 1984 s 62(12) (as added and substituted: see note 7 supra); Code D Guidance note 6C.

9 In relation to a skin impression, 'analysis' includes comparison and matching: Police and Criminal Evidence Act 1984 s 65(1) (definition added by the Criminal Justice and Police Act 2001 s 80(5)(a)).

10 For the meanings of 'sufficient' and 'insufficient' see PARA 1021 note 9 ante.

- 11 Police and Criminal Evidence Act 1984 s 62(1A)(a) (s 62(1A) added by the Criminal Justice and Public Order Act 1994 s 54(1), (2); and the Police and Criminal Evidence Act 1984 s 62(1A)(a) amended by the Criminal Justice and Police Act 2001 s 80(1)); Code D para 6.2(b)(i).
- 12 Police and Criminal Evidence Act 1984 s 62(1A)(b) (as added: see note 11 supra); Code D para 6.2(b)(ii).
- 13 Code D Guidance note 6C. In such instances the provisions of Code D para 2.12 (see PARA 1010 ante) relating to the role of the appropriate adult should be applied: Code D Guidance note 6C.
- 14 Is an authorisation under the Police and Criminal Evidence Act 1984 s 62(1) (as amended) or s 62(1A) (as added and amended) (see the text and notes 1-12 supra).
- 15 Ibid s 62(2)(a) (amended by the Criminal Justice and Public Order Act 1994 s 54(3)); Code D para 6.2(a)(i). As to recordable offences see PARA 1049 post.
- 16 Police and Criminal Evidence Act 1984 s 62(2)(b); Code D para 6.2(a)(i).
- 17 Police and Criminal Evidence Act 1984 s 62(3) (amended by the Criminal Justice and Public Order Act 1994 s 54(4)).
- 18 Police and Criminal Evidence Act 1984 s 62(4).
- 19 Ibid s 62(5)(a).
- 20 Ibid s 62(5)(b).
- 21 Ibid s 62(5)(i).
- 22 Ibid s 62(5)(ii). The duty imposed by s 62(5)(ii) includes a duty to state the nature of the offence in which it is suspected that the person from whom the sample is to be taken has been involved: s 62(6). Before any intimate sample is taken with consent, the person must be informed of the reason for taking the sample (Code D para 6.8(a)), of the grounds on which the relevant authority has been given (Code D para 6.8(b)), and that the sample or information derived from it may be retained and the subject of a speculative search, unless its destruction is required (see PARA 1039 post) (Code D para 6.8(c)). A record must be made of the fact that a person has been informed that samples may be the subject of a speculative search: Code D para 6.12. See also Code D Guidance note 4B; and PARA 1021 note 36 ante. As to speculative searches see PARA 1038 post.
- 23 Police and Criminal Evidence Act 1984 s 62(7)(a).
- 24 Ibid s 62(7)(b).
- 25 Ibid s 62(7)(c).
- 26 Ibid s 62(7). See PARA 1021 note 36 ante. If an intimate sample is taken from a person detained at a police station, the matters required to be recorded by s 62(7), (7A) (as added) (see the text and note 27 infra) must be recorded in his custody record: s 62(8) (amended by the Criminal Justice and Public Order Act 1994 Sch 10 para 57(b)). A record of the reasons for taking a sample or impression and, if applicable, of its destruction must be made as soon as practicable; and if written consent is given to the taking of a sample or impression, the fact must be recorded in writing: Code D para 6.10.
- 27 Police and Criminal Evidence Act 1984 s 62(7A)(a) (s 62(7A) added by the Criminal Justice and Public Order Act 1994 Sch 10 para 57(a)). See note 26 supra.
- 28 Police and Criminal Evidence Act 1984 s 62(7A)(b) (as added: see note 27 supra). See note 26 supra.
- 29 Ibid s 62(9) (s 62(9) substituted, and s 62(9A) added, by the Police Reform Act 2002 s 54(1)); Code D para 6.4. For the meaning of 'registered dentist' see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 417; definition applied by the Police and Criminal Evidence Act 1984 s 65(1) (amended by the Criminal Justice and Public Order Act 1994 s 58(1), (4)).
- 30 Police and Criminal Evidence Act 1984 s 62(9A)(a) (as added: see note 29 supra); Code D para 6.4. As to registered medical practitioners see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 4.
- 31 Police and Criminal Evidence Act 1984 s 62(9A)(b) (as added: see note 29 supra); Code D para 6.4. 'Registered health care professional' means a person (other than a medical practitioner) who is either a registered nurse or a registered member of a health care profession which is designated for these purposes by an order made by the Secretary of State: Police and Criminal Evidence Act 1984 s 65(1) (definition added by the

Police Reform Act 2002 s 54(2)). See the Registered Health Care Profession (Designation) Order 2003, SI 2003/2461, which designates the profession of paramedics for this purpose. As to the registration of nurses see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 716 et seq. For these purposes, a 'health care profession' is any profession mentioned in the Health Act 1999 s 60(2) (as amended) (see MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 291), other than the profession of practising medicine and the profession of nursing: Police and Criminal Evidence Act 1984 s 65(1A) (s 65(1A), (1B) added by the Police Reform Act 2002 s 54(3)). An order under the Police and Criminal Evidence Act 1984 s 65(1) (as amended) must be made by statutory instrument and is subject to annulment in pursuance of a resolution of either House of Parliament: s 65(1B) (as so added).

When clothing needs to be removed in circumstances likely to cause embarrassment to the person, no person of the opposite sex who is not a registered medical practitioner or registered health care professional may be present (unless in the case of a juvenile, mentally disordered or mentally vulnerable person, that person specifically requests the presence of an appropriate adult of the opposite sex who is readily available), nor may there be present any person whose presence is unnecessary: Code D para 6.9. However, in the case of a juvenile, this is subject to the overriding proviso that such a removal of clothing may take place in the absence of the appropriate adult only if the juvenile signifies, in his presence, that he prefers the adult's absence and the adult agrees: Code D para 6.9. For the meanings of 'mentally vulnerable' and 'appropriate adult', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante.

32 Police and Criminal Evidence Act 1984 s 62(10)(a)(ii).

33 Ibid s 62(10)(a)(i) (prospectively repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 56(1), (2)(a), Sch 37 Pt 4: at the date at which this volume states the law no such day had been appointed).

34 Ie an application under the Criminal Justice Act 1987 s 6 (as amended) or the Criminal Justice Act 1991 Sch 6 para 5 (as amended): Police and Criminal Evidence Act 1984 s 62(10)(aa)(i), (ii) (s 62(10)(aa) added by the Criminal Justice and Public Order Act 1994 Sch 9 para 24). As from a day to be appointed the Criminal Justice Act 1987 s 6 (as amended) and the Criminal Justice Act 1991 Sch 6 (as amended) are repealed by the Criminal Justice Act 2003 Sch 3 paras 58(1), (2), 62(1), (3), Sch 37 Pt 4, and this provision has effect in relation to applications under the Crime and Disorder Act 1998 Sch 3 para 2 (as amended): Police and Criminal Evidence Act 1984 s 62(10)(aa) (as so added; and prospectively amended by the Criminal Justice Act 2003 Sch 3 para 56(1), (2)(b)). At the date at which this volume states the law these amendments are in force only as respects cases sent for trial under the Crime and Disorder Act 1998 s 51 or s 51A(3)(d) (as added) (see PARAS 1132-1133 post), but no day had been appointed for their commencement for remaining purposes.

35 Police and Criminal Evidence Act 1984 s 62(10)(aa) (as added and prospectively amended: see note 34 supra).

36 Ibid s 62(10)(b).

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### **1029. Non-intimate samples.**

Non-intimate samples<sup>1</sup> may not in general<sup>2</sup> be taken from a person without the appropriate consent<sup>3</sup>. Consent to the taking of a non-intimate sample must be given in writing<sup>4</sup>.

A non-intimate sample may be taken from a person without the appropriate consent if:

- 1524 (1) he is in police detention<sup>5</sup> in consequence of his arrest for a recordable offence<sup>6</sup> and either he has not had a non-intimate sample of the same type and from the same part of the body taken in the course of the investigation of the offence by the police<sup>7</sup> or he has had such a sample taken but it proved insufficient<sup>8</sup>;
- 1525 (2) he is being held in custody by the police on the authority of a court<sup>9</sup> and an officer of at least the rank of inspector<sup>10</sup> authorises it to be taken without the appropriate consent<sup>11</sup> (provided that an officer may give such an authorisation only if he has reasonable grounds for suspecting the involvement of the person from whom the sample is to be taken in a recordable offence<sup>12</sup> and for believing that the sample will tend to confirm or disprove his involvement<sup>13</sup>);
- 1526 (3) whether or not he is in police detention or held in custody by the police on the authority of a court, he has been charged with a recordable offence or informed that he will be reported for such an offence<sup>14</sup> and either he has not had a non-intimate sample taken from him in the course of the investigation of the offence by the police or he has had a non-intimate sample taken from him but either it was not suitable for the same means of analysis<sup>15</sup> or, though so suitable, the sample proved insufficient<sup>16</sup>;
- 1527 (4) he has been convicted of a recordable offence<sup>17</sup>; or
- 1528 (5) he is a person detained following acquittal on grounds of insanity or finding of unfitness to plead<sup>18</sup>.

Where by virtue of these provisions<sup>19</sup> a sample is taken from a person without the appropriate consent he must be told the reason before the sample is taken<sup>20</sup> and the reason must be recorded as soon as practicable after the sample is taken<sup>21</sup>. The power to take a non-intimate sample from a person without the appropriate consent is exercisable by any constable<sup>22</sup>, who may, if necessary, use reasonable force<sup>23</sup>.

If a non-intimate sample is taken from a person at a police station, whether with or without the appropriate consent, before the sample is taken an officer must inform him that it may be the subject of a speculative search<sup>24</sup> and the fact that the person has been informed of this possibility must be recorded as soon as practicable after the sample has been taken<sup>25</sup>.

Where a sample of hair other than pubic hair is to be taken, the sample may be taken either by cutting hairs or by plucking hairs with their roots so long as no more are plucked than the person taking the sample reasonably considers to be necessary for a sufficient sample<sup>26</sup>. When hair samples are taken for the purpose of DNA analysis (rather than for other purposes such as making a visual match), the suspect should be permitted a reasonable choice as to what part of the body the hairs are taken from<sup>27</sup>. When hairs are plucked, they should be plucked individually, unless the suspect prefers otherwise and no more should be plucked than the person taking them reasonably considers necessary for a sufficient sample<sup>28</sup>.



As from a day to be appointed it is provided that where a non-intimate sample consisting of a skin impression is taken electronically from a person, it must be taken only in such manner, and using such devices, as the Secretary of State has approved for the purpose of the electronic taking of such an impression<sup>29</sup>.

1 For the meaning of 'non-intimate sample' see PARA 1027 ante.

2 The exceptions to the general prohibition are set out in the text and notes 5-18 infra.

3 Police and Criminal Evidence Act 1984 s 63(1); Code D: Code of Practice for the Identification of Persons by Police Officers paras 6.5, 6.6(a). For the meaning of 'the appropriate consent' see PARA 1007 note 16 ante. Nothing in the provisions relating to the taking of non-intimate samples (ie the Police and Criminal Evidence Act 1984 s 63 (as amended) (see the text and notes 4-25 infra)) applies to a person arrested or detained under the terrorism provisions (Police and Criminal Evidence Act 1984 s 63(10) (added by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 62(4)(b); and substituted by the Terrorism Act 2000 s 125(1), Sch 15 para 5(1), (9))) or to a person arrested under an extradition arrest power (Police and Criminal Evidence Act 1984 s 63(11) (added by the Extradition Act 2003 s 169(1), (4))). For the meaning of 'the terrorism provisions' see PARA 952 note 4 ante. For the meaning of 'extradition arrest power' see PARA 1021 note 3 ante.

Where any power to take a sample is exercisable in relation to a person the sample may be taken in a prison or other institution to which the Prison Act 1952 (see PRISONS) applies: Police and Criminal Evidence Act 1984 s 63A(3) (s 63A added by the Criminal Justice and Public Order Act 1994 s 56).

4 Police and Criminal Evidence Act 1984 s 63(2); Code D paras 6.5, 6.6(a). If written consent is given to the taking of a sample or impression, the fact must be recorded in writing: Code D para 6.10.

5 For the meaning of 'in police detention' see PARA 939 note 9 ante.

6 Police and Criminal Evidence Act 1984 s 63(2A), (2B) (s 63(2A)-(2C) added by the Criminal Justice Act 2003 s 10(1), (2)); Code D para 6.6(aa)(i). For the meaning of 'recordable offence' see PARA 1049 post.

7 Police and Criminal Evidence Act 1984 s 63(2C)(a) (as added: see note 6 supra).

8 Ibid s 63(2C)(b) (as added: see note 6 supra); Code D para 6.6(aa)(i). For the meanings of 'sufficient' and 'insufficient' see PARA 1021 note 9 ante.

9 Ibid s 63(3)(a) (amended by the Criminal Justice Act 2003 ss 10(1), (3), 332, Sch 37 Pt 1); Code D para 6.6(aa)(ii).

10 See PARA 858 ante.

11 Police and Criminal Evidence Act 1984 s 63(3)(b) (amended by the Criminal Justice and Police Act 2001 s 80(1)); Code D para 6.6(aa)(ii). An officer may give such an authorisation orally or in writing but, if he gives it orally, he must confirm it in writing as soon as is practicable: Police and Criminal Evidence Act 1984 s 63(5). An officer may not give an authorisation for the taking from any person of a non-intimate sample consisting of a skin impression if a skin impression of the same part of the body has already been taken from that person in the course of the investigation of the offence (s 63(5A)(a) (s 63(5A) added by the Criminal Justice and Police Act 2001 s 80(3))) and the impression previously taken is not one that has proved insufficient (Police and Criminal Evidence Act 1984 s 63(5A)(b) (as so added)). For the meaning of 'skin impression' see PARA 1027 ante.

Where an authorisation has been given (s 63(6)(a)) and it is proposed that a non-intimate sample be taken in pursuance of it (s 63(6)(b)), an officer must inform the person from whom the sample is to be taken of the giving of the authorisation (s 63(6)(i)) and of the grounds for giving it (s 63(6)(ii)). The duty imposed by s 63(6)(ii) includes a duty to state the nature of the offence in which it is suspected that the person from whom the sample is to be taken has been involved: s 63(7). If a non-intimate sample is taken from a person by virtue of s 63(3), the authorisation by virtue of which it was taken (s 63(8)(a)), and the grounds for giving it (s 63(8)(b)), must be recorded as soon as practicable after the sample is taken (s 63(8)). If a non-intimate sample is taken from a person detained at a police station, the matters required to be recorded by s 63(8) must be recorded in his custody record: s 63(9). As to custody records see PARA 940 ante.

12 Ibid s 63(4)(a) (amended by the Criminal Justice and Public Order Act 1994 s 55(1), (3)).

13 Police and Criminal Evidence Act 1984 s 63(4)(b).

14 Ibid s 63(3A)(a) (s 63(3A), (3B) added by the Criminal Justice and Public Order Act 1994 s 55(1), (2); and the Police and Criminal Evidence Act 1984 s 63(3A) amended by the Criminal Justice Act 2003 s 10(1), (4)).

15 As to the meaning of 'analysis' in relation to a skin impression see PARA 1028 note 9 ante.

16 Police and Criminal Evidence Act 1984 s 63(3A)(b) (as added: see note 14 supra); Code D para 6.6(b)(i), (ii).

17 Police and Criminal Evidence Act 1984 s 63(3B) (as added: see note 14 supra); Code D para 6.6(c). This does not apply to any person convicted before 10 April 1995 unless he is a person to whom the Criminal Evidence (Amendment) Act 1997 s 1 (as amended) (persons imprisoned or detained by virtue of pre-existing conviction for sexual offence) applies: Police and Criminal Evidence Act 1984 s 63(9A) (added by the Criminal Justice and Public Order Act 1994 s 55(1), (6); and renumbered and substituted by the Criminal Evidence (Amendment) Act 1997 s 1(2)).

Where the power to take a non-intimate sample under the Police and Criminal Evidence Act 1984 s 63(3B) (as added) is exercisable in relation to any person who is detained under the Mental Health Act 1983 Pt III (ss 35-55) (as amended) in pursuance of a hospital order or interim hospital order made following his conviction for the recordable offence in question (Police and Criminal Evidence Act 1984 s 63A(3A)(a)(i) (s 63A as added (see note 3 supra); and s 63A(3A), (3B) added by the Criminal Evidence (Amendment) Act 1997 s 3)) or a transfer direction given at a time when he was detained in pursuance of any sentence or order imposed following that conviction (Police and Criminal Evidence Act 1984 s 63A(3A)(a)(ii) (as so added)), the sample may be taken in the hospital where he is so detained (s 63A(3A)(a) (as so added)). For the meaning of 'hospital' see MENTAL HEALTH vol 30(2) (Reissue) PARA 417; for the meanings of 'hospital order' and 'interim hospital order' see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and for the meaning of 'transfer direction' see MENTAL HEALTH vol 30(2) (Reissue) PARA 535 (definitions applied by s 63A(3A) (as so added)). Where the power to take a non-intimate sample under s 63(3B) (as added) (see the text and note 17 supra) is exercisable in relation to a person detained in pursuance of directions of the Secretary of State under the Powers of Criminal Courts (Sentencing) Act 2000 s 92 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 81), the sample may be taken at the place where he is so detained: Police and Criminal Evidence Act 1984 s 63A(3B) (as so added; and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 97).

18 Police and Criminal Evidence Act 1984 s 63(3C) (added by the Criminal Evidence (Amendment) Act 1997 s 2(2)(b)). A person subject to such detention or finding is a person to whom the Criminal Evidence (Amendment) Act 1997 s 2 applies: Police and Criminal Evidence Act 1984 s 63(3C) (as so added). Where the power to take a non-intimate sample under s 63(3C) (as added) is exercisable in relation to any person the sample may be taken in the hospital where he is so detained: s 63A(3A)(b) (as added: see notes 3, 17 supra).

19 Ie by virtue of *ibid* s 63(2A), (3A), (3B) or (3C) (as added and amended) (see the text and notes 5-18 supra).

20 *Ibid* s 63(8A)(a) (s 63(8A) added by the Criminal Justice and Public Order Act 1994 s 55(1), (4); and the Police and Criminal Evidence Act 1984 s 63(8A)(a) amended by the Criminal Evidence (Amendment) Act 1997 s 2(2)(b); and the Criminal Justice Act 2003 s 10(1), (5)).

21 Police and Criminal Evidence Act 1984 s 63(8A)(b). If a non-intimate sample is taken from a person detained at a police station, the reason must be recorded in his custody record: s 63(9) (amended by the Criminal Justice and Public Order Act 1994 ss 55(1), (5), 168(2), Sch 10 para 58(b)).

22 Police and Criminal Evidence Act 1984 s 63(9ZA) (added by the Police Reform Act 2002 s 107(1), Sch 7 para 9(4)). As to the taking of non-intimate samples by designated detention officers see the Police Reform Act 2002 s 38(6), Sch 4 para 31; and POLICE vol 36(1) (2007 Reissue) PARAS 529, 531.

23 Police and Criminal Evidence Act 1984 s 117; Code D para 6.7. If force is used, a record must be made of the circumstances and those present: Code D para 6.10.

24 Police and Criminal Evidence Act 1984 s 63(8B)(a) (s 63(8B) added by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 58(a)).

25 Police and Criminal Evidence Act 1984 s 63(8B)(b) (as added: see note 24 supra). If a non-intimate sample is taken from a person detained at a police station, the reason must be recorded in his custody record: s 63(9) (as amended: see note 21 supra).

Before any non-intimate sample is taken, with or without consent, the person must be informed of the reason for taking the sample (Code D para 6.8(a)), of the grounds on which the relevant authority has been given (Code D para 6.8(b)), and that the sample or information derived from the sample may be retained and the subject of a speculative search, unless its destruction (see Code D Annex F Pt A; and PARA 1039 post) is required: Code D para 6.8(c). A record must be made of the fact that a person has been so informed: Code D para 6.12. For the meaning of 'speculative search' see PARA 1021 note 36 ante. As to the making of speculative searches generally see PARA 1038 post. As to the retention and use of samples taken with consent for elimination purposes see Code D Annex F; and PARA 1040 post. See also Code D Guidance note 4B; and PARA 1021 note 36 ante.

26 Police and Criminal Evidence Act 1984 s 63A(2) (as added: see note 3 supra).

27 Code D Guidance note 6A. When clothing needs to be removed in circumstances likely to cause embarrassment to the person, no person of the opposite sex who is not a registered medical practitioner or registered health care professional may be present, (unless in the case of a juvenile, mentally disordered or mentally vulnerable person, that person specifically requests the presence of an appropriate adult of the opposite sex who is readily available), nor may there be present any person whose presence is unnecessary: Code D para 6.9. However, in the case of a juvenile, this is subject to the overriding proviso that such a removal of clothing may take place in the absence of the appropriate adult only if the juvenile signifies, in his presence, that he prefers the adult's absence and the adult agrees: Code D para 6.9. For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante. For the meaning of 'appropriate adult' see PARA 940 note 9 ante.

28 Code D Guidance note 6A.

29 Police and Criminal Evidence Act 1984 s 63(9A) (prospectively added by the Criminal Justice and Police Act 2001 s 80(4)). At the date at which this volume states the law no day had been appointed for the commencement of this provision. Note that when this provision comes into force, there will be two provisions of the Police and Criminal Evidence Act 1984 numbered s 63(9A) (see note 17 supra).

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### **1030. Taking of intimate and non-intimate samples from persons not in custody.**

Any constable may, within the allowed period, require a person who is neither in police detention<sup>1</sup> nor held in custody by the police on the authority of a court to attend a police station in order to have a sample taken where:

- 1529 (1) the person has been charged with a recordable offence<sup>2</sup> or informed that he will be reported for such an offence and either he has not had a sample taken from him in the course of the investigation of the offence by the police or he has had a sample so taken from him but it was not suitable for the same means of analysis<sup>3</sup> or, though so suitable, the sample proved insufficient<sup>4</sup>; or
- 1530 (2) the person has been convicted of a recordable offence and either he has not had a sample taken from him since the conviction or he has had a sample taken from him (before or after his conviction) but it was not suitable for the same means of analysis or, though so suitable, the sample proved insufficient<sup>5</sup>.

The period allowed for requiring a person so to attend a police station for such purpose is:

- 1531 (a) in the case of a person falling within head (1) above, one month beginning with the date of the charge or of his being informed as mentioned in head (1) above or one month beginning with the date on which the appropriate officer<sup>6</sup> is informed of the fact that the sample is not suitable for the same means of analysis or has proved insufficient, as the case may be<sup>7</sup>; or
- 1532 (b) in the case of a person falling within head (2) above, one month beginning with the date of the conviction or one month beginning with the date on which the appropriate officer<sup>8</sup> is informed of the fact that the sample is not suitable for the same means of analysis or has proved insufficient, as the case may be<sup>9</sup>.

Any such requirement must give the person at least seven days within which he must so attend<sup>10</sup> and may direct a person to attend at a specified time of day or between specified times of day<sup>11</sup>.

Any constable may arrest without a warrant a person who has failed to comply with any such requirement<sup>12</sup>.

1 For the meaning of 'in police detention' see PARA 939 note 9 ante.

2 As to recordable offences see PARA 1049 post.

3 As to the meaning of 'analysis' in relation to a skin impression see PARA 1028 note 9 ante. For the meaning of 'skin impression' see PARA 1027 ante.

4 Police and Criminal Evidence Act 1984 s 63A(4)(a) (s 63A added by the Criminal Justice and Public Order Act 1994 s 56). For the meanings of 'sufficient' and 'insufficient' see PARA 1021 note 9 ante.

5 Police and Criminal Evidence Act 1984 s 63A(4)(b) (as added: see note 4 supra).

6     le the officer investigating the offence with which that person has been charged or as to which he was informed that he would be reported: *ibid* s 63A(8)(a) (as added: see note 4 *supra*).

7     *Ibid* s 63A(5)(a) (as added: see note 4 *supra*).

8     le the officer in charge of the police station from which the investigation of the offence of which the person was convicted was conducted: *ibid* s 63A(8)(b) (as added: see note 4 *supra*).

9     *Ibid* s 63A(5)(b) (as added: see note 4 *supra*).

10    *Ibid* s 63A(6)(a) (as added: see note 4 *supra*).

11    *Ibid* s 63A(6)(b) (as added: see note 4 *supra*).

12    *Ibid* s 63A(7) (as added: see note 4 *supra*).

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## ***F. DRUG TESTING***

### **1031. Testing for presence of Class A drugs.**

A sample of urine or a non-intimate sample<sup>1</sup> may be taken from a person in police detention<sup>2</sup> for the purpose of ascertaining whether he has any specified<sup>3</sup> Class A drug<sup>4</sup> in his body<sup>5</sup> if:

- 1533 (1) either the arrest condition<sup>6</sup> or the charge condition<sup>7</sup> is met<sup>8</sup>;
- 1534 (2) both the age condition<sup>9</sup> and the request condition<sup>10</sup> are met<sup>11</sup>; and
- 1535 (3) the notification condition<sup>12</sup> is met in relation to the arrest condition, the charge condition or the age condition (as the case may be)<sup>13</sup>.

Before requesting the person concerned to give a sample, an officer must warn<sup>14</sup> him that if, when so requested, he fails without good cause to do so he may be liable to prosecution<sup>15</sup>. The officer must also inform<sup>16</sup> the person that the purpose of taking the sample is for drug testing<sup>17</sup> under the Police and Criminal Evidence Act 1984<sup>18</sup>. Where the person concerned:

- 1536 (a) has been arrested for an offence but has not been charged with that offence and a police officer of at least the rank of inspector has reasonable grounds for suspecting that the misuse by that person of a specified Class A drug caused or contributed to the offence and has authorised the sample to be taken<sup>19</sup>; or
- 1537 (b) has been charged with an offence and a police officer of at least the rank of inspector, who has reasonable grounds for suspecting that the misuse by that person of any specified Class A drug caused or contributed to the offence, has authorised the sample to be taken<sup>20</sup>,

an officer must additionally inform the person, before requesting him to give a sample, of the giving of the authorisation and of the grounds in question<sup>21</sup>. The officer must also remind him of his rights, which may be exercised at any stage during the period in custody; that is, he must remind him about the right to have someone informed of his arrest<sup>22</sup>, about the right to consult privately with a solicitor<sup>23</sup> and that free independent legal advice is available<sup>24</sup>, and about the right to consult the codes of practice<sup>25</sup>.

If a sample is taken under these provisions from a person in respect of whom the arrest condition is met no other sample may be taken from him under these provisions during the same continuous period of detention (although, if the charge condition is also met in respect of him at any time during that period, the sample must be treated as a sample taken by virtue of the fact that the charge condition is met)<sup>26</sup>. Despite this, a sample may be taken from a person under these provisions if:

- 1538 (i) he was arrested for an offence (the first offence)<sup>27</sup>;
- 1539 (ii) the arrest condition is met but the charge condition is not met<sup>28</sup>;
- 1540 (iii) before a sample is taken<sup>29</sup> he would (but for his continuing to be in police detention by virtue of his having been arrested for an offence<sup>30</sup>) be required to be released from police detention<sup>31</sup>;

- 1541 (iv) he continues to be in police detention by virtue of his having been arrested for an offence<sup>32</sup>; and
- 1542 (v) the sample is taken before the end of the period of 24 hours starting with the time when his detention by virtue of his arrest for the first offence began<sup>33</sup>.

A sample must not be taken from a person under these provisions if he is detained in a police station unless he has been brought before the custody officer<sup>34</sup>, and a sample may be taken only by a prescribed person<sup>35</sup>.

Information obtained from a sample so taken may be disclosed:

- 1543 (A) for the purpose of informing any decision about granting bail in criminal proceedings<sup>36</sup> to the person concerned<sup>37</sup>;
- 1544 (B) for the purpose of informing any decision about the giving of a conditional caution<sup>38</sup> to the person concerned<sup>39</sup>;
- 1545 (C) where the person concerned is in police detention or is remanded in or committed to custody by an order of a court or has been granted such bail, for the purpose of informing any decision about his supervision<sup>40</sup>;
- 1546 (D) where the person concerned is convicted of an offence, for the purpose of informing any decision about the appropriate sentence to be passed by a court and any decision about his supervision or release<sup>41</sup>;
- 1547 (E) for the purpose of a misuse of drugs assessment which the person concerned is required<sup>42</sup> to attend<sup>43</sup>;
- 1548 (F) for the purpose of proceedings against the person concerned for a specified<sup>44</sup> offence relating to the assessment of the misuse of drugs<sup>45</sup>; or
- 1549 (G) for the purpose of ensuring that appropriate advice and treatment is made available to the person concerned<sup>46</sup>.

A person who fails without good cause to give any sample which may be taken from him under any of these provisions is guilty of an offence<sup>47</sup>, and liable on summary conviction to imprisonment for a term not exceeding three months<sup>48</sup> or to a fine not exceeding level 4 on the standard scale<sup>49</sup> or to both<sup>50</sup>.

1 For the meaning of 'non-intimate sample' see PARA 1027 ante.

2 For the meaning of 'in police detention' see PARA 939 note 9 ante.

3 For these purposes 'specified', in relation to a Class A drug, means specified by an order made by the Secretary of State: Criminal Justice and Court Services Act 2000 s 70(1); definition applied by the Police and Criminal Evidence Act 1984 s 63C(6) (ss 63B, 63C added by the Criminal Justice and Court Services Act 2000 s 57(1), (2)). The relevant order is the Criminal Justice (Specified Class A Drugs) Order 2001, SI 2001/1816.

4 For the meaning of 'Class A drug' see PARA 770 note 2 ante; definition applied by the Police and Criminal Evidence Act 1984 s 63C(6) (as added: see note 3 supra).

5 Any sample taken may not be used for any purpose other than to ascertain whether the person concerned has a specified Class A drug present in his body (Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 17.16(a)), and may not be used for identification purposes in accordance with Code D: Code of Practice for the Identification of Persons by Police Officers (Code D Guidance note 6F). Samples must be retained until the person concerned has made his first appearance before the court: Code C para 17.16(b). Such retention allows for the sample to be sent for confirmatory testing and analysis if the detainee disputes the test: Code C Guidance note 17D. However, such samples, and the information derived from them, may not be subsequently used in the investigation of any offence or in evidence against the persons from whom they were taken: Code C Guidance note 17D. A sample has to be sufficient and suitable; and a sufficient sample is sufficient in quantity and quality to enable drug testing analysis to take place, and a suitable sample is one which, by its nature, is suitable for a particular form of drug analysis: Code C Guidance note 17B.

In the case of a person who has not attained the age of 17, the taking of the sample may not take place except in the presence of an appropriate adult: Police and Criminal Evidence Act 1984 s 63B(5A)(c) (s 63B as added (see note 3 supra); and s 63B(5A) added by the Criminal Justice Act 2003 s 5(1), (3)(b)); Code C para 17.7(c). For these purposes, 'appropriate adult', in relation to a person who has not attained the age of 17, means: (1) his parent or guardian or, if he is in the care of a local authority or voluntary organisation, a person representing that authority or organisation; (2) a social worker of a local authority; or (3) if no person falling within head (1) or head (2) supra is available, any responsible person aged 18 or over who is not a police officer or a person employed by the police: Police and Criminal Evidence Act 1984 s 63B(10) (as so added; and amended by the Children Act 2004 s 64, Sch 5 Pt 4).

6 The 'arrest condition' is that the person concerned has been arrested for an offence but has not been charged with that offence and either the offence is a trigger offence (Police and Criminal Evidence Act 1984 s 63B(1A)(a) (s 63B as added (see note 3 supra); and s 63B(1)(a)-(c), (3) substituted, s 63B(1A), (4A), (4B), (5B)-(5D), (7)(aa), (ca), (cb) added, and s 63B(2), (4), (5)(b) amended, by the Drugs Act 2005 ss 7(1)-(9), (11), 23(1), Sch 1 paras 1, 4); Code C para 17.3(a)) or a police officer of at least the rank of inspector (see PARA 858 ante) has reasonable grounds for suspecting that the misuse by that person of a specified Class A drug caused or contributed to the offence and that officer has authorised the sample to be taken (Police and Criminal Evidence Act 1984 s 63B(1A)(b) (as so added); Code C para 17.3(b)). A 'trigger offence' is an offence under the Theft Act 1968 s 1 (theft: see PARA 282 ante), s 8 (robbery: see PARA 293 ante), s 9 (burglary: see PARA 294 ante), s 10 (aggravated burglary: see PARA 295 ante), s 12 (taking motor vehicle or other conveyance without authority: see PARA 298 ante), s 12A (as added) (aggravated vehicle-taking: see PARA 299 ante), s 15 (obtaining property by deception: see PARA 310 ante), s 22 (handling stolen goods: see PARA 302 ante) or s 25 (going equipped for stealing, etc: see PARA 296 ante); an offence (if committed in respect of a specified Class A drug: see PARA 770 note 2 ante) under the Misuse of Drugs Act 1971 s 4 (restriction on production and supply of controlled drugs: see PARA 772 ante), s 5(2) (possession of controlled drug: see PARA 770 ante) or s 5(3) (possession of controlled drug with intent to supply: see PARA 772 ante); an offence under the Criminal Attempts Act 1981 s 1(1) (see PARA 79 ante) if committed in respect of an offence under the Theft Act 1968 s 1, s 8, s 9, s 15 or s 22; and an offence under the Vagrancy Act 1824 s 3 (begging: see PARA 833 ante) or s 4 (persistent begging: see PARA 834 ante); Criminal Justice and Court Services Act 2000 s 70(1), Sch 6 (Sch 6 amended by the Criminal Justice and Court Services Act 2000 (Amendment) Order 2004, SI 2004/1892, art 2); definition applied by the Police and Criminal Evidence Act 1984 s 63C(6) (as added: see note 3 supra). See also Code C Guidance note 17E. The Secretary of State may by order amend the Criminal Justice and Court Services Act 2000 Sch 6 so as to add, modify or omit any description of offence: s 70(2). As to 'misusing' drugs see the Misuse of Drugs Act 1971 s 37(2); and MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 246 (definition applied by the Police and Criminal Evidence Act 1984 s 63C(6) (as so added)).

A police officer may give an authorisation under s 63B (as added and amended) orally or in writing but, if he gives it orally, he must confirm it in writing as soon as practicable: s 63C(2) (as so added); Code C para 17.8. If a sample is taken by virtue of an authorisation, the authorisation and the grounds for the suspicion must be recorded as soon as is practicable after the sample is taken: Police and Criminal Evidence Act 1984 s 63C(3) (as so added). The authorisation and the grounds for suspicion must be recorded in the custody record: Code C para 17.12(a). As to custody records see PARA 940 ante.

7 The 'charge condition' is either that the person concerned has been charged with a trigger offence (Police and Criminal Evidence Act 1984 s 63B(2)(a) (as added and amended: see notes 3, 6 supra); Code C para 17.4(a)) or that the person concerned has been charged with an offence and a police officer of at least the rank of inspector, who has reasonable grounds for suspecting that the misuse by that person of any specified Class A drug caused or contributed to the offence, has authorised the sample to be taken (Police and Criminal Evidence Act 1984 s 63B(2)(b) (as so added); Code C para 17.4(b)). See the Police and Criminal Evidence Act 1984 s 63C(2) (as added); Code C para 17.8; and note 6 supra.

8 Police and Criminal Evidence Act 1984 s 63B(1)(a) (as added and substituted: see notes 3, 6 supra); Code C para 17.2(a).

9 The 'age condition' is that the person concerned has attained the age of either 18 (if the arrest condition is met) (Police and Criminal Evidence Act 1984 s 63B(3)(a) (as added and substituted: see notes 3, 6 supra); Code C para 17.5(a)) or 14 (if the charge condition is met) (Police and Criminal Evidence Act 1984 s 63B(3)(b) (as so added and substituted); Code C para 17.5(b)). The Secretary of State may by order made by statutory instrument amend the Police and Criminal Evidence Act 1984 s 63B(3)(a) (as added and substituted) by substituting for the specified age of 18 a different age specified in the order or different ages so specified for different police areas so specified (s 63B(6A)(a) (s 63B as so added; s 63B(6A), (6B) added by the Criminal Justice Act 2003 s 5(1), 5(3)(c); and the Police and Criminal Evidence Act 1984 s 63B(6A) substituted by the Drugs Act 2005 s 7(10))), and may so amend the Police and Criminal Evidence Act 1984 s 63B(6A)(b) (as added and substituted) by substituting for the specified age of 14 a different age specified in the order (s 63B(6A)(b) (as so added)). A statutory instrument containing such an order may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: s 63B(6B) (as so added). At the date at which this volume states the law no such order had been made. As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.



10 The 'request condition' is that a police officer has requested the person concerned to give the sample: *ibid* s 63B(4) (as added and amended: see notes 3, 6 *supra*). In the case of a person who has not attained the age of 17, the making of the request under s 63B(4) (as added and amended) may not take place except in the presence of an appropriate adult: s 63B(5A)(a) (as added: see notes 3, 5 *supra*); Code C para 17.7(a).

11 Police and Criminal Evidence Act 1984 s 63B(1)(b) (as added and substituted: see notes 3, 6 *supra*); Code C para 17.2(b), (d).

12 The 'notification condition' is that: (1) the relevant chief officer has been notified by the Secretary of State that appropriate arrangements have been made for the police area as a whole, or for the particular police station, in which the person is in police detention (Police and Criminal Evidence Act 1984 s 63B(4A)(a) (as added: see notes 3, 6 *supra*)); and (2) the notice has not been withdrawn (s 63B(4A)(b) (as so added)). For these purposes, 'appropriate arrangements' are arrangements for the taking of samples under s 63B (as added and amended) from whichever of the following is specified in the notification: (a) persons in respect of whom the arrest condition is met (s 63B(4B)(a) (as so added)); (b) persons in respect of whom the charge condition is met (s 63B(4B)(b) (as so added)); and (c) persons who have not attained the age of 18 (s 63B(4B)(c) (as so added); Code C para 17.1). In the Police and Criminal Evidence Act 1984 s 63B (as added and amended) 'relevant chief officer' means: (i) in relation to a police area, the chief officer of police of the police force for that police area; or (ii) in relation to a police station, the chief officer of police of the police force for the police area in which the police station is situated: s 63B(10) (as so added).

In connection with the meeting of the notification condition on 1 December 2005 (ie the date on which the Drugs Act 2005 was brought into force by virtue of the Drugs Act 2005 (Commencement No 3) Order 2005, SI 2005/3053) see the Drugs Act 2005 s 7(13), (14).

13 Police and Criminal Evidence Act 1984 s 63B(1)(c) (as added and substituted: see notes 3, 6 *supra*); Code C para 17.2(c). Nothing in these provisions applies to:

- 415 (1) the taking of a specimen for the purposes of any of the provisions for requiring and taking samples of breath, blood and urine in relation to driving offences etc when under the influence of drink or drugs or excess alcohol under the Road Traffic Act 1988 ss 4-11 (as amended) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 975 et seq) or the Transport and Works Act 1992 ss 26-38 (as amended) (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 377 et seq; ROAD TRAFFIC vol 40(3) (2007 Reissue) PARA 1626) (Police and Criminal Evidence Act 1984 ss 62(11), 63C(5) (s 62(11) amended by the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 3 para 27(4); and by the Police Reform Act 2002 s 53(2); and the Police and Criminal Evidence Act 1984 s 63C as so added)); or
- 416 (2) a person arrested or detained under the terrorism provisions (ss 62(12), 63C(5) (s 62(12) added by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 62(4)(a); and substituted by the Terrorism Act 2000 s 125(1), Sch 15 para 5(1), (8); and the Police and Criminal Evidence Act 1984 s 63C(5) as so added)).

For the meaning of 'the terrorism provisions' see PARA 952 note 4 *ante*.

14 In the case of a person who has not attained the age of 17 the giving of the warning may not take place except in the presence of an appropriate adult: Police and Criminal Evidence Act 1984 s 63B(5A)(b) (as added: see notes 3, 5 *supra*); Code C para 17.7(b).

15 Police and Criminal Evidence Act 1984 s 63B(5)(a) (as added: see note 3 *supra*); Code C para 17.6(b). The following form of words may be used: 'You do not have to provide a sample, but I must warn you that if you fail or refuse without good cause to do so, you will commit an offence for which you may be imprisoned, or fined, or both': Code C Guidance note 17A. The giving of a warning of the consequences of failure to provide a specimen must be recorded in the custody record: Code C para 17.12(b).

16 In the case of a person who has not attained the age of 17 the giving of the information under the Police and Criminal Evidence Act 1984 s 63B(5) (as added) may not take place except in the presence of an appropriate adult: s 63B(5A)(b) (as added: see notes 3, 5 *supra*); Code C para 17.7(b).

17 Ie to ascertain whether he has a specified Class A drug present in his body: Code C para 17.6(a).

18 Code C para 17.6(a).

19 Ie in a case falling within the Police and Criminal Evidence Act 1984 s 63B(1A)(b) (as added) (see notes 3, 6 *supra*). As to the giving of authorisations see note 6 *supra*.

20 Ie in a case falling within *ibid* s 63B(2)(b) (as added) (see note 7 *supra*).

21 *Ibid* s 63B(5)(b) (as added and amended: see notes 3, 6 *supra*); Code C para 17.6(c).

- 22 Code C para 17.6(d)(i). As to this right see Code C paras 5.1-5.8; and PARA 952 ante.
- 23 For the meaning of 'solicitor' see PARA 953 note 4 ante.
- 24 Code C para 17.6(d)(ii). As to this right see Code C paras 6.1-6.17; and PARA 953 ante.
- 25 Code C para 17.6(d)(iii).
- 26 Police and Criminal Evidence Act 1984 s 63B(5B)(a) (as added: see notes 3, 6 supra); Code C para 17.9. The fact that the sample is to be so treated must be recorded in the person's custody record (Police and Criminal Evidence Act 1984 s 63B(5B)(b) (as so added)), as must the time at which any sample is given and the time of charge or, where the arrest condition is being relied upon, the time of arrest and, where applicable, the fact that a sample taken after arrest is being treated as a sample taken by virtue of the charge condition, where that is met in the same period of continuous detention (Code C para 17.12(c), (d)).
- 27 Police and Criminal Evidence Act 1984 s 63B(5C)(a) (as added: see notes 3, 6 supra).
- 28 Ibid s 63B(5C)(b) (as added: see notes 3, 6 supra).
- 29 Ie by virtue of ibid s 63B(1) (as added and amended) (see the text and notes 1-13 supra).
- 30 Ie an offence not falling within ibid s 63B(1A) (as added) (see note 6 supra).
- 31 Ibid s 63B(5C)(c) (as added: see notes 3, 6 supra).
- 32 Ibid s 63B(5C)(d) (as added: see notes 3, 6 supra). The offence referred to in the text is an offence not falling within s 63B(1A) (as added) (see note 6 supra).
- 33 Ibid s 63B(5C)(e) (as added: see notes 3, 6 supra).
- 34 Ibid s 63B(5D) (as added: see notes 3, 6 supra). Force may not be used to take any sample for the purpose of drug testing: Code C para 17.14. A detainee from whom a sample may be taken may be detained for up to six hours from the time of charge if the custody officer reasonably believes that the detention is necessary for the sample to be taken: Code C para 17.10. Where the arrest condition is met, a detainee whom the custody officer has decided to release on bail without charge may continue to be detained, but not beyond 24 hours from the relevant time (as to which see the Police and Criminal Evidence Act 1984 s 41(2); and PARA 1000 ante), to enable a sample to be taken: Code C para 17.10. A detainee in respect of whom the arrest condition, but not the charge condition, is met, and whose release would be required before a sample can be taken had he not continued to be detained as a result of being arrested for a further offence which does not satisfy the arrest condition, may have a sample taken at any time within 24 hours after the arrest for the offence that satisfies the arrest condition: Code C para 17.10.
- 35 Police and Criminal Evidence Act 1984 s 63B(6) (as added: see note 3 supra); Code C para 17.13; Code C Guidance note 17C. 'Prescribed person' means a person prescribed by regulations made by the Secretary of State by statutory instrument: Police and Criminal Evidence Act 1984 s 63B(6) (as so added). No regulations may be made under s 63B(6) (as added) unless a draft has been laid before, and approved by resolution of, each House of Parliament: s 63B(6) (as so added). The Police and Criminal Evidence Act 1984 (Drug Testing of Persons in Police Detention) (Prescribed Persons) Regulations 2001, SI 2001/2645, prescribe the persons who may take samples pursuant to these powers.
- 36 Ie within the meaning of the Bail Act 1976 (see PARA 1166 post).
- 37 Police and Criminal Evidence Act 1984 s 63B(7)(a) (as added: see note 3 supra).
- 38 Ie under the Criminal Justice Act 2003 Pt 3 (ss 22-27) (see PARA 1044 post).
- 39 Police and Criminal Evidence Act 1984 s 63B(7)(aa) (as added: see notes 3, 6 supra).
- 40 Ibid s 63B(7)(b) (as added: see note 3 supra).
- 41 Ibid s 63B(7)(c) (as added: see note 3 supra).
- 42 Ie by virtue of the Drugs Act 2005 s 9(2) or s 10(2) (see PARAS 1032-1033 ante).
- 43 Police and Criminal Evidence Act 1984 s 63B(7)(ca) (as added: see notes 3, 6 supra).
- 44 Ie an offence under the Drugs Act 2005 s 12(3) or s 14(3) (see PARA 1035 ante).

45 Police and Criminal Evidence Act 1984 s 63B(7)(cb) (as added: see notes 3, 6 supra).

46 Ibid s 63B(7)(d) (as added: see note 3 supra).

47 Ibid s 63B(8) (as added: see note 3 supra).

48 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 51 weeks: see the Police and Criminal Evidence Act 1984 s 63C(1) (as added (see note 3 supra); and prospectively amended by the Criminal Justice Act 2003 s 280(2), (3), Sch 26 para 35). At the date at which this volume states the law no such day had been appointed.

49 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

50 Police and Criminal Evidence Act 1984 s 63C(1) (as added (see note 3 supra); prospectively amended (see note 48 supra)).

## **UPDATE**

### **1031 Testing for presence of Class A drugs**

NOTE 6--2000 Act Sch 6 further amended: Fraud Act 2006 Sch 1 para 32, Sch 3; Criminal Justice and Court Services Act 2000 (Amendment) Order 2007, SI 2007/2171.

NOTE 39--Police and Criminal Evidence Act 1984 s 63B(7)(aa) amended: Criminal Justice and Immigration Act 2008 Sch 26 para 20(2) (in force in relation to specified police areas: see SI 2009/2780).

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### **1032. Initial assessment following testing for presence of Class A drugs.**

An initial assessment is an appointment with a suitably qualified person<sup>1</sup> (an 'initial assessor'):

- 1550 (1) for the purpose of establishing whether a person is dependent upon or has a propensity to misuse<sup>2</sup> any specified<sup>3</sup> Class A drug<sup>4</sup>;
- 1551 (2) if the initial assessor thinks that a person has such a dependency or propensity, for the purpose of establishing whether he might benefit from further assessment, or from assistance or treatment (or both), in connection with the dependency or the propensity<sup>5</sup>; and
- 1552 (3) if the initial assessor thinks that he might benefit from such assistance or treatment (or both), for the purpose of providing him with advice, including an explanation of the types of assistance or treatment (or both) which are available<sup>6</sup>.

If: (a) a sample is taken<sup>7</sup> for the purpose of testing for the presence of a specified Class A drug from a person detained at a police station<sup>8</sup>; (b) an analysis of the sample reveals that a specified Class A drug may be present in the person's body<sup>9</sup>; (c) the age condition is met<sup>10</sup>; and (d) the notification condition is met<sup>11</sup>, then a police officer may, at any time before the person is released from detention at the police station, require him to attend an initial assessment and remain for its duration<sup>12</sup>. Where a person is required to attend an initial assessment and remain for its duration by virtue of these provisions a police officer must inform him of the time when, and the place at which, the assessment is to take place<sup>13</sup>, warn him that he may be liable to prosecution if he fails without good cause to attend the assessment (and, if applicable, any follow-up assessment which he may be required to attend) and remain for its duration<sup>14</sup>, and explain that this information will be confirmed in writing<sup>15</sup>. A record must be made, as part of the person's custody record, of the information, warnings, explanations and notices<sup>16</sup> so given<sup>17</sup>. These duties<sup>18</sup> must be discharged before the person is released from detention at the police station<sup>19</sup>.

In exercising any functions conferred by the provisions concerned with assessments of the misuse of drugs, a police officer and a suitably qualified person must have regard to any guidance issued by the Secretary of State for the purpose<sup>20</sup>.

<sup>1</sup> I.e. a person who has such qualifications or experience as are from time to time specified by the Secretary of State for the purposes of the Drugs Act 2005 Pt 3 (ss 9-19) (see PARA 1032 et seq post): s 19(1), (6).

<sup>2</sup> As to 'misusing' drugs see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 246; definition applied by ibid s 19(2).

<sup>3</sup> For the meaning of 'specified' in this context see PARA 1031 note 3 ante; definition applied by ibid s 19(3).

<sup>4</sup> Ibid ss 9(3)(a), 19(3). For the meaning of 'Class A drug' see PARA 770 note 2 ante; definition applied by s 19(2).

<sup>5</sup> Ibid s 9(3)(b).

<sup>6</sup> Ibid s 9(3)(c).

7 le under the Police and Criminal Evidence Act 1984 s 63B (as added and amended) (see PARA 1031 ante).

8 Drugs Act 2005 s 9(1)(a).

9 Ibid s 9(1)(b).

10 Ibid s 9(1)(c); Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 17.17(a). The age condition is met if the person has attained the age of 18 or such different age as the Secretary of State may by order made by statutory instrument specify for these purposes: Drugs Act 2005 s 9(4). A statutory instrument containing an order under s 9(4) or s 10(5) (see PARA 1033 post) must not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament: s 18(1). Any such order may make different provision for different police areas (s 18(2)(a)) and make such provision as the Secretary of State considers appropriate in connection with requiring persons who have not attained the age of 18 to attend and remain for the duration of an initial assessment or a follow-up assessment (as the case may be), including provision amending Pt 3 (s 18(2)(b)). At the date at which this volume states the law no such orders had been made. As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq. As to follow-up assessments see s 10(3); and PARA 1033 post.

11 Ibid s 9(1)(d); Code C para 17.7(b). The notification condition is met, depending on whether the person in question has attained the age of 18 or not, if the relevant chief officer has been notified by the Secretary of State that arrangements for conducting initial assessments for persons who have attained that age (s 9(5)(a)) or, where applicable, have not (s 9(6)(a)), have been made for persons from whom samples have been taken at the police station in which the person in question is detained, and the notice has not been withdrawn (s 9(5)(b), (6)(b)). In these provisions, 'relevant chief officer' means the chief officer of police of the police force for the police area in which the police station is situated: s 9(7).

12 Ibid s 9(2); Code C para 17.17. A record must be made, as part of the person's custody record, of any requirement so imposed on him: Drugs Act 2005 s 11(7)(a); Code C para 17.20(a). As to custody records see PARA 940 ante.

13 Drugs Act 2005 s 11(1), (2)(a); Code C para 17.18(a).

14 Drugs Act 2005 s 11(3), (4); Code C para 17.18(c).

15 Drugs Act 2005 s 11(2)(b); Code C para 17.18(b). A police officer must give the person notice in writing which: (1) confirms that he is required to attend and remain for the duration of an initial assessment or both an initial assessment and a follow-up assessment (as the case may be) (Drugs Act 2005 s 11(5)(a); Code C para 17.19(a)); (2) confirms the information given in relation to the time when, and the place at which, the assessment is to take place (ie given in pursuance of the Drugs Act 2005 s 11(2) (see the text and note 13 supra)) (s 11(5)(b); Code C para 17.19(b)); and (3) repeats the warning as to the consequences of failure to attend either assessment (ie the warning given in pursuance of the Drugs Act 2005 s 11(3) and any warning given in pursuance of s 11(4) (see the text and note 14 supra)) (s 11(5)(c); Code C para 17.18(b)). If a person is given a notice in pursuance of these requirements, a police officer or a suitably qualified person may give the person a further notice in writing which informs the person of any change to the time when, or to the place at which, the initial assessment is to take place (Drugs Act 2005 s 11(8)(a); Code C para 17.21) and repeats the warning as to the consequences of failure to attend either assessment (Drugs Act 2005 s 11(8)(b); Code C para 17.21).

16 le the information, warnings, explanations and notices given in pursuance of the Drugs Act 2005 s 11(2)-(4) (see the text and notes 13-15 supra).

17 Ibid s 11(7)(c), (d); Code C para 17.20(b).

18 le the duties imposed by the Drugs Act 2005 s 11(2)-(5) (see the text and notes 13-15 supra).

19 Ibid s 11(6).

20 Ibid s 18(3); Code C para 17.22.

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### **1033. Follow-up assessment.**

As from a day to be appointed<sup>1</sup> provision is made for a follow-up assessment. A 'follow-up assessment' is an appointment with a suitably qualified person<sup>2</sup> (a 'follow-up assessor'):

- 1553 (1) for any of the purposes of the initial assessment which were not fulfilled at the initial assessment<sup>3</sup>; and
- 1554 (2) if the follow-up assessor thinks it appropriate, for the purpose of drawing up a care plan<sup>4</sup>.

A care plan is a plan which sets out the nature of the assistance or treatment (or both) which may be most appropriate for the person in connection with any dependency upon, or any propensity to misuse<sup>5</sup>, a specified<sup>6</sup> Class A drug<sup>7</sup> which the follow-up assessor thinks that he has<sup>8</sup>.

If a police officer requires<sup>9</sup> a person to attend an initial assessment and remain for its duration<sup>10</sup>, and the age condition<sup>11</sup> and notification condition<sup>12</sup> are met, the police officer must, at the same time as he imposes the initial assessment requirement<sup>13</sup>, require the person to attend a follow-up assessment and remain for its duration<sup>14</sup> and inform him that the requirement ceases to have effect if he is informed at the initial assessment that he is no longer required to attend the follow-up assessment<sup>15</sup>.

1 The Drugs Act 2005 s 10 (see the text and notes 4-15 *infra*), ss 11, 15, 16 so far as relating to s 10 (see note 14 *infra*; and PARA 1036 *post*), and ss 13, 14 (see note 14 *infra*; and PARAS 1034-1035 *post*) are to come into force as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'suitably qualified person' see PARA 1032 note 1 *ante*.

3 Drugs Act 2005 s 10(3)(a). For the meaning of 'initial assessment' see PARA 1032 *ante*.

4 *Ibid* s 10(3)(b).

5 As to 'misusing' drugs see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 246; definition applied by *ibid* s 19(1), (2).

6 For the meaning of 'specified' in this context see PARA 1031 note 3 *ante*; definition applied by *ibid* s 19(3).

7 For the meaning of 'Class A drug' see PARA 770 note 2 *ante*; definition applied by *ibid* s 19(2).

8 *Ibid* s 10(4).

9 *Ie* under *ibid* s 9(2) (see PARA 1032 *ante*).

10 *Ibid* s 10(1)(a).

11 *Ibid* s 10(1)(b). The age condition is met if the person has attained the age of 18 or such different age as the Secretary of State may by order made by statutory instrument specify for these purposes: s 10(5). As to the making of such orders see PARA 1032 note 10 *ante*. At the date at which this volume states the law no such orders had been made.

12 Ibid s 10(1)(c). The notification condition is met, depending on whether the person in question has attained the age of 18 or not, if the relevant chief officer has been notified by the Secretary of State that arrangements for conducting initial assessments for persons who have attained that age (s 10(6)(a)) or, where applicable, have not (s 10(7)(a)), have been made for persons from whom samples have been taken at the police station in which the person in question is detained, and the notice has not been withdrawn (s 10(6)(b), (7)(b)). In these provisions, 'relevant chief officer' means the chief officer of police of the police force for the police area in which the police station is situated: s 10(8). As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

13 Ie the initial assessment requirement under ibid s 9(2) (see PARA 1032 ante).

14 Ibid s 10(2)(a). A record must be made, as part of the person's custody record, of any requirement so imposed on him: s 11(7)(b). As to custody records see PARA 940 ante. It is provided that any such requirement ceases to have effect if the person is informed by the initial assessor that a follow-up assessment is not appropriate: see s 13(3); and PARA 1034 post.

15 Ibid s 10(2)(b).

## **UPDATE**

### **1033 Follow-up assessment**

NOTE 1--Day now appointed: SI 2007/562.

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### **1034. Arrangements for follow-up assessment.**

As from a day to be appointed<sup>1</sup>, if a person attends<sup>2</sup> an initial assessment<sup>3</sup> and is required<sup>4</sup> to attend a follow-up assessment<sup>5</sup> and remain for its duration<sup>6</sup>, then providing the initial assessor<sup>7</sup> thinks that a follow-up assessment is appropriate, he must inform the person of the time when, and the place at which, the follow-up assessment is to take place<sup>8</sup>, warn him that, if he fails without good cause to attend the follow-up assessment and remain for its duration, he may be liable to prosecution<sup>9</sup>, and explain that this information will be confirmed in writing<sup>10</sup>. If, however, the initial assessor thinks that a follow-up assessment is not appropriate, he must inform the person concerned that he is no longer required to attend it<sup>11</sup>.

These duties<sup>12</sup> must be discharged before the conclusion of the initial assessment<sup>13</sup>.

1 See PARA 1033 note 1 ante.

2 Ie in pursuance of the Drugs Act 2005 s 9(2) (see PARA 1032 ante).

3 Ibid s 13(1)(a). For the meaning of 'initial assessment' see PARA 1032 ante.

4 Ie by virtue of ibid s 10(2) (see PARA 1033 ante).

5 For the meaning of 'follow-up assessment' see PARA 1033 ante.

6 Drugs Act 2005 s 13(1)(b).

7 For the meaning of 'initial assessor' see PARA 1032 ante.

8 Drugs Act 2005 s 13(4)(a).

9 Ibid s 13(5).

10 Ibid s 13(4)(b). The initial assessor must give the person notice in writing which confirms that he is required to attend and remain for the duration of the follow-up assessment (s 13(6)(a)), confirms the information given regarding the time when, and the place at which, the follow-up assessment is to take place (ie the information given pursuant to s 13(4)) (s 13(6)(b)), and repeats the warning given (ie in pursuance of s 13(5) (see the text and note 9 supra)) about liability to prosecution (s 13(6)(c)). If a person is given a notice in pursuance of s 13(6), the initial assessor or another suitably qualified person may give the person a further notice in writing which informs him of any change to the time when, or to the place at which, the follow-up assessment is to take place (s 13(8)(a)) and repeats the warning about liability to prosecution (s 13(8)(b)).

11 Ibid s 13(2). The requirement that a police officer imposing a requirement to attend and remain at an initial assessment under s 9(2) (see PARA 1032 ante) must at the same time require the person to attend and remain at a follow-up assessment imposed by virtue of s 10(2) (see PARA 1033 ante) ceases to have effect if the person is informed as mentioned in s 13(2): s 13(3).

12 Ie those mentioned in ibid s 13(2), (4)-(6) (see the text and notes 7-11 supra).

13 Ibid s 13(7).



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### **1035. Attendance at assessments.**

If a person is required to attend an initial assessment<sup>1</sup> or (as from a day to be appointed<sup>2</sup>) a follow-up assessment<sup>3</sup> and remain for its duration, the initial assessor<sup>4</sup> or follow-up assessor<sup>5</sup> must inform a police officer or a police support officer<sup>6</sup> if the person either fails to attend the assessment at the specified time and place<sup>7</sup> or attends the assessment at the specified time and place but fails to remain for its duration<sup>8</sup>. A person is guilty of an offence if without good cause he either fails to attend an initial or follow-up assessment at the specified time and place<sup>9</sup> or attends the assessment at the specified time and place but fails to remain for its duration<sup>10</sup>. A person who is guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months<sup>11</sup> or to a fine not exceeding level 4 on the standard scale or to both<sup>12</sup>.

If a person fails to attend an initial assessment at the specified time and place, any requirement imposed on him<sup>13</sup> to attend a follow-up assessment and remain for its duration ceases to have effect<sup>14</sup>.

1    Ie by virtue of the Drugs Act 2005 s 9(2) (see PARA 1032 ante). For the meaning of 'initial assessment' see PARA 1032 ante.

2    See PARA 1033 note 1 ante.

3    Ie by virtue of the Drugs Act 2005 s 10(2) (see PARA 1033 ante). For the meaning of 'follow-up assessment' see PARA 1033 ante.

4    For the meaning of 'initial assessor' see PARA 1032 ante.

5    For the meaning of 'follow-up assessor' see PARA 1033 ante.

6    'Police support officer' means a person who is employed by a police authority under the Police Act 1996 s 15(1) (see POLICE vol 36(1) (2007 Reissue) PARA 168) and who is under the direction and control of the chief officer of police of the police force maintained by that authority: Drugs Act 2005 s 19(1), (7). As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

7    Ibid ss 12(1), (2)(a), 14(1), (2)(a). For these purposes the specified time and the specified place, in relation to the person concerned, are the time and the place specified in the notice given to him in pursuance of s 11(5) (see PARA 1032 ante) (in the case of an initial assessment) or s 13(6) (see PARA 1034 ante) (in the case of a follow-up assessment) or, if a further notice specifying a different time or place has been given to him in pursuance of s 11(8) (see PARA 1032 ante) (in the case of an initial assessment) or s 13(8) (see PARA 1034 ante) (in the case of a follow-up assessment), the time or place specified in that notice: ss 12(6)(a), (b), 14(5)(a), (b).

8    Ibid ss 12(2)(b), 14(2)(b).

9    Ibid ss 12(3)(a), 14(3)(a).

10   Ibid ss 12(3)(b), 14(3)(b). No proceedings may be brought, and existing proceedings must be discontinued, if the requirement for the person to attend or remain at an assessment ceases to have effect by virtue of s 16: see s 16(4), (5); and PARA 1037 post.

11   In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5), the reference in the Drugs Act 2005 ss 12(4), 14(4) to three months is to be read as a reference to 51 weeks: see ss 12(4), (7), 14(4), (6).

12 Ibid ss 12(4), (7), 14(4), (6). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

13 le imposed by virtue of ibid s 10(2) (see PARA 1033 ante).

14 Ibid s 12(5).

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### **1036. Disclosure of information about assessments.**

An initial assessor<sup>1</sup> may disclose information obtained as a result of an initial assessment<sup>2</sup>, and (as from a day to be appointed<sup>3</sup>) a follow-up assessor<sup>4</sup> may disclose information obtained as a result of a follow-up assessment<sup>5</sup>, to a person who is involved in the conduct of the assessment<sup>6</sup>. An initial assessor may also disclose information relating to an initial assessment for certain purposes connected with the granting of conditional bail<sup>7</sup>, and (as from a day to be appointed<sup>8</sup>) may also disclose information obtained as a result of an initial assessment to any person who is or may be involved in the conduct of any follow-up assessment<sup>9</sup>. Subject to this, information obtained as a result of an assessment may not be disclosed by any person without the written consent of the person to whom the assessment relates<sup>10</sup>.

1 For the meaning of 'initial assessor' see PARA 1032 ante.

2 For the meaning of 'initial assessment' see PARA 1032 ante.

3 See PARA 1033 note 1 ante.

4 For the meaning of 'follow-up assessor' see PARA 1033 ante.

5 For the meaning of 'follow-up assessment' see PARA 1033 ante.

6 Drugs Act 2005 s 15(1)(a), (2).

7 See *ibid* s 17(4); and PARA 1170 post.

8 See PARA 1033 note 1 ante.

9 Drugs Act 2005 s 15(1)(b).

10 *Ibid* s 15(3). Nothing in s 15 affects the operation of s 17(4) (disclosure to court for bail purposes: see PARA 1170 post): s 15(4).

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### **1037. Circumstances in which assessment requirements cease to have effect.**

A requirement for an initial assessment<sup>1</sup> or (as from a day to be appointed<sup>2</sup>) follow-up assessment<sup>3</sup> imposed on a person<sup>4</sup> ceases to have effect<sup>5</sup> if at any time before he has fully complied with the requirement:

- 1555 (1) a police officer makes arrangements for a further analysis of the sample taken<sup>6</sup> from him<sup>7</sup> and the analysis does not reveal that a specified<sup>8</sup> Class A drug<sup>9</sup> was present in the person's body<sup>10</sup>; or
- 1556 (2) he is charged with the related offence<sup>11</sup> and a court imposes on him a condition of bail<sup>12</sup>.

If a person fails to attend an assessment<sup>13</sup> which he is required to attend<sup>14</sup> or fails to remain for the duration of such an assessment but, at any time after his failure, the requirement to attend ceases to have effect:

- 1557 (a) no proceedings for an offence of failing to attend or failing to remain<sup>15</sup> may be brought against him<sup>16</sup>; and
- 1558 (b) if any such proceedings were commenced before the requirement ceased to have effect, those proceedings must be discontinued<sup>17</sup>.

1 For the meaning of 'initial assessment' see PARA 1032 ante.

2 See PARA 1033 note 1 ante.

3 For the meaning of 'follow-up assessment' see PARA 1033 ante.

4 I.e. by virtue of the Drugs Act 2005 s 9(2) (initial assessments: see PARA 1032 ante) or 10(2) (follow-up assessments: see PARA 1033 ante).

5 Nothing in *ibid* s 16(1) affects the validity of anything done in connection with the assessment requirement before it ceases to have effect: s 16(3).

6 I.e. under the Police and Criminal Evidence Act 1984 s 63B (as added and amended) (see PARA 1031 ante).

7 Drugs Act 2005 s 16(1)(a).

8 For the meaning of 'specified' in this context see PARA 1031 note 3 ante; definition applied by *ibid* s 19(3).

9 For the meaning of 'Class A drug' see PARA 770 note 2 ante; definition applied by *ibid* s 19(2).

10 *Ibid* s 16(1)(b). If a requirement ceases to have effect under these circumstances a police officer must so inform the person concerned: s 16(2).

11 *Ibid* s 17(1)(a). For these purposes, 'the related offence' is the offence in respect of which the condition specified in Police and Criminal Evidence Act 1984 s 63B(1A) or (2) (as added and amended) (see PARA 1031 ante) is satisfied in relation to the taking of the sample mentioned in the Drugs Act 2005 s 9(1)(a) (see PARA 1032 ante): s 17(6). Nothing in s 17(1) affects the validity of anything done in connection with the requirement before it ceases to have effect (s 17(5)(a)) or any liability which the person may have for an offence under s 12(3) or s 14(3) (see PARA 1035 ante) committed before the requirement ceases to have effect (s 17(5)(b)).

12 Ibid s 17(1)(b). See note 11 supra. For these purposes, a 'condition of bail' is a condition of bail under the Bail Act 1976 s 3(6D) (as added) (see PARA 1167 post): Drugs Act 2005 s 17(1)(b).

13 Ie either an initial assessment or a follow-up assessment.

14 Ie by virtue of the Drugs Act 2005 s 9(2) (initial assessments: see PARA 1032 ante) or 10(2) (follow-up assessments: see PARA 1033 ante).

15 As to such proceedings see *ibid* ss 12(3), 14(3); and PARA 1035 ante.

16 Ibid s 16(4)(a), (5)(a).

17 Ibid s 16(4)(b), (5)(b).

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### ***G. SPECULATIVE SEARCHES AND DESTRUCTION AND RETENTION OF SAMPLES AND PHOTOGRAPHS***

#### **1038. Speculative searches of fingerprints, footwear impressions and other samples.**

Where a person has been arrested on suspicion of being involved in a recordable offence<sup>1</sup> or has been charged with such an offence or has been informed that he will be reported for such an offence, fingerprints<sup>2</sup>, impressions of footwear<sup>3</sup> or samples<sup>4</sup>, or the information derived from samples, taken<sup>5</sup> from the person may be checked against:

- 1559 (1) other fingerprints, impressions of footwear or samples to which the person seeking to check has access and which are held by or on behalf of any one or more relevant law enforcement authorities<sup>6</sup> or which are held in connection with or as a result of an investigation of an offence<sup>7</sup>; and
- 1560 (2) information derived from other samples if the information is contained in records to which the person seeking to check has access and which are so held<sup>8</sup>.

Where fingerprints, impressions of footwear or samples have been taken from any person in connection with the investigation of an offence but otherwise than in these circumstances<sup>9</sup>, and that person has given his consent in writing<sup>10</sup> to the use in a speculative search<sup>11</sup> of the fingerprints, impressions or samples and of information derived from them<sup>12</sup>, the fingerprints or impressions or, as the case may be, those samples and that information may be checked against any of the fingerprints, impressions, samples or information mentioned in head (1) or head (2) above<sup>13</sup>.

1 As to recordable offences see PARA 1049 post.

2 For the meaning of 'fingerprints' see PARA 1021 note 2 ante. As to the power to take fingerprints see PARA 1021 ante.

3 As to the power to take impressions of footwear see PARA 1022 ante.

4 As to the power to take samples see PARAS 1027-1030 ante.

5 Ie under any power conferred by the Police and Criminal Evidence Act 1984 Pt V (ss 53-65) (as amended) (see PARA 952 et seq ante).

6 For these purposes, 'relevant law enforcement authority' means:

417 (1) a police force (ibid s 63A(1A)(a) (s 63A added by the Criminal Justice and Public Order Act 1994 s 56; and the Police and Criminal Evidence Act 1984 s 63A(1) substituted, and s 63A(1A) added, by the Criminal Procedure and Investigations Act 1996 s 64; and the Police and Criminal Evidence Act 1984 s 63A(1A) substituted, and s 63A(1B)-(1D) added, by the Criminal Justice and Police Act 2001 s 81(2)));

- 418 (2) the Serious Organised Crime Agency (Police and Criminal Evidence Act 1984 s 63A(1A)(b) (s 63A(1A) as so added and substituted; and s 63A(1A)(b) substituted by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 paras 43, 46));
- 419 (3) a public authority (not falling within heads (1), (2) supra) with functions in any part of the British Islands which consist of or include the investigation of crimes or the charging of offenders (Police and Criminal Evidence Act 1984 s 63A(1A)(d) (as so added and substituted));
- 420 (4) any person with functions in any country or territory outside the United Kingdom which correspond to those of a police force (s 63A(1A)(e)(i) (as so added and substituted)) or otherwise consist of or include the investigation of conduct contrary to the law of that country or territory, or the apprehension of persons guilty of such conduct (s 63A(1A)(e)(ii) (as so added and substituted));
- 421 (5) any person with functions under any international agreement which consist of or include the investigation of conduct which is unlawful under the law of one or more places (s 63A(1A)(f) (i) (as so added and substituted)), prohibited by such an agreement (s 63A(1A)(f)(ii) (as so added and substituted)) or contrary to international law (s 63A(1A)(f)(iii) (as so added and substituted)) or the apprehension of persons guilty of such conduct (s 63A(1A)(f) (as so added and substituted)).

The reference to a 'police force' is a reference to: any police force maintained under the Police Act 1996 s 2 (police forces in England and Wales outside London: see POLICE vol 36(1) (2007 Reissue) PARA 136) (Police and Criminal Evidence Act 1984 s 63A(1B)(a) (as so added)); the metropolitan police force (see POLICE vol 36(1) (2007 Reissue) PARA 137 et seq) (s 63A(1B)(b) (as so added)); the City of London police force (see POLICE vol 36(1) (2007 Reissue) PARA 138) (s 63A(1B)(c) (as so added)); any police force maintained under or by virtue of the Police (Scotland) Act 1967 s 1 (Police and Criminal Evidence Act 1984 s 63A(1B)(d) (as so added)); the Police Service of Northern Ireland (s 63A(1B)(e) (as so added)); the Police Service of Northern Ireland Reserve (s 63A(1B)(f) (as so added)); the Ministry of Defence Police (see POLICE vol 36(1) (2007 Reissue) PARA 120 et seq) (s 63A(1B)(g) (as so added)); the Royal Navy Regulating Branch (s 63A(1B)(h) (as so added)); the Royal Military Police (s 63A(1B)(i) (as so added)); the Royal Air Force Police (s 63A(1B)(j) (as so added)); the Royal Marines Police (s 63A(1B)(k) (as so added)); the British Transport Police (see POLICE vol 36(1) (2007 Reissue) PARA 129) (s 63A(1B)(l) (as so added)); the States of Jersey Police Force (s 63A(1B)(m) (as so added)); the salaried police force of the Island of Guernsey (s 63A(1B)(n) (as so added)); and the Isle of Man Constabulary (s 63A(1B)(o) (as so added)); Police and Criminal Evidence Act 1984 s 63A(1B) (as so added and substituted). As to the Serious Organised Crime Agency see POLICE vol 36(1) (2007 Reissue) PARA 430 et seq. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

7 Ibid s 63A(1)(a) (as added and substituted (see note 6 supra); and amended by the Criminal Justice and Police Act 2001 s 81(1); and by the Serious Organised Crime and Police Act 2005 s 118(1), (3)(a)); Code D: Code of Practice for the Identification of Persons by Police Officers Guidance note 6E.

8 Police and Criminal Evidence Act 1984 s 63A(1)(b) (as added and substituted: see note 6 supra); Code D Guidance note 6E.

9 Police and Criminal Evidence Act 1984 s 63A(1C)(a) (as added (see note 6 supra); and s 63A(1C) amended by the Serious Organised Crime and Police Act 2005 s 118(3)(b)(i)).

10 A consent given for these purposes is not capable of being withdrawn: Police and Criminal Evidence Act 1984 s 63A(1D) (as added: see note 6 supra). A basic form of words for such consent is 'I consent to my fingerprints/DNA sample and information derived from it being retained and used only for purposes related to the prevention and detection of a crime, the investigation of an offence or the conduct of a prosecution either nationally or internationally. I understand that this sample may be checked against other fingerprints/DNA records held by or on behalf of relevant law enforcement authorities, either nationally or internationally. I understand that once I have given my consent for the sample to be retained and used I cannot withdraw this consent': Code D Guidance note 6E. At the date at which this volume states the law Code D Guidance note 6E had not been updated to take account of the amendments made to the Police and Criminal Evidence Act 1984 s 63A (as added and amended) by the Serious Organised Crime and Police Act 2005 s 118 (which brought impressions of footwear within the scope of the provisions described in this paragraph) but it is clear that a consent for the taking of a footwear impression may be given in the form set out above with appropriate modifications to the wording.

11 For the meaning of 'speculative search' see PARA 1021 note 36 ante. See further PARA 1039 post.

12 Police and Criminal Evidence Act 1984 s 63A(1C)(b) (as added and amended: see notes 6, 9 supra).

13 Ibid s 63A(1C) (as added and amended: see notes 6, 9 supra); Code D Guidance note 6E.

## UPDATE

**1038 Speculative searches of fingerprints, footwear impressions and other samples**

NOTE 6--For 'Royal Navy Regulating Branch' now read 'Royal Naval Police': 1984 Act s 63A(1B)(h) (amended by the Armed Forces Act 2006 Sch 16 para 100(a)). 1984 Act s 63A(1B)(k) repealed: Armed Forces Act 2006 Sch 16 para 100(b), Sch 17.



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### **1039. Destruction of fingerprints, impressions of footwear and samples.**

If fingerprints<sup>1</sup>, impressions of footwear<sup>2</sup> or samples<sup>3</sup> are taken from a person in connection with the investigation of an offence<sup>4</sup> and that person is not suspected of having committed the offence<sup>5</sup> they must be destroyed as soon as they have fulfilled the purpose for which they were taken<sup>6</sup>. Samples, fingerprints and impressions of footwear are not, however, so required to be destroyed<sup>7</sup> if:

- 1561 (1) they were taken for the purposes of the investigation of an offence of which a person has been convicted<sup>8</sup>; and
- 1562 (2) a sample, fingerprint or, as the case may be, an impression of footwear was also taken from the convicted person for the purposes of that investigation<sup>9</sup>.

Where a person is entitled<sup>10</sup> to the destruction of any fingerprint, impression of footwear or sample taken from him (or would be but for the restriction on destruction<sup>11</sup>), neither the fingerprint, nor the impression of footwear nor the sample, nor any information derived from the sample, may be used<sup>12</sup> in evidence against the person who is or would be entitled to the destruction of that fingerprint, impression of footwear or sample<sup>13</sup> or for the purposes of the investigation of any offence<sup>14</sup>.

If fingerprints or impressions of footwear are destroyed any copies<sup>15</sup> of the fingerprints or impressions must also be destroyed<sup>16</sup> and any chief officer of police controlling access to computer data relating to the fingerprints or impressions must, as soon as it is practicable to do so, make access to the data impossible<sup>17</sup>. A person who asks to be allowed to witness the destruction of his fingerprints or footwear impressions (or copies of them) has a right to witness it<sup>18</sup>.

Provision is made, notwithstanding these provisions, for the retention of fingerprints, footwear impressions and samples in certain circumstances<sup>19</sup>.

1 For the meaning of 'fingerprints' see PARA 1021 note 2 ante. As to the power to take fingerprints see PARA 1021 ante.

2 As to the power to take impressions of footwear see PARA 1022 ante.

3 As to the power to take samples see PARAS 1027-1030 ante. The provisions of the Police and Criminal Evidence Act 1984 s 64 (as amended) (see the text and notes 4-19 infra; and PARA 1040 post) apply to DNA profiles: *R v Nathaniel* [1995] 2 Cr App Rep 565, CA.

4 Police and Criminal Evidence Act 1984 s 64(3)(a) (amended by the Serious Organised Crime and Police Act 2005 s 118(4)(c)).

5 Police and Criminal Evidence Act 1984 s 64(3)(b).

6 Ibid s 64(3). If a sample is improperly retained, the evidence derived from it is not automatically excluded: see *A-G's Reference (No 3 of 1999)* [2001] 2 AC 91, [2001] 1 Cr App Rep 475, HL (concerned with provisions in the Police and Criminal Evidence Act 1984 s 64 which have now been replaced). The use of DNA profiles for

statistical purposes is not contrary to the Police and Criminal Evidence Act 1984 s 64 (as amended): *R v Willoughby* [1997] 1 Archbold News 2, CA.

Nothing in the Police and Criminal Evidence Act 1984 s 64 (as amended) affects any power conferred by the Immigration Act 1971 s 4, Sch 2 para 18(2) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 156) or the Immigration and Asylum Act 1999 s 20 (as amended) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 142) (Police and Criminal Evidence Act 1984 s 64(7)(a) (amended by the Criminal Justice and Police Act 2001 s 82(1), (5))) or applies to a person arrested or detained under the terrorism provisions (Police and Criminal Evidence Act 1984 s 64(7)(b)). For the meaning of 'the terrorism provisions' see PARA 952 note 4 ante.

7 Ibid s 64(3), (3AA) (s 64(3) amended by the Criminal Justice and Public Order Act 1994 s 57(1), (2); and by the Criminal Justice and Police Act 2001 s 82(1), (3); and the Police and Criminal Evidence Act 1984 s 64(3AA), (3AB) added by the Criminal Justice and Police Act 2001 s 82(1), (4), (6); and the Police and Criminal Evidence Act 1984 s 64(3AA) amended by the Serious Organised Crime and Police Act 2005 s 118(4)(d)).

8 Police and Criminal Evidence Act 1984 s 64(3AA)(a) (as added: see note 7 supra).

9 Ibid s 64(3AA)(b) (as added and amended: see note 7 supra).

10 Ie under ibid s 64(3) (as amended) (see the text and notes 1-7 supra) or, as from a day to be appointed, under s 64(1BA) (prospectively added) (see PARA 1021 ante): s 64(3AB) (as added (see note 7 supra); prospectively amended by the Serious Organised Crime and Police Act 2005 s 117(1), (9)). At the date at which this volume states the law no such day had been appointed.

11 Ie under the Police and Criminal Evidence Act 1984 s 64(3AA) (as added and amended) (see the text and notes 7-9 supra).

12 For these purposes, the reference to 'using' a fingerprint or an impression of footwear includes a reference to allowing any check to be made against it under ibid s 63A(1) (as added, substituted and amended) (see PARA 1038 ante) or s 63A(1C) (as added) (see PARA 1038 ante) and to disclosing it to any person (s 64(1B) (a) (s 64(1B) added by the Criminal Justice and Police Act 2001 s 82(1), (2), (6); and the Police and Criminal Evidence Act 1984 s 64(1B)(a) amended by the Serious Organised Crime and Police Act 2005 s 118(4)(b)); Police and Criminal Evidence Act 1984 s 64(3AB) (as added: see note 7 supra)); and the reference to 'using' a sample includes a reference to allowing any check to be made under s 63A(1) (as added, substituted and amended) or s 63A(1C) (as added) against it or against information derived from it and to disclosing it or any such information to any person (s 64(1B)(b) (as so added)). This provision is subject to s 64(3AC) (as added and amended) (see PARA 1040 post).

13 Ibid s 64(3AB)(a) (as added (see note 7 supra); and amended by the Serious Organised Crime and Police Act 2005 s 118(4)(e)).

14 Police and Criminal Evidence Act 1984 s 64(3AB)(b) (as added: see note 7 supra); Code D: Code of Practice for the Identification of Persons by Police Officers Annex F para 3(d). For these purposes, the reference to an 'investigation' includes reference to any investigation outside the United Kingdom of any crime or suspected crime: Police and Criminal Evidence Act 1984 s 64(1B)(d) (as added: see note 12 supra). A reference to 'crime' includes a reference to any conduct which either: (1) constitutes one or more criminal offences (whether under the law of a part of the United Kingdom or of a country or territory outside the United Kingdom) (s 64(1B)(c)(i) (as so added)); or (2) is, or corresponds to, any conduct which, if it all took place in any one part of the United Kingdom, would constitute one or more criminal offences (s 64(1B)(c)(ii) (as so added)). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

15 As to the meaning of 'copies' for these purposes see PARA 1011 note 5 ante.

16 Police and Criminal Evidence Act 1984 s 64(5)(a) (s 64(5) substituted, and s 64(6A), (6B) added, by the Criminal Justice Act 1988 s 148(1); and the Police and Criminal Evidence Act 1984 s 64(5), (6A) amended by the Serious Organised Crime and Police Act 2005 s 118(4)(h), (j)); Code D Annex F para 3(a).

17 Police and Criminal Evidence Act 1984 s 64(5)(b) (as substituted and amended: see note 16 supra); Code D Annex F para 3(c). If this requirement falls to be complied with (Police and Criminal Evidence Act 1984 s 64(6A)(a) (as added: see note 16 supra)) and the person to whose fingerprints or impressions the data relate asks for a certificate that it has been complied with (s 64(6A)(b) (as so added and amended)), such a certificate must be issued to him, not later than the end of the period of three months beginning with the day on which he asks for it, by the responsible chief officer of police or a person authorised by him or on his behalf for these purposes (s 64(6A) (as so added); Code D Annex F para 3(c)). For these purposes, 'the responsible chief officer of police' means the chief officer of police in whose police area the computer data were put onto the computer: Police and Criminal Evidence Act 1984 s 64(6B) (as so added; and amended by the Police Act 1996 s 103(1), Sch 7 para 37). As to police areas and authorities see POLICE vol 36(1) (2007 Reissue) PARA 136 et seq.

18 Police and Criminal Evidence Act 1984 s 64(6) (amended by the Serious Organised Crime and Police Act 2005 s 118(4)(i)); Code D Annex F para 3(b).

19 See PARA 1040 post.

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#### **1040. Retention of fingerprints impressions of footwear and samples.**

Where fingerprints<sup>1</sup>, impressions of footwear<sup>2</sup> or samples<sup>3</sup> are taken from a person in connection with the investigation<sup>4</sup> of an offence<sup>5</sup> and they are not required<sup>6</sup> to be destroyed<sup>7</sup>,

the fingerprints, impressions or samples may be retained after they have fulfilled the purposes for which they were taken but must not be used by any person except for purposes related to the prevention or detection of crime<sup>8</sup>, the investigation of an offence, the conduct of a prosecution<sup>9</sup> or the identification of a deceased person or of the person from whom a body part came<sup>10</sup>.

Where a person from whom a fingerprint, impression of footwear or sample has been taken consents in writing<sup>11</sup> to its retention:

- 1563 (1) the impression or sample need not be destroyed<sup>12</sup>;
- 1564 (2) the restriction on the use<sup>13</sup> of the fingerprint, impression or sample<sup>14</sup> does not restrict the use that may be made of the fingerprint, impression or sample or, in the case of a sample, of any information derived from it<sup>15</sup>; and
- 1565 (3) that consent must be treated as comprising a consent for the purposes of the provisions<sup>16</sup> relating to checking fingerprints, impression or samples against other fingerprints, impressions, samples or information<sup>17</sup>.

1 For the meaning of 'fingerprints' see PARA 1021 note 2 ante. As to the power to take fingerprints see PARA 1021 ante.

2 As to the power to take impressions of footwear see PARA 1022 ante.

3 As to the power to take samples see PARAS 1027-1030 ante. The provisions of the Police and Criminal Evidence Act 1984 s 64 (as amended) apply to DNA profiles: *R v Nathaniel* [1995] 2 Cr App Rep 565, CA.

4 As to the meaning of 'investigation' for these purposes see PARA 1039 note 14 ante.

5 Police and Criminal Evidence Act 1984 s 64(1A)(a) (s 64(1A), (1B) added by the Criminal Justice and Police Act 2001 s 82(1), (2), (6); and the Police and Criminal Evidence Act 1984 s 64(1A)(a) amended by the Serious Organised Crime and Police Act 2005 s 118(4)(a)).

6 Ie by the Police and Criminal Evidence Act 1984 s 64(3) (as amended) (see PARA 1039 ante).

7 Ibid s 64(1A)(b) (as added: see note 5 supra).

8 As to the meaning of 'crime' for these purposes see PARA 1039 note 14 ante.

9 For these purposes, the references to a 'prosecution' include references to a prosecution brought in respect of any crime in a country or territory outside the United Kingdom: Police and Criminal Evidence Act 1984 s 64(1B)(d) (as added: see note 5 supra).

10 Ibid s 64(1A) (as added (see note 5 supra); and amended by the Serious Organised Crime and Police Act 2005 ss 117(6), (7), 118(4)(a)); Code D: Code of Practice for the Identification of Persons by Police Officers Annex F para 4. Fingerprints, footwear impressions and samples so retained may also be subject to a speculative search, which includes checking them against other fingerprints, footwear impressions and DNA records held by, or on behalf of, the police and other law enforcement authorities in, as well as outside, the

United Kingdom: Code D Annex F para 4. As to speculative searches see PARA 1038 ante. The provisions for the retention of fingerprints, footwear impressions and samples allow for all fingerprints and samples in a case to be available for any subsequent miscarriage of justice investigation: Code D Annex F Guidance note F2.

These provisions are not incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1973); Cmnd 8969) art 8(1) (right to private life); even if art 8 is engaged, the interference is justified under art 8(2): *R (on the application of S) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 4 All ER 193, [2004] 1 WLR 2196. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

Nothing in the Police and Criminal Evidence Act 1984 s 64 (as amended) affects any power conferred by the Immigration Act 1971 s 4, Sch 2 para 18(2) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 156) or the Immigration and Asylum Act 1999 s 20 (as amended) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 142) (Police and Criminal Evidence Act 1984 s 64(7)(a) (amended by the Criminal Justice and Police Act 2001 s 82(1), (5))) or applies to a person arrested or detained under the terrorism provisions (Police and Criminal Evidence Act 1984 s 64(7)(b)). For the meaning of 'the terrorism provisions' see PARA 952 note 4 ante.

11 For these purposes, it is immaterial whether the consent is given at, before or after the time when the entitlement to the destruction of the fingerprint, impression or sample arises: *ibid* s 64(3AD) (s 64(3AC), (3AD) added by the Criminal Justice and Police Act 2001 s 82(1), (4), (6); Police and Criminal Evidence Act 1984 s 64(3AD) amended by the Serious Organised Crime and Police Act 2005 s 118(1), (4)(g)). A consent given for these purposes is not capable of being withdrawn: Police and Criminal Evidence Act 1984 s 64(3AC) (as so added).

To minimise the risk of confusion, each consent should be physically separate and the volunteer should be asked to sign one or the other, not both: Code D Annex F note F1. Code D Annex F provides examples of consents, as follows:

- 422 (1) where a DNA sample is taken for the purposes of elimination or as part of an intelligence-led screen and is to be used only for the purposes of that investigation and destroyed afterwards: 'I consent to my DNA/mouth swab being taken for forensic analysis. I understand that the sample will be destroyed at the end of the case and that my profile will only be compared to the crime stain profile from this inquiry. I have been advised that the person taking the sample may be required to give evidence and/or provide a written statement to the police in relation to the taking of it' (Code D Annex F Guidance note F1(a)(i));
- 423 (2) where a DNA sample is to be retained on the national DNA database and used in the future: 'I consent to my DNA sample and information derived from it being retained and used only for purposes related to the prevention and detection of a crime, the investigation of an offence or the conduct of a prosecution either nationally or internationally. I understand that this sample may be checked against other DNA records held by, or on behalf of, relevant law enforcement authorities, either nationally or internationally. I understand that once I have given my consent for the sample to be retained and used I cannot withdraw this consent' (Code D Annex F Guidance note F1(a)(ii));
- 424 (3) where fingerprints are taken for the purposes of elimination or as part of an intelligence-led screen and to be used only for the purposes of that investigation and destroyed afterwards: 'I consent to my fingerprints being taken for elimination purposes. I understand that the fingerprints will be destroyed at the end of the case and that my fingerprints will only be compared to the fingerprints from this inquiry. I have been advised that the person taking the fingerprints may be required to give evidence and/or provide a written statement to the police in relation to the taking of it' (Code D Annex F Guidance note F1(b)(i));
- 425 (5) where fingerprints are to be retained for future use: 'I consent to my fingerprints being retained and used only for purposes related to the prevention and detection of a crime, the investigation of an offence or the conduct of a prosecution either nationally or internationally. I understand that my fingerprints may be checked against other records held by, or on behalf of, relevant law enforcement authorities, either nationally or internationally. I understand that once I have given my consent for my fingerprints to be retained and used I cannot withdraw this consent' (Code D Annex F Guidance note F1(b)(ii));
- 426 (6) where footwear impressions are taken for the purposes of elimination or as part of an intelligence-led screen and to be used only for the purposes of that investigation and destroyed afterwards: 'I consent to my footwear impressions being taken for elimination purposes. I understand that the footwear impressions will be destroyed at the end of the case and that my footwear impressions will only be compared to the footwear impressions from this inquiry. I have been advised that the person taking the footwear impressions may be required to give evidence

and/or provide a written statement to the police in relation to the taking of them' (Code D Annex F Guidance note F1(c)(i));

- 427 (7) where footwear impressions are to be retained for future use: 'I consent to my footwear impressions being retained and used only for purposes related to the prevention and detection of a crime, the investigation of an offence or the conduct of a prosecution either nationally or internationally. I understand that my footwear impressions may be checked against other records held by, or on behalf of, relevant law enforcement authorities, either nationally or internationally. I understand that once I have given my consent for my footwear impressions to be retained and used I cannot withdraw this consent' (Code D Annex F Guidance note F1(c)(ii)).

12 Police and Criminal Evidence Act 1984 s 64(3AC)(a) (s 64(3AC) as added (see note 11 supra); and s 64(3AC)(a), (b) amended by the Serious Organised Crime and Police Act 2005 s 118(1), (4)(f)); Code D Annex F para 2. As from a day to be appointed the Police and Criminal Evidence Act 1984 s 64(3AC) (as added and amended) is further amended so as to provide that fingerprints, in addition to impressions of footwear and samples, need not be destroyed if consent to their retention is given (s 64(3AC)(a) (as so added and amended; prospectively amended by the Serious Organised Crime and Police Act 2005 s 117(6), (10))) and that the Police and Criminal Evidence Act 1984 s 64(3AC) (as added and amended) does not apply to fingerprints taken by virtue of s 61(6A) (as added) (see PARA 1021 ante) (s 64(3AC) (as so added and amended; prospectively amended)). At the date at which this volume states the law no such day had been appointed.

The 'destruction' referred to in the text is destruction under s 64(3) (as amended) (see PARA 1039 ante).

Fingerprints, footwear impressions and samples given voluntarily for the purposes of elimination play an important part in many police investigations, and it is therefore important to make sure that innocent volunteers are not deterred from participating and their consent to their fingerprints, footwear impressions and DNA being used for the purposes of a specific investigation is fully informed and voluntary: Code D Annex F Guidance note F1. If the police or volunteer seek to have the fingerprints, footwear impressions or samples retained for use after the specific investigation ends, it is important that the volunteer's consent to this is also fully informed and voluntary: Code D Annex F Guidance note F1.

- 13 As to 'using' a fingerprint, impression or sample for these purposes see PARA 1039 note 12 ante.

14 Ie under the Police and Criminal Evidence Act 1984 s 64(3AB) (as added and amended) (see PARA 1039 ante).

15 Ibid s 64(3AC)(b) (as added and amended: see note 11 supra); Code D Annex F para 2.

16 Ie the provisions of the Police and Criminal Evidence Act 1984 s 63A(1C) (as added and amended) (see PARA 1038 ante).

17 Ibid s 64(3AC)(c) (as added: see note 11 supra).

## UPDATE

### 1040 Retention of fingerprints impressions of footwear and samples

NOTE 10--See *Lambeth LBC v S* [2006] EWHC 326 (Fam), [2007] 1 FLR 152 (retained evidence could not be used to determine paternity of child whose father was deceased); Applications 30562/04 and 30566/04 *S v United Kingdom* (2009) 48 EHRR 1169, [2008] All ER (D) 56 (Dec), ECtHR (blanket and indiscriminate nature of powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, failed to strike balance between competing public and private interests).

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#### **1041. Destruction and retention of photographs taken or used in identification procedures.**

Photographs (and all negatives and copies)<sup>1</sup> of suspects<sup>2</sup> which are taken for the purposes of, or in connection with, the procedures concerned with video and group identification, identification parades and confrontations<sup>3</sup> must be destroyed<sup>4</sup> unless the suspect:

- 1566 (1) is charged with, or informed that he may be prosecuted for, a recordable offence<sup>5</sup>;
- 1567 (2) is prosecuted for a recordable offence<sup>6</sup>;
- 1568 (3) is cautioned, warned or reprimanded for a recordable offence<sup>7</sup>; or
- 1569 (4) gives informed consent, in writing, for the photograph or images to be retained for specified purposes<sup>8</sup>.

When the destruction of any photograph is so required<sup>9</sup>, the person must be given an opportunity to witness the destruction or to have a certificate confirming the destruction if he requests one within five days of being informed that the destruction is required<sup>10</sup>.

1 As to the meanings of 'photographs', 'negatives' and 'copies' for these purposes see PARA 1011 note 5 ante. As to 'taking' a photograph see PARA 1017 note 52 ante.

2 Ie taken in accordance with Code D: Code of Practice for the Identification of Persons by Police Officers para 5.12 (see PARA 1024 ante).

3 The specified procedures are those under Code D paras 3.5-3.10 (suspect known and available: video identification; identification parade; and group identification) (see PARAS 1016-1018 ante) and Code D paras 3.21-3.23 (suspect known but not available: identification; confrontation) (see PARA 1019 ante): Code D para 3.31.

4 'Destruction' includes the deletion of computer data relating to such images or making access to that data impossible: Code D para 2.16. Nothing in Code D para 3.31 (see the text and notes 5-8 infra) affects any separate requirement under the Criminal Procedure and Investigations Act 1996 to retain material in connection with criminal investigations (see PARA 1385 post): Code D para 3.33.

5 Code D para 3.31(a). As to recordable offences see PARA 1049 post.

6 Code D para 3.31(b).

7 Code D para 3.31(c). As to cautions see PARA 959 ante. As to reprimands and warnings see the Crime and Disorder Act 1998 s 65 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1235.

8 Code D para 3.31(d). As to the purposes for which photographs may be retained see the Police and Criminal Evidence Act 1984 s 64A (as added and amended); Code D para 5.12; and PARA 1024 ante (applied by Code D para 3.30).

9 Ie required by Code D para 3.31.

10 Code D para 3.32.

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## **(ix) Charge**

### **1042. Charging detained persons.**

When the officer in charge of the investigation reasonably believes that there is sufficient evidence to provide a realistic prospect of the detainee's conviction<sup>1</sup> he must without delay inform the custody officer<sup>2</sup> who is then responsible for considering whether or not he should be charged<sup>3</sup>. When a person is detained in respect of more than one offence it is permissible to delay informing the custody officer until these conditions are satisfied in respect of all the offences<sup>4</sup>. If the detainee is a juvenile or mentally disordered or mentally vulnerable<sup>5</sup>, any resulting action must be taken in the presence of the appropriate adult<sup>6</sup> if he is present at the time<sup>7</sup>. Where, in compliance with the guidance issued by the Director of Public Prosecutions, the custody officer decides that the case should be immediately referred to the Crown Prosecution Service to make the charging decision, consultation should take place with a Crown prosecutor as soon as is reasonably practicable; and where the Crown prosecutor is unable to make the charging decision on the information available at that time, the detainee may be released without charge and on bail<sup>8</sup> (with conditions if necessary)<sup>9</sup>.

When a detainee is charged with or informed that he may be prosecuted for an offence<sup>10</sup>, he must, unless the restriction on drawing adverse inferences from silence applies<sup>11</sup>, be cautioned as follows: 'You do not have to say anything. But it may harm your defence if you do not mention now something which you later rely on in court. Anything you do say may be given in evidence'<sup>12</sup>. There are alternative terms of the caution to be used when the restriction on drawing adverse inferences from silence applies<sup>13</sup>. Whenever the restriction either begins to apply or ceases to apply after a caution has already been given, the person must be re-cautioned in the appropriate terms<sup>14</sup>. The changed position on drawing inferences and that the previous caution no longer applies must also be explained to the detainee in ordinary language<sup>15</sup>.

When a detainee is charged he must be given a written notice showing particulars of the offence with which he is charged and including the name of the officer in the case<sup>16</sup> and the reference number for the case<sup>17</sup>. So far as possible the particulars of the charge must be stated in simple terms, but they must also show the precise offence in law with which the detainee is charged<sup>18</sup>. The notice must begin 'You are charged with the offence(s) shown below', and be followed by the caution<sup>19</sup>. If the detainee is a juvenile, mentally disordered or mentally vulnerable, the notice must be given to the appropriate adult<sup>20</sup>.

If, after a detainee has been charged with or informed that he may be prosecuted for an offence, an officer wants to tell him about any written statement or interview with another person relating to such an offence, the detainee must either be handed a true copy of the written statement or the content of the interview record must be brought to his attention<sup>21</sup>. Nothing may be done, however, to invite any reply or comment save to caution the detainee 'You do not have to say anything, but anything you do say may be given in evidence'<sup>22</sup> and to remind him about his right to legal advice<sup>23</sup>.

If the detainee cannot read, the document may be read to him<sup>24</sup>. If the detainee is a juvenile or mentally disordered or mentally vulnerable, the copy must also be given to, or the interview record brought to the attention of, the appropriate adult<sup>25</sup>.



A detainee may not be interviewed about an offence after he has been charged with it, or informed that he may be prosecuted for it, unless the interview is necessary either for the purpose of preventing or minimising harm or loss to some other person or to the public<sup>26</sup> or for clearing up an ambiguity in a previous answer or statement<sup>27</sup>, or where it is in the interests of justice that the detainee should have put to him, and have an opportunity to comment on, information concerning the offence which has come to light since he was charged or informed that he might be prosecuted<sup>28</sup>. Before any such interview, the interviewer must caution the detainee 'You do not have to say anything, but anything you do say may be given in evidence'<sup>29</sup> and remind him about his right to legal advice<sup>30</sup>.

When a juvenile is charged with an offence and the custody officer authorises his continuing detention, the custody officer must try to make arrangements for the juvenile to be taken into the care of a local authority to be detained pending appearance in court unless the custody officer certifies<sup>31</sup> that it is impracticable to do so or, in the case of a juvenile at least 12 years old, no secure accommodation is available and there is a risk to the public of serious harm from that juvenile<sup>32</sup>. If it is not practicable so to make arrangements for the transfer of a juvenile into local authority care, the custody officer must record the reasons and make out a certificate to be produced before the court together with the juvenile<sup>33</sup>.

A record must be made of anything a detained person says when charged<sup>34</sup>. Any questions put in an interview after charge and answers given relating to the offence must be recorded in full during the interview on the forms for that purpose and the record signed by that detainee or, if he refuses, by the interviewer and any third parties present<sup>35</sup>. If the questions are audibly<sup>36</sup> or visually<sup>37</sup> recorded, the arrangements set out in the relevant codes of practice apply<sup>38</sup>.

1 See Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 11.6; and PARA 960 ante.

2 As to custody officers see PARA 939 ante. When a person is arrested under the provisions of the Criminal Justice Act 2003 which allow a person to be retried after being acquitted of a serious offence which is a qualifying offence by virtue of Sch 5 and not precluded from further prosecution by virtue of s 75(3) (see PARA 1937 post), it is the responsibility of an officer of the rank of superintendent or above who has not been involved in the investigation to determine whether the evidence is sufficient to charge: Code C Guidance note 16AA.

3 Code C para 16.1. See Code C Guidance note 11B; and PARA 960 ante. The custody officer must take into account alternatives to prosecution under the Crime and Disorder Act 1998, reprimands and warning applicable to persons under 18 (see the Crime and Disorder Act 1998 s 65 (as amended)); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1235), and national guidance on the cautioning of offenders, for persons aged 18 and over: Code C Guidance note 16A.

Where guidance issued by the Director of Public Prosecutions under the Police and Criminal Evidence Act 1984 s 37A (as added) (see PARAS 941-942 ante) is in force, the custody officer must comply with that guidance in deciding how to act in dealing with the detainee: Code C para 16.1A. Where guidance issued by the Director of Public Prosecutions under the Police and Criminal Evidence Act 1984 s 37B (as added) (see PARA 942 ante) is in force, a custody officer who determines in accordance with that guidance that there is sufficient evidence to charge the detainee may detain that person for no longer than is reasonably necessary to decide how that person is to be dealt with under s 37(7) (as amended) (see PARA 941 ante), including (where appropriate) consultation with a duty prosecutor: Code C Guidance note 16AB. The period is subject to the maximum period of detention before charge determined by the Police and Criminal Evidence Act 1984 ss 41-44 (as amended) (see PARAS 1000-1005 ante). Where in accordance with the guidance the case is referred to the Crown Prosecution Service for decision, the custody officer should ensure that an officer involved in the investigation sends to the Crown Prosecution Service such information as is specified in the guidance: Code C Guidance note 16AB.

The giving of a warning or the service of the Notice of Intended Prosecution required by the Road Traffic Offenders Act 1988 s 1 (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1028) does not amount to informing a detainee he may be prosecuted for an offence and so does not preclude further questioning in relation to that offence: Code C Guidance note 16B.

4 Code C para 16.1. See, however, Code C para 11.6; and PARA 960 ante.

5 For the meaning of 'mentally vulnerable', and as to the meaning of 'mental disorder', see PARA 940 note 9 ante.

6 For the meaning of 'appropriate adult' see PARA 940 note 9 ante. The provisions of Code C paras 16.2-16.5 (see the text and notes 10-30 *infra*) must be complied with in the appropriate adult's presence if he is already at the police station; and if he is not at the police station then these provisions must be complied with again in his presence when he arrives unless the detainee has been released: Code C para 16.6. There is, however, no power under the Police and Criminal Evidence Act 1984 to detain a person and delay action under Code C paras 16.2-16.5 solely to await the arrival of the appropriate adult: Code C Guidance note 16C. After charge, bail cannot be refused, or release on bail delayed, simply because an appropriate adult is not available, unless the absence of that adult provides the custody officer with the necessary grounds to authorise detention after charge under the Police and Criminal Evidence Act 1984 s 38 (as amended) (see PARA 944 ante): Code C Guidance note 16C.

7 Code C para 16.1.

8 le under the Police and Criminal Evidence Act 1984 s 37(7)(a) (as substituted) (see PARA 941 ante).

9 Code C para 16.1B. In such circumstances, the detainee should be informed that he is being released to enable the Director of Public Prosecutions to make a decision under the Police and Criminal Evidence Act 1984 s 37B (as added) (see PARA 942 ante): Code C para 16.1B.

10 Code C para 16.2. See Code C Guidance note 16B; and note 3 *supra*.

11 See Code C Annex C.

The Criminal Justice and Public Order Act 1994 ss 34, 36, 37 (as amended) describe the conditions under which adverse inferences may be drawn from a person's failure or refusal to say anything about his involvement in the offence when interviewed, after being charged or informed he may be prosecuted: see PARAS 1552-1554 *post*. These provisions are subject to an overriding restriction on the ability of a court or jury to draw adverse inferences from a person's silence. This restriction applies:

- 428 (1) to any detainee at a police station who, before being interviewed or being charged or informed he may be prosecuted, has asked for legal advice (Code C Annex C para 1(a)(i)), not been allowed an opportunity to consult a solicitor, including the duty solicitor (Code C Annex C para 1(a)(ii)), and not changed his mind about wanting legal advice (Code C Annex C para 1(a)(iii)); and
- 429 (2) to any person charged with, or informed that he may be prosecuted for, an offence who has had brought to his notice a written statement made by another person or the content of an interview with another person which relates to that offence (Code C Annex C para 1(b)(i)), is interviewed about that offence (Code C Annex C para 1(b)(ii)), or makes a written statement about that offence (Code C Annex C para 1(b)(iii)).

Note that the condition in Code C Annex C para 1(a)(ii) (see head (1) *supra*) will apply when a detainee who has asked for legal advice is interviewed before speaking to a solicitor but will not apply if he declines to ask for the duty solicitor: Code C Annex C para 1(a).

As to the limitation of the application of these provisions to detainees at police stations see Code C Guidance note 10C; and PARA 959 ante. As to interviews see Code C paras 11.1A-11.20; and PARAS 960-963 ante. As to the right to legal advice see Code C paras 6.1-6.17; and PARA 953 ante. As to a person who changes his mind about wanting legal advice see Code C para 6.6(d); and PARA 953 text and note 30 ante. As to the bringing to a person's notice of a written statement made by another person or the content of an interview with another person which relates to the offence in connection with which the first person has been charged or in respect of which he has been informed he may be prosecuted, and as to interviews of the first person in connection with such an offence, see Code C paras 16.4, 16.5; and the text and notes 21-30 *infra*. As to the making of a written statement in respect of such an offence see Code C Annex D paras 4, 9; and PARA 966 ante.

12 Code C para 16.2.

13 When a requirement to caution arises at a time when the restriction on drawing adverse inferences from silence applies, the caution must be: 'You do not have to say anything, but anything you do say may be given in evidence' (Code C Annex C para 2).

14 Code C Annex C para 3.

15 Code C Annex C para 3. Code C contains a suggested framework to help explain changes in the position on drawing adverse inferences from silence, as follows:

- 430 (1) if the restriction begins to apply, the changed position should be explained in terms that 'The caution you were previously given no longer applies. This is because after that caution' [either] 'you asked to speak to a solicitor but have not yet been allowed an opportunity to speak to a solicitor' (Code C Annex C Guidance note C2(a)(i)) [or] 'you have been charged/informed you may be prosecuted' (Code C Annex C Guidance note C2(a)(ii)). 'This means that from now on, adverse inferences cannot be drawn at court and your defence will not be harmed just because you choose to say nothing. Please listen carefully to the caution I am about to give you because it will apply from now on. You will see that it does not say anything about your defence being harmed' (Code C Annex C Guidance note C2(a));
- 431 (2) if the restriction ceases to apply before or at the time the person is charged or informed he may be prosecuted, the changed position should be explained in terms that 'The caution you were previously given no longer applies. This is because after that caution you have been allowed an opportunity to speak to a solicitor. Please listen carefully to the caution I am about to give you because it will apply from now on. It explains how your defence at court may be affected if you choose to say nothing' (Code C Annex C Guidance note C2(b)).

The restriction on drawing inferences from silence does not apply to a person who has not been detained and who therefore cannot be prevented from seeking legal advice if he wants to: Code C Annex C Guidance note 1. See further see Code C paras 3.15, 10.2; and PARAS 949, 959 ante.

16 This is subject to Code C para 2.6A (see PARA 940 ante).

17 Code C para 16.3.

18 Code C para 16.3.

19 Code C para 16.3.

20 Code C para 16.3.

21 Code C para 16.4.

22 Code C para 16.4(a).

23 Code C para 16.4(b).

24 Code C para 16.4A.

26 Code C para 16.5.

27 Code C para 16.5.

28 Code C para 16.5.

29 Code C para 16.5(a).

30 Code C para 16.5(b). See note 6 supra.

31 It is in accordance with the Police and Criminal Evidence Act 1984 s 38(6) (as substituted) (see PARA 944 ante).

32 Code C para 16.7. Except as in Code C para 16.7, neither a juvenile's behaviour nor the nature of the offence with which he is charged provides grounds for the custody officer to decide it is impracticable to arrange the juvenile's transfer to local authority care: Code C Guidance note 16D. Similarly, the lack of secure local authority accommodation does not make it impracticable to transfer the juvenile: Code C Guidance note 16D. The availability of secure accommodation is only a factor in relation to a juvenile aged 12 or over when the local authority accommodation would not be adequate to protect the public from serious harm from him: Code C Guidance note 16D. The obligation to transfer a juvenile to local authority accommodation applies as much to a juvenile charged during the daytime as to a juvenile to be held overnight, subject to a requirement to bring the juvenile before a court under the Police and Criminal Evidence Act 1984 s 46 (as amended) (see PARA 1043 post): Code C Guidance note 16D.

33 Code C para 16.10. See Code C Guidance note 16D; and note 32 supra.

34 Code C para 16.8.

35 Code C para 16.9.

- 36 As to the audio recording of interviews see PARA 971 et seq ante.
- 37 As to visual recording interviews and PARA 986 et seq ante.
- 38 Code C para 16.9.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(6) TREATMENT OF DETAINED PERSONS/(ix) Charge/1043. Detention after charge.

### **1043. Detention after charge.**

A person who is charged with an offence<sup>1</sup> and after being charged is kept in police detention<sup>2</sup> or is detained by a local authority<sup>3</sup> must be brought before a magistrates' court<sup>4</sup>. If he is to be brought before a magistrates' court in the local justice area<sup>5</sup> in which the police station at which he was charged is situated, he must be brought before such a court as soon as is practicable and in any event not later than the first sitting after he is charged with the offence<sup>6</sup>. If no magistrates' court in that area is due to sit either on the day on which he is charged or on the next day, the custody officer<sup>7</sup> for the police station at which he was charged must inform the designated officer in the area that there is a person in the area<sup>8</sup> who is required to be so brought before a magistrates' court<sup>9</sup>.

If the person charged is to be brought before a magistrates' court in a local justice area other than that in which the police station at which he was charged is situated, he must be removed to that area as soon as is practicable and brought before such a court as soon as is practicable after his arrival in the area and in any event not later than the first sitting of a magistrates' court in that area after his arrival in the area<sup>10</sup>. If no magistrates' court in that area is due to sit either on the day on which the person arrives in the area or on the next day, he must be taken to a police station in the area<sup>11</sup> and the custody officer at that station must inform the designated officer for the area that there is a person in the area<sup>12</sup> who must be so brought before a magistrates' court<sup>13</sup>.

Where the designated officer for a local justice area has been informed that there is a person in the area who must be brought before a magistrates' court<sup>14</sup>, he must arrange for a magistrates' court to sit not later than the day next following the relevant day<sup>15</sup>.

1 Police and Criminal Evidence Act 1984 s 46(1)(a).

2 Ibid s 46(1)(b)(i). For the meaning of 'in police detention' see PARA 939 note 9 ante.

3 Ibid s 46(1)(b)(ii). The reference in the text to a person being detained by a local authority is a reference to his being detained in pursuance of arrangements made under s 38(6) (see PARA 944 ante): s 46(1)(b)(ii).

4 Ibid s 46(1). Nothing in s 46 (as amended) requires a person who is in hospital to be brought before a court if he is not well enough: s 46(9).

5 As to local justice areas see the Courts Act 2003 s 8; and MAGISTRATES.

6 Police and Criminal Evidence Act 1984 s 46(2) (s 46(2)-(8) amended by the Courts Act 2003 s 109(1), Sch 8 para 282(1)-(8)). Where a person has been charged with an offence at a police station, any requirement imposed under the Police and Criminal Evidence Act 1984 Pt IV (ss 34-52) (as amended) (see PARA 938 et seq ante) for the person to appear or be brought before a magistrates' court is taken to be satisfied if the person appears or is brought before a justices' clerk in order for the clerk to conduct a hearing under the Crime and Disorder Act 1998 s 50 (see PARA 1101 post): Police and Criminal Evidence Act 1984 s 47A (added by the Crime and Disorder Act 1984 s 119, Sch 8 para 62; and amended by the Courts Act 2003 Sch 8 para 284).

7 As to custody officers see PARA 939 ante.

8 I.e. a person to whom the Police and Criminal Evidence Act 1984 s 46(2) (as amended) (see the text and notes 5-6 supra) applies: s 46(3) (as amended: see note 6 supra).

9 Ibid s 46(3) (as amended: see note 6 supra).

10 Ibid s 46(4) (as amended: see note 6 supra).

11 Ibid s 46(5)(a) (as amended: see note 6 supra).

12 Ie a person to whom ibid s 46(4) (as amended) (see the text and note 10 supra) applies: s 46(5)(b) (as amended: see note 6 supra).

13 Ibid s 46(5)(b) (as amended: see note 6 supra).

14 Ie either informed under ibid s 46(3) (as amended) that there is a person in the area to whom s 46(2) (as amended) applies (s 46(6)(a) (as amended: see note 6 supra)) or informed under s 46(5) (as amended) that there is a person in the area to whom s 46(4) (as amended) applies (s 46(6)(b) (as so amended)). See the text and notes 5-13 supra.

15 Ibid s 46(6) (as amended: see note 6 supra). For these purposes, 'the relevant day' means either the day on which the person was charged (in relation to a person who is to be brought before a magistrates' court in the local justice area in which the police station at which he was charged is situated) (s 46(7)(a) (as so amended)) or the day on which he arrives in the relevant local justice area (in relation to a person who is to be brought before a magistrates' court in any other local justice area) (s 46(7)(b) (as so amended)). Where the day next following the relevant day is Christmas Day, Good Friday or a Sunday, the duty of the designated officer under s 46(6) (as amended) is a duty to arrange for a magistrates' court to sit not later than the first day after the relevant day which is not one of those days: s 46(8) (as so amended). As to the clerk's duty under s 46(6) (as amended) see also *R v Avon Magistrates' Courts Committee, ex p Broome* [1988] 1 WLR 1246, 152 JP 529, DC.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(6) TREATMENT OF DETAINED PERSONS/(x) Cautions, Reprimands and Warnings/1044. Conditional cautions.

## **(x) Cautions, Reprimands and Warnings**

### **1044. Conditional cautions.**

A 'conditional caution' is a caution which is given in respect of an offence and which has conditions attached to it with which the offender must comply<sup>1</sup>. A conditional caution may be given only in respect of a person aged 18 or over<sup>2</sup> and may be given, by an authorised person<sup>3</sup>, only if:

- 1570 (1) the authorised person has evidence that the offender has committed an offence<sup>4</sup>;
- 1571 (2) a relevant prosecutor decides that there is sufficient evidence to charge the offender with the offence<sup>5</sup> and that a conditional caution should be given to the offender in respect of it<sup>6</sup>;
- 1572 (3) the offender admits to the authorised person that he committed the offence<sup>7</sup>;
- 1573 (4) the authorised person explains the effect of the conditional caution to the offender and warns him that failure to comply with any of the conditions attached to the caution may result in his being prosecuted for the offence<sup>8</sup>; and
- 1574 (5) the offender signs a document which contains details of the offence<sup>9</sup>, an admission by him that he committed the offence<sup>10</sup>, his consent to being given the conditional caution<sup>11</sup>, and the conditions attached to the caution<sup>12</sup>.

The conditions which may be attached to such a caution are those which have the object of facilitating the rehabilitation of the offender<sup>13</sup>, or ensuring that he makes reparation for the offence<sup>14</sup>, or both.

If the offender fails without reasonable excuse to comply with any of the conditions attached to the conditional caution, criminal proceedings may be instituted against him for the offence in question<sup>15</sup>; and where such proceedings are instituted the conditional caution ceases to have effect<sup>16</sup>.

1 Criminal Justice Act 2003 s 22(2). The Secretary of State has prepared a code of practice in relation to conditional cautions: see s 25; and the Criminal Justice Act 2003 (Conditional Cautions: Code of Practice) Order 2004, SI 2004/1683.

2 Criminal Justice Act 2003 s 22(1).

3 I.e. a constable (ibid ss 22(4)(a), 27), an investigating officer (s 22(4)(b)) or a person authorised by a relevant prosecutor for these purposes (s 22(4)(c)). 'Investigating officer' means an officer of Revenue and Customs appointed in accordance with the Commissioners for Revenue and Customs Act 2005 s 2(1) (see CUSTOMS AND EXCISE; INCOME TAXATION) or a person designated as an investigating officer under the Police Reform Act 2002 s 38 (see POLICE vol 36(1) (2007 Reissue) PARA 529); Criminal Justice Act 2003 s 27 (amended by the Commissioners for Revenue and Customs Act 2005 ss 50(6), 52(2), Sch 4 para 129, Sch 5). 'Relevant prosecutor' means the Attorney General, the Director of the Serious Fraud Office, the Director of Revenue and Customs Prosecutions, the Director of Public Prosecutions, a Secretary of State or a person who is specified in an order made by the Secretary of State as being a relevant prosecutor for the purposes of the Criminal Justice

Act 2003 Pt 3 (ss 22-27) (as amended): s 27 (as so amended). As to prosecution authorities see PARA 1065 et seq post. As to officers of Revenue and Customs see PARA 354 note 2 ante.

4 Ibid s 23(1).

5 Ibid s 23(2)(a).

6 Ibid s 23(2)(b).

7 Ibid s 23(3).

8 Ibid s 23(4).

9 Ibid s 23(5)(a).

10 Ibid s 23(5)(b).

11 Ibid s 23(5)(c).

12 Ibid s 23(5)(d).

13 Ibid s 22(3)(a).

14 Ibid s 22(3)(b).

15 Ibid s 24(1). The document which an offender who is given a conditional caution is required to sign under s 23(5) (see the text and notes 9-12 supra) is admissible in such proceedings: s 24(2).

16 Ibid s 24(3).

## **UPDATE**

### **1044 Conditional cautions**

TEXT AND NOTES--A condition that the offender pay a financial penalty (a 'financial penalty condition') may not be attached to a conditional caution given in respect of an offence unless the offence is one that is prescribed, or of a description prescribed, in an order made by the Secretary of State: Criminal Justice Act 2003 s 23A(1) (s 23A added by Police and Justice Act 2006 s 17(4) (s 17 in force in relation to specified police areas: SI 2009/1679, SI 2009/2774)). See the Criminal Justice Act 2003 (Conditional Cautions: Financial Penalties) Order 2009, SI 2009/2773. An order under the Criminal Justice Act 2003 s 23A(1) must prescribe, in respect of each offence or description of offence in the order, the maximum amount of the penalty that may be specified under head (a) below: s 23A(2). The amount that may be prescribed in respect of any offence must not exceed (1) one quarter of the amount of the maximum fine for which a person is liable on summary conviction of the offence, or (2) £250, whichever is the lower: s 23A(3). The Secretary of State may by order amend s 23A(3) by substituting a different fraction in head (1) or substituting a different figure in head (2): s 23A(4). Where a financial penalty condition is attached to a conditional caution, a relevant prosecutor must also specify (a) the amount of the penalty, (b) the person to whom the financial penalty is to be paid and how it may be paid: s 23A(5) (amended by Criminal Justice and Immigration Act 2008 Sch 26 para 60(2)). To comply with the condition, the offender must pay the penalty in accordance with the provision specified under head (a) above: Criminal Justice Act 2003 s 23A(6) (amended by Criminal Justice and Immigration Act 2008 Sch 26 para 60(3)). Where a financial penalty is (in accordance with the provision specified under head (b) above) paid to a person other than a designated officer for a local justice area, the person to whom it is paid must give the payment to such an officer: Criminal Justice Act 2003 s 23A(6A) (added by Criminal Justice and Immigration Act 2008 Sch 26 para 60(4)).



The conditions which may be attached to a conditional caution include (i) (subject to the Criminal Justice Act 2003 s 23A) a condition that the offender pay a financial penalty, or (ii) a condition that the offender attend at a specified place at specified times: s 22(3A) (s 22(3A)-(3C) added by Police and Justice Act 2006 s 17(3) (in force in relation to specified police areas: SI 2009/1679, SI 2009/2774)). 'Specified' means specified by a relevant prosecutor: Criminal Justice Act 2003 s 22(3A). Conditions attached by virtue of head (ii) above may not require the offender to attend for more than 20 hours in total, not including any attendance required by conditions attached for the purpose of facilitating the offender's rehabilitation: s 22(3B) (not yet in force). The Secretary of State may by order amend s 22(3B) by substituting a different figure: s 22(3C) (not yet in force).

A relevant prosecutor may, with the consent of the offender, vary the conditions attached to a conditional caution by (A) modifying or omitting any of the conditions, or (B) adding a condition: Criminal Justice Act 2003 s 23B (added by Criminal Justice and Immigration Act 2008 Sch 26 para 61).

NOTE 1--See now the Criminal Justice Act 2003 (Conditional Cautions: Code of Practice) Order 2010, SI 2010/133.

NOTES 1, 15--If a constable has reasonable grounds for believing that the offender has failed, without reasonable excuse, to comply with any of the conditions attached to the conditional caution, he may arrest him without warrant: Criminal Justice Act 2003 s 24A(1) (ss 24A, 24B added by Police and Justice Act 2006 s 18). A person arrested under the Criminal Justice Act 2003 s 24A must be (1) charged with the offence in question; (2) released without charge and on bail to enable a decision to be made as to whether he should be charged with the offence; or (3) released without charge and without bail, with or without any variation in the conditions attached to the caution: s 24A(2). Section 24A(2) also applies in the case of (a) a person who, having been released on bail under head (2) above, returns to a police station to answer bail or is otherwise in police detention at a police station; (b) a person who, having been released on bail under the Police and Criminal Evidence Act 1984 s 30A as applied by the Criminal Justice Act 2003 s 24B below, attends at a police station to answer bail or is otherwise in police detention at a police station; (c) a person who is arrested under the 1984 Act s 30D or s 46A as applied by the Criminal Justice Act 2003 s 24B below: s 24A(3). Where a person is released under head (2) above, the custody officer must inform him that he is being released to enable a decision to be made as to whether he should be charged with the offence in question: s 24A(4). A person arrested under s 24A, or any other person in whose case head (2) above, applies, may be kept in police detention (i) to enable him to be dealt with in accordance with s 24A(2), or (ii) where applicable, to enable the power under the 1984 Act s 37D(1) (see PARA 943), as applied by the Criminal Justice Act 2003 s 24B below, to be exercised; if the person is not in a fit state to enable him to be so dealt with, or to enable that power to be exercised, he may be kept in police detention until he is: s 24A(5). The power under head (i) above, includes power to keep the person in police detention if it is necessary to do so for the purpose of investigating whether he has failed, without reasonable excuse, to comply with any of the conditions attached to the conditional caution: s 24A(6). Section 24A(2) must be complied with as soon as practicable after the person arrested arrives at the police station or, in the case of a person arrested at the police station, as soon as practicable after the arrest: s 24A(7). Section 24A(2) does not require a person who falls within head (a) or (b) above, and is in police detention in relation to a matter other than the conditional caution, to be released if he is liable to be kept in detention in relation to that other matter: s 27A(8). 'Police detention' has the same meaning as in the 1984 Act s 118(2) (see PARA 939): s 24A(9).

In the case of a person arrested under s 24A, the 1984 Act ss 30-31 (see PARAS 933, 934), s 34(1)-(5) (see PARA 945), s 36 (see PARA 939), s 37(4)-(6) (see PARA 941), s 38 (see PARA 944), s 39 (see PARA 946), s 55A (see PARA 1008) apply with the modifications specified in the Criminal Justice Act 2003 s 24B(3) and with such further modifications as are necessary, as they apply in the case of a person arrested for an offence: s 24B(1), (2). The modifications are (A) in the 1984 Act s 30CA(5)(a), for the reference to being involved in the investigation of the offence mentioned in that provision substitute a reference to being involved in the investigation of the offence in respect of which the person was given the conditional caution, or in investigating whether the person has failed, without reasonable excuse, to comply with any of the conditions attached to the conditional caution; (B) in s 36(5), (7), for the references to being involved in the investigation of an offence for which the person is in police detention substitute references to being involved in the investigation of the offence in respect of which the person was given the conditional caution, or in investigating whether the person has failed, without reasonable excuse, to comply with any of the conditions attached to the conditional caution; (C) in s 38(1)(a)(iii), (iv), for 'arrested for' substitute 'charged with'; (D) in s 39(2), (3), for the references to an offence substitute references to a failure to comply with conditions attached to the conditional caution: 2003 Act s 24B(3). The 1984 Act s 40 (see PARA 941) applies to a person in police detention by virtue of s 24A as it applies to a person in police detention in connection with the investigation of an offence, but omitting s 40(8), (8A), and in s 40(9), for the reference to s 37(9) or s 37D(5) substitute a reference to the second sentence of the 2003 Act s 24A(5): s 24B(4). The 1984 Act ss 37D(1)-(3) (see PARA 941), 46A (see PARA 941), 47 (see PARA 935) apply to a person released on bail under the 2003 Act s 24A(2) (b) as they apply to a person released on bail under the 1984 Act s 37: 2003 Act s 24B(5). The 1984 Act s 54 applies in the case of a person who falls within the Criminal Justice Act 2003 s 24A(3) and is detained in a police station under s 24A as it applies in the case of a person who falls within s 34(7) and is detained at a police station under s 37: Criminal Justice Act 2003 s 24B(6). The 1984 Act s 54A (see PARA 1023) applies with the following modifications in the case of a person who is detained in a police station under the Criminal Justice Act 2003 s 24A: (i) in the 1984 Act s 54A(1)(a), (12), after 'as a person involved in the commission of an offence' add 'or as having failed to comply with any of the conditions attached to his conditional caution'; (ii) in s 54A(9)(a), after 'the investigation of an offence' add ',the investigation of whether the person in question has failed to comply with any of the conditions attached to his conditional caution': Criminal Justice Act 2003 s 24B(7).

NOTE 1--Criminal Justice Act 2003 s 25 amended: Police and Justice Act 2006 Sch 14 para 58, Sch 15 Pt 2; Criminal Justice and Immigration Act 2008 Sch 26 para 62.

TEXT AND NOTES 13, 14--Such conditions may also be those which have the object of punishing the offender: Criminal Justice Act 2003 s 22(3) (substituted by Police and Justice Act 2006 s 17(1) (in force in relation to specified police areas: SI 2009/1679)).

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#### **1045. Reprimands and warnings.**

In certain circumstances where a person aged under 18 has admitted an offence and there is evidence that would lead to a conviction but it would not be in the public interest to prosecute, he may be given a reprimand or warning by a constable and, where a warning is given, the constable must refer the person to a youth offending team<sup>1</sup> which must assess him and arrange for him to participate in a rehabilitation programme<sup>2</sup>.

<sup>1</sup> As to youth offending teams see PARA 1703 post.

<sup>2</sup> See the Crime and Disorder Act 1998 ss 65, 66 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1235-1236.

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## **(xi) Restrictions on Proceedings**

### **1046. Restrictions on vexatious proceedings.**

If, on an application made by the Attorney General, the High Court is satisfied that any person has habitually and persistently<sup>1</sup> and without any reasonable ground instituted vexatious<sup>2</sup> prosecutions (whether against the same person or different persons), the court may, after hearing that person or giving him an opportunity of being heard, make a criminal proceedings order (that is, an order that no information may be laid before a justice of the peace by the person against whom the order is made without the leave of the High Court and no application for leave to prefer a bill of indictment may be made by him without the leave of the High Court)<sup>3</sup>. An order so made may provide that it is to cease to have effect at the end of a specified period, but otherwise remains in force indefinitely<sup>4</sup>. Leave for the laying of an information or for an application for leave to prefer a bill of indictment by a person who is the subject of such an order may not be given unless the High Court is satisfied that the institution of the prosecution is not an abuse of the criminal process and that there are reasonable grounds for the institution of the prosecution by the applicant<sup>5</sup>. No appeal lies from a decision of the High Court refusing such leave<sup>6</sup>.

1 'Habitually and persistently' connote an element of repetition which although needing to be present does not need to be over a long period: *A-G v Barker* [2000] 2 FCR 1, [2000] 1 FLR 759, DC. Also see *A-G v Covey*, *A-G v Matthews* [2001] EWCA Civ 254, (2001) Times, 2 March (cumulative effect of a person's conduct on a number of different defendants satisfied the requirement of repetition, notwithstanding that he had not repeatedly brought proceedings against the same party on the same issue, and was a valid factor to consider in the making of an order under the Supreme Court Act 1981 s 42 (as amended)).

As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

2 In considering whether any proceedings are vexatious, the court must look at the whole history of the matter; and proceedings may be held to be vexatious notwithstanding that in each individual case taken singly the pleading discloses a cause of action: see *Re Vernazza* [1959] 2 All ER 200, [1959] 1 WLR 622; affd [1960] 1 QB 197, [1960] 1 All ER 183, CA; revsd in part on other grounds sub nom *A-G v Vernazza* [1960] AC 965, [1960] 3 All ER 97, HL.

The court considers the number, general character and result of the proceedings alleged to be vexatious, and may make an order even though there may have been reasonable grounds for the proceedings in each case considered by itself: *Re Chaffers, ex p A-G* (1897) 76 LT 351. See also *Re Jones, Re Vexatious Actions Act* (1902) 18 TLR 476.

3 Supreme Court Act 1981 s 42(1)(c), (1A) (s 42(1)(c), (1A), (3A) added, and s 42(4) amended, by the Prosecution of Offences Act 1985 s 24(1), (2)(c), (3), (5), (6)). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

The High Court may also make an all proceedings order: Supreme Court Act 1981 s 42(1) (as so amended). For these purposes, an 'all proceedings order' means an order which has the combined effect of a criminal proceedings order and a civil proceedings order: see s 42(1A) (as added); and CIVIL PROCEDURE vol 11 (2009) PARA 258.

A copy of any order made pursuant to these provisions must be published in the London Gazette: s 42(5).

- 4 Ibid s 42(2).
- 5 Ibid s 42(3A) (as added: see note 3 supra).
- 6 Ibid s 42(4) (as amended: see note 3 supra).

## **UPDATE**

### **1046 Restrictions on vexatious proceedings**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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### **1047. Limitation of time in criminal proceedings.**

Except where there are statutory provisions to the contrary<sup>1</sup>, criminal prosecutions may be commenced at any time after the commission of the offence<sup>2</sup>. A prosecution is commenced when an information is laid before a justice of the peace<sup>3</sup> (or, as from a day to be appointed, when a written charge is issued by a public prosecutor<sup>4</sup>) or, if there is no information (or written charge), when the defendant is brought before a justice to answer the charge<sup>5</sup> or, if there are no preliminary proceedings before a justice, when an indictment is preferred<sup>6</sup>.

Prolonged delay in starting or conducting criminal proceedings may be an abuse of process as, for example, when substantial delay has been caused by some improper use of procedure by, or inefficiency on the part of, the prosecution and the defendant has not himself caused or contributed to it and has been prejudiced by it, in which case the judge may stay proceedings for abuse of process<sup>7</sup>. The jurisdiction to decline to allow criminal proceedings to continue should be used sparingly<sup>8</sup>.

1 See eg the Trade Descriptions Act 1968 s 19(1) (no proceedings in respect of an offence under the Act may be commenced after the expiration of three years from the commission of the offence or one year from its discovery by the prosecutor whichever is the earlier: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 499); and the Customs and Excise Management Act 1979 s 146A(1)-(3) (as added) (except as otherwise provided by the customs and excise Acts, proceedings for an indictable offence under those Acts may not be commenced after the expiration of the period of 20 years, beginning with the day on which the offence was committed; and proceedings for a summary offence under those Acts may not be commenced after the end of the period of three years beginning with the day on which it was committed but, subject to that, may be commenced at any time within six months from the date on which sufficient evidence to warrant the proceedings came to the knowledge of the prosecuting authority: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1198). As to the restrictions on the institution of proceedings for conspiracy see PARA 70 ante. Except as otherwise expressly provided, a magistrates' court may not try an information or written charge for a summary offence unless the information was laid, or the written charge issued, within six months from the time when the offence was committed: see the Magistrates' Courts Act 1980 s 127(1); and MAGISTRATES vol 29(2) (Reissue) PARA 589.

2 Unless the statute otherwise provides, where there is a time limited for the commencement of a prosecution, the day on which the offence was committed must be excluded in the computation of the prescribed time: *Radcliffe v Bartholomew* [1892] 1 QB 161; and see *Pellew v Wonford Inhabitants* (1829) 9 B & C 134; *Williams v Burgess* (1840) 12 Ad & El 635. Sundays are to be included in the computation of time, unless the statute prescribing the time expressly excludes them: *R v Middlesex Justices* (1843) 2 Dowl NS 719. A period of limitation does not exclude, where otherwise admissible, evidence of other acts done by the accused more than the prescribed period before the prosecution was commenced: *R v Shellaker* [1914] 1 KB 414, 9 Cr App Rep 240, CCA.

3 *R v Willace* (1797) 1 East PC 186, CCR. Where an information, laid in time, is amended after the expiration of the time, the amendment relating to the date when the offence is alleged to have been committed and not charging a different offence from that charged in the information as originally laid, the consequent proceedings are in time: *R v Wakeley* [1920] 1 KB 688, CCA. Proof of the issue of a warrant which is not executed within the time limited for commencing the prosecution is not proof that the prosecution is commenced in time, unless proof is also given of the information: *R v Phillips* (1818) Russ & Ry 369, CCR; *R v Parker and Smith* (1864) Le & Ca 459, CCR; *R v Hull* (1860) 2 F & F 16.

4 See the Criminal Justice Act 2003 s 29(1) (not yet in force); and PARA 915 ante.

5 *R v Austin* (1845) 1 Car & Kir 621.

6 *R v Killminster* (1835) 7 C & P 228. If an indictment is presented within the time limited and is ignored, it would seem that the prosecution has been commenced in time, and another indictment found after the expiration of the limited time would be valid: *R v Killminster* *supra*.

7 *R v Grays Justices, ex p Graham* [1982] QB 1239, 75 Cr App Rep 229, DC; *R v Oxford City Justices, ex p Smith* (1982) 75 Cr App Rep 200, DC; *R v West London Stipendiary Magistrate, ex p Anderson* (1984) 80 Cr App Rep 143, DC; *Bell v DPP* [1985] AC 937, sub nom *Bell v DPP of Jamaica* [1985] 2 All ER 585, PC.

In criminal proceedings mere delay which gave rise to prejudice and unfairness might by itself amount to an abuse of the process; and in some circumstances prejudice would be presumed from substantial delay; but, in the absence of a presumption, where there was substantial delay, it would be for the prosecution to justify it: *R v Bow Street Stipendiary Magistrate, ex p DPP, R v Bow Street Stipendiary Magistrate, ex p Cherry* (1989) 91 Cr App Rep 283, 154 JP 237, DC. See also *Daventry District Council v Olins* (1990) 154 JP 478. Justices must consider whether a fair trial remains possible and not whether the delay is justifiable: *R v Telford Justices, ex p Badhan* [1991] 2 QB 78, [1991] 2 All ER 854, DC; *R v JAK* [1992] Crim LR 30. A trial based on even a very long delayed complaint by an alleged victim of sexual abuse within a home would only rarely amount to an abuse of the court's process: *R v LPB* (1990) 91 Cr App Rep 359. However, the judge must direct the jury appropriately as to the delay and its relevance: *R v B* [1996] Crim LR 406, CA; *R v Wilkinson* [1996] 1 Cr App Rep 81, CA. Where there has been no unjustifiable delay, manipulation or misuse of process by the prosecution, justices should first inquire into the full facts of the delay from both the prosecution and the defence: *R v Crawley Justices, ex p DPP* (1991) 155 JP 841, DC. Where the conduct of the defendant is alleged to have contributed to a delay, such conduct must be taken into account but is not necessarily a bar to the grant of a stay of proceedings: *A-G of Hong Kong v Cheung Wai-bun* [1994] 1 AC 1, [1993] 2 All ER 510, PC. See also *R v Dutton* [1994] Crim LR 910, CA; *R v Henry* [1998] 2 Cr App Rep 161, CA (judge's direction on possible prejudice of delay on defence); and *R v Liverpool City Justices, ex p Price* (1998) 162 JP 766, DC (very exceptional circumstances must exist for the Divisional Court to intervene and quash a decision by justices in the exercise of their discretion not to stay criminal proceedings for abuse of process); *Charles v State of Trinidad and Tobago, Carter v State of Trinidad and Tobago* [2000] 1 WLR 384, PC (prosecution's decision to continue with a third trial against a defendant who had spent almost a decade in prison on a murder charge was an abuse of process).

8 *R v Oxford City Justices, ex p Smith* (1982) 75 Cr App Rep 200, DC. As to when proceedings may be stayed because of delay see *A-G's Reference (No 1 of 1990)* [1992] QB 630 at 643-644, 95 Cr App Rep 296 at 302-303, CA, per Lord Lane CJ (stays imposed on the grounds of delay should be employed only in exceptional circumstances). Even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay. No stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, there should be borne in mind the power of the judge to regulate the admissibility of evidence, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for its consideration, and the powers of the judge to give appropriate directions to the jury before it considers its verdict. See also *R v S* [2006] All ER (D) 379 (Mar), CA, in which it was held that in considering whether to grant a stay, the judge should bear in mind: (1) that even where delay was unjustifiable, a permanent stay should be the exception rather than the rule; (2) that where there was no fault on the part of the complainant or the prosecution, it would be very rare for a stay to be granted; (3) that no stay should be granted in the absence of serious prejudice to the defence so that no fair trial could be held; (4) that when assessing possible serious prejudice, the judge should bear in mind his power to regulate the admissibility of evidence, and that the trial process itself should ensure that all the relevant factual issues which arose from delay would be placed before the jury; and (5) that if, after considering all those factors, the judge concluded that a fair trial would be possible, a stay should not be granted.

See also *R v E* [1996] 1 Cr App Rep 88, CA; *R v Sawoniuk* [2000] 2 Cr App Rep 220, [2000] Crim LR 506, CA (proceedings commenced 56 years after the commission of the alleged crimes would not be stayed). The right to a fair and public hearing under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 includes a reasonable time requirement which may result in proceedings being stayed, but only if a fair hearing is no longer possible, or it is for any compelling reason unfair to try the defendant: *A-G's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, [2004] 1 All ER 1049. See also *R v Henworth* [2001] EWCA Crim 120, [2001] 2 Cr App Rep 47 (there is no principle of law that where the prosecution of a criminal offence has failed twice, it is necessarily an abuse of process to hold a third trial). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

## UPDATE

**1047 Limitation of time in criminal proceedings**

NOTE 1--Where a defendant is acquitted of an offence by a court of a member state on the basis that prosecution for the offence was time barred, the Convention implementing the Schengen Agreement art 54 applies so as to preclude prosecution of the defendant on the same facts in another member state: Case C-467/04 *Criminal proceedings against Gasparini* [2007] 1 CMLR 367, ECJ. Where different acts are carried out in two different member states, such acts ought not to be regarded as 'same acts' within the meaning of the Convention implementing the Schengen Agreement art 54 merely because the competent national court finds that those acts are linked together by the same criminal intention: Case C-367/05 *Re Criminal proceedings against Kraaijenbrink* [2007] 3 CMLR 1207, [2007] All ER (D) 275 (Jul), ECJ.

NOTE 7--Where a defendant raises delay in an attempt to undermine credibility of a complainant in a rape case, the judge is entitled to make an appropriate warning to the jury to ensure fairness to the complainant: *R v Doody* (2008) Times, 26 November, CA.



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## **(xii) Extradition**

### **1048. Extradition.**

Extradition is the handing over in accordance with law by one country to another country of a person who is accused of having committed an offence over which the latter country has jurisdiction or who has been convicted of such an offence and is unlawfully at large: it is a transaction between states facilitated by the existence of extradition arrangements contained in treaties<sup>1</sup>.

There are two categories of procedure under the law of the United Kingdom for extradition from the United Kingdom to another territory; and the relevant category depends on the territory involved<sup>2</sup>. The Secretary of State has power by order to designate territories for the purposes of each<sup>3</sup>.

In the first category, the procedure commences where a judicial authority with the function of issuing arrest warrants in a category 1 territory issues such a warrant, which is received by a designated authority in the United Kingdom<sup>4</sup>. If the designated authority issues a certificate that the authority issuing the warrant is a judicial authority in a category 1 territory and has the function of issuing warrants in that territory<sup>5</sup>, the warrant is executed by a constable, an officer of Revenue and Customs or (in specified circumstances) a service policeman<sup>6</sup>. The arrested person is given a copy of the warrant and is brought as soon as practicable before a designated District Judge (Magistrates' Courts)<sup>7</sup>. The judge conducts an initial hearing to decide whether, on the balance of probabilities, the person brought before him is the person named in the warrant: if he decides that the person brought before him is the person named in the warrant, he must fix a date for an extradition hearing and remand the person in custody or on bail<sup>8</sup>. At the extradition hearing the judge decides whether the offence specified in the warrant is an extradition offence and if it is not the judge must discharge the person<sup>9</sup>. If the offence specified in the warrant is an extradition offence, the judge must decide whether extradition is barred by reason of one of a number of considerations<sup>10</sup> or whether (in a case following conviction) the person must be discharged because the conviction was in his non-deliberate absence and he would not be entitled to a re-trial, in which case he must be discharged<sup>11</sup>. If extradition is not so barred or (as the case may be) the person is not so discharged, the judge must proceed to decide whether extradition would be compatible with the person's Convention rights<sup>12</sup>. If the judge decides that extradition would not be incompatible with those rights, he must order extradition and remand the person in custody or on bail<sup>13</sup>.

In the second category, on receipt of a valid request for extradition of a person from a category 2 territory the Secretary of State must issue a certificate to the effect that the request is made in the approved way, and must send to the appropriate judge the extradition request, his certificate and a copy of any relevant Order in Council<sup>14</sup>. On receipt of such documents the judge may issue a warrant for the arrest of the person whose extradition is requested if he has reasonable grounds for believing that the offence in respect of which extradition is requested is an extradition offence and there is evidence that would either justify the issue of a warrant for the arrest of a person accused of the offence within the judge's jurisdiction, if the person whose extradition is requested is accused of the commission of the offence, or justify the issue of a warrant for the arrest of a person unlawfully at large after conviction of the offence within the judge's jurisdiction, if the person whose extradition is requested is alleged to be unlawfully at

large after conviction of the offence<sup>15</sup>. Such a warrant may be executed by the person to whom it is directed or by any police officer or officer of Revenue and Customs or (in specified circumstances) by a service policeman<sup>16</sup>. A person so arrested must be brought as soon as practicable before the appropriate judge unless granted bail by a constable or unless the Secretary of State decides that the extradition request is not to be proceeded with<sup>17</sup>. When the person first appears before the appropriate judge the judge must fix a date for the extradition hearing and remand him in custody or on bail<sup>18</sup>. If the judge is satisfied at the extradition hearing as to technical matters, he must proceed to decide whether on the balance of probabilities the person's extradition to a category 2 territory is barred by reason of a number of considerations<sup>19</sup>.

If the judge decides that extradition is not so barred, he must decide whether extradition is barred because there is insufficient evidence to make a case requiring an answer (if the person is accused, but has not been convicted, of the offence in question) or whether the person must be discharged because he was convicted in his non-deliberate absence and has no right of re-trial (if the person has been convicted and is unlawfully at large)<sup>20</sup>. If the judge decides such a person would have a right to re-trial, the judge must decide whether there is evidence sufficient to make a case requiring an answer by the person; if the judge decides that there is not, he must discharge the person<sup>21</sup>.

If extradition is not so barred or (as the case may be) the person is not so discharged, the judge must decide whether the person's extradition would be compatible with his Convention rights<sup>22</sup>. If he decides that it would not be incompatible with those rights, he must send the case to the Secretary of State for his decision whether the person is to be extradited and remand the person in custody or on bail<sup>23</sup>. The Secretary of State must order extradition unless he is prohibited from ordering extradition on specified grounds<sup>24</sup>.

1 See EXTRADITION vol 17(2) (Reissue) PARA 1101.

2 The law of extradition is governed by the Extradition Act 2003: see EXTRADITION.

3 See *ibid* ss 1(1), 69(1); and EXTRADITION.

4 See *ibid* s 2(1), (2); and EXTRADITION.

5 See *ibid* s 2(7), (8); and EXTRADITION.

6 See *ibid* s 3; the Commissioners for Revenue and Customs Act 2005 s 50(2), (7); and EXTRADITION. As to officers of Revenue and Customs see PARA 354 note 2 *ante*. As to service policemen see ARMED FORCES vol 2(2) (Reissue) PARA 330.

7 See the Extradition Act 2003 ss 4, 67; and EXTRADITION.

8 See *ibid* ss 7(2), (3), 8; and EXTRADITION.

9 See *ibid* s 10(2), (3); and EXTRADITION.

10 The considerations are set out in *ibid* s 11(1): see EXTRADITION.

11 See *ibid* s 20(1), (3), (5), (7), (8); and EXTRADITION.

12 See *ibid* s 21(1); and EXTRADITION.

13 See *ibid* ss 11(4), (5), 20(1), (2), (4), (6), 21(3), (4); and EXTRADITION.

14 See *ibid* s 70(1), (8), (9); and EXTRADITION.

15 See *ibid* s 71(1)-(3); and EXTRADITION.

16 See *ibid* s 71(5), (6); the Commissioners for Revenue and Customs Act 2005 s 50(2), (7); and EXTRADITION.

17 See the Extradition Act 2003 s 72(1), (3), (4); and EXTRADITION.

- 18 See *ibid* ss 72(7), 75(1); and EXTRADITION.
- 19 See *ibid* ss 78(1), (2), (4), (5), (7), 79(1); and EXTRADITION.
- 20 See *ibid* ss 79(4), (5), 84(1)-(6), 85(1)-(4), (6); and EXTRADITION.
- 21 See *ibid* s 86(1)-(5); and EXTRADITION.
- 22 See *ibid* ss 84(6), 85(2), (4), 86(6), 87(1); and EXTRADITION.
- 23 See *ibid* ss 87(3), 92(1), (4); and EXTRADITION.
- 24 See *ibid* s 93; and EXTRADITION.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/13. ARREST AND DETENTION/(6) TREATMENT OF DETAINED PERSONS/(xiii) Recordable Offences/1049. Recordable offences.

### **(xiii) Recordable Offences**

#### **1049. Recordable offences.**

Convictions for, and cautions<sup>1</sup>, reprimands and warnings<sup>2</sup> in respect of, any offence punishable with imprisonment<sup>3</sup> may be recorded in national police records<sup>4</sup>. There may also be recorded in those records convictions for, and cautions, reprimands and warnings in respect of, the following offences:

- 1575 (1) giving intoxicating liquor to children under five<sup>5</sup>;
- 1576 (2) exposing children under 12 to risk of burning<sup>6</sup>;
- 1577 (3) failing to provide for safety of children at entertainments<sup>7</sup>;
- 1578 (4) drunkenness in a public place<sup>8</sup>;
- 1579 (5) touting for car hire services<sup>9</sup>;
- 1580 (6) purchasing or hiring a crossbow or part of a crossbow by person under the age of 17<sup>10</sup>;
- 1581 (7) possessing a crossbow or parts of a crossbow by unsupervised person under the age of 17<sup>11</sup>;
- 1582 (8) failing to deliver up authority to possess a prohibited weapon or ammunition<sup>12</sup>;
- 1583 (9) possessing an assembled shotgun by unsupervised person under the age of 15<sup>13</sup>;
- 1584 (10) possessing an air weapon or ammunition for an air weapon by an unsupervised person under the age of 14<sup>14</sup>;
- 1585 (11) throwing missiles (in connection with a designated football match)<sup>15</sup>;
- 1586 (12) indecent or racist chanting (in connection with a designated football match)<sup>16</sup>;
- 1587 (13) unlawfully going on to the playing area (in connection with a designated football match)<sup>17</sup>;
- 1588 (14) trespassing in daytime on land in search of game, etc<sup>18</sup>;
- 1589 (15) refusing (in connection with a person trespassing in daytime on land in search of game) to give name and address<sup>19</sup>;
- 1590 (16) five or more persons being found armed in daytime in search of game and using violence or refusal of such persons to give name and address<sup>20</sup>;
- 1591 (17) being drunk on the highway or in a public place<sup>21</sup>;
- 1592 (18) obstructing an authorised person inspecting premises before the grant of a licence etc<sup>22</sup>;
- 1593 (19) failing to notify a change of name or alteration of rules of a club<sup>23</sup>;
- 1594 (20) obstructing an authorised person inspecting premises before the grant of a certificate etc<sup>24</sup>;
- 1595 (21) obstructing an authorised person exercising a right of entry where a temporary event notice has been given<sup>25</sup>;
- 1596 (22) failing to notify licensing authority of convictions during application period<sup>26</sup>;
- 1597 (23) failing to notify the court of a personal licence<sup>27</sup>;
- 1598 (24) keeping alcohol on premises for unauthorised sale etc<sup>28</sup>;

- 1599 (25) allowing disorderly conduct on licensed premises etc<sup>29</sup>;
- 1600 (26) selling alcohol to a person who is drunk<sup>30</sup>;
- 1601 (27) obtaining alcohol for a person who is drunk<sup>31</sup>;
- 1602 (28) failing to leave licensed premises etc<sup>32</sup>;
- 1603 (29) keeping smuggled goods<sup>33</sup>;
- 1604 (30) allowing unaccompanied children on certain premises<sup>34</sup>;
- 1605 (31) selling alcohol to children<sup>35</sup>;
- 1606 (32) allowing the sale of alcohol to children<sup>36</sup>;
- 1607 (33) purchasing alcohol by or on behalf of children<sup>37</sup>;
- 1608 (34) consumption of alcohol on relevant premises by children<sup>38</sup>;
- 1609 (35) delivering alcohol to children<sup>39</sup>;
- 1610 (36) sending a child to obtain alcohol<sup>40</sup>;
- 1611 (37) allowing unsupervised sales of alcohol by children<sup>41</sup>;
- 1612 (38) making false statements for the purposes of licensing applications etc<sup>42</sup>;
- 1613 (39) allowing premises to remain open following a closure order<sup>43</sup>;
- 1614 (40) obstructing an authorised person exercising rights of entry to investigate licensable activities<sup>44</sup>;
- 1615 (41) making a false statement in connection with an application for a sex establishment licence<sup>45</sup>;
- 1616 (42) falsely claiming a professional qualification etc (in connection with nursing and midwifery)<sup>46</sup>;
- 1617 (43) taking or destroying game or rabbits by night, or entering any land for that purpose<sup>47</sup>;
- 1618 (44) wearing police uniform with intent to deceive<sup>48</sup>;
- 1619 (45) unlawful possession of an article of police uniform<sup>49</sup>;
- 1620 (46) causing harassment, alarm or distress<sup>50</sup>;
- 1621 (47) failing to give advance notice of a public procession<sup>51</sup>;
- 1622 (48) failing to comply with conditions imposed on a public procession<sup>52</sup>;
- 1623 (49) taking part in a prohibited public procession<sup>53</sup>;
- 1624 (50) failing to comply with conditions imposed on a public assembly<sup>54</sup>;
- 1625 (51) taking part in a prohibited assembly<sup>55</sup>;
- 1626 (52) failing to comply with directions (concerning persons proceeding to trespassory assemblies)<sup>56</sup>;
- 1627 (53) failing to provide specimen of breath<sup>57</sup>;
- 1628 (54) tampering with motor vehicles<sup>58</sup>;
- 1629 (55) kerb crawling<sup>59</sup>;
- 1630 (56) persistently soliciting for the purpose of prostitution<sup>60</sup>;
- 1631 (57) allowing alcohol to be carried on public vehicles on journeys to or from designated sporting events<sup>61</sup>;
- 1632 (58) being drunk on public vehicles on journeys to or from designated sporting events<sup>62</sup>;
- 1633 (59) allowing alcohol to be carried in vehicles on journeys to or from designated sporting events<sup>63</sup>;
- 1634 (60) trying to enter a designated sports ground while drunk<sup>64</sup>;
- 1635 (61) loitering or soliciting for the purposes of prostitution<sup>65</sup>;
- 1636 (62) taking or riding a pedal cycle without the owner's consent<sup>66</sup>;
- 1637 (63) begging<sup>67</sup>; and
- 1638 (64) persistent begging<sup>68</sup>.

Where a person's convictions are so recordable, there may also be recorded his convictions for any other offence in the same proceedings<sup>69</sup>.

1 For these purposes, 'caution' means a caution given to a person in England and Wales or Northern Ireland in respect of an offence which, at the time when the caution is given, he has admitted: Police Act 1997 s 126(1);

definition applied by the National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, reg 3(2)(b).

2 For these purposes, 'reprimand' and 'warning' mean a reprimand or, as the case may be, a warning given under the Crime and Disorder Act 1998 s 65 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1235): National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, reg 3(2)(c).

3 The reference to offences punishable with imprisonment is to be construed without regard to any prohibition or restriction imposed by or under any enactment on the punishment of young offenders: *ibid* reg 3(2)(a).

4 *Ibid* reg 3(1) (made under the Police and Criminal Evidence Act 1984 s 27(4), which empowers the Secretary of State by regulations to make provision for recording in national police records convictions, cautions, reprimands or warnings for such offences as are specified in the regulations). Any such regulations must be made by statutory instrument and are subject to annulment in pursuance of a resolution of either House of Parliament: s 27(5).

5 *Ibid* s 27(4) (see note 4 *supra*); National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, reg 3(1), Schedule para 1. As to this offence see the Children and Young Persons Act 1933 s 5 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 631.

6 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 2. As to this offence see the Children and Young Persons Act 1933 s 11 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 613.

7 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 3. As to this offence see the Children and Young Persons Act 1933 s 12 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 635.

8 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 4. As to this offence see the Criminal Justice Act 1967 s 91 (as amended); and PARA 596 *ante*.

9 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 5 (substituted by SI 2003/2823). As to this offence see the Criminal Justice and Public Order Act 1994 s 167 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 888.

10 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 6. As to this offence see the Crossbows Act 1987 s 2; and PARA 709 *ante*.

11 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 7. As to this offence see the Crossbows Act 1987 s 3; and PARA 708 *ante*.

12 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 8. As to this offence see the Firearms Act 1968 s 5(6); and PARA 665 *ante*.

13 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 9. As to this offence see the Firearms Act 1968 s 22(3); and PARA 669 *ante*.

14 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 10. As to this offence see the Firearms Act 1968 s 22(4) (as amended); and PARA 670 *ante*.

15 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 12. As to this offence see the Football (Offences) Act 1991 s 2; and THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARA 113.

16 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 13. As to this offence see the Football (Offences) Act 1991 s 3 (as amended); and THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARA 113.

17 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 14. As to this offence see the Football (Offences) Act 1991 s 4; and THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARA 113.

18 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 15. As to this offence see the Game Act 1831 s 30 (as amended); and ANIMALS vol 2 (2008) PARA 786.

- 19 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 16. As to this offence see the Game Act 1831 s 31 (as amended); and ANIMALS vol 2 (2008) PARA 785.
- 20 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 17. As to this offence see the Game Act 1831 s 32 (as amended); and ANIMALS vol 2 (2008) PARA 787.
- 21 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 18. As to this offence see the Licensing Act 1872 s 12 (as amended).
- 22 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 19 (substituted by SI 2005/3106). As to this offence see the Licensing Act 2003 s 59(5); and LICENSING AND GAMBLING vol 67 (2008) PARA 54.
- 23 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 20 (substituted by SI 2005/3106). As to this offence see the Licensing Act 2003 s 82(6); and LICENSING AND GAMBLING vol 67 (2008) PARA 98.
- 24 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 21 (substituted by SI 2005/3106). As to this offence see the Licensing Act 2003 s 96(5); and LICENSING AND GAMBLING vol 67 (2008) PARA 89.
- 25 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 22 (substituted by SI 2005/3106). As to this offence see the Licensing Act 2003 s 108(3); and LICENSING AND GAMBLING vol 67 (2008) PARA 111.
- 26 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 23 (substituted by SI 2005/3106). As to this offence see the Licensing Act 2003 s 123(2); and LICENSING AND GAMBLING vol 67 (2008) PARA 117.
- 27 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24 (substituted by SI 2005/3106). As to this offence see the Licensing Act 2003 s 128(6); and LICENSING AND GAMBLING vol 67 (2008) PARA 128.
- 28 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24A (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 138(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 98.
- 29 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24B (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 140(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 135.
- 30 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24C (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 141(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 136.
- 31 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24D (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 142(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 137.
- 32 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24E (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 143(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 138.
- 33 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24F (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 144(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 134.
- 34 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24G (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 145(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 142.
- 35 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24H (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 146(1), (3); and LICENSING AND GAMBLING vol 67 (2008) PARA 143.
- 36 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24I (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 147(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 144.

37 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24J (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 149(1), (3), (4); and LICENSING AND GAMBLING vol 67 (2008) PARA 147.

38 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24K (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 150(1), (2); and LICENSING AND GAMBLING vol 67 (2008) PARA 148.

39 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24L (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 151(1), (2), (4); and LICENSING AND GAMBLING vol 67 (2008) PARA 149.

40 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24M (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 152(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 150.

41 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24N (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 153(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 151.

42 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24O (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 158(1); and LICENSING AND GAMBLING vol 67 (2008) PARA 156.

43 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24P (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 160(4); and LICENSING AND GAMBLING vol 67 (2008) PARA 168.

44 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 24Q (added by SI 2005/3106). As to this offence see the Licensing Act 2003 s 179(4); and LICENSING AND GAMBLING vol 67 (2008) PARA 34.

45 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 25. As to this offence see the Local Government (Miscellaneous Provisions) Act 1982 Sch 3 para 21; and LICENSING AND GAMBLING vol 67 (2008) PARA 306.

46 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 27 (substituted by SI 2003/2823). As to this offence see the Nursing and Midwifery Order 2001, SI 2002/253, art 44; and MEDICAL PROFESSIONS vol 30(1) (Reissue) PARA 784.

47 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 28. As to this offence see the Night Poaching Act 1828 s 1 (as amended); and ANIMALS vol 2 (2008) PARA 791.

48 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 29. As to this offence see the Police Act 1996 s 90(2); and POLICE vol 36(1) (2007 Reissue) PARA 481.

49 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 30. As to this offence see the Police Act 1996 s 90(3); and POLICE vol 36(1) (2007 Reissue) PARA 481.

50 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 31. As to this offence see the Public Order Act 1986 s 5 (as amended); and PARA 560 ante.

51 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 32. As to this offence see the Public Order Act 1986 s 11; and PARA 578 ante.

52 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 33. As to this offence see the Public Order Act 1986 s 12(5); and PARA 579 ante.

53 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 34. As to this offence see the Public Order Act 1986 s 13(8); and PARA 580 ante.

54 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 35. As to this offence see the Public Order Act 1986 s 14(5); and PARA 581 ante.

55 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 36. As to this offence see the Public Order Act 1986 s 14B(2) (as added); and PARA 582 ante.



- 56 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 37. As to this offence see the Public Order Act 1986 s 14C(3) (as added); and PARA 582 ante.
- 57 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 38. As to this offence see the Road Traffic Act 1988 s 6 (as substituted); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARAS 979, 985.
- 58 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 39. As to this offence see the Road Traffic Act 1988 s 25; and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1003.
- 59 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 40. As to this offence see the Sexual Offences Act 1985 s 1 (as amended); and PARA 227 ante.
- 60 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 41. As to this offence see the Sexual Offences Act 1985 s 2 (as amended); and PARA 227 ante.
- 61 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 42. As to this offence see the Sporting Events (Control of Alcohol Etc) Act 1985 s 1(2) (as amended); and PARA 597 ante.
- 62 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 43. As to this offence see the Sporting Events (Control of Alcohol Etc) Act 1985 s 1(2) (as amended); and PARA 597 ante.
- 63 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 44. As to this offence see the Sporting Events (Control of Alcohol Etc) Act 1985 s 1A(2) (as added); and PARA 598 ante.
- 64 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 45. As to this offence see the Sporting Events (Control of Alcohol Etc) Act 1985 s 2(2); and PARA 599 ante.
- 65 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 50. As to this offence see the Street Offences Act 1959 s 1 (as amended); and PARA 224 ante.
- 66 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 52. As to this offence see the Theft Act 1968 s 12(5) (as amended); and PARA 298 ante.
- 67 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 53 (added by SI 2003/2823). As to this offence see the Vagrancy Act 1824 s 3 (as amended); and PARA 833 ante.
- 68 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, Schedule para 54 (added by SI 2003/2823). As to this offence see the Vagrancy Act 1824 s 4 (as amended); and PARA 833 ante.
- 69 National Police Records (Recordable Offences) Regulations 2000, SI 2000/1139, reg 3(3).
- 24 Ie a requirement under *ibid* s 27(1) (see the text and notes 18-23 *supra*).
- 25 *Ibid* s 27(3); Code D para 4.4(b). As to arrest without warrant generally see PARA 924 *et seq* ante.
- 26 Police and Criminal Evidence Act 1984 s 61(6A)(a) (ss 61(6A)-(6C), 63A(1ZA), 64(1BA) prospectively added, and s 61(7), (7A) prospectively amended, by the Serious Organised Crime and Police Act 2005 s 117(1)-(4), (5)(a), (6), (8)). At the date at which this volume states the law no day had been appointed for the purposes of these provisions. The taking of fingerprints by virtue of these provisions does not count for any of the purposes of the Police and Criminal Evidence Act 1984 as taking them in the course of the investigation of an offence by the police: s 61(6C) (as so prospectively added). Fingerprints taken from a person by virtue of s 61(6A) (prospectively added) must be destroyed as soon as they have fulfilled the purpose for which they were taken: s 64(1BA) (as so prospectively added). As to the destruction of fingerprints and other samples see PARA 1039 *post*.
- 27 *Ibid* s 61(6A)(b), (6B)(a) (prospectively added: see note 26 *supra*).
- 28 *Ibid* s 61(6B)(b) (prospectively added: see note 26 *supra*).
- 29 See PARA 1038 note 6 *post*.
- 30 Police and Criminal Evidence Act 1984 s 63A(1ZA) (prospectively added: see note 26 *supra*).
- 31 Ie a case where fingerprints have been taken by virtue of *ibid* s 61(4A) (as added) (see the text and notes 10-11 *supra*).

32 Ibid s 61(7)(a) (as amended (see note 7 supra); prospectively amended (see note 26 supra)); Code D para 4.7(a).

33 Police and Criminal Evidence Act 1984 s 61(7)(b).

34 Ie where fingerprints are taken by virtue of ibid s 61(6A) (prospectively added) (see the text and notes 26-30 supra).

35 Or, as from a day to be appointed, in a case where fingerprints are taken at a place other than a police station on the grounds that the person's identity is in question, the constable: ibid s 61(6A) (prospectively added: see note 26 supra); s 61(7A)(a) (as added (see note 36 infra); prospectively amended (see note 26 supra)).

36 Ibid s 61(7A)(a) (s 61(7A) added, and s 61(8) amended, by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 56; and the Police and Criminal Evidence Act 1984 s 61(7A)(a) prospectively amended (see note 26 supra)); Code D para 4.7(c). 'Speculative search', in relation to a person's fingerprints or samples, means such a check against other fingerprints or samples or against information derived from other samples as is referred to in the Police and Criminal Evidence Act 1984 s 63A(1) (as added, substituted and amended) (see PARA 1038 post): s 65(1) (definition added by the Criminal Justice and Public Order Act 1994 s 58(4)). Fingerprints, footwear impressions or a DNA sample (and the information derived from it) taken from a person arrested on suspicion of being involved in a recordable offence, or charged with such an offence, or informed he will be reported for such an offence, may be the subject of a speculative search: Code D Guidance note 4B. This means that the fingerprints, footwear impressions or DNA sample may be checked against other fingerprints, footwear impressions and DNA records held by, or on behalf of, the police and other law enforcement authorities in, or outside, the United Kingdom, or held in connection with, or as a result of, an investigation of an offence inside or outside the United Kingdom: Code D Guidance note 4B. Fingerprints, footwear impressions and samples taken from a person suspected of committing a recordable offence but not arrested, charged or informed that he will be reported for it, may be subject to a speculative search only if the person consents in writing: Code D Guidance note 4B. The following is an example of a basic form of words: 'I consent to my fingerprints, footwear impressions and DNA sample and information derived from it being retained and used only for purposes related to the prevention and detection of a crime, the investigation of an offence or the conduct of a prosecution either nationally or internationally. I understand that my fingerprints, footwear impressions or DNA sample may be checked against other fingerprint, footwear impression and DNA records held by or on behalf of relevant law enforcement authorities, either nationally or internationally. I understand that once I have given my consent for my fingerprints, footwear impressions or DNA sample to be retained and used I cannot withdraw this consent': Code D Guidance note 4B. As to the retention and use of fingerprints taken with consent for elimination purposes see Code D Annex F; and PARAS 1039-1040 post.

A record must be made when a person has been informed under these provisions of the possibility that his fingerprints may be subject of a speculative search: Code D para 4.9. As to speculative searches see PARA 1038 post.

37 Police and Criminal Evidence Act 1984 s 61(7A)(b) (as added: see note 36 supra). The fact that a person has been informed of the possibility that his fingerprints may be the subject of a speculative search must be referred to in his custody record: s 61(8) (as amended: see note 36 supra). As to custody records see PARA 940 ante.

38 Code D para 4.7(d). As to the destruction of fingerprints see PARA 1039 post.

39 Police and Criminal Evidence Act 1984 s 61(8) (as amended: see note 36 supra). As to fingerprint evidence generally see PARAS 1455, 1460 post.

40 Ibid s 61(8A) (prospectively added by the Criminal Justice and Police Act 2001 s 78(7)). At the date at which this volume states the law no day had been appointed for the commencement of these provisions.

41 Police and Criminal Evidence Act 1984 s 61(8B) (added by the Police Reform Act 2002 s 107(1), Sch 7 para 9(3)).

## UPDATE

### 1049 Recordable offences

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTES 1-68--Also, heads (65) selling or disposing of tickets to a designated football match without authorisation (see the Criminal Justice and Public Order Act 1994 s 166(1)) (SI 2000/1139 Schedule para 46 (added by SI 2007/2121)); (66) failure to report at a police station pursuant to a banning order (see the Football Spectators Act 1989 s 19(6)) (SI 2000/1139 Schedule para 47 (added by SI 2007/2121)); and (67) providing false or misleading information to support an application for exemption from a banning order (see the Football Spectators Act 1989 s 20(10)) (SI 2000/1139 Schedule para 48 (added by SI 2007/2121)).

TEXT AND NOTES 35, 36--As to the offence of persistently selling alcohol to children see Licensing Act 2003 ss 147A, 147B (added by Violent Crime Reduction Act 2006 s 23(1)). See further LICENSING AND GAMBLING vol 67 (2008) PARA 145.

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## **14. ORIGINAL CRIMINAL JURISDICTION**

### **(1) CRIMINAL JURISDICTION OF COURTS**

#### **1050. Courts of ordinary criminal jurisdiction.**

The courts which exercise original criminal jurisdiction<sup>1</sup>, administering the ordinary criminal law in England and Wales, are: (1) the magistrates' courts (which include the youth courts)<sup>2</sup>; and (2) the Crown Court<sup>3</sup>. The former are inferior courts; and the latter is a superior court of record<sup>4</sup>, and part of the Supreme Court<sup>5</sup>.

<sup>1</sup> As to any original criminal jurisdiction remaining in the High Court of Parliament see COURTS vol 10 (Reissue) PARA 351 et seq.

<sup>2</sup> See PARA 1051 post; and MAGISTRATES vol 29(2) (Reissue) PARA 583.

<sup>3</sup> See PARA 1052 post.

<sup>4</sup> See the Supreme Court Act 1981 s 45(1) (as amended); and COURTS vol 10 (Reissue) PARA 621. As to the classification of courts into superior and inferior courts, and the characteristics of a court of record, see COURTS vol 10 (Reissue) PARA 708 et seq. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1; and COURTS. At the date at which this volume states the law no such day had been appointed.

<sup>5</sup> See the Supreme Court Act 1981 s 1(1) (as amended); and COURTS vol 10 (Reissue) PARA 601. As to the prospective renaming of the Supreme Court Act 1981 see note 4 supra.

#### **UPDATE**

#### **1050 Courts of ordinary criminal jurisdiction**

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

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### **1051. Magistrates' courts.**

In regard to criminal matters it is the function of magistrates' courts<sup>1</sup> to conduct the trial of summary offences<sup>2</sup> and of offences triable either way<sup>3</sup> which are not to be tried on indictment<sup>4</sup>, and to conduct preliminary hearings in regard to indictable offences and offences triable either way which are not to be tried summarily<sup>5</sup>. Youth courts (formerly known as juvenile courts) conduct the trials of most alleged juvenile offenders, even for offences that in the case of an adult are triable only on indictment, but in exceptional cases it may be necessary for juveniles to be tried on indictment<sup>5</sup> or in adult magistrates' courts<sup>6</sup>.

The jurisdiction of a magistrates' court over summary offences was previously limited to offences committed within its own commission area or within 500 yards of the boundary between that and another commission area, but this limitation has now been removed<sup>7</sup>.

1 As to the jurisdiction of justices of the peace and district judges, see PARAS 1098-1099 post; and as to the office of magistrates see MAGISTRATES vol 29(2) (Reissue) PARA 501.

2 See the Magistrates' Courts Act 1980 s 2(1) (as substituted and amended); and MAGISTRATES vol 29(1) (Reissue) PARA 524. As to trial of summary offences see PARA 1104 post; and MAGISTRATES.

3 See *ibid* s 2(3); and MAGISTRATES vol 29(2) (Reissue) PARA 501. As to the procedure for offences triable either way see PARAS 1103, 1105 et seq post; and as to determining the mode of trial see PARA 1102 post.

4 See MAGISTRATES vol 29(2) (Reissue) PARA 524.

5 See MAGISTRATES vol 29(2) (Reissue) PARA 654.

6 See CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1259 et seq. As to circumstances in which a juvenile defendant may be tried in an adult magistrates' court, see PARAS 1098 note 8, 1116 post.

7 See the Magistrates' Courts Act 1980 s 2(1) (as substituted); and MAGISTRATES vol 29(2) (Reissue) PARA 524. A number of provisions still remain in force in which 'for the purpose of conferring jurisdiction' offences may be deemed to have been committed at any place where the offender may be found, etc, but these are now obsolete both in respect of indictable offences (see PARA 1052 post) and in respect of summary offences.

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### **1052. The Crown Court.**

All proceedings on indictment must be brought before the Crown Court<sup>1</sup>. In addition, the Crown Court has jurisdiction to sentence or deal with persons committed to it by a magistrates' court<sup>2</sup> and to deal with certain appeals from magistrates' courts<sup>3</sup>.

1 Supreme Court Act 1981 s 46(1). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1; and COURTS. At the date at which this volume states the law no such day had been appointed. The jurisdiction of the Crown Court with respect to proceedings on indictment includes jurisdiction in proceedings on indictment for offences wherever committed, and in particular proceedings on indictment for offences within the jurisdiction of the Admiralty of England (Supreme Court Act 1981 s 46(2)); but as to limitations on the ambit of English criminal law itself see PARA 1054 post. See also COURTS vol 10 (Reissue) PARA 625 et seq.

2 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17.

3 See PARA 1980 et seq post.

### **UPDATE**

### **1052 The Crown Court**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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### **1053. Courts of special criminal jurisdiction.**

There are, in addition to those courts administering the ordinary criminal law<sup>1</sup>, certain courts having special criminal jurisdiction. These are (1): courts-martial<sup>2</sup>, which have jurisdiction in respect of offences committed by persons (including civilians) subject to naval, military and air force law; (2) standing civilian courts<sup>3</sup> for the summary trial outside the United Kingdom of certain civilians subject to naval, military or air force law; and (3) the ecclesiastical courts, exercising a limited jurisdiction of a criminal nature over the clergy and other members of the Church of England<sup>4</sup>.

1 See PARAS 1050-1052 ante. At a coroner's inquest into the death of a person who came by his death by murder, manslaughter or infanticide, the purpose of the proceedings does not include the finding of any person guilty of the murder, manslaughter or infanticide; and accordingly a coroner's inquisition may in no case charge a person with any of those offences: Coroners Act 1988 s 11(6). See further CORONERS vol 9(2) (2006 Reissue) PARA 1025, 1046.

2 See ARMED FORCES vol 2(2) (Reissue) PARAS 302 et seq, 448 et seq, 480 et seq.

3 See ARMED FORCES vol 2(2) (Reissue) PARA 520 et seq.

4 See ECCLESIASTICAL LAW vol 14 para 1272 et seq. By the Ecclesiastical Jurisdiction Measure 1963 art 69, no proceedings by way of a criminal suit, other than those authorised by Pts IV, V and VI of that Measure, may be instituted against a person in the consistory court of a diocese or in the Court of Ecclesiastical Causes Reserved, and no proceedings so authorised may be instituted except in accordance with those Parts. When brought into force, the Clergy Discipline Measure 2003 s 44(2), Sch 1 paras 1 and 12 will confine such proceedings to those authorised by Pt VI of the Ecclesiastical Jurisdiction Measure 1963 only.

## **UPDATE**

### **1053 Courts of special criminal jurisdiction**

NOTE 1--1988 Act s 11(6) amended: Corporate Manslaughter and Corporate Homicide Act 2007 Sch 2 para 1(2)(a).

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## **(2) AMBIT OF ENGLISH CRIMINAL LAW**

### **1054. Territorial jurisdiction.**

English criminal law extends to the acts or omissions of individuals or corporations<sup>1</sup> of whatever nationality or status<sup>2</sup> within the territorial limits of England and Wales<sup>3</sup>. The general rule is that English criminal law applies only within those limits<sup>4</sup>. At common law, acts or omissions outside the realm cannot amount to offences under English law<sup>5</sup> and statutory provisions creating offences will ordinarily be presumed to have no extra-territorial effect<sup>6</sup>, but there are now many statutory exceptions to the general rule<sup>7</sup>.

1 As to the criminal liability of corporations see PARA 38 ante.

2 This includes accredited foreign diplomats and other persons enjoying immunity from prosecution, because such persons are still required to comply with the law and their immunity from prosecution or punishment under English law may in some cases be waived by their governments: see PARA 42 et seq ante; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 283. As to jurisdictional immunities granted to visiting armed forces see PARA 46 ante; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 324.

3 As to the territorial limits of England and Wales see PARA 1055 post. As to airspace see PARA 1058 post. As to acts done partly within and partly outside England and Wales see PARA 1059 post.

4 *Cox v Army Council* [1963] AC 48 at 67, 46 Cr App Rep 258 at 262, HL, per Viscount Simonds. This is not strictly speaking a matter concerning the jurisdiction of the courts, but rather one concerning the ambit or extent of the law itself. See *Treacy v DPP* [1971] AC 537 at 559, 55 Cr App Rep 113 at 136-137, HL, per Lord Diplock.

5 *R v Keyn* (1876) 2 Ex D 63, CCR. As to the basis of the common law rule see *R v Page* [1954] 1 QB 170 at 175, [1953] 2 All ER 1355 at 1356, C-MAC, per Lord Goddard CJ. As to offences committed partly within and partly outside England and Wales see PARA 1059 post.

6 'It has been recognised from time immemorial that there is a strong presumption that when Parliament, in an Act applying to England, creates an offence by making certain things punishable, it does not intend this to apply to any act done by anyone in any country other than England. Parliament, being sovereign, is fully entitled to make an enactment on a wider basis. But the presumption is well known to draftsmen, and where there is an intention to make an English Act or part of such an Act apply to acts done outside England, that intention is and must be made clear in the Act': *Treacy v DPP* [1971] AC 537 at 551, 55 Cr App Rep 113 at 124-125, HL, per Lord Reid.

7 As to such exceptions see PARAS 1056-1058, 1060-1063 post.



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### **1055. The territorial limits of England and Wales.**

Criminal jurisdiction at common law extends to England and Wales<sup>1</sup> and the airspace above<sup>2</sup>. It includes all English and Welsh islands<sup>3</sup>, but excludes Scotland<sup>4</sup>, Northern Ireland, the Channel Islands and the Isle of Man<sup>5</sup>.

The boundary of the realm ordinarily lies on the foreshore, where the land meets the open sea according to the prevailing state of the tides<sup>6</sup>, but those tidal rivers, creeks, inlets and harbours that lie inter fauces terrae (that is, within the jaws of the land) nevertheless fall within county boundaries and thus lie within the realm<sup>7</sup>. The realm does not, however, include the territorial waters adjacent to England and Wales<sup>8</sup>, nor does it include those waters that are deemed to be 'internal' only on the basis that they lie to landward of the baselines from which the territorial sea is measured<sup>9</sup>.

1 'England' means, subject to any alteration of boundaries of local government areas, the area consisting of the counties established by the Local Government Act 1972 s 1 (see LOCAL GOVERNMENT vol 69 (2009) PARAS 5, 24), Greater London and the Isles of Scilly (see note 3 infra): Interpretation Act 1978 s 5, Sch 1. 'Wales' means the combined area of the counties which were created by the Local Government Act 1972 s 20 (as originally enacted) (see LOCAL GOVERNMENT vol 69 (2009) PARAS 5, 37), but subject to any alteration made under s 73 (as amended) (consequential alteration of boundary following alteration of watercourse) (see LOCAL GOVERNMENT vol 69 (2009) PARA 90): Interpretation Act 1978 Sch 1 (definition substituted by the Local Government (Wales) Act 1994 s 1(3), Sch 2 para 9). As to local government areas see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq; and as to boundary changes see LOCAL GOVERNMENT vol 69 (2009) PARA 54 et seq. As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

The Channel Tunnel system, as far as the French frontier, is deemed to form part of the county of Kent, and thus lies within the realm: see the Channel Tunnel Act 1987 s 10(1); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 324. Foreign embassies and other diplomatic or consular premises sited within the realm remain part of the realm and are subject to English law: see *R v Nejad* (22 January 1981, unreported) (acts committed by terrorists within Iranian embassy in London held to be justiciable as offences under English law).

2 As to airspace see PARA 1058 post.

3 These include Anglesey (in the county of Gwynedd), the Isle of Wight and Lundy Island: see *Harman v Bolt* (1931) 47 TLR 219. The Isles of Scilly are defined by reference to a map, copies of which are deposited at the offices of the Secretary of State, the Duchy of Cornwall and the Council of the Isles of Scilly: see the Isles of Scilly Order 1978, SI 1978/1844, art 2(1).

Rockall was annexed in 1955 and is the most recent addition to the land territory of the United Kingdom, but forms part of the territory of Scotland: see the Island of Rockall Act 1972 s 1 (amended by the Local Government (Scotland) Act 1973 s 214(2), Sch 27 para 202).

4 As to jurisdiction over fisheries offences committed on or in respect of the border rivers (namely, the Eden, Esk, Sark and Tweed): see AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 845. This may involve the application of Scots criminal law by English courts in respect of offences committed on certain stretches of the Tweed and its tributaries: *Ryan v Ross* [1963] 2 QB 151, [1963] 1 All ER 853, DC; *Gibson v Ryan* [1968] 1 QB 250, [1967] 3 All ER 184, DC.

5 As to the legal status of the Channel Islands and the Isle of Man (which are not within the United Kingdom) see COMMONWEALTH vol 13 (2009) PARA 790 et seq; and see also CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.

6 *R v Keyn* (1876) 2 Ex D 63 at 168, CCR, per Lord Cockburn CJ (not cited in *Embleton v Brown* (1860) 3 E & E 234). See also *Sir Henry Constable's Case* (1601) 5 Co Rep 106a; *Loose v Castleton* (1978) 41 P & CR 19 at 34

per Bridge LJ. One reason for rejecting the low water mean meridian tide line as the border of the realm (even though this is marked on ordnance survey maps) is that the considerable areas of shore left bare below that line on at least three days in every lunar week would not then form part of the realm or lie within the jurisdiction of a county, and crimes committed there would have to be regarded as committed on the high seas: *Anderson v Alnwick District Council* [1993] 3 All ER 613 at 620, DC, per Evans LJ. See also WATER AND WATERWAYS vol 100 (2009) PARA 31. The precise location of the boundary of the realm is of little importance in respect of offences that are triable on indictment, because the Territorial Waters Jurisdiction Act 1878 s 2 extends the ambit of such offences to all waters lying to landward of the outer limit of territorial waters, but its location may be of significance in respect of summary offences to which that Act does not apply: see s 7.

7 *R v Bruce* (1812) Russ & Ry 243; *R v Mannion* (1846) 2 Cox CC 158, CCR; *R v Cunningham* (1859) Bell CC 72; *The Fagernes* [1927] P 311, CA; *R v Kent Justices, ex p Lye* [1967] 2 QB 153, [1967] 1 All ER 560, DC. Historically, common law and Admiralty jurisdiction shared a concurrent criminal jurisdiction within waters inter fauces terrae, but this is no longer of any practical significance. As to historical matters concerning the Admiralty jurisdiction see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 80.

8 As to the general legal status and extent of territorial waters see generally para 1056 post; and WATER AND WATERWAYS vol 100 (2009) PARA 31 et seq.

9 This is because no provision is made for such waters to be included within littoral county boundaries. The distinction is of significance only in respect of summary offences (see note 6 supra; and PARA 1056 post).

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### **1056. Jurisdiction over offences within territorial or internal waters.**

Although at common law no criminal jurisdiction extends beyond waters lying *inter fauces terrae* (that is, within the jaws of the land)<sup>1</sup>, legislation has extended the ambit of Admiralty jurisdiction over indictable offences to cover things done or omitted anywhere within the outer limits of territorial waters<sup>2</sup>, even when committed on board or by means of a foreign ship<sup>3</sup>. Admiralty jurisdiction over indictable offences<sup>4</sup> is now exercised by the ordinary criminal courts<sup>5</sup>. Proceedings against a defendant who is not of British nationality require the consent of the Secretary of State and his certificate that the institution of such proceedings is expedient<sup>6</sup>. In practice, no jurisdiction would ordinarily be asserted over things done on foreign or Commonwealth naval vessels in English territorial or internal waters, but English law would still apply should sovereign immunity be waived by the flag state<sup>7</sup>.

<sup>1</sup> *R v Keyn* (1876) 2 Ex D 63, CCR. See also PARA 1055 note 6 ante; and WATER AND WATERWAYS vol 101 (2009) PARA 700.

<sup>2</sup> See the Territorial Waters Jurisdiction Act 1878, ss 2, 7. An offence committed on the open sea within the territorial limits falls within the jurisdiction of the Admiral, although it may have been committed aboard or by means of a foreign ship: see s 2. Under s 7 (as originally enacted), any part of the open sea within one marine league (ie three nautical miles) of the coast measured from low-water mark was deemed to lie within territorial waters. This has now been extended by the Territorial Waters Order in Council 1964, which enables the base line from which the outer territorial limit is measured to be drawn across the mouths of bays in accordance with public international law, although the location of that baseline, where it encloses such bays, is not officially published: see *R v Kent Justices, ex p Lye* [1967] 2 QB 153, [1967] 1 All ER 560, DC; *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, [1967] 3 All ER 663, CA.

The Territorial Sea Act 1987 s 1 extends the breadth of the territorial sea to 12 nautical miles, measured from its landward baselines. See also the Territorial Sea (Limits) Order 1989, SI 1989/482, which specifies the seaward limits of English jurisdiction in the English Channel. The landward baselines ordinarily follow the line of lowest astronomical tides, but this is not expressed in any legislation. As to the location of the boundary between English and Scottish territorial waters see the Scottish Adjacent Waters Boundaries Order 1999, SI 1999/1126, made under the Scotland Act 1998 s 126.

<sup>3</sup> 'Ship' for this purpose includes every description of ship, boat or other floating craft (Territorial Waters Jurisdiction Act 1878 s 7), and now includes hovercraft (Hovercraft (Application of Enactments) Order 1972, SI 1972/971, art 4, Sch 1). 'Foreign ship' means any ship which is not a British ship: Territorial Waters Jurisdiction Act 1878 s 7. As to jurisdiction over things done aboard British or United Kingdom ships see PARA 1057 post.

<sup>4</sup> 'Offence' means an act, neglect or default of such a description as would if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force: Territorial Waters Jurisdiction Act 1878 s 7. There has never been Admiralty jurisdiction over summary offences.

<sup>5</sup> The exclusive jurisdiction of the Crown Court in respect of proceedings on indictment applies in particular to proceedings on indictment for offences within the jurisdiction of the Admiralty of England: Supreme Court Act 1981 s 46(2). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1; and COURTS. At the date at which this volume states the law no such day had been appointed. As to summary jurisdiction over offences triable either way see the Magistrates' Courts Act 1980 s 2(3) (as substituted); and PARA 1098 post. As to summary or indictable offences committed aboard United Kingdom ships (whether within or outside territorial waters) see the Merchant Shipping Act 1995 s 281; and PARA 1057 post.

As to the jurisdiction in relation to offences under the Merchant Shipping Act 1995 see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1104.

6 See the Territorial Waters Jurisdiction Act 1878 s 3. This provision does not apply to proceedings for an offence specified in the Energy Act 2004 s 86: see s 86(6); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1311. See also the Criminal Justice (International Co-operation) Act 1990 s 21(3). Proceedings for offences under the Health and Safety at Work etc Act 1974 ss 1-54 committed outside Great Britain may be excluded from the operation of the Territorial Waters Jurisdiction Act 1878 s 3: see the Health and Safety at Work etc Act 1974 s 84(4)(d); and HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 305.

7 *Chung Chi Cheung v R* [1939] AC 160, [1938] 4 All ER 786, PC; and see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARAS 16, 138.

## **UPDATE**

### **1056 Jurisdiction over offences within territorial or internal waters**

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

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### **1057. Offences aboard British or United Kingdom ships etc.**

British ships<sup>1</sup> are not part of the United Kingdom, nor are they floating British territory<sup>2</sup>. Provisions dealing with acts committed or events occurring 'within England and Wales' or 'within the United Kingdom' do not automatically apply to acts or events aboard British ships. Specific provision must be made within the relevant legislation, or within legislation dealing with such ships, if such an effect is desired<sup>3</sup>. Persons aboard British ships do, however, sail under British Admiralty jurisdiction when on the high seas<sup>4</sup>. Admiralty jurisdiction over indictable offences is now exercised by the ordinary criminal courts<sup>5</sup>. Persons aboard United Kingdom ships<sup>6</sup> are subject to further criminal jurisdiction, including jurisdiction over summary offences<sup>7</sup>.

Offshore oil and gas platforms and drilling rigs cannot ordinarily be classified as ships<sup>8</sup>, but special provision has been made for the exercise of criminal jurisdiction over offences committed aboard (or within 500 meters around) platforms sited above designated areas of the continental shelf within which the United Kingdom claims rights to the seabed, subsoil and natural resources<sup>9</sup>.

1 A 'ship' is any kind of vessel used in navigation and such a ship is 'British' if it is registered in the United Kingdom under the Merchant Shipping Act 1995 Pt II (ss 8-23) (as amended); or it is a government ship, registered in the United Kingdom in pursuance of an Order in Council under s 308; or it is registered under the law of a relevant British possession (namely, British overseas territories such as Gibraltar, together with the Channel Islands and the Isle of Man); or it is a small ship other than a fishing vessel and is not registered under Pt II (as amended), but is wholly owned by qualified owners, and not registered under the law of a country outside the United Kingdom: see s 1; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 230. Her Majesty's ships and vessels (including vessels of the Royal Fleet Auxiliary service and any ships that are taken up from trade) are also subject to Admiralty jurisdiction (see *R v Devon Justices, ex p DPP* [1924] 1 KB 503, DC), but offences committed aboard such vessels will more commonly be dealt with under the Naval Discipline Act 1957 (see ARMED FORCES).

The words 'used in navigation' exclude from the definition of 'ship or vessel' craft that are simply used for having fun on the water without the object of going anywhere: *R v Goodwin* [2005] EWCA Crim 3184 at [33], [2006] 2 All ER 519 at [33], [2005] All ER (D) 111 (Dec) at [33], per Lord Phillips CJ. It follows that a leisure craft (such as a jet ski or 'wet bike') which is not used in navigation cannot be a ship even if it is registered as a United Kingdom ship in accordance with the Merchant Shipping Act 1995 Pt II (as amended). Registration is not conclusive on this matter: *R v Goodwin* supra at [12].

2 *Chung Chi Cheung v R* [1939] AC 160, [1938] 4 All ER 786, PC; *R v Gordon-Finlayson, ex p an Officer* [1941] 1 KB 171; *Oteri v R* [1976] 1 WLR 1272 at 1276, PC.

3 In the Suppression of Terrorism Act 1978 s 4(7): see PARA 1063 note 4 post.

4 In the context of Admiralty jurisdiction, the high seas have been defined as: 'all oceans, seas, bays, channels, rivers, creeks and waters . . . where great ships could go, with the exception only of such oceans etc as are within the body of some county' (*The Mecca* [1895] P 95 at 107, CA; *R v Carr and Wilson* (1882) 10 QBD 76, CCR (ship in port of Rotterdam held to be on high seas); *R v Anderson* (1868) 11 Cox CC 198, CCR (Garonne river at Bordeaux, 50 miles from the sea); *R v Liverpool Justices, ex p Molyneaux* [1972] 2 QB 384, [1972] 2 All ER 471, DC (port of Nassau)).

5 Supreme Court Act 1981 s 46(2); Magistrates' Courts Act 1980 s 2(4); Offences at Sea Act 1799 s 1. See also the Malicious Damage Act 1861 s 72 (amended by the Criminal Law Act 1967 s 10(2), Sch 3 Pt III). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the

Constitutional Reform Act 2005 s 59(5), Sch 11 para 1; and COURTS. At the date at which this volume states the law no such day had been appointed.

Admiralty jurisdiction over crimes on British ships may also be exercised by courts in British overseas territories or possessions (see the Admiralty Offences (Colonial) Act 1849 s 1; and COMMONWEALTH vol 13 (2009) PARA 840) but English criminal law is always the law applicable (*Oteri v R* [1976] 1 WLR 1272, [1977] 1 Lloyd's Rep 105, PC). See also COMMONWEALTH vol 13 (2009) PARA 840.

6     le a ship registered in the United Kingdom under the Merchant Shipping Act 1995 Pt II (as amended) (see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 245 et seq); s 1(3).

7     See *ibid* s 281 (jurisdiction in case of offences on board ship); and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1105. Section 281 applies to other offences under English law as it applies to offences under the Merchant Shipping Act 1995 itself: see the Magistrates' Courts Act 1980 s 3A (as added); the Supreme Court Act 1981 s 46A (as added); and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1105. As to the further application of the Merchant Shipping Act 1995 s 281 to offences committed by British citizens in foreign ports or harbours or aboard foreign ships to which they do not belong, see PARA 1062 post. As to the prospective renaming of the Supreme Court Act 1981 see note 5 *supra*.

8     A possible exception is an exploration rig fitted with legs that can be jacked up when the rig is moved, as opposed to one that is sunk into place on a permanent basis: see *Clark (Inspector of Taxes) v Perks* [2001] EWCA Civ 1228, sub nom *Perks v Clark* [2001] 2 Lloyd's Rep 431; considered in *R v Goodwin* [2005] EWCA Crim 3184, [2006] 2 All ER 519, [2006] 1 WLR 546.

9     See the Petroleum Act 1998 s 10; the Criminal Jurisdiction (Offshore Activities) Order 1987, SI 1987/2198; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1678. The Criminal Jurisdiction (Offshore Activities) Order 1987, SI 1987/2198, applies to the territorial waters of the United Kingdom and to waters in any area designated by orders made under the Continental Shelf Act 1964 s 1(7): see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1636. See also FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1678.

## UPDATE

### 1057 Offences aboard British or United Kingdom ships etc

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

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### **1058. Offences in United Kingdom airspace or aboard British-controlled aircraft.**

The territory of England and Wales extends at common law usque ad coelum et ad inferos (that is, up to the heavens and down to the depths) and English law thus applies without any need for legislation to acts or omissions in aircraft or balloons (or when, for example, skydiving) in the airspace above England and Wales<sup>1</sup>.

Any act or omission taking place on board a British-controlled aircraft while in flight elsewhere than in or over the United Kingdom which, if taking place in, or in a part of, the United Kingdom, would constitute an offence under the law in force in, or in that part of, the United Kingdom constitutes that offence; but this does not apply to any act or omission which is expressly or impliedly authorised by or under that law when taking place outside the United Kingdom<sup>2</sup>.

English law does not apply to acts or omissions in airspace above Scotland or Northern Ireland, even when they take place aboard a British controlled aircraft<sup>3</sup>.

Legislation has made no express provision for criminal jurisdiction to extend to the airspace above territorial waters<sup>4</sup>.

1 Cf Blackstone's Commentaries (1766) vol II, p 18: 'Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards . . . 'land' includes not only the face of the earth, but everything under it, or over it'. As to sovereignty over airspace see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 197. Territorial jurisdiction does not extend to outer space: see the Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (London, Moscow, Washington, 27 January 1967; TS 10 (1968); Cmnd 3519). The exact height at which national airspace ends and outer space begins has never been defined, but it is thought to lie somewhere below the minimum height of orbiting spacecraft or satellites.

2 See the Civil Aviation Act 1982 s 92(1) (as amended); and AIR LAW vol 2 (2008) PARA 621. For the purpose of conferring jurisdiction, any offence under the law in force in, or in a part of, the United Kingdom committed on board an aircraft in flight is deemed to have been committed in any place in the United Kingdom (or, as the case may be, in that part) where the offender may for the time being be: Civil Aviation Act 1982 s 92(3). Note however that whether something done on an aircraft in flight can indeed be 'an offence' in the first place depends on s 92(1) (as amended). Section 92(3) merely deals with jurisdiction in the sense of 'venue'. When enacted it enabled magistrates' courts to deal with summary offences committed outside their commission areas. It serves no useful purpose in English law now that magistrates' courts have acquired an unrestricted jurisdiction over summary offences (see PARA 1051 ante). As to offences committed aboard foreign aircraft in flight which then make their next landing in the United Kingdom see s 92(1A) (as added); and AIR LAW vol 2 (2008) PARA 621.

3 See the Civil Aviation Act 1982 s 92(1) (as amended); and the text and note 2 supra.

4 This appears to be an oversight. It is clear that the United Kingdom would be entitled to assert jurisdiction over things done above its territorial waters (see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 198); but the Territorial Waters Jurisdiction Act 1878 (see PARA 1056 ante) contains no provision dealing with airspace, and refers only to offences committed 'on the open sea'. By the Civil Aviation Act 1982 s 106, references in that Act to the United Kingdom include adjacent territorial waters; but s 92(1) (as amended) and s 92(1A) (as added) provide for jurisdiction only over things done on aircraft in flight outside the United Kingdom.

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### **1059. Offences committed partly within and partly outside England and Wales.**

An offence may be committed against the criminal law of England even where certain elements of that offence are committed or occur abroad, at least where the last essential constituent element of the offence takes place (that is, the offence is completed) within England and Wales<sup>1</sup>. Most case law suggests that completion of the offence within this territory is essential for the purposes of jurisdiction<sup>2</sup>, save where legislation makes specific provision to the contrary, as for example it has done in respect of certain offences involving cross-frontier fraud or dishonesty<sup>3</sup>, and computer misuse<sup>4</sup>, but recent authority asserts that it may suffice if any relevant element of an offence is committed there, even where the offence is only completed by something that is done, or by some result which occurs, abroad<sup>5</sup>.

In cases involving cross-frontier incitement<sup>6</sup>, attempt<sup>7</sup> or statutory conspiracy<sup>8</sup>, the general rule is that the conduct in question need not originate within England and Wales or involve any overt acts or consequences there<sup>9</sup>, but the substantive offence incited, attempted or conspired at must ordinarily be an offence which would itself have been punishable under English law<sup>10</sup>. It follows that an attempt in England to commit abroad an offence punishable only under foreign law is not ordinarily a criminal attempt under English law<sup>11</sup>. Various statutory provisions have, however, extended English territorial jurisdiction in respect of conspiracy to defraud<sup>12</sup>, incitement or attempts to commit acts of fraud or dishonesty outside the United Kingdom<sup>13</sup>, conspiracies in England and Wales in which the object is the commission outside the United Kingdom of offences under local law<sup>14</sup>, and incitement in England and Wales in which the object is the commission abroad of a specified act of terrorism<sup>15</sup> or a listed (child) sex offence under foreign law<sup>16</sup>.

Where an offence is committed within England and Wales, a secondary party who counselled or procured the commission of that offence<sup>17</sup> by means of things said or done abroad is guilty of the offence in England and Wales and liable to be punished accordingly<sup>18</sup>.

1 *R v MacKenzie* (1910) 6 Cr App Rep 64, CCA; *R v Harden* [1963] 1 QB 8, [1962] 1 All ER 286, CCA; *Treacy v DPP* [1971] AC 537, 55 Cr App Rep 113, HL; *DPP v Stonehouse* [1978] AC 55, 65 Cr App Rep 192, HL; *R v Governor of Brixton Prison, ex p Osman* [1989] 3 All ER 701, [1990] 1 WLR 277, DC.

2 *R v Tirado* (1974) 59 Cr App Rep 80, CA; *Secretary of State for Trade v Markus* [1976] AC 35, 61 Cr App Rep 58, HL; *R v Manning* [1999] QB 980, [1998] 2 Cr App Rep 461, CA.

3 See the Criminal Justice Act 1993 Pt 1 (ss 1-6); and PARAS 65, 73, 362 ante. A person may be guilty of certain offences ('Group A offences', ie offences under the Theft Act 1968, the Theft Act 1978, the Forgery and Counterfeiting Act 1981 and the common law offence of cheating the public revenue) whether or not he was a British citizen or in England and Wales at the material time: see PARA 362 ante.

4 See the Computer Misuse Act 1990 ss 4-7; and PARAS 358, 361 ante.

5 *R v Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631, [2004] QB 1418 (not following *R v Manning* [1999] QB 980, [1998] 2 Cr App Rep 461, CA).

6 This includes both incitement at common law and statutory offences of incitement or solicitation to commit offences (eg the Offences Against the Person Act 1861 s 4 (see PARA 104 ante)).

7 As to criminal attempt generally see PARA 79 ante.



8 As to statutory conspiracy generally see PARA 67 ante.

9 *Somchai Liangsirprasert v US Government* [1991] 1 AC 225, [1990] 2 All ER 866, PC; *R v Sansom* [1991] 2 QB 130, [1991] 2 All ER 145, CA; *R v Latif and Shahzad* [1996] 1 All ER 353, [1996] 1 WLR 104, HL; *R (on the application of Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556, sub nom *Re Al-Fawwaz* [2002] 1 All ER 545. Older cases assumed that some effect of the attempt or conspiracy etc must necessarily be felt within England and Wales before criminal liability can arise (see eg *R v Baxter* [1972] 1 QB 1, 55 Cr App Rep 214, CA; *DPP v Doot* [1973] AC 807, 57 Cr App Rep 600, HL; *DPP v Stonehouse* [1978] AC 55, 65 Cr App Rep 192, HL), but these must now be read in light of the later authorities. As to conspiracy to defraud see note 12 infra.

10 See the Criminal Attempts Act 1981 s 1(4); and PARA 79 ante. See also *R v Governor of Brixton Prison, ex p Rush* [1969] 1 All ER 316, [1969] 1 WLR 165, DC.

11 *R v Governor of Pentonville Prison, ex p Naghdi* [1990] 1 All ER 257, sub nom *Re Naghdi* [1990] 1 WLR 317. An exception purports to be made by the Criminal Attempts Act 1981 s 1(1A), (1B) (as added), in respect of attempts in England to commit abroad offences contrary to the Computer Misuse Act 1990 (see PARAS 358, 361 ante); but by virtue of ss 4, 5 (see PARA 358 ante) any conduct to which that exception might seem to apply must necessarily amount to an attempt to commit a substantive offence under English law, and would be punishable only under the Criminal Attempts Act 1981 s 1(1) (see PARA 79 ante).

12 At common law, a conspiracy to defraud must be directed towards an intended defrauding in England and Wales: *Board of Trade v Owen* [1957] AC 602, [1957] 1 All ER 411, HL; *R v Naini* [1999] 2 Cr App Rep 398, CA. In respect of things done on or after 1 June 1999, however, a person may be guilty of conspiracy to defraud, even where the defrauding is intended to occur elsewhere: see the Criminal Justice Act 1993 ss 5(3), 6(1); and PARA 73 ante.

13 As to incitement to commit a Group A offence (see note 3 supra) under the Criminal Justice Act 1993 see ss 4(b), 5(4); and PARA 65 ante. As to attempts abroad to commit a Group A offence in England and Wales see s 3(3); and PARA 79 note 3 ante. An attempt in England and Wales to commit a Group A offence abroad will necessarily be triable as an ordinary criminal attempt under the Criminal Attempts Act 1981 s 1(1) (see PARA 79 ante). For this reason, no practical use can be made of s 1A (as added) which envisages conduct in England and Wales that amounts to an attempt to commit abroad something that is not a Group A offence under English law but would be such an offence if committed in England and Wales. As to jurisdiction over statutory conspiracy where the offence conspired at is a Group A offence see s 3(2); and PARA 79 ante. See also PARA 362 ante.

14 See the Criminal Law Act 1977 s 1A (as added); and PARA 68 ante. For s 1A (as added) to apply, the agreement must be one that would be punishable under s 1(1) but for the fact that the offence in question would not be an offence triable in England and Wales if committed in accordance with the parties' intentions: s 1A(4) (added by the Criminal Justice (Terrorism and Conspiracy) Act 1998 s 5(1)). It follows that where the substantive offence in question is itself punishable as an extra-territorial offence under English law, the Criminal Law Act 1977 s 1A (as added) has no application and any conspiracy charge must be laid under s 1(1). As to evidence of foreign law see s 1A(8)-(10) (as added); and PARA 68 ante.

15 See the Terrorism Act 2000 s 59; and PARA 469 ante.

16 See the Sexual Offences (Conspiracy and Incitement) Act 1996 s 2; and PARA 243 ante. This Act no longer contains provisions dealing with conspiracy (s 1 having been repealed by the Criminal Justice (Terrorism and Conspiracy) Act 1998 s 9(1), (2), Sch 1 para 9(1), Sch 2 Pt II) and its application to incitement is now limited to cases in which the person incited is not a British citizen or United Kingdom resident (because where the person incited is a British citizen etc, he would, if he acted on the incitement, commit offences under the Sexual Offences Act 2003 s 72 (see PARA 243 ante)).

17 As to secondary participation in crime see PARA 49 et seq ante.

18 *R v Robert Millar (Contractors) Ltd and Millar* [1970] 2 QB 54, [1970] 1 All ER 577, CA.

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### **1060. Extra-territorial jurisdiction generally.**

Extra-territorial jurisdiction in English criminal law invariably has a statutory basis<sup>1</sup>. Legislation may provide an extra-territorial ambit to specific offences, such as murder or manslaughter<sup>2</sup>, or it may subject specific groups or categories of person (such as those subject to armed forces discipline<sup>3</sup>) to the general corpus of English criminal law when abroad. Where extra-territorial jurisdiction applies to specific offences, it does so in most cases only in respect of things done or omitted by persons who hold some form of British nationality or domicile<sup>4</sup>. In exceptional cases, however, a wider basis of jurisdiction may be specified in accordance with customary international law or specific treaty obligations<sup>5</sup>. This may involve 'universal jurisdiction' over crimes that are recognised internationally as meriting or demanding such treatment<sup>6</sup>, or it may involve, on a reciprocal convention basis, the assertion of jurisdiction over things done by persons in specified countries or things done elsewhere by nationals of specified countries<sup>7</sup>.

The United Kingdom does not ordinarily claim, or recognise claims to, criminal jurisdiction based on 'passive personality' (that is, based on the nationality of the victim of an offence)<sup>8</sup> but it has now adopted that principle in respect of some terrorist offences<sup>9</sup>.

1 See PARA 1054 ante.

2 See PARA 1061 post.

3 See PARA 1062 post; and ARMED FORCES vol 2(2) (Reissue) PARA 422.

4 See PARA 1061 post; and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 5 et seq. Different provisions creating offences specify various different forms of British nationality. Modern statutes typically restrict any extra-territorial application to British citizens (see eg the Merchant Shipping Act 1995 s 281; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1105) or to United Kingdom nationals or residents (see eg the International Criminal Court Act 2001; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 437 et seq) or to United Kingdom persons (see eg the Biological Weapons Act 1974 s 1A (as added); and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 469). The term 'United Kingdom person' includes Scottish partnerships and bodies incorporated in the United Kingdom (including registered companies and limited liability partnerships): s 1A(4); and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 469. References in older statutes imposing criminal jurisdiction over 'British subjects', 'subjects of her Majesty' or 'citizens of the United Kingdom and colonies' for things done in foreign or Commonwealth countries or in Ireland, must now be construed as references to British citizens, British overseas territories citizens, British overseas citizens, and British nationals (overseas): British Nationality Act 1948 s 3(1) (amended by the Merchant Shipping Act 1995 s 314(2), Sch 13 para 22); British Nationality Act 1981 s 51 (amended by the British Nationality (Falkland Islands) Act 1983 s 4(3); and the British Overseas Territories Act 2002 s 1(1)(b)); and see also the British Nationality (Hong Kong) Act 1997 s 2; and the Hong Kong (British Nationality) Order 1986, SI 1986/948.

5 See PARA 1061 post; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARAS 4, 56. There is a very strong presumption against the imposition of extra-territorial criminal liability on persons who do not hold any kind of British nationality: *R v Jameson* [1896] 2 QB 425; *Air India v Wiggins* [1980] 2 All ER 593 [1980] 1 WLR 815, HL; but contrast *Joyce v DPP* [1946] AC 347, 31 Cr App Rep 57, HL; and see PARA 1061 post.

6 Universal jurisdiction is that which may be exercised over extra-territorial offences without regard to the nationality or status of the alleged offender, or to the locus of the offence: see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 227. See also PARA 1061 post.

7 The Suppression of Terrorism Act 1978 gives effect to the European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977; TS 93 (1978); Cmnd 7390): see EXTRADITION vol 17(2) (Reissue) PARA 1161. See also PARA 1063 post.

8 See INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 228.

9 See the Terrorism Act 2000 s 63C (as added); and PARA 475 ante. See also the Anti-terrorism, Crime and Security Act 2001 ss 113, 113A (s 113A as added); and PARA 123 ante.

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### **1061. Extra-territorial jurisdiction over specific offences.**

Specific offences to which a universal, or near-universal, extra-territorial jurisdiction<sup>1</sup> attaches include: piracy<sup>2</sup>; war crimes amounting to grave breaches of the Geneva Conventions<sup>3</sup>; the infliction of torture by or on behalf of persons acting in an official capacity<sup>4</sup>; the hijacking, endangerment or sabotage of aircraft<sup>5</sup> or ships<sup>6</sup>; acts of violence endangering safety at international aerodromes serving civil aviation<sup>7</sup>; the seizure, endangerment, damage or destruction of ships or fixed maritime platforms such as oil or gas rigs<sup>8</sup>; hostage taking<sup>9</sup>; acts of violence against internationally protected persons<sup>10</sup> or United Nations personnel<sup>11</sup>; and offences involving terrorist bombing and explosives<sup>12</sup>, or terrorist fundraising, money laundering and finance<sup>13</sup>.

Specific extra-territorial offences applicable only on the basis of one or more type of British or United Kingdom nationality or residence<sup>14</sup> include: murder or manslaughter committed on land outside the United Kingdom<sup>15</sup>; bigamy<sup>16</sup>; most offences under official secrets legislation<sup>17</sup>; several offences under armed forces law<sup>18</sup>; offences involving the unlawful possession of explosives or the causing of explosions<sup>19</sup>; sexual offences against children under the age of 16 years<sup>20</sup>; offences of bribery or corruption<sup>21</sup>; enlistment or engagement in wars between or against foreign states that are at peace with the United Kingdom<sup>22</sup>; offences involving the use, development, production, acquisition or transfer of anti-personnel mines<sup>23</sup>; and various offences relating to flora, fauna or mineral resources or the security of war graves or military remains<sup>24</sup>.

Extra-territorial liability for high treason by adhering to the Queen's enemies may be incurred by anyone who at the time owes a duty of allegiance to the Crown<sup>25</sup>.

Acts of genocide, crimes against humanity, and war crimes<sup>26</sup> are punishable in England and Wales, as well as in the International Criminal Court<sup>27</sup>, when committed outside the United Kingdom by United Kingdom nationals or residents or by persons subject to United Kingdom service jurisdiction<sup>28</sup>.

1 See PARA 1060 ante.

2 See the Merchant Shipping and Maritime Security Act 1997 s 26, Sch 5; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1249. This adopts the definition of piracy laid down in the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982 to 9 December 1984; TS 3 Misc 11 (1983); Cmnd 8941) arts 101-103 (see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1249). Strictly speaking, piracy is not an offence of universal jurisdiction because it can be committed only on the high seas or at some place outside the jurisdiction of any state (art 101(a)). The 'high seas' in this context exclude the territorial or internal waters of any state (including those adjacent to the United Kingdom). See also SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1249.

3 See the Geneva Conventions Act 1957 s 1(1), (1A) (as added); the International Criminal Court Act 2001 s 70; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 424.

4 See the Criminal Justice Act 1988 s 134; *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147, [1999] 2 All ER 97, HL; and PARA 160 ante.

5 See the Aviation Security Act 1982 ss 1, 2; and AIR LAW vol 2 (2008) PARA 624 et seq. See also s 6(1) (universal jurisdiction over other offences (eg murder) committed in the course of a hijacking or hijacking attempt); and AIR LAW vol 2 (2008) PARA 625.

- 6 See the Aviation and Maritime Security Act 1990 s 9; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1210 et seq.
- 7 See *ibid* s 1; and AIR LAW vol 2 (2008) PARA 631.
- 8 See *ibid* s 10 (seizure of platforms), s 11 (destroying or endangering ships or platforms), s 12 (endangering navigation at sea), s 13 (threats), s 14 (connected offences); and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1210 et seq.
- 9 See the Taking of Hostages Act 1982 s 1; and PARA 468 ante.
- 10 See the Internationally Protected Persons Act 1978 s 1 (as amended); and PARA 477 ante.
- 11 See the United Nations Personnel Act 1997 ss 1-3; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 532.
- 12 See the Terrorism Act 2000 s 62; and PARA 470 ante. This gives universal effect to any of the following offences where committed 'as an act of terrorism or for the purposes of terrorism': (1) an offence under the Explosive Substances Act 1883 s 2, s 3 or s 5; (2) an offence under the Biological Weapons Act 1974 s 1; and (3) an offence under the Chemical Weapons Act 1996 s 2: see the Terrorism Act 2000 s 62; and PARA 470 ante. See also the Nuclear Material (Offences) Act 1983 s 1; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1583.
- 13 See the Terrorism Act 2000 ss 15-18; and PARAS 390-392 ante.
- 14 See PARA 1060 ante.
- 15 See the Offences Against the Person Act 1861 s 9 (amended by the Criminal Law Act 1967 s 10(2)). See *R v Sawyer* (1815) Russ & Ry 294; *R v Serva* (1845) 1 Cox CC 292; *R v Helsham* (1830) 4 C & P 394; *R v Azzopardi* (1843) 1 Car & Kir 203; *R v Page* [1954] 1 QB 170, [1953] 2 All ER 1355, C-MAC; *R v Kular* (19 April 2000, unreported), CA; *R (on the application of Lewin) v DPP* [2002] EWHC 1049 (Admin), [2002] All ER (D) 379 (May); *R v Cheong* [2006] EWCA Crim 524, [2006] All ER (D) 385 (Feb).
- 16 See the Offences against the Person Act 1861 s 57; and PARA 828 ante. See also *R v Earl Russell* [1901] AC 446, HL; *R v Sago* [1975] QB 885, [1975] 2 All ER 926, CA.
- 17 See the Official Secrets Act 1911 s 10 and the Official Secrets Act 1989 s 15 (see PARA 501 et seq). The Official Secrets Act 1920 s 8(3) is merely a venue provision (now obsolete) and does not extend the ambit of the substantive law (see PARAS 1051-1052 ante).
- 18 See ARMED FORCES vol 2(2) (Reissue) PARA 42 et seq. Civilian offences with extra-territorial effect include those under the Army Act 1955 s 191 (pretending to be a deserter: see ARMED FORCES vol 2(2) (Reissue) PARA 42); s 192 (procuring and assisting desertion: see PARA 375 ante); s 193 (obstructing or interfering with regular forces in the execution of their duty: see PARA 376 ante); s 194 (aiding a malingerer with a view to enabling him to avoid military service: see PARA 376 ante); s 195 (unlawfully acquiring or procuring the disposal of army stores: see ARMED FORCES vol 2(2) (Reissue) PARA 48); s 196 (unlawfully dealing in service pay or pension documents etc: see ARMED FORCES vol 2(2) (Reissue) PARA 46); s 197 (unauthorised use of or dealing in military or air force decorations etc: see ARMED FORCES vol 2(2) (Reissue) PARA 47). The Air Force Act 1955 contains corresponding and identically numbered provisions: see PARAS 375-376 ante; and ARMED FORCES vol 2(2) (Reissue) PARAS 42-47. The Naval Discipline Act 1957 contains provisions to broadly similar effect: see ss 96-100; para 374 ante; and ARMED FORCES vol 2(2) (Reissue) PARA 42 et seq. These provisions apply equally to civilians who are not otherwise subject to military or air force law, and offences are triable in the ordinary courts; but an offence committed in any part of the United Kingdom is not triable outside that part of the United Kingdom: see ARMED FORCES vol 2(2) (Reissue) PARAS 40, 60. See also the Naval Discipline Act 1957 s 93 (espionage on Her Majesty's vessels or in naval establishments abroad); and ARMED FORCES vol 2(2) (Reissue) PARA 50.
- 19 See the Explosive Substances Act 1883 ss 2, 3 (as substituted); and PARAS 127-128 ante. These provisions must now be construed in light of the Suppression of Terrorism Act 1978 s 4 (see PARA 1063 post) and the Terrorism Act 2000 s 62 (see note 12 supra; and PARA 470 ante).
- 20 See the Sexual Offences Act 2003 s 72; and PARA 243 ante.
- 21 See the Anti-terrorism, Crime and Security Act 2001 ss 108-110; and PARAS 527 et seq, 577 ante.
- 22 See the Foreign Enlistment Act 1870 s 4; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 412.
- 23 See the Landmines Act 1998 s 2; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 498.

24 See eg the Antarctic Act 1994 s 7 (see ANIMALS vol 2 (2008) PARA 991); the Deep Sea Mining (Temporary Provisions) Act 1981 s 1 (see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 175); the Protection of Military Remains Act 1986 s 3 and the Protection of Military Remains Act 1986 (Designation of Vessels and Controlled Sites) Order 2002, SI 2002/1761 (see ARMED FORCES vol 2(2) (Reissue) PARA 117).

25 See the Treason Act 1351; *R v Casement* [1917] 1 KB 98 at 137, 12 Cr App Rep 99 at 119, CCA; *Joyce v DPP* [1946] AC 347, 31 Cr App Rep 57, HL; and see PARA 363 et seq ante. Extra-territorial jurisdiction does not extend to other forms of high treason, but may possibly extend to some forms of treason felony: see the Treason Felony Act 1848 s 3; and PARA 367 ante.

26 For the meanings of 'genocide', 'crimes against humanity' and 'war crimes' see the International Criminal Court Act 2001 Sch 8; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 454.

27 The International Criminal Court was established by the Statute of the International Criminal Court in Rome on 17 July 1998: see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 437 et seq.

28 See the International Criminal Court Act 2001 s 51; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 454. As to ancillary offences of incitement, conspiracy, attempt or secondary participation see ss 52, 55; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 455. Crimes punishable under s 51 or s 52 will not necessarily involve 'grave breaches' of the Geneva Conventions so as to attract universal jurisdiction under the Geneva Conventions Act 1957 (see the text and note 3 supra).

As to persons subject to British armed service jurisdiction see PARA 1062 post.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/14. ORIGINAL CRIMINAL JURISDICTION/(2) AMBIT OF ENGLISH CRIMINAL LAW/1062. Extra-territorial jurisdiction over specific groups.

### **1062. Extra-territorial jurisdiction over specific groups.**

The particular groups or classes who are to be subject to the general corpus of English criminal law, or that part dealing with indictable offences, when abroad comprise Crown servants during employment abroad<sup>1</sup>; persons, including civilians, who are subject to British armed forces discipline<sup>2</sup>; British scientists, observers or Convention officials anywhere in Antarctica<sup>3</sup>; United Kingdom nationals, of whatever status, in the unclaimed sector of Antarctica<sup>4</sup>; British citizens in foreign ports or harbours<sup>5</sup> or aboard foreign ships to which they do not belong<sup>6</sup>; and masters or seamen who are employed, or who were employed within the last three months, aboard a United Kingdom ship<sup>7</sup>.

1 See the Criminal Jurisdiction Act 1802 s 1 (amended by the Criminal Justice Act 1948 s 83(3), Sch 10 Pt I; and extended to crimes which would formerly have been felonies by the Criminal Law Act 1967 s 10(1), (2), Sch 2 para 15(1), Sch 3 Pt III); and the Criminal Justice Act 1948 s 31 (amended by the Criminal Law Act 1967 s 10(2), Sch 3 Pt III) (restricted to indictable offences committed in foreign countries).

2 See the Army Act 1955 s 70; the Air Force Act 1955 s 70; the Naval Discipline Act 1957 s 42; and ARMED FORCES vol 2(2) (Reissue) PARA 422. Offences allegedly committed outside the United Kingdom are charged not as murder, rape etc but as civil offences corresponding to murder or rape etc: see *R v Spear* [2002] UKHL 31 at [26], [2003] 1 AC 734 at [26], [2002] 3 All ER 1074 at [26] per Lord Rodger.

3 See the Antarctic Act 1994 ss 22-23; and ANIMALS vol 2 (2008) PARA 993. As to the legal status of Antarctica and British Antarctic Territory see COMMONWEALTH vol 13 (2009) PARA 855; INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 218. A 'Convention official' means a person designated as an inspector or observer by a member of the Commission for the Conservation of Antarctic Marine Living Resources under the Convention on the Conservation of Antarctic Marine Living Resources (Canberra, 20 May 1980; TS 48 (1982); Cmd 8714), art XXIV: Antarctic Act 1994 ss 2(1), 23(2).

4 See *ibid* s 21; and ANIMALS vol 2 (2008) PARA 993.

5 See the Merchant Shipping Act 1995 s 281; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1105. A Commonwealth (or Irish) port or harbour is not 'foreign', but acts done on British or United Kingdom ships moored or anchored in such ports or harbours nevertheless fall within English criminal jurisdiction because such ports are deemed to form part of the high seas: *R v Liverpool Justices, ex p Molyneux* [1972] 2 QB 384, [1972] 2 All ER 471, DC; and see PARA 1057 *ante*. The wording of the Merchant Shipping Act 1995 s 281 (although supposedly a consolidation of existing law) appears to have changed the scope and extent of that law, in that it may be read as applying to things done by a British citizen in a foreign port or harbour, whether or not he is at the time aboard a United Kingdom ship: see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1105.

6 See *ibid* s 281; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1105. See also *R v Kelly* [1982] AC 665, 73 Cr App Rep 310, HL; *R v Cumberworth* (1989) 89 Cr App Rep 187, CA.

7 See the Merchant Shipping Act 1995 s 282; *R v Dudley and Stephens* (1884) 14 QBD 273 at 281, CCR, per Lord Coleridge CJ; and SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1106. It is doubtful whether the Merchant Shipping Act 1995 s 282 has any application to purely summary offences, because offences falling within its scope are triable as if committed within the jurisdiction of the Admiralty of England, and Admiralty jurisdiction has never extended to summary offences. As to Admiralty jurisdiction see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 79 *et seq*.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/14. ORIGINAL CRIMINAL JURISDICTION/(2) AMBIT OF ENGLISH CRIMINAL LAW/1063. Offences committed in, or by nationals of, convention countries.

### **1063. Offences committed in, or by nationals of, convention countries.**

If a person, whether a British citizen or not, does in a convention country<sup>1</sup> any act which, if he had done it in a part of the United Kingdom, would have made him guilty in that part of the United Kingdom of a specified offence<sup>2</sup>, or of an offence of attempting to commit any such offence<sup>3</sup>, he is, in that part of the United Kingdom, guilty of the offence or offences of which the act would have made him guilty if he had done it there<sup>4</sup>.

If a person who is a national of a convention country but not a British citizen, British overseas territories citizen, British overseas citizen, or British national (overseas)<sup>5</sup> does any act outside the United Kingdom and that convention country which makes him in that convention country guilty of an offence and which, if he had been a British citizen, British overseas territories citizen, British overseas citizen, or British national (overseas) would have made him in any part of the United Kingdom guilty of murder, manslaughter, culpable homicide<sup>6</sup>, or certain explosives offences<sup>7</sup>, he is, in any part of the United Kingdom, guilty of the offence or offences of which the act would have made him guilty if he had been such a citizen or national<sup>8</sup>.

These provisions are not confined to terrorist offences or acts connected with terrorism, but the power to bring proceedings under them is restricted<sup>9</sup>.

1 A 'convention country' is a country for the time being designated in an order made by the Secretary of State as a party to the European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977; TS 93 (1978); Cmnd 7390); and 'country' includes any territory: Suppression of Terrorism Act 1978 s 8(1). As to the procedure for designating countries: see s 8(4)-(6) (amended by the Extradition Act 2003 s 220, Sch 4). The following orders have been made under the Suppression of Terrorism Act 1978 s 8 (as amended): the Suppression of Terrorism Act 1978 (Designation of Countries) Order 1978, SI 1978/1245 (designating Austria, Denmark, Germany and Sweden); the Suppression of Terrorism Act 1978 (Designation of Countries) Order 1979, SI 1979/497 (designating the Republic of Cyprus); the Suppression of Terrorism Act 1978 (Designation of Countries) Order 1980, SI 1980/357 (designating Norway); the Suppression of Terrorism Act 1978 (Designation of Countries) (No 2) Order 1980, SI 1980/1392 (designating Iceland); the Suppression of Terrorism Act 1978 (Designation of Countries) Order 1981, SI 1981/1389 (designating Spain and the Republic of Turkey); the Suppression of Terrorism Act 1978 (Designation of Countries) (No 2) Order 1981, SI 1981/1507 (designating Luxembourg); the Suppression of Terrorism Act 1978 (Designation of Countries) Order 1986, SI 1986/271 (designating Belgium, the Netherlands, Portugal and Switzerland); the Suppression of Terrorism Act 1978 (Designation of Countries) (No 2) Order 1986, SI 1986/1137 (designating Italy and Liechtenstein); the Suppression of Terrorism Act 1978 (Designation of Countries) Order 1987, SI 1987/2137 (designating France); the Suppression of Terrorism Act 1978 (Designation of Countries) Order 1989, SI 1989/2210 (designating Ireland); the Suppression of Terrorism Act 1978 (Designation of Countries) Order 1990, SI 1990/1272 (designating Finland and Greece); the Suppression of Terrorism Act 1978 (Designation of Countries) Order 1994, SI 1994/2978 (designating the Czech Republic and Slovakia); the Suppression of Terrorism Act 1978 (Designation of Countries) Order 2003, SI 2003/6 (designating Albania, Bulgaria, Estonia, Georgia, Hungary, Latvia, Lithuania, Malta, Moldova, Poland, Romania, Russian Federation, San Marino, Slovenia and Ukraine); the Suppression of Terrorism Act 1978 (Designation of Countries) (No 2) Order 2003, SI 2003/1863 (designating Serbia and Montenegro and Croatia). See also note 4 infra. The United Kingdom is not itself designated as a convention country and accordingly the Terrorism Act 1978 has no effect as between different parts of the United Kingdom. The Suppression of Terrorism Act 1978 extends to the Channel Islands and the Isle of Man: see s 7(1).

2 Ibid s 4(1). A specified offence is one mentioned in Sch 1 (see heads (1)-(9) infra): s 4(1)(a) (amended by the Child Abduction Act 1984 s 11(4); and the Sexual Offences Act 2003 s 140, Sch 7). The specified offences are:

432 (1) murder (see PARA 89 et seq ante) (Suppression of Terrorism Act 1978 Sch 1 para 1);



- 433 (2) manslaughter or culpable homicide (see PARA 92 et seq ante) (Sch 1 para 2);
- 434 (3) kidnapping, abduction or plagium (an offence under Scottish law) (see PARA 136 et seq ante) (Sch 1 para 4);
- 435 (4) false imprisonment (see PARA 135 ante) (Sch 1 para 5);
- 436 (5) an offence under the Offences against the Person Act 1861 ss 55, 56 (repealed) (Suppression of Terrorism Act 1978 Sch 1 para 10);
- 437 (6) an offence under the Child Abduction Act 1984 s 2 (abduction of child by person other than parent etc: see PARA 141 ante), or any corresponding provision in force in Northern Ireland (Suppression of Terrorism Act 1978 Sch 1 para 11B (added by the Child Abduction Act 1984 s 11(4)));
- 438 (7) an offence under the Offences against the Person Act 1861 s 28 (causing bodily injury by gunpowder: see PARA 125 ante), s 29 (causing gunpowder to explode etc with intent to do grievous bodily harm: see PARA 126 ante), s 30 (placing gunpowder near a building etc with intent to cause bodily injury: see PARA 130 ante) (Suppression of Terrorism Act 1978 Sch 1 para 12);
- 439 (8) an offence under the Explosive Substances Act 1883 s 2 (causing explosion likely to endanger life or property: see PARA 127 ante), s 3 (doing any act with intent to cause such an explosion, conspiring to cause such an explosion, or making or possessing explosive with intent to endanger life or property: see PARA 128 ante) (Suppression of Terrorism Act 1978 Sch 1 para 13);
- 440 (9) an offence under the Firearms Act 1968 s 16 (possession of firearm with intent to injure: see PARA 674 ante) or s 17(1) (use of firearm or imitation firearm to resist arrest: see PARA 676 ante) involving the use or attempted use of a firearm within the meaning of s 17, or equivalent offences under the Firearms (Northern Ireland) Order 2004, SI 2004/702 (Suppression of Terrorism Act 1978 Sch 1 paras 14, 15).

3 Ibid s 4(1)(b).

4 Ibid s 4(1). For the purpose of s 4 (as amended) any act done: (1) on board a ship registered in a convention country, being an act which, if the ship had been registered in the United Kingdom, would have constituted an offence within the jurisdiction of the Admiralty; (2) on board an aircraft registered in a convention country while the aircraft is in flight elsewhere than in or over that country; or (3) on board a hovercraft registered in a convention country while the hovercraft is in journey elsewhere than in or over that country, is treated as done in that convention country: s 4(7). For the meaning of 'in flight' or, as applied to hovercraft, 'in journey' see the Civil Aviation Act 1982 s 92(5); and AIR LAW vol 2 (2008) PARA 619 (definitions applied by the Suppression of Terrorism Act 1978 s 4(7)).

The Suppression of Terrorism Act 1978 s 4 (as amended) applies to India as it applies to a convention country: see s 5; and the Suppression of Terrorism Act 1978 (Application of Provisions) (India) Order 1993, SI 1993/2533.

The Suppression of Terrorism Act 1978 s 4 (as amended) does not apply to the United States of America, although certain other provisions of the Act do apply: see the Suppression of Terrorism Act 1978 (Application of Provisions) (United States of America) Order, SI 1986/2146.

5 The Suppression of Terrorism Act 1978 refers to 'citizens of the United Kingdom and colonies' but this form of nationality no longer exists: see PARA 1060 note 4 ante. As to British citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 23-43; as to British overseas territories citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 44-57; as to the status of British national (overseas) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 63-65; as to British overseas citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 58-62; as to British subjects under the British Nationality Act 1981 see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 66-71; and as to British protected persons within the meaning of s 50(1) see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARAS 72-76.

6 Culpable homicide is an offence under the criminal law of Scotland, equivalent to manslaughter.

7 The offences under the Explosives Substances Act 1883 ss 2, 3: see EXPLOSIVES vol 17(2) (Reissue) PARAS 1022-1023. Where such an offence is committed as an act of terrorism or for the purposes of terrorism see also the Terrorism Act 2000 s 62; and PARA 1061 note 12 ante.

8 Suppression of Terrorism Act 1978 s 4(3), Sch 1 paras 1, 2, 13. See note 2 supra.

9 Proceedings for an offence which (disregarding the provisions of the Internationally Protected Persons Act 1978, the Nuclear Material (Offences) Act 1983, the United Nations Personnel Act 1997 and the Terrorism Act 2000) would not be an offence apart from the Suppression of Terrorism Act 1978 s 4 (as amended) may not be instituted in England and Wales, except by or with the consent of the Attorney General: s 4(4) (amended by the Internationally Protected Persons Act 1978 s 5(4)(b); the Nuclear Material (Offences) Act 1983 s 4(1)(b); the United Nations Personnel Act 1997 s 7, Schedule para 3; and the Crime (International Co-operation) Act 2003 s 91(1), Sch 5 paras 3, 4).

## **UPDATE**

### **1063 Offences committed in, or by nationals of, convention countries**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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#### **1064. Doctrine of autrefois convict or autrefois acquit in respect of offences committed abroad.**

At common law a person who has been tried and convicted or acquitted by a court of competent jurisdiction in another country may not be tried again in England and Wales in respect of the same offence<sup>1</sup>.

By statute the prosecution may now in certain cases seek the re-trial of a person who has already been acquitted of the offence in question<sup>2</sup>, and where appropriate this includes cases involving acquittals by courts outside the United Kingdom<sup>3</sup>.

1 *R v Hutchinson* (1677) 3 Keb 785; *R v Roche* (1775) 1 Leach 134; *R v Aughet* (1918) 118 LT 658, 13 Cr App Rep 101, CCA. As to pleas of autrefois convict and autrefois acquit see PARA 1272 et seq post.

A plea of autrefois convict based on a foreign conviction is not available to the accused unless he has been in real jeopardy because there was a real risk or danger of punishment following the foreign conviction. The mere fact of a foreign conviction is not by itself enough to found a plea of autrefois convict; and where the accused has been convicted abroad in his absence and has taken no part in the foreign proceedings, he may not as a general rule plead autrefois convict if he has not been in reach of the court that tried him: *R v Thomas* [1985] QB 604, 79 Cr App Rep 200, CA.

Where a member of a visiting force (see PARA 46 ante) has been tried by a competent service court, he is not liable to be tried for the same crime by a United Kingdom court: see the Visiting Forces Act 1952 s 4(1); and ARMED FORCES vol 2(2) (Reissue) PARA 145. A member of Her Majesty's forces is not liable to be tried by court-martial nor is he liable to summary trial in respect of an offence for which he has been tried by a competent civil court, wherever situated, or where he has had such offence taken into consideration when being sentenced by such court: see the Army Act 1955 s 134(1) (as amended); the Air Force Act 1955 s 134(1) (as amended); the Naval Discipline Act 1957 s 129(2) (as amended); and ARMED FORCES vol 2(2) (Reissue) PARA 57. Members of Her Majesty's forces are likewise protected against trial for an offence in the civil courts of the United Kingdom after being tried by court-martial for that offence: see the Army Act 1955 s 133(1) (as substituted); the Air Force Act 1955 s 133(1) (as substituted); the Naval Discipline Act 1957 s 129(1) (as amended); and ARMED FORCES vol 2(2) (Reissue) PARA 460.

2 See the Criminal Justice Act 2003 Pt 10 (ss 74-141); and PARA 1937 et seq post. This power is limited to 'qualifying offences' as listed in Sch 5 Pt 1 (see PARA 1914 post), and the Court of Appeal must be satisfied: (1) that there is new and compelling evidence against the acquitted person in relation to the offence; and (2) that in all the circumstances it is in the interests of justice for the court to order the re-trial: see ss 78, 79; and PARA 1939 post.

3 This applies where a person has been acquitted, in proceedings elsewhere than in the United Kingdom, of an offence under the law of the place where the proceedings were held, if the commission of the offence as alleged would have amounted to or included the commission (in the United Kingdom or elsewhere) of a qualifying offence: see the Criminal Justice Act 2003 s 75(4); and PARA 1937 post. Conduct punishable under the law in force elsewhere than in the United Kingdom is an offence under that law for the purposes of s 75(4), however it is described in that law: see s 75(5); and PARA 1937 post.

#### **UPDATE**

#### **1064 Doctrine of autrefois convict or autrefois acquit in respect of offences committed abroad**

NOTE 1--See Case C-288/05 *Kretzinger v Hauptzollamt Augsburg* [2007] 3 CMLR 1173, ECJ (interpretation of equivalent provision in Schengen Agreement).



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PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(i) In general/1065. The Attorney General and the Solicitor General.

## 15. PROSECUTION AUTHORITIES

### (1) LAW OFFICERS

#### (i) In general

##### 1065. The Attorney General and the Solicitor General.

The Queen may not appear in Her own courts to support Her interests<sup>1</sup> in person, but is represented by Her attorney<sup>2</sup>, who bears the title of Her Majesty's Attorney General<sup>3</sup>.

The Attorney General is primarily an officer of the Crown and is in that sense an officer of the public<sup>4</sup>. Although he performs to some extent judicial functions<sup>5</sup> both at common law and by statute, he does not constitute a court in the ordinary sense, so that prohibition will not lie against him<sup>6</sup>. It is the duty of the Attorney General to institute prosecutions for offences which have a tendency to disturb the peace of the state or to endanger the government<sup>7</sup>.

Any function of the Attorney General may now be exercised by the Solicitor General, and anything done by or in relation to the Solicitor General in the exercise of or in connection with a function of the Attorney General has effect as if done by or in relation to the Attorney General<sup>8</sup>. The Solicitor General also represents the Crown where distinct interests require it to be separately represented<sup>9</sup>.

The offices of Attorney General and Solicitor General are conferred by patent and are held during pleasure. Neither the Attorney General nor the Solicitor General may engage in private practice<sup>10</sup>.

1 In *R v Gregory* (1672) 2 Lev 82, a declaration quod dominus rex venit coram domino rege was allowed after some demur, but characterised by Hale CJ as 'well enough, but unmannerly'.

2 *R v Austen* (1821) 9 Price 142n: 'the King sues by his attorney' or 'the Attorney sues for the King' are only different forms of expressing the same thing. It is the Sovereign who, by his attorney, gives the court to understand and be informed of the matter which is being brought to its notice: *Wilkes v R* (1770) Wilm 322 at 327, HL. See also *A-G to Prince of Wales v St Aubyn* (1811) Wight 167; *A-G v Ellis* (1959) Times, 21 January (injunction to restrain publication of information relating to the royal family, in breach of undertaking).

3 As to the Attorney General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 529 et seq; and as to the precedence of the Attorney General see LEGAL PROFESSIONS vol 66 (2009) PARA 1119.

4 *A-G v Brown* (1818) 1 Swan 265 at 294; *R v Wilkes* (1770) 4 Burr 2527 at 2570 (on appeal 4 Burr 2576, HL). He may also represent the public: see eg CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 531.

5 *R v Comptroller-General of Patents, ex p Tomlinson* [1899] 1 QB 909, CA.

6 *Re Van Gelder's Patent* (1888) 6 RPC 22 at 27, CA.

7 See *Ex p Crawshay v Langley* (1860) 8 Cox CC 356.

8 Law Officers Act 1997 s 1(1), (2). The validity of anything done in relation to the Attorney General, or done by or in relation to the Solicitor General, is not affected by a vacancy in the office of Attorney General: s 1(3). Section 1 does not: (1) prevent anything being done by or in relation to the Attorney General in the exercise of

or in connection with any function of his; (2) require anything done by the Solicitor General to be done in the name of the Solicitor General instead of the name of the Attorney General: s 1(4). It is immaterial whether a function of the Attorney General arises under an enactment or otherwise: s 1(5). As to the Solicitor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 529 et seq.

9 *A-G v Galway Corpn* (1828) 1 Mol 95 at 101n; *A-G v Dean and Canons of Windsor* (1860) 8 HL Cas 369. See also *Ellis v Duke of Bedford* [1899] 1 Ch 494 at 504, 518, CA; *A-G v Duke of Richmond (No 2)* [1907] 2 KB 940.

10 See LEGAL PROFESSIONS vol 66 (2009) PARA 1128.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/15.

PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(i) In general/1066. The Director of Public Prosecutions.

### **1066. The Director of Public Prosecutions.**

The Director of Public Prosecutions is head of the Crown Prosecution Service<sup>1</sup>. He must be appointed by, and discharge his functions<sup>2</sup> under the superintendence of, the Attorney General<sup>3</sup>; and he must be a person who has a 10-year general qualification<sup>4</sup>.

1 As to the Crown Prosecution Service see PARA 1079 et seq post.

2 See PARA 1080 post. As to the exercise of the functions of the Director of Public Prosecutions by Crown prosecutors see PARA 1081 post.

3 Prosecution of Offences Act 1985 ss 2(1), 3(1). As to the Attorney General see PARA 1065 ante. As to the duty of the Director of Public Prosecutions to make an annual report to the Attorney General on the discharge of his functions see PARA 1073 post.

4 Ibid s 2(2) (amended by the Courts and Legal Services Act 1990 s 71(2), Sch 10 para 60). 'General qualification' means a general qualification within the meaning of the Courts and Legal Services Act 1990 s 71: see COURTS vol 10 (Reissue) PARA 530. There is to be paid to the Director of Public Prosecutions such remuneration as the Attorney General may, with the approval of the Treasury, determine: Prosecution of Offences Act 1985 s 2(3).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/15.

PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(i) In general/1067. The Director of the Serious Fraud Office.

#### **1067. The Director of the Serious Fraud Office.**

The Attorney General<sup>1</sup> must appoint a person to be the Director of the Serious Fraud Office<sup>2</sup>, and the person appointed must discharge his functions under the superintendence of the Attorney General<sup>3</sup>.

1 As to the Attorney General see PARA 1065 ante.

2 As to the Serious Fraud Office see PARA 1089 et seq post.

3 Criminal Justice Act 1987 s 1(2). There is to be paid to the Director of the Serious Fraud Office such remuneration as the Attorney General may, with the approval of the Treasury, determine: s 1(15), Sch 1 para 1. As to the duty of the Director of the Serious Fraud Office to make an annual report on the discharge of his functions see PARA 1074 post.



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PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(i) In general/1068. Director of Revenue and Customs Prosecutions.

#### **1068. Director of Revenue and Customs Prosecutions.**

The Attorney General<sup>1</sup> must appoint a Director of Revenue and Customs Prosecutions<sup>2</sup>, and the person appointed must discharge his functions<sup>3</sup> under the superintendence of the Attorney General<sup>4</sup>. The Director must have a 10-year general qualification<sup>5</sup>.

1 As to the Attorney General see PARA 1065 ante.

2 Commissioners for Revenue and Customs Act 2005 s 34(1).

3 See PARA 1097 post. As to the exercise of the functions of the Director by a designated or appointed person see PARA 1097 post.

4 Commissioners for Revenue and Customs Act 2005 s 36(1).

5 See *ibid* s 34(4), Sch 3 para 1. As to the meaning of 'general qualification' see PARA 1066 note 4 ante. There is to be paid to the Director such remuneration, expenses and other allowances as the Attorney General determines with the approval of the Minister for the Civil Service: Sch 3 para 3.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/15.

PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(i) In general/1069. The Chief Inspector of the Crown Prosecution Service.

### **1069. The Chief Inspector of the Crown Prosecution Service.**

The Attorney General<sup>1</sup> must appoint a person as Her Majesty's Chief Inspector of the Crown Prosecution Service<sup>2</sup> who must inspect or arrange for the inspection of the operation of the Crown Prosecution Service<sup>3</sup> and the Revenue and Customs Prosecution Office<sup>4</sup>. The Chief Inspector may appoint inspectors and other staff to assist him in the discharge of his functions<sup>5</sup>.

1 As to the Attorney General see PARA 1065 ante.

2 Crown Prosecution Service Inspectorate Act 2000 s 1(1). As to the Crown Prosecution Service see PARA 1079 et seq post.

3 Ibid s 2(1)(a). There is to be paid out of money provided by Parliament: (1) such sums in respect of salary, pension, allowances and compensation for the Chief Inspector as the Attorney General may determine; and (2) expenditure incurred by the Chief Inspector in the discharge of his functions, including expenditure on payments to or in respect of his staff: s 1(3). As to the duty of the Chief Inspector to make reports to the Attorney General on the operation of the Crown Prosecution Service see PARA 1076 post.

4 See ibid s 2(4) (added by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 77); and the Commissioners for Revenue and Customs Act 2005 s 42. As to the Revenue and Customs Prosecution Office see PARA 1097 et seq post.

5 Crown Prosecution Service Inspectorate Act 2000 s 1(2). The Chief Inspector may designate an inspector to discharge his functions during any period when he is absent or unable to act: s 2(3).

### **UPDATE**

### **1069 The Chief Inspector of the Crown Prosecution Service**

NOTE 2--For further provision about Her Majesty's Chief Inspector of the Crown Prosecution Service see the Crown Prosecution Service Inspectorate Act 2000 s 2(5), Schedule; and PARA 1069A.

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PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(i) In general/1069A Further provision about Her Majesty's Chief Inspector of the Crown Prosecution Service.

### **1069A Further provision about Her Majesty's Chief Inspector of the Crown Prosecution Service.**

The Chief Inspector of the Crown Prosecution Service may delegate any of his functions, to such extent as he may determine, to another public authority<sup>1</sup>. In these provisions 'public authority' includes any person certain of whose functions are functions of a public nature<sup>2</sup>.

The Chief Inspector must from time to time, or at such times as the Attorney General may specify by order, prepare a document setting out what inspections he proposes to carry out (an 'inspection programme') and a document setting out the manner in which he proposes to carry out his functions of inspecting and reporting (an 'inspection framework')<sup>3</sup>. Before preparing an inspection programme or an inspection framework the Chief Inspector must consult the Attorney General and (1) Her Majesty's Chief Inspector of Prisons; (2) Her Majesty's Chief Inspector of Constabulary; (3) Her Majesty's Chief Inspector of Probation for England and Wales; (4) Her Majesty's Chief Inspector of Court Administration; (5) Her Majesty's Chief Inspector of Education, Children's Services and Skills; (6) the Care Quality Commission; (7) the Audit Commission for Local Government and the National Health Service in England; (8) the Auditor General for Wales; and (9) any other person or body specified by an order made by the Attorney General, and he must send to each of those persons bodies a copy of each programme or framework once it is prepared<sup>4</sup>. The Attorney General may by order specify the form that inspection programmes or inspection frameworks are to take<sup>5</sup>. Nothing in any inspection programme or inspection framework is to be read as preventing the Chief Inspector from making visits, or causing visits to be made, without notice<sup>6</sup>.

If (a) a person or body specified by an order made by the Attorney General is proposing to carry out an inspection that would involve inspecting a specified organisation; and (b) the Chief Inspector considers that the proposed inspection would impose an unreasonable burden on that organisation, or would do so if carried out in a particular manner, the Chief Inspector must give a notice to that person or body not to carry out the proposed inspection, or not to carry it out in that manner<sup>7</sup>. Where such a notice is given, the proposed inspection is not to be carried out, or, as the case may be, is not to be carried out in the manner mentioned in the notice<sup>8</sup>. The Attorney General may by order make provision supplementing that made by this provision, including in particular (i) provision about the form of notices; (ii) provision prescribing the period within which notices are to be given; (iii) provision prescribing circumstances in which notices are, or are not, to be made public; (iv) provision for revising or withdrawing notices; (v) provision for setting aside notices not validly given<sup>9</sup>.

The Chief Inspector must co-operate with (A) Her Majesty's Chief Inspector of Prisons; (B) Her Majesty's Inspectors of Constabulary; (C) Her Majesty's Inspectorate of Probation for England and Wales; (D) Her Majesty's Inspectorate of Court Administration; (E) Her Majesty's Chief Inspector of Education, Children's Services and Skills; (F) the Care Quality Commission; (G) the Audit Commission for Local Government and the National Health Service in England; (H) the Auditor General for Wales; and (I) any other public authority specified by an order made by the Attorney General, where it is appropriate to do so for the efficient and effective discharge of his functions<sup>10</sup>. The Chief Inspector may act jointly with another public authority where it is appropriate to do so for the efficient and effective discharge of his functions<sup>11</sup>. The Chief Inspector, acting jointly with Her Majesty's Chief Inspector of Prisons, Her Majesty's Chief

Inspector of Constabulary, Her Majesty's Chief Inspector of Probation for England and Wales and Her Majesty's Chief Inspector of Court Administration must prepare a document (a 'joint inspection programme') setting out what inspections he proposes to carry out in the exercise of the above power, and what inspections the specified chief inspectors, or their inspectorates, propose to carry out in the exercise of any corresponding powers conferred on them<sup>12</sup>. A joint inspection programme must be prepared from time to time or at such times as the Secretary of State, the Lord Chancellor and the Attorney General may jointly direct<sup>13</sup>. The Secretary of State, the Lord Chancellor and the Attorney General may by a joint direction specify the form that a joint inspection programme is to take<sup>14</sup>. The Chief Inspector may, if he thinks it appropriate to do so, provide assistance to any other public authority for the purpose of the exercise by that authority of its functions<sup>15</sup>. An inspector may for the purposes of an inspection under the Crown Prosecution Service Inspectorate Act 2000 require documents to be produced, inspect, copy or take away any documents produced, require an explanation to be given of any document produced, or require any other information to be provided<sup>16</sup>. A person exercising the power to inspect documents is entitled to have access to, and inspect and check the operation of, any computer and associated apparatus or material that is or has been in use in connection with the documents in question, and may require the person by whom or on whose behalf the computer is or has been used, or any person having charge of, or otherwise concerned with the operation of, the computer, apparatus or material, to afford him such reasonable assistance as he may require<sup>17</sup>.

1 Crown Prosecution Service Inspectorate Act 2000 s 2(5), Schedule, PARA 1(1) (s 2(5), Schedule added by Police and Justice Act 2006 s 30; and amended by Local Government and Public Involvement in Health Act 2007 Sch 9 para 1(2)(o), Sch 18 Pt 9; and SI 2008/912). If the carrying out of an inspection is delegated under the 2000 Act Schedule para 1(1) it is nevertheless to be regarded for the purposes of the 2000 Act as carried out by the Chief Inspector: Schedule para 1(2).

2 Ibid Schedule para 1(3).

3 Ibid Schedule para 2(1). The power to make an order is exercisable by statutory instrument and a statutory instrument containing such an order is subject to annulment in pursuance of a resolution of either House of Parliament: Schedule para 8.

4 Ibid Schedule para 2(2) (amended by the Health and Social Care Act 2008 Sch 5 para 71(2), Sch 15 Pt 1). The requirement in the 2000 Act Schedule para 2(2) to consult, and to send copies to, a person or body listed in heads (1)-(9) is subject to any agreement made between the Chief Inspector and that person or body to waive the requirement in such case or circumstances as may be specified in the agreement: Schedule para 2(3).

5 Ibid Schedule para 2(4).

6 Ibid Schedule para 2(5).

7 Ibid Schedule para 3(1), (2). However, the Attorney General may by order specify cases or circumstances in which a notice need not, or may not, be given under Schedule para 3(6): Schedule para 3(6). In head (a) of the TEXT 'specified organisation' means a person or body specified by an order made by the Attorney General: Schedule para 3(3). A person or body may be specified under Schedule para 3(3) only if it exercises functions in relation to any matter falling within the scope of the duties of the Chief Inspector under the 2000 Act or any other enactment: Schedule para 3(4). A person or body may be specified under Schedule para 3(3) in relation to particular functions that it has; in the case of a person or body so specified, head (a) is to be read as referring to an inspection that would involve inspecting the discharge of any of its functions in relation to which it is specified: Schedule para 3(5).

8 Ibid Schedule para 3(7). The Attorney General, if satisfied that the proposed inspection would not impose an unreasonable burden on the organisation in question, or would not do so if carried out in a particular manner, may give consent to the inspection being carried out, or being carried out in that manner: Schedule para 3(8).

9 Ibid Schedule para 3(9).

10 Ibid Schedule para 4 (amended by the Health and Social Care Act 2008 Sch 5 para 71(3), Sch 15 Pt 1).

11 2000 Act Schedule para 5(1).

12 Ibid Schedule para 5(2), (3).

13 Ibid Schedule para 5(4). Schedule para 2(2), (3), (5) (see NOTES 4, 6) applies to a joint inspection programme as it applies to a document prepared under Schedule para 2: Schedule para 5(5).

14 Ibid Schedule para 5(6).

15 Ibid Schedule para 6(1). Assistance under Schedule para 6 may be provided on such terms, including terms as to payment, as the Chief Inspector thinks fit: Schedule para 6(2).

16 Ibid Schedule para 7(1). A reference in Schedule para 7(1) to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form, or information in a form from which it can readily be produced in legible and intelligible form: Schedule para 7(2).

17 Ibid Schedule para 7(3).

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PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(i) In general/1070. Prospective legislation relating to Her Majesty's Chief Inspector for Justice, Community Safety and Custody.

**1070. Prospective legislation relating to Her Majesty's Chief Inspector for Justice, Community Safety and Custody.**

At the date at which this volume states the law, a government Bill known as the Police and Justice Bill was before Parliament<sup>1</sup>.

The Bill makes provision for a new officer, to be called Her Majesty's Chief Inspector for Justice, Community Safety and Custody<sup>2</sup>, who is to replace Her Majesty's Chief Inspector of Prisons, Her Majesty's Inspectors of Constabulary, Her Majesty's Chief Inspector of the Crown Prosecution Service, Her Majesty's Inspectorate of the National Probation Service for England and Wales, and Her Majesty's Inspectorate of Court Administration.

<sup>1</sup> The description of the proposed legislation given in the text is based on the Bill as brought from the House of Commons and introduced in the House of Lords on 11 May 2006.

In addition to the provisions described in the text, the Bill contains provisions relating to police reform (see Part 1) and police powers (see Part 2). Part 3 concerns crime and anti-social behaviour and includes provision for local authority scrutiny of crime and disorder matters, as well as containing provisions relating to parenting contracts and parenting orders, and injunctions. The Bill also contains miscellaneous provisions relating to bail offences, computer misuse, forfeiture of indecent photographs of children, the Independent Police Complaints Commission, and extradition: see Part 5. There are supplemental provisions in Part 6.

<sup>2</sup> See the Police and Justice Bill Part 4.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/15.

PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(ii) Consents to Prosecutions/1071. Consents by the Attorney General and the Director of Public Prosecutions to prosecutions.

## (ii) Consents to Prosecutions

### 1071. Consents by the Attorney General and the Director of Public Prosecutions to prosecutions.

Any person may institute any criminal proceedings<sup>1</sup> or conduct any criminal proceedings to which the duty of the Director of Public Prosecutions to take over the conduct of proceedings does not apply<sup>2</sup>; but there are statutory provisions which specifically require that certain criminal proceedings may be undertaken only by order of a judge<sup>3</sup> or by, or by the direction of, or with the consent of, the Attorney General<sup>4</sup>, the Director of Public Prosecutions<sup>5</sup> or some other official person or body<sup>6</sup>.

Any enactment<sup>7</sup> which prohibits the institution or carrying on of proceedings for any offence except: (1) with the consent, however expressed, of a law officer of the Crown or the Director of Public Prosecutions; or (2) where the proceedings are instituted or carried on by or on behalf of a law officer of the Crown or the Director of Public Prosecutions, and so applies whether or not there are exceptions to the prohibition, and in particular whether or not the consent is an alternative to the consent of any other authority or person<sup>8</sup>:

1639 (a) does not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence<sup>9</sup>; and

1640 (b) is subject to any enactment concerning the apprehension or detention of children or young persons<sup>10</sup>.

Where any enactment, whenever passed: (i) prevents any step from being taken without the consent of the Director of Public Prosecutions or without his consent or the consent of another; or (ii) requires any step to be taken by or in relation to the Director, any consent given by or, as the case may be, step taken by or in relation to, a Crown prosecutor is to be treated, for the purposes of that enactment, as given by or, as the case may be, taken by or in relation to the Director of Public Prosecutions<sup>11</sup>.

1 For these purposes, binding over proceedings are to be taken as criminal proceedings: Prosecution of Offences Act 1985 s 15(4). 'Binding over proceedings' means any proceedings instituted, whether by way of complaint under the Magistrates' Courts Act 1980 s 115 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 152) or otherwise, with a view to obtaining from a magistrates' court an order requiring a person to enter into a recognisance to keep the peace or to be of good behaviour: Prosecution of Offences Act 1985 s 15(1).

2 Ibid s 6(1). Such a person does not, however, have a right of access to police statements, reports and photographs held by the Crown Prosecution Service: *R v DPP, ex p Hallas* (1988) 87 Cr App Rep 340, DC. It is not an abuse of process to bring a private prosecution against a defendant after he has been given an informal or simple caution by the police: *Hayter v L* [1998] 1 WLR 854, DC. Where criminal proceedings are so instituted, the Director of Public Prosecutions may nevertheless take over their conduct at any stage: Prosecution of Offences Act 1985 s 6(2). In appropriate cases the Director of Public Prosecutions may take over proceedings in order to abort them by offering no evidence: see *R v DPP, ex p Duckenfield*, *R v South Yorkshire Police Authority, ex p Chief Constable of the South Yorkshire Police* [1999] 2 All ER 873, [2000] 1 WLR 55, DC (it would be unlawful for the Director of Public Prosecutions to apply the same test for discontinuing a prosecution as he

applies for determining whether to commence a prosecution; otherwise the right of private prosecution would be undermined because the Director would be able to stop a private prosecution merely because he would not have initiated or continued it); and see also *Turner v DPP* (1978) 68 Cr App Rep 70; *Raymond v A-G* [1982] QB 839, 75 Cr App Rep 34, CA (both decided under the Prosecution of Offences Act 1979 s 4 (repealed)). The tests applicable to whether a Crown prosecutor should pursue a prosecution (ie whether there is sufficient evidence and whether a prosecution would be in the public interest) do not apply to a private prosecution: see *R (on the application of Charlson) v Guildford Magistrates Court* [2006] All ER (D) 41 (Sep). As to discontinuance of proceedings in magistrates' courts see PARA 1159 post. As to the Director of Public Prosecutions see PARA 1066 ante; as to the duty of the Director of Public Prosecutions to take over the conduct of proceedings see PARA 1080 post; and as to the Crown Prosecution Service see PARA 1079 et seq post.

The effect of the Prosecution of Offences Act 1985 s 6(1) is to preclude a person from bringing a private prosecution in cases covered by s 3(2)(a), (c) and (d) (see PARA 1080 heads (1), (3), (4) post) but not in the residuary category of s 3(2)(b) (see PARA 1080 head (2) post); in respect of that category there is nothing to preclude a private prosecution: *R v Bow Street Stipendiary Magistrate, ex p South Coast Shipping Co Ltd* [1993] QB 645, [1993] 1 All ER 219, DC (decided before the addition of the Prosecution of Offences Act 1985 s 3(2)(aa), (ba) (see PARA 1080 post)). Where the Director of Public Prosecutions could have instituted proceedings against a person under the Prosecution of Offences Act 1985 s 3(2)(b) where it appeared to him to be appropriate that he do so having regard to the importance and difficulty of the case but he has decided not to bring proceedings, any other person may institute a private prosecution in respect of the same matter: *R v Bow Street Stipendiary Magistrate, ex p South Coast Shipping Co Ltd* supra.

However, the Director may take over proceedings instituted by a private prosecutor which he might otherwise have instituted himself and having done so he may then discontinue them under Prosecution of Offences Act 1985 s 23 (see PARA 1159 post) or, if it is too late to discontinue, he may offer no evidence or the Attorney General can enter a nolle prosequi: *R v Bow Street Stipendiary Magistrate, ex p South Coast Shipping Co Ltd* supra. As to the Attorney General see PARA 1065 ante.

3 See eg the Law of Libel Amendment Act 1888 s 8; and LIBEL AND SLANDER vol 28 (Reissue) PARA 293.

4 See eg the Public Order Act 1986 s 27(1); and PARA 562 ante. Where the Director of Public Prosecutions decides not to prosecute an offence, an application for judicial review of the decision will succeed only if it can be shown that the decision was reached because of an unlawful policy, or if there was a failure to act in accordance with the policy set out in the Code for Crown Prosecutors, or if the decision was perverse: *R v DPP, ex p C* [1995] 1 Cr App Rep 136, 159 JP 227, DC. See also *R v DPP, ex p Jones* [2000] Crim LR 858, DC; *R v DPP, ex p Manning* [2001] QB 330, [2000] All ER (D) 674, DC; *R (on the application of Joseph) v DPP* [2001] Crim LR 489, DC.

To consent to a prosecution is not amenable to judicial review in the absence of dishonesty, mala fides or an exceptional circumstance: *R v DPP, ex p Kebilene* [2000] 2 AC 326, [2000] 4 All ER 801, HL. In the absence of compelling reasons to the contrary, the Director of Public Prosecutions is expected to give reasons for a decision not to prosecute where his refusal concerns a death in custody in respect of which a jury at a coroner's inquest has returned a verdict of unlawful killing implicating a clearly identifiable, but unnamed individual, whose whereabouts are known: *R v DPP, ex p Manning* supra.

5 See eg the Suicide Act 1961 s 2(4) (as amended); and PARA 106 ante. As to the exercise of the functions of the Director of Public Prosecutions by Crown prosecutors see PARA 1081 post.

6 See eg the Customs and Excise Management Act 1979 s 145(1), (6) (as amended) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1196), explained in *R v Keyes*, *R v Edjedewe*, *R v Chapman* [2000] 2 Cr App Rep 181, CA. The consent need not be in writing, although as a matter of practice it is doubtless desirable for there to be a signed written consent: *R v Jackson* [1997] Crim LR 293, CA.

7 For these purposes, 'enactment' includes any provision having effect under or by virtue of any Act, whenever passed: Prosecution of Offences Act 1985 s 25(3).

8 Ibid s 25(1). Where the defendant has been arrested and charged, proceedings are 'instituted' for these purposes when the defendant first comes to court to answer the charge: *R v Elliott* (1984) 81 Cr App Rep 115, CA; *R v Whale*, *R v Lockton* [1991] Crim LR 692, CA; *R v Bull* (1993) 99 Cr App Rep 193, CA. Where the defendant has not been arrested, proceedings are 'instituted' when a summons is issued following the laying of an information: *Price v Humphries* [1958] 2 QB 353, [1958] 2 All ER 725, DC (case decided before the process of laying an information and issue of a summons was replaced in the case of a public prosecutor by the process of issuing a written charge (see the Criminal Justice Act 2003 s 29; and PARA 915 ante)). At the time of the decisions in *R v Elliott* supra, *R v Whale*, *R v Lockton* supra and *R v Bull* supra, the time when the defendant first came before the court to answer the charge was when he was arraigned for the purposes of committal proceedings: see *R v Bull* supra at 207 per Cresswell J.

9 Prosecution of Offences Act 1985 s 25(2)(a). As to powers of arrest see PARA 910 et seq ante; and as to remand in custody or on bail see PARA 1144 et seq post.



10 Ibid s 25(2)(b). As to the detention of children or young persons see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1232 et seq.

11 Ibid s 1(7). As to proof of consents to prosecutions see PARA 1469 post. Section 1(7) does not apply to the Criminal Justice Act 2003 Pt 10 (ss 75-97) (re-trial for serious offences), other than s 85(2)(a) (see PARA 1943 post): s 92(1).

## **UPDATE**

### **1071 Consents by the Attorney General and the Director of Public Prosecutions to prosecutions**

NOTE 8--See *R v Lambert* [2009] EWCA Crim 700, [2010] 1 WLR 898, [2009] All ER (D) 220 (Nov) (proceedings in the form of plea before venue hearing instituted before the Attorney General's permission had been given).

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PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(ii) Consents to Prosecutions/1072. Consents to prosecutions by the Director of the Serious Fraud Office.

**1072. Consents to prosecutions by the Director of the Serious Fraud Office.**

Where any enactment, whenever passed, prohibits the taking of any step: (1) except by the Director of Public Prosecutions<sup>1</sup> or except by him or another; or (2) without the consent of the Director of Public Prosecutions or without his consent or the consent of another, it does not prohibit the taking of any such step by the Director of the Serious Fraud Office<sup>2</sup>.

<sup>1</sup> See PARA 1071 ante. As to the Director of Public Prosecutions see PARA 1066 ante.

<sup>2</sup> Criminal Justice Act 1987 s 1(15), Sch 1 para 4(1). As to the Director of the Serious Fraud Office see PARA 1067 ante.

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PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(iii) Reports/1073. Reports by the Director of Public Prosecutions to the Attorney General.

### **(iii) Reports**

#### **1073. Reports by the Director of Public Prosecutions to the Attorney General.**

As soon as practicable after 4 April in any year, the Director of Public Prosecutions<sup>1</sup> must make to the Attorney General<sup>2</sup> a report on the discharge of his functions during the year ending with that date<sup>3</sup>. The Attorney General must lay before Parliament a copy of every report so received by him and must cause every such report to be published<sup>4</sup>. At the request of the Attorney General, the Director of Public Prosecutions must report to him on such matters as the Attorney General may specify<sup>5</sup>.

1 As to the Director of Public Prosecutions see PARA 1066 ante.

2 As to the Attorney General see PARA 1065 ante.

3 Prosecution of Offences Act 1985 s 9(1).

4 Ibid s 9(2). As to the inclusion in such report of guidelines for Crown prosecutors see PARA 1083 post.

5 Ibid s 9(3).

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PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(iii) Reports/1074. Reports by the Director of the Serious Fraud Office to the Attorney General.

**1074. Reports by the Director of the Serious Fraud Office to the Attorney General.**

As soon as practicable after 4 April in any year, the Director of the Serious Fraud Office<sup>1</sup> must make to the Attorney General<sup>2</sup> a report on the discharge of his functions during the year ending with that date<sup>3</sup>. The Attorney General must lay before Parliament a copy of every report so received by him and must cause every such report to be published<sup>4</sup>.

1 As to the Director of the Serious Fraud Office see PARA 1067 ante.

2 As to the Attorney General see PARA 1065 ante.

3 Criminal Justice Act 1987 s 1(15), Sch 1 para 3(1).

4 Ibid Sch 1 para 3(2).

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PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(iii) Reports/1075. Reports by the Director of Revenue and Customs Prosecutions.

### **1075. Reports by the Director of Revenue and Customs Prosecutions.**

As soon as practicable after 31 March in any year, the Director of Revenue and Customs Prosecutions<sup>1</sup> must send to the Attorney General<sup>2</sup> a report on the discharge of his functions during the year ending with that date<sup>3</sup>. The Attorney General must lay before Parliament a copy of every report so received by him and arrange for it to be published<sup>4</sup>.

1 As to the Director of Revenue and Customs Prosecutions see PARA 1068 ante.

2 As to the Attorney General see PARA 1065 ante.

3 Commissioners for Revenue and Customs Act 2005 s 34, Sch 3 paras 6(1), 7(1). As to the matters required to be included in the report see Sch 3 para 6(2).

4 Ibid Sch 3 para 6(3).

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PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(iii) Reports/1076. Reports by the Chief Inspector of the Crown Prosecution Service to the Attorney General.

### **1076. Reports by the Chief Inspector of the Crown Prosecution Service to the Attorney General.**

The Chief Inspector of the Crown Prosecution Service<sup>1</sup> must report to the Attorney General<sup>2</sup> on any matter connected with the operation of the Crown Prosecution Service or of the Revenue and Customs Prosecution Office<sup>3</sup> which the Attorney General refers to him<sup>4</sup> and must submit to the Attorney General an annual report on the operation of the Crown Prosecution Service and an annual report on the operation of the Revenue and Customs Prosecution Office<sup>5</sup>. The Attorney General must lay before Parliament a copy of any such annual report which he receives<sup>6</sup>.

1 As to the Chief Inspector of the Crown Prosecution Service see PARA 1069 ante. As to the Crown Prosecution Service see PARA 1079 et seq post.

2 As to the Attorney General see PARA 1065 ante.

3 As to the Revenue and Customs Prosecution Office see PARA 1097 et seq ante.

4 Crown Prosecution Service Inspectorate Act 2000 s 2(1)(b); Commissioners for Revenue and Customs Act 2005 s 42.

5 Crown Prosecution Service Inspectorate Act 2000 s 2(1)(c); Commissioners for Revenue and Customs Act 2005 s 42.

6 Crown Prosecution Service Inspectorate Act 2000 s 2(2); Commissioners for Revenue and Customs Act 2005 s 42.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/15.

PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(iii) Reports/1077. Reports to the Director of Public Prosecutions by chief officers of police.

### **1077. Reports to the Director of Public Prosecutions by chief officers of police.**

The Attorney General<sup>1</sup> may make regulations<sup>2</sup> requiring the chief officer of any police force to which the regulations are expressed to apply to give to the Director of Public Prosecutions<sup>3</sup> information with respect to every offence of a kind prescribed by the regulations which is alleged to have been committed in his area and in respect of which it appears to him that there is a prima facie case for proceedings<sup>4</sup>. Such regulations may also require every such chief officer to give to the Director such information as he may require with respect to such cases or classes of case as he may from time to time specify<sup>5</sup>.

1 As to the Attorney General see PARA 1065 ante.

2 Any power to make regulations under the Prosecution of Offences Act 1985 is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament; and any such regulations may make different provisions with respect to different cases or classes of case: s 29.

3 As to the Director of Public Prosecutions see PARA 1066 ante.

4 Prosecution of Offences Act 1985 s 8(1). The Prosecution of Offences Regulations 1978, SI 1978/1357, art 6(1) (amended by SI 1978/1846; SI 1985/243) took effect under the Prosecution of Offences Act 1985 s 8 by virtue of the Interpretation Act 1978 s 17(2)(b) but were revoked by the Prosecution of Offences (Revocation) Regulations 1997, SI 1997/739. At the date at which this volume states the law no regulations were in force under the Prosecution of Offences Act 1985 s 8(1).

5 Ibid s 8(2).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/15.

PROSECUTION AUTHORITIES/(1) LAW OFFICERS/(iii) Reports/1078. Reports to the Director of the Serious Fraud Office by chief officers of police.

**1078. Reports to the Director of the Serious Fraud Office by chief officers of police.**

The Attorney General<sup>1</sup> may make regulations requiring the chief officer of any police force to which the regulations are expressed to apply to give to the Director of the Serious Fraud Office<sup>2</sup> information with respect to every offence of a kind prescribed by the regulations which is alleged to have been committed in his area and in respect of which it appears to him that there is a prima facie case for proceedings<sup>3</sup>. Such regulations may also require every chief officer to give to the Director such information as he may require with respect to such cases or classes of case as he may from time to time specify<sup>4</sup>.

1 As to the Attorney General see PARA 1065 ante.

2 As to the Director of the Serious Fraud Office see PARA 1067 ante.

3 Criminal Justice Act 1987 s 1(15), Sch 1 para 7(1). Any power to make regulations under Sch 1 is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament; and any such regulations may make different provisions with respect to different cases or classes of case: Sch 1 para 9. At the date at which this volume states the law no such regulations had been made.

4 Ibid Sch 1 para 7(2).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/15.  
PROSECUTION AUTHORITIES/(2) THE CROWN PROSECUTION SERVICE/1079. The Crown Prosecution Service.

## **(2) THE CROWN PROSECUTION SERVICE**

### **1079. The Crown Prosecution Service.**

There is a prosecuting service for England and Wales known as the Crown Prosecution Service, and consisting of:

- 1641 (1) the Director of Public Prosecutions<sup>1</sup>, who is head of the Service<sup>2</sup>;
- 1642 (2) the Chief Crown Prosecutors<sup>3</sup>, each of whom is the member of the Service responsible to the Director for supervising the operation of the Service in his area<sup>4</sup>; and
- 1643 (3) the other staff<sup>5</sup> appointed by the Director<sup>6</sup>.

The Director must appoint such staff for the Service as, with the approval of the Treasury as to numbers, remuneration and other terms and conditions of service, he considers necessary for the discharge of his functions<sup>7</sup>.

1 As to the Director of Public Prosecutions see PARA 1066 ante.

2 Prosecution of Offences Act 1985 s 1(1)(a).

3 As to Crown prosecutors and Chief Crown Prosecutors see PARA 1081 post.

4 Prosecution of Offences Act 1985 s 1(1)(b). As to the division of England and Wales into areas see PARA 1081 post.

5 He appointed under the Prosecution of Offences Act 1985 s 1.

6 Ibid s 1(1)(c).

7 Ibid s 1(2).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/15. PROSECUTION AUTHORITIES/(2) THE CROWN PROSECUTION SERVICE/1080. Duties of the Director of Public Prosecutions.

### **1080. Duties of the Director of Public Prosecutions.**

It is the duty of the Director of Public Prosecutions<sup>1</sup>:

- 1644 (1) to take over the conduct of all criminal proceedings<sup>2</sup>, other than specified proceedings<sup>3</sup>, instituted<sup>4</sup> on behalf of a police force<sup>5</sup>, whether by a member of that force or by any other person<sup>6</sup>;
- 1645 (2) to take over the conduct of any criminal proceedings instituted by an immigration officer<sup>7</sup> acting in his capacity as such an officer<sup>8</sup>;
- 1646 (3) to institute and have the conduct of criminal proceedings<sup>9</sup> in any case where it appears to him that the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him, or it is otherwise appropriate for proceedings to be instituted by him<sup>10</sup>;
- 1647 (4) to institute and have the conduct of any criminal proceedings in any case where the proceedings relate to the subject-matter of a report on an investigation into the conduct of a person serving with the police<sup>11</sup>, a copy of which has been sent to him<sup>12</sup>;
- 1648 (5) to take over the conduct of all binding over proceedings instituted on behalf of a police force, whether by a member of that force or by any other person<sup>13</sup>;
- 1649 (6) to take over the conduct of all proceedings begun by summons issued under the Obscene Publications Act 1959<sup>14</sup>;
- 1650 (7) to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences<sup>15</sup>;
- 1651 (8) to have the conduct of any extradition proceedings<sup>16</sup>;
- 1652 (9) to give, to such extent as he considers appropriate, and to such persons as he considers appropriate, advice on any matters relating to extradition proceedings or proposed extradition proceedings<sup>17</sup>;
- 1653 (10) to give, to such extent as he considers appropriate, advice to immigration officers on matters relating to criminal offences<sup>18</sup>;
- 1654 (11) to appear for the prosecution, when directed by the court<sup>19</sup> to do so, on any appeal under the Administration of Justice Act 1960<sup>20</sup>, the Criminal Appeal Act 1968<sup>21</sup> or the Magistrates' Courts Act 1980<sup>22</sup>;
- 1655 (12) to have the conduct of applications for anti-social behaviour orders made on conviction<sup>23</sup> and for banning orders made on conviction<sup>24</sup>;
- 1656 (13) where it appears to him appropriate to do so, to have the conduct of applications<sup>25</sup> for the variation or discharge of anti-social behaviour orders made after conviction in criminal proceedings<sup>26</sup>;
- 1657 (14) where it appears to him appropriate to do so to appear on any such application<sup>27</sup> made by a person subject to such an order<sup>28</sup> for the variation or discharge of the order<sup>29</sup>; and
- 1658 (15) to discharge such other functions as may from time to time be assigned to him by the Attorney General<sup>30</sup>.

The Director of Public Prosecutions may also institute and conduct criminal proceedings in England and Wales relating to criminal investigations<sup>31</sup> by the Serious Organised Crime Agency ('SOCA')<sup>32</sup> relating to a non-designated offence,<sup>33</sup> and must take over the conduct of criminal proceedings instituted<sup>34</sup> by SOCA in England and Wales in respect of such an offence<sup>35</sup>. The Director of Public Prosecutions must provide advice in relation to such criminal investigations or criminal proceedings that arise out of such an investigation<sup>36</sup>. The Director of Public Prosecutions acting jointly with the Director of Revenue and Customs Prosecutions may also give directions to SOCA to determine which cases to refer to the appropriate prosecutor<sup>37</sup>.

1 As to the Director of Public Prosecutions see PARA 1066 ante. This duty is subject to any provisions contained in the Criminal Justice Act 1987: see the Prosecution of Offences Act 1985 s 3(2) (amended by the Criminal Justice Act 1987 s 15, Sch 2 para 13). See further note 30 infra.

2 For these purposes, references to the conduct of any proceedings include references to the proceedings being discontinued and to the taking of any steps (including the bringing of appeals and making of representations in respect of applications for bail) which may be taken in relation to them: Prosecution of Offences Act 1985 s 15(3).

3 'Specified proceedings' means proceedings which fall within any category for the time being specified by order made by the Attorney General for the purposes of *ibid* s 3 (as amended): s 3(3). The power to make such orders is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 3(4).

The following proceedings have been specified for these purposes: (1) fixed penalty offences within the meaning of the Road Traffic Offenders Act 1988 s 51(1) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1093); (2) the offence under the Vehicle Excise and Registration Act 1994 s 29(1) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 777); (3) the offences under the Road Traffic Act 1988 ss 17(2), 18(3), 24(3), 26(1), (2), 29, 31(1), 42(b), 47(1), 87(2), 143, 164(6), (9), 165(3), (6), 168, 172(3) (see ROAD TRAFFIC); (4) all offences under the Road Traffic Regulation Act 1984 other than those under ss 35A(2) (as added), 43(5), (12), 47(3), 52(1), 108(3), 115(1), (2), 116(1), 129(3) (see ROAD TRAFFIC), or those mentioned in head (1) supra; (5) the offences arising by contravention of the Royal and Other Open Spaces Regulations 1997, SI 1997/1639, reg 3(9)(a) (involving a pedal cycle), and regs 3(9)(b), 4(27), (28), (30) (see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 565): Prosecution of Offences Act 1985 (Specified Proceedings) Order 1999, SI 1999/904, art 3(1), Schedule.

Where a summons has been issued in respect of any such offence, proceedings for that offence cease to be specified when the summons is served on the defendant unless the documents described in the Magistrates' Courts Act 1980 s 12(3)(b) (pleading guilty by post etc: see MAGISTRATES vol 29(2) (Reissue) PARA 705) are served upon the defendant with the summons: Prosecution of Offences Act 1985 (Specified Proceedings) Order 1999, SI 1999/904, art 3(2). Proceedings for an offence cease to be specified if at any time a magistrates' court begins to receive evidence in those proceedings; and, for these purposes, nothing read out before the court under the Magistrates' Courts Act 1980 s 12(7) (defendant's submission with a view to mitigation: see MAGISTRATES vol 29(2) (Reissue) PARA 706) is to be regarded as evidence: Prosecution of Offences Act 1985 (Specified Proceedings) Order 1999, SI 1999/904, art 3(3).

4 For these purposes, proceedings in relation to an offence are instituted:

- 441 (1) where a justice of the peace issues a summons under the Magistrates' Courts Act 1980 s 1 (see PARA 912 ante), when the information for the offence is laid before him (Prosecution of Offences Act 1985 s 15(2)(a));
- 442 (2) where a justice of the peace issues a warrant for the arrest of any person under the Magistrates' Courts Act 1980 s 1 (see PARA 912 ante), when the information for the offence is laid before him (Prosecution of Offences Act 1985 s 15(2)(b));
- 443 (3) where a person is charged with the offence after being taken into custody without a warrant, when he is informed of the particulars of the charge (s 15(2)(c));
- 444 (4) where a bill of indictment is preferred under the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2 in a case falling within s 2(2)(b) (see PARA 1206 head (4) post), when the bill of indictment is preferred before the court (Prosecution of Offences Act 1985 s 15(2)(d)),

and, where the application of these provisions would result in there being more than one time for the institution of the proceedings, they are to be taken to have been instituted at the earliest of those times: s 15(2). As from a day to be appointed, it is also provided that proceedings in relation to an offence are instituted, where a public prosecutor issues a written charge and requisition for the offence, when the written charge and

requisition are issued: s 15(2)(ba) (prospectively added by the Criminal Justice Act 2003 s 331, Sch 36 para 10). At the date at which this volume states the law no such day had been appointed.

As to whether proceedings resulting from the investigations of an individual or of a body can be described as 'instituted on behalf of a police force' for these purposes see *R v Ealing Justices, ex p Dixon* [1990] 2 QB 91, [1989] 2 All ER 1050, DC; *R v Stafford Justices, ex p Customs and Excise Comrs* [1991] 2 QB 339, [1991] 2 All ER 201, DC; *R (on the application of Hunt) v Criminal Cases Review Commission* [2001] QB 1108, [2001] 2 Cr App Rep 76, DC.

5 'Police force' means any police force maintained by a police authority under the Police Act 1996 and any other body of constables for the time being specified by order made by the Secretary of State for the purposes of the Prosecution of Offences Act 1985 s 3 (as amended): s 3(3) (amended by the Police Act 1996 s 103, Sch 7 para 39; the Police Act 1997 s 134(1), Sch 9 para 48; and the Serious Organised Crime and Police Act 2005 ss 59, 174, Sch 4 para 47, Sch 17 Pt 2). As to the making of orders see note 3 supra. The following bodies of constables have been specified for these purposes: the British Transport Police Force; the City of London Police; the Dover Harbour Board Police; the Falmouth Docks Police; the Felixstowe Dock and Railway Company Police; the Manchester Dock Police Force; the Mersey Tunnel law enforcement officers; the Metropolitan Police Force; the Milford Docks Police; the Ministry of Defence Police; the Port of Bristol Police; the Port of Liverpool Police; the Port of London Authority Police; the Royal Parks Constabulary (England); the Tees and Hartlepool Port Authority Harbour Police; the United Kingdom Atomic Energy Authority Constabulary: Prosecution of Offences Act 1985 (Specified Police Forces) Order 1985, SI 1985/1956, art 2, Schedule.

6 Prosecution of Offences Act 1985 s 3(2)(a).

7 le as defined for the purposes of the Immigration Act 1971: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 140 et seq.

8 Prosecution of Offences Act 1985 s 3(2)(aa) (added by the Immigration and Asylum Act 1999 s 164).

9 For these purposes, binding over proceedings are to be taken to be criminal proceedings: Prosecution of Offences Act 1985 s 15(4). For the meaning of 'binding over proceedings' see PARA 1071 note 1 ante.

10 Ibid s 3(2)(b). A person is not precluded from bringing a private prosecution in respect of proceedings under head (3) in the text: *R v Bow Street Stipendiary Magistrate, ex p South Coast Shipping Co Ltd* [1993] 1 All ER 219, 96 Cr App Rep 405, DC; and see PARA 1071 note 2 ante.

11 le a report sent to him under the Police Reform Act 2002 Sch 3 para 23 or 24: see POLICE vol 36(1) (2007 Reissue) PARAS 385-386.

12 Prosecution of Offences Act 1985 s 3(2)(ba) (added by the Police Reform Act 2002 s 107(1), Sch 7 para 10).

13 Prosecution of Offences Act 1985 s 3(2)(c).

14 Ibid s 3(2)(d). The proceedings referred to in the text are ones issued under the Obscene Publications Act 1959 s 3 (as amended) (forfeiture of obscene articles): see PARA 752 ante.

15 Prosecution of Offences Act 1985 s 3(2)(e).

16 Ibid s 3(2)(ea) (added by the Extradition Act 2003 s 190(1), (2)). The Prosecution of Offences Act 1985 s 3(2)(ea) (as added) does not require the Director to have the conduct of any extradition proceedings in respect of a person if he has received a request not to do so and: (1) in a case where the proceedings are under the Extradition Act 2003 Pt 1 (ss 1-68) (as amended), the request is made by the authority which issued the Pt 1 warrant in respect of the person; (2) in a case where the proceedings are under Pt 2 (ss 69-141), the request is made on behalf of the territory to which the person's extradition has been requested: Prosecution of Offences Act 1985 s 3(2A) (added by the Extradition Act 2003 s 190(1), (3)). See EXTRADITION.

17 Prosecution of Offences Act 1985 s 3(2)(eb) (added by the Extradition Act 2003 s 190(1), (2)). 'Extradition proceedings' means proceedings under the Extradition Act 2003 (see EXTRADITION): Prosecution of Offences Act 1985 s 15(1) (amended by the Extradition Act 2003 s 190(1), (6)).

18 Prosecution of Offences Act 1985 s 3(2)(ec) (added by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 7).

19 'The court' means: (1) in the case of an appeal to or from the criminal division of the Court of Appeal, that division; (2) in the case of an appeal from a Divisional Court of the Queen's Bench Division, the Divisional Court; and (3) in the case of an appeal against an order of a magistrates' court, the Crown Court: Prosecution of Offences Act 1985 s 3(3).

20    Ie the Administration of Justice Act 1960 s 1 (as amended) (appeal from the High Court in criminal cases): see PARA 2020 post.

21    Ie the Criminal Appeal Act 1968 Pts I, II (ss 1-44) (as amended) (appeals from the Crown Court to the criminal division of the Court of Appeal etc): see PARA 1837 et seq post.

22    Prosecution of Offences Act 1985 s 3(2)(f) (amended by the Anti-social Behaviour Act 2003 ss 86(6), 92, Sch 3). The reference to any appeal under the Magistrates' Courts Act 1980 is a reference to any appeal under s 108 (right of appeal to the Crown Court: see PARA 1980 post) as it applies, by virtue of the Contempt of Court Act 1981 s 12(5), to orders made under s 12 (contempt of magistrates' courts).

23    Ie anti-social behaviour orders made on conviction of certain offences under the Crime and Disorder Act 1998 s 1C (as added and amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 304.

24    Prosecution of Offences Act 1985 s 3(2)(fa) (added by the Anti-social Behaviour Act 2003 s 86(6)). The reference to banning orders made on conviction is a reference to orders made on conviction of certain offences under the Football Spectators Act 1989 s 14A (as added and amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 530.

25    Ie applications under the Crime and Disorder Act 1998 s 1CA(3) (as added): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 307.

26    Prosecution of Offences Act 1985 s 3(2)(fb) (added by the Serious Organised Crime and Police Act 2005 s 140(1), (5)). The reference to variation and discharge of orders is a reference to variation and discharge made under the Crime and Disorder Act 1998 s 1C (as added): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 304.

27    Ie an application under *ibid* s 1CA (as added): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 307.

28    Ie an order made under *ibid* s 1C (as added): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 304.

29    Prosecution of Offences Act 1985 s 3(2)(fc) (added by the Serious Organised Crime and Police Act 2005 s 140(1), (5)).

30    Prosecution of Offences Act 1985 s 3(2)(g). The Attorney General has assigned to the Director of Public Prosecutions the following three functions: (1) the conduct in England and Wales of applications made by foreign states, Commonwealth countries or colonies for extradition of persons from the United Kingdom; (2) the conduct of proceedings relating to appeals by way of case stated and to applications for writs of habeas corpus ad subjiciendum whether by representing a party or by intervention where it appears to the Director that the issues involved relate to the conduct of proceedings falling within the statutory functions of the Director of Public Prosecutions under the Prosecution of Offences Act 1985 or any other enactment; (3) the conduct of proceedings under the Dogs Act 1871 s 2 instituted on behalf of a police force, whether by a member of the force or by any other person: Attorney General's Assignment of Extradition Functions (10 December 1996).

31    For these purposes, 'criminal investigation' means any process: (1) for considering whether an offence has been committed; (2) for discovering by whom an offence has been committed; or (3) as a result of which an offence is alleged to have been committed: Serious Organised Crime and Police Act 2005 s 38(7)(a).

32    The Serious Organised Crime Agency is established under *ibid* s 1: see POLICE vol 36(1) (2007 Reissue) PARA 430 et seq.

33    Ibid s 38(3)(a). For these purposes, 'non-designated offence' means an offence which is not a designated offence: s 38(7)(c). For the meaning of 'designated offence' see PARA 1097 note 10 post.

34    Ie proceedings instituted by the Director General of the Serious Crime Agency or a person authorised by him: *ibid* s 38(7)(e).

35    Ibid s 38(3)(b). Section 38(3)(b) does not apply where the Director of the Serious Fraud Office (see PARA 1089 et seq post) has the conduct of the proceedings: s 38(3).

36    See *ibid* s 38; and POLICE vol 36(1) (2007 Reissue) PARA 467.

37    See *ibid* s 39; and POLICE vol 36(1) (2007 Reissue) PARA 468.

## UPDATE

## **1080 Duties of the Director of Public Prosecutions**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 4--Day now appointed: SI 2007/2874.

TEXT AND NOTES 6-30--Also, heads (16) where it appears to him appropriate to do so, to have the conduct of applications made by him for orders under the Football Spectators Act 1989 s 14B (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 530) (1985 Act s 3(2)(faa) (added by Violent Crime Reduction Act 2006 Sch 3 para 15)); (17) where it appears to him appropriate to do so, to have the conduct of applications under s 8(1)(b) for the variation or discharge of orders made under s 6 (1985 Act s 3(2)(fd) (s 3(2)(fd), (fe) added by 2006 Act s 8(7) (in force in relation to specified local justice areas on 1 April 2010: SI 2010/469)); (18) where it appears to him appropriate to do so, to appear on any application under s 8(1)(a) by a person subject to an order under s 6 for the variation or discharge of the order (1985 Act s 3(2)(fe)); (19) to discharge such duties as are conferred on him by, or in relation to, the Proceeds of Crime Act 2002 Pt 5 (ss 240-316) (see PARA 2147 et seq) or Pt 8 (ss 341-416) (see PARA 804 et seq) (1985 Act s 3(2)(ff) (added by Serious Crime Act 2007 Sch 8 para 149)).

NOTE 9--1985 Act s 15(4) amended: Criminal Justice and Immigration Act 2008 s 55(6).

TEXT AND NOTE 24--1985 Act s 3(2)(fa) amended: Violent Crime Reduction Act 2006 s 7(10) (in force in relation to specified local justice areas on 1 April 2010: SI 2010/469)).

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### **1081. Crown prosecutors.**

The Director of Public Prosecutions<sup>1</sup> may designate any member of the Crown Prosecution Service who has a general qualification<sup>2</sup>, and any person so designated is known as a Crown prosecutor<sup>3</sup>. The Director must divide England and Wales into areas and, for each of those areas, designate a Crown prosecutor and any person so designated is known as a Chief Crown Prosecutor<sup>4</sup>.

Without prejudice to any functions which may have been assigned to him in his capacity as a member of the Service, every Crown prosecutor has all the powers of the Director as to the institution and conduct of proceedings<sup>5</sup> but must exercise those powers under the direction of the Director<sup>6</sup>.

The Director may designate members of the staff of the Crown Prosecution Service who are not Crown prosecutors<sup>7</sup>. Subject to such exceptions, if any, as may be specified in the designation, a person so designated has such of the following as may be so specified: (1) the powers and rights of audience of a Crown prosecutor in relation to: (a) applications for, or relating to, bail in criminal proceedings<sup>8</sup>; (b) the conduct of criminal proceedings in magistrates' courts other than trials<sup>9</sup>; (2) the powers of a Crown prosecutor in relation to the conduct of criminal proceedings not falling within head (1)(b) above<sup>10</sup>. Any such powers are to be exercised subject to instructions given to the designated person by the Director; and any such instructions may be given so as to apply generally<sup>11</sup>.

1 As to the Director of Public Prosecutions see PARA 1066 ante.

2 The meaning of the Courts and Legal Services Act 1990 s 71, which provides that a 'general qualification' means a right of audience in relation to any class of proceedings in the Supreme Court, or all proceedings in a county or magistrates' court (see s 71(3)(c); and COURTS vol 10 (Reissue) PARA 530). As from a day to be appointed the Supreme Court is renamed the Senior Courts and s 71(3)(c) is amended accordingly: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 4 (not yet in force); and COURTS. At the date at which this volume states the law no such day had been appointed.

3 Prosecution of Offences Act 1985 s 1(3) (amended by the Courts and Legal Services Act 1990 s 71(2), Sch 10 para 61(1)).

4 Prosecution of Offences Act 1985 s 1(4). The Director of Public Prosecutions may, from time to time, vary the division of England and Wales so made: s 1(5).

5 For the meaning of references to the conduct of proceedings see PARA 1080 note 2 ante.

6 Prosecution of Offences Act 1985 s 1(6).

7 Ibid s 7A(1) (s 7A added by the Courts and Legal Services Act 1990 s 114; and substituted by the Crime and Disorder Act 1998 s 53).

8 Prosecution of Offences Act 1985 s 7A(2)(a)(i) (as added and substituted: see note 7 supra). 'Bail in criminal proceedings' has the same meaning as in the Bail Act 1976 s 1 (see PARA 1166 post), except that for these purposes 'offence' in that definition does not include an offence to which the Prosecution of Offences Act 1985 s 7A(6) (as added and substituted) applies: s 7A(5)(a) (as so added and substituted). 'Criminal proceedings' does not include proceedings for an offence to which s 7A(6) (as added and substituted) applies: s 7A(5)(b) (as so added and substituted). A trial begins with the opening of the prosecution case after the entry of

a plea of not guilty and ends with the conviction or acquittal of the accused: s 7A(5)(c) (as so added and substituted).

Section 7A (as added and substituted) applies to an offence if it is triable only on indictment or is an offence for which the defendant has been sent for trial: s 7A(6) (s 7A as so added and substituted; and s 7A(6) substituted by the Criminal Justice Act 2003 s 41, Sch 3 para 57(1), (2)). At the date at which this volume states the law, the substitution made by the Criminal Justice Act 2003 had been brought into force in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 or s 51A(3)(d) (as added) (see PARAS 1132-1133 post) (see the Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI 2005/1267, art 2(1), (2)(a), Schedule para 1(1)(m)), but no day had been appointed for it to come into effect for remaining purposes. Until such a day is appointed, the Prosecution of Offences Act 1985 s 7A(6) (as added and substituted) applies for those purposes to an offence if it is triable only on indictment, or is an offence: (1) for which the defendant has elected to be tried on indictment; (2) on, which a magistrates' court has decided is more suitable to be so tried; or (3) in respect of which a notice of transfer has been given under the Criminal Justice Act 1987 s 4 (see PARA 1105 post) or the Criminal Justice Act 1991 s 53 (see PARA 1105 post): Prosecution of Offences Act 1985 s 7A(6) (s 7A as so added and substituted; and s 7A(6) amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 49, 50).

Details of the following for any year, namely: (a) the criteria applied by the Director in determining whether to designate persons under the Prosecution of Offences Act 1985 s 7A (as added and substituted); (b) the training undergone by persons so designated; and (c) any general instructions given by the Director under s 7A(4) (as added and substituted) (see the text and note 11 *infra*), must be set out in the Director's report under s 9 (see PARA 1073 ante) for that year: s 7A(7) (s 7A as so added and substituted).

9 Ibid s 7A(2)(a)(ii) (as added and substituted: see note 7 *supra*).

10 Ibid s 7A(2)(b) (as added and substituted: see note 7 *supra*).

11 Ibid s 7A(3), (4) (as added and substituted: see note 7 *supra*).

## **UPDATE**

### **1081 Crown prosecutors**

TEXT AND NOTES--1985 Act s 7A amended: Criminal Justice and Immigration Act 2008 s 55, Sch 28 Pt 4. For transitional provisions and savings see Sch 27 para 21.

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.



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## **1082. Conduct of prosecutions on behalf of the Crown Prosecution Service.**

The Director of Public Prosecutions<sup>1</sup> may at any time appoint a person who is not a Crown prosecutor<sup>2</sup> but who has a general qualification<sup>3</sup> to institute<sup>4</sup> or take over the conduct of such criminal proceedings<sup>5</sup> or extradition proceedings as the Director may assign to him<sup>6</sup>. Any person conducting proceedings so assigned to him has all the powers of a Crown prosecutor but must exercise those powers subject to any instructions given to him by a Crown prosecutor<sup>7</sup>.

1 As to the Director of Public Prosecutions see PARA 1066 ante.

2 As to Crown prosecutors see PARA 1081 ante.

3 As to the meaning of 'general qualification' see PARA 1081 note 1 ante.

4 As to when proceedings are instituted see PARA 1080 note 4 ante.

5 For these purposes, binding over proceedings and proceedings begun by summons issued under the Obscene Publications Act 1959 s 3 (as amended) (see PARA 752 ante) are to be taken to be criminal proceedings: Prosecution of Offences Act 1985 s 15(4), (5). For the meaning of 'binding over proceedings' see PARA 1071 note 1 ante; and for the meaning of references to the conduct of proceedings see PARA 1080 note 2 ante.

6 Ibid s 5(1) (amended by the Courts and Legal Services Act 1990 s 71(2), Sch 10 para 61; and the Extradition Act 2003 s 190(1), (4)). As to prosecutions instituted and conducted otherwise than by the Crown Prosecution Service see PARA 1071 ante.

7 Prosecution of Offences Act 1985 s 5(2).

### **UPDATE**

## **1082 Conduct of prosecutions on behalf of the Crown Prosecution Service**

NOTE 5--1985 Act s 15(4) amended: Criminal Justice and Immigration Act 2008 s 55(6).

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PROSECUTION AUTHORITIES/(2) THE CROWN PROSECUTION SERVICE/1083. Guidelines for Crown prosecutors.

### **1083. Guidelines for Crown prosecutors.**

The Director of Public Prosecutions<sup>1</sup> must issue a Code for Crown Prosecutors<sup>2</sup> giving guidance on general principles to be applied by them:

- 1659 (1) in determining, in any case: (a) whether proceedings for an offence should be instituted or, where proceedings have been instituted<sup>3</sup>, whether they should be discontinued; or (b) what charges should be preferred<sup>4</sup>; and  
1660 (2) in considering, in any case, representation to be made by them to any magistrates' court about the mode of trial suitable for that case<sup>5</sup>.

The Director may from time to time make alterations in the Code<sup>6</sup>. The provisions of the Code must be set out in the Director's report<sup>7</sup> for the year in which the Code is issued and any alteration in the Code must be set out in his report for the year in which the alteration is made<sup>8</sup>.

In addition to the Code, the Crown Prosecution Service and the police have worked together to produce charging standards for various criminal offences, which are intended to ensure greater fairness to individual defendants, and to reduce the need to amend or substitute charges during the course of the proceedings.

- 1 As to the Director of Public Prosecutions see PARA 1066 ante.
- 2 As to Crown prosecutors see PARA 1081 ante.
- 3 As to when proceedings are instituted see PARA 1080 note 4 ante.
- 4 Prosecution of Offences Act 1985 s 10(1)(a).
- 5 Ibid s 10(1)(b).
- 6 Ibid s 10(2).
- 7 The Code is set out under ibid s 9: see PARA 1073 ante.
- 8 Ibid s 10(3).

### **UPDATE**

#### **1083 Guidelines for Crown prosecutors**

NOTE 2--The failure by the Director of Public Prosecutions to promulgate or disclose his policy as to the circumstances in which he would and would not consent to a prosecution for an offence under the Suicide Act 1961 s 2(1) (see PARA 106) is unlawful: *R (on the application of Purdy) v DPP* [2009] UKHL 45, [2009] 4 All ER 1147.

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PROSECUTION AUTHORITIES/(2) THE CROWN PROSECUTION SERVICE/1084. Control of certain fees and expenses etc paid by the Crown Prosecution Service.

#### **1084. Control of certain fees and expenses etc paid by the Crown Prosecution Service.**

The Attorney General may, with the approval of the Treasury, by regulations<sup>1</sup> make such provision as he considers appropriate in relation to:

- 1661 (1) the fees of any legal representative briefed to appear on behalf of the Crown Prosecution Service in any criminal proceedings or extradition proceedings<sup>2</sup>; and
- 1662 (2) the costs and expenses of witnesses attending<sup>3</sup> to give evidence at the instance of the Service and of any other person who in the opinion of the Service necessarily attends for the purpose of the case otherwise than to give evidence<sup>4</sup>.

Such regulations may, in particular, prescribe scales or rates of fees, costs or expenses, and specify conditions for the payment of fees, costs or expenses<sup>5</sup>.

1 As to regulations made under the Prosecution of Offences Act 1985 see PARA 1077 note 2 ante.

2 Ibid s 14(1)(a) (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 52; and the Extradition Act 2003 s 190(1), (5)). 'Legal representative' means an authorised advocate or authorised litigator, as defined by the Courts and Legal Services Act 1990 s 119(1) (see LEGAL PROFESSIONS vol 65 (2008) PARA 498); Prosecution of Offences Act 1985 s 15(1) (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 52). 'Extradition proceedings' means proceedings under the Extradition Act 2003 (see EXTRADITION): Prosecution of Offences Act 1985 s 15(1) (amended by the Extradition Act 2003 s 190(1), (6)).

3 'Attending' means attending at the court or elsewhere: Prosecution of Offences Act 1985 s 14(1B) (added by the Criminal Justice Act 1988 s 166(1)(b)).

4 Prosecution of Offences Act 1985 s 14(1)(b) (amended by the Criminal Justice Act 1988 s 166(1)). The power conferred on the Attorney General by the Prosecution of Offences Act 1985 s 14(1)(b) (as amended) only relates to the costs and expenses of an interpreter if the interpreter is required because of the lack of English of a person attending to give evidence at the instance of the Service: s 14(1A) (added by the Criminal Justice Act 1988 s 166(1)(b)). As to witnesses' costs and expenses see the Crown Prosecution Service (Witnesses Allowances) Regulations 1988, SI 1988/1862; and PARA 2086 et seq post.

5 Prosecution of Offences Act 1985 s 14(2).

#### **UPDATE**

#### **1084 Control of certain fees and expenses etc paid by the Crown Prosecution Service**

NOTE 2--'Legal representative' now means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act) (see LEGAL PROFESSIONS vol 65 (2008) PARA 512): Prosecution of Offences Act 1985 s 15(1) (definition amended by Legal Services Act 2007 Sch 21 para 64).



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### **1085. Delivery of recognisances etc to the Director of Public Prosecutions.**

Where the Director of Public Prosecutions<sup>1</sup> or any Crown prosecutor<sup>2</sup> gives notice to any justice of the peace that he has instituted<sup>3</sup>, or is conducting, any criminal proceedings<sup>4</sup>, the justice must:

- 1663 (1) at the prescribed<sup>5</sup> time and in the prescribed manner<sup>6</sup>; or
- 1664 (2) in a particular case, at the time and in the manner directed by the Attorney General<sup>7</sup>,

send him every recognisance, information, certificate, deposition, document and thing connected with those proceedings which the justice is required by law to deliver to the appropriate officer of the Crown Court<sup>8</sup>.

The Director or, as the case may be, Crown prosecutor must cause anything which is so sent to him to be delivered to the appropriate officer of the Crown Court, and is under the same obligation (on the same payment) to deliver to an applicant copies of anything so sent as that officer<sup>9</sup>.

It is the duty of the designated officer for every magistrates' court to send to the Director a copy of the information and of any depositions and other documents relating to any case in which<sup>10</sup>:

- 1665 (a) a prosecution for an offence before the magistrates' court is withdrawn or is not proceeded with within a reasonable time<sup>11</sup>;
- 1666 (b) the Director does not have the conduct of the proceedings<sup>12</sup>; and
- 1667 (c) there is some ground for suspecting that there is no satisfactory reason for the withdrawal or failure to proceed<sup>13</sup>.

1 As to the Director of Public Prosecutions see PARA 1066 ante.

2 As to Crown prosecutors see PARA 1081 ante.

3 As to when proceedings are instituted see PARA 1080 note 4 ante.

4 For these purposes, binding over proceedings are to be taken to be criminal proceedings: Prosecution of Offences Act 1985 s 15(4). For the meaning of 'binding over proceedings' see PARA 1071 note 1 ante.

5 The Attorney General may make regulations for the purpose of supplementing the provisions of *ibid* s 7; and for these purposes 'prescribed' means prescribed by the regulations: s 7(2). The Prosecution of Offences Regulations 1978, SI 1978/1357, reg 8, which took effect under the Prosecution of Offences Act 1985 s 7 by virtue of the Interpretation Act 1978 s 17(2)(b), were revoked by the Prosecution of Offences (Revocation) Regulations 1997, SI 1997/739. At the date at which this volume states the law no regulations were in force under the Prosecution of Offences Act 1985 s 7(2). As to the making of regulations under the Prosecution of Offences Act 1985 see PARA 1077 note 2 ante.

6 *Ibid* s 7(1)(a).

7 *Ibid* s 7(1)(b).

8 Ibid s 7(1).

9 Ibid s 7(3).

10 Ibid s 7(4) (amended by the Courts Act 2003 s 109(1), Sch 8 para 287(a)).

11 Prosecution of Offences Act 1985 s 7(4)(a) (amended by the Courts Act 2003 s 109(1), Sch 8 para 287(b)).

12 Prosecution of Offences Act 1985 s 7(4)(b).

13 Ibid s 7(4)(c).

## **UPDATE**

### **1085 Delivery of recognisances etc to the Director of Public Prosecutions**

NOTE 4--1985 Act s 15(4) amended: Criminal Justice and Immigration Act 2008 s 55(6).

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### **1086. Investigatory powers of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions.**

The Director of Public Prosecutions<sup>1</sup> and the Director of Revenue and Customs Prosecutions<sup>2</sup> have powers<sup>3</sup> in relation to the giving of disclosure notices<sup>4</sup> in connection with the investigation of specified<sup>5</sup> offences<sup>6</sup> or in connection with a terrorist investigation<sup>7</sup>.

The Director of Public Prosecutions may, to such extent as he may determine, delegate the exercise of these powers to a Crown prosecutor<sup>8</sup>. The Director of Revenue and Customs Prosecutions may, to such extent as he may determine, delegate the exercise of these powers to a Revenue and Customs Prosecutor<sup>9</sup>.

1 As to the Director of Public Prosecutions see PARA 1066 ante.

2 As to the Director of Revenue and Customs Prosecutions see PARA 1068 ante.

3 The powers are conferred by the Serious Organised Crime and Police Act 2005 Pt 2 Ch 1 (ss 60-70).

The same powers are also conferred on the Lord Advocate, and may be delegated to a procurator fiscal: see s 60(1)(c), (4).

4 As to disclosure notices see PARA 1087 post.

5 The specified offences to which the Serious Organised Crime and Police Act 2005 ss 60-70 apply are:

445 (1) any offence listed in the Proceeds of Crime Act 2002 Sch 2 (lifestyle offences, England and Wales: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 393) (Serious Organised Crime and Police Act 2005 s 61(1)(a));

446 (2) any offence listed in the Proceeds of Crime Act 2002 Sch 4 (lifestyle offences, Scotland) (Serious Organised Crime and Police Act 2005 s 61(1)(b));

447 (3) any offence under the Terrorism Act 2000 ss 15-18 (offences relating to fund-raising, money laundering etc: see PARA 390 et seq ante) Serious Organised Crime and Police Act 2005 s 61(1)(c));

448 (4) any offence under the Customs and Excise Management Act 1979 s 170 (fraudulent evasion of duty: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1178) or the Value Added Tax Act 1994 s 72 (offences relating to VAT: see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 316 et seq) which is a qualifying offence (Serious Organised Crime and Police Act 2005 s 61(1)(d));

449 (5) any offence under the Theft Act 1968 s 17 (false accounting: see PARA 316 ante) or any offence at common law of cheating in relation to the public revenue (see PARA 322 ante) which is a qualifying offence (Serious Organised Crime and Police Act 2005 s 61(1)(e));

450 (6) any offence under the Criminal Attempts Act 1981 s 1 (see PARA 79 ante), or in Scotland at common law, of attempting to commit any offence in head (3) supra or any offence in head (4) or head (5) supra which is a qualifying offence (Serious Organised Crime and Police Act 2005 s 61(1)(f));

451 (7) any offence under the Criminal Law Act 1977 s 1 (see PARA 67 ante), or in Scotland at common law, of conspiracy to commit any offence in head (3) supra or any offence in head (4) or

head (5) supra which is a qualifying offence (Serious Organised Crime and Police Act 2005 s 61(1)(g)); and

- 452 (8) in England and Wales, any common law offence of bribery (see PARAS 527-528 ante), any offence under the Public Bodies Corrupt Practices Act 1889 s 1 (corruption in office: see PARA 529 ante), and the first two offences under the Prevention of Corruption Act 1906 s 1 (bribes obtained by or given to agents: see PARA 321 ante) (Serious Organised Crime and Police Act 2005 s 61(1)(h) (added by the Serious Organised Crime and Police Act 2005 (Amendment of Section 61(1)) Order 2006, SI 2006/1629)).

For the purposes of the Serious Organised Crime and Police Act 2005 s 61(1) (as amended), an offence in head (4) or head (5) supra is a qualifying offence if the investigating authority (see PARA 1087 note 1 post) certifies that in his opinion: (a) in the case of an offence in head (4) supra or an offence of cheating the public revenue, the offence involved or would have involved a loss, or potential loss, to the public revenue of an amount not less than £5,000; (b) in the case of an offence under the Theft Act 1968 s 17, the offence involved or would have involved a loss or gain, or potential loss or gain, of an amount not less than £5,000: Serious Organised Crime and Police Act 2005 s 61(2). A document purporting to be a certificate under s 61(2) is to be received in evidence and treated as such a certificate unless the contrary is proved: s 61(3).

The Secretary of State has power by order:

- 453 (i) to amend s 61(1) (as amended), in its application to England and Wales, so as to remove an offence from it or add an offence to it (s 61(4)(a));
- 454 (ii) to amend s 61(2), in its application to England and Wales, so as to take account of any amendment made by virtue of head (i), or vary the sums for the time being specified in heads (a) and (b) supra (s 61(4)(b)).

As to the amending order that has been made see head (8) supra. As to the making of orders under the Serious Organised Crime and Police Act 2005 see PARA 821 note 2 ante.

6 Ibid s 60(1)(a), (b).

7 Ibid s 60(1) (s 60(1) amended, and s 60(7) added, by the Terrorism Act 2006 s 33(1), (2)). 'Terrorist investigation' means an investigation of the commission, preparation or instigation of acts of terrorism (Serious Organised Crime and Police Act 2005 s 60(7)(a) (as so added)), any act or omission which appears to have been for the purposes of terrorism and which consists in or involves the commission, preparation or instigation of an offence (s 60(7)(b) (as so added)) or the commission, preparation or instigation of an offence under the Terrorism Act 2000 or under the Terrorism Act 2006 Pt 1 (ss 1-20) (see PARA 383 et seq ante) other than an offence under s 1 or s 2 (encouragement of terrorism and dissemination of terrorist publications: see PARAS 448-450 ante) (Serious Organised Crime and Police Act 2005 s 60(7)(c) (as so added)). For these purposes, 'act of terrorism' includes anything constituting an action taken for the purposes of terrorism, within the meaning of the Terrorism Act 2000 (see s 1(5); and PARA 383 ante): Serious Organised Crime and Police Act 2005 s 70(1) (amended by the Terrorism Act 2006 s 33(4)).

8 Serious Organised Crime and Police Act 2005 s 60(2). As to the meaning of 'Crown prosecutor' see PARA 1081 ante.

9 Ibid s 60(3). As to 'Revenue and Customs Prosecutor' see PARA 1097 post.



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# **1087. Disclosure notices.**

If it appears to the investigating authority<sup>1</sup>:

- 1668 (1) that there are reasonable grounds for suspecting that a specified offence<sup>2</sup> has been committed<sup>3</sup>;
- 1669 (2) that any person has information, whether or not contained in a document<sup>4</sup>, which relates to a matter relevant to the investigation of that offence<sup>5</sup>; and
- 1670 (3) that there are reasonable grounds for believing that information which may be provided by that person in compliance with a disclosure notice is likely to be of substantial value, whether or not by itself, to that investigation<sup>6</sup>,

he may give<sup>7</sup>, or authorise an appropriate person<sup>8</sup> to give, a disclosure notice<sup>9</sup> to that person<sup>10</sup>.

If it appears to the investigating authority:

- 1671 (a) that any person has information (whether or not contained in a document) which relates to a matter relevant to a terrorist investigation<sup>11</sup>; and
- 1672 (b) that there are reasonable grounds for believing that information which may be provided by that person in compliance with a disclosure notice is likely to be of substantial value (whether or not by itself) to that investigation<sup>12</sup>,

he may give, or authorise an appropriate person to give, a disclosure notice to that person<sup>13</sup>.

Where a disclosure notice has been so given<sup>14</sup>, an authorised person<sup>15</sup> may take copies of or extracts from any documents produced in compliance with the notice<sup>16</sup>, and require the person producing them to provide an explanation of any of them<sup>17</sup>. Documents so produced may be retained for so long as the investigating authority considers that it is necessary to retain them, rather than copies of them, in connection with the investigation for the purposes of which the disclosure notice was given<sup>18</sup>. If the investigating authority has reasonable grounds for believing that any such documents may have to be produced for the purposes of any legal proceedings, and that they might otherwise be unavailable for those purposes, they may be retained until the proceedings are concluded<sup>19</sup>. If a person who is required by a disclosure notice to produce<sup>20</sup> any documents does not produce the documents in compliance with the notice, an authorised person may require that person to state, to the best of his knowledge and belief, where they are<sup>21</sup>.

A person commits an offence if, without reasonable excuse, he fails to comply with any requirement imposed on him under<sup>22</sup> the above provisions<sup>23</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>24</sup> or to a fine not exceeding level five on the standard scale<sup>25</sup> or to both<sup>26</sup>.

A person commits an offence if, in purported compliance with any requirement imposed on him under the above provisions<sup>27</sup> he makes a statement which is false or misleading, and he either knows that it is false or misleading or is reckless as to whether it is false or misleading<sup>28</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to

imprisonment for a term not exceeding six months<sup>29</sup> or to a fine not exceeding the statutory maximum<sup>30</sup> or to both<sup>31</sup>.

A person may not be required<sup>32</sup>:

- 1673 (i) to answer any privileged question<sup>33</sup>;
- 1674 (ii) to provide any privileged information<sup>34</sup>; or
- 1675 (iii) to produce any privileged document<sup>35</sup>,

except that a lawyer may be required to provide the name and address of a client of his<sup>36</sup>. In addition, a person may not be required<sup>37</sup> to produce any excluded material<sup>38</sup>.

A person may not be required<sup>39</sup> to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business, unless the person to whom the obligation of confidence is owed consents to the disclosure or production, or the requirement is made by, or in accordance with a specific authorisation given by, the investigating authority<sup>40</sup>.

A statement made by a person<sup>41</sup> in response to a requirement ('the relevant statement') may not be used in evidence against him in any criminal proceedings unless: (A) the person is being prosecuted for a particular offence<sup>42</sup>; or (B) the person is being prosecuted for some other offence and the person, when giving evidence in the proceedings, makes a statement inconsistent with the relevant statement, and in the proceedings evidence relating to the relevant statement is adduced, or a question about it is asked, by or on behalf of the person<sup>43</sup>.

1 For these purposes, 'the investigating authority' means the Director of Public Prosecutions or the Director of Revenue and Customs Prosecutions (or the Lord Advocate): Serious Organised Crime and Police Act 2005 s 60(5). However, in circumstances where the powers of any of those persons are exercisable by any other person (ie by virtue of s 60(2), (3) or (4): see PARA 1086 ante) references to 'the investigating authority' accordingly include any such other person: s 60(6).

2 Ie an offence to which ibid ss 60-70 apply: see PARA 1086 note 5 ante.

3 Ibid s 62(1)(a).

4 For the purposes of ibid ss 60-70, 'document' includes information stored otherwise than in legible form: s 70(1).

5 Ibid s 62(1)(b).

6 Ibid s 62(1)(c).

7 A disclosure notice may be given to a person by delivering it to him, leaving it at his proper address, or sending it by post to him at that address: ibid s 69(1), (2). The notice may be given:

455 (1) in the case of a body corporate, to the secretary or clerk of that body (s 69(3)(a));

456 (2) in the case of a partnership, to a partner or a person having the control or management of the partnership business (s 69(3)(b));

457 (3) in the case of an unincorporated association (other than a partnership), to an officer of the association (s 69(3)(c)).

For the purposes of s 69 and the Interpretation Act 1978 s 7 (service of documents by post) in its application to s 69, the proper address of a person is his usual or last-known address (whether residential or otherwise), except that:

458 (a) in the case of a body corporate or its secretary or clerk, it is the address of the registered office of that body or its principal office in the United Kingdom (Serious Organised Crime and Police Act 2005 s 69(4)(a));

459 (b) in the case of a partnership, a partner or a person having the control or management of the partnership business, it is that of the principal office of the partnership in the United Kingdom (s 69(4)(b)); and

460 (c) in the case of an unincorporated association (other than a partnership) or an officer of the association, it is that of the principal office of the association in the United Kingdom (s 69(4)(c)).

8 For the purposes of *ibid* ss 60-70, 'appropriate person' means a constable, a member of the staff of the Serious and Organised Crime Agency who is for the time being designated under s 43 (see *POLICE* vol 36(1) (2007 Reissue) PARA 470), or an officer of Revenue and Customs: s 62(2). As to officers of Revenue and Customs see PARA 354 note 2 ante.

9 For the purposes of *ibid* ss 60-70, 'disclosure notice' means a notice in writing requiring the person to whom it is given to do all or any of the following things in accordance with the specified requirements, namely: (1) answer questions with respect to any matter relevant to the investigation; (2) provide information with respect to any such matter as is specified in the notice; (3) produce such documents, or documents of such descriptions, relevant to the investigation as are specified in the notice: s 62(3). 'The specified requirements' means such requirements specified in the disclosure notice as relate to the time at or by which, the place at which, or the manner in which, the person to whom the notice is given is to do any of the things mentioned in heads (1)-(3) *supra*; and those requirements may include a requirement to do any of those things at once: s 62(4). A disclosure notice must be signed or counter-signed by the investigating authority: s 62(5).

10 *Ibid* s 62(1). Section 62 has effect subject to s 64 (see the text and notes 33-40 *infra*): s 62(6).

11 *Ibid* s 62(1A)(a) (s 62(1A) added by the Terrorism Act 2006 s 33(1), (3)). For the meaning of 'terrorist investigation' see PARA 1086 note 7 ante.

12 Serious Organised Crime and Police Act 2005 s 62(1A)(b) (as added: see note 11 *supra*).

13 *Ibid* s 62(1A) (as added: see note 11 *supra*).

14 *Ie* under *ibid* s 62 (as amended): s 63(1). Section 63 has effect subject to s 64 (see the text and notes 33-40 *infra*): s 63(7).

15 *Ie* any appropriate person who either is the person by whom the notice was given, or is authorised by the investigating authority for the purposes of *ibid* s 63: s 63(6).

16 *Ibid* s 63(2)(a).

17 *Ibid* s 63(2)(b).

18 *Ibid* s 63(3).

19 *Ibid* s 63(4).

20 In relation to information recorded otherwise than in legible form, any reference in *ibid* ss 60-70 to the production of documents is a reference to the production of a copy of the information in legible form: s 70(2).

21 *Ibid* s 63(5).

22 *Ie* under *ibid* s 62 (as amended) or s 63.

23 *Ibid* s 67(1).

24 In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) the reference to a period of imprisonment of six months is to be read as a reference to a period of imprisonment of 51 weeks: see the Serious Organised Crime and Police Act 2005 ss 67(4), 175(1), (3).

25 As to the standard scale see *SENTENCING AND DISPOSITION OF OFFENDERS* vol 92 (2010) PARA 142.

26 Serious Organised Crime and Police Act 2005 ss 67(4), 175(1), (3).

27 *Ie* under *ibid* s 62 (as amended) or s 63.

28 *Ibid* s 67(2). 'False or misleading' means false or misleading in a material particular: s 67(2).

29 In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 154(1) (not yet in force) the reference to a period of imprisonment of six months is to be read as a reference to a

period of imprisonment of 12 months: see the Serious Organised Crime and Police Act 2005 ss 67(5), 175(1), (2).

30 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

31 Serious Organised Crime and Police Act 2005 ss 67(5), 175(1), (2).

32 Ie under ibid s 62 (as amended) or s 63.

33 Ibid s 64(1)(a). A 'privileged question' is a question which the person would be entitled to refuse to answer on grounds of legal professional privilege in proceedings in the High Court: s 64(2).

34 Ibid s 64(1)(b). 'Privileged information' is information which the person would be entitled to refuse to provide on grounds of legal professional privilege in such proceedings: s 64(3).

35 Ibid s 64(1)(c). A 'privileged document' is a document which the person would be entitled to refuse to produce on grounds of legal professional privilege in such proceedings: s 64(4).

36 Ibid s 64(1).

37 Ie under ibid s 62 (as amended).

38 Ibid s 64(5). For these purposes, 'excluded material' is excluded material as defined by the Police and Criminal Evidence Act 1984 s 11 (see PARA 875 ante): Serious Organised Crime and Police Act 2005 s 64(5).

39 Ie under ibid s 62 (as amended) or s 63.

40 Ibid s 64(8). Subject to the preceding provisions of s 64, any requirement under s 62 (as amended) or s 63 has effect despite any restrictions on disclosure, however imposed: s 64(9).

41 Ie in response to a requirement imposed under ibid s 62 (as amended) or s 63.

42 Ie where the person is being prosecuted for an offence under ibid s 67, for an offence under the Perjury Act 1911 s 5 (false statements made on oath otherwise than in judicial proceedings or made otherwise than on oath: see PARA 717 ante), or for an offence under the False Oaths (Scotland) Act 1933 s 2: Serious Organised Crime and Police Act 2005 s 65(2).

43 Ibid s 65(1)-(3).

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### **1088. Power to enter and seize documents.**

A justice of the peace may issue a warrant if, on an information on oath laid by the investigating authority<sup>1</sup>, he is satisfied that any of the conditions mentioned in heads (1) to (3) below is met in relation to any documents of a description specified in the information<sup>2</sup>, and that the documents are on premises so specified<sup>3</sup>. The conditions are:

- 1676 (1) that a person has been required by a disclosure notice to produce the documents but has not done so<sup>4</sup>;
- 1677 (2) that it is not practicable to give a disclosure notice requiring their production<sup>5</sup>;
- 1678 (3) that giving such a notice might seriously prejudice the investigation of an offence to which the relevant provisions apply<sup>6</sup>.

Such a warrant is a warrant authorising an appropriate person named in it:

- 1679 (a) to enter and search the premises, using such force as is reasonably necessary<sup>7</sup>;
- 1680 (b) to take possession of any documents appearing to be documents of a description specified in the information, or to take any other steps which appear to be necessary for preserving, or preventing interference with, any such documents<sup>8</sup>;
- 1681 (c) in the case of any such documents consisting of information recorded otherwise than in legible form, to take possession of any computer disk or other electronic storage device which appears to contain the information in question, or to take any other steps which appear to be necessary for preserving, or preventing interference with, that information<sup>9</sup>;
- 1682 (d) to take copies of or extracts from any documents or information falling within head (b) or head (c) above<sup>10</sup>;
- 1683 (e) to require any person on the premises to provide an explanation of any such documents or information or to state where any such documents or information may be found<sup>11</sup>;
- 1684 (f) to require any such person to give the appropriate person such assistance as he may reasonably require for the taking of copies or extracts as mentioned in head (d) above<sup>12</sup>.

A person commits an offence if he wilfully obstructs any person in the exercise of any rights conferred by such a warrant<sup>13</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months<sup>14</sup> or to a fine not exceeding level five on the standard scale<sup>15</sup> or to both<sup>16</sup>.

1 For the meaning of 'the investigating authority' see PARA 1087 note 1 ante.

2 Serious Organised Crime and Police Act 2005 s 66(1)(a).

3 Ibid s 66(1)(b).

4 Ibid s 66(2)(a).

5 Ibid s 66(2)(b).

6 Ibid s 66(2)(c). The 'relevant provisions' referred to in the text are those of ss 60-70 (as amended) (see PARAS 1086-1087 ante).

7 Ibid s 66(3)(a).

8 Ibid s 66(3)(b).

9 Ibid s 66(3)(c).

10 Ibid s 66(3)(d).

11 Ibid s 66(3)(e).

12 Ibid s 66(3)(f). A person executing a warrant under s 66 may take other persons with him, if it appears to him to be necessary to do so: s 66(4). A warrant must, if so required, be produced for inspection by the owner or occupier of the premises or anyone acting on his behalf: s 66(5). If the premises are unoccupied or the occupier is temporarily absent, a person entering the premises under the authority of a warrant must leave the premises as effectively secured against trespassers as he found them: s 66(6).

Where possession of any document or device is taken under s 66, then: (1) the document may be retained for so long as the investigating authority considers that it is necessary to retain it (rather than a copy of it) in connection with the investigation for the purposes of which the warrant was sought; or (2) the device may be retained for so long as he considers that it is necessary to retain it in connection with that investigation: s 66(7).

If the investigating authority has reasonable grounds for believing that any such document or device may have to be produced for the purposes of any legal proceedings, and that it might otherwise be unavailable for those purposes, it may be retained until the proceedings are concluded: s 66(8). Nothing in s 66 authorises a person to take possession of, or make copies of or take extracts from, any document or information which, by virtue of s 64 (see PARA 1087 ante), could not be required to be produced or disclosed under s 62 (as amended) or s 63 (see PARA 1087 ante): s 66(9).

13 Ibid s 67(3).

14 In relation to an offence committed after the commencement of the Criminal Justice Act 2003 s 281(5) (not yet in force) the reference to a period of imprisonment of six months is to be read as a reference to a period of imprisonment of 51 weeks: see the Serious Organised Crime and Police Act 2005 ss 67(4), 175(1), (3).

15 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

16 Serious Organised Crime and Police Act 2005 ss 67(4), 175(1), (3).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/15.

PROSECUTION AUTHORITIES/(3) THE SERIOUS FRAUD OFFICE/1089. Functions of the Director of the Serious Fraud Office.

### **(3) THE SERIOUS FRAUD OFFICE**

#### **1089. Functions of the Director of the Serious Fraud Office.**

A Serious Fraud Office must be constituted for England and Wales and Northern Ireland<sup>1</sup>. The Director of the Serious Fraud Office<sup>2</sup> must appoint such staff for the Serious Fraud Office as, with the approval of the Treasury as to numbers, remuneration and other terms and conditions of service, he considers necessary for the discharge of his functions<sup>3</sup>.

The Director may investigate any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud<sup>4</sup>; and he must discharge such other functions in relation to fraud as may from time to time be assigned to him by the Attorney General<sup>5</sup>. If he thinks fit, the Director may conduct any such investigation in conjunction either with the police or with any other person who is, in the opinion of the Director, a proper person to be concerned in it<sup>6</sup>.

The Director may: (1) institute and have the conduct of any criminal proceedings<sup>7</sup> which appear to him to relate to such fraud<sup>8</sup>; and (2) take over the conduct of any such proceedings at any stage<sup>9</sup>. The Director may designate for these purposes any member of the Serious Fraud Office who is a barrister in England and Wales or Northern Ireland, a solicitor of the Supreme Court or a solicitor of the Supreme Court of Judicature of Northern Ireland<sup>10</sup>; and any member so designated has, without prejudice to any functions which may have been assigned to him in his capacity as a member of the Serious Fraud Office, all the powers of the Director as to the institution and conduct of proceedings but must exercise those powers under the direction of the Director<sup>11</sup>.

1 Criminal Justice Act 1987 s 1(1).

2 As to the Director of the Serious Fraud Office see PARA 1067 ante.

3 Criminal Justice Act 1987 s 1(15), Sch 1 para 2.

4 Ibid s 1(3). An investigation under s 1 may continue even after the person under investigation has been charged: *R v Director of Serious Fraud Office, ex p Saunders* [1988] Crim LR 837, DC. See also *R (on the application of Birmingham) v Serious Fraud Office* [2006] EWHC 200 (Admin), [2006] 3 All ER 239.

5 Criminal Justice Act 1987 s 1(6).

6 Ibid s 1(4).

7 For these purposes, references to the conduct of any proceedings include references to the proceedings being discontinued and to the taking of any steps (including the bringing of appeals and making of representations in respect of applications for bail) which may be taken in relation to them: *ibid* s 1(16).

8 Ibid s 1(5)(a).

9 Ibid s 1(5)(b).

10 Ibid s 1(7). As from a day to be appointed the Supreme Court is renamed the Senior Courts and the Supreme Court of Judicature of Northern Ireland is renamed the Court of Judicature of Northern Ireland and s

1(7) is amended accordingly: see the Constitutional Reform Act 2005 s 59(5), Sch 11 paras 4, 5 (not yet in force); and COURTS. At the date at which this volume states the law no such day had been appointed.

11 Criminal Justice Act 1987 s 1(8).

## **UPDATE**

### **1089 Functions of the Director of the Serious Fraud Office**

TEXT AND NOTES--The Director has the functions conferred on him by, or in relation to, the Proceeds of Crime Act 2002 Pt 5 or 8 (civil recovery of the proceeds etc of unlawful conduct, civil recovery investigations and disclosure orders in relation to confiscation investigations): 1987 Act s 1(6A) (added by Serious Crime Act 2007 Sch 8 para 152).

NOTE 10--Appointed day is 1 October 2009: SI 2009/1604.



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### **1090. Investigative powers of the Director of the Serious Fraud Office.**

The Director of the Serious Fraud Office<sup>1</sup> may by notice in writing:

- 1685 (1) require the person whose affairs are to be investigated ('the person under investigation') or any other person whom he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith<sup>2</sup>;
- 1686 (2) require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith, or at such time as may be so specified, any specified documents<sup>3</sup> which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate; and: (a) if such documents are produced the Director may take copies or extracts from them, and require the person producing them to provide an explanation of any of them; (b) if any such documents are not produced, the Director may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are<sup>4</sup>.

The above powers of the Director are exercisable for the purposes of an investigation into any suspected offence which appears to him on reasonable grounds to involve serious or complex fraud<sup>5</sup>, or, on a request made by an authority entitled to make such a request<sup>6</sup>, in any case in which it appears to him that there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person<sup>7</sup>.

A person must not be required to disclose any information or produce any document which he would be required to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court, except that a lawyer may be required to furnish the name and address of his client<sup>8</sup>. A person must not be required to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business unless: (i) the person to whom the obligation of confidence is owed consents to the disclosure or production; or (ii) the Director has authorised the making of the requirement or, if it is impracticable for him to act personally, a member of the Serious Fraud Office designated by him for these purposes has done so<sup>9</sup>.

A statement made by a person in response to a requirement imposed under the above provisions may only be used in evidence against him: (A) on a prosecution for an offence of making a false or misleading statement<sup>10</sup>; or (B) on a prosecution for some other offence where in giving evidence he makes a statement inconsistent with it<sup>11</sup>. However, the statement may not be used against the person by virtue of head (B) above unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of that person in the proceedings arising out of the prosecution<sup>12</sup>.

Any evidence obtained by the Director for use by an overseas authority must be given to the overseas authority which requested it or given to the Secretary of State for forwarding to that overseas authority<sup>13</sup>. Where any evidence obtained by the Director for use by an overseas

authority consists of a document the original or a copy must be forwarded, and where it consists of any other article the article itself or a description, photograph or other representation of it must be forwarded, as may be necessary in order to comply with the request of the overseas authority<sup>14</sup>.

1 As to the Director of the Serious Fraud Office see PARA 1067 ante.

2 Criminal Justice Act 1987 s 2(2) (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 paras 112, 113(1)). As to enforcement procedures see PARA 1091 post.

3 For these purposes, 'documents' includes information recorded in any form and, in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form: Criminal Justice Act 1987 s 2(18). As to concealment etc of documents see PARA 1093 post.

4 Ibid s 2(3) (amended by the Criminal Justice Act 1988 Sch 15 paras 112, 113(2)). The power to require production of documents remains exercisable even after the person under investigation has been charged: *R v Director of Serious Fraud Office, ex p Saunders* [1988] Crim LR 837, DC (obiter). As to the Director's obligation to provide an interviewee with advance information of the subject matter of the interview see *R v Serious Fraud Office, ex p Maxwell (Kevin)* (1992) Times, 9 October, DC (there is no obligation of disclosure in respect of the investigative process instigated by the Director). The investigative powers of the Director do not cease after the person under investigation has been charged: *R v Director of the Serious Fraud Office, ex p Smith* [1993] AC 1, 95 Cr App Rep 191, HL. The Director may re-interview witnesses even after the delivery of a case statement by the defence: *R v Nadir, R v Turner* [1993] 4 All ER 513, 98 Cr App Rep 163, CA. A court has no power to require liquidators of an insolvent company not to comply with a notice by the Serious Fraud Office requesting transcripts of an examination conducted under the Insolvency Act 1986 s 236 (see company and partnership insolvency vol 7(4) (2004 Reissue) PARA 679); it is for the judge at the criminal trial to determine whether such a transcript should be admitted at that trial: *Re Arrows Ltd (No 4), Hamilton v Naviede* [1995] 2 AC 75, [1995] 1 Cr App Rep 95, HL. As to the relationship between the Criminal Justice Act 1987 s 2(3) (as amended) and the restriction on the collateral use of disclosed documents under CrimPR 31.22 see *Marlwood Commercial Inc v Kozeny* [2004] EWCA Civ 798, [2004] 3 All ER 648, [2005] 1 WLR 104 (in the absence of other factors the court's discretion should be exercised in favour of compliance with a notice under the Criminal Justice Act 1987 s 2(3) (as amended)). As to non-compliance with a requirement under the Criminal Justice Act 1987 s 2 (as amended) see PARA 1092 post.

5 Ie under ibid s 1: see PARA 1089 ante.

6 The authorities entitled to request the Director to exercise his powers under ibid s 2 (as amended) are:

461 (1) the Attorney General of the Isle of Man, Jersey or Guernsey, acting under legislation corresponding to the Criminal Justice Act 1987 s 1 and having effect in the Island whose Attorney General makes the request (s 2(1A)(a) (s 2(1A) added by the Criminal Justice and Public Order Act 1994 s 164(2)(c)); and

462 (2) the Secretary of State acting under the Crime (International Co-operation) Act 2003 s 15(2) (see PARA 906 ante), in response to a request received by him from a person mentioned in s 13(2) (an 'overseas authority') (see PARA 904 ante) (Criminal Justice Act 1987 s 2(1A)(b) (s 2(1A) as so added; and s 2(1A)(b) substituted by the Crime (International Co-operation) Act 2003 s 91(1), Sch 5 paras 11, 12)).

'Evidence' (in relation to head (2) supra and the Criminal Justice Act 1987 s 2(8A), (8C) (as added) (see the text and notes 13, 14 infra)) includes documents and other articles: s 2(18) (added by the Criminal Justice and Public Order Act 1994 s 164(2)(d); and amended by the Crime (International Co-operation) Act 2003 Sch 5 paras 11, 12(e), Sch 6). A letter of request under head (2) supra is confidential and no part of it may be disclosed without the requesting authority's consent; thus where such a request is referred to the Director and the Director exercises the power under the Criminal Justice Act 1987 s 2(1A) (as added) to issue a notice, the recipient of the notice is not entitled to disclosure of the request: *R (on the application of Evans) v Director of Serious Fraud Office* [2002] EWHC 2304 (Admin), [2003] 1 WLR 299. Justice can usually be met if, at the time the request for disclosure was made, information as to the nature of the criminal investigation is given by the Director: *R (on the application of Evans) v Director of Serious Fraud Office* supra. Where such a request is referred to the Director, the Director can use the full powers under the Criminal Justice Act 1987 s 2 (as amended), and the power to obtain 'information' is not restricted by the use of the word 'evidence' in the Criminal Justice (International Co-operation) Act 1990 s 4(2A) (repealed: see now the Crime (International Co-operation) Act 2003 s 15; and PARA 906 ante): *R (on the application of Evans) v Director of Serious Fraud Office* supra.

The Director must not exercise his powers on a request from the Secretary of State acting in response to a request received from an overseas authority within the Criminal Justice Act 1987 s 2(1A)(b) (as added and

substituted) (see head (2) supra) unless it appears to the Director on reasonable grounds that the offence in respect of which he has been requested to obtain evidence involves serious or complex fraud: Criminal Justice Act 1987 s 2(1B) (added by the Criminal Justice and Public Order Act 1994 s 164(2)(c)).

7 Criminal Justice Act 1987 s 2(1) (amended by the Criminal Justice Act 1988 s 143; and the Criminal Justice and Public Order Act 1994 s 164(2)(a)).

8 Criminal Justice Act 1987 s 2(9).

9 Ibid s 2(10).

10 Ie under ibid s 2(14): see PARA 1092 post.

11 Ibid s 2(8).

12 Ibid s 2(8AA) (added by the Youth Justice and Criminal Evidence Act 1999 s 59, Sch 3 para 20).

13 Criminal Justice Act 1987 s 2(8A) (added by the Criminal Justice and Public Order Act 1994 s 164(2)(b); and amended by the Crime (International Co-operation) Act 2003 Sch 5 paras 11, 12(b)). The references in the Criminal Justice Act 1987 s 2(8A)-(8C) (as added and amended) to evidence obtained by the Director include references to evidence obtained by him by virtue of the exercise by a constable or by an appropriate person, in the course of a search authorised by a warrant issued under s 2(4) (see PARA 1091 post), of powers conferred by the Criminal Justice and Police Act 2001 s 50 (see PARA 890 ante): Criminal Justice Act 1987 s 2(8D) (added by the Criminal Justice and Police Act 2001 s 70, Sch 2 Pt 2 para 23; and amended by the Criminal Justice Act 2003 s 12, Sch 1 para 13). For these purposes, 'appropriate person' means a member of the Serious Fraud Office or some person who is not such a member but whom the Director of the Serious Fraud Office has authorised to accompany the constable: Criminal Justice Act 1987 s 2(7) (amended by the Criminal Justice Act 2003 Sch 1 para 12).

14 Criminal Justice Act 1987 s 2(8C) (added by the Criminal Justice and Public Order Act 1994 s 164(2)(b); and amended by the Crime (International Co-operation) Act 2003 Sch 5 paras 11, 12(d)).

## **UPDATE**

### **1090 Investigative powers of the Director of the Serious Fraud Office**

TEXT AND NOTES--See also 1987 Act s 2A (added by Criminal Justice and Immigration Act 2008 s 59(2)) (Director's pre-investigation powers in relation to bribery and corruption: foreign officers etc).

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PROSECUTION AUTHORITIES/(3) THE SERIOUS FRAUD OFFICE/1091. Enforcement procedures.

### **1091. Enforcement procedures.**

Where, on information on oath laid by a member of the Serious Fraud Office, a justice of the peace is satisfied, in relation to any documents<sup>1</sup>, that there are reasonable grounds for believing:

- 1687 (1) that: (a) a person has failed to comply with an obligation<sup>2</sup> to produce them;  
(b) it is not practicable to serve a notice<sup>3</sup> in relation to them; or (c) the service of such a notice in relation to them might seriously prejudice the investigation; and  
1688 (2) that they are on premises specified in the information,

he may issue a warrant<sup>4</sup> authorising any constable to enter, using such force as is reasonably necessary for the purpose, and search the premises, and to take possession of any documents appearing to be documents of the description specified in the information or to take in relation to any documents so appearing any other steps which may appear to be necessary for preserving them and preventing interference with them<sup>5</sup>. Unless it is not practicable in the circumstances, a constable executing such a warrant must be accompanied by an appropriate person<sup>6</sup>.

Without prejudice to the power of the Director to assign his functions to members of the Serious Fraud Office<sup>7</sup>, the Director may authorise any competent investigator (other than a constable) who is not such a member to exercise on his behalf all or any of his investigative powers<sup>8</sup>; but no such authority may be granted except for the purpose of investigating the affairs, or any aspect of the affairs, of a person specified in the authority<sup>9</sup>. However, no person is bound to comply with any requirement imposed by a person exercising powers by virtue of any authority so granted unless he has, if required to do so, produced evidence of his authority<sup>10</sup>.

1 For the meaning of 'documents' see PARA 1090 note 3 ante.

2 Ie an obligation under the Criminal Justice Act 1987 s 2 (as amended): see PARA 1090 ante.

3 Ie under ibid s 2(3) (as amended): see PARA 1090 ante.

4 Ibid s 2(4). The grant and execution of a warrant to search and seize is a serious infringement of the liberty of the subject and it is always necessary to consider whether some lesser measure, such as a notice under s 2(3) (as amended) (see PARA 1090 ante), would suffice. If it would not, consideration should be given to obtaining the documents from an alternative untainted source, but where that will involve many inquiries of many institutions which may not be willing or able to produce the information required, the need to assist the investigating authority may well render such resort impractical. If an application is to be made for a warrant, the applicant must give full assistance to the district judge, including drawing to his attention anything that militates against the issue of a warrant. When the Director is seeking a warrant pursuant to a request for mutual legal assistance the warrant need not reflect precisely the wording of the letter of request. When there is an ongoing investigation into the affairs of a company which appears to have been at the centre of a fraud, the warrant must be drafted with sufficient precision to enable both those who executed it and those whose property was affected by it to know whether any individual document or class of documents fell within it. It is desirable to give a district judge from whom a warrant is sought time to pre-read the material relied upon. It should be noted if at the hearing the applicant supplemented the material already provided. The decision of the district judge, which should be briefly reasoned, should also be noted. See *R (on the application of Energy Financing Team Ltd) v Bow Street Magistrates' Court* [2005] 1 EWHC 1626 (Admin), [2005] 4 All ER 285, [2006] 1 WLR 1316, DC.

5 Criminal Justice Act 1987 s 2(5). Where an appropriate person accompanies a constable, he may exercise these powers but only in the company, and under the supervision, of the constable: s 2(6A) (added by the Criminal Justice Act 2003 s 12, Sch 1 para 11).

6 Criminal Justice Act 1987 s 2(6). For the meaning of 'appropriate person' see PARA 1090 note 13 ante.

7 As to the appointment of such staff see PARA 1089 ante.

8 ie the powers conferred under the Criminal Justice Act 1987 s 2 (as amended).

9 Ibid s 2(11).

10 Ibid s 2(12).

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**1092. Failure to comply with the requirements of the Director of the Serious Fraud Office; making false or misleading statements.**

Any person who, without reasonable excuse<sup>1</sup>, fails to comply with a requirement imposed on him by the Director of the Serious Fraud Office in connection with his investigative powers<sup>2</sup> is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months<sup>3</sup> or to a fine not exceeding level five on the standard scale<sup>4</sup> or to both<sup>5</sup>.

A person who, in purported compliance with any such requirement: (1) makes a statement which he knows to be false or misleading in a material particular; or (2) recklessly makes a statement which is false or misleading in a material particular, is guilty of an offence<sup>6</sup> and liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>7</sup> or to a fine not exceeding the statutory maximum<sup>8</sup> or to both<sup>9</sup>.

1 The fact that a person required to answer questions in the course of an inquiry by the Serious Fraud Office is the spouse of the person charged is not in itself a reasonable excuse for failing to answer questions: *R v Director of Serious Fraud Office, ex p Johnson* [1993] COD 58.

A reasonable excuse does not arise for these purposes by reason only of the fact that the defendant has been charged: *R v Metropolitan Stipendiary Magistrate, ex p Serious Fraud Office* (1994) Independent, 24 June, DC.

2 See under the Criminal Justice Act 1987 s 2 (as amended): see PARA 1090 ante.

3 As from a day to be appointed this maximum term is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

4 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

5 See the Criminal Justice Act 1987 s 2(13).

6 See *ibid* s 2(14).

7 As from a day to be appointed this maximum term is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

8 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

9 Criminal Justice Act 1987 s 2(15).

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PROSECUTION AUTHORITIES/(3) THE SERIOUS FRAUD OFFICE/1093. Concealment etc of documents.

### **1093. Concealment etc of documents.**

Where any person: (1) knows or suspects that an investigation by the police or the Serious Fraud Office<sup>1</sup> into serious fraud or complex fraud is being or is likely to be carried out; and (2) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, documents<sup>2</sup> which he knows or suspects are or would be relevant to such an investigation, he is guilty of an offence unless he proves that he had no intention of concealing the facts disclosed by the documents from persons carrying out such an investigation<sup>3</sup>. A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding seven years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>4</sup> or to a fine not exceeding the statutory maximum<sup>5</sup> or to both<sup>6</sup>.

1 As to the Serious Fraud Office see PARA 1089 et seq ante.

2 For these purposes, 'document' includes information recorded in any form: see the Criminal Justice Act 1987 s 2(18).

3 Ibid s 2(16). As to whether 'proves' imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

4 As from a day to be appointed this maximum term is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 post), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force); and PARA 1121 post). At the date at which this volume states the law no such day had been appointed.

5 As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

6 See the Criminal Justice Act 1987 s 2(17).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/15. PROSECUTION AUTHORITIES/(3) THE SERIOUS FRAUD OFFICE/1094. Disclosure of information.

#### **1094. Disclosure of information.**

Where any information to which an obligation<sup>1</sup> of confidentiality applies has been disclosed by Her Majesty's Commissioners for Revenue and Customs to any member of the Serious Fraud Office for the purposes of any prosecution of an offence relating to a former Inland Revenue matter<sup>2</sup>, that information may be disclosed by any member of the Serious Fraud Office:

- 1689 (1) for the purposes of any prosecution of which the Serious Fraud Office has the conduct;
- 1690 (2) to the Revenue and Customs Prosecution Office<sup>3</sup> for the purposes of any prosecution for an offence relating to a former Inland Revenue matter; and
- 1691 (3) to the Director of Public Prosecutions for Northern Ireland for the purposes of any prosecution of an offence relating to a former Inland Revenue matter,

but not otherwise<sup>4</sup>.

Where the Serious Fraud Office has the conduct of any prosecution of an offence which does not relate to inland revenue, the court may not prevent the prosecution from relying on any evidence under the statutory discretion to exclude unfair evidence<sup>5</sup> by reason only of the fact that the information concerned was disclosed by the Commissioners for the purposes of any prosecution of an offence relating to a former Inland Revenue matter<sup>6</sup>.

Where any information is subject to an obligation of secrecy imposed by or under any enactment other than an enactment contained in the Taxes Management Act 1970, the obligation does not have effect to prohibit the disclosure of that information to any person in his capacity as a member of the Serious Fraud Office; but any information so disclosed may only be disclosed by a member of the Serious Fraud Office for the purposes of any prosecution in England and Wales, Northern Ireland or elsewhere and may only be disclosed by such a member if he is designated by the Director for such purposes<sup>7</sup>.

Without prejudice to his power to enter into agreements apart from this provision, the Director may enter into a written agreement for the supply of information to or by him, subject, in either case, to an obligation not to disclose the information concerned otherwise than for a specified purpose<sup>8</sup>.

Subject to specified provisions<sup>9</sup> and to any provision of an agreement for the supply of information which restricts the disclosure of the information supplied, information obtained by any person in his capacity as a member of the Serious Fraud Office may be disclosed by any member of the Serious Fraud Office designated by the Director for these purposes:

- 1692 (a) to any government department or Northern Ireland department or other authority or body discharging its functions on behalf of the Crown (including the Crown in right of Her Majesty's government in Northern Ireland)<sup>10</sup>;
- 1693 (b) to any competent authority<sup>11</sup>;
- 1694 (c) for the purposes of any criminal investigation or criminal proceedings, whether in the United Kingdom or elsewhere<sup>12</sup>; and



1695 (d) for the purposes of assisting any public or other authority for the time being designated for these purposes by an order<sup>13</sup> made by the Secretary of State to discharge any functions which are specified in the order<sup>14</sup>.

1 le information to which the Commissioners for Revenue and Customs Act 2005 s 18 would apply but for s 18(2) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 919).

2 le a matter listed in ibid Sch 1, except for Sch 1 paras 2, 10, 13, 14, 15, 17, 19, 28, 29, 30 (see CUSTOMS AND EXCISE): Criminal Justice Act 1987 s 3(8) (added by the Commissioners for Revenue and Customs Act 2005 s 50, Sch 4 para 35(2)). As to the Commissioners for Revenue and Customs see PARA 354 note 2 ante.

3 As to the Revenue and Customs Prosecution Office see PARA 1097 post.

4 Criminal Justice Act 1987 s 3(1) (amended by the Commissioners for Revenue and Customs Act 2005 Sch 4 para 35(1)).

5 le under the Police and Criminal Evidence Act 1984 s 78: see PARA 1365 post.

6 Criminal Justice Act 1987 s 3(2) (amended by the Commissioners for Revenue and Customs Act 2005 Sch 4 para 35(1)).

7 Criminal Justice Act 1987 s 3(3). Section 3(3) does not override CPR 31.22 (restriction on collateral use of disclosed documents): *Marlwood Commercial Inc v Kozeny, Omega Group Holdings Ltd v Kozeny* [2004] EWCA Civ 798, [2004] 3 All ER 648, [2005] 1 WLR 104.

8 Criminal Justice Act 1987 s 3(4).

9 le ibid s 3(1) (as amended) (see the text and note 4 supra), s 3(3) (see the text and note 7 supra).

10 Ibid s 3(5)(a).

11 Ibid s 3(5)(b). The following are competent authorities for these purposes:

463 (1) an inspector appointed under the Companies Act 1985 Pt XIV (ss 431-453) (as amended) (see COMPANIES vol 15 (2009) PARA 1541 et seq) or the Companies (Northern Ireland) Order 1986, SI 1986/1032, Pt XV (arts 424-446) (Criminal Justice Act 1987 s 3(6)(a));

464 (2) an official receiver (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 31 et seq) (s 3(6)(b));

465 (3) the Accountant in Bankruptcy (s 3(6)(c));

466 (4) the Official Receiver for Northern Ireland (s 3(6)(d) (substituted by the Insolvency (Northern Ireland) Order 1989, SI 1989/2405, art 381, Sch 9 Pt II para 57));

467 (5) a person appointed under:

20. (a) the Financial Services and Markets Act 2000 s 167 (general investigations: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 449) (Criminal Justice Act 1987 s 3(6)(e)(i) (s 3(6)(e), (f) substituted by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 308));

21

21. (b) the Financial Services and Markets Act 2000 s 168 (investigations in particular cases: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 449) (Criminal Justice Act 1987 s 3(6)(e)(ii) (as so substituted));

22

22. (c) the Financial Services and Markets Act 2000 s 169(1)(b) (investigation in support of overseas regulator: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 450) (Criminal Justice Act 1987 s 3(6)(e)(iii) (as so substituted));

23

23. (d) the Financial Services and Markets Act 2000 s 284 (investigations into affairs of certain collective investment schemes: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 683) (Criminal Justice Act 1987 s 3(6)(e)(iv) (as so substituted)); or

24

24. (e) regulations made as a result of the Financial Services and Markets Act 2000 s 262(2)(k) (investigations into open-ended investment companies: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 621) (Criminal Justice Act 1987 s 3(6)(e)(v) (as so substituted)),

25

468 to conduct an investigation (s 3(6)(e) (as so substituted));

469 (6) a body corporate established in accordance with the Financial Services and Markets Act 2000 s 212(1) (compensation scheme manager: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 583) (Criminal Justice Act 1987 s 3(6)(f) (as so substituted));

470 (7) any body having supervisory, regulatory or disciplinary functions in relation to any profession or any area of commercial activity (s 3(6)(l) (amended by the Crime (International Co-operation) Act 2003 ss 80(b), 91(2), Sch 6));

471 (8) any person or body having, under the law of any country or territory outside the United Kingdom, functions corresponding to any of the functions of any person mentioned in any of heads (1)-(7) supra (Criminal Justice Act 1987 s 3(6)(m));

472 (9) any person or body having, under the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485), or any other treaty to which the United Kingdom is a party, the function of receiving information of the kind in question (Criminal Justice Act 1987 s 3(6)(n) (s 3(6)(n), (o) added by the Crime (International Co-operation) Act 2003 s 80(b)); and

473 (10) any person or body having, under the law of any country or territory outside the United Kingdom, the function of receiving information relating to the proceeds of crime (Criminal Justice Act 1987 s 3(6)(o) (as so added)).

12 Ibid s 3(5)(c) (substituted by the Crime (International Co-operation) Act 2003 s 80(a)).

13 Such an order may impose conditions subject to which, and otherwise restrict the circumstances in which, information may be so disclosed: Criminal Justice Act 1987 s 3(7).

14 Ibid s 3(5)(d). The Serious Fraud Office has no general power to disclose to the liquidator of a company information obtained under statutory powers of search and seizure when investigating a fraud involving that company: *Morris v Director of the Serious Fraud Office* [1993] Ch 372, [1993] 1 All ER 788. The power of disclosure must be exercised reasonably, and in good faith; otherwise it can be impugned under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 (right to private life) on the basis that it is not made in accordance with the law for the purposes of art 8(2): *R (on the application of Kent Pharmaceuticals Ltd v Director of Serious Fraud Office* [2004] EWCA Civ 1494, [2005] 1 All ER 449. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. The Serious Fraud Office should normally give the owner of the documents sufficient advance notice of a proposed disclosure to enable him to raise any objection. Where it is not appropriate or practicable to give notice either at all or in time to enable the owner to have an opportunity to respond, the designated member of the Serious Fraud Office, having disclosed the documents, must then consider whether the owner should be told what has happened. The starting point is that the owner is entitled to be kept informed rather than the reverse: *R (on the application of Kent Pharmaceuticals Ltd) v Director of Serious Fraud Office* supra.

## UPDATE

### 1094 Disclosure of information

NOTE 11--Head (1). Criminal Justice Act 1987 s 3(6)(a) amended: SI 2009/1941.

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### **1095. Control of certain fees and expenses etc paid by the Serious Fraud Office.**

The Attorney General may, with the approval of the Treasury, by regulations<sup>1</sup> make such provision as he considers appropriate in relation to: (1) the fees of counsel briefed to appear on behalf of the Serious Fraud Office<sup>2</sup> in any criminal proceedings<sup>3</sup>; and (2) the costs and expenses of witnesses attending to give evidence at the instance of the Serious Fraud Office<sup>4</sup>. Such regulations may, in particular, prescribe scales or rates of fees, costs or expenses, and specify conditions for the payment of fees, costs or expenses<sup>5</sup>.

1 As to the making of regulations under the Criminal Justice Act 1987 Sch 1 see PARA 1078 note 2 ante.

2 As to the Serious Fraud Office see PARA 1089 et seq ante.

3 Criminal Justice Act 1987 s 1(15), Sch 1 para 8(1)(a), (4).

4 Ibid Sch 1 para 8(1)(b). As to witnesses' costs and expenses see the Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863; and PARA 2093 et seq post.

5 Criminal Justice Act 1987 Sch 1 para 8(3).

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### **1096. Delivery of recognisances to the Director of the Serious Fraud Office.**

Where the Director of the Serious Fraud Office<sup>1</sup> or any designated member<sup>2</sup> of the Serious Fraud Office gives notice to any justice of the peace that he has instituted, or is conducting, any criminal proceedings in England and Wales, the justice must: (1) at the prescribed time and in the prescribed manner; or (2) in a particular case, at the time and in the manner directed by the Attorney General, send him every recognisance, information, certificate, deposition, document and thing connected with those proceedings which the justice is required by law to deliver to the appropriate officer of the Crown Court<sup>3</sup>.

1 As to the Director of the Serious Fraud Office see PARA 1067 ante.

2 Ie any member designated for the purposes of the Criminal Justice Act 1987 s 1(5): see PARA 1089 ante.

3 Ibid s 1(15), Sch 1 para 6(1) (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 paras 112, 116). The Attorney General may make regulations for the purpose of supplementing the Criminal Justice Act 1987 Sch 1 para 6(1) (as amended); and in Sch 1 para 6(1) (as amended) 'prescribed' means prescribed by the regulations: Sch 1 para 6(3). As to the making of regulations see PARA 1078 note 2 ante. At the date at which this volume states the law no such regulations had been made.

The Director of the Serious Fraud Office or, as the case may be, the member so designated must, subject to the regulations, cause anything which is sent to him to be delivered to the appropriate officer of the Crown Court, and is under the same obligation (on the same payment) to deliver to an applicant copies of anything so sent as that officer: Sch 1 para 6(4).

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PROSECUTION AUTHORITIES/(4) REVENUE AND CUSTOMS PROSECUTIONS OFFICE/1097.  
Functions of the Director of Revenue and Customs Prosecutions.

## **(4) REVENUE AND CUSTOMS PROSECUTIONS OFFICE**

### **1097. Functions of the Director of Revenue and Customs Prosecutions.**

The Director of Revenue and Customs Prosecutions<sup>1</sup> and such staff as he may appoint<sup>2</sup> are together referred to as the Revenue and Customs Prosecution Office<sup>3</sup>.

The Director institutes<sup>4</sup> and conducts criminal proceedings in England and Wales relating to criminal investigations<sup>5</sup> by the Revenue and Customs<sup>6</sup>, and provides advice in relation to such criminal investigations or criminal proceedings<sup>7</sup>. The Director of Revenue and Customs Prosecutions also institutes and conducts criminal proceedings in England and Wales relating to criminal investigations<sup>8</sup> by the Serious Organised Crime Agency<sup>9</sup> of designated offences<sup>10</sup> and provides advice in relation to such criminal investigations or criminal proceedings that arise out of such investigations<sup>11</sup>. The Director of Revenue and Customs Prosecutions acting jointly with the Director of Public Prosecutions may also give directions to the Serious Organised Crime Agency for enabling it to determine which cases to refer to the appropriate prosecutor<sup>12</sup>.

Subject to specified exceptions<sup>13</sup>, it is an offence for the Revenue and Customs Prosecutions Office to disclose information held by it in connection with any of its functions, which relates to a person whose identity is specified in the disclosure or can be deduced from it<sup>14</sup>. A person found guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding six months<sup>15</sup> or to a fine not exceeding the statutory maximum<sup>16</sup> or to both<sup>17</sup>.

1 As to the Director of Revenue and Customs Prosecutions see PARA 1068 ante.

2 As to the appointment of staff see the Commissioners for Revenue and Customs Act 2005 s 34(2); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1192; INCOME TAXATION.

3 See s 34(3); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1192; INCOME TAXATION.

4 As to the institution of proceedings see the Prosecution of Offences Act 1985 s 15(2); and PARA 1080 ante (applied by the Commissioners for Revenue and Customs Act 2005 s 35(5)(a)). See CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1193; INCOME TAXATION.

5 For these purposes, 'criminal investigation' means any process: (1) for considering whether an offence has been committed; (2) for discovering by whom an offence has been committed; or (3) as a result of which an offence is alleged to have been committed: *ibid* s 35(5)(b).

6 For these purposes, 'Revenue and Customs' is a reference to: (1) the Commissioners for Her Majesty's Revenue and Customs; (2) an officer of Revenue and Customs; and (3) a person acting on behalf of the Commissioners or an officer of Revenue and Customs: see *ibid* s 35(3). See PARA 354 note 2 ante; and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1193; INCOME TAXATION.

7 See *ibid* s 35; and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1193; INCOME TAXATION. Functions may also be assigned to the Director by the Attorney General by order: see s 35(4); and CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1193; INCOME TAXATION.

8 For these purposes, 'criminal investigation' means any process: (1) for considering whether an offence has been committed; (2) for discovering by whom an offence has been committed; or (3) as a result of which an offence is alleged to have been committed: *ibid* s 38(7)(a).

9 The Serious Organised Crime Agency ('SOCA') is established under the Serious Organised Crime and Police Act 2005 s 1: see *POLICE* vol 36(1) (2007 Reissue) PARA 430 et seq.

10 For these purposes, an offence is a 'designated offence' if criminal proceedings instituted by the Serious Organised Crime Agency in respect of the offence fall (or, as the case may be, would fall) to be referred to the Director of Revenue and Customs Prosecutions by virtue of directions under the Serious Organised Crime and Police Act 2005 s 39(1) (see *POLICE* vol 36(1) (2007 Reissue) PARA 468): s 38(7)(b).

11 See *ibid* s 38; and *POLICE* vol 36(1) (2007 Reissue) PARA 467.

12 See *ibid* s 39; and *POLICE* vol 36(1) (2007 Reissue) PARA 468.

13 The Commissioners for Revenue and Customs Act 2005 s 40(2) provides circumstances under which s 40(1) does not apply: see s 40(2); and *CUSTOMS AND EXCISE* vol 12(3) (2007 Reissue) PARA 1195; *INCOME TAXATION*. See also ss 40(5), 41(4); and *CUSTOMS AND EXCISE* vol 12(3) (2007 Reissue) PARA 1195; *INCOME TAXATION*.

14 See *ibid* s 40; and *CUSTOMS AND EXCISE* vol 12(3) (2007 Reissue) PARA 1195; *INCOME TAXATION*.

15 After the commencement of the Criminal Justice Act 2003 s 282 (not yet in force), the reference to a maximum term of imprisonment of six months is to be read as if it were a reference to 12 months: see the Commissioners for Revenue and Customs Act 2005 ss 40(6), 55(7).

16 As to the statutory maximum see *SENTENCING AND DISPOSITION OF OFFENDERS* vol 92 (2010) PARA 140.

17 Commissioners for Revenue and Customs Act 2005 ss 40(6), 55(7); and *CUSTOMS AND EXCISE* vol 12(3) (2007 Reissue) PARA 1195; *INCOME TAXATION*.

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## **16. HEARING, PLEA AND ALLOCATION OF PROCEEDINGS**

### **(1) INTRODUCTION**

#### **1098. Jurisdiction of justices.**

A magistrates' court<sup>1</sup> has jurisdiction to try any summary offence<sup>2</sup>. A magistrates' court has jurisdiction under the provisions relating to sending for trial<sup>3</sup> in respect of any offence committed by a person who appears or is brought before the court<sup>4</sup>. Subject to provisions relating to the allocation of trial<sup>5</sup>, and to any other enactment relating to the mode of trial of offences triable either way<sup>6</sup>, a magistrates' court has jurisdiction to try summarily any offence which is triable either way<sup>7</sup>. Where the defendant is under 18<sup>8</sup>, a magistrates' court has jurisdiction<sup>9</sup> to try summarily an indictable offence<sup>10</sup>.

The Criminal Procedure Rules relating to active case management apply to each case in a magistrates' court<sup>11</sup>.

1 For these purposes, the expression 'magistrates' court' means any justice or justices of the peace acting under any enactment or by virtue of his or their commission or under the common law: Magistrates' Courts Act 1980 s 148(1). Except where the contrary is expressed, anything authorised or required by the Magistrates' Courts Act 1980 to be done by, to or before the magistrates' court by, to or before which any other thing was done, or is to be done, may be done by, to or before any magistrates' court acting in the same local justice area as that court: s 148(2) (amended by the Courts Act 2003 s 109(1), Sch 8 para 248). As to the powers of a magistrates' court for any area which may be exercised by a single justice of the peace for that area see the Crime and Disorder Act 1998 s 49 (as amended); and MAGISTRATES vol 29(2) (Reissue) PARA 540. The reference in the Magistrates' Courts Act 1980 s 148(2) (as amended) to the Magistrates' Courts Act 1980 includes a reference to the Criminal Procedure and Investigations Act 1996: s 76. As to magistrates' courts generally see MAGISTRATES.

2 Magistrates' Courts Act 1980 s 2(1) (s 2 substituted by the Courts Act 2003 s 44). See MAGISTRATES vol 29(2) (Reissue) PARA 524. For the meaning of 'summary offence' see PARA 1102 post. As to the jurisdiction of magistrates generally see MAGISTRATES vol 29(2) (Reissue) PARA 501 et seq.

3 See PARAS 1132-1140 post.

4 Magistrates' Courts Act 1980 s 2(2) (as substituted (see note 2 supra); and amended by the Criminal Justice Act 2003 s 41, Sch 3 para 51(1), (2)). See MAGISTRATES vol 29(2) (Reissue) PARAS 523-524.

5 See PARAS 1106-1118 post.

6 For the meaning of 'offence triable either way' see PARA 1102 post.

7 Magistrates' Courts Act 1980 s 2(3) (as substituted: see note 2 supra). See MAGISTRATES vol 29(2) (Reissue) PARA 524.

8 Where a person who appears or is brought before a youth court charged with an offence subsequently attains the age of 18, the youth court (the 'remitting court') may at any time before the start of the trial remit the person for trial to a magistrates' court other than a youth court (the 'other court'): Crime and Disorder Act 1998 s 47(1) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(4), Sch 12 Pt I). For the meaning of 'start of the trial' see the Prosecution of Offences Act 1985 s 22(11B) (as added); and PARA 1152 note 2 post: Crime and Disorder Act 1998 s 47(1). Where a person is so remitted he has no right of appeal against the remission and the remitting court must adjourn proceedings in relation to the offence: see s 47(2). The other court may deal with the case in any way in which it would have power to deal with it if all proceedings relating to the offence which took place before the remitting court had taken place before the other court: see s

47(4). Enactments relating to remand or the granting of bail in criminal proceedings (including the Magistrates' Courts Act 1980 s 128 (as amended) (see PARA 1145 post)) have effect in relation to the remitting court's power or duty to remand the person on the adjournment as if any reference to the court to or before which the person remanded is to be brought or appear after remand were a reference to the other court: Crime and Disorder Act 1998 s 47(3).

As to the power of magistrates' courts to deal with defendants under the age of 18 see PARAS 1116-1118 post. See also PARA 1123 note 1 post. As to criminal proceedings against or involving children and young persons generally see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1232 et seq.

9     le in the exercise of its powers under the Magistrates' Court 1980 s 24 (as amended; prospectively amended): see PARA 1116 post.

10    Ibid s 2(4) (as substituted: see note 2 supra). As to the meaning of 'indictable offence' see PARA 1102 note 1 post.

11    See CrimPR 3.1-3.11; and PARA 1240 post. See also CrimPR 1.1-1.3; and PARA 1239 post.

## **UPDATE**

### **1098 Jurisdiction of justices**

NOTE 11--CrimPR 1.1-1.3, 3.1-3.11 now Criminal Procedure Rules 2010, SI 2010/60, r 1.1-1.3, 3.1-3.11.



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### **1099. Jurisdiction of District Judges (Magistrates' Courts).**

Nothing in the Magistrates' Courts Act 1980 requiring a magistrates' court to be composed of two or more justices, or limiting the powers of a magistrates' court composed of a single justice, applies to any District Judge (Magistrates' Courts)<sup>1</sup>.

A District Judge (Magistrates' Courts)<sup>2</sup> has power to do any act, and to exercise alone any jurisdiction, which can be done or exercised by two justices, apart from granting or transferring a licence<sup>3</sup>. Any statutory provision ancillary to the jurisdiction exercisable by two justices of the peace applies also to the jurisdiction of a District Judge (Magistrates' Courts), unless the provision relates to granting or transferring a licence<sup>4</sup>.

1 Courts Act 2003 s 26(1). Section 26 does not apply to the hearing or determination of domestic proceedings within the meaning of the Magistrates' Court Act 1980 s 65 (as amended) (see MAGISTRATES vol 29(2) (Reissue) PARA 739) : Courts Act 2003 s 26(4).

As to District Judges (Magistrates' Courts) see MAGISTRATES vol 29(2) (Reissue) PARA 572 et seq.

2 le appointed under the Courts Act 2003 s 22 (as amended): see MAGISTRATES vol 29(2) (Reissue) PARA 573.

3 Ibid s 26(2).

4 Ibid s 26(3).

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### **1100. Appearance by a legal representative.**

The prosecutor<sup>1</sup> must appear before a magistrates' court either himself or by a legal representative<sup>2</sup>. If he does not attend, and no legal representative attends on his behalf to support the charge, it will be dismissed, unless non-attendance is due to a mistake, when a fresh summons should be issued<sup>3</sup>. The proceedings do not abate by the death of the justice who issued the summons or warrant<sup>4</sup> or of the person who instituted criminal proceedings<sup>5</sup>. Any person may, it seems, take up the prosecution on the death of that person. The majority of prosecutions are instituted by the Crown Prosecution Service; but, where a private prosecutor is present and ready to proceed, he ought to have the conduct of the proceedings, except where the Director of Public Prosecutions takes over the prosecution<sup>6</sup>. The justices have an inherent right to regulate the procedure in their court in the interests of justice and a fair and expeditious hearing. There is nothing to prevent them, in the exercise of their discretion, permitting a person other than the informant, prosecutor or his legal representative to examine the witnesses<sup>7</sup>.

The defendant may be represented in a magistrates' court by a legal representative<sup>8</sup>, and an adjournment for the attendance of a legal representative may be, and indeed ought to be, granted where the application is made in good faith<sup>9</sup>. The defendant is entitled in an appropriate case to legal representation funded by the Legal Services Commission as part of the Criminal Defence Service<sup>10</sup>. Even in criminal proceedings, if the defendant is not legally represented, any person, whether a professional person or not, may attend as a friend of the defendant, may take notes, and unobtrusively make suggestions and give advice to the defendant, so long as he does not seek to take part in the proceedings as an advocate<sup>11</sup>.

1 The person supporting the charge. As to proceedings in respect of certain offences committed against children or young persons see PARA 1164 post.

2 Magistrates' Courts Act 1980 s 122(1) (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 25(1), (3)).

3 *R v Bennett and Bond, ex p Bennett* (1908) 72 JP 362.

4 Magistrates' Courts Act 1980 s 124.

5 *R v Truelove* (1880) 5 QBD 336.

6 See PARA 1080 ante.

7 *O'Toole v Scott* [1965] AC 939, [1965] 2 All ER 240, PC; *Simms v Moore* [1970] 2 QB 327, [1970] 3 All ER 1, DC. As to the participation of the clerk in the proceedings see *Simms v Moore* [1970] 2 QB 327, [1970] 3 All ER 1, DC; *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at V.55.5, CA; and MAGISTRATES vol 29(2) (Reissue) PARA 735.

8 Magistrates' Courts Act 1980 s 122(1) (as amended: see note 2 supra). Everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require: Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(3)(c). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. A defendant is entitled to be represented by a legal representative of his own

choosing if reasonably practicable; although this is not an absolute right, his choice should be respected: *Goddard v Italy* (1984) 6 EHRR 457, ECtHR. The overriding consideration is the requirements of justice, for both the prosecution and defence, in the circumstances of the case: *R v D'Oliveira* [1997] Crim LR 600, CA. See *R v Al-Zubeidi* [1999] Crim LR 906, CA. See also PARA 1237 post. An unrepresented defendant cannot rely on the disadvantages of not being legally represented to support an argument that the conviction was unsafe because of an inequality of arms: *Van Geyseghen v Belgium* (2001) 32 EHRR 554, ECtHR; *R v Walton* [2001] 8 Archbold News 2, CA.

An absent party who is legally represented is deemed not to be absent: Magistrates' Courts Act 1980 s 122(2). However, appearance of a party by a legal representative does not satisfy any provision of any enactment or any recognisance expressly requiring his presence: s 122(3) (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 25(1), (3)).

9 There is no absolute right to such an adjournment: *R v Cambridgeshire Justices* (1880) 44 JP 168; *R v Biggins* (1862) 5 LT 605.

10 See the Access to Justice Act 1999 Pt I (ss 1-26) (as amended); and LEGAL AID vol 65 (2008) PARA 120 et seq.

11 *Collier v Hicks* (1831) 2 B & Ad 663 at 669 per Lord Tenterden; approved in *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034, CA (hence the use of the expression 'McKenzie adviser'). See also *R v Leicester City Justices, ex p Barrow* [1991] 2 QB 260, [1991] 3 All ER 935, DC.

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### **1101. Early administrative hearing.**

Where a person ('the defendant') has been charged with an offence at a police station, the magistrates' court before whom he appears or is brought for the first time in relation to the charge may consist of a single justice<sup>1</sup>. At such a hearing conducted by a single justice the defendant must be asked whether he wishes to be granted a right to representation funded by the Legal Services Commission as part of the Criminal Defence Service and, if he does, the justice must decide whether or not to grant him such a right<sup>2</sup>.

At such a hearing the single justice: (1) may exercise, subject to the above provision, such of his powers as a single justice as he thinks fit; and (2) on adjourning the hearing, may remand the defendant in custody or on bail<sup>3</sup>.

These provisions apply in relation to a justices' clerk as they apply in relation to a single justice; but nothing in head (2) above authorises such a clerk to remand the defendant in custody or, without the consent of the prosecutor and the defendant, to remand the defendant on bail on conditions other than those (if any) previously imposed<sup>4</sup>.

<sup>1</sup> See the Crime and Disorder Act 1998 s 50(1). As to the exception to this provision under s 51 (prospectively amended) (sending for trial procedure) see PARAS 1131-1132 post.

<sup>2</sup> Ibid s 50(2) (amended by the Access to Justice Act 1999 s 24, Sch 4 paras 53, 54).

<sup>3</sup> Crime and Disorder Act 1998 s 50(3).

<sup>4</sup> Ibid s 50(4).

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## **(2) PROCEDURAL CLASSIFICATION OF OFFENCES**

### **1102. Procedural classification of offences.**

As regards mode of trial there are three classes of offences: (1) offences triable only on indictment, which cannot be tried summarily in a magistrates' court<sup>1</sup>; (2) summary offences<sup>2</sup>, the trial of which may not take place on indictment in the Crown Court<sup>3</sup>; and (3) offences triable either way<sup>4</sup>.

1 These offences are commonly described as 'indictable-only offences'. Statutes often refer to 'indictable offences'. 'Indictable offence' means an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either way (see note 4 infra); and 'indictable', in its application to offences, is to be construed accordingly: see the Interpretation Act 1978 s 5, Sch 1.

2 'Summary offence' means an offence which, if committed by an adult, is triable only summarily: and 'summary', in its application to offences, is to be construed accordingly: see the Interpretation Act 1978 s 5, Sch 1.

3 As to summary trial see PARA 1104 post.

4 'Offence triable either way' means an offence, other than an offence triable on indictment only by virtue of the Criminal Justice Act 1988 Pt V (ss 37-70) (as amended), which, if committed by an adult, is triable either on indictment or summarily: Interpretation Act 1978 Sch 1 (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 para 59). See PARA 1103 post.

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### **1103. Offences triable either way.**

Without prejudice to any other enactment by virtue of which any offence is triable either way, the following offences are triable either way<sup>1</sup>:

- 1696 (1) offences at common law of public nuisance<sup>2</sup>;
- 1697 (2) an offence at common law of outraging public decency<sup>3</sup>;
- 1698 (3) appearing to be the keeper of a bawdy house etc<sup>4</sup>;
- 1699 (4) administering an oath etc touching matters in which a person has no jurisdiction<sup>5</sup>;
- 1700 (5) obstructing engines or carriages on railways<sup>6</sup>;
- 1701 (6) specified offences under the Offences against the Person Act 1861<sup>7</sup>;
- 1702 (7) disclosing or intercepting messages<sup>8</sup>;
- 1703 (8) entering into transactions intended to defraud creditors<sup>9</sup>;
- 1704 (9) obliterating marks with intent to conceal<sup>10</sup>;
- 1705 (10) making false returns under the Corn Returns Act 1882<sup>11</sup>;
- 1706 (11) damaging submarine cables<sup>12</sup>;
- 1707 (12) offences under the Stamp Duties Management Act 1891 relating to dies and stamps<sup>13</sup>;
- 1708 (13) making false representations etc with a view to procuring the burning of any human remains<sup>14</sup>;
- 1709 (14) specified offences under the Perjury Act 1911<sup>15</sup>;
- 1710 (15) specified offences under the Deeds of Arrangement Act 1914<sup>16</sup>;
- 1711 (16) disclosing census information<sup>17</sup>;
- 1712 (17) making an untrue statement for the purposes of procuring a passport<sup>18</sup>;
- 1713 (18) specified offences under the Agricultural Credits Act 1928<sup>19</sup>;
- 1714 (19) specified offences under the Criminal Law Act 1967 where the offence to which they relate is triable either way<sup>20</sup>;
- 1715 (20) specified offences under the Theft Act 1968<sup>21</sup>;
- 1716 (21) specified offences under the Criminal Damage Act 1971<sup>22</sup>;
- 1717 (22) offences relating to stamps issued for the purpose of national insurance under the provisions of any enactment as applied to those stamps<sup>23</sup>;
- 1718 (23) aiding, abetting, counselling or procuring the commission of any offence listed in heads (1) to (22) above except head (19) above<sup>24</sup>;
- 1719 (24) any offence consisting in the incitement<sup>25</sup> to commit an offence triable either way except an offence mentioned in head (23) above<sup>26</sup>.

1 See the Magistrates' Courts Act 1980 s 17(1), Sch 1 (amended by the Criminal Attempts Act 1981 s 10, Schedule Pt I; the Wages Act 1986 s 32(2), Sch 5 Pt III; the Housing (Consequential Provisions) Act 1985 s 3, Sch 1 Pt I; the Criminal Justice Act 1988 s 170(2), Sch 16; the Electricity Act 1989 s 112(4), Sch 18; the Statute Law (Repeals) Act 1989; the Sexual Offences Act 2003 s 140, Sch 7; the Criminal Justice Act 2003 s 320(1); the Postal Services Act 2000 (Consequential Modifications No 1) Order 2001, SI 2001/1149, art 3(2), Sch 2).

2 See NUISANCE vol 78 (2010) PARAS 105, 109 et seq.

3 See PARA 764 et seq ante. This offence is not triable either way if committed before 20 January 2004: Criminal Justice Act 2003 s 320(2); Criminal Justice Act 2003 (Commencement No 2 and Saving Provisions) Order 2004, SI 2004/81, art 2.

4 le contrary to the Disorderly Houses Act 1751 s 8 (as amended): see PARA 223 ante.

5 le contrary to the Statutory Declarations Act 1835 s 13.

6 le contrary to the Malicious Damage Act 1861 s 36: see PARA 344 ante.

7 le offences contrary to the following provisions of the Offences against the Person Act 1861:

474 (1) s 16 (as substituted) (threatening to kill: see PARA 105 ante);

475 (2) s 20 (as amended) (inflicting bodily injury, with or without a weapon: see PARA 120 ante);

476 (3) s 26 (as amended) (not providing apprentices or servants with food etc: see PARA 146 ante);

477 (4) s 27 (as amended) (abandoning or exposing a child: see PARA 143 ante);

478 (5) s 34 (doing or omitting to do anything so as to endanger railway passengers: see PARA 134 ante);

479 (6) s 36 (assaulting a clergyman at a place of worship etc: see PARA 827 ante);

480 (7) s 38 (as amended) (assault with intent to resist apprehension: see PARAS 150, 737 ante);

481 (8) s 47 (as amended) (assault occasioning actual bodily harm: see PARA 149 ante);

482 (9) s 57 (as amended) (bigamy: see PARA 828 ante);

483 (10) s 60 (as amended) (concealing the birth of a child: see PARA 113 ante).

8 le contrary to the Telegraph Act 1868 s 20 (repealed).

9 le contrary to the Debtors Act 1869 s 13 (as amended): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 724.

10 le contrary to the Public Stores Act 1875 s 5 (as amended): see PARA 542 ante.

11 le under the Corn Returns Act 1882 s 12 (as amended): see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARAS 1325, 1327.

12 le contrary to the Submarine Telegraph Act 1885 s 3 (as amended): see TELECOMMUNICATIONS vol 97 (2010) PARA 207.

13 le under the Stamp Duties Management Act 1891 s 13 (as amended): see PARA 354 ante.

14 le contrary to the Cremation Act 1902 s 8(2) (as amended): see CREMATION AND BURIAL vol 10 (Reissue) PARA 983.

15 le all offences under the Perjury Act 1911 (see PARA 712 et seq ante) except offences under:

484 (1) s 1 (perjury in judicial proceedings: see PARA 712 ante);

485 (2) s 3 (as amended) (false statements etc with reference to marriage: see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 560);

486 (3) s 4 (as amended) (false statements etc as to births or deaths: see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 534).

16 le under the Deeds of Arrangement Act 1914 s 17: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 873.

17 le contrary to the Census Act 1920 s 8(2) (as substituted): see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 634.

- 18    le contrary to the Criminal Justice Act 1925 s 36 (as amended): see PARA 328 ante.
- 19    le under the Agricultural Credits Act 1928 s 11 (as amended): see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1329.
- 20    le under the Criminal Law Act 1967 s 4(1) (as amended) (assisting offenders: see PARA 58 ante) and s 5(1) (as amended) (concealing relevant offences and giving false information: see PARAS 734, 739 ante).
- 21    le all indictable offences under the Theft Act 1968 (see PARA 282 et seq ante) except:
- 487   (1)   robbery (see s 8; and PARA 293 ante), aggravated burglary (see s 10; and PARA 295 ante), blackmail (see s 21; and PARA 308 ante) and assault with intent to rob (see PARA 293 ante);
- 488   (2)   burglary comprising the commission of, or an intention to commit, an offence which is triable only on indictment (see s 8 and PARA 293 ante);
- 489   (3)   burglary in a dwelling if any person in the dwelling was subjected to violence or the threat of violence (see s 8 and PARA 293 ante).
- 22    le offences under the following provisions of the Criminal Damage Act 1971:
- 490   (1)   s 1(1) (destroying or damaging property: see PARA 334 ante);
- 491   (2)   s 1(1), (3) (arson: see PARA 334 ante);
- 492   (3)   s 2 (threatening to destroy or damage property: see PARA 337 ante);
- 493   (4)   s 3 (possessing anything with intent to destroy or damage property: see PARA 338 ante).
- 23    See SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 50.
- 24    See the text and note 20 supra. As to aiding, abetting etc see PARA 49 et seq ante.
- 25    As to incitement see PARA 65 ante.
- 26    See the text and note 24 supra.

## UPDATE

### 1103 Offences triable either way

NOTE 4--Disorderly Houses Act 1751 repealed: Statute Law (Repeals) Act 2008.

TEXT AND NOTE 11--Corn Returns Act 1882 repealed: SI 2008/576.



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### **(3) PROCEDURE FOR OFFENCES TRIABLE SUMMARILY ONLY**

#### **1104. In general.**

On summary trial of an information charging a summary offence the court must, if the defendant appears, state to him the substance of the information and ask him whether he pleads guilty or not guilty<sup>1</sup>. After hearing the evidence and the parties, the court must convict the defendant or dismiss the information<sup>2</sup>. If the defendant pleads guilty, the court may convict him without hearing evidence<sup>3</sup>.

1 Magistrates' Courts Act 1980 s 9(1). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. As to summary trial of an offence triable either way see PARA 1112 post; and as to summary trial of an information or written charge against a child or young person for an indictable offence see PARA 1116 post.

2 Ibid s 9(2).

3 Ibid s 9(3).

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## **(4) PROCEDURE FOR OFFENCES TRIABLE EITHER WAY**

### **(i) Introduction**

#### **1105. Introduction.**

The Criminal Justice Act 2003 has introduced many amendments to the legislation relating to the procedure for offences that are triable either way, not all of which are yet in force. The provisions described in this paragraph apply until a day to be appointed.

The Magistrates' Court Act 1980<sup>1</sup> provides that where an adult appears or is brought before a magistrates' court charged with an either-way offence, the court must explain to him that he may indicate whether (if the offence were to proceed to trial) he would plead guilty; and explain that if he indicates that he would plead guilty:

- 1720 (1) the court must proceed as if the proceedings constituted from the beginning the summary trial of the offence, and the court had asked whether he pleaded guilty or not guilty<sup>2</sup>; and
- 1721 (2) he may be committed for sentence to Crown Court if the court is of the opinion that certain grounds exist<sup>3</sup>.

If the defendant indicates that he would plead guilty the court must proceed as if the proceedings constituted from the beginning the summary trial of the offence and the defendant had pleaded guilty<sup>4</sup>. If the defendant indicates that he would plead not guilty or fails to indicate how he would plead, the court must decide, in the light of any representations by the prosecutor or the defendant, whether the offence appears to be more suitable for summary trial or for trial on indictment<sup>5</sup>. The court must consider: (a) the nature of the case; (b) whether the circumstances make the offence one of a serious character; (c) whether the punishment which a magistrates' court could inflict would be adequate; and (d) any other relevant circumstances<sup>6</sup>. If having considered these issues the magistrates' court decides that trial on indictment is more suitable, it will commence to hold committal proceedings in respect of the offence in order to determine whether to commit the defendant to the Crown Court for trial<sup>7</sup>. It will so commit him if there is sufficient evidence to put the defendant on trial or if the court acts under a power to commit without consideration of the evidence<sup>8</sup>. However, if the court decides that summary trial is more suitable it must explain to the defendant that the offence appears more suitable for summary trial and that he can either consent to summary trial, or if he wishes, be tried on indictment, and that if he is tried summarily and convicted he may be committed to the Crown Court for sentence if the court is of the opinion that certain grounds exist<sup>9</sup>. If the defendant consents to summary trial the magistrates' court will proceed to it; if he does not so consent, committal proceedings will be held as they would if the court had decided that trial on indictment was more suitable<sup>10</sup>.

Special provisions apply in all respects where the case is one of serious or complex fraud and in certain cases involving children. In serious or complex fraud cases a notice may be given by a designated authority<sup>11</sup> in respect of an indictable offence where the authority is satisfied that there is sufficient evidence for the person charged to be put on trial and that a case of fraud of

such seriousness or complexity is revealed making it appropriate that the management of the case should be, without delay, taken over by the Crown Court<sup>12</sup>. In the case of certain offences involving children<sup>13</sup>, the Director of Public Prosecutions may give notice that he is of the opinion that the evidence is sufficient for the person to be put on trial for the offence; that a child under the relevant specified age will be called as a witness at the trial; and that for the purpose of avoiding prejudice to the welfare of the child the case should be taken over and proceeded with without delay by the Crown Court<sup>14</sup>. If a notice of transfer is served on a magistrates' court under either of these sets of provisions the effect is that the magistrates' court must forthwith send the defendant to the Crown Court for trial; they cannot allocate the case for summary trial if the offence is an either way offence.

A magistrates' court before which a person under 18 appears or is brought charged with an offence which, in the case of an adult, is triable only on indictment or triable either way must deal with it summarily unless: (i) the charge is one of homicide or of a specified firearms offence in respect of which the defendant, if convicted, would be subject to a minimum sentence provision; (ii) the offence is so grave that under specific statutory powers he, if found guilty, may be sentenced to be detained for a long period; (iii) he is charged jointly with an adult and the court considers it necessary in the interest of justice to commit the case for trial. If a case falls within heads (i) to (iii) above, the defendant cannot be tried summarily and the court must commit the defendant for trial subject to the normal rules relating to committal proceedings<sup>15</sup>.

The Powers of Criminal Courts (Sentencing) Act 2000<sup>16</sup> provides that where on the summary trial of an offence triable either way a person aged 18 or over is convicted of an offence and the court is of the opinion that the offence or combination of offences was so serious that greater punishment should be inflicted for the offence than the court has power to impose, or in the case of a violent or sexual offence that a custodial sentence for a term longer than the court has power to impose is necessary to protect the public from serious harm to him, the court may commit<sup>17</sup> the offender in custody or on bail to the Crown Court for sentence<sup>18</sup>. In addition, where: (A) a person aged 18 or over appears or is brought before a magistrates' court ('the court') on an information charging him with an offence triable either way ('the offence'); (B) he or his representative indicates that he would plead guilty if the offence were to proceed to trial; and (C) proceeding as if he had been asked to plead and he had pleaded guilty, the court convicts him of the offence<sup>19</sup>, then if the court has committed the offender to the Crown Court for trial for one or more related offences, that is to say, one or more offences which, in its opinion, are related to the offence, it may commit him in custody or on bail to the Crown Court to be dealt with in respect of the offence<sup>20</sup>. Where an offender is committed by a magistrates' court for sentence<sup>21</sup> the Crown Court must inquire into the circumstances of the case and may deal with the offender in any way in which it could deal with him if he had just been convicted of the offence on indictment before the court<sup>22</sup>.

1 As from a day to be appointed the Criminal Justice Act 2003 s 41, Sch 3 Pt 1 amends the Magistrates' Courts Act 1980 and introduces new procedural provisions for offences triable on indictment or summarily. At the date at which this volume states the law no such day had been appointed. As to those provisions see PARA 1107 et seq post.

2 See *ibid* s 17A(1), (4)(a) (s 17A added by the Criminal Procedure and Investigations Act 1996 s 49(1), (6)). See note 1 *supra*.

3 See the Magistrates Courts' Act 1980 s 17A(1), (4)(b) (as added (see note 2 *supra*); s 17A(4)(b) amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 62). See note 1 *supra*.

4 See the Magistrates Courts' Act 1980 s 17A(6) (as added: see note 2 *supra*). See note 1 *supra*.

5 See *ibid* s 19(1), (2) (s 19(2) amended by the Criminal Procedure and Investigations Act 1996 s 49(4), (6)). See note 1 *supra*.

6 See the Magistrates' Courts Act 1980 s 19(3). See note 1 *supra*.

- 7 See *ibid* s 21. See note 1 *supra*.
- 8 See *ibid* s 6(1), (2) (substituted by the Criminal Procedure and Investigations Act 1996 s 47, Sch 1 para 4). See note 1 *supra*.
- 9 See the Magistrates' Courts Act 1980 s 20(1), (2) (s 20(2) amended by the Criminal Justice Act 1991 s 100, Sch 11 para 25; and the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 63). See note 1 *supra*.
- 10 See the Magistrates' Courts Act 1980 s 20(3). See note 1 *supra*.
- 11 *Ie* the Director of Public Prosecutions, the Director of the Serious Fraud Office, the Commissioners for Her Majesty's Revenue and Customs or the Secretary of State: Criminal Justice Act 1987 s 4(2); Commissioners for Revenue and Customs Act 2005 s 50(1), (7). As to the Commissioners for Her Majesty's Revenue and Customs see *PARA* 354 note 2 *ante*.
- 12 See the Criminal Justice Act 1987 s 4 (amended by the Criminal Justice Act 1988 s 144(1), (2); the Legal Aid Act 1988 s 45, Sch 5 para 22; the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 29; the Crime and Disorder Act 1998 s 119, Sch 8 para 65; and the Access to Justice Act 1999 s 24, Sch 4 paras 38, 39). As from a day to be appointed the Criminal Justice Act 1987 s 4 (as amended) is repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 58, Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed. As to the procedure for notices of transfer see the Criminal Justice Act 1987 s 5 (as amended; prospectively repealed); as to applications for dismissal see s 6 (as substituted and amended; prospectively repealed).
- 13 *Ie*: (1) an offence involving an assault on, or injury or threat of injury to, a person; (2) an offence of cruelty to a person under 16; (3) a sexual offence; (4) an offence relating to indecent photographs or pseudo-photographs of children; or (5) inchoate liability as a secondary party for such offences.
- 14 See the Criminal Justice Act 1991 s 53 (amended by the Criminal Justice and Public Order Act 1994 Sch 9 para 49; the Crime and Disorder Act 1998 s 119, Sch 8 para 93; and the Access to Justice Act 1999 s 24, Sch 4 para 47). See also the Criminal Justice Act 1991 (Notice of Transfer) Regulations 1992, SI 1992/1670 (amended by SI 1997/738; SI 1998/461). As from a day to be appointed the Criminal Justice Act 1991 s 53 (as amended) is repealed by the Criminal Justice Act 2003 Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.
- 15 See the Magistrates' Courts Act 1980 s 24(1) (amended by the Criminal Justice Act 1991 s 68, Sch 8 para 6; the Criminal Justice and Public Order Act 1994 s 168(2), (3), Sch 10 para 40, Sch 11; the Crime and Disorder Act 1998 Sch 8 para 40; the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 64; and the Criminal Justice Act 2003 s 42(1), (2)(a)); and the Magistrates' Courts Act 1980 s 24(1B) (added by the Criminal Justice Act 2003 s 42(1), (2)(c)). See note 1 *supra*. For the inter-relationship of the Magistrates' Courts Act 1980 s 24(1) (as amended) with the Crime and Disorder Act 1998 s 51A(3)(d) (as added) (see *PARA* 1133 *post*) see *R (on the application of the Crown Prosecution Service) v South East Surrey Youth Court* [2005] EWHC 2929 (Admin), [2006] 2 All ER 444.
- 16 As from a day to be appointed the Criminal Justice Act 2003 Sch 3 Pt 1 amends the Powers of Criminal Courts (Sentencing) Act 2000 and introduces new provisions relating to the procedure for committal to the Crown Court for sentence. At the date at which this volume states the law no such day had been appointed. As to those provisions see *PARA* 1123 *et seq post*.
- 17 *Ie* in accordance with *ibid* s 5(1): see the text and notes 21-22 *infra*. See note 16 *supra*.
- 18 *Ibid* s 3(1), (2). See note 16 *supra*.
- 19 *Ibid* s 4(1). See note 16 *supra*.
- 20 *Ibid* s 4(2). See note 16 *supra*.
- 21 *Ie* under *ibid* s 3 (see the text and notes 16-18 *supra*; and *PARA* 1123 *post*) or s 4 (as amended) (see the text and notes 19-20 *supra*; and *PARA* 1127 *post*). See note 16 *supra*.
- 22 *Ibid* s 5(1). See note 16 *supra*. See also *SENTENCING AND DISPOSITION OF OFFENDERS* vol 92 (2010) *PARA* 17.

## UPDATE

### 1105 Introduction

NOTES 1, 16--2003 Act Sch 3 Pt 1 amended: Criminal Justice and Immigration Act 2008 Sch 13.

NOTE 14--See further Serious Crime Act 2007 Sch 6 para 19(a).

NOTE 15--1980 Act s 24(1B) amended: Violent Crime Reduction Act 2006 Sch 1 para 1, Sch 5.

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## **(ii) Order of Consideration**

### **1106. Order of consideration for either-way offences.**

As from a day to be appointed<sup>1</sup> where an adult<sup>2</sup> appears or is brought before a magistrates' court charged with an either-way offence<sup>3</sup> (the 'relevant offence'), the court must proceed in the following manner<sup>4</sup>.

If a notice has been given in respect of the relevant offence under specified provisions<sup>5</sup> relating to cases of serious or complex fraud or to certain cases involving children, the court must deal with the offence as provided in specified provisions<sup>6</sup> relating to sending cases to the Crown Court for trial<sup>7</sup>.

Otherwise the following provisions apply:

1722 (1) if the adult (or another adult with whom the adult is charged jointly with the relevant offence) is or has been sent<sup>8</sup> to the Crown Court for trial for an offence triable only on indictment (other than one in respect of which such a notice<sup>9</sup> has been given) or such a notice is given:

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110. (a) the court must first consider the relevant offence under a number of specified provisions<sup>10</sup> and, where applicable, deal with it under one of them<sup>11</sup>;

111. (b) if the adult is not sent to the Crown Court for trial for the relevant offence by virtue of head (a) above, the court must then proceed to deal with the relevant offence in accordance with specified provisions<sup>12</sup> relating to indication of intended plea ('plea before venue') and, if necessary, allocation of trial<sup>13</sup>;

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1723 (2) in all other cases:

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112. (a) the court must first consider the relevant offence under specified provisions<sup>14</sup> relating to indication of intended plea ('plea before venue') and, if necessary, allocation of trial<sup>15</sup>;

113. (b) if, by virtue of head (2)(a) above, the court would be required<sup>16</sup> to proceed as if the proceedings constituted a summary trial and the defendant pleaded guilty, it must proceed as so required (and, accordingly, may not consider the offence under the provisions<sup>17</sup> relating to sending to the Crown Court for trial)<sup>18</sup>;

114. (c) if head (2)(b) above does not apply: (i) the court must consider the relevant offence under specified provisions<sup>19</sup> relating to sending for trial and, where applicable, deal with it under the relevant provision<sup>20</sup>; (ii) if the adult is not sent to the Crown Court for trial for the relevant offence by virtue of head (i) above, the court must then proceed<sup>21</sup> to deal with the relevant offence as follows: (A) if summary trial appears more suitable to the magistrates' court it must ask the defendant whether he consents to summary trial and proceed to such trial if he so consents, or proceed in accordance with the sending for trial provisions if he does not; (B) if trial on indictment appears more suitable it must proceed in accordance with the specified sending for trial provisions<sup>22</sup>.

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1 The Crime and Disorder Act 1998 s 50A is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 15, 17 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. See PARA 1131 post.

2 'Adult' means a person aged 18 or over, and references to an adult include a corporation: Crime and Disorder Act s 51E(a) (s 51E added by the Criminal Justice Act 2003 Sch 3 paras 15, 18). At the date at which this volume states the law the Crime and Disorder Act 1998 s 51E (as added) has effect only in relation to cases sent for trial under s 51A(3)(d) (as added) (see PARA 1133 post): Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2, Sch 1 para 29. For the purposes of the Crime and Disorder Act 1998, the age of a person is deemed to be that which it appears to the court to be after considering any available evidence: s 117(3). A person reaches a particular age at the commencement of the relevant anniversary of the birth: Family Law Reform Act 1969 s 9. As to proceedings against corporations see PARA 1161 post.

3 For these purposes, 'either-way offence' means an offence triable either way: Crime and Disorder Act s 51E(b) (as added: see note 2 supra). For the meaning of 'offence triable either way' see PARA 1102 note 4 ante.

4 Ibid s 50A(1) (prospectively added: see note 1 supra).

5 Ie a notice in respect of the relevant offence under ibid s 51B (prospectively added and amended) or s 51C (prospectively added): see PARAS 1134-1135 post.

6 Ie ibid s 51 (as substituted): see PARA 1132 post.

7 Ibid s 50A(2) (prospectively added: see note 1 supra).

8 Ie under ibid s 51(2)(a) (as substituted) or s 51(2)(c) (as substituted): see PARA 1132 post.

9 Ie a notice under s 51B (prospectively added and amended) or s 51C (prospectively added): see PARAS 1134-1135 post.

10 Ie under ibid s 51(3), (4), (5) or (6) (as substituted): see PARA 1132 post.

11 See ibid s 50A(3)(a)(i) (prospectively added: see note 1 supra).

12 Ie the Magistrates' Courts Act 1980 ss 17A-23 (17A as added, amended and prospectively amended; ss 17B, 17C as added; ss 17D, 17E prospectively added; s 18 as amended and prospectively amended; ss 19, 20 prospectively substituted; s 20A prospectively added; s 21 prospectively substituted; s 22 as amended; s 23 as amended and prospectively amended): see PARAS 1107-1112, 1115 post.

13 See the Crime and Disorder Act 1998 s 50A(3)(a)(ii) (prospectively added: see note 1 supra).

14 Ie the Magistrates' Courts Act 1980 ss 17A-20 (s 17A as added, amended and prospectively amended; ss 17B, 17C as added; ss 17D, 17E prospectively added; s 18 as amended and prospectively amended; ss 19, 20 prospectively substituted), excluding s 20(8), (9): see PARAS 1107-1112 post.

15 See the Crime and Disorder Act 1998 s 50A(3)(b)(i) (prospectively added: see note 1 supra).

16 Ie under the Magistrates' Courts Act 1980 s 17A(6) (as added) (see PARA 1107 post), s 17B(2)(c) (as added) (see PARA 1108 post) or s 20(7) (prospectively substituted) (see PARA 1112 post).

17 Ie under the Crime and Disorder Act 1998 s 51 (as substituted) (see PARA 1132 post) or s 51A (as added) (see PARA 1133 post).

18 See ibid s 50A(3)(b)(ii) (prospectively added: see note 1 supra).

19 Ie under ibid s 51 (as substituted) (see PARA 1132 post) or s 51A (as added) (see PARA 1133 post).

20 See ibid s 50A(3)(b)(iii)(a) (prospectively added: see note 1 supra).

21 Ie as contemplated by the Magistrates' Courts Act 1980 s 20(8), (9) (prospectively substituted) (see PARA 1112 post) or s 21 (prospectively substituted) (see PARA 1113 post).

22 Crime and Disorder Act 1998 50A(3)(b)(iii)(b) (prospectively added: see note 1 supra). Section 50A(3) (prospectively added) (see the text and notes 8-21 supra) is subject to any requirement to proceed as mentioned in the Magistrates' Courts Act 1980 s 22(2) or 22(6)(a) (certain offences where value involved is

small: see PARA 1114 post): Crime and Disorder Act 1998 s 50A(4) (prospectively added: see note 1 supra).  
Nothing in s 50A (prospectively added) (see the text and notes 1-21 supra) prevents the court from committing the adult to the Crown Court for sentence pursuant to any enactment, if he is convicted of the relevant offence: s 50A(5) (prospectively added: see note 1 supra).



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### **(iii) Indication of Intended Plea**

#### **1107. Initial procedure: defendant to indicate intention as to plea.**

Where a person who has attained the age of 18<sup>1</sup> years appears or is brought before a magistrates' court on an information<sup>2</sup> charging him with an offence triable either way<sup>3</sup>, the court must cause the charge to be written down, if this has not already been done, and to be read to the defendant<sup>4</sup>. The court must then explain to the defendant in ordinary language that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty:

1724 (1) the court must proceed as if the proceedings constituted from the beginning the summary trial of the information and, having been asked, he had pleaded guilty<sup>5</sup>;

1725 (2) he may be committed to the Crown Court for the sentence<sup>6</sup> if the court is of a specified<sup>7</sup> opinion<sup>8</sup>.

The court must then ask the defendant whether (if the offence were to proceed to trial) he would plead guilty or not guilty<sup>9</sup>. If the defendant indicates that he would plead guilty the court must proceed as if the proceedings constituted from the beginning the summary trial of the information and as if, having been asked, the defendant had pleaded guilty<sup>10</sup>.

If the defendant indicates that he would plead not guilty the provisions<sup>11</sup> relating to the initial procedure for allocation of trial proceedings apply<sup>12</sup>. If the defendant in fact fails to indicate a plea he is to be taken<sup>13</sup> to indicate that he would plead not guilty<sup>14</sup>.

As from a day to be appointed the above provisions do not apply where, in respect of the offence, the court receives a notice under provisions<sup>15</sup> relating to serious or complex fraud cases or to certain other cases involving children; instead the court must proceed in relation to the offence under the provisions<sup>16</sup> relating to sending for trial<sup>17</sup>.

1 Where the age of any person at any time is material for the purposes of any provision of the Magistrates' Courts Act 1980 regulating the powers of a magistrates' court, his age at the material time is deemed to be or to have been that which appears to the court after considering any available evidence to be or to have been his age at that time: s 150(4). A person attains a particular age at the commencement of the relevant anniversary of the date of his birth: Family Law Reform Act 1969 s 9.

2 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante.

3 For the meaning of offence 'triable either way' see PARA 1102 note 4 ante.

4 Magistrates' Courts Act 1980 s 17A(1), (3) (s 17A added by the Criminal Procedure and Investigations Act 1996 s 49(1), (2)). Everything that the court is required to do under the Magistrates' Courts Act 1980 s 17A (as added) must be done with the defendant present in court: s 17A(2) (as so added).

As from a day to be appointed the functions of a magistrates' court under ss 17A-17D (s 17A as added, amended, prospectively amended; ss 17B, 17C as added; s 17D prospectively added) may be discharged by a

single justice: s 17E(1) (s 17E prospectively added by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 3). At the date at which this volume states the law no such day had been appointed. See PARA 1105 ante. The Magistrates' Courts Act 1980 s 17E(1) (prospectively added) is not to be taken as authorising the summary trial of an information (otherwise than in accordance with s 17A(6) (as added) (see the text and note 10 infra) or s 17B(2)(c) (as added) (see PARA 1108 head (c) post), or the imposition of a sentence, by a magistrates' court composed of fewer than two justices: s 17E(2) (as so prospectively added).

5 See *ibid* s 17A(4)(a) (as added: see note 4 supra).

6 *Ie* under the Powers of Criminal Courts (Sentencing) Act 2000 s 3: see PARA 1105 ante.

7 *Ie* such opinion as is mentioned in *ibid* s 3(2): see PARA 1105 ante.

8 Magistrates' Courts Act 1980 s 17A(4)(b) (as added (see note 4 supra); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 62). As from a day to be appointed head (2) in the text is substituted so that under these provisions a defendant may be committed to the Crown Court under s 3 (prospectively substituted) (see PARA 1123 post) or s 3A (prospectively added) (see PARA 1124 post) if the court is of such opinion as is mentioned in s 3(2) (prospectively substituted) or s 3A(2) (prospectively added) unless the Magistrates' Courts Act 1980 s 17D(2) (prospectively added) (see the text and note 10 infra) were to apply: s 17A(4)(b) (prospectively substituted by the Criminal Justice Act 2003 Sch 3 paras 1, 2(1), (2)). At the date at which this volume states the law no such day had been appointed. See PARA 1105 note 1 ante. For the approved form of words to be used see *R v Southampton Magistrates' Court, ex p Sansome* [1999] 1 Cr App Rep (S) 112, DC. As to the procedure see also *R v Warley Magistrates' Court, ex p DPP* [1999] 1 All ER 251, [1998] 2 Cr App Rep 307, DC; *R v Rafferty* [1999] 1 Cr App Rep 235, 162 JP 353, CA. Although the procedure under the Magistrates' Courts Act 1980 s 17A (as added and amended) should take place as soon as possible, the defendant is entitled to receive relevant information from the prosecution that will affect his plea and the allocation of trial proceedings (if any); and if a request for advanced disclosure under the Magistrates' Courts (Advance Information) Rules 1985, SI 1985/601 (as amended) (see MAGISTRATES vol 29(2) (Reissue) PARA 588) has not been complied with, the court must adjourn the case unless satisfied that his failure to disclose does not prejudice the defendant: *R v Calderdale Magistrates Court, ex p Donahue and Cutler* [2001] Crim LR 141, DC.

9 Magistrates' Courts Act 1980 s 17A(5) (as added: see note 4 supra). Subject to s 17A(6) (as added) (see the text and note 10 infra), the following are not for any purpose to be taken to constitute the taking of a plea: (1) asking the defendant under s 17A (as added and amended) whether if the offence were to proceed to trial he would plead guilty or not guilty; (2) an indication by the defendant under s 17A (as added and amended) of how he would plead: s 17A(9) (as so added).

10 *Ibid* s 17A(6) (as added: see note 4 supra). As from a day to be appointed if: (1) the offence is a scheduled offence; (2) the court proceeds in relation to the offence in accordance with s 17A(6) (as added) or 17B(2)(c) (as added) (see PARA 1108 post); and (3) the court convicts the defendant of the offence, the court must consider whether, having regard to any representations made by him or by the prosecutor, the value involved appears to the court to exceed the relevant sum as specified for the purposes of s 22 (as amended) (see PARA 299 ante): s 17D(1) (s 17D prospectively added by the Criminal Justice Act 2003 Sch 3 paras 1, 3). At the date at which this volume states the law no such day had been appointed. See PARA 1105 note 1 ante. As to the value involved see PARA 1114 post. For the meaning of 'scheduled offence' see PARA 1114 note 2 post.

As from a day to be appointed if it appears to the court clear that the value involved does not exceed the relevant sum, or it appears to the court for any reason not clear whether the value involved does or does not exceed the relevant sum: (a) subject to the Magistrates' Courts Act 1980 s 17D(4) (prospectively added) the court does not have power to impose on the defendant in respect of the offence a sentence in excess of the limits mentioned in s 33(1)(a) (as amended; prospectively amended) (see MAGISTRATES vol 29(2) (Reissue) PARA 661); (b) the Powers of Criminal Courts (Sentencing) Act 2000 s 3 (prospectively substituted) and s 4 (prospectively amended) (see PARAS 1123, 1127 post) do not apply as regards that offence: Magistrates' Courts Act 1980 s 17D(2) (as so prospectively added). At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed the provisions of s 22(9)-(12) (as amended) (see PARA 1114 post) apply for the purposes of s 17D (as prospectively added) as they apply for the purposes of s 22 (as amended): see s 17D(3) (as so prospectively added). At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed head (a) supra does not apply to an offence under the Theft Act 1968 s 12A (as added and amended) (aggravated vehicle-taking: see PARA 299 ante): Magistrates' Courts Act 1980 s 17D(4) (as so prospectively added). At the date at which this volume states the law no such day had been appointed.

11 *Ie* *ibid* ss 18-23 (as amended): see PARAS 1109-1112, 1115 post.

12 *Ibid* s 17A(7) (as added: see note 4 supra).

13 le for the purposes of *ibid* s 17A (as added and amended), ss 18-23 (as amended) (see PARAS 1109-1112, 1115 post).

14 *Ibid* s 17A(8) (as added: see note 4 *supra*). A magistrates' court proceeding under s 17A (as added and amended) or s 17B (as added) (see PARA 1108 post) may adjourn the proceedings at any time, and on doing so on any occasion when the defendant is present may remand the defendant, and must remand him if:

494 (1) on the occasion on which he first appeared, or was brought, before the court to answer to the information he was in custody or, having been released on bail, surrendered to the custody of the court; or

495 (2) he has been remanded at any time in the course of proceedings on the information,

and where the court remands the defendant, the time fixed for the resumption of proceedings is to be that at which he is required to appear or be brought before the court in pursuance of the remand or would be required to be brought before the court but for s 128(3A) (as added and amended; prospectively amended) (see PARA 1144 post): s 17C (added by the Criminal Procedure and Investigations Act 1996 s 49(2)).

15 le a notice under the Crime and Disorder Act 1998 s 51B (prospectively added and amended) or s 51C (prospectively added): see PARAS 1134-1135 post.

16 le in accordance with *ibid* s 51 (as substituted) or s 51A (as added): see PARAS 1132-1133 post.

17 Magistrates' Courts Act 1980 s 17A(10) (prospectively added by the Criminal Justice Act 2003 Sch 3 paras 1, 2(1), (3)). At the date at which this volume states the law no such day had been appointed. See PARA 1105 note 1 *ante*.

## UPDATE

### **1107 Initial procedure: defendant to indicate intention as to plea**

NOTE 8--2003 Act Sch 3 para 2(2) amended: Criminal Justice and Immigration Act 2008 Sch 13 para 2.

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### **1108. Intention as to plea: absence of defendant.**

Where:

- 1726 (1) a person who has attained the age of 18 years<sup>1</sup> appears or is brought before a magistrates' court on an information<sup>2</sup> charging him with an offence triable either way<sup>3</sup>;
- 1727 (2) the defendant is represented by a legal representative<sup>4</sup>;
- 1728 (3) the court considers that by reason of the defendant's disorderly conduct before the court it is not practicable for specified proceedings<sup>5</sup> relating to an indication as to plea to be conducted in his presence<sup>6</sup>; and
- 1729 (4) the court considers that it should proceed in the absence of the defendant<sup>7</sup>,

then the procedure is as follows:

- 1730 (a) the court must cause the charge to be written down, if this has not already been done, and to be read to the representative<sup>8</sup>;
- 1731 (b) the court must ask the representative whether (if the offence were to proceed to trial) the defendant would plead guilty or not guilty<sup>9</sup>;
- 1732 (c) if the representative indicates that the defendant would plead guilty the court must proceed as if the proceedings constituted from the beginning the summary trial of the information and as if, having been asked, the defendant pleaded guilty under it<sup>10</sup>;
- 1733 (d) if the representative indicates that the defendant would plead not guilty, the provisions<sup>11</sup> relating to the initial procedure for allocation of trial proceedings apply<sup>12</sup>.

If the representative in fact fails to indicate how the defendant would plead, he is to be taken<sup>13</sup> to indicate that the defendant would plead not guilty<sup>14</sup>.

As from a day to be appointed the above provisions do not apply where, in respect of the offence, the court receives a notice under provisions<sup>15</sup> relating to serious or complex fraud cases or to certain cases involving children; instead the court must proceed in relation to the offence under the provisions<sup>16</sup> relating to sending for trial<sup>17</sup>.

1 See PARA 1107 note 1 ante.

2 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

3 Magistrates' Courts Act 1980 s 17B(1)(a) (s 17B added by the Criminal Procedure and Investigations Act 1996 s 49(1), (2)). For the meaning of offence 'triable either way' see PARA 1102 note 4 ante.

4 Magistrates' Courts Act 1980 s 17B(1)(b) (as added: see note 3 supra).

5 Ie under ibid s 17A (as added and amended): see PARA 1107 ante.

6 Ibid s 17B(1)(c) (as added: see note 3 supra).

7 Ibid s 17B(1)(d) (as added: see note 3 supra).

8 Ibid s 17B(2)(a) (as added: see note 3 supra).

9 Ibid s 17B(2)(b) (as added: see note 3 supra). Subject to s 17B(2)(c) (as added) (see head (c) in the text), the following are not for any purpose to be taken to constitute the taking of a plea:

496 (1) asking the representative under s 17B (as added) whether, if the offence were to proceed to trial, the defendant would plead guilty or not guilty (s 17B(4)(a) (as added: see note 3 supra));

497 (2) an indication by the representative under s 17B (as added) of how the defendant would plead (s 17B(4)(b) (as so added)).

See also PARA 1107 note 10 ante.

10 Ibid s 17B(2)(c) (as added: see note 3 supra).

11 Ie ibid s 18-23 (as amended): see PARAS 1109-1112, 1115 post.

12 Ibid s 17B(2)(d) (as added: see note 3 supra). See PARA 1107 note 4 ante.

13 Ie for the purposes of ibid s 17B (as added), and ss 18-23 (as amended) (see PARAS 1109-1112, 1115 post).

14 Ibid s 17B(3) (as added: see note 3 supra).

15 Ie under the Crime and Disorder Act 1998 s 51B (prospectively added and amended) or s 51C (prospectively added): see PARAS 1134-1135 post.

16 Ie in accordance with ibid s 51 (as substituted) or s 51A (as added): see PARAS 1132-1133 post.

17 Magistrates' Courts Act 1980 s 17A(10) (prospectively added by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 2(1), (3)). At the date at which this volume states the law no such day had been appointed. See PARA 1105 note 1 ante.

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## **(iv) Allocation of Trial**

### **1109. In general.**

Where a person who has attained the age of 18<sup>1</sup> appears or is brought before a magistrates' court<sup>2</sup> on an information<sup>3</sup> charging him with an offence triable either way<sup>4</sup>, and he indicates<sup>5</sup>, or his representative indicates<sup>6</sup>, that if the offence were to proceed to trial he would plead not guilty, the following procedure<sup>7</sup> applies<sup>8</sup>; and<sup>9</sup> everything that the court is required to do<sup>10</sup> must be done before any evidence is called and with the defendant present<sup>11</sup> in court<sup>12</sup>.

The court may proceed in the absence of the defendant in accordance with such of the statutory provisions<sup>13</sup> as are applicable in the circumstances if the court considers that, by reason of his disorderly conduct before the court, it is not practicable for the proceedings to be conducted in his presence<sup>14</sup>.

A magistrates' court<sup>15</sup> may adjourn the proceedings at any time, and on doing so on any occasion when the defendant is present may remand the defendant, and must remand him if:

- 1734 (1) on the occasion on which he first appeared, or was brought, before the court to answer to the information he was in custody or, having been released on bail, surrendered to the custody of the court<sup>16</sup>; or
- 1735 (2) he has been remanded at any time in the course of proceedings on the information<sup>17</sup>,

and, where the court remands the defendant, the time fixed for the resumption of the proceedings must be that at which he is required to appear or be brought before the court in pursuance of the remand or would be required to be so brought<sup>18</sup> before the court<sup>19</sup>.

1 As to the procedure in respect of persons who have not attained the age of 18 see PARA 1116 post. As to age see PARA 1107 note 1 ante. The appropriate date at which to determine whether a defendant has attained the age of 18, thus entitling him to elect to be tried by a jury, is the date of his appearance before the court on the occasion when the court makes its decision as to the mode of trial: *R v Islington North Juvenile Court, ex p Daley* [1983] 1 AC 347, 75 Cr App Rep 280, HL. The fact that the defendant reaches 18 after the allocation of trial decision has been made but before the commencement of the trial does not confer the right to elect trial by jury: *R v Nottingham Justices, ex p Taylor* [1992] QB 557, 93 Cr App Rep 365, DC.

2 As from a day to be appointed the functions of a magistrates' court under the Magistrates' Courts Act 1980 ss 19-23 (as amended; prospectively amended) (see PARA 1111 et seq post) may be discharged by a single justice; but this provision is not to be taken to authorise the summary trial of an information otherwise than in accordance with s 20(7) (prospectively substituted) (see PARA 1112 post), or the imposition of a sentence, by a magistrates' court composed of fewer than two justices: s 18(5) (prospectively substituted by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 4). At the date at which this volume states the law no such day had been appointed. See PARA 1105 note 1 ante.

3 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

4 For the meaning of 'offence triable either way' see PARA 1102 note 4 ante.

5 Ie under the Magistrates' Courts Act 1980 s 17A (as added and amended): see PARA 1107 ante.

6 le under ibid s 17B (as added): see PARA 1108 ante.

7 le ibid ss 19-23 (s 19 as amended, prospectively amended; s 20 as amended, prospectively substituted; s 20A prospectively added; s 21 prospectively substituted; s 22 as amended; s 23 as amended, prospectively amended): see PARAS 1105 note 1 ante, 1111 et seq post.

8 Ibid s 18(1) (amended by the Criminal Justice Act 1991 s 68, Sch 8 para 6; and the Criminal Procedure and Investigations Act 1996 s 49(3), (6)).

9 This is without prejudice to the Magistrates' Courts Act 1980 s 11(1), which provides that where the prosecutor appears at the time and place appointed for the trial or adjourned trial of an information but the defendant does not, the court may proceed in his absence.

10 le under ibid ss 19-22 (s 19 as amended, prospectively amended; s 20 as amended, prospectively substituted; s 20A prospectively added; s 21 prospectively substituted; s 22 as amended): see PARAS 1105 note 1 ante, 1111 et seq post.

11 le subject to ibid s 18(3) (see the text and notes 13, 14 infra) and s 23 (as amended) (see PARA 1115 post).

12 Ibid s 18(2).

13 See note 10 supra.

14 See the Magistrates' Courts Act 1980 s 18(3). However, the provisions of s 23(3)-(5) (prospectively amended) (see PARA 1115 post) have effect, so far as applicable, in relation to proceedings conducted in the absence of the defendant by virtue of s 18(3), references in s 23(3)-(5) (prospectively amended) to the person representing the defendant being for this purpose read as references to the person, if any, representing him: see s 18(3).

15 le a magistrates' court proceeding under ibid ss 19-23 (s 19 as amended, prospectively amended; s 20 as amended, prospectively substituted; s 20A prospectively added; s 21 prospectively substituted; s 22 as amended; s 23 as amended, prospectively amended): see PARAS 1105 note 1 ante, 1111 et seq post.

16 Ibid s 18(4)(a).

17 Ibid s 18(4)(b).

18 le but for ibid s 128(3A) (as added, amended and prospectively amended): see PARA 1144 post.

19 See ibid s 18(4) (amended by the Criminal Justice Act 1982 s 59, Sch 9 para 1(c)).

## **UPDATE**

### **1109 In general**

NOTE 9--1980 Act s 11(1) amended: Criminal Justice and Immigration Act 2008 s 54(2).

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### **1110. Supply of advance information.**

As soon as practicable after a person has been charged with an offence in proceedings for an offence triable either way<sup>1</sup> or a summons or requisition<sup>2</sup> has been served on a person in connection with such an offence, the prosecutor must provide him with a notice in writing explaining the effect of his right to request advance information<sup>3</sup> and setting out the address at which such a request may be made<sup>4</sup>.

If, in any such proceedings, either before the magistrates' court considers whether the offence appears to be more suitable for summary trial<sup>5</sup> or trial on indictment<sup>6</sup> or, where the defendant has not attained the age of 18 years<sup>7</sup> when he appears or is brought before a magistrates' court, before he is asked whether he pleads guilty or not guilty, the defendant or a person representing the defendant requests the prosecutor to furnish him with advance information, the prosecutor must furnish him as soon as practicable with either:

- 1736 (1) a copy of those parts of every written statement<sup>8</sup> which contain information as to the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings<sup>9</sup>; or
- 1737 (2) a summary of the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings<sup>10</sup>.

However, if the prosecutor is of the opinion that the disclosure of any particular fact or matter in compliance with any such requirements might lead to any person on whose evidence he proposes to rely in the proceedings being intimidated, to an attempt to intimidate him being made or otherwise to the course of justice being interfered with, he is not obliged to comply with such requirements in relation to that fact or matter<sup>11</sup>. Where the prosecutor considers that he is not obliged to comply with the above requirements in relation to any particular fact or matter, he must give notice in writing to the person who made the request to the effect that certain advance information is being withheld<sup>12</sup>.

If the court is satisfied that, a request for advance information having been so made to the prosecutor by or on behalf of the defendant, a requirement imposed on the prosecutor has not been complied with, the court must adjourn the proceedings pending compliance with the requirement unless the court is satisfied that the conduct of the case for the defendant will not be substantially prejudiced by non-compliance with the requirement<sup>13</sup>.

1 As to offences triable either way see PARA 1103 ante.

2 As from a day to be appointed a reference to a summons includes a reference to a requisition: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

3 I.e the effect of CrimPR 21.3: see the text and notes 5-10 infra.

4 CrimPR 21.1, 21.2. The prosecution should reveal the identity of a complainant at an early stage before advance disclosure: *Daventry District Council v Olinio* (1990) 54 JP 478, DC.

5 See PARAS 1111-1112 post.



6 See PARAS 1111, 1113 post.

7 See PARA 1116 post. As to age see PARA 1107 note 1 ante.

8 For these purposes, 'written statement' means a statement made by a person on whose evidence the prosecutor proposes to rely in the proceedings and, where such a person has made more than one written statement one of which contains information as to all the facts and matters in relation to which the prosecutor proposes to rely on the evidence of that person, only that statement is a written statement for these purposes: see CrimPR 21.3(2). The provision of advance information by the prosecution by way of witness statements in the magistrates' court is equivalent to the service of witness statements in the Crown Court, with the result that at that stage the prosecution's discretion as to which witnesses to call is fettered and it ought normally to call any witness whose evidence is capable of belief: *R v Haringey Justices, ex p DPP* [1996] QB 351, [1996] 2 Cr App Rep 119, DC.

9 CrimPR 21.3(1)(a).

10 CrimPR 21.3(1)(b). See *R v Calderdale Magistrates' Court, ex p Donahue and Cutler* [2001] Crim LR 141, DC (document includes a video for these purposes). Where in any part of a written statement or in a summary so furnished reference is made to a document on which the prosecutor proposes to rely, the prosecutor must, subject to CrimPR 21.4 (see the text and notes 11, 12 infra), when furnishing the part of the written statement or the summary, also furnish either a copy of the document or such information as may be necessary to enable the person making the request to inspect the document or a copy of it: see CrimPR 21.3(3). A reference to DNA profiles in a summary of facts on which the prosecution intends to rely is not a reference to a document on which the prosecution proposes to rely within the meaning of CrimPR 21.3 (see the text and notes 5-9 supra): *R (on the application of DPP) v Croydon Magistrates' Court* [2001] EWHC Admin 552, [2001] Crim LR 980, DC.

As to the application of CrimPR 21.3 where the court is considering the more suitable mode of trial or where a defendant who has not attained the age of 18 appears or is brought before the court see CrimPR 21.5; and PARA 1111 note 2 post.

11 CrimPR 21.4(1).

12 CrimPR 21.4(2). The Serious Fraud Office, when conducting an interview under the Criminal Justice Act 1987 is not required to provide the interviewee with advance information of the subject matter of the interview because such an interview is part of the investigative process, and not part of the judicial process: see *R v Serious Fraud Office, ex p Maxwell* (1992) Times, 9 October, (1992) Independent, 7 October, DC; and PARA 1090 ante.

13 CrimPR 21.6(1). Where, in such circumstances, the court decides not to adjourn the proceedings, a record of that decision and of the reasons why the court was satisfied that the conduct of the case for the defendant would not be substantially prejudiced by non-compliance with the requirement must be entered in the register kept under CrimPR 6.1 (see MAGISTRATES vol 29(2) (Reissue) PARAS 628, 661-662, 726, 761, 765): CrimPR 21.6(2). See *R v Willesden Magistrates' Court, ex p Clemmings* (1978) 87 Cr App Rep 280, 152 JP 286, DC; *King v Kucharz* (1989) 153 JP 336, DC; *R v Dunmow Justices, ex p Nash* (1993) 157 JP 1153, DC. The court has no power to dismiss a case on the ground that advance information requested has not been provided: *R (on the application of AP, MD and JS) v Leeds Youth Court* [2001] EWHC 215 (Admin), (2001) 165 JP 684.

As to the disclosure by the prosecution and the defence of material not relied on as evidence see PARA 1383 post.

## UPDATE

### 1110-1111 Supply of advance information, Decision as to allocation

CrimPR Pt 21 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), Pt 21. The following rules apply unless the court otherwise directs, under CrimPR 21.1(2), that, for a specified period, CrimPR Pt 21 will not apply to any case in that court; or to any specified category of case.

CrimPR Pt 21 applies in a magistrates' court, where the offence is one that can be tried in a magistrates' court: CrimPR 21.1(1). The prosecutor must provide initial details of the prosecution case by serving those details on the court officer; and making those details available to the defendant, at, or before, the beginning of the day of the first hearing: CrimPR 21.2. Initial details of the prosecution case must include (1) a summary of the evidence on which that case will be based; or (2) any statement,

document or extract setting out facts or other matters on which that case will be based; or (3) any combination of such a summary, statement, document or extract; and (4) the defendant's previous convictions: CrimPR 21.3.

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### **1111. Decision as to allocation.**

As from a day to be appointed<sup>1</sup> the court must decide whether the offence appears to it more suitable for summary trial or for trial on indictment<sup>2</sup>. Before making such a decision, the court must:

- 1738 (1) give the prosecution an opportunity to inform the court of the defendant's previous convictions (if any)<sup>3</sup>; and
- 1739 (2) give the prosecution and the defendant an opportunity to make representations as to whether summary trial or trial on indictment would be more suitable<sup>4</sup>.

In making such a decision, the court must consider:

- 1740 (a) whether the sentence which a magistrates' court would have power to impose for the offence would be adequate<sup>5</sup>; and
- 1741 (b) any representations made<sup>6</sup> by the prosecution or the defendant<sup>7</sup>,

and must have regard to any allocation guidelines (or revised allocation guidelines) issued<sup>8</sup> as definitive guidelines by the Sentencing Guidelines Council<sup>9</sup>.

If, in respect of the offence, the court receives a notice under specified provisions<sup>10</sup> relating to serious or complex fraud cases or to certain cases involving children, the above provisions<sup>11</sup> and other specified provisions<sup>12</sup> do not apply, and the court must proceed in relation to the offence in accordance with specified provisions<sup>13</sup> relating to sending for trial<sup>14</sup>.

1 The Magistrates' Courts Act 1980 s 19 (as amended) is substituted by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 5 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning offences triable on indictment or summarily see PARA 1105 ante.

2 See the Magistrates' Courts Act 1980 s 19(1) (prospectively substituted: see note 1 supra). Where a defendant is brought before a magistrates' court in respect of proceedings for an offence triable either way, the court must, before it considers whether the offence appears to be more suitable for summary trial or trial on indictment, satisfy itself that the defendant is aware of the requirements which may be imposed on the prosecutor under CrimPR 21.3: CrimPR 21.1, 21.5(1). Where the defendant has not attained the age of 18 years when he appears or is brought before a magistrates' court in such proceedings, the court must, before the defendant is asked whether he pleads guilty or not guilty, satisfy itself that the defendant is aware of the requirements which may be imposed on the prosecutor under CrimPR 21.3 (see PARA 1110 notes 5-10 ante): CrimPR 21.5(2). As to offences triable either way see PARA 1103 ante.

3 See the Magistrates' Courts Act 1980 s 19(2)(a) (prospectively substituted: see note 1 supra). In s 19 (prospectively substituted) any reference to a previous conviction is a reference to:

498 (1) a previous conviction by a court in the United Kingdom (s 19(5)(a) (as so prospectively substituted)); or

499 (2) a previous finding of guilt in: (a) any proceedings under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 (whether before a court-martial or any other court or

person authorised under any of those Acts to award a punishment in respect of any offence: see ARMED FORCES vol 2(2) (Reissue) PARAS 151 et seq, 191 et seq, 206 et seq); or (b) any proceedings before a standing civilian court (see ARMED FORCES vol 2(2) (Reissue) PARA 520) (Magistrates Courts Act 1980 s 19(5)(b) (as so prospectively substituted)).

- 4 Ibid s 19(2)(b) (prospectively substituted: see note 1 supra).
- 5 Ibid s 19(3)(a) (prospectively substituted: see note 1 supra).
- 6 Ie under ibid s 19(2)(b) (prospectively substituted): see head (2) in the text.
- 7 Ibid s 19(3)(b) (prospectively substituted: see note 1 supra).
- 8 Ie under the Criminal Justice Act 2003 s 170: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 635.
- 9 Magistrates' Courts Act 1980 s 19(3) (prospectively substituted: see note 1 supra). At the date at which this volume states the law no such allocation guidelines had been issued. Where: (1) the defendant is charged with two or more offences; and (2) it appears to the court that the charges for the offences could be joined in the same indictment or that the offences arise out of the same or connected circumstances, s 19(3)(a) (prospectively substituted) (see head (a) in the text) has effect as if references to the sentence which a magistrates' court would have power to impose for the offence were a reference to the maximum aggregate sentence which a magistrates' court would have power to impose for all of the offences taken together: s 19(4) (as so prospectively substituted).
- 10 Ie the Crime and Disorder Act 1998 s 51B (prospectively added and amended) or s 51C (prospectively added): see PARAS 1134-1135 post.
- 11 Ie the Magistrates' Courts Act 1980 s 19(1)-(5) (prospectively substituted): see the text and notes 1-9 supra.
- 12 Ie ibid s 20 (prospectively substituted), s 20A (prospectively added), s 21 (prospectively substituted): see PARAS 1112-1113 post.
- 13 Ie the Crime and Disorder Act 1998 s 51 (as substituted): see PARA 1132 post.
- 14 Magistrates' Courts Act 1980 s 19(6) (prospectively substituted: see note 1 supra).

## UPDATE

### 1110-1111 Supply of advance information, Decision as to allocation

CrimPR Pt 21 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), Pt 21. The following rules apply unless the court otherwise directs, under CrimPR 21.1(2), that, for a specified period, CrimPR Pt 21 will not apply to any case in that court; or to any specified category of case.

CrimPR Pt 21 applies in a magistrates' court, where the offence is one that can be tried in a magistrates' court: CrimPR 21.1(1). The prosecutor must provide initial details of the prosecution case by serving those details on the court officer; and making those details available to the defendant, at, or before, the beginning of the day of the first hearing: CrimPR 21.2. Initial details of the prosecution case must include (1) a summary of the evidence on which that case will be based; or (2) any statement, document or extract setting out facts or other matters on which that case will be based; or (3) any combination of such a summary, statement, document or extract; and (4) the defendant's previous convictions: CrimPR 21.3.

### 1111 Decision as to allocation

NOTE 3--Magistrates Courts Act 1980 s 19(5)(b) (s 19 as prospectively substituted: see NOTE 1) further substituted: Armed Forces Act 2006 Sch 16 para 88.



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### **1112. Procedure where summary trial appears more suitable.**

As from a day to be appointed<sup>1</sup> if the court decides<sup>2</sup> that the offence appears more suitable for summary trial, the following provisions apply<sup>3</sup>.

The court must explain to the defendant in ordinary language:

- 1742 (1) that it appears to the court more suitable for him to be tried summarily for the offence<sup>4</sup>;
- 1743 (2) that he can either consent to be so tried or, if he wishes, be tried by a jury<sup>5</sup>; and
- 1744 (3) in the case of a specified offence<sup>6</sup>, that, if he is tried summarily and is convicted by the court, he may be committed for sentence<sup>7</sup> to the Crown Court if the committing court is of opinion that the criteria for the imposition of a sentence under specified provisions relating to dangerous adult offenders would be met<sup>8</sup>.

The defendant may then request an indication ('an indication of sentence') of whether a custodial sentence<sup>9</sup> or non-custodial sentence would be more likely to be imposed if he were to be tried summarily for the offence and to plead guilty<sup>10</sup>. If the defendant requests an indication of sentence, the court may, but need not, give such an indication<sup>11</sup>. If the defendant requests and the court gives an indication of sentence, the court must ask the defendant whether he wishes, on the basis of the indication, to reconsider the indication of plea which was given<sup>12</sup>, or is taken<sup>13</sup> to have been given<sup>14</sup>. If the defendant indicates that he wishes to reconsider the indication of plea, the court must ask the defendant whether (if the offence were to proceed to trial) he would plead guilty or not guilty<sup>15</sup>.

If the defendant indicates that he would plead guilty, the court must proceed as if the proceedings constituted from that time the summary trial of the information<sup>16</sup> and as if, having been asked, the defendant had pleaded guilty<sup>17</sup>.

Where:

- 1745 (a) the court does not give an indication of sentence (whether because the defendant does not request one or because the court does not agree to give one)<sup>18</sup>;
- 1746 (b) the defendant either:  
73
  - 115. (i) does not indicate<sup>19</sup> that he wishes<sup>20</sup>; or
  - 116. (ii) indicates that he does not wish<sup>21</sup>,
- 74
  - 1747 to reconsider the indication<sup>22</sup> of plea<sup>23</sup>; or
  - 1748 (c) the defendant does not indicate<sup>24</sup> that he would plead guilty<sup>25</sup>,

the court must ask the defendant whether he consents to be tried summarily or wishes to be tried on indictment<sup>26</sup> and:

- 1749 (A) if he consents to be tried summarily, must proceed to the summary trial of the information<sup>27</sup>; and
- 1750 (B) if he does not so consent, must proceed in relation to the offence in accordance with specified provisions<sup>28</sup> relating to sending for trial<sup>29</sup>.

Where the case is dealt with summarily<sup>30</sup> no court (whether a magistrates' court or not) may impose a custodial sentence for the offence unless such a sentence was indicated in the indication of sentence, where one has been given<sup>31</sup>. Except as so provided an indication of sentence is not binding on any court (whether a magistrates' court or not); and no sentence may be challenged or be the subject of appeal in any court on the ground that it is not consistent with an indication of sentence<sup>32</sup>.

1 The Magistrates' Courts Act 1980 s 20 (as amended) is substituted, and s 20A is added, by the Criminal Justice Act 2003 s 41, Sch 3 Pt 1 paras 1, 6 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning offences triable on indictment or summarily see PARA 1105 ante.

2 *Ie* under the Magistrates' Courts Act 1980 s 19 (prospectively substituted): see PARA 1111 ante.

3 *Ibid* s 20(1) (prospectively substituted: see note 1 *supra*). Section 20 (prospectively substituted) applies unless excluded by s 23 (as amended; prospectively amended) (see PARA 1115 post): see s 20(1) (as so prospectively substituted).

4 *Ibid* s 20(2)(a) (prospectively substituted: see note 1 *supra*).

5 *Ibid* s 20(2)(b) (prospectively substituted: see note 1 *supra*).

6 *Ie* an offence within the meaning of the Criminal Justice Act 2003 s 224 (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 68 et seq.

7 *Ie* under the Powers of Criminal Courts (Sentencing) Act 2000 s 3A (prospectively added): see PARA 1124 post.

8 Magistrates' Courts Act 1980 s 20(2)(c) (prospectively substituted: see note 1 *supra*).

9 In *ibid* s 20 (prospectively substituted) and s 20A (prospectively added) (see the text and notes 1-8 *supra*, 10-32 *infra*), references to a custodial sentence are references to a custodial sentence within the meaning of the Powers of Criminal Courts (Sentencing) Act 2000 s 76 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 23); and references to a non-custodial sentence are to be construed accordingly: Magistrates' Courts Act 1980 s 20A(6) (prospectively added: see note 1 *supra*).

10 *Ibid* s 20(3) (prospectively substituted: see note 1 *supra*).

11 *Ibid* s 20(4) (prospectively substituted: see note 1 *supra*).

12 *Ie* under *ibid* s 17A (as added and amended; prospectively amended): see PARA 1107 ante.

13 *Ie* under *ibid* s 17B (as added): see PARA 1108 ante.

14 *Ibid* s 20(5) (prospectively substituted: see note 1 *supra*). Where the court gives an indication of sentence under s 20 (prospectively substituted), it must cause each such indication to be entered in the register: s 20A(5) (prospectively added: see note 1 *supra*).

15 *Ibid* s 20(6) (prospectively substituted: see note 1 *supra*).

16 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

17 Magistrates' Courts Act 1980 s 20(7) (prospectively substituted: see note 1 *supra*). Subject to s 20(7) (prospectively substituted), the following may not for any purpose be taken to constitute the taking of a plea: (1) asking the defendant under s 20 (prospectively substituted) whether (if the offence were to proceed to trial) he would plead guilty or not guilty; or (2) an indication by the defendant under s 20 (prospectively substituted) of how he would plead: s 20A(4) (prospectively added: see note 1 *supra*).

- 18 Ibid s 20(8)(a) (prospectively substituted: see note 1 supra).
- 19 Ie under ibid s 20(5) (prospectively substituted): see the text and notes 12-14 supra.
- 20 Ibid s 20(8)(b)(i) (prospectively substituted: see note 1 supra).
- 21 Ibid s 20(8)(b)(ii) (prospectively substituted: see note 1 supra).
- 22 Ie under ibid s 17A (as added and amended; prospectively amended) or s 17B (as added): see PARAS 1107-1108 ante.
- 23 See ibid s 20(8)(b) (prospectively substituted: see note 1 supra).
- 24 Ie in accordance with ibid s 20(6) (prospectively substituted): see the text and note 15 supra.
- 25 Ibid s 20(8)(c) (prospectively substituted: see note 1 supra).
- 26 See ibid s 20(9) (prospectively substituted: see note 1 supra).
- 27 Ibid s 20(9)(a) (prospectively substituted: see note 1 supra).
- 28 Ie in accordance with the Crime and Disorder Act 1998 s 51(1) (as substituted): see PARA 1132 post.
- 29 Magistrates' Courts Act 1980 s 20(9)(b) (prospectively substituted: see note 1 supra).
- 30 Ie in accordance with ibid s 20(7) (prospectively substituted): see the text and notes 16-17 supra.
- 31 Ibid s 20A(1) (prospectively added: see note 1 supra). Section 20A(1) (prospectively added) is subject to the Powers of Criminal Courts (Sentencing) Act 2000 s 3A(4), 4(8) (both prospectively added) and s 5(3) (prospectively substituted) (see PARAS 1124, 1127 post): Magistrates' Courts Act 1980 s 20A(2) (as so prospectively added).
- 32 Ibid s 20A(3) (prospectively added: see note 1 supra).

## **UPDATE**

### **1112 Procedure where summary trial appears more suitable**

NOTE 1--2003 Act Sch 3 para 6 amended: Criminal Justice and Immigration Act 2008 Sch 13 para 3.



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### **1113. Procedure where trial on indictment appears more suitable.**

As from a day to be appointed<sup>1</sup> if the court decides<sup>2</sup> that the offence appears to it more suitable for trial on indictment, the court must tell the defendant that the court has decided that it is more suitable for him to be tried on indictment, and must proceed in relation to the offence in accordance with specified provisions<sup>3</sup> relating to sending for trial<sup>4</sup>.

1 The Magistrates' Courts Act 1980 s 21 is substituted by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 7 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning offences triable on indictment or summarily see PARA 1105 ante.

2 le as required by the Magistrates' Courts Act 1980 s 19 (prospectively substituted): see PARA 1111 ante.

3 le the Crime and Disorder Act 1998 s 51(1) (as substituted): see PARA 1132 post.

4 Magistrates' Courts Act 1980 s 21 (prospectively substituted: see note 1 supra).

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**1114. Certain offences triable either way to be tried summarily if value involved is small.**

If the offence charged by the information<sup>1</sup> is a scheduled offence<sup>2</sup>, the court must, before proceeding to consider which mode of trial appears more suitable<sup>3</sup>, consider whether, having regard to any representations made by the prosecutor or the defendant, the value involved<sup>4</sup> appears to the court to exceed the relevant sum<sup>5</sup>.

If it appears to the court clear that, for the offence charged, the value involved does not exceed the relevant sum, the court must proceed as if the offence were triable only summarily<sup>6</sup>.

If it appears to the court clear that, for the offence charged, the value involved exceeds the relevant sum, the court must thereupon proceed to consider which mode of trial appears more suitable in the ordinary way<sup>7</sup> without further regard to the above provisions<sup>8</sup>.

If, however, it appears to the court for any reason not clear whether, for the offence charged, the value involved does or does not exceed the relevant sum, the following provisions apply<sup>9</sup>. The court must cause the charge to be written down, if this has not already been done, and read to the defendant, and must explain to him in ordinary language:

- 1751 (1) that he can, if he wishes, consent to be tried summarily for the offence and that, if he consents to be so tried, he will definitely be tried in that way<sup>10</sup>; and
- 1752 (2) that, if he is tried summarily and is convicted by the court, his liability to imprisonment or a fine will be limited<sup>11</sup> in accordance with the statutory provisions<sup>12</sup>.

After so explaining to the defendant, the court must ask him whether he consents to be tried summarily and:

- 1753 (a) if he so consents, must proceed<sup>13</sup> as if the offence were triable only summarily<sup>14</sup>;
- 1754 (b) if he does not so consent, must proceed<sup>15</sup> to consider which mode of trial appears more suitable<sup>16</sup>.

Where a person is convicted by a magistrates' court of a scheduled offence, it is not open to him to appeal to the Crown Court against the conviction on the ground that the convicting court's decision as to the value involved was mistaken<sup>17</sup>.

<sup>1</sup> As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

<sup>2</sup> For these purposes, 'scheduled offence' means an offence mentioned in the Magistrates' Courts Act 1980 s 22(1), Sch 2 column 1 (as amended). The offences so mentioned are:

500 (1) offences under the Criminal Damage Act 1971 s 1 (destroying or damaging property: see PARA 334 ante), excluding any offence committed by destroying or damaging property by fire (Magistrates' Court Act 1980 Sch 2 column 1 para 1);

- 501 (2) the following offences: (a) aiding, abetting, counselling or procuring the commission of any offence mentioned in head (1) above; (b) attempting to commit any offence so mentioned; (c) inciting another to commit any offence so mentioned (Sch 2 column 1 para 2); and
- 502 (3) offences under the Theft Act 1968 s 12A (as added and amended) (aggravated vehicle-taking: see PARA 299 ante) where no allegation is made under s 12A(1)(b) (as added) other than of damage, whether to the vehicle or other property or both (Magistrates' Court Act 1980 Sch 2 column 1 para 3 (added by the Aggravated Vehicle-Taking Act 1992 s 2(1))).

The provisions of head (1) supra are to be treated as applying only to offences under the Criminal Damage Act 1971 s 1(1), ie as not applying to offences under s 1(2), (3) (offences of criminal damage with intent or recklessness as to endangering life or of arson): *R v Burt* (1996) 161 JP 77, CA. For these purposes, 'the material time' means the time of the alleged offence: see the Magistrates' Courts Act 1980 s 22(10).

3 ie in accordance with *ibid* s 19 (prospectively substituted): see PARAS 1105, 1111 ante.

4 For these purposes, 'the value involved', in relation to any scheduled offence, means the value indicated in *ibid* Sch 2 column 2, measured as indicated in Sch 2 column 3 (as added): see s 22(10). The value involved is calculated as follows:

- 503 (1) in the case of offences under note 2 head (1) supra:
25. (a) as regards property alleged to have been destroyed, its value, measured by what the property would probably have cost to buy in the open market at the material time;
- 26
26. (b) as regards property alleged to have been damaged, the value of the alleged damage, measured by: (i) where immediately after the material time the damage was capable of repair: (A) what would probably then have been the market price for the repair of the damage; or (B) what the property alleged to have been damaged would have cost to buy in the open market at the material time, whichever is the less; or (ii) if immediately after the material time the damage was beyond repair, what the said property would probably have cost to buy in the open market at the material time;
- 27
- 504 (2) in the case of offences under note 2 head (2) supra, the value indicated in head (1) supra for the offence alleged to have been aided, abetted, counselled or procured, or attempted or incited, measured by the corresponding provision in head (1) supra;
- 505 (3) in the case of offences under note 2 head (3) supra, the total value of the damage alleged to have been caused, measured by:
27. (a) in the case of damage to any property other than the vehicle involved in the offence, as for the corresponding entry in head (1) supra, substituting a reference to the time of the accident concerned for any reference to the material time;
- 28
28. (b) in the case of damage to the vehicle involved in the offence: (i) if immediately after the vehicle was recovered the damage was capable of repair, what would probably then have been the market price for the repair of the damage, or what the vehicle would probably have cost to buy in the open market immediately before it was unlawfully taken, whichever is the less; or (ii) if immediately after the vehicle was recovered the damage was beyond repair, what the vehicle would probably have cost to buy in the open market immediately before it was unlawfully taken.
- 29

The Theft Act 1968 s 12A(8) (as added) (determination of when a vehicle is recovered: see PARA 299 ante) applies for the purposes of the determination of the value involved in respect of offences under head (3) of note 2 supra as it applies for the purposes of the Magistrates' Courts Act 1980 Sch 2 para 3 (as added): s 22(12) (added by the Aggravated Vehicle-Taking Act 1992 s 2(2)). The Magistrates' Courts Act 1980 Sch 2 (as amended) is concerned only with actual values, as described above, and not with any consequential damage: *R v Colchester Magistrates' Court, ex p Abbott* [2001] EWHC Admin 136, 165 JP 386, DC.

Where the defendant is charged on the same occasion with two or more scheduled offences and it appears to the court that they constitute or form part of a series of two or more offences of the same or a similar character, or the offence charged consists in incitement to commit two or more scheduled offences, the Magistrates' Courts Act 1980 s 22 (as amended) has effect as if any reference in it to the value involved were a reference to the aggregate of the values involved: s 22(11) (added by the Criminal Justice Act 1988 s 38(3)). Whether or not offences form part of a series depends on there being a sufficient separation in time between them; this is very much a matter of degree. Where offences are committed at different places and involve different types of

property they may be too remote to form a series: *R v Braden* (1987) 152 JP 92, DC. Offences which occur simultaneously cannot form part of a series: *Re Prescott* (1979) 70 Cr App Rep 244, CA.

5 See the Magistrates' Courts Act 1980 s 22(1) (amended by the Criminal Justice and Public Order Act 1994 s 168(3), Sch 11). For these purposes, 'the relevant sum' is £5,000: see the Magistrates' Courts Act 1980 s 22(1) (as so amended).

If, where s 22(1) (as amended) applies, the offence charged is one with which the defendant is charged jointly with a person who has not attained the age of 18, the reference in s 22(1) (as amended) to any representations made by the defendant is to be read as including any representations made by the person under 18: s 22(9) (amended by the Criminal Justice Act 1991 s 68, Sch 8 para 6).

6 See the Magistrates' Courts Act 1980 s 22(2). In such a case ss 19-21 (s 19 as amended, prospectively substituted; s 20 as amended, prospectively substituted; s 20A prospectively added; s 21 prospectively substituted) (see PARAS 1105, 1111-1113 ante) do not apply: see s 22(2). The fact that in such a case the offence has to be proceeded with 'as if' it was triable summarily does not mean that it is a summary offence. On the contrary, like any other offence under the Criminal Damage Act 1971 s 1(1) (see PARA 334 ante) it is an either-way offence (and therefore an indictable offence) for purposes other than trial, such as the offence of attempt (see PARA 79 ante) (*R v Bristol Magistrates' Court, ex p E* [1998] 3 All ER 798, [1999] 1 WLR 390, DC), or the alternative verdict provisions of the Criminal Law Act 1967 s 6(3) (see PARA 82 ante) (*R v Fennell* [2000] 1 WLR 2011, 164 JP 386, CA).

The court is not required to hear evidence as to the value of the property in issue unless it wishes to do so: *R v Canterbury and St Augustine's Justices, ex p Klisiak* [1982] QB 398, 72 Cr App Rep 250, DC. Where a defendant has caused damage of more than £5,000 in value, which can be itemised into various sums, the prosecution is entitled to charge only sums of damage up to £5,000 in value and thereby ensure that the defendant is tried summarily for criminal damage: *R v Canterbury and St Augustine's Justices, ex p Klisiak* supra.

Where the prosecution is unable to prove the total amount of damage done by an individual defendant, as where a number of other people have also damaged the property in question, but it can prove the minimum amount of the damage done by that defendant (being an amount less than £5,000) then, unless there is material before the magistrates which gives them any real doubts as to the accuracy of the calculation, the prosecution is entitled to prove only that minimum, and thereby ensure that the accused is tried summarily: *R v Salisbury Magistrates' Court, ex p Mastin* (1986) 84 Cr App Rep 248, DC.

If the magistrates' court does not categorise the offence as one where the value of the damage was less than £5,000, it is to be dealt with as an offence triable either way in the normal way and is not subject on summary conviction to the maximum sentence laid down by the Magistrates' Courts Act 1980 s 33(1) (as amended) (see note 11 infra): *R v Alden* [2002] EWCA Crim 421, [2002] 2 Cr App Rep (S) 74.

7 In accordance with the Magistrates' Courts Act 1980 s 19 (as amended; prospectively substituted): see PARAS 1105, 1111 ante.

8 Ibid s 22(3).

9 Ibid s 22(4). See *R v Prestatyn Magistrates' Court, ex p DPP* [2002] EWHC Admin 1177, [2002] Crim LR 924.

10 Magistrates' Courts Act 1980 s 22(5)(a).

11 In limited as provided in ibid s 33 (as amended). Where, in pursuance of s 22(2) (see the text and note 6 supra), a magistrates' court proceeds to the summary trial of an information, then, if the defendant is summarily convicted of the offence: (1) the court may not impose on him in respect of that offence imprisonment for more than three months or a fine greater than level 4 on the standard scale; and (2) the Powers of Criminal Courts (Sentencing) Act 2000 s 3 (prospectively substituted) (see PARAS 1105 ante, 1123 post) does not apply as regards that offence: s 33(1) (amended by the Criminal Justice Act 1991 s 17(3), Sch 4 Pt II; and the Aggravated Vehicle-Taking Act 1992 s 2(3)(a)). See PARA 1105 note 1 ante. As from a day to be appointed this maximum term of imprisonment is increased to 51 weeks: see the Criminal Justice Act 2003 s 304, Sch 32 para 27 (not yet in force). At the date at which this volume states the law no such day had been appointed. As from a day to be appointed head (2) supra is repealed: see the Criminal Justice Act 2003 ss 41, 304, 332, Sch 3 paras 1, 13, Sch 37 Pt 4 (not yet in force). At the date at which this volume states the law no such day had been appointed. The limitation set out in head (1) supra does not apply to an offence under the Theft Act 1968 s 12A (as added) (see PARA 299 ante): Magistrates' Courts Act 1980 s 33(3) (added by the Aggravated Vehicle-Taking Act 1992 s 2(3)(b)). For these purposes, 'fine' includes a pecuniary penalty but does not include a pecuniary forfeiture or pecuniary compensation: Magistrates' Courts Act 1980 s 33(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

12 Ibid s 22(5).

13 In accordance with ibid s 22(2), as if s 22(2) applied: see the text and note 6 supra.

14 Ibid s 22(6)(a).

15 le in accordance with ibid s 22(3), as if s 22(3) applied: see the text and notes 7-8 supra.

16 Ibid s 22(6)(b).

17 Ibid s 22(8).

#### **UPDATE**

#### **1114 Certain offences triable either way to be tried summarily if value involved is small**

NOTE 11--2003 Act Sch 3 para 13 omitted: Criminal Justice and Immigration Act 2008 Sch 13 para 6, Sch 28 Pt 4.

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**1115. Power of court, with consent of legally represented defendant, to proceed in his absence.**

Where:

- 1755 (1) the defendant is represented by a legal representative who in his absence signifies to the court the defendant's consent to the proceedings for determining how he is to be tried for the offence being conducted in his absence<sup>1</sup>; and
- 1756 (2) the court is satisfied that there is good reason for proceeding in the absence of the defendant<sup>2</sup>,

the following provisions apply<sup>3</sup>.

The court may proceed<sup>4</sup> in the absence of the defendant in accordance with such specified provisions<sup>5</sup> as are applicable in the circumstances<sup>6</sup>.

If, in a case where the offence is a scheduled offence<sup>7</sup>, it appears to the court<sup>8</sup> for any reason not clear whether, for the offence charged, the value involved does or does not exceed the relevant sum<sup>9</sup>, the statutory provisions<sup>10</sup> requiring the court to cause the charge to be written down and read to the defendant, to explain the defendant's rights and to ask him whether he consents to be tried summarily do not apply and the court:

- 1757 (a) if the defendant's consent to be tried summarily has been or is signified by the person representing him, must proceed<sup>11</sup> as if the offence were triable only summarily<sup>12</sup>; or
- 1758 (b) if that consent has not been and is not so signified, must proceed<sup>13</sup> by considering which mode of trial appears more suitable<sup>14</sup>.

As from a day to be appointed if the court decides<sup>15</sup> that the offence appears to it to be more suitable for summary trial, then:

- 1759 (i) if the defendant's consent to be tried summarily has been or is signified by the person representing him, the procedure<sup>16</sup> where summary trial appears more suitable does not apply, and the court must proceed to the summary trial of the information<sup>17</sup>; or
- 1760 (ii) if that consent has not been and is not so signified, the procedure where summary trial appears more suitable does not apply and the court must proceed in relation to the offence in accordance with specified provisions<sup>18</sup> relating to sending for trial<sup>19</sup>.

As from a day to be appointed if the court decides<sup>20</sup> that the offence appears to it more suitable for trial on indictment, the court must proceed in relation to the offence in accordance with specified provisions<sup>21</sup> relating to sending for trial<sup>22</sup>.

1 Magistrates' Courts Act 1980 s 23(1)(a) (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 25).

2 Magistrates' Courts Act 1980 s 23(1)(b).

3 See *ibid* s 23(1). As from a day to be appointed where in the circumstances mentioned in s 23(1)(a) (as amended) (see head (1) in the text) the court is not satisfied that there is good reason for proceeding in the absence of the defendant, the justice or any of the justices of which the court is composed may issue a summons directed to the defendant requiring his presence before the court: s 26(1) (s 26 prospectively substituted by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 12). See PARA 1105 note 1 ante. If, in a case within the Magistrates' Courts Act 1980 s 26(1) (prospectively substituted) the defendant is not present at the time and place appointed for the proceedings under s 19(1) (prospectively substituted) (see PARA 1111 ante) or s 22(1) (as amended) (see PARA 1114 ante), the court may issue a warrant for his arrest: s 26(2) (as so prospectively substituted). At the date at which this volume states the law no such day had been appointed.

4 *Ie* subject to *ibid* s 23(3)-(5) (s 23(4) prospectively amended; and s 23(5) prospectively substituted): see notes 5-22 *infra*; and PARA 1105 ante.

5 *Ie* such of *ibid* ss 19-22 (ss 19, 20 as amended, prospectively substituted; s 20A prospectively added; s 21 prospectively substituted; s 22 as amended): see PARAS 1105, 1111-1114 ante.

6 *Ibid* s 23(2).

7 *Ie* a case where *ibid* s 22(1) (as amended) applies: see PARA 1114 ante.

8 *Ie* as mentioned in *ibid* s 22(4): see PARA 1114 ante.

9 For the meaning of 'the relevant sum' see PARA 1114 note 5 ante.

10 *Ie* the Magistrates' Courts Act 1980 s 22(5), (6): see PARA 1114 ante.

11 *Ie* in accordance with *ibid* s 22(2): see PARA 1114 ante.

12 *Ibid* s 23(3)(a).

13 *Ie* in accordance with *ibid* s 22(3): see PARA 1114 ante.

14 *Ibid* s 23(3)(b).

15 *Ie* under *ibid* s 19 (prospectively substituted): see PARA 1111 ante.

16 *Ie* *ibid* s 20 (prospectively substituted): see PARA 1112 ante.

17 See *ibid* s 23(4)(a). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

18 *Ie* the Crime and Disorder Act 1998 s 51(1) (as substituted: see PARA 1132 post).

19 See the Magistrates' Courts Act 1980 s 23(4)(b) (prospectively amended by the Criminal Justice Act 2003 Sch 3 paras 1, 8(1), (2)). At the date at which this volume states the law no such day had been appointed. See PARA 1105 ante.

20 *Ie* under the Magistrates' Courts Act 1980 s 19 (prospectively substituted): see PARA 1111 ante.

21 See note 18 *supra*.

22 See the Magistrates' Courts Act 1980 s 23(5) (prospectively substituted by the Criminal Justice Act 2003 Sch 3 paras 1, 8(1), (3)). At the date at which this volume states the law no such day had been appointed. See PARA 1105 ante. The procedure under the Magistrates' Courts Act 1980 s 21 (prospectively substituted) (see PARA 1113 ante) does not apply where the court so decides: see s 23(5) (as so prospectively substituted).

## UPDATE

### **1115 Power of court, with consent of legally represented defendant, to proceed in his absence**

NOTE 19--2003 Act Sch 3 para 8(2) amended: Criminal Justice and Immigration Act 2008  
Sch 13 para 4.



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### **1116. Summary trial of information against child or young person for indictable offence.**

As from a day to be appointed<sup>1</sup> where a person under the age of 18<sup>2</sup> appears or is brought before a magistrates' court on an information<sup>3</sup> charging him with an indictable offence<sup>4</sup>, he must, subject to specified provisions<sup>5</sup>, be tried summarily<sup>6</sup>.

1 The Magistrates' Courts Act 1980 s 24(1) is substituted by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 9(1), (2) as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning offences triable on indictment or summarily see PARA 1105 ante.

2 The appropriate date at which to determine whether a defendant has attained the age of 18 is the date of his appearance before the court on the occasion when the court makes its decision as to the mode of trial: see *R v Islington North Juvenile Court, ex p Daley* [1983] 1 AC 347, 75 Cr App Rep 280, HL.

As to the power of a magistrates' court to remit a person under 18 for trial to a youth court see the Magistrates' Courts Act 1980 s 29 (as amended); and MAGISTRATES vol 29(2) (Reissue) PARA 747. As to the power of a youth court to remit a person who attains the age of 18 for trial in a magistrates' court see PARA 1098 note 8 ante.

3 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

4 See PARA 1102 ante.

5 See PARAS 1117-1118, 1132-1133 post.

6 Magistrates' Courts Act 1980 s 24(1) (prospectively substituted: see note 1 supra).

If, on trying a person summarily in pursuance of the Magistrates' Courts Act 1980 24(1) (prospectively substituted) (see the text and notes 1-5 supra; and PARA 1105 ante), the court finds him guilty, it may impose a fine of an amount not exceeding £1,000 or may exercise the same powers as it could have exercised if he had been found guilty of an offence for which, but for the Powers of Criminal Courts (Sentencing) Act 2000 s 89(1) (prospectively amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 11), it could have sentenced him to imprisonment for a term not exceeding the maximum term of imprisonment for the offence on conviction on indictment or six months, whichever is the less: see the Magistrates' Courts Act 1980 s 24(3) (amended by the Criminal Justice Act 1982 s 77, Sch 14 para 47; the Criminal Justice Act 1991 s 17(2); and the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 64(1), (3)). In relation to a person under the age of 14, the Magistrates' Courts Act 1980 s 24(3) (as amended) has effect as if it referred to £250 instead of £1,000: s 24(4) (amended by the Criminal Justice Act 1991 ss 17(2), 101(2), Sch 13).

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### **1117. Child or young person to indicate intention as to plea in certain cases.**

As from a day to be appointed<sup>1</sup> where:

1761 (1) a person under the age of 18 years<sup>2</sup> appears or is brought before a magistrates' court on an information<sup>3</sup> charging him with an offence other than one of homicide<sup>4</sup> or a firearms offence of a specified<sup>5</sup> type<sup>6</sup>; and

1762 (2) but for the application of the following provisions<sup>7</sup>, the court would be required at that stage<sup>8</sup> to determine, in relation to the offence, whether to send the person to the Crown Court for trial (or to determine any matter, the effect of which would be to determine whether he is sent to the Crown Court for trial)<sup>9</sup>,

the court must, before proceeding to make any such determination (the 'relevant determination'), follow the following procedure<sup>10</sup>.

The court must cause the charge to be written down, if this has not already been done, and to be read to the defendant<sup>11</sup>. The court must then explain to the defendant in ordinary language that he may indicate whether (if the offence were to proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty:

1763 (a) the court must proceed as if the proceedings constituted from the beginning the summary trial of the information and, having been asked, he had pleaded guilty<sup>12</sup>;

1764 (b) (in cases where the offence is mentioned in the provisions<sup>13</sup> relating to a sentence of detention for a specified period) he may be sent to the Crown Court for sentencing<sup>14</sup> if the court is of a specified<sup>15</sup> opinion<sup>16</sup>.

The court must then ask the defendant whether (if the offence were to proceed to trial) he would plead guilty or not guilty<sup>17</sup>. If the defendant indicates that he would plead guilty, the court must proceed as if the proceedings constituted from the beginning the summary trial of the information and as if, having been asked, the defendant had pleaded guilty, and, accordingly, the court must not (and may not be required to) proceed to make the relevant determination or to proceed further under the relevant provision relating to sending for trial in relation to the offence<sup>18</sup>.

If the defendant indicates that he would plead not guilty, the court must proceed to make the relevant determination and the above provisions<sup>19</sup> cease to apply<sup>20</sup>. If the defendant in fact fails to indicate a plea he is to be taken<sup>21</sup> to indicate that he would plead not guilty<sup>22</sup>.

1 The Magistrates' Courts Act 1980 ss 24A, 24C, 24D are added by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 10 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning offences triable on indictment or summarily see PARA 1105 ante.

2 See PARAS 1116 note 2 ante.

3 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

4 An offence under the Domestic Violence, Crime and Victims Act 2004 s 5 (see PARA 107 ante) is an offence of homicide for these purposes: s 6(1), (5).

5 Ie a firearms offence in respect of which each of the requirements of the Crime and Disorder Act 1998 s 51A(12) (as added) (see PARA 1133 post) is satisfied with respect to the offence and the person charged with it.

6 Magistrates' Courts Act 1980 s 24A(1)(a) (prospectively added: see note 1 supra).

7 Ie the provisions of *ibid* s 24A(2)-(10) (prospectively added) (see the text and notes 8-22 *infra*).

8 Ie by virtue of the Crime and Disorder Act 1998 s 51(7), (8) (as substituted) (see PARA 1132 post), s 51A(3) (b), (4), (5) (as added) (see PARA 1133 post).

9 Magistrates' Courts Act 1980 s 24A(1)(b) (prospectively added: see note 1 supra).

10 *Ibid* s 24A(2) (prospectively added: see note 1 supra).

11 *Ibid* s 24A(4) (prospectively added: see note 1 supra). Everything that the court is required to do under s 24A (prospectively added) must be done with the defendant present in court: s 24A(3) (as so prospectively added).

The functions of a magistrates' court under ss 24A, 24B (prospectively added) (see PARA 1118 post) and 24C (prospectively added) (see note 22 *infra*) may be discharged by a single justice: s 24D(1) (prospectively added: see note 1 supra). Section 24D(1) (prospectively added) is not to be taken as authorising the summary trial of an information (other than a summary trial by virtue of s 24A(7) (prospectively added) (see the text and note 18 *infra*) or s 24B(2)(c) (prospectively added) (see PARA 1118 post), or the imposition of a sentence, by a magistrates' court composed of fewer than two justices: s 24D(2) (as so prospectively added).

12 See *ibid* s 24A(5)(a) (prospectively added: see note 1 supra).

13 Ie the Powers of Criminal Courts (Sentencing) Act 2000 s 91(1) (as amended; prospectively amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78.

14 Ie under the Powers of Criminal Courts (Sentencing) Act 2000 s 3B (prospectively added) or (if applicable) s 3C (as added): see PARAS 1125-1126 post.

15 Ie such opinion as is mentioned in *ibid* s 3B(2) (prospectively added) or 3C(2) (as added): see PARAS 1125-1126 post.

16 Magistrates' Courts Act 1980 s 24A(5)(b) (prospectively added: see note 1 supra).

17 *Ibid* s 24A(6) (prospectively added: see note 1 supra). Subject to s 24A(7) (prospectively added) (see the text and note 18 *infra*), the following are not for any purpose to be taken to constitute the taking of a plea: (1) asking the defendant under s 24A (prospectively added) whether (if the offence were to proceed to trial) he would plead guilty or not guilty; (2) an indication by the defendant under s 24A (prospectively added) of how he would plead: s 24A(10) (as so prospectively added).

18 *Ibid* s 24A(7) (prospectively added: see note 1 supra).

19 Ie *ibid* s 24A (prospectively added).

20 *Ibid* s 24A(8) (prospectively added: see note 1 supra).

21 Ie for the purposes of *ibid* s 24A (prospectively added).

22 *Ibid* s 24A(9) (prospectively added: see note 1 supra). A magistrates' court proceeding under s 24A (prospectively added) or s 24B (prospectively added) (see PARA 1118 post) may adjourn the proceedings at any time, and on doing so on any occasion when the defendant is present may remand the defendant: s 24C(1) (prospectively added: see note 1 supra). Where the court remands the defendant, the time fixed for the resumption of proceedings is to be that at which he is required to appear or be brought before the court in pursuance of the remand or would be required to be brought before the court but for s 128(3A) (as added and amended; prospectively amended) (see PARA 1144 post): s 24C(2) (as so prospectively added).

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**1118. Intention as to plea by child or young person: absence of defendant.**

As from a day to be appointed<sup>1</sup> where:

- 1765 (1) a person under the age of 18 years<sup>2</sup> appears or is brought before a magistrates' court on an information<sup>3</sup> charging him with an offence other than one of homicide or a firearms offence of a specified<sup>4</sup> type<sup>5</sup>;
- 1766 (2) but for the application of the following provisions<sup>6</sup>, the court would be required at that stage<sup>7</sup> to determine in relation to the offence, whether to send the person to the Crown Court for trial (or to determine any matter, the effect of which would be to determine whether he is sent to the Crown Court for trial) ('the relevant determination')<sup>8</sup>;
- 1767 (3) the defendant is represented by a legal representative<sup>9</sup>;
- 1768 (4) the court considers that by reason of the defendant's disorderly conduct before the court it is not practicable for the relevant proceedings<sup>10</sup> above to be conducted in his presence<sup>11</sup>; and
- 1769 (5) the court considers that it should proceed in the absence of the defendant<sup>12</sup>,

then, in such a case:

- 1770 (a) the court must cause the charge to be written down, if this has not already been done, and to be read to the representative<sup>13</sup>;
- 1771 (b) the court must ask the representative whether (if the offence were to proceed to trial) the defendant would plead guilty or not guilty<sup>14</sup>;
- 1772 (c) if the representative indicates that the defendant would plead guilty, the court must proceed as if the proceedings constituted from the beginning the summary trial of the information and as if, having been asked, the defendant pleaded guilty under it<sup>15</sup>;
- 1773 (d) if the representative indicates that the defendant would plead not guilty, the court must proceed to make the relevant determination<sup>16</sup>.

If the representative in fact fails to indicate how the defendant would plead, he is to be taken to indicate that the defendant would plead not guilty<sup>17</sup>.

1 The Magistrates' Courts Act 1980 s 24B is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 10 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning offences triable on indictment or summarily see PARA 1105 ante.

2 See PARA 1116 note 2 ante.

3 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

- 4 See PARA 1117 note 4 ante.
- 5 Magistrates' Courts Act 1980 s 24B(1)(a) (prospectively added: see note 1 supra).
- 6 Ie the following provisions of ibid s 24B (prospectively added).
- 7 Ie by virtue of the Crime and Disorder Act 1998 s 51(7), (8) (as substituted) (see PARA 1132 post), s 51A(3) (b), (4), (5) (as added) (see PARA 1133 post).
- 8 Magistrates' Courts Act 1980 s 24B(1)(b) (prospectively added: see note 1 supra).
- 9 Ibid s 24B(1)(c) (prospectively added: see note 1 supra).
- 10 Ie under s 24A (prospectively added): see PARA 1117 ante.
- 11 Ibid s 24B(1)(d) (prospectively added: see note 1 supra).
- 12 Ibid s 24B(1)(e) (prospectively added: see note 1 supra).
- 13 Ibid s 24B(2)(a) (prospectively added: see note 1 supra).
- 14 Ibid s 24B(2)(b) (prospectively added: see note 1 supra).
- 15 Ibid s 24B(2)(c) (prospectively added: see note 1 supra).
- 16 Ibid s 24B(2)(d) (prospectively added: see note 1 supra). See s 24D(1), (2) (prospectively added); and PARA 1117 ante. If the representative indicates that the defendant would plead not guilty, s 24B (prospectively added) ceases to apply: s 24B(2) (as so prospectively added). Subject to s 24B(2)(c) (prospectively added) (see head (c) in text), the following do not for any purpose constitute the taking of a plea: (1) asking the representative under s 24B (prospectively added) whether (if the offence were to proceed to trial) the defendant would plead guilty or not guilty; (2) an indication by the representative under s 24B (prospectively added) of how the defendant would plead: s 24B(4) (as so prospectively added).
- 17 Ibid s 24B(3) (prospectively added: see note 1 supra). See also PARA 1117 note 22 ante.

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### **1119. Power to change from summary trial to sending for trial proceedings.**

As from a day to be appointed<sup>1</sup>, where a person who has attained the age of 18<sup>2</sup> appears or is brought before a magistrates' court on an information<sup>3</sup> charging him with an offence triable either way<sup>4</sup>, the following provisions apply<sup>5</sup>.

Where the court is required<sup>6</sup> to proceed to the summary trial of the information, the prosecution may apply to the court for the offence to be tried on indictment instead<sup>7</sup>. Such an application must be made before the summary trial begins; and must be dealt with by the court before any other application or issue in relation to the summary trial is dealt with<sup>8</sup>. The court may grant such an application but only if it is satisfied that the sentence which a magistrates' court would have power to impose for the offence would be inadequate<sup>9</sup>. Where the court grants such an application, it must proceed in relation to the offence in accordance with the specified<sup>10</sup> provision relating to sending for trial<sup>11</sup>.

1 The Magistrates' Courts Act 1980 s 25(1) is amended, s 25(2) is substituted, and s 25(2A)-(2D) is added, by the Criminal Justice Act 2003 s 41, Sch 3 paras 1, 11(1)-(3) as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning offences triable on indictment or summarily see PARA 1105 ante.

2 See PARA 1116 note 2 ante.

3 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

4 As to offences triable either way see PARA 1103 ante.

5 Magistrates' Courts Act 1980 s 25(1) (amended by the Criminal Justice Act 1991 s 68, Sch 8 para 6; prospectively amended (see note 1 supra)). See further MAGISTRATES vol 29(2) (Reissue) PARA 664.

6 Ie under the Magistrates' Courts Act 1980 s 20(9) (prospectively substituted): see PARA 1112 ante.

7 Ibid s 25(2) (prospectively substituted: see note 1 supra).

8 Ibid s 25(2A) (prospectively added: see note 1 supra).

9 Ibid s 25(2B) (prospectively added: see note 1 supra). Where: (1) the defendant is charged on the same occasion with two or more offences; and (2) it appears to the court that they constitute or form part of a series of two or more offences of the same or a similar character, s 25(2B) (prospectively added) has effect as if references to the sentence which a magistrates' court would have power to impose for the offence were a reference to the maximum aggregate sentence which a magistrates' court would have power to impose for all of the offences taken together: s 25(2C) (prospectively added: see note 1 supra).

Decisions about mode of trial are irrevocable unless s 25 (as amended; prospectively amended) applies; and a magistrates' court has no inherent jurisdiction to supplement the statutory powers as to mode of trial: *R (on the application of DPP) v Camberwell Green Youth Court* [2003] EWHC 3217 (Admin), 168 JP 157. Where the Director of Public Prosecutions is concerned about a decision of a magistrates' court to retain jurisdiction rather than sending a defendant for trial, the Director should normally apply for judicial review rather than seeking a voluntary bill of indictment: *R (on the application of DPP) v Camberwell Green Youth Court* [2004] EWHC 1805 (Admin), [2004] 4 All ER 699, [2005] 1 Cr App Rep 89, DC.

10 Ie the Crime and Disorder Act 1998 s 51(1) (as substituted): see PARA 1132 post.

- 11 Magistrates' Courts Act 1980 s 25(2D) (prospectively added: see note 1 supra).

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**1120. Preservation of depositions where offence triable either way is dealt with summarily.**

The magistrates' court officer for the magistrates' court by which any person charged with an offence triable either way has been tried summarily must preserve such depositions as have been taken for a period of three years<sup>1</sup>.

<sup>1</sup> CrimPR 37.6.

**UPDATE**

**1120 Preservation of depositions where offence triable either way is dealt with summarily**

NOTE 1--CrimPR Pt 37 now Criminal Procedure Rules 2010, SI 2010/60, Pt 37.



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### **1121. Penalties on summary conviction for offences triable either way.**

On summary conviction of an offence triable either way listed in the Magistrates' Courts Act 1980<sup>1</sup> a person is liable to imprisonment for a term not exceeding six months or to a fine not exceeding the prescribed sum<sup>2</sup> or to both<sup>3</sup>, except that:

- 1774 (1) a magistrates' court does not have power to impose imprisonment for such an offence if the Crown Court would not have that power in the case of an adult convicted of it on indictment<sup>4</sup>;
- 1775 (2) on summary conviction of an offence consisting in the incitement to commit an offence triable either way<sup>5</sup>, a person is not liable to any greater penalty than he would be liable to on summary conviction of the last-mentioned offence<sup>6</sup>.

The maximum fine<sup>7</sup> which may be imposed on summary conviction for such an offence under a relevant enactment<sup>8</sup> is the prescribed sum unless the offence is one for which by virtue of another enactment<sup>9</sup> a larger fine may be imposed on summary conviction<sup>10</sup>.

1 le listed in the Magistrates' Courts Act 1980 s 17(1), Sch 1 (as amended): see PARA 1103 ante.

2 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

3 See the Magistrates' Courts Act 1980 s 32. As from a day to be appointed the maximum term of imprisonment is increased to 12 months: see s 32 (prospectively amended by the Criminal Justice Act 2003 s 282(1)). This increase does not apply to an offence committed before the Criminal Justice Act 2003 s 282(1) comes into force: s 282(4). At the date at which this volume states the law no such day had been appointed.

4 See the Magistrates' Courts Act 1980 s 32(1)(a).

5 As to incitement see PARA 65 ante.

6 Magistrates' Courts Act 1980 s 32(1)(b).

As from a day to be appointed where any offence triable either way other than an offence listed in s 17(1), Sch 1 (as amended) (see PARA 1103 ante) is an offence under a relevant enactment and is punishable with imprisonment on summary conviction, the maximum term of imprisonment to which a person is liable on summary conviction of it is 12 months: see the Criminal Justice Act 2003 s 282(2), (3) (not yet in force); and note 3 supra. This increased maximum term does not apply to an offence committed before s 282(2), (3) comes into force: see s 282(4) (not yet in force). 'Relevant enactment' means any enactment contained in an Act of Parliament passed before or in the same session as the Criminal Justice Act 2003 or any subordinate legislation made before the passing of that Act: s 281(7) (not yet in force). At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed the Secretary of State may by order amend any relevant enactment which confers a power (however framed or worded) by subordinate legislation to make a person, as regards an offence triable either way, liable on summary conviction to a term of imprisonment: s 283(1)(b) (not yet in force). At the date at which this volume states the law no such day had been appointed. Such an order may amend the relevant enactment in question so as to increase the maximum term of imprisonment to which a person may be made liable on summary conviction of an offence under the power to 12 months: s 283(3) (not yet in force). The power conferred by s 283(1)(b) does not apply to the enactments listed in s 283(4), Sch 27: s 283(5) (not yet in force). An order under s 283(1) may make such supplementary, incidental or consequential provision as the Secretary of State considers necessary or expedient, including provision amending any

relevant enactment: s 283(6) (not yet in force). An order under s 283(1) does not affect the penalty for any offence committed before the commencement of that order: s 283(7) (not yet in force). 'Subordinate legislation' has the same meaning as in the Interpretation Act 1978 (ie Orders in Council, rules, regulations, schemes, warrants, byelaws and any other instrument made or to be made under any Act: Interpretation Act 1978 s 21(1)): Criminal Justice Act 2003 s 283(8) (not yet in force). 'Relevant enactment' means any enactment contained in an Act passed before or in the same session as the Criminal Justice Act 2003: s 283(9) (not yet in force). As to the making of orders under the Criminal Justice Act 2003 see PARA 90 note 6 ante.

7 For these purposes, 'fine' includes a pecuniary penalty but does not include a pecuniary forfeiture or pecuniary compensation: Magistrates' Courts Act 1980 s 32(9).

8 For these purposes, 'relevant enactment' means an enactment contained in the Criminal Law Act 1977 or in any Act passed before, or in the same session as, that Act: Magistrates' Courts Act 1980 s 32(9).

9 Ie an enactment other than *ibid* s 32(2): see the text and note 10 *infra*.

10 *Ibid* s 32(2). Where, by virtue of a relevant enactment, a person summarily convicted of an offence triable either way would, apart from s 32(2), be liable to a maximum fine of one amount in the case of a first conviction and of a different amount in the case of a second or subsequent conviction, s 32(2) applies irrespective of whether the conviction is a first, second or subsequent one: s 32(3). Section 32(2) does not affect so much of any enactment as (in whatever words) makes a person liable on summary conviction to a fine not exceeding a specified amount for each day on which a continuing offence is continued after conviction or the occurrence of any other specified event: s 32(4).

Section 32(2) does not apply on summary conviction of any of the following offences: (1) offences under the Misuse of Drugs Act 1971 s 5(2) (see PARA 770 ante), where the controlled drug in relation to which the offence was committed was a Class B or Class C drug; (2) offences under s 4(2), (3), s 5(3), s 8 (as amended), s 12(6), s 13(3), where the controlled drug in relation to which the offence was committed was a Class C drug: Magistrates' Courts Act 1980 s 32(5). For these purposes, 'controlled drug', 'Class B drug' and 'Class C drug' have the same meanings as in the Misuse of Drugs Act 1971 (see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 238): Magistrates' Courts Act 1980 s 32(8). Where, as regards any offence triable either way, there is under any enactment (however framed or worded) a power by subordinate legislation to restrict the amount of the fine which on summary conviction can be imposed in respect of that offence: (a) s 32(2) does not affect that power or override any restriction imposed in the exercise of that power; and (b) the amount to which that fine may be restricted in the exercise of that power is any amount less than the maximum fine which could be imposed on summary conviction in respect of the offence apart from any restriction so imposed: s 32(6).

## UPDATE

### 1121 Penalties on summary conviction for offences triable either way

TEXT AND NOTE 6--1980 Act s 32(1)(b) repealed: Serious Crime Act 2007 Sch 6 para 55(2), Sch 14.

NOTE 6--The Criminal Justice Act 2003 s 282(3), so far as it applies to offences under the Sexual Offences Act 2003, applies to them as amended, extended or applied by virtue of the Violent Crime Reduction Act 2006 s 56: s 56(4).

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**1122. Effect of dismissal of information for offence triable either way.**

Where, on the summary trial of an information<sup>1</sup> for an offence triable either way<sup>2</sup>, the court dismisses the information, the dismissal has the same effect as an acquittal on indictment<sup>3</sup>.

1 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

2 As to offences triable either way see PARA 1103 ante.

3 Magistrates' Courts Act 1980 s 27.

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## **(v) Committal for Sentence**

### **1123. Committal for sentence on indication of guilty plea to serious offence triable either way.**

As from a day to be appointed<sup>1</sup> the following provisions apply where:

- 1776 (1) a person aged 18<sup>2</sup> or over appears or is brought before a magistrates' court ('the court') on an information<sup>3</sup> charging him with an offence triable either way ('the offence')<sup>4</sup>;
- 1777 (2) he or his representative indicates<sup>5</sup> that he would plead guilty if the offence were to proceed to trial<sup>6</sup>; and
- 1778 (3) proceeding as if, having been asked, he pleaded guilty under it, the court convicts him of the offence<sup>7</sup>.

If the court is of the opinion that: (a) the offence<sup>8</sup>; or (b) the combination of the offence and one or more offences associated with it<sup>9</sup>, was so serious<sup>10</sup> that the Crown Court should, in the court's opinion, have the power to deal with the offender in any way it could deal with him if he had been convicted on indictment, the court may commit him in custody or on bail to the Crown Court for sentence<sup>11</sup>.

These provisions apply in relation to a corporation as if: (i) the corporation were an individual aged 18 or over; and (ii) the words<sup>12</sup> 'in custody or on bail' were omitted<sup>13</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 s 3 is substituted by the Criminal Justice Act 2003 s 41, Sch 3 paras 21, 22 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning committal for sentencing see PARA 1105 ante. Certain provisions relating to the Powers of Criminal Courts (Sentencing) Act 2000 s 3 (prospectively substituted) were brought into force on 25 August 2000 under s 168(1): see s 9 (as amended), s 161(1), s 164(1); and notes 2, 9 infra.

2 For the purposes of any provision of the Powers of Criminal Courts (Sentencing) Act 2000 which requires the determination of the age of a person by the court or the Secretary of State, his age is deemed to be that which it appears to the court or (as the case may be) the Secretary of State to be after considering any available evidence: s 164(1). See note 1 supra.

Where a person who appears or is brought before a youth court charged with an offence subsequently attains the age of 18, the youth court may, at any time after conviction and before sentence, remit him for sentence to a magistrates' court other than a youth court: s 9(1) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 63). See note 1 supra. Where the offender is so remitted the youth court must adjourn proceedings and all enactments relating to remand or the granting of bail in criminal proceedings (including the Magistrates' Courts Act 1980 s 128 (as amended; prospectively amended) (see PARA 1145 post)) have effect in relation to the youth court's power or duty to remand the offender on that adjournment as if any reference to the court to or before which the person remanded is to be brought or appear after remand were a reference to the court to which he is being remitted: Powers of Criminal Courts (Sentencing) Act 2000 s 9(2)(a). The court to which the offender is so remitted (the 'other court') may deal with the case in any way in which it would have power to deal with it if all proceedings relating to the offence which took place before the youth court had taken place before the other court: s 9(2)(b). An offender so remitted has no right of appeal against the remission order, but without prejudice to any right of appeal

against an order made in respect of the offence by the court to which he is remitted: s 9(4). Where an offender is so remitted, s 8(6) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1259) does not apply to the court to which he is remitted: s 9(3). 'Enactment' includes any enactment contained in any order, regulation or other instrument having effect by virtue of an Act: s 9(5). For the meaning of 'bail in criminal proceedings' see the Bail Act 1976; and PARA 1166 post (definition applied by the Powers of Criminal Courts (Sentencing) Act 2000 s 9(5)).

3 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

4 Powers of Criminal Courts (Sentencing) Act 2000 s 3(1)(a) (prospectively substituted: see note 1 supra). For the meaning of 'offence triable either way' see PARA 1102 note 4 ante.

5 le under the Magistrates' Courts Act 1980 s 17A (as added and amended; prospectively amended) (see PARA 1107 ante) or s 17B (as added) (see PARA 1108 ante), but not under s 20(7) (prospectively substituted) (see PARA 1112 ante).

6 Powers of Criminal Courts (Sentencing) Act 2000 s 3(1)(b) (prospectively substituted: see note 1 supra).

7 Ibid s 3(1)(c) (prospectively substituted: see note 1 supra). See PARA 1105 note 16 ante.

8 In the context of this provision, 'offence' cannot be construed to include the plural, contrary to the normal rule in the Interpretation Act 1978 s 6.

9 For these purposes, an offence is associated with another if: (1) the offender is convicted of it in the proceedings in which he is convicted of the other offence, or (although convicted of it in earlier proceedings) is sentenced for it at the same time as he is sentenced for that offence (Powers of Criminal Courts (Sentencing) Act 2000 s 161(1)(a)); or (2) the offender admits the commission of it in the proceedings in which he is sentenced for the other offence and requests the court to take it into consideration in sentencing him for that offence (s 161(1)(b)). See note 1 supra.

10 See the Criminal Justice Act 2003 s 143; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 618.

11 Powers of Criminal Courts (Sentencing) Act 2000 s 3(2) (prospectively substituted: see note 1 supra). For guidance see *R v Warley Magistrates' Court, ex p DPP* [1998] 2 Cr App Rep 307, 162 JP 559, DC. The decision in allocation of trial proceedings and the decision on committal for sentence are different decisions, and the former decision does not restrict the latter; the power of a magistrates' court to commit for sentence is not limited to cases where the magistrates' court only learnt that the offence is more serious than previously thought after the allocation of trial decision: *R v North Sefton Magistrates' Court, ex p Marsh* (1994) 16 Cr App Rep (S) 401, DC. A magistrates' court may commit for sentence where it considers a financial penalty appropriate and it considers that the limits on the level of such a penalty which it can impose are too low to deal with the offence: *R v North Essex Justices, ex p Lloyd* [2001] 2 Cr App Rep (S) 86, DC. A court dealing with an offender for breach of a community order may not commit him to the Crown Court for sentence for the offence in respect of which the order was made: *R v Jordan* [1998] 2 Cr App Rep (S) 83, DC. 'Commit . . . for sentence' refers to committal for sentence in accordance with the Powers of Criminal Courts (Sentencing) Act 2000 s 5(1) (prospectively substituted) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17): s 3(2) (as so prospectively substituted). Where the court commits a person under s 3(2) (prospectively substituted), then s 6 (as amended; prospectively amended) (see PARA 1129 post) (which enables a magistrates' court, where it commits a person under s 3 (prospectively substituted) in respect of an offence, also to commit him to the Crown Court to be dealt with in respect of certain other offences) applies accordingly: s 3(3) (as so prospectively substituted). Section 3 (prospectively substituted) does not apply in relation to an offence as regards which it is excluded by the Magistrates' Courts Act 1980 s 17D (prospectively added) (see PARA 1107 ante): Powers of Criminal Courts (Sentencing) Act 2000 s 3(4) (as so prospectively substituted).

A person committed for sentence must be committed to the most convenient location of the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at Ill.21, CA. As to warrants of commitment see PARA 1162 post.

Where a magistrates' court commits an offender under the Vagrancy Act 1824 (see PARA 833 ante), the Bail Act 1976 s 6 (as amended) (see PARA 1199 post), the Powers of Criminal Courts (Sentencing) Act 2000 s 3 (prospectively substituted) or s 6 (as amended; prospectively amended) (see PARA 1129 post), the magistrates' court officer must send to the Crown Court officer: (1) a copy signed by the magistrates' court officer of the minute or memorandum of the conviction entered in the register; (2) a copy of any note of the evidence given at the trial of the offender, any written statement tendered in evidence and any deposition; (3) such documents and articles produced in evidence before the court as have been retained by the court; (4) any report relating to the offender considered by the court; (5) if the offender is committed on bail, a copy of the record made in pursuance of the Bail Act 1976 s 5 (as amended, prospectively amended) (see PARA 1173 post) relating to such bail and also any recognisance entered into by any person as his surety; (6) if the court imposes under the Road

Traffic Offenders Act 1988 s 26 (as substituted and amended) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1046) an interim disqualification for holding or obtaining a licence under the Road Traffic Act 1988 Pt III (ss 87-109C) (as amended) (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 444 et seq), a statement of the date of birth and sex of the offender; (7) if the court makes an order under the Powers of Criminal Courts (Sentencing) Act 2000 s 148 (as amended) (restitution orders: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 388-389), a copy signed by the clerk of the convicting court of the minute or memorandum of the order entered in the register; and (8) any documents relating to an appeal by the prosecution against the granting of bail: CrimPR 43.1(1).

Where a magistrates' court commits an offender to the Crown Court under the Vagrancy Act 1824 or the Powers of Criminal Courts (Sentencing) Act 2000 s 3 (prospectively substituted) or s 6 (as amended, prospectively amended), and the magistrates' court on that occasion imposes, under the Road Traffic Offenders Act 1988 s 26 (as substituted and amended), an interim disqualification for holding or obtaining a licence, the magistrates' court officer must give notice of the interim disqualification to the Crown Court officer: CrimPR 43.1(2).

Where a magistrates' court commits a person on bail to the Crown Court under any of the enactments mentioned in CrimPR 43.1(2) or under the Bail Act 1976 s 6 (as amended) (see PARA 1199 post), the magistrates' court officer must give notice thereof in writing to the governor of the prison to which persons of the sex of the person committed are committed by that court if committed in custody for trial and also, if the person committed is under the age of 21, to the governor of the remand centre to which he would have been committed if the court had refused him bail: CrimPR 43.1(3).

On a committal for sentence any reasons given by the magistrates for their decision should be included with the notes sent to the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at V.52.1, CA.

12     le in the Powers of Criminal Courts (Sentencing) Act 2000 s 3(2) (prospectively substituted): see the text and notes 8-11 supra.

13     See *ibid* s 3(5) (prospectively substituted: see note 1 supra).

## UPDATE

### **1123 Committal for sentence on indication of guilty plea to serious offence triable either way**

TEXT AND NOTES--As to committal for sentence on summary trial of offence triable either way see 2003 Act Sch 3 para 22A (added by Criminal Justice and Immigration Act 2008 Sch 13 para 8).

NOTE 1--2003 Act Sch 3 para 22 omitted: Criminal Justice and Immigration Act 2008 Sch 13 para 7, Sch 28 Pt 4.

NOTE 11--CrimPR 43.1 now Criminal Procedure Rules 2010, SI 2010/60, r 43.1.

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#### **1124. Committal for sentence of dangerous adult offenders.**

As from a day to be appointed<sup>1</sup> the following provisions apply where on the summary trial of a specified offence<sup>2</sup> triable either way<sup>3</sup> a person aged 18 or over<sup>4</sup> is convicted of the offence<sup>5</sup>.

If, in relation to the offence, it appears to the court that the criteria for the imposition of a sentence<sup>6</sup> of imprisonment for public protection for a serious offence or an extended sentence for a specified violent offence or specified sexual offence would be met, the court must commit the offender in custody or on bail to the Crown Court for sentence<sup>7</sup>. In reaching any decision under or taking any step contemplated by these provisions<sup>8</sup>:

1779 (1) the court is not bound by any indication<sup>9</sup> of sentence given in respect of the offence<sup>10</sup>; and

1780 (2) nothing the court does under them may be challenged or be the subject of any appeal in any court on the ground that it is not consistent with an indication of sentence<sup>11</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 s 3A is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 21, 23 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning committal for sentencing see PARA 1105 ante.

2 For these purposes, references to a specified offence are references to a specified offence within the meaning of *ibid* s 224 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 68, 70-71): Powers of Criminal Courts (Sentencing) Act 2000 s 3A(6) (prospectively added: see note 1 supra).

3 See PARA 1102 ante.

4 See PARA 1123 note 2 ante.

5 Powers of Criminal Courts (Sentencing) Act 2000 s 3A(1) (prospectively added: see note 1 supra). See PARA 1105 note 16 ante.

6 *Ie* under the Criminal Justice Act 2003 s 225(3) or s 227(2) (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 74-75 post.

7 See the Powers of Criminal Courts (Sentencing) Act 2000 s 3A(2) (prospectively added: see note 1 supra). 'Commit . . . for sentence' refers to committal for sentence in accordance with s 5(1) (prospectively substituted) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17): see s 3A(2) (as so prospectively added). Where the court commits a person under s 3A(2) (as prospectively added), then s 6 (as amended; prospectively amended) (see PARA 1129 post) (which enables a magistrates' court, where it commits a person under s 3A (prospectively added) in respect of an offence, also to commit him to the Crown Court to be dealt with in respect of certain other offences) applies accordingly: s 3A(3) (as so prospectively added). Nothing in s 3A (prospectively added) prevents the court from committing a specified offence to the Crown Court for sentence under s 3 (prospectively substituted) (see PARA 1123 ante) if its provisions are satisfied: s 3A(5) (as so prospectively added).

A person committed for sentence must be committed to the most convenient location of the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.21, CA. As to warrants of commitment see PARA 1162 post. On a committal for sentence any reasons given by the magistrates for their decision should be included with the notes sent to the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at V.52.1, CA.

- 8 le the Powers of Criminal Courts (Sentencing) Act 2000 s 3A (prospectively added).
- 9 le under the Magistrates' Courts Act 1980 s 20 (prospectively substituted): see PARA 1112 ante.
- 10 See the Powers of Criminal Courts (Sentencing) Act 2000 s 3A(4)(a) (prospectively added: see note 1 supra).
- 11 See ibid s 3A(4)(b) (prospectively added: see note 1 supra).

## **UPDATE**

### **1124 Committal for sentence of dangerous adult offenders**

NOTE 1--2003 Act Sch 3 para 23 amended: Criminal Justice and Immigration Act 2008 Sch 13 para 9.



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### **1125. Committal for sentence on indication of guilty plea by child or young person.**

As from a day to be appointed<sup>1</sup> the following provisions apply where:

- 1781 (1) a person aged under 18<sup>2</sup> appears or is brought before a magistrates' court ('the court') on an information<sup>3</sup> charging him with an offence mentioned in specified provisions<sup>4</sup> relating to the detention for a specified period of offenders under 18 ('the offence')<sup>5</sup>;
- 1782 (2) he or his representative indicates<sup>7</sup> that he would plead guilty if the offence were to proceed to trial<sup>7</sup>; and
- 1783 (3) proceeding as if, having been asked, he pleaded guilty, the court convicts him of the offence<sup>8</sup>.

If the court is of the opinion that: (a) the offence<sup>9</sup>; or (b) the combination of the offence and one or more offences associated with it<sup>10</sup>, was such that the Crown Court should, in the court's opinion, have power to deal with the offender as if specified<sup>11</sup> provisions relating to the detention of offenders under 18 applied, the court may commit him in custody or on bail to the Crown Court for sentence<sup>12</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 s 3B is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 21, 23 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning committal for sentencing see PARA 1105 ante.

2 See PARA 1123 note 1 ante.

3 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

4 I.e. under the Powers of Criminal Courts (Sentencing) Act 2000 s 91(1) (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78.

5 Ibid s 3B(1)(a) (prospectively added: see note 1 supra).

6 I.e. under the Magistrates' Courts Act 1980 s 24A (prospectively added) or s 24B (prospectively added): see PARAS 1117-1118 ante.

7 Powers of Criminal Courts (Sentencing) Act 2000 s 3B(1)(b) (prospectively added: see note 1 supra).

8 Ibid s 3B(1)(c) (prospectively added: see note 1 supra). See PARA 1105 note 16 ante.

9 See PARA 1123 note 8 ante.

10 See PARA 1123 note 9 ante.

11 I.e. the Powers of Criminal Courts (Sentencing) Act 2000 s 91(3) (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78.

12 Ibid s 3B(2) (prospectively added: see note 1 supra). 'Commit . . . to the Crown Court for sentence' refers to committal for sentence in accordance with s 5A(1) (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol

92 (2010) PARA 17): s 3B(2) (as so prospectively added). Where the court so commits a person under s 3B(2) (prospectively added), then s 6 (as amended; prospectively amended) (see PARA 1129 post) (which enables a magistrates' court, where it commits a person under s 3B (prospectively added) in respect of an offence, also to commit him to the Crown Court to be dealt with in respect of certain other offences) applies accordingly: s 3B(3) (as so prospectively added).

A person committed for sentence must be committed to the most convenient location of the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.21, CA. As to warrants of commitment see PARA 1162 post. On a committal for sentence any reasons given by the magistrates for their decision should be included with the notes sent to the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at V.52.1, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/16. HEARING, PLEA AND ALLOCATION OF PROCEEDINGS/(4) PROCEDURE FOR OFFENCES TRIABLE EITHER WAY/(v) Committal for Sentence/1126. Committal for sentence of dangerous young offenders.

### **1126. Committal for sentence of dangerous young offenders.**

The following provisions apply where on the summary trial of a specified offence<sup>1</sup> a person aged under 18<sup>2</sup> is convicted of the offence<sup>3</sup>. If, in relation to the offence, it appears to the court that the criteria for the imposition of a sentence<sup>4</sup> of detention for public protection for a serious offence or an extended sentence for a specified violent offence or specified sexual offence would be met, the court must commit the offender in custody or on bail to the Crown Court for sentence<sup>5</sup>.

1 For these purposes, references to a specified offence are references to a specified offence within the meaning of the Criminal Justice Act 2003 s 224 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 68, 70-71); Powers of Criminal Courts (Sentencing) Act 2000 s 3C(5) (s 3C added by the Criminal Justice Act 2003 s 41, Sch 3 paras 21, 23).

2 See PARA 1123 note 1 ante.

3 Powers of Criminal Courts (Sentencing) Act 2000 s 3C(1) (as added: see note 1 supra). See PARA 1105 note 16 ante.

4 If under the Criminal Justice Act 2003 s 226(3) or s 228(2): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 83-84.

5 See the Powers of Criminal Courts (Sentencing) Act 2000 s 3C(2) (as added: see note 1 supra). 'Commit . . . for sentence' refers to committal for sentence in accordance with s 5A(1) (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17): see s 3C(2) (as so added). Where the court commits a person under s 3C(2) (as added), then s 6 (as amended; prospectively amended) (see PARA 1129 post) (which enables a magistrates' court, where it commits a person under s 3C (as added) in respect of an offence, also to commit him to the Crown Court to be dealt with in respect of certain other offences) applies accordingly: s 3C(3) (as so added). Nothing in s 3C (as added) prevents the court from committing a specified offence to the Crown Court for sentence under s 3B (prospectively added) (see PARA 1125 ante) if its provisions are satisfied: s 3C(4) (as so added).

A person committed for sentence must be committed to the most convenient location of the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at Ill.21, CA. As to warrants of commitment see PARA 879 ante. On a committal for sentence any reasons given by the magistrates for their decision should be included with the notes sent to the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at V.52.1, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/16. HEARING, PLEA AND ALLOCATION OF PROCEEDINGS/(4) PROCEDURE FOR OFFENCES TRIABLE EITHER WAY/(v) Committal for Sentence/1127. Committal for sentence on indication of guilty plea to offence triable either way.

**1127. Committal for sentence on indication of guilty plea to offence triable either way.**

The following provisions apply where:

- 1784 (1) a person aged 18<sup>1</sup> or over appears or is brought before a magistrates' court ('the court') on an information<sup>2</sup> charging him with an offence triable either way ('the offence')<sup>3</sup>;
- 1785 (2) he or (where applicable) his representative indicates that he would plead guilty if the offence were to proceed to trial<sup>4</sup>; and
- 1786 (3) proceeding as if, having been asked, he pleaded guilty, the court convicts him of the offence<sup>5</sup>.

If the court has committed the offender to the Crown Court for trial for one or more related offences<sup>6</sup>, that is to say, one or more offences which, in its opinion, are related to the offence, it may commit him in custody or on bail to the Crown Court to be dealt with in respect of the offence<sup>7</sup>.

As from a day to be appointed<sup>8</sup> if such power is not exercisable but the court is still to determine to, or to determine whether to, send the offender to the Crown Court for trial<sup>9</sup> for one or more related offences: (a) it must adjourn the proceedings relating to the offence until after it has made those determinations; and (b) if it sends the offender to the Crown Court for trial for one or more related offences, it may then exercise that power<sup>10</sup>. In reaching any decision under, or taking any step contemplated by, these provisions: (i) the court is not bound by any indication of sentence given<sup>11</sup> in respect of the offence; and (ii) nothing the court does under them may be challenged or be the subject of any appeal in any court on the ground that it is not consistent with an indication of sentence<sup>12</sup>.

1 See PARA 1123 note 1 ante.

2 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

3 See the Powers of Criminal Courts (Sentencing) Act 2000 s 4(1)(a).

4 See *ibid* s 4(1)(b). As from a day to be appointed such indication is made under the Magistrates' Courts Act 1980 s 17A (as added and amended; prospectively amended) (see PARA 1107 ante), s 17B (as added) (see PARA 1108 ante) or s 20(7) (prospectively substituted) (see PARA 1112 ante): Powers of Criminal Courts (Sentencing) Act 2000 s 4(1)(b) (prospectively substituted by the Criminal Justice Act 2003 s 41, Sch 3 paras 21, 24(1), (2)). At the date at which this volume states the law no such day had been appointed. See PARA 1105 ante.

5 See the Powers of Criminal Courts (Sentencing) Act 2000 s 4(1)(c). As from a day to be appointed s 4 (prospectively amended) does not apply to an offence as regards which s 4 (prospectively amended) is excluded by the Magistrates' Courts Act 1988 s 17D (prospectively added) (see PARA 1107 ante): Powers of Criminal Courts (Sentencing) Act 2000 s 4(1A) (prospectively added by the Criminal Justice Act 2003 Sch 3 paras 21, 24(1), (4)). At the date at which this volume states the law no such day had been appointed. See PARA 1105 ante.

6 For the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 4 (prospectively amended), one offence is related to another if, were they both to be prosecuted on indictment, the charges for them could be joined in the same indictment: s 4(7).

7 See *ibid* s 4(2). 'Commit . . . to be dealt with in respect of the offence' refers to committal to be dealt with in respect of the offence in accordance with s 5(1) (prospectively substituted) (see PARA 1105 ante; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17): see s 4(2). Where the court: (1) under s 4(2) commits the offender to the Crown Court to be dealt with in respect of the offence; and (2) does not state that, in its opinion, it also has power so to commit him under s 3(2) (prospectively substituted) (see PARAS 1105, 1123 ante) (or, as from a day to be appointed, s 3A(2) (prospectively added) (see PARA 1124 ante)), then s 5(1) (prospectively substituted) does not apply unless he is convicted before the Crown Court of one or more of the related offences: s 4(4) (prospectively amended by the Criminal Justice Act 2003 Sch 3 paras 21, 24(1), (6)). At the date at which this volume states the law no such day had been appointed. Where the Powers of Criminal Courts (Sentencing) Act 2000 s 5(1) (prospectively substituted) does not apply, the Crown Court may deal with the offender in respect of the offence in any way in which the magistrates' court could deal with him if it had just convicted him of the offence: s 4(5). Where the court commits a person under s 4(2), then s 6 (as amended; prospectively amended) (see PARA 1129 post) (which enables a magistrates' court, where it commits a person under s 4 (prospectively amended) in respect of an offence, also to commit him to the Crown Court to be dealt with in respect of certain other offences) applies accordingly: s 4(6).

A person committed for sentence must be committed to the most convenient location of the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.21, CA. As to warrants of commitment see PARA 1162 post. On a committal for sentence any reasons given by the magistrates for their decision should be included with the notes sent to the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at V.52.1, CA.

8 The Powers of Criminal Courts (Sentencing) Act 2000 s 4(3) is substituted, and s 4(8) is added, by the Criminal Justice Act 2003 Sch 3 paras 21, 24(1), (5), (7) as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. See PARA 1105 ante.

9 *Ie* under the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A (as added): see PARAS 1132-1133 post.

10 Powers of Criminal Courts (Sentencing) Act 2000 s 4(3) (prospectively substituted: see note 8 supra).

11 *Ie* given under the Magistrates' Courts Act 1980 s 20 (prospectively substituted): see PARA 1112 ante.

12 Powers of Criminal Courts (Sentencing) Act 2000 s 4(8) (prospectively added: see note 8 supra).

## UPDATE

### **1127 Committal for sentence on indication of guilty plea to offence triable either way**

NOTE 5--2003 Act Sch 3 para 24(4A) added: Criminal Justice and Immigration Act 2008 Sch 13 para 10.

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**1128. Committal for sentence on indication of guilty plea by child or young person with related offences.**

As from a day to be appointed<sup>1</sup> the following provisions apply where:

- 1787 (1) a person aged under 18<sup>2</sup> appears or is brought before a magistrates' court ('the court') on an information<sup>3</sup> charging him with an offence mentioned in specified provisions<sup>4</sup> relating to the detention for a specified period of offenders under 18 ('the offence')<sup>5</sup>;
- 1788 (2) he or his representative indicates<sup>6</sup> that he would plead guilty if the offence were to proceed to trial<sup>7</sup>; and
- 1789 (3) proceeding as if, having been asked, he pleaded guilty, the court convicts him of the offence<sup>8</sup>.

If the court has sent the offender to the Crown Court for trial for one or more related offences<sup>9</sup>, that is to say one or more offences which, in its opinion, are related to the offence, it may commit him in custody or on bail to the Crown Court to be dealt with<sup>10</sup> in respect of the offence<sup>11</sup>.

If such power is not exercisable but the court is still to determine to, or determine whether to, send the offender to the Crown Court for trial<sup>12</sup> for one or more related offences:

- 1790 (a) it must adjourn the proceedings relating to the offence until after it has made those determinations<sup>13</sup>; and
- 1791 (b) if it sends the offender to the Crown Court for trial for one or more related offences, it may then exercise that power<sup>14</sup>.

1 The Powers of Criminal Courts (Sentencing) Act 2000 s 4A is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 21, 25 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. As to preceding legislation concerning committal for sentencing see PARA 1105 ante.

2 See PARA 1123 note 1 ante.

3 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

4 I.e. under the Powers of Criminal Courts (Sentencing) Act 2000 s 91(1) (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78.

5 See *ibid* s 4A(1)(a) (prospectively added: see note 1 *supra*).

6 I.e. under the Magistrates' Courts Act 1980 s 24A (prospectively added) (see PARA 1117 ante) or s 24B (prospectively added) (see PARA 1118 ante).

7 Powers of Criminal Courts (Sentencing) Act 2000 s 4A(1)(b) (prospectively added: see note 1 *supra*).

8 *Ibid* s 4A(1)(c) (prospectively added: see note 1 *supra*).

9 For these purposes, *ibid* s 4(7) (see PARA 1127 text and note 6 ante) applies as it applies for the purposes of s 4 (prospectively amended) (see PARA 1127 ante): s 4A(7) (prospectively added: see note 1 supra).

10 *Ie* in accordance with *ibid* s 5A(1) (as added): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17.

11 *Ibid* s 4A(2) (prospectively added: see note 1 supra).

Where the court: (1) under s 4A(2) (prospectively added) commits the offender to the Crown Court to be dealt with in respect of the offence; and (2) does not state that, in its opinion, it also has power so to commit him under s 3B(2) (prospectively added) (see PARA 1125 ante) or, as the case may be, s 3C(2) (as added) (see PARA 1126 ante), then s 5A(1) (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17) does not apply unless he is convicted before the Crown Court of one or more of the related offences: s 4A(4) (as so prospectively added). Where s 5A(1) (as added) does not apply, the Crown Court may deal with the offender in respect of the offence in any way in which the magistrates' court could deal with him if it had just convicted him of the offence: s 4A(5) (as so prospectively added).

Where the court commits a person under s 4A(2) (prospectively added), then s 6 (as amended; prospectively amended) (which enables a magistrates' court, where it commits a person under s 4A (prospectively added) in respect of an offence, also to commit him to the Crown Court to be dealt with in respect of certain other offences) applies accordingly: see s 4A(6) (as so prospectively added); and PARA 1138 post.

A person committed for sentence must be committed to the most convenient location of the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.21, CA. As to warrants of commitment see PARA 879 ante. On a committal for sentence any reasons given by the magistrates for their decision should be included with the notes sent to the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at V.52.1, CA.

12 *Ie* under the Crime and Disorder Act 1998 s 51 (as substituted) (see PARA 1132 post) or s 51A (as added) (see PARA 1133 post).

13 Powers of Criminal Courts (Sentencing) Act 2000 s 4A(3)(a) (prospectively added: see note 1 supra).

14 *Ibid* s 4A(3)(b) (prospectively added: see note 1 supra).

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**1129. Committal for sentence in certain cases where offender committed in respect of another offence.**

The following provisions apply where a magistrates' court ('the committing court') commits a person in custody or on bail to the Crown Court under any specified enactment<sup>1</sup> to be sentenced or otherwise dealt with in respect of an offence ('the relevant offence')<sup>2</sup>.

Where these provisions apply and the relevant offence is an indictable offence<sup>3</sup>, the committing court may also commit the offender, in custody or on bail as the case may require, to the Crown Court to be dealt with in respect of any other offence whatsoever in respect of which the committing court has power to deal with him (being an offence of which he has been convicted by that or any other court)<sup>4</sup>.

Where these provisions apply and the relevant offence is a summary offence<sup>5</sup>, the committing court may commit the offender, in custody or on bail as the case may require, to the Crown Court to be dealt with in respect of:

- 1792 (1) any other offence of which the committing court has convicted him, being either:
  - 75 117. (a) an offence punishable with imprisonment<sup>6</sup>; or
  - 118. (b) an offence in respect of which the committing court has a power or duty to order him to be disqualified under specified<sup>7</sup> road traffic legislation<sup>8</sup>; or
- 76 1793 (2) any suspended sentence in respect of which the committing court has power<sup>9</sup> to deal with him<sup>10</sup>.

1. I.e. any enactment mentioned in the Powers of Criminal Courts (Sentencing) Act 2000 s 6(4) (as amended), that is: (1) the Vagrancy Act 1824 (incorrigible rogues) (prospectively repealed); (2) the Powers of Criminal Courts (Sentencing) Act 2000 ss 3, 4 (committal for sentence for offences triable either way: see PARA 1105 ante); (3) s 13(5) (as amended) (conditionally discharged person convicted of further offence); (4) the Criminal Justice Act 2003 Sch 12 para 11(2) (committal to Crown Court where offender convicted during operational period of suspended sentence: see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 128); Powers of Criminal Courts (Sentencing) Act 2000 s 6(4) (amended by the Criminal Justice Act 2003 s 332, Sch 32 paras 90, 91(1), (3), Sch 37 Pt 7). As from a day to be appointed head (1) supra is repealed: see the Powers of Criminal Courts (Sentencing) Act 2000 s 6(4) (as so amended; prospectively amended by the Criminal Justice Act 2003 Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed. Head (2) supra is amended in relation to cases committed under the Powers of Criminal Courts (Sentencing) Act 2000 s 3C (as added) (see PARA 1126 ante) so that the relevant provisions are ss 3-4A (s 3 prospectively substituted; ss 3A, 3B prospectively added; s 3C as added; s 4 prospectively amended; s 4A prospectively added) (see PARAS 1123-1128 ante): see s 6(4)(b) (amended by the Criminal Justice Act 2003 s 41, Sch 3 paras 21, 28; and the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Savings Provisions) Order 2005, SI 02005/950, art 2, Sch 1 para 29(c)). This amendment to head (2) supra has effect for remaining purposes as from a day to be appointed: see the Powers of Criminal Courts (Sentencing) Act 2000 s 6(4)(b) (prospectively amended by the Criminal Justice Act 2003 Sch 3 Pt 1 paras 21, 28). At the date at which this volume states the law no such day had been appointed.

2. Powers of Criminal Courts (Sentencing) Act 2000 s 6(1).

3. For the meaning of 'indictable offence' see PARA 1102 note 1 ante.



4 Powers of Criminal Courts (Sentencing) Act 2000 s 6(2).

5 For the meaning of 'summary offence' see PARA 1102 note 2 ante.

6 Powers of Criminal Courts (Sentencing) Act 2000 s 6(3)(a)(i).

7 In the Road Traffic Offenders Act 1988 ss 34, 35 (as amended) or s 36 (as substituted and amended): see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARAS 1058, 1060, 1070-1071.

8 Powers of Criminal Courts (Sentencing) Act 2000 s 6(3)(a)(ii).

9 In under the Criminal Justice Act 2003 Sch 12 para 11(1): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 128.

10 Powers of Criminal Courts (Sentencing) Act 2000 s 6(3)(b) (amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 90, 91).

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### **1130. Power of justices to remit to another court for sentence.**

Where a person who has attained the age of 18<sup>1</sup> ('the offender') has been convicted<sup>2</sup> by a magistrates' court ('the convicting court') of a specified offence<sup>3</sup> ('the instant offence') and:

- 1794 (1) it appears to the convicting court that some other magistrates' court ('the other court') has convicted him of another such offence in respect of which the other court has neither passed sentence on him nor committed him to the Crown Court for sentence nor dealt with him in any other way<sup>4</sup>; and  
 1795 (2) the other court consents to his being so remitted to the other court<sup>5</sup>,

the convicting court may remit him to the other court to be dealt with in respect of the instant offence by the other court instead of by the convicting court<sup>6</sup>.

The offender, if so remitted, has no right of appeal against the order of remission<sup>7</sup>.

Where the convicting court so remits the offender to the other court, it must adjourn the trial of the information<sup>8</sup> charging him with the instant offence<sup>9</sup>.

Where the convicting court has remitted the offender to the other court, the other court may remit him back to the convicting court<sup>10</sup>.

1 See PARA 1123 note 2 ante.

2 For these purposes, 'conviction' includes a finding under the Powers of Criminal Courts (Sentencing) Act 2000 s 11(1) (remand for medical examination: see MAGISTRATES vol 29(2) (Reissue) PARA 723) that the person in question did the act or made the omission charged; and 'convicted' is to be construed accordingly: s 10(8)(a).

3 Ibid s 10 applies to: (1) any offence punishable with imprisonment; and (2) any offence in respect of which the convicting court has a power or duty to order the offender to be disqualified under the Road Traffic Offenders Act 1988 ss 34, 35 (as amended) or s 36 (as substituted and amended) (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARAS 1058, 1060, 1070-1071); Powers of Criminal Courts (Sentencing) Act 2000 s 10(2).

4 Ibid s 10(1)(a).

5 Ibid s 10(1)(b).

6 Ibid s 10(1). Nothing in s 10 precludes the convicting court from making any order which it has power to make under s 148 (prospectively amended) (restitution orders: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 388-389) by virtue of the offender's conviction of the instant offence: s 10(7). As to the documents etc to be sent by the court officer for the convicting court to the court officer for the other court see CrimPR 42.1(1).

7 Powers of Criminal Courts (Sentencing) Act 2000 s 10(6).

8 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

9 Powers of Criminal Courts (Sentencing) Act 2000 s 10(3). In such a case: (1) the Magistrates' Courts Act 1980 s 128 (as amended; prospectively amended) (see PARA 1144 post) and all other enactments, whenever passed, relating to remand or the granting of bail in criminal proceedings have effect, in relation to the

convicting court's power or duty to remand the offender on that adjournment, as if any reference to the court to or before which the person remanded is to be brought or appear after remand were a reference to the court to which he is being remitted; and (2) subject to the Powers of Criminal Courts (Sentencing) Act 2000 s 10(7) (see note 6 supra), the other court may deal with the case in any way in which it would have power to deal with it, including, where applicable, the remission of the offender under s 10 to another magistrates' court in respect of the instant offence, if all proceedings relating to that offence which took place before the convicting court had taken place before the other court: s 10(3), (4). For the purposes of s 10, 'enactment' includes an enactment contained in any order, regulation or other instrument having effect by virtue of an Act; and 'bail in criminal proceedings' has the same meaning as in the Bail Act 1976 (see PARA 1166 post); Powers of Criminal Courts (Sentencing) Act 2000 s 10(8)(b), (c).

10 Ibid s 10(5). In such a case the provisions of s 10(3), (4) (see note 9 supra) apply with the necessary modifications in relation to any remission under s 10: s 10(5). As to the documents etc to be sent by the court officer for the other court to the court officer for the convicting court see CrimPR 42.1(2).

## **UPDATE**

### **1130 Power of justices to remit to another court for sentence**

NOTES 6, 10--CrimPR 42.1 now Criminal Procedure Rules 2010, SI 2010/60, r 42.1.

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## **(5) SENDING TO THE CROWN COURT FOR TRIAL**

### **1131. Introduction.**

Until a day to be appointed the Crime and Disorder Act 1998 provides that where an adult ('A') appears or is brought before a magistrates' court charged with an offence triable only on indictment no committal proceedings are to be held. Instead the court must send him forthwith to the Crown Court for trial for that offence and any either way or summary offence fulfilling specified conditions<sup>1</sup>. There are also provisions concerning: (1) the sending for trial of an either way offence related to the indictable only offence; and (2) the sending for trial of a person under 18 charged jointly with A with an indictable offence<sup>2</sup>.

1 See the Crime and Disorder Act 1998 s 51. The Criminal Justice Act 2003 s 41, Sch 3 amends the Crime and Disorder Act 1998 and introduces new provisions relating to procedure and functions of the court including the procedure for sending cases to the Crown Court for trial. As to those provisions see PARAS 1106 ante, 1132 et seq post.

As to sending a person charged with such an offence to the Crown Court for trial see PARA 1132 et seq post.

2 See note 1 supra.

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### **1132. Sending cases to the Crown Court: adults.**

There are seven provisions relating to sending cases involving adults to the Crown Court for trial<sup>1</sup>.

The first provision is that, where an adult<sup>2</sup> appears or is brought before a magistrates' court ('the court') charged with an offence and any of the following conditions<sup>3</sup> is satisfied, the court must send him forthwith to the Crown Court for trial for the offence<sup>4</sup>. Those conditions are:

- 1796 (1) that the offence is an offence triable only on indictment other than one in respect of which notice has been given<sup>5</sup> in serious or complex fraud cases or in certain cases involving children<sup>6</sup>;
- 1797 (2) that the offence is an either-way offence<sup>7</sup> and the court is required<sup>8</sup> to proceed in relation to the offence by sending the defendant forthwith to the Crown Court for trial<sup>9</sup>;
- 1798 (3) that notice<sup>10</sup> is given to the court in serious or complex fraud cases or in certain cases involving children in respect of the offence<sup>11</sup>.

The second provision is that, where the court sends an adult for trial under the first provision<sup>12</sup>, it must at the same time send him to the Crown Court for trial for any either-way or summary offence<sup>13</sup> with which he is charged and which:

- 1799 (a) (if it is an either-way offence) appears to the court to be related to<sup>14</sup> the offence mentioned in the first provision<sup>15</sup>; or
- 1800 (b) (if it is a summary offence) appears to the court to be related to<sup>16</sup> the offence in the first provision or to the either-way offence, and fulfils the requisite condition<sup>17</sup>.

The third provision is that, where an adult who has been sent for trial under the first provision<sup>18</sup> subsequently appears or is brought before a magistrates' court charged with an either-way or summary offence<sup>19</sup> which appears to the court to be related to the offence mentioned in the first provision<sup>20</sup>, and (in the case of a summary offence) fulfils the requisite condition<sup>21</sup>, the court may send him forthwith to the Crown Court for trial for the either-way or summary offence<sup>22</sup>.

The fourth provision is that, where:

- 1801 (i) the court sends an adult ('A') for trial under the first or second provision<sup>23</sup>;
- 1802 (ii) another adult appears or is brought before the court on the same or a subsequent occasion charged jointly with A with an either-way offence<sup>24</sup>; and
- 1803 (iii) that offence appears to the court to be related to an offence for which A was sent for trial under the first or second provision<sup>25</sup>,

the court must where it is the same occasion, and may where it is a subsequent occasion, send the other adult forthwith to the Crown Court for trial for the either-way offence<sup>26</sup>.

The fifth provision is that, where the court sends an adult for trial under the fourth provision<sup>27</sup>, it must at the same time send him to the Crown Court for trial for any either-way or summary offence<sup>28</sup> with which he is charged and which:

- 1804 (A) (if it is an either-way offence) appears to the court to be related to the offence for which he is sent for trial<sup>29</sup>; and
- 1805 (B) (if it is a summary offence) appears to the court to be related to the offence for which he is sent for trial or to the either-way offence, and fulfils the requisite condition<sup>30</sup>.

The sixth provision is that, where the court sends an adult ('A') for trial under the first, second or fourth provision<sup>31</sup>, and a child or young person<sup>32</sup> appears or is brought before the court on the same or a subsequent occasion charged jointly with A with an indictable offence<sup>33</sup> for which A is sent for trial under the first, second or fourth provision, or an indictable offence which appears to the court to be related to that offence<sup>34</sup>,

the court must, if it considers it necessary in the interests of justice to do so, send the child or young person forthwith to the Crown Court for trial for the indictable offence<sup>35</sup>.

The seventh provision is that, where the court sends a child or young person for trial under the sixth provision<sup>36</sup>, it may at the same time send him to the Crown Court for trial for any indictable or summary offence<sup>37</sup> with which he is charged and which:

- 1806 (aa) (if it is an indictable offence) appears to the court to be related to the offence for which he is sent for trial; and
- 1807 (bb) (if it is a summary offence) appears to the court to be related to the offence for which he is sent for trial or to the indictable offence, and fulfils the requisite condition<sup>38</sup>.

The functions of a magistrates' court under the above provisions<sup>39</sup> may be discharged by a single justice<sup>40</sup>.

A magistrates' court may adjourn any proceedings under the above provisions, and if it does so may remand<sup>41</sup> the defendant<sup>42</sup>.

1 See the text and notes 2-42 *infra*; and PARA 1131 *ante*. The Crime and Disorder Act 1998 s 51 is substituted by the Criminal Justice Act 2003 s 41, Sch 3 paras 15, 18. At the date at which this volume states the law this substitution has effect only in relation to cases sent to the Crown Court for trial under s 51A(3)(d) (as added) (see PARA 1133 *post*): Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2, Sch 1 para 29.

2 See PARA 1106 note 1 *ante*.

3 *Ie* those mentioned in the Crime and Disorder Act 1998 s 51(2) (as substituted): see the text and notes 5-9 *infra*.

4 *Ibid* s 51(1) (as substituted: see note 1 *supra*). 'Charged' for these purposes does not simply refer to those who have been subject to an information; it also includes persons against whom charges have been preferred at or after the first court appearance: *R (on the application of Salubi) v Bow Street Magistrates' Court* [2002] EWHC 919, [2002] 1 WLR 3073, [2002] 2 Cr App Rep 660.

5 *Ie* under the Crime and Disorder Act 1998 s 51B (prospectively added and amended) (see PARA 1134 *post*) or s 51C (prospectively added) (see PARA 1135 *post*). Summary trial of an offence triable only on indictment is a nullity; the case must be dealt with at the Crown Court: *R v West* [1964] 1 QB 15, 46 Cr App Rep 296, CCA.

6 Crime and Disorder Act 1998 s 51(2)(a) (as substituted: see note 1 *supra*).

7 See PARA 1106 note 2 *ante*.

8 le under the Magistrates' Courts Act 1980 s 20(9)(b) (prospectively substituted) (see PARA 1112 ante), s 21 (prospectively substituted) (see PARA 1113 ante), s 23(4)(b) (prospectively amended), s 23(5) (prospectively substituted) (see PARA 1115 ante) or s 25(2D) (prospectively added) (see PARA 1119 ante).

9 Crime and Disorder Act 1998 s 51(2)(b) (as substituted: see note 1 supra).

10 le under ibid s 51B (prospectively added and amended) (see PARA 1134 post) or s 51C (prospectively added) (see PARA 1135 post).

11 Ibid s 51(2)(c) (as substituted: see note 1 supra).

12 le under ibid s 51(1) (as substituted): see the text and notes 2-4 supra.

13 For the meaning of 'summary offence' see PARA 1102 note 2 ante. For the purposes of ibid s 51 (as substituted) and s 51A (as added) (see PARA 1133 post), the court must treat as an indictable offence an offence which is mentioned in the first column of the Magistrates' Courts Act 1980 Sch 2 (as amended) (offences for which the value involved is relevant to the mode of trial: see PARA 1114 ante) unless it is clear to the court, having regard to any representations made by the prosecutor or the defendant, that the value involved does not exceed the relevant sum: Crime and Disorder Act 1998 s 52(3) (amended by the Criminal Justice Act 2003 Sch 3 paras 68, 69(b)). In the Crime and Disorder Act 1998 s 52(3) (as amended), 'the value involved' and 'the relevant sum' have the same meanings as in the Magistrates' Courts Act 1980 s 22 (as amended) (see PARA 1114 ante): Crime and Disorder Act 1998 s 52(4). As to the power of the Crown Court to deal with a summary offence see s 52(6), Sch 3 para 6; and PARA 1358 post.

14 An either-way offence is related to an indictable offence if the charge for the either-way offence could be joined in the same indictment as the charge for the indictable offence: ibid s 51E(c) (s 51E added by the Criminal Justice Act 2003 Sch 3 paras 15, 18). At the date at which this volume states the law the Crime and Disorder Act 1998 s 51E (as added) has effect only in relation to cases sent to the Crown Court for trial under s 51A(3)(d) (as added) (see PARA 1133 post): Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, Sch 1 para 29.

15 Crime and Disorder Act 1998 s 51(3)(a) (as substituted: see note 1 supra); and see note 17 infra.

16 A summary offence is related to an indictable offence if it arises out of circumstances which are the same as or connected with those giving rise to the indictable offence: ibid s 51E(d) (as added: see note 14 supra).

17 Ibid s 51(3)(b) (as substituted: see note 1 supra).

A summary offence fulfils the requisite condition if it is punishable with imprisonment or involves obligatory or discretionary disqualification from driving: s 51(11) (as so substituted).

The trial of the information charging any summary offence for which a person is sent for trial under s 51 (as substituted) must be treated as if the court had adjourned it under the Magistrates' Courts Act 1980 s 10 (as amended) (see MAGISTRATES vol 29(2) (Reissue para 707) and had not fixed the time and place for its resumption: Crime and Disorder Act 1998 s 51(10) (as so substituted). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

18 le under ibid s 51(1) (as substituted): see the text and notes 2-4 supra.

19 See note 16 supra.

20 le in the Crime and Disorder Act 1998 s 51(1) (as substituted): see the text and notes 2-4 supra.

21 As to the requisite condition see note 17 supra.

22 Crime and Disorder Act 1998 s 51(4) (as substituted: see note 1 supra).

23 Ibid s 51(5)(a) (as substituted: see note 1 supra). See the text and notes 2-17 supra.

24 Ibid s 51(5)(b) (as substituted: see note 1 supra).

25 Ibid s 51(5)(c) (as substituted: see note 1 supra).

26 See ibid s 51(5) (as substituted: see note 1 supra).

27 le under ibid s 51(5) (as substituted): see the text and notes 23-26 supra.

28 See note 16 supra.

- 29 Crime and Disorder Act 1998 s 51(6)(a) (as substituted: see note 1 supra).
- 30 Ibid s 51(6)(b) (as substituted: see note 1 supra). As to the requisite condition see note 17 supra.
- 31 Ibid s 51(7)(a) (as substituted: see note 1 supra). See the text and notes 2-17, 23-26 supra.
- 32 In the Crime and Disorder Act 1998, 'child' means a person under the age of 14; and 'young person' means a person who has attained the age of 14 and is under the age of 18: s 117(1). See also PARA 1106 ante.
- 33 For the meaning of 'indictable offence' see PARA 1102 note 1 ante.
- 34 Crime and Disorder Act 1998 s 51(7)(b) (as substituted: see note 1 supra).
- 35 See ibid s 51(7) (as substituted: see note 1 supra). Section 51(7), (8) (as substituted) (see the text and notes 31-34 supra, 36-38 infra) is subject to the Magistrates' Courts Act 1980 ss 24A, 24B (both prospectively added) (see PARAS 1117-1118 post), which provide for certain cases involving children and young persons to be tried summarily: Crime and Disorder Act 1998 s 51(9) (as so substituted).
- 36 Ie under ibid s 51(7) (as substituted): see the text and notes 31-35 supra.
- 37 See note 16 supra.
- 38 Crime and Disorder Act 1998 s 51(8) (as substituted: see note 1 supra). See note 35 supra.
- 39 Ie under ibid s 51 (as substituted).
- 40 Ibid s 51(13) (as substituted: see note 1 supra). In the case of an adult charged with an offence: (1) if the offence satisfies s 51(2)(c) (as substituted) (see head (3) in text), the offence must be dealt with under the first provision in the text and not under any other provision of s 51 (as substituted) or s 51A (as added) (see PARA 1133 post) (s 51(12)(a) (as so substituted)); (2) subject to s 51(12)(a) (as substituted), if the offence is one in respect of which the court is required to, or would decide to, send the adult to the Crown Court under (a) s 51(5) (as substituted) (see the text and notes 23-26 supra); or (b) s 51A(6) (as added) (see PARA 1133 post), the offence must be dealt with under s 51(5) (as substituted) or s 51A(6) (as added) (as the case may be) and not under any other provision of s 51 (as substituted) or s 51A (as added): s 51(12)(b) (as so substituted).
- 41 See PARA 1144 post.
- 42 Crime and Disorder Act 1998 s 52(5) (amended by the Criminal Justice Act 2003 Sch 3 paras 68, 69(c)).



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### **1133. Sending cases to the Crown Court: children and young persons.**

There are five provisions relating to sending cases involving children or young persons<sup>1</sup> to the Crown Court for trial<sup>2</sup>. These provisions are subject to those<sup>3</sup> providing for certain offences involving children or young persons to be tried summarily<sup>4</sup>.

The first provision is that, where a child or young person appears or is brought before a magistrates' court ('the court') charged with an offence and any of the following conditions<sup>5</sup> is satisfied, the court must send him forthwith to the Crown Court for trial for the offence<sup>6</sup>. Those conditions are:

- 1808 (1) that the offence is an offence of homicide or a specified type of firearms offence<sup>7</sup>;
- 1809 (2) that the offence is such as is mentioned in specified<sup>8</sup> provisions<sup>9</sup> relating to the detention for a specified period of an offender under 18 and the court considers that if he is found guilty of the offence it ought to be possible to sentence<sup>10</sup> him to a period of detention<sup>11</sup>;
- 1810 (3) that notice is given<sup>12</sup> under the provisions relating to serious or complex fraud or to certain cases involving children<sup>13</sup>;
- 1811 (4) that the offence is a specified offence<sup>14</sup> and it appears to the court that if he is found guilty of the offence the criteria for the imposition of a sentence of detention for public protection for a serious offence<sup>15</sup> or an extended sentence for certain violent or sexual offences<sup>16</sup> would be met<sup>17</sup>.

The second provision is that, where the court sends a child or young person for trial under the first provision<sup>18</sup>, it may at the same time send him to the Crown Court for trial for any indictable<sup>19</sup> or summary offence<sup>20</sup> with which he is charged and which:

- 1812 (a) (if it is an indictable offence) appears to the court to be related to the offence mentioned in the first provision<sup>21</sup>; or
- 1813 (b) (if it is a summary offence) appears to the court to be related to<sup>22</sup> the offence mentioned in the first provision or to the indictable offence, and fulfils the requisite condition<sup>23</sup>.

The third provision is that, where a child or young person who has been sent for trial under the first provision subsequently appears or is brought before a magistrates' court charged with an indictable or summary offence which appears to the court to be related to the offence mentioned in the first provision<sup>24</sup>; and (in the case of a summary offence) fulfils the requisite condition<sup>25</sup>, the court may send him forthwith to the Crown Court for trial for the indictable or summary offence<sup>26</sup>.

The fourth provision is that, where:

- 1814 (i) the court sends a child or young person ('C') for trial under the first or second provision<sup>27</sup>; and

- 1815 (ii) an adult appears or is brought before the court on the same or a subsequent occasion charged jointly with C with an either-way offence<sup>28</sup> for which C is sent for trial under the first or second provision, or an either-way offence which appears to the court to be related to that offence<sup>29</sup>,

the court must, where it is the same occasion, and may where it is a subsequent occasion, send the adult forthwith to the Crown Court for trial for the either-way offence<sup>30</sup>.

The fifth provision is that, where the court sends an adult for trial under the fourth provision<sup>31</sup>, it must at the same time send him to the Crown Court for trial for any either-way or summary offence with which he is charged and which:

- 1816 (A) (if it is an either-way offence) appears to the court to be related to the offence for which he was sent for trial<sup>32</sup>; and  
 1817 (B) (if it is a summary offence) appears to the court to be related to the offence for which he was sent for trial or to the either-way offence, and fulfils the requisite condition<sup>33</sup>.

The functions of a magistrates' court under the above provisions<sup>34</sup> may be discharged by a single justice<sup>35</sup>.

A magistrates' court may adjourn any proceedings under the above provisions, and if it does so may remand<sup>36</sup> the defendant<sup>37</sup>.

1 See PARA 1132 ante.

2 See the text and notes 3-33 infra. The Crime and Disorder Act 1998 s 51A is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 15, 18. At the date at which this volume states the law the Crime and Disorder Act 1998 s 51A (as added) has effect only for cases sent for trial under s 51A(3)(d) (as added) (see the text and notes 14-17 infra): Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2, Sch 1 para 29. See PARA 1131 ante.

3 Ie under the Magistrates' Courts Act 1980 s 24A (prospectively added) (see PARA 1117 ante) and s 24B (prospectively added) (see PARA 1118 ante).

4 Crime and Disorder Act 1998 s 51A(1) (as added: see note 1 supra).

5 Ie those mentioned in ibid s 51A(3) (as added): see the text and notes 7-17 infra.

6 Ibid s 51A(2) (as added: see note 2 supra).

7 Ibid s 51A(3)(a), (12) (as added: see note 2 supra). A firearms offence is so specified where each of the requirements of the Firearms Act 1968 s 51A(1) (as added) (see notes 1-4 supra) would be satisfied with respect to the offence, and to the person charged with it, if he were convicted of the offence: see the Crime and Disorder Act 1998 s 51A(12) (as so added). An offence under the Domestic Violence, Crime and Victims Act 2004 s 5 (see PARA 107 ante) is an offence of homicide for these purposes: s 6(1), (5).

8 Ie by the Powers of Criminal Courts (Sentencing) Act 2000 s 91(1) (as amended; prospectively amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78.

9 Ie other than an offence mentioned in head (4) in the text in relation to which it appears to the court as mentioned there.

10 Ie in pursuance of the Powers of Criminal Courts (Sentencing) Act 2000 s 91(3) (as amended; prospectively amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78.

11 Crime and Disorder Act 1998 s 51A(3)(b) (as added: see note 2 supra). The court should start with a strong presumption against sending a young defendant to the Crown Court unless it is satisfied that it is clearly required. The general policy of the legislature is that those under 18 years of age and, in particular, children under 15 years of age, should, wherever possible, be tried in the youth court. A trial in the Crown Court should be reserved for the most serious cases; a magistrates' court should not decline jurisdiction unless the offence

and the circumstances surrounding it and the defendant are such as to make it more than a vague or theoretical possibility that a sentence of detention for a long period might be passed under the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78): *R v Bresa* [2005] EWCA Crim 1414, [2006] Crim LR 179; *R (on the application of the Crown Prosecution Service) v Redbridge Youth Court* [2005] EWHC 1390 (Admin), 169 JP 393. See also *R (on the application of W) v Southampton Youth Court* [2002] EWHC 1640 (Admin), [2003] 1 Cr App Rep (S) 455; *R (on the application of H) v Southampton Youth Court* [2004] EWHC 2912 (Admin), [2005] 2 Cr App Rep (S) 171, 169 JP 37.

12 le under the Crime and Disorder Act 1998 s 51B (prospectively added and amended) or 51C (prospectively added): see PARAS 1134-1135 post.

13 Ibid s 51A(3)(c) (as added: see note 2 supra).

14 le within the meaning of the Criminal Justice Act 2003 s 224 (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 68 et seq.

15 le under ibid s 226(3): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 83.

16 le under ibid s 228(2): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 84.

17 Ibid s 51A(3)(d) (as added: see note 2 supra).

18 le under s 51A(2) (as added): see the text and notes 5-6 supra.

19 For the meaning of 'indictable offence' see PARA 1102 note 1 ante.

20 For the meaning of 'summary offence' see PARA 1102 note 2 ante. As to the powers of the Crown Court to deal with a summary offence see the Crime and Disorder Act 1998 s 52(6), Sch 3 para 6; and PARA 1358 post.

21 Ibid s 51A(4)(a) (as added: see note 2 supra). See note 23 infra.

22 See PARA 1132 ante.

23 Crime and Disorder Act 1998 s 51A(4)(b) (as added: see note 2 supra). For the purposes of s 51A (as added), the court must treat as an indictable offence an offence which is mentioned in the first column of the Magistrates' Courts Act 1980 Sch 2 (as amended) (offences for which the value involved is relevant to the mode of trial: see PARA 1114 ante) unless it is clear to the court, having regard to any representations made by the prosecutor or the defendant, that the value involved does not exceed the relevant sum: Crime and Disorder Act 1998 s 52(3) (amended by the Criminal Justice Act 2003 Sch 3 paras 68, 69(b)). In the Crime and Disorder Act 1998 s 52(3) (as amended), 'the value involved' and 'the relevant sum' have the same meanings as in the Magistrates' Courts Act 1980 s 22 (as amended) (see PARA 1114 ante): Crime and Disorder Act 1998 s 52(4).

A summary offence fulfils the requisite condition if it is punishable with imprisonment or involves obligatory or discretionary disqualification from driving: s 51A(9) (as so added).

The trial of the information charging any summary offence for which a person is sent for trial under s 51A (as added) must be treated as if the court had adjourned it under the Magistrates' Courts Act 1980 s 10 (as amended) (see MAGISTRATES vol 29(2) (Reissue para 707) and had not fixed the time and place for its resumption: Crime and Disorder Act 1998 s 51A(8) (as so added). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

24 le under ibid s 51A(2) (as added): see the text and notes 5-6 supra.

25 As to the requisite condition see note 23 supra.

26 Crime and Disorder Act 1998 s 51A(5) (as added: see note 2 supra).

27 Ibid s 51A(6)(a) (as added: see note 2 supra). See the text and notes 5-6, 18-23 supra.

28 See PARA 1106 ante.

29 Ibid s 51A(6)(b) (as added: see note 2 supra).

30 See ibid s 51A(6) (as added: see note 2 supra).

31 le under ibid s 51A(6) (as added): see the text and notes 27-30 supra.

- 32 Ibid s 51A(7)(a) (as added: see note 2 supra).
- 33 Ibid s 51A(7)(b) (as added: see note 2 supra). As to the requisite condition see note 14 supra.
- 34 Ie under ibid s 51A (as added).
- 35 Ibid s 51A(11) (as added: see note 2 supra). In the case of a child or young person charged with an offence:
- 506 (1) if the offence satisfies any of the conditions in s 51A(3) (as added) (see the text and notes 7-17 supra), the offence must be dealt with under s 51A(2) (as added) (see the text and notes 5-6 supra) and not under any other provision of s 51A (as added) or s 51 (as substituted) (see PARA 1132 ante) (s 51A(10)(a) (as so added));
- 507 (2) subject to s 51A(10)(a) (as added), if the offence is one in respect of which the requirements of s 51(7) (as added) (see the text and notes 31-33 supra) for sending the child or young person to the Crown Court are satisfied, the offence must be dealt with under s 51(7) (as substituted) and not under any other provision of s 51A (as added) or s 51 (as substituted) (s 51A(10)(b) (as so added)).
- 36 See PARA 1144 post.
- 37 Crime and Disorder Act 1998 s 52(5) (amended by the Criminal Justice Act 2003 Sch 3 paras 68, 69(c)).

## UPDATE

### 1133 Sending cases to the Crown Court: children and young persons

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 7--1988 Act s 51A(12) amended: Violent Crime Reduction Act 2006 Sch 1 para 5, Sch 5.

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#### **1134. Notices in serious or complex fraud cases.**

As from a day to be appointed<sup>1</sup> a notice may be given<sup>2</sup> by a designated authority<sup>3</sup> in respect of an indictable offence if the authority is of the opinion<sup>4</sup> that the evidence of the offence charged: (1) is sufficient for the person charged to be put on trial for the offence; and (2) reveals a case of fraud of such seriousness or complexity that it is appropriate that the management of the case should without delay be taken over by the Crown Court<sup>5</sup>.

Such a notice must be given to the magistrates' court at which the person charged appears or before which is brought<sup>6</sup>; and such a notice must be given to the magistrates' court before any summary trial begins<sup>7</sup>.

The effect of such a notice is that the functions of the magistrates' court cease in relation to the case, with specified exceptions<sup>8</sup>. A decision to give such a notice is not subject to appeal or liable to be questioned in any court (whether a magistrates' court or not)<sup>9</sup>.

1 The Crime and Disorder Act 1998 s 51B is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 15, 18 as from an appointed day under s 336(3). At the date at which this volume states the law no such day had been appointed. See PARA 1131 ante.

2 Ie under the Crime and Disorder Act 1998 s 51B (prospectively added and amended): see the text and notes 3-9 infra.

3 For these purposes, a 'designated authority' means: (1) the Director of Public Prosecutions (see PARA 1066 ante); (2) the Director of the Serious Fraud Office (see PARA 1067 ante); (3) the Director of Revenue and Customs Prosecutions (see PARA 1068 ante); or (4) the Secretary of State: *ibid* s 51B(9) (s 51B prospectively added (see note 1 supra); s 51B(9) amended by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 69). The functions of a designated authority under the Crime and Disorder Act 1998 s 51B (prospectively added and amended) may be exercised by an officer of the authority acting on behalf of the authority: s 51B(7) (as so prospectively added).

4 That opinion must be certified by the designated authority in the notice: *ibid* s 51B(2) (prospectively added: see note 1 supra). The notice must also specify the proposed place of trial, and in selecting that place the designated authority must have regard to the same matters as are specified in s 51D(4)(a)-(c) (as added; prospectively amended) (see PARA 1136 post): s 51B(3) (as so prospectively added).

5 *Ibid* s 51B(1) (prospectively added: see note 1 supra).

6 *Ibid* s 51B(4) (prospectively added: see note 1 supra).

7 *Ibid* s 51B(5) (prospectively added: see note 1 supra).

8 *Ibid* s 51B(6) (prospectively added: see note 1 supra). The exceptions are that the functions of the magistrates' court do not cease: (1) for the purposes of s 51D (as added; prospectively amended) (see PARA 1136 post); (2) as provided by the Access to Justice Act 1999 s 14, Sch 3 para 2 (as amended) (grant of right to representation: see LEGAL AID vol 65 (2008) PARAS 146, 172); (3) as provided by the Crime and Disorder Act 1998 s 52 (as amended) (see PARAS 1132 ante, 1137-1138 post): s 51B(6) (as so prospectively added).

9 *Ibid* s 51B(8) (prospectively added: see note 1 supra).

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### **1135. Notices in certain cases involving children.**

As from a day to be appointed<sup>1</sup> a notice may be given<sup>2</sup> by the Director of Public Prosecutions<sup>3</sup> in respect of a specified offence<sup>4</sup> if he is of the opinion:

- 1818 (1) that the evidence of the offence would be sufficient for the person charged to be put on trial for the offence<sup>5</sup>;
- 1819 (2) that a child<sup>6</sup> would be called as a witness at the trial<sup>7</sup>; and
- 1820 (3) that, for the purpose of avoiding any prejudice to the welfare of the child, the case should be taken over and proceeded with, without delay, by the Crown Court<sup>8</sup>.

A decision to give such a notice is not subject to appeal or liable to be questioned in any court (whether a magistrates' court or not)<sup>9</sup>.

1 The Crime and Disorder Act 1998 s 51C is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 15, 18 as from an appointed day under s 336(3). At the date at which this volume states the law no such day had been appointed. See PARA 1131 ante.

2 le under the Crime and Disorder Act 1998 s 51C (prospectively added).

3 The functions of the Director of Public Prosecutions under *ibid* s 51C (prospectively added) may be exercised by an officer acting on behalf of the Director: s 51C(5) (prospectively added: see note 1 *supra*).

4 le an offence: (1) which involves an assault on, or injury or a threat of injury to, a person (see PARA 147 et seq ante); (2) under the Children and Young Persons Act 1933 s 1 (as amended) (cruelty to persons under 16: see PARA 143 ante); (3) under the Sexual Offences Act 1956 (repealed), the Protection of Children Act 1978 (see PARA 757 et seq ante) or the Sexual Offences Act 2003 (see PARA 165 et seq ante); (4) of kidnapping or false imprisonment (see PARA 135 et seq ante) or an offence under the Child Abduction Act 1984 s 1 or s 2 (as amended) (see PARAS 137-141 ante); (5) which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within heads (1)-(4) above (see PARAS 65-83 ante): Crime and Disorder Act 1998 s 51C(3) (prospectively added: see note 1 *supra*).

5 *Ibid* s 51C(1)(a) (prospectively added: see note 1 *supra*).

6 For these purposes, 'child' means: (1) a person who is under the age of 17; or (2) any person of whom a video recording was made when he was under the age of 17 with a view to its admission as his evidence in chief in the trial referred to in *ibid* s 51C(1) (prospectively added): s 51C(7) (prospectively added: see note 1 *supra*). As to age see PARA 1106 note 2 ante. For the meaning of 'video recording' see PARA 1420 note 9 post.

7 *Ibid* s 51C(1)(b) (prospectively added: see note 1 *supra*).

8 *Ibid* s 51C(1)(c) (prospectively added: see note 1 *supra*). The opinion must be certified by the Director of Public Prosecutions in the notice: s 51C(2) (as so prospectively added). The provisions of s 51B(4)-(6) (prospectively added) (see PARA 1134 ante) apply for the purposes of s 51C (prospectively added) as they apply for the purposes of s 51B (prospectively added and amended) (see PARA 1134 ante): s 51C(4) (as so prospectively added).

9 *Ibid* s 51C(6) (prospectively added: see note 1 *supra*).

### **UPDATE**

**1135 Notices in certain cases involving children**

NOTE 4--See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law). See further Serious Crime Act 2007 Sch 6 para 36 (references to common law offence of incitement).

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### **1136. Notice of offence and place of trial.**

The court must specify in a notice: (1) the offence or offences for which a person is sent for trial<sup>1</sup>; and (2) the place<sup>2</sup> at which he is to be tried<sup>3</sup>. A copy of the notice must be served on the defendant and given to the Crown Court sitting at that place<sup>4</sup>. In a case where a person is sent for trial<sup>5</sup> for more than one offence, the court must specify in that notice, for each offence, the specific provision<sup>6</sup> under which the person is so sent, and, if applicable, the offence to which that offence appears to the court to be related<sup>7</sup>. Where the court selects the place of trial<sup>8</sup> it must have regard to: (a) the convenience of the defence, the prosecution and the witnesses; (b) the desirability of expediting the trial; and (c) any direction<sup>9</sup> given by or on behalf of the Lord Chief Justice with the concurrence of the Lord Chancellor<sup>10</sup>.

The functions of a magistrates' court under the above provisions may be discharged by a single justice<sup>11</sup>.

1    Ie under the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A (as added): see PARAS 1132-1133 ante.

2    If a notice has been given under *ibid* s 51B (prospectively added and amended) (see PARA 1134 ante) the place at which a defendant is so to be tried must be the place specified in that notice: see s 51D(1)(b) (s 51D added by the Criminal Justice Act 2003 s 41, Sch 3 paras 15, 18). At the date at which this volume states the law the Crime and Disorder Act 1998 s 51D (as added) has effect only in relation to cases sent to the Crown Court for trial under s 51A(3)(d) (as added) (see PARA 1133 ante): Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2, Sch 1 para 29. See PARA 1131 ante.

3    Crime and Disorder Act 1998 s 51D(1) (as added: see note 2 *supra*). Defects in the notice do not render an otherwise valid (or effective) sending invalid (or ineffective): *R (on the application of Bentham) v Governor of HM Prison Wandsworth* [2006] EWHC 121 (Admin), [2006] All ER (D) 80 (Feb).

4    Crime and Disorder Act 1998 s 51D(2) (as added: see note 2 *supra*). A Crown Court officer to whom notice was given under s 51(7) (see PARA 1132 ante) must list the first Crown Court appearance of the person to whom the notice relates in accordance with any directions given by the magistrates' court: CrimPR 12.2.

5    Ie under the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A (as added): see PARAS 1132-1133 ante.

6    Ie the relevant subsection of *ibid* s 51 (as substituted) or s 51A (as added): see PARAS 1132-1133 ante.

7    *Ibid* s 51D(3) (as added: see note 2 *supra*).

8    Ie the place of trial for the purposes of *ibid* s 51D(1) (as added): see the text and notes 1-3 *supra*.

9    Ie given under the Supreme Court Act 1981 s 75(1) (as amended) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 487). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.21.1, CA, and *Practice Direction (Crown Court: Classification and Allocation of Business)* [2005] 1 WLR 2215 at III.21.1, Sup Ct, provide that, for the purposes of trial in the Crown Court, offences are to be classified as follows:

508   (1)   Class 1:



29. (a) misprision of treason and treason felony (see PARAS 365, 367 ante);
30. (b) murder (see PARAS 89-91 ante);
31. (c) genocide (see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 454);
32. (d) torture, hostage-taking and offences under the War Crimes Act 1991 (see WAR  
AND ARMED CONFLICT vol 49(1) 2005 Reissue) PARA 465);
33. (e) an offence under the Official Secrets Acts (see PARA 478 ante);
34. (f) manslaughter (see PARA 92 et seq ante);
35. (g) infanticide (see PARA 103 ante);
36. (h) child destruction (see PARA 108 ante);
37. (i) abortion contrary to the Offences against the Person Act 1861 s 58 (see PARA  
109 ante);
38. (j) sedition (see PARA 371 et seq ante);
39. (k) an offence under the Geneva Conventions Act 1957 s 1 (as amended) (see  
PARA 1061 ante);
40. (l) mutiny (see ARMED FORCES vol 2(2) (Reissue) PARA 399);
41. (m) piracy (see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 156);
42. (n) soliciting, incitement, attempt or conspiracy to commit any of the offences in  
heads (1)(a)-(m) supra (see PARAS 65-83 ante);
43. (2) Class 2:
44. (i) rape (see PARA 165 ante);
45. (ii) sexual intercourse with a girl under 13 (repealed);
46. (iii) incest with a girl under 13 (repealed);
47. (iv) assault by penetration (see PARA 167 ante);
48. (v) causing a person to engage in sexual activity, where penetration is involved  
(see PARA 171 ante);
49. (vi) rape of a child under 13 (see PARA 166 ante);

- 50 49. (vii) assault of a child under 13 by penetration (see PARA 168 ante);
- 51 50. (viii) causing or inciting a child under 13 to engage in sexual activity, where  
penetration is involved (see PARA 172 ante);
- 52 51. (ix) sexual activity with a person with a mental disorder, where penetration is  
involved (see PARA 197 ante);
- 53 52. (x) inducement to procure sexual activity with a mentally disordered person  
where penetration is involved (see PARA 202 ante);
- 54 53. (xi) paying for sexual services of a child where child is under 13 and penetration  
is involved (see PARA 215 ante);
- 55 54. (xii) committing an offence with intent to commit a sexual offence, where the  
offence is kidnapping or false imprisonment (see PARA 231 ante);
- 56 55. (xiii) soliciting, incitement, attempt or conspiracy to commit any of the offences  
listed in heads (2)(i)-(xii) supra (see PARAS 65-83 ante);
- 510 (3) Class (3): all other offences not listed in Class 1 or Class 2 supra.

The magistrates' court, upon sending a person for trial must: (A) if the offence or any of the offences is included in Class 1 (see head (1) supra), specify the most convenient location of the Crown Court where a High Court judge, or where a circuit judge duly authorised by the Lord Chief Justice to try Class 1 cases, regularly sits; (B) if the offence or any of the offences is included in Class 2 (see head (2) supra), specify the most convenient location of the Crown Court where a judge duly authorised to try Class 2 cases regularly sits (these courts on each circuit will be identified by the presiding judges, with the concurrence of the Lord Chief Justice); (C) where an offence is in Class 3 (see head (3) supra), the magistrates' court must specify the most convenient location of the Crown Court: *Practice Direction (Criminal Proceedings: Consolidation)* supra at III.21.2; *Practice Direction (Crown Court: Classification and Allocation of Business)* supra at III.21.2.

In selecting the most convenient location of the Crown Court, the justices must have regard to the considerations referred to in the Crime and Disorder Act 1998 s 51(1) (as substituted) (see PARA 1132 ante) and to the location or locations of the Crown Court designated by a presiding judge as the location to which cases should normally be committed from their court area: *Practice Direction (Criminal Proceedings: Consolidation)* supra at III.21.3; *Practice Direction (Crown Court: Classification and Allocation of Business)* supra at III.21.3.

For the purposes of the trial:

Cases in Class 1 (see head 1 supra) may only be tried by a High Court judge; or by a circuit judge or deputy High Court judge or deputy circuit judge provided that, in all cases save attempted murder, such judge is authorised by the Lord Chief Justice to try murder cases, or in the case of attempted murder, to try murder or attempted murder, and that the presiding judge has released the case for trial by such a judge: *Practice Direction (Criminal Proceedings: Consolidation)* supra at IV.33.1; *Practice Direction (Crown Court: Classification and Allocation of Business)* supra at IV.33.1.

Cases in Class 2 (see head 2 supra) may be tried by a High Court judge; or by a circuit judge or deputy High Court judge or deputy circuit judge or a recorder, provided that in all cases such judge is authorised to try Class 2 cases by the Lord Chief Justice and the case has been assigned to the judge by or under the direction of the presiding judge or resident judge in accordance with guidance given by the presiding judges: *Practice Direction (Criminal Proceedings: Consolidation)* supra at IV.33.2; *Practice Direction (Crown Court: Classification and Allocation of Business)* supra at IV.33.2.

Cases in Class 3 (see head 3 supra) may be tried by a High Court judge, or in accordance with guidance given by the presiding judges, a circuit judge, a deputy circuit judge or a recorder. A case in Class 3 must not be listed for trial by a High Court judge except with the consent of a presiding judge: *Practice Direction (Criminal Proceedings: Consolidation)* supra at IV.33.3; *Practice Direction (Crown Court: Classification and Allocation of Business)* supra at IV.33.3.

10 Crime and Disorder Act 1998 s 51D(4) (as added: see note 2 supra). As to the Crown Court's power to give directions altering the place of any trial on indictment see PARA 1228 post.

11 Ibid s 51(13) (substituted by the Criminal Justice Act 2003 Sch 3 paras 15, 18); Crime and Disorder Act 1998 s 51A(11) (added by the Criminal Justice Act 2003 Sch 3 paras 15, 18). See PARAS 1132-1133 ante.

## **UPDATE**

### **1136 Notice of offence and place of trial**

NOTE 4--CrimPR 12.2 now Criminal Procedure Rules 2010, SI 2010/60, r 12.2.

NOTE 9--Appointed day is 1 October 2009: SI 2009/1604.

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### **1137. Supplementary provisions.**

A magistrates' court may adjourn any proceedings under specified provisions relating to sending for trial<sup>1</sup>, and if it does so must remand the defendant<sup>2</sup>.

The court may send a person for trial under these provisions: (1) in custody, that is to say, by committing him to custody there to be safely kept until delivered in due course of law; or (2) on bail<sup>3</sup>, that is to say, by directing him to appear before the Crown Court for trial<sup>4</sup>. Where the person's release on bail is conditional on his providing one or more sureties, and the court fixes the amount in which a surety is to be bound<sup>5</sup> with a view to his entering into his recognisance subsequently<sup>6</sup>, the court must in the meantime make an order such as is mentioned in head (1) above<sup>7</sup>.

As soon as practicable after any person is sent for trial<sup>8</sup>, and in any event within four days from the date on which he is sent<sup>9</sup>, the magistrates' court officer must<sup>10</sup> send to the Crown Court officer: (a) the information<sup>11</sup>, if it is in writing; (b) the notice<sup>12</sup> specifying the offence or offences for which he is sent for trial and the place at which he is to be tried; (c) a copy of the record<sup>13</sup> relating to the grant or withholding of bail in respect of the defendant on the occasion of the sending; (d) any recognisance entered into by any person as surety for the defendant together with any enlargement of it<sup>14</sup>; (e) the names and addresses of any interpreters engaged for the defendant for the purposes of the appearance in the magistrates' court, together with any telephone numbers at which they can be readily contacted, and details of the languages or dialects in connection with which they have been so engaged; (f) if any person under the age of 18 is concerned in the proceedings, a statement whether the magistrates' court has given a direction<sup>15</sup> restricting reporting; (g) a copy of any representation order previously made in the case; (h) a copy of any application for a representation order previously made in the case which has been refused; and (i) any documents relating to an appeal by the prosecution against the granting of bail<sup>16</sup>.

A Crown Court officer to whom notice has been given must list the first Crown Court appearance of the person to whom the notice relates in accordance with any directions given by the magistrates' court<sup>17</sup>.

Where a person is sent for trial<sup>18</sup> on any charge or charges, copies of the documents containing the evidence on which the charge or charges are based must before expiry of the prescribed period<sup>19</sup> be served on that person, and given to the Crown Court sitting at the place specified in the relevant notice<sup>20</sup>; but the Crown Court at that place may extend or further extend the period on an oral or written application by the prosecutor<sup>21</sup>. Where a person has been sent for trial for any offence to which the proceedings concerned relate, an application for a witness summons<sup>22</sup> must be made as soon as reasonably practicable after such service on that person of documents relevant to that offence<sup>23</sup>.

1    Ie under the Crime and Disorder Act 1998 s 51 (prospectively amended) (see PARA 1131 ante), s 51 (as substituted) (see PARA 1132 ante) or s 51A (as added) (see PARA 1133 ante).

2    Ibid s 52(5) (amended by the Criminal Justice Act 2003 s 41, Sch 3 paras 68, 69(c)).

3    Ie in accordance with the Bail Act 1976 (see PARA 1165 et seq post). As to sending for trial on bail see PARA 1163 post.

- 4 Crime and Disorder Act 1998 s 52(1) (amended by the Criminal Justice Act 2003 Sch 3 paras 68, 69(a)).
- 5 le in accordance with the Bail Act 1976 s 8(3): see PARA 1172 post.
- 6 le in accordance with *ibid* s 8(4), s 8(5) (as amended) or s 8(6): see PARA 1172 post.
- 7 Crime and Disorder Act 1998 s 52(2). This provision is subject to the Bail Act 1976 s 4 (as amended) (see PARA 1169 post), the Magistrates' Courts Act 1980 s 41 (see PARA 1178 post), regulations under the Prosecution of Offences Act 1985 s 22 (as amended) (see PARA 1152 post) and the Criminal Justice and Public Order Act 1994 s 25 (as amended) (see PARA 1170 post).
- 8 le under the Crime and Disorder Act 1998 s 51 (prospectively amended) or s 51 (as substituted): see PARAS 1131-1132 ante.
- 9 le not counting Saturdays, Sundays, Good Friday, Christmas Day or Bank Holidays: CrimPR 12.1.
- 10 le subject to the Prosecution of Offences Act 1985 s 7 (as amended): see PARA 1085 ante.
- 11 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.
- 12 le required by the Crime and Disorder Act 1998 s 51D (as added; prospectively amended): see PARA 1136 ante.
- 13 le made in pursuance of the Bail Act 1976 s 5 (as amended): see PARA 1173 post.
- 14 le under the Magistrates' Courts Act 1980 s 129(4) (as amended): see PARA 1148 post.
- 15 le under the Children and Young Persons Act 1933 s 39 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1271.
- 16 CrimPR 12.1.
- 17 CrimPR 12.2.
- 18 le under the Crime and Disorder Act 1998 s 51 (prospectively amended) or s 51 (as substituted): see PARAS 1131-1132 ante.
- 19 le within 70 days from the date of the first hearing in the Crown Court or, in the case of a person committed to custody under *ibid* s 52(1)(a) (see head (1) in the text), within 50 days: Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005, SI 2005/902, reg 2.
- 20 le the notice referred to in the Crime and Disorder Act 1998 s 51D (as added; prospectively amended): see PARA 1136 ante.
- 21 Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005, SI 2005/902, regs 3-6. See PARA 1131 note 1 ante. Failure by the prosecution to comply with the time limit does not render the prosecution a nullity: *Re Fehily, Re Clarke, Re McCadden* [2003] 1 Cr App Rep 153, [2002] All ER (D) 122 (Jun), DC.
- 22 See PARA 1409 post.
- 23 Criminal Procedure (Attendance of Witnesses) Act 1965 s 2(4) (substituted by the Criminal Justice Act 2003 Sch 3 para 42).

## UPDATE

### 1137 Supplementary provisions

TEXT AND NOTES 8-17--CrimPR 12.1, 12.2 now Criminal Procedure Rules 2010, SI 2010/60, rr 12.1, 12.2.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/16. HEARING, PLEA AND ALLOCATION OF PROCEEDINGS/ (5) SENDING TO THE CROWN COURT FOR TRIAL/1138. Application for dismissal.

### **1138. Application for dismissal.**

A person who is sent for trial<sup>1</sup> on any charge or charges may, at any time after he is served with copies of the documents containing the evidence on which the charge or charges are based, and before he is arraigned (and whether or not an indictment has been preferred against him), apply orally or in writing to the Crown Court sitting at the place specified<sup>2</sup> for the charge, or any of the charges, in the case to be dismissed<sup>3</sup>. The judge must dismiss a charge (and accordingly quash any count relating to it in any indictment preferred against the applicant) which is the subject of any such application if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him<sup>4</sup>. No oral application may be made unless the applicant has given to the Crown Court sitting at the place in question written notice of his intention to make the application<sup>5</sup>.

If the charge, or any of the charges, against the applicant is dismissed, no further proceedings may be brought on the dismissed charge or charges except by means of the preferment of a voluntary bill of indictment<sup>6</sup>, and, unless the applicant is in custody otherwise than on the dismissed charge or charges, he must be discharged<sup>7</sup>.

1     le under the Crime and Disorder Act 1998 s 51 (prospectively amended) (see PARA 1131 ante) or s 51 (as substituted) (see PARA 1132 ante) (or, as from a day to be appointed, under s 51A (as added) (see PARA 1133 ante)): see s 56(2), Sch 3 para 2(1) (prospectively amended by the Criminal Justice Act s 41, Sch 3 paras 15, 20(1), (3)). At the date at which this volume states the law no such day had been appointed. See PARA 1131 ante.

2     le in the notice under the Crime and Disorder Act 1998 s 51D(1) (as added; prospectively amended): see PARA 1136 ante.

3     See *ibid* Sch 3 para 2(1). As to procedure see CrimPR 13.1-13.6. The Youth Justice and Criminal Evidence Act 1999 s 41 (restriction on evidence or questions about complainant's sexual history in proceedings for sexual offences: see PARA 1446 post) applies to the hearing of an application under the Crime and Disorder Act 1998 s 52(6), Sch 3 para 2(1) (prospectively amended): Youth Justice and Criminal Evidence Act 1999 s 42(3)(c) (amended by the Criminal Justice Act 2003 Sch 3 para 73(1), (3)).

4     Crime and Disorder Act 1998 s 52(6), Sch 3 para 2(2). As from a day to be appointed this provision is amended to provide that a charge must be dismissed where such evidence against an applicant would not be sufficient for him to be properly convicted: see the Criminal Justice Act 2003 s 331, Sch 36 para 73 (not yet in force). At the date at which this volume states the law no such day had been appointed. The judge must take into account the whole of the evidence against a defendant; it is not appropriate for the judge to view any evidence in isolation from its context and other evidence; the judge is not bound to assume that a jury might make every possible inference capable of being drawn from a document against the defendant; whether there is sufficient evidence for a jury properly to convict depends on the judge to assess the weight of the evidence but the judge must not substitute himself for the jury; where the evidence is largely documentary, and the case depends on inferences to be drawn from it, the judge must assess the inferences that the prosecution proposes to ask the jury to draw, and decide whether the jury could properly draw those inferences; a judge's decision that there was or was not sufficient evidence can only be impugned if no reasonable judge could have reached it: *R (on the application of IRC) v Crown Court at Kingston* [2001] EWHC Admin 581, [2001] 4 All ER 721 (case concerned with identical provision in the Criminal Justice Act 1987 s 6(1) (repealed)).

An application to dismiss a charge based merely on the defective draft of a notice under the Crime and Disorder Act 1998 s 51D (as added; prospectively amended) (see PARA 1136 ante) is not entitled to succeed: *R (on the application of Bentham) v Governor of HM Prison Wandsworth* [2006] EWHC 121 (Admin), [2006] All ER (D) 80 (Feb).

Where a person is charged in the same proceedings with murder or manslaughter and with an offence under the Domestic Violence, Crime and Victims Act 2004 s 5 (see PARA 107 ante) in respect of the same death, the charge of murder or manslaughter is not to be dismissed under the Crime and Disorder Act 1998 Sch 3 para 2 (as amended, prospectively amended) unless the offence under the Domestic Violence, Crime and Victims Act 2004 s 5 is dismissed: s 6(1), (3).

A decision on an application to dismiss a charge is not susceptible to judicial review: *R (on the application of Snelgrove) v Woolwich Crown Court* [2004] EWHC 2172 (Admin), [2005] 1 WLR 3223, [2005] 1 Cr App Rep 253.

5 Crime and Disorder Act 1998 Sch 3 para 2(3).

6 See PARA 1207 post.

7 Crime and Disorder Act 1998 Sch 3 para 2(6).

## **UPDATE**

### **1138 Application for dismissal**

NOTE 3--CrimPR Pt 13 now Criminal Procedure Rules 2010, SI 2010/60, Pt 13.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/16. HEARING, PLEA AND ALLOCATION OF PROCEEDINGS/ (5) SENDING TO THE CROWN COURT FOR TRIAL/1139. Restrictions on reporting applications for dismissal.

### **1139. Restrictions on reporting applications for dismissal.**

It is not lawful to publish<sup>1</sup> in the United Kingdom<sup>2</sup> a written report of an application for dismissal<sup>3</sup>, or to include in a relevant programme<sup>4</sup> for reception in the United Kingdom a report of such an application, if (in either case) the report contains any matter other than permitted matter<sup>5</sup>. An order that this is not to apply to reports of such an application may be made by the judge dealing with the application<sup>6</sup>. Where in the case of two or more defendants one of them objects to the making of such an order, the judge may make the order if, and only if, he is satisfied, after hearing the representations of the defendants, that it is in the interests of justice to do so<sup>7</sup>. It is not unlawful to publish or include in a relevant programme a report of an application for dismissal containing any matter other than that permitted where the application is successful<sup>8</sup> nor is it unlawful to publish or include in a relevant programme a report of an unsuccessful application at the conclusion of the trial of the person charged, or of the last of the persons charged to be tried<sup>9</sup>.

The following matters may be contained in a report published or included in a relevant programme without an order<sup>10</sup> before the time authorised<sup>11</sup>: (1) the identity of the court and the name of the judge; (2) the names, ages, home addresses<sup>12</sup> and occupations of the defendant or defendants and witnesses; (3) where the application for dismissal relates to a charge for an offence of serious or complex fraud in respect of which notice has been given<sup>13</sup> to the court, any relevant business information<sup>14</sup>; (4) the offence or offences, or a summary of them, with which the defendant is or are charged; (5) the names of counsel and solicitors engaged in the proceedings; (6) where the proceedings are adjourned, the date and place to which they are adjourned; (7) the arrangements as to bail, (8) whether a right to representation funded by the Legal Services Commission as part of the Criminal Defence Service was granted to the defendant or any of the defendants<sup>15</sup>.

If a report is published or included in a relevant programme in contravention of these provisions, the following persons are liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>16</sup>: (a) in the case of a publication of a written report as part of a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical; (b) in the case of a publication of a written report otherwise than as part of a newspaper or periodical, the person who publishes it; (c) in the case of the inclusion of a report in a relevant programme, any body corporate which is engaged in providing the service in which the programme is included and any person having functions in relation to the programme corresponding to those of the editor of a newspaper<sup>17</sup>.

1 'Publish', in relation to a report, means publish the report, either by itself or as part of a newspaper or periodical, for distribution to the public: Crime and Disorder Act 1998 s 52(6), Sch 3 para 3(13).

2 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 Ie under the Crime and Disorder Act 1998 s 52(6), Sch 3 para 2(1) (as amended): see PARA 1138 ante.

4 Ie a programme included in a programme service (within the meaning of the Broadcasting Act 1990: see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328): Crime and Disorder Act 1998 Sch 3 para 3(13).



5 Ibid Sch 3 para 3(1) (amended by the Criminal Justice Act 2003 s 41, Sch 3 paras 68, 71(a)). See PARA 1131 note 1 ante. This is in addition to, and not in derogation from, other statutory provisions: Crime and Disorder Act 1998 Sch 3 para 3(12). 'Permitted matter' means matter permitted by Sch 3 para 3(8): see the text and note 15 infra.

6 Ibid s 52(6), Sch 3 para 3(2). Cf the Contempt of Court Act 1981 s 4 (as amended); and CONTEMPT OF COURT vol 9(1) (Reissue) PARA 428. Other restrictions are imposed by eg the Criminal Justice Act 1925 s 41 (as amended) (prohibition on taking photographs etc in court: see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 407); the Judicial Proceedings (Regulation of Reports) Act 1926 (as amended) (see CONTEMPT OF COURT vol 9(1) (Reissue) PARAS 430-431); the Children and Young Persons Act 1933 s 39 (as amended) (see CONTEMPT OF COURT vol 9(1) (Reissue) PARAS 430-431). An order under the Crime and Disorder Act 1998 Sch 3 para 3(2) does not apply to reports of proceedings under Sch 3 para 3(3) (see the text and note 7 infra), but any decision of the court to make or not to make such an order may be contained in reports published or included in a relevant programme before the time authorised by Sch 3 para 3(5) (see the text and note 8 infra): Sch 3 para 3(4).

7 Ibid Sch 3 para 3(3).

8 Ibid Sch 3 para 3(5). Where two or more persons were jointly charged, and applications for dismissal are made by more than one of them, Sch 3 para 3(5) (see the text and note 8 supra) is modified to refer to all being successful: Sch 3 para 3(6).

9 Ibid Sch 3 para 3(7).

10 Ie under ibid Sch 3 para 3(2): see the text and note 6 supra.

11 Ie under ibid Sch 3 para 3(5), (6): see the text and note 8 supra.

12 Ie addresses at any relevant time, and at the time of their publication or inclusion in a relevant programme: ibid Sch 3 para 3(9). 'Relevant time' means a time when events giving rise to the charges to which the proceedings relate occurred: Sch 3 para 3(13).

13 Ie under ibid s 51B (prospectively added and amended): see PARA 1134 post.

14 For these purposes, the following is relevant business information for the purposes of ibid Sch 3 para 3(8) (as amended) (see the text and note 15 infra):

511 (1) any address used by the defendant for carrying on a business on his own account;

512 (2) the name of any business which he was carrying on on his own account at any relevant time;

513 (3) the name of any firm in which he was a partner at any relevant time or by which he was engaged at any such time;

514 (4) the address of any such firm;

515 (5) the name of any company of which he was a director at any relevant time or by which he was otherwise engaged at any such time;

516 (6) the address of the registered or principal office of any such company;

517 (7) any working address of the defendant in his capacity as a person engaged by any such company,

and for these purposes 'engaged' means engaged under a contract of service or a contract for services: Sch 3 para 9A (added by the Criminal Justice Act 2003 Sch 3 paras 68, 71(c)).

15 Crime and Disorder Act 1998 Sch 3 para 3(8) (amended by the Access to Justice Act 1999 Sch 4 paras 53, 55; and the Criminal Justice Act 2003 Sch 3 paras 68, 71(b)). As to the Legal Services Commission see LEGAL AID vol 65 (2008) PARA 17 et seq; and as to the Criminal Defence Service see LEGAL AID vol 65 (2008) PARA 120 et seq.

16 As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

17 Crime and Disorder Act 1998 Sch 3 para 3(10). Proceedings for an offence may not be instituted otherwise than by or with the consent of the Attorney General: Sch 3 para 3(11). As to the effect of this limitation see PARA 1071 ante.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/16. HEARING, PLEA AND ALLOCATION OF PROCEEDINGS/ (5) SENDING TO THE CROWN COURT FOR TRIAL/1140. Depositions.

### **1140. Depositions.**

Where a justice of the peace is satisfied that any person ('the witness') is likely to be able to make on behalf of the prosecutor a written statement containing material evidence, or produce on behalf of the prosecutor a document or other exhibit likely to be material evidence, for the purposes of proceedings for an offence for which a person has been sent for trial<sup>1</sup> by a magistrates' court, and it is in the interests of justice to issue a summons to secure the attendance of the witness to have his evidence taken as a deposition or to produce the document or other exhibit, the justice must issue a summons directed to the witness requiring him to attend before a justice at the time and place appointed in the summons, and to have his evidence taken as a deposition or to produce the document or other exhibit<sup>2</sup>. If a justice of the peace is satisfied by evidence on oath of the matters mentioned above, and also that it is probable that such a summons would not procure the result required by it, the justice may instead of issuing a summons issue a warrant to arrest the witness and to bring him before a justice at the time and place specified in the warrant<sup>3</sup>.

If: (1) the witness fails to attend before a justice in answer to such a summons; (2) the justice is satisfied by evidence on oath that the witness is likely to be able to make a statement or produce a document or other exhibit; (3) it is proved on oath, or in such other manner as may be prescribed<sup>4</sup>, that he has been duly served with the summons and that a reasonable sum has been paid or tendered to him for costs and expenses; and (4) it appears to the justice that there is no just excuse for the failure, the justice may issue a warrant to arrest the witness and to bring him before a justice at the time and place specified in the warrant<sup>5</sup>.

If any person so attending or so brought before a justice refuses without just excuse to have his evidence taken as a deposition, or to produce the document or other exhibit, the justice may do one or both of the following: (a) commit him to custody until the expiration of such period not exceeding one month as may be specified in the summons or warrant or until he sooner has his evidence taken as a deposition or produces the document or other exhibit; (b) impose on him a fine not exceeding £2,500<sup>6</sup>. If a person has his evidence taken as a deposition, or produces an exhibit which is a document<sup>7</sup>, the designated officer for the justice concerned must as soon as is reasonably practicable send a copy of the deposition to the prosecutor and the Crown Court<sup>8</sup>.

Where a person has his evidence taken as a deposition, the deposition may without further proof be read as evidence on the trial of the defendant, whether for an offence for which he was sent for trial<sup>9</sup> or for any other offence arising out of the same transaction or set of circumstances<sup>10</sup>. This does not apply if it is proved that the deposition was not signed by the justice by whom it purports to have been signed, the court of trial at its discretion orders that it is not apply, or a party to the proceedings objects to it applying<sup>11</sup>.

<sup>1</sup> I.e. under the Crime and Disorder Act 1998 s 51 (prospectively amended) (see PARA 1131 ante) or s 51 (as substituted) (see PARA 1132 ante) (or, as from a day to be appointed, s 51A (as added) (see PARA 1133 ante)); see s 52(6), Sch 3 para 4(1) (prospectively amended by the Criminal Justice Act 2003 s 41, Sch 3 paras 15, 20(1), (4)). At the date at which this volume states the law no such day had been appointed. See PARA 1131 ante.

2 See the Crime and Disorder Act 1998 s 52(6), Sch 3 para 4(1), (2) (amended by the Serious Organised Crime and Police Act 2005 s 169(4); and the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 61). As to summonses see PARA 350 ante. Where a summons is issued with a view to securing that the witness has his evidence taken as a deposition, the time appointed in the summons must be such as to enable the evidence to be taken as a deposition before the relevant date: Crime and Disorder Act 1998 Sch 3 para 4(6).

A summons may also be issued under Sch 3 para 4(1), (2) (as amended; prospectively amended) if the justice is satisfied that the witness is outside the British Islands: Sch 3 para 4(4). 'The British Islands' means the United Kingdom, the Channel Islands and the Isle of Man: see the Interpretation Act 1978 s 5, Sch 1.

The witness summons procedure may not be used in order to obtain disclosure of documents: *R v Skegness Magistrates' Court, ex p Cardy* [1985] RTR 49, DC; *R v Sheffield Justices, ex p Wigley* [1985] RTR 78, DC (both cases under the corresponding provision in the Magistrates' Courts Act 1980 s 97 (see MAGISTRATES vol 29(2) (Reissue) PARAS 734, 736)). No witness summons may be issued where the document would have no probative value in relation to the charge: *R v Coventry Magistrates' Court, ex p Perks* [1985] RTR 74, DC; *R v Barking Justices, ex p Goodspeed* [1985] RTR 70n, DC (both cases under the Magistrates' Courts Act 1980 s 97).

The Queen's Bench Division of the High Court has power to set aside a witness summons where there has been an abuse of the process of the court or if it is clear that the witness cannot give relevant evidence. On an application for a witness summons, justices should inquire as to the nature of the evidence and whether and why it is likely to be material: *R v Peterborough Magistrates' Court, ex p Willis and Amos* (1987) 151 JP 785, DC; *R v Reading Justices, ex p Berkshire County Council* [1996] 1 Cr App Rep 239, 160 JP 392, DC (both cases under the Magistrates' Courts Act 1980 s 97). It must be shown that the evidence would be material to the party seeking the summons; this would not be the case where the witness would give hostile evidence: *R v Marylebone Magistrates' Court, ex p Gatting and Emburey* (1990) 154 JP 549, DC. An application may also be made to the magistrates' court for this purpose: *R v Hove Justices, ex p Donne* [1967] 2 All ER 1235n, DC; *R v Lewes Justices, ex p Gaming Board for Great Britain* [1972] 1 QB 232 at 240, [1971] 2 All ER 1126 at 1132, DC, per Lord Parker CJ (affd sub nom *Gaming Board for Great Britain v Rogers* [1973] AC 388, [1972] 2 All ER 1057, HL) (all cases under the Magistrates' Courts Act 1980 s 97). A summons requiring the production of a document may be set aside if the document would be inadmissible in evidence: *R v Cheltenham Justices, ex p Secretary of State for Trade* [1977] 1 All ER 460, [1977] 1 WLR 95, DC (case under the Magistrates' Courts Act 1980 s 97).

A witness summons should not be issued to compel production by a prosecution witness of proof of evidence and attendance notes giving factual instructions to his solicitor which may contain or record inconsistent statements by the witness and/or which are the subject of legal professional privilege which has not been waived; the inadmissibility of such evidence by virtue of the privilege means that it is not 'likely to be material evidence': *R v Derby Magistrates' Court, ex p B* [1995] 4 All ER 526, [1996] 1 Cr App Rep 385, HL; *R (on the application of Howe) v South Durham Magistrates' Court* [2004] EWHC 362 (Admin), 168 JP 424 (both cases under the Magistrates' Courts Act 1980 s 97).

Subject to the provisions of any enactment or rule of law authorising the reception of unsworn evidence, evidence given before a magistrates' court must be given on oath: Magistrates' Courts Act s 98. As to the unsworn evidence of children under 14 see PARA 1442 post. As to affirmations see the Oaths Act 1978; and CIVIL PROCEDURE vol 11 (2009) PARA 1021 et seq.

The procedure of taking a deposition from a witness who will not voluntarily make a statement, pursuant to the Crime and Disorder Act 1998 Sch 3 para 4 (as amended) is a proceeding in open court. In the circumstances of a particular case, however, the justices may exceptionally exclude persons from the taking of the deposition or otherwise modify the procedure where that will assist in the reception of the evidence or it is in the interests of justice to do so: *R (on the application of the Crown Prosecution Service) v Bolton Justices* [2003] EWHC 2697 (Admin), [2005] 2 All ER 848, [2004] 1 Cr App Rep 438. Where a witness who has been summonsed to give a deposition pursuant to the Crime and Disorder Act 1998 Sch 3 para 4 (as amended) refuses to answer questions on the ground of privilege against self-incrimination, that claim should be the subject of a proper investigation by the justices in respect of each and every question for which it is claimed: *R (on the application of the Crown Prosecution Service) v Bolton Justices* supra.

See also *R (on the application of the Crown Prosecution Service) v Bolton Justices* supra (deposition proceedings are proceedings in open court; every question for which privilege is sought must be investigated by the justices).

Where a person attends before a justice of the peace pursuant to the Crime and Disorder Act 1998 Sch 3 para 4 (as amended) the justice must: (1) where that person attends for the purpose of giving evidence, cause his evidence to be put in writing; (2) where that person attends for the purposes of producing a document or other exhibit, cause the document or exhibit to be handed over for examination and any evidence given by that person in respect of it to be put in writing; (3) where that person refuses to have his evidence taken or to produce the document or other exhibit, as the case may be, explain to him the consequences of so refusing without just excuse, and ask him to explain why he has so refused; and (4) cause a record of any such refusal to be put in writing: CrimPR 28.2(1).

The attendance as a witness of a person who is in custody is generally secured by an order of the Secretary of State (see the Crime (Sentences) Act 1997 s 41, Sch 1 para 3; and PRISONS vol 36(2) (Reissue) PARA 550) but

may also be secured by a warrant issued by, or on the order of, a judge of the Queen's Bench Division (see the Criminal Procedure Act 1853 s 9 (as amended); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 250). In the latter instance application is made on witness statement or affidavit: Civil Procedure Rules 1998, SI 1998/3132 Sch RSC Ord 54 r 9(2) (amended by SI 1999/1008).

As soon as practicable after the examination by the prosecutor of a witness whose evidence is put in writing the justice must cause his deposition to be read to him, and must require the witness to sign the deposition: CrimPR 28.2(2). Any such deposition must be authenticated by a certificate signed by the justice: CrimPR 28.2(3).

3 See the Crime and Disorder Act 1998 Sch 3 para 4(3). No warrant may be issued under Sch 3 para 4(3) unless the justice is satisfied by evidence on oath that the witness is in England and Wales: see Sch 3 para 4(3). Where a warrant is issued with a view to securing that the witness has his evidence taken as a deposition, the time appointed in the warrant must be such as to enable the evidence to be taken as a deposition before the relevant date: Sch 3 para 4(6). The 'relevant date' means the expiry of the period referred to in Sch 3 para 1 (as amended): see Sch 3 para 4(12) (amended by the Criminal Justice Act 2003 Sch 3 paras 68, 72).

4 It is prescribed by the Criminal Procedure Rules: Crime and Disorder Act 1998 Sch 3 para 4(12) (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035 art 3, Schedule paras 35, 37).

5 Crime and Disorder Act 1998 Sch 3 para 4(5).

6 Ibid Sch 3 para 4(7). A fine imposed under Sch 3 para 4(7) is deemed, for the purposes of any enactment, to be a sum adjudged to be paid by a conviction: Sch 3 para 4(8).

7 If in pursuance of ibid Sch 3 para 4 (as amended) a person produces an exhibit which is not a document, the designated officer concerned must as soon as is reasonably practicable inform the prosecutor and the Crown Court of that fact and of the nature of the exhibit: Sch 3 para 4(11) (Sch 3 para 4(9)-(11) amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 61).

8 Crime and Disorder Act 1998 Sch 3 para 4(9), (10) (as amended: see note 7 supra).

9 It is under ibid s 51 (prospectively amended) (see PARA 1131 ante) or s 51 (as substituted) (see PARA 1132 ante) (or, as from a day to be appointed, s 51A (as added) (see PARA 1133 ante)): see Sch 3 para 5(2) (prospectively amended by the Criminal Justice Act 2003 Sch 3 paras 15, 20(5)). At the date at which this volume states the law no such day had been appointed. See PARA 1131 ante.

10 Crime and Disorder Act 1998 Sch 3 para 5(1), (2).

11 Ibid Sch 3 para 5(3).

## **UPDATE**

### **1140 Depositions**

NOTE 2--CrimPR Pt 28 now Criminal Procedure Rules 2010, SI 2010/60, Pt 28. CrimPR 28.2 not reproduced.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/16. HEARING, PLEA AND ALLOCATION OF PROCEEDINGS/ (5) SENDING TO THE CROWN COURT FOR TRIAL/1141. Procedure where no main offence is included in indictment against defendant sent for trial.

**1141. Procedure where no main offence is included in indictment against defendant sent for trial.**

Except in the case of a child or young person<sup>1</sup>, where:

- 1821 (1) a person has been sent for trial<sup>2</sup> but has not been arraigned<sup>3</sup>; and
- 1822 (2) the person is charged on an indictment which (following amendment of the indictment, or as a result of an application for dismissal<sup>4</sup>, or for any other reason) includes no main offence<sup>5</sup>,

the Crown Court must cause to be read to the defendant each remaining count of the indictment that charges an offence triable either way<sup>6</sup>. The court must then explain to the defendant in ordinary language that, in relation to each of those offences, he may indicate whether (if it were to proceed to trial) he would plead guilty or not guilty, and that if he indicates that he would plead guilty the court must proceed as if he had been arraigned on the count in question and had pleaded guilty<sup>7</sup>. The court must then ask the defendant whether (if the offence in question were to proceed to trial) he would plead guilty or not guilty<sup>8</sup>. If the defendant indicates that he would plead guilty the court must proceed as if he had been arraigned on the count in question and had pleaded guilty<sup>9</sup>. If the defendant indicates that he would plead not guilty, or fails to indicate how he would plead, the court must decide whether the offence is more suitable for summary trial or for trial on indictment<sup>10</sup>.

Except in the case of a child or young person, where:

- 1823 (a) a person has been sent for trial<sup>11</sup> but has not been arraigned<sup>12</sup>;
- 1824 (b) he is charged on an indictment which (following amendment of the indictment, or as a result of an application for dismissal, or for any other reason) includes no main offence<sup>13</sup>;
- 1825 (c) he is represented by a legal representative<sup>14</sup>;
- 1826 (d) the Crown Court considers that by reason of his disorderly conduct before the court it is not practicable for proceedings of the above type<sup>15</sup> to be conducted in his presence<sup>16</sup>; and
- 1827 (e) the court considers that it should proceed in his absence<sup>17</sup>,

the court must: (i) cause to be read to the representative each remaining count of the indictment that charges an offence triable either way<sup>18</sup>; (ii) must ask the representative whether (if the offence in question were to proceed to trial) the defendant would plead guilty or not guilty<sup>19</sup>; (iii) if the representative indicates that the defendant would plead guilty, proceed as if the defendant had been arraigned on the count in question and had pleaded guilty<sup>20</sup>; (iv) if the representative indicates that the defendant would plead not guilty or fails to indicate how the accused would plead, decide whether the offence is more suitable for summary trial or for trial on indictment<sup>21</sup>.

Where the Crown Court is required by the above provisions<sup>22</sup> to decide the question whether an offence is more suitable for summary trial or for trial on indictment<sup>23</sup>, the court, before

considering the question, must give the prosecution an opportunity to inform the court of the defendant's previous convictions (if any)<sup>24</sup>; and must give the prosecution and the defendant an opportunity to make representations as to whether summary trial or trial on indictment would be more suitable<sup>25</sup>. In deciding the question, the court must consider whether the sentence which a magistrates' court would have power to impose for the offence would be adequate<sup>26</sup>; and any such representations made by the prosecution or the defendant<sup>27</sup>, and must have regard to any allocation guidelines<sup>28</sup>.

Unless otherwise excluded<sup>29</sup>, where the Crown Court considers that an offence is more suitable for summary trial<sup>30</sup>, the court must explain to the defendant in ordinary language:

- 1828 (A) that it appears to the court more suitable for him to be tried summarily for the offence<sup>31</sup>;
- 1829 (B) that he can either consent to be so tried or, if he wishes, be tried on indictment<sup>32</sup>; and
- 1830 (C) in the case of a specified offence<sup>33</sup>, that if he is tried summarily and is convicted by the court, he may be committed<sup>34</sup> for sentence to the Crown Court if the committing court is of the requisite opinion<sup>35</sup>.

After so explaining to the defendant the court must ask him whether he wishes to be tried summarily or on indictment<sup>36</sup>. If the defendant indicates that he wishes to be tried summarily, the court must remit him for trial to a magistrates' court acting for the place where he was sent to the Crown Court for trial<sup>37</sup>. On the other hand, if the defendant does not give such an indication, the court must retain its functions in relation to the offence and must proceed accordingly<sup>38</sup>.

If the Crown Court considers that an offence is more suitable for trial on indictment, the court must tell the defendant that it has decided that it is more suitable for him to be tried for the offence on indictment<sup>39</sup>, and must retain its functions in relation to the offence and proceed accordingly<sup>40</sup>.

The following provisions apply in place of those described above. In the case of a child or young person who has been sent for trial<sup>41</sup> but has not been arraigned<sup>42</sup>, and is charged on an indictment which (following amendment of the indictment, or as a result of an application for dismissal, or for any other reason) includes no main offence<sup>43</sup>, the Crown Court must remit the child or young person for trial to a magistrates' court acting for the place where he was sent to the Crown Court for trial<sup>44</sup>.

Subject to specified exceptions<sup>45</sup>, the Crown Court may proceed in the absence of the defendant in accordance with such of the above provisions<sup>46</sup> as are applicable in the circumstances if:

- 1831 (aa) the defendant is represented by a legal representative who signifies to the court the defendant's consent to the proceedings in question being conducted in his absence<sup>47</sup>; and
- 1832 (bb) the court is satisfied that there is good reason for proceeding in the absence of the defendant<sup>48</sup>.

1 For these purposes, 'child' means a person under the age of 14 and 'young person' means a person who has attained the age of 14 and is under the age of 18: Crime and Disorder Act 1998 s 117(1).

2 *Ie* under *ibid* s 51 (prospectively amended) (see PARA 1131 ante) or s 51 (as substituted) (see PARA 1132 ante) or s 51A (as added) (see PARA 1133 ante).

3 *Ibid* s 52(6), Sch 3 para 7(1)(a) (Sch 3 para 7(1) prospectively amended by the Criminal Justice Act 2003 s 41, Sch 3 paras 15, 20(1), (7)(a), (b)). As from a day to be appointed the Criminal Justice Act 2003 Sch 3 paras 15, 20 make various amendments to the Crime and Disorder Act 1998 Sch 3. At the date at which this volume

states the law no such day had been appointed. See also PARAS 1131, 1140 ante. As to arraignment see PARAS 1263-1265 post.

4 Ibid an application under *ibid* s 52(6), Sch 3 para 2 (prospectively amended) (see PARA 1138 ante).

5 Ibid Sch 3 para 7(1)(b) (prospectively amended: see note 3 *supra*). For these purposes, a 'main offence' is: (1) an offence for which the person has been sent to the Crown Court for trial under s 51(1) (as substituted) (see PARA 1132 ante); or (2) an offence for which the person has been sent to the Crown Court for trial under s 51(5) (as substituted) (see PARA 1132 ante) or s 51A(6) (as added) (see PARA 1133 ante) ('the applicable subsection'), and in respect of which the conditions for sending him to the Crown Court for trial under the applicable subsection (as set out in s 51(5)(a)-(c) (as substituted) or s 51A(6)(a), (b) (as added) (see PARAS 1132-1133 ante)) continue to be satisfied: Sch 3 para 7(9) (prospectively added: see note 3 *supra*). Everything that the Crown Court is required to do under Sch 3 para 7(3)-(7) (prospectively amended) (see the text and notes 6-10 *infra*) must be done with the defendant present in court: Sch 3 para 7(2).

6 Ibid Sch 3 para 7(3) (prospectively amended: see note 3 *supra*).

7 Ibid Sch 3 para 7(4).

8 Ibid Sch 3 para 7(5).

9 Ibid Sch 3 para 7(6). Subject to Sch 3 para 7(6), asking the defendant under Sch 3 para 7 (prospectively amended) (see the text and note 10 *infra*) whether (if the offence were to proceed to trial) he would plead guilty or not guilty, and an indication by him thereunder of how he would plead, are not for any purpose to be taken to constitute the taking of a plea: Sch 3 para 8.

10 Ibid Sch 3 para 7(7) (prospectively amended: see note 3 *supra*).

11 Ibid under *ibid* s 51 (as substituted) or s 51A (as added): see PARAS 1132-1133 ante.

12 Ibid Sch 3 para 8(1)(a) (prospectively amended: see note 3 *supra*).

13 Ibid Sch 3 para 8(1)(b) (prospectively amended: see note 3 *supra*).

14 Ibid Sch 3 para 8(1)(c).

15 Ibid under *ibid* Sch 3 para 7 (prospectively amended): see the text and note 10 *supra*.

16 Ibid Sch 3 para 8(1)(d).

17 Ibid Sch 3 para 8(1)(e).

18 Ibid Sch 3 para 8(2)(a) (prospectively amended: see note 3 *supra*).

19 Ibid Sch 3 para 8(2)(b) (prospectively amended: see note 3 *supra*). Subject to head (iii) in the text, the following do not for any purpose constitute the taking of a plea: (1) asking the representative under this provision whether (if the offence were to proceed to trial) the accused would plead guilty or not guilty; and (2) an indication by the representative thereunder of how the defendant would plead: Sch 3 para 8(3).

20 Ibid Sch 3 para 8(2)(c).

21 Ibid Sch 3 para 8(2)(d).

22 Ibid by *ibid* Sch 3 para 7(7) (prospectively amended) (see the text and note 10 *supra*) or Sch 3 para 8(2)(d) (see the text to note 21 *supra*).

23 Ibid Sch 3 para 9(1) (prospectively amended: see note 3 *supra*).

24 Ibid Sch 3 para 9(2)(a) (prospectively substituted: see note 3 *supra*). In Sch 3 para 9 (prospectively amended) any reference to a previous conviction is a reference to a previous conviction by a court in the United Kingdom, or to a previous finding of guilt in any proceedings under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 (whether before a court-martial or any other court or person authorised under any of those Acts to award a punishment in respect of any offence), or any proceedings before a standing civilian court: Crime and Disorder Act 1998 Sch 3 para 9(5) (as so prospectively substituted).

25 Ibid Sch 3 para 9(2)(b) (prospectively substituted: see note 3 *supra*).

26 Ibid Sch 3 para 9(3)(a) (prospectively substituted: see note 3 supra). Where the defendant is charged on the same occasion with two or more offences, and it appears to the court that they constitute or form part of a series of two or more offences of the same or a similar character, Sch 3 para 9(3)(a) (prospectively substituted) has effect as if references to the sentence which a magistrates' court would have power to impose for the offence were a reference to the maximum aggregate sentence which a magistrates' court would have power to impose for all of the offences taken together: Sch 3 para 9(4) (prospectively substituted: see note 3 supra).

27 Ibid Sch 3 para 9(3)(b) (prospectively substituted: see note 3 supra).

28 Ibid Sch 3 para 9(3) (prospectively substituted: see note 3 supra). The reference to allocation guidelines is a reference to allocation guidelines (or revised allocation guidelines) issued as definitive guidelines by the Sentencing Guidelines Council under the Criminal Justice Act 2003 s 170 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 635, 638): Crime and Disorder Act 1998 Sch 3 para 9(5) (prospectively substituted: see note 3 supra).

29 Ie by ibid Sch 3 para 15 (prospectively amended): see the text and notes 45-48 infra.

30 Ibid Sch 3 para 10(1).

31 Ibid Sch 3 para 10(2)(a) (prospectively substituted: see note 3 supra).

32 Ibid Sch 3 para 10(2)(b) (prospectively substituted: see note 3 supra).

33 Ie a specified offence within the meaning of the Criminal Justice Act 2003 s 224 (specified violent offences and specified sexual offences): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 68 et seq.

34 Ie committed for sentence under the Powers of Criminal Courts (Sentencing) Act 2000 s 3A (prospectively added): see PARA 1124 ante.

35 Crime and Disorder Act 1998 Sch 3 para 10(2)(c) (prospectively substituted: see note 3 supra). The requisite opinion is that mentioned in the Powers of Criminal Courts (Sentencing) Act 2000 s 3A(2) (prospectively added) (see PARA 1124 ante).

36 Crime and Disorder Act 1998 Sch 3 para 10(3) (prospectively amended: see note 3 supra).

37 Ibid Sch 3 para 10(3)(a).

38 Ibid Sch 3 para 10(3)(b).

39 Ibid Sch 3 para 11(a) (prospectively amended: see note 3 supra).

40 Ibid Sch 3 para 11(b).

41 Ie under ibid s 51 (as substituted) or s 51A (as added): see PARAS 1132-1133 ante.

42 Ibid Sch 3 para 13(1)(a) (prospectively amended: see note 3 supra).

43 Ibid Sch 3 para 13(1)(b) (prospectively amended: see note 3 supra). In Sch 3 para 13 (prospectively amended), a 'main offence' is: (1) an offence for which the child or young person has been sent to the Crown Court for trial under s 51A(2) (as added) (see PARA 1133 ante); or (2) an offence for which the child or young person has been sent to the Crown Court for trial under s 51(7) (as substituted) (see PARA 1132 ante) and in respect of which the conditions for sending him to the Crown Court for trial under s 51(7) (as substituted) (see PARA 1132 ante) as set out in s 51(7)(a), (b) (as substituted) (see PARA 1132 ante) continue to be satisfied: Sch 3 para 13(3) (prospectively substituted: see note 3 supra).

44 Ibid Sch 3 para 13(2) (prospectively amended: see note 3 supra).

45 Ibid Sch 3 para 15(1) (see the text and notes 46-48 infra) is subject to the following provisions: Sch 3 para 15(2). If where the court has decided as required by Sch 3 para 7(7) (prospectively amended) (see the text and notes 2-10 supra) or Sch 3 para 8(2)(d) (prospectively amended) (see the text and note 21 supra), it appears to the court that an offence is more suitable for summary trial, Sch 3 para 10 (prospectively amended) (see the text and notes 29-38 supra) does not apply and: (1) if the legal representative indicates that the defendant wishes to be tried summarily, the court must remit the defendant for trial to a magistrates' court acting for the place where he was sent to the Crown Court for trial; (2) if the legal representative does not give such an indication, the court must retain its functions and proceed accordingly: Sch 3 para 15(3) (prospectively amended: see note 3 supra). If, where the court has decided as required by Sch 3 para 7(7) (prospectively amended) or Sch 3 para 8(2)(d) (prospectively amended), it appears to the court that an offence is more suitable for trial on indictment, Sch 3 para 11 (prospectively amended) (see the text and notes 39, 40 supra)



applies with the omission of Sch 3 para 11(a) (prospectively amended): Sch 3 para 15(4) (prospectively amended: see note 3 supra). See also PARA 1358 post.

46     Ie ibid Sch 3 paras 9-13 (prospectively amended) (see the text and notes 22-44 supra) and Sch 3 para 14 (see PARA 1358 post).

47     Ibid Sch 3 para 15(1)(a).

48     Ibid Sch 3 para 15(1)(b).

## **UPDATE**

### **1141 Procedure where no main offence is included in indictment against defendant sent for trial**

NOTE 24--Crime and Disorder Act 1998 Sch 3 para 9(5) amended: Armed Forces Act 2006 Sch 16 para 155.

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## **(6) RESTRICTIONS ON REPORTING ALLOCATION OR SENDING PROCEEDINGS**

### **1142. Restrictions on reporting.**

As from a day to be appointed<sup>1</sup> it is not lawful:

- 1833 (1) to publish<sup>2</sup> in the United Kingdom<sup>3</sup> a written report of any allocation or sending proceedings<sup>4</sup> in England and Wales<sup>5</sup>; or
- 1834 (2) to include in a relevant programme<sup>6</sup> for reception in the United Kingdom a report of any such proceedings<sup>7</sup>,

if (in either case) the report contains any matter other than permitted matter<sup>8</sup>.

A magistrates' court may, with reference to any allocation or sending proceedings, order that this prohibition is not to apply to reports of those proceedings<sup>9</sup>. However, where there is only one defendant and he objects to the making of such an order, the court may make the order if, and only if, it is satisfied, after hearing the representations of the defendant, that it is in the interests of justice to do so<sup>10</sup>. In addition, where in the case of two or more defendants one of them objects to the making of such an order, the court may make the order if, and only if, it is satisfied, after hearing the representations of the defendant, that it is in the interests of justice to do so<sup>11</sup>.

It is not unlawful to publish or include in a relevant programme a report of allocation or sending proceedings containing any matter other than any permitted matter:

- 1835 (a) where, in relation to the defendant (or all of the defendants if there are more than one), the magistrates' court is required<sup>12</sup> to proceed as if the proceedings constituted a summary trial, after the court is required so to proceed<sup>13</sup>;
- 1836 (b) where, in relation to the defendant (or any of the defendants, if there are more than one), the court proceeds other than as mentioned above, after the conclusion of his trial (or, as the case may be, the trial of the last to be tried)<sup>14</sup>.

The following matters may be contained in a report of allocation or sending proceedings published or included in a relevant programme without an order<sup>15</sup> before the time authorised<sup>16</sup>:

- 1837 (i) the identity of the court and the name of the justice or justices<sup>17</sup>;
- 1838 (ii) the name, age, home address<sup>18</sup> and occupation of the defendant or defendants<sup>19</sup>;
- 1839 (iii) in the case of a defendant charged with an offence in respect of which notice<sup>20</sup> has been given to the court in a case of serious or complex fraud, any relevant business information<sup>21</sup>;
- 1840 (iv) the offence or offences, or a summary of them, with which the defendant is, or the defendants are, charged<sup>22</sup>;
- 1841 (v) the names of counsel and solicitors engaged in the proceedings<sup>23</sup>;

- 1842 (vi) where the proceedings are adjourned, the date and place to which they are adjourned<sup>24</sup>;
- 1843 (vii) the arrangements as to bail<sup>25</sup>;
- 1844 (viii) whether a right to representation funded by the Legal Services Commission as part of the Criminal Defence Service was granted to the defendant or any of the defendants<sup>26</sup>.

1 The Crime and Disorder Act 1998 s 52A is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 15, 19 as from a day to be appointed under s 336(3). At the date at which this volume states the law no such day had been appointed. See PARA 1131 ante.

2 For these purposes, 'publish', in relation to a report, means publish the report, either by itself or as part of a newspaper or periodical, for distribution to the public: Crime and Disorder Act 1998 s 52A(11) (prospectively added: see note 1 supra).

3 As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4 For these purposes, 'allocation or sending proceedings' means, in relation to an information charging an indictable offence:

518 (1) any proceedings in the magistrates' court at which matters are considered under any of the following provisions: (a) the Magistrates' Courts Act 1980 ss 19-23 (ss 19, 20 prospectively substituted; s 20A prospectively added; s 21 prospectively substituted; s 22 as amended; s 23 as amended, prospectively amended) (see PARAS 1109-1115 ante); (b) the Crime and Disorder Act 1998 s 51 (as substituted), s 51A (as added) or s 52 (as amended) (see PARAS 1132-1133, 1137-1138 ante) (s 52A(11)(a) (prospectively added: see note 1 supra));

519 (2) any proceedings in the magistrates' court before the court proceeds to consider any matter mentioned in head (1) supra (s 52A(11)(b) (as so prospectively added)); and

520 (3) any proceedings in the magistrates' court at which an application under the Magistrates' Courts Act 1980 s 25(2) (prospectively substituted) (see PARA 1119 ante) is considered (Crime and Disorder Act 1998 s 52A(11)(c) (as so prospectively added)).

5 Ibid s 52A(1)(a) (prospectively added: see note 1 supra).

6 For these purposes, 'relevant programme' means a programme included in a programme service (within the meaning of the Broadcasting Act 1990: see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328): see the Crime and Disorder Act 1998 s 52A(11) (prospectively added: see note 1 supra).

7 Ibid s 52A(1)(b) (prospectively added: see note 1 supra).

8 See ibid s 52A(1) (prospectively added: see note 1 supra). As to the meaning of 'permitted matter' see s 52A(7) (prospectively added); and the text and notes 16-26 infra. Section 52A(1) (prospectively added) is in addition to, and not in derogation from, the provisions of any other enactment with respect to the publication of court proceedings: s 52A(10) (prospectively added: see note 1 supra).

9 Ibid s 52A(2) (prospectively added: see note 1 supra).

10 Ibid s 52A(3) (prospectively added: see note 1 supra). An order under s 52A(2) (prospectively added) (see the text to note 9 supra) does not apply to reports of proceedings under s 52A(3) or (4) (prospectively added) (see the text and note 11 infra), but any decision of the court to make or not to make such an order may be contained in reports published or included in a relevant programme before the time authorised by s 52A (prospectively added) (see the text and notes 16-26 infra): s 52A(5) (prospectively added: see note 1 supra).

11 Ibid s 52A(4) (prospectively added: see note 1 supra). The lifting of reporting restrictions without hearing submissions on behalf of all defendants is a breach of natural justice: *R v Wirral District Magistrates' Court, ex p Meikle* (1990) 154 JP 1035, DC (decided under a corresponding provision in the Magistrates' Courts Act 1980 s 8 (repealed)).

12 Ie under the Magistrates' Courts Act 1980 s 20(7) (prospectively substituted): see PARA 1112 ante.

13 Crime and Disorder Act 1998 s 52A(6)(a) (prospectively added: see note 1 supra).

14 Ibid s 52A(6)(b) (prospectively added: see note 1 supra).

15    le an order under ibid s 52A(2) (prospectively added): see the text to note 9 supra.

16    le authorised by ibid s 52A(6) (prospectively added): see notes 11-13 supra.

17    Ibid s 52A(7)(a) (prospectively added: see note 1 supra).

18    The addresses that may be published or included in a relevant programme under this provision are addresses: (1) at any relevant time; and (2) at the time of their publication or inclusion in a relevant programme: ibid s 52A(8) (prospectively added: see note 1 supra). 'Relevant time' means a time when events giving rise to the charges to which the proceedings relate occurred: see s 52A(11) (prospectively added: see note 1 supra).

19    Ibid s 52A(7)(b) (prospectively added: see note 1 supra).

20    le a notice under ibid s 51B (prospectively added and amended): see PARA 1134 ante.

21    Ibid s 52A(7)(c) (prospectively added: see note 1 supra). The following is relevant business information for the purposes of this provision:

521   (1)   any address used by the defendant for carrying on a business on his own account;

522   (2)   the name of any business which he was carrying on on his own account at any relevant time;

523   (3)   the name of any firm in which he was a partner at any relevant time or by which he was engaged at any such time;

524   (4)   the address of any such firm;

525   (5)   the name of any company of which he was a director at any relevant time or by which he was otherwise engaged at any such time;

526   (6)   the address of the registered or principal office of any such company;

527   (7)   any working address of the defendant in his capacity as a person engaged by any such company,

and for the above purposes 'engaged' means engaged under a contract of service or a contract for services: s 52A(9) (prospectively added: see note 1 supra).

22    Ibid s 52A(7)(d) (prospectively added: see note 1 supra).

23    Ibid s 52A(7)(e) (prospectively added: see note 1 supra).

24    Ibid s 52A(7)(f) (prospectively added: see note 1 supra).

25    Ibid s 52A(7)(g) (prospectively added: see note 1 supra).

26    Ibid s 52A(7)(h) (prospectively added: see note 1 supra).

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### **1143. Offences in connection with reporting.**

As from a day to be appointed<sup>1</sup> if a report is published<sup>2</sup> or included in a relevant programme<sup>3</sup> in contravention of the restrictions on reporting<sup>4</sup>, each of the following persons is guilty of an offence:

- 1845 (1) in the case of a publication of a written report as part of a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical<sup>5</sup>;
- 1846 (2) in the case of a publication of a written report otherwise than as part of a newspaper or periodical, the person who publishes it<sup>6</sup>;
- 1847 (3) in the case of the inclusion of a report in a relevant programme, any body corporate which is engaged in providing the service in which the programme is included and any person having functions in relation to the programme corresponding to those of the editor of a newspaper<sup>7</sup>.

A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>8</sup>.

<sup>1</sup> The Crime and Disorder Act 1998 s 52B is added by the Criminal Justice Act 2003 s 41, Sch 3 paras 15, 19 as from an appointed day under s 336(3). At the date at which this volume states the law no such day had been appointed. See PARA 1131 ante.

<sup>2</sup> For the meaning of 'publish' see PARA 1142 note 2 ante; definition applied by the Crime and Disorder Act 1998 s 52B(5) (prospectively added: see note 1 supra).

<sup>3</sup> For the meaning of 'relevant programme' see PARA 1142 note 6 ante; definition applied by ibid s 52B(5) (prospectively added: see note 1 supra).

<sup>4</sup> See under ibid s 52A (prospectively added): see PARA 1142 ante.

<sup>5</sup> Ibid s 52B(1)(a) (prospectively added: see note 1 supra).

<sup>6</sup> Ibid s 52B(1)(b) (prospectively added: see note 1 supra).

<sup>7</sup> Ibid s 52B(1)(c) (prospectively added: see note 1 supra).

<sup>8</sup> Ibid s 52B(2) (prospectively added: see note 1 supra). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 142. Proceedings for an offence under s 52B(1) (prospectively added) (see the text and notes 1-7 supra) may not in England and Wales be instituted otherwise than by or with the consent of the Attorney General: s 52B(3) (prospectively added: see note 1 supra). As to the effect of this limitation see PARA 1071 ante.

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Remand in custody.

## **(7) REMAND IN CUSTODY OR ON BAIL**

### **1144. Remand in custody.**

Where:

- 1848 (1) on adjourning a case<sup>1</sup> a magistrates' court proposes to remand or further remand a person in custody<sup>2</sup>; and
- 1849 (2) he is before the court<sup>3</sup>; and
- 1850 (3) he is legally represented<sup>4</sup> in that court<sup>5</sup>,

it is the duty of the court to explain the effect of the statutory provisions<sup>6</sup> to him in ordinary language and to inform him in ordinary language that, notwithstanding the procedure for a remand without his being brought before a court, he would be brought before a court for the hearing and determination of at least every fourth application for his remand, and of every application for his remand heard at a time when it appeared to the court that he had no legal representative acting for him in the case<sup>7</sup>. After so explaining to a defendant, the court must ask him whether he consents to the hearing and determination of such applications in his absence<sup>8</sup>. Where a person is brought before the court after remand, the court may further remand him<sup>9</sup>.

Where a person has been remanded in custody and the remand was not a remand for a period exceeding eight clear days<sup>10</sup>, the court may further remand him<sup>11</sup> on an adjournment<sup>12</sup> without his being brought before it if it is satisfied:

- 1851 (a) that he gave his consent<sup>13</sup> to the hearing and determination in his absence of any application for his remand on an adjournment of the case<sup>14</sup>; and
- 1852 (b) that he has not been remanded without being brought before the court on more than two applications immediately preceding the application which the court is hearing<sup>15</sup>; and
- 1853 (c) that he has not withdrawn his consent to such applications being heard and determined in his absence<sup>16</sup>.

However, the court may not exercise such power if it appears to the court, on an application for a further remand being made to it, that the person to whom the application relates has no legal representative acting for him in the case, whether present in court or not<sup>17</sup>.

Where:

- 1854 (i) a person has been remanded in custody on an adjournment of a case<sup>18</sup>; and
- 1855 (ii) an application is subsequently made for his further remand on such an adjournment<sup>19</sup>; and
- 1856 (iii) he is not brought before the court which hears and determines the application<sup>20</sup>; and
- 1857 (iv) that court is not satisfied as to the statutory requirements<sup>21</sup>,

the court must adjourn the case and remand him in custody for the period for which it stands adjourned<sup>22</sup>. Any such adjournment must be for the shortest period that appears to the court to make it possible for the defendant to be brought before it<sup>23</sup>.

Where on an adjournment of a case<sup>24</sup> a person has been remanded in custody without being brought before the court, and it subsequently appears to the court which so remanded him or to an alternate magistrates' court to which he is remanded<sup>25</sup> that he ought not to have been remanded in custody in his absence, the court must require him to be brought before it at the earliest time that appears to the court to be possible<sup>26</sup>.

1     Ie adjourned under the Magistrates' Courts Act 1980 s 5 (as amended; prospectively repealed) (see MAGISTRATES vol 29(2) (Reissue) PARA 710), s 10(1) (see MAGISTRATES vol 29(2) (Reissue) PARA 707), s 17C (as added) (see PARA 1107 ante), or s 18(4) (as amended) (see PARA 1109 ante): see s 128(1A)(a) (s 128(1A) added by the Criminal Justice Act 1982 s 59, Sch 9 para 3; and amended by the Criminal Procedure and Investigations Act 1996 ss 49(5)(a), 52(1), 80, Sch 5). As from a day to be appointed head (1) supra is repealed, and a court may additionally adjourn a case under the Magistrates' Courts Act 1980 s 24C (prospectively added) (intention as to plea by children or young person adjournment: see PARA 1117 ante): see the Criminal Justice Act 2003 ss 41, 332, Schs 3 para 51(1), (7), Sch 37 Pt 4 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2     See the Magistrates' Courts Act 1980 s 128(1A)(a) (as added, amended, and prospectively amended: see note 1 supra).

3     Ibid s 128(1A)(b) (as added: see note 1 supra).

4     For these purposes, a person is to be treated as legally represented in a court, if, but only if, he has the assistance of a legal representative to represent him in the proceedings in that court: *ibid* s 128(1B) (added by the Criminal Justice Act 1982 Sch 9 para 3; and amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 25(1), (3)). As to the denial of access to a legal representative to a person remanded in custody see *R v Chief Constable of South Wales, ex p Merrick* [1994] 2 All ER 560, [1994] 1 WLR 663, DC.

5     Magistrates' Courts Act 1980 s 128(1A)(d) (as added: see note 1 supra).

6     Ie the effect of *ibid* s 128(3A), (3B) (as added and amended): see the text and notes 11-17 *infra*.

7     See *ibid* s 128(1A)(i), (ii) (as added (see note 1 supra); and amended by the Courts and Legal Services Act 1990 Sch 18 para 25(1), (4)).

8     Magistrates' Courts Act 1980 s 128(1C) (added by the Criminal Justice Act 1982 Sch 9 para 3).

9     Magistrates' Courts Act 1980 s 128(3). As to further remand see PARA 1148 *post*.

10    Ie under *ibid* s 128A (as added and amended): see PARA 1147 *post*.

11    Ie otherwise than in the exercise of the power conferred by *ibid* s 128A (as added and amended): see PARA 1147 *post*.

12    See the text and note 1 *supra*.

13    Ie either in response to a question under the Magistrates' Courts Act 1980 s 128(1C) (as added) (see note 8 *supra*) or otherwise.

14    See *ibid* s 128(3A)(a) (s 128(3A) added by the Criminal Justice Act 1982 Sch 9 para 4).

15    See the Magistrates' Courts Act 1980 s 128(3A)(b) (as so added: see note 14 *supra*).

16    Ibid s 128(3A)(d) (as added: see note 14 *supra*).

17    Ibid s 128(3B) (added by the Criminal Justice Act 1982 Sch 9 para 4; and amended by the Courts and Legal Services Act 1990 Sch 18 para 25(1), (4)).

18    See the Magistrates' Courts Act 1980 s 128(3C)(a) (s 128(3C) added by the Criminal Justice Act 1982 Sch 9 para 4). See also note 1 *supra*.

19    Magistrates' Courts Act 1980 s 128(3C)(b) (as added: see note 18 *supra*).

20 Ibid s 128(3C)(c) (as added: see note 18 supra).

21 Ibid s 128(3C)(d) (as added: see note 18 supra). As to the statutory requirements see s 128(3A) (as added and amended); and the text and notes 10-16 supra.

22 See ibid s 128(3C) (as added: see note 18 supra).

23 Ibid s 128(3D) (added by the Criminal Justice Act 1982 Sch 9 para 4).

24 See note 1 supra.

25 le under the Magistrates' Courts Act 1980 s 130 (as amended; prospectively amended): see PARA 1149 post.

26 See ibid s 128(3E) (added by the Criminal Justice Act 1982 Sch 9 para 4).



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Remand on bail.

#### **1145. Remand on bail.**

Where a person is remanded on bail by a magistrates' court<sup>1</sup>, the court may, where it remands him on bail in accordance with the Bail Act 1976, direct him to appear or, in any other case, direct that his recognisance be conditioned for his reappearance:

- 1858 (1) before that court at the end of the period of remand<sup>2</sup>; or
- 1859 (2) at every time and place to which during the course of the proceedings the hearing may be from time to time adjourned<sup>3</sup>,

and, where it remands him on bail conditionally on his providing a surety during an inquiry into an offence alleged to have been committed by him, may direct that the recognisance of the surety be conditioned to secure that the person so bailed appears at every time and place to which during the course of the proceedings the hearing may be from time to time adjourned and also before the Crown Court in the event of the person so bailed being committed for trial there<sup>4</sup>.

Where a person is directed to appear or a recognisance is conditioned for a person's appearance<sup>5</sup>, the fixing at any time of the time for him next to appear is to be deemed to be a remand<sup>6</sup>; but nothing in the above provisions<sup>7</sup> deprives the court of power at any subsequent hearing to remand him afresh<sup>8</sup>.

<sup>1</sup> I.e. under the Magistrates' Courts Act 1980 s 128(1) (prospectively amended): see MAGISTRATES vol 29(2) (Reissue) PARA 718.

<sup>2</sup> Ibid s 128(4)(a).

<sup>3</sup> Ibid s 128(4)(b).

<sup>4</sup> Ibid s 128(4)(c). As to further remand see PARA 1148 post.

<sup>5</sup> I.e. in accordance with ibid s 128(4)(b) or (c).

<sup>6</sup> See ibid s 128(5).

<sup>7</sup> I.e. ibid s 128(4), (5): see the text to notes 1-5 supra.

<sup>8</sup> See ibid s 128(5).

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General limitation on remands.

#### **1146. General limitation on remands.**

A magistrates' court may not<sup>1</sup> remand a person for a period exceeding eight clear days<sup>2</sup>, except that:

- 1860 (1) if the court remands him on bail<sup>3</sup>, it may remand him for a longer period if he and the other party consent<sup>4</sup>;
- 1861 (2) where the court adjourns a trial<sup>5</sup>, the court may remand him for the period of the adjournment<sup>6</sup>;
- 1862 (3) where a person is charged with an offence triable either way<sup>7</sup>, then, if it falls to the court to try the case summarily but the court is not at the time so constituted, and sitting in such a place, as will enable it to proceed with the trial, the court may remand him until the next occasion on which it will be practicable for the court to be so constituted, and to sit in such a place, notwithstanding that the remand is for a period exceeding eight clear days<sup>8</sup>.

A magistrates' court having power to remand a person in custody may, if the remand is for a period not exceeding three clear days<sup>9</sup>, commit him to detention at a police station<sup>10</sup>. Where a person is so committed to detention at a police station:

- 1863 (a) he may not be kept in such detention unless there is a need for him to be so detained for the purpose of inquiries into other offences<sup>11</sup>;
- 1864 (b) if kept in such detention, he must be brought back before the magistrates' court which committed him as soon as that need ceases<sup>12</sup>;
- 1865 (c) he is to be treated as a person in police detention to whom the duties under the Police and Criminal Evidence Act 1984<sup>13</sup> relate<sup>14</sup>; and
- 1866 (d) his detention is subject to review at the times set out<sup>15</sup> in that Act<sup>16</sup>.

1 He is subject to the provisions of the Magistrates' Courts Act 1980 s 128A (as added and amended) and s 129 (prospectively amended): see PARAS 1147-1148 post.

2 See *ibid* s 131(1), which enables a longer remand of a defendant already serving a custodial sentence; and see PARA 1151 post.

3 As to warrants of commitment see PARA 1162 post.

4 Magistrates' Courts Act 1980 s 128(6)(a).

5 He is under *ibid* s 10(3) (adjournment for inquiries or to determine the most suitable method of dealing with the case: see MAGISTRATES vol 29(2) (Reissue) PARA 711) or under the Powers of Criminal Courts (Sentencing) Act 2000 s 11 (remand for medical examination: see MAGISTRATES vol 29(2) (Reissue) PARA 723).

6 Magistrates' Courts Act 1980 s 128(6)(b) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 75).

7 As to offences triable either way see PARA 1103 ante.

8 Magistrates' Courts Act 1980 s 128(6)(c).

9 In the case of a child or young person the period must not exceed 24 hours: see the Children and Young Persons Act 1969 s 23(14)(b) (as substituted); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1247.

10 Magistrates' Courts Act 1980 s 128(7) (amended by the Police and Criminal Evidence Act 1984 s 48(a)).

11 See the Magistrates' Courts Act 1980 s 128(8)(a) (s 128(8) added by the Police and Criminal Evidence Act 1984 s 48). 'Other offences' is not to be given a restricted meaning but includes offences relating to those with which the defendant has already been charged; and on an application for the defendant to be remanded in police detention, head (1) in the text requires merely that the magistrates are told whatever is directly pertinent to the question whether a need exists for the defendant to be detained at a police station for the purpose of inquiries into other offences: *R v Bailey, R v Smith* (1993) 97 Cr App Rep 365, CA.

12 Magistrates' Courts Act 1980 s 128(8)(b) (as added: see note 11 supra).

13 Ie the duties under the Police and Criminal Evidence Act 1984 s 39 (as amended) (responsibilities in relation to persons detained): see PARA 946 ante.

14 Magistrates' Courts Act 1980 s 128(8)(c) (as added: see note 11 supra).

15 Ie at the times set out in the Police and Criminal Evidence Act 1984 s 40 (as amended): see PARA 1001 ante.

16 Magistrates' Courts Act 1980 s 128(8)(d) (as added: see note 11 supra).

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Remand in custody for more than eight days.

### **1147. Remand in custody for more than eight days.**

A magistrates' court may remand the defendant in custody for a period exceeding eight clear days if it has previously remanded him in custody for the same offence and he is before the court, but only if, after affording the parties an opportunity to make representations, it has set a date on which it expects that it will be possible for the next stage in the proceedings, other than a hearing relating to a further remand in custody or on bail, to take place, and only for a period ending not later than that date or for a period of 28 clear days, whichever is the less<sup>1</sup>. Nothing in the above provisions affects the right of the defendant to apply for bail during the period of remand<sup>2</sup>.

1 Magistrates' Courts Act 1980 s 128A(2) (s 128A added by the Criminal Justice Act 1988 s 155(1)). The Magistrates' Courts Act 1980 s 128A (as added and amended) (see the text and notes 2, 3 *infra*) applies throughout England and Wales: s 128A(1) (as so added; and amended by the Criminal Procedure and Investigations Act 1996 ss 52(2), 80, Sch 5); Magistrates' Courts (Remand in Custody) Order 1991, SI 1991/2667 (amended by SI 1997/35; SI 2005/617). Where the court is considering exercising this power, it must have regard to the total length of time which the defendant would then spend in custody: see the Bail Act 1976 s 4(5), Sch 1 para 9B (as added); and PARA 1170 *post*.

2 Magistrates' Courts Act 1980 s 128A(3) (as added: see note 1 *supra*).

### **UPDATE**

### **1147 Remand in custody for more than eight days**

NOTE 1--See *Remice, Re* [2007] All ER (D) 439 (Mar), DC.

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#### **1148. Further remand.**

If a magistrates' court is satisfied<sup>1</sup> that any person who has been remanded<sup>2</sup> is unable by reason of illness or accident<sup>3</sup> to appear or be brought before the court at the expiration of the period for which he was remanded, the court may, in his absence, remand him for a further time<sup>4</sup>.

The power of the court so to remand a person on bail for a further time includes power to enlarge the recognisance of any surety for him to a later time<sup>5</sup>.

Where a person remanded on bail is bound to appear before a magistrates' court at any time and the court has no power so to remand him, the court may in his absence appoint a later time as the time at which he is to appear and enlarge the recognisances of any sureties for him to appear at that time; and the appointment of the time or the enlargement is deemed to be a further remand<sup>6</sup>.

Where a magistrates' court sends a person for trial on bail and the recognisance of any surety for him has been conditioned<sup>7</sup>, the court may, in the absence of the surety, enlarge his recognisance so that he is bound to secure that the person so sent for trial appears also before the Crown Court<sup>8</sup>.

1 The court must have been given solid grounds on which it can found a reliable opinion: *R v Liverpool City Justices, ex p Grogan* (1990) 155 JP 450, DC.

2 As to remand see PARA 1144 et seq ante.

3 'Accident' includes the situation where the prison authorities cannot produce the defendant because he has been remanded in custody on the same day in relation to other charges by another court: *R v Jenkins* [1997] COD 38, DC.

4 Magistrates' Courts Act 1980 s 129(1). Section 128(6) (as amended) (see PARA 1146 ante) does not apply: s 129(1). Where a magistrates' court further remands a person on bail in his absence under s 129 (as amended; prospectively amended), it must give him, and his sureties if any, notice thereof: CrimPR 19.3(b). A high test is imposed by the Magistrates' Courts Act 1980 s 129 (as amended; prospectively amended) before a defendant can be remanded in his absence by reason of 'accident', and the material before the court must show a good deal more than inconvenience or minor impediment: *R v Liverpool City Justices, ex p Grogan* (1990) 155 JP 450, DC.

5 Magistrates' Courts Act 1980 s 129(2)(a).

6 Ibid s 129(3). If a magistrates' court before which any person is bound by a recognisance to appear enlarges the recognisance to a later time under the Magistrates' Courts Act 1980 s 129 (as amended; prospectively amended) in his absence, it must give him and his sureties, if any, notice thereof: CrimPR 19.8(1).

7 In accordance with the Magistrates' Courts Act 1980 s 128(4)(a): see PARA 1145 ante.

8 Ibid s 129(4). The reference in s 129(4) to committal of a person for trial is substituted, so as to refer to sending a person to the Crown Court for trial, by the Criminal Justice Act 2003 s 41, Sch 3 para 51(8). At the date at which this volume states the law this substitution has effect only in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A(3)(d) (as added) (see PARAS 1132-1133 ante): Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI 2005/1267, Schedule para 1. If a magistrates' court under these provisions enlarges the recognisance of a surety, it must give the surety notice thereof: CrimPR 19.8(2).

**UPDATE**

**1148 Further remand**

NOTES 4, 6, 8--CrimPR 19.3, 19.8 now Criminal Procedure Rules 2010, SI 2010/60, rr 9.3, 19.8.

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### **1149. Transfer of remand hearings.**

A magistrates' court adjourning a case<sup>1</sup>, and remanding the defendant in custody, may, if he has attained the age of 17, order that he be brought up for any subsequent remands before an alternate magistrates' court nearer to the prison where he is to be confined while on remand<sup>2</sup>. A court which, on adjourning a case, so makes an order, is not required at that time to fix the time and place at which the case is to be resumed but must do so as soon as practicable after the order ceases to be in force<sup>3</sup>.

The order must require the defendant to be brought before the alternate court at the end of the period of remand or such earlier time as the alternate court may require<sup>4</sup>.

While the order is in force, the alternate court, to the exclusion of the court which made the order, has all the powers in relation to further remand (whether in custody or on bail) and the grant of a right to representation funded by the Legal Services Commission as part of the Criminal Defence Service<sup>5</sup> which that court would have had but for the order<sup>6</sup>.

The alternate court may, on remanding the defendant in custody, require him to be brought before the court which made the order at the end of the period of remand or at such earlier time as that court may require; and, if the alternate court does so, or the defendant is released on bail<sup>7</sup>, the order ceases to have effect<sup>8</sup>.

1 The case adjourned under the Magistrates' Courts Act 1980 s 5 (as amended; prospectively repealed) (adjournment of inquiry: see MAGISTRATES vol 29(2) (Reissue) PARA 710), s 10(1) (adjournment of summary trial: see MAGISTRATES vol 29(2) (Reissue) PARA 707), s 17C (as added) (intention as to plea: adjournment: see PARA 1107 ante), or s 18(4) (as amended) (see PARA 1109 ante): see s 130(1) (amended by the Criminal Procedure and Investigations Act 1996 s 49(5)(b), (6)). As from a day to be appointed head (1) supra is repealed, and a court may additionally adjourn a case under the Magistrates' Courts Act 1980 s 24C (prospectively added) (intention as to plea by children or young person adjournment: see PARA 1117 ante): see the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 51(1), (9), Sch 37 Pt 4 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 See the Magistrates' Courts Act 1980 s 130(1) (as amended; prospectively amended: see note 1 supra).

A court making such an order or remanding the defendant under s 130(4) (see the text and notes 7-8 infra) must at once notify the terms of the order or remand to the court before which the defendant is to be brought for the hearing on any application for a subsequent remand or, as the case may be, before which any such application is to be made without his being brought before it: s 130(5), Sch 5 para 3 (amended by the Criminal Justice Act 1982 s 59, Sch 9 para 7).

Where a magistrates' court is satisfied as mentioned in the Magistrates' Courts Act 1980 s 128(3A) (as added and amended; prospectively amended) (see PARA 1144 ante), s 130(1) (as amended; prospectively amended) has effect as if for the words 'he be brought up for any subsequent remands before' there were substituted the words 'applications for any subsequent remands be made to': s 130(4A)(a) (added by the Criminal Justice Act 1982 Sch 9 para 5).

3 Magistrates' Courts Act 1980 Sch 5 para 1.

4 Ibid s 130(2). Where a magistrates' court is satisfied as mentioned in s 128(3A) (as added and amended; prospectively amended) (see PARA 1144 ante), s 130(2) has effect as if for the words 'the defendant to be brought before' there were substituted the words 'an application for a further remand to be made to': s 130(4A) (b) (added by the Criminal Justice Act 1982 Sch 9 para 5).

5 See LEGAL AID vol 65 (2008) PARA 120 et seq.

6 Magistrates' Courts Act 1980 s 130(3) (amended by the Access to Justice Act 1999 s 24, Sch 4 para 18).

7 A person to whom an order under the Magistrates' Courts Act 1980 s 130(1) (as amended; prospectively amended) (see notes 1, 2 supra) applies must, if released on bail, be bailed to appear before the court which made the order: Sch 5 para 4.

8 Ibid s 130(4). Where a magistrates' court is satisfied as mentioned in s 128(3A) (as added and amended; prospectively amended) (see PARA 1144 ante), s 130(4) has effect as if for the words 'him to be brought before' there were substituted the words 'an application for a further remand to be made to': s 130(4A)(c) (added by the Criminal Justice Act 1982 Sch 9 para 5).



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### **1150. Transfer of remand hearings; procedure.**

Where a magistrates' court orders<sup>1</sup> that a defendant who has been remanded in custody<sup>2</sup> be brought up for any subsequent remands before an alternate magistrates' court, the court officer for the first-mentioned court must, as soon as practicable after the making of the order and in any case within two days<sup>3</sup> thereafter, send to the court officer of the alternate court:

- 1867 (1) a statement indicating the offence or offences charged<sup>4</sup>;
- 1868 (2) a copy of the record relating to the withholding of bail in respect of the defendant when he was last remanded in custody made by the first-mentioned court in pursuance of the Bail Act 1976<sup>5</sup>;
- 1869 (3) a copy of any representation order<sup>6</sup> previously made in the same case<sup>7</sup>;
- 1870 (4) a copy of any application for a representation order<sup>8</sup>;
- 1871 (5) if the first-mentioned court has made an order<sup>9</sup> for the removal of restrictions on reports of committal proceedings<sup>10</sup>, a statement to that effect<sup>11</sup>;
- 1872 (6) a statement indicating whether or not the defendant has a solicitor acting for him in the case and has consented to the hearing and determination in his absence of any application for his remand on an adjournment<sup>12</sup> of the case, together with a statement indicating whether or not that consent has been withdrawn<sup>13</sup>;
- 1873 (7) a statement indicating the occasions, if any, on which the defendant has been remanded<sup>14</sup> for more than eight days without being brought before the first-mentioned court<sup>15</sup>;
- 1874 (8) if the first-mentioned court remands the defendant for more than eight days on the occasion upon which it makes the order<sup>16</sup> transferring remand hearings, a statement indicating the date set<sup>17</sup> for the next stage in the proceedings, other than a hearing relating to a further remand in custody or on bail<sup>18</sup>.

The court officer for an alternate magistrates' court before which a defendant who has been remanded in custody is brought up for any subsequent remands in pursuance of such an order<sup>19</sup> must, as soon as practicable after the order ceases to be in force and in any case within two days<sup>20</sup> thereafter, send to the court officer for the magistrates' court which made the order:

- 1875 (a) a copy of the record relating to the grant or withholding of bail in respect of the defendant when he was last remanded in custody or on bail made by the alternate court in pursuance of the Bail Act 1976<sup>21</sup>;
- 1876 (b) a copy of any representation order made by the alternate court<sup>22</sup>;
- 1877 (c) a copy of any application for a representation order made to the alternate court<sup>23</sup>;
- 1878 (d) if the alternate court has made an order<sup>24</sup> for the removal of restrictions on reports of committal proceedings, a statement to that effect<sup>25</sup>;
- 1879 (e) a statement such as is mentioned in head (6) above<sup>26</sup>;
- 1880 (f) a statement indicating the occasions, if any, on which the defendant has been remanded<sup>27</sup> by the alternate court without being brought before that court<sup>28</sup>.

1 le under the Magistrates' Courts Act 1980 s 130(1) (as amended; prospectively amended): see PARA 1149 ante. As to warrants of commitment generally see PARA 1162 post.

2 As to remand in custody see PARA 1144 et seq ante.

3 le not counting Sundays, Good Friday, Christmas Day or bank holidays: see CrimPR 19.13(1).

4 CrimPR 19.13(1)(a).

5 See CrimPR 19.13(1)(b); and PARA 1173 post.

6 See LEGAL AID vol 65 (2008) PARA 141 et seq.

7 CrimPR 19.13(1)(c).

8 CrimPR 19.13(1)(d).

9 le under the Magistrates' Courts Act 1980 s 8(2) (as amended; prospectively repealed): see MAGISTRATES vol 29(2) (Reissue) PARA 677.

10 As from a day to be appointed committal for trial is abolished: Criminal Justice Act 2003 s 332, Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

11 CrimPR 19.13(1)(e).

12 le under the Magistrates' Courts Act 1980 s 5 (as amended; prospectively repealed) (see MAGISTRATES vol 29(2) (Reissue) PARA 710), s 10(1) (see MAGISTRATES vol 29(2) (Reissue) PARA 340) or s 18(4) (as amended) (see PARA 1109 ante). See PARA 1149 note 1 ante.

13 CrimPR 19.13(1)(f).

14 le under the Magistrates' Courts Act 1980 s 128(3A) (as added and amended; prospectively amended): see PARA 1144 ante.

15 CrimPR 19.13(1)(g).

16 le under the Magistrates' Courts Act 1980 s 130(1) (as amended; prospectively amended): see PARA 1149 ante.

17 le under ibid s 128A(2) (as added): see PARA 1147 ante.

18 CrimPR 19.13(1)(h). Where the first-mentioned court is satisfied as mentioned in the Magistrates' Courts Act 1980 s 128(3A) (as added and amended; prospectively amended) (see PARA 1144 ante), CrimPR 19.13(1) (see the text and notes 1-17 supra) has effect as if for the words 'a defendant who has been remanded in custody be brought up for subsequent remand before' there were substituted the words 'applications for any subsequent remands of the defendant be made to': CrimPR 19.13(2).

19 See note 1 supra.

20 See note 3 supra.

21 See CrimPR 19.13(3)(a); and PARA 1172 post.

22 CrimPR 19.13(3)(b).

23 CrimPR 19.13(3)(c).

24 See note 9 supra.

25 CrimPR 19.13(3)(d).

26 CrimPR 19.13(3)(e).

27 See the text and notes 14-15 supra.

28 CrimPR 19.13(3)(f). Where the alternate court is satisfied as mentioned in the Magistrates' Courts Act 1980 s 128(3A) (as added and amended; prospectively amended) (see PARA 1144 ante), CrimPR 19.13(2) (see note 18 supra) has effect as if for the words 'a defendant who has been remanded in custody is brought up for

any subsequent remands' there were substituted the words 'applications for the further remand of the defendant are to be made': CrimPR 19.13(4).

## **UPDATE**

### **1150 Transfer of remand hearings; procedure**

TEXT AND NOTES--CrimPR 19.13 now Criminal Procedure Rules 2010, SI 2010/60, r 19.13.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/16. HEARING, PLEA AND ALLOCATION OF PROCEEDINGS/(7) REMAND IN CUSTODY OR ON BAIL/1151.  
Remand of defendant already in custody.

### **1151. Remand of defendant already in custody.**

When a magistrates' court remands a defendant in custody<sup>1</sup> and he is already detained under a custodial sentence, the period for which he is remanded may be up to 28 clear days<sup>2</sup>. However, the court must inquire as to the expected date of his release from that detention; and, if it appears that it will be before 28 clear days have expired, he may not be remanded in custody for more than eight clear days or (if longer) a period ending with that date<sup>3</sup>.

1 As to remand in custody see PARA 1144 et seq ante.

2 Magistrates' Courts Act 1980 s 131(1).

3 Ibid s 131(2). Where the defendant is serving a sentence of imprisonment to which an intermittent custody order under the Criminal Justice Act 2003 s 183 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 100) relates, the reference in the Magistrates' Courts Act 1980 s 131(2) to the expected date of his release is to be read as a reference to the expected date of his next release on licence: s 131(2A) (added by the Criminal Justice Act 2003 s 304, Sch 32 para 29). This provision is in force for the purposes of the passing of a sentence of imprisonment to which an intermittent custody order relates and the release on licence of a person serving such a sentence: Criminal Justice Act 2003 (Commencement No 1) Order 2003, SI 2003/3282, art 2, Sch.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/16. HEARING, PLEA AND ALLOCATION OF PROCEEDINGS/(8) TIME LIMITS IN RELATION TO PRELIMINARY STAGES OF CRIMINAL PROCEEDINGS/1152. Power of Secretary of State to set time limits in relation to preliminary stages of criminal proceedings.

## **(8) TIME LIMITS IN RELATION TO PRELIMINARY STAGES OF CRIMINAL PROCEEDINGS**

### **1152. Power of Secretary of State to set time limits in relation to preliminary stages of criminal proceedings.**

The Secretary of State may by regulations make provision, with respect to any specified<sup>1</sup> preliminary stage<sup>2</sup> of proceedings for an offence, as to the maximum period:

- 1881 (1) to be allowed to the prosecution to complete that stage<sup>3</sup>;
- 1882 (2) during which the defendant may, while awaiting completion of that stage, be in the custody of a magistrates' court<sup>4</sup> or in the custody of the Crown Court<sup>5</sup>, in relation to that offence<sup>6</sup>.

The regulations may in particular:

- 1883 (a) be made so as to apply only in relation to proceedings instituted in specified areas, or proceedings of, or against persons of, specified classes or descriptions<sup>7</sup>;
- 1884 (b) make different provision with respect to the proceedings instituted in different areas, or different provision with respect to proceedings of, or against persons of, different classes or descriptions<sup>8</sup>;
- 1885 (c) make such provision with respect to the procedure to be followed in criminal proceedings as the Secretary of State considers appropriate in consequence of any other provision of the regulations<sup>9</sup>;
- 1886 (d) provide for the Magistrates' Courts Act 1980 and the Bail Act 1976 to apply in relation to cases to which custody<sup>10</sup> or overall time limits<sup>11</sup> apply subject to such modifications as may be specified (being modifications which the Secretary of State considers necessary in consequence of any provision made by the regulations)<sup>12</sup>; and
- 1887 (e) make such transitional provision in relation to proceedings instituted before the commencement of any provision of the regulations as the Secretary of State considers appropriate<sup>13</sup>.

The appropriate court<sup>14</sup> may, at any time before the expiry<sup>15</sup> of a time limit so imposed, extend, or further extend, that limit; but the court may not do so unless it is satisfied<sup>16</sup>:

- 1888 (i) that the need for the extension is due to:
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- 119. (A) the illness or absence of the defendant, a necessary witness, a judge or a magistrate<sup>17</sup>;
  - 120. (B) a postponement which is occasioned by the ordering by the court of separate trials in the case of two or more defendants or two or more offences<sup>18</sup>; or
  - 121. (C) some other good and sufficient cause<sup>19</sup>; and

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1889 (ii) that the prosecution<sup>20</sup> has acted with all<sup>21</sup> due diligence and expedition<sup>22</sup>.

Where, in relation to any proceedings for an offence, an overall time limit has expired before the completion of the stage of the proceedings to which the limit applies, the appropriate court must stay the proceedings<sup>23</sup>.

Where a person escapes from the custody of a magistrates' court or the Crown Court before the expiry of a custody time limit which applies in his case<sup>24</sup>, or a person who has been released on bail in consequence of the expiry of a custody time limit fails to surrender himself into the custody of the court at the appointed time or is arrested by a constable<sup>25</sup> for breach, or likely breach, of conditions of bail<sup>26</sup>, the regulations must, so far as they provide for any custody time limit in relation to the preliminary stage in question, be disregarded<sup>27</sup>.

Where a person escapes from the custody of a magistrates' court or the Crown Court, or a person who has been released on bail fails to surrender himself into the custody of the court at the appointed time, and is accordingly at large for any period<sup>28</sup>: (aa) the period for which the person is unlawfully at large; and (bb) such additional period (if any) as the appropriate court may direct, having regard to the disruption of the prosecution occasioned by the person's escape or failure to surrender, and to the length of the period mentioned in head (aa) above<sup>29</sup>, must be disregarded, so far as the offence in question is concerned, for the purposes of the overall time limit which applies in his case in relation to the stage which the proceedings have reached at the time of the escape or, as the case may be, at the appointed time<sup>30</sup>.

Any period during which proceedings for an offence are adjourned pending the determination of a prosecution appeal<sup>31</sup> must be disregarded, so far as the offence is concerned, for the purposes of the overall time limit and the custody time limit which applies to the stage which the proceedings have reached when they are adjourned<sup>32</sup>.

Where a magistrates' court decides to extend, or further extend, a custody or overall time limit, or to give a direction under head (bb) above, the defendant may appeal against the decision to the Crown Court<sup>33</sup>; and, where a magistrates' court refuses to extend, or further extend, a custody or overall time limit, or to give such a direction, the prosecution may appeal against the refusal to the Crown Court<sup>34</sup>.

1 For these purposes, 'specified' means specified in the regulations: see the Prosecution of Offences Act 1985 s 22(11). As to the regulations see notes 3, 6 *infra*.

2 For these purposes, 'preliminary stage', in relation to any proceedings, does not include any stage of the proceedings after the start of the trial: see *ibid* s 22(11) (amended by the Criminal Procedure and Investigations Act 1996 s 71(1), (2)).

For the purposes of the Prosecution of Offences Act 1985 s 22 (as amended), the start of a trial on indictment is taken to occur at the time when a jury is sworn to consider the issue of guilt or fitness to plead ('the relevant time') or, if the court accepts a plea of guilty before the time when a jury is sworn, when that plea is accepted; but this is subject to the Criminal Justice Act 1987 s 8 and the Criminal Procedure and Investigations Act 1996 s 30 (preparatory hearings: see PARA 1256 post): Prosecution of Offences Act 1985 s 22(11A) (added by the Criminal Procedure and Investigations Act 1996 s 71(1), (3); and the Prosecution of Offences Act 1985 s 22(11A) amended, and s 22(11AA) added, by the Criminal Justice Act 2003 s 331, Sch 36 paras 49, 51). For these purposes, 'the time when a jury is sworn' includes the time when a jury would be sworn but for the making of an order under the Criminal Justice Act 2003 Pt 7 (ss 43-50) (not yet fully in force; prospectively amended) (see PARA 1284 post): Prosecution of Offences Act 1985 s 22(11AA) (as so added). Because the preliminary stage of a trial on indictment ends 'at the time when a jury is sworn' to consider the issue of guilt, the custody limit does not continue contingently through the trial against the event of it aborting (ie the limit does not recommence if the defendant's trial is aborted): *R v Leeds Crown Court, ex p Whitehead* (1999) 164 JP 102, DC.

For the purposes of the Prosecution of Offences Act 1985 s 22 (as amended), the start of a summary trial is taken to occur: (1) when the court begins to hear evidence for the prosecution at the trial or to consider whether to exercise its power under the Mental Health Act 1983 s 37(3) (power to make hospital order without convicting the defendant: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332) (Prosecution of Offences Act 1985 s 22(11B)(a) (added by the Criminal Procedure and Investigations Act 1996 s 71(1), (5))); or

(2) if the court accepts a plea of guilty without proceeding as mentioned in head (1) *supra*, when that plea is accepted: (Prosecution of Offences Act 1985 s 22(11B)(b) (as so added)).

3 *Ibid* s 22(1)(a). At the date at which this volume states the law, there were no regulations in force under head (1) in the text. Regulations providing for overall time limits in youth courts, made pursuant to head (1) in the text and to the Prosecution of Offences Act 1985 s 22A(1) (as added) (see PARA 1157 *post*), were revoked as from 22 April 2003: Prosecution of Offences (Youth Courts Time Limits) (Revocation and Transitional Provisions) Regulations 2003, SI 2003/917.

4 For these purposes, 'custody' includes local authority accommodation to which a person is remanded or committed by virtue of the Children and Young Persons Act 1969 s 23 (as substituted and amended) (remand to the care of local authorities: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1247-1253); and references to a person being committed to custody are to be construed accordingly: see the Prosecution of Offences Act 1985 s 22(11) (amended by the Criminal Justice Act 1991 s 100, Sch 11 para 36). A defendant who remains in custody because of inability to find a surety is in custody for the purposes of custody time limits: *Re Ofili* [1995] Crim LR 880, DC. 'Custody of a magistrates' court' means custody to which a person is committed in pursuance of the Magistrates' Courts Act 1980 s 128 (as amended; prospectively amended) (see PARA 1144 *et seq ante*): see the Prosecution of Offences Act 1985 s 22(11).

5 For these purposes, 'custody of the Crown Court' includes custody to which a person is committed in pursuance of: (1) the Magistrates' Courts Act 1980 s 6 (as amended; prospectively repealed) (see MAGISTRATES vol 29(2) (Reissue) PARA 676); (2) s 43A (as added; prospectively amended) (see PARA 1261 *post*); (3) the Criminal Justice Act 1987 s 5(3)(a) (prospectively repealed) (see PARA 1105 *ante*); or (4) the Criminal Justice Act 1991 s 53(5), Sch 6 para 2(1)(a) (prospectively repealed) (see PARA 1105 *ante*). As from a day to be appointed heads (1), (3), (4) *supra* are repealed; and custody of the Crown Court only includes custody to which a person is committed in pursuance of the Magistrates' Courts Act 1980 s 43A (as added) (magistrates' court dealing with a person brought before it following his arrest in pursuance of a warrant issued by the Crown Court: see PARA 1261 *post*), or the Crime and Disorder Act 1998 s 52 (as amended): see PARA 1132 *ante*: Prosecution of Offences Act 1985 s 22(11) (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 para 104; and the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 7; and prospectively amended by the Criminal Justice Act 2003 s 41, Sch 3 para 57(1), (5)). At the date at which this volume states the law no such day had been appointed except in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 or s 51A(3) (d) (as added) (see PARAS 1132-1133 *ante*): Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI 2005/1267, art 2, Schedule, Pt 1. See note 4 *supra*.

6 Prosecution of Offences Act 1985 s 22(1). In exercise of such power the Secretary of State made the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299 (as amended): see PARAS 1153-1156 *post*.

For the purposes of the Supreme Court Act 1981 s 29(3) (as amended) (High Court to have power to make prerogative orders in relation to jurisdiction of the Crown Court in matters which do not relate to trial on indictment: see PARA 2013 *post*; and JUDICIAL REVIEW vol 61 (2010) PARA 709), the jurisdiction conferred on the Crown Court by the Prosecution of Offences Act 1985 s 22 (as amended) is to be taken to be part of its jurisdiction in matters other than those relating to trial on indictment: s 22(13). The purpose of s 22(13) is to permit the Divisional Court to deal with ancillary matters preceding trial: *R v Bristol Crown Court, ex p Customs and Excise Comrs* [1990] COD 11, DC. As to the minimum period which may elapse between a person's committal or being sent for trial and the commencement of the trial see PARA 1282 *post*. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

7 Prosecution of Offences Act 1985 s 22(2)(a) (substituted by the Crime and Disorder Act 1998 s 43(1)).

8 Prosecution of Offences Act 1985 s 22(2)(b) (substituted by the Crime and Disorder Act 1998 s 43(1)).

9 Prosecution of Offences Act 1985 s 22(2)(c).

10 For these purposes, 'custody time limit' means a time limit imposed by regulations made under *ibid* s 22(1)(b) (see head (2) in the text) or, where any such limit has been extended by a court under s 22(3) (as substituted) (see the text and notes 17-22 *infra*), the limit as so extended: s 22(11).

For the purposes of the application of any custody time limit in relation to a person who is in the custody of a magistrates' court or the Crown Court, all periods during which he is in the custody of the magistrates' court in respect of the same offence are to be aggregated and treated as a single continuous period; and all periods during which he is in the custody of the Crown Court in respect of the same offence are to be aggregated and treated similarly: s 22(12). All custody periods begin at the close of the day during which the defendant is first remanded and expire at the relevant midnight thereafter: *R v Governor of Canterbury Prison, ex p Craig* [1991] 2 QB 195, [1990] 2 All ER 654, DC.

11 For these purposes, 'overall time limit' means a time limit imposed by regulations made under the Prosecution of Offences Act 1985 s 22(1)(a) (see head (1) in the text) or, where any such time limit has been extended by a court under s 22(3) (as substituted) (see the text and notes 17-22 *infra*), the limit as so extended: s 22(11). At the date at which this volume states the law, no regulations were in force as to an overall time limit. Proceedings for an offence begin when the defendant is charged with the offence or, as the case may be, an information is laid, charging him with the offence: s 22(11ZA) (added by the Crime and Disorder Act 1998 s 43(8)). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 *ante*. At the date at which this volume states the law no such day had been appointed.

12 Prosecution of Offences Act 1985 s 22(2)(d).

13 *Ibid* s 22(2)(e).

14 For these purposes, 'appropriate court' means: (1) where the defendant has been committed for trial (prospectively abolished by the Criminal Justice Act 2003 s 332, Sch 37 Pt 4), sent for trial or indicted for the offence, the Crown Court; and (2) in any other case, the magistrates' court specified in the summons or warrant in question or, where the defendant has already appeared or been brought before a magistrates' court, a magistrates' court for the same area: *ibid* s 22(11) (amended by the Access to Justice Act 1999 s 67(3); and the Criminal Justice Act 2003 Sch 3 para 57(1), (5)). Where the Crown Court is the appropriate court, an application for an extension may be heard by a Crown Court judge sitting in chambers: CrimPR 16.11(2)(f).

Where an application for an extension has been refused by a Crown Court judge, a further application may be made within the existing time limit, provided that it does not constitute an abuse of process; ordinarily it is such an abuse for the prosecution to re-apply (to the same or another judge) on essentially the same basis, but not where a judge has refused an extension on a fundamental mistake of fact: *R v Bradford Crown Court, ex p Crossling* [2000] 1 Cr App Rep 463, 163 JP 821, DC. Provided that it is made during the currency of an initial custody time limit or an extension thereof, more than one application for an extension may be made: *R (on the application of Haque) v Central Criminal Court* [2003] EWHC 2457 (Admin), [2004] Crim LR 298, [2003] 10 Archbold News 1.

15 If a custody time limit has expired without an application for an extension having been made, a court cannot grant an extension and must grant bail, but the expiry of one custody time limit does not bar detention under a different custody time limit at a later stage in the proceedings: *R v Sheffield Justices, ex p Turner* [1991] 2 QB 472, 93 Cr App Rep 180, DC.

16 *Ie* on the balance of probabilities: *R v Governor of Canterbury Prison, ex p Craig* [1991] 2 QB 195, [1990] 2 All ER 654, DC; *R v Manchester Crown Court, ex p McDonald* [1999] 1 All ER 805, [1999] 1 Cr App Rep 409, DC.

17 Prosecution of Offences Act 1985 s 22(3)(a)(i) (s 22(3) substituted by the Crime and Disorder Act 1998 s 43(2)). See note 22 *infra*.

18 Prosecution of Offences Act 1985 s 22(3)(a)(ii) (as substituted: see note 17 *supra*). See note 22 *infra*.

19 *Ibid* s 22(3)(a)(iii) (as substituted: see note 17 *supra*). What amounts to some other 'good and sufficient cause' is a matter for the court on the facts of the case; the unavailability of a courtroom may be such a cause but should be approached with caution: *R v Manchester Crown Court, ex p McDonald* [1999] 1 All ER 805, [1999] 1 Cr App Rep 409, DC. Before a court grants an extension because of the unavailability of a courtroom, or of a particular judge required to try the case, it should go to considerable lengths to avoid doing so; but, although generally in routine cases lack of resources is irrelevant, lack of resources cannot be ignored and on occasions of intense pressure on the court must be taken into account: *R (on the application of Gibson) v Winchester Crown Court* [2004] EWHC 361 (Admin), [2004] 3 All ER 475, [2004] 2 Cr App Rep 234 (explaining *R (on the application of Bannister) v Guildford Crown Court* [2004] EWHC 221 (Admin), [2004] All ER (D) 229 (Feb), DC, at [11], [21]-[22] per May LJ. See also *R (on the application of Eliot) v Reading Crown Court* [2001] EWHC Admin 464, [2001] 4 All ER 625, [2002] 1 Cr App Rep 32; *R v Central Criminal Court, ex p Abu-Wardeh* [1997] 1 All ER 159, [1997] 1 Cr App Rep 43, DC; *R v Crown Court at Norwich, ex p Cox* (1993) 97 Cr App Rep 145, 157 JP 593, DC.

The seriousness of the offence cannot of itself be good and sufficient cause, nor can the fact that the extension is only for a short period, nor can the need to protect the public: *R v Manchester Crown Court, ex p McDonald* *supra*. See also *R v Governor of Winchester Prison, ex p Roddie* [1991] 2 All ER 931, sub nom *R v Crown Court at Southampton, ex p Roddie* 93 Cr App Rep 190, DC; *R v Sheffield Crown Court, ex p Headley* [2000] 2 Cr App Rep 1, DC; *R v Central Criminal Court, ex p Abu-Wardeh* *supra*.

Considerations relating to bail are irrelevant: *R v Sheffield Crown Court, ex p Headley* *supra*; and see also *R (on the application of Eliot) v Reading Crown Court* *supra*. A reasonable requirement of the defence for time to consider the case may be a good and sufficient cause for an extension (*McKay White v DPP* [1989] Crim LR 375, DC); so may the desirability of trying co-defendants together (*R v Central Criminal Court, ex p Abu-Wardeh*



supra); and so may the unexpected absence of a prosecution witness (*R v Leeds Crown Court, ex p Redfearn* [1998] COD 437, DC).

Even where a 'good cause' for an extension exists, the court must rigorously examine the circumstances to determine whether that cause is a 'sufficient cause' for any extension: *R v Manchester Crown Court, ex p McDonald* supra. See note 22 infra.

20     le those collectively responsible for the distinct stages in the conduct of the prosecution: *R v Birmingham Crown Court, ex p Ricketts* [1991] RTR 105n, DC. A forensic science laboratory is not part of the prosecution for these purposes, but this does not entitle the prosecution to refrain from taking reasonable steps to ensure that such a laboratory produces evidence within the relevant custody time limit: *R v Central Criminal Court, ex p Johnson* [1999] 2 Cr App Rep 51, DC.

21     The test of 'all due diligence and expedition' is an objective one, judged by the standards of a competent prosecutor, alert to his duty: *R v Governor of Winchester Prison, ex p Roddie* [1991] 2 All ER 931, sub nom *R v Crown Court at Southampton, ex p Roddie* 93 Cr App Rep 190, DC; *R v Manchester Crown Court, ex p McDonald* [1999] 1 All ER 805, [1999] 1 Cr App Rep 409, DC. It is not sufficient in itself that the prosecution has done its best in trying circumstances: *R v Governor of Winchester Prison, ex p Roddie* supra. The issue of 'due diligence and expedition' must be decided by reference to the expedition used in the stage of proceedings to which the particular time limit relates; lack of expedition at some earlier stage need not be taken into account, although there may be factual situations where it will be necessary to look at past history: *R v Birmingham Crown Court, ex p Bell*, *R v Birmingham Crown Court, ex p Brown* [1997] 2 Cr App Rep 363, 161 JP 345, DC.

'All due expedition' means all the expedition appropriate in the circumstances, one of which is the custody time limit: *R v Crown Court at Norwich, ex p Parker* (1992) 96 Cr App Rep 68, DC. The prosecution will not have acted with all due diligence and expedition if it unwarrantedly delays serving important evidence on the defence with consequent delay in the proceedings to enable the defence to consider it: *R v Central Criminal Court, ex p Behbehani* [1994] Crim LR 352, DC; and see also *R (on the application of Holland) v Leeds Crown Court* [2002] EWHC 1862 (Admin), [2003] Crim LR 272.

22     See the Prosecution of Offences Act 1985 s 22(3)(b) (as substituted: see note 17 supra).

In determining whether to extend a custody time limit, the court must give full weight to the overriding purpose of the Prosecution of Offences Act 1985 s 22(3) (as substituted): (1) to ensure that the periods for which unconvicted defendants are held in custody are as short as reasonably and practicably possible; (2) to ensure that the prosecution prepare cases for trial with all due diligence and expedition; (3) to invest the court with a power and duty to control any extension of the prescribed maximum period: *R v Manchester Crown Court, ex p McDonald* [1999] 1 All ER 805, [1999] 1 Cr App Rep 409, DC. The court cannot grant an extension on the nod, even if the parties agree; it must address its mind to the Prosecution of Offences Act 1985 s 22(3) (as substituted); whether it is necessary to call evidence depends on the circumstances of the case; the court must remember that the time limits are a maximum and not a target: *R v Manchester Crown Court, ex p McDonald* supra.

Heads (i) and (ii) in the text are linked, in that the prosecution must show that the need for an extension does not arise from lack of due expedition or diligence on its part; the court is not obliged to refuse the extension of a custody time limit because the prosecution has been guilty of avoidable delay where that delay had had no effect whatever on the ability of the prosecution and the defence to be ready for trial on a predetermined date: *R v Leeds Crown Court, ex p Baqoutie* (1999) Times, 31 May, DC; *R (on the application of Gibson) v Winchester Crown Court* [2004] EWHC 361 (Admin), [2004] 3 All ER 475, [2004] 2 Cr App Rep 234 (not following *R v Central Criminal Court, ex p Bennett* (1999) Times, 25 January, DC); *R (on the application of Thomas) v Central Criminal Court*, *R (on the application of Stubbs) v Central Criminal Court* [2006] All ER (D) 88 (Jul).

The prosecutor must make the application for an extension clearly and unmistakably; the defence must have an opportunity to raise objections and make representations; the terms of an order extending the limit must be clear and unambiguous, and the clerk of the court must ensure that a proper record is made of the order: *Re Ward, Ward and Bond* (1990) 155 JP 181, DC. The court must not only state its decision but also give its reasons for reaching it and (if an extension is granted) its reasons for holding that the conditions in the Prosecution of Offences Act 1985 s 22(3) (as substituted) (see the text and notes 17-21 supra) are satisfied: *R v Crown Court at Chelmsford, ex p Mills* (1999) 164 JP 1, DC; *R v Manchester Crown Court, ex p McDonald* supra.

Where a person is convicted of an offence in any proceedings, the exercise, in relation to any preliminary stage of those proceedings, of the power conferred by the Prosecution of Offences Act 1985 s 22(3) (as substituted) may not be called into question in any appeal against that conviction: s 22(10).

Applications under s 22(3) (as substituted) may be heard by a judge of the Crown Court sitting in chambers: CrimPR 16.11(2)(f). The notice requirements under the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 7 (as amended) (see PARA 1155 post) do not in any way limit the powers of the empowering statute; and the prosecution's failure to comply with reg 7 (as amended) does not deprive the court of its supervening discretion under the Prosecution of Offences Act 1985 s 22(3) (as substituted): *R v Governor of Canterbury Prison, ex p Craig* [1991] 2 QB 195, [1990] 2 All ER 654, DC. Formal rules of evidence

do not apply, but if it is necessary for the defendant to test any aspect of the application for an extension, the means must be provided to enable him to do that: *Wildman v DPP* [2001] Crim LR 565, DC.

23 Prosecution of Offences Act 1985 s 22(4) (amended by the Crime and Disorder Act 1998 s 43(3)). As to the re-institution of stayed proceedings see PARA 1158 post.

24 Prosecution of Offences Act 1985 s 22(5)(a).

25 le on a ground mentioned in the Bail Act 1976 s 7(3)(b): see PARA 1200 post.

26 Prosecution of Offences Act 1985 s 22(5)(b).

27 See *ibid* s 22(5).

28 See *ibid* s 22(6) (amended by the Crime and Disorder Act 1998 s 43(4)).

29 See the Prosecution of Offences Act 1985 s 22(6A) (added by the Crime and Disorder Act 1998 s 43(5)).

30 See the Prosecution of Offences Act 1985 s 22(6A) (as added: see note 29 *supra*).

31 le under the Criminal Justice Act 2003 Pt 9 (ss 57-74) (as amended): see PARA 1898 *et seq* post.

32 Prosecution of Offences Act 1985 s 22(6B) (added by the Criminal Justice Act 2003 s 70).

33 Prosecution of Offences Act 1985 s 22(7) (amended by the Crime and Disorder Act 1998 s 43(6)). As to the procedure on such appeals see PARA 1986 post.

34 Prosecution of Offences Act 1985 s 22(8) (amended by the Crime and Disorder Act 1998 s 43(7)). An appeal under the Prosecution of Offences Act 1985 s 22(8) (as amended) may not be commenced after the expiry of the limit in question; but, where such an appeal is commenced before the expiry of the limit, the limit is deemed not to have expired before the determination or abandonment of the appeal: s 22(9). As to the procedure on such appeals see PARA 1986 post.

## UPDATE

### **1152 Power of Secretary of State to set time limits in relation to preliminary stages of criminal proceedings**

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

NOTES 16, 22--CrimPR 16.11 now Criminal Procedure Rules 2010, SI 2010/60, r 16.11.

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### **1153. Custody time limits in magistrates' courts.**

The maximum period<sup>1</sup> during which a person accused of an indictable offence other than treason may be in the custody of a magistrates' court in relation to that offence while awaiting completion of any preliminary stage of the proceedings is as follows<sup>2</sup>.

In the case of an offence triable either way<sup>3</sup>, the maximum period of custody between the defendant's first appearance<sup>4</sup> and the start of summary trial<sup>5</sup> or, as the case may be, the time when the court decides whether or not to commit<sup>6</sup> the defendant to the Crown Court for trial<sup>7</sup> is 70 days<sup>8</sup>. However, if, before the expiry of 56 days following the day of the defendant's first appearance, the court decides to proceed to summary trial<sup>9</sup>, the maximum period of custody between the defendant's first appearance and the start of the summary trial is 56 days<sup>10</sup>.

In the case of an offence triable on indictment exclusively, the maximum period of custody between the defendant's first appearance and the time when the court decides whether or not to commit the defendant to the Crown Court for trial is 70 days<sup>11</sup>. Where a new charge is preferred against a person held in custody subject to this time limit, that offence attracts a fresh custody time limit provided that the new offence is a different offence in law to the original offence charged and not simply a restatement of the original offence with different particulars and that bringing the new charge does not amount to an abuse of process<sup>12</sup>.

In the case of a summary offence, the maximum period of custody beginning with the defendant's first appearance and ending with the date of the start of the summary trial is 56 days<sup>13</sup>.

1 For these purposes, any maximum period set during which a person may be in the custody of a court does not include the day on which the custody commenced: Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 2(4).

2 Ibid reg 4(1) (amended by SI 1991/1515).

3 For the meaning of 'offences triable either way' see PARA 1102 note 4 ante. 'Offence triable either way' includes in this context in the case of a defendant who is under 18 an offence which is triable only on indictment in the case of an adult but which, in the case of a child or young person, may be tried summarily: *R v Stratford Youth Court, ex p S (A Minor)* [1998] 1 WLR 1758, 162 JP 552, DC.

4 For these purposes, a reference to a person's first appearance in relation to proceedings in a magistrates' court for an offence is: (1) in a case where that person has made an application under the Magistrates' Courts Act 1980 s 43B (as added) (see PARA 1177 post), a reference to the time when he appears before the court on the hearing of that application; (2) in a case where that person appears or is brought before the court in pursuance of the Bail Act 1976 s 5B (as added) (see PARA 1175 post) and the decision which is to be, or has been, reconsidered under that provision is the decision of a constable, a reference to the time when he so appears or is brought; and (3) in any other case, a reference to the time when first he appears or is brought before the court on an information charging him with that offence: Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 2(2) (substituted by SI 1995/555). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

5 For these purposes, a reference to the start of a summary trial is to be construed in accordance with the Prosecution of Offences Act 1985 s 22(11B) (as added) (see PARA 1152 note 2 ante): Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 2(3) (substituted by the Criminal Procedure and Investigations Act 1996 s 71(4)(a)).

6 As from a day to be appointed committal for trial (see PARA 1105 ante) is abolished: Criminal Justice Act 2003 s 332, Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

7 These provisions have effect as if any reference therein to the time when the court decides whether or not to commit the defendant to the Crown Court for trial were a reference: (1) where a court proceeds to inquire into an information as examining justices in pursuance of the Magistrates' Courts Act 1980 s 6(1) (as amended; prospectively repealed) (see MAGISTRATES vol 29(2) (Reissue) PARA 676), to the time when it begins to hear evidence for the prosecution at the inquiry; (2) where a notice has been given under the Criminal Justice Act 1987 s 4(1)(c) (as amended) (see PARA 1105 ante), to the date on which notice of transfer was given: Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 4(5) (substituted by SI 1989/767).

8 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 4(2) (amended by the Criminal Procedure and Investigations Act 1996 s 71(4)(b); SI 1989/767; SI 1991/1515). The period spent by a person serving a sentence for another offence must be taken into account (ie the custody time limit continues to run) when custody time limits are calculated: *R v Peterborough Crown Court, ex p L* [2000] Crim LR 470, DC. Trial dates ought to be fixed within the relevant custody time limit: *R v Worcester Crown Court, ex p Norman* [2000] 3 All ER 267, [2000] 2 Cr App Rep 33, DC.

9 le in pursuance of the Magistrates' Courts Act 1980 ss 19-24 (as amended, prospectively amended): see PARA 1111 et seq ante.

10 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 4(3) (amended by the Criminal Procedure and Investigations Act 1996 s 71(4)(c)).

11 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 4(4) (amended by SI 1989/767; SI 1991/1515).

12 *R (on the application of Wardle) v Leeds Crown Court* [2001] UKHL 12, [2002] 1 AC 754, [2001] 2 All ER 1. See also *R v Wirral District Magistrates' Court, ex p Meikle* (1990) 154 JP 1035, DC. As to abuse of process see also *R v Waltham Forest Justices, ex p Lee and Lee* (1993) 97 Cr App Rep 287, DC; *R v Wolverhampton Magistrates, ex p Uppa* (1995) 159 JP 86, DC.

13 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 4(4A) (added by SI 1999/2744).

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#### **1154. Custody time limits in the Crown Court.**

Where a person accused of an indictable offence other than treason is committed<sup>1</sup> to the Crown Court for trial or a bill of indictment is preferred against such a person by the direction of the Court of Appeal or by the direction or with the consent of a judge of the High Court<sup>2</sup>, the maximum period<sup>3</sup> during which he may be in the custody of the Crown Court in relation to that offence, or any other offence included in the indictment preferred against him, while awaiting the preliminary stage of the proceedings, is as follows<sup>4</sup>.

The maximum period of custody between the time when the defendant is committed for trial and the start of the trial<sup>5</sup> or, where a bill of indictment is preferred against him by the direction of the Court of Appeal or by the direction or with the consent of a judge of the High Court, between the preferment of the bill and the start of the trial, is 112 days<sup>6</sup>.

Where, following a committal for trial, the bill of indictment preferred against the defendant, not being a bill of indictment preferred by the direction of the Court of Appeal or by the direction or with the consent of a judge of the High Court<sup>7</sup>, contains a count charging an offence for which he was committed for trial at that committal together with a count charging an offence for which he was committed for trial on a different occasion, the maximum period of custody applies in relation to each offence separately<sup>8</sup>.

Where, following a committal for trial, a bill of indictment is preferred by the direction of the Court of Appeal or by the direction or with the consent of a judge of the High Court<sup>9</sup> and the bill does not contain a count charging an offence for which he was not committed for trial, the maximum period of custody between the preferment of the bill and the start of the trial is 112 days less any period, or the aggregate of any periods, during which the defendant has, since the committal, been in the custody of the Crown Court in relation to an offence for which he was committed for trial<sup>10</sup>.

Where, following a committal for trial, the bill of indictment preferred against the defendant, not being a bill preferred by the direction of the Court of Appeal or by the direction or with the consent of a judge of the High Court<sup>11</sup>, contains a count charging an offence for which he was not committed for trial, the maximum period of custody between the preferment of the bill and the start of the trial or, if the count was inserted to the bill after its preferment, between that addition and the start of the trial, is 112 days less any period, or the aggregate of any periods, during which he has, since the committal, been in the custody of the Crown Court in relation to an offence for which he was committed for trial<sup>12</sup>.

Where a defendant is sent for trial<sup>13</sup>, the maximum period of custody between the defendant being sent to the Crown Court by a magistrates' court for an offence and the start of the trial in relation to it, is 182 days less any period, or the aggregate of any periods, during which the defendant has, since that first appearance<sup>14</sup> for the offence, been in the custody of the magistrates' court<sup>15</sup>.

Where, following a sending for trial, a bill of indictment is preferred by the direction of the Court of Appeal or by the direction or with the consent of a judge of the High Court<sup>16</sup> and the bill does not contain a count charging an offence for which he was not sent for trial, the maximum period of custody between the preferment of the bill and the start of the trial is the maximum period of custody as provided above<sup>17</sup> (after making any deductions so required<sup>18</sup>) less any

period, or the aggregate of any periods, during which the accused has, since he was sent for trial, been in the custody of the Crown Court in relation to an offence for which he was sent for trial<sup>19</sup>.

Where, following a sending for trial, the bill of indictment preferred against the defendant (not being a bill preferred by the direction of the Court of Appeal or by the direction or with the consent of a judge of the High Court) contains a count charging an offence for which he was not sent for trial, the maximum period of custody: (1) between the preferment of the bill and the start of the trial; or (2) if the count was added to the bill after its preferment, between that addition and the start of the trial, is to be the maximum period of custody as provided for above<sup>20</sup> (after making any deductions so required<sup>21</sup>) less any period, or the aggregate of any periods, during which he has, since being sent for trial, been in the custody of the Crown Court in relation to the offence for which he was previously sent for trial<sup>22</sup>.

1 As from a day to be appointed committal for trial (see PARA 1105 ante) is abolished: Criminal Justice Act 2003 s 332, Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

2 Ie under the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(b) (as amended): see PARA 1206 head (3) post.

3 As to the calculation of the maximum period see PARA 1153 note 1 ante.

4 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 5(2) (amended by SI 1991/1515). See the cases cited in PARA 1153 note 8 ante. These provisions have effect, where a notice of transfer (see PARA 1105 ante) is given in respect of a case, as if references to committal for trial and to offences for which a person was or was not committed for trial included references to the giving of notice of transfer and to charges contained or not contained in the notice of transfer: Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 5(6A) (added by SI 1989/767). As from a day to be appointed notices of transfer are abolished: Criminal Justice Act 2003 Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

5 For these purposes, a reference to the start of the trial is to be construed in accordance with the Prosecution of Offences Act 1985 s 22(11A) (as added and amended) (see PARA 1152 note 2 ante): Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 2(3) (substituted by the Criminal Procedure and Investigations Act 1996 s 71(4)(a)).

6 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 5(3) (amended by the Criminal Procedure and Investigations Act 1996 s 71(4)(c)). See PARA 1153 note 8 ante.

7 See note 2 supra.

8 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 5(4).

9 See note 2 supra.

10 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 5(5) (amended by the Criminal Procedure and Investigations Act 1996 s 71(4)(c)).

11 See note 2 supra.

12 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 5(6) (amended by the Criminal Procedure and Investigations Act 1996 s 71(4)(c)).

13 Ie under the Crime and Disorder Act 1998 s 51 (prospectively amended) or s 51 (as substituted): see PARAS 1131-1132 ante.

14 See PARA 1153 note 4 ante.

15 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 5(6B) (added by SI 2000/3284).

16 See note 2 supra.

17    le as provided for in the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 5(6B) (as added): see the text and note 15 supra.

18    le by ibid reg 5(6B) (as added): see the text and note 15 supra.

19    Ibid reg 5(6C) (added by SI 2000/3284).

20    le as provided for in the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 5(6B) (as added): see the text and note 15 supra.

21    le as provided for in ibid reg 5(6B) (as added): see the text and note 15 supra.

22    Ibid reg 5(6D) (added by SI 2000/3284).

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### **1155. Application for extension of custody time limit.**

An application to a court for the extension or further extension of a custody time limit<sup>1</sup> may be made orally or in writing<sup>2</sup>. The prosecution must: (1) not less than five days before making such an application in the Crown Court; and (2) not less than two days before making such an application in a magistrates' court, give notice in writing to the defendant or his representative and to the proper officer of the court<sup>3</sup> stating that it intends to make such an application<sup>4</sup>. However, it is not necessary for the prosecution to comply with this requirement if the defendant or his representative has informed the prosecution that he does not require such notice<sup>5</sup>. If the court is satisfied that it is not practicable in all the circumstances for the prosecution so to give notice, the court may direct that the prosecution need not comply with that requirement or that the minimum period of notice required to be so given is to be such lesser period as the court may specify<sup>6</sup>.

1    Ie under the Prosecution of Offences Act 1985 s 22(3) (as substituted): see PARA 1152 ante.

2    Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 7(1).

3    For these purposes, 'the proper officer of the court' means, in relation to an application to the Crown Court, the appropriate officer of the court and, in relation to an application to a magistrates' court, the clerk of the court: *ibid* reg 7(2A) (added by SI 1989/767). If the prosecution is uncertain whether or not it will need to make such an application, it is not necessary to give a contingent notice: *R v Governor of Canterbury Prison, ex p Craig* [1991] 2 QB 195, [1990] 2 All ER 654, DC.

4    Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 7(2) (amended by SI 1989/767).

5    Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 7(3).

6    *Ibid* reg 7(4). Regulation 7 (as amended) (see the text and notes 1-5 *supra*) is directory and not mandatory, and does not limit the plain statutory power conferred by the Prosecution of Offences Act 1985 s 22(3) (as substituted) (see PARA 1152 ante) to extend the time limit at any time before its expiry: *R v Governor of Canterbury Prison, ex p Craig* [1991] 2 QB 195, [1990] 2 All ER 654, DC.



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### **1156. Bail on expiry of Crown Court custody time limit.**

Where a defendant who is in custody pending trial in the Crown Court has the benefit of a custody time limit<sup>1</sup>, the prosecution must:

- 1890 (1) not less than five days before the expiry<sup>2</sup> of the time limit give notice in writing to the appropriate officer of the Crown Court and to the defendant or his representative stating whether or not it intends to ask the Crown Court to impose conditions on the grant of bail in respect of the defendant and, if it intends to do so, the nature of the conditions to be sought; and
- 1891 (2) make arrangements for the defendant to be brought before the Crown Court within the period of two days preceding the expiry of the time limit<sup>3</sup>.

If the Crown Court is satisfied that it is not practicable in all the circumstances for the prosecution to comply with head (1) above, the Crown Court may direct that the prosecution need not so comply or that the minimum period of notice so required is to be such lesser minimum period as the Crown Court may specify<sup>4</sup>.

On receiving notice under head (1) above stating that the prosecution intends to ask the Crown Court to impose conditions on the grant of bail, the defendant or his representative must:

- 1892 (a) give notice in writing to the appropriate officer of the Crown Court and to the prosecution that the defendant wishes to be represented at the hearing of the application; or
- 1893 (b) give notice in writing to the appropriate officer and to the prosecution stating that the defendant does not oppose the application; or
- 1894 (c) give to the appropriate officer, for the consideration of the Crown Court, a written statement of the defendant's reasons for opposing the application, at the same time sending a copy of the statement to the prosecution<sup>5</sup>.

The Crown Court may direct that the prosecution need not comply with head (2) above<sup>6</sup>.

On being notified that a defendant who is in custody pending trial has the benefit of a custody time limit and that the time limit is about to expire, the Crown Court must<sup>7</sup> grant him bail<sup>8</sup>, as from the expiry of the time limit, subject to a duty to appear before the Crown Court for trial<sup>9</sup>.

<sup>1</sup> ie under the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 5 (as amended); see PARA 1154 ante.

<sup>2</sup> A custody time limit which would otherwise expire on a Saturday, a Sunday, Christmas Day, Good Friday or any day which under the Banking and Financial Dealings Act 1971 is a bank holiday in England and Wales is to be treated as expiring on the next preceding day which is not one of those days: Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 2(5).

<sup>3</sup> Ibid reg 6(1). The prosecution need not comply with head (1) in the text if it has given notice under reg 7(2) (as amended) (see PARA 1155 ante) of its intention to make an application under the Prosecution of Offences Act 1985 s 22(3) (as substituted) (see PARA 1152 ante): Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 6(3).

4 Ibid reg 6(2).

5 Ibid reg 6(4).

6 Ibid reg 6(5).

7 Is subject to the Criminal Justice and Public Order Act 1994 s 25: see PARA 1170 post.

8 Is under the Bail Act 1976. The Bail Act 1976 applies in relation to cases to which a custody time limit applies subject to modifications: see the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 8 (amended by SI 1995/555).

9 Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 6(6) (amended by SI 1995/555). Once the time limit has expired it is the duty of the court, and not a prison governor, to direct release of the defendant on bail; if the prosecution fails to perform its duty under the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 6 (as amended) of ensuring that the defendant does not remain in custody beyond the relevant custody time limit, the defendant has no right of action for damages: *Olotu v Home Office* [1997] 1 All ER 385, [1997] 1 WLR 328, CA.

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### **1157. Additional time limits for persons under the age of 18.**

The Secretary of State may by regulations make provision: (1) with respect to a person under the age of 18 at the time of his arrest in connection with an offence, as to the maximum period to be allowed for the completion of the stage beginning with his arrest and ending with the date fixed for his first appearance in court in connection with the offence ('the initial stage'); (2) with respect to a person convicted of an offence who was under that age at the time of his arrest for the offence or (where he was not arrested for it) the laying of the information charging him with it, as to the period within which the stage between his conviction and his being sentenced for the offence should be completed<sup>1</sup>.

A magistrates' court may, at any time before the expiry of the time limit imposed by the regulations under head (1) above ('the initial stage time limit'), extend, or further extend, that limit<sup>2</sup>; but it may not do so unless it is satisfied that the need for the extension is due to some good and sufficient cause, and that the investigation has been conducted, and (where applicable) the prosecution has acted, with all due diligence and expedition<sup>3</sup>.

Where the initial stage time limit (whether as originally imposed or as extended or further extended<sup>4</sup>) expires before the person arrested is charged with the offence<sup>5</sup>, he may not be charged with it unless further evidence relating to it is obtained, and: (a) if he is then under arrest, he must be released; and (b) if he is then on bail<sup>6</sup>, his bail (and any duty or conditions to which it is subject) must be discharged<sup>7</sup>.

Where the initial stage time limit (whether as originally imposed or as extended or further extended) expires after the person arrested is charged with the offence but before the date fixed for his first appearance in court in connection with it, the court must stay the proceedings<sup>8</sup>.

Where a person escapes from arrest, or a person who has been released on bail<sup>9</sup> fails to surrender himself at the appointed time, and is accordingly unlawfully at large for any period, that period is to be disregarded, so far as the offence in question is concerned, for the purposes of the initial stage time limit<sup>10</sup>.

1 Prosecution of Offences Act 1985 s 22A(1) (s 22A added by Crime and Disorder Act 1998 s 44). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

The Prosecution of Offences Act 1985 s 22(2) (as amended) (see PARA 1152 ante) applies for the purposes of regulations under s 22A(1) (as added) as if the reference in s 22(2)(d) (see PARA 1152 ante) to custody or overall time limits were a reference to time limits imposed by the regulations, and the reference in s 22(2)(e) (see PARA 1152 ante) to proceedings instituted before the commencement of any provisions of the regulations were a reference to a stage begun before that commencement: s 22A(2) (as so added). At the date at which this volume states the law no regulations were in force under these provisions. The Prosecution of Offences (Youth Courts Time Limits) Regulations 1999, SI 1999/2743, which were made under s 22(1) (see PARA 1152 ante) and s 22A (as added), were revoked as from 22 April 2003, by the Prosecution of Offences (Youth Courts Time Limits) (Revocation and Transitional Provisions) Regulations 2003, SI 2003/917.

2 The provisions of the Prosecution of Offences Act 1985 s 22(7)-(9) (s 22(7), (8) as amended) (see PARA 1152 ante) apply for the purposes of s 22A (as added), at any time after the person arrested has been charged

with the offence in question, as if any reference (however expressed) to a custody or overall time limit were a reference to the initial stage time limit: s 22A(7) (as added: see note 1 supra).

3 Ibid s 22A(3) (as added: see note 1 supra). Where a person is convicted of an offence in any proceedings, the exercise of this power may not be called into question in any appeal against that conviction: s 22A(8) (as so added). Not every failure by the prosecution to comply with the time limits obliges the court to refuse an extension of time, but where there is a clear link between the prosecution's defaults and the need to extend time, the position will be different: *R v Crown Court at Kingston, ex p Bell* (2000) 164 JP 633.

4 Ie as extended or further extended under the Prosecution of Offences Act 1985 s 22A(3) (as added): see the text and note 3 supra.

5 In these provisions any reference to a person being charged with an offence includes a reference to the laying of an information charging him with it: ibid s 22A(9) (as added: see note 1 supra).

6 Ie under the Police and Criminal Evidence Act 1984 Pt IV (ss 34-64) (as amended): see PARA 938 et seq ante.

7 Prosecution of Offences Act 1985 s 22A(4) (as added: see note 1 supra).

8 Ibid s 22A(5) (as added: see note 1 supra). As to re-institution of proceedings stayed by a court under s 22A(5) (as added) see s 22B (as added and amended); and PARA 1158 post.

9 See note 6 supra.

10 Prosecution of Offences Act 1985 s 22A(6) (as added: see note 1 supra).

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### **1158. Re-institution of stayed proceedings.**

Where proceedings for an offence ('the original proceedings') are stayed by a court<sup>1</sup>, if: (1) in the case of proceedings conducted by the Director of Public Prosecutions, he or a Chief Crown Prosecutor so directs; (2) in the case of proceedings conducted by the Director of the Serious Fraud Office or the Commissioners for Her Majesty's Revenue and Customs, the Director of the Serious Fraud Office or the Commissioners for Her Majesty's Revenue and Customs so direct; or (3) in the case of proceedings not conducted as mentioned in head (1) or head (2) above, a person designated for the purpose by the Secretary of State so directs, fresh proceedings for the offence may be instituted within a period of three months (or such longer period as the court may allow) after the date on which the original proceedings were stayed by the court<sup>2</sup>.

Fresh proceedings must be instituted: (a) where the original proceedings were stayed by the Crown Court, by preferring a bill of indictment<sup>3</sup>; (b) where the original proceedings were stayed by a magistrates' court, by laying an information<sup>4</sup>. Where a person is convicted of an offence in fresh proceedings, the institution of those proceedings may not be called into question in any appeal against that conviction<sup>5</sup>.

<sup>1</sup> *Ibid* under the Prosecution of Offences Act 1985 s 22(4) (as amended) (see PARA 1152 ante) or s 22A(5) (as added) (see PARA 1157 ante).

<sup>2</sup> *Ibid* s 22B(1), (2) (s 22B added by Crime and Disorder Act 1998 s 45); Commissioners for Revenue and Customs Act 2005 s 50(1), (7). Where fresh proceedings are instituted, anything done in relation to the original proceedings is to be treated as done in relation to the fresh proceedings if the court so directs or it was done by the prosecutor in compliance or purported compliance with the Criminal Procedure and Investigations Act 1996 s 3 (as amended) (see PARA 1387 post), s 4 (as amended) (see PARA 1387 post), s 7A (as added) (see PARA 1391 post), or by the defendant in compliance or purported compliance with s 5 (as amended; prospectively amended) (see PARA 1388 post) or s 6 (prospectively amended) (see PARA 1388 post): Prosecution of Offences Act 1985 s 22B(5) (as so added; and amended by the Criminal Justice Act 2003 s 331, Sch 36 para 17). As to the Commissioners for Her Majesty's Revenue and Customs see PARA 354 note 2 ante.

<sup>3</sup> Prosecution of Offences Act 1985 s 22B(3)(a) (as added: see note 2 supra). As to bills of indictment see PARAS 1205, 1210 post.

<sup>4</sup> *Ibid* s 22B(3)(b) (as added: see note 2 supra). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

Fresh proceedings may be instituted in accordance with heads (1)-(3) and head (b) in the text notwithstanding anything in the Magistrates' Courts Act 1980 s 127(1) (limitation of time for taking proceedings: see MAGISTRATES vol 29(2) (Reissue) PARA 589): Prosecution of Offenders Act 1985 s 22B(4) (as so added).

<sup>5</sup> *Ibid* s 22B(6) (as so added).

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## **(9) DISCONTINUANCE OF PROCEEDINGS**

### **1159. Discontinuance of proceedings in magistrates' courts.**

Where the Director of Public Prosecutions<sup>1</sup> has the conduct of proceedings for an offence, the following provisions apply in relation to the preliminary stages<sup>2</sup> of those proceedings<sup>3</sup>.

Where, at any time during the preliminary stages of the proceedings, the Director gives notice<sup>4</sup> to the designated officer for the court that he does not want the proceedings to continue, they are discontinued with effect from the giving of that notice but may be revived by notice given<sup>5</sup> by the defendant<sup>6</sup>. In any notice so given the Director must give reasons for not wanting the proceedings to continue<sup>7</sup>; and, on so giving notice, the Director must inform the defendant of the notice and of the defendant's right to require the proceedings to be continued, but the Director is not obliged to give the defendant any indication of his reasons for not wanting the proceedings to continue<sup>8</sup>. Where the Director has so given notice, the defendant must, if he wants the proceedings to continue, give notice to that effect to the designated officer for the court within the prescribed period<sup>9</sup>; and, where notice is so given, the proceedings continue as if no notice had been given by the Director<sup>10</sup>. Where the designated officer for the court has been so notified by the defendant, he must inform the Director<sup>11</sup>.

Where, in the case of a person charged with an offence after being taken into custody without a warrant<sup>12</sup>, the Director gives him notice, at a time when no magistrates' court has been informed of the charge, that the proceedings against him are discontinued, they are discontinued with effect from the giving of that notice<sup>13</sup>.

1 As to the Director of Public Prosecutions see PARAS 1066, 1080 ante.

2 For these purposes, 'preliminary stage' in relation to proceedings for an offence does not include: (1) in the case of a summary offence, any stage of the proceedings after the court has begun to hear evidence for the prosecution at the trial; (2) in the case of an indictable offence, any stage of the proceedings after the defendant has been committed for trial or the court has begun to hear evidence for the prosecution at a summary trial; (3) in the case of any offence, any stage of the proceedings after the defendant has been sent for trial under the Crime and Disorder Act 1998 s 51 (prospectively amended) (see PARA 1131 ante) (no committal proceedings for indictable-only and related offences): Prosecution of Offences Act 1985 s 23(2) (amended by the Crime and Disorder Act 1998 s 119, Sch 8 para 63). As from a day to be appointed this provision is substituted so as to provide that 'preliminary stage' means: (a) any stage of the proceedings after the court has begun to hear evidence for the prosecution at a summary trial of the offence; or (b) any stage of the proceedings after the accused has been sent for trial for the offence: Prosecution of Offences Act 1985 s 23(2) (substituted by the Criminal Justice Act 2003 s 41, Sch 3 para 57(1), (6)). At the date at which this volume states the law this substitution had been brought into force in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 (as substituted) (see PARA 1132 ante) or s 51A(3)(d) (as added) (see PARA 1133 ante) (see the Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI 2005/1267, art 2, Schedule Pt 1), but no day had been appointed for other purposes.

3 Prosecution of Offences Act 1985 s 23(1). The discontinuance of any proceedings by virtue of s 23 (as amended) does not prevent the institution of fresh proceedings in respect of the same offence: s 23(9).

4 Notice under *ibid* s 23(3), (4), (7) (s 23(3), (7) as amended) (see the text and notes 5-6, 9-10, 13 *infra*) must be given in writing and must contain sufficient particulars to identify the particular offence to which it relates; and, without prejudice to any other lawful method of giving notice, may be given by post in a registered letter or by the recorded delivery service, in which case it is to be treated as having been given on the date on

which it was received for dispatch by the postal operator concerned: CrimPR 8.2. For the meaning of 'postal operator' see the Postal Services Act 2000 s 125(1); and POST OFFICE vol 36(2) (Reissue) PARA 10. On giving notice under the Prosecution of Offences Act 1985 s 23(3) (as amended) or s 23(4), the Director of Public Prosecutions must inform any person who is detaining the defendant for the offence in relation to which the notice is given that he has given such notice and of the effect of the notice: CrimPR 8.3.

5     le under the Prosecution of Offences Act 1985 s 23(7) (as amended): see the text and note 10 infra.

6     Ibid s 23(3) (amended by the Access to Justice Act 1999 s 90(1), Sch 13 paras 129, 131; and the Courts Act 2003 s 109(1), Sch 8 para 290(1), (2)). On being given notice under the Prosecution of Offences Act 1985 s 23(3) (as amended) in relation to an offence for which the defendant has been granted bail by a court, the magistrates' court officer must inform any sureties of the defendant and any persons responsible for securing the defendant's compliance with any conditions of bail that he has been given such notice and of the effect of the notice: CrimPR 8.4. The power to discontinue proceedings under the Prosecution of Offences Act 1985 s 23(3) (as amended) is additional to the prosecution's pre-existing powers of discontinuance: *R v DPP, ex p Cooke* (1992) 95 Cr App Rep 233, DC.

7     Prosecution of Offences Act 1985 s 23(5).

8     Ibid s 23(6).

9     For these purposes, 'prescribed' means prescribed by the Criminal Procedure Rules: Prosecution of Offences Act 1985 s 23(10) (amended by the Courts Act 2003 Sch 8 para 290(1), (3)). The period within which a defendant may give notice under the Prosecution of Offences Act 1985 s 23(7) (as amended) (see the text and note 10 infra) that he wants proceedings against him to continue is 35 days from the date when the proceedings were discontinued under s 23 (as amended): CrimPR 8.1.

10    Prosecution of Offences Act 1985 s 23(7) (amended by the Access to Justice Act 1999 Sch 13 paras 129, 131; and the Courts Act 2003 Sch 8 para 290(1), (2)). As to the mode of service see note 4 supra.

11    Prosecution of Offences Act 1985 s 23(8) (amended by the Access to Justice Act 1999 Sch 13 paras 129, 131; and the Courts Act 2003 Sch 8 para 290(1), (2)).

12    See PARA 924 et seq ante.

13    Prosecution of Offences Act 1985 s 23(4). As to the mode of service see note 4 supra.

## UPDATE

### 1159 Discontinuance of proceedings in magistrates' courts

NOTES 4, 6, 9--CrimPR Pt 8 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), Pt 8. Words 'and, without prejudice ... operator concerned' omitted: CrimPR 8.2.

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### **1160. Discontinuance of proceedings in the Crown Court.**

Where the Director of Public Prosecutions, or a public authority<sup>1</sup> has the conduct of proceedings for an offence, and the defendant has been sent for trial for the offence, and, at any time before the indictment is preferred, the Director or authority gives notice to the Crown Court sitting at the place specified in the notice of offence as the place of trial<sup>2</sup> that he or it does not want the proceedings to continue, they must be discontinued with effect from the giving of that notice<sup>3</sup>. The Director or authority must, in any notice so given, give reasons for not wanting the proceedings to continue<sup>4</sup>. On giving any such notice, the Director or authority must inform the defendant of the notice, but the Director or authority is not obliged to give the defendant any indication of his reasons for not wanting the proceedings to continue<sup>5</sup>. The discontinuance of any proceedings by virtue of these provisions does not prevent the institution of fresh proceedings in respect of the same offence<sup>6</sup>.

1    Ie within the meaning of the Prosecution of Offences Act 1985 s 17 (as amended): see PARA 2062 note 5.

2    See PARA 1136 ante.

3    Prosecution of Offences Act 1985 s 23A(1), (2) (s 23A added by the Crime and Disorder Act 1998 s 119, Sch 8 para 64; and the Prosecution of Offences Act 1985 s 23A(1), (2) amended by the Criminal Justice Act 2003 ss 41, 332 Sch 3 para 57(1), (7)).

4    Prosecution of Offences Act 1985 s 23A(3) (as added: see note 3 supra).

5    Ibid s 23A(4) (as added: see note 3 supra).

6    Ibid s 23A(5) (as added: see note 3 supra).

### **UPDATE**

### **1160 Discontinuance of proceedings in the Crown Court**

NOTE 3--See *R (on the application of B) v DPP* [2009] EWHC 106 (Admin), [2009] 1 WLR 2072, [2009] All ER (D) 03 (Mar) (proceedings should not have been discontinued where doubts cast over credibility of victim as witness).



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## **(10) PROCEEDINGS AGAINST CORPORATIONS**

### **1161. Proceedings against corporations.**

A magistrates' court may commit a corporation for trial by an order in writing empowering the prosecutor to prefer a bill of indictment<sup>1</sup> in respect of the offence named in the order<sup>2</sup>. Such an order may not prohibit the inclusion in the bill of indictment of counts<sup>3</sup> that may be included in the bill in substitution for, or in addition to, counts charging the offence named in the order<sup>4</sup>. A representative<sup>5</sup> may on behalf of a corporation: (1) consent to the corporation being tried summarily; (2) enter a plea of guilty or not guilty on the trial by a magistrates' court of an information<sup>6</sup>.

Where a corporation and an individual who has attained the age of 17 are jointly charged before a magistrates' court with an offence triable either way<sup>7</sup>, the court may not try either of the defendants summarily unless each of them consents to be so tried<sup>8</sup>.

1 As to bills of indictment see PARA 1205 post.

2 See the Magistrates' Courts Act 1980 s 46, Sch 3 para 1(1). The order must be properly authenticated: *R v H Sherman Ltd* [1949] 2 KB 674, 33 Cr App Rep 151, CCA; *R v Deputy Recorder of Wolverhampton, ex p DPP* [1951] 1 All ER 627n, 35 Cr App Rep 29.

The Magistrates' Courts Act 1980 Sch 3 (as amended) merely provides machinery enabling a corporation to be brought to trial; the provisions do not alter the law so as to render a corporation liable to be indicted where it was not previously liable: see *R v Cory Bros & Co Ltd* [1927] 1 KB 810; cf *R v ICR Haulage Ltd* [1944] KB 551, 30 Cr App Rep 31, CCA. As to the criminal liability of a corporation see PARA 38 ante.

Subject to the Magistrates' Courts Act 1980 Sch 3 paras 1-4 (as amended), the provisions of the Magistrates' Courts Act 1980 relating to the trial of indictable offences apply to a corporation as they apply to an adult: see Sch 5 para 6 (amended by the Criminal Justice Act 2003 s 41, Sch 3 para 51(1), (13)(b)).

3 Ie under the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2 (as amended): see PARA 1206 post.

4 See the Magistrates' Courts Act 1980 Sch 3 para 1(2).

5 'Representative', in relation to a corporation, means a person duly appointed by the corporation to represent it for the purpose of doing any act or thing which the representative of a corporation is authorised to do, but a person so appointed is not, by virtue only of being so appointed, qualified to act for the corporation before any court for any other purpose: Criminal Justice Act 1925 s 33(6) (applied by the Magistrates' Courts Act 1980 Sch 3 para 8). The representative need not be appointed under the seal of the corporation, and a statement in writing purporting to be signed by a managing director of the corporation, or by any person (by whatever name called) having, or being one of the persons having, the management of the affairs of the corporation, to the effect that the person named in the statement has been appointed as the representative of the corporation for these purposes is admissible without further proof as prima facie evidence that that person has been so appointed: Criminal Justice Act 1925 s 33(6) (as so applied). Where a corporation appears by a solicitor it is advisable for the solicitor to be appointed as its representative: *R v Birmingham and Gloucester Railway Co*, *R v LCC and London Tramways Co*, *R v Manchester Corp*n, *R v Ascanio Puck & Co and Paice* (1912) 76 JP 487. As to service of summonses and other documents on a corporation see PARA 914 ante.

6 See the Magistrates' Courts Act 1980 Sch 3 para 2 (amended by the Criminal Procedure and Investigations Act 1996 s 47, Sch 1 para 13; and the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 51(1), (13)(a), Sch 37 Pt 4). Where a representative appears, any requirement of the Magistrates' Courts Act 1980 that anything is to be done in the presence of the defendant, or is to be read or said to him, is to be construed as a requirement that

that thing is to be done in the presence of the representative or read or said to the representative: see Sch 3 para 3(1). However, where a representative does not appear, any such requirement, and any requirement that the consent of the defendant is to be obtained for summary trial, does not apply: see Sch 3 para 3(2). As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

7 For the meaning of 'offence triable either way' see PARA 1102 note 4 ante; and as to offences triable either way see PARA 1103 ante.

8 See the Magistrates' Courts Act 1980 Sch 3 para 7.

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## **(11) COMMITMENT TO CUSTODY AND SENDING FOR TRIAL ON BAIL**

### **1162. Commitment to custody must be made by warrant.**

A justice of the peace must issue a warrant of commitment<sup>1</sup> when committing a person to:

- 1895 (1) a prison<sup>1</sup>;
- 1896 (2) a young offender institution<sup>2</sup>;
- 1897 (3) a remand centre<sup>3</sup>;
- 1898 (4) detention at a police station<sup>4</sup>; or
- 1899 (5) customs detention<sup>5</sup>.

A warrant of commitment must contain the following information: (a) the name or a description of the relevant person<sup>6</sup>; and (b) a statement of the offence with which the relevant person is charged<sup>7</sup>, or a statement of the offence of which the person to be committed or detained was convicted<sup>8</sup>, or any other ground on which the warrant is issued<sup>9</sup>.

The person executing the warrant is required to take the relevant person to the prison or place of detention specified in the warrant<sup>10</sup>. But where it is not immediately practicable to do so, or where there is some other good reason, the relevant person may be taken to any prison or place where he may be lawfully detained until such time when he can be taken to the prison or place specified in the warrant<sup>11</sup>.

1 A warrant of commitment must require:

- 528 (1) the persons to whom it is directed: (a) to arrest the relevant person, if he is at large; (b) to take him to the prison or place specified in the warrant; and (c) to deliver him with the warrant to the governor or keeper of that prison or place (CrimPR 18.6(1)(a)); and
- 529 (2) the governor or keeper to keep the relevant person in custody at that prison or place for as long as the warrant requires, or until he is delivered, in accordance with the law, to the court or other proper place or person (CrimPR 18.6(1)(b)).

For the meaning of the 'relevant person' see PARA 920 note 9 ante.

Where the justice issuing a warrant of commitment or detention is aware that the relevant person is already detained in a prison or other place of detention, the warrant must be delivered to the governor or keeper of that prison or place: CrimPR 18.6(2).

1 CrimPR 18.4(a).

2 CrimPR 18.4(b). As to the form of warrant applicable to a male aged 15 or 16 see CrimPR 18.8.

3 CrimPR 18.4(c).

4 CrimPR 18.4(d). Detention at a police station as referred to in the text is detention under the Magistrates' Courts Act 1980 s 128(7) (see PARA 1146 ante).

5 CrimPR 18.4(e). Customs detention as referred to in the text is detention under the Criminal Justice Act 1988 s 152 (see PARA 770 ante).

6 CrimPR 18.9(a).

7 CrimPR 18.9(b)(i).

8 CrimPR 18.9(b)(ii).

9 CrimPR 18.9(c).

10 CrimPR 18.12(1), (2). The governor or keeper of the prison or place to which the relevant person is delivered must give a receipt on delivery: CrimPR 18.12(6).

11 CrimPR 18.12(3). If (and for as long as) the relevant person is detained in a place other than the one specified in the warrant, the warrant has effect as if it specified the place where he is in fact being detained: CrimPR 18.12(4). The court must be kept informed of the prison or place where the relevant person is in fact being detained: CrimPR 18.12(5).

## **UPDATE**

### **1162 Commitment to custody must be made by warrant**

TEXT AND NOTES--CrimPR Pt 18 now Criminal Procedure Rules 2010, SI 2010/60, Pt 18.

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### **1163. Notice to prison governor of sending for trial on bail.**

Where the defendant is committed<sup>1</sup> or sent for trial on bail<sup>2</sup>, a magistrates' court officer must give notice thereof in writing to the governor of the prison to which persons of the sex of the person committed or sent are committed or sent by that court if committed or sent in custody for trial and also, if the person committed or sent is under 21, to the governor of the remand centre to which he would have been committed or sent if the court had refused him bail<sup>3</sup>.

Where a corporation is committed or sent for trial<sup>4</sup>, a magistrates' court officer must give notice thereof to the governor of the prison to which would be committed or sent a man committed or sent by that court in custody for trial<sup>5</sup>.

1 As from a day to be appointed committal for trial is abolished: see the Criminal Justice Act 2003 s 332, Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

2 Ie in pursuance of the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A (as added): see PARAS 1132-1133 ante.

3 CrimPR 19.19(1). Where a warrant is issued when the court office is closed, the applicant must serve on the court officer any information on which that warrant is issued and do so within 72 hours of that warrant being issued: CrimPR 18.3(1). 'The court office' is the office for the local justice area in which the justice is acting when he issues the warrant: CrimPR 18.3(2).

4 As to proceedings against corporations see PARA 1161 ante.

5 CrimPR 19.19(2).

### **UPDATE**

### **1163 Notice to prison governor of sending for trial on bail**

TEXT AND NOTES--CrimPR 19.9 now Criminal Procedure Rules 2010, SI 2010/60, r 19.9.

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## **(12) OFFENCES AGAINST CHILDREN AND YOUNG PERSONS**

### **1164. Procedural provisions.**

Special statutory provisions<sup>1</sup>, mainly of a procedural nature, apply to the prosecution of certain offences<sup>2</sup> involving the death of or bodily injury to a child<sup>3</sup> or young person<sup>4</sup>.

1 The Children and Young Persons Act 1933 s 14(1), (2) (as amended) (charging offences in respect of two or more children or young persons in one information or written charge or in one summons or requisition: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1277); s 14(4) (charging continuous offence: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1277); s 41 (proceedings determined in absence of child or young person in respect of whom an offence was committed: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1277); s 42 (as amended) and s 43 (taking of depositions of children and young persons in respect of whom offences have been committed and admission of depositions in evidence: see PARA 1534 post); s 99(2) (as amended) (where a charge or indictment alleges that a person in respect of whom an offence has been committed is under a specified age, there is a rebuttable presumption that the person is under that age: see PARA 1376 post; and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243); s 99(3) (where a charge or indictment alleges that a person in respect of whom an offence was committed was a child, or young person, and the offence could equally have been committed against a young person, or a child, it is no defence to prove that the person concerned was a young person, or a child: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243).

2 The offences are listed in *ibid* Sch 1 (amended by the Sexual Offences Act 1956 ss 48, 51, Schs 3, 4; the Suicide Act 1961 s 2(3), Sch 1 Pt I; the Protection of Children Act 1978 s 1(5); the Criminal Justice Act 1988 s 170, Sch 15 paras 8, 9, Sch 16; the Sexual Offences Act 2003 s 139, Sch 6 para 7; the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 2). They are:

- 530 (1) the murder (see PARA 89 et seq ante) or manslaughter (see PARA 92 et seq ante) of a child or young person, including aiding, abetting, counselling or procuring the suicide (see PARA 106 ante) of a child or young person;
- 531 (2) infanticide (see PARA 103 ante);
- 532 (3) an offence under the Domestic Violence, Crime and Victims Act 2004 s 5 (causing or allowing the death of a child or vulnerable adult: see PARA 107 ante), in respect of a child or young person;
- 533 (4) an offence under the Offences against the Person Act 1861 s 27 (exposing or abandoning child under two: see PARA 143 note 6 ante) or s 56 (repealed), and an offence against a child or young person under s 5 (manslaughter: see PARA 93 ante);
- 534 (5) common assault, or battery (see PARA 147 ante);
- 535 (6) any offence under the Children and Young Persons Act 1933 s 1 (as amended) (cruelty to persons under 16: see PARA 143 ante); s 3 (as amended) (allowing persons under 16 to be in brothels: see PARA 222 ante); s 4 (as amended) (allowing persons under 16 to be used for begging: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 619); s 11 (as amended) (exposing children under seven to risk of burning: see PARA 144 ante); or s 23 (as amended) (persons under 16 taking part in dangerous performances: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 773);
- 536 (7) any offence against a child or young person under the Sexual Offences Act 2003 ss 1-41, 47-53, 57-61, 66, 67 (see PARA 165 et seq ante), or any attempt to commit such an offence;

- 537 (8) any offence under the Sexual Offences Act 2003 s 62 or s 63 (see PARAS 231-232 ante) where the intended offence was an offence against a child or young person, or any attempt to commit such an offence;
- 538 (9) any offence under the Protection of Children Act 1978 s 1(1)(a) (as amended) (taking or permitting to be taken any indecent photograph of a child under the age of 16: see PARA 757 ante);
- 539 (10) any offence under the Child Abduction Act 1984 Pt 1 (ss 1-5) (as amended) (see PARAS 137, 141 ante);
- 540 (11) any other offence involving bodily injury to a child or young person.

As to whether impending danger constitutes 'bodily injury' to a child for these purposes see *R v Moore* [1954] 2 All ER 189, 38 Cr App Rep 95.

3 For the meaning of 'child' see PARA 143 note 2 ante.

4 As to the meaning of 'young person' see PARA 143 note 2 ante.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/(1) IN GENERAL/1165. Grant of bail.

## **17. BAIL**

### **(1) IN GENERAL**

#### **1165. Grant of bail.**

Bail in criminal proceedings<sup>1</sup> must be granted, unconditionally or conditionally, in accordance with the Bail Act 1976<sup>2</sup>.

1 For the meaning of 'bail in criminal proceedings' see PARA 1166 post.

2 Bail Act 1976 s 1(6).

#### **UPDATE**

##### **1165-1176 In General**

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/(1) IN GENERAL/1166. Meaning of 'bail in criminal proceedings'.

### **1166. Meaning of 'bail in criminal proceedings'.**

'Bail in criminal proceedings' means:

1900 (1) bail<sup>1</sup> grantable in or in connection with proceedings for an offence<sup>2</sup> to a person who is accused or convicted<sup>3</sup> of the offence<sup>4</sup>; or

1901 (2) bail grantable in connection with an offence to a person who is under arrest for the offence or for whose arrest for the offence a warrant, indorsed for bail<sup>5</sup>, is being issued<sup>6</sup>; or

1902 (3) bail grantable in connection with extradition proceedings<sup>7</sup> for an offence<sup>8</sup>.

1 In the Bail Act 1976, 'bail' means bail grantable under the law, including common law, for the time being in force: s 1(2).

2 For these purposes, 'offence' includes an alleged offence: *ibid* s 2(2).

3 For these purposes, unless the context otherwise requires, 'conviction' includes:

541 (1) a finding of guilt (*ibid* s 2(1)(a));

542 (2) a finding that a person is not guilty by reason of insanity (s 2(1)(b));

543 (3) a finding under the Powers of Criminal Courts (Sentencing) Act 2000 s 11(1) (remand for medical examination: see *MAGISTRATES* vol 29(2) (Reissue) PARA 723) that the person in question did the act or made the omission charged (Bail Act 1976 s 2(1)(c) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 50(1), (2)));

544 (4) a conviction for an offence committed for which an order is made discharging the offender absolutely or conditionally (Bail Act 1976 s 2(1)(d) (amended by the Criminal Justice Act 2003 ss 304, 332, Sch 32 paras 20, 21(1), (2), Sch 37 Pt 7); Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 2 para 5(1), (2)),

and 'convicted' is to be construed accordingly: Bail Act 1976 s 2(1).

4 *Ibid* s 1(1)(a).

5 As to warrants indorsed for bail see PARA 919 ante.

6 Bail Act 1976 s 1(1)(b).

7 'Extradition proceedings' means proceedings under the Extradition Act 2003 (see *EXTRADITION*): Bail Act 1976 s 2(2) (added by the Extradition Act 2003 s 198(1), (3)).

8 Bail Act 1976 s 1(1)(c) (added by the Extradition Act 2003 s 198(1), (2)). Except as provided by the Bail Act 1976 s 13(3) (bail grantable by the Courts-Martial Appeal Court), s 1 does not apply to bail in or in connection with proceedings outside England and Wales: s 1(3). Section 1 (as amended) applies: (1) whether the offence was committed in England or Wales or elsewhere; and (2) whether it is an offence under the law of England and Wales, or of any other country or territory: s 1(5).

## **UPDATE**

### **1165-1176 In General**

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/(1) IN GENERAL/1167. Incidents of bail in criminal proceedings.

### **1167. Incidents of bail in criminal proceedings.**

A person granted bail in criminal proceedings<sup>1</sup> is under a duty to surrender to custody<sup>2</sup>, and that duty is enforceable<sup>3</sup> in accordance with the Bail Act 1976<sup>4</sup>. No recognisance for his surrender to custody may be taken from him<sup>5</sup>.

Except as otherwise provided<sup>6</sup>:

- 1903 (1) no security for his surrender to custody may be taken from him<sup>7</sup>;
- 1904 (2) he may not be required to provide a surety or sureties for his surrender to custody<sup>8</sup>; and
- 1905 (3) no other requirement may be imposed on him as a condition of bail<sup>9</sup>.

However, he may be required, before release on bail, to provide a surety or sureties to secure his surrender to custody<sup>10</sup>. In addition, he may be required, before release on bail, to give security for his surrender to custody; and the security may be given by him or on his behalf<sup>11</sup>.

He may be required to comply, before release on bail or later, with such requirements as appear to the court necessary<sup>12</sup>:

- 1906 (a) to secure that he surrenders to custody<sup>13</sup>;
- 1907 (b) to secure that he does not commit an offence while on bail<sup>14</sup>;
- 1908 (c) to secure that he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person<sup>15</sup>;
- 1909 (d) for his own protection or, if he is a child or young person, for his own welfare or in his own interests<sup>16</sup>;
- 1910 (e) to secure that he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence<sup>17</sup>;
- 1911 (f) to secure that before the time appointed for him to surrender to custody, he attends an interview with an authorised<sup>18</sup> advocate or authorised litigator<sup>19</sup>.

If a child or young person is granted bail, he may<sup>20</sup> be required to comply with requirements imposed for the purpose of securing the electronic monitoring of his compliance with any other requirement imposed on him as a condition of bail<sup>21</sup>.

In the case of a person accused of murder, the court granting bail must, unless it considers that satisfactory reports on his mental condition have already been obtained, impose as conditions of bail a requirement that the defendant must undergo examination by two medical practitioners for the purpose of enabling such reports to be prepared; and a requirement that he must for that purpose attend such an institution or place as the court directs and comply with any other directions which may be given to him for that purpose by either of those practitioners<sup>22</sup>.

Where the court has been notified by the Secretary of State that arrangements for conducting a relevant assessment or, as the case may be, providing relevant follow-up have been made for the local justice area in which it appears to the court that the person referred to as 'P' below

would reside if granted bail, and the notice has not been withdrawn<sup>23</sup>, then in the case of the person ('P'):

- 1912 (i) in relation to whom specified conditions apply<sup>24</sup>;
- 1913 (ii) who, after analysis of a sample<sup>25</sup>, has been offered a relevant assessment<sup>26</sup> or, if a relevant assessment has been carried out, has a relevant follow-up<sup>27</sup> proposed to him<sup>28</sup>; and
- 1914 (iii) who has agreed to undergo the relevant assessment or, as the case may be, to participate in the relevant follow-up<sup>29</sup>,

the court, if it grants bail, must impose as a condition of bail that P both undergo the relevant assessment and participate in any relevant follow-up proposed to him or, if a relevant assessment has been carried out, that P participate in the relevant follow-up<sup>30</sup>.

If a parent or guardian of a child<sup>31</sup> or young person<sup>32</sup> consents to be surety for the child or young person, the parent or guardian may be required to secure that the child or young person complies with any requirement imposed on him<sup>33</sup>; but no requirement may be so imposed on the parent or the guardian of a young person where it appears that the young person will attain the age of 17 before the time to be appointed for him to surrender to custody; and the parent or guardian may not be required to secure compliance with any requirement to which his consent does not extend and may not, in respect of those requirements to which his consent does extend, be bound in a sum greater than £50<sup>34</sup>.

Where a court has granted bail in criminal proceedings, that court or, where the court has committed or sent a person on bail to the Crown Court for trial or for sentence or to be otherwise dealt with, that court or the Crown Court, may on application by or on behalf of the person to whom bail was granted, or by the prosecutor or a constable, vary<sup>35</sup> the conditions of bail or impose conditions in respect of bail which it has granted unconditionally<sup>36</sup>.

1 For the meaning of 'bail in criminal proceedings' see PARA 1166 ante.

2 For these purposes, 'surrender to custody' means, in relation to a person released on bail, surrendering himself into the custody of the court or of the constable (according to the requirements of the grant of bail) at the time and place for the time being appointed for him to do so: Bail Act 1976 s 2(2). When a defendant who has not previously surrendered to custody is arraigned he thereby surrenders to the custody of the court: *R v Central Criminal Court, ex p Guney* [1996] AC 616, [1996] 2 All ER 705, HL. Bail granted by a magistrates' court ceases when the defendant surrenders to the custody of the Crown Court, whether for the purposes of arraignment or not: *R v Kent Crown Court, ex p Jodka* (1997) 161 JP 638, DC. Once a person on bail has complied with the procedures of the court where he was due to appear by reporting to the appropriate official at the appropriate time, he has surrendered to bail and is then in the custody of the court. He is thereafter under an implied obligation not to leave the court building without consent and, if he does so, he is liable to be arrested under the Bail Act 1976 s 7(2) (see PARA 1200 post). However, he is not guilty of any offence under s 6(1) (see PARA 1199 post): *DPP v Richards* [1988] QB 701, 88 Cr App Rep 97, DC.

3 In accordance with the Bail Act 1976 s 6: see PARA 1199 post.

4 Ibid s 3(1). Section 3 (as amended) is subject to the Powers of Criminal Courts (Sentencing) Act 2000 s 11 (conditions of bail on remand for medical examination: see MAGISTRATES vol 29(2) (Reissue) PARA 723) (Bail Act 1976 s 3(9) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 51)) and applies with modifications in relation to cases to which a custody time limit applies (see PARA 1156 note 8 ante). The Bail Act 1976 s 3 (as amended) is subject, in its application to bail granted by a constable, to s 3A (as added) (see PARA 1168 post): s 3(10) (added by the Criminal Justice and Public Order Act 1994 s 27(2)(c)). Note that there are two provisions in the Bail Act 1976 numbered s 3(10): see note 36 infra. Where a custody time limit has expired, the Bail Act 1976 s 3 (as amended) has effect as if s 3(4), (5) (sureties and security for surrender) were omitted, and as if in s 3(6) (conditions of bail) for the words 'before release on bail or later' there were substituted the words 'after release on bail': s 3(10A) (added, in relation to where a custody time limit applies, by the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 8(1), (2) (a) (amended by SI 1995/555)).

5 Bail Act 1976 s 3(2).

6 le by *ibid* s 3 (as amended).

7 *Ibid* s 3(3)(a).

8 *Ibid* s 3(3)(b).

9 *Ibid* s 3(3)(c).

10 *Ibid* s 3(4). Where the defendant is granted bail, no conditions may be imposed under s 3(4)-(6B) or (7) (except s 3(6)(d), (e)) unless it appears to the court that it is necessary to do so: (1) for the purpose of preventing the occurrence of any of the events mentioned in s 4(5), Sch 1 Pt I para 2(1) (see PARA 1170 head (1) post); or (2) for the defendant's own protection or, if he is a child, for his own welfare or in his own interests: Sch 1 Pt I para 8(1) (amended by the Criminal Justice Act 1991 ss 100, 101(2), Sch 11 para 22(1), (2), Sch 13; the Crime and Disorder Act 1998 s 119, Sch 8 para 38; and the Criminal Justice Act 2003 ss 13(3), 19(4)(b)). In the case of a condition under the Bail Act 1976 s 3(6)(d) (see head (e) in the text), no condition may be imposed unless it appears to the court that it is necessary to do so to enable inquiries or a report to be made: Sch 1 Pt I para 8(1A) (added by the Criminal Justice Act 1991 s 100, Sch 11 para 22(1), (3)). The provisions of the Bail Act 1976 Sch 1 Pt I para 8(1), (1A) (as added) also apply on any application to the court to vary the conditions of bail or to impose conditions in respect of bail which has been granted unconditionally: Sch 1 Pt I para 8(2) (amended by the Criminal Justice Act 1991 s 100, Sch 11 para 22(1), (4)). The restriction imposed by the Bail Act 1976 Sch 1 Pt I para 8(1A) (as added) does not apply to the conditions required to be imposed under s 3(6A) (as added) or operate to override the direction in the Powers of Criminal Courts (Sentencing) Act 2000 s 11(3) (see MAGISTRATES vol 29(2) (Reissue) PARA 723) to a magistrates' court to impose conditions of bail under the Bail Act 1976 s 3(6)(d) of the description specified in the Powers of Criminal Courts (Sentencing) Act 2000 s 11(3) in the circumstances so specified: Bail Act 1976 Sch 1 Pt I para 8(3) (amended by the Mental Health (Amendment) Act 1982 s 34(4); the Criminal Justice Act 1991 s 100, Sch 11 para 22(1), (5); and the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 54(1), (2)).

11 Bail Act 1976 s 3(5) (amended by the Crime and Disorder Act 1998 ss 54(1), 120(2), Sch 10). Where a person has so given security and a court is satisfied that he failed to surrender to custody, then, unless it appears that he had reasonable cause for his failure, the court may order the forfeiture of the security: Bail Act 1976 s 5(7). If a court so orders the forfeiture of a security, the court may declare that the forfeiture extends to such amount less than the full value of the security as it thinks fit to order: s 5(8). Any such order takes effect, unless previously revoked, at the end of 21 days beginning with the day on which it was made: s 5(8A) (added by the Criminal Law Act 1977 s 65(4), Sch 12).

A court which has so ordered the forfeiture of a security may, if satisfied on an application made by or on behalf of the person who gave it that he did after all have reasonable cause for his failure to surrender to custody, by order remit the forfeiture or declare that it extends to such amount less than the full value of the security as it thinks fit to order: Bail Act 1976 s 5(8B) (added by the Criminal Law Act 1977 Sch 12). Such an application may be made before or after the order for forfeiture has taken effect, but may not be entertained unless the court is satisfied that the prosecution was given reasonable notice of the applicant's intention to make it: Bail Act 1976 s 5(8C) (added by the Criminal Law Act 1977 Sch 12).

A security which has been ordered to be forfeited by a court under the Bail Act 1976 s 5(7) must, to the extent of the forfeiture: (1) if it consists of money, be accounted for and paid in the same manner as a fine imposed by that court would be; (2) if it does not consist of money, be enforced by such magistrates' court as may be specified in the order: s 5(9). Where an order under s 5(8B) (as added) is made after the order for forfeiture of the security has taken effect, any money which would have fallen to be repaid or paid over to the person who gave the security if the order under s 5(8B) (as added) had been made before the order for forfeiture took effect must be repaid or paid over to him: s 5(9A) (added by the Criminal Law Act 1977 Sch 12).

Where a magistrates' court under the Bail Act 1976 s 3(5) or (6) (as amended) imposes any requirement to be complied with before a person's release on bail, the court may give directions as to the manner in which and the person or persons before whom the requirement may be complied with: CrimPR 19.4.

Although Parliament doubtless envisaged the lodging of some asset in cash or kind as security under the Bail Act 1976 s 3(5) (as amended), the court can accept a less simple form of surety, such as an interest in land, if it is satisfied that the surety can be forfeited without giving rise either to disputes as to third party rights or the risk of a charge of conversion: *R (on the application of Stevens) v Truro Magistrates' Court* [2001] EWHC 558 (Admin), [2002] 1 WLR 144 (third party's mortgage on property given as surety not affected by forfeiture proceedings). Where a security given by the defendant has been provided by a third party, the third party has no standing to claim its return if the defendant fails to surrender to bail: *R (on the application of Stevens) v Truro Magistrates' Court* supra.

12 Bail Act 1976 s 3(6) (amended by the Criminal Justice and Public Order Act 1994 ss 27(2)(a), 168(3), Sch 11; and the Criminal Justice Act 2003 ss 13(1)(a), 332, Sch 37 Pt 2).

13 Bail Act 1976 s 3(6)(a) (s 3(6)(a)-(d) amended by the Criminal Justice Act 2003 s 13(1)(d)).

14 Bail Act 1976 s 3(6)(b) (as amended: see note 13 supra). There is no requirement of 'substantial grounds' for believing that a person may commit an offence while on bail when imposing conditions under s 3(6) (as amended) or Sch 1 Pt I para 8(1) (as amended); all that is required of magistrates is that they perceive a real and not a fanciful risk of such an occurrence: *R v Mansfield Justices, ex p Sharkey* [1985] QB 613, [1985] 1 All ER 193, DC. Cf the Bail Act 1976 Sch 1 Pt I para 2(b): see PARA 1170 head (1) post.

15 Ibid s 3(6)(c) (as amended: see note 13 supra).

16 Ibid s 3(6)(ca) (added by the Criminal Justice Act 2003 s 13(1)(c)).

17 Bail Act 1976 s 3(6)(d) (as amended: see note 13 supra).

18 Ie as defined by the Courts and Legal Services Act 1990 s 119(1): see LEGAL PROFESSIONS vol 65 (2008) PARAS 497-498.

19 Bail Act 1976 s 3(6)(e) (added by the Crime and Disorder Act 1998 s 54(2); and amended by the Criminal Justice Act 2003 s 13(1)(d)). In any Act, the 'normal powers to impose conditions of bail' means the powers to impose conditions under the Bail Act 1976 s 3(6)(a), (b), (c) or (ca) (see heads (a)-(d) in the text): s 3(6) (amended by the Criminal Justice and Public Order Act 1994 s 27(2)(b); and the Criminal Justice Act 2003 s 13(1)(d)). The power to impose conditions applies to non-imprisonable offences as well as imprisonable ones; and refusal to consent to a condition of bail is not an exception to the right (see PARA 1171 post) to bail, so a defendant cannot be remanded in custody for that reason: *R v Bournemouth Justices, ex p Cross, Griffen and Pamment* (1988) 89 Cr App Rep 90, DC. Where a person is required under the Bail Act 1976 s 3(6) (as amended) to reside in a bail hostel or probation hostel, he may also be required to comply with the rules of the hostel: s 3(6ZA) (added by the Criminal Justice Act 1988 s 131(1)). For these purposes, 'bail hostel' means premises for the accommodation of persons remanded on bail: Bail Act 1976 s 2(2) (added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 52; and substituted by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 50(1), (2)(a)).

20 Ie subject to the Bail Act 1976 s 3AA (as added). Under s 3AA (as added), a court may not impose on a child or young person an electronic monitoring requirement under s 3(6ZAA) (as added) unless each of the following conditions is satisfied: s 3AA(1) (s 3AA added by the Criminal Justice and Police Act 2001 s 131(2)). The conditions are:

- 545 (1) that the child or young person has attained the age of 12 years (Bail Act 1976 s 3AA(2) (as so added));
- 546 (2) that: (a) the child or young person is charged with or has been convicted of a violent or sexual offence, or an offence punishable in the case of an adult with imprisonment for a term of 14 years or more; or (b) he is charged with or has been convicted of one or more imprisonable offences which, together with any other imprisonable offences of which he has been convicted in any proceedings amount, or would, if he were convicted of the offences with which he is charged, amount to a recent history of repeatedly committing imprisonable offences while remanded on bail or to local authority accommodation (s 3AA(3) (as so added));
- 547 (3) that the court: (a) has been notified by the Secretary of State that electronic monitoring arrangements are available in each local justice area which is a relevant area; and (b) is satisfied that the necessary provision can be made under those arrangements (s 3AA(4) (s 3AA as so added; and s 3AA(4) amended by the Courts Act 2003 s 109(1), Sch 8 para 181));
- 548 (4) that a youth offending team has informed the court that in its opinion the imposition of such a requirement will be suitable in the case of the child or young person (Bail Act 1976 s 3AA(5) (as so added)).

'Local authority accommodation' has the same meaning as in the Children and Young Persons Act 1969 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1246): Bail Act 1976 s 3AA(11) (as so added). For the purposes of s 3AA (as added), a local justice area is a relevant area in relation to a proposed electronic monitoring requirement if the court considers that it will not be practicable to secure the electronic monitoring in question unless electronic monitoring arrangements are available in that area: s 3AA(12) (s 3AA as so added; and s 3AA(12) amended by the Courts Act 2003 Sch 8 para 181).

Where a court imposes an electronic monitoring requirement, the requirement must include provision for making a person responsible for the monitoring; and a person who is made so responsible must be of a description specified in an order made by the Secretary of State: Bail Act 1976 s 3AA(6) (as so added). See the Bail (Electronic Monitoring of Requirements) (Responsible Officer) Order 2002, SI 2002/844 (amended by SI 2005/984).

The Secretary of State may make rules for regulating: (i) the electronic monitoring of compliance with requirements imposed on a child or young person as a condition of bail; and (ii) without prejudice to the

generality of head (i) supra, the functions of persons made responsible for securing the electronic monitoring of compliance with such requirements: Bail Act 1976 s 3AA(7) (as so added). Rules under s 3AA (as added) may make different provision for different cases: s 3AA(8) (as so added). Any power of the Secretary of State to make an order or rules under s 3AA (as added) is exercisable by statutory instrument: s 3AA(9) (as so added). A statutory instrument containing rules made under s 3AA (as added) is subject to annulment in pursuance of a resolution of either House of Parliament: s 3AA(10) (as so added).

21 Ibid s 3(6ZAA) (added by the Criminal Justice and Police Act 2001 s 131(1)).

22 Bail Act 1976 s 3(6A) (added by the Mental Health (Amendment) Act 1982 s 34(1), (2)). Of the medical practitioners so referred to at least one must be a practitioner approved for the purposes of the Mental Health Act 1983 s 12 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 482): Bail Act 1976 s 3(6B) (added by the Mental Health (Amendment) Act 1982 s 34(1), (2); and amended by the Mental Health Act 1983 s 148, Sch 4 para 46).

23 Bail Act 1976 s 3(6C) (s 3(6C)-(6F) added by the Criminal Justice Act 2003 s 19(1), (2); and the Bail Act 1976 s 3(6C) amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 40).

24 Bail Act 1976 s 3(6D)(a) (as added: see note 23 supra). The specified conditions that apply are:

549 (1) he (ie 'P') is aged 18 or over (Sch 1 para 6B(1)(a) (Sch 1 para 6B added by the Criminal Justice Act 2003 s 19(1), (4)));

550 (2) a sample taken under the Police and Criminal Evidence Act 1984 s 63B (as added and amended) (testing for presence of Class A drugs: see PARA 1031 ante) in connection with the offence, or under the Criminal Justice Act 2003 s 161 (drug testing after conviction of an offence but before sentence: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 629), has revealed the presence in his body of a specified Class A drug (Bail Act 1976 Sch 1 para 6B(1)(b) (as so added));

551 (3) the offence is one under the Misuse of Drugs Act 1971 s 5(2) or (3) (see PARAS 770, 772 ante) and relates to a specified Class A drug, or the court is satisfied that there are substantial grounds for believing that misuse by him of any specified Class A drug caused or contributed to the offence or (even if it did not) that the offence was motivated wholly or partly by his intended misuse of such a drug (Bail Act 1976 Sch 1 para 6B(1)(c) (as so added)).

In head (2) supra 'Class A drug' and 'misuse' have the same meanings as in the Misuse of Drugs Act 1971; and 'specified' (in relation to a Class A drug) has the same meaning as in the Criminal Justice and Court Services Act 2000 Pt 3 (ie specified by an order made by the Secretary of State): Bail Act 1976 s 3(6E) (added by the Criminal Justice Act 2003 s 19(1), (2)). As to 'Class A' drugs see PARA 770 ante. The Misuse of Drugs Act 1971 s 37(2) provides that references in that Act to misusing a drug are references to misusing it by taking it (ie taking it by a human being by way of any form of self-administration, whether or not involving the assistance of another).

25 Ie a sample referred to in note 24 head (2) supra.

26 'Relevant assessment' means an assessment conducted by a suitably qualified person of whether P is dependent upon or has a propensity to misuse any specified Class A drugs: Bail Act 1976 s 3(6E)(a) (s 3(6E) added by the Criminal Justice Act 2003 s 19(1), (2)). In the Bail Act 1976 s 3(6E)(a) (as added), 'suitably qualified person' means a person who has such qualifications or experience as are from time to time specified by the Secretary of State for these purposes: s 3(6F) (added by the Criminal Justice Act 2003 s 19(1), (2)).

27 'Relevant follow-up' means, in a case where the person who conducted the relevant assessment believes P to have such a dependency or propensity, such further assessment, and such assistance or treatment (or both) in connection with the dependency or propensity, as the person who conducted the relevant assessment (or conducts any later assessment) considers to be appropriate in P's case: Bail Act 1976 s 3(6E)(b) (as added: see note 26 supra).

28 Ibid s 3(6D)(b) (as added: see note 23 supra).

29 Ibid s 3(6D)(c) (as added: see note 23 supra).

30 For the purposes of ibid s 3(6D) (as added), a relevant assessment is to be treated as having been carried out if a person attends an initial assessment and remains for its duration, and the initial assessor is satisfied that the initial assessment fulfilled the purposes of a relevant assessment: Drugs Act 2005 s 17(2). An initial assessor may disclose information relating to an initial assessment for the purpose of enabling a court considering an application for bail by the person concerned to determine whether s 17(2) or (3) (see PARA 1170 post) applies: s 17(4). For the meanings of 'initial assessment' and 'initial assessor' see PARA 1032 ante.

31 For these purposes, 'child' means a person under the age of 14: Bail Act 1976 s 2(2).

32 For these purposes, 'young person' means a person who has attained the age of 14 and is under the age of 17: *ibid* s 2(2).

33 *Ie* by virtue of *ibid* s 3(6), 3(6ZAA) or (6A) (as added: see note 13 *supra*).

34 *Ibid* s 3(7) (amended by the Mental Health (Amendment) Act 1982 s 34(1), (3); and the Criminal Justice and Police Act 2001 s 131(3)).

35 For these purposes, 'vary', in relation to bail, means imposing further conditions after bail is granted, or varying or rescinding conditions: Bail Act 1976 s 2(2). Variation of bail conditions does not affect the validity of a recognisance for continuous bail, but consideration should be given to explaining to a surety before he enters into a recognisance, and expressly warning him when he does so, that the conditions of bail may be varied by the court and that he should not enter into such a recognisance if he is concerned about the conditions: *R v Wells Street Magistrates' Court, ex p Albanese* [1982] QB 333, 74 Cr App Rep 180, DC. As to bail with sureties see PARA 1172 *post*.

36 Bail Act 1976 s 3(8) (amended by the Criminal Law Act 1977 s 65(4), Sch 12; and the Criminal Justice Act 2003 s 41, Sch 3 para 48(1), (2)(a)). The Criminal Justice Act 2003 Sch 3 para 48(1), (2) amends the Bail Act 1976 s 3 (as amended) so as to refer to persons being sent rather than committed for trial, but at the date at which this volume states the law this amendment only has effect in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51A(3)(d) (as added) (see PARA 1133 *ante*). As from a day to be appointed the Criminal Justice Act 2003 Sch 3 para 48(1), (2) also amends the Bail Act 1976 s 3 (as amended) to include where a court has committed a person on bail to the Crown Court for sentence. At the date at which this volume states the law no such day had been appointed.

Until a day to be appointed, where a notice of transfer is given under a relevant transfer provision, s 3(8) (as amended) has effect in relation to a person in relation to whose case the notice is given as if he had been committed on bail to the Crown Court for trial (s 3(8A) (added by the Criminal Justice Act 1987 s 15, Sch 2 para 9; and substituted by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 12(a)); and the Bail Act 1976 s 3(8) (as amended) applies where a court has committed a person on bail to the Crown Court for trial under the Crime and Disorder Act 1998 s 51 (see PARA 1131 *ante*) as it applies where a court has committed a person on bail to the Crown Court for trial (Bail Act 1976 s 3(8B) (added by the Crime and Disorder Act 1998 s 119, Sch 8 para 37)). For these purposes, 'relevant transfer provision' means the Criminal Justice Act 1987 s 4 (prospectively repealed) (see PARA 1105 *ante*) or the Criminal Justice Act 1991 s 53 (see PARA 1105 *ante*): Bail Act 1976 s 3(10) (added by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 12(b)). Note that there are two provisions in the Bail Act 1976 numbered s 3(10): see note 4 *supra*. As from a day to be appointed s 3(8A), (8B) (10) (as added) are repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 48(1), (2), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed. The Criminal Justice Act 2003 Sch 3 para 48(1), (2) amends the Bail Act 1976 s 3 so as to refer to persons being sent rather than committed for trial, but at the date at which this volume states the law this amendment only has effect in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51A(3)(d) (as added) (see PARA 1133 *ante*).

## UPDATE

### 1165-1176 In General

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

### 1167 Incidents of bail in criminal proceedings

TEXT AND NOTES 10-19--CrimPR 19.4 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), r 19.4. The defendant must notify the prosecutor of the address at which the defendant would reside if released on bail with a condition of residence as soon as practicable after the institution of proceedings, unless already done; and as soon as practicable after any change of that address; and the prosecutor must help the court to assess the suitability of an address proposed as a condition of residence: CrimPR 19.25. The person responsible for electronic monitoring must be notified of relevant bail conditions and variations of them: see CrimPR 19.26, 19.27.



NOTE 11--Bail Act 1976 s 3(5) further amended: Legal Services Act 2007 Sch 21 para 34).

NOTE 20--Bail Act 1976 s 3AA(1), (4) substituted, s 3AA(5) amended, s 3AA(6)-(10), (12) omitted: Criminal Justice and Immigration Act 2008 Sch 11 para 3, Sch 28 Pt 4. See Bail Act 1976 s 3AB (conditions for the imposition of electronic monitoring requirements: other persons), s 3AC (electronic monitoring: general provisions) (ss 3AB, 3AC added by Criminal Justice and Immigration Act 2008 Sch 11 para 4). SI 2002/844 replaced: Bail (Electronic Monitoring of Requirements) (Responsible Officer) Order 2008, SI 2008/2713.

TEXT AND NOTE 21--Bail Act 1976 s 3(6ZAA), (6ZAB) (substituted by Criminal Justice and Immigration Act 2008 Sch 11 para 2).

TEXT AND NOTE 24--Bail Act 1976 s 3(6D)(a) amended: Criminal Justice and Immigration Act 2008 Sch 12 para 2.

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### **1168. Conditions of bail in case of police bail.**

The general provisions relating to bail in criminal proceedings under the Bail Act 1976<sup>1</sup> apply equally in relation to bail granted by a custody officer<sup>2</sup> in cases where the normal powers to impose conditions of bail are available to him, subject to the following modifications<sup>3</sup>.

The provisions authorising the imposition on a person granted bail of a requirement<sup>4</sup> do not authorise the imposition of a requirement to reside in a bail hostel, nor do they authorise a requirement<sup>5</sup> to secure that that person makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence, or a requirement<sup>6</sup> to secure that he attends an interview with an authorised advocate or authorised litigator<sup>7</sup>.

The provisions relating to:

- 1915 (1) a requirement for electronic monitoring<sup>8</sup>;
- 1916 (2) a requirement of residence in a bail hostel<sup>9</sup>;
- 1917 (3) in the case of a person accused of murder, the imposition of a requirement of undergoing a medical examination<sup>10</sup>; and
- 1918 (4) a drug dependence, or propensity to drug misuse, assessment<sup>11</sup>,

do not apply<sup>12</sup>.

The provision<sup>13</sup> relating to the variation of the conditions of bail is replaced by a provision that where a custody officer has granted bail in criminal proceedings he or another custody officer serving at the same police station may, at the request of the person to whom it was granted, vary the conditions of bail; and in doing so he may impose conditions or more onerous conditions<sup>14</sup>.

Where a constable grants bail to a person no conditions may be imposed as to the provision of a surety or sureties to secure surrender to custody<sup>15</sup>, as to the giving of security for surrender to custody<sup>16</sup>, as to compliance with requirements to secure various specified purposes<sup>17</sup>, or as to requiring a parent or guardian to secure that a child or young person complies with a requirement imposed on him<sup>18</sup>, unless it appears to the constable that it is necessary to do so<sup>19</sup>:

- 1919 (a) for the purpose of preventing that person from failing to surrender to custody<sup>20</sup>; or
- 1920 (b) for the purpose of preventing that person from committing an offence while on bail<sup>21</sup>; or
- 1921 (c) for the purpose of preventing that person from interfering with witnesses or otherwise obstructing the course of justice, whether in relation to himself or any other person<sup>22</sup>; or
- 1922 (d) for that person's own protection or, if he is a child or young person, for his own welfare or in his own interests<sup>23</sup>.

<sup>1</sup> ie the Bail Act 1976 s 3 (as amended) (see PARA 1167 ante).

- 2 le a custody officer under the Police and Criminal Evidence Act 1984 Pt IV (ss 34-52) (as amended) (see PARA 939 ante).
- 3 Bail Act 1976 s 3A(1) (s 3A added by the Criminal Justice and Public Order Act 1994 s 27(3)).
- 4 le the Bail Act 1976 s 3(6) (as amended) (see PARA 1167 ante).
- 5 le a requirement under ibid s 3(6)(d) (see PARA 1167 ante).
- 6 le a requirement under ibid s 3(6)(e) (as added) (see PARA 1167 ante).
- 7 Ibid s 3A(2) (as added (see note 3 supra); and amended by the Crime and Disorder Act 1998 s 54(1), (3)).
- 8 le the Bail Act 1976 s 3(6ZAA) (as added) (see PARA 1167 ante).
- 9 le ibid s 3(6ZA) (as added) (see PARA 1167 ante).
- 10 le ibid s 3(6A), (6B) (as added) (see PARA 1167 ante).
- 11 le ibid s 3(6C)-(6F) (as added) (see PARA 1167 ante).
- 12 Ibid s 3A(3) (as added (see note 3 supra); and amended by the Criminal Justice and Police Act 2001 s 131(4); and the Criminal Justice Act 2003 s 19(3)).
- 13 le the Bail Act 1976 s 3(8) (as amended) (see PARA 1167 ante).
- 14 Ibid s 3A(4) (as added: see note 3 supra). See note 19 infra.
- 15 le under ibid s 3(4) (see PARA 1167 ante).
- 16 le under ibid s 3(5) (as amended) (see PARA 1167 ante).
- 17 le under ibid s 3(6) (as amended) (see PARA 1167 ante).
- 18 le under ibid s 3(7) (as amended) (see PARA 1167 ante).
- 19 Ibid s 3A(5) (as added (see note 3 supra); and amended by the Criminal Justice Act 2003 ss 13(2)(a), 332, Sch 37 Pt 2). The Bail Act 1976 s 3A(5) (as added) also applies to a request to a custody officer under s 3(8) (as amended) (see the text and note 13 supra; and PARA 1167 ante) to vary the conditions of bail: s 3A(6) (as added: see note 3 supra).
- 20 Ibid s 3A(5)(a) (s 3A(5) as added (see note 3 supra); and s 3A(5)(a)-(c) amended by the Criminal Justice Act 2003 s 13(2)(b)).
- 21 Bail Act 1976 s 3A(5)(b) (as added and amended: see notes 3, 20 supra).
- 22 Ibid s 3A(5)(c) (as added and amended: see notes 3, 20 supra).
- 23 Ibid s 3A(5)(d) (s 3A(5) as added (see note 3 supra); and s 3A(5)(d) added by the Criminal Justice Act 2003 s 13(2)(c)).

## UPDATE

### 1165-1176 In General

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

### 1168 Conditions of bail in case of police bail

NOTE 2--Or a custody officer under the Criminal Justice Act 2003 Pt III (ss 22-27) (see PARA 1044): 1976 Act s 3A(1) (amended by Police and Justice Act 2006 Sch 14 para 5).



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### **1169. General right to bail of accused persons and others.**

A person:

1923 (1) who is accused of an offence when:

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122. (a) he appears or is brought before a magistrates' court or the Crown Court in the course of or in connection with proceedings for the offence<sup>1</sup>; or

123. (b) he applies to a court<sup>2</sup> for bail or for a variation of the conditions of bail in connection with the proceedings<sup>3</sup>; or

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1924 (2) whose extradition is sought in respect of an offence, when he appears or is brought before a court in the course of or in connection with extradition proceedings in respect of the offence<sup>4</sup>, or when he applies to a court for bail or for a variation of the conditions of bail in connection with those proceedings<sup>5</sup>; or

1925 (3) who, having been convicted of an offence, appears or is brought before a magistrates' court or a Crown Court<sup>6</sup> to be dealt with<sup>7</sup>; or

1926 (4) who has been convicted of an offence and whose case is adjourned by the court for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence<sup>8</sup>,

must be granted bail except in specified<sup>9</sup> circumstances<sup>10</sup>.

If the court decides not to grant the defendant<sup>11</sup> bail, it is the court's duty to consider, at each subsequent hearing while the defendant is a person to whom heads (1) to (4) above apply and who remains in custody, whether he ought to be granted bail<sup>12</sup>. At the first hearing after that at which the court decided not to grant the defendant bail, he may support an application for bail with any argument as to fact or law that he desires, whether or not he has advanced that argument previously<sup>13</sup>. At subsequent hearings the court need not hear arguments as to fact or law which it has heard previously<sup>14</sup>.

1 Bail Act 1976 s 4(2)(a). The Bail Act 1976 s 4 applies in relation to the grant of bail by the Court of Appeal under the Criminal Justice Act 2003 s 90 (see PARA 1948 post) as if in the Bail Act 1976 s 4(2) the reference to the Crown Court included a reference to the Court of Appeal: Criminal Justice Act 2003 s 90(4).

2 For these purposes, 'court' includes a judge of a court or a justice of the peace and, in the case of a specified court, includes a judge or (as the case may be) justice having powers to act in connection with proceedings before that court: Bail Act 1976 s 2(2) (amended by the Criminal Law Act 1977 Sch 12).

3 Bail Act 1976 s 4(2)(b) (amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 33). The provisions in head (1) in the text do not apply as respects proceedings on or after a person's conviction of the offence: Bail Act 1976 s 4(2) (amended by the Extradition Act 2003 ss 198(1), (4), 220, Sch 4).

4 Bail Act 1976 s 4(2A)(a) (s 4(2A), (2B) added by the Extradition Act 2003 s 198(1), (5)).

5 Bail Act 1976 s 4(2A)(b) (as added: see note 4 supra). Section 4(2A) (as added) does not apply if the person is alleged to be unlawfully at large after conviction of the offence: s 4(2B) (as so added).

6 To be dealt with under the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 Pt 2 (breach of certain youth community orders: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 234), or the Criminal

Justice Act 2003 Sch 8 Pt 2 (breach of requirements of community order: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 178); see the Bail Act 1976 s 4(3)(a), (b) (amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 20, 22); and the Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 2 para 5(1), (2).

7 Bail Act 1976 s 4(3) (as amended: see note 6 supra).

8 Ibid s 4(4).

9 le except as provided by ibid s 4(1), Sch 1 (as amended): see PARA 1170 post. Schedule 1 (as amended) also has effect as respects conditions of bail for a person to whom s 4 applies: s 4(5).

10 Ibid s 4(1). Section 4 (as amended) is subject to the Magistrates' Courts Act 1980 s 41 (restriction of bail by magistrates' courts in cases of treason: see PARA 1178 post) and the Criminal Justice and Public Order Act 1994 s 25 (exclusion of bail for defendants charged with or convicted of homicide or rape after previous conviction for such an offence: see PARA 1170 post): see the Bail Act 1976 s 4(7), (8) (s 4(7) amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 145; and the Bail Act 1976 s 4(8) added by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 32). The Bail Act 1976 s 4 (as amended) applies with modifications to cases to which a custody time limit applies: see PARA 1156 note 8 ante. In taking any decisions required by Sch 1 Pt I or Sch 1 Pt II, the considerations to which the court is to have regard include, so far as relevant, any misuse of controlled drugs by the defendant ('controlled drugs' and 'misuse' having the same meanings as in the Misuse of Drugs Act 1971 (see PARAS 770 note 2, 1167 note 24 ante)): Bail Act 1976 s 4(9) (added by the Criminal Justice and Court Services Act 2000 s 58).

Where a custody time limit has expired the Bail Act 1976 s 4 (as amended) has effect as if duty to grant bail was not subject to the exception for specified circumstances: s 4(8A) (added by virtue of the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, reg 8(1), (2)(b); and amended by virtue of the Prosecution of Offences (Custody Time Limits) (Amendment) Regulations 1995, SI 1995/555, reg 2)).

11 For these purposes, 'the defendant' means a person to whom the Bail Act 1976 s 4 (as amended) applies; and any reference to a defendant whose case is adjourned for inquiries or a report is a reference to a person to whom s 4 (as amended) applies by virtue of s 4(4) (see the text and note 8 supra): s 4(6).

12 Ibid Sch 1 Pt IIA para 1 (Sch 1 Pt IIA added by the Criminal Justice Act 1988 s 154). See *R v Calder Justices, ex p Kennedy* [1992] Crim LR 496, DC.

13 Bail Act 1976 Sch 1 Pt IIA para 2 (as added: see note 12 supra).

14 Ibid Sch 1 Pt IIA para 3 (as added: see note 12 supra). See also *R v Nottingham Justices, ex p Davies* [1981] QB 38, 71 Cr App Rep 178, DC.

## UPDATE

### 1165-1176 In General

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

### 1169 General right to bail of accused persons and others

NOTE 5--For 'to be ... conviction' read 'to have been convicted': 1976 Act s 4(2B) (amended by Police and Justice Act 2006 Sch 13 para 34).

TEXT AND NOTES 6, 7--Bail Act 1976 s 4(3) further amended: Criminal Justice and Immigration Act 2008 Sch 4 paras 23, 102, Sch 28 Pt 1.

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**1170. Exceptions to right to bail where defendants are accused or convicted of imprisonable offences.**

Where the offence or one of the offences of which the defendant<sup>1</sup> is accused or convicted in the proceedings is punishable with imprisonment<sup>2</sup> or his extradition is sought in respect of an offence, the defendant need not be granted bail<sup>3</sup>:

- 1927 (1) if the court<sup>4</sup> is satisfied that there are substantial grounds for believing that the defendant, if released on bail, whether subject to conditions or not, would fail to surrender to custody<sup>5</sup>; or would commit an offence while on bail<sup>6</sup>; or would interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person<sup>7</sup>;
- 1928 (2) if the offence is an indictable offence or an offence triable either way and it appears to the court that he was on bail in criminal proceedings on the date of the offence<sup>8</sup>;
- 1929 (3) in connection with extradition proceedings if the conduct constituting the offence would, if carried out by the defendant in England and Wales, constitute an indictable offence or an offence triable either way<sup>9</sup>, and it appears to the court that the defendant was on bail on the date of the offence<sup>10</sup>;
- 1930 (4) if the court is satisfied that the defendant should be kept in legal custody<sup>11</sup> for his own protection or, if he is a child<sup>12</sup> or young person<sup>13</sup>, for his own welfare<sup>14</sup>;
- 1931 (5) if he is in custody in pursuance of the sentence of a court<sup>15</sup> or of any authority acting under any of the Services Acts<sup>16</sup>;
- 1932 (6) where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the required decisions<sup>17</sup> for want of time since the institution of the proceedings against him<sup>18</sup>;
- 1933 (7) if, having been released on bail in or in connection with the proceedings for the offence or in extradition proceedings, he has been arrested<sup>19</sup> for absconding or breaking conditions of bail<sup>20</sup>;
- 1934 (8) where:
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  - 124. (a) a defendant is aged 18 or over<sup>21</sup>; and
  - 125. (b) a sample taken under specified provisions<sup>22</sup> has revealed the presence in his body of a specified Class A drug<sup>23</sup>; and
  - 126. (c) either the offence is one of possession of a controlled drug and relates to a specified Class A drug<sup>24</sup>, or the court is satisfied that there are substantial grounds for believing that misuse by him of any specified Class A drug caused or contributed to the offence<sup>25</sup> or (even if it did not) that the offence was motivated wholly or partly by his intended misuse of such a drug<sup>26</sup>; and
  - 127. (d) the specified condition<sup>27</sup> is satisfied or, if the court is considering on a second or subsequent occasion whether or not to grant bail, has been, and continues to be, satisfied<sup>28</sup>,
  - 82
- 1935 unless the court is satisfied that there is no significant risk of his committing an offence while on bail, whether subject to conditions or not<sup>29</sup>;

- 1936 (9) where his case is adjourned for inquiries or a report, if it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody<sup>30</sup>.

In taking the decisions required by head (1) above, or in deciding whether it is satisfied under certain provisions<sup>31</sup>, the court must have regard to such of the following considerations as appear to it to be relevant:

- 1937 (i) the nature and seriousness of the offence or default<sup>32</sup>, and the probable method of dealing with the defendant for it<sup>33</sup>;  
 1938 (ii) the character, antecedents, associations and community ties of the defendant<sup>34</sup>;  
 1939 (iii) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings<sup>35</sup>;  
 1940 (iv) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted<sup>36</sup>,

as well as to any other considerations which appear to be relevant<sup>37</sup>.

A person who in any proceedings has been charged with or convicted of murder, attempted murder, manslaughter, rape (or similar offence)<sup>38</sup> or attempt to commit rape (or similar offence)<sup>39</sup>, and who has been previously convicted<sup>40</sup> by or before a court in any part of the United Kingdom<sup>41</sup> of any such offence or of culpable homicide<sup>42</sup> and, in the case of a previous conviction of manslaughter or of culpable homicide, if he was then sentenced to imprisonment or, if he was then a child or young person, to long-term detention under any of the relevant enactments<sup>43</sup>, may be granted bail in those proceedings only if the court or, as the case may be, the constable considering the grant of bail is satisfied that there are exceptional circumstances which justify it<sup>44</sup>.

Where the court is considering exercising its power to remand in custody for more than eight clear days<sup>45</sup>, it must have regard to the total length of time which the defendant would spend in custody if it were to exercise its power<sup>46</sup>.

As from a day to be appointed, where the defendant is under the age of 18, and it appears to the court that:

- 1941 (A) he was on bail in criminal proceedings on the date of the offence, the court, in deciding for the purposes of head (1) above whether it is satisfied that there are substantial grounds for believing that the defendant, if released on bail, whether subject to conditions or not, would commit an offence on bail, must give particular weight to the fact that the defendant was on bail in criminal proceedings on the date of the offence<sup>47</sup>;  
 1942 (B) having been released on bail in or in connection with the proceedings for the offence, he failed to surrender to custody<sup>48</sup>, the court, in deciding for the purposes of head (1) above whether it is satisfied that there are substantial grounds for believing that the defendant, if released on bail, whether subject to conditions or not, would fail to surrender to custody, must give particular weight to the following: (aa) where the defendant did not have reasonable cause<sup>49</sup> for his failure to surrender to custody, the court must give particular weight to the fact that he failed to surrender to custody<sup>50</sup>; and (bb) where the defendant did have such reasonable cause, the court must give particular weight to the fact that he failed to surrender to custody at the appointed place as soon as reasonably practicable after the appointed time<sup>51</sup>.



- 1 For the meaning of 'the defendant' for these purposes see PARA 1169 note 11 ante.
  - 2 See the Bail Act 1976 s 4(5), Sch 1 Pt I para 1(a) (Sch 1 Pt I para 1 substituted by the Extradition Act 2003 s 198(1), (12)). For these purposes, the question whether an offence is one which is punishable with imprisonment is to be determined without regard to any enactment prohibiting or restricting the imprisonment of young offenders or first offenders: Bail Act 1976 Sch 1 Pt III para 1.
  - 3 See *ibid* Sch 1 Pt I para 1(b) (as substituted: see note 2 supra).
  - 4 For the meaning of 'court' for these purposes see PARA 1169 note 2 ante.
  - 5 Bail Act 1976 Sch 1 Pt I para 2(1)(a) (Sch 1 Pt I para 2(1) renumbered as such by the Criminal Justice Act 2003 s 20(1)). For the meaning of 'surrender to custody' see PARA 1167 note 2 ante.
  - 6 Bail Act 1976 Sch 1 Pt I para 2(1)(b) (as renumbered: see note 5 supra).
  - 7 *Ibid* Sch 1 Pt I para 2(1)(c) (as renumbered: see note 5 supra). In considering whether to grant bail under s 4 (as amended) (see PARA 1169 ante), before the discretion to refuse bail arises pursuant to Sch 1 Pt I para 2 or Sch 1 Pt I para 9 (see the text and notes 31-37 *infra*), the court must be satisfied that there are substantial grounds for believing that one of the events described in Sch 1 Pt I para 2(a), (b) or (c) will happen; it is the existence of substantial ground for the belief, not the belief itself, which is the crucial factor; accordingly, if one court finds as a fact that substantial grounds exist at the time of the determination, a later court must accept that finding: *R v Slough Justices, ex p Duncan* (1982) 75 Cr App Rep 384, DC (decided before the Bail Act 1976 Sch 1 Pt I para 2 was amended by the Criminal Justice Act 2003). The strict rules of evidence are inappropriate when considering whether there are substantial grounds for believing the matters set out in the Bail Act 1976 Sch 1 Pt I para 2 (as amended): *Re Moles* [1981] Crim LR 170; and see *R v Mansfield Justices, ex p Sharkey* [1985] QB 613, [1985] 1 All ER 193, DC.
- Where the defendant falls within one or more of the Bail Act 1976 Sch 1 Pt I para 2A (as added), Sch 1 Pt I para 6 (as amended), Sch 1 Pt I para 6B (as added), then Sch 1 Pt I para 2 (as amended) does not apply unless:
- 552 (1) where the defendant falls within Sch 1 Pt I para 2A (as added; prospectively substituted) (see the text and note 8 *infra*), the court is satisfied as mentioned in Sch 1 Pt I para 2A(1) (as added; prospectively substituted) (Sch 1 Pt I para 2(2)(a) (Sch 1 Pt I para 2(2) added by the Criminal Justice Act 2003 s 20(1));
  - 553 (2) where the defendant falls within the Bail Act 1976 Sch 1 Pt I para 6 (see the text and note 20 *infra*), the court is satisfied as mentioned in Sch 1 Pt I para 6(1) (Sch 1 Pt I para 2(2)(b) (as so added));
  - 554 (3) where the defendant falls within Sch 1 Pt I para 6B (as added) (see the text and notes 21-28 *infra*), either the court is satisfied as mentioned in Sch 1 Pt I para 6A (as added) (see note 29 *infra*) or Sch 1 Pt I para 6A (as added) does not apply by virtue of Sch 1 Pt I para 6C (as added) (Sch 1 Pt I para 2(2) (as so added)).
- 8 *Ibid* Sch 1 Pt I para 2A (added by the Criminal Justice and Public Order Act 1994 s 26(a)). As from a day to be appointed, the Bail Act 1976 Sch 1 Pt I para 2A (as added) is substituted to instead provide that such a defendant may not be provided bail where the defendant is aged 18 or over, and it appears to the court that he was on bail in criminal proceedings on the date of the offence, unless the court is satisfied that there is no significant risk of his committing an offence while on bail, whether subject to conditions or not: Sch 1 Pt I para 2A(1), (2) (Sch 1 Pt I para 2A as so added; prospectively substituted by the Criminal Justice Act 2003 s 14(1)). At the date at which this volume states the law no such day had been appointed.
  - 9 Bail Act Sch 1 Pt I para 2B(a) (Sch 1 Pt I para 2B added by the Extradition Act 2003 s 198(1), (13)).
  - 10 Bail Act Sch 1 Pt I para 2B(b) (as added: see note 9 supra).
  - 11 For these purposes, references to a defendant being kept in custody or being in custody include, where the defendant is a child or young person, references to him being kept or being in the care of the local authority in pursuance of a warrant of commitment under the Children and Young Persons Act 1969 s 23(1) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1247, 1253): Bail Act 1976 Sch 1 Pt III para 3.
  - 12 For the meaning of 'child' see PARA 1167 note 31 ante.
  - 13 For the meaning of 'young person' see PARA 1167 note 32 ante.
  - 14 Bail Act 1976 Sch 1 Pt I para 3.

15 For these purposes, 'court' in the expression 'sentence of a court' includes a service court as defined in the Visiting Forces Act 1952 s 12(1) (see ARMED FORCES vol 2(2) (Reissue) PARA 384); and 'sentence', in that expression, is to be construed in accordance with that definition: Bail Act 1976 Sch 1 Pt III para 4.

16 Ibid Sch 1 Pt I para 4. For these purposes, 'the Services Acts' means the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 (see ARMED FORCES): Bail Act 1976 Sch 1 Pt III para 4.

17 Ie the decisions required by ibid Sch 1 Pt I (as amended).

18 Ibid Sch 1 Pt I para 5.

19 Ie in pursuance of ibid s 7 (as amended): see PARA 1200 post.

20 Ibid Sch 1 Pt I para 6 (amended by the Extradition Act 2003 s 198(1), (14)). As from a day to be appointed the Bail Act 1976 Sch 1 Pt I para 6 (as amended) is substituted by the Criminal Justice Act 2003 s 15(1) to instead provide that where such a defendant is aged 18 or over, and it appears to the court that, having been released on bail in or in connection with the proceedings for the offence, he failed to surrender to custody, he may not be granted bail unless the court is satisfied that there is no significant risk that, if released on bail, whether subject to conditions or not, he would fail to surrender to custody: see the Bail Act 1976 Sch 1 Pt I para 6(1), (2) (Sch 1 Pt I para 6 as so amended; prospectively substituted by the Criminal Justice Act 2003 s 15(1)). At the date at which this volume states the law no such day had been appointed. Where it appears to the court that the defendant had reasonable cause for his failure to surrender to custody, he does not fall within the Bail Act 1976 Sch 1 Pt I para 6 (as amended; prospectively substituted) unless it also appears to the court that he failed to surrender to custody at the appointed place as soon as reasonably practicable after the appointed time: Sch 1 Pt I para 6(3) (as so amended; prospectively substituted). For these purposes, a failure to give to the defendant a copy of the record of the decision to grant him bail does not constitute a reasonable cause for his failure to surrender to custody: Sch 1 Pt I para 6(4) (as so amended; prospectively substituted).

21 Ibid Sch 1 Pt I para 6B(1)(a) (Sch 1 Pt I paras 6A-6C added by the Criminal Justice Act 2003 s 19(1), (4)).

22 Ie a sample taken:

555 (1) under the Police and Criminal Evidence Act 1984 s 63B (as added and amended) (testing for presence of Class A drugs: see PARA 1031 ante) in connection with the offence (Bail Act Sch 1 Pt I para 6B(1)(b)(i) (as added: see note 21 supra)); or

556 (2) under the Criminal Justice Act 2003 s 161 (drug testing after conviction of an offence but before sentence: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 629) (Bail Act 1976 Sch 1 Pt I para 6B(1)(b)(ii) (as so added)).

23 Ibid Sch 1 Pt I para 6B(1)(b) (as added: see note 21 supra). For the meaning of 'Class A drug' see the Misuse of Drugs Act 1971; and PARA 770 note 2 ante (definition applied by the Bail Act 1976 Sch 1 Pt I para 6B(3)(a) (as so added)). 'Specified', in relation to a Class A drug, means specified by an order made by the Secretary of State: Criminal Justice and Court Services Act 2000 s 70(1); definition applied by the Bail Act 1976 Sch 1 Pt I para 6B(3)(c) (as so added).

24 Ie an offence under the Misuse of Drugs Act 1971 s 5(2) or (3): see PARAS 770, 772 ante.

25 Bail Act 1976 Sch 1 Pt I para 6B(1)(c)(i) (as added: see note 21 supra).

26 Ibid Sch 1 Pt I para 6B(1)(c)(ii) (as added: see note 21 supra).

27 The specified condition is that after the taking and analysis of the sample:

557 (1) a relevant assessment has been offered to the defendant but he does not agree to undergo it (ibid Sch 1 Pt I para 6B(2)(a) (as added: see note 21 supra)); or

558 (2) he has undergone a relevant assessment, and relevant follow-up has been proposed to him, but he does not agree to participate in it (Sch 1 Pt I para 6B(2)(b) (as so added)).

For the meanings of 'relevant assessment' and 'relevant follow-up' see Sch 1 Pt I para 3(6E) (as added); and PARA 1167 notes 26-27 supra (definitions applied by Sch 1 Pt I para 6B(3)(b)). For these purposes, a person is to be treated as having undergone a relevant assessment if the person attends an initial assessment and remains for its duration, and the initial assessor is satisfied that the initial assessment fulfilled the purposes of a relevant assessment: Drugs Act 2005 s 17(3). An initial assessor may disclose information relating to an initial assessment for the purpose of enabling a court considering an application for bail by the person concerned to determine whether s 17(3) applies: s 17(4). For the meanings of 'initial assessment' and 'initial assessor' see PARA 1032 ante.

28 Bail Act 1976 Sch 1 Pt I para 6B (as added: see note 21 supra).

29 Ibid Sch 1 Pt I para 6A (as added: see note 21 supra). This restriction on bail does not apply unless: (1) the court has been notified by the Secretary of State that arrangements for conducting a relevant assessment or, as the case may be, providing relevant follow-up have been made for the local justice area in which it appears to the court that the defendant would reside if granted bail; and (2) the notice has not been withdrawn: Sch 1 Pt I para 6C (as added (see note 21 supra); and amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 40).

30 Bail Act 1976 Sch 1 Pt I para 7.

31 Ie whether the court is satisfied as mentioned in ibid Sch 1 Pt I para 2A(1) (as added; prospectively substituted) (see note 8 supra), Sch 1 Pt I para 6(1) (as amended; prospectively substituted) (see the text and note 20 supra), or Sch 1 Pt I para 6A (as added) (see the text and note 29 supra): Sch 1 Pt I para 9 (amended by the Criminal Justice Act 2003 s 20(2)).

32 For these purposes, 'default', in relation to the defendant, means the default for which he is to be dealt with under the Criminal Justice Act 2003 Sch 8 Pt 2 (breach of requirement of order: see PARA SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 178): Bail Act 1976 Sch 1 Pt III para 4 (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 54(1), (3); and the Criminal Justice Act 2003 s 304, Sch 32 paras 20, 23).

33 Bail Act 1976 Sch 1 Pt I para 9(a).

34 Ibid Sch 1 Pt I para 9(b).

35 Ibid Sch 1 Pt I para 9(c). For these purposes, references to previous grants of bail in criminal proceedings include references to bail granted before 17 April 1978; and so as respects the reference to an offence committed by a person on bail in relation to any period before 10 April 1995: Sch 1 Pt III para 2 (amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 34). As from a day to be appointed, references to previous grants of bail include: (1) bail granted before 17 April 1978; (2) as respects the reference in Sch 1 Pt I para 2A (as added; prospectively substituted) (see the text and note 8 supra), bail granted before 10 April 1995; (3) as respects the references in Sch 1 Pt I para 6 (prospectively substituted) (see the text and note 20 supra), bail granted before 17 April 1976; (4) as respects the references in Sch 1 Pt I para 9AA (prospectively added) (see the text and note 47 infra), bail granted before the coming into force of that provision; (5) as respects the references in Sch 1 Pt I para 9AB (prospectively added) (see the text and notes 49-51 infra), bail granted before the coming into force of that provision; (6) as respects the reference of Sch 1 Pt II para 5 (as substituted) (see PARA 1171 post), bail granted before 17 April 1978: Sch 1 Pt III para 2 (prospectively substituted by the Criminal Justice Act 2003 s 331, Sch 36 paras 1, 3). At the date at which this volume states the law no such day had been appointed.

36 Bail Act 1976 Sch 1 Pt I para 9(d).

37 Ibid Sch 1 Pt I para 9.

38 The following offences are included within this provision: (1) rape under the law of Scotland or Northern Ireland; (2) an offence under the Sexual Offences Act 1956 s 1 (rape) (repealed); (3) an offence under the Sexual Offences Act 2003 s 1 (rape: see PARA 165 ante); (4) an offence under the Sexual Offences Act 2003 s 2 (assault by penetration: see PARA 167 ante); (5) an offence under the Sexual Offences Act 2003 s 4 (causing a person to engage in sexual activity without consent: see PARA 171 ante), where the activity caused involved penetration within s 4(4)(a)-(d); (6) an offence under the Sexual Offences Act 2003 s 5 (rape of a child under 13: see PARA 166 ante); (7) an offence under the Sexual Offences Act 2003 s 6 (assault of a child under 13 by penetration: see PARA 168 ante); (8) an offence under the Sexual Offences Act 2003 s 8 (causing or inciting a child under 13 to engage in sexual activity: see PARA 172 ante), where an activity involving penetration within s 8(3)(a)-(d) was caused; (9) an offence under the Sexual Offences Act 2003 s 30 (sexual activity with a person with a mental disorder impeding choice: see PARA 197 ante), where the touching involved penetration within s 30(3)(a)-(d); (10) an offence under the Sexual Offences Act 2003 s 31 (causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity: see PARA 198 ante), where an activity involving penetration within s 31(3)(a)-(d) was caused: see the Criminal Justice and Public Order Act 1994 s 25(2)(a)-(m) (amended by the Sexual Offences Act 2003 s 139, Sch 6 para 32(1), (2)).

39 Ie an attempt to commit any of the offences referred to in note 38 supra: see the Criminal Justice and Public Order Act 1994 s 25(2)(n).

40 For these purposes, 'conviction' includes:

559 (1) a finding that a person is not guilty by reason of insanity;

560 (2) a finding under the Criminal Procedure (Insanity) Act 1964 s 4A(3) (cases of unfitness to plead: see PARA 1265 post) that a person did the act or made the omission charged against him; and

561 (3) a conviction of an offence for which an order is made discharging the offender absolutely or conditionally (or in relation to an offence committed before 4 April 2005, placing him on probation);

and 'convicted' is to be construed accordingly: Criminal Justice and Public Order Act 1994 s 25(5) (amended by the Criminal Justice Act 2003 ss 304, 332, Sch 32 para 67, Sch 37 Pt 7); Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 2 para 5(1), (2).

41 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

42 Culpable homicide is a Scottish offence corresponding to that of manslaughter.

43 See the Criminal Justice and Public Order Act 1994 s 25(3). For these purposes, 'the relevant enactments' means the Powers of Criminal Courts (Sentencing) Act 2000 s 91 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78); Criminal Justice and Public Order Act 1994 s 25(5) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 160).

44 See the Criminal Justice and Public Order Act 1994 s 25(1). Section 25 (as amended) applies whether or not an appeal is pending against conviction or sentence: s 25(4). Section 25 (as amended) does not contravene the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5 (right to liberty and security of the person); it places a burden on the defendant to rebut a presumption: *R (on the application of O) v Crown Court at Harrow* [2003] EWHC 868 (Admin), [2003] 1 WLR 2756, DC (affd sub nom *R (on the application of O) v Crown Court at Harrow, Re O* [2006] UKHL 42, [2006] 3 All ER 1157, [2006] 3 WLR 195). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

'Satisfied' as to exceptional circumstances has been read so as to impose a purely evidential burden on the defendant: *R (on the application of O) v Crown Court at Harrow* [2003] EWHC 868 (Admin), [2003] 1 WLR 2756, at [94] per Hooper J (but contrast Kennedy LJ who did not consider that 'satisfied' in the present context imposed any burden on the defendant). See also *Ilijakov v Bulgaria* [2001] ECHR No 33977/96, [2001] 7 Archbold News 1, ECtHR.

45 Ie under the Magistrates' Courts Act 1980 s 128A (as added and amended) (see PARA 1147 ante).

46 Bail Act 1976 Sch 1 Pt I para 9B (added by the Criminal Justice Act 1988 s 155(2)).

47 Bail Act 1976 Sch 1 Pt I para 9AA (prospectively added by the Criminal Justice Act 2003 s 14(2)). The Bail Act 1976 Schedule 1 Pt I para 9AA (prospectively added) is to come into force as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

48 Where it appears to the court that the defendant had reasonable cause for his failure to surrender to custody, *ibid* Sch 1 Pt I para 9AB (prospectively added) does not apply unless it also appears to the court that he failed to surrender to custody at the appointed place as soon as reasonably practicable after the appointed time: Sch 1 Pt I para 9AB(2) (Sch 1 Pt I para 9AB prospectively added by the Criminal Justice Act 2003 s 15(2)). The Bail Act 1976 Schedule 1 Pt I para 9AB (prospectively added) is to come into force as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

49 For these purposes, a failure to give to the defendant a copy of the record of the decision to grant him bail does not constitute a reasonable cause for his failure to surrender to custody: *ibid* Sch 1 Pt I para 9AB(4) (prospectively added: see note 48 supra).

50 *Ibid* Sch 1 Pt I para 9AB(1), (3)(a) (prospectively added: see note 48 supra).

51 *Ibid* Sch 1 Pt I para 9AB(1), (3)(b) (prospectively added: see note 48 supra).

## UPDATE

### 1165-1176 In General

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

**1170 Exceptions to right to bail where defendants are accused or convicted of imprisonable offences**

TEXT AND NOTES--See also Bail Act 1976 Sch 1 Pt 1A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 6) (defendants accused or convicted of imprisonable offences to which Bail Act 1976 Pt 1 does not apply).

TEXT AND NOTES 2, 3--Bail Act 1976 Sch 1 para 1 amended: Criminal Justice and Immigration Act 2008 Sch 12 para 5.

NOTES 8, 20--Day appointed for certain purposes: SI 2006/3217.

TEXT AND NOTE 16--Bail Act 1976 Sch 1 Pt I para 4 amended, definition of 'the Services Acts' repealed: Armed Forces Act 2006 Sch 16 para 78, Sch 17.

NOTE 35--Day appointed: SI 2006/3217.

NOTE 44--*O*, cited, reported at [2007] 1 AC 249.

TEXT AND NOTES 47-51--Day appointed for certain purposes: SI 2006/3217.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/(1) IN GENERAL/1171. Exceptions to right to bail where defendants are accused or convicted of non-imprisonable offences.

**1171. Exceptions to right to bail where defendants are accused or convicted of non-imprisonable offences.**

Where the offence or every offence of which the defendant<sup>1</sup> is accused or convicted in the proceedings is one which is not punishable with imprisonment<sup>2</sup>, the defendant need not be granted bail:

- 1943 (1) if it appears to the court<sup>3</sup> that, having previously been granted bail in criminal proceedings<sup>4</sup>, he has failed to surrender to custody<sup>5</sup> in accordance with his obligations under the grant of bail, and the court believes, in view of that failure, that the defendant, if released on bail, whether subject to conditions or not, would fail to surrender to custody<sup>6</sup>;
- 1944 (2) if the court is satisfied that the defendant should be kept in custody<sup>7</sup> for his own protection or, if he is a child<sup>8</sup> or young person<sup>9</sup>, for his own welfare<sup>10</sup>;
- 1945 (3) if he is in custody in pursuance of the sentence of a court<sup>11</sup> or of any authority acting under any of the Services Acts<sup>12</sup>;
- 1946 (4) if, having been released on bail in or in connection with the proceedings for the offence, he has been arrested<sup>13</sup> for absconding or breaking conditions of bail, and the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail, whether subject to conditions or not, would fail to surrender to custody, commit an offence on bail, or interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person<sup>14</sup>.

1 For the meaning of 'the defendant' for these purposes see PARA 1169 note 11 ante.

2 As to determining whether an offence is one which is punishable with imprisonment see PARA 1170 note 2 ante.

3 For the meaning of 'court' for these purposes see PARA 1169 note 2 ante.

4 For the meaning of 'previous grants of bail in criminal proceedings' see PARA 1170 note 35 ante.

5 For the meaning of 'surrender to custody' see PARA 1167 note 2 ante.

6 Bail Act 1976 s 4(5), Sch 1 Pt II paras 1, 2. The circumstances in which conditions may be imposed where bail is granted with regard to a non-imprisonable offence are not limited to those set out in head (1) in the text: *R v Bournemouth Magistrates' Court, ex p Cross* (1988) 89 Cr App Rep 90, DC.

7 For the meaning of 'kept in custody' see PARA 1170 note 11 ante.

8 For the meaning of 'child' see PARA 1167 note 31 ante.

9 For the meaning of 'young person' see PARA 1167 note 32 ante.

10 Bail Act 1976 Sch 1 Pt II paras 1, 3.

11 For the meaning of 'court' for these purposes see PARA 1170 note 15 ante.

12 Bail Act 1976 Sch 1 Pt II paras 1, 4. For the meaning of 'the Services Acts' see PARA 1170 note 16 ante.

13 le under the Bail Act 1976 s 7 (as amended): see PARA 1200 post.

14 Ibid Sch 1 Pt II paras 1, 5 (Sch 1 Pt II para 5 substituted by the Criminal Justice Act 2003 s 13(4)).

## **UPDATE**

### **1165-1176 In General**

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/(1) IN GENERAL/1172. Bail with sureties.

### **1172. Bail with sureties.**

Where a person is granted bail in criminal proceedings<sup>1</sup> on condition that he provides one or more surety or sureties for the purpose of securing that he surrenders to custody<sup>2</sup>, then, in considering the suitability for that purpose of a proposed surety, regard may be had, amongst other things, to:

- 1947 (1) the surety's financial resources<sup>3</sup>;
- 1948 (2) his character and any previous convictions of his<sup>4</sup>; and
- 1949 (3) his proximity, whether in point of kinship, place of residence or otherwise, to the person for whom he is to be surety<sup>5</sup>.

Where a court grants a person bail in criminal proceedings on such a condition but is unable to release him because no surety or no suitable surety is available, the court must fix the amount in which the surety is to be bound<sup>6</sup>. The recognisance of the surety may be entered into before such of the following persons or descriptions of persons as the court may by order specify or, if it makes no such order, before any of the following persons, that is to say:

- 1950 (a) where the decision is taken by a magistrates' court, before a justice of the peace, a justices' clerk or a police officer who is of the rank of inspector or above or who is in charge of a police station or, if Criminal Procedure Rules so provide, by a person of such other description as is specified in the rules<sup>7</sup>;
- 1951 (b) where the decision is taken by the Crown Court, before any of the persons specified in head (a) above or, if Criminal Procedure Rules so provide, by a person of such other description as is specified in the rules<sup>8</sup>;
- 1952 (c) where the decision is taken by the High Court or the Court of Appeal, before any of the persons specified in head (a) above or, if Civil Procedure Rules or criminal procedure rules so provide, by a person of such other description as is specified in the rules<sup>9</sup>;
- 1953 (d) where the decision is taken by the Courts-Martial Appeal Court, before any of the persons specified in head (a) above or, if courts-martial appeal rules so provide, by a person of such other description as is specified in the rules<sup>10</sup>,

and Civil Procedure Rules, criminal procedure rules or courts-martial appeal rules may also prescribe the manner in which a recognisance which is to be entered into before such a person is to be entered into and the persons by whom and the manner in which the recognisance may be enforced<sup>11</sup>.

Where a surety seeks to enter into his recognisance before any person<sup>12</sup> but that person declines to take the surety's recognisance because he is not satisfied of the surety's suitability, the surety may apply to:

- 1954 (i) the court which fixed the amount of the recognisance in which the surety was to be bound<sup>13</sup>; or
- 1955 (ii) a magistrates' court<sup>14</sup>,



for that court to take his recognisance and that court must, if satisfied of his suitability, take his recognisance<sup>15</sup>.

1 For the meaning of 'bail in criminal proceedings' see PARA 1166 ante.

2 For the meaning of 'surrender to custody' see PARA 1167 note 2 ante.

3 Bail Act 1976 s 8(1), (2)(a). It is irresponsible, and possibly a matter for consideration by a professional disciplinary body, for a lawyer, legal executive or court clerk to tender anyone as a surety unless he had reasonable grounds for believing that the surety would, if necessary, be able to meet his financial undertaking. The same applies to a court official and unless the surety has the benefit of separate legal advice, the court official should make some inquiries to satisfy himself that the surety would, if necessary, be able to pay and that the recognisance was realistic: *R v Birmingham Crown Court, ex p Rashid Ali* (1998) 163 JP 145, DC.

4 Bail Act 1976 s 8(1), (2)(b).

5 Ibid s 8(1), (2)(c).

6 Ibid s 8(1), (3). The provisions of s 8(4), (5) (see the text and notes 7-15 infra) or, in a case where the proposed surety resides in Scotland, s 8(6) (see note 11 infra) apply for the purpose of enabling the recognisance to be entered into subsequently: s 8(3). See also the Criminal Justice Act 1987 s 5(3) (prospectively repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 58, Sch 37 Pt 4 as from a day to be appointed, but at the date at which this volume states the law no such day had been appointed).

7 Bail Act 1976 s 8(1), (4)(a) (s 8(4)(a)-(c) amended by the Courts Act 2003 Sch 8 para 186(1), (2)). See PARA 1182 note 1 post.

8 Bail Act 1976 s 8(1), (4)(b) (as amended: see note 7 supra). See PARA 1187 note 10 post.

9 Ibid s 8(1), (4)(c) (as amended: see note 7 supra). See PARAS 1192 note 7, 1194 post.

10 Ibid s 8(1), (4)(d).

11 Ibid s 8(1), (4) (amended by the Courts Act 2003 s 109(1), Sch 8 para 186(1), (2)). If the court is satisfied of the suitability of the proposed surety, it may direct that arrangements be made for the recognisance of the surety to be entered into in Scotland before any constable, within the meaning of the Police (Scotland) Act 1967, having charge at any police office or station in like manner as the recognisance would be entered into in England and Wales: Bail Act 1976 s 8(6).

Where, in pursuance of s 8(4) (as amended) or s 8(6), a recognisance is entered into otherwise than before the court that fixed the amount of the recognisance, the same consequences follow as if it had been entered into before that court: s 8(7).

As to variation of bail conditions after a recognisance has been entered into see PARA 1167 ante. As to forfeiture of recognisances in relation to magistrates' courts see PARA 1182 note 1 post; as to forfeiture of recognisances in relation to the Crown Court see PARA 1187 note 12 post; as to forfeiture of recognisances in relation to the High Court see PARA 1192 note 7 post; and as to forfeiture of recognisances in relation to the Court of Appeal see PARA 1194 note 2 post.

12 Ie in accordance with ibid s 8(4) (as amended): see the text and notes 7-11 supra.

13 Ibid s 8(5)(a).

14 Ibid s 8(5)(b) (amended by the Courts Act 2003 s 109(1), (3), Sch 8 para 186(1), (3), Sch 10).

15 Bail Act 1976 s 8(5).

## UPDATE

### 1165-1176 In General

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

## **1172 Bail with sureties**

TEXT AND NOTES 1-5--It is lawful for a recognisance in Crown Court proceedings to be continuous until the conclusion of those proceedings: *Choudhry v Crown Court at Birmingham*; *Hanson v Crown Court at Birmingham* [2007] EWHC 2764 (Admin), (2007) 172 JP 33, DC.

TEXT AND NOTES 7-11--Bail Act 1976 s 8(4) further amended: Armed Forces Act 2006 Sch 16 para 76.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/(1) IN GENERAL/1173. Record of decisions.

### **1173. Record of decisions.**

Where:

- 1956 (1) a court<sup>1</sup> or constable grants bail in criminal proceedings<sup>2</sup>; or
- 1957 (2) a court withholds bail<sup>3</sup> in criminal proceedings<sup>4</sup>; or
- 1958 (3) a court, officer of a court or constable appoints a time or place or a different time or place for a person granted bail in criminal proceedings to surrender to custody<sup>5</sup>; or
- 1959 (4) a court or constable varies<sup>6</sup> any conditions of bail or imposes conditions in respect of bail in criminal proceedings<sup>7</sup>,

that court, officer or constable must make a record of the decision<sup>8</sup> and, if requested to do so by the person in relation to whom the decision was taken, must cause him to be given a copy of the record of the decision as soon as practicable after the record is made<sup>9</sup>. However, where bail in criminal proceedings is granted by indorsing a warrant of arrest for bail<sup>10</sup>, the constable who releases on bail the person arrested must make the record instead of the judge or justice who issued the warrant<sup>11</sup>.

Where a magistrates' court or the Crown Court grants bail in criminal proceedings to a person<sup>12</sup> after hearing representations from the prosecutor<sup>13</sup> in favour of withholding bail, then the court must give reasons for granting bail<sup>14</sup>. A court which is so required to give reasons for its decision must include a note of those reasons in the record of its decision and, if requested to do so by the prosecutor, must cause the prosecutor to be given a copy of the record of the decision as soon as practicable after the record is made<sup>15</sup>.

Where a magistrates' court or the Crown Court:

- 1960 (a) withholds bail in criminal proceedings; or
- 1961 (b) imposes conditions in granting bail in criminal proceedings; or
- 1962 (c) varies any conditions of bail or imposes conditions in respect of bail in criminal proceedings,

in relation to a person<sup>16</sup>, the court must give reasons for withholding bail or for imposing or varying the conditions<sup>17</sup>. A court which is so required to give reasons for its decision must include a note of those reasons in the record of its decision and must, except in a case where this need not be done<sup>18</sup>, give a copy of that note to the person in relation to whom the decision was taken<sup>19</sup>. However, the Crown Court need not give a copy of the note of the reasons for its decision to the person in relation to whom the decision was taken where that person is represented by counsel or a solicitor unless his counsel or solicitor requests the court to do so<sup>20</sup>.

Where a magistrates' court withholds bail in criminal proceedings from a person who is not represented by counsel or a solicitor, the court must if it is committing or sending him for trial to the Crown Court, or if it issues a certificate that the court has heard full argument on his application for bail before it refused the application<sup>21</sup>, inform him that he may apply to the Crown Court<sup>22</sup> to be granted bail<sup>23</sup>.

Where in criminal proceedings a magistrates' court remands a person in custody under specified provisions<sup>24</sup> after hearing full argument on an application for bail from him, and either it has not previously heard such argument on an application for bail from him in those proceedings or it has previously heard full argument from him on such an application but it is satisfied that there has been a change in his circumstances or that new considerations have been placed before it, it is the duty of the court to issue a certificate<sup>25</sup> that the court heard full argument on his application for bail before it refused the application<sup>26</sup>.

1 For the meaning of 'court' for these purposes see PARA 1169 note 2 ante.

2 Bail Act 1976 s 5(1)(a). For the meaning of 'bail in criminal proceedings' see PARA 1166 ante.

3 le from a person to whom *ibid* s 4 (as amended) applies: see PARA 1169 ante.

4 *Ibid* s 5(1)(b).

5 *Ibid* s 5(1)(c) (amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 12).

6 For the meaning of 'vary' see PARA 1167 note 35 ante.

7 Bail Act 1976 s 5(1)(d) (amended by the Criminal Justice and Public Order Act 1994 s 27, Sch 3 para 1(a)).

8 le in the prescribed manner and containing the prescribed particulars. For these purposes, 'prescribed' means, in relation to the decision of a court or an officer of a court, prescribed by civil procedure rules, courts-martial appeal rules or criminal procedure rules, as the case may require or, in relation to a decision of a constable, prescribed by direction of the Secretary of State: Bail Act 1976 s 5(10) (amended by the Courts Act 2003 s 109(1), Sch 8 para 182).

9 Bail Act 1976 s 5(1). Section 5 (as amended) is subject, in its application to bail granted by a constable, to s 5A (as added) (see PARA 1174 post): s 5(11) (added by the Criminal Justice and Public Order Act 1994 s 27(4), Sch 3 para 1(b)). Any record required by the Bail Act 1976 s 5 (as amended) to be made by a magistrates' court (together with any note of the reasons required by s 5(4) (see the text and note 19 *infra*) to be included and the particulars set out in s 5(6A) (as added and amended) (see note 24 *infra*)) must be made by way of an entry in the register: CrimPR 19.11. Any such record required to be made by the Crown Court (together with any such note) must be made by way of an entry in the file relating to the case in question and must include: (1) the effect of the decision; (2) a statement of any condition imposed in respect of bail, indicating whether it is to be complied with before or after release on bail; (3) where conditions of bail are varied, a statement of the conditions as varied; (4) where bail is withheld, a statement of the relevant exception to the right to bail (as provided in the Bail Act 1976 s 4(5), Sch 1: see PARAS 1170-1171 ante) on which the decision is based: CrimPR 19.18(8). As to the record required to be made by the High Court see PARA 1192 note 7 post.

Where a magistrates' court hears full argument as to bail, the clerk of the court must take a note of that argument: CrimPR 19.10.

10 As to warrants indorsed for bail see PARA 919 ante.

11 Bail Act 1976 s 5(2).

12 le a person to whom *ibid* s 4 (as amended) (see PARA 1169 ante) applies.

13 In relation to extradition proceedings, 'prosecutor' means the person acting on behalf of the territory to which the extradition is sought: *ibid* s 2(2) (added by the Extradition Act 2003 s 198(1), (3)).

14 Bail Act 1976 s 5(2A) (added by the Criminal Justice and Police Act 2001 s 129(1)).

15 Bail Act 1976 s 5(2B) (added by the Criminal Justice and Police Act 2001 s 129(1)).

16 See note 12 *supra*.

17 Bail Act 1976 s 5(3) (amended by the Criminal Justice Act 2003 Sch 37 Pt 2).

18 le by virtue of the Bail Act 1976 s 5(5) (see the text and note 20 *infra*).

19 *Ibid* s 5(4).

20 *Ibid* s 5(5).

21 le under *ibid* s 5(6A) (as added and amended): see note 24 *infra*. Before the Crown Court can deal with an application for bail requiring such a certificate it must be satisfied that the magistrates' court has issued a certificate; because a copy of the certificate is sent to the applicant, and not to the Crown Court, his solicitors must attach a copy of it to the bail application form: *Practice Direction (Criminal Procedure: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at V.53.2, CA.

22 As to bail granted by the Crown Court see PARA 1187 *post*.

23 Bail Act 1976 s 5(6) (amended by the Criminal Justice Act 1982 s 60(2); and the Criminal Justice Act 2003 s 41 Sch 3 para 48(1), (3)(a), Sch 37 Pt 2). The Criminal Justice Act 2003 Sch 3 para 48(1), (3) amends the Bail Act 1976 s 5 (as amended) so as to refer to persons being sent rather than committed for trial, but at the date at which this volume states the law this amendment only has effect in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A(3)(d) (as added) (see PARAS 1132-1133 *ante*).

24 le under:

- 562 (1) the Powers of Criminal Courts (Sentencing) Act 2000 s 11 (remand for medical examination: see MAGISTRATES vol 29(2) (Reissue) PARA 723) (Bail Act 1976 s 5(6A)(a) (s 5(6A) added by the Criminal Justice Act 1982 s 60(2), (3); and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 53(a)));
- 563 (2) the Crime and Disorder Act 1998 s 52(5) (as amended) (adjournment for proceedings under s 51 etc: see PARA 1132 *ante*) in relation to cases sent for trial under s 51 (as substituted) or s 51A(3)(d) (as added) (Bail Act 1976 s 5(6A)(a) (as so added; and amended by the Criminal Justice Act 2003 Sch 3 para 48(1), (3)(b)(i)); Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI 2005/1267, art 2(1), (2)(a), Sch 1 para 1(1)(g)); or
- 564 (3) any of the following provisions: the Magistrates' Courts Act 1980 s 5 (as amended) (adjournment of inquiry into offence: see MAGISTRATES vol 29(2) (Reissue) PARA 710); s 10 (adjournment of trial: see MAGISTRATES vol 29(2) (Reissue) PARA 711); or s 18 (initial procedure on information against adult for offence triable either way: see PARA 1109 *ante*) (Bail Act 1976 s 5(6A)(a)(i)-(iii) (as so added; and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 53(c))).

As from a day to be appointed, the reference in head (2) *supra* to the Crime and Disorder Act 1998 s 52(5) applies for all remaining purposes; and head (3) *supra* is amended so as to remove the reference to the Magistrates' Courts Act 1980 s 5 (as amended), and so as to include references to s 17C (as added) (intention as to plea, adjournment: see PARA 1107 *ante*) and s 24C (prospectively added) (intention as to plea by child or young person, adjournment: see PARA 1117 *ante*): see the Bail Act 1976 s 5(6A)(a) (as so added and amended; prospectively amended by the Criminal Justice Act 2003 ss 41, 331, Sch 3 para 48(1), (3)(b), Sch 36 paras 1, 2, Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

25 The certificate must be in the prescribed form: see the Bail Act 1976 s 5(6A) (as added and amended: see note 24 *supra*). Where a court so issues a certificate in a case where the court has previously heard full argument but is satisfied that there has been a change in circumstances or that new considerations have been placed before it, the court must state in the certificate the nature of the change of circumstances or the new considerations which caused it to hear a further fully argued bail application: s 5(6B) (added by the Criminal Justice Act 1982 s 60(3)). Where a court so issues a certificate, it must cause the person to whom it refuses bail to be given a copy of the certificate: Bail Act 1976 s 5(6C) (added by the Criminal Justice Act 1982 s 60(3)).

26 Bail Act 1976 s 5(6A) (as added and amended: see note 24 *supra*).

## UPDATE

### 1165-1176 In General

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

### 1173 Record of decisions

NOTE 8--Bail Act 1976 s 5(10) further amended: Armed Forces Act 2006 Sch 16 para 74.

NOTE 9--CrimPR Pt 19 now Criminal Procedure Rules 2010, SI 2010/60, Pt 19.

TEXT AND NOTE 20--For 'is represented by counsel or a solicitor unless his counsel or solicitor' read 'has legal representation unless his legal representative': Bail Act 1976 s 5(5) (amended by Legal Services Act 2007 Sch 20 para 35).

TEXT AND NOTE 21--For 'is not represented by counsel or a solicitor' read 'does not have legal representation': Bail Act 1976 s 5(6) (amended by Legal Services Act 2007 Sch 20 para 35).

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### **1174. Supplementary provisions in cases of police bail.**

The provisions under the Bail Act 1976 relating to the making of records of bail decisions<sup>1</sup> apply in relation to bail granted by a custody officer<sup>2</sup> in cases where the normal powers to impose conditions<sup>3</sup> of bail are available to him, subject to the following modifications<sup>4</sup>.

The provisions<sup>5</sup> requiring a court to give reasons for granting bail if it does so after hearing representations from the prosecutor<sup>6</sup> do not apply to bail granted by a custody officer<sup>7</sup>.

The provisions<sup>8</sup> requiring a magistrates' court or the Crown Court to give its reasons for withholding bail or imposing or varying any conditions in respect of bail and to include a note of its reasons in the record of its decision are substituted by a requirement that, where a custody officer, in relation to any person, imposes conditions in granting bail in criminal proceedings<sup>9</sup>, or varies any condition of bail or imposes conditions in respect of bail in such proceedings, the custody officer must give reasons for imposing or varying the conditions<sup>10</sup> and must include a note of those reasons in the custody record<sup>11</sup> and give a copy of the note to the person in relation to whom the decision was taken<sup>12</sup>.

1    Ie the provisions in the Bail Act 1976 s 5 (as amended): see PARA 1173 ante.

2    Ie a custody officer under the Police and Criminal Evidence Act 1984 Pt IV (ss 34-52) (as amended): see PARA 939 ante.

3    Ie the powers under the Bail Act 1976 s 3: see PARA 1167 ante.

4    Ibid s 5A(1) (s 5A added by the Criminal Justice and Public Order Act 1994 s 27(4), Sch 3 para 2).

5    Ie under the Bail Act 1976 s 5(2A), (2B) (as added): see PARA 1173 ante.

6    For the meaning of 'prosecutor' see PARA 1173 note 13 ante.

7    See the Bail Act 1976 s 5A(1A) (s 5A as added (see note 4 supra); and s 5A(1A) added by the Criminal Justice and Police Act 2001 s 129(2)).

8    Ie under the Bail Act 1976 s 5(3): see PARA 1173 ante.

9    For the meaning of 'bail in criminal proceedings' see PARA 1166 ante.

10   See the Bail Act 1976 s 5A(2) (s 5A as added (see note 4 supra); and s 5A(2) amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 2).

11   See PARA 1173 ante.

12   See the Bail Act 1976 s 5A(3) (s 5A as added: see note 4 supra). The provisions of s 5(5), (6) (see PARA 1173 ante) do not apply to police bail: s 5A(4) (as so added).

## **UPDATE**

### **1165-1176 In General**

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

**1174 Supplementary provisions in cases of police bail**

NOTE 2--Or a custody officer under the Criminal Justice Act 2003 Pt III (ss 22-27) (see PARA 1044): 1976 Act s 5A(1) (amended by Police and Justice Act 2006 Sch 14 para 5).



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### **1175. Reconsideration of decisions granting bail.**

Where:

- 1963 (1) a magistrates' court has granted bail in criminal proceedings<sup>1</sup> in connection with an offence triable only on indictment or triable either way or proceedings for such an offence<sup>2</sup>;
- 1964 (2) a constable has granted bail in criminal proceedings in connection with proceedings for such an offence<sup>3</sup>;
- 1965 (3) a magistrates' court or a constable has granted bail in connection with extradition proceedings<sup>4</sup>,

the court or the appropriate court<sup>5</sup> in relation to the constable may, on application by the prosecutor<sup>6</sup> for the decision to be reconsidered:

- 1966 (a) vary the conditions of bail<sup>7</sup>;
- 1967 (b) impose conditions in respect of bail which has been granted unconditionally<sup>8</sup>; or
- 1968 (c) withhold bail<sup>9</sup>.

No application for such reconsideration of a decision may be made unless it is based on information which was not available to the court or constable when the decision was taken<sup>10</sup>. Whether or not the person to whom the application relates appears before it, the magistrates' court must take the decision in accordance with specified<sup>11</sup> provisions<sup>12</sup>.

Where the decision of the court on such a reconsideration is to withhold bail from the person to whom it was originally granted, the court must:

- 1969 (i) if that person is before the court, remand him in custody<sup>13</sup>; and
- 1970 (ii) if that person is not before the court, order him to surrender himself forthwith into the custody of the court<sup>14</sup>.

Where a person surrenders himself into the custody of the court in compliance with such an order, the court must remand him in custody<sup>15</sup>. A person who has been ordered to surrender to custody may be arrested without warrant by a constable if he fails without reasonable cause to surrender to custody in accordance with the order<sup>16</sup>.

Where the court, on a reconsideration, refuses to withhold bail from a relevant person<sup>17</sup> after hearing representations from the prosecutor in favour of withholding bail, then the court must give reasons for refusing to withhold bail<sup>18</sup>. A court which is required<sup>19</sup> to give reasons for its decision must include a note of those reasons in any record of its decision and, if requested to do so by the prosecutor, must cause the prosecutor to be given a copy of any such record as soon as practicable after the record is made<sup>20</sup>.

1 For the meaning of 'bail in criminal proceedings' see PARA 1166 ante.

2 Bail Act 1976 s 5B(A1)(a), (2) (s 5B added by the Criminal Justice and Public Order Act 1994 s 30; and s 5B(A1) added by the Extradition Act 2003 s 198(1), (6)).

3 Bail Act 1976 s 5B(A1)(b) (as added: see note 2 supra).

4 Ibid s 5B(A1)(c) (as added: see note 2 supra).

5 le: (1) the magistrates' court (if any) appointed by the custody officer as the court before which the person to whom bail was granted has a duty to appear; or (2) if no such court has been appointed, a magistrates' court acting for the local justice area in which the police station at which bail was granted is situated: CrimPR 19.2(1).

6 For the meaning of 'prosecutor' see PARA 1173 note 13 ante.

7 Bail Act 1976 s 5B(1)(a) (s 5B as added (see note 2 supra); and s 5B(1) substituted by the Extradition Act 2003 s 198(1), (6)).

8 Bail Act 1976 s 5B(1)(b) (s 5B as added (see note 2 supra); and s 5B(1) as substituted (see note 7 supra)).

9 Ibid s 5B(1)(c) (s 5B as added (see note 2 supra); and s 5B(1) as substituted (see note 7 supra)).

10 Ibid s 5B(3) (as added: see note 2 supra).

11 le in accordance with ibid s 4(1), Sch 1: see PARA 1169 ante.

12 Ibid s 5B(4) (as added: see note 2 supra).

13 Ibid s 5B(5)(a) (as added: see note 2 supra).

14 Ibid s 5B(5)(b) (as added: see note 2 supra).

15 Ibid s 5B(6) (as added: see note 2 supra).

16 Ibid s 5B(7) (as added: see note 2 supra). A person arrested in pursuance of s 5B(7) (as added) must be brought as soon as practicable, and in any event within 24 hours after his arrest, before a justice of the peace and the justice must remand him in custody: s 5B(8) (as so added; and amended by the Courts Act 2003 s 109(1), (3), Sch 8 paras 183(1), (2), Sch 10). In reckoning for this purpose any period of 24 hours, no account is to be taken of Christmas Day, Good Friday or any Sunday: Bail Act 1976 s 5B(8) (as so added and amended).

17 A 'relevant person' means a person to whom ibid s 4(1) and Sch 1 (see PARA 1169 ante) apply in accordance with s 5B(4) (as added) (see the text and note 12 supra): s 5B(8B) (s 5B as added (see note 2 supra); and s 5B(8B) added by the Criminal Justice and Police Act 2001 s 129(3)).

18 Bail Act 1976 s 5B(8A) (s 5B as added (see note 2 supra); and s 5B(8A) added by the Criminal Justice and Police Act 2001 s 129(3)).

19 le required by virtue of the Bail Act 1976 s 5B(8A) (as added): see the text and note 18 supra.

20 Ibid s 5B(8C) (s 5B as added (see note 2 supra); and s 5B(8C) added by the Criminal Justice and Police Act 2001 s 129(3)). Criminal Procedure Rules must include provision: (1) requiring notice of an application under the Bail Act 1976 s 5B (as added and amended) and of the grounds for it to be given to the person affected, including notice of the powers available to the court under it; (2) for securing that any representations made by the person affected (whether in writing or orally) are considered by the court before making its decision; and (3) designating the court which is the appropriate court in relation to the decision of any constable to grant bail: s 5B(9) (s 5B as so added; and s 5B(9) amended by the Courts Act 2003 s 109(1), Sch 8 paras 1, 3). As to the rules that have been made see CrimPR 19.2.

## **UPDATE**

### **1165-1176 In General**

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

### **1175 Reconsideration of decisions granting bail**

NOTES 5, 20--CrimPR 19.2 now Criminal Procedure Rules 2010, SI 2010/60, r 19.2.

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### **1176. Effect of bail.**

The effect of granting bail is not to set the defendant free, but to release him from the custody of the law and to entrust him to the custody of his sureties, who are bound to produce him to appear at his trial at a specified time and place<sup>1</sup>. The sureties may seize their principal at any time<sup>2</sup> and may discharge themselves by handing him over to the custody of the law, and he will then be imprisoned unless he obtains fresh bail. A surety who believes that the principal is likely to break the condition as to his appearance may have him arrested by a constable<sup>3</sup>. A contract by the defendant or someone else to indemnify a surety against liability under his recognisance is illegal<sup>4</sup>; and a person who enters into such an agreement is guilty of an offence<sup>5</sup>.

1 2 Hawk PC c 15 s 3. As to bail with sureties see PARA 1172 ante.

2 *Anon* (1704) 6 Mod Rep 231; *Ex p Lyne* (1822) 3 Stark 132; *Foxhall v Barnett* (1853) 23 LJQB 7.

3 See PARA 1200 head (3) post.

4 *Herman v Jeuchner* (1885) 15 QBD 561, CA; *Consolidated Exploration and Finance Co v Musgrave* [1900] 1 Ch 37; *R v Porter* [1910] 1 KB 369, 3 Cr App Rep 237, CCA; and see CONTRACT vol 9(1) (Reissue) PARA 727.

5 See PARA 1201 post.

## **UPDATE**

### **1165-1176 In General**

For bail decisions relating to persons aged under 18 who are accused of offences mentioned in the Magistrates' Courts Act 1980 Sch 2 see Bail Act 1976 s 9A (added by Criminal Justice and Immigration Act 2008 Sch 12 para 3).

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## **(2) BAIL GRANTED BY A MAGISTRATES' COURT**

### **1177. Bail on arrest.**

Where a person has been granted bail under the Police and Criminal Evidence Act 1984<sup>1</sup> subject to a duty to appear before a magistrates' court, the court before which he is to appear may appoint a later time as the time at which he is to appear and may enlarge the recognisances of any sureties for him at that time<sup>2</sup>.

The recognisance of any surety for any person granted bail subject to a duty to attend at a police station may be enforced as if it were conditioned for his appearance before a magistrates' court acting in the local justice area in which the police station named in the recognisance is situated<sup>3</sup>.

<sup>1</sup> See under the Police and Criminal Evidence Act 1984 Pt IV (ss 34-52) (as amended). See PARA 935 ante.

<sup>2</sup> Magistrates' Courts Act 1980 s 43(1) (s 43 substituted by the Police and Criminal Evidence Act 1984 s 47(8)(a); and the Magistrates' Courts Act 1980 s 43(1) amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 43). Notice of the change of time must be given to the person granted bail and to his sureties, if any: see CrimPR 19.3.

<sup>3</sup> Magistrates' Courts Act 1980 s 43(2) (as substituted (see note 2 supra); and amended by the Courts Act 2003 s 109(1), Sch 8, PARA 206).

### **UPDATE**

### **1177 Bail on arrest**

NOTE 2--CrimPR 19.3 now Criminal Procedure Rules 2010, SI 2010/60, r 19.3.

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**1178. Restriction on grant of bail in treason.**

A person charged with treason may not be granted bail except by order of a judge of the High Court or the Secretary of State<sup>1</sup>.

<sup>1</sup> Magistrates' Courts Act 1980 s 41.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/(2) BAIL GRANTED BY A MAGISTRATES' COURT/1179. Remand on bail.

**1179. Remand on bail.**

Where a magistrates' court has power to remand any person, the court may<sup>1</sup> remand him on bail<sup>2</sup>. If a magistrates' court is satisfied that any person who has been remanded is unable by reason of illness or accident to appear or be brought before the court at the expiration of the period for which he was remanded, the court may remand him for a further time on bail<sup>3</sup>.

1     le subject to the Bail Act 1976 s 4 (as amended) (see PARA 1169 ante) and to any other statutory modification.

2     See the Magistrates' Courts Act 1980 s 128(1)(b); and MAGISTRATES vol 29(2) (Reissue) PARA 718.

3     See PARA 1148 ante.

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### **1180. Bail on committing or sending to Crown Court.**

A magistrates' court may commit or send a person for trial on bail in accordance with the Bail Act 1976<sup>1</sup>; and, where his release on bail is conditional on his providing one or more surety or sureties<sup>2</sup> and the court fixes the amount in which the surety is to be bound with a view to his entering into a recognisance subsequently, the court must in the meantime commit the defendant to custody<sup>3</sup>.

1 See PARA 1123 ante; and MAGISTRATES vol 29(2) (Reissue) PARAS 676, 777. Where a magistrates' court has committed or sent a person on bail to the Crown Court for trial or committed a person for sentence etc under any of the enactments mentioned in CrimPR 43.1(1) (see PARA 1123 note 11 ante), and subsequently varies any conditions of the bail or imposes any conditions in respect of the bail, the magistrates' court officer must send to the Crown Court officer a copy of the record made in pursuance of the Bail Act 1976 s 5 (as amended) relating to such variation or imposition of conditions: CrimPR 19.21. See also PARAS 1167 note 19, 1173 ante.

2 See under the Bail Act 1976 s 8(3) (see PARA 1172 ante).

3 See PARA 1137 ante; and MAGISTRATES vol 29(2) (Reissue) PARA 676. As to the subsequent taking of recognisances see PARA 1182 post.

### **UPDATE**

### **1180 Bail on committing or sending to Crown Court**

NOTE 1--CrimPR 19.21 now Criminal Procedure Rules 2010, SI 2010/60, r 19.21.



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### **1181. Exercise of discretion by justices in granting bail.**

In deciding questions relating to the granting of bail, justices act judicially and not ministerially<sup>1</sup>. A justice may be indicted if he refuses bail from improper motives<sup>2</sup>, or sued if he does so maliciously<sup>3</sup>.

Excessive bail ought not to be required<sup>4</sup>. If a justice is satisfied with the pecuniary sufficiency of the sureties offered<sup>5</sup>, he cannot reject them because of their political opinions<sup>6</sup>; but it is inexpedient to accept the defendant's legal representative as a surety<sup>7</sup>.

1 *Linford v Fitzroy* (1849) 13 QB 240 at 247.

2 *R v Badger* (1843) 4 QB 468 at 472.

3 See *Linford v Fitzroy* (1849) 13 QB 240.

4 Bill of Rights (1688) s 1. Bail is not, however, excessive merely because sureties cannot be found: see *R v Governor of Brixton Prison, ex p Goswami* (1966) Times, 22 December.

5 If there is a doubt whether a surety will be able to meet the amount of the recognisance, the justices may properly reject him as a surety: *R v Harrow Justices, ex p Morris* [1973] QB 672 at 677, [1972] 3 All ER 494 at 496, DC. See also 2 Hawk PC c 15 s 4 (the sureties should be of ability sufficient to answer the sum in which they are bound). As to bail with sureties see further PARA 1172 ante.

6 *R v Badger* (1843) 4 QB 468.

7 *R v Scott Jervis* (1876) Times, 20 November.

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## **1182. Postponement of taking recognisance.**

Where a magistrates' court has power to take any recognisance, the court may, instead of taking it, fix the amount in which the defendant's sureties, if any, are to be bound; and thereafter the recognisance may be taken by any such person<sup>1</sup> as may be prescribed<sup>2</sup>. Where a recognisance is so entered into otherwise than before the court that fixed the amount of it, the same consequences follow as if it had been entered into before that court<sup>3</sup>.

1 Where a magistrates' court has fixed the amount in which any surety is to be bound by a recognisance, the recognisance may be entered into by a surety in connection with bail in criminal proceedings where the defendant is in a prison or other place of detention, before the governor or keeper of the prison or other place of detention as well as before the persons mentioned in the Bail Act 1976 s 8(4)(a) (see PARA 1172 head (a) ante): CrimPR 19.5(1).

The court officer for the magistrates' court which has fixed the amount in which any surety is to be bound by a recognisance or, under the Bail Act 1976 s 3(5), (6) or (6A) (as added) (see PARA 1167 ante), imposed any requirement to be complied with before a person's release on bail or any condition of bail must issue a certificate showing the amount and conditions, if any, of the recognisance or, as the case may be, containing a statement of the requirement or condition of bail; and a person authorised to take the recognisance or do anything in relation to the compliance with such requirement or condition of bail may not be required to take or do it without production of such certificate: CrimPR 19.5(2). If any person proposed as a surety for a person committed to custody by a magistrates' court produces to the governor or keeper of the prison or other place of detention in which the person so committed is detained a certificate to the effect that he is acceptable as a surety, signed by any of the justices composing the court or the clerk of the court and signed in the margin by the person proposed as surety, the governor or keeper must take the recognisance of the person so proposed: CrimPR 19.5(3).

Where the recognisance of any surety of a person committed to custody by a magistrates' court is taken by any person other than the court which committed the first-mentioned person to custody, the person taking the recognisance must send it to the court officer for that court; provided that if the person committed has been committed to the Crown Court for trial or committed for sentence etc under any of the enactments mentioned in CrimPR 43.1(1) (see PARA 1180 note 1 ante), the person taking the recognisance must send it to the appropriate officer of the Crown Court: CrimPR 19.5(4).

Where a magistrates' court has, with a view to the release on bail of a person in custody, fixed the amount in which any surety of such a person is to be bound or has, under the Bail Act 1976 s 3(5), (6), or (6A) (as added), imposed any requirement to be complied with before his release or any condition of bail: (1) the magistrates' court officer must give notice thereof to the governor or keeper of the prison or place where that person is detained by sending him such a certificate as is mentioned in CrimPR 19.5(2); and (2) any person authorised to take the recognisance of a surety or do anything in relation to the compliance with such requirement must, on taking or doing it, send notice thereof by post to the governor or keeper and, in the case of a recognisance of a surety, must give a copy of the notice to the surety: CrimPR 19.6.

Where a magistrates' court has, with a view to the release on bail of a person in custody, fixed the amount in which any surety is to be bound or, under the Bail Act 1976 s 3(5) or (6), imposed any requirement to be complied with before his release and so given notice to the governor or keeper of the prison or place where that person is detained, the governor or keeper, when satisfied that the recognisances of all sureties required have been taken and that all such requirements have been complied with, must release the defendant, unless the defendant is in custody for some other cause: CrimPR 19.7.

Where a recognisance is conditioned for the appearance of a person before a magistrates' court, or for his doing any other thing connected with a proceeding before a magistrates' court, and the defendant fails to appear in accordance with the condition, the court must declare the recognisance to be forfeited and issue a summons directed to each person bound by the recognisance as surety, requiring him to appear before the court on a date specified in the summons to show cause why he should not be adjudged to pay the sum in which he is bound, and on that date the court may proceed in the absence of any surety if it is satisfied that he has been served with the summons: Magistrates' Courts Act 1980 s 120(1), (1A) (amended by the Crime and Disorder Act 1998 s 55). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 157.

2 Magistrates' Courts Act 1980 s 119(1).

3 Ibid s 119(2). For these purposes, references in the Magistrates' Courts Act 1980 or any other Act to the court before which a recognisance was entered into are to be construed accordingly: s 119(2). Nothing in s 119 enables a magistrates' court to alter the amount of a recognisance fixed by the High Court or the Crown Court: s 119(3) (amended by the Criminal Justice Act 1982 s 77, Sch 14 para 55).

## **UPDATE**

### **1182 Postponement of taking recognisance**

NOTE 1--CrimPR 19.5-19.7 now Criminal Procedure Rules 2010, SI 2010/60, rr 19.5-19.7.

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### **1183. Granting of bail after committal in custody.**

Until a day to be appointed<sup>1</sup>, where a magistrates' court has committed a person for trial in custody<sup>2</sup>, then, if that person is in custody for no other cause, the court may, at any time before his first appearance before the Crown Court, grant him bail<sup>3</sup> subject to a duty to appear before the Crown Court for trial<sup>4</sup>.

1 The Magistrates' Courts Act 1980 s 6 (committal for trial) is prospectively repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 51(1), (3), Sch 37 Pt 4. At the date at which this volume states the law no day had been appointed for this repeal to come into effect.

2 Ie under the Magistrates' Courts Act 1980 s 6(3)(a): see MAGISTRATES vol 29(2) (Reissue) PARA 676.

3 Ie in accordance with the Bail Act 1976: see PARA 1166 et seq ante.

4 See the Magistrates' Courts Act 1980 s 6(4); and MAGISTRATES vol 29(2) (Reissue) PARA 676.

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#### **1184. Bail where defendant arrested under Crown Court warrant.**

Where<sup>1</sup> a magistrates' court commits to custody or releases on bail a person who has been arrested in pursuance of a warrant issued by the Crown Court<sup>2</sup>, or the officer in charge of a police station releases<sup>3</sup> such a person on bail, the designated officer for the court or the police officer, as the case may be, must forthwith notify the appropriate officer of the Crown Court of the action which has been taken and, if that person has been released, must as soon as practicable transmit to the appropriate officer of the Crown Court a copy of the record made<sup>4</sup> relating to such bail<sup>5</sup>.

1    le under the Courts Act 1971 s 13(7) (repealed: see now the Magistrates' Courts Act 1980 s 43A (as added); and PARA 1261 post).

2    As to warrants of arrest issued by the Crown Court see PARA 1261 post.

3    le under the Courts Act 1971 s 13(6). See also POLICE vol 36(1) (2007 Reissue) PARA 519.

4    le the record made in pursuance of the Bail Act 1976 s 5 (as amended): see PARA 1173 ante.

5    Magistrates' Courts Rules 1981, SI 1981/552, r 89 (amended by SI 2001/610; SI 2005/617).

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### **1185. Power to grant bail where police bail has been granted.**

Where a custody officer<sup>1</sup> grants<sup>2</sup> bail to any person in criminal proceedings<sup>3</sup> and imposes conditions, or varies<sup>4</sup>, in relation to any person, conditions of bail in criminal proceedings, a magistrates' court may, on application by or on behalf of that person, grant bail or vary the conditions<sup>5</sup>. On such an application, the court, if it grants bail and imposes conditions or if it varies the conditions may impose more onerous conditions<sup>6</sup>. On determining such an application, the court must remand the applicant in custody or on bail in accordance with the determination, and, where the court withholds bail or grants bail, the grant of bail made by the custody officer lapses<sup>7</sup>.

1 See PARA 939 ante.

2 Ie under the Police and Criminal Evidence Act 1984 Pt IV (ss 34-51) (see PARA 941 ante).

3 'Bail in criminal proceedings' has the same meaning as in the Bail Act 1976 (see PARA 1166 ante): Magistrates' Courts Act 1980 s 43B(4) (s 43B added by the Criminal Justice and Public Order Act 1994 s 27, Sch 3 para 3).

4 Ie varies conditions of bail in criminal proceedings under the Bail Act 1976 s 3(8). 'Varies' has the same meaning as in the Bail Act 1976 (see PARA 1167 note 35 ante): Magistrates' Courts Act 1980 s 43B(4) (as added: see note 3 supra).

5 Ibid s 43B(1) (as added: see note 3 supra). For the procedure to be followed on such an application see CrimPR 19.1.

6 Magistrates' Courts Act 1980 s 43B(2) (as added: see note 3 supra).

7 Ibid s 43B(3) (as added: see note 3 supra).

### **UPDATE**

### **1185 Power to grant bail where police bail has been granted**

NOTE 5--CrimPR 19.1 now Criminal Procedure Rules 2010, SI 2010/60, r 19.1.

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### **1186. Appeal against grant of bail.**

Where a magistrates' court grants bail to a person who is charged with or convicted of an offence punishable by a term of imprisonment, the prosecution may appeal to a judge of the Crown Court against the granting of bail<sup>1</sup>.

Where a magistrates' court grants bail to a person in connection with extradition proceedings, the prosecution may appeal to a judge of the Crown Court against the granting of bail<sup>2</sup>.

Such an appeal<sup>3</sup> may be made only if:

- 1971 (1) the prosecution made representations that bail should not be granted; and
- 1972 (2) the representations were made before it was granted<sup>4</sup>.

In the event of the prosecution wishing to exercise this right of appeal, oral notice of appeal must be given to the court which granted bail at the conclusion of the proceedings in which such bail was granted and before the release from custody of the person concerned<sup>5</sup>. Written notice of appeal must thereafter be served on the court which granted bail and the person concerned within two hours of the conclusion of such proceedings<sup>6</sup>. Upon receipt from the prosecution of oral notice of appeal from its decision to grant bail the court which granted bail must remand in custody the person concerned, until the appeal is determined or otherwise disposed of<sup>7</sup>.

Where the prosecution fails, within the period of two hours, to serve one or both of the requisite notices<sup>8</sup>, the appeal is deemed to have been disposed of<sup>9</sup>.

The hearing of such an appeal against a decision of the court to grant bail must be commenced within 48 hours, excluding weekends and any public holiday<sup>10</sup>, from the date on which oral notice of appeal is given<sup>11</sup>.

At the hearing<sup>12</sup> of any such appeal by the prosecution, the appeal must be by way of rehearing; and the judge hearing the appeal may remand the person concerned in custody or may grant bail subject to such conditions, if any, as he thinks fit<sup>13</sup>.

1 Bail (Amendment) Act 1993 s 1(1) (substituted by the Criminal Justice Act 2003 s 18). In relation to a child or young person, within the meaning of the Children and Young Persons Act 1969 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1238), the reference in the Bail (Amendment) Act 1993 s 1(1) to an offence punishable by imprisonment is to be read as a reference to an offence which would be so punishable in the case of an adult: s 1(10)(a) (amended by the Criminal Justice Act 2003 s 18(1), (3)).

The Bail (Amendment) Act 1993 s 1(1) (as substituted) applies only where the prosecution is conducted by or on behalf of the Director of Public Prosecutions, or by a person who falls within such class or description of person as may be prescribed for the purposes of s 1 (as amended) by order made by the Secretary of State: s 1(2). The power to make an order under s 1(2) is exercisable by statutory instrument and any such instrument is subject to annulment in pursuance of a resolution of either House of Parliament: s 1(11). The following have been so prescribed: the Director of the Serious Fraud Office and any person designated under the Criminal Justice Act 1987 s 1(7) (see PARA 1089 ante); the Secretary of State for Trade and Industry; the Secretary of State for Social Security; a universal service provider (within the meaning of the Postal Services Act 2000 (see POST OFFICE)) in connection with the provision of a postal service (within the meaning of that Act (see POST OFFICE)); and the Director of Revenue and Customs Prosecutions (see PARA 1068 ante) and any person designated under the Commissioners for Revenue and Customs Act 2005 s 37(1) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1193); Bail (Amendment) Act 1993 (Prescription of Prosecuting Authorities) Order 1994, SI 1994/1438

(amended by SI 2001/1149; SI 2005/1129). There is no longer a Secretary of State for Social Security; social security matters are now the responsibility of the Secretary of State for Work and Pensions.

Where the prosecution wishes to exercise the right of appeal, under the Bail (Amendment) Act 1993 s 1 (as amended), to a judge of the Crown Court against a decision to grant bail, the oral notice of appeal must be given to the justices' clerk and to the person concerned at the conclusion of the proceedings in which such bail was granted and before the release of the person concerned: CrimPR 19.16(1). References in CrimPR 19.16 to 'the person concerned' are references to such a person within the meaning of the Bail (Amendment) Act 1993 s 1 (as amended): CrimPR 19.16(11).

2 Bail Act 1976 s 1(1A) (added by the Extradition Act 2003 s 200(1), (2)). 'Extradition proceedings' means proceedings under the Extradition Act 2003 (see EXTRADITION); 'magistrates' court' and 'court' in relation to extradition proceedings means a District Judge (Magistrates' Courts) designated for the purposes of the Extradition Act 2003 Pt 1 (ss 1-68) or Pt 2 (ss 69-141) by the Lord Chancellor; 'prosecution' in relation to extradition proceedings means the person acting on behalf of the territory to which extradition is sought: Bail (Amendment) Act 1993 s 1(12) (added by the Extradition Act 2003 s 200(1), (9)).

3 le under the Bail (Amendment) Act 1993 s 1(1) (as substituted) or s 1(1A) (as added).

4 Ibid s 1(3) (amended by the Extradition Act 2003 s 200(1), (3)).

5 Bail (Amendment) Act 1993 s 1(4) (amended by the Extradition Act 2003 s 200(1), (4), Sch 4). This provision was satisfied where notice was given five minutes after the justices had withdrawn: *R v Isleworth Crown Court, ex p Clarke* [1998] 1 Cr App Rep 257, DC. When oral notice of appeal is given, the justices' clerk must announce in open court the time at which such notice was given: CrimPR 19.16(2). A record of the prosecution's decision to appeal and the time the oral notice of appeal was given must be made in the register and must contain the particulars set out: CrimPR 19.16(3). Where an oral notice of appeal has been given the court must remand the person concerned in custody by a warrant of commitment: CrimPR 19.16(4).

6 Bail (Amendment) Act 1993 s 1(5) (amended by the Extradition Act 2003 s 200(1), (5)). The written notice of appeal required by the Bail (Amendment) Act 1993 s 1(5) (as amended) must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA, *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; and must be served on the magistrates' court officer and the person concerned: CrimPR 19.17(2). For these purposes, 'the person concerned' has the same meaning as in the Bail (Amendment) Act 1993: CrimPR 19.17(1).

The Crown Court officer must enter the appeal and give notice of the time and place of the hearing to: (1) the prosecution; (2) the person concerned or his legal representative; and (3) the magistrates' court officer: CrimPR 19.17(3). On receipt of the written notice of appeal required by the Bail (Amendment) Act 1993 s 1(5) (as amended), the court must remand the person concerned in custody by a warrant of commitment, until the appeal is determined or otherwise disposed of: CrimPR 19.16(5). A record of the receipt of the written notice of appeal must be made in the same manner as that of the oral notice of appeal under CrimPR 19.16(3) (see note 5 supra): CrimPR 19.16(6). If, having given oral notice of appeal, the prosecution fails to serve a written notice of appeal within the two hour period referred to in the Bail (Amendment) Act 1993 s 1(5) (as amended) the justices' clerk must, as soon as practicable, by way of written notice (served by a court officer) to the persons in whose custody the person concerned is, direct the release of the person concerned on bail as granted by the magistrates' court and subject to any conditions which it imposed: CrimPR 19.16(7). If the prosecution serves notice of abandonment of appeal on a court officer, the justices' clerk must, forthwith, by way of written notice (served by the court officer) to the governor of the prison where the person concerned is being held, or the person responsible for any other establishment where such a person is being held, direct his release on bail as granted by the magistrates' court and subject to any conditions which it imposed: CrimPR 19.16(8). A court officer must record the prosecution's failure to serve a written notice of appeal, or its service of a notice of abandonment: CrimPR 19.16(9). Where a written notice of appeal has been served on a magistrates' court officer, he must provide as soon as practicable to a Crown Court officer a copy of that written notice, together with the notes of argument made by the court officer for the court under CrimPR 19.10 (see PARA 1173 ante); and a note of the date, or dates, when the person concerned is next due to appear in the magistrates' court, whether he is released on bail or remanded in custody by the Crown Court: CrimPR 19.16(10).

At any time after the service of written notice of appeal under CrimPR 19.17(2), the prosecution may abandon the appeal by giving notice in writing in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA, *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA: CrimPR 19.17(6).

The notice of abandonment required by CrimPR 19.17(6) must be served on the person concerned or his legal representative; the magistrates' court officer; and the Crown Court officer: CrimPR 19.17(7).

7 Bail (Amendment) Act 1993 s 1(6) (amended by the Extradition Act 2003 s 200(1), (6)). In relation to a child or young person (within the meaning of the Children and Young Persons Act 1969: see CHILDREN AND YOUNG



PERSONS vol 5(4) (2008 Reissue) PARA 1238), the references in the Bail (Amendment) Act 1993 s 1(6) (as amended) and s 1(9) (see the text and note 13 infra) to remand in custody are to be read subject to the provisions of the Children and Young Persons Act 1969 s 23 (remands to local authority accommodation: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1247-1253): Bail (Amendment) Act 1993 s 1(10)(b) (amended by the Extradition Act 2003 s 200(1), (8)). Where a person concerned has not been able to instruct a solicitor to represent him at the appeal, he may give notice to the Crown Court requesting that the Official Solicitor represent him at the appeal, and the court may, if it thinks fit, assign the Official Solicitor to act for the person concerned accordingly: CrimPR 19.17(5).

8 le the notices mentioned in the Bail (Amendment) Act 1993 s 1(5) (as amended) (see the text and note 6 supra).

9 Ibid s 1(7). See *R (on the application of Jeffrey) v Warwick Crown Court* [2002] EWHC 2469 (Admin), [2003] Crim LR 190 (fact that notice under the Bail (Amendment) Act 1993 s 1(5) was served three minutes after expiry of two-hour period was held not to dispose of appeal under s 1(7); prosecutor had used all due diligence to try and serve the notice and failure to do so was due to circumstances beyond his control, and appellant was not prejudiced by delay).

10 le Christmas Day, Good Friday or a bank holiday.

11 Bail (Amendment) Act 1993 s 1(8) (amended by the Extradition Act 2003 ss 200(1), (7), 220, Sch 4). The hearing must be commenced within 48 hours of the end of the day on which oral notice of appeal is given: *R v Middlesex Crown Court, ex p Okoli* [2001] 1 Cr App Rep 1, [2000] Crim LR 921, 165 JP 144.

12 The hearing may be conducted by the judge sitting in chambers: CrimPR 16.11(1), (2)(h). The person concerned is not entitled to be present at the hearing of the appeal unless he is acting in person or, in any other case of an exceptional nature, a judge of the Crown Court is of the opinion that the interests of justice require him to be present and gives him leave to be so: CrimPR 19.17(4). For these purposes, 'person concerned' has the same meaning as in the Bail (Amendment) Act 1993 s 1 (as amended): CrimPR 19.17(1).

13 Bail (Amendment) Act 1993 s 1(9). Any record required by the Bail Act 1976 s 5 (see PARA 1173 ante) (together with any note of reasons required by s 5(4) to be included) must be made by way of an entry in the file relating to the case in question and the record must include the following particulars, namely: (1) the effect of the decision; (2) a statement of any condition imposed in respect of bail, indicating whether it is to be complied with before or after release on bail; and (3) where bail is withheld, a statement of the relevant exception to the right to bail (as provided in the Bail Act 1976 Sch 1: see PARAS 1170-1171 ante) on which the decision is based: CrimPR 19.17(8).

The Crown Court officer must, as soon as practicable after the hearing of the appeal, give notice of the decision and of the matters required by CrimPR 19.17(8) to be recorded to the person concerned or his legal representative; the prosecution; the police; the magistrates' court officer; and the governor of the prison or person responsible for the establishment where the person concerned is being held: CrimPR 19.17(9).

Where the judge hearing the appeal grants bail to the person concerned, the provisions of CrimPR 19.18(9) (informing the court of any earlier application for bail: see PARA 1188 post) and CrimPR 19.22 (conditions attached to bail granted by the Crown Court: see PARA 1187 note 12 post) apply as if that person had applied to the Crown Court for bail: CrimPR 19.17(10).

In addition to the methods of service permitted by CrimPR 4.3 (service of documents in Crown Court proceedings: see PARA 1992 post), the notices required by CrimPR 19.17(3), (5), (7), (9) may be sent by way of facsimile transmission and the notice required by CrimPR 19.17(3) may be given by telephone: CrimPR 19.17(11).

## UPDATE

### 1186 Appeal against grant of bail

NOTES--Crim PR Pt 19 now Criminal Procedure Rules 2010, SI 2010/60, Pt 19.

NOTE 1--SI 1994/1438 further amended: SI 2007/3224, SI 2009/2748.

TEXT AND NOTE 2--Reference to a judge of the Crown Court is now to the High Court: 1993 Act s 1(1A) (amended by Police and Justice Act 2006 Sch 13 para 28).

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### **(3) BAIL GRANTED BY THE CROWN COURT**

#### **1187. Crown Court's power to grant bail.**

The Crown Court may<sup>1</sup> grant bail to any person:

- 1973 (1) who has been committed in custody for appearance before the Crown Court<sup>2</sup>, or in relation to whose case a notice of transfer has been given under a relevant transfer provision<sup>3</sup> or who has been sent<sup>4</sup> in custody for trial<sup>5</sup>; or
- 1974 (2) who is in custody pursuant to a sentence imposed by a magistrates' court and who has appealed to the Crown Court against his conviction or sentence<sup>6</sup>; or
- 1975 (3) who is in the custody of the Crown Court pending the disposal of his case by that court<sup>7</sup>; or
- 1976 (4) who, after the decision of his case by the Crown Court, has applied to that court for the statement of a case for the High Court on that decision<sup>8</sup>; or
- 1977 (5) who has applied to the High Court for a quashing order to remove proceedings in the Crown Court in his case into the High Court, or has applied to the High Court for leave to make such an application<sup>9</sup>; or
- 1978 (6) to whom the Crown Court has granted a certificate<sup>10</sup>; or
- 1979 (7) who has been remanded in custody by a magistrates' court on adjourning a case<sup>11</sup>,

and the time during which a person is released on bail under any of the above provisions does not count as part of any term of imprisonment or detention under his sentence<sup>12</sup>.

1    Ie subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended) (see PARA 1170 ante): Supreme Court Act 1981 s 81(1) (amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 48). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

2    As to the commitment of a defendant to custody see PARA 1162 ante.

3    Ie under the Criminal Justice Act 1987 s 4 (as amended; prospectively repealed) (see PARA 1105 ante) or under the Criminal Justice Act 1991 s 53 (as amended; prospectively repealed) (see PARA 1105 ante): Supreme Court Act 1981 s 81(7) (added by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 19(b)). As to the prospective renaming of the Supreme Court Act 1981 see note 1 supra.

4    Ie under the Crime and Disorder Act 1998 s 51 or s 51A (as added) (see PARAS 1131-1133 ante).

5    Supreme Court Act 1981 s 81(1)(a) (amended by the Criminal Justice Act 1987 s 15, Sch 2 para 12; the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 19(a); the Crime and Disorder Act 1998 s 119, Sch 8 para 48; and the Criminal Justice Act 2003 s 41, Sch 3 para 54(1), (5)(a)(i)(b)). As from a day to be appointed the Supreme Court Act 1981 s 81(1)(a) is amended so as to apply only to a person who has been sent in custody to the Crown Court for trial under the Crime and Disorder Act 1998 s 51 or s 51A (as added) (see notes 3, 4 supra): see the Supreme Court Act 1981 s 81(1)(a) (as so amended; prospectively amended by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 54(1), (5)(a)(i)(a), Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

6    Supreme Court Act 1981 s 81(1)(b). See further PARA 1989 post. As to the prospective renaming of the Supreme Court Act 1981 see note 1 supra.

7 Ibid s 81(1)(c). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17.

8 Ibid s 81(1)(d). See further PARA 2010 post.

9 Ibid s 81(1)(e) (amended by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, arts 2, 6)). See further PARA 2017 post.

10 Supreme Court Act 1981 s 81(1)(f) (added by the Criminal Justice Act 1982 s 29(1)). The text refers to a certificate granted under the Criminal Appeal Act 1968 s 1(2) (as amended) (see PARA 1837 post) or s 11(1A) (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 46) or a certificate that a case is fit for appeal on a ground which involves a question of law alone: Supreme Court Act 1981 s 81(1)(f), (1B) (s 81(1B) added by the Criminal Justice Act 1982 ss 29(1), 60(1)). See further PARA 1837 post.

The power conferred by head (6) in the text does not extend to a case to which the Criminal Appeal Act 1968 s 12 (as amended) (see PARA 1838 post), s 15 (as amended) (see PARA 1839 post) or s 16A (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332, 334, 368) applies: Supreme Court Act 1981 s 81(1A) (added by the Criminal Justice Act 1982 s 29(1); and amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 7, Sch 3 para 6; and the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 15)). As to matters to be considered by the Crown Court judge hearing an application for bail under these provisions see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.50.3-IV.50.6, CA. The procedure is described in *Guide to Proceedings in the Court of Appeal, Criminal Division* (1983) 77 Cr App Rep 138.

The power conferred by head (6) in the text is to be exercised: (1) where the appeal is under the Criminal Appeal Act 1968 s 1 (as amended) (see PARA 1837 post) or s 9 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 46, 48), by the judge who tried the case; and (2) where it is under the Criminal Appeal Act 1968 s 10 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 47), by the judge who passed the sentence: Supreme Court Act 1981 s 81(1C) (added by the Criminal Justice Act 1982 s 29(1)). Such power may only be exercised within 28 days from the date of the conviction appealed against, or in the case of an appeal against sentence, from the date on which sentence was passed or, in the case of an order made or treated as made on conviction, from the date of the making of the order: Supreme Court Act 1981 s 81(1D) (added by the Criminal Justice Act 1982 s 29(1)). Such power may not be exercised if the appellant has made an application to the Court of Appeal for bail in respect of the offence or offences to which the appeal relates: Supreme Court Act 1981 s 81(1E) (added by the Criminal Justice Act 1982 s 29(1)). As to bail granted by the Court of Appeal see PARA 1193 et seq post.

It is a condition of bail granted in the exercise of such power that, unless a notice of appeal has previously been lodged in accordance with the Criminal Appeal Act 1968 s 18(1) (see PARA 1863 post): (a) such a notice must be so lodged within the period specified in s 18(2) (see PARA 1863 post); and (b) not later than 14 days from the end of that period, the appellant must lodge with the Crown Court a certificate from the Registrar of Criminal Appeals that a notice of appeal was given within that period: Supreme Court Act 1981 s 81(1F) (added by the Criminal Justice Act 1982 s 29(1)). If the Crown Court grants bail to a person in the exercise of such power, it may direct him to appear: (i) if a notice of appeal is lodged within the period mentioned in the Criminal Appeal Act 1968 s 18(2), at such time and place as the Court of Appeal may require; and (ii) if no such notice is lodged within that period, at such time and place as the Crown Court may require: Supreme Court Act 1981 s 81(1G) (added by the Criminal Justice Act 1982 s 29(1)).

11 Supreme Court Act 1981 s 81(1)(g) (added by the Criminal Justice Act 1982 s 60(1)). Head (7) in the text applies to a person who has been remanded in custody by a magistrate's court on adjourning a case under:

- 565 (1) the Powers of Criminal Courts (Sentencing) Act 2000 s 11 (remand for medical examination: see MAGISTRATES vol 29(2) (Reissue) PARA 723) (Supreme Court Act 1981 s 81(1)(g) (as so added)); or
- 566 (2) any of the following provisions: the Magistrates' Courts Act 1980 s 5 (as amended) (adjournment of inquiry into offence: see MAGISTRATES vol 29(2) (Reissue) PARA 710); s 10 (adjournment of trial: see MAGISTRATES vol 29(2) (Reissue) PARA 711); s 18 (initial procedure on information against adult for offence triable either way: see PARA 1109 ante) (see the Supreme Court Act 1981 s 81(1)(g) (as so added; and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 87(a))).

As from a day to be appointed, the reference in head (2) supra to the Magistrates' Courts Act 1980 s 5 (as amended) is repealed (see the Supreme Court Act 1981 s 81(1)(g)(i) (as so added; prospectively repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 54(1), (5)(a)(ii), Sch 37 Pt 4), and the following provisions are to be added to those listed above: the Crime and Disorder Act 1998 s 52(5) (as amended) (adjournment for proceedings under s 51 etc: see PARA 1132 ante); the Magistrates' Courts Act 1980 s 17C (as added) (intention as to plea: adjournment: see PARA 1107 ante); s 24C (prospectively added) (intention as to plea by child or young person, adjournment: see PARA 1117 ante); see the Supreme Court Act 1981 s 81 (prospectively

amended by the Criminal Justice Act 2003 Sch 3 para 54(1), (5)(a)(ii), Sch 36 para 4, Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

Where the Crown Court grants a person bail under head (7) in the text, it may direct him to appear at a time and place which the magistrates' court could have directed and the recognisance of any surety must be conditioned accordingly: Supreme Court Act 1981 s 81(1H) (added by the Criminal Justice Act 1982 s 60(1)). The Crown Court may only grant bail to a person under head (7) in the text, however, if the magistrates' court which remanded him in custody has certified under the Bail Act 1976 s 5(6A) (as added) (see PARA 1173 ante) that it heard full argument on his application for bail before it refused the application: Supreme Court Act 1981 s 81(1J) (added by the Criminal Justice Act 1982 s 60(1)).

As to venue in respect of applications to the Crown Court see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, at V.53.3, CA.

12 Supreme Court Act 1981 s 81(1).

Where the Crown Court grants bail in criminal proceedings, the recognisance of any surety required as a condition of bail may be entered into before an officer of the Crown Court or, where the person who has been granted bail is in a prison or other place of detention, before the governor or keeper of the prison or place as well as before the persons specified in the Bail Act 1976 s 8(4) (see PARA 1172 ante): CrimPR 19.22(1). Where the Crown Court under the Bail Act 1976 s 3(5) or (6) (see PARA 1167 ante) imposes a requirement to be complied with before a person's release on bail, the court may give directions as to the manner in which and the person or persons before whom the requirement may be complied with: CrimPR 19.22(2).

A person who, in pursuance of an order made by the Crown Court for the grant of bail, proposes to enter into a recognisance or give security must, unless the Crown Court otherwise directs, give notice to the prosecutor at least 24 hours before he enters into the recognisance or gives security: CrimPR 19.22(3).

Where, in pursuance of an order of the Crown Court, a recognisance is entered into or any requirement imposed under the Bail Act 1976 s 3(5) or (6) is complied with (being a requirement to be complied with before a person's release on bail) before any person, it is his duty to cause the recognisance or, as the case may be, a statement of the requirement to be transmitted forthwith to the court officer; and a copy of the recognisance or statement must at the same time be sent to the governor or keeper of the prison or other place of detention in which the person named in the order is detained, unless the recognisance was entered into or the requirement was complied with before such governor or keeper: CrimPR 19.22(4). Where, in pursuance of the Bail Act 1976 s 3(5), security has been given in respect of a person granted bail with a duty to surrender to the custody of the Crown Court and either that person surrenders to the custody of the court or, that person having failed to surrender to the custody of the court, the court decides not to order the forfeiture of the security, the court officer must as soon as practicable give notice of the surrender to custody or, as the case may be, of the decision not to forfeit the security to the person before whom the security was given: CrimPR 19.22(5).

Where a recognisance has been entered into in respect of a person granted bail to appear before the Crown Court and it appears to the court that a default has been made in performing the conditions of the recognisance, the court may order the recognisance to be estreated: CrimPR 19.23(1). Where the court is to consider making such an order, the court officer must give notice to that effect to the person by whom the recognisance was entered into indicating the time and place at which the matter will be considered; and no such order may be made before the expiry of seven days after such notice has been given: CrimPR 19.23(2). As to the duty of a court before ordering forfeiture under CrimPR 19.23 see *R v Crown Court at Reading, ex p Bello* [1992] 3 All ER 353, 92 Cr App Rep 303, CA. 'Default', in the Crown Court Rules 1982, SI 1982/1109, r 21, means 'failure': *R v Crown Court at Warwick, ex p Smalley* [1987] 1 WLR 237, 84 Cr App Rep 51, DC.

Where a recognisance is conditioned for the appearance of a defendant before the Crown Court and the defendant fails to appear in accordance with the condition, the court must declare the recognisance to be forfeited: CrimPR 19.24(1). Where the Crown Court declares a recognisance to be forfeited under CrimPR 19.24(1), the court officer must issue a summons to the person by whom the recognisance was entered into requiring him to appear before the court at a time and place specified in the summons to show cause why the court should not order the recognisance to be estreated: CrimPR 19.24(2). At the time specified in the summons the court may proceed in the absence of the person by whom the recognisance was entered into if it is satisfied that he has been served with the summons: CrimPR 19.24(3).

## UPDATE

### 1187 Crown Court's power to grant bail

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 12--CrimPR 19.22-19.24 now Criminal Procedure Rules 2010, SI 2010/60, rr 19.22-19.24. See also *Choudhry v Crown Court at Birmingham*; *Hanson v Crown Court at Birmingham* [2007] EWHC 2764 (Admin), (2007) 172 JP 33, DC (recognisance forfeited

despite sureties' efforts to extricate themselves from obligations and to bring defendant to trial).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/(3) BAIL GRANTED BY THE CROWN COURT/1188. Procedure on application to the Crown Court for bail.

### **1188. Procedure on application to the Crown Court for bail.**

Where an application to the Crown Court relating to bail is made otherwise than during the hearing of proceedings in the Crown Court<sup>1</sup>, notice in writing of intention to make such an application must, at least 24 hours before it is made, be given to the prosecutor and, if the prosecution is being carried on by the Crown Prosecution Service, to the appropriate Crown prosecutor or, if the application is to be made by the prosecutor or a constable<sup>2</sup>, to the person to whom bail was granted<sup>3</sup>.

On receiving such notice, the prosecutor<sup>4</sup> or the appropriate Crown prosecutor or, as the case may be, the person to whom bail was granted must:

- 1980 (1) notify the Crown Court officer and the applicant that he wishes to be represented at the hearing of the application; or
- 1981 (2) notify the Crown Court officer and the applicant that he does not oppose the application; or
- 1982 (3) give to the Crown Court officer, for the consideration of the Crown Court, a written statement of his reasons for opposing the application, at the same time sending a copy of the statement to the applicant<sup>5</sup>.

The applicant is not entitled<sup>6</sup> to be present on the hearing of his application unless the Crown Court gives him leave to be present<sup>7</sup>.

Where a person who is in custody or has been released on bail desires to make an application relating to bail and has not been able to instruct a solicitor to apply on his behalf<sup>8</sup>, he may give notice in writing to the Crown Court of his desire to make such an application, requesting that the Official Solicitor act for him in the application, and the court may, if it thinks fit, assign the Official Solicitor to act for the applicant accordingly<sup>9</sup>. Where the Official Solicitor has been so assigned, the Crown Court may, if it thinks fit, dispense with the requirements as to notice of intention to make an application<sup>10</sup> and deal with the application in a summary manner<sup>11</sup>.

Any record required<sup>12</sup> (together with any note or reasons required<sup>13</sup> to be included) must be made by way of an entry in the file relating to the case in question and the records must include the following particulars:

- 1983 (a) the effect of the decision<sup>14</sup>;
- 1984 (b) a statement of any condition imposed in respect of bail, indicating whether it is to be complied with before or after release on bail<sup>15</sup>;
- 1985 (c) where conditions of bail are varied, a statement of the conditions as varied<sup>16</sup>; and
- 1986 (d) where bail is withheld, a statement of the relevant exception to the right to bail<sup>17</sup> on which the decision is based<sup>18</sup>.

<sup>1</sup> Every person who makes an application to the Crown Court relating to bail must inform the court of any earlier application to the High Court or the Crown Court relating to bail in the course of the same proceedings: CrimPR 19.18(9).

2 le under the Bail Act 1976 s 3(8) (as amended): see PARA 1167 ante.

3 CrimPR 19.18(1), (2). The notice must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA, *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA, or to the like effect; and the applicant must give a copy of the notice to the Crown Court officer: CrimPR 19.18(4).

The jurisdiction of the Crown Court in hearing applications for bail may be exercised by a judge of the Crown Court sitting in chambers: CrimPR 16.11(1), (2)(a).

The prosecution has, in certain circumstances, a right of reply to bail applications: *R v Crown Court at Isleworth, ex p Customs and Excise Comrs* [1990] Crim LR 859, DC.

4 For the meaning of 'prosecutor' see PARA 1173 note 13 ante.

5 CrimPR 19.18(3).

6 le except in the case of an application made by the prosecutor or a constable under the Bail Act 1976 s 3(8): see PARA 1167 ante.

7 CrimPR 19.18(5).

8 le under CrimPR 19.18(1)-(5): see the text and notes 1-7 supra.

9 CrimPR 19.18(6).

10 le the requirements of CrimPR 19.18(2): see the text and note 3 supra.

11 CrimPR 19.18(7).

12 le by the Bail Act 1976 s 5: see PARA 1173 ante.

13 le by *ibid* s 5(4).

14 CrimPR 19.18(8)(a).

15 CrimPR 19.18(8)(b).

16 CrimPR 19.18(8)(c).

17 le as provided in the Bail Act 1976 Sch 1 (as amended) (see PARAS 1170-1171 ante).

18 CrimPR 19.18(8)(d).

## UPDATE

### 1188 Procedure on application to the Crown Court for bail

TEXT AND NOTES--CrimPR 19.18 now Criminal Procedure Rules 2010, SI 2010/60, r 19.8.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/(3) BAIL GRANTED BY THE CROWN COURT/1189. Appeal to Crown Court.

### **1189. Appeal to Crown Court.**

Where a magistrates' court grants bail<sup>1</sup> to a person ('the person concerned') on adjourning a case under specified provisions<sup>2</sup>, the person concerned may appeal to the Crown Court against any condition of bail of a specified<sup>3</sup> type<sup>4</sup>. However, such an appeal may not be brought unless an application<sup>5</sup> to the magistrates' court, by or on behalf of the person granted bail or by the prosecutor<sup>6</sup> or a constable for the variation or imposition of conditions, or an application<sup>7</sup> by the prosecutor for re-consideration of a decision to grant bail, was made and determined before the appeal was brought<sup>8</sup>.

On such an appeal the Crown Court may vary the conditions of bail<sup>9</sup>. Where the Crown Court determines such an appeal the person concerned may not bring any such further appeal<sup>10</sup> in respect of the conditions of bail unless an application or a further application<sup>11</sup> to the magistrates' court for variation of conditions is made and determined after the appeal<sup>12</sup>.

<sup>1</sup> Ie bail in criminal proceedings within the meaning of the Bail Act 1976 (see PARA 1166 ante): Criminal Justice Act 2003 s 21.

<sup>2</sup> Ie under the Magistrates' Court Act 1980 s 10 (adjournment of trial: see MAGISTRATES vol 29(2) (Reissue) PARA 707); s 17C (as added) (intention as to plea, adjournment: see PARA 1107 ante); s 18 (see MAGISTRATES); s 24C (prospectively added) (intention as to plea by child or young person, adjournment: see PARA 1117 ante); the Crime and Disorder Act 1998 s 52(5) (as amended) (adjournment for proceedings under s 51 etc: see PARA 1132 ante); or the Powers of Criminal Courts (Sentencing) Act 2000 s 11 (remand for medical examination: see MAGISTRATES vol 29(2) (Reissue) PARA 723): see the Criminal Justice Act 2003 a 16(1)(a)-(f).

<sup>3</sup> Ie a requirement: (1) that the person concerned resides away from a particular place or area; (2) that the person concerned resides at a particular place other than a bail hostel; (3) for the provision of a surety or sureties or the giving of a security; (4) that the person concerned remains indoors between certain hours; (5) imposed under the Bail Act 1976 s 3(6ZAA) (as added) (requirements with respect to electronic monitoring: see PARA 1167 ante); or (6) that the person concerned makes no contact with another person: Criminal Justice Act 2003 s 16(3).

<sup>4</sup> Ibid s 16(1), (2).

<sup>5</sup> Ie on application under the Bail Act 1976 s 3(8) (as amended) (see PARA 1167 ante): Criminal Justice Act 2003 s 16(5), (6)(a).

<sup>6</sup> For the meaning of 'prosecutor' see PARA 1173 note 13 ante.

<sup>7</sup> Ie an application under the Bail Act 1976 s 5B(1) (as added) (see PARA 1175 ante): Criminal Justice Act 2003 s 16(6)(b).

<sup>8</sup> See ibid s 16(4).

<sup>9</sup> Ibid s 16(7). The judge of the Crown Court may sit in chambers when hearing such an appeal: CrimPR 16.11(1), (2)(i).

<sup>10</sup> Ie under the Criminal Justice Act 2003 s 16.

<sup>11</sup> Ie under the Bail Act 1976 s 3(8)(a) (application by person to whom bail granted) (see PARA 1167 ante).

<sup>12</sup> Criminal Justice Act 2003 s 16(8).

### **UPDATE**



**1189 Appeal to Crown Court**

NOTE 9--CrimPR 16.11 now Criminal Procedure Rules 2010, SI 2010/60, r 16.11.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/ (4) BAIL GRANTED BY THE HIGH COURT/1190. Power of the High Court to grant, or vary the conditions of, bail.

#### **(4) BAIL GRANTED BY THE HIGH COURT**

##### **1190. Power of the High Court to grant, or vary the conditions of, bail.**

Where: (1) a magistrates' court withholds bail in criminal proceedings<sup>1</sup> or imposes conditions in granting bail in criminal proceedings<sup>2</sup>; and (2) it does so where an application to the court to state a case for the opinion of the High Court is made<sup>3</sup>, the High Court may grant bail or vary<sup>4</sup> the conditions<sup>5</sup>. Where the High Court so grants a person bail, it may direct him to appear at a time and place which the magistrates' court could have directed and the recognisance of any surety must be conditioned accordingly<sup>6</sup>.

The inherent power of the High Court to entertain an application:

1987 (a) in relation to bail<sup>7</sup> where a magistrates' court: (i) has granted or withheld<sup>8</sup> bail, or (ii) has varied the conditions of bail,

1988 (b) in relation to bail where the Crown Court has determined specified types of application<sup>9</sup>,

is abolished<sup>10</sup>.

The High Court has no power to entertain an application in relation to bail where the Crown Court has determined<sup>11</sup> an appeal against specified<sup>12</sup> conditions of bail imposed by a magistrates' court on adjourning a case under specified<sup>13</sup> provisions<sup>14</sup>.

The High Court has no power to entertain an application in relation to bail where the Crown Court has granted or withheld bail<sup>15</sup> before an application, or before a hearing of an application for re-trial of a serious offence<sup>16</sup>.

1 For these purposes, 'bail in criminal proceedings' has the same meaning as in the Bail Act 1976 (see PARA 1166 ante): Criminal Justice Act 1967 s 22(4) (amended by the Bail Act 1976 s 12(1), Sch 2 para 37).

2 Criminal Justice Act 1967 s 22(1)(a) (s 22(1) substituted by the Bail Act 1976 s 12(1), Sch 2 para 37; and the Criminal Justice Act 1967 s 22(1)(a) amended by the Criminal Law Act 1977 s 65(4), Sch 12; and by the Criminal Justice Act 2003 s 17(1)(a)).

3 Criminal Justice Act 1967 s 22(1)(b) (s 22(1) as substituted (see note 2 supra); and s 22(1)(b) added by the Criminal Justice Act 2003 s 17(1)(b)).

4 For these purposes, 'vary' has the same meaning as in the Bail Act 1976 (see PARA 1167 note 35 ante): Criminal Justice Act 1967 s 22(4) (as amended: see note 1 supra).

5 Criminal Justice Act 1967 s 22(1) (s 22(1) as substituted (see note 2 supra); and amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 15; and the Criminal Justice Act 2003 s 332, Sch 37 Pt 2). The powers conferred by the Criminal Justice Act 1967 s 22 (as amended) are in substitution for the powers conferred by the Criminal Justice Act 1948 s 37(1)(b) (as substituted and amended: see PARAS 2010, 2017 post) but, save as aforesaid, the Criminal Justice Act 1967 s 22 (as amended) does not prejudice any powers of the High Court to admit or direct the admission of persons to bail: s 22(5).

The Criminal Justice Act 1948 s 37(4), (6) (as amended) (ancillary provisions as to persons granted bail by the High Court under s 37 (as amended) and the currency of sentence in the case of persons so admitted: see PARA 2010 post) applies in relation to the powers conferred by the Criminal Justice Act 1967 s 22 (as amended) and

persons granted bail in pursuance of those powers as it applies in relation to the powers conferred by the Criminal Justice Act 1948 s 37 (as amended) and persons admitted to bail in pursuance of those powers: Criminal Justice Act 1967 s 22(3) (amended by the Courts Act 1971 Sch 8 para 48(b); the Bail Act 1976 s 12(1), (2), Sch 2 para 37, Sch 3; and the Criminal Justice Act 2003 s 331, Sch 37 Pt 2).

6 Criminal Justice Act 1967 s 22(2) (substituted by the Bail Act 1976 Sch 2 para 37; and amended by the Criminal Law Act 1977 Sch 12).

7 Any reference in the Criminal Justice Act 2003 s 17 to an application in relation to bail is to be read as including an application for bail to be granted, an application for bail to be withheld, and an application for the conditions of bail to be varied: s 17(7).

8 Any reference in *ibid* s 17 to the withholding of bail is to be read as including a reference to the revocation of bail: s 17(8).

9 *Ie* under the Bail Act 1976 s 3(8) (as amended) (see PARA 1167 ante) or under the Supreme Court Act 1981 s 81(1)(a), (b), (c) or (g) (as amended) (see PARA 1187 heads (1)-(3), (7) ante). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

10 Criminal Justice Act 2003 s 17(2), (3). Although the High Court has jurisdiction to judicially review (see PARA 2013 post) a refusal of bail in the Crown Court that jurisdiction should be exercised sparingly: *R (on the application of M) v Isleworth Crown Court* [2005] EWHC 363 (Admin), [2005] 5 Archbold News 2. See also *R (on the application of Allwin) v Snaresbrook Crown Court* [2005] EWHC 742 (Admin), [2005] All ER (D) 40 (Apr); *R (on the application of Galliano) v Crown Court at Manchester* [2005] EWHC 1125 (Admin), [2005] All ER (D) 320 (May).

11 *Ie* under the Criminal Justice Act 2003 s 16: see PARA 1189 ante.

12 *Ie* specified under *ibid* s 16(3), which specifies a requirement:

- 567 (1) that the person concerned resides away from a particular place or area;
- 568 (2) that the person concerned resides at a particular place other than a bail hostel;
- 569 (3) for the provision of a surety or sureties or the giving of a security;
- 570 (4) that the person concerned remains indoors between certain hours;
- 571 (5) imposed under the Bail Act 1976 s 3(6ZAA) (as added) (requirements with respect to electronic monitoring: see PARA 1167 ante); or
- 572 (6) that the person concerned makes no contact with another person.

13 *Ie* under the Magistrates' Courts Act 1980 s 10 (as amended) (adjournment of trial: see MAGISTRATES vol 29(2) (Reissue) PARAS 707, 711); s 17C (as added) (intention as to plea, adjournment: see PARA 1107 ante); s 18 (as amended) (see PARA 1109 ante); s 24C (prospectively added) (intention as to plea by child or young person, adjournment: see PARA 1117 ante); the Crime and Disorder Act 1998 s 52(5) (as amended) (adjournment for proceedings under s 51 etc: see PARA 1132 ante); or the Powers of Criminal Courts (Sentencing) Act 2000 s 11 (remand for medical examination: see MAGISTRATES vol 29(2) (Reissue) PARA 723).

14 See the Criminal Justice Act 2003 s 17(4).

15 *Ie* under *ibid* ss 88, 89 (see PARAS 1946-1947 post).

16 See *ibid* s 17(5). Nothing in s 17 affects any other power of the High Court to grant or withhold bail or to vary the conditions of bail, or any right of a person to apply for a writ of habeas corpus or any other prerogative remedy: s 17(6). Section 17 does not prevent judicial review of a bail decision in a magistrates' court: see PARA 2013 et seq post.

## UPDATE

### 1190 Power of the High Court to grant, or vary the conditions of, bail

NOTE 5--Where a magistrates' court withholds bail in extradition proceedings or imposes conditions in granting bail in extradition proceedings, the High Court may

grant bail or vary the conditions: 1967 Act s 22(1A) (added by Police and Justice Act 2006 Sch 13 para 27(2)(b)). 'Extradition proceedings' has the same meaning as in the Bail Act 1976 (see PARA 1166 NOTE 7): 1967 Act s 22(4) (amended by 2006 Act Sch 13 para 27(2)(c)).

NOTE 9--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/ (4) BAIL GRANTED BY THE HIGH COURT/1191. Bail pending appeal.

### **1191. Bail pending appeal.**

The power of the High Court under any enactment or rule of law to grant bail in connection with proceedings pending before the High Court<sup>1</sup> includes power<sup>2</sup> to grant bail pending the appeal<sup>3</sup> to an appellant<sup>4</sup> or a person applying for leave to appeal to the House of Lords<sup>5</sup>. Where application is made to the High Court for leave to appeal, that court may give such directions as it thinks fit for discharging or enlarging any recognisances entered into by any surety, under any enactment or otherwise, with reference to the proceedings of that court<sup>6</sup>.

Where the defendant<sup>7</sup> in any proceedings from which appeal lies to the House of Lords<sup>8</sup> would, but for the decision of the court below<sup>9</sup>, be liable to be detained, and immediately after that decision the prosecutor<sup>10</sup> is granted, or gives notice that he intends to apply for, leave to appeal, the court may make an order providing for the detention<sup>11</sup> of the defendant, or directing that he may not be released except on bail<sup>12</sup>, so long as any appeal<sup>13</sup> is pending<sup>14</sup>. Unless the appeal has previously been disposed of, an order so made ceases to have effect at the expiration of the period for which the defendant would have been liable to be detained but for the decision of the court below<sup>15</sup>.

Where a person subject to a sentence is granted bail pending an appeal to the House of Lords<sup>16</sup>, the time during which he is released on bail is to be disregarded in computing the term of his sentence<sup>17</sup>. However, any sentence passed on such an appeal in substitution for another sentence begins to run, unless the House of Lords or the court below otherwise directs, from the time when that other sentence would have begun to run<sup>18</sup>.

1 See PARAS 1190 ante, 2010, 2017 post.

2 This power is subject to the Criminal Justice and Public Order Act 1994 s 25: see PARA 1170 ante.

3 For these purposes, an appeal under the Administration of Justice Act 1960 s 1(1)(a) (as amended) (see PARA 2020 post) is to be treated as pending until any application for leave to appeal is disposed of and, if leave is granted, until the appeal is disposed of; and an application for leave to appeal is to be treated as disposed of at the expiration of the time within which it may be made, if it is not made within that time: s 17(4). For these purposes, 'leave to appeal' means leave to appeal to the House of Lords under s 1(1)(a) (as amended) (see PARA 2020 post): s 1(5). As from a day to be appointed this provision is amended so as to refer to the Supreme Court instead of the House of Lords: see s 1(5) (prospectively amended by the Constitutional Reform Act 2005 s 40, Sch 9 para 13(1), (2)(d)). At the date at which this volume states the law no such day had been appointed.

4 Ie an appellant under the Administration of Justice Act 1960 s 1(1)(a) (as amended): see PARA 2020 post.

5 Ibid s 4(2) (amended by the Criminal Justice Act 1967 s 98(6), Sch 4 para 24(b); the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 10; and the Access to Justice Act 1999 s 63(2)). In relation to the time and place of appearance appointed and any recognisance to be entered into by any surety under the Criminal Justice Act 1948 s 37 (as amended) (as applied by the Administration of Justice Act 1960 s 4(2) (as so amended)), any reference in the Criminal Justice Act 1948 s 37 (as amended) to the judgment of the High Court is to be construed as a reference to the judgment of the House of Lords or, if the case is remitted by that House to the court below, to the judgment of that court on the case as so remitted: Administration of Justice Act 1960 s 4(2) (amended by the Bail Act 1976 s 12(1), Sch 2 para 31). As from a day to be appointed this provision is amended so as to refer to the Supreme Court instead of the House of Lords: see the Administration of Justice Act 1960 s 4(2) (as so amended; prospectively amended by the Constitutional Reform Act 2005 s 40, Sch 9 para 13(1), (4)). At the date at which this volume states the law no such day had been appointed. As to bail on an application for a quashing order following conviction or sentence by a magistrates' court see the Criminal Justice Act 1948 s 37(1)(d) (as substituted); and MAGISTRATES vol 29(2) (Reissue) PARA 884.

6 Administration of Justice Act 1960 s 4(3) (amended by the Bail Act 1976 s 12(2), Sch 3; and the Access to Justice Act 1999 s 63(2)).

7 Ie, in relation to proceedings for an offence, and in relation to an application for a mandatory order, prohibitory order or quashing order in connection with such proceedings, the person who was or would have been the defendant in those proceedings: see the Administration of Justice Act 1960 s 17(1)(a). Any references to 'the prosecutor' are to be construed accordingly: s 17(1).

8 Ie under *ibid* s 1(1)(a): see PARA 2020 post. As from a day to be appointed the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed.

9 For these purposes, any reference to the court below, in relation to any function of a Divisional Court, is to be construed as a reference to the Divisional Court or to a judge according as the function is by virtue of the rules of court exercisable by the Divisional Court or a judge: *ibid* s 17(3).

10 See note 7 *supra*.

11 Any order so made for the detention of a defendant who, but for the decision of the court below, would be liable to be detained under an order or direction under the Mental Health Act 1983 Pt III (ss 35-55) (as amended) (see MENTAL HEALTH vol 30(2) (Reissue) PARA 486 et seq) (other than under s 35, s 36 or s 38 (as amended)) is an order authorising his continued detention in pursuance of that order or direction, and the provisions of the Mental Health Act 1983 with respect to persons so liable (including the provisions as to the renewal of authority for detention and the removal or discharge of patients) apply accordingly: Administration of Justice Act 1960 s 5(4) (amended by the Mental Health Act 1983 s 148(1), (2), Sch 4 para 17).

Where an order is made under the Administration of Justice Act 1960 s 5(1) (as amended) (see the text and note 14 *infra*) in the case of a defendant who, but for the decision of the court below, would be liable to be detained in pursuance of an interim hospital order under the Mental Health Act 1983 s 38 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334), the order may, if the court thinks fit, be one authorising his continued detention in a hospital or mental nursing home; and in that event: (1) the Administration of Justice Act 1960 s 5(3) (see the text and note 15 *infra*) does not apply to the order; (2) the Mental Health Act 1983 Pt III (as amended) applies as if he had been ordered under the Administration of Justice Act 1960 s 5 (as amended) to be detained in custody so long as an appeal under s 1 (as amended; prospectively amended) (see PARA 2020 post) is pending, and were detained in pursuance of a transfer direction together with a restriction direction; and (3) if the defendant is detained by virtue of these provisions and the appeal by the prosecutor succeeds, the Mental Health Act 1983 s 38(2) (power of court to make hospital order in the absence of an offender who is subject to an interim hospital order: see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334) applies as if the defendant were still subject to an interim hospital order: Administration of Justice Act 1960 s 5(4A) (added by the Mental Health (Amendment) Act 1982 s 65(1), Sch 3 para 32; and amended by the Mental Health Act 1983 s 148(1), (2), Sch 4 para 17).

12 Bail may be granted in accordance with the Administration of Justice Act 1960 s 4 (as amended) (see the text and notes 1-6 *supra*): s 5(1) (as amended: see note 10 *supra*). Such an order should normally be made: *United States Government v McCaffery* [1984] 2 All ER 570, 80 Cr App Rep 82, HL.

13 Ie any appeal under the Administration of Justice Act 1960 s 1(1)(a): see PARA 2020 post.

14 *Ibid* s 5(1) (amended by the Criminal Justice Act 1967 s 98(6), Sch 4 para 26).

15 Administration of Justice Act 1960 s 5(3). Where the court below has power to make an order under s 5(1) (as amended) (see the text and note 14 *supra*), and either no such order is made or the defendant is released or discharged by virtue of s 5(3), s 5(4) (see note 11 *supra*) or s 5(4A) (as added and amended) (see note 11 *supra*) before the appeal is disposed of, the defendant is not liable to be again detained as a result of the decision of the House of Lords on the appeal: s 5(5) (amended by the Mental Health (Amendment) Act 1982 Sch 3 para 32. As from a day to be appointed, this provision is amended so as to refer to the Supreme Court instead of the House of Lords: see the Administration of Justice Act 1960 s 5(5) (as so amended; prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 13(1), (5)). At the date at which this volume states the law no such day had been appointed.

16 See note 13 *supra*. As from a day to be appointed the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed.

17 Administration of Justice Act 1960 s 6(1) (amended by the Bail Act 1976 Sch 2 para 31).

18 Administration of Justice Act 1960 s 6(3). As from a day to be appointed, this provision is amended so as to refer to the Supreme Court instead of the House of Lords: see s 6(3) (prospectively amended by the Constitutional Reform Act 2005 Sch 9 para 13(1), (5)). At the date at which this volume states the law no such day had been appointed.

## **UPDATE**

### **1191 Bail pending appeal**

NOTES 3, 5, 15, 16, 18--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTES 11-15--Administration of Justice Act 1960 s 5 further amended: Criminal Justice and Immigration Act 2008 Sch 8 para 26. For transitory modifications see Criminal Justice and Immigration Act 2008 (Transitory Provisions) Order 2008, SI 2008/1587.

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### **1192. Procedure on application to the High Court for bail.**

Every application to the High Court in respect of bail in any criminal proceedings:

- 1989 (1) where the defendant is in custody, must be made by claim form to a judge to show cause why the defendant should not be granted bail;
- 1990 (2) where the defendant has been admitted to bail, must be made by claim form to a judge to show cause why the variation in the arrangements for bail proposed by the applicant should not be made<sup>1</sup>.

The claim form<sup>2</sup> must, at least 24 hours before the day named therein for the hearing, be served:

- 1991 (a) where the application was made by the defendant, on the prosecutor and on the Director of Public Prosecutions, if the prosecution is being carried on by him;
- 1992 (b) where the application was made by the prosecutor or a constable<sup>3</sup>, on the defendant<sup>4</sup>.

Every application must be supported by witness statement or affidavit<sup>5</sup>.

Where a defendant in custody who desires to apply for bail is unable through lack of means to instruct a solicitor, he may give notice in writing to the court stating his desire to apply for bail and requesting that the Official Solicitor act for him in the application; and the court may assign the Official Solicitor to act for the applicant accordingly<sup>6</sup>.

Where the court grants the defendant bail or varies the arrangements under which the defendant has been granted bail, the order must be in the prescribed form and a copy of the order must be transmitted forthwith:

- 1993 (i) where the proceedings in respect of the defendant have been transferred to the Crown Court for trial or where the defendant has been committed to the Crown Court to be sentenced or otherwise dealt with, to the appropriate officer of the Crown Court;
- 1994 (ii) in any other case, to the designated officer for the court which committed the defendant<sup>7</sup>.

Where, in pursuance of an order of the High Court or the Crown Court, a person is released on bail in any criminal proceeding pending the determination of an appeal to the High Court or House of Lords or an application for a quashing order, then, upon the abandonment of the appeal or application, or upon the decision of the High Court or House of Lords being given, any justice, being a justice for the same local justice area as the magistrates' court by which that person was convicted or sentenced, may issue process for enforcing the decision in respect of which such appeal or application was brought or, as the case may be, the decision of the High Court or the House of Lords<sup>8</sup>.

If an applicant to the High Court in any criminal proceedings is refused bail, the applicant is not entitled to make a fresh application for bail to any other judge or to a Divisional Court<sup>9</sup>.



1 CPR Sch 1 RSC Ord 79 r 9(1).

2 le in Form No 97 (claim form to grant bail) or Form 97A (claim form to vary arrangements for bail in a criminal proceeding) in the relevant practice directions.

3 le a constable under the Bail Act 1976 s 3(8) (as amended) (see PARA 1167 ante).

4 CPR Sch 1 RSC Ord 79 r 9(2).

5 CPR Sch 1 RSC Ord 79 r 9(3).

6 CPR Sch 1 RSC Ord 79 r 9(4). Where the Official Solicitor has been so assigned, the court may dispense with the requirements of CPR Sch 1 RSC Ord 79 r 9(1)-(3) (see the text and notes 1-5 supra) and deal with the application in a summary manner: CPR Sch 1 RSC Ord 79 r 9(5).

7 CPR Sch 1 RSC Ord 79 r 9(6), (8). For the prescribed form of order see the relevant practice direction, Form 98 (order to release prisoner on bail), and Form 98A (order varying arrangements for bail): CPR Sch 1 RSC Ord 79, r 9(6), (10). The record required by the Bail Act 1976 s 5 (as amended) (see PARA 1173 ante) to be made by the High Court must be made by including in the file relating to the case in question a copy of the relevant order of the court and must contain the particulars set out in Form 98 or Form 98A, whichever is appropriate, except that in the case of a decision to withhold bail the record must be made by inserting a statement of the decision on the court's copy of the relevant claim form and including it in the file relating to the case in question: CPR Sch 1 RSC Ord 79 r 9(13).

The recognisance of any surety required as a condition of bail so granted may, where the defendant is in a prison or other place of detention, be entered into before the governor or keeper of the prison or place as well as before the persons specified in the Bail Act 1976 s 8(4) (see PARA 1172 ante): CPR Sch 1 RSC Ord 79 r 9(6A). Where under the Bail Act 1976 s 3(5) or (6) (see PARA 1167 ante) the court imposes a requirement to be complied with before a person's release on bail, it may give directions as to the manner in which and the person or persons before whom the requirement may be complied with: CPR Sch 1 RSC Ord 79 r 9(6B).

A person who, in pursuance of an order for the grant of bail made by the court under CPR Sch 1 RSC Ord 79 r 9, proposes to enter into a recognisance or give security must, unless the court otherwise directs, give notice in the prescribed form to the prosecutor at least 24 hours before he so enters into the recognisance or so complies with the requirements: CPR Sch 1 RSC Ord 79 r 9(7). For the prescribed form of notice see the relevant practice direction and Form 100.

Where, in pursuance of such an order a recognisance is entered into or requirement complied with before any person, it is the duty of that person to cause the recognisance or, as the case may be, a statement of the requirement complied with to be transmitted forthwith:

573 (1) where the proceedings in respect of the defendant have been transferred to the Crown Court for trial or where the defendant has been committed to the Crown Court for trial or to be sentenced or otherwise dealt with, to the appropriate officer of the Crown Court;

574 (2) in any other case, to the designated officer for the court which committed the defendant,

and a copy of such recognisance or statement must at the same time be sent to the governor or keeper of the prison or other place of detention in which the defendant is detained, unless the recognisance was entered into or the requirement complied with before such governor or keeper: CPR Sch 1 RSC Ord 79 r 9(8).

No recognisance acknowledged in or removed into the Queen's Bench Division may be estreated without the order of a judge: CPR Sch 1 RSC Ord 79 r 8(1). Every application to estreat a recognisance in the Queen's Bench Division must be made by claim form and will be heard by a judge and must be supported by a witness statement showing in what manner the breach has been committed and proving that the summons was duly served: CPR Sch 1 RSC Ord 79 r 8(2). When it issues the claim form, the court will fix a date for the hearing of the application: CPR Sch 1 RSC Ord 79 r 8(2A). Any such claim form must be served at least two clear days before the day named therein for the hearing: CPR Sch 1 RSC Ord 79 r 8(3). On the hearing of the application the judge may, and if requested by any party must, direct any issue of fact in dispute to be tried by a jury: CPR Sch 1 RSC Ord 79 r 8(4). If it appears to the judge that a default has been made in performing the conditions of the recognisance, the judge may order the recognisance to be estreated: CPR Sch 1 RSC Ord 79 r 8(5).

8 CPR Sch 1 RSC Ord 79 r 9(11). This provision refers to the petty sessions area, but this presumably is to be read as a reference to the local justice area. As from a day to be appointed the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed.

9 CPR Sch 1 RSC Ord 79 r 9(12).

**UPDATE**

**1192 Procedure on application to the High Court for bail**

NOTE 8--Appointed day is 1 October 2009: SI 2009/1604. CPR Sch 1 RSC Ord 79 r 9(11) amended: SI 2009/2092.

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## **(5) BAIL GRANTED BY THE COURT OF APPEAL**

### **1193. Bail pending appeal to the Court of Appeal.**

If the Court of Appeal thinks fit, it may<sup>1</sup> grant the appellant<sup>2</sup> bail pending the determination of his appeal<sup>3</sup>. The power may be exercised on the application<sup>4</sup> of an appellant or, if it appears to the Registrar of Criminal Appeals that such power ought to be exercised, on a reference to the court by him<sup>5</sup>.

A judge of the Crown Court who grants a certificate of fitness for appeal<sup>6</sup> may grant bail pending appeal<sup>7</sup>.

The power to grant bail is rarely exercised. Exceptional circumstances must be shown to exist<sup>8</sup>.

Notice of the application must be given to the prosecution<sup>9</sup>.

1    Is subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended): see PARA 1170 ante.

2    For the meaning of 'appellant' see PARA 1837 note 4 post.

3    Criminal Appeal Act 1968 s 19(1)(a) (substituted by the Criminal Justice Act 1982 s 29(2) (b); and amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 22). The power contained in the Criminal Appeal Act 1968 s 19(1)(a) (as substituted and amended) may be exercised by a single judge: s 31(2) (e) (substituted by the Criminal Justice Act 1982 s 29(2)(c)). If the single judge refuses an application on the part of an appellant to exercise in his favour such power, the appellant is entitled to have the application determined by the Court of Appeal: Criminal Appeal Act 1968 s 31(3). The power to grant bail pending determination of an appeal applies where the appellant is a person in respect of whom a deportation order is in force, even though the Secretary of State has refused to order his release: *R v Ofori*, *R v Tackie* (1993) 99 Cr App Rep 219, CA.

A second or subsequent application for bail may be made where circumstances have changed since bail was refused on an earlier application: *R v Jones* (1974) 59 Cr App Rep 120.

4    Notice of an application by the appellant to be granted bail pending the determination of his appeal or pending his re-trial must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA, *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; and, unless notice of appeal or of an application for leave to appeal has previously been given, must be accompanied by such a notice and must be served on the Registrar, save that where notice of such an application is given together with a notice of appeal or notice of application for leave to appeal, it must be served on the Crown Court officer: CrimPR 68.7(1). Such an application may be made to the court orally: CrimPR 68.7(2).

5    Criminal Appeal Act 1968 s 19(2) (substituted by the Criminal Justice Act 1982 s 29(2)(b)).

6    As to such certificate see PARA 1187 note 10 ante.

7    See PARA 1187 ante.

8    *R v Watton* (1978) 68 Cr App Rep 293. An application for bail is unlikely to succeed unless supported by strong grounds of appeal which are likely to result in the appellant being released from custody. Where there is a risk that the appellant's sentence will have been served by the time the appeal is heard and the grounds of appeal are arguable, bail may be granted if it is not possible to expedite the hearing: see *R v Shah* (13 August 1976, unreported), CA. As to the effect of release on bail on the computation of the term of any sentence see PARA 1845 post.

Although the court is reluctant to send an appellant released on bail back to custody, there is no principle to prevent the court from doing so: *R v Cullis, R v Nash* [1969] 1 All ER 593n, 53 Cr App Rep 162, CA; *R v Kalia* (1974) 60 Cr App Rep 200, CA; *R v Macleod* [1982] Crim LR 61, CA.

There is to be no substantial reduction made in a custodial sentence simply because the defendant has been on bail for a considerable time pending the hearing of his appeal: *R v Callan* (1993) 98 Cr App Rep 467, 158 JP 33, CA. Also see *R v Neal* (1986) Times, 29 January, CA (it is not always wise to apply for bail pending determination of appeal against sentence, especially if application is made soon after conviction and the sentence is comparatively short; the Court of Appeal has frequently taken the view that a period in prison pending such determination was sufficient; where the appellant has only been imprisoned for a comparatively short time, it is difficult for the Court of Appeal to say that that period of time suffices for the purposes of justice).

9 See the CrimPR 68.7(3). Unless the court or a judge thereof otherwise directs, notice in writing of intention to make an application relating to bail to the court must, at least 24 hours before it is made, be served on the prosecutor and on the Director of Public Prosecutions, if the prosecution was carried on by him, or on the appellant, if the application is to be made by the prosecutor or a constable under the Bail Act 1976 s 3(8) (as amended) (see PARA 1167 ante): CrimPR 68.7(3).

## UPDATE

### **1193-1194 Bail pending appeal to the Court of Appeal, Conditions of bail**

CrimPR Pt 68 substituted: see PARA 1856-1861.

### **1193 Bail pending appeal to the Court of Appeal**

NOTE 4--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA, further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

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### **1194. Conditions of bail.**

Where the Court of Appeal grants bail to the appellant, the recognisance of any surety required as a condition of bail may be entered into before the Registrar of Criminal Appeals or, where the person who has been granted bail is in a prison or other place of detention, before the governor or keeper of the prison or place, as well as before the persons specified<sup>1</sup> in the Bail Act 1976<sup>2</sup>.

Where the court imposes<sup>3</sup> a requirement to be complied with before a person's release on bail, the court may give directions as to the manner in which and the person or persons before whom the requirement may be complied with<sup>4</sup>.

A person who, in pursuance of an order for the grant of bail made by the court, proposes to enter into a recognisance as a surety or give security must, unless the court or a judge thereof otherwise directs, give notice to the prosecutor at least 24 hours before he so enters into the recognisance or gives security<sup>5</sup>.

Where the court has fixed the amount in which a surety is to be bound by a recognisance or has imposed<sup>6</sup> any requirement to be complied with before the appellant's release on bail, the Registrar must issue a certificate<sup>7</sup> showing the amount and conditions, if any, of the recognisance or, as the case may be, containing a statement of the requirement; and a person authorised to take the recognisance or do anything in relation to the compliance with such requirement may not be required to take or do it without production of such a certificate<sup>8</sup>.

Where, in pursuance of an order for the grant of bail made by the court, a recognisance is entered into or requirement complied with before any person, it is the duty of that person to cause that recognisance or, as the case may be, a statement that the requirement has been complied with, to be transmitted forthwith to the Registrar; and a copy of such recognisance or statement must at the same time be sent to the governor or keeper of the prison or other place of detention in which the appellant is detained, unless the recognisance was entered into or the requirement complied with before such governor or keeper<sup>9</sup>. A person taking a recognisance in pursuance of such an order must give a copy of it to the person entering into the recognisance<sup>10</sup>.

Where the court has fixed the amount in which a surety is to be bound by a recognisance or has imposed<sup>11</sup> any requirement to be complied with before the appellant's release on bail, the governor or keeper of the prison or other place of detention in which the appellant is detained must, on receipt of the certificate stating that the recognisances of all sureties have been taken and that all such requirements have been complied with or on being otherwise so satisfied, release the appellant<sup>12</sup>.

Any record which is required<sup>13</sup> must be made by including in the file relating to the case in question: (1) where bail is granted, a copy of the form<sup>14</sup> and a statement of the day on which, and the time and place at which, the appellant is notified to surrender to custody; and (2) in any other case, a copy of the notice<sup>15</sup> of determination of court<sup>16</sup>.

1 le the persons specified in the Bail Act 1976 s 8(4) (as amended) (see PARA 1172 ante).

2 CrimPR 68.8(1). The recognisance of a surety must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA, *Amendment to the*

*Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA, there being an alternative form for use in relation to an appellant granted bail pending his re-trial or on the issue of a writ of venire de novo: CrimPR 68.8(2).

Where a recognisance has been entered into in respect of an appellant and it appears to the court that a default has been made in performing the conditions of the recognisance, the court may order the recognisance to be forfeited; and such an order may: (1) allow time for the payment of the amount due under the recognisance; (2) direct payment of that amount by instalments of such amounts and on such dates respectively as may be specified in the order; (3) discharge the recognisance or reduce the amount due thereunder: CrimPR 68.9(1). Where the court is to consider making such an order, the Registrar must give notice to that effect to the person by whom the recognisance was entered into indicating the time and place at which the matter will be considered; and no such order may be made before the expiry of seven days after the notice so required has been given: CrimPR 68.9(2). The provisions of CrimPR 68.9 apply, with the necessary modifications, with respect to a person pending his appeal to the House of Lords: see CrimPR 74.1(3); and PARA 1198 post. As from a day to be appointed the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed.

3 le under the Bail Act 1976 s 3(5) (as amended) or s 3(6) (as amended): see PARA 1167 ante.

4 CrimPR 68.8(3).

5 CrimPR 68.8(4).

6 le under the Bail Act 1976 s 3(5) (as amended) or s 3(6) (as amended): see PARA 1167 ante.

7 le in the form set out in the *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

8 CrimPR 68.8(5).

9 CrimPR 68.8(6).

10 CrimPR 68.8(7).

11 le under the Bail Act 1976 s 3(5) (as amended) or s 3(6) (as amended): see PARA 1167 ante.

12 CrimPR 68.8(8). The provisions of CrimPR 68.8 apply, with the necessary modifications, with respect to a person pending his appeal to the House of Lords: see CrimPR 74.1(3); and PARA 1198 post. As from a day to be appointed the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed.

13 le required by the Bail Act 1976 s 5 (as amended): see PARA 1173 ante.

14 le a copy of the form issued under CrimPR 68.8(5): see the text and note 8 supra.

15 le a copy of the notice served under CrimPR 68.29(1): see PARA 1894 post.

16 CrimPR 68.8(10).

## UPDATE

### 1193-1194 Bail pending appeal to the Court of Appeal, Conditions of bail

CrimPR Pt 68 substituted: see PARA 1856-1861.

### 1194 Conditions of bail

NOTES 2, 12--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA, further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.



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### **1195. Variation and revocation of bail pending appeal.**

If the Court of Appeal thinks fit, it may<sup>1</sup> revoke bail granted to an appellant<sup>2</sup> by the Crown Court under its powers to do so<sup>3</sup> or vary the conditions of bail granted<sup>4</sup> to the appellant in the exercise of such powers<sup>5</sup>. The power so to revoke bail or to vary the conditions of bail may be exercised on the application of an appellant or, if it appears to the Registrar of Criminal Appeals that such power ought to be exercised, on a reference to the Court of Appeal by him<sup>6</sup>.

1    Ie subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended): see PARA 1170 ante.

2    For the meaning of 'appellant' see PARA 1837 note 4 post.

3    Ie under the Supreme Court Act 1981 s 81(1)(f) (see PARA 1187 head (6) ante) or the Criminal Appeal Act 1968 s 19(1)(a) (as substituted and amended) (see PARA 1193 ante). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

4    Ie under the Supreme Court Act 1981 s 81(1)(f) (see PARA 1187 head (6) ante) or the Criminal Appeal Act 1968 s 19(1)(a) (as substituted and amended) (see PARA 1193 ante).

5    Ibid s 19(1)(b), (c) (substituted by the Criminal Justice Act 1982 s 29(2)(b); and amended by the Criminal Justice Act 1988 s 170(1), Sch 15 paras 20, 26; and the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 22). The power contained in the Criminal Appeal Act 1968 s 19(1)(b), (c) (as substituted and amended) may be exercised by a single judge: s 31(2)(e) (substituted by the Criminal Justice Act 1982 s 29(2)(c)).

6    Criminal Appeal Act 1968 s 19(2) (substituted by the Criminal Justice Act 1982 s 29(2)(b)).

### **UPDATE**

### **1195 Variation and revocation of bail pending appeal**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.



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### **1196. Bail when interim hospital order quashed.**

Where the Court of Appeal quashes<sup>1</sup> an interim hospital order<sup>2</sup>, but does not pass any sentence or make any other order in its place, the court may<sup>3</sup> direct the appellant<sup>4</sup> to be kept in custody or released on bail pending his being dealt with by the court below<sup>5</sup>.

1     ie under the Criminal Appeal Act 1968 s 9 or s 10 (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 46 et seq.

2     ie an interim hospital order under the Mental Health Act 1983: see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334.

3     ie subject to the Criminal Justice and Public Order Act 1994 s 25: see PARA 1170 ante.

4     For the meaning of 'appellant' see PARA 1837 note 4 post.

5     See the Criminal Appeal Act 1968 s 11(5) (added by the Mental Health (Amendment) Act 1982 s 65(1), Sch 3 para 37; and amended by the Mental Health Act 1983 s 148, Sch 4 para 23(d); and the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 20).

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**1197. Bail in cases of venire de novo and re-trial.**

Where the Court of Appeal orders a venire de novo or a re-trial, it may order that the accused be released on bail<sup>1</sup>.

<sup>1</sup> See PARAS 1895-1896 post.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/17. BAIL/(5) BAIL GRANTED BY THE COURT OF APPEAL/1198. Bail or detention pending appeal to the House of Lords.

### **1198. Bail or detention pending appeal to the House of Lords.**

The Court of Appeal may<sup>1</sup>, if it seems fit, on the application of a person appealing or applying for leave to appeal<sup>2</sup> to the House of Lords, grant him bail pending the determination of his appeal<sup>3</sup>. Where, immediately after a decision of the Court of Appeal from which an appeal lies to the House of Lords, the prosecutor is granted, or gives notice that he intends to apply for, leave to appeal, and, but for the decision of the court, the defendant would be liable to be detained, the Court of Appeal may make an order providing for his detention, or direct that he must not be released except on bail<sup>4</sup> so long as an appeal to the House of Lords is pending<sup>5</sup>. Where an order is made in the case of a defendant who, but for the decision of the court, would be liable to be detained in pursuance of an order or direction under the Mental Health Act 1983<sup>6</sup> or a hospital order made by virtue of the Criminal Procedure (Insanity) Act 1964<sup>7</sup>, the order so made must be one authorising his continued detention in pursuance of any such order or direction<sup>8</sup>.

Where the Court of Appeal has power to make such an order<sup>9</sup>, and either no such order is made or the defendant is released or discharged<sup>10</sup> before the appeal is disposed of, the defendant is not liable to be again detained as a result of the decision of the House of Lords on the appeal<sup>11</sup>.

1 le subject to the Criminal Justice and Public Order Act 1994 s 25: see PARA 1170 ante.

2 Other than a person appealing or applying for leave to appeal from a decision under the Criminal Justice Act 2003 Pt 9 (ss 57-74) (prosecution appeals: see PARA 1898 et seq post), the Criminal Justice Act 1987 s 9(11) (appeals against orders or rulings at preparatory hearings: see PARA 1921 et seq post), the Criminal Procedure and Investigations Act 1996 s 35 (appeal from judge's ruling in preparatory proceedings: see PARA 1922 post), or the Criminal Justice Act 2003 s 47 (appeal in relation to the discharge of jury on ground of jury tampering: see PARA 1933 post): see the Criminal Appeal Act 1968 s 36 (amended by the Criminal Procedure and Investigations Act 1996 s 36(1)(b); and the Criminal Justice Act 2003 ss 47(7), 68(2)).

3 Criminal Appeal Act 1968 s 36 (amended by the Bail Act 1976 s 12(1), Sch 2 para 43; the Criminal Justice Act 1987 s 15, Sch 2 para 2; the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 23; the Criminal Procedure and Investigations Act 1996 s 36(1); and the Criminal Justice Act 2003 s 68(2)). As from a day to be appointed, this provision is amended so as to refer to the Supreme Court instead of the House of Lords: see the Criminal Appeal Act 1968 s 36 (as so amended; prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 16(1), (6)). At the date at which this volume states the law no such day had been appointed. As to the mode of application see PARA 1967 note 1 post. The provisions of CrimPR 68.8 (bail with condition of surety: see PARA 1194 ante) and CrimPR 68.9 (forfeiture of recognisances: see PARA 1194 ante) apply with respect to an appeal to the House of Lords as they apply with respect to an appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended)) (see PARA 1837 et seq post) with the necessary modifications: CrimPR 74.1(3). See also CrimPR 74.1(8); and PARA 1967 post. As from a day to be appointed the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed. The recognisance of a surety must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

The power to grant bail may be exercised by a single judge: see PARA 1972 post.

4 Bail may be granted as under the Criminal Appeal Act 1968 s 36 (as amended) (see the text and note 3 supra): s 37(2).

5 Ibid s 37(1), (2). An appeal to the House of Lords is treated as pending until any application for leave to appeal is disposed of and, if leave to appeal is granted, until the appeal is disposed of: s 34(3). For these purposes, an application for leave to appeal is to be treated as disposed of at the expiration of the time within which it may be made, if it is not made within that time: s 34(3). As to the time for applying for leave to appeal see PARA 1967 post. Unless the appeal has previously been disposed of, an order under s 37 (as amended) ceases to have effect at the expiration of the period for which the defendant would have been liable to be detained but for the decision of the Court of Appeal: s 37(3). As from a day to be appointed, ss 34, 37 are amended so as to refer to the Supreme Court instead of the House of Lords: see the Constitutional Reform Act 2005 Sch 9 para 16(1), (4), (6). At the date at which this volume states the law no such day had been appointed.

6 le in pursuance of an order or direction under the Mental Health Act 1983 Pt III (ss 35-55) (as amended) (see MENTAL HEALTH vol 30(2) (Reissue) PARA 486 et seq), otherwise than under ss 35, 36, 38 (as amended) (admission to hospital of persons convicted by criminal courts).

7 le a hospital order made by virtue of the Criminal Procedure (Insanity) Act 1964 s 5(2)(a) (as substituted) (powers to deal with persons not guilty by reason of insanity or unfit to plead etc): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332.

8 Criminal Appeal Act 1968 s 37(4) (amended by the Mental Health Act 1983 s 148(1), Sch 4 para 23(g); and the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 5). The provisions of the Mental Health Act 1983 with respect to persons liable to be so detained (including provisions as to the renewal of authority for detention and the removal or discharge of patients) apply accordingly: Criminal Appeal Act 1968 s 37(4) (amended by the Mental Health Act 1983 Sch 4 para 23(g)).

Where an order is made under the Criminal Appeal Act 1968 s 37 (as amended) in the case of a defendant who, but for the decision of the Court of Appeal, would be liable to be detained in pursuance of a remand under the Mental Health Act 1983 s 36 or an interim hospital order under s 38, the order may, if the Court of Appeal thinks fit, be one authorising his continued detention in a hospital or mental nursing home and in that event: (1) the Criminal Appeal Act 1968 s 37(3) (see note 5 supra) does not apply to the order; (2) the Mental Health Act 1983 Pt III (as amended) applies to him as if he had been ordered under the Criminal Appeal Act 1968 s 37 (as amended) to be detained in custody so long as an appeal to the House of Lords is pending, and were detained in pursuance of a transfer direction together with a restriction direction; and (3) if the defendant, having been subject to an interim hospital order, is detained by virtue of this provision and the appeal by the prosecutor succeeds, the Mental Health Act 1983 s 38(2) (power of court to make hospital order in the absence of an offender who is subject to an interim hospital order: see MENTAL HEALTH vol 30(2) (Reissue) PARA 491) applies as if the defendant were still subject to an interim hospital order: Criminal Appeal Act 1968 s 37(4A) (added by the Mental Health (Amendment) Act 1982 s 65(1), Sch 3 para 39; and amended by the Mental Health Act 1983 Sch 4 para 23(h)). As from a day to be appointed, this provision is amended so as to refer to the Supreme Court instead of the House of Lords: see the Criminal Appeal Act 1968 s 37(4A) (as so added and amended; prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 16(1), (6)). At the date at which this volume states the law no such day had been appointed.

9 le an order under the Criminal Appeal Act 1968 s 37 (as amended).

10 le by virtue of ibid s 37(3) (see note 5 supra), s 37(4) (as amended) (see the text and note 8 supra) or s 37(4A) (as added and amended) (see note 8 supra).

11 Ibid s 37(5) (amended by the Mental Health (Amendment) Act 1982 s 65(1), Sch 3 para 69). As from a day to be appointed, this provision is amended so as to refer to the Supreme Court instead of the House of Lords: see the Criminal Appeal Act 1968 s 37(5) (as so amended; prospectively amended by the Constitutional Reform Act 2005 Sch 9 para 16(1), (6)). At the date at which this volume states the law no such day had been appointed. See also DPP v Merriman [1973] AC 584, 56 Cr App Rep 766, HL. Such an order should be made unless there are strong reasons for not doing so: DPP v Merriman supra; and see also United States Government v McCaffrey [1984] 2 All ER 570, 80 Cr App Rep 82, HL; R v Hollinshead, R v Dettlaff, R v Griffiths [1985] AC 975, 81 Cr App Rep 365, HL. As to the effect of bail on sentence see PARA 1970 post.

## UPDATE

### 1198 Bail or detention pending appeal to the [Supreme Court]

TEXT AND NOTES--Where, immediately after a decision of the Court of Appeal from which an appeal lies to the Supreme Court, the prosecutor is granted, or gives notice that he intends to apply for, leave to appeal, if, but for the decision of the Court of Appeal, the defendant would be liable to recall (because he is subject to a community treatment order and, when it was made, he was liable to be detained) (see MENTAL HEALTH vol

30(2) (Reissue) PARA 528A), the Court of Appeal may make an order for the continuation of the community treatment order: Criminal Appeal Act 1968 s 37A (added by Mental Health Act 2007 Sch 4 para 2).

NOTES 3, 5, 8, 11--Appointed day for commencement of Constitutional Reform Act 2005 Sch 9 is 1 October 2009: SI 2009/1604.

NOTE 3--CrimPR Pt 74 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 74.

TEXT AND NOTES 4-11--Criminal Appeal Act 1968 s 37 further amended to provide that, when the prosecution successfully appeals from the Court of Appeal to the Supreme Court, an offender can be compelled to serve out any remainder of his sentence unless the Court of Appeal has actively made an order to the contrary effect: Criminal Justice and Immigration Act 2008 Sch 8 para 13. For transitory modifications see Criminal Justice and Immigration Act 2008 (Transitory Provisions) Order 2008, SI 2008/1587.

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## **(6) OFFENCES RELATING TO BAIL**

### **1199. Absconding by person released on bail.**

If a person who has been released on bail in criminal proceedings<sup>1</sup> fails without reasonable cause to surrender to custody<sup>2</sup>, he is guilty of an offence<sup>3</sup>.

If a person who:

- 1995 (1) has been released on bail in criminal proceedings; and
- 1996 (2) having reasonable cause therefor, has failed to surrender to custody,

fails to surrender to custody<sup>4</sup> at the appointed place as soon after the appointed time as is reasonably practicable, he is guilty of an offence<sup>5</sup>.

Where a person has been released on bail in criminal proceedings and that bail was granted by a constable, a magistrates' court may not try that person for any such offence<sup>6</sup> in relation to that bail (the 'relevant offence') unless either or both of heads (a) and (b) below applies:

- 1997 (a) an information<sup>7</sup> is laid for the relevant offence within six months from the time of the commission of the relevant offence; or
- 1998 (b) an information is laid for the relevant offence no later than three months from the time of the occurrence of the first of the following events to occur after the commission of the relevant offence:

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- 128. (i) the person surrenders to custody at the appointed place;
- 129. (ii) the person is arrested, or attends at a police station, in connection with the relevant offence or the offence for which he was granted bail;
- 130. (iii) the person appears or is brought before a court in connection with the relevant offence or the offence for which he was granted bail<sup>8</sup>.

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Any such offence is punishable either on summary conviction or as if it were a criminal contempt of court<sup>9</sup>.

Where a magistrates' court convicts a person of any such offence<sup>10</sup>, the court may, if it thinks:

- 1999 (A) that the circumstances of the offence are such that greater punishment should be inflicted for that offence than the court has power to inflict; or
- 2000 (B) in a case where it commits or sends that person for trial to the Crown Court for another offence, that it would be appropriate for him to be dealt with for the offence under the above provisions<sup>11</sup> by the court before which he is tried for the other offence,

commit him in custody or on bail to the Crown Court for sentence<sup>12</sup>.

A person who is convicted summarily of any such offence and is not committed to the Crown Court for sentence is liable to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale or to both; and a person who is so committed for sentence or is dealt with as for such a contempt is liable to imprisonment for a term not exceeding 12 months or to a fine or to both<sup>13</sup>.

1 For the meaning of 'bail in criminal proceedings' see PARA 1166 ante.

2 It is for the defendant to prove that he had reasonable cause for his failure to surrender to custody: Bail Act 1976 s 6(3). As to whether 'prove' imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. A failure to give to a person granted bail in criminal proceedings a copy of the record of the decision does not constitute a reasonable cause for that person's failure to surrender to custody: Bail Act 1976 s 6(4). For the meaning of 'surrender to custody' see PARA 1167 note 2 ante.

Delay of seven minutes cannot be said to amount to an offence under s 6: *R v Gateshead Justices, ex p Usher* [1981] Crim LR 491, DC. It is a question of fact to be decided on all the circumstances of the particular case whether there is a 'reasonable cause': *R v Liverpool City Justices, ex p Santos* (1997) Times, 23 January, DC. It has been held that, where a defendant fails to surrender to his bail because he mistakenly thinks that his appearance is on another date because of an administrative blunder by his solicitors, there is no reasonable excuse for failure to surrender because the duty should have been known to the defendant in any event, although the circumstances would provide mitigating factors on his behalf: *Laidlaw v Atkinson* (1986) Times, 2 August, DC. Whether a mistake by a solicitor, such as giving the defendant the wrong date, amounts to 'reasonable cause', is a question of fact to be decided in all the circumstances of the case: *R v Liverpool City Justices, ex p Santos* supra.

3 Bail Act 1976 s 6(1). In any proceedings for an offence under s 6(1) or (2) (see the text and note 5 infra) a document purporting to be a copy of the part of the prescribed record which relates to the time and place appointed for the person specified in the record to surrender to custody and to be duly certified to be a true copy of that part of the record is evidence of the time and place appointed for that person to surrender to custody: s 6(8). For these purposes, 'the prescribed record' means the record of the decision of the court, officer or constable made in pursuance of s 5(1) (as amended) (see PARA 1173 ante); the copy of the prescribed record is duly certified if it is certified by the appropriate officer of the court or, as the case may be, by the constable who took the decision or a constable designated for the purpose by the officer in charge of the police station from which the person to whom the record relates was released; and 'the appropriate officer' of the court is: (1) in the case of a magistrates' court, the designated officer of the court; (2) in the case of the Crown Court, such officer as may be designated for the purpose in accordance with arrangements made by the Lord Chancellor; (3) in the case of the High Court, such officer as may be designated for the purpose in accordance with arrangements made by the Lord Chancellor; (4) in the case of the Court of Appeal, the Registrar of Criminal Appeals or such other officer as may be authorised by him to act for the purpose; (5) in the case of the Courts-Martial Appeal Court, the Registrar or such other officer as may be authorised by him to act for the purpose: s 6(9) (amended by the Courts Act 2003 s 109(1), Sch 8 para 184).

For the courses of action available in the event of a defendant failing to surrender to custody in accordance with the terms of his bail see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at I.13.1-I.13.19, CA; *Practice Direction (Bail: Failure to Surrender)* [2004] 1 WLR 589, sub nom *Consolidated Criminal Practice Direction (Amendment No 3) (Bail: failure to surrender and trials in absence)* [2004] 1 Cr App Rep 402 at I.13.1-I.13.19, CA.

4 See note 2 supra.

5 Bail Act 1976 s 6(2). See also note 2 supra.

6 Is an offence under *ibid* s 6(1) or (2): see the text and notes 1-5 supra.

7 As from a day to be appointed a reference to an information includes a reference to a written charge: see PARA 915 ante. At the date at which this volume states the law no such day had been appointed.

8 Bail Act 1976 s 6(11)-(14) (added by the Criminal Justice Act 2003 s 15(3)). The Magistrates' Courts Act 1980 s 127 (limitation of time for taking proceedings: see MAGISTRATES vol 29(2) (Reissue) PARA 589) is disapplied: Bail Act 1976 s 6(10) (added by the Criminal Justice Act 2003 s 15(3)).

9 Bail Act 1976 s 6(5). Where a court decides of its own motion to deal with such an offence as if it were a contempt of court, the defendant must be given an opportunity to give an explanation and his counsel should

be invited to make submissions: *R v Davis* (1986) 8 Cr App Rep (S) 64, CA. If the defendant is unrepresented, the court should give him the chance of legal representation for the purposes of explaining his absence, or at least the opportunity to explain himself: *R v Woods* (1989) 11 Cr App Rep (S) 551, CA. In serious cases an immediate custodial sentence is appropriate: *R v Harbax Singh* [1979] QB 319, 68 Cr App Rep 108, CA. In principle, a sentence for such an offence should be consecutive to the sentence for the substantive offence: *R v Woods* supra; *R v O'Hara* [2002] EWCA Crim 2963, [2003] 2 Cr App Rep (S) 121; *R v McKinnon, R v White* [2002] EWCA Crim 2952, [2003] 2 Cr App Rep (S) 133. Cf *R v Gorman* (1992) 14 Cr App Rep (S) 120, CA (explained in *R v O'Hara* supra; *R v McKinnon, R v White* supra). See also *Schiavo v Anderton* [1987] QB 20, 83 Cr App Rep 228, DC; considered in *R v Reader* (1986) 84 Cr App Rep 294, CA. The provision in the Bail Act 1976 s 6(5) that the offence may be dealt with as if it were a contempt of court does not convert the offence into an offence of contempt; it merely provides an alternative procedure for dealing with the offence (which remains an offence contrary to s 6(1)): *R v Reader* (1986) 84 Cr App Rep 294, CA; *R v Lubega* (1999) 163 JP 221, CA.

Where the Crown Court deals with such an offence as a contempt of court, an appeal lies as of right from any order or decision in relation to the offence: see the Administration of Justice Act 1960 s 13(1), (2)(bb) (as added), (5)(a) (as amended); and PARA 1920 post.

10    le an offence under the Bail Act 1976 s 6(1) or (2): see the text and notes 1-5 supra.

11    le an offence under *ibid* s 6(1) or (2): see the text and notes 1-5 supra.

12    Ibid s 6(6) (amended by the Criminal Justice Act 2003 s 41, Sch 3 para 48(1), (4)). The Criminal Justice Act 2003 Sch 3 para 48(1), (4) amends the Bail Act 1976 s 6(6) so as to refer to persons being sent rather than committed for trial, but at the date at which this volume states the law this amendment only has effect in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A(3)(d) (as added) (see PARAS 1132-1133 ante). See also CrimPR 43.1(1), (3); and PARA 1123 note 11 ante.

13    Bail Act 1976 s 6(7) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## UPDATE

### 1199 Absconding by person released on bail

NOTE 2--Where a defendant fails to attend court in response to a summons, he cannot be convicted under the 1976 Act s 6 if he is not on bail at the time: *R v Noble* (2008) Times, 21 July, CA.

NOTE 3--Bail Act 1976 s 6(9) further amended: Armed Forces Act 2006 Sch 16 para 75.



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### **1200. Liability to arrest for absconding or breaking conditions of bail.**

If a person who has been released on bail in criminal proceedings<sup>1</sup> and is under a duty to surrender into the custody of a court fails to surrender to custody<sup>2</sup> at the time appointed for him to do so, the court may issue a warrant for his arrest<sup>3</sup>.

If a person has been released on bail in connection with extradition proceedings<sup>4</sup>, and that person is under a duty to surrender into the custody of a constable, and he fails to surrender to custody at the time appointed for him to do so, a magistrates' court may issue a warrant for the person's arrest<sup>5</sup>.

If a person who has been released on bail in criminal proceedings absents himself from the court at any time after he has surrendered into the custody of the court and before the court is ready to begin or to resume the hearing of the proceedings, the court may issue a warrant for his arrest; but no warrant may be so issued where that person is absent in accordance with leave given to him by or on behalf of the court<sup>6</sup>.

A person who has been released on bail in criminal proceedings and is under a duty to surrender into the custody of a court may be arrested without warrant by a constable:

- 2001 (1) if the constable has reasonable grounds for believing that that person is not likely to surrender to custody;
- 2002 (2) if the constable has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or has reasonable grounds for suspecting that that person has broken any of those conditions; or
- 2003 (3) in a case where that person was released on bail with one or more surety or sureties<sup>7</sup>, if a surety notifies a constable in writing that that person is unlikely to surrender to custody and that for that reason the surety wishes to be relieved of his obligations as a surety<sup>8</sup>.

A person arrested in pursuance of heads (1) to (3) above must: (a) except where he was arrested within 24 hours of the time appointed for him to surrender to custody, be brought as soon as practicable and in any event within 24 hours<sup>9</sup> after his arrest before a justice of the peace<sup>10</sup>; and (b) in such excepted case, be brought before the court at which he was to have surrendered to custody<sup>11</sup>.

A person who has been released on bail in connection with extradition proceedings and is under a duty to surrender into the custody of a constable may be arrested without warrant by a constable on any of the grounds set out in heads (1) to (3) above<sup>12</sup>. A person so arrested must be brought as soon as practicable and in any event within 24 hours after his arrest before a justice of the peace for the local justice area in which he was arrested<sup>13</sup>.

A justice of the peace before whom a person is so brought<sup>14</sup> may, if of the opinion that that person:

- 2004 (i) is not likely to surrender to custody; or
- 2005 (ii) has broken or is likely to break any condition of his bail,

remand him in custody or commit him to custody, as the case may require, or alternatively, grant him bail subject to the same or to different conditions, but if not of that opinion must grant him bail subject to the same conditions (if any) as were originally imposed<sup>15</sup>.

1 For the meaning of 'bail in criminal proceedings' see PARA 1166 ante.

2 For the meaning of 'surrender to custody' see PARA 1167 note 2 ante.

3 Bail Act 1976 s 7(1).

4 For the meaning of 'extradition proceedings' see PARA 1166 note 7 ante.

5 Bail Act 1976 s 7(1A), (1B) (added by the Extradition Act 2003 s 198(1), (7)).

6 Bail Act 1976 s 7(2).

7 As to bail with sureties see PARA 1172 ante.

8 Bail Act 1976 s 7(3).

9 In reckoning for the purposes of *ibid* s 7 (as amended) any period of 24 hours, no account is to be taken of Christmas Day, Good Friday or any Sunday: s 7(7) (added by the Extradition Act 2003 s 198(1), (10)). See *R v Governor of Glen Parva Young Offender Institution, ex p G (A Minor)* [1998] QB 877, [1998] 2 Cr App Rep 349 (stipulation that defendant be brought before a justice within 24 hours is absolute and should not be overlooked).

10 A Recorder of the Crown Court is not a justice of the peace for the purposes of the Bail Act 1976 s 7 (as amended): *Re Marshall* (1994) 159 JP 688, DC.

11 Bail Act 1976 s 7(4) (amended by the Criminal Law Act 1977 s 65(4), Sch 12; the Courts Act 2003 s 109(1), (3), Sch 8 para 185, Sch 10; and the Extradition Act 2003 ss 198(1), (8), 220, Sch 4). Where a person who has been released on bail and is under a duty to surrender into the custody of a court is brought under the Bail Act 1976 s 7(4)(a) (see head (a) in the text) before a justice of the peace, the justice must cause a copy of the record made in pursuance of s 5 (as amended) (see PARA 1173 ante) relating to his decision under s 7(5) in respect of that person to be sent to the court officer for that court, although this rule does not apply where the court is a magistrates' court acting for the same local justice area as that for which the justice acts: CrimPR 19.12.

12 Bail Act 1976 s 7(4A) (added by the Extradition Act 2003 s 198(1), (9)).

13 Bail Act 1976 s 7(4B) (added by the Extradition Act 2003 s 198(1), (9)). This provision refers to the petty sessions area, but this presumably is to be read as a reference to the local justice area.

14 *Ie* under the Bail Act 1976 s 7(4) (as amended) or s 7(4B) (as added).

15 Bail Act 1976 s 7(5) (amended by the Extradition Act 2003 s 198(1), (10)). Where the person so brought before the justice is a child or young person and the justice does not grant him bail, the Bail Act 1976 s 7(5) (as amended) has effect subject to the provisions of the Children and Young Persons Act 1969 s 23 (as amended) (remand to the care of local authorities: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1247-1253): Bail Act 1976 s 7(6). For the meaning of 'child' see PARA 1167 note 31 ante; and for the meaning of 'young person' see PARA 1167 note 32 ante. Where a breach of condition is alleged, a justice acting under s 7(5) (as amended) must first consider whether there has been a breach of the bail condition alleged; if he finds such a breach he must then consider whether to admit the person to bail again or to remand him in custody and in this respect any issues relating to reasonable cause are relevant: *R (on the application of Vickers) v West London Magistrates' Court* [2003] EWHC 1809 (Admin), (2003) 167 JP 473.

A single justice has the jurisdiction to determine whether a bailed defendant should be remanded in custody or granted further bail: *R v Liverpool City Justices, ex p DPP* [1993] QB 233, 95 Cr App Rep 222, DC. A justice has no power to adjourn proceedings under the Bail Act 1976 s 7(5) (as amended) since the terms of s 7(5) (as amended) are mandatory; if the justice is not of the opinion that the bailed defendant is not likely to surrender to custody or has broken or is likely to break any condition of his bail, he must grant the defendant bail subject to the same conditions, if any, as were originally imposed: *R v Liverpool City Justices, ex p DPP* supra. However, the Bail Act 1976 s 7(5) (as amended) does not prevent proceedings being adjourned so that they can be heard and determined by a differently constituted court on the day of adjournment: *R (on the application of Hussain) v Derby Magistrates' Court* [2001] EWHC Admin 507, [2001] 1 WLR 2454, [2002] 1 Cr App Rep 37, DC. Where a person arrested under the Bail Act 1976 s 7 (as amended) is brought before the court he must be dealt with in accordance with s 7(5) (as amended). The magistrates' court does not have the power to commit the defendant

to the Crown Court for that court to deal with the question of bail: *R v Teeside Magistrates' Court, ex p Ellison* [2001] EWCA Admin 11, 165 JP 355.

The procedures under the Bail Act 1976 s 7(5) (as amended) are compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5 (right to liberty and security), and art 6 (right to a fair trial) provided, in the case of art 5, that the court evaluates the material presented in the context of the consequences to the defendant and gives the defendant a fair opportunity to answer the material, including the opportunity to cross-examine a witness who has given oral evidence, and by giving evidence in person: *R (on the application of DPP) v Havering Magistrates' Court, R (on the application of McKeown) v Wirral Borough Magistrates' Court* [2001] 3 All ER 997, [2001] 2 Cr App Rep 12, DC. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

The Bail Act 1976 s 7 (as amended) applies with modifications in relation to cases to which a custody time limit applies: see PARA 1156 note 8 ante.

## **UPDATE**

### **1200 Liability to arrest for absconding or breaking conditions of bail**

NOTE 11--CrimPR 19.12 now Criminal Procedure Rules 2010, SI 2010/60, r 19.12.

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### **1201. Agreeing to indemnify sureties in criminal proceedings.**

If a person agrees with another to indemnify that other against any liability which that other may incur as a surety<sup>1</sup> to secure the surrender to custody of a person accused or convicted of or under arrest for an offence, he and that other person are guilty of an offence<sup>2</sup>. Such an offence is committed whether the agreement is made before or after the person to be indemnified becomes a surety and whether or not he becomes a surety and whether the agreement contemplates compensation in money or in money's worth<sup>3</sup>.

Where a magistrates' court convicts a person of such an offence, the court may, if it thinks:

- 2006 (1) that the circumstances of the offence are such that greater punishment should be inflicted for that offence than the court has power to inflict; or
- 2007 (2) in a case where it commits or sends that person for trial to the Crown Court for another offence, that it would be appropriate for him to be dealt with for such an offence by the court before which he is tried for the other offence,

commit him in custody or on bail to the Crown Court for sentence<sup>4</sup>.

A person guilty of such an offence is liable on conviction on indictment or if sentenced by the Crown Court on committal for sentence to imprisonment for a term not exceeding 12 months or to a fine or to both, or on summary conviction to imprisonment for a term not exceeding three months<sup>5</sup> or to a fine not exceeding the prescribed sum<sup>6</sup> or to both<sup>7</sup>.

1 As to bail with sureties see PARA 1172 ante.

2 Bail Act 1976 s 9(1). No proceedings for such an offence may be instituted except by or with the consent of the Director of Public Prosecutions: s 9(5). As to the effect of this limitation see PARA 1071 ante.

3 Ibid s 9(2).

4 Ibid s 9(3) (amended by the Criminal Justice Act 2003 s 41, Sch 3 para 48(1), (5)). The Criminal Justice Act 2003 Sch 3 para 48(1), (5) amends the Bail Act 1976 s 9(3)(b) (see head (2) in the text) so as to refer to persons being sent rather than committed for trial, but at the date at which this volume states the law this amendment only has effect in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A(3)(d) (as added) (see PARAS 1132-1133 ante).

5 As from a day to be appointed this maximum term of imprisonment is increased to a maximum term of 12 months (see the Criminal Justice Act 2003 ss 281(7), 282(2), (3) (not yet in force); and PARA 1121 ante), although this does not affect the penalty for any offence committed before that day (see s 282(4) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

6 As to the prescribed sum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

7 Bail Act 1976 s 9(4).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/18.  
INDICTMENTS/(1) PREFERRING AN INDICTMENT/1202. What an indictment is.

## **18. INDICTMENTS**

### **(1) PREFERRING AN INDICTMENT**

#### **1202. What an indictment is.**

An indictment is a written accusation preferred before the Crown Court, signed by the proper officer of that court, and charging one or more persons with the commission of one or more indictable offences<sup>1</sup>.

<sup>1</sup> See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(1) (as amended); and PARA 1205 post.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/18. INDICTMENTS/(1) PREFERRING AN INDICTMENT/1203. When an indictment lies.

**1203. When an indictment lies.**

An indictment lies for any offence other than an offence over which courts of summary jurisdiction have exclusive jurisdiction<sup>1</sup>.

<sup>1</sup> As to offences triable summarily only see PARA 1104 ante; and MAGISTRATES vol 29(2) (Reissue) PARA 653 et seq. As to offences triable on indictment see PARA 1232 et seq post.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/18. INDICTMENTS/(1) PREFERRING AN INDICTMENT/1204. Trial of indictable offences.

#### **1204. Trial of indictable offences.**

All proceedings on indictment must be brought before the Crown Court<sup>1</sup>. The jurisdiction of the Crown Court with respect to proceedings on indictment includes jurisdiction in proceedings on indictment for offences wherever committed, and in particular proceedings on indictment for offences within the jurisdiction of the Admiralty<sup>2</sup>.

At a coroner's inquest into the death of a person who came by his death by murder, manslaughter or infanticide, the purpose of the proceedings does not include the finding of any person guilty of the murder, manslaughter or infanticide; and accordingly a coroner's inquisition may in no case charge a person with any of those offences<sup>3</sup>.

1 Supreme Court Act 1981 s 46(1). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed. As to trial on indictment see PARA 1232 et seq post. There is an alternative method of proceeding by way of impeachment which is in practice obsolete: see COURTS vol 10 (Reissue) PARA 355. A person may be punished for criminal contempt of court either summarily or on indictment; the latter method is, however, now obsolete: see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 491.

2 Supreme Court Act 1981 s 46(2). See note 1 supra. As to the jurisdiction of the Admiralty see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 79 et seq.

3 Coroners Act 1988 s 11(6). See CORONERS vol 9(2) (Reissue) PARAS 923, 942.

#### **UPDATE**

#### **1204 Trial of indictable offences**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTE 3--1988 Act s 11(6) amended: Corporate Manslaughter and Corporate Homicide Act 2007 Sch 2 para 1(2)(a).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/18. INDICTMENTS/(1) PREFERRING AN INDICTMENT/1205. How an indictment is preferred.

### **1205. How an indictment is preferred.**

A bill of indictment charging any person with an indictable offence may be preferred<sup>1</sup> by any person before a court in which the person charged may lawfully be indicted for that offence; and, where a bill of indictment has been so preferred, the proper officer of the court must, if he is satisfied that the statutory requirements<sup>2</sup> have been complied with, sign the bill<sup>3</sup>, and it thereupon becomes an indictment and is proceeded with accordingly<sup>4</sup>. However, if the judge<sup>5</sup> of the court is satisfied that the statutory requirements have been complied with, he may, on the application of the prosecution or of his own motion, direct the proper officer to sign the bill, and the bill must be signed accordingly<sup>6</sup>.

A bill of indictment is preferred before the Crown Court by delivering the bill to the Crown Court officer<sup>7</sup>. However, where with the assent of the prosecutor the bill is prepared by, or under the supervision of, the appropriate officer, it is not necessary for the bill to be delivered to him, but, as soon as it is settled to his satisfaction, it is deemed to have been duly preferred<sup>8</sup>. The bill of indictment must be preferred: (1) where a defendant has been committed for trial, within a period of 28 days commencing with the date of committal; (2) where a notice of transfer has been given<sup>9</sup> or served<sup>10</sup>, within a period of 28 days commencing with the date on which notice is given or served; or (3) where a person is sent for trial<sup>11</sup>, within a period of 28 days commencing with the date on which copies of the documents containing the evidence on which the charge or charges are based are served<sup>12</sup> on the defendant<sup>13</sup>; but that period may, on the application of the person preferring the bill of indictment or otherwise, be extended by a judge of the Crown Court<sup>14</sup> before or after it has expired, and any period so extended may be further extended in like manner<sup>15</sup>.

A person charged on indictment must, if he so requests, be supplied by the proper officer of the court of trial with a copy of the indictment free of charge<sup>16</sup>.

1    Is subject to the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2 (as amended): see PARAS 1206-1208 post.

2    Is the requirements of *ibid* s 2(2) (as amended): see PARA 1206 post.

As to the summary trial of an information against a child or young person for an indictable offence see PARA 1116 ante.

3    Signature by the proper officer of the court is a mandatory, rather than a directory, requirement: see *R v Morais* [1988] 3 All ER 161, 87 Cr App Rep 9, CA (trial and conviction on unsigned 'indictment' held to be a nullity; the Court of Appeal stated that the proper officer's signature was not 'a comparatively meaningless formality' but 'a necessary condition precedent to the existence of a proper indictment'); distinguished, on the ground that in the circumstances the requirement for the proper officer's signature was a meaningless formality, in *R v Jackson* [1997] 2 Cr App Rep 497, CA, (judge had directed in open court that two new indictments be signed because original indictment contained misjoined counts, but proper officer did not sign them; held that in circumstances proper officer's signature was a meaningless formality, that the proper officer's signature was deemed to have been appended, and that the indictments were therefore valid and the trial was not a nullity). The normal practice is for the signature to be placed immediately after the last count and to be dated; any departure from this practice is to be strongly discouraged but does not of itself invalidate the indictment: *R v Laming* (1989) 90 Cr App Rep 450, CA.

When the bill is signed, the date should be added and the date of preferment and any extension should be recorded on it: *R v Stewart* (1990) 154 JP 512, CA.

4    See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(1).



5 For these purposes, 'judge' includes any judge of the High Court, or any circuit judge, Recorder or District Judge (Magistrates' Court): see the Supreme Court Act 1981 s 8(1) (amended by the Courts Act 2003 s 65(1)). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed.

6 Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(1) proviso (amended by the Courts Act 1971 s 56(4), Sch 11 Pt IV).

7 CrimPR 14.1.

8 See CrimPR 14.1 proviso. See also PARA 1212 post.

9 Ie under the Criminal Justice Act 1987 s 4 (as amended; prospectively repealed): see PARA 1105 ante.

10 Ie under the Criminal Justice Act 1991 s 53 (as amended; prospectively repealed): see PARA 1105 ante.

11 Ie under the Crime and Disorder Act 1998 s 51 (prospectively substituted): see PARA 1132 ante.

12 Ie under ibid Sch 3 para 1 (as amended): see PARA 1138 ante.

13 CrimPR 14.2(1).

14 For these purposes, 'judge of the Crown Court' has the meaning given in note 5 supra.

15 CrimPR 14.2(2). Notwithstanding CrimPR 14.2(2), the first extension of the period may be granted by the Crown Court officer provided that the period of the extension does not exceed 28 days; but if the court officer is of the opinion that the first extension of the period should not be granted, he must refer the application to a judge of the Crown Court who must determine the application himself: CrimPR 14.2(3).

Where such an application is made after the expiry of the period referred to in CrimPR 14.2(1) (see the text and notes 9-13 supra) or, as the case may be, the expiry of that period as extended under CrimPR 14.2(2), the application must in addition include a statement of the reasons why the application was not made before the expiry of the period or, as the case may be, the extended period: CrimPR 14.2(5).

The time limit prescribed for the preferment of a bill of indictment is not necessarily mandatory: see *R v Urbanowski* [1976] 1 All ER 679, 62 Cr App Rep 229, CA; *R v Sheerin* (1976) 64 Cr App Rep 68, CA; *R v Soffe* (1982) 75 Cr App Rep 133, CA (court gave general guidance on the procedure to be adopted in preferring bills of indictment); *R v Farooki* (1983) 77 Cr App Rep 257, CA. Consequently, a breach of CrimPR 14.2 does not invalidate subsequent proceedings: *R v Soffe* supra; *R v Farooki* supra.

16 Indictment Rules 1971, SI 1971/1253, r 10(1). The cost of supplying a person charged on indictment with a copy of the indictment is to be treated as part of the costs of the prosecution for the purposes of the Prosecution of Offences Act 1985 ss 16, 17 (as amended; prospectively further amended) (see PARAS 2059, 2062 post); Indictment Rules 1971, SI 1971/1253, r 10(2); Interpretation Act 1978 ss 17(2)(a), 23. Those engaged in the defence should be in close touch with the court so as to obtain a copy of the indictment as soon as it is signed: *R v Dickson* [1969] 1 All ER 729, 53 Cr App Rep 263, CA.

## UPDATE

### 1205 How an indictment is preferred

TEXT AND NOTES 1-15--CrimPR Pt 14 now Criminal Procedure Rules 2010, SI 2010/60, Pt 14.

NOTE 3--Parliament's intention is that a bill of indictment does not become an indictment unless it is signed, and a trial on an unsigned bill of indictment is not valid: *R v Clarke*; *R v McDaid* [2008] UKHL 8, [2008] 2 All ER 665.

TEXT AND NOTES 4, 6--Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(1) partly repealed: Coroners and Justice Act 2009 s 116(1)(a), Sch 23 Pt 3. See also Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(6ZA)-(6ZC) (added by Coroners and Justice Act 2009 s 116(1)(c)).

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTE 16--SI 1971/1253 revoked: SI 2007/699.

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INDICTMENTS/(1) PREFERRING AN INDICTMENT/1206. Restrictions on preferring indictments.

### **1206. Restrictions on preferring indictments.**

No bill of indictment charging any person with an indictable offence may be preferred unless:

- 2008 (1) the person charged has been committed for trial for the offence<sup>1</sup>;
- 2009 (2) the offence is specified<sup>2</sup> in a notice of transfer<sup>3</sup>;
- 2010 (3) the person charged has been sent<sup>4</sup> for trial<sup>5</sup>;
- 2011 (4) the bill is preferred by the direction of the criminal division of the Court of Appeal<sup>6</sup> or by the direction or with the consent of a judge of the High Court<sup>7</sup>; or
- 2012 (5) the bill is preferred under the provisions<sup>8</sup> relating to the re-institution of proceedings stayed by the Crown Court<sup>9</sup>.

However, where the person charged has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence or offences for which he was committed, any counts founded on facts or evidence disclosed to the magistrates' court inquiring into that offence as examining justices, being counts which may be lawfully joined in the same indictment<sup>10</sup>. In a case to which head (2) above applies, the bill of indictment may include, either in substitution for or in addition to any count charging an offence specified in the notice of transfer, any counts founded on material that accompanied the copy of that notice which<sup>11</sup> was given to the person charged, being counts which may lawfully be joined in the same indictment<sup>12</sup>. In a case to which head (3) above applies, the bill of indictment may include, either in substitution for or in addition to any count charging an offence specified in the notice<sup>13</sup>, any counts founded on material which<sup>14</sup> was served on the person charged, being counts which may be lawfully joined in the same indictment<sup>15</sup>.

The charges which may be added are not to be confined to charges similar to those on which the committal was based<sup>16</sup>. The power to include in an indictment a count representing a charge which the examining justices have rejected should be exceptionally used<sup>17</sup>. Where the justices have refused to commit upon a charge, the prosecution may include a count for that charge in the indictment, but the defence is entitled to object by moving to quash that count; the trial judge must then rule whether the count is founded on facts or evidence disclosed in any examination or deposition taken before the justices, and may either allow or disallow that count of the indictment<sup>18</sup>. Although not included in the committal<sup>19</sup> or in any direction or consent, a count charging a previous conviction for an offence may be included in any bill of indictment<sup>20</sup>.

Where there has been a committal for trial for an offence not known to the law, the committal is a nullity and no other charge may be validly added<sup>21</sup>.

If a bill of indictment preferred otherwise than in accordance with the statutory provisions<sup>22</sup> is signed by the proper officer of the court, the indictment is liable to be quashed<sup>23</sup>; but if the bill contains several counts, and the statutory provisions have been complied with as respects one or more of them, those counts only that were wrongly included may be so quashed<sup>24</sup>. However, where a person who has been committed<sup>25</sup> for trial is convicted on any indictment or any count of an indictment, that indictment or count may not be so quashed in any proceedings on appeal, unless application was made at the trial that it should be so quashed<sup>26</sup>. There is no rule of law or practice which prohibits two indictments being in existence at the same time for the same offence against the same person on the same facts, but the court will not allow the

prosecution to proceed on both such indictments<sup>27</sup>. They cannot in law be tried together and the court will insist that the prosecution elects the one on which the trial is to proceed<sup>28</sup>.

1 See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(a). As from a day to be appointed this provision is amended so as to refer to persons being sent rather than committed for trial: see s 2(2)(a) (prospectively amended by the Criminal Justice Act 2003 s 41, Sch 3 para 34(1), (2)(a)). At the date at which this volume states the law this amendment has effect only in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51A(3)(d) (as added) (see PARA 1133 ante): Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI 2005/1267, art 2(1), Schedule para 2. The words 'the offence' require that there must be no substantial departure from the original charge, although the count need not be framed exactly as was the charge before the committing justices: see *R v McDonnell* [1966] 1 QB 233, 50 Cr App Rep 5. It is only once that an indictment may be preferred on the basis of one committal (but for an exception to this rule see *R v Groom* [1977] QB 6, 62 Cr App Rep 242, CA); if that indictment fails in toto, the remedy for the Crown, if it is desired to pursue the prosecution, is to obtain leave to prefer a second indictment: *R v Thompson, R v Clein* [1975] 2 All ER 1028, [1975] 1 WLR 1425, CA.

2 Ie under the Criminal Justice Act 1987 s 4 (as amended; prospectively repealed) (serious and complex fraud: see PARA 1105 ante) or under the Criminal Justice Act 1991 s 53 (as amended; prospectively repealed) (violent or sexual offences against children: see PARA 1105 ante).

3 See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(aa), (ab) (s 2(2)(aa) added by the Criminal Justice Act 1987 s 15, Sch 2 para 1; and the Administration of Justice Act (Miscellaneous Provisions) Act 1933 s 2(2)(ab) added by the Criminal Justice Act 1991 s 53(3), Sch 6 para 8). As from a day to be appointed head (2) in the text is repealed: see the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 34(1), (2)(b), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

4 Ie under the Crime and Disorder Act 1998 s 51 (as substituted): see PARA 1132 ante.

5 See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(ac) (s 2(2)(ac) added by the Crime and Disorder Act 1998 s 119, Sch 8 para 5(1)(a)). As from a day to be appointed head (3) in the text is repealed: see the Criminal Justice Act 2003 Sch 3 para 34(1), (2)(b), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

6 A re-trial pursuant to an order of the Court of Appeal under the Criminal Appeal Act 1968 s 7 (as amended) (see PARA 1896 post) is upon a fresh indictment preferred by direction of that court (see s 8(1) (as amended); and PARA 1896 post) but after the end of two months from the date of the order for his re-trial a person may not be arraigned on an indictment preferred in pursuance of such a direction unless the Court of Appeal gives leave: see s 8(1) (as amended); and PARA 1896 post.

7 See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(b) (amended by the Criminal Appeal Act 1964 s 5, Sch 2; the Supreme Court Act 1981 s 152(1), Sch 5; and the Prosecution of Offences Act 1985 s 31(6), Sch 2).

8 Ie under the Prosecution of Offences Act 1985 s 22B(3)(a) (as added): see PARA 1158 ante.

9 See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(c) (added by the Crime and Disorder Act 1998 s 119, Sch 8 para 5(1)); and see *R v Considine* (1979) 70 Cr App Rep 239, CA (addition to indictment of offence for which examining justices did not commit for trial not unlawful). Leave to prefer an indictment is reserved to the Court of Appeal or a High Court judge; if leave is given by a judge in the Crown Court who is not a High Court judge, the indictment is invalid and the trial a nullity: *R v Thompson, R v Clein* [1975] 2 All ER 1028, [1975] 1 WLR 1425, CA. Cf *R v Cairns* (1983) 87 Cr App Rep 287, CA.

The Court of Appeal (Criminal Division) will not inquire into the exercise of the judge's discretion to consent to the preferment of a bill of indictment provided that it is clear that he had the jurisdiction to deal with the application: *R v Rothfield* [1937] 4 All ER 320, 26 Cr App Rep 103, CCA. See also *R v L and W* [1971] Crim LR 481; *R v Coleshill Justices, ex p Davies* [1971] 3 All ER 929, [1971] 1 WLR 1684, DC.

10 See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2) proviso (i) (amended by the Criminal Procedure and Investigations Act 1996 s 47, Sch 1 paras 17, 39). As from a day to be appointed this proviso is substituted so that where the person charged has been sent for trial, the bill of indictment against him may include, either in substitution for or in addition to any count charging a specified offence, any counts founded on material which was served in pursuance of the Crime and Disorder Act 1998 s 52(6), Sch 3 para 1 (as amended) (see PARA 1138 ante) on the person charged, being counts which may lawfully be joined in the same indictment: see the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2) proviso (i) (substituted by the Criminal Justice Act 2003 Sch 3 para 34(1), (2)). At the date at which this volume states the law this substitution has effect only in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51A(3)(d) (as added) (see PARA 1133 ante): Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI

2005/1267, art 2(1), Schedule para 2. For these purposes, 'lawfully joined' means joined under the Indictment Rules 1971, SI 1971/1253, r 9 (see PARA 1221 post): *R v Lombardi* [1989] 1 All ER 992, [1989] 1 WLR 73, CA. Counts arising from separate committals may be joined in one indictment: *R v Wilson* (1973) 58 Cr App Rep 169, CA. The Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2) (as amended; prospectively further amended) is not infringed in relation to one defendant by the addition of counts charging persons other than that defendant who have been separately committed for trial for offences which can lawfully be charged in counts in the same indictment: *R v Groom* [1977] QB 6, 62 Cr App Rep 242, CA.

11    Ie in pursuance of regulations under the Criminal Justice Act 1987 s 5(9) (as amended; prospectively repealed): see PARA 1105 ante. See the Criminal Justice Act 1987 (Notice of Transfer) Regulations 1988, SI 1988/1691 (amended by SI 1997/737; SI 2001/444).

12    See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2) proviso (iA) (added by the Criminal Justice Act 1987 Sch 2 para 1(2); substituted by the Criminal Justice Act 1988 s 170(1), Sch 15 para 10; and amended by the Criminal Justice Act 1991 s 53(5), Sch 6 para 8(2), (3)). As from a day to be appointed this proviso is repealed: see the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 34(1), (2)(d), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

13    Ie under the Crime and Disorder Act 1998 s 51(7) (as substituted): see PARA 1132 ante.

14    Ie in pursuance of *ibid* s 52(6), Sch 3 para 1 (as amended): see PARA 1138 ante.

15    See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2) proviso (iB) (added by the Crime and Disorder Act 1998 s 119, Sch 8 para 5(2)). As from a day to be appointed this proviso is repealed: see the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 34(1), (2)(d), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

16    See *R v Roe* [1967] 1 All ER 492, 51 Cr App Rep 10, CA.

17    *R v Dawson* [1960] 1 All ER 558, 44 Cr App Rep 87, CCA.

18    *R v Morry* [1946] KB 153, 31 Cr App Rep 19, CCA.

19    Or, as from a day to be appointed, a notice: see the Administration of Justice Act 1933 s 2(2) proviso (ii) (amended by the Criminal Justice Act 2003 Sch 3 para 34). At the date at which this volume states the law this amendment has effect only in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 or s 51A(3)(d) (as added) (see PARA 1133 ante): Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI 2005/1267, art 2(1), Schedule para 1.

20    See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2) proviso (ii) (amended by the Statute Law (Repeals) Act 1993 Sch 1).

21    *R v Lamb* [1969] 1 All ER 45, [1968] 1 WLR 1964, CA; and see note 1 *supra*.

22    Ie the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2) (as amended; prospectively further amended): see the text and notes 1-20 *supra*.

23    *Ibid* s 2(3).

24    *Ibid* s 2(3) proviso (a).

25    Or, as from a day to be appointed, sent: see *ibid* s 2(3) proviso (b) (amended by the Criminal Justice Act 2003 Sch 3 para 34(1), (3)). At the date at which this volume states the law this amendment has effect only in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 or s 51A(3)(d) (as added) (see PARA 1133 ante): Criminal Justice Act 2003 (Commencement No 9) Order 2005, SI 2005/1267, art 2(1), Schedule para 1.

26    See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(3) proviso (b). See also *R v Cleghorn* [1938] 3 All ER 398, CCA.

27    *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.34.2, CA.

28    *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.34.2, CA.

## UPDATE

## **1206 Restrictions on preferring indictments**

TEXT AND NOTES 1-20--See also Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(6ZA)-(6ZC) (added by Coroners and Justice Act 2009 s 116(1)(c)).

NOTE 7--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1.

NOTE 10--SI 1971/1253 revoked: SI 2007/699.

TEXT AND NOTE 23--Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(3) amended: Coroners and Justice Act 2009 s 116(1)(b), Sch 23 Pt 3.

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### **1207. Voluntary bills.**

On obtaining the consent of a judge of the High Court, any person may prefer a bill of indictment against anyone whom he accuses of committing an indictable offence<sup>1</sup>. The usual practice is to prefer such a bill of indictment only when there has been a dismissal of an information by a magistrates' court<sup>2</sup> or when there has been a sending or committal for trial and the prosecution wishes to include in the indictment a new offence<sup>3</sup> or an offence which amounts to a substantial departure from the charge originally made<sup>4</sup>.

1 See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(1), (2) (amended by the Criminal Appeal Act 1964 s 5, Sch 2; the Supreme Court Act 1981 s 152(1), Sch 5; and the Prosecution of Offences Act 1985 s 31(6), Sch 2); the Indictments (Procedure) Rules 1971, SI 1971/2084, r 6; and PARA 1206 ante. Such a bill is, by custom, still referred to as a 'voluntary bill', although strictly the voluntary bill which could, by common law, be preferred before a grand jury by any person, without previous inquiry, leave or notice, no longer exists.

2 See eg a case reported in (1913) 135 LT Jo 164.

3 See eg *R v Morais* [1988] 3 All ER 161, 87 Cr App Rep 9, CA.

4 Where it is sought to join a defendant or more than one with others who have already been committed for trial, it is the practice to prefer a voluntary bill in respect of all of them in order to avoid the delay which would be occasioned by further committal proceedings. See *R v Smith* [1958] 1 All ER 475, 42 Cr App Rep 35 (voluntary bill preferred combining several counts in order to avoid separate trials).

### **UPDATE**

#### **1207 Voluntary bills**

NOTE 1--Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(1) partly repealed: Coroners and Justice Act 2009 s 116(1)(a), Sch 23 Pt 3.

Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### **1208. Application for leave to prefer a voluntary bill.**

An application for consent to the preferment of a bill of indictment<sup>1</sup> may be made to a judge of the High Court<sup>2</sup>. Every such application must be in writing and must be signed by the applicant or his solicitor<sup>3</sup>. It must be accompanied by the bill of indictment which it is proposed to prefer and, unless the application is made by or on behalf of the Director of Public Prosecutions, it must also be accompanied by an affidavit by the applicant or, if the applicant is a corporation, by an affidavit by some director or officer of the corporation, that the statements contained in the application are, to the best of the deponent's knowledge, information and belief, true<sup>4</sup>. The application must also state whether or not any application has previously been made<sup>5</sup> and whether there have been any committal proceedings<sup>6</sup>, and the result of any such application or proceedings<sup>7</sup>. The defendant has no right to be heard or make representations<sup>8</sup>. In addition, the application must state whether there has been any sending for trial and any application for dismissal<sup>9</sup>, and the result of any such application<sup>10</sup>.

Where there have been no committal proceedings and no sending for trial, the application must state the reason why it is desired to prefer a bill without such proceedings and: (1) proofs of the evidence of witnesses whom it is proposed to call in support of the charges must accompany the application; and (2) the application must embody a statement that the evidence shown by the proofs will be available at the trial and that the case disclosed by the proofs is, to the best of the knowledge, information and belief of the applicant, substantially a true case<sup>11</sup>.

Where there have been committal proceedings, and the justice or justices have refused to commit the accused for trial, or there has been a sending for trial, and the charge or charges have been withdrawn or dismissed, the application must be accompanied by:

- 2013 (a) a copy of the committal documents; and
- 2014 (b) proofs of any evidence which it is proposed to call in support of the charges, so far as that evidence is not contained in the committal documents or given documents,

and the application must embody a statement that the evidence shown by the proofs and, except in so far as may be expressly stated to the contrary in the application, the evidence shown by the committal documents or given documents will be available at the trial and that the case disclosed by the committal documents or given documents and proofs is, to the best of the knowledge, information and belief of the applicant, substantially a true case<sup>12</sup>.

Where the defendant has been committed or sent for trial, the application must state why it is made and must be accompanied by proofs of any evidence which it is proposed to call in support of the charges, so far as that evidence is not contained in the committal documents or given documents, and, unless the committal documents or given documents have already been transmitted to the judge to whom the application is made, must also be accompanied by a copy of the committal documents or given documents; and the application must embody a statement that the evidence shown by the proofs will be available at the trial, and that the case disclosed by the committal documents or given documents and proofs is, to the best of the knowledge, information and belief of the applicant, substantially a true case<sup>13</sup>.



It is the duty of any person in charge of any committal documents to give to any person desiring to make an application for leave to prefer a bill of indictment against a person in respect of whom committal proceedings have taken place a reasonable opportunity to inspect the committal documents and, if so required by him, to supply him with copies of the documents or any part of them<sup>14</sup>.

1     Ie under the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(b) (as amended): see PARA 1206 ante.

2     Indictments (Procedure) Rules 1971, SI 1971/2084, r 6.

3     Ibid r 7.

4     Ibid r 8(a) (amended by SI 2000/3360). The application for consent must also be accompanied by documents specified in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.35.2, CA. As to the exercise by Crown prosecutors of the powers of the Director of Public Prosecutions in respect of the institution of proceedings see the Prosecution of Offences Act 1985 s 1(6); and PARA 1081 ante. The contention that s 1(6) confers the powers of the Director on Crown prosecutors only where they are acting on the express direction of the Director would produce absurd results: *R v Crown Court at Liverpool, ex p Bray* [1987] Crim LR 51, DC.

5     Ie under the Indictments (Procedure) Rules 1971, SI 1971/2084 (as amended) or any rules revoked by those Rules.

6     For these purposes, 'committal proceedings' means proceedings before a magistrates' court acting as examining justices: see *ibid* r 2.

7     Ibid r 8(b).

8     *R v Raymond* [1981] QB 910, 72 App Rep 151, CA; *R v Soffe* (1982) 75 Cr App Rep 133, CA. There may well be a discretion vested in the judge to agree to receive written representations with regard to an application for leave to prefer a bill of indictment from, or on behalf of, the accused. That discretion, exercisable only in very unusual circumstances, does not, it is thought, extend to hearing oral representations. If the discretion does go that far, it is only in an extraordinary circumstance that it should be exercised in favour of the accused: *R v Raymond* *supra* at 921 and 161.

Neither the Administration of Justice (Miscellaneous Provisions) Act 1933 nor the Indictments (Procedure) Rules 1971 expressly require a prosecuting authority applying for consent to the preferment of a voluntary bill to give notice of the application to the prospective defendant or to serve on him a copy of documents delivered to the judge. However, guidance issued by the prosecuting authorities for England and Wales on the procedures to be adopted in seeking judicial consent to the preferment of voluntary bills directs prosecutors: (1) on the making of application for consent to preferment of a voluntary bill, forthwith to give notice to the prospective defendant that such application has been made; (2) at about the same time, to serve on the prospective defendant a copy of all the documents delivered to the judge (save to the extent that these have already been served on him); (3) to inform the prospective defendant that he may make submissions in writing to the judge, provided that he does so within nine working days of the giving of notice under head (1) *supra*. Prosecutors will be directed that these procedures should be followed unless there are good grounds for not doing so, in which case prosecutors will inform the judge that the procedures have not been followed and seek his leave to dispense with all or any of them: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.35.4, IV.35.5, CA.

9     Ie under the Crime and Disorder Act 1998 s 52(6), Sch 3 para 2 (as amended): see PARA 1138 ante.

10    Indictments (Procedure) Rules 1971, SI 1971/2084, r 8(c) (added by SI 2000/3360).

11    Indictments (Procedure) Rules 1971, SI 1971/2084, r 9(1) (amended by SI 2000/3360). In addition, the application must be accompanied by: (1) a summary of the evidence or other document which (a) identifies the counts in the proposed indictment on which he has been committed for trial (or which are substantially the same as charges on which he has been so committed); and (b) in relation to each other count in the proposed indictment, identifies the pages in the accompanying statements and exhibits where the essential evidence said to support that count is to be found; (2) marginal markings of the relevant passages on the pages of the statements and exhibits identified under head (1)(b) *supra*: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.35.2, CA.

12    Indictments (Procedure) Rules 1971, SI 1971/2084, r 9(2) (amended by SI 1997/711; SI 2000/3360). A copy of any charges on which the defendant has been committed for trial, and a copy of any charges on which

the defendant has not been so committed, should also accompany the application: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.35.2, CA.

13 Indictments (Procedure) Rules 1971, SI 1971/2084, r 9(3) (amended by SI 1997/711; SI 2000/3360).

14 CrimPR 14.3.

## **UPDATE**

### **1208 Application for leave to prefer a voluntary bill**

NOTE 14--CrimPR Pt 14 now Criminal Procedure Rules 2010, SI 2010/60, Pt 14.

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### **1209. Decision on application.**

Unless the judge otherwise directs in any particular case, his decision on an application for consent to the preferment of a bill of indictment must be signified in writing on the application without requiring the attendance before him of the applicant or of any of the witnesses; and, if the judge thinks fit to require the attendance of the applicant or of any of the witnesses, their attendance may not be in open court<sup>1</sup>. Unless the judge gives a direction to the contrary, where an applicant is required so to attend, he may attend by a solicitor or by counsel<sup>2</sup>.

The Court of Appeal will not inquire into the judge's exercise of his discretion in granting or refusing leave, provided that it is clear that the judge had jurisdiction to deal with the application<sup>3</sup>.

1 Indictments (Procedure) Rules 1971, SI 1971/2084, r 10. The preferment of a voluntary bill is an exceptional procedure. Consent should only be granted where good reason to depart from the normal procedure is clearly shown and only where the interests of justice, rather than considerations of administrative convenience, require it. Judges should not give leave to dispense unless good grounds are shown: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.35.3, IV.35.5, CA.

A judge to whom application for consent to the preferment of a voluntary bill is made will, of course, wish to consider carefully the documents submitted by the prosecutor and any written submissions timeously made by the prospective defendant, and may properly seek any necessary amplification. The judge may invite oral submissions from either party, or accede to a request for an opportunity to make such oral submissions, if the judge considers it necessary or desirable to receive such oral submissions in order to make a sound and fair decision on the application. Any such oral submissions should be made on notice to the other party, who should be allowed to attend: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.35.6, CA.

Once the consent of the judge has been obtained, the bill is preferred in the ordinary way: see PARA 1205 ante.

2 Indictments (Procedure) Rules 1971, SI 1971/2084, r 10.

3 *R v Rothfield* [1937] 4 All ER 320, 26 Cr App Rep 103, CCA; and see PARA 1206 note 9 ante. A Divisional Court has no power to review the decision of a High Court judge to give leave to prefer a voluntary bill of indictment: *R v Manchester Crown Court, ex p Williams and Simpson* [1990] Crim LR 654, DC.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/18.  
INDICTMENTS/(2) FORM OF INDICTMENT/(i) Contents of Indictment/1210. General provisions.

## **(2) FORM OF INDICTMENT**

### **(i) Contents of Indictment**

#### **1210. General provisions.**

In form an indictment is an accusation at the suit of the Queen that one or more persons named or otherwise identified have committed one or more specified offences, which has been signed by the proper officer of the court. Until it is signed, it is a bill of indictment<sup>1</sup>. Every indictment must contain, and is sufficient if it contains, a statement of the specific offence or offences with which the defendant is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge<sup>2</sup>. An indictment must be in the prescribed form or in a form substantially to the like effect<sup>3</sup>.

Notwithstanding any rule of law or practice, and subject to the provisions of the Indictments Act 1915, an indictment is not open to objection in respect of its form or contents if it is framed in accordance with rules<sup>4</sup> made under that Act<sup>5</sup>.

1 See the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(1) (as amended); and PARA 1205 ante.

2 See the Indictments Act 1915 s 3(1); and the Indictment Rules 1971, SI 1971/1253, r 5(1).

3 For the prescribed form of indictment see *ibid* r 4(1), Sch 1.

4 The Indictment Rules 1971, SI 1971/1253, revoke and replace the Indictment Rules 1915 (contained in the Indictments Act 1915 Sch 1): see the Indictment Rules 1971, SI 1971/1253, r 2(1), Sch 2. A number of the Indictment Rules 1915 which were not reproduced in the Indictment Rules 1971, SI 1971/1253, are still observed as a matter of common sense and established practice: see PARAS 1213-1217 post. As to defective indictments see PARAS 1226-1227 post.

The Criminal Procedure Rule Committee (see COURTS vol 10 (Reissue) PARA 577) has power from time to time to make rules varying or annulling the rules contained in the Indictments Act 1915 Sch 1 (repealed) and to make further rules with respect to the matters dealt with in those rules; and those rules have effect subject to any modifications or additions so made: s 2(2) (amended by the Criminal Justice Administration Act 1956 s 19(4)(b); and the Courts Act 2003 s 109(1), Sch 8 para 67).

5 Indictments Act 1915 s 3(2). An indictment for a specific offence is not open to objection in respect of its form if it is framed in accordance with a form of indictment for that offence for the time being approved by the Lord Chief Justice: see the Indictment Rules 1971, SI 1971/1253, r 5(2). At the date at which this volume states the law no specimen forms of indictment had been approved by the Lord Chief Justice under r 5(2).

#### **UPDATE**

#### **1210 General provisions**

NOTES--SI 1971/1253 revoked: SI 2007/699.

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### **1211. Counts.**

Where more than one offence is charged in an indictment, the statement and particulars of each offence must be set out in the indictment in a separate paragraph called a count<sup>1</sup>. A single count may not charge the defendant with more than one offence; if it does, it will, generally speaking, be bad for duplicity<sup>2</sup>.

Where an indictment contains more than one count, the counts must be numbered consecutively<sup>3</sup>. It is undesirable that an indictment should contain an unduly large number of counts<sup>4</sup> or that it should include charges of a trivial nature<sup>5</sup>.

When there are counts in an indictment which are mutually exclusive, the trial judge may leave both counts to the jury if the evidence establishes a *prima facie* case on both counts, without requiring the prosecution to make an election at the close of its case as to which count it wishes to be left to the jury<sup>6</sup>.

A count charging a person with one of the specified summary offences<sup>7</sup> may be included in an indictment if the charge:

- 2015 (1) is founded on the same facts or evidence as a count charging an indictable offence<sup>8</sup>; or
- 2016 (2) is part of a series<sup>9</sup> of offences of the same or similar character as an indictable offence which is also charged<sup>10</sup>,

but only if (in either case) the facts or evidence relating to the offence: (a) were disclosed to a magistrates' court inquiring into the offence as examining justices; or (b) are disclosed by material which has been served<sup>11</sup> on the person charged<sup>12</sup>.

1 Indictment Rules 1971, SI 1971/1253, r 4(2). Rules 5 and 6 (see PARAS 1212, 1218 post) apply to each count in an indictment as they apply to an indictment where one offence is charged: r 4(2).

2 As to duplicity see PARA 1220 post.

3 Indictment Rules 1971, SI 1971/1253, r 4(3).

4 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 404, [2002] 2 Cr App Rep 533 at IV.34.3, CA. As to the desirability of the prosecution being put to its election if an unduly large number of counts is included see *Practice Direction* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.34.3, CA; and see *R v Novak* (1976) 65 Cr App Rep 107 at 118, CA; *R v Thorne* (1977) 66 Cr App Rep 6, CA. See also *R v Kellard*, *R v Dwyer*, *R v Wright* [1995] 2 Cr App Rep 134, CA (lengthy indictment and trial acceptable where those taking part in trial were able to discharge their function despite its length). As to the rules governing the inclusion of a count for conspiracy in an indictment containing charges for substantive offences see PARA 78 ante. See also *R v Laycock* [2003] EWCA Crim 1477, [2003] Crim LR 803; and PARA 1219 note 1 post.

5 See *R v Ambrose* (1973) 57 Cr App Rep 538 at 541, CA.

6 *R v Bellman* [1989] AC 836, [1989] 1 All ER 22, HL.

7 The specified offences are:

- 575 (1) common assault (see PARAS 147-148 ante) (Criminal Justice Act 1988 s 40(3)(a)), which for these purposes includes the offence of battery (*R v Lynsey* [1995] 3 All ER 654, [1995] 2 Cr App Rep 667, CA);
- 576 (2) an offence under the Criminal Justice Act 1991 s 90(1) (as amended) (assaulting a prison custody officer: see PRISONS vol 36(2) (Reissue) PARA 528) (Criminal Justice Act 1988 s 40(3)(aa) (added by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 35));
- 577 (3) an offence under the Criminal Justice and Public Order Act 1994 s 13(1) (assaulting a secure training centre custody officer: see PRISONS vol 36(2) (Reissue) PARA 670) (Criminal Justice Act 1988 s 40(3)(ab) (added by the Criminal Justice and Public Order Act 1994 Sch 9 para 35));
- 578 (4) an offence under the Theft Act 1968 s 12(1) (taking motor vehicle or other conveyance without authority etc: see PARA 298 ante) (Criminal Justice Act 1988 s 40(3)(b));
- 579 (5) an offence under the Road Traffic Act 1988 s 103(1)(b) (as substituted) (driving a motor vehicle while disqualified: see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 481) (Criminal Justice Act 1988 s 40(3)(c) (amended by the Road Traffic Consequential Provisions) Act 1988 s 4, Sch 3 para 39));
- 580 (6) an offence mentioned in the Magistrates' Courts Act 1980 s 22(1), Sch 2 column 1 (criminal damage etc (see PARA 333 et seq ante); specified type of aggravated vehicle-taking (see PARA 299 ante) which would otherwise be triable only summarily by virtue of s 22(2) (see PARA 1114 ante) (Criminal Justice Act 1988 s 40(3)(d));
- 581 (7) any summary offence specified by the Secretary of State (s 40(3)(e)).

The Secretary of State may by order made by statutory instrument specify for the purposes of s 40 (as amended) any summary offence which is punishable with imprisonment or involves obligatory or discretionary disqualification from driving: s 40(4). A statutory instrument containing such an order is subject to annulment in pursuance of a resolution of either House of Parliament: s 40(5). At the date at which this volume states the law no such order had been made.

8 Ibid s 40(1)(a). See *R v Bird* [1995] Crim LR 745, CA; *R v Lewis* (1991) 95 Cr App Rep 131, CA; *R v Cox* [2001] 5 Archbold News 2, CA.

9 See *R v Lewis* (1991) 95 Cr App Rep 131, CA; *R v Smith* [1997] QB 836, [1997] 1 Cr App Rep 390, CA.

10 A specified summary offence (see note 7 supra) cannot be included in the indictment if its only link is not with an indictable offence in the indictment but with another specified summary offence, linked to such an indictable offence which has been included: *R v Callaghan* (1991) 94 Cr App Rep 226, CA.

11 Ie under the regulations made under the Crime and Disorder Act 1998 s 56(2), Sch 3 para 1 (as amended): see PARA 1138 ante.

12 Criminal Justice Act 1988 s 40(1) (amended by the Criminal Procedure and Investigations Act 1996 s 47, Sch 1 paras 34, 39; and the Crime and Disorder Act 1998 s 119, Sch 8 para 66). As from a day to be appointed head (a) in the text is repealed: see the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 60(1), (7), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed. The Criminal Justice Act 1988 s 40(1) (as amended; prospectively further amended) does not justify the inclusion of a specified offence (see note 7 supra) in an indictment where there has been a transfer for trial: *R v T*, *R v K* [2001] 1 Cr App Rep 32, CA.

Where a specified summary offence (see note 7 supra) has been improperly included in an indictment, the proceedings are not thereby rendered a nullity; the wrongly included count can be quashed, leaving the other counts to stand, provided that this does not prejudice the defendant: *R v Callaghan* (1991) 94 Cr App Rep 226, CA; *R v Smith* [1997] QB 836, [1997] 1 Cr App Rep 390, CA; *R v Lockley*, *R v Sainsbury* [1997] Crim LR 455, CA. As to the trial of such an offence see PARA 1233 post.

## UPDATE

### 1211 Counts

TEXT AND NOTES 1-3--SI 1971/1253 revoked: SI 2007/699.

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INDICTMENTS/(2) FORM OF INDICTMENT/(i) Contents of Indictment/1212. Statement and particulars of offence.

### **1212. Statement and particulars of offence.**

Each count of an indictment must commence with a statement of the offence charged, which must briefly describe it<sup>1</sup>. If the offence is created by or under an enactment, the statement must contain a reference to the relevant statutory provision<sup>2</sup>.

After the statement of the offence, particulars of the offence must be set out with such particularity as may be necessary for giving reasonable information as to the nature of the charge<sup>3</sup>.

Where the offence is one created by or under an enactment, the particulars must disclose the essential elements of the offence<sup>4</sup>.

The responsibility for the correctness of an indictment rests on counsel for the prosecution and not upon the court<sup>5</sup>.

1 See the Indictment Rules 1971, SI 1971/1253, r 5(1); and PARA 1210 ante. In the case of statutory offences, r 5(1) is subject to r 6 (see PARA 1218 post): r 5(1). The offence must be adequately described both in the statement, and in the particulars, of offence: *R v Quintner* (1934) 25 Cr App Rep 32, CCA; and see also *R v Tyler* (1992) 96 Cr App Rep 332, CA (indictment the particulars of which disclose correct offence but widen ambit of offence capable of amendment and not a nullity).

2 See the Indictment Rules 1971, SI 1971/1253, r 6(a); and PARA 1218 post.

3 See *ibid* r 5(1). In cases involving complicated conspiracies to defraud, the particulars of offence should contain considerable detail: see *R v Landy* [1981] 1 All ER 1172, 72 Cr App Rep 237, CA.

4 See the Indictment Rules 1971, SI 1971/1253, r 6(b); and PARA 1218 post.

5 *R v Pople* [1951] 1 KB 53, 34 Cr App Rep 168, CCA. For a consideration of that case in relation to amendments to the indictment and the time of application for amendment see *R v Johal*, *R v Ram* [1973] QB 475, 56 Cr App Rep 348, CA.

## **UPDATE**

### **1212 Statement and particulars of offence**

TEXT AND NOTES 1-4--SI 1971/1253 revoked: SI 2007/699.

NOTE 4--See *R v Goldshield Group plc* [2008] UKHL 17, [2009] 2 All ER 737 (indictment failing to isolate and charge specific aggravating elements which would elevate price-fixing into conspiracy to defraud).

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INDICTMENTS/(2) FORM OF INDICTMENT/(i) Contents of Indictment/1213. Description of persons.

### **1213. Description of persons.**

The description or designation in an indictment of the defendant, or of any other person to whom reference is made, must be such as is reasonably sufficient to identify him, without necessarily stating his correct name or his abode, style, degree or occupation<sup>1</sup>. It is sufficient to describe a person whose name is not known as 'a person unknown'<sup>2</sup>.

If the offence alleged is one that has been committed against the person or property of someone, the name and surname of that person should be stated, if known<sup>3</sup>.

In general, a statement of the age of the defendant or of the person injured is not necessary<sup>4</sup>. Where it is an essential ingredient of the particular offence that the person committing it or the person injured should be within particular age limits<sup>5</sup>, the indictment and every count in it must state the relevant age<sup>6</sup>.

<sup>1</sup> See 2 Hale PC 175. See also the Indictment Rules 1915 r 7 (revoked); and see PARA 1210 note 4 ante. When a corporation is indicted, it should be described by its proper corporate name or style; the presumption of regularity (see PARA 1376 post) operates to establish the due incorporation of a corporation which has acted as such: *R v Langton* (1876) 2 QBD 296.

<sup>2</sup> Indictment Rules 1971, SI 1971/1253, r 8.

<sup>3</sup> 2 Hawk PC c 25 ss 71, 72; *R v Earl of Cardigan* (1841) 4 State Tr NS 601, HL. The name given may be either the real name of the person injured or the name by which he is known: *R v Norton* (1823) Russ & Ry 510, CCR; *R v Williams* (1836) 7 C & P 298 at 299; *R v Gregory* (1846) 8 QB 508. As to the proper description where parent and child have the same name see *R v Peace* (1820) 3 B & Ald 579 at 580. If the person injured was eg a peer, a baronet or a knight, this rank was formerly given (see *R v Pitts* (1839) 8 C & P 771; *R v Graham* (1791) 2 Leach 547; *R v Gregory* supra; *R v Frost* (1855) Dears CC 474), but this is no longer the practice.

Where a defendant would not be likely to know the exact nature of the charge alleged without particulars asserting the ownership of the property, such particulars should be stated in the indictment. In *R v Gregory* [1972] 2 All ER 861, 56 Cr App Rep 441, CA, it was held that, when the subject of a count was a common and indistinctive object, such as a starter motor, particulars of ownership were not surplusage for they informed the defendant of the nature of the case against him and limited the prosecution to that case as the one which it had sought to establish at the outset of the trial.

<sup>4</sup> It is not necessary to aver that the defendant is ten years of age or more. Although a person under ten may not be convicted of an offence (see PARA 37 ante), the fact of a person's being ten years of age or above is not an essential element of any particular offence, but a condition of criminal liability common to all offences.

<sup>5</sup> See eg the Children and Young Persons Act 1933 ss 1, 3 (as amended) (see PARAS 143-144 ante); the Sexual Offences Act 2003 ss 5-19, 25, 26, 47-50 (see PARAS 166-185, 191 et seq, 215-216 ante); and the Protection of Children Act 1978 s 1 (as amended) (see PARA 757 ante).

<sup>6</sup> *R v Martin* (1840) 9 C & P 213, CCR; *R v Waters* (1849) 1 Den 356, CCR. See also *R v Jones* (1911) 6 Cr App Rep 290, 106 LT 1024, CCA; *R v Stephenson* [1912] 3 KB 341, 8 Cr App Rep 36, CCA.

## **UPDATE**

### **1213 Description of persons**

TEXT AND NOTE 2--SI 1971/1253 revoked: SI 2007/699.





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INDICTMENTS/(2) FORM OF INDICTMENT/(i) Contents of Indictment/1214. Description of document.

**1214. Description of document.**

Where it is necessary to refer to any document or instrument in an indictment, it is sufficient to describe it by any name or designation by which it is usually known, or by giving its purport, without setting out any copy of it<sup>1</sup>.

<sup>1</sup> Indictment Rules 1915 r 8 (revoked); and see PARA 1210 note 4 ante.

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INDICTMENTS/(2) FORM OF INDICTMENT/(i) Contents of Indictment/1215. Place, time etc.

### **1215. Place, time etc.**

It is sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in an indictment, in ordinary language in such manner as to indicate with reasonable clearness the place, time, thing, matter, act, or omission referred to<sup>1</sup>.

It is usual to insert the date on which the offence charged is alleged to have been committed<sup>2</sup>, but the date is not material unless it is an essential part of the offence<sup>3</sup>. Where time is of the essence of the offence<sup>4</sup>, the day of the month or year, and sometimes the time of day, when the alleged offence was committed must be alleged<sup>5</sup>.

It is not necessary to state the place where the offence is alleged to have been committed unless it is an essential part of the offence<sup>6</sup>.

1 See the Indictment Rules 1915 r 9 (revoked); and see PARA 1210 note 4 ante.

2 As to the degree of precision necessary see *HM Advocate v MacKenzie* 1913 SC (J) 107. Where any offence mentioned in the Children and Young Persons Act 1933 Sch 1 (as amended) (see PARA 1164 ante) charged against any person is a continuous offence, it is not necessary to specify in the indictment the date of the acts constituting the offence but the indictment must be free from duplicity or repugnancy: see s 14(4); and PARA 1220 post. For a further general example of continuous offences see *Hodgetts v Chiltern District Council* [1983] 2 AC 120, sub nom *Chiltern District Council v Hodgetts* [1983] 1 All ER 1057, HL (it is not an essential characteristic of a single criminal offence that the prohibited act or omission took place once and for all on a single day, since it can take place continuously or intermittently over a period of time and still remain a single offence).

3 *R v Dossi* (1918) 13 Cr App Rep 158, 87 LJB 1024, CCA; and see also *R v James* (1923) 17 Cr App Rep 116, CCA.

4 Time is of the essence of the offence: (1) when an act is criminal only if done within a certain time of some other act or event (eg persons in possession of firearms within five years from the date of release from certain sentences, contrary to the Firearms Act 1968 s 21(2) (as amended) (see PARA 672 ante)); (2) when it is an essential ingredient of a particular offence that certain consequences should follow a particular act; (3) when it is an essential ingredient of a particular offence that the act alleged was committed between certain hours of the day or night (eg night poaching or making signals to smuggling vessels); and (4) when the prosecution for a particular offence must be commenced within a certain time of the commission of the criminal act alleged (see PARA 1047 ante).

5 In an indictment for night poaching it is sufficient to aver that the offence was committed by night without stating the hour: *Davies v R* (1829) 10 B & C 89. As to the averment of time in an indictment for an offence, for the commencement of the prosecution of which the time is limited, see *R v Brown* (1828) Mood & M 163 (time stated in the indictment must be taken to be the true time without a substantive averment).

6 It is otiose to state the place or county, where it has no bearing on the offence: *R v Wallwork* (1958) 42 Cr App Rep 153, 122 JP 229, CCA. Since the Crown Court is a single court with jurisdiction over all England and Wales (see PARA 1052 ante), the common law rules as to venue are of no importance in so far as trials on indictment are concerned and the instances in which it will be necessary to aver the place in which the offence was alleged to have been committed will now be rare.

## **UPDATE**

### **1215 Place, time etc**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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INDICTMENTS/(2) FORM OF INDICTMENT/(i) Contents of Indictment/1216. Mental element.

### **1216. Mental element.**

Where any particular mental element is a necessary ingredient of an offence, the mental element must be stated in the indictment<sup>1</sup>. However, it is not necessary, in stating any intent to defraud, deceive, or injure, to state an intent to defraud, deceive, or injure any particular person where the statute creating the offence does not make an intent to defraud, deceive, or injure a particular person an essential ingredient of the offence<sup>2</sup>.

<sup>1</sup> Eg in an indictment for arson under the Criminal Damage Act 1971 s 1(1), (3) (see PARA 334 ante), an intent to destroy or damage, as the case may be, another's property, or recklessness as to whether such property would be destroyed or damaged, as the case may be, must be alleged. As to indictments under the Forgery and Counterfeiting Act 1981 see PARA 353 ante. See also the offences of: (1) wounding with intent to do grievous bodily harm or to resist apprehension (see the Offences against the Person Act 1861 s 18 (as amended); and PARA 118 ante); (2) attempting to procure a miscarriage (see s 58; and PARA 109 ante); (3) blackmail (see the Theft Act 1968 s 21; and PARA 308 ante); (4) burglary (see s 9 (as amended); and PARA 294 ante); and (5) obstructing a railway (see the Malicious Damage Act 1861 s 35; and PARA 344 ante). As regards all of which the relevant intent must be specifically alleged in the indictment.

<sup>2</sup> See the Indictment Rules 1915 r 10 (revoked); and see PARA 1210 note 4 ante. See also *R v Addis* [1965] 2 All ER 794n, 49 Cr App Rep 95, CCA, where in an indictment for conspiracy to defraud it was held that an indictment was sufficient where the particulars of offence alleged that the defendant conspired together to cheat and defraud such persons as might be induced to part with money to certain named companies 'by false representations and other false and fraudulent devices'.

However, in *R v Landy* [1981] 1 All ER 1172, 72 Cr App Rep 237, CA, it was stated that the particulars in an indictment for conspiracy to defraud should be such as will enable the defendants and the trial judge to know the nature of the prosecution's case and will prevent the prosecution from shifting its ground during the trial without applying for leave to amend the indictment, and that the words 'and by divers other false and fraudulent devices' were outdated and not to be used any longer in an indictment. Further, the term 'falsely representing' was called imprecise and likely to confuse a jury.

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### **1217. Property.**

The description of property in a count in an indictment must be in ordinary language and such as to indicate with reasonable clearness the property referred to<sup>1</sup>. If the property is so described, it is not always necessary, except when required for the purpose of describing an offence depending on any special ownership of property or special value of property, to name the person to whom the property belongs or the value of the property<sup>2</sup>. If, however, it is possible to do so, the indictment should aver who is the owner of the property<sup>3</sup>. Moreover, where a defendant would not be likely to know the nature of the charge alleged without particulars asserting the ownership of the property, such particulars should be stated in the indictment<sup>4</sup>. Where property is vested in more than one person and the owners of the property are referred to in an indictment, it is sufficient to describe the property as owned by one of those persons by name with others; and if the persons owning the property are a body of persons with a collective name, such as 'inhabitants', 'trustees', 'commissioners', or 'club', or other such name, it is sufficient to use the collective name without naming any individual<sup>5</sup>.

1 See the Indictment Rules 1915 r 6(1) (revoked); and see PARA 1210 note 4 ante. It is not necessary in a count charging the dishonest handling of stolen goods to assert the ownership of the goods provided that they are identified with reasonable clarity and that it is immaterial from whom they were stolen: *R v Deakin* [1972] 3 All ER 803, 54 Cr App Rep 841, CA.

A substantial misdescription of property, where a description is essential, will, unless amended, render the indictment bad: see *R v Satchwell* (1873) LR 2 CCR 21 (decided under the Malicious Damage Act 1861 s 17 (repealed)).

2 See the Indictment Rules 1915 r 6(1) (revoked); and *R v Gregory* [1972] 2 All ER 861, 56 Cr App Rep 441, CA.

3 See Hawk PC c 25 s 71; and PARA 1213 text and notes 2, 3 ante.

4 *R v Gregory* [1972] 2 All ER 861, 56 Cr App Rep 441, CA.

5 See the Indictment Rules 1915 r 6(2) (revoked); and see PARA 1210 note 4 ante.

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### **1218. Statutory offences.**

Where the specific offence with which a defendant is charged in an indictment is one created by or under an enactment:

- 2017 (1) the statement of offence must contain a reference to the section of, or the paragraph of the Schedule to, the Act creating the offence in the case of any offence created by a provision of an Act, or to the provision creating the offence in the case of an offence created by a provision of a subordinate instrument<sup>1</sup>;
- 2018 (2) the particulars must disclose the essential elements of the offence, provided that an essential element need not be disclosed if the defendant is not prejudiced or embarrassed in his defence by the failure to disclose it<sup>2</sup>;
- 2019 (3) it is not necessary to specify or negative an exception, exemption, proviso, excuse or qualification<sup>3</sup>.

Where an offence created by or under an enactment states the offence to be the doing or the omission to do any one of any different acts in the alternative, or the doing or the omission to do any act in any one of any different capacities, or with any one of any different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment or subordinate instrument may be stated in the alternative in an indictment charging the offence<sup>4</sup>. The courts have emphasised the desirability in settling indictments of following the words of the statute creating the offence and not departing from them when it is unnecessary to do so<sup>5</sup>.

1 Indictment Rules 1971, SI 1971/1253, r 6(a). Rule 6 is without prejudice to r 5 (see PARA 1210 ante): r 6. Where a section of an enactment under which an indictment is laid has been repealed, the indictment is bad, although in essence the offence charged has been preserved by a later statute: *R v Taylor* (1924) 18 Cr App Rep 105, 93 LJB 912, CCA. Cf *R v Tuttle* (1929) 21 Cr App Rep 85, 45 TLR 357, CCA; and see *R v Nelson* (1977) 65 Cr App Rep 119, CA (indictment which failed to mention the statute contravened was not a nullity, but merely defective).

2 Indictment Rules 1971, SI 1971/1253, r 6(b). See note 1 supra.

3 Ibid r 6(c). See note 1 supra. Rule 6(c) enacts the common law: see *R v Edwards* [1975] QB 27, [1974] 2 All ER 1085, CA.

4 Indictment Rules 1971, SI 1971/1253, r 7. See *R v Arrowsmith* [1975] QB 678, 60 Cr App Rep 211, CA. The Indictment Rules 1971, SI 1971/1253, r 7 does not authorise the charging in one count of two separate offences in the alternative: see *R v Molloy* [1921] 2 KB 364, 15 Cr App Rep 170, CCA; *R v Naismith* [1961] 2 All ER 735, [1961] 1 WLR 952, CCA.

5 *R v Johnson* [1945] KB 419 at 426, 30 Cr App Rep 159 at 167, CCA, per Singleton J.

## **UPDATE**

### **1218 Statutory offences**

TEXT AND NOTES 1-4--SI 1971/1253 revoked: SI 2007/699.





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INDICTMENTS/(2) FORM OF INDICTMENT/(i) Contents of Indictment/1219. Previous conviction.

### **1219. Previous conviction.**

An indictment should not contain any reference to a previous conviction unless the fact of such a conviction is an associated element of the offence charged<sup>1</sup>.

<sup>1</sup> See eg the Firearms Act 1968 s 21 (as amended); and PARA 672 ante. It is particularly important not to overload the indictment with unnecessary counts which involve disclosure of a conviction: *R v Laycock* [2003] EWCA Crim 1477, [2003] Crim LR 803, CA.

### **UPDATE**

### **1219 Previous conviction**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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INDICTMENTS/(2) FORM OF INDICTMENT/(i) Contents of Indictment/1220. Duplicity.

## 1220. Duplicity.

Each count in an indictment must allege only one offence<sup>1</sup>. Thus a count in an indictment may not charge a defendant with one or other of two offences, and must not be capable of being construed as applying to two different offences without stating which one is charged<sup>2</sup>. A count which alleges more than one offence is said to be bad for duplicity<sup>3</sup>. No single count may charge the defendant with two or more offences<sup>4</sup>; but a defendant may be charged in separate counts with committing a number of offences<sup>5</sup>. Whether an enactment creates one or more offences is a matter of statutory interpretation<sup>6</sup>. There will be only one offence if it was clearly the intention of Parliament to create one offence embracing the commission of numerous offences which themselves, if the details were known, could be individually chargeable<sup>7</sup>.

Duplicity is a matter of form; it is not a matter relating to the evidence called in support<sup>8</sup>.

An application to quash the indictment for irregularity of form, particularly for duplicity, should, save in exceptional circumstances, be made on the arraignment of the defendant and before his plea is taken<sup>9</sup>.

1 Indictment Rules 1971, SI 1971/1253, r 4(2). In relation to theft, if someone like an employee or trustee is unable to account for property held or received by him as such, and it is clear that the whole or part of the property has been appropriated within a specific period but it is impossible to prove when or, indeed, whether there was more than one appropriation, there can be a conviction on an indictment charging theft of the whole deficiency on one count: *R v Tomlin* [1954] 2 QB 274, 38 Cr App Rep 82, CCA; *R v Hallam*, *R v Blackburn* [1995] Crim LR 323, CA.

In addition, in theft, there can be a single charge of theft where there has been a 'continuous offence', ie a continuous course of individual appropriations of the same type over a period: *R v Firth* (1869) LR 1 CCR 172, CCR; *R v Henwood* (1870) 11 Cox CC 526; *DPP v McCabe* [1992] Crim LR 885, DC; *Barton v DPP* [2001] EWHC Admin 223, 165 JP 779, DC.

2 *R v Surrey Justices, ex p Witherick* [1932] 1 KB 450; *R v Wilmot* (1933) 149 LT 407, CCA; *Jones v Sherwood* [1942] 1 KB 127 (a conviction of alternative offences is bad). Because assault and battery are separate offences (see PARA 147 ante), a charge alleging that the defendant did 'assault and batter' the victim is bad for duplicity: *DPP v Taylor*, *DPP v Little* [1992] 1 QB 645, [1992] 1 All ER 299, DC.

3 An indictment containing a duplicitous count is not void but merely irregular: *R v Levantiz* [1999] 1 Cr App Rep 465, CA. An appeal on a duplicitous count will not be allowed unless there has been a substantial miscarriage of justice: *R v Levantiz* supra; *R v Thompson* [1914] 2 KB 99, 9 Cr App Rep 252, CCA.

4 *R v Thompson* [1914] 2 KB 99, 9 Cr App Rep 252, CCA (count charging offence, which was not a continuing offence, as having been committed 'on divers days' bad for duplicity). See also *R v Williams* [1953] 1 QB 660, 37 Cr App Rep 71, CCA (where a count was quashed for duplicity because it charged the larceny of a sum which was the aggregate of sums charged in other counts). Where articles have been stolen from various departments of a store, each article should be the subject of a different count: *R v Ballysingh* (1953) 37 Cr App Rep 28, CCA. However, if the evidence reveals that there was one activity made up of a number of acts of the same kind connected in time and place, those acts may be charged as one offence in a simple count of an indictment: see *Heaton v Costello* (1984) 148 JP 688, DC. An information or count in an indictment is not bad for duplicity if it relates to one activity even though the activity may involve more than one act: *Jemmison v Priddle* [1972] 1 QB 489, 56 Cr App Rep 229, DC. It is legitimate to bring a single charge in respect of one activity even though that activity may involve more than one act. The question whether the charge relates to one offence or more than one offence is to be determined by applying common sense and by deciding what is fair in the circumstances; it is a question of fact and degree: *DPP v Merriman* [1973] AC 584 at 593, [1972] 3 All ER 42 at 47, HL, per Lord Morris of Borth-y-Gest, and at 607 and 59 per Lord Diplock. See also *R v Wilson* (1979) 69 Cr App Rep 83, CA; *R v Jones* (1974) 59 Cr App Rep 120, CA. The question whether there is more than one offence disclosed is a question of fact and degree: *R v Wilson* supra.

5 Eg beating two persons at the same time; libelling two persons in one publication: see *R v Benfield*, *R v Saunders* (1760) 2 Burr 980 at 983-984. A defendant may be charged in the same count with publishing a libel and causing it to be published: see *R v Bradlaugh* (1883) 15 Cox CC 217. A defendant may be charged with 'destroying, defacing, and injuring' a register: *R v Bowen* (1844) 1 Den 22, CCR.

6 *Thomson v Knights* [1947] KB 336, [1947] 1 All ER 112, DC. A provision may create two (or more) offences or it may create one offence with alternative ways of committing it. There are separate offences where the provision refers to two separate types of conduct as constituting an offence (see *R v Surrey Justices, ex p Withwick* [1932] 1 KB 450, DC; *R v Naismith* [1961] 2 All ER 735, [1961] 1 WLR 952, C-MAC; *Mallon v Allon* [1964] 1 QB 385, [1963] 3 All ER 843, DC; *R v Bolton Justices, ex p Khan* [1999] Crim LR 912, DC) as opposed to referring to various ways of committing one specified piece of conduct (*Bale v Rosier* [1977] 2 All ER 160, [1977] 1 WLR 263, DC; *R v Nicklin* [1977] 2 All ER 444, [1977] 1 WLR 403, 64 Cr App Rep 205, CA).

It has, for example, been held that the Theft Act 1968 s 22 (see PARA 302 ante) creates a single offence of handling stolen goods, which can be committed by a variety of specified activities: *Griffiths v Freeman* [1970] 1 All ER 1117, [1970] 1 WLR 659, DC; *R v Nicklin* supra; cf *R v Bloxham* [1983] 1 AC 109 at 113, 74 Cr App Rep 279 at 289, HL, per Lord Bridge (two distinct offences: one of receiving and the other one of the other specified activities). Nevertheless, on a charge of dishonest handling contrary to the Theft Act 1968 s 22, where the prosecution relies on different methods of the alleged handling, it is desirable that it should provide particulars of the offence by dividing the indictment into two counts, one dealing with the first part of s 22 (ie the old type of receiving), and the other dealing with the second part of s 22, alleging dishonest undertaking or assisting in the retention etc of stolen goods by or for the benefit of another: see *R v Bloxham* supra; *R v Nicklin* supra. A conviction on a simple count of handling stolen goods without sub-divided particulars may be upheld where the summing up has made the position clear to the jury, and provided it is made clear at the trial what case is being presented: *R v Pitchley* (1972) 57 Cr App Rep 30, CA; and see also *Griffiths v Freeman* supra; *R v Sloggett* [1972] 1 QB 430, 55 Cr App Rep 532, CA; *R v Marshall* (1971) 56 Cr App Rep 263, CA; *R v Alt* (1972) 56 Cr App Rep 457, CA; *R v Willis* [1972] 3 All ER 797, 57 Cr App Rep 1, CA; *R v Deakin* [1972] 3 All ER 803, 54 Cr App Rep 841, CA. Cf *R v Ikpong* [1972] Crim LR 432, CA. See further PARA 302 note 9 ante. Where there is any doubt as to the form of handling, particulars of charges should be laid in the alternative as a person charged only with handling by dishonestly receiving cannot be convicted of another form of handling: *R v Nicklin* supra.

Whenever there is doubt as to whether or not a provision creates one offence, the safe course is to include separate counts in the indictment for each type of activity specified in the provision which it is wished to allege (eg because there is doubt as to which can be proved). An indictment bad for duplicity can be amended by the court: see PARA 1227 post.

7 *R v Asif* (1985) 82 Cr App Rep 123, CA.

8 *R v Greenfield* [1973] 3 All ER 1050 at 1054, 57 Cr App Rep 849 at 855, CA (prosecution evidence consistent with existence of more than one conspiracy did not make bad in law count charging one conspiracy). For examples of the application of this rule see *R v Greenfield* supra; *R v Griffiths* [1966] 1 QB 589, [1965] 2 All ER 448, CCA; cf *R v West* [1948] 1 KB 709, 32 Cr App Rep 152, CCA; *R v Davey* [1960] 3 All ER 533, 45 Cr App Rep 11, CCA.

9 *R v Asif* (1985) 82 Cr App Rep 123, CA. See also *R v Laming* (1989) 90 Cr App Rep 450, (1989) Times, 19 December, CA (defence counsel applied 'most unusually and inappropriately' to trial judge, after defendant's conviction, for declaration that trial a nullity because indictment allegedly invalid (on grounds of lack of signature: see PARA 1205 ante)). Any such application after conviction should be made by way of appeal to the Court of Appeal: *R v Laming* supra.

## UPDATE

### 1220 Duplicity

TEXT AND NOTE 1--SI 1971/1253 revoked: SI 2007/699.

NOTE 3--The rule relating to duplicity relates to form; the fact that a count in an indictment is duplicitous will not lead to the quashing of a conviction if, on the facts, the duplicity has not caused any injustice to the defendant: *R v Marchese* [2008] EWCA Crim 389, [2009] 1 WLR 992, [2008] All ER (D) 150 (Feb).

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INDICTMENTS/(2) FORM OF INDICTMENT/(ii) Joinder of Offences or Defendants/1221. Joinder of offences.

## (ii) Joinder of Offences or Defendants

### 1221. Joinder of offences.

Charges for any offences may be joined in the same indictment<sup>1</sup> if those charges are founded on the same facts<sup>2</sup>, or form or are part of a series of offences of the same or a similar character<sup>3</sup>. A series of offences may be constituted by only two<sup>4</sup>. Although, to be part of a series, the offences need not arise out of the same facts or be part of a system of conduct, there must be a sufficient connection between them<sup>5</sup>.

Except where the prosecutor is put to his election as to the count upon which he will proceed, the defendant may be put in charge of the jury, and evidence may be given, upon all the counts of the indictment at the same trial<sup>6</sup>; but for the purposes of verdict and judgment each count is treated as a separate indictment<sup>7</sup>. A verdict must be taken separately on each count, for, if there is a general verdict on the whole indictment followed by a general judgment, then, if some of the counts should be found to be bad, the whole judgment may be vitiated<sup>8</sup>. The simultaneous trial of two indictments is a nullity<sup>9</sup>. Where different persons have been separately committed for trial for offences which may lawfully be charged in the same indictment, the counts founded on the separate committals may be joined in one indictment even though an indictment in respect of one committal has already been signed<sup>10</sup>.

1 Separate offences must form the subject of separate counts: see PARA 1211 ante.

2 To be 'founded on the same facts' charges must have a common factual origin; if the 'subsidiary' charge could not be alleged but for the facts which give rise to the 'primary' charge, the charges are 'founded on the same facts'; it is not necessary, however, that the facts should be identical in substance or contemporaneous: *R v Barrell, R v Wilson* (1979) 69 Cr App Rep 250, CA. See also *R v Barnes* (1985) 83 Cr App Rep 38, CA; *R v Williams* [1993] Crim LR 533, CA; *R v Lockley, R v Sainsbury* [1997] Crim LR 455, CA.

3 Indictments Act 1915 s 4 (amended by the Criminal Justice Act 1948 s 83(3), Sch 10 Pt 1; and the Criminal Law Act 1967 s 10(2), Sch 3 Pt III); Indictment Rules 1971, SI 1971/1253, r 9.

Where an indictment is defective because of the misjoinder of disparate offences, the defect cannot be cured by severance of the misjoined counts and an order for their separate trial under the Indictments Act 1915 s 5(3) (see PARA 1222 post), although it may amend the indictment so as to remove one or more of the counts, if a court proceeds to try a misjoined indictment: *R v Newland* [1988] QB 402, 87 Cr App Rep 118, CA; followed in *R v O'Reilly* [1989] Crim LR 652, CA. However, the court may stay proceedings on such an indictment and give leave to the prosecution to prefer out of time two or more fresh indictments splitting up the offences so that each indictment complies with the Indictment Rules 1971, SI 1971/1253, r 9: *R v Follett* [1989] QB 338, 88 Cr App Rep 310, CA. Another way to deal with counts removed from the indictment on the grounds of misjoinder would be to seek a voluntary bill of indictment: see PARAS 1207-1209 ante. In *R v Newland* supra it was also held that, if a court proceeds to try a misjoined indictment, or orders separate trials, the proceedings will be a nullity and any resulting convictions on the indictment will be quashed; but in *R v Smith* [1997] QB 836, [1997] 1 Cr App Rep 390, CA, the Court of Appeal (obiter) disapproved this part of the decision in *R v Newland* supra and stated that only a misjoined count should be quashed. *R v Smith* supra was followed in *R v Lockley, R v Sainsbury* [1997] Crim LR 455, CA. How it is determined which count or counts is or are misjoined in a case of breach of the rules dealt with in this paragraph has not yet been explained; there is no obvious misjoined offence, as there is where a summary offence has been improperly joined: see PARA 1211 ante.

The court has a discretion, outside the strict limits of a plea of autrefois acquit or autrefois convict, to stay, and as a general rule should stay, a second indictment containing charges founded on the same facts as those in a previous indictment, or forming, or being part of, a series of offences of the same or similar character as those

in the previous indictment, if satisfied that the subject matter of the second indictment ought to have been included in the first. Accordingly, charges which may properly be joined in one indictment ought in general to be so joined: *Connelly v DPP* [1964] AC 1254 at 1359-1360, 48 Cr App Rep 183 at 260-261, HL, per Lord Devlin. 'The prosecutor should join in one indictment all the charges that he wishes to prefer in respect of one incident': *Connelly v DPP* supra at 1367 and 282 per Lord Pearce. In *R v Thatcher* [1967] 3 All ER 410n, 51 Cr App Rep 452, CA, an application to proceed with an indictment which had been stayed was held on the facts to be an abuse of the process of the court. As to stay of indictments see PARA 1224 post.

See also *R v Clayton-Wright* [1948] 2 All ER 763, 33 Cr App Rep 22, CCA.

4 *R v Kray* [1970] 1 QB 125, 53 Cr App Rep 569, CA. In deciding whether offences are similar in character, both the law and the facts must be taken into account: *Ludlow v Metropolitan Police Comr* [1971] AC 29 at 39, 54 Cr App Rep 233 at 241-242, HL (attempted larceny and robbery with violence at neighbouring public houses within a period of 16 days held to constitute a series).

5 *R v Kray* [1970] 1 QB 125, 53 Cr App Rep 569, CA; *R v Baird* (1993) 97 Cr App Rep 308, CA. When joining counts relating to offences widely separated in time, the longer the gap between the separate offences, the clearer the nexus must be to give rise to one period being admissible to prove offences in another period: *R v O'Brien* [2000] Crim LR 863, CA.

6 As to the undesirability of indictments containing a large number of counts, and the desirability of the prosecution being put to its election if an unduly large number of counts is contained in one indictment, see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.34.3, CA. As to mutually exclusive counts in an indictment see *R v Bellman* [1989] AC 836, 88 Cr App Rep 252, HL.

7 *Latham v R* (1864) 5 B & S 635.

8 See *R v O'Connell* (1844) 5 State Tr NS 1; *R v Bailey* [1924] 2 KB 300, 18 Cr App Rep 42, CCA.

9 *R v McDonnell* (1928) 20 Cr App Rep 163, CCA. The clerk of the court should see that the requisite formalities are complied with and should ensure that the trial judge has the actual indictment or an accurate abstract of it; counsel engaged in the case should make themselves aware of its terms: *R v Olivo* [1942] 2 All ER 494, 28 Cr App Rep 173, CCA; and see also *R v Peckham* (1935) 25 Cr App Rep 125, CCA.

10 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.34.2, CA. See further *R v Groom* [1977] QB 6, [1976] 2 All ER 321; *R v Bell* (1984) 78 Cr App Rep 305, CA.

## UPDATE

### 1221 Joinder of offences

NOTE 3--SI 1971/1253 revoked: SI 2007/699. Whether counts have been properly joined does not depend on the explanation given by an appellant, propriety of indictment is to be judged when it is drawn: *R v Roberts* [2008] EWCA Crim 1304, [2009] 1 Cr App Rep 273, [2008] All ER (D) 226 (Jun).

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INDICTMENTS/(2) FORM OF INDICTMENT/(ii) Joinder of Offences or Defendants/1222. Separate trial of counts.

## **1222. Separate trial of counts.**

Where, before trial, or at any stage of a trial, the court<sup>1</sup> is of opinion that the defendant may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that, for any other reason, it is desirable to direct that he should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of the indictment<sup>2</sup>. The mere fact that evidence is admissible on one count and inadmissible on another is not by itself a ground for separate trials unless the prejudice created by that evidence would be improper and too great to be overcome by any direction in the summing up<sup>3</sup>.

Where, before trial, or at any stage of a trial, the court is of opinion that the postponement of the trial of a person is expedient as a consequence of the exercise of any power of the court to order a separate trial of a count<sup>4</sup>, the court must make such order as to the postponement of the trial as appears necessary<sup>5</sup>. Where an order of the court for a separate trial or for the postponement of a trial is made:

- 2020 (1) if such order is made during a trial, the court may order that the jury (if there is one) be discharged from giving a verdict on the count or counts, the trial of which is postponed, or on the indictment, as the case may be<sup>6</sup>;
- 2021 (2) the procedure on the separate trial of a count is the same in all respects as if the count had been found in a separate indictment; and the procedure on the postponed trial is the same in all respects (if the jury has been so discharged<sup>7</sup>) as if the trial had not commenced<sup>8</sup>; and
- 2022 (3) the court may make such order as to granting the defendant bail, and as to the enlargement of recognisances and otherwise, as the court thinks fit<sup>9</sup>.

<sup>1</sup> For these purposes, 'the court' means the court before which any indictable offence is tried or prosecuted: Indictments Act 1915 s 8(2).

<sup>2</sup> Ibid s 5(3). Any power of the court under s 5 (as amended) (see the text and notes 3-9 infra) is in addition to, and not in derogation of, any other power of the court for the same or similar purposes: s 5(6). There must be some special feature of the case which would render a joint trial of several counts prejudicial or embarrassing to the defendant, requiring separate trials in the interests of justice. Examples might be that the offences charged are too numerous or complicated or difficult to disentangle, or that one of the counts is of a scandalous nature likely to arouse in the minds of the jury feelings hostile to the defendant: see *Ludlow v Metropolitan Police Comr* [1971] AC 29 at 41, 54 Cr App Rep 233 at 245-246, HL, per Lord Pearson. See also *R v McGlinchey* (1983) 78 Cr App Rep 282, CA; *R v Dixon* (1989) 92 Cr App Rep 43n, CA; *R v Cannan* (1991) 92 Cr App Rep 16, CA; *R v Christou* [1997] AC 117, [1996] 2 Cr App Rep 360, HL. The court's power under the Indictments Act 1915 s 5(3) applies to valid indictments only and may not be used to sever an indictment which is in breach of the Indictment Rules 1971, SI 1971/1253, r 9 (see PARA 1221 ante): *R v Newland* [1988] QB 402, 87 Cr App Rep 118, CA. See also *R v Follett* [1989] 1 All ER 995, 88 Cr App Rep 310, CA; *R v O'Reilly* [1989] Crim LR 652, CA. The Court of Appeal will not interfere with the exercise of the judge's discretion to order separate trials unless it is shown that the judge has failed to exercise his discretion on usual and proper principles: *R v Flack* (1969) 53 Cr App Rep 166 at 171, CA, per Salmon LJ; *R v Cannan* (1991) 92 Cr App Rep 16 at 23, CA, per Lord Lane CJ.

As to the separate trial of two or more defendant jointly indicted see PARA 1303 post.

<sup>3</sup> In general, if offences are properly joined, the defendant has no right to have the indictment severed merely because he may wish to give evidence in respect of one count but not another. It is a matter for the

discretion of the trial judge: see the Indictments Act 1915 s 5(3); and *R v Phillips (DM)* (1987) 86 Cr App Rep 18, CA. See also *R v Sims* [1946] KB 531, 31 Cr App Rep 158, CCA (the mere fact that evidence is admissible on one count and not on another is not in itself a ground for ordering counts to be tried separately, because often the matter can be made clear in the summing up without prejudice to the defendant, but if it cannot be this is a ground for ordering separate trials).

4 Or to amend an indictment: see PARA 1227 post.

5 Indictments Act 1915 s 5(4).

6 Ibid s 5(5)(a) (s 5(5)(a), (b) amended by the Criminal Justice Act 2003 s 331, Sch 36 para 40).

7 Ie under the Indictments Act 1915 s 5(5)(a) (as amended) (see the text and note 6 supra).

8 Ibid s 5(5)(b) (as amended: see note 6 supra).

9 See ibid s 5(5)(c) (amended by the Bail Act 1976 s 12(1), Sch 2 para 8; and the Prosecution of Offences Act 1985 s 31(6), Sch 2).

## **UPDATE**

### **1222 Separate trial of counts**

NOTE 2--SI 1971/1253 revoked: SI 2007/699.

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INDICTMENTS/(2) FORM OF INDICTMENT/(ii) Joinder of Offences or Defendants/1223. Joinder of two or more defendants.

### **1223. Joinder of two or more defendants.**

Where two or more persons join in the commission of an offence, all, or any number, of them may be indicted for that offence jointly in one indictment<sup>1</sup>. As a general rule it is not proper for a jury to try several defendants together on charges of committing individual offences that have nothing to do with each other; where, however, the matters which constitute the individual offences of the several alleged offenders are on the evidence so related, whether in time or by other facts, that the interests of justice are best served by their being tried together, they may properly be the subject of counts in one indictment and, subject always to the discretion of the trial judge, may be tried together<sup>2</sup>. This rule is not limited to cases where there is evidence that several alleged offenders acted in concert<sup>3</sup>. Charges against some only of the defendants may be included in an indictment charging them all<sup>4</sup>; but in complicated cases where the indictment contains numerous counts concerning different persons the prosecution should endeavour to divide the trial into convenient parts in order to reduce the issues before the jury and render the duties of the court easier<sup>5</sup>. Indictments should be kept as short as possible; and no more defendants should be tried together on one indictment than is necessary for the presentation of the case against the principal defendant. Necessity not convenience is the guiding factor<sup>6</sup>.

Where two or more persons are jointly charged with an offence alleged to have been committed by each on the same and not separate occasions, and when they were together, it is not essential for the prosecution to establish that each was acting in concert with the other; it is open to the jury to convict each of having committed independently the offence which is the subject matter of the joint charge<sup>7</sup>. Thus where one of two persons jointly charged with an offence is acquitted, the other may be convicted of that offence as if he had been charged in a separate count with a separate offence<sup>8</sup>. There is no rule of law which deprives a court of jurisdiction to try two defendants together on an indictment containing only two separate counts, each being a count against one defendant alone<sup>9</sup>.

1 *R v Atkinson* (1706) 1 Salk 382; *R v Trafford* (1831) 1 B & Ad 874, Ex Ch; *Young v R* (1789) 3 Term Rep 98; *R v Benfield and Saunders* (1760) 2 Burr 980 at 985; and see PARA 1303 post. As to aiders and abettors see PARA 57 ante; as to the joinder of persons charged with handling stolen goods stolen by the same theft see PARA 302 ante; and as to the separate trial of persons jointly indicted see PARA 1303 post. As to joinder of counts founded on separate committals see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.34.2, CA.

2 *R v Assim* [1966] 2 QB 249, 50 Cr App Rep 224, CCA. As a matter of practice, where two offenders may be properly tried jointly on indictment, they may be properly committed jointly without their consent: *R v Camberwell Green Justices, ex p Christie* [1978] QB 602, 67 Cr App Rep 39, DC. See also *R v Townsend, R v Dearsley, R v Bretscher* [1997] 2 Cr App Rep 540, CA (single indictment containing counts founded on separate committals and transfers in respect of a number of alleged offenders).

3 *R v Assim* [1966] 2 QB 249, 50 Cr App Rep 224, CCA.

4 *R v Hooley, R v Macdonald, R v Wallis* (1922) 92 LJB 78, 16 Cr App Rep 171, CCA.

5 *R v Shaw* [1942] 2 All ER 342, 28 Cr App Rep 138, CCA; *R v Greenberg* [1942] 2 All ER 344, 28 Cr App Rep 160, CA (citing *R v Carless, R v Stapley* (1934) 25 Cr App Rep 43, CCA); and see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.34.3, CA.



6 *R v Thorne* (1977) 66 Cr App Rep 6, CA.

7 *DPP v Merriman* [1973] AC 584, 56 Cr App Rep 766, HL (adopting *R v Fenwick* (1953) 54 SR NSW 147, NSW FC; explaining *R v Hempstead*, *R v Hudson* (1818) Russ & Ry 344, CCR, *R v Messingham* (1830) 1 Mood CC 357, CCR, and *R v Dovey and Gray* (1851) 4 Cox CC 428, CCR; and overruling *R v Scaramanga* [1963] 2 QB 807, 47 Cr App Rep 213, CCA, *R v Parker* [1969] 2 QB 248, 53 Cr App Rep 289, CA, and *R v Holley* (1969) 53 Cr App Rep 519, CA.

8 *R v Rowlands* [1972] 1 QB 424, 56 Cr App Rep 168, CA.

9 *R v Assim* [1966] 2 QB 249, 50 Cr App Rep 224, CCA.

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### (iii) Defective Indictments

#### 1224. Stay of indictment.

Once an indictment is before the court it must be tried except in the following cases: (1) if it is held defective<sup>1</sup>; (2) if matter in bar is pleaded and is tried and confirmed in favour of the defendant<sup>2</sup>; (3) if a nolle prosequi is entered<sup>3</sup>; (4) if the court has no jurisdiction to try an offence charged in the indictment<sup>4</sup>; (5) if the charges are founded on the same facts as those on which a previous indictment is based<sup>5</sup>; and (6) if the proceedings are an abuse of the court's process<sup>6</sup>. It has also become an accepted practice, where a defendant has pleaded guilty to one or more counts of an indictment, and this is regarded as an adequate plea to the indictment as a whole, for the trial judge to order that any remaining counts in an indictment to which the defendant has pleaded not guilty, should remain on the file marked not to be proceeded with without leave of the court or of the Court of Appeal<sup>7</sup>. Likewise, it is an accepted practice that, where a defendant has pleaded guilty, or been found guilty, on one indictment, the judge may order that another indictment to which the defendant has pleaded not guilty should so remain with the consent of the prosecution and the defendant<sup>8</sup>.

A stayed indictment may be proceeded with on application by the prosecution in certain circumstances<sup>9</sup> unless to do so would be oppressive to the defendant<sup>10</sup> or would be an abuse of the process of the court<sup>11</sup>.

A stayed indictment will not be proceeded with on application by the defendant if to do so would be an abuse of the process of the court<sup>12</sup>.

1 See PARAS 1226-1227 post. As to moving to quash see PARA 1266 post. As to stay of a defective indictment followed by the preferment of fresh indictments see *R v Follett* [1989] 1 All ER 995, 88 Cr App Rep 310, CA.

2 See PARA 1269 et seq post.

3 See PARAS 1229-1231 post.

4 As to jurisdiction see PARA 1050 et seq ante.

5 See *R v London County Quarter Sessions, ex p Downes* [1954] 1 QB 1 at 6, 37 Cr App Rep 148 at 151-152 per Lord Goddard CJ; *Connelly v DPP* [1964] AC 1254 at 1355, 1360, 48 Cr App Rep 183 at 268, 274, HL, per Lord Devlin; and PARA 1221 note 3 ante. As to abuse of process see PARA 1225 post.

6 Head (5) in the text does not apply if the second charge is not an abuse of process or oppressive: *R v Thomson Holidays Ltd* [1974] QB 592, 58 Cr App Rep 429, CA.

7 See *R v Moorhead* [1973] Crim LR 36, CA. As to when the Court of Appeal has jurisdiction to order counts to be tried when the judge has ordered them to remain on file see *R v Mackell* (1981) 74 Cr App Rep 27, CA. Where the defendant alleges oppressive conduct amounting to abuse of the process of the court, there is no general duty to hold a pre-trial inquiry and decide whether to stay the indictment: *R v Heston-Francois* [1984] QB 278, 78 Cr App Rep 209, CA.

8 If the defendant's conviction is quashed on appeal, the Court of Appeal may give leave to proceed in respect of a count or indictment left on the file: *Connelly v DPP* [1964] AC 1254, 48 Cr App Rep 183, HL. An order that a count or indictment stay on the file cannot be challenged in the Court of Appeal: *R v Mackell* (1981) 74 Cr App Rep 27, CA.

9 See *Connelly v DPP* [1964] AC 1254 at 1360, 48 Cr App Rep 183 at 274, HL, per Lord Devlin.

- 10     *R v Riebold* [1965] 1 All ER 653, [1967] 1 WLR 674.
- 11     See *Connelly v DPP* [1964] AC 1254 at 1347, 48 Cr App Rep 183 at 260, HL, per Lord Devlin.
- 12     *R v Thatcher* [1967] 3 All ER 410n, 51 Cr App Rep 452, CA.

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INDICTMENTS/(2) FORM OF INDICTMENT/(iii) Defective Indictments/1225. Abuse of process.

## **1225. Abuse of process.**

Proceedings in the Crown Court on an indictment or a count in the indictment<sup>1</sup> may be stayed where they constitute an abuse of the court's process<sup>2</sup>. In order to determine an application to stay for abuse of process, the court should hear from both the prosecution and the defence<sup>3</sup>. A stay of proceedings is of no effect whilst the prosecution is able to take any of the following steps: (1) to inform the court that it intends to appeal; or (2) to request an adjournment to consider whether to appeal, and after the adjournment to inform the court that it intends to appeal<sup>4</sup>.

The power to stay proceedings for abuse of process can be exercised in many different circumstances, but two main strands can be detected in the authorities: (a) cases in which the court concedes that the defendant cannot receive a fair trial; and (b) cases where the court concludes that it would be unfair for the defendant to be tried<sup>5</sup>.

Examples of circumstances which may result in proceedings being stayed for abuse of process are: unjustifiable delay by the prosecution or delay which is so prejudicial to the defendant that a fair trial cannot be held<sup>6</sup>; adverse publicity rendering fair trial impossible<sup>7</sup>; revocation of a promise not to prosecute if there are special circumstances<sup>8</sup>; deliberate and improper manipulation by the prosecution of the criminal process so as to take unfair advantage of the defendant<sup>9</sup>; entrapment by police officers or other agents of the state when it would not be contrary to the public interest in the integrity of the criminal justice system that a trial should take place<sup>10</sup>; and unconscionable abuse of executive power<sup>11</sup>.

1 An indictment is not indivisible; the court may stay an indictment in part, if appropriate, where there are a number of counts or a number of defendants: *R v Munro* (1992) 97 Cr App Rep 183, CA.

2 *Connelly v DPP* [1964] AC 1254, 48 Cr App Rep 183, HL. As to staying proceedings in a magistrates' court for abuse of process see *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, sub nom *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, HL; *R v Belmarsh Magistrates' Court, ex p Watts* [1999] 2 Cr App Rep 188, DC; *R (on the application of AP, MD and JS) v Leeds Youth Court* [2001] EWHC Admin 215, 165 JP 684, DC.

In all cases where a defendant in the Crown Court proposes to make an application to stay an indictment on the ground of abuse of process, written notice of such application must be given to the prosecuting authority and to any co-defendant not later than 14 days before the date fixed or warned for trial ('the relevant date'). Such notice must: (1) give the name of the case and the indictment number; (2) state the fixed date or the warned date as appropriate; (3) specify the nature of the application; (4) set out in numbered sub-paragraphs the grounds on which the application is to be made; (5) be copied to the chief listing officer at the court centre where the case is due to be heard: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.36.1, CA. Any co-defendant who wishes to make a like application must give a like notice not later than seven days before the relevant date, setting out any additional grounds relied upon: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.36.2, CA. See further *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.36.3, IV.36.4 and IV.36.5, CA.

3 *R v Clerkenwell Stipendiary Magistrate, ex p Bell* [1991] Crim LR 468, DC; *R v Crawley Justices, ex p DPP* (1991) 155 JP 841, DC. See also *DPP v Ayres* [2004] EWHC 2553 (Admin), [2006] Crim LR 62, DC. The prosecution must disclose unused material that is relevant to the issue: *R v DPP, ex p Lee* [1999] 2 All ER 737, [1999] 2 Cr App Rep 304, DC; *R v Early* [2002] EWCA Crim 1904, [2003] 1 Cr App Rep 288.

4 See the Criminal Justice Act 2003 s 58(3), (4). As to an appeal by the prosecution against a stay see PARA 1898 et seq post.

5 *R v Beckford* [1996] 1 Cr App Rep 94, (1995) 159 JP 305, CA. See also *R v Cheong* [2006] EWCA Crim 524, [2006] All ER (D) 385 (Feb) (lapse of time after proceedings concluded in foreign jurisdiction no bar to proceedings by the Crown in respect of the same offence).

6 *A-G's Reference (No 1 of 1990)* [1992] QB 630, 95 Cr App Rep 296, CA. Although the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) art 6(1) (right to a fair trial) entitles the defendant to a fair and public hearing within a reasonable time by an independent and impartial tribunal, breach of art 6(1) should result in proceedings being stayed only if a fair trial is no longer possible, or it is for any compelling reason unfair to try the defendant: *A-G's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, [2004] 1 All ER 1049. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

The discretionary decision whether or not to grant a stay on the ground of abuse of process through delay is an exercise in judicial assessment dependent on judgment rather than any conclusion as to fact based on evidence; it is therefore misleading to apply to the exercise of that decision the language of burden and standard of proof: *R v S* [2006] EWCA Crim 756, [2006] All ER (D) 73 (Mar).

The correct approach for a judge to whom an application for a stay by reason of delay is made is to bear in mind the following principles: (1) even where delay is unjustifiable, a permanent stay should be the exception rather than the rule; (2) where there is no fault on the part of the complainant or the prosecution, it will be very rare for a stay to be granted; (3) no stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held; (4) when assessing possible serious prejudice, the judge should bear in mind his power to regulate the admissibility of evidence, and that the trial process itself should ensure that all the relevant factual issues arising from delay will be placed before the jury for its consideration from the judge; (5) if having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted: see *R v S* supra.

Normally an application for stay based on delay in reporting sexual abuse should not be made at the outset of the trial, because, save in exceptional cases, such an application will fail and will take up the court's time unnecessarily; if an application is to be made, the best time for doing so is after the evidence of the complainant has been called and for the judge then to decide whether the trial should proceed or whether the evidence is such that it would not be safe for a jury to convict: *R v Smolinski* [2004] EWCA Crim 1270, [2004] 2 Cr App Rep 661.

7 *R v Bow Street Metropolitan Stipendiary Magistrate, ex p DPP* (1992) 95 Cr App Rep 9, DC; *A-G v MGN Ltd* [1997] 1 All ER 456, DC.

8 See eg *R v Bloomfield* [1997] 1 Cr App Rep 135, CA (abuse of process where prosecution had revoked assurance given at plea and directions not to offer evidence against defendant: stay of proceedings upheld); *DPP v Taylor* [2004] EWHC 1554 (Admin), [2004] 7 Archbold News 2, DC (Crown Prosecution Service advised defendant that he would not be prosecuted for careless driving after fatal road traffic accident, but then proceeded to so prosecute following representations from victim's family; held justices entitled to find abuse of process on the basis of the general proposition that the assurance of the Crown about whether or not a prosecution would ensue should ordinarily be relied on); cf *R v Horseferry Road Magistrates' Court, ex p DPP* [1999] COD 441, DC (revocation of assurance of no prosecution given by police could not in itself justify stay of proceedings; there had to be special circumstances); *R v Mulla* [2003] EWCA Crim 1881, [2004] 1 Cr App Rep 72, CA (when case listed for trial on causing death by dangerous driving charge, the prosecution had indicated a decision to accept a plea to careless driving but the judge expressed dissent and requested re-consideration; later that day the prosecution indicated that it would not now accept such a plea; decision not to stay proceedings for abuse of process upheld; no abuse of process because defendant knew from outset that the judge was unhappy with the decision not to proceed with the more serious charge, and therefore the defendant's hopes had not been inappropriately raised and then dashed). A police officer's decision to caution rather than prosecute an offender does not preclude a victim's right to bring a private prosecution, although it may in certain circumstances be an abuse of process for a court to entertain such a prosecution: see *Jones v Whalley* [2006] UKHL 41, [2006] 3 WLR 179, [2006] All ER (D) 369 (Jul) (revsg [2005] EWHC 931 (Admin), 169 JP 466, [2005] All ER (D) 114 (May)) (offender accepted police caution on terms that he would not be prosecuted; abuse of court's process for subsequent private prosecution to proceed).

9 See eg *R v Brentford Justices, ex p Wong* [1981] QB 445, 73 Cr App Rep 65, DC; *R v Schlesinger* [1995] Crim LR 137, CA; *R v Piggott*, *R v Litwin* [1999] 2 Cr App Rep 320, CA. Cf *R v Rotherham Justices, ex p Brough* [1991] COD 89, DC.

10 *R v Looseley*, *A-G's Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 4 All ER 897, [2002] 1 Cr App Rep 360.

11 *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, sub nom *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, HL (disguised extradition where no extradition treaty existed); *R v*

*Mullen* [2000] QB 520, [1999] 2 Cr App Rep 143, CA (British authorities procured unlawful deportation of defendant from country with whom there were extradition arrangements); *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60, [2005] 6 Archbold News 1 (covert police tape-recording of solicitor-client conversations).

## UPDATE

### 1225 Abuse of process

NOTE 2--A private prosecution may be deemed an abuse of process if the crime which is the subject of the prosecution is one that has been encouraged by the private prosecutor or if in some other way the private prosecutor has essentially created the same mischief as that about which he complains: *R (on the application of Dacre) v Westminster Magistrates' Court* [2008] EWHC 1667 (Admin), [2009] 1 All ER 639.

NOTE 5--See also *DPP v B* [2008] EWHC 201 (Admin), [2008] All ER (D) 51 (Jan), DC (no abuse where judge asked prosecution to consider increasing number of charges against defendant); *R v Gore*; *R v Maher* [2009] EWCA Crim 1424, [2009] 1 WLR 2454, (2009) 173 JP 505 (no abuse where prosecution for inflicting grievous bodily harm not stayed although penalty notice already imposed in respect of same incident: evidence justifying prosecution for an offence of violence came to light after issue of notice) (see further PARA 587 NOTE 1).

TEXT AND NOTES 6-11--Where a defendant has been acquitted of an offence on grounds that he has a statutory defence, it is an abuse of process to proceed with a separate charge on the same factual basis to which the statutory defence does not apply: *R v Asfaw* [2008] UKHL 31, [2008] 1 AC 1061, [2008] 3 All ER 775.

TEXT AND NOTE 10--For 'when it would not be contrary to the public interest' read 'when it would be contrary to the public interest'.

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### **1226. Objections to indictments.**

Nothing in the Indictments Act 1915 prevents an indictment being open to objection if it contravenes or fails to comply with any other enactment<sup>1</sup>; but, save in exceptional circumstances, the objection should be taken on arraignment and before the defendant's plea is taken<sup>2</sup>.

<sup>1</sup> See the Indictments Act 1915 s 7 (amended by the Administration of Justice (Miscellaneous Provisions) Act 1933 s 10(3), Sch 3).

<sup>2</sup> *R v Asif* (1985) 82 Cr App Rep 123, CA; and see *R v Laming* (1989) 90 Cr App Rep 450, CA. As to moving to quash an indictment see PARA 1266 post.

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INDICTMENTS/(2) FORM OF INDICTMENT/(iii) Defective Indictments/1227. Amendment of indictments.

## **1227. Amendment of indictments.**

Where, before trial, or at any stage of a trial<sup>1</sup>, it appears to the court<sup>2</sup> that the indictment is defective<sup>3</sup>, the court must make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice<sup>4</sup>.

In those cases where no injustice is caused to the defendant, an indictment may be amended after arraignment<sup>5</sup> for the purpose of substituting another offence for that originally charged or for the purpose of adding a further charge<sup>6</sup>. Even after arraignment and plea, a count alleging a further offence or offences may be added; but this is not permissible if it would cause injustice to the defendant<sup>7</sup>. Provided the amendment causes no injustice to the defendant, alterations in matters of particulars may be made<sup>8</sup>. Where an indictment is so amended, a note of the order for amendment must be indorsed on the indictment, and the indictment is then treated for the purposes of the trial and for the purpose of all proceedings in connection therewith as if it had been signed in its amended form<sup>9</sup>. In general, where amendment is substantial, it is desirable that the arraignment be repeated<sup>10</sup>.

Where the trial judge considers that it is expedient, by reason of an order for amendment of the indictment, he may postpone the trial<sup>11</sup>.

1     le even after verdict where amendment does not relate to a material averment: *R v Dossi* (1918) 87 LJB 1024, 13 Cr App Rep 158, CCA (amendment after verdict of date of offence specified in indictment permissible; date not material because not an essential element of offence charged); *R v Nelson* (1977) 65 Cr App Rep 119, CA (statement of offence failed to refer to statute allegedly contravened; amendment after verdict permissible). As to the duty of counsel for the prosecution see PARA 1212 text and note 6 ante.

2     For the meaning of 'the court' see PARA 1222 note 1 ante.

3     'Defective' includes the concept of 'lack' or 'want': *R v Palmer* [2002] EWCA Crim 892, (2002) Times, 18 April, so that an indictment can be amended by the addition of a new defendant.

4     Indictments Act 1915 s 5(1) (amended by the Prosecution of Offences Act 1985 s 31(6), Sch 2). Any power of the court under the Indictments Act 1915 s 5 (as amended) is in addition to, and not in derogation of, any other power of the court for the same or similar purposes: s 5(6). The court's power to amend an indictment under s 5(1) (as amended) applies to all indictments preferred by whatever method: *R v Walters*, *R v Tovey*, *R v Padfield* (1979) 69 Cr App Rep 115, CA; *R v Ismail* (1991) 92 Cr App Rep 92, CA; *R v Wells* [1995] 2 Cr App Rep 417, CA; *R v Allcock* [1999] 1 Cr App Rep 227, CA; *R v Hemmings* [2000] 2 All ER 155, [2000] 1 Cr App Rep 360, CA.

The Indictments Act 1915 s 5(1) (as amended) imposes on the trial judge a duty to remedy a defective indictment if the necessary amendment may be made without injustice: *R v Fraser* (1923) 93 LJB 236, 17 Cr App Rep 182, CCA. An indictment is defective if it is bad for duplicity (see PARA 1220 ante) or misjoinder (see PARAS 1221-1223 ante), or if: (1) it charges offences which are not disclosed by the committal documents or the documents served on the defendant after being sent for trial and fails to charge an offence which is so disclosed (*R v Martin* [1962] 1 QB 221 at 227, 45 Cr App Rep 199 at 204, CCA; *R v Radley* (1973) 58 Cr App Rep 394, CA); (2) it does not accord with the evidence given at the trial (*R v Hall* [1968] 2 QB 788, 52 Cr App Rep 528, CA; *R v Johal*, *R v Ram* [1973] QB 475, 56 Cr App Rep 348, CA); (3) when the evidence in support of the indictment discloses more than one offence (*R v Jones* (1974) 59 Cr App Rep 120, CA; *R v Stanley* (1998) Times, 8 December, CA); (4) where the indictment originates from a voluntary bill of indictment, the indictment does not include a charge in respect of an offence disclosed on the material before the High Court judge who granted leave to prefer the voluntary bill (*R v Wells* supra; *R v Allcock* supra); (5) it does not disclose as a defendant a person who might properly be joined in the indictment (*R v Ismail* supra; *R v Palmer* supra). In view of the fact



that justice lies at the back of all these considerations and no amendment is to be made if it cannot be made without injustice, a fairly liberal meaning should be given to the language of the Indictments Act 1915 s 5 (as amended): *R v Radley* supra at 401. See also *R v Tirado* (1974) 59 Cr App Rep 80 at 87-88, CA.

5 An amendment during the course of the trial is likely to prejudice the defendant, and the longer the interval between arraignment and amendment, the more likely it is that injustice will be caused: *R v Johal, R v Ram* [1973] QB 475, 56 Cr App Rep 348, CA. See also *R v Jennings* (1949) 33 Cr App Rep 143, CCA (amendment resulting in a totally different offence from that originally charged must have prejudiced the defendant; conviction quashed).

6 *R v Johal, R v Ram* [1973] QB 475, 56 Cr App Rep 348, CA; *R v Radley* (1973) 58 Cr App Rep 394, CA; *R v Teong Sun Chuah, R v Teong Tatt Chuah* [1991] Crim LR 463, CA. In *R v Johal, R v Ram* supra the Court of Appeal was of the opinion that the principle in *R v Harden* [1963] 1 QB 8, 46 Cr App Rep 90, CCA, as stated in the headnote to that case in the Criminal Appeal Reports at (1962) 46 Cr App Rep 90 at 91 ('an amendment of a count of an indictment may not be made after arraignment if the result is to substitute another offence for that originally charged'), as a statement of principle to be applied generally was too wide. Thus *R v Hughes* (1927) 20 Cr App Rep 4, 136 LT 671, CCA (an amendment must be of a defect in form and must not amount to an alteration or revision of the substance of the charge) would appear to have been overruled by implication. See also *R v Pain, R v Jory, R v Hawkins* (1985) 82 Cr App Rep 141, CA (substitution of count where proof of offences charged under original counts proved facts justifying prosecution under amended count); *R v Collison* (1980) 71 Cr App Rep 249, CA (addition of count of unlawful wounding, where members of the jury disagreed on the charge of wounding with intent and therefore could not convict of lesser offence, on which they were agreed, under the Criminal Law Act 1967 s 6(3) (see PARA 1335 post)); *R v Cash* [1985] QB 801, 80 Cr App Rep 314, CA (amendment during closing speech of prosecuting counsel).

7 *R v O'Connor* [1997] Crim LR 516, CA; *R v Piggott, R v Litwin* [1999] 2 Cr App Rep 320, CA. Notwithstanding the restrictions under the Administration of Justice Act 1933 s 2(2) (see PARA 1206 ante) an indictment may be amended so as to include an additional offence or offences which are not disclosed in committal documents or in the documents served on the defendant after being sent for trial, although the fact that the offence or offences were not foreshadowed in those documents may be a ground for not permitting the amendment, or for permitting it only on terms as to an adjournment: *R v Osieh* [1996] 1 WLR 1260, [1996] 2 Cr App Rep 145, CA (case concerned with committal proceedings procedure). Cf *R v Hall* [1968] 2 QB 787, 52 Cr App Rep 528, CA (dicta to the effect that the question was whether the amendment was supported by the evidence given at the committal proceedings). In the event of a re-trial, a new count may be added in appropriate circumstances, providing that there is no injustice to the defendant: *R v Swaine* [2001] Crim LR 166, (2000) Times 1 November, CA.

8 Any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case, so long as the amendment causes no injustice to the defendant: *R v Pople* [1951] 1 KB 53 at 54, 34 Cr App Rep 168 at 177, CCA. See also *R v Norton* [1970] Crim LR 282, CA (indictment for burglary alleging that the defendant, having entered a building as a trespasser, stole six keys amended by the substitution of particulars that he entered the building as a trespasser with intent to steal property allowed as merely correcting a misdescription of the alleged offence); *R v Hall* [1968] 2 QB 788, 52 Cr App Rep 528, CA (where there was evidence at trial to support a charge of receiving eight paintings, the alteration of a count charging receiving three to a charge of receiving the eight properly allowed); *R v Bonner* [1974] Crim LR 479, CA (amendment of non-material date of offence allowed after commencement of summing up); *R v Dossi* (1918) 87 LJB 1024, 13 Cr App Rep 158, CCA.

9 Indictments Act 1915 s 5(2); Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(8), Sch 2 para 1.

10 See *R v Radley* (1974) 58 Cr App Rep 394 at 404, CA.

11 See the Indictments Act 1915 s 5(4), (5) (as amended); and PARA 1222 ante.

## UPDATE

### 1227 Amendment of indictments

NOTE 4--See also *R v Hodgson; R v Pollin* [2008] EWCA Crim 895, [2009] 1 WLR 1070, [2008] All ER (D) 119 (May) (failure to include mental element in indictment for causing grievous bodily harm with intent did not mean defendants charged with offence unknown to law).

NOTE 9--Administration of Justice (Miscellaneous Provisions) Act 1933 Sch 2 para 1 amended: Coroners and Justice Act 2009 s 116(1)(d), Sch 23 Pt 3.



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### **(3) ALTERATION OF PLACE OF TRIAL**

#### **1228. Power to alter place of trial.**

The Crown Court may<sup>1</sup> give directions, or further directions, altering the place of any trial on indictment, whether by varying the decision of a magistrates' court<sup>2</sup> or by substituting some other place for the place specified in a notice of transfer<sup>3</sup>, or by varying a previous decision of the Crown Court<sup>4</sup>, or by varying the place of trial where a person has been sent<sup>5</sup> for trial<sup>6</sup>. Where a preparatory hearing has been ordered<sup>7</sup>, directions altering the place of trial may be so given at any time before the time when the jury is sworn<sup>8</sup>.

If dissatisfied with the place of trial as fixed by the magistrates' court, as specified in a notice of transfer<sup>9</sup>, or as fixed by the Crown Court, the defendant or the prosecutor may apply to the Crown Court for a direction, or further direction, varying the place of trial; and the court must take the matter into consideration and may comply with or refuse the application, or give a direction not in compliance with the application, as the court thinks fit<sup>10</sup>.

1    Ie without prejudice to the provisions of the Supreme Court Act 1981 about the distribution of court business: see s 75 (as amended); *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.21.1 et seq, CA. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2    Ie under the Magistrates' Courts Act 1980 s 7 (prospectively repealed): see MAGISTRATES vol 29(2) (Reissue) PARA 676.

3    Ie a notice of transfer under the Criminal Justice Act 1987 s 4 (as amended; prospectively repealed) (see PARA 1105 ante) or the Criminal Justice Act 1991 s 53 (as amended; prospectively repealed) (see PARA 1105 ante); Supreme Court Act 1981 s 76(5) (added by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 17(c)). As from a day to be appointed this provision is repealed: see the Criminal Justice Act 2003 Sch 3 para 54(1), (2)(c) (not yet in force). At the date at which this volume states the law no such day had been appointed.

4    See the Supreme Court Act 1981 s 76(1) (amended by the Criminal Justice Act 1987 s 15, Sch 2 para 10(a); and the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 17(a)). As from a day to be appointed this provision is amended so as to refer to substituting some other place for the place specified in a notice under the Crime and Disorder Act 1998 s 51D (as added; prospectively amended) (see PARA 1136 ante) instead of referring to the variation of the decision of a magistrates' court or the substitution of some other place for that specified in a notice of transfer: see the Supreme Court Act 1981 s 76(1) (as so amended; and prospectively amended by the Criminal Justice Act 2003 s 41, Sch 3 para 54(1), (2)(a)). At the date at which this volume states the law no such day had been appointed. Directions may be so given on behalf of the Crown Court by an officer of the court: Supreme Court Act 1981 s 82(2).

5    Ie under the Crime and Disorder Act 1998 s 51 (prospectively substituted): see PARA 1131 ante.

6    *R v Croydon Crown Court, ex p Britton* (2000) 164 JP 729, DC (power under the Supreme Court Act 1981 s 76(1) to vary the place of trial even though sending for trial is not a circumstance listed in s 76(1)).

7    Ie under the Criminal Justice Act 1987 s 7 (as amended; prospectively further amended): see PARA 1250 post.

8    Supreme Court Act 1981 s 76(2A) (s 76(2A) added by the Criminal Justice Act 1987 Sch 2 para 10(b); and the Supreme Court Act 1981 s 76(2A) amended, and s 76(2B) added, by the Criminal Justice Act 2003 s 331, Sch 36 para 47). The reference to 'the time when the jury is sworn' includes the time when the jury would be

sworn but for the making of an order under the Criminal Justice Act 2003 Pt 7 (ss 43-50) (not yet fully in force; prospectively amended): Supreme Court Act 1981 s 76(2B) (as so added).

9 As from a day to be appointed, there is substituted for the reference in the text to a place of trial fixed by the magistrates' court or specified in a notice of transfer a reference to a place of trial specified in a notice under the Crime and Disorder Act 1998 s 51D (as added; prospectively amended) (see PARA 1136 ante): see the Supreme Court Act 1981 s 76(3) (prospectively amended by the Criminal Justice Act 2003 s 41, Sch 3 para 54(1), (2)(b)). At the date at which this volume states the law no such day had been appointed.

10 Supreme Court Act 1981 s 76(3) (amended by the Criminal Justice Act 1987 Sch 2 para 10(c); and the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 17(b)).

## **UPDATE**

### **1228 Power to alter place of trial**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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#### **(4) NOLLE PROSEQUI**

##### **1229. Stay of proceedings by nolle prosequi.**

Proceedings on an indictment may be stayed at any time after the signing of the indictment<sup>1</sup> and before judgment<sup>2</sup>, at the instance of either the prosecutor or the defendant, if the Attorney General, who alone has authority to do so<sup>3</sup>, enters a nolle prosequi<sup>4</sup>. The Attorney General's power in this respect is not subject to the control of the courts, but its exercise does not prevent a judge, on the application of the prosecutor, from directing that the indictment should remain on the file and not be proceeded with unless by leave of the court or of the Court of Appeal<sup>5</sup>.

<sup>1</sup> They may not be stayed before the indictment has been preferred: *R v Wylie*, *R v Howe*, *R v McGuire* (1919) 83 JP 295; *R v London County Quarter Sessions, ex p Downes* [1954] 1 QB 1 at 6, 37 Cr App Rep 148 at 151-152, DC, per Lord Goddard CJ.

<sup>2</sup> See also *R v Leatham* (1861) 7 Jur NS 674 (defendant found guilty on several counts; Attorney General could enter a nolle prosequi on one of them, after a rule nisi obtained for a new trial).

<sup>3</sup> The functions of the Attorney General may be exercised by the Solicitor General: see the Law Officers Act 1997 s 1; and PARA 1065 ante.

<sup>4</sup> *R v Dunn* (1843) 1 Car & Kir 730; *R v Colling* (1847) 9 LTOS 180; *R v Allen* (1862) 1 B & S 850; *Jones v Clay* (1798) 1 Bos & P 191.

<sup>5</sup> *R v Comptroller General of Patents* [1899] 1 QB 909 at 914, CA.

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### **1230. When nolle prosequi may be entered.**

A nolle prosequi may be entered as against one of two or more defendants who are jointly indicted to enable that one defendant to give evidence for the Crown against his co-defendants<sup>1</sup>; and, if two persons indicted together are found guilty of different offences, a nolle prosequi may be entered against one and judgment passed on the other<sup>2</sup>. A nolle prosequi may be entered: (1) where an indictment is not the proper remedy<sup>3</sup>; (2) where civil remedies are also pursued<sup>4</sup>; (3) where the proceedings are vexatious<sup>5</sup>; or (4) where there have been summary proceedings on the same events<sup>6</sup>. A nolle prosequi will normally be entered where the defendant cannot be produced in court to plead or stand trial owing to physical or mental incapacity which is expected to be permanent<sup>7</sup>.

1 *R v Teal* (1809) 11 East 307.

2 *R v Hempstead and Hudson* (1818) Russ & Ry 344, CCR; *R v Butterworth* (1823) Russ & Ry 520, CCR; *Ruck v A-G* (1858) 3 H & N 208; and see *R v Rowlands* (1851) 17 QB 671 (conspiracy; counts vague).

3 *R v Pond* (1718) 1 Com 312.

4 *R v Fielding* (1759) 2 Burr 719; *Jones v Clay* (1798) 1 Bos & P 191.

5 *R v Guerchy* (1765) 1 Wm Bl 545; *Jones v Clay* (1798) 1 Bos & P 191.

6 See *Re Beresford* (1952) 36 Cr App Rep 1 (death caused by motor accident; summary trial for dangerous driving; subsequent charges of manslaughter pursuant to coroner's inquest).

7 See Archbold *Criminal Pleading, Evidence and Practice* (2006 Edn) PARA 1-251.

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### **1231. Effect of nolle prosequi.**

Nolle prosequi is distinct from, and does not have the same effect as, offering no evidence and submitting to acquittal<sup>1</sup>. The effect of a nolle prosequi is that all proceedings on the indictment are stayed and the defendant, if he is in custody, is discharged but may be indicted afresh on the same charge<sup>2</sup>.

1 *Elworthy v Bird* (1824) 2 Bing 258.

2 *Gilchrist v Gardner* (1891) 12 NSWLR 184; *Goddard v Smith* (1704) 6 Mod Rep 261; *R v Ridpath* (1713) 10 Mod Rep 152; *R v Allen* (1862) 1 B & S 850; *R v Mitchel* (1848) 3 Cox CC 93. Cf *Poole v R* [1961] AC 223, [1960] 3 All ER 398, PC. It is now a common practice for the trial judge on the application of the prosecution to allow an indictment or counts in an indictment, instead of being tried, to remain on the file marked not to be proceeded with without leave of the court or of the Court of Appeal.

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## **19. TRIAL OF INDICTMENTS**

### **(1) PROCEEDINGS ON INDICTMENT GENERALLY**

#### **1232. All proceedings on indictment to be before the Crown Court.**

By the Courts Act 1971, assize courts and courts of quarter sessions were abolished and replaced by the Crown Court, which is part of the Supreme Court of England and Wales<sup>1</sup>. All proceedings on indictment must be brought before the Crown Court<sup>2</sup>; and the jurisdiction of the Crown Court with respect to such proceedings includes jurisdiction in proceedings on indictment for offences wherever committed, and in particular proceedings on indictment for offences within the jurisdiction of the Admiralty<sup>3</sup>. The Crown Court being a part of the Supreme Court, judicial review by way of a mandatory order, quashing order or prohibiting order does not lie to it in respect of its jurisdiction in matters relating to trial on indictment<sup>4</sup>. All enactments and rules of law relating to procedure in connection with indictable offences continue to have effect in relation to proceedings in the Crown Court<sup>5</sup>. The order in which business is conducted, the fixing of dates and matters of that nature are within the day-to-day control of the Crown Court<sup>6</sup>.

Where a child or young person is tried in the Crown Court all possible steps should be taken to assist him to understand and participate in proceedings<sup>7</sup>.

The jurisdiction of the Crown Court in hearing any application<sup>8</sup> relating to procedural matters preliminary or incidental to proceedings in the Crown Court may be exercised by a judge of the Crown Court sitting in chambers<sup>9</sup>.

1 See the Supreme Court Act 1981 s 1(1). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 In the administration of justice in Wales, the English and Welsh languages should be treated on a basis of equality: see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.23.1, and at III.23.2-III.23.13, CA. If a defendant in a court in England asks to give or call evidence in the Welsh language, the case should not be transferred to Wales. In ordinary circumstances interpreters can be provided on request: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.22.1, CA.

3 Supreme Court Act 1981 s 46(1), (2). As to the jurisdiction of the Admiralty see PARA 1055 et seq ante; as to the appellate jurisdiction of the Crown Court see PARA 1980 et seq post; and as to the power of the Crown Court to deal with certain summary offences see PARAS 1233, 1358 post. As to the classification of Crown Court business, and allocation of Crown Court centres, see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.21.1 et seq, CA; and PARA 1136 ante. As to alteration of the place of trial see PARA 1228 ante.

As to the procedure to be followed when a devolution issue arises in relation to Wales, Scotland or Northern Ireland in proceedings in the Crown Court see *Practice Note* [1999] 3 All ER 466, [1999] 2 Cr App Rep 486, Supreme Ct.

Certain adaptations must be made to criminal procedure in cases where the defendant is a child or young person: see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.39, CA.

Active, hands on, case management both pre-trial and throughout the trial itself, is now regarded as an essential part of a judge's duty: *R v Jisl* [2004] EWCA Crim 696, [2004] All ER (D) 31 (Apr), (2004) Times 19 April.

4 Supreme Court Act 1981 s 29(3) (amended by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, arts 2, 3(b)). As to the circumstances in which judicial review lies see PARA 2013 et seq post.

5 Supreme Court Act 1981 s 79(1). Without prejudice to the generality of s 79(1), this provision applies in particular to: (1) the practice by which, on any one indictment, the taking of pleas, the trial by jury and the pronouncement of judgment may respectively be by or before different judges; (2) the release, after respite of judgment, of a convicted person on recognisance to come up for judgment if called on, but meanwhile to be of good behaviour; (3) the manner of trying any question relating to the breach of a recognisance; and (4) the manner of execution of any sentence on conviction, or the manner in which any other judgment or order given in connection with trial on indictment may be enforced: s 79(2).

6 See eg *Crawley UDC v Cosmos Tours Ltd* [1973] Crim LR 37, DC; and see also the observations of Lord Denning MR in *R v Smith* (1973) Times, 5 December, CA.

7 Some children or young persons ('young defendants') accused of committing serious crimes may be very young and very immature when standing trial in the Crown Court. The purpose of such trial is to determine guilt (if that is in issue) and decide the appropriate sentence if the young defendant pleads guilty or is convicted. The trial process should not itself expose the young defendant to avoidable intimidation, humiliation or distress. All possible steps should be taken to assist the young defendant to understand and participate in the proceedings. The ordinary trial process should, so far as necessary, be adapted to meet those ends. Regard should be had to the welfare of the young defendant as required by the Children and Young Persons Act 1933 s 44 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1232): *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, CA at IV.39.1, IV.39.3; and see further *Practice Direction (Criminal Proceedings: Consolidation)* supra at IV.39.2, IV.39.4-IV.39.17.

8 Ie including applications relating to legal aid.

9 CrimPR 16.11(2)(c). For general guidance as to when a judge should adjourn into chambers to receive information on the preliminary question whether privacy is required in the interests of justice and, if so, to what extent, see *Re Crook* (1989) 93 Cr App Rep 17, CA. As to exclusion of the public from the hearing see PARA 1300 post; and as to private meetings with counsel in the judge's room see PARAS 1278, 1280 post.

## UPDATE

### 1232 All proceedings on indictment to be before the Crown Court



NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 3--See also Crown Court Rules 1982, SI 1982/1109 r 5A (added by SI 2009/3361), which confers on the Crown Court explicit case management powers when dealing with civil cases.

TEXT AND NOTES 8, 9--CrimPR 16.11(2)(c) now Criminal Procedure Rules 2010, SI 2010/60, r 16.11(2)(c).

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**1233. Power of Crown Court to try charge for summary offence included in indictment.**

Where a count charging a summary offence<sup>1</sup> is included in an indictment, the offence must be tried in the same manner<sup>2</sup> as if it were an indictable offence; but the court may only deal with the offender in respect of it in a manner in which a magistrates' court could have dealt<sup>3</sup> with him<sup>4</sup>.

1     le a summary offence to which the Criminal Justice Act 1988 s 40(1) (as amended) applies: see PARA 1211 ante.

2     See PARA 1234 et seq post.

3     See MAGISTRATES vol 29(2) (Reissue) PARA 653 et seq.

4     Criminal Justice Act 1988 s 40(2).

**UPDATE**

**1233 Power of Crown Court to try charge for summary offence included in indictment**

NOTE 4--Where a summary offence is tried with an indictable offence in the Crown Court but there is no case to answer on the indictable offence, the summary offence does not have to be withdrawn from the jury and retried before justices: *R v Plant* [2008] EWCA Civ 960, [2008] 2 Cr App Rep 386, [2008] All ER (D) 138 (May).

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### **1234. Record of proceedings.**

In general, the whole of proceedings on indictment must be recorded by means of shorthand notes or, with the permission of the Lord Chancellor<sup>1</sup>, by mechanical means<sup>2</sup>. Where it is not practicable for the proceedings to be recorded in this manner, the trial judge must direct how and to what extent the proceedings are to be recorded<sup>3</sup>. It is important that a note is taken of every plea and, where the plea is taken in one court and the trial takes place in another, that the note of the latter should include the plea<sup>4</sup>. Where proceedings are recorded by means of shorthand notes, it is not necessary to record the opening or closing addresses on behalf of the prosecution or a defendant unless the trial judge otherwise directs<sup>5</sup> or to record any other part of the proceedings which the judge directs need not be recorded<sup>6</sup>. It is the duty of the judge, counsel and court officials to ensure that a proper record of the evidence and summing up is made<sup>7</sup>.

1 The permission of the Lord Chancellor may contain conditions concerning the custody, and supply of transcripts, of a recording made by mechanical means: CrimPR 68.12(4).

2 See the Criminal Appeal Act 1968 s 32(1); CrimPR 68.12(1); and see also PARA 1859 post. As to the need to record discussion between judge and counsel in chambers see *R v Smith* [1990] 1 All ER 634, 90 Cr App Rep 413, CA.

3 CrimPR 68.12(3).

4 *R v Strickson* (1936) 25 Cr App Rep 206, CCA.

5 CrimPR 68.12(2)(a). See *R v Osborne-Odelli* [1998] Crim LR 902, CA (where important exchanges take place during final speeches, the shorthand writer must be summoned to record them).

6 CrimPR 68.12(2)(b).

7 It is the judge's duty to do all that is practicable to ensure that an adequate and, so far as is possible, an unchallengeable record is made. If for any reason there is no competent shorthand writer or adequate mechanical means of recording, the trial judge should make a note of his summing up. Counsel should make their own notes, particularly of the summing up, and are entirely free to raise any query with the trial judge: *R v Payne*, *R v Spillane* [1971] 3 All ER 1146n, 56 Cr App Rep 9, CA. The absence or inadequacy of a shorthand note is not of itself a ground for allowing an appeal: see *R v Le Caer* (1972) 56 Cr App Rep 727, CA; and PARA 1859 post.

## **UPDATE**

### **1234 Record of proceedings**

TEXT AND NOTES 1-6--CrimPR Pt 68 substituted: see PARA 1856-1861.

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### **1235. Presence of defendant.**

In general a defendant has a right to be present<sup>1</sup> throughout his trial<sup>2</sup>. However, a judge has a discretion to commence or continue a trial in the defendant's absence, although this discretion must be exercised with the utmost care and caution; fairness to the defendant is of prime importance but fairness to the prosecution should also be taken into account<sup>3</sup>.

The trial judge may, if he considers that the sight or behaviour of the defendant in the dock may intimidate a witness, remove the defendant from the presence of the witness, though not it seems out of hearing<sup>4</sup>. There is a variety of special measures which can be directed to protect vulnerable or intimidated witnesses<sup>5</sup>.

A defendant must be present at the time of sentence if he is in custody and does not waive that right<sup>6</sup>. If the trial continues after the defendant has voluntarily absented himself, for example, by escaping from custody or failing to surrender to custody whilst on bail, and the defendant is convicted, the judge may sentence him in his absence<sup>7</sup>.

<sup>1</sup> The defendant must have the proceedings interpreted to him if necessary: *Kunnath v The State* [1993] 4 All ER 30, 98 Cr App Rep 455, PC.

<sup>2</sup> On a charge of felony the rule was that, unless removed for disorderly conduct, the defendant had to be present throughout his trial: see *R v Berry* (1897) 104 LT Jo 110. Since the abolition of the distinctions between felonies and misdemeanours, the law and practice in relation to all offences is that formerly applicable to misdemeanours: see the Criminal Law Act 1967 s 1(2); and PARA 49 ante. See, however, *R v Lee Kun* [1916] 1 KB 337 at 341, 11 Cr App Rep 293 at 300, CCA, per Lord Reading CJ ('Even in a charge of misdemeanour there must be exceptional circumstances to justify proceeding with the trial in his absence'); applied in *R v Teesside Justices, ex p Nilsson* (1991) 155 JP 101, DC.

<sup>3</sup> *R v Jones (Anthony)* [2002] UKHL 5, [2002] 1 AC 1, [2002] 2 Cr App Rep 128. If the defendant's absence is due to involuntary illness or incapacity, it will rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin or continue: *R v Jones (Anthony)* supra. It is generally desirable that a defendant should be legally represented if he has voluntarily absconded and the trial continues in his absence: *R v Jones (Anthony)* supra. See also *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533 at I.13.17-I.13.19, CA.

<sup>4</sup> *R v Smellie* (1919) 14 Cr App Rep 128, CCA; *R v Brown* [1998] 2 Cr App Rep 364, CA.

<sup>5</sup> See PARA 1417 post. As to controls designed to protect such a witness from intimidatory cross-examination by the defendant in person see PARA 1308 post.

<sup>6</sup> *R v Cornwell* [1972] 2 NSWLR 1, NSW CCA. As to restrictions on a magistrates' court passing sentence in the defendant's absence see the Magistrates' Courts Act 1980 s 11(3) (as amended); and MAGISTRATES vol 29(2) (Reissue) PARA 706. As to a convicted person's right to be present on the hearing of a reference under the Criminal Justice Act 1988 s 36 (as amended) (reviews of sentencing) and the restrictions on that right see s 36, Sch 3 paras 6-8; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 65. Variation of sentence under the Powers of Criminal Courts (Sentencing) Act 2000 s 155(1) must be made in the presence of the defendant: see PARA 1357 post.

<sup>7</sup> *R v Jones (No 2)* [1972] 2 All ER 731, 56 Cr App Rep 413, CA.

## **UPDATE**

### **1235 Presence of defendant**

NOTE 3--See *R v Kepple* [2007] EWCA Crim 1339, [2007] All ER (D) 107 (Jun) (defence counsel unfairly restricted with regard to cross-examining the victim when defendant voluntarily absent)

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### **1236. Attendance at court of parent or guardian.**

Where a child or young person<sup>1</sup> is charged with an offence or is for any other reason brought before a court, the court may, and must in the case of a child or young person who is under 16, require a person who is a parent or guardian<sup>2</sup> of his to attend at the court at all the stages of the proceedings, unless and to the extent that it is satisfied that it would be unreasonable to require such attendance, having regard to the circumstances of the case<sup>3</sup>.

1 For the meanings of 'child' and 'young person' see PARA 143 note 2 ante.

2 In relation to a child or young person for whom a local authority has parental responsibility and who is in its care, or is provided with accommodation by it in the exercise of any functions which are social services functions within the meaning of the Local Authority Social Services Act 1970 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 1005 et seq), the reference to a person who is a parent or guardian of his is to be construed as a reference to that authority or, where he is allowed to live with such a person, as including such a reference: see the Children and Young Persons Act 1933 s 34A(2) (s 34A added by the Criminal Justice Act 1991 s 56; and amended by the Local Government Act 2000 s 107(1), Sch 5 para 1). For these purposes, 'local authority' and 'parental responsibility' have the same meanings as in the Children Act 1989 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 134, 138): see the Children and Young Persons Act 1933 s 34A(2) (as so added and amended).

3 See *ibid* s 34A (as added and amended: see note 2 *supra*).

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### **1237. Legal representation.**

Both prosecutor and defendant<sup>1</sup> are entitled to have a barrister or solicitor<sup>2</sup> to appear on their behalf in the Crown Court to conduct their respective cases<sup>3</sup>. A defendant, if he wishes and if he has the means, may be assisted and represented by solicitor and counsel privately, or he may be assisted and represented funded by the Legal Services Commission through the Criminal Defence Service<sup>4</sup>. If the defence advocate is dismissed or withdraws, the judge has a discretion (to be exercised by reference to the interests of justice) whether to adjourn the proceedings so as to enable another advocate to be instructed<sup>5</sup>.

There is no reason why an unrepresented defendant should not, with the consent of the trial judge, have a friend with him to advise, take notes and generally assist him, provided that person does not seek to take part in the proceedings as an advocate<sup>6</sup>.

There are restrictions on the imposition of custodial sentences upon persons not legally represented<sup>7</sup>.

If, during the course of a criminal trial and prior to final sentence, the defendant voluntarily absconds and defending counsel's instructing solicitor withdraws from the case<sup>8</sup>, counsel too must withdraw<sup>9</sup>. If the trial judge requests counsel to remain to assist the court, counsel has an absolute discretion whether he does so<sup>10</sup>. If he does, he must act on the basis that his instructions are withdrawn and he will not be entitled to use any material contained in his brief save that part already established in evidence before the court<sup>11</sup>. He should request the trial judge to instruct the jury that this is the basis on which he is prepared to assist the court<sup>12</sup>. If, for any reason, counsel's instructing solicitor does not withdraw from the case, counsel retains an absolute discretion whether to continue to act<sup>13</sup>. If he does continue, he should conduct the case as if his client were still present in court but had decided not to give evidence and on the basis of any instructions he has received<sup>14</sup>. He will be free to use any material contained in his brief and may cross-examine witnesses called for the prosecution and call witnesses for the defence<sup>15</sup>.

1 Everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require: Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(3)(c). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

2 As to the rights of audience of barristers or solicitors, including those who are employed by the Crown Prosecution Service, see the Courts and Legal Services Act 1990 s 31 (as substituted), s 31A (as added); and COURTS vol 10 (Reissue) PARAS 331-350.

3 A point of law in favour of a defendant may be suggested to the court or argued before it by a barrister or solicitor who is not instructed in the case, or by any other person acting as *amicus curiae*: see *Lilburne's Case* (1649) 4 State Tr 1270 at 1305; *R v Ratcliffe* (1746) 18 State Tr 429 at 435; *Faulkner v R* [1905] 2 KB 76. See also *R v Coolledge* [1996] Crim LR 748 (defence counsel should not be excluded from a pre-trial judge's inquiry where the inquiry affects the conduct of the trial itself).

4 See the Access to Justice Act 1999 Pt I (ss 1-26) (as amended); and LEGAL AID vol 65 (2008) PARA 120 et seq.

5 See *R v Mills* [1997] 2 Cr App Rep 206, CA.

6 *Collier v Hicks* (1831) 2 B & Ad 663 at 669 per Lord Tenterden; approved in *McKenzie v McKenzie* [1971] P 33, [1970] 3 All ER 1034. See also *T v Leicester City Justices, ex p Barrow* [1991] 2 QB 260, [1991] 3 All ER 935, CA.

7 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 21.

8 le in accordance with the ruling of the Law Society.

9 Code of Conduct for the Bar of England and Wales (8th Edn, 2004); Bar Council Miscellaneous Guidance: Written Standards for the Conduct of Professional Work (Standards Applicable to Criminal Cases) PARA 15.3.1. See also LEGAL PROFESSIONS vol 66 (2009) PARA 1230.

10 Ibid para 15.3.1. See also LEGAL PROFESSIONS vol 66 (2009) PARA 1230.

11 Ibid para 15.3.1. See also LEGAL PROFESSIONS vol 66 (2009) PARA 1230.

12 Ibid para 15.3.1. See also LEGAL PROFESSIONS vol 66 (2009) PARA 1230.

13 Ibid para 15.3.2. See also LEGAL PROFESSIONS vol 66 (2009) PARA 1230.

14 Ibid para 15.3.2. See also LEGAL PROFESSIONS vol 66 (2009) PARA 1230.

15 Ibid para 15.3.2. See also LEGAL PROFESSIONS vol 66 (2009) PARA 1230.



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## **(2) PRE-TRIAL HEARINGS**

### **(i) Case Management**

#### **1238. Introduction.**

The Criminal Procedure Rules<sup>1</sup>, together with the Consolidated Criminal Practice Direction<sup>2</sup>, give the criminal courts powers and responsibilities to manage cases actively, and to reduce the numbers of ineffective hearings.

The Rules indicate that criminal procedure is subject to two sets of overarching principles: the principles of justice contained in a statement of the overriding objective<sup>3</sup>, and the duty of active case management<sup>4</sup>.

1    le the Criminal Procedure Rules 2005, SI 2005/384 (as amended).

2    *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, CA.

3    CrimPR 1.1-1.3. See PARA 1239 post.

4    CrimPR 3.1-3.11. CrimPR 3.2-3.11 (see PARA 1240 post) applies to the management of each case in a magistrates' court and in the Crown Court (including an appeal to the Crown Court) until the conclusion of that case: CrimPR 3.1.

#### **UPDATE**

#### **1238 Introduction**

TEXT AND NOTES--SI 2005/384 replaced: Criminal Procedure Rules 2010, SI 2010/60.  
CrimPR 1.1-1.3, 3.1-3.11 now SI 2010/60 rr 1.1-1.3, 3.1-3.11.

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### **1239. The overriding objective.**

The overriding objective of the Criminal Procedure Rules<sup>1</sup> is that criminal cases be dealt with justly<sup>2</sup>. Dealing with a criminal case justly includes:

- 2023 (1) acquitting the innocent and convicting the guilty<sup>3</sup>;
  - 2024 (2) dealing with the prosecution and the defence fairly<sup>4</sup>;
  - 2025 (3) recognising the rights of a defendant, particularly the right to a fair trial under the European Convention on Human Rights<sup>5</sup>;
  - 2026 (4) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case<sup>6</sup>;
  - 2027 (5) dealing with the case efficiently and expeditiously<sup>7</sup>;
  - 2028 (6) ensuring that appropriate information is available to the court when bail and sentence are considered<sup>8</sup>; and
  - 2029 (7) dealing with the case in ways that take into account:
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- 56. (a) the gravity of the offence alleged<sup>9</sup>;
  - 57. (b) the complexity of what is in issue<sup>10</sup>;
  - 58. (c) the severity of the consequences for the defendant and others affected<sup>11</sup>; and
  - 59. (d) the needs of other cases<sup>12</sup>.
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Each participant<sup>13</sup>, in the conduct of each case, must:

- 2030 (i) prepare and conduct the case in accordance with the overriding objective<sup>14</sup>;
- 2031 (ii) comply with the Criminal Procedure Rules, practice directions and directions made by the court<sup>15</sup>; and
- 2032 (iii) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by the Criminal Procedure Rules, any practice direction or any direction of the court<sup>16</sup>.

The court must further the overriding objective in particular when:

- 2033 (A) exercising any power given to it by legislation (including the Criminal Procedure Rules)<sup>17</sup>;
- 2034 (B) applying any practice direction<sup>18</sup>; or
- 2035 (C) interpreting any rule or practice direction<sup>19</sup>.

1    Ie the Criminal Procedure Rules 2005, SI 2005/384 (as amended).

2    CrimPR 1.1(1).

3    CrimPR 1.1(2)(a).

4    CrimPR 1.1(2)(b).

5 CrimPR 1.1(2)(c). See the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6; and PARA 1368 et seq post. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

6 CrimPR 1.1(2)(d).

7 CrimPR 1.1(2)(e).

8 CrimPR 1.1(2)(f).

9 CrimPR 1.1(2)(g)(i).

10 CrimPR 1.1(2)(g)(ii)

11 CrimPR 1.1(2)(g)(iii)

12 CrimPR 1.1(2)(g)(iv).

13 Anyone involved in any way with a criminal case is a participant in its conduct for these purposes: CrimPR 1.2(2).

14 CrimPR 1.2(1)(a). See *R v Siddall, R v Brooke* [2006] EWCA Crim 1353, (2006) Times, 26 July.

15 CrimPR 1.2(1)(b)

16 CrimPR 1.2(1)(c). For these purposes, a failure is significant if it might hinder the court in furthering the overriding objective: CrimPR 1.2(1)(c).

17 CrimPR 1.3(a).

18 CrimPR 1.3(b).

19 CrimPR 1.3(c).

## **UPDATE**

### **1239 The overriding objective**

NOTE 1--SI 2005/384 replaced: Criminal Procedure Rules 2010, SI 2010/60.

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#### **1240. Case management.**

The court<sup>1</sup> is under a duty to further the overriding objective by actively managing the case<sup>2</sup>.

Active case management includes:

- 2036 (1) the early identification of the real issues<sup>3</sup>;
- 2037 (2) the early identification of the needs of witnesses<sup>4</sup>;
- 2038 (3) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case<sup>5</sup>;
- 2039 (4) monitoring the progress of the case and compliance with directions<sup>6</sup>;
- 2040 (5) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way<sup>7</sup>;
- 2041 (6) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings<sup>8</sup>;
- 2042 (7) encouraging the participants to co-operate in the progression of the case<sup>9</sup>; and
- 2043 (8) making use of technology<sup>10</sup>.

The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible<sup>11</sup>. Each party must actively assist the court in fulfilling its duty to further the overriding duty to manage the case actively, without or if necessary with a direction; and apply for a direction if needed to further the overriding objective<sup>12</sup>.

At the beginning of the case each party must, unless the court otherwise directs nominate an individual responsible for progressing that case (a 'case progression officer'<sup>13</sup>), and must tell other parties and the court who he is and how to contact him<sup>14</sup>. In fulfilling its duty to further the overriding objective to manage the case actively, the court must where appropriate nominate a court officer responsible for progressing the case, and must make sure the parties know who he is and how to contact him<sup>15</sup>. A case progression officer must:

- 2044 (a) monitor compliance with directions<sup>16</sup>;
- 2045 (b) make sure that the court is kept informed of events that may affect the progress of that case<sup>17</sup>;
- 2046 (c) make sure that he can be contacted promptly about the case during ordinary business hours<sup>18</sup>;
- 2047 (d) act promptly and reasonably in response to communications about the case<sup>19</sup>; and
- 2048 (e) if he will be unavailable, appoint a substitute to fulfil his duties and inform the other case progression officers<sup>20</sup>.

In fulfilling its duty to further the overriding objective to manage the case actively, the court may give any direction and take any step actively to manage a case unless that direction or step would be inconsistent with legislation, including the Criminal Procedure Rules<sup>21</sup>. In particular, the court may:

- 2049 (i) nominate a judge, magistrate, justices' clerk or assistant to a justices' clerk to manage the case<sup>22</sup>;
- 2050 (ii) give a direction on its own initiative or on application by a party<sup>23</sup>;
- 2051 (iii) ask or allow a party to propose a direction<sup>24</sup>;
- 2052 (iv) for the purpose of giving directions, receive applications and representations by letter, by telephone or by any other means of electronic communication, and conduct a hearing by such means<sup>25</sup>;
- 2053 (v) give a direction without a hearing<sup>26</sup>;
- 2054 (vi) fix, postpone, bring forward, extend or cancel a hearing<sup>27</sup>;
- 2055 (vii) shorten or extend (even after it has expired) a time limit fixed by a direction<sup>28</sup>;
- 2056 (viii) require that issues in the case should be determined separately, and decide in what order they will be determined<sup>29</sup>; and
- 2057 (ix) specify the consequences of failing to comply with a direction<sup>30</sup>.

At every hearing, if a case cannot be concluded there and then the court must give directions so that it can be concluded at the next hearing or as soon as possible after that<sup>31</sup>.

At every hearing the court must, where relevant:

- 2058 (A) if the defendant is absent, decide whether to proceed nonetheless<sup>32</sup>;
- 2059 (B) take the defendant's plea (unless already done) or if no plea can be taken then find out whether the defendant is likely to plead guilty or not guilty<sup>33</sup>;
- 2060 (C) set, follow or revise a timetable for the progress of the case, which may include a timetable for any hearing including the trial or (in the Crown Court) the appeal<sup>34</sup>;
- 2061 (D) in giving directions, ensure continuity in relation to the court and to the parties' representatives where that is appropriate and practicable<sup>35</sup>; and
- 2062 (E) where a direction has not been complied with, find out why, identify who was responsible, and take appropriate action<sup>36</sup>.

The following rule applies to a party's preparation for trial<sup>37</sup> or (in the Crown Court) appeal<sup>38</sup>. In fulfilling his duty<sup>39</sup> actively to assist the court, each party must: comply with directions given by the court<sup>40</sup>; take every reasonable step to make sure his witnesses will attend when they are needed<sup>41</sup>; make appropriate arrangements to present any written or other material<sup>42</sup>; and promptly inform the court and the other parties of anything that may affect the date or duration of the trial or appeal, or significantly affect the progress of the case in any other way<sup>43</sup>.

In order to manage the trial or (in the Crown Court) appeal, the court may require a party to identify:

- 2063 (aa) which witnesses he intends to give oral evidence<sup>44</sup>;
- 2064 (bb) the order in which he intends those witnesses to give their evidence<sup>45</sup>;
- 2065 (cc) whether he requires an order compelling the attendance of a witness<sup>46</sup>;
- 2066 (dd) what arrangements, if any, he proposes to facilitate the giving of evidence by a witness<sup>47</sup>;
- 2067 (ee) what arrangements, if any, he proposes to facilitate the participation of any other person, including the defendant<sup>48</sup>;
- 2068 (ff) what written evidence he intends to introduce<sup>49</sup>;
- 2069 (gg) what other material, if any, he intends to make available to the court in the presentation of the case<sup>50</sup>;
- 2070 (hh) whether he intends to raise any point of law that could affect the conduct of the trial or appeal<sup>51</sup>; and
- 2071 (ii) what timetable he proposes and expects to follow<sup>52</sup>.

The case management forms set out in the Consolidated Practice Direction<sup>53</sup> must be used, and where there is no form then no specific formality is required<sup>54</sup>.

The court must make available to the parties a record of directions given<sup>55</sup>.

1 The provisions of CrimPR Pt 3 (ie CrimPR 3.1-3.11) (see the text and notes 2-55 *infra*) apply to the management of each case in a magistrates' court and in the Crown Court (including an appeal to the Crown Court) until the conclusion of that case: CrimPR 3.1.

2 CrimPR 3.2(1). See *R v K* [2006] EWCA Crim 724, [2006] All ER (D) 28 (Apr) (case management powers of judges mean that a judge dealing with matters preliminary to trial is not bound to allow oral submissions, and if he does hear oral submissions he is entitled to place a time limit on them; if he deals with the issues exclusively by reference to written submissions, he may limit their length).

3 CrimPR 3.2(2)(a).

4 CrimPR 3.2(2)(b).

5 CrimPR 3.2(2)(c).

6 CrimPR 3.2(2)(d).

7 CrimPR 3.2(2)(e).

8 CrimPR 3.2(2)(f).

9 CrimPR 3.2(2)(g).

10 CrimPR 3.2(2)(h).

11 CrimPR 3.2(3).

12 CrimPR 3.3.

13 CrimPR 3.4(3).

14 CrimPR 3.4(1).

15 CrimPR 3.4(2).

16 CrimPR 3.4(4)(a).

17 CrimPR 3.4(4)(b).

18 CrimPR 3.4(4)(c).

19 CrimPR 3.4(4)(d).

20 CrimPR 3.4(4)(e).

21 CrimPR 3.5(1).

22 CrimPR 3.5(2)(a).

23 CrimPR 3.5(2)(b).

24 CrimPR 3.5(2)(c).

25 CrimPR 3.5(2)(d).

26 CrimPR 3.5(2)(e).

27 CrimPR 3.5(2)(f).

28 CrimPR 3.5(2)(g).

29 CrimPR 3.5(2)(h).

30 CrimPR 3.5(2)(i). A magistrates' court may give a direction that will apply in the Crown Court if the case is to continue there: CrimPR 3.5(3). The Crown Court may give a direction that will apply in a magistrates' court if the case is to continue there: CrimPR 3.5(4). Any power to give a direction includes a power to vary or revoke that direction: CrimPR 3.5(5).

A party may apply to vary a direction if: (1) the court gave it without a hearing; (2) the court gave it at a hearing in his absence; or (3) circumstances have changed: CrimPR 3.6(1). A party who applies to vary a direction must apply as soon as practicable after he becomes aware of the grounds for doing so; and he must give as much notice to the other parties as the nature and urgency of his application permits: CrimPR 3.6(2).

The parties may agree to vary a time limit fixed by a direction, but only if:

57 (a) the variation will not affect the date of any hearing that has been fixed, or significantly affect the progress of the case in any other way (CrimPR 3.7(1)(a));

58 (b) the court has not prohibited variation by agreement (CrimPR 3.7(1)(b)); and

59 (c) the court's case progression officer is promptly informed (CrimPR 3.7(1)(c)).

The court's case progression officer must refer the agreement to the court if he doubts the condition in head (a) above is satisfied: CrimPR 3.7(2).

31 CrimPR 3.8(1).

32 CrimPR 3.8(2)(a).

33 CrimPR 3.8(2)(b).

34 CrimPR 3.8(2)(c).

35 CrimPR 3.8(2)(d).

36 CrimPR 3.8(2)(e).

37 For these purposes and for the purposes of CrimPR 3.10 (see the text and notes 44-52 *infra*), trial includes any hearing at which evidence will be introduced: CrimPR 3.9(1).

38 CrimPR 3.9(1).

39 I.e. the duty under CrimPR 3.3: see the text to note 12 *supra*.

40 CrimPR 3.9(2)(a). See note 43 *infra*.

41 CrimPR 3.9(2)(b). See note 43 *infra*.

42 CrimPR 3.9(2)(c). See note 43 *infra*.

43 CrimPR 3.9(2)(d). The court may require a party to give a certificate of readiness: CrimPR 3.9(3).

44 CrimPR 3.10(a).

45 CrimPR 3.10(b).

46 CrimPR 3.10(c).

47 CrimPR 3.10(d).

48 CrimPR 3.10(e).

49 CrimPR 3.10(f).

50 CrimPR 3.10(g).

51 CrimPR 3.10(h).

52 CrimPR 3.10(i).

53 See *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for Use in Criminal Proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

54 CrimPR 3.11(1).

55 CrimPR 3.11(2).

## UPDATE

### 1240 Case management

TEXT AND NOTES--CrimPR Pt 3 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), Pt 3.

NOTES 21, 44--A court's power to give a direction under CrimPR 3.5(1) does not extend to requiring a defendant to provide details of witnesses he intends to call: *R (on the application of Kelly) v Warley Magistrates' Court* [2007] EWHC 1836 (Admin), [2008] 1 WLR 2001, (2007) 171 JP 585, DC.

TEXT AND NOTE 22--Reference to 'justices' clerk or assistant to a justices' clerk' replaced by reference to 'justices' legal adviser': CrimPR 3.5(2)(a).

NOTE 30--As to the powers of the court if a party fails to comply with a rule or a direction see CrimPR 3.5(6).

TEXT AND NOTES 31-36--In order to prepare for the trial, the court must take every reasonable step to encourage and to facilitate the attendance of witnesses when they are needed: CrimPR 3.8(4).

NOTE 36--In order to prepare for a trial in the Crown Court, the court must conduct a plea and case management hearing unless the circumstances make that unnecessary: CrimPR 3.8(3).

TEXT AND NOTES 37-52--These provisions now apply to all appeals, not just appeals to the Crown Court: CrimPR 3.9, 3.10.



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## **(ii) Non-statutory Preliminary Hearings and Plea and Case Management Hearings**

### **1241. Preliminary hearings.**

Where a case is sent for trial, a preliminary hearing ('PH') is not always required; it should be ordered by the magistrates' court or by the Crown Court only where such a hearing is considered necessary; the PH should be held about 14 days after sending<sup>1</sup>. Whether or not a magistrates' court orders a PH, it should order a plea and case management hearing ('PCMH') to be held within about 14 weeks after sending for trial where a defendant is in custody and within about 17 weeks after sending for trial if the defendant is on bail<sup>2</sup>.

<sup>1</sup> *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.41.3, CA; *Amendment to the Consolidated Criminal Practice Direction (Case Management)* [2005] 3 All ER 91, [2005] 1 WLR 1491 at IV, CA. The case progression form to be used in the magistrates' court and the PH forms to be used in the Crown Court are set out with guide notes in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex E, CA. The forms provide a detailed and effective timetable to enable the PCMH to be effective: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.41.4, CA.

<sup>2</sup> *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.41.5, CA.

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## **1242. Plea and case management hearing.**

Active case management at the plea and case management hearing ('PCMH') should reduce the number of ineffective and cracked trials and delays during the trial to resolve legal issues. The effectiveness of a PCMH in a contested case depends in large measure upon preparation by all concerned and upon the presence of the trial advocate or an advocate who is able to make decisions and give the court the assistance which the trial advocate could be expected to give. Resident judges in setting the listing policy should ensure that list officers fix cases as far as possible to enable the trial advocate to conduct the PCMH and the trial<sup>1</sup>.

In class 1 and class 2 cases<sup>2</sup>, and in all cases involving a serious sexual offence against a child, the PCMH must be conducted by: (1) a High Court judge; (2) a circuit judge or a recorder to whom the case has been assigned<sup>3</sup>; or (3) a judge authorised by the presiding judges to conduct such hearings. In the event of a guilty plea before such an authorised judge, the case will be adjourned for sentencing by a High Court judge or by a circuit judge or recorder to whom the case has been assigned<sup>4</sup>.

<sup>1</sup> *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.41.8, CA; *Amendment to the Consolidated Criminal Practice Direction (Case Management)* [2005] 3 All ER 91, [2005] 1 WLR 1491 at IV.41.8, CA.

<sup>2</sup> See PARA 1136 ante.

<sup>3</sup> ie in accordance with *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.33, CA; *Practice Direction (Crown Court: Classification and Allocation of Business)* [2005] 1 WLR 2215 at IV.33.

<sup>4</sup> *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.41.9, CA; *Amendment to the Consolidated Criminal Practice Direction (Case Management)* [2005] 3 All ER 91, [2005] 1 WLR 1491 at IV.41.9, CA. In pilot courts (ie the Central Criminal Court, the Crown Court at Preston and the Crown Court at Nottingham), the PCMH form as set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex E, CA, will be used in accordance with the guidance notes: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.41.10, CA. In other courts, the resident judge should exercise discretion as to the manner in which the form is used taking account of the views of the local criminal justice agencies and of practitioners. In the event of the residing judge deciding to use the forms in a manner that is not agreed to by either the local criminal justice agencies or the practitioners, the resident judge should consult the presiding judges of his circuit before doing so: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.41.11, CA.

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### **1243. Further pre-trial hearings.**

Additional pre-trial hearings should be held only if needed for some compelling reason. Where necessary the power to give, vary or revoke a direction without a hearing should be used<sup>1</sup>.

<sup>1</sup> *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.41.12, CA; *Amendment to the Consolidated Criminal Practice Direction (Case Management)* [2005] 3 All ER 91, [2005] 1 WLR 1491 at IV.41.12, CA. Paragraph 5 of the PCMH form enables the court to require the parties' case progression officers to inform the Crown Court case progression officer that the case is ready for trial, that it will proceed as a trial on the date fixed and will take no more or less time than that previously ordered: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.41.12, CA.

### **UPDATE**

### **1243 Further pre-trial hearings**

NOTE 1--As to management of cases to be heard in the crown court see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 IV.41 (substituted by *Amendment No 15 to the Consolidated Criminal Practice Direction* [2007] All ER (D) 520 (Mar), CA).

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### **(iii) Pre-trial Rulings**

#### **1244. Meaning of pre-trial ruling.**

For the purposes of the statutory provisions<sup>1</sup> relating to a pre-trial ruling, a hearing is a pre-trial hearing if it relates to a trial on indictment and it takes place:

- 2072 (1) after the defendant has been sent for the trial for the offence<sup>2</sup>; and
- 2073 (2) before the start of the trial<sup>3</sup>.

For the purposes of such provisions, a hearing is also a pre-trial hearing if:

- 2074 (a) it relates to a trial on indictment to be held in pursuance of a voluntary bill of indictment preferred<sup>4</sup> by direction of the Court of Appeal, or by direction or with consent of a judge<sup>5</sup>; and
- 2075 (b) it takes place after the bill of indictment has been preferred and before the start of the trial<sup>6</sup>.

1    Ie the Criminal Procedure and Investigations Act 1996 Pt IV (ss 39-43) (as amended): see PARAS 1245-1246 post.

2    Ibid s 39(1)(a) (substituted by the Criminal Justice Act 2003 s 41, Sch 3 para 66(1), (7)).

3    Criminal Procedure and Investigations Act 1996 s 39(1)(b).

For the purposes of s 39 (as amended), the start of a trial on indictment occurs at the time when a jury is sworn to consider the issue of guilt or fitness to plead or, if the court accepts a plea of guilty before the time when a jury is sworn, when that plea is accepted; but this is subject to the Criminal Justice Act 1987 s 8 and the Criminal Procedure and Investigations Act 1996 s 30 (preparatory hearings: see PARA 1256 post): s 39(3) (s 39(3) amended, and s 39(4) added, by the Criminal Justice Act 2003 s 331, Sch 36 paras 65, 71). For this purpose, references to 'the time when a jury is sworn' include the time when that jury would be sworn but for the making of an order under the Criminal Justice Act 2003 Pt 7 (ss 43-50) (not yet fully in force; prospectively amended) (see PARA 1284 post): see the Criminal Procedure and Investigations Act 1996 s 39(4) (as so added).

4    Ie under the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(b) (as amended): see PARA 1206 ante.

5    Criminal Procedure and Investigations Act 1996 s 39(2)(a).

6    Ibid s 39(2)(b).

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### **1245. Power to make rulings.**

A judge may make at a pre-trial hearing a ruling as to: (1) any question as to the admissibility of evidence; (2) any other question of law relating to the case concerned<sup>1</sup>. Such a ruling may be made: (a) on an application by a party to the case; or (b) of the judge's own motion<sup>2</sup>.

Such a ruling has binding effect from the time it is made until the case against the defendant or, if there is more than one, against each of them is disposed of; and the case against a defendant is disposed of if he is acquitted or convicted or if the prosecutor<sup>3</sup> decides not to proceed with the case against him<sup>4</sup>.

A judge<sup>5</sup> may discharge or vary (or further vary) such a ruling if it appears to him that it is in the interests of justice to do so; and a judge may so act: (i) on an application by a party to the case; or (ii) of the judge's own motion<sup>6</sup>.

1 Criminal Procedure and Investigations Act 1996 s 40(1). A pre-trial ruling under s 40 is not binding for the purposes of a re-trial: *R v Clayton* [1998] 8 Archbold News 3, CA.

2 Criminal Procedure and Investigations Act 1996 s 40(2).

3 Ie any person acting as prosecutor, whether an individual or a body: *ibid* s 40(7).

4 *Ibid* s 40(3).

5 The judge need not be the judge who made the ruling or, if it has been varied, the judge (or any judge) who varied it: *ibid* s 40(6).

6 *Ibid* s 40(4). See *R v Clayton* [1998] 8 Archbold News 3, CA. No application may be made under head (i) in the text unless there has been a material change of circumstances since the ruling was made or, if a previous application has been made, since the application (or last application) was made: Criminal Procedure and Investigations Act 1996 s 40(5).

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#### **1246. Restrictions on reporting.**

With the exceptions referred to below:

- 2076 (1) no written report of specified matters may be published<sup>1</sup> in the United Kingdom<sup>2</sup>;
- 2077 (2) no report of specified matters may be included in a relevant programme<sup>3</sup> for reception in the United Kingdom<sup>4</sup>.

The following are specified matters for these purposes:

- 2078 (a) a ruling made at a pre-trial hearing<sup>5</sup>;
- 2079 (b) proceedings on an application for such a ruling to be made<sup>6</sup>;
- 2080 (c) an order that such a ruling be discharged or varied or further varied<sup>7</sup>;
- 2081 (d) proceedings for an application for such a ruling to be discharged or varied or further varied<sup>8</sup>.

The judge dealing with any specified matter may order that the above restrictions on reporting are not to apply, or are not to apply to a specified extent, to a report of the matter<sup>9</sup>. Where there is only one defendant and he objects to the making of such an order<sup>10</sup>, the judge must make the order if (and only if) satisfied after hearing the representations of the defendant that it is in the interests of justice to do so; and, if the order is made, it does not apply to the extent that a report deals with any such objection or representations<sup>11</sup>. Where there are two or more defendants and one or more of them objects to the making of such an order, the judge must make the order if (and only if) satisfied after hearing the representations of each of the defendants that it is in the interests of justice to do so; and, if the order is made, it does not apply to the extent that a report deals with any such objection or representations<sup>12</sup>.

If a report is published or included in a relevant programme in contravention of an order restricting reporting, each of the following persons is guilty of an offence:

- 2082 (i) in the case of a publication of a written report as part of a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical<sup>13</sup>;
- 2083 (ii) in the case of a publication of a written report otherwise than as part of a newspaper or periodical, the person who publishes it<sup>14</sup>;
- 2084 (iii) in the case of the inclusion of a report in a relevant programme, any body corporate which is engaged in providing the service in which the programme is included and any person having functions in relation to the programme corresponding to those of an editor of a newspaper<sup>15</sup>.

A person guilty of an offence under these provisions is liable on summary conviction to a fine of an amount not exceeding level 5 on the standard scale<sup>16</sup>.

<sup>1</sup> 'Publish', in relation to a report, means publish the report, either by itself or as part of a newspaper or periodical, for distribution to the public; and expressions cognate with 'publish' are to be construed accordingly: Criminal Procedure and Investigations Act 1996 s 41(8)(a), (b).

2 Ibid s 41(1)(a) (s 41(1) amended by the Criminal Justice Act 2003 s 311(1), (8)). As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 'Relevant programme' means a programme included in a programme service, within the meaning of the Broadcasting Act 1990 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328): Criminal Procedure and Investigations Act 1996 s 41(8)(c).

4 Ibid s 41(1)(b) (as amended: see note 2 supra). Section 41(1) (as amended) does not apply to: (1) the publication of a report of matters; or (2) the inclusion in a relevant programme of a report of matters, at the conclusion of the trial of the defendant or of the last of the defendants to be tried: s 41(6). Nothing in s 41 (as amended) affects any prohibition or restriction imposed by virtue of any other enactment on a publication or on matter included in a programme: s 41(7).

5 Ibid s 41(2)(a). See s 40; and PARA 1245 ante.

6 Ibid s 41(2)(b).

7 Ibid s 41(2)(c).

8 Ibid s 41(2)(d).

9 Ibid s 41(3).

10 Ie an order under ibid s 41(3): see the text and note 9 supra.

11 Ibid s 41(4).

12 Ibid s 41(5).

13 Ibid s 42(1)(a). See note 15 infra.

14 Ibid s 42(1)(b). See note 15 infra.

15 Ibid s 42(1)(c). The definitions in s 41(8) (see notes 1, 3 supra) apply for the purposes of s 42 as they apply for the purposes of s 41 (see the text and notes 1-12 supra): s 42(4).

16 Ibid s 42(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. Proceedings for an offence under s 42 are not to be instituted in England and Wales otherwise than by or with the consent of the Attorney General: s 42(3). For the effect of this limitation see PARA 1071 ante.

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#### **(iv) Preparatory Hearings in Serious or Complex Fraud Cases or Serious or Long Cases or Terrorism Cases**

##### **1247. Application.**

An application for a preparatory hearing<sup>1</sup> must be made in writing in the prescribed form<sup>2</sup>, must include a short explanation of the reasons for applying<sup>3</sup>, and must be served on the court officer and all other parties<sup>4</sup>.

A prosecutor who wants the court to order that the trial will be conducted without a jury<sup>5</sup> must apply under these provisions for a preparatory hearing, whether or not the defendant has applied for one<sup>6</sup>.

<sup>1</sup> ie in pursuance of the Criminal Justice Act 1987 s 7(2) or the Criminal Procedure and Investigations Act 1996 s 29(4) (as amended): see PARA 1250 post.

<sup>2</sup> CrimPR 15.1(1)(a). For the prescribed form of application see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for Use in Criminal Proceedings)* [2006] 3 All ER 484, Annex D, CA.

<sup>3</sup> CrimPR 15.1(1)(b).

<sup>4</sup> CrimPR 15.1(1)(c). As to the persons who may make the application see PARA 1250 post; and as to service of documents see PARA 1255 post.

The provisions about preparatory hearings are intended to assist in the control and management of heavy fraud and other complex criminal cases. The Criminal Procedure Rules 2005 also assist in this respect, and they are supplemented by the *Protocol for the Control and Management of Heavy Fraud and Other Complex Criminal Cases* [2005] 2 All ER 429, CA, issued by Lord Woolf CJ.

<sup>5</sup> ie under the Criminal Justice Act 2003 s 43 (not yet in force) or s 44: see PARA 1284 post.

<sup>6</sup> CrimPR 15.1(2).

#### **UPDATE**

##### **1247 Application**

TEXT AND NOTES--CrimPR 15.1 now Criminal Procedure Rules 2010, SI 2010/60, r 15.1.

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D further amended: *Practice Direction (Criminal Proceedings: Forms)* [2007] 1 WLR 1535, CA.



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### **1248. Time for making application.**

A party who applies for a preparatory hearing<sup>1</sup> must do so no more than 28 days after: (1) the committal of the defendant; (2) the consent to the preferment of a bill of indictment in relation to the case; (3) the service of a notice of transfer; or (4) where a person is sent for trial, the service of copies of the documents containing the evidence on which the charge or charges are based<sup>2</sup>.

A prosecutor who applies for a preparatory hearing because he wants the court to order a trial without a jury<sup>3</sup> must do so as soon as reasonably practicable where the reasons do not arise until after that time limit has expired<sup>4</sup>.

The court may extend the time limit even after it has expired<sup>5</sup>.

<sup>1</sup> Ie under CrimPR 15.1: see PARA 1247 ante.

<sup>2</sup> CrimPR 15.2(1).

<sup>3</sup> Ie under the Criminal Justice Act 2003 s 44: see PARA 1284 post.

<sup>4</sup> CrimPR 15.2(2).

<sup>5</sup> CrimPR 15.2(3). An application for extension of time must be made in writing in the form set out in the *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for Use in Criminal Proceedings)* [2006] 3 All ER 484, Annex D, CA.

### **UPDATE**

### **1248 Time for making application**

TEXT AND NOTES--CrimPR 15.2 now Criminal Procedure Rules 2010, SI 2010/60, r 15.2.

NOTE 5--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D further amended: *Practice Direction (Criminal Proceedings: Forms)* [2007] 1 WLR 1535, CA.

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**1249. Representations concerning application for a preparatory hearing; determination of application.**

A party who wants to make written representations concerning an application for a preparatory hearing<sup>1</sup> must do so within seven days of receiving a copy of that application, and must serve those representations on the court officer and all other parties<sup>2</sup>.

A defendant who wants to oppose an application for an order that the trial will be conducted without a jury<sup>3</sup> must serve written representations under these provisions, including a short explanation of the reasons for opposing that application<sup>4</sup>.

Applications for a preparatory hearing<sup>5</sup> are normally determined without a hearing<sup>6</sup>. However, where an application is made to order a trial without a jury<sup>7</sup>, the court must hold a hearing for the purpose of determining whether to grant the application<sup>8</sup>.

1    Ie under CrimPR 15.1: see PARA 1247 ante.

2    CrimPR 15.3(1).

3    Ie under the Criminal Justice Act 2003 s 43 (not yet in force) or s 44: see PARA 1284 post.

4    CrimPR 15.3(2).

5    Ie under CrimPR 15.1: see PARA 1247 ante.

6    CrimPR 15.4(2).

7    Ie under the Criminal Justice Act 2003 s 43 (not yet in force) or s 44: see PARA 1284 post.

8    CrimPR 15.4(1).

**UPDATE**

**1249 Representations concerning application for a preparatory hearing; determination of application**

TEXT AND NOTES--CrimPR 15.3, 15.4 now Criminal Procedure Rules 2010, SI 2010/60, rr 15.3, 15.4.

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### **1250. Making of order: serious or complex fraud cases.**

Where it appears to a judge of the Crown Court that the evidence on an indictment reveals a case of fraud of such seriousness or complexity that substantial benefits are likely to accrue from a hearing (a 'preparatory hearing') before the time when a jury is sworn<sup>1</sup>, for the purpose of:

- 2085 (1) identifying issues which are likely to be material to the verdict of the jury<sup>2</sup>;
- 2086 (2) assisting their comprehension of any such issues<sup>3</sup>;
- 2087 (3) expediting the proceedings before the jury<sup>4</sup>;
- 2088 (4) assisting the judge's management of the trial<sup>5</sup>; or
- 2089 (5) considering questions as to the severance or joinder of charges<sup>6</sup>,

he may order that such a hearing is to be held<sup>7</sup>.

A judge may make such an order on the application<sup>8</sup> of the prosecution or of the person indicted or, if the indictment charges a number of persons, any of them, or of his own motion<sup>9</sup>.

Where a judge orders a preparatory hearing and decides that any order which could be made at the hearing under specified provisions<sup>10</sup> should be made before the hearing, he may make any such order before the hearing, or at the hearing<sup>11</sup>.

1 The reference to 'the time when the jury is sworn' includes the time when the jury would be sworn but for the making of an order under the Criminal Justice Act 2003 Pt 7 (ss 43-50) (not yet fully in force; prospectively amended) (see PARA 1284 post): see the Criminal Justice Act 1987 s 7(1), (2A) (s 7(1) amended, and s 7(2A) added, by the Criminal Justice Act 2003 s 331, Sch 36 paras 52, 53).

2 See the Criminal Justice Act 1987 s 7(1)(a). This provision is substituted so as to provide 'identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial': see s 7(1)(a) (s 7(1)(a)-(c) substituted by the Criminal Justice Act 2003 s 45(1), (4)). At the date at which this volume states the law this substitution had effect in so far as applying to applications under the Criminal Justice Act 2003 s 44 (see PARA 1284 post) (see the Criminal Justice Act 2003 (Commencement No 13 and Transitional Provision) Order 2006, SI 2006/1835, art 2(c)), but no order had been made bringing the Criminal Justice Act 2003 s 45 into force for any remaining purposes. An application concerning disclosure is not one of the purposes of a preparatory hearing within the meaning of the Criminal Justice Act 1987 s 7(1) (as amended): see *R v H* [2006] All ER (D) 92 (Jul), CA.

3 See the Criminal Justice Act 1987 s 7(1)(b). This provision is substituted so as to provide 'if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them': see s 7(1)(b) (as substituted: see note 2 supra).

4 See the Criminal Justice Act 1987 s 7(1)(c). This provision is substituted so as to provide: 'determining an application to which the Criminal Justice Act 2003 s 45 (not yet fully in force) (application for trial without jury under ss 43, 44 (not yet fully in force): see PARA 1284 post) applies': see the Criminal Justice Act 1987 s 7(1)(c) (as substituted: see note 2 supra).

5 Ibid s 7(1)(d).

6 Ibid s 7(1)(e) (added by the Criminal Justice Act 2003 s 310(1)).

7 See the Criminal Justice Act 1987 s 7(1) (amended by the Criminal Justice and Public Order Act 1994 s 168, Sch 9 para 30). As to notification of the order see PARA 1252 post. As from a day to be appointed a judge may order a preparatory hearing for the further purpose of determining an application by the prosecution for certain counts to be tried without a jury under the Domestic Violence, Crime and Victims Act 2004 s 17 (not yet in force): see s 18(2) (not yet in force); and PARA 1285 post. The parties to a preparatory hearing at which an application under s 17 (not yet in force) is to be determined must be given an opportunity to make representations with respect to the application: s 18(4) (not yet in force). At the date at which this volume states the law no such day had been appointed.

In a trial relating to serious or complex fraud the trial judge must, save in exceptional circumstances, be the judge who presided at the preparatory hearing; and what are exceptional circumstances will have to be decided in each case; but whereas death or illness of the judge will clearly qualify as such, administrative convenience will not: *R v Southwark Crown Court, ex p Comrs for Customs and Excise* [1993] 1 WLR 764, 97 Cr App Rep 266, DC. See also *R v Lord Chancellor, ex p Maxwell* [1997] 1 WLR 104, CA.

8 As to the form of application see PARA 1247 ante; and as to the time for making the application see PARA 1248 ante.

9 Criminal Justice Act 1987 s 7(2). See PARA 1251 post.

10 *Ibid* s 9(4), (5): see PARA 1253 post.

11 *Ibid* s 9A(1), (2) (added by the Criminal Procedure and Investigations Act 1996 s 72, Sch 3 para 4). In such a case the Criminal Justice Act 1987 s 9(4)-(10) (see PARA 1253 post) applies.

## UPDATE

### 1250 Making of order: serious or complex fraud cases

NOTE 2--*R v H*, cited, affirmed: [2007] UKHL 7, [2007] 3 All ER 269.

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### **1251. Making of order: complex, serious or long cases or terrorism cases.**

Where it appears to a judge of the Crown Court that an indictment reveals a case of such complexity, a case of such seriousness or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing before the time when a jury is sworn<sup>1</sup> and for any of the following specified purposes, he may order that a preparatory hearing be held<sup>2</sup>. Those purposes are:

- 2090 (1) identifying issues which are likely to be material to the verdict of the jury<sup>3</sup>;
- 2091 (2) assisting the jury's comprehension of any such issues<sup>4</sup>;
- 2092 (3) expediting the proceedings before the jury<sup>5</sup>;
- 2093 (4) assisting the judge's management of the trial<sup>6</sup>;
- 2094 (5) considering questions as to the severance or joinder of charges<sup>7</sup>.

An order for a preparatory hearing must be made by a Crown Court judge in every case which is a case in which at least one of the offences charged by the indictment against at least one of the persons charged is a terrorism offence<sup>8</sup>. An order for a preparatory hearing must also be made by a Crown Court judge in every case which is a case in which:

- 2095 (a) at least one of the offences charged by the indictment against at least one of the persons charged is an offence carrying a maximum of at least 10 years' imprisonment<sup>9</sup>; and
- 2096 (b) it appears to the judge that evidence on the indictment reveals that conduct in respect of which that offence is charged had a terrorist connection<sup>10</sup>.

In a case in which it appears to a judge of the Crown Court that evidence on an indictment reveals a case of fraud of seriousness or complexity<sup>11</sup>:

- 2097 (i) the judge may make an order for a preparatory hearing under these provisions<sup>12</sup> only if he is required to do so under the provisions<sup>13</sup> relating to terrorism<sup>14</sup>;
- 2098 (ii) before making such an order he must determine whether to make an order for a preparatory hearing under alternative<sup>15</sup> provisions<sup>16</sup>;
- 2099 (iii) he is not required by the provisions relating to terrorism<sup>17</sup> to make an order under these provisions<sup>18</sup> if he determines that an order for a preparatory hearing should be made under alternative<sup>19</sup> provisions<sup>20</sup>,

and, in a case where an order is made under alternative provisions<sup>21</sup>, requirements imposed under these provisions<sup>22</sup> apply only if that order ceases to have effect<sup>23</sup>.

An order that a preparatory hearing must be held may be made on the application of the prosecutor, on the application of the defendant (or if there is more than one of them, any of them), or of the judge's own motion<sup>24</sup>.

Where a judge orders a preparatory hearing and decides that any order which could be made at the hearing under specified provisions<sup>25</sup> should be made before the hearing, he may make any such order before the hearing, or at the hearing<sup>26</sup>.

1 The reference to the time when the jury is sworn includes the time when the jury would be sworn but for the making of an order under the Criminal Justice Act 2003 Pt 7 (ss 43-50) (not yet fully in force; prospectively amended) (see PARA 1284 post): see the Criminal Procedure and Investigations Act 1996 s 29(5) (added by the Criminal Justice Act 2003 s 331, Sch 36 paras 65, 66(1), (3)).

2 See the Criminal Procedure and Investigations Act 1996 s 29(1) (amended by the Criminal Justice Act 2003 s 309, Sch 36 para 66(2)). As from a day to be appointed this provision has effect as if the grounds on which a judge of the Crown Court may make an order included the ground that an application under the Domestic Violence, Crime and Victims Act 2004 s 17 (not yet in force) (see PARA 1285 post) has been made: s 18(3) (not yet in force). The parties to a preparatory hearing at which an application under s 17 (not yet in force) is to be determined must be given an opportunity to make representations with respect to the application: s 18(4) (not yet in force). At the date at which this volume states the law no such day had been appointed.

A judge of the Crown Court may also order that a preparatory hearing be held if an application to which the Criminal Justice Act 2003 s 45 (application for trial without jury: see PARA 1284 post) applies is made: Criminal Procedure and Investigations Act 1996 s 29(1A) (added by the Criminal Justice Act 2003 s 45(1), (6)). At the date at which this volume states the law this provision had effect in so far as applying to applications under s 44 (see PARA 1284 post) (see the Criminal Justice Act 2003 (Commencement No 13 and Transitional Provision) Order 2006, SI 2006/1835, art 2(c)), but no further orders had been made bringing the Criminal Justice Act 2003 s 45 into force for any remaining purposes.

When considering whether to order a preparatory hearing, the judge must give close consideration to the statutory criteria; an order cannot be made simply because the parties agree to a preliminary hearing; the judge is not limited in his consideration to the terms of the indictment, but may also consider the evidence likely to be called: *A-G's Reference (No 1 of 2004)*, *R v Edwards*, *R v Denton*, *R v Jackson*, *R v Hendley*, *R v Crowley* [2004] EWCA Crim 1025, [2004] 1 WLR 2111, [2004] 2 Cr App Rep 424.

A preparatory hearing cannot be ordered merely to enable points of law to be decided and then tested on interlocutory appeal; but where a judge, having considered the terms of the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended), decides that the legal issue is complex and that its resolution would assist the management of the trial, he is entitled to order a preparatory hearing: *R v Pennine Acute Hospitals NHS Trust* [2003] EWCA Crim 3436, [2004] 1 All ER 1324, CA.

The Criminal Procedure and Investigations Act 1996 Pt III (ss 28-39) (as amended; prospectively amended) applies in relation to an offence if the defendant is committed for trial or sent for trial under the Crime and Disorder Act 1998 s 51 (prospectively amended) or s 51 (as substituted) (see PARAS 1131-1132 ante) for the offence concerned, and proceedings for the trial on the charge concerned are transferred to the Crown Court (or the defendant is sent for trial for the offence concerned) or a bill of indictment relating to the offence is preferred, under the authority of the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(b) (see PARA 1206 ante), by direction of the Court of Appeal or by the direction or with the consent of a judge: Criminal Procedure and Investigations Act 1996 s 28 (amended by the Crime and Disorder Act 1998 s 119 Sch 8 para 128; prospectively amended by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 66(1), (6), Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed. Where a judge orders a preparatory hearing and he decides that any order which could be made under the Criminal Procedure and Investigations Act 1996 s 31(4)-(7) (see PARA 1253 post) at the hearing should be made before the hearing, he may make any such order before the hearing (or at the hearing), and the provisions of s 31(4)-(11) (see PARA 1253 post) apply accordingly: s 32.

3 See *ibid* s 29(2)(a). This provision is substituted so as to provide: 'identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial': see s 29(2)(a) (s 29(2)(a)-(c) substituted by the Criminal Justice Act 2003 s 45(1), (7)). At the date at which this volume states the law this substitution had effect in so far as applying to applications under the Criminal Justice Act 2003 s 44 (see PARA 1284 post) (see the Criminal Justice Act 2003 (Commencement No 13 and Transitional Provision) Order 2006, SI 2006/1835, art 2(c)), but no order had been made bringing the Criminal Justice Act 2003 s 45 into force for any remaining purposes.

4 See the Criminal Procedure and Investigations Act 1996 s 29(2)(b). This provision is substituted so as to provide: 'if there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them': see s 29(2)(b) (as substituted: see note 3 *supra*).

5 See *ibid* s 29(2)(c). This provision is substituted so as to provide: 'determining an application to which the Criminal Justice Act 2003 s 45 (not yet fully in force) (application for trial without jury under ss 43, 44 (not yet in force): see PARA 1284 post) applies: see the Criminal Procedure and Investigations Act 1996 s 29(2)(c) (as substituted: see note 3 *supra*).

6 See *ibid* s 29(2)(d).

7 See *ibid* s 29(2)(e) (added by the Criminal Justice Act 2003 s 310). As from a day to be appointed the Criminal Procedure and Investigations Act 1996 s 29(2) (as amended) (see the text and notes 3-6 *supra*) is to have effect as if the purposes there mentioned included the purpose of determining an application by the prosecution for certain counts to be tried without a jury under the Domestic Violence, Crime and Victims Act 2004 s 17 (not yet in force); s 18(2) (not yet in force); and PARA 1285 post. The parties to a preparatory hearing at which an application under s 17 (not yet in force) is to be determined must be given an opportunity to make representations with respect to the application: s 18(4) (not yet in force). At the date at which this volume states the law no such day had been appointed.

8 See *ibid* s 29(1B) (added by the Terrorism Act 2006 s 16(1), (2)). For these purposes, 'terrorism offence' means:

- 60 (1) an offence under the Terrorism Act 2000 ss 11, 12 (offences relating to proscribed organisations: see PARAS 387-388 *ante*) (Criminal Procedure and Investigations Act 1996 s 29(6) (a) (s 29(6) added by the Terrorism Act 2006 s 16));
- 61 (2) an offence under the Terrorism Act 2000 ss 15-18 (offences relating to terrorist property: see PARAS 390-393 *ante*) (Criminal Procedure and Investigations Act 1996 s 29(6)(b) (as so added));
- 62 (3) an offence under the Terrorism Act 2000 s 38B (as added) (failure to disclose information about acts of terrorism: see PARA 414 *ante*) (Criminal Procedure and Investigations Act 1996 s 29(6)(c) (as so added));
- 63 (4) an offence under the Terrorism Act 2000 s 54 (as amended) (weapons training: see PARA 439 *ante*) (Criminal Procedure and Investigations Act 1996 s 29(6)(d) (as so added));
- 64 (5) an offence under the Terrorism Act 2000 ss 56-59 (s 57 as amended) (directing terrorism, possessing things and collecting information for the purposes of terrorism and inciting terrorism outside the United Kingdom: see PARAS 441-447, 469 *ante*) (Criminal Procedure and Investigations Act 1996 s 29(6)(e) (as so added));
- 65 (6) an offence in respect of which there is jurisdiction by virtue of the Terrorism Act 2000 s 62 (extra-territorial jurisdiction in respect of certain offences committed outside the United Kingdom for the purposes of terrorism etc) (Criminal Procedure and Investigations Act 1996 s 29(6)(f) (as so added));
- 66 (7) an offence under the Terrorism Act 2006 Pt 1 (ss 1-19): see PARA 383 *et seq ante*) (Criminal Procedure and Investigations Act 1996 s 29(6)(g) (as so added));
- 67 (8) conspiring or attempting to commit a terrorism offence (s 29(6)(h) (as so added));
- 68 (9) incitement to commit a terrorism offence (s 29(6)(i) (as so added)).

9 See *ibid* s 29(1C)(a) (s 29(1C) added by the Terrorism Act 2006 s 16(1), (2)). An offence carries a maximum of at least 10 years' imprisonment if: (1) it is punishable on conviction on indictment with imprisonment; and (2) the maximum term of imprisonment that may be imposed on conviction on indictment of that offence is 10 years or more or is imprisonment for life: Criminal Procedure and Investigations Act 1996 s 29(7) (added by the Terrorism Act 2006 s 16(1), (5)).

10 See the Criminal Procedure and Investigations Act 1996 s 29(1C)(b) (as added: see note 9 *supra*). For these purposes, conduct has a terrorist connection if it is or takes place in the course of an act of terrorism or is for the purposes of terrorism: s 29(8) (added by the Terrorism Act 2006 s 16(1), (5)). 'Terrorism' has the same meaning as in the Terrorism Act 2000 s 1 (as amended) (see PARA 383 *ante*): Criminal Procedure and Investigations Act 1996 s 29(9) (added by the Terrorism Act 2006 s 16(1), (5)).

11 *Ie* a case of such seriousness and complexity as is mentioned in the Criminal Justice Act 1987 s 7 (as amended; prospectively amended): see PARA 1250 *ante*.

12 *Ie* under the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended).

13 *Ie* *ibid* s 29(1B), (1C) (as added): see notes 8-10 *supra*.

14 See *ibid* s 29(3)(a) (s 29(3) substituted by the Terrorism Act 2006 s 16(1), (3)). See the Criminal Procedure and Investigations Act 1996 s 29(1B), (1C) (as added); and the text and notes 8-10 *supra*.

15 *Ie* under the Criminal Justice Act 1987 s 7 (as amended; prospectively amended): see PARA 1250 *ante*.

16 See the Criminal Procedure and Investigations Act 1996 s 29(3)(b) (as substituted: see note 14 *supra*).

17 *Ie* by *ibid* s 29(1B) (as added) or s 29(1C) (as added): see the text and notes 8-10 *supra*.

18 *Ie* under *ibid* s 29 (as amended; prospectively amended).

19 *Ie* under the Criminal Justice Act 1987 s 7 (as amended; prospectively amended): see PARA 1250 *ante*.

20 See the Criminal Procedure and Investigations Act 1996 s 29(3)(c) (as substituted: see note 14 *supra*).

21 *Ie* under the Criminal Justice Act 1987 s 7 (as amended; prospectively amended): see PARA 1250 *ante*.

22 *Ie* under the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended).

23 See *ibid* s 29(3) (as substituted): see note 14 *supra*.

24 *Ibid* s 29(4) (amended by the Terrorism Act 2006 s 16(1), (4)). A Crown Court judge can conduct separate preparatory hearings in respect of different defendants charged in the same indictment where he considers it necessary to do so in the interests of justice: *Re Kanaris* [2003] UKHL 2, [2003] 1 All ER 593, [2003] 1 WLR 443. Where the judge purports to conduct a preparatory hearing under the provisions of the Criminal Procedure and Investigations Act 1996 Pt III (ss 28-38) (as amended; prospectively amended) but has no jurisdiction to do so, the hearing may take effect as a statutory pre-trial hearing (see PARAS 1244-1246 *ante*): *R v Ward, R v Parsons, R v Lee* [2003] EWCA Crim 814, [2003] 2 Cr App Rep 20.

25 *Ie* the Criminal Procedure and Investigations Act 1996 s 31(4)-(7): see PARA 1253 *post*.

26 *Ibid* s 32(1), (2). In such a case s 31(4)-(11) (see PARA 1253 *post*) applies.

## UPDATE

### 1251 Making of order: complex, serious or long cases or terrorism cases

NOTE 8--Head (9). See further Serious Crime Act 2007 Sch 6 para 29 (references to common law offence of incitement).



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## **1252. Notification of order.**

The court officer must serve<sup>1</sup> on the parties in the case in the prescribed form<sup>2</sup>:

- 2100 (1) notice of the determination of the application<sup>3</sup>;
- 2101 (2) an order for a preparatory hearing made by the court of its own initiative, including one that the court is required to make<sup>4</sup>.

<sup>1</sup> As to service of documents see PARA 1255 post.

<sup>2</sup> Ie prescribed by *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for Use in Criminal Proceedings)* [2006] 3 All ER 484, CA.

<sup>3</sup> CrimPR 15.4(3)(a). As to the determination of the application see PARA 1249 ante.

<sup>4</sup> CrimPR 15.4(3)(b).

## **UPDATE**

### **1252 Notification of order**

TEXT AND NOTES--CrimPR 15.4(3) now Criminal Procedure Rules 2010, SI 2010/60, r 15.4(3).

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### **1253. Judge's powers at preparatory hearing.**

At the preparatory hearing<sup>1</sup> the judge may:

- 2102 (1) adjourn the hearing from time to time<sup>2</sup>;
- 2103 (2) in a serious or complex fraud case, determine a question<sup>3</sup> relating to the relevance of external law to certain charges of conspiracy, attempt and incitement<sup>4</sup>;
- 2104 (3) determine any question as to the admissibility of evidence, any other question of law relating to the case and any question relating to the severance or joinder of charges<sup>5</sup>;
- 2105 (4) order the prosecution<sup>6</sup> to supply the court and the defendant or, if there is more than one, each of them, with a statement (a 'case statement') of certain matters<sup>7</sup>;
- 2106 (5) order the prosecution to prepare its evidence and other explanatory material in such a form as appears to him to be likely to aid comprehension by a jury and to supply it in that form to the court and to the defendant or, if there is more than one, to each of them<sup>8</sup>;
- 2107 (6) order the prosecution to give the court and the defendant or, if there is more than one, each of them, notice of documents the truth of the contents of which ought in the prosecution's view to be admitted and of any other matters which in its view ought to be agreed<sup>9</sup>;
- 2108 (7) order the prosecution to make any amendments of any case statement supplied in pursuance of an order under head (4) above that appear to the court to be appropriate, having regard to objections made by the defendant, or, if there is more than one defendant, by any of them<sup>10</sup>;
- 2109 (8) where he has ordered the prosecution to supply a case statement and the prosecution has complied with the order, order the defendant or, if there is more than one, each of them:
  - 584 60. (a) to give the court and the prosecution notice of any objections that he has to the case statement<sup>11</sup>; and
  - 61. (b) to give the court and the prosecution a notice setting out the extent to which he agrees with the prosecution as to documents and other matters to which a notice under head (6) above relates and the reason<sup>12</sup> for any disagreement<sup>13</sup>;
- 585 2110 (9) continue the hearing notwithstanding that leave to appeal<sup>14</sup> from any order or ruling under head (3) above<sup>15</sup> has been granted; but the preparatory hearing may not be concluded until after the appeal has been determined or abandoned<sup>16</sup>.

An order made under the above provisions may specify the time within which any specified requirement contained in it is to be complied with<sup>17</sup>; and any order or ruling made at or for the

purposes of a preparatory hearing has effect during the trial, unless it appears to the judge, on application made to him, that the interests of justice require him to vary or discharge it<sup>18</sup>.

1     le the preparatory hearing under the Criminal Justice Act 1987 s 7 (as amended; prospectively amended) or under the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended): see PARAS 1250-1251 ante.

2     See the Criminal Justice Act 1987 s 9(1), (2); and the Criminal Procedure and Investigations Act 1996 s 31(1), (2).

3     le under the Criminal Justice Act 1993 s 6 (as amended): see PARA 79 ante.

4     Criminal Justice Act 1987 s 9(1), (3)(aa) (added by the Criminal Justice Act 1993 s 6(8)). As to the admissibility of evidence generally see PARA 1364 et seq post.

5     Criminal Justice Act 1987 s 9(1), (3)(b), (c), (d) (s 9(1)(d) added by the Criminal Justice Act 2003 s 310(2)); Criminal Procedure and Investigations Act 1996 s 31(1), (3)(a), (b), (c) (s 31(3)(c) added by the Criminal Justice Act 2003 s 310(5)).

6     In respect of the Criminal Procedure and Investigations Act 1996, 'the prosecutor' is the term employed in place of 'the prosecution' under these provisions. References to 'the prosecutor' are references to any person acting as prosecutor, whether an individual or a body: s 28(4).

7     See the Criminal Justice Act 1987 s 9(1), (4)(a); and the Criminal Procedure and Investigations Act 1996 s 31(1), (4)(a). A case statement is a statement of: (1) the principal facts of the prosecution case; (2) the witnesses who will speak to those facts; (3) any exhibits relevant to those facts; (4) any proposition of law on which the prosecution proposes to rely; (5) the consequences in relation to any of the counts in the indictment that appear to the prosecution to flow from the matters stated in pursuance of heads (1)-(4) supra: Criminal Justice Act 1987 s 9(4)(a); Criminal Procedure and Investigations Act 1996 s 31(5). As to disclosure of the prosecution case see also PARA 1383 post.

8     Criminal Justice Act 1987 s 9(1), (4)(b) (s 9(4)(b) amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 52, 54(1), (2)); Criminal Procedure and Investigations Act 1996 s 31(4)(b) (amended by the Criminal Justice Act 2003 Sch 36 paras 65, 67).

9     See the Criminal Justice Act 1987 s 9(1), (4)(c); and the Criminal Procedure and Investigations Act 1996 s 31(4)(c).

10    Criminal Justice Act 1987 s 9(1), (4)(d); Criminal Procedure and Investigations Act 1996 s 31(1), (4)(d).

11    See the Criminal Justice Act 1987 s 9(1), (5)(ii); and the Criminal Procedure and Investigations Act 1996 s 31(1), (6)(b). Criminal Procedure Rules may provide that except to the extent that disclosure is required either by rules under the Police and Criminal Evidence Act 1984 s 81 (expert evidence: see PARA 1492 post) or by the Criminal Procedure and Investigations Act 1996 s 5(7) (see PARA 1388 post), anything required to be given by an accused in pursuance of a requirement imposed under s 31 need not disclose who will give evidence: s 33(1) (s 33(1), (2) amended by the Courts Act 2003 s 109(1), Sch 8 para 379).

12    If it appears to a judge that reasons given in pursuance of the Criminal Justice Act 1987 s 9(5)(iv) or the Criminal Procedure and Investigations Act 1996 s 31(7) (see the text and note 13 infra) are inadequate, he must so inform the person giving them, and may require him to give further or better reasons: see the Criminal Justice Act 1987 s 9(8); and the Criminal Procedure and Investigations Act 1996 s 31(9).

13    See the Criminal Justice Act 1987 s 9(1), (5)(iv); and the Criminal Procedure and Investigations Act 1996 s 31(1), (7). It is of prime importance for the purposes of a preparatory hearing under the Criminal Justice Act 1987 that the prosecution case statement be in the hands of the court and of the defendant at least seven days before the preparatory hearing, to give both the court and the defendant a proper opportunity of examining it so that they may be prepared to argue such points as are raised by the Crown at the hearing with regard to s 9(4), (5) (as amended) (see the text and notes 6-12 supra); any order made under s 9(5) (as amended) (see the text and note 11 supra) must clearly identify the documents or evidence or both which the prosecution requires the defendants' agreement upon: *Re Case Statements Made Under s 9 of the Criminal Justice Act 1987* (1992) 97 Cr App Rep 417, CA.

A judge making an order under the Criminal Justice Act 1987 s 9(5) (as amended) or the Criminal Procedure and Investigations Act 1996 s 31(6), (7) (as amended) (see the text and notes 11, 12 supra) must warn the defendant or, if there is more than one, all of them, of the possible consequences under the Criminal Justice Act 1987 s 10 (as substituted) (see PARA 1258 post) or the Criminal Procedure and Investigations Act 1996 s 34 (as amended) (see PARA 1258 post) of not complying with it: Criminal Justice Act 1987 s 9(7) (amended by the

Criminal Procedure and Investigations Act 1996 ss 72, 80, Sch 3 paras 1, 3(1), (2), Sch 5(12)); Criminal Procedure and Investigations Act 1996 s 31(8). As to disclosure by the defence see PARA 1254 post.

14 The under Criminal Justice Act 1987 s 9(11) (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 35(1) (as amended; prospectively amended): see PARAS 1921-1922 post. As from a day to be appointed the Criminal Justice Act 1987 s 9(11) (as amended; prospectively amended) (see PARA 1921 post) and the Criminal Procedure and Investigations Act 1996 s 35(1) (as amended; prospectively amended) (see PARA 1922 post) have effect as if they also provided for an appeal to the Court of Appeal to lie from the determination by a judge of an application under the Domestic Violence, Victims and Crime Act 2004 s 17 (not yet in force) for certain counts to be tried without a jury: see s 18(5) (not yet in force); and PARA 1285 post. At the date at which this volume states the law no such day had been appointed.

15 Such an appeal includes an appeal from the refusal of an application for trial without jury in certain fraud cases or where there is a danger of jury tampering or from the making of an order for such trial in such a case: see the Criminal Justice Act 2003 ss 43-45 (not yet fully in force); and PARA 1284 post.

16 See *ibid* s 9(1), (13) (s 9(13) amended by the Criminal Justice Act 2003 Sch 36 para 52, 54); and the Criminal Procedure and Investigations Act 1996 s 35(2) (ss 35(2), 36(2) amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 69, 70). The judge may continue a preparatory hearing notwithstanding that leave to appeal has been granted under the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended) (see PARA 1966 post), but the preparatory hearing may not be concluded until after the appeal has been determined or abandoned: Criminal Procedure and Investigations Act 1996 s 36(2) (as so amended).

17 Criminal Justice Act 1987 s 9(9); Criminal Procedure and Investigations Act 1996 s 31(10). Criminal Procedure Rules may, however, make provision as to the minimum or maximum time that may be specified for compliance: see the Criminal Justice Act 1987 s 9(9); and the Criminal Procedure and Investigations Act 1996 s 33(2) (as amended: see note 11 *supra*).

18 See the Criminal Justice Act 1987 s 9(10) (amended by the Criminal Procedure and Investigations Act 1996 s 72, Sch 3 para 3); and the Criminal Procedure and Investigations Act 1996 s 31(11). A preparatory hearing must be used for a specified purpose or purposes set out in the Criminal Justice Act 1987 s 7(1) (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 29(1) (as amended; prospectively amended) (see PARAS 1250-1251 *ante*); the judge's jurisdiction under the Criminal Justice Act 1987 s 9 (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 31 (as amended) (see the text and notes 1-17 *supra*) is subordinated to the provisions of the Criminal Justice Act 1987 s 7 (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended); if an application relates to a matter outside the Criminal Justice Act 1987 s 7 (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended), as the case may be, the judge has no jurisdiction to entertain the application within the ambit of the preparatory hearing: *Re Gunawardena, Harbutt and Banks* [1990] 1 WLR 703, 91 Cr App Rep 55, CA (no jurisdiction at preparatory hearing to stay trial on grounds of abuse of process); *R v T* [2006] All ER (D) 142 (Feb); *R v Hedworth* [1997] 1 Cr App Rep 421, CA (no jurisdiction to deal with motion to quash indictment); *R v Jennings* (1993) 98 Cr App Rep 308, CA (no jurisdiction to sever indictment). See also *R v Van Hoogstraten* [2003] EWCA Crim 3642, [2004] Crim LR 498. Cf *R v Claydon* [2001] EWCA Crim 1359, [2004] 1 WLR 1575, [2004] 1 Cr App Rep 474 (jurisdiction at preparatory hearing to entertain application for exclusion of evidence under the Police and Criminal Evidence Act 1984 s 78 (see PARA 1365 post), but not to deal with application for stay for abuse of process). See further *R v G*, *R v S*, *R v N* [2002] Crim LR 59, CA.

## UPDATE

### 1253 Judge's powers at preparatory hearing

NOTE 5--See *R v I-I*; *R v I (T)* [2009] EWCA Crim 1793, [2010] 1 WLR 1125 (sufficient compelling cause to depart from norm that judge who had conducted case management of complex case should conduct trial).

NOTE 18--See *R v M* [2007] EWCA Crim 970, [2007] 3 All ER 53.

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### **1254. Orders for disclosure by prosecution or defence.**

Where an order is made at a preparatory hearing<sup>1</sup> for disclosure (a 'disclosure order'), the order must identify any documents that are required to be prepared and served<sup>2</sup> by the prosecutor under that order<sup>3</sup>.

A disclosure order does not require a defendant to disclose who will give evidence, except to the extent that such disclosure is required by specified<sup>4</sup> provisions<sup>5</sup>.

The court officer must serve notice of the order in the specified form<sup>6</sup> on the parties<sup>7</sup>.

1     le under the Criminal Justice Act 1987 s 9 (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 31 (as amended): see PARA 1253 ante.

2     As to service of documents see PARA 1255 post.

3     CrimPR 15.5(1).

4     le required by the Criminal Procedure and Investigation Act 1996 s 6A(2) (as added) (disclosure of alibi: see PARA 1388 post) or CrimPR Pt 24 (disclosure of expert evidence: see PARA 1492 post): see CrimPR 15.5(2).

5     CrimPR 15.5(2).

6     See *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for Use in Criminal Proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

7     CrimPR 15.5(3).

### **UPDATE**

### **1254 Orders for disclosure by prosecution or defence**

TEXT AND NOTES--CrimPR 15.5 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), r 15.5.

NOTE 4--Reference to CrimPR Pt 24 now to CrimPR Pt 33: CrimPR 15.5(2).

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### **1255. Service of documents.**

Any notice or document<sup>1</sup> may be served on any person by any of the following methods:

- 2111 (1) personally on that person or his solicitor<sup>2</sup>;
- 2112 (2) by first class post to, or by leaving it at: (a) that person's usual or last known residence or place of business in England and Wales; (b) in the case of a company, that company's registered address in England and Wales; or (c) the business address of that person's solicitor<sup>3</sup>;
- 2113 (3) by fax or other electronic means, but only if that person has agreed to accept service by that method<sup>4</sup>;
- 2114 (4) where the person or his solicitor has given a number of a box at a document exchange and has not indicated that he is unwilling to accept service through a document exchange, by leaving it at the document exchange addressed to the box number<sup>5</sup>.

Where a document or notice is served<sup>6</sup> by any method other than personal service it is deemed to be served:

- 2115 (i) if left at an address, on the next business day after the day on which it was left<sup>7</sup>;
- 2116 (ii) if sent by first class post, on the second business day after the day on which it was posted<sup>8</sup>;
- 2117 (iii) if transmitted on a business day by fax or other electronic means before five pm, on that day, and if so transmitted at any other time, on the next business day after the day on which it is transmitted<sup>9</sup>; and
- 2118 (iv) if left at a document exchange, on a second business day after the day on which it was left<sup>10</sup>.

1    le a notice or document required by CrimPR Pt 15: see PARA 1247 et seq ante.

2    CrimPR 15.6(1)(a).

3    CrimPR 15.6(1)(b).

4    CrimPR 15.6(1)(c).

5    CrimPR 15.6(1)(d).

6    le served under CrimPR Pt 15: see PARA 1247 et seq ante.

7    CrimPR 15.6(2)(a). 'Business day' means any day other than a Saturday, Sunday, Christmas Day, Good Friday or a bank holiday: CrimPR 15.6(3).

8    CrimPR 15.6(2)(b).

9    CrimPR 15.6(2)(c).

10   CrimPR 15.6(2)(d).

**UPDATE**

**1255 Service of documents**

TEXT AND NOTES--CrimPR now Criminal Procedure Rules 2010, SI 2010/60. CrimPR 15.6 not reproduced.

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### **1256. Commencement of trial; arraignment.**

If a judge orders a preparatory hearing<sup>1</sup>, the trial begins with that hearing; and arraignment<sup>2</sup> accordingly takes place at the start of the preparatory hearing unless it has taken place before then<sup>3</sup>.

1     le under the Criminal Justice Act 1987 s 7 (as amended; prospectively amended) or under the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended): see PARAS 1250-1251 ante.

2     As to arraignment generally see PARAS 1263-1265 post.

3     See the Criminal Justice Act 1987 s 8; Criminal Procedure and Investigations Act 1996 s 30.



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### **1257. Restrictions on reporting preparatory hearings.**

Except as provided by the following provisions, no written report of a preparatory hearing<sup>1</sup>, an application for leave to appeal in relation to such a hearing<sup>2</sup>, or an appeal in relation to such a hearing, may be published in the United Kingdom<sup>3</sup>, nor may any report of any such proceedings be included in a relevant programme<sup>4</sup> for reception in the United Kingdom<sup>5</sup>. The judge dealing with a preparatory hearing may order that such restrictions do not apply, or do not apply to a specified extent, to a report of the preparatory hearing, or an application to the judge for leave to appeal to the Court of Appeal<sup>6</sup> in relation to the preparatory hearing<sup>7</sup>. The Court of Appeal may order that the restrictions do not apply, or do not apply to a specified extent, to a report of an appeal to the Court of Appeal<sup>8</sup> in relation to a preparatory hearing, an application to that court for leave to appeal to it in relation to a preparatory hearing<sup>9</sup>, or an application to that court for leave to appeal to the House of Lords<sup>10</sup> in relation to a preparatory hearing<sup>11</sup>.

The House of Lords<sup>12</sup> may order that the restrictions do not apply, or do not apply to a specified extent, to a report of an appeal<sup>13</sup> to that House in relation to a preparatory hearing, or an application to that House for leave to appeal<sup>14</sup> to it in relation to a preparatory hearing<sup>15</sup>.

Where there is only one defendant and he objects to the making of an order<sup>16</sup> for the lifting of restrictions on reporting, the judge or the Court of Appeal or the House of Lords<sup>17</sup> must make the order if (and only if) satisfied after hearing the representations of the defendant that it is in the interests of justice to do so and; if the order is made, it does not apply to the extent that a report deals with any such objection or representations<sup>18</sup>. Where there are two or more defendants and one or more of them objects to the making of an order<sup>19</sup>, the judge or the Court of Appeal or the House of Lords<sup>20</sup> must make the order if (and only if) satisfied after hearing the representations of each of the defendants that it is in the interests of justice to do so; and, if the order is made, it does not apply to the extent that a report deals with any such objection or representations<sup>21</sup>.

The reporting restrictions do not apply to the publication of a report of a preparatory hearing, the publication of a report of an appeal in relation to a preparatory hearing or of an application for leave to appeal in relation to such a hearing, the inclusion in a relevant programme of a report of a preparatory hearing, or the inclusion in a relevant programme of a report of an appeal in relation to a preparatory hearing or of an application for leave to appeal in relation to such a hearing, at the conclusion of the trial of the defendant or of the last of the defendants to be tried<sup>22</sup>. Further, those restrictions do not apply to a report which contains only one or more of the following matters: (1) the identity of the court and the name of the judge; (2) the names, ages, home addresses<sup>23</sup> and occupations of the defendants and witnesses; (3) the offence or offences, or a summary of them, with which the defendant or defendants is or are charged; (4) the names of counsel and solicitors in the proceedings; (5) where the proceedings are adjourned, the date and place to which they are adjourned; (6) any arrangements as to bail; (7) whether a right to representation funded by the Legal Services Commission as part of the Criminal Defence Service was granted to the defendant or any of the defendants<sup>24</sup>.

If a report is published or included in a relevant programme in contravention of the above provisions, each of the following persons is guilty of an offence: (a) in the case of a publication of a written report as part of a newspaper or periodical, any proprietor, editor or publisher of

the newspaper or periodical; (b) in the case of a publication of a written report otherwise than as part of a newspaper or periodical, the person who publishes it; (c) in the case of the inclusion of a report in a relevant programme, any body corporate which is engaged in providing the service in which the programme is included and any person having functions in relation to the programme corresponding to those of an editor of a newspaper<sup>25</sup>. A person guilty of such an offence is liable on summary conviction to a fine of an amount not exceeding level 5 on the standard scale<sup>26</sup>.

1     Ie under the Criminal Justice Act 1987 s 7 (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended): see PARA 1250 ante.

2     Ie under the Criminal Justice Act 1987 s 9(11) (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 35(1) (as amended; prospectively amended): see PARAS 1921-1922 post.

3     'Publish', in relation to a report, means publish the report, either by itself or as part of a newspaper or periodical, for distribution to the public; and expressions cognate with 'publish' are to be construed accordingly: Criminal Justice Act 1987 s 11(16)(a), (b) (s 11 substituted by the Criminal Procedure and Investigations Act 1996 s 72, Sch 3 paras 1, 6); Criminal Procedure and Investigations Act 1996 s 37(12)(a), (b). As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4     Ie a programme included in a programme service, within the meaning of the Broadcasting Act 1990 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328): Criminal Justice Act 1987 s 11(16)(a) (as substituted: see note 3 supra); Criminal Procedure and Investigations Act 1996 s 37(12)(c).

5     Criminal Justice Act 1987 s 11(1), (2)(b)-(d) (s 11 as substituted (see note 3 supra); and s 11(1) amended by the Criminal Justice Act 2003 s 311(1), (2)); Criminal Procedure and Investigations Act 1996 s 37(1), (2) (s 37(1) amended by the Criminal Justice Act 2003 s 311(5), (6)).

6     Ie under the Criminal Justice Act 1987 s 9(11) (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 35(1) (as amended; prospectively amended): see PARAS 1921-1922 post.

7     Criminal Justice Act 1987 s 11(4) (as substituted: see note 3 supra); Criminal Procedure and Investigations Act 1996 s 37(3).

8     Ie under the Criminal Justice Act 1987 s 9(11) (as amended; prospectively amended); or the Criminal Procedure and Investigations Act 1996 s 35(1) (as amended; prospectively amended): see PARAS 1921-1922 post.

9     Ie under the Criminal Justice Act 1987 s 9(11) (as amended; prospectively amended); or the Criminal Procedure and Investigations Act 1996 s 35(1) (as amended; prospectively amended): see PARAS 1921-1922 post.

10    Ie under the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended; prospectively amended): see PARA 1966 post. As from a day to be appointed appeals will be made to the Supreme Court: see the Criminal Justice Act 1987 s 11(5)(c) (as substituted (see note 3 supra); prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 46); and the Criminal Procedure and Investigations Act 1996 s 37(4)(c) (prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 61). At the date at which this volume states the law no such day had been appointed.

11    See the Criminal Justice Act 1987 s 11(5) (as substituted: see note 3 supra); and the Criminal Procedure and Investigations Act 1996 s 37(4).

12    As from a day to be appointed the Supreme Court is substituted for the House of Lords under these provisions: see the Criminal Justice Act 1987 s 11(6) (prospectively amended by the Constitutional Reform Act 2005 Sch 9 para 46); and the Criminal Procedure and Investigations Act 1996 s 37(5) (prospectively amended by the Constitutional Reform Act 2005 Sch 9 para 61). At the date at which this volume states the law no such day had been appointed.

13    Ie under the Criminal Appeal Act 1968 Pt II (as amended; prospectively amended): see PARA 1966 post.

14    Ie under *ibid* Pt II (as amended; prospectively amended): see PARA 1966 post.

15 See the Criminal Justice Act 1987 s 11(6) (as substituted: see note 3 supra); and the Criminal Procedure and Investigations Act 1996 s 37(5) (prospectively amended: see note 12 supra).

16 Ie under the Criminal Justice Act 1987 s 11(4), (5) or (6) (s 11 as substituted; s 11(5), (6) prospectively amended); or the Criminal Procedure and Investigations Act 1996 s 37(3), (4) or (5) (s 37(4), (5) prospectively amended): see the text and notes 6-15 supra.

17 As from a day to be appointed the Supreme Court is substituted for the House of Lords under these provisions: see the Criminal Justice Act 1987 s 11(7) (prospectively amended by the Constitutional Reform Act 2005 Sch 9 para 46); and the Criminal Procedure and Investigations Act 1996 s 37(6) (prospectively amended by the Constitutional Reform Act 2005 Sch 9 para 61). At the date at which this volume states the law no such day had been appointed.

18 See the Criminal Justice Act 1987 s 11(7) (as substituted: see note 3 supra); and the Criminal Procedure and Investigations Act 1996 s 37(6).

19 Ie under the Criminal Justice Act 1987 s 11(4), (5) or (6) (s 11 as substituted; s 11(5), (6) prospectively amended); or the Criminal Procedure and Investigations Act 1996 s 37(3), (4) or (5) (s 37(4), (5) prospectively amended): see the text and notes 6-15 supra.

20 As from a day to be appointed the Supreme Court is substituted for the House of Lords under these provisions: see the Criminal Justice Act 1987 s 11(7) (prospectively amended by the Constitutional Reform Act 2005 Sch 9 para 46); and the Criminal Procedure and Investigations Act 1996 s 37(6) (prospectively amended by the Constitutional Reform Act 2005 Sch 9 para 61). At the date at which this volume states the law no such day had been appointed.

21 See the Criminal Justice Act 1987 s 11(8) (as substituted: see note 3 supra); and the Criminal Procedure and Investigations Act 1996 s 37(7).

22 See the Criminal Justice Act 1987 s 11(11)(b), (c), (e), (f) (as substituted: see note 3 supra); and the Criminal Procedure and Investigations Act 1996 s 37(8).

23 The addresses that may be published or included in a relevant programme are addresses at any relevant time, and at the time of their publication or inclusion in a relevant programme; and 'relevant time' means a time when events giving rise to the charges to which the proceedings relate occurred: Criminal Justice Act 1987 s 11(13) (as substituted: see note 3 supra); Criminal Procedure and Investigations Act 1996 s 37(10).

24 Criminal Justice Act 1987 s 11(12) (as substituted (see note 3 supra); and amended by the Access to Justice Act 1999 s 24, Sch 4 paras 38, 40); Criminal Procedure and Investigations Act 1996 s 37(9) (amended by the Access to Justice Act 1999 Sch 4 para 49). In the case of a report of a preparatory hearing under the Criminal Justice Act 1987 s 11(12) (as substituted and amended) also includes an exception for a report which contains 'any relevant business information': s 11(12)(c) (as so substituted). For these purposes, 'relevant business information' means: (1) any address used by the defendant for carrying on a business on his own account; (2) the name of any business which he was carrying on on his own account at any relevant time; (3) the name of any firm in which he was a partner at any relevant time or by which he was engaged at any such time; (4) the address of any such firm; (5) the name of any company of which he was a director at any relevant time or by which he was otherwise engaged at any such time; (6) the address of the registered or principal office of any such company; (7) any working address of the defendant in his capacity as a person engaged by any such company: s 11(14). 'Engaged' means engaged under a contract of service or a contract for services: s 11(14).

25 See the Criminal Justice Act 1987 s 11A(1) (s 11A added by the Criminal Procedure and Investigations Act 1996 s 72, Sch 3 paras 1, 6); and the Criminal Procedure and Investigations Act 1996 s 38(1). Proceedings for an offence may not be instituted otherwise than by or with the consent of the Attorney General: Criminal Justice Act 1987 s 11A(3) (as so added); Criminal Procedure and Investigations Act 1996 s 38(3). For the effect of this limitation see PARA 1071 ante.

26 See the Criminal Justice Act 1987 s 11A(2) (as added: see note 25 supra); Criminal Procedure and Investigations Act 1996 s 38(2). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **UPDATE**

### **1257 Restrictions on reporting preparatory hearings**

NOTES 10, 12, 17, 20--Appointed day is 1 October 2009: SI 2009/1604.



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### **1258. Provisions relating to later stages of trial.**

Any party may depart from the case he disclosed in pursuance of a requirement imposed under the provisions<sup>1</sup> relating to a preparatory hearing<sup>2</sup>.

Where a party departs from the case which he disclosed in pursuance of a requirement<sup>3</sup>, or fails to comply with such a requirement, the judge or, with the leave of the judge, any other party, may make such comment as appears to him to be appropriate and the jury (or, in the case of a trial without a jury, the judge) may draw such inference as appears proper<sup>4</sup>.

Except as so provided<sup>5</sup> (in the case of a trial with a jury) no part of a statement given<sup>6</sup>, or of any other information relating to the case for the defendant or, if there is more than one, the case for any of them, which was given at the preparatory hearing, may be disclosed at a stage in the trial after the jury has been sworn without the consent of the defendant concerned<sup>7</sup>.

<sup>1</sup>    Ie under the Criminal Justice Act 1987 s 9 (as amended); or the Criminal Procedure and Investigations Act 1996 s 31 (as amended): see PARA 1253 ante.

<sup>2</sup>    Criminal Justice Act 1987 s 10(1) (s 10 substituted by the Criminal Procedure and Investigations Act 1996 s 72, Sch 3 paras 1, 5); Criminal Procedure and Investigations Act 1996 s 34(1). 'Preparatory hearing' means a preparatory hearing under the Criminal Justice Act 1987 s 7 (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended): see PARAS 1250-1251 ante.

<sup>3</sup>    Ie a requirement under the Criminal Justice Act 1987 s 9 (as amended) or the Criminal Procedure and Investigations Act 1996 s 31 (as amended): see PARA 1253 ante.

<sup>4</sup>    Criminal Justice Act 1987 s 10(2) (as substituted (see note 2 supra); and s 10(2)-(4) amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 52, 55); Criminal Procedure and Investigations Act 1996 s 34(2) (s 34(2)-(4) amended by the Criminal Justice Act 2003 Sch 36 paras 65, 68). In doing anything under the Criminal Justice Act 1987 s 10(2), or in deciding whether to do anything thereunder, the judge must have regard to the extent of any departure or failure and to whether there was any justification for it: s 10(3) (as so substituted and amended); Criminal Procedure and Investigations Act 1996 s 34(3) (as so amended).

<sup>5</sup>    Ie provided by the Criminal Justice Act 1987 s 10 (as substituted and amended); or the Criminal Procedure and Investigations Act 1996 s 34 (as amended).

<sup>6</sup>    Ie given under the Criminal Justice Act 1987 s 9(5) (as amended): see PARA 1253 ante.

<sup>7</sup>    See *ibid* s 10(4) (as substituted and amended: see notes 2, 4 supra); and the Criminal Procedure and Investigations Act 1996 s 34(4) (as amended: see note 4 supra).

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## **(v) Live Television Links at Preliminary Hearings**

### **1259. The procedural provisions.**

In any proceedings for an offence, a court may, after hearing representations from the parties, direct that the defendant be treated as being present in the court for any particular hearing before the start of the trial<sup>1</sup> if, during that hearing:

- 2119 (1) he is held in custody in a prison or other institution<sup>2</sup>; and
- 2120 (2) whether by means of a live television link or otherwise, he is able to see and hear the court and to be seen and heard by it<sup>3</sup>.

No such direction may be given unless the court has been notified by the Secretary of State that facilities are available for enabling persons held in custody in the institution in which the defendant is or is to be so held to see and hear the court and to be seen and heard by it, and the notice has not been withdrawn<sup>4</sup>.

1 For the meaning of 'the start of the trial' see PARA 1152 ante.

2 Crime and Disorder Act 1998 s 57(1)(a). See note 3 infra.

3 Ibid s 57(1)(b). If in a case where it has power to do so a magistrates' court decides not to give a direction under s 57(1), it must give its reasons for not doing so: s 57(3).

4 Ibid s 57(2).

## **UPDATE**

### **1259 The procedural provisions**

TEXT AND NOTES--1998 Act s 57 replaced by Pt 3A (ss 57A-57E) (substituted by Police and Justice Act 2006 s 45). Provision is made for the use of live link at preliminary hearings where the accused is in custody (s 57B), the use of live link at preliminary hearings where the accused is at police station (s 57C), the continued use of live link for sentencing hearing following a preliminary hearing (s 57D), and the use of live link in sentencing hearings (s 57E).

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### **(3) PROCEEDINGS BEFORE PLEA**

#### **(i) Appearance**

##### **1260. Appearance of defendant.**

If an indictment has been signed and the defendant is in custody, he is placed at the bar in the dock<sup>1</sup>. If he has been on bail, bound over to appear, he is called upon to surrender, and, if he surrenders, takes his place in the dock. A defendant who is conducting his own defence may be permitted by the trial judge to leave the dock after arraignment and take a seat at a table in the court<sup>2</sup>. A defendant corporation must appear by a representative<sup>3</sup>.

<sup>1</sup> In general, unless there is danger of escape or violence, the defendant ought not to be handcuffed or otherwise restrained in the dock: see 2 Hawk PC c 28 s 1. See also *R v Young* [1973] Crim LR 507, CA. If the prosecution has reason to think, for reasons of security, that an defendant should be handcuffed during the trial, it should, before the jury panel is brought into court, apply to the trial judge for the defendant to remain handcuffed and call evidence in support of its application, if it is contested: see *R v Vratsides* [1988] Crim LR 251. Such application should be heard inter partes, except in very exceptional circumstances: *R v Rollinson* (1996) 161 JP 107, CA. The means adopted to counter the risk should be such as to minimise the risk of prejudice: *R v Mullen* [2000] 6 Archbold News 2, CA. A defendant in custody who refuses to come into court should not be compelled to do so, even if he is in the course of giving evidence; the judge should take steps to punish such a defendant for contempt, and continue the trial in his absence: *R v O'Boyle* (1990) 92 Cr App Rep 202, CA.

<sup>2</sup> See *R v Lovett* (1839) 9 C & P 462.

<sup>3</sup> See the Criminal Justice Act 1925 s 33(3) (amended by the Courts Act 1971 s 56(1), Sch 8 para 19). For the meaning of 'representative' see PARA 1161 note 5 ante.

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### **1261. Procedure when defendant does not appear.**

When an indictment has been signed, although the person charged has not been committed<sup>1</sup> the Crown Court may issue a summons requiring him to appear before it, or may issue a warrant for his arrest<sup>2</sup>. If a person who has been released on bail and is under a duty to surrender into the custody of the court fails to surrender to custody at the time appointed for him to do so, the court may issue a warrant for his arrest<sup>3</sup>. A person in custody on such a warrant must be brought forthwith before either the Crown Court or a magistrates' court<sup>4</sup>. If he is brought before a magistrates' court, the court must commit him in custody or release him on bail until he can be brought or appear before the Crown Court at the time and place appointed by that court<sup>5</sup>. Where the warrant is indorsed for bail, but the person in custody is unable to satisfy the conditions indorsed, the magistrates' court may vary those conditions, if satisfied that it is proper to do so<sup>6</sup>.

1 Or, as from a day to be appointed, sent: see the Supreme Court Act 1981 s 80(2) (prospectively amended by the Criminal Justice Act 2003 s 41, Sch 3 para 54(1), (4)). At the date at which this volume states the law no such day had been appointed. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 Supreme Court Act 1981 s 80(2). Where the Crown Court issues a warrant, it may be indorsed for bail: see s 81(4).

3 Bail Act 1976 s 7(1). See PARA 1200 ante.

4 See the Supreme Court Act 1981 s 81(5).

5 Magistrates' Courts Act 1980 s 43A(1)(a) (s 43A added by the Supreme Court Act 1981 s 152(1), Sch 5). See note 6 infra.

6 Magistrates' Courts Act 1980 s 43A(1)(b) (as added: see note 5 supra). A magistrates' court has jurisdiction under s 43A(1) (as added) whether or not the offence was committed, or the arrest was made, within the court's area: s 43A(2) (as so added). As to the procedure to be followed by the designated officer for the court or the officer in charge of a police station where a person is committed to custody or released on bail under these provisions see the Magistrates' Courts Rules 1981, SI 1981/552, r 89 (as amended); and PARA 1184 ante.

### **UPDATE**

#### **1261 Procedure when defendant does not appear**

NOTE 1--Appointed day for commencement of Constitutional Reform Act 2005 Sch 11 is 1 October 2009: SI 2009/1604.



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## **1262. Illness or insanity of defendant.**

Where the defendant is ill and unable to take his place in the dock, the trial cannot proceed. Where he was committed on bail, the practice is for a medical certificate to be sent to the court, certifying that he is unable to travel and attend court. If he has been committed or sent in custody for trial at the Crown Court, or is in custody pending a re-trial ordered by the Court of Appeal, and the Secretary of State is satisfied by reports from at least two medical practitioners<sup>1</sup> that the defendant is suffering from mental illness or severe mental impairment, and that that mental disorder is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and that the defendant is in urgent need of such treatment, the Secretary of State, if he is of opinion having regard to the public interest and all the circumstances that it is expedient to do so, may direct by warrant<sup>2</sup> that the defendant be removed to and detained in the hospital specified in the direction<sup>3</sup>.

<sup>1</sup> At least one must be a practitioner approved for the purposes of the Mental Health Act 1983 s 12 (as amended) by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder: see s 54(1) (amended by the Crime (Sentences) Act 1997 s 55, Sch 4 para 12(6)); and MENTAL HEALTH vol 30(2) (Reissue) PARA 491.

<sup>2</sup> Such a direction has the same effect as the making of a hospital order: see the Mental Health Act 1983 ss 47(3), 48(3); and MENTAL HEALTH vol 30(2) (Reissue) PARAS 535-536. As to hospital orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332 et seq; and as to the contents of the warrant see ss 47(4), 48(3); and MENTAL HEALTH vol 30(2) (Reissue) PARAS 535-536. A direction ceases to have effect at the expiration of 14 days beginning with the date on which it is given unless within that period the defendant has been received into the hospital specified in the direction: ss 47(2), 48(3).

<sup>3</sup> See *ibid* ss 47(1), 48(1) (s 47(1) amended by the Crime (Sentences) Act 1997 ss 49(3), 56(2), Sch 6). The Mental Health Act 1983 s 48 (as amended) applies to: (1) persons detained in a prison or remand centre if they are not serving a sentence of imprisonment; (2) persons remanded in custody by a magistrates' court; (3) civil prisoners; and (4) persons detained under the Immigration Act 1971 or under the Nationality, Immigration and Asylum Act 2002 s 62 (as amended): see the Mental Health Act 1983 s 48(2) (amended by the Nationality, Immigration and Asylum Act 2002 s 62(10)(a); and the Statute Law (Repeals) Act 2004); and MENTAL HEALTH vol 30(2) (Reissue) PARA 536. As from a day to be appointed the words 'or remand centre' are repealed: see the Mental Health Act 1983 s 48(2)(a) (prospectively amended by the Criminal Justice and Court Services Act 2000 ss 74, 75, Sch 7 paras 72, 73, Sch 8). At the date at which this volume states the law no such day had been appointed.

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## (ii) Arraignment

### 1263. Arraignment.

When a defendant appears in the dock, he is arraigned by the clerk of the court<sup>1</sup>. The arraignment consists in calling the defendant to the bar by name, reading out each count of the indictment, or the material parts (or an abstract) of it, and asking the defendant whether he is guilty or not guilty<sup>2</sup>. On arraignment, a defendant is entitled in all cases to make a plea of not guilty in addition to any demurrer<sup>3</sup> or special plea<sup>4</sup>; he may also plead not guilty to an offence specifically alleged in the indictment but guilty of another offence of which he might be found guilty on the indictment<sup>5</sup>. If he stands mute of malice or will not answer directly to the indictment<sup>6</sup>, a plea of not guilty may be entered on his behalf and he must then be treated as having so pleaded<sup>7</sup>. Otherwise the defendant must enter a plea himself; it is not sufficient for his counsel to do so on his behalf, or to indicate that the defendant wishes to plead guilty<sup>8</sup>. Where the judge's ruling on agreed facts is sought, argument should be heard and the ruling given after arraignment<sup>9</sup>.

1 Where a defendant who has not previously surrendered to custody is arraigned he thereby surrenders to the custody of the court and from that moment the defendant's further detention lies solely within the discretion and power of the trial judge. Unless the judge grants bail he remains in custody pending and during his trial: *R v Central Criminal Court, ex p Guney* [1996] AC 616, [1996] 2 Cr App Rep 352, HL. For the special provisions relating to arraignment where a preparatory hearing is held under the Criminal Justice Act 1987 s 7 (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended) see PARA 1256 ante.

2 See *R v Central Criminal Court, ex p Guney* [1996] AC 616 at 622, [1996] 2 Cr App Rep 352 at 357, HL, per Lord Steyn. Where there are several counts in an indictment, each should be put to the defendant separately, and he should be asked to plead to each as it is read to him: *R v Boyle* [1954] 2 QB 292, 38 Cr App Rep 111, CCA. As to re-arraignment after amendment of an indictment see PARA 1227 ante.

3 As to demurrer see PARA 1267 post.

4 As to special pleas see PARA 1269 et seq post.

5 Criminal Law Act 1967 s 6(1)(a), (b). As to alternative verdicts see PARA 1335 et seq post.

6 See PARA 1264 post.

7 Criminal Law Act 1967 s 6(1)(c); and see PARA 1264 post.

8 *R v Heyes* [1951] 1 KB 29, 34 Cr App Rep 161, CCA; and see further PARA 1280 post. Except in a few special cases, such as that of a refusal to plead, if the defendant has not himself pleaded to the indictment, everything that follows must be regarded as a mistrial: *R v Ellis* (1973) 57 Cr App Rep 571, CA; but see *R v Williams* [1978] QB 373, 64 Cr App Rep 106, CA (failure to arraign the defendant does not render the trial a nullity where the proceedings have followed the course of a duly constituted trial by jury for an defendant pleading not guilty). As to a plea by a corporation see PARA 1281 post.

9 See PARA 1278 post.

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#### **1264. Defendant standing mute.**

If the defendant on being arraigned stands mute and does not answer, the issue arises as to whether he is mute of malice (that is deliberately silent) or mute by visitation of God (that is silent for reasons beyond his control). This issue cannot be determined by the judge; the judge must direct a jury to be empanelled and sworn<sup>1</sup> to try the issue whether the defendant is mute of malice or by the visitation of God<sup>2</sup>. If the defendant has counsel, his counsel may address the jury and call witnesses to the effect that he is mute by the visitation of God<sup>3</sup>. If the defendant stands mute of malice or will not answer directly to the indictment, the court may order a plea of not guilty to be entered on his behalf and he must then be treated as having pleaded not guilty<sup>4</sup>. If the jury finds that the defendant is mute by the visitation of God, the further issue then falls to be tried by the court without a jury, namely whether he is fit to be tried<sup>5</sup>. If the defendant can communicate by signs, and there is anyone who can interpret the signs to the court, or if the defendant can read and write, the jury should be directed to find that he is fit to be tried, and he may then be arraigned and may answer by signs or by means of writing<sup>6</sup>.

<sup>1</sup> See PARA 1286 et seq post.

<sup>2</sup> *R v Schleter* (1866) 10 Cox CC 409. See *R v Holman* (1994) 32 BMLR 52, CA (where a defendant was mute but had quite clearly communicated a guilty plea to the court, it was inappropriate to empanel a jury to determine whether she was mute of malice). The prosecution has the burden of proving muteness of malice beyond reasonable doubt: *R v Sharp* [1960] 1 QB 357n, 41 Cr App Rep 197.

<sup>3</sup> *R v Roberts* (1816) Car CL 57; and see *R v Sharp* [1960] 1 QB 357n, 41 Cr App Rep 197. The defendant has no right of challenge in respect of the jurors empanelled to determine whether he is mute of malice or by visitation of God: *R v Paling* (1978) 67 Cr App Rep 299, CA. As to the burden of proof in such cases see *R v Podola* [1960] 1 QB 325, 43 Cr App Rep 220, CCA (overruling *R v Sharp* supra on this point); and PARA 1265 post.

<sup>4</sup> See the Criminal Law Act 1967 s 6(1)(c); and PARA 1263 ante.

<sup>5</sup> Cf *R v Steel* (1787) 1 Leach 451, where the proper procedure does not seem to have been followed; and *R v Pritchard* (1836) 7 C & P 303; *R v Berry* (1876) 1 QBD 447, CCR. As to the trial of this issue see PARA 1265 post.

<sup>6</sup> *R v Jones* (1773) 1 Leach 102; *R v Thompson* (1827) 2 Lew CC 137. However, the practice has arisen of arraigning a deaf and dumb defendant through an interpreter, in cases where he has given instructions in such a manner to his legal representatives, instead of leaving the issue to be tried by a jury whether he is mute of malice or by the visitation of God. As to the right of the defence to have the general issue tried before the issue of fitness to plead see *R v Roberts* [1954] 2 QB 329, 37 Cr App Rep 86; and PARA 1265 post. See also *R v Sharp* [1960] 1 QB 357n, 41 Cr App Rep 197. As with any other aspect of fitness to be tried, the court may postpone consideration of the question until any time up to the opening of the case for the defence: see the Criminal Procedure (Insanity) Act 1964 s 4(2) (as substituted); and PARA 1265 post.

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### **1265. Unfitness to stand trial.**

The issue of fitness to stand trial may be raised by the defence, the prosecution or the judge<sup>1</sup>. It is for the court without a jury<sup>2</sup> to decide on the evidence whether the defendant is capable of: (1) understanding the charge; (2) understanding the difference between a plea of guilty and not guilty and the course of the proceedings so as to make a proper defence; (3) challenging a juror to whom he might wish to object; (4) understanding the details of the evidence; and (5) giving evidence<sup>3</sup>.

Where the defendant has raised the issue of unfitness to be tried he has the persuasive burden of proving this, although he only has to satisfy the jury of his unfitness on the balance of probabilities<sup>4</sup>. However, if the issue is raised by the prosecution it must be established by the prosecution beyond reasonable doubt<sup>5</sup>.

The court has a discretion to postpone the question of fitness to be tried until any time up to the opening of the case for the defence, where it considers it expedient to do so and in the interests of the defendant<sup>6</sup>. Subject to this, however, the question of fitness to be tried must generally be determined as soon as it arises<sup>7</sup>.

The court may not make a determination on the question of fitness to be tried except on the written or oral evidence of two or more registered medical practitioners, at least one of whom is duly approved by the Secretary of State<sup>8</sup>.

Where it is determined by a court that the defendant is unfit to be tried (a finding of disability), the trial must not proceed or further proceed but it must be determined by a jury:

- 2121 (a) on the evidence (if any) already given in the trial<sup>9</sup>; and
- 2122 (b) on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court to put the case for the defence<sup>10</sup>,

whether it is satisfied, as respects the count or each of the counts against the defendant, that he did the act or made the omission charged against him as the offence<sup>11</sup>. This means that the jury needs only be satisfied that the defendant committed the actus reus of the offence, and not whether he did so with the mens rea for it; it does not have to consider that issue<sup>12</sup>.

Defences which arise only on proof of actus reus and mens rea, such as diminished responsibility and provocation on murder charges, are not available when the jury considers whether the defendant did the act or made the omission charged<sup>13</sup>.

The normal criminal standard of proof (beyond reasonable doubt) applies to the question of whether the defendant did the act or made the omission charged<sup>14</sup>. If as respects that count or any of those counts the jury is satisfied as mentioned above, it must make a finding that the defendant did the act or made the omission charged against him<sup>15</sup>. If as respects that count or any of those counts the jury is not satisfied, it must return a verdict of acquittal as if on the count in question the trial had proceeded to a conclusion<sup>16</sup>.

Where the question of disability was determined after arraignment of the defendant, the determination of whether the defendant did the act or made the omission charged is to be made by the jury by whom he was being tried<sup>17</sup>.

Where there have been findings that the defendant is under a disability (that is, unfit to be tried) and that he did the act or made the omission charged against him, the judge must make in respect of the defendant: (i) a hospital order (with or without a restriction order)<sup>18</sup>; (ii) a supervision order<sup>19</sup>; or (iii) an order for his absolute discharge<sup>20</sup>.

Where the offence to which the findings relate is an offence the sentence for which is fixed by law<sup>21</sup>, and the court has power to make a hospital order, the court must make a hospital order with a restriction order (whether or not it would otherwise have power to make a restriction order)<sup>22</sup>.

1 *R v MacCarthy* [1967] 1 QB 68, [1966] 1 All ER 447, CCA.

2 See the Criminal Procedure (Insanity) Act 1964 s 4(5) (s 4 substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 2; and the Criminal Procedure (Insanity) Act 1964 s 4(5) amended by the Domestic Violence, Crime and Victims Act 2004 s 22(1), (2)).

3 *R v Pritchard* (1836) 7 C & P 303; *R v Berry* (1977) 66 Cr App Rep 156, CA; *R v Robertson* [1968] 3 All ER 557, [1968] 1 WLR 1767, CA. An attack of hysterical amnesia rendering it impossible for the defendant to remember what happened at the time of the events in respect of which he is charged has been held not to make him unfit to stand trial: *R v Podola* [1960] 1 QB 325, [1959] 3 All ER 418, CCA. The mere fact that the defendant is incapable of acting in his best interests is insufficient to make him unfit to stand trial: *R v Robertson* [1968] 3 All ER 557, [1968] 1 WLR 1767, CA.

4 *R v Podola* [1960] 1 QB 325, [1959] 3 All ER 418, CCA.

5 *R v Robertson* [1968] 3 All ER 557, [1968] 1 WLR 1767, CA. Presumably, this is also the case where the judge raises the issue of fitness to stand trial.

6 Criminal Procedure (Insanity) Act 1964 s 4(2) (as substituted: see note 2 supra). The Criminal Procedure (Insanity) Act 1964 s 4 (as substituted and amended) applies to any disability such as, apart from the Act, would constitute a bar to the accused being tried: s 4(1) (as so substituted); *R v Burles* [1970] 2 QB 191 at 196, [1970] 1 All ER 642 at 645, CA. See also *R v McCarthy* [1967] 1 QB 68, 50 Cr App Rep 109, CCA, distinguishing *R v Beynon* [1957] 2 QB 111, 41 Cr App Rep 123. The prosecution case may be so strong, and the defendant's condition so disabling, that postponement of the trial would be wholly inexpedient; conversely, the prosecution case may be so thin that, whatever the degree of disability, it clearly would be expedient to postpone: *R v Burles* [1970] 2 QB 191, [1970] 1 All ER 642, CA. If there is a reasonable chance that the prosecution case will be successfully challenged, postponement will usually be in the defendant's interests: *R v Webb* [1969] 2 QB 278, [1969] 2 All ER 626, CA.

7 Criminal Procedure (Insanity) Act 1964 s 4(4) (as substituted: see note 2 supra). If, before the question of fitness to be tried falls to be determined, the jury returns a verdict of acquittal on the count or each of the counts on which the defendant is being tried, the question may not be determined: s 4(3) (as so substituted).

8 *Ibid* s 4(6) (as substituted (see note 2 supra); and amended by the Domestic Violence, Crime and Victims Act 2004 s 22(1), (3)).

9 Criminal Procedure (Insanity) Act 1964 s 4A(2)(a) (s 4A added by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 2).

10 Criminal Procedure (Insanity) Act 1964 s 4A(2)(b) (as added: see note 9 supra).

11 *Ibid* s 4A(1), (2) (as added (see note 9 supra); and s 4A(1) amended by the Domestic Violence, Crime and Victims Act 2004 s 22(1), (4)).

12 *R v Antoine* [2001] AC 340, [2000] 2 All ER 208, HL. If 'objective' evidence raises the issue of mistake, accident, self-defence or involuntariness, the jury should not find that the defendant has done the act or made the omission charged unless it is satisfied that the prosecution has disproved that 'defence': *R v Antoine* supra. As recognised in *R (on the application of Young) v Central Criminal Court* [2002] EWHC 548 (Admin), [2002] 2 Cr App Rep 178, the actus reus itself may contain an element in which the defendant's intention is an essential ingredient. In such a case, the jury will have to consider the defendant's intentions in the relevant respect in order to decide whether or not he committed the actus reus. See also *R v M (KJ)* [2003] EWCA Crim 357, [2003] 2 Cr App Rep 332.

13 *R v Antoine* [2001] AC 340, [2000] 2 All ER 208, HL (diminished responsibility); *R v Grant* [2001] EWCA Crim 2611, [2002] QB 1030, [2002] 1 Cr App Rep 528 (provocation).

14 *R v Antoine* [2001] AC 340, [2002] 2 All ER 208 at 221, HL, per Lord Hutton; *R (on the application of Young) v Central Criminal Court* [2002] EWHC 548 (Admin) at [38], [2002] 2 Cr App Rep 178 at [38].

15 Criminal Procedure (Insanity) Act 1964 s 4A(3) (as added: see note 9 supra). Such a finding is not a conviction: *R v Antoine* [2001] 1 AC 340 at 367, [2000] 2 All ER 208 at 222, HL, per Lord Hutton.

16 Criminal Procedure (Insanity) Act 1964 s 4A(4) (as added: see note 9 supra).

17 *Ibid* s 4A(5) (as added (see note 9 supra); and amended by the Domestic Violence, Crime and Victims Act 2004 s 22(1), (5)).

18 'Hospital order' and 'restriction order' have the meanings given by the Mental Health Act 1983 ss 37, 41 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332, 333, 337): Criminal Procedure (Insanity) Act 1964 s 5(1), (4) (s 5 substituted by the Domestic Violence, Crime and Victims Act 2004 s 24(1)). Before making a hospital order, the court may make an interim hospital order: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334.

19 'Supervision order' has the meaning given by the Criminal Procedure (Insanity) Act 1964 Sch 1A Pt 1 (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 368): s 5(4) (as substituted: see note 18 supra).

20 *Ibid* s 5(1), (2) (as substituted: see note 18 supra).

21 As to sentences fixed by law see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 15.

22 Criminal Procedure (Insanity) Act 1964 s 5(1), (3) (as substituted: see note 18 supra). If before the defendant has been dealt with under s 5 (as substituted) it appears that a defendant who has been found unfit to be tried has recovered from his disability, the court is not required to follow the procedures under s 4A (as added) (see the text and notes 9-17 supra) or s 5 (as substituted), or both, provided that it provides a further hearing under s 4 (as substituted and amended) (see the text and notes 1-8 supra) at which it holds the defendant fit to stand trial: *R (on the application of Hasani) v Blackfriars Crown Court* [2005] EWHC 3016 (QB), [2006] 1 All ER 817, DC.

Because it cannot result in a conviction and because any order made following a finding adverse to the defendant is not punitive but is made only for the purpose of protecting the public, the above procedure for determining whether the defendant did the act or made the omission charged does not involve the determination of a criminal charge. Therefore, the procedure is not incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 (right to a fair trial): *R v H* [2003] UKHL 1, [2003] 1 All ER 497, [2003] 1 WLR 411. See also *R v Grant, Grant v DPP* [2001] EWCA Crim 2611, [2002] QB 1030, [2002] 1 Cr App Rep 528. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

These provisions only apply to trials on indictment: *R v Metropolitan Stipendiary Magistrate, ex p Anifowosi* (1985) 149 JP 748, DC. There is no procedure expressly devised for the question of fitness to plead in relation to magistrates' courts, including youth courts: see *R (on the application of P (A Juvenile)) v Barking Youth Court* [2002] EWHC 734 (Admin), [2002] 2 Cr App Rep 294. However, where the defendant is suffering from mental illness or from severe mental impairment and appears unfit to plead, the magistrates may make use of their power under the Mental Health Act 1983 s 37(3) to make a hospital order without proceeding to a trial or conviction, if they are satisfied that he 'did the act or made the omission charged': see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332.

## UPDATE

### 1265 Unfitness to stand trial

NOTE 7--It is not an abuse of process for a person to stand trial where a court of higher authority has determined he is unfit to stand trial, since unfitness must be reviewed on an ongoing basis: *DPP v P* [2007] EWHC 946 (Admin), [2008] 1 WLR 1005.

NOTE 8--The requirement applies only to a determination that a defendant is unfit to plead, not where a late application is made at the trial itself: *R v Ghulam* [2009] EWCA Crim 2285, [2010] 1 WLR 891.

NOTE 10--See also *R v Norman* [2008] EWCA Crim 1810, [2009] 1 Cr App Rep 192, [2008] All ER (D) 11 (Aug).

NOTE 11--See also *R v Chal* (2008) 172 JP 17, CA.

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### **(iii) Motion to Quash Indictment; Demurrer**

#### **1266. Motion to quash indictment.**

A motion to quash an indictment because of a defect which cannot be amended<sup>1</sup> may be made at any time before verdict, but the proper time to make the motion is before the plea is entered<sup>2</sup>. When the indictment is for treason, the court will not entertain a motion to quash an indictment before the plea is entered, but the motion may be made at the close of the case for the prosecution<sup>3</sup>; or the court may leave the defendant to his remedy by demurrer<sup>4</sup> or motion in arrest of judgment<sup>5</sup>. There is no power to quash an indictment merely because it is expected that the evidence will not support the charge<sup>6</sup>.

After verdict an objection to the indictment may be taken by motion in arrest of judgment, if the defect is one arising on the face of the record itself<sup>7</sup>.

1 As to amendment of indictments see the Indictments Act 1915 s 5 (as amended); and PARA 1227 ante.

2 *R v Thompson* [1914] 2 KB 99, 9 Cr App Rep 252, CCA (where it was left open whether a motion to quash an indictment could be made after verdict); *Fost* 231; *R v Rookwood* (1696) 13 State Tr 139 at 161, 165; *R v Heane* (1864) 4 B & S 947; *R v Goldsmith* (1873) LR 2 CCR 74; *R v James* (1871) 12 Cox CC 127; and see *R v Jameson* [1896] 2 QB 425. Although objection to a defective indictment is not raised at the trial, the Court of Appeal must take the point and decide it: *R v Molloy* [1921] 2 KB 364, 15 Cr App Rep 170, CCA; *R v Wilmot* (1933) 24 Cr App Rep 63, 149 LT 407, CCA. See also *R v Maywhort* [1955] 2 All ER 752, 39 Cr App Rep 107 (previous disclosure of offence on oath, in consequence of compulsory process of court of law or equity, afforded statutory protection from prosecution). Although in general a motion will be made on behalf of a defendant, there may be cases where the prosecution seeks to quash the indictment; a motion to quash by the prosecution may be made at any time before the defendant has been tried on the indictment: *R v Webb* (1764) 3 Burr 1468. See also *R v Smith* (1838) 2 Mood & R 109 (indictment cannot be quashed on application of prosecution if judgement has been given for the defendant on demurrer (see note 4 infra)).

3 *R v Casement* (1916) as reported in 115 LT 267, CCA.

4 As to demurrer see PARA 1267 post.

5 *R v Lynch* [1903] 1 KB 444 at 449. So also if the indictment is for a crime of a public nature, such as a nuisance to a highway, perjury, sedition (2 Hawk PC c 25 s 146), a cheat, or an offence founded on fraud or oppression (see 2 East PC 818n; *R v Wadsworth* (1694) 5 Mod Rep 13; *R v Orbell* (1703) 6 Mod Rep 42; *R v Bailey* (1744) 2 Stra 1211; *R v King* (1748) 2 Stra 1268).

6 *R v London County Quarter Sessions, ex p Downes* [1954] 1 QB 1, 37 Cr App Rep 148, DC; *R v McDonnell* [1966] 1 QB 233 at 239, 50 Cr App Rep 5 at 10. See also *R v Inner London Quarter Sessions, ex p Metropolitan Police Comr* [1970] 2 QB 80, 54 Cr App Rep 49, DC.

7 As to motion in arrest of judgment see PARA 1349 post.



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## **1267. Demurrer.**

A defendant arraigned on indictment may object to an indictment by demurrer, that is, by alleging in writing that, admitting the matters of fact put against him to be true, the indictment is not sufficient in law<sup>1</sup>; a plea of not guilty may be combined with a demurrer<sup>2</sup>. In practice demurrers have for many years been regarded as obsolete<sup>3</sup>.

1 A demurrer is an objection to the form or substance of the indictment: *R v Inner London Quarter Sessions, ex p Metropolitan Police Comr* [1970] 2 QB 80, 54 Cr App Rep 49, DC. If judgment has been given for the defendant on demurrer, the indictment cannot afterwards be queried at the instance of the prosecutor: *R v Smith* (1838) 2 Mood & R 109.

2 Criminal Law Act 1967 s 6(1)(a).

3 The wide powers to amend or quash indictments (see PARAS 1227, 1266 ante) and the powers to move in arrest of judgment (see PARA 1349 post) and to appeal on points of law arising during the trial are probably responsible for this situation. In *R v Inner London Quarter Sessions, ex p Metropolitan Police Comr* [1970] 2 QB 80 at 85, 54 Cr App Rep 49 at 55, DC, Lord Parker CJ expressed the hope that demurrer in criminal cases would be allowed to die naturally. There have, however, recently been instances of resort to demurrer: see Archbold *Criminal Pleading, Evidence and Practice* (2006 Edn) PARA 4-113.

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#### **(iv) Application for Order Restricting Public Access**

##### **1268. Application for order restricting public access.**

Where a prosecutor or a defendant intends to apply for an order that all or part of a trial<sup>1</sup> be held in camera<sup>2</sup> for reasons of national security or for the protection of the identity of a witness or any other person, he must serve notice<sup>3</sup> in writing to that effect, not less than seven days before the date on which the trial is expected<sup>4</sup> to begin, on the Crown Court officer and the prosecutor or the defendant, as the case may be<sup>5</sup>. On receiving such notice, the court officer must forthwith cause a copy of it to be displayed<sup>6</sup> in a prominent place within the precincts of the court<sup>7</sup>.

Unless the court orders otherwise, the application must be made in camera, after the defendant has been arraigned<sup>8</sup> but before the jury has been sworn<sup>9</sup>; and, if such an order is made, the trial<sup>10</sup> must be adjourned until:

- 2123 (1) 24 hours after the making of the order, where no application for leave to appeal<sup>11</sup> from the order is made<sup>12</sup>; or
- 2124 (2) after the determination of an application for leave to appeal, where the application is dismissed<sup>13</sup>; or
- 2125 (3) after the determination of the appeal, where leave to appeal is granted<sup>14</sup>,

whichever is appropriate<sup>15</sup>.

1    Ie the relevant part of the process, including a pre-trial application to stay the trial for an abuse of process: *Ex p Guardian Newspapers Ltd* [1999] 1 All ER 65, [1999] 1 Cr App Rep 284, CA. 'Trial' does not include hearing relating to procedural matters preliminary or incidental to proceedings in the Crown Court or any other matters that may be dealt with pursuant to CrimPR 16.11 (hearings in chambers: ie in private): see *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261, [2002] 1 All ER 865; *Re Crook* (1989) 93 Cr App Rep 17, (1989) Times, 13 November, CA.

2    As to the power of the Crown Court to order that proceedings be held in camera see PARA 995 post. 'In camera' means in private: see *Clibbery v Allan* [2002] EWCA Civ 45 at [19], [2002] Fam 261 at [19], [2002] 1 All ER 865 at [19] per Butler-Sloss P.

3    The notice must be dated and specify the reason relied on: *Ex p Guardian Newspapers Ltd* [1999] 1 All ER 65, [1999] 1 Cr App Rep 284, CA.

4    The expected commencement is that expected when the application is made, whether or not it is the original expected date: *Ex p Godwin* [1992] QB 190, sub nom *Re Godwin* [1991] Crim LR 302, CA.

5    CrimPR 16.10(1). Where the application is made for reasons of national security, the judge must receive the opinions of an appropriate authority, in order to be able properly to weigh the interests of national security with open justice: *Ex p Guardian Newspapers Ltd* [1999] 1 All ER 65, [1999] 1 Cr App Rep 284, CA. CrimPR 16.10 is not engaged where an application for a hearing in camera is not based on one of the specified reasons: *Re Crook* (1989) 93 Cr App Rep 17, CA.

6    Ie for at least a week: *Ex p Guardian Newspapers Ltd* [1999] 1 All ER 65, [1999] 1 Cr App Rep 284, CA.

7    CrimPR 16.10(2).

8 As to the arraignment of the defendant see PARA 1263 ante.

9 See note 1 supra.

10 As to the swearing of the jury see PARA 1297 post.

11 As to the right of appeal see PARA 1934 post.

12 CrimPR 16.10(3)(a).

13 CrimPR 16.10(3)(b).

14 CrimPR 16.10(3)(c).

15 See CrimPR 16.10(3). At least where there has been an ample opportunity to comply with CrimPR 16.10 (see the text and notes 1-14 supra), in the event of non-compliance with it the trial judge is not entitled to side-step these provisions by invoking any inherent power which he might have to order a hearing in camera: *Ex p Godwin* [1992] QB 190, sub nom *Re Godwin* [1991] Crim LR 302, CA.

## **UPDATE**

### **1268 Application for order restricting public access**

TEXT AND NOTES--CrimPR 16.10 now Criminal Procedure Rules 2010, SI 2010/60, r 16.10.

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## **(4) PLEADING TO THE INDICTMENT**

### **(i) Special Pleas**

#### **1269. What a defendant may plead.**

An defendant is entitled to plead the following special pleas: (1) a plea to the jurisdiction<sup>1</sup>; (2) a plea of pardon<sup>2</sup>; (3) a plea of autrefois convict<sup>3</sup>; or (4) a plea of autrefois acquit<sup>3</sup>. In addition to any special plea he is entitled to make a plea of not guilty<sup>4</sup>. On an indictment for criminal libel a defendant may plead the special plea that the matter charged as libellous is true and that its publication was for the public benefit<sup>5</sup>.

The issue as to whether a special plea, except a plea of autrefois convict or autrefois acquit, is established falls to be determined by a jury. If the special plea fails, and the defendant then pleads not guilty, the same jury may try the general issue<sup>6</sup>. The taking of pleas, the trial by jury and the pronouncement of sentence on any one indictment may respectively be by or before different judges<sup>7</sup>.

Where, however, a defendant pleads autrefois convict or autrefois acquit, it is for the judge, without the presence of a jury, to decide the issue<sup>8</sup>.

1 See PARA 1270 post.

2 See PARA 1271 post.

3 See PARAS 1272-1275 post.

4 Criminal Law Act 1967 s 6(1)(a); *Flatman v Light* [1946] KB 414, [1946] 2 All ER 368, DC; and see PARA 1279 et seq post.

5 See the Libel Act 1843 s 6; and LIBEL AND SLANDER vol 28 (Reissue) PARA 296.

6 Juries Act 1974 s 11(5)(c). The court may, however, order any juror to withdraw if the court considers he could be justly challenged or excused, or if the parties to the proceedings consent: s 11(6) (amended by the Domestic Violence, Crime and Victims Act 2004 s 58, Sch 10 para 8, Sch 11). A juror who replaces him must be selected by ballot in open court: see the Juries Act 1974 s 11(6) (as so amended); and JURIES vol 61 (2010) PARA 522.

7 Supreme Court Act 1981 s 79(2)(a). The traditional practice is thus expressly saved by the Act. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed.

8 Criminal Justice Act 1988 s 122.

## **UPDATE**

### **1269 What a defendant may plead**

NOTE 7--Appointed day is 1 October 2009: SI 2009/1604.



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### **1270. Plea to the jurisdiction.**

A plea to the jurisdiction raises an objection to the jurisdiction of the court<sup>1</sup>. It is more usual for the defendant to raise the question of want of jurisdiction under a motion to quash the indictment<sup>2</sup> or on a plea to the general issue<sup>3</sup>. It is the duty of counsel, whether prosecuting or defending, to bring to the attention of the court on arraignment, or, if not known then, as soon as known, any query there may be as to the jurisdiction.

1 The plea should be in writing: see *R v Kinloch* (1746) Fost 16. For the form of plea see Archbold *Criminal Pleading, Evidence and Practice* (2006 Edn) PARA 4-112.

2 See PARA 1266 ante.

3 See *R v Jameson* [1896] 2 QB 425. As to pleas to the general issue see PARA 1278 et seq post.

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### **1271. Pardon.**

A pardon other than a pardon under statute must be specially pleaded at the first opportunity the defendant has of doing so. If he has obtained such a pardon before arraignment and, instead of pleading it, pleads only the general issue, he is deemed to have waived the benefit of the pardon. If a pardon is granted after plea pleaded, advantage of it may be taken at any time, after verdict in arrest of judgment, and after judgment in arrest of execution<sup>1</sup>.

<sup>1</sup> 2 Hawk PC c 37 ss 58, 59, 67; Fost 43; Coke 3 Inst 234. For the form of plea see Archbold *Criminal Pleading, Evidence and Practice* (2006 Edn) PARA 4-162; 3 Co Inst 234; Trem PC 311; 2 Hale PC 391. As to pardon see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 823 et seq.

A pardon normally only relates to offences which have already been committed and the power to pardon cannot be used to dispense with criminal responsibility for offences which have not yet been committed. Accordingly, a pardon which purports to take effect at some uncertain time in the future and which purports to pardon any offences committed in the meantime is invalid. On the other hand, if a pardon is granted subject to 'lawful conditions' the protection provided by the pardon is not conferred until the condition is complied with. Nevertheless, the grant of such a pardon is not to be treated as deferred pending compliance with the condition, since the validity of the pardon is to be judged at the time of the grant. In determining whether the grant of a pardon subject to a condition to be performed in the future, such as the laying down of arms by a specified date, is invalid because it purports to apply to offences committed in the meantime, a purposive construction is to be adopted with the aim of upholding the validity of the pardon if possible: *A-G of Trinidad and Tobago v Phillips* [1995] 1 AC 396, [1995] 1 All ER 93, PC.

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### **1272. Plea of autrefois convict or autrefois acquit.**

Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, the offender is, unless the contrary intention appears, liable to be prosecuted and punished under either or any of those Acts or at common law, but is not liable to be punished more than once for the same offence<sup>1</sup>. The pleas of autrefois convict or autrefois acquit aver respectively that the defendant has been previously convicted<sup>2</sup> or acquitted on a charge for the same offence as that in respect of which he is arraigned. If shown to be well-founded, such a plea operates, subject to two statutory exceptions<sup>3</sup>, as a bar to the indictment, since a person cannot be tried for an offence of which he has been previously convicted or acquitted. The pleas of autrefois convict and autrefois acquit may be pleaded orally, but must afterwards be reduced to writing<sup>4</sup>.

Where the defendant makes such a plea, the prosecution replies or demurs. If the prosecution replies<sup>5</sup>, it is for the judge, without the presence of a jury, to decide the issue<sup>6</sup>.

1 Interpretation Act 1978 s 18; and see *Wemyss v Hopkins* (1875) LR 10 QB 378; *Williams v Hallam* (1943) 112 LJB 353, 59 TLR 287, DC; *R v Thomson Holidays Ltd* [1974] QB 592, 58 Cr App Rep 429, CA. Where, however, the second charge includes new facts constituting a different offence, it may validly be brought: *R v Thomas* [1950] 1 KB 26, 33 Cr App Rep 200, CA. The Interpretation Act 1978 s 18 'adds nothing to and detracts nothing from the common law': *R v Thomas* supra at 31 and 204 per Humphreys J.

2 A plea of autrefois convict can only be sustained where the offence with which the defendant stands charged has already been the subject of a complete adjudication against him by a court of competent jurisdiction comprising both the decision establishing his guilt (whether by a decision of the court or of the jury or a guilty plea) and the final disposal of the case by the court passing sentence or some other order such as an absolute discharge; the plea of autrefois convict is not available where guilt has been established but no sentence has been passed: *Richards v R* [1993] AC 217, 96 Cr App Rep 268, PC.

3 As to tainted acquittal see PARA 1276 post; and as to re-trial for serious offences see PARA 1937 post.

4 For an instance of a plea of autrefois acquit see *R v Sheen* (1827) 2 C & P 634. For the forms of pleas of autrefois convict or autrefois acquit see Archbold *Criminal Pleading, Evidence and Practice* (2006 Edn) PARAS 4-154, 4-155. See *R v (on the application of A) v South Staffordshire Youth Court* [2006] All ER (D) 38 (May). Where necessary, the court will assign counsel to the defendant to draw the plea in proper form: *R v Chamberlain* (1833) 6 C & P 93. As to the court's discretion, apart from principles of autrefois convict or autrefois acquit, to stay a subsequent indictment see *Connelly v DPP* [1964] AC 1254 at 1340, 1358, 1364, 48 Cr App Rep 183, HL; and see also *R v Williams*, *R v Wilson* [1965] NI 52, CCA; *R v Beedie* [1998] QB 356, [1997] 2 Cr App Rep 167, CA.

The rules governing autrefois convict or autrefois acquit are open to a civil contemnor who has previously been punished or in jeopardy for the same civil contempt (*Jelson (Estates) Ltd v Harvey* [1984] 1 All ER 12, [1984] 1 WLR 1401, CA; and see also *El Capistrano SA v ATO Marketing Ltd* [1989] 2 All ER 572, [1989] 1 WLR 471, CA), but a plea of autrefois convict or autrefois acquit which is based on civil contempt proceedings cannot constitute a bar to subsequent criminal proceedings (*R v Green (Bryan)* [1993] Crim LR 46, CA). The principle does not operate where the decision to acquit was a nullity: see *Re Harrington* [1984] AC 473, 79 Cr App Rep 305, HL. Where two informations are laid in respect of the same offence, there is no double jeopardy where the second is laid to remedy a defect in the first: *Broadbent v High* (1984) 149 JP 115.

5 In *R v Sheen* (1827) 2 C & P 634 at 638, counsel for the prosecution replied orally. For a written form of reply see Archbold *Criminal Pleading, Evidence and Practice* (2006 Edn) PARAS 4-154, 4-155; *R v Sheen* supra.

6 Criminal Justice Act 1988 s 122.





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### **1273. Proof of plea of autrefois convict or autrefois acquit.**

The burden of proving the plea of autrefois convict or autrefois acquit is upon the defendant. He must establish that judgment of conviction or acquittal has been legally given<sup>1</sup>. If, by reason of any defect in the indictment or process, he was not legally liable on the first proceedings to suffer judgment for the offence then charged, he cannot set up such proceedings as a bar to a subsequent indictment<sup>2</sup>. A judgment of conviction which has been reversed as erroneous in law is no bar to a subsequent indictment<sup>3</sup>; nor is an acquittal before a court which had no jurisdiction to try the offence charged<sup>4</sup>. If a judgment of conviction is quashed on the facts, this will support a plea of autrefois acquit<sup>5</sup>. When two summonses are founded on the same facts, the dismissal of the lesser charge in view of a conviction on the graver cannot be pleaded in bar on an appeal by way of rehearing<sup>6</sup>. A plea of autrefois acquit does not lie where there has been no determination on the merits<sup>7</sup>. The fact that the jury was discharged without giving a verdict cannot be a bar to a subsequent indictment<sup>8</sup>. To sustain a plea of autrefois convict or autrefois acquit the defendant has to show that on a former occasion there has been a verdict delivered by the jury to the court<sup>9</sup>. A previous acquittal before a court of competent jurisdiction in a foreign country is a bar to a subsequent indictment in England and Wales<sup>10</sup>.

1 *R v Marham, ex p Pethick Lawrence* [1912] 2 KB 362; and see *R v Coughlan, R v Young* (1976) 63 Cr App Rep 33, CA ('satisfaction' on the balance of probabilities is the proper standard where a defendant put forward reason why he should not be tried).

2 *R v Drury* (1849) 18 LJMC 189; *R v Marham, ex p Pethick Lawrence* [1912] 2 KB 362; *Halsted v Clark* [1944] KB 250, [1944] 1 All ER 270, DC; *R v West* [1964] 1 QB 15, 46 Cr App Rep 296, CCA. See also *DPP v Porthouse* (1989) 89 Cr App Rep 21, DC (magistrates' court). A judgment on demurrer is not therefore a bar to a subsequent indictment: *R v Richmond* (1843) 1 Car & Kir 240.

3 *R v Drury* (1849) 18 LJMC 189; *Connelly v DPP* [1964] AC 1254 at 1280, 48 Cr App Rep 183, HL.

4 2 Hawk PC c 35 ss 3, 4; and see *R v Bitton* (1833) 6 C & P 92; *R v Simpson* [1914] 1 KB 66.

5 *R v Barron* [1914] 2 KB 570, 10 Cr App Rep 81, CCA. It has been held in an Irish case that, where a conviction by justices was quashed by certiorari on the ground that it was bad on its face for want of jurisdiction, this did not constitute an acquittal entitling the defendant to plead autrefois acquit in subsequent proceedings; but it would seem to be otherwise if such a conviction were to be quashed on the merits eg where it was founded on insufficient evidence: *Conlin v Patterson* [1915] 2 IR 169.

6 *A-G v Mallen* [1957] IR 344.

7 See *R v Williams and Wilson* [1965] NI 52, CCA; *Lloyd v Roberts* (1965) 109 Sol Jo 850, DC; *Jelson (Estates) Ltd v Harvey* [1984] 1 All ER 12, [1984] 1 WLR 1401, CA; *Williams v DPP* [1991] 3 All ER 651, 93 Cr App Rep 319, DC.

8 *R v Charlesworth* (1861) 1 B & S 460, explained in *R v Robinson* [1975] QB 508, 60 Cr App Rep 108, CA. A dismissal by a magistrate on no evidence being offered on the trial of an information summarily (*Metropolitan Police Comr v Meller* (1963) 107 Sol Jo 831, [1963] Crim LR 856, DC) or the dismissal of a charge 'without prejudice' (*Great Southern and Western Rly Co v Gooding* [1908] 2 IR 429) operates as a bar to a subsequent indictment.

9 *R v Robinson* [1975] QB 508, 60 Cr App Rep 108, CA.

10 *R v Roche* (1775) 1 Leach 134; *R v Hutchinson* (1677) 3 Keb 785; and see *Beak v Thyrwhit* (1688) 3 Mod Rep 194; *R v Aughet* (1918) 13 Cr App Rep 101, 118 LT 658, CCA (foreign court-martial). See also the Visiting Forces Act 1952 s 4; and PARA 1064 ante. The admissibility of evidence in such a case is governed by the Evidence Act 1851 s 7: see CIVIL PROCEDURE vol 11 (2009) PARA 899.

Where, however, a person has been convicted abroad in his absence of an offence for which extradition is not available, he cannot plead autrefois convict to substantially similar charges in England, since he was not in reach of the foreign court that tried him and there is thus no double jeopardy: *R v Thomas* [1985] QB 604, 79 Cr App Rep 200, CA.

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#### **1274. Plea of autrefois convict or autrefois acquit; evidence.**

The defendant may establish a plea of autrefois convict or autrefois acquit by producing a certificate of conviction, or as the case may be, of acquittal<sup>1</sup>, and showing by such certificate, or by other evidence, if necessary, that he has been convicted<sup>2</sup> or acquitted of the same offence as that on which he is presently arraigned<sup>3</sup>, or by showing that he might at the former trial have been convicted of the offence on which he is now arraigned<sup>4</sup>.

The question for the judge, in deciding the issue, is whether the defendant has previously been in jeopardy in respect of the charge upon which he is now arraigned<sup>5</sup>. A necessary incident of that question is that the offence charged in the second indictment had been committed at the time of the first charge<sup>6</sup>. A plea of autrefois acquit is not established unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the subsequent charge<sup>7</sup>.

1 See the Police and Criminal Evidence Act 1984 s 73 (as amended); and PARA 1347 post.

2 It is sufficient to establish a plea of autrefois convict to show that the defendant has been convicted, even though he has not been sentenced (*R v Sheridan* [1937] 1 KB 223, 26 Cr App Rep 1, CCA); or that he has pleaded guilty (*R v Grant* [1936] 2 All ER 1156, 26 Cr App Rep 8, CCA). These cases were distinguished in *R v Briggs* [1938] 1 All ER 529, CCA (where the defendant had not been asked whether he elected summary trial). A conviction is effective although it has not been recorded in the court register: *R v Manchester Justices, ex p Lever* [1937] 2 KB 96, [1937] 3 All ER 4. That case and *R v Sheridan* supra were applied in *R v Campbell, ex p Hoy* [1953] 1 QB 585, [1953] 1 All ER 684, DC. Such cases as *R v Sheridan* supra and *R v Grant* supra are now unlikely to arise in view of the magistrates' powers to commit persons to the Crown Court for sentence: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17. See also *R v Grant* [1951] 1 KB 500, 34 Cr App Rep 230, CCA.

3 *R v Kendrick and Smith* (1931) 23 Cr App Rep 1, 144 LT 748, CCA. Cf *R v Thomson Holidays Ltd* [1974] QB 592, 58 Cr App Rep 429, CA. The defendant is not restricted to a comparison between the later indictment and some previous indictment, or to the records of the court, but may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is the same as one in respect of which he could have been convicted on an earlier effective trial. It is not sufficient that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings: *Connelly v DPP* [1964] AC 1254 at 1280, 48 Cr App Rep 183, HL.

In *R v Lester* (1938) 27 Cr App Rep 8, CCA, on an indictment for larceny and receiving, the jury returned a verdict of guilty of receiving, but the trial judge refused to accept it as he had not directed the jury on the law of receiving, and ordered a new trial; it was held on appeal that the plea of autrefois convict succeeded.

The fact that an outstanding offence is taken into consideration at the request of the defendant (see PARA 1348 post) does not constitute a conviction in respect of that offence upon which a plea of autrefois convict can be sustained: *R v Nicholson* [1947] 2 All ER 535, 32 Cr App Rep 98, CCA (disapproving *R v McMinn* (1945) 30 Cr App Rep 138, CCA). It is, however, the practice not to proceed on any case already taken into consideration because of the danger of the defendant being twice punished for the same offence: see *R v Nicholson* supra; *R v Williams and Wilson* [1965] NI 52, CCA. It must of course be shown that the conviction was before a court of competent jurisdiction: *Lewis v Mogan* [1943] 1 KB 376, [1943] 2 All ER 272, DC. Cf *R v Hogan* [1960] 2 QB 513, 44 Cr App Rep 255, CCA.

4 *R v Barron* [1914] 2 KB 570, 10 Cr App Rep 81, CCA; *R v Bird* (1851) 2 Den 94, CCR; *R v Thomas* [1950] 1 KB 26, 33 Cr App Rep 200, CCA; *Connelly v DPP* [1964] AC 1254 at 1280, 48 Cr App Rep 183, HL. It has been held that the following could not found a plea of autrefois acquit: no evidence offered by the prosecution in respect of a charge of an either way offence where no plea has been made nor any decision as to mode of trial (*R v Bradford Magistrates' Court, ex p Daniel* (1997) Independent, 16 June, DC); withdrawal of a summons prior

to the defendant pleading to it (*R v Grays Justices, ex p Low* [1990] 1 QB 54, 88 Cr App Rep 291, DC; *Islington London Borough Council v Michaelides* [2001] Crim LR 843, DC); dismissal of an information under the Magistrates' Courts Act 1980 s 15 (non-appearance of the prosecutor: see MAGISTRATES vol 29(2) (Reissue) PARAS 703, 712) (*R v Bennett and Bond, ex p Bennett* (1908) 72 JP 362; *Holmes v Campbell* (1998) 162 JP 655, DC; cf *R (on the application of O) v Stratford Youth Court* [2004] EWHC 1553 (Admin), 168 JP 469, DC (prosecution offered no evidence, after complainant absent when trial called on; justices dismissed the charge; held any further hearing into matter would inevitably give rise to bar of autrefois acquit)); dismissal of an information (on which the prosecution have offered no evidence) which was so faulty in form and content that the defendant could never have been in jeopardy under it (*DPP v Porthouse* (1988) 89 Cr App Rep 21, [1989] RTR 177, DC). By statute, the following do not found a plea of autrefois acquit: (1) service of a notice of discontinuance under the Prosecution of Offences Act 1985 s 23 (as amended; prospectively amended) (see PARA 1159 ante); (2) where the statutory provisions relating to tainted acquittals and to re-trial for serious offences apply (see PARA 1937 et seq post). As to the circumstances in which a defendant who has been indicted for a particular offence may be convicted of another offence see the Criminal Law Act 1967 s 6 (as amended); and PARAS 1335-1338 post.

5 *Haynes v Davis* [1915] 1 KB 332, DC. In *Williams v DPP* [1991] 3 All ER 651, 93 Cr App Rep 319, DC, it was held that a defendant had not been 'in peril' because (1) the first summons had been dismissed before he pleaded to it; and (2) a defect in the first summons meant that he could never have validly been convicted on it. Cf *Halsted v Clark* [1944] KB 250, [1944] 1 All ER 270, DC, where it was held that the defendant had been 'in peril' where the first summons was dismissed at the close of the prosecution case on the ground that, even if it was amended, the evidence was insufficient to support the charge. See also *R v Thomas* [1985] QB 604, 79 Cr App Rep 200, CA; *DPP v Porthouse* [1989] RTR 177, DC.

6 *Connelly v DPP* [1964] AC 1254 at 1305-1306, 48 Cr App Rep 183 at 212, HL, per Lord Morris of Borth-y-Gest. Thus a conviction for assault is no bar to an indictment for murder if the victim later dies: see *R v Thomas* [1950] 1 KB 26, 33 Cr App Rep 200, CCA.

7 *R v Barron* [1914] 2 KB 570, 10 Cr App Rep 81, CCA.

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### **1275. Grounds on which plea of autrefois convict or autrefois acquit can succeed.**

The defendant can succeed on a plea of autrefois convict or autrefois acquit only if the charge to which he pleads is one in respect of which he could have been legally convicted on the prior occasion<sup>1</sup> or is one in respect of which, by statute, previous proceedings for the same cause are a bar to subsequent proceedings. Thus a conviction before justices for an assault is a bar to a subsequent indictment in respect of the same incident for wounding with intent<sup>2</sup>; but, if the person assaulted dies after the conviction, the conviction is no bar to an indictment for murder or manslaughter<sup>3</sup>. A conviction for a common assault is no bar to an indictment for rape<sup>4</sup>. An acquittal on an indictment for murder is a bar to an indictment for manslaughter in respect of the same incident; and an acquittal or conviction for manslaughter is a bar to an indictment for murder in respect of the same incident<sup>5</sup>.

An acquittal on an indictment for murder (and, it seems, also for manslaughter) is a bar to a subsequent indictment for an assault, if there is only one act alleged in the first indictment; but, if there are several distinct and independent assaults, and some or any of them did not in any way conduce to the death of the person killed, then an acquittal on an indictment for murder is no bar to an indictment for the distinct and independent assaults which did not conduce to the death<sup>6</sup>. Where a conviction for murder is quashed on appeal, a plea of autrefois acquit is not available in subsequent proceedings for robbery<sup>7</sup>.

An acquittal on a charge of conspiracy is not a bar to a subsequent charge of aiding and abetting<sup>8</sup>. An acquittal of rape is no bar to a charge of common assault<sup>9</sup> or to a charge of sexual activity with a child<sup>10</sup>.

1 The principle that a person who has been convicted of an offence cannot subsequently be charged with the same offence in an aggravated form in relation to the same facts is confined to courts of competent jurisdiction: *R v Hogan* [1960] 2 QB 513, 44 Cr App Rep 255, CCA. See *Lloyd v Roberts* (1965) 109 Sol Jo 850, DC (plea of autrefois acquit did not lie where the defendant had not been in peril of lawful conviction).

2 *R v Walker* (1843) 2 Mood & R 446; *R v Elrington* (1861) 1 B & S 688 (justices' certificate of dismissal of charge of unlawful wounding barred subsequent indictment alleging aggravated assault). See the Offences against the Person Act 1861 s 45 (as amended); and PARA 151 ante. See also *R v Miles* (1890) 24 QBD 423, CCR (where the earlier authorities were reviewed); and PARA 151 ante.

3 *R v Morris* (1867) LR 1 CCR 90, applied in *R v Thomas* [1950] 1 KB 26, 33 Cr App Rep 200, CCA (conviction of wounding before victim's death no bar to subsequent indictment for murder); *R v Friel* (1890) 17 Cox CC 325. See also *R v Tonks* [1916] 1 KB 443, 11 Cr App Rep 284, CCA.

4 *R v Miles* (1890) 24 QBD 423 at 433, CCR, per Hawkins J.

5 *R v Holcroft* (1578) 4 Co Rep 46b; 2 Hale PC 246; *R v Tancock* (1876) 34 LT 455; and see *Connelly v DPP* [1964] AC 1254 at 1310-1311, 48 Cr App Rep 183 at 217, HL. A partial verdict of acquittal on a charge of murder is not a bar to an indictment for manslaughter: *DPP v Nasralla* [1967] 2 AC 238, [1967] 2 All ER 161, PC (where the jury brought in a verdict of not guilty of murder, but was unable to agree sufficiently as to manslaughter and did not bring in a verdict on that issue).

6 *R v Bird* (1851) 2 Den 94, CCR.

7 *Connelly v DPP* [1964] AC 1254 at 1280, 48 Cr App Rep 183, HL. As to the general rule that a judge should stay an indictment when he is satisfied that the charges in it are founded on the same facts as the charges in a previous indictment on which the defendant has been tried, or form or are part of a series of offences of the

same or a similar character as the offences or charges in the previous indictment see *Connolly v DPP* supra at 1359-1360 and 274 per Lord Devlin; *R v Riebold* [1965] 1 All ER 653 at 655, [1967] 1 WLR 674 at 676-677; and PARA 1221 ante. This rule would not apply where a trial judge has or would have ordered separate trials for charges in the same indictment; nor did it apply in *Connolly v DPP* supra because at that time there was a rule of practice (see PARA 1221 ante) which prevented the joinder of other charges with a charge of murder. As to the rule that more than one charge of murder may be joined in the same indictment see PARA 1221 ante.

8 *R v Kupferberg* (1918) 13 Cr App Rep 166, 34 TLR 587, CCA.

9 *R v Dungey* (1864) 4 F & F 99.

10 *R v Fisher, R v Marshall, R v Mitchell* [1969] 2 QB 114, [1969] 1 All ER 265n.

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### **1276. Acquittals tainted by intimidation etc.**

The following provisions apply where a person has been acquitted of an offence, and a person has been convicted of an administration of justice offence<sup>1</sup> involving interference with or intimidation of a juror or a witness (or potential witness) in any proceedings which led to the acquittal<sup>2</sup>. Where it appears to the court before which the person was convicted of the administration of justice offence that: (1) there is a real possibility that, but for the interference or intimidation, the acquitted person would not have been acquitted; and (2) it is not a case where, because of lapse of time or for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he was acquitted, the court must certify that it so appears<sup>3</sup>. Where a court so certifies, an application may be made to the High Court for an order quashing the acquittal, and the High Court must make the order if (but must not do so unless) the four conditions specified below are satisfied<sup>4</sup>. Where such an order is made, proceedings may be taken against the acquitted person for the offence of which he was acquitted<sup>5</sup>.

The four conditions for making an order are that: (a) it appears to the High Court likely that, but for the interference or intimidation, the acquitted person would not have been acquitted; (b) it does not appear to the court that, because of lapse of time or for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he was acquitted; (c) it appears to the court that the acquitted person has been given a reasonable opportunity to make written representations to the court; (d) it appears to the court that the conviction for the administration of justice offence will stand<sup>6</sup>. In applying those conditions, the court must take into account all the information before it, but must ignore the possibility of new factors coming to light<sup>7</sup> and, accordingly, the fourth condition has the effect that the court must not make an order if (for instance) it appears to it that any time allowed for giving notice of appeal has not expired or that an appeal is pending<sup>8</sup>.

Where: (i) an order is made<sup>9</sup> quashing an acquittal; (ii) it is proposed to take proceedings<sup>10</sup> against the acquitted person for the offence of which he was acquitted; and (iii) the effect of an enactment would otherwise be that the proceedings must be commenced before a specified period calculated by reference to the commission of the offence, in relation to the proceedings the enactment has effect as if the period were instead one calculated by reference to the time the order quashing the acquittal is made<sup>11</sup>.

The Criminal Procedure Rules make provision in connection with the certification of tainted acquittals<sup>12</sup>.

1 For these purposes, the following offences are administration of justice offences: (1) the common law offence of perverting the course of justice (see PARA 731 ante), (2) the offence under the Criminal Justice and Public Order Act 1994 s 51(1) (as amended) (intimidation etc of witnesses, jurors and others: see PARA 837 ante), (3) an offence of aiding, abetting, counselling, procuring, suborning or inciting another person to commit an offence under the Perjury Act 1911 s 1 (as amended) (see PARAS 712-715 ante): Criminal Procedure and Investigations Act 1996 s 54(6).

2 Ibid s 54(1). These provisions apply in relation to acquittals in respect of offences alleged to be committed on or after 15 April 1997: s 54(7), (8); Criminal Procedure and Investigations Act 1996 (Appointed Day No 4) Order 1997, SI 1997/1019. Where an offence is alleged to be committed over a period of more than one day, or



at some time during a period of more than one day, it must be taken to be alleged to be committed on the last of the days in the period: Criminal Procedure and Investigations Act 1996 s 75(2).

3 Ibid s 54(2), (5).

4 Ibid s 54(3).

5 Ibid s 54(4).

6 Ibid s 55(1)-(4).

7 Ibid s 55(5).

8 Ibid s 55(6).

9 Ie under ibid s 54(3): see the text and note 4 supra.

10 Ie by virtue of ibid s 54(4): see the text and note 5 supra.

11 Ibid s 56(1). Head (iii) in the text applies however the enactment is expressed so that it applies eg in the case of: (1) the Magistrates' Courts Act 1980 s 127(1) (see MAGISTRATES vol 29(2) (Reissue) PARA 589); (2) an enactment that imposes a time limit only in certain circumstances (as where proceedings are not instituted by or with the consent of the Director of Public Prosecutions): Criminal Procedure and Investigations Act 1996 s 56(2).

12 See CrimPR 40.1-40.8.

## **UPDATE**

### **1276 Acquittals tainted by intimidation etc**

TEXT AND NOTE 12--CrimPR 40.1-40.8 now Criminal Procedure Rules 2010, SI 2010/60, rr 40.1-40.8.

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### **1277. Issue estoppel.**

Unlike the position in civil proceedings, issue estoppel does not operate in criminal proceedings<sup>1</sup>. However, when in the first of two trials a defendant has been acquitted, the prosecution in the second trial is precluded from challenging the correctness of that verdict if that would put the defendant in double jeopardy for one and the same incident<sup>2</sup>.

1 *DPP v Humphrys* [1977] AC 1, 63 Cr App Rep 95, HL (overruling *R v Hogan* [1974] QB 398, 59 Cr App Rep 174 (where Lawson J had adjudged that issue estoppel did apply in criminal proceedings so as to estop the defendant in a murder trial from denying that he had caused the deceased grievous bodily harm with intent when in an earlier trial he had admitted causing such harm with intent but had alleged unsuccessfully that he had done so in self-defence); and disapproving of obiter dicta in *Connelly v DPP* [1964] AC 1254 at 1280, 48 Cr App Rep 183, HL, that issue estoppel could be applicable on appropriate facts).

2 *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458, PC; followed in *R v Hay* (1983) 77 Cr App Rep 70, CA; qualified in *R v Z* [2000] 2 AC 483, [2000] 2 Cr App 281, HL. Where there is no risk of double jeopardy, it is open to the prosecution to argue that a defendant was in fact guilty of an earlier offence of which he has previously been acquitted (eg for the purpose of demonstrating that he is a serial offender). See *R v Ollis* [1900] 2 QB 756, CCA; *R v Z* supra; *R v Colman* [2004] EWCA Crim 3252, [2004] All ER (D) 345 (Dec). Although *R v Hay* supra was not expressly overruled in *R v Z* supra, much of the reasoning of the court in *R v Hay* supra is plainly inconsistent with the rationale of the decision of the House of Lords in *R v Z* supra: *R v Colman* supra at [41] per Auld LJ. See PARA 1499 post.

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## (ii) The General Issue

### 1278. Pleading generally.

If no special plea is pleaded, or if a special plea has been made and the issue has been determined against the defendant<sup>1</sup>, he is called upon to plead to the indictment. He may plead either guilty or not guilty. He may also plead not guilty of the offence charged in the indictment but guilty of another offence of which he might be found guilty on the indictment<sup>2</sup>. If the indictment contains more than one count, each count should be put to the defendant separately and he should be asked to plead to each as it is put<sup>3</sup>.

The defendant must plead himself; it is not sufficient for his counsel (or anyone else) to do so on his behalf, or to indicate that the defendant wishes to plead guilty<sup>4</sup>.

Where it is intended to seek the trial judge's ruling upon agreed facts, as a basis for determining the defendant's plea, the proper course is for the defendant to enter a plea of not guilty; after any argument has been heard and the ruling given, then, if the circumstances require it, the defendant may change his plea to one of guilty<sup>5</sup>.

Although counsel have freedom of access to the judge in his chambers both before and during trial, when there are matters calling for communications or discussions of such a nature that counsel cannot in the interests of his client mention them in open court, such communications should never take place unless there is no alternative<sup>6</sup>.

1 See PARA 1269 ante.

2 See the Criminal Law Act 1967 s 6(1)(b); and PARA 1279 post.

3 *R v Boyle* [1954] 2 QB 292, 38 Cr App Rep 111, CCA; and see PARA 1274 note 2 ante.

4 *R v Heyes* [1951] 1 KB 29, 34 Cr App Rep 161, CCA; *R v Ellis* (1973) 57 Cr App Rep 571, CA; and see PARA 1280 text to note 3 post.

5 *R v Vickers* [1975] 2 All ER 945, [1975] 1 WLR 811, CA, disapproving the practice of hearing argument and ruling on agreed facts before plea; *R v Marshall*, *R v Coombes*, *R v Eren* [1998] 2 Cr App Rep 282, 162 JP 489, CA.

6 *R v Harper-Taylor*, *R v Bakker* [1988] NLJR 80, [1991] RTR 76, CA; *R v Pitman* [1991] 1 All ER 468 at 470-471, 155 JP 390 at 392, CA; *R v Preston* [1994] 2 AC 130, [1993] 4 All ER 638, HL. Such meetings should always be recorded either by a tape-recorder or a shorthand writer: *R v Cullen* (1984) 81 Cr App Rep 17, CA.

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### **1279. Plea of not guilty.**

Where the defendant pleads not guilty, he must be given in charge of the jury and may then be convicted or acquitted only by the verdict of the jury<sup>1</sup>. Even where he changes his plea to guilty during the course of the trial, a formal verdict of guilty must still be taken from the jury<sup>2</sup>.

A defendant may plead not guilty of the offence specifically charged in the indictment but guilty of another offence of which he might be found guilty on that indictment<sup>3</sup>. If there is nothing contained in the committal documents or documents served on the defendant after being sent for trial which can be said to reduce the charge alleged in the indictment to some lesser offence for which a verdict may be returned, counsel for the prosecution ought not to accept the plea of guilty of that lesser offence<sup>4</sup>; even where counsel for the prosecution proposes to accept, the trial judge has a discretion whether to approve the acceptance of the plea or not<sup>5</sup>. If a plea of not guilty to the offence charged, but guilty of another offence not charged, is not accepted, it is deemed to be withdrawn and to be a nullity, so that the defendant may not be sentenced upon it if he is acquitted by the jury of the offence charged in the indictment<sup>6</sup>.

Where prosecuting counsel accepts a plea of not guilty, he should invite the trial judge to order that a verdict of not guilty be recorded<sup>7</sup>. The court may, if it thinks fit, order that such a verdict be recorded without any further steps being taken in the proceedings; it has the same effect as if the defendant had been tried and acquitted on the verdict of the jury or a court<sup>8</sup>.

1 Certain fraud cases may be tried without a jury and trials may be conducted without a jury where there is a danger of jury tampering: see the Criminal Justice Act 2003 ss 43, 44 (not yet fully in force); and PARA 1284 post. See also the text and notes 7, 8 infra.

2 *R v Hancock* (1931) 23 Cr App Rep 16, 100 LJB 419, CCA. Cf *R v Tomey* (1909) 2 Cr App Rep 329, CCA; *R v Heyes* [1951] 1 KB 29, 34 Cr App Rep 161, CCA; *R v Kelly* [1965] 2 QB 409, 49 Cr App Rep 352, CCA.

3 See the Criminal Law Act 1967 s 6(1)(b); and PARAS 1212 ante, 1335-1338 post. Each count of a multi-count indictment is treated as a separate indictment: see s 6(7). If the defendant's plea of guilty of that other offence is accepted, his conviction for it constitutes an acquittal of the offence of which he has pleaded not guilty, whether or not the two offences are separately charged in distinct counts: see s 6(5); and PARA 1280 post.

4 As to the prosecuting counsel's responsibility see *Attorney General's Guidelines on the Acceptance of Pleas* [2001] 1 Cr App Rep 425; and PARA 1280 post.

5 *R v Soanes* [1948] 1 All ER 289, 32 Cr App Rep 136, CCA; applied in *R v Cole* [1965] 2 QB 388, 49 Cr App Rep 199, CCA. If the trial judge approves the acceptance of the plea of guilty to a lesser charge, it is not a material irregularity if the judge changes his mind, when he hears the background to the charges, and directs the trial to proceed: *R v Emmanuel* (1982) 74 Cr App Rep 135, CA; *Richards v R* [1993] AC 217, 96 Cr App Rep 268, PC. As to the course which should be adopted by prosecuting counsel in the event of disagreement with the prosecuting authority regarding whether or not to accept a plea to a lesser charge see LEGAL PROFESSIONS vol 66 (2009) PARA 1222; and as to the determination by the trial judge of the circumstances of offence after a plea of guilty see PARAS 1353-1355 post.

6 *R v Hazeltine* [1967] 2 QB 857, 51 Cr App Rep 351, CCA; *R v McGregor-Read* [1999] Crim LR 860, CA; *R v Yeardley* [2000] QB 374, [2000] 2 Cr App Rep 141, DC. It is, however, open to the prosecution to lead evidence in the course of the trial that the defendant pleaded guilty of the lesser charge and, if the defendant raises a defence inconsistent with that plea, he may be cross-examined on that point: *R v Hazeltine* supra at 862 and 356.

7 *R v Moorhead* [1973] Crim LR 36, CA. The indictment should be fully noted: *R v Moorhead* supra.

8 Criminal Justice Act 1967 s 17 (amended by the Criminal Justice Act 2003 s 331, Sch 36 para 42).

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### **1280. Plea of guilty.**

A defendant must have a free choice of plea; if at the time that he pleaded guilty the defendant was subject to such pressure that he did not have a free choice between pleading 'guilty' or 'not guilty' his plea is a nullity<sup>1</sup>. He is not to be taken to admit an offence unless he pleads guilty to it in unmistakable terms with appreciation of the essential elements of the offence<sup>2</sup>. A defendant must himself plead; it is not sufficient for his counsel (or anyone else) to plead on his behalf or to indicate that the defendant wishes to plead guilty<sup>3</sup>. In the case of an unrepresented defendant, care must be taken to ensure that he fully understands the elements of the offence to which he is pleading guilty, and this is particularly the case where a possible defence is disclosed in the evidence<sup>4</sup>. A plea of guilty by one of several defendants is in no sense to be regarded as evidence against a co-defendant<sup>5</sup>.

Where a defendant pleads guilty to part of a count upon which he is arraigned but, the prosecution having refused to accept the plea, the trial proceeds on the whole count, his plea of guilty is impliedly withdrawn; thus, in the event of his acquittal on the count, he cannot be sentenced in respect of that part of the count to which he had originally pleaded guilty<sup>6</sup>. Where the defendant pleads not guilty of an offence specifically charged in the indictment but guilty of some other offence of which he might be found guilty on that charge, and he is convicted upon that plea of guilty without trial for the offence charged, his conviction of the one offence is an acquittal of the other; and this is so whether or not the two offences are charged in separate counts<sup>7</sup>.

Where a defendant pleads guilty but disputes the prosecution account of the facts, a judge can order a hearing to ascertain the truth about those disputed facts<sup>8</sup>.

If, during the course of a trial, it appears that a plea of guilty has been entered in error, it must be withdrawn and a plea of not guilty entered<sup>9</sup>; an unequivocal plea of guilty may, with the leave of the trial judge, be withdrawn at any time before sentence in the interests of justice<sup>10</sup>, but not after<sup>11</sup>.

The public has a right to know the circumstances of the commission of an offence and upon a plea of guilty the prosecution should state the facts in open court before sentence is imposed<sup>12</sup>.

1 See eg *R v Inns* (1974) 60 Cr App Rep 231, CA; *R v Brook* [1970] Crim LR 600, CA; *R v Smith*, *R v Beaney* [1999] 6 Archbold News 1, CA.

It is the duty of the defendant's counsel to advise him on the strengths of his case and, if appropriate, the possible advantages in terms of sentence which may be gained from pleading guilty: *R v Herbert* (1991) 94 Cr App Rep 230, CA. Even if the advice is given forcefully, this will not in itself render a subsequent guilty plea a nullity (*R v Peace* [1976] Crim LR 119, CA), but it will do so if it is so forceful as to deprive the defendant of his freedom of choice (*R v Inns* supra).

There is an obvious danger that discussions between counsel and the trial judge with regard to sentencing may put undue pressure on the defendant to plead guilty. For this reason the guidance about advance indications of sentence by a judge in the Crown Court given in *R v Goodyear* [2005] EWCA Crim 888, [2005] 3 All ER 117, [2005] 2 Cr App Rep 281, is of great importance. The guidance is set out below.

The guidance given in relation to the judge is as follows. The judge should not give an advance indication of sentence unless one has been sought by the defendant. That indication should normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication is sought. The judge is entitled in an appropriate case to remind the defence advocate that the defendant is entitled to seek an advance indication of sentence. The judge retains an unfettered discretion to refuse to give such an indication.

The judge can also reserve his position until such time as he feels able to give an indication. The judge may or may not give reasons. In many cases involving an outright refusal, he would probably conclude that it would be inappropriate to give reasons. Once an indication has been given, it is and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case. If, after a reasonable opportunity to consider his position, the defendant does not plead guilty, the indication ceases to have effect. An indication should not be sought on a basis of hypothetical facts. Where appropriate, there must be an agreed, written basis of plea. Unless there is, the judge should refuse to give an indication.

The guidance given in relation to the defence is as follows. The process of seeking an indication should normally be started by the defence. The defendant's advocate should not seek an indication without written authority, signed by his client, that he, the client, wishes to seek an indication. The defendant's advocate is personally responsible for ensuring that his client fully appreciates that:

- 69 (1) he should plead not guilty unless he was guilty;
- 70 (2) any indication given remains subject to the entitlement of the Attorney General, where it arises, to refer an unduly lenient sentence to the Court of Appeal;
- 71 (3) any indication given reflects the situation at the time when it was given and, if a guilty plea was not then tendered, it ceases to have effect; and
- 72 (4) any indication relates only to the matters about which an indication has been sought.

An indication should not be sought while there is any uncertainty between the prosecution and the defence about an acceptable plea to the indictment or any factual basis relating to the plea. Any agreed basis should be reduced into writing before an indication is sought. Where there is a dispute about a particular fact which defence counsel believes to be immaterial to the sentencing decision, the difference should be recorded, so that the judge can make up his own mind. The judge should never be invited to give an indication on the basis of what would appear to be a plea bargain. The judge is not to be asked to indicate levels of sentence depending on possible different pleas. If the defendant is unrepresented, he is entitled to seek a sentence indication on his own initiative.

The guidance given in relation to the prosecution is as follows. If there is no final agreement about the plea to the indictment, or the basis of plea, and the defence nevertheless proceeds to seek an indication, prosecuting counsel should remind him that normally an indication should not be given until the basis of the plea has been agreed, or the judge has concluded that he could properly deal with the case without the need for a hearing on the facts: see *R v Newton* (1982) 77 Cr App Rep 13. If an indication is sought, the prosecution should normally inquire whether the judge is in possession of all the evidence relied on by the prosecution, including any victim impact statement, as well as any relevant previous convictions of the defendant. Prosecuting counsel should draw the judge's attention to any minimum or mandatory statutory sentencing requirements and, where he would be expected to offer assistance with relevant guideline cases or the Sentencing Guideline Council's views, invite the judge to allow him to do so, and, where it applied, remind the judge that the position of the Attorney General to refer any eventual sentencing decision as unduly lenient was not affected. Prosecuting counsel should not say anything which might create the impression that the sentence indication had the support or approval of the Crown.

The guidance given in relation to process is as follows. Any sentence indication will normally be sought at the plea and case management hearing (see PARA 1242 ante) but a defendant may seek an indication at a later stage, or even, in rare cases, during the trial itself. In complicated or difficult cases, no less than seven days notice in writing of an intention to seek an indication should normally be given in writing to the prosecution and the court. The hearing should normally take place in open court, with a full recording of the entire proceedings, and both sides represented, in the defendant's presence. Any reference to a request for a sentence indication is inadmissible in any subsequent trial. Reporting restrictions should normally be imposed, to be lifted if and when the defendant pleads or is found guilty. It is only in wholly exceptional circumstances that counsel should see the judge in private to discuss pleas or sentence; an example would be where the defendant is unaware that he is dying of cancer: *A-G's Reference (No 44 of 2000)* (*R v Peverett*) [2001] 1 Cr App Rep 416, CA. As to private meetings between counsel and the judge see PARA 1278 ante.

See also the *Attorney General's Guidelines on the Acceptance of Pleas* [2001] 1 Cr App Rep 425:

- 73 (a) Justice, save in the most exceptional circumstances, is conducted in public. This includes the acceptance of pleas by the prosecution and sentencing.
- 74 (b) The Code for Crown Prosecutors sets out the circumstances in which pleas to a reduced number of charges, or less serious charges, can be accepted. Where this is done the prosecution should be prepared to explain the reasons in open court.

- 75 (c) Only in the most exceptional circumstances should plea and sentence be discussed in chambers. Where there is such a discussion, the prosecution advocate should at the outset, if necessary, remind the judge of the principle that an independent record must be kept. The prosecution counsel should make a full note of such an event, recording all decisions and comments. This note should be made available to the prosecuting authority.
- 76 (d) Where there is to be a discussion on plea and sentence and the prosecution counsel takes the view that the circumstances are not exceptional, then it is his duty to remind the judge of the relevant decisions of the Court of Appeal (see *R v Goodyear* supra) and disassociate himself from involvement in any discussion on sentence. Counsel should not do or say anything which could be construed as expressly or impliedly agreeing to a particular sentence. If the offence is one to which the Criminal Justice Act 1988 s 35 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 55 et seq) applies counsel should make it clear that the Attorney General may refer the case for review under s 36 (as amended; prospectively amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 55 et seq).
- 77 (e) When a case is listed for trial and the prosecution forms the view that the appropriate course is to accept a plea before the proceedings commence or continue, or to offer no evidence, the prosecution should whenever practicable, speak with the victim or the victim's family, so that the position can be explained and their views and interests can be taken into account as part of the decision making process. The victim or victim's family should then be kept informed and decisions explained once made at court.

2 *R v Golathan* (1915) 11 Cr App Rep 79, 84 LJB 758, CCA. See also *R v Baker* (1912) 7 Cr App Rep 217, 28 TLR 363, CCA; *R v Alexander* (1912) 7 Cr App Rep 110; *R v Ingleson* [1915] 1 KB 512, 11 Cr App Rep 21, CCA; *R v Lloyd* (1923) 17 Cr App Rep 184; *R v Hussey* (1924) 18 Cr App Rep 121, CCA; *R v Clarke* [1972] 1 All ER 219, 56 Cr App Rep 225, CA. As to defending counsel's duty to advise his client about pleading to the charge see also LEGAL PROFESSIONS vol 66 (2009) PARAS 1225-1227. The trial judge ought to refuse to accept a plea of guilty if he is of opinion that it proceeds from fear, duress, weakness or ignorance: see *R v Cole* [1965] 2 QB 388, 49 Cr App Rep 199, CCA.

3 *R v Heyes* [1951] 1 KB 29, 34 Cr App Rep 161, CCA; *R v Ellis* (1973) 57 Cr App Rep 571, CA.

4 *R v Griffiths* (1932) 23 Cr App Rep 153, 76 Sol Jo 148, CCA.

5 *R v Moore* (1956) 40 Cr App Rep 50, CCA. Where several defendants are charged jointly, sentence on any who plead guilty may be postponed until the others have been tried: see PARA 1356 post.

6 *R v Kelly* [1965] 2 QB 409, 49 Cr App Rep 352, CCA.

7 Criminal Law Act 1967 s 6(5). See also *R v Soanes* [1948] 1 All ER 289, 32 Cr App Rep 136, CCA; and PARA 1279 ante. If the counts are alternative, eg robbery and dishonest handling, a plea of guilty to dishonest handling does not preclude a trial for robbery, and, if the defendant is convicted of robbery, the plea of guilty on the alternative count of dishonest handling may be allowed to remain on the file marked not to be proceeded with without leave of the court: see *R v Cole* [1965] 2 QB 388, 49 Cr App Rep 199, CCA.

Where the defendant is charged on two counts and is convicted and sentenced on the more serious charge and pleads guilty to the less serious charge, he should not be sentenced for the lesser offence; but the plea of guilty should remain recorded on the court's file: *R v Bebbington* (1978) 67 Cr App Rep 285, CA (indictment of possessing cannabis with intent to supply).

8 *R v Underwood*, *R v Arobieke*, *R v Khan*, *R v Connors* (2004) Times, 1 September, CA. The hearing should proceed immediately unless impractical for some exceptional reason, and the judge should direct himself in a way that reflected the relevant direction he would have given to a jury and having reached his conclusions he should explain them in a judgment: *R v Underwood*, *R v Arobieke*, *R v Khan*, *R v Connors* supra.

9 *R v Durham Quarter Sessions, ex p Virgo* [1952] 2 QB 1, [1952] 1 All ER 466, DC.

10 *R v Plummer* [1902] 2 KB 339, CCR; *R v Dodd* (1982) 74 Cr App Rep 50, CA; *Richards v R* [1993] AC 217, 96 Cr App Rep 268, PC. Only rarely, however, will it be appropriate for a trial judge to exercise his discretion to permit a defendant to change an unequivocal plea of guilty to a plea of not guilty: *R v Drew* [1985] 2 All ER 1061, 81 Cr App Rep 190, CA. A plea of guilty does not rank as a conviction until the defendant is sentenced: *R v Cole* [1965] 2 QB 388, 49 Cr App Rep 199, CCA. See, however, *R v Riley* [1963] 3 All ER 949. As to the effect of a plea of guilty which is withdrawn see *R v Rimmer* [1972] 1 All ER 604, 56 Cr App Rep 196, CA; *R v Hetherington* [1972] Crim LR 703, CA. See also *P Foster (Haulage) Ltd v Roberts* [1978] 2 All ER 751, 67 Cr App Rep 305, DC (discretion exists notwithstanding that the defendant is legally represented), distinguished in *R v South Tameside Magistrates' Court, ex p Rowland* [1983] 3 All ER 689, DC (in exercising their discretion magistrates are entitled to consider the likelihood that withdrawal of the plea is sought by the defendant in



order to avoid a custodial sentence); *R v Drew* supra (discretion exists even where verdict of guilty formally returned by jury). Examples of cases where the discretion to permit withdrawal of an unequivocal plea might be exercised are where a defendant has been misinformed about the nature of the charge or the availability of a defence, or where he has been put under pressure to plead guilty in circumstances where he is not truly admitting guilt. Commonly, however, it is reserved for cases where there is doubt that the plea represents a genuine acknowledgement of guilt: *R v Sheikh*, *R v Sheikh*, *R v Sheikh* [2004] EWCA Crim 492, [2004] 2 Cr App Rep 228 (the possibility of confiscation proceedings taking place could not, of itself, have any bearing upon a defendant's acceptance of guilt).

11 *R v Sell* (1840) 9 C & P 346; *R v McNally* [1954] 2 All ER 372, 38 Cr App Rep 90, CCA (not following *R v Blakemore* (1948) 33 Cr App Rep 49, CCA). See also *R v Tottenham Justices, ex p Rubens* [1970] 1 All ER 879, [1970] 1 WLR 800, DC; *R v Marylebone Justices, ex p Westminster City Council* [1971] 1 All ER 1025, [1971] 1 WLR 567, DC; *R v Southampton Justices, ex p Briggs* [1972] 1 All ER 573, [1972] 1 WLR 277, DC. See, however, *R v Crown Court at Huntingdon, ex p Jordan* [1981] QB 857, [1981] 2 All ER 872, DC (where it is alleged that a plea of guilty in a magistrates' court has been entered into under duress or coercion, the Crown Court has jurisdiction to inquire into the matter, notwithstanding the fact that sentence has been passed by the magistrates); *R v Rochdale Justices, ex p Allwork* [1981] 3 All ER 434, 73 Cr App Rep 319, DC.

12 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.26.1, CA. As to the procedure to be followed before sentence where there are disputed issues of fact see PARAS 1353-1355 post.

## UPDATE

### 1280 Plea of guilty

TEXT AND NOTES--As to the procedure for making an application to change a plea of guilty see Criminal Procedure Rules 2010, SI 2010/60, r 39.3.

NOTE 1--Guidance on the application of *Goodyear* has been given in *R v Kulah* [2007] EWCA Crim 1701, [2008] 1 All ER 16. The practice of putting mitigation in writing and describing it as a basis of plea is to be deplored: *R v Lewis* [2008] EWCA Crim 1878, [2008] All ER (D) 106 (Sep). See also *Amendment No 22 to the Consolidated Criminal Practice Direction (criminal proceedings: victim personal statements; pleas of guilty in the Crown Court; forms)* [2009] EWHC 1072 (QB), [2009] 1 WLR 1396.

NOTE 5--See *R v Downer* [2009] EWCA Crim 1361, [2010] 1 WLR 846 (co-defendant's plea of guilty to different offence excluded as would have adverse effect on fairness of trial).

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**1281. Plea by corporation.**

A corporation may, on arraignment, enter in writing by its representative<sup>1</sup> a plea of guilty or not guilty<sup>2</sup>. If the corporation does not appear by a representative or, though it does so appear, fails to enter any plea, the court must order a plea of not guilty to be entered and the trial proceeds as though the corporation had duly entered a plea of not guilty<sup>3</sup>.

1 For the meaning of 'representative' see PARA 1161 note 5 ante.

2 Criminal Justice Act 1925 s 33(3) (amended by the Courts Act 1971 s 56(1), Sch 8 para 19).

3 Criminal Justice Act 1925 s 33(3) (as amended: see note 2 supra).

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## **1282. Commencement of trial.**

Except with his consent and that of the prosecution, the trial of a person committed by a magistrates' court must not begin<sup>1</sup> until the expiration of 14 days beginning with the date when the defendant is committed for trial<sup>2</sup>; and, unless the Crown Court has ordered otherwise, the trial must begin not later than the expiration of eight weeks beginning with the date of committal when the defendant is sent for trial<sup>3</sup>.

An application for postponement may be made at the instance of the prosecution or defence, and is usually made before a plea is taken<sup>4</sup>.

It is not usual to order the defendant to pay the costs of the prosecution on postponement, if the application is by the defendant, or to order the prosecution to pay the defendant's costs, if the application is by the prosecution<sup>5</sup>.

1 A trial is deemed to begin when a jury is sworn and the defendant is arraigned and put in charge of the jury: see the Supreme Court Act 1981 s 77(3); and *R v Tonner, R v Evans* [1985] 1 All ER 807, 80 Cr App Rep 170, CA; *Ex p Guardian Newspapers Ltd* [1999] 1 WLR 2130, [1999] 1 Cr App Rep 284, CA. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed. Where, however, a judge orders a preparatory hearing under the Criminal Justice Act 1987 s 7 (as amended; prospectively amended) or the Criminal Procedure and Investigations Act 1996 s 29 (as amended; prospectively amended) (see PARAS 1250-1251 ante), the trial begins with the hearing: Criminal Justice Act 1987 s 8(1); Criminal Procedure and Investigations Act 1996 s 30. See further PARA 1256 ante. See also the Prosecution of Offences Act 1985 s 22(11A) (as added and amended); and PARA 1152 ante.

2 See the Supreme Court Act 1981 s 77(2)(a) (amended by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 18(b)); and CrimPR 39.1(a).

3 See the Supreme Court Act 1981 s 77(2)(b) (amended by the Criminal Justice and Public Order Act 1994 Sch para 18(b)); and CrimPR 39.1(b). The Supreme Court Act 1981 s 77(2)(b) (as amended) is directory not mandatory: *R v Urbanowski* [1976] 1 All ER 679, 62 Cr App Rep 229, CA; *R v Governor of Spring Hill Prison, ex p Sohi and Dillon* [1988] 1 All ER 424, 86 Cr App Rep 382, DC. The court has a discretion to extend the statutory period: *R v Urbanowski* supra. As to the court's power to order a postponement of the trial where an indictment is amended or the court orders a separate trial of a count see the Indictments Act 1915 s 5(4); and PARAS 1222, 1227 ante. As to release on bail by the Crown Court see PARAS 1187-1188 ante.

4 The absence or illness of a material witness as to the facts is usually accepted as grounds for postponement of trial. The absence of a witness as to character only has been held no ground for postponing the trial: see *R v Jones* (1806) 8 East 31 at 34.

5 *R v Hunter* (1829) 3 C & P 591; *R v Crowe* (1829) 4 C & P 251. See, however, the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3 (costs unnecessarily or improperly incurred); and PARA 2064 post.

## **UPDATE**

### **1282 Commencement of trial**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTES 2, 3--CrimPR now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'). Supreme Court Act 1981 now cited as Senior Courts Act 1981: CrimPR 39(1).

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## **(5) THE JURY**

### **(i) The Need for a Jury**

#### **1285. Trial by jury of sample counts only.**

As from a day to be appointed the following provisions apply<sup>1</sup>. The prosecution may apply to a judge of the Crown Court for a trial on indictment to take place on the basis that the trial of some, but not all, of the counts included in the indictment may be conducted without a jury<sup>2</sup>. If such an application is made and the judge is satisfied that the following three conditions are fulfilled, he may make an order for the trial to take place on the basis that the trial of some, but not all<sup>3</sup>, of the counts included in the indictment may be conducted without a jury<sup>4</sup>. The three conditions are that:

- 2126 (1) the number of counts included in the indictment is likely to mean that a trial by jury involving all of those counts would be impracticable<sup>5</sup>;
- 2127 (2) if such an order were made, each count or group of counts which would accordingly be tried with a jury can be regarded as a sample of counts which could accordingly be tried without a jury<sup>6</sup>; and
- 2128 (3) it is in the interests of justice for such an order to be made<sup>7</sup>.

In deciding whether or not to make such an order, the judge must have regard to any steps which might reasonably<sup>8</sup> be taken to facilitate a trial by jury<sup>9</sup>.

The effect of an order for counts to be tried without a jury is that where, in the course of the proceedings to which the order relates, a defendant is found guilty by a jury on a count which can be regarded as a sample of other counts to be tried in those proceedings, those other counts may be tried without a jury in those proceedings<sup>10</sup>.

Where the trial of a count is conducted without a jury because of such an order, the court is to have all the powers, authorities and jurisdiction which the court would have had if the trial of that count had been conducted with a jury (including power to determine any question and to make any finding which would be required to be determined or made by a jury)<sup>11</sup>.

Where the trial of a count is conducted without a jury because of such an order and the court convicts the defendant of that count: (a) the court must give a judgment which states the reasons for the conviction at, or as soon as reasonably practicable after, the time of the conviction; and (b) the requirement<sup>12</sup> for notice of appeal or of application for leave to appeal to be given within 28 days from date of conviction is to be read as a reference to the date of the judgment mentioned in head (a) above<sup>13</sup>.

Where, in the case of proceedings in respect of which such an order has been made, a jury convicts a defendant of a count, time does not begin to run<sup>14</sup> in relation to an appeal against that conviction until the date on which the proceedings end<sup>15</sup>.

<sup>1</sup> The Domestic Violence, Crime and Victims Act 2004 ss 17-20 (see the text and notes 2-15 *infra*) are to be brought into force by order made by the Secretary of State under s 60 as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

2 Ibid s 17(1) (not yet in force). Such an application must be determined at a preparatory hearing (within the meaning of the Criminal Justice Act 1987 or the Criminal Procedure and Investigations Act 1996 Pt III (ss 28-38) (as amended) (see PARAS 1253, 1257 ante)): Domestic Violence, Crime and Victims Act 2004 s 18(1), (6) (not yet in force). The parties to a preparatory hearing at which such an application is to be determined must be given an opportunity to make representations with respect to the application: s 18(4) (not yet in force). For the purposes of ss 17-20 (see the text and notes 13-15 infra), a count may not be regarded as a sample of other counts unless the defendant in respect of each count is the same person: s 17(9) (not yet in force).

3 An order must specify the counts which may be tried without a jury: ibid s 17(8) (not yet in force).

4 Ibid s 17(2) (not yet in force).

5 Ibid s 17(3) (not yet in force).

6 Ibid s 17(4) (not yet in force).

7 Ibid s 17(5) (not yet in force).

8 A step is not to be regarded as reasonable if it could lead to the possibility of a defendant in the trial receiving a lesser sentence than would be the case if that step were not taken: ibid s 17(7) (not yet in force).

9 Ibid s 17(6) (not yet in force).

10 Ibid s 19(1) (not yet in force).

11 Ibid s 19(2) (not yet in force). Except where the context otherwise requires, any reference in an enactment to a jury, the verdict of a jury or the finding of a jury is to be read, in relation to the trial of a count conducted without a jury because of an order under s 17(2) (see the text and notes 3, 4 supra), as a reference to the court, the verdict of the court or the finding of the court: s 19(3) (not yet in force).

12 See the Criminal Appeal Act 1968 s 18(2); and PARA 1863 post.

13 Domestic Violence, Crime and Victims Act 2004 s 19(4) (not yet in force).

14 Ie under the Criminal Appeal Act 1968 s 18(2): see PARA 1863 post.

15 Domestic Violence, Crime and Victims Act 2004 s 19(5) (not yet in force). In determining for these purposes the date on which proceedings end, any part of those proceedings which takes place after the time when matters relating to sentencing begin to be dealt with is to be disregarded: s 19(6) (not yet in force).

Nothing in ss 17-20 (not yet in force) affects the requirement under the Criminal Procedure (Insanity) Act 1964 s 4A (as added and amended) (see PARA 1265 ante) that any question, finding or verdict mentioned in that provision be determined, made or returned by a jury: Domestic Violence, Crime and Victims Act 2004 s 19(7) (not yet in force).

Rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of ss 17-19 (not yet in force): s 20(1) (not yet in force). Without limiting s 20(1) (not yet in force), rules of court may in particular make provision for time limits within which applications under s 17 (not yet in force) (see the text and notes 1-9 supra) must be made or within which other things in connection with s 17 (not yet in force) or s 18 (not yet in force) or s 19 (not yet in force) (see the text and notes 2, 10-14 supra) must be done: s 20(2) (not yet in force). Nothing in s 20 (not yet in force) is to be taken as affecting the generality of any enactment conferring powers to make rules of court: s 20(3) (not yet in force).

## **UPDATE**

### **1285 Trial by jury of sample counts only**

TEXT AND NOTE 1--Day now appointed: SI 2006/3423.

## **UPDATE**

### **1286-1289 Calling the Jury**

Material relating to this part has been revised and published under the title JURIES vol 61 (2010).

**UPDATE**

**1290-1296 Challenges**

Material relating to this part has been revised and published under the title JURIES vol 61 (2010).

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**(ii) Calling the Jury**



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**(iii) Challenges**

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#### **(iv) Swearing the Jury; Giving in Charge**

##### **UPDATE**

##### **1297 Administering oath or affirmation to jury**

Material relating to this paragraph has been revised and published under the title JURIES vol 61 (2010).

##### **1298. Giving the defendant in charge to the jury.**

When a full jury has been sworn, it is a common practice for the clerk of the court to state the effect of the indictment, or that part of it on which the defendant has been arraigned, to the jury, and to give the defendant in charge to the jury<sup>1</sup> by saying 'to this indictment he has pleaded not guilty and it is your charge to say, having heard the evidence, whether he be guilty or not'.

<sup>1</sup> Giving a defendant in charge to the jury is not legally necessary. It is not an essential part of the trial; and failure to do so does not render the trial a nullity: see *R v Desai* [1973] Crim LR 36, CA. As to giving in charge see also JURIES vol 61 (2010) PARA 836.

##### **UPDATE**

##### **1299 Death or discharge of individual juror**

Material relating to this paragraph has been revised and published under the title JURIES vol 61 (2010).

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## **(6) THE HEARING**

### **(i) In general**

#### **1300. Admission of the public.**

In general, all persons except children have a right to be present in court<sup>1</sup>, provided there is sufficient accommodation and no disturbance of the proceedings; there is, however, an inherent jurisdiction in the court to exclude the public if it becomes necessary to do so for the due administration of justice<sup>2</sup>. Except during such time as his presence is required as a witness or otherwise for the purpose of justice<sup>3</sup> or while the court consents to his presence, no child under 14 years of age (other than an infant in arms) may be present during the trial of any other person charged with an offence, or during any preliminary proceedings; and, if he is so present, he must be ordered to be removed<sup>4</sup>.

When a person who in the opinion of the court is a child under 14 years of age or a young person<sup>5</sup> is called as a witness in any proceedings in relation to an offence against, or any conduct contrary, to decency or morality, the court may order the public<sup>6</sup> to be excluded from the court during the taking of his evidence<sup>7</sup>. On a trial under the Official Secrets Acts<sup>8</sup>, the court, on the application of the prosecution, may order all, or any section, of the public to be excluded during any part of the hearing if the publication of any evidence to be given or statement to be made would be prejudicial to the national safety<sup>9</sup>. The sentence must, however, be passed in public<sup>10</sup>.

Although, as a general rule, it is not right to distinguish between excluding the press and other members of the public<sup>11</sup>, the interests of justice<sup>12</sup> may sometimes be served by excluding the general public but allowing the press to remain<sup>13</sup>, or by permitting an individual to be anonymous or by protecting his identity in some other way<sup>14</sup>.

1 In addition, the defendant is entitled to a public hearing: see the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(1) (the right to a fair trial). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

2 *Scott v Scott* [1913] AC 417, HL; *R v Governor of Lewes Prison, ex p Doyle* [1917] 2 KB 254. See also *R v Denbigh Justices, ex p Williams* [1974] QB 759, [1974] 2 All ER 1052, DC; *Re Crook* (1989) 93 Cr App Rep 17, CA. The risk of financial damage, or damage to reputation or goodwill, from proceedings concerning a person's business does not justify excluding the public: *R v Dover Justices, ex p Dover District Council* [1992] Crim LR 371, DC. Nor does the embarrassing nature of the evidence, although it would be a relevant consideration if it would cause a witness to be unable or unwilling to give evidence: *Scott v Scott* supra; *R v Chancellor of Chichester Consistory Court, ex p News Group Newspapers Ltd* [1992] COD 48, DC.

3 As to the court's power to allow children to give evidence through television links in certain cases see PARAS 1414, 1417 post.

4 See the Children and Young Persons Act 1933 ss 36, 107(1) (s 36 amended by the Access to Justice Act 1999 ss 73(1), 106, Sch 15 Pt III). As to youth courts see the Children and Young Persons Act 1933 s 47(2) (as amended); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1267.

5 For the meaning of 'young person' see PARA 143 note 2 ante.

6     le all or any persons not being members or officers of the court or parties, their counsel or solicitors or persons otherwise directly concerned with the case, or the bona fide representatives of a newspaper or news agency: see the Children and Young Persons Act 1933 s 37(1). As from a day to be appointed this provision is amended so as to refer to bona fide representatives of a news gathering or reporting organisation instead of bona fide representatives of a newspaper or news agency: see s 37(1) (prospectively amended by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 para 2(2)). At the date at which this volume states the law no such day had been appointed.

7     Children and Young Persons Act 1933 s 37(1) (prospectively amended: see note 6 supra). The powers conferred on a court by s 37 (prospectively amended) are in addition and without prejudice to any other powers of the court to hear proceedings in camera: s 37(2).

8     le the Official Secrets Act 1911; the Official Secrets Act 1920; the Official Secrets Act 1989; and see the European Communities Act 1972 s 11(2).

9     Official Secrets Act 1920 s 8(4); Official Secrets Act 1989 s 11(4). See PARA 504 ante. Such orders may not, however, be made where the proceedings relate to offences under the Official Secrets Act 1989 s 8(1), (4) or (5) (see PARA 490 ante): see s 11(4); and PARA 504 ante. For the procedure to be adopted in relation to an application for such an order see CrimPR 16.10; and PARA 1268 ante. As to appeals against such orders see PARAS 1934, 1936 post.

10    Official Secrets Act 1920 s 8(4); Official Secrets Act 1989 s 11(4).

11    *R v Crook* (1989) 93 Cr App Rep 17, CA.

12    The interests of an individual are not the only consideration: *R v Newtownabbey Magistrates' Court, ex p Belfast Telegraph Newspapers Ltd* (1997) Times, 27 August, NI QB Crown Side.

13    See *R v Richards* (1998) 163 JP 246, CA (public gallery cleared when a prosecution witness felt intimidated by, and refused to give evidence in the presence of, the defendant's family); *R v Waterfield* [1975] 2 All ER 40, 60 Cr App Rep 296, CA (although the judge has a discretion to exclude the public where an allegedly indecent film is shown to the jury, he should normally allow representatives of the press to be present).

14    See *R v Shayler* [2003] EWCA Crim 2218, [2003] ACD 79.

As to applications for orders restricting public access see PARA 1268 ante; and as to appeals against such orders see PARAS 1934, 1936 post. As to matters which may be dealt with in chambers see PARAS 1232 ante, 1304 post; and as to private meetings between counsel and the judge see PARAS 1278, 1280 ante.

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### **1301. Restrictions on reporting of proceedings.**

Where the trial is held in public<sup>1</sup>, there is a general right to publish a fair and accurate report of the proceedings, contemporaneously and in good faith<sup>2</sup>. There is no inherent jurisdiction to prohibit or postpone publication of proceedings<sup>3</sup>. The court may, however, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings or in any other proceedings pending or imminent<sup>4</sup>. In addition, a court may prohibit the publication of any name or other matter in connection with the proceedings which it has allowed to be withheld from the public<sup>5</sup>. A person who is in breach of any such order restricting the reporting of proceedings is in contempt of court and liable to be punished accordingly<sup>6</sup>.

Particular restrictions on reporting apply to trials on charges of most sexual offences<sup>7</sup>, to trials involving children and young persons<sup>8</sup>, to certain applications<sup>9</sup>, to preparatory hearings in cases of serious or complex fraud, or complex, serious or long cases, or terrorism cases<sup>10</sup>, and to pre-trial rulings<sup>11</sup>.

A court has power to prohibit the publication of derogatory assertions made in a speech in mitigation<sup>12</sup>.

1 See PARA 1300 ante.

2 See the Contempt of Court Act 1981 s 4(1); and CONTEMPT OF COURT vol 9(1) (Reissue) PARAS 420, 428.

3 *R v Newtownabbey Magistrates' Court, ex p Belfast Telegraph Newspapers Ltd* (1997) Times, 27 August, NI QB Crown Side. In the absence of a statutory power, a court has jurisdiction derived from the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8069) art 8 (right to respect for life) to restrict publication of proceedings for the protection of a child or young person who is not a victim, defendant or witness; where such a prohibition is sought on this basis the court must balance the right of the child under art 8 with the right to freedom of expression under art 10: *Re S (A Child) (Identification: Restriction on Publication)* [2004] UKHL 47, [2005] 1 AC 593, [2004] 4 All ER 683 (publication not restrained). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. Where there is a conflict between the Convention art 8 and art 10, an intense focus on the comparative importance of the two rights is necessary, neither article having precedence over the other: see *Re S (A Child) (Identification: Restriction on Publication)* supra (newspapers not to be restrained from publishing the identity of mother charged with murder of one of her children in order to protect privacy of another of her children who was not involved in the proceedings). Publication of the identity of the defendant and her victim was restrained in order to protect their children in *Re W (Children) (Identification: Restrictions on Publication)* [2005] EWHC 1564 (Admin), (2005) Times, 21 July.

4 Contempt of Court Act 1981 s 4(2). Orders made under s 4(2) or s 11 (see the text to note 5 infra) must be in precise terms and should always be committed to writing: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at I.3.3, CA. A person aggrieved may appeal to the Court of Appeal, with leave, against any such order or against any order restricting the publication of any report of the whole or any part of a trial on indictment or any proceedings ancillary to such a trial; and the decision of the Court of Appeal is final: Criminal Justice Act 1988 s 159(1) (amended by the Criminal Procedure and Investigations Act 1996 s 61(6)). See further PARAS 1934-1935 post.

5 See the Contempt of Court Act 1981 s 11.

6 See further CONTEMPT OF COURT vol 9(1) (Reissue) PARA 404 et seq.

7 See PARA 238 et seq ante.

8 See CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1271, 1276.

9 See applications under the Criminal Justice Act 1987 s 6(1) (as substituted; prospectively repealed) or under the Crime and Disorder Act 1998 Sch 3 para 2 (as amended) (see PARA 1138 ante).

10 See the Criminal Justice Act 1987 s 11 (as substituted and amended; prospectively amended); the Criminal Procedure and Investigations Act 1996 s 37 (as amended; prospectively amended); and PARA 1257 ante.

11 See *ibid* s 41; and PARA 1246 ante. Given the number of statutory reporting restrictions there are, the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice: *Re S (A Child) (Identification: Restriction on Publication)* [2004] UKHL 47, [2005] 1 AC 593, [2004] 4 All ER 683.

12 See the Criminal Procedure and Investigations Act 1996 ss 58-61 (s 61 as amended); and LIBEL AND SLANDER vol 28 (Reissue) PARA 302 et seq.

## UPDATE

### 1301 Restrictions on reporting of proceedings

NOTES 4, 10--See *Re B* [2006] EWCA Crim 2692, [2007] EMLR 145 (postponement on reporting of sentencing hearing of co-conspirator in major terrorist plot until other co-conspirators tried overturned).

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### **1302. Power to restrict reports about certain witnesses.**

The following provisions apply where: (1) in any criminal proceedings in any court (other than a service court<sup>1</sup>) in England and Wales or Northern Ireland; or (2) in any proceedings (whether in the United Kingdom or elsewhere) in any service court, a party to the proceedings makes an application for the court to give a reporting direction<sup>2</sup> in relation to a witness<sup>3</sup> in the proceedings (other than the defendant) who has attained the age of 18<sup>4</sup>. If, in such a case, the court determines that the witness is eligible for protection<sup>5</sup>, and that giving a reporting direction in relation to the witness is likely to improve the quality of evidence given by the witness<sup>6</sup>, or the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case<sup>7</sup>, the court may give a reporting direction in relation to the witness<sup>8</sup>. A reporting direction may be revoked by the court or an appellate court<sup>9</sup>.

The court or an appellate court may by an excepting direction dispense, to any extent specified in the excepting direction, with the restrictions imposed by a reporting direction if:

- 2129 (a) it is satisfied that it is necessary in the interests of justice to do so<sup>10</sup>; or
- 2130 (b) it is satisfied that the effect of those restrictions is to impose a substantial and unreasonable restriction on the reporting of the proceedings, and that it is in the public interest<sup>11</sup> to remove or relax that restriction<sup>12</sup>,

but no excepting direction may be given under head (b) above by reason only of the fact that the proceedings have been determined in any way or have been abandoned<sup>13</sup>. An excepting direction may be given at the time the reporting direction is given or subsequently; and may be varied or revoked by the court or an appellate court<sup>14</sup>.

Where proceedings in which reporting directions or excepting directions have been ordered are sent or transferred from a magistrates' court to the Crown Court, the magistrates' court officer must forward copies of all relevant directions to the Crown Court officer at the place to which the proceedings are sent or transferred<sup>15</sup>.

With the exceptions described below, no publication may include a report of:

- 2131 (i) a special measures direction<sup>16</sup> or a prohibition of cross-examination<sup>17</sup>, or an order discharging, or (in the case of a special measures direction) varying, such a direction<sup>18</sup>; or
- 2132 (ii) proceedings on an application for such a direction or order, or where the court acts of its own motion to determine whether to give or make any such direction order<sup>19</sup>.

The court dealing with such a matter may order that this restriction is not to apply, or is not to apply to a specified extent, to a report of the matter<sup>20</sup>. The restriction does not apply to the inclusion in a publication of a report of matters after the relevant proceedings are either determined (by acquittal, conviction or otherwise), or abandoned, in relation to the defendant or (if there is more than one) in relation to each of the defendants<sup>21</sup>.

If a publication<sup>22</sup> includes any matter in contravention of a direction restricting reporting<sup>23</sup>, or a report in contravention of the restriction on publication relating to a special measures direction or a prohibition of cross-examination (or of other matters under head (i) or head (ii) above), the following persons are guilty of an offence<sup>24</sup> and liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>25</sup>:

- 2133 (A) where the publication is a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical<sup>26</sup>;
- 2134 (B) where the publication is a relevant programme, any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included, and any person having functions in relation to the programme corresponding to those of an editor of a newspaper<sup>27</sup>;
- 2135 (C) in the case of any other publication, any person publishing it<sup>28</sup>.

Where a person is charged with such an offence it is a defence to prove<sup>29</sup> that at the time of the alleged offence he was not aware, and neither suspected nor had reason to suspect, that the publication included the matter or report in question<sup>30</sup>.

Where a person is charged with such an offence, and the offence relates to the inclusion of any matter in a publication in contravention of a reporting direction<sup>31</sup>, it is a defence to prove that the person in relation to whom the direction was given had given written consent to the inclusion of that matter in the publication<sup>32</sup>. However, written consent is not a defence if it is proved that any person interfered with the peace or comfort of the person giving the consent with intent to obtain the consent<sup>33</sup>.

1 'Service court' means: (1) a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957; (2) the Courts-Martial Appeal Court; or (3) a standing civilian court: Youth Justice and Criminal Evidence Act 1999 s 63(1) (amended by the Armed Forces Act 2001 s 38, Sch 7 Pt 1).

2 'Reporting direction' in relation to a witness is a direction that no matter relating to the witness shall during the witness's lifetime be included in any publication if it is likely to lead members of the public to identify him as being a witness in the proceedings: Youth Justice and Criminal Evidence Act 1999 s 46(6). The matters relating to a witness in relation to which the restrictions imposed by a reporting direction apply (if their inclusion in any publication is likely to have the result mentioned in s 46(6)) include in particular the witness's name, the witness's address, the identity of any educational establishment attended by the witness, the identity of any place of work, and any still or moving picture of the witness: s 46(7). In determining whether to give a reporting direction the court must consider whether it would be in the interests of justice to do so, and the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings: s 46(8). For the procedure relating to an application for a reporting direction, and opposition to such an application see CrimPR 16.1-16.3, 16.6, 16.7. As to an application for the variation or revocation of such an order see CrimPR 16.5-16.7.

3 'Witness', in relation to any criminal proceedings, means any person called, or proposed to be called, to give evidence in the proceedings: see the Youth Justice and Criminal Evidence Act 1999 s 63(1).

4 Ibid s 46(1).

5 For the purposes of ibid s 46, a witness is eligible for protection if the court is satisfied that the quality of evidence given by the witness, or the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case, is likely to be diminished by reason of fear or distress on the part of the witness in connection with being identified by members of the public as a witness in the proceedings: s 46(3).

In determining whether a witness is eligible for protection the court must take into account, in particular:

78 (1) the nature and alleged circumstances of the offence to which the proceedings relate (s 46(4)(a));

79 (2) the age of the witness (s 46(4)(b));



80 (3) such of the following matters as appear to the court to be relevant, namely the social and cultural background and ethnic origins of the witness, the domestic and employment circumstances of the witness, and any religious beliefs or political opinions of the witness (s 46(4)(c));

81 (4) any behaviour towards the witness on the part of the defendant, members of the family or associates of the defendant, or any other person who is likely to be a defendant or a witness in the proceedings (s 46(4)(d)).

In determining that question the court must in addition consider any views expressed by the witness: s 46(5).

6 References to the quality of a witness's evidence are references to its quality in terms of completeness, coherence and accuracy (and for this purpose 'coherence' refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively): *ibid* s 46(12)(b).

7 References to the preparation of the case of a party to any proceedings include, where the party is the prosecution, the carrying out of investigations into any offence at any time charged in the proceedings: *ibid* s 46(12)(c).

8 *Ibid* s 46(2).

9 *Ibid* s 46(10). 'Appellate court', in relation to any proceedings in a court, means a court dealing with an appeal (including an appeal by way of case stated) arising out of the proceedings or with any further appeal: s 45(11), 46(12)(a).

10 *Ibid* s 46(9)(a).

11 In determining whether anything is (or, as the case may be, was) in the public interest, the court must have regard, in particular, to the following matters (so far as relevant):

82 (1) the interest in each of the following: (a) the open reporting of crime; (b) the open reporting of matters relating to human health or safety; and (c) the prevention and exposure of miscarriages of justice (s 52(1), (2)(a));

83 (2) the welfare of any person in relation to whom the relevant restrictions imposed by or under Pt II Ch IV (ss 44-52) apply or would apply (or as the case may be, applied) (s 52(1), (2)(b)); and

84 (3) any views expressed by that person (see s 52(1), (2)(c)).

12 *Ibid* s 46(9)(b).

13 See *ibid* s 46(9). For the procedure relating to an application for an excepting direction, and to an application for the variation or revocation of such an order see *CrimPR* 16.4-16.7.

14 Youth Justice and Criminal Evidence Act 1999 s 46(11).

15 *CrimPR* 16.8.

16 See *PARA* 619 ante.

17 See *PARA* 1308 post.

18 See the Youth Justice and Criminal Evidence Act 1999 s 47(1), (2)(a).

19 See *ibid* s 47(1), (2)(b). Nothing in s 47 affects any prohibition or restriction by virtue of any other enactment on the inclusion of matter in a publication: s 47(8).

20 *Ibid* s 47(3). Where there is only one defendant in the relevant proceedings, and he objects to the making of an order under s 47(3), the court must make the order if (and only if) satisfied after hearing the representations of the defendant that it is in the interests of justice to do so; and if the order is made it does not apply to the extent that a report deals with any such objections or representations: s 47(4).

Where there are two or more defendants in the relevant proceedings, and one or more of them objects to the making of an order under s 47(3), the court must make the order if (and only if) satisfied after hearing the representations of each of the defendants that it is in the interests of justice to do so; and if the order is made it does not apply to the extent that a report deals with any such objections or representations: s 47(5).

'The relevant proceedings' means the proceedings to which any such direction as is mentioned in s 47(2) (see the text to notes 18, 19 supra) relates or would relate: s 47(7).

21 Ibid s 47(6).

22 'Publication' includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme must be taken to be so addressed), but does not include an indictment or other document prepared for use in particular legal proceedings: see *ibid* s 63(1).

23 Ie a direction under *ibid* s 46(2): see the text to note 8 supra.

24 Ibid s 49(1)-(4). Proceedings for an offence under s 49 in respect of a publication falling within head (ii) in the text may not be instituted in England and Wales otherwise than by or with the consent of the Attorney General: s 49(6)(a). For the effect of this limitation see *PARA 1071 ante*.

If an offence under s 49 committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, an officer, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly: s 51(1). In s 51, 'officer' means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity: s 51(2). If the affairs of a body corporate are managed by its members, 'director' in s 51(2) means a member of that body: s 51(3).

Where an offence under s 49 is committed by a Scottish partnership and is proved to have been committed with the consent or connivance of a partner, he as well as the partnership is guilty of the offence and is liable to be proceeded against and punished accordingly: s 51(4).

25 Ibid s 49(5). As to the standard scale see *SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142*.

26 Ibid s 49(2).

27 Ibid s 49(3). 'Relevant programme' means a programme included in a programme service, within the meaning of the Broadcasting Act 1990 (see *TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328*): Youth Justice and Criminal Evidence Act 1999 s 63(1).

28 Ibid s 49(4).

29 As to whether this imposes a legal (or persuasive) burden or an evidential one, and, if the former, its compatibility with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(2) (the presumption of innocence), see *PARA 1368 et seq post*. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see *CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq*.

30 Youth Justice and Criminal Evidence Act 1999 s 50(1).

31 Ie under *ibid* s 46(2): see the text and note 8 supra.

32 Ibid s 50(7).

33 Ibid s 50(8).

## UPDATE

### 1302 Power to restrict reports about certain witnesses

NOTE 1--Definition of 'service court' further amended: Armed Forces Act 2006 Sch 16 para 159.

NOTES 2, 13, 15--CrimPR Pt 16 now Criminal Procedure Rules 2010, SI 2010/60, Pt 16.

NOTE 18--1999 Act s 47(2)(a) amended: Police and Justice Act 2006 Sch 14 para 37(3).

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### **1303. Trial of two or more defendants.**

Where two or more persons join in the commission of an offence, all or any number of them may be jointly indicted for it and tried together<sup>1</sup>. Persons who are jointly indicted should, however, be tried separately if the interests of justice seem to require that course to be taken<sup>2</sup>. Whether two persons jointly indicted should be tried together or separately is a matter for the discretion of the judge who must exercise that discretion judicially<sup>3</sup>.

Where an essential part of the defence of one defendant amounts to an attack on another, the judge is not bound to order separate trials, although he must take it into consideration in the exercise of his judicial discretion<sup>4</sup>. Where the statement made by one defendant is highly incriminating of another, this may be a good ground for ordering separate trials<sup>5</sup>.

Where two defendants concerned in an offence based on the same transaction are tried separately, the fact that the juries return an acquittal in the one case and a conviction in the other will not of itself render the verdict of guilty unsafe<sup>6</sup>.

Two defendants who are separately indicted may not be tried together<sup>7</sup>. Such a trial is a nullity even though counsel on both sides have purported to consent<sup>8</sup>.

1 2 Hale PC 173; and see PARA 1223 ante. Prima facie, where persons were engaged on a common enterprise, they should be jointly indicted and jointly tried: *R v Grondkowski*, *R v Malinowski* [1946] KB 369, 31 Cr App Rep 116, CCA. In the majority of cases it is in the public interest that jointly indicted defendants should be tried together: *R v Hoggins* [1967] 3 All ER 334, 51 Cr App Rep 444, CA. As to postponement of sentence on one of them who pleads guilty see PARA 1356 post.

Where two persons are jointly charged in one count of an indictment with one offence, the count, in effect, alleges against each defendant a separate offence committed on the same occasion and as part of the same transaction, the connection between the separate offences being no more than that. As against each defendant not only his own physical acts, but also the physical acts of the other defendant, may be relied upon by the prosecution as an actus reus of the offence with which he is charged. It is sufficient to show against any and each of the defendants that either he himself did a physical act which is an essential ingredient of the offence charged, or that he helped another defendant to do such an act, and that in doing that act or in helping the other defendant to do it, he himself had the required criminal intent: *DPP v Merriman* [1973] AC 584, 56 Cr App Rep 766, HL (approving *R v Fenwick* (1953) 54 SR NSW 147, NSW FC; and overruling *R v Scaramanga* [1963] 2 QB 807, 47 Cr App Rep 213, CCA, *R v Parker* [1969] 2 QB 248, 53 Cr App Rep 289, CA, and *R v Holley* (1969) 53 Cr App Rep 519, CA). Any number of persons may be charged in one indictment, with reference to the same theft, with having at different times or at the same time handled all or any of the stolen goods, and the persons so charged may be tried together: Theft Act 1968 s 27(1). On the trial of two or more persons indicted for jointly handling any stolen goods, the jury may find any of the defendants guilty if it is satisfied that he handled all or any of the stolen goods, whether or not he did so jointly with the other defendants or any of them: s 27(2). These provisions also apply to goods obtained by blackmail or deception: see s 24(4). Section 27 (as amended) is to be construed in accordance with s 24 (see PARA 303 ante): s 27(5).

2 Kel 8, 9; *R v Ahearne* (1852) 6 Cox CC 6, CCR; *R v Bradlaugh* (1883) 15 Cox CC 217. See also *R v Dibble* (1908) 1 Cr App Rep 155, CCA. Separate trials may be desirable in the interests of brevity and simplicity: see *R v Novac* (1977) 65 Cr App Rep 107 at 119, CA.

3 *R v Gibbins and Proctor* (1918) 13 Cr App Rep 134, 82 JP 287, CCA; *The People (A-G) v Carney and Mulcahy* [1955] IR 324, Ir SC; *R v Assim* [1966] 2 QB 249, [1966] 2 All ER 881, CCA. As to the proper practice where one of several defendant pleads guilty and others plead not guilty see PARA 1356 post.

4 *R v Grondkowski*, *R v Malinowski* [1946] KB 369, 31 Cr App Rep 116, CCA (explaining *R v Barnes*, *R v Richards* [1940] 2 All ER 229, 27 Cr App Rep 154, CCA); and see *R v Miller* [1952] 2 All ER 667, 36 Cr App Rep 169; *R v Hall* [1952] 1 KB 302, 35 Cr App Rep 167, CCA; *R v Hoggins* [1967] 3 All ER 334, 51 Cr App Rep 444,

CA. See also *R v Moghal* (1977) 65 Cr App Rep 56, CA (separate trials of two defendants, each alleging that the other committed the offence; first acquitted and second convicted; verdict safe).

5 *R v Gunewardene* [1951] 2 KB 600 at 610, 35 Cr App Rep 80 at 91, CCA, per Lord Goddard CJ. See also *R v O'Boyle* (1990) 92 Cr App Rep 202, CA (separate trials should have been ordered where one defendant proposed to cross-examine co-defendant on contents of interview which had been ruled inadmissible for prosecution purposes).

6 See *R v Andrews Weatherfoil Ltd* [1972] 1 All ER 65, [1972] 1 WLR 118, CA.

7 *Crane v DPP* [1921] 2 AC 299; sub nom *R v Crane* (1921) 15 Cr App Rep 183, HL.

8 *R v Dennis, R v Parker* [1924] 1 KB 867, 18 Cr App Rep 39, CCA.

## **UPDATE**

### **1303 Trial of two or more defendants**

NOTE 1--Where one of the defendants has become unfit after a jury has been empanelled, the jury can, in principle, proceed to consider whether that defendant has committed the actus reus while looking, in the case of other defendants, to both actus reus and mens rea: *R v B* [2008] EWCA Crim 1997, [2009] 3 WLR 1545.

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### **1304. Bail during course of trial.**

Once a trial has begun, the further grant of bail<sup>1</sup>, whether during the short adjournment, or overnight, is in the discretion of the trial judge. It may be a proper exercise of this discretion to refuse bail during the short adjournment if the defendant cannot otherwise be segregated from witnesses and jurors<sup>2</sup>.

A defendant who was on bail while on remand should not be refused overnight bail during the trial, unless in the opinion of the judge there are positive reasons to justify this refusal. Such reasons are likely to be: (1) that a point has been reached where there is a real danger that the defendant will abscond, either because the case is going badly for him, or for any other reason; (2) that there is a real danger that he may interfere with witnesses or jurors<sup>3</sup>.

There is no universal rule of practice that bail must not be renewed when the summing up has begun. Each case must be decided in the light of its own circumstances, and having regard to the judge's assessment from time to time of the risks involved<sup>4</sup>.

Once the jury has returned a verdict, a further renewal of bail should be decided in the light of the gravity of the offence and the likely sentence to be passed in all the circumstances of the case<sup>5</sup>.

1 As to bail pending trial see PARA 1169 et seq ante.

2 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.25.2, CA.

*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.25.2 and III.25.3-III.25.5, CA (see the text and notes 3-5 infra) are to be read subject to the Bail Act 1976, especially s 4 (as amended) (see PARA 1169 ante): *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.25.1, CA. Applications for bail may be heard in chambers: see CrimPR 16.11(1), (2)(a).

3 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.25.3, CA.

4 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.25.4, CA.

5 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.25.5, CA.

## **UPDATE**

### **1304 Bail during course of trial**

NOTE 2--CrimPR 16.11(1), (2)(a) now Criminal Procedure Rules 2010, SI 2010/60, r 16.11(1), (2)(a).

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### **1305. Communication between jury and judge during course of trial.**

Where the jury communicates with the judge during the course of the trial<sup>1</sup> about a matter unconnected with it (domestic or administrative matters), the judge may deal with the matter without reference to counsel<sup>2</sup>. Except in the most exceptional cases, the judge should state in open court the nature and content of a communication about a matter connected with the trial and, if he thinks it helpful to do so, seek the assistance of counsel<sup>3</sup>.

1 As to communication after the summing up see PARA 1333 post.

2 *R v Andriamampandry* [2003] EWCA Crim 1974, 147 Sol Jo LB 871. It has been stated that the judge should inform counsel about a communication (and its content) relating to such a matter but could not be faulted if he did not: see *R v Conroy*, *R v Glover* [1997] 2 Cr App Rep 285, CA; *R v Brown*, *R v Stratton* [1998] Crim LR 505, CA.

3 *R v Andriamampandry* [2003] EWCA Crim 1974, 147 Sol Jo LB 871. See also *R v Conroy*, *R v Glover* [1997] 2 Cr App Rep 285, CA; *R v Brown*, *R v Stratton* [1998] Crim LR 505, CA (where the jury sends the judge a communication about a matter connected with the trial, the fact and the content of the communication should be made known to counsel, except in the most exceptional of cases).

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### **1306. Determining admissibility of evidence; trial within a trial.**

As a general rule the evidence of witnesses at a jury trial must be given before the jury<sup>1</sup>. Where, however, it is necessary for the trial judge to ascertain preliminary facts in order to determine the question of admissibility of another piece of evidence (such as a confession by a defendant<sup>2</sup>), evidence relating to the question of admissibility is ordinarily heard by the judge in the absence of the jury<sup>3</sup>, in a procedure known as a 'trial within a trial' (or 'voir dire')<sup>4</sup>. In cases involving confessions, the judge's duty is to determine whether or not the disputed confession is admissible, and he should not ordinarily be influenced in this task by whether the confession appears to him to be true or untrue<sup>5</sup>. A judge cannot, however, be expected to try an issue of admissibility of evidence in total isolation; he neither can nor should put out of his mind the whole background of the case<sup>6</sup>. A trial within a trial may also assist the judge to determine whether the admission of legally admissible prosecution evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted<sup>7</sup>. On completion of the voir dire and the judge's ruling, the judge should give no explanation of the outcome of the voir dire to the jury<sup>8</sup>.

1 *R v Reynolds* [1950] 1 KB 606, 34 Cr App Rep 60, CCA. This does not necessarily require the presence of the witness in court. Evidence of some witnesses may be played to the jury via a video recording or given via a television link.

2 See PARA 1542 et seq post. Other types of evidence that may sometimes require a trial within a trial in order to determine admissibility include res gestae statements (see PARA 1530 post) and tape recordings (*R v Robson* [1972] 1 WLR 651, 56 Cr App Rep 450, CA). It is unnecessary for a trial judge to hold a trial within a trial when faced with issues about the quality or probative value of identification evidence. Disputes concerning identification evidence will rarely justify the holding of a trial within a trial (*R v Beveridge* (1987) 85 Cr App Rep 255, CA; *R v Fleming* (1987) 86 Cr App Rep 32, CA; *R v Davies* [2004] EWCA Crim 2521, [2004] All ER (D) 433 (Oct)) although different considerations may possibly apply where there is some dispute as to whether improper identification procedures were followed, as in *R v Willoughby* [1999] 2 Cr App Rep 82, CA. As to the appropriate time to raise a question of admissibility see generally para 1307 post. As to the time for raising objections to the admissibility of confession evidence see *R v Sat-Bhambra* (1988) 88 Cr App Rep 55, 62, CA.

3 It is for the judge, having heard the views of the defence, to have the final word on whether the jury should remain in court: *R v Hendry* (1988) 88 Cr App Rep 187, CA; *R v Davies* [1990] Crim LR 860, CA. Contrast *R v Anderson* (1929) 21 Cr App Rep 178, CCA, and *Ajodha v The State* [1982] AC 204, [1981] 2 All ER 193, PC (not followed on this point in *R v Hendry* supra) in which it was held that the jury should be excluded 'only at the request or with the consent of the defence'. Where the members of the jury are asked to leave the court, they should be told merely that 'a point of law has arisen which does not concern them'.

4 The term 'voir dire' is a corruption of 'vrai dire' and derives from the oath or affirmation taken by witnesses who testify in the course of this procedure.

It is primarily the responsibility of defence counsel to inform the prosecution and the judge in advance and in the absence of the jury of an intended objection to the admissibility of statements of a defendant; at the appropriate time, counsel must ask the judge to request the jury to withdraw so that a matter can be raised on which the ruling of the judge is required; no discussion of an intended objection must take place in front of the jury: *Mitchell v R* [1998] AC 695, [1998] 2 Cr App Rep 35, PC.

5 *Wong Kam-ming v R* [1980] AC 247, 69 Cr App Rep 47, PC; *R v Brophy* [1982] AC 476, [1981] 2 All ER 705, HL.

6 *R v Tyrer* (1989) 90 Cr App Rep 446, CA.

7 See the Police and Criminal Evidence Act 1984 s 78(1); and PARA 1365 post. It will not always be appropriate for a trial within a trial to be held in cases where prosecution evidence is challenged under s 78 (as amended); in many such cases the judge will be able to resolve the issue by reading statements and listening to argument from counsel: *R v Keenan* [1990] 2 QB 54, [1989] 3 All ER 598, CA; *R v Flemming* (1987) 86 Cr App Rep 32, CA.

8 *Mitchell v R* [1998] AC 695, [1998] 2 Cr App Rep 35, PC.



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## (ii) Case for the Prosecution

### 1307. Opening the case for the prosecution.

Counsel<sup>1</sup> for the prosecution opens the case to the jury by giving an outline of the salient features of his case and the nature of the evidence<sup>2</sup> which he proposes to call in support of it<sup>3</sup>.

As a general rule, submissions on the admissibility of evidence should not be made at the outset of the trial but when the time comes for tendering the evidence in regard to which the question of admissibility arises<sup>4</sup>. There is a presumption that counsel's opening address should not address the law, save in cases of real complication and difficulty where counsel believes, and the trial judge agrees, that the jury might be assisted by a brief and well focussed submission<sup>5</sup>.

Prosecuting counsel should regard themselves as ministers of justice assisting in its administration rather than as advocates<sup>6</sup>; and accordingly should not employ language likely to inflame the jury against the defendant<sup>7</sup>.

1 See PARA 1237 ante.

2 Defence counsel is not entitled to insist that a statement, which he has drafted for the defendant on his instructions, is signed by a police officer as a witness and made part of the material to be used by prosecuting counsel in opening his case: *R v Thatcher (Practice Note)* [1969] 1 All ER 998n, sub nom *R v Hedges* (1968) 53 Cr App Rep 206, CA.

3 Counsel should acquaint himself with the contents of the indictment before opening his case: *R v Peckham* (1935) 25 Cr App Rep 125, 100 JP 59, CCA. It is a wrong practice for counsel to open his case on one aspect of the matter, and then later to seek to adopt an alternative approach, thus widening the scope of the prosecution's attack: *R v Falconer-Atlee* (1973) 58 Cr App Rep 348 at 355-357, CA.

A prosecutor in person is not permitted to address the jury: *R v Brice* (1819) 2 B & Ald 606; and see also *R v Gurney* (1869) 11 Cox CC 414.

As to the absence of a child or young person who is the victim of a specified offence see PARA 1164 ante.

4 *R v Cole* (1941) 28 Cr App Rep 43, 165 LT 125, CCA; *R v Hammond* [1941] 3 All ER 318, 28 Cr App Rep 84, CCA; *R v Zielinski* [1950] 2 All ER 1114n, 34 Cr App Rep 193, CCA; *R v Patel* [1951] 2 All ER 29, 35 Cr App Rep 62, CCA.

If there is an objection to the admissibility of any part of the evidence, the nature and extent of the objection should be intimated to the prosecution by the defence before the trial begins. Except in those cases where it is virtually impossible to open the case to the jury without adverting to the evidence objected to, prosecuting counsel should omit any reference to it in his opening. It is only where such a course is impracticable that the trial judge should be asked to rule on questions of admissibility before the case is opened. This is likely to be so when the prosecution's case cannot succeed if an alleged confession is adjudged inadmissible: see *R v Hammond* supra. As to determining the admissibility of evidence see PARA 1306 ante; and as to evidence generally see PARA 1359 et seq post.

5 *R v Lashley* [2005] EWCA Crim 2016, [2006] Crim LR 83, (2005) Times, 28 September.

6 *R v Puddick* (1865) 4 F & F 497 at 499. The trial court is not to be misled as to vital facts: *R v Birtles* [1969] 2 All ER 1131n, 53 Cr App Rep 469, CA (use of police informer).

Counsel engaged to prosecute are acting for the Crown and not for the party initiating the prosecution, and in any event owe a duty to the court for the proper conduct of the case: see *R v Thursfield* (1838) 8 C & P 269;

*Abbott v Refuge Assurance Co Ltd* [1962] 1 QB 432, [1961] 3 All ER 1074, CA. It is a long-established practice that, if counsel in charge of a prosecution at any stage is convinced that there is no evidence against the defendant, or so little evidence that it would not be safe to leave the case to the jury, it is then his duty to acquaint the court of his views and to ask for leave to withdraw the prosecution: see *Abbott v Refuge Assurance Co Ltd* supra at 451 and 1084-1085 per Ormrod LJ; *R v Renshaw* [1989] Crim LR 811, (1989) Times, 23 June, CA. As to the course which should be adopted by prosecuting counsel in the event of disagreement with the prosecuting authority as to whether or not to proceed on a particular charge or to accept a plea to a lesser charge see LEGAL PROFESSIONS vol 66 (2009) PARA 1222.

7 *R v Banks* [1916] 2 KB 621, 12 Cr App Rep 74, CCA; *R v House* (1921) 16 Cr App Rep 49, CCA.

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### **1308. Calling witnesses.**

After opening his case, prosecuting counsel calls his witnesses<sup>1</sup>, and tenders any depositions or written statements<sup>2</sup>. When a witness is called, objection may be taken to his competence<sup>3</sup>; he may then be examined as to his competence before he is sworn or affirmed<sup>4</sup>.

If there is no such objection, or if it is made and rejected, each witness in turn takes the oath or affirmation<sup>5</sup>, and is examined in chief, and may be cross-examined by the defendant or his counsel; if cross-examined, he may be re-examined by counsel for the prosecution.

With some exceptions<sup>6</sup>, the rules as to the examination in chief<sup>7</sup>, cross-examination<sup>8</sup>, and re-examination<sup>9</sup> of witnesses<sup>10</sup> are the same in criminal as in civil trials<sup>11</sup>.

Where a prosecution has otherwise been properly brought and there is evidence fit to go to the jury, the judge has power neither to prevent the prosecution from calling evidence nor to direct the jury to acquit on the basis that he considers a conviction is unlikely<sup>12</sup>.

Although questioning by a trial judge during a witness's evidence should be avoided if it gives rise to the suggestion that he is taking sides, it is his duty to ask questions to clarify ambiguities in answers previously given or to identify the nature of the defence if this is unclear<sup>13</sup>.

1 As to securing the attendance of witnesses see PARA 1409 post.

2 In the following cases a deposition or written statement may be read to the jury, in which case there is no need to call the maker as a witness.

The Criminal Procedure and Investigations Act 1996 s 68, Sch 2 (prospectively repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 68(1), (8), Sch 37 Pt 4) provides that witness statements or depositions admitted as evidence at committal proceedings may be read as evidence at the trial. However, this does not apply if it is proved that the statement or deposition was not signed by the justice by whom it purports to have been signed or the trial court at its discretion orders that the statement be not read. In the case where a party to the proceedings objects to the statement or deposition being so read, it may not be so read unless the court of trial orders that the objection is to have no effect on the ground that it considers it in the interest of justice so to order. Any such objection must be made in writing to the prosecutor and the Crown Court within 14 days of the defendant being committed for trial unless the court permits it to be made outside that period: CrimPR 27.2(3).

A deposition taken under the Crime and Disorder Act 1998 s 52, Sch 3 para 4 (as amended; prospectively amended) (see PARA 1140 ante) for the purposes of proceedings for an offence for which a person has been sent for trial may be read as evidence on the trial of the defendant unless it is proved that the deposition was not signed by the justice by whom it purports to have been signed, the trial court at its discretion orders that it should not be so read or a party to the proceedings objects to it being so read: see Sch 3 para 5 (amended by the Criminal Justice Act 2003 ss 130, 332, Sch 37 Pt 6; prospectively amended by s 41, Sch 3 paras 15, 20).

Other cases where a deposition or written statement may be read as evidence without calling its maker as a witness relate to depositions taken under the Children and Young Persons Act 1933 s 42 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1277) and written statements under the Criminal Justice Act 1967 s 9 (as amended) (see PARA 1535 post).

3 As to the competence of witnesses see PARA 1401 et seq post.

Once the issue of competence has been raised, it is for the prosecution to prove that the person is competent to testify: *R v Yacoub* (1981) 72 Cr App Rep 313, CA.

4 This may be done either by examining the witness on the voir dire, or by calling other evidence: *R v Whitehead* (1866) LR 1 CCR 33. It is normal to take the objection when the witness is called, but there may be cases in which the incompetence of the witness appears only in the course of his evidence, and objection may be taken at that stage: *R v Moore* (1892) 61 LJMC 80, CCR. See also *Turner v Pearte* (1787) 1 Term Rep 717; *Stone v Blackburn* (1793) 1 Esp 37.

Evidence is admissible to show that a witness is suffering from a disease of the mind etc which affects the reliability of his evidence: *Toohy v Metropolitan Police Comr* [1965] AC 595, 49 Cr App Rep 148, HL.

5 As to when a witness may be cross-examined as to his choice to affirm rather than swear see *R v Mehrban (Razia)*, *R v Mehrban (Mohammed)* [2001] EWCA Crim 2627, [2002] 1 Cr App Rep 561, CA.

6 See notes 7-9 infra; and PARA 1502 et seq post.

7 For instances in criminal cases of the general rule in relation to leading questions on material issues see *R v Rosewell* (1684) 10 State Tr 147 at 190; *R v Robinson* (1897) 61 JP 520; *R v Wilson (alias Whittingdale)* (1913) 9 Cr App Rep 124, CCA. The objection to leading questions is based on the weight to be attached to the answers given to them, not on any basis of admissibility: see *Moor v Moor* [1954] 2 All ER 458, [1954] 1 WLR 927, CCA. It is generally undesirable to ask a witness to identify a defendant for the first time in court: see *R v Cartwright* (1914) 10 Cr App Rep 219, CCA; *R v Hunter* [1969] Crim LR 262, CA; *R v Howick* [1970] Crim LR 403, CA; and PARA 1146 post. Different considerations apply in summary trials, where such identification is customary and permissible: *Barnes v Chief Constable of Durham* [1997] 2 Cr App Rep 505, DC; *Karia v DPP* [2002] EWHC Admin 2175, 166 JP 753.

8 As to the rules approved by the Bar Council in regard to cross-examination see the Code of Conduct for the Bar of England and Wales (8th Edn, 2004) PARA 708; Bar Council Miscellaneous Guidance: Written Standards for the Conduct of Professional Work (General Standards) PARA 5.10(e)-(h), (Standards Applicable to Criminal Cases) PARA 12.5; and LEGAL PROFESSIONS vol 66 (2009) PARA 1210. The trial judge should do his utmost to restrain unnecessarily prolonged cross-examination: see *R v Kalia* [1975] Crim LR 181, CA. The trial judge is not precluded from stopping cross-examination merely because there is some tenuous legal reason for conducting it: *R v Flynn* [1972] Crim LR 428, CA. Although time limits on evidence in chief or cross-examination are not to become a routine feature of trial management, it is proper for a judge to impose such a limit where questioning is prolix and repetitious: *R v Butt* [2005] EWCA Crim 805, [2006] Crim LR 54, CA.

As to cross-examination in relation to previous inconsistent statements see PARA 1437 post; as to cross-examination with regard to previous convictions see PARA 1504 post; and as to restrictions on the cross-examination of a defendant who gives evidence see PARA 1497 et seq post. As to cross-examination and contradiction of a witness by the party who calls him, if he turns out to be hostile, see the Criminal Procedure Act 1865 s 3; and PARA 1436 post. It is not normal to allow cross-examination or examination of the witness in the absence of the jury in order to determine the question of hostility, which should be determined as a result of his answers and demeanour in the presence of the jury: *R v Darby* [1989] Crim LR 817, CA. However, in exceptional circumstances only it may be appropriate to conduct a voir dire to determine whether or not a witness is hostile: *R v Khan*, *R v Dad*, *R v Afsar* [2002] EWCA Crim 945, [2003] Crim LR 428 (in which *R v Honeyghan*, *R v Sayles* [1999] Crim LR 221, CA, was considered). See further PARA 1436 text and note 6 post.

In exceptional circumstances, as where the witness is a child, the judge may cross-examine a prosecution witness: see *R v Cameron* [2001] EWCA Crim 562, [2001] Crim LR 587.

9 See *The Queen's Case* (1820) 2 Brod & Bing 284 at 294, HL. See also *R v Beezley* (1830) 4 C & P 220 (if the counsel for the prosecution calls a witness merely to allow the defence to cross-examine him, any questions put by prosecuting counsel after the cross-examination must be considered as re-examination, and accordingly may be on points touched on by the cross-examination only).

10 As to evidence of expert witnesses on matters of handwriting, fingerprints, insanity etc see PARA 1484 post.

11 See PARA 1359 post. As to the evidence of children see PARAS 1441-1442 post. As to evidence through television links see PARAS 1414, 1417 post.

There is no rule which precludes a witness from refreshing his memory before he goes into the witness box from a statement made by him at some time reasonably close to the time of the event which is the subject of the trial (*R v Richardson* [1971] 2 QB 484, 55 Cr App Rep 244, CA (applied in *Worley v Bentley* [1976] 2 All ER 449, 62 Cr App Rep 239, DC, and *R v Westwell* [1976] 2 All ER 812, 62 Cr App Rep 251, CA)) but it is desirable where the prosecution follows this procedure that the defence should be told, before the witness goes into the witness box, that he has refreshed his memory since it may be relevant to the weight which can be attached to the evidence (*Worley v Bentley* supra; *R v Westwell* supra). Once a witness is in the witness box, he may refresh his memory by reference to a writing made or verified by him, or from the transcript of a sound recording of an oral account given by him, if the provisions of the Criminal Justice Act 2003 s 139 are satisfied: see PARA 1438 post.

As to the power of the judge to recall a witness, or to call one not called by either party see PARA 1318 post. As to questions by the judge see *R v Bateman* (1946) 31 Cr App Rep 106, 174 LT 336, CCA; and PARA 1318 post.

12 *A-G's Reference (No 2 of 2000)* [2001] 1 Cr App Rep 503, 165 JP 195, CA.

13 *R v Tuegel* [2000] 2 All ER 872, [2000] 2 Cr App Rep 361, CA. Particularly in a long case, such questions are most likely to help the jury and everyone else if they are asked at or near the time when the ambiguity is first apparent: *R v Tuegel* supra.

## **UPDATE**

### **1308 Calling witnesses**

NOTE 2--CrimPR Pt 27 now Criminal Procedure Rules 2010, SI 2010/60, Pt 27.

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### **1309. Witnesses out of court.**

The general rule and practice in criminal cases is that witnesses as to fact should remain out of court until they are required to give evidence<sup>1</sup>.

Professional or expert witnesses<sup>2</sup>, or witnesses as to character only, are generally permitted to remain in court.

If a witness remains in court in breach of the rule, his evidence, though open to criticism on that ground, is not rendered inadmissible<sup>3</sup>; but if a witness disobeys an order of the court and remains, it seems that he may be punished for contempt<sup>4</sup>.

<sup>1</sup> See *R v Smith* [1968] 2 All ER 115, [1968] 1 WLR 636, CA. As to child witnesses see PARAS 1300 ante, 1441-1442 post.

<sup>2</sup> As to expert witnesses see PARA 1484 post.

<sup>3</sup> *Moore v Registrar of Lambeth County Court* [1969] 1 All ER 782, [1969] 1 WLR 141, CA (a civil case); and see *R v Briggs* (1930) 22 Cr App Rep 68; *R v Thompson* [1967] Crim LR 62.

<sup>4</sup> *Chandler v Horne* (1842) 2 Mood & R 423; *Cobbett v Hudson* (1852) 1 E & B 11 at 14; *Cook v Nethercote* (1835) 6 C & P 741; *Thomas v David* (1836) 7 C & P 350; *R v Colley and Sweet* (1829) Mood & M 329.

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### **1310. Prosecution duty in respect of calling or tendering witnesses.**

Generally speaking, the prosecution must have at court all the witnesses whose statements have been served as witnesses on whom the prosecution intends to rely, if the defence wants those witnesses to attend; in deciding which statements to serve, the prosecution has an unfettered discretion, but must normally disclose<sup>1</sup> material statements not served<sup>2</sup>.

The prosecution enjoys a discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered because: (1) it must be exercised in the interests of justice, so as to promote a fair trial; and (2) the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness's evidence as unworthy of belief. In most cases the jury should have available all that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another<sup>3</sup>.

It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case; a prosecutor may reasonably take the view that what a particular witness has to say is at best marginal. The prosecutor is also the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. A prosecutor properly exercising his discretion is not therefore obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies<sup>4</sup>.

Where it proves impossible, despite all reasonable steps being taken, to have a witness present, the trial judge may in his discretion permit the trial to proceed, provided that no injustice will be done thereby<sup>5</sup>.

1 See PARA 1359 et seq post.

2 *R v Russell-Jones* [1995] 3 All ER 239, [1995] 1 Cr App Rep 538, CA.

3 *R v Russell-Jones* [1995] 3 All ER 239, [1995] 1 Cr App Rep 538, CA. The defence cannot always be expected to call witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say 'incredible', then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called: *R v Russell-Jones* supra at 545 per Kennedy LJ.

4 *R v Russell-Jones* [1995] 3 All ER 239, [1995] 1 Cr App Rep 538, CA. There is nothing to prevent the prosecution calling a witness if it does not regard the whole of his evidence as reliable; provided that it considers that part of the evidence is credible, it is a proper exercise of its discretion to call the witness, although it may not rely on the other parts; in such a case the jury should be directed about the special need for caution in relation to the reliability of the witness: *R v Cairns*, *R v Zaidi*, *R v Choudhury* [2002] EWCA Crim 2838, [2003] 1 Cr App Rep 662. The prosecution is not obliged to call the makers of witness statements served on the defence as unused material: *R v Richardson* (1993) 98 Cr App Rep 174, CA.

5 *R v Cavanagh*, *R v Shaw* [1972] 2 All ER 704, 56 Cr App Rep 407, CA.

As to the prosecution's duty to disclose to the defence matters in its possession see PARA 1383 et seq post.

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### **1311. Trial of person with insufficient command of English.**

The language of the court is English<sup>1</sup>. Unless a defendant fully comprehends the charge against him, its full implications and the ways in which a defence may be raised to it, and, in addition, is able to give full instructions to his solicitor and counsel so that a court can be sure that he has pleaded with a full and understanding mind, a proper plea will not have been tendered to the court, and any 'trial' will be a nullity<sup>2</sup>. Where a person with insufficient command of the language is on trial and is not represented by counsel, the evidence must be translated to him; he cannot waive compliance with this rule<sup>3</sup>. Where he is represented by counsel, the evidence should still to be translated to him unless he or his counsel expresses a wish to dispense with the translation and the trial judge thinks fit to allow this omission; the judge should not allow such omission unless he is of opinion that, in view of what has passed before the trial, the defendant substantially understands the nature of the evidence that is going to be given against him; any substantial variation from the account originally given in a statement or deposition, or any additional evidence, should be translated to the defendant, even though he may be indifferent about the matter or may not wish it<sup>4</sup>.

1 In legal proceedings in Wales the Welsh language may be used by any party, witness or other person who desires to use it: Welsh Language Act 1993 s 22(1). As to the use of the Welsh language in courts in Wales see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.23.1-III.23.13, CA. If a defendant in a court in England asks to give or call evidence in the Welsh language the case should not be transferred to Wales. In ordinary circumstances interpreters can be provided on request: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.22.1, CA.

2 *R v Begum* (1985) 93 Cr App Rep 96, CA.

3 *R v Lee Kun* [1916] 1 KB 337, 11 Cr App Rep 293, CCA. As to evidence of a police interview through an interpreter see *R v Attard* (1958) 43 Cr App Rep 90. As to the conduct of such interviews see Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 13.1-13.4; and PARAS 967-968 ante. The use of double translation, at interview and at trial, is permissible: *R v West London Youth Court, ex p N* [2000] 1 All ER 823, [2000] 1 WLR 2368, DC.

The cost of employing an interpreter is payable out of central funds and may not be treated as costs of any party to the proceedings: see the Prosecution of Offences Act 1985 ss 19(3)(b), 21(5). As to payment out of central funds see PARA 2058 et seq post. See also *Wei Hai Restaurant Ltd v Kingston upon Hull City Council* [2001] EWHC Admin 490, 166 JP 185, DC (refusal of magistrates' court to appoint an interpreter during defence case did not render trial unfair where no prior indication of need for interpreter, and no evidence that defence case had in fact been prejudiced).

4 *R v Lee Kun* [1916] 1 KB 337, 11 Cr App Rep 293, CCA; approved in *Kunnath v The State* [1993] 4 All ER 30, 98 Cr App Rep 455, PC. Where there is an issue as to whether the defendant has sufficient understanding of the English language to follow the trial proceedings and to appreciate the consequences of his plea, the judge has a duty to verify the need for interpretation facilities with the defendant, and to satisfy himself as to the adequacy of the arrangements made; failure to do so is a violation of the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(1) (right to a fair trial), taken together with art 6(3)(e) (right to interpreter): *Cuscani v United Kingdom* (2003) 36 EHRR 11, ECtHR. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.



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### **1312. Close of case for the prosecution.**

When counsel for the prosecution has called all his witnesses, and tendered any documentary evidence or exhibits on which he proposes to rely, he must then close the prosecution case<sup>1</sup>.

Ordinarily, no further evidence may thereafter be adduced by the prosecution<sup>2</sup> (or raised by the prosecution in cross-examination of defence witnesses<sup>3</sup>) for the purpose of proving the defendant's guilt<sup>4</sup>. This is, however, a general principle of practice, rather than an absolute rule of law<sup>5</sup>, and the trial judge has discretion to permit the reopening of the prosecution case, either in response to a submission of no case to answer or in rebuttal of evidence adduced by the defence<sup>6</sup>.

1 At this point the defence may make a submission of no case to answer (see PARA 1313 post) or proceed with the defence case but is not obliged to call any evidence. See PARA 1314 et seq post.

2 *R v Frost* (1839) 4 State Tr NS 85; *R v Rice* [1963] 1 QB 857, 867, 47 Cr App Rep 79, 85, CCA, per Winn J; *R v Pilcher* (1974) 60 Cr App Rep 1, CA; *R v Francis* [1991] 1 All ER 225, 91 Cr App Rep 271, CA.

3 *R v Kane* (1977) 65 Cr App Rep 270, CA. On the other hand, a statement made by one of several co-defendants can undoubtedly be used by the Crown, in cross-examining him, as a tool to extract from him in the form of evidence upon oath all that he has formerly said against any co-defendant: *R v Rice* [1963] 1 QB 857, 47 Cr App Rep 79, CCA.

4 A distinction may thus be drawn (but often with some difficulty) between cases in which the prosecution seeks to introduce further evidence of guilt through cross-examination of defence witnesses (as in *R v Kane* (1977) 65 Cr App Rep 270, CA) and cases in which cross-examination is directed solely as to credit (see *R v Halford* (1978) 67 Cr App Rep 318, CA).

5 *R v Rice* [1963] 1 QB 857, 47 Cr App Rep 79, CCA; *R v Halford* (1978) 67 Cr App Rep 318, CA.

6 See PARA 1316 post.

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### **1313. Submission of no case to answer.**

At the close of the case for the prosecution the defendant, or, if he is represented, his counsel, may submit that there is no case to go to the jury<sup>1</sup>. This submission of no case to answer may properly be made and upheld: (1) if there is no evidence to prove that the crime has been committed by the defendant; or (2) where there is some evidence but it is of a tenuous character and, taken at its highest, it is such that a jury properly directed could not properly convict on it<sup>2</sup>. In these circumstances it is the judge's duty, on a submission being made, to stop the case<sup>3</sup>. Where, however, the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury, then the judge should allow the matter to be tried by the jury<sup>4</sup>. Borderline cases may safely be left to the discretion of the judge<sup>5</sup>.

If such a submission is upheld by the trial judge in respect of a particular count, the rule is of no effect whilst the prosecution is able to take any of the following steps: (a) to inform the court that it intends to appeal; or (b) to request an adjournment to consider whether to appeal, and after the adjournment to inform the court that it intends to appeal<sup>6</sup>. Subject to this, it is the duty of the trial judge to direct a verdict of not guilty on the relevant count<sup>7</sup>. Even though no formal verdict is taken then and there, the defendant in respect of whom such a submission has succeeded on one of several counts is to be treated during the rest of the trial as being no longer charged on that count<sup>8</sup>. A submission of no case should be made in the absence of the jury<sup>9</sup>. When, after hearing the submission, the trial judge decides that the case should proceed, he should not comment on this to the jury<sup>10</sup>. He should, however, in the absence of the jury, give brief reasons for his decision<sup>11</sup>.

If at the close of the prosecution case there is no evidence to go to the jury, but no submission to that effect is made, the jury may still convict if what was wanting in the prosecution case is supplied by evidence adduced by the defence; and this is so whether the defendant was represented or not<sup>12</sup>. If a submission of no case is wrongly rejected by the trial judge, the conviction may be quashed as unsafe; if, following the wrongful rejection of the submission, the defence calls evidence, the Court of Appeal will not look at that evidence and dismiss the appeal on the basis of it<sup>13</sup>.

If, at the conclusion of the evidence, the trial judge is of the opinion that no reasonable jury properly directed could safely convict, he should raise the matter for discussion with counsel even if no submission of no case to answer is made. If having heard submissions he is of the same opinion, he should withdraw the case from the jury<sup>14</sup>.

The jury is entitled at common law to decide at any time after the close of the prosecution case that it does not need to hear further evidence as to the indictment as a whole or one or more counts, in which case it may acquit (but not convict) the defendant forthwith on the whole indictment or one or more counts (as the case may be). The judge may remind the jury of this entitlement to stop the case, but he may not go further and invite them to do so<sup>15</sup>.

<sup>1</sup> Although the usual approach is for such a submission to be made at the end of the case for the prosecution, it is open to the trial judge to hear and rule upon a submission of no case to answer at the end of the case for the defence: *R v Anderson* (1998) Independent (CS), 13 July, CA. Where, in a borderline case, the judge rules at the end of the prosecution case that there is a case to answer, he may be under a duty to re-

consider the issue at the end of the case for the defence, in the light of the evidence called for the defence: *R v Ramsey* [2000] 6 Archbold News 3, CA. See also *R v Brown* [2001] EWCA Crim 961, [2002] 1 Cr App Rep 46, CA (judge has a duty to withdraw case from jury at any time after close of prosecution case if satisfied that there is no case to answer, whether or not a submission of no case has been made).

Where the defendant is charged in the same proceedings with an offence of murder or manslaughter and with an offence under the Domestic Violence, Crime and Victims Act 2004 s 5 (see PARA 107 ante) in respect of the same death, the question whether there is a case for the defendant to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the s 5 offence, before that earlier time): s 6(1), (4).

2 See *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, CA (disapproving dicta of Lawton LJ in *R v Mansfield* [1978] 1 All ER 134, 65 Cr App Rep 276, CA, and preferring *R v Barker* (1977) 65 Cr App Rep 287, CA). See also *R v Smith*, *R v Doe* (1986) 85 Cr App Rep 197, CA; *R v Jacquith*, *R v Emode* [1989] Crim LR 508, CA (where the prosecution did not dispute evidence that a defendant had been threatened, the question whether that evidence was sufficient to make out the defence of duress should have been left to the jury; trial judge erred in accepting a submission of no case to answer). Where there are alternative charges, such as counts for stealing and dishonest handling against the same defendant in respect of the same property, the proper course in almost every case will be to allow both charges to proceed and be ultimately decided by the jury: *R v Plain* [1967] 1 All ER 614 at 615, 51 Cr App Rep 91 at 93, CA, per Winn LJ; *R v Bellman* [1989] AC 836, [1989] 1 All ER 22, HL. See also *R v Shelton* (1986) 83 Cr App Rep 379, CA.

3 *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, CA.

4 *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, CA.

5 *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, CA.

6 See the Criminal Justice Act 2003 s 58(3), (4). As to an appeal by the prosecution against a ruling that there is no case to answer see PARA 1898 et seq post.

7 *R v Leach* (1909) 2 Cr App Rep 72, CCA; and see also *R v Joiner* (1910) 4 Cr App Rep 64, CCA; *R v Fraser* (1911) 7 Cr App Rep 99, CCA; *R v Power* [1919] 1 KB 572, 14 Cr App Rep 17, CCA; *R v Hogan* (1922) 16 Cr App Rep 182, CCA.

8 *R v Meek* (1966) 110 Sol Jo 867, CA; *R v Plain* [1967] 1 All ER 614, 51 Cr App Rep 91, CA.

9 *R v Falconer-Atlee* (1973) 58 Cr App Rep 348, CA. For a possible exception see *Crosdale v R* [1995] 2 All ER 500, [1995] 1 WLR 864, PC.

10 As to improper comment after such a submission in the course of a judge's summing up see *R v Smith*, *R v Doe* (1986) 85 Cr App Rep 197, CA. Where the judge upholds one or some of a number of submissions of no case to answer, it is proper for him to give the jury a brief explanation for doing so, provided that he does not say anything which could be construed as indicating any belief by him that any remaining counts are well-founded: *R v Thirunavkkarasu* [1998] 7 Archbold News 3, CA.

11 *R v Powell* [2006] EWCA Crim 685, [2006] All ER (D) 146 (Jan), CA.

12 *R v Pearson* (1908) 1 Cr App Rep 77, CCA; *R v George* (1908) 1 Cr App Rep 168, 25 TLR 66, CCA; *R v Jackson* (1910) 5 Cr App 22, CCA. See also *R v Juett* [1981] Crim LR 113, CA.

13 *R v Joiner* (1910) 4 Cr App Rep 64, CCA; *R v Fraser* (1911) 7 Cr App Rep 99, CCA; *R v Power* [1919] 1 KB 572, 14 Cr App Rep 17, CCA; *R v Abbott* [1955] 2 QB 497, 39 Cr App Rep 141, CCA; *R v Smith* [2000] 1 All ER 263, [1999] 2 Cr App Rep 238, CA; *R v Berry* [1998] Crim LR 487, CA. This approach was preferred by Mantell LJ in *R v Davis*, *R v Rowe*, *R v Johnson* [2001] 1 Cr App Rep 115 at 129, CA, to that in *R v Clarke*, *R v Hewins* [1999] 6 Archbold News 2, CA (if submission of no case wrongly rejected, Court of Appeal cannot ignore, in determining whether conviction unsafe, what has happened after that rejection). See also *R v Cockley* (1984) 79 Cr App Rep 181, CA (disapproving *R v Power* supra).

14 *R v Brown* [1998] Crim LR 196, CA. Where no submission of no case to answer is made, when it should have been, and evidence is thereafter forthcoming of the defendant's guilt, the Court of Appeal will not regard the conviction as unsafe on the ground that, had the submission been made, it ought to have been upheld; the judge is not obliged or entitled to interfere with counsel's responsibility in the absence of improper or irregular conduct: *R v Juett* [1981] Crim LR 113, CA.

15 *R v Falconer-Atlee* (1973) 58 Cr App Rep 348 at 357, CA, per Roskill LJ; *R v Kemp* [1995] 1 Cr App Rep 151, CA. The practice of reminding the jury of its entitlement is very occasionally exercised and is not one which the Court of Appeal encourages on the ground that if the judge is not prepared to stop the case he should not try to cast the responsibility on to the jury: *R v Falconer-Atlee* supra; *R v Kemp* supra. Only the judge may

remind the jury of its entitlement; thus counsel for the defendant has no right to do so: *R v Speechley* [2004] EWCA Crim 3067, [2005] Crim LR 811.

## **UPDATE**

### **1313 Submission of no case to answer**

NOTE 1--See *R v N Ltd* [2008] EWCA Crim 1223, [2008] 1 WLR 2684, [2008] All ER (D) 112 (Jun) (judge cannot find no case to answer and direct jury to not guilty verdicts before close of prosecution's case); *R v Penner* [2010] EWCA Crim 1155, (2010) Times, 3 June (defence counsel must avoid ambushing the prosecution with a new issue raised as part of a submission of no case to answer).

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### **(iii) Case for the Defence**

#### **1314. Defendant as a witness.**

If there is no successful submission that there is insufficient evidence to go to the jury<sup>1</sup>, it is for the defendant, if he so wishes, to give evidence. If he decides to give evidence, he must do so on oath and is liable to cross-examination<sup>2</sup>. Where a defendant is unrepresented, the trial judge must at the conclusion of the evidence and in the presence of the jury inform him in the approved way: (1) of his right to give evidence on oath (and that he is liable to be cross-examined if he does); (2) that, if he does not give evidence or, having been sworn, without good cause refuses to answer any question, the jury may draw such inferences as appear proper; (3) of his right to call witnesses in his own defence; and (4) of his right afterwards to address the jury (but not to give evidence at that stage)<sup>3</sup>.

Where the only witness to the facts of the case called by the defence is the person charged, he must be called as a witness immediately after the close of the evidence for the prosecution<sup>4</sup>. If, at the trial of any person for an offence, the defence intends to call two or more witnesses to the facts of the case, and those witnesses include the defendant, the defendant must be called before the other witness or witnesses unless the court in its discretion otherwise directs<sup>5</sup>.

Where counsel for the defendant, or the defendant himself if he is unrepresented by counsel, calls witnesses other than the defendant, he has a right to open his case before calling the evidence; in exercising this right he is not limited to outlining his own case, but is entitled to open fully, commenting on the prosecution evidence if he so desires<sup>6</sup>.

If there are more than one defendant, they address the jury, cross-examine witnesses and give evidence in the order in which their names appear on the indictment, or in any other order which the trial judge thinks proper<sup>7</sup>.

1 As to the submission of no case see PARA 1313 ante.

2 See the Criminal Justice Act 1982 s 72(1) (amended by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 para 10). See also PARA 1446 post. As to cross-examination of the defendant see PARAS 1445, 1497-1501 post. Neither the defendant nor counsel on his behalf may make a statement of political views to the court: see *R v King* (1973) 57 Cr App Rep 696, CA.

3 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.44.5, CA. Failure to inform an unrepresented defendant of his right to call witnesses may result in the conviction being quashed: *R v Carter* (1960) 44 Cr App Rep 225, CCA. As to the judge's duty to assist an unrepresented defendant, but also to restrain unnecessary cross-examination by him, see *R v Brown (Milton)* [1998] 2 Cr App Rep 364, CA.

4 See the Criminal Evidence Act 1898 s 2. See also PARA 1446 post.

5 See the Police and Criminal Evidence Act 1984 s 79. See also PARA 1446 post.

6 See *R v Randall* (1973) Times, 11 July, CA.

7 *R v Barber* (1844) 1 Car & Kir 434 at 438; *R v Balfour* (1895) Times, 29 October.

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### **1315. Defence witnesses.**

After the defendant has given evidence<sup>1</sup>, or forthwith, if he does not himself give evidence, the witnesses for the defence are called and examined<sup>2</sup>; they may be cross-examined by counsel for the prosecution<sup>3</sup>. Where two or more defendants are being tried together, and one calls a witness whose evidence may affect another defendant, that other may cross-examine the witness<sup>4</sup>.

The defendant is entitled to have his defence, however improbable, put to the jury by his counsel, whose task may be rendered impossible if he is constantly subjected to interruptions<sup>5</sup>. Thus examination-in-chief by counsel for the defendant should not be interrupted by cross-examination from the judge<sup>6</sup>, and this applies also to cross-examination of witnesses whether called by the prosecution or by the defence<sup>7</sup>. If, by reason of the conduct of the judge<sup>8</sup>, or by reason of the frequency and nature of his interruptions<sup>9</sup>, counsel for the defence has been deprived of the opportunity of putting the defence fairly before the jury or the defendant or a witness for the defence has effectively been prevented from giving his evidence in his own way, the conviction may be quashed<sup>10</sup>. The judge should, however, do his utmost to restrain unnecessarily prolonged cross-examination<sup>11</sup> and counsel should exercise in the interests of justice as a whole a proper discretion so as not to prolong cases unnecessarily<sup>12</sup>.

1 See PARAS 1314 ante, 1443 et seq post.

2 See the Criminal Procedure Act 1865 s 2 (amended by the Criminal Law Act 1967 s 10(2), Sch 3 Pt III). In *R v Nicholson* (1909) 2 Cr App Rep 195, CCA, a conviction was quashed by the Court of Criminal Appeal, because witnesses for the defence who had attended at the trial were told that they were not wanted and went away without giving evidence.

3 As to the rules in regard to examination and cross-examination of witnesses see PARA 1308 ante. It is not usual for counsel for the prosecution to cross-examine witnesses to character, except where there is a previous conviction against the defendant who calls such witnesses. See also PARA 1502 et seq post.

4 *R v Woods, R v May* (1853) 6 Cox CC 224; *R v Burdett* (1855) 6 Cox CC 458, CCR.

5 *R v Clewer* (1953) 37 Cr App Rep 37 at 42, CCA, per Lord Goddard CJ.

6 *R v Cain* (1936) 25 Cr App Rep 204, CCA; *R v Gilson, R v Cohen* (1944) 29 Cr App Rep 174, CCA; *R v Whybrow* (1994) Times, 14 February, CA; *R v Roncoli* [1998] Crim LR 584, CA. See also *Jones v National Coal Board* [1957] 2 QB 55 at 63-64, [1957] 2 All ER 155 at 159, CA, per Denning LJ.

7 *R v Bateman* (1946) 31 Cr App Rep 106, 174 LT 336, CCA; *R v Hulusi, R v Purvis* (1973) 58 Cr App Rep 378, CA.

8 *R v Barnes* (1970) 55 Cr App Rep 100, CA (defendant pressed by trial judge to plead guilty); *R v Hircock* [1970] 1 QB 67, 53 Cr App Rep 51, CA (trial judge showing signs of impatience); *R v Hulusi, R v Purvis* (1973) 58 Cr App Rep 378, CA; *R v Ford* [1989] QB 868, 89 Cr App Rep 278, CA (trial judge's proper concern to avoid 'racial haranguing' by defence counsel led to erroneous refusal to allow full cross-examination of police witness); *R v Roncoli* [1998] Crim LR 584, CA. Cf *R v Ptohopoulos* (1967) 52 Cr App Rep 47, CA. As to the guidelines to be followed in considering the propriety of a judge's questions and interruptions see *R v Mathews* (1983) 78 Cr App Rep 23, CA.

9 *R v Clewer* (1953) 37 Cr App Rep 37, CCA; *R v Perks* [1973] Crim LR 388, CA; *R v Hulusi, R v Purvis* (1973) 58 Cr App Rep 378, CA.

10 See *R v Alves* [1997] 1 Cr App Rep 78, CA (appeal allowed because possible that judge's adverse comments about defendant's chances of acquittal, made in absence of jury, had influenced defendant in giving evidence and been equivalent to the handicap of being improperly interrupted by judge in giving evidence).

11 *R v Kalia* (1974) 60 Cr App Rep 200, CA.

12 *R v Simmonds* [1969] 1 QB 685 at 693, 51 Cr App Rep 316 at 326, CA. As to defending counsel's professional duties generally see LEGAL PROFESSIONS vol 66 (2009) PARA 1149 et seq.

## **UPDATE**

### **1315 Defence witnesses**

NOTES 6, 8, 9--See *Michel v R* [2009] UKPC 41, [2010] 1 WLR 879, [2009] All ER (D) 142 (Nov) (character of interruptions by judge amounted to cross-examination, which was generally hostile).

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### **1316. Fresh evidence for the prosecution after close of case.**

The general rule is that the prosecution may adduce no further evidence of the defendant's guilt after the closure of its case, either in response to a submission of no case to answer or in response to evidence adduced by the defence<sup>1</sup>; but this is not an absolute rule and the trial judge has a discretion to permit a reopening of the prosecution case where it is in the interests of justice to do so<sup>2</sup>.

There are, in particular, three well-recognised circumstances in which it may be appropriate to exercise this discretion in favour of the prosecution. The first is where what has been inadvertently omitted is a mere formality as distinct from a central issue in the case<sup>3</sup>. The second is where the defence has raised evidence or issues that could not reasonably have been anticipated by the prosecution or included in the original prosecution case<sup>4</sup>. The third<sup>5</sup> is where new evidence of guilt has become available for the first time after the closure of the prosecution case<sup>6</sup>. The discretion is nevertheless flexible and cannot be rigidly constrained within set categories<sup>7</sup>, but the earlier the application to admit the further evidence is made, the more likely it is that the discretion will be exercised in favour of the prosecution<sup>8</sup>; and no evidence for the prosecution may be called after the judge has begun his summing up<sup>9</sup>.

1 See PARAS 1312-1313 ante. As to evidence concerning only the credibility of the defendant or of other defence witnesses see *R v Halford* (1978) 67 Cr App Rep 318, CA; and PARA 1312 ante.

2 *R v Pilcher* (1974) 60 Cr App Rep 1, CA; *R v Francis* [1991] 1 All ER 225, 91 Cr App Rep 271, CA. Similar principles have been applied to summary trial: see *MacDonald v Skelt* [1985] RTR 321, DC; *Jolly v DPP* [2000] All ER (D) 444, DC.

3 *R v McKenna* (1956) 40 Cr App Rep 65, CCA; *Royal v Prescott-Clark* [1966] 2 All ER 366, [1966] 1 WLR 788; *Piggott v Sims* [1973] RTR 15, DC. Contrast *R v Central Criminal Court, ex p Garnier* [1988] RTR 42, DC (proposed further evidence not considered to be a mere formality).

4 'The Crown . . . cannot afterwards support their case by calling fresh witnesses because they are met by certain evidence that contradicts it . . . but if any matter arises ex improviso which no human ingenuity can foresee . . . there seems to me no reason why the matter . . . may not be answered by contrary evidence on the part of the Crown . . .': *R v Frost* (1839) 4 State Tr NS 85 at 386 per Tindall CJ. See also *R v Owen* [1952] 2 QB 362, 36 Cr App Rep 16, CCA; *R v Flynn* (1957) 42 Cr App Rep 15, CCA; *R v Milliken* (1969) 53 Cr App Rep 330, CA; *R v Scott* (1984) 79 Cr App Rep 49, CA. Contrast *R v Day* [1940] 1 All ER 402, 27 Cr App Rep 168, CCA, in which there was no justification for permitting the prosecution to reopen its case given that the nature of the defence case had been entirely foreseeable. As to pre-trial disclosure obligations now imposed on the defence see PARA 1383 et seq post.

5 In *R v Francis* [1991] 1 All ER 225, 91 Cr App Rep 271, Lloyd LJ refers to just two 'well-established' circumstances, but the third is now also well-established.

6 *R v Doran* (1972) 56 Cr App Rep 429, CA; *R v Patel* [1992] Crim LR 739, CA. In *James v South Glamorgan County Council* (1994) 99 Cr App Rep 321, DC, the prosecution was permitted to reopen its case to adduce the evidence of a witness who had initially been unable to find the court building.

7 See *R v Francis* [1991] 1 All ER 225 at 228 per Lloyd LJ ('We refrain from defining precisely the limit of that discretion since we cannot foresee all of the circumstances in which it might fall to be exercised . . .'). It was suggested in *R v Francis* supra that in cases not falling within established exceptions the discretion to permit reopening of the prosecution case should be exercised only 'on the rarest of occasions', but in *R v Munnery* (1990) 94 Cr App Rep 164, 172, CA, it was said that this proposition 'might have been stated in less restrictive terms'. See also *R v Bowles* [1992] Crim LR 726, CA.



8 In particular, it is easier to justify the reopening of the prosecution case if the defence case has not yet been opened: *R v Munnery* (1990) 94 Cr App Rep 164; *Saunders v Johns* [1965] Crim LR 49, DC.

9 *R v Owen* [1952] 2 QB 362, 368, CCA, per Lord Goddard CJ.

## **UPDATE**

### **1316 Fresh evidence for the prosecution after close of case**

NOTE 2--See also *Malcolm v DPP* [2007] EWHC 363 (Admin), [2007] 3 All ER 578, DC.

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### **1317. Closing speeches of counsel.**

After the close of the evidence for the defendant, or the last of several defendants, or, if rebutting evidence is permitted, after the close of that evidence, prosecuting counsel has the right to address the jury a second time, and counsel for the defendant or, if he is unrepresented, the defendant himself<sup>1</sup>, has the right of reply<sup>2</sup>. Where a defendant who is unrepresented gives evidence himself but calls no other witnesses, counsel for the prosecution is not allowed to address the jury a second time<sup>3</sup>; and a fortiori the same rule applies where such a defendant not only does not call any other witnesses, but does not give evidence himself<sup>4</sup>. When a defendant is represented by counsel but neither gives evidence himself nor calls any witnesses, prosecuting counsel may address the jury a second time but the right to do so should be used sparingly<sup>5</sup>. The fact that a co-defendant is unrepresented does not deprive prosecuting counsel of the right to make a closing speech in relation to a represented defendant; in such circumstances, however, the speech must focus on the evidence relating to the represented defendant<sup>6</sup>.

In making his closing speech, prosecuting counsel may comment on the evidence of the defendant, if he has given evidence<sup>7</sup>, or on his failure to give evidence, if he has not<sup>8</sup>; but he may not comment on the failure of the wife or husband or civil partner of the defendant to give evidence<sup>9</sup>, nor should he comment on the failure of the defendant to call other witnesses unless the circumstances are such that it might be fairly expected that those witnesses could and would be called<sup>10</sup>. Although prosecuting counsel in closing may not invite the jury to infer evidence contrary to that given by the sole prosecution witness<sup>11</sup>, he may point to any inconsistencies between a prosecution witness and other prosecution evidence or indicate matters on which a prosecution witness's evidence might be unreliable<sup>12</sup>. Prosecuting counsel may comment in his final speech to the jury on all the issues arising in the case, including the possibility of alternative verdicts<sup>13</sup>, but he should not comment on the potentially serious consequences to a police officer of his evidence being disbelieved<sup>14</sup>.

Counsel for the defendant is not restricted merely to observations on the evidence of his witnesses; whatever occurs to him as desirable to mention on the whole case, he is at liberty to say<sup>15</sup>. He may, for example, advance hypotheses, even beyond his client's version of the case, provided that there is other evidence in the case to support such hypotheses<sup>16</sup>, or comment on the fact that a co-defendant who has run a defence conflicting with his client's has not given evidence<sup>17</sup>. Defence counsel should not refer to the likely consequences of a conviction in terms of sentence<sup>18</sup>, nor should he invite the jury to add a recommendation of mercy if it returns a verdict of guilty<sup>19</sup>.

It is inadvisable for counsel to attempt to give an explanation of the rules governing the return of a majority verdict<sup>20</sup>; nor should counsel read passages from the law reports to juries<sup>21</sup>.

Where the judge has interrupted a line of questioning because it related to inadmissible evidence, the counsel concerned must not refer in his closing speech to the matter in respect of which the line of questioning was prohibited<sup>22</sup>.

Generally speaking, it is preferable for a judge not to interrupt a speech by counsel in the presence of the jury, although exceptionally it may be necessary<sup>23</sup>.

Although final speeches are not normally recorded, where it becomes apparent that important exchanges are to take place during them, the shorthand writer should be summoned so that these exchanges may be recorded<sup>24</sup>.

1 The defendant's right to make a closing address to the jury may not, however, be used to frustrate the trial and is conditional on the defendant using that right for the purpose of advancing the course of justice and for the proper conduct of the trial: *R v Morley* [1988] QB 601, [1988] 2 All ER 396, CA.

2 See the Criminal Procedure (Right of Reply) Act 1964 s 1. The defence always has the right of reply, ie the right to the last speech, and the position is not affected by the fact that a law officer appears for the Crown: see s 1.

It seems that a distinction is technically to be drawn between the closing speeches of counsel and the right, stemming from the Criminal Procedure Act 1865 s 2 (as amended), of counsel on each side to sum up their respective cases, but the practice of prosecuting counsel summing up his case at the close of his evidence has fallen into desuetude: see PARA 1315 ante.

A defendant cannot have the assistance of counsel to examine witnesses and reserve to himself the right of addressing the jury: *R v White* (1811) 3 Camp 98.

3 *R v Pink* [1971] 1 QB 508 at 510, 55 Cr App Rep 16 at 18, CA, per Megaw LJ. Such an irregularity will not necessarily result in the conviction being quashed: see *R v Pink* supra (following *R v Thomas* (1922) 17 Cr App Rep 34, CCA; *R v Harrison* (1923) 17 Cr App Rep 156, CCA). Cf *R v Baggott* (1927) 20 Cr App Rep 92, CCA; *R v Mondon* (1968) 52 Cr App Rep 695, CA (where the convictions were quashed).

4 *R v Pink* [1971] 1 QB 508, 55 Cr App Rep 16, CA.

5 *R v Bryant, R v Oxley* [1979] QB 108, 67 Cr App Rep 157, CA. See also *R v Francis* [1988] Crim LR 250, CA. Where all of a number of defendants are represented by counsel and none of them gives evidence, but evidence is called on behalf of one of them which may assist one or more of the other defendants, prosecuting counsel is entitled to comment in his closing speech on the cases of those other defendants: *R v Bryant, R v Oxley* supra (approving *R v Trevelli* (1882) 15 Cox CC 289).

6 *R v Tahir, R v Simpkins* [1997] Crim LR 837, CA.

7 *R v Gardner* [1899] 1 QB 150, CCR.

8 The prohibition of comment about the defendant's failure to give evidence (see the Criminal Evidence Act 1898 s 1(b) (repealed)) was abolished by the Criminal Justice and Public Order Act 1994 s 168(2), (3), Sch 10 para 2, 11. As to the judge's direction about a defendant's failure to testify see PARA 1555 post.

9 Police and Criminal Evidence Act 1984 s 80A (added by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 para 14; and amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 98).

10 *R v Puddick* (1865) 4 F & F 497; *R v Rudland* (1865) 4 F & F 495.

11 *R v Pacey* (1994) Times, 3 March, CA.

12 *R v Cairns, R v Zaidi, R v Choudhary* [2003] EWCA Crim 2838, [2003] 1 WLR 796, [2003] 1 Cr App Rep 662.

13 See *DPP v Daley* [1980] AC 237, 69 Cr App Rep 39, PC.

14 *R v Gale* [1994] Crim LR 208, CA.

15 *R v Wainwright* (1875) 13 Cox CC 171.

16 *R v Bateson* (1991) Times, 10 April, CA.

17 *R v Wickham* (1971) 55 Cr App Rep 199, CA. The judge does not have power to prevent or restrict such comment, but may comment upon it in his summing up if he considers it unfair.

18 *A-G for State of South Australia v Brown* [1960] AC 432, 44 Cr App Rep 100, PC.

19 *R v Black (Practice Note)* [1963] 1 WLR 1311, 48 Cr App Rep 52, CCA.

20 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.46.1, CA.

21 *R v Chandler* [1976] 3 All ER 105, 63 Cr App Rep 1, CA.

22 *R v Fahy* [2002] EWCA Crim 525, [2002] Crim LR 596, CA.

23 *R v Tuegel* [2000] 2 All ER 872, [2000] 2 Cr App Rep 361, CA. Ideally, interventions intended to correct or clarify something said, either by judge or counsel, should be made in the first instance in the absence of the jury and at a break in the proceedings so that thereafter, if necessary, the point may be dealt with before the jury in an orderly fashion: *R v Tuegel* supra.

24 *R v Osborne-Odelli* [1998] Crim LR 902, CA.

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### **1318. Power of judge to call witness.**

The trial judge has the power<sup>1</sup> to call a witness not called by either the prosecution or the defence, without their consent, if he considers that course is necessary in the interests of justice<sup>2</sup>; but he should not call such a witness after the evidence for the defence is closed, except in a matter arising unexpectedly<sup>3</sup>, and only where no injustice or prejudice could be caused to the defendant<sup>4</sup>. Once the summing up is concluded, no further evidence ought to be introduced to the jury<sup>5</sup> except in very exceptional circumstances in favour of the defence<sup>6</sup>.

The trial judge is entitled to ask a witness, at any stage of the proceedings, questions directed to ascertain whether he has a sense of responsibility and of the obligations imposed by an oath<sup>7</sup>.

1 The power should be exercised sparingly: *R v Roberts* (1984) 80 Cr App Rep 89, CA.

2 *R v Chapman* (1838) 8 C & P 558; *R v Holden* (1838) 8 C & P 606; *R v Liddle* (1928) 21 Cr App Rep 3, CCA; *R v McMahon* (1933) 24 Cr App Rep 95, CCA; *R v Wallwork* (1958) 42 Cr App Rep 153, CCA; *R v Roberts* (1985) 80 Cr App Rep 89, CA; *R v Coleman* (1987) Times, 21 November, CA. The judge is not entitled to call remaining prosecution witnesses after refusing to allow discontinuance of the prosecution by the prosecution: *R v Grafton* [1993] QB 101, 96 Cr App Rep 156, CA.

3 As to evidence in rebuttal see PARA 1316 ante. See also *R v Howarth* (1918) 13 Cr App Rep 99, CCA (recall after summing up; cross-examination); *R v Liddle* (1928) 21 Cr App Rep 3, CCA (alibi); *R v McMahon* (1933) 24 Cr App Rep 95, CCA (defamatory libel; questions put after defence suggesting words complained of were true); *R v Day* [1940] 1 All ER 402, 27 Cr App Rep 168, CCA (forgery; evidence of handwriting expert called after defence); *R v Davis* (1960) 44 Cr App Rep 235, CCA (communication between clerk and jury); *R v Cleghorn* [1967] 2 QB 584, 51 Cr App Rep 291, CA; cf *R v Tregear* [1967] 2 QB 574, 51 Cr App Rep 280, CA.

4 *R v Cleghorn* [1967] 2 QB 584, 51 Cr App Rep 291, CA (applying *R v Harris* [1927] 2 KB 587, 20 Cr App Rep 86, CCA).

5 *R v Owen* [1952] 2 QB 362, 36 Cr App Rep 16, CCA; *R v Wilson* (1957) 41 Cr App Rep 226, CCA; *R v Gearing* [1968] 1 WLR 344n, 50 Cr App Rep 18, CCA; *R v Lawrence* [1968] 1 All ER 579, 52 Cr App Rep 163, CA; *R v Corless* (1972) 56 Cr App Rep 341, CA; cf *R v Nixon* [1968] 2 All ER 33, 52 Cr App Rep 218, CA. As to the right of the trial judge to recall a witness for the prosecution after a submission of no case to answer on behalf of the defence see *R v Sullivan* [1923] 1 KB 47, 16 Cr App Rep 121, CCA; *R v McKenna* (1956) 40 Cr App Rep 65, CCA. See also *R v Higgins* (1989) Times, 16 February, CA (improper for trial judge to allow jury to take knife into retiring room in order to conduct experiment; this amounted to introduction of new matter into the trial without notice to the defence; conviction quashed); and see PARA 1332 note 2 post.

6 *R v Sanderson* [1953] 1 All ER 485, 37 Cr App Rep 32, CCA. See also *R v Nixon* [1968] 2 All ER 33, 52 Cr App Rep 218, CA (inspection by jury after summing up at request of defence); cf *R v Lawrence* [1968] 1 All ER 579, 52 Cr App Rep 163, CA (inspection by jury after summing up; conviction quashed). As to inspections and views by the jury see PARA 1326 post.

7 *R v Wilson* (1924) 18 Cr App Rep 108, CCA.

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#### **(iv) The Summing Up**

##### **1319. Judge's summing up.**

At the close of counsel's speeches<sup>1</sup> the trial judge sums up the case to the jury, reminding it of the case on each side and giving it directions on the matters in issue and on the points of law applicable<sup>2</sup>, and such other assistance as may help it to reach a verdict. The summing up must be neutral; it must reflect the case which has been put to the jury as a balanced whole<sup>3</sup>. Every summing up must be regarded in the light of the course and conduct of the trial and the matters raised by counsel for the prosecution and the defence respectively<sup>4</sup>. The guidelines in the specimen directions drawn up by the Judicial Studies Board have been commended by the Court of Appeal to those who have to try criminal cases<sup>5</sup>. A summing up does not follow a stereotyped pattern, nor need it contain any set form of words. Every case has its own features and the summing up must be related to its features and to its particular problems<sup>6</sup>. The specimen directions of the Judicial Studies Board often require an adaptation to the circumstances of a particular case and, above all, are not intended to offer solutions to vexed questions of law<sup>7</sup>.

In a complicated case there is no objection to the judge splitting his summing up into parts and taking verdicts in relation to each part as he proceeds, although this course is unusual<sup>8</sup>. Occasionally, in a complicated case it can be advantageous for a judge to supplement his summing up by giving the jury written directions or questions<sup>9</sup>. He should give such directions or questions to counsel for consideration in ample time before closing speeches, to enable counsel to invite the judge to correct any errors and to enable them to fashion their closing speeches with the proposed directions in mind, and he should use them as an integral part of the summing up, referring the jury to them as he deals with the points orally<sup>10</sup>.

In a lengthy and complicated case it is incumbent on the judge to deal with the evidence; conversely, however, in a case which has not occupied a great deal of time and in which the issue of guilt or innocence can be simply and clearly stated, it is not a fatal defect in the summing up that the evidence has not been discussed<sup>11</sup>.

It is the duty of the trial judge to ensure that members of the jury understand that responsibility for the verdict is theirs and not his<sup>12</sup>. Subject to that consideration, the judge is entitled to make such comments on the evidence as he thinks proper, whether in favour of the prosecution or of the defence<sup>13</sup>; but he must strike a fair balance between the prosecution case and the defence case<sup>14</sup>. The judge should not comment on the consequences of the conviction<sup>15</sup>, but if he does this will not necessarily make the conviction unsafe<sup>16</sup>.

The fact that on the evidence, including the evidence of the defendant himself, only one verdict is possible, does not justify the trial judge in directing the jury to convict; he may give the defendant an opportunity, in the absence of the jury, to change his plea; but, if the defendant maintains his plea, he is entitled to the verdict of a jury even though an acquittal would seem perverse to the judge, and the judge's language, however strong, must fall short of a direction to convict<sup>17</sup>.

When summing up in a case involving disputed identity, the judge should:

- 2136 (1) warn the jury of the special need for caution before convicting on the evidence of identification;
- 2137 (2) direct the jury to examine closely the circumstances in which the identification was made;
- 2138 (3) leave the identification evidence to the jury only where the quality of the evidence is good; where the quality is not good and there was no evidence to support the evidence of identification, the judge should withdraw the case from the jury and order an acquittal;
- 2139 (4) identify to the jury the evidence capable of supporting the evidence of identification, which need not be corroborative evidence in the strict legal sense;
- 2140 (5) explain the circumstances in which a rejected alibi could amount to support for identification evidence<sup>18</sup>.

Failure to follow these guidelines may lead to a conviction being quashed<sup>19</sup>. A direction to the effect that the fact that an alibi is false does not mean that a defendant is guilty is not an essential part of the summing up whenever an alibi is questioned<sup>20</sup>.

The judge is entitled to comment on any matter given in evidence; he is not limited to the matters argued by counsel<sup>21</sup>. Thus, for example, the judge may refer to any defence to the charge which is raised on the evidence, even though it has not been relied on by defence counsel<sup>22</sup> and even though this may affect the line of argument adopted by the defence<sup>23</sup>.

A judge should put a defence requiring proof by the defendant to the jury in the face of defence objections only in rare and exceptional circumstances<sup>24</sup>.

If he is to introduce an issue into the summing up which has not been actively canvassed in the course of the hearing, a judge should at least give ample warning of his intention so to do to counsel in the absence of the jury before addresses are begun, so that there can be discussion between the judge and counsel as to the rightness of the course to be adopted by the judge, and an opportunity given to counsel to deal with the issue in their addresses to the jury<sup>25</sup>.

Prosecuting counsel is under a duty to draw any possible errors or omissions (of fact or of law) to the judge's attention at the close of the summing up<sup>26</sup>. Defence counsel is not so obliged<sup>27</sup>, and if he remains silent and then takes the point on appeal the appeal will not necessarily be dismissed<sup>28</sup>.

When, after the retirement of the jury, counsel wishes to draw the judge's attention to an omission in the summing up, the matter should be raised and discussed and decided in open court in the presence of the shorthand writer<sup>29</sup>.

1 See PARA 1317 ante.

2 It is usually necessary for the judge to give a direction as to the elements of the offence: *R v James* [1997] Crim LR 598, CA.

3 *R v Bryant* [2005] EWCA Crim 2079, [2005] 9 Archbold News 3.

4 See the observations of Lord Morris of Borth-y-Gest in *Arthurs v A-G for Northern Ireland* as reported in (1970) 55 Cr App Rep 161 at 170, HL, and also in *McGreevy v DPP* [1973] 1 All ER 503 at 510-511, 57 Cr App Rep 424 at 431, HL.

5 *R v Jackson* [1992] Crim LR 214, CA.

6 See the observations of Lord Morris of Borth-y-Gest in *Arthurs v A-G for Northern Ireland* as reported in (1970) 55 Cr App Rep 161 at 170, HL, and also in *McGreevy v DPP* [1973] 1 All ER 503 at 510-511, 57 Cr App Rep 424 at 431, HL.

7 *R v Jackson* [1992] Crim LR 214, CA.

8 *R v Newland* [1954] 1 QB 158, 37 Cr App Rep 154, CCA; *R v Simmonds* [1969] 1 QB 685, 51 Cr App Rep 316, CA; *R v Houssein* (1980) 70 Cr App Rep 267, CA. Cf *R v Neal* [1949] 2 KB 590, 33 Cr App Rep 189, CCA; and see PARA 1323 post.

9 The judge is entitled to decline the jury's request for written directions: *R v Lawson* [1998] Crim LR 883, CA.

10 *R v McKechnie*, *R v Gibbons*, *R v Dixon* (1991) 94 Cr App Rep 51, CA. The same applies where the judge proposes to dictate the directions or questions to the jury: *R v Wright* [2000] Crim LR 510, CA.

11 *R v Attfield* [1961] 3 All ER 243, 45 Cr App Rep 309, CCA. See *R v Amado-Taylor* [2000] 2 Cr App Rep 189 (conviction considered unsafe where judge failed to review the evidence given over a five-day period). In all cases, however simple the facts, it is incumbent upon the trial judge to direct the jury in clear, unequivocal terms as to the law and to remind the jury as to the facts: *R v O'Meara* (1989) Times, 15 December, CA. It is a dangerous practice to read out passages from the statements as if they were the evidence given at the trial: *R v Blewitt*, *R v Hopkins* (1966) 110 Sol Jo 829, [1967] Crim LR 61, CA; and see *R v Thompson* [1966] 1 All ER 505, 50 Cr App Rep 91, CCA. Brevity in summing up is a virtue, not a vice: *R v Farr* (1998) 163 JP 193, CA. See also *R v Causley* [1999] Crim LR 572, CA.

12 See eg *Broadhurst v R* [1964] AC 441 at 457, 459, [1964] 1 All ER 111 at 119, 121, PC.

13 *R v O'Driscoll* as reported in [1968] 1 QB 839 at 844, CA, per Lawton J.

14 *R v Wood* [1996] 1 Cr App Rep 207, CA; *R v Bentley* [2001] 1 Cr App Rep 307, CA; *R v Farr* (1998) 163 JP 193, CA. As to directions on the burden of proof see PARA 1320 post; as to putting the defence see PARA 1321 post; as to dealing with a confessional statement see PARA 1543 et seq post; and as to summing up in a case involving a number of defendants see PARA 1323 post.

15 *R v Milligan* (1989) Times, 11 March, CA.

16 *R v Peart* (1992) 157 JP 917, CA.

17 *R v Gent* [1990] 1 All ER 364, 89 Cr App Rep 247, CA; and see *DPP v Stonehouse* [1978] AC 55, 65 Cr App Rep 192, HL; *R v Wang* [2005] UKHL 9, [2005] 1 All ER 782, [2005] 2 Cr App Rep 136. No distinction is to be drawn between cases where the burden of proof lies on the prosecution in respect of the matter in issue and those where the burden of proof lies on the defence: *R v Wang* supra. Whilst there are no circumstances in which a judge is entitled to direct a jury to return a verdict of guilty, *R v Wang* supra does not support the proposition that in every case where a judge has given a direction to convict, the conviction must automatically be considered unsafe: *R v Caley-Knowles*, *R v Jones* [2006] All ER (D) 213 (Jun), CA.

18 *R v Turnbull* [1977] QB 224, 63 Cr App Rep 132, CA; and see *R v Allan*, *R v Willis* (1990) Times, 2 January, CA. See further PARA 1458 post. The guidelines from *R v Turnbull* supra should be adapted for voice identification cases: *R v Hersey* [1998] Crim LR 281, CA; *R v Gummerson*, *R v Steadman* [1999] Crim LR 680, CA.

19 *R v Hunjan* (1978) 68 Cr App Rep 99, CA; *R v Keane* (1977) 65 Cr App Rep 247, CA.

20 *R v Penman* (1985) 82 Cr App Rep 44, CA.

21 *R v Evans* (1990) 91 Cr App Rep 173, CA.

22 *R v Kachikwu* (1968) 52 Cr App Rep 538 at 543, CA, per Winn LJ; *R v Cascoe* [1970] 2 All ER 833, 54 Cr App Rep 401, CA; *R v Courtneil* [1990] Crim LR 115, CA; *R v Cambridge* [1994] 2 All ER 760, 99 Cr App Rep 142, CA. See also *R v Williams* (1994) 99 Cr App Rep 163, CA.

23 *Von Starck v R* [2000] 1 WLR 1270, PC.

24 *R v Thomas* (1996) 29 BMLR 120, CA.

25 *R v Cristini* [1987] Crim LR 504, CA; *R v Feeny* (1992) 94 Cr App Rep 1, CA; *T v Goldman* [1997] Crim LR 894, CA; *R v Ramzan (Mohammed)* [1998] 2 Cr App Rep 328, CA; and see *R v White* [1987] Crim LR 505, CA. This approach applies also when the jury has been deliberating for a considerable time: *R v Gascoigne* [1988] Crim LR 317, CA. See also *R v Wright* [1992] Crim LR 596, CA (where judge indicates he will follow a particular course when summing up and then changes his view, he must give counsel the opportunity to make representations before summing up).

As to when the judge should give the jury a direction including a basis for conviction different from that set out by the prosecution see *R v Falconer-Attlee* (1973) 58 Cr App Rep 348, CA; *R v Warburton-Pitt* (1991) 92 Cr App Rep 136, CA; *R v Japes* [1994] Crim LR 605, CA; *R v Hembling* [2005] EWCA Crim 200, [2005] Crim LR 586, CA.



26 *R v Donoghue* (1987) 86 Cr App Rep 267, CA. See also Code of Conduct for the Bar of England and Wales (8th Edn, 2004); Bar Council Miscellaneous Guidance: Bar Council's Written Standards for the Conduct of Professional Work (Standards Applicable to Criminal Cases) PARA 11.7.

27 *R v Cocks* (1976) 63 Cr App Rep 79, CA; *R v Edwards (NW)* (1983) 77 Cr App Rep 5, CA; *R v Curtin* [1996] Crim LR 831, CA. Cf *R v L* (2001) Times, 9 February, CA, where a contrary view was taken without reference to any authorities.

28 *R v Holden* [1991] Crim LR 478, CA.

29 *R v Whitehead* (1989) Times, 17 May, CA. As to the retirement of the jury see PARA 1331 et seq post.

## **UPDATE**

### **1319 Judge's summing up**

NOTE 3--See *R v Cole* [2008] EWCA Crim 3234, [2008] All ER (D) 181 (Dec) (judge expressing hostility towards defence counsel); *R v Leon* [2009] EWCA Crim 839, [2009] RTR 345, [2009] All ER (D) 53 (May) (unclear summary of defence expert's evidence).

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### **1320. Directions on burden and standard of proof.**

The summing up must contain an adequate direction as to the burden and standard of proof<sup>1</sup>; and this is so whether or not counsel have dealt with either matter in addressing the jury<sup>2</sup>. It is usually best to deal with the burden and standard of proof towards the start of the summing up<sup>3</sup>. No particular form of words is mandatory or sacrosanct<sup>4</sup>, and directions must where necessary be tailored to the circumstances of the case, but judges are well advised to follow where possible the form of direction suggested by the Judicial Studies Board<sup>5</sup>.

In the usual kind of case where the entire burden of proof rest upon the prosecution, the direction should state this fact and emphasise that the defendant does not have to prove his innocence<sup>6</sup>. Where the defendant relies upon an alibi, mistake or accident in order to deny the offence, or relies upon an affirmative defence (such as self-defence, provocation or duress) on which he does not incur any persuasive burden of proof, it must be emphasised to the jury that it is for the prosecution to negative or disprove such a denial or defence and not for the defendant to convince them of its truth<sup>7</sup>.

The jury should be told that the prosecution must succeed in proving the defendant's guilt so that the jury is 'sure' of it (or sure 'beyond reasonable doubt'<sup>8</sup>), and that 'nothing less than that will do'. It is rarely advisable for a judge to attempt any explanation as to what is meant by being 'sure' or what amounts to a 'reasonable doubt'<sup>9</sup>.

In cases where the defendant bears a persuasive burden of proof (for example, in respect of a defence such as insanity or diminished responsibility), a more elaborate direction will be required<sup>10</sup>. The judge must first explain the need for the prosecution to prove those facts upon which it still bears the burden of proof. The jury should then be directed that if, and only if, it is sure of those matters, it must go on to consider whether the defendant can prove his defence on all the evidence. The judge must at this point explain the lower standard of proof which applies to the defence<sup>11</sup>.

The judge should direct the jury in every case on the need for unanimity, while at the same time informing the jury in the approved formula<sup>12</sup> of the possibility of returning a majority verdict<sup>13</sup> where certain circumstances arise<sup>14</sup>.

1 *R v Attfield* [1961] 3 All ER 243, 45 Cr App Rep 309, CCA; *R v Lang-Hall* (1989) Times, 24 March, CA. As to the burden and standard of proof see PARA 1368 et seq post. As to limited circumstances in which conviction may exceptionally be upheld, notwithstanding a failure to direct the jury adequately on the burden of proof, see *R v Edwards* (1983) 77 Cr App Rep 5, CA; cf *R v Slinger* (1961) 46 Cr App Rep 244, CCA; *R v Sparrow* (1961) 46 Cr App Rep 288, CCA.

2 *R v Blackburn* (1955) 39 Cr App Rep 84n, CCA.

3 See *R v Yap Chuan Ching* (1976) 63 Cr App Rep 7 at 9, CA. There is no particular magic in the order in which topics are covered: judges must assess the order which is most appropriate for the specific case in hand (Judicial Studies Board, Crown Court Bench Book: Specimen Directions).

4 *R v Blackburn* (1955) 39 Cr App Rep 84n, CCA. See also *R v Kritz* [1950] 1 KB 82, 33 Cr App Rep 169, CCA; *R v Hepworth and Fearnley* [1955] 2 QB 600, 39 Cr App Rep 152, CCA; *Walters v R* [1969] 2 AC 26, [1969] 2 WLR 60, PC.

5 See the Crown Court Bench Book: Specimen Direction No 2.

6 As to the inclusion within a summing up of comment on a defendant's failure to testify in his defence or call particular witnesses see PARA 1557 post.

7 'If there is any danger of the jury thinking that an alibi, because it is called a defence, raises some burden on the defence to establish it, then clearly it is the duty of the judge to give a specific direction to the jury in regard to how they should approach the alibi': *R v Wood (No 2)* (1967) 52 Cr App Rep 74 at 78, CCA, per Lord Parker CJ. See also *R v Cameron* [1973] Crim LR 520, CA; *R v Abraham* [1973] 3 All ER 694, [1973] 1 WLR 1270, CA; *R v Williams* [1987] 3 All ER 411, 78 Cr App Rep 276, CA; *R v McPherson* (1957) 41 Cr App Rep 213, CCA; *R v Cascoe* [1970] 2 All ER 833, 54 Cr App Rep 401, CA.

8 It is not usually necessary to use the phrase 'beyond reasonable doubt'. Where, however, it has already been used in the trial (eg by counsel in speeches to the jury), it is desirable to give the following direction: 'the prosecution must make you sure of guilt, which is the same as proving the case beyond reasonable doubt' (Crown Court Bench Book: Specimen Direction No 2).

9 See *R v Yap Chuan Ching* (1976) 63 Cr App Rep 7 at 11, CA ('If judges stopped trying to define that which is almost impossible to define there would be fewer appeals'); *R v Stephens* [2002] All ER (D) 34 (Jun), (2002) Times, 27 June, CA (in which the Court of Appeal advised that it was unhelpful for a judge to distinguish between being 'sure' and being 'certain'). It is apparently permissible to tell a jury that a reasonable doubt is the sort of doubt that might affect the mind of a person dealing with matters of importance in his own affairs: *Walters v R* [1969] 2 AC 26; *R v Gray* (1973) 58 Cr App Rep 177, CA; *R v Stephens* supra. For an alternative explanation of the criminal standard of proof see *Miller v Ministry of Pensions* [1947] 2 All ER 372 at 373 per Denning J.

10 As to the circumstances in which the defence bears a persuasive burden of proof see PARA 1370 post. Where issues of both insanity and automatism arise, the summing up should distinguish these issues, particularly with regard to the different burdens of proof that are involved. See *R v Burns* (1973) 58 Cr App Rep 364, CA.

11 A possible formula to adopt here is: 'He does not have to make you sure of it. He has to show that it is probable, which means it is more likely than not, that eg he had reasonable excuse etc for doing it. If you decide that probably he did [eg have a reasonable excuse etc for doing it], you must find him Not Guilty. If you decide that he did not, then providing that the prosecution has made you sure of what it has to prove, you must find him Guilty': Crown Court Bench Book: Specimen Direction No 2.

12 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, CA, states: 'Before the jury retire . . . the judge should direct the jury in some such words as the following: 'As you may know, the law permits me, in certain circumstances, to accept a verdict which is not the verdict of you all. Those circumstances have not as yet arisen, so that when you retire I must ask you to reach a verdict upon which each one of you is agreed. Should, however, the time come when it is possible for me to accept a majority verdict, I will give you a further direction: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.46.1, CA.

13 See PARAS 1340-1342 post.

14 *McGreevy v DPP* [1973] 1 All ER 503, 57 Cr App Rep 424, HL.

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### **1321. Putting the defence and other possible defences.**

The summing up must fairly and adequately identify and put the defence before the jury<sup>1</sup>, and the jury must not agree on a guilty verdict before hearing what the judge has to say about the defence<sup>2</sup>.

Whatever may be the line of defence adopted by counsel, the trial judge should ordinarily put to the jury any possible defences as appear to arise on the evidence, even though they were not adduced or relied upon by counsel<sup>3</sup>. This may mean directing the jury on a partial defence, such as provocation on a charge of murder, when the defendant has denied any responsibility for or involvement in the offence<sup>4</sup>. Only in rare and exceptional cases, however, should the judge introduce before the jury an 'alternative' defence on which the defendant bears the persuasive burden of proof<sup>5</sup>.

In cases where there is a conflict between the defence statement and the defendant's evidence at trial, a specific direction must be given by the judge to the jury on how to approach that inconsistency<sup>6</sup>.

1 *R v Dinnick* (1909) 3 Cr App Rep 77, CCA; *R v Hill* (1911) 7 Cr App Rep 26, 105 LT 751, CCA; *R v Totty* (1914) 10 Cr App Rep 78, 111 LT 167, CCA; *R v Immer*, *R v Davis* (1917) 13 Cr App Rep 22, 118 LT 416, CCA; *R v Rosen* (1931) 23 Cr App Rep 70, CCA; *R v Mills* (1935) 25 Cr App Rep 138, CCA; *R v Badjan* (1966) 50 Cr App Rep 141, CCA; *R v Hamilton* [1972] Crim LR 266, CA; *R v Marr* (1989) 90 Cr App Rep 154, [1989] Crim LR 743, CA; *R v Farr* (1998) 163 JP 193, CA; *R v Curtin* [1996] Crim LR 831, CA (judge's failure to refer to defendant's answers to questions on a crucial issue during police interview); *R v Amado-Taylor* [2000] 2 Cr App Rep 189, CA (judge's failure to review evidence, which supported defendant's defence); *Nicholls v R* [2000] All ER (D) 2305, PC. Where the defendant claims to have suffered a loss of memory concerning the events in question, the direction must specifically address this issue: *R v Podola* [1960] 1 QB 325 at 356, [1959] 3 All ER 418 at 433, CCA, per Lord Parker CJ; *Broadhurst v R* [1964] AC 441, [1964] 1 All ER 111.

2 *R v Young* [1964] 2 All ER 480, 48 Cr App Rep 292, CCA (conviction quashed where foreman of jury announced at end of summing up that jury had already made up their mind as to the defendant's guilty).

3 *Palmer v R* [1971] AC 814, 55 Cr App Rep 223, PC; *R v Bonnick* (1977) 66 Cr App Rep 266, 121 Sol Jo 791, CA. Evidence supporting such a defence (ie discharging the evidential burden) may come from prosecution witnesses. In some cases, however, it may first be appropriate for the judge to ascertain from defence counsel whether he has any objection to the giving of such a direction: *R v Groark* [1999] Crim LR 669, CA.

4 *Bullard v R* [1957] AC 635, 42 Cr App Rep 1, PC; *R v Hopper* [1915] 2 KB 431, 11 Cr App Rep 136, CCA; *R v Thorpe* (1925) 18 Cr App Rep 189, 133 LT 95, CCA; *R v Porritt* [1961] 3 All ER 463, 45 Cr App Rep 348, CCA; *R v Cambridge* [1994] 1 WLR 971, 99 Cr App Rep 142, CA; *DPP (Jamaica) v Bailey* [1995] 1 Cr App Rep 257, PC; *R v Dhillon* [1997] 2 Cr App Rep 104, CA; *R v Rossiter* [1994] 2 All ER 752, 95 Cr App Rep 326, CA. As to cases involving only feeble, implausible or speculative evidence of the alternative defence see *R v Wellington* [1993] Crim LR 616, CA; *R v Miao* [2003] EWCA Crim 3486, [2003] All ER (D) 218 (Nov).

5 *R v Thomas* [1995] Crim LR 314, CA; *R v Dickie* (1984) 79 Cr App Rep 213 at 218, CA, per Watkins LJ. Contrast the duty of the judge to rule on whether evidence relied on by the defence actually raises the defence of insanity as a matter of law.

6 *R v Wheeler* [2000] All ER (D) 914, 164 JP 565, CA. As to inferences that may be drawn by the jury see the Criminal Procedure and Investigations Act 1996 s 11(3)(b) (as substituted; prospectively substituted); and PARA 1393 post.

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**1322. Other directions.**

The judge's direction may have to refer to other matters as appropriate<sup>1</sup>.

<sup>1</sup> Examples include directions relating to the defendant's good character (if he has one) or to the defendant's failure to testify. See PARA 1359 et seq post.

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### **1323. Summing up in case of a number of defendants.**

In a case involving a number of defendants, the judge, in summing up, should carefully distinguish between the cases of each<sup>1</sup>. Where the jury hears a confession by a defendant which implicates a co-defendant, the judge must also impress upon the jury the fact that the statement of any one defendant not made on oath in the course of the trial is not evidence against any other and must be entirely disregarded<sup>2</sup>.

Where one defendant gives evidence at the trial which implicates another, the jury should at least be warned of the special need for caution in respect of such evidence because a co-defendant's evidence may be motivated by self-interest<sup>3</sup>.

In a long and complex case with a number of defendants the judge may sum up the case against each and allow the jury to retire to consider its verdict in respect of each separately, returning to hear the summing up in respect of the next defendants and then again retiring<sup>4</sup>. This practice should not, however, be followed where it may be unfair to one or more of the defendants<sup>5</sup>.

1 *R v MacDonald* (1928) 21 Cr App Rep 33, CCA.

2 *R v Gunewardene* [1951] 2 KB 600 at 610, 35 Cr App Rep 80 at 91, CCA, per Lord Goddard CJ. See also PARA 1549 post.

3 *R v Knowlden, R v Knowlden* (1983) 77 Cr App Rep 94, CA; *R v Cheema* [1994] 1 All ER 639, 98 Cr App Rep 195, CA; *R v Jones, R v Jenkins* [2003] EWCA Crim 1966, [2004] 1 Cr App Rep 60. Many or most cases where defendants give evidence against each other would require four directions: (1) the jury should consider the case for and against each defendant separately; (2) the jury should decide the case on all the evidence, including the evidence of each defendant's co-defendant; (3) when considering the evidence of a co-defendant, the jury should bear in mind that he might have an interest to serve or, as it is often put, an axe to grind; and (4) the jury should assess the evidence of co-defendants in the same way as that of the evidence of any other witness in the case: *R v Jones, R v Jenkins* supra.

4 See PARA 1319 text to note 8 ante.

5 See *R v Wooding* (1979) 70 Cr App Rep 256, CA. Unfairness is likely in nearly all cases where a number of defendants are charged with the same offence and there is a divided summing up: *R v Wooding* supra.

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## **(v) Temporary Retirement of Jury; View by Jury**

### **1324. Temporary retirement of jury.**

Whether or not a submission<sup>1</sup> made during the trial is to be heard in the absence of the jury is a matter for the judge to decide<sup>2</sup>.

<sup>1</sup> Eg as to the admissibility of evidence: see PARA 1306 ante.

<sup>2</sup> *R v Hendry* (1988) 88 Cr App Rep 187, CA. As to evidence given in the absence of the jury see PARA 1325 post.

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### **1325. Evidence in the absence of jury.**

It should be regarded as most exceptional that any evidence should be given in a trial otherwise than in the presence of the jury<sup>1</sup>. There are exceptions to this rule, notably that the judge may order that any evidence with regard to whether a confession was properly made ought to be given in the absence of the jury, whether or not the defence consents to this<sup>2</sup>. Any question arising in legal proceedings relating to the interpretation or effect of European Community provisions is to be treated as a question of law, whether it is one or not, and therefore is for determination by the judge alone and may be heard in the absence of the jury<sup>3</sup>.

Where the trial judge wishes to commend a witness for his actions in connection with the offence being tried, or to reward a witness by ordering<sup>4</sup> a payment of money to him out of public funds, he should do so in the absence of the jury<sup>5</sup>.

1 *R v Reynolds* [1950] 1 KB 606 at 611, 34 Cr App Rep 60 at 64, CCA, per Lord Goddard CJ.

2 *R v Davis* [1990] Crim LR 860, CA. As to the obligations of counsel see *Mitchell v R* [1998] AC 695, [1998] 2 Cr App Rep 35, PC; and as to the admissibility of confessions generally see PARA 1542 et seq post. Other exceptions to the rule that evidence should be given in the presence of the jury relate eg to the admissibility of identification evidence (see PARA 1457 post) or of *res gestae* statements (see PARA 1530 post), whether the jury should be directed that it may draw adverse inferences against a defendant who fails to give evidence (see PARA 1555 post) and the questioning by the judge of a hostile or unwilling witness (see PARA 1436 post). By statute, the competence of a witness must be determined in the absence of the jury: Youth Justice and Criminal Evidence Act 1999 s 54(4). See also *R v Sutton* [1969] 1 All ER 928, 53 Cr App Rep 269, CA (alleged misconduct of defendant's solicitors with regard to notice of alibi); *R v Stevenson*, *R v Hulse*, *R v Whitney* [1971] 1 All ER 678, 55 Cr App Rep 171; *R v Robson*, *R v Harris* [1972] 2 All ER 699, 56 Cr App Rep 450 (authenticity of tape-recording for purpose of determining its admissibility); *R v Rimmer* [1972] 1 All ER 604, 56 Cr App Rep 196, CA (admissibility of plea of guilty in other proceedings).

3 *R v Goldstein* [1983] 1 All ER 434, [1983] 1 WLR 151, HL.

4 Ie under the Criminal Law Act 1826 s 28 (as amended): see PARA 2057 post.

5 *R v Newman* (1990) 154 JP 113, [1990] Crim LR 203, CA; and see *R v Haigh* [1981] Crim LR 263, CA; *R v Spiteri* [1981] Crim LR 419, CA.



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### **1326. View by jury.**

The jury may have a view of the locus in quo<sup>1</sup> at any time during the trial if the trial judge thinks that a view would be of service to the jury<sup>2</sup>. All participating members of the court (that is, the judge, the jury, the parties<sup>3</sup>, their counsel and the shorthand writer) should be present at a view, and the judge should be present to control proceedings, whether it is a simple view without witnesses being present or a view with witnesses present who give evidence<sup>4</sup> or a demonstration<sup>5</sup>. All members of the jury must be present; it is an irregularity for one or some jurors to attend a view<sup>6</sup>. The irregular conduct of a view or inspection may vitiate a trial<sup>7</sup>.

1 Criminal Procedure Rules may make provision as respects views by jurors; and the places to which a juror may be called on to go to view cannot be restricted to any particular county or other area: Juries Act 1974 s 14 (amended by the Courts Act 2003 s 109(1), Sch 8 para 173). At the date at which this volume states the law no such provision had been made.

2 *Anon* (1815) 2 Chit 422; *R v Whalley* (1847) 2 Car & Kir 376; *R v Martin* (1872) LR 1 CCR 378. Care must be taken not to infringe the rule against the introduction of new evidence after the conclusion of the summing up: see *R v Martin* supra; *R v Gearing* [1968] 1 All ER 581n, 50 Cr App Rep 18, CCA; *R v Lawrence* [1968] 1 All ER 579, 52 Cr App Rep 163, CA; *R v Nixon* [1968] 2 All ER 33, 52 Cr App Rep 218, CA; and see PARA 1318 ante.

3 The defendant should generally be present also, but, if he declines to be so, the view may proceed without him: *Karamat v R* [1956] AC 256, 40 Cr App Rep 13, PC. As to the importance of the presence of the defendant see *R v Ely Justices, ex p Burgess* [1992] Crim LR 888, DC.

4 Witnesses may give such demonstrations and answer such questions as the judge allows; but they must then be recalled for further cross-examination since what happens at a view or inspection is part of the evidence: *Karamat v R* [1956] AC 256, 40 Cr App Rep 13, PC. Witnesses who have given evidence may be present but the judge should ensure that they do not communicate with the jury: *Karamat v R* supra. See also note 2 supra.

5 *R v Hunter* [1985] 2 All ER 173, 81 Cr App Rep 40, CA (applying *Tameshwar v R* [1957] AC 476, 41 Cr App Rep 161, PC); *R v Albarus, R v James* [1989] Crim LR 905, CA.

6 *R v Gurney* [1976] Crim LR 567, CA; *R v Albarus, R v James* [1989] Crim LR 905, CA.

7 *R v Hunter* [1985] 2 All ER 173, 81 Cr App Rep 40, CA (judge absent from view; appeal allowed); *R v Albarus, R v James* [1989] Crim LR 905, CA (any view 'useless and irrelevant' in circumstances of the case; appeal dismissed); *R v Smyth, R v Aspinall, R v Aspinall* (1998) Times, 16 September, CA (visit by juror to scene of crime in order to ascertain colour of street lighting; such colour not relevant to any significant issue in case; appeal dismissed (see PARA 1877 post)).

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## (vi) Adjournment of Trial

### 1327. Adjournment and separation of jury.

The court may adjourn the hearing of a criminal case from day to day or for part of a day<sup>1</sup>.

During such adjournments, the judge may, if he thinks fit, permit members of the jury to separate at any time<sup>2</sup>. On the first occasion when members of the jury separate, the judge should warn them not to talk about the case to anyone outside their number<sup>3</sup>.

The judge must not make public comments outside the court about the case since such comments are likely to be seen or heard by the jury<sup>4</sup>.

1 *R v Castro* (1874) LR 9 QB 350 at 356; *R v Hardy* (1794) 24 State Tr 199, 418. The hearing may be adjourned for the attendance of witnesses or the production of evidence: see *R v Wenborn* (1842) 6 Jur 267; *R v Foster* (1848) 3 Car & Kir 201; *R v Fernandez* (1861) 2 F & F 862n; *R v Tempest* (1858) 1 F & F 381; *R v Jackson* (1919) 83 JP 196, CCA. See, however, *R v Parr* (1862) 2 F & F 861; *R v Robson* (1864) 4 F & F 360. Refusal of an adjournment is a course to be followed with great caution where a defence witness is unavailable if the witness might have significant evidence to give and if the unavailability of the witness is due to no fault on the part of the defendant and his advisers: *R v Ealing Justices, ex p Avondale* [1999] Crim LR 840, DC. See also *R v Bradford Justices, ex p Wilkinson* [1990] 2 All ER 833, 91 Cr App Rep 390, DC; *R v Bristol Magistrates' Court, ex p Rowles* [1994] RTR 40, DC; *R v Guildford Crown Court, ex p Flanighan* [2000] 3 Archbold News 2, DC. See also *R v Johnson* [1973] 3 WWR 513, BC CA (where it was held that to refuse a defendant an adjournment to enable him to engage counsel was to deny him the right to a proper hearing); *R v Rowley* (1968) 112 Sol Jo 800, CA (an unrepresented defendant must be given adequate time to acquaint himself with the case); *Monteath v HM Advocate* 1965 JC 14 (the court is not bound to adjourn on withdrawal of the defendant's professional adviser); *R (on the application of Lappin) v Customs and Excise Comrs* [2004] EWHC 953 (Admin) (on the application to adjourn so that an expert can be instructed, the court is entitled to take into account the reason for earlier non-instruction when deciding whether to adjourn). As to bail during an adjournment see PARA 1304 ante.

Judges of the Crown Court may sit simultaneously to take any number of different cases in the same or in different places, and may adjourn cases from place to place at any time: Supreme Court Act 1981 s 78(2). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed.

There is no rigid rule which prohibits adjournment of a criminal case so as to await a change in the law; but a qualitative judgment that the existing law is wanting in justice is not a legitimate basis for ordering an adjournment: *R v Walsall Justices, ex p W (A Minor)* [1990] 1 QB 253, [1989] 3 All ER 460, DC.

The power to grant an adjournment must not be exercised in a manner which undermines the statute under which the proceedings are brought or in a way which deprives a litigant of rights conferred by that statute: *R v Dudley Magistrates' Court, ex p Hollis, Hollis v Dudley Metropolitan Borough Council, Probert v Dudley Metropolitan Borough Council* [1998] 1 All ER 759, [1998] Env LR 354, DC.

2 Juries Act 1974 s 13 (substituted by the Criminal Justice and Public Order Act 1994 s 43(1)). See *The People (A-G) v Heffernan (No 2)* [1951] IR 206; *R v Taylor* [1950] NI 57, CCA.

3 *R v Prime* (1973) 57 Cr App Rep 632, CA. Contact between a juror and an outsider during an adjournment does not affect the validity of a trial unless it is shown by acceptable evidence that an attempt has been made to tamper with the juror: *R v Prime* supra (distinguishing *R v Crippen* [1911] 1 KB 149, 5 Cr App Rep 255, CCA).

4 *R v Earnshaw* [1990] Crim LR 53, (1989) Times, 19 October, CA (conviction quashed in view of 'ill-advised publicity' given to such comments); *R v Batth* [1990] Crim LR 727, CA (conviction not quashed despite material

irregularity of apparently prejudicial comment as reported in newspaper, uncorrected by judge, because overwhelming evidence against defendant).

## **UPDATE**

### **1327 Adjournment and separation of jury**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

A judge should be cautious about refusing an application for adjournment where the defendant has failed to attend the first day of his trial: *R v Amrouchi* [2007] All ER (D) 342 (Nov), CA.

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## (vii) Discharge of Jury During Trial

### 1328. Power to discharge jury.

The trial judge may discharge the jury at any stage of the trial<sup>1</sup> if he should deem it proper on grounds of evident necessity<sup>2</sup>, and may swear a fresh jury and start the case again<sup>3</sup>. Whether or not to discharge the jury is a matter for the judge's discretion<sup>4</sup> on the particular facts of the case. If a judge decides not to discharge a jury when the issue arises, the Court of Appeal will not lightly interfere with the exercise of that discretion on an appeal against conviction<sup>5</sup>, nor may the judge's decision be challenged by judicial review<sup>6</sup>. Where the judge decides to discharge the jury, that decision is not open to review by the Court of Appeal<sup>7</sup> or on an application for judicial review<sup>8</sup>.

Even where the judge wrongly exercises his discretion, that fact is no bar to the defendant being tried again before another jury<sup>9</sup>.

1 Where a jury has to consider more than one verdict, the judge may discharge a juror even after the jury has delivered one or more of its verdicts; the remaining jurors may thereafter return valid verdicts: *R v Wood, R v Furey* [1997] Crim LR 229, CA.

2 4 Bl Com 360. A jury should not be discharged unless a high degree of need arises: *Winsor v R* (1866) LR 1 QB 389 at 390. The judge may discharge the jury even though neither party invites him to do so, and even if both parties submit that he should not: *R v Azam* [2006] EWCA Crim 161, [2006] All ER (D) 340 (Feb).

3 *R v Lewis* (1909) 2 Cr App Rep 180, CCA; *R v Kirke* (1909) 43 ILT 130. See also *R v Robinson* [1975] QB 508, 60 Cr App Rep 108, CA. As to the circumstances in which the need may arise see PARA 1329 post; and as to the effect of discharge see PARA 1330 post. As to the effect of the death or discharge of individual jurors see PARA 1299 ante.

4 As to considerations relevant to the exercise of the discretion see *R v Hambery* [1977] QB 924, 65 Cr App Rep 233, CA.

5 *R v Weaver* [1968] 1 QB 353, 51 Cr App Rep 77, CA; *R v Shuker, R v Shuker* [1998] Crim LR 906, CA; *R v Panayis* [1999] Crim LR 84, CA.

6 Judicial review does not lie against the Crown Court in respect of its jurisdiction on indictment: see the Supreme Court Act 1981 s 29(3) (amended by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, art 1). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed. See *Ex p Meredith* [1973] 2 All ER 234, 57 Cr App Rep 451, DC; *R v Smith* [1975] QB 531, [1974] 1 All ER 651, CA. See also PARA 2013 et seq post. As to a reference of a point of law by the Attorney General see PARA 1950 post.

7 *Winsor v R* (1866) LR 1 QB 389 at 390; *R v Lewis* (1909) 2 Cr App Rep 180, CCA; *R v Gorman* [1987] 2 All ER 435, 85 Cr App Rep 121, CA.

8 See note 6 supra.

9 *R v Lewis* (1909) 2 Cr App Rep 180, CCA; *Winsor v R* (1866) LR 1 QB 390. See also *Conway and Lynch v R* (1845) 7 IR 149; *R v Charlesworth* (1861) 1 B & S 460; *DPP v Nasralla* [1967] 2 AC 238, [1967] 2 All ER 161, PC.

## UPDATE

**1328 Power to discharge jury**

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

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### **1329. Reasons for discharge during trial.**

A jury may be discharged if any juror is guilty of misconduct<sup>1</sup>, and, in particular, if the jurors separate without the leave of the court<sup>2</sup>, eat or drink before the verdict at the expense of one of the parties<sup>3</sup>, hold communication with any person or receive evidence, oral or documentary, out of court<sup>4</sup>, determine their verdict by lot<sup>5</sup> or if a stranger was with them for a substantial time<sup>6</sup>.

It seems that it might be a good reason for discharging the jury<sup>7</sup> if undue pressure has been used to keep witnesses out of the way, or to influence them in giving or withholding their evidence or where witnesses are prevented from giving evidence by sudden accidents<sup>8</sup>. It is not a good ground for discharging a jury, however, that evidence for the Crown is not forthcoming or that a material witness for the Crown refuses to give evidence<sup>9</sup>; nor is it a sufficient ground for discharging a jury that a material adult witness is not sufficiently acquainted with the nature and obligation of an oath<sup>10</sup>.

The inadvertent admission of prejudicial evidence may result in the discharge of the jury<sup>11</sup>.

If counsel fails to apply for the jury to be discharged, that is not necessarily fatal to an appeal founded on improper admission of evidence, though it may bear on the question whether the defendant was really prejudiced; but it is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal<sup>12</sup>.

1 Trial judges should ensure that the jury is alerted to the need to bring any concerns about the behaviour of fellow jurors or of others affecting the jurors at the time and not to wait until the case is concluded: *Practice Direction (Criminal Proceedings: Consolidation)* [1992] 3 All ER 904, [1992] 2 Cr App Rep 533 at IV.42.6-IV.42.9, CA; *Practice Direction (Crown Court: Guidance to Jurors)* [2004] 1 WLR 665, [2004] 2 Cr App Rep 3 at IV.42.6-IV.42.9, CA. If there is an indication of an irregularity caused by extraneous influences (eg contact with other persons who may have passed on information which should not have been before the jury) which raises a reasonable suspicion, the judge must investigate the matter: see *R v Blackwell*, *R v Farley*, *R v Adams* [1995] 2 Cr App Rep 625, CA; *R v Oke* [1997] Crim LR 898, CA.

Where it is apparent that there is friction between members of a jury, so that the inference could be drawn that certain members of the jury might not be able to perform their duty, the whole jury should be questioned in open court as to their capacity, as a body, to continue: *R v Orgles* [1993] 4 All ER 533, 98 Cr App Rep 185, CA. Circumstances that give rise to such a situation would be internal to the jury and are to be distinguished from external circumstances that might make it appropriate to question an individual juror: *R v Orgles* supra. The Contempt of Court Act 1981 s 8(1) (see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 451) does not preclude the judge from conducting an investigation into matters such as bias or irregularity in the jury room (*R v Connor*, *R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118, [2004] 1 All ER 925), but as a general rule it is contrary to common law for the judge to ask the jury questions, or receive evidence, about anything said in the course of the jury's deliberations while it is considering its verdict (*R v Smith*, *R v Mercieca* [2005] UKHL 12, [2005] 2 All ER 29, [2005] 1 WLR 704). An exception to this rule may exist if an allegation is made which tends to show that the jury as a whole declined to deliberate at all, but decided the case by other means such as drawing lots or tossing a coin. Such conduct would be a negation of the function of a jury and a trial whose result was determined in such a manner would not be a trial at all: see *R v Connor*, *R v Mirza* supra at [123] per Lord Hope of Craighead. Where an investigation is impermissible, the judge has the choice of either discharging the jury or giving it a further direction. However, it is incumbent on the judge to ensure that the further direction is apposite, clear, and as emphatic as the situation requires: *R v Smith*, *R v Mercieca* supra.

2 *R v Ward* (1867) 17 LT 220, CCR (where a juror left the court-house without leave after being sworn); *R v Ketteridge* [1915] 1 KB 467, 11 Cr App Rep 54, CCA (where a conviction was quashed because, on the jury retiring, one of them left the precincts of the court for a quarter of an hour before joining the jury in its retiring

room); *R v Goodson* [1975] 1 All ER 760, [1975] 1 WLR 549, CA (conviction quashed because a juror had left the jury room to make a telephone call after the jury had retired). Cf *R v Alexander* [1974] 1 All ER 539, [1974] 1 WLR 422, CA (where a juror returned to the courtroom to collect an exhibit; no application was made for discharge of the jury and the conviction was upheld); *R v Chandler* [1993] Crim LR 394, CA (the separation of one juror after retirement without permission was an irregularity but, on the particular facts, the integrity of the process of deliberation by the jury was not threatened). Jurors may now separate after retirement with the leave of the court (see PARA 1332 post) and the authorities should be read in the light of the fact that the long-standing rule against separation after retirement has been relaxed.

3 Jurors are now at the court's discretion allowed reasonable refreshment at their own expense: see PARA 1331 post.

4 Co Litt 227b; 2 Roll Abr 686; *R v Willmont* (1914) 78 JP 352, CCA (where the conviction was quashed because the clerk of assize had entered the jury's retiring room and answered questions put to him by members of the jury and a discussion took place); *R v Shepherd* (1910) 74 JP Jo 605 (where the jury was discharged because a woman had spoken to a juror during the adjournment); *R v Twiss* [1918] 2 KB 853, 13 Cr App Rep 177, CCA; *R v Brandon* (1969) 53 Cr App Rep 466, CA (where the conviction was quashed because of prejudicial remarks of a jury bailiff when escorting jurors to the lavatory): *R v McNeil* [1967] Crim LR 540, CA (jury bailiffs retired with jury; conviction quashed). Cf *R v Panayis* [1999] Crim LR 84, CA (juror had conversation with defendant's solicitor's clerk; co-defendant absconded; juror not discharged and conviction upheld). See also *R v Thorpe*, *R v Nicholls*, *R v Burke*, *R v Boyd* [1996] 1 Cr App Rep 269, CA (where jurors rejected improper attempts to influence them and reported incidents promptly to judge, assuring him their deliberations would not thereby be influenced, no real risk of injustice; judge entitled to refuse to discharge jury).

5 *Hale v Cove* (1735) 1 Stra 642; *Harvey v Hewitt* (1840) 8 Dowl 598. Where the court was satisfied with the verdict, albeit arrived at by lot, a new trial was not ordered: *Prior v Powers* (1664) 1 Keb 811. See now the Contempt of Court Act 1981 s 8, which prohibits any breach of the confidentiality of jury deliberations, and which confirms the principle derived from the common law authorities that the fact that a verdict was arrived at by lot cannot be proved by the evidence of the jurors themselves: see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 451.

6 *Goby v Wetherill* [1915] 2 KB 674; *R v McNeil* [1967] Crim LR 540, CA (see note 6 supra).

7 As to the judge's discretion to discharge the jury see PARA 1328 ante; and as to discharge if the members of the jury cannot agree on a verdict see PARA 1346 post.

8 See *R v Charlesworth* (1861) 1 B & S 460 at 504 per Cockburn CJ. As to other circumstances held good ground for discharging the jury see *R v Stevenson* (1791) 2 Leach 546; *R v Streek* (1826) 2 C & P 413 (defendant ill); *R v Rasool*, *R v Choudhary* [1997] 1 WLR 1092, [1997] 2 Cr App Rep 190 (jury should have been discharged where defendant unable to do himself justice (including giving evidence) because of terminal illness of son); *R v Stokes* (1833) 6 C & P 151 (jury discharged at defendant's request owing to the absence of one of his witnesses); *R v Phillips* (1868) 11 Cox CC 142 (where a juror who had not been summoned was sworn); and see *R v Metcalfe and Slater* (1848) 3 Cox CC 220; *R v Ketteridge* [1915] 1 KB 467, 11 Cr App Rep 54 (juror mistakenly separating himself from the jury); *R v Kirke* (1909) 43 ILT 130 (jury unable to follow evidence).

9 *R v Lewis* (1909) 2 Cr App Rep 180, 78 LJKB 722, CCA; *R v Charlesworth* (1861) 1 B & S 460.

10 *R v Wade* (1825) 1 Mood CC 86, CCA. In *R v Wardle* (1842) Car & M 647, it was adjudged that it was not a good ground for discharging a jury that the defendant had a relation on it; but quaere whether this decision would still be followed since it has been adjudged that a juror who knows the defendant should tell the judge so before taking the oath (see *R v Box* [1964] 1 QB 430, 47 Cr App Rep 284, CCA; *R v Hood* [1968] 2 All ER 56, 52 Cr App Rep 265, CA).

11 *R v Blackford* (1989) 89 Cr App Rep 239, CA; *R v Ellis*, *R v Ellis* (1991) 156 JP 148, (1991) Times, 13 June, CA; *R v Docherty* [1999] 1 Cr App Rep 274, CA. In exercising his discretion the judge should decide whether the test of bias (see PARA 1250 ante) is satisfied: *R v Docherty* supra. Where there is more than one interpretation of the prejudicial evidence, the judge should approach the issue on the basis of the more prejudicial possible meaning: *R v Docherty* supra.

12 *Stirland v DPP* [1944] AC 315, 30 Cr App Rep 40, HL. See also *R v Cutter* [1944] 2 All ER 337, 30 Cr App Rep 107, CCA (where counsel elected to appeal).

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### **1330. Effect of discharge during trial.**

Except in very rare cases where the circumstances demand the reinstatement of the jury<sup>1</sup>, once the judge has discharged the jury<sup>2</sup>, it may not be recalled for the purpose of continuing the trial<sup>3</sup>.

The discharge of the jury does not amount to a verdict of acquittal and the defendant may therefore be remanded either on bail or in custody pending a fresh trial<sup>4</sup>; nor may the discharge of the jury found a plea of autrefois acquit or autrefois convict since no formal verdict has been delivered<sup>5</sup>.

1 *R v Follen* [1994] Crim LR 225, CA; *R v Aylott* [1996] 2 Cr App Rep 169, CA. In *R v Aylott* supra, the judge had mistakenly discharged the jury which had in fact reached a verdict; it was held that the judge was correct in subsequently taking the verdict of the jury who had not had contact with anyone else in the meantime. See also *R v S* [2005] EWCA Crim 1987, [2006] Crim LR 247.

2 See PARA 1328 ante.

3 *R v Russell* [1984] Crim LR 425, CA.

4 *R v Davison* (1860) 2 F & F 250; *R v Prime* (1973) 57 Cr App Rep 632, CA; *R v Burley* [2001] 5 Archbold News 3, CA; and see *R v Robinson* [1975] QB 508, 60 Cr App Rep 108, CA. See also PARA 1328 ante.

5 *R v Robinson* [1975] QB 508, 60 Cr App Rep 108, CA; and see PARA 1272 et seq ante.



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## **(viii) Verdict**

### **1331. Retirement of jury.**

At the conclusion of the summing up the members of the jury consider their verdict<sup>1</sup>.

The members of the jury may confer together then and there, but it is usual for a bailiff to be sworn and for the members of the jury to be conducted to their retiring room to consider their verdict<sup>2</sup>. The judge must direct the jury not to continue their deliberations outside the jury room<sup>3</sup>.

Although there is nothing to prevent the trial judge from exhorting the jury to reach a verdict<sup>4</sup>, it is a cardinal principle of the criminal law that, since the verdict of a jury involves the liberty of the subject, the jury must deliberate in complete and uninhibited freedom, uninfluenced by any extraneous consideration whatsoever<sup>5</sup>. The judge must avoid any hint of pressure on a jury to reach a verdict<sup>6</sup>.

1 The jury must have the benefit of the whole of the summing up before returning a verdict except where it is one of acquittal: *R v Young* [1964] 2 All ER 480, 48 Cr App Rep 292, CCA (premature verdict).

2 2 Hale PC 296-297. They may, at the discretion of the trial judge, be allowed reasonable refreshment at their own expense: Juries Act 1974 s 15.

3 *R v Tharakan* [1995] 2 Cr App Rep 368, CA.

4 See PARA 1346 note 5 post. See also *R v Kalia* [1975] Crim LR 181, CA.

5 See *R v McKenna* [1960] 1 QB 411, 43 Cr App Rep 63, CCA (trial judge setting time limit for agreement; conviction quashed). See also *Shoukatallie v R* [1962] AC 81, [1961] 3 All ER 996, PC; *R v Thomas* [1983] Crim LR 745, CA; and PARA 1320 ante.

6 *R v Watson* [1988] QB 690, 87 Cr App Rep 1, CA; *Crosdale v R* [1995] 2 All ER 500, PC. Even asking the members of a jury whether they wish to consider their verdict without retiring may constitute such a hint: see *R v Rankine* [1997] Crim LR 757, CA.

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### **1332. Consideration of verdict.**

If he thinks fit, the judge may at any time after the jury has retired to consider its verdict, permit the jury to separate<sup>1</sup>.

The jury may not, when it has retired to consider its verdict, be given any additional evidence, any additional matter or material to assist it<sup>2</sup>. There is likewise a prohibition on the use of information, potentially relevant to the outcome of the case, privately obtained out of court by a juror<sup>3</sup>.

If the jury ask for exhibits not already in the jury room, the matter should be dealt with in open court; counsel should be given the opportunity to ensure that the exhibits can properly be seen by the jury<sup>4</sup>.

The jury may not be provided with equipment with which to conduct experiments<sup>5</sup>, but it may be provided with equipment which a person might normally have in his pocket when called to serve on a jury and which would not normally raise the possibility of use for experiments<sup>6</sup>.

A video recording of an interview with a child complainant or child witness may, at the judge's discretion, be replayed in open court after the jury's retirement, provided that a warning is given that other evidence cannot be replayed and that the jury is reminded of what the child said in cross-examination and re-examination<sup>7</sup>.

No one, other than the bailiff in whose custody they are, may visit the members of the jury in the jury room<sup>8</sup>. They must not be given further assistance or information except in open court from the trial judge in the presence of the defendant<sup>9</sup>.

1 See the Juries Act 1974 s 13 (substituted by the Criminal Justice and Public Order Act 1994 s 43(1)). For guidance on the direction to be given to the jury when it is allowed to separate during consideration of its verdict see *R v Oliver* [1996] 2 Cr App Rep 514, CA.

2 *R v Owen* [1952] 2 QB 362, 36 Cr App Rep 16, CCA; *R v Gearing* [1968] 1 WLR 344n, 50 Cr App Rep 18, CA; *R v Davis* (1975) 62 Cr App Rep 194 at 201, CA, per Lord Widgery CJ. Even the inadvertent provision of additional evidence, eg an item not exhibited, may render a conviction unsafe: *R v Davis* supra; *R v Kaul* [1998] Crim LR 135, CA; *R v Gilder* [1997] Crim LR 668, CA.

3 *R v Karakaya* [2005] EWCA Crim 346, [2005] 2 Cr App Rep 77.

4 *R v Ellis*, *R v Ellis* (1992) 95 Cr App Rep 52, CA; *R v Emmerson* (1990) 92 Cr App Rep 284, CA (tape recording of interview played at trial); *R v Riaz*, *R v Burke* (1991) 94 Cr App Rep 339 (tape recording of interview made an exhibit but not played at trial). It is preferable for a tape recording of an interview to be played in open court: *R v Riaz*, *R v Burke*. Also see *R v Imran*, *R v Hussain* [1997] Crim LR 754, CA (video surveillance films shown in court); *R v Haque* [2005] 9 Archbold News 2, CA (replaying of video-recording of search of defendant's house). As to exhibits in general being seen by the jury after retirement see also *R v Devichand* [1991] Crim LR 446, CA; *R v Abrar* (2000) Times, 26 May, CA.

5 *R v Stewart*, *R v Sappleton* (1989) 89 Cr App Rep 273, CA (pair of scales), as explained in *R v Maggs* (1990) 91 Cr App Rep 243 at 247, CA, per Lord Lane CJ.

6 *R v Maggs* (1990) 91 Cr App Rep 243, CA (magnifying glass, tape measure, ruler), not following dicta about magnifying glass or ruler in *R v Stewart*, *R v Sappleton* (1989) 89 Cr App Rep 273, CA.

7 *R v Rawlings*, *R v Broadbent* [1995] 1 WLR 178, [1995] 2 Cr App Rep 222, CA; *R v Mullen* [2004] EWCA Crim 602, [2004] 2 Cr App Rep 290.

8 *R v Willmont* (1914) 10 Cr App Rep 173, CCA; *Goby v Wetherill* [1915] 2 KB 674, DC; *R v Davis* (1960) 44 Cr App Rep 235, CCA. In *R v Newton* (1849) 3 Car & Kir 85, a surgeon was allowed to attend one of the jurors. The clerk of the court may go to the jury room at the judge's request, whether or not accompanied by the bailiff, as long as he does not participate in the jury's deliberations: *R v Glen* [1966] Crim LR 112, CCA. As to the duty of the jury bailiff see *R v Brown*, *R v Slaughter* (1989) Times, 25 October, CA. Where a juror indicated to the bailiff that members of the jury were intimidated, the bailiff acted properly in ascertaining the reason and reporting it to the judge: *R v Brown*, *R v Slaughter* supra. Cf *R v Brandon* (1969) 53 Cr App Rep 466, CA (improper remarks to jury by bailiff; conviction quashed).

9 See PARA 1333 post.

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### **1333. Communications between judge and jury after summing up.**

The jury is entitled after the conclusion of the summing up, whether before or after retiring, to seek further assistance from the trial judge either on matters of law or in relation to the evidence given in the course of the trial, provided that no further evidence is introduced<sup>1</sup>.

A written communication from the jury which raises something unconnected with the trial may be dealt with without reference to counsel and without bringing the jury back to court<sup>2</sup>. In almost every other case the judge should state in open court the nature and content of the communication which he has received and, if he considers it helpful to do so, should seek the assistance of counsel before the jury is asked to return to court<sup>3</sup>. When the members of the jury return, the judge should deal with their communication; but, where this contains information which need not and should not have been imparted, such as details of the jury's voting figures, the judge should not disclose such information, but should in all other respects deal with the communication in the normal way<sup>4</sup>.

If no evidence on the point raised by the jury has been given, it is the duty of the judge to tell the jury so; but, if the question relates to a matter on which evidence has been given, it is proper for the judge to remind the jury of it and to instruct the jury accordingly<sup>5</sup>. If, after retirement, the members of the jury show by a question that they appear to be assuming facts or drawing inferences for which there is no supporting evidence, further direction by the judge is called for, and they should be reminded how far the relevant evidence went<sup>6</sup>. Where a question shows that the members of the jury have forgotten or misunderstood the judge's direction on an important point, the judge must correct this<sup>7</sup>.

Where the jury indicates that it is in difficulty, whether or not as to law or as to fact, the judge must assist the jury<sup>8</sup>.

1 *R v Owen* [1952] 2 QB 362, 36 Cr App Rep 16, CCA (witness for prosecution recalled by judge after retirement of jury); *R v Wilson* (1957) 41 Cr App Rep 226, CCA (witness recalled after retirement); *R v Davis* (1960) 44 Cr App Rep 235, CCA (clerk of the peace introducing evidence into jury room); *R v Gearing* [1968] 1 All ER 581n, 50 Cr App Rep 18, CCA (another defendant brought up for identification); *R v Lawrence* [1968] 1 All ER 579, 52 Cr App Rep 163, CA (view of car); *R v Corless* (1972) 56 Cr App Rep 341, CA (agreed statement by counsel); cf *R v Nixon* [1968] 2 All ER 33, 52 Cr App Rep 218, CA (view of car with consent and at express wish of defence). See further PARAS 1318, 1332 ante.

2 *R v Gorman* [1987] 2 All ER 435, [1987] 1 WLR 545, CA. It is, however, advisable to inform counsel of what has occurred: *R v Connor* (1985) Times, 26 June, CA.

3 *R v Gorman* [1987] 2 All ER 435, 85 Cr App Rep 121, CA; *R v Green* [1992] Crim LR 292, CA; *Ramstead v R* [1999] 2 AC 92, PC. See also *R v Franklin* [1989] Crim LR 499, CA. For examples of improper communications between judge and jury see *R v Green* [1950] 1 All ER 38, 34 Cr App Rep 33, CCA (judge receiving note in private room and giving answer); *R v Davis* (1960) 44 Cr App Rep 235, CCA (judge sending oral message to jury in retiring room); cf *R v Furlong* [1950] 1 All ER 636, 34 Cr App Rep 79, CCA (note read out after verdict but before sentence).

4 *R v Gorman* [1987] 2 All ER 435, [1987] 1 WLR 545, CA.

5 *R v Owen* [1952] 2 QB 362, 36 Cr App Rep 16, CCA.

6 *R v Adair* [1958] 2 All ER 629, 42 Cr App Rep 227, CCA. See also *R v Sweetland* (1957) 42 Cr App Rep 62, CCA; *R v Bell* [1967] Crim LR 545, CCA.

7 *R v Wickramaratne* [1998] Crim LR 565, CA.

8 *Berry v R* [1992] 2 AC 364, 96 Cr App Rep 7, PC. The judge is under a continuing duty to provide appropriate assistance to a jury, whether in retirement or not, and he is entitled to act on his own initiative if he sees fit: *R v Nawaz* (1999) Independent, 19 May, CA.

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### **1334. Permissible verdicts.**

The verdict of the jury may be either a general verdict of guilty or not guilty on the whole charge, or a verdict of guilty on one part of the charge and not guilty on another part, or a special verdict<sup>1</sup>. Where several counts are joined in one indictment, a verdict must be taken separately on each count<sup>2</sup>. Where an indictment contains alternative counts, if the jury convicts on one count, it should be discharged from giving a verdict on the other<sup>3</sup>.

A verdict may be either unanimous or by a majority. It must be unanimous unless the trial judge, in accordance with statute<sup>4</sup>, has directed the jury that he will accept a majority verdict<sup>5</sup>.

Where the prosecution has put its case on the basis that the defendant might have committed the actus reus in one of two or more ways, it may be necessary to direct the members of the jury that, in order to convict, they must be unanimous (where a unanimous verdict is required) not only as to their verdict but also as to the basis for it<sup>6</sup>. Where, however, the prosecution alleges that on the evidence the defendant must have committed the offence in one of two ways (A and B), it will suffice if the members of the jury are agreed that this must have been the case, although some of them believe that it was mode A (and, if not, mode B) and the rest believe that it was mode B (and, if not, mode A)<sup>7</sup>. If the members of the jury are agreed that the defendant committed a number of acts with the relevant mens rea, and that one of them resulted in the offence, it is irrelevant that they are not sure which of those acts was the material one<sup>8</sup>.

If several defendants are tried together, unless there is some rule of law to the contrary, the jury may find one or more defendants guilty and another or others not guilty<sup>9</sup>, or it may agree on a verdict about one or more of them, returning such verdict in respect of these, and disagree about another or others, being discharged without giving a verdict in respect of those<sup>10</sup>. The jury is not entitled to disregard the judge's direction for a partial verdict and return only a general verdict<sup>11</sup>.

1 See *DPP v Nasralla* [1967] 2 AC 238 at 248, [1967] 2 All ER 161 at 165, PC. As to a special verdict see PARA 1339 post. The jury's verdict may also, where appropriate, be one of not guilty by reason of insanity: see PARA 31 ante.

2 *O'Connell v R* (1844) 5 State Tr NS 1, HL; *R v Bailey* [1924] 2 KB 300, 18 Cr App Rep 42, CCA; *R v Gibson* [1983] 3 All ER 263, 77 Cr App Rep 151, CA. See PARA 1221 ante.

3 *R v Seymour* [1954] 1 All ER 1006, 38 Cr App Rep 68, CCA; *R v Roma* [1956] Crim LR 46, CCA. See also *R v Velasquez* [1996] 1 Cr App Rep 155, CA.

4 Ie the Juries Act 1974 s 17: see JURIES vol 61 (2010) PARA 850.

5 As to the direction about the need for unanimity see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, CA, at IV.46.1. As to majority verdicts see PARAS 1340, 1342 post.

6 *R v Brown* (1983) 79 Cr App Rep 115, CA; *R v Mitchell* [1994] Crim LR 66, CA. Such a direction will only be necessary comparatively rarely, the appropriate case being where there is a realistic danger of some of the members of the jury finding one mode of commission proved and others another mode: *R v Mitchell* supra. Such a direction should be given where the evidence alleges that the offence might have been committed in a number of ways, comprising completely different acts at different times: *R v Bateman*, *R v Byrne*, *R v Byrne* [2000] 1 All ER 307, [2000] 2 Cr App Rep 17, CA. The rule established in *R v Brown* supra does not have any

application where a verdict of manslaughter is returned as an alternative to murder; provided that a jury is unanimously agreed that a defendant is guilty of manslaughter in that they are sure that he committed an unlawful act which caused the death of the deceased, there is no need for unanimity as to the basis of that verdict: *R v Jones* (1999) Times 17 February, CA.

7 *R v Giannetto* [1997] 1 Cr App Rep 1, CA.

8 *A-G's Reference (No 4 of 1980)* [1981] 2 All ER 617, [1981] 1 WLR 705, CA.

9 *R v Gray* (1851) T & M 411, CCR; *R v Rendle* (1909) 2 Cr App Rep 33, CCA. On an indictment for violent disorder against three or more persons, if the jury cannot be sure that three or more of the defendants were using or threatening violence, it should acquit every defendant of violent disorder, even if satisfied that one or more of the defendants were unlawfully fighting, unless there is evidence that others not named in the indictment were also involved in the criminal behaviour: *R v Fleming*, *R v Robinson* [1989] Crim LR 658, CA; and see *R v Mahroof* (1988) 88 Cr App Rep 317, CA; *R v Worton* (1989) 154 JP 201, CA. As to violent disorder see PARA 556 ante.

Where, however, two persons are tried together for conspiracy, the judge is no longer obliged to direct a verdict of both guilty or both not guilty: Criminal Law Act 1977 s 5(8), (9); applied in *R v Longman* (1981) 72 Cr App Rep 121, CA.

On the trial of two or more persons for jointly handling any stolen goods the jury may find any of the defendants guilty if it is satisfied that he handled all or any of the stolen goods, whether or not he did so jointly with the other defendant(s) or any of them: Theft Act 1968 s 27(2). The reference to handling stolen goods includes any corresponding offence committed before 1 January 1969: s 27(5). See further PARA 1303 note 1 ante.

10 *R v Evans*, *R v Pritchard* (1920) 15 Cr App Rep 111, CCA.

11 *DPP v Nasralla* [1967] 2 AC 238 at 258, [1967] 2 All ER 161 at 172, PC. As to the position when the jury acquits on the charge alleged and disagrees on an alternative see *R v Shipton, ex p DPP* [1957] 1 All ER 206n, 40 Cr App Rep 197, DC.

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### **1335. General power to convict of an offence other than that charged.**

At common law a jury could not convict a defendant of an offence of an entirely different character from that alleged in the indictment<sup>1</sup>, but might convict of a cognate offence of the same character but of a less aggravated nature if the words of the indictment were wide enough to cover such an offence<sup>2</sup>. By statute<sup>3</sup>, where, on a trial for any offence except treason or murder<sup>4</sup>, the jury finds the defendant not guilty<sup>5</sup> of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include<sup>6</sup> (expressly or by implication) an allegation of another offence<sup>7</sup> falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence<sup>8</sup>. If the averments which have not been proved are struck out of the count of the indictment, and those particulars which remain disclose another offence within the jurisdiction of the court of trial, then that offence is considered to be expressly included in the offence charged in the indictment<sup>9</sup>. A count for an offence may impliedly include an alternative offence even though the commission of the latter offence is not a necessary step towards the commission of the offence charged<sup>10</sup>.

Under the above statutory provisions it has been held that, where burglary is alleged, with intent to steal, the jury may convict of theft<sup>11</sup>, but a defendant cannot be convicted of dishonest handling on a single-count indictment alleging theft<sup>12</sup>. A defendant may be convicted of the offence of attempting to cause grievous bodily harm with intent on an indictment alleging attempted murder<sup>13</sup>, or of inflicting grievous bodily harm on an indictment alleging causing grievous bodily harm with intent, because the latter offence is wide enough to include any actions that could amount to the infliction of grievous bodily harm<sup>14</sup>. Likewise, a defendant may be convicted of the offence of assault occasioning actual bodily harm on an indictment alleging the infliction of grievous bodily harm, including grievous bodily harm in the course of a burglary, since the infliction of grievous bodily harm often, though not necessarily always, involves an assault and necessarily includes actual bodily harm<sup>15</sup>, and the same is true on an indictment alleging unlawful wounding<sup>16</sup>.

1 *R v Thomas* (1875) LR 2 CCR 142; *R v Woodhall*, *R v Wilkes* [1872] 12 Cox CC 240; *R v Catherall* (1875) 13 Cox CC 109; *R v Stokes* (1925) 19 Cr App Rep 71, CCA.

2 *R v Hollingberry* (1825) 4 B & C 329; *R v Hunt* (1811) 2 Camp 583.

3 *Ie the Criminal Law Act 1967. As to the other statutory provisions for alternative verdicts see PARAS 1336-1338 post.*

4 *As to alternative verdicts on an indictment for murder see PARA 1336 post.*

5 *Where a jury has been discharged from returning verdicts, after a successful application to stay proceedings on grounds of abuse of process, or because the jury is unable to reach a verdict, it cannot then proceed to return an alternative verdict under a statutory provision providing that an alternative verdict can be returned if the defendant has been found not guilty of the offence for which he was tried: R v Khela, R v Smith [2005] EWCA Crim 3446, (2005) Times, 6 December.*

6 *The words 'amount to or include' are to be read disjunctively: Metropolitan Police Comr v Wilson, R v Jenkins [1984] AC 242, 77 Cr App Rep 319, HL (overruling R v Springfield (1969) 53 Cr App Rep 608, CA).*



7 For these purposes, any allegation of an offence is to be taken as including an allegation of attempting to commit that offence; and, where a person is charged on indictment with attempting to commit an offence or with any assault or other act preliminary to an offence, but not with the completed offence, then (subject to the discretion of the trial judge to discharge the jury (or otherwise act) with a view to the preferment of an indictment for the completed offence) he may be convicted of the offence charged notwithstanding that he is shown to be guilty of the completed offence: see the Criminal Law Act 1967 s 6(4) (amended by the Criminal Justice Act 2003 s 331, Sch 36 para 41).

8 See the Criminal Law Act 1967 s 6(3). Section 6(3) applies to an indictment containing more than one count as if each count were a separate indictment: s 6(7). The judge has a discretion whether to ask the jury to consider if the other offence has been proved (see *R v Woods* [1969] 1 QB 447, 53 Cr App Rep 30, CA; *R v Lyttle* [1969] Crim LR 213, CA); but the defendant ought to be protected against any unexpected disadvantage or risk of injustice (*R v Powell* [2006] EWCA Crim 685, [2006] All ER (D) 146 (Jan); *R v Lillis* [1972] 2 QB 236, 56 Cr App Rep 432, CA; *Metropolitan Police Comr v Wilson, R v Jenkins* [1984] AC 242, 77 Cr App Rep 319, HL). See also *R v Whiting* (1987) 85 Cr App Rep 78, CA. If the possibility that the defendant is guilty only of the alternative offence has fairly arisen on the evidence and if directing the jury about it will not unnecessarily complicate the case, the judge should leave the alternative to the jury: *R v Fairbanks* [1986] 1 WLR 1202, 83 Cr App Rep 251; approved in *R v Maxwell* [1990] 1 All ER 801, 91 Cr App Rep 61, HL. See also *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154, [2006] All ER (D) 253 (Jul). A verdict cannot be returned under the Criminal Law Act 1967 s 6(3) unless the jury has found the defendant not guilty of the offence specifically charged; where the jury is agreed regarding the alternative, an alternative count for the alternative may be added to the indictment: *R v Collison* (1980) 71 Cr App Rep 249, CA.

For the purposes of the Criminal Law Act 1967 s 6(3), an offence falls within the jurisdiction of the court of trial if it is an offence to which the Criminal Justice Act 1988 s 40 (as amended; prospectively amended) applies (see PARA 148 ante), even if a count charging the offence is not included in the indictment: Criminal Law Act 1967 s 6(3A) (s 6(3A), (3B) added by the Domestic Violence, Crime and Victims Act 2004 s 11). A person convicted of an offence by virtue of the Criminal Law Act 1967 s 6(3A) (as added) may only be dealt with for it in a manner in which a magistrates' court could have dealt with him: s 6(3B) (as so added).

As from a day to be appointed the committal of a person under the Criminal Justice Act 1988 s 41 (as amended; prospectively repealed) (see PARA 1358 post) in respect of an offence to which s 40 (as amended; prospectively amended) applies does not prevent him being found guilty of that offence under the Criminal Law Act 1967 s 6(3); but where he is convicted under s 6(3) of such an offence, the functions of the Crown Court under the Criminal Justice Act 1988 s 41 (as amended; prospectively repealed) in relation to that offence cease: see s 41(4A) (prospectively added by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 28). At the date at which this volume states the law no such day had been appointed.

9 *R v Lillis* [1972] 2 QB 236, 56 Cr App Rep 432, CA (the so-called 'red pencil test').

10 *Metropolitan Police Comr v Wilson, R v Jenkins* [1984] AC 242, 77 Cr App Rep 319, HL (disapproving *R v Springfield* (1969) 53 Cr App Rep 608, CA). Thus where the commission of the offence charged may involve the commission of another offence, an allegation of the other offence is impliedly included in the count, even though the offence charged could in law be committed without the commission of the other offence.

11 *R v Lillis* [1972] 2 QB 236, 56 Cr App Rep 432, CA (where the 'red pencil test' applied: see the text and note 9 supra). A person charged with an offence under the Theft Act 1968 s 9(1)(b) may be convicted of an offence under s 9(1)(a) since the allegation in the former offence impliedly includes an allegation of the latter: *R v Whiting* (1987) 85 Cr App Rep 78, CA. As to burglary see PARA 294 ante.

12 *R v Woods* [1969] 1 QB 447, 53 Cr App Rep 30, CA (the wording of the Criminal Law Act 1967 s 6(3) (see the text and note 8 supra) did not alter the rule which previously applied, namely that the defendant may not be convicted of 'receiving' in the absence of a count expressly charging him with that offence).

13 *R v Morrison* [2003] EWCA Crim 1722, [2003] 2 Cr App Rep 563.

14 *R v Mandair* [1995] 1 AC 208, 99 Cr App Rep 250, HL.

15 *Metropolitan Police Comr v Wilson, R v Jenkins* [1982] AC 242, 77 Cr App Rep 319, HL; and see *R v Taylor* (1869) LR 1 CCR 194.

16 *R v Savage; R v Parmenter* [1992] 1 AC 699, 94 Cr App Rep 193, HL.

## UPDATE

### 1335 General power to convict of an offence other than that charged

NOTE 8--*R v Coutts*, reported, cited at [2006] 4 All ER 353. See also *R v Foster* [2007] EWCA CRIM 2869, [2008] 2 All ER 597.

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### **1336. Alternative verdicts on indictments for murder, manslaughter or infanticide.**

On an indictment for murder a person found not guilty of murder<sup>1</sup> may be found guilty:

- 2141 (1) of manslaughter, or of causing grievous bodily harm with intent to do so; or
- 2142 (2) of any offence of which he may be found guilty under an enactment specifically so providing<sup>3</sup>, or of assisting an offender<sup>4</sup>; or
- 2143 (3) of an attempt to commit murder, or of an attempt to commit any other offence of which he might be found guilty,

but he may not be found guilty of any other offence not included in heads (1) to (3) above<sup>5</sup>.

If on the trial of an indictment for murder or manslaughter it is proved that the defendant aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of that offence<sup>6</sup>. Where, upon the trial of a woman for the murder of her child, being a child under the age of 12 months, the jury is of the opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, the jury may convict her of infanticide<sup>7</sup>. Upon the trial of any person for the murder or manslaughter of any child, or for infanticide, the jury may find that person guilty of child destruction<sup>8</sup>.

1 Where the members of the jury cannot agree on a murder charge and are discharged from giving a verdict on that charge, but desire to return a verdict of manslaughter, the Criminal Law Act 1967 s 6(2) (see the text and notes 3-5 infra) does not apply; under the common law they may properly return a verdict of manslaughter in these circumstances: *R v Saunders* [1988] AC 148, [1987] 2 All ER 973, HL.

2 See *R v Rumping* [1964] AC 814, [1962] 2 All ER 233, CCA; affd on other grounds sub nom *Rumping v DPP* [1964] AC 814 at 822, 46 Cr App Rep 398, HL. In that case the Court of Criminal Appeal stated that, where the accepted evidence showed that murder had been committed, the judge need not leave the possibility of a verdict of manslaughter open to the jury. See, however, *DPP v Daley* [1980] AC 237, 69 Cr App Rep 39, PC.

3 Ie the Infant Life (Preservation) Act 1929 s 2(2); the Infanticide Act 1938 s 1(2); or the Suicide Act 1961 s 2(2). See the text and notes 6-8 infra.

4 Ie under the Criminal Law Act 1967 s 4(2) (as amended): see PARA 1337 post.

5 Ibid s 6(2). Section 6(2) applies to an indictment containing more than one count as if each count were a separate indictment: s 6(7). The public interest in the administration of justice is best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there was evidence to support, although it is fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial: *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154, [2006] All ER (D) 253 (Jul). The judge should not leave manslaughter, as an alternative to murder, when this is inconsistent with the defence case: *R v Kearney* (1989) 88 Cr App Rep 380, CA; *Fazal Mohammed v The State (Trinidad and Tobago)* [1990] 2 AC 320, 91 Cr App Rep 256, PC. See also *R v Coutts* supra (possible basis for manslaughter verdict wholly inconsistent with prosecution case; judge right not to leave manslaughter as an alternative to murder).

6 Suicide Act 1961 s 2(2); and see PARA 106 ante.

7 Infanticide Act 1938 s 1(2); and see PARA 103 ante.

8 Infant Life (Preservation) Act 1929 s 2(2).

**UPDATE**

**1336 Alternative verdicts on indictments for murder, manslaughter or infanticide**

NOTE 5--*R v Coutts*, reported, cited at [2006] 4 All ER 353.

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### **1337. Verdict of assisting an offender.**

If on the trial of an indictment for a relevant offence<sup>1</sup> the jury is satisfied that the offence charged (or some other offence of which the defendant might on that charge be found guilty) was committed, but finds the defendant not guilty of it, it may find him guilty of doing an act with intent to impede the offender's apprehension or prosecution<sup>2</sup>.

1 For these purposes, 'relevant offence' means: (1) an offence for which the sentence is fixed by law; (2) an offence for which a person of 18 years or over (not previously convicted) may be sentenced to imprisonment for a term of five years or might be so sentenced but for the restrictions imposed by the Magistrates' Courts Act 1980 s 33 (as amended) (see MAGISTRATES vol 29(2) (Reissue) PARA 661); Criminal Law Act 1967 s 4(1A) (added by the Police and Criminal Evidence Act 1984 s 119(1), Sch 6 para 17; and substituted by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 40(1), (2)(b)).

2 See the Criminal Law Act 1967 s 4(1), (2) (amended by the Serious Organised Crime and Police Act 2005 Sch 7 para 40(1), (2)). As to the proper procedure to be followed where the issue of an offence under the Criminal Law Act 1967 s 4(1) (as amended) is, or may be, raised see *R v Cross, R v Channon* [1971] 3 All ER 641, 55 Cr App Rep 540, CA. The issue should be raised before the evidence has been completed and the defendant should be offered the opportunity of an adjournment: see *R v Cross, R v Channon* supra. See also *R v Vincent* (1972) 56 Cr App Rep 281, CA.

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### **1338. Miscellaneous alternative verdicts.**

By statute<sup>1</sup>, upon the trial of any person for an offence of administering drugs or using an instrument to procure an abortion<sup>2</sup>, the jury may find him guilty of child destruction<sup>3</sup>; on the trial of any person for child destruction, the jury may find him guilty of administering drugs or using an instrument to procure an abortion<sup>4</sup>; on the trial of a person for maliciously administering poison etc so as to endanger life or inflict grievous bodily harm<sup>5</sup>, the jury may find him guilty of the offence of administering poison with intent to injure, aggrieve or annoy<sup>6</sup>; on an indictment for a corrupt practice at an election the defendant may be found guilty of an illegal practice<sup>7</sup>; on an indictment for theft or aggravated vehicle-taking the jury may find the defendant guilty of taking a conveyance without authority<sup>8</sup>; on an indictment for violent disorder or affray the jury may find the defendant guilty of using threatening words or behaviour<sup>9</sup>; and on an indictment for unauthorised access to computer material with intent to commit or facilitate a further offence or for unauthorised modification of computer material the jury may find the defendant guilty of unauthorised access to computer material<sup>10</sup>.

1 The provisions set out in the text to notes 2-10 infra are in addition to the general statutory provisions relating to alternative verdicts: see PARA 1335 ante. For further examples see PARAS 156, 561 ante.

2 Ie an offence under the Offences against the Person Act 1861 s 58: see PARA 109 ante.

3 See the Infant Life (Preservation) Act 1929 s 2(2); and PARA 108 ante.

4 Ibid s 2(3).

5 Ie an offence under the Offences against the Person Act 1861 s 23: see PARA 124 ante.

6 Ie an offence under ibid s 24 (see PARA 124 ante): s 25.

7 See the Representation of the People Act 1983 s 170; and ELECTIONS AND REFERENDUMS vol 15(4) (2007 Reissue) PARAS 885, 886.

8 Ie an offence under the Theft Act 1968 s 12(1) (see PARA 298 ante): see s 12(4) (amended by the Criminal Justice Act 1988 s 37(1)); Theft Act 1968 s 12A(5) (s 12A added by the Aggravated Vehicle-Taking Act 1992 s 2(1)).

9 Ie an offence under the Public Order Act 1986 s 4 (as amended) (see PARA 558 ante): s 7(3).

10 Ie an offence under the Computer Misuse Act 1990 s 1 (see PARA 358 ante): s 12.

### **UPDATE**

### **1338 Miscellaneous alternative verdicts**

TEXT AND NOTE 10--Computer Misuse Act 1990 s 12 repealed: Police and Justice Act 2006 Sch 14 para 24.

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### 1339. Special verdict.

Special verdicts<sup>1</sup> ought to be found only in the most exceptional cases<sup>2</sup>. Where a special verdict is returned, it is for the court to act upon it and to direct a verdict of guilty or not guilty to be entered<sup>3</sup>. The judge may not ask the members of the jury whether they believe the evidence for the prosecution and, on their saying that they do, enter a verdict of guilty<sup>4</sup>. If, after the jury has given a special verdict, the court enters a general verdict of guilty, an appeal lies to the Court of Appeal<sup>5</sup>. If the finding of the jury is ambiguous or inconsistent, and a verdict of guilty has been entered on it, the conviction will be quashed<sup>6</sup>.

1 The verdicts which find the facts and reserve the legal inference to be drawn from them for the judgment of the court: see 3 Bl Com (14th Edn) 377 ('The jury state the naked facts, as they find them to be proved, and pray the advice of the court thereon'); *R v Dudley, R v Stephens* (1884) 14 QBD 273, 560, CCR; *R v Staines Local Board* (1888) 52 JP 215. See also *DPP v Nasralla* [1967] 2 AC 238 at 248, [1967] 2 All ER 161 at 165, PC. See, however, *R v Ekwuyasi* [1981] Crim LR 574, CA. As to the special verdict of not guilty by reason of insanity see PARA 31 ante; where such a verdict is returned, a general verdict is not returned.

2 *R v Bourne* (1952) 36 Cr App Rep 125 at 127, CCA, per Lord Goddard CJ. See also *R v Agbim* [1979] Crim LR 171, CA.

3 *R v Dudley, R v Stephens* (1884) 14 QBD 273 at 280 per Lord Coleridge CJ; *R v Farnborough* [1895] 2 QB 484 at 486, CCR, per Pollock B; see *R v Naylor* (1865) LR 1 CCR 4. If the jury returns a verdict of not guilty in spite of the judge's direction upon matters specially found by it, a defendant must be discharged: *R v Allday* (1837) 8 C & P 136; *R v Jameson* (1896) 12 TLR 551 at 593-594.

4 *R v Farnborough* [1895] 2 QB 484 at 486, CCR, per Pollock B. It is doubtful whether a judge may lawfully put certain specific questions to the members of the jury and, on their answering them in a particular way, direct them to find a particular verdict: see *R v Jameson* (1896) Shorthand Notes p 396 (where a verdict of guilty was extracted by this means from an unwilling jury); *R v Hendrick* (1921) 37 TLR 447, CCA.

5 See PARAS 1837, 1880 post.

6 *R v Hawkes* (1931) 22 Cr App Rep 172, CCA; *R v Gray* (1891) 17 Cox CC 299, CCR; but see *R v Petch* (1909) 2 Cr App Rep 71, 25 TLR 401, CCA; *R v Howell* (1938) 27 Cr App Rep 5, 160 LT 16, CCA.

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### **1340. Majority verdict.**

The verdict of a jury need not be unanimous; a verdict may be valid and effective if, where there are not less than eleven jurors, ten of them agree on the verdict, or, where there are ten jurors, nine of them agree on the verdict<sup>1</sup>. A majority verdict may not be accepted unless the jury has had at least two hours<sup>2</sup> for deliberation or such longer period as is reasonable having regard to the nature and complexity of the particular case<sup>3</sup>. A verdict of guilty by a majority is not valid unless the foreman of the jury states in open court the number of jurors who respectively agreed to and dissented from the majority verdict<sup>4</sup>.

1 See the Juries Act 1974 s 17(1); and JURIES vol 61 (2010) PARA 850. The normal number of jurors is 12; but as to the position when the jury falls below that number see PARA 1299 ante.

2 The minimum two-hour period is mandatory: *R v Barry* (1975) 61 Cr App Rep 172, CA. In computing the statutory period any time during which the jury returns to court to ask a question of the judge should be included: *R v Adams* [1968] 3 All ER 437, 52 Cr App Rep 588, CA. At least two hours and ten minutes should elapse between the time when the last member of the jury has left the jury box to go to the jury room and the time when the jury is invited to deliver a majority verdict: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.46.2, IV.46.3, CA. If a majority verdict direction is given before this time has elapsed the judge has a discretion to discharge the error or to correct the error and, if necessary, repeal the direction at an appropriate time: *R v Shields* [1997] Crim LR 758, CA.

3 Juries Act 1974 s 17(4); and see *R v Thornton*, *R v Stead* (1988) 89 Cr App Rep 54, CA.

4 Juries Act 1974 s 17(3); and see *R v Barry* [1975] 2 All ER 760, 61 Cr App Rep 172, CA; *R v Reynolds* [1981] 3 All ER 849, 73 Cr App Rep 324, CA (Juries Act 1974 s 17(3) a mandatory requirement; failure to comply with requirement to state number of dissenting jurors fatal as no verdict properly taken; conviction will be quashed); *R v Pigg* [1983] 1 All ER 56, 76 Cr App Rep 79, HL (compliance with requirements of the Juries Act 1974 s 17(3) mandatory but precise form of words not an essential requirement as long as it is clear how the jury is divided); *R v Maloney* [1996] 2 Cr App Rep 303, CA (Juries Act 1974 s 17(3) a mandatory requirement). If the Juries Act 1974 s 17(3) is not complied with, it is permissible, despite the discharge of the jury, to reconvene the court with the jury immediately the error is appreciated and then to rectify the error: *R v Maloney* supra. The position would be different if the jury had to deliberate further or, perhaps, if the verdict was being altered from not guilty to guilty: *R v Maloney* supra. As to the procedure on majority verdict see PARA 1342 post.



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### **1341. Delivery of verdict.**

When the members of the jury, having intimated that they wish to return to court, are brought from their retiring room, or when, after conferring in the jury box, they appear to have made up their minds, the clerk of the court asks the foreman of the jury whether they have reached a verdict on which they are all agreed, and calls upon him to answer 'yes' or 'no'. If the answer is in the affirmative, the verdict is taken<sup>1</sup>.

Where an indictment contains a number of counts, and the foreman indicates that the jurors have reached a unanimous verdict on some but not on others, it is good practice to take the verdict on those counts on which the jurors have agreed before sending them out again to consider the remaining counts.

The verdict of the jury is not complete until it has dealt with all possible verdicts open to it on the indictment<sup>2</sup>.

A jury sometimes asks the trial judge whether it may add a rider to its verdict and, on the judge being satisfied that the rider is a proper one, leave may be given<sup>3</sup>.

1 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.46.2, CA. As to the position where members of the jury are not agreed upon a unanimous verdict see PARA 1342 post. The trial judge is not bound to accept the first verdict returned: see PARA 1343 post. As to correction of the verdict to accord with the intention of the jury see PARA 1344 post. In general the assent of all the jurors to the verdict pronounced by the foreman in their presence and hearing will be conclusively inferred; but not when it is uncertain whether they all heard the verdict: *R v Wooller* (1817) 2 Stark 111. See also *Ellis v Deheer* [1922] 2 KB 113, CA; *Nanan v The State* [1986] AC 860, 83 Cr App Rep 292, PC; *R v Hart* [1998] Crim LR 417, CA; *R v Millward* [1999] 1 Cr App Rep 61, CA; *R v Austin* [2002] EWCA Crim 1796, [2003] Crim LR 426. If a verdict is pronounced and a juror is so drunk or otherwise incapable that he cannot or does not assent, a conviction in such a case would, it seems, be bad: see *Ex p Morris* (1907) 72 JP 5. Evidence by a juror that he did not understand English sufficiently well to follow the proceedings is inadmissible: *R v Thomas* [1933] 2 KB 489, 24 Cr App Rep 91, CCA. This decision was adversely criticised in *Ras Behari Lal v R* (1933) 102 LJPC 144.

2 As to permissible verdicts see PARA 1334 ante. If the trial judge discharges the defendant before the jury has completed its verdict, the discharge is a nullity: *R v Carter*, *R v Canavan* [1964] 2 QB 1, 48 Cr App Rep 122, CCA.

3 *R v Larkin* [1943] KB 174 at 177, 29 Cr App Rep 18 at 29, CCA, per Humphreys J. No reference to that right should be made either expressly or obliquely by either the trial judge or counsel: see *R v Larkin* supra at 176-177 and 29-30; *R v Black (Practice Note)* [1963] 3 All ER 682, 48 Cr App Rep 52, CCA (recommendation to mercy).

## **UPDATE**

### **1341 Delivery of verdict**

NOTE 1--Following a trial, a juror should not be interviewed without leave first being obtained from the Court of Appeal: *R v Adams* [2007] EWCA Crim 1, [2007] All ER (D) 25 (Jan). If the clerk makes a mistake when taking the vote of the jury, counsel should interrupt and ask him to start again: *R v Stringfellow* (2008) Times, 14 November, CA.

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### **1342. Procedure on majority verdict.**

If the jury returns before the statutory two hours and ten minutes<sup>1</sup>, or such longer time as the judge thinks reasonable, since the last member of the jury left the jury box to go to the jury room on initial retirement, and intimates that its members have not reached a verdict on which they are all agreed, the jury should be sent out again for further deliberation with a further direction to arrive if possible at a unanimous verdict<sup>2</sup>.

Should the jury return (whether for the first or second time) or be sent for after the two hours and ten minutes or longer period has elapsed<sup>3</sup>, the jury should be asked again whether its members have reached a verdict on which they are all agreed, and, if they are unanimous, the verdict is accordingly taken; if it appears that they are not unanimous, the jury should be asked to retire once more and told that its members should continue to endeavour to reach a unanimous verdict, but that, if they cannot do so, the judge will accept, in a case where there are not less than eleven jurors, the verdict of ten of them, and in a case where there are ten jurors, the verdict of nine of them<sup>4</sup>. Where there are several counts (or alternative verdicts) left to the jury, and the jury returns to court at a time when a majority verdict could be given, the jury should normally first be asked in respect of each count (or alternative verdict) whether its members have reached a decision on which they are all agreed; if so, any unanimous verdict should be taken and the majority verdict direction should then be given as to the remaining counts (or alternative verdicts)<sup>5</sup>. However, if a judge has clear reasons for acting differently he is permitted to do so<sup>6</sup>.

When the jury finally returns, its members should be asked whether at least ten (or nine as the case may be) of them are agreed upon their verdict. If the answer is in the affirmative, the foreman is asked to declare the verdict by the words 'guilty' or 'not guilty'. If the verdict is one of not guilty, it must be accepted without more ado<sup>7</sup>; if the verdict is one of guilty, the foreman must be asked whether that verdict is unanimous or by a majority. If the answer to that question is that the verdict is by a majority<sup>8</sup>, the foreman must be asked how many jurors agreed to the verdict and how many dissented<sup>9</sup>.

<sup>1</sup> See PARA 1340 note 2 ante.

<sup>2</sup> *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.46.2, CA. With the exception of the provisions in the text to notes 8, 9 infra, *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, CA, is directory in respect of majority verdicts, and not mandatory: *R v Trickett*, *R v Trickett* [1991] Crim LR 59, CA. As to the importance of following *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, CA, with particularity see *R v Bateson* [1969] 3 All ER 1372, 54 Cr App Rep 11, CA; *R v Georgiou* (1969) 53 Cr App Rep 428, CA; *R v Barry* [1975] 2 All ER 760, [1975] 1 WLR 1190, CA. Cf *R v Wright* (1974) 58 Cr App Rep 444, CA. See also *R v Paley* (1976) 63 Cr App Rep 172, CA (provisions in predecessor to *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, CA, not followed, but no material irregularity).

<sup>3</sup> See PARA 1340 ante. In a complicated case much more than two hours should be allowed to elapse before the jury is recalled: *R v Bateson* [1969] 3 All ER 1372, 54 Cr App Rep 11, CA. The jury need not, however, have at least two hours for a consideration of any one verdict where there are several counts and more than one defendant: *R v Thornton*, *R v Stead* (1988) 89 Cr App Rep 54, CA.

At whatever stage the jury returns, the period that has elapsed since it left the jury box (ie since the last member of the jury left the jury box) to consider its verdict and its return to the jury box is to be stated in open court, for each period when the jury was out of court for the purpose of considering its verdict, by the senior

officer of the court present before the jury is asked to return a verdict; the total of such periods is also to be so stated: see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.46.5, CA.

4 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.46.3, CA.

5 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.46.7, CA; *R v Nash* [2004] EWCA Crim 2696, [2005] Crim LR 232. The general rule is that verdicts should be taken as and when the jury is known to be ready to deliver them: *R v Nash* supra.

6 *R v Nash* [2004] EWCA Crim 2696, [2005] Crim LR 232.

7 A 'majority' acquittal should not appear on the face of the record: *R v Adams* [1968] 3 All ER 437 at 438, [1969] 1 WLR 106 at 108, CA, per Lord Parker CJ.

8 See *R v Mendy* [1992] Crim LR 313, CA (ambiguity in foreman's answer, that verdict of guilty was 'by a majority of us all', had to be resolved in favour of the defendant, so that the mandatory next step (see the text and note 9 infra) had to be followed).

9 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.46.4, CA; and see note 2 supra. This requirement, being a statutory requirement, is mandatory: see PARA 1340 note 4 ante.

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### **1343. Reconsideration of verdict.**

The trial judge is not bound to accept at once the first verdict which members of the jury bring in, but may direct them to reconsider it, if it is ambiguous, inconsistent or one which the jury cannot lawfully return on the indictment<sup>1</sup>. If, however, the jury insists on a general verdict of guilty or not guilty, the judge must accept it<sup>2</sup>; and, if the verdict is plain and unambiguous, the jury should not be asked further questions about it<sup>3</sup>.

1 *R v Harris* [1964] Crim LR 54, CCA; *R v Robinson* [1975] QB 508 at 512, [1975] 1 All ER 360 at 363, CA, per James LJ. See also *R v Meany* (1862) Le & Ca 213, CCR; *R v Crisp* (1912) 7 Cr App Rep 173, CCA (ambiguity of verdict); *R v Cova Products Ltd* [2005] EWCA Crim 95, [2005] Crim LR 667, CA. If the verdict is not clear, the jurors should be asked what their meaning is: *R v Hawkes* (1931) 22 Cr App Rep 172, CCA; *R v Rafique* [1973] Crim LR 777, CA.

2 *R v Meany* (1862) Le & Ca 213 at 216, CCR, per Pullock CB; *R v Yeadon*, *R v Birch* (1861) Le & Ca 81, CCR; and see *R v Lester* (1938) 27 Cr App Rep 8, CCA. The mere fact that a jury returns inconsistent verdicts on counts in an indictment does not mean that the Court of Appeal is bound necessarily to quash a conviction: *R v Drury* (1971) 56 Cr App Rep 104, CA. See also *R v Cooper and Compton* [1947] 2 All ER 701, 32 Cr App Rep 102, CCA; *R v Hopkins-Husson* (1949) 34 Cr App Rep 47, CCA; *R v Christ* [1951] 2 All ER 254n, 35 Cr App Rep 76, CCA; *R v Sweetland* (1957) 42 Cr App Rep 62, CCA; *R v Beach and Owens* [1957] Crim LR 687, CCA; *R v Warner* (1966) 50 Cr App Rep 291, CCA; *R v Maskell* (1970) 54 Cr App Rep 429, CA; *R v Stone* (13 December 1954, unreported), CCA, cited in *R v Hunt* [1968] 2 QB 433, 52 Cr App Rep 580, CA; *R v Durante* [1972] 3 All ER 962, 56 Cr App Rep 708, CA; *R v Segal* [1976] Crim LR 324, CA; *R v Dawes* [1978] Crim LR 503.

3 *R v Larkin* [1943] KB 174, 29 Cr App Rep 18, CCA; *R v White* (1960) 45 Cr App Rep 34, CCA. See, however, *R v Matheson* [1958] 2 All ER 87, 42 Cr App Rep 145, CCA (on an indictment for murder, where the jury returns a verdict of manslaughter, the judge should generally ask the jury on what grounds this is based).

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#### **1344. Correction of verdict.**

If a verdict is pronounced by the foreman which is not in accordance with the intention of the jury, the jury may, at the judge's discretion, correct the mistake and enter a verdict entered in accordance with its intention<sup>1</sup>. A fresh verdict cannot be entered if there is any question of it being altered as a result of anything seen or heard by the jury after returning the initial verdict<sup>2</sup> or as a result of further deliberation and a resultant change of mind by the jury<sup>3</sup>.

<sup>1</sup> *R v Parkin* (1824) 1 Mood CC 45; *R v Vodden* (1853) Dears CC 229; *R v Andrews* (1985) 82 Cr App Rep 148, CA.

In exercising the discretion the judge takes into account all the circumstances of the case; in particular, important considerations will be the length of time from the original verdict; the probable reason for the initial mistake, and the necessity for justice to be done not only to the defendant but also to the prosecution. The fact that the defendant has been discharged is one factor but not necessarily fatal to the discretion to alter a verdict to guilty: *R v Andrews* *supra*.

<sup>2</sup> *R v Andrews* (1985) 82 Cr App Rep 148, CA. See also *R v Bills* [1995] 2 Cr App Rep 643, CA (jury's original not guilty verdict was plain and unequivocal, and changed only after it had heard material which it would not have been entitled to hear in the course of the trial; jury therefore should not have been allowed to change its original verdict).

<sup>3</sup> *R v Tantram* [2001] EWCA Crim 1364, [2001] Crim LR 824, CA.

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**1345. Verdict of not guilty and special verdict.**

If the verdict is one of not guilty, the defendant must be immediately discharged, unless there is another indictment against him on which it is proposed to proceed<sup>1</sup>.

If the jury finds the facts in a special verdict<sup>2</sup>, the defendant may be detained in custody or admitted to bail until judgment is given.

1 *Mee v Cruickshank* (1902) 86 LT 708.

2 As to special verdicts see PARA 1339 ante.

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### **1346. Discharge if jury cannot agree.**

If members of the jury cannot agree upon either a unanimous or a majority verdict, they may, at the discretion of the judge, be discharged without giving a verdict, but such a discharge does not amount to an acquittal, and the defendant may be tried again<sup>1</sup>. The jurors must agree honestly; a loose acquiescence by a minority for the sake of conformity and avoiding inconvenience is wrong<sup>2</sup>. The judge may direct the jury as to the desirability of its reaching agreement, either during the summing up<sup>3</sup> or after the jury has had time to consider the majority direction<sup>4</sup>; but there is usually no need to do so<sup>5</sup>. The judge must not pressurise the jury into agreeing<sup>6</sup>. Any communication between the judge and jury about the chances of a verdict being reached should take place in open court<sup>7</sup>.

1 *Winsor v R* (1866) LR 1 QB 390, Ex Ch; *R v Newton* (1849) 3 Car & Kir 85. See also *R v Richardson* [1913] 1 KB 395, CCA; *R v Randall* [1960] Crim LR 435, CCA. If a verdict is so insufficiently expressed or so ambiguous that a judgment cannot be founded upon it, it seems that the judge may discharge the jury and try the case again: see *R v Murphy* (1869) LR 2 PC 535 at 548; and cf *R v Woodfall* (1770) 20 State Tr 895 at 903, 917. As to where the jury acquits on a more serious charge, and cannot agree on a lesser alternative charge, see *R v Shipton, ex p DPP* [1957] 1 All ER 206n, 40 Cr App Rep 197, DC; and as to where the jury disagrees regarding the offence alleged but is agreed regarding the alternative see *R v Collison* (1980) 71 Cr App Rep 249, CA. The general rule is that a jury, having been discharged, is functus officio and accordingly any subsequent proceedings are a nullity: *R v Russell* (1984) 148 JP 765, CA. See also PARA 1330 ante.

If the second jury is also unable to agree, the prosecution does not in practice, but not by rule of law, seek a third trial but instead formally offers no evidence: *Charles v State* [2000] 1 WLR 384 at 387, PC; *R v Byrne* [2002] EWCA Crim 632, [2002] Crim LR 487, CA.

2 *R v Mills* [1939] 2 KB 90, [1939] 2 All ER 299, CCA.

3 See PARAS 1319-1323 ante.

4 As to the majority direction see PARA 1342 ante.

5 *R v Watson* [1988] QB 690, 87 Cr App Rep 1, CA (disapproving *R v Walhein* (1952) 36 Cr App Rep 167, CA). It is a matter for the judge's discretion as to whether the following direction is given: 'Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If unhappily, [ten of] you cannot reach agreement, you must say so': *R v Watson* supra.

If, however, the direction is given, individual variations which alter its sense should be avoided: *R v Watson* supra. An '*R v Watson* direction', where appropriate, must never be combined with a majority direction and must adhere to the precise wording, and no more, given in that case: *R v Buono* (1992) 95 Cr App Rep 338, CA. See also *R v Morgan* [1997] Crim LR 593, CA (judge departed from terms of *R v Watson* supra, but there was nothing to suggest the jury was placed under improper pressure; conviction not unsafe). An '*R v Watson* direction' must make it clear that any 'give and take' should be within the scope of the juror's oath: *R v Atlan* [2004] EWCA Crim 1798, [2005] Crim LR 63, CA.

6 *R v McKenna* [1960] 1 QB 411, 44 Cr App Rep 63, CCA; *R v Rose* [1982] AC 822, 75 Cr App Rep 322, HL; *R v Watson* [1988] QB 690, 87 Cr App Rep 1, CA; *R v Duggan* [1992] Crim LR 513, CA.

7 *R v Rose* [1982] 2 All ER 536, CA; affd [1982] AC 822, 75 Cr App Rep 322, HL.

### **UPDATE**

**1346 Discharge if jury cannot agree**

NOTE 1--The exercise of the jurisdiction to permit a third trial must be confined to cases where a crime of extreme gravity has undoubtedly occurred and in which evidence that the defendant committed the crime remains objectively very powerful: *R v Bell* [2010] EWCA Crim 3, [2010] 1 Cr App Rep 407, [2010] All ER (D) 109 (Jan).



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## **(ix) Proceedings after Verdict**

### **1347. Proof of previous convictions.**

In the Crown Court the police will provide brief details of the circumstances of the last three similar convictions and/or of convictions likely to be of interest to the court, the latter being judged on a case by case basis; this information should be provided separately and attached to the antecedents<sup>1</sup>. However, if any of the previous convictions are not admitted, they are proved by producing a certificate of the conviction signed by the proper officer<sup>2</sup> of the court where the conviction took place, and by proving that the person named in the certificate is the same person as the defendant<sup>3</sup>. The defendant must be proved beyond reasonable doubt to be the person named in the certificate<sup>4</sup>.

<sup>1</sup> See *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.27.1-III.27.3, CA. See further SENTENCING AND DISPOSITION OF OFFENDERS.

<sup>2</sup> 'Proper officer' means: (1) in relation to a magistrates' court in England and Wales, the designated officer for the court; (2) in relation to any other court, the clerk of the court, his deputy or any other person having custody of the court record: Police and Criminal Evidence Act 1984 s 73(3) (amended by the Access to Justice Act 1999 s 90(1), Sch 13 paras 125, 128(1), (3); and the Courts Act 2003 s 109(1), Sch 8 para 285).

<sup>3</sup> Police and Criminal Evidence Act 1984 s 73(1), (2) (s 73(2) amended by the Access to Justice Act 1999 Sch 13 paras 125, 128). At common law it was necessary to produce the record or an examined copy: *R v Smith* (1828) 8 B & C 341; *Hartley v Hindmarsh* (1866) LR 1 CP 553. This method of proof is still available: see CIVIL PROCEDURE VOL 11 (2009) PARA 936.

Evidence of previous convictions is not affected by the provisions of the Rehabilitation of Offenders Act 1974: see PARA 1515 post. However, see also PARA 1515 text to note 4 post.

<sup>4</sup> *Pattison v DPP* [2005] EWHC 2938 (Admin), [2006] 2 All ER 317. Although three ways in which this can be proved are proof by an admission by or on behalf of the defendant, proof by the evidence of finger prints, and proof by someone who was present in court at the time the person was convicted being present to give evidence, it can be proved by any admissible means. In the absence of any evidence contradicting evidence showing a prima facie case that the defendant is the person named in the certificate, that evidence is sufficient for the court to convict: *Pattison v DPP* supra.

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### **1348. Outstanding charges.**

If there are outstanding charges against the defendant, he should be told what the offences are and asked whether he admits them and wishes them to be taken into consideration<sup>1</sup>. The details of each offence need not in every case be put to him, but he should be asked whether he has received the list<sup>2</sup> of outstanding offences and signed it, so that, if need be, he may have the opportunity of correcting it himself by saying that he does not admit the offences or that he admits some of them only<sup>3</sup>. It is essential in a case of doubt or controversy that the judge should satisfy himself by explicit inquiry that the defendant admits his guilt and there must be neither pressure nor appearance of pressure upon him to do so<sup>4</sup>.

1 As to taking other offences into consideration in passing sentence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 630. Offences cannot be taken into consideration without the defendant's consent: see eg *R v Miles* [2006] EWCA Crim 256. Consent to offences being taken into consideration should be given by the defendant personally and not through his counsel: *R v Davis* [1943] KB 274, 29 Cr App Rep 35, CCA.

2 The police prepare a list of outstanding offences and serve the list upon the defendant. He signs for the receipt of the list, not as an admission of guilt.

3 *R v Marquis* (1951) 115 JP 329, 35 Cr App Rep 33, CCA. For the procedure to be followed see the observations of Scarman LJ in *R v Walsh* (1973) unreported, CA (set out in *Archbold: Criminal Pleading, Evidence and Practice* (2006 Edn) PARA 5-109).

4 *R v Nelson* [1967] 1 All ER 358n, 51 Cr App Rep 98, CA.

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### **1349. Motion in arrest of judgment.**

At any time between conviction and judgment (that is, sentence), the defendant may, by himself or his counsel<sup>1</sup>, move the court in arrest of judgment. The grounds of this motion may be an objection appearing on the face of the record, such as want of certainty in the indictment or omission or insufficient statement of some material allegation, where the defect is more than formal and has not been amended<sup>2</sup>. The granting of a pardon after the arraignment is also a ground for moving in arrest of judgment<sup>3</sup>. In practice, objections to the form of the indictment should be taken on arraignment, not after verdict<sup>4</sup>.

Except as otherwise provided, no judgment after verdict may be stayed or reversed by reason: (1) that the statutory provisions regarding the summoning or impanelling of jurors, or the selection of jurors by ballot<sup>5</sup>, have not been complied with<sup>6</sup>; or (2) that a juror was not qualified<sup>7</sup> or was misnamed or misdescribed or unfit to serve<sup>8</sup>. Head (1) above does not, however, apply if objection to an irregularity is taken at or as soon as practicable after the time it occurs and the irregularity is not corrected<sup>9</sup>. Nothing in head (1) or head (2) above applies to any objection to a verdict on the ground of personation<sup>10</sup>.

The court may itself without motion arrest judgment, if it is of opinion that no offence in law is disclosed in the indictment<sup>11</sup>.

If judgment is arrested, the proceedings are set aside and the defendant is entitled to be discharged, unless there is another indictment against him, but this is no bar to a fresh indictment<sup>12</sup>.

1 The defendant must be in court when the motion is made: *R v Spragg* (1760) 2 Burr 930.

2 See PARA 1227 ante.

3 See PARA 1271 ante.

4 See PARA 1220 note 9 ante. In *R v Laming* (1989) 90 Cr App Rep 450, CA, the Court of Appeal stated that if, between conviction and sentence, a point arises as to the validity of the indictment it should be investigated by the Court of Appeal and not by the Crown Court. The propriety of the procedure of moving in arrest of judgment in such a case had not, however, been the subject of argument before the Court of Appeal.

5 I.e the Juries Act 1974 ss 2-11 (as amended): see PARAS 1286-1288 ante; and JURIES vol 61 (2010) PARAS 812-817, 823.

6 Ibid s 18(1)(a). See PARA 1296 note 3 ante.

7 I.e in accordance with ibid s 1, Sch 1 (as substituted and amended): see JURIES vol 61 (2010) PARAS 804-805.

8 Ibid s 18(1)(b)-(d). See PARA 1296 note 3 ante.

9 Ibid s 18(2).

10 Ibid s 18(3). A venire de novo (see PARA 1895 post) will be ordered in a criminal case if, by reason of personation, a person whose name is not on the panel serves as a juror and the personation is not discovered until after verdict and judgment: *R v Tremearne* (1826) 5 B & C 254; *R v Wakefield* [1918] 1 KB 216, CCA; and see *R v Kelly* [1950] 2 KB 164 at 173-174, [1950] 1 All ER 806 at 810-811, CCA. Where a person whose name was on the panel answered to the name of another member of the panel by mistake when it was called and was

sworn and served in that person's name, the court was divided on the question whether there had been a mistake: *R v Mellor* (1858) Dears & B 468, CCR.

11 *R v Waddington* (1801) 1 East 143 at 146. The repeal of a statute on which an indictment is founded may be a ground for arrest of judgment: see *R v Denton Inhabitants* (1852) 18 QB 761, Dears CC 3; *R v Mawgan Inhabitants* (1838) 8 Ad & El 496; and see also *R v M'Kenzie* (1820) Russ & Ry 429, CCR.

12 *Vaux's Case* (1590) 4 Co Rep 44a at 45a.

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### **1350. Respite of judgment.**

If judgment is not arrested<sup>1</sup>, then, except in the case of a conviction for an offence the sentence for which is fixed by law<sup>2</sup>, judgment may be respited on good grounds<sup>3</sup> and the passing of sentence may be postponed<sup>4</sup>. If judgment is respited, the defendant may be bound over to come up for judgment if called upon and meanwhile to be of good behaviour<sup>5</sup>. The Crown Court has power to admit to bail or direct the admission to bail of any person in the custody of the Crown Court pending the disposal of his case<sup>6</sup>.

1 See PARA 1349 ante.

2 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 15.

3 These grounds include the preparation or production of pre-sentence reports (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 617); or the situation where the court, if contemplating a community order with a mental health requirement, drug rehabilitation requirement or alcohol treatment requirement, wishes further inquiries to be made as to whether the necessary arrangements can be made; or the situation where it appears to the court that some slight period of reflection would be useful. As to adjournment for inquiries to be made see PARA 1352 post.

4 Ie under the common law power to postpone sentence which is not affected by the statutory power to defer sentence under the Powers of Criminal Courts (Sentencing) Act 2000 s 1 (as substituted) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 22); see s 1(8) (substituted by the Criminal Justice Act 2003 s 278, Sch 23 para 1); and *R v Ingle* [1974] 3 All ER 811 at 815, 59 Cr App Rep 306 at 309, CA; *R v McQuaide* (1974) 60 Cr App Rep 239, CA. Except under the statutory power to defer, it is wrong to postpone sentence pending eg the fulfilment of a promise to make restitution (*R v West* (1959) 43 Cr App Rep 109, CCA), or to see whether a defendant convicted of theft can help to recover the stolen property (*R v Collins* (1969) 53 Cr App Rep 385, CA). As to part postponement see *R v Annesley* [1976] 1 All ER 589, [1976] 1 WLR 106, CA; *R v Dorrian* [2001] 1 Cr App Rep (S) 135, CA; *R v Jones* [2003] EWCA Crim 1631, [2004] 1 Cr App Rep (S) 154, CA.

5 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 151. This practice is expressly preserved by the Supreme Court Act 1981 s 79(2)(b). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed.

6 Supreme Court Act 1981 s 81(1)(c); but see PARA 1304 ante. This power is subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended) (see PARA 1170 ante): see the Supreme Court Act 1981 s 81(1) (amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 48).

## **UPDATE**

### **1350 Respite of judgment**

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

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### **1351. Other matters relevant to sentence.**

Except where the trial judge has no discretion as to the sentence to be passed<sup>1</sup>, before judgment is given, the court may hear evidence from the prosecution or the defence on the question what punishment should be imposed<sup>2</sup>; defence counsel or the defendant, if unrepresented, may address the court in mitigation of sentence<sup>3</sup>; and the court considers any pre-sentence reports<sup>4</sup> on the case.

In the case of murder, where the judge has no discretion as to the sentence to be imposed, namely imprisonment (or detention) for life, he is required to set a minimum term to be served before the offender is eligible for consideration for release by the Parole Board, unless the judge determines that a 'whole life sentence' is required, and in this respect the judge should take into account aggravating and mitigating factors relevant to the seriousness of the offence, or a combination of the offence and any associated offences<sup>5</sup>.

An application for a court to hear a plea in mitigation in camera should be made in camera but the court should announce in public its decision on that application<sup>6</sup>.

<sup>1</sup> See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 15.

<sup>2</sup> As to evidence regarding the defendant's antecedents see PARAS 1347 ante; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 617. As to the duty of counsel to know the relevant sentencing powers of the court and any relevant sentencing guidelines, and, where appropriate, to direct the judge's attention to them, see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 15.

The opinions of the victim or surviving members of his family about the appropriate level of sentence do not provide a sound basis for assessing a sentence: *R v Nunn* [1996] 2 Cr App Rep (S) 136, CA; *A-G's Reference (No 2 of 1995)* [1996] 1 Cr App Rep (S) 274, CA; *R v Perks* [2001] 1 Cr App Rep (S) 66, CA. However, the damaging and distressing effects of a crime on them, including anguish and emotional suffering, represent an important factor in the sentencing decision: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.28.1, III.28.2, CA; *R v Nunn* [1996] 2 Cr App Rep (S) 136, CA; *R v Hurd* [1998] 2 Cr App Rep (S) 241, CA; *R v O'Brien* [2001] 1 Cr App Rep (S) 22, CA; and see also *R v Matthew* [2002] EWCA Crim 1484, [2003] 1 Cr App Rep (S) 109 (appellant convicted of constructive manslaughter after killing brother; sentence reduced because of increase in grief and anxiety caused to family); *R v Roche* [1999] 2 Cr App Rep (S) 105, CA (appellant convicted of killing cousin by careless driving under influence of drink; sentence reduced because length of sentence delaying time for family to grieve, and otherwise having adverse effect on family). As to the principles that determine the penalty imposed see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 615 et seq.

<sup>3</sup> In appropriate circumstances there is no reason why a defendant should not give evidence in mitigation: see *R v Cross* [1975] Crim LR 591, CA.

<sup>4</sup> See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 617.

<sup>5</sup> See PARA 90 ante.

<sup>6</sup> See *R v Ealing Justices, ex p Weafer* (1981) 74 Cr App Rep 204, DC. A plea in mitigation should be heard in camera only when strictly necessary on the ground that hearing it in public would frustrate or render impracticable the administration of justice: *R v Reigate Justices, ex p Argus Newspapers* (1983) 5 Cr App Rep (S) 181, DC.

## **UPDATE**

**1351 Other matters relevant to sentence**

NOTE 2--See *Goldsmith v Goldsmith* [2006] All ER (D) 380 (Oct), CA (judge should not pass a custodial sentence prior to hearing mitigation).

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### **1352. Adjournment after conviction and resumption by differently composed court.**

The taking of pleas, the trial by jury and the pronouncement of judgment on any one indictment may respectively be by or before different judges<sup>1</sup>. Where the court before which an offender has been convicted on indictment adjourns the case to enable inquiries to be made for determining the most suitable method of dealing with it, that court may order that the case be resumed by another court composed of a different judge<sup>2</sup>.

1 This practice is expressly preserved by the Supreme Court Act 1981 s 79(2)(a): see PARA 1232 note 5 ante. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 The facts of the case should be opened to that different judge, so that he is apprised of all the factors in the case. The judge of the court before which the offender has been convicted may commit him either in custody or on bail (but see PARA 1304 ante) to another location of the Crown Court, where the same judge will be sitting in the future: see the Supreme Court Act 1981 s 78(2).

### **UPDATE**

### **1352 Adjournment after conviction and resumption by differently composed court**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.



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## **(x) Proceedings after Plea of Guilty**

### **1353. Determination of disputed issues of fact before sentence.**

Where the defendant has pleaded guilty<sup>1</sup>, he is ordinarily<sup>2</sup> sentenced on the basis of the summary of the facts presented by the prosecution<sup>3</sup>. However, there may be disputed issues of fact relevant to sentence which must be determined by the trial judge before he may pass sentence<sup>4</sup>. In these circumstances the trial judge may:

- 2144 (1) obtain an answer to the issues from a jury by adding a new count, if possible, to the indictment<sup>5</sup>; or
- 2145 (2) himself hear evidence (the so-called 'Newton hearing') and come to his own conclusions<sup>6</sup>; or
- 2146 (3) hear no evidence and listen to the submissions of counsel<sup>7</sup>.

1 As to a plea of guilty see PARA 1280 ante.

2 Unless the plea is the subject of a written statement of the basis of the plea which the prosecution accepts.

3 To enable the press and the public to know the circumstances of each offence to which a defendant has pleaded guilty, the prosecution must state the facts in open court before sentence is imposed: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.26.1, CA.

4 See *R v Brown* (1981) 3 Cr App Rep (S) 250, CA; *R v Tolera* [1999] 1 Cr App Rep 29, CA; followed in *R v Anderson* [2002] EWCA Crim 1850, [2003] 1 Cr App Rep (S) 4211, CA. The responsibility for taking any initiative and alerting the prosecutor to the areas of dispute about material facts rests with the defence; if the Crown accepts and agrees the defendant's account of the disputed facts, the agreement should be reduced into writing and signed by both advocates and made available to the judge before the start of the Crown's opening and, if possible, before he is invited to approve the acceptance of any pleas(s); if the agreed basis of plea is not signed by the advocates for both sides, the judge is entitled to ignore it; if the Crown rejects the defendant's version, the areas of dispute should be identified in writing and the document should focus the court's attention on the precise fact(s) in dispute; where an issue raised by the defence is outside the knowledge of the prosecution, that does not mean that the truth of those matters should be agreed; the Crown should not normally agree the defendant's account unless it is supported by other material: *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App Rep (S) 478.

5 In *R v Eubank* [2001] EWCA Crim 891, [2002] 1 Cr App Rep (S) 11, for example, the defendant pleaded guilty to robbery but there was an issue as to whether he had been carrying a firearm at the material time; the Court of Appeal held that the fact that although the 'Newton hearing' conducted by the judge (see head (2) in the text) might have been a more expeditious resolution of the issue it was preferable where such a serious offence was concerned to have the verdict of a jury on the issue; there should have been a separate count in the indictment. See also *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App Rep (S) 478.

6 See PARA 1354 post. Exceptionally a trial of the facts by the judge may take place by virtue of a decision of the judge, even though the prosecution and defence are agreed on the facts (as where the defendant has agreed to plead guilty on the basis of particular facts, and the prosecution is prepared to accept this or feels that it cannot challenge it): *R v McNulty* [1994] Crim LR 385, CA (papers before court showing agreed facts in stark conflict with evidence); *R v Beswick* [1996] 1 Cr App Rep (S) 343, CA. The prosecution should not lend itself to any agreement with the defendant based on an unreal set of facts; if it does, the judge may hold a hearing with the facts: *R v Beswick* supra. If the judge does not accept the agreed version of the facts, he should make his views known and give the defendant the chance to convince the judge of the truth of his story: *R v Tolera* [1999] 1 Cr App Rep 29, CA; *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App Rep (S) 478.

7 *R v Newton* (1982) 77 Cr App Rep 13, 4 Cr App Rep (S) 388, CA. See further PARA 1355 post. As to submissions of counsel before sentence see also PARA 1351 ante. If the court is unwilling to sentence on the basis of the defendant's version in a case of substantial conflict, it must proceed to hear evidence, regardless of counsel's wishes: *R v Smith* (1986) 8 Cr App Rep (S) 169, CA; *Williams v R* (1982) 77 Cr App Rep 329, DC.

## **UPDATE**

### **1353 Determination of disputed issues of fact before sentence**

NOTE 4--The fact that a person unequivocally pleaded guilty to a charge does not prevent him from disputing issues of fact in subsequent confiscation proceedings: *R v Knaggs* [2009] EWCA Crim 1363, [2010] 1 WLR 435, [2009] All ER (D) 120 (Jul).

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### **1354. Trial of disputed issues of fact by the judge: Newton hearing.**

Counsel are under a duty to make it clear when a trial of disputed issues of fact by the judge is appropriate<sup>1</sup>. Where there is a substantial conflict between the versions of facts put forward by the prosecution and the defence after a plea of guilty, and the trial judge is not prepared to pass sentence on the basis of the defence version, he must hear evidence on the question regardless of whether counsel for the prosecution or for the defence wishes such a hearing to take place<sup>2</sup>. Evidence should be called in the normal way and the judge must direct himself according to the normal criminal burden and standard of proof<sup>3</sup> and explain his conclusions in a judgment<sup>4</sup>. Where, after a hearing of disputed issues of fact, the judge decides the issue against the defendant, the defendant may lose some of the mitigation he would otherwise receive for a guilty plea<sup>5</sup>.

The trial judge is not, however, obliged to hear evidence in this way:

- 2147 (1) where the facts in dispute are immaterial to sentence, or their impact on the sentencing decision is minimal<sup>6</sup>;
- 2148 (2) where the version of the facts put forward by the defence is manifestly false or wholly implausible<sup>7</sup>; or
- 2149 (3) where the matters put forward by the defence are relevant in mitigation but do not amount to a contradiction of the prosecution case<sup>8</sup>.

1 *R v Gardener* (1994) 15 Cr App Rep (S) 667, CA; *R v Tolera* [1998] Crim LR 425, CA.

2 *R v Smith* (1986) 8 Cr App Rep (S) 169, CA; *R v Costley* [1989] Crim LR 913, CA. The prosecuting advocate should assist the judge by calling any appropriate evidence; and, in particular, where the issue arises from facts within the exclusive knowledge of the defendant and the defendant is willing to give evidence in support of his case, he should be called; if he is not, and subject to any explanation that may be proffered, the judge may draw such inferences as he thinks fit from that fact; he may reject evidence called by the prosecution and may equally reject assertions advanced by the defendant, or his witnesses, even if the Crown does not offer positive contradictory evidence: *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App Rep (S) 478.

3 *R v McGrath, R v Casey* (1983) 5 Cr App Rep (S) 460 at 463, CA, per May LJ; *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App Rep (S) 478; and see *R v Nabil Ahmed* (1985) 80 Cr App Rep 295, 6 Cr App Rep (S) 391, CA (Crown Court must direct itself that the defendant's account must be accepted unless that court is sure that it is untrue); *R v Ghandi* (1986) 8 Cr App Rep (S) 391, CA (judge may reject defendant's account after hearing evidence even if prosecution takes no part in trial of issue). As to the burden of proof see PARA 1368 et seq post. The rules of evidence should be strictly followed and the judge should direct himself appropriately as the trier of fact: *R v Gandy* (1989) 11 Cr App Rep (S) 564, CA.

4 *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App Rep (S) 478.

5 *R v Stevens* (1986) 8 Cr App Rep (S) 297, CA. The defendant is, nevertheless, entitled to some credit for his guilty plea: *R v Williams* (1990) 12 Cr App Rep (S) 415, CA; *R v Hassall* [2000] 1 Cr App Rep (S) 67, CA.

6 See *R v Hall* (1984) 6 Cr App Rep (S) 321, CA; *R v Bent* (1986) 8 Cr App Rep (S) 19, CA; *R v Sweeting* (1987) 9 Cr App Rep (S) 372, CA; *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App Rep (S) 478.

7 See *R v Hawkins* (1985) 7 Cr App Rep (S) 351, CA; *R v Bilinski* (1987) 86 Cr App Rep 146, 9 Cr App Rep (S) 360, CA (disapproving *R v Mackenzie* (1985) 7 Cr App Rep (S) 441, CA); *R v Ghandi* (1986) 8 Cr App Rep (S) 391, CA; *R v Walton* (1987) 9 Cr App Rep (S) 107, CA; *R v Mudd* (1988) 10 Cr App Rep (S) 22, CA. The judge's view that the defence version is manifestly false or wildly implausible must be in accordance with the facts: *R v*

*Costley* (1989) 11 Cr App Rep (S) 357, CA. If the judge declines to hear evidence about disputed facts on the ground that the defendant's version is manifestly false or wholly implausible, he should explain why he reached this conclusion: *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App Rep (S) 478.

8 See *R v Connell* (1983) 5 Cr App Rep (S) 360, CA; *R v Ogunti* (1987) 9 Cr App Rep (S) 325, CA; *R v Underwood* [2004] EWCA Crim 2256, [2005] 1 Cr App Rep (S) 478. As to evidence in mitigation see PARA 1351 ante.

## **UPDATE**

### **1354 Trial of disputed issues of fact by the judge: Newton hearing**

NOTE 2--Where, after holding a Newton hearing, a district judge decides to commit an offender to the Crown Court for sentence, the Crown Court judge may hold a fresh Newton hearing if he is satisfied that it is in the interests of fairness and justice: *Gillan v DPP; R (on the application of Gillan) v DPP* [2007] EWHC 380 (Admin), [2007] 2 Cr App Rep 148, DC.

NOTE 5--See *R v Elicin* [2008] All ER (D) 60 (Sep), CA; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 623.

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**1355. Trial judge's duty where no evidence is heard.**

Where the trial judge decides not to hear evidence on the facts in dispute<sup>1</sup>, he must, if there is a substantial conflict between the prosecution and the defence, accept the version of the defendant so far as possible<sup>2</sup>.

1 See PARA 1353 head (3) ante.

2 *R v Newton* (1982) 77 Cr App Rep 13, 4 Cr App Rep (S) 388, CA; *R v Costley* [1989] Crim LR 913, CA.

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## (xi) Judgment

### 1356. Delivery of judgment.

Judgment must be pronounced orally in open court by the trial judge<sup>1</sup>. It is the practice for the defendant to be present to hear judgment and sentence unless there is a good reason for his absence<sup>2</sup>. In cases of treason he must be present when judgment is given<sup>3</sup>.

If there has been a verdict of guilty on more counts than one, the proper course is to deliver and enter up a separate judgment on each count<sup>4</sup>. Where a defendant is sentenced to imprisonment on more than one count, it should be expressly stated in his presence whether the sentences are to be concurrent or consecutive<sup>5</sup>.

In general, where several defendants are charged jointly, sentence on any who plead guilty should normally be postponed until those who pleaded not guilty have been tried, when all who are guilty should be sentenced together, because the court will then be able to assess the degree of guilt of each<sup>6</sup>. Where, however, a defendant who has pleaded guilty is to give evidence for the prosecution against his co-defendant(s), the question of whether he should be sentenced before or after he has given evidence is a matter subject to the discretion of the judge<sup>7</sup>, but the normal practice is for the judge to postpone sentencing that defendant until verdicts have been returned in respect of all the defendants<sup>8</sup>. Evidence given in the trials of co-defendants may be taken into account by the judge when assessing the culpability of a defendant who has pleaded guilty, but the judge must remember that self-serving statements are likely to be untrue and that the defence has been unable to cross-examine; the defendant should be given the opportunity to give evidence of his understanding of the facts<sup>9</sup>.

A defendant who is sentenced before giving evidence may be brought back to have his sentence increased or decreased at the end of the trial, but his sentence may not be increased on the basis that the evidence he gives differs from that raised by way of mitigation in his own trial<sup>10</sup>.

The judge must give his reasons for, and explain the effect of, the sentence<sup>11</sup>. Although, when passing sentence, a judge can express his views about the defendant's evidence in trenchant terms, if he knows that he is likely to have to conduct a fact-finding exercise, such as confiscation proceedings, he must not express himself in a way which might be perceived as indicating that he is biased against the defendant and unlikely to believe anything that the defendant might tell him<sup>12</sup>.

1 As to sentences generally see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 1 et seq; as to the function of justices in the Crown Court see COURTS vol 10 (Reissue) PARA 623; as to the time of commencement of sentence see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 30; and as to variation or rescission of sentence see PARA 1357 post. The judge should not refer to a spent conviction unless it is necessary to do so to explain the sentence to be passed: see PARA 1515 post.

2 Eg where he has voluntarily waived that right by absconding whilst on bail: *R v Jones (No 2)* [1972] 2 All ER 731, 56 Cr App Rep 413, CA (applying *R v Abrahams* (1895) 21 VLR 343); and see PARA 1235 ante.

3 1 Ld Raym 48, 267.

4 See *Campbell v R* (1846) 11 QB 799 at 814, Ex Ch; *O'Connell v R* (1844) 11 Cl & Fin 155, HL; *Castro v R* (1881) 6 App Cas 229, HL.

5 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at I.8.1, CA. As to the form of a further sentence of imprisonment where the defendant is already subject to consecutive sentences see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at I.8.2, CA. As to concurrent and consecutive sentences see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 35.

6 *R v Payne* [1950] 1 All ER 102, 34 Cr App Rep 43, CCA. As to the circumstances in which an accomplice may be called as a witness for the prosecution see PARA 1453 post.

7 *R v Palmer* (1993) 99 Cr App Rep 83, CA.

8 *R v Weekes* (1982) 74 Cr App Rep 161 at 166, CA; *R v Palmer* (1993) 99 Cr App Rep 83, CA.

9 *R v Smith* (1988) 87 Cr App Rep 393, CA, disapproving *R v Michaels*, *R v Skoblo* (1981) 3 Cr App Rep (S) 188, CA; *R v Ghandi* (1986) 8 Cr App Rep (S) 391, CA; *R v Winter*, *R v Colk*, *R v Wilson* [1997] 1 Cr App Rep (S) 331, CA. See also *R v Mahoney* (1992) 14 Cr App Rep (S) 291, CA.

10 *R v Stone* [1970] 2 All ER 594, 54 Cr App Rep 364, CA.

11 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 23. As to types of case where reasons need not be given see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 23.

12 *R v Odewale*, *R v Oshungbure* [2005] EWCA Crim 709, (2005) Times, 14 March.

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### **1357. Entry of judgment, variation and rescission.**

After the judgment has been pronounced, a minute of the judgment is entered on the record sheet attached to the indictment<sup>1</sup>.

A sentence imposed, or other order made, by the Crown Court when dealing with an offender may be varied or rescinded by the Crown Court<sup>2</sup>: (1) in the case of two or more persons jointly tried on an indictment, not later than the period of 28 days beginning with the date of the conclusion of the joint trial<sup>3</sup>, or the period of 56 days beginning with the day on which the sentence or other order was imposed or made, whichever period is the shorter<sup>4</sup>; and (2) except in such case, within the period of 28 days beginning with the day on which the sentence or other order was imposed or made<sup>5</sup>. After that it may not be altered, but it may be reversed or amended by the Court of Appeal<sup>6</sup>. Any subsequent alteration of sentence should be made in open court<sup>7</sup> in the presence of the offender unless he has waived this right, expressly or by implication<sup>8</sup>.

1 At the Central Criminal Court it is also entered in the book kept for that purpose by the clerk of the court.

2 Under the Powers of Criminal Courts (Sentencing) Act 2000 s 155 (as amended) (see the text and notes 3-5 *infra*) the court has power to vary not only the terms of the original sentence or order but also to substitute a sentence or order of a different nature from the original sentence or order (*R v Sodhi* (1978) 66 Cr App Rep 260, CA) or to add an order (*R v Reilly* [1982] QB 1208, 75 Cr App Rep 266, CA). The court's power under the Powers of Criminal Courts (Sentencing) Act 2000 s 155 (as amended) includes a power to extend the length of a custodial sentence in appropriate circumstances: see *R v Newsome* [1970] 2 QB 711, 54 Cr App Rep 485, CA; *R v Hart* (1983) 5 Cr App Rep (S) 25, CA; *R v McLean* (1988) 10 Cr App Rep (S) 18, CA; *R v Hadley* (1995) 16 Cr App Rep (S) 358, CA. The Powers of Criminal Courts (Sentencing) Act 2000 s 155 (as amended) should not, however, be used for a change of mind, or to convert a sentence because of some event which has taken place after the original sentence has been passed: *R v Nodjoumi* (1985) 7 Cr App Rep (S) 183, CA; *R v Powell* (1985) 7 Cr App Rep (S) 247, CA. Contrast the following cases where a sentence was held to be properly varied: *R v Hart* (1983) 5 Cr App Rep (S) 25, CA (offender had given false information highly relevant to sentence); *R v Iqbal* (1985) 81 Cr App Rep 145, CA (mistake as to sentencing powers); *R v Sodhi* (1978) 66 Cr App Rep 260, CA (receipt of further information relevant to sentence).

The variation or rescission must be made by the court constituted as it was when the original sentence or order was imposed or made, or, where that court comprised one or more justices of the peace, a court so constituted except for the omission of any one or more of those justices: Powers of Criminal Courts (Sentencing) Act 2000 s 155(4). A forfeiture order made under the Misuse of Drugs Act 1971 s 27 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 480) or alternatively a deprivation order under the Powers of Criminal Courts (Sentencing) Act 2000 s 143 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 481) is a 'sentence imposed or other order made' for these purposes: *R v Menocal* [1980] AC 598, sub nom *Customs and Excise Comrs v Menocal* (1979) 66 Cr App Rep 148, HL. As to variation of confiscation orders made under the Proceeds of Crime Act 2002 Pt 5 (ss 240-316) (as amended) see PARA 2147 *et seq* post.

3 For these purposes, the joint trial is concluded on the latest of the following dates, that is, any date on which any of the persons jointly tried is sentenced, or is acquitted, or on which a special verdict is brought in: Powers of Criminal Courts (Sentencing) Act 2000 s 155(3).

4 *Ibid* s 155(2). The time limits in s 155 (as amended) must be strictly observed; a court is not permitted to add an order to a sentence after the expiry of the relevant time limit: *R v Menocal* [1980] AC 598, sub nom *Customs and Excise Comrs v Menocal* (1979) 66 Cr App Rep 148, HL; *R v Hart* (1983) 5 Cr App Rep (S) 25, CA. If a sentence is rescinded within the time limit, and a new sentence imposed after its expiry, the rescission will be valid but the new sentence will not be: *R v Stillwell*, *R v Jewell* (1992) 13 Cr App Rep (S) 253, CA. However, a mere technical defect can be corrected under the Crown Court's inherent jurisdiction to remedy mistakes in its record after the expiry of the relevant statutory time limit: *R v Saville* [1981] QB 12, 70 Cr App Rep 204, CA.



5 Powers of Criminal Courts (Sentencing) Act 2000 s 155(1). Criminal Procedure Rules may: (1) as respects cases where two or more persons are tried separately on the same or related facts alleged in one or more indictments, provide for extending the period prescribed in the Powers of Criminal Courts (Sentencing) Act 2000 s 155(1); and (2) subject to the provisions of s 155(1)-(6) (see the text and notes 1-4 supra), prescribe the cases and circumstances in which, and the time within which, any order or other decision made by the court may be varied or rescinded: s 155(7) (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035, art 3, Schedule paras 39, 43). At the date at which this volume states the law no such rules had been made.

As to the date from which a varied sentence or other order takes effect see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 30.

6 *R v Fox* (1866) 15 WR 106; *R v Horn* (1883) 15 Cox CC 205, CCR; *R v Turner* [1904] 1 KB 181, CCR; and see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 49. As to the grounds on which judgment may be set aside see SENTENCING AND DISPOSITION OF OFFENDERS. As to reviews of sentence on the application of the Attorney General see the Criminal Justice Act 1988 s 36 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 55 et seq.

7 *R v Dowling* (1988) 88 Cr App Rep 88, CA; *R v Hussain* [2000] 1 Cr App Rep (S) 181, CA.

8 *R v May* [1981] Crim LR 729, CA; *R v McLean* (1988) 10 Cr App Rep (S) 18, CA (implied waiver by absconding). At least where the sentence is not increased by the variation, it will suffice that the offender's counsel is present in the offender's absence: *R v Shacklady* (1987) 9 Cr App Rep (S) 258, CA. Any clarification of doubt or ambiguity in respect of a sentence should also take place in open court: *R v Dowling* (1988) 88 Cr App Rep 88, CA.

## UPDATE

### 1357 Entry of judgment, variation and rescission

TEXT AND NOTES 1-5--Powers of Criminal Courts (Sentencing) Act 2000 s 155(1) amended, s 155(1A) added, s 155(2), (3) repealed: Criminal Justice and Immigration Act 2008 Sch 8 para 28, Sch 28 Pt 3.

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## **(xii) Trial of Summary Offence after Conviction on Indictment**

### **1358. Power of Crown Court to deal with summary offence where defendant committed for offence triable either way or sent for trial.**

Until a day to be appointed<sup>1</sup>, where a magistrates' court has committed a person for trial<sup>2</sup> on indictment for an offence triable either way<sup>3</sup> and has also committed him for trial for a summary offence in accordance with the statutory provisions<sup>4</sup>, and he is convicted on the indictment, the Crown Court must consider whether the statutory conditions<sup>5</sup> have been satisfied<sup>6</sup>. If the court considers that those conditions were so satisfied, it must state to him the substance of the summary offence and ask him whether he pleads<sup>7</sup> guilty or not guilty<sup>8</sup>. If he pleads guilty, the court must convict him of the summary offence, but may deal with him in respect of that offence only in a manner in which a magistrates' court could have dealt with him; if he pleads not guilty, the Crown Court may try him for the offence, but may deal with him only in a manner in which a magistrates' court could have dealt with him<sup>9</sup>. The court must inform the designated officer for the magistrates' court of the outcome of any proceedings under the above provisions<sup>10</sup>.

The following provisions apply where a magistrates' court has sent a person for trial<sup>11</sup> for offences which include a summary offence<sup>12</sup>. If the person is convicted on the indictment, the Crown Court must consider whether the summary offence is related to the offence that is triable only on indictment or, as the case may be, any of the offences that are so triable<sup>13</sup>. If it considers that a summary offence is so related, the court must state to the person the substance of the offence and ask him whether he pleads guilty or not guilty<sup>14</sup>. If the person pleads guilty, the Crown Court must convict him but may deal with him in respect of the summary offence only in a manner in which a magistrates' court could have dealt with him<sup>15</sup>. If he does not plead guilty the powers of the Crown Court cease in respect of the summary offence<sup>16</sup> except that if the prosecution informs the court that it would not desire to submit evidence on the charge relating to the summary offence, the court must dismiss it<sup>17</sup>. The Crown Court must inform the designated officer for the magistrates' court of the outcome of any such proceedings<sup>18</sup>.

Where the Court of Appeal allows an appeal against conviction of an indictable only offence<sup>19</sup> which is related to a summary offence of which the appellant was convicted under these provisions:

- 2150 (1) it must set aside his conviction of the summary offence and give the clerk of the magistrates' court notice that it has done so; and
- 2151 (2) it may direct that no further proceedings in relation to the offence are to be undertaken,

and the proceedings before the Crown Court in relation to the offence must thereafter be disregarded for all purposes<sup>20</sup>.

1 As from a day to be appointed the Criminal Justice Act 1988 s 41 (as amended; prospectively amended) (see the text and notes 2-10 infra) is repealed: see the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 60(1), (8), Sch 37 Pt 4 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 As to committal proceedings see PARA 1123 et seq ante.

3 For the meaning of 'offence triable either way' see PARA 1102 note 4 ante; and as to offences triable either way see PARA 1103 ante.

4 Ie in accordance with the Criminal Justice Act 1988 s 41(1)-(4) (prospectively repealed) (see MAGISTRATES vol 29(2) (Reissue) PARA 660).

5 Ie the conditions specified in ibid s 41(1) (prospectively repealed).

6 Ibid s 41(5).

7 As to pleading to the general issue see PARA 1278 et seq ante.

8 See the Criminal Justice Act 1988 s 41(6).

9 See ibid s 41(7), (8) (s 41(8) substituted by the Courts Act 2003 s 109(1), Sch 8 para 303(1), (2)). As from a day to be appointed the committal of a person under these provisions in respect of an offence to which the Criminal Justice Act 1988 s 40 (as amended; prospectively amended) (see PARA 148 ante) applies, does not prevent him being found guilty of that offence under the Criminal Law Act 1967 s 6(3) (alternative verdicts on trial on indictment: see PARA 1335 ante); but where he is convicted under that provision of such an offence, the functions of the Crown Court under these provisions in relation to the offence cease: Criminal Justice Act 2003 s 41(4A) (prospectively added by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 28). At the date at which this volume states the law no such day had been appointed.

10 See the Criminal Justice Act 2003 s 41(10) (amended by the Courts Act 2003 s 109(1), Sch 8 para 303(1), (4)). As to the power of the Court of Appeal to set aside a conviction for a summary offence under these provisions see PARA 1885 post.

11 Ie under the Crime and Disorder Act 1998 s 51 (prospectively amended) or s 51 (as substituted) (see PARAS 1131-1132 ante) or s 51A (prospectively added) (see PARA 1133 ante): see Sch 3 para 6(1) (prospectively amended by the Criminal Justice Act 2003 s 41, Sch 3 Pt 1 paras 15, 20). At the date at which this volume states the law no day had been appointed for the commencement of these prospective amendments.

12 Crime and Disorder Act 1998 Sch 3 para 6(1).

Where the Crown Court has to determine whether an offence which is listed in the first column of the Magistrates' Courts Act 1980 Sch 2 (offences for which the value involved is relevant to the mode of trial) is a summary offence, the following provisions apply. The court must have regard to any representations made by the prosecutor or the defendant: Crime and Disorder Act 1998 Sch 3 para 14(2). If it appears clear to the court that the value involved does not exceed the relevant sum, it must treat the offence as a summary offence: Sch 3 para 14(3). If it appears clear to the court that the value involved exceeds the relevant sum it must treat the offence as an indictable offence: Sch 3 para 14(4). If it appears to the court for any reason not clear whether the value involved does or does not exceed the relevant sum, the court must ask the defendant whether he wishes the offence to be treated as a summary offence: Sch 3 para 14(5). Where Sch 3 para 14(5) applies: (1) if the defendant indicates that he wishes the offence to be treated as a summary offence, the court must so treat it; (2) if the defendant does not give such an indication, the court must treat the offence as an indictable offence: Sch 3 para 14(6). For these purposes, 'the value involved' and 'the relevant sum' have the same meanings as in the Magistrates' Courts Act 1980 s 22 (see PARAS 299, 1114 post): Crime and Disorder Act 1998 Sch 3 para 14(7).

Where the Crown Court proceeds in the defendant's absence in accordance with Sch 3 para 15(1) (see PARA 1141 ante) and it appears to the court for any reason not clear whether the value involved does or does not exceed the relevant sum, the provisions of Sch 3 paras 14(5), (6) do not apply and: (a) the court must ask the defendant's legal representative whether the defendant wishes the offence to be treated as a summary offence; (b) if the legal representative indicates that the defendant wishes the offence to be treated as a summary offence, the court must so treat it; (c) if the legal representative does not give such an indication, the court must treat the offence as an indictable offence: Sch 3 para 15(5).

13 Ibid Sch 3 para 6(2). As from a day to be appointed the Crown Court must consider whether the summary offence is related to the indictable offence for which he has been sent for trial or as the case may be, any of the indictable offences for which he was so sent: Sch 3 para 6(2) (prospectively amended by the Criminal Justice Act 2003 Sch 3 paras 15, 20). At the date at which this volume states the law no such day had been appointed.

14 Crime and Disorder Act 1998 Sch 3 para 6(3).

15 Ibid Sch 3 para 6(4).

16 Ibid Sch 3 para 6(5).

17 Ibid Sch 3 para 6(6). If the offence is one to which the Criminal Justice Act 1988 s 40 (as amended; prospectively amended) (see PARA 148 ante) applies, the Crown Court may exercise in relation to the offence the power conferred by s 40 (as amended; prospectively amended); but where the person is tried on indictment for such an offence the functions of the Crown Court under these provisions in relation to the offence cease: Crime and Disorder Act 1998 Sch 3 para 6(8).

18 Ibid Sch 3 para 6(7) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 61).

19 Or, as from a day to be appointed, an indictable offence: see the Crime and Disorder Act 1998 Sch 3 para 6(9) (prospectively amended by the Criminal Justice Act 2003 Sch 3 paras 15, 20). At the date at which this volume states the law no such day had been appointed.

20 Crime and Disorder Act 1998 Sch 3 para 6(9). A notice under Sch 3 para 6(9) must include particulars of any direction given under head (2) in the text in relation to that offence: Sch 3 para 6(10).

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EVIDENCE/(1) GENERAL PRINCIPLES OF EVIDENCE IN CRIMINAL CASES/1359. Function and classification of rules of evidence.

## **20. EVIDENCE**

### **(1) GENERAL PRINCIPLES OF EVIDENCE IN CRIMINAL CASES**

#### **1359. Function and classification of rules of evidence.**

Evidence is the usual means of proving or disproving a fact in issue<sup>1</sup>. It may take the form of testimony from witnesses, documentary evidence (including audio or video recordings) or the production of exhibits for inspection. The law of evidence determines what matters may properly be adduced by the prosecution or defence, that is to say what evidence is relevant and admissible<sup>2</sup>, and it more broadly regulates the manner or circumstances in which such evidence may be adduced. Further, it allocates burdens of proof, and the standard of proof which must be attained<sup>3</sup>.

The rules of evidence in criminal cases are generally the same whether the evidence is tendered by the prosecution or by the defence, although several significant differences exist, particularly in respect of the court's discretion to exclude admissible but unfairly prejudicial evidence<sup>4</sup>.

The admissibility of evidence is a question of law to be determined by the trial judge<sup>5</sup> (as is any question concerning the allocation of a burden of proof or the competence or compellability of a witness), while the weight or credibility of any evidence or testimony, if a case is left to the jury<sup>6</sup>, is a question for the jury alone to determine<sup>7</sup>.

1 As to formal admissions rendering proof unnecessary see PARA 1538 post; as to the doctrine of judicial notice of facts see PARA 1378 et seq post; and as to the operation of conclusive or irrebuttable presumptions precluding proof see PARA 1375 post.

2 As to the link between relevance and admissibility see PARA 1364 post.

3 As to the burden of proof in criminal cases see PARA 1368 et seq post; as to the standard of proof in criminal cases see PARA 1372 post.

4 A court or judge generally has no discretion to exclude admissible defence evidence, either at common law or under the Police and Criminal Evidence Act 1984 s 78 (as amended); but see PARA 1365 post.

5 *Ajodha v The State* [1982] AC 204, [1981] 2 All ER 193, PC. As to the power of the judge to conduct a trial within a trial in order to determine issues of admissibility see PARA 1306 ante. As to the power of a judge to decide issues of admissibility at a preparatory hearing under the Criminal Procedure and Investigations Act 1996 ss 28-38 (as amended), see *R v Claydon* [2001] EWCA Crim 1359, [2004] 1 WLR 1575, [2004] 1 Cr App Rep 474, CA; and PARA 1253 ante.

6 It is for the judge to rule (as a matter of law) whether the prosecution or defence has discharged any evidential burden of proof: see PARA 1313 ante.

7 *Ajodha v The State* [1982] AC 204, [1981] 2 All ER 193, PC.

## **UPDATE**

### **1359 Function and classification of rules of evidence**

NOTE 6--It is the responsibility of the judge to consider whether evidential inconsistencies are such that no jury, even if properly directed as to the significance of the inconsistencies, could safely convict: *R v R* [2006] EWCA Crim 2754, [2005] All ER (D) 339 (Dec).

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EVIDENCE/(1) GENERAL PRINCIPLES OF EVIDENCE IN CRIMINAL CASES/1360. Evidence in criminal and civil cases.

### **1360. Evidence in criminal and civil cases.**

The rules of evidence in criminal cases were at one time broadly similar to those which applied in civil actions<sup>1</sup>. Various points of distinction have long existed, notably in the higher standard of proof imposed on the prosecution in criminal cases<sup>2</sup>, and in a range of common law and statutory rules designed to prevent the introduction of unfair or prejudicial prosecution evidence<sup>3</sup>, but the enactment of the Criminal Evidence Act 1965<sup>4</sup> and in particular the Civil Evidence Act 1968<sup>5</sup> marked the beginning of a major divergence between the civil and criminal branches of the law of evidence. A series of legislative reforms followed, in the course of which many of the shared common law rules of evidence have been replaced by statutory provisions unique to either the civil or the criminal law systems<sup>6</sup>. Some rules of evidence remain more or less equally applicable to both civil and criminal trials<sup>7</sup>, but the differences are now widespread and fundamental.

1 As to the rules of evidence in civil cases see CIVIL PROCEDURE vol 11 (2009) PARA 749 et seq.

2 As to the standard of proof in criminal cases see PARA 1372 post; and as to the standard applicable in civil proceedings see CIVIL PROCEDURE vol 11 (2009) PARA 775. See also *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, [1956] 3 All ER 970, CA.

3 Thus, whilst much of the Criminal Procedure Act 1865 was equally applicable to civil cases, the Criminal Evidence Act 1898 introduced rules unique to criminal trials. 'The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials': *R v Christie* [1914] AC 545 at 564, sub nom *DPP v Christie* (1914) 10 Cr App Rep 141 at 164, HL, per Lord Reading (referring to the common law).

4 The Criminal Evidence Act 1965 (repealed by the Police and Criminal Evidence Act 1984 s 119, Sch 7 Pt III) made significant changes to the rules governing documentary hearsay evidence in criminal cases. As to the circumstances in which hearsay evidence may be adduced in criminal cases see PARA 1519 et seq post.

5 The Civil Evidence Act 1968 provided, inter alia, a comprehensive regime for the admissibility of hearsay evidence in most (but not all) civil cases. See also the Civil Evidence Act 1972 and the Civil Evidence Act 1995; and CIVIL PROCEDURE.

6 See eg the Police and Criminal Evidence Act 1984, the Criminal Justice Act 1988, the Criminal Justice and Public Order Act 1994, the Criminal Procedure and Investigations Act 1996 and the Criminal Justice Act 2003.

7 Eg the rules governing judicial notice (see PARA 1378 et seq post) and private privilege (see PARA 1474 et seq post).

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### **1361. Facts in issue.**

In criminal proceedings<sup>1</sup> the facts in issue are generally: (1) those which it is necessary for the prosecution to establish in order to prove the actus reus and mens rea of the offence charged<sup>2</sup>; and (2) any further facts which the defendant alleges in denial of the offence<sup>3</sup> or in support of a specific legal defence<sup>4</sup>.

A defendant who pleads not guilty ordinarily puts all the facts alleged by the prosecution in issue<sup>5</sup>. However, either party may formally admit facts<sup>6</sup>, thus narrowing or reducing the range of issues which must be proved<sup>7</sup>.

A defendant who pleads guilty admits the offence charged, but does not necessarily admit that all the facts related in the depositions or statements tendered in support of the charge are true<sup>8</sup>.

1 As to the facts in issue generally see CIVIL PROCEDURE vol 11 (2009) PARAS 1065-1066. As to the admissibility of facts relevant to the facts in issue (ie circumstantial evidence) see PARA 1366 post.

2 As to the standard of proof to be reached see PARA 1372 post. As to actus reus and mens rea see PARAS 5, 8 et seq ante.

3 Eg where the defendant relies on an alibi defence (see PARA 1371 post).

4 As to the allocation of the burden of proof in relation to defences and the standard of proof required see PARAS 1369-1372 post; and as to the special pleas which may be raised to an indictment see PARA 1269 et seq ante.

5 'Wherever there is a plea of not guilty, everything is in issue, and the prosecution have to prove the whole of their case, including the identity of the defendant, the nature of the act, and the existence of any necessary knowledge or intent': *R v Sims* [1946] KB 531 at 539, 31 Cr App Rep 158 at 167, 168, CCA, per Lord Goddard CJ.

6 As to formal admissions see PARA 1538 post.

7 In a case that is to be tried on indictment the defendant is now required to give a 'defence statement' to the court and the prosecutor (and where directed to do so, to any co-defendant) before the trial, which must indicate the matters on which he takes issue with the prosecution: see PARA 1384 post. This does not operate as a formal admission and does not prevent the defendant from later contesting matters previously admitted, but a court or jury may draw such inferences as may appear proper where, inter alia, the defendant puts forward a defence which was not mentioned in his defence statement or is different from any defences set out in that statement: see the Criminal Procedure and Investigations Act 1996 s 5 (as amended), s 6A (as added), s 11 (as amended); and PARA 1388 post. Such a statement may also be given voluntarily in respect of a case that is to be tried summarily: see s 6 (as amended); and PARA 1388 post.

8 *R v Riley* [1896] 1 QB 309 at 318, CCR, per Hawkins J; *R v Newton* (1982) 77 Cr App Rep 13, CA. As to the trial of disputed facts relevant to sentence following a guilty plea (ie Newton hearings) see PARA 1354 ante.



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EVIDENCE/(1) GENERAL PRINCIPLES OF EVIDENCE IN CRIMINAL CASES/1362. Secondary or collateral issues.

### **1362. Secondary or collateral issues.**

Questions of fact may also arise for determination regarding matters which are not directly relevant to the issue of the guilt or innocence of the defendant, and evidence may need to be adduced in relation to such secondary issues<sup>1</sup>. In a criminal trial, for example, it is frequently necessary to inquire into: (1) the admissibility of evidence; and (2) the competence<sup>2</sup> or credibility<sup>3</sup> of witnesses in the proceedings.

At a trial on indictment, questions concerning the admissibility of evidence or the competence or compellability of witnesses are for the judge to determine as and when such issues arise<sup>4</sup>. Where necessary, a trial within a trial may have to be held to determine the truth of any relevant facts that are in dispute<sup>5</sup>.

1 Such evidence must ordinarily conform to the general rules of admissibility and of burden and standard of proof: see PARA 1373 post.

2 As to the rules regarding the competence of witnesses see PARA 1401 post.

3 As to the rules regarding the impeachment of the credit of witnesses see PARA 1433 post.

4 In a summary trial, such issues must be decided by the trial court as they arise.

5 See PARA 1306 ante.

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### **1363. Questions of fact and questions of law.**

At a trial on indictment, questions of law are determined by the judge as they arise and questions of fact (other than questions of foreign law) are determined by the jury at the conclusion of the trial<sup>1</sup>. Questions of law include the interpretation of statutes, statutory instruments and case law<sup>2</sup> and questions concerning the admissibility of evidence or the competence or compellability of witnesses<sup>3</sup>. The judge may take judicial notice of the rules of English law, and does not need to hear evidence concerning that law, although counsel may make submissions in respect of it<sup>4</sup>.

Questions of fact include all those matters which are not perceived as questions of law. Thus the credibility of a witness is a question of fact, whether he is dealing in facts or opinions. So too is the reasonableness of a person's behaviour or the foreseeability of a particular consequence<sup>5</sup>.

The legal construction or interpretation of documents, such as deeds, wills, articles of association and contracts, is a question of law<sup>6</sup>. In criminal cases, however, the court will rarely be concerned with the strict legal or contractual effect of the document. Issues of criminal liability will more frequently turn on issues such as authorship, intent, deception and causation, which are questions of fact<sup>7</sup>.

Where a rule of foreign law<sup>8</sup> needs to be ascertained<sup>9</sup>, expert evidence must be heard and determined by the judge alone<sup>10</sup>. Although the interpretation or construction of a statute is a question of law for the judge, the meaning of ordinary words used in a statute is a question of fact for the jury, unless such words have acquired a technical legal meaning<sup>11</sup>.

1 Similarly, at a summary trial, the court must decide issues of law as they arise. As to questions of foreign law see the text and notes 8-10 infra.

2 *Brutus v Cozens* [1973] AC 854 at 861, [1972] 2 All ER 1297 at 1299, HL, per Lord Reid.

3 Where disputed facts need to be established in order to determine the admissibility of evidence, a judge may hold a trial within a trial for that purpose, at which he may hear evidence; see PARA 1306 ante. As to the procedure for determining the competence of a witness see PARA 1401 et seq post.

4 As to the taking of judicial notice see PARA 1378 post.

5 In the context of theft or related offences, it may be necessary to decide whether D was under a legal obligation to act in a certain way, or whether title in property had passed between one person and another as a result of a particular action or event. The occurrence of the action or event (if disputed) will be a question of fact, but the question whether such an act would, if established, give rise to rights or obligations is clearly one of law, and must accordingly be decided by the judge: *R v Mainwaring* (1981) 74 Cr App Rep 99, CA; *R v Dubar* [1995] 1 All ER 781, [1995] 1 Cr App Rep 280, C-MAC; *R v Clowes (No 2)* [1994] 2 All ER 316, CA.

6 *Lyle v Richards* (1866) LR 1 HL 222; *Hutchison v Bowker* (1839) 9 LJ Ex 24; *R v Rex* (1991) 93 Cr App Rep 194. See also *R v Spens* [1991] 4 All ER 421, [1991] 1 WLR 624, CA, in which it was held that the proper interpretation of the City Code on Take-overs and Mergers was a question of law for the judge, that document being very like a statute in many respects.

7 *R v Adams* [1993] Crim LR 525, CA; *R v Morris* [1994] Crim LR 596, CA; *R v Clarksons Holidays Ltd* (1972) 57 Cr App Rep 38, CA. See also *R v Sunair Holidays* [1973] 2 All ER 1233, [1973] 1 WLR 1105, CA; *British Airways Board v Taylor* [1976] 1 All ER 65, [1976] 1 WLR 13, HL.

8 The laws of all other jurisdictions, including Scotland, Northern Ireland, the Republic of Ireland, British overseas territories, Commonwealth countries and foreign states are ordinarily regarded as 'foreign law', but see PARA 1382 post.

9 In civil cases, foreign law may be presumed (in the absence of evidence to the contrary) to be similar to English law (*Bumper Development Corpn v Metropolitan Police Comr* [1991] 4 All ER 638 at 644, [1991] 1 WLR 1362 at 1368, CA, per Purchas LJ), but this is not ordinarily true in criminal cases (*R v Ofori and Tackie (No 2)* (1993) 99 Cr App Rep 223, [1994] Crim LR 822, CA). In some cases, however, legislation allows such a presumption to be made until and unless the issue is raised: see eg the Sexual Offences Act 2003 s 72; and PARA 243 ante.

10 See the Administration of Justice Act 1920 s 15 (repealed in relation to the High Court and county courts). See *R v Hammer* [1923] 2 KB 786, CCA. As to the determination of any question as to the meaning or effect of any of the Community Treaties or the validity, meaning or effect of any Community instrument, see the European Communities Act 1972 s 3(1) (amended by the European Communities (Amendment) Act 1986 s 2); and *R v Goldstein* [1983] 1 All ER 434, [1983] 1 WLR 151, HL.

11 *Brutus v Cozens* [1973] AC 854, [1972] 2 All ER 1297, HL. Examples of terms that have acquired such meanings include 'obscenity' (*R v Skirving* [1985] QB 819, [1985] 2 All ER 705, CA) and 'dishonesty' (*R v Ghosh* [1982] QB 1053, [1982] 2 All ER 689, CA). See further STATUTES vol 44(1) (Reissue) PARAS 1487-1488.

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EVIDENCE/(1) GENERAL PRINCIPLES OF EVIDENCE IN CRIMINAL CASES/1364. Relevance and admissibility.

### **1364. Relevance and admissibility.**

Any evidence which is sought to be admitted must always be relevant to some issue in the case<sup>1</sup>. Evidence that is of no logical relevance clearly fails this test, but evidence may also be excluded if its relevance is so slight as to be marginal, especially if its admission would give rise to a plethora of subsidiary issues that would prolong the trial and distract the court or jury from the primary issue<sup>2</sup>. Evidence is relevant if it is logically probative or disprobative of some matter which requires proof<sup>3</sup>.

It does not follow that evidence which is relevant must necessarily be admissible, for, while relevance is a condition precedent to admissibility, further rules of exclusion exist which may serve to exclude evidence which would generally be considered to be relevant<sup>4</sup>. Thus evidence must be: (1) relevant; and (2) admissible according to the rules of exclusion.

1 This may be either a primary or collateral issue; but evidence will be irrelevant if it relates only to some fact which is admitted or which need not be proved (such as proof of knowledge or intent in respect of a strict liability offence that does not require it): see *R v Sandhu* [1997] Crim LR 288, CA; *R v Byrne* [2002] EWCA Crim 632, [2002] 2 Cr App Rep 311, CA.

2 *R v Berry* (1986) 83 Cr App Rep 7, CA; *A-G v Hitchcock* (1847) 1 Exch 91 at 105 per Rolfe B; *R v Patel* [1951] 2 All ER 29 at 30, 35 Cr App Rep 62 at 65, CCA, per Byrne J. The requirement of relevance applies equally to prosecution and defence (see eg *R v Blastland* [1986] AC 41, [1985] 2 All ER 1095, HL, where evidence of the state of mind of a third party alleged by the defence to have committed the murder with which the defendant was charged was rejected as lacking in sufficient relevance) but prosecution evidence that is more prejudicial than probative may be excluded, either at common law or under the Police and Criminal Evidence Act 1984 s 78 (as amended), in circumstances where comparable defence evidence might have to be admitted (see PARA 1365 post).

3 *DPP v Kilbourne* [1973] AC 729 at 756, 57 Cr App Rep 381 at 417, HL, per Lord Simon of Glaisdale. What is or is not logically probative may, however, be a matter of dispute. Thus in *R v Kearley* [1992] 2 AC 228, 95 Cr App Rep 88, HL, it was clear that several persons had called at the defendant's address because they believed he could provide them with drugs. A majority the House of Lords ruled that this was logically irrelevant to the issue of whether the defendant was indeed a drug dealer, but a minority, dissenting, held that this evidence was highly relevant.

4 *R v Bond* [1906] 2 KB 389 at 410, CCR. 'Our law excludes evidence of many matters which in life outside the courts sensible people take into consideration when making decisions': *R v Turner* [1975] QB 834 at 841, [1975] 1 All ER 70 at 74, CA, per Lawton LJ. See also *R v Blastland* [1986] AC 41 at 53, 81 Cr App Rep 266 at 271, HL, per Lord Bridge of Harwich.

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EVIDENCE/(1) GENERAL PRINCIPLES OF EVIDENCE IN CRIMINAL CASES/1365. Discretion to exclude admissible evidence.

### **1365. Discretion to exclude admissible evidence.**

In any proceedings<sup>1</sup> the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it<sup>2</sup>.

This principal statutory discretion to exclude admissible prosecution evidence exists alongside other statutory and common law powers and duties<sup>3</sup>, but in most respects appears to be significantly wider than any exclusionary power at common law<sup>4</sup>. At common law, courts and judges retain a limited discretion to exclude prosecution evidence the prejudicial effect of which outweighs its probative value<sup>5</sup>, and to exclude self-incriminatory evidence unfairly obtained from the defendant after the commission of the alleged offence<sup>6</sup>, but there is no wider discretion at common law to exclude relevant admissible evidence on the ground that it was obtained by improper, unlawful or unfair means<sup>7</sup>.

In exercising the statutory discretion, a court or judge may need to take a number of considerations into account. It is not enough to ask whether admission of the evidence in question would in some way be unfair to the defendant. The question is whether admission of that evidence would have such an unfair effect as to require its exclusion<sup>8</sup>. That may in turn require the court to balance the interests of the defendant against wider and potentially conflicting interests, including the need for the public to be protected against dangerous offenders<sup>9</sup>.

A court or judge ordinarily has no power to exclude or restrict the use of legally admissible evidence by or on behalf of a defendant, even if that evidence is unfairly prejudicial to a co-defendant and has been, or would have been excluded as prosecution evidence<sup>10</sup>. In respect of hearsay evidence, however, either prosecution or defence evidence may be excluded where, taking account of the danger that to admit it would result in undue waste of time, the case for exclusion outweighs the case for admitting it<sup>11</sup>.

1 For these purposes, 'proceedings' means criminal proceedings, including (1) proceedings in the United Kingdom or elsewhere before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957; (2) proceedings in the United Kingdom or elsewhere before the Courts-Martial Appeal Court (a) on an appeal from a court-martial so constituted; or (b) on a reference under the Courts-Martial (Appeals) Act 1968 s 34; and (3) proceedings before a Standing Civilian Court: Police and Criminal Evidence Act 1984 s 82(1) (definition amended by the Armed Forces Act 1996 ss 5, 35(2), Sch 1 para 107(a), (b), Sch 7 Pt I). As from a day to be appointed the definition is amended so that the reference to the court-martial being constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 is removed: see the Police and Criminal Evidence Act 1984 s 82(1) (definition prospectively amended by the Youth Justice and Criminal Evidence Act 1999 ss 67(3), 68(3)). At the date at which this volume states the law no such day had been appointed.

2 Police and Criminal Evidence Act 1984 s 78(1). 'The width of section 78(1) is of critical importance. Although it is formally cast in the form of a discretion ('the court may') the objective criterion whether 'the evidence would have such an adverse effect on the fairness of the proceedings' in truth imports a judgment whether in the light of the statutory criterion of fairness the court ought to admit the evidence': *R v Z* [2005] UKHL 22 at [53], [2005] 2 AC 467 at [53] per Lord Steyn.

An appellate court nevertheless may interfere with a ruling under the Police and Criminal Evidence Act 1984 s 78 (as amended) only where it appears that the court below reached a decision that was perverse or unreasonable, or failed to consider relevant issues (*R v Pettman* (2 May 1985) Lexis, CA; *R v Burke* (1985) 82 Cr App Rep 156, CA; *R v Mason* [1987] 3 All ER 481, 86 Cr App Rep 349, CA; *R v Hawkins* [2005] All ER (D) 163 (Jun), CA).

Examples of the s 78 discretion in operation may be found in relation to confession evidence (see PARA 1545 post), evidence of identification obtained in breach of the Code D: Code of Practice for the Identification of Persons by Police Officers (see PARA 1456 post), evidence of the conviction of a person other than the defendant tendered in order to establish his guilt of the offence for which he was convicted under the Police and Criminal Evidence Act 1984 s 74(1) (see PARA 1498 post) and evidence obtained as a result of entrapment, although in cases of unfair entrapment the court's power to stay proceedings as an abuse of process may often be more appropriate (see *R v Looseley*; *A-G's Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 4 All ER 897, [2002] 1 Cr App Rep 360; and PARA 55 ante).

3 Nothing in the Police and Criminal Evidence Act 1984 s 78 prejudices any rule of law requiring a court to exclude evidence (s 78(2)) and nothing in that Act prejudices any power of a court to exclude evidence, whether by preventing questions from being put or otherwise, at its discretion (s 82(3)). Where, however, the Serious Fraud Office has the conduct of any prosecution of an offence which does not relate to inland revenue, the court may not prevent the prosecution from relying on any evidence under s 78 by reason only of the fact that the information concerned was disclosed by Her Majesty's Revenue and Customs for the purposes of any prosecution of an offence relating to a former inland revenue matter: Criminal Justice Act 1987 s 3(2) (amended by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 35(1)(b)). See further PARA 1094 ante.

4 It was said on a few occasions after its enactment that the Police and Criminal Evidence Act 1984 s 78 merely restates the common law power to exclude evidence (see eg *R v Mason* [1987] 3 All ER 481 at 484, 86 Cr App Rep 349 at 354, CA, per Watkins LJ). It is now clear that the Police and Criminal Evidence Act 1984 s 78 goes much further than this, in particular because it significantly widens the discretion to exclude evidence that has been unfairly or unlawfully obtained: see *R v Gill and Ranuana* [1989] Crim LR 358, CA, per Lord Lane CJ, disapproving dicta in *R v Harwood* [1989] Crim LR 285, CA; *R v Smurthwaite*, *R v Gill* [1994] 1 All ER 898, 98 Cr App Rep 437, CA; *A-G's Reference (No 3 of 1999)* [2001] 2 AC 91, [2001] 1 All ER 577, HL; *R v Looseley*; *A-G's Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 4 All ER 897, [2002] 1 Cr App Rep 360.

There is one context in which the courts' common law powers are more extensive than those under the Police and Criminal Evidence Act 1984 s 78, and that is where the evidence in question has already been adduced. Section 78 is of no assistance in that context, but if it appears that the evidence ought not to have been admitted the court or judge may at common law take whatever action may be necessary to prevent an injustice, whether by directing the jury to ignore the offending evidence or, if this is not sufficient, by discharging the jury: see *R v Sat-Bhambra* (1988) 88 Cr App Rep 55, CA.

5 *Selvey v DPP* [1970] AC 304, 52 Cr App Rep 443, HL; *R v Sang* [1980] AC 402, 69 Cr App Rep 282, HL. See also *R v Christie* [1914] AC 545 at 559 and at 564, sub nom *DPP v Christie* (1914) 10 Cr App Rep 141 at 159, 160, 164, HL, per Lord Moulton and Lord Reading respectively; *Noor Mohamed v R* [1949] AC 182 at 192, [1949] 1 All ER 365 at 370, PC, per Lord du Parq. The discretion is linked to, and is probably an aspect of, the discretion to exclude evidence to ensure a fair trial: *R v Sang* supra at 434 and at 288, at 438 and at 292, at 451 and at 303 per Lord Diplock, Viscount Dilhorne and Lord Scarman respectively. See also *Kuruma, Son of Kaniu v R* [1955] AC 197 at 204, [1955] 1 All ER 236 at 239, PC, per Lord Goddard; *R v Apicella* (1985) 82 Cr App Rep 295, CA; *Scott v R*, *Barnes v R* [1989] AC 1242, 89 Cr App Rep 153, PC.

6 *R v Sang* [1980] AC 402 at 438, 69 Cr App Rep 282 at 292, HL, per Lord Diplock.

7 *R v Sang* [1980] AC 402 at 438, 69 Cr App Rep 282 at 292, HL, per Lord Diplock. See also *Morris v Beardmore* [1981] AC 446, [1980] 2 All ER 753, HL; *R v Fox* [1986] AC 281, 82 Cr App Rep 105, HL. At common law evidence obtained by entrapment could not be excluded by exercise of the court's discretion (*R v Sang* supra) but it is now recognised that entrapment may in some cases justify a court in ordering a stay of the proceedings in order to prevent an abuse of process (*R v Looseley*; *A-G's Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 4 All ER 897, [2002] 1 Cr App Rep 360; see PARA 55 ante).

8 *R v Walsh* (1989) 91 Cr App Rep 161, CA. In so deciding, the court or judge must now take account of any relevant principles established under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969): see *A-G's Reference (No 3 of 1999)* [2001] 2 AC 91, [2001] 1 All ER 577, HL; *R v Allan* [2004] EWCA Crim 2236, [2005] Crim LR 716 (following *Allan v United Kingdom* (2002) 13 BHRC 652, ECtHR). Indeed, the Police and Criminal Evidence Act 1984 s 78 serves a very similar purpose to Art 6 of the Convention: *R v Highton*, *R v Van Nguyen*, *R v Carp* [2005] EWCA Crim 1985, [2005] 1 WLR 3472, [2006] 1 Cr App Rep 125. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

9 'The competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion': *A-G's Reference (No 3 of 1999)* [2001] 2 AC 91 at 124, 125, [2001] 1 All ER 577 at 590, HL, per Lord Hutton, citing *R v Ireland* (1970) 126 CLR 321 at 335, Aust HC, per Barwick CJ.

10 *Lobban v R* [1995] 1 WLR 877, [1995] 2 Cr App Rep 573, PC; *R v Myers* [1998] AC 124, [1997] 4 All ER 314, HL; *R v Robinson* [2005] EWCA Crim 1940, [2006] 1 Cr App Rep 221.

11 See the Criminal Justice Act 2003 s 126. See also *R v Patel* (1992) 97 Cr App Rep 294, CA; *R v Millen* [1995] Crim LR 568, CA.

## UPDATE

### 1365 Discretion to exclude admissible evidence

NOTE 1--Definition of 'proceedings' further amended, definition of 'service proceedings' added: Armed Forces Act 2006 Sch 16 para 104(2).

NOTE 2--To ensure fairness the court may exclude evidence of substantial probative value where a defendant manipulates procedural rules so as to prevent his co-defendant from responding to an allegation of bad character: *R v Musone* [2007] EWCA Crim 1237, [2007] 1 WLR 2467.

NOTE 7--The fact that a person has been arrested unlawfully does not automatically invalidate medical procedures subsequently carried out to obtain evidence from him: *DPP v Wilson* [2009] EWHC 1988 (Admin), [2009] RTR 29.

NOTE 8--See *R v Ibrahim* [2008] EWCA Crim 880, [2008] 4 All ER 208 (evidence obtained in 'safety interviews' under Terrorism Act 2000 admissible at trial, subject to ordinary principles as to a fair trial and over-arching provisions in 1984 Act s 78); *R v Malicki* [2009] EWCA Crim 365, [2009] All ER (D) 309 (Mar) (exclusion of evidence of five-year-old complainant who had just watched her video evidence given 14 months previously).

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EVIDENCE/(1) GENERAL PRINCIPLES OF EVIDENCE IN CRIMINAL CASES/1366. Relevant facts and circumstantial evidence.

### **1366. Relevant facts and circumstantial evidence.**

As a general rule the evidence which may be adduced is restricted to evidence of matters tending directly or indirectly to prove or disprove the facts in issue<sup>1</sup>. In a criminal trial the prosecution must prove that the offence alleged has been committed<sup>2</sup>, and that the defendant was responsible<sup>3</sup>. In so doing, it may be relevant to go beyond proof of the unlawful act itself and to show other conduct or surrounding circumstances which are so connected with the offence as to make them part of the same transaction<sup>4</sup>. All the details of the alleged transaction may become relevant so as to be admissible as part of the prosecution's case.

Since many crimes are committed in secrecy, it is inevitable that, in a criminal trial, direct proof of guilt is often lacking and a great deal of the evidence is indirect or circumstantial<sup>5</sup>.

Circumstantial evidence is evidence of one or more facts (such as motive, opportunity, or fingerprints left at or near the scene of the crime) from which other facts (which may be the facts in issue, or secondary or collateral facts) may then be inferred or deduced<sup>6</sup>.

A single strand of circumstantial evidence may carry little weight, but when combined with other such evidence the cumulative effect may become very strong<sup>7</sup>. In the absence of evidence directly proving the facts in issue, the defendant may even be convicted solely on circumstantial evidence: in a case of murder, for example, there may be a conviction notwithstanding that the body is never found, provided that there is sufficient circumstantial evidence to convince the jury that the facts cannot be accounted for on any rational hypothesis other than murder<sup>8</sup>.

In seeking to connect the defendant with the offence, facts which tend to show motive for, means of, or opportunity of, committing the offence, or which show that the defendant had made preparations with the offence in view, or had threatened to do the act complained of, are also relevant<sup>9</sup>. Where the acts constituting the offence reveal any special knowledge, technique or attribute, the possession or non-possession of such special knowledge, skill or attribute is relevant<sup>10</sup>, and the non-possession of it may be decisive proof of innocence.

The subsequent conduct of the defendant may furnish evidence of guilt, for example evidence of flight, or of the fabrication or suppression of evidence, or of the telling of lies<sup>11</sup>. Possession of recently stolen property may, if unexplained, give rise to an inference that the person in possession is the thief or handler of the property<sup>12</sup>.

Where a particular intent is of the essence of the offence, that intent must be proved, either by direct evidence or, more likely, by inference on the ground that the particular injury or damage was the natural and probable consequence of the act done by the defendant<sup>13</sup>. In determining whether a person has committed an offence, a court or jury is not, however, bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; it must decide whether the defendant did intend or foresee that result by reference to all the evidence, drawing such inferences from it as appear proper in all the circumstances<sup>14</sup>.

1 As to facts in issue see PARA 1361 ante. As to secondary facts see PARA 1362 ante.



2 See 2 Hale PC 290; *R v Burdett* (1820) 4 B & Ald 95 at 162; *R v Sims* [1946] KB 531 at 539, 31 Cr App Rep 158. As to a defendant being found guilty of an offence other than that with which he is charged see PARA 1335 et seq ante.

3 As to evidence of identification see PARA 1455 et seq post.

4 See *Ratten v R* [1972] AC 378 at 388, 56 Cr App Rep 18 at 25, PC, per Lord Wilberforce, explaining that it may be 'arbitrary and artificial' to confine the inquiry to an act, such as a stabbing or shooting, without knowing in a broader sense what was done. This aspect of the doctrine of relevance is sometimes unhelpfully referred to as the *res gestae*, which phrase in the modern law of criminal evidence is more commonly used to denote that exception to the hearsay rule whereby a hearsay statement may be given in evidence if it is an immediate and spontaneous reaction to the events in issue: see PARA 1525 post. As to the proof of facts connected with the offence so as to be part of the transaction see *R v Lord George Gordon* (1781) 21 State Tr 485 at 535; *R v Damaree* (1710) 15 State Tr 521; *R v Black* (1922) 16 Cr App Rep 118, CCA. Evidence must generally be confined to those facts which constitute, or are connected with, the offence charged, and evidence cannot be given of other, unrelated, facts: *R v Butler* (1846) 2 Car & Kir 221; *R v Ollis* [1900] 2 QB 758 at 781, CCR per Channell J; *R v Peckham* (1935) 100 JP 59, CCA. If, however, the further facts are so inextricably bound up with the facts in issue as to constitute in effect one transaction, evidence may be given of the further facts: *R v Whiley* (1804) 2 Leach 983 at 985 per Lord Ellenborough CJ; *R v Voke* (1823) Russ & Ry 531, CCR; *R v Ellis* (1826) 6 B & C 145; *R v Winkworth* (1830) 4 C & P 444; *R v Mansfield* (1841) Car & M 140; *R v Long* (1833) 6 C & P 179; *R v Bleasdale* (1848) 2 Car & Kir 765; *R v Cobden* (1862) 3 F & F 833; *R v Firth* (1869) LR 1 CCR 172; *Ex p Burnby* [1901] 2 KB 458; *R v Welman* (1853) Dears CC 188; *O'Leary v R* (1946) 73 CLR 566, Aust HC; *R v Sims* [1946] KB 531, 31 Cr App Rep 158, CCA.

5 *R v Burdett* (1820) 4 B & Ald 95.

6 As to the facts in issue see PARA 1361 ante. As to secondary or collateral facts see PARA 1362 ante.

7 See *R v Exall* (1866) 4 F & F 922 at 929 per Pollock CB. 'Such evidence typically works by cumulatively, in geometrical progression, eliminating other possibilities': *DPP v Kilbourne* [1973] AC 729 at 758, [1973] 1 All ER 440 at 462, HL, per Lord Simon of Glaisdale. Circumstantial evidence which is itself of little weight may, taken together with other evidence, satisfy the onus of proof on the prosecution: see eg *R v Lydon (Sean)* (1987) 85 Cr App Rep 221, CA (piece of paper bearing defendant's first name found near scene of crime close to articles likely to have been used in the commission of the offence; taken together with other evidence, sufficient proof of identity).

8 *R v Onufrejczyk* [1955] 1 QB 388, 39 Cr App Rep 1, CCA (approving *R v Horry* [1952] NZLR 111); *McGreevy v DPP* [1973] 1 All ER 503, 57 Cr App Rep 424, HL. See also *R v Hodge* (1838) 2 Lew CC 227; *R v Gardner* (1859) 1 F & F 669; *R v Taylor, Weaver and Donovan* (1928) 21 Cr App Rep 20, CCA. Other examples of the use of circumstantial evidence as the only proof of an offence may be found: see eg *Noon v Smith* [1964] 3 All ER 895, 49 Cr App Rep 55, DC.

9 As to motive see *R v Clewes* (1830) 4 C & P 221; *R v Buckley* (1873) 13 Cox CC 293. 'In an ordinary prosecution for murder you can prove previous acts or words of the defendant to show that he entertained feelings of enmity towards the deceased, and this is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. . . . It is more probable that men are killed by those who have some motive for killing them than by those who have not': *R v Ball* [1911] AC 47 at 68, HL, per Lord Atkinson (affd in *R v Williams* (1986) 84 Cr App Rep 299, CA; and *R v Phillips* [2003] EWCA Crim 1379, [2003] 2 Cr App Rep 528, CA).

See also *Thompson v R* [1918] AC 221, sub nom *Thompson v DPP* (1917) 13 Cr App Rep 61, HL; *R v Twiss* [1918] 2 KB 853, 13 Cr App Rep 177, CCA (possession of items relevant to the type of homosexual offence charged as showing propensity). However, such evidence should now be considered in the light of *DPP v Boardman* [1975] AC 421 at 435, sub nom *Boardman v DPP* (1974) 60 Cr App Rep 165, HL, and the Criminal Justice Act 2003 Pt 11 Ch 1 (ss 98-113) (see PARA 1502 et seq post). See also *R v Hodges* (1957) 41 Cr App Rep 218, CCA (evidence of invitation to help break into building admissible to rebut defence of lawful excuse for possession of housebreaking implements).

Evidence that the defendant had no motive to commit the offence, or had a motive not to commit it, is admissible for the defence: *R v Grant* (1865) 4 F & F 322. This may involve the suggestion that a co-defendant had a motive or disposition which the defendant lacked: *Lowery v R* [1974] AC 85, [1973] 3 All ER 662, PC.

10 See eg *R v W (John)* [1998] 2 Cr App Rep 289, sub nom *R v Wharton* [1998] Crim LR 668, CA; *R v Gray* [2004] EWCA Crim 1074, [2004] 2 Cr App Rep 498 (being left-handed); *R v Mullen* [1992] Crim LR 735, CA (unusual blow-torch burglary technique).

11 *R v Onufrejczyk* [1955] 1 QB 388, 39 Cr App Rep 1, CCA. The fact that the defendant seeks to induce another to give false evidence on his behalf is admissible against him: *R v Watt* (1905) 20 Cox CC 852. As to fabrication of evidence, see *Mawaz Khan v R* [1967] 1 AC 454, [1967] 1 All ER 80, PC; *R v Thorne* (1977) 66 Cr

App Rep 6 at 18, CA (false alibi); *R v Lucas* [1981] QB 720, 73 Cr App Rep 159, CA, (lies as corroboration). See also *R v Long* (1973) 57 Cr App Rep 871, CA (flight in suspicious circumstances). As to a defendant's failure to provide intimate samples for analysis, or testify at trial, or explain certain facts or disclose his defence prior to the trial, see PARA 1550 et seq post.

12 This is sometimes called the 'doctrine of recent possession' but is merely a matter of drawing possible inferences from circumstantial evidence. See generally *R v Partridge* (1836) 7 C & P 551; *R v Crowhurst* (1844) 1 Car & Kir 370; *R v Poolman* (1909) 3 Cr App Rep 36, CCA; *R v Schama, R v Abramovitch* (1914) 84 LJKB 396, 11 Cr App Rep 45, CCA; *R v Seymour* [1954] 1 All ER 1006, 38 Cr App Rep 68, CCA; *R v Ball* [1983] 2 All ER 1089, 77 Cr App Rep 131, CA.

13 As to the direction to be given to a jury in a case where intention is in issue see PARA 13 ante.

14 See the Criminal Justice Act 1967 s 8; and PARA 13 ante.

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### **1367. The best evidence and primary evidence rules.**

There are some references, mostly in old cases, to a 'best evidence rule' by which at common law only the best available evidence of a fact in issue was said to be admissible<sup>1</sup>; but whatever status this rule may once have enjoyed, there is now very little modern authority for its continued survival and some express assertions of its demise<sup>2</sup>. The general rule now appears to be that whether a given item of evidence is the best available evidence or not goes only to its weight, not its admissibility<sup>3</sup>.

Closely related to the best evidence rule, the 'primary evidence rule' formerly provided that in the case of documentary evidence, only the original document or an 'enrolled' copy of that document was admissible to prove its contents and authenticity, but the old rule has effectively been discarded by the courts<sup>4</sup>, and any surviving remnants of this rule are further limited in criminal proceedings by legislation (which now generally permits the use of authenticated copies)<sup>5</sup>.

1 See eg *Omychund v Barker* (1744) 1 Atk 21 at 49; *Robinson Bros (Brewers) Ltd v Houghton and Chester-le-Street Assessment Committee* [1937] 2 KB 445 at 468, [1937] 2 All ER 298 at 307, CA, per Scott LJ.

2 See *R v Francis* (1874) LR 2 CCR 128; *Garton v Hunter* [1969] 2 QB 37 at 44, [1969] 1 All ER 451 at 453 CA, per Lord Denning MR ('That old rule has gone by the board long ago'); *Kajala v Noble* (1982) 75 Cr App Rep 149, DC; *R v Wayte* (1982) 76 Cr App Rep 110, CA; *Springsteen v Masquerade Music Ltd* [2001] EWCA Civ 563, [2001] EMLR 654.

3 *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, 90 Cr App Rep 281, DC. There is a reference to evidence being inadmissible as 'not the best evidence' in *R v Quinn* [1962] 2 QB 245 at 257, [1961] 3 All ER 88 at 93, CCA, per Ashworth J, but the evidence in this case was a self-serving filmed reconstruction of an allegedly obscene stage performance (akin to a self-serving pre-trial statement), and arguably inadmissible on that ground alone. In contrast, a self-incriminating reconstruction of an alleged offence, if made in circumstances in which an oral or written confession would have been admissible, will be admissible on the same basis as such a confession (*Li Shu Ling v R* [1989] AC 270, 88 Cr App Rep 82, PC).

4 *Springsteen v Masquerade Music Ltd* [2001] EWCA Civ 563, [2001] EMLR 654. The primary evidence rule was in any event inapplicable to recordings on film or tape, which may be proved by copies at common law (*Kajala v Noble* (1982) 75 Cr App Rep 149, DC; *R v Wayte* (1982) 76 Cr App Rep 110, CA) and if lost or destroyed their contents may be proved by oral evidence from persons who have previously viewed or heard them (*Taylor v Chief Constable of Cheshire* [1987] 1 All ER 225, 84 Cr App Rep 191, DC).

5 See now the Criminal Justice Act 2003 s 133; and PARA 1464 post.

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## **(2) BURDEN AND STANDARD OF PROOF**

### **1368. Persuasive and evidential burdens of proof.**

A party to legal proceedings is said to bear a persuasive (or legal) burden of proof in respect of a particular fact or issue in the cases where the onus is on him to prove that fact or issue to the required standard of proof<sup>1</sup>. This involves satisfying or persuading the court or jury as to the truth of that fact or issue at the conclusion of the trial. In contrast, a party is said to bear an evidential burden where he is required to adduce evidence that is capable of belief and capable (if believed) of proving the fact or issue in question, so that at a trial on indictment the judge may properly leave that issue to the jury<sup>2</sup>. The evidential burden ordinarily lies on the party bearing the persuasive burden in respect of the issue in question<sup>3</sup>, but this is not always the case<sup>4</sup>.

Where the evidential burden rests on the prosecution, the general rule is that it must be discharged by the end of the prosecution case<sup>5</sup>. If it has not then been discharged (that is if the prosecution fails to adduce such credible evidence as would, if believed and uncontradicted, suffice to prove the case against the defendant) the defendant may successfully make a submission of 'no case to answer'<sup>6</sup>.

A burden of proof may also arise where there is a dispute as to facts relating to the admissibility of an item of evidence or as to the competence of a witness. This is a persuasive burden, but differs from the normal persuasive burden in that it is the judge who must be persuaded prior to the admission or exclusion of the evidence<sup>7</sup>.

1 *R v Edwards* [1975] 1 QB 27 at 40, 59 Cr App Rep 213 at 221, CA, per Lawton LJ ('persuasive burden'). This burden of proof is sometimes also referred to as the 'probative burden': see *DPP v Morgan* [1976] AC 182 at 209, 61 Cr App Rep 136 at 146, HL, per Lord Hailsham of St Marylebone LC. As to the incidence of the burden see PARA 1369 post.

2 I.e. the obligation to lay a foundation for proof of a particular issue: *Bratty v A-G for Northern Ireland* [1963] AC 386 at 413, 46 Cr App Rep 1 at 21, HL, per Lord Denning.

3 As to the position where the prosecution fails to make out a case to answer see *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, CA; and PARA 1313 ante.

4 As to cases where the defendant bears an evidential (but not a persuasive) burden see PARA 1371 post.

5 See PARA 1316 ante. Where, however, the defendant is charged in the same proceedings with an offence of murder or manslaughter and with an offence of causing or allowing the death of a child or vulnerable adult under the Domestic Violence, Crime and Victims Act 2004 s 5 (see PARA 107 ante) in respect of the same death, the question whether there is a case to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the s 5 offence, before that earlier time): see s 6(4).

6 See PARA 1313 ante.

7 See PARA 1373 post.

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### **1369. Persuasive burden generally on prosecution.**

The general rule at common law is that the prosecution must establish the guilt of the defendant beyond reasonable doubt<sup>1</sup>. This rule is reinforced by the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>2</sup>. The prosecution's obligation is to prove the whole crime, including (with some exceptions) the negating of any defences which are in issue<sup>3</sup>. Accordingly, a defendant who pleads 'not guilty' ordinarily casts upon the prosecution the burden of proving every fact that is in issue<sup>4</sup>. If, when the totality of the evidence has been heard and considered, the court or jury is not satisfied of his guilt, it must then acquit him<sup>5</sup>.

1 *Woolmington v DPP* [1935] AC 462, 25 Cr App Rep 72, HL. As to the standard of proof see further PARA 1372 post. The general rule is subject to exceptions: see PARA 1370 et seq post. The common law recognises only one specific exception, namely in the case of a defendant who raises the issue of insanity: *Woolmington v DPP* supra; *Mancini v DPP* [1942] AC 1 at 11, 28 Cr App Rep 65 at 76, HL, per Lord Simon. All other specific exceptions to the rule are statutory.

2 The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq. By art 6(2), 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. This does not, however, create an absolute rule: *Salabiaku v France* (1988) 13 EHRR 379, ECtHR; *Brown v Stott* [2003] 1 AC 681, [2001] 2 All ER 97, PC. There are, accordingly, certain circumstances in which the imposition of a burden of proof on the defendant is permissible under the Convention: see *R v DPP, ex p Kebeline* [2000] 2 AC 326, [1999] 4 All ER 801, HL; *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, [2001] 2 Cr App Rep 511; *R v Johnstone* [2003] UKHL 28, [2003] 3 All ER 884, [2003] 2 Cr App Rep 493; *A-G's Reference (No 1 of 2004)*, *R v Edwards* [2004] EWCA Crim 1025, [2005] 4 All ER 457, [2004] 2 Cr App Rep 424; *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450. See further PARA 1370 post.

3 *Chan Kau v R* [1955] AC 206 at 211, [1955] 1 All ER 266 at 267, PC. Thus the prosecution must negative self-defence, where that defence is raised: *Chan Kau v R* supra; and see also *R v Lobell* [1957] 1 QB 547, 41 Cr App Rep 100, CCA; *Palmer v R* [1971] AC 814, 55 Cr App Rep 223, PC. As to exceptional cases in which a defence must be proved by the defendant see PARA 1370 post.

4 If the defendant formally admits the actus reus of the offence, but denies mens rea (eg by pleading that an alleged murder was in fact an accidental killing) the prosecution is required to prove mens rea; a plea of accident is a denial of guilt and imposes no burden of proof on the defendant: *Woolmington v DPP* [1935] AC 462, 25 Cr App Rep 72, HL.

5 It is the duty of the trial judge to give the jury a clear and accurate direction on the burden and standard of proof, without which a conviction is liable to be quashed: see PARA 1320 ante.

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### **1370. Persuasive burden on defendant.**

A persuasive burden of proof (or 'reverse legal burden') is in some cases imposed on the defendant. At common law, the only such reverse burden is imposed when the defendant raises a defence of insanity<sup>1</sup>. To succeed with this defence, the defendant must establish his insanity upon a balance of probabilities<sup>2</sup>. In contrast, statutory exceptions are numerous. It is common for statutes to include provisions that purport expressly to reverse the usual burden of proof in respect of a particular issue<sup>3</sup>, and in other cases the courts may conclude that Parliament must, by necessary implication, have intended to impose such a reverse burden, even where it has not done so expressly<sup>4</sup>. There is statutory authority for this type of implied reversal of the burden as far as summary trials are concerned<sup>5</sup>, and this has been held to mirror the principles of statutory interpretation applicable to trial on indictment<sup>6</sup>, which means that the allocation of the burden of proof in respect of offences triable either way does not differ according to the mode of trial adopted<sup>7</sup>.

In no case, however, is the entire burden of proof in a case imposed on the defendant. The prosecution must always prove certain facts (or those facts must instead be formally admitted) before the defendant can be required to discharge his reverse burden in respect of other facts. Thus, even if the defendant fails to discharge a burden of proof placed upon him in respect of a defence of lawful authority or justification, he must still be acquitted if the prosecution fails to satisfy the court or jury beyond reasonable doubt as to the basic facts that give rise to the imposition of the burden in the first place<sup>8</sup>.

The position governing both express and implied reversals of the persuasive burden of proof is now further complicated by the fact that legislation must be construed wherever possible in such a way as to be compatible with any rights protected under the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>9</sup>. Even where Parliament appears clearly to have intended to impose a persuasive burden of proof on the defendant, if the court considers that a literal or purposive interpretation of the relevant provision would be incompatible with the presumption of innocence guaranteed under the Convention, it must wherever possible 'read down' that provision so as to impose only an evidential burden in its place<sup>10</sup>. The imposition of an evidential burden will not ordinarily be incompatible with any Convention rights<sup>11</sup>.

In deciding whether the imposition of a reverse persuasive burden is or is not compatible with the Convention, the task of the court is never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence<sup>12</sup>. Where the imposition of such a burden goes no further than is reasonably necessary to achieve its objective (ie where it is proportionate) and is reasonably necessary in all the circumstances, it will ordinarily be justified<sup>13</sup>. The court may need to take a number of factors into account<sup>14</sup>, but although these factors are reasonably well established in English and United Kingdom case law and in the jurisprudence of the European Court of Human Rights<sup>15</sup>, the application and assessment of those factors in particular cases is often a matter of great difficulty and uncertainty<sup>16</sup>. Some rules or provisions imposing reverse persuasive burdens have already been ruled compatible with the Convention<sup>17</sup> and even fewer have been ruled incompatible<sup>18</sup>, but the compatibility of others remains to be determined, because the courts address such issues on a case-by-case basis.

A persuasive burden of proof may also be imposed on a defendant in respect of the admissibility of an item of evidence on which he proposes to rely<sup>19</sup>.

1 *Woolmington v DPP* [1935] AC 462, 25 Cr App Rep 72, HL; *Bratty v A-G for Northern Ireland* [1963] AC 386, 46 Cr App Rep 1, HL. See also *M'Naghten's Case* (1843) 10 Cl & Fin 200 at 210, HL. Where the issue of insanity is raised by the prosecution, the burden is on the prosecution to establish the issue beyond reasonable doubt: *R v Bastian* [1958] 1 All ER 568n, [1958] 1 WLR 413; *R v Grant* [1960] Crim LR 424; and see the Criminal Procedure (Insanity) Act 1964 s 6; and PARA 96 ante. In the same way, where the issue of unfitness to plead is raised, the legal burden lies upon the party seeking to establish unfitness: *R v Podola* [1960] 1 QB 325, 43 Cr App Rep 220, CCA; *R v Robertson* [1968] 3 All ER 557, 52 Cr App Rep 690, CA. See PARA 1265 ante.

2 This is invariably the standard to be attained where the defendant bears a persuasive burden of proof: *R v Dunbar* [1958] 1 QB 1, 41 Cr App Rep 182, CCA; *R v Carr-Briant* [1943] KB 607, 29 Cr App Rep 76, CCA; *R v Hudson* [1966] 1 QB 448, 49 Cr App Rep 69, CCA; *Sodeman v R* [1936] 2 All ER 1138, PC (burden of proving insanity not higher than the burden which rests on a party in civil proceedings). See further PARA 1372 post.

3 See eg the Homicide Act 1957 s 2 (diminished responsibility; see PARA 96 ante); s 4 (as amended) (suicide pact; see PARA 98 ante); Trade Descriptions Act 1968 s 24(1) (act or default of another person or accident or other cause beyond defendant's control; see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 472); the Public Order Act 1986 s 6(5) (burden of proving that intoxication was not self-induced, or that it was caused solely by the taking or administration of a substance in the course of medical treatment is on the defendant; see PARA 555 ante); Criminal Justice Act 1988 s 139(4) (good reason or lawful authority for carrying a blade in public place; see PARA 700 ante); Road Traffic Offenders Act 1988 s 15 (as amended) (defence of consuming alcohol before providing a specimen for analysis but after the alleged excess alcohol offence; see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 991). Note, however, that provisions which purport to reverse a burden of proof may be construed differently where they would otherwise be incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969); see the text and notes 9-18 infra. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

4 *R v Oliver* [1944] KB 68, 29 Cr App Rep 137, CCA; *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, [1967] 3 All ER 187, HL; *R v Edwards* [1975] QB 27, 59 Cr App Rep 213, CA; *R v Hunt (Richard)* [1987] AC 352, 84 Cr App Rep 163, HL.

5 Where the defendant relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification is on him, notwithstanding that the information or complaint may contain an allegation negating the exception, exemption, proviso, excuse or qualification: Magistrates' Courts Act 1980 s 101. Thus the defendant is obliged to prove that he has a valid licence if charged with driving without a licence (*John v Humphreys* [1955] 1 All ER 793, [1955] 1 WLR 325, DC) and that he has at least third party insurance if charged with driving without insurance (*Williams v Russell* (1933) 149 LT 190, DC; *Davey v Towle* [1973] Crim LR 360, DC).

6 *R v Edwards* [1975] QB 27, 59 Cr App Rep 213, CA; *R v Hunt (Richard)* [1987] AC 352, 84 Cr App Rep 163, HL.

7 *R v Hunt (Richard)* [1987] AC 352 at 372-373, 84 Cr App Rep 163 at 173-174, HL, per Lord Griffiths. As a guide to construction, it should be considered whether the enactment in question prohibits the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities (*R v Hunt (Richard)* supra approving to this extent *R v Edwards* [1975] QB 27, 59 Cr App Rep 213, CA) although other considerations must also be taken into account, such as whether it is fair or practicable for the defendant to be required to discharge such a burden (*R v Hunt (Richard)* supra). Provisions which might otherwise have been (and may previously have been) construed as imposing a full reverse burden of proof may now have to be construed differently if they would otherwise be incompatible with the European Convention on Human Rights: see *R (on the application of Grundy and Co Excavations Ltd) v Halton Division Magistrates' Court* [2003] EWHC 272 (Admin), 167 JP 387, DC; and the text and notes 9-18 infra.

8 See eg *Gatland v Metropolitan Police Comr* [1968] 2 QB 279, [1968] 2 All ER 100, DC, where the defendant was charged under what is now the Highways Act 1980 s 161(1) (see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 381), the case being that, without lawful authority or excuse he had deposited a skip on a highway in consequence of which a user of the highway had been injured or endangered. The defendant failed to prove any lawful authority for his actions (as required under what is now the Magistrates' Courts Act 1980 s 101) but his guilt was not established because the prosecutor failed to prove that the presence of the skip on the highway had in fact caused any user of the highway to be injured or endangered.

9 See the Human Rights Act 1998 s 3. Within the European Convention on Human Rights, the provision that is at risk of being infringed by reverse burdens is art 6(2), by which everyone charged with a criminal offence is presumed innocent until proved guilty according to law: see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

10 *R v DPP, ex p Kebeline* [2000] 2 AC 326, [1999] 4 All ER 801, HL; *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, [2001] 2 Cr App Rep 511; *R v Johnstone* [2003] UKHL 28, [2003] 3 All ER 884, [2003] 2 Cr App Rep 493; *A-G's Reference (No 1 of 2004)*, *R v Edwards* [2004] EWCA Crim 1025, [2005] 4 All ER 457, [2004] 2 Cr App Rep 424; *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450. Such radical re-interpretation may not give effect to the intention of Parliament when it enacted the legislation in question, but does give effect to the intention of Parliament when it enacted the Human Rights Act 1998 s 3: see *Sheldrake v DPP* supra at [53] per Lord Bingham; *R v A* [2001] UKHL 25, [2002] 1 AC 45, [2001] 2 Cr App Rep 351; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [2004] 3 All ER 411. See also CONSTITUTIONAL LAW AND HUMAN RIGHTS.

11 *A-G's Reference (No 1 of 2004)*, *R v Edwards* [2004] EWCA Crim 1025, [2005] 4 All ER 457, [2004] 2 Cr App Rep 424.

12 *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43 at [31], [2005] 1 AC 264 at [31], [2005] 1 Cr App Rep 450 at [31] per Lord Bingham. As to the presumption of innocence see note 9 supra.

13 *Salabiaku v France* (1988) 13 EHRR 379, ECtHR; *A-G's Reference (No 1 of 2004)*, *R v Edwards* [2004] EWCA Crim 1025, [2005] 4 All ER 457, [2004] 2 Cr App Rep 424; *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264.

14 The following principles are derived from *A-G's Reference (No 1 of 2004)*, *R v Edwards* [2004] EWCA Crim 1025 at [52], [2005] 4 All ER 457 at [52], [2004] 2 Cr App Rep 424 at [51] per Lord Woolf CJ:

- 85 (1) When ascertaining whether an exception is justified, the court must construe the provision to ascertain the realistic effects of the reverse burden. In doing this the courts should be more concerned with substance than form. If the proper interpretation is that the statutory provision creates an offence plus an exception, that will in itself be a strong indication that there is no contravention of the European Convention on Human Rights art 6(2).
- 86 (2) The easier it is for the defendant to discharge the burden the more likely it is that the reverse burden is justified. This will be the case where the facts are within the defendant's own knowledge. How difficult it would be for the prosecution to establish the facts is also indicative of whether a reverse legal burden is justified.
- 87 (3) Caution must be exercised when considering the seriousness of the offence. The need for a reverse burden is not necessarily reflected by the gravity of the offence, though, from a defendant's point of view, the more serious the offence, the more important it is that there is no interference with the presumption of innocence.

15 For guidance as to the approach of the European Court of Human Rights see *Salabiaku v France* (1988) 13 EHRR 379, ECtHR; *A-G's Reference (No 1 of 2004)*, *R v Edwards* [2004] EWCA Crim 1025 at [52], [2005] 4 All ER 457 at [52], [2004] 2 Cr App Rep 424 at [52] per Lord Woolf CJ.

16 See eg *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450 (in which Lords Carswell and Rodger agreed with the majority as to the basic principles, but dissented as to the proper application of those principles to the Terrorism Act 2000 s 11; see PARA 387 ante).

17 See eg *L v DPP* [2001] EWHC Admin 882, [2003] QB 137, [2001] 1 Cr App Rep 420; *R v Matthews* [2003] EWCA Crim 813, [2004] QB 690, [2003] 2 Cr App Rep 302 (Criminal Justice Act 1988 s 139(4), (5); requirement that defendant prove good reason or lawful authority for having a bladed article with him in a public place strikes a proper balance between rights of defendant and rights of society).

See also *R v Drummond* [2002] EWCA Crim 527, [2002] 2 Cr App Rep 352 (Road Traffic Offenders Act 1988 s 15 (as amended); if a defendant drinks alcohol after an alleged drink-driving offence, but before providing a specimen for analysis, he defeats the aim of the legislature by making the test potentially unreliable; and the relevant scientific evidence to set against the specimen result is within his knowledge or means of access).

See also *R v Johnstone* [2003] UKHL 28 at [52], [53], [2003] 3 All ER 884 at [52], [53], [2003] 2 Cr App Rep 493 at [53] (Trade Marks Act 1994 s 92(5) (see TRADE MARKS AND TRADE NAMES vol 48 (2007 Reissue) PARA 144): those who trade in brand products are aware of the need to be on guard against counterfeit goods. They are aware of the need to deal with reputable suppliers and to keep records, and are aware of the risks they take if they do not. The s 92(5) defence relates to facts within the defendant person's own knowledge; his state of mind, and the reasons why he held the belief in question. His sources of supply are known to him. Conversely, it is to be expected that those who supply traders with counterfeit products, if traceable at all by outside investigators,



are unlikely to be co-operative. So, in practice, if the prosecution must prove that a trader acted dishonestly, fewer investigations will be undertaken and fewer prosecutions will take place).

See also *A-G's Reference (No 1 of 2004)*, *R v Edwards* [2004] EWCA Crim 1025 at [130], [2005] 4 All ER 457 at [130], [2004] 2 Cr App Rep 424 at [130] (the imposition of a reverse burden in the Homicide Act 1957 s 4 in cases where the defendant relies on the partial defence of a suicide pact is justified because it provides protection for society from murder disguised as a suicide pact). A similar burden is imposed for the purposes of the related defence of diminished responsibility (ie under the Homicide Act 1957 s 2): see *R v Lambert*, *R v Ali*, *R v Jordan* [2002] QB 1112, [2001] 1 All ER 1014, CA; *R v McQuade* [2005] NICA 2.

See also *A-G's Reference (No 1 of 2004)*, *R v Edwards* supra at [147] (for the purposes of the Criminal Justice and Public Order Act 1994 s 51, once it is proved that the defendant did an act which intimidates or is intended to intimidate another person; and that he did so knowing or believing that the victim was a potential witness or juror, it is entirely reasonable that the burden of proving the absence of any intention to pervert or interfere with the course of justice should rest with the defendant). As to what constitutes 'an act which intimidates' another person for the purposes of s 51, see *R v Patrascu* [2004] EWCA Crim 2417, [2004] 4 All ER 1066, [2005] 1 Cr App Rep 577.

See also *Sheldrake v DPP*, *A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450 (Road Traffic Act 1988 s 5(2); defendant has a full opportunity to show that there was no likelihood of his driving, a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecutor to prove, beyond reasonable doubt, that he would).

18 See eg *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, [2001] 2 Cr App Rep 511 (Misuse of Drugs Act 1971 s 28; defence of lack of knowledge etc must be construed as imposing a mere evidential burden on a defendant, because imposition of a full persuasive burden is not necessary in order to make the relevant legislation effective).

See also *Sheldrake v DPP*, *A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450 (Terrorism Act 2000 s 11(2); a person who is innocent of any blameworthy or properly criminal conduct may fall within s 11(1) (belonging or professing to belong to a proscribed organisation). There would be a clear breach of the presumption of innocence, and a real risk of unfair conviction, if such a person could exonerate himself only by establishing on the balance of probabilities that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and that he has not taken part in the activities of the organisation at any time while it was proscribed).

Note that *R v Carass* [2001] EWCA Crim 2845, [2002] 1 WLR 1714, [2002] 2 Cr App Rep 77 (in which it was held that in order to avoid incompatibility with the European Convention on Human Rights, the Insolvency Act 1986 s 206(4) must be read as imposing only an evidential burden on the defendant) is inconsistent with *R v Johnstone* [2003] UKHL 28, [2003] 3 All ER 884, [2003] 2 Cr App Rep 493, and should now be regarded as impliedly overruled by that case: see *A-G's Reference (No 1 of 2004)*, *R v Edwards* [2004] EWCA Crim 1025 at [52], [2005] 4 All ER 457 at [52], [2004] 2 Cr App Rep 424 at [52] per Lord Woolf CJ.

19 In such cases, however, it is the judge, rather than the jury, who must be satisfied as to the facts that would make the evidence admissible: see PARA 1373 post.

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### **1371. Evidential burden on defendant.**

The defendant necessarily bears the evidential burden as to those issues or defences in respect of which the persuasive burden rests upon him<sup>1</sup>. In addition, he bears the evidential, though not the persuasive, burden of raising any other common law defences, including self-defence<sup>2</sup>, provocation<sup>3</sup>, duress by threats<sup>4</sup>, duress of circumstances<sup>5</sup>, or non-insane automatism<sup>6</sup>. Similarly, the defendant bears an evidential burden in respect of any statutory defences even if he does not also bear the persuasive burden<sup>7</sup>.

In contrast, no such burden is imposed on the defendant where his defence involves a mere denial of one or more of the basic elements of the offence that must be proved by the prosecution<sup>8</sup>. Where, for example, an alleged offence requires proof of intent and the defendant claims that he committed the actus reus by accident<sup>9</sup> or mistake<sup>10</sup>, this is effectively a denial of mens rea; and the defendant cannot bear an evidential burden in denying what the prosecution bears the evidential and legal burdens of proving<sup>11</sup>.

Where the defendant relies upon evidence of an alibi, he does not merely deny that he committed the alleged offence, but positively asserts that he was somewhere else when that offence was committed. The prosecution cannot be required to disprove such an alibi unless the defendant has adduced some evidence in support of it, and it follows that the defendant bears an evidential (but not a persuasive) burden in respect of that evidence<sup>12</sup>, but the prosecution cannot prove the defendant's guilt merely by disproving his alibi. The prosecution's evidential and legal burdens of proving that the defendant committed the offence with the requisite mens rea remain unaffected<sup>13</sup>.

It is not always necessary for the defendant to adduce evidence in support of an issue in respect of which he bears an evidential burden, because in some cases the prosecution's own evidence may itself provide a sufficient evidential foundation for leaving the issue to the jury<sup>14</sup>. Where this is not the case, the defendant should place before the court, by cross-examination of prosecution witnesses or by evidence called on his behalf or by a combination of the two, such material as makes the issue in question a live issue, fit to be placed before the jury<sup>15</sup>. It is for the judge to rule whether a theory or a submission advanced by the defence has the support of evidence<sup>16</sup>. If he so rules, it is then for the prosecution to eliminate the issue and prove the constituents of the offence charged<sup>17</sup>. If the judge rules against the defendant, the defence in question will not be left to the jury<sup>18</sup>.

1 See PARA 1370 ante. This means that a defence such as insanity or diminished responsibility may not be left to the jury unless some admissible evidence has been adduced that is capable, if believed, of establishing that defence (see *R v Windle* [1952] 2 QB 826, [1952] 2 All ER 1, CCA). Where there is evidence supporting such a defence, but the defendant has not chosen to raise it (eg because his defence is one of outright denial) the trial judge should bring the matter to the attention of the defence, but should not of his own motion direct the jury to consider the issue: *R v Campbell* (1986) 84 Cr App Rep 255, CA. See further PARA 96 ante.

A verdict of insanity cannot be returned by a jury unless supported by the written or oral evidence of two or more registered medical practitioners, at least one of whom is duly approved by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder: see the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 1; and PARA 1485 ante. It follows that an insanity defence cannot be left to the jury in the absence of such evidence.

2 *R v Lobell* [1957] 1 QB 547, 41 Cr App Rep 100, CCA; *Chan Kau v R* [1955] AC 206, [1955] 1 All ER 266, PC; *R v Wheeler* [1967] 3 All ER 829, 52 Cr App Rep 28, CA; *R v Moon* [1969] 3 All ER 803n, [1969] 1 WLR 1705, CA;

*Palmer v R* [1971] AC 814, 55 Cr App Rep 223, PC; *R v Abraham* [1973] 3 All ER 694, [1973] 1 WLR 1270, CA; *R v Cameron* [1973] Crim LR 520, CA; *R v Folley* [1978] Crim LR 556, CA.

3 *Mancini v DPP* [1942] AC 1, 28 Cr App Rep 65, HL; *R v Gauthier* (1943) 29 Cr App Rep 113, CCA; *Holmes v DPP* [1946] AC 588, 31 Cr App Rep 123, HL; *Chan Kau v R* [1955] AC 206, [1955] 1 All ER 266, PC; *Bullard v R* [1957] AC 635, 42 Cr App Rep 1, PC; *R v Macpherson* (1957) 41 Cr App Rep 213, CCA; *R v Wheeler* [1967] 3 All ER 829, 52 Cr App Rep 28, CA.

4 *R v Gill* [1963] 2 All ER 688, 47 Cr App Rep 166, CCA; *R v Bone* [1968] 2 All ER 644, 52 Cr App Rep 546, CA. Cf *R v Steane* [1947] KB 997, 32 Cr App Rep 61, CCA.

5 *R v Pommell* [1995] 2 Cr App Rep 607, CA.

6 *Hill v Baxter* [1958] 1 QB 277, 42 Cr App Rep 51, DC; *Bratty v A-G for Northern Ireland* [1963] AC 386, 46 Cr App Rep 1, HL; *Cook v Atchison* [1968] Crim LR 266, DC; *R v Dervish* [1968] Crim LR 37, CA; *R v Burns* (1973) 58 Cr App Rep 364, CA; *R v Stripp* (1978) 69 Cr App Rep 318, CA. See also *R v Quick*, *R v Paddison* [1973] QB 910, [1973] 3 All ER 347, CA; and PARAS 34-36 ante. As to the direction which is appropriate where issues of insanity and non-insane automatism arise in the same case see *R v Burns* supra. As to the analogous defence of involuntariness (eg brake failure in road traffic cases) see *R v Spurge* [1961] 2 QB 205, [1961] 2 All ER 688, CCA; *Burns v Bidder* [1967] 2 QB 227, [1966] 3 All ER 29, DC.

7 See eg *Jaggard v Dickinson* [1981] QB 527, 72 Cr App Rep 33, DC (Criminal Damage Act 1971 s 5); *R v Cameron* [1973] Crim LR 520, CA; *R v Khan* [1995] Crim LR 78, CA (Criminal Law Act 1967 s 3); *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, [2001] 2 Cr App Rep 511 (Misuse of Drugs Act 1971 s 28); *Sheldrake v DPP, A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 AC 264, [2005] 1 Cr App Rep 450 (Terrorism Act 2000 s 11(2)).

8 *DPP v Morgan* [1976] AC 182, [1975] 2 All ER 347, HL. Strictly speaking, a claim to have acted in lawful self-defence or in the prevention of crime etc is a denial of the unlawfulness that is an essential element in any crime, but the defendant in such cases is nevertheless introducing an issue that the prosecution might not otherwise have to address, and accordingly he bears an evidential burden on that issue. See *R v Cameron* [1973] Crim LR 520, CA. Similarly, a defence of non-insane automatism (see note 6 supra) involves a denial that the defendant either committed the actus reus or possessed the requisite mens rea, but it is clear that the defendant cannot seek to rely on automatism unless there is some credible evidence to support that defence: *Hill v Baxter* [1958] 1 QB 277, 42 Cr App Rep 51, DC.

9 *Woolmington v DPP* [1935] AC 462, 25 Cr App Rep 72, HL.

10 In *DPP v Morgan* [1976] AC 182, [1975] 2 All ER 347, HL, it was held that a mistaken belief in the complainant's consent would negate any possible liability for rape. It followed that there could be no question of any evidential burden with regard to it being on the defendant, or of the judge withdrawing that issue from the jury in the absence of evidence supporting it. This remains true of any charge of rape brought in respect of things allegedly done before 1 May 2004 (ie the date on which the Sexual Offences Act 2003 Pt 2 was brought into force: Sexual Offences Act 2003 (Commencement) Order 2004, SI 2004/874), but as regards any such offence allegedly committed on or after that date, see PARA 165 et seq ante.

11 *DPP v Morgan* [1976] AC 182 at 200, [1975] 2 All ER 347 at 350, HL, per Lord Cross. If the defendant admits killing the deceased but denies murder on the basis that the killing was a mere accident, imposition of an evidential burden on the defendant would mean that in the event of there being no admissible evidence to support that defence, the judge would direct the jury to conclude that the killing was 'not an accident'. Clearly this is not the law. To the extent that *Mancini v DPP* [1942] AC 1 at 8, [1941] 3 All ER 272 at 279, HL, per Viscount Simon LC, suggests that the defendant bears an evidential burden in such cases, *DPP v Morgan* supra is to be preferred.

Not all accidents or mistakes will negate mens rea. Eg where the defendant shoots at A and accidentally hits B, or mistakes A for B, his liability is unaffected: see PARA 12 ante. Where the defendant claims that he mistakenly believed himself to be acting in self defence he bears a similar evidential burden to that imposed in case of self-defence generally: *Blackburn v Bowering* [1994] 3 All ER 380, [1994] 1 WLR 1324, CA.

12 *R v Johnson* [1961] 3 All ER 969, 46 Cr App Rep 55, CCA; *R v Denney* [1963] Crim LR 191, CCA; *R v Wood* (1967) 52 Cr App Rep 74, CA.

13 *R v Lesley* [1996] 1 Cr App Rep 39, CA; and see Judicial Studies Board, Specimen Direction No 46.

14 *Bullard v R* [1957] AC 635, 42 Cr App Rep 1, PC. Thus, where there is evidence of provocation fit to be left to the jury, the judge should put the defence to the jury, whether or not the issue has been raised by the defence and whether or not the defendant has said in terms that he was provoked: *Bullard v R* supra; *R v Cambridge* [1994] 2 All ER 760, 99 Cr App Rep 142, CA; and see also PARA 1321 ante.

15 *R v Gill* [1963] 2 All ER 688, 47 Cr App Rep 166, CCA; *Jayasena v R* [1970] AC 618 at 623, [1970] 1 All ER 219 at 221, PC; *Parker v Smith* [1974] Crim LR 426, DC.

16 *Bratty v A-G for Northern Ireland* [1963] AC 386, 46 Cr App Rep 1, HL. Where there is no evidence to support a defence of self-defence, counsel should not speculate in his closing speech about the way in which the injuries might have been caused, and the defence should not be put to the jury: *R v Critchley* [1982] Crim LR 524, CA. Where, on the other hand, the issue is raised, it is the duty of the judge to leave the issue to the jury: *R v Cousins* [1982] QB 526, 74 Cr App Rep 363, CA.

17 *R v Gill* [1963] 2 All ER 688, 47 Cr App Rep 166, CCA. This does not necessarily require the prosecution to produce specific evidence in rebuttal of the defendant's defence. If the jury considers the defence to be absurd or incredible it may reject it on that basis.

18 *R v Miao* [2003] EWCA Crim 3486, [2004] 05 LS Gaz R 28, CA.

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### **1372. Standard of proof.**

Where a persuasive (or legal) burden of proof lies on the prosecution<sup>1</sup>, the standard of proof required was for many years described as 'proof beyond reasonable doubt'<sup>2</sup>. This standard has not changed, but judges are now advised to direct juries that they must be 'sure' of the defendant's guilt and that 'nothing less will suffice'<sup>3</sup>. Where, however, the concept of proof beyond reasonable doubt has already been referred to in the trial (for example by counsel in their speeches), the jury should be told that this means the same thing as being sure<sup>4</sup>. Proof beyond a reasonable doubt does not mean proof to a scientific certainty<sup>5</sup>, but it is unwise for trial judges to attempt any further elaboration of the test to be applied<sup>6</sup>.

Where the defence bears a persuasive burden of proof, the standard of proof required is proof on the balance of probabilities<sup>7</sup>.

In so far as the prosecution bears an evidential burden of proof, it must adduce such credible evidence as, if believed and if left uncontradicted and unexplained, could be accepted by the jury as proof<sup>8</sup>.

The prosecution does not discharge its burden by proving that the defendant must have committed either one offence or another, unless the two offences share certain elements and all the elements of the lesser offence at least are proved<sup>9</sup>. This means that where the prosecution cannot prove whether an offence of rape was committed under the old law<sup>10</sup> or the new law<sup>11</sup>, it will be impossible for the defendant to be convicted of either offence<sup>12</sup>.

A court or jury should not (at least in the absence of special features or circumstances) be invited to use complex statistical theorems, such as Bayes's Theorem, when seeking to establish whether facts have been proved to the requisite standard. Most evidence has no precise statistical value, and the use of such techniques by unqualified juries would be a 'recipe for confusion, misunderstanding and misjudgment'<sup>13</sup>.

1 See PARA 1369 ante.

2 *Woolmington v DPP* [1935] AC 462 at 481, 25 Cr App Rep 72 at 95, HL. See also eg *Mancini v DPP* [1942] AC 1 at 11, 28 Cr App Rep 65 at 76, HL; *Miller v Minister of Pensions* [1947] 2 All ER 372 at 374, obiter, per Denning J. The term is still used in legislation (eg in the Police and Criminal Evidence Act 1984 s 76(2), which requires proof beyond reasonable doubt that confession evidence to be used by the prosecution was not obtained by oppression etc; see PARA 1540 post).

3 Judicial Studies Board, Specimen Direction No 2B. It is a misdirection to tell the jury that it may convict if merely 'satisfied' of the defendant's guilt: *R v Hepworth and Fearnley* [1955] 2 QB 600, 39 Cr App Rep 152, CCA; *R v Gourley* [1981] Crim LR 334, CA. It is acceptable, however, to direct that the jury must be 'satisfied so that they feel sure' of his guilt: *R v Summers* [1952] 1 All ER 1059, 36 Cr App Rep 14, CCA; *R v Quinn* [1983] Crim LR 475, CA. As to the essential content of directions on the burden and standard of proof see PARA 1320 ante.

4 *R v Adey* (3 March 1998, unreported) CA; Judicial Studies Board, Specimen Direction No 2B.

5 *R v Bracewell* (1978) 68 Cr App Rep 44 at 49, CA; and see *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373, obiter, per Denning J.

6 *R v Yap Chuan Ching* (1976) 63 Cr App Rep 7, CA; *R v Stephens* [2002] EWCA Crim 1529, (2002) Times, 27 June.

7 *R v Hunt (Richard)* [1987] AC 352, 84 Cr App Rep 163, HL; *Sodeman v R* [1936] 2 All ER 1138, PC; *R v Carr-Briant* [1943] KB 607, 29 Cr App Rep 76, CCA; *R v Dunbar* [1958] 1 QB 1, 41 Cr App Rep 182, CCA; *R v Podola* [1960] 1 QB 325, 43 Cr App Rep 220, CCA; *R v Hudson* [1966] 1 QB 448, 49 Cr App Rep 69, CCA; *R v Coughlan* (1976) 63 Cr App Rep 33, CA. See also *Miller v Minister of Pensions* [1947] 2 All ER 372 at 374, obiter, per Denning J. As to when the persuasive burden of proof rests on the defendant see PARA 1370 ante.

8 *Jayasena v R* [1970] AC 618 at 624, [1970] 1 All ER 219 at 221, PC. See also *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, CA; *R v Shire* [2001] EWCA Crim 2800; *DPP v Uddin* [2006] All ER (D) 43 (Jun), DC; and see also PARA 1313 ante. There is no clear authority on the amount of evidence to be adduced by the defence in order to discharge an evidential burden, but arguably it should suffice if the defendant adduces evidence that, if believed, would put the essential facts in some doubt. In some cases the nature of the issue is such that a certain kind of evidence may be called for (eg where the defence of non-insane automatism is raised, it may be necessary to adduce medical evidence in support of it): *Bratty v A-G for Northern Ireland* [1963] AC 386 at 413, 46 Cr App Rep 1 at 22, HL, per Lord Denning.

9 It is not enough, eg, that the defendant must have committed either perjury in court or an attempt to pervert the course of justice by giving false information to the police beforehand: *Tsang Ping-Nam v R* [1981] 1 WLR 1462, 74 Cr App Rep 139, PC. See also *R v Bellman* [1989] 1 All ER 22 at 27, [1989] 2 WLR 37 at 43, HL, per Lord Griffiths ('There are, of course, rare situations in which it is clear that the defendant has committed a crime but the state of the evidence is such that it is impossible to say which crime has been committed. In such circumstances no prima facie case can be established to support either crime, and neither crime can be left to the jury'); but see *R v Cash* [1985] QB 801, [1985] 2 All ER 128, CA; *A-G of Hong Kong v Yip Kai Foon* [1988] AC 642, 86 Cr App Rep 368, PC.

10 *Id* under the Sexual Offences Act 1956 s 1 (repealed by the Sexual Offences Act 2003 s 140, as of 1 May 2004).

11 *Id* under the Sexual Offences Act 2003 s 1 (in force as of 1 May 2004: see s 141; and the Sexual Offences Act 2003 (Commencement) Order 2004, SI 2004/874, art 2).

12 *R v A (appeal under s 58 of the Criminal Justice Act 2003)* [2005] All ER (D) 242 (Dec).

13 *R v Adams (No 2)* [1998] 1 Cr App Rep 377 at 384, CA, per Lord Bingham CJ.

## UPDATE

### 1372 Standard of proof

NOTE 10--See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).

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### **1373. Burden of proving the admissibility of evidence, etc.**

A third type of burden, which is distinct both from the evidential burden and from the persuasive (or legal) burden, is the burden of proving the admissibility of evidence<sup>1</sup> or the competence of a witness<sup>2</sup>. Admissibility and competence are issues of law and are decided by the court or judge as they arise during the course of the proceedings<sup>3</sup>, but may in some cases depend on disputed facts, such as whether a defendant's confession was freely made or made under oppression<sup>4</sup>. The general rule is that if the admissibility of an item of evidence depends on proof of certain facts, the burden of proving those facts lies on the party seeking to adduce the evidence in question<sup>5</sup>. Similarly, the burden of proving witness competence lies on the party seeking to call that witness<sup>6</sup>.

The standard of proof applicable ordinarily mirrors the standard applicable to the persuasive burden of proof<sup>7</sup>. Thus the prosecution must prove to the full criminal standard any facts essential to the admissibility of their evidence (that is proof beyond reasonable doubt), whereas in similar circumstances a defendant need only prove such matters on the balance of probabilities<sup>8</sup>. On issues of competence, however, legislation now provides that the balance of probabilities standard is applicable to both prosecution and defendant<sup>9</sup>.

In contrast, where the issue is one concerning the genuineness or otherwise of a document or recording upon which (if it is admitted in evidence) the jury will ultimately have to reach its own decision, the obligation of the judge is merely to satisfy himself that there is some prima facie evidence to suggest that the document or recording may be genuine. Only in exceptional cases should the jury be deprived of the opportunity to decide whether the document or recording is genuine or not<sup>10</sup>.

1 As to admissibility of evidence generally see PARA 1364 ante. As to the persuasive and evidential burdens of proof see PARA 1368 ante.

2 As to witness competence see PARA 1401 et seq post.

3 As to the distinction between questions of fact and questions of law see PARA 1363 ante.

4 As to the admissibility of confession evidence see PARA 1540 et seq post.

5 *R v Jenkins* (1869) LR 1 CCR 187.

6 See the Youth Justice and Criminal Evidence Act 1999 s 54(2); and PARA 1401 post. See also *R v Yacoub* (1981) 72 Cr App Rep 313, CA.

7 *R v Ewing* [1983] QB 1039, 77 Cr App Rep 47, CA (not following *R v Angeli* [1978] 3 All ER 950, 68 Cr App Rep 32, CA); *R v Minors*, *R v Harper* [1989] 2 All ER 208, 89 Cr App Rep 102, CA. As to the standard of proof generally see PARA 1372 ante.

8 *R v Matthey* [1995] 2 Cr App Rep 409, CA; *Rush v DPP* [1994] RTR 268, DC. Contrast the Police and Criminal Evidence Act 1984 s 76(2) (prosecution must prove admissibility of challenged confession beyond reasonable doubt; see PARA 1540 post) with s 76A(2) (as added) (defendant seeking to rely on co-defendant's confession need prove admissibility only on a balance of probabilities; see PARA 1540 post).

9 See eg the Youth Justice and Criminal Evidence Act 1999 s 54(2); and see also the Criminal Justice Act 2003 s 123 (proof of capacity of person who made a statement that is now tendered as hearsay under ss 116, 117, 119, 120); and PARA 1529 post.

10 See *R v Robson, R v Harris* [1972] 2 All ER 699, 56 Cr App Rep 450, Central CC; *R v Stevenson, R v Hulse, R v Whitney* [1971] 1 All ER 678 at 680, [1971] 1 WLR 1 at 3, Notts Assizes, per Kilner Brown J: 'As a general rule it [is] highly undesirable, and indeed wrong for [a detailed] investigation to take place before the judge. If it is regarded as a general practice it would lead to the ludicrous situation that in every case where a defendant said that the prosecution evidence is fabricated the judge would be called on to usurp the functions of the jury'. See also *R v Wayte* (1982) 76 Cr App Rep 110, CA. *R v Ewing* [1983] QB 1039, 77 Cr App Rep 47, CA, can be distinguished in that it concerned the admissibility of a sample of handwriting that was to be used for comparison with the writing in dispute. Such writing must first be proved to the satisfaction of the judge to be genuine: see the Criminal Procedure Act 1865 s 8; and PARA 1488 post.



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### **(3) PRESUMPTIONS**

#### **1374. Classification of presumptions.**

Presumptions may be classified as: (1) conclusive and irrebuttable presumptions of law (which are really rules of law, rather than of evidence)<sup>1</sup>; (2) rebuttable presumptions of law, by which if a basic fact is proved or admitted, a further fact must then be presumed, either until the contrary is proved, or (in the case of 'evidential' presumptions) until some admissible evidence to the contrary is adduced<sup>2</sup>; and (3) so-called presumptions of fact, which are merely permissible circumstantial inferences of fact, having no special significance in law<sup>3</sup>.

The general rule that the prosecution must prove the guilt of the defendant of the offence charged is frequently expressed in terms of a 'presumption of innocence'<sup>4</sup>, and the rule that the defendant bears the burden of establishing a defence of insanity is sometimes termed the 'presumption of sanity'<sup>5</sup>, but in such cases the language of presumption is merely a convenient way of describing the allocation of the persuasive burden of proof.

1 See PARA 1375 post; and CIVIL PROCEDURE vol 11 (2009) PARA 1098.

2 See PARA 1376 post; and CIVIL PROCEDURE vol 11 (2009) PARA 1097.

3 See PARA 1377 post. As to circumstantial evidence generally see PARA 1366 ante.

4 Cf *Woolmington v DPP* [1935] AC 462, 25 Cr App Rep 72, HL.

5 *M'Naghten's Case* (1843) 10 Cl & Fin 200 at 210, HL. As to the persuasive burden of proof see PARA 1368 et seq ante.

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### **1375. Irrebuttable presumptions of law.**

There are at least two irrebuttable presumptions of law which are peculiar to criminal cases. The first is the presumption (or rule of law) that a child under the age of ten is 'doli incapax' (that is incapable of committing a criminal offence)<sup>1</sup>.

The second such presumption (or rule of law) arises where on a charge of rape<sup>2</sup>, assault by penetration<sup>3</sup>, sexual assault<sup>4</sup> or causing the complainant to engage in sexual activity without consent<sup>5</sup>, the defendant is proved to have intentionally deceived the complainant as to the nature or purpose of the relevant act or induced the complainant to consent to the relevant act by impersonating another person known to the complainant. In any such case, it is to be 'conclusively presumed' that the complainant did not consent to the relevant act and that the defendant did not believe the complainant to have consented<sup>6</sup>.

The former presumption that a boy under the age of 14 is incapable of any offence involving an act of sexual intercourse by him has been abolished<sup>7</sup>. It is also now clear that no rule of law requires a court of jury to infer that a defendant must have intended a consequence of his actions by reason only of it being a natural and probable consequence of those actions. The court or jury must instead reach its own conclusion after considering all the evidence and drawing such inferences from that evidence as appear proper in the circumstances<sup>8</sup>.

1 See the Children and Young Persons Act 1933 s 50 (amended by the Children and Young Persons Act 1963 s 16(1)); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1232. Although referred to as a presumption, this rule effectively belongs to the substantive law of crime rather than to the law of evidence.

2 See the Sexual Offences Act 2003 s 1; and PARA 165 ante.

3 See *ibid* s 2; and PARA 167 ante.

4 See *ibid* s 3; and PARA 169 ante.

5 See *ibid* s 4; and PARA 171 ante.

6 See *ibid* ss 76(1), (2), 77; and PARA 163 ante. The presumption applies only to offences committed under the new law which came into force on 1 May 2004: Sexual Offences Act 2003 (Commencement) Order 2004, SI 2004/874, art 2.

7 See the Sexual Offences Act 1993 s 1.

8 See the Criminal Justice Act 1967 s 8; and PARA 13 ante.

## **UPDATE**

### **1375 Irrebuttable presumptions of law**

TEXT AND NOTE 1--The defence of doli incapax has been abolished by the Crime and Disorder Act 1998 s 34: *R v JTB* [2009] UKHL 20, [2009] 1 AC 1310, [2009] 3 All ER 1.

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### **1376. Rebuttable presumptions of law.**

A rebuttable presumption of law is one which leads to a decision on a particular issue in favour of the party who establishes it or relies upon it, unless it is rebutted. Rebuttable presumptions of law may be created by statute<sup>1</sup>, or may exist at common law<sup>2</sup>, and may cast either a persuasive<sup>3</sup> or an evidential burden<sup>4</sup> on the party seeking to rebut the presumption, except that it is a rule of the common law that (save in the case of a defence of insanity) the defendant cannot be required to discharge a persuasive burden of proof<sup>5</sup>.

The common law presumption that a child between the ages of ten and 14 years is incapable of forming any criminal intention has now been abolished<sup>6</sup>. In alleged offences of bigamy, the common law presumption of marriage from cohabitation and repute does not apply, and the prosecution must adduce strict proof of the marriage<sup>7</sup>. The common law presumption that everything has been done according to due form is common to both criminal and civil proceedings<sup>8</sup>, but must be applied with great care in criminal cases<sup>9</sup>. The related presumption that mechanical instruments are in proper working order, may however be relied on in criminal cases<sup>10</sup>.

1 See eg the Prevention of Corruption Act 1916 s 2 (gifts etc deemed to have been given and received corruptly in certain circumstances; see PARA 530 ante); the Children and Young Persons Act 1933 s 99(2) (presumption as to age; see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1243); the Road Traffic Offenders Act 1988 s 15(2), (3) (presumption that amount of alcohol in defendant's breath, blood or urine at time of alleged offence not less than that in specimen taken under the Act: see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 991); the Police and Criminal Evidence Act 1984 s 74 (presumption of guilt of person convicted of an offence; see PARA 1498 post). Many other such presumptions exist, and are dealt with in connection with the offences to which they relate.

2 Eg the presumption of regularity (see the text and note 8 infra).

3 For the meaning of 'persuasive burden' see PARA 1368 ante.

4 For the meaning of 'evidential burden' see PARA 1368 ante. See eg the Sexual Offences Act 2003 s 75(1); and PARA 163 ante.

5 *Woolmington v DPP* [1935] AC 462, 25 Cr App Rep 72, HL; and see PARA 1369 ante. See, however, *DPP v Bugg* [1987] Crim LR 625, DC (defendant who challenges the validity of a byelaw bears the persuasive burden of proving it to be invalid). Statutory presumptions are capable of imposing a persuasive burden of proof on a defendant (see eg the statutes cited in note 1 supra) but must now be construed in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969), and in some cases (but not all) provisions that appear to impose such a burden will need to be 'read down' so as to impose on an evidential burden on the defendant: see PARA 1370 ante. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

6 Crime and Disorder Act 1998 s 34. As to the basis of (and objections to) the old presumption see *C (A Minor) v DPP* [1996] AC 1, [1995] 2 Cr App Rep 166, HL.

7 See *Morris v Miller* (1767) 4 Burr 2057; and PARA 832 ante.

8 See CIVIL PROCEDURE vol 11 (2009) PARA 1103. For instances of the application of the presumption, often termed *omnia praesumuntur rite esse acta*, to criminal cases see *R v Gordon* (1789) 1 Leach 515, CCR; *R v Jones* (1809) 2 Camp 131; *R v Gardner* (1810) 2 Camp 513; *R v Verelst* (1813) 3 Camp 432; *R v Howard* (1832) 1 Mood & R 187; *R v Borrett* (1833) 6 C & P 124; *R v Rees* (1834) 6 C & P 606; *R v Murphy and Douglas* (1837) 8 C & P 297; *R v Newton* (1844) 1 Car & Kir 469; *R v Townsend* (1841) Car & M 178; *R v Manwaring* (1856) Dears

& B 132 at 142, CCR; *R v Cresswell* (1876) 1 QBD 446, CCR; *R v Stewart* (1876) 13 Cox CC 296 at 297; *R v Roberts* (1878) 14 Cox CC 101, CCR; *R v Garvey* (1887) 16 Cox CC 252, CCR; *R v Waller* [1910] 1 KB 364, CCA; *Whelan v R* [1921] 2 IR 310; *Gibbins v Skinner* [1951] 2 KB 379, DC; *Price v Humphries* [1958] 2 QB 353, [1958] 2 All ER 725, DC; *Campbell v Wallsend Shipway and Engineering Co Ltd* [1977] Crim LR 351, DC. The effect of the presumption, where it operates against the defendant, appears to be to cast upon him the burden to adduce some evidence in rebuttal: *Campbell v Wallsend Shipway and Engineering Co Ltd* supra.

9 *Scott v Baker* [1969] 1 QB 659 at 672, 52 Cr App Rep 566 at 571, DC, per Lord Parker CJ. The presumption ought not to be invoked to prove a fact central to the prosecution case: *Dillon v R* [1982] AC 484, 74 Cr App Rep 274, PC.

10 *Nicholas v Penny* [1950] 2 KB 466 (sub nom *Penny v Nicholas* [1950] 2 All ER 89, DC (speedometer)); *Tingle, Jacobs & Co v Kennedy* [1964] 1 All ER 888n, [1964] 1 WLR 638n, CA (traffic signals); *Castle v Cross* [1985] 1 All ER 87, [1984] 1 WLR 1372, DC (breath analysis device); *Kelly Communications Ltd v DPP* (2002) 167 JP 73 (weighbridge). A mechanical device may for this purpose operate electrically or optically etc.

A representation of fact made otherwise than by a person which depends for its accuracy on information supplied (directly or indirectly) by a person is not admissible in criminal proceedings as evidence of the fact unless it is proved that the information was accurate: Criminal Justice Act 2003 s 129(1). This properly addresses the need for proof that data placed on computers by individuals is accurate; but it does not affect the presumption that a mechanical device has been properly set or calibrated (s 129(2)).

## UPDATE

### 1376 Rebuttable presumptions of law

NOTE 6--See *R v JTB* [2009] UKHL 20, [2009] 1 AC 1310, [2009] 3 All ER 1; and PARA 1375 TEXT AND NOTE 1.

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### **1377. Presumptions of fact.**

Presumptions of fact involve nothing more than the drawing of a reasonable inference from circumstantial evidence<sup>1</sup>. Where frequently recurring fact situations have led to the emergence of a rule as to how the jury should be directed in such circumstances, the term 'presumption of fact' is then used to describe the rule thus formulated<sup>2</sup>.

1 *R v Lumley* (1869) LR 1 CCR 196.

2 Thus, where the possession of recently stolen goods gives rise to a presumption of guilty knowledge, the jury should be directed that it *may*, not must, infer the presumed fact: *R v Schama, R v Abramovitch* (1914) 84 LJKB 396 at 398, 11 Cr App Rep 45 at 49 per Lord Reading CJ. See further CIVIL PROCEDURE vol 11 (2009) PARA 1096; and PARA 304 ante.

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## **(4) JUDICIAL NOTICE**

### **1378. The nature of judicial notice.**

The doctrine of judicial notice enables a court or judge to establish and act upon certain facts, or to regard certain facts as clear and beyond dispute, without requiring those facts to be proved by evidence from the parties in the normal way<sup>1</sup>. In a trial on indictment, the jury may likewise be instructed to accept the truth of such facts; and magistrates' courts may take notice of facts that are common knowledge in that court's own locality<sup>2</sup>.

Courts are permitted, in appropriate cases, to draw on their personal knowledge or expertise when assessing evidence given in court<sup>3</sup>. This is akin to the taking of judicial notice, although distinct from its other forms.

Courts are specifically required to take judicial notice of Acts of Parliament and of European Community law<sup>4</sup>.

<sup>1</sup> *Carter v Eastbourne Borough Council* (2000) 164 JP 273 [2000] 2 PLR 60, DC; *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191 at 212, HL, per Lord Summer. See also PARAS 1379-1380 post; and CIVIL PROCEDURE vol 11 (2009) PARA 779 et seq.

<sup>2</sup> See PARA 1379 post.

<sup>3</sup> See PARA 1381 post.

<sup>4</sup> See PARA 1382 post.

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### **1379. Judicial notice of obvious or notorious facts.**

A court or judge will not require the prosecution or defence to prove a fact that is considered to be self-evident or a matter of common and unchallengeable knowledge<sup>1</sup>. Nevertheless, courts remain cautious as to the circumstances in which the usual requirement for proof may be dispensed with, and may in some cases require formal proof even of matters that appear obvious to them<sup>2</sup>.

Magistrates' courts may take judicial notice of facts that are notorious in their own locality, even if those facts are not widely known elsewhere<sup>3</sup>, but should inform the parties if they are proposing to make use of such knowledge<sup>4</sup>.

1 See eg *R v Luffe* (1807) 8 East 193 (two weeks is an impossible period for human gestation); *R v Yap Chuan Ching* (1976) 63 Cr App Rep 7, CA (many jurors will have seen televised court room dramas or reconstructions); *R v Tricoglus* (1977) 65 Cr App Rep 16, CA (an Austin Mini vehicle does not resemble a Morris 1100); *Bryant v Foot* (1868) LR 3 QB 497 (value of money has depreciated over the years); *St Alban's Sand and Gravel Co v Minnis* [1981] RTR 231, DC (fine sand may blow about on a windy day, and sand blowing from an uncovered lorry may be a danger to other road users); *Nye v Niblett* [1918] 1 KB 23, DC (cats are domestic animals); *Hughes v DPP* [2003] EWHC 2470 (Admin), 167 JP 589, DC (goldfinches are wild British birds); *R v Gilmour* [2000] NI 367, NICA (petrol bombing of a house only rarely causes serious injury). See further CIVIL PROCEDURE VOL 11 (2009) PARA 788.

2 See *Carter v Eastbourne Borough Council* (2000) 164 JP 273, [2000] 2 PLR 60, DC (magistrates' court was held to have erred in taking judicial notice of the fact that a group of substantial trees were over four years old when felled, although the Divisional Court agreed that the felled trunks appeared to be 'obviously older than four years'). See also *Preston Jones v Preston Jones* [1951] AC 391, [1951] 1 All ER 124, HL, in which only one member of the Appellate Committee was prepared to take judicial notice that 360 days was an impossible period for human gestation.

3 *Ingram v Percival* [1969] 1 QB 548, [1968] 3 All ER 657, DC (magistrates' court could properly take notice as to whether certain local waters were tidal); *Borthwick v Vickers* [1973] RTR 390, DC (local journey must have involved driving on public roads); *Paul v DPP* (1989) 90 Cr App Rep 173, DC (magistrates could use their knowledge of locality to decide whether kerb crawling there would be likely to cause nuisance or annoyance to residents).

4 *Bowman v DPP* [1990] Crim LR 600, DC.

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### **1380. Judicial notice after inquiry.**

A court or judge may take judicial notice of facts that are readily verifiable from sources of indisputable authority<sup>1</sup>. Reference may be made for this purpose to suitably qualified experts<sup>2</sup>. Once judicial notice has been taken, the ruling in question is deemed to be one of law and may set a legal precedent<sup>3</sup>, which may be binding or persuasive according to the status of the court concerned<sup>4</sup>.

In relation to diplomatic issues or affairs of state, a court or judge must take judicial notice of facts stated by ministerial certificate<sup>5</sup>.

1 *Carter v Eastbourne Borough Council* (2000) 164 JP 273 [2000] 2 PLR 60, DC; *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191 at 212, HL, per Lord Sumner; *McQuaker v Goddard* [1940] 1 KB 687, [1940] 1 All ER 471, CA. As to judicial notice of calendar dates see CIVIL PROCEDURE vol 11 (2009) PARA 784.

2 *McQuaker v Goddard* [1940] 1 KB 687, [1940] 1 All ER 471, CA (camel is not a domestic animal in UK); *Heather (Inspector of Taxes) v P-E Consulting Group Ltd* [1973] Ch 189, [1972] 2 All ER 107 (accounting practice); *Davey v Harrow Corpn* [1958] 1 QB 60, [1957] 2 All ER 305, CA (Ordnance Survey practice in marking boundaries).

3 *Davey v Harrow Corpn* [1958] 1 QB 60 at 69, [1957] 2 All ER 305 at 307, CA, per Lord Goddard CJ.

4 See CIVIL PROCEDURE vol 11 (2009) PARA 91 et seq.

5 *Duff Development Co Ltd v Kelantan Government* [1924] AC 797, HL; *Carl Zeiss Stiftung v Rayner & Keeler* [1965] Ch 525, [1964] 3 All ER 326, CA; *Engelke v Musmann* [1928] AC 433, HL; *Mighell v Sultan of Johore* [1894] 1 QB 149, CA. See also the Diplomatic Privileges Act 1964 s 4; International Organisations Act 1968 s 8; Consular Relations Act 1968 s 11, each of which provides in identical terms that a certificate issued by or under the authority of the Secretary of State is conclusive on any question as to whether a person is entitled to any privilege or immunity under the Act in question. See further CIVIL PROCEDURE vol 11 (2009) PARA 785.

As to state and county divisions and boundaries, including the territorial limits within which English criminal law applies, see *The Fagernes* [1927] P 311, CA (Secretary of State's certificate conclusive as to whether part of the Bristol Channel lay within English territorial or internal waters); *R v Kent Justices, ex p Lye* [1967] 2 QB 153, [1967] 1 All ER 560, DC (status of Red Sands Tower in the Thames estuary); and see also CIVIL PROCEDURE vol 11 (2009) PARA 787.



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### **1381. Personal knowledge of judges, magistrates or jurors.**

It may be proper for judges, magistrates or jurors to make use of their personal knowledge, experience or expertise when hearing evidence, but they may not substitute specialised knowledge of their own in contradiction of evidence they have heard. Thus, a lay magistrate who has special knowledge of matters relevant to a particular case may draw on that special knowledge in interpretation of the evidence he has heard, but such a magistrate may not give evidence to himself or his colleagues in contradiction of that which has been heard in court<sup>1</sup>, nor should he force his views on those sitting with him<sup>2</sup>; and nor for that same reason is it proper for a juror with specialist knowledge to inform fellow jurors on that basis that certain evidence given in court cannot be true<sup>3</sup>.

Courts or judges may not use particular knowledge gained in one case to take judicial notice of facts that are also relevant or in issue in later cases<sup>4</sup>. They may, however, take judicial notice of facts that have become notorious after being decided in reported cases<sup>5</sup>; and magistrates and district judges may in appropriate cases make use of their local knowledge<sup>6</sup>.

1 See *Wetherall v Harrison* [1976] QB 773, [1976] 1 All ER 241, DC (magistrate with medical expertise could use that expertise to assess evidence as to whether the defendant had suffered a real or merely a pretend fit).

2 *Wetherall v Harrison* [1976] QB 773, [1976] 1 All ER 241, DC.

3 *R v Fricker* (1999) Times, 13 July, CA (juror with specialist knowledge of the vehicle tyre industry ought not to have been permitted to inform fellow jurors that the defendant's account of how he acquired certain tyres was implausible).

4 *Jarvis v DPP* [1996] RTR 192, DC.

5 *R v Jones (Reginald)* [1969] 3 All ER 1559, [1970] 1 WLR 16, CA; and see PARA 1379 ante.

6 See PARA 1379 ante.

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### **1382. Judicial notice of English and European Community law.**

All courts must take judicial notice of Public Acts of the United Kingdom Parliament<sup>1</sup>. Acts passed after 1850 are presumed for this purpose to be Public Acts, unless the contrary is stated<sup>2</sup>. Judicial notice must also be taken throughout the United Kingdom of any Act of the Scottish Parliament<sup>3</sup>, although in most other respects Scottish and Northern Irish law cannot be judicially noticed by courts in England and Wales, and must instead be proved as foreign law<sup>4</sup>.

European Community law is incorporated within English law and must itself be judicially noted<sup>5</sup>. Decisions of the European Court of Human Rights must, where relevant, be taken into account by courts in the United Kingdom, but may be proved by evidence in accordance with applicable rules of court<sup>6</sup>.

1 Co Litt 98b; Co Inst 98a; *Lord Cromwell's Case* (1581) 4 Co Rep 12b at 13a; *Holland's Case* (1597) 4 Co Rep 75a at 76a; *Lovell v Plomer* (1812) 15 East 320; *R v Sutton* (1816) 4 M & S 532 at 542; *Forman v Dawes* (1841) Car & M 127; *Aiton v Stephen* (1876) 1 App Cas 456 at 457, HL; *Chilton v London Corp'n* (1878) 7 ChD 735 at 740. This means, inter alia, that no evidence may be heard as to whether a Public Act was duly passed after compliance with all requisite procedures, and nor is it necessary for a copy of a statute to be adduced in evidence in order to prove its contents.

In contrast, the content of a Private Act, or a statutory instrument or order, must if required be proved by adducing a Queen's Printer's or Stationery Office (HMSO) copy in evidence (Evidence Act 1845 s 3; Documentary Evidence Act 1882 s 2; *R v Clarke* [1969] 2 QB 91, [1969] 1 All ER 924, CA) unless express provision has been made to the contrary or the relevant provision of a statutory instrument or order has become a matter of notoriety through reported decisions (*R v Jones (Reginald)* [1969] 3 All ER 1559 at 1561, [1970] 1 WLR 16 at 20, CA (court entitled to take judicial notice of order by Secretary of State approving breath-test device, where the order had previously been proved in a large number of cases)). See CIVIL PROCEDURE vol 11 (2009) PARA 889.

2 Interpretation Act 1978 s 3, Sch 2 para 2.

3 See the Scotland Act 1998 s 28.

4 See CIVIL PROCEDURE vol 11 (2009) PARA 783. As to proof of foreign law by expert witnesses see PARA 1486 post.

5 See CIVIL PROCEDURE vol 11 (2009) PARA 780.

6 See the Human Rights Act 1998 s 2; CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 104; CIVIL PROCEDURE vol 11 (2009) PARA 1086.

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## **(5) ADVANCE INFORMATION AND DISCLOSURE**

### **(i) Introduction**

#### **1383. Disclosure or advance notification by the prosecution.**

Fair disclosure by the prosecution to the defendant is now considered to be an inseparable part of a fair trial<sup>1</sup>. The prosecution, therefore, must ordinarily provide the defence with advance notice of any evidence upon which the prosecution proposes to rely<sup>2</sup>, and must also provide the defence with copies of (or access to) any material which might reasonably be considered capable of undermining the case for the prosecution, or of assisting the defence case<sup>3</sup>.

A statutory disclosure scheme governs the disclosure of 'unused' material by the prosecution to the defence<sup>4</sup>, and this scheme must be scrupulously followed<sup>5</sup>; but prosecutors and investigators must at the same time be alive to the potential need to reveal and disclose material even before the statutory scheme specifically so requires, in the interests of justice and fairness in the particular circumstances of any case<sup>6</sup>.

1 Attorney-General's Guidelines on Disclosure (revised April 2005) PARA 1. See also *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, ECtHR.

2 Where the defendant is sent for trial on indictment under the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A (as added), disclosure of the prosecution case must be effected in accordance with regulations made under Sch 3 para 1. In respect of cases sent under s 51 (as substituted), the Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005, SI 2005/902, apply. Copies of the documents containing the evidence on which the charge or charges are based must be served on the person sent for trial and given to the Crown Court within 70 days from the date of the sending of the person for trial or, in the case of a person committed to custody, 50 days: regs 1, 2. The prosecutor may apply for an extension or further extension of the period prescribed by reg 2 by making an oral or written application to the Crown Court at the place specified in the notice under the Crime and Disorder Act 1998 s 51(7): Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005, SI 2005/902, reg 3. The procedure to be followed on an oral or written application for the extension or further extension of the prescribed period is contained in regs 4-6.

As to disclosure of prosecution evidence in preparatory hearings held pursuant to the Criminal Justice Act 1987 s 7 (as amended) or the Criminal Procedure and Investigations Act 1996 s 29, see PARA 1251 ante.

As to advance notice of evidence in connection with voluntary bills of indictment, see the Indictments (Procedure) Rules 1971, SI 1971/2084, r 9(1) (amended by SI 2000/3360). Where the defendant is charged with an offence triable either way see also CrimPR 21.1-21.6 (see PARAS 1110-1111 ante). There is no statutory requirement for the advance disclosure of prosecution evidence in proceedings for summary offences.

The absence of advance notice by the prosecution will not invariably prejudice the fairness of a summary trial, but it is desirable for prosecutors to give such notice because without it magistrates' courts may be obliged to grant adjournments to enable the defendant or his representatives to deal with the evidence when it is given, to cross-examine a witness and, if necessary, to obtain evidence to show that the witness is wrong: *R v Kingston-upon-Hull Justices, ex p McCann* (1991) 155 JP 569, DC; *R v Stratford Justices, ex p Imbert* [1999] 2 Cr App Rep 276, [1999] All ER (D) 115, DC; and see Attorney-General's Guidelines on Disclosure para 57.

3 See PARA 1385 et seq post. This may include disclosure of material in the possession of other agencies (Attorney-General's Guidelines on Disclosure paras 51-54) but prosecutors will only be expected to anticipate what material might weaken their case or strengthen the defence in the light of information available at the time of the disclosure decision (Attorney-General's Guidelines on Disclosure para 9; and see *R v Luttrell* [2004] EWCA Crim 1344 at [62], [2004] 2 Cr App Rep 520 at [62]).

4 See PARA 1385 et seq post.

5 Attorney-General's Guidelines on Disclosure para 4. There are, however, other interests that need to be protected, including those of victims and witnesses who might otherwise be exposed to harm. The statutory disclosure scheme protects those interests. It should also ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay, and is wasteful of resources: Attorney-General's Guidelines on Disclosure para 6. As to the principles and procedures governing the withholding of disclosure on grounds of public interest see PARAS 1480-1481 post.

6 le after the commencement of proceedings but before their duty arises under the statutory scheme. For instance, disclosure ought to be made of significant information that might affect a bail decision or that might enable the defence to contest the committal proceedings: Attorney-General's Guidelines on Disclosure para 55; and see *R v DPP, ex p Lee* [1999] 2 All ER 737, [1999] 2 Cr App Rep 304, DC.

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### **1384. Disclosure or advance notification by the defendant.**

The defendant is not required to disclose any evidence or material that may be damaging to his own case or of assistance to the prosecution case, nor is he required to disclose evidence that may assist the case of any other defendant<sup>1</sup>.

At common law, the defendant was not required to give any advance notice or disclosure of evidence on which he proposed to rely at trial<sup>2</sup>. By statute, however, he may now be required (where the case is to be tried on indictment) to serve a 'defence statement' on the prosecution and court<sup>3</sup>. The court may also direct that a copy of this statement be served on any co-defendant<sup>4</sup>. A defence statement may (but is not required to be) given to the prosecution and the court prior to summary trial<sup>5</sup>. Where a defence statement has been given the defendant may then be required to provide an updated statement prior to the trial<sup>6</sup>.

Failure or delay in issuing a defence statement complying with statutory requirements or to present a defence consistent with the defence statement may be the subject of adverse comment by the court or any other party<sup>7</sup> and the court or jury may draw such inferences as appear proper in deciding whether the defendant is guilty of the offence concerned<sup>8</sup>.

The defendant is also required to give advance notice of expert evidence on which he proposes to rely<sup>9</sup>. A defendant who seeks to adduce expert evidence in any proceedings (including summary proceedings) and who fails to comply with the disclosure requirements may not adduce that evidence without the leave of the court<sup>10</sup>.

1 Any such requirement would infringe the privilege against self-incrimination: see PARA 1476 post. As to the obligation to notify the prosecution of any expert witnesses instructed (even where not to be called) see PARA 1390 post.

2 Alibi defences, however, were by statute required to be disclosed prior to trial on indictment: see the Criminal Justice Act 1967 s 11 (repealed, in relation to offences into which no criminal investigation began before 1 April 1997, by the Criminal Procedure and Investigations Act 1996 ss 74(1)-(3), (5), 80, Sch 5); Criminal Procedure and Investigations Act 1996 (Appointed Day No 3) Order 1997, SI 1997/682.

3 See the Criminal Procedure and Investigations Act 1996 s 5 (as amended); and PARA 1388 post.

4 See *ibid* s 5(5A) (as added); and PARA 1388 post.

5 See *ibid* s 6 (as amended); and PARA 1388 post.

6 See *ibid* s 6B (as added); and PARA 1388 post.

7 See *ibid* s 11(5)(a) (as substituted); and PARA 1393 post. In some cases comment by another party is permitted only with leave of the court: see s 11(6), (7); and PARA 1393 post.

8 See *ibid* s 11(5)(b) (as substituted); and PARA 1393 post.

9 See the Police and Criminal Evidence Act 1984 s 81 (as amended) (advance notice of expert evidence in Crown Court); the Criminal Procedure and Investigations Act 1996 s 20(3) (amended by the Courts Act 2003 s 109(1), Sch 8 para 378) (advance notice of expert evidence in magistrates' courts); and CrimPR 24.1, 24.2. See further PARA 1492 post.

10 CrimPR 24.3.

**UPDATE**

**1384 Disclosure or advance notification by the defendant**

NOTE 2--Criminal Justice Act 1967 s 11 repealed: Armed Forces Act 2006 Sch 17.

NOTES 9, 10--CrimPR now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'). See now CrimPR Pt 22, which applies in a magistrates' court and in the Crown Court where the Criminal Procedure and Investigations Act 1996 Pts I (ss 1-21A) and II (ss 22-27) apply. As to expert evidence see CrimPR Pt 33.

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## **(ii) Disclosure under the Criminal Procedure and Investigations Act 1996**

### **1385. The statutory scheme and the code of practice.**

The Criminal Procedure and Investigations Act 1996<sup>1</sup> creates a statutory scheme governing (1) the prosecution's duty to disclose certain kinds of evidence on which they do not propose to rely at trial<sup>2</sup>; and (2) the duty of the defendant to disclose, by means of a 'defence statement' the essential basis of the defence case, including any particular defences upon which he intends to rely and any points of law he wishes to take<sup>3</sup>.

This statutory scheme applies in relation to alleged offences into which no criminal investigation<sup>4</sup> has begun before 1 April 1997<sup>5</sup>. It does not apply to (a) proceedings before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957<sup>6</sup>; (b) proceedings before a standing civilian court<sup>7</sup>; or (c) any investigation conducted with a view to it being ascertained whether a person should be charged with an offence under any of those Acts or whether a person charged with such an offence is guilty of it<sup>8</sup>, but the Secretary of State may by order make equivalent provision as regards proceedings before a court-martial or standing civilian court, subject to such modifications as he thinks fit and specifies in the order<sup>9</sup>.

This statutory scheme does not govern or affect the prosecution's obligation to provide the defendant with advance information of the evidence that is intended to form part of the prosecution case<sup>10</sup>, nor does it impose any obligation on the defendant to disclose evidence that he does not intend to rely upon at trial<sup>11</sup>.

The statutory scheme is supplemented by the Attorney-General's Guidelines on Disclosure<sup>12</sup> and by a code of practice in respect of criminal investigations carried out by police officers<sup>13</sup> which in accordance with statutory requirements<sup>14</sup> contains provisions designed to secure:

- 2152 (i) that where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued<sup>15</sup>;
- 2153 (ii) that information which is obtained in the course of a criminal investigation and may be relevant to the investigation is recorded<sup>16</sup>;
- 2154 (iii) that any record of such information is retained<sup>17</sup>;
- 2155 (iv) that any other material which is obtained in the course of a criminal investigation and may be relevant to the investigation is retained<sup>18</sup>;
- 2156 (v) that information falling within head (ii) above and material falling within head (iv) above is revealed to a person who is involved in the prosecution of criminal proceedings arising out of or relating to the investigation and who is identified in accordance with prescribed provisions<sup>19</sup>;
- 2157 (vi) that where the prosecutor inspects information or other material in pursuance of a requirement that it be revealed to him, and he requests that it be disclosed to the defendant, the defendant is allowed to inspect it or is given a copy of it<sup>20</sup>;

- 2158 (vii) that where the prosecutor is given a document indicating the nature of information or other material in pursuance of a requirement that it be revealed to him, and he requests that it be disclosed to the defendant, the defendant is allowed to inspect it or is given a copy of it<sup>21</sup>;
- 2159 (viii) that the person who is to allow the defendant to inspect information or other material or to give him a copy of it must decide which of those (inspecting or giving a copy) is appropriate<sup>22</sup>;
- 2160 (ix) that where the defendant is allowed to inspect material as mentioned in head (vi) or (vii) above and he requests a copy, he is given one unless the person allowing the inspection is of opinion that it is not practicable or not desirable to give him one<sup>23</sup>;
- 2161 (x) that a person mentioned in PARA (v) above is given a written statement that prescribed activities which the code requires have been carried out<sup>24</sup>.

The Code of Practice also contains provisions prescribing the general responsibilities of police officers<sup>25</sup>, the form in which information is to be recorded<sup>26</sup>, the manner in which and the period for which (A) a record of information is to be retained, and (B) any other material is to be retained<sup>27</sup>, and provision about the time when, the form in which, the way in which, and the extent to which, information or any other material is to be revealed to the prosecutor<sup>28</sup>.

1     le the Criminal Procedure and Investigations Act 1996 Pt 1 (ss 1-21) (as amended). The scheme is designed to ensure that there is fair disclosure of material which may be relevant to an investigation and which does not form part of the prosecution case. Disclosure under the Act should assist the defendant in the timely preparation and presentation of his case and assist the court to focus on all the relevant issues in the trial. Disclosure which does not meet these objectives risks preventing a fair trial taking place: Attorney-General's Guidelines on Disclosure para 3.

2     See PARA 1387 post.

3     See PARA 1388 post.

4     le an investigation which police officers or other persons have a duty to conduct with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it: Criminal Procedure and Investigations Act 1996 s 1(4). It may include an investigation into a crime that the police believe is about to be committed and also cases in which a series of offences is committed, some before and some after the appointed day: *R v Uxbridge Magistrates' Court, ex p Patel* (1999) 164 JP 209, DC; but see also *R v Norfolk Stipendiary Magistrates, ex p Keable* [1998] Crim LR 510, DC.

5     Criminal Procedure and Investigations Act 1996 s 1(3); Criminal Procedure and Investigations Act 1996 (Appointed Day No 3) Order 1997, SI 1997/682, art 2. The statutory scheme does not apply where an old investigation that had been 'put on hold' was re-opened on or after the appointed day, 'such that although in two parts, the criminal investigation may properly be regarded as one whole'; but it does apply where a new investigation is opened on or after that day: *R v Brizzalari* [2004] EWCA Crim 310 at [31], (2004) Times, 3 March, per Hedley J.

6     Criminal Procedure and Investigations Act 1996 s 78(1)(a).

7     Ibid s 78(1)(b).

8     Ibid s 78(1)(c).

9     Ibid s 78(2)(a), (3).

10    As to this obligation see PARA 1383 ante. As to disclosure of expert evidence see PARA 1492 post.

11    No such obligation is imposed on the defendant either at common law or by statute, but as to the obligation to notify the prosecution of any expert witnesses instructed (even where not to be called) see PARA 1390 post.

12    See the Attorney-General's Guidelines on Disclosure (revised April 2005).



13 The Code of Practice was issued under the Criminal Procedure and Investigations Act 1996 Pt II: see the Criminal Procedure and Investigations Act 1996 (Code of Practice) Order 2005, SI 2005/985, which appoints 4 April 2005 as the day on which the revised Code of Practice prepared under the Criminal Procedure and Investigations Act 1996 s 23 was brought into operation in England and Wales. The Code of Practice (published and subsequently revised in accordance with s 25) is so framed that it does not apply to material intercepted in obedience to a warrant issued under the Interception of Communications Act 1985 s 2 or under the authority of an interception warrant under the Regulation of Investigatory Powers Act 2000 s 5: Criminal Procedure and Investigations Act 1996 s 23(6) (amended by the Regulation of Investigatory Powers Act 2000 s 82(1), Sch 4 para 7(2)); Code of Practice para 1.3.

For these purposes a criminal investigation is an investigation conducted by police officers with a view to it being ascertained (1) whether a person should be charged with an offence; or (2) whether a person charged with an offence is guilty of it: Criminal Procedure and Investigations Act 1996 s 22(1). See also the Code of Practice para 2.1.

The Code of Practice does not apply to persons who are not charged with the duty of conducting a criminal investigation (Code of Practice para 1.2), but a person other than a police officer who is charged with the duty of conducting an investigation with a view to it being ascertained (a) whether a person should be charged with an offence; or (b) whether a person charged with an offence is guilty of it, must in discharging that duty have regard to any relevant provision of the code which would apply if the investigation were conducted by police officers: Criminal Procedure and Investigations Act 1996 s 26(1).

Failure (i) by a police officer to comply with any provision of a code for the time being in operation by virtue of an order under s 25; or (ii) by any other person subject to s 26(1) to have regard to any relevant provision, does not in itself render him liable to any criminal or civil proceedings (s 26(2)) but in all criminal and civil proceedings a code in operation at any time by virtue of an order under s 25 is admissible in evidence (s 26(3)) and if it appears to a court or tribunal conducting criminal or civil proceedings that any provision of a code in operation at any time by virtue of an order under s 25, or any failure mentioned in s 26(2) is relevant to any question arising in the proceedings, the provision or failure is to be taken into account in deciding the question (s 26(4)).

Where the Code of Practice applies, its provisions supplant any common law rules that would previously have applied concerning the revealing of material (A) by a police officer or other person charged with the duty of conducting an investigation with a view to it being ascertained whether a person should be charged with an offence or whether a person charged with an offence is guilty of it; (B) to a person involved in the prosecution of criminal proceedings: see s 27.

14 Ie the requirements of *ibid* s 23(1)(a)-(j); see heads (i)-(x) in the text. See also s 24 (examples of disclosure provisions).

15 *Ibid* s 23(1)(a); Code of Practice para 3.5.

16 Criminal Procedure and Investigations Act 1996 s 23(1)(b); Code of Practice paras 4.1-4.4.

17 Criminal Procedure and Investigations Act 1996 s 23(1)(c); Code of Practice paras 4.2, 5.4.

18 Criminal Procedure and Investigations Act 1996 s 23(1)(d); Code of Practice paras 5.1-5.6.

19 Ie to the prosecutor: Criminal Procedure and Investigations Act 1996 s 23(1)(e); Code of Practice paras 7.1-7.5.

20 Criminal Procedure and Investigations Act 1996 s 23(1)(f); Code of Practice para 10.1.

21 Criminal Procedure and Investigations Act 1996 s 23(1)(g); Code of Practice para 10.3.

22 Criminal Procedure and Investigations Act 1996 s 23(1)(h); Code of Practice para 10.2.

23 Criminal Procedure and Investigations Act 1996 s 23(1)(i); Code of Practice para 10.3 (eg it may not be desirable to give the defendant a copy of a statement by a child witness in relation to a sexual offence).

24 Criminal Procedure and Investigations Act 1996 s 23(1)(j); Code of Practice para 9.1.

25 Criminal Procedure and Investigations Act 1996 s 23(2); Code of Practice paras 3.1-3.7.

26 Criminal Procedure and Investigations Act 1996 s 23(3). Material must be recorded in a durable or retrievable form that may be writing, video or audio tape, or computer disc: Code of Practice para 4.1. Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy if the original is perishable or is to be returned to its owner, or where retention of a copy rather than an original is reasonable in all the circumstances: Code of Practice para 5.1.

27 Criminal Procedure and Investigations Act 1996 s 23(4); Code of Practice paras 5.7-5.11.

28 Criminal Procedure and Investigations Act 1996 s 23(5); Code of Practice paras 6.1-6.14; 7.1-7.5. The code may make different provision in relation to different cases or descriptions of case, and may contain exceptions as regards prescribed cases or descriptions of case: Criminal Procedure and Investigations Act 1996 s 23(7). For these purposes, 'prescribed' means prescribed by the code: s 23(8). Thus provisions of the Code of Practice concerning the preparation of schedules of unused material vary according to the circumstances of the case in question.

## **UPDATE**

### **1385 The statutory scheme and the code of practice**

TEXT AND NOTES 6-9--Criminal Procedure and Investigations Act 1996 s 78 substituted: Armed Forces Act 2006 Sch 16 para 137.

NOTE 9--See Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009, SI 2009/988.

TEXT AND NOTES 12-28--See also Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2009, SI 2009/989; *R v RF* [2009] EWCA Crim 682, [2009] All ER (D) 113 (Oct) (Crown has an obligation to pursue reasonable lines of inquiry in relation to material that may be held in states outside European Union).

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### **1386. Application of statutory disclosure scheme.**

The statutory disclosure scheme<sup>1</sup> applies where: (1) a person is charged with a summary offence in respect of which a court proceeds to summary trial and in respect of which he pleads not guilty<sup>2</sup>; (2) a person who has attained the age of 18 is charged with an offence which is triable either way, in respect of which a court proceeds to summary trial and in respect of which he pleads not guilty<sup>3</sup>; (3) a person under the age of 18 is charged with an indictable offence in respect of which a court proceeds to summary trial and in respect of which he pleads not guilty<sup>4</sup>; (4) a person is charged with an offence for which he is sent for trial<sup>5</sup>; (5) a count charging a person with a summary offence is included in an indictment<sup>6</sup>; or (6) a bill of indictment charging a person with an indictable offence is preferred<sup>7</sup>.

Where the disclosure provisions apply as regards things falling to be done after the relevant time<sup>8</sup> in relation to an alleged offence, the rules of common law which were effective immediately before 1 April 1997<sup>9</sup>, and relate to the disclosure of material by the prosecutor, do not apply as regards things falling to be done after that time in relation to the alleged offence<sup>10</sup>. This does not affect the rules of common law as to whether disclosure is in the public interest<sup>11</sup>.

1    Ie the Criminal Procedure and Investigations Act 1996 Pt I (ss 1-21) (as amended). As to the statutory scheme and the code of practice see PARA 1385 ante.

2    Ibid s 1(1)(a).

3    Ibid s 1(1)(b).

4    Ibid s 1(1)(c).

5    Ibid s 1(2)(cc) (added by the Crime and Disorder Act 1998 s119, Sch 8 para 125(a); and amended by the Criminal Justice Act 2003 ss 41, 332, Sch 37 Pts 2, 4).

6    Ie under the authority of the Criminal Justice Act 1988 s 40 (common assault etc) (see PARA 1211 ante): Criminal Procedure and Investigations Act 1996 s 1(2)(d).

7    A bill of indictment may be preferred (1) under the authority of the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(b) (Criminal Procedure and Investigations Act 1996 s 1(2)(e)); or (2) under the Prosecution of Offences Act 1985 s 22B(3)(a) (as added) (Criminal Procedure and Investigations Act 1996 s 1(2)(f) (added by the Crime and Disorder Act 1998 Sch 8 para 125(b)).

8    References to the 'relevant time' are to the time when (1) the defendant pleads not guilty (where the Criminal Procedure and Investigations Act 1996 Pt I (as amended) applies by virtue of s 1(1)); (2) the defendant is sent for trial (where Pt I (as amended) applies by virtue of s 1(2)(cc) (as added and amended)); (3) the count is included in the indictment (where Pt I (as amended) applies by virtue of s 1(2)(d)); or (4) the bill of indictment is preferred (where Pt I (as amended) applies by virtue of s 1(2)(e)): s 21(3) (amended by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 66(1), (5)).

9    Ie the day appointed by the Criminal Procedure and Investigations Act 1996 (Appointed Day No 3) Order 1997, SI 1997/682, in accordance with the Criminal Procedure and Investigations Act 1996 s 1(5): see s 21(4).

10   Ibid s 21(1). The Act does not specifically address the period between arrest for an indictable offence and the relevant time under s 21(3) (see note 8 supra), but there remains a continuing duty on the responsible prosecutor to ascertain whether more immediate disclosure is required in the interests of justice and fairness: *R v DPP, ex p Lee* [1999] 2 All ER 737, [1999] 2 Cr App Rep 304, DC.

11 Criminal Procedure and Investigations Act 1996 s 21(2).

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### **1387. Initial duty of the prosecutor to disclose.**

The prosecutor<sup>1</sup> must (1) disclose to the defendant any prosecution material<sup>2</sup> which has not previously been disclosed to the defendant and which might reasonably be considered capable of undermining the case for the prosecution against the defendant, or of assisting the case for the defendant<sup>3</sup>; or (2) give to the defendant a written statement that there is no material of any such description<sup>4</sup>. For these purposes, prosecution material is material which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the defendant, or which, in pursuance of a code<sup>5</sup>, he has inspected in connection with the case for the prosecution against the defendant<sup>6</sup>. Where material consists of information which has been recorded in any form, the prosecutor discloses it for these purposes by securing that a copy<sup>7</sup> is made of it and that the copy is given to the defendant<sup>8</sup>, or if in the prosecutor's opinion that is not practicable or not desirable, by allowing the defendant to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so<sup>9</sup>.

Where material consists of information which has not been recorded, the prosecutor discloses it for the above purposes by securing that it is recorded in such form as he thinks fit and by securing that a copy is made of it and that the copy is given to the defendant<sup>10</sup>, or if in the prosecutor's opinion that is not practicable or not desirable, by allowing the defendant to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so<sup>11</sup>. Where material does not consist of information, the prosecutor discloses it for the above purposes by allowing the defendant to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so<sup>12</sup>.

Material must not be disclosed under these provisions to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly<sup>13</sup>. Nor may it be disclosed to the extent that it is material the disclosure of which is prohibited by the Regulation of Investigatory Powers Act 2000<sup>14</sup>.

The prosecutor must act under the provisions described above during the relevant period<sup>15</sup>. He must at the same time pass on to the defendant any schedule of non-sensitive material previously given to the prosecutor by the disclosure officer in accordance with the code of practice<sup>16</sup>.

If the prosecutor purports to make primary disclosure after the end of the period which is the relevant period, the failure to act during the period concerned does not on its own constitute grounds for staying the proceedings for abuse of process<sup>17</sup>.

1 References in the Criminal Procedure and Investigations Act 1996 Pt I (ss 1-21) (as amended) to the prosecutor are to any person acting as prosecutor, whether an individual or a body: Criminal Procedure and Investigations Act 1996 s 2(3), (6).

2 References to the defendant are to the person mentioned in *ibid* s 1(1) or s 1(2) (see PARA 1386 ante) and where there is more than one accused in any proceedings, Pt I (as amended) applies separately in relation to each of them: see s 2(1), (2). References to material are to material of all kinds, in particular, information, and objects of all descriptions: s 2(4).

3 Ibid s 3(1)(a) (amended by the Criminal Justice Act 2003 s 32(a), (b)). See *R v Mills*; *R v Poole* [1998] AC 302, [1997] 3 All ER 780, HL (prosecution decided not to call witness whom it considered not to be credible; held they should have given copy of his statement, not merely his name and address, to defence); *Preston Borough Council v McGrath* (2000) Times, 19 May, CA (disclosure to third party; third party allowed to use evidence in civil action); *R v Early* [2002] EWCA Crim 1904, [2003] 1 Cr App Rep 288, CA (failure to disclose use of informants by customs and excise officers rendered convictions unsafe).

4 Criminal Procedure and Investigations Act 1996 s 3(1)(b).

5 Ie the Code of Practice issued under ibid Pt II: see s 23; and PARA 1385 ante.

6 Ibid s 3(2). The Crown Prosecution Service is not required to obtain a pre-trial psychiatric report of a person accused of murder: *R v Reid* [2001] EWCA Crim 1806, [2002] 1 Cr App Rep 234, CA. See also *R v H* (2003) Times, 10 March, CA (skeleton arguments adopted by counsel and treated by the court as forming part of counsel's oral submissions should be disclosed when a request to do so is received).

7 A copy may be in such a form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded: Criminal Procedure and Investigations Act 1996 s 3(3). References to recording information are to putting it in a durable or retrievable form (such as writing or tape): s 2(5).

8 Ibid s 3(3)(a).

9 Ibid s 3(3)(b). As from a day to be appointed, s 3(3) has effect subject to the Sexual Offences (Protected Material) Act 1997 s 9(2) (not yet in force) which provides that the Criminal Procedure and Investigations Act 1996 s 3 (as amended) does not apply where the Sexual Offences (Protected Material) Act 1997 s 3(1) (not yet in force) applies: Criminal Procedure and Investigations Act 1996 s 1(6) (prospectively added by the Sexual Offences (Protected Material) Act 1997 s 9(4)). At the date at which this volume states the law no such day had been appointed. See PARA 1395 et seq post.

10 Criminal Procedure and Investigations Act 1996 s 3(4)(a).

11 Ibid s 3(4)(b). Section 3(4) has effect subject to the Sexual Offences (Protected Material) Act 1997 s 9(2) (not yet in force): Criminal Procedure and Investigations Act 1996 s 1(6) (not yet in force): see note 9 supra; and PARA 1395 et seq post.

12 Ibid s 3(5). Section 3(5) has effect subject to the Sexual Offences (Protected Material) Act 1997 s 9(2) (not yet in force): Criminal Procedure and Investigations Act 1996 s 1(6) (not yet in force): see note 9 supra; and PARA 1395 et seq post.

13 Ibid s 3(6). As to the practice and procedure to be followed in relation to an application or order under s 3(6), see the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997, SI 1997/698; Magistrates' Courts (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997, SI 1997/703. In a summary trial, after the court makes an order under the Criminal Procedure and Investigations Act 1996 s 3(6) and before the defendant is acquitted or convicted or the prosecutor decides not to proceed with the case, the defendant may apply to the court for a review of the question whether it is still not in the public interest to disclose the material: see s 14 (amended by the Criminal Justice Act 2003 s 331, Sch 36 Pt 3 paras 20, 30). In other cases, the court must keep the question under review: see the Criminal Procedure and Investigations Act 1996 s 15 (amended by the Criminal Justice Act 2003 Sch 36 Pt 3 paras 20, 31). The person claiming to have an interest in the material has a right to be heard by the court: see the Criminal Procedure and Investigations Act 1996 s 16 (amended by the Criminal Justice Act 2003 Sch 36 Pt 3 paras 20, 32).

14 Ie by the Regulation of Investigatory Powers Act 2000 s 17: Criminal Procedure and Investigations Act 1996 s 3(7) (amended by the Regulation of Investigatory Powers Act 2000 s 82(1), Sch 4 para 7(1)).

15 Criminal Procedure and Investigations Act 1996 s 3(8). The relevant period is a period beginning and ending with such days as the Secretary of State prescribes by regulations for the purposes of s 3: see s 12. As to rules of court in relation to regulations made under s 12, see note 13 supra. For transitional provision for a case in relation to which no regulations prescribing time limits for primary disclosure have come into force under s 12, see s 13 (amended by the Crime and Disorder Act 1998 Sch 8 para 127(b); and the Access to Justice Act 1999 s 67(2), Sch 15 Pt III).

16 Criminal Procedure and Investigations Act 1996 s 4(1), (2).

17 Ibid s 10(1), (2). This does not prevent the failure constituting such grounds if it involves such delay by the prosecutor that the defendant is denied a fair trial: s 10(3).

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### **1388. Disclosure by defendant: defence statement.**

Where a case is to be tried on indictment, and the prosecutor complies with the primary disclosure provisions<sup>1</sup> or purports to comply with them, the defendant must within the relevant period give a defence statement to the court and the prosecutor<sup>2</sup> and to any co-defendant specified by the court<sup>3</sup>. This does not apply where the defendant is sent for trial to the Crown Court<sup>4</sup>, unless copies of the documents containing the evidence have been served on him<sup>5</sup> and a copy of the notice<sup>6</sup> specifying the offence or offences for which he is so sent has been served on him<sup>7</sup>. Nor does it apply where a bill of indictment has been preferred<sup>8</sup> unless the prosecutor has served on the defendant a copy of the indictment and a copy of the set of documents containing the evidence which is the basis of the charge<sup>9</sup>.

A defence statement is a written statement (1) setting out the nature of the defendant's defence, including any particular defences on which he intends to rely; (2) indicating the matters of fact on which he takes issue with the prosecution; (3) setting out, in the case of each such matter, why he takes issue with the prosecution; and (4) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose<sup>10</sup>.

A defence statement that discloses an alibi<sup>11</sup> must give particulars of it, including: (a) the name, address and date of birth of any witness the defendant believes is able to give evidence in support of the alibi, or as many of those details as are known to the defendant when the statement is given; and (b) any information in the defendant's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in (a) above are not known to the defendant when the statement is given<sup>12</sup>.

Where a case is to be tried summarily, and the prosecutor complies with the provisions as to primary disclosure<sup>13</sup> or purports to comply with them, the defendant may within the relevant period<sup>14</sup> give a defence statement to the prosecutor, and if he does so, must also give such a statement to the court<sup>15</sup>.

Once the initial defence statement has been given, the defendant is then required (again during a specified 'relevant period'<sup>16</sup>) to give to the court and the prosecutor either an updated defence statement<sup>17</sup> or a written statement stating that he has no changes to make to the statement which he has already given<sup>18</sup>.

The judge in a trial before a judge and jury may direct that the jury be given a copy of any defence statement<sup>19</sup>, and if he does so, may direct that it be edited so as not to include references to matters evidence of which would be inadmissible<sup>20</sup>.

Any such statement that the defendant's solicitor purports to give on behalf of the defendant is, unless the contrary is proved, deemed to be given with the authority of the defendant<sup>21</sup>.

1    Ie under the Criminal Procedure and Investigations Act 1996 s 3 (as amended): see PARA 1387 ante.

2    Ibid s 5(1), (5) (s 5(1) amended by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 66(1), (3)). As to the meaning of 'prosecutor' see PARA 1387 note 1 ante. A defence statement that has to be given to the court and the prosecutor under the Criminal Procedure and Investigations Act 1996 s 5(5) must be given during the period which, by virtue of s 12, is the 'relevant period' for s 5: s 5(5C) (s 5(5A)-(5D) added, partly prospectively, by the Criminal Justice Act 2003 s 33(1): at the date at which this volume states the law the Criminal Procedure and

Investigations Act 1996 s 5(5C) was in force only in relation to alleged offences in relation to which a criminal investigation within the meaning of s 1(4) (see PARA 1385 text and note 4 ante) began in England and Wales on or after 4 April 2005 and the duty to give a defence statement in accordance with s 5(5) arises on or after 24 July 2006 (Criminal Justice Act 2003 (Commencement No 13 and Transitional Provision) Order 2006, SI 2006/1835, arts 2(a), 3(a)(i), (b)), while the Criminal Procedure and Investigations Act 1996 s 5(5A), (5B), (5D) had yet to be brought into force). As to the relevant period see also s 12(2) (amended by the Criminal Justice Act 2003 Sch 36 Pt 3 paras 20, 28(a)).

3 Criminal Procedure and Investigations Act 1996 s 5(5A) (as prospectively added: see note 2 supra). The statement must then be given to the co-defendant within such period as the court may specify: s 5(5D) (as prospectively added: see note 2 supra). The court may make an order under s 5(5A) (as prospectively added) either of its own motion or on the application of any party: s 5(5B) (as prospectively added: see note 2 supra). As to the importance of such disclosure in order to ensure a fair trial see *R v Cairns* [2002] EWCA Crim 2838, [2003] 1 WLR 796, [2003] 1 Cr App Rep 662. For the consequences of any failure to comply fully with this or other defence disclosure requirements see the Criminal Procedure and Investigations Act 1996 s 11(5); and PARA 1393 post. See also s 6E(2), (3) (as added) (duty of trial judge to warn defendant at pre-trial hearing).

4 Ie under the Crime and Disorder Act 1998 s 51; see PARA 1132 ante.

5 Ie under regulations made under *ibid* Sch 3 para 1; see PARA 1383 ante.

6 Ie under *ibid* s 51D(1) (as added); see PARA 1136 ante.

7 Criminal Procedure and Investigations Act 1996 s 5(3A) (added by the Crime and Disorder Act 1998 Sch 8 para 126; and amended by the Criminal Justice Act 2003 Sch 3 Pt 2 para 66(1), (3)).

8 Ie under the authority of the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(b) (bill preferred by direction of Court of Appeal, or by direction or with consent of a judge).

9 Criminal Procedure and Investigations Act 1996 s 5(4).

10 *Ibid* s 6A(1)(a)-(d) (s 6A added by the Criminal Justice Act 2003 s 33(2)). The Secretary of State may by regulations make provision as to the details of the matters that, by virtue of the Criminal Procedure and Investigations Act 1996 s 6A(1) (as added), are to be included in defence statements: s 6A(4) (as so added). At the date at which this volume states the law no such regulations had been made.

11 Evidence in support of an alibi is evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission: *ibid* s 6A(3) (as added: see note 10 supra).

12 *Ibid* s 6A(2) (as added: see note 10 supra).

13 Ie under *ibid* s 3; see PARA 1387 ante.

14 See *ibid* s 6(4). As to relevant periods see s 12. The relevant period currently specified is 14 days following initial disclosure by the prosecution: Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997, SI 1997/684, reg 2.

15 Criminal Procedure and Investigations Act 1996 s 6(2).

16 Ie the period specified by regulations made under *ibid* s 12: see s 6B(2) (s 6B prospectively added by the Criminal Justice Act 2003 s 33(3) as from a day to be appointed). At the date at which this volume states the law no such day had been appointed.

17 Criminal Procedure and Investigations Act 1996 s 6B(1)(a) (as prospectively added: see note 16 supra). This must comply with the requirements imposed by or under the Criminal Procedure and Investigations Act 1996 s 6A (as added) by reference to the state of affairs at the time when the statement is given: s 6B(3) (as so added). Where there are co-defendants and the court so orders (either of its own motion or on the application of any party: s 6B(6) (as so added)) the defendant must also, within such period as may be specified by the court, give an updated defence statement (or a written statement that he has no changes to make) to each other defendant as specified in the order: s 6B(5) (as so added).

18 *Ibid* s 6B(1)(b), (4) (as prospectively added: see note 16 supra).

19 Where the defendant has provided an updated defence statement, this is the statement to which any such direction must relate: *ibid* s 6E(6) (s 6E added by the Criminal Justice Act 2003 s 36).



20 Criminal Procedure and Investigations Act 1996 s 6E(4) (as added: see note 19 supra). Such a direction may be made either of the judge's own motion or on the application of any party, but may be made only if the judge is of the opinion that seeing a copy of the defence statement would help the jury to understand the case or to resolve any issue in the case: s 6E(5) (as so added).

21 Ibid s 6E(1) (as added: see note 19 supra).

## **UPDATE**

### **1388 Disclosure by defendant: defence statement**

TEXT AND NOTE 10--Criminal Procedure and Investigations Act 1996 s 6A(1) amended:  
Criminal Justice and Immigration Act 2008 s 60(1).

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### **1389. Disclosure by defendant: intention to call witnesses.**

The defendant must (if he has not already done so as part of his defence statement<sup>1</sup>) give to the court and the prosecutor within the relevant period<sup>2</sup> a notice indicating whether he intends to call any persons (other than himself) as witnesses at his trial and, if so (1) giving the name, address and date of birth of each such proposed witness, or as many of those details as are known to the defendant when the notice is given; (2) providing any information in the defendant's possession which might be of material assistance in identifying or finding any such proposed witness in whose case any of the details mentioned in head (1) above are not known to the defendant when the notice is given<sup>3</sup>.

The Secretary of State is required to prepare a code of practice for the guidance of police officers, and other persons charged with the duty of investigating offences, in relation to the arranging and conducting of interviews of persons, particulars of whom are given in a defence statement or who are included in a notice of intention to call defence witnesses<sup>4</sup>.

1     Ie under the Criminal Procedure and Investigations Act 1996 s 6A(2) (as added) (see PARA 1388 ante): s 6C(2) (prospectively added by the Criminal Justice Act 2003 s 34 as from a day to be appointed). At the date at which this volume states the law no such day had been appointed.

2     Ie the relevant period under the Criminal Procedure and Investigations Act 1996 s 12: see s 6C(3) (as prospectively added: see note 1 supra). See the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997, SI 1997/684.

3     Criminal Procedure and Investigations Act 1996 s 6C(1) (as prospectively added: see note 1 supra). A notice does not have to be given under s 6D(1) (as prospectively added) (see PARA 1390 post) specifying the name and address of an expert witness whose name and address have already been given under s 6C (as prospectively added): s 6D(2) (prospectively added by the Criminal Justice Act 2003 s 35 as from a day to be appointed). At the date at which this volume states the law no such day had been appointed. As to the consequences of any failure to comply fully with this or other defence disclosure requirements see the Criminal Procedure and Investigations Act 1996 s 11(5); and PARA 1393 post.

As to the judge's duty to warn the defendant of these consequences at a pre-trial hearing see s 6E(2) (as prospectively added). If, following the giving of a notice under s 6C(1) (as prospectively added) the defendant (1) decides to call a person (other than himself) who is not included in the notice as a proposed witness, or decides not to call a person who is so included; or (2) discovers any information which he would have had to include in the notice if he had been aware of it when giving the notice, he must give an appropriately amended notice to the court and the prosecutor: s 6C(4) (as so added).

4     Ibid s 21A(1) (s 21A added by the Criminal Justice Act 2003 s 40). As to the duties of the Secretary of State in preparing the code see the Criminal Procedure and Investigations Act 1996 s 21A(4)-(6) (as so added); and as to the procedure to be followed for preparing such a code see s 21A(7)-(10) (as so added). Any such code must include in particular:

- 88     (1)   information that should be provided to the interviewee and the defendant in relation to such an interview (s 21A(2)(a) (as so added));
- 89     (2)   the notification of the defendant's solicitor of such an interview (s 21A(2)(b) (as so added));
- 90     (3)   the attendance of the interviewee's solicitor at such an interview (s 21A(2)(c) (as so added));

91 (4) the attendance of the defendant's solicitor at such an interview (s 21A(2)(d) (as so added));

92 (5) the attendance of any other appropriate person at such an interview taking into account the interviewee's age or any disability of the interviewee (s 21A(2)(e) (as so added)).

Any police officer or other person charged with the duty of investigating offences who arranges or conducts such an interview must have regard to the code (s 21A(3) (as so added)), but failure to have regard to any provision of a code for the time being in operation by virtue of an order under s 21A (as added) does not in itself render him liable to any criminal or civil proceedings (s 21A(11) (as so added)). The code will be admissible in evidence and if it appears to a court or tribunal conducting criminal or civil proceedings that any provision of a code in operation at any time or any failure mentioned in s 21A(11) (as added) is relevant to any question arising in the proceedings, the provision or failure must be taken into account in deciding the question: s 21A(12), (13) (as so added).

## **UPDATE**

### **1389 Disclosure by defendant: intention to call witnesses**

NOTE 1--Day appointed is 1 May 2010: SI 2010/1183.

NOTE 4--1996 Act s 21A amended: Police and Justice Act 2006 Sch 4 para 9, Sch 15 Pt 1(B).

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### **1390. Disclosure by defendant of names of any expert witnesses instructed.**

Where the defendant instructs a person with a view to his providing any expert opinion<sup>1</sup> for possible use as evidence at the trial of the defendant, he must within the relevant period<sup>2</sup> give to the court and the prosecutor a notice specifying the person's name and address<sup>3</sup>, unless he has already given notification of his intention to call that person as a witness<sup>4</sup>. It might then be open to the prosecution to call the expert witness in question, should it transpire that his evidence would assist the prosecution case<sup>5</sup>, although questions of legal professional privilege may arise in respect of any communications between the expert and the defence<sup>6</sup>.

1 As to expert opinion evidence see PARA 1482 et seq post.

2 Criminal Procedure and Investigations Act 1996 s 6D(3) (s 6D added by the Criminal Justice Act 2003 s 35 as from a day to be appointed) At the date at which this volume states the law no such day had been appointed. As to the relevant period see the Criminal Procedure and Investigations Act 1996 s 12 (amended by the Criminal Justice Act 2003 s 331, Sch 36 Pt 3 paras 20, 28(a)); and the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997, SI 1997/684.

3 Criminal Procedure and Investigations Act 1996 s 6D(1) (as prospectively added: see note 2 supra).

4 Ie in accordance with ibid s 6C (as prospectively added) (see PARA 1389 ante): s 6D(2) (as prospectively added: see note 2 supra).

5 No party has any property in an expert witness: *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 3 All ER 177, [1979] 1 WLR 1380, CA; *R v Davies* [2002] EWCA Crim 85, 166 JP 243.

6 See *R v King* [1983] 1 All ER 929 at 931, 77 Cr App Rep 1 at 3, CA, per Dunn LJ: '... the rule is that in the case of expert witnesses legal professional privilege attaches to confidential communications between the solicitor and the expert, but it does not attach to the chattels or documents upon which the expert based his opinion, nor to the independent opinion of the expert himself'. Contrast *R v R* [1994] 4 All ER 260, [1995] 1 Cr App Rep 183, CA (privilege attached to a blood specimen provided by defendant to his doctor at his solicitors' request and subsequently analysed for the purpose of DNA profiling. The defendant was entitled to object when the prosecution called evidence from the scientist concerned, for the purpose of proving that the sample incriminated the defendant).

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### **1391. Continuing duty of prosecutor to disclose.**

At all times after the prosecutor has complied with the duty to make initial disclosure<sup>1</sup> or has purported to comply with it, and before the defendant is acquitted or convicted or the prosecutor decides not to proceed with the case concerned<sup>2</sup>, the prosecutor must keep under review the question whether at any given time (and, in particular, following the giving of a defence statement) there is prosecution material<sup>3</sup> which might reasonably be considered capable of undermining the case for the prosecution against the defendant, or of assisting the case for the defendant and has not been disclosed to the defendant<sup>4</sup>. If there is such material at any time the prosecutor must disclose it to the defendant as soon as is reasonably practicable, or (where the defendant has given a defence statement and as a result of that statement the prosecutor is required to make any disclosure) within the relevant period<sup>5</sup>.

Material must not be disclosed under these provisions to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly<sup>6</sup>, or to the extent that it is material the disclosure of which is prohibited<sup>7</sup>.

1     Ie under the Criminal Procedure and Investigations Act 1996 s 3 (see PARA 1387 ante): s 7A(1)(a) (s 7A added by the Criminal Justice Act 2003 s 37).

2     Criminal Procedure and Investigations Act 1996 s 7A(1)(b) (as added: see note 1 supra).

3     For these purposes prosecution material is material (1) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the defendant; or (2) which, in pursuance of a code of practice operative under *ibid* Pt 2 (ss 22-27) (as amended) (see PARA 1385 ante), he has inspected in connection with the case for the prosecution against the defendant: s 7A(6) (as added: see note 1 supra). See also PARA 1387 ante.

4     *Ibid* s 7A(2) (as added: see note 1 supra). In applying this provision by reference to any given time the state of affairs at that time (including the case for the prosecution as it stands at that time) must be taken into account: s 7A(4) (as so added).

5     *Ibid* s 7A(3), (5)(a) (as added: see note 1 supra). The relevant period is the period specified by s 12. If the defendant gives a defence statement under s 5 (as amended), s 6 (as amended) or s 6B (as prospectively added) and the prosecutor considers that he is not required to make any further prosecution disclosure he must during that period give the defendant a written statement to that effect: s 7A(5)(b) (as so added). As to the method by which the prosecutor discloses such evidence see s 3(3)-(5) (see PARA 1387 ante): s 7A(7) (as so added). Any failure of the prosecutor to act during the relevant period does not on its own constitute grounds for staying the proceedings for abuse of process (s 10(1)(b), (2) (s 10(1)(b) substituted by the Criminal Justice Act 2003 s 331, Sch 36 Pt 3 paras 20, 27)), but this does not prevent the failure constituting such grounds if it involves such delay by the prosecutor that the defendant is denied a fair trial (Criminal Procedure and Investigations Act 1996 s 10(3)).

6     *Ibid* s 7A(8) (as added: see note 1 supra). As to the withholding of evidence or disclosure on grounds of public interest see PARAS 1480-1481 post. In a summary trial, after the court makes an order under the Criminal Procedure and Investigations Act 1996 s 7A(8) (as added) and before the defendant is acquitted or convicted or the prosecutor decides not to proceed with the case, the defendant may apply to the court for a review of the question whether it is still not in the public interest to disclose the material: see s 14 (amended by the Criminal Justice Act 2003 s 331, Sch 36 Pt 3 paras 20, 30). In other cases, the court must keep the question under review: see the Criminal Procedure and Investigations Act 1996 s 15 (amended by the Criminal Justice Act 2003 Sch 36 Pt 3 paras 20, 31). The person claiming to have an interest in the material has a right to be heard by the court: see the Criminal Procedure and Investigations Act 1996 s 16 (amended by the Criminal Justice Act 2003 Sch 36 Pt 3 paras 20, 32).

7 Criminal Procedure and Investigations Act 1996 s 7A(9) (as added: see note 1 supra). The text refers to prohibition by the Regulation of Investigatory Powers Act 2000 s 17 (see PARA 519 ante): Criminal Procedure and Investigations Act 1996 s 7A(9) (as so added).

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### **1392. Application by defendant for disclosure.**

Where the defendant has given a defence statement<sup>1</sup> and the prosecutor complies with the provisions as to continuing disclosure<sup>2</sup> or purports to comply with them or fails to comply with them<sup>3</sup>, if the defendant has at any time reasonable cause to believe that there is prosecution material<sup>4</sup> which is required to be disclosed to him but has not been, he may apply to the court for an order requiring the prosecutor to disclose it to him<sup>5</sup>.

Material may not be disclosed under these provisions to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly<sup>6</sup>, or to the extent that it is material the disclosure of which is prohibited<sup>7</sup>.

1     Ie under the Criminal Procedure and Investigations Act 1996 s 5 (as amended), s 6 (as amended) or s 6B (as prospectively added) (see PARA 1388 ante): s 8(1) (substituted by the Criminal Justice Act 2003 s 38).

2     Ie under the Criminal Procedure and Investigations Act 1996 s 7A (as added) (see PARA 1391 ante): s 8(1) (as substituted: see note 1 supra).

3     Ibid s 8(1) (as substituted: see note 1 supra).

4     For these purposes, prosecution material is material (1) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the defendant; (2) which in pursuance of a code of practice under ibid Pt II (ss 22-27) (as amended) (see PARA 1385 ante), he has inspected in connection with the case for the prosecution against the defendant; or (3) which in pursuance of such a code, the prosecutor must, if he asks for the material, be given a copy of it or be allowed to inspect it in connection with the case for the prosecution against the defendant: s 8(3), (4). See *DPP v Wood* [2005] EWHC 32 (Admin), 170 JP 177 (material sought to be disclosed did not satisfy the criteria listed in the Criminal Procedure and Investigations Act 1996 s 8(3), (4) and therefore was not 'prosecution material').

5     Ibid s 8(2) (substituted by the Criminal Justice Act 2003 s 38). As to the practice and procedure to be followed in relation to an application or order under the Criminal Procedure and Investigations Act 1996 s 8(2) (as substituted) or s 8(5), see the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Regulations 1997, SI 1997/698; and the Magistrates' Courts (Criminal Procedure and Investigations Act 1996) (Disclosure) Regulations 1997, SI 1997/703. In due course, the procedure will be set out in CrimPR Pt 22.

6     Criminal Procedure and Investigations Act 1996 s 8(5). As to the withholding of evidence or disclosure on grounds of public interest see PARAS 1480-1481 post. In a summary trial, after the court makes an order under the Criminal Procedure and Investigations Act 1996 s 8(5) and before the defendant is acquitted or convicted or the prosecutor decides not to proceed with the case, the defendant may apply to the court for a review of the question whether it is still not in the public interest to disclose the material: see s 14 (amended by the Criminal Justice Act 2003 s 331, Sch 36 Pt 3 paras 20, 30). In other cases, the court must keep the question under review: see the Criminal Procedure and Investigations Act 1996 s 15 (amended by the Criminal Justice Act 2003 Sch 36 Pt 3 paras 20, 31). The person claiming to have an interest in the material has a right to be heard by the court: see the Criminal Procedure and Investigations Act 1996 s 16 (amended by the Criminal Justice Act 2003 Sch 36 Pt 3 paras 20, 32).

7     Criminal Procedure and Investigations Act 1996 s 8(6). The text refers to prohibition by the Regulation of Investigatory Powers Act 2000 s 17 (see PARA 519 ante): Criminal Procedure and Investigations Act 1996 8(6).

## **UPDATE**

### **1392 Application by defendant for disclosure**

NOTE 5--CrimPR Pt 22 now Criminal Procedure Rules 2010, SI 2010/60, Pt 22. See further PARA 1384. *Amendment No 23 to the Consolidated Criminal Practice Direction (criminal proceedings: disclosure; witness statements; contempt of court; forms)* [2010] 1 Cr App Rep 179, [2009] All ER (D) 50 (Oct) sets out forms for use in connection with disclosure.



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EVIDENCE/(5) ADVANCE INFORMATION AND DISCLOSURE/(ii) Disclosure under the Criminal Procedure and Investigations Act 1996/1393. Faults in disclosure by defendant.

### **1393. Faults in disclosure by defendant.**

Where in any of three specified cases<sup>1</sup> the defendant fails to make disclosure in accordance with the statutory scheme, the court or any other party may make such comment as appears appropriate and the court or jury may draw such inferences as appear proper in deciding whether he is guilty of the offence concerned<sup>2</sup>, but a defendant may not be convicted of an offence solely on an inference drawn on this basis<sup>3</sup>.

<sup>1</sup> Criminal Procedure and Investigations Act 1996 s 11(1) (s 11 substituted by the Criminal Justice Act 2003 s 39). The three specified cases are:

- 93 (1) where the Criminal Procedure and Investigations Act 1996 s 5 (as amended) (see PARA 1388 ante) applies and the defendant is required to give a defence statement or updated defence statement (ie a defence statement given under s 6B (as prospectively added) (s 11(12)(b) (as so substituted))) but: (a) fails to give an initial defence statement (ie a defence statement given under s 5 or s 6 (both as amended) (s 11(12)(a) (as so substituted))); (b) gives an initial defence statement but does so after the end of the period which, by virtue of s 12, is the relevant period for s 5 (as amended); (c) is required by s 6B (as prospectively added) (see PARA 1388 ante) to give either an updated defence statement or a statement of the kind mentioned in s 6B(4) (as prospectively added) (ie a statement that he has no changes to make to his initial defence statement) but fails to do so; (d) gives an updated defence statement or a statement of the kind mentioned in s 6B(4) (as prospectively added) but does so after the end of the period which, by virtue of s 12, is the relevant period for s 6B (as prospectively added); (e) sets out inconsistent defences in his defence statement; or (f) at his trial (i) puts forward a defence which was not mentioned in his defence statement or is different from any defence set out in that statement; (ii) relies on a matter which, in breach of the requirements imposed by or under s 6A (as added) (see PARA 1388 ante), was not mentioned in his defence statement; (iii) adduces evidence in support of an alibi (see s 6A(3) (as added): s 11(12)(d) (as so substituted)) without having given particulars of the alibi in his defence statement; or (iv) calls a witness to give evidence in support of an alibi without having complied with s 6A(2)(a) (as added) or s 6A(2)(b) (as added) as regards the witness in his defence statement (s 11(2) (as so substituted));
- 94 (2) where s 6 (as amended) (see PARA 1388 ante) applies and the defendant gives the initial defence statement after the end of the period which, by virtue of s 12, is the relevant period for s 6 (as amended), or does any of the things specified in heads (1)(c)-(f) supra (s 11(3) (as so substituted)); or
- 95 (3) where the defendant gives a witness notice (ie under s 6C (as prospectively added): s 11(12)(e) (as so substituted)) but does so after the end of the period which, by virtue of s 12, is the relevant period for s 6C (as prospectively added) (see PARA 1389 ante), or at his trial calls a witness (other than himself) not included, or not adequately identified, in a witness notice (s 11(4) (as so substituted)).

A reference simply to a defendant's 'defence statement' is a reference (A) where he has given only an initial defence statement, to that statement; (B) where he has given both an initial and an updated defence statement, to the updated defence statement; (C) where he has given both an initial defence statement and a statement of the kind mentioned in s 6B(4) (as prospectively added), to the initial defence statement: s 11(12)(c) (as so substituted).

<sup>2</sup> Ibid s 11(5) (as substituted: see note 1 supra). Where, however, the defendant is at fault under s 11(4) (as substituted) (see note 1 supra) or his fault is that at trial he has relied on a point of law (including any point as to the admissibility of evidence or an abuse of process) or an authority which, in breach of the requirements imposed by or under s 6A (as added), was not mentioned in his defence statement, comment by another party may be made only with the leave of the court: s 11(6), (7) (as so substituted). Where the defendant puts

forward a defence which is different from any defence set out in his defence statement, in doing anything under s 11(5) (as substituted) or in deciding whether to do anything under it the court must have regard to: (1) the extent of the differences in the defences; and (2) whether there is any justification for it: s 11(8) (as so substituted). Similarly, where the defendant calls a witness whom he has failed to include, or to identify adequately, in a witness notice, in doing anything under s 11(5) (as substituted) or in deciding whether to do anything under it the court must have regard to whether there is any justification for the failure: s 11(9) (as so substituted).

Where the defendant has given a statement of the kind mentioned in s 6B(4) (as prospectively added) (ie he has stated that he has no changes to make to his initial defence statement), then, for the purposes of s 11(2)(f) (ii), (iv) (as substituted) (see note 1 supra), the question as to whether there has been a breach of the requirements imposed by or under s 6A (as added) or a failure to comply with s 6A(2)(a) or (b) (as added) is to be determined: (a) by reference to the state of affairs at the time when that statement was given; and (b) as if the defence statement was given at the same time as that statement: s 11(11) (as so substituted).

3 Ibid s 11(10) (as substituted: see note 1 supra).

## **UPDATE**

### **1393 Faults in disclosure by defendant**

NOTE 1--Head (1). Criminal Procedure and Investigations Act 1996 s 11(2) amended: Criminal Justice and Immigration Act 2008 s 60(2).

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### **1394. Confidentiality.**

If the defendant is given or allowed to inspect a document or other object<sup>1</sup> then, subject to the provisions described below<sup>2</sup>, he must not use or disclose it or any information recorded in it<sup>3</sup>. The defendant may use or disclose the object or information in connection with the proceedings for whose purposes he was given the object or allowed to inspect it, with a view to the taking of further criminal proceedings (for instance, by way of appeal) with regard to the matter giving rise to the proceedings, or in connection with the proceedings<sup>4</sup>. The defendant may use or disclose the object to the extent that it has been displayed to the public in open court, or the information to the extent that it has been communicated to the public in open court, but he may not do so if the object is displayed or the information is communicated in proceedings to deal with a contempt of court<sup>5</sup>.

If the defendant applies to the court<sup>6</sup> for an order granting permission to use or disclose the object or information, and the court makes such an order, the defendant may use or disclose the object or information for the purpose and to the extent specified by the court<sup>7</sup>. Subject to rules of court<sup>8</sup>, such an application may be made and dealt with at any time, and in particular after the defendant has been acquitted or convicted or the prosecutor has decided not to proceed with the case concerned<sup>9</sup>. Where such an application is made<sup>10</sup>, and the prosecutor or a person claiming to have an interest in the object or information applies to be heard by the court<sup>11</sup>, the court must not make an order granting permission unless the person applying to be heard has been given an opportunity to be heard<sup>12</sup>.

Nothing in the foregoing provisions affects any other restriction or prohibition on the use or disclosure of an object or information, whether the restriction or prohibition arises under an enactment (whenever passed) or otherwise<sup>13</sup>.

It is a contempt of court for a person knowingly to use or disclose an object or information recorded in it if the use or disclosure is in contravention of the foregoing provisions<sup>14</sup>. A magistrates' court or the Crown Court has jurisdiction to deal with a person who is guilty of a contempt<sup>15</sup>. A person who is guilty of such a contempt may be committed to custody by a magistrates' court for a specified period not exceeding six months or that court may impose on him a fine not exceeding £5,000 or may both commit him to custody and impose a fine on him<sup>16</sup>. The Crown Court may commit a person guilty of such an offence to custody for a specified period not exceeding two years or impose a fine on him or may both commit him to custody and impose a fine on him<sup>17</sup>.

If a person is guilty of a contempt under these provisions, and the object concerned is in his possession, the court finding him guilty may order that the object be forfeited and dealt with in such manner as the court may order<sup>18</sup>. If the court proposes to make an order<sup>19</sup>, and the person found guilty, or any other person claiming to have an interest in the object, applies to be heard by the court, the court must not make the order unless the applicant has been given an opportunity to be heard<sup>20</sup>. If a person is guilty of a contempt under these provisions, and a copy of the object concerned is in his possession, the court finding him guilty may order that the copy be forfeited and dealt with in such manner as the court may order<sup>21</sup>. An object or information is inadmissible as evidence in civil proceedings if to adduce it would in the opinion of the court<sup>22</sup> be likely to constitute a contempt under these provisions<sup>23</sup>.

1 le under the Criminal Procedure and Investigations Act 1996 s 3 (as amended), s 4 (as amended), s 7A (as added), s 14 (as amended) or s 15 (as amended), or under an order under s 8 (as amended): s 17(1)(a), (b) (s 17(1)(a) amended by the Criminal Justice Act 2003 s 331, Sch 36 Pt 3 paras 20, 33).

2 le the Criminal Procedure and Investigations Act 1996 s 17(2)-(4), and the Sexual Offences (Protected Material) Act 1997 s 9(2), (3) (not yet in force) (by virtue of which the Criminal Procedure and Investigations Act 1996 ss 17, 18 (as amended) do not apply in relation to disclosures regulated by the 1997 Act: see PARA 1395 et seq post.

3 Criminal Procedure and Investigations Act 1996 s 17(1).

4 Ibid s 17(2).

5 Ibid s 17(3). As to proceedings to deal with a contempt of court see s 18; and note 14 infra.

6 le a magistrates' court, where ibid Pt I (ss 1-21) (as amended) applies by virtue of s 1(1), or the Crown Court, where Pt I (as amended) applies by virtue of s 1(2): ss 17(7), 18(2). The powers of a magistrates' court under s 18 may be exercised either of the court's own motion or by order on complaint: s 18(10).

7 Ibid s 17(4). As to the practice and procedure to be followed in relation to an application under s 17(4) or s 17(6)(b) or an order under s 17(4) see CrimPR 26.1-26.3.

8 le rules made under the Criminal Procedure and Investigations Act 1996 s 19: see note 19 infra.

9 Ibid s 17(5).

10 Ibid s 17(6)(a).

11 Ibid s 17(6)(b). As to the practice and procedure to be followed see note 7 supra.

12 Ibid s 17(6).

13 Ibid s 17(8).

14 Ibid s 18(1). As to the practice and procedure to be followed in dealing with a contempt under s 18 see CrimPR 26.4-26.5. As to contempt of court see generally CONTEMPT OF COURT.

15 Criminal Procedure and Investigations Act 1996 s 18(2). A magistrates' court has jurisdiction where Pt I (as amended) applies by virtue of s 1(1), and the Crown Court has jurisdiction where Pt I (as amended) applies by virtue of s 1(2): s 18(2).

16 Ibid s 18(3)(a).

17 Ibid s 18(3)(b).

18 Ibid s 18(4). The power of the court under s 18(4) includes power to order the object to be destroyed or to be given to the prosecutor or to be placed in his custody for such period as the court may specify: s 18(5). As to the practice and procedure to be followed in relation to an order under s 18(4) or an application under s 18(6), see CrimPR 26.5. As to the power to make provision relating to practice and procedure by way of rules of court, see the Criminal Procedure and Investigations Act 1996 s 19 (amended by the Courts Act 2003 s 109(1), Sch 8 para 377(1), (2), 930; the Criminal Justice Act 2003 s 331, Sch 36 Pt 3 paras 20, 34; and the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 para 251).

19 le under the Criminal Procedure and Investigations Act 1996 s 18(4): see the text and note 18 supra.

20 Ibid s 18(6).

21 Ibid s 18(7). Section 18(5), (6) applies for these purposes but as if the references to the object were references to the copy: s 18(8).

22 le the court before which the civil proceedings are being taken: ibid s 18(9).

23 Ibid s 18(9).

## UPDATE

### 1394 Confidentiality

NOTES 7, 14, 18--CrimPR now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'). As to contempt of court see CrimPR Pt 62.

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### **(iii) Protected Material in Proceedings Relating to Certain Sexual Offences**

#### **1395. Meaning of 'protected material'.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. 'Protected material' in relation to proceedings for a sexual offence<sup>2</sup> means a copy<sup>3</sup> of (1) a statement relating to that or any other sexual offence made by the victim<sup>4</sup> of the offence, whether recorded in writing or any other form; (2) a photograph or pseudo-photograph<sup>5</sup> of any such victim; or (3) a report of a medical examination of the physical condition of any such victim<sup>6</sup>.

1 The Sexual Offences (Protected Material) Act 1997 comes into force on such day as the Secretary of State may appoint by order under s 11 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 For these purposes, references to proceedings for a sexual offence include references to: (1) any appeal or application for leave to appeal brought or made by or in relation to a defendant in such proceedings; (2) any application made to the Criminal Cases Review Commission for the reference under the Criminal Appeal Act 1995 s 9 or s 11 of any conviction, verdict, finding or sentence recorded or imposed in relation to any such defendant; and (3) any petition to the Secretary of State requesting him to recommend the exercise of Her Majesty's prerogative of mercy in relation to any such defendant: Sexual Offences (Protected Material) Act 1997 s 2(2) (not yet in force). 'Proceedings' means criminal proceedings: s 2(2) (not yet in force).

'Sexual offence', for the purposes of the Sexual Offences (Protected Material) Act 1997, includes any offence under (a) the Protection of Children Act 1978 s 1 or the Criminal Justice Act 1988 s 160; (b) any offence under any provision of the Sexual Offences Act 2003 Pt 1 (ss 1-79) (as amended) except ss 64, 65, 69 or s 71; (c) the Criminal Law Act 1977 (ie conspiracy to commit any of the offences mentioned in heads (a) and (b) supra); (d) the Criminal Attempts Act 1981 s 1 (ie attempting to commit any of those offences); (e) any offence of inciting another to commit any of those offences: Sexual Offences (Protected Material) Act 1997 s 2(1), Schedule (not yet in force) (amended by the Sexual Offences Act 2003 ss 139, 140, Sch 6 para 36, Sch 7).

3 Ie a copy in whatever form, which is given by the prosecutor to any person under the Sexual Offences (Protected Material) Act 1997: s 1(1) (not yet in force). Subject to s 1(4) (not yet in force), references to any protected material include references to any part of any such material and references to a copy of any such material include references to any part of such copy: s 1(3) (not yet in force). Nothing in the Act (1) so far as it relates to a defendant making any copy of (a) any protected material; or (b) a copy of such material, applies to a manuscript copy which is not a verbatim copy of the whole of that material; or (2) so far as it refers to a defendant having in his possession any copy of any protected material, applies to a manuscript copy made by him which is not a verbatim copy of the whole of that material: s 1(4) (not yet in force).

4 A person is, in relation to any proceedings for a sexual offence, a victim of that offence if (1) the charge, summons or indictment by which proceedings are instituted names that person as a person in relation to whom that offence was committed; or (2) that offence can, in the prosecutor's opinion, be reasonably regarded as having been committed in relation to that person; and a person is, in relation to any such proceedings, a victim of any other sexual offence if that offence can, in the prosecutor's opinion, be reasonably regarded as having been committed in relation to that person: *ibid* s 1(2) (not yet in force).

5 'Photograph' and 'pseudo-photograph' are to be construed in accordance with the Protection of Children Act 1978 s 7(4), (7): Sexual Offences (Protected Material) Act 1997 s 2(1) (not yet in force).

6 *Ibid* s 1(1) (not yet in force).

#### **UPDATE**

**1395 Meaning of 'protected material'**

NOTE 2--See further Serious Crime Act 2007 Sch 6 para 34 (references to common law offence of incitement).

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### **1396. Regulation of disclosures by the prosecutor.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Where, in connection with any proceedings for a sexual offence<sup>2</sup>, any statement or other protected material<sup>3</sup> would otherwise<sup>4</sup> fall to be disclosed by the prosecutor<sup>5</sup> to the defendant<sup>6</sup>, the prosecutor must not disclose that material to the defendant<sup>7</sup>, but rather if the defendant has a legal representative<sup>8</sup> who has given the requisite undertaking<sup>9</sup>, must disclose the material in question by giving a copy of it to that representative<sup>10</sup>. If the defendant has no legal representative<sup>11</sup>, the prosecutor must disclose the material in question by giving a copy of it to the appropriate person<sup>12</sup> in order for that person to show that copy to the defendant<sup>13</sup>. Once a copy of any material is given to any relevant person<sup>14</sup> by the prosecutor the copy is protected material<sup>15</sup>.

If material has been disclosed to the defendant's legal representative<sup>16</sup>, and at a time when any relevant proceedings<sup>17</sup> are current or in contemplation the legal representative either ceases to act as the defendant's legal representative<sup>18</sup> or dies or becomes incapacitated, that material is to be further disclosed in accordance with the relevant statutory provision<sup>19</sup>. If material has been disclosed to an appropriate person<sup>20</sup> and, at a time when any relevant proceedings are current or in contemplation, the defendant acquires a legal representative who gives the prosecutor the requisite undertaking, that material must be further disclosed in accordance with the relevant statutory provision<sup>21</sup> to the defendant's legal representative<sup>22</sup>.

1 The Sexual Offences (Protected Material) Act 1997 comes into force on such day as the Secretary of State may appoint by order under s 11 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 As to the meaning of 'proceedings for a sexual offence' see PARA 1395 note 2 ante. For the meaning of 'sexual offence' see PARA 1395 note 2 ante.

3 For the meaning of 'protected material' see PARA 1395 ante.

4 Ie other than under the Sexual Offences (Protected Material) Act 1997 s 3: s 3(1) (not yet in force).

5 'The prosecutor', in relation to any proceedings for a sexual offence, means any person acting as prosecutor (whether an individual or a body): *ibid* s 2(1) (not yet in force).

6 'Defendant', in relation to any proceedings for a sexual offence, means any person charged with that offence (whether or not he has been convicted): *ibid* s 2(1) (not yet in force).

7 *Ibid* s 3(1)(a) (not yet in force). The material must instead be disclosed in accordance with s 3(2) or s 3(3) (not yet in force) as applicable: s 3(1)(b) (not yet in force). Where a copy of any material falls to be given by any person under the Act by the prosecutor any such copy may be in such form as the prosecutor thinks fit, and where the material consists of information which has been recorded in any form, need not be in the same form as that in which the information has already been recorded: s 3(4) (not yet in force).

8 'Legal representative', in relation to a defendant, means any authorised advocate or authorised litigator (as defined by the Courts and Legal Services Act 1990 s 119(1)) acting for the defendant in connection with any proceedings for the sexual offence in question: Sexual Offences (Protected Material) Act 1997 s 2(1) (not yet in force).

9 See PARA 1397 post.



- 10 Sexual Offences (Protected Material) Act 1997 s 3(1)(b), (2) (not yet in force).
- 11 Or if the defendant's legal representative has not given the requisite undertaking (ie where ibid s 3(2) (not yet in force) does not apply): s 3(3) (not yet in force).
- 12 Ie for the purposes of ibid s 5 (not yet in force) (see PARA 1398 post): s 3(3) (not yet in force).
- 13 Ie in accordance with ibid s 5 (not yet in force) (see PARA 1398 post): s 3(3) (not yet in force).
- 14 Ie any person under ibid s 3(5) (not yet in force).
- 15 Ibid s 3(5) (not yet in force).
- 16 Ie in accordance with ibid s 3(2) (not yet in force): see the text and notes supra.
- 17 'Relevant proceedings', in relation to any material which has been disclosed by the prosecutor, means any proceedings for the purposes of which it has been so disclosed or any further proceedings for the sexual offence in question: ibid s 2(1) (not yet in force).
- 18 Ie in circumstances where ibid s 4(5)(b) (not yet in force) does not apply: see PARA 1397 post.
- 19 Ibid s 6(1) (not yet in force). The relevant statutory provisions are contained in s 3(2) or s 3(3) (not yet in force) as applicable: s 6(2) (not yet in force).
- 20 Ie in accordance with ibid s 3(3) (not yet in force): s 6(2) (not yet in force).
- 21 Ie in accordance with ibid s 3(2) (not yet in force): s 6(2) (not yet in force).
- 22 Ibid s 6(2) (not yet in force).

## **UPDATE**

### **1396 Regulation of disclosures by the prosecutor**

NOTE 8--For 'any authorised ... s 119(1) read 'a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act) (see LEGAL PROFESSIONS vol 65 (2008) para 512)': Sexual Offences (Protected Material) Act 1997 s 2(1) (amended by Legal Services Act 2007 Sch 21 para 123).

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### **1397. Disclosure to the defendant's legal representative.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. The defendant's legal representative<sup>2</sup> is required to give, in relation to any protected material<sup>3</sup> given to him, an undertaking to discharge the following obligations<sup>4</sup>.

He must take reasonable steps to ensure that the protected material, or any copy of it, is only shown to the defendant in circumstances where it is possible to exercise adequate supervision to prevent the defendant retaining possession of the material or copy or making a copy of it<sup>5</sup>, and to ensure that the protected material is not shown and no copy of it is given, and its contents are not otherwise revealed, to any person other than the defendant, except so far as it appears to him necessary to show the material or give a copy of it to any such person in connection with any relevant proceedings, or for the purposes of any assessment or treatment of the defendant (whether before or after conviction)<sup>6</sup>.

The legal representative must inform<sup>7</sup> the defendant that the protected material is such material<sup>8</sup>, and that the defendant can only inspect it in specified circumstances<sup>9</sup>. He must also inform the defendant that it would be an offence for the defendant to have protected material, or a copy of it, in his possession otherwise than while inspecting it or the copy in specified circumstances<sup>10</sup>, or to give that material or any copy of it, or otherwise reveal its contents, to any other person<sup>11</sup>.

Where the protected material or copy of it has been shown or given to a person other than the defendant<sup>12</sup>, the legal representative must inform that person that he must not give any copy of that material, or otherwise reveal its contents to any other person other than the defendant, or to the defendant otherwise than in specified circumstances<sup>13</sup> and that it would be an offence for that person to do so<sup>14</sup>.

A legal representative who ceases to act as such for the defendant at a time when any relevant proceedings are current or in contemplation, must inform the prosecutor of that fact, and if he is informed by the prosecutor that the defendant has a new legal representative who has given the prosecutor the undertaking required, he must give the protected material, and any copies of it in his possession, to the defendant's new legal representative<sup>15</sup>. At the time of giving the protected material to the new legal representative he must inform that person that the material is protected material<sup>16</sup>, and of the extent to which that material has been shown by him, and any copies of it have been given by him, to any other person (including the defendant)<sup>17</sup>.

1 The Sexual Offences (Protected Material) Act 1997 comes into force on such day as the Secretary of State may appoint by order under s 11 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'defendant' see PARA 1396 note 6 ante; for the meaning of 'legal representative' see PARA 1396 note 8 ante.

3 For the meaning of 'protected material' see PARA 1395 ante.

4 Sexual Offences (Protected Material) Act 1997 s 4(1) (not yet in force).

5 Ibid s 4(2)(a) (not yet in force).

6 Ibid s 4(2)(b)(i), (ii) (not yet in force). For the meaning of 'relevant proceedings' see PARA 1396 note 17 ante.

7 'Inform' means inform in writing: ibid s 2(1) (not yet in force).

8 Ibid s 4(3)(a) (not yet in force).

9 Ibid s 4(3)(b) (not yet in force). The circumstances are as described in s 4(2)(a) (not yet in force): see the text and note 5 supra.

10 Ie the circumstances described in ibid s 4(2)(a) (not yet in force): see the text and notes supra.

11 Ibid s 4(3)(c) (not yet in force).

12 Ie in accordance with ibid s 2(b)(i) or (ii) (not yet in force): see the text and note 6 supra.

13 Ie the circumstances as described in ibid s 4(2)(a) (not yet in force): see the text and notes supra.

14 Ibid s 4(4) (not yet in force). See also PARA 1400 post.

15 Ibid s 4(5) (not yet in force).

16 Ibid s 4(6)(a) (not yet in force).

17 Ibid s 4(6)(b) (not yet in force). He must keep a record of every occasion on which the protected material was shown, or a copy of it was given under the circumstances as described in s 4(6)(b): s 4(7) (not yet in force).

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### **1398. Disclosure to unrepresented defendant.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Where a defendant<sup>2</sup> has no legal representative<sup>3</sup> a copy of any material falls to be given by the prosecutor<sup>4</sup> to the appropriate person<sup>5</sup>. The appropriate person must take reasonable steps to ensure that: (1) the protected material<sup>6</sup>, or any copy of it, is only shown to the defendant in circumstances where it is possible to exercise adequate supervision to prevent the defendant retaining possession of the material or copy or making a copy of it<sup>7</sup>; (2) the defendant is given such access to that material, or a copy of it, as he reasonably requires in connection with any relevant proceedings<sup>8</sup>; and (3) the material is not shown and no copy of it is given, and its contents are not otherwise revealed, to any person other than the defendant<sup>9</sup>.

The prosecutor must inform the defendant that it would be an offence for the defendant to have that material, or any copy of it, in his possession otherwise than while inspecting it in specified circumstances<sup>10</sup>, or to give that material or any copy of it, or otherwise reveal its contents, to any other person<sup>11</sup>. If the defendant requests the prosecutor in writing to give a further copy of the material to some other person, and it appears to the prosecutor to be necessary to do so in connection with any relevant proceedings, or for the purposes of any assessment or treatment of the defendant (whether before or after conviction), the prosecutor must give such a copy to that person<sup>12</sup>. The prosecutor may give such a copy to some other person where no request has been made but it appears to him that in the interests of the defendant it is necessary to do so<sup>13</sup>. In such circumstances, the prosecutor at the time of giving such a copy to a person must inform that person that he must not give any copy of the protected material or otherwise reveal its contents to any person other than the defendant, or to the defendant otherwise than in specified circumstances<sup>14</sup> and that it would be an offence to do so<sup>15</sup>. If the prosecutor receives a request from the defendant to give a further copy of the material to another person, but does not consider it to be necessary to do so and refuses the request, he must inform the defendant of that refusal<sup>16</sup>.

1 The Sexual Offences (Protected Material) Act 1997 comes into force on such day as the Secretary of State may appoint by order under s 11 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'defendant' see PARA 1396 note 6 ante.

3 For the meaning of 'legal representative' see PARA 1396 note 8 ante.

4 For the meaning of 'the prosecutor' see PARA 1396 note 5 ante.

5 Sexual Offences (Protected Material) Act 1997 s 5(1) (not yet in force). The material is given in accordance with s 3(3) (not yet in force); s 5(1) (not yet in force). Subject to s 5(3) (not yet in force), the appropriate person is (1) if the defendant is detained in a prison, the governor of the prison or any person nominated by the governor for the purposes of s 5 (not yet in force); and (2) otherwise the officer in charge of such police station as appears to the prosecutor to be suitable for enabling the defendant to have access to the material in accordance with s 5 (not yet in force) or any person nominated by that officer for the purposes of s 5 (not yet in force); s 5(2) (not yet in force). The Secretary of State may make regulations by way of statutory instrument providing that in certain circumstances the appropriate person will be a person of any description as specified in such regulations: see s 5(3), (11) (not yet in force).

6 For the meaning of 'protected material' see PARA 1395 ante.

7 Sexual Offences (Protected Material) Act 1997 s 5(4)(a) (not yet in force). The prosecutor at the time of giving the protected material to the appropriate person, must inform him that the material is protected material for the purposes of the Act and that he is required to discharge the obligations set out in s 5(4) (not yet in force): s 5(5) (not yet in force).

8 Ibid s 5(4)(b) (not yet in force). For the meaning of 'relevant proceedings' see PARA 1396 note 17 ante.

9 Ibid s 5(4)(c) (not yet in force). See also note 2 supra.

10 Ie those described in ibid s 5(4)(a) (not yet in force): see also PARA 1400 post.

11 Ibid s 5(6)(c) (not yet in force). The prosecutor must also inform the defendant that the material is protected for the purposes of the Act (s 5(6)(a) (not yet in force)), and that the defendant can only inspect that material, or any copy of it, in the circumstances as described in s 5(4)(a) (not yet in force) (s 5(6)(b) (not yet in force)). The prosecutor must also inform the defendant of the effect of s 5(7) (not yet in force): s 5(6) (not yet in force).

12 Ibid s 5(7) (not yet in force).

13 Ibid s 5(8) (not yet in force).

14 Ie those specified in ibid s 5(4)(a) (not yet in force): see the text and notes 1-7 supra.

15 Ibid s 5(9) (not yet in force).

16 Ibid s 5(10) (not yet in force).

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### **1399. Disclosure by the Criminal Cases Review Commission.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Where, in connection with any relevant application<sup>2</sup> made to the Criminal Cases Review Commission, any protected material<sup>3</sup> would otherwise fall to be disclosed by the Commission to the applicant<sup>4</sup> the Commission must not disclose that material to the applicant, but it must instead be disclosed in the prescribed manner<sup>5</sup>.

1 The Sexual Offences (Protected Material) Act 1997 comes into force on such day as the Secretary of State may appoint by order under s 11 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 'Relevant application' means an application made to the Commission for the reference under the Criminal Appeal Act 1995 s 9 or s 11, of any conviction, verdict, finding or sentence of a court in proceedings for a sexual offence: Sexual Offences (Protected Material) Act 1997 s 7(4)(a) (not yet in force). As to the Criminal Cases Review Commission see PARAS 2028-2032 post.

3 For the meaning of 'protected material' see PARA 1395 ante.

4 'The applicant' in relation to a relevant application means the person by or on whose behalf the application is made: Sexual Offences (Protected Material) Act 1997 s 7(4)(b) (not yet in force).

5 Ibid s 7(1) (not yet in force). Sections 3(2)-(5), 4-6 (not yet in force) apply in connection with any disclosure by the Commission in relation to which s 7(1) (not yet in force) applies as they apply in connection with any disclosure by the prosecutor in relation to which s 3(1) (not yet in force; see PARA 1396 ante) applies: s 7(2) (not yet in force). For the purposes of s 7(1) (not yet in force) and the operation, in connection with any such disclosure by the Commission, of the provisions in 7(2) (not yet in force), references in the Act to the prosecutor and the defendant are to be read as references to the Commission and the applicant respectively: s 7(3) (not yet in force).

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## **1400. Offences.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Where any material has been disclosed under the Sexual Offences (Protected Material) Act 1997<sup>2</sup> in connection with any proceedings for a sexual offence<sup>3</sup>, it is an offence for the defendant<sup>4</sup> to have the protected material<sup>5</sup>, or any copy of it, in his possession otherwise than while inspecting it or the copy in specified circumstances<sup>6</sup>, or to give that material or any copy of it, or otherwise reveal its contents, to any other person<sup>7</sup>. Where any protected material, or any copy of any such material, has been shown or given to any person in accordance with the relevant statutory provisions<sup>8</sup>, it is an offence for that person to give any copy of that material or otherwise reveal its contents to any person other than the defendant, or to the defendant otherwise than in the circumstances specified<sup>9</sup>.

A person found guilty of such an offence<sup>10</sup> is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both, or on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both<sup>11</sup>. In the case of a person charged with an offence under the Sexual Offences (Protected Material) Act 1997 relating to any protected material or copy of any such material, it is a defence to prove that, at the time of the alleged offence, he was not aware, and neither suspected nor had reason to suspect, that the material or copy in question was protected material or a copy of any such material<sup>12</sup>.

1 The Sexual Offences (Protected Material) Act 1997 comes into force on such day as the Secretary of State may appoint by order under s 11 (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 See PARA 1395 et seq ante.

3 As to the meaning of 'proceedings for a sexual offence' see PARA 1395 note 2 ante. For the meaning of 'sexual offence' see PARA 1395 note 2 ante.

4 For the meaning of 'defendant' see PARA 1396 note 6 ante.

5 For the meaning of 'protected material' see PARA 1395 ante.

6 Ie in accordance with the Sexual Offences (Protected Material) Act 1997 s 4(2)(a) (not yet in force) (see PARA 1397 ante) or s 5(4)(a) (not yet in force) (see PARA 1398 ante).

7 Ibid s 8(1) (not yet in force).

8 Ie in accordance with ibid s 4(2)(b)(i) or s 4(2)(b)(ii) or s 5(7) or s 5(8) (all not yet in force): see PARAS 1397-1398 ante.

9 Ibid s 8(2) (not yet in force). The circumstances are those described in s 4(2)(a) or 5(4)(a) (not yet in force): s 8(2) (not yet in force). Section 8(1), (2) (not yet in force) applies whether or not any relevant proceedings are current or in contemplation (and references to the defendant are to be construed accordingly): s 8(3) (not yet in force). For the meaning of 'relevant proceedings' see PARA 1396 note 17 ante.

10 Ie under ibid s 8(1) or s 8(2) (not yet in force).

11 Ibid s 8(4) (not yet in force). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. The court before which a person is tried for an offence under s 8 (not yet in force) may

(whether or not he is convicted of that offence) make an order requiring him to return any protected material, or any copy of any such material, in his possession to the prosecutor: s 8(6) (not yet in force).

12 Ibid s 8(5) (not yet in force). Nothing in s 8(1) or s 8(2) (not yet in force) is to be taken to apply to: (1) any disclosure made in the course of any proceedings before a court or in any report of any such proceedings; or (2) any disclosure made or copy given by a person when returning any protected material, or a copy of any such material, to the prosecutor or the defendant's legal representative; and accordingly nothing in s 4 or s 5 (not yet in force) is to be read as precluding the making of any disclosure or the giving of any copy in circumstances falling within head (1) or (2) supra: s 8(7) (not yet in force).



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## **(6) WITNESS COMPETENCE AND COMPELLABILITY**

### **1401. Competence of witnesses generally.**

A competent witness is one who may lawfully give evidence. The general rule is that at every stage in criminal proceedings all persons are (whatever their age) competent to give evidence for the prosecution or the defence<sup>1</sup>, unless they are unable to understand questions put to them or unable to give answers which can be understood<sup>2</sup>.

Incapacity may arise from a temporary cause, such as illness or drunkenness, if this renders a witness incapable of understanding questions or of giving a rational account of events<sup>3</sup>.

A person who is a defendant in the proceedings is not competent to give evidence for the prosecution<sup>4</sup>. This does not include a former defendant, who is no longer liable to be convicted of any offence in the proceedings, whether as a result of pleading guilty or for any other reason<sup>5</sup>. A former defendant may thus be competent as a witness for either the prosecution or defence.

If any question as to the competence of a witness is raised (whether by a party or by the court of its own motion) it is for the party calling the witness to satisfy the court that, on a balance of probabilities, the witness is competent to give evidence in the proceedings<sup>6</sup>.

1 Youth Justice and Criminal Evidence Act 1999 s 53(1). See *R v MacPherson* [2005] EWCA Crim 3605, [2006] All ER (D) 104 (Feb) (a child should not be found incompetent on the basis of age alone); see also *R v Cowell* [1940] 2 KB 49, 27 Cr App Rep 191, CCA (competence of defendant to testify at trial within a trial).

2 Youth Justice and Criminal Evidence Act 1999 s 53(2), (3). A witness who cannot speak may give evidence in writing, and witnesses who are aged under 17 or who suffer from disabilities, mental disorder or significant impairment of intelligence and social functioning may qualify for assistance through 'special measures directions': see PARA 1417 et seq post. In the case of child witnesses, this will almost invariably include the adoption of a videotaped interview in place of that witness's evidence in chief (see PARA 1417 et seq post) but in *R v Powell* [2006] EWCA Crim 03, [2006] All ER (D) 45 (Jan), CA, the court warned that such a witness must be competent to understand and answer questions under cross-examination during the trial itself. Where a child or other witness provides intelligible testimony on videotape, but fails to cope with cross-examination at trial, the court or judge will have to reconsider the question of competence and if necessary withdraw the case from the jury.

3 Where it appears likely that the witness will recover his faculties in a short while, it may be proper to grant an adjournment to allow his evidence to be received or completed: *R v Baines* [1987] Crim LR 508, CA.

4 Youth Justice and Criminal Evidence Act 1999 s 53(2), (4).

5 Ibid s 53(5).

6 Ibid s 54(1), (2). In determining competence, the court must treat the witness as having the benefit of any special measures directions which the court has given, or proposes to give, in relation to that witness: s 54(3). As to special measures directions see PARA 1417 et seq post. Issues of competence must be determined in the absence of the jury, if there is one (s 54(4)), but any questioning of the witness must take place in the presence of the parties (s 54(6)). Expert evidence may be received on the question: s 54(5). As to the guidelines to be followed when hearing evidence of a person with learning difficulties see *R v SH* [2003] EWCA Crim 1208.

## **UPDATE**

### **1401 Competence of witnesses generally**

NOTES 1, 2--Where child is called as witness by prosecution he has to have the ability to understand all questions put to him by defence as well as prosecution and to provide answers to them which are understandable: *R v Barker* [2010] EWCA Crim 4, [2010] All ER (D) 126 (Jan) (child under five years of age deemed competent to give evidence).

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### **1402. Compellability of witnesses.**

A compellable witness is one who may lawfully be required to give evidence. As a general rule witnesses who are competent<sup>1</sup> to testify are also compellable<sup>2</sup>.

A defendant may be called as a witness only on his own application<sup>3</sup>, but where there are separate trials of two defendants originally charged in the same indictment, each is a compellable witness for the other<sup>4</sup>. A former defendant who has pleaded guilty<sup>5</sup>, or who has been acquitted on the judge's direction<sup>6</sup>, or in respect of whom a *nolle prosequi*<sup>7</sup> has been entered, is a compellable witness for the prosecution or for any remaining defendant<sup>8</sup>. There is no general rule that a defendant who has pleaded guilty should be sentenced before he gives evidence against a co-defendant. On the contrary, it may be most undesirable for him to be sentenced before the full facts have been established<sup>9</sup>.

The spouse or civil partner of a defendant is compellable only in certain circumstances<sup>10</sup>. Immunities attach to the sovereign and to foreign or commonwealth diplomats, consular agents, officers of certain international organisations and heads of state<sup>11</sup>.

A witness who is not compellable, but who chooses to give evidence, is in the same position regarding the obligation to answer questions properly put as a witness who is compellable<sup>12</sup>. In the case of a defendant who elects to testify, inferences may also be drawn from his failure to answer any such questions<sup>13</sup>. A compellable witness may nevertheless enjoy a privilege in respect of certain disclosures<sup>14</sup>.

Where the prosecution or defence wishes to call a ward of court to testify at a criminal trial, it is for the judge of the criminal court to determine whether the ward should be called. Leave of the wardship court is not required<sup>15</sup>.

1 As to competence see PARA 1401 ante.

2 *Hoskyn v Metropolitan Police Comr* [1979] AC 474, 67 Cr App Rep 88, HL. A compellable witness who refuses to give evidence may be punished for contempt of court: *Hennegal v Evance* (1806) 12 Ves 201. He should usually be given the opportunity to reflect, take legal advice and purge his contempt before being punished, but this is not a legal right: *R v Moran* (1985) 81 Cr App Rep 51. See further CONTEMPT OF COURT.

3 Criminal Evidence Act 1898 s 1(1) (amended by the Youth Justice and Criminal Evidence Act 1999 s 67(1), (3), Sch 4 para 1(1), (2), (3), (7), Sch 6). As to the making of any comment on or the drawing of any inference from a defendant's failure to testify see PARA 1555 post.

4 *R v Richardson* (1967) 51 Cr App Rep 381, CCA. It has, however, been held that a person awaiting trial for an offence should not be called to give evidence of his own offence against another person, even if the other is being tried for a different offence: *R v Grant* [1944] 2 All ER 311, 30 Cr App Rep 99, CCA; *R v Sharrock* [1948] 1 All ER 145, 32 Cr App Rep 124, CCA.

5 *R v Boal* [1964] 1 QB 402, 48 Cr App Rep 342, CCA.

6 *R v Conti* (1973) 58 Cr App Rep 387, CA (defendant discharged after successful submission of no case to answer).

7 *R v Sherman* (1736) Cas KB temp Hardwicke 303. As to *nolle prosequi* see PARAS 1229-1231 ante.

8 An accomplice who has been charged but against whom proceedings have not yet been taken should be called by the prosecution only if he is omitted from the indictment or has pleaded guilty or the prosecution offer no evidence against him or a nolle prosequi has been entered in respect of him: *R v Pipe* (1966) 51 Cr App Rep 17, CA (explained in *R v Turner* (1975) 61 Cr App Rep 67, CA).

9 *R v Weekes* (1982) 74 Cr App Rep 161 at 166, CA, per Boreham J. The previous practice was to sentence where possible before the evidence was given: *R v Payne* [1950] 1 All ER 102, 34 Cr App Rep 43, CCA. In the ordinary case the prosecution should not call a former co-defendant who has been sentenced to give evidence against another defendant who is being tried unless it has a clear indication that he is willing to testify for the Crown: *R v Sinclair* (1989) Times, 18 April, CA.

10 See PARA 1405 post. In contrast, other partners, parents or children of the defendant (where competent) are always compellable (*R v Pearce* [2001] EWCA Crim 2834, [2002] 1 WLR 1553, [2002] 1 Cr App Rep 551), as are parties to a bigamous or invalid marriage (*R v Khan* (1986) 84 Cr App Rep 44, CA).

11 See further CIVIL PROCEDURE vol 11 (2009) PARA 969; INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 302.

12 *R v Pitt* [1983] QB 25, 75 Cr App Rep 254, CA (non-compellable spouse-witness). The witness should be warned in the absence of the jury of the consequences of choosing to testify: *R v Pitt* supra.

13 See the Criminal Justice and Public Order Act 1994 s 35; and PARA 1555 post. See also *R v Ackinclose* [1996] Crim LR 774, CA.

14 See PARA 1474 et seq post.

15 *Re R (a minor) (Wardship: Witness in Criminal Proceedings)* [1991] 2 All ER 193, [1991] Fam 56, CA.

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### **1403. Competence of witness to give sworn evidence.**

Any question whether a witness in criminal proceedings may be sworn for the purpose of giving evidence on oath, whether raised by a party to the proceedings, or by the court of its own motion, is to be determined by the court as follows<sup>1</sup>.

A child under the age of 14 may not give sworn evidence<sup>2</sup>, nor may any witness give sworn evidence who lacks a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath<sup>3</sup>, but a witness who can give intelligible evidence<sup>4</sup> is presumed to have a sufficient appreciation of those matters unless some evidence tending to show the contrary is adduced (by any party)<sup>5</sup>, in which case the party seeking to have the witness sworn must satisfy the court that, on a balance of probabilities, the witness has attained the age of 14 and does have sufficient appreciation<sup>6</sup>.

<sup>1</sup> Youth Justice and Criminal Evidence Act 1999 s 55(1). As to the reception of unsworn evidence see PARA 1404 post.

<sup>2</sup> Ibid s 55(2)(a).

<sup>3</sup> Ibid s 55(2)(b). The test is derived from *R v Hayes* [1977] 2 All ER 288, 64 Cr App Rep 194, CA, in which it was established that the witness need not believe in any 'divine sanction' of the oath.

<sup>4</sup> A person is able to give intelligible testimony if he is able to understand questions put to him as a witness, and give answers to them which can be understood: Youth Justice and Criminal Evidence Act 1999 s 55(8).

<sup>5</sup> Ibid s 55(3).

<sup>6</sup> Ibid s 55(4). Note that a balance of probabilities suffices even in the case of a prosecution witness. Any such question must be determined in the absence of any jury (s 55(5)), but any questioning of the witness must take place in the presence of the parties (s 55(7)). Expert evidence may be received on the question: s 55(6).

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#### **1404. Reception of unsworn evidence.**

Where a person is competent to give evidence in criminal proceedings<sup>1</sup>, but is not permitted to be sworn for the purpose of giving evidence on oath in such proceedings<sup>2</sup> he must give his evidence unsworn<sup>3</sup>.

A defendant may now be convicted on the basis of unsworn evidence. There is no longer any requirement that such evidence be corroborated by sworn testimony<sup>4</sup>, nor is there now any obligation to warn a jury as to the 'dangers' of convicting on the uncorroborated evidence of a child<sup>5</sup>.

Where a witness who is competent to give evidence in criminal proceedings gives evidence in such proceedings unsworn, no conviction, verdict or finding in those proceedings on appeal is to be taken to be unsafe<sup>6</sup> by reason only that it appears to the Court of Appeal that the witness should have given his evidence on oath<sup>7</sup>.

If a person over the age of 14 wilfully gives false evidence in such circumstances that, had the evidence been given on oath, he would have been guilty of perjury, he is instead guilty of a summary offence<sup>8</sup>.

1    Ie competent under the Youth Justice and Criminal Evidence Act 1999 s 53 (see PARA 1401 ante).

2    Ie he has not attained 14 years of age or lacks sufficient understanding for the purposes of *ibid* s 55(2) (see PARA 1403 ante): s 56(1).

3    *Ibid* s 56(2). A deposition of unsworn evidence given by such a person may be taken for the purposes of criminal proceedings as if that evidence had been given on oath (s 56(3)) and may be received in evidence (s 56(4)). A child or other witness may be competent to give unsworn evidence without having any appreciation of the importance of telling the truth, but it may still be appropriate in some cases for a child witness to be warned as to the importance of telling the truth: *R v Hampshire* [1996] QB 1, [1995] 2 Cr App Rep 319, CA.

4    The Children and Young Persons Act 1933, which formerly imposed such a requirement, was repealed by the Criminal Justice Act 1988 s 34(1).

5    *Ibid* s 34(2) (amended by the Criminal Justice and Public Order Act 1994 ss 32(2), (4), 168(3), Sch 11).

6    Ie for the purposes of the Criminal Appeal Act 1968 s 2(1), s 13(1) or s 16(1) (as amended) (grounds for allowing appeals): see PARAS 1877, 1886-1887 post.

7    Youth Justice and Criminal Evidence Act 1999 s 56(5). In contrast, if a witness is allowed to give evidence on oath when not competent to do so, an appellate court might treat this as material, but whether it would be sufficient to make a conviction unsafe must depend on the circumstances.

8    *Ibid* s 57(1), (2). In the case of an adult the maximum penalty is imprisonment for a term not exceeding 6 months, or a fine not exceeding £1,000 or both: s 57(2). As from a day to be appointed this maximum term is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed. In relation to a person under the age of 14, the maximum penalty on summary conviction is limited to a fine not exceeding £250: Youth Justice and Criminal Evidence Act 1999 s 57(3). See also PARA 712 ante.

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#### **1405. Competence and compellability of spouse or civil partner of defendant.**

No special rules govern the competence of the spouse or civil partner<sup>1</sup> of a defendant to give evidence in criminal proceedings<sup>2</sup>.

The spouse or civil partner of a defendant (if not also charged in the same proceedings<sup>3</sup>) is compellable to give evidence on behalf of that defendant<sup>4</sup>; but is compellable to give evidence for the prosecution or on behalf of any person charged in the same proceedings only in respect of a 'specified offence'<sup>5</sup>. A specified offence is one which:

- 2162 (1) involves an assault on, or injury or a threat of injury to, the spouse or civil partner of the defendant or a person who was at the material time under the age of 16<sup>6</sup>; or
- 2163 (2) is a sexual offence<sup>7</sup> alleged to have been committed in respect of a person who was at the material time under that age<sup>8</sup>; or
- 2164 (3) consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of an offence falling within head (1) or (2) above<sup>9</sup>.

In any proceedings a person who has been but is no longer married to the defendant (or who has been but is no longer a civil partner of that defendant) is compellable to give evidence as if that person and the defendant had never been married or civil partners<sup>10</sup>.

The failure of the spouse or civil partner of a defendant to give evidence in the proceedings must not be made the subject of any comment by the prosecution<sup>11</sup>.

1 As to civil partnerships see the Civil Partnership Act 2004; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW. A party to an invalid or bigamous marriage is not a wife or husband for the purposes of the rules governing competence and compellability: see *R v Khan (Junaid)* (1987) 84 Cr App Rep 44, CA.

2 As to the general competency requirements for witnesses see PARA 1401 ante.

3 Where spouses or civil partners are charged in the same proceedings, neither is compellable at the trial (or competent as a prosecution witness) unless no longer liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason): see the Police and Criminal Evidence Act 1984 s 80(4), (4A) (s 80(4) substituted, and s 80(4A) added by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 paras 12, 13).

4 Police and Criminal Evidence Act 1984 s 80(2) (substituted by the Youth Justice and Criminal Evidence Act 1999 Sch 4 paras 12, 13; and amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 97). A witness giving evidence for a spouse or civil partner may be cross-examined by any co-defendant: see *R v Hilton* [1972] 1 QB 421, 55 Cr App Rep 466, CA.

5 Police and Criminal Evidence Act 1984 s 80(2A) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 4 paras 12, 13; and amended by the Civil Partnership Act 2004 Sch 27 para 97). The fact that a witness may be compellable in respect of one offence does not make him compellable in respect of other offences charged in the same indictment: *R v Deacon* [1973] 2 All ER 1145, 57 Cr App Rep 688, CA. In other cases, the prosecution is under a duty to disclose to the defence and to the court that a defendant's spouse (or civil partner) is reluctant to give evidence against him, so that the court can warn her before she gives evidence that she is not obliged to do so: *R v Birmingham Magistrates' Court, ex p Shields* (1994) 158 JP 845, DC. See also *R v Pitt* [1983] QB 25, 75 Cr App Rep 254, CA.

6 Police and Criminal Evidence Act 1984 s 80(3)(a) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 97). As to what may amount to an offence 'involving' an assault, injury or threat of injury, see *R v Lee* [1996] 2 Cr App Rep 266, CA; *R v Verolla* [1963] 1 QB 285, 46 Cr App Rep 252, CCA. The age of such a person at the material time is, for such purposes, deemed to be or to have been that which appears to the court to be or to have been his age at that time: Police and Criminal Evidence Act 1984 s 80(6).

7 'Sexual offence' means for this purpose an offence under the Sexual Offences Act 1956, the Indecency with Children Act 1960, the Protection of Children Act 1978 or the Sexual Offences Act 2003 Pt 1: Police and Criminal Evidence Act 1984 s 80(7) (amended by the Sexual Offences Act 2003 ss 139, 140, Sch 6 para 28(1), (2), Sch 7).

8 Police and Criminal Evidence Act 1984 s 80(3)(b).

9 Ibid s 80(3)(c).

10 Ibid s 80(5) (amended by the Youth Justice and Criminal Evidence Act 1999 Sch 4 paras 12, 13(1), (4), Sch 6), Police and Criminal Evidence Act 1984 s 80(5A) (added by the Civil Partnership Act 2004 s 261(1), Sch 27 para 97). Spouses who are judicially separated, but not divorced, remain husband and wife: *Moss v Moss* [1963] 2 QB 799, 47 Cr App Rep 222, DC. As to the procedure to be followed when the status of a witness as the spouse of the defendant is questioned see *R v Yacoob* (1981) 72 Cr App Rep 313, CA; and PARA 1401 ante.

11 Police and Criminal Evidence Act 1984 s 80A (added by the Youth Justice and Criminal Evidence Act 1999 Sch 4 paras 12, 14; amended by the Civil Partnership Act 2004 Sch 27 para 98). See also *R v Naudeer* [1984] 3 All ER 1036, 80 Cr App Rep 9, CA. Breach of the prohibition will not necessarily lead to the quashing of a conviction: *R v Hunter* [1969] Crim LR 262, CA; and see also *R v Dickman* (1910) 5 Cr App Rep 135, CCA. The trial judge is not prohibited from commenting (*R v Gallagher* [1974] 3 All ER 118, 59 Cr App Rep 239, CA), but should be circumspect about doing so (*R v Naudeer* supra). See also PARAS 1317, 1321 ante.

## UPDATE

### 1405 Competence and compellability of spouse or civil partner of defendant

NOTE 4--As to the giving by the police of a caution to a spouse in relation to the making of a statement see *R v L* [2008] EWCA Crim 973, [2009] 1 WLR 626, [2008] All ER (D) 66 (May).

TEXT AND NOTE 9--See further Serious Crime Act 2007 Sch 6 para 9 (references to common law offence of incitement).



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#### **1406. Witness wrongly compelled to testify.**

Where the spouse or civil partner of a defendant is not compellable, but is wrongly compelled to testify for the prosecution<sup>1</sup>, or was not informed of his or her right not to testify when he or she might have taken advantage of that right<sup>2</sup>, any conviction based upon that spouse's evidence is liable to be quashed on appeal. Similar considerations apply where the defendant is effectively forced to testify owing to the wrongful exclusion of other defence evidence on which he might otherwise have relied<sup>3</sup>.

1 *Leach v R* [1912] AC 305, 7 Cr App Rep 158, HL; *Hoskyn v Metropolitan Police Comr* [1979] AC 474, 67 Cr App Rep 88, HL.

2 *R v Pitt* [1983] QB 25, 75 Cr App Rep 254, CA.

3 *R v Hamand* (1985) 82 Cr App Rep 65, CA.

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#### **1407. Capacity of absent witnesses.**

Where, under the Criminal Justice Act 2003, either the prosecution or the defence seeks to adduce hearsay evidence in the form of a business document<sup>1</sup>, or a statement by a person who for specified reasons is not available to give oral evidence in the proceedings<sup>2</sup>, or where it is sought to adduce evidence of a witness's previous consistent or inconsistent statement<sup>3</sup>, or where it is submitted that a document used by a witness to refresh his memory in court has become admissible as evidence in the proceedings<sup>4</sup>, an issue may be raised as to the capacity of the maker of the statement, etc, or of any person who supplied or received the information concerned or created or received in the business document<sup>5</sup>. In such a case proceedings must be held for the determination of that issue in the absence of the jury (if there is one)<sup>6</sup> and it must be established by the party seeking to adduce the evidence in question<sup>7</sup> that the maker of the statement or any person who supplied or received the information concerned was capable at the time of understanding questions put to him about the matters stated, and of giving answers to such questions which could be understood<sup>8</sup>. That person must, in other words, be proved to have been capable at the time of acting as a competent witness<sup>9</sup>.

1 See the Criminal Justice Act 2003 s 117; and PARA 1522 post.

2 See *ibid* s 116; and PARA 1521 post.

3 See *ibid* ss 119, 120; and PARA 1529 post.

4 See *ibid* s 120(3); and PARA 1439 post.

5 See *ibid* s 123(4). Nothing in s 116, s 119 or s 120 makes a statement admissible as evidence if it was made by a person who did not have the required capability at the time when he made the statement: s 123(1). Nothing in s 117 makes a statement admissible as evidence if any person who, in order for the requirements of s 117(2) to be satisfied, must at any time have supplied or received the information concerned or created or received the document or part concerned (1) did not have the required capability at that time; or (2) cannot be identified but cannot reasonably be assumed to have had the required capability at that time: s 123(2).

6 *Ibid* s 123(4)(a).

7 Expert evidence may be admitted on this issue, as may evidence from any person to whom the statement in question was made: *ibid* s 123(4)(b).

8 *Ibid* s 123(3).

9 As to the test for competence see PARA 1401 ante. The standard of proof required of either party is proof on a balance of probabilities: *ibid* s 123(4)(c).

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## **(7) CALLING WITNESSES**

### **(i) Attendance**

#### **1408. Evidence of defendant.**

In criminal proceedings, a defendant who elects to give evidence must (where competent to do so<sup>1</sup>) testify on oath and is then liable to cross-examination<sup>2</sup>. Unless otherwise ordered by the court, he must give his evidence from the witness box or any other place from which the other witnesses give their evidence<sup>3</sup>.

Where the only witness to the facts of the case called by the defence is the defendant, he must be called as a witness immediately after the close of the evidence for the prosecution<sup>4</sup>. If the defence intends to call two or more witnesses to the facts of the case, and those witnesses include the defendant, the defendant must be called before the other witness or witnesses unless the court in its discretion otherwise directs<sup>5</sup>.

<sup>1</sup> As to the circumstances in which a defendant may be competent only to give unsworn evidence see PARA 1403 ante.

<sup>2</sup> See the Criminal Justice Act 1982 s 72(1) (amended by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 para 10). This abolished the common law right of the defendant to make an unsworn statement from the dock on which he was not open to cross-examination. It does not affect the right of the defendant, if not represented by counsel or solicitor, to address the court or jury otherwise than on oath on any matter on which, if he were represented, counsel or a solicitor could address the court or jury on his behalf: Criminal Justice Act 1982 s 72(1). Nor does it prevent the defendant making a statement without being sworn if (1) it is one he is required by law to make personally; or (2) if he makes it by way of mitigation before the court passes sentence upon him: s 72(2).

<sup>3</sup> Criminal Evidence Act 1898 s 1(4) (amended and renumbered by the Youth Justice and Criminal Evidence Act 1999 Sch 4 para 1(1), (6)). The defendant should not be deprived of this right unless there are special circumstances, eg he is too infirm to walk to the witness box or so violent that he cannot be properly controlled there: *R v Symonds* (1924) 18 Cr App Rep 100, CCA.

<sup>4</sup> Criminal Evidence Act 1898 s 2.

<sup>5</sup> Police and Criminal Evidence Act 1984 s 79. At common law it was held that in exceptional circumstances a formal witness or a witness about whose evidence there was no controversy might, by the leave of the court, be called before the defendant: *R v Morrison* (1911) 6 Cr App Rep 159, CCA; *R v Smith (Joan)* [1968] 2 All ER 115, 52 Cr App Rep 224, CA. It would appear that in these circumstances it would now be open to a court to exercise the power conferred by the Police and Criminal Evidence Act 1984 s 79. See also PARA 1314 ante.

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### **1409. Securing attendance of witnesses.**

The statutory provisions and associated procedural rules governing the summoning of persons to testify or produce evidence in criminal proceedings before the Crown Court<sup>1</sup> differ from those applicable in the magistrates' courts<sup>2</sup>. Only those rules and provisions governing proceedings before the Crown Court are considered in this volume<sup>3</sup>.

Where in any proceedings before the Crown Court any party to those proceedings wishes to secure the attendance of a witness or the production of any document or thing<sup>4</sup>, an application may be made to the Crown Court for a witness summons<sup>5</sup>. Where following such an application the Crown Court is satisfied that:

- 2165 (1) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court<sup>6</sup>; and
- 2166 (2) it is in the interests of justice to issue a summons to secure the attendance of that person to give evidence or to produce the document or thing<sup>7</sup>,

the Court must, subject to certain provisos, issue a witness summons directed to the person concerned and requiring him to attend before the Crown Court at the time and place stated in the summons, and give the evidence or produce the document or thing<sup>8</sup>. The Court may, however, refuse to issue the summons if any requirement relating to the application is not fulfilled<sup>9</sup>, and it may also issue such a summons of its own motion<sup>10</sup>.

A witness summons which requires a person to produce a document or thing may additionally require him to produce the document or thing for prior inspection by the applicant at a time and place stated in the summons<sup>11</sup>.

1 The legislation applicable to proceedings in the Crown Court is the Criminal Procedure (Attendance of Witnesses) Act 1965 ss 2-2E (as substituted, added and amended). The relevant procedural rules are contained in CrimPR Pt 28.

2 The legislation applicable to proceedings in the magistrates' courts is the Magistrates' Courts Act 1980 s 97 (as amended). The relevant procedural rules are contained in CrimPR Pt 28.

3 As to the procedure in magistrates' courts see MAGISTRATES vol 29(2) (Reissue) PARA 734.

4 In cases where the party in question is not confident that the person will attend or produce the evidence voluntarily.

5 Where a person has been sent for trial for any offence to which the proceedings concerned relate, an application must be made as soon as is reasonably practicable after service on that person, in pursuance of regulations made under the Crime and Disorder Act 1998 Sch 3 para 1, of the documents relevant to that offence: Criminal Procedure (Attendance of Witnesses) Act 1965 s 2(4) (s 2 substituted by the Criminal Procedure and Investigations Act 1996 s 66(1), (2), (7), (8); the Criminal Procedure (Attendance of Witnesses) Act 1965 s 2(4) further substituted by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 42(a)). Where the proceedings concerned relate to an offence in relation to which a bill of indictment has been preferred under the authority of the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(b) (bill preferred by direction of Court of Appeal, or by direction or with consent of judge) an application must be made as soon as is reasonably practicable after the bill was preferred: Criminal Procedure (Attendance of Witnesses) Act 1965 s 2(6) (s 2 as so substituted).

The application must be made in accordance with the CrimPR, which may make different provision for different cases or different descriptions of case: Criminal Procedure (Attendance of Witnesses) Act 1965 s 2(7)-(10) (as so substituted). The application must be made in writing to the appropriate officer of the Crown Court and must: (1) contain a brief description of the stipulated evidence, document or thing; (2) set out the reasons why the applicant considers that the stipulated evidence, document or thing is likely to be material evidence; (3) set out the reason why the applicant considers that the directed person will not voluntarily attend as a witness or produce the document or thing; and (4) if the witness summons is proposed to require the directed person to produce a document or thing, (a) inform the directed person of his right to make representations in writing and at a hearing, and (b) state whether the applicant seeks a requirement also to be imposed under the Criminal Procedure (Attendance of Witnesses) Act 1965 s 2A (as added) and, if such a requirement is sought, specify the place and time at which the applicant wishes the document or thing to be produced: CrimPR 28.3(1), (2).

The application must be supported by an affidavit (i) setting out any charge on which the proceedings concerned are based; (ii) specifying the stipulated evidence, document or thing in such a way as to enable the directed person to identify it; (iii) specifying grounds for believing that the directed person is likely to be able to give the stipulated evidence or to produce the stipulated evidence or thing; (iv) specifying grounds for believing that the stipulated evidence is likely to be material evidence or, as the case may be, that the stipulated document or thing is likely to be material evidence: CrimPR 28.3(3). A copy of the application and the supporting affidavit must be served on the directed person at the same time as it is served on the appropriate officer of the Crown Court: CrimPR 28.3(4). The directed person may, within seven days of receiving a copy of the application inform the appropriate officer of the Crown Court whether or not he wishes to make representations, concerning the issue of the witness summons proposed to be directed to him, at a hearing and may also make written representations to that officer: CrimPR 28.3(5). The appropriate officer of the Crown Court must: (A) if the directed person indicates that he wishes to have the application considered at a hearing, fix a time, date and place for the hearing; (B) if the directed person does not indicate in accordance with CrimPR 28.3(5) that he wishes to make representations at a hearing, refer the application to a judge of the Crown Court for determination with or without a hearing; and (C) notify the applicant and, where head (A) supra applies, the directed person of the time, date and place fixed for any hearing of the application: CrimPR 28.3(6).

Any hearing under CrimPR 28.3 must, unless the judge directs otherwise, take place in private and the proceedings at the hearing must be recorded: CrimPR 28.3(7). In the case of an application for a witness summons which it is proposed is to require the directed person to give evidence but not to produce any document or thing, that application may be made orally to a judge or in writing and, in such a case CrimPR 28.3(3)-(7) does not have effect, and the application must, in addition to the matters set out in CrimPR 28.3(2) (a)-(c) (see heads (1)-(3) supra), specify any charge on which the proceedings concerned are based, and the grounds for believing that the directed person is likely to be able to give the stipulated evidence: CrimPR 28.3(8). Subject to CrimPR 28.3(10), in the case of an application for a witness summons which it is proposed is to require the directed person to produce any document or thing and which is made within seven days of the date fixed for trial, the appropriate officer must refer the notice of application to the trial judge, or such other judge as may be available, to determine the application or to give such directions as the judge to whom the notice is referred considers appropriate, and CrimPR 28.3(2)(d)(i) (see head (4)(a) supra), (4)-(6) does not have effect: CrimPR 28.3(9).

In the case of an application for a witness summons which it is proposed is to require the directed person to produce any document or thing and which is made during the trial, such application must be made orally to the trial judge, to determine the application or to give such directions as he considers appropriate, and in such a case CrimPR 28.3(3)-(7) does not have effect, and the application must, in addition to the matters set out in heads (1)-(3) supra, specify the grounds for believing that the directed person is likely to be able to produce the document or thing: CrimPR 28.3(10).

6 Criminal Procedure (Attendance of Witnesses) Act 1965 s 2(1)(a) (s 2 as substituted: see note 5 supra).

7 Ibid s 2(1)(b) (s 2 as substituted (see note 5 supra); s 2(1)(b) further substituted by the Serious Organised Crime and Police Act 2005 s 169(1)).

8 Criminal Procedure (Attendance of Witnesses) Act 1965 s 2(2) (s 2 as substituted: see note 5 supra), CrimPR 28.3. If such a summons is directed to a person who then applies to the Crown Court in accordance with CrimPR 28.5, satisfies the court that he was not served with notice of the application to issue the summons and that he was neither present nor represented at the hearing of the application, and satisfies the court that he cannot give any evidence likely to be material evidence or, as the case may be, produce any document or thing likely to be material evidence, the court may direct that the summons is of no effect; and it is immaterial whether the CrimPR require that person to be served with notice of the application to issue the summons; or whether those Rules enable that person to be present or represented at the hearing of the application: Criminal Procedure (Attendance of Witnesses) Act 1965 s 2C(1), (2), (3) (s 2C added by the Criminal Procedure and Investigations Act 1996 s 66(1), (2); and amended by the Courts Act 2003 s 109(1), Sch 3 para 126(c)). Such an application must be made in accordance with the CrimPR: see the Criminal Procedure (Attendance of Witnesses) Act 1965 s 2C(5), (6), (7) (as so added and amended). On receiving the application, the court officer must serve notice of the application on the person on whose application the witness summons was issued, and the court must not grant or refuse the application unless the applicant and the person on whose application the

witness summons has been issued have been given an opportunity of making representations, whether at a hearing or (where they agree to do so) in writing without a hearing: CrimPR 28.5(3), (4). The Court may refuse to make such a direction if any requirement relating to the application is not fulfilled: Criminal Procedure (Attendance of Witnesses) Act 1965 s 2C(4) (as so added).

Where a direction is made under the Criminal Procedure (Attendance of Witnesses) Act 1965 s 2C (as added and amended) that a witness summons is of no effect, the person on whose application the summons was issued may be ordered to pay the whole or any part of the costs of the application: s 2C(8) (as so added). Any costs payable under such an order must be taxed by the proper officer of the court, and payment of those costs is enforceable in the same manner as an order for payment of costs made by the High Court in a civil case or as a sum adjudged summarily to be paid as a civil debt: s 2C(9) (as so added).

9 Ibid s 2(3) (s 2 as substituted: see note 5 supra).

10 Ibid s 2D (added by the Criminal Procedure and Investigations Act 1996 s 66(1), (2)). If such a summons is directed to a person who then applies to the Crown Court in accordance with CrimPR 28.6, satisfies the court that he cannot give any evidence likely to be material evidence or, as the case may be, produce any document or thing likely to be material evidence, the court may direct that the summons is of no effect: Criminal Procedure (Attendance of Witnesses) Act 1965 s 2E(1) (added by the Criminal Procedure and Investigations Act 1996 s 66(1), (2); and amended by the Courts Act 2003 Sch 8 para 126(d)). Such an application must be made in accordance with the CrimPR: Criminal Procedure (Attendance of Witnesses) Act 1965 s 2E(3), (4) (as so added and amended). The Court may refuse to make such a direction if any requirement relating to the application is not fulfilled: s 2E(2) (as so added). The Court must not grant or refuse the application unless the applicant has been given an opportunity of making representations, whether at a hearing or (where he agrees to do so) in writing without a hearing: CrimPR 28.5, 28.6.

11 Criminal Procedure (Attendance of Witnesses) Act 1965 s 2A (added by the Criminal Procedure and Investigations Act 1996 s 66(1), (2)). If, following the production of a document or thing in pursuance of a requirement imposed under the Criminal Procedure (Attendance of Witnesses) Act 1965 s 2A (as added), the person applying for the summons concludes that a requirement imposed by the summons under s 2(2) (as substituted) (ie for attendance and production at trial) is no longer needed, he may apply to the Crown Court in accordance with CrimPR 28.4 for a direction that the summons is of no further effect and the court may direct accordingly: Criminal Procedure (Attendance of Witnesses) Act 1965 s 2B (added by the Criminal Procedure and Investigations Act 1996 s 66(1), (2); and amended by the Courts Act 2003 Sch 8 para 126(b)).

## **UPDATE**

### **1409 Securing attendance of witnesses**

NOTES--CrimPR Pt 28 now Criminal Procedure Rules 2010, SI 2010/60, Pt 28.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/20. EVIDENCE/(7) CALLING WITNESSES/(i) Attendance/1410. Punishment for disobedience; further process to secure attendance.

#### **1410. Punishment for disobedience; further process to secure attendance.**

Any person who without just excuse disobeys a witness summons requiring him to attend before any court<sup>1</sup> or who without just excuse disobeys a requirement made by any court requiring him to produce any document or thing at a stated time and place<sup>2</sup> is guilty of contempt of that court and may be punished summarily by that court as if his contempt had been committed in the face of the court<sup>3</sup>, but no person may by reason of any such disobedience be liable to imprisonment for a period exceeding three months<sup>4</sup>.

If a judge of the Crown Court is satisfied by evidence on oath that a witness in respect of whom a witness summons is in force is unlikely to comply with the summons, the judge may issue a warrant to arrest the witness and bring him before the court before which he is required to attend; but such a warrant may not be so issued unless the judge is satisfied by such evidence that the witness is likely to be able to give evidence likely to be material evidence or produce any document or thing likely to be material evidence in the proceedings<sup>5</sup>.

Where a witness who is required to attend before the Crown Court by virtue of a witness summons fails to attend in compliance with the order or summons, that court may (1) cause to be served on him a notice requiring him to attend the court forthwith or at such time as may be specified in the notice; or (2) if the court is satisfied that there are reasonable grounds for believing that he has failed to attend without just excuse, or if he has failed to comply with a notice under head (1) above, issue a warrant to arrest him and bring him before the court<sup>6</sup>.

1    I.e. a witness summons issued under the Criminal Procedure (Attendance of Witnesses) Act 1965 s 2 (as substituted and amended) or s 2D (as substituted): see PARA 1409 ante.

2    I.e. a witness summons issued under *ibid* s 2A (as added): see PARA 1409 ante.

3    *Ibid* s 3(1) (amended by the Criminal Procedure and Investigations Act 1996 ss 65(2)(a), (4), 80, Sch 5), Criminal Procedure (Attendance of Witnesses) Act 1965 s 3(1A) (added by the Criminal Procedure and Investigations Act 1996 s 66(1), (3), (7), (8)). The prosecution must prove that the witness was properly notified of the summons and the trial date, but it is not necessary for the summons to have been served on the witness in person: *R v Abdulaziz* [1989] Crim LR 717, CA; *R v Abbott* [2004] EWCA Crim 91, [2004] All ER (D) 154 (Feb); *R v Wang* [2005] EWCA Crim 476, [2005] All ER (D) 137 (Apr). It would suffice if it were proved the defendant was warned that the prosecution would obtain a witness summons and if he had gone to ground for the purposes of evading a witness summons which he knew was coming: *R v Wang* *supra*. It is both desirable and appropriate for the judge who issued the warrant to deal in person with the witness: *R v Yusef* [2003] EWCA Crim 1488, [2003] 2 Cr App Rep 488. Forgetfulness on the part of a witness cannot be a just excuse: *R v Lennock* (1993) 97 Cr App Rep 228, CA.

4    Criminal Procedure (Attendance of Witnesses) Act 1965 s 3(2) (amended by the Criminal Procedure and Investigations Act 1996 s 66(1), (4)). There is no parallel jurisdiction to punish such misconduct as contempt at common law: *R v Abbott* [2004] EWCA Crim 91 at [14], [2004] All ER (D) 154 (Feb) at [14]; cf *R v Montgomery* [1995] 2 All ER 28, [1995] 2 Cr App Rep 23, CA, in which there was contempt in the form of a refusal to testify in court.

5    Criminal Procedure (Attendance of Witnesses) Act 1965 s 4(1) (amended by the Criminal Procedure and Investigations Act 1996 ss 65(2), (4), 66(1), (5), 67(1), 80, Sch 5).

6    Criminal Procedure (Attendance of Witnesses) Act 1965 s 4(2) (amended by the Courts Act 1971 s 56(1), Sch 8 para 45(4); and the Criminal Procedure and Investigations Act 1996 s 65(2)(d)). A witness brought before the court in pursuance of a warrant under the Criminal Procedure (Attendance of Witnesses) Act 1965 s 4 (as

amended) may be remanded by that court in custody or on bail (with or without sureties) until such time as the court may appoint for receiving his evidence or dealing with him under s 3 (as amended) and where a witness attends a court in pursuance of a notice under s 4 (as amended) the court may direct that the notice is to have effect as if it required him to attend at any later time appointed by the court for receiving his evidence or dealing with him as aforesaid: s 4(3).



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**1411. Transfer of overseas prisoners for the purpose of criminal proceedings or investigations in the United Kingdom.**

Where a witness order has been made or a witness summons issued in criminal proceedings in the United Kingdom in respect of a person in custody in another country<sup>1</sup> or it is desirable that a person in custody in another country should assist in investigations in the United Kingdom<sup>2</sup>, the Secretary of State may<sup>3</sup> issue a warrant authorising: (1) the bringing<sup>4</sup> of the prisoner to the United Kingdom; (2) the taking of the prisoner to, and his detention in custody at, such place or places in the United Kingdom as are specified in the warrant; and (3) the returning of the prisoner to the country or territory from which he has come<sup>5</sup>.

Corresponding provision is made for United Kingdom prisoners required overseas<sup>6</sup>.

1 Either by virtue of a sentence of a court exercising criminal jurisdiction there or having been transferred there under the Repatriation of Prisoners Act 1984 or corresponding provisions in another country: Criminal Justice (International Co-operation) Act 1990 s 6(1)(a), (7). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

Without prejudice to the generality of any existing power to make rules, provision may be made by rules of court for any purpose for which it appears to the authority having power to make the rules that it is necessary or expedient that provision should be made in connection with any of the provisions of Pt 1 (ss 5, 6, 9): s 10(1).

2 Ibid s 6(1)(b).

3 The Secretary of State must be satisfied that the appropriate authority in that country will make arrangements for the prisoner to come to the United Kingdom: see *ibid* s 6(2). As to the immigration consequences of bringing the person to the United Kingdom see s 6(5), (6); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

4 The consent of the prisoner is required, but it may not be withdrawn after the issue of the warrant: see *ibid* s 6(3).

5 Ibid s 6(4).

6 See *ibid* s 5 (amended by the Crime (International Co-operation) Act 2003 s 9(1), Sch 5 paras 41, 43); and PARA 1412 post.

**UPDATE**

**1411 Transfer of overseas prisoners for the purpose of criminal proceedings or investigations in the United Kingdom**

NOTE 1--1990 Act s 6(7) amended: Criminal Justice and Immigration Act 2008 Sch 26 para 27.

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### **1412. Transfer of United Kingdom prisoner to assist investigation abroad.**

The Secretary of State may, pursuant to an agreement with the competent authority of a participating country, issue a warrant providing for any prisoner to whom the following provisions<sup>1</sup> apply<sup>2</sup> to be transferred to that country for the purpose of assisting there in the investigation of an offence<sup>3</sup>. A warrant may be issued in respect of a prisoner only if (1) the prisoner; or (2) in certain circumstances<sup>4</sup>, a person appearing to the Secretary of State to be an appropriate person to act on the prisoner's behalf, has made a written statement consenting to his being transferred<sup>5</sup>. Such consent cannot be withdrawn after the issue of the warrant<sup>6</sup>. A warrant under these provisions authorises (a) the taking of the prisoner to a place in the United Kingdom and his delivery at a place of departure from the United Kingdom into the custody of a person representing the appropriate authority of the participating country to which the prisoner is to be transferred<sup>7</sup>; and (b) the bringing of the prisoner back to the United Kingdom and his transfer in custody to the place where he is liable to be detained under the sentence or order to which he is subject<sup>8</sup>.

1    I.e. the Crime (International Co-operation) Act 2003 s 47: see the text and notes *infra*.

2    Ibid s 47 applies to a person (1) serving a sentence in a prison; (2) in custody awaiting trial or sentence; or (3) committed to prison for default in paying a fine: s 47(2). References to a prison in s 47 include any other institution to which the Prison Act 1952, the Prison Act (Northern Ireland) 1953 or the Criminal Justice (Children) (Northern Ireland) Order 1998, SI 1998/1504 (NI 9) art 45(1) applies (see PRISONS): Crime (International Co-operation) Act 2003 s 47(8).

3    Ibid s 47(1). The offence must be one which was or may have been committed in the United Kingdom: s 47(1). For the meaning of 'United Kingdom' see PARA 45 note 2 *ante*.

The Criminal Justice (International Co-operation) Act 1990 s 5(3A)-(8) (as amended) (transfer of UK prisoner to give evidence or assist investigation overseas: see PARA 1411 *ante*) has effect in relation to a warrant issued under the Crime (International Co-operation) Act 2003 s 47 as it has effect in relation to a warrant issued under the Criminal Justice (International Co-operation) Act 1990 s 5: Crime (International Co-operation) Act 2003 s 47(9). A warrant under the Criminal Justice (International Co-operation) Act 1990 s 5 (as amended) has effect in spite of the Army Act 1955 s 127(1), the Air Force Act 1955 s 127(1) or the Naval Discipline Act 1957 s 82A(1) (as added) (restriction on removing persons out of the United Kingdom who are serving military sentences: see ARMED FORCES): Criminal Justice (International Co-operation) Act 1990 s 5(3A) (added by the Crime (International Co-operation) Act 2003 s 91(1), Sch 5 paras 41, 43). Where a warrant has been issued in respect of a prisoner, he is deemed to be in legal custody at any time when, being in the United Kingdom or on board a British ship, British aircraft or British hovercraft, he is being taken under the warrant to or from any place or being kept in custody under the warrant: Criminal Justice (International Co-operation) Act 1990 s 5(4), (7). A person authorised by or for the purposes of the warrant to take the prisoner to or from any place or to keep him in custody has all the powers, authority, protection and privileges (1) of a constable in the part of the United Kingdom in which that person is for the time being; or (2) if he is outside the United Kingdom, of a constable in the part of the United Kingdom to or from which the prisoner is to be taken under the warrant: s 5(5). If the prisoner escapes or is unlawfully at large, he may be arrested without warrant by a constable and taken to any place to which he may be taken under the warrant: s 5(6). 'Constable', in relation to any part of the United Kingdom, means any person who is a constable in that or any other part of the United Kingdom or any person who, at the place in question has the powers of a constable in that or any other part of the United Kingdom: s 5(7).

4    The circumstances are those in which it appears to the Secretary of State to be inappropriate for the prisoner to act for himself, by reason of his physical or mental condition or his youth: Crime (International Co-operation) Act 2003 s 47(5).

- 5 Ibid s 47(4).
- 6 Ibid s 47(6).
- 7 Ibid s 47(7)(a).
- 8 Ibid s 47(7)(b).

#### **UPDATE**

#### **1412 Transfer of United Kingdom prisoner to assist investigation abroad**

NOTE 3--Crime (International Co-operation) Act 2003 s 47(9) amended: Armed Forces Act 2006 Sch 16 para 237. Criminal Justice (International Co-operation) Act 1990 s 5(3A) repealed: Armed Forces Act 2006 Sch 17.

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EVIDENCE/(7) CALLING WITNESSES/(i) Attendance/1413. Transfer of overseas prisoner to assist United Kingdom investigation into offence committed overseas.

### **1413. Transfer of overseas prisoner to assist United Kingdom investigation into offence committed overseas.**

The Secretary of State may, pursuant to an agreement with the competent authority of a participating country, issue a warrant providing for any person to whom the following provisions<sup>1</sup> apply<sup>2</sup> ('the overseas prisoner') to be transferred to the United Kingdom for the purpose of assisting in the investigation of an offence<sup>3</sup>. A warrant may be issued in respect of an overseas prisoner<sup>4</sup> only if the competent authority provides a written statement made by the prisoner consenting to his being transferred<sup>5</sup>. Such consent cannot be withdrawn after the issue of the warrant<sup>6</sup>. A warrant under these provisions authorises: (1) the bringing of the prisoner to the United Kingdom; (2) the taking of the prisoner to, and his detention in custody at, any place or places in the United Kingdom specified in the warrant; (3) the returning of the prisoner to the country from which he has come<sup>7</sup>.

1    Ie the Crime (International Co-operation) Act 2003 s 48: see the text and notes infra.

2    Ibid s 48 applies to a person who is detained in custody in a participating country (1) by virtue of a sentence or order of a court exercising criminal jurisdiction there; or (2) in consequence of having been transferred there from the United Kingdom under the Repatriation of Prisoners Act 1984 or under any similar provision or arrangement from any other country: Crime (International Co-operation) Act 2003 s 48(2). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3    Ibid s 48(1). The offence must be one which was or may have been committed in the participating country: s 48(1).

The Criminal Justice (International Co-operation) Act 1990 s 5(4)-(8) (see PARA 1412 note 3 ante) has effect in relation to a warrant issued under the Crime (International Co-operation) Act 2003 s 48 as it has effect in relation to a warrant issued under the Criminal Justice (International Co-operation) Act 1990 s 5: Crime (International Co-operation) Act 2003 s 48(7).

A person is not subject to the Immigration Act 1971 in respect of his entry into or presence in the United Kingdom pursuant to a warrant under the Crime (International Co-operation) Act 2003 s 48; but if the warrant ceases to have effect while he is still in the United Kingdom (1) he is to be treated for the purposes of the Immigration Act 1971 as if he has then illegally entered the United Kingdom; and (2) the provisions of Sch 2 have effect accordingly except that Sch 2 para 20(1) (liability of carrier for expenses of custody etc of illegal entrant: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM) does not have effect in relation to directions for his removal given by virtue of Crime (International Co-operation) Act 2003 s 48(8): s 48(8).

4    Ie under ibid s 48(1): see the text to note 3 supra.

5    Ibid s 48(4).

6    Ibid s 48(5).

7    Ibid s 48(6).

## **UPDATE**

### **1413 Transfer of overseas prisoner to assist United Kingdom investigation into offence committed overseas**

NOTE 2--Crime (International Co-operation) Act 2003 s 48(2)(b) amended: Criminal Justice and Immigration Act 2008 Sch 26 para 52.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/20. EVIDENCE/(7) CALLING WITNESSES/(i) Attendance/1414. Evidence through live television link from abroad.

#### **1414. Evidence through live television link from abroad.**

A witness (other than a defendant) who is outside the United Kingdom<sup>1</sup> may with leave of the court<sup>2</sup> give evidence through a live television link<sup>3</sup>:

- 2167 (1) at a trial on indictment, appeal to the criminal division of the Court of Appeal or the hearing of a reference by the Criminal Cases Review Commission<sup>4</sup>; or  
 2168 (2) in proceedings in youth courts, and in appeals or references to the Crown Court arising out of such proceedings<sup>5</sup>.

Such evidence is treated for the purpose of the law relating to perjury as having been made in the proceedings in question<sup>6</sup>.

1 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 Where the proceedings in question are in the Crown Court, an application for leave to call such evidence must ordinarily be made in writing within 28 days of notice of transfer of the case to the Crown Court of the preferring of a bill of indictment in relation to the case, or within 28 days of the service of copies of the documents containing the evidence on which the charge or charges are based, and must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, CA: CrimPR 30.1(1)-(4). The 28-day period may be extended by the Crown Court, either before or after it expires, on an application made in writing, specifying the grounds of the application: CrimPR 30.1(5). Copies of any application must be sent by the applicant to the court officer and to all other parties, who have 28 days in which to give notice of any objection to the application and to indicate whether they wish to be represented at any hearing of the application: CrimPR 30.1(6), (7), (8). Applications may be dealt with in chambers by any judge of the Crown Court. Where leave is granted it may specify as a condition that the witness should give the evidence in the presence of a specified person who is able and willing to answer under oath or affirmation any questions the trial judge may put as to the circumstances in which the evidence is given, including questions about any persons who are present when the evidence is given and any matters which may affect the giving of the evidence: CrimPR 30.1(10). All parties must be notified by the court officer as to: (1) the country in which the witness will give evidence; (2) if known, the place where the witness will give evidence; (3) where the witness is to give evidence on behalf of the prosecutor, or where disclosure is required by the defence (alibi witness or expert evidence), the name of the witness; (4) the location of the Crown Court at which the trial should take place; and (5) any conditions specified by the Crown Court: CrimPR 30.1(9). For the corresponding rules governing evidence given in proceedings in the Court of Appeal see CrimPR 68.19.

3 Criminal Justice Act 1988 s 32(1) (amended by the Criminal Justice Act 1991 s 55(2); Youth Justice and Criminal Evidence Act 1999 s 67(3), (4), Sch 6, Sch 7 para 3).

4 As to the Criminal Cases Review Commission see PARAS 2028-2032 post.

5 Criminal Justice Act 1988 s 32(1A) (added by the Criminal Justice Act 1991 s 55(3); amended by the Criminal Appeal Act 1995 s 29, Sch 2 para 16(2)). The Secretary of State may by order provide for s 32(1A) (as added and amended) to be extended to any further description of criminal proceedings, or to all criminal proceedings: Crime (International Co-operation) Act 2003 s 29(1).

6 Criminal Justice Act 1988 s 32(3). However, evidence may be given from abroad through a television link by virtue of s 32(1)(a) even where no extradition treaty is in force with that foreign place and the witness cannot therefore be extradited to the United Kingdom if he should commit perjury: *R v Forsyth* [1997] 2 Cr App Rep 299, [1997] Crim LR 581, CA. As to perjury generally see PARA 712 et seq ante.

#### **UPDATE**

**1414 Evidence through live television link from abroad**

NOTE 2--CrimPR Pts 30, 68 now Criminal Procedure Rules 2010, SI 2010/60, Pts 30, 68.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/20. EVIDENCE/(7) CALLING WITNESSES/(i) Attendance/1415. Evidence given by live link from within the United Kingdom.

### **1415. Evidence given by live link from within the United Kingdom.**

As from a day to be appointed, the following provisions have effect<sup>1</sup>. Where in specified criminal proceedings<sup>2</sup> the court is satisfied that it is in the interests of the efficient or effective administration of justice for a witness (other than a defendant) to give evidence in the proceedings through a live link<sup>3</sup> (and has been notified by the Secretary of State that suitable facilities for receiving evidence by such means are available in the area in which it appears to the court that the proceedings will take place<sup>4</sup>) it may on an application by a party to the proceedings<sup>5</sup>, or of its own motion<sup>6</sup> direct that the witness give evidence by means of such a link<sup>7</sup>.

Where the court gives such a direction, the witness concerned may not (unless the order is rescinded<sup>8</sup>) give evidence in those proceedings after the direction is given otherwise than through a live link<sup>9</sup>.

The judge may give the jury (if there is one) such direction as he thinks necessary to ensure that the jury gives the same weight to the evidence as if it had been given by the witness in the courtroom or other place where the proceedings are held<sup>10</sup>.

The provisions described above do not affect any power of the court to make an order, give directions or give leave of any description in relation to any witness (including the defendant) or to exclude evidence at its discretion (whether by preventing questions being put or otherwise)<sup>11</sup>.

1 The Criminal Justice Act 2003 ss 51-54, 56 come into force on such day as the Secretary of State may appoint by order under s 336. At the date at which this volume states the law no such day had been appointed.

2 These are: (1) a summary trial; (2) an appeal to the Crown Court arising out of such a trial; (3) a trial on indictment; (4) an appeal to the criminal division of the Court of Appeal; (5) the hearing of a reference under the Criminal Appeal Act 1995 s 9 or s 11; (6) a hearing before a magistrates' court or the Crown Court which is held after the defendant has entered a plea of guilty; and (7) a hearing before the Court of Appeal under the Criminal Justice Act 2003 s 80 (see PARA 1940 post): s 51(2) (not yet in force).

3 Ibid s 51(4)(a) (not yet in force). 'Witness' means a person called, or proposed to be called, to give evidence in proceedings: s 56(1) (not yet in force). A 'live link' means for this purpose a live television link or other arrangement by which a witness, while at a place in the United Kingdom (for the meaning of which see PARA 45 note 2 ante) which is outside the building where the proceedings are being held, is able to see and hear a person at the place where the proceedings are being held and to be seen and heard by the defendant or defendants, the judge or justices (or both) and the jury (if there is one), legal representatives acting in the proceedings, and any interpreter or other person appointed by the court to assist the witness: s 56(2), (3) (not yet in force). The extent (if any) to which a person is unable to see or hear by reason of any impairment of eyesight or hearing is to be disregarded for these purposes: s 56(4) (not yet in force).

4 Ibid s 51(4)(b) (not yet in force). The notification must not have been withdrawn: s 51(4)(c) (not yet in force). The withdrawal of such a notification does not affect a direction given under s 51 (not yet in force) before that withdrawal: s 51(5) (not yet in force). If suitable facilities for receiving such evidence are not available at any place where a magistrates' court would otherwise sit, the court may arrange to sit for the purposes of the whole or any part of the proceedings at any place at which such facilities are available and which has been authorised by a direction under the Courts Act 2003 s 30: Criminal Justice Act 2003 s 53(1), (2) (not yet in force). If this place is outside the local justice area in which the justices act it is deemed to be in that area for the purpose of the jurisdiction of the justices acting in that area: Criminal Justice Act 2003 s 53(3) (not yet in force).



yet in force) (amended by the Courts Act 2003 (Consequential Provisions) Order 2005, SI 2005/886, art 2, Schedule para 99).

5 Criminal Justice Act 2003 s 51(3)(a) (not yet in force).

6 Ibid s 51(3)(b) (not yet in force). The court must state in open court its reasons for refusing an application for a direction and, if it is a magistrates' court, it must cause them to be entered in the register of its proceedings: s 51(8) (not yet in force).

7 Ibid s 51(1) (not yet in force). In deciding whether to give a direction under s 51 the court must consider all the circumstances of the case, including in particular: the availability of the witness, the need for the witness to attend in person, the importance of the witness's evidence to the proceedings, the views of the witness, the suitability of the facilities at the place where the witness would give evidence through a live link, and whether a direction might tend to inhibit any party to the proceedings from effectively testing the witness's evidence: s 51(6), (7) (not yet in force). Rules of court may be made in connection with ss 51, 52 (not yet in force): see s 55 (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035, art 3, Schedule paras 45, 47). At the date at which this volume states the law, the CrimPR had made no such provision.

8 The court may rescind a direction under the Criminal Justice Act 2003 s 51 (not yet in force) if it appears to the court to be in the interests of justice to do so: s 52(3) (not yet in force). It may act either on an application by a party to the proceedings (which may be made only where there has been a material change of circumstances since the direction was given) or it may act of its own motion: s 52(5), (6) (not yet in force). Where it rescinds the direction, the witness concerned ceases to be able to give evidence in the proceedings through a live link, but this does not prevent the court from giving a further direction under s 51 (not yet in force) in relation to him: s 52(4) (not yet in force). The court must give reasons for rescinding a direction under s 51 (not yet in force) or for refusing an application to rescind it; and, if it is a magistrates' court, it must cause them to be entered in the register of its proceedings: s 52(7) (not yet in force).

9 Ibid s 52(1), (2) (not yet in force).

10 Ibid s 54 (not yet in force).

11 Ibid s 56(5) (not yet in force).

## **UPDATE**

### **1415 Evidence given by live link from within the United Kingdom**

TEXT AND NOTES--Criminal Justice Act 2003 ss 51, 52, 54, 56 in force for all purposes by, s 53 in force on, 26 April 2010: SI 2007/3451, SI 2010/1183.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/20.

EVIDENCE/(7) CALLING WITNESSES/(ii) Special Measures to Protect or Assist Vulnerable or Intimidated Witnesses/1416. Statutory and non-statutory measures.

## **(ii) Special Measures to Protect or Assist Vulnerable or Intimidated Witnesses**

### **1416. Statutory and non-statutory measures.**

Various measures may be adopted to assist, encourage or protect potentially vulnerable witnesses<sup>1</sup>. Some of these measures are available only where and to the extent that legislation so provides<sup>2</sup>, and are therefore not available to defendants, even where, as witnesses, they would otherwise be eligible to benefit from such measures<sup>3</sup>. Other measures may be provided by the courts on their own authority<sup>4</sup>, although in some cases legislation now makes further or more specific provision for their use<sup>5</sup>. Witnesses (such as defendants) who are not eligible to benefit from statutory special measures directions may still be eligible to benefit from any such measures as fall within the scope of the courts' inherent powers to regulate their own proceedings<sup>6</sup>.

1 Such measures include measures taken to protect the identity of a witness who may fear or be at risk of reprisals or other forms of intimidation, measures taken to reduce the stresses of testifying in court, and (particularly in the case of children or handicapped witnesses) measures designed to facilitate communication between the witness and the court. In prosecutions for certain alleged sexual offences, the identity of a complainant is automatically protected: see the Sexual Offences (Amendment) Act 1992 s 1 (as amended); and PARA 239 ante. Witness anonymity is not prohibited by the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969), art 6 (right to a fair trial), provided that the witness can be examined by or on behalf of the defendant: see *R v Davis* [2006] EWCA Crim 1155, [2006] All ER (D) 281 (May). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

2 See in particular the Youth Justice and Criminal Evidence Act 1999 Pt II Ch 1 (ss 16-33) (as amended); and PARA 1417 et seq post. The Secretary of State may by order make such amendments to the Youth Justice and Criminal Evidence Act 1999 Pt II Ch 1 as he considers appropriate: see s 18(5).

3 Defendants are not eligible to benefit from special measures directions under the Youth Justice and Criminal Evidence Act 1999: see ss 16(1), 17(1); and PARA 1417 post. This inequality between the parties has been held not to involve any incompatibility with the European Convention on Human Rights: *R (on the application of S) v Waltham Forest Youth Court* [2004] EWHC 715 (Admin), [2004] 2 Cr App Rep 335; but see also *R (on application of D) v Camberwell Green Youth Court* [2005] UKHL 4 at [63], [2005] 1 All ER 999 at [63], [2005] 2 Cr App Rep 1 at [63] per Baroness Hale.

4 Measures that may be adopted by the courts without necessarily relying on the Youth Justice and Criminal Evidence Act 1999 include shielding a witness by means of a screen, allowing a witness to be accompanied by a reassuring member of the court's witness service, providing an interpreter, or excluding members of the public. The list is not exhaustive or the categories closed: *R (on the application of S) v Waltham Forest Youth Court* [2004] EWHC 715 (Admin), [2004] 2 Cr App Rep 335.

At common law, witnesses may also be granted anonymity, where this is necessary for the fair and proper administration of justice: *R v Socialist Worker Printers and Publishers, ex p A-G* [1975] QB 637, [1975] 1 All ER 142, DC; *A-G v Leveller Magazine* [1979] AC 440, [1979] 1 All ER 745, HL. In relation to reporting restrictions see also the Youth Justice and Criminal Evidence Act 1999 s 46; and PARA 1430 post. In the case of eligible witnesses anonymity may be combined with special measures under the Youth Justice and Criminal Evidence Act 1999: see eg *R v Piggott* [2005] EWCA Crim 655, [2005] All ER (D) 46 (Mar) (witnesses to gangland shooting allowed to give evidence anonymously and via live link under the Youth Justice and Criminal Evidence Act 1999 s 24). As to live links see PARA 1422 post.

5 Eg the use of screens to shield witnesses from the defendant and the public may now be authorised pursuant to the Youth Justice and Criminal Evidence Act 1999 s 23: see PARA 1421 post.

6 In particular, young, handicapped or vulnerable defendants may benefit from various measures that lie within a court's inherent power to secure a fair trial. In the case of a defendant with learning difficulties, the following possible measures were suggested in *R v H* [2003] EWCA Crim 1208, (2003) Times, 15 April:

- 96 (1) the defendant's legal representatives may be asked to provide a detailed defence statement which can be read to the jury if there is concern about the defendant's ability to recall everything that he wants to tell the jury;
- 97 (2) if the defendant can recall matters only by reference to an earlier account of events that he has given, the judge may permit that course to be taken; and
- 98 (3) if the defendant cannot read, the judge may permit him to be asked leading questions in relation to the account given in the defence statement.

See also *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.39, CA (trial of children and young persons). This addresses a number of issues concerning the trial of juveniles in adult courts (following *V v United Kingdom* (1999) 30 EHRR 121, [2000] Crim LR 187, ECtHR). One of the guiding principles adopted is that all possible steps should be taken to assist the young defendant to understand and participate in the proceedings: see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.39.3, CA.

## UPDATE

### 1416 Statutory and non-statutory measures

NOTE 1--Where witness anonymity prevents the defence from taking steps to undermine the credibility of a witness who gives decisive evidence against the defendant, it may prevent a fair trial in contravention of art 6 and common law: *R v Davis* [2008] UKHL 36, [2008] 1 AC 1128, [2008] 3 All ER 461, [2008] 3 WLR 125. See, however, the Criminal Evidence (Witness Anonymity) Act 2008; *Amendment No 24 to the Consolidated Criminal Practice Direction (criminal proceedings: witness anonymity orders (2); forms)* [2010] All ER (D) 276 (Mar). As to guidance on the interpretation of, and making of orders under, the Criminal Evidence (Witness Anonymity) Act 2008 see *R v Mayers*; *R v P* [2008] EWCA Crim 2989, [2009] 2 All ER 145. See also *R v Davis* [2008] EWCA Crim 1735, [2008] All ER (D) 78 (Sep); and *R v Powar* [2009] EWCA Crim 594, [2009] All ER (D) 45 (Apr).

NOTE 6--*Practice Direction (Criminal Proceedings: Consolidation)* Pt IV.39 deleted; see now III.30 (treatment of vulnerable defendants) (Pt IV.39 deleted, Pt III.30 added, by *Practice Direction (Amendment No 15)* [2007] 1 WLR 1790, CA).

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### **(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999**

#### **1417. Witnesses eligible for assistance on grounds of age or incapacity.**

A witness<sup>1</sup> in criminal proceedings other than a defendant<sup>2</sup> is eligible for assistance if: (1) under the age of 17 at the time of the hearing<sup>3</sup>; or (2) the court considers that the quality of evidence given by the witness<sup>4</sup> is likely to be diminished by reason of specified circumstances<sup>5</sup>. The specified circumstances are that (a) the witness suffers from mental disorder within the meaning of the Mental Health Act 1983, or otherwise has a significant impairment of intelligence and social functioning<sup>6</sup>; or (b) the witness has a physical disability or is suffering from a physical disorder<sup>7</sup>.

The following special measures are available to such witnesses<sup>8</sup>: (i) screening the witness from the defendant<sup>9</sup>; (ii) the giving of evidence by live link<sup>10</sup>; (iii) the giving of evidence in private<sup>11</sup>; (iv) the removal of wigs and gowns<sup>12</sup>; (v) the giving of video recorded evidence in chief<sup>13</sup>; (vi) the video-recording of any cross-examination and re-examination of the witness<sup>14</sup>; (vii) the examination of the witness through an intermediary<sup>15</sup>; and (viii) the provision of aids to communication<sup>16</sup>. Where a special measure would, in accordance with heads (i) to (viii) above, be available to a witness, it must not be taken by a court to be available in relation to the witness unless the court has been notified by the Secretary of State that relevant arrangements<sup>17</sup> may be made available in the area in which it appears to the court that the proceedings will take place and the notice has not been withdrawn<sup>18</sup>.

1 'Witness' means any person called, or proposed to be called, to give evidence in the proceedings: Youth Justice and Criminal Evidence Act 1999 s 63(1).

2 Ie any person charged with an offence to which the proceedings relate, whether or not he has been convicted: *ibid* s 63(1). Note that the Youth Justice and Criminal Evidence Act 1999 uses the term 'accused' in place of 'defendant' (which is the term employed throughout this work for consistency).

3 *Ibid* ss 16(1)(a), 33(1). 'The time of the hearing' means the time when it falls to the court to make a determination for the purposes of s 19(2) (see *PARA 1419 post*) in relation to the witness: s 16(3). 'Court' means a magistrates' court, the Crown Court or the criminal division of the Court of Appeal: s 63(1).

4 References to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy: *ibid* ss 16(5), 33(1). 'Coherence' refers to a witness's ability in giving evidence to give answers which address the questions put to him and can be understood both individually and collectively: s 16(5).

5 *Ibid* ss 16(1)(b), 33(1). In determining whether a witness falls within s 16(1)(b), the court must consider any views expressed by the witness: s 16(4).

6 *Ibid* s 16(2)(a). For the meaning of 'mental disorder' see *MENTAL HEALTH vol 30(2) (Reissue) PARA 402*.

7 *Ibid* s 16(2)(b).

8 See *ibid* ss 18(1)(a), 33(2).

9 See *ibid* s 23; and *PARA 1421 post*.

10 See *ibid* s 24; and PARA 1422 post.

11 See *ibid* s 25; and PARA 1423 post.

12 See *ibid* s 26; and PARA 1424 post.

13 See *ibid* s 27; and PARA 1425 post. This must be distinguished from the use of a video recording as admissible hearsay in a case where the witness is no longer alive or no longer competent to testify at all: see *R v D* [2002] EWCA Crim 990, [2003] QB 90, [2002] 2 Cr App Rep 601 (witness suffering from Alzheimer's disease; earlier video recording admitted under the Criminal Justice Act 1988 s 23).

14 See the Youth Justice and Criminal Evidence Act 1999 s 28 (not yet in force); and PARA 1426 post. For the meaning of 'video recording' see PARA 1420 note 9 post.

15 See *ibid* s 29; and PARA 1427 post.

16 See *ibid* s 30; and PARA 1428 post.

17 'Relevant arrangements' means arrangements for implementing the measure in question which cover the witness and the proceedings in question: *ibid* s 18(3).

18 *Ibid* s 18(2). The withdrawal of a notice under s 18(2) does not affect the availability of the measure in relation to a witness if a special measures direction providing for that measure to apply to the witness's evidence has been made by the court before the notice is withdrawn: s 18(4).

## UPDATE

### 1417 Witnesses eligible for assistance on grounds of age or incapacity

NOTE 18--The 1999 Act s 18(2) makes provision for 'good administration' by making sure the courts have the requisite information before considering whether to make a direction; it does not enable the Secretary of State to apply or disapply the power of a particular court, or the Crown Court at a particular location, under the substantive law to admit evidence obtained pursuant to a special measure: see *R v R (video recording: admissibility)* [2008] EWCA Crim 678, [2008] 1 WLR 2044, [2008] All ER (D) 61 (Apr).

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EVIDENCE/(7) CALLING WITNESSES/(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999/1418. Witnesses eligible for assistance on grounds of fear or distress.

#### **1418. Witnesses eligible for assistance on grounds of fear or distress.**

A witness<sup>1</sup> in criminal proceedings other than a defendant<sup>2</sup> is eligible for assistance if the court<sup>3</sup> is satisfied that the quality of evidence given by the witness<sup>4</sup> is likely to be diminished by reason of fear or distress on the part of the witness in connection with the testifying in the proceedings<sup>5</sup>. In determining whether a witness is so eligible, the court must take into account in particular<sup>6</sup>: (1) the nature and alleged circumstances of the offence to which the proceedings relate<sup>7</sup>; (2) the age of the witness<sup>8</sup>; (3) such of the following matters as appear to the court to be relevant, namely, the social and cultural background and ethnic origins of the witness, the domestic and employment circumstances of the witness, and any religious beliefs or political opinions of the witness<sup>9</sup>; and (4) any behaviour towards the witness on the part of the defendant, members of the family or associates of the defendant or any other person who is likely to be a defendant or a witness in the proceedings<sup>10</sup>.

Where the complainant<sup>11</sup> in respect of a sexual offence<sup>12</sup> is a witness in proceedings relating to that offence, or to that offence and any other offences, the witness is eligible for assistance in relation to those proceedings unless he has informed the court of his wish not to be so eligible<sup>13</sup>.

The following special measures are available to such witnesses<sup>14</sup>: (a) screening the witness from the defendant<sup>15</sup>; (b) the giving of evidence by live link<sup>16</sup>; (c) the giving of evidence in private<sup>17</sup>; (d) the removal of wigs and gowns<sup>18</sup>; (e) the giving of video evidence recorded in chief<sup>19</sup>; and (f) the cross-examination and re-examination of the witness adduced by video recording<sup>20</sup>. Where, however, a special measure would, in accordance, with heads (a) to (f) above be available to a witness, it must not be taken by a court to be available in relation to the witness unless the court has been notified by the Secretary of State that relevant arrangements<sup>21</sup> may be made available in the area in which it appears to the court that the proceedings will take place and the notice has not been withdrawn<sup>22</sup>.

1 For the meaning of 'witness' see PARA 1417 note 1 ante.

2 As to non-statutory measures that may be available to defendants see PARA 1416 ante.

3 For the meaning of 'court' see PARA 1417 note 3 ante.

4 As to the quality of a witness's evidence see PARA 1417 note 4 ante.

5 Youth Justice and Criminal Evidence Act 1999 s 17(1). The exclusion of the defendant from the power to make a special measures direction is not incompatible with the right to a fair trial: *R (on the application of S) v Waltham Forest Youth Court* [2004] EWHC 715 (Admin), [2004] 2 Cr App Rep 335, DC; but see also *R (on application of D) v Camberwell Green Youth Court* [2005] UKHL 4 at [63], [2005] 1 All ER 999 at [63], [2005] 2 Cr App Rep 1 at [63] per Baroness Hale.

6 Youth Justice and Criminal Evidence Act 1999 s 17(2). In determining the question, the court must in addition consider any views expressed by the witness: s 17(3).

7 Ibid s 17(2)(a).

8 Ibid s 17(2)(b).

9 Ibid s 17(2)(c).

10 Ibid s 17(2)(d).

11 'Complainant' means a person against or in relation to whom the offence was, or is alleged to have been, committed: *ibid* s 63(1). On a literal construction of s 63(1), a 'complainant' may in some cases be a co-defendant who denies that any such offence has been committed (eg where D1 is charged with an offence of penetrative sex with an adult relative (D2), contrary to the Sexual Offences Act 2003 s 64, and D2 is charged with consenting to such penetration by D1 (contrary to s 65), D1 and D2 are each (in respect of the other) 'persons in relation to whom the offence was committed'). In contrast, the victim or alleged victim of some other offence committed or allegedly committed by the defendant, which is referred to in evidence, but not charged in the instant proceedings, is not a 'complainant' within the meaning of this section: *R v M* [2006] All ER (D) 164 (May), CA.

12 'Sexual offence' means any offence under the Sexual Offences Act 2003 Pt 1 (ss 1-79) (as amended): Youth Justice and Criminal Evidence Act 1999 s 62(1) (substituted by the Sexual Offences Act 2003 s 139, Sch 6 para 41(3)). Any reference in the Youth Justice and Criminal Evidence Act 1999 Pt II to an offence of any description ('the substantive offence') is to be taken to include a reference to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, the substantive offence: s 62(2). As originally enacted, s 62(1) listed only rape, burglary with intent to rape (under the Theft Act 1968 s 9), offences under the Sexual Offences Act 1956 ss 2-12, 14-17 (now repealed), offences under the Mental Health Act 1959 s 128 (now repealed), offences under the Indecency with Children Act 1960 s 1 (now repealed) and offences under the Criminal Law Act 1977 s 54 (now repealed), together with inchoate versions of any of those offences or secondary participation. It is submitted that this original list still governs cases where a defendant is charged with a sexual offence allegedly committed before 1 May 2004, when the provisions of the Sexual Offences Act 2003 came into force.

13 Youth Justice and Criminal Evidence Act 1999 s 17(4).

14 See *ibid* s 18(1)(b).

15 See *ibid* s 23; and PARA 1421 post.

16 See *ibid* s 24; and PARA 1422 post.

17 See *ibid* s 25; and PARA 1423 post.

18 See *ibid* s 26; and PARA 1424 post.

19 See *ibid* s 27; and PARA 1425 post.

20 See *ibid* s 28 (not yet in force); and PARA 1426 post.

21 For the meaning of 'relevant arrangements' see PARA 1417 note 17 ante.

22 Youth Justice and Criminal Evidence Act 1999 s 18(2). See also s 18(4); and PARA 1417 note 18 ante.

## UPDATE

### 1418 Witnesses eligible for assistance on grounds of fear or distress

NOTE 12--See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law). See further Serious Crime Act 2007 Sch 6 para 37 (references to common law offence of incitement).

Youth Justice and Criminal Evidence Act 1999 s 62(1) amended, s 62(1A) added: Criminal Justice and Immigration Act 2008 Sch 26 para 37. The amendment made by Sch 26 para 37 is deemed to have had effect as from 1 May 2004: Sch 26 para 38.

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### **1419. Special measures directions.**

Where in any criminal proceedings a party makes an application for the court<sup>1</sup> to give a special measures direction in relation to a witness<sup>2</sup> other than the defendant<sup>3</sup>, or the court of its own motion raises the issue whether such a direction should be given<sup>4</sup>, then, where the court determines that the witness is eligible for assistance<sup>5</sup>, it must determine whether any of the special measures available in relation to the witness, or any combination of them, would in its opinion be likely to improve the quality of evidence given by him<sup>6</sup>, and if so it must (1) determine which of those measures, or combination of them, would in its opinion, be likely to maximise so far as practicable the quality of such evidence<sup>7</sup>; and (2) give a direction providing for the measure or measures to apply to evidence given by the witness<sup>8</sup>. In determining whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular<sup>9</sup> any views expressed by the witness<sup>10</sup> and whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings<sup>11</sup>. A special measures direction must specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence<sup>12</sup>.

Nothing in these provisions<sup>13</sup> is to be regarded as affecting any power of a court to make an order or give leave of any description, in the exercise of its inherent jurisdiction or otherwise<sup>14</sup> (a) in relation to a witness who is not an eligible witness<sup>15</sup>; or (b) in relation to an eligible witness where (as, for example, in a case where a foreign language interpreter is to be provided) the order is made or the leave is given otherwise than by reason of the fact that the witness is an eligible witness<sup>16</sup>.

A special measures direction has binding effect from the time it is made until the proceedings are either determined<sup>17</sup> or abandoned<sup>18</sup> in relation to the defendant or, if there is more than one, in relation to each defendant<sup>19</sup>. The court may discharge, vary or further vary a special measures direction if it appears to it to be in the interests of justice to do so<sup>20</sup>, and may do so either on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time<sup>21</sup>, or of its own motion<sup>22</sup>. The court must state in open court its reasons for: (i) giving or varying a direction<sup>23</sup>; (ii) refusing an application for, or for the variation or discharge of a direction<sup>24</sup>; or (iii) discharging a special measures direction<sup>25</sup>. If it is a magistrates' court, the court must cause the reasons to be entered in the register of its proceedings<sup>26</sup>.

Criminal Procedure Rules make provision for: (A) uncontested applications to be determined by the court without a hearing; (B) preventing the renewal of an unsuccessful application for a direction except where there has been a material change of circumstances; (C) for expert evidence to be given in connection with an application for, or for varying or discharging, such a direction; and (D) for the manner in which confidential or sensitive information is to be treated in connection with such an application and in particular as to its being disclosed to, or withheld from, a party<sup>27</sup>.

Where in the course of a trial on indictment with a jury evidence is given in accordance with a special measures direction, the judge must give the jury such warning, if any, as he considers



necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the defendant<sup>28</sup>.

- 1 For the meaning of 'court' see PARA 1417 note 3 ante.
- 2 For the meaning of 'witness' see PARA 1417 note 1 ante.
- 3 Youth Justice and Criminal Evidence Act 1999 s 19(1)(a).
- 4 Ibid s 19(1)(b).
- 5 Ie under ibid s 16 or s 17: see PARAS 1417-1418 ante.
- 6 Ibid s 19(2)(a). As to the quality of a witness's evidence see PARA 1417 note 4 ante.
- 7 Ibid s 19(2)(b)(i).
- 8 Ibid s 19(2)(b)(ii). 'Special measures direction' means a direction under s 19: ss 19(5), 33(1).
- 9 Ibid s 19(3).
- 10 Ibid s 19(3)(a).
- 11 Ibid s 19(3)(b).
- 12 Ibid s 19(4).
- 13 Ie ibid Pt II Ch I (ss 16-33) (as amended).
- 14 Ibid s 19(6).
- 15 Ibid s 19(6)(a). As to directions that may be made in respect of a witness who is a defendant, see PARA 1416 note 6 ante.
- 16 Ibid s 19(6)(b).
- 17 Ie by acquittal, conviction or otherwise: ibid s 20(1)(a).
- 18 Ibid s 20(1)(b).
- 19 Ibid s 20(1). This provision is subject to s 21(8): see PARA 1420 post.
- 20 Ibid s 20(2). Nothing in s 24(2), (3) (see PARA 1422 post), s 27(4)-(7) (see PARA 1425 post) or s 28(4)-(6) (not yet in force) (see PARA 1426 post) is to be regarded as affecting the power of the court to vary or discharge a direction under s 20(2): s 20(4).
- 21 Ibid s 20(2)(a). 'The relevant time' means (1) the time when the direction was given; or (2) if a previous application has been made under s 20(2), the time when the application, or last application, was made: s 20(3).
- 22 Ibid s 20(2)(b).
- 23 Ibid s 20(5)(a).
- 24 Ibid s 20(5)(b).
- 25 Ibid s 20(5)(c).
- 26 Ibid s 20(5).
- 27 Ibid s 20(6) (amended by the Courts Act 2003 s 109(1), Sch 8 para 384). See CrimPR 29.1 (applications for special directions), CrimPR 29.2 (application for extension of time), CrimPR 29.3 (late applications), CrimPR 29.4 (discharge or variation of special measures direction), CrimPR 29.5 (renewal application following a change of circumstances), CrimPR 29.6 (application for special measures direction for witness to give evidence by means of a live television link), CrimPR 29.7 (video recording of testimony from witnesses), CrimPR 29.8 (expert evidence in connection with special measures directions), CrimPR 29.9 (intermediaries).

The time-limits provided for by the CrimPR are not mandatory, but directory. Any significant handicap to the defence by a late application, is for the judge to take very carefully into account: *R v Brown* [2004] EWCA Crim 1620, [2004] All ER (D) 98 (Jun).

28 Youth Justice and Criminal Evidence Act 1999 s 32 (amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 74, 75). Some forms of special measure (eg the use of screens or live links) may necessarily require such a warning whereas others may not. As to the form that such a warning might take, see Judicial Studies Board, Specimen Direction No 22a; and see also *R v Piggott* [2005] EWCA Crim 655, [2005] All ER (D) 46 (Mar). The warning should be given immediately before the witness testifies with the benefit of the special measure, because it is more likely to impress itself on the jury if it is given then. In contrast, it is not important whether the warning is repeated in the summing-up: *R v Brown* [2004] EWCA Crim 1620, [2004] All ER (D) 98 (Jun).

## **UPDATE**

### **1419 Special measures directions**

TEXT AND NOTES--See the Standing Civilian Courts (Evidence) Rules 2006, SI 2006/2891.

NOTE 27--CrimPR Pt 29 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), Pt 29. The form for use with CrimPR 29.3 is set out in *Amendment No 24 to the Consolidated Criminal Practice Direction (criminal proceedings: witness anonymity orders (2); forms)* [2010] All ER (D) 276 (Mar).

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#### **1420. Child witnesses.**

Where the court determines<sup>1</sup> that a witness is eligible for assistance by virtue of being a child<sup>2</sup>, it must have regard to certain provisions<sup>3</sup> before determining whether any special measures direction (or combination of them) is required<sup>4</sup>. These provisions limit the court's discretion by specifying that certain special measures must ordinarily be adopted in cases involving child witnesses, and by making certain measures mandatory in the case of a child witness who is deemed 'in need of special protection', whether or not the court would otherwise have determined upon those measures. Any special measures required by these provisions<sup>5</sup> must be treated as if they were measures determined by the court<sup>6</sup> to be ones that (whether on their own or with any other special measures) would be likely to maximise so far as practicable, the quality of the child's evidence<sup>7</sup>.

The issues which must be considered by the court are as follows. The primary rule in the case of a child witness is that the court must give a special measures direction in relation to that witness which complies with the following requirements<sup>8</sup>: (1) it must provide for any 'relevant recording'<sup>9</sup> to be admitted<sup>10</sup>; and (2) it must provide for any evidence given by the witness which is not given by means of a video recording, whether in chief or otherwise, to be given by means of a live link<sup>11</sup>.

The primary rule is subject to the following limitations: (a) the requirement relating to relevant recordings or relating to evidence which is not given by video recording has effect subject to the availability<sup>12</sup> of the special measure in question in relation to the witness<sup>13</sup>; (b) the requirement relating to relevant recordings also has effect subject to the provision regarding the interests of justice<sup>14</sup>; and (c) save where the witness is a child in need of special protection, the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable, whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason<sup>15</sup>.

A child witness is deemed 'in need of special protection' where he testifies (whether for the prosecution or for the defence) in proceedings involving one or more specified sexual offences<sup>16</sup> or proceedings involving offences of kidnapping, false imprisonment, child abduction, assault, threats of violence or child cruelty<sup>17</sup>. In such proceedings the court must apply the primary rule even if satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence<sup>18</sup>.

Where the proceedings relate to one or more of the specified sexual offences, any special measures direction given by the court as to the use of video-recorded evidence must provide for cross-examination of the witness and any subsequent re-examination to be recorded by means of a video-recording<sup>19</sup>, in addition to the recording of the child's evidence in chief<sup>20</sup>. However, the provision concerning video-recorded cross-examination and re-examination has not been brought into force and, if it is brought into force, it will have effect subject to the availability of that special measure in relation to the witness<sup>21</sup> and it will not apply if the witness has informed the court that he does not want that special measure to apply in relation to him<sup>22</sup>.

<sup>1</sup> In accordance with the Youth Justice and Criminal Evidence Act 1999 s 19(2): see PARA 1419 ante. For the meaning of 'court' see PARA 1417 note 3 ante.

2 A witness is a child witness if he is an eligible witness by reason of *ibid* s 16(1)(a) (ie he is aged under 17 at the time of the hearing) whether or not he is an eligible witness by reason of any other provision of s 16 or s 17 (see *PARAS* 1417-1418 ante); s 21(1)(a). For the meaning of 'witness' see *PARA* 1417 note 1 ante.

Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of the fact that he is under the age of 17 at the time of the hearing, and, except where he has already begun to give evidence in proceedings, the direction ceases to have effect at the time when the witness attains that age: see s 21(8), (9). The provisions of s 21 are extended to qualifying witnesses over the age of 17 in certain circumstances: see s 22.

3 *Ie* first *ibid* s 21(3)-(7) (see the text and notes *infra*) and then s 19(2) (see *PARA* 1419 ante).

4 *Ibid* s 21(2).

5 *Ie* by virtue of *ibid* s 21.

6 *Ie* pursuant to *ibid* s 19(2)(a), (b)(i): see *PARA* 1419 ante.

7 *Ibid* s 21(2). As to the quality of a witness's evidence see *PARA* 1170 note 4 ante.

8 *Ibid* s 21(3).

9 A 'relevant recording' in relation to a child witness is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness: *ibid* s 21(1)(c). 'Video recording' means any recording, on any medium, from which a moving image may by any means be produced, and includes the accompanying sound-track: s 63(1).

10 *Ibid* s 21(3)(a). The reference to the recording being admitted is a reference to admission under *ibid* s 27: see *PARA* 1425 post.

11 *Ibid* s 21(3)(b). The reference to evidence being given by means of a live link is a reference to evidence being given in accordance with s 24: see *PARA* 1422 post. As to the time for determining competence in such cases see *R v Powell* [2006] EWCA Crim 3; and *PARA* 1401 ante.

12 *Ie* within the meaning of *ibid* s 18(2): see *PARA* 1418 ante.

13 *Ibid* s 21(4)(a).

14 *Ibid* s 21(4)(b). The reference to the provision regarding the interests of justice is a reference to s 27(2): see *PARA* 1425 post.

15 *Ibid* s 21(4)(c), (5). Where the child witness is in need of special protection, but video recorded testimony is excluded in the interests of justice (eg because it is marred by the improper use of leading questions, as in *Re N (a minor) (sexual abuse: video evidence)* [1996] 4 All ER 225, [1997] 1 WLR 153, CA) the court would appear to be obliged to conduct both examination in chief and cross-examination by means of a live link.

16 *Ie* a sexual offence falling within the Youth Justice and Criminal Evidence Act 1999 s 35(3)(a) (as amended) (see *PARA* 1441 post): s 21(1)(b)(i). The offences in question are those under the Sexual Offences Act 2003 Pt 1 or the Protection of Children Act 1978: see *PARA* 165 et seq ante.

17 Youth Justice and Criminal Evidence Act 1999 s 21(1)(b)(ii). The offences are those falling within s 35(3)(b), (c), (d) (see *PARA* 1441 post).

18 See *ibid* s 21(5).

19 *Ie* the special measure available under the Youth Justice and Criminal Evidence Act 1999 s 28 (not yet in force): see *PARA* 1426 post.

20 *Ibid* s 21(6).

21 *Ibid* s 21(7)(a).

22 *Ibid* s 21(7)(b).

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### **1421. Screening the witness from the defendant.**

A special measures direction may provide for the witness<sup>1</sup>, while giving testimony or being sworn in court<sup>2</sup>, to be prevented by means of a screen or other arrangement from seeing the defendant<sup>3</sup>. The screen or other arrangement must not prevent the witness from being able to see<sup>4</sup>, and to be seen by, the judge or justices (or both) and the jury (if there is one)<sup>5</sup>, legal representatives<sup>6</sup> acting in the proceedings<sup>7</sup>, and any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness<sup>8</sup>.

1 For the meaning of 'witness' see PARA 1417 note 1 ante.

2 For the meaning of 'court' see PARA 1417 note 3 ante.

3 Youth Justice and Criminal Evidence Act 1999 s 23(1). Justices do not give the impression of having pre-judged a defendant by ordering a screen to be brought into the court before deciding whether it is required: *KL v DPP, LK v DPP* [2001] EWHC 1112 (Admin), 166 JP 369.

4 References to a person being able to see or hear, or be seen or heard by, another person are to be read as not applying to the extent that either of them is unable to see or hear by reason of any impairment of eyesight or hearing: Youth Justice and Criminal Evidence Act 1999 s 33(3).

5 Ibid s 23(2)(a).

6 'Legal representative' means any authorised advocate or authorised litigator, as defined by the Courts and Legal Services Act 1990 s 119(1) (see LEGAL PROFESSIONS vol 65 (2008) PARA 498): Youth Justice and Criminal Evidence Act 1999 s 63(1).

7 Ibid s 23(2)(b). Where two or more legal representatives are acting for a party to the proceedings, s 23(2)(b) is to be regarded as satisfied if the witness is able at all material times to see and be seen by at least one of them: s 23(3).

8 Ibid s 23(3)(c). The fact that one witness is happy to testify without the protection of a screen does not mean that other witnesses do not require such protection: *R v Brown* [2004] EWCA Crim 1620, [2004] All ER (D) 98 (Jun).

## **UPDATE**

### **1421 Screening the witness from the defendant**

NOTE 6--'Legal representative' now means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act) (see LEGAL PROFESSIONS vol 65 (2008) para 512): Youth Justice and Criminal Evidence Act 1999 s 63(1) (definition amended by Legal Services Act 2007 Sch 21 para 132).

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EVIDENCE/(7) CALLING WITNESSES/(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999/1422. Evidence by live link.

## **1422. Evidence by live link.**

A special measures direction may provide for an eligible witness<sup>1</sup> to give evidence by means of a live link<sup>2</sup>. Where a direction provides for the witness to give evidence by such means, he may not give evidence in any other way without the permission of the court<sup>3</sup>. The court may give such permission if it appears to it to be in the interests of justice to do so, and may do so either<sup>4</sup>: (1) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time<sup>5</sup>; or (2) of its own motion<sup>6</sup>.

A vulnerable, intimidated or child witness giving evidence by means of a live link may be accompanied by a 'witness supporter'<sup>7</sup>.

1 As to eligible witnesses see PARA 1417 ante. For the meaning of 'witness' see PARA 1417 note 1 ante.

2 Youth Justice and Criminal Evidence Act 1999 s 24(1). 'Live link' means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and to be seen and heard by the judge or justices (or both) and the jury (if there is one), legal representatives acting in the proceedings, and any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness: ss 24(8), 33(1). See also s 23(2); and PARA 1421 ante. Note that in some cases involving child witnesses the use of a live link is effectively mandatory as far as cross-examination and re-examination is concerned.

3 Ibid s 24(2).

4 Ibid s 24(3).

5 Ibid s 24(3)(a). 'The relevant time' means the time when the direction was given, or if a previous application has been made under s 24(3), the time when the application (or last application) was made: s 24(4).

6 Ibid s 24(3)(b). This contemplates a time after the live link direction has been made. Usually it will be at the trial, eg where the machinery is not working properly or where the child is sliding down so as to be invisible to the camera. Another possibility might be where the child was positively anxious to give evidence in the courtroom and the court considered that it would be contrary to the interests of justice to require her to use the live link: *R (on application of D) v Camberwell Green Youth Court* [2005] UKHL 4 at [35], [2005] 1 All ER 999 at [35], [2005] 2 Cr App Rep 1 at [35] per Baroness Hale.

7 The witness supporter should be completely independent of the witness and his or her family and have no previous knowledge of or personal involvement in the case. The supporter should also be suitably trained so as to understand the obligations of, and comply with, the National Standards relating to witness supporters. Providing these criteria are met, the witness supporter need not be an usher or court official. Thus, the functions of the witness supporter may be performed by a representative of the Witness Service: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.29.2, CA.

Where the witness supporter is someone other than the court usher, the usher should continue to be available both to assist the witness and the witness supporter, and to ensure that the judge's requirements are properly complied with in the CCTV room: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.29.3, CA.

## **UPDATE**

### **1422 Evidence by live link**

TEXT AND NOTES--As to the use of live link for the evidence of certain accused persons, see the 1999 Act s 33A; and PARA 1422A.

NOTE 6--See also *R v Ukpabio* [2007] EWCA Crim 2108, [2008] 1 WLR 728.

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#### **1422A. Use of live link for evidence of certain accused persons.**

The court may, on the application of the accused, give a live link direction if it is satisfied that certain conditions<sup>1</sup> are met in relation to the accused, and that it is in the interests of justice for the accused to give evidence through a live link<sup>2</sup>. A live link direction is a direction that any oral evidence to be given before the court by the accused is to be given through a live link<sup>3</sup>. Where the accused is aged under 18 when the application is made, the conditions are that (1) his ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by his level of intellectual ability or social functioning; and (2) use of a live link would enable him to participate more effectively in the proceedings as a witness, whether by improving the quality of his evidence or otherwise<sup>4</sup>. Where the accused has attained the age of 18 at that time, the conditions are that (a) he suffers from a mental disorder<sup>5</sup> or otherwise has a significant impairment of intelligence and social function; (b) he is for that reason unable to participate effectively in the proceedings as a witness giving oral evidence in court; and (c) use of a live link would enable him to participate more effectively in the proceedings as a witness, whether by improving the quality of his evidence or otherwise<sup>6</sup>. While a live link direction has effect the accused may not give oral evidence before the court in the proceedings otherwise than through a live link<sup>7</sup>. The court may discharge a live link direction at any time before or during any hearing to which it applies if it appears to the court to be in the interests of justice to do so, but this does not affect the power to give a further live link direction in relation to the accused<sup>8</sup>. The court must state in open court its reasons for giving or discharging a live link direction, or refusing an application for or for the discharge of a live link direction, and, if it is a magistrates' court, it must cause those reasons to be entered in the register of its proceedings<sup>9</sup>. In these provisions 'live link' means an arrangement by which the accused, while absent from the place where the proceedings are being held, is able to see and hear a person there, and to be seen and heard by (i) the judge or justices, or both, and the jury, if there is one; (ii) where there are two or more accused in the proceedings, each of the other accused; (iii) legal representatives acting in the proceedings; and (iv) any interpreter or other person appointed by the court to assist the accused<sup>10</sup>. Nothing in these provisions affects any power of a court to make an order, give directions or give leave of any description in relation to any witness, including an accused, or the operation of any rule of law relating to evidence in criminal proceedings<sup>11</sup>.

1     Ie those in the Youth Justice and Criminal Evidence Act 1999 s 33A(4) (ss 33A-33C added by the Police and Justice Act 2006 s 47) or, as the case may be, the 1999 Act s 33A(5). Section 33A applies to any proceedings, whether in a magistrates' court or before the Crown Court, against a person for an offence: s 33A(1).

2     Ibid s 33A(2).

3     Ibid s 33A(3).

4     Ibid s 33A(4).

5     Ie within the meaning of the Mental Health Act 1983: see MENTAL HEALTH.

6     1999 Act s 33A(5).



7 Ibid s 33A(6).

8 Ibid s 33A(7).

9 Ibid s 33A(8).

10 Ibid s 33B.

11 Ibid s 33C.

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EVIDENCE/(7) CALLING WITNESSES/(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999/1423. Evidence given in private.

### **1423. Evidence given in private.**

A special measures direction may provide for the exclusion from the court<sup>1</sup>, during the giving of the witness's<sup>2</sup> evidence, of persons of any description specified in the direction<sup>3</sup>. The persons who may be so excluded do not include the defendant<sup>4</sup>, legal representatives<sup>5</sup> acting in the proceedings<sup>6</sup>, or any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness<sup>7</sup>. A direction providing for representatives of news gathering or reporting organisations to be excluded must be expressed not to apply to one named person who is a representative of such an organisation and who has been nominated for the purpose by one or more such organisations, unless it appears to the court that no such nomination has been made<sup>8</sup>. A direction may only provide for the exclusion of persons where the proceedings relate to a sexual offence<sup>9</sup> or it appears to the court that there are reasonable grounds for believing that any person other than the defendant has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings<sup>10</sup>. Any proceedings from which persons are excluded, whether or not those persons include representatives of news gathering or reporting organisations, must nevertheless be taken to be held in public for the purposes of any privilege or exemption from liability available in respect of fair, accurate and contemporaneous reports of legal proceedings held in public<sup>11</sup>.

1 For the meaning of 'court' see PARA 1417 note 3 ante.

2 For the meaning of 'witness' see PARA 1417 note 1 ante.

3 Youth Justice and Criminal Evidence Act 1999 s 25(1).

4 Ibid s 25(2)(a).

5 For the meaning of 'legal representative' see PARA 1421 note 6 ante.

6 Youth Justice and Criminal Evidence Act 1999 s 25(2)(b).

7 Ibid s 25(2)(c).

8 Ibid s 25(3).

9 Ibid s 25(4)(a). For the meaning of 'sexual offence' see PARA 1418 note 12 ante.

10 Ibid s 25(4)(b).

11 Ibid s 25(5).

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EVIDENCE/(7) CALLING WITNESSES/(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999/1424. Removal of wigs and gowns.

#### **1424. Removal of wigs and gowns.**

A special measures direction may provide for the wearing of wigs or gowns to be dispensed with during the giving of the witness's evidence<sup>1</sup>.

<sup>1</sup> Youth Justice and Criminal Evidence Act 1999 s 26. For the meaning of 'witness' see PARA 1417 note 1 ante. As to the removal of wigs and gowns where children or young persons are tried in adult courts, see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.39, CA (trial of children and young persons).

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#### **1425. Video recorded evidence in chief.**

A special measures direction may provide for a video recording<sup>1</sup> of an interview of the witness<sup>2</sup> to be admitted as evidence in chief of the witness<sup>3</sup>. However, a direction may not provide for a video recording, or part of such a recording, to be admitted if the court<sup>4</sup> is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not be so admitted<sup>5</sup>. In considering whether any part of a recording should not be admitted, the court must consider whether any prejudice to the defendant<sup>6</sup> which might result from that part being so admitted is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview<sup>7</sup>.

Where a direction provides for a recording to be admitted, the court may nevertheless subsequently direct that it is not to be so admitted if<sup>8</sup>: (1) it appears to the court that the witness will not be available for cross-examination, whether conducted in the ordinary way or in accordance with any such direction<sup>9</sup>, and the parties to the proceedings have not agreed that there is no need for the witness to be so available<sup>10</sup>; or (2) any Criminal Procedure Rules requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court<sup>11</sup>.

Where a recording is admitted<sup>12</sup>: (a) the witness must be called by the party tendering it in evidence, unless a special measures direction provides for the witness's evidence on cross-examination to be given otherwise than by testimony in court<sup>13</sup> or the parties to the proceedings have agreed that there is no need for the witness to be available for cross-examination<sup>14</sup>; and (b) the witness may not give evidence in chief otherwise than by means of the recording<sup>15</sup> as to any matter which, in the opinion of the court, has been dealt with adequately in the witness's recorded testimony<sup>16</sup>, or, without permission of the court<sup>17</sup>, as to any other matter which, in the opinion of the court, is dealt with in that testimony<sup>18</sup>.

Nothing in the above provisions affects the admissibility of any video recording which would be admissible apart from those provisions<sup>19</sup>.

1 For the meaning of 'video recording' see PARA 1420 note 9 ante. The procedure for making application for leave to adduce a video recording of testimony from a witness under the Youth Justice and Criminal Evidence Act 1999 s 27 (as amended) is laid down in CrimPR 29.7 (which reproduces the Crown Court (Special Measures Directions and Directions Prohibiting Cross-Examination) Rules 2002, SI 2002/1688).

2 For the meaning of 'witness' see PARA 1417 note 1 ante.

3 Youth Justice and Criminal Evidence Act 1999 s 27(1).

4 For the meaning of 'court' see PARA 1417 note 3 ante.

5 Youth Justice and Criminal Evidence Act 1999 s 27(2). Where the court directs that some part of the recording be excluded, the party who made application to admit the video recording must edit the recording in accordance with the judge's directions and send a copy of the edited recording to the appropriate officer of the Crown Court and to every other party to the proceedings: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.40.2, CA.

Where a video recording is to be adduced during proceedings before the Crown Court, it should be produced and proved by the interviewer, or any other person who was present at the interview with the witness at which the recording was made. The applicant should ensure that such a person will be available for this purpose,

unless the parties have agreed to accept a written statement in lieu of attendance by that person: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.40.3, CA.

Once a trial has begun if, by reason of faulty or inadequate preparation or for some other cause, the procedures set out above have not been properly complied with and an application is made to edit the video recording, thereby making necessary an adjournment for the work to be carried out, the court may make at its discretion an appropriate award of costs: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.40.4, CA.

6     le any person charged with an offence to which the proceedings relate, whether or not he has been convicted: Youth Justice and Criminal Evidence Act 1999 s 63(1).

7     Ibid s 27(3). See *R v K* [2006] EWCA Crim 472, (2006) Times, 10 April (the test for admissibility of video-recorded evidence was whether a reasonable jury properly directed could be sure that the witness had given a credible and accurate account on the videotape, notwithstanding any breaches of the guidelines).

8     Youth Justice and Criminal Evidence Act 1999 s 27(4). Where a direction provides for part only of a recording to be admitted, references in s 27(4), (5) to the recording or to the witness's recorded testimony are references to the part of the recording or testimony which is to be so admitted: s 27(6).

9     Ibid s 27(4)(a)(i).

10    Ibid s 27(4)(a)(ii). See *R v Powell* [2006] EWCA Crim 03, [2006] All ER (D) 45 (Jan); and PARA 1401 ante.

11    Youth Justice and Criminal Evidence Act 1999 s 27(4)(b) (amended by the Courts Act 2003 s 109(1), Sch 8 para 384).

12    Youth Justice and Criminal Evidence Act 1999 s 27(5). See also s 27(6); and note 8 supra.

13    Ibid s 27(5)(a)(i).

14    Ibid s 27(5)(a)(ii).

15    Ibid s 27(5)(b).

16    Ibid s 27(5)(b)(i).

17    The court may give permission if it appears to it to be in the interests of justice to do so, and may do so either (1) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time; or (2) of its own motion: ibid s 27(7). 'The relevant time' means the time when the direction was given or, if a previous application has been made under s 27(7), the time when the application (or last application) was made: s 27(8).

The court may, in giving permission, direct that the evidence in question is to be given by the witness by means of a live link (see PARA 1422 ante), and, if the court so directs, s 24(5)-(7) will apply in relation to that evidence as it applies in relation to evidence which is to be given in accordance with a special measures direction: s 27(9).

18    Ibid s 27(5)(b)(ii).

19    Ibid s 27(11).

## UPDATE

### 1425 Video recorded evidence in chief

NOTE 1--CrimPR now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'). As to the admission of video recorded evidence see CrimPR Pt 29.

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EVIDENCE/(7) CALLING WITNESSES/(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999/1426. Video recorded cross-examination or re-examination.

#### **1426. Video recorded cross-examination or re-examination.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Where a special measures direction provides for a video recording<sup>2</sup> to be admitted as evidence in chief of the witness<sup>3</sup>, the direction may also provide for: (1) any cross-examination of the witness, and any re-examination, to be recorded by means of a video recording<sup>4</sup>; and (2) such a recording to be admitted, so far as it relates to any such cross-examination or re-examination, as evidence of the witness under cross-examination or on re-examination<sup>5</sup>. Such a recording must be made in the presence of such persons as the Criminal Procedure Rules or the direction may provide and in the absence of the defendant<sup>6</sup>, but in circumstances in which<sup>7</sup>: (a) the judge or justices, or both, and legal representatives<sup>8</sup> acting in the proceedings are able to see and hear the examination of the witness and to communicate with the persons in whose presence the recording is being made<sup>9</sup>; and (b) the defendant is able to see and hear any such examination and to communicate with any legal representative acting for him<sup>10</sup>. Where a direction provides for a recording to be admitted, the court<sup>11</sup> may nevertheless subsequently direct that it is not to be so admitted if any of the specified circumstances<sup>12</sup> or the Criminal Procedure Rules or the direction has not been complied with to the satisfaction of the court<sup>13</sup>.

Where a recording has been made of any examination of the witness<sup>14</sup>, the witness may not be subsequently cross-examined or re-examined in respect of any evidence given by him in the proceedings (whether in any recording admissible<sup>15</sup> or otherwise than in such a recording) unless the court gives a further special measures direction making such provision as is mentioned above<sup>16</sup> in relation to any subsequent cross-examination, and re-examination, of the witness<sup>17</sup>. The court may only give such a further direction if it appears to the court<sup>18</sup> that: (i) the proposed cross-examination is sought by a party as a result of that party having become aware, since the time when the original recording was made, of a matter which that party could not with reasonable diligence have ascertained by then<sup>19</sup>; or (ii) for any other reason it is in the interests of justice to give the further direction<sup>20</sup>.

Nothing in the above provisions is to be read as applying in relation to any cross-examination of the witness by the defendant in person in a case where the defendant is able to conduct any such cross-examination<sup>21</sup>.

<sup>1</sup> The Youth Justice and Criminal Evidence Act 1999 s 28 comes into force on such day as the Secretary of State may appoint by order under s 68. At the date at which this volume states the law no such day had been appointed.

<sup>2</sup> For the meaning of 'video recording' see PARA 1420 note 9 ante.

<sup>3</sup> In accordance with the Youth Justice and Criminal Evidence Act 1999 s 27: see PARA 1425 ante. For the meaning of 'witness' see PARA 1417 note 1 ante.

<sup>4</sup> Ibid s 28(1)(a) (not yet in force).

<sup>5</sup> Ibid s 28(1)(b) (not yet in force).

<sup>6</sup> In any person charged with an offence to which the proceedings relate, whether or not he has been convicted: ibid s 63(1).

<sup>7</sup> Ibid s 28(2) (in force only for the purposes of the power to make rules of court).

- 8 For the meaning of 'legal representative' see PARA 1421 note 6 ante.
- 9 Youth Justice and Criminal Evidence Act 1999 s 28(2)(a) (s 28 in force for certain purposes: see note 7 supra). Where two or more legal representatives are acting for a party, s 28(2) is to be regarded as satisfied if at all material times it is satisfied in relation to at least one of them: s 28(3) (not yet in force).
- 10 Ibid s 28(2)(b) (amended by the Courts Act 2003 s 109(1), Sch 8 para 384). See note 7 supra.
- 11 For the meaning of 'court' see PARA 1417 note 3 ante.
- 12 Ie the circumstances specified in the Youth Justice and Criminal Evidence Act 1999 s 28(2) (in force for certain purposes: see note 7 supra).
- 13 Ibid s 28(4) (not yet in force) (amended by the Courts Act 2003 Sch 8 para 384).
- 14 Ie in pursuance of the Youth Justice and Criminal Evidence Act 1999 s 28(1) (not yet in force): see the text and notes supra.
- 15 Ie under ibid s 27: see PARA 1425 ante.
- 16 Ie in ibid s 28(1)(a), (b) (not yet in force): see the text and notes supra.
- 17 Ibid s 28(5) (not yet in force).
- 18 Ibid s 28(6) (not yet in force).
- 19 Ibid s 28(6)(a) (not yet in force).
- 20 Ibid s 28(6)(b) (not yet in force).
- 21 Ibid s 28(7) (not yet in force).

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EVIDENCE/(7) CALLING WITNESSES/(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999/1427. Examination of witness through intermediary.

### **1427. Examination of witness through intermediary.**

A special measures direction may provide for any examination of the witness<sup>1</sup>, however and wherever conducted, to be conducted through an interpreter or other person approved by the court ('an intermediary')<sup>2</sup>. The function of an intermediary is to communicate to the witness questions put to the witness, and, to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question<sup>3</sup>. Any examination of the witness must take place in the presence of such persons as the Criminal Procedure Rules or the directions may provide, but in circumstances in which<sup>4</sup> (1) the judge or justices, or both, and legal representatives<sup>5</sup> acting in the proceedings are able to see and hear the examination of the witness and to communicate with the intermediary<sup>6</sup>; and (2) except in the case of a video recorded examination, the jury (if there is one) is able to see and hear the examination of the witness<sup>7</sup>.

A person may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by the Criminal Procedure Rules, that he will faithfully perform his function as intermediary<sup>8</sup>. The statutory provision relating to perjury<sup>9</sup> applies in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding<sup>10</sup>. Where a person acts as an intermediary in any proceeding which is not a judicial proceeding<sup>11</sup>, that proceeding is to be taken to be part of the judicial proceeding in which the witness's evidence is given<sup>12</sup>.

1 For the meaning of 'witness' see PARA 1417 note 1 ante.

2 Youth Justice and Criminal Evidence Act 1999 s 29(1). This provision does not apply to an interview of the witness recorded by means of a video recording with a view to its admission as evidence in chief of the witness, but a special measures direction may provide for such a recording to be admitted under s 27 (see PARA 1425 ante) if the interview was conducted through an intermediary and that person complied with s 29(5) (see the text and note 8 infra) before the interview began, and the court's approval is given before the direction is given: s 29(6).

3 Ibid s 29(2).

4 Ibid s 29(3).

5 For the meaning of 'legal representative' see PARA 1421 note 6 ante.

6 Youth Justice and Criminal Evidence Act 1999 s 29(3)(a). Where two or more legal representatives are acting for a party, s 29(3)(a) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them: s 29(4).

7 Ibid s 29(3)(b).

8 Ibid s 29(5) (amended by the Courts Act 2003 s 109(1), Sch 8 para 384).

9 Ie the Perjury Act 1911 s 1: see PARA 712 ante.

10 Youth Justice and Criminal Evidence Act 1999 s 29(7).

11 Ie for the purposes of the Perjury Act 1911 s 1.



12 Youth Justice and Criminal Evidence Act 1999 s 29(7)

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EVIDENCE/(7) CALLING WITNESSES/(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999/1428. Aids to communication.

#### **1428. Aids to communication.**

A special measures direction may provide for the witness<sup>1</sup>, while giving evidence (whether by testimony in court<sup>2</sup> or otherwise) to be provided with such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any disability or disorder or other impairment which the witness has or suffers from<sup>3</sup>.

1 For the meaning of 'witness' see PARA 1417 note 1 ante.

2 For the meaning of 'court' see PARA 1417 note 3 ante.

3 Youth Justice and Criminal Evidence Act 1999 s 30.

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#### **1429. Status of evidence given in accordance with special measures direction.**

The following provisions apply to a statement<sup>1</sup> made by a witness<sup>2</sup> in criminal proceedings which, in accordance with a special measures direction, is not made by the witness in direct oral testimony in court but forms part of the witness's evidence in those proceedings<sup>3</sup>. The statement must be treated as if made by the witness in direct oral testimony in court<sup>4</sup>, and, accordingly: (1) it is admissible evidence of any fact of which such testimony from the witness would be admissible<sup>5</sup>; and (2) it is not capable of corroborating any other evidence given by the witness<sup>6</sup>.

In estimating the weight to be attached to the statement, the court must have regard to all the circumstances from which an inference can reasonably be drawn (as to the accuracy of the statement or otherwise)<sup>7</sup>. Nothing in the provisions relating to special measures directions<sup>8</sup> affects the operation of any rule of law relating to evidence in criminal proceedings<sup>9</sup>.

Where any statement made by a person on oath in any proceedings which is not a judicial proceeding for the purposes of the statutory provision relating to perjury<sup>10</sup> is received in evidence in pursuance of a special measures direction, that proceeding is to be taken for the purposes of that provision to be part of the judicial proceeding in which the statement is so received in evidence<sup>11</sup>. Where in any proceeding which is not a judicial proceeding for the purposes of the Perjury Act 1911, a person wilfully makes a false statement otherwise than on oath which is subsequently received in evidence in pursuance of a special measures direction, and the statement is made in such circumstances that had it been given on oath in any such judicial proceeding that person would have been guilty of perjury, he is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding 6 months<sup>12</sup> or a fine not exceeding £1,000 or both<sup>13</sup>.

1 'Statement' includes any representation of fact, whether made in words or otherwise: Youth Justice and Criminal Evidence Act 1999 s 31(8).

2 For the meaning of 'witness' see PARA 1417 note 1 ante.

3 Youth Justice and Criminal Evidence Act 1999 s 31(1).

4 Ibid s 31(2). This applies to a statement admitted under s 27 (see PARA 1425 ante) or s 28 (not yet in force) (see PARA 1426 ante) which is not made by the witness on oath even though it would have been required to be made on oath if made by the witness in direct oral testimony in court: s 31(3).

5 Ibid s 31(2)(a).

6 Ibid s 31(2)(b).

7 Ibid s 31(4).

8 Apart from ibid s 31(3) (see note 4 supra): s 31(5).

9 Ibid s 31(5).

10 Ie the Perjury Act 1911 s 1: see PARA 712 ante.

11 Youth Justice and Criminal Evidence Act 1999 s 31(6).

12 As from a day to be appointed this maximum term is increased to a maximum term of 51 weeks (see the Criminal Justice Act 2003 s 281(4), (5), (7) (not yet in force)), although this does not affect the penalty for any offence committed before that day (s 281(6)(b) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

13 Youth Justice and Criminal Evidence Act 1999 ss 31(7), 57(2).

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EVIDENCE/(7) CALLING WITNESSES/(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999/1430. Reporting restrictions relating to adult witnesses.

### **1430. Reporting restrictions relating to adult witnesses.**

Where, in criminal proceedings in any court, other than a service court<sup>1</sup>, or in any proceedings, whether in the United Kingdom<sup>2</sup> or elsewhere, in any service court, a party to the proceedings makes an application for the court to give a reporting direction in relation to a witness<sup>3</sup> in the proceedings, other than a defendant, who has attained the age of 18, a court may give a reporting direction<sup>4</sup> in relation to the witness<sup>5</sup>. However, the court may give a reporting direction only if it determines that the witness is eligible for protection and that giving a reporting direction in relation to the witness is likely to improve the quality of evidence given by the witness, or the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case<sup>6</sup>.

A witness is eligible for protection if the court is satisfied that the quality of evidence<sup>7</sup> given by the witness, or the level of co-operation given by the witness to any party to the proceedings in connection with that party's preparation of its case, is likely to be diminished by reason of fear or distress on the part of the witness in connection with being identified by members of the public as a witness in the proceedings<sup>8</sup>. In determining whether a witness is eligible for protection the court must take into account, in particular: (1) the nature and alleged circumstances of the offence to which the proceedings relate<sup>9</sup>; (2) the age of the witness<sup>10</sup>; (3) such of the social and cultural background and ethnic origins of the witness<sup>11</sup>, the domestic and employment circumstances of the witness<sup>12</sup>, and any religious beliefs or political opinions of the witness, as appear to the court to be relevant matters<sup>13</sup>; and (4) any behaviour towards the witness on the part of the defendant, members of the family or associates of the defendant, or any other person who is likely to be a defendant or a witness in the proceedings<sup>14</sup>. In making such a determination the court must in addition consider any views expressed by the witness<sup>15</sup>.

In determining whether to give a reporting direction the court must consider whether it would be in the interests of justice to do so, and the public interest<sup>16</sup> in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings<sup>17</sup>.

The court or an appellate court<sup>18</sup> may by an excepting direction dispense, to any extent specified in that direction, with the restrictions imposed by a reporting direction if it is satisfied (a) that it is necessary in the interests of justice to do so<sup>19</sup>; or (b) that the effect of those restrictions is to impose a substantial and unreasonable restriction on the reporting of the proceedings<sup>20</sup>, and that it is in the public interest to remove or relax that restriction<sup>21</sup>.

A reporting direction may be revoked by the court or an appellate court<sup>22</sup>. An excepting direction may be given at the time the reporting direction is given or subsequently<sup>23</sup>, and may be varied or revoked by the court or an appellate court<sup>24</sup>.

1 'Service court' means a court-martial, the Courts-Martial Appeal Court, or a Standing Civilian Court: Youth Justice and Criminal Evidence Act 1999 s 63(1). For the meaning of 'court' see PARA 1417 note 3 ante.

2 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 For the meaning of 'witness' see PARA 1417 note 1 ante.

4 A reporting direction in relation to a witness is a direction that no matter relating to the witness may be included in any publication during the witness's lifetime if it is likely to lead members of the public to identify

him as being a witness in the proceedings: Youth Justice and Criminal Evidence Act 1999 s 46(6). 'Publication' includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme is taken to be so addressed), but does not include an indictment or other document prepared for use in particular legal proceedings: s 63(1). Matters relating to a witness in relation to which the restrictions imposed by a reporting direction apply, if their inclusion in any publication is likely to have such a result, include in particular the witness's name, the witness's address, the identity of any educational establishment attended by the witness, the identity of any place of work, and any still or moving picture of the witness: s 46(7). 'Picture' includes a likeness however produced: s 63(1).

5 Ibid s 46(1), (2).

6 Ibid s 46(2). References to the preparation of the case of a party to any proceedings include, where the party is the prosecution, the carrying out of investigations into any offence at any time charged in the proceedings: s 46(12)(c).

7 Ie the quality of the evidence in terms of completeness, coherence and accuracy: ibid s 46(12)(b). 'Coherence' refers to a witness's ability in giving evidence to give answers which address the questions put to the witness and which can be understood both individually and collectively: s 46(12)(b).

8 Ibid s 46(3).

9 Ibid s 46(4)(a).

10 Ibid s 46(4)(b).

11 Ibid s 46(4)(c)(i).

12 Ibid s 46(4)(c)(ii).

13 Ibid s 46(4)(c)(iii).

14 Ibid s 46(4)(d).

15 Ibid s 46(5).

16 Where for the purposes of any provision in ibid Pt II Ch IV (ss 44-52) it falls to a court to determine whether anything is or, as the case may be, was in the public interest, the court must have regard, in particular and so far as relevant, to: (1) the interest in the open reporting of crime, the open reporting of matters relating to human health or safety, and the prevention and exposure of miscarriages of justice; (2) the welfare of any person in relation to whom the relevant restrictions imposed by or under Pt II Ch IV apply, applied or would apply, as the case may be; and (3) any views expressed by an appropriate person on behalf of a person within head (2) supra who is under the age of 16 ('the protected person'), or by a person within head (2) supra who has attained that age: s 52(1), (2). 'An appropriate person', in relation to the protected person, has the same meaning as it has for the purposes of the Youth Justice and Criminal Evidence Act 1999 s 50 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1275; MAGISTRATES vol 29(2) (Reissue) PARA 755): s 52(3).

17 Ibid s 46(8).

18 'Appellate court', in relation to any proceedings in a court, means a court dealing with an appeal, including an appeal by way of case stated, arising out of the proceedings or with any further appeal: ibid s 46(12)(a).

19 Ibid s 46(9)(a).

20 Ibid s 46(9)(b)(i).

21 Ibid s 46(9)(b)(ii). However, no excepting direction may be given under s 46(9)(b) by reason only of the fact that the proceedings have been determined in any way or have been abandoned: s 46(9).

22 Ibid s 46(10).

23 Ibid s 46(11)(a).

24 Ibid s 46(11)(b).

## UPDATE

**1430 Reporting restrictions relating to adult witnesses**

NOTE 1--Definition of 'service court' further amended: Armed Forces Act 2006 Sch 16 para 159.

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EVIDENCE/(7) CALLING WITNESSES/(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999/1431. Witnesses giving evidence in foreign proceedings from the United Kingdom through live television links.

**1431. Witnesses giving evidence in foreign proceedings from the United Kingdom through live television links.**

Where the Secretary of State receives a request<sup>1</sup> from an external authority<sup>2</sup>, for a person in the United Kingdom<sup>3</sup> to give evidence through a live television link in criminal proceedings<sup>4</sup> before a court in a country outside the United Kingdom<sup>5</sup>, he must unless he considers it inappropriate to do so, nominate by notice in writing a court in the United Kingdom where the witness may be heard in the proceedings in question through a live television link<sup>6</sup>. Anything done by the witness in the presence of the nominated court which, if it were done in proceedings before the court, would constitute contempt of court is to be treated for that purpose as done in proceedings before the court<sup>7</sup>.

Evidence given pursuant to the above provisions is not to be treated for any purpose as evidence given in proceedings in the United Kingdom<sup>8</sup>.

1    Ie a request under the Crime (International Co-operation) Act 2003 s 30.

2    An external authority is the authority in that country which appears to the Secretary of State to have the function of making requests of the kind to which *ibid* s 30 applies: s 30(2).

3    For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4    Criminal proceedings include any proceedings on an appeal before a court against a decision in administrative proceedings: *ibid* s 30(1).

5    *Ibid* s 30(1).

6    *Ibid* s 30(3). The nominated court has the like powers for securing the attendance of the witness to give evidence through the link as it has for the purpose of proceedings before the court: s 30(6), Sch 2 Pt 1 para 1.

7    *Ibid* s 30(4). Any statement made on oath by a witness giving evidence in pursuance of s 30 is to be treated for the purposes of the Perjury Act 1911 s 1 (see PARA 712 ante) as made in proceedings before the nominated court: Crime (International Co-operation) Act 2003 s 30(5).

The witness is to give evidence in the presence of the nominated court: Crime (International Co-operation) Act 2003 Sch 2 Pt 1 para 3). The nominated court is to establish the identity of the witness: Sch 2 Pt 1 para 4. The nominated court is to intervene where it considers it necessary to do so to safeguard the rights of the witness: Sch 2 Pt 1 para 5. The evidence is to be given under the supervision of the court of the country concerned: Sch 2 Pt 1 para 6. The evidence is to be given in accordance with the laws of that country and with any measures for the protection of the witness agreed between the Secretary of State and the authority in that country which appears to him to have the function of entering into agreements of that kind: Sch 2 Pt 1 para 7. Rules of court make provision for the use of interpreters: Sch 2 Pt 1 para 8; CrimPR 32.6. The witness cannot be compelled to give any evidence which he could not be compelled to give in criminal proceedings in the part of the United Kingdom in which the nominated court exercises jurisdiction, and the witness cannot be compelled to give any evidence if his doing so would be prejudicial to the security of the United Kingdom: Crime (International Co-operation) Act 2003 Sch 2 Pt 1 para 9. Rules of court make provision for the drawing up of a record of the hearing and for sending the record to the external authority: Sch 2 Pt 1 para 10; CrimPR 32.7.

8    Crime (International Co-operation) Act 2003 s 30(7). Section 30(7) is subject to s 30(4), (5) and the provisions of Sch 2 Pt 1 (see note 7 supra): s 30(7).

**UPDATE**



**1431 Witnesses giving evidence in foreign proceedings from the United Kingdom through live television links**

NOTE 7--CrimPR 32.6, 32.7 now Criminal Procedure Rules 2010, SI 2010/60, rr 32.6, 32.7.

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EVIDENCE/(7) CALLING WITNESSES/(iii) Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999/1432. Witnesses giving evidence in foreign proceedings from the United Kingdom by telephone.

### **1432. Witnesses giving evidence in foreign proceedings from the United Kingdom by telephone.**

Where the Secretary of State receives a request<sup>1</sup> from an external authority<sup>2</sup> in a participating country<sup>3</sup>, for a person in the United Kingdom to give evidence by telephone in criminal proceedings<sup>4</sup> before a court in that country<sup>5</sup>, he must unless he considers it inappropriate to do so, nominate by notice in writing a court in the United Kingdom where the witness may be heard in the proceedings in question by telephone<sup>6</sup>. Anything done by the witness in the presence of the nominated court which, if it were done in proceedings before the court, would constitute contempt of court is to be treated for that purpose as done in proceedings before the court<sup>7</sup>.

Evidence given in pursuance of the above provisions is not to be treated for any purpose as evidence given in proceedings in the United Kingdom<sup>8</sup>.

1    Ie a request under the Crime (International Co-operation) Act 2003 s 31.

2    An external authority is the authority in that country which appears to the Secretary of State to have the function of making requests of the kind to which *ibid* s 31 applies: s 31(2).

3    A participating country in relation to any provision of the Crime (International Co-operation) Act 2003 Pt 1 (ss 1-51) means (1) a country other than the United Kingdom which is a member State on a day appointed for the commencement of that provision; and (2) any other country designated by an order made by the Secretary of State: s 51(2). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

4    Criminal proceedings include any proceedings on an appeal before a court against a decision in administrative proceedings: *ibid* s 31(1).

5    *Ibid* s 31(1). A request under s 31(1) must: (1) specify the court in the participating country; (2) give the name and address of the witness; (3) state that the witness is willing to give evidence by telephone in the proceedings before that court: s 31(3).

6    *Ibid* s 31(4).

7    *Ibid* s 31(5). Any statement made on oath by a witness giving evidence in pursuance of s 31 is to be treated for the purposes of the Perjury Act 1911 s 1 (see PARA 712 ante) as made in proceedings before the nominated court: Crime (International Co-operation) Act 2003 s 31(6).

The nominated court must notify the witness of the time when and the place at which he is to give evidence by telephone: Crime (International Co-operation) Act 2003 s 31(6), Sch 2 Pt 2 para 11. The nominated court must be satisfied that the witness is willingly giving evidence by telephone: Sch 2 Pt 2 para 12. The witness is to give evidence in the presence of the nominated court: Sch 2 Pt 2 para 13. The nominated court is to establish the identity of the witness: Sch 2 Pt 2 para 14. The evidence is to be given under the supervision of the court of the participating country: Sch 2 Pt 2 para 15. The evidence is to be given in accordance with the laws of that country: Sch 2 Pt 2 para 16. Rules of court make provision for the use of interpreters: Sch 2 Pt 2 para 17; CrimPR 32.6. As to the keeping of record see CrimPR 32.8.

8    Crime (International Co-operation) Act 2003 s 31(8). Section 31(8) is subject to s 31(5), (6) and the provisions of Sch 2 Pt 2 (see note 7 supra): s 31(8).

### **UPDATE**

**1432 Witnesses giving evidence in foreign proceedings from the United Kingdom by telephone**

NOTE 3--As to orders made for the designation of participating countries, see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 917.

NOTE 7--CrimPR 32.6, 32.8 now Criminal Procedure Rules 2010, SI 2010/60, rr 32.6, 32.8.

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## **(8) EXAMINATION IN CHIEF**

### **1433. Evidence to establish credibility.**

A party calling a witness may not ordinarily call evidence to establish the credibility of that witness, except in rebuttal of attempts to discredit the witness; and it is limited, even then, to the rebuttal of allegations of general untruthfulness by contrary evidence of reputation<sup>1</sup>. Evidence in rebuttal of particular allegations of misconduct relating to credibility is not permitted because such issues are collateral and the witness's denial of such an accusation will be final<sup>2</sup>.

A witness may however be questioned as to his trade, profession or calling, and such questions might sometimes help to underpin his credit<sup>3</sup>. In the case of an expert witness evidence may be adduced to establish the experience and qualifications of the witness<sup>4</sup>.

If the defendant proposes to call an expert witness to say that a witness of fact for the prosecution should be regarded as unreliable due to mental abnormality<sup>5</sup>, then, depending on the precise issue, it may be open to the prosecution to call an expert in rebuttal, or even (anticipating the defence expert) as part of the prosecution case. It may even be open to the prosecution to rebut by expert evidence a case put only in cross-examination that a prosecution witness is unreliable in a particular respect arising from mental abnormality<sup>6</sup>. If such evidence is admitted, great care must be taken to restrict the expert opinion to meeting the specific challenge and not to allow it to extend to 'oath-helping'<sup>7</sup>.

1 *R v Wood* [1951] 2 All ER 112n. 35 Cr App Rep 61; *R v Robinson* [1994] 3 All ER 346, 98 Cr App Rep 370, CA; *R v Beard* [1998] Crim LR 585, CA; *R v Hamilton* (26 June 1998, unreported), CA. Even where there has been a direct attack on the credibility of a witness, a further witness called to testify as to the other's credibility cannot be permitted to testify in chief as to the particular facts, circumstances of incidents which form the basis of his opinion, although he may be cross-examined upon them: *R v Richardson and Longman* [1969] 1 QB 299 at 304, sub nom *R v Longman and Richardson* [1968] 2 All ER 761 at 764, CA, per Edmund Davies LJ.

2 *R v Hamilton* (26 June 1998, unreported), CA. As to the finality of a witness's answer on a collateral issue see PARA 1444 post.

3 *R v DS* [1999] Crim LR 911, CA.

4 As to the competence and credibility of expert witnesses see PARAS 1490, 1494 post.

5 See eg *Toohy v Metropolitan Police Comr* [1965] AC 595, 49 Cr App Rep 148, HL.

6 *R v Robinson* [1994] 3 All ER 346, 98 Cr App Rep 370, CA.

7 *R v Robinson* [1994] 3 All ER 346, 98 Cr App Rep 370, CA. See also *R v Beard* [1998] Crim LR 585, CA.

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#### **1434. Leading questions.**

A witness may not ordinarily be asked leading questions during examination in chief or re-examination<sup>1</sup>, but some leading questions are permissible. Where a matter is not in dispute, there is no reason why the witness should not be led through his evidence<sup>2</sup>, and where a witness is asked to identify an exhibit in court, it may be difficult to avoid the use of a leading question<sup>3</sup>. It may be necessary in the interests of justice for a court to allow leading questions to be put to a defendant who suffers from learning and communication difficulties<sup>4</sup>. Where the court or judge has granted leave for a witness to be treated as hostile, leading questions may then be asked by the party calling him, as if in cross-examination<sup>5</sup>.

Evidence given in answer to a leading question is not thereby rendered inadmissible, but the weight or credibility of such evidence may be adversely affected<sup>6</sup>, and where a child has been pressurised by leading questions in the course of a video-taped interview which it is proposed to use as that child's evidence in chief<sup>7</sup>, the videotape may be excluded as unreliable<sup>8</sup>.

1 *Pop v R* [2003] UKPC 40, [2003] All ER (D) 333 (May). There is no clear definition of the phrase 'leading question'. The definition most frequently cited is that from Stephen *Digest of the Law of Evidence* (12th edn, 1936) p 165 which defines a leading question as one which suggests the answer which the questioner wishes to receive or which suggests the existence of disputed facts to which the witness has not already testified. During examination in chief, counsel must phrase his questions in a neutral form and must build on the witness's own testimony without pre-supposing the existence of facts to which he has not testified.

2 See eg *R v Knighton* [2002] EWCA Crim 2227, [2003] Crim LR 117, (2002) Times, 28 October. Counsel may thus lead evidence in respect of his witness's name, address and occupation, or in respect of any other matters of agreed fact.

3 *R v Watson* (1817) 2 Stark 116 at 128.

4 *R v H* [2003] EWCA Crim 1208, (2003) Times, 15 April; *R (on the application of D) v Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 All ER 999, [2005] 2 Cr App Rep 1.

5 As to hostile witnesses see PARA 1436 post.

6 *Moor v Moor* [1954] 2 All ER 458, [1954] 1 WLR 927, CA; *R v Wilson* (1913) 9 Cr App Rep 124.

7 See PARAS 1420, 1425 ante.

8 *Re N (a minor) (sexual abuse: video evidence)* [1996] 4 All ER 225, [1997] 1 WLR 153, CA.

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### **1435. Unfavourable witnesses.**

Where a witness for the prosecution or defence fails to 'come up to proof', and does not give the evidence expected of him, or gives evidence that is in some respect positively unfavourable to the party calling him, that party may not ordinarily<sup>1</sup> cross-examine the witness as to any inconsistencies between his oral testimony and his previous statements or proof of evidence<sup>2</sup>, nor may that party under any circumstances seek to impeach the credit of his own witness by calling evidence of his bad character<sup>3</sup>. The party concerned is not, however, precluded from calling other witnesses to establish the facts in question, even though their evidence may contradict the unfavourable witness and prove him to have been inaccurate or mistaken<sup>4</sup>.

1 He not unless the witness is declared to be hostile. As to hostile witnesses see PARA 1436 post.

2 Where a witness appears to be confused or forgetful, it may be appropriate for him to be given an opportunity to refresh his memory by reading a copy of any previous statement that is admissible for that purpose: see *R v Maw* [1994] Crim LR 841, CA. As to refreshing memory see generally paras 1438-1439 post.

3 See the Criminal Procedure Act 1865 s 3; and PARA 1436 post.

4 *Ewer v Ambrose* (1825) 3 B & C 746; *Bradley v Ricardo* (1831) 8 Bing 57; *Greenough v Eccles* (1859) 5 CBNS 786; *R v Brent* [1973] Crim LR 295, CA; *R v Osborne and Virtue* [1973] QB 678, [1973] 1 All ER 649, CA.

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### **1436. Hostile witnesses.**

A hostile witness (sometimes referred to as a witness who proves 'adverse'<sup>1</sup>) is one who is not merely disappointing or unfavourable to the party calling him, but is also, in the opinion of the court, unwilling to tell the truth at the instance of that party<sup>2</sup>. A witness may prove hostile through his adverse testimony or through his refusal to answer questions, even where he does not give any adverse testimony<sup>3</sup>, and he may be ruled hostile even where his unwillingness to co-operate is driven by fear, rather than by any animosity to the party calling him<sup>4</sup>.

A party producing a witness who is found to be hostile may not impeach the credit of that witness by general evidence of bad character<sup>5</sup>, but may (as with any other unfavourable witness<sup>6</sup>) contradict him by evidence from other sources, and in addition the court may give leave for that party to cross-examine his own witness and prove the witness has made at other times a statement inconsistent with his present testimony<sup>7</sup>. Before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement<sup>8</sup>.

In cases where the witness demonstrates his hostility by refusing to testify once sworn, it is arguably impossible for his previous statements to be 'inconsistent with his present testimony', but at common law he may still be cross-examined concerning such statements<sup>9</sup>.

A witness may be called to testify even when it is known in advance that he is likely to prove hostile<sup>10</sup>, although a judge may in some cases be justified in holding a trial within a trial for the purpose of deciding whether the calling of such a witness by the prosecution would be in the interests of justice, and whether he should exclude (in the exercise of his discretion) evidence of any previous statements of a hostile witness that might be considered unfairly prejudicial to the defendant<sup>11</sup>.

Where a previous inconsistent statement is proved in evidence, it is admissible as evidence of any fact asserted<sup>12</sup>. It is accordingly possible for a defendant to be convicted on the basis of previous statements made by prosecution witnesses who have resiled from those statements in their oral testimony<sup>13</sup>.

1 See eg the Criminal Procedure Act 1865 s 3; and see *Greenough v Eccles* (1859) 5 CBNS 786.

2 Stephen, *Digest of the Law of Evidence* (12th edn, 1936) pp 169-170. A witness who is genuinely forgetful may not be treated as hostile: *R v Manning* [1968] Crim LR 675, CA.

3 *R v Thompson* (1976) 64 Cr App Rep 96, CA. An application to have a witness ruled hostile should be made once he shows clear signs of hostility: *R v Fraser and Warren* (1956) 40 Cr App Rep 160, CCA; *R v Pestano* [1981] Crim LR 397, CA. If he does not show any such signs until he is cross-examined by the other party, he may still be treated as hostile during re-examination: *R v Norton and Driver* [1987] Crim LR 687, CA. See also *R v Powell* [1985] Crim LR 592, CA (hostility first manifested during re-examination).

4 As in *R v Joyce* [2005] EWCA Crim 1785, [2005] All ER (D) 309 (Jun).

5 Criminal Procedure Act 1865 s 3. As to evidence of bad character see PARA 1502 et seq post.

6 As to unfavourable witnesses see PARA 1435 ante.

7 Criminal Procedure Act 1865 s 3; and see *R v Booth* (1981) 74 Cr App Rep 123, CA. The judge's discretion to refuse or grant leave to cross-examine is absolute (*Greenough v Eccles* (1859) 5 CBNS 786; *Price v Manning* (1889) 42 ChD 372, CA; *R v Williams* (1913) 8 Cr App Rep 133, CA) and will rarely be interfered with on appeal (*R v Williams* supra; *R v Manning* [1968] Crim LR 675, CA). Any questioning of a possibly hostile witness should generally take place in the presence of the jury: *R v Darby* [1989] Crim LR 817, CA; but cf *R v Honeyghon and Sayles* [1999] Crim LR 221, CA.

8 Criminal Procedure Act 1865 s 3. A statement admitted under this provision need not be in writing: *R v Prefas, R v Pryce* (1986) 86 Cr App Rep 111, CA. Where a defendant's spouse is not a compellable witness, the possibility of being cross-examined as a hostile witness should be explained before the witness is sworn: *R v Pitt* [1983] QB 25, 75 Cr App Rep 254, CA. As to the compellability of a spouse see PARA 1402 ante.

9 The Criminal Procedure Act 1865 s 3 does not refer to this, but has not removed or destroyed the basic common law right of the judge in his discretion to allow such cross-examination when a witness proves to be hostile: *R v Thompson* (1976) 64 Cr App Rep 96, CA.

10 *R v Mann* (1972) 56 Cr App Rep 750, CA; *R v Dat* [1998] Crim LR 488, CA; *R v Honeyghon and Sayles* [1999] Crim LR 221, CA.

11 *R v Honeyghon and Sayles* [1999] Crim LR 221, CA. As to the exclusion of prosecution evidence on the basis of unfair prejudice see generally para 1365 post.

12 Criminal Justice Act 2003 s 119(1)(b). See PARA 1529 post.

13 As in *R v Joyce* [2005] EWCA Crim 1785, [2005] All ER (D) 309 (Jun). If, however, such evidence is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe, the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a re-trial, discharge the jury: Criminal Justice Act 2003 s 125(1).

## UPDATE

### 1436 Hostile witnesses

NOTE 3--Where a judge rules that a witness can be treated as hostile at trial within the meaning of the 1865 Act s 3 by the party calling him, he must, in all but exceptional cases, still direct the jury to approach the witness' evidence with caution, even if the witness does not ultimately prove to be hostile: *R v Greene* (2009) Times, 28 October, CA.



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### **1437. Previous consistent statements of witnesses.**

A previous statement by a witness which appears to supplement or support his testimony is not generally admissible, either as evidence of any matter stated<sup>1</sup> or as evidence of that witness's consistency<sup>2</sup>. There are, however, certain statutory exceptions to this general rule<sup>3</sup>, under which a statement made by a witness may be admissible as evidence of any matter stated of which oral evidence by him would be admissible, provided in each case that the witness while giving evidence indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth<sup>4</sup>.

At common law, the previous consistent statement of a witness may also be admissible to rebut a suggestion that his testimony has been fabricated at some later date or time<sup>5</sup>, and by statute any statement that is admissible on that basis is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible<sup>6</sup>.

1    le as hearsay evidence (see PARA 1519 et seq post).

2    *R v Roberts* [1942] 1 All ER 187, 28 Cr App Rep 102, CCA; *R v Larkin* [1943] KB 174, 29 Cr App Rep 18, CCA; *Fox v General Medical Council* [1960] 3 All ER 225, [1960] 1 WLR 1017, PC.

3    See PARA 1529 post.

4    See the Criminal Justice Act 2003 s 120(1), (4); and PARA 1529 post.

5    *R v Oyesiku* (1971) 56 Cr App Rep 240, CA; *R v Benjamin* (1913) 8 Cr App Rep 146, CCA. Such evidence does not become admissible merely because it is suggested that the testimony of the witness in question is untrue: *Fox v General Medical Council* [1960] 3 All ER 225, [1960] 1 WLR 1017, PC; *R v Oyesiku* supra.

6    See the Criminal Justice Act 2003 s 120(2); and PARA 1529 post. Rules of common law continue to determine when such a statement is admissible in the first place. Section 120(2) merely addresses the evidential value of such evidence once it has been given. At common law, such a statement was originally admissible only for the purpose of rebutting the allegation and could not be regarded as evidence of the facts stated.

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### **1438. Refreshing memory.**

A witness in criminal proceedings may be permitted to refresh his memory either in the course of his evidence or before going into the witness box<sup>1</sup>. In practice, it would be almost impossible for a court to control the extent to which witnesses refresh their memories before testifying, and testimony would become more a test of memory than of truthfulness if witnesses were deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question<sup>2</sup>. Any rule purporting to deny witnesses prior access to their statements would tend to create difficulties for honest witnesses but do little to hamper dishonest witnesses<sup>3</sup>.

A witness giving oral evidence in criminal proceedings about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time if: (1) he states in his oral evidence that the document records his recollection of the matter at that earlier time; and (2) his recollection of the matter is likely to have been significantly better at that time than it is at the time of his oral evidence<sup>4</sup>. Similarly, where such a witness (a) has previously given an oral account, of which a sound recording was made, and he states in that evidence that the account represented his recollection of the matter at the time; (b) his recollection of the matter is likely to have been significantly better at the time of the previous account than it is at the time of his oral evidence; and (c) a transcript has been made of the sound recording, he may, at any stage in the course of giving his evidence, refresh his memory of the matter from that transcript<sup>5</sup>.

A document used by a witness to refresh his memory need not have been made by the witness personally, provided it was verified by him while the facts were relatively fresh in his memory<sup>6</sup>. Where a witness has dictated a note to, for example, a police officer, he need not verify the original by inspecting it; it is enough if the officer reads back to the witness what he has written<sup>7</sup>. Documents may be used to refresh memory even if they would not otherwise be admissible if tendered in evidence<sup>8</sup>, and there seems to be nothing to prevent copies of original documents being used for this purpose<sup>9</sup>.

It is not necessary that the witness should have any independent recollection of the facts to which he testifies and of which he seeks to refresh his memory, apart from the document to which he refers<sup>10</sup>.

1 Police officers or others who may have to gather and present evidence in several different cases each year will often need to refresh their memories from notebooks or statements made at or near the time of the events in question, especially on matters of detail. See eg *R v Simmonds* [1969] 1 QB 685, 51 Cr App Rep 316, CA. The rule applies to all witnesses, however, including (where he gives evidence) the defendant: *R v Britton* [1987] 2 All ER 412, 85 Cr App Rep 14, CA. See also *R v Tyagi* (1986) Times, 21 July, CA (trial judge may suggest witness refreshes his memory in interests of justice). In some cases it may be appropriate for the witness to have the statement read to him (eg where he is dyslexic or otherwise impaired from reading it himself): *R v Gordon* [2002] EWCA Crim 412, [2002] All ER (D) 99 (Feb).

2 *R v Richardson* [1971] 2 QB 484, 55 Cr App Rep 244, CA, citing *Lau Pak Ngam v R* [1966] Crim LR 443, PC. See also *Worley v Bentley* [1976] 2 All ER 449, 62 Cr App Rep 239, DC. It is nevertheless desirable that the defence be informed that prosecution witnesses have seen their statements: *R v Westwell* [1976] 2 All ER 812, 62 Cr App Rep 251, CA. A party cross-examining a witness who has refreshed his memory out of court may inspect the document in the same way as if it had been used to refresh memory in court: *Owen v Edwards* (1983) 77 Cr App Rep 191, DC; and see PARA 1439 post.

3 *R v Richardson* [1971] 2 QB 484 at 489, 55 Cr App Rep 244 at 251, CA, per Sachs LJ, citing *Lau Pak Ngam v R* [1966] Crim LR 443, PC. It would nevertheless be wrong if prior to giving evidence several witnesses were handed statements in circumstances which enabled one to compare with another what each had said: *R v Richardson* supra. See also *R v Shaw* [2002] EWCA Crim 3004, [2002] All ER (D) 79 (Dec). Discussions between witnesses ought not to take place, particularly just before they give evidence, nor should statements or proofs of evidence be read to witnesses in each other's presence: *R v Skinner* (1993) 99 Cr App Rep 212, CA. There is, however, nothing objectionable in the practice whereby police officers collaborate together to produce a joint note of an incident or event witnessed by them: *R v Bass* [1953] 1 QB 680 at 686, 37 Cr App Rep 51 at 59, CCA.

Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so: *R v Momodou* [2005] EWCA Crim 177, [2005] 2 All ER 571, [2005] 2 Cr App Rep 85. The court in this case also issued guidance as to the regulation of witness familiarisation sessions (the holding of which must be disclosed to the court and other parties) so as to ensure that they do not infringe the prohibition against the coaching of witnesses.

4 Criminal Justice Act 2003 s 139(1). This represents a significant relaxation of the old common law rules by which a witness could refer during his oral testimony only to a document made at the time of the events described therein or one made so shortly afterwards that the facts in question would have been fresh in the mind of the witness. See *R v Mills*, *R v Rose* [1962] 3 All ER 298, 46 Cr App Rep 336, CCA; *R v Simmonds* [1969] 1 QB 685, 51 Cr App Rep 316, CA; *R v Richardson* [1971] 2 QB 484, 55 Cr App Rep 244, CA; *R v Graham* [1973] Crim LR 628, CA; *R v Fotheringham* [1975] Crim LR 710, CA.

At common law, a witness who had begun to give evidence might nevertheless be permitted to adjourn and refresh his memory from a statement that was not strictly speaking 'contemporaneous' if the judge was satisfied: (1) that the witness could not then recall the details of events because of the lapse of time since they took place; (2) that the witness had made a statement much nearer the time of the events and that the contents of the statement represented his recollection at the time he made it; (3) that the witness had not read the statement before coming into the witness box; and (4) that the witness desired an opportunity to read his statement before he continued to give evidence: *R v Da Silva* [1990] 1 All ER 29, [1990] 1 WLR 31, CA. See also *R v South Ribble Magistrates' Court, ex p Cochrane* [1996] 2 Cr App Rep 544, DC (the criteria in *R v Da Silva* supra were not wholly inflexible). It did not matter whether the witness withdrew from the witness box to read his statement or whether he read it in the witness box; but, if he withdrew, no communication could be had with him other than to see that he could read the statement in peace; and, whichever course was adopted, the statement had to be removed from him when he came to resume his evidence and he could not be permitted to refer to it again: *R v Da Silva* supra. The Criminal Justice Act 2003 s 139 does not appear to leave any room or necessity for the kind of distinction drawn in *R v Da Silva*.

5 Criminal Justice Act 2003 s 139(2). Cf *R v Bailey* [2001] EWCA Crim 733, [2001] All ER (D) 185 (Mar). As to documents used to refresh memory see further PARA 1439 post.

6 *R v Bass* [1953] 1 QB 680 at 686, [1953] 1 All ER 1064, CCA; *R v Mills*, *R v Rose* [1962] 3 All ER 298, 46 Cr App Rep 336, CCA. A note taken of a conversation need not contain a verbatim account, provided that it substantially reproduces what was said: *R v O'Connell* (1844) Armstrong & Trevor 163.

7 *R v Kelsey* (1981) 74 Cr App Rep 213, CA.

8 *Maugham v Hubbard* (1828) 8 B & C 14; and see further CIVIL PROCEDURE vol 11 (2009) PARA 1039. Some memory-refreshing documents may themselves be admissible under the Criminal Justice Act 2003 s 117: see PARA 1522 post.

9 Cf *Topham v M'Gregor* (1844) 1 Car & Kir 320. The common law recognised that a police officer who made jottings during the course of an interview, and then wrote up a fuller note some time later when the facts were still fresh in his mind, could use the fuller note to refresh his memory: *A-G's Reference (No 3 of 1979)* (1979) 69 Cr App Rep 411, CA. See also *R v Cheng* (1976) 63 Cr App Rep 20, CA; *Katoria v DPP* [2001] EWHC Admin 120, [2001] All ER (D) 113 (Feb), DC. Revised or enhanced notes of this kind would appear to be equally admissible for the purpose of refreshing memory under the Criminal Justice Act 2003 s 139.

10 *R v Bryant*, *R v Dickson* (1946) 31 Cr App Rep 146, CCA; *Maugham v Hubbard* (1828) 8 B & C 14; *Topham v M'Gregor* (1844) 1 Car & Kir 320.

## UPDATE

### 1438 Refreshing memory

NOTE 4--As to the making of a blanket order permitting all witnesses to refresh their memories of written statements see *R v Mangena* [2009] EWCA Crim 2535, (2009) 174 JP 67.

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### **1439. Documents used to refresh memory.**

Where a document has been used to refresh memory, any other party may inspect the document and cross-examine the witness upon it<sup>1</sup>. If the witness is cross-examined on parts of the document to which he has not made reference in his evidence, the party calling him may treat the document as evidence in the proceedings<sup>2</sup>. At common law such a document could be treated as evidence only for the limited purpose of showing the witness's consistency<sup>3</sup>, but now a statement made by a witness in a document: (1) which is used by him to refresh his memory while giving evidence; (2) on which he is cross-examined; and (3) which as a consequence is received in evidence in the proceedings, is admissible as evidence of any matter stated of which oral evidence by him would be admissible<sup>4</sup>.

If on a trial before a judge and jury a statement made by a witness in a document and used by him to refresh his memory is admitted in evidence<sup>5</sup> and the document or a copy of it is produced as an exhibit, the exhibit must not accompany the jury when it retires to consider its verdict unless (a) the court considers it appropriate or (b) all the parties to the proceedings agree that it should accompany the jury<sup>6</sup>.

1 See *R v Fenlon, R v Neal* (1980) 71 Cr App Rep 307 at 311, CA; *R v Sekhon* (1987) 85 Cr App Rep 19, CA. The right to cross-examine a witness as to a previous statement does not depend on whether the witness purports to recall events after refreshing his memory from the statement: but is in any case permitted under the Criminal Procedure Act 1865 s 5 (see PARA 1445 post): *R v Bradley* [2004] EWCA Crim 1770, [2004] All ER (D) 282 (Jun). A party cross-examining a witness who has refreshed his memory out of court may inspect the document in the same way as if it had been used in court: *Owen v Edwards* (1983) 77 Cr App Rep 191, DC. A document may also provide evidence of its own authenticity where this is in question eg where it is alleged that it has been altered: *R v Sekhon* supra at 23. As to refreshing memory see further PARA 1438 ante. As to cross-examination see PARA 1440 et seq post.

2 *R v Virgo* (1978) 67 Cr App Rep 323, [1978] Crim LR 557, CA. See also *Owen v Edwards* (1983) 77 Cr App Rep 191, DC. The jury may inspect a memory-refreshing document if it is necessary to its determination of a point in issue (*R v Bass* [1953] 1 QB 680, 37 Cr App Rep 51, CCA) or where it would be difficult for the jury to follow the cross-examination of the witness without having the record, or copies of the record, before it: *R v Sekhon* (1987) 85 Cr App Rep 19, CA.

3 *R v Virgo* (1978) 67 Cr App Rep 323, [1978] Crim LR 557, CA; *R v Sekhon* (1987) 85 Cr App Rep 19, CA.

4 Criminal Justice Act 2003 s 120(3); but nothing in s 120 makes a statement admissible as evidence if it was made by a person who would not have been competent to give unsworn testimony as a witness at the time when he made the statement: s 123(1), (3). Such a statement becomes admissible hearsay evidence, and where such evidence appears unconvincing s 125 may apply: see PARA 1533 post.

5 Ie under the Criminal Justice Act 2003 s 120(3): see the text and note 4 supra.

6 Ibid s 122(1), (2).

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## **(9) CROSS-EXAMINATION AND RE-EXAMINATION**

### **1440. General principles governing cross-examination.**

In criminal proceedings the prosecution will ordinarily cross-examine the defendant, if he testifies<sup>1</sup>, and any other witness called on behalf of the defence. A defendant or his advocate may in turn cross-examine any prosecution witness and any co-defendant who testifies, together with any other witness called on behalf of a co-defendant<sup>2</sup>. In some cases, however, a defendant may not be permitted to conduct a cross-examination in person<sup>3</sup>.

Cross-examination may be conducted for any of a number of purposes, but will usually be intended to challenge or undermine part or all of the witness's evidence in chief. The cross-examiner may seek to cast doubt on the accuracy, completeness and/or veracity of that evidence, and will in many cases seek to undermine that evidence by suggesting that the witness is biased, of bad character, or otherwise unworthy of belief (for example by means of cross-examination as to credit)<sup>4</sup>. In the case of an expert witness<sup>5</sup>, cross-examination may seek to cast doubt on the validity or accuracy of that witness's investigations, opinions or conclusions. In contrast, the cross-examination by a defendant of a witness called on behalf of a co-defendant may in some cases be intended to complement or enhance, rather than undermine, that witness's evidence in chief.

A witness may only be cross-examined by the party calling him if he has been declared hostile by the court<sup>6</sup>, and a witness called by the judge may only be cross-examined with leave of the judge<sup>7</sup>. Certain witnesses are not subject to cross-examination, namely:

- 2169 (1) a witness who is called only to produce a document<sup>8</sup>; and
- 2170 (2) a witness who is called by mistake, and who is unable to give any evidence through examination in chief<sup>9</sup>.

A witness may be called by the prosecution for the sole purpose of being tendered for cross-examination by the defence<sup>10</sup>.

Where a witness for the prosecution gives evidence in chief but dies before the completion of his cross-examination or becomes too ill or distressed to go on, it may sometimes be necessary for the trial to be halted, but in other cases any potential unfairness to the defendant may be dealt with by a carefully worded direction from the judge<sup>11</sup>.

1 As to the right of a defendant to choose whether or not he should testify see PARA 1402 ante.

2 The right to cross-examine a co-defendant does not depend on whether the co-defendant or his witnesses have given evidence unfavourable to the defendant (*R v Hadwen* [1902] 1 KB 882, CCA; *R v Paul, R v McFarlane* [1920] 2 KB 183, 14 Cr App Rep 155, CCA; *R v Hilton* [1972] 1 QB 421, 55 Cr App Rep 466, CA), but cross-examination as to a co-defendant's bad character is permitted only in accordance with the Criminal Justice Act 2003 s 101, notably where there is an important matter in issue between the defendant and the co-defendant: see s 101(1)(e); and PARA 1508 post.

3 See PARA 1441 post.

4 See PARA 1443 post.

5 See PARA 1484 post.

6 See PARA 1436 ante.

7 Leave to cross-examine should be given if the evidence of the witness is damaging to a party (*Coulson v Disborough* [1894] 2 QB 316; *R v Cliburn* (1898) 62 JP 232.

8 *Sumners v Moseley* (1834) 2 Cr & M 477; *Rush v Smith* (1834) 1 Cr M & R 94.

9 *Wood v Mackinson* (1840) 2 Mood & R 273.

10 *R v Brooke* (1819) 2 Stark 472. This may be done where the evidence in chief of several witnesses would merely duplicate each other.

11 *R v Wyatt* [1990] Crim LR 343, CA; *R v Stretton* (1986) 86 Cr App Rep 7, CA; *R v Lawless* (1993) 98 Cr App Rep 342, CA.

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#### **1441. Restrictions on cross-examination by defendant in person.**

A defendant may ordinarily conduct in person the cross-examination of witnesses called by the prosecution or by a co-defendant<sup>1</sup>, but this right is now subject to the following restrictions.

No person charged with a sexual offence<sup>2</sup> may in any criminal proceedings cross-examine in person a witness who is the complainant<sup>3</sup>, either (1) in connection with that offence; or (2) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings<sup>4</sup>.

No person charged with one of certain sexual offences<sup>5</sup>, or with kidnapping<sup>6</sup>, child abduction<sup>7</sup>, child cruelty or neglect<sup>8</sup> or any other offence which involves an assault on, or injury or a threat of injury to, any person<sup>9</sup> may in any criminal proceedings cross-examine in person a protected witness<sup>10</sup>, either in connection with that offence, or in connection with any other offence (of whatever nature) with which that person is charged in the proceedings<sup>11</sup>.

Where neither of the above rules applies, the prosecutor may apply for the court to give a direction, prohibiting the defendant from cross-examining (or further cross-examining) a specified witness in person, or the court may of its own motion raise the issue whether such a direction should be given<sup>12</sup>. If it then appears to the court:

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62. (a) that the quality of evidence<sup>13</sup> given by the witness on cross-examination is likely to be diminished if the cross-examination (or further cross-examination) is conducted by the defendant in person, and would be likely to be improved if a direction were given prohibiting it<sup>14</sup>; and
63. (b) that it would not be contrary to the interests of justice to give such a direction<sup>15</sup>,

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the court may give such a direction<sup>16</sup>.

A defendant who is prevented by the above rules from cross-examining (or from continuing the cross-examination of) a witness in person must be informed of this by the court as early in the proceedings as is reasonably practicable and he must be invited to arrange for a legal representative to act for him for the purpose of cross-examining the witness<sup>17</sup>. The defendant is then required to notify the court whether a legal representative is to act for him for that purpose<sup>18</sup>. If he notifies the court that no legal representative is to act for him for the purpose of cross-examining the witness, or if no notification is received by the court and it appears to the court that no legal representative is to so act, it must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative<sup>19</sup> appointed to represent the interests of the defendant<sup>20</sup>. If the court decides that it is necessary and makes such an appointment<sup>21</sup>, the person so appointed is not responsible to the defendant<sup>22</sup>.

Where on a trial on indictment with a jury a defendant is prevented from cross-examining (or from continuing the cross-examination of<sup>23</sup>) a witness in person by virtue of any of the above



rules, the judge must give the jury such warning (if any) as the judge considers necessary to ensure that the defendant is not prejudiced:

- 2171 (i) by any inferences that might be drawn from the fact that the defendant has been prevented from cross-examining the witness in person<sup>24</sup>; or
- 2172 (ii) where the witness has been cross-examined by a legal representative appointed by the court<sup>25</sup>, by the fact that the cross-examination was carried out by such a legal representative and not by a person acting as the defendant's own legal representative<sup>26</sup>.

1 *R v Brown (Milton)* [1998] 2 Cr App Rep 364, [1998] All ER (D) 187, CA. A court or judge is not, however, obliged to give an unrepresented defendant his head to ask whatever questions, at whatever length, the defendant wishes: *R v Brown* supra.

2 Is an offence under the Sexual Offences Act 2003 Pt 1 (ss 1-79) (as amended) (see PARA 165 et seq ante): Youth Justice and Criminal Evidence Act 1999 s 62(1) (substituted by the Sexual Offences Act 2003 s 139, Sch 6 para 41(1), (3)).

3 For the meaning of 'complainant' see PARA 1418 note 11 ante.

4 Youth Justice and Criminal Evidence Act 1999 s 34.

5 Is an offence under the Sexual Offences Act 2003 Pt 1 (as amended) or an offence under the Protection of Children Act 1978: see PARA 165 et seq ante.

6 As to kidnapping see PARA 136 ante.

7 Is an offence under the Child Abduction Act 1984 s 1 or s 2: see PARA 137 et seq ante; and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 781-785.

8 Is an offence contrary to the Children and Young Persons Act 1933 s 1: see PARA 143 ante.

9 Youth Justice and Criminal Evidence Act 1999 s 35(3) (amended by the Sexual Offences Act 2003 s 140, Sch 7).

10 For these purposes, a 'protected witness' is a witness who either is the complainant or is alleged to have been a witness to the commission of the offence to which the Youth Justice and Criminal Evidence Act 1999 s 35 (as amended) applies, and either is a child or falls to be cross-examined after giving evidence in chief (whether wholly or in part) (1) by means of a video recording made for the purposes of s 27 (see PARA 1425 ante) at a time when the witness was a child; or (2) in any other way at any such time: s 35(2). Such a witness may also be a co-defendant: s 35(5). For the meaning of 'witness' see PARA 1417 note 1 ante. A 'child' for the purpose of an alleged offence under the Sexual Offences Act 2003 Pt 1 (as amended) or an offence under the Protection of Children Act 1978 is a person under the age of 17, but for other purposes it means a person under the age of 14: Youth Justice and Criminal Evidence Act 1999 s 35(4).

11 Ibid s 35(1).

12 Ibid s 36(1). See also CrimPR 31.4.

13 References to the quality of a witness's evidence are to be construed in accordance with the Youth Justice and Criminal Evidence Act 1999 s 16(5) (see PARA 1417 ante): s 36(4)(b).

14 Ibid s 36(2)(a). In determining whether this is the case, the court must have regard in particular to: (1) any views expressed by the witness as to whether or not the witness is content to be cross-examined by the defendant in person; (2) the nature of the questions likely to be asked, having regard to the issues in the proceedings and the defence case advanced so far (if any); (3) any behaviour on the part of the defendant at any stage of the proceedings, both generally and in relation to the witness; (4) any relationship (of whatever nature) between the witness and the accused; (5) whether any person (other than the defendant) is or has at any time been charged in the proceedings with a sexual offence or an offence to which s 35 applies, and (if so) whether s 34 or s 35 operates or would have operated to prevent that person from cross-examining the witness in person; and (6) any direction under s 19 (see PARA 1419 ante) which the court has given, or proposes to give, in relation to the witness: s 36(3).

15 Ibid s 36(2)(b).

16 Ibid s 36(2). A direction under s 36 has binding effect from the time it is made until the witness to whom it applies is discharged: s 37(1). The court may discharge a direction if it appears to the court to be in the interests of justice to do so, and may do so either (1) on an application made by a party to the proceedings, if there has been a material change of circumstances since the time when the direction was given (or the time when any previous application to discharge it was made); or (2) of its own motion: s 37(2), (3). The court must state in open court its reasons for its decision in relation to a direction: s 37(4). The CrimPR may make further provision for the procedure to be followed: s 37(5) (amended by the Courts Act 2003 s 109(1), Sch 8 para 384).

17 Youth Justice and Criminal Evidence Act 1999 s 38(1), (2), (8)(a); CrimPR 31.1.

18 The defendant should notify the court officer within 7 days of the court giving its explanation, or within such other period as the court may in any particular case allow: CrimPR 31.1(3); and see CrimPR 31.3.

19 'Qualified legal representative' means a legal representative who has a right of audience (within the meaning of the Courts and Legal Services Act 1990) in relation to the proceedings before the court: Youth Justice and Criminal Evidence Act 1999 s 38(8)(b).

20 Ibid s 38(3). The CrimPR may make further provision for the procedure to be followed: Youth Justice and Criminal Evidence Act 1999 s 38(6), (7) (amended by the Courts Act 2003 s 109(1), Sch 8 para 384). Where no reply is received within the specified period the court may extend the period, either of its own motion or on the application of the defendant: CrimPR 31.1(8).

21 Youth Justice and Criminal Evidence Act 1999 s 38(4).

22 Ibid s 38(5). The court officer must notify all parties to the proceedings of the name and address of the representative, whose appointment ordinarily terminates at the conclusion of the cross-examination of the witness or witnesses: CrimPR 31.2.

23 Youth Justice and Criminal Evidence Act 1999 ss 38(8), 39(2).

24 Ibid s 39(1)(a) (s 39(1) amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 74, 76).

25 Ie under the Youth Justice and Criminal Evidence Act 1999 s 38(4): see the text and notes supra.

26 Ibid s 39(1)(b) (as amended: see note 24 supra).

## UPDATE

### 1441 Restrictions on cross-examination by defendant in person

NOTE 2--Youth Justice and Criminal Evidence Act 1999 s 62(1) amended, s 62(1A) added: Criminal Justice and Immigration Act 2008 Sch 26 para 37. The amendment made by Sch 26 para 37 is deemed to have had effect as from 1 May 2004: Sch 26 para 38.

TEXT AND NOTE 9--Youth Justice and Criminal Evidence Act 1999 s 35(3) further amended, s 35(3A) added: Criminal Justice and Immigration Act 2008 Sch 26 para 36. The amendment made by Sch 26 para 36 is deemed to have had effect as from 1 May 2004: Sch 26 para 38.

NOTES 12, 16-22--CrimPR Pt 31 now Criminal Procedure Rules 2010, SI 2010/60, Pt 31.

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#### **1442. Failure to cross-examine.**

As a general rule, a party who fails to cross-examine a witness upon any matter tacitly accepts the truth of the witness's evidence in chief on that matter, and will not thereafter be entitled to challenge or contradict it by other evidence, or invite the jury to disbelieve him in that regard<sup>1</sup>.

Two exceptions to this general rule have been recognised. The first is that in summary proceedings, where parties may lack experienced advocates who understand the importance of the rule, it cannot be said, as a matter of law, that justices must accept a witness's evidence merely because he has not been cross-examined<sup>2</sup>. The second is that there may be cases in which it is perfectly clear to the witness that his evidence is disputed, or is inconsistent with evidence that has gone before, and in which no injustice would be done by failure to cross-examine him<sup>3</sup>.

1 *R v Hart* (1932) 23 Cr App Rep 202, CCA; *R v Bircham* [1972] Crim LR 430, CA; *R v Fenlon* (1980) 71 Cr App Rep 307, CA; *R v Wood Green Crown Court, ex p Taylor* [1995] Crim LR 879, DC. See also *Browne v Dunn* (1893) 6 R 67 at 76, HL, per Lord Halsbury. Where evidence is later adduced in contradiction of a witness who has not previously been cross-examined on that particular matter, it may be necessary to recall that witness in order to cross-examine him on it: *R v Cannan* [1998] Crim LR 284, CA.

2 *O'Connell v Adams* [1973] Crim LR 313, DC.

3 *R v Lovelock* [1997] Crim LR 821, CA; *Wilkinson v DPP* [2003] EWHC 865 (Admin), [2003] All ER (D) 294 (Feb).

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### **1443. Cross-examination as to credit.**

Cross-examination as to credit involves an attempt to undermine a witness's testimony by means of an attack on the witness's personal credibility as opposed to the specific content of his testimony<sup>1</sup>. The distinction is potentially important, because as a general rule any answers given by the witness to questions going merely to credibility are collateral and final and evidence is not admissible to contradict them, whereas evidence may be adduced to contradict answers given under cross-examination in respect of the facts in issue<sup>2</sup>.

Cross-examination as to credit will generally involve attempts to establish that the witness is a person of bad character or reputation, or that he has in the past committed or been convicted of criminal offences or has been guilty of other forms of misconduct. Cross-examination on such matters is now regulated primarily by statute<sup>3</sup>. Notice in the prescribed form must be given of any intention to cross-examine a witness as to his (or any other person's) previous convictions, or as to any misconduct or disposition thereto, other than where this (1) has to do with the alleged facts of the offence with which the defendant is charged; or (2) is evidence of misconduct in connection with the investigation or prosecution of that offence<sup>4</sup>. Save where the witness concerned is a defendant, or where all parties agree to it, no such cross-examination may then take place without leave of the court<sup>5</sup>. Other legislation restricts the right of a defendant in proceedings concerning alleged sexual offences from cross-examining a complainant as to the complainant's sexual behaviour on other occasions<sup>6</sup>, particularly where the apparent purpose of such questioning is to impugn the credibility of complainants<sup>7</sup>.

Cross-examination as to credit may not necessarily involve allegations of bad character. It may for example be possible to impugn the credibility of a witness to identification by cross-examining that witness as to deficiencies in his eyesight or in his ability to recall facial features. In such cases the right to cross-examine remains governed by the common law<sup>8</sup>.

A witness may also be cross-examined as to any previous oral or written statement made by him which is inconsistent with his testimony in court<sup>9</sup>, or as to his impartiality or his relationship or connection with any person for or in respect of whom he gives evidence<sup>10</sup>.

1 The credibility of any witness who testifies as to the facts, whether for the prosecution or for the defence, is a relevant matter, although collateral to the facts in issue: *R v Baker* [1895] 1 QB 797, CCR. See also *R v Garner* (1889) 61 LT 699, CCR.

2 *R v Cargill* [1913] 2 KB 271, 8 Cr App Rep 224, CCA; *A-G v Hitchcock* (1847) 1 Exch 91 at 99 per Pollock CB; *Harris v Tippet* (1811) 2 Camp 637 at 638, 170 ER 1277 at 1278 per Lawrence J; *R v Edwards* [1991] 2 All ER 266, 93 Cr App Rep 48, CA; *Nicholls v R* [2005] HCA 1, Aust HC. In practice it may frequently be difficult to determine whether the matter upon which it is sought to contradict the witness goes only to credit: see eg *R v Busby* (1981) 75 Cr App Rep 79, CA; *R v Phillips* (1936) 26 Cr App Rep 17, CCA; *R v Funderburk* [1990] 2 All ER 482, 90 Cr App Rep 466, CA. As to collateral evidence generally see PARA 1444 post.

3 See the Criminal Justice Act 2003 ss 98-113; and PARA 1502 et seq post. See also the Criminal Procedure Act 1865 s 6 (as amended); and PARA 1445 post.

4 See PARA 1502 et seq post. See also CrimPR 35 which specifies the practice and procedure to be followed in the criminal courts in connection with cross-examination as to bad character.

5 See PARA 1504 post. As to cross-examination of a defendant on his character see PARA 1505 et seq post.

6 See the Youth Justice and Criminal Evidence Act 1999 s 41; and PARA 1446 post.

7 In particular, no evidence or question concerning about any sexual behaviour of the complainant in such a case may be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness: *ibid* s 41(4). This prevents the defence from suggesting that a promiscuous complainant lacks credibility merely on account of such promiscuity; but it must not be used to prevent cross-examination as to any sexual behaviour which is properly admissible as bearing on the issue of consent: *R v A* [2001] UKHL 25 at [138], [2002] 1 AC 45 at [138], [2001] 2 Cr App Rep 351 at [138] per Lord Hutton. See also *R v Martin* [2004] EWCA Crim 916, [2004] 2 Cr App Rep 354, sub nom *R v M* [2004] All ER (D) 487 (Mar); *R v F* [2005] EWCA Crim 493, [2005] 1 WLR 2348, [2005] All ER (D) 58 (Mar).

8 The general rule here is that since the purpose of cross-examination as to credit is to show that the witness ought not to be believed on oath, the matters about which he is questioned must (in order to be admissible) relate to his likely standing after cross-examination with the tribunal which is trying him or listening to his evidence: *R v Sweet-Escott* (1971) 55 Cr App Rep 316 per Lawton J at 320; approved *R v Funderburk* [1990] 2 All ER 482, 90 Cr App Rep 466, CA; *R v Edwards* [1991] 2 All ER 266, 93 Cr App Rep 48, CA.

9 See the Criminal Procedure Act 1865 ss 4, 5; and PARA 1445 post.

10 *R v Yewin* (1811) 2 Camp 638n; *Thomas v David* (1836) 7 C & P 350; *R v Shaw* (1888) 16 Cox CC 503; see also *R v Denley, Bovey and Rawlinson* [1970] Crim LR 583; *R v Mendy* (1976) 64 Cr App Rep 4, CA; *R v Marsh* (1985) 83 Cr App Rep 165, CA; *R v Edwards* [1991] 2 All ER 266, 93 Cr App Rep 48, CA.

## UPDATE

### 1443 Cross-examination as to credit

NOTE 4--CrimPR Pt 35 now Criminal Procedure Rules 2010, SI 2010/60, Pt 35.

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#### **1444. Finality of answers on credit and other collateral issues.**

The general rule at common law is that answers of witnesses to questions pertaining to matters collateral to the proceedings are final<sup>1</sup>. This does not mean that a witness's answers to such questions must necessarily be believed. It merely prevents the cross-examiner from calling further evidence in respect of matters which are not directly relevant to the issues in the proceedings. Collateral matters do not bear directly on the facts in issue in the trial, but on matters such as the character of a defendant or the credibility or consistency of a witness<sup>2</sup>.

The distinction between questions which are merely collateral and those which are directly relevant to the issue can be difficult to apply in practice. It is virtually impossible to identify matters that will always be collateral or will always be relevant to the facts in issue<sup>3</sup>. Cases often turn on their own particular facts and the final classification may need to be based on the court's sense of justice rather than on any precise philosophical or analytical process<sup>4</sup>. In some cases the importance of the distinction is rendered largely academic by rules that permit the contradiction of a witness's answers even on matters which might be considered collateral to the proceedings<sup>5</sup>.

1 'Policy considerations provide the rationale for the collateral evidence rule. The reasons for the rule are generally practical: it is based on principles of case management, such as the desirability of avoiding a multiplicity of issues and of protecting the efficiency and cost-effectiveness of the trial process by preventing the parties from litigating matters of marginal relevance; [but] it is also based on the need to be fair to the witness': *Nicholls v R* [2005] HCA 1 at [39], Aust HC, per McHugh J. See also *R v Mendy* (1976) 64 Cr App Rep 4 at 5, CA, per Lord Lane CJ: 'The rule is of great practical use. It serves to prevent the indefinite prolongation of trials which would result from a minute examination of the character and credit of witnesses'.

2 'The test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your own part to prove in evidence (if it have such a connection with the issues, that you would be allowed to give it in evidence) then it is a matter on which you may contradict him': *A-G v Hitchcock* (1847) 1 Exch 91 at 99, 154 ER 38 at 42 per Pollock CB. As to evidence of bad character see PARA 1502 et seq post.

3 *Nicholls v R* [2005] HCA 1, Aust HC; *R v Mendy* (1976) 64 Cr App Rep 4, CA.

4 *R v Funderburk* [1990] 2 All ER 482, 90 Cr App Rep 466, CA; *R v Busby* (1981) 75 Cr App Rep 79, CA; *R v Edwards* [1991] 2 All ER 266, 93 Cr App Rep 48, CA. See also *R v Phillips* (1936) 26 Cr App Rep 17, CCA (on a charge of incest, the defence alleged that the defendant's two daughters, who were the complainants, had been rehearsed by their mother in false testimony. They denied this in cross-examination and denied having admitted to other persons that their allegations were false. Held: the judge ought to have allowed the defence to call witnesses to whom it was claimed the complainants had made such admissions, because this went to the heart of the prosecution case, suggesting that it may have been a complete invention).

5 See PARA 1445 post.

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#### **1445. Exceptions to the finality rule.**

There are certain exceptions to the general rule by which evidence may not ordinarily be called to contradict the answers of a witness on a collateral issue such as that of the witness's own credibility<sup>1</sup>. The following statutory and common law exceptions to that rule now apply in criminal cases.

- 2173 (1) If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement<sup>2</sup>.
- 2174 (2) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it is competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit<sup>3</sup>.
- 2175 (3) If, upon a witness being lawfully questioned as to whether he has been convicted of any offence<sup>4</sup>, he either denies or does not admit the fact, or refuses to answer, it is lawful for the cross-examining party to prove such conviction<sup>5</sup>.
- 2176 (4) It is permissible to call evidence to contradict a witness's denial of bias or partiality towards one of the parties and to show that he is prejudiced so far as the case being tried is concerned<sup>6</sup>.
- 2177 (5) Medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence. Such evidence is not confined to a general opinion of the unreliability of the witness, but may give all the matters necessary to show not only the foundation of and reasons for the diagnosis but also the extent to which the credibility of the witness is affected<sup>7</sup>.
- 2178 (6) Where a witness's reputation for untruthfulness is properly admissible on the issue of his credibility<sup>8</sup>, that reputation may be demonstrated by calling another witness, who may be asked whether he knows of the impugned witness's general reputation and whether from that knowledge he would believe the impugned witness's testimony<sup>9</sup>.

1 As to this rule see PARA 1444 ante.

2 Criminal Procedure Act 1865 s 4. It is for the court or judge to determine whether the previous statement does indeed relate to the subject-matter of the indictment or proceeding: *R v Hart* (1957) 42 Cr App Rep 47, CCA; *R v Bashir and Manzur* [1969] 3 All ER 692, 52 Cr App Rep 1, CA. Once evidence of the previous statement

is admitted under the Criminal Procedure Act 1865 s 4, it may now be considered admissible as evidence of any matter stated in it of which oral evidence by the witness would have been admissible: Criminal Justice Act 2003 s 119(1)(b). As to the proof of previous inconsistent statements made by witnesses who have been ruled hostile, see the Criminal Procedure Act 1865 s 3; *R v Booth* (1981) 74 Cr App Rep 123, CA; and PARA 1436 ante.

3 Criminal Procedure Act 1865 s 5. See *R v Anderson* (1929) 21 Cr App Rep 178, CCA. Once evidence of the previous statement is admitted under the Criminal Procedure Act 1865 s 5, it may now be considered admissible as evidence of any matter stated in it of which oral evidence by the witness would have been admissible: Criminal Justice Act 2003 s 119(1)(b).

4 It is lawfully questioned in accordance with the restrictions imposed by *ibid* s 100 (witnesses other than defendants) or s 101 (defendants) and in accordance with CrimPR Pt 35: see PARA 1504 et seq post.

5 Criminal Procedure Act 1865 s 6 (amended by the Police and Criminal Evidence Act 1984 ss 119(2), (3), 120, Sch 7 Pt IV; the Criminal Justice Act 2003 s 331, Sch 36 Pt 5 para 79(a)).

6 *R v Mendy* (1976) 64 Cr App Rep 4 at 5, CA, per Lord Lane CJ. See also *R v Yewin* (1811) 2 Camp 638n; *Thomas v David* (1836) 7 C & P 350; *R v Shaw* (1888) 16 Cox CC 503; *R v Marsh* (1985) 83 Cr App Rep 165, CA; *R v Edwards* [1991] 2 All ER 266, 93 Cr App Rep 48, CA.

7 *Toohey v Metropolitan Police Comr* [1965] AC 595 at 609, [1965] 1 All ER 506 at 511, HL, per Lord Pearce; *R v Mackenney*, *R v Pinfold* [2003] EWCA Crim 3643, [2004] 2 Cr App Rep 32, [2003] All ER (D) 255 (Dec). As to the admissibility of expert evidence concerning the dangers of childhood amnesia in cases where adult witnesses testify concerning childhood events, see *R v H*; *R v G* [2005] EWCA Crim 1828, sub nom *R v X* [2005] All ER (D) 06 (Jul).

8 Such evidence must necessarily be evidence of bad character, and its admissibility is accordingly governed (in the case of a defendant) by the Criminal Justice Act 2003 s 101 and associated provisions (see PARA 1505 et seq post) and in the case of witness who is not a defendant by s 100 (see PARA 1504 post).

9 *Toohey v Metropolitan Police Comr* [1965] AC 595, [1965] 1 All ER 506, HL; *R v Bogie* [1992] Crim LR 301, CA; *R v Richardson* [1969] 1 QB 299 at 304, sub nom *R v Longman and Richardson* [1968] 2 All ER 761 at 764, CA, per Edmund Davies LJ. The common law rule applied in these cases is preserved by the Criminal Justice Act 2003 ss 99(2), 118(1), but only so far as they allow the court to treat such evidence as proving or disproving the matter concerned.



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#### **1446. Protection of complainants in proceedings for sexual offences.**

Where a defendant is charged with a sexual offence<sup>1</sup>, then, except with the leave of the court, no evidence may be adduced at the trial, and no question may be asked in cross-examination, by or on behalf of any defendant at the trial<sup>2</sup>, about any sexual behaviour<sup>3</sup> of the complainant<sup>4</sup>. The court may give leave in relation to any such evidence or question only on an application made by or on behalf of a defendant<sup>5</sup>, and may not give such leave unless it is satisfied:

- 2179 (1) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case<sup>6</sup>; and
- 2180 (2) that in addition one of two of the following statutory requirements<sup>7</sup> is satisfied<sup>8</sup>.

The first requirement is satisfied if the evidence or question (which must concern specific instances of sexual behaviour, and not merely general evidence of character or reputation<sup>9</sup>) relates to a relevant issue in the case<sup>10</sup> and either:

- 2181 (a) that issue is not an issue of consent<sup>11</sup>; or
- 2182 (b) it is an issue of consent and the sexual behaviour of the complainant<sup>12</sup> to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the defendant<sup>13</sup>; or
- 2183 (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar to: (i) any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the defendant) took place as part of the event which is the subject matter of the charge against the defendant<sup>14</sup>; or (ii) any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event<sup>15</sup>, that the similarity cannot reasonably be explained as a coincidence<sup>16</sup>.

The second (alternative) statutory requirement is satisfied if the evidence or question:

- 2184 (A) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant<sup>17</sup>; and
- 2185 (B) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the defendant<sup>18</sup>.

1 For the meaning of 'sexual offence' see PARA 1418 note 12 ante. The Secretary of State may by order make such provision as he considers appropriate for adding or removing, for the purposes of the Youth Justice and Criminal Evidence Act 1999 s 41, any offence to or from the offences which are sexual offences for the purposes of the Youth Justice and Criminal Evidence Act 1999 by virtue of s 62 (see PARA 1418 note 12 ante); s 42(2).

2 The prohibition thus extends not only to cross-examination of the complainant by the defence, but to questions asked in cross-examination of other witnesses (who may be witnesses for the prosecution or for a co-defendant) and to evidence given in chief by or on behalf of the defendant. It does not apply, however, to the prosecution: *R v Renda* [2005] EWCA Crim 2826, [2006] 2 All ER 553.

3 For this purpose, 'sexual behaviour' means any sexual behaviour or other sexual experience, whether or not involving any defendant or other person, but excluding anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused: Youth Justice and Criminal Evidence Act 1999 s 42(1)(c). As to what is sexual behaviour, this is largely a matter of impression and common sense, but there may be borderline cases and it is not possible to provide a precise definition: *R v Mukadi* [2003] EWCA Crim 3765 at [14], [2004] Crim LR 373, [2003] All ER (D) 327 (Nov); cf the Sexual Offences Act 2003 s 78; and PARA 162 ante.

Evidence that the complainant is or has been a prostitute is evidence of sexual behaviour and is prima facie inadmissible (*R v White* [2004] EWCA Crim 946, [2004] All ER (D) 103 (Mar)), as is evidence that the defendant and complainant have had a consensual sexual relationship in the past (although there may be exceptional circumstances in which cross-examination or evidence concerning such matters will become admissible). Evidence of demonstrably false accusations made by the complainant on other occasions is not 'evidence of sexual behaviour'; but where the defence seeks to cross-examine a complainant as to statements made (or not made) by the complainant concerning other sexual incidents (eg previous complaints as to offences allegedly committed by other persons) it may be difficult to determine whether this concerns the complainant's veracity, general credibility or sexual behaviour, and therefore a ruling should be obtained from the court before any such cross-examination is attempted, and there must be a proper evidential basis for the defence claims before any such cross-examination is permitted: *R v T*; *R v H* [2001] EWCA Crim 1877, [2002] 1 All ER 683, sub nom *R v BT*, *R v MH* [2002] 1 Cr App Rep 254.

A further complication is that the complainant may insist that the earlier complaints (even if ineffective in securing convictions) were true, whereas the defence may argue that the complainant consented to or instigated the incidents giving rise to those complaints, and this would inevitably involve questioning as to previous sexual behaviour. See also *R v Singh (Gulab)* [2003] EWCA Crim 485, sub nom *R v S* [2003] All ER (D) 408 (Feb); *R v H (Stephen)* [2003] EWCA Crim 2367, [2003] All ER (D) 332 (Jul); *R v E* [2004] EWCA Crim 1313, [2005] Crim LR 227; *R v Garaxo* [2005] EWCA Crim 1170, [2005] Crim LR 883, [2005] All ER (D) 363 (Apr); cf *R v Lloyd* [2005] EWCA Crim 1111, [2005] All ER (D) 317 (Apr).

4 Youth Justice and Criminal Evidence Act 1999 s 41(1). For the meaning of 'complainant' see *R v M* [2006] All ER (D) 164 (May), CA; and PARA 1418 note 11 ante. Nothing in the Youth Justice and Criminal Evidence Act 1999 s 41 authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from s 41: s 41(8). Where s 41 applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence: (1) it ceases to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but (2) it does not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge: s 41(7).

5 Applications for leave must be made and determined in accordance with *ibid* s 43 and CrimPR 36.1: see PARA 1447 post.

6 Youth Justice and Criminal Evidence Act 1999 s 41(2)(b). See *R v Mokrecovas* [2001] EWCA Crim 1644, [2002] 1 Cr App Rep 226; *R v Bahador* [2005] EWCA Crim 396, sub nom *R v Bahadoor* [2005] All ER (D) 220 (Feb).

7 Ie those under the Youth Justice and Criminal Evidence Act 1999 s 41(3) or s 41(5): see the text and notes *infra*.

8 *Ibid* s 41(2)(a). Note that on a literal interpretation of s 41(2) a court may be constrained to forbid cross-examination (or the adduction of evidence) concerning such behaviour, even when strongly of the opinion that such a ruling may render the jury's verdict unsafe; but see *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, [2001] 3 All ER 1, HL; *R v R* [2003] EWCA Crim 2754, [2003] All ER (D) 346 (Oct), in each of which the Human Rights Act 1998 s 3 was held to require a more flexible interpretation of the Youth Justice and Criminal Evidence Act 1999 s 41(2), thereby enabling such a ruling to be avoided.

9 See *ibid* s 41(6).

10 A 'relevant issue in the case' means any issue falling to be proved by the prosecution or defence in the trial of the defendant: *ibid* s 42(1)(a). No evidence or question may be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness: s 41(4). This provision prevents the defence from invoking the myth or heresy that a complainant's sexual history may cast doubt on his or her general credibility; but it must be carefully handled so as to secure the availability of evidence of sexual behaviour which is properly admissible as bearing on the issue of consent:

*R v A* [2001] UKHL 25 at [138], [2002] 1 AC 45 at [138], [2001] 3 All ER 1 at [138] per Lord Hutton. See also *R v Martin* [2004] EWCA Crim 916, [2004] 2 Cr App Rep 354 (sub nom *R v M* [2004] All ER (D) 487 (Mar)); *R v F* [2005] EWCA Crim 493, [2005] 1 WLR 2848, [2005] All ER (D) 58 (Mar); *R v Darnell* [2002] EWCA Crim 176, [2003] All ER (D) 24 (Feb), but cf *R v Singh (Gulab)* [2003] EWCA Crim 485, sub nom *R v S* [2003] All ER (D) 408 (Feb).

11 Youth Justice and Criminal Evidence Act 1999 s 41(3)(a). An 'issue of consent' means any issue whether the complainant in fact consented to the conduct constituting the offence with which the defendant is charged (and accordingly does not include any issue as to the belief of the defendant that the complainant so consented): s 42(1)(b). In many of the offences under the Sexual Offences Act 2003 to which the Youth Justice and Criminal Evidence Act 1999 now applies, consent or the lack of consent can never be an issue. Even in respect of crimes such as rape there will be no issue of consent where the defendant denies that any sexual contact occurred, nor where he now admits that the complainant did not consent but alleges that at the time he mistakenly believed she did: see *R v A* [2001] UKHL 25 at [79], [2002] 1 AC 45 at [79], [2001] 3 All ER 1 at [79] per Lord Hope of Craighead. Where the relevant issue is not one of consent, leave can more easily be given because the additional conditions or requirements imposed by the Youth Justice and Criminal Evidence Act 1999 s 41(1)(b) or (c) are not then applicable: see heads (b)-(c) in the text.

12 See notes 3, 4, 10 *supra*.

13 Youth Justice and Criminal Evidence Act 1999 s 41(3)(b). The court may thus give leave for a complainant to be cross-examined about his or her sexual behaviour shortly before or shortly after the time of the alleged offence (eg within a 24 hour period before or after the alleged offence) or for the defence to call evidence of such behaviour: see *R v A* [2001] UKHL 25 at [40], [2002] 1 AC 45 at [40], [2001] 3 All ER 1 at [40] per Lord Steyn; *R v Mukadi* [2003] EWCA Crim 3765, [2004] Crim LR 373, [2003] All ER (D) 327 (Nov); *R v T* [2004] EWCA Crim 1220, [2004] 2 Cr App Rep 551, sub nom *R v Tahed* [2004] All ER (D) 346 (Feb).

Note that no leave is required before the complainant is cross-examined as to his or her behaviour at the time of (or during) the alleged offence, but where leave is required a court may grant such leave only where it considers this to be necessary under the Youth Justice and Criminal Evidence Act 1999 s 41(2)(b) in order to avoid the risk of an unsafe verdict: see *R v Bahador* [2005] EWCA Crim 396, sub nom *R v Bahadoor* [2005] All ER (D) 220 (Feb); and the text and note 6 *supra*.

14 Youth Justice and Criminal Evidence Act 1999 s 41(3)(c)(i). 'Sexual behaviour' bears the same meaning as elsewhere in s 41 (see note 3 *supra*) save that it does not, in this context, exclude anything alleged to have taken place as part of the event which is the subject matter of the charge against the defendant: s 42(1)(c).

15 *Ibid* s 41(3)(c)(ii).

16 *Ibid* s 41(3)(c). Such behaviour (or alleged behaviour) may have involved the defendant or other persons and may have taken place either before or after the events giving rise to the alleged offence: *R v Tahed* [2004] EWCA Crim 1220, [2004] All ER (D) 346 (Feb), sub nom *R v T* [2004] 2 Cr App Rep 551.

There is no need for any 'striking similarity'. It is only a similarity that is required, not an identity. The similarity must be such as cannot reasonably be explained as coincidence. That does not necessitate that the similarity has to be in some rare or bizarre conduct. So long as the particular factor is of a significance which goes beyond the realm of what could reasonably be explained as a coincidence, it should suffice: *R v A* [2001] UKHL 25 at [135], [2002] 1 AC 45 at [135], [2001] 3 All ER 1 at [135] per Lord Clyde.

17 Youth Justice and Criminal Evidence Act 1999 s 41(5)(a). 'Sexual behaviour' bears the same meaning as elsewhere in s 41 (see note 3 *supra*) save that it does not, in this context, exclude anything alleged to have taken place as part of the event which is the subject matter of the charge against the defendant: s 42(1)(c).

18 *Ibid* s 41(5)(b). See *R v Martin* [2004] EWCA Crim 916, [2004] 2 Cr App Rep 354, sub nom *R v M* [2004] All ER (D) 487 (Mar); *R v Mitchell* [2004] EWCA Crim 3206, [2004] All ER (D) 266 (Dec); *R v Singh (Gulab)* [2003] EWCA Crim 485, sub nom *R v S* [2003] All ER (D) 408 (Feb).

## UPDATE

### 1446 Protection of complainants in proceedings for sexual offences

NOTE 4--The absence of a provision expressly stating that the 1999 Act s 41 continues to apply following the Criminal Justice Act 2003 does not prevent the court from having jurisdiction, in respect of trials that take place on or after the coming into force of the 2003 Act for sexual offences committed before that date, to preclude the cross-examination of a complainant about her sexual history: *R v C* [2007] EWCA Crim 2581,

[2008] 1 WLR 966. See *R v D* [2009] All ER (D) 46 (Oct), CA (previous allegation of rape by complainant that was not prosecuted did not justify cross-examination).

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#### **1447. Procedure for applications for leave to adduce evidence as to complainant's sexual behaviour.**

In proceedings for a sexual offence<sup>1</sup> an application for leave to adduce evidence as to any sexual behaviour of the complainant<sup>2</sup>, or to ask questions in cross-examination of any witness concerning such behaviour of the complainant, must be heard in private and in the absence of the complainant<sup>3</sup>.

Where such an application has been determined, the court must state in open court (but in the absence of the jury, if there is one): (1) its reasons for giving, or refusing, leave<sup>4</sup>; and (2) if it gives leave, the extent to which evidence may be adduced or questions asked in pursuance of the leave, and, if it is a magistrates' court, must cause those matters to be entered in the register of its proceedings<sup>5</sup>.

1 For the meaning of 'sexual offence' see PARAS 1418 note 12, 1446 note 1 ante.

2 le leave under the Youth Justice and Criminal Evidence Act 1999 s 41: see PARA 1446 ante. For the meaning of 'sexual behaviour' see PARA 1446 note 3 ante. For the meaning of 'complainant' see PARA 1418 note 11 ante.

3 Ibid s 43(1). The CrimPR make provision for the procedures governing the making and consideration of such an application: see the Youth Justice and Criminal Evidence Act 1999 s 43(3) (amended by the Courts Act 2003 s 109(1), Sch 8 para 384(g)); CrimPR 36.1.

4 Youth Justice and Criminal Evidence Act 1999 s 43(2)(a).

5 Ibid s 43(2)(b).

#### **UPDATE**

#### **1447 Procedure for applications for leave to adduce evidence as to complainant's sexual behaviour**

NOTE 3--CrimPR Pt 36 now Criminal Procedure Rules 2010, SI 2010/60, Pt 36.

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#### **1448. Re-examination.**

Following cross-examination, a witness may be re-examined by the party calling him. Re-examination must be confined to matters raised in cross-examination, although additional evidence may be adduced in so far as it bears on matters arising in cross-examination<sup>1</sup>. Re-examination may be carried out with a view to restoring the witness's original testimony, or with a view to re-establishing his credit.

Occasionally, evidence may be admissible in re-examination which was not admissible during examination in chief<sup>2</sup>. Where, for example, an allegation has been made that the witness has fabricated his evidence, it may be permissible for him to be re-examined in respect of a previous consistent statement, if this tends to rebut the allegation of fabrication<sup>3</sup>. This may happen if it can be shown that the witness made a statement consistent with his present testimony at a time before the alleged decision to fabricate was made.

Aside from cases in which the nature of the cross-examination allows the admission of evidence which otherwise would not have been admissible in examination in chief, the principles of re-examination are similar to those of examination in chief. Counsel therefore may not ask leading questions<sup>4</sup> or seek to elicit evidence which is otherwise inadmissible, nor may he treat his witness as hostile except with the leave of the judge<sup>5</sup>.

Where the prosecution calls a witness for the purpose of offering him to the defence for cross-examination, the failure of the prosecution to examine the witness in chief does not prevent his re-examination, but this must be confined to matters raised by his cross-examination<sup>6</sup>.

Where, during examination in chief, the prosecution has been granted leave to treat a witness as hostile, he may nevertheless be re-examined, but such re-examination should apparently be confined to 'completely and genuinely new' matters arising during cross-examination. Such matters should be identified before questions are put to the witness<sup>7</sup>.

A witness may be allowed to refresh his memory during re-examination. The principles are the same as those governing refreshing memory by a witness during his examination in chief<sup>8</sup>.

1 As to cross-examination see PARA 1440 et seq ante.

2 *R v Coll* (1889) 25 LR Ir 522; *R v Chambers* (1848) 3 Cox CC 92. As to examination in chief see PARAS 1433-1439 ante.

3 *R v Benjamin* (1913) 8 Cr App Rep 146, CCA; *R v Oyesiku* (1971) 56 Cr App Rep 240, CA.

4 As to leading questions see PARA 1434 ante.

5 Although it is rare for an application for a witness to be treated as hostile to be made during re-examination, rather than during examination in chief, this may be possible where the witness showed no hostility during examination in chief: *R v Powell* [1985] Crim LR 592, CA; *R v Norton and Driver* [1987] Crim LR 687, CA; cf *R v Booth* (1981) 74 Cr App Rep 123 at 131, CA, per Watkins LJ. As to hostile witnesses see PARA 1436 ante.

6 *R v Beezley* (1830) 4 C & P 220.

7 *R v Wong* [1986] Crim LR 683, Crown Court at Southwark.

8 *R v Sutton* (1991) 94 Cr App Rep 70, CA. As to refreshing memory see PARAS 1438-1439 ante.



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## **(10) CORROBORATION, LIES AND CARE WARNINGS**

### **1449. General principles.**

Corroboration, or corroborative evidence, is evidence which tends to confirm the truth or accuracy of other evidence by supporting it in some material particular<sup>1</sup>. Such evidence must itself be admissible and credible, and it must come from a source independent of any testimony which is to be supported by it<sup>2</sup>.

Corroborative evidence is always desirable where the truth or accuracy of the evidence it supports has been called into question, but it is only very rarely required by law. A conviction may at common law be based on the evidence of a single competent witness, or of a single document or exhibit, provided that this single piece of evidence is credible and by itself sufficient to convince the court or jury of the defendant's guilt<sup>3</sup>. Where the defendant bears a persuasive or evidential burden of proof, this burden can similarly be discharged, as a general rule, by one piece of evidence or by the testimony of a single witness<sup>4</sup>.

There are now very few statutory exceptions to this general rule<sup>5</sup>. Others have now been abolished<sup>6</sup>, as have certain common law rules of practice that formerly required judges to give juries complex and technical 'corroboration warnings' before allowing them to rely upon certain kinds of evidence that were considered inherently prone to the dangers of fabrication or fantasy<sup>7</sup>. It is now a matter for the judge's discretion what, if any, warning he considers appropriate in respect of evidence from a witness whose evidence may appear to be suspect or unreliable<sup>8</sup>.

1 *R v Baskerville* [1916] 2 KB 658, 12 Cr App Rep 81, CCA; *R v Jenkins* (1845) 1 Cox CC 177; *DPP v Hester* [1973] AC 296 at 325, 57 Cr App Rep 212 at 240, HL, per Lord Diplock. To be corroborative in the strict legal sense, prosecution evidence must implicate the defendant; evidence tending merely to show that a prosecution witness is truthful is not in itself corroborative of the case against the defendant: *R v Baskerville* supra; *R v Donat* (1985) 82 Cr App Rep 173, CA. On a charge of rape, evidence proving that sexual intercourse had taken place was not considered corroborative because it did not confirm either that rape had been committed or that the defendant had committed it: see *James v R* (1970) 55 Cr App Rep 299 at 303, PC, per Viscount Dilhorne.

2 *DPP v Kilbourne* [1973] AC 729, 57 Cr App Rep 381, HL; *R v Whitehead* [1929] 1 KB 99, 21 Cr App Rep 23, CCA. Evidence that is not strictly corroborative (either because it lacks independence or because it does not implicate the defendant) may still be useful, eg for the purpose of supporting the credibility of a witness or the accuracy of a witness's visual identification: *R v Turnbull and others* [1977] QB 224, 63 Cr App Rep 132, CA. See also PARA 1458 post.

3 *DPP v Hester* [1973] AC 296 at 324, 57 Cr App Rep 212 at 242, HL, per Lord Diplock; *DPP v Kilbourne* [1973] AC 729 at 739, 57 Cr App Rep 381 at 393, HL, per Lord Hailsham LC.

4 The only exception is that a defence of insanity may be put to the jury only if supported by the written or oral evidence of at least two expert medical witnesses, at least one of whom is approved by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder: see the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 1(1).

5 Apart from the special rule concerning medical evidence of insanity (as to which see note 4 supra), these exceptions are considered in PARA 1450 post.

6 'Procuring' offences under the Sexual Offences Act 1956, together with offences under s 4 (administering drugs in order to facilitate unlawful sexual intercourse) all required corroboration, until this requirement was abrogated by the Criminal Justice and Public Order Act 1994 s 33. The offences themselves were later repealed



by the Sexual Offences Act 2003 ss 139, 140, Sch 6 para 11, Sch 7 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 71). The unsworn testimony of a 'child of tender years' similarly required corroboration before any person could be convicted on such evidence (Children and Young Persons Act 1933 s 38; and see *DPP v Hester* [1973] AC 296, 57 Cr App Rep 212, HL) but this requirement was repealed by the Criminal Justice Act 1988 s 34. The Treason Act 1795, which contained further corroboration requirements, was repealed by the Crime and Disorder Act 1998 ss 36(3)(b), 120(2), Sch 10.

7 Any requirement whereby at a trial on indictment it was obligatory for the court to give the jury a warning about convicting the defendant on the uncorroborated evidence of a person merely because that person was (1) an alleged accomplice; or (2) where the offence charged was a sexual offence, the person in respect of whom it was alleged to have been committed, was abrogated by the Criminal Justice and Public Order Act 1994 s 32. The common law practice of requiring a corroboration warning to be given in respect of any prosecution evidence given by a child (even when that evidence was given on oath) was abrogated by the Criminal Justice Act 1988 s 34. Children aged under 14 years must now give evidence unsworn: see PARAS 1403-1404 ante.

8 *R v Makanjuola, R v Easton* [1995] 3 All ER 730, [1995] 2 Cr App Rep 469, CA; and see PARA 1453 post.

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#### **1450. Cases in which strict corroboration is still required.**

The only surviving cases in which strict corroboration of prosecution evidence remains a formal legal requirement are as follows. A person may not be convicted of any offence under the Perjury Act 1911<sup>1</sup> or of any other offence declared to be punishable as perjury or subornation of perjury<sup>2</sup> solely upon the evidence of one witness as to the falsity of any statement alleged to be false<sup>3</sup>. A similar rule applies to prosecutions for attempting to commit such offences<sup>4</sup>.

Corroboration of a sort is required in one further case. A motorist charged with a speeding offence may not be convicted solely on the evidence of one witness to the effect that, in the opinion of that witness, the motorist was exceeding a specified limit<sup>5</sup>. The witness may, however, support such opinion with his own reading of a speedometer or approved speed measuring device<sup>6</sup>. The requirement does not apply to opinion evidence based on an examination of accident damage or skid marks at the scene of an accident<sup>7</sup>.

1 As to perjury and related offences see PARA 712 et seq ante.

2 The corroboration rule also applies to offences under the Criminal Justice Act 1967 s 89(1), because the Perjury Act 1911 has effect as if the Criminal Justice Act 1967 s 89 were contained in the Perjury Act 1911: Criminal Justice Act 1967 s 89(2).

3 See the Perjury Act 1911 s 13; and PARA 723 ante. This does not expressly refer to 'corroboration', but corroboration is what it requires: *R v Hamid* (1979) 69 Cr App Rep 324, CA. It is required, however, only as to the falsity of a statement. No corroboration is required as to the wilfulness of the defendant's conduct or any other element of an offence under the Perjury Act 1911: *R v O'Connor* [1980] Crim LR 43, CA.

4 See the Criminal Attempts Act 1981 s 2(1), (2)(g); and PARA 79 ante.

5 See the Road Traffic Regulation Act 1984 s 89(2); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 856. But this does not require that the evidence of a witness in a speeding case must always be corroborated, nor does it preclude a conviction where the evidence of a single witness includes, as part of his observations and conclusions, an expression of opinion: *Crossland v DPP* [1988] 3 All ER 712, [1988] RTR 417, DC, per Hutchison J.

6 *Nicholas v Penny* [1950] 2 KB 466, sub nom *Penny v Nicholas* [1950] 2 All ER 89, DC; *Swain v Gillet* [1974] RTR 446, DC.

7 *Crossland v DPP* [1988] 3 All ER 712, [1988] RTR 417, DC.

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### **1451. What may amount to corroboration.**

Much of the law concerning what evidence may or may not suffice as corroboration is derived from cases concerning evidence given on behalf of the prosecution by children, accomplices of the defendant or complainants in sex cases. Strict corroboration warnings (identifying any possible sources of corroboration) were once mandatory in respect of such evidence<sup>1</sup>, but such requirements have now been abrogated<sup>2</sup>, and in consequence the importance of the issue is much reduced.

Evidence of a kind that would previously have been considered capable of providing corroboration will, however, remain capable of providing independent support for any evidence that might be considered suspect or unreliable in the absence of such support. Where, for example, the evidence of one witness might be doubted, the independent evidence of two or more might be considered worthy of belief<sup>3</sup>. Moreover, a defendant may in some cases unwittingly help to support or provide corroboration of the case against him, as for example where it is established that he has lied<sup>4</sup>, attempted to fabricate an alibi<sup>5</sup>, made incriminating admissions<sup>6</sup>, failed to deny an accusation made against him<sup>7</sup> or refused without good cause to provide a body sample for analysis<sup>8</sup>. Evidence of other misconduct which is admissible against the defendant may also be capable of affording corroboration<sup>9</sup>. Corroboration may be afforded by a combination of pieces of evidence which, taken together, tend to show that the defendant committed the crime, even though each item of evidence taken on its own would be insufficient<sup>10</sup>.

Where two persons are tried together, corroboration of the evidence against one does not necessarily amount to corroboration in respect of the other<sup>11</sup>.

1 See PARA 1449 ante.

2 See PARAS 1449-1450 ante.

3 See *R v Sims* [1946] KB 531, [1946] 1 All ER 697, CCA. Evidence which requires corroboration may be corroborated by evidence which itself requires corroboration, so that two suspect witnesses may each corroborate the other: *DPP v Hester* [1973] AC 296, 57 Cr App Rep 212, HL. Where there appears to be a risk of possible collusion between witnesses who might otherwise be seen to corroborate or support each other's stories, the jury must be directed not to accept the evidence unless they are satisfied that it is reliable and true and not tainted by collusion or other defects. If, in the course of the trial, the judge forms the view that no reasonable jury could be so satisfied, he should direct the jury that the evidence is not to be relied on, either as corroboration or for any other prosecution purpose; otherwise it is a matter for the jury: *R v H* [1995] 2 AC 596, sub nom *R v H(A)* [1995] 2 Cr App Rep 437, HL.

4 *R v Lucas* [1981] QB 720, 73 Cr App Rep 159, CA. The lie must be deliberate, relate to a material issue, and proceed from a realisation of guilt. Independent proof of the falsity of the statement must be given. Mere disbelief of the defendant's account is not enough: *R v Chapman* [1973] QB 774, 57 Cr App Rep 511, CA. See also *R v Clynes* (1960) 44 Cr App Rep 158, CCA; *Credland v Knowler* (1951) 35 Cr App Rep 48, DC; *R v Penman* (1985) 82 Cr App Rep 44, CA; *R v Rahmoun* (1985) 82 Cr App Rep 217, CA; *R v Burge*, *R v Pegg* [1996] 1 Cr App Rep 163, CA. A lie in relation to one charge may corroborate another only if it amounts to an attempt by the defendant to lie his way out of both charges: *R v West* (1984) 79 Cr App Rep 45, CA.

5 *R v Thorne* (1977) 66 Cr App Rep 6, CA; *R v Keane* (1977) 65 Cr App Rep 247, CA (false alibi may be relied upon to support disputed identification).

6 *R v Dossi* (1918) 87 LJB 1024, 13 Cr App Rep 158, CCA. A plea of guilty may be capable of corroborating a related charge: *R v Jarrett* [1985] Crim LR 306, CA.

7 *R v Cramp* (1880) 14 Cox CC 390; affd 5 QBD 307, CCR; and see PARAS 1541, 1551 post. As to the effect of a defendant's failure to testify and/or provide answers to police questions see PARA 1550 et seq post.

8 *R v Smith (Robert William)* (1985) 81 Cr App Rep 286, CA; and see the Police and Criminal Evidence Act 1984 s 62(10) (as amended); and PARA 1028 ante.

9 *R v Sims* [1946] KB 531, [1946] 1 All ER 697, CCA; *DPP v Kilbourne* [1973] AC 729, 57 Cr App Rep 381, HL; *DPP v Boardman* [1975] AC 421 (sub nom *Boardman v DPP* (1974) 60 Cr App Rep 165, HL). See also *R v Mitchell* (1952) 36 Cr App Rep 79, CA; *R v Johansen* (1977) 65 Cr App Rep 101, CA. As to the admissibility of evidence of a defendant's bad character see PARA 1502 et seq post.

10 *R v Hills* (1987) 86 Cr App Rep 26.

11 *R v Baskerville* [1916] 2 KB 658, 12 Cr App Rep 81, CCA; *R v Donat* (1985) 82 Cr App Rep 173, CA; but cf *R v Olaleye* (1986) 82 Cr App Rep 337, CA.

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### **1452. Direction as to corroboration.**

In those (now rare) cases where corroboration is still required by statute<sup>1</sup>, the trial judge must bring the need for corroboration to the attention of the jury, but it is not essential that he should refer to the relevant statute<sup>2</sup>. No particular form of words need be used in warning the jury so long as the direction is explicit and intelligible<sup>3</sup> and the legal requirement is explained<sup>4</sup>. The summing up should not contain a general disquisition on corroboration in legal language, but should be tailored to the particular circumstances of the case<sup>5</sup>.

Where there is evidence capable of amounting to corroboration, the judge must indicate that evidence to the jury<sup>6</sup>. Evidence which is incapable of affording corroboration, but which might be thought by the jury to have that effect, should also be identified<sup>7</sup>. It is the function of the trial judge to rule whether or not evidence is in law capable of amounting to corroboration, and, if it is, it is for the jury to decide whether the evidence in fact affords corroboration<sup>8</sup>.

<sup>1</sup> See PARA 1450 ante.

<sup>2</sup> *R v Saldanha* (1920) 90 LJB 97, CCA; *R v Southern* (1929) 22 Cr App Rep 6, CCA; *R v Gregg* (1932) 102 LJB 126, 24 Cr App Rep 13, CCA.

<sup>3</sup> *R v O'Reilly* [1967] 2 QB 722 at 727, 51 Cr App Rep 345 at 349, CA; *R v Henry*, *R v Manning* (1968) 53 Cr App Rep 150, CA; *R v Spencer*, *R v Smalls* [1987] AC 128, 83 Cr App Rep 277, HL.

<sup>4</sup> *R v Clynes* (1960) 44 Cr App Rep 158, CCA; *R v O'Reilly* [1967] 2 QB 722, 51 Cr App Rep 345, CA. It may, however, be best to avoid the use of the word 'corroboration' itself: *DPP v Kilbourne* [1973] AC 729 at 741, 57 Cr App Rep 381 at 394, HL, per Lord Hailsham LC.

<sup>5</sup> *DPP v Hester* [1973] AC 296 at 328, 57 Cr App Rep 212 at 249, HL, per Lord Diplock. As to the form of direction where there is an issue of possible collusion between witnesses, see *R v H* [1995] 2 AC 596, sub nom *R v H(A)* [1995] 2 Cr App Rep 437, HL; and PARA 1451 note 3 ante.

<sup>6</sup> *R v Goddard* [1962] 3 All ER 582 at 586, 46 Cr App Rep 456 at 461, CCA; *R v Charles* [1977] AC 177, 68 Cr App Rep 334, HL; *R v Reeves* (1978) 68 Cr App Rep 331, CA; *R v Cullinane (Stephen)* [1984] Crim LR 420, CA.

<sup>7</sup> *R v Goddard* [1962] 3 All ER 582, 46 Cr App Rep 456, CCA; *R v Spencer*, *R v Smalls* [1987] AC 128 at 140, 83 Cr App Rep 277 at 287, HL, per Lord Ackner.

<sup>8</sup> *R v Farid* (1945) 30 Cr App Rep 168 at 175, 176, CCA. See also *R v Clive* (1930) 22 Cr App Rep 19, CCA; *R v Pountney* [1989] Crim LR 216, CA. Whether evidence tendered as corroborative is believed or not is a question for the jury: *R v Threlfall* (1914) 10 Cr App Rep 112, 24 Cox C 230, CCA; *R v Tragen* [1956] Crim LR 332.

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### **1453. Judicial warnings in respect of suspect evidence.**

It is no longer obligatory for a judge to direct the jury that it is dangerous to convict a defendant on the uncorroborated evidence of a complainant in a sexual case or of an accomplice<sup>1</sup>; but in some cases (not necessarily cases involving sexual offences or accomplice evidence) a judge may still consider that some kind of warning is necessary<sup>2</sup>. The Court of Appeal has provided the following guidelines as to how such cases should be approached<sup>3</sup>.

- 2186 (1) It is a matter for the judge's discretion what, if any, warning he considers appropriate in respect of such a witness or indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and on what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
- 2187 (2) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting on the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence, nor will it necessarily be so because the witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable<sup>4</sup>. An evidential basis does not include a mere suggestion by cross-examining counsel.
- 2188 (3) If any question arises as to whether the judge should give a special warning in respect of the witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.
- 2189 (4) Where the judge does decide to give some warning in respect of the witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it, rather than as a set-piece legal direction.
- 2190 (5) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules<sup>5</sup>.
- 2191 (6) Attempts to re-impose the straitjacket of the old corroboration rules are strongly to be deprecated.
- 2192 (7) The Court of Appeal will be disinclined to interfere with the trial judge's exercise of his discretion, save in a case where that exercise is unreasonable in the *Wednesbury*<sup>6</sup> sense.

'Cell mate confessions', in which it is alleged that the defendant confessed to or boasted of his crime to a fellow prisoner when in custody, will often require some kind of warning, because of the ease with which such evidence can be fabricated and because of possible issues as to the motivation and integrity of any witnesses to the confession<sup>7</sup>. There is, however, no absolute rule to the effect that any specific warning is necessarily required in such cases. Such a rule would be inconsistent with the guidelines mentioned above<sup>8</sup>.

1 See the Criminal Justice and Public Order Act 1994 s 32; and PARA 1449 ante.

2 *R v Beck* [1982] 1 All ER 807, 74 Cr App Rep 221, CA; *R v Spencer*, *R v Smalls* [1987] AC 128, 83 Cr App Rep 277, HL; *R v Makanjuola*, *R v Easton* [1995] 3 All ER 730, [1995] 2 Cr App Rep 469, CA.

3 The guidelines set out in heads (1)-(7) in the text are derived from *R v Makanjuola*, *R v Easton* [1995] 3 All ER 730 at 733, [1995] 2 Cr App Rep 469 at 472-473, CA, per Lord Taylor CJ. See also *R v Sutton* [2005] EWCA Crim 190 at [51], [2005] All ER (D) 44 (Feb); *R v Jobe* [2004] EWCA Crim 3155, [2004] All ER (D) 163 (Dec).

4 *R v Makanjuola*, *R v Easton* [1995] 3 All ER 730 at 732, [1995] 2 Cr App Rep 469 at 472, CA, per Lord Taylor CJ: 'The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, the judge may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought to be appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence.' See also *R v R* [1996] Crim LR 815; *Pringle v R* [2003] UKPC 9, [2003] All ER (D) 235 (Jan). If the judge does suggest that it would be prudent for the jury to look for supporting evidence, he should identify any such potentially supportive evidence: see *R v B (MT)* [2000] Crim LR 181, CA. As to the form of direction where there is an issue of possible collusion between witnesses, see *R v H* [1995] 2 AC 596, sub nom *R v H(A)* [1995] 2 Cr App Rep 437, HL; and PARA 1451 note 3 ante.

5 See also *R v Muncaster* [1999] Crim LR 409, CA.

6 See *Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223, [1947] 2 All ER 680, CA; and JUDICIAL REVIEW vol 61 (2010) PARA 617. Cf *R v Walker* [1996] Crim LR 742, CA.

7 *Pringle v R* [2003] UKPC 9, [2003] All ER (D) 236 (Jan); *Benedetto v R* [2003] UKPC 27, [2003] 1 WLR 1545, [2003] Crim LR 880; *R v Price* [2004] EWCA Crim 1359, [2004] All ER (D) 461 (May).

8 *R v Stone (Michael)* [2005] EWCA Crim 105, [2005] Crim LR 569, [2005] All ER (D) 181 (Jan).

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#### **1454. Defendant's lies or other self-incriminating behaviour.**

A defendant may knowingly or unknowingly corroborate or support the case against him through his own admissions<sup>1</sup>, lies<sup>2</sup>, or other self-incriminating behaviour<sup>3</sup>. His failure promptly to disclose matters later relied upon in his defence<sup>4</sup>, to answer police questions concerning apparently incriminating facts<sup>5</sup> and/or to testify at his trial<sup>6</sup> may also enable a court or jury to draw such inferences as may seem appropriate; and this may include the inference that the defendant has (or had when first questioned) no answer to the prosecution case or none that could withstand cross-examination<sup>7</sup>.

Lies or apparent lies told by a defendant raise particular difficulties<sup>8</sup>. Where it appears that the defendant has lied, whether before the trial or in the course of his evidence, or both (for example by concocting or attempting to concoct a false alibi) and there appears to be a danger that a jury will jump at once to the conclusion that he must therefore be guilty, the jury must be warned that such lies may support or corroborate other evidence against him if, but only if, certain criteria are satisfied<sup>9</sup>, namely:

- 2193 (1) The lie must be deliberate.
- 2194 (2) It must refer to a material issue.
- 2195 (3) The motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family<sup>10</sup>.
- 2196 (4) It must clearly be shown to be a lie by independent evidence, other than that which it is taken to support<sup>11</sup>.

It does not follow that such a direction is needed wherever there is a conflict between the evidence of the defendant and that of the prosecution's witnesses. In some cases the jury merely has to decide whether to believe the defendant or his accusers, and in such a case a complex direction as to inferences from lies would merely confuse matters<sup>12</sup>.

1 As to admissions and confessions see PARA 1537 et seq post.

2 *Credland v Knowler* (1951) 35 Cr App Rep 48, DC.

3 See eg the Police and Criminal Evidence Act 1984 s 62(10) (as amended) (refusal to provide intimate samples); and PARA 1028 ante.

4 See the Criminal Justice and Public Order Act 1994 s 34 (as amended); and PARA 1552 post.

5 See *ibid* ss 36, 37 (as amended); and PARAS 1553-1554 post.

6 See *ibid* s 35 (as amended); and PARA 1555 post.

7 *R v Cowan* [1996] QB 373, [1996] 1 Cr App Rep 1, CA; and see PARA 1555 post.

8 *Broadhurst v R* [1964] AC 441 at 457, [1964] 1 All ER 111 at 119, PC, per Lord Devlin.



9 *R v Lucas* [1981] QB 720, 73 Cr App Rep 159, CA. Such a direction is commonly referred to as a '*Lucas* direction': see the criteria set out in heads (1)-(4) in the text. See also *R v Burge*, *R v Pegg* [1996] 1 Cr App Rep 163, CA; *R v Armstrong* [2005] EWCA Crim 1299, [2005] All ER (D) 139 (May).

10 See also *R v Goodway* [1993] 4 All ER 894, 98 Cr App Rep 11, CA; *R v Taylor* [1998] Crim LR 822, CA. In cases involving alibis, juries may need to be warned that false alibis are sometimes given in order to boost genuine defences (*R v Lesley* [1996] 1 Cr App Rep 39, CA), but such a warning is not invariably required (*R v Harron* [1996] 2 Cr App Rep 457, CA).

11 The jury may simply prefer the evidence of a prosecution witness to that of the defendant, and may accordingly conclude that the defendant has lied, but it would be absurd in that kind of case to treat the conclusion that he has lied as supportive of their conclusion that the prosecution witness is truthful, because that would involve manifestly circular logic: see *R v Chapman* [1973] QB 774, 57 Cr App Rep 511, CA.

A lie in relation to one charge may corroborate another only if it amounts to an attempt by the defendant to lie his way out of both charges: *R v West* (1984) 79 Cr App Rep 45, CA.

12 A *Lucas* direction is generally required only where: (1) the defence relies on an alibi; (2) the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant; (3) the prosecution seeks to show that something said, either in or out of court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved; or (4) although the prosecution has not adopted that approach, the judge reasonably envisages that there is a real danger that the jury may do so: *R v Burge*, *R v Pegg* [1996] 1 Cr App Rep 163, CA. See also *R v Genus and Britton* [1996] Crim LR 502, CA; *R v Middleton* [2000] All ER (D) 453, CA; *R v Barnett* [2002] EWCA Crim 454 [2002] 2 Cr App Rep 168, CA; *R v Gultutan* [2006] EWCA Crim 207, [2006] All ER (D) 230 (Jan).

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## (11) IDENTIFICATION

### 1455. Proof of identity of defendant.

The identity of the defendant as the person who committed an alleged offence may be established in various ways, notably by visual or aural (voice) identification<sup>1</sup>, by fingerprints (including palm prints)<sup>2</sup>, by skin or footwear impressions<sup>3</sup>, by DNA profiles obtained from body samples<sup>4</sup>, by bite marks and dental impressions<sup>5</sup>, by handwriting<sup>6</sup>, by photographic or video evidence<sup>7</sup>, by evidence of his propensity to commit such an offence<sup>8</sup> and by evidence of any incriminating articles, injuries or marks found on him or his clothing or in his possession<sup>9</sup>.

Where the defendant has surrendered to bail for an offence, it may be inferred that he was the person arrested, charged and bailed in respect of it<sup>10</sup>. Difficulties may, however, arise where the evidence purporting to identify the defendant is a name and address given by a person who claimed to be the defendant, but who, according to the defendant, was not him at all<sup>11</sup>.

1 As to visual identification see PARAS 1456-1458 post; as to identification by voice see PARA 1459 post.

2 See PARA 1460 post.

3 For the meaning of 'skin impression' see PARA 1027 ante. As to the taking of such impressions see Code D: Code of Practice for the Identification of Persons by Police Officers para 6. As to the taking of footwear impressions, see PARA 1022 ante. As to Code D see PARA 1010 ante. As to the Codes of Practice under the Police and Criminal Evidence Act 1984 see further PARA 856 ante.

4 As to the use of DNA evidence at trial see PARA 1461 post. As to the procedure for taking body samples etc see Code D para 6; and PARA 1027 et seq ante. Intimate samples include blood, semen or tissue fluid, urine, pubic hair, dental impressions and swabs taken from a person's genitals or from orifices other than the mouth: see the Police and Criminal Evidence Act 1984 s 65(1) (definition as substituted and amended); and PARA 1027 ante. Non-intimate samples include saliva, skin impressions, mouth swabs and swabs not taken from body orifices: see s 65(1) (definition substituted and amended); and PARA 1027 ante. Hair samples may be plucked with roots for DNA testing: see s 63A(2) (as added); and PARA 1029 ante. Save as provided by s 63B (as added), an intimate sample may be taken from a person in police detention (or from a person who is not in police detention but from whom, in the course of the investigation of an offence, two or more non-intimate samples suitable for the same means of analysis have been taken which have proved insufficient) only if a police officer of at least the rank of inspector authorises it to be taken and only if the appropriate consent is given: see s 62(1), (1A) (as added); and PARA 1028 ante.

Where the appropriate consent to the taking of an intimate sample has been refused without good cause, in any proceedings against that person for an offence (1) the court, in determining whether there is a case to answer; (2) a judge, in deciding whether to grant an application made by the defendant for dismissal under the Crime and Disorder Act 1998 Sch 3; and (3) a court or jury, in determining whether that person is guilty of the offence charged, may draw such inferences from the refusal as appear proper: see the Police and Criminal Evidence Act 1984 s 62(10) (as amended); and PARA 1028 ante. A non-intimate sample may in some cases be taken without consent: see s 63 (as amended); and PARA 1029 ante.

The court has a power at common law to exclude evidence of an incriminating sample where to admit it would be adverse to the fairness of the proceedings: *R v Apicella* (1985) 82 Cr App Rep 295, [1986] Crim LR 238, CA. As to the principles governing the power of a court to exclude admissible prosecution evidence see PARA 1365 ante.

5 As to the taking of dental impressions (which are intimate samples under the Police and Criminal Evidence Act 1984 s 65(1) (as amended)) see s 62(9) (as substituted); and PARA 1028 ante.

6 As to the admissibility of expert and non-expert evidence of handwriting or signatures, see PARAS 1484, 1496 post. The recurrence of different writings of the same misspelling may tend to prove the identity of the writer: *Brookes v Tichborne* (1850) 5 Exch 929; *R v Voisin* [1918] 1 KB 531, 13 Cr App Rep 89, CCA; *R v Nottle* [2004] EWCA Crim 599, [2004] All ER (D) 442 (Mar). See also the Police and Criminal Evidence Act 1984 s 76(4) (b); and PARA 1548 post.

7 *Kajala v Noble* (1982) 75 Cr App Rep 149, [1982] Crim LR 433, CA; *R v Grimer* [1982] Crim LR 674, CA; *R v Fowden and White* [1982] Crim LR 588, CA (evidence excluded because identifying witness connected defendant with another offence); *R v Thomas* [1986] Crim LR 682, CA. Identification may also be aided by images taken by security cameras (*R v Dodson*, *R v Williams* [1984] 1 WLR 971, 79 Cr App Rep 220, CA) and such evidence may be enhanced by evidence from expert witnesses using techniques such as facial mapping (*R v Stockwell* (1993) 97 Cr App Rep 260, CA; *R v Hookway* [1999] Crim LR 750, CA; *A-G's Ref (No 2 of 2002)* [2002] EWCA Crim 2373, [2003] 1 Cr App Rep 321, CA; *R v Gray* [2003] EWCA Crim 1001; *R v Gardner* [2004] EWCA Crim 1639, [2004] All ER (D) 327 (Jun); *R v Mitchell* [2005] EWCA Crim 731, [2005] All ER (D) 182 (May)). As to the admissibility of expert evidence concerning the interpretation of video images see also *R v Clare* [1995] 2 Cr App Rep 333, CA.

A witness who has seen a video made at the time of an offence may identify the defendant even though the video has been erased: *Taylor v Chief Constable of Cheshire* [1987] 1 All ER 225, 84 Cr App Rep 191, DC. See also *R (on the application of Ebrahim) v Feltham Magistrates' Court* [2001] EWHC Admin 130, [2001] 1 All ER 831, [2001] 2 Cr App Rep 427, DC. As to the taking of photographs of suspects at police stations or of persons arrested or detained by police or community support officers, or of persons issued with fixed penalty notices, see the Police and Criminal Evidence Act 1984 s 64A (as added and amended); and PARA 1024 ante.

8 See PARA 1507 post.

9 *R v Reading* [1966] 1 All ER 521n, 50 Cr App Rep 98, CCA; *R v Mustafa* (1976) 65 Cr App Rep 26, CA. As to the drawing of inferences from a defendant's failure to account for such matters when questioned under caution see the Criminal Justice and Public Order Act 1994 s 36; and PARA 1553 post.

10 *Allen v Ireland* [1984] 1 WLR 903, 79 Cr App Rep 206, DC; and see *Creed v Scott* [1976] RTR 485, DC.

11 See *R v Ward* [2000] All ER (D) 2382, (2001) Times, 2 February at [41], CA, per Waller LJ: 'A clear direction should be given ... that only if the jury were sure from the contents of the statement sought to be put in by the prosecution, and such surrounding evidence as there was, that it was the [defendant] giving an accurate identification, should the jury rely on the same as an admission of presence by the [defendant]'.

## UPDATE

### 1455 Proof of identity of defendant

NOTE 3--See *R v Kempster* [2008] EWCA Crim 975, [2008] 2 Cr App Rep 256, [2008] All ER (D) 76 (May) (quality of ear print evidence required to identify person).

NOTE 7--An expert witness in facial mapping who gives evidence, properly based on study and experience, of similarities and dissimilarities between a questioned photograph and a known person, is not disabled either by authority or principle from expressing a conclusion as to the significance of his findings: *R v Atkins* [2009] EWCA Crim 1876, (2009) 173 JP 529.

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#### **1456. Visual identification by witnesses: general principles.**

Where there is an issue concerning the visual identification of a suspect by one or more witnesses (or where there is a witness who may be able to make such an identification) the police must ordinarily conduct a pre-trial identification procedure<sup>1</sup>. Where the prosecution case at trial relies wholly or substantially on visual identification evidence, judges must follow the guidelines issued by the Court of Appeal when directing juries as to that evidence or when determining whether there is a case fit to go to the jury<sup>2</sup>.

No such identification issue arises (and therefore no such procedures or guidelines are applicable) where it is clear that the witness can provide only a general description of an offender or possible offender, or a description of clothing worn by an offender or of a vehicle apparently connected with the offence<sup>3</sup>. Nor does any identification issue arise, even where the witness claims to have seen the defendant commit the offence, if there is no suggestion that the witness could be mistaken, rather than deliberately untruthful<sup>4</sup>.

Where there is any possibility that a witness may have mistakenly identified a close acquaintance or relative in poor visibility or in a fleeting or distant glimpse, no useful purpose may be served by conducting a pre-trial identification procedure<sup>5</sup>, but it will still be necessary for the jury to be warned as to the dangers of mistaken recognition in accordance with the guidelines issued by the Court of Appeal<sup>6</sup>.

A 'dock identification', in which the defendant is identified in court by a witness who has not identified him in any pre-trial procedure, is not inadmissible in law or necessarily incompatible with the defendant's right to a fair trial<sup>7</sup>, but it is generally considered to be an unsatisfactory form of identification and a witness should not ordinarily be invited by the prosecution to make such an identification at a trial on indictment<sup>8</sup>.

At trial, a previous statement made by a witness is admissible as evidence of any matter stated of which oral evidence by him would be admissible, if the statement identifies or describes a person, object or place and while giving evidence the witness indicates that to the best of his belief he made the statement and that to the best of his belief it states the truth<sup>9</sup>. Hearsay evidence of pre-trial identification may also be admissible in some other cases, notably where the witness in question is dead or unavailable to testify on that issue<sup>10</sup>.

1 Code D: Code of Practice for the Identification of Persons by Police Officers para 3.12. See further PARA 1457 post. A record should first be made of any description of the suspected offender provided by the witness: Code D para 3.1. As to Code D see PARA 1010 ante. As to the Codes of Practice under the Police and Criminal Evidence Act 1984 see further PARA 856 ante.

2 These are the *Turnbull* guidelines (*R v Turnbull* [1977] QB 224, 63 Cr App Rep 132, CA) as to which see PARA 1458 post.

3 *R v Gayle* [1999] 2 Cr App Rep 130, CA; *R v Browning* (1991) 94 Cr App Rep 109, CA, (warning not required on identification of motor vehicle); and see also *R v White* [2000] All ER (D) 602, CA; *R v Nyanteh* [2005] EWCA Crim 686, [1995] Crim LR 651.

4 *R v Courtneil* [1990] Crim LR 115, CA; *Beckford v R* (1993) 97 Cr App Rep 409, [1993] Crim LR 944, PC; *R v Bentley* (1991) 99 Cr App Rep 342, CA; *R v Cape* [1996] 1 Cr App Rep 191, CA. There may, however, be an identification issue even where the principal basis of the defence case is that the witness is telling deliberate lies: see *Beckford v R* supra; *Shand v R* [1996] 1 All ER 511, [1996] 2 Cr App Rep 204, PC.

5 Code D para 3.12; *R v Forbes* [2001] 1 AC 473, [2001] 1 All ER 686, HL.

6 *Beckford v R* (1993) 97 Cr App Rep 409, [1993] Crim LR 944, PC; *R v Bentley* (1991) 99 Cr App Rep 342, CA; *R v Bowden* [1993] Crim LR 379, CA.

7 *Holland v HM Advocate* [2005] UKPC D1, 2005 SLT 563.

8 *R v Cartwright* (1914) 10 Cr App Rep 219, CCA; *R v Hunter* [1969] Crim LR 262, CA; *R v Howick* [1970] Crim LR 403, CA; *R v Fergus* (1993) 98 Cr App Rep 313, CA. It is not wholly clear whether the same considerations apply to the summary trial of minor or regulatory offences: see *Barnes v Chief Constable of Durham* [1997] 2 Cr App Rep 505, DC; *Karia v DPP* [2002] EWHC 2175 (Admin), 166 JP 753, [2002] All ER (D) 146 (Oct); but cf *North Yorkshire Trading Standards Department v Williams* (1995) 159 JP 383, DC.

9 See PARA 1529 post. This broadly corresponds to the former position at common law: see *R v Christie* [1914] AC 545 at 551, sub nom *DPP v Christie* (1914) 10 Cr App Rep 141 at 152, HL, per Lord Haldane LC. See also *Sealey v The State* [2002] UKPC 52, [2003] 3 LRC 269, PC.

10 See PARA 1521 post. At common law, photofits, sketches and other composite images were held not to be statements, but items of real evidence, analogous to photographs (*R v Cook* [1987] QB 417, 84 Cr App Rep 369, CA; *R v Constantinou* (1989) 91 Cr App Rep 74, [1989] Crim LR 571, CA), but now under the Criminal Justice Act 2003 s 115(2) a statement includes any representation of fact or opinion made by a person by whatever means; and includes a representation made in a sketch, photofit or other pictorial form (see PARA 1519 post).

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### **1457. Pre-trial identification procedures.**

Pre-trial identification procedures should ordinarily be conducted in accordance with the current Code of Practice<sup>1</sup>. Where a pre-trial identification procedure is required, and a known suspect is willing and available to take part<sup>2</sup>, the police should ordinarily offer to arrange a video identification, in which witnesses are shown moving (video) images of the suspect and of at least eight others persons who as far as possible resemble him<sup>3</sup>, but a formal identity parade may be offered instead if it is considered to be practicable and more suitable<sup>4</sup>. A group identification procedure, in which the suspect is viewed by the witness in an informal group of persons, may be used where it is considered practicable to arrange and more suitable than either of the first two procedures<sup>5</sup>.

A confrontation between the suspect and the witness does not require the suspect's co-operation and should be used only where all other options are impracticable<sup>6</sup>, but force cannot be used to make a suspect reveal his face<sup>7</sup>. Video identification (if necessary using still or covertly recorded images) or group identification may still be practicable in some cases despite a lack of co-operation, and if so should be used instead of a confrontation<sup>8</sup>.

Witnesses must not be shown photographs or composite images for identification purposes if there is a suspect already available to be asked to take part in an identification procedure<sup>9</sup>. Where no such suspect is available, photographs etc may be shown to witnesses in accordance with procedures prescribed in the Code of Practice<sup>10</sup>, or published via local or national media<sup>11</sup>.

1 See Code D: Code of Practice for the Identification of Persons by Police Officers; and PARA 1010 ante. As to the Codes of Practice under the Police and Criminal Evidence Act 1984 see further PARA 856 ante. In all civil and criminal proceedings the Code is admissible in evidence; and, if any provision of the code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings, it is to be taken into account in determining that question: Police and Criminal Evidence Act 1984 s 67(11) (amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 1).

Failure to observe the provisions of Code D may lead to the exclusion of identification evidence: *R v Gaynor* [1988] Crim LR 242; *R v Gall* [1989] Crim LR 745, CA. However, the fact that there has been such a breach does not of itself render the evidence inadmissible; the trial judge must exercise his discretion in deciding whether any unfairness to the defendant justifies the exclusion of the evidence: *R v Grannell* (1989) 90 Cr App Rep 149, CA; *R v Khan* [1997] Crim LR 584, CA. See also *R v Malashev* [1997] Crim LR 587, CA; *R v Huntley* [2006] All ER (D) 95 (Jun), CA. A judge should give reasons if he decides to admit identification evidence obtained following breaches of Code D (*R v Allen* [1995] Crim LR 643, CA) and if the defendant has been deprived of the safeguard of properly testing a witness's ability to make an identification, the jury should be warned of that fact and invited to take it into account, giving it such weight as it thinks fit (*R v H* [2003] EWCA Crim 174, [2003] All ER (D) 31 (Feb)).

As to the conduct of identification procedures see Code D: Annexes A-F. Where a witness fails to make an identification at that time but subsequently does so, the later identification remains admissible in law, although it may carry less weight: *R v Creamer* (1984) 80 Cr App Rep 248, CA; *R v Willoughby* [1999] 2 Cr App Rep 82, CA. An identifying witness must not be prompted or encouraged in any way: *R v Bundy* (1910) 5 Cr App 270, CCA; *R v Chapman* (1911) 7 Cr App Rep 53, CCA; *R v Willoughby* supra. Where a witness is unable to make a positive identification (or purports to identify a volunteer or foil at an identity parade or group identification) that witness may still be able to testify as to other matters at trial (*R v George* [2002] EWCA Crim 1923, [2003] Crim LR 282).

2 As to cases where there is a known suspect who is not (or has ceased to be) available see Code D para 3.21. Where there is no known suspect see Code D para 3.2, by which potential witnesses to identify may be taken to a particular place or neighbourhood to see whether they can make a 'street identification'. If a street

identification can be made in this way, the police should then conduct an appropriate procedure for the identification of a known and available suspect: see *R v Forbes* [2001] 1 AC 473, [2001] 1 All ER 686, HL.

3 Code D paras 3.5, 3.14. As to the conduct of the relevant procedure see Code D: Annex A. As to the position where the suspect refuses the first procedure offered see Code D para 3.15.

4 Code D paras 3.7, 3.14, Annex B. As to the concealment of unusual physical features, see Code D Annex B para 10; and see also *R v Marrin (Keith Ian)* [2002] EWCA Crim 251, (2002) Times, 5 March; *R v Marcus* [2004] EWCA Crim 3387, [2005] Crim LR 384.

5 Code D paras 3.9, 3.16, Annex C. See also *R v Jamel* [1993] Crim LR 52, CA.

6 Code D para 3.23, Annex D.

7 Code D para 3.23, Annex D. See also *R v Jones* (1999) Times, 21 April, CA.

8 Code D paras 3.21-3.23.

9 Code D para 3.3. Where a witness has been shown photographs of a person, with a view to that person's arrest, the value of a subsequent identification may be lessened: see *R v Chadwick, Matthews and Johnson* (1917) 12 Cr App Rep 247, CCA.

10 Code D Annex E.

11 Code D paras 3.28, 3.29.

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### **1458. Weight or sufficiency of visual identification evidence at trial.**

There is a special risk of mistake inherent in evidence of visual identification. Therefore, whenever the case against a defendant depends wholly or substantially on the correctness of one or more visual identifications which are alleged to be mistaken, the judge must warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. In addition he should instruct the jury as to the reasons behind the warning (including the fact that it is based on the lessons of past experience) and refer to the possibility that a mistaken witness may be a convincing one and that a number of identifying witnesses may all be equally mistaken<sup>1</sup>.

Recognition of an acquaintance may be more reliable than identification of a stranger, but a jury must nevertheless be warned that mistakes may still occur<sup>2</sup>.

Where the quality of identification evidence is good, the jury may safely be left to assess it. Where it is poor, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification<sup>3</sup>.

A failure to follow the above guidelines is likely to result in the quashing of a conviction on appeal<sup>4</sup>.

1 *R v Turnbull* [1977] QB 224, 63 Cr App Rep 132, CA. See also *Reid v R* [1990] 1 AC 363, [1993] 4 All ER 95n, PC. The judge must also direct the jury to examine closely the circumstances in which the identification by each witness came to be made, and attention should be drawn to any material discrepancy between the description given to the police by the identifying witness and the actual appearance of the defendant. The prosecution should supply the defence with particulars of any description containing such a material discrepancy, and in all cases, if the defendant asks for them, he should be given particulars of any description the police were first given: *R v Turnbull* supra. As to the direction to be given to the jury see also the specimen direction (based on the *Turnbull* guidelines) published by the Judicial Studies Board which is the briefest direction permissible in such cases (*R v Nash* [2004] EWCA Crim 2696, [2005] Crim LR 232, CA; *Langford v The State* [2005] UKPC 20, [2005] 4 LRC 433).

The direction should be given even where the opportunity for observation was good and the witness is convinced that he has correctly identified the defendant (*R v Tyson* [1985] Crim LR 48, CA; *Beckford v R* (1993) 97 Cr App Rep 409, [1993] Crim LR 944, PC) and even where the principal basis of the defence case is that the witness is telling deliberate lies, although such a direction may be inappropriate and confusing in exceptional cases where the only possible issue is the witness's willingness to tell the truth (*R v Courtneil* [1990] Crim LR 115, CA; *R v Bentley* (1991) 99 Cr App Rep 342, CA; *Shand v R* [1996] 1 All ER 511, [1996] 2 Cr App Rep 204, PC).

The guidance given in *R v Turnbull* supra should also be followed by magistrates' courts when dealing with identification evidence: *McShane v Northumbria Chief Constable* (1979) 72 Cr App Rep 208, DC.

An attempt by the defendant to change his appearance before the trial may be the subject of adverse inferences: *R v Byrne*, *R v Trump* [1987] Crim LR 689, CA.

2 *R v Turnbull* [1977] QB 224, 63 Cr App Rep 132, CA. The guidelines laid down in that case are intended primarily to deal with the problems inherent in the 'fleeting glance' identification and not for example with the problem which arises when the question is which of a number of persons known to have been present at the scene of an offence did a particular act: *R v Oakwell* [1978] 1 All ER 1223 at 1227, 66 Cr App Rep 174 at 178, CA; *R v Curry*, *R v Keeble* [1983] Crim LR 737, CA; *R v Hewett* [1978] RTR 174, CA; *R v Nelson*, *R v McLeod* (1983) Times, 18 November, CA. The rules in *R v Turnbull* supra are to be applied flexibly bearing in mind the circumstances of the case: *R v Keane* (1977) 65 Cr App Rep 247 at 248, CA. As to their application to the



identification of the defendant's alleged accomplice or companion see *R v Bath* (1990) 154 JP 849, CA; but cf *R v White* [2000] All ER (D) 602, CA, where the correctness of that identification was not in doubt.

3 *R v Turnbull* [1977] QB 224, 63 Cr App Rep 132, CA; *Daley v R* [1994] AC 117, [1993] 4 All ER 86, PC; *R v MacMath* [1997] Crim LR 586. Identification evidence may be poor even though it is given by a number of witnesses (*R v Weeder* (1980) 71 Cr App Rep 228, CA; *R v Breslin* (1984) 80 Cr App Rep 226, CA) or by a police officer (*Reid v R* [1990] 1 AC 363, [1993] 4 All ER 95n, PC). This does not preclude the possibility that one identification may support another: *R v Shelton and Carter* [1981] Crim LR 776, CA; *R v Barnes* [1995] 2 Cr App Rep 491, CA. Evidence in support of an identification need not amount to corroboration in the technical legal sense: *R v Turnbull* supra; and see *R v Long* (1973) 57 Cr App Rep 871, CA. As to corroboration generally see PARA 1449 et seq ante.

A false alibi may support an identification if the sole reason for it is to deceive the jury: *R v Turnbull* supra; *R v Keane* (1977) 65 Cr App Rep 247, CA. See also *R v Penman* (1985) 82 Cr App Rep 44, CA; cf *R v Lucas* [1981] QB 720, 73 Cr App Rep 159, CA; and PARA 1450 ante. The trial judge must identify for the jury any evidence capable of affording support: *R v Turnbull* supra; *R v Allan*, *R v Willis* (1990) Times, 2 January, CA. When *R v Turnbull* supra was decided, the defendant's failure to testify could not be considered as providing any support for identification evidence against him, but such failure may now enable inferences to be drawn: see PARA 1555 post.

When issues are raised as to the quality or probative value of identification evidence, a trial judge does not ordinarily need to hold a trial within a trial in order to decide whether such evidence should be admitted: *R v Walshe* (1980) 74 Cr App Rep 85, CA; *R v Beveridge* (1987) 85 Cr App Rep 255, CA; *R v Flemming* (1987) 86 Cr App Rep 32, CA.

4 *R v Hunjan* (1978) 68 Cr App Rep 99, CA; *R v Keane* (1977) 65 Cr App Rep 247, CA; *R v Bowden* [1993] Crim LR 379. See also *R v Pope* (1986) 85 Cr App Rep 201, CA; *Reid v R* [1990] 1 AC 363, [1993] 4 All ER 95n, PC. A full *Turnbull* warning is not necessary or appropriate in cases involving identification from still photographs or video recordings: *R v Blenkinsop* [1995] 1 Cr App Rep 7, CA.

## UPDATE

### 1458 Weight or sufficiency of visual identification evidence at trial

NOTE 3--See also *R v Ley* [2006] EWCA Crim 3063, [2006] All ER (D) 104 (Dec).

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### **1459. Voice identification.**

The inherent risks of mistake in auditory (voice) identification or recognition are broadly similar to those in visual identification or recognition, and such evidence must be approached with even greater caution<sup>1</sup>. The judge must accordingly warn the jury of the need for such caution before convicting in reliance on the accuracy of such evidence, especially if this comes from a witness who has no training in making auditory identifications<sup>2</sup>.

Where voice recordings are available, expert evidence may be admissible as to the identity of the speaker<sup>3</sup>. The members of the jury must then be allowed to hear the recordings for themselves, but should be warned of the dangers of relying on their own untrained ears<sup>4</sup>.

As with visual identification, evidence of voice identification or recognition may be admissible alongside other evidence, even if it would not of itself be sufficient to prove guilt<sup>5</sup>.

1 As to visual identification see PARAS 1456-1458 ante.

2 *R v Hersey* [1998] Crim LR 281, CA; *R v Gummerson* [1999] Crim LR 680, CA; *R v Roberts* [2000] Crim LR 183, CA; *R v Chenia* [2002] EWCA Crim 2345, [2004] 1 All ER 543, [2003] 2 Cr App Rep 83; *R v Davies* [2004] EWCA Crim 2521, [2004] All ER (D) 433 (Oct). It is not necessary to hold a voice identification procedure to render admissible evidence of identification by voice: *R v Gummerson* supra; *R v Neal* [2003] EWCA Crim 3465, [2003] All ER (D) 337 (Nov).

Code D: Code of Practice for the Identification of Persons by Police Officers concentrates on visual identification procedures and contains no detailed provisions concerning voice identification procedures. However, this does not preclude the police making use of aural identification procedures such as a voice identification parade where they judge this appropriate: Code D para 1.2. As to Code D see PARA 1010 ante. As to the Codes of Practice under the Police and Criminal Evidence Act 1984 see further PARA 856 ante.

3 Where the prosecution relies on expert voice identification, expert evidence both of auditory and of acoustic analysis should normally be adduced: *R v O'Doherty* [2003] 1 Cr App Rep 77, NICA; *R v Dallagher* [2002] EWCA Crim 1903, [2003] 1 Cr App Rep 195, CA; cf *R v Robb* (1991) 93 Cr App Rep 161, CA. As to expert evidence see PARA 1482 et seq post.

4 *R v Bentum* (1989) 153 JP 538, CA.

5 *R v Robinson* [2005] EWCA Crim 1940, [2006] 1 Cr App Rep 221, CA.

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### **1460. Identification by fingerprints.**

Identification by fingerprints<sup>1</sup> by a person expert in identification by such means may in a proper case be sufficient even though there is no other means of identification<sup>2</sup>. The '16 point standard', by which, as a matter of expert practice, a positive fingerprint match was once thought to require a minimum of 16 matching ridge characteristics, never had any formal legal status<sup>3</sup> and is no longer applied by fingerprint experts in England and Wales<sup>4</sup>. Fingerprint evidence may tend to prove the guilt of the defendant, even if there are only a few similar ridge characteristics, but it may, in such a case, have little weight. It may be excluded in the exercise of judicial discretion, if its prejudicial effect outweighs its probative value<sup>5</sup>. Courts or juries must take into account the number of similar ridge characteristics identified, the presence of any dissimilar characteristics, the size of the crime print (a given number of matches in a fragment of a print may be more compelling than a similar number in a complete print) and the quality and clarity of that print (including any evidence of injury to the person who left the print, and any smearing or contamination of the print<sup>6</sup>).

The prosecution must provide admissible evidence that the fingerprints in question belong to the defendant; his failure to deny that fingerprints are his cannot suffice<sup>7</sup>.

Evidence relating to the fingerprints of a defendant is not rendered inadmissible by procedural irregularities when they were taken, although the court has discretion to exclude prosecution evidence where significant unfair prejudice would otherwise result<sup>8</sup>.

1 For the meaning of 'fingerprints' see PARA 1021 note 2 ante.

2 *R v Castleton* (1909) 3 Cr App Rep 74, CCA; *R v Bacon* (1915) 11 Cr App Rep 90, CCA; cf *R v Court* (1960) 44 Cr App Rep 242, CCA. As to the procedure for taking fingerprints from suspects and convicted offenders see the Police and Criminal Evidence Act 1984 s 61 (as amended); Code D: Code of Practice for the Identification of Persons by Police Officers para 4, Annex F; and PARA 1021 ante.

3 *R v Giles* (13 February 1998, unreported), CA; *R v Buckley* (1999) 163 JP 561, CA.

4 The history behind the adoption of the 16 point standard and the reasons for its abandonment are explained in *R v Buckley* (1999) 163 JP 561, CA. In 2001, police forces in England and Wales moved to a non-numerical system of fingerprint analysis.

5 *R v Buckley* (1999) 163 JP 561, CA.

6 *R v Buckley* (1999) 163 JP 561, CA.

7 *Chappell v DPP* (1988) 89 Cr App Rep 82, DC.

8 *Callis v Gunn* [1964] 1 QB 495, 48 Cr App Rep 36, DC (failure to caution); *R v Buchan* [1964] 1 All ER 502, 48 Cr App Rep 126, CCA. As to the principles governing the power of a court to exclude admissible prosecution evidence see PARA 1365 ante.

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#### **1461. Identification by DNA evidence.**

Where the prosecution seeks to rely on DNA evidence to identify the defendant, it is essential that its provenance is established by admissible evidence<sup>1</sup>. It is also essential that the statistical significance of any match between DNA profiles is properly explained to the jury<sup>2</sup>. A jury should not be invited to use complex statistical formulae, such as Bayes's Theorem when evaluating such evidence, because in the context of a criminal trial the use of such evidence would be impractical and a recipe for confusion<sup>3</sup>.

1 *R v Loveridge* [2001] EWCA Crim 734, [2001] All ER (D) 123 (Mar). As to the admissibility of DNA evidence derived from improperly retained samples (ie samples that ought to have been destroyed in accordance with the Police and Criminal Evidence Act 1984 s 64 (as amended) (see PARA 1039 ante) or which ought not to have been used for speculative searches on the DNA database) see *A-G's Reference (No 3 of 1999)* [2001] 2 AC 91, [2001] 1 All ER 577, HL. As to the human rights implications of retaining DNA evidence taken from a suspect after the acquittal of the suspect from whom it was taken (or after the dropping of charges against that suspect) see *R (on the application of S) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 4 All ER 193, [2004] 1 WLR 2196.

2 *R v Doheny and Adams* [1997] 1 Cr App Rep 369 at 375, CA, per Phillips LJ. See also *R v Bates* [2006] EWCA Crim 1395 (partial profile DNA evidence is admissible as long as the jury is made aware of its inherent limitations and is given sufficient explanation to evaluate it).

3 *R v Adams (No 2)* [1998] 1 Cr App Rep 377, CA.

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## (12) DOCUMENTARY AND REAL EVIDENCE

### 1462. Meaning of documentary evidence.

The term 'document' bears different meanings in different contexts. At common law, it has been held that any written thing capable of being evidence is properly described as a document<sup>1</sup>, and this clearly includes printed text, diagrams, maps and plans<sup>2</sup>. Photographs are also regarded as documents at common law<sup>3</sup>.

Varying definitions have been adopted in legislation<sup>4</sup>. A document may be relied on as real evidence (where its existence, identity or appearance, rather than its content, is in issue<sup>5</sup>), or as documentary evidence. Documentary evidence denotes reliance on a document as proof of its terms or contents<sup>6</sup>. The question of the authenticity of a document is to be decided by the jury<sup>7</sup>.

1 *R v Daye* [1908] 2 KB 333 at 340, DC, per Darling J.

2 A tombstone bearing an inscription is in this sense a document (see *Mortimer v M'Callan* (1840) 6 M & W 58), as is a coffin-plate bearing an inscription (see *R v Edge* (1842) Wills, Circumstantial Evidence (6th Edn) 309).

3 See also *Lyell v Kennedy (No 3)* (1884) 27 ChD 1, 50 LT 730, CA; *Senior v Holdsworth, ex p Independent Television News Ltd* [1976] QB 23, [1975] 2 All ER 1009, CA; *Victor Chandler International Ltd v Customs and Excise Comrs* [2000] 1 All ER 160, [1999] 1 WLR 2160, ChD.

4 For the purposes of the Police and Criminal Evidence Act 1984, 'document' means anything in which information of any description is recorded: s 118 (amended by the Civil Evidence Act 1995 s 15(1), Sch 1 para 9(3)). For the purposes of the Criminal Justice Act 2003 Pt 11 (ss 98-141) (as amended) (evidence), the definition is the same (see s 134(1)), save that for the purposes of Pt 11 Ch 3 (ss 137-141) (which includes the provision relating to refreshing memory (see s 139; and PARA 1438 ante)) it excludes any recording of sounds or moving images (see s 140).

5 See eg *R v Elworthy* (1867) LR 1 CCR 103, 32 JP 54, CCR; *Boyle v Wiseman* (1855) 11 Exch 360. Documents produced by purely mechanical means may constitute real evidence even where reliance is placed on their content: *The Statue of Liberty, Sapporo Maru (Owners) v Statue of Liberty (Owners)* [1968] 2 All ER 195, [1968] 1 WLR 739 (film of radar echoes); *R v Wood* (1982) 76 Cr App Rep 23, CA (computer used as calculator); *Castle v Cross* [1985] 1 All ER 87, [1984] 1 WLR 1372, DC (printout of evidential breath-testing device). See also *Garner v DPP* [1989] Crim LR 583, DC; *R v Skinner* [2005] EWCA Crim 1439, [2006] Crim LR 56, [2005] All ER (D) 324 (May). As to real evidence generally see PARA 1466 post.

6 *R v Elworthy* (1867) LR 1 CCR 103, 32 JP 54, CCR.

7 *R v Wayte* (1982) 76 Cr App Rep 110 at 118, CA. The admissibility of a document is, following the general rule, a question for the judge: see PARA 1360 ante. A document which the law requires to be stamped, but which is unstamped, is admissible in criminal proceedings: Stamp Act 1891 s 14(4) (amended by the Finance Act 1999 s 109(3), Sch 12 para 3(1), (5)).

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### **1463. The primary evidence rule.**

Under the 'primary evidence rule' at common law<sup>1</sup>, it was once thought necessary for the contents of any private document to be proved by production of the original document<sup>2</sup>. A copy of an original document, or oral evidence as to the contents of that document, was considered admissible only in specified circumstances, namely: (1) where another party to the proceedings failed to comply with a notice to produce the original which was in his possession (or where the need to produce it was so clear that no such notice was required)<sup>3</sup>; (2) where production of the original was shown to be impossible<sup>4</sup>; (3) where the original appeared to have been lost or destroyed<sup>5</sup>; and (4) where a third party in possession of the original lawfully declined to produce it<sup>6</sup>.

This rule (and the best evidence rule of which it was thought to be a part) no longer appears to enjoy judicial support. In criminal cases it has been said that, '... the only remaining instance of it is that, if an original document is available in one's hands, one must produce it'<sup>7</sup> and the civil courts subsequently went further still in denying the existence of the rule as a rule of law<sup>8</sup>.

There are also various circumstances in which the use of copies of documents as evidence is expressly authorised by legislation<sup>9</sup>. If the primary evidence rule still survives in any form at all, its application must be largely confined to cases in which oral evidence is offered to prove the contents of a missing or unavailable document<sup>10</sup>. In such cases, however, the better view appears to be that the 'admissibility' of such evidence of the contents of documents is now entirely dependent upon whether or not any weight can be attached to that evidence<sup>11</sup>.

1 As to the related 'best evidence rule' see PARA 1367 ante.

2 As to the admissibility of examined or certified copies of public documents at common law see CIVIL PROCEDURE vol 11 (2009) PARA 884 et seq.

3 *A-G v Le Merchant* (1788) 2 2 Term Rep 201n; *R v Hunter* (1829) 4 C & P 128; *R v Elworthy* (1867) LR 1 CCR 103, 32 JP 54, CCR.

4 *Owner v Bee Hive Spinning Co Ltd* [1914] 1 KB 105, 12 LGR 421; *Alivon v Furnival* (1834) 1 Cr M & R 277.

5 *R v Haworth* (1830) 4 C & P 254.

6 *R v Nowaz* (1976) 63 Cr App Rep 178, CA. A further possibility was that that contents of a document might be proved by an admission or confession: *Slatterie v Pooley* (1840) 6 M & W 664.

7 *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, [1990] 1 WLR 277, DC; *Kajala v Noble* (1982) 75 Cr App Rep 149, [1982] Crim LR 433, DC.

8 *Springsteen v Masquerade Music Ltd* [2001] EWCA Civ 563, [2001] EMLR 654, [2001] All ER (D) 101 (Apr).

9 See PARA 1464 post.

10 *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, [1990] 1 WLR 277, DC.

11 *Springsteen v Masquerade Music Ltd* [2001] EWCA Civ 563, [2001] EMLR 654, [2001] All ER (D) 101 (Apr).

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#### **1464. Copies of documents admissible by legislation.**

Where a statement in a document<sup>1</sup> is admissible as evidence in criminal proceedings<sup>2</sup>, the statement may be proved by producing either: (1) the document<sup>3</sup>; or (2) (whether or not the document exists) a copy<sup>4</sup> of the document or of the material part of it, authenticated in whatever way the court may approve<sup>5</sup>. Alternatively, in criminal proceedings<sup>6</sup> the contents of a document may, whether or not the document is still in existence, be proved by the production of an enlargement of a microfilm copy of that document or of the material part of it, authenticated in such manner as the court may approve<sup>7</sup>.

A copy of any entry in a banker's book is in all legal proceedings to be received as prima facie evidence of such entry, and of the matters, transactions, and accounts therein recorded<sup>8</sup>. The content of a public document may be proved by means of a certified or examined copy<sup>9</sup>.

1 For the meaning of 'document' see PARA 1462 note 4 ante.

2 'Criminal proceedings' means criminal proceedings in relation to which the strict rules of evidence apply: Criminal Justice Act 2003 s 134(1). As to whether a document contains a statement and if so whether that statement is hearsay and if so whether that statement may nevertheless be admissible see PARA 1519 et seq post.

3 There may be more than one original document in existence: see eg *Forbes v Samuel* [1913] 3 KB 706.

4 'Copy', in relation to a document, means anything on to which information recorded in the document has been copied, by whatever means and whether directly or indirectly: Criminal Justice Act 2003 s 134(1).

5 Ibid s 133. A court will need to be satisfied that a copy is a true and accurate copy, which may involve proving the accuracy of any intermediate copies of which it is itself a copy: see *R v Collins* (1960) 44 Cr App Rep 170, CCA; *R v Wayte* (1982) 76 Cr App Rep 110, CA (the fact that it is easy to construct a false document by photocopying does not render a photocopy inadmissible; the fact that it is a photocopy goes to weight only).

6 These include for this purpose: (1) proceedings in the United Kingdom or elsewhere before a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957; (2) proceedings in the United Kingdom or elsewhere before the Courts-Martial Appeal Court: (a) on an appeal from a court-martial so constituted; or (b) on a reference under the Courts-Martial (Appeals) Act 1968 s 34; and (3) proceedings before a standing civilian court: see the Police and Criminal Evidence Act 1984 s 82(1) (amended by the Armed Forces Act 1996 ss 5, 35(2), Sch 1 para 107, Sch 7 Pt I; and prospectively amended by the Youth Justice and Criminal Evidence Act 1999 s 67(3), Sch 6). As to courts-martial see ARMED FORCES vol 2(2) (Reissue) PARA 448 et seq.

7 Police and Criminal Evidence Act 1984 s 71. 'Copy', in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly; and 'statement' means any representation of fact, however made: s 72(1) (definitions substituted by the Civil Evidence Act 1995 s 15(1), Sch 1 para 9(2)). As to the admissibility of copies of entries in bankers' books see the Bankers' Books Evidence Act 1879 s 5 (as amended); CIVIL PROCEDURE vol 11 (2009) PARA 939; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 907 et seq.

8 Ibid s 3.

9 See the Evidence Act 1851 s 14; and PARA 1468 post.

#### **UPDATE**

**1464 Copies of documents admissible by legislation**

NOTE 6--Police and Criminal Evidence Act 1984 s 82(1) further amended: Armed Forces Act 2006 Sch 16 para 104(2).



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#### **1465. Production of original documents in court.**

As a matter of practice (but no longer as a rule of law) the prosecution will ordinarily seek to produce where possible at the trial the original version of any allegedly incriminating document<sup>1</sup>. If the document is believed to be in the defendant's possession, it may be obtained by means of a search warrant in those cases in which a search warrant may be issued<sup>2</sup>. A third party who is in possession of such a document may be served a witness summons requiring him to produce it<sup>3</sup>, but the defendant may not be served with such an order, since it would require him to produce evidence against himself<sup>4</sup>.

Special powers may be invoked in the investigation of serious and complex fraud<sup>5</sup>. In the course of an investigation into a case which appears to involve any such fraud, the Director of the Serious Fraud Office may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified any specified documents which appear to the Director to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate; and if any such documents are produced, the Director may take copies or extracts from them and require the person producing them to provide an explanation of any of them<sup>6</sup>. If any such documents are not produced, the Director may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are<sup>7</sup>. Any person who without reasonable excuse fails to comply with such a requirement is guilty of an offence<sup>8</sup>.

1 *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, [1990] 1 WLR 277, DC; and see PARAS 1463-1464 ante.

2 As to when search warrants may be issued see PARA 352 ante.

3 As to witness summonses see PARA 1409 ante.

4 *Trust Houses Ltd v Postlethwaite* (1944) 109 JP 12, DC. Prior to the apparent abolition of the primary evidence rule (as to which see *Springsteen v Masquerade Music Ltd* [2001] EWCA Civ 563, [2001] EMLR 654, [2001] All ER (D) 101 (Apr); and PARA 1463 ante) it was held at common law that a notice to produce the document could be served on the defendant a reasonable time before the trial. The defendant was not obliged to comply with this notice; but if that notice had been duly served, and proof given of the service, the contents of the document could then be proved by secondary evidence (*R v Haworth* (1830) 4 C & P 254; *R v Fitzsimons* (1870) IR 4 CL 1, CCR; *R v Elworthy* (1867) LR 1 CCR 103, 32 JP 54, CCR).

5 See the Criminal Justice Act 1987 Pt I (ss 1-12) (as amended); and PARA 1089 et seq ante.

6 Ibid s 2(3)(a) (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 para 113).

7 Criminal Justice Act 1987 s 2(3)(b).

8 Ibid s 2(13). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both: s 2(13). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. The Criminal Justice Act 1987 restricts the use in evidence of statements made by the defendant in response to requirements imposed under s 2 (as amended) (see s 2(8)), but this does not appear to apply to the use of documents produced under compulsion.



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#### **1466. Real evidence.**

Material objects or things (other than the contents of documents) which are produced as exhibits for inspection by a court or jury are classed as real evidence<sup>1</sup>. The court or jury may need to hear oral testimony explaining the background and alleged significance of any such exhibit, and may be assisted by expert evidence in drawing inferences or conclusions from the condition of that exhibit<sup>2</sup>.

Where a jury wishes to take an exhibit, such as a weapon, into the jury room, this is something which the judge has a discretion to permit<sup>3</sup>. Jurors must not however conduct unsupervised experiments<sup>4</sup>, or be allowed to inspect a thing which has not been produced in evidence<sup>5</sup>.

Failure to produce an object which might otherwise have been admissible as real evidence does not preclude the admission of oral evidence concerning the existence or condition of that object, although such evidence may carry far less weight<sup>6</sup>.

1 This includes animals, such as dogs, which may be inspected to see if they are ferocious (*Line v Taylor* (1862) 3 F & F 731) or whether they appear to have been ill-treated, etc. Note however that statements (such as statements of origin) printed on objects may give rise to issues of hearsay if it is sought to rely on them as true: *Comptroller of Customs v Western Electric Co Ltd* [1966] AC 367, [1965] 3 All ER 599, PC.

2 Expert evidence may often be essential if the court or jury is to draw any kind of informed conclusions from their examination of the exhibit. It would be dangerous, for example, for a court or jury to draw its own unaided conclusions concerning the identity of fingerprints or the age and origin of bloodstains: *Anderson v R* [1972] AC 100, [1971] 3 All ER 768, PC.

3 *R v Wright* [1993] Crim LR 607, CA; *R v Devichand* [1991] Crim LR 446, CA.

4 *R v Maggs* (1990) 91 Cr App Rep 243, CA, per Lord Lane CJ at 247; *R v Crees* [1996] Crim LR 830, CA; *R v Stewart* (1989) 89 Cr App Rep 273, [1989] Crim LR 653, CA.

5 *R v Lawrence* [1968] 1 All ER 579, 52 Cr App Rep 163, CCA.

6 *R v Francis* (1874) LR 2 CCR 128, 43 LJMC 97, CCR; *Hocking v Ahlquist Bros* [1944] KB 120, [1943] 2 All ER 722, DC. See also *R v Uxbridge Justices, ex p Sofaer* (1987) 85 Cr App Rep 367, DC. If the object in question is in the possession of the prosecutor or of a third person, its production may generally be compelled by issue of a witness order under the Criminal Procedure (Attendance of Witnesses) Act 1965 s 2 (as substituted and amended) or under the Magistrates' Court Act 1980 s 97 (as substituted and amended) (see PARA 1409 ante). The defendant cannot, however, be served with such an order, lest he be forced to incriminate himself: *Trust Houses Ltd v Postlethwaite* (1944) 109 JP 12.

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### **1467. Views, demonstrations and reconstructions.**

Where an object is immovable, or cannot practicably be brought into the courtroom (for example because of its size, dangerousness etc) the court or jury may inspect it in situ or in some convenient location to which it can be moved. There is no difference in principle between examination of real evidence inside the courtroom and examination of such evidence in situ or outside. A vehicle, for example, may be inspected in the road or car park outside the court building<sup>1</sup>.

A view cannot ordinarily be conducted in the absence of the judge<sup>2</sup> or after the judge's summing-up<sup>3</sup> and should not be held in the absence of the defendant unless it is through his own choice<sup>4</sup>, or unless the circumstances in no way prejudice his trial<sup>5</sup>. A view cannot be made by one juror or magistrate reporting back to his fellow jurors or magistrates, nor should it be left to the uncontrolled initiative of individual jurors<sup>6</sup>.

Demonstrations or reconstructions of alleged incidents, whether staged within or without the courtroom, may be of value in so far as they may show what is or is not possible, or how something might have been done<sup>7</sup>. Where, however, a reconstruction purports to show what did actually happen, it should be staged only by or at the direction of competent witnesses who have first-hand knowledge of the matter demonstrated, and who confirm the reconstruction with their testimony. A self-serving reconstruction may even then be of little use to the court<sup>8</sup>.

<sup>1</sup> *London General Omnibus Co v Lovell* [1901] 1 Ch 135, [1956] 2 All ER 904, CA; *Buckingham v Daily News Ltd* [1956] 2 QB 534, CA.

<sup>2</sup> *Tameshwar v R* [1957] AC 476, [1957] 2 All ER 683, PC; *R v Hunter* [1985] 1 WLR 613, 81 Cr App Rep 40, CA.

<sup>3</sup> *R v Lawrence* [1968] 1 WLR 341, 52 Cr App Rep 163, CA; cf *R v Nixon* [1968] 1 WLR 577, 52 Cr App Rep 218, CA.

<sup>4</sup> *Karamat v R* [1956] AC 256, [1956] 1 All ER 415, PC; *R v Ely Justices, ex p Burgess* [1992] Crim LR 888, DC.

<sup>5</sup> *Poole v R* [1961] AC 223, [1960] 3 All ER 398, PC; cf *Parry v Boyle* (1987) 83 Cr App Rep 310, DC.

<sup>6</sup> *R v Gurney* [1977] RTR 211, CA; *R v Albarus* [1989] Crim LR 905, CA. A breach of this rule may be considered a serious irregularity: *R v Davis, Johnson and Rowe* [2000] Crim LR 1012, CA.

<sup>7</sup> Thus in *R v Smith (George Joseph)* (1915) 11 Cr App Rep 229, 25 Cox CC 271, CCA, a courtroom demonstration was used to prove that it was indeed possible for the defendant to have drowned his victims as alleged by the prosecution.

<sup>8</sup> *R v Quinn and Bloom* [1962] 2 QB 245, 45 Cr App Rep 279, CCA; cf *Li Shu-ling v R* [1989] AC 270, 88 Cr App Rep 82, PC (reconstruction filmed by the police and featuring the defendant admissible as a confession).

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### **1468. Proof of public documents and registers.**

If a document is of a public nature, it is admissible in evidence on its mere production from proper custody without further proof<sup>1</sup>. Copies of such documents, if officially certified, are by various statutory provisions made admissible in evidence in place of the originals<sup>2</sup>, but in practice most such provisions no longer permit anything that has not in any case become permissible under later provisions of more general application<sup>3</sup>.

Specific provision is made for proving the content of Private and Local Acts of Parliament<sup>4</sup>, Parliamentary journals<sup>5</sup>, Royal proclamations and orders<sup>6</sup>, statutory instruments<sup>7</sup>, public records and registers<sup>8</sup>, by-laws<sup>9</sup> and foreign legal judgments<sup>10</sup>.

1 See CIVIL PROCEDURE vol 11 (2009) PARA 884 et seq.

2 Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no [other] statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom is admissible in evidence in any court of justice, provided it is proved to be an examined copy or extract, or purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted: see the Evidence Act 1851 s 14; and CIVIL PROCEDURE vol 11 (2009) PARA 884 et seq.

3 See PARA 1463 ante.

4 See the Evidence Act 1845 s 3; and CIVIL PROCEDURE vol 11 (2009) PARA 889. Public and General Acts are judicially noticed and require no proof: see PARA 1382 ante.

5 See the Evidence Act 1845 s 3; and CIVIL PROCEDURE vol 11 (2009) PARA 890.

6 See the Documentary Evidence Act 1868 s 2 (as amended); and CIVIL PROCEDURE vol 11 (2009) PARA 892.

7 See *ibid* s 2 (as amended); the Statutory Instruments Act 1946 s 3 (as amended); and CIVIL PROCEDURE vol 11 (2009) PARA 892.

8 See the Public Records Act 1958 s 9 (as amended); the Births and Deaths Registration Act 1953 s 34 (as amended); para 1470 post; and CIVIL PROCEDURE vol 11 (2009) PARA 906.

9 See the Local Government Act 1972 s 238 (as amended); and CIVIL PROCEDURE vol 11 (2009) PARA 895.

10 See the Evidence Act 1851 s 7; and CIVIL PROCEDURE vol 11 (2009) PARA 899.

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#### **1469. Proof of consents to prosecutions.**

Any document purporting to be the consent<sup>1</sup> of a law officer of the Crown<sup>2</sup>, the Director of Public Prosecutions<sup>3</sup> or a Crown prosecutor<sup>4</sup> for or to the institution of any criminal proceedings<sup>5</sup> in any particular form, and to be signed by a law officer of the Crown, the Director of Public Prosecutions or a Crown prosecutor is admissible as prima facie evidence without further proof<sup>6</sup>.

1 As to consents to prosecutions see PARA 1071 ante.

2 'Law officer' is not defined in the Prosecution of Offences Act 1985. In the Prosecution of Offences Act 1979, 'a law officer of the Crown' meant the Attorney General or the Solicitor General: see *ibid* s 10 (repealed).

3 As to the Director of Public Prosecutions see PARA 1066 ante.

4 As to Crown prosecutors see PARA 1081 ante.

5 For the meaning of 'criminal proceedings' see PARA 1071 note 1 ante.

6 Prosecution of Offences Act 1985 s 26.

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#### **1470. Documentary proof of age.**

An extract from a register of births, which is proved to be an examined copy or extract, or which purports to be signed and certified as a true copy or extract by the officer entrusted with custody of the original, is sufficient evidence of the age of (for example) the complainant<sup>1</sup> if identified as the person named in the extract<sup>2</sup>. However, the complainant's age may also be proved by any other admissible evidence<sup>3</sup>.

1 The age of the complainant is material in certain sexual offences: see generally para 162 et seq ante.

2 See the Evidence Act 1851 s 14; and *R v Weaver* (1873) LR 2 CCR 85; *R v Bellis* (1911) 6 Cr App Rep 283, CCA. See also *R v Rogers* (1914) 111 LT 1115, 10 Cr App Rep 276, CCA (evidence of identity held insufficient); *Lockwood v Walker* 1910 SC (J) 3 (insufficient evidence of age).

3 Eg even by the evidence of persons who have seen her and speak as to their belief with regard to her age: *R v Cox* [1898] 1 QB 179, CCR. The date of birth of an adopted child may be proved by means of a certified copy of the entry in the adopted children register: see the Adoption and Children Act 2002 s 77; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 383, 384.

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### **1471. Audio and video recordings.**

An audio recording is admissible in evidence provided that the accuracy of the recording can be proved, the recorded voices can be properly identified, and the evidence is relevant and otherwise admissible<sup>1</sup>. However, that evidence should always be regarded with caution and assessed in the light of all the circumstances<sup>2</sup>.

A video recording of an incident which is in issue is admissible<sup>3</sup>. There is no difference in terms of admissibility between a direct view of an incident and a view of it on a visual display unit of a camera or on a recording of what the camera has filmed. A witness who sees an incident on a display or a recording may give evidence of what he saw in the same way as a witness who had a direct view<sup>4</sup>.

1 *R v Maqsd Ali, R v Ashiq Hussain* [1966] 1 QB 688, 49 Cr App Rep 230, CCA. For the considerations relevant to the determination of admissibility see *R v Stevenson, R v Hulse, R v Whitney* [1971] 1 All ER 678, 55 Cr App Rep 171; *R v Robson, R v Harris* [1972] 2 All ER 699, 56 Cr App Rep 450. See also *R v Senat, R v Sin* (1968) 52 Cr App Rep 282, CA; *R v Bailey* [1993] 3 All ER 513, 97 Cr App Rep 365, CA. Where a video recording of an incident becomes available after the witness has made a statement, the witness may view the video and, if necessary, amend his statement so long as the procedure adopted is fair and the witness does not rehearse his evidence: *R v Roberts (Michael); R v Roberts (Jason)* [1998] Crim LR 682, 162 JP 691, CA.

2 *R v Maqsd Ali, R v Ashiq Hussain* [1966] 1 QB 688, 49 Cr App Rep 230, CCA. As to the use of tape recordings and transcripts see *R v Rampling* [1987] Crim LR 823, CA; and see also *Butera v DPP* (1986) 76 ALR 45, Aust HC. As to the tape recording of police interviews see PARA 971 et seq ante; and as to the exclusion of a tape recording under the Police and Criminal Evidence Act 1984 s 78 (as amended) (see PARA 1365 ante) as unfair evidence see *R v H* [1987] Crim LR 47. Cf *R v Jelen, R v Katz* (1989) 90 Cr App Rep 456, CA (tape recording admitted despite element of entrapment).

3 *Taylor v Chief Constable of Cheshire* [1987] 1 All ER 225, 84 Cr App Rep 191, DC.

4 *Taylor v Chief Constable of Cheshire* [1987] 1 All ER 225, 84 Cr App Rep 191, DC. As to the admissibility of video recordings as evidence identifying the defendant see also *R v Fowden and White* [1982] Crim LR 588, CA; *R v Grimer* [1982] Crim LR 674, CA; *R v Blenkinsop* [1995] 1 Cr App Rep 7, CA. A recording showing a road on which an incident had occurred was admitted in *R v Thomas* [1986] Crim LR 682. As to the identification of the defendant by still photographs taken by an automatic security camera see *R v Dodson, R v Williams* [1984] 1 WLR 971, 79 Cr App Rep 220, CA; as to identification generally see PARA 1455 ante; and as to the admissibility of a copy of a video recording of an incident see *Kajala v Noble* (1982) 75 Cr App Rep 149, CA.



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**1472. Representations other than by a person.**

Where a representation of any fact is made otherwise than by a person, but depends for its accuracy on information supplied (directly or indirectly) by a person, the representation is not admissible in criminal proceedings as evidence of the fact unless it is proved that the information was accurate<sup>1</sup>.

This rule does not affect the operation of the presumption that a mechanical device has been properly set or calibrated<sup>2</sup>.

<sup>1</sup> Criminal Justice Act 2003 s 129(1). This properly addresses the need for proof that data placed on computers by individuals is accurate (faulty initial data being the commonest cause of 'computer error').

<sup>2</sup> Ibid s 129(2). See PARA 1376 ante.

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**1473. Form of evidence and glossaries.**

For the purpose of helping members of juries to understand complicated issues of fact or technical terms Criminal Procedure Rules may make provision:

- 2197 (1) as to the furnishing of evidence in any form, notwithstanding the existence of admissible material from which the evidence to be given in that form would be derived; and
- 2198 (2) as to the furnishing of glossaries for such purposes as may be specified

in any case where the court gives leave for, or requires, evidence or a glossary to be so furnished<sup>1</sup>.

<sup>1</sup> Criminal Justice Act 1988 s 31 (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035, art 3, Schedule paras 24, 25). At the date at which this volume states the law no such rules had been made.

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## **(13) PRIVILEGE AND PUBLIC INTEREST IMMUNITY**

### **(i) Privilege**

#### **1474. Privilege generally.**

A witness in legal proceedings<sup>1</sup> may refuse to answer a question and a witness or person served with a witness summons may refuse to produce a document or other article demanded of him<sup>2</sup> if he can establish a claim to privilege in respect of the matter concerned<sup>3</sup>. Some historic privileges have been abolished<sup>4</sup>, but two important privileges remain applicable to criminal proceedings. These are:

- 2199 (1) the privilege against self-incrimination<sup>5</sup>; and
- 2200 (2) legal professional privilege<sup>6</sup>.

A limited privilege is also accorded to journalists, writers, publishers and broadcasters, in so far as no court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime<sup>7</sup>.

No privilege attaches to communications made with medical advisers<sup>8</sup>, priests<sup>9</sup>, agents<sup>10</sup>, bankers<sup>11</sup>, or accountants<sup>12</sup>, nor does it attach to matters disclosed (even in the strictest confidence) between friends<sup>13</sup>.

1 The same general principles apply to civil and criminal proceedings, but the application and scope of claims to privilege differ significantly on several points of detail as between civil and criminal proceedings. This title (see PARAS 1475-1479 post) is concerned primarily with claims to privilege arising in criminal proceedings, although in respect of the privilege against self-incrimination, some consideration is also required as to the circumstances in which the privilege may be asserted in civil proceedings. As to privilege in civil proceedings generally see CIVIL PROCEDURE vol 11 (2009) PARA 970 et seq.

2 *Mills v Oddy* (1834) 6 C & P 728; *R v Derby Magistrates' Court, ex p B* [1996] AC 487, [1995] 4 All ER 526, HL.

3 A person entitled to privilege has the onus of claiming and establishing it: *Boyle v Wiseman* (1855) 10 Exch 647. The court must be satisfied that such a claim is based on reasonable grounds: *R v Boyes* (1861) 1 B & S 311; *Khan v Khan* [1982] 2 All ER 60, 126 Sol Jo 187, CA.

If a legal adviser is called upon to testify in respect of privileged communications between his client and himself, he should ensure that his client is given a proper and informed opportunity to claim privilege, which belongs to the client. See further PARA 1477 post.

4 Eg under the Criminal Evidence Act 1898 s 1(d) (repealed by the Police and Criminal Evidence Act 1984 s 80(9)) communications between a husband and wife were formerly privileged. Under the Matrimonial Causes Act 1965 s 43(1) (also repealed by the Police and Criminal Evidence Act 1984 s 80(9)) spouses could not be compelled to give evidence as to whether marital intercourse had taken place between them at any time. The old common law privilege whereby, in legal proceedings, a person other than a party to the proceedings cannot be compelled to produce any deed or other document relating to his title to any land, has been abolished only

in so far as civil proceedings are concerned (see the Civil Evidence Act 1968 s 16(1)) but in practice it has minimal practical application to criminal proceedings.

5 See PARA 1476 post.

6 See PARA 1479 post. Patent agents and their clients may assert a privilege similar to legal professional privilege in criminal proceedings as well as civil: see the Copyright, Designs and Patents Act 1988 s 280 (as amended); and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 618.

7 See the Contempt of Court Act 1981 s 10; and CONTEMPT OF COURT vol 9(1) (Reissue) PARA 408.

8 *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, [1977] 1 All ER 589, HL.

9 *R v Hay* (1860) 2 F & F 4.

10 *Slade v Tucker* (1880) 14 Ch D 824, 49 LJ Ch 644.

11 *Tournier v National Provincial and Union Bank* [1924] 1 KB 461, 93 LJB 449, CA.

12 *Chantrey Martin (a firm) v Martin* [1953] 2 QB 286, [1953] 2 All ER 691, CA.

13 *Wheeler v Le Marchant* (1881) 17 Ch D 675, 45 JP 728, CA.

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### **1475. Admissibility of evidence on privileged matters.**

Evidence is not inadmissible merely because it may be subject to a claim of privilege. A witness may overlook or consciously waive a claim to privilege to which he is entitled, and if he does so neither he nor any other person may subsequently object<sup>1</sup>. Even where a witness is wrongly denied a properly supported claim to privilege, the only wrong done is to the witness himself<sup>2</sup>. Save where the defendant is himself the wronged witness, the admission of privileged evidence in such circumstances has no bearing on the safety of a conviction<sup>3</sup>.

The matters covered by the privilege may alternatively be proved by other evidence, should such evidence be available<sup>4</sup>; and where privileged documents or copies thereof have been acquired by another party, they may be admissible in the hands of that party<sup>5</sup>. In some cases, however, the improper obtaining of privileged material by the police or prosecution may amount to an abuse of process and may require the prosecution to be stayed<sup>6</sup>.

1 *R v Noel* [1914] 3 KB 848, 10 Cr App Rep 255, CCA. Nor may the witness himself object if any admissions made by him in such circumstances are subsequently used against him in criminal proceedings: *R v Sloggett* (1856) 7 Cox CC 139, Dears CC 656, CCR; cf *O Ltd v Z* [2005] EWHC 238 (Ch), [2005] All ER (D) 387 (Apr).

2 *R v Kinglake* (1870) 11 Cox CC 499, 22 LT 335. Such evidence may not be used in a prosecution against the person who was wrongly denied a claim to privilege: *R v Goldshede* (1844) 1 Car & Kir 657; *R v Garbett* (1847) 1 Den 236, 2 Car & Kir 474; *R v Chidley and Cummins* (1860) 8 Cox CC 365; *R v Coote* (1873) LR 4 PC 599; *R v Laurent, Barrett and Weekes* (1898) 62 JP 250.

3 'But if instead of giving the evidence voluntarily he gives it under compulsion, what is the difference?': *R v Kinglake* (1870) 11 Cox CC 499 at 500, 22 LT 335 at 336 per Blackburn J.

4 *Calcraft v Guest* [1898] 1 QB 759, CA; *Mills v Oddy* (1834) 6 C & P 728. Where privilege against self-incrimination is claimed, the police may thereby be alerted and may seek other evidence of the witness's offending: *O Ltd v Z* [2005] EWHC 238 (Ch), [2005] All ER (D) 387 (Apr).

5 *Rumping v DPP* [1964] AC 814, [1962] 3 All ER 256, HL; *Butler v Board of Trade* [1971] Ch 680, [1970] 3 All ER 593; *R v Tompkins* (1977) 67 Cr App Rep 181, sub nom *R v Tomkins* [1978] Crim LR 290, CA; but rules of professional conduct may oblige counsel to return (if possible unread) any privileged documents that wrongly come into his possession, and where the prosecution proposes to use such evidence a court or judge may need to consider whether it should exercise its discretion to exclude such evidence on the basis that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it: see PARA 1365 ante.

6 See *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60, [2005] 3 WLR 437; and PARA 1479 post.

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### **1476. Privilege against self-incrimination.**

In legal proceedings<sup>1</sup> a witness may ordinarily refuse to answer any question, and a person may ordinarily refuse to produce any document or thing<sup>2</sup>, which might tend to incriminate him<sup>3</sup> in the United Kingdom<sup>4</sup> by exposing him to proceedings for a criminal offence<sup>5</sup>, or to proceedings for the recovery of a penalty<sup>6</sup>. In criminal (but not in civil) proceedings a person may similarly decline to answer any question or produce any document or thing if to do so would tend to expose him to a forfeiture<sup>7</sup>.

Where the privilege is claimed, the court or judge must be satisfied, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend real and appreciable danger to the witness with reference to the ordinary operation of the law in the ordinary course of things, and not a danger of an imaginary or insubstantial character<sup>8</sup>.

1 As to certain differences between the rules governing criminal and civil proceedings see the Civil Evidence Act 1968 s 14 (as amended), s 16 (see CIVIL PROCEDURE vol 11 (2009) PARAS 970, 974); and notes 3, 5 *infra*. In most respects, however, s 14 (as amended) is considered declaratory of the common law: *Rio Tinto Zinc Corpn v Westinghouse Electric Corpn* [1978] AC 547, [1978] 1 All ER 434, HL.

2 *Triplex Safety Glass Co v Lancegay Safety Glass (1934) Ltd* [1939] 2 KB 395, [1939] 2 All ER 613, CA; *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, [1981] 2 All ER 76, HL; *AT & T Istel Ltd v Tully* [1993] AC 45, [1992] 3 All ER 523, HL; and see *O Ltd v Z* [2005] EWHC 238 (Ch) at [49], [2005] All ER (D) 387 (Apr) at [49] per Lindsay J ('there is no material distinction between a person being obliged to answer questions under the compulsion of the court and his being obliged by a search order to produce documents, including computer disks, CD-ROMs and tapes, or, at any rate, none that makes it easier to deny the privilege to that person in the latter case'); but see contra *C plc v P (Secretary of State for the Home Office and another intervening)* [2006] EWHC 1226 (Ch), [2006] All ER (D) 386 (May).

3 In civil proceedings, privilege extends to matters that might incriminate a spouse or civil partner (see the Civil Evidence Act 1968 s 14 (as amended); and CIVIL PROCEDURE vol 11 (2009) PARA 974) but in criminal proceedings the privilege protects only the person claiming it. There is no privilege in respect of questions tending to incriminate another: *R v Minihane* (1921) 16 Cr App Rep 38, CCA. As to the right of a corporation to claim this privilege see *Triplex Safety Glass Co v Lancegay Safety Glass (1934) Ltd* [1939] 2 KB 395, [1939] 2 All ER 613, CA; *Rio Tinto Zinc Corpn v Westinghouse Electric Corpn* [1978] AC 547, [1978] 1 All ER 434, HL.

4 The privilege does not extend to self-incrimination under foreign law: *King of the Two Sicilies v Willcox* (1851) 1 Sim NS 301; *Re Atherton* [1912] 2 KB 251, 81 LjKB 791.

5 *R v Slaney* (1832) 5 C & P 213; *R v Garbett* (1847) 1 Den 236, 2 Car & Kir 474, Ex Ch; *R v Coote* (1873) LR 4 PC 599; *R v Sloggett* (1856) Dears CC 656; *R v Boyes* (1861) 1 B & S 311; *R v Kinglake* (1870) 11 Cox CC 499, 22 LT 335.

6 This includes administrative penalties under European Union law that are enforceable within the United Kingdom: *Rio Tinto Zinc Corpn v Westinghouse Electric Corpn* [1978] AC 547, [1978] 1 All ER 434, HL.

7 This privilege was abolished (but in respect of civil proceedings only) by the Civil Evidence Act 1968 s 16(1).

8 *R (on the application of the Crown Prosecution Service) v Bolton Magistrates' Court* [2003] EWHC 2697 (Admin) at [25], [2005] 2 All ER 848 at [25], [2004] 1 WLR 835 at [25] per Kennedy LJ. See also *R v Boyes* (1861) 1 B & S 311 (witness pardoned for offence; possibility of impeachment too remote to afford privilege). See also *Khan v Khan* [1982] 2 All ER 60, [1982] 1 WLR 513, CA (civil) in which the evidence against the witness was already so great that rejection of a claim to privilege could make no material difference in his case.

**UPDATE**

**1476 Privilege against self-incrimination**

NOTE 6--As to the privilege attaching to admissions made in without prejudice negotiations see *R v K* [2009] EWCA Crim 1640, [2010] 2 All ER 509.

NOTE 8--See also *R v Khan* [2007] EWCA Crim 2331, [2007] All ER (D) 210 (Oct) (no privilege where defendant had admitted facts).

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### **1477. Exceptions to the privilege against self-incrimination.**

The privilege against self-incrimination is protected by the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup>, but it is not absolute<sup>2</sup>. Thus, a defendant who testifies may (subject to statutory restrictions concerning evidence of bad character<sup>3</sup>) be asked any question in cross-examination (and required to answer it) notwithstanding that it would tend to criminate him as to any offence with which he is charged in the proceedings<sup>4</sup>.

There are certain other circumstances in which the privilege is qualified or abrogated by statute. The most significant of these, as far as the criminal law is concerned, are provisions which require a person to produce evidence that may then be used in criminal proceedings against him. Thus, a motorist may be required on pain of prosecution to provide a sample of breath, blood or urine that may become the principal item of evidence against him on a drink-driving charge<sup>5</sup>; and the registered owner of a motor vehicle may be required to provide details of who was driving that vehicle at a given time and place, notwithstanding that in answering this question he may have to incriminate himself by admitting he was the driver<sup>6</sup>. Similarly, a taxpayer may be required to furnish the Revenue and Customs authorities with accurate information concerning his affairs, even if this means revealing a previously undisclosed liability on which he might face prosecution<sup>7</sup>. Provisions of this kind are not incompatible with the right to a fair trial under the Convention, as long as they represent a necessary and proportionate response to the problem they seek to address<sup>8</sup>.

In other cases, abrogation of the privilege against self-incrimination is balanced, at least in part, by express or implied restrictions on the permissible uses of any evidence thereby obtained. Such evidence may, for example, be admissible in the civil proceedings for the purpose of which it was secured, but not in any subsequent prosecution of the person from whom it was obtained<sup>9</sup>.

1    I.e. the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (commonly referred to as the European Convention on Human Rights and enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq). See *JB v Switzerland* [2001] ECHR 31827/96 at [64], [2001] Crim LR 748, ECtHR ('the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6(1) of the Convention. The right not to incriminate oneself in particular presupposes that the authorities seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the person charged').

2    *Brown v Stott* [2003] 1 AC 681, [2001] 2 All ER 97, PC; *R v Allen* [2001] UKHL 45, [2002] 1 AC 509, [2002] 4 All ER 768; *Hayes v DPP* [2004] EWHC 277 (Admin), [2004] All ER (D) 55 (Feb), DC.

3    See the Criminal Justice Act 2003 s 101; and PARA 1505 ante.

4    Criminal Evidence Act 1898 s 1(2) (amended by the Criminal Justice Act 2003 s 331, Sch 36 para 80(a); and the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 para 1(1), (4)).

5    See the Road Traffic Act 1988 s 7 (as amended); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 986.

6    *Mawdesley v Chief Constable of the Cheshire Constabulary* [2003] EWHC 1586 (Admin), [2004] 1 All ER 58, [2004] 1 WLR 1035, DC; *Hayes v DPP* [2004] EWHC 277 (Admin), [2004] All ER (D) 55 (Feb).

7    *R v Allen* [2001] UKHL 45, [2002] 1 AC 509, [2002] 4 All ER 768, HL.



8 *Brown v Stott* [2003] 1 AC 681, [2001] 2 All ER 97, PC. See also *R v Hertfordshire County Council, ex p Green Environmental Industries Ltd* [2000] 2 AC 412, [2000] 1 All ER 773, HL; *A-G's Reference (No 7 of 2000)* [2001] EWCA Crim 888, [2001] 1 WLR 1879.

9 See eg the Theft Act 1968 s 31(1) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 28), by which a person is not to be excused, by reason that to do so may incriminate that person, or the spouse or civil partner of that person, of an offence under the Theft Acts 1968 or 1978: (1) from answering any question put to him in proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property; or (2) from complying with any order made in any such proceedings; but no statement or admission made by a person in answering such a question put or complying with an order so made is admissible in evidence in proceedings for an offence under the Theft Acts 1968 or 1978 against that person or, unless they married after the making of the statement or admission, against the spouse or civil partner of that person. The Criminal Damage Act 1971 s 9 (amended by the Civil Partnership Act 2004 Sch 27 para 36) makes provision in similar terms concerning offences under that Act. See also the Companies Act 1985 s 434(5A), (5B) (as added) (see COMPANIES vol 15 (2009) PARA 1544); the Supreme Court Act 1981 s 72 (as amended) (see CIVIL PROCEDURE vol 11 (2009) PARA 580); the Children Act 1989 s 98 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 229); and the amendments made by the Youth Justice and Criminal Evidence Act 1999 s 59, Sch 3.

## UPDATE

### 1477 Exceptions to the privilege against self-incrimination

NOTE 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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#### **1478. Assistance by offender: undertakings as to use of evidence.**

Specified prosecutors<sup>1</sup> may provide various undertakings to offenders or suspected offenders with a view to eliciting their assistance in the investigation or prosecution of offences<sup>2</sup>. If such a prosecutor thinks that for the purposes of the investigation or prosecution of any offence it is appropriate to offer any person an undertaking that information of any description<sup>3</sup> will not be used against that person in any criminal proceedings<sup>4</sup>, or in any proceedings under Part 5 of the Proceeds of Crime Act 2002<sup>5</sup>, he may give that person a written notice (or 'restricted use undertaking') to that effect<sup>6</sup>.

If a person is given a restricted use undertaking, the information described in the undertaking must not be used against that person in any such proceedings in England and Wales or in Northern Ireland, except in the circumstances specified in the undertaking<sup>7</sup>, but a restricted use undertaking ceases to have effect in relation to the person to whom it is given if that person fails to comply with any conditions specified in the undertaking<sup>8</sup>.

1 Each of the following is a specified prosecutor for this purpose: the Director of Public Prosecutions; the Director of Revenue and Customs Prosecutions; the Director of the Serious Fraud Office; the Director of Public Prosecutions for Northern Ireland; or a prosecutor designated for this purpose by one of the above (Serious Organised Crime and Police Act 2005 ss 71(4), 72(7)); but the Director of Public Prosecutions for Northern Ireland or a person designated by him may not give a restricted use undertaking in relation to proceedings in England and Wales and the Director of Public Prosecutions or a person designated by him may not give a restricted use undertaking in relation to proceedings in Northern Ireland: s 72(5), (6).

2 This may include the provision of immunity from prosecution, on condition that the person in question complies with any condition specified (see *ibid* s 71) or in the case of a convicted offender who is still serving his sentence, referral of that sentence back to the court by which the sentence was passed (see s 74). See further SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 625.

3 This will ordinarily be information provided by the person in question in response to the undertaking, but the undertaking may for example extend to any further information discovered as a direct or indirect result of the information provided.

4 'Criminal proceedings' are not defined in the Serious Organised Crime and Police Act 2005, but see the Criminal Justice Act 2003 s 134(1) (see PARA 1464 note 2 ante); and *R v H* [2005] EWCA Crim 2083, [2006] 1 Cr App Rep 50, [2005] All ER (D) 311 (Jul). Proceedings under the Crime and Disorder Act 1998 s 1C (as added and amended) (anti-social behaviour orders following criminal conviction) are not criminal proceedings: *R (on the application of W) v Acton Youth Court* [2005] EWHC 954 (Admin), [2005] All ER (D) 284 (May), DC.

5 I.e. the Proceeds of Crime Act 2002 Pt 5 (ss 240-316) (as amended) civil proceedings for the recovery of the proceeds of unlawful conduct: see PARA 2147 et seq post.

6 Serious Organised Crime and Police Act 2005 s 72(1), (2).

7 *Ibid* s 72(3).

8 *Ibid* s 72(4).

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### **1479. Legal professional privilege.**

Confidential communications made for the purpose of obtaining legal advice from solicitors, barristers or other legal advisers<sup>1</sup> are privileged from disclosure<sup>2</sup>, with the exception of communications made with the intention of furthering a criminal purpose<sup>3</sup>. In a criminal trial the privilege is now considered to be absolute, in that once the privilege is established even documents which might help to establish the innocence of a defendant remain exempt from disclosure<sup>4</sup>. The privilege is that of the client, not the lawyer, and it may be waived only by the client<sup>5</sup>.

Material that is not otherwise privileged does not become so merely by being enclosed with communications which do attract privilege<sup>6</sup>, nor does the concept of a 'communication' extend to mere records of visits to a legal adviser's office<sup>7</sup>.

Communications between a client (or his legal adviser) and a third party, such as a doctor, analyst or surveyor, are not ordinarily privileged, but will become so if made with reference to actual or contemplated litigation<sup>8</sup>, provided that the dominant purpose behind the communication is to assist in the preparation of a possible case<sup>9</sup>.

Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests<sup>10</sup>. Where the police interfere with this privilege by conducting covert surveillance (or 'bugging') of a suspect's privileged communications with his solicitor, this so seriously undermines the rule of law as to justify a court or judge in staying a prosecution on grounds of abuse of process, even if it appears that no damaging or prejudicial material was obtained as the fruit of this surveillance<sup>11</sup>.

1 The expression 'legal adviser' extends to clerks and other employees of a law firm (see *Wheeler v Le Marchant* (1881) 17 ChD 675 at 682 per Jessel MR) including interpreters employed in consultations and negotiations (*Du Barré v Livette* (1791) Peake 108; *R (on the application of Bozkurt) v South Thames Magistrates' Court* [2001] EWHC 400 (Admin), [2002] RTR 246). The basis of the privilege is just as apt to cover foreign legal advisers as English lawyers, provided only that the relationship of lawyer and client subsists between them: *Re Duncan, Garfield v Fay* [1968] P 306, [1968] 2 All ER 395; *International Business Machines Corp v Phoenix International (Computers) Ltd* [1995] 1 All ER 413. See also LEGAL PROFESSIONS vol 66 (2009) PARA 1146; CONFIDENCE AND DATA PROTECTION vol 8(1) (2003 Reissue) PARA 501.

2 *Du Barre v Livette* (1791) Peake 77; *R v Cox and Railton* (1884) 14 QBD 153, CCR; *R v Jones* (1846) 1 Den 166, CCR; *R v Farley and Jones* (1846) 2 Car & Kir 313, CCR; *R v Hayward* (1846) 2 Car & Kir 234, CCR; *R v Brewer* (1834) 6 C & P 363; *R v Brown* (1862) 9 Cox CC 281; *R v Tylney and Tuffs and Tuffs* (1848) 1 Den 319, CCR; *R v Avery* (1838) 8 C & P 596; *R v Watkinson* (1739) 2 Stra 1122; *R v Downer* (1880) 14 Cox CC 486, CCR; *Minter v Priest* [1930] AC 558, HL; *R v Derby Magistrates' Court, ex p B* [1996] AC 487, [1995] 4 All ER 526, HL. See further CIVIL PROCEDURE vol 11 (2009) PARAS 558 et seq, 972.

3 *R v Hayward* (1846) 2 Car & Kir 234, CCR; *R v Farley and Jones* (1846) 2 Car & Kir 313, CCR; *R v Avery* (1838) 8 C & P 596; *R v Cox and Railton* (1884) 14 QBD 153, CCR; *R v Smith* (1915) 84 LJKB 2153, 11 Cr App Rep 229, CCA; *Bullivant v A-G for Victoria* [1901] AC 196 at 200, HL; *O'Rourke v Darbishire* [1920] AC 581, HL. See also the Police and Criminal Evidence Act 1984 s 10(2); and PARA 873 ante. The criminal purpose may be that of the client or of another party, and it makes no difference if, for example, the legal adviser is innocent and unaware of that purpose: *R v Central Criminal Court, ex p Francis and Francis (a firm)* [1989] AC 346 at 357, 88 Cr App Rep 213, HL. See also CIVIL PROCEDURE vol 11 (2009) PARA 569.

4 *R v Derby Magistrates' Court, ex p B* [1996] AC 487, [1995] 4 All ER 526, HL, overruling *R v Barton* [1972] 2 All ER 1192, [1973] 1 WLR 115; *R v Ataou* [1988] QB 798, 87 Cr App Rep 210, CA.

5 *R v Justices of the Peace for Peterborough, ex p Hicks* [1978] 1 All ER 225, [1977] 1 WLR 1371, DC; *Wilson v Rastall* (1792) 4 Term Rep 753; *A-G v Mullholland* [1963] 2 QB 477 at 489, [1963] 1 All ER 767 at 771, CA, per Lord Denning MR.

Privilege is not necessarily waived where the defendant explains his failure to disclose in interview facts now relied upon in his defence by stating that he was advised by his solicitor not to answer police questions (*R v Robinson* [2003] EWCA Crim 2219, [2003] All ER (D) 479 (Jul)) but this in itself is unlikely to prevent inferences being drawn against him under the Criminal Justice and Public Order Act 1994 s 34 (as amended) (see PARA 1552 post). If, however, the reasons for this advice are revealed, this may be construed as a waiver of privilege and may enable the prosecution to cross-examine the defendant or his solicitor concerning discussions between them: *R v Roble* [1997] Crim LR 449, CA. Evidence given at a trial within a trial may involve waiver of privilege at the trial proper: *R v Bowden* [1999] 4 All ER 43, [1999] 2 Cr App Rep 176, CA; *Condron v United Kingdom* (2000) 8 BHRC 290, 31 EHRR 1, ECtHR; *R v Loizou* [2006] EWCA Crim 1719.

6 *R v King* [1983] 1 All ER 929 at 931, 77 Cr App Rep 1 at 3, CA, per Dunn LJ ('the rule is that in the case of expert witnesses legal professional privilege attaches to confidential communications between the solicitor and the expert, but it does not attach to the chattels or documents upon which the expert based his opinion, nor to the independent opinion of the expert himself'). Contrast *R v R* [1994] 4 All ER 260, [1995] 1 Cr App Rep 183, CA (blood sample sent to expert for analysis held to be privileged). Cf the Police and Criminal Evidence Act 1984 s 10(1)(c) (see PARA 873 ante).

7 *R v Crown Court at Manchester, ex p Rogers* [1999] 1 WLR 832, [1999] 2 Cr App Rep 267.

8 *Wheeler v Le Marchant* (1881) 17 ChD 675, CA. Different considerations may apply where a report is prepared at the request of a parent in connection with non-adversarial proceedings under the Children Act 1989: see *Re L (minors)* [1997] AC 16, [1996] 2 All ER 78, HL.

9 *Wagh v British Railways Board* [1980] AC 521, [1979] 2 All ER 1169, HL.

10 *R v Derby Magistrates' Court, ex p B* [1996] AC 487, [1995] 4 All ER 526, HL.

11 *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60, [2005] All ER (D) 44 (May).

## UPDATE

### 1479 Legal professional privilege

NOTE 3--See *R v Hall-Chung* [2007] All ER (D) 429 (Jul), CA.

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EVIDENCE/(13) PRIVILEGE AND PUBLIC INTEREST IMMUNITY /(ii) Exclusion of Evidence on Grounds of Public Interest/1480. Material that may be subject to public interest immunity.

## **(ii) Exclusion of Evidence on Grounds of Public Interest**

### **1480. Material that may be subject to public interest immunity.**

In criminal proceedings, certain evidence may need to be excluded from disclosure at trial (and also from pre-trial disclosure to the defence) on the grounds that it is not in the public interest that it should be so disclosed. The basic principles were developed primarily in civil cases<sup>1</sup> under the heading 'Crown privilege'<sup>2</sup> but the concept of public interest immunity (as it is now known) differs fundamentally from privilege because the safeguarding of the public interest involves a duty rather than a right, and this duty cannot in theory be waived by a party or witness so as to permit disclosure of sensitive material that the public interest requires to be excluded<sup>3</sup>. Where any disputed question of public interest immunity arises, it is ordinarily for the court to decide whether exclusion is required after weighing all competing considerations in the balance<sup>4</sup>. In criminal cases, one of the most important considerations is that, if the material in question tends to raise any doubt as to the guilt of a defendant, it may be impossible to proceed with the trial unless that evidence is disclosed<sup>5</sup>.

Although in theory public interest immunity cannot be waived, questions of public interest immunity generally arise during pre-trial disclosure by the prosecution, and it may sometimes be proper for the prosecution to disclose potentially sensitive material to the defence without making any claim to public interest immunity or referring the matter to the court<sup>6</sup>. Moreover, in cases where persons (such as police informers) who might be affected by possible disclosure have been consulted and offer no objection to it, it is unlikely that a court would regard the public interest as requiring exclusion<sup>7</sup>.

Material that may (depending on the circumstances) be subject to a claim to public interest immunity includes (but is not confined to) material falling within the following categories<sup>8</sup>: (1) material relating to national security<sup>9</sup>; (2) material received from the intelligence and security agencies<sup>10</sup>; (3) material relating to intelligence from foreign sources which reveals sensitive intelligence gathering methods<sup>11</sup>; (4) material given in confidence<sup>12</sup>; (5) material which relates to the use of a telephone system and which is supplied to an investigator for intelligence purposes only<sup>13</sup>; (6) material relating to the identity or activities of informants, or under-cover police officers, or other persons supplying information to the police who may be in danger if their identities are revealed<sup>14</sup>; (7) material revealing the location of any premises or other place used for police surveillance, or the identity of any person allowing a police officer to use them for surveillance<sup>15</sup>; (8) material revealing, either directly or indirectly, techniques and methods relied upon by a police officer in the course of a criminal investigation, such as covert surveillance techniques, or other methods of detecting crime<sup>16</sup>; (9) material whose disclosure might facilitate the commission of other offences or hinder the prevention and detection of crime; (10) internal police communications such as management minutes<sup>17</sup>; (11) material upon the strength of which search warrants were obtained<sup>18</sup>; (12) material containing details of persons taking part in identification parades; (13) material supplied to an investigator during a criminal investigation which has been generated by an official of a body concerned with the regulation or supervision of bodies corporate or of persons engaged in financial activities, or which has been generated by a person retained by such a body; and (14) material supplied to an investigator during a criminal investigation which relates to a child or young person and

which has been generated by a local authority social services department, an Area Child Protection Committee or other party contacted by an investigator during the investigation<sup>19</sup>.

Considerations of public interest also lie behind the rule whereby evidence may not ordinarily be received from jurors or others concerning what took place during a jury's deliberations<sup>20</sup>.

1 As to public interest immunity in civil cases see CIVIL PROCEDURE vol 11 (2009) PARAS 574-579. In criminal cases, there was little case law on public interest immunity until strict rules were developed to govern pre-trial disclosure by the prosecution: see *R v H*; *R v C* [2004] UKHL 03 at [19] et seq, [2004] 2 AC 134 at [19] et seq, [2004] 1 All ER 1269 at [19] et seq per Lord Bingham.

2 See *R v Governor of Brixton Prison, ex p Osman (No 1)* [1992] 1 All ER 108, [1991] 1 WLR 281, DC; *R v H*; *R v C* [2004] UKHL 03, [2004] 2 AC 134, [2004] 1 All ER 1269.

3 *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274, [1995] 1 Cr App Rep 342, HL. Public interest immunity also differs from privilege in that secondary evidence may not be admitted where the original evidence is excluded in the public interest: *Chatterton v Secretary of State for India in Council* [1895] 2 QB 189 at 193-195, CA; and see also *Rogers v Secretary of State for the Home Department* [1973] AC 388, [1972] 2 All ER 1057, HL; *Evans v Chief Constable of Surrey Constabulary* [1988] QB 588, [1989] 2 All ER 594, DC.

4 *R v Ward* [1993] 2 All ER 577, 96 Cr App Rep 1, CA; *R v Keane* [1994] 2 All ER 478, 99 Cr App Rep 1, CA; *R v Chief Constable of the West Midlands Police, ex p Wiley* [1995] 1 AC 274, [1995] 1 Cr App Rep 342, HL. But as to ministerial public interest immunity certificates see *Balfour v Foreign and Commonwealth Office* [1994] 2 All ER 588, [1994] 1 WLR 681; and note 9 infra.

5 *Marks v Beyfus* (1890) 25 QBD 494, CA; and see *R v Richardson* (1863) 3 F & F 693; *R v Hennessey* (1979) 68 Cr App Rep 419 at 426, CA; *R v Rankine* [1986] QB 861 at 867, 83 Cr App Rep 18 at 22, CA; *R v Hallett* [1986] Crim LR 462, CA; *R v Brown*, *R v Daley* [1988] Crim LR 239, CA; *R v Clowes* [1992] 3 All ER 440; *R v Keane* [1994] 2 All ER 478, 99 Cr App Rep 1, CA; *R v H*; *R v C* [2004] UKHL 03, [2004] 2 AC 134, [2004] 1 All ER 1269. See also *Rowe and Davis v United Kingdom* (2000) 8 BHRC 325, [2000] Crim LR 584, ECtHR.

6 *R v Horseferry Road Magistrates' Court, ex p Bennett (No 2)* [1994] 1 All ER 289, 99 Cr App Rep 123, DC. Before making disclosure the Crown Prosecution Service should first obtain the Treasury Solicitor's express written approval for such a course. He should consult any other relevant government department and satisfy himself that the balance falls clearly in favour of disclosure. He should be the readier to approve disclosure of documents likely to assist the defence case than those which the Crown Prosecution Service wishes to disclose with a view to furthering the interests of the prosecution; and he should consider not merely the importance of the documents but also the importance of the prosecution itself: it may in some cases be preferable to abandon the case rather than permit disclosure: see *R v Horseferry Road Magistrates' Court, ex p Bennett (No 2)* supra at 297 and 130 per Simon Brown LJ. As to pre-trial disclosure generally see PARA 1383 et seq ante. See also *R v Adams* [1997] Crim LR 292; *R v H*; *R v C* [2004] UKHL 03 at [35], [2004] 2 AC 134 at [35], [2004] 1 All ER 1269 at [35] per Lord Bingham ('only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands'). As to the procedure for resolving issues of public interest immunity in pre-trial proceedings see PARA 1481 post.

Once disclosure of the evidence in question has been made to the defence there will often be no point in seeking to assert public interest immunity at the trial, but cases may arise in which it would be undesirable to repeat in open court disclosures that have so far been made only in pre-trial communications, and in such cases it is not too late to claim public interest immunity: *R v Governor of Brixton Prison, ex p Osman* [1992] 1 All ER 108, [1991] 1 WLR 281, DC.

7 *Savage v Chief Constable of Hampshire* [1997] 2 All ER 631, [1997] 1 WLR 1061, CA (police informer who wished to sacrifice his anonymity not precluded from so doing by automatic application of the principle of public interest). But once a court has determined that evidence attracts public interest immunity it has no residual discretion to admit that evidence: *Powell v Chief Constable of North Wales Constabulary* [1999] All ER (D) 1451, CA.

8 As listed in the Criminal Procedure and Investigations Act 1996 (s 23(1)) Code of Practice para 6.12. But the categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop: *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 230 per Lord Hailsham LC.

9 See also *Duncan v Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL. In such cases (and also in cases falling within heads (2) and (3) in the text) a public interest immunity certificate signed by the appropriate minister will ordinarily be conclusive as to the need for exclusion, and the court will not require further evidence of it: *Balfour v Foreign and Commonwealth Office* [1994] 2 All ER 588, [1994] 1 WLR 681. But

note that in response to criticisms of previous policy made by Sir Richard Scott V-C (*Report of the Inquiry into the Export of Defence Equipment and Dual-use Goods to Iraq and Related Prosecutions* HC Paper 115/1995-96) the Government has undertaken to cease making blanket 'class claims' to immunity for all documents or materials of this kind, and will instead consider each relevant document on its own merits.

10 In practice a claim to public interest immunity on this basis may also involve issues of national security: see *Balfour v Foreign and Commonwealth Office* [1994] 2 All ER 588, [1994] 1 WLR 681; and note 9 *supra*.

11 See notes 9, 10 *supra*.

12 In civil cases it has been held that information provided in confidence may attract public interest immunity: see eg *Alfred Crompton Amusement Machines v Comrs of Customs and Excise (No 2)* [1974] AC 405, [1973] 2 All ER 1169, HL; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, [1977] 1 All ER 589, HL; but such immunity will not always be granted, even where it is argued that it is important to the proper operation of the public service, and where immunity is claimed the court may insist on inspecting the material in question before making a ruling: *Conway v Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL. In *R v Umoh* (1986) 84 Cr App Rep 138 at 143, CA, it was recognised that public interest immunity might extend in a criminal case to confidential discussions between a prisoner and a prison officer in connection with a legal aid application. As to immunity attaching to confidential medical records see *Morrow, Geach and Thomas v DPP* [1994] Crim LR 58, DC.

13 As to restrictions on the use of telephone intercepts and other intercepted communications see PARA 519 *ante*.

14 *R v Hardy* (1794) 24 State Tr 199 at 753; *R v Watson* (1817) 32 State Tr 1 at 100; *A-G v Briant* (1846) 15 M & W 169; *R v Smith O'Brien* (1849) 7 State Tr NS 1; *R v Richardson* (1863) 3 F & F 693; *Marks v Beyfus* (1890) 25 QBD 494, CA; *R v Keane* [1994] 2 All ER 478, 99 Cr App Rep 1, CA; but see *Savage v Chief Constable of Hampshire* [1997] 2 All ER 631, [1997] 1 WLR 1061, CA (see note 7 *supra*).

15 *R v Rankine* [1986] QB 861, 83 Cr App Rep 18; *R v Johnson* [1989] 1 All ER 121, 88 Cr App Rep 131, CA; *R v Hewitt* (1992) 95 Cr App Rep 81, CA; *Blake v DPP* (1992) 97 Cr App Rep 169, DC.

16 But as to the need for any claim to immunity on this basis to be properly supported by the independent evidence of senior police officers see *R v Brown* (1987) 87 Cr App Rep 52, CA.

17 As to files dealing with police disciplinary proceedings see *Halford v Sharples* [1992] 3 All ER 624, [1992] 1 WLR 736, CA.

18 *Taylor v Anderton* (1986) Times, 21 October, CA.

19 See also *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, [1977] 1 All ER 589, HL (protection of identity of informant in case of suspected child abuse).

20 As to the extent and basis of this rule see *R v Connor*, *R v Mirza* [2004] UKHL 02, [2004] 1 AC 1118, [2004] 2 Cr App Rep 112; *R v Smith* [2005] UKHL 12, [2005] 2 All ER 29, [2005] 1 WLR 704; and see JURIES vol 61 (2010) PARA 852.

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### **1481. Procedure for determining issues of public interest immunity.**

Although rules of common law ultimately determine whether the disclosure of material is in the public interest<sup>1</sup>, applications to withhold disclosure on grounds of public interest immunity are now largely governed by statute<sup>2</sup> and by associated rules of criminal procedure<sup>3</sup>.

Where a prosecutor applies for disclosure to be withheld<sup>4</sup>, notice of this application must be served on the court officer and must specify the nature of the material to which the application relates<sup>5</sup>. A copy of this notice must ordinarily be served on the defendant<sup>6</sup>; but where the prosecutor has reason to believe that to reveal to the defendant the nature of the material to which the application relates would have the effect of disclosing that which the prosecutor contends should not in the public interest be disclosed, he must instead notify the defendant that an application to withhold disclosure has been made<sup>7</sup>, unless he considers that even this would have the effect of disclosing that which should not in the public interest be disclosed, in which case notice of the application must (where it is made in the Crown Court) be served on the trial judge or, if the application is made before the start of the trial, on the judge, if any, who has been designated to conduct the trial instead of on the court officer<sup>8</sup>.

Where notice of the application has been served on the defendant, he must then be notified of date, time and place of the hearing, at which he will be entitled to make representations to the court<sup>9</sup>; but in other cases the hearing will be *ex parte* and (save where an interested party is permitted to make representations<sup>10</sup>) only the prosecutor may make representations to the court<sup>11</sup>. In cases where the defendant is not notified of the application, he will not ordinarily be notified of the outcome of the hearing<sup>12</sup>.

A defendant may (where he is aware of a ruling that disclosure be withheld on grounds of public interest immunity) subsequently apply to the court for a review of whether that ruling remains appropriate<sup>13</sup>, and in cases tried on indictment the Crown Court has an ongoing duty to keep that question under review<sup>14</sup>.

The adoption of an *ex parte* procedure, although sometimes necessary, involves obvious difficulties for the defendant and his legal advisers, and in order to preserve the defendant's right to a fair trial, such difficulties must be sufficiently counterbalanced by the procedures followed by the judicial authorities<sup>15</sup>. In exceptional cases, it may be appropriate for the court to appoint a special counsel or special advocate to represent the interests of the defendant at an *ex parte* hearing<sup>16</sup>.

1 See the Criminal Procedure and Investigations Act 1996 s 21(2).

2 See *ibid* ss 3(6), 7A(8), 8(5) (s 7A(8) added by the Criminal Justice Act 2003 s 37), which provide that material must not be disclosed to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

3 See CrimPR Pt 25. The rules in this part reproduce the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997, SI 1997/698, and the Magistrates' Courts (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997, SI 1997/703 (revoked), and effectively sanction guidance previously given by the courts in *R v Davis* [1993] 2 All ER 643, sub nom *R v Johnson* (1993) 97 Cr App Rep 110, CA; and *R v Keane* [1994] 2 All ER 478, 99 Cr App Rep 1: see *R v H*; *R v C* [2004] UKHL 3 at [20], [2004] 2 AC 134 at [20], [2004] 1 All ER 1269 at [20] per Lord Bingham.



4 le under the Criminal Procedure and Investigations Act 1996 ss 3(6), 7A(8), 8(5) (s 7A(8) as added): see note 2 *supra*.

5 CrimPR 25.1(1), (2).

6 See CrimPR 25.1(3).

7 CrimPR 25.1(4).

8 CrimPR 25.1(5), (6). This procedure is appropriate only in highly exceptional cases, where any revelation that an application has been made would suffice to 'let the cat out of the bag': *R v Davis* [1993] 2 All ER 643, sub nom *R v Johnson* (1993) 97 Cr App Rep 110, CA; *R v Keane* [1994] 2 All ER 478, 99 Cr App Rep 1; *R v H*; *R v C* [2004] UKHL 03 at [20], [2004] 2 AC 134 at [20], [2004] 1 All ER 1269 at [20] per Lord Bingham.

9 CrimPR 25.2(3). Where however the prosecutor applies to the court for leave to make representations in the absence of the defendant, the court may for that purpose sit in the absence of the defendant and any legal representative of his: CrimPR 25.2(4).

10 le in accordance with CrimPR 25.5(4). As to the circumstances in which a third party may be able to intervene see the Criminal Procedure and Investigations Act 1996 s 16 (as amended); and PARA 1387 *ante*.

11 See CrimPR 25.2(5). But if the judge concludes that the application should be heard *inter partes* and that the defendant should also be permitted to make representations, he may order accordingly: *R v Davis* [1993] 2 All ER 643, sub nom *R v Johnson* (1993) 97 Cr App Rep 110, CA.

12 CrimPR 25.3(3).

13 Criminal Procedure and Investigations Act 1996 ss 14(2), 15(4) (s 14(2) amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 20, 30); CrimPR 25.4.

14 See the Criminal Procedure and Investigations Act 1996 s 15(2), (3) (s 15(2) amended by the Criminal Justice Act 2003 Sch 36 paras 20, 31).

15 *Rowe and Davis v United Kingdom* (2000) 8 BHRC 325, [2000] Crim LR 584, ECtHR; *Jasper v United Kingdom* (2000) 30 EHRR 441, [2000] Crim LR 586, ECtHR; *Edwards v United Kingdom* (2003) 15 BHRC 189, [2003] Crim LR 891, ECtHR; *R v H*; *R v C* [2004] UKHL 03 at [20], [2004] 2 AC 134 at [20], [2004] 1 All ER 1269 at [20] per Lord Bingham.

16 Statutory provision is made for the appointment of special advocates in certain civil hearings (see eg the Proscribed Organisations Appeal Commission (Procedure) Rules 2001, SI 2001/443, r 10 (and PARA 386 *ante*)) but the absence of specific legislative provision does not exclude the possibility of their appointment in criminal cases, whether in pre-trial hearings under CrimPR Pt 25, or in respect of confiscation proceedings following conviction (see *R v May* [2005] EWCA Crim 97 at [21], [2005] 3 All ER 523 at [21], [2005] 2 Cr App Rep (S) 408 at [21] per Keene LJ) or in proceedings before the Court of Appeal. Nevertheless, 'such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant': *R v H*; *R v C* [2004] UKHL 03 at [22], [2004] 2 AC 134 at [22], [2004] 1 All ER 1269 at [22] per Lord Bingham. See also *R v Shayler* [2002] UKHL 11 at [113], [2003] 1 AC 247 at [113], [2002] 2 All ER 477 at [113] per Lord Hutton; *R v Ojinnaka* [2003] All ER (D) 103 (Nov), CA; *Edwards v United Kingdom* (2003) 15 BHRC 189, [2003] Crim LR 891, ECtHR.

As to procedure on appeal see *R v McDonald* [2004] EWCA Crim 2614, [2004] All ER (D) 165 (Oct).

## UPDATE

### 1481 Procedure for determining issues of public interest immunity

NOTE 1--See also *Secretary of State for the Home Department v Wellington* [2007] All ER (D) 131 (Aug).

NOTES 3-13--CrimPR now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'). As to disclosure see CrimPR Pt 22; and PARA 1384.

NOTE 16--SI 2001/4413 replaced: SI 2007/1286.

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## **(14) OPINION AND EXPERT EVIDENCE**

### **1482. Evidence of opinion or belief generally inadmissible.**

As a general rule, witnesses in criminal proceedings may testify only as to facts perceived or experienced by them, and must not seek to influence the court or jury by expressing opinions or judgments concerning those facts or by drawing inferences as to the causes or significance of those facts<sup>1</sup>. The rationale behind this rule is that such opinions, if not founded upon evidence, are worthless<sup>2</sup>; and, in so far as they may be founded upon legally admissible evidence, they may tend to usurp the function of the court or jury, whose task it is to draw inferences from the evidence and apportion blame or responsibility where appropriate<sup>3</sup>. It follows that evidence as to the opinion or belief of a witness or of any other person<sup>4</sup> is generally inadmissible to prove the correctness of the opinion held<sup>5</sup>.

There are various exceptions to this general rule, notably in respect of expert evidence<sup>6</sup>. On some matters, even non-expert witnesses may be permitted to give evidence of opinion<sup>7</sup>.

<sup>1</sup> *R v Turner* [1975] QB 834, 60 Cr App Rep 80, CA. As to the distinction between evidence of fact and evidence of opinion see *R v Meads* [1996] Crim LR 519, CA (expert evidence of tests showing that police notes of interviews could not have been written in the time alleged by the officers concerned was admissible as evidence of fact rather than opinion, as would be evidence of tests in an alibi case showing that a journey could or could not be completed in a given time).

<sup>2</sup> *Carter v Boehm* (1766) 3 Burr 1905 at 1918; *Rigg v Manchester, Sheffield and Lincolnshire Rly Co* (1866) 12 Jur NS 525; *The Solway* (1885) 10 PD 137; *Joseph Crosfield & Sons Ltd v Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378.

<sup>3</sup> See *North Cheshire and Manchester Brewery Co Ltd v Manchester Brewery Co Ltd* [1899] AC 83 at 85, HL, per Earl of Halsbury LC. See also *R v Turner* [1975] QB 834, 60 Cr App Rep 80, CA.

Opinion evidence has in some cases been said to be irrelevant: *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 at 595, [1943] 2 All ER 35 at 40, CA, per Lord Goddard CJ; but contrast *R v Turner* [1975] QB 834, 60 Cr App Rep 80, CA, in which an expert's opinion on a matter not calling for expert testimony was regarded as relevant but inadmissible, the reason for exclusion being that the jury had no need of it.

<sup>4</sup> At common law, this rule extends to the opinion of a court or jury at an earlier trial as expressed in its verdict: *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, [1943] 2 All ER 35. Save where statute otherwise provides, the verdict of such a court or jury remains inadmissible to prove the guilt or innocence of the person convicted or acquitted, or any other facts on which that decision was based. See further PARAS 1498-1499 post.

<sup>5</sup> The exclusionary rule does not apply where the mere holding of the opinion or belief is itself relevant irrespective of its correctness: eg where on a charge of blackmail the defendant testifies that he believed that the menaces used to reinforce the demand were proper in the circumstances: see the Theft Act 1968 s 21(1) (b); and PARA 308 ante. As to a false expression of opinion amounting to perjury see PARA 712 ante.

<sup>6</sup> See PARA 1484 et seq post.

<sup>7</sup> See PARAS 1483, 1496 post.

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### **1483. Evidence of general reputation and character.**

At common law<sup>1</sup>, evidence of the defendant's general reputation for good character amongst those who know him is admissible, both to establish his credibility as a witness, and as evidence of his lack of criminal propensity<sup>2</sup>.

Evidence is also admissible at common law to prove that a witness's general reputation is such that he ought not to be believed on his oath<sup>3</sup>.

In practice, witnesses called upon to testify as to a defendant's character are often permitted to give their individual opinion, rather than mere general reputation; and a witness called to impeach another's credit may be permitted to express his individual opinion based on his personal knowledge<sup>4</sup>.

1 The common law rules are preserved by the Criminal Justice Act 2003 s 118(1).

2 See PARA 1502 post. As to the restrictions on the admission of the defendant's bad character see PARA 1505 et seq post; and as to the complainant's character see PARA 1504 post.

3 See PARA 1502 post. As to the expression of individual opinion as to another's credit see PARA 1496 post.

4 *R v Richardson, R v Longman* [1969] 1 QB 299, 52 Cr App Rep 317, CA.

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#### **1484. Expert evidence: general principles.**

Expert opinion evidence is generally admissible to assist the court or jury in respect of matters which lie outside the experience or understanding of ordinary jurors or justices<sup>1</sup>. If, however, a court or jury can be expected to understand the evidence in question without such assistance, expert testimony concerning that evidence cannot be received<sup>2</sup>.

By way of example, expert evidence will ordinarily be considered necessary and admissible on matters of science<sup>3</sup>, medicine<sup>4</sup>, professional competence<sup>5</sup>, the authenticity or identification of handwriting<sup>6</sup>, and questions of foreign law<sup>7</sup>. Where the facts on which an opinion is based are to be established by other testimony, the expert's opinion will be tendered on the hypothesis that these facts are accepted<sup>8</sup>.

Expert witnesses may express opinions only on matters falling within their own areas of expert knowledge or competence<sup>9</sup>. It follows that experts in (for example) DNA profiling may be competent to explain the significance of a positive DNA match, but are not generally competent to comment on other evidence in the case and should not ordinarily be permitted to express an opinion as to the ultimate issue of guilt or innocence, because this would involve expressing a view on the other evidence<sup>10</sup>.

Expert witnesses (especially those proposing to testify in respect of new or little known theories) must be prepared to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence<sup>11</sup>.

1 *Folkes v Chadd* (1782) 3 Doug KB 157; *R v Turner* [1975] QB 834, 60 Cr App Rep 80, CA. In such cases, it may sometimes be necessary to warn juries against conducting their own experiments, comparisons or calculations: Judicial Studies Board, Specimen Direction No 33; and see *R v Harden* [1963] 1 QB 8, 46 Cr App Rep 90, CCA.

2 *R v Turner* [1975] QB 834, 60 Cr App Rep 80, CA. See also *R v Staniforth*, *DPP v Jordan* [1977] AC 699, sub nom *DPP v Jordan* (1976) 64 Cr App Rep 33, HL; *R v Camplin* [1978] AC 705 at 727, 67 Cr App Rep 14 at 29, HL, per Lord Simon; *R v Masih* [1986] Crim LR 395, CA; *R v Reynolds* [1989] Crim LR 220, CA; *R v Toner* (1991) 93 Cr App Rep 382, CA; *R v Gilfoyle* [2000] EWCA Crim 81, [2001] 2 Cr App Rep 57, [2000] All ER (D) 2431; *R v Henry* [2005] EWCA Crim 1681, [2006] 1 Cr App Rep 118, [2005] All ER (D) 352 (Jun), CA.

3 *Folkes v Chadd* (1782) 3 Doug KB 157. As to expert evidence on the authenticity and originality of tape-recordings see *R v Robson*, *R v Harris* [1972] 2 All ER 699, 56 Cr App Rep 450, CA. The opinions of police officers and others experienced in the identification of persons by fingerprints or palm prints are admissible to identify them: *R v Castleton* (1909) 3 Cr App Rep 74, CCA; *R v Robinson* [1955] Crim LR 434, CCA. It is a question for the jury whether the expert explanations are sufficiently reliable to establish identity: *R v Robinson* supra; *R v O'Callaghan* [1976] VR 676, Vict SC.

4 *R v Davies* [1962] 3 All ER 97, 46 Cr App Rep 292, C-MAC; *R v Mason* (1911) 7 Cr App Rep 67, CCA; *R v Inch* (1989) 91 Cr App Rep 51, C-MAC.

5 See for example *R v Adomako* [1995] 1 AC 171, 99 Cr App Rep 362, HL.

6 *R v Rickard* (1918) 119 LT 192, CCA; *R v Tilley* [1961] 3 All ER 406, 45 Cr App Rep 360, CCA; *R v Harden* [1963] 1 QB 8, 46 Cr App Rep 90, CCA; *R v Smith* (1968) 52 Cr App Rep 648, CA; and see PARA 1488 post.

7 *R v Ofori* (1993) 99 Cr App Rep 223, CA. See PARA 1486 post.

8     *R v Mason* (1911) 7 Cr App Rep 67, CCA; *R v Smith* (1915) 84 LJB 2153, 11 Cr App Rep 229, CCA. An expert should be asked in chief to state the facts on which his opinion is based: see *R v Turner* [1975] QB 834 at 840, 60 Cr App Rep 80 at 82, CA.

9     *Hinds v London Transport Executive* [1979] RTR 103, CA (civil); *R v Theodosi* [1993] RTR 179, (1992) Times 13 April, CA.

10    See *R v Doheny*, *R v Adams* [1997] 1 Cr App Rep 369, [1997] Crim LR 669, CA.

11    *R v Gilfoyle* [2000] EWCA Crim 81 at [24], [2001] 2 Cr App Rep 57 at [24], [2000] All ER (D) 2431 at [24] per Rose LJ (citing *Davie v Edinburgh Magistrates* 1953 SC 34, Ct of Sess).

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### **1485. Psychiatric and psychological evidence.**

Expert psychiatric evidence is a statutory requirement in cases where it is argued that the defendant was insane at the time of the alleged offence or currently unfit to plead to the indictment<sup>1</sup>. In practice, such evidence is also necessary and admissible if there is any question whether the defendant's behaviour was caused by automatism<sup>2</sup> or diminished responsibility<sup>3</sup>. Expert evidence has been held admissible on the question of a defendant's ability to make a reliable confession<sup>4</sup>, and to show that a witness suffers from a disease, defect or abnormality of mind which may affect the reliability of his evidence<sup>5</sup>. Such evidence may also be admissible in cases of provocation<sup>6</sup> or duress<sup>7</sup>, if (and to the limited extent that) it relates to a recognised mental condition that may legitimately be taken into account in respect of such defences<sup>8</sup>.

Where it is alleged that the victim of an assault has suffered psychological injury amounting to actual bodily harm or grievous bodily harm, expert evidence will in practice be needed in support of that allegation, and without it the case cannot properly be left to the jury<sup>9</sup>.

In contrast, expert evidence is not admissible to explain the behaviour or likely intent of an adult defendant (or of any other adult) where no question of mental illness or significant mental abnormality is involved<sup>10</sup>, because trials operate on the premise that courts and juries 'do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness [or abnormality] are likely to react the stresses and strains of life'<sup>11</sup>; nor will expert psychological evidence be admissible unless the expert in question can furnish the court with the necessary scientific criteria for testing the accuracy of his conclusions, 'so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence'<sup>12</sup>.

1 A jury may not return a special verdict under the Trial of Lunatics Act 1883 s 2 (as amended) (acquittal on ground of insanity) (see PARA 31 ante) except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder: Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 ss 1, 6 (read in conjunction with the Mental Health Act 1983 s 54(2), (3) (see MENTAL HEALTH vol 30 (Reissue) 492). Where on the trial of a person the question arises (at the instance of the defence or otherwise) whether the defendant is under a disability, that is to say, under any disability such that apart from the Criminal Procedure (Insanity) Act 1964 it would constitute a bar to his being tried, a court may not make a determination as to fitness to be tried except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved: Criminal Procedure (Insanity) Act 1964 s 4(1), (5), (6) (s 4 substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 2; the Criminal Procedure (Insanity) Act 1964 s 4(5), (6) amended by the Domestic Violence, Crime and Victims Act 2004 s 22(1), (2), (3)).

2 *Hill v Baxter* [1958] 1 QB 277, 42 Cr App Rep 51, DC; *Bratty v A-G for Northern Ireland* [1963] AC 386 at 413, 46 Cr App Rep 1 at 22, HL, per Lord Denning; *R v Smith* [1979] 3 All ER 605, 69 Cr App Rep 378, CA. As to automatism see PARA 35 ante.

3 *R v Byrne* [1960] 2 QB 396, 44 Cr App Rep 246, CA; *R v Dix* (1981) 74 Cr App Rep 306, CA; *R v Turner* [1975] QB 834, 60 Cr App Rep 80, CA. As to diminished responsibility see PARAS 96-97 ante.

4 *R v Stewart* (1972) 56 Cr App Rep 272, CA. The courts have shown increased willingness to admit expert evidence bearing upon the reliability of confession evidence: *R v Henry* [2005] EWCA Crim 1681 at [13], [2006] 1 Cr App Rep 118 at [13], [2005] All ER (D) 352 (Jun) at [13] per Maurice Kay LJ. The restrictive approach adopted in *R v Weightman* (1990) 92 Cr App Rep 291, CA, excluding expert evidence of personality disorders falling short of mental abnormality, was rejected in *R v Ward (Judith)* [1993] 2 All ER 577, 96 Cr App Rep 1, CA, where it was held that expert evidence of a psychiatrist or a psychologist may properly be admitted if it is to the effect that a defendant is suffering from a condition not properly described as mental illness, but from a

personality disorder so severe as properly to be categorised as mental disorder. The following guidelines were suggested in *R v O'Brien* [2000] All ER (D) 62, [2000] Crim LR 676, CA, per Roach LJ (where a co-defendant made admissions in the course of his testimony at trial, incriminating the appellants); followed in *R v Smith* [2003] EWCA Crim 927, [2003] All ER (D) 28 (Apr), CA:

'First the abnormal disorder must not only be of the type which might render a confession or evidence unreliable; there must also be a very significant deviation from the norm shown. . . . Second, there should be a history pre-dating the making of the admissions or the giving of evidence which is not based solely on a history given by the subject, which points to or explains the abnormality or abnormalities.

If such [expert] evidence is admitted, the jury must be directed that they are not obliged to accept such evidence. They should consider it if they think it right to do so, as throwing light on the personality of the defendant and bringing to their attention aspects of that personality of which they might otherwise have been unaware'.

5 *Toohey v Metropolitan Police Comr* [1965] AC 595, 49 Cr App Rep 148, HL; *R v O'Brien* [2000] All ER (D) 62, [2000] Crim LR 676 (see note 4 supra). In a proper case evidence from a psychiatrist or psychologist is admissible to show that a witness or a confession is or was unreliable: contrast *R v Mackenney* (1981) 76 Cr App Rep 271, CA, with *R v Mackenney*, *R v Pinfold* [2003] EWCA Crim 3643, [2004] 2 Cr App Rep 32, [2003] All ER (D) 255 (Dec). As to the admissibility of expert evidence concerning the dangers of childhood amnesia or false memory syndrome in cases where adult witnesses testify concerning supposedly remembered childhood events see *R v H*; *R v G* [2005] EWCA Crim 1828, sub nom *R v X* [2005] All ER (D) 06 (Jul). As to childhood amnesia see *R v S*; *R v W* [2006] EWCA Crim 1404, [2006] All ER (D) 214 (Jun).

The Crown cannot call a witness of fact and then, without more, call a psychologist or psychiatrist to give reasons why the jury should regard that witness as reliable: *R v Robinson* [1994] 3 All ER 346, 98 Cr App Rep 370, CA. Only in very exceptional circumstances will psychiatric evidence be permitted in chief to support the defendant's veracity: *R v Turner* [1975] QB 834, 60 Cr App Rep 80, CA, explaining *Lowery v R* [1974] AC 85, 58 Cr App Rep 35, PC. See also *R v Bowen* [1996] 4 All ER 837, [1996] 2 Cr App Rep 157, CA; *R v Huckerby* [2004] EWCA Crim 3251, [2004] All ER (D) 364 (Dec).

6 *R v Humphreys* [1995] 4 All ER 1008, CA; *R v Thornton (No 2)* [1996] 2 All ER 1023, 2 Cr App Rep 108, CA. As to provocation see PARAS 94-95 ante.

7 *R v Emery* (1992) 14 Cr App Rep (S) 394, CA; *R v Hegarty* [1994] Crim LR 353, CA; *R v Bowen* [1996] 4 All ER 837, 2 Cr App Rep 157, CA. See also *R v Huckerby* [2004] EWCA Crim 3251 [2004] All ER (D) 364 (Dec) (expert medical evidence as to post-traumatic stress disorder arising from an earlier incident held admissible on an issue as to whether the defendant willingly co-operated with and assisted robbers who seized his security van or whether his ineffective behaviour was attributable instead to his alleged mental condition. As to duress see PARAS 23-25 ante.

8 See *R v Hurst* [1995] 1 Cr App Rep 82, CA; *R v Hegarty* [1994] Crim LR 353, CA; *R v Bowen* [1996] 4 All ER 837, [1996] 2 Cr App Rep 157, CA. As to the extent to which abnormal mental conditions may be relevant to defences of duress or provocation see PARA 23 note 10 ante.

9 *R v Chan-fook* [1994] 2 All ER 552, [1994] 1 WLR 689, CA; *R v Morris* [1998] 1 Cr App Rep 386, CA.

10 *R v Chard* (1971) 56 Cr App Rep 268, CA; *R v Turner* [1975] QB 834, 60 Cr App Rep 80, CA; *R v Masih* [1986] Crim LR 395, CA; *R v Toner* [1991] Crim LR 627, CA; *R v Strudwick* (1993) 99 Cr App Rep 326, CA. The mere fact that a defendant has a very low IQ does not necessarily make expert evidence admissible in respect of an issue as to his intent or purpose at the time of the alleged offence: *R v Henry* [2005] EWCA Crim 1681, [2006] 1 Cr App Rep 118, [2005] All ER (D) 352 (Jun). See also *R v Coles* [1995] 1 Cr App Rep 157, CA.

11 *R v Turner* [1975] QB 834 at 840, [1975] 1 All ER 70 at 74, CA, per Lawton LJ; applied in *R v Gilfoyle* [2000] EWCA Crim 81, [2001] 2 Cr App Rep 57, [2000] All ER (D) 2431.

12 See *R v Gilfoyle* [2000] EWCA Crim 81 at [24]-[25], [2001] 2 Cr App Rep 57 at [24]-[25], [2000] All ER (D) 2431 at [24]-[25], where evidence of a 'psychological autopsy' performed in respect of an alleged murder victim and suggesting the possibility of suicide, was held to have been properly excluded at trial, because (inter alia) the expert's report identified no criteria by reference to which the court could test the quality of his opinions. There was no database comparing real and questionable suicides and no substantial body of academic writing approving his methodology.

## UPDATE

### 1485 Psychiatric and psychological evidence

NOTE 5--*R v S*; *R v W*, cited, reported at [2007] 2 All ER 974.





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### **1486. Expert evidence as to foreign law.**

The law, whether written or customary, of a foreign country or any part of the Commonwealth outside England and Wales is a question of fact and must ordinarily be proved by the evidence of a competent expert witness<sup>1</sup>. Questions as to the effect of evidence given with regard to foreign law are for the judge to determine<sup>2</sup>.

1 *R v Ofori* (1994) 99 Cr App Rep 223, CA. Scots law is foreign law for the purposes of proceedings in English courts: *Cooper v Cooper* (1888) 13 App Cas 88 at 101, HL, per Lord Halsbury LC; *Elliot v Joicey* [1935] AC 209, HL; see also *Douglas v Brown* (1831) 2 Dow & Cl 171, HL. As to the competence of a witness to testify as to foreign law see PARA 1490 post.

As to alternative methods of proving the law of British overseas territories (formerly known as colonies) and of independent countries within the Commonwealth see the Colonial Laws Validity Act 1865 s 6; the Evidence (Colonial Statutes) Act 1907 s 1; the British Law Ascertainment Act 1859; and CIVIL PROCEDURE vol 11 (2009) PARAS 898, 1085 et seq.

2 Supreme Court Act 1981 s 69(5); *R v Hammer* [1923] 2 KB 786, 17 Cr App Rep 142, CCA; and see further CIVIL PROCEDURE vol 11 (2009) PARA 1090.

## **UPDATE**

### **1486 Expert evidence as to foreign law**

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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#### **1487. Expert evidence in obscenity cases.**

Expert evidence is by statute admissible on the question whether publication of an otherwise obscene article may be justified as being for the public good, on the grounds that it is in the interests of science, art, literature, art or learning or other objects of general concern<sup>1</sup>. Such evidence is not ordinarily admissible to prove that a given publication is or is not obscene, in the sense that it may have a tendency to deprave or corrupt those to whom it is exposed<sup>2</sup>, but it may be so admissible if in the circumstances the court or jury requires expert guidance in relation to matters outside their ordinary experience<sup>3</sup>.

1 Obscene Publications Act 1959 s 4(1), (2) (s 4(1) amended by the Criminal Law Act 1977 s 53(6)). In the case of a moving picture film or soundtrack, such evidence may be admissible to show that the film or soundtrack is justified as being for the public good on the ground that it is in the interests of drama, opera, ballet or any other art, or of literature or learning: Obscene Publications Act 1959 s 4(1A) (added by the Criminal Law Act 1977 s 53(6), (7)). See further PARA 747 et seq ante.

2 *DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159, [1967] 2 All ER 504, DC; *R v Stamford* [1972] 2 QB 391, 56 Cr App Rep 398, CA; *R v Anderson* [1972] 1 QB 304, 56 Cr App Rep 115, CA. As to the meaning of 'obscenity' see PARA 748 ante.

3 *DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159, [1967] 2 All ER 504, DC (likely effect of violent images on young children to whom they were marketed); *R v Skirving* [1985] QB 819, 81 Cr App Rep 9, CA (evidence as to the effects of cocaine on users, where defendant published leaflet advocating such use).

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#### **1488. Evidence as to handwriting.**

Non-expert opinion evidence from persons familiar with the alleged author's writing, style or signature, may constitute an important means of proving a document's authenticity<sup>1</sup>. In the case of non-expert witnesses who claim to be familiar with the alleged author's handwriting, the value of their evidence will depend on the extent of that familiarity. The court may decline to admit such testimony if this familiarity is only slight<sup>2</sup>. Where it is contended that the document in question is a skilful forgery, and comparisons are necessary between specimen writing and those in dispute, expert testimony will in practice be required<sup>3</sup>. A jury should not ordinarily be invited, unaided by the evidence of an expert, to examine a disputed instrument or document and compare it with an admitted genuine one<sup>4</sup>.

1 *Doe d Mudd v Suckermore* (1836) 5 Ad & El 703; *R v Slaney* (1832) 5 C & P 213; *R v Hensey* (1758) 1 Burr 642; *R v Hurley* (1843) 2 Mood & R 473. The required knowledge may have been acquired by the witness having: (1) seen the person write; (2) received communications purporting to come from him in response to those addressed to him by the witness; or (3) observed documents purporting to be in that person's handwriting in the ordinary course of business: see *R v O'Brien* (1911) 7 Cr App Rep 29, CCA.

2 *R v O'Brien* (1911) 7 Cr App Rep 29, CCA; *R v Harvey* (1869) 11 Cox CC 546. Knowledge acquired by a non-expert witness before or during the trial for the express purpose of qualifying him to prove that person's handwriting at the trial will not suffice to render that evidence admissible: *R v Crouch* (1850) 4 Cox CC 163; *R v Rickard* (1918) 88 LJB 720, 13 Cr App Rep 40, CCA.

3 *R v Harden* [1963] 1 QB 8, 46 Cr App Rep 90, CCA. Opinions of experts in handwriting are admissible to decipher words which have been obliterated, erased or altered (*R v Williams* (1838) 8 C & P 434); to determine whether the writing is in a genuine or forged hand (*R v Cator* (1802) 4 Esp 117 at 145; *R v Shepherd* (1845) 1 Cox CC 237); and, upon comparison, to point out similarities and dissimilarities, leaving the jury to determine the particular issue (see *Wakeford v Bishop of Lincoln* (1921) 90 LJPC 174).

A sample of handwriting that is to be used for comparison with the writing in dispute must first be proved to the satisfaction of the judge to be genuine: Criminal Procedure Act 1865 s 8; *R v Ewing* [1983] QB 1039, 77 Cr App Rep 47, CA. The Criminal Procedure Act 1865 s 8 does not preclude the use by an expert of a photocopy of the disputed writing where, for example, the original cannot be obtained: *Lockheed-Arabia Corp v Owen* [1993] QB 806, [1993] 3 All ER 641, CA (civil).

4 *R v Harvey* (1869) 11 Cox CC 546; *R v Tilley* [1961] 3 All ER 406, 45 Cr App Rep 360, CCA; *R v Harden* [1963] 1 QB 8, 46 Cr App Rep 90, CCA; *R v Smith* (1968) 52 Cr App Rep 648, CA; *R v O'Sullivan* [1969] 2 All ER 237, 53 Cr App Rep 274, CA. As to the desirability of calling an expert who is the subject of a conditional witness order to attend the trial where there is a danger that the jury might reach a decision on its own without proper guidance see *R v Hipson* [1969] Crim LR 85, CA.

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#### **1489. Evidence of polygraph analysis or hypnosis.**

There is little authority as to the admissibility of polygraph (or lie detector) analysis in English law. Such evidence has been ruled inadmissible in Canada<sup>1</sup> and New Zealand<sup>2</sup>, but the Privy Council has declined to express any final conclusion as to whether or not there may be exceptional cases where the evidence of an expert may be admissible to testify as to the results of a polygraph test<sup>3</sup>.

Where hypnosis has been used on witnesses in the course of an investigation, Home Office guidelines require that the hypnotherapist must first take a resume of the witness's recollection prior to hypnosis; the interview must be video recorded and the tape transcribed; the hypnotherapist must himself make a witness statement; any additional information obtained under hypnosis must be made the subject of a subsequent normal witness statement within 24 hours; and full details must be given to the Crown Prosecution Service<sup>4</sup>. Details of a hypnosis session involving potential witnesses must also be disclosed to the defence, even if the session is considered to be unsatisfactory and produces no admissible evidence of its own<sup>5</sup>.

1 *Phillion v R* [1978] 1 SCR 18; *R v Beland and Phillips* (1987) 43 DLR (4th) 641.

2 *Blackie v Police* [1966] NZLR 910; *R v McKay* [1967] NZLR 139, NZ CA.

3 *Bernal v R* [1997] 2 LRC 534, PC. Their lordships nevertheless upheld a ruling by the Court of Appeal in Jamaica excluding such evidence in the case before them, noting that 'the arguments against the admission of such evidence are very formidable'.

4 See Home Office Circular 66/1988 *The use of hypnosis by the police in the investigation of crime*.

5 See also *R v Browning* [1995] Crim LR 227, CA. As to false memory see *R v C* [2006] All ER (D) 36 (Feb), CA.

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### **1490. Competence of expert witnesses.**

Whether a witness is competent to give expert evidence is for the trial judge to determine<sup>1</sup>. In some cases, the witness need not necessarily have acquired his knowledge professionally; it is enough if he has made a special study of the subject, or has acquired special experience in it<sup>2</sup>.

A witness who has expert knowledge of an area of foreign law may be competent to give expert evidence as to that law irrespective of whether he is qualified to practise law in that country<sup>3</sup>.

A witness may become an expert 'ad hoc' in relation to a specific issue that he has studied so as to gain knowledge beyond that which a jury could be expected to possess<sup>4</sup>.

1 *R v Silverlock* [1894] 2 QB 766, 58 JP 788, CCR; *R v Inch* (1989) 91 Cr App Rep 51, C-MAC.

2 *R v Silverlock* [1894] 2 QB 766, 58 JP 788, CCR. The test is whether the witness is sufficiently skilled to give expert evidence, or has the necessary means of knowledge to make his opinion material. A drug abuser may be sufficiently well acquainted with drugs to give expert evidence as to the nature of a substance: *R v Chatwood* [1980] 1 All ER 467, 70 Cr App Rep 39, CA. In some areas, however, it is almost inconceivable that a witness without professional qualifications would be permitted to give expert evidence (see eg *R v Inch* (1989) 91 Cr App Rep 51, C-MAC, where a medical orderly was not entitled to express his opinion as to cause of an injury, despite extensive experience in treating such injuries).

As to the competence of witnesses to give expert evidence see also *R v Oakley* (1979) 70 Cr App Rep 7, CA; *R v Murphy* [1980] QB 434, 71 Cr App Rep 33, CA (police accident inspector competent to give expert evidence as to causes of crash); *Gaimster v Marlow* [1984] QB 218, 78 Cr App Rep 156, DC (police Intoximeter operator may explain significance of test results relying on his expertise); *R v Barnes* [2005] EWCA Crim 1158, [2005] All ER (D) 117 (May) (expert on woodgrains had no experience or expertise to judge the extent to which striations in a fingerprint lift might reflect the woodgrain on the door).

3 The Civil Evidence Act 1972 s 4(1) states: it is hereby declared that in civil proceedings a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to the law of any country or territory outside the United Kingdom or of any part of the United Kingdom other than England and Wales irrespective of whether he has acted or is entitled to act as a legal practitioner there. This provision is clearly declaratory of the common law (see eg *Brailey v Rhodesian Consolidates Ltd* [1910] 2 Ch 95; *Ajami v Customs Comptroller* [1954] 1 WLR 1405, PC). As such it appears to reflect the law applicable in criminal cases.

4 See *R v Clare* [1995] 2 Cr App Rep 333, [1995] Crim LR 947, CA (police officer who had spent many hours studying and interpreting a video recording showing crowd trouble at a football match, comparing the images with film of the appellants taken as they entered and left the ground, held competent to give expert testimony identifying them as the ringleaders of the disturbance).

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#### **1491. Proof of facts upon which expert opinion is based.**

Counsel calling an expert witness should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination<sup>1</sup>. An expert witness is entitled to support his opinion by referring to professional practice with which he is familiar<sup>2</sup>, and is entitled both to refresh his memory by reference to textbooks or other treatises and to refer to them to confirm or explain his opinion<sup>3</sup>.

The hearsay rule applies to expert testimony to the extent that any fact which is basic to the expert's opinion must be proved by admissible evidence, and the expert may not ordinarily give hearsay evidence of it<sup>4</sup>. In contrast, an expert witness may draw on the body of expertise relevant to his field in reaching his conclusion, and this may involve giving evidence of published or unpublished research or statistics undertaken or prepared by other persons working in his field<sup>5</sup>.

Where requisite notice is given under the Criminal Procedure Rules<sup>6</sup>, an expert witness may in his written or oral evidence<sup>7</sup> base an opinion or inference on a statement prepared for the purposes of criminal proceedings or for the purposes of a criminal investigation which gave rise to those proceedings<sup>8</sup> by another person (such as a colleague or assistant) who had or may reasonably be supposed to have had personal knowledge of the matters stated<sup>9</sup>; but this procedure does not apply if the court, on an application by a party to the proceedings, orders that it is not in the interests of justice that it should apply<sup>10</sup>.

1 *R v Turner* [1975] QB 834 at 840, 60 Cr App Rep 80 at 82, CA, per Lawton LJ. In some cases these will be assumed facts, which must be proved by other evidence: *R v Mason* (1911) 7 Cr App Rep 67, CCA.

2 *R v Smith (John)* [1974] 1 All ER 376 at 384, 58 Cr App Rep 106 at 119, CA.

3 *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at 114-115, HL. See also *R v Somers* [1963] 3 All ER 808, [1963] 1 WLR 1306, CA.

4 *R v Abadom* [1983] 1 All ER 364, 76 Cr App Rep 48, CA; *R v Bradshaw* (1985) 82 Cr App Rep 79, CA. As to circumstances where hearsay evidence may now be admissible under the Criminal Justice Act 2003 see PARA 1519 et seq post. As to hearsay generally see PARA 1519 post.

5 *R v Abadom* [1983] 1 All ER 364, 76 Cr App Rep 48, CA; *R v Hodges* [2003] EWCA Crim 290, [2003] 2 Cr App Rep 247. Cf *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415, [1973] 1 All ER 726. The common law rule is preserved by the Criminal Justice Act 2003 s 118(1): see PARA 1528 post.

6 The appropriate rules are those originally made by virtue of the Police and Criminal Evidence Act 1984 s 81 (as amended) (advance notice of expert evidence in Crown Court), and the Criminal Procedure and Investigations Act 1996 s 20(3) (as amended) (advance notice of expert evidence in magistrates' courts): Criminal Justice Act 2003 s 127(7) (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035, art 3, Schedule paras 45, 50). These rules are now contained in CrimPR Pt 24.

7 In written evidence under the Criminal Justice Act 1967 s 9 (as amended): see the Criminal Justice Act 2003 s 127(1)(c); and PARA 1535 post.

8 See *ibid* s 127(1)(a), (6).

9 *Ibid* s 127(1)(b), (2). If evidence based on the statement is given, the statement is to be treated as evidence of what it states: s 127(3).

10 Ibid s 127(4). The matters to be considered by the court in deciding whether to make an order under s 127(4) include: (1) the expense of calling as a witness the person who prepared the statement; (2) whether relevant evidence could be given by that person which could not be given by the expert; (3) whether that person can reasonably be expected to remember the matters stated well enough to give oral evidence of them: s 127(5).

## **UPDATE**

### **1491 Proof of facts upon which expert opinion is based**

NOTE 6--CrimPR now Criminal Procedure Rules 2010, SI 2010/60. CrimPR Pt 24 not reproduced.

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EVIDENCE/(14) OPINION AND EXPERT EVIDENCE/1492. Expert evidence: admissibility and pre-trial disclosure.

### **1492. Expert evidence: admissibility and pre-trial disclosure.**

An expert report<sup>1</sup> is admissible as evidence in criminal proceedings whether or not the person making it attends to give oral evidence in those proceedings; but, if it is proposed that the person making the report is not to give oral evidence, the report is admissible only with the leave of the court<sup>2</sup>.

The Criminal Procedure Rules<sup>3</sup> make provision for requiring any party to proceedings before the court to disclose to the other party or parties any expert evidence which he proposes to adduce in the proceedings, and prohibiting a party who fails to comply in respect of any evidence with any requirement so imposed from adducing that evidence without the leave of the court<sup>4</sup>.

Where an expert witness is instructed by the prosecution but his findings do not support the prosecution case, the prosecution is obliged to disclose this to the defence<sup>5</sup>. No directly comparable obligation is placed on the defence, but where the defendant instructs a person with a view to his providing any expert opinion for possible use as evidence at the trial, he must give to the court and the prosecutor a notice specifying the person's name and address<sup>6</sup> unless he has already given notification of his intention to call that person as a witness<sup>7</sup>. It may then be possible for the prosecution to call the expert witness in question (for example where his findings would be damaging to the defence case)<sup>8</sup>.

1 For these purposes, 'expert report' means a written report by a person dealing wholly or mainly with matters on which he is, or would if living be, qualified to give expert evidence: Criminal Justice Act 1988 s 30(5).

2 Ibid s 30(1), (2). An expert report, when admitted, is evidence of any fact or opinion of which the person making it could have given oral evidence: s 30(4). For the purpose of determining whether to give leave, the court must have regard to:

99 (1) the contents of the report (s 30(3)(a));

100 (2) the reasons why it is proposed that the person making the report is not to give oral evidence (s 30(3)(b));

101 (3) any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the defendant or, if there is more than one, to any of them (s 30(3)(c)); and

102 (4) any other circumstances that appear to the court to be relevant (s 30(3)(d)).

At common law, an expert report was inadmissible as evidence of the deceased expert's opinion: *R v McGuire* (1985) 81 Cr App Rep 323, CA.

3 See CrimPR Pt 24. The appropriate rules are made by virtue of the Police and Criminal Evidence Act 1984 s 81 (amended by the Courts Act 2003 s 109(1), Sch 8 para 286) (advance notice of expert evidence in Crown Court), and the Criminal Procedure and Investigations Act 1996 s 20(3) (amended by the Courts Act 2003 Sch 8 para 378) (advance notice of expert evidence in magistrates' courts).

4 Police and Criminal Evidence Act 1984 s 81(1) (as amended: see note 3 supra); Criminal Procedure and Investigations Act 1996 s 20(3) (as amended: see note 3 supra). Such rules may specify the kinds of expert advice to which they apply and may exempt facts or matters of any description specified in the rules: Police and Criminal Evidence Act 1984 s 81(2) (as so amended); Criminal Procedure and Investigations Act 1996 s 20(4).



If following:

- 103 (1) a plea of not guilty by any person to an alleged offence in respect of which a magistrates' court proceeds to summary trial (see PARA 1104 et seq ante);
- 104 (2) the committal for trial of any person (see PARA 1105 ante);
- 105 (3) the transfer to the Crown Court of any proceedings for the trial of a person by virtue of a notice of transfer given under the Criminal Justice Act 1987 s 4 (as amended; prospectively repealed) (see PARA 1105 ante);
- 106 (4) the transfer to the Crown Court of any proceedings for the trial of a person by virtue of a notice of transfer served on a magistrates' court under the Criminal Justice Act 1991 s 53 (as amended; prospectively repealed) (see PARA 1105 ante);
- 107 (5) the sending of any person for trial under the Crime and Disorder Act 1998 s 51 (as amended; prospectively substituted) (see PARA 1132 ante);
- 108 (6) the preferring of a bill of indictment charging a person with an offence under the authority of the Administration of Justice (Miscellaneous Provisions) Act 1933 s 2(2)(b) (as amended) (see PARA 1206 ante); or
- 109 (7) the making of an order for the re-trial of any person (see PARA 1896 post),

any party to criminal proceedings proposes to adduce expert evidence (whether of fact or opinion) in the proceedings (otherwise than in relation to sentence) he must as soon as practicable, unless in relation to the evidence in question he has already done so or the evidence is the subject of an application for leave to adduce such evidence in accordance with the Youth Justice and Criminal Evidence Act 1999 s 41 (see PARA 1446 ante): (a) furnish the other party or parties with a statement in writing of any finding or opinion which he proposes to adduce by way of such evidence; and (b) where a request in writing is made to him in that behalf by any other party, provide that party also with a copy of (or if it appears to the party proposing to adduce the evidence to be more practicable, a reasonable opportunity to examine) the record of any observation, test, calculation or other procedure on which such finding or opinion is based and any document or other thing or substance in respect of which any such procedure has been carried out: CrimPR 24.1(1). 'Document' means anything in which information of any description is recorded: CrimPR 24.1(3).

A party may by notice in writing waive his right to be furnished with any of the matters mentioned in r 24.1(1) and, in particular, may agree that the statement mentioned in head (a) supra may be furnished to him orally and not in writing: CrimPR 24.1(2).

Such evidence may be withheld where a party has reasonable grounds for believing that disclosure might lead to the intimidation or attempted intimidation of any person on whose evidence he intends to rely in the proceedings, or otherwise to the course of justice being interfered with: CrimPR 24.2(1). Notice in writing that the evidence is being withheld must be given to the other party along with the grounds for doing so: CrimPR 24.2(2).

A party who seeks to adduce expert evidence in any proceedings and who fails to comply with CrimPR 24.1 may not adduce that evidence in those proceedings without the leave of the court: CrimPR 24.3.

5 As to the prosecution's duty to disclose unused evidence that may assist the defence see PARA 1383 et seq ante.

6 Criminal Procedure and Investigations Act 1996 s 6D(1) (s 6D prospectively added by the Criminal Justice Act 2003 s 35 as from a day to be appointed; at the date at which this volume states the law no such day had been appointed).

7 Criminal Procedure and Investigations Act 1996 s 6D(2) (as prospectively added: see note 6 supra). Notice may be given under s 6C (as prospectively added: see PARA 1389 ante).

8 No party has any property in an expert witness: *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 3 All ER 177, CA; *R v Davies* [2002] EWCA Crim 85, 166 JP 243, [2002] All ER (D) 159 (Jan). In some cases, however, evidence discovered in this way will be protected by legal professional privilege: *R v King* (1983) 77 Cr App Rep 1 at 3, CA, per Dunn LJ ('the rule is that in the case of expert witnesses legal professional privilege attaches to confidential communications between the solicitor and the expert, but it does not attach to the chattels or documents upon which the expert based his opinion, nor to the independent opinion of the expert himself'). See also *R v R* [1994] 4 All ER 260, [1995] 1 Cr App Rep 183, CA (privilege attached to a blood specimen provided by R to his doctor at his solicitors' request and subsequently analysed for the purpose of

DNA profiling. The defence were entitled to object when the prosecution called evidence from the scientist concerned, for the purpose of proving that the sample incriminated R); and see also *R v Davies* supra.

## **UPDATE**

### **1492 Expert evidence: admissibility and pre-trial disclosure**

NOTE 2--As to guidance concerning the admissibility of expert evidence relating to DNA see *R v Reed*; *R v Garmson* [2009] EWCA Crim 2698, [2010] 1 Cr App Rep 310, [2009] All ER (D) 200 (Dec).

NOTES 3, 4--CrimPR now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'). As to disclosure see CrimPR Pt 22; and PARA 1384. As to expert evidence see CrimPR Pt 33.

NOTE 3--See *Writtle v DPP* [2009] EWHC 236 (Admin), [2009] RTR 367, [2009] All ER (D) 141 (Jan), DC (expert's report served after close of prosecution case held inadmissible for failure to comply with CrimPR 24.1).

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### **1493. Duty of expert witnesses to assist the court.**

Expert witnesses have an obligation to assist the court. They must remain objective and express only genuinely held opinions which are not biased in favour of either party<sup>1</sup>, and they should ensure wherever possible that developments in scientific thinking and techniques are not kept from the court, even where they remain at the stage of a mere hypothesis<sup>2</sup>. This duty is facilitated by the Criminal Procedure Rules<sup>3</sup> which enable opposing experts to consult together prior to the trial and, if possible, agree points of agreement or disagreement with a summary of reasons<sup>4</sup>.

1 *R v Maguire* [1992] QB 936, [1992] 2 All ER 433, CA; *R v Ward (Judith)* [1993] 2 All ER 577, 96 Cr App Rep 1, CA; *R v Harris* [2005] EWCA Crim 1980, [2006] 1 Cr App Rep 55, [2005] All ER (D) 298 (Jul).

2 *R v Clarke (RL)* [1995] 2 Cr App Rep 425, CA; *R v Harris* [2005] EWCA Crim 1980 at [270], [2006] 1 Cr App Rep 55 at [270], [2005] All ER (D) 298 (Jul) at [270] per Gage LJ, giving the judgment of the court. In *R v Harris* supra at [271] per Gage LJ the Court of Appeal endorsed the following principles, derived from *The Ikerian Reefer* [1993] 2 Lloyd's Rep 68 at 81 per Cresswell J:

- 110 (1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
- 111 (2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness . . . should never assume the role of advocate.
- 112 (3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.
- 113 (4) An expert should make it clear when a particular question or issue falls outside his expertise.
- 114 (5) If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one.
- 115 (6) If after exchange of reports, an expert witness changes his view on material matters, such change of view should be communicated to the other side without delay and when appropriate to the court.

In *R v Bowman* [2006] EWCA Crim 417, [2006] All ER (D) 20 (Mar), the court further indorsed those principles, but called for the following additional matters to be included (where relevant) in expert reports:

- 116 (a) Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise.
- 117 (b) A statement setting out the substance of all the instructions received (written or oral), questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which those opinions are based.

- 118 (c) Information relating to who has carried out measurements, examinations, tests etc and the methodology used, and whether or not such measurements etc were carried out under the expert's supervision.
- 119 (d) Where there is a range of opinion in the matters dealt with in the report, a summary of the range of opinion and the reasons for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made against any opinions expressed should be set out.
- 120 (e) Relevant extracts of literature or any other material which might assist the court.
- 121 (f) A statement to the effect that the expert has complied with his duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his expertise and an acknowledgment that the expert will inform all parties and where appropriate the court in the event that his opinion changes on any material issues.
- 122 (g) Where, on an exchange of experts' reports, matters arise which require a further or supplemental report the above guidelines should, of course, be complied with.

See also *R v Puaca* [2005] EWCA Crim 3001 at [32], [2006] Crim LR 341 at [32], [2005] All ER (D) 333 (Nov) at [32] per Hooper LJ ('the duty of all pathologists, whoever instructs them, is in our view to comply with the obligations imposed on expert witnesses from the start. It is wholly wrong for a pathologist carrying out the first post-mortem at the request of the police or coroner merely to leave it to the defence to instruct a pathologist to prepare a report setting out contrary arguments').

3 See PARA 1492 ante.

4 *R v Harris* [2005] EWCA Crim 1980 at [273], [2006] 1 Cr App Rep 55 at [273], [2005] All ER (D) 298 (Jul) at [273] per Gage LJ, giving the judgment of the court. In *R v Harris* supra at [272] per Gage LJ the court also endorsed the following guidance, derived from *Re AB (Child Abuse: Expert Witnesses)* [1995] 1 FLR 181 at 192 per Wall J: 'The expert who advances . . . a hypothesis owes a very heavy duty to explain to the court that what he is advancing is a hypothesis, that it is controversial (if it is) and place before the court all material which contradicts the hypothesis. Secondly, he must make all his material available to the other experts in the case. It is the common experience of the courts that the better the experts the more limited their areas of disagreement, and in the forensic context of a contested case relating to children, the objective of the lawyers and the experts should always be to limit the ambit of disagreement on medical issues to the minimum'.

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#### **1494. Weight and evaluation of expert evidence.**

The weight to be given to expert evidence is ultimately a matter for the court or jury<sup>1</sup> or (in the case of evidence as to foreign law) a matter for the judge to assess<sup>2</sup>. Clearly a court or jury is not bound to accept the truth of expert evidence where there is other material before them which conflicts with it and outweighs it<sup>3</sup>. In most cases it would be wrong for a jury to be directed even that uncontradicted expert evidence should be accepted<sup>4</sup>. In some cases, however, rejection of cogent, unequivocal and uncontradicted expert evidence would be perverse and the jury should be directed accordingly, especially where such evidence is favourable to the defendant<sup>5</sup>. Whether rejection of expert evidence would in fact be perverse must be assessed in the light of all the circumstances<sup>6</sup>.

Where prosecution and defence experts disagree and offer contradictory opinions, this clearly creates difficulties, particularly in cases where there is no hard factual evidence that might provide a court or jury with a reasoned basis for preferring the opinions of one reputable set of experts to the other. If in such a case the outcome of a trial depends exclusively (or almost exclusively) on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, for the trial to proceed<sup>7</sup>. It does not follow, however, that expert evidence called for the prosecution is necessarily neutralised whenever it is contradicted by reputable experts called for the defence, or that the defendant must then be acquitted unless there is other evidence, independent of the expert, supporting the prosecution case<sup>8</sup>.

1 *R v Rivett* (1950) 34 Cr App Rep 87, CCA; *R v Robb* (1991) 93 Cr App Rep 161, CA; *R v Dallagher* [2002] EWCA Crim 1903, [2003] 1 Cr App Rep 195; *R v Luttrell* [2004] EWCA Crim 1344, [2004] 2 Cr App Rep 520. The weight to be attached to evidence by an expert witness may depend upon his skill, qualifications (if any) and experience: see *R v Silverlock* [1894] 2 QB 766 at 771, CCR. Where an expert gives evidence of voice identification, the jury should be allowed to hear the tapes for the purpose of making its own comparisons: *R v Bentum* (1989) 153 JP 538, CA.

2 As to foreign law see further PARA 1363 ante.

3 *R v Byrne* [1960] 2 QB 396, [1960] 3 All ER 1, CCA.

4 *R v Lanfear* [1968] 2 QB 77, 52 Cr App Rep 176, CA. See also Judicial Studies Board, Specimen Direction No 33. As to the respective roles of expert witnesses and the jury see further *R v Rivett* (1950) 34 Cr App Rep 87 at 94, CCA; *R v Latham* [1965] Crim LR 434, CCA; *R v Smith (John)* [1974] 1 All ER 376, 58 Cr App Rep 106, CA.

5 *R v Matheson* [1958] 2 All ER 87, 42 Cr App Rep 145, CCA; *R v Bailey* (1961) noted in (1978) 66 Cr App Rep 31; *R v Vernege* [1982] 1 WLR 293, 74 Cr App Rep 232, CA; *Anderson v R* [1972] AC 100, [1971] 3 All ER 768, PC.

6 *R v Sanders* (1991) 93 Cr App Rep 245. In cases where the defence is one of diminished responsibility, uncontradicted evidence of the defendant's mental abnormality does not necessarily answer the question whether in light of this abnormality his responsibility for the killing was 'substantially impaired'. As to diminished responsibility see PARAS 96-97 ante.

7 *R v Cannings* [2004] EWCA Crim 01 at [178], [2004] 1 All ER 725 at [178], [2004] 2 Cr App Rep 63 at [178] per Judge LJ, giving the judgment of the court.

8     *R v Kai-Whitewind* [2005] EWCA Crim 1092, [2006] Crim LR 348, [2005] All ER (D) 14 (May); approved by *R v Harris* [2005] EWCA Crim 1980, [2006] 1 Cr App Rep 55, [2005] All ER (D) 298 (Jul). See also *R v Puaca* [2005] EWCA Crim 3001, [2006] Crim LR 341, [2005] All ER (D) 333 (Nov).

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#### **1495. Opinion evidence on the ultimate issue.**

At common law, it was formerly held that opinion evidence could not be given, even where it otherwise fell within the competence of an expert witness, if it dealt with the ultimate issue to be decided by the court or jury<sup>1</sup>. This rule has been abolished in civil cases<sup>2</sup>. In criminal cases, it is now regarded as more a matter of form than one of substance<sup>3</sup> and in some cases it appears to have been largely ignored<sup>4</sup>. In most cases, however, an expert will not be able to offer a valid opinion on the ultimate issue, if only because he will have examined only one part of the evidence in the case, and will have no special competence in respect of other issues relevant to guilt or innocence<sup>5</sup>. Even where expert witnesses have (rightly or wrongly) been allowed to express an opinion as to guilt or innocence, the jury must be directed that the decision is theirs and they are not bound to accept the expert's views<sup>6</sup>.

1 *R v Mason* (1911) 7 Cr App Rep 67, 28 TLR 120, CCA.

2 See the Civil Evidence Act 1972 s 3(1) (as amended); and CIVIL PROCEDURE vol 11 (2009) PARA 835.

3 *R v Stockwell* (1993) 97 Cr App Rep 20, CA. See also *R v Hookway* [1999] Crim LR 750, CA; *R v Hodges* [2003] EWCA Crim 290, [2003] 2 Cr App Rep 247.

4 See *DPP v A and BC Chewing Gum Ltd* [1968] 1 QB 159 at 164, [1967] 2 All ER 504 at 506, DC, per Lord Parker CJ: 'Those who practise in the criminal courts see every day cases of experts being called on the question of diminished responsibility and, although technically the final question 'Do you think he was suffering from diminished responsibility?' is strictly inadmissible, it is allowed time and time again without objection.' See also *R v Holmes* [1953] 2 All ER 324, 37 Cr App Rep 61, CCA.

5 See *R v Doheny*, *R v Adams* [1997] 1 Cr App Rep 369, [1997] Crim LR 669, CA.

6 *R v Stockwell* (1993) 97 Cr App Rep 260, (1993) Times 11 March, CA.

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#### **1496. Opinions of ordinary witnesses.**

On matters with respect to which it is practically impossible for a witness to swear positively, the most that can be asked is that a witness should give his honest impression. Hence the opinions of ordinary witnesses are admissible as to a variety of matters including the identity, condition, comparison or resemblance of persons or things<sup>1</sup>. A witness may state his belief that the defendant is the person he saw committing the offence<sup>2</sup>, or that a photograph which is produced is a likeness of a relevant person<sup>3</sup>; and a person's handwriting may be proved by, inter alia, the opinion of witnesses who are acquainted with it<sup>4</sup>.

Where a statement of opinion is proffered as a way of conveying relevant facts perceived by a witness, the opinion is admissible<sup>5</sup>. Thus a witness may give his opinion that a person was drunk, if he gives the facts on which he bases his opinion<sup>6</sup>. Observations as to the conduct of a person with whom he is well acquainted may lead the witness to a conclusion as to his sanity which summarises the results of his observations<sup>7</sup>.

Where the opinion of the witness or his belief is, or becomes, relevant to an issue in the case, as evidencing his state of mind or good faith, he may of course give evidence of it<sup>8</sup>.

1 *Fryer v Gathercole* (1849) 13 Jur 542 (identity of document). See also eg *R v Cox* [1898] 1 QB 179, CCR (age of child); *R v Beckett* (1913) 29 TLR 332, 8 Cr App Rep 204, CCA (value of item where specialised knowledge not necessary). A witness may state his belief that a written threat refers to him: *R v Hendy* (1850) 4 Cox CC 243.

2 As to visual identification see PARA 1455 et seq ante.

3 *R v Tolson* (1864) 4 F & F 103.

4 As to proof of handwriting see PARA 1488 ante.

5 See the Civil Evidence Act 1972 s 3(2) (which purports to be declaratory of the common law); and CIVIL PROCEDURE vol 11 (2009) PARA 831. See also *Rasool v West Midlands Passenger Transport Executive* [1974] 3 All ER 638.

6 An ordinary witness may give evidence of his opinion that a person was drunk, but not, even if he is a driver, that the person was unfit to drive through drink. Expert medical evidence may be necessary on that issue: *R v Davies* [1962] 3 All ER 97, 46 Cr App Rep 292, C-MAC. Cf *R v Neal* [1962] Crim LR 698, C-MAC.

7 *Wright v Doe d Tatham* (1838) 4 Bing NC 489 at 543-544 per Parke B. A witness may not in general testify to the insanity of another unless he is an expert: *R v Loake* (1911) 7 Cr App Rep 71 at 72, CCA. As to the need for expert medical evidence in insanity cases see the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 1(1), (2); and PARA 1485 ante.

8 Eg in offences relating to deception, where the prosecution must prove that the representation operated on the mind of the victim: see eg *R v Laverty* [1970] 3 All ER 432, 54 Cr App Rep 495, CA. The belief of the defendant, even where mistaken, may be relevant eg to bigamy (*R v Tolson* (1889) 23 QBD 168, CCR), self defence (*R v Williams* [1987] 3 All ER 411, 78 Cr App Rep 276, CA) and to the element of dishonesty in theft (see the Theft Act 1968 s 2; and PARA 283 ante).



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## **(15) PREVIOUS JUDGMENTS**

### **1497. Previous conviction of defendant as element of offence charged.**

It is an element of certain statutory offences that the defendant has been convicted previously<sup>1</sup>. In such circumstances the fact of the previous conviction will be relevant to the issues before the jury and may accordingly be proved<sup>2</sup>.

1 See eg the Firearms Act 1968 s 21(1), (2) (as amended) (possession of firearms by persons previously convicted of crime) (see PARA 672 ante); and the Road Traffic Act 1988 s 103(1) (as substituted) (obtaining a licence, or driving, while disqualified) (see ROAD TRAFFIC vol 40(1) (2007 Reissue) PARA 481). Where a certificate of conviction is tendered to prove the disqualification, the particular offence for which the disqualification was imposed should alone appear upon the certificate: *Stone v Bastick* [1967] 1 QB 74, [1965] 3 All ER 713, DC.

2 See *R v Penfold* [1902] 1 KB 547, 66 JP 248, CCR. As to the methods by which convictions may be proved see PARA 1500 post. As to other judgments and sentences that may determine the status of a person or thing see PARA 1499 post.

## **UPDATE**

### **1497 Previous conviction of defendant as element of offence charged**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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EVIDENCE/(15) PREVIOUS JUDGMENTS/1498. Convictions by United Kingdom or Service courts as evidence of commission of offence.

#### **1498. Convictions by United Kingdom or Service courts as evidence of commission of offence.**

In any proceedings<sup>1</sup>, the fact that a person other than the defendant has been convicted of an offence by or before any court in the United Kingdom or by a Service court<sup>2</sup> outside the United Kingdom is admissible in evidence for the purpose of proving, where to do so is relevant to any issue<sup>3</sup> in those proceedings, that that person committed that offence, where evidence of his having done so is admissible is given<sup>4</sup>. In any proceedings in which by virtue of the above provisions a person other than the defendant is proved to have been convicted of an offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom, he is to be taken to have committed that offence unless the contrary is proved<sup>5</sup>.

In any proceedings where evidence is admissible of the fact that the defendant has committed an offence, if the defendant is proved to have been convicted of the offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom, he is to be taken to have committed that offence unless the contrary is proved<sup>6</sup>.

Nothing in the above provisions prejudices the admissibility in evidence of any conviction which would otherwise be admissible, or the operation of any enactment whereby a conviction or a finding of fact in any proceedings is for the purposes of any other proceedings made conclusive evidence of any fact<sup>7</sup>.

Where evidence that a person has been convicted of any offence is so admissible, then, without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction and the contents of the information, complaint, indictment, or charge-sheet on which the person in question was convicted are admissible in evidence for that purpose<sup>8</sup>. Where in any proceedings the contents of any document are so admissible in evidence, a copy of that document, or of the material part of it, purporting to be certified or otherwise authenticated by or on behalf of the court or authority having custody of that document is admissible in evidence and is to be taken to be true copy of that document or part unless the contrary is shown<sup>9</sup>.

Nothing in the above provisions prejudices any power of a court to exclude evidence, whether by preventing questions from being put or otherwise, at its discretion<sup>10</sup>.

1 For the meaning of 'proceedings' see PARA 1365 note 1 ante.

2 For these purposes, 'Service court' means a court-martial or a standing civilian court: Police and Criminal Evidence Act 1984 s 82(1). References to conviction before a Service court are references to a finding of guilty which is, or falls to be treated as, the finding of the court; and convicted is to be construed accordingly: s 82(2) (amended by the Armed Forces Act 1996 s 35(1), Sch 6 para 14). As to courts-martial see ARMED FORCES vol 2(2) (Reissue) PARA 448 et seq.

As to the admissibility of convictions in foreign courts, or of acquittals, or of the verdicts of civil courts, as evidence of the facts they purport to decide see PARA 1499 post.

3 'Issue' is apt to cover not only an issue which is an essential ingredient in the offence charged, for instance in a handling case the fact that the goods were stolen (as in *R v Pigram* [1995] Crim LR 808, CA) but also less fundamental issues, for instance evidential issues arising during the course of the proceedings: *R v Robertson*,

*R v Golder* [1987] QB 920 at 927, 85 Cr App Rep 304 at 311, CA, per Lord Lane CJ; *R v Roberts* [1995] Crim LR 638, CA. Evidence of the previous convictions of third parties may be relevant to the nature of the transactions in which the defendant is taking part: *R v Warner*; *R v Jones* (1992) 96 Cr App Rep 324, CA (on a charge of conspiracy to supply heroin, convictions of the defendant's alleged customers for possession of heroin could not be described as irrelevant). See also *R v Buckingham* (1993) 99 Cr App Rep 303, CA (evidence of previous convictions admissible if it prevents undesirable speculation by jury); but the conviction of a mere friend or associate is otherwise unlikely to have sufficient relevance: *R v Hasson and Davey* [1997] Crim LR 579, CA.

The provision should be sparingly used, particularly in relation to joint offences such as conspiracy and affray (in which a guilty plea by one of two defendants would potentially raise a presumption that they conspired or committed affray together): *R v Robertson*, *R v Golder* supra; *R v Curry* [1988] Crim LR 527, CA; *R v Dixon* (2000) 164 JP 721, CA; *R v Stewart* [1999] Crim LR 746, CA; *R v Wardell* [1997] Crim LR 450, CA (evidence of conviction of co-defendant inadmissible where of no probative value); *R v Mahmood* [1997] Crim LR 447, CA (trial judge must know basis of co-defendant's guilty plea before he can identify a possible issue to which it may be relevant). Technically admissible evidence might be of such slight value that it ought not to be adduced: *R v Robertson*, *R v Golder* supra at 928 and 311 per Lord Lane CJ.

The Police and Criminal Evidence Act 1984 s 78 (as amended) (see PARA 1365 ante) may be used to limit the operation of s 74 (as amended): *R v Robertson*, *R v Golder* supra at 928 and 312 per Lord Lane CJ, but this is possible only where it is the prosecution that seeks to rely on s 74 (as amended). See further *R v O'Connor* [1987] Crim LR 260, CA; *R v Lunnon* (1988) 88 Cr App Rep 71, CA; *R v Grey* (1988) 88 Cr App Rep 375, CA; *R v Bennett* [1988] Crim LR 686, CA; *R v Castle* [1989] Crim LR 567, CA; *R v Kempster* [1989] 1 WLR 1125, 90 Cr App Rep 14, CA.

4 Police and Criminal Evidence Act 1984 s 74(1) (amended by the Criminal Justice Act 2003 s 331, Sch 36 Pt 5 para 85(1), (2)). Nothing in the Powers of Criminal Courts (Sentencing) Act 2000 s 14 (under which a conviction leading to probation or discharge is to be disregarded except as mentioned in that provision) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 41), or any legislation which is in force in Scotland or Northern Ireland for the time being and corresponds to that provision, affects the operation of the Police and Criminal Evidence Act 1984 s 74 (as amended): see the Police and Criminal Evidence Act 1984 s 75(3) (amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 s 5, Sch 4 para 55; and by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 98). Nothing in the Police and Criminal Evidence Act 1984 s 74 (as amended) is to be construed as rendering admissible in any proceedings evidence of any conviction other than a subsisting one: s 75(4).

5 Ibid s 74(2).

6 Ibid s 74(3) (amended by the Criminal Justice Act 2003 ss 331, 332, Sch 36 Pt 5 para 85(1), (3), Sch 37 Pt 5).

7 Police and Criminal Evidence Act 1984 s 74(4).

8 Ibid s 75(1).

9 Ibid s 75(2).

10 Ibid s 82(3).

## UPDATE

### 1498 Convictions by United Kingdom or Service courts as evidence of commission of offence

NOTE 2--Definition of 'service court' in the Police and Criminal Evidence Act 1984 s 82(1) amended, s 82(2) repealed: Armed Forces Act 2006 Sch 16 para 104, Sch 17.

NOTE 4--Police and Criminal Evidence Act 1984 s 75(3) further amended: Armed Forces Act 2006 Sch 16 para 103.

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#### **1499. Evidential value of acquittals, civil judgments and rulings of foreign courts.**

The judgment of a civil or criminal court in the United Kingdom or elsewhere may (regardless of its merits) provide conclusive evidence as to the legal status of a person or thing<sup>1</sup>; but at common law a verdict in an earlier case was considered to be a mere expression of opinion and as such was inadmissible in other proceedings for the purpose of proving any alleged facts on which that judgment was based<sup>2</sup>.

It is sometimes suggested that this rule has now been abolished<sup>3</sup>, but subject to a number of important statutory exceptions, it remains good law<sup>4</sup>.

The common law rule has been abrogated by legislation in so far as it concerned convictions by courts in the United Kingdom or by (British) service courts elsewhere. Where relevant such convictions are now admissible and once proved raise a presumption that the person convicted was guilty of the offence in question<sup>5</sup>; but in criminal trials the common law rule remains applicable to other judicial decisions, including convictions imposed by foreign, Commonwealth or Irish courts, acquittals in United Kingdom courts or elsewhere<sup>6</sup> and the judgments of civil courts<sup>7</sup>.

Where at a previous trial the defendant was himself acquitted of some other alleged offence, the prosecution is not bound to accept that he was innocent of that offence and is not thereby precluded from calling evidence to prove that he was in fact guilty of it<sup>8</sup>. The doctrine of issue estoppel has no application to criminal proceedings<sup>9</sup>.

1 Judgments which conclusively determine status include adjudications in bankruptcy (see the Insolvency Act 1986 ss 278-282 (as amended) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 629 et seq); grants of probate (see *Allen v Dundas* (1789) Term Rep 125; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 72 et seq); adjudications by professional bodies such as the Law Society or the General Medical Council under which practitioners are 'struck off' (*Hill v Clifford* [1907] 2 Ch 236, CA); and disqualification orders made under the Company Directors Disqualification Act 1986 (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) PARA 1107 et seq) or the Road Traffic Act 1988 (see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1057 et seq).

2 *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, [1943] 2 All ER 35, CA; *R v Spinks* [1982] 1 All ER 587, 74 Cr App Rep 263, CA; *Hui Chi-ming v R* [1992] 1 AC 34, [1991] 3 All ER 897, PC (at the defendant's trial as a secondary party to murder allegedly committed by A, evidence of A's earlier acquittal of that murder and conviction of manslaughter was inadmissible, and the defendant's conviction for murder was upheld). See also *R v Petch* [2005] EWCA Crim 1883, [2005] 2 Cr App Rep 657, [2005] All ER (D) 151 (Jul).

3 See eg *R v Hayter* [2005] UKHL 6 at [21], [2005] 2 All ER 209 at [21], [2005] 2 Cr App Rep 37 at [21] obiter per Lord Steyn.

4 *R v D*; *R v J* [1996] QB 283, [1996] 1 Cr App Rep 455, CA.

5 See the Police and Criminal Evidence Act 1984 s 74 (as amended); and PARA 1498 ante.

6 See *Hui Chi-ming v R* [1992] 1 AC 34, [1991] 3 All ER 897, PC; *R v Thorne* (1977) 66 Cr App Rep 6, CA. It may be permissible to cross-examine a witness concerning previous cases in which he gave evidence for the prosecution but in which courts or juries then acquitted the persons accused, 'by reason of which his evidence is demonstrated to have been disbelieved': *R v Edwards* [1991] 2 All ER 266, 93 Cr App Rep 48, CA. See also *R v Cooke* (1986) 84 Cr App Rep 286, CA; *R v Clancy* [1997] Crim LR 290, CA; *R v Guney* [1998] 2 Cr App Rep 242, CA; *R v Malik* [2000] 2 Cr App Rep 8, [1999] All ER (D) 1052, CA. The fact that a court or jury has acquitted some other person in a previous trial does not necessarily demonstrate that any particular prosecution

witnesses at that trial were disbelieved. A verdict of not guilty at an earlier trial may mean no more than that the jury entertained some doubt about the prosecution case, not necessarily that they believed any witness was lying: *R v Edwards* supra.

7 See *R v D*; *R v J* [1996] QB 283, [1996] 1 Cr App Rep 455, CA.

8 *R v Ollis* [1900] 2 QB 758, CCA; *R v Z* [2000] 2 AC 483, [2000] 3 All ER 385, [2000] 2 Cr App Rep 281, HL (not following *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458, 66 (pt 2) TLR 254, PC); *R v Colman* [2004] EWCA Crim 3252, [2004] All ER (D) 345 (Dec); *R v Edwards* [2005] EWCA Crim 3244, [2006] 1 WLR 1524, [2005] All ER (D) 319 (Dec). Although *R v Hay* (1983) 77 Cr App Rep 70, CA, was not expressly overruled in *R v Z* supra, much of the reasoning in *R v Hay* supra is plainly inconsistent with the rationale of the decision of the House of Lords in *R v Z* supra: see *R v Colman* supra at [41] per Auld LJ, giving the judgment of the court.

9 *DPP v Humphrys* [1977] AC 1, 63 Cr App Rep 95, HL. See PARA 1277 ante. Nevertheless, the principle of double jeopardy may be infringed if any steps are taken by the prosecutor which may result in the punishment of the defendant on some other ground for what is in effect the same offence as that for which he has already been acquitted. To this limited extent, *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458, 66 (pt 2) TLR 254, PC, appears to remain good law.

## UPDATE

### 1499 Evidential value of acquittals, civil judgments and rulings of foreign courts

TEXT AND NOTES 1-4--Cf *R v Kordasinski* [2006] EWCA Crim 2984, [2007] 1 Cr App Rep 238; and PARA 1502 NOTE 3.

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### **1500. Proof of convictions and acquittals.**

Where in any proceedings<sup>1</sup> the fact that a person has in the United Kingdom<sup>2</sup> been convicted or acquitted of an offence otherwise than by a Service court<sup>3</sup> is admissible in evidence, it may be proved by producing a certificate of conviction or, as the case may be, of acquittal relating to that offence, and proving that the person named in the certificate as having been convicted or acquitted of the offence is the person whose conviction or acquittal of the offence is to be proved<sup>4</sup>.

For these purposes, a certificate of conviction or of acquittal:

- 2201 (1) must, as regards a conviction or acquittal on indictment, consist of a certificate, signed by the proper officer<sup>5</sup> of the court where the conviction or acquittal took place, giving the substance and effect (omitting the formal parts) of the indictment and of the conviction or acquittal; and
- 2202 (2) must, as regards a conviction or acquittal on a summary trial, consist of a copy of the conviction or of the dismissal of the information, signed by the proper officer of the court where the conviction or acquittal took place or by the proper officer of the court, if any, to which a memorandum of the conviction or acquittal was sent;

and a document purporting to be a duly signed certificate of conviction or acquittal is to be taken to be such a certificate unless the contrary is proved<sup>6</sup>.

The method of proving a conviction or acquittal so authorised is in addition to, and not to the exclusion of, any other authorised manner of proving a conviction or acquittal<sup>7</sup>.

Where a person is convicted of a summary offence by a magistrates' court, other than a youth court, and it is proved to the satisfaction of the court, on oath or in such other manner as may be prescribed, that not less than seven days previously a notice was served on the defendant in the prescribed form and manner specifying any alleged previous conviction of the defendant of a summary offence proposed to be brought to the notice of the court in the event of his conviction of the offence charged; and the defendant is not present in person before the court, the court may take account of any such previous conviction so specified as if the defendant had appeared and admitted it<sup>8</sup>.

Where evidence of a conviction or acquittal in a foreign court is admissible, the conviction or acquittal may be proved by examined copies or authenticated copies of the relevant judgment<sup>9</sup>, although it may still be necessary to prove that the conviction or acquittal relates to (for example) the defendant who is currently before the court<sup>10</sup>.

1 For the meaning of 'proceedings' see PARA 1365 note 1 ante.

2 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

3 For the meaning of 'Service court' see PARA 1498 note 2 ante. As to proof of proceedings of a court-martial see the Army Act 1955 s 200; the Air Force Act 1955 s 200; the Naval Discipline Act 1957 s 129C (as added); and ARMED FORCES vol 2(2) (Reissue) PARA 387. These provisions apply to evidence given in any court, whether civil or criminal and whether in the United Kingdom or in any colony: see the Army Act 1955 s 200(3); the Air

Force Act 1955 s 200(3); the Naval Discipline Act 1957 s 129C(3) (as added); and ARMED FORCES vol 2(2) (Reissue) PARA 387. They also apply in respect of judgments of Standing Civilian Courts: see the Standing Civilian Courts Order 1997, SI 1997/172, art 91, Sch 4.

4 Police and Criminal Evidence Act 1984 s 73(1). Proof according to s 73(1) involves two evidential stages: (1) the production of the certificate of conviction; and (2) proof to the criminal standard that the person to whom that certificate relates is the defendant. There are no particular defined methods of proof in relation to head (2) *supra*. It might take the form of an admission by or on behalf of the defendant (or of a failure by him to deny it), evidence of finger prints or of a witness who was present in court when the defendant was convicted or evidence of a match between the personal details of the defendant and those recorded on the certificate of conviction. Even where the personal details are not uncommon, a match would be sufficient for a *prima facie* case and if not contradicted it may be sufficient for the court to convict: *Pattison v DPP* [2005] EWHC 2938 (Admin), [2006] 2 All ER 317. See also *Ellis v Jones* [1973] 2 All ER 893, DC; *R v Derwentside Justices, ex p Heaviside* [1996] RTR 384, DC; *R v Derwentside Justices, ex p Swift*; *R v Sunderland Justices, ex p Bate* [1997] RTR 89, DC; *DPP v Mooney* [1997] RTR 434, CA; *Olakunori v DPP* [1998] COD 443; *Bailey v DPP* (1999) 163 JP 518, DC; *R v Burns* [2006] EWCA Crim 617, [2006] 1 WLR 1273, [2006] All ER (D) 9 (Mar); *R v Lewenden* [2006] EWCA Crim 648, [2006] All ER (D) 10 (Mar). Fingerprint evidence, if available, will usually be the best form of proof: *R v Mauricia* [2002] EWCA Crim 676, [2002] 2 Cr App Rep 377.

As to the circumstances in which a previous conviction or acquittal of the defendant may be admissible in evidence see PARA 1507 post; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 618-619. As to the circumstances in which the conviction or acquittal of a witness, complainant or third party may be admissible see PARAS 1504, 1510 post.

5 For these purposes, 'proper officer' means: (1) in relation to a magistrates' court in England and Wales, the designated officer for the court; and (2) in relation to any other court, the clerk of the court, his deputy or any other person having custody of the court record: Police and Criminal Evidence Act 1984 s 73(3) (substituted by the Access to Justice Act 1999 s 90(1), Sch 13 paras 125, 128(1), (3)). See also PARA 1347 note 2 ante.

6 Police and Criminal Evidence Act 1984 s 73(2) (amended by the Access to Justice Act 1999 Sch 13 paras 125, 128(1), (2)). As to the distinction between matters relating to the substance and effect of an indictment (which should be included in the certificate) and its formal parts (which should not be) see *R v Hacker* [1995] 1 All ER 45, [1995] 1 Cr App Rep 332, HL.

7 Police and Criminal Evidence Act 1984 s 73(4). As to formal admissions see PARA 1538 post. As to proof by statements in documents under the Criminal Justice Act 2003 s 117 see *R v Humphris* [2005] EWCA Crim 2030, 169 JP 441, [2005] All ER (D) 259 (Jul); and PARA 1535 post.

8 Magistrates' Courts Act 1980 s 104 (amended by the Criminal Justice Act 1991 s 100, Sch 11 para 40(1), (2)(n)). The register of a magistrates' court, or an extract from the register certified by the magistrates' court officer as a true extract, is admissible in any legal proceedings as evidence of the proceedings of the court entered in the register: CrimPR 6.4 (reproducing the Magistrates' Courts Rules 1981, SI 1981/552, r 68 (as amended)).

9 See the Evidence Act 1851 s 7. In the case of a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court; and such judge must attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies purports to be sealed or signed as hereinbefore respectively directed, the same must respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement: Evidence Act 1851 s 7.

10 *R v Mauricia* [2002] EWCA Crim 676, [2002] 2 Cr App Rep 377.

## UPDATE

### 1500 Proof of convictions and acquittals

NOTE 8--CrimPR Pt 6 now Criminal Procedure Rules 2010, SI 2010/60, Pt 6.

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### **1501. Proof of civil judgments and proceedings.**

Proceedings and judgments in a county court may be proved by production of a copy of any entry or document purporting to be signed and certified as a true copy by the relevant district judge<sup>1</sup>.

Every document purporting to be sealed or stamped with the seal or stamp of the Supreme Court must be received in evidence in all parts of the United Kingdom without further proof<sup>2</sup>.

The register of a magistrates' court, or an extract from the register certified by the magistrates' court officer as a true extract, is admissible in any legal proceedings as evidence of the proceedings of the court entered in the register<sup>3</sup>.

Civil judgments of courts outside the United Kingdom may be proved in the same manner as foreign convictions and acquittals<sup>4</sup>.

1 County Courts Act 1984 s 12(2) (amended by the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 42). Such a copy must at all times without further proof be admitted in any court or place whatsoever as evidence of the entry and of the proceeding referred to by it and of the regularity of that proceeding: County Courts Act 1984 s 12(2) (as so amended).

2 See the Supreme Court Act 1981 s 132; CPR 2.6(3); and CIVIL PROCEDURE vol 11 (2009) PARA 81.

3 CrimPR 6.4 (reproducing the Magistrates' Courts Rules 1981, SI 1981/552, r 68 (as amended)).

4 See the Evidence Act 1851 s 7; and PARA 1500 text and note 9 ante.

### **UPDATE**

#### **1501 Proof of civil judgments and proceedings**

TEXT AND NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981 and reference to Supreme Court is now to Senior Courts: s 132 (amended by Constitutional Reform Act 2005 Sch 11 paras 1, 26).

TEXT AND NOTE 3--CrimPR Pt 6 now Criminal Procedure Rules 2010, SI 2010/60, Pt 6.



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## **(16) EVIDENCE OF GOOD OR BAD CHARACTER**

### **1502. In general.**

In criminal proceedings<sup>1</sup>, all common law rules governing the admissibility of evidence of a person's bad character<sup>2</sup> have now been abolished<sup>3</sup>, with the exception of the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his good or bad character<sup>4</sup>. In most respects, therefore, the admissibility of evidence of bad character, whether of a defendant, a witness or complainant, or third party (such as an alternative suspect or the deceased victim of the alleged crime) is now governed by legislation<sup>5</sup>.

Evidence of a person's good character is still governed primarily by rules of common law<sup>6</sup>. Cases may also arise in which the previous conduct of a defendant is of probative value and therefore relevant to a matter in issue between him and the prosecution or a co-defendant, yet the conduct in question may not involve evidence of 'bad character' as such. Such evidence may also remain admissible at common law because it is relevant to an issue in the case<sup>7</sup>.

<sup>1</sup> For this purpose, 'criminal proceedings' means criminal proceedings in relation to which the strict rules of evidence apply: Criminal Justice Act 2003 s 112(1).

<sup>2</sup> As to the meaning of 'bad character' see PARA 1503 post.

<sup>3</sup> Criminal Justice Act 2003 s 99(1). Some cases decided under common law rules may nevertheless remain of value when interpreting and applying the legislation that has supplanted those rules: *R v Hanson* [2005] EWCA Crim 824, [2005] 2 Cr App Rep 299, [2005] All ER (D) 380 (Mar).

<sup>4</sup> Criminal Justice Act 2003 s 99(2). As to the use of evidence of reputation to prove good or bad character see also s 118(1); and *R v Rowton* (1865) Le & Ca 520, CCCR. The preserved common law rule permits the use of evidence that might otherwise be impugned both as hearsay and as non-expert opinion as a means of establishing good or bad character; but it is concerned with how such character may be proved, and not with whether such character is relevant or admissible in the first place. The admissibility of a person's bad character, in circumstances where it is to be proved by reputation, falls to be determined under the Criminal Justice Act 2003: see s 101; and PARA 1505 post.

<sup>5</sup> The principal provisions are now set out in *ibid* Pt 11 Ch 1 (ss 98-113): see PARA 1503 et seq post. These were brought into force on 15 December 2004 (see the Criminal Justice Act 2003 (Commencement No 6 and Transitional Provisions) Order 2004, SI 2004/3033) and apply in all trials beginning on or after that date, regardless of the date on which the defendant was first charged with the offence (*R v Bradley* [2005] EWCA Crim 20, [2005] 1 Cr App Rep 397). See also the Theft Act 1968 s 27(3) (see PARA 1514 post); and, in so far as sexual history evidence may involve evidence of bad character, see the Youth Justice and Criminal Evidence Act 1999 s 41 (see PARA 1446 ante).

The rules governing the admissibility of 'evidence of bad character' necessarily determine what questions may legitimately be asked in the cross-examination of defendants or other witnesses. This is recognised in CrimPR Pt 35, which specifies the practice and procedure to be followed in the criminal courts in connection with the admission of bad character evidence.

<sup>6</sup> See PARA 1515 et seq post.

<sup>7</sup> The Criminal Justice Act 2003 s 99(1) (see the text to notes 1-3 supra) does not exclude such material because it abolishes only common law rules as to bad character: *R v Weir* [2005] EWCA Crim 2866, [2006] 2 All ER 570, [2006] 1 WLR 1885. See also *R v Edwards* [2005] EWCA Crim 3244 at [1], [2006] 1 WLR 1524 at [1], [2006] 3 All ER 882 at [1] per Scott Baker LJ, giving the judgment of the court.

## **UPDATE**

### **1502 In general**

NOTE 3--The rules abolished include the principle that foreign convictions are not admissible as evidence of character: *R v Kordasinski* [2006] EWCA Crim 2984, [2007] 1 Cr App Rep 238.

NOTE 5--CrimPR Pt 35 now Criminal Procedure Rules 2010, SI 2010/60, Pt 35.

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### **1503. Bad character.**

References to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which: (1) has to do with the alleged facts of the offence with which the defendant is charged; or (2) is evidence of misconduct in connection with the investigation or prosecution of that offence<sup>1</sup>. 'Misconduct' means the commission of an offence<sup>2</sup> or other reprehensible behaviour<sup>3</sup>.

<sup>1</sup> Criminal Justice Act 2003 ss 98, 112(1). The various controls and notice requirements imposed by the Criminal Justice Act 2003 on the admissibility of evidence of 'bad character' do not affect the admissibility of any evidence that can be said to concern the commission of the offence itself. They do not therefore apply to evidence suggesting, for example, that the defendant was provoked by the misconduct of the complainant or that he previously stole a car used in the commission of the offence, or that the offence was committed by a co-defendant or third party. Nor do they apply to evidence concerning alleged misconduct (by the defendant or by the police, or indeed by anyone else) in the investigation of the offence. See *R v Edwards* [2005] EWCA Crim 3244 at [1(i)], [2006] 1 WLR 1524 at [1(i)], [2006] 3 All ER 882 at [1(i)] per Scott Baker LJ, giving the judgment of the court. See also *R v Machado* [2006] EWCA Crim 837, [2006] All ER (D) 28 (Mar) (evidence of complainant's intoxication). Where, however, such evidence is deemed to amount to an attack by a defendant on another person's character, this may enable evidence to be given as to the bad character of that defendant: see the Criminal Justice Act 2003 s 101(1)(g); and PARA 1510 post.

<sup>2</sup> 'Offence' includes a service offence: *ibid* s 112(1). However, an offence need not necessarily have been marked by a charge, caution or conviction. There was no special rule at common law requiring the exclusion of evidence relating to alleged offences of which the defendant had previously been acquitted, provided that the evidence in question was otherwise admissible (*R v Z* [2000] 2 AC 483, [2000] 3 All ER 385, [2000] 2 Cr App Rep 281, HL; *R v Barney* [2005] All ER (D) 299 (May), CA) and this clearly remains the position under the Criminal Justice Act 2003: *R v Edwards* [2005] EWCA Crim 3244 at [77], [2006] 1 WLR 1524 at [77], [2006] 3 All ER 882 at [77] per Scott Baker LJ, giving the judgment of the court. Similarly an unproven allegation of criminal conduct may properly be put to a witness in cross-examination, with a view to demonstrating an improper motive on the part of that witness: *R v Jeneson* [2005] EWCA Crim 2298, [2005] All ER (D) 370 (Jul).

If, upon a witness being lawfully questioned as to whether he has been convicted of any offence he either denies or does not admit the fact, or refuses to answer, it is lawful for the cross-examining party to prove such conviction: Criminal Procedure Act 1865 s 6 (amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 3(1), (2); and the Criminal Justice Act 2003 ss 331, 332, Sch 36 Pt 5 para 79, Sch 37 Pt 5). As to the methods of proving such a conviction see PARA 1500 ante.

An absolute discharge following a finding of unfitness to plead does not constitute a criminal conviction, but nor does it necessarily indicate that the person found unfit to plead was blameless as far as the alleged offence was concerned: eg an act of violence that gave rise to the proceedings in question may still be considered reprehensible behaviour: *R v Renda* [2005] EWCA Crim 2826, [2006] 2 All ER 553; and see note 3 *infra*.

<sup>3</sup> Criminal Justice Act 2003 s 112(1). 'Reprehensible behaviour' is not itself defined in the Criminal Justice Act 2003, but the term is clearly intended to include conduct that is considered scandalous, disgraceful, dishonest or improper, without being criminal. This may include evidence of sexual misconduct (eg adultery or infidelity to an unmarried partner) but where the person in question is a complainant in respect of an alleged sexual offence, the restrictions imposed on the admissibility of such evidence by the Youth Justice and Criminal Evidence Act 1999 s 41 (see PARA 1446 ante) are significantly tighter than those imposed under the Criminal Justice Act 2003.

Bad character is defined in terms of disposition as well as actual misconduct and it may therefore include evidence of racist beliefs or of perverted sexual interests, even if there is no evidence to suggest that the person in question has ever acted upon those beliefs or interests. In borderline cases it may be in the interests of the person concerned that his conduct or disposition is classed as 'reprehensible behaviour', because the admissibility of such evidence is then controlled (and may then be prevented) by the provisions of the Criminal Justice Act 2003.

As to findings of unfitness to plead in respect of acts that might otherwise have resulted in criminal convictions see *R v Renda* [2005] EWCA Crim 2826, [2006] 2 All ER 553.

## UPDATE

### 1503 Bad character

TEXT AND NOTE 1--There must be a nexus in time between the offence with which the defendant is charged and the evidence of misconduct which the prosecution seeks to adduce: *R v Tirnaveanu* [2007] EWCA Crim 1239, [2007] 4 All ER 301.

NOTE 1--Evidence of a person's 'bad character' might include circumstantial evidence consisting of the common features of several offences with which the defendant is charged: *R v Wallace* [2007] EWCA Crim 1760, (2007) 171 JP 543. See also *R v McNeill* [2007] All ER (D) 79 (Nov), CA (evidence supported alleged facts of offence charged but was not evidence of defendant's bad character).

NOTE 2--'Service offence' has the same meaning as in the Armed Forces Act 2006 (see **ARMED FORCES**): Criminal Justice Act 2003 s 112(1) (definition substituted by the Armed Forces Act 2006 Sch 16 para 215).

NOTE 3--Shouting between partners over the care of a young child is not to be commended but, in the context of a charge of murdering a close friend, it does not cross the threshold contemplated by the words of the 2003 Act: *R v Osbourne* [2007] EWCA Crim 481, (2007) Times, 24 April.

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### **1504. Bad character of persons other than defendants.**

In criminal proceedings<sup>1</sup> evidence of the bad character<sup>2</sup> of a person other than the defendant<sup>3</sup> is admissible if and only if: (1) it is important explanatory evidence<sup>4</sup>; (2) it has substantial probative value in relation to a matter which is a matter in issue in the proceedings, and is of substantial importance in the context of the case as a whole<sup>5</sup>; or (3) all parties to the proceedings agree to the evidence being admissible<sup>6</sup>. The test in respect of the introduction of evidence concerning the bad character of a person other than a defendant is accordingly stricter than the test applicable to evidence concerning the bad character of the defendant himself<sup>7</sup>, but it does clearly extend to matters relating only to the credibility of a witness<sup>8</sup>. Except where it is admitted by agreement, evidence of the bad character of a person other than the defendant must not be given without leave of the court<sup>9</sup>.

1 For the meaning of 'criminal proceedings' see PARA 1502 note 1 ante.

2 As to the meaning of 'bad character' see PARA 1503 ante.

3 Such persons will usually be witnesses for the prosecution or defence, but the same rules of admissibility apply whether they are witnesses or not. There is nothing in the Criminal Justice Act 2003 to suggest that such a person need still be alive; indeed specific reference was made in the Criminal Evidence Act 1898 s 1(3)(ii) (repealed) to imputations made against the deceased victim of the alleged crime.

4 Criminal Justice Act 2003 s 100(1)(a). For this purpose evidence is important explanatory evidence if: (1) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case; and (2) its value for understanding the case as a whole is substantial: s 100(2). Where, for example, it is alleged that the victim of the crime was attacked in connection with a feud between two criminal gangs, the prosecution case might not make sense if the court or jury were left unaware of the victim's own criminal acts or associations. The concept of important explanatory evidence is essentially the same where it involves evidence of a defendant's bad character. See PARA 1506 post.

5 Ibid s 100(1)(b). In assessing the probative value of evidence for this purpose the court must have regard to the following factors (and to any others it considers relevant): (1) the nature and number of the events, or other things, to which the evidence relates; (2) when those events or things are alleged to have happened or existed; (3) where (a) the evidence is evidence of a person's misconduct, and (b) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct; and (4) where (a) the evidence is evidence of a person's misconduct, (b) it is suggested that that person is also responsible for the misconduct charged, and (c) the identity of the person responsible for the misconduct charged is disputed, the extent to which the evidence shows or tends to show that the same person was responsible each time: s 100(3).

One of the objectives of this provision was to enhance the limited protection given to witnesses at common law (see *R v Sweet-Escott* (1971) 55 Cr App Rep 316, CA) and protect them from gratuitous character assassination. Evidence of bad character which has no real significance to an issue or which is only marginally relevant is not admissible under the Criminal Justice Act 2003 s 100(1)(b), nor is evidence that goes only to a trivial or minor issue in the case.

6 Ibid s 100(1)(c). The consent of a complainant, witness or other person whose character is to be impugned need not be obtained in such a case, since he will not be a party to the proceedings.

7 *R v Weir* [2005] EWCA Crim 2866, [2006] 2 All ER 570, [2006] 1 WLR 1885.

8 *R v Weir* [2005] EWCA Crim 2866 at [73], [2006] 2 All ER 570 at [73], [2006] 1 WLR 1885 at [73] per Kennedy LJ, giving the judgment of the court. Where the credibility of a witness is important in the context of

the case as a whole (eg because it is suggested that his evidence or some relevant part of his evidence is untrue) a conviction or other significant evidence of bad character is likely to be seen as having substantial probative value in respect of his credibility. See *R v Renda* [2005] EWCA Crim 2826, [2006] 2 All ER 553; *R v Edwards (John)* [1991] 2 All ER 266, 93 Cr App Rep 48, CA; but cf *R v S* [2006] All ER (D) 273 (Apr), CA. Even a spent conviction may be relevant where credibility is of real importance: *R v Paraskeva* (1982) 76 Cr App Rep 162, CA.

As to evidence of a witness's 'general reputation for veracity' (which may involve hearsay evidence of bad character) see *R v Richardson* [1969] 1 QB 299 at 304, sub nom *R v Longman and Richardson* [1968] 2 All ER 761 at 764, CA, per Edmund Davies LJ. See also the Criminal Justice Act 2003 ss 99(2), 118(1); and PARAS 1502 ante, 1523 post. Evidence of reputation may be given in order to prove the bad character of a witness who is not a defendant only when the fact of that bad character is admissible under s 100: see further PARA 1524 post.

9 Ibid s 100(4). A party who wants to introduce evidence of a non-defendant's bad character or who wants to cross-examine a witness with a view to eliciting that evidence under s 100 must apply in the form set out in the practice direction (see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA) and the application must be received by the court officer and all other parties to the proceedings: (1) not more than 14 days after the prosecutor has: (a) complied or purported to comply with the Criminal Procedure and Investigations Act 1996 s 3 (as amended) (initial disclosure by the prosecutor), or (b) disclosed the previous convictions of that non-defendant; or (2) as soon as reasonably practicable, where the application concerns a non-defendant who is to be invited to give (or has given) evidence for a defendant: CrimPR 35.2.

A party who receives a copy of an application under CrimPR 35.2 may oppose that application by giving notice in writing to the court officer and all other parties to the proceedings not more than 14 days after receiving that application: CrimPR 35.3.

A party calling a witness who gives unfavourable evidence is not allowed to impeach the witness's credit by general evidence of bad character, even if that witness is ruled to be hostile: see the Criminal Procedure Act 1865 s 3; and PARA 1436 ante.

## UPDATE

### 1504 Bad character of persons other than defendants

NOTE 4--See *R v GH* [2009] EWCA Crim 2899, (2010) 174 JP 203 (s 100 not limited in such way as to exclude evidence either of the propensity of a non-defendant or his credibility).

NOTE 8--As to the duty to disclose the outstanding charges against a prosecution witness see *Allison v HM Advocate* [2010] UKSC 6, 2010 SLT 261, [2010] All ER (D) 103 (Feb).

NOTE 9--CrimPR Pt 35 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), Pt 35. The forms for use with CrimPR 35.3, 35.3(4) are set out in *Amendment No 24 to the Consolidated Criminal Practice Direction (criminal proceedings: witness anonymity orders (2); forms)* [2010] All ER (D) 276 (Mar).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/20. EVIDENCE/(16) EVIDENCE OF GOOD OR BAD CHARACTER/1505. Bad character of defendants.

### **1505. Bad character of defendants.**

In criminal proceedings<sup>1</sup> evidence of the defendant's bad character<sup>2</sup> is admissible if, but only if, at least one of the following criteria is satisfied<sup>3</sup>:

- 2203 (1) all parties to the proceedings agree to the evidence being admissible<sup>4</sup>;
- 2204 (2) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it<sup>5</sup>;
- 2205 (3) it is important explanatory evidence<sup>6</sup>;
- 2206 (4) it is relevant to an important matter in issue between the defendant and the prosecution<sup>7</sup>;
- 2207 (5) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant<sup>8</sup>;
- 2208 (6) it is evidence to correct a false impression given by the defendant<sup>9</sup>; or
- 2209 (7) the defendant has made an attack on another person's character<sup>10</sup>.

The court must not admit evidence under head (4) or head (7) above if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it<sup>11</sup>.

Rules of court may, and, where the party in question is the prosecution, must, contain provision requiring a party who: (a) proposes to adduce evidence of a defendant's bad character; or (b) proposes to cross-examine a witness with a view to eliciting such evidence, to serve on the defendant such notice, and such particulars of or relating to the evidence, as may be prescribed<sup>12</sup>.

1 For the meaning of 'criminal proceedings' see PARA 1502 note 1 ante.

2 As to the meaning of 'bad character' see PARA 1503 ante.

3 See the Criminal Justice Act 2003 s 101(1). See also ss 102-106; and PARA 1506 et seq post.

4 Ibid s 101(1)(a).

5 Ibid s 101(1)(b). There may be circumstances in which it would be in the defendant's own interests to adduce or elicit evidence of his own bad character, either because his character would otherwise be revealed more damagingly in cross-examination or because it is consistent with his chosen line of defence.

6 Ibid s 101(1)(c). See further s 102; and PARA 1506 post.

7 Ibid s 101(1)(d). See further s 103; and PARA 1507 post. 'Important matter' means a matter of substantial importance in the context of the case as a whole: s 112(1).

8 Ibid s 101(1)(e). See further s 104; and PARA 1508 post. Where evidence has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant (because it demonstrates either the defendant's propensity to commit such offences or his propensity to be untruthful) it may be adduced by a co-defendant notwithstanding that it is also highly prejudicial to the defendant. Section 101(3) (see the text to note 11 infra) does not apply to evidence under s 101(1)(e). See also *R v Lawson* [2006] All ER (D) 116 (Aug), CA.

9 Criminal Justice Act 2003 s 101(1)(f). See further s 105; and PARA 1509 post.

10 Ibid s 101(1)(g). See further s 106; and PARA 1510 post. Where s 101(1) permits proof of the bad character of a defendant (eg for the purpose of impugning his credibility) this proof may be provided (inter alia) by evidence of general reputation under a common law principle preserved by s 118(1) (see PARA 1483 ante). See further PARA 1524 post.

11 Ibid s 101(3). Under the new regime it is apparent that Parliament intended that evidence of bad character would be put before juries more frequently than had hitherto been the case: *R v Edwards* [2005] EWCA Crim 3244 at [1(iii)], [2006] 1 WLR 1524 at [1(iii)], [2006] 3 All ER 882 at [1(iii)] per Scott Baker LJ, giving the judgment of the court; and see also *R v Stone (Michael)* [2005] EWCA Crim 105 at [91], [2005] Crim LR 569 at [91] per Rose LJ, giving the judgment of the court. Evidence that satisfies the relevant criteria is admissible in the absence of such an application, and its use does not require leave from the court; but the court should where necessary encourage the making of such an application: *R v Weir* [2005] EWCA Crim 2866 at [38], [2006] 2 All ER 570 at [38], [2005] All ER (D) 163 (Nov) at [38] per Kennedy LJ, giving the judgment of the court. On an application to exclude evidence under the Criminal Justice Act 2003 s 101(3), the court must perform a balancing exercise (see *R v Weir* supra) and must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged (Criminal Justice Act 2003 s 101(4)). See also *R v Hanson* [2005] EWCA Crim 824, [2005] 2 Cr App Rep 299, [2005] All ER (D) 380 (Mar).

Although the Criminal Justice Act 2003 s 101(3) applies only to evidence that might otherwise be adduced under s 101(1)(d) or (g) (see heads (4), (7) in the text), the Police and Criminal Evidence Act 1984 s 78(1) (by which a court may refuse to allow any evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it: see PARA 1365 ante) provides an additional protection to defendants: *R v Highton* [2005] EWCA Crim 1985 at [13], [2005] 1 WLR 3472 at [13], [2006] Crim LR 52 at [13] per Lord Woolf CJ, giving the judgment of the court. Application of the Police and Criminal Evidence Act 1984 s 78 (as amended) should ensure that there is no infringement of the defendant's rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969): *R v Highton* supra at [14] per Lord Woolf CJ, giving the judgment of the court. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq.

12 Criminal Justice Act 2003 s 111(1), (2). The rules may provide that the court or the defendant may, in such circumstances as may be prescribed by rules of court, dispense with a requirement imposed by virtue of s 111(2): s 111(3), (7). In considering the exercise of its powers with respect to costs, the court may take into account any failure by a party to comply with a requirement imposed by such rules: s 111(4). The rules may: (1) limit the application of any provision of the rules to prescribed circumstances; (2) subject any provision of the rules to prescribed exceptions; (3) make different provision for different cases or circumstances: s 111(5). Nothing in s 111 prejudices the generality of any enactment conferring power to make rules of court; and no particular provision of s 111 prejudices any general provision of it: s 111(6).

A prosecutor who wants to introduce evidence of a defendant's bad character or who wants to cross-examine a witness with a view to eliciting that evidence under s 101 must give notice within the prescribed time limits in the form set out in the practice direction (see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D Pt 35, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D Pt 35, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2006] 3 All ER 484, Annex D Pt 35, CA) to the court officer and all other parties to the proceedings: see CrimPR 35.4. As to the applicable time limits see CrimPR 35.8; and *R (on the application of Robinson) v Sutton Coldfield Magistrates' Court* [2006] EWHC 307 (Admin), 170 JP 336, [2006] All ER (D) 28 (Feb); *R v M* [2006] All ER (D) 164 (May).

A co-defendant who wants to introduce evidence of a defendant's bad character or who wants to cross-examine a witness with a view to eliciting that evidence under the Criminal Justice Act 2003 s 101 must give notice in the form set out in the practice direction (see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D Pt 35, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D Pt 35, CA) to the court officer and all other parties to the proceedings not more than 14 days after the prosecutor has complied or purported to comply with the Criminal Procedure and Investigations Act 1996 s 3: CrimPR 35.5.

A defendant's application to exclude bad character evidence must be in the form set out in the Practice Direction and received by the court officer and all other parties to the proceedings not more than 14 days after receiving a notice given under CrimPR 35.4 or CrimPR 35.5: CrimPR 35.6.

## UPDATE



## 1505 Bad character of defendants

NOTE 5--The jury should be given assistance as to the significance to attach to bad character evidence where introduced: *R v Campbell* [2007] EWCA Crim 1472, [2007] 1 WLR 2798.

NOTE 6--See also *R v Osbourne* [2007] EWCA Crim 481, (2007) Times, 24 April.

NOTE 7--See *R v Ngyuen* [2008] EWCA Crim 585, [2008] All ER (D) 267 (Mar) (relevant bad character evidence, not made subject of criminal charge, admissible).

NOTE 8--*Lawson*, cited, reported at [2006] EWCA Crim 2572, [2007] 1 WLR 1191. See *R v Jarvis* [2008] All ER (D) 327 (Feb), CA (previous history of untruthfulness when dealing with others or of serial lying and so on, plainly relevant and should be admitted so long as substantial probative value in relation to issue arising between relevant parties).

NOTE 10--See *R v Lamaletie* [2008] EWCA Crim 314, (2008) 172 JP 249; *R v O* [2009] EWCA Crim 2235, (2009) JPR 616.

NOTE 11--See *R v Musone* [2007] EWCA Crim 1237, [2007] 1 WLR 2467, PARA 1365. As to the circumstances in which the judge should direct the jury as to how to use bad character evidence see *R v L* [2007] All ER (D) 213 (Dec), CA.

NOTE 12--CrimPR Pt 35 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), Pt 35. The forms for use with CrimPR 35.4(2), 35.4(5) are set out in *Amendment No 24 to the Consolidated Criminal Practice Direction (criminal proceedings: witness anonymity orders (2); forms)* [2010] All ER (D) 276 (Mar). *Robinson*, cited, reported at [2006] 4 All ER 1029.

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### **1506. Important explanatory evidence.**

Evidence of a defendant's bad character<sup>1</sup> is important explanatory evidence<sup>2</sup> if: (1) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case; and (2) its value for understanding the case as a whole is substantial<sup>3</sup>.

1 As to the meaning of 'bad character' see PARA 1503 ante.

2 Ie it is admissible evidence under the Criminal Justice Act 2003 s 101(1)(c): see PARA 1505 head (3) ante.

3 Ibid s 102. This appears to preserve or restate established common law doctrine concerning background evidence. See *R v Pettman* (2 May 1985, unreported), CA, per Purchas LJ: 'Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing commission of an offence with which the defendant is not charged is not of itself a ground for excluding the evidence'.

See also *R v Sidhu* (1994) 98 Cr App Rep 59, CA; *R v Sawoniuk* [2000] 2 Cr App Rep 220, [2000] Crim LR 506, CA; *R v M* [2000] 1 All ER 148, [2000] 2 Cr App Rep 266, CA; *R v Bourgass* [2005] EWCA Crim 1943, [2005] All ER (D) 254 (Jul).

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### **1507. Important matter in issue between the defendant and the prosecution.**

Only the prosecution may adduce evidence of a defendant's bad character<sup>1</sup> on the basis of its relevance to an important matter in issue between the defendant and the prosecution<sup>2</sup>. Matters in issue between the defendant and the prosecution include: (1) the question whether the defendant has a propensity to commit offences of the kind with which he is charged<sup>3</sup>, except where his having such a propensity makes it no more likely that he is guilty of the offence<sup>4</sup>; and (2) the question whether the defendant has a propensity to be untruthful<sup>5</sup>, except where it is not suggested that the defendant's case is untruthful in any respect<sup>6</sup>.

Where head (1) above applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of an offence of the same description as the one with which he is charged, or an offence of the same category as the one with which he is charged<sup>7</sup>; but this does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case<sup>8</sup>.

For these purposes, two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms; and two offences are of the same category as each other if they belong to the same category of offences prescribed for these purposes by an order made by the Secretary of State<sup>9</sup>. A category so prescribed must consist of offences of the same type<sup>10</sup>.

1 As to the meaning of 'bad character' see PARA 1503 ante.

2 Criminal Justice Act 2003 s 103(6). Such evidence may be admissible prosecution evidence under s 101(1) (d) (see PARA 1505 head (4) ante). Prosecution applications to adduce such evidence should not be made routinely, simply because a defendant has previous convictions, but should be based on the particular circumstances of each case: *R v Hanson* [2005] EWCA Crim 824 at [4], [2005] 2 Cr App Rep 299 at [4], [2005] All ER (D) 380 (Mar) at [4] per Rose LJ, giving the judgment of the court. See also *R v L* [2006] All ER (D) 238 (Jan), CA; *R v Blake* [2006] EWCA Crim 871, [2006] All ER (D) 361 (Feb); *R v Smith* [2006] All ER (D) 280 (Feb), CA; *R v Atkinson* [2006] All ER (D) 290 (May), CA.

3 'There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions [where convictions are relied upon] the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged. . . . Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity': *R v Hanson* [2005] EWCA Crim 824 at [9], [2005] 2 Cr App Rep 299 at [9], [2005] All ER (D) 380 (Mar) at [9] per Rose LJ, giving the judgment of the court; cf *DPP v P* [1991] 2 AC 447, 93 Cr App Rep 267, HL.

'In any case in which evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful the judge in summing-up should warn the jury clearly against placing undue reliance on previous convictions. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, the jury should be directed that they should not conclude that the defendant is guilty or untruthful merely because he has these convictions. That, although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show a propensity is for them to decide; that they must take into account

what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity as shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case': *R v Hanson* supra at [18] per Rose LJ, giving the judgment of the court; *R v Edwards* [2005] EWCA Crim 1813, [2006] 1 Cr App Rep 31, [2005] All ER (D) 358 (Jun); *R v Edwards* [2005] EWCA Crim 3244, [2006] 1 WLR 1524, [2005] All ER (D) 319 (Dec). See also *R v Brima* [2006] EWCA Crim 408, [2006] All ER (D) 108 (Feb).

Evidence of bad character or propensity (in the form of what was previously known as 'similar fact evidence') may nevertheless transform what would otherwise be an inadequate prosecution case into an overwhelming one: see eg *R v Smith (George Joseph)* (1915) 11 Cr App Rep 229, CCA (in which it was shown that the unusual but otherwise unexplained death of the defendant's wife through drowning in her bath was identical to the deaths of two other women he had purported to marry, and that in each case the defendant profited financially from the death).

4 Criminal Justice Act 2003 s 103(1)(a). An example of a case in which the defendant's criminal propensity would make it no more likely that he is guilty of the offence is one in which his conduct is not in dispute, but it is disputed whether that conduct was factually or legally the cause of a death with which he is charged.

5 'Propensity to untruthfulness . . . is not the same as propensity to dishonesty. It is to be assumed, bearing in mind the frequency with which the words honest and dishonest appear in the criminal law, that Parliament deliberately chose the word 'untruthful' to convey a different meaning, reflecting a defendant's account of his behaviour, or lies told when committing an offence. Previous convictions, whether for offences of dishonesty or otherwise, are therefore only likely to be capable of showing a propensity to be untruthful where . . . truthfulness is an issue and, in the earlier case, either there was a plea of not guilty and the defendant gave an account, on arrest, in interview, or in evidence, which the jury must have disbelieved, or the way in which the offence was committed shows a propensity for untruthfulness, for example, by the making of false representations: *R v Hanson* [2005] EWCA Crim 824 at [13], [2005] 2 Cr App Rep 299 at [13], [2005] All ER (D) 380 (Mar) at [13] per Rose LJ, giving the judgment of the court.

6 Criminal Justice Act 2003 s 103(1)(b). It follows that evidence of bad character will not be admissible under s 103(1)(b) where, for example, the defendant and prosecution are agreed on the facts of the alleged offence and the only question is whether on such facts all the elements of the offence have been made out.

7 Ibid s 103(2). 'In a conviction case the Crown must decide, at the time of giving notice of the application to admit such evidence, whether it proposes to rely simply upon the fact of conviction or also upon the circumstances of it. The former may be enough when the circumstances of the conviction are sufficiently apparent from its description, to justify a finding that it can establish propensity, either to commit an offence of the kind charged or to be untruthful and that the requirements of ss 103(3) and 101(3) can, subject to any particular matter raised on behalf of the defendant, be satisfied: eg, a succession of convictions for dwelling-house burglary, where the same is now charged, may well call for no further evidence than proof of the fact of the convictions. But where, as will often be the case, the Crown needs and proposes to rely on the circumstances of the previous convictions, those circumstances and the manner in which they are to be proved must be set out in the application': *R v Hanson* [2005] EWCA Crim 824 at [17], [2005] 2 Cr App Rep 299 at [17], [2005] All ER (D) 380 (Mar) at [17] per Rose LJ, giving the judgment of the court. See also *R v Humphris* [2005] EWCA Crim 2030, [2005] All ER (D) 105 (Sep).

In practice, evidence of the defendant's propensity to commit offences of the kind charged will frequently not involve previous convictions at all: see eg *R v N* [2006] All ER (D) 314 (Mar), CA. In *R v Straffen* [1952] 2 QB 911, 36 Cr App Rep 132, CCA, the defendant had previously been found unfit to plead to an indictment alleging very similar offences; in *R v Smith (George Joseph)* (1915) 11 Cr App Rep 229, CCA and *Makin v A-G for New South Wales* [1894] AC 57, PC, evidence was adduced of other apparently identical offences of which the defendant had never been tried; in *R v Z (prior acquittal)* [2000] 2 AC 483, [2000] 3 All ER 385, HL (overruling *G (an infant) v Coltart* [1967] 1 QB 432, [1967] 1 All ER 271, DC) evidence was held to be admissible showing that in several previous cases apparently similar to the instant case the defendant had been acquitted of rape after running the same defence of consent on each occasion. In *R v Weir* [2005] EWCA Crim 2866, [2006] 2 All ER 570, [2006] 1 WLR 1855, it was held that propensity might be established by evidence of offences previously taken into consideration. Convictions or other evidence as to the commission of subsequent offences may also be relevant to show propensity at the time of the offence with which the defendant is charged: *R v Adenusi* [2006] EWCA Crim 1059, [2006] All ER (D) 231 (Apr).

8 Criminal Justice Act 2003 s 103(3). 'In a conviction case, the decisions required of the trial judge under s 101(3) (see PARA 1505 ante) and s 103(3), though not identical, are closely related. The wording of s 101(3) ('must not admit') is stronger than the comparable provision in the Police and Criminal Evidence Act 1984 s 78(1) ('may refuse to allow') (see PARA 1365 ante). When considering what is just under the Criminal Justice Act 2003 s 103(3), and the fairness of the proceedings under s 101(3), the judge may, among other factors, take into consideration the degree of similarity between the previous conviction and the offence charged, albeit they are both within the same description or prescribed category. For example, theft and assault occasioning actual bodily harm may each embrace a wide spectrum of conduct. This does not however mean that what used to be referred as striking similarity must be shown before convictions become admissible. The judge may also take

into consideration the respective gravity of the past and present offences. He or she must always consider the strength of the prosecution case. If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are': *R v Hanson* [2005] EWCA Crim 824 at [10], [2005] 2 Cr App Rep 299 at [10], [2005] All ER (D) 380 (Mar) at [10] per Rose LJ, giving the judgment of the court. See also *R v Highton* [2005] EWCA Crim 1985, [2005] 1 WLR 3472, [2006] 1 Cr App Rep 125; *R v Tully* [2006] All ER (D) 249 (Mar), CA.

Arguably, the approach that should be adopted according to the guidance given in *R v Hanson* supra differs only slightly from that which was adopted at common law, under which the admissibility of similar fact evidence depended on whether its probative force was sufficiently great to make it just to admit that evidence, notwithstanding that it would be prejudicial to the defendant to show that he was guilty of committing another crime (the test adopted in *DPP v P* [1991] 2 AC 447, 93 Cr App Rep 267, HL; and see also *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26 at [76], [2005] 2 AC 534 at [76], [2005] All ER (D) 416 (Apr) at [76] per Lord Carswell). It is nevertheless clear that evidence may be admissible under the Criminal Justice Act 2003 ss 101, 103 that would not have been admissible at common law.

If there is a substantial gap between the dates of commission of and conviction for the earlier offences, the date of commission will generally be of more significance than the date of conviction when assessing admissibility. Old convictions, with no special feature shared with the offence charged, are likely seriously to affect the fairness of proceedings adversely, unless, despite their age, it can properly be said that they show a continuing propensity: *R v Hanson* supra at [11] per Rose LJ, giving the judgment of the court.

9 Criminal Justice Act 2003 s 103(4). The Criminal Justice Act 2003 (Categories of Offences) Order 2004, SI 2004/3346, prescribes for this purpose two categories of offences. The first is a theft category comprising: (1) an offence under the Theft Act 1968 s 1 (theft) (see PARA 282 ante); (2) an offence under s 8 (robbery) (see PARA 293 ante); (3) an offence under s 9(1)(a) (burglary) (see PARA 294 ante) if it was committed with intent to commit an offence of stealing anything in the building or part of a building in question; (4) an offence under s 9(1)(b) (burglary) (see PARA 294 ante) if the offender stole or attempted to steal anything in the building or that part of it; (5) an offence under s 10 (aggravated burglary) (see PARA 295 ante) if the offender committed a burglary of the kind described in head (3) or head (4) supra; (6) an offence under s 12 (as amended) (taking motor vehicle or other conveyance without authority) (see PARA 298 ante); (7) an offence under s 12A (as added and amended) (aggravated vehicle-taking) (see PARA 299 ante); (8) an offence under s 22 (handling stolen goods) (see PARA 302 ante); (9) an offence under s 25 (as amended) (going equipped for stealing) (see PARA 296 ante); (10) an offence under the Theft Act 1978 s 3 (as amended) (making off without payment) (see PARA 315 ante); (11) aiding, abetting, counselling, procuring or inciting the commission of an offence mentioned in heads (1)-(10) supra or attempting to commit any such offence: Criminal Justice Act 2003 (Categories of Offences) Order 2004, SI 2004/3346, art 2, Schedule Pt 1.

The second is a sexual offences category comprising the following offences: (1) an offence under the Sexual Offences Act 1956 s 1 (repealed) (rape) if it was committed in relation to a person under the age of 16; (2) an offence under the Sexual Offences Act 1956 s 5 (repealed) (intercourse with a girl under 13); (3) an offence under s 6 (repealed) (intercourse with a girl under 16); (4) an offence under s 7 (repealed) (intercourse with a defective) if it was committed in relation to a person under the age of 16; (5) an offence under s 10 (repealed) (incest by a man) if it was committed in relation to a person under the age of 16; (6) an offence under s 11 (repealed) (incest by a woman) if it was committed in relation to a person under the age of 16; (7) an offence under s 12 (repealed) (buggery) if it was committed in relation to a person under the age of 16; (8) an offence under s 13 (repealed) (indecently between men) if it was committed in relation to a person under the age of 16; (9) an offence under s 14 (repealed) (indecent assault on a woman) if it was committed in relation to a person under the age of 16; (10) an offence under s 15 (repealed) (indecent assault on a man) if it was committed in relation to a person under the age of 16; (11) an offence under the Mental Health Act 1959 s 128 (repealed) (sexual intercourse with patients) if it was committed in relation to a person under the age of 16; (12) an offence under the Indecency with Children Act 1960 s 1 (repealed) (indecent conduct towards young child); (13) an offence under the Criminal Law Act 1977 s 54 (repealed) (inciting a girl under 16 to have incestuous sexual intercourse); (14) an offence under the Sexual Offences (Amendment) Act 2000 s 3 (repealed) (abuse of a position of trust) if it was committed in relation to a person under the age of 16; (15) an offence under the Sexual Offences Act 2003 s 1 (rape) (see PARA 165 ante) if it was committed in relation to a person under the age of 16; (16) an offence under s 2 (assault by penetration) (see PARA 167 ante) if it was committed in relation to a person under the age of 16; (17) an offence under s 3 (sexual assault) (see PARA 169 ante) if it was committed in relation to a person under the age of 16; (18) an offence under s 4 (causing a person to engage in sexual activity without consent) (see PARA 171 ante) if it was committed in relation to a person under the age of 16; (19) an offence under s 5 (rape of a child under 13) (see PARA 166 ante); (20) an offence under s 6 (assault of a child under 13 by penetration) (see PARA 168 ante); (21) an offence under s 7 (sexual assault of a child under 13) (see PARA 170 ante); (22) an offence under s 8 (causing or inciting a child under 13 to engage in sexual activity) (see PARA 172 ante); (23) an offence under s 9 (sexual activity with a child) (see PARA 173 ante); (24) an offence under s 10 (causing or inciting a child to engage in sexual activity) (see PARA 174 ante); (25) an offence under s 14 if doing it will involve the commission of an offence under s 9 and s 10 (arranging or facilitating the commission of a child sex offence) (see PARA 178 ante); (26) an offence under s 16 (abuse of position of trust: sexual activity with a child) (see PARA 180 ante) if it was committed in relation to a person under the age of 16; (27) an offence under s 17 (abuse of position of trust: causing or inciting a child to engage

in sexual activity) (see PARA 181 ante) if it was committed in relation to a person under the age of 16; (28) an offence under s 25 (sexual activity with a child family member) (see PARA 191 ante) if it was committed in relation to a person under the age of 16; (29) an offence under s 26 (inciting a child family member to engage in sexual activity) (see PARA 191 ante) if it was committed in relation to a person under the age of 16; (30) an offence under s 30 (sexual activity with a person with a mental disorder impeding choice) (see PARA 197 ante) if it was committed in relation to a person under the age of 16; (31) an offence under s 31 (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity) (see PARA 198 ante) if it was committed in relation to a person under the age of 16; (32) an offence under s 34 (inducement, threat, or deception to procure activity with a person with a mental disorder) (see PARA 202 ante) if it was committed in relation to a person under the age of 16; (33) an offence under s 35 (causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception) (see PARA 203 ante) if it was committed in relation to a person under the age of 16; (34) an offence under s 38 (care workers: sexual activity with a person with a mental disorder) (see PARA 207 ante) if it was committed in relation to a person under the age of 16; (35) an offence under s 39 (care workers: causing or inciting sexual activity) (see PARA 208 ante) if it was committed in relation to a person under the age of 16; (36) aiding, abetting, counselling, procuring or inciting the commission of any offence mentioned in heads (1)-(35) supra; or attempting to commit any such offence: Criminal Justice Act 2003 (Categories of Offences) Order 2004, SI 2004/3346, art 2, Schedule Pt 2.

Each category is deemed to consist of offences of the same type. 'In referring to offences of the same description or category, the Criminal Justice Act 2003 s 103(2) is not exhaustive of the types of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged. Nor, however, is it necessarily sufficient, in order to show such propensity, that a conviction should be of the same description or category as that charged': *R v Hanson* [2005] EWCA Crim 824 at [8], [2005] 2 Cr App Rep 299 at [8], [2005] All ER (D) 380 (Mar) at [8] per Rose LJ, giving the judgment of the court.

10 Criminal Justice Act 2003 s 103(5).

## UPDATE

### 1507 Important matter in issue between the defendant and the prosecution

NOTE 3--Evidence of unproven allegations, including those made by co-defendants, may in appropriate cases be admissible under the 2003 Act s 101(1)(d): *R v Chopra* [2006] EWCA Crim 2133, [2006] All ER (D) 44 (Dec). In determining guilt in respect of any count, a jury is entitled to have regard to the evidence in regard to any other count, or any other bad character evidence, if that evidence is admissible and relevant: *R v Freeman*; *R v Crawford* [2008] EWCA Crim 1863, [2009] 2 All ER 18. For offences requiring specific intent, it may be inappropriate to admit evidence of convictions for offences lacking such a requirement: *R v Bullen* [2008] EWCA Crim 4, [2008] 2 Cr App Rep 364. See also *R v McKenzie* [2008] EWCA Crim 758, (2008) 172 JP 377 (evidence of reckless driving in trial for causing death by dangerous driving); *R v O'Dowd* [2009] EWCA Crim 905, (2009) 173 JP 640 (introduction of bad character evidence led to investigation of satellite issues).

NOTE 7--See *R v B* [2008] EWCA Crim 4, [2008] All ER (D) 85 (Jan) (previous convictions for offences of basic intent not relevant to issue of defendant's propensity to commit offence of specific intent); *R v Johnson* [2009] EWCA Crim 649, [2009] All ER (D) 47 (Apr) (2003 Act s 103(2) does not preclude demonstrating propensity in other ways); and *R v Clements* [2009] All ER (D) 261 (Nov), CA (previous conviction for sexual activity with child not admissible in trial for sexual assault).

NOTE 9--See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).

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### **1508. Important matter in issue between the defendant and a co-defendant.**

Evidence of a defendant's bad character<sup>1</sup> which is relevant only to the question whether the defendant has a propensity to be untruthful<sup>2</sup> is admissible under the Criminal Justice Act 2003<sup>3</sup> only if the nature or conduct of his defence is such as to undermine the co-defendant's defence<sup>4</sup>. Only evidence which is to be (or has been) adduced by the co-defendant, or which a witness is to be invited to give (or has given) in cross-examination by the co-defendant, is admissible under this provision<sup>5</sup>.

1 As to the meaning of 'bad character' see PARA 1503 ante.

2 Such evidence may also be admissible on behalf of a co-defendant in order to demonstrate the defendant's propensity to commit an offence such as the one charged, provided it has substantial probative value in that context. This was also recognised at common law. See *R v Randall* [2003] UKHL 69 at [22], [2004] 1 All ER 467 at [22], [2004] 1 Cr App Rep 375 at [22] per Lord Steyn: 'Postulate a joint trial involving two accused arising from an assault committed in a pub. Assume it to be clear that one of the two men committed the assault. The one man has a long list of previous convictions involving assaults in pubs. It shows him to be prone to fighting when he had consumed alcohol. The other man has an unblemished record. Relying on experience and common sense one may rhetorically ask why the propensity to violence of one man should not be deployed by the other man as part of his defence that he did not commit the assault. Surely such evidence is capable, depending on the jury's assessment of all the evidence, of making it more probable that the man with the violent disposition when he had consumed alcohol committed the assault. To rule that the jury may use the convictions in regard to his credibility but that convictions revealing his propensity to violence must otherwise be ignored is to ask the jury to put to one side their common sense and experience.' See also *Lowery v R* [1974] AC 85, [1973] 3 All ER 662, PC.

3 Under the Criminal Justice Act 2003 s 101(1)(e), which states that evidence of the defendant's bad character may be admitted if it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant: see PARA 1505 head (5) ante.

4 Ibid s 104(1). This restriction does not purport to have any application in cases such as that postulated in *R v Randall* [2003] UKHL 69, [2004] 1 All ER 467, [2004] 1 Cr App Rep 375 (see note 2 supra) where the evidence is admissible because of its substantial probative value on the issue of propensity to commit offences such as that charged. Nevertheless, a court or judge is not bound to admit evidence of a defendant's bad character simply because an application to admit is made by a co-defendant. See *R v Edwards* [2005] EWCA Crim 3244 at [1(v)], [2006] 1 WLR 1524 at [1(v)], [2006] All ER 882 at [1(v)] per Scott Baker LJ, giving the judgment of the court ('the gateway in the Criminal Justice Act 2003 s 101(3) (see note 3 supra) must be gone through. In determining an application under s 101(1)(e), analysis with a fine-tooth comb is unlikely to be helpful; it is the context of the case as a whole that matters. Section 112(1) (see PARA 1505 note 7 ante) makes this clear by its definition of what amounts to an important matter in issue'). See also *R v Lawson* [2006] All ER (D) 116 (Aug), CA.

Whether a defendant's stance amounts to no more than a denial of participation or gives rise to an important matter in issue between a defendant and a co-defendant will inevitably turn on the facts of the individual case: *R v Edwards* supra at [1(vi)] per Scott Baker LJ, giving the judgment of the court. See also *Murdoch v Taylor* [1965] AC 574 at 592, 49 Cr App Rep 119 at 137, HL, per Lord Donovan; *R v Varley* [1982] 2 All ER 519, 75 Cr App Rep 242, CA. In some cases it will be impossible for a defendant to give evidence denying the offence without contradicting or undermining the defence of a co-defendant: see eg *R v Davis* [1975] 1 All ER 233, 60 Cr App Rep 157, CA; *R v Crawford* [1997] 1 WLR 1329, [1998] 1 Cr App Rep 338; *R v Varley* supra. Evidence which, if believed, would result in the acquittal of a co-defendant is not evidence against him, even if it is inconsistent with the defence put forward by him: *R v Bruce* [1975] 3 All ER 277, 61 Cr App Rep 123, CA. But where evidence does more to undermine a defence than to undermine the prosecution case, it is evidence against the co-defendant who advances the defence: *R v Hatton* (1976) 64 Cr App Rep 88, CA.

5 Criminal Justice Act 2003 s 104(2). This does not appear to mean that the jury should be directed to ignore such evidence when considering the strength of the prosecution's case against the defendant. Such a direction might needlessly perplex the jury (see *R v Randall* [2003] UKHL 69 at [35], [2004] 1 All ER 467 at [35], [2004] 1 Cr App Rep 375 at [35] per Lord Steyn. Thus where at common law evidence of propensity was admitted for the sake of a co-defendant's defence, the Crown could become the beneficiary of that: *R v B* [2004] EWCA Crim 1254 at [56], [2004] 2 Cr App Rep 570 at [56], [2004] All ER (D) 268 (May) at [56] per Rix LJ, giving the judgment of the court. There is nothing to suggest that the Criminal Justice Act 2003 changes this principle.

## **UPDATE**

### **1508 Important matter in issue between the defendant and a co-defendant**

NOTE 4--*Lawson*, cited, reported at [2006] EWCA Crim 2572, [2007] 1 WLR 1191.



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EVIDENCE/(16) EVIDENCE OF GOOD OR BAD CHARACTER/1509. Evidence to correct a false impression given by the defendant.

### **1509. Evidence to correct a false impression given by the defendant.**

Evidence of a defendant's bad character<sup>1</sup> is admissible for the purpose of correcting a false impression given by the defendant<sup>2</sup> only when adduced by the prosecution<sup>3</sup>. A defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant; and evidence to correct such an impression is evidence which has probative value in correcting it<sup>4</sup>.

A defendant is treated as being responsible for the making of an assertion if: (1) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him); (2) the assertion was made by the defendant: (a) on being questioned under caution, before charge, about the offence with which he is charged; or (b) on being charged with the offence or officially informed that he might be prosecuted for it, and evidence of the assertion is given in the proceedings; (3) the assertion is made by a witness called by the defendant; (4) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so; or (5) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings<sup>5</sup>.

A defendant who would otherwise be treated as responsible for the making of an assertion is not to be so treated if, or to the extent that, he withdraws it or disassociates himself from it<sup>6</sup>.

Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression<sup>7</sup>.

1 As to the meaning of 'bad character' see PARA 1503 ante.

2 Ie under the Criminal Justice Act 2003 s 101(1)(f): see PARA 1505 head (6) ante. Evidence is admissible under s 101(1)(f) only if it goes no further than is necessary to correct the false impression: s 105(6).

3 Ibid s 105(7).

4 Ibid s 105(1). Whether a true assertion is nevertheless misleading may depend on all the facts. Section 101(1)(f) and s 105 do not appear to adopt the common law principle that 'character is not severable' (see *R v Winfield* [1939] 4 All ER 164, 27 Cr App Rep 139, CCA) and so it may be possible for a defendant to stress good aspects of his character without purporting to make any claims to good character overall (eg 'I have been in trouble once or twice before, but never for anything of this kind'). Contrast *R v Marsh* [1994] Crim LR 52, CA, where the defendant's proposed assertion was true but misleading (he was charged with causing grievous bodily harm to an opponent during a rugby match, and wished to assert his clean criminal record; but the judge correctly ruled that this would expose him to cross-examination concerning his poor disciplinary record for violence in previous rugby matches).

5 Criminal Justice Act 2003 s 105(2).

6 Ibid s 105(3). Where, for example, the defendant made false or misleading claims as to his character when questioned by the police, it may be advisable for him to dissociate himself from them at the trial, rather than wait for the prosecution to contradict them in detail. If he is prepared to do this, it may not be necessary for the court or jury to learn that he made the assertions at all. The problem is more acute in a case such as *R v Redd* [1923] 1 KB 104, 17 Cr App Rep 36, CCA, where a defence witness blurts out an unsolicited and misleading assertion concerning the defendant's character. In such a case, the defendant may have little choice but to dissociate himself from the assertion in open court.

There is a significant difference between the defendant who makes a specific and positive decision to correct a false impression for which he is responsible, or to disassociate himself with false impressions conveyed by the assertions of others, and the defendant who in the process of cross-examination is obliged to concede that he has been misleading the jury. A concession extracted in cross-examination that the defendant was not telling the truth in part of his examination in chief will not normally amount to a withdrawal or disassociation from the original assertion for the purposes of the Criminal Justice Act 2003 s 105(3): *R v Renda* [2005] EWCA Crim 2826 at [21], [2006] 2 All ER 553 at [21] per Sir Igor Judge P, giving the judgment of the court.

7 Criminal Justice Act 2003 s 105(4). For this purpose, 'conduct' includes appearance or dress: s 105(5).

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EVIDENCE/(16) EVIDENCE OF GOOD OR BAD CHARACTER/1510. Attack by defendant on another person's character.

### **1510. Attack by defendant on another person's character.**

Evidence of a defendant's bad character<sup>1</sup> is admissible as a response to an attack on another person's character<sup>2</sup> only when adduced by the prosecution<sup>3</sup>. A defendant makes an attack on another person's character if: (1) he adduces evidence attacking the other person's character<sup>4</sup>; (2) he (or any legal representative appointed to cross-examine a witness in his interests<sup>5</sup>) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so<sup>6</sup>; or (3) evidence is given of an imputation about the other person made by the defendant: (a) on being questioned under caution, before charge, about the offence with which he is charged; or (b) on being charged with the offence or officially informed that he might be prosecuted for it<sup>7</sup>.

Evidence admitted on this basis is not necessarily relevant only to the defendant's credibility. It may (depending on the facts and circumstances) also be relevant to the issue of propensity<sup>8</sup>.

The court must not admit evidence of the defendant's bad character in response to his attack on another person's character, if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it<sup>9</sup>.

1 As to the meaning of 'bad character' see PARA 1503 ante.

2 It is admissible evidence under the Criminal Justice Act 2003 s 101(1)(g): see PARA 1505 head (7) ante.

3 Ibid s 106(3). Where a co-defendant's character has been attacked by the defendant, the co-defendant may, however, have recourse in some cases to s 101(1)(e): see PARA 1508 ante.

4 Ibid s 106(1)(a). 'Evidence attacking the other person's character' means evidence to the effect that the other person: (1) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one); or (2) has behaved, or is disposed to behave, in a reprehensible way; and 'imputation about the other person' means an assertion to that effect: s 106(2).

Authorities predating the implementation of the Criminal Justice Act 2003 will continue to apply when assessing whether an attack has been made on another person's character, to the extent that they are compatible with s 106: *R v Hanson* [2005] EWCA Crim 824 at [14], [2005] 2 Cr App Rep 299 at [14], [2005] All ER (D) 380 (Mar) at [14] per Rose LJ, giving the judgment of the court. Such authorities are cases decided under the Criminal Evidence Act 1898 s 1(f)(ii) (renumbered as s 1(3)(ii); and repealed). This provision applied only where the nature and character of the defence case involved imputations on the character of prosecution witnesses or on the deceased victim of the alleged crime and could be invoked only through cross-examination of a defendant who had testified in his own defence.

Authorities that may be relevant to the question whether an attack has been made on another person include *R v Jenkins* (1945) 31 Cr App Rep 1, CCA (allegation of infidelity and other immoral conduct against married woman held to involve imputations on her character); *R v Britzman* [1983] 1 All ER 369, 76 Cr App Rep 134, CA, (allegation that police officers had invented admissions held to amount to an imputation); *R v Hudson* [1912] 2 KB 464, 7 Cr App Rep 256, CCA (assertion that prosecution witness was the real offender, also an imputation). Contrast *R v McLean* [1978] Crim LR 430, CA (allegation of drunkenness not an attack on character).

Where the defence in question amounted to no more than a denial of the charge, albeit one expressed in emphatic language, this was held not to amount to an imputation on any prosecution witness under the Criminal Evidence Act 1898: *Selvey v DPP* [1970] AC 304 at 339, 52 Cr App Rep 443 at 465, HL, per Viscount Dilhorne; *R v Rimarczy* [2005] EWCA Crim 1834, [2005] All ER (D) 324 (Jun). Thus it was not an imputation where the defendant merely stated that the evidence of the complainant was a lie: *R v Rouse* [1904] 1 KB 184, 3 Cr App Rep 64, CCA; *R v Grout*, *R v Jones* (1909) 74 JP 30, 3 Cr App Rep 64, CCA; *R v Parker* (1924) 18 Cr App Rep 14, CCA. See also *R v Renda* [2005] EWCA Crim 2826 at [34], [2006] 2 All ER 553 at [34] per Sir Igor Judge

P, giving the judgment of the court, in which a similar approach appears to have been adopted under the Criminal Justice Act 2003.

Nor under the old law was it considered an imputation in a case of alleged rape merely to assert that the complainant consented to sexual intercourse: *R v Sheean* (1908) 21 Cox CC 561, CCA; *R v Turner* [1944] KB 463, 30 Cr App Rep 9, CCA; *Selvey v DPP* supra. In *R v Renda* supra the court appears to have adopted a similar approach under the Criminal Justice Act 2003.

However, under the old law it was considered to be an imputation to suggest discreditable reasons for the witness or complainant to give false evidence: *R v Manley* (1962) 46 Cr App Rep 235, CCA. See also *R v Rappolt* (1911) 6 Cr App Rep 156, CCA; *R v Clark* [1955] 2 QB 469, 39 Cr App Rep 120, CCA; *R v St Louis and Case* (1984) 79 Cr App Rep 53, CA.

The purpose of the defence in making an imputation was held to be irrelevant under the old law. In particular, the fact that it may have been necessary to make a discreditable assertion about a prosecution witness in order to put the defence case did not prevent it being an imputation: *R v Bishop* [1975] QB 274, [1974] 2 All ER 1206; *R v Burke* (1985) 82 Cr App Rep 156, [1985] Crim LR 660, CA; *R v Powell* [1986] 1 All ER 193, 82 Cr App Rep 165, CA; *R v Hudson* supra; *Selvey v DPP* supra. In *R v Bishop* supra an allegation of a homosexual relationship with the victim of an alleged burglary was held to involve imputations on character, even though adduced only to account for the defendant's fingerprints being found within the property; but it is questionable whether an allegation of homosexuality would still be seen as an attack on character.

5 le appointed under the Youth Justice and Criminal Evidence Act 1999 s 38(4): see PARA 1441 ante.

6 Criminal Justice Act 2003 s 106(1)(b). As to the cross-examination of witnesses see generally para 1440 et seq ante.

7 Ibid s 106(1)(c). See *R v Renda* [2005] EWCA Crim 2826, [2006] 2 All ER 553.

8 *R v Highton* [2005] EWCA Crim 1985, [2005] 1 WLR 3472, [2006] Crim LR 52. However, this depends on the circumstances: *R v M* [2006] All ER (D) 472 (Mar), CA; see also *R v George* [2006] All ER (D) 71 (Jun), CA.

9 Criminal Justice Act 2003 s 101(3). Where a defendant has given an answer in evidence making an attack on another person's character such that the gateway under s 101(1)(g) (see PARA 1505 head (7) ante) might be open, it cannot have been Parliament's intention that, in order to assess any 'adverse effect on the fairness of the proceedings' for the purposes of s 101(3), a trial judge should conduct some investigation as to why the defendant had given the answer he did. The impact on the fairness of the proceedings has to be assessed by reference to matters other than what the defendant's particular intention might have been: see *R v Bovell*; *R v Dowds* [2005] EWCA Crim 1091 at [32], [2005] 2 Cr App Rep 27 at [32], [2005] All ER (D) 349 (Apr) at [32] per Rose LJ, giving the judgment of the court.

Under the 'tit-for-tat' provisions of the Criminal Evidence Act 1898 s 1(3)(ii) (now replaced by the Criminal Justice Act 2003 s 101(1)(g) (see PARA 1505 head (7) ante)) the courts were prepared only in limited circumstances to exercise a comparable discretion to safeguard the defendant's shield against cross-examination on his bad character following imputations made against the prosecutor or prosecution witnesses. The following guidelines were laid down by the Court of Appeal in *R v Burke* (1985) 82 Cr App Rep 156, CA, and later approved in *R v Powell* [1986] 1 All ER 193, 82 Cr App Rep 165, CA:

123 (1) The trial judge must weigh the prejudicial effect of the questions against the damage done by the attack on the prosecution's witnesses, and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and the defence.

124 (2) Cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the defendant, even though there may be some tenuous grounds for holding it technically admissible. Thus, although the position is established in law, still the putting of the questions as to character of the defendant person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the defendant almost impossible.

125 (3) In the ordinary and normal case, the trial judge may feel that if the credit of the prosecutor or his witnesses has been attacked it is only fair that the jury should have before them material on which they can form their judgment whether the defendant person is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about a defendant person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section.

126 (4) In order to see if the conviction should be quashed, it is not enough that the court thinks it would have exercised its discretion differently. The court will not interfere with the exercise of a

discretion by a judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision.

See also *Selvey v DPP* [1970] AC 304, 52 Cr App Rep 443, HL; disapproving dicta in *R v Flynn* [1963] 1 QB 729, 45 Cr App Rep 286, CCA. See further *R v George* [2006] All ER (D) 71 (Jun), CA.

## **UPDATE**

### **1510 Attack by defendant on another person's character**

NOTE 4--The 2003 Act s 101(1)(g) applies also to attacks on the character of a non-witness: *R v Nelson* [2006] All ER (D) 290 (Dec), CA. The provision does not permit evidence of the bad character of one defendant to be adduced at the behest of a co-defendant: *R v Assani* [2008] EWCA Crim 2503, [2008] All ER (D) 188 (Nov).

NOTE 7--See *R v Lamaletie* [2008] EWCA Crim. 314, (2008) 172 JP 249.

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### **1511. Evidence of bad character: credibility and contamination.**

It is not ordinarily the task of a trial judge to determine whether evidence should be believed<sup>1</sup>, and where a court or judge is required to rule on the admissibility of evidence of bad character<sup>2</sup> the relevance or probative value of that evidence must ordinarily be assessed on the assumption that it is true<sup>3</sup>. However, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true<sup>4</sup>.

Where at a trial before a judge and jury evidence of a defendant's bad character has been admitted under the Criminal Justice Act 2003<sup>5</sup> (other than by the defendant himself or with his agreement) and the court is satisfied at any time after the close of the case for the prosecution that: (1) the evidence is contaminated<sup>6</sup>; and (2) the contamination is such that, considering the importance of the evidence to the case against the defendant, his conviction of the offence would be unsafe, the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a re-trial, discharge the jury<sup>7</sup>. Evidence of a defendant's bad character is contaminated for this purpose if: (a) as a result of an agreement or understanding between the witness in question and one or more others; or (b) as a result of that witness being aware of anything alleged by one or more others whose evidence may be, or has been, given in the proceedings, the evidence is false or misleading in any respect, or is different from what it would otherwise have been<sup>8</sup>.

The provisions set out above do not prejudice any other power a court may have to direct a jury to acquit a person of an offence or to discharge a jury<sup>9</sup>.

1 As to the respective functions of judge and jury see PARA 1359 ante.

2 As to the meaning of 'bad character' see PARA 1503 ante.

3 See the Criminal Justice Act 2003 s 109(1).

4 Ibid s 109(2). Section 109(1), (2) reflects the position that existed at common law (see *R v H(A)* [1995] 2 AC 596, [1995] 2 Cr App Rep 437, HL; *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26 at [76], [2005] 2 AC 534 at [76], [2005] All ER (D) 416 (Apr) at [76] per Lord Carswell).

5 Ie under the Criminal Justice Act 2003 s 101(1)(c)-(g): see PARA 1505 heads (3)-(7) ante.

6 This appears to mean the evidence of bad character previously referred to, and not any other evidence (eg contaminated testimony of a complainant) adduced in addition to evidence of bad character, but see *R v Card* [2006] EWCA Crim 1079, [2006] 3 All ER 689.

7 Criminal Justice Act 2003 s 107(1). This applies equally to alternative verdicts and to findings of a jury under the Criminal Procedure (Insanity) Act 1964 (ie whether a person charged on an indictment with an offence but unfit to plead to it did the act or made the omission charged): see the Criminal Justice Act 2003 s 107(2), (3).

8 Ibid s 107(5). However, unless the case falls squarely within s 107(5), the Court of Appeal is the appropriate court in which the correctness of the judge's decision should be questioned: *R v Renda* [2005] EWCA Crim 2826 at [27], [2006] 2 All ER 553 at [27] per Sir Igor Judge P, giving the judgment of the court. Even where the case does fall within the Criminal Justice Act 2003 s 107(5), this does not mean that it would be unsafe to continue with the trial. It may in some cases be possible to neutralise any potential prejudice by demonstrating the fact (if such be the case) that the evidence in question is false. Greater difficulty may in fact

be caused by evidence which although clearly contaminated is not demonstrably false, so that a jury may be tempted to rely upon it.

9 Ibid s 107(4).

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### **1512. Spent convictions and convictions for childhood offences.**

In proceedings for an offence committed or alleged to have been committed by the defendant when aged 21 or over, evidence of his conviction for an offence when under the age of 14 is not admissible unless: (1) both of the offences are triable only on indictment; and (2) the court is satisfied that the interests of justice require the evidence to be admissible<sup>1</sup>.

In contrast, statutory provisions which otherwise restrict the disclosure of spent convictions<sup>2</sup> in judicial proceedings<sup>3</sup> do not affect the determination of any issue, or prevent the admission or requirement of any evidence relating to a person's previous convictions, or circumstances ancillary<sup>4</sup> thereto in any criminal proceedings before a court in Great Britain (including any appeal or reference in a criminal matter)<sup>5</sup>.

Nevertheless, criminal courts and advocates should give effect to the general intention of Parliament by never referring to a spent conviction when such reference can reasonably be avoided; no one should refer in open court to a spent conviction without the authority of the judge, which authority should not be given unless the interests of justice so require; and when passing sentence the judge should make no reference to a spent conviction unless it is necessary to do so for the purpose of explaining the sentence to be passed<sup>6</sup>.

1 Criminal Justice Act 2003 s 108(2). This applies in addition to s 101 (see PARA 1505 ante): s 108(3). However, it applies in terms only to evidence of convictions and not to evidence of conduct giving rise to a conviction or to other evidence of bad character within the meaning of s 98 (see PARA 1503 ante). It may be that such evidence would be subject to exclusion under the Police and Criminal Evidence Act 1984 s 78 (as amended) (see PARA 1365 ante) (cf *R v Highton* [2005] EWCA Crim 1985 at [13], [2005] 1 WLR 3472 at [13], [2006] Crim LR 52 at [13] per Lord Woolf CJ).

2 I.e. the Rehabilitation of Offenders Act 1974: see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 660 et seq.

3 I.e. as defined by *ibid* s 4(6): see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 663 note 2.

4 For such purposes, any of the following are circumstances ancillary to a conviction: (1) the offence or offences which were the subject of that conviction; (2) the conduct constituting that offence or those offences; and (3) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings, whether by way of appeal or otherwise, for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence: *ibid* s 4(5).

5 *Ibid* s 7(2)(a). The statutory provisions also do not apply to proceedings under the Sexual Offences Act 2003 Pt 2 (ss 80-136) (as amended) (notification and orders): Rehabilitation of Offenders Act 1974 s 7(2)(bb) (substituted by the Sexual Offences Act 2003 s 139, Sch 6 para 19). They also do not apply in any proceedings relating to the variation or discharge of a supervision order under the Powers of Criminal Courts (Sentencing) Act 2000, or on appeal from any such proceedings: Rehabilitation of Offenders Act 1974 s 7(2)(d) (substituted by the Children Act 1989 s 108(5), Sch 13 para 35; and amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 49).

6 *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at 1.6, CA. But contrast *R v Corelli* [2001] EWCA Crim 1398, [2001] All ER (D) 139 (Apr); *R v Gadsby* [2005] EWCA Crim 3206, [2005] All ER (D) 191 (Dec) (defendant must be allowed to disclose evidence of other persons' spent convictions if they are relevant and admissible).



Where there is a 'head-on collision' between the version of events sworn to by the complainant and by the defendant, revelation of the spent convictions of the complainant may be unavoidable: *R v Paraskeva* (1982) 76 Cr App Rep 162, CA.

As to the question whether a defendant with spent convictions should be presented as a person of previous good character, or receive the benefit of a 'good character' direction see *R v Nye* (1982) 75 Cr App Rep 247, CA; *R v Bailey* [1989] Crim LR 723, CA; *R v Durbin* [1995] 2 Cr App Rep 84, CA; *R v Mentor (Steven)* [2004] EWCA Crim 3104, [2005] Crim LR 472; and see also PARAS 1322 ante, 1518 post.

## **UPDATE**

### **1512 Spent convictions and convictions for childhood offences**

NOTE 5--Rehabilitation of Offenders Act 1974 s 7(2)(d) further substituted: Criminal Justice and Immigration Act 2008 Sch 4 para 22.

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**1513. Duty of court to give reasons for rulings on evidence of bad character.**

Where the court makes a relevant ruling<sup>1</sup> it must state in open court (but in the absence of the jury, if there is one) its reasons for the ruling and if it is a magistrates' court, it must cause the ruling and the reasons for it to be entered in the register of the court's proceedings<sup>2</sup>.

1 A 'relevant ruling' means: (1) a ruling on whether an item of evidence is evidence of a person's bad character (see PARA 1503 ante); (2) a ruling on whether an item of such evidence is admissible under the Criminal Justice Act 2003 s 100 or s 101 (including a ruling on an application under s 101(3) (see PARAS 1504-1505 ante); or (3) a ruling under s 107 (see PARA 1511 ante): s 110(2).

2 Ibid s 110(1).

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#### **1514. Bad character of defendant in cases of handling stolen goods.**

Where a person is being proceeded against for handling stolen goods<sup>1</sup>, but not for any offence other than handling stolen goods<sup>2</sup>, then at any stage of the proceedings, if evidence has been given of his having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realisation, the following evidence is admissible for the purpose of proving that he knew or believed the goods to be stolen goods<sup>3</sup>:

- 2210 (1) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realisation of, stolen goods from any theft taking place not earlier than 12 months<sup>4</sup> before the offence charged<sup>5</sup>; and
- 2211 (2) provided that seven days' notice in writing has been given to him of the intention to prove the conviction<sup>6</sup>, evidence that he has within the five years preceding the date of the offence charged been convicted of theft or of handling stolen goods<sup>7</sup>.

The trial judge has an overriding discretion to exclude such evidence if its prejudicial effect outweighs its probative value<sup>8</sup>.

1 See PARA 302 ante.

2 See *R v Davies* [1953] 1 QB 489, 37 Cr App Rep 16, CCA; *R v Ballard* (1916) 12 Cr App Rep 1, CCA. It is immaterial that other goods evidence of which is admitted should be the subject of another indictment awaiting trial against the defendant: *R v Jones and Hayes* (1877) 14 Cox CC 3. The judge should withdraw the evidence from the consideration of the jury if the prosecution fails to establish that the other property was stolen property (*R v Girod and Girod* (1906) 70 JP 514, CCR) or if the prosecution fails to prove an allegation of possession of other stolen property (*R v Garside* (1967) 52 Cr App Rep 85, CA). The evidence is not restricted to the finding of other stolen property in the defendant's possession but may include eg the circumstances in which it was found: see *R v Smith* [1918] 2 KB 415, 13 Cr App Rep 151, CCA.

3 Theft Act 1968 s 27(3). Such evidence is capable only of proving guilty knowledge or belief. It may not be used to prove that the defendant possessed the goods he is charged with handling, nor can it be treated as relevant to any issue of dishonesty: *R v Duffas* (1993) 158 JP 224, CA. Such matters may however be provable by evidence of bad character admissible under the Criminal Justice Act 2003 s 101 (see PARA 1505 et seq ante). Note that convictions for theft, robbery, burglary by stealing and handling stolen goods all fall within the same category for the purposes of s 101(1)(d) and s 103(4): see the Criminal Justice Act 2003 (Categories of Offences) Order 2004, SI 2004/3346; and PARA 1507 note 9 ante.

4 For the meaning of 'not earlier than 12 months' see *R v Davis* [1972] Crim LR 431, CA.

5 Theft Act 1968 s 27(3)(a). Section 27(3)(a) is to be restrictively construed and is not to be used to elicit the details of other instances of possession: *R v Bradley* (1979) 70 Cr App Rep 200, CA; *R v Wood* [1987] 1 WLR 779, 85 Cr App Rep 287, CA. Cf *R v Smith* [1918] 2 KB 415, 13 Cr App Rep 151, CCA. The Theft Act 1968 s 27 (as amended) is to be construed in accordance with s 24 (scope of offences relating to stolen goods: see PARA 303 ante): s 27(5).

6 Such a notice is not defective because it does not state that it is given under or for the purpose of ibid s 27 (as amended): *R v Airlie* [1973] Crim LR 310, CA.

7 Theft Act 1968 s 27(3)(b). Section 27(3)(b) does not provide for the details of previous offences to be admitted: *R v Fowler* (1987) 86 Cr App Rep 219, CA; but the effect of the Police and Criminal Evidence Act 1984 s 73(2) (as amended) (see PARA 1347 ante) is that any certificate of conviction following trial on indictment must state the substance and effect of the indictment and conviction (including the type of property involved), omitting only the formal parts. If this conviction was in fact for a very similar offence (eg handling the same kind of property) this will be apparent on the certificate, and admissible in evidence, subject only to the judge's discretion to exclude it, should it appear that its admission would prejudice the fairness of the proceedings: *R v Hacker* [1995] 1 All ER 45, [1995] 1 Cr App Rep 332, HL.

8 *R v Knott* [1973] Crim LR 36, CA (applying to the Theft Act 1968 s 27(3) earlier decisions in *R v List* [1965] 3 All ER 710, 50 Cr App Rep 81; *R v Herron* [1967] 1 QB 107, 50 Cr App Rep 132, CCA). See also *R v Rasini* (1986) Times, 20 March, CA; *R v Hacker* [1995] 1 All ER 45, [1995] 1 Cr App Rep 332, HL.

Where more than one offence is alleged, it may be necessary to exclude the evidence admissible under the Theft Act 1968 s 27(3) in relation to counts where guilty knowledge is the primary issue, in order to prevent the evidence influencing the jury on those counts where the primary issue is possession. Where the evidence is admitted, the jury should be warned about the uses to which such evidence may properly be put: *R v Wilkins* [1975] 2 All ER 734, 60 Cr App Rep 300, CA; *R v Perry* [1984] Crim LR 680, CA. Such difficulties may be avoided in many cases if the prosecution relies instead on the Criminal Justice Act 2003 s 101(1)(d): see PARAS 1505, 1507 ante.

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### **1515. Positive and negative evidence of good character.**

The concept of 'good character' may be divided into 'positive good character' (which may include matters such as a solid employment record or faithful discharge of family duties<sup>1</sup>) and 'negative good character' (which means the mere absence of significant criminal convictions<sup>2</sup>). Evidence of positive good character may, in the case of a defendant, be given by witnesses called specifically for that purpose<sup>3</sup> and may take the form of evidence of general reputation, even though such evidence is mere hearsay evidence of opinion<sup>4</sup>.

1 *R v Howells* [1999] 1 All ER 50, [1999] 1 Cr App Rep 98 (although these examples were given in the context of sentencing).

2 *R v Aziz* [1996] AC 41, [1995] 3 All ER 149, HL (the existence of old or insignificant convictions is not inconsistent with good character).

3 See PARA 1517 post.

4 Criminal Justice Act 2003 s 118(1). See further PARA 1517 post.

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### **1516. Good character of persons other than defendants.**

A party calling a witness (other than a defendant) may not ordinarily call evidence or ask questions in order to establish the good character or credibility of that witness, except in rebuttal of attempts to discredit that witness; and he is limited, even then, to the rebuttal of allegations of general untruthfulness by contrary evidence of reputation<sup>1</sup>. Evidence in rebuttal of particular allegations of misconduct relating to credibility is not permitted, because such issues are collateral and the witness's denial of such an accusation will be final<sup>2</sup>. However, it is common for a witness to be questioned as to his trade, profession or calling, or occasionally as to whether he is married etc, and such questions might sometimes help to underpin his credit<sup>3</sup>. Expert witnesses are exceptions to the rule. It is necessary to adduce evidence to establish the experience and qualification of any expert witness<sup>4</sup>.

The admissibility of evidence relating to the good character of other persons (such as the deceased victim of a crime) depends simply on relevance<sup>5</sup>. It may be relevant where for example it is suggested that the deceased attacked or provoked the defendant<sup>6</sup>.

1 *R v Wood* [1951] 2 All ER 112n, CCA; *R v Hamilton* (26 June 1998, unreported), CA; *R v Turner* [1975] QB 834, 60 Cr App Rep 80, CA. See also *R v Robinson (Raymond)* [1994] 3 All ER 346, 98 Cr App Rep 370, CA; *R v Beard* [1998] Crim LR 585, CA.

2 Even where there has been a direct attack on the credibility of a witness, a further witness called to testify as to the other's credibility cannot be permitted to testify in chief as to the particular facts, circumstances of incidents which form the basis of his opinion, although he may be cross-examined upon them: *R v Richardson* [1969] 1 QB 299 at 304, sub nom *R v Longman and Richardson* [1968] 2 All ER 761 at 764, CA, per Edmund Davies LJ.

3 *R v DS* [1999] Crim LR 911, CA (court approved direction in which the jury were invited to 'have regard' to the fact that a prosecution witness was a clergyman, but were also warned that their main judgment should be formed upon their impression of him in the witness box).

4 See PARA 1490 ante.

5 As to relevance see PARA 1364 ante.

6 Any such attack on the character of another person may also lead to evidence of the defendant's bad character becoming admissible: see PARA 1510 ante.

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### **1517. Good character of defendants.**

A defendant is entitled to have evidence of his good character<sup>1</sup> put before the court, in one or more of the following ways:

- 2212 (1) the defence may cross-examine prosecution witnesses (or witnesses called for a co-defendant) for the purposes of establishing the defendant's good character. A police officer who has testified for the prosecution may, for example, be asked to confirm that the defendant has no previous convictions or cautions, if such is the fact<sup>2</sup>;
- 2213 (2) the defence may elicit such evidence from its own witnesses, and may call witnesses ('character witnesses') for the specific purpose of testifying as to the defendant's good character<sup>3</sup>; and
- 2214 (3) the defendant may take the witness stand and give evidence of his own good character<sup>4</sup>.

Evidence of good character may be relevant because it appears to show a lack of criminal propensity<sup>5</sup> and where the defendant's credibility is in issue it may also serve to bolster that credibility<sup>6</sup>. Positive evidence of a defendant's good character may not strictly speaking be established by reference to his specific good deeds or creditable behaviour, but only by evidence of general character founded upon the knowledge of those who know anything about him and his general conduct<sup>7</sup>. This rule has long been recognised as an anomaly<sup>8</sup>, and although a defendant has no right to adduce evidence of more specific matters reflecting on his good character or lack of relevant criminal propensity, in practice the courts will often permit such evidence to be given<sup>9</sup>.

Of crucial importance in proceedings on indictment before a jury is the entitlement of a defendant to have his good character (if any) dealt with in the judge's summing up. In this context, a defendant may be entitled to be presented to the jury as being of good character notwithstanding that he may have some minor or largely irrelevant criminal convictions, although a 'good character' direction may need to be qualified so as to take such matters into account<sup>10</sup>.

1 This may be positive or negative good character: see PARA 1515 ante. The defendant's right to adduce such evidence remains governed by the common law, although the Criminal Justice Act 2003 s 101(1)(f) (see PARA 1509 ante) may become engaged where a defendant's claim to good character threatens to create a false or misleading impression.

2 This may mean only that the defendant has escaped justice on previous occasions, but in the absence of positive evidence of previous criminal behaviour it would not be appropriate for a trial judge to make any comment to that effect: cf *R v Marr* (1989) 90 Cr App Rep 154, [1989] Crim LR 743, CA.

3 *R v Rowton* (1865) Le & Ca 520, CCR; *R v Winfield* [1939] 4 All ER 164, 27 Cr App Rep 139, CCA.

4 See eg *R v Samuel* (1956) 40 Cr App Rep 8, CCA; *R v Bracewell* (1978) 68 Cr App Rep 44, CA.

5 *R v Vye, Wise and Stephenson* [1993] 3 All ER 241, 97 Cr App Rep 134, CA; *R v Stannard* (1837) 7 C & P 673; *R v Aziz* [1996] AC 41, [1995] 3 All ER 149, HL.

6 *R v Vye, Wise and Stephenson* [1993] 3 All ER 241, 97 Cr App Rep 134, CA; *R v Aziz* [1996] AC 41, [1995] 3 All ER 149, HL. See further PARA 1518 post.

7 *R v Rowton* (1865) Le & Ca 520, CCR; *R v Redgrave* (1981) 74 Cr App Rep 10, CA.

8 See *R v Rowton* (1865) Le & Ca 520 at 530, CCR, per Cockburn CJ: 'The only way the law allows of your getting at the disposition and tendency of [the defendant's] mind, is by evidence as to his general character founded upon the knowledge of those who know anything about him and his general conduct. . . . No one pretends that . . . examination can be made as to a specific fact, though everyone would agree that evidence of one fact of honesty or dishonesty, as the case might be, would weigh infinitely more than the opinions of a man's friends or neighbours as to his general character. The truth is, this part of our law is an anomaly. . . . Evidence must be of [D's] general reputation and not the individual opinion of the witness . . . '

Where evidence of a defendant's allegedly good general reputation has been adduced, evidence in rebuttal may include (but is not confined to) evidence suggestive of a bad reputation. The common law rule permitting the use of hearsay evidence of reputation has been preserved by the Criminal Justice Act 2003 ss 99(2), 118(1): see PARA 1515 ante.

9 See eg *R v Samuel* (1956) 40 Cr App Rep 8, CCA, in which the defendant was allowed to give evidence of a specific occasion on which he had behaved with commendable honesty. The defendant nevertheless has no right to insist on the admission of such evidence. See *R v Redgrave* (1982) 74 Cr App Rep 10 at 15, CA, per Lawton LJ: 'It was brought to our attention . . . that nowadays, as a matter of practice in [cases involving alleged homosexual offences] defendants are often allowed to say that they are happily married and having a normal sexual relationship with their wives. We are not seeking to stop defending counsel putting that kind of information before a jury. It has long been the practice for judges to allow some relaxation of the law of evidence on behalf of defendants. Had this young man been a married man, or alternatively, had he confined his relationship to one girl, it might not have been all that objectionable for him to have given evidence in general terms that his relationship with his wife or the girl was satisfactory. That would have been an indulgence on the part of the court. It would not have been his right to have it said'.

10 See generally para 1518 post.



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### **1518. Directions as to defendant's good character.**

A defendant who is of previous good character<sup>1</sup> is ordinarily entitled to have this good character put to the jury by the judge in the course of the summing up<sup>2</sup>. The jury should be directed that good character cannot by itself provide a defence to a criminal charge, but is evidence which should be taken into account in his favour<sup>3</sup>. There are two limbs to a typical good character direction. First, if the defendant has testified at his trial, or if he relies on exculpatory passages in 'mixed' statements made by him before the trial<sup>4</sup>, the jury should be told that his previous good character is relevant to the question of his credibility<sup>5</sup>. The judge may, however, comment on the difference between denials made in pre-trial statements and evidence given on oath<sup>6</sup>. Secondly, the judge must direct the jury as to the relevance of the defendant's good character as an indicator of a possible lack of criminal propensity, whether or not the defendant relies on pre-trial statements or he has testified in his own defence<sup>7</sup>.

Since good character may be a relative concept<sup>8</sup>, a judge may, if the circumstances justify it, qualify that direction<sup>9</sup>, or give only one limb of the standard good character direction, omitting the other if it is inappropriate<sup>10</sup>. He may not, however, withhold or water down a defendant's good character direction merely because by giving it in the usual way he might risk prejudicing the position of a co-defendant who is not of good character<sup>11</sup>, nor (in the absence of positive evidence contradicting or qualifying claims to good character) should he undermine such claims by suggesting that the defendant's good reputation or absence of previous convictions may have been undeserved<sup>12</sup>.

1 A defendant may be of good character merely in the sense that he has no (or no significant) convictions or cautions recorded against him, or he may be of 'positive good character' in the sense that evidence has been adduced as to his positive qualities: see *R v Aziz* [1996] AC 41, [1995] 3 All ER 149, HL; and PARA 1515 ante. As to the effect on good character of a defendant's plea of guilty to other counts to the indictment see *R v Challenger* [1994] Crim LR 202, CA; *R v Teasdale* [1993] 4 All ER 290, 99 Cr App Rep 80, CA. As to the position where a defendant of previously good character pleads provocation on a charge of murder see *R v Richens* [1993] 4 All ER 877, 98 Cr App Rep 43, CA. As to spent convictions see *R v Timson* [1993] Crim LR 58, CA; *R v H* [1994] Crim LR 205, CA; *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at I.6, CA. As to formal cautions or warnings see *R v Clarius* [2000] All ER (D) 951, CA; *R v Sanchez* [2003] EWCA Crim 735, [2003] All ER (D) 118 (Jun). As to how a defendant may adduce evidence of his good character see PARA 1517 ante.

2 *R v Vye, Wise and Stephenson* [1993] 3 All ER 241, 97 Cr App Rep 134, CA; *R v Aziz* [1996] AC 41, [1995] 3 All ER 149, HL; *R v Fulcher* [1995] 2 Cr App Rep 251, CA; *R v Hickmet* [1996] Crim LR 588, CA; *R v Napper* [1996] Crim LR 591, CA. Earlier cases which may suggest that such directions are merely discretionary are no longer good law.

3 *R v Vye, Wise and Stephenson* [1993] 3 All ER 241, 97 Cr App Rep 134, CA; *R v Aziz* [1996] AC 41, [1995] 3 All ER 149, HL. It is a misdirection to water this down by telling the jury that they are merely 'entitled' to take good character into account: *R v Lloyd* [2000] 2 Cr App Rep 355, CA; *R v Scranage* [2001] EWCA Crim 1171, [2001] All ER (D) 185 (Apr). See also *R v Miah* [1997] 2 Cr App Rep 12, CA; *R v Sanchez* [2003] EWCA Crim 735, [2003] All ER (D) 118 (Jun).

4 As to mixed statements see *R v Duncan* (1981) 73 Cr App Rep 359; and PARA 1541 post.

5 The right to a 'credibility' direction does not, however, extend to cases in which the defendant attempts to rely on a fundamentally exculpatory interview in which his denials are mixed with insignificant admissions, which do not add any weight to the prosecution case: *R v Garrod* [1997] Crim LR 445, CA.

6 *R v Aziz* [1996] AC 41 at 50, [1995] 3 All ER 149 at 157, HL, per Lord Steyn. The judge may also need to qualify (but should not ordinarily withhold) the direction on credibility in cases where, for example, it is conceded that the defendant lied to the police when interviewed (*R v Sharp* [1994] QB 261, [1993] 3 All ER 225, CA; *R v Burnham* [1995] Crim LR 491, CA; *R v Metcalfe* [2005] EWCA Crim 1814, [2005] All ER (D) 360 (Jun)).

7 *R v Vye, Wise and Stephenson* [1993] 3 All ER 241, 97 Cr App Rep 134, CA; *R v Aziz* [1996] AC 41, [1995] 3 All ER 149, HL; *R v Wren* [1993] Crim LR 952, CA.

8 See note 2 *supra*.

9 This may be appropriate for example where the defendant has admitted some lesser criminal conduct, or has a criminal record for an offence less serious than those with which he is now charged (*R v Aziz* [1996] AC 41, [1995] 3 All ER 149, HL; *R v Durbin* [1995] 2 Cr App Rep 84, CA; *R v Gray* [2004] EWCA Crim 1074, [2002] 2 Cr App Rep 498, [2004] All ER (D) 358 (Apr)). Cases may arise in which, despite an absence of previous convictions, a good character direction would be inappropriate, unhelpful to the defendant or even an insult to common sense (*R v Aziz* *supra*; *R v Zoppola-Barraza* [1994] Crim LR 833, CA; *R v Akram* [1995] Crim LR 50, CA; *Shaw v R* [2001] UKPC 26, [2001] 1 WLR 1519, [2001] All ER (D) 365 (May)). Where a defendant has attempted to conceal his past from the jury, there may be no injustice in a judge declining to give him even a qualified good character direction: *R v Mailett* [2005] EWCA Crim 3159, [2005] All ER (D) 98 (Nov).

Whether spent convictions require qualification of a good character direction depends on the circumstances. A recently spent conviction for a relatively serious or similar kind of offence may still be relevant. See *R v Nye* (1982) 75 Cr App Rep 247, CA; *R v Durbin* *supra*; *R v Mentor (Steven)* [2004] EWCA Crim 3104, [2005] Crim LR 472.

10 *R v Sanchez* [2003] EWCA Crim 735 at [35], [2003] All ER (D) 118 (Jun) per Auld LJ. The defendant in that case had previously been cautioned for theft (shoplifting) but had not previously been involved in anything as serious as the cocaine smuggling with which she was now charged. The judge rightly withheld the 'credibility limb' of a good character direction, but still gave a standard propensity direction. See also *R v Martin* [2000] 2 Cr App Rep 42, CA. Where a judge is minded to give only a qualified or partial direction, it may be advisable for him first to invite submissions on this from counsel (*R v Aziz* [1996] AC 41, [1995] 3 All ER 149, HL).

11 *R v Vye, Wise and Stephenson* [1993] 3 All ER 241, 97 Cr App Rep 134, CA; *R v Holden* (1994) 99 Cr App Rep 244, CA. If nothing has been said and no evidence has been adduced as to the bad character of the co-defendant, the judge may be justified in saying nothing at all about that co-defendant's character (*R v Shepherd* [1995] Crim LR 153, CA).

12 *R v Marr* (1989) 90 Cr App Rep 154, [1989] Crim LR 743, CA.

## UPDATE

### 1518 Directions as to defendant's good character

NOTE 9--See also *R v Doncaster* [2008] EWCA Crim 5, (2008) 172 JP 202 (where evidence of earlier criminal inquiries not resulting in convictions had been given, judge entitled to direct the jury as to the bad character evidence without reminding it about the absence of convictions).

NOTE 10--See *R v Moustakim* [2008] EWCA Crim 3096, [2009] All ER (D) 176 (May) (failure by judge to make explicit positive direction regarding defendant's good character meant summing up was deficient).

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## **(17) HEARSAY**

### **1519. Hearsay and original evidence.**

A fact is proved by original evidence when it is proved by oral testimony in the proceedings<sup>1</sup> from witnesses who have first-hand knowledge of that fact. If a witness lacks first hand knowledge (ie he did not personally perceive or experience the fact or event in question, but has merely heard or read about it through statements made by others) any evidence he purports to give on that matter will be second-hand evidence and thus hearsay<sup>2</sup>.

Even where a person does have first-hand knowledge of the facts in question, his evidence is original evidence only when it takes the form of oral testimony in the proceedings. A previously written or recorded statement by that person is hearsay (whether or not he later gives oral testimony in the proceedings) if tendered as evidence of those facts<sup>3</sup>.

Where a witness testifies as to what he has heard or been told in a statement made by another person, this is not necessarily hearsay. It is hearsay where the court or jury is invited to believe or rely upon the truth of what was asserted in the statement, but it is not hearsay where it is proposed to establish by such evidence, not the truth of the statement, but merely the fact that it was made<sup>4</sup>.

At common law, evidence that one or more persons had, by their words or conduct, demonstrated knowledge of or belief in certain facts was, according to some authorities<sup>5</sup>, equivalent to an 'implied assertion' of those facts by the persons concerned, and thus inadmissible as hearsay if tendered as evidence to prove the existence of those facts, even if the conduct in question was not intended to assert any such facts<sup>6</sup>. This interpretation of the hearsay rule, if it was ever good law, has now been abrogated<sup>7</sup>. The rules governing the admissibility of hearsay evidence<sup>8</sup> now apply if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been to cause another person to believe the matter<sup>9</sup>, or to cause another person to act or a machine to operate on the basis that the matter is as stated<sup>10</sup>.

Evidence produced by computers, cameras or other machines without incorporating any human statement cannot be hearsay<sup>11</sup>. At common law, it was held that visual images, even when produced by human hands, were not 'statements' of any facts they purported to represent and therefore could not be hearsay<sup>12</sup>, but there is now express provision to the contrary<sup>13</sup>.

1 A statement made by a witness in criminal proceedings which, in accordance with a special measures direction under the Youth Justice and Criminal Evidence Act 1999 (see PARA 1417 et seq ante), is not made by the witness in direct oral testimony in court but forms part of the witness's evidence in those proceedings (eg video-recorded evidence in chief) is treated as if made by the witness in direct oral testimony in court: see s 31(1), (2).

As from a day to be appointed, oral testimony also includes evidence given by live link under the Criminal Justice Act 2003 s 51 (not yet in force) (see PARA 1415 ante) and evidence which, by reason of any disability, disorder or other impairment, a person called as a witness gives in writing or by signs or by way of any device: s 134(1). Where a video recording of an account given by a witness is admitted as his evidence in chief under s 137(1) (not yet in force), then if, or to the extent that, the witness in his oral evidence in the proceedings asserts the truth of the statements made by him in the recorded account, they are to be treated as if made by him in that evidence: s 137(2) (not yet in force). At the date at which this volume states the law no such day had been appointed.

2 *R v Gibson* (1887) 18 QBD 537, CCR; *Myers v DPP* [1965] AC 1001, 48 Cr App Rep 348, HL; *Patel v Comptroller of Customs* [1966] AC 356, [1965] 3 All ER 593, PC; *Customs Comptroller v Western Electric Co Ltd* [1966] AC 367, [1965] 3 All ER 599, PC; *R v Sharp* [1988] 1 All ER 65 at 68, [1988] 1 WLR 7 at 11, HL, per Lord Havers; *R v Hussain* [1998] Crim LR 820, CA. Where a witness purports to know a fact, it may be necessary to cross-examine him as to the basis of that knowledge. If it transpires that his knowledge was acquired only at second-hand (ie through reliance on statements made by others) his evidence may then be challenged as hearsay: *R v Rothwell* (1993) 99 Cr App Rep 388, CA. As to circumstances in which hearsay evidence may be admissible see PARA 1520 post.

3 At common law, a distinction was sometimes drawn between hearsay in the strict sense (where the witness testifies as to matters of which he has no first-hand knowledge) and narrative (where the witness attempts to reinforce his testimony by reference to his own previous statements on the subject). The general rule was that neither was admissible, but evidence of a witness's previous consistent statements might in some cases be admissible not as evidence of the facts asserted, but as evidence of the consistency of the witness. As to the admissibility of evidence of a witness's previous consistent or inconsistent statements as evidence of any facts stated see now the Criminal Justice Act 2003 ss 119, 120; and PARA 1529 post.

4 *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970, PC. Where eg it is relevant to prove that an offer was made, testimony as to the words constituting the offer, given by a witness who heard it being made, is not hearsay: *Woodhouse v Hall* (1980) 72 Cr App Rep 39, DC; and see also *Ratten v R* [1972] AC 378 at 387, 56 Cr App Rep 18 at 23, PC ('The mere fact that the evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay arises only where the words are relied on 'testimonialially' ie as establishing some fact narrated by the words'). See also *Teper v R* [1952] AC 480 at 486, [1952] 2 All ER 447 at 449, PC; *Mawaz Khan v R* [1967] 1 AC 454, [1967] 1 All ER 80, PC (evidence that the defendants advanced a demonstrably false alibi when arrested was not hearsay (confession) evidence because the alibi was not tendered by the prosecution as evidence of truth).

A statement concerning facts which are proved by other evidence is not hearsay if relied upon merely to prove that the maker of the statement was aware of those facts: *R v Blastland* [1986] AC 41 at 55, 81 Cr App Rep 266 at 272, HL, approving *Thomas v Connell* (1838) 4 M & W 267.

The hearsay rule applies both to positive assertions of fact and to 'negative assertions' (ie cases in which it is alleged that because no mention of a fact or event is made in a statement or document which might have been expected to mention it, that fact or event is not true or did not occur): *R v Patel* [1981] 3 All ER 94, 73 Cr App Rep 117, CA; but cf *R v Shone* (1982) 76 Cr App Rep 72, CA; *R v Muir* (1983) 79 Cr App Rep 153, CA.

5 *Wright v Doe d Tatham* (1837) 7 Ad & El 313; *R v Harry* (1987) 86 Cr App Rep 105, CA. See also *R v Kearley* [1992] 2 AC 228, 95 Cr App Rep 88, HL, although arguably the evidence in that case was excluded not as hearsay but because it was considered irrelevant.

6 In contrast it is clear that conduct which is intended to convey information (eg as a pre-arranged signal or through sign language) amounts to a statement and evidence given by someone who witnessed that conduct may be hearsay: *Chandrasekera (alias Alisandiri) v R* [1937] AC 220, [1936] 3 All ER 865, PC.

7 See the Criminal Justice Act 2003 ss 114, 115; and PARA 1520 post. See also *R v Singh* [2006] EWCA Crim 660, [2006] 1 WLR 1564, [2006] All ER (D) 335 (Feb).

8 Ie the rules contained in the Criminal Justice Act 2003 Pt 11 Ch 2 (ss 114-141) (as amended) and common law rules preserved by s 118(1). See PARA 1520 et seq post.

9 Ibid s 115(3)(a).

10 Ibid s 115(3)(b). It follows that the hearsay rule no longer applies even to cases in which the witness heard another person state a fact expressly, if it appears that this other person did not thereby intend to cause the witness or any other person (or machine) to believe or act upon that fact. For example, it may be that the witness overheard a conversation between two persons in which one or both of the speakers mentioned a fact apparently well known to each of them. The witness cannot say whether this fact is true, because he has no first-hand knowledge of it, but the court may be able to infer from the reported conversation that the fact mentioned is indeed true, without having to rely on any rule by which hearsay evidence is made admissible under the Criminal Justice Act 2003.

11 *R v Dodson* [1984] 1 WLR 971, 79 Cr App Rep 220, CA (photographic evidence); *R v Maqsood Ali* [1966] 1 QB 688, 49 Cr App Rep 230, CCA (tape recorded conversation); *R v Wood* (1982) 76 Cr App Rep 23, CA; *Castle v Cross* [1985] 1 All ER 87, [1984] 1 WLR 1372, DC; *R v Minors* [1989] 1 WLR 441 at 446, CA, per Steyn LJ; *R v Spiby* (1990) 91 Cr App Rep 186, CA; *DPP v McKeown* [1997] 1 All ER 737, [1997] 2 Cr App Rep 155, HL (computer evidence). But where, for example, a computer stores or processes data that has been inputted by

human hands (and thus depends on human truthfulness and accuracy) this data may be hearsay: *R v Wood* supra; and see the Criminal Justice Act 2003 s 129(1) (see PARA 1472 ante).

12 *R v Cook* [1987] QB 417, 84 Cr App Rep 369, CA. See also *R v Constantinou* [1989] Crim LR 571, CA.

13 A 'statement' is now defined as any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form: Criminal Justice Act 2003 ss 115(2), 134(2).

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## **1520. Admissibility and discretionary exclusion of hearsay evidence.**

In criminal proceedings<sup>1</sup> a statement<sup>2</sup> not made in oral evidence in the proceedings<sup>3</sup> is admissible as evidence of any matter stated<sup>4</sup> if, but only if: (1) any statutory provision makes it admissible<sup>5</sup>; (2) it is admissible under a common law rule that has been expressly preserved under the Criminal Justice Act 2003<sup>6</sup>; (3) all parties to the proceedings agree to it being admissible<sup>7</sup>; or (4) the court is satisfied that it is in the interests of justice for it to be admissible<sup>8</sup>.

Further restrictions apply to 'multiple hearsay' in which one hearsay statement<sup>9</sup> is used to prove that an earlier hearsay statement was made<sup>10</sup>.

Where hearsay evidence is admissible, the court may nevertheless refuse to admit it as evidence of a matter stated if the statement was made otherwise than in oral evidence in the proceedings and the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence<sup>11</sup>. Prosecution (but not defence) evidence may alternatively be excluded either in the exercise of the court's discretion at common law<sup>12</sup> or where it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it<sup>13</sup>. Human rights issues must be considered in this context<sup>14</sup>.

A party proposing to tender hearsay evidence must comply with requirements prescribed by the Criminal Procedure Rules (notably in respect of advance notice)<sup>15</sup>. If he fails to comply, one of the consequences is that the evidence is not admissible except with the court's leave<sup>16</sup>.

1 For the meaning of 'criminal proceedings' see PARA 1464 note 2 ante. See also *R v H* [2005] EWCA Crim 2083, [2006] 1 Cr App Rep 50, [2005] All ER (D) 311 (Jul). As to hearsay evidence in proceedings before service courts see the Criminal Justice Act 2003 s 135, Sch 7 (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035, art 3, Schedule paras 45, 53) (see **ARMED FORCES**). Proceedings under the Crime and Disorder Act 1998 s 1C (as added and amended) (anti-social behaviour orders following criminal conviction) (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 304) are not criminal proceedings and the admissibility of hearsay evidence in such proceedings is governed by the Civil Evidence Act 1995 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 808 et seq): *R (on the application of W) v Acton Youth Court* [2005] EWHC 954 (Admin), [2005] All ER (D) 284 (May).

2 For the meaning of 'statement' see PARA 1519 note 13 ante.

3 As to the meaning of 'oral evidence in the proceedings' see PARA 1519 note 1 ante.

4 Ie it is admissible despite being hearsay (unless it falls to be excluded on grounds other than the fact that it is hearsay: see the Criminal Justice Act 2003 s 114(3)). As to the meaning of 'matters stated' see s 115(3); and PARA 1519 text and notes 9-10 ante. Although the Criminal Justice Act 2003 does not directly address the status of oral testimony from witnesses who are found to lack first-hand knowledge of the matters on which they purport to testify, *R v Rothwell* (1993) 99 Cr App Rep 388, CA (see PARA 1519 note 2 ante) clearly remains good law (ie the witness's testimony cannot be admissible unless any statements from which his second-hand knowledge is derived would themselves be admissible).

5 Criminal Justice Act 2003 s 114(1)(a). A 'statutory provision' means any provision contained in, or in an instrument made under, the Criminal Justice Act 2003 or any other Act, including any Act passed after the Criminal Justice Act 2003: s 134(1). As to hearsay admissible under the Criminal Justice Act 2003 see PARA 1521

et seq post. As to the admissibility of hearsay in the form of confessions see the Police and Criminal Evidence Act 1984 s 76 (as amended), s 76A (as added); and PARA 1540 post.

6 Criminal Justice Act 2003 s 114(1)(b). Common law rules are preserved by s 118(1): see PARA 1523 et seq post.

7 Ibid s 114(1)(c).

8 Ibid s 114(1)(d). See *R v Xhabri* [2005] EWCA Crim 3135, [2006] 1 All ER 776. See also the Criminal Justice Act 2003 s 114(2); and PARA 1530 post.

9 I.e. a statement, not made in oral evidence, that is relied on as evidence of a matter stated in it: *ibid* s 121(2).

10 A hearsay statement is not admissible to prove the fact that an earlier hearsay statement was made unless: (1) either of the statements is admissible under *ibid* s 117 (see PARA 1522 post), s 119 or s 120 (see PARA 1529 post); (2) all parties to the proceedings so agree; or (3) the court is satisfied that the value of the evidence in question, taking into account how reliable the statements appear to be, is so high that the interests of justice require the later statement to be admissible for that purpose: s 121(1). See *R v Xhabri* [2005] EWCA Crim 3135, [2006] 1 All ER 776; *Maheer v DPP* [2006] EWHC 1271 (Admin), [2006] EWHC 1271 (Admin), 170 JP 441.

11 Criminal Justice Act 2003 s 126(1). The potential application of this discretion appears narrower than that of the Criminal Justice Act 1988 s 26 (repealed) under which the court was able to take account of the wider interests of justice even when excluding evidence tendered by the defence: see *R v Patel* [1993] Crim LR 291, CA; *R v Gregory* [1995] Crim LR 568, CA. But see *R v C* [2006] EWCA Crim 197, [2006] All ER (D) 287 (Feb), in which it was held that the power to exclude evidence under the Criminal Justice Act 2003 s 126(1) is in fact extensive.

12 This discretion is preserved by *ibid* s 126(2)(b): see PARA 1365 ante.

13 *Ibid* s 126(2)(a). This power of the court to exclude evidence is under the Police and Criminal Evidence Act 1984 s 78(1): see PARA 1365 ante.

14 By virtue of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(3)(d), everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq. To the extent that art 6 (right to a fair trial) would be infringed by admitting such evidence, the court has a power to exclude the evidence under the Criminal Justice Act 2003 s 126 and a duty so to do by virtue of the Human Rights Act 1998. There can thus be no question of the Criminal Justice Act 2003 s 114 (see the text to notes 1-8 supra) being incompatible with the Convention. Article 6(3)(d) of the Convention does not, however, give a defendant an absolute right to examine every witness whose testimony is adduced against him. The touchstone is whether fairness of the trial requires this: *R v Xhabri* [2005] EWCA Crim 3135 at [43]-[44], [2006] 1 All ER 776 at [43]-[44] per Lord Phillips of Worth Matravers CJ, giving the judgment of the court. Hearsay evidence from 'absent witnesses' may in some cases be admitted without infringing the Convention, eg where the witness in question is dead (*R v Al-Khawaja* [2005] EWCA Crim 2697, [2006] 1 All ER 543, [2006] 1 Cr App Rep 184) or too ill to testify (*Trivedi v United Kingdom* [1997] EHRLR 520) or has been intimidated by the defendant or persons acting on his behalf (*R v Sellick* [2005] EWCA Crim 651, [2005] 1 WLR 3257, [2005] All ER (D) 223 (Mar); *R v Thomas* [1998] Crim LR 887, CA). In 'fear or intimidation' cases the rights and safety of potential witnesses may need to be balanced against those of the defendant, and this may justify the admission of hearsay evidence: *Doorson v Netherlands* (1996) 22 EHRR 330, ECtHR. See also *R v Radak* [1999] 1 Cr App Rep 187, [1999] Crim LR 223, CA; *R v Gokal* [1997] 2 Cr App Rep 266, CA; *Luca v Italy* [2001] Crim LR 747, ECtHR.

15 See the Criminal Justice Act 2003 s 132; and CrimPR Pt 34 (see further PARA 1531 post).

16 See the Criminal Justice Act 2003 s 132(5), (6).

## UPDATE

### 1520 Admissibility and discretionary exclusion of hearsay evidence

NOTE 1--Criminal Justice Act 2003 Sch 7 further amended: Armed Forces Act 2006 Sch 16 para 235.

NOTE 8--See also *R v M* [2007] All ER (D) 21 (Feb), CA; *R v Adams* [2007] EWCA Crim 3025, (2007) 172 JP 113; *Sak v Crown Prosecution Service* [2007] EWHC 2886 (Admin), (2008) 172 JP 89; *R v Z* [2009] EWCA Crim 20, (2009) 173 JP 145; *R v Athwal* [2009] EWCA Crim 789, [2009] 1 WLR 2430, [2009] All ER (D) 61 (May).

NOTE 14--Where hearsay evidence is demonstrably reliable, or its reliability can properly be tested and assessed, the rights of the defence are respected and the trial is fair: *R v Horncastle*; *R v Marquis*; *R v Carter* [2009] EWCA Crim 964, [2009] 4 All ER 183 (affd *R v Horncastle*; *R v Marquis* [2009] UKSC 14, [2010] 2 All ER 359).

NOTES 15, 16--A hearing as to admissibility must be conducted on the basis that both parties have had equal access to relevant material and arguments: *R v Ali* [2008] EWCA Crim 146, (2008) 172 JP 516.



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### **1521. Cases where a witness is unavailable.**

In criminal proceedings<sup>1</sup> a statement<sup>2</sup> not made in oral evidence in the proceedings<sup>3</sup> is admissible as evidence of any matter stated<sup>4</sup> if: (1) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter<sup>5</sup>; (2) the person who made the statement (the relevant person) is identified to the court's satisfaction<sup>6</sup>; and (3) any of the following conditions is satisfied<sup>7</sup>:

- 2215 (a) the relevant person is dead<sup>8</sup>;
- 2216 (b) the relevant person is unfit to be a witness because of his bodily or mental condition<sup>9</sup>;
- 2217 (c) the relevant person is outside the United Kingdom<sup>10</sup> and it is not reasonably practicable to secure his attendance<sup>11</sup>;
- 2218 (d) the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken<sup>12</sup>; or
- 2219 (e) through fear<sup>13</sup> the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence<sup>14</sup>.

An appropriate direction is required in cases where hearsay evidence is admitted. This should draw the jury's attention to the inherent deficiencies of hearsay evidence<sup>15</sup>. It may be appropriate to explain why the relevant person is not available to testify, but not where such an explanation would be prejudicial to the defendant<sup>16</sup>.

1 For the meaning of 'criminal proceedings' see PARA 1464 note 2 ante.

2 For the meaning of 'statement' see PARA 1519 note 13 ante.

3 As to the meaning of 'oral evidence in the proceedings' see PARA 1519 note 1 ante.

4 As to the meaning of 'matters stated' see the Criminal Justice Act 2003 s 115(3); and PARA 1519 text and notes 9-10 ante.

5 Ibid s 116(1)(a). It is not necessary that such evidence would have been original (first-hand) evidence, but as to the additional requirements that are imposed by s 121 in respect of multiple hearsay see PARA 1520 ante. Nothing in s 116 makes a statement admissible as evidence if it was made by a person who did not have the required capability (ie would not have been competent to testify as a witness) at the time when he made the statement: see s 123(1), (3). See further PARA 1407 ante.

6 Ibid s 116(1)(b). Where the relevant person cannot be identified, the statement may in some cases be admissible on another basis (eg under the *res gestae* principle preserved under s 118(1): see PARA 1525 post) or in the interests of justice under s 114(1)(d) (see PARA 1530 post).

7 Ibid s 116(1)(c). These conditions are largely similar (but not identical) to those which previously governed the admissibility of first-hand documentary hearsay under the Criminal Justice Act 1988 s 23 (repealed) and the following cases were all decided under that Act. The burden of proof in respect of the specified conditions lies on the party seeking to adduce the evidence (see PARA 1373 ante) and admissible evidence must be used to prove that the conditions are satisfied: see *Neill v North Antrim Magistrates' Court* [1992] 4 All ER 846, 97 Cr App Rep 121, HL; *R v Lobban* [2004] EWCA Crim 1099, [2004] All ER (D) 91 (May), CA. A statement in a document cannot for this purpose be relied upon as evidence of that same document's admissibility (eg where

it recites that the maker is about to go abroad and will not be able to return for the trial): *R v Case* [1991] Crim LR 192, CA. See further note 14 infra.

A condition which is in fact satisfied is to be treated as not satisfied if it is shown that the circumstances described are caused by the person in support of whose case it is sought to give the statement in evidence, or by a person acting on his behalf, in order to prevent the relevant person giving oral evidence in the proceedings (whether at all or in connection with the subject matter of the statement): Criminal Justice Act 2003 s 116(5).

8 Ibid s 116(2)(a).

9 Ibid s 116(2)(b). This may include inability to testify because of stress or anxiety: *R v Setz-Dempsey* (1994) 98 Cr App Rep 23, [1994] Crim LR 123, CA (decided under the Criminal Justice Act 1988 s 23).

10 For the meaning of 'United Kingdom' see PARA 45 note 2 ante. It is not sufficient that a person who is within the United Kingdom cannot be compelled to testify because he enjoys diplomatic immunity: *R v Jimenez-Paez* (1994) 98 Cr App Rep 239, [1993] Crim LR 596, CA (decided under the Criminal Justice Act 1988 s 23).

11 Criminal Justice Act 2003 s 116(2)(c). In deciding whether it is reasonably practicable to secure the witness's attendance to give oral testimony, a court or judge must weigh a number of factors, including the potential importance of the evidence, the expense and inconvenience that would be involved in securing the witness's attendance, and any particular reasons put forward as to why it would not be practicable or convenient for the witness to attend: *R v Castillo* [1996] 1 Cr App Rep 438, 140 Sol Jo LB 12, CA; *R v Yu* [2006] EWCA Crim 349, [2006] All ER (D) 29 (Feb). See also *R v French and Gowhar* (1993) 97 Cr App Rep 421, CA; *R v Hurst* [1995] 1 Cr App Rep 82, CA (all decided under the Criminal Justice Act 1988 s 23). Consideration should also be given to whether the witness's evidence may be secured by other means, such as by using a live link (see *R v Radak* [1999] 1 Cr App Rep 187, [1999] Crim LR 223, CA; and PARA 1414 ante).

12 Criminal Justice Act 2003 s 116(2)(d).

13 'Fear' is to be widely construed and, for example, includes fear of the death or injury of another person or of financial loss: ibid s 116(3). There is no requirement that the fear must be justified or reasonable (cf *R v Acton Justices, ex p McMullen* (1990) 92 Cr App Rep 98, DC); but see the Criminal Justice Act 2003 s 116(4) (see note 14 infra).

14 Ibid s 116(2)(e). Leave may be given under s 116(2)(e) only if the court considers that the statement ought to be admitted in the interests of justice, having regard: (1) to the statement's contents; (2) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence); (3) in appropriate cases, to the fact that a direction under the Youth Justice and Criminal Evidence Act 1999 s 19 (special measures for the giving of evidence by fearful witnesses etc) (see PARA 1419 ante) could be made in relation to the relevant person; and (4) to any other relevant circumstances: Criminal Justice Act 2003 s 116(4). See also *R (on the application of Robinson) v Sutton Coldfield Magistrates' Court* [2006] EWHC 307 (Admin), 170 JP 336, [2006] All ER (D) 28 (Feb).

As to the means by which the relevant person's fear may be established (including the possible use of evidence from the fearful witness on the voir dire) see *R v Acton Justices, ex p McMullen* (1991) 92 Cr App Rep 98, DC; *R v Lobban* [2004] EWCA Crim 1099, [2004] All ER (D) 91 (May) (decided under the Criminal Justice Act 1988 s 23). Where the defence on proper grounds can point to the necessity for them to be able to cross examine the witness or witnesses called to give evidence about the reason for the inability of a particular prosecution witness to attend to give evidence, they should ordinarily be given such an opportunity: *R v Wood and Fitzsimmons* [1998] Crim LR 213, CA; *R v Elliot* [2003] EWCA Crim 1695; but special arrangements may sometimes be appropriate in the case of the fearful witness himself: eg some vulnerable witnesses may insist, for reasons which the judge feels he should act on, that they are only prepared to be questioned by the judge. In those circumstances it may be appropriate to depart from the usual course, but reasonable steps, such as have been identified with the assistance of counsel, should be taken to protect the interests of both the prosecution and the defence; eg counsel should be asked to identify the questions and issues they respectively wish to have explored with the witness during the voir dire. Thereafter, it will be for the judge to determine what questions should be asked, but the identification of the relevant issues in this way will significantly help to ensure the proceedings are fair. Additionally, it may be necessary to separate the defendant from the witness by means of screens or a television link: *R v Lobban* supra at [38] per Fulford J, giving the judgment of the court.

15 See Judicial Studies Board, Specimen Direction No 35.

16 This may be a particularly sensitive issue where eg the relevant person claims to have been intimidated. See *R v Ricketts* [1991] Crim LR 915, CA; *R v Churchill* [1993] Crim LR 285, CA; *R v Jennings* [1995] Crim LR 810, CA.

As to human rights issues arising from the use of hearsay evidence from key (but absent or deceased) prosecution witnesses see *R v Al-Khawaja* [2005] EWCA Crim 2697, [2006] 1 All ER 543, [2006] 1 Cr App Rep 184; and PARA 1520 note 14 ante.

## UPDATE

### 1521 Cases where a witness is unavailable

NOTES 8, 9--Where a witness is dead, or cannot be called for some other reason, the question of whether the admission of a statement from that witness will impair the fairness of a trial, will depend on the facts of the particular case: *R v Cole*; *R v Keet* [2007] EWCA Crim 1924, [2007] 1 WLR 2716.

NOTE 12--See *R v Adams* [2007] EWCA Crim 3025, (2007) 172 JP 113; *R v T (D)* [2009] All ER (D) 34 (Jun), CA.

NOTE 13--Courts will be ill-advised to seek to test the basis of fear by calling witnesses since that may undermine the very thing that the 2003 Act s 116 is designed to avoid: *R v Davies* [2006] EWCA Crim 2643, [2007] 2 All ER 1070.

NOTE 14--*Robinson*, cited, reported at [2006] 4 All ER 1029. See also *Grant v R* [2006] UKPC 2, [2007] 1 AC 1 (selective admission of unsworn written statements).

NOTE 16--The hearsay rule and exceptions to it developed by common law and the Criminal Justice Act 2003 s 116 are consistent with the defendant's right under the European Convention on Human Rights art 6(3)(d) to examine witnesses against him: see *R v Horncastle*; *R v Marquis* [2009] UKSC 14, [2010] 2 All ER 359.

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## **1522. Business and other documents.**

In criminal proceedings<sup>1</sup> a statement<sup>2</sup> contained in a document<sup>3</sup> is admissible as evidence of any matter stated<sup>4</sup> of which oral evidence given in the proceedings would be admissible if certain requirements are satisfied<sup>5</sup>. The first three requirements must each be satisfied in every case<sup>6</sup>, and at least one additional requirement must be satisfied in cases where the statement was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation<sup>7</sup>.

The following requirements must each be satisfied in every case where hearsay evidence is to be admitted under this principle<sup>8</sup>:

- 2220 (1) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office<sup>9</sup>;
- 2221 (2) the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with<sup>10</sup>; and
- 2222 (3) each person (if any) through whom the information was supplied from the relevant person to the person mentioned in head (1) above received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office<sup>11</sup>.

The additional requirements applicable to statements prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation are:

- 2223 (a) that any of the five conditions applicable to statements from persons who are not available to testify is satisfied<sup>12</sup>; or
- 2224 (b) the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since he supplied the information and all other circumstances)<sup>13</sup>.

Even where the above conditions are satisfied, the court may rule a statement inadmissible if satisfied that the statement's reliability as evidence for the purpose for which it is tendered is doubtful in view of: (i) its contents; (ii) the source of the information contained in it; (iii) the way in which or the circumstances in which the information was supplied or received; or (iv) the way in which or the circumstances in which the document concerned was created or received<sup>14</sup>.

1 For the meaning of 'criminal proceedings' see PARA 1464 note 2 ante.

2 For the meaning of 'statement' see PARA 1519 note 13 ante.

3 For the meaning of 'document' see PARA 1462 note 4 ante. As to the admissibility of authenticated copies of documents see the Criminal Justice Act 2003 s 133; and PARA 1464 ante.

4 As to the meaning of 'matters stated' see *ibid* s 115(3); and PARA 1519 text and notes 9-10 ante.

5 Ibid s 117(1)(a). Section 117 is similar in most respects to the Criminal Justice Act 1988 s 24, which it replaces.

6 Criminal Justice Act 2003 s 117(1)(b).

7 Ibid s 117(1)(c), (4)(a). See *R v Bedi* (1991) 95 Cr App Rep 21, CA; *R v Hogan* [1997] Crim LR 349, CA. The additional requirements do not apply to a statement prepared pursuant to a request under the Crime (International Co-operation) Act 2003 s 7 or an order under the Criminal Justice Act 1988 Sch 13 para 6 (as amended) (which relate to overseas evidence) (see PARA 903 ante); Criminal Justice Act 2003 s 117(4)(b).

8 Ie under ibid s 117. Where certain requirements are not satisfied, the statement may in some cases be admissible on another basis (eg as a public document under rules preserved by s 118(1) or in the interests of justice under s 114(1)(d): see PARA 1530 post.

9 Ibid s 117(2)(a). Examples of documents held to satisfy requirements of the similarly worded Criminal Justice Act 1988 s 24 (repealed) include the label on a bottle alleged to contain veterinary medicine (*Department of Environment, Food and Rural Affairs v Atkinson* [2002] EWHC 2029 (Admin), [2002] All ER (D) 116 (Oct)), police custody records (*R v Hogan* [1997] Crim LR 349, CA) and a transcript of evidence given at an earlier trial (*R v Lockley* [1995] 2 Cr App Rep 554, CA).

10 Criminal Justice Act 2003 s 117(2)(b). This may be the same person as the one who created or received the document etc under s 117(2)(a) (see head (1) in the text): s 117(3). As to the importance of identifying the relevant person (particularly in documents to which the additional requirements imposed by s 117(4)(a) apply (see the text and note 7 supra)) see *R v Humphris* [2005] EWCA Crim 2030, [2005] All ER (D) 105 (Sep).

11 Criminal Justice Act 2003 s 117(2)(c). Nothing in s 117 makes a statement admissible as evidence if any person who, in order for the requirements of s 117(2) to be satisfied, must at any time have supplied or received the information concerned or created or received the document or part concerned did not have the required capability at that time (ie would not then have been competent to testify as a witness) or cannot be identified but cannot reasonably be assumed to have had the required capability at that time: s 123(2), (3). See further PARA 1407 ante.

12 Ibid s 117(5)(a). The conditions are the requirements set out in s 116(2) (see PARA 1521 ante).

13 Ibid s 117(5)(b). See *R v Carrington* [1994] Crim LR 438, CA (decided under the Criminal Justice Act 1988 s 24 (repealed)); *R v Humphris* [2005] EWCA Crim 2030, [2005] All ER (D) 105 (Sep).

14 Criminal Justice Act 2003 s 117(6), (7). This provision in effect gives the court a discretion to exclude documentary hearsay evidence even when tendered by the defence (evidence in respect of which the Police and Criminal Evidence Act 1984 s 78 (as amended) (see PARA 1365 ante) has no application). A much broader discretion was previously exercisable under the Criminal Justice Act 1988 s 25 (repealed) and, in respect of statements prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation, s 26 (repealed), but the Criminal Justice Act 2003 s 117(7) focuses on the reliability of the evidence and does not appear to permit challenges to admissibility based on any other considerations.

## UPDATE

### 1522 Business and other documents

NOTES 7, 8--See *West Midlands Probation Board v French* [2008] EWHC 2631 (Admin), [2009] 1 WLR 1715, [2008] All ER (D) 09 (Nov) (licence issued by prison governor admissible).

TEXT AND NOTES 10-13--See *Wellington v DPP* [2007] EWHC 1061 (Admin), (2007) 171 JP 497 (print-out from Police National Computer admissible).

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### **1523. Public information etc.**

The following exceptions to the rule against hearsay were established at common law, and have now been preserved by statute<sup>1</sup>:

- 2225 (1) published works dealing with matters of a public nature (such as histories, scientific works, dictionaries and maps) may be admissible as evidence of facts of a public nature stated in them<sup>2</sup>;
- 2226 (2) public documents (such as public registers, and returns made under public authority with respect to matters of public interest) may be admissible as evidence of facts stated in them<sup>3</sup>;
- 2227 (3) records (such as the records of certain courts, treaties, Crown grants, pardons and commissions) may be admissible as evidence of facts stated in them<sup>4</sup>; and
- 2228 (4) evidence relating to a person's age or date or place of birth may in some cases be given by a person without personal knowledge of the matter<sup>5</sup>.

1 Criminal Justice Act 2003 s 118(1).

2 *Read v Bishop of Lincoln* [1892] AC 644 at 653, HL, per Lord Halsbury LC.

3 To be admissible under the public documents principle, a document must contain information of public interest, although not necessarily of widespread or general interest, and it must be open to inspection by members of the public on or without payment: *Sturla v Freccia* (1880) 5 App Cas 623, HL; *Heath v Deane* [1905] 2 Ch 86. Thus, the Companies Register is public (*R v Halpin* [1975] QB 907, [1975] 2 All ER 1124, CA) whereas National Health Service records or army regimental records, to which the public have no access, are not (*Lilley v Pettit* [1946] KB 401, sub nom *Pettit v Lilley* [1946] 1 All ER 593). Documents made by a public officer for his own personal use or reference are not admissible under this principle: *Merrick v Wakley* (1838) 8 Ad & El 170. It is not necessary for the official responsible for compiling or maintaining the records to have any duty to verify their accuracy: *R v Halpin* supra.

4 Such records may or may not be public documents within the meaning of head (2) in the text.

5 See *R v Bellis* (1911) 6 Cr App Rep 283, CCA; *Bird v Keep* [1918] 2 KB 692. An entry in a register of births or deaths (or a certified copy of such an entry) will ordinarily be admissible by statute as to the facts recorded (see the Births and Deaths Registration Act 1953 s 34 (as amended)); and **CIVIL PROCEDURE** vol 11 (2009) PARA 906) but further evidence may in some cases be needed to identify a person as the one recorded in the register, and a person cannot give original evidence as to the circumstances of his own birth.

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#### **1524. Reputation as to character or family tradition.**

The following exceptions to the rule against hearsay were established at common law, and have now been preserved by statute<sup>1</sup>:

- 2229 (1) any rule of law under which in criminal proceedings<sup>2</sup> evidence of a person's reputation is admissible for the purpose of proving his good or bad character<sup>3</sup>; and  
 2230 (2) any rule of law under which in criminal proceedings evidence of reputation or family tradition is admissible for the purpose of proving or disproving: (a) pedigree or the existence of a marriage; (b) the existence of any public or general right; or (c) the identity of any person or thing<sup>4</sup>.

However, these rules are preserved only so far as they allow the court to treat such evidence as proving or disproving the matter concerned<sup>5</sup>.

1 Criminal Justice Act 2003 s 118(1). See also s 99(2).

2 For the meaning of 'criminal proceedings' see PARA 1464 note 2 ante.

3 A defendant may give or call evidence as to his own good reputation, but not evidence as to specific deeds done by him: *R v Rowton* (1865) Le & Ca 520, CCCR. At common law, evidence may be given on behalf of either side to show that a witness as to the facts, other than the defendant, called by the other side has such a character or reputation that he ought not to be believed: *R v Brown and Hedley* (1867) LR 1 CCR 70; *R v Bispham* (1830) 4 C & P 392; *R v Gunewardene* [1951] 2 KB 600 at 609, 35 Cr App Rep 80 at 90, CCA, per Lord Goddard CJ. A witness called in such circumstances may be asked whether he has knowledge of the general reputation of the impugned witness for veracity, and whether, on the basis of such knowledge, he would believe the sworn testimony of the witness: *R v Richardson* [1969] 1 QB 299, sub nom *R v Longman, R v Richardson* [1968] 2 All ER 761, CA.

4 Evidence of reputation as being married is not sufficient to support a charge of bigamy: *R v Woodward* (1838) 8 C & P 561; *Catherwood v Caslon* (1844) 13 M & W 261 at 265; cf *R v Wilson* (1862) 3 F & F 119.

5 If they are concerned only with the mechanics of proof and do not determine whether the matter concerned is itself relevant or admissible. Thus, evidence of a non-defendant's bad character must be admissible under the Criminal Justice Act 2003 s 100 (see PARA 1504 ante) before evidence of reputation may be used to establish it under s 118(1); and evidence of a defendant's bad character must likewise be admissible under s 101 (see PARA 1505 ante).

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### 1525. *Res gestae*.

The following exceptions to the rule against hearsay were established at common law, and have now been preserved by statute<sup>1</sup> in so far as they apply to criminal proceedings<sup>2</sup>. They are each considered to concern evidence forming part of the '*res gestae*' (that is they are 'facts or statements so closely surrounding or accompanying the event or transaction in question as to form an intrinsic part of the overall picture')<sup>3</sup>.

- 2231 (1) A statement may be admissible as evidence of any matter stated<sup>4</sup> if it was made by a person (who may or may not be available to testify as a witness<sup>5</sup>) so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded<sup>6</sup>.
- 2232 (2) A statement may be admissible as evidence of any matter stated if it accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement<sup>7</sup>.
- 2233 (3) A statement may be admissible as evidence of any matter stated if it relates to a physical sensation or a mental state (such as intention or emotion)<sup>8</sup>.

Although preserved, the practical importance of the *res gestae* principle (often used at common law to admit the dying statements of murder victims or of other persons since deceased) appears to be greatly diminished given the extensive provision for the admission of hearsay evidence by statute<sup>9</sup>.

1 Criminal Justice Act 2003 s 118(1).

2 As to the meaning of 'criminal proceedings' see PARA 1464 note 2 ante.

3 *Teper v R* [1952] AC 480 at 486, [1952] 2 All ER 447 at 448, PC. The term '*res gestae*' is also used in some cases to describe events related to the events in issue but in which no question of the reception of hearsay evidence is involved.

4 The definition of 'matter stated' in the Criminal Justice Act 2003 s 115(3) (see PARA 1519 text and notes 9-10 ante) does not directly apply to *res gestae* statements which remain admissible at common law.

5 *R v Andrews* [1987] AC 281 at 302, 84 Cr App Rep 382 at 392, HL, per Lord Ackner (the *res gestae* principle should not be used as a device to avoid the inconvenience of calling oral testimony from witnesses who are available to attend the trial).

6 The possibility of concoction or distortion can be disregarded where the event which has given rise to the statement is so unusual or startling or dramatic as to dominate the thoughts of the speaker, so that his utterance was an instinctive reaction to the event, thus giving no time for reasoned reflection: *R v Andrews* [1987] AC 281 at 301, 84 Cr App Rep 382 at 391, HL, per Lord Ackner. See also *Ratten v R* [1972] AC 378, 56 Cr App Rep 18, PC, followed in *R v Andrews* supra; *R v Nye*, *R v Loan* (1977) 66 Cr App Rep 252, CA; *R v Turnbull* (1984) 80 Cr App Rep 104, CA. To satisfy that requirement the statement must have been made in circumstances of approximate, but not exact, contemporaneity, so that it can fairly be stated that the mind of the speaker was still dominated by the event: *R v Andrews* supra at 301 and 391, per Lord Ackner; *Ratten v R* supra; *R v Glover* [1991] Crim LR 48, CA. For an example of a case decided under the test in *R v Andrews* supra where the event (a minor traffic accident) was not sufficiently exciting to justify the admissibility of a subsequent statement see *Tobi v Nicholas* [1988] RTR 343, 86 Cr App Rep 323, DC. In addition, there must be no special features, apart from the time factor, suggesting concoction or distortion of the statement, such as malice on the part of the speaker: *R v Andrews* supra at 302 and 393 per Lord Ackner. Admissibility should be established without reliance on the contents of the statement itself, which would otherwise lift itself into the



area of admissibility: *Ratten v R* [1972] AC 378, 56 Cr App Rep 18, PC. Any possibility of error in the facts related in the statement goes to the weight to be attached to it and not to the admissibility of the statement, and is therefore a matter for the jury, unless there are special features going beyond the ordinary fallibility of human recollection, such as the intoxication of the speaker, or the defectiveness of his eyesight: *R v Andrews* supra at 301 and 392 per Lord Ackner; and see *Mills v R* [1995] 3 All ER 865, [1995] 1 WLR 511, PC.

7 *R v Edwards* (1872) 12 Cox CC 230, but cf *R v Kearley* [1992] 2 AC 228, 95 Cr App Rep 88, HL. *R v McCay* [1991] 1 All ER 232, 91 Cr App Rep 84, CA, appears impossible to reconcile with *R v Kearley* supra.

8 Such a statement may be admissible at common law in so far as it relates to the nature and effects of a condition, but not as to how or by whom the condition was caused: *R v Johnson* (1847) 2 Car & Kir 354; *R v Conde* (1867) 10 Cox CC 547; *R v Gloster* (1888) 16 Cox CC 471 at 473; approved in *R v Perry* [1909] 2 KB 697, 2 Cr App Rep 267, CCA. See also *R v Nicholas* (1846) 2 Car & Kir 246 at 248; *R v Thomson* [1912] 3 KB 19, 7 Cr App Rep 276, CCA; *R v Black* (1922) 16 Cr App Rep 118, CCA; *R v Moghal* (1977) 65 Cr App Rep 56, CA; *R v Callender* [1998] Crim LR 337, CA; *R v Gilfoyle* [1996] 3 All ER 883, [1996] 1 Cr App Rep 302, CA. The state of mind indicated by any statement admitted under this exception must be relevant to an issue in the proceedings: *R v Blastland* [1986] AC 41, 81 Cr App Rep 266, HL.

9 See PARAS 1519-1522 ante, 1529 et seq post.

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## **1526. Confessions and admissions.**

Confessions and admissions<sup>1</sup> (other than formal admissions<sup>2</sup>) made by or on behalf of defendants<sup>3</sup> are admissible in criminal proceedings (if at all) only by way of exception to the rule against hearsay<sup>4</sup>. Common law rules in this area have largely been supplanted by statute<sup>5</sup>, but certain common law rules relating to the admissibility of confessions and vicarious admissions in criminal proceedings have been preserved<sup>6</sup>, namely:

2234 (1) any rule of law relating to the admissibility of confessions or mixed statements<sup>7</sup> in criminal proceedings; and

2235 (2) any rule of law under which in criminal proceedings: (a) an admission made by an agent of a defendant is admissible against the defendant as evidence of any matter stated<sup>8</sup>; or (b) a statement made by a person to whom a defendant refers a person for information is admissible against the defendant as evidence of any matter stated<sup>9</sup>.

1 See PARA 1537 et seq post.

2 See PARA 1538 post.

3 Self-incriminating statements made by third parties are not admissible as confessions (*R v Turner* (1975) 61 Cr App Rep 67, CA) but may now be admissible eg under the Criminal Justice Act 2003 s 116 (see PARA 1521 ante) or s 114(1)(d) (see PARA 1530 post).

4 A statement by a defendant is not a confession if it is incriminating only on the basis of its manifest falsity: *Mawaz Khan v R* [1967] 1 AC 454, [1967] 1 All ER 80, PC (prosecution evidence of demonstrably false alibi concocted by defendants was not hearsay and thus not subject to rules governing confessions, because the prosecution did not rely on it as being true). See also *R v Z* [2005] UKHL 22, [2005] 2 AC 467, sub nom *R v Hasan* [2005] 4 All ER 685, reversing *R v Z* [2003] EWCA Crim 191, [2003] 1 WLR 1489, [2003] 2 Cr App Rep 173.

5 The admissibility of confessions is primarily governed by the Police and Criminal Evidence Act 1984 s 76 (as amended), s 76A (as added): see PARA 1540 et seq post.

6 Ie by the Criminal Justice Act 2003 s 118(1).

7 As to mixed statements (ie statements that are only in part incriminating) see PARA 1541 post. As to the admissibility at common law of evidence concerning statements made in the presence of a defendant and not denied by him (also preserved by the Criminal Justice and Public Order Act 1994 s 34(5)) see PARA 1552 post.

8 As to the admissibility at common law of admissions made on a defendant's behalf by persons who have authority to make them see PARA 1539 post.

9 See *R v Mallory* (1884) 13 QBD 33.

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### **1527. Common enterprise or conspiracy.**

At common law<sup>1</sup> statements made, or acts done, by one of several accomplices or conspirators in pursuance of a common enterprise or conspiracy<sup>2</sup> may be admissible as evidence against the others<sup>3</sup>; but there must be independent evidence to prove the existence of the conspiracy or common enterprise<sup>4</sup>, and at common law a statement which is not proved to have been made in pursuance of this common enterprise can be evidence only against its maker<sup>5</sup>.

1 The common law rule is preserved by the Criminal Justice Act 2003 s 118(1).

2 As to what may be regarded as a single common enterprise or conspiracy (as opposed to two or more individual ones) see *R v Gray* [1995] 2 Cr App Rep 100, [1995] Crim LR 45, CA (the principle is limited to evidence which shows the involvement of each of the defendants in the commission of the offence or offences). See also *R v Murray* [1997] 2 Cr App Rep 136, [1997] Crim LR 506, CA; *R v Williams* [2002] EWCA Crim 2208, [2002] All ER (D) 200 (Oct), CA. It is not limited to cases in which a conspiracy is alleged: see *R v Jones* [1997] 2 Cr App Rep 119, CA.

3 *R v Blake and Tye* (1844) 6 QB 126. See also *R v Hardy* (1794) 24 State Tr 199; *R v Hunt* (1820) 3 B & Ald 566; *R v Shellard* (1840) 9 C & P 277; *R v Meany* (1867) 10 Cox CC 506; *R v McCafferty* (1867) 10 Cox CC 603; *R v Whitaker* [1914] 3 KB 1283, 10 Cr App Rep 245, CCA; *R v Steward* [1963] Crim LR 697, DC; *R v Walters* (1979) 69 Cr App Rep 115, CA; *R v Donat* (1985) 82 Cr App Rep 173, CA. Where a conspiracy is alleged between A, B and C, statements made by A or B before C is shown to have become involved are only capable of being evidence against C to the extent that they prove the origin, character and object of the conspiracy, and cannot be evidence of C's later involvement: *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701 at 730, 90 Cr App Rep 281 at 312 per Lloyd LJ. See also *R v Platten* [2006] EWCA Crim 140, [2006] All ER (D) 194 (Feb).

4 *R v Blake and Tye* (1844) 6 QB 126; *R v Donat* (1985) 82 Cr App Rep 173, CA; *R v Jenkins* [2002] EWCA Crim 2475, [2003] Crim LR 107, CA.

5 *R v Blake and Tye* (1844) 6 QB 126; *R v Walters* (1979) 69 Cr App Rep 115, CA; but cf *R v Devonport* [1996] 1 Cr App Rep 221, CA; *R v Ilyas* [1996] Crim LR 810, CA. It is possible that a statement may have wider admissibility by statute (eg under the Criminal Justice Act 2003 s 116: see PARA 1521 ante). A statement may be made in pursuance of a common enterprise even where it does nothing to advance that enterprise, as long as it provides evidence of that enterprise in operation: see *R v Jones (Brian)* [1997] 2 Cr App Rep 119, CA; *R v Platten* [2006] EWCA Crim 140, [2006] All ER (D) 194 (Feb).

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### **1528. Expert evidence.**

At common law, an expert witness in criminal proceedings may draw on the body of expertise relevant to his field when assessing evidence in the case and when drawing inferences or expressing opinions concerning that evidence<sup>1</sup>. This principle is now recognised and preserved by statute<sup>2</sup>.

Further provision has been made by statute as to the admissibility of expert evidence that might otherwise be excluded as hearsay<sup>3</sup>.

1 *R v Abadom* [1983] 1 All ER 364, 76 Cr App Rep 48, CA; *R v Hodges* [2003] EWCA Crim 290, [2003] 2 Cr App Rep 247; and see further PARA 1491 ante.

2 Criminal Justice Act 2003 s 118(1).

3 As to the admissibility of statements in expert reports under the Criminal Justice Act 1988 s 30 (as amended) see PARA 1492 ante. As to the use by an expert witness of a statement prepared by another person (such as a colleague or assistant) see the Criminal Justice Act 2003 s 127; and PARA 1491 ante.

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### **1529. Previous statements of a witness.**

Where a witness is called to give evidence in criminal proceedings<sup>1</sup>, a previous statement by that witness is admissible as evidence of any matter stated<sup>2</sup> of which oral evidence by him would be admissible<sup>3</sup>, if:

- 2236 (1) the statement identifies or describes a person, object or place<sup>4</sup>;
- 2237 (2) the statement was made by the witness when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings<sup>5</sup>; or
- 2238 (3) (a) the witness claims to be a person against whom an offence has been committed; (b) the offence is one to which the proceedings relate; (c) the statement consists of a complaint made by the witness (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence; (d) the complaint was made as soon as could reasonably be expected after the alleged conduct; (e) the complaint was not made as a result of a threat or a promise; and (f) before the statement is adduced the witness gives oral evidence in connection with its subject matter<sup>6</sup>.

However, in all such cases the witness must while giving evidence indicate that to the best of his belief he made the statement, and that to the best of his belief it states the truth<sup>7</sup>.

If a previous statement by the witness is admitted as evidence to rebut a suggestion that his oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible<sup>8</sup>.

If a witness admits making a previous inconsistent statement<sup>9</sup> or if a previous inconsistent statement made by him is proved<sup>10</sup>, the statement is admissible as evidence of any matter stated of which oral evidence by him would be admissible<sup>11</sup>.

A statement made by the witness in a document which is used by him to refresh his memory while giving evidence, on which he is cross-examined, and which as a consequence is received in evidence in the proceedings, is admissible as evidence of any matter stated of which oral evidence by him would be admissible<sup>12</sup>.

However, no previous statement by a witness is admissible as evidence under any of the above heads unless that witness would have been competent to give at least unsworn testimony at the time when he made the statement<sup>13</sup>; and where a document containing a previous statement by a witness is produced as an exhibit it must not accompany the jury when it retires to consider its verdict unless the court considers it appropriate, or all the parties to the proceedings agree that it should accompany the jury<sup>14</sup>.

1 The term 'witness' includes a defendant who testifies for the defence. For the meaning of 'criminal proceedings' see PARA 1464 note 2 ante.

2 For the meaning of 'statement' see PARA 1519 note 13 ante; and as to the meaning of 'matters stated' see PARA 1519 text to notes 9-10 ante.

3 Criminal Justice Act 2003 s 120(1), (4)(a).

4 Ibid s 120(5).

5 Ibid s 120(6).

6 Ibid s 120(7); *R v Xhabri* [2005] EWCA Crim 3135, [2006] 1 All ER 776. At common law, the admissibility of such evidence was confined to prosecutions for alleged sexual offences and the complaint was even then admissible only as evidence bearing on the credibility of the complainant: *R v Lillyman* [1896] 2 QB 167, CCR; *R v Christie* [1914] AC 545, sub nom *DPP v Christie* (1914) 10 Cr App Rep 141; *R v Osborne* [1905] 1 KB 551, CCR. Such evidence was admissible where it was sufficiently consistent with the complainant's evidence that it might, depending on the view of the evidence taken by the jury, support or enhance the credibility of the complainant: *R v S* [2004] EWCA Crim 1320, [2004] 3 All ER 689, [2004] 2 Cr App Rep 646. Under the Criminal Justice Act 2003 s 120, however, admissibility is not limited to complaints in sexual cases and such evidence may also be admissible to prove the truth of any facts asserted: *R v O* [2006] EWCA Crim 556, [2006] All ER (D) 177 (Jun).

Under the old common law rule concerning complaints of sexual offences, it was held in some cases that complaints made on the following day (as in *R v Rush* (1896) 60 JP 777) or three days after the event (as in *R v Ingre* (1900) 64 JP 106 at 107) were made too late and were inadmissible, whereas on one occasion at least a complaint made after eight days was admitted (*R v Hedges* (1909) 3 Cr App Rep 262, CCA). What amounted to a reasonable time for the complaint, for the purposes of admissibility of evidence depended on the circumstances, including the character of the complainant, and the relationship between the complainant and the person he complained to, or would have complained to: *R v Valentine* [1996] 2 Cr App Rep 213, CA. It was for the judge to decide whether a complaint was made as speedily as could reasonably be expected: *R v Cummings* [1948] 1 All ER 551, CCA. Under the new statutory regime, admissibility is not limited to the first complaint made by a victim (eg, he may complain first to X and then, some time later (but at the first reasonable opportunity) to Y. It may however be necessary for a judge to restrict evidence of 'complaint upon complaint' which might be merely self-serving: *R v O* [2006] EWCA Crim 556, [2006] All ER (D) 177 (Jun).

7 Criminal Justice Act 2003 s 120(1), (4)(b).

8 Ibid s 120(2). Rules of common law determine when such a statement is admissible in the first place. See PARA 1437 ante. Section 120(2) merely addresses the evidential value of such evidence once it has been given. At common law, such a statement was admissible only for the purpose of rebutting the allegation and could not be regarded as evidence of the facts stated.

9 Ibid s 119(1)(a). As to the procedure for cross-examination of a witness concerning an alleged previous inconsistent statement see PARA 1445 ante. At common law, such a statement, if admitted or proved was admissible only for the purpose of impugning the credibility of the witness and could not be regarded as evidence of the facts stated.

10 It is proved by virtue of the Criminal Procedure Act 1865 ss 3, 4, 5: see PARAS 1436, 1445 ante.

11 Criminal Justice Act 2003 s 119(1). See *R v Joyce* [2005] EWCA Crim 1785, [2005] All ER (D) 309 (Jun). If in criminal proceedings evidence of an inconsistent statement by any person (eg the deceased maker of a statement admitted under s 116 (see PARA 1521 ante)) is given under the Criminal Justice Act 2003 s 124(2)(c) (see PARA 1532 post), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible: s 119(2).

12 See PARA 1439 ante.

13 See the Criminal Justice Act 2003 s 123(1), (3), which incorporates the test for competence as laid down by the Youth Justice and Criminal Evidence Act 1999 s 53 (see PARA 1401 ante).

14 Criminal Justice Act 2003 s 122.

## UPDATE

### 1529 Previous statements of a witness

NOTE 11--See also *R v Coates* [2007] EWCA Crim 1471, [2008] 1 Cr App Rep 52; and *R v Billingham* [2009] EWCA Crim 19, [2009] 2 Cr App Rep 341, [2009] All ER (D) 177 (Jan).

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### **1530. Hearsay admissible in the interests of justice.**

Hearsay evidence was not rendered admissible at common law merely because it appeared to be cogent or reliable<sup>1</sup>, or because it was favourable to the defence<sup>2</sup>, but the court now has a statutory discretion to admit any hearsay evidence that would otherwise be inadmissible where it is satisfied that it is in the interests of justice for it to be admissible<sup>3</sup>.

<sup>1</sup> *Myers v DPP* [1965] AC 1001 at 1009, 48 Cr App Rep 348 at 356, HL; *Jones v Metcalfe* [1967] 3 All ER 205, [1967] 1 WLR 1286, DC.

<sup>2</sup> *R v Turner* (1975) 61 Cr App Rep 67, CA (confession of other person not admissible on behalf of defence); see also *Sparks v R* [1964] AC 964, [1964] 1 All ER 727, PC; *R v Harry* (1987) 86 Cr App Rep 105, CA; *R v Blastland* [1986] AC 41, 81 Cr App Rep 266, HL. Where, however, a strict application of the hearsay rule might lead to injustice, the prosecution was sometimes permitted to make admissions relating to facts which might point to a third party having committed the crime: *R v Greenwood* [2004] EWCA Crim 1388, [2005] 1 Cr App Rep 99; and see also *R v Beckford and Daley* [1991] Crim LR 833, CA (convictions quashed as unsafe even though court held that hearsay evidence favouring the defence was rightly ruled inadmissible).

<sup>3</sup> Criminal Justice Act 2003 s 114(1)(d). See *R v Taylor* [2006] EWCA Crim 260, 170 JP 353, sub nom *R v T* [2006] All ER (D) 174 (Jan). In deciding whether hearsay evidence should be admitted on this basis, the court must have regard to the following factors (which are intended to focus attention on whether the circumstances surrounding the making of the statement indicate that it can be treated as reliable enough to admit it as evidence, despite the fact that it will not be subject to cross-examination) and to any others it considers relevant (Criminal Justice Act 2003 s 114(2)):

- 127 (1) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- 128 (2) what other evidence has been, or can be, given on the matter or evidence mentioned in head (1) supra;
- 129 (3) how important the matter or evidence mentioned in head (1) supra is in the context of the case as a whole;
- 130 (4) the circumstances in which the statement was made;
- 131 (5) how reliable the maker of the statement appears to be;
- 132 (6) how reliable the evidence of the making of the statement appears to be;
- 133 (7) whether oral evidence of the matter stated can be given and, if not, why it cannot;
- 134 (8) the amount of difficulty involved in challenging the statement; and
- 135 (9) the extent to which that difficulty would be likely to prejudice the party facing it.

The requirement that the court or judge 'must have regard to' these factors does not mean that a trial judge must embark upon a detailed investigation (perhaps involving the hearing of evidence) in respect of each listed factor. There is nothing in the wording of the statute that requires a court or judge to reach a specific conclusion in relation to each listed factor. If it did have that meaning, trials would become greatly elongated. Section 114(2) does, however, require an exercise of judgment in the light of any particular factor identified in accordance with that provision: *R v Taylor* [2006] EWCA Crim 260, 170 JP 353, sub nom *R v T* [2006] All ER (D) 174 (Jan).

**UPDATE**

**1530 Hearsay admissible in the interests of justice**

NOTE 3--Hearsay material contained in the confession of another person may be admissible under the 2003 Act s 114(1)(d): *Prosecution Appeal (No 2 of 2008)*; *R v Y* [2008] EWCA Crim 10, [2008] 2 All ER 484.



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### **1531. Rules of Court and notice requirements.**

Notice requirements prescribed by the Criminal Procedure Rules<sup>1</sup> must be complied with by any party wishing to introduce a hearsay statement in evidence<sup>2</sup> or to object to the introduction of such evidence<sup>3</sup>.

The Criminal Procedure Rules require that parties wishing to introduce or object to the introduction of such evidence must give notice in the prescribed form<sup>4</sup> to the court officer and all other parties<sup>5</sup>. However, the court may dispense with this requirement to give notice of hearsay evidence, and allow notice to be given in a different form, or orally, or shorten a time limit or extend it (even after it has expired)<sup>6</sup>. A party entitled to receive a notice of hearsay evidence may waive his entitlement by so informing the court and the party who would have given the notice<sup>7</sup>.

1 See CrimPR Pt 34, made under the Criminal Justice Act 2003 s 132(1), (2).

2 If a party proposing to tender evidence fails to comply with a prescribed requirement applicable to it: (1) the evidence is not admissible except with the court's leave; (2) where leave is given the court or jury may draw such inferences from the failure as appear proper; and (3) the failure may be taken into account by the court in considering the exercise of its powers with respect to costs: *ibid* s 132(5). However, a defendant may not be convicted solely on the basis of such an inference: s 132(7). In considering whether or how to exercise any of its powers under s 132(5) the court must have regard to whether there is any justification for the failure to comply with the requirement: s 132(6).

3 The rules may provide that if no counter-notice is served in the prescribed form objecting to the admission of the evidence, the evidence is to be treated as admissible by agreement of the parties: see *ibid* s 132(4). Cf CrimPR 34.5.

4 See *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2006] 3 All ER 484, Annex D, CA.

5 See CrimPR 34.2-34.6.

6 CrimPR 34.7.

7 CrimPR 34.8.

### **UPDATE**

### **1531 Rules of Court and notice requirements**

TEXT AND NOTES--CrimPR Pt 34 now Criminal Procedure Rules 2010, SI 2010/60, Pt 34. The forms for use with CrimPR 34.2, 34.3 are set out in *Amendment No 24 to the Consolidated Criminal Practice Direction (criminal proceedings: witness anonymity orders (2); forms)* [2010] All ER (D) 276 (Mar).

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### **1532. Credibility of maker of hearsay statement.**

Where in criminal proceedings<sup>1</sup> a statement<sup>2</sup> not made in oral evidence in the proceedings is admitted as evidence of a matter stated<sup>3</sup> and the maker of the statement in question does not give oral evidence in connection with the subject matter of the statement<sup>4</sup>, other parties will have no opportunity to cross-examine that person, but the following provision is made for evidence to be adduced of matters appertaining to his credibility<sup>5</sup>:

- 2239 (1) any evidence which (if the maker had given oral evidence) would have been admissible as relevant to his credibility as a witness is so admissible in the proceedings<sup>6</sup>;
- 2240 (2) evidence may with the court's leave be given of any matter which (if he had given such evidence) could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party<sup>7</sup>; and
- 2241 (3) evidence tending to prove that he made (at whatever time) any other statement inconsistent with the statement admitted as evidence is admissible for the purpose of showing that he contradicted himself<sup>8</sup>.

Where any such allegation is made, the court may permit additional evidence of such description as the court may specify to be adduced for the purposes of denying or answering the allegation<sup>9</sup>.

1 For the meaning of 'criminal proceedings' see PARA 1464 note 2 ante.

2 For the meaning of 'statement' see PARA 1519 note 13 ante.

3 As to the meaning of 'matters stated' see the Criminal Justice Act 2003 s 115(3); and PARA 1519 text and notes 9-10 ante.

4 Ibid s 124(1). Where a statement in a document is admitted as evidence under s 117 (see PARA 1522 ante) each person who, in order for the statement to be admissible, must have supplied or received the information concerned or created or received the document or part concerned is to be treated as the maker of the statement for the purposes of s 124(1)-(3): s 124(4).

5 See ibid s 124(2).

6 Ibid s 124(2)(a).

7 Ibid s 124(2)(b). These are collateral matters on which a witness's answer (where there is a witness) must be treated as final (see PARA 1444 ante).

8 Ibid s 124(2)(c). If in criminal proceedings evidence of an inconsistent statement by any person (eg the deceased maker of a statement admitted under s 116 (see PARA 1521 ante)) is given under s 124(2)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible: s 119(2).

9 See ibid s 124(3).

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### **1533. Duty of judge to stop case where hearsay evidence is unconvincing.**

If at trial before a judge and jury the court is satisfied at any time after the close of the case for the prosecution that the case against the defendant is based wholly or partly on a statement<sup>1</sup> not made in oral evidence in the proceedings<sup>2</sup> which is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe, the court must either direct the jury to acquit him of the offence or, if it considers that there ought to be a re-trial, discharge the jury<sup>3</sup>.

1 For the meaning of 'statement' see PARA 1519 note 13 ante.

2 As to the meaning of 'oral evidence in the proceedings' see PARA 1519 note 1 ante.

3 Criminal Justice Act 2003 s 125(1). Where: (1) a jury is directed under s 125(1) to acquit a defendant of an offence; and (2) the circumstances are such that, apart from this provision, the defendant could if acquitted of that offence be found guilty of another offence, the defendant may not be found guilty of that other offence if the court is satisfied as mentioned in s 125(1) in respect of it: s 125(2). These provisions do not supplant the principles established in *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, CA, governing the threshold at which prosecution evidence leaves the defendant with a case to answer (see PARAS 1313, 1372 ante) but they provide an additional safety valve obliging a judge to direct an acquittal where hearsay evidence appears particularly unpersuasive: *R v Joyce* [2005] EWCA Crim 1785, [2005] All ER (D) 309 (Jun), CA; and see also the Criminal Justice Act 2003 s 125(4) which states that s 125 does not prejudice any other power a court may have to direct a jury to acquit a person of an offence or to discharge a jury.

If: (a) a jury is required to determine under the Criminal Procedure (Insanity) Act 1964 s 4A(2) (as added) (see PARA 1265 ante) whether a person charged on an indictment with an offence did the act or made the omission charged; and (b) the court is satisfied as mentioned in the Criminal Justice Act 2003 s 125(1) at any time after the close of the case for the prosecution that: (i) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings; and (ii) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the person, a finding that he did the act or made the omission would be unsafe, the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a rehearing, discharge the jury: s 125(3).

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### **1534. Deposition of child or young person.**

Where, in any proceedings in respect of any specified offence<sup>1</sup>, the court is satisfied by the evidence of a duly qualified medical practitioner that the attendance before the court of any child<sup>2</sup> or young person<sup>3</sup> in respect of whom the offence is alleged to have been committed would involve serious danger to his life or health, any deposition of the child or young person<sup>4</sup> is admissible in evidence either for or against the defendant without further proof thereof if it purports to be signed by the justice by or before whom it purports to be taken<sup>5</sup>. However, the deposition is not admissible in evidence against the defendant unless it is proved that reasonable notice of the intention to take the deposition has been served upon him and that he or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child or young person making the deposition<sup>6</sup>.

1    le the offences specified in the Children and Young Persons Act 1933 s 43, Sch 1 (as amended): see PARA 1164 note 2 ante.

2    For the meaning of 'child' see PARA 143 note 2 ante.

3    For the meaning of 'young person' see PARA 143 note 2 ante.

4    le taken under the Children and Young Persons Act 1933 s 42 (amended by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 33; and the Access to Justice Act 1999 s 90(1), Sch 13 paras 8, 9). As to depositions generally see PARA 1140 ante.

5    Children and Young Persons Act 1933 s 43. See also the provisions of the Criminal Justice Act 2003 s 116 (see PARA 1521 ante) under which hearsay evidence of a child who is not available to testify might also be received.

6    Children and Young Persons Act 1933 s 43 proviso.

### **UPDATE**

### **1534 Deposition of child or young person**

TEXT AND NOTE 6--Reference to counsel or solicitor is now to legal representative, which means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act) (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 512): Children and Young Persons Act 1933 ss 43 proviso, 107 (s 43 proviso amended, definition in s 107 added, by Legal Services Act 2007 Sch 21 paras 18, 20).

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### **1535. Proof by written statement.**

In any criminal proceedings<sup>1</sup>, a written statement by any person is admissible as evidence to the like extent as oral evidence to the like effect<sup>2</sup> by that person if such of the following conditions as are applicable are satisfied<sup>3</sup>:

- 2242 (1) the statement purports to be signed by the person who made it<sup>4</sup>;
- 2243 (2) the statement contains<sup>5</sup> a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true<sup>6</sup>;
- 2244 (3) before the hearing at which the statement is tendered in evidence, a copy of the statement is served<sup>7</sup>, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings<sup>8</sup>; and
- 2245 (4) none of the other parties or their solicitors, within seven days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence<sup>9</sup>;

but the conditions in heads (3) and (4) above do not apply if the parties agree before or during the hearing that the statement is to be so tendered<sup>10</sup>.

The following provisions also have effect in relation to any written statement so tendered in evidence:

- 2246 (a) if the statement is made by a person under the age of 18, it must give his age<sup>11</sup>;
- 2247 (b) if the statement is made by a person who cannot read it, it must be read to him before he signs it and it must be accompanied by a declaration by the person who read it to the effect that it was so read<sup>12</sup>;
- 2248 (c) if the statement refers to any other document as an exhibit, the copy required to be served on any other party<sup>13</sup> must be accompanied by a copy of that document or by such information as may be necessary in order to enable the party on whom it is served to inspect that document or a copy of it<sup>14</sup>.

Notwithstanding that a statement made by any person may be admissible<sup>15</sup> as evidence by virtue of the above provisions, the party by whom or on whose behalf a copy of the statement was served may call that person to give evidence<sup>16</sup>; and the court may, of its own motion or on the application of any party to the proceedings<sup>17</sup>, require that person to attend before the court and give evidence<sup>18</sup>.

So much of any statement as is admitted in evidence<sup>19</sup> must be read aloud at the hearing unless the court otherwise directs; and, where the court so directs, an account must be given orally of so much of any statement as is not read aloud<sup>20</sup>.

Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under the above provisions is to be treated as if it had been produced as an exhibit and identified in court by the maker of the statement<sup>21</sup>.

1 The Criminal Justice Act 1967 s 9 (as amended) is applicable in all criminal proceedings, although it is invoked primarily in summary trials. Section 9 does not apply to committal proceedings (see s 9(1)) although as from a day to be appointed this exception is removed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 2 para 43(1), (2), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

2 The effect of a written statement is the same as if the statement had been made orally from the witness box: *Ellis v Jones* [1973] 2 All ER 893, DC; see also *Lister v Quaiife* [1983] 2 All ER 29, 75 Cr App Rep 313, DC. Where the issue is central to the case, prosecutors should give careful consideration as to whether or not to call the actual witnesses so that the proper impact of the evidence can be made on the court rather than relying on such statements which save expense and trouble in many cases: *Lister v Quaiife* supra.

3 Criminal Justice Act 1967 s 9(1).

4 Ibid s 9(2)(a).

5 The declaration must be 'contained' in the statement but it does not matter where in the statement it is positioned: *Chapman v Ingleton* (1973) 57 Cr App Rep 476, DC.

6 Criminal Justice Act 1967 s 9(2)(b). The declaration itself does not require a signature: *Chapman v Ingleton* (1973) 57 Cr App Rep 476, DC.

7 For these purposes, a document requiring to be served on any person may be served: (1) by delivering it to him or to his solicitor; (2) by addressing it to him and leaving it at his usual or last-known place of abode or place of business or by addressing it to his solicitor and leaving it at his office; (3) by sending it in a registered letter or by the recorded delivery service or by first class post addressed to him at his usual or last-known place of abode or place of business or addressed to his solicitor at his office; or (4) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or sending it in a registered letter or by the recorded delivery service or by first class post addressed to the secretary or clerk of that body at that office; and references to the secretary, in relation to a limited liability partnership, are to any designated member of the limited liability partnership: Criminal Justice Act 1967 s 9(8) (amended by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 6(1); and the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 9(1), Sch 5 para 4).

8 Criminal Justice Act 1967 s 9(2)(c).

9 Ibid s 9(2)(d).

10 Ibid s 9(2). Section 9 (as amended) applies to written statements made in Scotland or Northern Ireland as well as to written statements made in England and Wales: Criminal Justice Act 1972 s 46(1) (amended by the Criminal Procedure and Investigations Act 1996 s 47, Sch 1 para 22(2), (3)). As to the application of the Criminal Justice Act 1967 s 9 (as amended) to courts-martial see **ARMED FORCES** vol 2(2) (Reissue) PARA 376.

11 Criminal Justice Act 1967 s 9(3)(a) (amended by the Criminal Procedure and Investigations Act 1996 s 69(1)). By the Criminal Justice Act 1967 s 9(3A) (prospectively added by the Children and Young Persons Act 1969 s 72(3), Sch 5 para 55, but never brought into force), where the statement discloses that its maker has not attained the age of 14, the declaration must state that it is true to the best of the maker's knowledge and belief and that he understands the importance of telling the truth in it). The Criminal Justice Act 1967 s 9(3A) (as prospectively added) is no longer consistent with principles governing the competence of child witnesses, in which it is no longer a requirement that the child 'understands the importance of telling the truth' and it is therefore unlikely ever to be brought into force.

12 Ibid s 9(3)(b).

13 Ie under ibid s 9(2)(c): see head (3) in the text.

14 Ibid s 9(3)(c).

15 As to the tendering of statements prepared from originals but excluding inadmissible or prejudicial matter see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.24, CA.

Where the prosecution proposes to tender written statements in evidence either under the Magistrates' Courts Act 1980 ss 5A, 5B (both as added; prospectively repealed) (see **MAGISTRATES** vol 29(2) (Reissue) PARAS 669-

670) or the Criminal Justice Act 1967 s 9 (as amended) it will frequently be not only proper, but also necessary for the orderly presentation of the evidence, for certain statements to be edited. This will occur either because a witness has made more than one statement whose contents should conveniently be reduced into a single, comprehensive statement or where a statement contains inadmissible, prejudicial or irrelevant material. Editing of statements should in all circumstances be done by a Crown Prosecutor (or by a legal representative, if any, of the prosecutor if the case is not being conducted by the Crown Prosecution Service) and not by a police officer: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.24.1, CA.

A composite statement giving the combined effect of two or more earlier statements or settled by a person referred to in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.24.1, CA, must be prepared in compliance with the requirements of the Magistrates' Courts Act 1980 ss 5A, 5B (both as added; prospectively repealed) or the Criminal Justice Act 1967 s 9 (as amended) as appropriate and must then be signed by the witness: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at iii.24.2, CA.

There are two acceptable methods of editing single statements (see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.24.3, CA):

136 (1) By marking copies of the statement in a way which indicates the passages on which the prosecution will not rely. This merely indicates that the prosecution will not seek to adduce the evidence so marked. The original signed statement to be tendered to the court is not marked in any way. The marking on the copy statement is done by lightly striking out the passages to be edited so that what appears beneath can still be read, or by bracketing, or by a combination of both. It is not permissible to produce a photocopy with the deleted material obliterated, since this would be contrary to the requirement that the defence and the court should be served with copies of the signed original statement. Whenever the striking out/bracketing method is used, it will assist if the following words appear at the foot of the frontispiece or index to any bundle of copy statements to be tendered: 'The prosecution does not propose to adduce evidence of those passages of the attached copy statements which have been struck out and/or bracketed (nor will it seek to do so at the trial unless a notice of further evidence is served)'.

137 (2) By obtaining a fresh statement, signed by the witness, which omits the offending material, applying the procedure in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.24.2, CA.

In most cases where a single statement is to be edited, the striking out/bracketing method will be the more appropriate, but the taking of a fresh statement is preferable in the following circumstances (see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.24.4, CA):

138 (a) When a police (or other investigating) officer's statement contains details of interviews with more suspects than are eventually charged, a fresh statement should be prepared and signed omitting all details of interview with those not charged except, in so far as it is relevant, for the bald fact that a certain named person was interviewed at a particular time, date and place.

139 (b) When a suspect is interviewed about more offences than are eventually made the subject of committal charges, a fresh statement should be prepared and signed omitting all questions and answers about the uncharged offences unless either they might appropriately be taken into consideration or evidence about those offences is admissible on the charges preferred, such as evidence of system. It may, however, be desirable to replace the omitted questions and answers with a phrase such as: 'After referring to some other matters, I then said . . .', so as to make it clear that part of the interview has been omitted.

140 (c) A fresh statement should normally be prepared and signed if the only part of the original on which the prosecution is relying is only a small proportion of the whole, although it remains desirable to use the alternative method if there is reason to believe that the defence might itself wish to rely, in mitigation or for any other purpose, on at least some of those parts which the prosecution does not propose to adduce.

141 (d) When the passages contain material which the prosecution is entitled to withhold from disclosure to the defence.

Prosecutors should also be aware that, where statements are to be tendered under the Criminal Justice Act 1967 s 9 (as amended) in the course of summary proceedings, there will be a need to prepare fresh statements excluding inadmissible or prejudicial material rather than using the striking out or bracketing method: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at iii.24.5, CA.

None of the above principles applies to oral statements of a defendant which are recorded in the witness statements of interviewing police officers, except in the circumstances referred to in head (b) *supra*. All this material should remain in its original state in the committal bundles, any editing being left to prosecuting counsel at the Crown Court (after discussion with defence counsel and, if appropriate, the trial judge: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at iii.24.6, CA).

Whenever a fresh statement is taken from a witness, a copy of the earlier, unedited statements of that witness will be given to the defence in accordance with the Attorney General's guidelines on the disclosure of unused material (see *Practice Note* [1982] 1 All ER 734) unless there are grounds under para 6 of the guidelines for withholding such disclosure: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at iii.24.7, CA.

16 Criminal Justice Act 1967 s 9(4)(a). If the prosecutor finds a defendant giving evidence which is inconsistent with evidence in such statements which have not been the subject of a notice under s 9(2)(d) (see head (4) in the text), he has the right under s 9(4) to apply for an adjournment so that the maker may be called to give evidence: *Lister v Quaife* [1983] 2 All ER 29, 75 Cr App Rep 313, DC.

17 Such application to a court other than a magistrates' court may be made before the hearing and on any such application the powers of the court are exercisable by a puisne judge of the High Court, a circuit judge, a district judge (magistrates' courts) or a recorder sitting alone: Criminal Justice Act 1967 s 9(5) (amended by the Courts Act 1971 s 56(1), Sch 8 Pt II para 49; and further amended to include a district judge (magistrates' courts) by the Courts Act 2003 s 65, Sch 4 para 1 as from a day to be appointed). At the date at which this volume states the law no such day had been appointed.

18 Criminal Justice Act 1967 s 9(4)(b). Justices allowing evidence under s 9(4) must observe the general rules as to the time within which evidence is called: *French's Dairies (Sevenoaks) Ltd v Davis* [1973] Crim LR 630, DC (justices, after retiring to consider finding, called maker of statement to give oral evidence: conviction quashed on appeal).

19 *Ie* by virtue of the Criminal Justice Act 1967 s 9 (as amended).

20 *Ibid* s 9(6).

21 *Ibid* s 9(7).



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### **1536. Admissibility of evidence by certificate or declaration.**

There are numerous statutory provisions by which certificates or declarations are made admissible evidence (or in some cases 'sufficient proof') of any facts stated therein. The following are some of the more important examples.

In any criminal proceedings, a certificate purporting to be signed by a constable or a person having the prescribed qualifications<sup>1</sup>, and certifying that a plan or drawing exhibited thereto is a plan or drawing made by him of the place or object specified in the certificate, and that the plan or drawing is correctly drawn to a scale so specified, is evidence of the relative position of the things shown on the plan or drawing<sup>2</sup>.

In any proceedings in England and Wales for a specified offence<sup>3</sup> under the Road Traffic Act 1960 or the Road Traffic Offenders Act 1988, a certificate in the prescribed form<sup>4</sup> purporting to be signed by a constable<sup>5</sup> and certifying that a person specified in the certificate stated to the constable: (1) that a particular motor vehicle or mechanically propelled vehicle was being driven or used by, or belonged to, that person on a particular occasion; (2) that a particular motor vehicle or mechanically propelled vehicle on a particular occasion was used by, or belonged to, a firm and that he was, at the time of the statement, a partner in that firm; or (3) that a particular motor vehicle or mechanically propelled vehicle on a particular occasion was used by, or belonged to, a corporation and that he was, at the time of the statement, a director, officer or employee of that corporation, is admissible as evidence for the purpose of determining by whom the vehicle was being driven or used, or to whom it belonged, as the case may be, on that occasion<sup>6</sup>.

In proceedings for driving or being in charge of a motor vehicle when under the influence of drink or drugs<sup>7</sup>, or with an alcohol concentration above the prescribed limit<sup>8</sup>, evidence of the proportion of alcohol or a drug in a specimen of breath, blood or urine may<sup>9</sup> be given by the production of a document or documents purporting to be whichever of the following is appropriate, that is to say: (a) a statement automatically produced by the device by which the proportion of alcohol in a specimen of breath was measured and a certificate<sup>10</sup> signed by a constable that the statement relates to a specimen provided by the defendant at the date and time shown in the statement; and (b) a certificate signed by an authorised analyst as to the proportion of alcohol or any drug found in a specimen of blood or urine identified in the certificate<sup>11</sup>.

In any proceedings for the theft of anything in the course of transmission, whether by post or otherwise, or for handling stolen goods from such a theft, a statutory declaration made by any person that he dispatched or received or failed to receive any goods or postal packet, or that any goods or postal packet when dispatched or received by him were in a particular state or condition, is admissible as evidence of the facts stated in the declaration<sup>12</sup>. A statutory declaration of this sort is also admissible in proceedings for offences concerning unauthorised interference with mail or improper opening of mail bags or postal packets<sup>13</sup>.

In any proceedings for an offence under the Video Recordings Act 1984, a certificate purporting to be signed by a person authorised in that behalf by the Secretary of State and stating: (i) that he has examined: (A) the record maintained in pursuance of arrangements made by the designated authority, and (B) a video work (or part of a video work) contained in a video recording identified by the certificate; and (ii) that the record shows that, on the date specified

in the certificate, no classification certificate had been issued in respect of the video work concerned, is admissible as evidence of the fact that, on that day, no classification certificate had been issued in respect of the video work concerned<sup>14</sup>.

Certificates may be used to prove the content and validity of byelaws made by local authorities<sup>15</sup>, to prove the payment or non payment of fixed penalties<sup>16</sup>, or to prove the issue or non issue of gaming or gaming machine licences<sup>17</sup>.

1 For these purposes, the prescribed qualifications are: (1) registration as an architect under the Architects Act 1997; or (2) membership of any of the following bodies, that is to say, the Royal Institution of Chartered Surveyors, the Institution of Civil Engineers, the Institution of Municipal Engineers and the Land Agents Society: Evidence by Certificate Rules 1961, SI 1961/248, r 1; Interpretation Act 1978 s 117(2).

2 Criminal Justice Act 1948 s 41(1). Such a certificate is admissible only where and to the extent to which oral evidence to the like effect would have been admissible: s 41(4) (s 41(3)-(5) amended by the Theft Act 1968 s 33(3), Sch 3 Pt III). Such a certificate is not admissible: (1) unless a copy has been served in the prescribed manner on the person charged with the offence not less than seven days before the hearing or trial; or (2) if the person charged serves notice in the prescribed form and manner on the prosecutor not later than three days before the hearing or trial requiring the attendance at the trial of the person who signed the certificate or declaration: Criminal Justice Act 1948 s 41(5) (as so amended). As to service of notices see the Evidence by Certificate Rules 1961, SI 1961/248, r 3. The court may in special circumstances allow further time for service: see the Criminal Justice Act 1948 s 41(5)(b) (as so amended).

3 The offences to which this provision applies are: (1) offences to which the Road Traffic Act 1960 s 232 (as amended) applies; and (2) the offences shown in the Road Traffic Offenders Act 1988 s 11(5), Sch 1 (as amended): Road Traffic Act 1960 s 242(1); Road Traffic Offenders Act 1988 s 11(5). See **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 1035.

4 For the prescribed form of certificate see the Evidence by Certificate Rules 1961, SI 1961/248, r 2, Schedule Form 1 (amended by SI 1962/2319) made under the Road Traffic Act 1960 s 242 and having effect under the Road Traffic Offenders Act 1988 s 11 (as amended) by virtue of the Road Traffic (Consequential Provisions) Act 1988 s 2(2).

5 For these purposes, 'constable' includes a traffic warden: Functions of Traffic Wardens Order 1970, SI 1970/1958, art 3(2), having effect under the Road Traffic Regulation Act 1984 ss 95(5), 96 and read in accordance with the Road Traffic (Consequential Provisions) Act 1988 s 2(4).

6 Road Traffic Act 1960 s 242(1) (amended by the Road Traffic Act 1962 s 51(1), Sch 4 Pt I); Road Traffic Offenders Act 1988 s 11(1) (amended by the Road Traffic Act 1991 s 48, Sch 4 para 84). Such a certificate is admissible only where and to the extent to which oral evidence to the like effect would have been admissible, and is not admissible: (1) unless a copy has been served in the prescribed manner on the person charged with the offence not less than seven days before the hearing or trial; or (2) if the person charged serves notice in the prescribed form and manner on the prosecutor not later than three days before the hearing or trial requiring the attendance at the trial of the person who signed the certificate or declaration: Road Traffic Act 1960 s 242(2), (3); Road Traffic Offenders Act 1988 s 11(2), (3). As to service of notices see the Evidence by Certificate Rules 1961, SI 1961/248, r 3.

7 Ie in proceedings under the Road Traffic Act 1988 s 3A (as added), s 4 (as amended): see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARAS 974-975.

8 Ie in proceedings under *ibid* s 5: see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 978.

9 Ie subject to the Road Traffic Offenders Act 1988 s 15(5), (5A) (as added), s 16(3) (as substituted and amended), s 16(4) (as amended): see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 991.

10 The certificate may, but need not, be contained in the same document as the statement: *ibid* s 16(1)(a).

11 *Ibid* ss 15(1), 16(1) (both as amended): see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 991.

12 Theft Act 1968 s 27(4). Such a declaration is admissible only to the extent to which oral evidence to the like effect would have been admissible in the proceedings and only if at least seven days before the hearing or trial a copy of it has been given to the person charged, and he has not, at least three days before the hearing or trial or within such further time as the court may in special circumstances allow, given the prosecutor written notice requiring the attendance at the hearing or trial of the person making the declaration: s 27(4)(a), (b).

The Theft Act 1968 s 27 is to be construed in accordance with s 24 (see PARA 303 ante): s 27(5). In order to render documentary evidence admissible the exact terms of the statutory requirements must be followed: *R v Marley* [1958] 2 All ER 359n, 42 Cr App Rep 218, CCA.

13 The Theft Act 1968 s 27(4) applies to proceedings for offences under the Postal Services Act 2000 ss 83, 84 (see **POST OFFICE**) as it applies to proceedings for theft of anything in the course of transmission by post: Postal Services Act 2000 s 109(2). Evidence that any article is in the course of transmission by post, or has been accepted by a postal operator for transmission by post, is sufficient evidence that the article is a postal packet on the prosecution of any offence under the Postal Services Act 2000: s 109(1).

A certificate given by or on behalf of a universal service provider to the effect that any box or receptacle is or was provided by the provider concerned for the purpose of receiving postal packets, or any class of postal packets, for onwards transmission in connection with the provision of a universal postal service, unless the contrary is shown, is sufficient proof in any legal proceedings of the facts stated: s 110.

14 Video Recordings Act 1984 s 19(1). Such a certificate may also be used as evidence that a classification certificate in terms of the document so identified was issued in respect of the video work concerned (see s 19(3)); or that the video work concerned differs in specified respects from another video work in respect of which a classification certificate was issued (see s 19(2)); or that a classification certificate has or has not been issued in respect of a video work having a particular title (see s 19(3A), (3B) (added by the Video Recordings Act 1993 s 4)).

No such certificate is admissible unless a copy of the certificate has, not less than seven days before the hearing, been served on the person charged with the offence (see the Video Recordings Act 1984 s 19(5)).

15 See the Local Government Act 1972 s 238 (as amended); and **LOCAL GOVERNMENT** vol 69 (2009) PARA 568. This may be done without proof of the handwriting or official position of any person purporting to sign the certificate: see s 238 (as amended).

16 See eg the Environmental Protection Act 1990 s 88(8) (as amended) (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 384; **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 722); and the Clean Neighbourhoods and Environment Act 2005 s 59(10).

17 See eg the Betting and Gaming Duties Act 1981 s 29A (as added and amended); and **LICENSING AND GAMBLING** vol 68 (2008) PARA 746.

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## **(18) CONFESSIONS AND ADMISSIONS**

### **1537. Judicial admissions.**

A plea of guilty at the trial is an express and conclusive admission of the offence in respect of which the plea is made, for the purposes of that trial, and dispenses with the necessity of proving the facts alleged in that count of the indictment<sup>1</sup>.

Where a defendant is permitted to withdraw a guilty plea and contest the case<sup>2</sup>, the original guilty plea would ordinarily be admissible as a confession<sup>3</sup>, but its actual admission as evidence against the defendant would be subject to the power of the court or judge to exclude it, if it were concluded that its admission would have an unduly prejudicial effect on the fairness of the proceedings<sup>4</sup>.

Where the plea is one of not guilty, facts may be formally admitted by the defendant or the prosecutor for the purpose of the proceedings<sup>5</sup> or evidence may be given of confessions or admissions made by or on behalf of the defendant before the commencement of the proceedings<sup>6</sup>.

A plea in mitigation made by or on behalf of the defendant following conviction is not admissible at a re-trial as an admission or confession, even though it may appear to assume or concede the defendant's guilt<sup>7</sup>.

1 See PARA 1361 ante. As to the determination of disputed issues of fact after a plea of guilty see PARA 1353 et seq ante.

2 As to the court's discretion to allow a defendant to withdraw a plea of guilty see PARA 1280 ante; *R v Plummer* [1902] 2 KB 339, DC; *R v Rimmer* [1972] 1 All ER 604, 56 Cr App Rep 196, CA; *R v Hetherington* [1972] Crim LR 703, CA; *R v Dodd* (1981) 74 Cr App Rep 50, CA. As to re-trials see *R v McGregor* [1968] 1 QB 371, [1967] 2 All ER 267, CA. As to appeals against conviction following a plea of guilty see PARA 1837 post.

3 As to confession evidence and the admissibility of confessions see PARA 1540 post.

4 See PARA 1545 post.

5 See PARA 1538 post.

6 See PARA 1539 et seq post.

7 *Wu Chun-piu v R* [1996] 1 WLR 1113, PC.

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### 1538. Formal admissions.

Any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or a defendant; and the admission by any party of any such fact is, as against that party, conclusive evidence in those proceedings of the fact admitted<sup>1</sup>.

An admission so made:

- 2249 (1) may be made before or at the proceedings<sup>2</sup>;
- 2250 (2) if made otherwise than in court, must be in writing<sup>3</sup>;
- 2251 (3) if made in writing by an individual, must purport to be signed by the person making it and, if so made by a body corporate, must purport to be signed by a director<sup>4</sup> or manager, or the secretary or clerk, or some other similar officer of the body corporate<sup>5</sup>;
- 2252 (4) if made on behalf of a defendant who is an individual, must be made by his counsel or solicitor<sup>6</sup>;
- 2253 (5) if made at any stage before the trial by a defendant who is an individual, must be approved by his counsel or solicitor, whether at the time it was made or subsequently, before or at the proceedings in question<sup>7</sup>.

1 Criminal Justice Act 1967 s 10(1). An admission under s 10 for the purpose of proceedings relating to any matter is to be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter, including any appeal or re-trial: s 10(3). With the leave of the court, an admission under s 10 may be withdrawn in the proceedings for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter: s 10(4). It is not generally satisfactory for the defence to use this procedure to admit the facts as alleged in the opening speech for the prosecution: see *R v Lewis* (1971) 55 Cr App Rep 386, CA.

The prosecution may choose to make formal admissions which help the defence over a difficulty which they might otherwise face under the hearsay rule: *R v Greenwood* [2004] EWCA Crim 1388, [2005] 1 Cr App Rep 99, [2004] All ER (D) 17 (Jun). As to hearsay see PARA 1519 et seq ante.

As to the application of the Criminal Justice Act 1967 s 9 (as amended), s 10 to courts-martial see s 12 (amended by the Armed Forces Act 1996 ss 5, 35(2), Sch 1 para 99, Sch 7 Pt I); the Criminal Justice Act 1967 (Application to Courts-Martial) (Evidence) Regulations 1997, SI 1997/173; and **ARMED FORCES** vol 2(2) (Reissue) PARA 379.

2 Criminal Justice Act 1967 s 10(2)(a). If admissions are made in the course of a trial, the manner of making them should be such that what has been admitted appears clearly on the shorthand record: *R v Lennard* [1973] 2 All ER 831, 57 Cr App Rep 542, CA. It is immaterial whether the admission is made in the presence of the jury: *R v Lewis* [1989] Crim LR 61, CA.

Where, under the Criminal Justice Act 1967 s 10, a fact is admitted orally in court by or on behalf of the prosecutor or defendant for the purposes of the summary trial of an offence the court must cause the admission to be written down and signed by or on behalf of the party making the admission: CrimPR 37.4.

3 Criminal Justice Act 1967 s 10(2)(b). For the meaning of 'writing' see PARA 578 note 3 ante.

4 For these purposes, 'director', in relation to a body corporate which is established by or under any enactment for the purpose of carrying on under national ownership any industry or part of an industry or undertaking and whose affairs are managed by the members thereof, means a member of that body: *ibid* s 36(1).

5 Ibid s 10(2)(c).

6 Ibid s 10(2)(d).

7 Ibid s 10(2)(e).

## **UPDATE**

### **1538 Formal admissions**

NOTE 2--CrimPR Pt 37 now Criminal Procedure Rules 2010, SI 2010/60, Pt 37.

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### **1539. Statements made on behalf of the defendant.**

At common law, a statement made by another person on the authority of the defendant is evidence against the defendant as much as if he had made the statement himself<sup>1</sup>. A defendant which is a body corporate may make admissions through or on the authority of its officers, directors or appointed agents<sup>2</sup>. The authority of that person to make such an admission on behalf of the defendant must be established but may in appropriate cases be inferred from the circumstances<sup>3</sup>. Such statements are not confessions and therefore are not subject to the specific statutory provisions which restrict the admissibility of confessions that may have been obtained by oppression etc<sup>4</sup>.

Admissions made by a defendant's lawyers during a pre-trial hearing or on a plea and directions questionnaire are not intended to have legal force and are not admissible as evidence against him at the trial<sup>5</sup>.

1 *R v Mallory* (1884) 13 QBD 33, CCR; *R v Turner* (1975) 61 Cr App Rep 67. This rule is preserved by the Criminal Justice Act 2003 s 118(1), as is the rule that where the defendant has referred investigators to a third person for information on a particular matter, that person's statement or answer may be admissible against him (see *R v Mallory* supra). As to formal admissions made for the purpose of the proceedings see PARA 1538 ante.

2 *R v Turner* (1975) 61 Cr App Rep 67, CA (authority may be inferred where barrister speaks in court on client's behalf); *R v Downer* (1880) 14 Cox CC 486, CCR (letter written by a solicitor 'in consequence of ' an interview with the defendant was not equivalent to a letter written by the solicitor on the instructions of the defendant, and was therefore not evidence against him); *R v Evans* [1981] Crim LR 699, CA (admissions by solicitor's clerk not binding without proof of authority); *Edwards v Brookes (Milk) Ltd* [1963] 3 All ER 62, [1963] 1 WLR 795 (manager of milk depot had implied authority to make admissions to a weights and measures inspector concerning the sale of undeclared milk cartons). As to the authority of agents to make admissions see further **CIVIL PROCEDURE** vol 11 (2009) PARA 776 et seq.

3 *Edwards v Brookes (Milk) Ltd* [1963] 3 All ER 62, [1963] 1 WLR 795. See also *Burr v Ware Rural District Council* [1939] 2 All ER 688.

4 As to confessions by the defendant himself see PARA 1540 et seq post.

5 *R v Hutchinson* (1985) 82 Cr App Rep 51, CA; *R v Diedrick* [1997] 1 Cr App Rep 361, CA. But as to the drawing of inferences from discrepancies between a defendant's defence statement and his defence at trial see PARA 1550 post.

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#### **1540. Confessions by defendants: general principles.**

The term 'confession' includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise<sup>1</sup>. A confession made by a defendant may be given in evidence against him<sup>2</sup>, or given in evidence for another person (a co-defendant) charged in the same proceedings<sup>3</sup>, in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of one or more of the following provisions:

- 2254 (1) if, in any proceedings where the prosecution proposes to give in evidence a confession made by a defendant person, it is represented to the court<sup>4</sup> that the confession was or may have been obtained: (a) by oppression<sup>5</sup> of the person who made it; or (b) in consequence of anything said or done<sup>6</sup> which was likely, in the circumstances existing at the time, to render unreliable<sup>7</sup> any confession which might be made by him in consequence thereof, the court may not allow the confession to be given in evidence against him, except in so far as the prosecution proves to the court beyond reasonable doubt that the confession, notwithstanding that it may be true, was not so obtained<sup>8</sup>; and
- 2255 (2) if, in any proceedings where a co-defendant proposes to give in evidence a confession made by a defendant person, it is represented to the court that the confession was or may have been obtained (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court may not allow the confession to be given in evidence for the co-defendant, except in so far as it is proved to the court on the balance of probabilities that the confession (notwithstanding that it may be true) was not so obtained<sup>9</sup>.

Nothing in the above provisions prejudices the power of a court to exclude evidence at its discretion<sup>10</sup>.

An admission or confession made (otherwise than in the course of giving oral evidence at the instant trial) by a person who is not a defendant was inadmissible as hearsay at common law<sup>11</sup>; but statutory reform of the hearsay rule may now in some cases permit such confessions to be proved in evidence<sup>12</sup>.

1 Police and Criminal Evidence Act 1984 s 82(1). This may include an admission of liability made in the course of civil proceedings: *R v Morris* [2006] All ER (D) 154 (Jun), CA. As to statements that are only partly adverse to the maker see further PARA 1541 post. A statement which, when made, is on its face exculpatory does not become a confession merely because it is inconsistent with the defendant's defence in court: *R v Sat-Bhambra* (1988) 88 Cr App Rep 55, [1988] Crim LR 453, CA; *R v Z* [2005] UKHL 22, [2005] 2 AC 467, sub nom *R v Hasan* [2005] 4 All ER 685, reversing *R v Z* [2003] EWCA Crim 191, [2003] 1 WLR 1489, [2003] 2 Cr App Rep 173. See also *R v Pearce* (1979) 69 Cr App Rep 365 at 370, CA, per Lloyd J: 'A denial does not become an admission because it is inconsistent with another denial'. Nor is a statement by the defendant a confession if it is incriminating only on the basis of its manifest or admitted falsity: *Mawaz Khan v R* [1967] 1 AC 454, [1967] 1 All ER 80, PC (demonstrably false alibi not a confession, because not tendered by the prosecution as evidence of truth).



A videotaped reconstruction of a murder by the defendant has been held to be a confession at common law: *Li Shu-Ling v R* [1989] AC 270, [1988] 3 All ER 138, PC. The same result would appear to follow under the Police and Criminal Evidence Act 1984, even where no words are used.

2 Ibid s 76(1). Nothing in Pt VII (ss 69-72) (as amended) (see PARA 1464 ante) prejudices the admissibility of a confession made by a defendant: s 76(7). At common law there was nothing to prevent a conviction on confession evidence alone: *R v Sullivan* (1887) 16 Cox CC 347; *R v Mallinson* [1977] Crim LR 161, CA. The same result would appear to follow under the Police and Criminal Evidence Act 1984.

3 See ibid s 76A(1) (added by the Criminal Justice Act 2003 s 128(1)). See also *R v Myers* [1998] AC 124, [1997] 4 All ER 314, HL; *R v Lawless* [2003] EWCA Crim 271, [2003] All ER (D) 183 (Feb).

4 As to the procedure to be followed when a confession is challenged see PARA 1543 post. A mere suggestion in cross-examination that the confession is inadmissible is not a 'representation' for this purpose: *R v Liverpool Juvenile Court, ex p R* [1988] QB 1, [1987] 2 All ER 668, DC.

5 For these purposes, 'oppression' includes torture, inhuman or degrading treatment, and the use or threat of violence, whether or not amounting to torture: Police and Criminal Evidence Act 1984 s 76(8). Other conduct may also amount to oppression. The term should be given its dictionary meaning of 'exercise of authority or power in a burdensome, harsh or wrongful manner; unjust or cruel treatment of subjects, inferiors etc; the imposition of unreasonable or unjust burdens': *R v Fulling* [1987] QB 426 at 432, [1987] 2 All ER 65 at 69, 85 Cr App Rep 136 at 142, CA, per Lord Lane CJ. See also *R v Mushtaq* [2005] UKHL 25 at [64], [2005] 3 All ER 885 at [64] per Lord Carswell: oppression includes 'questioning which by its nature, duration or other circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent'; (but note that his lordship was using the term 'oppression' in his opinion as a compendious term to include all of the exclusionary matters set out in the Police and Criminal Evidence Act 1984 s 76(2)(a), (b) (see *R v Mushtaq* supra at [63]). See also *R v Emmerson* (1990) 92 Cr App Rep 284, CA; *R v Paris* (1992) 97 Cr App Rep 99, CA.

The character, age and experience or antecedents of the defendant may be relevant considerations when determining whether interview techniques falling short of violence or threats of violence amounted to oppression: *R v Seelig* [1991] 4 All ER 429, [1992] 1 WLR 148, CA (intelligent, sophisticated and experienced merchant banker interviewed concerning allegedly criminal share support operation); *R v Smith* [1994] 1 WLR 1396, 99 Cr App Rep 233, CA. See also at common law *R v Gowan* [1982] Crim LR 821, CA (experienced professional criminals must expect any police interrogation to be vigorous).

Oppression was a ground of exclusion of confession evidence at common law, but the Police and Criminal Evidence Act 1984 is to be regarded as a new code for the admission of such evidence and the 'artificially wide' definition of the term at common law is no longer to be followed: *R v Fulling* supra at 432, 69 and 142 per Lord Lane CJ. Much of the conduct previously regarded as oppressive may now lead to exclusion under the Police and Criminal Evidence Act 1984 s 76(2) on the ground of unreliability (see note 6 infra): *R v Fulling* supra. See also *R v Davison* [1988] Crim LR 442; *R v Hughes* [1988] Crim LR 519, CA.

Oppression need not lead to the exclusion of confession evidence if it is proved that it had no causal link to the confession itself (eg a threat of violence that the defendant knew could not or would not be carried out, or a threat that had been withdrawn or removed before the defendant confessed).

6 Ie excluding things said or done by the defendant himself: *R v Goldenberg* (1988) 88 Cr App Rep 285, CA. The fact that the defendant may have had mixed motives for making the confession (such as hope of an earlier release on police bail) cannot be taken to make his confession inadmissible (*R v Rennie* [1982] 1 All ER 385, 74 Cr App Rep 207, CA; approved in *R v Crampton* [1991] Crim LR 277, CA).

7 It is clear that the issue is not whether a particular confession is in fact unreliable or likely to be untrue. Instead, the focus is on the potential dangers of anything that was said or done. Breach of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (see PARA 908 et seq ante) may render a confession potentially unreliable: see *R v Doolan* [1988] Crim LR 747, CA. See also *DPP v Blake* [1989] 1 WLR 432, 89 Cr App Rep 179, DC (breach of 'spirit' of the Code led to exclusion of confession). Breaches of the Code (eg through not properly recording interviews) may also make it harder for the prosecution to prove admissibility where the facts relating to the making of that confession are in dispute. However, breaches of the Code, or of the provisions of the Police and Criminal Evidence Act 1984 relating to the treatment of persons in custody, do not necessarily lead to exclusion of evidence: *R v Delaney* (1988) 88 Cr App Rep 338, CA; *R v Parris* (1988) 89 Cr App Rep 68, CA; and see further PARA 1545 post. See also *R v Harvey* [1988] Crim LR 241; *R v Everett* [1988] Crim LR 826, CA; *R v Waters* [1989] Crim LR 62, CA.

The 'circumstances' which are to be taken into account under the Police and Criminal Evidence Act 1984 s 76(2) (b) (see head (1)(b) in the text) include the mental, physical and emotional condition of the defendant at the time: *R v Everett* supra; *R v Crampton* [1991] Crim LR 277, CA; *R v McGovern* (1990) 92 Cr App Rep 228, CA; *R v Walker* [1998] Crim LR 211, CA; *Re Proulx* [2001] 1 All ER 57, [2000] Crim LR 997, DC. See also *R v Delaney* supra. As to the detention, treatment and questioning of persons in custody see generally para 938 et seq ante.

8 Police and Criminal Evidence Act 1984 s 76(2). In any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own motion require the prosecution to prove, as a condition of allowing it to do so, that the confession was not obtained as mentioned in s 76(2): s 76(3).

Statements made or documents produced by or on behalf of a person are not inadmissible in any criminal proceedings against the person in question for any form of fraudulent conduct in connection with or in relation to tax; or any proceedings against him for the recovery of any tax due from him, or any proceedings for a penalty or on appeal against the determination of a penalty by reason only that it has been drawn to his attention that: (1) where serious tax fraud has been committed the Commissioners for Her Majesty's Revenue and Customs may accept a money settlement and that they will accept such a settlement, and will not pursue a criminal prosecution, if he makes a full confession of all tax irregularities; or (2) that the extent to which he is helpful and volunteers information is a factor that will be taken into account in determining the amount of any penalty; and that he was or may have been induced thereby to make the statements or produce the documents: Taxes Management Act 1970 s 105 (amended by the Finance Act 1989 ss 149(5), 168(5); and the Finance Act 2003 s 206); Commissioners for Revenue and Customs Act 2005 s 50(2). See further **INCOME TAXATION** vol 23(2) (Reissue) PARA 1717. As to the Commissioners for Revenue and Customs see PARA 354 note 2 ante.

9 Police and Criminal Evidence Act 1984 s 76A(2) (added by the Criminal Justice Act 2003 s 128(1)). As to the meanings of 'oppression', 'anything said or done' and 'unreliable' see notes 5-7 supra. Note that the burden of proof imposed under the Police and Criminal Evidence Act 1984 s 76A(2) (as added) is lower than that imposed on the prosecution under s 76(2) (ie balance of probabilities rather than beyond reasonable doubt), and may be discharged with the help of prosecution evidence as well as by evidence adduced by the co-defendant. It follows that an unsuccessful prosecution attempt to satisfy the burden imposed under s 76(2) may nevertheless suffice to discharge the lesser burden imposed under s 76A(2) (as added), and a co-defendant may then take advantage of this when running a 'cut-throat defence' in which he blames the defendant for the offence.

10 Police and Criminal Evidence Act 1984 s 82(3).

11 *R v Blastland* [1986] AC 41, 81 Cr App Rep 266, HL.

12 See the Criminal Justice Act 2003 ss 114-134, in particular s 114(1)(d) (see PARA 1530 ante). See PARA 1520 et seq ante.

## UPDATE

### 1540 Confessions by defendants: general principles

NOTE 3--Where a co-accused does not stand trial with a defendant but has pleaded guilty, the confession of the co-accused cannot be used as evidence at that defendant's trial: *R v Finch* [2007] EWCA Crim 36, [2007] All ER (D) (Jan) 46.

NOTE 8--Where a very long time has passed before a fresh judicial consideration of the admissibility of a confession, the confession should be judged by current evidential standards: *R v Nolan* [2006] All ER (D) 98 (Nov).

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### **1541. Mixed and self-serving statements.**

Where a statement made out of court by a defendant is partly self-serving and partly adverse or self-incriminating, the prosecution may not put the incriminating parts in evidence<sup>1</sup> whilst excluding those parts which are favourable to the defendant<sup>2</sup>.

Where a 'mixed'<sup>3</sup> statement is put before a jury, the jury should be directed that the whole of the statement is to be taken into account in deciding where the truth lies. Where appropriate, the trial judge should point out that the incriminating parts may be more likely to be true, whereas excuses may carry less weight<sup>4</sup>.

A statement which is purely self-serving is not ordinarily admissible as evidence of the truth of the facts stated<sup>5</sup>, although courts now have a discretion under the so-called 'safety valve' principle to admit any hearsay statement if satisfied that it is in the interests of justice for it to be admissible<sup>6</sup>. A self-serving statement may alternatively be admitted in order to show the attitude of the defendant at the time when he made it. This principle is not limited to statements made on the first encounter with the police<sup>7</sup>. Although in practice statements made to the police are often given in evidence by the prosecution even when they are self-serving, there may be occasions where the defendant produces a carefully prepared written statement to the police, with a view to its being made a part of the prosecution case. Such a statement should not be admitted in evidence<sup>8</sup>.

1 A statement which is partly adverse to the maker is admissible against him as a confession under the Police and Criminal Evidence Act 1984 ss 76(1), 76A(1) (as added), subject to the conditions imposed by ss 76(2), 76A(2) (as added): see PARA 1540 ante.

2 *R v Pearce* (1979) 69 Cr App Rep 365, CA. See also *R v McGregor* [1968] 1 QB 371, 51 Cr App Rep 338, CA; *R v Donaldson* (1976) 64 Cr App Rep 59, CA; *R v Duncan* (1981) 73 Cr App Rep 359, CA; *Leung-Kam Kwok v R* (1985) 81 Cr App Rep 83, PC; *R v Sharp* [1988] 1 All ER 65, [1988] 1 WLR 7, HL; *R v Chapman* [1989] Crim LR 60, CA.

3 I.e. one which is partly self-serving and partly adverse or incriminating.

4 *R v Sharp* [1988] 1 All ER 65, 86 Cr App Rep 274, HL, approving *R v Duncan* (1981) 73 Cr App Rep 359, CA. See also *R v Hamand* (1985) 82 Cr App Rep 65, CA; and Judicial Study Board, Specimen Direction No 45.

5 *R v Storey* (1968) 52 Cr App Rep 334, CA; *R v Sparrow* [1973] 2 All ER 129, 57 Cr App Rep 352, CA; *R v Barbary* (1975) 62 Cr App Rep 248, CA; *R v Donaldson* (1976) 64 Cr App Rep 59, CA; *R v Pearce* (1979) 69 Cr App Rep 365, CA; *R v McCarthy* (1980) 71 Cr App Rep 142, CA; *R v Kurshid* [1984] Crim LR 288, CA; *R v Tooke* (1989) 90 Cr App Rep 417, 154 JP 318, CA.

6 See the Criminal Justice Act 2003 s 114(1)(d); and PARA 1530 ante.

7 *R v Pearce* (1979) 69 Cr App Rep 365, CA. See also *R v Storey* (1968) 52 Cr App Rep 334, CA; *R v Newsome* (1980) 71 Cr App Rep 325, CA.

8 *R v Pearce* (1979) 69 Cr App Rep 365, CA. See also *R v Hedges* (1968) 53 Cr App Rep 206, CA; *R v Blinkhorn* [2006] All ER (D) 365 (May), CA.

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#### **1542. Evidence of defendant on previous occasions.**

Any admissions made by a defendant when giving evidence on a former occasion as a witness is evidence against him, if properly proved<sup>1</sup>, unless there is some statutory provision rendering such evidence inadmissible in other proceedings<sup>2</sup>. Thus, for example, depositions of a defendant who is called as a witness at a coroner's inquisition are evidence against him at his trial<sup>3</sup>, and the admissions of a defendant at his trial are admissible against him on a re-trial<sup>4</sup>.

1 Such statements were admissible at common law, and may also now be admissible as confessions under the Police and Criminal Evidence Act 1984 s 76(1), unless inadmissible under ss 76(2), 76A(2) (as added): see PARA 1540 et seq ante.

2 Where the normal privilege against self-incrimination is abrogated in specified proceedings, restrictions are now imposed to restrict or prevent the use in any later criminal trial of any admissions thereby obtained under compulsion. The unrestricted use of such admissions would infringe the defendant's right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6: *Saunders v United Kingdom* (1996) 23 EHRR 313, [1998] 1 BCLC 362, ECtHR. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq. See also the Youth Justice and Criminal Evidence Act 1999 s 59, Sch 3 (as amended), and the provisions amended by it. See also the Theft Act 1968 s 31(1) (as amended) (see PARA 1477 ante); the Theft Act 1978 s 5(2) (see PARA 313 ante); the Criminal Damage Act 1971 s 9 (as amended) (see PARA 1477 note 9 ante); the Representation of the People Act 1983 s 141(2) (as amended) (see **ELECTIONS AND REFERENDUMS** vol 15(4) (2007 Reissue) PARA 828); the Explosive Substances Act 1883 s 6(2) (as amended) (see **EXPLOSIVES** vol 17(2) (Reissue) PARA 1044); the Land Registration Act 2002 s 125 (as amended) (see **LAND REGISTRATION**).

3 *R v Bateman* (1866) 4 F & F 1068; *R v Colmer* (1864) 9 Cox CC 506; *R v Marriott* (1911) 75 JP 288; but see *R v Wheeley* (1838) 8 C & P 250; *R v Owen, Ellis and Thomas* (1840) 9 C & P 238; *R v Sandys* (1841) Car & M 345, CCR.

4 *R v McGregor* [1968] 1 QB 371, 51 Cr App Rep 338, CA. As to the admissibility at a re-trial of transcripts of evidence given at the original trial see the Criminal Appeal Act 1968 s 8, Sch 2 para 1 (as substituted); and PARA 1897 post.

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### **1543. Confessions: determining admissibility.**

If objection is taken to the admissibility of a confession<sup>1</sup>, or if the judge of his own motion considers that the question of admissibility should be examined<sup>2</sup>, the judge must hold a trial within a trial in the absence of the jury<sup>3</sup> at which he must hear evidence on the voir dire as to the circumstances in which the confession was made<sup>4</sup>; and he must then rule on the basis of that evidence whether or not the confession should be admitted<sup>5</sup>. The prosecution has the onus of satisfying the judge beyond reasonable doubt that the confession is admissible, although a co-defendant may be able to rely on such a confession if admissibility is proved only on the balance of probabilities<sup>6</sup>.

The truth of the alleged confession is not directly relevant at a trial within a trial, but at common law the authorities were divided as to whether the judge might nevertheless hear evidence as to truth or falsity of any elements of the confession when determining the question of admissibility, and in particular whether the defendant was required to answer on the voir dire questions as to his possible involvement in the alleged offence<sup>7</sup>. Under the current statutory regime it is generally assumed that a trial within a trial may not address or consider the guilt or innocence of the defendant<sup>8</sup>; and it is expressly provided that a confession may be inadmissible even where obviously it is true<sup>9</sup>.

If the judge rules that the confession may be admitted in evidence, the defendant may continue to argue (this time before the jury) that the confession was obtained in circumstances rendering it inadmissible<sup>10</sup>. If there is evidence before the jury to support this argument<sup>11</sup>, the jury must then be directed to disregard the confession unless satisfied (to whichever standard of proof is appropriate) that it was not so obtained<sup>12</sup>. The jury must not be told that the judge has already considered such matters and ruled the confession admissible<sup>13</sup>.

If the jury is thus satisfied as to admissibility, or if the issue is not raised before them, it must then decide whether it is satisfied (again, to whichever standard of proof is appropriate) that the confession is true<sup>14</sup>. In deciding this the jury may need to consider whether there are any circumstances which cast doubt upon its reliability, and should be directed towards any features of the case which may have a bearing on the issue. These may include the circumstances in which the confession was made, the contents of the confession itself, and whether the defendant appears to have admitted matters which are improbable or cannot be true. The jury must be reminded of any specific weaknesses or obvious inaccuracies in the confession evidence which may reflect upon its overall reliability<sup>15</sup>.

A judge has no statutory power to reconsider his ruling on admissibility once the confession in question has been given in evidence, but at common law he does retain the power to take whatever measures may be necessary to prevent an injustice, which may in some cases involve discharging the jury<sup>16</sup>.

If the judge rules a confession inadmissible following a trial within a trial, the jury should ordinarily be told nothing about it<sup>17</sup>.

1 Admissibility is to be decided in accordance with the Police and Criminal Evidence Act 1984 s 76 (as amended), s 76A (as added); see PARA 1540 ante.

2 In accordance with *ibid* ss 76(3), 76A(3) (as added); see PARA 1540 ante.

3 *R v Chadwick* (1934) 24 Cr App Rep 138, CCA; *Chan Wei-Keung v R* [1967] 2 AC 160, 51 Cr App Rep 257, PC; *R v Ovenell* [1969] 1 QB 17, 52 Cr App Rep 167, CA; *R v Burgess* [1968] 2 QB 112, 52 Cr App Rep 258, CA; *DPP v Ping Lin* [1976] AC 574, [1975] 3 All ER 175, HL (all decided at common law before the Police and Criminal Evidence Act 1984 s 76 came into force, at a time when the test for admissibility was whether the confession was voluntary; however, the principles to be followed in respect of procedure for the determination of admissibility under the Police and Criminal Evidence Act 1984 would appear to be the same in this respect). See also *R v Voisin* [1918] 1 KB 531 at 538, 13 Cr App Rep 89 at 94, CCA; *Minter v Priest* [1930] AC 558 at 581-582, HL, per Lord Atkin. The issue must be determined as one of fact and causation. On appeal, the trial judge's findings should not be disturbed merely because of difficulties in reconciling them with different findings of fact, on apparently similar evidence, in other reported cases: see *DPP v Ping Lin* supra; *R v Rennie* [1982] 1 All ER 385, 74 Cr App Rep 207, CA. Underlying the basic rules concerning the admissibility of confessions is the need to be fair to the defendant: see *R v Middleton* [1975] QB 191, 59 Cr App Rep 18, CA. As to proof of facts, knowledge of which has been obtained by means of inadmissible confessions see PARA 1548 post.

Where counsel wishes to challenge a confession by means of a trial within a trial, he ought not to refer specifically to the confession in front of the jury, but ought merely to indicate that he would like the jury to be withdrawn for a certain matter to be determined in its absence: *Mitchell v R* [1998] AC 695, [1998] 2 Cr App Rep 35, PC.

4 The defendant may give evidence on the voir dire as to the issue of admissibility: see *R v Cowell* [1940] 2 KB 49, 27 Cr App Rep 191, CCA. In so doing, he is not obliged to testify as to any matters concerning the circumstances of the alleged offence itself: *Wong Kam-Ming v R* [1980] AC 247, 69 Cr App Rep 47, PC; *R v Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885 at 1195, [2005] 1 WLR 1513.

At common law, the rule was that in most cases when a confession was challenged a trial within a trial should ensue: *R v Middleton* [1975] QB 191 at 197, 59 Cr App Rep 18 at 22, CA, per Edmund Davies LJ. However, it was possible for the defence to elect to forgo the trial within a trial for tactical reasons, and to elect to challenge the admissibility of the confession for the first time before the jury: *Ajodha v The State* [1982] AC 204, 73 Cr App Rep 129, PC; *R v Airey* [1985] Crim LR 305, CA. It is not clear whether this option survives the Police and Criminal Evidence Act 1984 s 76 (as amended) (see PARA 1540 ante), but if so there is no reported case of it being exercised. In *R v Liverpool Juvenile Court, ex p R* [1988] QB 1 at 10, [1987] 2 All ER 668 at 673, DC, it was suggested that, in relation to summary trial, the option was still open, but the option is not mentioned in *R v Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885, [2005] 1 WLR 1513.

The rule that a trial within a trial must be held where the defendant so desires under the Police and Criminal Evidence Act 1984 s 76 (as amended) is applicable to summary trials: *R v Liverpool Juvenile Court, ex p R* supra. Cf the position at common law, where it was thought that trials within trials were unsuitable for magistrates' courts: *F (an Infant) v Chief Constable of Kent* [1982] Crim LR 682, DC. The common law position continues to prevail with regard to questions of admissibility of evidence other than that raised by the Police and Criminal Evidence Act 1984 s 76 (as amended): see eg *Vel v Chief Constable of North Wales* (1987) 151 JP 510, sub nom *Vel v Owen* [1987] Crim LR 496, DC (trial within a trial not required in summary proceedings where confession challenged under the Police and Criminal Evidence Act 1984 s 78 (as amended) (exclusion of unfair evidence) (see PARA 1365 ante)); see also *Halawa v Federation Against Copyright Theft* [1995] 1 Cr App Rep 21, [1995] Crim LR 409, DC.

A trial within a trial may enable a trial judge to decide not only whether confession evidence is admissible, but whether he should in fact admit it or exclude it under the Police and Criminal Evidence Act 1984 s 78 (as amended): see PARA 1545 post. A trial within a trial is inappropriate where the defence case is that no confession was made: *Ajodha v The State* supra. Where, however, a defendant denies having made a confession, but also argues that the alleged confession would in any event be inadmissible, the judge must first consider the admissibility issue and, where the alleged confession is judged to be admissible, the question whether the confession was actually made should then be addressed: *Thongjai v R; Chun-Kong v R* [1998] AC 54, [1997] 3 WLR 667, PC.

5 The defendant is entitled to a ruling: *Sparks v R* [1964] AC 964 at 982, [1964] 1 All ER 727 at 735, PC. See also *R v Richards* [1967] 1 All ER 829, 51 Cr App Rep 266, CA; *R v Francis, R v Murphy* (1959) 43 Cr App Rep 174, CCA.

6 Contrast the different standards of proof imposed under the Police and Criminal Evidence Act 1984 s 76(2) and s 76A(2) (as added): see PARA 1540 ante.

Where a court is determining the admissibility of evidence, or is considering whether to exercise its discretion to exclude admissible evidence, any relevant provisions of a Code of Practice issued under the Police and Criminal Evidence Act 1984 must be taken into account (see s 67(11) (amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 1)), but breach of the Codes of Practice does not lead to automatic exclusion of evidence obtained in consequence: *R v Delaney* (1988) 88 Cr App Rep 338 at 341, CA; *R v Parris* (1988) 89 Cr App Rep 68, CA; *R v Keenan* [1990] 2 QB 54 at 67, [1989] 3 All ER 598 at 609, CA, per Hodgson J.

7 Contrast *R v Hammond* [1941] 3 All ER 318, 28 Cr App Rep 84, CCA (in which it was held that such evidence was relevant and admissible on the voir dire) with *Wong Kam-ming v R* [1980] AC 247, 69 Cr App Rep

47, PC (in which it was held (Lord Hailsham LC dissenting) that such evidence was irrelevant and inadmissible). In practice, *Wong Kam-ming v R* supra (although a Privy Council ruling) was generally considered to have altered the law as stated in *R v Hammond* supra. See *R v Brophy* [1982] AC 476, 73 Cr App Rep 287, HL. However, in certain cases it was relevant for the defendant to volunteer an admission of guilt on the voir dire in order to challenge admissibility, and where it was so relevant, the admission thus made could not be given in evidence against him at the trial: *R v Brophy* supra. It is not clear whether this latter principle survives the Police and Criminal Evidence Act 1984, as such an admission would appear to constitute an admissible confession under s 76 (as amended) (see PARA 1540 ante).

8 *Wong Kam-ming v R* [1980] AC 247, 69 Cr App Rep 47, PC (see note 7 supra) was cited with apparent approval in *R v Mushtaq* [2005] UKHL 25 at [38], [2005] 3 All ER 885 at [38], [2005] 1 WLR 1513 at [38] per Lord Rodger of Earlsferry.

9 See PARA 1540 ante.

10 *R v Murray* [1951] 1 KB 391, 34 Cr App Rep 203, CCA; *R v Mushtaq* [2005] UKHL 25 [2005] 3 All ER 885, [2005] 1 WLR 1513.

11 The jury does not need to be directed to consider the issue of admissibility unless there is evidence before it on which it might find in favour of the defendant. Suggestions made by counsel in cross-examination do not suffice for this purpose: *R v Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885, [2005] 1 WLR 1513.

12 *R v Bass* [1953] 1 QB 680, [1953] 1 All ER 1064, CCA; *R v Mushtaq* [2005] UKHL 25 at [47]-[48], [2005] 3 All ER 885 at [47]-[48], [2005] 1 WLR 1513 at [47]-[48] per Lord Rodger of Earlsferry, disapproving *Chan Wei-Keung v R* [1967] 2 AC 160, 51 Cr App Rep 257, PC, in which it was said that the jury was not concerned with issues of admissibility. Other cases impliedly overruled in *R v Mushtaq* supra include *R v Burgess* [1968] 2 QB 112, 52 Cr App Rep 258, CA; *R v Owenell* [1969] 1 QB 17, 52 Cr App Rep 167, CA. It would be incompatible with the defendant's right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(1) for a jury to be invited to convict in reliance upon a confession, notwithstanding that they may consider that confession to have obtained by oppression etc: *R v Mushtaq* supra. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq.

13 *Mitchell v R* [1998] AC 695, [1998] 2 Cr App Rep 35, PC; *Thompson v R* [1998] AC 811, [1998] 2 WLR 927, PC.

14 The jury may rely on a confession by the defendant for the purpose of establishing the innocence of a co-defendant on whose behalf it has been admitted if merely satisfied of its truth on a balance of probabilities (see the Police and Criminal Evidence Act 1984 s 76A(2) (as added); and PARA 1540 ante), but must at the same time be directed not to convict the defendant on the basis of that confession unless sure (ie satisfied beyond reasonable doubt) of his guilt. See PARA 1540 ante.

15 See Judicial Studies Board, Specimen Direction No 25.

16 *R v Sat-Bhambra* (1988) 88 Cr App Rep 55, CA.

17 *R v Treacy* [1944] 2 All ER 229, 30 Cr App Rep 93, CCA; *R v Mushtaq* [2005] UKHL 25 at [37], [2005] 3 All ER 885 at [37], [2005] 1 WLR 1513 at [37] per Lord Rodger of Earlsferry. A previous inconsistent statement of the defendant, made while giving evidence to dispute the admissibility of a confession at the trial within a trial, may be put to him in cross-examination at the trial only if the disputed confession is admitted in evidence: *Wong Kam-ming v R* [1980] AC 247, 69 Cr App Rep 47, PC.

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#### **1544. Confessions by mentally handicapped persons.**

Without prejudice to the general duty of the court at a trial on indictment with a jury to direct the jury on any matter on which it appears to the court appropriate to do so, where at such a trial: (1) the case against the defendant depends wholly or substantially on a confession<sup>1</sup> by him; and (2) the court is satisfied that he is mentally handicapped<sup>2</sup> and that the confession was not made in the presence of an independent person<sup>3</sup>, the court must warn the jury that there is special need for caution before convicting the defendant in reliance on the confession<sup>4</sup>, and must explain that the need arises because of the circumstances mentioned in heads (1) and (2) above<sup>5</sup>.

In any case where at the summary trial of a person for an offence it appears to the court that such a warning would be required if the trial were on indictment with a jury, the court must treat the case as one in which there is a special need for caution before convicting the defendant on his confession<sup>6</sup>.

Where the prosecution case depends wholly upon one or more confessions made by a defendant who suffers from a significant degree of mental handicap; and the confessions are unconvincing to a point where a jury properly directed could not properly convict upon them, the trial judge (if he has not already excluded the confessions) must withdraw the case from the jury and direct an acquittal<sup>7</sup>.

1 As to the meaning of 'confession' see PARA 1540 ante.

2 For these purposes, 'mentally handicapped', in relation to a person, means that he is in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning: Police and Criminal Evidence Act 1984 s 77(3). See *R v Kenny* [1994] Crim LR 284, CA. See also *R v Ham* (1995) 36 BMLR 169, CA (wrong definition of 'mentally handicapped' applied and opinions of police officers, who were not experts, improperly taken into account).

3 For these purposes, 'independent person' does not include a police officer or a person employed for, or engaged on, police purposes: Police and Criminal Evidence Act 1984 s 77(3). 'Police purposes', in relation to a police area, includes the purposes of special constables appointed for that area, of police cadets undergoing training with a view to becoming members of the police force maintained for that area and of civilians employed for the purposes of that force or of any such special constables or cadets: Police Act 1996 s 101(2); definition applied by the Police and Criminal Evidence Act 1984 s 77(3). A solicitor may be an independent person for the purposes of s 77 (as amended): *R v Lewis* [1996] Crim LR 260, CA.

In its application to Her Majesty's Revenue and Customs, the definition of 'independent person' in the Police and Criminal Evidence Act 1984 s 77(3) includes, in addition to the persons mentioned therein, an officer or any other person acting under the authority of the Commissioners for Her Majesty's Revenue and Customs: Police and Criminal Evidence Act 1984 (Application to Customs and Excise) Order 1985, SI 1985/1800, art 10; Commissioners for Revenue and Customs Act 2005 s 50(2).

4 As to the special rules applicable to the interviewing of a mentally handicapped suspect see Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Annex E; and PARA 940 ante.

5 Police and Criminal Evidence Act 1984 s 77(1) (s 77(1), (2) amended, s 77(2A) added, by the Criminal Justice Act 2003 s 331, Sch 36 para 48). In any case where at the trial on indictment without a jury of a person for an offence it appears to the court that a warning under the Police and Criminal Evidence Act 1984 s 77(1) (as amended) would be required if the trial were with a jury, the court must treat the case as one in which there is a special need for caution before convicting the accused on his confession: s 77(2A) (as so added).



The required direction under s 77(1) is not a matter of prudence but is ordinarily an essential part of a fair summing up: *R v Lamont* [1989] Crim LR 813, CA. The judge is not, however, obliged to give the direction where the prosecution case does not substantially rely upon the confession evidence: *R v Campbell* [1995] 1 Cr App Rep 522, [1995] Crim LR 157, CA; *R v Bailey* [1995] 2 Cr App Rep 262, [1995] Crim LR 723, CA.

The need to give such a warning will only arise in respect of a confession admitted in evidence ie one which has already satisfied the test for admissibility in the Police and Criminal Evidence Act 1984 s 76 (as amended) (see PARA 1540 ante) and has not been excluded by the court by virtue of its discretion under s 78 (as amended) (see PARA 1365 ante), but it is possible that the jury will take a different view as to reliability etc from that taken by the trial judge. If the Court of Appeal considers that the judge ought to have ruled the confession inadmissible in the first place (eg because the manner of interrogation was likely to result in an unreliable confession, given the defendant's mental condition (see s 76(2)(b) (see PARA 1540 ante)) a conviction must ordinarily be quashed notwithstanding an impeccable direction under s 77 (as amended): *R v Moss* (1990) 91 Cr App Rep 371, CA.

6 Police and Criminal Evidence Act 1984 s 77(2) (as amended: see note 5 supra). Nothing in s 77 (as amended) prejudices any power of the court to exclude evidence, whether by preventing questions from being put or otherwise, at its discretion: s 82(3).

7 *R v McKenzie* [1993] 1 WLR 453, 96 Cr App Rep 98, CA, applying *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, CA.

## **UPDATE**

### **1544 Confessions by mentally handicapped persons**

NOTE 3--SI 1985/1800 art 10 now Police and Criminal Evidence Act 1984 (Application to Customs and Excise) Order 2007, SI 2007/3175, art 15.

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#### **1545. Discretionary exclusion of confessions.**

The trial judge or court has the power, both at common law<sup>1</sup> and by statute<sup>2</sup>, to exclude a confession which otherwise satisfies the statutory tests governing admissibility. In practice the statutory power is more extensive and the common law power is now rarely exercised<sup>3</sup>.

Where police officers or other investigators have infringed or ignored statutory provisions<sup>4</sup> or provisions of the relevant Codes of Practice governing the questioning or treatment of suspects<sup>5</sup> or the recording of interviews<sup>6</sup>, the exclusion of any confession evidence obtained in consequence may (but need not automatically) follow<sup>7</sup>.

Although the statutory power is formally cast in the form of a discretion ('the court may') the objective criterion whether 'the evidence would have such an adverse effect on the fairness of the proceedings' in truth imports a judgment whether in the light of the statutory criterion of fairness the court ought to admit the evidence<sup>8</sup>. It is nevertheless a discretionary power in the sense that the court must often weigh competing considerations in the balance<sup>9</sup>, and also in the sense that the judge's discretion, if properly exercised and not perverse, cannot be overturned on appeal merely because the appellate court, having taken the same factors into consideration, might have exercised that discretion differently<sup>10</sup>.

In exercising the power to exclude, courts and judges must now have regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>11</sup>, and this is likely to be of crucial importance where police undercover operations or informers are used to gather or solicit admissions or confessions<sup>12</sup>.

Neither the statutory nor the common law power to exclude may be used to prevent a defendant from calling or eliciting evidence as to a legally admissible confession made by a co-defendant, should that confession tend to assist the defendant's own case<sup>13</sup>.

1 The Police and Criminal Evidence Act 1984 s 82(3) preserves the common law powers of the court to exclude evidence at its discretion. As to the ambit of the common law powers of the court see PARA 1365 ante.

2 See *ibid* s 78(1); and PARA 1365 ante. In *R v Mason* [1987] 3 All ER 481, [1988] 1 WLR 139, CA, the Court of Appeal rejected an argument that the Police and Criminal Evidence Act 1984 s 78 (as amended) was inapplicable to confession evidence, and it has been used in that context on many occasions since.

3 As to the rare circumstances in which recourse to the common law power may still be necessary see *R v Sat-Bhambra* (1988) 88 Cr App Rep 55, [1988] Crim LR 453, CA (see PARA 1365 note 4 ante).

4 These include in particular the Police and Criminal Evidence Act 1984 s 58 (as amended) which governs a suspect's right to legal advice. See PARA 953 ante.

5 See Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers; and PARA 908 et seq ante.

6 See Code E: the Code of Practice on Audio Recording Interviews with Suspects (see PARA 971 et seq ante) and Code F: Code of Practice on Visual Recording with Sound of Interviews with Suspects (see PARA 986 et seq ante).

7 Where a court is determining the admissibility of evidence, or is considering whether to exercise its discretion to exclude admissible evidence, any relevant provisions of a Code of Practice issued under the Police and Criminal Evidence Act 1984 must be taken into account: see s 67(11). As to the exercise of the discretion to exclude see *R v Walsh* (1989) 91 Cr App Rep 161 at 163, [1989] Crim LR 822, CA, per Saville J: 'If there are

significant and substantial breaches of [the Police and Criminal Evidence Act 1984] s 58 or the provisions of [Code C], then prima facie at least the standards of fairness set by Parliament have not been met. So far as a defendant is concerned, it seems to us also to follow that to admit evidence against him which has been obtained in circumstances where these standards have not been met, cannot but have an adverse effect on the fairness of the proceedings. This does not mean . . . that in every case of a significant or substantial breach of s 58 or the Code of Practice the evidence concerned will automatically be excluded. Section 78 does not so provide. The task of the court is not merely to consider whether there would be an adverse effect on the fairness of the proceedings, but such an adverse effect that justice requires the evidence to be excluded'.

See also *R v Delaney* (1988) 88 Cr App Rep 338 at 341, CA; *R v Parris* (1988) 89 Cr App Rep 68, CA. The deliberate breach in bad faith of the right to legal advice (see the Police and Criminal Evidence Act 1984 s 58 (as amended); and PARA 953 ante) will almost certainly result in exclusion, and the breach of the same right without bad faith may well do so (*R v Alladice* (1988) 87 Cr App Rep 380, [1988] Crim LR 608, CA) as may significant and substantial breaches whether in bad faith or not (see *R v Walsh* supra). See also *R v Samuel* [1988] QB 615, 87 Cr App Rep 232, CA; *R v Absolam* (1988) 88 Cr App Rep 332, [1988] Crim LR 748, CA; *R v Maguire* [1989] Crim LR 815, CA; *R v Canale* [1990] 2 All ER 187, 91 Cr App Rep 1, CA. Significant and substantial breaches of the interviewing rules of Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (see PARA 908 et seq ante), which also applies (inter alia) to officers of Revenue and Customs and inspectors, frequently results in the exclusion of evidence obtained in consequence: *R v Keenan* [1990] 2 QB 54, [1989] 3 All ER 598, CA; *R v Weekes* (1993) 97 Cr App Rep 222, [1993] Crim LR 211, CA; *R v Kirk* [1999] 4 All ER 698, [2000] 1 WLR 567, CA; *R v Gill* [2003] EWCA Crim 2256, [2003] 4 All ER 681, [2004] 1 WLR 469; but see also *R v Senior* [2004] EWCA Crim 454, [2004] 3 All ER 9, [2004] 2 Cr App Rep 215. It may be unfair to admit in evidence a confession made after a promise of immunity has been given: *R v Mathias* (1989) Times, 24 August, [1989] NLJR 1417, CA.

As to conduct which may arguably be considered unfair, even though it is not specifically covered in any relevant Code of Practice see *R v Mason* [1987] 3 All ER 481, 86 Cr App Rep 349, CA (police lies as to fingerprint evidence); *R v Bailey* [1993] 3 All ER 513, 97 Cr App Rep 365, CA (defendant and co-defendant placed in police cell so that any conversation could be overheard). As to the use of undercover agents and informers see note 11 infra.

8 *R v Z* [2005] UKHL 22 at [53], [2005] 2 AC 467 at [53], sub nom *R v Hasan* [2005] 4 All ER 685 at [53] per Lord Steyn.

9 *R v Walsh* (1989) 91 Cr App Rep 161, [1989] Crim LR 822, CA; *R v Elleray* [2003] EWCA Crim 553, [2003] 2 Cr App Rep 165.

10 *R v Mason* [1987] 3 All ER 481, 86 Cr App Rep 349, CA; *R v Quinn* [1995] 1 Cr App Rep 480, [1995] Crim LR 56, CA; *R v Dures* [1997] 2 Cr App Rep 247, CA.

11 Ie the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (commonly referred to as the European Convention on Human Rights and enshrined in the Human Rights Act 1998 Sch 1: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq).

12 *R v Allan* [2004] EWCA Crim 2236, [2005] Crim LR 716, [2004] All ER (D) 114 (Aug) (following *Allan v United Kingdom* (2002) 13 BHRC 652, ECtHR; *R v Roberts* [1997] 1 Cr App Rep 217, CA, doubted). As to undercover operations see also *R v Christou* [1992] QB 979, [1992] 4 All ER 559, CA; *R v Bryce* [1992] 4 All ER 567, 95 Cr App Rep 320, CA; *R v Edwards* [1997] Crim LR 348; *Re Proulx* [2001] 1 All ER 57, [2000] Crim LR 997, DC.

It does not follow that a confession to an informant will necessarily require exclusion, even if the informant is a fellow prisoner: see eg *R v Stone* [2005] EWCA Crim 105, [2005] Crim LR 569.

13 *R v Myers* [1998] AC 124, [1997] 4 All ER 314, HL.

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### **1546. Editing of confessions.**

An admissible confession may require to be edited so as to protect the defendant<sup>1</sup> or a co-defendant<sup>2</sup> from any unfair prejudice that might be caused through inappropriate references to other criminal activities, previous convictions, etc. A defendant may, however, object to any editing which may damage his own case, even if the unedited version may be inadmissible against (or unfairly prejudicial to) a co-defendant<sup>3</sup>.

When a suspect is interviewed about more offences than are eventually made the subject of committal charges, a fresh statement should be prepared and signed omitting all questions and answers about the uncharged offences unless either they might appropriately be taken into consideration or evidence about those offences is admissible on the charges preferred, such as evidence of system<sup>4</sup>.

<sup>1</sup> *Turner v Underwood* [1948] 2 KB 284, [1948] 1 All ER 859, DC; *R v Weaver* [1968] 1 QB 353, 51 Cr App Rep 77, CA. See also *R v Knight*, *R v Thompson* (1946) 31 Cr App Rep 52, CCA.

<sup>2</sup> *R v Rogers and Tarran* [1971] Crim LR 413, CA; *R v Silcott* [1987] Crim LR 765; *R v Mathias* [1989] Crim LR 64.

<sup>3</sup> *R v Gunewardene* [1951] 2 KB 600, 35 Cr App Rep 80, CCA; *Lobban v R* [1995] 2 All ER 602, [1995] 1 WLR 877, PC. Self-serving passages in 'mixed' statements are admissible on the same basis as self-incriminating passages: see PARA 1541 ante.

<sup>4</sup> *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at III.24.4(b), CA. See further PARA 1535 note 15 ante.

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#### **1547. Inadmissible confessions as previous inconsistent statements.**

At common law, it was established that the prosecution could not be permitted to use or refer to an inadmissible confession even as a previous inconsistent statement with which to cross-examine the defendant and impugn his credibility if he testified<sup>1</sup>. A previous inconsistent statement of the defendant, made while giving evidence to dispute the admissibility of a confession at a trial within a trial, is likewise inadmissible unless the original confession is ruled admissible following the trial within a trial<sup>2</sup>.

In contrast, a co-defendant was permitted to use an excluded confession for that purpose<sup>3</sup>, but this right now appears to have been abolished under provisions which bring the powers of the co-defendant broadly into line with that of the prosecution<sup>4</sup>.

1 *R v Treacy* [1944] 2 All ER 229, 30 Cr App Rep 93, CCA. The same principle applies in favour of a co-defendant of the maker of an involuntary statement: *R v Rice* [1963] 1 QB 857, 47 Cr App Rep 79, CCA. Thus, while information derived from such a statement may be used as a tool to extract from its maker in the form of evidence on oath all that he has formerly said about a co-defendant, the fact that the information was provided in a statement may not be revealed to the jury: *R v Rice* supra at 868-869 and 86 per Winn J.

2 *Wong Kam-ming v R* [1980] AC 247, 69 Cr App Rep 47, PC.

3 *R v Rowson* [1986] QB 174, 80 Cr App Rep 218, CA; *Lui Mei Lin v R* [1989] AC 288, [1989] 1 All ER 359, PC; *R v O'Boyle* [1991] Crim LR 67, CA; approved *R v Myers* [1998] AC 124, [1997] 4 All ER 314, HL.

4 See the Police and Criminal Evidence Act 1984 s 76A(2) (as added); and PARA 1540 ante.

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#### **1548. Facts discovered as a result of inadmissible confessions.**

The fact that a confession<sup>1</sup> is wholly or partly inadmissible<sup>2</sup> in law does not affect the admissibility in evidence: (1) of any facts discovered as a result of the confession; or (2) where the confession is relevant as showing that the defendant speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so<sup>3</sup>.

Evidence is not admissible to show that a fact was discovered as a result of a statement made by a defendant person if it was so discovered: (a) as a result of a confession which is wholly inadmissible in law; or (b) as a result of a confession partly so inadmissible, if the fact is discovered as a result of the inadmissible part; unless evidence of how it was discovered is given by the defendant or on his behalf<sup>4</sup>.

1 As to the meaning of 'confession' see PARA 1540 ante.

2 It is excluded in pursuance of the Police and Criminal Evidence Act 1984 s 76 (as amended) or s 76A (as added): see PARA 1540 ante.

3 Ibid ss 76(4), 76A(4) (s 76A added by the Criminal Justice Act 2003 s 128). These provisions follow the rule at common law as to the discovery of facts consequent upon a confession: see *R v Warickshall* (1783) 1 Leach 263; *R v Griffin* (1809) Russ & Ry 151, CCR. See also *Kuruma, Son of Kaniu v R* [1955] AC 197, [1955] 1 All ER 236, PC; *King v R* [1969] 1 AC 304, 52 Cr App Rep 353, PC. Cf *R v Jones* (1809) Russ & Ry 152; *R v Jenkins* (1822) Russ & Ry 492, CCR. As to the admissibility of a confession showing how the defendant misspells particular words see *R v Voisin* [1918] 1 KB 531, 13 Cr App Rep 89, CCA; *R v Nottle* [2004] EWCA Crim 599, [2004] All ER (D) 442 (Mar).

It is possible that in some cases the admission of evidence discovered as a result of an inadmissible confession would have such a prejudicial effect on the fairness of the proceedings that the court or judge should exclude it under the Police and Criminal Evidence Act 1984 s 78 (as amended) (see PARA 1365 ante), although there does not appear to be any reported case in which this possibility has been explored. Nothing in Pt VIII (ss 73-82) (as amended) prejudices the power of the court to exclude evidence, whether by preventing questions from being put or otherwise, at its discretion: s 82(3).

4 Ibid ss 76(5), (6), 76A(5), (6) (as added: see note 3 supra). See also *R v Berriman* (1854) 6 Cox CC 388; *Lam Chi-ming v R* [1991] 2 AC 212, [1991] 3 All ER 172, PC. These provisions do not apply to cases in which confession evidence is excluded only as a matter of judicial discretion.

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### **1549. Confession by one of two or more defendants.**

Where two or more persons are accused of an offence, and one of them makes a statement amounting to a confession, that confession (unless made in the other's presence and effectively assented to by him<sup>1</sup>) can be directly admissible only against the defendant who made it<sup>2</sup>. If the other defendant was not present when the statement was made the jury must be reminded of this and warned that, because he had had no opportunity to contradict it, it must be disregarded when considering the case against that other defendant<sup>3</sup>. Anything said by a defendant in evidence in chief or in cross-examination may, however, be treated as evidence for all purposes and may where relevant be used to implicate a co-defendant, whether it amounts to an admission of joint liability or an allegation that the co-defendant was solely responsible<sup>4</sup>.

A confession may nevertheless be used to secure the conviction of a co-defendant in one of two ways. First, information derived from a defendant's confession may be used to extract from him, if he testifies, all that he has formerly said about a co-defendant<sup>5</sup>. Secondly, cases may arise in which the case against a defendant requires or depends upon proof of the guilt of a co-defendant, notably where the defendant is charged with being a secondary party to the co-defendant's offence<sup>6</sup>, or with handling the proceeds of the co-defendant's theft<sup>7</sup>. A confession by the co-defendant may in such cases be relied upon to establish the guilt of that co-defendant, even though this may be the key to the conviction of the defendant himself<sup>8</sup>.

1 As to this possibility see *R v Coll* [2005] EWCA Crim 3675, [2005] All ER (D) 82 (Nov); and PARA 1551 post.

2 This is implicit in the wording of the Police and Criminal Evidence Act 1984 s 76(1): see PARA 1540 ante. See also at common law *R v Boroski* (1682) 9 State Tr 1 at 23; *R v Pearson* (1908) 72 JP 449, 1 Cr App Rep 77, CCA; *R v Davis* (1913) 9 Cr App Rep 66, CCA; *R v Rudd* (1948) 32 Cr App Rep 138, CCA; *R v Gunewardene* [1951] 2 KB 600, 35 Cr App Rep 80, CCA; *R v Moore* (1956) 40 Cr App Rep 50, CCA; *R v Daniel and Watson* [1973] Crim LR 627, CA; *R v Campbell and Williams* [1993] Crim LR 448, CA. See also *R v Gray and Evans* [1998] Crim LR 570, CA (where a defendant's interview with police is ruled inadmissible as against that defendant, it may not be used in the cross-examination of a co-defendant in a way which suggests to a jury that it is admissible).

3 As to the form of direction to the jury where such evidence is admitted see *R v Gunewardene* [1951] 2 KB 600 at 610-611, [1951] 2 All ER 290 at 295, CCA, per Lord Goddard CJ: 'If no separate trial is ordered it is the duty of the judge to impress on the jury that the statement of one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded.' See also Judicial Studies Board, Specimen Direction No 32.

Joint trials in cases involving joint liability are generally to be preferred despite any such complications: *R v Randall* [2003] UKHL 69 at [16], [2004] 1 All ER 467 at [16], [2004] 1 WLR 56 at [16] per Lord Steyn; *R v Hayter* [2005] UKHL 6, [2005] 2 All ER 209, [2005] 2 Cr App Rep 37.

A defendant may confess as to his own acts, knowledge or intentions but he cannot 'confess' as to the acts of other persons which he has not seen and of which he can only have knowledge by hearsay: *Surujpaul (called Dick) v R* [1958] 3 All ER 300, 42 Cr App Rep 266, PC; *A-G's Reference (No 4 of 1979)* [1981] 1 All ER 1193, 71 Cr App Rep 341, CA; *R v Spinks* [1982] 1 All ER 587, 74 Cr App Rep 263, CA.

Where at common law a statement incriminating the defendant had been made by an accomplice and, after the defendant had been charged and cautioned, the statement was read to the defendant, his subsequent voluntary statement was admissible against him: *R v Hirst* (1896) 18 Cox CC 374. Cf *R v Male and Cooper* (1893) 17 Cox CC 689. As to the procedure for drawing a suspect's attention to such statements see now Code

C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 16.4; and PARAS 908 et seq, 1042 ante, 1551 post.

4 See *R v O'Brien* [2000] Crim LR 676, [2000] All ER (D) 62, CA.

5 *R v Rice* [1963] 1 QB 857, 47 Cr App Rep 79, CCA. As to the use to which information contained in an inadmissible statement may be put see PARA 1547 ante.

6 As to secondary parties see PARA 51 et seq ante.

7 As to handling stolen goods see PARA 302 et seq ante.

8 *R v Hayter* [2005] UKHL 6, [2005] 2 All ER 209, [2005] 2 Cr App Rep 37. *R v Rhodes* (1959) 44 Cr App Rep 23, CCA and *R v Spinks* [1982] 1 All ER 587, 74 Cr App Rep 263, CA, which suggest the contrary, were decided before the enactment of the Police and Criminal Evidence Act 1984 s 74(1) (see PARA 1498 ante), which renders a relevant conviction of a third party evidence against a defendant, and those cases would be decided differently now: *R v Hayter* supra at [23] per Lord Steyn.

## UPDATE

### 1549 Confession by one of two or more defendants

NOTES 3, 8--*Hayter*, cited, distinguished: *Persad v State of Trinidad and Tobago* [2007] UKPC 51, [2007] 1 WLR 2379.



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## **(19) INFERENCES FROM A DEFENDANT'S SILENCE OR NON-DISCLOSURE**

### **1550. Inferences at common law and by statute.**

At common law, a suspect or person charged with an offence has a 'right to silence' and accordingly has no duty to assist the police with their inquiries or to answer questions when interviewed<sup>1</sup>. A defendant likewise is under no obligation to testify at his own trial. By statute, however, inferences may in certain circumstances be drawn by a judge, court or jury from a defendant's failure to testify or from his failure to disclose alleged facts or answer certain types of question when interviewed<sup>2</sup>. In particular, inferences may be drawn from:

- 2256 (1) a defendant's failure when questioned under caution to mention facts later relied upon by him in court<sup>3</sup>;
- 2257 (2) a defendant's failure or refusal when questioned under caution following arrest to account for objects, substances or marks found on his person, clothing, footwear, etc, or in his possession or at the scene of his arrest<sup>4</sup>;
- 2258 (3) a defendant's failure or refusal when questioned under caution following arrest to account for his being found by a constable at a particular place at or about the time of the alleged offence<sup>5</sup>; and
- 2259 (4) a defendant's failure to testify at his trial<sup>6</sup>.

Furthermore, a defendant who is sent for trial on indictment is now required to disclose the essential elements of his case in advance of the trial by means of a defence statement<sup>7</sup>. Although a defendant cannot be compelled to comply with the relevant requirements or to present a defence at trial that is consistent with his defence statement, inferences may again be drawn from any significant failures or deficiencies in that respect<sup>8</sup>.

Even at common law, a suspect's failure to deny an allegation made in his presence may be construed as a tacit admission of guilt on his part, but only if the accusation was made in circumstances where an innocent person might have been expected to refute or deny it<sup>9</sup>. This principle remains important because it may in some cases be possible to draw such inferences at common law where no such inference could be drawn by statute.

1 The right to silence forms one part of a suspect's privilege against self-incrimination: see PARA 1476 ante.

2 Such inferences as appear proper may also be drawn where the appropriate consent to the taking of an intimate sample from a person has been refused without good cause: see the Police and Criminal Evidence Act 1984 s 62(10) (as amended); and PARA 1028 ante.

3 See the Criminal Justice and Public Order Act 1994 s 34 (as amended); and PARA 1552 post.

4 See *ibid* s 36 (as amended); and PARA 1553 post.

5 See *ibid* s 37 (as amended); and PARA 1554 post.

6 See *ibid* s 35 (as amended); and PARA 1555 post.

7 See the Criminal Procedure and Investigations Act 1996 s 5 (as amended), ss 6A, 6B, 6E (as added); and PARA 1388 ante.

8 See s 11 (as substituted); and PARA 1393 ante.

9 See PARA 1551 post.

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### **1551. Defendant's reaction to statements or accusations in his presence.**

At common law, a statement made in the presence and hearing of the defendant may (depending on the defendant's reaction to it) be admissible in evidence in criminal proceedings, not as evidence in its own right, but in order to show that by his reaction the defendant effectively accepted that statement so as to make it his own admission<sup>1</sup>, or that he reacted in some other way that may be considered incriminating<sup>2</sup>. If he accepts the statement only in part, it becomes his statement only to the extent that he accepts it<sup>3</sup>. If there is no evidence from which a jury could reasonably find that the defendant accepted the truth of any part of the statement, there can then be no logical basis for the admission of the statement, and if it has already been admitted the jury should be told to disregard it<sup>4</sup>.

Where an allegation is made against the defendant in such a way and in such circumstances that an innocent person would be expected to repudiate the accusation, and nothing is said in reply, the defendant's failure to respond may be evidence that he accepts or admits the accusation<sup>5</sup>. But where the circumstances are such that no reply can reasonably be expected it would be unfair to permit any adverse inferences to be drawn from the defendant's silence<sup>6</sup>. Where the defendant is questioned under caution by police officers, legislation now governs the circumstances in which inferences may be drawn from the defendant's failure to answer specific questions or to disclose facts later relied upon in his defence<sup>7</sup>.

If, after a detainee has been charged with or informed that he may be prosecuted for an offence, an officer wants to tell him about any written statement or interview with another person relating to such an offence, the detainee must either be handed a true copy of the written statement or the content of the interview record brought to his attention. Nothing must be done to invite any reply or comment except to: (1) caution the detainee, 'You do not have to say anything, but anything you do say may be given in evidence'; and (2) remind the detainee about his right to legal advice<sup>8</sup>.

If the detainee cannot read, the document may be read to him; and if he is a juvenile, mentally disordered or otherwise mentally vulnerable, the appropriate adult must also be given a copy, or the interview record must be brought to his attention<sup>9</sup>.

1 *R v Bromhead* (1906) 71 JP 103, CCR; *R v Firth* (1913) 8 Cr App Rep 162, CCA; *R v Christie* [1914] AC 545, sub nom *DPP v Christie* (1914) 10 Cr App Rep 141, HL; *R v Adams* (1923) 17 Cr App Rep 77, CCA; *R v Norton* [1910] 2 KB 496, 5 Cr App Rep 65, CCA. See also *Neile v Jakle* (1849) 2 Car & Kir 709 (statement made within hearing but not in presence of party); *R v Attard* (1958) 43 Cr App Rep 90 (evidence of conversation conducted through interpreter inadmissible as not made in 'presence and hearing' of defendant).

As the defendant's incriminating reaction is crucial, this rule is generally considered to be a branch of the law governing confessions and, if so, it is preserved by the Criminal Justice Act 2003 s 118(1): see PARA 1537 et seq ante.

2 *R v Christie* [1914] AC 545 at 554, sub nom *DPP v Christie* (1914) 10 Cr App Rep 141 at 155, HL, per Lord Atkinson. See also *Parkes v R* [1976] 3 All ER 380, 64 Cr App Rep 25, PC (defendant's reaction included an attempt to knife accuser).

3 *R v Christie* [1914] AC 545 at 554, sub nom *DPP v Christie* (1914) 10 Cr App Rep 141 at 155, HL, per Lord Atkinson. See also *R v Bowen* [2006] EWCA Crim 333, [2006] All ER (D) 294 (Mar). Where the evidence is admitted, the meaning to be attributed to the defendant's response is a question for the jury: *R v Black* (1922) 16 Cr App Rep 118, CCA.

4 *R v Norton* [1910] 2 KB 496, 5 Cr App Rep 65, CCA; *R v Christie* [1914] AC 545 at 554, sub nom *DPP v Christie* (1914) 10 Cr App Rep 141 at 155, HL, per Lord Atkinson. See also *R v Thompson* [1910] 1 KB 640, 4 Cr App Rep 45, CCA. It has been said that an unconvincing denial may in some circumstances be equivalent to acceptance (see *R v Christie* supra at 554 and 156 per Lord Atkinson), but contrast *R v Sat-Bhambra* (1988) 88 Cr App Rep 55, [1988] Crim LR 453, CA, and *R v Z* [2005] UKHL 22, [2005] 2 AC 467, sub nom *R v Hasan* [2005] 4 All ER 685. Where there is evidence that is capable of suggesting that the defendant accepted the truth of a statement by failing to deny it, the question whether he in fact did so (or even heard what was said) is for the jury to determine: *R v Coll* [2005] EWCA Crim 3675, [2005] All ER (D) 82 (Nov).

As to the inadmissibility of statements made in the presence of the defendant and in the course of judicial proceedings see *R v Appleby* (1821) 3 Stark 33; *Melen v Andrews* (1829) Mood & M 336; *R v Turner* (1832) 1 Mood CC 347; *Brooker v Floyd* (1866) 13 LT 803; *Wetzlar v Zachariah* (1867) 16 LT 432.

5 *Richards v Gellatly* (1872) LR 7 CP 127; *R v Cramp* (1880) 14 Cox CC 390; *Wiedemann v Walpole* [1891] 2 QB 534, CA; *R v Mitchell* (1892) 17 Cox CC 503 at 508 per Cave J; *Parkes v R* [1976] 3 All ER 380, 64 Cr App Rep 25, PC.

6 *R v Mitchell* (1892) 17 Cox CC 503 at 508 per Cave J.

7 See the Criminal Justice and Public Order Act 1994 ss 34, 36, 37, 38 (all as amended); and PARA 1552 et seq post.

8 Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 16.4.

9 Code C: para 16.4A. For the meaning of 'the appropriate adult' see PARA 940 note 9 ante. As to charging detained persons see PARA 1042 ante.

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EVIDENCE/(19) INFERENCES FROM A DEFENDANT'S SILENCE OR NON-DISCLOSURE/1552.

Defendant's failure when questioned under caution to mention facts later relied upon in court.

### **1552. Defendant's failure when questioned under caution to mention facts later relied upon in court.**

Where, in any proceedings against a person for an offence, evidence is given that the defendant at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed<sup>1</sup>, failed to mention any fact<sup>2</sup> relied on in his defence in those proceedings<sup>3</sup>, or on being charged with the offence or officially informed<sup>4</sup> that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the defendant could reasonably have been expected to mention when so questioned, charged or informed, as the case may be<sup>5</sup>, such inferences as appear proper may be drawn from the failure<sup>6</sup>.

Such inferences may be drawn:

- 2260 (1) by a judge, in deciding whether to grant an application to dismiss charges against the defendant<sup>7</sup>;
- 2261 (2) by a court, in determining whether there is a case to answer<sup>8</sup>;
- 2262 (3) by a court or jury, in determining whether the defendant is guilty of the offence charged<sup>9</sup>.

Where the defendant was at an authorised place of detention<sup>10</sup> at the time of the failure, no such inference may be drawn unless the defendant had been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed<sup>11</sup>.

Inferences may in some cases be drawn even where the defendant's failure to mention the fact in question was in accordance with the instructions of his legal adviser<sup>12</sup>, but it is appropriate to draw such inferences only where it is clear that the defendant was sheltering behind that advice, rather than merely submitting reluctantly to it or accepting it without question<sup>13</sup>. Where the defendant gives or the defence calls or elicits evidence as to the reasons for any such legal advice that was given, this may be treated as a waiver of legal professional privilege, and the defendant or his legal adviser may (if either testifies) be cross-examined as to the basis of that advice and as to any matters that were discussed between them<sup>14</sup>.

Evidence tending to establish the defendant's failure may be given before or after evidence tending to establish the fact which he is alleged to have failed to mention<sup>15</sup>.

Nothing in these provisions prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances is not admissible in evidence against him or some other person in any proceedings or class of proceedings<sup>16</sup> or prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion<sup>17</sup>.

These rules apply with some modifications to proceedings before courts-martial or other service courts<sup>18</sup>.

1 The Criminal Justice and Public Order Act 1994 s 34 (as amended) applies in relation to questioning by persons other than constables charged with the duty of investigating offences or charging offenders as it

applies in relation to questioning by constables; and 'officially informed' means informed by a constable or any such person: s 34(4). The provisions of s 34 (as amended) do not prejudice the admissibility in evidence of the silence or other reaction of the defendant in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would otherwise be admissible, or preclude the drawing of any inference from any such silence or other reaction of the defendant which could otherwise properly be drawn: s 34(5).

As to the form of caution that must be administered before inferences may be drawn under s 34 (as amended) see Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers para 10.5. Where the defendant refuses to leave his cell or enter the interview room, he may then be questioned under caution in his cell; but no inferences may properly be drawn under the Criminal Justice and Public Order Act 1994 s 34 (as amended) if he is not questioned at all: *R v Johnson* [2004] EWCA Crim 2520, [2005] All ER (D) 245 (Jan).

2 Where the defendant declines to answer questions in interview, but does nevertheless mention or disclose the fact in question by other means (eg in a prepared statement), this may prevent any inference from being drawn under the Criminal Justice and Public Order Act 1994 s 34 (as amended): *R v Ali* [2001] EWCA Crim 863, [2001] All ER (D) 16 (Apr); *R v Knight* [2003] EWCA Crim 1977, [2004] 1 WLR 340, [2003] Crim LR 799. Where the defendant produced a prepared statement in a police interview but refused to answer police questions, the judge should compare the statement with the evidence that the defendant has called or given at trial to see if there is any fact relied upon that he did not mention in his prepared statement. A specific direction is required in respect of any such fact from which the jury may be entitled to draw an inference against the defendant: *R v Turner* [2003] EWCA Crim 3108, [2004] 1 All ER 1025, [2004] 1 Cr App Rep 305.

Where the defendant merely speculates or offers a theory at trial as to a possible explanation for admitted facts, his failure to do so when first questioned cannot be the basis for the drawing of any inference under the Criminal Justice and Public Order Act 1994 s 34 (as amended): *R v Nickolson* [1999] Crim LR 61, CA; considered in *R v Webber* [2004] UKHL 01 at [22], [2004] 1 All ER 770 at [22], [2004] 1 Cr App Rep 513 at [22] per Lord Bingham of Cornhill.

3 Where a defendant calls no evidence, there will not ordinarily be any scope for the drawing of inferences under this principle (*R v Bowers* (1998) 163 JP 33, [1998] Crim LR 817, CA; *R v Moshaid* [1998] Crim LR 420, CA) but a defendant may 'rely' on a fact if that fact is suggested by his advocate and specifically and positively put in cross-examination to witnesses for the prosecution, even if those witnesses deny it and no positive evidence of it is called by the defence: *R v Webber* [2004] UKHL 01, [2004] 1 All ER 770, [2004] 1 Cr App Rep 513. If, however, the truth of the fact in question is not in dispute, it will not be appropriate for any inferences to be drawn from a defendant's initial failure to mention it: *R v Webber* supra.

If the prosecution accepts that a defendant has not relied on any facts not mentioned at the time of questioning, the judge must ordinarily direct the jury that no adverse inferences can be drawn from the defendant's silence when questioned by the police (*R v McGarry* [1998] 3 All ER 805, [1999] 1 WLR 1500, CA), but it may be sensible for the judge to raise with counsel whether such a direction is desirable or necessary (*R v Thomas (Scott)* [2002] EWCA Crim 1308; *R v Brizzalari* [2004] EWCA Crim 310, [2004] All ER (D) 325 (Feb)).

4 For the meaning of 'officially informed' see note 1 supra.

5 As to the meaning of 'in the circumstances' see *R v Argent* [1997] 2 Cr App Rep 27, [1997] Crim LR 346, CA; *R v Gill* [2001] 1 Cr App Rep 160, [2000] Crim LR 922, [2000] All ER (D) 1036, CA. What the defendant may reasonably be expected to mention must depend, in part at least, on what the police have at that stage disclosed to him. He cannot for example be expected to mention an alibi unless he has been told when (and perhaps where) the offence is supposed to have been committed. See also *R v Goodsir* [2006] EWCA Crim 852, [2006] All ER (D) 326 (Mar) (adverse inference could be drawn from defendant's silence when charged with dangerous driving, even though he was not questioned directly regarding his driving).

6 Criminal Justice and Public Order Act 1994 s 34(1). Juries may more readily understand an invitation to draw 'conclusions' rather than inferences: see Judicial Studies Board, Specimen Direction No 40. The most likely inference or conclusion may be that the fact in question is a later fabrication, but other inferences may sometimes be possible, depending on the circumstances: *R v Beckles*, *R v Montague* [1999] Crim LR 148, CA; *R v Milford* [2000] EWCA Crim 84, [2001] Crim LR 330; *R v Daniel* [1998] 2 Cr App Rep 373, [1998] Crim LR 818, CA. Another equally damaging inference might be that the defendant was unwilling to disclose eg his alibi defence until he had briefed or persuaded the necessary witnesses: cf *R v Beckles*, *R v Montague* supra.

Where it is open to a court or jury to draw such an inference, it does not follow that the court or jury must draw it. On the contrary, the jury must be directed not to do so unless satisfied that the explanation for the defendant's failure was that he then had no innocent explanation to offer at the time in relation to this aspect of the case: *Condron v United Kingdom* (2000) 31 EHRR 1, [2000] Crim LR 679, ECtHR.

Where it appears that the defendant was advised by his lawyer not to answer questions or comment at his interview, it may be harder for a court or jury to know what inferences, if any, may properly be drawn. See the text and notes 12-13 infra.

Juries should not be invited to draw inferences on the basis of circular logic (eg where 'the question whether the fact not revealed in the interview was or might have been true was the issue in the case, the resolution of which would determine the verdict': *R v Mountford* [1999] Crim LR 575, CA, per Henry LJ) but such cases will rarely arise (*R v Chenia* [2002] EWCA Crim 2345, [2004] 1 All ER 543, [2003] 2 Cr App Rep 83) and it has been doubted whether *R v Mountford* supra was itself such a case (see *R v Webber* [2004] UKHL 01 at [26], [2004] 1 All ER 770 at [26], [2004] 1 Cr App Rep 513 at [26] per Lord Bingham of Cornhill).

The mischief at which the Criminal Justice and Public Order Act 1994 s 34 (as amended) is primarily directed is the positive defence following a 'no comment' interview and/or the 'ambush' defence. Whilst s 34 (as amended) has a wider potential application than this, the Court of Appeal has counselled against the further complicating of trials and summings-up by invoking this provision unless the merits of the individual case require that that should be done: *R v Brizzalari* [2004] EWCA Crim 310 at [57], [2004] All ER (D) 325 (Feb) at [57] per Hedley LJ, giving the judgment of the court.

7 Criminal Justice and Public Order Act 1994 s 34(2)(b) (amended in relation to cases sent for trial under the Crime and Disorder Act 1998 ss 51, 51A(3)(d) (as added) as from 9 May 2005 and as from a day to be appointed for other purposes, by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 64(1), (2)(b)). Such an application is made under the Crime and Disorder Act 1998 s 52(6), Sch 3 para 2 (as amended): see PARA 1138 ante. A judge may not refuse such an application solely on an inference drawn from such a failure as is mentioned in the Criminal Justice and Public Order Act 1994 s 34(2) (as amended): s 38(4).

Until a day to be appointed, inferences may also be drawn by a magistrates' court inquiring into the offence as examining justices: s 34(2)(a) (substituted by the Criminal Procedure and Investigations Act 1996 s 44(3), (7); prospectively repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 2 para 64(1), (2)(a), Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

8 Criminal Justice and Public Order Act 1994 s 34(2)(c). See note 9 infra.

9 Ibid s 34(2)(d). A reference to an offence charged includes a reference to any other offence of which the defendant could lawfully be convicted on that charge: s 38(2). However, a person may not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in s 34(2) (as amended): s 38(3). Indeed, the balance of authority on s 34 (as amended) suggests that a jury should be directed not to draw any inferences against a defendant unless there is a case for him to answer independently of any such inference: see *R v Milford* [2000] EWCA Crim 84, [2001] Crim LR 330; *Condon v United Kingdom* (2000) 8 BHRC 290, 31 EHRR 1, ECtHR; *R v Gill* [2001] 1 Cr App Rep 160, [2000] Crim LR 922, [2000] All ER (D) 1036, CA; *R v Francom* [2001] 1 Cr App Rep 237, [2000] All ER (D) 1131, CA; *R v Bromfield* [2002] EWCA Crim 195, [2002] All ER (D) 118 (Feb); *R v Chenia* [2002] EWCA Crim 2345, [2004] 1 All ER 543, [2003] 2 Cr App Rep 83; *R v Petkar* [2003] EWCA Crim 2668, [2004] 1 Cr App Rep 270, [2003] All ER (D) 278 (Oct).

As to the particular importance of the Judicial Studies Board Specimen Direction on the Criminal Justice and Public Order Act 1994 s 34 (as amended) see *R v Beckles* [2004] EWCA Crim 2766 at [33], [2005] 1 All ER 705 at [33] per Lord Woolf CJ, giving the judgment of the court; *R v Joseph* [2004] EWCA Crim 1616, [2004] All ER (D) 93 (Jun) (see PARA 1557 post).

10 'Authorised place of detention' means a police station or any other place prescribed for the purposes of the Criminal Justice and Public Order Act 1994 s 34(2A) (as added) by order made by the Secretary of State; and the power to make such an order is exercisable by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament: s 38(2A) (added by the Youth Justice and Criminal Evidence Act 1999 s 58). At the date at which this volume states the law no place had been prescribed for these purposes.

11 Criminal Justice and Public Order Act 1994 s 34(2A) (added by the Youth Justice and Criminal Evidence Act 1999 s 58). See *Murray v United Kingdom* (1996) 22 EHRR 29, ECtHR.

12 *R v Condon and Condon* [1997] 1 WLR 827, [1997] 1 Cr App Rep 185, CA; *Condon v United Kingdom* (2000) 8 BHRC 290, 31 EHRR 1, ECtHR; *R v Knight* [2003] EWCA Crim 1977, [2004] 1 WLR 340, [2003] Crim LR 799; *R v Beckles* [2004] EWCA Crim 2766, [2005] 1 All ER 705; *R v Betts and Hall* [2001] EWCA Crim 224, [2001] 2 Cr App Rep 257; *R v Howell* [2003] EWCA Crim 01, [2005] 1 Cr App Rep 1; *R v Hoare* [2004] EWCA Crim 784, [2005] 1 WLR 1804, [2005] 1 Cr App Rep 355.

13 *R v Beckles* [2004] EWCA Crim 2766, [2005] 1 All ER 705; *R v Bresa* [2005] EWCA Crim 1414, [2006] Crim LR 179, [2005] All ER (D) 402 (May); *R v Francom* [2001] 1 Cr App Rep 237, [2000] All ER (D) 1131, CA; *R v Betts and Hall* [2001] EWCA Crim 224, [2001] 2 Cr App Rep 257. See also *R v Hoare* [2004] EWCA Crim 784 at [55], [2005] 1 WLR 1804 at [55], [2005] 1 Cr App Rep 328 at [55] per Auld LJ, giving the judgment of the court: 'The question in the end . . . is whether regardless of advice, genuinely given and genuinely accepted, an accused has remained silent not because of that advice but because he had no or no satisfactory explanation to give'.

14 Privilege is not necessarily waived where the defendant explains his failure to disclose in interview facts now relied upon in his defence by stating that he was advised by his solicitor not to answer police questions (*R v Robinson* [2003] EWCA Crim 2219, [2003] All ER (D) 479 (Jul)) but this in itself is unlikely to prevent inferences being drawn against him under the Criminal Justice and Public Order Act 1994 s 34 (as amended). If, however, the reasons for this advice are revealed, this may be construed as a waiver of privilege and may enable the prosecution to cross-examine the defendant or his solicitor concerning discussions between them: *R v Roble* [1997] Crim LR 449, CA. Evidence given at a trial within a trial may involve waiver of privilege at the trial proper: *R v Bowden* [1999] 4 All ER 43, [1999] 2 Cr App Rep 176, CA; *Condon v United Kingdom* (2000) 8 BHRC 290, 31 EHRR 1, ECtHR; *R v Loizou* [2006] EWCA Crim 1719.

15 Criminal Justice and Public Order Act 1994 s 34(3). This is subject to any directions given by the court: see s 34(3).

16 *Ibid* s 38(5). This applies to proceedings however described, and whether civil or criminal: see s 38(5). The reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise: s 38(5).

17 *Ibid* s 38(6).

18 See *ibid* s 39(1), (2) (amended by the Armed Forces Act 2001 s 38, Sch 7 Pt 1); and the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 1997, SI 1997/16 (amended by SI 2006/2326).

## UPDATE

### **1552 Defendant's failure when questioned under caution to mention facts later relied upon in court**

NOTE 6--See also *T v DPP* [2007] EWHC 1793 (Admin), (2007) 171 JP 605, DC.

NOTE 11--The protection afforded by the 1996 Act s 34(2A) involves the disapplication of the adverse inferences provisions in s 34 but does not render inadmissible the answers given by the detainee during questioning: *R v Ibrahim* [2008] EWCA Crim 880, [2008] 4 All ER 208.

NOTE 18--SI 1997/16 replaced: Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 2009, SI 2009/990.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/20.

EVIDENCE/(19) INFERENCES FROM A DEFENDANT'S SILENCE OR NON-DISCLOSURE/1553.  
Defendant's failure or refusal to account for objects, substances or marks.

### **1553. Defendant's failure or refusal to account for objects, substances or marks.**

Where: (1) a person is arrested by a constable<sup>1</sup> and there is: (a) on his person, (b) in or on his clothing or footwear, (c) otherwise in his possession, or (d) in any place in which he is at the time of his arrest<sup>2</sup>, any object, substance or mark, or there is any mark on any such object<sup>3</sup>; (2) that or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable<sup>4</sup>; (3) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark<sup>5</sup>; and (4) the person fails or refuses to do so<sup>6</sup>, then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, such inferences as appear proper<sup>7</sup> may be drawn from the failure or refusal<sup>8</sup>.

Such inferences may be drawn:

- 2263 (i) by a judge, in deciding whether to grant an application to dismiss charges against the defendant<sup>9</sup>;
- 2264 (ii) by a court, in determining whether there is a case to answer<sup>10</sup>;
- 2265 (iii) by a court or jury, in determining whether the defendant is guilty of the offence charged<sup>11</sup>.

Where the defendant was at an authorised place of detention at the time of the failure or refusal, no such inference may be drawn unless the defendant had been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed<sup>12</sup>.

No such inference may be drawn unless the defendant was told in ordinary language by the constable when making the request to account for the presence of the object, substance or mark what the effect of those provisions would be if he failed or refused to comply with the request<sup>13</sup>. However, they do not preclude the drawing of any inference from a failure or refusal of the defendant to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could otherwise<sup>14</sup> properly be drawn<sup>15</sup>.

Nothing in these provisions prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances is not admissible in evidence against him or some other person in any proceedings or class of proceedings<sup>16</sup> or prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion<sup>17</sup>.

These rules apply with some modifications to proceedings before courts-martial or other service courts<sup>18</sup>.

1 As to arrest and police powers of arrest see PARA 908 et seq ante.

2 'Place' includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever: Criminal Justice and Public Order Act 1994 s 38(1). The inferences that may be drawn on the basis of this rule (ie under s 36 (as amended)) are not applicable to cases in which objects, marks etc are found otherwise than in the circumstances or places specified (eg where the defendant's knife is found at the scene of the crime, but the defendant is arrested elsewhere).

3 Ibid s 36(1)(a). Inferences may be drawn from the condition of clothing or footwear in the same way as from a substance or mark thereon: see s 36(3).

4 Ibid s 36(1)(b). This does not mean that the constable must specify the precise terms of the offence, by specific reference to statutory provisions. Parliament did not intend anything so elaborate: *R v Compton* [2002] EWCA Crim 2835, [2002] All ER (D) 149 (Dec).

5 Criminal Justice and Public Order Act 1994 s 36(1)(c). A suitably designated investigating officer may also exercise this power: see the Police Reform Act 2002 s 38(6), Sch 4 para 23; and **POLICE** vol 36(1) (2007 Reissue) PARA 529.

6 Criminal Justice and Public Order Act 1994 s 36(1)(d).

7 It may be easier for a jury to understand an invitation to draw 'conclusions' rather than inferences in this context: see Judicial Studies Board, Specimen Direction No 41.

8 Criminal Justice and Public Order Act 1994 s 36(1). A jury must be told that it can only hold against the defendant a failure to give an explanation if sure that he had no acceptable explanation to offer: *R v Compton* [2002] EWCA Crim 2835, [2002] All ER (D) 149 (Dec). Where the defendant later does put forward an explanation and relies on this at trial, inferences may also be drawn under the Criminal Justice and Public Order Act 1994 s 34 (as amended) (see PARA 1552 ante).

In practice, any inferences drawn under s 36 (as amended) from a defendant's failure to account for objects, substances or marks will often add little to inferences that may be drawn at common law from the discovery of the objects, substances or marks themselves (and which may be drawn even in circumstances to which s 36 (as amended) has no application, or in cases where the requirements of s 36 (as amended) are not satisfied). Thus, at common law inferences may properly be drawn from the fact that the defendant was found in possession of recently stolen property or of large sums of bank notes contaminated by abnormal traces of cocaine, even if for some reason no statutory inferences may be drawn from his failure to account for such matters under the Criminal Justice and Public Order Act 1994 s 36 (as amended). In appropriate cases, it may be permissible for a court or jury to convict a defendant wholly on the basis of such evidence. The main value of s 36 (as amended) to a prosecutor is likely to be in a case where the objects, substances or marks found are not obviously incriminating, but may appear so in light of the defendant's failure or refusal to account for them when required to do so.

9 Ibid s 36(2)(b) (amended in relation to cases sent for trial under the Crime and Disorder Act 1998 ss 51, 51A(3)(d) (as added) as from 9 May 2005 and, for other purposes amended by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 64(1), (3)(b) as from a day to be appointed). Such an application is made under the Crime and Disorder Act 1998 s 52(6), Sch 3 para 2 (as amended): see PARA 1138 ante. A judge may not refuse such an application solely on an inference drawn from such a failure as is mentioned in the Criminal Justice and Public Order Act 1994 s 36(2) (as amended): s 38(4).

Until a day to be appointed, inferences may also be drawn by a magistrates' court inquiring into the offence as examining justices: s 36(2)(a) (substituted by the Criminal Procedure and Investigations Act 1996 s 44(3), (7); prospectively repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 2 para 64(1), (2)(a), Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

10 Criminal Justice and Public Order Act 1994 s 36(2)(c). See note 11 *infra*.

11 Ibid s 36(2)(d). A reference to an offence charged includes a reference to any other offence of which the defendant could lawfully be convicted on that charge: s 38(2).

A person may not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in s 36(2) (as amended): s 38(3). Indeed, the balance of authority suggests that a jury should be directed not to draw any inferences against a defendant on the basis of any inferences under ss 34-37 (as amended) unless there is a case for him to answer independently of any such inference: see the cases cited at para 1552 note 9 ante. In cases falling within s 36 (as amended) or s 37 (as amended), however, it will generally be possible for inferences (including direct inferences of guilt) to be drawn from the original facts for which the defendant has failed to account. See note 8 *supra*.

12 See *ibid* s 36(4A) (added by the Youth Justice and Criminal Evidence Act 1999 s 58(1), (3)). See *Murray v United Kingdom* (1996) 22 EHRR 29, ECtHR; and Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Annex C (see PARA 908 *et seq* ante). 'Authorised place of detention' means a police station or any other place prescribed for the purposes of the Criminal Justice and Public Order Act 1994 s 36(4A) (as added) by order made by the Secretary of State: s 38(2A) (added by the Youth Justice and Criminal Evidence Act 1999 s 58(1), (5)). At the date at which this volume states the law no place had been prescribed for these purposes.

Where it would be wrong for any adverse inference to be drawn from a defendant's failure or refusal, it may well be sensible for the judge to raise with counsel whether a positive direction not to draw any adverse inference is desirable or necessary (cf *R v Thomas (Scott)* [2002] EWCA Crim 1308; *R v Brizzalari* [2004] EWCA Crim 310, [2004] All ER (D) 325 (Feb)).

13 Criminal Justice and Public Order Act 1994 s 36(4). As to the matters that must be included in any caution given under s 36 (as amended) see Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers paras 10.10, 10.11.

14 *Ie* apart from the Criminal Justice and Public Order Act 1994 s 36 (as amended).

15 *Ibid* s 36(5).

16 *Ibid* s 38(5). This applies to proceedings however described, and whether civil or criminal: see s 38(5). The reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise: s 38(5).

17 *Ibid* s 38(6).

18 See *ibid* s 39(1), (2) (amended by the Armed Forces Act 2001 s 38, Sch 7 Pt 1); and the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 1997, SI 1997/16 (amended by SI 2006/2326).

## **UPDATE**

### **1553 Defendant's failure or refusal to account for objects, substances or marks**

NOTE 18--Criminal Justice and Public Order Act 1994 s 39(2) substituted: Armed Forces Act 2006 Sch 16 para 130. SI 1997/16 replaced: Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 2009, SI 2009/990.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/20. EVIDENCE/(19) INFERENCES FROM A DEFENDANT'S SILENCE OR NON-DISCLOSURE/1554. Defendant's failure or refusal to account for presence at a particular place etc.

**1554. Defendant's failure or refusal to account for presence at a particular place etc.**

Where: (1) a person arrested by a constable<sup>1</sup> was found by him at a place<sup>2</sup> at or about the time the offence for which he was arrested is alleged to have been committed<sup>3</sup>; (2) that or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence<sup>4</sup>; (3) the constable informs the person that he so believes, and requests him to account for that presence<sup>5</sup>; and (4) the person fails or refuses to do so<sup>6</sup>, then if, in any proceedings against the person for the offence, evidence of those matters is given, such inferences<sup>7</sup> as appear proper may be drawn from the failure or refusal<sup>8</sup>.

Such inferences may be drawn:

- 2266 (a) by a judge, in deciding whether to grant an application to dismiss charges against the defendant<sup>9</sup>;
- 2267 (b) by a court, in determining whether there is a case to answer<sup>10</sup>;
- 2268 (c) by a court or jury, in determining whether the defendant is guilty of the offence charged<sup>11</sup>.

Where the defendant was at an authorised place of detention at the time of the failure or refusal, no such inference may be drawn unless the defendant had been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed<sup>12</sup>.

No such inference may be drawn unless the defendant was told in ordinary language by the constable when making the request for the defendant to account for his presence at a particular place what the effect of these provisions would be if he failed or refused to comply with the request<sup>13</sup>. However, they do not preclude the drawing of any inference from a failure or refusal of the defendant to account for his presence at a particular place which could otherwise<sup>14</sup> properly be drawn<sup>15</sup>.

Nothing in these provisions prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances is not admissible in evidence against him or some other person in any proceedings or class of proceedings<sup>16</sup> or prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion<sup>17</sup>.

These rules apply with some modifications to proceedings before courts-martial or other service courts<sup>18</sup>.

1 As to arrest and police powers of arrest see PARA 908 et seq ante.

2 For the meaning of 'place' see PARA 1553 note 2 ante.

3 Criminal Justice and Public Order Act 1994 s 37(1)(a).

4 Ibid s 37(1)(b).

5 Ibid s 37(1)(c). A suitably designated investigating officer may also exercise this power: see the Police Reform Act 2002 s 38(6), Sch 4 para 23; and **POLICE** vol 36(1) (2007 Reissue) PARA 529.

6 Criminal Justice and Public Order Act 1994 s 37(1)(d).

7 It may be easier for a jury to understand an invitation to draw 'conclusions' rather than inferences in this context: see Judicial Studies Board, Specimen Direction No 42.

8 Criminal Justice and Public Order Act 1994 s 37(1).

9 Ibid s 37(2)(b) (amended in relation to cases sent for trial under the Crime and Disorder Act 1998 ss 51, 51A(3)(d) (as added) as from 9 May 2005 and as from a day to be appointed for other purposes, by the Criminal Justice Act 2003 s 41, Sch 3 Pt 2 para 64(1), (4)(b)). Such an application is made under the Crime and Disorder Act 1998 s 52(6), Sch 3 para 2 (as amended): see PARA 1138 ante. A judge may not refuse such an application solely on an inference drawn from such a failure as is mentioned in the Criminal Justice and Public Order Act 1994 s 37(2) (as amended): s 38(4).

Until a day to be appointed, inferences may also be drawn by a magistrates' court inquiring into the offence as examining justices: s 37(2)(a) (substituted by the Criminal Procedure and Investigations Act 1996 s 44(3), (7); prospectively repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 Pt 2 para 64(1), (4)(a), Sch 3 Pt 4). At the date at which this volume states the law no such day had been appointed.

10 Criminal Justice and Public Order Act 1994 s 37(2)(c). See note 11 infra.

11 Ibid s 37(2)(d). A reference to an offence charged includes a reference to any other offence of which the defendant could lawfully be convicted on that charge: s 38(2).

A person may not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in s 37(2) (as amended): s 38(3). Indeed, the balance of authority suggests that a jury should be directed not to draw any inferences against a defendant on the basis of any inferences under ss 34-37 (as amended) unless there is a case for him to answer independently of any such inference: see the cases cited at para 1552 note 9 ante. In cases falling within s 36 (as amended) or s 37 (as amended), however, it will generally be possible for inferences (including direct inferences of guilt) to be drawn from the original facts for which the defendant has failed to account. See PARA 1553 note 8 ante.

Where it would be wrong for any adverse inference to be drawn from a defendant's failure or refusal, it may well be sensible for the judge to raise with counsel whether a positive direction not to draw any adverse inference is desirable or necessary (cf *R v Thomas (Scott)* [2002] EWCA Crim 1308; *R v Brizzalari* [2004] EWCA Crim 310, [2004] All ER (D) 325 (Feb)).

12 Criminal Justice and Public Order Act 1994 s 37(3A) (added by the Youth Justice and Criminal Evidence Act 1999 s 58(1), (4)). See *Murray v United Kingdom* (1996) 22 EHRR 29, ECtHR; Code C: Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers Annex C (see PARA 908 et seq ante). 'Authorised place of detention' means a police station or any other place prescribed for the purposes of the Criminal Justice and Public Order Act 1994 s 37(3A) (as added) by order made by the Secretary of State: s 38(2A) (added by the Youth Justice and Criminal Evidence Act 1999 s 58(1), (5)).

13 Criminal Justice and Public Order Act 1994 s 37(3).

14 Ie apart from ibid s 37 (as amended).

15 Ibid s 37(5). Nor do they prevent inferences being drawn from the fact that he was found in that place. If any explanation is later relied upon at trial, inferences may then be drawn under s 34 (as amended) (see PARA 1552 ante).

16 Ibid s 38(5). This applies to proceedings however described, and whether civil or criminal: s 38(5). The reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise: s 38(5).

17 Ibid s 38(6).

18 See ibid s 39(1), (2) (amended by the Armed Forces Act 2001 s 38, Sch 7 Pt 1); and the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 1997, SI 1997/16 (amended by SI 2006/2326).

## UPDATE

**1554 Defendant's failure or refusal to account for presence at a particular place etc**

NOTE 18--SI 1997/16 replaced: Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 2009, SI 2009/990.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/20.

EVIDENCE/(19) INFERENCES FROM A DEFENDANT'S SILENCE OR NON-DISCLOSURE/1555.

Failure of defendant to testify at trial.

### **1555. Failure of defendant to testify at trial.**

At the trial of any person for an offence the defendant may be called as a witness only on his own application<sup>1</sup>, but unless: (1) his guilt is not in issue<sup>2</sup>; or (2) it appears to the court that his physical or mental condition makes it undesirable for him to give evidence<sup>3</sup>, if he fails to testify or, having been sworn, without good cause refuses to answer any question, the court or jury, in determining whether he is guilty of the offence charged<sup>4</sup>, may draw such inferences as appear proper from his failure or refusal<sup>5</sup>.

A defendant may not have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal<sup>6</sup>; but where there is a case for the defendant to answer on a charge of causing or allowing the death of a child or vulnerable adult<sup>7</sup>, and the court or jury is permitted, in relation to that offence, to draw such inferences as appear proper from the defendant's failure to give evidence or refusal to answer a question<sup>8</sup>, the court or jury may also draw such inferences in determining whether he is guilty of an offence of murder or manslaughter which is charged in the same proceedings<sup>9</sup> or of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter<sup>10</sup>, even if there would otherwise be no case for him to answer in relation to that offence<sup>11</sup>.

Unless:

- 2269 (a) the defendant's guilt is not in issue or it appears to the court that his physical or mental condition makes it undesirable for him to give evidence; or
- 2270 (b) at the conclusion of the evidence for the prosecution, the defendant's legal representative informs the court that the defendant will give evidence or (where he is unrepresented) the court ascertains from him that he will give evidence<sup>12</sup>,

the following procedure must be followed<sup>13</sup>. The court must, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment with a jury, in the presence of the jury) that the defendant is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question<sup>14</sup>.

These provisions do not render the defendant compellable to give evidence on his own behalf, and he is accordingly not guilty of contempt of court by reason of a failure to do so<sup>15</sup>. For these purposes, a person who, having been sworn, refuses to answer any question must be taken to do so without good cause unless he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege, or the court in the exercise of its general discretion excuses him from answering it<sup>16</sup>.

Nothing in these provisions prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer or evidence given by a person in specified circumstances is not admissible in evidence against him or some other person in any

proceedings or class of proceedings<sup>17</sup> or prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion<sup>18</sup>.

These rules apply with some modifications to proceedings before courts-martial or other service courts<sup>19</sup>.

1 Criminal Evidence Act 1898 s 1(1) (amended and renumbered by the Youth Justice and Criminal Evidence Act 1999 s 67(1), (3), Sch 4 para 1, Sch 6). See PARA 1402 ante.

2 Criminal Justice and Public Order Act 1994 s 35(1)(a) (amended by the Crime and Disorder Act 1998 ss 35(a), 120(2), Sch 10).

3 Criminal Justice and Public Order Act 1994 s 35(1)(b) (amended by the Crime and Disorder Act 1998 ss 35(a), 120(2), Sch 10). It is for the judge in a given case to determine (if necessary by conducting a trial within a trial) whether or not it is undesirable for a defendant to give evidence and appellate courts should be slow to interfere: *R v Friend* [1997] 2 All ER 1011, [1997] 1 WLR 1433, CA.

Where it would be wrong for any adverse inference to be drawn from a defendant's failure, it may well be sensible for the judge to raise with counsel whether a positive direction not to draw any adverse inference is desirable or necessary (cf *R v Thomas (Scott)* [2002] EWCA Crim 1308; *R v Brizzalari* [2004] EWCA Crim 310, [2004] All ER (D) 325 (Feb)).

4 A reference to an offence charged includes a reference to any other offence of which the defendant could lawfully be convicted on that charge: Criminal Justice and Public Order Act 1994 s 38(2).

5 Ibid s 35(3). This rule is not confined to exceptional cases and does not affect or interfere with the presumption of innocence: *R v Cowan* [1996] QB 373, [1995] 4 All ER 939, [1996] 1 Cr App Rep 1, CA; *R v Napper* [1996] Crim LR 591, (1995) 161 JP 16, CA. Where the defendant has reason to fear cross-examination on collateral issues if he should testify, that is no reason for denying the application of the Criminal Justice and Public Order Act 1994 s 35 (as amended) if he does not: *R v Becouarn* [2005] UKHL 55, [2005] 4 All ER 673. As to the form of direction that should be given to a jury where it is open to the jury to draw an inference under the Criminal Justice and Public Order Act 1994 s 35 (as amended) see *R v Cowan* supra; *R v Birchall* [1999] Crim LR 311, CA; *R v Whitehead* [2006] EWCA Crim 1486, [2006] All ER (D) 267 (Jun); Judicial Studies Board, Specimen Direction No 39.

If the defendant fails to give evidence at trial following the judge's direction to the jury that he is capable of doing so, the jury, in determining the issue of guilt, is entitled under the Criminal Justice and Public Order Act 1994 s 35(3) to draw such inferences as appear proper from that failure and can take account of medical or other evidence directed to that issue: *R v Friend* [1997] 2 All ER 1011, [1997] 1 WLR 1433, CA. The defence may invite the jury not to draw any such inference, but there must be evidence to support that invitation. If there is none, submissions by counsel are no substitute. The judge should stop defence counsel, if necessary during his or her final speech, from seeking to give such reasons in the course of a submission: See *R v Cowan* supra.

Where arraignment was prior to 10 April 1995 (as may still occasionally be the case where re-trials have been ordered) no such inferences may be drawn and the jury must be directed that the defendant's failure to testify 'does nothing to establish his guilt'.

It should be the invariable practice of counsel to record any decision of a defendant not to give evidence, signed by the defendant himself, indicating, clearly, that the decision had been made of his own free will, and that in reaching that decision he has borne in mind advice tendered by counsel: *R v Bevan* (1993) 98 Cr App Rep 354, 157 JP 1121, CA; *R v Chatroodi* [2001] EWCA Crim 585, [2001] All ER (D) 259 (Feb); *Ebanks v R* [2006] UKPC 16, [2006] 1 WLR 1827.

6 Criminal Justice and Public Order Act 1994 s 38(3). See *R v Cowan* [1996] QB 373, [1996] 1 Cr App Rep 1, CA; *R v Birchall* [1999] Crim LR 311, CA.

7 Ie contrary to the Domestic Violence, Crime and Victims Act 2004 s 5 (see PARA 107 ante).

8 Ie in accordance with the Criminal Justice and Public Order Act 1994 s 35(3): see the text to notes 4-5 supra.

9 Domestic Violence, Crime and Victims Act 2004 s 6(2)(a).

10 Ibid s 6(2)(b).

11 Ibid s 6(2). The charge of murder or manslaughter is not to be dismissed under the Crime and Disorder Act 1998 s 52(6), Sch 3 para 2 (see PARA 1138 ante) unless the offence under the Domestic Violence, Crime and



Victims Act 2004 s 5 is dismissed: s 6(3). At the defendant's trial the question whether there is a case for the defendant to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the s 5 offence, before that earlier time): s 6(4).

12 Criminal Justice and Public Order Act 1994 s 35(1). 'Legal representative' means an authorised advocate or authorised litigator, as defined by the Courts and Legal Services Act 1990 s 119(1) (see **LEGAL PROFESSIONS** vol 65 (2008) PARAS 497-498); Criminal Justice and Public Order Act 1994 s 38(1).

13 See *ibid* s 35(2) (as amended).

14 *Ibid* s 35(2) (amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 62, 63). As to the precise form of words to be used see the *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.44, CA; and Judicial Studies Board, Specimen Direction No 38. Where the defendant is legally represented, and the court is not informed that the defendant will give evidence, the representative should be asked in front of the jury: 'Have you advised your client that the stage has now been reached at which he may give evidence and, if he chooses not to do so or, having been sworn, without good cause refuses to answer any question, the jury may draw such inferences as appear proper from his failure to do so?' If the representative replies to the judge that the defendant has been so advised, then the case must proceed. If counsel replies that the defendant has not been advised of these consequences then the judge must direct the representative to advise his client of the consequences (ie, that if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any questions, it will be permissible for the jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question) and should adjourn briefly for this purpose before proceeding further.

Where the defendant is not represented the judge must at the conclusion of the evidence for the prosecution and in the presence of the jury say to him: 'You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath, and be cross-examined like any other witness. If you do not give evidence or, having been sworn, without good cause refuse to answer any question the jury may draw such inferences as appear proper. That means they may hold it against you. You may also call any witness or witnesses whom you have arranged to attend court. Afterwards you may also, if you wish, address the jury by arguing your case from the dock. But you cannot at that stage give evidence. Do you now intend to give evidence?'

Where magistrates fail to warn a defendant of the consequences of remaining silent, there is an irregularity in the proceedings, but any subsequent conviction will not be unsafe if no adverse inference was in fact drawn: *Radford v Kent County Council* (1998) 162 JP 697, DC. See also *R v Gough (Stephen)* [2001] EWCA Crim 2545, [2002] 2 Cr App Rep 121 (jury could not draw adverse inferences where defendant absconded before warning as to consequences of remaining silent).

15 Criminal Justice and Public Order Act 1994 s 35(4). This does not prevent a defendant from being in contempt if, having been sworn, he refuses without good cause to answer any question. As to the duty of the defendant to answer questions that might require him to incriminate himself in respect of the offence charged see the Criminal Evidence Act 1898 s 1(2) (as amended); and PARA 1477 ante. As to contempt of court by witnesses who refuse to answer lawful questions see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 455.

16 Criminal Justice and Public Order Act 1994 s 35(5). As to privilege see PARA 1474 et seq ante.

17 *Ibid* s 38(5). This applies to proceedings however described, and whether civil or criminal: s 38(5). The reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise: s 38(5).

18 *Ibid* s 38(6).

19 See *ibid* s 39(1), (2) (amended by the Armed Forces Act 2001 s 38, Sch 7 Pt 1); and the Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 1997, SI 1997/16 (amended by SI 2006/2326).

## UPDATE

### 1555 Failure of defendant to testify at trial

NOTES 3, 5--Difficulties that defendant has in giving evidence are matters to be taken into account by judge in assessing reliability of his evidence: *R v Tabbakh* [2009] EWCA Crim 464, (2009) 173 JP 201.

NOTE 12--'Legal representative' now means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act) (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 512): Criminal Justice and Public Order Act 1994 s 38(1) (definition amended by Legal Services Act 2007 Sch 21 para 116).

NOTE 19--SI 1997/16 replaced: Criminal Justice and Public Order Act 1994 (Application to the Armed Forces) Order 2009, SI 2009/990.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/20. EVIDENCE/(19) INFERENCES FROM A DEFENDANT'S SILENCE OR NON-DISCLOSURE/1556. Failure to call spouse or other possible witnesses.

**1556. Failure to call spouse or other possible witnesses.**

The failure of the spouse or civil partner of a defendant to give evidence in the proceedings must not be made the subject of any comment by the prosecution<sup>1</sup>, but breach of the prohibition will not necessarily lead to the quashing of a conviction<sup>2</sup>.

1 Police and Criminal Evidence Act 1984 s 80A (added by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 paras 12, 14; and amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 98). See also *R v Naudeer* [1984] 3 All ER 1036, 80 Cr App Rep 9, CA. The trial judge is not prohibited from commenting (*R v Gallagher* [1974] 3 All ER 118, 59 Cr App Rep 239, CA), but should be circumspect about doing so (*R v Naudeer* *supra*).

2 *R v Hunter* [1969] Crim LR 262, CA; and see *R v Dickman* (1910) 5 Cr App Rep 135, CCA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/20. EVIDENCE/(19) INFERENCES FROM A DEFENDANT'S SILENCE OR NON-DISCLOSURE/1557. Direction as to defendant's failures.

### **1557. Direction as to defendant's failures.**

The judge must in his summing up include where appropriate directions as to what inferences, if any, may be drawn by the jury in respect of certain failures or defaults by the defendant, namely: (1) total or partial failure to testify in his defence<sup>1</sup>; (2) failure to mention, when questioned under caution by a constable or charged, facts later relied upon in his defence<sup>2</sup>; (3) failure or refusal, when questioned under caution following arrest by a constable, to account for objects, substances or marks (including marks on objects) found on him or on his clothing or footwear or otherwise in his possession or at any place where he was at the time of his arrest<sup>3</sup>; (4) failure or refusal, when found at a place at or about the time of the alleged offence, arrested by a constable and questioned under caution in respect of that offence, to account for his presence at that place<sup>4</sup>; (5) failure to call particular witnesses in support of the defence<sup>5</sup>; and (6) failure to comply with statutory pre-trial disclosure requirements, or to put forward a defence consistent with the one disclosed<sup>6</sup>. Guidance as to the form of such directions is provided in Specimen Directions issued by the Judicial Studies Board<sup>7</sup>.

1 See the Criminal Justice and Public Order Act 1994 s 35 (as amended); and PARA 1555 ante.

2 See *ibid* s 34 (as amended); and PARA 1552 ante.

3 See *ibid* s 36 (as amended); and PARA 1553 ante.

4 See *ibid* s 37 (as amended); and PARA 1554 ante.

5 See PARA 1556 ante.

6 See the Criminal Procedure and Investigations Act 1996 s 11 (as substituted); and PARA 1393 ante.

7 As to the development and importance of the Specimen Directions in this area (especially in respect of the Criminal Justice and Public Order Act 1994 s 34 (as amended)) see *R v Beckles* [2004] EWCA Crim 2766 at [33], [2005] 1 All ER 705 at [33] per Lord Woolf CJ, giving the judgment of the court; see also *R v Joseph* [2004] EWCA Crim 1616 at [8], [2004] All ER (D) 93 (Jun) at [8] per Buxton LJ, giving the judgment of the court: 'Normally this Court will approach those [specimen] directions, very valuable though they are, in a spirit of flexibility, because they are indeed intended to be specimens and not straitjackets for a trial judge. But the s 34 direction has to be treated with more care and more literally than many of the other directions because it has been drawn up specifically to accommodate s 34 to this country's obligations in international law and under the Human Rights Act 1998 in regard to the European Convention on Human Rights'. See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (commonly referred to as the European Convention on Human Rights and enshrined in the Human Rights Act 1998 Sch 1: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(1) SENTENCING PRINCIPLES

## **21. SENTENCE**

### **(1) SENTENCING PRINCIPLES**

#### **UPDATE**

#### **1558-1582 Sentencing principles**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 1 et seq, 615 et seq.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(2) CUSTODIAL SENTENCES

## **(2) CUSTODIAL SENTENCES**

### **UPDATE**

#### **1583-1633 Custodial sentences**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 67 et seq.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(3) COMMUNITY SENTENCES

### **(3) COMMUNITY SENTENCES**

#### **UPDATE**

#### **1634-1672 Community sentences**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163 et seq.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(4) FINES AND RECOGNISANCES

#### **(4) FINES AND RECOGNISANCES**

##### **UPDATE**

##### **1673-1684 Fines and recognisances**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 139 et seq.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(5) COMPENSATION ORDERS

## **(5) COMPENSATION ORDERS**

### **UPDATE**

#### **1685-1688 Compensation orders**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 375 et seq.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(6) DISCHARGE

## **(6) DISCHARGE**

### **UPDATE**

#### **1689-1692 Discharge**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 40-43.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(7) MENTALLY DISORDERED OFFENDERS

## **(7) MENTALLY DISORDERED OFFENDERS**

### **UPDATE**

#### **1693-1700 Mentally disordered offenders**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332-342.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.

SENTENCE/(8) YOUNG OFFENDERS/(i) In general/1702. Local provision of youth justice services.

## **(8) YOUNG OFFENDERS**

### **(i) In general**

#### **UPDATE**

#### **1701 In general**

Material relating to this paragraph has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010).

#### **1702. Local provision of youth justice services.**

It is the duty of each local authority<sup>1</sup>, acting in co-operation with the persons and bodies mentioned below, to secure that, to such extent as is appropriate for its area, all youth justice services are available there<sup>2</sup>. It is the duty of every chief officer of police<sup>3</sup> or police authority<sup>4</sup> any part of whose police area<sup>5</sup> lies within the local authority's area<sup>6</sup>, and every local probation board, strategic health authority, health authority or primary care trust any part of whose area lies within that area<sup>7</sup>, to co-operate in the discharge by the local authority of this duty<sup>8</sup>.

The local authority and every such person or body has power to make payments towards expenditure incurred in the provision of youth justice services either by making the payments directly<sup>9</sup> or by contributing to a fund, established and maintained by the local authority, out of which the payments may be made<sup>10</sup>.

'Youth justice services' means any of the following:

- 2271 (1) the provision of persons to act as appropriate adults to safeguard the interests of children and young persons<sup>11</sup> detained or questioned by police officers<sup>12</sup>;
- 2272 (2) the assessment of children and young persons, and the provision of rehabilitation programmes for those who have been warned<sup>13</sup>;
- 2273 (3) the provision of support for children and young persons remanded or committed on bail while awaiting trial or sentence<sup>14</sup>;
- 2274 (4) the placement in local authority accommodation of children and young persons remanded or committed to such accommodation<sup>15</sup>;
- 2275 (5) the provision of reports or other information required by courts in criminal proceedings against children and young persons<sup>16</sup>;
- 2276 (6) the performance by youth offending teams<sup>17</sup> and members of such teams of specified functions<sup>18</sup>;
- 2277 (7) the provision of persons to act as responsible officers in relation to individual support orders<sup>19</sup>, parenting orders<sup>20</sup>, child safety orders<sup>21</sup>, reparation orders<sup>22</sup> and action plan orders<sup>23</sup>;
- 2278 (8) the supervision of young persons sentenced to a community order<sup>24</sup>;
- 2279 (9) the supervision of children and young persons sentenced to a detention and training order<sup>25</sup> or a supervision order<sup>26</sup>;
- 2280 (10) the post-release supervision of children and young persons<sup>27</sup>;

- 2281 (11) the performance of functions<sup>28</sup> by such persons as may be authorised<sup>29</sup> by the Secretary of State<sup>30</sup>; and  
 2282 (12) the implementation of referral orders<sup>31</sup>.

The Secretary of State may by order amend the definition of 'youth justice services' by extending, restricting or otherwise altering it<sup>32</sup>.

In carrying out any of its duties under these provisions, a local authority, a police authority, a local probation board, a strategic health authority, a health authority or a primary care trust must act in accordance with any guidance given by the Secretary of State<sup>33</sup>.

1 'Local authority', in relation to England, means a county council, a district council whose district does not form part of an area that has a county council, a London borough council or the Common Council of the City of London; and, in relation to Wales, means a county council or a county borough council: Crime and Disorder Act 1998 s 42(1). For these purposes, the Isles of Scilly form part of the county of Cornwall, and the Inner Temple and the Middle Temple form part of the City of London: s 42(2). As to counties and districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 24 et seq. As to counties and county boroughs in Wales and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 37 et seq. As to the London boroughs and their councils see LONDON GOVERNMENT vol 29(2) (Reissue) PARAS 5, 29-30, 35 et seq. As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq. As to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

2 Ibid s 38(1).

3 'Chief officer of police' has the meaning given by the Police Act 1996 s 101(1) (see POLICE vol 36(1) (2007 Reissue) PARA 105): Crime and Disorder Act 1998 s 42(1).

4 'Police authority' has the meaning given by the Police Act 1996 s 101(1) (see POLICE vol 36(1) (2007 Reissue) PARA 139): Crime and Disorder Act 1998 s 42(1).

5 For the meaning of 'police area' see the Police Act 1996 s 1(2); and POLICE vol 36(1) (2007 Reissue) PARA 136.

6 Crime and Disorder Act 1998 s 38(2)(a).

7 Ibid s 38(2)(b) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 paras 150, 151; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 35(1), (3); and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, reg 4, Sch 1 para 25(1), (2)).

8 Crime and Disorder Act 1998 s 38(2). For the meaning of 'local probation board' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737. As to the health service bodies mentioned in the text see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

9 Ibid s 38(3)(a).

10 Ibid s 38(3)(b).

11 For the meanings of 'child' and 'young person' in the Crime and Disorder Act 1998 see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 10 note 5.

12 Ibid s 38(4)(a).

13 Ibid s 38(4)(b). The reference in the text to the assessment of children and young persons and the provision of rehabilitation programmes for those who have been warned is a reference to the assessment and the provision of such programmes for the purposes of s 66(2) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1236).

14 Ibid s 38(4)(c).

15 Ibid s 38(4)(d). The reference in the text to children and young persons remanded or committed to local authority accommodation is a reference to the remand or committal of such children and young persons under the Children and Young Persons Act 1969 s 23 (as substituted and amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1247-1253).

16 Crime and Disorder Act 1998 s 38(4)(e).

17 See PARA 1703 post.

18 Crime and Disorder Act 1998 s 38(4)(ee) (added by the Anti-social Behaviour Act 2003 s 29(2)). The 'specified functions' are those specified under the Anti-social Behaviour Act 2003 ss 25-27 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1312-1318, 1327-1334).

19 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 309 et seq.

20 See CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1319-1322.

21 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 625.

22 See CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1308.

23 Crime and Disorder Act 1998 s 38(4)(f) (amended by the Criminal Justice Act 2003 s 323(1), (5)). As to action plan orders see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARAS 1365-1366.

24 Crime and Disorder Act 1998 s 38(4)(g) (amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 87, 89(1), (2)). The reference in the text to a community order is a reference to an order under the Crime and Disorder Act 1998 s 177 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163).

The amendment of s 38(4)(g) is of no effect in relation to an offence committed before 4 April 2005: Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 2 para 5(1), (2). In relation to such an offence the Crime and Disorder Act 1998 s 38(4)(g) refers to a probation order, a community service order or a combination order.

25 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 89 et seq.

26 Crime and Disorder Act 1998 s 38(4)(h). As to supervision orders see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1340 et seq; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 250 et seq.

27 Ibid s 38(4)(i) (amended by the Criminal Justice Act 2003 s 332, Sch 32 paras 87, 89(1), (3), Sch 37 Pt 7). The reference in the text to the post-release supervision of children and young persons is a reference to the post-release supervision of children and young persons under the Crime (Sentences) Act 1997 s 31 (see PRISONS vol 36(2) (Reissue) PARA 627) or the Criminal Justice Act 2003 s 250 (see PRISONS).

28 Ie under the Powers of Criminal Courts (Sentencing) Act 2000 s 102(1) (detention and training in secure accommodation): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 91.

29 Ie authorised under ibid s 102(1).

30 Crime and Disorder Act 1998 s 38(4)(j) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 197(a)).

31 Crime and Disorder Act 1998 s 38(4)(k) (added by the Youth Justice and Criminal Evidence Act 1999 s 67, Sch 4 paras 25, 28; and amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 197(b)). As to referral orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 344 et seq.

32 Crime and Disorder Act 1998 s 38(5). No order under s 38(5) may be made unless a draft of the order has been laid before and approved by a resolution of each House of Parliament: s 114(3) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 199). As to the making of orders under the Crime and Disorder Act 1998 generally see PARA 614 note 6 ante. At the date at which this volume states the law no order had been made under s 38(5).

33 Ibid s 42(3) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 150, 151; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, Sch 1 para 35(1), (6); and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, Sch 1 para 25(1), (5)).

## UPDATE

### 1702 Local provision of youth justice services

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTES 6-8--1998 Act s 38(2)(aa), (ab) added: Offender Management Act 2007 Sch 3 para 3(2).

TEXT AND NOTE 7--1998 Act s 38(2)(b) further amended: References to Health Authorities Order 2007, SI 2007/961.

TEXT AND NOTES 12-31--1998 Act s 38(4)(aa), (ba), (bb) added: Criminal Justice and Immigration Act 2008 Sch 26 para 34 (partly in force: SI 2009/2780).

TEXT AND NOTE 23--1998 Act s 38(4)(f) further amended, s 38(4)(fa), (fb) added: Criminal Justice and Immigration Act 2008 Sch 4 para 49(a), (b).

TEXT AND NOTE 24--1998 Act s 38(4)(g) repealed: Criminal Justice and Immigration Act 2008 Sch 4 para 49(c), Sch 28 Pt 1.

TEXT AND NOTE 26--1998 Act s 38(4)(h) amended: Armed Forces Act 2006 Sch 16 para 153; Criminal Justice and Immigration Act 2008 Sch 4 para 49(d), Sch 28 Pt 1.

NOTE 32--1998 Act s 114(3) further amended, s 114(3A) added: Criminal Justice and Immigration Act 2008 Sch 9 para 4.

TEXT AND NOTE 33--1998 Act s 42(3) further amended: SI 2007/961.

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### **1703. Youth offending teams.**

It is the duty of each local authority<sup>1</sup>, acting in co-operation with the persons and bodies mentioned below, to establish for its area one or more youth offending teams<sup>2</sup>. Two (or more) local authorities acting together may establish one or more youth offending teams for both (or all) their areas<sup>3</sup>. It is the duty of every chief officer of police<sup>4</sup> any part of whose police area lies within the local authority's area<sup>5</sup>, and every local probation board, strategic health authority, health authority or primary care trust any part of whose area lies within that area<sup>6</sup>, to co-operate in the discharge by the local authority of this duty<sup>7</sup>.

A youth offending team must include at least one of each of the following:

- 2283 (1) an officer of a local probation board<sup>8</sup>;
- 2284 (2) a social worker of a local authority<sup>9</sup>;
- 2285 (3) a police officer<sup>10</sup>;
- 2286 (4) a person nominated by a primary care trust or health authority any part of whose area lies within the local authority's area<sup>11</sup>; and
- 2287 (5) a person nominated by the chief education officer appointed<sup>12</sup> by the local authority<sup>13</sup>.

A youth offending team may also include such other persons as the local authority thinks appropriate after consulting the persons and bodies mentioned above<sup>14</sup>.

It is the duty of the youth offending team or teams established by a particular local authority to co-ordinate the provision of youth justice services for all those in the authority's area who need them<sup>15</sup> and to carry out such functions as are assigned to the team or teams in the youth justice plan formulated<sup>16</sup> by the authority<sup>17</sup>.

In carrying out any of its duties under these provisions, a local authority, a local probation board, a strategic health authority, a health authority or a primary care trust must act in accordance with any guidance given by the Secretary of State<sup>18</sup>.

1 For the meaning of 'local authority' see PARA 1702 note 1 ante.

2 Crime and Disorder Act 1998 s 39(1).

3 Ibid s 39(2). Where they do so, any reference in s 39(2)-(7) (see the text and notes 4-17 infra) (except s 39(4)(b)) to, or to the area of, the local authority or a particular local authority is to be construed accordingly (s 39(2)(a)); and the reference in s 39(4)(b) (see note 7 infra) to the local authority is to be construed as a reference to one of the authorities (s 39(2)(b)).

4 As to the meaning of 'chief officer of police' see PARA 1702 note 3 ante.

5 Crime and Disorder Act 1998 s 39(3)(a).

6 Ibid s 39(3)(b) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 paras 150, 151; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 35(1), (4); and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, reg 4, Sch 1 para 25(1), (3)(a)).



7 Crime and Disorder Act 1998 s 39(3) (as amended: see note 6 supra). The local authority and every person or body mentioned in s 39(3) (as amended) has power to make payments towards expenditure incurred by, or for purposes connected with, youth offending teams by making the payments directly (s 39(4)(a)) or by contributing to a fund, established and maintained by the local authority, out of which the payments may be made (s 39(4)(b)). For the meaning of 'local probation board' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737. As to the health service bodies mentioned in the text see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

8 Ibid s 39(5)(a) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 para 4(1)(a), (2)).

9 Crime and Disorder Act 1998 s 39(5)(b) (amended by the Children Act 2004 s 69, Sch 5 Pt 4). As from a day to be appointed it is instead provided that where the local authority is in England, a youth offending team must include at least one person with experience of social work in relation to children nominated by the director of children's services appointed under the Children Act 2004 s 18 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 190) by the local authority (Crime and Disorder Act 1998 s 39(5)(aa) (prospectively added by the Children Act 2004 s 18(9), (10), Sch 2 para 5(1), (3)(a))), and that where the local authority is in Wales, a youth offending team must include at least one social worker of the local authority (Crime and Disorder Act 1998 s 39(5)(b) (as so amended; prospectively further amended by the Children Act 2004 Sch 2 para 5(3)(b))). At the date at which this volume states the law no such day had been appointed.

10 Crime and Disorder Act 1998 s 39(5)(c).

11 Ibid s 39(5)(d) (amended by the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, Sch 1 para 25(1), (3)(b)).

12 Ie under the Education Act 1996 s 532 (see EDUCATION vol 15(1) (2006 Reissue) PARA 51).

13 Crime and Disorder Act 1998 s 39(5)(e). As from a day to be appointed it is instead provided that where the local authority is in England, a youth offending team must include at least one person with experience in education nominated by the director of children's services appointed under the Children Act 2004 s 18 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 190) by the local authority (Crime and Disorder Act 1998 s 39(5)(da) (prospectively added by the Children Act 2004 Sch 2 para 5(1), (3)(c))), and that where the local authority is in Wales, a youth offending team must include at least one person nominated by the chief education officer appointed under the Education Act 1996 s 532 by the local authority (Crime and Disorder Act 1998 s 39(5)(e) (prospectively amended by the Children Act 2004 Sch 2 para 5(1), (3)(d))). At the date at which this volume states the law no such day had been appointed.

14 Ie those listed in the Crime and Disorder Act 1998 s 39(3) (see the text and notes 4-6 supra): s 39(6).

15 Ibid s 39(7)(a).

16 Ie under ibid s 40(1) (see PARA 1704 post).

17 Ibid s 39(7)(b).

18 Ibid s 42(3) (amended by the Criminal Justice and Court Services Act 2000 Sch 7 paras 150, 151; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, Sch 1 para 35(1), (6); and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, Sch 1 para 25(1), (5)). As to the health service bodies mentioned in the text see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

## UPDATE

### 1703 Youth offending teams

TEXT AND NOTES 5-8--1998 Act s 39(3)(aa), (ab) added, s 39(5)(a) further amended: Offender Management Act 2007 Sch 3 para 3(3).

TEXT AND NOTE 6--1998 Act s 39(3)(b) further amended: References to Health Authorities Order 2007, SI 2007/961.

TEXT AND NOTE 11--1998 Act s 39(5)(d) further amended: SI 2007/961.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21. SENTENCE/(8) YOUNG OFFENDERS/(i) In general/1704. Youth justice plans.

#### **1704. Youth justice plans.**

It is the duty of each local authority<sup>1</sup>, after consultation with the relevant persons and bodies<sup>2</sup>, to formulate and implement for each year a youth justice plan setting out how youth justice services<sup>3</sup> in its area are to be provided and funded<sup>4</sup> and how the youth offending team or teams<sup>5</sup> established by it (whether alone or jointly with one or more other local authorities) are to be composed and funded, how they are to operate, and what functions they are to carry out<sup>6</sup>. The functions assigned to a youth offending team may include, in particular, functions relating to a local authority's duty<sup>7</sup> to take reasonable steps designed to encourage children and young persons not to commit offences<sup>8</sup>. A local authority must submit its youth justice plan to the Youth Justice Board<sup>9</sup>, and must publish it in such manner and by such date as the Secretary of State may direct<sup>10</sup>.

In carrying out any of its duties under these provisions, a local authority must act in accordance with any guidance given by the Secretary of State<sup>11</sup>.

1 For the meaning of 'local authority' see PARA 1702 note 1 ante.

2 Ie the persons and bodies mentioned in the Crime and Disorder Act 1998 s 38(2) (see PARA 1702 ante) and, where the local authority is a county council, any district councils whose districts form part of its area: s 40(2).

3 For the meaning of 'youth justice services' see PARA 1702 ante.

4 Crime and Disorder Act 1998 s 40(1)(a).

5 See PARA 1703 ante.

6 Crime and Disorder Act 1998 s 40(1)(b).

7 Ie under the Children Act 1989 Sch 2 para 7(b) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 846).

8 Crime and Disorder Act 1998 s 40(3).

9 See PARA 1705 post.

10 Crime and Disorder Act 1998 s 40(4).

11 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 10 note 6.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21. SENTENCE/(8) YOUNG OFFENDERS/(i) In general/1705. Youth Justice Board.

### **1705. Youth Justice Board.**

There is a body corporate known as the Youth Justice Board for England and Wales<sup>1</sup>, consisting of 10, 11 or 12 members appointed by the Secretary of State<sup>2</sup>, one of whom is appointed as its chairman<sup>3</sup>, who include persons appearing to the Secretary of State to have extensive recent experience of the youth justice system<sup>4</sup>.

The Board has the following functions:

- 2288 (1) to monitor the operation of the youth justice system and the provision of youth justice services<sup>5</sup>;
- 2289 (2) to advise the Secretary of State on: (a) the operation of that system and the provision of such services<sup>6</sup>; (b) how the principal aim of that system might most effectively be pursued<sup>7</sup>; (c) the content of any national standards he may see fit to set with respect to the provision of such services, or the accommodation in which children and young persons<sup>8</sup> are kept in custody<sup>9</sup>; and (d) the steps that might be taken to prevent offending by children and young persons<sup>10</sup>;
- 2290 (3) to monitor the extent to which that aim is being achieved and any such standards met<sup>11</sup>;
- 2291 (4) for the purposes of heads (1) to (3) above, to obtain information from relevant authorities<sup>12</sup>;
- 2292 (5) to publish information so obtained<sup>13</sup>;
- 2293 (6) to identify, to make known and to promote good practice in: (a) the operation of the youth justice system and the provision of youth justice services<sup>14</sup>; (b) the prevention of offending by children and young persons<sup>15</sup>; and (c) working with children and young persons who are or are at risk of becoming offenders<sup>16</sup>;
- 2294 (7) to make grants, with the approval of the Secretary of State, to local authorities or other bodies for them to develop such practice, or to commission research in connection with such practice<sup>17</sup>;
- 2295 (8) itself to commission research in connection with such practice<sup>18</sup>;
- 2296 (9) to enter into agreements<sup>19</sup> for the provision of secure accommodation<sup>20</sup> for the purpose of detaining certain persons<sup>21</sup> or agreements for the provision of other accommodation<sup>22</sup> for the purpose of detaining certain persons<sup>23</sup>;
- 2297 (10) to facilitate arrangements between the Secretary of State and any person providing secure accommodation<sup>24</sup> to be used for detaining a person in accordance with a statutory determination<sup>25</sup> or accommodation to be used for detaining a person in accordance with a direction<sup>26</sup> by the Secretary of State<sup>27</sup>;
- 2298 (11) to offer assistance to local authorities<sup>28</sup> in discharging their duty<sup>29</sup> to provide secure accommodation<sup>30</sup>; and
- 2299 (12) annually to assess future demand for secure accommodation for remanded and sentenced children and young persons<sup>31</sup>, to prepare a plan setting out how it intends to exercise, in the following three years, the functions described in heads (10) and (11) above, and any function for the time being exercisable by the Board concurrently with the Secretary of State<sup>32</sup> which relates to securing the provision of such accommodation<sup>33</sup>, and to submit the plan to the Secretary of State for approval<sup>34</sup>.

The Secretary of State may by order<sup>35</sup> amend this list of functions so as to add to, subtract from or alter any of the Board's functions for the time being specified<sup>36</sup> or provide that any function of his which is exercisable in relation to the youth justice system is exercisable concurrently with the Board<sup>37</sup>.

A relevant authority<sup>38</sup> must furnish to the Board any information required for the purposes of head (1), (2) or (3) above<sup>39</sup>; and, whenever so required by the Board, must submit to it a report on such matters connected with the discharge of its duties as may be specified in the requirement<sup>40</sup>.

In carrying out its functions, the Board must comply with any directions given by the Secretary of State and act in accordance with any guidance given by him<sup>41</sup>.

1 Crime and Disorder Act 1998 s 41(1). The Board is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown; and the Board's property must not be regarded as property of, or held on behalf of, the Crown: s 41(2).

2 Ibid s 41(3).

3 Ibid s 41(11), Sch 2 para 1.

4 Ibid s 41(4). For the meaning of 'youth justice system' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 10 note 4. As to membership of the Board see further Sch 2.

5 Ibid s 41(5)(a). For the meaning of 'youth justice services' see PARA 1702 ante.

6 Ibid s 41(5)(b)(i).

7 Ibid s 41(5)(b)(ii).

8 For the meanings of 'child' and 'young person' in the Crime and Disorder Act 1998 see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 10 note 5.

9 Ibid s 41(5)(b)(iii).

10 Ibid s 41(5)(b)(iv).

11 Ibid s 41(5)(c).

12 Ibid s 41(5)(d).

13 Ibid s 41(5)(e).

14 Ibid s 41(5)(f)(i).

15 Ibid s 41(5)(f)(ii).

16 Ibid s 41(5)(f)(iii).

17 Ibid s 41(5)(g) (s 41(5)(g) amended, and s 41(5)(i)-(l) added, by the Youth Justice Board for England and Wales Order 2000, SI 2000/1160, art 3).

18 Crime and Disorder Act 1998 s 41(5)(h).

19 No agreement may be made in relation to accommodation for persons who have attained the age of 18 unless it appears to the Board that it is expedient to enter into such an agreement for the operation of the youth justice system: ibid s 41(5)(i) (as added: see note 17 supra).

20 Ie within the meaning of ibid s 75(7) (repealed).

21 Ie persons in respect of whom a detention and training order is made under ibid s 73 (repealed: see now the Powers of Criminal Courts (Sentencing) Act 2000 ss 100, 101 (as amended); paras 1603-1604 ante; and PRISONS vol 36(2) (Reissue) PARA 628) or an order is made under the Crime and Disorder Act 1998 s 77(3)(a) (repealed: see now the Powers of Criminal Courts (Sentencing) Act 2000 s 104(3)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 93) or the Crime and Disorder Act 1998 s 78(2) (repealed: see now

the Powers of Criminal Courts (Sentencing) Act 2000 s 105(2); and PRISONS vol 36(2) (Reissue) PARA 656): Crime and Disorder Act 1998 s 41(5)(i)(i) (as added: see note 17 supra).

22 le:

142 (1) accommodation which is or may be used for the purpose of detaining persons sentenced under the Children and Young Persons Act 1933 s 53(1) or s 53(3) (repealed: see now the Powers of Criminal Courts (Sentencing) Act 2000 ss 90-92; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 78, 81) (Crime and Disorder Act 1998 s 41(5)(i)(ii) (as added: see note 17 supra));

143 (2) accommodation which is or may be used for the purpose of detaining persons dealt with under the Children and Young Persons Act 1969 s 23(4)(c) as s 23 has effect in relation to persons described in the Crime and Disorder Act 1998 s 98(1) (ie 15-year-old or 16-year-old boys who are not of a description prescribed for the purposes of the Children and Young Persons Act 1969 s 23(5) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1253)) (Crime and Disorder Act 1998 s 41(5)(i)(iii) (as so added));

144 (3) accommodation which is or may be used for the purpose of detaining persons who are under the age of 18 when remanded in custody under the Magistrates' Courts Act 1980 s 128 (as amended) (see PARA 1144 ante) (Crime and Disorder Act 1998 s 41(5)(i)(iv) (as so added));

145 (4) accommodation which is or may be used for the purpose of detaining persons sentenced when under the age of 18 and before 1 April 2000 to detention in a young offender institution under the Criminal Justice Act 1982 s 1A (repealed: see now the Powers of Criminal Courts (Sentencing) Act 2000 s 96 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 85) (Crime and Disorder Act 1998 s 41(5)(i)(v) (as so added)); and

146 (5) accommodation which is or may be used for the purpose of detaining persons subject to secure training orders made before 1 April 2000 under the Criminal Justice and Public Order Act 1994 s 1 (repealed) (Crime and Disorder Act 1998 s 41(5)(i)(vi) (as so added)).

23 Ibid s 41(5)(i) (as added: see note 17 supra).

24 le within the meaning of ibid s 75(7) (repealed).

25 le under ibid s 75(1), s 77(3)(a) or s 78(2) (all repealed).

26 le under the Children and Young Persons Act 1933 s 53(1)(a) or s 53(3)(a) (repealed: see now the Powers of Criminal Courts (Sentencing) Act 2000 s 92(1)(a); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 78).

27 Crime and Disorder Act 1998 s 41(5)(j).

28 For the meaning of 'local authority' see PARA 1702 note 1 ante.

29 le under the Criminal Justice Act 1991 s 61 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1248), whether by acting as the agent of a local authority or facilitating arrangements under s 61(2), or otherwise.

30 Crime and Disorder Act 1998 s 41(5)(k).

31 Ibid s 41(5)(l)(i).

32 le by virtue of ibid s 41(6)(b) (see the text and note 37 infra).

33 Ibid s 41(5)(l)(ii).

34 Ibid s 41(5)(l)(iii).

35 As to the making of orders under the Crime and Disorder Act 1998 generally see PARA 614 note 6 ante. No order under s 41(6) may be made unless a draft of the order has been laid before and approved by a resolution of each House of Parliament: s 114(3) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 199).

36 Crime and Disorder Act 1998 s 41(6)(a).

37 Ibid s 41(6)(b). As to functions of the Board exercisable concurrently with the Secretary of State see the Youth Justice Board for England and Wales Order 2000, SI 2000/1160.

38 'Relevant authority' means a local authority, a chief officer of police, a police authority, a local probation board, a strategic health authority, a health authority and a primary care trust: Crime and Disorder Act 1998 s 41(10) (amended by the Criminal Justice and Court Services Act 2000 s 74, Sch 7 paras 150, 151; the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 35(1), (5); and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, reg 4, Sch 1 para 25(1), (4)). As to the meanings of 'chief officer of police' and 'police authority' see PARA 1702 notes 3, 4 ante. For the meaning of 'local probation board' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737. As to the health service bodies mentioned above see HEALTH SERVICES vol 54 (2008) PARA 75 et seq.

39 Crime and Disorder Act 1998 s 41(8)(a).

40 Ibid s 41(8)(b). Such a requirement may specify the form in which a report is to be given: s 41(8). The Board may arrange, or require the relevant authority to arrange, for such a report to be published in such manner as appears to the Board to be appropriate: s 41(9).

41 Ibid s 41(7).

## **UPDATE**

### **1705 Youth Justice Board**

TEXT AND NOTES 5-37--1998 Act s 41(5)(ja), (6A) added: Offender Management Act 2007 s 32.

NOTE 21--2000 Act ss 104(3)(a), 105(2) amended: 2007 Act s 34(3), (4).

TEXT AND NOTES 22, 23, 27--1998 Act s 41(5)(i), (j) amended: Armed Forces Act 2006 Sch 16 para 154; 2007 Act Sch 3 para 16.

TEXT AND NOTE 31--1998 Act s 41(5)(l) amended: 2007 Act Sch 3 para 16.

NOTE 35--1998 Act s 114(3) further amended, s 114(3A) added: Criminal Justice and Immigration Act 2008 Sch 9 para 4.

NOTE 37--SI 2000/1160 amended: SI 2008/3155.

NOTE 38--1998 Act s 41(10) further amended: 2007 Act Sch 3 para 3(4); References to Health Authorities Order 2007, SI 2007/961.

## **UPDATE**

### **1706-1741 Custodial sentences ... Other orders**

Material relating to these paragraphs has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 10-12, 78-97, 384-387.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(9) ANCILLARY ORDERS/(i) Recommendation for Deportation

## **(9) ANCILLARY ORDERS**

### **(i) Recommendation for Deportation**

#### **UPDATE**

#### **1742 Recommendation for deportation**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 10-12, 78-97, 384-387.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.

SENTENCE/(9) ANCILLARY ORDERS/(ii) Confiscation under the Proceeds of Crime Act 2002

## **(ii) Confiscation under the Proceeds of Crime Act 2002**

### **UPDATE**

#### **1743-1802 Confiscation under the Proceeds of Crime Act 2002**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 390-458.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(9) ANCILLARY ORDERS/(iii) Confiscation Orders under Part VI of the Criminal Justice Act 1988

### **(iii) Confiscation Orders under Part VI of the Criminal Justice Act 1988**

#### **UPDATE**

#### **1803 Confiscation orders under Part VI of the Criminal Justice Act 1988**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 459-473.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(9) ANCILLARY ORDERS/(iv) Confiscation Orders under Part 1 of the Drug Trafficking Act 1994

#### **(iv) Confiscation Orders under Part 1 of the Drug Trafficking Act 1994**

##### **UPDATE**

##### **1804 Confiscation orders under Part 1 of the Drug Trafficking Act 1994**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 459, 474.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(9) ANCILLARY ORDERS/(v) Forfeiture and Deprivation Orders

## **(v) Forfeiture and Deprivation Orders**

### **UPDATE**

#### **1805-1807 Forfeiture and deprivation orders**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 480-495.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(9) ANCILLARY ORDERS/(vi) Restitution Orders

## **(vi) Restitution Orders**

### **UPDATE**

#### **1808 Restitution orders**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 388-389.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(9) ANCILLARY ORDERS/(vii) Financial Reporting Orders

## **(vii) Financial Reporting Orders**

### **UPDATE**

#### **1809-1812 Financial reporting orders**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 475-479.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21. SENTENCE/(9) ANCILLARY ORDERS/(viii) Disqualification/1818. Other disqualifications consequent on conviction.

## **(viii) Disqualification**

### **UPDATE**

#### **1813-1815 Disqualification orders ... Disqualification for driving where vehicle used for purposes of crime**

Material relating to these paragraphs has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 313-315.

### **UPDATE**

#### **1816 Disqualification for driving for certain offences**

See now ROAD TRAFFIC vol 40(2) (2007 Reissue) PARAS 1058-1061.

### **UPDATE**

#### **1817 Disqualification from working with children**

Material relating to this paragraph has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 316.

#### **1818. Other disqualifications consequent on conviction.**

On conviction for treason a person becomes, and (until he has suffered punishment<sup>1</sup> or received a free pardon from Her Majesty<sup>2</sup>) continues to be, incapable of holding any military, air force<sup>3</sup> or naval office or any civil office under the Crown or other public employment; or of being elected, sitting or voting as a member of either House of Parliament; or of exercising any right of suffrage<sup>4</sup>.

If any person at the time of his conviction for treason holds any military, air force<sup>1</sup> or naval office or any civil office under the Crown or other public employment or any place, office or emolument in any university, college or other corporation or is entitled to any pension or superannuation allowance payable by the public or out of any public fund, the office, employment or place becomes vacant and the pension, superannuation allowance or emolument ceases to be payable<sup>5</sup> unless he receives a free pardon from Her Majesty within two months after conviction or before the office, employment or place is filled<sup>6</sup>. Conviction of the sale or purchase of a public office renders a person permanently disqualified from holding that office; and on conviction of the common law offence of neglect of duty a public officer becomes disqualified from holding the office in question<sup>7</sup>.

A person is disqualified from being or being elected a member of a local authority or an elected mayor if, within five years before the day of his election or since his election, he has been convicted<sup>8</sup> of any offence and has had passed on him a sentence of imprisonment (suspended

or not) for a period of not less than three months without the option of a fine<sup>9</sup>. While detained in a penal institution in pursuance of his sentence or unlawfully at large when he would otherwise be so detained, a convicted person is legally incapable of voting at any parliamentary or local government election<sup>10</sup>.

1    le the punishment imposed or any punishment lawfully substituted.

2    As to pardons by Her Majesty see PARA 1978 post.

3    See the Air Force (Application of Enactments) (No 2) Order 1918, SR & O 1918/548 (amended by SI 1964/488).

4    Forfeiture Act 1870 s 2 (amended by the Criminal Justice Act 1948 ss 79, 83(3), Sch 9, Sch 10 Pt I; the Ecclesiastical Jurisdiction Measure 1963 s 87, Sch 5; the Criminal Law Act 1967 ss 10(2), 11(1), (2), Sch 3 Pt III; and the Statute Law (Repeals) Act 1993).

5    Where a pension or superannuation allowance has been so forfeited, the granting authority may restore it in whole or in part: Criminal Justice Act 1948 s 70(2).

6    Forfeiture Act 1870 s 2 (as amended: see note 4 supra).

7    See PARAS 535-536 ante. As to liability to disqualification from holding public office consequent upon conviction of bribery see PARAS 527-530 ante. Other disqualifications affecting specified classes of persons or eligibility for certain offices, membership of certain professions etc which are, or may be, consequent upon conviction or conviction of certain offences are dealt with in the relevant titles in this work.

8    le in the United Kingdom, the Channel Islands or the Isle of Man.

9    Local Government Act 1972 s 80(1)(d) (s 80(1) amended by the Local Authorities (Executive and Alternative Arrangements) (Modification of Enactments and Other Provisions) (England) Order 2001, SI 2001/2237, arts 1(2), 2(a), 5(a); and the Local Authorities (Executive and Alternative Arrangements) (Modification of Enactments and Other Provisions) (Wales) Order 2002, SI 2002/808, arts 2(a), 5(a)). See also LOCAL GOVERNMENT vol 69 (2009) PARA 119.

10   Representation of the People Act 1983 s 3(1) (amended by the Representation of the People Act 1985 s 24, Sch 4 para 1). See also ELECTIONS AND REFERENDUMS vol 15(3) (2007 Reissue) PARA 122.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21. SENTENCE/(9) ANCILLARY ORDERS/(viii) Disqualification/1819. Effect of rehabilitation provisions on disqualifications etc.

### **1819. Effect of rehabilitation provisions on disqualifications etc.**

The statutory provisions relating to the effect of rehabilitation<sup>1</sup> do not affect the operation of any enactment by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence<sup>2</sup>, to any disqualification, disability, prohibition or other penalty the period of which extends beyond the rehabilitation period applicable<sup>3</sup> to the conviction<sup>4</sup>.

1    Ie the Rehabilitation of Offenders Act 1974 s 4(1): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660.

2    For the meaning of 'sentence' for these purposes see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660 note 4.

3    Ie applicable in accordance with the Rehabilitation of Offenders Act 1974 s 6 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 670, 673-674). As to rehabilitation periods applicable to convictions see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 670 et seq. Where in respect of a conviction a disqualification etc is ordered, the rehabilitation period for the sentence ends on the date on which the disqualification etc ceases to have effect: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 681.

4    Ibid s 7(1)(d).

### **UPDATE**

### **1820-1829 Exclusion orders ... Restraining orders**

Material relating to these paragraphs has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(10) SENTENCE ON COMMITTAL FOR SENTENCE

**(10) SENTENCE ON COMMITTAL FOR SENTENCE**

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21.  
SENTENCE/(11) SURCHARGES

## **(11) SURCHARGES**

### **UPDATE**

#### **1832 Surcharges**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 158.

### **UPDATE**

#### **1833-1835 Introduction ... the inspectorate**

Material relating to these paragraphs has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 733 et seq.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/21. SENTENCE/(12) THE NATIONAL PROBATION SERVICE/1836. Transfer schemes.

## **(12) THE NATIONAL PROBATION SERVICE**

### **1836. Transfer schemes.**

The Secretary of State may by order make a scheme for the transfer<sup>1</sup>:

- 2300 (1) to the Secretary of State of any property<sup>2</sup> belonging to a probation committee, a local authority, the Official Solicitor or the Receiver for the Metropolitan Police District (the 'old employer')<sup>3</sup>;
- 2301 (2) to the Secretary of State of any liabilities to which the old employer is subject<sup>4</sup>;
- 2302 (3) of property or liabilities to a local probation board<sup>5</sup> after an initial transfer to the Secretary of State under head (1) or head (2) above<sup>6</sup>.

The Secretary of State may by order make a scheme<sup>7</sup> for the transfer to a local probation board of any eligible employee<sup>8</sup>. 'Eligible employee' means: (a) in relation to a local authority or the Official Solicitor or the Receiver for the Metropolitan Police district, a person who is employed under a contract of employment with the authority, the Official Solicitor or the Receiver for the Metropolitan Police district on work which would have been continued but for provisions<sup>9</sup> of the Criminal Justice and Court Services Act 2000; (b) in relation to a probation committee, a person other than a chief probation officer who is employed under a contract of employment with the committee<sup>10</sup>. A scheme may also provide for any person who is employed as chief probation officer under a contract of employment with a probation committee to be appointed as chief officer of a local probation board<sup>11</sup>. A scheme may apply to all or any description of eligible employees or persons so employed, or to any individual eligible employees or person so employed<sup>12</sup>.

The contract of employment of an employee transferred under a scheme<sup>13</sup> is not terminated by the transfer and has effect from the date of the transfer<sup>14</sup> as if originally made between the employee and the local probation board<sup>15</sup>. Where an employee is transferred under a scheme all the rights, powers, duties and liabilities of the old employer under or in connection with the contract of employment are transferred to the local probation board on the date of transfer and anything done before that date by or in relation to the old employer in respect of that contract or the employee is to be treated from that date as having been done by or in relation to the local probation board<sup>16</sup>. If the employee informs the old employer or the local probation board that he objects to the transfer, the above provisions<sup>17</sup> do not transfer his contract of employment, or the rights, powers duties and liabilities under or in connection with it, and the contract is terminated immediately before the date of transfer<sup>18</sup>. An employee is not to be treated for the purposes of the Employment Rights Act 1996<sup>19</sup> as having been dismissed by the old employer by reason of the transfer of his contract of employment under a scheme or the termination of his contract following such an objection<sup>20</sup>. Where an employee's contract of employment with a probation committee is not transferred under a scheme, it is terminated immediately before the date on which the committee ceases to exist and the employee is to be treated for the purposes of the Employment Rights Act 1996 as having been dismissed by the committee<sup>21</sup>. No right of an employee to terminate his contract of employment arises by reason only that the identity of his employer changes<sup>22</sup> unless the employee shows that in all the circumstances the change is a significant change and is to his detriment<sup>23</sup>.

Where a scheme<sup>24</sup> provides for a person who is employed as a chief probation officer under a contract of employment with a probation committee to be appointed as chief officer of a local probation board, the officer's period of employment with the committee counts as a period of employment in his Crown employment<sup>25</sup> and the appointment does not break the continuity of the employment<sup>26</sup>. The terms and conditions of the officer's contract of employment<sup>27</sup> have effect on and after his appointment as if they were terms and conditions of his Crown employment<sup>28</sup>. Where an officer is so transferred<sup>29</sup>, all the rights, powers, duties and liabilities of the probation committee under or in connection with the contract of employment are transferred to the local probation board on the date of transfer, and anything done before that date by or in relation to the probation committee in respect of that contract or the officer is to be treated from that date as having been done by or in relation to the local probation board<sup>30</sup>. The officer is not to be treated for the purposes of the Employment Rights Act 1996 as having been dismissed by the probation committee by reason of his appointment<sup>31</sup>. If the officer informs the probation committee or the Secretary of State that he objects to the appointment, the above provisions<sup>32</sup> do not apply<sup>33</sup>. Where the officer is not appointed as chief officer of the local probation board, whether because he objects to the appointment or for any other reason, his contract of employment is terminated immediately before the date on which the committee ceases to exist and he is to be treated for the purposes of the Employment Rights Act 1996 as having been dismissed by the committee<sup>34</sup>.

Where, by reason of the implementation or termination of any arrangements<sup>35</sup> any functions exercisable by any person (the 'former employer') become exercisable by another person (whether on behalf, or instead, of the former employer), the Secretary of State may by order<sup>36</sup> make a scheme for the transfer to the other person (the 'transferee') of any person (an 'employee') employed under a contract of employment with the transferor on work which would have continued but for the implementation or termination of the arrangements<sup>37</sup>. Such a scheme may apply to all or any description of employees, or to any individual employee; and may be made only if any directions about consultation given by the Secretary of State have been complied with in relation to each of the employees to be transferred in pursuance of the scheme<sup>38</sup>.

1 As to the contents of such schemes see the Criminal Justice and Court Services Act 2000 s 19, Sch 3 (amended by the Transfer of Functions (Children, Young Persons and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4(1), (2)). As to the power of the Secretary of State to make orders under the Criminal Justice and Court Services Act 2000 see PARA 1833 note 2 ante. No instrument made or executed under or in pursuance of the scheme for the purposes of such a transfer or grant is to be treated as duly stamped unless: (1) it is stamped with the duty to which it would, but for s 19 (as amended) (see the text and notes 2-7 infra) be liable; or (2) it has, in accordance with the provisions of the Stamp Act 1891 s 12 (as substituted) (see STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1111), been stamped with a particular stamp denoting that it is not chargeable with any duty or that it has been duly stamped: Criminal Justice and Court Services Act 2000 s 19(3).

2 'Property' includes rights and interests of any description, other than: (1) those under a contract of employment; or (2) land, in the case of transfers to a local board: *ibid* s 18(5).

3 *Ibid* ss 18(4), 19(1)(a) (s 19(1) amended by the Transfer of Functions (Children, Young Persons and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4(1), (2)).

4 Criminal Justice and Court Services Act 2000 s 19(1)(b) (as amended: see note 3 supra).

5 As to local probation boards see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 737.

6 Criminal Justice and Court Services Act 2000 s 19(1)(c) (as amended: see note 3 supra).

7 As to the power of the Secretary of State to make orders under the Criminal Justice and Court Services Act 2000 see PARA 1833 note 2 ante. A scheme may be made under s 20 (as amended) (see the text and notes 8-12 infra) only if any directions about consultation given by the Secretary of State have been complied with in relation to each of the eligible employees and chief probation officers to be transferred or appointed in pursuance of the scheme: s 20(4) (amended by the Transfer of Functions (Children, Young Persons and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4(1), (2)).

8 Criminal Justice and Court Services Act 2000 ss 18(3), 20(1) (s 20(1) amended by the Transfer of Functions (Children, Young Persons and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4(1), (2)).

9 Ie the Criminal Justice and Court Services Act 2000 Pt 1 (ss 1-25) (as amended).

10 Ibid s 18(2).

11 See ibid s 20(2); Sch 1 paras 2, 3 (Sch 1 para 2 amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 para 298(1), (2)).

12 Criminal Justice and Court Services Act 2000 s 20(3).

13 Ie a scheme made by virtue of ibid s 20 (see the text and notes 7-12 supra): ss 21(7), 25. 'By virtue of' includes 'by or under': see s 25.

14 'Date of transfer' means the date of transfer determined under the scheme in relation to the employee: ibid s 21(7).

15 Ibid ss 18(3), 21(1), (7).

16 Ibid ss 18(3), 21(2), (7). Section 21(2) does not prejudice the generality of s 21(1): see the text and notes 13-15 supra.

17 Ie ibid s 21(1), (2): see the text and notes 13-16 supra.

18 Ibid ss 18(3), 21(3), (7).

19 As to the Employment Rights Act 1996 see EMPLOYMENT.

20 Criminal Justice and Court Services Act 2000 s 21(4). As to such an objection see s 21(3); and the text and notes 17-18 supra.

21 Ibid s 21(5).

22 Ie by virtue of ibid s 21.

23 Ibid s 21(6). Section 21 does not prejudice any right of an employee to terminate his contract of employment if a substantial change is made to his detriment in his working conditions: s 21(6).

24 Ie under ibid s 20 (as amended): see the text and notes 7-12 supra.

25 'Crown employment' means the employment which the chief officer of a local probation board is to be treated as employed in for the purposes of the Employment Rights Act 1996 by virtue of the Criminal Justice and Court Services Act 2000 s 4, Sch 1 para 3(5): s 22(8).

26 Ibid s 22(1), (2).

27 Ie so far as is consistent with appointment under ibid Sch 1 paras 2, 3 (as amended).

28 Ibid s 22(3).

29 Ie under ibid s 22.

30 See ibid ss 18(3), 21(2), (7), 22(4).

31 Ibid s 22(5).

32 Ie ibid s 22(2)-(5): see the text and notes 24-31 supra.

33 Ibid s 22(6).

34 Ibid s 22(7).

35 Ie under ibid s 5 (functions of the board: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 738) or s 8 (support services: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 739).

36 Such orders are not made by statutory instrument and are not recorded in this work. As to the power of the Secretary of State to make orders under the Criminal Justice and Court Services Act 2000 see PARA 1833 note 2 ante.

37 See *ibid* s 23(1), (2) (s 23(2) amended by the Transfer of Functions (Children, Young Persons and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4(1), (2)).

38 See the Criminal Justice and Court Services Act 2000 s 23(3), (4) (s 23(4) amended by the Transfer of Functions (Children, Young Persons and Families) Order 2003, SI 2003/3191, arts 3(d), 6, Schedule para 4(1), (2)). The Criminal Justice and Court Services Act 2000 s 21 (except s 21(5) and the definitions of 'scheme' and 'transferee') (see the text and notes 13-21 *supra*) applies to a scheme made by virtue of s 23 (as amended) as it applies to a scheme made by virtue of s 20 (as amended) (see the text and notes 7-12 *supra*), and as if 'old employer' and 'transferee' had the same meanings as in s 23 (as amended): see s 23(5).

## UPDATE

### 1836 Transfer schemes

TEXT AND NOTES--Criminal Justice and Court Services Act 2000 s 18(2)-(4) amended, s 20(2), 21(5), 22, Sch 1 repealed: Offender Management Act 2007 Sch 5 Pt 1 (in force in relation to specified areas: SI 2008/504, SI 2009/547). As from a day to be appointed 2000 Act s 23 repealed: Offender Management Act 2007 Sch 5 Pt 1.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(i) Right to Appeal/A. APPEAL AGAINST CONVICTION, VERDICT OR FINDING/1837. Appeal on conviction on indictment.

## 22. APPEALS

### (1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT

#### (i) Right to Appeal

#### **A. APPEAL AGAINST CONVICTION, VERDICT OR FINDING**

#### **1837. Appeal on conviction on indictment.**

A person convicted of an offence on indictment<sup>1</sup> may appeal to the Court of Appeal<sup>2</sup> against his conviction<sup>3</sup>.

The appeal<sup>4</sup> lies only: (1) with the leave of the Court of Appeal<sup>5</sup>; or (2) if the judge of the court of trial<sup>6</sup> grants a certificate<sup>7</sup> that the case is fit for appeal<sup>8</sup>.

Where a person is convicted before the Crown Court of a scheduled offence<sup>9</sup>, it is not open to him to appeal to the Court of Appeal against the conviction on the ground that the decision of the court which sent him to the Crown Court<sup>10</sup> for trial as to the value involved was mistaken<sup>11</sup>.

There is no right of appeal from a decision dismissing a criminal charge unless clearly given by statute<sup>12</sup>. The extension of a custody time limit<sup>13</sup> may not be called into question in any appeal against conviction<sup>14</sup>.

1 All proceedings on indictment in England and Wales are brought in the Crown Court: see PARA 1232 ante.

Appeal lies in respect of each conviction on each count of an indictment. Grounds of appeal must be submitted in respect of each conviction challenged: see CrimPR 68.3(2), (5). Notice of appeal or of an application for leave to appeal must be given by completing the prescribed form and serving it on a Crown Court officer: see CrimPR 68.3(1). The prescribed form is set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2006] 3 All ER 484, Annex D, CA.

2 The jurisdiction of the Court of Appeal is exercised by the criminal division of that Court: Supreme Court Act 1981 s 53(2)(a). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. The jurisdiction of the former Court of Criminal Appeal was transferred to the criminal division of the Court of Appeal: see the Criminal Appeal Act 1966 s 1(2)(b)(ii) (repealed). It is considered that the practice of the Court of Criminal Appeal as developed and reported is applicable, with exceptions, to the Court of Appeal as constituted since 1966 and the cases decided by the former are therefore considered still to be relevant.

As to the composition, jurisdiction and sittings of the Criminal Division of the Court of Appeal see COURTS vol 10 (Reissue) PARAS 636, 640. Rule-making power is conferred on the Criminal Procedure Rule Committee: see the Courts Act 2003 s 69(2); and COURTS.

References in the Criminal Appeal Act 1968 Pts I, II (ss 1-43) (as amended) and s 44A (as added: see PARA 1977 post), s 51 (as amended) are to be construed as references to the criminal division of the Court of Appeal: Criminal Appeal Act 1968 s 45(1) (substituted by the Supreme Court Act 1981 s 152(1), Sch 5; and amended by the Criminal Appeal Act 1995 s 29(1), Sch 2 para 4(1), (5)(a); Criminal Justice Act 2003 s 331, Sch 36 paras 86, 89(a)).

3 Criminal Appeal Act 1968 s 1(1) (amended by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 71(a)). 'Conviction' does not include a finding by a jury in respect of the defendant's fitness to plead: *R v Larkins* (1911) 6 Cr App Rep 194, CCA. The court will entertain an appeal against conviction on the ground that a hearing of a preliminary issue with regard to fitness to plead was open to an objection of error in law so that the defendant should not have been tried on the indictment: *R v Podola* [1960] 1 QB 325, 43 Cr App Rep 220, CCA. As to appeal against a finding of unfitness to plead etc see PARA 1839 post; and as to the power of the Court of Appeal to substitute a finding of unfitness to plead etc on an appeal against conviction see PARA 1883 post.

Where leave to appeal is limited to some of the grounds of appeal, the Court of Appeal will not allow the other grounds to be argued without leave: *R v Jackson (Stephen Shaun)* [1999] 1 All ER 572, CA; *R v Bullock* [1998] 9 Archbold News 1, CA; *R v Cox, R v Thomas* [1999] 2 Cr App Rep 6, CA.

The Court of Appeal, being a creature of statute, has no jurisdiction other than that conferred upon it by statute: *R v Jefferies* [1969] 1 QB 120, 52 Cr App Rep 654, CA. For example, it cannot hear an application for leave to appeal against conviction in a case where it has previously determined such an application or appeal against conviction: *R v Pinfold* [1988] QB 462, 87 Cr App Rep 15, CA. See also *R v Berry (No 2)* [1991] 2 All ER 789, 92 Cr App Rep 147, CA (where appeal undertaken on a number of grounds but decided on only one both in the Court of Appeal and House of Lords, there is no jurisdiction to relist it for consideration of the remaining grounds). Save for the jurisdiction conferred by the Criminal Justice Act 1987 s 9(11) (see PARA 1921 post), the Criminal Justice Act 1988 s 159 (as amended) (see PARA 1934 post) and the Criminal Procedure and Investigations Act 1996 s 35(1) (as amended) (see PARA 1922 post), the Court of Appeal has no power to entertain an appeal on an interlocutory matter: *R v Collins* [1970] 1 QB 710, 54 Cr App Rep 19, CA. There is no jurisdiction to review the exercise of a discretion to discharge a jury and order a re-trial: *R v Home Office, ex p Graham* [1983] 1 WLR 1281, 78 Cr App Rep 124; and see *R v Gorman* [1987] 2 All ER 435, 85 Cr App Rep 121, CA.

As to appeals in cases where the convicted person has died see PARA 1977 post.

4 For these purposes, 'appeal' means an appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended) (see PARA 1838 et seq post); and 'appellant' has a corresponding meaning and includes a person who has given notice of application for leave to appeal: s 51(1).

5 Ibid s 1(2)(a) (s 1(2) substituted by the Criminal Appeal Act 1995 s 1(1)). Leave may be granted by the Court of Appeal or by a single judge of the court: see the Criminal Appeal Act 1968 s 31(1)(a), (2)(a) (as substituted and amended); and PARA 1854 post. As to the powers of a single judge see PARA 1854 post.

Leave to appeal is granted in respect of the conviction and not in respect of a particular ground put forward by the appellant.

Where leave to appeal has been granted, the Court of Appeal may not give a direction under s 29(1) that time spent in custody is not to be reckoned as part of sentence: see s 29(2)(a); and PARA 1845 post.

6 For these purposes, 'the court of trial', in relation to an appeal, means the court from which the appeal lies; and 'the judge of the court of trial' means, where the Crown Court comprises justices of the peace, the judge presiding: *ibid* s 51(1) (amended by the Courts Act 1971 s 56(1), Sch 8 para 57(3)).

7 The certificate of the judge of the court of trial under the Criminal Appeal Act 1968 ss 1(2), 12 (see PARA 1838 post), s 15(2) (see PARA 1839 post) that a case is a fit case for appeal must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; CrimPR 68.2(1).

The certificate must be forwarded forthwith to the Registrar of Criminal Appeals, whether or not the person to whom the certificate relates has applied for a certificate, and a copy forwarded to that person or his legal representative: CrimPR 68.2(2), (3).

A certificate should not be granted lightly; it should not be granted merely because counsel asks for it, but only where the trial judge considers that there are sufficient grounds: *R v Langley* (1923) 17 Cr App Rep 199, CCA; *R v Eyles* (1963) 47 Cr App Rep 260, CCA. A trial judge ought only to grant such a certificate that a case is fit for appeal in very limited and exceptional circumstances, as the granting of leave to appeal against conviction ought generally to be exercised by members of the Court of Appeal: *R v Bansal* [1999] Crim LR 484, CA. There must be a particular and cogent ground of appeal; and a judge should not grant a certificate in regard to conviction on a ground where he considers the chance of a successful appeal is not substantial: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.50.4, CA. As to the importance of adhering to Pt IV.50.4 see *R v Day* (1991) Times, 3 October, CA; *R v Williams (Paul David)* (1991) 156 JP 325, CA; *R v Bansal* [1991] Crim LR 484, CA.

Where such a certificate has been granted, the Court of Appeal may not give a direction under the Criminal Appeal Act 1968 s 29(1) that time spent in custody is not to be reckoned as part of sentence: see s 29(2)(b) (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 paras 20, 27); and PARA 1845 post. Where such a certificate has been granted, bail pending appeal may be granted by the Crown Court: Supreme Court Act 1981 s 81(1)(f). As to the prospective renaming of the Supreme Court Act 1981 see note 2 *supra*. The procedure for granting bail pending appeal to the Court of Appeal, Criminal Division is described in the *Guide to Proceedings in the Court of Appeal, Criminal Division* (revised 1997, amended 2002). See also *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.50.1-IV.50.6, CA.

8 Criminal Appeal Act 1968 s 1(2)(b) (as substituted: see note 5 *supra*).

9 For these purposes, 'scheduled offence' and 'the value involved' have the same meaning as they have in the Magistrates' Courts Act 1980 s 22 (as amended) (certain offences against property to be tried summarily if value of property or damage is small: see PARA 1114 ante): Criminal Appeal Act 1968 s 1(4) (added by the Magistrates' Courts Act 1980 s 154(1), Sch 7 para 71).

10 The words 'sent him to the court' were substituted for the words 'committed him' by the Criminal Justice Act 2003 s 41, Sch 3 para 44(1), (2), but at the date at which this volume states the law this amendment only has effect in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 (as substituted) or s 51A(3)(d) (as added) (see PARAS 1132-1133 ante).

11 Criminal Appeal Act 1968 s 1(3) (added by the Magistrates' Courts Act 1980 Sch 7 para 71; amended and prospectively amended: see note 10 *supra*).

12 *Benson v Northern Ireland Road Transport Board* [1942] AC 520, [1942] 1 All ER 465, HL. No right of appeal is given to the prosecution against a verdict of acquittal. As to appeals by the prosecution against terminating rulings and evidentiary rulings see PARA 1898 et seq post. As to the powers of the Attorney General to refer to the Court of Appeal a point of law arising on an acquittal on indictment see PARA 1950 post; and as to appeal by a prosecutor from a decision at a preparatory hearing see PARAS 1921-1922 post.

In its jurisdiction in matters relating to trial on indictment the Crown Court is not subject to judicial review by the High Court: see the Supreme Court Act 1981 s 29(3); and PARA 2013 post. As to the prospective renaming of the Supreme Court Act 1981 see note 2 *supra*. As to whether an order of the Crown Court falls within such jurisdiction see PARA 2013 note 1 post.

13 *le* under the Prosecution of Offences Act 1985 s 22(3): see PARA 1152 ante.

14 See PARA 1152 note 22 ante.

## UPDATE

### 1837 Appeal on conviction on indictment



NOTES 1, 7--CrimPR 68 substituted: see PARA 1856-1861.

NOTE 1--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2003] 2 Cr App Rep 533, Annex D, CA, further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 3--See *Guide to Commencing Proceedings in the Court of Appeal, Criminal Division* [2008] All ER (D) 113 (Oct), CA. See also *R v Hughes* [2009] EWCA Crim 841, [2009] All ER (D) 121 (May).

NOTE 7--See also *R v Harries* (2007) Times, 26 March, CA.

TEXT AND NOTE 8--Criminal Appeal Act 1968 s 1(2)(b) amended: Criminal Justice and Immigration Act 2008 Sch 8 para 2.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(i) Right to Appeal/A. APPEAL AGAINST CONVICTION, VERDICT OR FINDING/1838. Appeal against verdict of not guilty by reason of insanity.

### **1838. Appeal against verdict of not guilty by reason of insanity.**

A person in whose case there is returned a verdict of not guilty by reason of insanity<sup>1</sup> may appeal to the Court of Appeal against the verdict: (1) with the leave of the Court of Appeal; or (2) if the judge of the court of trial<sup>2</sup> grants a certificate<sup>3</sup> that the case is fit for appeal<sup>4</sup>.

1 As to a verdict of not guilty by reason of insanity see PARAS 31, 1339 ante.

2 For the meaning of 'the judge of the court of trial' see PARA 1837 note 6 ante.

3 As to the certificate of the judge of the court of trial see PARA 1837 note 7 ante.

4 Criminal Appeal Act 1968 s 12 (amended by the Criminal Appeal Act 1995 s 1(3)). There was formerly no right of appeal in these circumstances as the defendant was not a person 'convicted': see *Felstead v R* [1914] AC 534, 10 Cr App Rep 129, HL. As to disposal of an appeal against this verdict see PARA 1887 et seq post; as to the power of the Court of Appeal to make a hospital order on an appeal from such verdict see PARA 1889 post; as to leave to appeal see PARA 1837 note 5 ante; and as to appeals in cases of death see PARA 1977 post.

As to appeal against a hospital or supervision order made after a verdict of not guilty by reason of insanity see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 45.

### **UPDATE**

### **1838 Appeal against verdict of not guilty by reason of insanity**

TEXT AND NOTE 4--Criminal Appeal Act 1968 s 12 further amended: Criminal Justice and Immigration Act 2008 Sch 8 para 4.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(i) Right to Appeal/A. APPEAL AGAINST CONVICTION, VERDICT OR FINDING/1839. Appeal against finding of disability etc.

### **1839. Appeal against finding of disability etc.**

Where there has been a determination<sup>1</sup> of the question of a person's fitness to be tried, and there have been findings that he is under a disability<sup>2</sup> and that he did the act or made the omission charged against him, the person may appeal to the Court of Appeal against either or both of those findings<sup>3</sup>. Such an appeal lies only: (1) with the leave of the Court of Appeal; or (2) if the judge of the court of trial<sup>4</sup> grants a certificate<sup>5</sup> that the case is fit for appeal<sup>6</sup>.

1 He is under the Criminal Procedure (Insanity) Act 1964 s 4 (as amended): see PARA 1265 ante.

2 'Under disability' has the meaning assigned to it by ibid s 4 (as amended) (unfitness to plead: see PARA 1265 ante): Criminal Appeal Act 1968 s 51(1).

3 Ibid s 15(1) (amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 7, Sch 3 para 2; and the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 4).

4 For the meaning of 'the judge of the court of trial' see PARA 1837 note 6 ante.

5 As to the certificate of the judge of the court of trial see PARA 1837 note 7 ante.

6 Criminal Appeal Act 1968 s 15(2) (substituted by the Criminal Appeal Act 1995 s 1(5)). As to the disposal of appeals under the Criminal Appeal Act 1968 s 15 (as amended) see PARA 1886 post; as to the substitution of findings that the defendant was under a disability and did the act or made the omission charged against him on an appeal against conviction see PARA 1883 post; as to leave to appeal see PARA 1837 note 5 ante; and as to appeals in cases of death see PARA 1977 post. As to appeal against a hospital order or suspension order made after such findings see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 45.

## **UPDATE**

### **1839 Appeal against finding of disability etc**

TEXT AND NOTE 6--Criminal Appeal Act 1968 s 15(2) amended: Criminal Justice and Immigration Act 2008 Sch 8 para 5.

## **UPDATE**

### **1840-1843 Appeal against sentence**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 44-48.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(i) Right to Appeal/B. APPEAL AGAINST SENTENCE

***B. APPEAL AGAINST SENTENCE***

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(ii) Effect of Appealing/1844. General rule.

## **(ii) Effect of Appealing**

### **1844. General rule.**

In general, the giving of notice of appeal does not suspend the operation of any sentence or order of the court of trial unless an enactment expressly so provides<sup>1</sup>.

<sup>1</sup> There is no general power of suspension in the Criminal Procedure Rules comparable to that found in the Criminal Appeal Rules 1908, SR & O 1908/227, r 11 (revoked). As to time spent in custody pending appeal see PARA 1845 post; and as to compensation and restitution orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 375 et seq, 388 et seq.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(ii) Effect of Appealing/1845. Time spent in custody pending appeal.

### **1845. Time spent in custody pending appeal.**

Subject to any direction which the Court of Appeal may give to the contrary, the time during which an appellant<sup>1</sup> is in custody pending the determination of his appeal is reckoned as part of the term of any sentence to which he is for the time being subject<sup>2</sup>. However, when an appellant is granted bail<sup>3</sup>, the time during which he is released on bail is to be disregarded in computing the term of any sentence to which he is for the time being subject<sup>4</sup>.

Where the court gives a contrary direction, it must state its reasons for doing so; and it may not give any such direction where:

- 2303 (1) leave to appeal has been granted<sup>5</sup>;
- 2304 (2) a certificate that the case is fit for appeal has been given by the judge of the court of trial<sup>6</sup>; or
- 2305 (3) the case has been referred<sup>7</sup> to the court by the Criminal Cases Review Commission<sup>8</sup>.

Unless the Court of Appeal otherwise directs, the term of any sentence passed by that court<sup>9</sup> in substitution for that passed on an appellant in proceedings below begins to run from the time when it would have begun to run if passed in the proceedings from which the appeal lies<sup>10</sup>.

1 For the meanings of 'appeal' and 'appellant' see PARA 1837 note 4 ante.

2 Criminal Appeal Act 1968 s 29(1). A person becomes an appellant on the day he gives notice of appeal or application for leave to appeal: see s 51(1). Those who contemplate putting in a notice of application for leave to appeal and their legal advisers should bear in mind that the single judge and the court may make such a direction, and should remember that it is useless to appeal without grounds and that grounds should be substantial and particularised; where an application devoid of merit has been refused by the single judge and a direction for loss of time has been made, the full court, on renewal of the application, may direct that additional time be lost if it thinks it right to do so: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at II.16.1, CA.

The power to give such a direction may be exercised by a single judge: Criminal Appeal Act 1968 s 31(2)(h). See further PARA 1854 post. Where the grounds of the application have been settled and signed by counsel, the single judge may refrain from giving a direction: see *R v Howitt* (1975) 61 Cr App Rep 327, CA. The fact that the application was made upon the advice of counsel may carry less weight with the full court where the application is renewed after refusal by the single judge: *R v Gayle* (1986) Times, 28 May, CA. For examples of the exercise of such jurisdiction see *R v Westlake* (1920) 15 Cr App Rep 100, CCA (court misled by appellant); *R v Oswin and Oswin* [1966] Crim LR 347, CCA (applications without merit refused by a single judge and renewed, despite warning, to full court); *R v McCulloch* [1970] Crim LR 399, CA (plea of guilty; application to extend time in which to appeal against conviction; application hopeless; direction by single judge; further direction given on renewed application); *R v Penfold* [1973] Crim LR 249, CA (impudent application to full court; appellant represented by counsel); *R v Ahmed* (1985) 80 Cr App Rep 295, CA (direction by single judge; dispute as to proper factual basis for sentencing and defendant's version of facts 'wholly fanciful').

The prescribed notice of appeal or of application for leave to appeal (see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA) which must be signed by, or on behalf of, the appellant (see CrimPR 68.3(10)) includes a statement that he understands that such a direction may be given. Where the prescribed form is signed on the appellant's behalf by his legal adviser, and he is in custody, the Registrar of Criminal Appeals (see PARA 1851 et

seq post) must, as soon as practicable after receiving the form from the Crown Court, send a copy to the appellant: CrimPR 68.3(11).

In *Morrell and Morris v United Kingdom* (1987) 10 EHRR 205, ECtHR it was held that neither the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969) art 5 (right to liberty) nor art 6 (right to fair trial) was contravened by a direction under the Criminal Appeal Act 1968 s 29(1). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

3 le under the Criminal Appeal Act 1968 s 19 (as substituted and amended) (see PARA 1193 ante). See also PARA 1849 post.

4 Ibid s 29(3) (amended by the Bail Act 1976 s 12(1), Sch 2 para 41).

5 le under the Criminal Appeal Act 1968 ss 1(2)(a), 11(1), 12(a), 15(2)(a): see PARAS 1837-1839 ante; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 46.

6 le under ibid s 1 (see PARA 1837 ante), s 11(1A) (as added: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 46), or the Supreme Court Act 1981 s 81(1B) (as added: see PARA 1187 ante). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981. The Criminal Appeal Act 1968 is accordingly amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. For the meaning of 'the judge of the court of trial' see PARA 1837 note 6 ante.

7 le under the Criminal Appeal Act 1995 s 9 (as amended): see PARA 1963 post.

8 Criminal Appeal Act 1968 s 29(2) (amended by the Criminal Justice Act 1988 Sch 15 paras 20, 27; and the Criminal Appeal Act 1995 s 29(1), Sch 2 para 4(1), (4); and prospectively amended by the Constitutional Reform Act 2005 s 59, Sch 11 para 1(2) (see note 6 supra)). As to the Criminal Cases Review Commission see PARA 2028 et seq post.

9 le under the Criminal Appeal Act 1968 s 3 (as amended), ss 4, 5 (as amended), s 11 (as amended) or s 13(4): see PARAS 1880-1881, 1884 post; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 49.

10 Ibid s 29(4). As to the effect on sentence where an appeal is made to the House of Lords see PARA 1969 post.

## UPDATE

### 1845 Time spent in custody pending appeal

NOTE 2--CrimPR 68 substituted: see PARA 1856-1861. See *R v Fortean* (2009) Times, 4 March, CA (time spent in custody pending appeal should not count towards sentence where application for leave to appeal is without merit).

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

## UPDATE

### 1846, 1847 Suspension of orders for restitution of property, Suspension of compensation orders

Material relating to these paragraphs has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 382, 389.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iii) Matters Antecedent to the Hearing of Appeals/1848. Leave to appeal.

### **(iii) Matters Antecedent to the Hearing of Appeals**

#### **1848. Leave to appeal.**

Leave to appeal to the Court of Appeal from a conviction, finding of disability, verdict of not guilty by reason of insanity or sentence is necessary in all cases unless the trial judge or sentencing judge, as the case may be, certifies that the case is fit for appeal<sup>1</sup>.

<sup>1</sup> See PARAS 1837-1839 ante; SENTENCING AND DISPOSITION OF OFFENDERS VOL 92 (2010) PARA 44 et seq. Most applications for leave to appeal are dealt with by a single judge: see PARA 1854 post. Where leave is granted, the case is listed before the full court; and, if a representation order is granted, counsel will normally be assigned by the Registrar of Criminal Appeals. Where leave is refused, the appellant has the right to renew the application to the full court and such applications are normally dealt with without oral argument: see PARA 1855 post. Where an appellant does not require leave to appeal, a notice of application for leave to appeal is to be treated as a notice of appeal; and, where an appellant requires leave to appeal but serves only a notice of appeal, the notice of appeal is to be treated as an application for leave to appeal: CrimPR 68.3(12). For the prescribed form of notice and grounds of appeal and of application for leave to appeal see CrimPR 68.3(1)-(7), (10), (11) (see PARAS 1863-1864 post); and *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2006] 3 All ER 484, Annex D, CA. Notices of appeal and of applications for leave to appeal must be served on the Crown Court at the centre where the proceedings took place. The Crown Court will then forward them to the Criminal Appeal Office together with the trial documents and any others which may be required: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at I.14.1, CA.

The certificate of the trial judge under the Criminal Appeal Act 1968 ss 1(2), 12 or 15(2) (see PARAS 1837-1839 ante) that a case is a fit case for appeal must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; CrimPR 68.2(1). The certificate must be forwarded forthwith to the Registrar of Criminal Appeals, whether or not the person to whom the certificate relates has applied for a certificate: CrimPR 68.2(2). A copy of the certificate must be forwarded forthwith to the person to whom the certificate relates or to his legal representative: CrimPR 68.2(3).

#### **UPDATE**

#### **1848 Leave to appeal**

NOTE 1--CrimPR 68 substituted: see PARA 1856-1861. *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, further amended: *Amendment to the Consolidated Practice Direction (Criminal Proceedings: Forms)* [2007] 1 WLR 1535, CA, *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iii) Matters Antecedent to the Hearing of Appeals/1849. Bail pending appeal to the Court of Appeal.

**1849. Bail pending appeal to the Court of Appeal.**

If the Court of Appeal thinks fit, it may grant the appellant<sup>1</sup> bail pending the determination of his appeal<sup>2</sup>.

1 For the meaning of 'appellant' see PARA 1837 note 4 ante.

2 See PARA 1193 ante.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iii) Matters Antecedent to the Hearing of Appeals/1850. Direction to Director of Public Prosecutions to appear.

### **1850. Direction to Director of Public Prosecutions to appear.**

It is the duty of the Director of Public Prosecutions to appear for the prosecution, when directed by the court to do so on any appeal<sup>1</sup> to the criminal division of the Court of Appeal<sup>2</sup>.

<sup>1</sup> See under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended): see PARA 1837 et seq ante.

<sup>2</sup> See the Prosecution of Offences Act 1985 s 3(2)(f)(ii). See further PARA 1080 ante. It is not usual for the prosecution to be represented on appeals against sentence. However, the increasing complexity of sentencing law and procedure makes it desirable for the prosecution to be represented more frequently than previously: *R v Dempster* (1987) 85 Cr App Rep 176, CA. See also *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at II.1.1-II.1.12, CA; *Amendment to the Consolidated Practice Directions (Appeals against sentence - Provision of Notice to the Prosecution)* [2003] 4 All ER 665 at II.1.1-II.1.12, CA, under which the Registrar of Criminal Appeals will notify the prosecution authority of a forthcoming appeal against sentence and a procedure is laid down for the prosecution to notify the grounds of appeal and for related matters.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iii) Matters Antecedent to the Hearing of Appeals/1851. Powers of court exercisable by Registrar of Criminal Appeals.

### **1851. Powers of court exercisable by Registrar of Criminal Appeals.**

The Registrar of Criminal Appeals may exercise the following powers of the Court of Appeal in respect of appeals to that court in criminal cases<sup>1</sup>:

- 2306 (1) to extend the time within which notice of appeal or of application for leave to appeal may be given<sup>2</sup>;
- 2307 (2) to order a witness to attend for examination<sup>3</sup>;
- 2308 (3) to vary the conditions of bail granted to an appellant by the Court of Appeal or the Crown Court<sup>4</sup>; and
- 2309 (4) to make orders for the production of any document, exhibit or other thing connected with the proceedings, the production of which appears necessary for the determination of the case<sup>5</sup>.

No variation of the conditions of bail granted to an appellant may be made by the Registrar unless he is satisfied that the respondent<sup>6</sup> does not object to the variation; but, subject to this, the powers specified above are to be exercised by the Registrar in the same manner as by the Court of Appeal and subject to the same provisions<sup>7</sup>.

1 Criminal Appeal Act 1968 s 31A(1) (s 31A added by Criminal Appeal Act 1995 s 6). As to the applicant's right to have the application determined by a single judge see the Criminal Appeal Act 1968 s 31A(4) (as added); and PARA 1852 post.

2 Ibid s 31A(2)(a) (as added: see note 1 supra). As to giving leave to appeal see PARAS 1837-1839 ante; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 44 et seq; and as to extensions of time see PARA 1865 post.

3 Ibid s 31A(2)(b) (as added: see note 1 supra).

4 Ibid s 31A(2)(c) (as added: see note 1 supra). As to bail see PARA 1193 ante; and as to the variation or revocation of bail see PARA 1195 ante.

5 Ibid s 31A(2)(d) (s 31A as added (see note 1 supra); s 31A(2)(d) added by the Courts Act 2003 s 87(2)). The orders referred to in head (4) in the text are those made under the Criminal Appeal Act 1968 s 23(1)(a) (see PARA 1866 post).

6 'Respondent' includes a person who will be a respondent if leave to appeal is granted: ibid s 31A(5) (s 31A as added (see note 1 supra); s 31A(5) added by the Criminal Justice Act 2003 s 331, Sch 30 paras 86, 88).

7 Criminal Appeal Act 1968 s 31A(3) (as added: see note 1 supra).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iii) Matters Antecedent to the Hearing of Appeals/1852. Determination of renewed application by a single judge.

### **1852. Determination of renewed application by a single judge.**

If the Registrar of Criminal Appeals refuses an application on the part of an appellant<sup>1</sup> to exercise in his favour any of the powers vested in him<sup>2</sup>, the appellant is entitled to have the application determined by a single judge<sup>3</sup>. The appellant must serve a notice within 14 days, or such longer period as the Registrar, a single judge or the court may fix (before or after the expiry of the 14-day period), from the date on which the Registrar serves on him notice of the refusal<sup>4</sup>.

1 For the meaning of 'appellant' see PARA 1837 note 4 ante.

2 Ie under the Criminal Appeal Act 1968 s 31A (as added and amended); see PARA 1851 ante.

3 Ibid s 31A(4) (added by the Criminal Appeal Act 1995 s 6).

4 See CrimPR 68.6(1). The general rule is that an application for an extension of the 14-day period will be considered at the same time as the further application itself: see CrimPR 68.6(1).

### **UPDATE**

### **1852 Determination of renewed application by a single judge**

NOTE 4--CrimPR 68 substituted: see PARA 1856-1861.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iii) Matters Antecedent to the Hearing of Appeals/1853. Procedural directions; powers of single judge and Registrar.

### **1853. Procedural directions; powers of single judge and Registrar.**

The power of the Court of Appeal, on an appeal or on an application to it for leave to appeal<sup>1</sup>, to determine an application for procedural directions<sup>2</sup> may be exercised by a single judge, or by the Registrar of Criminal Appeals<sup>3</sup>.

A single judge may give such procedural directions as he thinks fit:

- 2310 (1) when determining such an application<sup>4</sup>;
- 2311 (2) on a reference from the Registrar<sup>5</sup>;
- 2312 (3) of his own motion, when he is exercising, or considering whether to exercise, any power of his in relation to the application or appeal<sup>6</sup>.

The Registrar may give such procedural directions as he thinks fit when determining such an application<sup>7</sup>; or of his own motion<sup>8</sup>.

If a single judge gives, or refuses to give, procedural directions, the Court of Appeal may, on an application to it<sup>9</sup> confirm, set aside or vary any procedural directions given by the single judge, and give such procedural directions as it thinks fit<sup>10</sup>.

If the Registrar gives, or refuses to give, procedural directions, a single judge may, on an application to him<sup>11</sup>, confirm, set aside or vary any procedural directions given by the Registrar, and give such procedural directions as he thinks fit<sup>12</sup>.

Where an appellant or respondent so appeals against procedural directions<sup>13</sup> he must do so within 14 days, or such longer period as the Registrar, a single judge or the court may fix (before or after the expiry of the 14-day period), from the date on which the Registrar serves on him notice of the procedural directions<sup>14</sup>.

1    Ie under the Criminal Appeal Act 1968 Pt 1 (ss 1-32) (as amended), the Criminal Justice Act 1987 s 9 (as amended: see PARA 1253 ante) or the Criminal Procedure and Investigations Act 1996 s 35 (see PARA 1922 post): Criminal Appeal Act 1968 s 31B(5) (s 31B added by the Courts Act 2003 s 87(3)).

2    'Procedural directions' means directions for the efficient and effective preparation of an application for leave to appeal, or an appeal, to which the Criminal Appeal Act 1968 s 31B (as added) applies (see note 1 supra): s 31B(2) (as added: see note 1 supra).

3    Ibid s 31B(1) (as added: see note 1 supra).

4    Ibid s 31B(3)(a) (as added: see note 1 supra).

5    Ibid s 31B(3)(b) (as added: see note 1 supra).

6    Ibid s 31B(3)(c) (as added: see note 1 supra).

7    Ibid s 31B(4)(a) (as added: see note 1 supra).

8    Ibid s 31B(4)(b) (as added: see note 1 supra).

9     le an application under *ibid* s 31C(5) (s 31C added by the Courts Act 2003 s 87(3)). An application under the Criminal Appeal Act 1968 s 31C(5) (as added) may be made by: (1) an appellant; (2) a respondent, if the directions: (a) relate to an application for leave to appeal and appear to need the respondent's assistance to give effect to them; (b) relate to an application for leave to appeal which is to be determined by the Court of Appeal; or (c) relate to an appeal: s 31C(5) (as so added). For these purposes, 'appellant' includes a person who has given notice of application for leave to appeal under any of the provisions mentioned in s 31B(5) (as added) (see note 1 *supra*); and 'respondent' includes a person who will be a respondent if leave to appeal is granted: s 31C(6) (as so added).

10    *Ibid* s 31C(1), (2) (as added: see note 9 *supra*).

11    le under *ibid* s 31C(5) (as added: see note 9 *supra*).

12    *Ibid* s 31C(3), (4) (as added: see note 9 *supra*).

13    le under *ibid* s 31C (as added).

14    See CrimPR 68.6(1). The general rule is that an application for an extension will be considered at the same time as the further application itself: CrimPR 68.6(1).

## **UPDATE**

### **1853 Procedural directions; powers of single judge and Registrar**

TEXT AND NOTE 10--1968 Act s 31C(1), (2) repealed: Criminal Justice and Immigration Act 2008 Sch 8 para 12, Sch 28 Pt 3.

NOTE 14--CrimPR 68 substituted: see PARA 1856-1861.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iii) Matters Antecedent to the Hearing of Appeals/1854. Powers of court exercisable by a single judge.

### **1854. Powers of court exercisable by a single judge.**

A single judge<sup>1</sup> may exercise the following powers of the Court of Appeal<sup>2</sup>:

- 2313 (1) to give leave to appeal<sup>3</sup>;
- 2314 (2) to extend the time within which notice of appeal or of an application for leave to appeal may be given<sup>4</sup>;
- 2315 (3) to allow an appellant<sup>5</sup> to be present at any proceedings<sup>6</sup>;
- 2316 (4) to order a witness to attend for examination<sup>7</sup>;
- 2317 (5) to grant or revoke bail or to vary conditions of bail<sup>8</sup>;
- 2318 (6) to make, discharge or vary orders<sup>9</sup> relating to custody or bail and the retention of property pending re-trial<sup>10</sup>;
- 2319 (7) to suspend disqualification<sup>11</sup> under the Road Traffic Offenders Act 1988<sup>12</sup>;
- 2320 (8) to give a direction<sup>13</sup> as to the computation of sentence<sup>14</sup>;
- 2321 (9) to make orders<sup>15</sup> for the production of any document, exhibit or other thing connected with the proceedings, the production of which appears necessary for the determination of the case<sup>16</sup>;
- 2322 (10) to grant an application for a representation order in respect of proceedings in the Court of Appeal or House of Lords<sup>17</sup>;
- 2323 (11) to give directions<sup>18</sup> under the Sexual Offences (Amendment) Act 1992<sup>19</sup>;
- 2324 (12) to make orders<sup>20</sup> for the payment of costs<sup>21</sup>;
- 2325 (13) to give leave, where a reference by the Criminal Cases Review Commission is treated as an appeal against conviction, verdict, finding or sentence<sup>22</sup>, for the appeal to be on a ground relating to the conviction, verdict, finding or sentence which is not related to any reason given by the Commission for making the reference<sup>23</sup>;
- 2326 (14) to grant leave to appeal against an order<sup>24</sup> restricting or preventing reports or restricting public access<sup>25</sup>;
- 2327 (15) to suspend an order<sup>26</sup> for forfeiture or suspension of a personal licence to supply alcohol<sup>27</sup>.

These powers may be exercised by a single judge in the same manner and subject to the same provisions as they may be exercised by the Court of Appeal<sup>28</sup>. If the single judge refuses an application on the part of an appellant to exercise in his favour any of the above powers, the appellant is entitled to have the application determined by the Court of Appeal<sup>29</sup>.

<sup>1</sup> References in the Criminal Appeal Act 1968 ss 31, 44 (both as amended) to a single judge are to any judge of the Court of Appeal or the High Court: s 45(2) (amended by the Administration of Justice Act 1970 ss 9(3), 54(3), Sch 11).

<sup>2</sup> See the Criminal Appeal Act 1968 s 31(1)(a) (s 31(1) substituted by the Criminal Justice Act 1988 s 170(1), Sch 15 paras 20, 29).

<sup>3</sup> Criminal Appeal Act 1968 s 31(2)(a). As to giving leave to appeal see PARAS 1837-1839, 1848 ante; SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 44 et seq.

4 Ibid s 31(2)(b). The single judge may refer a case to the full Court of Appeal without granting leave: *R v Munns* (1908) 1 Cr App Rep 4, CCA. A court of two judges may determine an appeal against sentence: see the Supreme Court Act 1981 s 55(4). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. As to extensions of time see PARA 1865 post.

5 For the meaning of 'appellant' see PARA 1837 note 4 ante.

6 Criminal Appeal Act 1968 s 31(2)(c).

7 Ibid s 31(2)(d).

8 Ibid s 31(2)(e) (substituted by the Criminal Justice Act 1982 s 29(2)(c)). The power so conferred is exercisable under the Criminal Appeal Act 1968 s 19 (as substituted and amended): see PARA 1193 ante. As to bail see PARA 1193 ante; and as to the variation or revocation of bail see PARA 1195 ante.

9 Ie under ibid s 8(2): see PARA 1896 post.

10 Ibid s 31(2)(f).

11 Ie under the Road Traffic Offenders Act 1988 s 40(2): see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1075.

12 Criminal Appeal Act 1968 s 31(2A) (added by the Road Traffic Act 1974 s 24(2), Sch 6 para 10; and amended by the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 3 para 4(1)).

13 Ie under the Criminal Appeal Act 1968 s 29(1): see PARA 1845 ante.

14 Ibid s 31(2)(h).

15 Ie under ibid s 23(1)(a): see PARA 1866 post.

16 Ibid s 31(2)(i) (added by the Courts Act 2003 s 87(1)).

17 Criminal Defence Service (General) (No 2) Regulations 2001, SI 2001/1437, reg 10(1). As from a day to be appointed the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (as prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed.

18 Ie under the Sexual Offences (Amendment) Act 1992 s 3(4): see PARA 241 ante.

19 Criminal Appeal Act 1968 s 31(1)(b) (as substituted (see note 2 supra); and amended by the Youth Justice and Criminal Evidence Act 1999 s 67(1), Sch 4 para 4(1), (3)).

20 Ie under the Prosecution of Offences Act 1985 ss 16-18 (as amended): see PARA 2059 et seq post.

21 Criminal Appeal Act 1968 s 31(1)(c) (as substituted: see note 2 supra).

22 Ie under the Criminal Appeal Act 1995 s 14(4B) (as added): see PARA 1965 post. As to the Criminal Cases Review Commission see PARA 2028 et seq post.

23 Criminal Appeal Act 1968 s 31(1)(aa) (added by the Criminal Justice Act 2003 s 331, Sch 36 paras 86, 87).

24 Ie under the Criminal Justice Act 1988 s 159: see PARA 1934 post.

25 Criminal Appeal Act 1968 s 31(2B) (added by the Criminal Justice Act 1988 Sch 15 paras 20, 30).

26 Ie the power of the Court of Appeal under the Licensing Act 2003 s 130 to suspend an order under s 129 (see LICENSING AND GAMBLING vol 67 (2008) PARA 129).

27 Criminal Appeal Act 1968 s 31(2C) (added by the Licensing Act 2003 s 198(1), Sch 6 paras 38, 40).

28 Criminal Appeal Act 1968 s 31(1) (as substituted: see note 2 supra). It is improper to ask a High Court judge to act under s 31 (as substituted and amended) until the proper application has been made under s 18(1) (see PARA 1863 post): *R v Suggett* (1985) 81 Cr App Rep 243, CA. For general rules relating to the exercise of these powers by a single judge see CrimPR 68.5.

29 Criminal Appeal Act 1968 s 31(3). See further PARA 1855 post. Where a single judge has refused leave on particular grounds of appeal, and granted leave on other grounds, the appellant may not pursue any refused



ground without the leave of the full court: *R v Cox*; *R v Thomas* [1999] 2 Cr App Rep 6, CA; *R v Jackson* [1999] 1 All ER 572, CA.

## **UPDATE**

### **1854 Powers of court exercisable by a single judge**

TEXT AND NOTES--The power of the Court of Appeal to renew an interim hospital order made by them by virtue of any provision of the Criminal Appeal Act 1968 Pt 1 may be exercised by a single judge in the same manner as it may be exercised by the Court: s 31(2ZA) (added by Criminal Justice and Immigration Act 2008 Sch 8 para 9).

The power of the Court of Appeal to grant leave to appeal under the Criminal Justice Act 1987 s 9(11) may be exercised by a single judge in the same manner as it may be exercised by the Court: Criminal Appeal Act 1968 s 31(2D) (added by Criminal Justice and Immigration Act 2008 Sch 8 para 11(3)).

The power of the Court of Appeal to grant leave to appeal under the Criminal Procedure and Investigations Act 1996 s 35(1) may be exercised by a single judge in the same manner as it may be exercised by the Court: Criminal Appeal Act 1968 s 31(2E) (added by Criminal Justice and Immigration Act 2008 Sch 8 para 11(3)).

TEXT AND NOTES 1-27--Also, head (16) to give a live link direction under the 1986 Act s 22(4) (see PARA 1874): s 31(2)(ca) (added by the Police and Justice Act 2006 s 48(3)).

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTE 17--Appointed day is 1 October 2009: SI 2009/1604. Reference to Supreme Court substituted for reference to House of Lords: SI 2001/1437 reg 10(1) (amended by SI 2009/2468).

NOTE 28--CrimPR 68 substituted: see PARA 1856-1861.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iii) Matters Antecedent to the Hearing of Appeals/1855. Determination of application by the full court.

### **1855. Determination of application by the full court.**

If a single judge refuses an application on the part of an appellant<sup>1</sup> to exercise in his favour any of the powers vested in him<sup>2</sup>, the appellant is entitled to have the application determined by the Court of Appeal<sup>3</sup>. The appellant must serve a notice within 14 days, or such longer period as the Registrar of Criminal Appeals, a single judge, or the court may fix (before or after the expiry of the 14-day period), from the date on which the Registrar serves on him notice of the refusal<sup>4</sup>.

Where an appellant may renew to the court an application for the exercise of a power conferred on a single judge<sup>5</sup>, but he does not do so within the period fixed for doing so or an extended period for doing so, then his application is to be treated as having been refused by the court<sup>6</sup>.

1 For the meaning of 'appellant' see PARA 1837 note 4 ante.

2 Ie under the Criminal Appeal Act 1968 s 31(2) (as amended): see PARA 1854 ante.

3 Ibid s 31(3). As to the composition of the court see the Supreme Court Act 1981 s 55 (as amended); and COURTS vol 10 (Reissue) PARA 636. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. An application on a secondary matter such as bail or legal aid arises out of a primary application for leave to appeal against conviction or sentence and hence may not be renewed unless at least one primary application for leave to appeal against conviction or sentence still exists.

4 See CrimPR 68.6(1). The Registrar of Criminal Appeals must, as soon as practicable, serve notice of any determination by any judge of the court under the Criminal Appeal Act 1968 s 31 (as amended): CrimPR 68.29(1). The general rule is that an application for an extension of the 14-day period will be considered at the same time as the further application itself: CrimPR 68.6(1).

CrimPR 68.6, 68.29 applies, with the necessary modifications, for the purpose of having an application determined by the court in pursuance of the Criminal Appeal Act 1968 s 44 (as amended) (see PARA 1972 post): see CrimPR 74.1(5), (6). Good reasons must exist, however, for the power to extend the 14-day period to be exercised: *R v Doherty* [1971] 3 All ER 622n, 55 Cr App Rep 548, CA; *R v Sullivan* (1972) 56 Cr App Rep 541, CA. Delay in obtaining legal advice is not a sufficient reason to extend the time (*R v Hatfield* [1971] Crim LR 700, CA) but positively misleading advice may be a sufficient excuse (*R v Doherty* supra). If counsel intends to appear pro bono on a renewed application, he should inform the Criminal Appeal Office within 14 days of notification of refusal by the single judge: *R v Dowling* (1995) Times, 20 October, CA. If extension of time is refused by the judge of the court, there is no right to have the application for extension of time in which to renew determined by the full court since CrimPR 68.6 contains no such provision. As to notice of determination of the court see further PARA 1894 post.

The full court may, for the purpose of hearing a renewed application, be composed of two judges: see the Supreme Court Act 1981 s 55(4). One judgment only is given by the judge presiding over the court or by such other member of the court as he directs: see s 59. As to the prospective renaming of the Supreme Court Act 1981 see note 3 supra. If the judges are not unanimous, leave to appeal is granted: see the Report of the Interdepartmental Committee on the Court of Criminal Appeal 1965 (Cmd 2755) PARA 19.

5 Ie a power conferred by the Criminal Appeal Act 1968 s 31 (as amended).

6 CrimPR 68.6(2). This does not have the effect of precluding the full court from determining whether an extension of time for service ought to be granted: *R v Dixon (Leon)* [1999] 3 All ER 889, [2000] 1 Cr App Rep 173, CA.

**UPDATE**

**1855 Determination of application by the full court**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTES 4-6--CrimPR Pt 68 replaced: see PARA 1856-1861.

NOTE 4--CrimPR Pt 74 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 74.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1856. Preparation of the case for hearing.

## **(iv) Procedure**

### **1856. Preparation of the case for hearing.**

The Registrar of Criminal Appeals must: (1) take all necessary steps for obtaining a hearing of any appeal<sup>1</sup> or application of which notice is given to him and which is not referred and dismissed<sup>2</sup> summarily<sup>3</sup>; and (2) obtain and lay before the Court of Appeal in proper form all documents, exhibits and other things which appear necessary for the proper determination of the appeal or application<sup>4</sup>.

1 For the meaning of 'appeal' see PARA 1837 note 4 ante.

2 le referred and dismissed summarily under the Criminal Appeal Act 1968 s 20 (as substituted): see PARA 1875 post.

3 Criminal Appeal Act 1968 s 21(1)(a). The Registrar must give as long notice in advance as reasonably possible of the date on which the court will hear any appeal or application by an appellant to: (1) the appellant; (2) any person having custody of the appellant; and (3) any other interested party whom the court requires to be represented at the hearing: CrimPR 68.23(2). CrimPR 68.23(2) does not apply, however, to proceedings before a judge of the court under the Criminal Appeal Act 1968 s 31 (as amended) (see PARA 1854 ante): CrimPR 68.23(3). For the meaning of 'appellant' for these purposes see PARA 1837 note 4 ante. 'Interested party' means a person or organisation who is not the prosecutor or defendant but who has some other legal interest in a criminal case: CrimPR 2.4, glossary.

4 Criminal Appeal Act 1968 s 21(1)(b). The Registrar may require the court of trial to furnish the court with any assistance or information which it may require for the purpose of exercising its jurisdiction: CrimPR 68.23(1). Upon receiving notice of appeal or application, the Crown Court supplies to the Registrar the trial documents. Where the application is for leave to appeal against sentence only, the Crown Court will also order on behalf of the Registrar a transcript of the trial judge's sentencing remarks to be delivered to the Registrar.

Whenever an interpreter has been used for a defendant in the Crown Court, the barrister or solicitor responsible for signing the application for leave to appeal against the sentence or conviction should make clear the need for an interpreter in the Court of Appeal: *R v Kadiu* (2004) Times, 18 February, CA.

CrimPR 68.23 applies, with the necessary modifications, in relation to an appeal under the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended) (see PARA 1966 et seq post) or under the Administration of Justice Act 1960 s 13 (as amended) (see PARA 1920 post) as it applies in relation to an appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended) (see PARA 1837 et seq ante): CrimPR 74.1(7).

## **UPDATE**

### **1856-1861 Preparation of the case for hearing ... Verification of record of proceedings**

CrimPR Pt 68 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 68.

### **1856 Preparation of the case for hearing**

NOTE 3--CrimPR 2.4, glossary now Criminal Procedure Rules 2010, SI 2010/60, r 2.4, glossary. Definition of 'interested party' not reproduced.

NOTE 4--CrimPR Pt 74 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 74.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1857. Supply of documents and other things.

### **1857. Supply of documents and other things.**

The Registrar of Criminal Appeals must, on request, supply to the appellant or respondent copies of documents or other things<sup>1</sup> required for the appeal<sup>2</sup>; and he must, on request, make arrangements for the appellant or respondent to inspect any document or other thing required for the appeal<sup>3</sup>.

1 CrimPR 68.11 does not apply to the supply of the transcripts of any proceedings or part thereof: CrimPR 68.11(3). As to the supply of transcripts see PARA 1860 post.

2 CrimPR 68.11(1); Criminal Appeal Act 1968 s 21(2). The Registrar may make charges in accordance with scales and rates fixed for the time being by the Treasury: CrimPR 68.11(1); Criminal Appeal Act 1968 s 21(2).

3 CrimPR 68.11(2).

CrimPR 68.11 applies in relation to an appeal under the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended) (see PARA 1966 et seq post) or under the Administration of Justice Act 1960 s 13 (as amended) (see PARA 1920 post) as it applies in relation to an appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended) (see PARA 1837 et seq ante): CrimPR 74.1(7).

Summaries prepared by the Criminal Appeal Office to assist the court are provided to all advocates in the case: see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.18.1-IV.18.7, CA.

### **UPDATE**

### **1856-1861 Preparation of the case for hearing ... Verification of record of proceedings**

CrimPR Pt 68 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 68.

### **1857 Supply of documents and other things**

NOTE 3--CrimPR Pt 74 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 74.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1858. Custody of exhibits.

### **1858. Custody of exhibits.**

On a conviction on indictment or on a coroner's inquisition a court officer of the court of trial must, subject to any directions of the trial judge, make arrangements<sup>1</sup> for any exhibit at the trial, which in his opinion may be required for the purposes of an appeal against conviction, to be kept in the custody of the court, or given into the custody of the person producing it at the trial or any other person for retention, until the expiration of 35 days from the date of conviction<sup>2</sup>.

Where an appellant has given notice of appeal, or of an application for leave to appeal, against conviction<sup>3</sup>, the Registrar of Criminal Appeals must inform a court officer of the notice, and must give directions concerning the continued retention in custody of any exhibit which appears necessary for the proper determination of the appeal or application<sup>4</sup>.

Where the Court of Appeal orders an appellant to be re-tried<sup>5</sup>, it must make arrangements<sup>6</sup> pending the re-trial for the continued retention in custody of exhibits<sup>7</sup>.

<sup>1</sup> Any such arrangements may include arrangements for the inspection of an exhibit by an interested party: CrimPR 68.10(4). See also PARA 1857 ante. For the meaning of 'interested party' see PARA 1856 note 3 ante.

<sup>2</sup> CrimPR 68.10(1). As to the duty of the court or prosecution where exhibits are required for separate trials in different courts see *R v Lambeth Metropolitan Stipendiary Magistrate, ex p McComb* [1983] QB 551, [1983] 1 All ER 321, CA.

<sup>3</sup> As to service of notices see PARA 1863 post.

<sup>4</sup> CrimPR 68.10(2). To enable the Registrar to give these directions, he must be informed by the appellant of any exhibit produced at the trial which he wishes to be kept in custody for the purposes of his appeal: see PARA 1864 note 3 post.

<sup>5</sup> See PARAS 1896-1897 post.

<sup>6</sup> See CrimPR 68.10(4); and note 1 supra.

<sup>7</sup> CrimPR 68.10(3).

## **UPDATE**

### **1856-1861 Preparation of the case for hearing ... Verification of record of proceedings**

CrimPR Pt 68 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 68.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1859. Record of proceedings.

### **1859. Record of proceedings.**

The whole of any proceedings in respect of which an appeal lies, with or without leave, must be recorded<sup>1</sup> by means of shorthand notes, or by mechanical means<sup>2</sup>.

Where such proceedings are recorded by means of shorthand notes, it is not necessary to record:

- 2328 (1) the opening or closing addresses to the jury on behalf of the prosecution or a defendant unless the judge of the court of trial otherwise directs; or
- 2329 (2) any other part of such proceedings which the judge of the court of trial directs need not be recorded<sup>3</sup>.

Where it is not practicable for such proceedings to be so recorded, the judge of the court of trial must direct how and to what extent the proceedings are to be recorded<sup>4</sup>.

The cost of making any record of proceedings is payable out of public funds<sup>5</sup>.

1 le unless expressly provided to the contrary by CrimPR 68.12: see the text to notes 2-4 infra.

2 CrimPR 68.12(1); Criminal Appeal Act 1968 s 32(1)(a). Mechanical means may only be used with the Lord Chancellor's permission: CrimPR 68.12(1). Any permission so given may contain conditions concerning the custody, and supply of transcripts, of that record: CrimPR 68.12(4).

3 CrimPR 68.12(2).

4 CrimPR 68.12(3). A trial is not rendered a nullity solely because of the absence of a record, as the statutory provisions are directory only: *R v Rutter* (1908) 1 Cr App Rep 174, CCA; *R v Elliott* (1909) 2 Cr App Rep 171, CCA; *R v Bennett* (1909) 2 Cr App Rep 152, CCA (statement by counsel at trial accepted in lieu of shorthand note); *R v Le-Caer* (1972) 56 Cr App Rep 727, CA; *R v Ingham* (24 November 1987, unreported), CA (notes of trial judge and counsel used). As to counsel's duty where there is a breakdown in the recording apparatus see LEGAL PROFESSIONS vol 66 (2009) PARA 1214.

5 See the Criminal Appeal Act 1968 32(3).

### **UPDATE**

#### **1856-1861 Preparation of the case for hearing ... Verification of record of proceedings**

CrimPR Pt 68 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 68.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1860. Transcripts.

### **1860. Transcripts.**

A transcript of the record of any proceedings or part thereof in respect of which an appeal lies, with or without leave, to the court and which are recorded<sup>1</sup>:

2330 (1) must on request be supplied to the Registrar of Criminal Appeals or any interested party<sup>2</sup>, on payment of such charge as may be fixed for the time being by the Treasury;

2331 (2) may on request be supplied to any other person, on payment of such sum as may be fixed for the time being by the Treasury<sup>3</sup>.

However, the Registrar may on request supply to any interested party a transcript of the record of any proceedings or part thereof which is in his possession for the purposes of the appeal or application in question and in such case may make charges in accordance with scales and rates fixed for the time being by the Treasury<sup>4</sup>.

The Secretary of State may in any case direct that a transcript of the record of proceedings be made and supplied to him<sup>5</sup>.

The cost of making and supplying any transcript to the Registrar or the Secretary of State is payable out of public funds<sup>6</sup>.

1 le in accordance with CrimPR 68.12(1): see PARA 1859 ante.

2 For the meaning of 'interested party' see PARA 1856 note 3 ante.

3 CrimPR 68.13(1); Criminal Appeal Act 1968 s 32(1)(b). As to the reading of a transcript of evidence on a re-trial see PARA 1897 post. A transcript may be supplied under CrimPR 68.13 for purposes other than an appeal, eg for another trial; there is no limitation of time during which this may be done: *R (on the application of Customs and Excise Comrs) v Crown Court at Blackfriars* [2004] EWHC 2119 (Admin), [2004] 9 Archbold News 1, DC.

4 CrimPR 68.13(2). In the case of a person who has been granted a right to representation by the Criminal Defence Service under the Access to Justice Act 1999 s 14, Sch 3 (as amended) for the purpose of the appeal or any proceedings preliminary or incidental thereto, such a transcript must be supplied free: CrimPR 68.13(2) proviso. As to the Criminal Defence Service see LEGAL AID vol 65 (2008) PARA 120 et seq.

CrimPR 68.13(2) applies in relation to an appeal under the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended) (see PARA 1966 et seq post) or under the Administration of Justice Act 1960 s 13 (as amended) (see PARA 1920 post) as it applies in relation to an appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended) (see PARA 1837 et seq ante): CrimPR 74.1(7).

5 Criminal Appeal Act 1968 s 32(2).

6 See *ibid* s 32(3). The cost of the transcript is among the costs of the appeal or application for leave to appeal, the whole or part of which an unsuccessful appellant may be ordered to pay: see the Prosecution of Offences Act 1985 s 18(6); and PARAS 1893, 2063 post. As to verification of transcripts see PARA 1861 post.

### **UPDATE**

**1856-1861 Preparation of the case for hearing ... Verification of record of proceedings**

CrimPR Pt 68 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 68.

**1860 Transcripts**

NOTE 4--CrimPR Pt 74 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 74.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1861. Verification of record of proceedings.

### **1861. Verification of record of proceedings.**

An official shorthand writer who takes shorthand notes of any proceedings or part thereof in respect of which an appeal lies (with or without leave) to the Court of Appeal must:

- 2332 (1) at the beginning of the notes state the name of the parties to the proceedings;
- 2333 (2) in the case of shorthand notes of part of any proceedings, state the part concerned;
- 2334 (3) record his name in the notes;
- 2335 (4) retain the shorthand notes for not less than five years<sup>1</sup>.

Verification of a transcript of the shorthand notes taken by an official shorthand writer of any proceedings or part thereof in respect of which an appeal lies (with or without leave) to the court must be by a certificate by the person making the transcript that:

- 2336 (a) he has made a correct and complete transcript of the notes to the best of his skill and ability; and
- 2337 (b) the notes were either taken by him and were to the best of his skill and ability a complete and correct account of those proceedings or part thereof, or were taken by another official shorthand writer<sup>2</sup>.

Verification of a transcript of the record of the proceedings or part thereof, if recorded by mechanical means, must be by:

- 2338 (i) a certificate by the person making the transcript that he has made a correct and complete transcript of the recording to the best of his skill and ability; and
- 2339 (ii) a certificate by a person responsible for the recording or a successor that the recording records so much of the proceedings as is specified in the certificate<sup>3</sup>.

Verification of a transcript of the record of the proceedings or part thereof, if recorded in any other way, must be by:

- 2340 (A) a certificate by the person who made the record that he recorded the proceedings or part thereof to the best of his ability; and
- 2341 (B) a certificate by the person making the transcript that he has made a correct and complete transcript of the record to the best of his skill and ability<sup>4</sup>.

<sup>1</sup> CrimPR 68.14(1).

<sup>2</sup> CrimPR 68.14(2); Criminal Appeal Act 1968 s 32(1)(b). Subject to CrimPR 68.12(2) (see PARA 1859 ante), a proper and full note must be taken of everything relevant said in court: *R v Rimes* (1912) 7 Cr App Rep 240, CCA; *R v Austin and Davies* (1916) 12 Cr App Rep 171, CCA; *R v Dixon and Rockliffe* (1920) 15 Cr App Rep 96, CCA; *R v Monkman* (1922) 16 Cr App Rep 115, CCA. Where a plea is taken in one court and the trial is conducted in another, the transcript should cover the whole proceedings including pleas of guilty in the other

court: *R v Strickson* (1936) 25 Cr App Rep 206, CCA. In the absence of evidence of any mistake the court is bound by the transcript: *R v Martin* (1927) 20 Cr App Rep 103, CCA. However, an ambiguity may be resolved by reference to the judge's notes: see *R v Beauchamp* (1909) 2 Cr App Rep 40, CCA; *R v Le-Caer* (1972) 56 Cr App Rep 727, CA. A judge must not revise the transcript of his summing up: *R v Kluczynski, R v Stefanowicz* [1973] 3 All ER 401n, 57 Cr App Rep 836, CA. As to counsel's duty where the transcript is incomplete see LEGAL PROFESSIONS vol 66 (2009) PARA 1214.

3 CrimPR 68.14(3).

4 CrimPR 68.14(4).

## UPDATE

### **1856-1861 Preparation of the case for hearing ... Verification of record of proceedings**

CrimPR Pt 68 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 68.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1862. Service of documents.

## **1862. Service of documents.**

Service of a document in proceedings in the Court of Appeal may be effected:

2342 (1) in the case of a document to be served on the Registrar of Criminal Appeals:

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- 64. (a) in the case of an appellant<sup>1</sup> who is in custody, by delivering it to the person having custody of him<sup>2</sup>;
- 65. (b) by delivering it to the Registrar<sup>3</sup>;
- 66. (c) by addressing it to him and leaving it at his office in the Royal Courts of Justice, London, WC2<sup>4</sup>; or
- 67. (d) by sending it by post addressed to him at that office<sup>5</sup>;

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2343 (2) in the case of a document to be served on a Crown Court officer:

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- 68. (a) in the case of an appellant who is in custody, by delivering it to the person having custody of him<sup>6</sup>; or
- 69. (b) by delivering it to, or sending it by post addressed to, a court officer at the Crown Court centre at which the conviction, verdict, finding or sentence appealed against was given or passed<sup>7</sup>;

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2344 (3) in the case of a document to be served on a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or sending it by post addressed to the secretary or clerk of the body at that office<sup>8</sup>;

2345 (4) in the case of a document to be served on any other person:

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- 70. (a) by delivering it to the person to whom it is directed<sup>9</sup>;
- 71. (b) by leaving it for him with some person at his last known or usual place of abode<sup>10</sup>; or
- 72. (c) by sending it by post addressed to him at his last known or usual place of abode<sup>11</sup>.

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1 For these purposes, 'appellant' includes: (1) an appellant under the Administration of Justice Act 1960 s 13 (as amended) (appeal in cases of contempt of court: see PARA 1920 post); (2) a defendant in proceedings in the Crown Court in respect of which an application is made for leave to appeal under the Criminal Justice Act 1988 s 159 (Crown Court proceedings-orders restricting or preventing reporting or restricting public access: see PARA 1934 post); (3) an appellant under the Criminal Justice Act 2003 s 276, Sch 22 para 14 (mandatory life sentences: appeals in transitional cases); (4) in the case of an application under the Criminal Appeal Act 1968 s 8(1) (as amended) or s 8(1A) (as added) (see PARA 1896 post) a person who has been ordered to be re-tried: CrimPR 68.1(3). See also PARA 1194 ante.

2 CrimPR 68.1(1)(a)(i). A person having custody of an appellant to whom a document is delivered in pursuance of CrimPR 68.1(a)(i) (see head (1)(a) in the text) or CrimPR 68.1(b)(i) (see head (2)(a) in the text) must indorse on it the date of delivery and cause it to be forwarded forthwith to the Registrar or to a Crown Court officer, as the case may be: CrimPR 68.1(2).

- 3 CrimPR 68.1(1)(a)(ii).
- 4 CrimPR 68.1(1)(a)(iii).
- 5 CrimPR 68.1(1)(a)(iv).
- 6 CrimPR 68.1(1)(b)(i). See note 2 *supra*.
- 7 CrimPR 68.1(1)(b)(ii).
- 8 CrimPR 68.1(1)(c).
- 9 CrimPR 68.1(1)(d)(i).
- 10 CrimPR 68.1(1)(d)(ii).
- 11 CrimPR 68.1(1)(d)(iii).

## **UPDATE**

### **1862 Service of documents**

TEXT AND NOTES--Crim PR Pt 68 now Criminal Procedure Rules 2010, SI 2010/60, Pt 68.  
CrimPR 68.1 not reproduced.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1863. Notice of appeal or of application for leave to appeal.

### **1863. Notice of appeal or of application for leave to appeal.**

A person who wishes to appeal<sup>1</sup> to the Court of Appeal or to obtain the leave of that court to appeal, must give notice of appeal or, as the case may be, notice of application for leave to appeal, in such manner as may be directed<sup>2</sup>.

Notice of appeal, or of application for leave to appeal, must be given within 28 days from the date of the conviction, verdict or finding appealed against, or in the case of appeal against sentence<sup>3</sup>, from the date on which sentence was passed or, in the case of an order made or treated as made on conviction, from the date of the making of the order<sup>4</sup>.

The time for giving such notice may be extended, either before or after it expires, by the Court of Appeal<sup>5</sup>.

1     le under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended): see PARA 1837 et seq ante. An application for leave to appeal by a defendant who has absconded and is still unlawfully at large is not thereby to be treated as ineffective by the Registrar or dismissed for the reason that, by absconding, the applicant has put it out of his power to instruct his solicitors to initiate proceedings. A single judge or the court is entitled (but not bound) to conclude that solicitors who submit the application have the actual or implied authority to do so: *R v Charles (Jerome)*; *R v Tucker (Lee)* [2001] EWCA Crim 129, [2001] 2 Cr App Rep 233 (*R v Jones* [1971] 2 QB 456, 55 Cr App Rep 321, CA, not followed).

2     Criminal Appeal Act 1968 s 18(1). Notice of appeal or of an application for leave to appeal under Pt I (as amended) or notice of appeal under the Administration of Justice Act 1960 s 13 (as amended) (as required by the Criminal Appeal Act 1968 s 18A (as added); see PARA 1920 post) must be given by completing the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA, and serving it on a Crown Court officer: CrimPR 68.3(1). A notice of appeal or of an application for leave to appeal must be accompanied by a notice in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2006] 3 All ER 484, Annex D, containing the grounds of the appeal or application: CrimPR 68.3(2). As to grounds of appeal see PARA 1864 post. The form to which CrimPR 68.3 relates must be signed by, or on behalf of, the appellant: CrimPR 68.3(10). If a form is not signed by the appellant and the appellant is in custody, the Registrar must, as soon as practicable after receiving the form from the Crown Court, send a copy of it to the appellant: CrimPR 68.3(11). As to notice of an application for bail pending appeal see PARA 1193 note 4 ante. As to service of documents see PARA 1862 ante; and as to the importance of complying with the above procedure see *R v Suggett* (1985) 81 Cr App Rep 243, CA.

3     For the meaning of 'sentence' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 45

4     Criminal Appeal Act 1968 s 18(2). In the case of an appeal against conviction, time runs from the date of conviction, and not from the date of sentence: *R v Leonard L* [1998] 2 Cr App Rep 326, (sub nom *R v Long (Leonard)* 161 JP 769), CA. Where a sentence or other order is varied under the Powers of Criminal Courts (Sentencing) Act 2000 s 155 (see PARA 1357 ante), the sentence or other order is to be regarded as imposed or made on the day on which it is so varied: see s 155(6)(a).

Where: (1) a sentence has been imposed on any person under the Powers of Criminal Courts (Sentencing) Act 2000 s 110 (see PARA 772 ante) or s 111 (see PARA 294 ante); and (2) any previous conviction of his without which s 110 or s 111 would not have applied has been subsequently set aside on appeal, then notwithstanding anything in the Criminal Appeal Act 1968 s 18, notice of appeal against the sentence may be given at any time within 28 days from the date on which the previous conviction was set aside: Powers of Criminal Courts (Sentencing) Act 2000 s 112 (amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 7).

Where: (a) a sentence has been imposed on any person under the Criminal Justice Act 2003 s 225 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 73-74, 80, 87) or s 227 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 75, 88); and (b) any previous conviction of his without which the court would not have been required to make the assumption mentioned in s 229(3) has been subsequently set aside on appeal, then notwithstanding anything in the Criminal Appeal Act 1968 s 18, notice of appeal against the sentence may be given at any time within 28 days from the date on which the previous conviction was set aside: Criminal Justice Act 2003 s 231.

As from a day to be appointed, where a case in the Crown Court has been conducted or continued without a jury and the court convicts a defendant, the reference in the Criminal Appeal Act 1968 s 18(2) to the date of conviction is to be read as a reference to the date of judgment stating the reasons for the conviction: Criminal Justice Act 2003 s 48(5)(b) (in force, at the date at which this volume states the law, for certain purposes only: see PARA 1284 note 1 ante).

5 Criminal Appeal Act 1968 s 18(3). See PARA 1865 post. The power to extend the time is exercisable by a single judge: see s 31(2)(b); and PARA 1854 ante.

## UPDATE

### **1863-1865 Notice of appeal or of application for leave to appeal ... Extensions of time**

CrimPR Pt 68 substituted: see PARA 1856-1861.

### **1863 Notice of appeal or of application for leave to appeal**

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, further amended: *Amendment to the Consolidated Practice Direction (Criminal Proceedings: Forms)* [2007] 1 WLR 1535, CA, *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

NOTE 4--2003 Act s 231 amended: Criminal Justice and Immigration Act 2008 s 18(1).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1864. Statement of grounds of appeal.

### **1864. Statement of grounds of appeal.**

A notice of appeal or of an application for leave to appeal<sup>1</sup> must be accompanied by a notice<sup>2</sup> containing the grounds of the appeal or application<sup>3</sup>. Such a notice must include notice: (1) of any application to be made to the court for a declaration of incompatibility<sup>4</sup>; or (2) of any issue for the court to decide which may lead to the court making such a declaration<sup>5</sup>. Where grounds have been settled by counsel, they must be signed by counsel and attached to the notice of appeal or of the application for leave to appeal<sup>6</sup>. Sufficient particulars must be given to enable the Registrar and subsequently the Court of Appeal to identify clearly the matters relied upon<sup>7</sup>. Where the appellant was represented at trial by counsel who settles the grounds of appeal, particulars should be given without waiting for a transcript of the trial<sup>8</sup>. The grounds of appeal enable the Registrar of Criminal Appeals to order the transcript necessary for the purposes of the appeal or application<sup>9</sup>. Upon receipt of the transcript the Registrar may require counsel to perfect the grounds in the light of the transcript<sup>10</sup>.

A notice unsupported by grounds is ineffective<sup>11</sup>.

The grounds of an appeal or application may, with the consent of the court, be varied or amplified within such time as the court may allow<sup>12</sup>.

1 As to notice of appeal or of application for leave to appeal see PARA 1863 ante.

2 The notice must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2006] 3 All ER 484, Annex D, CA.

3 CrimPR 68.3(2). If the appellant has been convicted of more than one offence, the notice must specify the convictions or sentences against which the appellant is appealing or applying for leave to appeal: CrimPR 68.3(5). An appellant who is appealing or applying for leave to appeal against conviction must specify in the form (see note 2 supra) any exhibit produced at the trial which he wishes to be kept in custody for the purposes of his appeal: CrimPR 68.3(9). As to custody of the exhibits see PARA 1858 ante.

The form must be signed by or on behalf of the appellant: CrimPR 68.3(10). If a form is not signed by the appellant and the appellant is in custody, the Registrar must, as soon as practicable after receiving the form from the Crown Court, send a copy of it to the appellant: CrimPR 68.3(11).

4 CrimPR 68.3(3)(a). A declaration of incompatibility means a declaration under the Human Rights Act 1998 s 4: see PARA 1892 post.

5 CrimPR 68.3(3)(b). Where the grounds of appeal or application include notice in accordance with CrimPR 68.3(3)(b), a copy of the notice must be served on the prosecutor by the appellant: CrimPR 68.3(4).

6 Advocates should not settle grounds or support them with written advice unless they consider that they are properly arguable. Grounds should be carefully drafted and properly particularised. Advocates should not assume that the court will entertain any ground of appeal not set out and properly particularised. Should leave to amend the grounds be granted it is most unlikely that further grounds will be entertained: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at II.15.1, CA. A copy of the Advocate's positive advice about the merits should be attached as part of the grounds: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at II.15.2, CA. In certain cases counsel may not be able to confirm that his grounds of appeal are reasonable without, for example, a transcript or other further information. In this event grounds should be accompanied by a 'Note to the Registrar'

setting out the matters upon which assistance is required: *A Guide to Proceedings in the Court of Appeal Criminal Division* (1997) PARA 2.1.

7 See *A Guide to Proceedings in the Court of Appeal Criminal Division* (1997) PARA 2.2; *R v Bremner and Joy* (20 December 1984, unreported), CA.

8 *R v Adler* (1923) 17 Cr App Rep 105, CCA; *R v Ellson* [1962] 1 All ER 417n, [1962] 1 WLR 312, CCA; *R v Kooner* [1972] Crim LR 420, CA.

9 Only transcript essential for the proper conduct of the appeal should be requested. Counsel are likely to be criticised by the court for seeking excessive quantities of transcript (see *R v Campbell* (1981) Times, 21 July, CA; *R v Lifely* (1990) Times, 16 July, CA) and in certain circumstances the costs of unnecessary transcript can be ordered to be paid by the appellant: *A Guide to Proceedings in the Court of Appeal Criminal Division* (1997) PARA 3.3.

10 The Registrar will almost certainly do so where application is made for leave to appeal against conviction. Counsel who wish to perfect their grounds in any event should give an indication to that effect in the form of a Note to the Registrar to accompany the grounds: *A Guide to Proceedings in the Court of Appeal Criminal Division* (1997) PARA 4.1. Perfected grounds should consist of a fresh document, superseding the original grounds of appeal, with references by page number and letter to all relevant passages in the transcript; authorities relied on should be cited, where possible using Criminal Appeal Report references, and documents mentioned in the grounds should be identified clearly and an indication given if each member of the court will require a copy: *A Guide to Proceedings in the Court of Appeal Criminal Division* (1997) PARA 4.4. As to the importance of complying with para 4 see *R v Howell* (1984) 78 Cr App Rep 195, CA.

If, having considered the transcript, counsel is of the opinion that the appeal or application should be abandoned, he should set out his reasons to his instructing solicitors. He should inform the Registrar that he has done so; but a copy of his advice should not be sent to the Registrar: *A Guide to Proceedings in the Court of Appeal Criminal Division* (1997) PARA 4.5. Solicitors should send a copy of counsel's advice to the appellant and obtain his instructions, at the same time explaining that, if the appellant persists with his application, the court may consider whether to give a direction that time spent in custody should be lost: *A Guide to Proceedings in the Court of Appeal Criminal Division* (1997) PARA 4.5. As to the giving of such directions see PARA 1845 ante; and as to abandonment of appeals see PARA 1876 post.

11 *R v Wilson* [1973] Crim LR 572. It is not made effective by qualifications such as 'grounds to follow', 'grounds being settled': *R v Wilson* supra.

12 CrimPR 68.3(6). As to applications at the last moment before the hearing before the court see *R v Willmott* (1933) 24 Cr App Rep 54, CCA; *R v Antoniadis* [1973] Crim LR 572, CA.

In appeals against conviction advocates for the appellant and for the prosecution authority must lodge skeleton arguments with the Registrar and their counterpart after notification that leave to appeal is granted: see further *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at II.17.1-II.17.5, CA.

## UPDATE

### **1863-1865 Notice of appeal or of application for leave to appeal ... Extensions of time**

CrimPR Pt 68 substituted: see PARA 1856-1861.

### **1864 Statement of grounds of appeal**

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1865. Extensions of time.

### **1865. Extensions of time.**

The time for giving notice of appeal or of application for leave to appeal may be extended, either before or after it expires, by the Court of Appeal<sup>1</sup>. Substantial reasons for the delay are, however, required, and the longer the delay the stronger must be the reasons<sup>2</sup>.

<sup>1</sup> Criminal Appeal Act 1968 s 18(3). Notice of an application to extend time must be given by completing so much of Pt 2 of the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2006] 3 All ER 484, Annex D, CA as relates to the application and by giving notice of appeal or of application for leave to appeal in accordance with CrimPR 68.3(1)-(6) (see PARA 1863 ante): see CrimPR 68.3(7). Notice of any such application must specify the grounds of the application: CrimPR 68.3(8). As to the procedure on giving notice of appeal or of application for leave to appeal see PARA 1863 ante.

<sup>2</sup> *R v Rhodes* (1910) 74 JP 380, 5 Cr App Rep 35, CCA; *R v Moore* (1923) 17 Cr App Rep 155, CCA; *R v Lesser* (1939) 27 Cr App Rep 69, CCA; *R v Cullum* (1942) 28 Cr App Rep 150, CCA; *R v Hawkins (Paul Nigel)* [1977] 1 Cr App Rep 234, CA. The court will, however, take into account matters other than the reasons for the delay, eg whether or not on the facts there might have been a conviction of some other offence: *R v Richardson* [1998] 10 Archbold News 1, CA. Consideration will usually be given to the merits before declining to grant an extension of time: *R v Charles*; *R v Tucker* [2001] EWCA Crim 129 at [42], [2001] 2 Cr App Rep 233 at [42] per Hooper J. Even in the case of inordinate delay, for which there was no clear indication, an extension may be granted if the facts of the case are exceptional; in such a case it must not be forgotten that a refusal could result in a reference by the Criminal Cases Review Commission, which would fall to be treated as an appeal and would itself cause further delay: *R v King* [2000] Crim LR 835, CA.

The court will not usually grant an extension of time where the law on which the conviction was based has since been overruled; it is a matter of discretion: *R v Ramsden* [1972] Crim LR 547, CA; *R v Hawkins (Paul Nigel)* supra; *R v Benjafield*, *R v Leal*, *R v Milford*, *R v Rezvi* [2001] 2 All ER 609, [2001] 2 Cr App Rep 87, CA (point not considered on appeal [2002] UKHL 2, [2003] 1 AC 1099, [2002] 1 All ER 815); *R v Kansal (No 2)* [2001] EWCA Crim 1260, [2002] 2 AC 69, [2001] 3 WLR 751 (point not considered on appeal [2001] UKHL 62, [2002] 2 AC 69, [2002] 1 All ER 257).

If an application for extension of time is refused by a single judge, it may be renewed to the full court: see PARA 1855 ante.

## **UPDATE**

### **1863-1865 Notice of appeal or of application for leave to appeal ... Extensions of time**

CrimPR Pt 68 substituted: see PARA 1856-1861.

### **1865 Extensions of time**

NOTE 1--See *R v Orr* [2009] All ER (D) 74 (Nov), CA (permission for extension of time of two years to mount appeal against sentence refused).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1866. Production of documents on appeal.

### **1866. Production of documents on appeal.**

If the Court of Appeal thinks it necessary or expedient in the interests of justice, the Court of Appeal may<sup>1</sup> order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case<sup>2</sup>.

<sup>1</sup> le for the purposes of an appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended) (see PARA 1837 et seq ante): Criminal Appeal Act 1968 s 23(1) (amended by the Criminal Appeal Act 1995 s 29(1), Sch 2 para 4(1), (3)).

<sup>2</sup> Criminal Appeal Act 1968 s 23(1)(a). Section 23(1) (as amended) does not prevent the court from examining such material as it thinks fit in deciding whether to order production of documents at the hearing of the appeal: *R v Callaghan* [1988] 1 All ER 257, 86 Cr App Rep 181, CA. As to inspection of documents by parties to the appeal see PARA 1857 ante. See also *R v Robinson* [1917] 2 KB 108, 12 Cr App Rep 226, CCA (secondary evidence allowed of letter written by prisoner after conviction); *R v Gordon (Practice Note)* [1963] 3 All ER 175, [1963] 1 WLR 810, CCA (order for production of a tape-recording of conversation); *R v Benjamin* (3 March 1988, unreported), CA (order for production of shorthand writer's tapes and notes).

As to custody of exhibits etc pending the determination of an appeal see PARA 1858 ante; and as to the reception of fresh evidence on appeal see PARA 1867 post.

### **UPDATE**

### **1866 Production of documents on appeal**

TEXT AND NOTES--Criminal Appeal Act 1968 s 23 further amended to extend the powers of the Court of Appeal to compel the production of documents and the attendance of witnesses: Criminal Justice and Immigration Act 2008 Sch 8 para 10.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1867. Additional evidence on appeal.

### **1867. Additional evidence on appeal.**

If the Court of Appeal thinks it necessary or expedient in the interests of justice, it may<sup>1</sup>:

2346 (1) order any witness who would have been compellable in the proceedings from which the appeal<sup>2</sup> lies to attend for examination and be examined before the court, whether or not he was called in those proceedings<sup>3</sup>;

2347 (2) receive any evidence which was not adduced in the proceedings from which the appeal lies<sup>4</sup>; and this power applies to any evidence of a witness (including the appellant<sup>5</sup>) who is competent but not compellable<sup>6</sup>.

In considering whether to receive any evidence, the Court of Appeal must have regard in particular to:

2348 (a) whether the evidence appears to the court to be capable of belief<sup>7</sup>;

2349 (b) whether it appears to the court that the evidence may afford any ground for allowing the appeal<sup>8</sup>;

2350 (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue<sup>9</sup> which is the subject of the appeal<sup>10</sup>; and

2351 (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings<sup>11</sup>.

A party to an appeal who applies for leave to call a witness may also apply for leave<sup>12</sup> for the evidence of that witness to be given through a live television link where the witness is a specified vulnerable person<sup>13</sup> and the offence is a specified<sup>14</sup> offence<sup>15</sup>. Such an application must be made at the same time as the application for leave to call the witness or at any time thereafter, but no less than 14 days before the date fixed for the hearing of the appeal except with the leave of the court<sup>16</sup>. An application so made is determined without a hearing, unless the court otherwise directs; and the Registrar must notify the applicant and the other parties of the time and place of any such hearing<sup>17</sup>.

A party to an appeal who applies for leave to call a witness may also apply for leave<sup>18</sup> for the evidence of that witness to be given through a live television link where the witness is outside the United Kingdom<sup>19</sup>. Such an application must be made at the same time as the application for leave to call the witness or at any time thereafter, but no less than 14 days before the date fixed for the hearing of the appeal except with the leave of the court<sup>20</sup>. An application so made is determined without a hearing, unless the court otherwise directs, and the Registrar must notify the applicant and the other parties of the time and place of any such hearing<sup>21</sup>.

1. le for the purposes of an appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended) (see PARA 1837 et seq ante): Criminal Appeal Act 1968 s 23(1) (amended by the Criminal Appeal Act 1995 s 29(1), Sch 2 para 4(1), (3)). The discovery of 'fresh' evidence after the determination of an appeal does not allow the court to reconsider the propriety of the conviction etc, unless the court becomes seised of the case by way of reference by the Secretary of State: *R v Pinfold* [1988] QB 462, 87 Cr App Rep 15, CA. The court may examine such material as it thinks fit in order to ascertain whether to exercise its powers under the Criminal Appeal Act 1968 s 23(1): *R v Callaghan* [1988] 1 All ER 257, 86 Cr App Rep 181, CA.

2 For the meaning of 'appeal' see PARA 1837 note 4 ante.

3 Criminal Appeal Act 1968 s 23(1)(b). Notice of an application for an order under s 23(1)(b) or (c) must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA and must be served on the Registrar of Criminal Appeals, save that where a notice of application is given together with a notice of appeal or notice of application for leave to appeal, it must be served on the Crown Court officer: CrimPR 68.15(1). Alternatively, application may be made to the court orally: CrimPR 68.15(2). An order of the court to a person to attend for examination as a witness must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA and must specify the time and place of attendance: CrimPR 68.16(1). Such an order may be made by a single judge: see PARA 1854 ante. The court may order the arrest of a witness who fails to attend: see *R v Moylan* (1969) as reported in 119 NLJ 462, CA.

As to the examination of a witness before an officer of the court see PARA 1871 post.

4 Criminal Appeal Act 1968 s 23(1)(c) (substituted by the Criminal Appeal Act 1995 s 4(1)(a)). As to notice of the application see note 3 supra.

5 For the meaning of 'appellant' see PARA 1837 note 4 ante.

6 Criminal Appeal Act 1968 s 23(1), (3) (amended by the Criminal Appeal Act 1995 ss 4(1)(c), 29, Sch 3). The court may consider a judgment in other proceedings where the judge has considered issues identical or similar to those in the case before the jury or which bear on those issues: *R v D (David)*, *R v Philip (J)* [1996] QB 283, [1996] 1 Cr App Rep 455, CA; *R v B* [1999] 1 Archbold News 2, CA.

Evidence will not be received if it would not afford any ground for allowing the appeal or if it is inadmissible: *R v Lattimore* (1975) 62 Cr App Rep 53, CA. Save in the most exceptional circumstances, the court will not receive evidence to advance a different case from that run at the trial: *R v Abrol* (11 July 1983, unreported), CA. Also see *R v Arnold* (1996) 31 BMLR 24, CA (new evidence as to appellant's mental health not referable to proven facts, and therefore not admissible); *R v Gilfoyle* [1996] 3 All ER 883, [1996] 1 Cr App Rep 302, CA (evidence ruled inadmissible at trial received on appeal because relevant and admissible; decided before substitution of the Criminal Appeal Act 1968 s 23(1)(c)). It is permissible to cross-examine a witness about any relevant finding of fact by a court, but caution is required in relation to what is and is not findings by the Court of Appeal: *R v Twitchell* [2000] 1 Cr App Rep 373, (1999) Times, 10 November, CA.

7 Criminal Appeal Act 1968 s 23(2)(a) (s 23(2) substituted by the Criminal Appeal Act 1995 s 4(1)(b)).

8 Criminal Appeal Act 1968 s 23(2)(b) (as substituted: see note 7 supra).

9 'On an issue' means on an issue which was raised at the trial and is the subject of the appeal: *R v Melville* [1976] 1 All ER 395 at 399, 62 Cr App Rep 100 at 104, CA.

10 Criminal Appeal Act 1968 s 23(2)(c) (as substituted: see note 7 supra).

11 Ibid s 23(2)(d) (as substituted: see note 7 supra). The court may order the appellant to be re-tried if the interests of justice so require: see PARA 1896 post. Provided that consideration has been given to the above criteria, fresh evidence may be admitted even if none of the criteria have been satisfied: *R v Sales* [2000] 2 Cr App Rep 431, CA. The court may receive evidence which has only become available to the prosecution after the conclusion of the trial (*R v Craven* [2001] 2 Cr App Rep 12, CA); including evidence whose purpose is not to rebut fresh evidence called by the appellant (*R v Hanratty* [2002] EWCA Crim 1141, [2002] 3 All ER 534, [2002] 2 Cr App Rep 419). The overriding consideration of the court in deciding whether to admit fresh evidence is whether the evidence will assist it to achieve justice; justice can equally be achieved by upholding a conviction if it is safe or setting it aside if it is unsafe: *R v Hanratty* supra. On an application to call fresh evidence, the court must be provided in advance with all information relevant under the Criminal Appeal Act 1968 s 23(2)(d) (as substituted); where a lengthy or complicated explanation is necessary, it is usually appropriate for the court to be provided with an affidavit or signed statement from the appellant or his solicitor setting out the matters relied on: *R v Trevor* [1998] Crim LR 652, CA. Where fresh evidence is proffered to the Court of Appeal from a witness which has a different effect from that which he has previously given, or from a witness who did not give evidence at the trial, affidavit evidence from all involved in relation to the taking of the new statement must be supplied: *R v Gogana* (1999) Times, 12 July, CA (different effect); *R v James* [2000] Crim LR 571, CA (witness did not give evidence at trial). A re-trial will not necessarily be ordered because the evidence is different from that given at the trial: *R v Flower*, *R v Siggins*, *R v Flower* [1966] 1 QB 146, 50 Cr App Rep 22, CCA ((1) a court may, and no doubt ordinarily will, simply quash the conviction and not order a re-trial if it is satisfied not only that evidence is true but is also conclusive to the appeal; (2) if it is satisfied that that evidence is true but not that it is conclusive it may order a re-trial; (3) if it is not satisfied that that evidence is true, but nevertheless thinks

that it might be accepted by a jury, a court would generally order a re-trial; (4) if the court positively disbelieves the additional evidence, a re-trial will not generally be ordered, because the additional evidence is worthless, and the court will proceed to deal with the appeal as though no additional evidence had been tendered). See also *R v Collins* (1950) 34 Cr App Rep 146, CCA; *R v Chionye* (1988) 89 Cr App Rep 285, CA.

In order to provide a reasonable explanation for the failure to adduce the evidence at the trial the appellant must satisfy the court that with reasonable diligence the evidence could not have been obtained for the trial: *R v Beresford* (1971) 56 Cr App Rep 143, CA; *R v Nabarro* [1972] Crim LR 497, CA; a tactical decision not to call evidence at the trial is not a reasonable explanation for failure to adduce it: *R v Hampton*, *R v Brown* [2004] EWCA Crim 2139, (2004) Times, 13 October. For examples of reasonable explanations for not adducing the evidence at the trial see *R v Murphy* (1921) 15 Cr App Rep 181, CCA (evidence not available at trial); *R v Knox* (1927) 20 Cr App Rep 96, CCA; *R v Ditch* (1969) 53 Cr App Rep 627, CA (post-trial confession of co-defendant clearing appellant); *R v Conway* (1979) 70 Cr App Rep 4, CA (statements by prosecution witnesses inconsistent with evidence at trial); *R v Williams*, *R v Smith* [1995] 1 Cr App Rep 74, CA (evidence of discreditable conduct by police officers after trial).

As to the approach to be taken by the court where the evidence relates to a matter which arose after the conviction see *R v Twitchell* [2000] 1 Cr App Rep 373, CA.

On an application to call evidence on appeal, the court should be informed of all the relevant facts in order to consider whether there was a reasonable explanation for the failure to adduce the evidence at the time of the trial: *R v T* (1998) Times, 30 June, CA. The existence or non-existence of a reasonable explanation is only one factor to be taken into account in deciding whether it is necessary or expedient in the interests of justice to admit the evidence: *R v Cairns* [2000] Crim LR 473, CA.

As to the court's receiving fresh evidence from an expert witness, such evidence is admissible even though the requirement in the Criminal Appeal Act 1968 s 23(2)(a) (as substituted) that the evidence should appear to be capable of belief applies more aptly to factual evidence than to expert opinion, which may or may not be acceptable or persuasive but which is unlikely to be thought to be incapable of belief in any ordinary sense. The giving of a reasonable explanation for failure to adduce the evidence before the jury again applies more aptly to factual evidence of which a party was unaware, or could not adduce, than to expert evidence, since if one expert is unavailable to testify at a trial a party would ordinarily be expected to call another unless circumstances prevented this. Expert witnesses, although inevitably varying in standing and experience, are interchangeable in a way in which factual witnesses are not. It would clearly subvert the trial process if a defendant, convicted at trial, were to be generally free to mount on appeal an expert case which, if sound, could and should have been advanced before the jury: *R v Jones (Steven)* [1997] 1 Cr App Rep 86, CA. Also see *R v Hobson* [1998] 1 Cr App Rep 31, CA; *R v Borthwick* [1998] Crim LR 274, CA (fresh expert evidence admitted); cf *R v Andrews (Jane)* [2003] EWCA Crim 2750, [2004] Crim LR 376 (fresh expert evidence not admitted).

Evidence of what happened at the trial of matters relating to an alleged irregularity at it may be admitted under the Criminal Appeal Act 1968 s 23(1) (as amended): see *R v Allaway* (1922) 17 Cr App Rep 15, CCA; *R v Clewer* (1953) 37 Cr App Rep 37, CCA; *R v Hircok*, *R v Farmer*, *R v Leggett* [1970] 1 QB 67, 53 Cr App Rep 51, CA; *R v Smith (Winston)* (1975) 61 Cr App Rep 128, CA; *R v Kemble* [1990] 3 All ER 116, 91 Cr App Rep 178, CA. The court will not make inquiries or hear evidence about bias or impropriety among the jury (*Ellis v Deheer* [1922] 2 KB 113, CA; *R v Thompson* [1962] 1 All ER 65, 46 Cr App Rep 72, CCA; *R v Miah*, *R v Akhtar* [1997] 2 Cr App Rep 12, CA; *R v Qureshi* [2001] EWCA Crim 1807, [2002] 1 WLR 518, [2002] 1 Cr App Rep 433); even if the evidence, if admitted, would provide a prima facie case of partiality (*R v Mirza*, *R v Connor and Rollock* [2004] UKHL 02, [2004] 1 AC 1118, [2004] 1 All ER 925).

In so far as decisions before the Criminal Appeal Act 1964 (repealed) were decided on the basis that the court had no power to order the defendant to be tried again save where the original trial was a nullity (see PARA 1895 post), they are now of doubtful value.

12    le under the Criminal Justice Act 1988 s 32(1)(b) (ss 32(1)(b), (2), 32A repealed except in relation to proceedings before Service courts: see the Youth Justice and Criminal Evidence Act 1999 s 67(3), (4), Sch 6, Sch 7 para 3; and the Youth Justice and Criminal Evidence Act 1999 (Commencement No 7) Order 2002, SI 2002/1739).

13    le a person who is:

147 (1)    in the case of an offence falling within the Criminal Justice Act 1988 s 32(2)(a) or (b) (see note 12 supra), under the age of 14 (CrimPR 68.18(1)(b)(i));

148 (2)    in the case of an offence falling within the Criminal Justice Act 1988 s 32(2)(c) (repealed: see note 12 supra), under the age of 17 (CrimPR 68.18(1)(b)(ii)); or

149 (3)    a person who is to be cross-examined following the admission under the Criminal Justice Act 1988 s 32A (repealed (see note 12 supra); see PARA 1414 ante) of a video recording of testimony from him (CrimPR 68.18(1)(b)(iii)),

and references in this rule to an offence include references to attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting the commission of, that offence: CrimPR 68.18(1).

14 Ie an offence specified in the Criminal Justice Act 1988 s 32(2) (repealed: see note 12 supra): CrimPR 68.18(1)(a). See note 13 supra.

15 CrimPR 68.18(1). An application under CrimPR 68.18(1) must be made by serving a notice in writing on the Registrar stating: (1) the grounds of the application; (2) the date of birth of the witness; (3) the name of the witness; and (4) the name, occupation and relationship, if any, to the witness of any person proposed to accompany the witness and the grounds for believing that person should accompany the witness: CrimPR 68.18(2). The Registrar must, as soon as practicable after receiving such an application, send a copy of the notice to the other parties to the appeal: CrimPR 68.18(4). Without prejudice to CrimPR 68.29 (see PARA 1894 post), the Registrar must notify all the parties and the person who is to accompany the witness, if known, of the decision of the court in relation to such an application; and, where leave is granted, the notification must state the name of the witness, and, if known, the name, occupation and relationship, if any, to the witness of the person who is to accompany the witness: CrimPR 68.18(6). A witness giving evidence through a television link pursuant to leave granted in accordance with this rule must be accompanied by a person acceptable to the Court and, unless the Court otherwise directs, by no other person: CrimPR 68.18(7).

16 CrimPR 68.18(3).

17 CrimPR 68.18(5).

18 Ie under the Criminal Justice Act 1988 s 32(1) (as amended): see PARA 1414 ante (see also note 12 supra).

19 CrimPR 68.19(1). An application under CrimPR 68.19(1) must be made by serving a notice in writing on the Registrar stating: (1) the grounds of the application; (2) the name of the witness; (3) the country and place where it is proposed the witness will be when giving evidence; and (4) the name and occupation of any person who it is proposed should be available for the purpose specified in CrimPR 68.19(3): CrimPR 68.19(2). The purpose referred to in CrimPR 68.19(2)(d) (see head (4) supra) is that of answering any questions the court may put, before or after the evidence of the witness is given, as to the circumstances in which the evidence is given, including questions about any persons who are present when the evidence is given and any matters which may affect the giving of the evidence: CrimPR 68.19(3). The Registrar must, as soon as practicable after receiving an application under CrimPR 68.19(1), send a copy of the notice to the other parties to the appeal: CrimPR 68.19(5). Without prejudice to CrimPR 68.29 (see PARA 1894 post), the Registrar must notify all the parties of the decision of the court in relation to an application under CrimPR 68.19(1), and, where leave is granted, the notification must state the name of the witness and, where applicable, the name and occupation of any person specified by the court for the purpose set out in CrimPR 68.19(3): CrimPR 68.19(7).

20 CrimPR 68.19(4).

21 CrimPR 68.19(6).

## UPDATE

### **1867-1868 Additional evidence on appeal, Video recordings of testimony from child witnesses**

CrimPR 68 substituted: see PARA 1856-1861.

### **1867 Additional evidence on appeal**

TEXT AND NOTES 1-11--Criminal Appeal Act 1968 s 23 further amended to extend the powers of the Court of Appeal to compel the production of documents and the attendance of witnesses: Criminal Justice and Immigration Act 2008 Sch 8 para 10.

NOTE 3--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

NOTE 4--Fresh evidence of a defendant's diminished responsibility that was not known at the time of the trial may be admitted on appeal where there is no suggestion that



the decision to rely on an alternative defence at trial was a tactical decision: *R v Neaven* [2006] EWCA Crim 955, [2007] 2 All ER 891.

NOTE 8--See *R v Pomfrett* [2009] EWCA Crim 1939, [2010] 2 All ER 481.

NOTE 11--See *R v George* [2007] EWCA Crim 2722, [2007] All ER (D) 242 (Nov) (fresh evidence on firearms discharge residue).

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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1868. Video recordings of testimony from child witnesses.

### **1868. Video recordings of testimony from child witnesses.**

A party to an appeal who applies for leave to call a witness may also apply for leave<sup>1</sup> to tender in evidence a video recording of testimony from a witness in specified<sup>2</sup> cases<sup>3</sup>. Such an application must be made by serving a notice in writing on the Registrar<sup>4</sup>. The application must be accompanied by the video recording which it is proposed to tender in evidence and must include: (1) the name of the appellant and the offence or offences charged; (2) the name and date of birth of the witness in respect of whom the application is made; (3) the date on which the video recording was made; (4) a statement that in the opinion of the applicant the witness is willing and able to attend the appeal for cross-examination; (5) a statement, containing specified information<sup>5</sup>, of the circumstances in which the video recording was made<sup>6</sup>. Where it is proposed to tender part only of a video recording of an interview with the witness, an application must specify that part and be accompanied by a video recording of the entire interview, including those parts which it is not proposed to tender in evidence, and by a statement of the circumstances in which the video recording of the entire interview was made<sup>7</sup>.

Such an application must be made at the same time as the application for leave to call the witness or at any time thereafter, but no less than 14 days before the date fixed for the hearing of the appeal except with the leave of the court<sup>8</sup>. The Registrar must, as soon as practicable after receiving such an application, send a copy of the notice to the other parties to the appeal<sup>9</sup>. Copies of any video recording required to accompany the notice must be provided by the applicant and sent by the Registrar to any party to the appeal not already served with a copy, and in the case of an appellant acting in person, a copy must be made available for viewing by him<sup>10</sup>. An application is determined without a hearing, unless the court otherwise directs, and the Registrar must notify the applicant and the other parties of the time and place of any hearing<sup>11</sup>.

1    le under the Criminal Justice Act 1988 s 32A (video recordings of testimony from child witnesses) (ss 32(2), 32A repealed, except in relation to Service courts: see the Youth Justice and Criminal Evidence Act 1999 s 67(3), (4), Sch 6, Sch 7 para 3; and the Youth Justice and Criminal Evidence Act 1999 (Commencement No 7) Order 2002, SI 2002/1739).

2    le where: (1) the offence charged is one to which the Criminal Justice Act 1988 s 32(2) (repealed: see note 1 supra) applies; (2) in the case of an offence falling within s 32(2)(a), (b) (repealed: see note 1 supra), the proposed witness is under the age of 14 or, if he was under 14 when the video recording was made, is under the age of 15; (3) in the case of an offence falling within s 32(2)(c) (repealed: see note 1 supra), the proposed witness is under the age of 17 or, if he was under 17 when the video recording was made, is under the age of 18; and (4) the video recording is of an interview conducted between an adult and a person coming within heads (2) or (3) supra (not being the defendant or one of the defendants) which relates to any matter in issue in the proceedings: CrimPR 68.17(1). References to an offence include attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting the commission of, that offence: CrimPR 68.17(1).

3    CrimPR 68.17(1).

4    CrimPR 68.17(2).

5    The statement of the circumstances in which the video recording was made must include the following information, except in so far as it is contained in the recording itself: (1) the times at which the recording commenced and finished, including details of any interruptions; (2) the location at which the recording was made and the usual function of the premises; (3) the name, age and occupation of any person present at any point during the recording, the time for which he was present, his relationship (if any) to the witness and to the

appellant; (4) a description of the equipment used including the number of cameras used and whether they were fixed or mobile, the number and location of microphones, the video format used and whether there were single or multiple recording facilities; (5) the location of the mastertape if the video recording is a copy and details of when and by whom the copy was made: CrimPR 68.17(4).

6 CrimPR 68.17(2).

7 CrimPR 68.17(3). The statement must contain the information set out in note 5 supra: see CrimPR 68.17(3).

8 CrimPR 68.17(5).

9 CrimPR 68.17(6).

10 CrimPR 68.17(6).

11 CrimPR 68.17(7). Without prejudice to CrimPR 68.29 (see PARA 1894 post), the Registrar must notify all the parties of the decision of the court in relation to such an application and, where leave is granted, the notification must state whether the whole or specified parts only of the video recording or recordings disclosed are to be admitted in evidence: CrimPR 68.17(8).

## **UPDATE**

### **1867-1868 Additional evidence on appeal, Video recordings of testimony from child witnesses**

CrimPR 68 substituted: see PARA 1856-1861.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1869. Power to order investigations.

### **1869. Power to order investigations.**

On an appeal against conviction or an application for leave to appeal against conviction<sup>1</sup> the Court of Appeal may direct the Criminal Cases Review Commission<sup>2</sup> to investigate and report to the Court on any matter if it appears to the Court that<sup>3</sup>:

- 2352 (1) in the case of an appeal, the matter is relevant to the determination of the appeal and ought, if possible, to be resolved before the appeal is determined<sup>4</sup>;
- 2353 (2) in the case of an application for leave to appeal, the matter is relevant to the determination of the application and ought, if possible, to be resolved before the application is determined<sup>5</sup>;
- 2354 (3) an investigation of the matter by the Commission is likely to result in the Court being able to resolve it<sup>6</sup>; and
- 2355 (4) the matter cannot be resolved by the Court without an investigation by the Commission<sup>7</sup>.

Such a direction may not be given by a single judge notwithstanding that, in the case of an application for leave to appeal, the application may be determined<sup>8</sup> by a single judge<sup>9</sup>.

Copies of such a direction must be made available to the appellant and the respondent<sup>10</sup>.

Where the Commission has reported to the Court of Appeal on any matter which it has been directed<sup>11</sup> to investigate, the court:

- 2356 (a) must notify the appellant and the respondent that the Commission has reported; and
- 2357 (b) may make available to the appellant and the respondent the report of the Commission and any statements, opinions and reports which accompanied it<sup>12</sup>.

1 See PARA 1863 ante.

2 See PARA 1963 post. As to the Criminal Cases Review Commission see PARA 2028 et seq post.

3 Criminal Appeal Act 1968 s 23A(1) (s 23A added by the Criminal Appeal Act 1995 s 5(1); and the Criminal Appeal Act 1968 s 23A(1) amended by the Criminal Justice Act 2003 s 313(1), (2)). Such a direction must be given in writing and must specify the matter to be investigated: Criminal Appeal Act 1968 s 23A(2) (as so added).

4 Ibid s 23A(1)(a) (as added (see note 3 supra); and amended by the Criminal Justice Act 2003 s 313(1), (3)).

5 Criminal Appeal Act 1968 s 23A(1)(aa) (added by the Criminal Justice Act 2003 s 313(1), (4)).

6 Criminal Appeal Act 1968 s 23A(1)(b) (as added: see note 3 supra).

7 Ibid s 23A(1)(c) (as added: see note 3 supra).

8 As provided by ibid s 31: see PARA 1193 ante.

9 Ibid s 23A(1A) (added by the Criminal Justice Act 2003 s 313(1), (5)).

- 10 Criminal Appeal Act 1968 s 23A(3) (as added: see note 3 supra). 'Respondent' includes a person who will be a respondent if leave to appeal is granted: s 23A(5) (added by the Criminal Justice Act 2003 s 313(1), (6)).
- 11 le under the Criminal Appeal Act 1968 s 23A(1) (as added and amended).
- 12 Ibid s 23A(4) (as added: see note 3 supra).

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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1870. Investigations for Court of Appeal by Criminal Cases Review Commission.

### **1870. Investigations for Court of Appeal by Criminal Cases Review Commission.**

Where, on an appeal against conviction, a direction is given by the Court of Appeal<sup>1</sup> to the Criminal Cases Review Commission<sup>2</sup>, the Commission must investigate the matter specified in the direction in such manner as it thinks fit<sup>3</sup>. Where, in investigating a matter specified in such a direction, it appears to the Commission that another matter (a 'related matter') which is relevant to the determination of the appeal or application for leave to appeal by the Court of Appeal ought, if possible, to be resolved before the appeal or application for leave to appeal is determined by that Court, and an investigation of the related matter is likely to result in the Court's being able to resolve it, the Commission may also investigate the related matter<sup>4</sup>. The Commission must keep the Court of Appeal informed as to the progress of the investigation of any matter specified in a direction<sup>5</sup>, and if it decides to investigate any related matter, must notify the Court of Appeal of its decision and keep the court informed as to the progress of the investigation<sup>6</sup>.

The Commission must report to the Court of Appeal on the investigation of any matter specified in a direction when it completes the investigation of that matter and of any related matter investigated by it, or it is directed to do so by the Court of Appeal, whichever happens first<sup>7</sup>. Such a report must include details of any inquiries made by or for the Commission in the investigation of the matter specified in the direction or any related matter investigated by it<sup>8</sup>; and must be accompanied by any statements and opinions received by the Commission in the investigation of the matter specified in the direction or any related matter investigated by it, and by any reports so received<sup>9</sup>.

1    Ie under the Criminal Appeal Act 1968 s 23A(1) (as added and amended: see PARA 1869 ante).

2    As to the Criminal Cases Review Commission see PARA 2028 et seq post.

3    Criminal Appeal Act 1995 s 15(1).

4    Ibid s 15(2) (amended by the Criminal Justice Act 2003 s 331, Sch 36 para 97).

5    Ie under the Criminal Appeal Act 1968 s 23A(1) (as added and amended: see PARA 1869 ante).

6    Criminal Appeal Act 1995 s 15(3).

7    Ibid s 15(4). In making its report, the Commission is entitled to make evaluative judgments: *R v Coles, R v Bradley* [1999] 8 Archbold News 3, CA.

8    Criminal Appeal Act 1995 s 15(5).

9    Ibid s 15(6). Such a report need not be accompanied by any reports submitted to the Commission under s 20(6) (see PARA 2031 post) by an investigating officer: s 15(7). For the meaning of 'an investigating officer' see s 19; and PARA 2030 post (definition applied by s 30(1)).

### **UPDATE**

### **1870 Investigations for Court of Appeal by Criminal Cases Review Commission**

TEXT AND NOTES--Criminal Appeal Act 1995 s 15(1), (3), (4) amended, s 15(2) further amended, s 15(8) added: Armed Forces Act 2006 Sch 11 para 5.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1871. Examination of witness before judge, officer of the court etc.

### **1871. Examination of witness before judge, officer of the court etc.**

For the purposes of an appeal<sup>1</sup>, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice, order the examination of any witness whose attendance might be required<sup>2</sup> to be conducted<sup>3</sup> before any judge or officer of the court or other person appointed by the court for the purpose, and allow the admission of any depositions so taken as evidence before the court<sup>4</sup>.

1 le for the purposes of the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended): see PARA 1837 et seq ante.

2 le under ibid s 23(1)(b): see PARA 1867 ante.

3 le in the manner provided by rules of court: see note 4 infra.

4 Criminal Appeal Act 1968 s 23(4) (amended by the Criminal Appeal Act 1995 s 29(1), Sch 2 para 4(1), (3)). The order to attend for examination must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA and must specify the time and place of attendance: CrimPR 68.16(1). The examination of a witness must be conducted by the taking of a deposition and, unless the court directs otherwise, must take place in public: CrimPR 68.16(2).

### **UPDATE**

#### **1871 Examination of witness before judge, officer of the court etc**

TEXT AND NOTE 4--Criminal Appeal Act 1968 s 23(4) further amended: Criminal Justice and Immigration Act 2008 Sch 8 para 10(5).

NOTE 4--CrimPR 68 substituted: see PARA 1856-1861.



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**1872. Evidence as to previous convictions etc.**

Nothing in the statutory provisions relating to the inadmissibility of questions about, and evidence of, spent convictions<sup>1</sup> affects the determination of any issue, or prevents the admission or requirement of any evidence, relating to a person's previous convictions<sup>2</sup> or to circumstances ancillary<sup>3</sup> thereto in any appeal or reference in a criminal matter<sup>4</sup>.

1 In the Rehabilitation of Offenders Act 1974 s 4(1): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660. For the meaning of 'spent conviction' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 661.

2 For the meaning of 'conviction' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660 note 3.

3 For the meaning of 'circumstances ancillary' to a conviction see PARA 1510 note 4 ante.

4 Rehabilitation of Offenders Act 1974 s 7(2)(a).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1873. Reference to European Court of Justice for preliminary ruling.

### **1873. Reference to European Court of Justice for preliminary ruling.**

At any time before the determination of an appeal or application for leave to appeal<sup>1</sup>, the Court of Appeal may make an order<sup>2</sup> referring a question to the European Court of Justice for a preliminary ruling<sup>3</sup>; and, where such an order is made<sup>4</sup>, no appeal or application for leave to appeal may, unless the court otherwise orders, be determined until the European Court has given a preliminary ruling on the question referred to it<sup>5</sup>.

1    le under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended): see PARA 1837 et seq ante.

2    The order must set out in a schedule the request for the preliminary ruling of the European Court, and the Court of Appeal may give directions as to the manner and form in which the schedule is to be prepared: CrimPR 75.1(3).

3    CrimPR 75.1(2)(b). The reference is made under the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 234 (formerly art 177) ('the EC Treaty'), the Treaty establishing the European Atomic Energy Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) ('the Euratom Treaty') art 150 or the Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951; TS 16 (1979); Cmnd 7461) ('the ECSC Treaty') art 41: CrimPR 75.1(1).

4    When such an order has been made, a copy must be sent to the senior master of the Supreme Court (Queen's Bench Division) for transmission to the Registrar of the European Court: CrimPR 75.1(4). As from a day to be appointed, the reference to the Supreme Court is replaced by a reference to the Senior Courts by virtue of the Constitutional Reform Act 2005 s 59(4). At the date at which this volume states the law no such day had been appointed.

5    CrimPR 75.1(7).

### **UPDATE**

### **1873 Reference to European Court of Justice for preliminary ruling**

TEXT AND NOTES--Crim PR Pt 75 now Criminal Procedure Rules 2010, SI 2010/60, Pt 75.

TEXT AND NOTE 3--The ECSC Treaty has now expired: see art 97. Since 24 July 2002, the sectors previously covered by this Treaty, and the procedural rules and other secondary legislation derived from it, have been subject to the rules of the EC Treaty as well as the procedural rules and other secondary legislation derived from the EC Treaty.

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1874. Right of appellant to be present at hearing.

### **1874. Right of appellant to be present at hearing.**

An appellant<sup>1</sup> is entitled to be present, if he wishes, on the hearing of his appeal, although he may be in custody<sup>2</sup>. A person in custody is not entitled to be present, however:

- 2358 (1) where his appeal is on some ground involving a question of law alone<sup>3</sup>;
- 2359 (2) on an application by him for leave to appeal<sup>4</sup>;
- 2360 (3) on any proceedings preliminary or incidental to an appeal<sup>5</sup>; or
- 2361 (4) where he is in custody in consequence of a verdict of not guilty by reason of insanity or of a finding of disability<sup>6</sup>,

unless the Court of Appeal gives him leave to be present<sup>7</sup>.

The power of the Court of Appeal to pass sentence on a person may be exercised although he is for any reason not present<sup>8</sup>.

1 For the meaning of 'appellant' see PARA 1837 note 4 ante.

2 Criminal Appeal Act 1968 s 22(1). As to the hearing of an appeal when the appellant has escaped from custody see *R v Flower (Richard)*, *R v Siggins*, *R v Flower (Eric)* [1966] 1 QB 146, 50 Cr App Rep 22, CCA. As to the presence of the appellant at the hearing of an appeal to the House of Lords (or, as from a day to be appointed, the Supreme Court) see PARA 1971 post.

3 Criminal Appeal Act 1968 s 22(2)(a).

4 Ibid s 22(2)(b). See *R v Spruce*, *R v Anwar* [2005] EWCA Crim 1090, [2006] 1 Cr App Rep (S) 62, (2005) Times, 5 May (on a renewed application for leave to appeal against sentence, the court not only granted leave but went on to allow the appeal in the appellant's absence; held that, where a defendant's appeal against sentence was allowed on a renewed application, matter could be re-listed at appellant's request for re-consideration in his presence by the same court but court's decision would not be varied at such a second hearing unless there was an entirely fresh matter with an important bearing on sentence).

5 Criminal Appeal Act 1968 s 22(2)(c).

6 Ibid s 22(2)(d).

7 Ibid s 22(2). Application for leave to be present may be made to a single judge: see PARA 1854 ante. An application for such leave must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA and must be served on the Registrar of Criminal Appeals; except that where such a notice of application is given together with a notice of appeal or notice of application for leave to appeal (see PARA 1848 ante), it must be served on a Crown Court officer: CrimPR 68.26(1). Alternatively, application may be made orally to the court: CrimPR 68.26(2).

8 Criminal Appeal Act 1968 s 22(3). If the nature of the sentence requires the presence of the appellant, eg in those cases where a community sentence requires the offender's consent, the court may adjourn so that he may be present or it may require counsel to explain the effect of the order. The Registrar must give as long notice in advance as reasonably possible of the date on which the court will hear any appeal or application by an appellant to: (1) the appellant; (2) any person having custody of him; and (3) any other interested party whom the court requires to be represented at the hearing, except in the case of proceedings before a single judge under the Criminal Appeal Act 1968 s 31 (as amended) (see PARA 1854 ante): CrimPR 68.23.

As to an appellant who has escaped from custody or who, having been granted bail pending the hearing (see PARA 1193 ante) fails to surrender to custody for the hearing of the appeal or application, the normal practice is to adjourn the appeal or application, or to dismiss it according to the justice of the case: *R v Flower* [1966] 1 QB 146, (1965) 50 Cr App Rep 22, CCA (escape from custody); *R v Whiting* (1987) 85 Cr App Rep 78, CA (failure to surrender to bail); *R v Carter (Eula)* (1993) 98 Cr App Rep 106, CA (failure to surrender to bail). However, the Court of Appeal has a discretion, in exceptional circumstances, to hear an appeal where an appellant has escaped from custody: *R v Gooch* [1998] 1 WLR 1100, [1998] 2 Cr App Rep 130, CA.

## **UPDATE**

### **1874 Right of appellant to be present at hearing**

TEXT AND NOTES--The Court of Appeal may give a live link direction in relation to a hearing at which the appellant is expected to be in custody but is entitled to be present, by virtue of the 1968 Act s 22(1) or leave given under s 22(2), at any time before the beginning of that hearing: s 22(4) (ss 22(4)-(6), 23(5) added by Police and Justice Act 2006 s 48(1), (2)). A 'live link direction' is a direction that the appellant, if he is being held in custody at the time of the hearing, is to attend the hearing through a live link from the place at which he is held and a 'live link' means an arrangement by which the appellant is able to see and hear, and to be seen and heard by, the Court of Appeal, and for this purpose any impairment of eyesight or hearing is to be disregarded: 1968 Act s 22(5). The Court of Appeal must not give a live link direction unless the parties to the appeal have had the opportunity to make representations about the giving of such a direction and may rescind a live link direction at any time before or during any hearing to which it applies, whether of its own motion or on the application of a party: s 22(6). A live link direction under s 22(4) does not apply to the giving of oral evidence by the appellant at any hearing unless that direction, or any subsequent direction of the court, provides expressly for the giving of such evidence through a live link: s 23(5).

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

NOTES 7, 8--CrimPR 68 substituted: see PARA 1856-1861.

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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1875. Disposal of groundless appeals and applications for leave to appeal.

### **1875. Disposal of groundless appeals and applications for leave to appeal.**

If it appears to the Registrar of Criminal Appeals that a notice of appeal or application for leave to appeal does not show any substantial ground of appeal, he may refer the appeal<sup>1</sup> or application for leave to the Court of Appeal for summary determination<sup>2</sup>; and, where the case is so referred, the court may, if it considers that the appeal or application for leave is frivolous<sup>3</sup> or vexatious, and can be determined without adjourning it for a full hearing, dismiss the appeal or application for leave summarily, without calling on anyone to attend the hearing or to appear for the Crown thereon<sup>4</sup>.

1 For the meaning of 'appeal' see PARA 1837 note 4 ante.

2 As to the nature of the Registrar's power to make such a reference see *DPP v Majewski* [1977] AC 443, sub nom *R v Majewski* [1975] 3 All ER 296, CA; affd without discussion of this point sub nom *DPP v Majewski* [1977] AC 443, 62 Cr App Rep 262, HL (decided under the Criminal Appeal Act 1968 s 20 as originally enacted).

3 'Frivolous' must include a ground of appeal which could not possibly succeed on argument: *R v Taylor* [1979] Crim LR 649, CA (decided under the Criminal Appeal Act 1968 s 20 as originally enacted).

4 Ibid s 20 (substituted by the Criminal Justice Act 1988 s 157).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(iv) Procedure/1876. Abandonment of appeal.

### **1876. Abandonment of appeal.**

An appeal or an application for leave to appeal<sup>1</sup> may be abandoned before the hearing of the appeal or application by serving on the Registrar of Criminal Appeals notice in the prescribed form<sup>2</sup>. Where an appeal or an application for leave to appeal is so abandoned, it is treated as having been dismissed or refused by the Court of Appeal<sup>3</sup>. Thereafter, the only manner in which such an appeal may be revived is where the appellant is able to put before the court sufficient facts to satisfy it that the purported abandonment is to be treated as a nullity<sup>4</sup>.

<sup>1</sup> le under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended): see PARA 1837 et seq ante.

<sup>2</sup> CrimPR 68.22(1). The prescribed form of notice is set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA. As to service of documents see PARA 1862 ante. The notice of abandonment must be signed by or on behalf of the appellant: CrimPR 68.22(2). As soon as practicable after receiving the notice, the Registrar must send a copy of it, indorsed with the date of receipt, to the appellant, the Secretary of State, and to a court officer of the court of trial: CrimPR 68.22(3). An appeal may be abandoned orally as of right immediately after the case is called on but, once an appeal has opened, it cannot be abandoned without leave of the court, nor can one part of it be abandoned (*R v Tool* (23 October 1961, unreported), CCA; *R v De Courcy* [1964] 3 All ER 251, 48 Cr App Rep 323, CCA; *R v Spicer* (1987) 87 Cr App Rep 297, CA). Where, however, an appellant appeals against conviction only, and an appeal against sentence is referred to the court by the Registrar, abandonment of the latter appeal during the hearing may be permitted: *R v Spicer* supra.

CrimPR 68.22 applies for the purposes of an appeal or application for leave to appeal by an appellant under the Criminal Justice Act 1987 s 9(11) (see PARA 1921 post), the Criminal Procedure and Investigations Act 1996 s 35(1) (preparatory hearings: interlocutory appeals; see PARA 1922 post) as it applies to an appeal or application for leave under the Criminal Appeal Act 1968 Pt I (as amended), except that: (1) a notice thereof must be served on the Registrar in the alternative form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; and (2) the requirement under CrimPR 68.22(3) supra is omitted: CrimPR 65.5.

<sup>3</sup> CrimPR 68.22(4).

<sup>4</sup> *R v Medway* [1976] QB 779, 62 Cr App Rep 85, CA. The notice of abandonment is treated as a nullity where the mind of the appellant did not go with his act of abandonment; and headings such as mistake, fraud, wrong advice, misapprehension etc are to be regarded only as guidelines, the presence of which may justify the exercise of such jurisdiction of the court; they are not exhaustive of the types of case where this jurisdiction may be exercised: *R v Medway* supra; *R v Burt* [2004] EWCA Crim 2826, [2005] 1 Archbold News 1. For examples of the exercise of this jurisdiction see *R v Pitman* (1916) 12 Cr App Rep 14, CCA; *R v Sloan* (1923) 87 JP 56, CCA; *R v Scott* (1924) 18 Cr App Rep 10, CCA; *R v Van Dyn* (1932) 23 Cr App Rep 150, CCA; *R v Healey* (1956) 40 Cr App Rep 40, CCA; *R v Moore* [1957] 2 All ER 703n, 41 Cr App Rep 179, CCA; *R v Peters* (1973) 58 Cr App Rep 328, CA; *R v Munisamy* [1975] 1 All ER 910, 60 Cr App Rep 289, CA. Since the Criminal Appeal Act 1968, the court has interpreted the rule more strictly: see *R v Sutton* [1969] 1 All ER 928, 53 Cr App Rep 269, CA. Ignorance of a material fact may constitute a sufficient mistake or misapprehension: *R v Noble* [1971] 3 All ER 361, 55 Cr App Rep 529, CA (postal strike delaying receipt of notification that leave to appeal had been granted until after appeal had been abandoned); explained in *R v Medway* supra. Misapprehension of the law is not a sufficient reason for regarding a purported abandonment as a nullity: *R v Kempson* [1967] Crim LR 230, CA. However, where the appellant did not know what he was doing when he abandoned the appeal, the abandonment was treated as a nullity: *R v Lowbridge* [1967] Crim LR 656, CA. A deliberate decision to abandon founded on a mistaken view of the law is not enough to vitiate the notice to abandon: *R v Medway* supra.

The court has applied similar considerations to courts-martial appeals: see *R v Condon* (1952) 36 Cr App Rep 130, C-MAC; *R v Caddy* [1959] 3 All ER 138n, 43 Cr App Rep 198, C-MAC. The Divisional Court has also held that

the same principles apply to appeals to the Crown Court: *R v Essex Quarter Sessions Appeals Committee, ex p Larkin* [1962] 1 QB 712, [1961] 3 All ER 1930, DC.

Application for leave to show that a notice of abandonment should be nullified may be made in a letter to the Registrar giving reasons. An application which has been refused or abandoned cannot be further considered by the court: see *R v Grantham* [1969] 2 QB 574, 53 Cr App Rep 369, C-MAC. See also *R v La Plante* (19 May 1972, unreported), CA (mistaken abandonment by appellant unable to read or write); *R v Brown* (5 June 1972, unreported), CA (advice by counsel to renew application received at wrong prison after notice of abandonment sent); in both these cases the court gave leave for the notice of abandonment to be treated as a nullity. The court has refused to interfere with a deliberate abandonment, even though a trial judge's certificate had been granted: *R v Najar* (21 December 1972, unreported), CA.

There is no inherent jurisdiction enabling the court to give leave in other special circumstances: *R v Medway* supra; *R v Burt* supra. The Criminal Cases Review Commission (see PARA 2028 et seq post) may, however, refer the case to the Court of Appeal. Indeed, in *R v Burt* supra the Court of Appeal invited the appellant to apply to the Commission with all possible speed.

## **UPDATE**

### **1876 Abandonment of appeal**

NOTES 2, 3--CrimPR 68 substituted: see PARA 1856-1861.

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/A. APPEALS AGAINST CONVICTION/1877. Ground for allowing an appeal against conviction.

## **(v) Determination of Appeals**

### **A. APPEALS AGAINST CONVICTION**

#### **1877. Ground for allowing an appeal against conviction.**

The Court of Appeal: (1) must<sup>1</sup> allow an appeal against conviction<sup>2</sup> if it thinks that the conviction is unsafe<sup>3</sup>; and (2) must dismiss such an appeal in any other case<sup>4</sup>.

In the case of an appeal against conviction, the court must, subject to its powers in special cases<sup>5</sup>, quash the conviction, if it allows the appeal<sup>6</sup>. An order of the court quashing a conviction operates, except when the appellant is ordered<sup>7</sup> to be re-tried, as a direction to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal<sup>8</sup>.

1 See *R v E (T)* [2004] EWCA Crim 1441, [2004] 2 Cr App Rep 621.

2 'Conviction' includes a conviction resulting from a plea of guilty (see PARA 1837 note 3 ante) and does not merely refer to the final disposal of the proceedings by passing sentence on the defendant (*R v Drew* [1985] 2 All ER 1061, 81 Cr App Rep 190, CA (defendant appealed against conviction after guilty plea and formal verdict but before sentence which was deferred pending verdicts against co-defendant; Court of Appeal had jurisdiction to entertain the appeal)). See further PARA 1878 post.

3 Criminal Appeal Act 1968 s 2(1)(a) (s 2(1) substituted by the Criminal Appeal Act 1995 s 2(1)).

4 Criminal Appeal Act 1968 s 2(1)(b) (as substituted: see note 3 supra). The Court of Appeal's duties under s 2(1) (as substituted) are subject to the provisions of the Criminal Appeal Act 1968: s 2(1) (as so substituted). Before the substitution of the current version of s 2(1), the Criminal Appeal Act 1968 s 2(1) (as amended by the Criminal Law Act 1977 s 44) provided that the Court of Appeal had to allow an appeal against conviction if it thought that: (1) the conviction should be set aside on the ground that under all the circumstances of the case it was unsafe or unsatisfactory; (2) the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or (3) there had been a material irregularity in the course of the trial; and in any other case had to dismiss the appeal. However, notwithstanding that the court was of opinion that the point raised in the appeal might be decided in favour of the appellant, it could dismiss the appeal if it considered that no miscarriage of justice had actually occurred.

5 See PARAS 1880, 1888-1889 post.

6 Criminal Appeal Act 1968 s 2(2).

7 *Ie* under *ibid* s 7: see PARA 1896 post.

8 *Ibid* s 2(3). The Court of Appeal may amend or correct the record of the verdict: *R v Proctor*, *R v Whitfield*, *R v Morrison* (1923) 17 Cr App Rep 124, CCA. As to the disposal of a groundless appeal see PARA 1875 ante.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/A. APPEALS AGAINST CONVICTION/1878. Conviction unsafe.

### **1878. Conviction unsafe.**

In order to establish that a conviction<sup>1</sup> is unsafe<sup>2</sup>, it will not generally be sufficient to show that the case against the appellant was a weak one<sup>3</sup>, or that the verdict was against the weight of the evidence<sup>4</sup>, or that the judge of the court of trial felt some doubt about it and has given a certificate on that ground<sup>5</sup>.

If the Court of Appeal concludes that, for whatever reason, the appellant was wrongly convicted of the offence charged, or is left in doubt as to whether he was rightly convicted of that offence, it must of necessity quash the conviction on the ground that it is unsafe, but if it is satisfied that, despite any misdirection (or other judicial error) or irregularity in the conduct of the trial or any fresh evidence, the conviction was safe, it will not quash the conviction<sup>6</sup>.

Normally, the reason why the Court of Appeal holds that a verdict is unsafe is because an error or irregularity at trial is such that it is not satisfied that, had the error or irregularity not occurred, the jury would still have convicted the appellant<sup>7</sup>. However, in exceptional cases, including those where fresh evidence is admitted, the Court may quash a conviction even though there has been no error or irregularity at trial on the ground that it has a lurking doubt about the appellant's guilt<sup>8</sup>.

The Court of Appeal may also hold that a verdict is unsafe on grounds which do not relate to whether the defendant is guilty of the offence of which he was convicted, for example, on grounds that there has been a material irregularity, such as abuse of process<sup>9</sup>, that the indictment is duplicitous or otherwise defective<sup>10</sup>, or that a count in question was improperly included or joined in the indictment<sup>11</sup>.

The Court of Appeal may quash a conviction as unsafe even though the appellant pleaded guilty at his trial. However, the conviction may be quashed as unsafe in such a case only in exceptional circumstances. For example, because the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it<sup>12</sup>, because erroneous legal advice had been received by the defendant which went to the heart of the plea of guilty, so that that plea was not a true acknowledgement of guilt<sup>13</sup>, or because the appellant's plea of guilty or change of plea to guilty was a result of an erroneous ruling on a point of law by the trial judge<sup>14</sup>, but only where the erroneous ruling had rendered acquittal legally impossible, rather than where it made the case against the appellant factually overwhelming<sup>15</sup>. A conviction founded on a guilty plea may also be quashed as unsafe on the basis that on the admitted facts the appellant could not in law be convicted of the offence charged<sup>16</sup>.

There can be other circumstances where a conviction founded on a guilty plea may be quashed as unsafe, for example, where the appellant pleaded guilty because of improper pressure from the trial judge<sup>17</sup> or in the light of fresh evidence exceptionally admitted<sup>18</sup> by the Court of Appeal in the interests of justice<sup>19</sup>, or where there has been a material irregularity<sup>20</sup>.

A conviction will be quashed if there has been a violation of the right<sup>21</sup> to a fair trial by an independent and impartial tribunal<sup>22</sup>, but not if there has been a breach of the right<sup>23</sup> to a trial within a reasonable time unless the trial has been unfair or it was unfair to try the defendant at all<sup>24</sup>. The mere fact that a trial has been found to be unfair by the European Court of Human Rights does not necessarily make the conviction unsafe<sup>25</sup>.

- 1 For the meaning of 'conviction' see PARA 1877 note 2 ante.
- 2 le under the Criminal Appeal Act 1968 s 2(1) (as substituted). See PARA 1877 ante.
- 3 See eg *R v McNair* (1909) 25 TLR 228, 2 Cr App Rep 2, CCA.
- 4 See *Aladesuru v R* [1956] AC 49, 39 Cr App Rep 184, PC.
- 5 *R v Hopkins-Husson* (1949) 34 Cr App Rep 47, CCA; *R v Chalk* [1961] Crim LR 326, CCA. However, that may be a material factor in the case: *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, CA; *R v Arobieke* [1988] Crim LR 314, CA.
- 6 *R v Graham* [1997] 1 Cr App Rep 302, CA.
- 7 As to this type of case see PARA 1879 post. As to the approach taken by the Court of Appeal where there has been a change in the substantive law, law of evidence or law of procedure since the conviction in an old case see *R v Bentley (David)* [2001] 1 Cr App Rep 307, CA; *R v King (Ashley)* [2000] 2 Cr App Rep 391, CA; *R v Hanratty (James) (Decd)* [2002] EWCA Crim 1141, [2002] 3 All ER 534, [2002] 2 Cr App Rep 419; *R v Hussain* [2005] EWCA Crim 31, [2005] 3 Archbold News 1.
- 8 The court must in the end ask itself a subjective question, whether it is content to let the matter stand as it is, or whether there is not some lurking doubt in its mind which makes it wonder whether an injustice has been done. This reaction may not be based strictly on the evidence; it is a reaction which can be produced by the general feel of the case as the court experiences it: *R v Cooper* [1969] 1 QB 267 at 271, 53 Cr App Rep 82 at 85-86, CA, per Widgery LJ (approved in *Stafford and Luvaglio v DPP* [1974] AC 878, 58 Cr App Rep 256, HL, which was itself followed in *R v Puddleton* [2001] UKHL 66, [2002] 1 WLR 72, [2002] 1 Cr App Rep 441). See also *R v Pattinson*, *R v Laws* (1973) 58 Cr App Rep 417, CA; *R v Lake* (1976) 64 Cr App Rep 172, CA; *R v B* [2003] EWCA Crim 319, [2003] 2 Cr App Rep 197; *R v E (T)* [2004] EWCA Crim 1441, [2004] 2 Cr App Rep 621). This approach is different from that applied by a trial judge on a submission of 'no case' (see PARA 1313 ante): *R v Arobieke* [1988] Crim LR 314, CA.
- 9 *R v Mullen* [2000] QB 520, [1999] 2 Cr App Rep 143, CA (*R v Chalkley*, *R v Jeffries* [1998] QB 848, [1998] 2 Cr App Rep 79, CA, not followed); approved in *R v Togher* [2001] 3 All ER 463, [2001] 1 Cr App Rep 457, CA (*R v Chalkley*, *R v Jeffries* supra disapproved); *R v Early* [2002] EWCA Crim 1904, [2003] 1 Cr App Rep 288.
- 10 *R v Jones (J)* (1974) 59 Cr App Rep 120, CCA; *R v Cain* [1983] Crim LR 802, CA; *R v Graham* [1997] 1 Cr App Rep 302, CA. See PARA 1220 ante.
- 11 *R v Nisbet* [1972] 1 QB 37, 55 Cr App Rep 490, CA; *R v Smith (Brian)* [1997] QB 836, [1997] 1 Cr App Rep 390, CA; *R v Lockley*, *R v Sainsbury* [1997] Crim LR 455, CA.
- 12 *R v Forde* [1923] 2 KB 400, 17 Cr App Rep 99, CCA; *R v Phillips* [1982] 1 All ER 245, 74 Cr App Rep 199, CA.
- 13 *R v Inns* (1974) 60 Cr App Rep 231, CA; *R v Saik* (2004) Times, 29 November, CA. It is very difficult to see how erroneous advice as to the length of the sentence can ever go to the heart of a plea, except perhaps where the maximum penalty for the offence is understated, because the decision on the length of the sentence is a matter for the judge or Court of Appeal: *R v Saik* supra.
- 14 See *R v Clarke* [1972] 1 All ER 219, 56 Cr App Rep 225, CA.
- 15 *R v Chalkley*, *R v Jeffries* [1998] QB 848, [1998] 2 Cr App Rep 79, CA; followed in *R v Rajcoomar* [1999] Crim LR 728, CA; *R v Thomas* [2000] 1 Cr App Rep 447, CA.
- 16 *R v Forde* supra; *R v Whitehouse* [1977] QB 868, 65 Cr App Rep 33, CA; *R v Boal* [1992] QB 591, 95 Cr App Rep 272, CA.
- 17 See *R v Turner* [1970] 2 QB 321, 54 Cr App Rep 352, CA.
- 18 le under the Criminal Appeal Act 1968 s 23 (as amended): see PARA 1867 ante.
- 19 *R v Lee* [1984] 1 All ER 1080, 79 Cr App Rep 108, CA. See, for example, *R v Foster* [1985] QB 115, 79 Cr App Rep 61, CA. For an example of another ground see *R v W (AG)* [1999] Crim LR 87, CA.
- 20 *R v Togher* [2001] 3 All ER 463, [2001] 1 Cr App Rep 457, CA. For examples of a material irregularity see the text to notes 9-11 supra.

21 le under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6(1) (right to a fair trial). The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

22 *Montgomery v HM Advocate* [2003] 1 AC 641, PC; *Dyer v Watson*; *JK v HM Advocate* [2002] UKPC D1, [2004] 1 AC 379, [2002] 4 All ER 1.

23 le under the European Convention on Human Rights art 6(1).

24 *A-G's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, [2004] 1 All ER 1049. In other cases where there has been breach of the right to trial within a reasonable time, the appropriate remedy on appeal may be a reduction in sentence: see *Mills v HM Advocate* [2002] UKPC D2, [2004] 1 AC 441, [2002] 3 WLR 1597. Also see *R v Webber*, *R v Lyons*, *R v Ashton* [2002] EWCA Crim 2782, (2002) Times, 10 December.

25 *R v Lewis* [2005] EWCA Crim 859, (2005) Times, 19 May (appeal dismissed; overwhelming and incontrovertible evidence that defendant guilty).

## UPDATE

### 1878 Conviction unsafe

NOTE 6--See *R v Bieber* [2006] All ER (D) 276 (Oct), CA (evidence against appellant overwhelming; appeal dismissed). See also *R v Akers* [2007] EWCA Crim 2066, [2007] All ER (D) 83 (Oct) (defence solicitors having had previous dealings with deceased victim did not disadvantage defendant); *R v Pomfrett* [2009] EWCA Crim 1939, [2010] 2 All ER 481 (effect of fresh evidence would have been seriously damaging to defence and would not have warranted a different conclusion).

NOTE 8--See *R v Webster* [2006] All ER (D) 219 (Nov), CA (brevity of jury's deliberations did not render conviction unsafe).

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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/A. APPEALS AGAINST CONVICTION/1879. Conviction unsafe because of error or irregularity.

### **1879. Conviction unsafe because of error or irregularity.**

The following are examples of where a verdict may be held unsafe because an error or irregularity at trial is such that the Court of Appeal is not satisfied that had it not occurred the jury would still have convicted the appellant:

- 2362 (1) misdirection or non-direction on law<sup>1</sup>;
- 2363 (2) wrongful withdrawal of issue of fact<sup>2</sup>;
- 2364 (3) wrongful exclusion or admission of evidence<sup>3</sup>;
- 2365 (4) failure to refer, or to refer adequately, in summing-up to a defence put forward by the defendant<sup>4</sup>;
- 2366 (5) misdirection on the evidence or its effects<sup>5</sup>;
- 2367 (6) prejudicial publicity before or during trial<sup>6</sup>;
- 2368 (7) prosecution failure to comply with duty of disclosure<sup>7</sup>;
- 2369 (8) lack of jurisdiction on part of the Crown Court<sup>8</sup>;
- 2370 (9) indictment does not disclose an offence known to law<sup>9</sup>;
- 2371 (10) inconsistent verdicts, whether at the same trial or at different trials<sup>10</sup>;
- 2372 (11) incompetence of counsel<sup>11</sup>;
- 2373 (12) where there has been misconduct on the part of a juror or the jury has been tampered with<sup>12</sup>;
- 2374 (13) where the jury has accidentally been made aware of matters constituting inadmissible evidence<sup>13</sup>.

1 Eg as to the ingredients of the offence (*R v Bogacki* [1973] QB 832, 57 Cr App Rep 593, CA; *R v Smith (DR)* [1974] QB 354, 58 Cr App Rep 320, CA; *R v Falconer-Attlee* (1974) 58 Cr App Rep 348, CA); as to the burden or standard of proof (*R v Bone* [1968] 2 All ER 644, 52 Cr App Rep 546, CA; *R v Gray* (1974) 58 Cr App Rep 177, CA); as to a matter raised by way of defence by the defendant or by the evidence (*R v Julien* (1969) 53 Cr App Rep 407; *R v Gambling* [1975] QB 207, 60 Cr App Rep 25, CA; *R v Gittens* [1984] QB 698, 79 Cr App Rep 272; *R v Hudson*; *R v Taylor* [1971] 2 QB 202, 56 Cr App Rep 1, CA); or as to an evidential matter (*R v Smythe* (1981) 72 Cr App Rep 8, CA; *R v Vye*, *R v Wise*, *R v Stephenson* [1993] 3 All ER 241, 97 Cr App Rep 134, CA; *R v Turnbull* [1977] QB 224, 63 Cr App Rep 132, CA).

2 See eg *R v Feely* [1973] QB 530, 57 Cr App Rep 312, CA; *R v Johnson* [1989] 2 All ER 839, 89 Cr App Rep 148, CA; *R v Shepherd* (1987) 86 Cr App Rep 47, CA; *R v Wang (Cheong)* [2005] UKHL 9, [2005] 1 All ER 782, [2005] 1 WLR 661.

3 *Stirland v DPP* [1944] AC 315, 30 Cr App Rep 40, HL; *Hoskyn v Metropolitan Police Comr* [1979] AC 474, 67 Cr App Rep 88, HL.

4 *R v Badjan* (1966) 50 Cr App Rep 141, CCA; *R v Jones (P)* [1987] Crim LR 701, CA; *R v Bury* [1997] 10 Archbold News 2, CA.

5 *R v Bateson* (1969) as reported in 54 Cr App Rep 11, CA.

6 *R v Taylor*, *R v Taylor* (1993) 98 Cr App Rep 361, CA; *R v Wood* [1996] 1 Cr App Rep 207, CA.

7 *R v Craven* [2001] 2 Cr App Rep 181, CA; *R v Clark* [2003] EWCA Crim 1020, [2003] 2 FCR 447, 147 Sol Jo LB 472. A breach of the duty of disclosure does not render a conviction unsafe where the undisclosed material was 'double-edged', in that it could have equally helped the prosecution, and where no jury would have reached

a different conclusion if the undisclosed evidence had been given: *R v Hampton, R v Brown* [2004] EWCA Crim 2139, [2006] Crim LR 60.

8 *R v Cox* [1968] 1 All ER 410, 52 Cr App Rep 106, CA.

9 *DPP v Withers* [1975] AC 842, 60 Cr App Rep 85, HL; *R v Whitehouse* [1977] QB 868, 65 Cr App Rep 33, CA.

10 *R v Durante* [1972] 1 WLR 1612, 56 Cr App Rep 708, CA; *R v Malashev* [1997] Crim LR 587, CA; *R v Hayward* [2000] Crim LR 189, CA; *R v Ireland* [1985] Crim LR 367, CA.

11 *R v Clinton* [1993] 2 All ER 998, 97 Cr App Rep 320, CA; *R v Day* [2003] EWCA Crim 1060, [2003] 6 Archbold News 1; *Boddram v The State* [2001] UKPC 20, [2002] 1 Cr App Rep 103; *Teeluck v R* [2005] UKPC 14, sub nom *Teeluck v State of Trinidad and Tobago* [2005] 1 WLR 2421, [2005] 2 Cr App Rep 378.

12 *R v Twiss* [1918] 2 KB 853, 13 Cr App Rep 177, CCA; *R v Brookes* [1965] Crim LR 162, CCA; *R v Sanson* [1966] Crim LR 1112, CCA; *R v Prime* (1973) 57 Cr App Rep 632, CA; *R v K* [2005] EWCA Crim 346, [2005] 2 Cr App Rep 77.

13 *R v Flower* (1956) 40 Cr App Rep 189, CCA.

## UPDATE

### 1879 Conviction unsafe because of error or irregularity

NOTE 3--See also *McInnes v HM Advocate* [2010] UKSC 7, 2010 SLT 267, [2010] All ER (D) 101 (Feb) (failure to disclose certain witness statements did not give rise to denial of fair trial, or that there had been a miscarriage of justice).

NOTE 10--See also *R v W* [2009] All ER (D) 47 (Feb), CA.

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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/A. APPEALS AGAINST CONVICTION/1880. Disposal of appeal against conviction on special verdict.

### **1880. Disposal of appeal against conviction on special verdict.**

On an appeal<sup>1</sup> against conviction by a person in a case where the jury has found a special verdict<sup>2</sup>, the Court of Appeal may, if it considers that a wrong conclusion has been arrived at by the court of trial on the effect of the jury's verdict, instead of allowing the appeal, order such conclusion to be recorded as appears to it to be in law required by the verdict, and pass such sentence in substitution for that passed at the trial as may be authorised by law<sup>3</sup>.

1 For the meaning of 'appeal' see PARA 1837 note 4 ante.

2 As to special verdicts see PARA 1339 ante. For examples of the quashing of a conviction on the ground of a wrong conclusion as to the effect of a special verdict before the Criminal Appeal Act 1968 see *R v Rutter* (1908) 73 JP 12, 1 Cr App Rep 174, CCA; *R v Knight* (1908) 73 JP 15, 1 Cr App Rep 186, CCA; *R v Muirhead* (1908) 73 JP 31, 1 Cr App Rep 189, CCA; *R v Johnson* (1913) 9 Cr App Rep 57, CCA (wrong direction of trial judge misled jury); *R v Lomas* (1913) 110 LT 239, 9 Cr App Rep 220, CCA; *R v Chainey* [1914] 1 KB 137, 9 Cr App Rep 175, CCA. See also *R v Petch* (1909) 25 TLR 401, 2 Cr App Rep 71, CCA; *R v Charlton* (1911) 6 Cr App Rep 119, CCA; *R v Rawlings* (1909) 3 Cr App Rep 5, CCA (Criminal Appeal Act 1907 s 4(1) proviso (now repealed) applied in case of confused verdict); *R v Syme* (1914) 112 LT 136, 10 Cr App Rep 284, CCA. As to the verdict of not guilty by reason of insanity see PARA 31 ante.

3 Criminal Appeal Act 1968 s 5(1), (2) (s 5(1) amended by the Criminal Appeal Act 1995 s 29(1), Sch 2 para 4(1), (2)).

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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/A. APPEALS AGAINST CONVICTION/1881. Power to substitute conviction for alternative offence.

### **1881. Power to substitute conviction for alternative offence.**

On an appeal against conviction, where the appellant<sup>1</sup> has been convicted of an offence to which he did not plead guilty and the jury could on the indictment have found him guilty of some other offence<sup>2</sup>, and on the jury's finding it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity<sup>3</sup>.

1 For the meanings of 'appeal' and 'appellant' see PARA 1837 note 4 ante.

2 I.e: (1) under an alternative verdict provision, such as the Criminal Law Act 1967 s 6(3) (see PARA 1335 ante); or (2) under an alternative count (see PARA 1335 et seq ante). As to head (1) supra see eg *R v Spratt* [1980] 2 All ER 269, 71 Cr App Rep 125, CA (murder charged in indictment; defendant convicted thereof; manslaughter verdict substituted); *R v Worton* (1990) 154 JP 201, [1990] Crim LR 124, CA (violent disorder charged in indictment; defendant convicted thereof; affray verdict substituted). Head (2) supra is concerned with where the facts alleged by the prosecution did not in law amount to the offence in the count in respect of which the defendant was convicted but do amount to the offence in an alternative count. It is essential, for the Criminal Appeal Act 1968 s 3 (as amended) to apply, that the jury was discharged from giving a verdict on the alternative count in respect of which the substitution of a verdict is sought; a verdict for the offence in the alternative count cannot be substituted if the defendant was acquitted of it: *R v Melvin* [1953] 1 QB 481, 37 Cr App Rep 1, CCA; *R v Seymour* [1954] 1 All ER 1006, 38 Cr App Rep 68, CCA. Although the Criminal Appeal Act 1968 s 3 (as amended) does not apply if the defendant pleaded guilty, a verdict may be substituted under the Criminal Appeal Act 1968 s 3A (as added) (see PARA 1882 post).

3 Ibid s 3(1), (2) (amended by the Criminal Justice Act 2003 s 316(1), (2)). The Criminal Appeal Act 1968 s 3 (as amended) substantially re-enacts the Criminal Appeal Act 1907 s 5(2) (repealed).

Where the defendant has been convicted of an offence after the prosecution has refused to accept a plea of guilty to some other offence and the conviction is quashed on appeal, the Court of Appeal has power to substitute a conviction for that other offence if the jury must have been satisfied of facts proving guilt of the other offence: *R v Blackford* (1989) 89 Cr App Rep 239, CA.

Before the Court of Appeal can substitute one verdict for another, it must be sure that the jury was satisfied of the facts which proved the defendant guilty of the other offence: *R v Caslin* [1961] 1 All ER 246, 45 Cr App Rep 47, CCA; *R v Porritt* [1961] 3 All ER 463, 45 Cr App Rep 348, CCA; *R v Smith* [1962] 2 QB 317, 46 Cr App Rep 277, CCA. Further, the jury must have been satisfied on evidence which was properly admitted: *R v Deacon* [1973] 2 All ER 1145, 57 Cr App Rep 688, CA. Cf *R v Scaramanga* [1963] 2 QB 807, 47 Cr App Rep 213, CCA; *R v Holley* (1969) 53 Cr App Rep 519, CA. See also *R v Collins* (1922) 128 LT 31, 17 Cr App Rep 42, CCA; *R v Spratt* [1980] 2 All ER 269, 71 Cr App Rep 125, CA.

In *R v Weekes* [1999] 2 Cr App Rep 520, [1999] Crim LR 907, CA, a conviction of manslaughter on grounds of diminished responsibility was substituted for a conviction of murder, even though there had been no evidence of diminished responsibility before the jury, after the Court of Appeal admitted such evidence. The court held that the indictment was sufficiently widely drawn to permit a conviction of manslaughter and that the evidence led at the trial must have satisfied the jury that the appellant killed the victim deliberately and unlawfully; thus, it held, the jury could have found him guilty of manslaughter even though they could not, on the evidence before them, have done so by virtue of the provisions relating to diminished responsibility.

The Court of Appeal can substitute a verdict of guilty of another offence, even though the jury was not directed about the possibility of an alternative verdict: *R v Caslin* [1961] 1 All ER 246, 45 Cr App Rep 47, CCA. However, the fact that the jury did not have a proper direction about the alternative offence is a highly relevant

consideration in deciding whether to exercise the jurisdiction to substitute an alternative verdict (*R v Caslin* supra; *R v Cooke* [1997] Crim LR 436, CA), as is the question whether there are reasonable grounds for concluding that had the appellant been charged with the other offence, the conduct of the defence would have been materially affected (*R v Graham* [1997] 1 Cr App Rep 302, CA). The Court of Appeal must be satisfied that an alternative verdict provision is fulfilled; it cannot apply a different test: *R v Cooke* supra.

The discretion under the Criminal Appeal Act 1968 s 3 (as amended) is a wide one and as such it will be inappropriate to substitute a conviction for a variety of reasons, for instance where it would bring about injustice or prejudice of some kind, or where it would amount to an abuse of process. However, the discretion should be exercised on the procedural and evidential history of the case and not the personal circumstances of the applicant: *R v Peterson* [1997] Crim LR 339, CA.

Where it is submitted that a verdict of guilty of another offence should be substituted, the prosecution should provide the court with a draft count in respect of that offence: *R v Graham* supra.

As to the commencement of a sentence passed by the Court of Appeal see PARA 1845 ante; as to the consideration of the comparative severity of sentences see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 49 note 4; and as to making a recommendation for deportation see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 49 note 3.



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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/A. APPEALS AGAINST CONVICTION/1882. Power to substitute conviction of alternative offence after guilty plea.

### **1882. Power to substitute conviction of alternative offence after guilty plea.**

On an appeal<sup>1</sup> against conviction where:

- 2375 (1) an appellant<sup>2</sup> has been convicted of an offence to which he pleaded guilty<sup>3</sup>;
- 2376 (2) if he had not so pleaded, he could on the indictment have pleaded, or been found, guilty of some other offence<sup>4</sup>; and
- 2377 (3) it appears to the Court of Appeal that the plea of guilty indicates an admission by the appellant of facts which prove him guilty of the other offence<sup>5</sup>,

the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the appellant's plea of guilty a plea of guilty of the other offence and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity<sup>6</sup>.

1 For the meaning of 'appeal' see PARA 1837 note 4 ante.

2 For the meaning of 'appellant' see PARA 1837 note 4 ante.

3 Criminal Appeal Act 1968 s 3A(1)(a) (s 3A added by the Criminal Justice Act 2003 s 316(1), (3)).

4 Criminal Appeal Act 1968 s 3A(1)(b) (as added: see note 3 supra).

5 Ibid s 3A(1)(c) (as added: see note 3 supra).

6 Ibid s 3A(2) (as added: see note 3 supra).

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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/A. APPEALS AGAINST CONVICTION/1883. Power to substitute finding of insanity or unfitness to plead.

### **1883. Power to substitute finding of insanity or unfitness to plead.**

Where, on an appeal<sup>1</sup> against conviction, the Court of Appeal, on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved<sup>2</sup>, is of opinion: (1) that the proper verdict would have been one of not guilty by reason of insanity<sup>3</sup>; or (2) that the case is not one where there should have been a verdict of acquittal, but that there should have been findings that the defendant was under disability<sup>4</sup> and that he did the act or made the omission charged against him<sup>5</sup>, the court must make in respect of the defendant:

- 2378 (a) a hospital order<sup>6</sup> (with or without a restriction order)<sup>7</sup>;
- 2379 (b) a supervision order<sup>8</sup>; or
- 2380 (c) an order for his absolute discharge<sup>9</sup>.

An issue of insanity may be raised on appeal even if not pleaded at the trial<sup>10</sup>.

1 For the meaning of 'appeal' see PARA 1837 note 4 ante.

2 'Duly approved', in relation to a registered medical practitioner, means approved for the purposes of the Mental Health Act 1983 s 12 by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder (MENTAL HEALTH vol 30(2) (Reissue) PARA 482): Criminal Appeal Act 1968 s 51(1) (definition added by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 7, Sch 3 para 5(1)). 'Registered medical practitioner' means a fully registered person within the meaning of the Medical Act 1983 (see MEDICINE, PHARMACY, DRUGS AND MEDICINAL PRODUCTS vol 30(1) (Reissue) PARA 3): Criminal Appeal Act 1968 s 51(1) (definition added by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 Sch 3 para 5(1)). As from a day to be appointed, the words 'who holds a licence to practise' are added after the words 'the Medical Act 1983' by the Medical Act 1983 (Amendment) Order 2002, SI 2002/3135, art 16(1), Sch 1 para 6. At the date at which this volume states the law no such day had been appointed.

3 Criminal Appeal Act 1968 s 6(1)(a) (s 6 substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 4(1)). See PARA 31 ante.

4 See PARA 1839 note 2 ante.

5 Criminal Appeal Act 1968 s 6(1)(b) (as substituted: see note 3 supra). See PARA 1265 ante.

6 'Hospital order' has the meaning given in the Mental Health Act 1983 s 37 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332): Criminal Appeal Act 1968 ss 6(7), 51(2) (s 6(7) added by the Domestic Violence, Crime and Victims Act 2004 s 24(3); the Criminal Appeal Act 1968 s 51(2) amended by the Mental Health Act 1983 s 148, Sch 4 para 23(j); and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(2), Sch 2 para 1).

Where the Court of Appeal makes an interim hospital order by virtue of the Criminal Appeal Act 1968 s 14 (as substituted and amended) (see PARA 1889 post): (1) the power of renewing or terminating it and of dealing with the appellant on its termination is exercisable by the court below and not by the Court of Appeal; and (2) the court below is to be treated for the purposes of the Mental Health Act 1983 s 38(7) (absconding offenders: see MENTAL HEALTH vol 30(2) (Reissue) PARA 494; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334) as the court that made the order: Criminal Appeal Act 1968 s 6(5) (added by the Domestic Violence, Crime and Victims Act 2004 s 24(3)). 'Interim hospital order' has the meaning given in the Mental Health Act 1983 s 38 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334): Criminal Appeal Act 1968 s 6(7) (added by the Domestic Violence, Crime and Victims Act 2004 s 24(3)).

7 Criminal Appeal Act 1968 s 6(2)(a) (s 6(2) substituted by the Domestic Violence, Crime and Victims Act 2004 s 24(3)). 'Restriction order' has the meaning given to it by the Mental Health Act 1983 s 41 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 496; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 337): Criminal Appeal Act 1968 ss 6(7), 51(2) (s 6(7) as added (see note 6 supra); s 51(2) as amended (see note 6 supra)).

8 Ibid s 6(2)(b) (as substituted: see note 7 supra). 'Supervision order' has the meaning given in the Criminal Procedure (Insanity) Act 1964 s 5A, Sch 1A Pt 1 (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 368): Criminal Appeal Act 1968 s 6(7) (as added: see note 6 supra). Where the Court of Appeal makes a supervision order by virtue of s 6 (as amended), any power of revoking or amending it is exercisable as if the order had been made by the court below: s 6(6) (added by the Domestic Violence, Crime and Victims Act 2004 s 24(3)).

9 Criminal Appeal Act 1968 s 6(2)(c) (as substituted: see note 7 supra). Where the offence to which the appeal relates is an offence the sentence for which is fixed by law (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 15), and the court has power to make a hospital order, the court must make a hospital order with a restriction order (whether or not it would otherwise have power to make a restriction order: s 6(3) (substituted by the Domestic Violence, Crime and Victims Act 2004 s 24(3)). The Mental Health Act 1983 s 54(2), (3) has effect with respect to proof of the appellant's mental condition for the purposes of the Criminal Appeal Act 1968 s 6 (as amended) or s 14 (as substituted and amended) (see PARA 1889 post) as it has effect with respect to proof of an offender's mental condition for the purposes of the Mental Health Act 1959 s 37(2)(a) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 333 head (1)): Criminal Appeal Act 1968 s 51(2A) (added by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 7, Sch 3 para 5(2); and amended by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 6). The Criminal Procedure (Insanity) Act 1964 s 5A (as added: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332 et seq) applies to the Criminal Appeal Act 1968 s 6 (as amended) as it applies to the Criminal Procedure (Insanity) Act 1964 s 5 (as substituted): Criminal Appeal Act 1968 s 6(4) (added by the Domestic Violence, Crime and Victims Act 2004 s 24(3)).

10 *R v Canham* (1925) 18 Cr App Rep 163, CCA; but see PARA 1867 note 11 ante.

## UPDATE

### 1883 Power to substitute finding of insanity or unfitness to plead

NOTE 2--Appointed day is 16 November 2009: London Gazette, 21 August 2009.

NOTE 6--Criminal Appeal Act 1968 s 6(5) and the definition of 'interim hospital order' in s 6(7) omitted: Criminal Justice and Immigration Act 2008 Sch 8 para 7(a), Sch 28 Pt 3. As to the effect of interim hospital orders see Criminal Appeal Act 1968 s 30A (added by Criminal Justice and Immigration Act 2008 Sch 8 para 8).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/A. APPEALS AGAINST CONVICTION/1884. Adjustment of sentence when appeal allowed on part of indictment.

### **1884. Adjustment of sentence when appeal allowed on part of indictment.**

Where, on an appeal<sup>1</sup> against conviction on an indictment containing two or more counts, the Court of Appeal allows the appeal in respect of part of the indictment, it may in respect of any count on which the appellant<sup>2</sup> remains convicted pass such sentence in substitution for any sentence, passed thereon at the trial<sup>3</sup>, as it thinks proper and is authorised by law for the offence of which he remains convicted on that count<sup>4</sup>. However, the court may not pass any sentence such that the appellant's sentence on the indictment as a whole will, in consequence of the appeal, be of greater severity than the sentence (taken as a whole) which was passed at the trial for all offences of which he was convicted on the indictment<sup>5</sup>.

1 For the meaning of 'appeal' see PARA 1837 note 4 ante.

2 For the meaning of 'appellant' see PARA 1837 note 4 ante.

3 As to the making of a recommendation for deportation see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 49 note 3.

4 Criminal Appeal Act 1968 s 4(1), (2). This power extends to passing a sentence in respect of a conviction one of the counts for which the Crown Court did not impose a separate sentence when the Court of Appeal quashes a conviction under another count for which a sentence was imposed: *R v O'Grady* (1941) 28 Cr App Rep 33, CCA; *R v Dolan* (1975) 62 Cr App Rep 36, CA. Where a person is convicted on two counts and the counts are alternatives to one another, the court will treat the conviction as if it had been on the lesser charge: *R v Johnston* (1913) 9 Cr App Rep 262, CCA; *R v Norman* [1915] 1 KB 341, 11 Cr App Rep 58, CCA; *R v Smith* (1915) 11 Cr App Rep 81, CCA. Cf *R v Dawson*, *R v Wenlock* [1960] 1 All ER 558, 44 Cr App Rep 87, CCA (cited in PARA 1881 note 3 ante).

5 Criminal Appeal Act 1968 s 4(3). See also *R v Lovelock* [1956] 3 All ER 223n, 40 Cr App Rep 137, CCA; *R v Edirimanasingham* [1961] AC 454, [1961] 1 All ER 376, PC; *R v Craig* [1967] 1 All ER 1052n, 51 Cr App Rep 8, CA; *R v Lattimore* (1975) 62 Cr App Rep 53, CA; *R v Dolan* (1975) 62 Cr App Rep 36, CA. As to the commencement of sentences passed by the Court of Appeal see PARA 1845 ante; as to the alteration of sentences by the Court of Appeal see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 49; and as to the comparative severity of sentences see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 49 note 4.

### **UPDATE**

#### **1884 [Power to re-sentence where appellant remains convicted of related offences]**

TEXT AND NOTES--Criminal Appeal Act 1968 s 4 amended so as to empower the Court of Appeal, when they quash a conviction, to re-sentence the appellant for any other offence for which he was sentenced by the court below on the same day as he was sentenced for the conviction which has been quashed: Criminal Justice and Immigration Act 2008 Sch 8 para 6, Sch 28 Pt 3.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/A. APPEALS AGAINST CONVICTION/1885. Power to set aside conviction of summary offence tried before the Crown Court.

### **1885. Power to set aside conviction of summary offence tried before the Crown Court.**

Until a day to be appointed<sup>1</sup>, where the Court of Appeal allows an appeal against conviction of an offence triable either way<sup>2</sup> which arose out of circumstances which were the same as or connected with those giving rise to a summary offence of which the appellant was convicted by the Crown Court in accordance with the statutory provisions<sup>3</sup>, the court: (1) must set aside his conviction of the summary offence and give notice<sup>4</sup> to the designated officer for the magistrates' court that it has done so; and (2) may direct that no further proceedings in relation to the offence are to be undertaken<sup>5</sup>.

Where the Court of Appeal allows an appeal against conviction of an indictable-only offence which is related<sup>6</sup> to a summary offence of which the appellant was convicted under specified provisions<sup>7</sup>: (a) it must set aside his conviction of the summary offence and give the clerk of the magistrates' court notice<sup>8</sup> that it has done so; and (b) it may direct that no further proceedings in relation to the offence are to be undertaken<sup>9</sup>.

1 The Criminal Justice Act 1988 s 41 is repealed as from a day to be appointed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 60(1), (8), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed.

2 For the meaning of 'offence triable either way' see PARA 1102 note 4 ante; and as to offences triable either way see PARA 1109 et seq ante.

3 Ie in accordance with the Criminal Justice Act 1988 s 41(5)-(10): see PARA 1358 ante.

4 The notice must include particulars of any direction given under *ibid* s 41(11)(b) (see head (2) in the text) in relation to the offence: s 41(12).

5 *Ibid* s 41(11) (amended by the Courts Act 2003 s 109(1), Sch 8 para 303). The proceedings before the Crown Court in relation to the offence must thereafter be disregarded for all purposes: Criminal Justice Act 1988 s 41(11).

6 An offence is related to another offence for these purposes if it arises out of circumstances which are the same as or connected with those giving rise to the other offence: Crime and Disorder Act 1998 s 52(6), Sch 3 para 6(12).

7 Ie under *ibid* Sch 3 para 6 (see PARA 1358 ante).

8 The notice must include particulars of any direction given under *ibid* Sch 3 para 6(9)(b) (see head (b) in the text) in relation to the offence: Sch 3 para 6(10).

9 *Ibid* Sch 3 para 6(9). As from a day to be appointed the word 'indictable' is substituted for 'indictable-only' by the Criminal Justice Act 2003 Sch 3 paras 15, 20(1), (6)(c). At the date at which this volume states the law no such day had been appointed.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/B. APPEALS AGAINST FINDING OF DISABILITY/1886. Disposal of appeal against finding of disability etc.

## **B. APPEALS AGAINST FINDING OF DISABILITY**

### **1886. Disposal of appeal against finding of disability etc.**

A person may appeal against either or both findings that he is under a disability<sup>1</sup> and that he did the act or made the omission charged against him<sup>2</sup>, with the leave of the Court of Appeal or if the trial judge has granted a certificate<sup>3</sup>. Where a person has so appealed, the Court of Appeal must allow the appeal if it thinks that the finding is unsafe; and must dismiss such an appeal in any other case<sup>4</sup>.

Where, however, the Court of Appeal allows such an appeal against a finding that the appellant is under a disability, the appellant may be tried accordingly for the offence with which he was charged; and the court may<sup>5</sup> make such orders as appear to it necessary or expedient pending any such trial for his custody, release on bail or continued detention<sup>6</sup>.

Where, otherwise than in such a case<sup>7</sup>, the Court of Appeal allows such an appeal against a finding that the appellant did the act or made the omission charged against him, the court must, in addition to quashing the finding, direct a verdict of acquittal to be recorded (but not a verdict of not guilty by reason of insanity)<sup>8</sup>.

1 See PARA 1839 note 2 ante. For the meaning of 'under disability' see PARA 1839 note 2 ante.

2 See PARA 1265 ante.

3 See the Criminal Appeal Act 1968 s 15; and PARA 1839 ante. See also *R v Clarke* [1966] Crim LR 447, CCA.

4 Criminal Appeal Act 1968 s 16(1) (substituted by the Criminal Appeal Act 1995 s 2(5)). If the court dismisses an appeal or an application for leave to appeal by an appellant who is subject to a hospital order under the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332) or an order under the Criminal Procedure (Insanity) Act 1964 s 5(1) (power to deal with persons not guilty by reason of insanity or unfit to plead etc: see PARA 1265 ante) or the court affirms the order and the appellant has been released on bail pending his appeal, the court must give such directions as it thinks fit for his conveyance to the hospital from which he was released on bail and for his detention, if necessary, in a place of safety as defined in the Mental Health Act 1983 s 55 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 495) pending his admission to the said hospital: CrimPR 68.28.

5 le subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended): see PARA 1170 ante.

6 Criminal Appeal Act 1968 s 16(3) (substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 7, Sch 3 para 3(3); and amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 21). The reference to continued detention is to such detention under the Mental Health Act 1983: Criminal Appeal Act 1968 s 16(3) (as so substituted). The Criminal Appeal Act 1968 Sch 3 has effect for applying provisions in the Mental Health Act 1983 Pt III (ss 35-55) (as amended) (patients concerned in criminal proceedings or under sentence: see further MENTAL HEALTH) to persons in whose case an order is made by the court under the Criminal Appeal Act 1968 s 16(3) (as substituted and amended): s 16(3) (as so substituted and amended). Where an order is made by the Court of Appeal under s 16(3) (as substituted and amended) for a person's continued detention under the Mental Health Act 1983, Pt III of that Act (as amended) applies to him as if he had been ordered under the Criminal Appeal Act 1968 s 16(3) (as substituted and amended) to be kept in custody pending trial and were detained in pursuance of a transfer direction together with a restriction direction: Sch 3 para 2 (substituted by the Mental Health Act 1983 s 148, Sch 4 para 23n).

7 le a case falling within the Criminal Appeal Act 1968 s 16(3) (as substituted and amended).

8 Ibid s 16(4) (substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 Sch 3 para 3(3)).

## **UPDATE**

### **1886 Disposal of appeal against finding of disability etc**

NOTE 4--CrimPR 68 substituted: see PARA 1856-1861.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/C. APPEALS AGAINST VERDICT OF NOT GUILTY BY REASON OF INSANITY/1887. Disposal of appeal against verdict of not guilty by reason of insanity.

### ***C. APPEALS AGAINST VERDICT OF NOT GUILTY BY REASON OF INSANITY***

#### **1887. Disposal of appeal against verdict of not guilty by reason of insanity.**

A person in whose case a verdict of not guilty by reason of insanity is returned<sup>1</sup> may appeal to the Court of Appeal against the verdict, with the leave of the Court of Appeal or if the trial judge grants a certificate<sup>2</sup>.

The court must allow such an appeal if it thinks that the verdict is unsafe; and must dismiss such an appeal in any other case<sup>3</sup>.

Where such an appeal would fall to be allowed and none of the grounds for allowing it relates to the question of the insanity of the defendant, the Court of Appeal may dismiss the appeal if it is of opinion that, but for the insanity of the defendant, the proper verdict would have been that he was guilty of an offence other than the offence charged<sup>4</sup>.

1 See PARA 31 ante.

2 le under the Criminal Appeal Act 1968 s 12 (as amended: see PARA 1838 ante).

3 Ibid s 13(1) (substituted by the Criminal Appeal Act 1995 s 2(3)). See *R v Dickie* [1984] 3 All ER 173, 79 Cr App Rep 213, CA (issue of insanity raised by trial judge in absence of sufficient evidence to form basis for such a verdict; verdict set aside). For consequential provisions where the appeal is dismissed and the appellant has been released on bail pending appeal see CrimPR 68.28; and PARA 1886 note 4 ante. As to the effect of an order allowing an appeal in accordance with the Criminal Appeal Act 1968 s 13 (as amended) see PARA 1888 note 3 post.

4 Ibid s 13(3).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/C. APPEALS AGAINST VERDICT OF NOT GUILTY BY REASON OF INSANITY/1888. Substitution of verdict on allowing appeal.

# **1888. Substitution of verdict on allowing appeal.**

Where an appeal against a verdict of not guilty by reason of insanity<sup>1</sup> is allowed:

- 2381 (1) if the ground, or one of the grounds, for allowing the appeal is that the jury's finding as to the defendant's insanity ought not to stand, and the Court of Appeal is of opinion that the proper verdict would have been that he was guilty of an offence (whether the offence charged or any other offence of which the jury could have found him guilty), the court: (a) must substitute for the verdict of not guilty by reason of insanity a verdict of guilty of that offence; and (b) has like powers of punishing or otherwise dealing with the appellant, and other powers, as the court of trial would have had if the jury had come to the substituted verdict<sup>2</sup>;
- 2382 (2) in any other case, the Court of Appeal must substitute for the verdict of the jury a verdict of acquittal<sup>3</sup>.

1 le under the Criminal Appeal Act 1968 s 12 (as amended): see PARA 1838 ante.

2 Ibid s 13(4)(a).

3 Ibid s 13(4)(b). As to the commencement of a sentence passed by the Court of Appeal see PARA 1845 ante; and as to the power of the court to make a hospital order see PARA 1889 post. An order allowing an appeal in accordance with s 13 (as amended) operates as a direction to the court of trial to amend the record to conform with the order: s 13(6).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/C. APPEALS AGAINST VERDICT OF NOT GUILTY BY REASON OF INSANITY/1889. Substitution of findings of unfitness to plead etc.

### **1889. Substitution of findings of unfitness to plead etc.**

Where, on an appeal against a verdict of not guilty by reason of insanity<sup>1</sup>, the Court of Appeal, on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved<sup>2</sup>, is of opinion that the case is not one where there should have been a verdict of acquittal, but that there should have been findings that the defendant was under disability<sup>3</sup> and that he did the act or made the omission charged against him<sup>4</sup>, it must make in respect of the defendant:

- 2383 (1) a hospital order<sup>5</sup> (with or without a restriction order)<sup>6</sup>;
- 2384 (2) a supervision order<sup>7</sup>; or
- 2385 (3) an order for his absolute discharge<sup>8</sup>.

1 le under the Criminal Appeal Act 1968 s 12 (as amended): see PARA 1838 ante.

2 See PARA 1883 note 2 ante.

3 For the meaning of 'under disability' see PARA 1839 note 2 ante.

4 Criminal Appeal Act 1968 s 14(1) (s 14 substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 4(2)). See PARA 1265 ante.

5 'Hospital order' has the meaning given in the Mental Health Act 1983 s 37 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332): Criminal Appeal Act 1968 ss 14(7), 51(2) (s 14(7) added by the Domestic Violence, Crime and Victims Act 2004 s 24(3); the Criminal Appeal Act 1968 s 51(2) amended by the Mental Health Act 1983 s 148, Sch 4 para 23(j); and the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(2), Sch 2 para 1). Where the Court of Appeal makes an interim hospital order by virtue of the Criminal Appeal Act 1968 s 14 (as substituted and amended): (1) the power of renewing or terminating it and of dealing with the appellant on its termination is exercisable by the court below and not by the Court of Appeal; and (2) the court below must be treated for the purposes of the Mental Health Act 1983 s 38(7) (absconding offenders: see MENTAL HEALTH vol 30(2) (Reissue) PARA 494; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334) as the court that made the order: Criminal Appeal Act 1968 s 14(5) (added by the Domestic Violence, Crime and Victims Act 2004 s 24(3)). 'Interim hospital order' has the meaning given in the Mental Health Act 1983 s 38 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334): Criminal Appeal Act 1968 s 14(7) (as so added).

6 Ibid s 14(2)(a) (s 14(2) substituted by the Domestic Violence, Crime and Victims Act 2004 s 24(3)). 'Restriction order' has the meaning given to it by the Mental Health Act 1983 s 41 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 496): Criminal Appeal Act 1968 s 14(7) (as added: see note 5 supra), s 51(2) (as amended: see note 5 supra).

7 Ibid s 14(2)(b) (as substituted: see note 6 supra). 'Supervision order' has the meaning given in the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 5A, Sch 1A Pt 1 (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 368): Criminal Appeal Act 1968 s 14(7) (as added: see note 5 supra). Where the Court of Appeal makes a supervision order by virtue of s 14 (as substituted and amended), any power of revoking or amending it is exercisable as if the order had been made by the court below: s 14(6) (added by the Domestic Violence, Crime and Victims Act 2004 s 24(3)).

8 Criminal Appeal Act 1968 s 14(2)(c) (as substituted: see note 6 supra). See the Mental Health Act 1983 s 37(2)(a); PARA 1883 note 9 ante; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 333. Where the offence to which the appeal relates is an offence the sentence for which is fixed by law (see SENTENCING AND

DISPOSITION OF OFFENDERS vol 92 (2010) PARA 15), and the court has power to make a hospital order, the court must make a hospital order with a restriction order (whether or not it would otherwise have power to make a restriction order): Criminal Appeal Act 1968 s 14(3) (substituted by the Domestic Violence, Crime and Victims Act 2004 s 24(3)). The Criminal Procedure (Insanity) Act 1964 s 5A (as added: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332 et seq) applies to the Criminal Appeal Act 1968 s 14 (as substituted and amended) as it applies to the Criminal Procedure (Insanity) Act 1964 s 5 (as substituted): Criminal Appeal Act 1968 s 14(4) (added by the Domestic Violence, Crime and Victims Act 2004 s 24(3)).

## **UPDATE**

### **1889 Substitution of findings of unfitness to plead etc**

NOTE 5--Criminal Appeal Act 1968 s 14(5) and the definition of 'interim hospital order' in s 14(7) omitted: Criminal Justice and Immigration Act 2008 Sch 8 para 7(c), Sch 28 Pt 3. As to the effect of interim hospital orders see Criminal Appeal Act 1968 s 30A (added by Criminal Justice and Immigration Act 2008 Sch 8 para 8).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/D. APPEALS AGAINST SENTENCE

## ***D. APPEALS AGAINST SENTENCE***

### **UPDATE**

#### **1890-1891 Appeals against sentence**

Material relating to these paragraphs has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 49-50.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/E. DECLARATION OF INCOMPATIBILITY; COSTS; NOTIFICATION OF RESULT OF APPEALS/1892. Declaration of incompatibility.

## ***E. DECLARATION OF INCOMPATIBILITY; COSTS; NOTIFICATION OF RESULT OF APPEALS***

### **1892. Declaration of incompatibility.**

The Court of Appeal must not consider making a declaration of incompatibility<sup>1</sup> unless it has given written notice to the Crown<sup>2</sup>. Where notice has been given to the Crown, a Minister, or other person entitled<sup>3</sup> to be joined as a party, must be so joined on giving written notice to the court<sup>4</sup>.

A notice so given must provide an outline of the issues in the case and specify:

- 2386 (1) the prosecutor and the appellant<sup>5</sup>;
- 2387 (2) the date, judge and court of the trial in the proceedings from which the appeal lies<sup>6</sup>; and
- 2388 (3) the provision of primary legislation and the Convention right under question<sup>7</sup>.

Any consideration of whether a declaration of incompatibility should be made must be adjourned for:

- 2389 (a) 21 days from the date of the notice so given<sup>8</sup>; or
- 2390 (b) such other period (specified in the notice) as the court allows in order that the relevant Minister or other person may seek to be joined and prepare his case<sup>9</sup>.

1 le under the Human Rights Act 1998 s 4 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS).

2 CrimPR 68.27(1). Such a notice must be given to: (1) the person named in the list published under the Crown Proceedings Act 1947 s 17(1) (see CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) PARA 119); or (2) in the case of doubt as to whether any and if so which of those departments is appropriate, the Treasury Solicitor: CrimPR 68.27(3).

3 le under the Human Rights Act 1998 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS). Unless the court otherwise directs, the Minister or other person entitled under the Human Rights Act 1998 to be joined as a party must, if he is to be joined, give written notice to the court and every other party: CrimPR 68.27(6). Where a Minister of the Crown has nominated a person to be joined as a party by virtue of the Human Rights Act 1998 s 5(2)(a) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS), a notice under CrimPR 68.27(6) must be accompanied by a written nomination signed by or on behalf of the Minister: CrimPR 68.27(7).

4 CrimPR 68.27(2).

5 CrimPR 68.27(4)(a).

6 CrimPR 68.27(4)(b).

7 CrimPR 68.27(4)(c). 'Convention right' means a right under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969): CrimPR 2.4, glossary. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

8 CrimPR 68.27(5)(a).

9 CrimPR 68.27(5)(b).

## **UPDATE**

### **1892 Declaration of incompatibility**

TEXT AND NOTES--CrimPR 68 substituted: see PARA 1856-1861.

NOTE 7--CrimPR 2.4, glossary now Criminal Procedure Rules 2010, SI 2010/60, r 2.4, glossary.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/E. DECLARATION OF INCOMPATIBILITY; COSTS; NOTIFICATION OF RESULT OF APPEALS/1893. Costs awarded by the Court of Appeal.

### **1893. Costs awarded by the Court of Appeal.**

The Court of Appeal has power<sup>1</sup> to make the following orders as to costs:

- 2391 (1) an order that the appellant's costs be paid out of central funds<sup>2</sup>;
- 2392 (2) an order that private prosecution costs be paid out of central funds<sup>3</sup>;
- 2393 (3) an award of costs against the defendant<sup>4</sup>;
- 2394 (4) a wasted costs order against a legal or other representative<sup>5</sup>;
- 2395 (5) an order for costs against a third party<sup>6</sup>;
- 2396 (6) an order that costs unnecessarily or improperly incurred be paid by the party responsible<sup>7</sup>.

<sup>1</sup> The power to make orders under heads (1)-(3) in the text may be exercised by a single judge: see PARA 1854 ante.

<sup>2</sup> See PARA 2059 post.

<sup>3</sup> See PARA 2062 post.

<sup>4</sup> See PARA 2063 post.

<sup>5</sup> See PARA 2060 post. The Court of Appeal may also disallow such an order: see PARA 2060 post.

<sup>6</sup> See PARA 2061 post.

<sup>7</sup> See PARA 2064 post.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(v) Determination of Appeals/E. DECLARATION OF INCOMPATIBILITY; COSTS; NOTIFICATION OF RESULT OF APPEALS/1894. Notification of determination of court.

### **1894. Notification of determination of court.**

As soon as practicable, the Registrar of Criminal Appeals must serve<sup>1</sup> notice of any determination by the Court of Appeal or by any judge of the court<sup>2</sup> on any appeal or application for leave to appeal by an appellant on:

- 2397 (1) the appellant<sup>3</sup>;
- 2398 (2) the Secretary of State<sup>4</sup>;
- 2399 (3) any person having custody of the appellant<sup>5</sup>;
- 2400 (4) in the case of an appellant detained under the Mental Health Act 1983, the responsible authority<sup>6</sup>;
- 2401 (5) in the case of a declaration of incompatibility<sup>7</sup>, the declaration must be served on: (a) all of the parties to the proceedings<sup>8</sup>; and (b) where a Minister of the Crown has not been joined as a party, the Crown<sup>9</sup>.

The Registrar must, as soon as practicable, serve notice on a court officer of the court of trial of the order disposing of an appeal or application for leave to appeal<sup>10</sup>.

1 As to the mode of service see PARA 1862 ante.

2 le under the Criminal Appeal Act 1968 s 31 (as amended): see PARA 1854 ante.

3 CrimPR 68.29(1)(a).

4 CrimPR 68.29(1)(b).

5 CrimPR 68.29(1)(c).

6 CrimPR 68.29(1)(d). For these purposes, the expression 'responsible authority' means: (1) in relation to a patient liable to be detained under the Mental Health Act 1983 in a hospital or mental nursing home, the managers of the hospital or home as defined in s 145(1) (see MENTAL HEALTH vol 30(2) (Reissue) PARA 439); and (2) in relation to a patient subject to guardianship, the responsible local health authority as defined in s 34(3) (see MENTAL HEALTH): CrimPR 68.29(3).

7 le under the Human Rights Act 1998 s 4: see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

8 CrimPR 68.29(1)(e)(i).

9 CrimPR 68.29(1)(e)(ii). Service on the Crown must be in accordance with CrimPR 68.27(3) (see PARA 1892 note 2 ante): CrimPR 68.29(1)(e)(ii).

10 CrimPR 68.29(2). CrimPR 68.29 also applies, with the necessary modifications, to a determination under the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended) (see PARA 1966 et seq post) or the Administration of Justice Act 1960 s 13 (as amended) (see PARA 1920 post): CrimPR 74.1(6). As to the renewal of an application refused by a single judge see PARA 1855 ante.

## **UPDATE**

### **1894-1896 Notification of determination of court ... Re-trial**



CrimPR 68 substituted: see PARA 1856-1861.

**1894 Notification of determination of court**

NOTE 10--CrimPR Pt 74 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 74.

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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(vi) Venire de Novo and Re-trial/1895. Venire de novo.

## **(vi) Venire de Novo and Re-trial**

### **1895. Venire de novo.**

Where the Court of Appeal holds that the appellant's trial has been a nullity, it has power to order that he be tried on the indictment in question<sup>1</sup>. In such a case a writ of venire de novo may be issued if there has been an irregularity of procedure which results in there having been no trial validly commenced, and also if the trial has ended without a properly constituted jury having returned a valid verdict<sup>2</sup>. An irregularity in the course of the trial occurring between the time it was validly commenced and the discharge of the jury after returning a verdict does not fall within the scope of venire de novo<sup>3</sup>.

Where a venire de novo is ordered, the parties stand precisely as they did before the first trial and the whole of the facts are reheard<sup>4</sup>. The order is that the conviction and judgment be set aside and annulled<sup>5</sup>. The court has no power to order a venire de novo by reason of a mistrial after a verdict of not guilty has been recorded, however improperly that verdict has been obtained<sup>6</sup>.

1 The Court of Appeal inherited the jurisdiction exercised by the former Court of Criminal Appeal immediately before it ceased to exist and this was expressed specifically to include jurisdiction to order the issue of writs of venire de novo: see the Criminal Appeal Act 1966 s 1(2)(b)(ii) (amended by the Criminal Appeal Act 1968 s 52(1), Sch 5 Pt I) (repealed). See now the Supreme Court Act 1981 s 53(2)(d) which provides that the Court of Appeal Criminal Division must exercise the jurisdiction to issue writs of venire de novo. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

2 *R v Rose* [1982] AC 822, 75 Cr App Rep 322, HL.

3 *R v Rose* [1982] AC 822, 75 Cr App Rep 322, HL.

4 The terms 'venire de novo' and 're-trial' are used in different senses in modern legislation; cf para 1896 post; and see *R v Turner (No 2)* [1971] 2 All ER 441, 55 Cr App Rep 336, CA (cited infra). 'Venire de novo' means an order on the appellant to attend and take his trial again in respect of the charge that lies against him, to plead to the indictment and to be tried on it according to law: *R v Olivo* [1942] 2 All ER 494 at 495, 28 Cr App Rep 173 at 176, CCA.

Venire de novo will not be ordered in every case involving nullity: see *R v Gash* [1967] 1 All ER 811, 51 Cr App Rep 37, CA (appellant had almost served his sentence). The court may simply quash the conviction: see *R v King* (1920) 15 Cr App Rep 13, CCA; *R v McDonnell* (1928) 20 Cr App Rep 163, CCA; *R v Wilde* (1933) 24 Cr App Rep 98, CCA; *R v Gee*, *R v Bibby*, *R v Dunscombe* [1936] 2 KB 442, 25 Cr App Rep 198, CCA; *R v Brennan* (1941) 28 Cr App Rep 41, CCA; *R v Olivo* supra; *R v Heyes* [1951] 1 KB 29, 34 Cr App Rep 161, CCA; *R v Lamb* [1969] 1 All ER 45, [1968] 1 WLR 1946, CA; *R v Braden* (1987) 87 Cr App Rep 289, CA; *R v Lewis* (1988) 87 Cr App Rep 270, CA; *R v Newland* [1988] QB 402, 87 Cr App Rep 118, CA. The restriction on passing a sentence of greater severity on a re-trial (see PARA 1897 post) is inapplicable where a venire de novo has been ordered: *R v Turner (No 2)* supra. Examples where a venire de novo has been ordered include: where the defendant has been wrongfully denied a right to challenge a juror (*R v Edmonds* (1821) 1 State Tr NS 785; *Gray v R* (1844) 6 State Tr NS 117, HL; *R v Williams* (1925) 19 Cr App Rep 67, CCA); where the trial judge was not qualified (*R v Cronin* [1940] 1 All ER 618, 27 Cr App Rep 179, CCA); where a plea of guilty was improperly recorded (*R v Baker* (1912) 7 Cr App Rep 217, CCA; subsequent proceedings (1912) 7 Cr App Rep 252, CCA; *R v Lloyd* (1923) 130 LT 319, 17 Cr App Rep 184, CCA; subsequent proceedings (1924) 18 Cr App Rep 12, CCA; *R v Hussey* (1924) 18 Cr App Rep 121, CCA; *R v Ingleson* [1915] 1 KB 512, 11 Cr App Rep 21, CCA; *R v Ellis* (1973) 57 Cr App Rep 571, CCA); where there was a mistaken or involuntary plea of guilty (*R v Ishmael* [1970] Crim LR 399, CA; *R v Turner*

[1970] 2 QB 321, [1970] 2 All ER 281, CA; *R v Inns* [1975] Crim LR 182, CA; *R v Smith*; *R v Beaney* [1999] 6 Archbold News 1, CA); where an ambiguous plea was treated as a plea of guilty (*R v Small* [1962] Crim LR 624, CCA); where the jury was improperly constituted (*R v Solomon* [1958] 1 QB 203, 42 Cr App Rep 9, CCA); where two indictments have been tried together (*Crane v DPP* [1921] 2 AC 299; sub nom *R v Crane* (1921) 15 Cr App Rep 183, HL; *R v Dennis*, *R v Parker* [1924] 1 KB 867, 18 Cr App Rep 39, CCA, but in such instances the courts have on occasions found reasons not to order a venire de novo: see *R v McDonnell* supra; *R v Wilde* supra; *R v Olivo* supra); where there was no valid indictment (*R v Morais* [1988] 3 All ER 161, 87 Cr App Rep 9, CA); where an indictment to which the defendant had pleaded guilty was originally invalid because of a misjoined count and, after that count had been quashed at a second hearing, the defendant was not re-arraigned (*R v O'Reilly* (1990) 90 Cr App Rep 40, CA); where a sentence was passed on a defendant in charge of the jury although no verdict had been returned (*R v Hancock* (1931) 100 LJB 419, 23 Cr App Rep 16, CCA, but in a similar case the court found reason not to order a venire de novo: see *R v Heyes* supra). The court may also order a venire de novo where sentence was passed on a count to which the defendant did not plead (see *R v Brennan* supra).

5 Where there has been a mistrial and no valid conviction it is a contradiction in terms to 'quash' that conviction because in law it never existed: *R v Booth*; *R v Molland*; *R v Wood* [1999] 1 Cr App Rep 457, [1999] Crim LR 413, CA. An order of venire de novo must be in such form as the court issuing it considers appropriate: Juries Act 1974 s 21(4). See also eg *R v Baker* (1912) 7 Cr App Rep 217 at 218, CCA; *R v Gatenby* [1951] 1 All ER 173n, 34 Cr App Rep 255, CCA; *R v Ellis* (1973) 57 Cr App Rep 571 at 577, CA. The court of trial is the original court; as to applications to change the venue see PARA 1228 ante. Bail may be granted on ordering a venire de novo (see *R v Hussey* (1924) 18 Cr App Rep 121, CCA) or the court may order the defendant to be held in custody (*R v Golathan* (1915) 84 LJB 758, 11 Cr App Rep 79, CCA). Where the court has granted bail, the Registrar of Criminal Appeals must forward to the Crown Court officer a copy of any record made in pursuance of the Bail Act 1976 s 5 (as amended) (see PARA 1173 ante) and also all recognisances and statements sent to the Registrar under CrimPR 68.8(6) (see PARA 1194 ante): CrimPR 68.8(9). The recognisance of a surety must be in the alternative form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA: CrimPR 68.8(2). As to notice of application for bail see PARA 1193 note 4 ante; and as to conditions of bail see PARA 1194 ante. The Court of Appeal has no power to grant a representation order if it orders venire de novo; such an order may be granted 'de novo' by the court of trial under the Access to Justice Act 1999 s 14, Sch 3 para 2: see LEGAL AID vol 65 (2008) PARAS 146, 172. The Court of Appeal has inherent powers to see that its orders are carried out: *R v Gatenby* supra.

6 *R v Middlesex Quarter Sessions (Chairman)*, ex p *DPP* [1952] 2 QB 758, 36 Cr App Rep 114, DC.

## UPDATE

### 1894-1896 Notification of determination of court ... Re-trial

CrimPR 68 substituted: see PARA 1856-1861.

### 1895 Venire de novo

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 5--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(vi) Venire de Novo and Re-trial/1896. Re-trial.

### **1896. Re-trial.**

Where the Court of Appeal allows an appeal<sup>1</sup> against conviction and it appears to the court that the interests of justice so require<sup>2</sup>, it may order the appellant to be re-tried<sup>3</sup>.

A person who is to be re-tried must be tried on a fresh indictment preferred by direction of the Court of Appeal; but after the end of two months from the date of the order for re-trial he may not be arraigned on an indictment preferred in pursuance of such a direction unless the Court of Appeal gives leave<sup>4</sup>. Where a person has been ordered to be re-tried but may not be arraigned without leave, he may apply to the Court of Appeal to set aside the order for re-trial and to direct the court of trial<sup>5</sup> to enter a judgment and verdict of acquittal of the offence for which he was ordered to be re-tried<sup>6</sup>. On any such application<sup>7</sup> the Court of Appeal has power to grant leave to arraign or to set aside the order for re-trial and to direct the entry of a judgment and verdict of acquittal, but may not give leave to arraign unless it is satisfied that the prosecution has acted with all due<sup>8</sup> expedition and that there is a good and sufficient cause for a re-trial in spite of the lapse of time since the order<sup>9</sup> for re-trial was made<sup>10</sup>.

However, a person may not be ordered so to be re-tried for any offence other than:

- 2402 (1) the offence of which he was convicted at the original trial and in respect of which his appeal is allowed<sup>11</sup>;
- 2403 (2) an offence of which he could have been convicted at the original trial on an indictment for the first-mentioned offence<sup>12</sup>; or
- 2404 (3) an offence charged in an alternative count of the indictment in respect of which no verdict was given in consequence of his being convicted of the first-mentioned offence<sup>13</sup>.

On ordering a re-trial the Court of Appeal may make such orders as appear to it to be necessary or expedient for the custody or<sup>14</sup> release on bail<sup>15</sup> of the person ordered to be re-tried pending his re-trial, or for the retention pending the re-trial of any property or money forfeited, restored or paid by virtue of the original conviction or any order made on that conviction<sup>16</sup>.

1 For the meanings of 'appeal' and 'appellant' see PARA 1837 note 4 ante.

2 The condition that the interests of justice require a re-trial requires an exercise of judgment, and will involve consideration of the public interest and the legitimate interests of the defendant. The public interest is generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution can be conducted without unfairness to or oppression of the defendant. The legitimate interests of the defendant will often call for consideration of the time which has passed since the alleged offence, and any penalty the defendant may already have paid before the quashing of the conviction: *R v Graham* [1997] 1 Cr App Rep 302 at 318, CA, per Lord Bingham CJ. As to lapse of time, contrast *R v Saunders* (1973) 58 Cr App Rep 248, CA (re-trial because appeal not determined until three-and-a-half years after the offence and appellant had been in prison for a number of years) with *R v Grafton* [1993] QB 101, [1992] 4 All ER 609, CA (re-trial ordered two years after offence; Court of Appeal pointed out that it was now much more common for trials to take longer coming to court). Also see *R v Stone* [2001] EWCA Crim 297, [2001] Crim LR 465, CA (re-trial should be refused on ground of adverse publicity subsequent to conviction only if Court of Appeal satisfied on the balance of probabilities that a verdict of guilty at a re-trial would be unsafe). As to whether or not to order a re-trial after the receipt of additional evidence (see PARA 1867 ante) see *R v Flower*, *R*

*v Siggins, R v Flower* [1966] 1 QB 146, 50 Cr App Rep 22, CCA, and the related cases cited in PARA 1867 note 11 ante.

3 Criminal Appeal Act 1968 s 7(1) (amended by the Criminal Justice Act 1988 ss 43(1), (2), 170(2), Sch 16). Formerly the court's power to order a re-trial was confined to cases where appeal was allowed only by reason of evidence received or available to be received under the Criminal Appeal Act 1968 s 23 (see PARA 1866 et seq ante). Re-trial may now be ordered where eg the trial judge made a wrong decision of law. The re-trial takes place at the Crown Court: see the Supreme Court Act 1981 s 46(1); and PARA 1232 ante. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. As to the custody of exhibits pending re-trial see PARA 1858 ante.

4 Criminal Appeal Act 1968 s 8(1) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt IV; and the Criminal Justice Act 1988 s 43(1), (3)). Notice of an application under the Criminal Appeal Act 1968 s 8(1) (as amended) for leave to arraign, and notice of an application to set aside an order for re-trial (see s 8(1A) (as added); and the text to notes 5-6 infra) must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA and must be served on the prosecutor or the person ordered to be re-tried, as the case may be, and on the Registrar of Criminal Appeals: CrimPR 68.31. The Court of Appeal does not have power to order that an arraignment on the new indictment should take place in a specified period less than the two-month period specified by the Criminal Appeal Act 1968 s 8(1): *R v Khan* [2001] EWCA Crim 486, [2001] 4 Archbold News 3.

5 For the meaning of 'court of trial' see PARA 1837 note 6 ante.

6 Criminal Appeal Act 1968 s 8(1A) (added by the Criminal Justice Act 1988 s 43(1), (4)). See also note 4 supra.

7 Ie an application under the Criminal Appeal Act 1988 s 8(1) (as amended) or s 8(1A) (as added).

8 'Due' in this context means 'reasonable' or 'proper' and 'expedition' means 'promptness' or 'speed': *R v Coleman* (1992) 95 Cr App Rep 345, CA. See also *R v Jones (Paul)* [2002] EWCA Crim 2284, [2003] 1 Cr App Rep 313.

9 Ie under the Criminal Appeal Act 1968 s 7 (as amended): see note 3 supra.

10 Ibid s 8(1B) (added by the Criminal Justice Act 1988 s 43(1), (4); and amended by the Access to Justice Act 1999 s 58(2)).

11 Criminal Appeal Act 1968 s 7(2)(a).

12 Ibid s 7(2)(b). See PARA 1335 et seq ante.

13 Ibid s 7(2)(c) (amended by the Criminal Justice Act 2003 s 331, Sch 36 para 44). The Criminal Appeal Act 1968 s 7(2) (as amended) does not exclude the power of the trial judge at the re-trial to permit the amendment of the indictment preferred by direction of the Court of Appeal, provided that that power is exercised in accordance with the underlying purpose of s 7 (as amended), namely to permit the court to order a re-trial while at the same time protecting the defendant by ensuring that he is not put in a worse position than at the original trial: *R v Hemmings* [2000] 2 All ER 155, [2000] 1 Cr App Rep 360, CA.

14 Ie subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended): see PARA 1170 ante.

15 Where bail is granted, the Registrar of Criminal Appeals must forward to the Crown Court officer a copy of any record made in pursuance of the Bail Act 1976 s 5 (as amended) (see PARA 1173 ante) and also all recognisances and statements sent to the Registrar under CrimPR 68.8(6) (see PARA 1194 ante): CrimPR 68.8(9). The recognisance of a surety must be in the alternative form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA: CrimPR 68.8(2). As to notice of application for bail see PARA 1193 note 7 ante; and as to conditions of bail see PARA 1194 ante.

If the person ordered to be re-tried was, immediately before the determination of his appeal, liable to be detained in pursuance of an order or direction under the Mental Health Act 1983 Pt III (ss 35-55) (as amended) (excluding ss 35, 36 or 38), that order or direction continues in force pending the re-trial as if the appeal had not been allowed, and any order made by the Court of Appeal under the Criminal Appeal Act 1968 s 8 (as amended) for his custody or release on bail has effect subject to the former order or direction: ibid s 8(3) (amended by the Bail Act 1976 s 12(1), Sch 2 para 38; and the Mental Health Act 1983 s 148(1), Sch 4 para 23(b)). If the person ordered to be re-tried was, immediately before the determination of his appeal, liable to be detained in pursuance of a remand under the Mental Health Act 1983 s 36, or an interim hospital order under s

38, the Court of Appeal may, if it thinks fit, order that he must continue to be detained in a hospital or mental nursing home, and in that event Pt III (as amended) applies as if he had been ordered under the Criminal Appeal Act 1968 s 8 (as amended) to be kept in custody pending his re-trial and were detained in pursuance of a transfer direction together with a restriction direction: *ibid* s 8(3A) (added by the Mental Health (Amendment) Act 1982 s 65(1), Sch 3 para 36; and amended by the Mental Health Act 1983 Sch 4 para 23(c)). See further MENTAL HEALTH.

16 Criminal Appeal Act 1968 s 8(2) (amended by the Bail Act 1976 Sch 2 para 38; and the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 19). The power to make such orders may be exercised by a single judge: see PARA 1854 ante.

## **UPDATE**

### **1894-1896 Notification of determination of court ... Re-trial**

CrimPR 68 substituted: see PARA 1856-1861.

### **1896 Re-trial**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

NOTES 4, 15--CrimPR 68 substituted: see PARA 1856-1861.

NOTE 15--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA. See also Criminal Appeal Act 1968 s 8(3B) (added by Mental Health Act 2007 Sch 3 para 2(2)) (continuation of community treatment order).

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APPEALS/(1) APPEAL BY DEFENDANT TO THE COURT OF APPEAL FOLLOWING TRIAL ON INDICTMENT/(vi) Venire de Novo and Re-trial/1897. Evidence and procedure on re-trial.

### **1897. Evidence and procedure on re-trial.**

Evidence given at a re-trial must be given orally if it was given orally at the original trial, unless: (1) all the parties to the re-trial agree otherwise; or (2) the witness is unavailable and prescribed requirements apply<sup>1</sup>.

Where a person ordered to be re-tried is again convicted on the re-trial, the court before which he is convicted may pass in respect of the offence any sentence authorised by law, not being a sentence of greater severity than that passed on the original conviction<sup>2</sup>. Without prejudice to its power to impose any other sentence, the court before which an offender is convicted on re-trial may pass in respect of the offence any sentence passed in respect of that offence notwithstanding that, on the date of the conviction on re-trial, the offender has ceased to be of an age at which such a sentence could otherwise be passed<sup>3</sup>.

Where the person convicted on re-trial is sentenced to imprisonment or other detention, the sentence begins to run from the time when a like sentence passed at the original trial would have begun to run; but in computing the term of his sentence or the period for which he may be detained thereunder, as the case may be, there are to be disregarded:

- 2405 (a) any time before his conviction on re-trial which would have been disregarded in computing that term or period if the sentence had been passed at the original trial and the original conviction had not been quashed<sup>4</sup>; and
- 2406 (b) any time during which he was released<sup>5</sup> on bail<sup>6</sup>.

<sup>1</sup> Criminal Appeal Act 1968 s 8(4), Sch 2 para 1(1) (Sch 2 para 1 substituted by the Criminal Justice Act 2003 s 131). The prescribed requirements referred to in head (2) in the text are that: (1) the Criminal Justice Act 2003 s 116 (see PARA 1521 ante) applies (admissibility of hearsay evidence where a witness is unavailable); or (2) the witness is unavailable to give evidence, otherwise than as mentioned in s 116(2) (see PARA 1521 ante), and s 114(1)(d) (see PARA 1520 note 8 ante) applies (admission of hearsay evidence under residual discretion): Criminal Appeal Act 1968 Sch 2 para 1(1) (as so substituted). The Crime and Disorder Act 1998 s 52(6), Sch 3 para 5 (see PARA 1140 ante) does not apply at a re-trial to a deposition read as evidence at the original trial: Criminal Appeal Act 1968 Sch 2 para 1(2) (as so substituted).

<sup>2</sup> Ibid Sch 2 para 2(1). This restriction does not apply on a venire de novo: see PARA 1895 note 4 ante. As to what constitutes greater severity see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 49 note 4.

<sup>3</sup> Ibid Sch 2 para 2(2).

<sup>4</sup> Ibid Sch 2 para 2(3)(a).

<sup>5</sup> He released on bail under ibid s 8(2) (as amended): see PARA 1896 ante.

<sup>6</sup> Ibid Sch 2 para 2(3)(b) (amended by the Bail Act 1976 s 12(1), Sch 2 para 45). The Criminal Justice Act 2003 s 240 (crediting of periods of remand in custody: terms of imprisonment and detention: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 36) applies to any sentence imposed on conviction on a re-trial as if it had been imposed on the original conviction: Criminal Appeal Act 1968 Sch 2 para 2(4) (amended by the Criminal Justice Act 2003 s 304, Sch 32 paras 7, 10. As to costs on an acquittal on a re-trial see PARA 2059 text to note 43 post.

### **UPDATE**

**1897 Evidence and procedure on re-trial**

NOTE 6--Criminal Appeal Act 1968 Sch 2 para 2(4) further amended: Criminal Justice and Immigration Act 2008 s 22(4).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(i) Introduction/1898.  
The prosecution's rights of appeal.

## **(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION**

### **(i) Introduction**

#### **1898. The prosecution's rights of appeal.**

In relation to a trial on indictment, the prosecution has the right to appeal to the Court of Appeal<sup>1</sup>:

- 2407 (1) in respect of rulings<sup>2</sup>; and
- 2408 (2) in respect of evidentiary rulings<sup>3</sup>.

For these purposes, 'ruling' includes a decision, determination, direction, finding, notice, order, refusal, rejection or requirement<sup>4</sup>. Such an appeal may be brought only with the leave of the judge of the Crown Court or the Court of Appeal<sup>5</sup>.

1 Subject to rules of court made under the Supreme Court Act 1981 s 53(1) (power by rules to distribute business of Court of Appeal between its criminal and civil division), the jurisdiction of the Court of Appeal under the Criminal Justice Act 2003 Pt 9 (ss 57-74) (as amended) is to be exercised by the criminal division of that court, and references in Pt 9 (as amended) are to be construed as references to that division: s 74(6). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

2 Ie under the Criminal Justice Act 2003 ss 58-61 (see PARA 1899 et seq post). Examples of the rulings concerned are 'terminating rulings' ie rulings which will have the effect of bringing proceedings for an offence to an end, eg following a successful submission of no case to answer or a stay of proceedings, and 'public interest rulings', ie rulings that it is in the public interest to disclose material in the possession of the prosecution.

3 Ibid s 57(1), (3). The relevant provisions relating to evidentiary rulings are contained in ss 62-66 (see PARAS 1914-1916 post) (not yet in force). The prosecution has no right of appeal under Pt 9 (as amended) in respect of: (1) a ruling that a jury be discharged; or (2) a ruling from which an appeal lies to the Court of Appeal by virtue of any other enactment: s 57(2).

Rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of Pt 9 (as amended): s 73(1). Without limiting s 73(1), rules of court may in particular make provision:

150 (a) for time limits which are to apply in connection with any provisions of Pt 9 (as amended) (s 73(2)(a));

151 (b) as to procedures to be applied in connection with Pt 9 (as amended) (s 73(2)(b));

152 (c) enabling a single judge of the Court of Appeal to give leave to appeal under Pt 9 (as amended) or to exercise the power of the Court of Appeal under s 58(12) (s 73(2)(c)).

Nothing in s 73 is to be taken as affecting the generality of any enactment conferring powers to make rules of court: s 73(3).

4 Ibid s 74(1).

5 Ibid s 57(4). The prosecutor must inform the judge of the court immediately after the ruling or the adjournment if he intends to seek leave to appeal against a ruling (ie under head (a) in the text) and at the same time he may apply orally for leave to appeal: CrimPR 66.3(1). Before deciding whether or not to grant leave to appeal, the judge of the court must hear oral representations from the defendant: CrimPR 66.3(2). The judge of the court must decide whether or not to give leave to appeal on the same day on which an oral application for leave to appeal is made to that judge: CrimPR 66.3(3). The judge of the court may extend the period under CrimPR 66.3(3) only if it is in the interests of justice to do so: CrimPR 66.3(4). If the judge of the court gives leave to appeal he must issue a certificate in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA, and the court officer must forward that certificate to the Registrar: CrimPR 66.3(5).

The power of the Court of Appeal to grant leave under the Criminal Justice Act 2003 s 57(4) may be exercised by a single judge: CrimPR 66.11(1)(a). See further PARA 1907 post.

As from a day to be appointed, in its application to a trial on indictment in respect of which an order under the Domestic Violence, Crime and Victims Act 2004 s 17(2) (trial by jury of sample counts: see PARA 1285 ante), the Criminal Justice Act 2003 Pt 9 (as amended) has effect with such modifications as the Secretary of State may by order specify: s 74(7) (prospectively added by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 62). At the date at which this volume states the law no such day had been appointed. As to such an order see PARA 90 note 6 ante.

## UPDATE

### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

### **1898 The prosecution's rights of appeal**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 5--Day now appointed: SI 2006/3423.

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APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1899. General right of appeal in respect of rulings.

## **(ii) Appeal against Ruling**

### **1899. General right of appeal in respect of rulings.**

Where a judge<sup>1</sup> makes a ruling<sup>2</sup> in relation to a trial on indictment at an applicable time<sup>3</sup> and the ruling relates to one or more offences included in the indictment, the prosecution may appeal in respect of the ruling<sup>4</sup> in accordance with the following provisions<sup>5</sup>.

The prosecution may not appeal in respect of the ruling unless:

- 2409 (1) following the making of the ruling, it:  
593
- 73. (a) informs the court that it intends to appeal<sup>6</sup>; or
  - 74. (b) requests an adjournment to consider whether to appeal<sup>7</sup>; and
- 594
- 2410 (2) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal<sup>8</sup>.

Where the ruling relates to two or more offences:

- 2411 (i) any one or more of those offences may be the subject of the appeal<sup>9</sup>; and
- 2412 (ii) if the prosecution informs the court in accordance with heads (1) and (2) above that it intends to appeal, it must at the same time inform the court of the offence or offences which are the subject of the appeal<sup>10</sup>.

Where:

- 2413 (A) the ruling is a ruling that there is no case to answer<sup>11</sup>; and
- 2414 (B) the prosecution, at the same time that it informs the court in accordance with heads (1) and (2) above that it intends to appeal, nominates one or more other rulings which have been made by a judge in relation to the trial on indictment at an applicable time and which relate to the offence or offences which are the subject of the appeal<sup>12</sup>,

that other ruling, or those other rulings, are also to be treated as the subject of the appeal<sup>13</sup>.

The prosecution may not inform the court in accordance with heads (1) and (2) above that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the defendant in relation to that offence should be acquitted of that offence if either of the following conditions is fulfilled, namely that leave to appeal to the Court of Appeal is not obtained, or that the appeal is abandoned before it is determined by the Court of Appeal<sup>14</sup>. Where the prosecution has so informed the court of its agreement and either of the conditions mentioned is fulfilled, the judge or the Court of Appeal must order that the defendant in relation to the offence or each offence concerned be acquitted of that offence<sup>15</sup>.

If the prosecution informs the court in accordance with heads (1) and (2) above that it intends to appeal, the ruling in question continues to have no effect in relation to the offence or offences which are the subject of the appeal whilst the appeal is pursued<sup>16</sup>. In addition, proceedings may be continued in respect of any offence which is not the subject of the appeal<sup>17</sup>.

1 Any reference in the Criminal Justice Act 2003 Pt 9 (ss 57-74) (as amended) (other than s 73(2)(c): see PARA 1898 ante) to a judge is a reference to a judge of the Crown Court: s 74(2).

2 As to the meaning of 'ruling' see PARA 1898 ante.

3 For these purposes, 'applicable time', in relation to a trial on indictment, means any time (whether before or after the commencement of the trial) before the start of judge's summing-up to the jury: Criminal Justice Act 2003 s 58(13). As from a day to be appointed, the words 'time when the judge start his' are substituted for the words 'start of judge's' by the Domestic Violence, Crime and Victims Act 2004 s 30(1). The reference to the time when the judge starts his summing-up to the jury includes the time when the judge would start his summing-up to the jury but for the making of an order under Pt 7 (ss 43-50) (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 342): s 58(14) (prospectively added by the Domestic Violence, Crime and Victims Act 2004 s 30(2)). At the date at which this volume states the law no such day had been appointed.

4 The ruling is to have no effect whilst the prosecution is able to take any steps under the Criminal Justice Act 2003 s 58(4) (see the text and notes 6-8 infra): s 58(3).

5 Ibid s 58(1), (2).

6 Ibid s 58(4)(a)(i).

7 Ibid s 58(4)(a)(ii).

8 Ibid s 58(4)(b). If the prosecution requests an adjournment under head (1)(b) in the text, the judge may grant such an adjournment: s 58(5). A request for an adjournment under head (1)(b) in the text must be made to the judge of the Crown Court with conduct of the proceedings immediately following the ruling to which s 58 refers; except that, if that ruling is of no case to answer, an application by the prosecutor must be made immediately following that ruling of no case to answer notwithstanding that the prosecutor may also nominate earlier rulings to be the subject of an appeal: CrimPR 66.1, 66.2(1), (2).

The judge of the court must grant the request unless it is in the interests of justice for the prosecutor to indicate immediately whether or not he intends to seek leave to appeal: CrimPR 66.2(3). The adjournment must be until the next business day after the day on which the ruling was given, unless the interests of justice require a longer adjournment: CrimPR 66.2(4).

9 Criminal Justice Act 2003 s 58(6)(a).

10 Ibid s 58(6)(b). Where a ruling relates to two or more offences but not all of those offences are the subject of an appeal under Pt 9 (as amended), nothing in Pt 9 (as amended) is to be regarded as affecting the ruling so far as it relates to any offence which is not the subject of the appeal: s 74(4). Where two or more defendants are charged jointly with the same offence, the provisions of Pt 9 (as amended) are to apply as if the offence, so far as relating to each defendant, were a separate offence (so that, for example, any reference in Pt 9 (as amended) to a ruling which relates to one or more offences includes a ruling which relates to one or more of those separate offences): s 74(5).

11 Ibid s 58(7)(a).

12 Ibid s 58(7)(b).

13 Ibid s 58(7).

14 Ibid s 58(8), (9).

15 Ibid s 58(12).

16 Ibid s 58(10). If and to the extent that a ruling has no effect in accordance with s 58: (1) any consequences of the ruling are also to have no effect; (2) the judge may not take any steps in consequence of the ruling; and (3) if he does so, any such steps are also to have no effect: s 58(11).

17 Ibid s 60(1), (2).

## UPDATE

### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

### **1899 General right of appeal in respect of rulings**

NOTES--As to when a ruling regarding the admissibility of evidence can be appealed against under the Criminal Justice Act 2003 s 58 where it is not obvious, without further investigation by the court, that the judge's ruling is a terminating ruling see *Prosecution Appeal (No 31 of 2007)*; *R v R* [2008] EWCA Crim 370, [2008] All ER (D) 438 (Feb).

NOTE 2--A decision under the Crime and Disorder Act 1998 Sch 3 para 2 that a charge should be dismissed does not amount to a ruling for the purposes of the 2003 Act s 58: *R v Thompson* [2006] EWCA Crim 2849, [2007] 2 All ER 205. A right to appeal against a terminating ruling granted by the 2003 Act s 58, extends to case management decisions: *R v Clark (application under s 58 of the Criminal Justice Act 2003)* [2007] All ER (D) 120 (Oct), CA.

NOTE 3--Day now appointed: SI 2006/3423.

NOTE 8--The prosecution may not appeal against a ruling in relation to a trial on indictment unless following the making of the ruling it either informs the court that it intends to appeal or requests an adjournment to consider whether to appeal; prosecutors who wish to launch appeals against rulings must give the undertaking in open court at the time of invoking the right of appeal: *Prosecution Appeal (No 11 of 2009)*; *R v C* [2009] EWCA Crim 2614, [2009] All ER (D) 127 (Dec).

NOTE 14--See *R v NT* [2010] EWCA Crim 711, [2010] All ER (D) 05 (Apr) (prosecution deprived itself of the power to appeal by failing to comply with the requirement).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1900. Expedited and non-expedited appeals.

### **1900. Expedited and non-expedited appeals.**

Where the prosecution informs the court<sup>1</sup> that it intends to appeal, the judge<sup>2</sup> must decide whether or not the appeal should be expedited<sup>3</sup>. If the judge decides that the appeal should be expedited, he may order an adjournment<sup>4</sup>. If the judge decides that the appeal should not be expedited, he may order an adjournment, or discharge the jury (if one has been sworn)<sup>5</sup>.

If the judge decides that the appeal should be expedited, he or the Court of Appeal may subsequently reverse that decision and, if it is reversed, the judge may order an adjournment, or discharge the jury (if one has been sworn)<sup>6</sup>.

1    Ie in accordance with the Criminal Justice Act 2003 s 58(4): see PARA 1899 ante.

2    See PARA 1899 note 1 ante.

3    Criminal Justice Act 2003 s 59(1). At the time when the prosecutor informs the judge of the court that he intends to seek leave to appeal against a ruling, he must also make oral representations as to whether or not that appeal should be expedited under s 59(1): CrimPR 66.4(1). Before deciding whether or not the appeal should be expedited, the judge of the court must hear oral representations from the defendant or any interested party: CrimPR 66.4(2).

4    Criminal Justice Act 2003 s 59(2). The court officer must provide a copy of the reasons given by the judge of the court for his decision whether or not the appeal should be expedited, to the prosecutor, the defendant and all interested parties: CrimPR 66.4(3).

5    Criminal Justice Act 2003 s 59(3).

6    Ibid s 59(4). The judge of the court may reverse his decision that the appeal should be expedited at any time before notice of appeal or application for leave to appeal is served on the Crown Court under CrimPR 66.5(1) (see PARA 1901 post) and must provide reasons for that reversal in writing to the prosecutor, the defendant and all interested parties: CrimPR 66.4(4). At any time after notice of appeal or application for leave to appeal has been served on the Registrar under CrimPR 66.5(1), the prosecutor or defendant may invite the Court of Appeal to reverse a judge's decision that the appeal should be expedited under the Criminal Justice Act 2003 s 59(4) and written notice of such an application must be served on: (1) the Registrar; (2) the court officer; (3) the prosecutor; (4) the defendant; and (5) any interested party: CrimPR 66.4(5). For the meaning of 'interested party' see PARA 1901 note 4 post.

The Court of Appeal's power to reverse a decision of the judge of the court (ie of the Crown Court) that an appeal should be exercised may be exercised by a single judge: CrimPR 66.11(1)(b). See further PARA 1907 post.

## **UPDATE**

### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1901. Practice and procedure: notice of appeal or application to the Court of Appeal for leave to appeal.

**1901. Practice and procedure: notice of appeal or application to the Court of Appeal for leave to appeal.**

A notice of appeal<sup>1</sup> (where the judge of the court has granted leave) or notice of application for leave to appeal must be in the prescribed form<sup>2</sup> and must be served by the prosecutor on: (1) the Registrar of Criminal Appeals; (2) the court officer; (3) the defendant<sup>3</sup>; and (4) any interested party<sup>4</sup>.

Notice of appeal or application for leave to appeal must be served:

- 2415 (a) where the judge of the court has decided that the appeal should be expedited<sup>5</sup> and that decision has not been subsequently reversed, before 5 pm on the day on which the prosecutor informs the judge of the court that he intends to seek leave to appeal or, if the prosecutor demonstrates to that judge that it is not practical to do so, before 5 pm on the next business day<sup>6</sup>; or
- 2416 (b) in any other case, within seven business days of the day on which the prosecutor informs the judge of the court that he intends to seek leave to appeal<sup>7</sup>.

The Court of Appeal may extend the above period for service, either before or after it expires, on application by the prosecutor<sup>8</sup>.

Notice of appeal or application for leave to appeal must be accompanied by any documents necessary for the proper determination of the appeal or application for leave to appeal including:

- 2417 (i) a transcript of the ruling which is the subject of the appeal<sup>9</sup>;
- 2418 (ii) the skeleton arguments provided to the judge of the court by the parties in respect of the issue which gave rise to the ruling<sup>10</sup>; and
- 2419 (iii) if the appeal is to be expedited, a copy of the reasons given<sup>11</sup> by the judge of the court<sup>12</sup>.

The notice of appeal or application for leave to appeal served on the defendant must<sup>13</sup> be accompanied by the prescribed form<sup>14</sup> for the defendant to complete if he wishes to oppose the appeal or application<sup>15</sup>.

1 le an appeal under the Criminal Justice Act 2003 s 58 (see PARA 1898 et seq ante): CrimPR 66.1.

2 le in the form prescribed by *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

3 le the party in whose favour the ruling was made which is the subject of the appeal: CrimPR 66.1.

4 CrimPR 66.5(1), which is expressed to be subject to CrimPR 66.8 (see PARA 1904 post). 'Interested party' means a person other than the defendant who: (1) is a party to the proceedings in the Crown Court; (2) may be affected by the decision of the trial judge under the Criminal Justice Act 2003 s 59(1) (see PARA 1900 ante) as to

whether or not the appeal should be expedited; and (3) is permitted by the trial judge or the Court of Appeal to make representations on that issue: CrimPR 66.1.

As to service on the Registrar and the court officer see PARA 1912 post.

5 le under the Criminal Justice Act 2003 s 59(1) (see PARA 1900 ante).

6 CrimPR 66.5(2)(a). 'Business day' means any day other than a Saturday, Sunday, Christmas Day or Good Friday or a bank holiday under the Banking and Financial Dealings Act 1971 in England and Wales (see TIME vol 97 (2010) PARA 321): CrimPR 66.1.

7 CrimPR 66.5(2)(b).

8 CrimPR 66.5(3). The Court of Appeal's power to extend the time for service of the notice of appeal or of an application for leave to appeal may be exercised by a single judge or by the Registrar of Criminal Appeals: CrimPR 66(11)(c), 66.12(1)(a) (see PARAS 1907-1908 post).

9 CrimPR 66.5(4)(a).

10 CrimPR 66.5(4)(b).

11 le under CrimPR 66.4(3) (see PARA 1900 ante).

12 CrimPR 66.5(4)(c).

13 le subject to CrimPR 66.8 (see PARA 1904 post).

14 le the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

15 CrimPR 66.5(5).

## UPDATE

### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

### **1901 Practice and procedure: notice of appeal or application to the Court of Appeal for leave to appeal**

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, further amended: *Amendment to the Consolidated Practice Direction (Criminal Proceedings: Forms)* [2007] 1 WLR 1535, CA, *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.



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APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1902. Practice and procedure: defendant's response.

## **1902. Practice and procedure: defendant's response.**

Upon receiving notice of an appeal<sup>1</sup> or application for leave to appeal, the defendant if he wishes to oppose the appeal or application, must serve<sup>2</sup> his response in the specified form<sup>3</sup> on: (1) the Registrar of Criminal Appeals; (2) the court officer; (3) the prosecutor; and (4) any interested party<sup>4</sup>.

A defendant's response must be served on those so listed:

2420 (a) on the next business day<sup>5</sup> after the day on which the notice of appeal or application for leave to appeal is served on the defendant, where the judge of the court has decided that the appeal should be expedited<sup>6</sup> and that decision has not been subsequently reversed<sup>7</sup>; or

2421 (b) within seven business days of the day on which notice of the appeal or application for leave to appeal is served on the defendant in any other case<sup>8</sup>.

1    Ie an appeal under the Criminal Justice Act 2003 s 58 (see PARA 1898 et seq ante): CrimPR 66.1.

2    See PARA 1912 post.

3    Ie the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

4    CrimPR 66.6(1). For the meaning of 'interested party' see PARA 1901 note 4 ante.

5    For the meaning of 'business day' see PARA 1901 note 6 ante.

6    Ie under the Criminal Justice Act 2003 s 59(1) (see PARA 1900 ante).

7    CrimPR 66.6(2)(a). A decision subsequently reversed is one reversed under the Criminal Justice Act 2003 s 59(4) (see PARA 1900 ante).

8    CrimPR 66.6(2)(b). The Court of Appeal may extend the period of service under CrimPR 66.6(2) either before or after it expires: CrimPR 66.6(3). The Court of Appeal's power under CrimPR 66.6(3) may be exercised by a single judge or the Registrar of Criminal Appeals: CrimPR 66.11(1)(d), 66.12(1)(b) (see PARAS 1907-1908 post).

## **UPDATE**

### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1903. Practice and procedure: defendants in custody.

### **1903. Practice and procedure: defendants in custody.**

A defendant in custody is not entitled to be present in person at the hearing of an appeal<sup>1</sup> or application for leave to appeal, unless the Court of Appeal so directs<sup>2</sup>. However, a defendant in custody may participate in such a hearing, without a direction of the Court of Appeal, by way of live television link if he is able to see and hear the court and to be seen and heard by it<sup>3</sup>.

In directing whether a defendant in custody must be present in person the Court of Appeal must take into account: (1) any representations of the prosecutor and the defendant<sup>4</sup>; (2) the availability and reliability of live television link facilities<sup>5</sup>; (3) any practical difficulties with the physical attendance of the defendant<sup>6</sup>; and (4) whether or not the appeal is expedited<sup>7</sup>.

1     le an appeal under the Criminal Justice Act 2003 s 58 (see PARA 1898 et seq ante): CrimPR 66.1.

2     CrimPR 66.7(1). The Court of Appeal's power under CrimPR 66.7(1) may be exercised by a single judge: CrimPR 66.11(1)(e). See further PARA 1907 post.

3     CrimPR 66.7(2).

4     CrimPR 66.7(3)(a).

5     CrimPR 66.7(3)(b).

6     CrimPR 66.7(3)(c).

7     CrimPR 66.7(3)(d). 'Expedited' means expedited under the Criminal Justice Act 2003 s 59 (see PARA 1900 ante): CrimPR 66.7(3).

### **UPDATE**

#### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1904. Practice and procedure: public interest rulings.

#### **1904. Practice and procedure: public interest rulings.**

The following provisions apply where a public interest ruling<sup>1</sup> is the subject of an appeal<sup>2</sup> or application for leave to appeal<sup>3</sup>.

In any appeal or application for leave to appeal against a public interest ruling, the prosecutor need not describe the material that is the subject of the ruling in the notice<sup>4</sup> of appeal or application for leave to appeal<sup>5</sup>.

Where the prosecutor has reason to believe that to reveal to the defendant or any interested party<sup>6</sup> the category of material that is the subject of the public interest ruling would have the effect of disclosing that which the prosecutor considers should not be disclosed, the prosecutor need not describe the category of the material in the notice of appeal or application for leave to appeal<sup>7</sup>.

Where the prosecutor has reason to believe that to reveal to the defendant or to any other interested party the fact that a public interest ruling has been made would have the effect of disclosing that which the prosecutor considers should not be disclosed, the prosecutor need not serve notice of appeal or application for leave to appeal on the defendant or any interested party as otherwise required<sup>8</sup>, unless the Court of Appeal otherwise directs<sup>9</sup>.

Where the prosecutor has taken the measures<sup>10</sup> set out above, the notice of appeal or application for leave to appeal served<sup>11</sup> on the Registrar of Criminal Appeals<sup>12</sup> must be accompanied by a confidential annexe indicating that the measures have been taken and giving the prosecutor's reasons for taking them<sup>13</sup>.

1 For these purposes, 'public interest ruling' means a ruling under the Criminal Procedure and Investigations Act 1996 ss 3(6), 7A(8) (as added) or s 8(5) (see PARAS 1387, 1391-1392 ante) that it is in the public interest to disclose material in the possession of the prosecutor: CrimPR 66.1.

2 Ie an appeal under the Criminal Justice Act 2003 s 58 (see PARA 1898 et seq ante): CrimPR 66.1.

3 CrimPR 66.8(1).

4 Ie under CrimPR 66.5 (see PARA 1901 ante).

5 CrimPR 66.8(2).

6 For the meaning of 'interested party' see PARA 1901 note 4 ante.

7 CrimPR 66.8(3).

8 Ie under CrimPR 66.5.

9 CrimPR 66.8(4).

10 Ie the measures set out in CrimPR 66.8(2), (3) or (4).

11 See PARA 1912 post.

12 Ie under CrimPR 66.5(1): see PARA 1901 ante.

13 CrimPR 66.8(5). Where the prosecutor has taken the measures set out in CrimPR 66.8(4) (see the text and notes 8-9 supra), the defendant is not entitled to be present in person at the hearing by the Court of Appeal of the appeal or application for leave to appeal, or appear by way of live television link, unless the Court of Appeal otherwise directs: CrimPR 66.8(6).

## **UPDATE**

### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1905. Practice and procedure: supply of documentary and other exhibits.

### **1905. Practice and procedure: supply of documentary and other exhibits.**

The Registrar of Criminal Appeals must, on request, supply to the prosecutor, the defendant or any interested party<sup>1</sup> copies of documents or other exhibits required for the appeal<sup>2</sup> or application for leave to appeal and may make charges in accordance with scales and rates fixed for the time being by the Treasury<sup>3</sup>. The Registrar must, on request, make arrangements for the prosecutor, the defendant or any interested party to inspect any document or other exhibit required for the appeal<sup>4</sup>.

1 For the meaning of 'interested party' see PARA 1901 note 4 ante.

2 ie an appeal under the Criminal Justice Act 2003 s 58 (see PARA 1898 et seq ante).

3 CrimPR 66.9(1). CrimPR 66.9 does not apply to the supply of transcripts of proceedings: CrimPR 66.9(3). CrimPR 66.9 does not require the Registrar to supply to the defendant or any interested party, or allow the defendant or any interested party to inspect:

153 (1) material that is the subject of a public interest ruling;

154 (2) a notice of appeal served by the prosecutor on the Registrar in accordance with CrimPR 66.8(4) (see PARA 1904 ante); or

155 (3) a confidential annexe served by the prosecutor on the Registrar in accordance with CrimPR 66.8(5) (see PARA 1904 ante),

unless the Court of Appeal otherwise directs: CrimPR 66.9(4).

4 CrimPR 66.9(2).

### **UPDATE**

#### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1906. Practice and procedure: abandonment of proceedings.

### **1906. Practice and procedure: abandonment of proceedings.**

An appeal<sup>1</sup> or application for leave to appeal (including an application for leave to appeal to the House of Lords<sup>2</sup>) may be abandoned by the prosecutor before it is heard by the Court of Appeal by serving<sup>3</sup> notice in writing on the Registrar of Criminal Appeals in the prescribed<sup>4</sup> form<sup>5</sup>.

1    le an appeal under the Criminal Justice Act 2003 s 58 (see PARA 1898 et seq ante): CrimPR 66.1.

2    As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords', by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt I. At the date at which this volume states the law no such day had been appointed.

3    See PARA 1912 post.

4    The form is set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

5    CrimPR 66.10.

### **UPDATE**

### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

### **1906 Practice and procedure: abandonment of proceedings**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 4--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1907. Practice and procedure: powers exercisable by a single judge.

### **1907. Practice and procedure: powers exercisable by a single judge.**

A number of specified<sup>1</sup> powers are exercisable by a single judge in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions<sup>2</sup>. A single judge may, for the purposes of exercising any of the specified powers, sit in such place as he appoints and may sit otherwise than in open court<sup>3</sup>.

1    le the powers:

- 156 (1)   to give leave to appeal under the Criminal Justice Act 2003 s 57(4) (see PARA 1898 ante) (CrimPR 66.11(1)(a));
- 157 (2)   to reverse a decision of the judge of the court that an appeal should be expedited under the Criminal Justice Act 2003 s 59(4) (see PARA 1900 ante) (CrimPR 66.11(1)(b));
- 158 (3)   to extend the time for service of the notice of appeal or of an application for leave to appeal under CrimPR 66.5(3) (see PARA 1901 ante) (CrimPR 66.11(1)(c));
- 159 (4)   to extend time for service of the defendant's response under CrimPR 66.6(3) (see PARA 1902 ante) (CrimPR 66.11(1)(d));
- 160 (5)   to direct that the defendant in custody be present in person at the hearing of the appeal or application for leave to appeal under CrimPR 66.7(1) (see PARA 1903 ante) (CrimPR 66.11(1)(e)); or
- 161 (6)   to order the acquittal of the defendant and, where appropriate, his release from custody and order payment of his costs where the prosecution has served a notice of abandonment under CrimPR 66.10 (see PARA 1906 ante) (CrimPR 66.11(1)(f)).

2    CrimPR 66.11(1).

3    CrimPR 66.11(2).

### **UPDATE**

### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1908. Practice and procedure: powers exercisable by the Registrar of Criminal Appeals.

### **1908. Practice and procedure: powers exercisable by the Registrar of Criminal Appeals.**

Specified powers<sup>1</sup> may be exercised by the Registrar of Criminal Appeals in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions<sup>2</sup>. Where the Registrar has refused an application to exercise any of the specified powers, the party making the application may have it determined by a single judge by serving a renewal in the prescribed form<sup>3</sup> within seven business days<sup>4</sup> of the day on which notice of the Registrar's decision is served on that party<sup>5</sup>.

1 The powers specified are those: (1) to extend the time for service of the notice of appeal or of an application for leave to appeal under CrimPR 66.5(3) (see PARA 1901 ante); and (2) to extend time for service of the defendant's response under CrimPR 66.6(3) (see PARA 1902 ante): CrimPR 66.12(1).

2 CrimPR 66.12(1).

3 The form is set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

4 For the meaning of 'business day' see PARA 1901 note 6 ante.

5 CrimPR 66.12(2).

### **UPDATE**

#### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

### **1908 Practice and procedure: powers exercisable by the Registrar of Criminal Appeals**

NOTE 3--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1909. Practice and procedure: determination by full court.

### **1909. Practice and procedure: determination by full court.**

Where a single judge has refused an application to exercise any of the specified powers<sup>1</sup> the party making the application may have it determined by the Court of Appeal by serving a notice of renewal in the prescribed<sup>2</sup> form<sup>3</sup>. Notice of renewal must be served on the Registrar of Criminal Appeals within seven business days<sup>4</sup> of the day on which notice of the single judge's decision is served<sup>5</sup> on the party making the application<sup>6</sup>. The Court of Appeal may extend such period for service either before or after it expires<sup>7</sup>.

A notice of renewal must be signed by, or on behalf of, the person making the application. If the notice is not signed by the party making the application and that party is in custody, the Registrar must, as soon as practicable after receiving the notice, send a copy of it to that party<sup>8</sup>.

If the notice of renewal is not served on the Registrar within the specified<sup>9</sup> period or such extended period as the Court of Appeal has allowed<sup>10</sup>, the application must be treated as having been refused by the court<sup>11</sup>.

1    Ie the powers specified in CrimPR 66.11 (see PARA 1907 ante).

2    See *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

3    CrimPR 66.13(1).

4    For the meaning of 'business day' see PARA 1901 note 6 ante.

5    See PARA 1912 post.

6    CrimPR 66.13(2).

7    CrimPR 66.13(3).

8    CrimPR 66.13(4).

9    Ie under CrimPR 66.13(2).

10   Ie under CrimPR 66.13(3).

11   CrimPR 66.13(5).

### **UPDATE**

#### **1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

### **1909 Practice and procedure: determination by full court**

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1910. Practice and procedure: notice of hearing and determination of the Court of Appeal, single judge or Registrar.

**1910. Practice and procedure: notice of hearing and determination of the Court of Appeal, single judge or Registrar.**

The Registrar of Criminal Appeals must give notice, as far in advance as is reasonably practicable, of the date fixed for the hearing by the Court of Appeal of an appeal<sup>1</sup> or application to: (1) the prosecutor<sup>2</sup>; (2) the defendant<sup>3</sup>; (3) any interested party<sup>4</sup>; and (4) the court officer<sup>5</sup>. The Registrar of Criminal Appeals must, as soon as reasonably practicable, serve<sup>6</sup> notice of:

- 2422 (a) a decision of the Court of Appeal on an appeal or application<sup>7</sup>;
- 2423 (b) a decision of a single judge exercising one of the specified powers exercisable by a single judge<sup>8</sup>; or
- 2424 (c) a decision of the Registrar exercising one of the specified powers exercisable by the Registrar<sup>9</sup>;

on the above parties<sup>10</sup>.

Where a party to whom notice is so required to be given is in custody, notice must instead be given to the person having custody of him<sup>11</sup>. However, where a public interest ruling applies<sup>12</sup> the Registrar must not give or serve any such notice<sup>13</sup> on the defendant or any interested party, unless a judge or the Court of Appeal otherwise directs<sup>14</sup>.

1    Ie an appeal under the Criminal Justice Act 2003 s 58 (see PARA 1898 et seq ante): CrimPR 66.1.

2    CrimPR 66.14(1)(a).

3    CrimPR 66.14(1)(b).

4    CrimPR 66.14(1)(c). For the meaning of 'interested party' see PARA 1901 note 4 ante.

5    CrimPR 66.14(1)(d).

6    See PARA 1912 post.

7    CrimPR 66.14(2)(a).

8    CrimPR 66.14(2)(b). The specified powers referred to in the text are those powers referred to in CrimPR 66.11(1) (see PARA 1907 ante).

9    CrimPR 66.14(2)(c). The specified powers referred to in the text are those powers referred to in CrimPR 66.12(1) (see PARA 1908 ante).

10   CrimPR 66.14(2)

11   CrimPR 66.14(3).

12   Ie where CrimPR 66.8 applies (see PARA 1904 ante).

13   Ie a notice under CrimPR 66.14.

14   CrimPR 66.14(4).

**UPDATE**

**1898-1911 The prosecution's rights of appeal ... Practice and procedure:  
assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1911. Practice and procedure: assistance from the Crown Court.

**1911. Practice and procedure: assistance from the Crown Court.**

The Registrar of Criminal Appeals may require the court officer to furnish the Court of Appeal with any assistance or information which it may require for the purposes of exercising its jurisdiction in relation to a prosecution appeal<sup>1</sup> in respect of a ruling<sup>2</sup>.

1     le under the Criminal Justice Act 2003 Pt 9 (ss 57-74) (as amended): see PARA 1898 et seq ante.

2     CrimPR 66.15.

**UPDATE**

**1898-1911 The prosecution's rights of appeal ... Practice and procedure: assistance from the Crown Court**

CrimPR 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1912. Practice and procedure: service.

## **1912. Practice and procedure: service.**

Where any procedural provision<sup>1</sup> requires service of a document on the Registrar of Criminal Appeals then, unless the Registrar, a single judge or the Court of Appeal directs otherwise, the document may be served by any of the following methods:

- 2425 (1) in the case of a defendant or interested party<sup>2</sup> who is in custody, by delivering it to the person who has custody of him<sup>3</sup>; or
- 2426 (2) by addressing it to the Registrar and delivering it at, or sending it by first class post or fax or other means of electronic communication, to his office at the Royal Courts of Justice, London WC2A 2LL<sup>4</sup>.

Where any procedural provision<sup>5</sup> requires service of a document on the court officer then, unless the Registrar, a single judge or the Court of Appeal directs otherwise, the document may be served by any of the following methods:

- 2427 (a) in the case of a defendant or interested party who is in custody, by delivering it to the person who has custody of him<sup>6</sup>; or
- 2428 (b) by delivering it to, or sending it by first class post or fax or other means of electronic communication, to the court officer at the Crown Court centre at which the ruling appealed against was made<sup>7</sup>.

Where any procedural provision<sup>8</sup> requires the service of a document on any other person then, unless the Registrar, a single judge or the Court of Appeal directs otherwise, the document may be served by any of the following methods:

- 2429 (i) personally on that person or his solicitor<sup>9</sup>;
- 2430 (ii) by first class post to that person's last known residence or place of business or to his solicitor's business address<sup>10</sup>;
- 2431 (iii) leaving it at that person's last known residence or place of business<sup>11</sup>;
- 2432 (iv) if the party has indicated that he is willing to accept service by fax or other means of electronic communication, by sending a legible copy of the document by such means to that party<sup>12</sup>; or
- 2433 (v) where the person or his solicitor has given a number of a box at a document exchange and has not indicated that he is unwilling to accept service through a document exchange, by leaving it at the document exchange addressed to the box number<sup>13</sup>.

1 le any provision contained in CrimPR Pt 66 (66.1-66.17) (see PARA 1898 et seq ante).

2 For the meaning of 'interested party' see PARA 1901 note 4 ante.

3 CrimPR 66.17(1)(a). A person who has custody of a defendant or interested person and to whom the defendant or interested person delivers a document under head (1) in the text must indorse on it the date of delivery and forward it to the Registrar or the court officer, as the case may be: CrimPR 66.17(3).

Where a document is served under CrimPR Pt 66 by any method other than personal service it is deemed to be served:

- 162 (1) in the case of a document left at an address, on the next business day after the day on which it was left (CrimPR 66.17(5)(a));
- 163 (2) in the case of a document sent by first class post, on the second business day after the day on which it was posted (CrimPR 66.17(5)(b));
- 164 (3) in the case of a document left at a document exchange, on the second business day after the day on which it was left (CrimPR 66.17(5)(c));
- 165 (4) in the case of a document transmitted by fax or other electronic means on a business day, before 5 pm on that day (CrimPR 66.17(5)(d)); and
- 166 (5) in the case of a document transmitted by fax or other electronic means at any time other than that specified in head (4) supra, on the next business day after the day on which it was transmitted (CrimPR 66.17(5)(e)).

For the meaning of 'business day' see PARA 1901 note 6 ante.

4 CrimPR 66.17(1)(b).

5 See note 1 supra.

6 CrimPR 66.17(2)(a). A person who has custody of a defendant or interested person and to whom the defendant or interested person delivers a document under head (a) in the text must indorse on it the date of delivery and forward it to the Registrar or the court officer, as the case may be: CrimPR 66.17(3). See note 3 supra.

7 CrimPR 66.17(2)(b).

8 See note 1 supra.

9 CrimPR 66.17(4)(a).

10 CrimPR 66.17(4)(b).

11 CrimPR 66.17(4)(c).

12 CrimPR 66.17(4)(d).

13 CrimPR 66.17(4)(e). See note 3 supra.

## **UPDATE**

### **1912 Practice and procedure: service**

TEXT AND NOTES--CrimPR Pt 66 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), Pts 65-67. CrimPR 66.17 not reproduced. As to service of documents see CrimPR Pt 4.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(ii) Appeal against Ruling/1913. Determination of appeal by the Court of Appeal.

### **1913. Determination of appeal by the Court of Appeal.**

On an appeal against a terminating ruling or terminating rulings<sup>1</sup>, the Court of Appeal may confirm, reverse or vary any ruling to which the appeal relates<sup>2</sup>. The Court of Appeal may not reverse such a ruling unless it is satisfied:

- 2434 (1) that the ruling was wrong in law<sup>3</sup>;
- 2435 (2) that the ruling involved an error of law or principle<sup>4</sup>; or
- 2436 (3) that the ruling was a ruling that it was not reasonable for the judge to have made<sup>5</sup>.

Where the appeal relates to a single ruling, and the Court of Appeal confirms the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence<sup>6</sup>.

Where the appeal relates to a single ruling, and the Court of Appeal reverses or varies the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, do any of the following:

- 2437 (a) order that proceedings for that offence may be resumed in the Crown Court<sup>7</sup>;
- 2438 (b) order that a fresh trial may take place in the Crown Court for that offence<sup>8</sup>;
- 2439 (c) order that the defendant in relation to that offence be acquitted of that offence<sup>9</sup>.

However, the Court of Appeal may not make an order under head (a) or head (b) above in respect of an offence unless it considers it necessary in the interests of justice to do so<sup>10</sup>.

Where the appeal relates to a ruling that there is no case to answer and one or more other rulings, and the Court of Appeal confirms the ruling that there is no case to answer, it must, in respect of the offence or each offence which is the subject of the appeal, order that the defendant in relation to that offence be acquitted of that offence<sup>11</sup>.

Where the appeal relates to a ruling that there is no case to answer and one or more other rulings, and the Court of Appeal reverses or varies the ruling that there is no case to answer, it must in respect of the offence or each offence which is the subject of the appeal, make any of the orders mentioned in heads (a) to (c) above but may not make an order under head (a) or head (b) above in respect of an offence unless it considers it necessary in the interests of justice to do so<sup>12</sup>.

The Registrar of Criminal Appeals must, as soon as reasonably practicable, serve<sup>13</sup> a notice of a decision of the Court of Appeal on specified persons<sup>14</sup>. Where a party to whom notice is so required to be given is in custody, notice must instead be given to the person having custody of him<sup>15</sup>.

1    le under the Criminal Justice Act 2003 s 58: see PARA 1899 ante.



2 Ibid s 61(1).

3 Ibid s 67(a).

4 Ibid s 67(b).

5 Ibid s 67(c).

6 Ibid s 61(2), (3).

7 Ibid s 61(2), (4)(a).

8 Ibid s 61(2), (4)(b).

9 Ibid s 61(2), (4)(c).

10 Ibid s 61(2), (5).

11 Ibid s 61(6), (7).

12 Ibid s 61(6), (8).

13 See PARA 1912 ante.

14 See CrimPR 66.14(1)(a)-(d), (2); and PARA 1910 ante. The specified persons referred to in the text are: (1) the prosecutor; (2) the defendant; (3) any interested party; and (4) the court officer: see CrimPR 66.14(1).

15 CrimPR 66.14(3).

## **UPDATE**

### **1913 Determination of appeal by the Court of Appeal**

NOTE 4--See *R v B* [2008] All ER (D) 08 (May), CA.

NOTE 10--2003 Act s 61(5) substituted: Criminal Justice and Immigration Act 2008 s 44. For transitional provisions and savings see Criminal Justice and Immigration Act 2008 Sch 27 para 16.

See *R v Al-Ali* [2008] EWCA Crim 2186, [2009] 1 WLR 1661.

NOTES 14, 15--CrimPR Pt 66 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65-67. CrimPR 66.14 not reproduced.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(iii) Appeals against Evidentiary Rulings/1914. Right of appeal in respect of evidentiary rulings.

### **(iii) Appeals against Evidentiary Rulings**

#### **1914. Right of appeal in respect of evidentiary rulings.**

As from a day to be appointed, the following provisions have effect<sup>1</sup>. The prosecution may<sup>2</sup> appeal in respect of: (1) a single qualifying evidentiary ruling<sup>3</sup>; or (2) two or more qualifying evidentiary rulings<sup>4</sup>. A 'qualifying evidentiary ruling' is an evidentiary ruling of a judge<sup>5</sup> in relation to a trial on indictment which is made at any time (whether before or after the commencement of the trial) before the opening of the case for the defence<sup>6</sup>.

The prosecution may not appeal in respect of a single qualifying evidentiary ruling unless the ruling relates to one or more qualifying offences<sup>7</sup> (whether or not it relates to any other offence)<sup>8</sup>.

The prosecution may not appeal in respect of two or more qualifying evidentiary rulings unless each ruling relates to one or more qualifying offences (whether or not it relates to any other offence)<sup>9</sup>.

If the prosecution intends to appeal<sup>10</sup>, it must before the opening of the case for the defence inform the court: (a) of its intention to do so<sup>11</sup>; and (b) of the ruling or rulings to which the appeal relates<sup>12</sup>.

In respect of the ruling, or each ruling, to which the appeal relates:

- 2440 (i) the qualifying offence, or at least one of the qualifying offences, to which the ruling relates must be the subject of the appeal<sup>13</sup>; and
- 2441 (ii) any other offence to which the ruling relates may, but need not, be the subject of the appeal<sup>14</sup>.

Where the prosecution informs the court before the opening of the case for the defence of its intention to appeal and of the ruling or rulings to which the appeal relates, proceedings may be continued in respect of any offence which is not the subject of the appeal<sup>15</sup>.

Leave<sup>16</sup> so to appeal<sup>17</sup> may not be given unless the judge or, as the case may be, the Court of Appeal is satisfied that the relevant condition<sup>18</sup> is satisfied<sup>19</sup>.

Nothing in the above provisions<sup>20</sup> affects the right of the prosecution to appeal<sup>21</sup> in respect of an evidentiary ruling<sup>22</sup>.

1 The Criminal Justice Act 2003 ss 62, 74, Sch 4 are to be brought into force by order made by the Secretary of State under s 336(3) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

2 *Ie* in accordance with *ibid* ss 62, 63.

3 *Ibid* s 62(1)(a). For these purposes, 'evidentiary ruling' means a ruling which relates to the admissibility or exclusion of any prosecution evidence: s 62(9)(a).

4 *Ibid* s 62(1)(b).

Where a ruling relates to two or more offences but not all of those offences are the subject of an appeal under Pt 9 (ss 57-74), nothing in Pt 9 is to be regarded as affecting the ruling so far as it relates to any offence which is not the subject of the appeal: s 74(4).

Where two or more defendants are charged jointly with the same offence, the provisions of Pt 9 apply as if the offence, so far as relating to each defendant, were a separate offence (so that, for example, any reference in Pt 9 to a ruling which relates to one or more offences includes a ruling which relates to one or more of those separate offences): s 74(5).

5 See PARA 1899 note 1 ante.

6 Criminal Justice Act 2003 s 62(2). For these purposes, the case for the defence opens when, after the conclusion of the prosecution evidence, the earliest of the following events occurs:

- 167 (1) evidence begins to be adduced by or on behalf of a defendant (s 62(8)(a));
- 168 (2) it is indicated to the court that no evidence will be adduced by or on behalf of a defendant (s 62(8)(b));
- 169 (3) a defendant's case is opened, as permitted by the Criminal Procedure Act 1865 s 2 (see PARA 1315 ante) (Criminal Justice Act 2003 s 62(8)(c)).

7 'Qualifying offence' means an offence described in *ibid* Sch 4 Pt 1: s 62(9). The Secretary of State may by order amend Sch 4 Pt 1 by doing any one or more of the following: adding a description of offence; removing a description of offence for the time being included; modifying a description of offence for the time being included: s 62(10). This power of amendment is exercisable by statutory instrument: see PARA 90 note 6 ante.

The list of qualifying offences in Sch 4 Pt 1 is:

- 170 (1) murder (see PARA 86 et seq ante) (Sch 4 para 1);
- 171 (2) an offence under the Criminal Attempts Act 1981 s 1 (see PARA 79 ante) of attempting to commit murder (Criminal Justice Act 2003 Sch 4 para 2);
- 172 (3) an offence under the Offences against the Person Act 1861 s 4 (soliciting murder: see PARA 104 ante) (Criminal Justice Act 2003 Sch 4 para 3);
- 173 (4) manslaughter (see PARA 86 et seq ante) (Sch 4 para 4);
- 174 (5) an offence under the Offences against the Person Act 1861 s 18 (wounding or causing grievous bodily harm with intent: see PARA 118 ante) (Criminal Justice Act 2003 Sch 4 para 5);
- 175 (6) kidnapping (see PARA 136 et seq ante) (Sch 4 para 6);
- 176 (7) an offence under the Sexual Offences Act 1956 s 1 (repealed) or the Sexual Offences Act 2003 s 1 (rape: see PARA 165 ante) (Criminal Justice Act 2003 Sch 4 para 7);
- 177 (8) an offence under the Criminal Attempts Act 1981 s 1 of attempting to commit an offence under the Sexual Offences Act 1956 s 1 (repealed) or the Sexual Offences Act 2003 s 1 (Criminal Justice Act 2003 Sch 4 para 8);
- 178 (9) an offence under the Sexual Offences Act 1956 s 5 (repealed) (intercourse with a girl under 13) (Criminal Justice Act 2003 Sch 4 para 9);
- 179 (10) an offence of incest under the Sexual Offences Act 1956 s 10 (repealed) alleged to have been committed with a girl under 13 (Criminal Justice Act 2003 Sch 4 para 10);
- 180 (11) an offence under the Sexual Offences Act 2003 s 2 (assault by penetration: see PARA 167 ante) (Criminal Justice Act 2003 Sch 4 para 11);
- 181 (12) an offence under the Sexual Offences Act 2003 s 4 (causing a person to engage in sexual activity without consent: see PARA 171 ante) where it is alleged that the activity caused involved penetration within s 4(4)(a)-(d) (Criminal Justice Act 2003 Sch 4 para 12);

- 182 (13) an offence under the Sexual Offences Act 2003 s 5 (rape of a child under 13: see PARA 166 ante) (Criminal Justice Act 2003 Sch 4 para 13);
- 183 (14) an offence under the Criminal Attempts Act 1981 s 1 of attempting to commit an offence under the Sexual Offences Act 2003 s 5 (Criminal Justice Act 2003 Sch 4 para 14);
- 184 (15) an offence under the Sexual Offences Act 2003 s 6 (assault of a child under 13 by penetration: see PARA 168 ante) (Criminal Justice Act 2003 Sch 4 para 15);
- 185 (16) an offence under the Sexual Offences Act 2003 s 8 (causing a child under 13 to engage in sexual activity: see PARA 172 ante) where it is alleged that an activity involving penetration within s 8(2)(a)-d) was caused (Criminal Justice Act 2003 Sch 4 para 16);
- 186 (17) an offence under the Sexual Offences Act 2003 s 30 (sexual activity with a person with a mental disorder impeding choice: see PARA 201 ante) where it is alleged that the touching involved penetration within s 30(3)(a)-(d) (Criminal Justice Act 2003 Sch 4 para 17);
- 187 (18) an offence under the Sexual Offences Act 2003 s 31 (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity: see PARA 201 ante) where it is alleged that an activity involving penetration within s 31(3)(a)-(d) was caused (Criminal Justice Act 2003 Sch 4 para 18);
- 188 (19) an offence under the Customs and Excise Management Act 1979 s 50(2) (unlawful importation of Class A drug: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 994) alleged to have been committed in respect of a Class A drug (as defined by the Misuse of Drugs Act 1971 s 2: see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 239) (Criminal Justice Act 2003 Sch 4 para 19);
- 189 (20) an offence under the Customs and Excise Management Act 1979 s 68(2) (unlawful exportation of controlled drug: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1029) alleged to have been committed in respect of a Class A drug (as defined by the Misuse of Drugs Act 1971 s 2) (Criminal Justice Act 2003 Sch 4 para 20);
- 190 (21) an offence under the Customs and Excise Management Act 1979 s 170(1) or (2) (fraudulent evasion in respect of controlled drug: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1178) alleged to have been committed in respect of a Class A drug (as defined by the Misuse of Drugs Act 1971 s 2) (Criminal Justice Act 2003 Sch 4 para 21);
- 191 (22) an offence under the Misuse of Drugs Act 1971 s 4(2) (producing or being concerned in production of controlled drug: see PARA 772 ante) alleged to have been committed in relation to a Class A drug (as defined by s 2) (Criminal Justice Act 2003 Sch 4 para 22);
- 192 (23) an offence under the Misuse of Drugs Act 1971 s 4(3) (supplying or offering to supply controlled drug: see PARA 772 ante) alleged to have been committed in relation to a Class A drug (as defined by s 2) (Criminal Justice Act 2003 Sch 4 para 23);
- 193 (24) an offence under the Theft Act 1968 s 8(1) (robbery: see PARA 293 ante) where it is alleged that, at some time during the commission of the offence, the defendant had in his possession a firearm or imitation firearm (as defined by the Firearms Act 1968 s 57: see PARA 630 et seq ante) (Criminal Justice Act 2003 Sch 4 para 24);
- 194 (25) an offence under the Criminal Damage Act 1971 s 1(2) alleged to have been committed by destroying or damaging property by fire (arson endangering life: see PARA 336 ante) (Criminal Justice Act 2003 Sch 4 para 25);
- 195 (26) an offence under the Explosive Substances Act 1883 s 2 (causing explosion likely to endanger life or property: see PARA 127 ante) (Criminal Justice Act 2003 Sch 4 para 26);
- 196 (27) an offence under the Explosive Substances Act 1883 s 3(1)(a) (intent or conspiracy to cause explosion likely to endanger life or property: see PARA 128 ante) (Criminal Justice Act 2003 Sch 4 para 27);

- 197 (28) an offence under the International Criminal Court Act 2001 s 51 or s 52 (genocide, crimes against humanity and war crimes: see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARAS 454, 455) (Criminal Justice Act 2003 Sch 4 para 28);
- 198 (29) an offence under the Geneva Conventions Act 1957 s 1 (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 424) (Criminal Justice Act 2003 Sch 4 para 29);
- 199 (30) an offence under the Terrorism Act 2000 s 56 (directing terrorist organisation: see PARA 441 ante) (Criminal Justice Act 2003 Sch 4 para 30);
- 200 (31) an offence under the Taking of Hostages Act 1982 s 1 (hostage-taking: see PARA 468 ante) (Criminal Justice Act 2003 Sch 4 para 31);
- 201 (32) an offence under the Aviation Security Act 1982 s 1 (hijacking of aircraft: see AIR LAW vol 2 (2008) PARAS 624-625) (Criminal Justice Act 2003 Sch 4 para 32);
- 202 (33) an offence under the Aviation Security Act 1982 s 2 (destroying, damaging or endangering the safety of an aircraft: see AIR LAW vol 2 (2008) PARA 628) (Criminal Justice Act 2003 Sch 4 para 33);
- 203 (34) an offence under the Aviation and Maritime Security Act 1990 s 9 (hijacking of ships: see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1210) (Criminal Justice Act 2003 Sch 4 para 34);
- 204 (35) an offence under the Aviation and Maritime Security Act 1990 s 10 (seizing or exercising control of fixed platforms: see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1211) (Criminal Justice Act 2003 Sch 4 para 35);
- 205 (36) an offence under the Aviation and Maritime Security Act 1990 s 11 (destroying ships or fixed platforms or endangering their safety: see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1212) (Criminal Justice Act 2003 Sch 4 para 36);
- 206 (37) an offence under the Channel Tunnel (Security) Order 1994, SI 1994/570, art 4 (hijacking of Channel Tunnel trains: see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 324) (Criminal Justice Act 2003 Sch 4 para 37);
- 207 (38) an offence under the Channel Tunnel (Security) Order 1994, SI 1994/570, art 5 (seizing or exercising control of the Channel Tunnel system: see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 324) (Criminal Justice Act 2003 Sch 4 para 38);
- 208 (39) an offence under the Criminal Law Act 1977 s 1 (see PARA 67 ante) of conspiracy to commit an offence listed in the Criminal Justice Act 2003 Sch 4 Pt 1 (Criminal Justice Act 2003 Sch 4 para 39).

A reference in Sch 4 Pt 1 to an offence includes a reference to an offence of aiding, abetting, counselling or procuring the commission of the offence: Sch 4 para 40. A reference in Sch 4 Pt 1 to an enactment includes a reference to the enactment as enacted and as amended from time to time: Sch 4 para 41.

8 Ibid s 62(3).

9 Ibid s 62(4).

10 Ie under ibid s 62.

11 Ibid s 62(5)(a).

12 Ibid s 62(5)(b). The prosecution must, at the same time that it informs the court in accordance with s 62(5), inform the court of the offence or offences which are the subject of the appeal: s 62(7).

There is to be no right of appeal under Pt 9 in respect of a ruling in relation to which the prosecution has previously informed the court of its intention to appeal under s 62(5): s 74(3).

13 Ibid s 62(6)(a).

14 Ibid s 62(6)(b).

15 Ibid s 65.

16 See PARA 1898 ante.

17 Ie under the Criminal Justice Act 2003 s 62.

18 In relation to an appeal in respect of a single qualifying evidentiary ruling, the relevant condition is that the ruling significantly weakens the prosecution's case in relation to the offence or offences which are the subject of the appeal: *ibid* s 63(2). In relation to an appeal in respect of two or more qualifying evidentiary rulings, the relevant condition is that the rulings taken together significantly weaken the prosecution's case in relation to the offence or offences which are the subject of the appeal: s 63(3).

19 *Ibid* s 63(1).

20 Ie *ibid* s 62.

21 Ie under *ibid* s 58: see PARA 1899 ante.

22 *Ibid* s 62(11).

## **UPDATE**

### **1914 Right of appeal in respect of evidentiary rulings**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 7--Also, head (40) an offence under the Corporate Manslaughter and Corporate Homicide Act 2007 s 1 (see PARA 38A): 2003 Act Sch 4 para 4A (added by 2007 Act Sch 2 para 2).

Heads (7)-(10). See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(iii) Appeals against Evidentiary Rulings/1915. Expedited and non-expedited appeals.

### **1915. Expedited and non-expedited appeals.**

As from a day to be appointed, the following provisions have effect<sup>1</sup>. Where the prosecution informs the court<sup>2</sup> that it intends to appeal, and of the ruling or rulings to which the appeal relates, the judge<sup>3</sup> must decide whether or not the appeal should be expedited<sup>4</sup>.

If the judge decides that the appeal should be expedited, he may order an adjournment<sup>5</sup>. If the judge decides that the appeal should not be expedited, he may order an adjournment, or discharge the jury (if one has been sworn)<sup>6</sup>.

If the judge decides that the appeal should be expedited, he or the Court of Appeal may subsequently reverse that decision and, if it is reversed, the judge may order an adjournment, or discharge the jury (if one has been sworn)<sup>7</sup>.

1 The Criminal Justice Act 2003 s 64 is to be brought into force by order made by the Secretary of State under s 336(3) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

2 Ie under the Criminal Justice Act 2003 s 62(5): see PARA 1914 ante.

3 See PARA 1899 note 1 ante.

4 Criminal Justice Act 2003 s 64(1).

5 Ibid s 64(2).

6 Ibid s 64(3).

7 Ibid s 64(4).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(iii) Appeals against Evidentiary Rulings/1916. Determination of appeal by Court of Appeal.

### **1916. Determination of appeal by Court of Appeal.**

As from a day to be appointed, the following provisions have effect<sup>1</sup>. On an appeal<sup>2</sup> in respect of an evidentiary ruling, the Court of Appeal may confirm, reverse or vary any ruling to which the appeal relates<sup>3</sup>. The Court of Appeal may not reverse a ruling on such an appeal unless it is satisfied:

- 2442 (1) that the ruling was wrong in law<sup>4</sup>;
- 2443 (2) that the ruling involved an error of law or principle<sup>5</sup>; or
- 2444 (3) that the ruling was a ruling that it was not reasonable for the judge to have made<sup>6</sup>.

In addition, the Court of Appeal must, in respect of the offence or each offence which is the subject of the appeal, do any of the following:

- 2445 (a) order that proceedings for that offence be resumed in the Crown Court<sup>7</sup>;
- 2446 (b) order that a fresh trial may take place in the Crown Court for that offence<sup>8</sup>;
- 2447 (c) order that the defendant in relation to that offence be acquitted of that offence<sup>9</sup>.

No order may be made under head (c) above in respect of an offence unless the prosecution has indicated that it does not intend to continue with the prosecution of that offence<sup>10</sup>.

1 The Criminal Justice Act 2003 s 66 is brought into force by order made by the Secretary of State under s 336(3) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

2 Ie under the Criminal Justice Act 2003 s 62: see PARA 1914 ante.

3 Ibid s 66(1).

4 Ibid s 67(a).

5 Ibid s 67(b).

6 Ibid s 67(c).

7 Ibid s 66(2)(a).

8 Ibid s 66(2)(b).

9 Ibid s 66(2)(c).

10 Ibid s 66(3).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(iv) Reporting/1917. Restrictions on reporting.

## **(iv) Reporting**

### **1917. Restrictions on reporting.**

Except as otherwise provided<sup>1</sup> no publication<sup>2</sup> may include a report of:

- 2448 (1) anything done under specified provisions<sup>3</sup>;
- 2449 (2) an appeal against a ruling or evidentiary ruling<sup>4</sup>;
- 2450 (3) an appeal<sup>5</sup> to the House of Lords<sup>6</sup> in relation to an appeal against a ruling or evidentiary ruling<sup>7</sup>; or
- 2451 (4) an application for leave to appeal in relation to an appeal mentioned in head (2) or head (3) above<sup>8</sup>.

However, the judge may order that these restrictions<sup>9</sup> are not to apply, or are not to apply to a specified extent, to a report of anything done under the specified provisions<sup>10</sup>, or an application to the judge for leave to appeal<sup>11</sup> to the Court of Appeal<sup>12</sup>.

In addition, the Court of Appeal may order that the above restrictions<sup>13</sup> are not to apply, or are not to apply to a specified extent, to a report of:

- 2452 (a) an appeal against a ruling or evidentiary ruling<sup>14</sup> to the Court of Appeal<sup>15</sup>;
- 2453 (b) an application to that court for leave to appeal<sup>16</sup> to it<sup>17</sup>; or
- 2454 (c) an application to that court for leave to appeal to the House of Lords<sup>18</sup>.

Lastly, the House of Lords may order that the above restrictions are not to apply, or are not to apply to a specified extent, to a report of an appeal<sup>19</sup> to that House<sup>20</sup>, or an application to that House for leave to appeal<sup>21</sup> to it<sup>22</sup>.

The above restrictions do not apply to the inclusion in a publication of a report of:

- 2455 (i) anything done under the specified provisions<sup>23</sup>;
- 2456 (ii) an appeal<sup>24</sup>;
- 2457 (iii) an appeal<sup>25</sup> in relation to an appeal<sup>26</sup>; or
- 2458 (iv) an application for leave to appeal in relation to an appeal mentioned in head (ii) or head (iii) above<sup>27</sup>,

at the conclusion of the trial of the defendant or the last of the defendants to be tried<sup>28</sup>.

The above restrictions do not apply to a report which contains only one or more of the following matters:

- 2459 (A) the identity of the court and the name of the judge<sup>29</sup>;
- 2460 (B) the names, ages, home addresses<sup>30</sup> and occupations of the defendant or defendants and witnesses<sup>31</sup>;
- 2461 (C) the offence or offences, or a summary of them, with which the defendant or defendants are charged<sup>32</sup>;

- 2462 (D) the names of counsel and solicitors in the proceedings<sup>33</sup>;
- 2463 (E) where the proceedings are adjourned, the date and place to which they are adjourned<sup>34</sup>;
- 2464 (F) any arrangements as to bail<sup>35</sup>;
- 2465 (G) whether a right to representation funded by the Legal Services Commission<sup>36</sup> as part of the Criminal Defence Service was granted to the defendant or any of the defendants<sup>37</sup>.

Nothing in the above provisions<sup>38</sup> affects any prohibition or restriction by virtue of any other enactment on the inclusion of any matter in a publication<sup>39</sup>.

1   Ie except as provided by the Criminal Justice Act 2003 s 71.

2   For these purposes 'publication' includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme is to be taken to be so addressed), but does not include an indictment or other document prepared for use in particular legal proceedings; 'relevant programme' means a programme included in a programme service; and 'programme service' has the same meaning as in the Broadcasting Act 1990 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328): Criminal Justice Act 2003 s 71(11).

3   Ibid s 71(1)(a). The specified provisions referred to in the text are ss 58, 59, 62, 63 or 64: see PARAS 1899-1900, 1914-1915 ante.

4   Ibid s 71(1)(b). An appeal against a ruling or evidentiary ruling referred to in the text is one under Pt 9 (ss 57-74): see PARA 1898 et seq ante.

5   Ie under the Criminal Appeal Act 1968 Pt 2 (ss 33-44) (as amended): see PARA 1966 et seq post.

6   As from a day to be appointed, the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court (see the Administration of Justice Act 1960 s 1(1) (prospectively amended); and PARA 2020 post) and accordingly in the Criminal Justice Act 2003 s 71 the words 'Supreme Court' are prospectively substituted for the words 'House of Lords' and the words 'the Supreme Court' are prospectively substituted for the words 'that House' by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 81(1), (3). At the date at which this volume states the law no such day had been appointed.

7   Criminal Justice Act 2003 s 71(1)(c). An appeal again a ruling or evidentiary ruling referred to in the text is one under Pt 9: see PARA 1898 et seq ante.

8   Ibid s 71(1)(d).

9   Ie under ibid s 71(1).

10   Ibid s 71(2)(a). The specified provisions referred to in the text are ss 58, 59, 62, 63 or 64: see PARAS 1899-1900, 1914-1915 ante.

11   Ie under ibid Pt 9: see PARA 1898 et seq ante.

12   Ibid s 71(2)(b). Where there is only one defendant and he objects to the making of an order under s 71(2), (3) or (4):

209 (1) the judge, the Court of Appeal or the House of Lords is to make the order if (and only if) satisfied, after hearing the representations of the defendant, that it is in the interests of justice to do so (s 71(5)(a) (prospectively amended: see note 6 supra)); and

210 (2) the order (if made) is not to apply to the extent that a report deals with any such objection or representations (s 71(5)(b)).

Where there are two or more defendants and one or more of them object to the making of an order under s 71(2), (3) or (4):

211 (a) the judge, the Court of Appeal or the House of Lords is to make the order if (and only if) satisfied, after hearing the representations of each of the defendants, that it is in the interests of justice to do so (s 71(6)(a) (prospectively amended: see note 6 supra)); and

212 (b) the order (if made) is not to apply to the extent that a report deals with any such objection or representations (s 71(6)(b)).

13 le under ibid s 71(1).

14 le under ibid Pt 9: see PARA 1898 et seq ante.

15 Ibid s 71(3)(a).

16 le under ibid Pt 9: see PARA 1898 et seq ante.

17 Ibid s 71(3)(b).

18 Ibid s 71(3)(c) (prospectively amended: see note 6 supra). See note 12 supra.

19 le under the Criminal Appeal Act 1968 Pt 2 (as amended): see PARA 1966 et seq post.

20 Criminal Justice Act 2003 s 71(4)(a) (prospectively amended: see note 6 supra).

21 le under the Criminal Appeal Act 1968 Pt 2 (as amended): see PARA 1966 et seq post.

22 Criminal Justice Act 2003 s 71(4)(b) (prospectively amended: see note 6 supra).

23 Ibid s 71(7)(a). The specified provisions referred to in the text are ss 58, 59, 62, 63 or 64: see PARAS 1899-1900, 1914-1915 ante.

24 Ibid s 71(7)(b). An appeal referred to in the text is an appeal under the Criminal Justice Act 2003 Pt 9: see PARA 1898 et seq ante.

25 le under the Criminal Appeal Act 1968 Pt 2 (as amended): see PARA 1966 et seq post.

26 Ibid s 71(1)(c). An appeal referred to in the text is an appeal under the Criminal Justice Act 2003 Pt 9 (ss 57-74, Sch 4).

27 Criminal Justice Act 2003 s 71(7)(d).

28 Ibid s 71(7).

29 Ibid s 71(8)(a).

30 The addresses that may be included in a report by virtue of ibid s 71(8) are addresses at any relevant time, and at the time of their inclusion in the publication: s 71(9). 'Relevant time' means a time when events giving rise to the charges to which the proceedings relate are alleged to have occurred: s 71(11).

31 Ibid s 71(8)(b).

32 Ibid s 71(8)(c).

33 Ibid s 71(8)(d).

34 Ibid s 71(8)(e).

35 Ibid s 71(8)(f).

36 As to the Legal Services Commission and the Criminal Defence Service see LEGAL AID vol 65 (2008) PARAS 17 et seq, 120 et seq.

37 Criminal Justice Act 2003 s 71(8)(g).

38 le ibid s 71.

39 Ibid s 71(10).

## UPDATE

### 1917 Restrictions on reporting

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(2) APPEAL TO THE COURT OF APPEAL BY THE PROSECUTION/(iv) Reporting/1918. Offences in connection with reporting.

### **1918. Offences in connection with reporting.**

The following provisions apply if a publication<sup>1</sup> includes a report in contravention of the statutory restrictions on reporting<sup>2</sup>.

Where the publication is a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical is guilty of an offence<sup>3</sup>.

Where the publication is a relevant programme<sup>4</sup>:

2466 (1) any body corporate or Scottish partnership engaged in providing the programme service<sup>5</sup> in which the programme is included<sup>6</sup>; and

2467 (2) any person having functions in relation to the programme corresponding to those of an editor of a newspaper<sup>7</sup>,

is guilty of an offence<sup>8</sup>.

In the case of any other publication, any person publishing it is guilty of an offence<sup>9</sup>.

If one of the above offences committed by a body corporate is proved:

2468 (a) to have been committed with the consent or connivance of<sup>10</sup>; or

2469 (b) to be attributable to any neglect on the part of<sup>11</sup>,

an officer<sup>12</sup>, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly<sup>13</sup>.

A person guilty of one of the above offences is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>14</sup>.

1 As to the meaning of 'publication' see PARA 1917 note 2 ante (definition applied by the Criminal Justice Act 2003 s 74(1)).

2 Ibid s 72(1). The restrictions referred to in the text are those under s 71 (see PARA 1917 ante).

3 Ibid s 72(2).

4 For the meaning of 'relevant programme' see PARA 1917 note 2 ante (definition applied by ibid s 74(1)).

5 For the meaning of 'programme service' see the Broadcasting Act 1990 (see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 328) (definition applied by the Criminal Justice Act 2003 ss 71(11), 74(1)).

6 Ibid s 72(3)(a).

7 Ibid s 72(3)(b).

8 Ibid s 72(3).

9 Ibid s 72(4).

10 Ibid s 72(5)(a).

11 Ibid s 72(5)(b).

12 For these purposes, 'officer' means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity: *ibid* s 72(6). If the affairs of a body corporate are managed by its members, 'director' in s 72(6) means a member of that body: s 72(7).

13 *Ibid* s 72(5). As to this type of provision see *PARA 38 ante*. Where an offence under s 72 is committed by a Scottish partnership and is proved to have been committed with the consent or connivance of a partner, he as well as the partnership is guilty of the offence and is liable to be proceeded against and punished accordingly: s 72(8).

14 *Ibid* s 72(9). Proceedings for an offence under s 72 may not be instituted in England and Wales otherwise than by or with the consent of the Attorney General: s 72(10)(a). For the effect of this limitation see *PARA 1071 ante*. As to the standard scale see *SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142*.

## **UPDATE**

### **1919 Order made in cases of insanity or unfitness to plead**

Material relating to this paragraph has been revised and published under the title *SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332, 334, 389*.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(i) Order Made in Cases of Insanity or Unfitness to Plead

### **(3) OTHER APPEALS TO THE COURT OF APPEAL**

#### **(i) Order Made in Cases of Insanity or Unfitness to Plead**

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(ii) Contempt/1920. Appeal against finding of contempt or order thereon.

## (ii) Contempt

### 1920. Appeal against finding of contempt or order thereon.

An appeal from any order or decision of the Crown Court in the exercise of its jurisdiction to punish for contempt of court (including criminal contempt) lies to the Court of Appeal<sup>1</sup>.

A person who wishes to appeal from any order or decision of the Crown Court in the exercise of its jurisdiction to punish for contempt of court must give notice of appeal in such manner as may be directed by rules of court<sup>2</sup>; and notice of appeal must be given within 28 days from the date of the order or decision appealed against<sup>3</sup>.

The Court of Appeal may reverse or vary the order or decision of the court below, and make such other order as may be just<sup>4</sup>. An appeal lies to the House of Lords<sup>5</sup> from an order or decision of the Court of Appeal, including a decision of the court<sup>6</sup> under the provisions set out above<sup>7</sup>.

1 See the Administration of Justice Act 1960 s 13(1), (2)(bb) (added by the Courts Act 1971 s 56(1), (4), Sch 8 para 40(1), Sch 11 Pt II). This right of appeal applies not only when a contemnor has been convicted of, and sentenced for, contempt, but also to orders (eg a refusal of bail) made in the course of proceedings which may result in a conviction of, and sentence for, contempt: *R v Serumaga* [2005] EWCA Crim 370, [2005] 2 All ER 160, [2005] 2 Cr App Rep 181. In circumstances where the Court of Appeal, Criminal Division has jurisdiction to entertain an appeal under the Administration of Justice Act 1960 s 13, that, rather than judicial review, is the appropriate procedure: *R v Serumaga* supra. The reference to an order or decision in the exercise of the Crown Court's jurisdiction to punish for contempt of court includes a reference to an order of the Crown Court under any enactment to deal with an offence as if it were a contempt of court: Administration of Justice Act 1960 s 13(5)(a) (amended by the Courts Act 1971 Sch 8 para 40(2)). The jurisdiction is exercised by the criminal division of the Court of Appeal: Supreme Court Act 1981 s 53(2)(b). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. As to such appeals see CONTEMPT OF COURT vol 9(1) (Reissue) PARA 497 et seq.

2 Criminal Appeal Act 1968 s 18A(1) (s 18A added by the Criminal Justice Act 1988 s 170(1), Sch 15 paras 20, 25). CrimPR 68.1 (see PARA 1862 ante), 68.3(1)-(4), (6), (10)-(12) (see PARAS 1848, 1863-1864 ante), 68.11 (see PARA 1857 ante), 68.13 (see PARA 1860 ante), 68.23 (see PARA 1856 ante), 68.27 (see PARA 1892 ante), 68.29 (see PARA 1894 ante) apply to such appeals: see CrimPR 74.1(1), (6), (7).

3 Criminal Appeal Act 1968 s 18A(2) (as added: see note 2 supra). The time for giving notice of appeal may be extended before or after its expiry by the Court of Appeal (see PARA 1865 ante): Criminal Appeal Act 1968 s 18A(3) (as so added).

4 Administration of Justice Act 1960 s 13(3). Section 13(3) gives the Court of Appeal wide powers to vary or reverse any order and to substitute an order considered to be just (*Linnett v Coles* [1987] QB 555, 84 Cr App Rep 227, CA), including ordering a rehearing (*Duo v Duo* [1992] 3 All ER 121, sub nom *Duo v Osborne* [1992] 1 WLR 611, CA). It does not, however, extend to making an order for costs out of central funds in favour of a successful appellant: *R v Moore* [2003] EWCA Crim 1574, [2003] 1 WLR 2170, [2003] 2 Cr App Rep 481. The Administration of Justice Act 1960 s 13(3) empowers the making of rules of court for authorising the release on bail of an appellant under s 13. As to such rules see CPR Sch 1 RSC Ord 109 rr 3, 4; and CONTEMPT OF COURT vol 9(1) (Reissue) PARAS 514, 516.

5 See note 2 supra.

6 lie under the Administration of Justice Act 1960 s 13 (as amended): see the text and note 4 supra.



7 See PARA 1966 post.

**UPDATE**

**1920 Appeal against finding of contempt or order thereon**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 2--CrimPR Pt 74 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 74.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/A. RIGHT OF APPEAL/1921. Appeal against rulings in preparatory hearings in serious or complex fraud cases.

### **(iii) Interlocutory Appeals**

#### **A. RIGHT OF APPEAL**

##### **1921. Appeal against rulings in preparatory hearings in serious or complex fraud cases.**

An appeal against any order or ruling on the admissibility of evidence<sup>1</sup> or other question of law<sup>2</sup> or on any question as to the severance or joinder of charges<sup>3</sup> determined at a preparatory hearing in a case of serious or complex fraud<sup>4</sup> lies to the Court of Appeal<sup>5</sup>, but only with the leave of the judge or of the Court of Appeal<sup>6</sup>. On termination of the hearing of an appeal, the court may confirm, reverse or vary the decision appealed against<sup>7</sup>.

1    Ie under the Criminal Justice Act 1987 s 9(3)(b) (see PARA 1253 ante).

2    Ie under *ibid* s 9(3)(c) (see PARA 1253 ante). As to whether the exercise of discretion can constitute a question of law for these purposes see *Re Saunders* (1990) Times, 8 February, CA; *R v Moore* (5 February 1991, unreported), CA; *R v Jennings* (1993) 98 Cr App Rep 308, CA.

3    Ie under the Criminal Justice Act 1987 s 9(3)(d) (as added) (see PARA 1253 ante).

4    Ie under *ibid* s 9 (as amended): see PARA 1253 ante.

5    As from a day to be appointed, an appeal also lies to the Court of Appeal from the refusal by a judge of an application to which the Criminal Justice Act 2003 s 45 (see PARA 1284 ante) applies or from an order of a judge under s 43 or s 44 (see PARA 1284 ante) which is made on the determination of such an application: Criminal Justice Act 1987 s 9(11) (amended by the Criminal Justice Act 2003 s 45(1), (5)). At the date at which this volume states the law this amendment had effect in so far as applying to applications under s 44 (see PARA 1284 ante) (see the Criminal Justice Act 2003 (Commencement No 13 and Transitional Provision) Order 2006, SI 2006/1835, art 2(c)), but no further orders had been made bringing the Criminal Justice Act 2003 s 45 into force for any remaining purposes.

6    Criminal Justice Act 1987 s 9(11) (amended by the Criminal Justice Act 2003 s 310(3)). As from a day to be appointed, the Criminal Justice Act 1987 s 9(11) has effect as if it also provided for an appeal to the Court of Appeal to lie from the determination by a judge of an application by the prosecution for sample counts to be tried without a jury: Domestic Violence, Crime and Victims Act 2004 s 18(5) (not yet in force). At the date at which this volume states the law no such day had been appointed. The Criminal Justice Act 1987 s 9(3) is subordinate to s 7(1) (see PARA 1250 ante); consequently, if a ruling does not fall within both provisions it cannot be appealed under s 9(11) (as amended): *R v Gunawardena* [1990] 2 All ER 477, [1990] 1 WLR 703, CA; *R v Hedworth* [1997] 1 Cr App Rep 421, CA. Rulings made under the Criminal Justice Act 1987 s 9(4) (see PARA 1253 ante) in relation to the prosecution case statements do not fall within s 9(3), and therefore there is no right of appeal in respect of them: *R v Smithson* [1994] 1 WLR 1052, [1995] 1 Cr App Rep 14, CA. As to the procedure see PARA 1923 et seq post. The power to give leave may be exercised by a single judge: see PARA 1928 post.

7    Criminal Justice Act 1987 s 9(14). As to costs see PARA 1893 ante.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/A. RIGHT OF APPEAL/1922. Appeal against decisions in preparatory hearings under the Criminal Procedure and Investigations Act 1996.

## **1922. Appeal against decisions in preparatory hearings under the Criminal Procedure and Investigations Act 1996.**

An appeal lies to the Court of Appeal from any ruling of a judge made at a preparatory hearing under the Criminal Procedure and Investigations Act 1996<sup>1</sup> but only with the leave of the judge or of the Court of Appeal<sup>2</sup>. The judge may continue such a preparatory hearing notwithstanding that leave to appeal has been granted, but the preparatory hearing may not be concluded until after the appeal has been determined or abandoned<sup>3</sup>. On the termination of the hearing of an appeal, the Court of Appeal may confirm, reverse or vary the decision appealed against<sup>4</sup>.

1 lie from any ruling under the Criminal Procedure and Investigations Act 1996 s 31(3) (see PARA 1253 ante). From a day to be appointed, an appeal also lies to the Court of Appeal from any ruling of a judge from the refusal by a judge of an application to which the Criminal Justice Act 2003 s 45 applies or from an order of a judge under s 43 or s 44 (see PARA 1284 ante): Criminal Procedure and Investigations Act 1996 s 35(1) (amended by the Criminal Justice Act 2003 s 45(1), (9)). At the date at which this volume states the law this amendment had effect in so far as applying to applications under s 44 (see PARA 1284 ante) (see the Criminal Justice Act 2003 (Commencement No 13 and Transitional Provision) Order 2006, SI 2006/1835, art 2(c)), but no further orders had been made bringing the Criminal Justice Act 2003 s 45 into force for any remaining purposes.

2 Criminal Procedure and Investigations Act 1996 s 35(1). Subject to rules of court made under the Supreme Court Act 1981 s 53(1), the jurisdiction of the Court of Appeal under the Criminal Procedure and Investigations Act 1996 s 35(1) must be exercised by the criminal division of the court and references in Pt III (ss 28-38) (as amended) to the Court of Appeal are to be construed as references to that division: s 35(4). As from a day to be appointed, the words 'Senior Courts Act 1981' are substituted for the words 'Supreme Court Act 1981' by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(2). At the date at which this volume states the law no such day had been appointed.

As from a day to be appointed, the Criminal Procedure and Investigations Act 1996 s 35(1) has effect as if it also provided for an appeal to the Court of Appeal to lie from the determination by a judge of an application by the prosecution for sample counts to be tried without a jury: Domestic Violence, Crime and Victims Act 2004 s 18(5) (not yet in force). At the date at which this volume states the law no such day had been appointed.

The Court of Appeal does not have jurisdiction under the Criminal Procedure and Investigations Act 1996 s 35(1) if the judge lacked jurisdiction to make the order for a preparatory hearing under s 29; but if the judge has addressed the criteria under s 29(1) (see PARA 1251 ante) in the context of the specified purposes of any preparatory hearing, and proceeds on the basis that the potential advantages outweigh the disadvantages, the Court of Appeal will be reluctant to set aside his decision to do so: *A-G's Reference (No 1 of 2004)*; *R v Edwards*; *R v Denton*; *R v Hendley*; *R v Crowley* [2004] EWCA Crim 1025, [2005] 4 All ER 457, [2004] 1 WLR 2111. The Court of Appeal's jurisdiction is limited to rulings properly within the scope of a preparatory hearing: *R v Van Hoogstraten* [2003] EWCA Crim 3642, [2004] Crim LR 498 (Court of Appeal had no jurisdiction to entertain an appeal against a ruling at a preparatory hearing under the Criminal Procedure and Investigations Act 1996 that a jury could not properly convict even if the prosecution succeeded in proving the facts alleged because the ruling was outside the scope of such a preparatory hearing). A ruling given in a preparatory hearing on an application for the exclusion of evidence under the Police and Criminal Evidence Act 1984 s 78 (see PARA 1365 ante) is within the Criminal Procedure and Investigations Act 1996 s 35(1): *R v R* (22 February 2000, unreported), CA; *R v Claydon* [2001] EWCA Crim 1359, [2004] 1 WLR 1575, [2004] 1 Cr App Rep 474.

3 Criminal Procedure and Investigations Act 1996 s 35(2) (amended by the Criminal Justice Act 2003 s 331, Sch 36 paras 65, 69).

4 Criminal Procedure and Investigations Act 1996 s 35(3).

### **UPDATE**

**1922 Appeal against decisions in preparatory hearings under the Criminal Procedure and Investigations Act 1996**

NOTE 2--Constitutional Reform Act 2005 Sch 11 in force 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.  
 APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/B.  
 PRACTICE AND PROCEDURE/1923. Notice of appeal.

## **B. PRACTICE AND PROCEDURE**

### **1923. Notice of appeal.**

An application to the judge of the Crown Court for leave to appeal<sup>1</sup> must be made orally within two days of the making of the order or ruling to which it relates<sup>2</sup>. Unless the application is made on the occasion of an order or ruling to which it relates, the appellant must serve notice in writing thereof, specifying the grounds of the application, on the Crown Court officer and on all parties to the hearing directly affected by the order or ruling in question<sup>3</sup>.

The appellant must no later than the specified day<sup>4</sup> serve notice of appeal therefrom or, as the case may be, of an application to the Court of Appeal for leave to appeal on:

- 2470 (1) the Registrar of Criminal Appeals<sup>5</sup>;
- 2471 (2) the Crown Court officer<sup>6</sup>; and
- 2472 (3) all parties to the preparatory hearing directly affected by such order or ruling<sup>7</sup>;

and the time for so giving notice may be extended, before or after it expires, by the Court of Appeal<sup>8</sup>.

Notice of appeal or of an application for leave to appeal may be given either in respect of the whole or any part of the order to which it relates and must:

- 2473 (a) specify any question of law in respect of which the appeal is brought and, where appropriate, such facts of the case as are necessary for its proper consideration<sup>9</sup>;
- 2474 (b) summarise the arguments intended to be put to the Court of Appeal<sup>10</sup>; and
- 2475 (c) specify any authorities intended to be cited<sup>11</sup>.

Where the judge of the Crown Court has given leave to appeal, the notice of appeal must state that fact and specify the grounds on which leave is given<sup>12</sup>.

Notice of appeal or of an application for leave to appeal must be accompanied by any documents or other things (or copies thereof) necessary for the proper determination of the appeal or application<sup>13</sup>.

<sup>1</sup> le under the Criminal Justice Act 1987 s 9(11) or the Criminal Procedure and Investigations Act 1996 s 35(1): see PARAS 1921-1922 ante.

<sup>2</sup> CrimPR 65.1(1). A notice of appeal or of an application for leave to appeal, or an application to the Court of Appeal for an extension of time (see note 8 infra), must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA; CrimPR 65.1(6).

<sup>3</sup> CrimPR 65.1(2). If notice in writing of an application for leave to appeal was, under CrimPR 65.1(2), served on the Crown Court, a copy thereof must accompany the notice of appeal or, as the case may be, of an

application for leave to appeal required under CrimPR 65.1(3) (see notes 5-7 *infra*) to be served on the Registrar: CrimPR 65.1(7).

4 The specified day is: (1) the day which occurs seven days after the making of the order or ruling; or (2) where an application is made to the judge of the Crown Court for leave to appeal under the Criminal Procedure and Investigations Act 1996 s 35(3) (see PARA 1922 *ante*), the day which occurs seven days after such application is determined or withdrawn: CrimPR 65.1(4).

5 CrimPR 65.1(3)(a). See also note 3 *supra*.

6 CrimPR 65.1(3)(b). See also note 3 *supra*.

7 CrimPR 65.1(3)(c). See also note 3 *supra*.

8 CrimPR 65.1(5). The power to extend the time for giving notice may be exercised by a single judge: see PARA 1928 *post*.

9 CrimPR 65.1(8)(a).

10 CrimPR 65.1(8)(b).

11 CrimPR 65.1(8)(c).

12 CrimPR 65.1(9).

13 CrimPR 65.1(10).

## **UPDATE**

### **1923-1930 Notice of appeal ... Notice of determination by the court**

CrimPR Pt 65 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 66.

### **1923 Notice of appeal**

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.  
 APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/B.  
 PRACTICE AND PROCEDURE/1924. Respondent's notice.

### **1924. Respondent's notice.**

Upon receiving notice of appeal or of an application for leave to appeal<sup>1</sup>, the respondent, if he desires to oppose the appeal, must, within seven days of receipt of the notice, serve a notice<sup>2</sup> on the Registrar of Criminal Appeals:

- 2476 (1) stating the date on which the appellant's notice was received by the respondent<sup>3</sup>;
- 2477 (2) summarising his response to the arguments of the appellant<sup>4</sup>; and
- 2478 (3) specifying the authorities which he intends to cite<sup>5</sup>;

and he must at the same time serve a copy thereof on the appellant and any other party to the proceedings directly affected by the order or ruling and on the Crown Court officer<sup>6</sup>.

The time for giving notice may be extended, either before or after it expires, by the Court of Appeal<sup>7</sup>.

1 See PARA 1923 ante.

2 For the form of notice see *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

3 CrimPR 65.2(1)(a).

4 CrimPR 65.2(1)(b).

5 CrimPR 65.2(1)(c).

6 CrimPR 65.2(1).

7 CrimPR 65.2(2). The power to extend the time for giving notice may be exercised by a single judge: see PARA 1928 post.

## **UPDATE**

### **1923-1930 Notice of appeal ... Notice of determination by the court**

CrimPR Pt 65 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 66.

### **1924 Respondent's notice**

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/B. PRACTICE AND PROCEDURE/1925. Persons in custody.

### **1925. Persons in custody.**

A person in custody is entitled to be present on the hearing of an appeal, or an application for leave to appeal<sup>1</sup>, to which he is a party<sup>2</sup>; but, except as so provided, a person in custody is not entitled to be present on the hearing of an appeal, or an application for leave to appeal, except: (1) on an application to the Crown Court for leave to appeal, with the leave of the judge; or (2) on an appeal, or an application to the Court of Appeal for leave to appeal, with the leave of that court<sup>3</sup>. An application for leave to be present must be made, where head (1) above applies, by applying orally to the judge, and where head (2) above applies, by serving notice on the Registrar of Criminal Appeals or orally to the court<sup>4</sup>.

<sup>1</sup> le under the Criminal Justice Act 1987 s 9(11) or the Criminal Procedure and Investigations Act 1996 s 35(1): see PARAS 1921-1922 ante.

<sup>2</sup> CrimPR 65.3(1).

<sup>3</sup> CrimPR 65.3(2). The power to give leave may be exercised by a single judge: see PARA 1928 post.

<sup>4</sup> CrimPR 65.3(3). For the form of notice see *Practice Direction (Criminal Proceedings Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

### **UPDATE**

#### **1923-1930 Notice of appeal ... Notice of determination by the court**

CrimPR Pt 65 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 66.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.  
 APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/B.  
 PRACTICE AND PROCEDURE/1926. Supply of documentary and other exhibits.

### **1926. Supply of documentary and other exhibits.**

The Registrar of Criminal Appeals must, on request, supply to the appellant or respondent copies of documents or other things required for the appeal and in such case may make charges in accordance with scales and rates fixed for the time being by the Treasury<sup>1</sup>. The Registrar must, on request, make arrangements for the appellant or respondent to inspect any document or other thing required for the appeal<sup>2</sup>.

<sup>1</sup> CrimPR 68.11(1) (applied by CrimPR 65.4).

<sup>2</sup> CrimPR 68.11(2) (applied by CrimPR 65.4). CrimPR 68.11 does not apply to the supply of transcripts of any proceedings or any part thereof: CrimPR 68.11(3) (applied by CrimPR 65.4).

### **UPDATE**

#### **1923-1930 Notice of appeal ... Notice of determination by the court**

CrimPR Pt 65 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 66.

#### **1926-1927 Supply of documentary and other exhibits, Abandonment of proceedings**

CrimPR Pt 68 substituted: see PARA 1856-1861.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/B. PRACTICE AND PROCEDURE/1927. Abandonment of proceedings.

## **1927. Abandonment of proceedings.**

An appeal or an application for leave to appeal<sup>1</sup> may be abandoned before the hearing of the appeal or application by serving notice on the Registrar of Criminal Appeals<sup>2</sup>. The notice must be signed by, or on behalf of, the appellant<sup>3</sup>. As soon as practicable after receiving such notice, the Registrar must send a copy of it, indorsed with the date of receipt, to the appellant and a court officer of the court of trial<sup>4</sup>. Where an appeal or an application for leave to appeal is abandoned, the appeal or application is to be treated as having been dismissed or refused by the court<sup>5</sup>.

<sup>1</sup> See under the Criminal Justice Act 1987 s 9(11) or the Criminal Procedure and Investigations Act 1996 s 35(1): see PARAS 1921-1922 ante.

<sup>2</sup> CrimPR 68.22(1) (applied by CrimPR 65.5). The notice must be in the alternative form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA: CrimPR 68.22(1) (as so applied).

<sup>3</sup> CrimPR 68.22(2) (applied by CrimPR 65.5).

<sup>4</sup> CrimPR 68.22(3) (applied and amended by CrimPR 65.5)

<sup>5</sup> CrimPR 68.22(4) (applied by CrimPR 65.5).

## **UPDATE**

### **1923-1930 Notice of appeal ... Notice of determination by the court**

CrimPR Pt 65 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 66.

### **1926-1927 Supply of documentary and other exhibits, Abandonment of proceedings**

CrimPR Pt 68 substituted: see PARA 1856-1861.

## **1927 Abandonment of proceedings**

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/B. PRACTICE AND PROCEDURE/1928. Powers exercisable by a single judge.

### **1928. Powers exercisable by a single judge.**

The following powers may be exercised by a judge of the court in the same manner as they may be exercised by the court and subject to the same provisions:

- 2479 (1) to give leave to appeal<sup>1</sup>;
- 2480 (2) to extend<sup>2</sup> the time within which notice of appeal or of an application for leave to appeal must be given<sup>3</sup>;
- 2481 (3) to extend the time within which a notice<sup>4</sup> of opposition to an appeal or application for leave to appeal must be given by the respondent<sup>5</sup>; and
- 2482 (4) to give leave<sup>6</sup> for a person in custody to be present at any proceedings<sup>7</sup>.

For the purpose of exercising any of the above powers, a judge of the court may sit in such place as he appoints, and may sit otherwise than in open court<sup>8</sup>.

Where a judge of the court has refused to exercise any of the above powers in favour of an applicant, the application may be renewed to the full court<sup>9</sup>.

1 CrimPR 65.6(1)(a). The reference to leave to appeal in the text refers to leave to appeal under the Criminal Justice Act 1987 s 9(11) or the Criminal Procedure and Investigations Act 1996 s 35(1); see PARAS 1921-1922 ante.

2 Ie under CrimPR 65.1: see PARA 1923 ante.

3 CrimPR 65.6(1)(b).

4 Ie under CrimPR 65.2: see PARA 1924 ante.

5 CrimPR 65.6(1)(c).

6 Ie under CrimPR 65.3: see PARA 1925 ante.

7 CrimPR 65.6(1)(d).

8 CrimPR 65.6(2).

9 See PARA 1929 post.

### **UPDATE**

#### **1923-1930 Notice of appeal ... Notice of determination by the court**

CrimPR Pt 65 substituted by SI 2007/2317; and amended by SI 2007/3662, SI 2008/2076, SI 2009/2087.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/B. PRACTICE AND PROCEDURE/1929. Determination by full court.

### **1929. Determination by full court.**

Where a judge of the court has refused an application on the part of an applicant to exercise in his favour any of the powers<sup>1</sup> exercisable by a single judge, the applicant may have the application determined by the court by serving a notice on the Registrar of Criminal Appeals within seven days, or such longer period as a judge of the court may fix, from the date on which notice of the refusal was served on him by the Registrar<sup>2</sup>. The notice must be signed by or on behalf of the applicant<sup>3</sup>. If the notice is not signed by the applicant and the applicant is in custody, the Registrar must, as soon as practicable after receiving the notice, send a copy of it to the applicant<sup>4</sup>. If such a notice is not served on the Registrar, the application is to be treated as having been refused by the court<sup>5</sup>.

1    le the powers referred to in CrimPR 65.6: see PARA 1928 ante.

2    CrimPR 65.7(1). The notice must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA: CrimPR 65.7(1). As to service of notice by the Registrar see PARA 1930 post.

3    CrimPR 65.7(2).

4    CrimPR 65.7(3).

5    CrimPR 65.7(4).

### **UPDATE**

### **1923-1930 Notice of appeal ... Notice of determination by the court**

CrimPR Pt 65 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 66.

### **1929 Determination by full court**

NOTE 2--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/B. PRACTICE AND PROCEDURE/1930. Notice of determination by the court.

### **1930. Notice of determination by the court.**

As soon as practicable, the Registrar of Criminal Appeals must serve notice of any determination<sup>1</sup> by the Court of Appeal<sup>2</sup> or by any judge of the court<sup>3</sup> on:

- 2483 (1) the applicant<sup>4</sup>;
- 2484 (2) the respondent<sup>5</sup>; and
- 2485 (3) any other party who is directly affected by the ruling to which the appeal or application relates<sup>6</sup>.

As soon as practicable, the Registrar must serve notice on the Crown Court officer at the place of trial of the order of the Court of Appeal disposing of the appeal or application for leave to appeal<sup>7</sup>.

<sup>1</sup> The notice of a determination by a single judge under CrimPR 65.6 must be served in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA: CrimPR 65.8(1).

<sup>2</sup> *Ie* under CrimPR 65.7: see PARA 1929 ante.

<sup>3</sup> *Ie* under CrimPR 65.6: see PARA 1928 ante.

<sup>4</sup> CrimPR 65.8(1)(a).

<sup>5</sup> CrimPR 65.8(1)(b).

<sup>6</sup> CrimPR 65.8(1)(c).

<sup>7</sup> CrimPR 65.8(2).

### **UPDATE**

#### **1923-1930 Notice of appeal ... Notice of determination by the court**

CrimPR Pt 65 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 66.

#### **1930 Notice of determination by the court**

NOTE 1--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D, CA, further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/B. PRACTICE AND PROCEDURE/1931. Service of documents.

### **1931. Service of documents.**

The statutory provisions<sup>1</sup> relating to service of documents in respect of an appeal or an application for leave to appeal against conviction or sentence apply for the purposes of an appeal or application for leave to appeal<sup>2</sup> against an order or ruling at a preparatory hearing<sup>3</sup>. Where, however, any document is required to be served on any party to the proceedings and that party is acting by a solicitor, service of the document may be effected by delivering it, or sending it by post, to the solicitor's address for service<sup>4</sup>.

<sup>1</sup> Ie CrimPR 68.1: see PARA 1862 ante.

<sup>2</sup> Ie under the Criminal Justice Act 1987 s 9(11) and the Criminal Procedure and Investigations Act 1996 s 35(1): see PARAS 1921-1922 ante.

<sup>3</sup> CrimPR 65.9(1).

<sup>4</sup> CrimPR 65.9(2). Where there is inscribed on the writing paper of the person to be served with a document or on the writing paper of his solicitor (where the person to be served is a party to the proceedings and is acting by a solicitor) a document exchange box number, and that person or his solicitor (as the case may be) has not indicated in writing to the person serving the document that he is unwilling to accept service through a document exchange, service of the document may be effected by leaving the document addressed to the numbered box of that person or his solicitor at the document exchange in question or at a document exchange which transmits documents every business day to that document exchange; and any document which is left at a document exchange in accordance with this provision is, unless the contrary is proved, deemed to have been served on the second business day following the day on which it is left: CrimPR 65.9(3). For these purposes, 'document exchange' means any document exchange for the time being approved by the Lord Chancellor for the purposes of the service of documents; 'business day' means a day other than a day which is to be excluded for the purposes of reckoning a period of seven days or less; and 'solicitor' includes a body corporate which is recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (a 'recognised body') and, in the case of a recognised body, the reference in CrimPR 65.9(2) to the solicitor's address for service is to be construed as a reference to the address specified by the recognised body as its address for the purposes of the proceedings relating to the appeal or application for leave to appeal under the Criminal Procedure and Investigations Act 1996 s 35(1) (including an address specified for the general purposes of the criminal proceedings in relation to which the appeal or application for leave to appeal is made), or, in the absence of such a specified address, to its registered office: CrimPR 65.9(4).

### **UPDATE**

#### **1931 Service of documents**

TEXT AND NOTES--CrimPR Pt 65 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 66. CrimPR 65.9 not reproduced.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.  
 APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iii) Interlocutory Appeals/B.  
 PRACTICE AND PROCEDURE/1932. Registrar's powers and duties.

### **1932. Registrar's powers and duties.**

The Registrar of Criminal Appeals may require the Crown Court at the place of trial to furnish the Court of Appeal with any assistance or information which it may require for the purpose of exercising its jurisdiction<sup>1</sup>.

The Registrar must give as long notice in advance as is reasonably possible of the date of hearing of any appeal or application:

- 2486 (1) to the appellant; and
- 2487 (2) to the respondent and any other party directly affected by the order or ruling to which the appeal or application<sup>2</sup> relates<sup>3</sup>.

Where a party to whom notice is required to be given is at the material time in custody, notice must instead be given to the person having custody of him<sup>4</sup>.

1 CrimPR 65.10(1).

2 Ie under the Criminal Justice Act 1987 s 9(11) or the Criminal Procedure and Investigations Act 1996 s 35(1): see PARAS 1921-1922 ante.

3 CrimPR 65.10(2). CrimPR 65.10(2) does not, however, apply to proceedings before a judge of the court under CrimPR 65.6 (see PARA 1928 ante): CrimPR 65.10(3). CrimPR 65.1-65.10 (see PARAS 1923-1932 ante) applies with the necessary modifications to an appeal under the Criminal Justice Act 2003 s 47 (not yet in force: see PARA 1933 post): CrimPR 65.11.

4 CrimPR 65.10(4).

### **UPDATE**

### **1932 Registrar's powers and duties**

TEXT AND NOTES--CrimPR Pt 65 substituted: see PARA 1923-1930.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(iv) Order for Discharge of Jury and Continuation of Trial Without Jury/1933. Appeal against order for discharge of jury and continuation of trial without jury.

#### **(iv) Order for Discharge of Jury and Continuation of Trial Without Jury**

##### **1933. Appeal against order for discharge of jury and continuation of trial without jury.**

Where a judge discharges the jury because jury tampering appears to have taken place, he may make an order that the trial or a new trial is to be conducted without a jury<sup>1</sup>. An appeal against such an order lies to the Court of Appeal<sup>2</sup> but only with the leave of the judge or the Court of Appeal<sup>3</sup>. On the termination of the hearing of such an appeal, the Court of Appeal may confirm or revoke the order<sup>4</sup>.

1 See the Criminal Justice Act 2003 s 46; and PARA 1284 ante.

2 See *ibid* s 47(1); and PARA 1284 ante.

3 *Ibid* s 47(2).

4 *Ibid* s 47(4).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(v) Restrictions on Reporting and Public Access/1934. Appeal from order restricting or preventing reports or restricting public access.

## **(v) Restrictions on Reporting and Public Access**

### **1934. Appeal from order restricting or preventing reports or restricting public access.**

A person aggrieved may appeal to the Court of Appeal, if that court grants leave, against:

- 2488 (1) an order postponing or prohibiting reporting<sup>1</sup> made in relation to a trial on indictment<sup>2</sup>;
- 2489 (2) an order made by the Crown Court before the determination of sentence restricting the reporting of a derogatory assertion<sup>3</sup> in a case where the court has convicted a person on trial on indictment<sup>4</sup>;
- 2490 (3) any order restricting the access of the public<sup>5</sup> to the whole or any part of a trial on indictment or to any proceedings ancillary to such a trial<sup>6</sup>; or
- 2491 (4) any order restricting the publication of any report of the whole or any part of a trial on indictment or any such ancillary proceedings<sup>7</sup>;

and the decision of the Court of Appeal is final<sup>8</sup>.

On an application for leave to appeal, a judge has power to give such directions as appear to him to be appropriate and, in particular, power:

- 2492 (a) to order the production in court of any transcript or note of proceedings or other document<sup>9</sup>;
- 2493 (b) to give directions as to persons who are to be parties to the appeal or who may be parties to it if they wish and as to service of documents on any person<sup>10</sup>;

and the Court of Appeal has the same powers as a single judge<sup>11</sup>.

Any party to such an appeal may give evidence before the court orally or in writing<sup>12</sup>.

On the hearing of an appeal the court has power:

- 2494 (i) to stay any proceedings in any other court until after the appeal is disposed of<sup>13</sup>;
- 2495 (ii) to confirm, reverse or vary the order complained of<sup>14</sup>; and
- 2496 (iii) to make such order as to costs as it thinks fit<sup>15</sup>.

1     le under the Contempt of Court Act 1981 s 4 or s 11: see PARA 1301 ante. On an appeal against an order under s 4(2), the Court of Appeal's duty is to come to its own independent decision on the matter, and not merely to review the judge's decision: *R (on the application of Telegraph Group plc) v Sherwood* [2001] EWCA Crim 1075, [2001] 1 WLR 1983, [2001] 28 LS Gaz R 42. If an order under the Contempt of Court Act 1981 s 4(2) is set aside on an appeal under the Criminal Justice Act 1988 s 159 costs will not automatically be awarded against the prosecution; such an order may be made where an order for reporting restrictions has been improperly applied for and wrongly made: *R v News Group Newspapers Ltd* (1999) Times, 21 May, CA.

2 Criminal Justice Act 1988 s 159(1)(a).

3 le under the Criminal Procedure and Investigations Act 1996 s 58(7) or (8): see PARA 1301 ante; and LIBEL AND SLANDER vol 28 (Reissue) PARA 302 et seq.

4 Criminal Justice Act 1988 s 159(1)(aa) (added by the Criminal Procedure and Investigations Act 1996 s 61(6)).

5 As to applications for such orders see PARA 1268 ante.

6 Criminal Justice Act 1988 s 159(1)(b).

7 Ibid s 159(1)(c).

8 Ibid s 159(1). Subject to rules of court, the jurisdiction of the Court of Appeal under s 159 (as amended) must be exercised by the criminal division of the court: s 159(2). As to applications for leave to appeal see further PARAS 1935-1936 post.

9 Ibid s 159(3)(a).

10 Ibid s 159(3)(b).

11 Ibid s 159(3).

12 Ibid s 159(4). Section 159(4) is subject to rules of court made by virtue of s 159(6): s 159(4). Rules of court may make, in relation to trials satisfying specified conditions, special provision as to the practice and procedure to be followed in relation to hearings in camera and appeals from orders for such hearings and may, in particular, but without prejudice to the generality of this provision, provide that the Criminal Justice Act 1988 s 159(4) does not have effect: s 159(6) (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035, art 3, Sch para 27(1), (2)). See CrimPR 16.10 (see PARA 1268 ante); and CrimPR 67.2 (see PARA 1936 post). There is no right of appeal against a refusal to order that proceedings be heard in camera: *R v S* [1995] 2 Cr App Rep 347, CA.

There is nothing to prevent an applicant putting written submissions before the Court of Appeal either at the leave stage or, if leave is granted, at the stage when the matter is to be determined: *Ex p Guardian Newspapers* (1993) Times, 26 October, CA.

13 Criminal Justice Act 1988 s 159(5)(a).

14 Ibid s 159(5)(b).

15 Ibid s 159(5)(c). Section 159(5)(c) (see head (iii) in text) does not authorise an award of costs out of central funds: *Steele, Ford & Newton v Crown Prosecution Service (No 2)* [1994] 1 AC 22, sub nom *Steele, Ford & Newton v Crown Prosecution Service* [1993] 2 All ER 769, HL. As to the exercise of discretion under the Criminal Justice Act 1988 s 159(5)(c) see *R v News Group Newspapers Ltd* (1999) Times, 21 May, CA.

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APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(v) Restrictions on Reporting and Public Access/1935. Appeal from order restricting or preventing reports; procedure.

### **1935. Appeal from order restricting or preventing reports; procedure.**

An application for leave to appeal against:

- 2497 (1) an order postponing or prohibiting reporting made in relation to a trial on indictment<sup>1</sup>;
- 2498 (2) an order made by the Crown Court before the determination of sentence restricting the reporting of a derogatory assertion in a case where the court has convicted a person on trial on indictment<sup>2</sup>; or
- 2499 (3) an order restricting the publication of any report of the whole or any part of a trial on indictment or of any proceedings ancillary to such a trial<sup>3</sup>,

must be made within 14 days<sup>4</sup> after the date on which the order was made by serving notice<sup>5</sup> on the Registrar of Criminal Appeals<sup>6</sup>. The applicant must at the same time serve a copy of the application on the Crown Court officer at the place where the order was made, on the prosecutor and the defendant and on any other interested person<sup>7</sup>.

A prosecutor or a defendant or any interested person may, not later than three days after service of the application, notify the Registrar in writing that he wishes to be made a respondent to the appeal if leave is granted, and must serve a copy of such notice on the applicant<sup>8</sup>.

The application may be determined without a hearing<sup>9</sup>; and, where the Court of Appeal grants leave to appeal:

- 2500 (a) the notice of application for leave stands as notice of appeal, unless the Court otherwise orders<sup>10</sup>;
- 2501 (b) the court must direct that the person in whose favour the order was made is to be a respondent to the appeal and must determine what, if any, other persons are to be respondents or may be respondents if they wish<sup>11</sup>;
- 2502 (c) the evidence of any witness must be given in writing, unless the court otherwise orders<sup>12</sup>;
- 2503 (d) the rule<sup>13</sup> as to the supply of documents and other exhibits applies, with the necessary modifications<sup>14</sup>; and
- 2504 (e) the Registrar must notify the parties of the time and place of the hearing of the appeal<sup>15</sup>.

<sup>1</sup> Ie under the Criminal Justice Act 1988 s 159(1)(a): see PARA 1934 head (1) ante.

<sup>2</sup> Ie under ibid s 159(1)(aa) (as added): see PARA 1934 head (2) ante.

<sup>3</sup> Ie under ibid s 159(1)(c): see PARA 1934 head (4) ante.

<sup>4</sup> The period of 14 days may be extended by the Court or a judge of the Court, before or after it expires, on an application which must be made in writing, specifying the grounds of the application, and served on the Registrar; and a copy of the application must be served by the applicant on every person who is to be served with a copy of the application for leave to appeal (see the text and note 7 infra): CrimPR 67.1(4). Such

application must be determined without a hearing unless the Court of Appeal or a judge of the court, as the case may be, directs otherwise: CrimPR 67.1(5).

5 The notice must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA.

6 CrimPR 67.1(1).

7 CrimPR 67.1(2). As to service of documents see PARA 1862 ante. 'Interested person' means a person or organisation who is not the prosecutor or defendant but who has some other legal interest in a criminal case: CrimPR 2.4, glossary. See also 1901 note 4 ante.

8 CrimPR 67.1(3).

9 CrimPR 67.1(6). As to a judge's power to give directions on such an application see PARA 1934 ante.

10 CrimPR 67.1(7)(a).

11 CrimPR 67.1(7)(b).

12 CrimPR 67.1(7)(c).

13 Ie CrimPR 68.11: see PARA 1857 ante.

14 CrimPR 67.1(7)(d).

15 CrimPR 67.1(7)(e). As to the hearing of the appeal see PARA 1934 ante.

## UPDATE

### 1935 Appeal from order restricting or preventing reports; procedure

TEXT AND NOTES--CrimPR Pt 67 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 69.

NOTE 5--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

NOTE 7--CrimPR 2.4, glossary now Criminal Procedure Rules 2010, SI 2010/60, r 2.4, glossary. Definition of 'interested party' not reproduced.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(3) OTHER APPEALS TO THE COURT OF APPEAL/(v) Restrictions on Reporting and Public Access/1936. Appeal from order restricting public access; procedure.

### **1936. Appeal from order restricting public access; procedure.**

Where a prosecutor or a defendant has served<sup>1</sup> a notice of intention to apply for an order that all or part of a trial be held in camera for reasons of national security or for the protection of a witness or any other person, and the notice has been displayed<sup>2</sup>, a person aggrieved may serve notice in writing<sup>3</sup> on the Registrar of Criminal Appeals, within seven days of the display of the notice of intention, that he intends to appeal<sup>4</sup> against any order that may be made on the prosecutor's or defendant's application; and he must serve a copy of such notice on the appropriate officer of the Crown Court where the trial is to take place, on the prosecutor and the defendant and on any other interested person<sup>5</sup>.

Where an order restricting public access is made at the trial, a person aggrieved who has not served such a notice may apply for leave to appeal against the order by serving notice in writing<sup>6</sup>, which must be served on the Registrar within 24 hours after the making of the order, and he must forthwith serve a copy of such notice on each of the specified<sup>7</sup> persons<sup>8</sup>. Where an order restricting public access has been made, and a person aggrieved has served<sup>9</sup> a notice, the Crown Court officer must forthwith upon the making of the order notify the Registrar of its making, and the applicant for the order must, as soon as practicable, send the Registrar a copy of any transcript or note of the application for the order and of any documents that were in evidence at the Crown Court<sup>10</sup>.

An application for leave to appeal<sup>11</sup> must be determined by a judge of the Court of Appeal or the Court, as the case may be, without a hearing; and, where leave to appeal is granted, the appeal must be determined without a hearing<sup>12</sup>.

The Registrar must, as soon as practicable, serve notice of the order of the court disposing of an appeal on the person aggrieved and on each of the specified<sup>13</sup> persons<sup>14</sup>.

1    Ie under CrimPR 16.10(1): see PARA 1268 ante.

2    Ie under CrimPR 16.10(2): see PARA 1268 ante.

3    The notice must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA: CrimPR 67.2(2).

4    Ie under the Criminal Justice Act 1988 s 159(1)(b): see PARA 1934 head (2) ante. Where an order restricting public access is made at the trial, the notice is treated as the application for leave to appeal against the order: CrimPR 67.2(3).

5    See CrimPR 67.2(1)-(3). For the meaning of 'interested person' see PARA 1935 note 7 ante. As to service of documents see PARA 1862 ante.

6    The notice must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA: CrimPR 67.2(4).

7    Ie specified in CrimPR 67.2(2): see the text to note 5 supra.

8    CrimPR 67.2(4).

9 le under CrimPR 67.2(2) or (4) (see the text and notes 5, 8 supra).

10 CrimPR 67.2(5).

11 le under the Criminal Justice Act 1988 s 159(1)(b): see PARA 1934 head (2) ante.

12 CrimPR 67.2(6), (7). As to the hearing of the appeal see further PARA 1934 ante. There is no discretion under CrimPR 67.2(7) for the Court of Appeal to order an oral hearing of an appeal where a judge had ordered that parts of the proceedings in the defendant's trial were to be heard in camera pursuant to the Criminal Justice Act 1988 s 159 (see PARA 1934 ante): see *Re A* [2006] EWCA Crim 04, [2006] 2 All ER 1, [2006] 1 WLR 1361.

13 See note 7 supra.

14 CrimPR 67.2(8). The Criminal Justice Act 1988 s 159(4) (see PARA 1934 ante) does not apply to proceedings to which the above provisions apply: CrimPR 67.2(9).

## **UPDATE**

### **1936 Appeal from order restricting public access; procedure**

TEXT AND NOTES--CrimPR Pt 67 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 69.

NOTES 3, 6--*Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904 Annex D further amended: *Practice Direction (Criminal Appeals: Forms)* [2007] 1 WLR 2607, CA.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(i) Cases that may be Re-tried/1937. Cases that may be re-tried.

## **(4) RE-TRIAL FOR SERIOUS OFFENCES**

### **(i) Cases that may be Re-tried**

#### **1937. Cases that may be re-tried.**

The provisions<sup>1</sup> relating to re-trial for serious offences apply where a person has been acquitted of a qualifying offence<sup>2</sup> in proceedings:

- 2505 (1) on indictment in England and Wales<sup>3</sup>;
- 2506 (2) on appeal against a conviction, verdict or finding in proceedings on indictment in England and Wales<sup>4</sup>; or
- 2507 (3) on appeal from a decision on such an appeal<sup>5</sup>.

A person acquitted of an offence in such proceedings is treated for these purposes as also acquitted of any qualifying offence of which he could have been convicted in the proceedings because of the first-mentioned offence being charged in the indictment, except an offence:

- 2508 (a) of which he has been convicted<sup>6</sup>;
- 2509 (b) of which he has been found not guilty by reason of insanity<sup>7</sup>; or
- 2510 (c) in respect of which in proceedings where he has been found to be under a disability<sup>8</sup>, a finding has been made that he did the act or made the omission charged against him<sup>9</sup>.

The provisions relating to re-trial for a serious offence also apply where a person has been acquitted, in proceedings elsewhere than in the United Kingdom<sup>10</sup>, of an offence under the law of the place where the proceedings were held, if the commission of the offence as alleged would have amounted to or included the commission (in the United Kingdom or elsewhere) of a qualifying offence<sup>11</sup>.

<sup>1</sup> ie the Criminal Justice Act 2003 Pt 10 (ss 75-97). The provisions of Pt 10 apply whether the acquittal was before or after the passing of the Criminal Justice Act 2003: s 75(6).

Rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of Pt 10: s 93(1). Without limiting s 93(1), rules of court may in particular make provision as to procedures to be applied in connection with ss 76-82, 84, 88-90 (see PARAS 1938-1942, 1946-1948 post): s 93(2).

<sup>2</sup> References in *ibid* s 75(1), (2) (see the text and notes 3-9 *infra*) to a qualifying offence do not include references to an offence which, at the time of the acquittal, was the subject of an order under s 77(1) or (3) (see PARA 1939 post): s 75(3).

A 'qualifying offence' in Pt 7 is an offence listed in Sch 5 Pt 1: s 75(8). The offences listed in Sch 5 Pt 1 are:

213 (1) murder (see PARA 86 *et seq ante*) (Sch 5 para 1);

214 (2) an offence under the Criminal Attempts Act 1981 s 1 (see PARA 79 *ante*) of attempting to commit murder (Criminal Justice Act 2003 Sch 5 para 2);

- 215 (3) an offence under the Offences against the Person Act 1861 s 4 (soliciting murder: see PARA 104 ante) (Criminal Justice Act 2003 Sch 5 para 3);
- 216 (4) manslaughter (see PARA 86 et seq ante) (Sch 5 para 4);
- 217 (5) kidnapping (see PARA 136 et seq ante) (Sch 5 para 5);
- 218 (6) an offence under the Sexual Offences Act 1956 s 1 (repealed) or the Sexual Offences Act 2003 s 1 (rape: see PARA 165 ante) (Criminal Justice Act 2003 Sch 5 para 6);
- 219 (7) an offence under the Criminal Attempts Act 1981 s 1 of attempting to commit an offence under the Sexual Offences Act 1956 s 1 or the Sexual Offences Act 2003 s 1 (attempted rape) (Criminal Justice Act 2003 Sch 5 para 7);
- 220 (8) an offence under the Sexual Offences Act 1956 s 5 (repealed: intercourse with a girl under 13) (Criminal Justice Act 2003 Sch 5 para 8);
- 221 (9) an offence of incest under the Sexual Offences Act 1956 s 10 (repealed) alleged to have been committed with a girl under 13 by a man (Criminal Justice Act 2003 Sch 5 para 9);
- 222 (10) an offence under the Sexual Offences Act 2003 s 2 (assault by penetration: see PARA 167 ante) (Criminal Justice Act 2003 Sch 5 para 10);
- 223 (11) an offence under the Sexual Offences Act 2003 s 4 (causing a person to engage in sexual activity without consent: see PARA 171 ante) where it is alleged that the activity involved penetration within s 4(4)(a)-(d) (Criminal Justice Act 2003 Sch 5 para 11);
- 224 (12) an offence under the Sexual Offences Act 2003 s 5 (rape of a child under 13: see PARA 166 ante) (Criminal Justice Act 2003 Sch 5 para 12);
- 225 (13) an offence under the Criminal Attempts Act 1981 s 1 of attempting to commit an offence under the Sexual Offences Act 2003 s 5 (attempted rape of a child under 13) (Criminal Justice Act 2003 Sch 5 para 13);
- 226 (14) an offence under the Sexual Offences Act 2003 s 6 (assault of a child under 13 by penetration: see PARA 168 ante) (Criminal Justice Act 2003 Sch 5 para 14);
- 227 (15) an offence under the Sexual Offences Act 2003 s 8 (causing a child under 13 to engage in sexual activity: see PARA 172 ante) where it is alleged that an activity involving penetration within s 8(2)(a)-(d) was caused (Criminal Justice Act 2003 Sch 5 para 15);
- 228 (16) an offence under the Sexual Offences Act 2003 s 30 (sexual activity with a person with a mental disorder impeding choice: see PARA 201 ante) where it is alleged that the touching involved penetration within s 30(3)(a)-(d) (Criminal Justice Act 2003 Sch 5 para 16);
- 229 (17) an offence under the Sexual Offences Act 2003 s 31 (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity: see PARA 201 ante) where it is alleged that an activity involving penetration within s 31(3)(a)-(d) was caused (Criminal Justice Act 2003 Sch 5 para 17);
- 230 (18) an offence under the Customs and Excise Management Act 1979 s 50(2) (unlawful importation of controlled drug: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 994) alleged to have been committed in respect of a Class A drug (as defined by the Misuse of Drugs Act 1971 s 2) (Criminal Justice Act 2003 Sch 5 para 18);
- 231 (19) an offence under the Customs and Excise Management Act 1979 s 68(2) (unlawful exportation of controlled drug: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1029) alleged to have been committed in respect of a Class A drug (as defined by the Misuse of Drugs Act 1971 s 2) (Criminal Justice Act 2003 Sch 5 para 19);
- 232 (20) an offence under the Customs and Excise Management Act 1979 s 170(1) or (2) (fraudulent evasion in respect of controlled drug: see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 1178) alleged to have been committed in respect of a Class A drug (as defined by the



Misuse of Drugs Act 1971 s 2: see MEDICINAL PRODUCTS AND DRUGS vol 30(2) (Reissue) PARA 239)  
(Criminal Justice Act 2003 Sch 5 para 20);

- 233 (21) an offence under the Misuse of Drugs Act 1971 s 4(2) (producing or being concerned in production of Class A drug: see PARA 772 ante) alleged to have been committed in relation to a Class A drug (as defined by s 2) (Criminal Justice Act 2003 Sch 5 para 21);
- 234 (22) an offence under the Criminal Damage Act 1971 s 1(2) alleged to have been committed by destroying or damaging property by fire (arson endangering life: see PARA 336 ante) (Criminal Justice Act 2003 Sch 5 para 22);
- 235 (23) an offence under the Explosive Substances Act 1883 s 2 (causing explosion likely to endanger life or property: see PARA 127 ante) (Criminal Justice Act 2003 Sch 5 para 23);
- 236 (24) an offence under the Explosive Substances Act 1883 s 3(1)(a) (intent or conspiracy to cause explosion likely to endanger life or property: see PARA 128 ante) (Criminal Justice Act 2003 Sch 5 para 24);
- 237 (25) an offence under the International Criminal Court Act 2001 s 51 or s 52 (genocide, crimes against humanity and war crimes: see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARAS 454, 455) (Criminal Justice Act 2003 Sch 5 para 25);
- 238 (26) an offence under the Geneva Conventions Act 1957 s 1 (grave breaches of the Geneva Conventions: see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 424) (Criminal Justice Act 2003 Sch 5 para 26);
- 239 (27) an offence under the Terrorism Act 2000 s 56 (directing terrorist organisation: see PARA 441 ante) (Criminal Justice Act 2003 Sch 5 para 27);
- 240 (28) an offence under the Taking of Hostages Act 1982 s 1 (hostage-taking: see PARA 468 ante) (Criminal Justice Act 2003 Sch 5 para 28);
- 241 (29) an offence under the Criminal Law Act 1977 s 1 (see PARA 67 ante) of conspiracy to commit an offence listed in heads (1)-(28) supra (Criminal Justice Act 2003 Sch 5 para 29).

A reference in Sch 5 to an offence includes a reference to an offence of aiding, abetting, counselling or procuring the commission of an offence: Sch 5 para 51. A reference to an enactment includes a reference to an enactment as enacted and as amended from time to time: Sch 5 para 52.

3 Ibid s 75(1)(a).

4 Ibid s 75(1)(b).

5 Ibid s 75(1)(c).

6 Ibid s 75(2)(a).

7 Ibid s 75(2)(b).

8 Ie as defined by the Criminal Procedure (Insanity) Act 1964 s 4 (as substituted and amended: see PARA 1265 ante).

9 Criminal Justice Act 2003 s 75(2)(c).

10 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

11 Criminal Justice Act 2003 s 75(4). Conduct punishable under the law in force elsewhere than in the United Kingdom is an offence under that law for the purposes of s 75(4), however it is described in that law: s 75(5).

## UPDATE

### 1937 Cases that may be re-tried

NOTE 2--Also, head (30) an offence under the Corporate Manslaughter and Corporate Homicide Act 2007 s 1 (see PARA 38A): 2003 Act Sch 5 para 4A (added by 2007 Act Sch 2 para 3(2)).

Heads (6)-(9). See Violent Crime Reduction Act 2006 s 55 (continuity of sexual offences law).

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APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(ii) Application for Re-trial/1938. Application to Court of Appeal.

## **(ii) Application for Re-trial**

### **1938. Application to Court of Appeal.**

A prosecutor<sup>1</sup> may apply to the Court of Appeal<sup>2</sup> for an order:

- 2511 (1) quashing a person's acquittal<sup>3</sup> in specified proceedings in England and Wales<sup>4</sup>; and
- 2512 (2) ordering him to be re-tried for the qualifying offence<sup>5</sup>.

A prosecutor may apply to the Court of Appeal, in the case of a person acquitted elsewhere than in the United Kingdom<sup>6</sup>, for:

- 2513 (a) a determination whether the acquittal is a bar to the person being tried in England and Wales for the qualifying offence<sup>7</sup>; and
- 2514 (b) if it is, an order that the acquittal is not to be a bar<sup>8</sup>.

A prosecutor may make such an application<sup>9</sup> only with the written consent of the Director of Public Prosecutions<sup>10</sup>. The Director of Public Prosecutions may give his consent only if satisfied that:

- 2515 (i) there is evidence as respects which the specified requirements<sup>11</sup> appear to be met<sup>12</sup>;
- 2516 (ii) it is in the public interest for the application to proceed<sup>13</sup>; and
- 2517 (iii) any trial pursuant to an order on the application would not be inconsistent with certain obligations<sup>14</sup> of the United Kingdom<sup>15</sup>.

1 For the purposes of the Criminal Justice Act 2003 Pt 10 (ss 75-97) 'prosecutor' means an individual or body charged with duties to conduct criminal prosecutions: s 95(1).

2 Subject to rules of court made under the Supreme Court Act 1981 s 53(1) (power by rules to distribute business of Court of Appeal between its civil and criminal divisions) the jurisdiction of the Court of Appeal under Pt 10 is to be exercised by the criminal division of that court, and references in Pt 10 to the Court of Appeal are to be construed as references to that division: s 95(2). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

3 References to acquittal are to acquittal in circumstances within the Criminal Justice Act 2003 s 75(1), (4) (see PARA 1937 ante): ss 75(7), 95(1).

4 Ibid s 76(1)(a).

5 Ibid s 76(1)(b). For the meaning of 'qualifying offence' see s 75(8), Sch 5 Pt 1; and PARA 1937 note 2 ante (definition applied by virtue of s 95(1)). Not more than one application may be made under s 76(1) or (2) (see the text to notes 6-8 infra) in relation to an acquittal: s 76(5).

Notice of the application must be sent in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479,

Annex D, CA, to the Registrar of Criminal Appeals and the acquitted person: see CrimPR 41.2(1). That notice must, where practicable, be accompanied by: (1) relevant witness statements which are relied upon as forming new and compelling evidence of guilt of the acquitted person as well as any relevant witness statements from the original trial; (2) any unused statements which might reasonably be considered capable of undermining the application or of assisting an acquitted person's application to oppose that application; (3) a copy of the indictment and paper exhibits from the original trial; (4) copies of the transcript of the summing up and any other relevant transcripts from the original trial; and (5) any other documents relied upon to support the application: CrimPR 41.2(2). The prosecutor must, as soon as practicable after service of that notice on the acquitted person, file with the Registrar a witness statement or certificate of service which exhibits a copy of that notice: CrimPR 41.2(3). An acquitted person who wants to oppose an application under the Criminal Justice Act 2003 s 76 must serve a response in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA, on the Registrar and the prosecutor which: (a) indicates if he is also seeking an order under the Criminal Justice Act 2003 s 80(6) (see PARA 1940 post) for the production of any document, exhibit or other thing, or a witness to attend for examination and to be examined before the Court of Appeal; and (b) exhibits any relevant documents: CrimPR 41.3(1). The acquitted person must serve that response not more than 28 days after receiving notice under CrimPR 41.2, unless the Court of Appeal extends that period, either before or after that period expires: CrimPR 41.3(2), (3). The Court of Appeal's power to extend the period may be exercised by a single judge of the Court of Appeal or the Registrar of Criminal Appeals, subject to the power of the Court of Appeal or a single judge respectively to re-determine the matter if the applicant for the extension serves a notice of renewal in the prescribed form within 14 days of service on him of the determination or such longer period as the Court of Appeal permits: see CrimPR 41.10, 41.11.

The power of the Court of Appeal to determine procedural directions for the efficient and effective preparation of an application by a prosecutor under the Criminal Justice Act 2003 s 76(1) or (2) may be exercised by a single judge, or the Registrar: Criminal Justice Act 2003 (Retrial for Serious Offences) Order 2005, SI 2005/679, art 4(1). 'Procedural directions' means directions for the efficient and effective preparation of an application by a prosecutor under the Criminal Justice Act 2003 s 76(1) or (2): Criminal Justice Act 2003 (Retrial for Serious Offences) Order 2005, SI 2005/679, art 4(2).

A single judge may give such procedural directions as he thinks fit: (i) when acting under art 4(1); (ii) on a reference from the Registrar; (iii) of his own motion, when he is exercising, or considering whether to exercise, any power of his in relation to the application or appeal: art 4(3). The Registrar may give such procedural directions as he thinks fit when acting under art 4(1), or of his own motion: art 4(4).

If a single judge gives, or refuses to give, procedural directions, the Court of Appeal may, on an application to it by a prosecutor or an acquitted person: (A) confirm, set aside or vary any procedural directions given by the single judge; and (B) give such procedural directions as he thinks fit: art 5(1), (2), (5). If the Registrar gives, or refuses to give, procedural directions, a single judge may, on an application to him by a prosecutor or acquitted person confirm, set aside or vary any procedural directions given by the Registrar and give such procedural directions as he thinks fit: art 5(3), (4), (5).

6 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

7 Criminal Justice Act 2003 s 76(2)(a).

8 Ibid s 76(2)(b).

9 Ie under ibid s 76(1), (2) (see the text and notes 1-8 supra). The prosecutor may abandon such an application; for the procedure see CrimPR 41.16.

10 Criminal Justice Act 2003 s 76(3). The Prosecution of Offences Act 1985 s 1(7) (Director of Public Prosecutions' functions exercisable by Crown Prosecutor: see PARA 1071 ante) does not apply to the provisions of the Criminal Justice Act 2003 Pt 10 other than s 85(2)(a) (see PARA 1943 head (a) post): s 92(1). In the absence of the Director of Public Prosecutions, his functions under those provisions may be exercised by a person authorised by him: s 92(2). Such an authorisation: (1) may relate to a specified person or to persons of a specified description; and (2) may be general or relate to a specified function or specified circumstances: s 92(3).

11 Ie the requirement specified in ibid s 78 (see PARA 1939 post).

12 Ibid s 76(4)(a).

13 Ibid s 76(4)(b).

14 Ie the obligation of the United Kingdom under the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485) art 31 or art 34 relating to the principle of *ne bis in idem*.

15 Criminal Justice Act 2003 s 76(4)(c).

**UPDATE**

**1938 Application to Court of Appeal**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

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 APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(ii) Application for Re-trial/1939.  
 Determination by Court of Appeal.

### **1939. Determination by Court of Appeal.**

On an application for a re-trial of a person acquitted of a qualifying offence<sup>1</sup>, the Court of Appeal:

- 2518 (1) if satisfied that the specified requirements are met<sup>2</sup>, must make the order applied for<sup>3</sup>;
- 2519 (2) otherwise, it must dismiss the application<sup>4</sup>.

Where, on an application<sup>5</sup>, in the case of an acquittal<sup>6</sup> outside the United Kingdom, for a determination whether that acquittal is a bar to the acquitted person being tried in England and Wales for the qualifying offence, and if it is, an order that the acquittal is not to be a bar, the Court of Appeal determines that the acquittal is a bar to the person being tried for the qualifying offence<sup>7</sup>, the court:

- 2520 (a) if satisfied that the specified requirements are met<sup>8</sup>, must make the order applied for;
- 2521 (b) otherwise, must make a declaration to the effect that the acquittal is a bar to the person being tried for the offence<sup>9</sup>.

Where the Court of Appeal determines that the acquittal is not a bar to the person being tried for the qualifying offence, it must make a declaration to that effect<sup>10</sup>.

There are two sets of specified requirements, both of which must be satisfied. The first set is met if there is new and compelling evidence against the person acquitted in relation to the qualifying offence<sup>11</sup>. The second set is met if in all the circumstances it is in the interests of justice for the Court to make the order applied for<sup>12</sup>. That question is to be determined having regard in particular to:

- 2522 (i) whether existing circumstances make a fair trial unlikely<sup>13</sup>;
- 2523 (ii) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed<sup>14</sup>;
- 2524 (iii) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor<sup>15</sup> to act with due diligence or expedition<sup>16</sup>;
- 2525 (iv) whether, since those proceedings or, if later, since the commencement of the provisions relating to the re-trial of serious offences<sup>17</sup>, any officer or prosecutor has failed to act with due diligence or expedition<sup>18</sup>.

1    Ie an application under the Criminal Justice Act 2003 s 76(1): see PARA 1938 ante.

2    Ie the requirements of *ibid* ss 78, 79.

3    *Ibid* s 77(1)(a).

4 Ibid s 77(1)(b). As to an appeal against a decision made on an application under s 76(1) or (2) (see PARA 1966 post). As to the jurisdiction of the Court of Appeal see PARA 1938 note 2 ante.

5 le under ibid s 76(2): see PARA 1938 ante.

6 References to acquittal are to acquittal in circumstances within ibid s 75(1), (4) (see PARA 1937 ante): ss 75(7), 95(1).

7 For the meaning of 'qualifying offence' see ibid s 75(8), Sch 5 Pt 1; and PARA 1937 note 2 ante (definition applied by virtue of s 95(1)).

8 le the requirements of ibid ss 78, 79.

9 Ibid s 77(2), (3).

10 Ibid s 77(4).

11 See ibid s 78(1). For these purposes, evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related): s 78(2). Evidence is compelling if: (1) it is reliable; (2) it is substantial; and (3) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person: s 78(3). The outstanding issues are the issues in dispute in the proceedings in which the person was acquitted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related: s 78(4). For the purposes of s 78, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person: s 78(5). See also *R v Dunlop* [2006] EWCA Crim 1354, (2006) Times, 14 September, [2006] All ER (D) 96 (Sep) (re-trial ordered of defendant twice acquitted for murder whose subsequent admitting of the offence led to his conviction for perjury).

12 See the Criminal Justice Act 2003 s 79(1).

13 Ibid s 79(2)(a). In connection with the 'fair trial' requirement, and the degree to which the requirements for a fair trial must be weighed against the interests of justice in retrying the acquitted person, see *R v Dunlop* [2006] EWCA Crim 1354, (2006) Times, 14 September, [2006] All ER (D) 96 (Sep).

14 Criminal Justice Act 2003 s 79(2)(b).

15 For the meaning of 'prosecutor' see PARA 1938 note 1 ante.

16 Criminal Justice Act 2003 s 79(2)(c).

17 le the commencement of ibid Pt 10 (ss 75-97) which came into force as follows:

242 (1) ss 74-92, 94, 95, Sch 5 Pts I, III came into force on 4 April 2005 (Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 2(1), Sch 1 paras 4, 5, 30);

243 (2) the Criminal Justice Act 2003 s 93 came into force on 29 January 2004 (Criminal Justice Act 2003 (Commencement No 2 and Saving Provisions) Order 2004, SI 2004/81, art 4);

244 (3) the Criminal Justice Act 2003 s 96, Sch 5 Pt II came into force on 18 April 2005 (Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005, SI 2005/950, art 3); and

245 (4) the Criminal Justice Act 2003 s 97 came into force on 7 March 2005 (Criminal Justice Act 2003 (Commencement No 7) Order 2005, SI 2005/373, art 2).

18 Criminal Justice Act 2003 s 79(2)(d). In s 79(2), references to an officer or prosecutor include references to a person charged with corresponding duties under the law in force elsewhere than in England and Wales: s 79(3). Where the earlier prosecution was conducted by a person other than a prosecutor, s 79(2)(c) (see head (iii) in the text) applies in relation to that person as well as in relation to a prosecutor: s 79(4).

## UPDATE

### 1939 Determination by Court of Appeal

NOTES 11, 13--*R v Dunlop*, cited, reported at [2007] 1 Cr App Rep 115.

NOTE 11--See *R v Miell* [2007] EWCA Crim 3130, [2008] 1 WLR 627 (offender's conviction for perjury not compelling, reliable or highly probative evidence that he committed murder as confession contrary to forensic evidence); and *R v G(G)* [2009] EWCA Crim 1077, [2009] All ER (D) 121 (Jun).

NOTE 12--See *R v A* [2008] EWCA Crim 2908, [2009] 3 All ER 898.



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APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(ii) Application for Re-trial/1940. Procedure and evidence.

#### **1940. Procedure and evidence.**

A prosecutor<sup>1</sup> who wishes (1) to make an application for the re-trial of a person acquitted of a qualifying offence; or (2) for the determination in relation to a person acquitted outside the United Kingdom whether that acquittal is a bar to that person being tried in England and Wales for the qualifying offence, and, if it is, an order that the acquittal is not to be a bar<sup>2</sup>, must give notice of the application to the Court of Appeal<sup>3</sup>. Within two days beginning with the day on which any such notice is given, notice of the application must be served by the prosecutor on the person to whom the application relates, charging him with the offence to which it relates or, if he has been charged with it in specified circumstances<sup>4</sup>, stating that he has been so charged<sup>5</sup>. The Court of Appeal must consider the application at a hearing<sup>6</sup>. For the purposes of the application, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice:

- 2526 (a) order the production of any document, exhibit or other thing, the production of which appears to the court to be necessary for the determination of the application<sup>7</sup>; and
- 2527 (b) order any witness who would be a compellable witness in proceedings pursuant to an order or declaration made on the application to attend for examination and be examined before the court<sup>8</sup>.

The powers under heads (a) and (b) above are exercisable by a single judge, in the same manner as by the Court of Appeal and subject to the same provisions, or by the Registrar of Criminal Appeals<sup>9</sup>. If the single judge refuses an application on the part of a party to exercise in his favour such a power, the party is entitled to have his application determined by the Court of Appeal<sup>10</sup>; and if the Registrar refuses such an application, the party is entitled to have his application determined by the single judge<sup>11</sup>.

1 For the meaning of 'prosecutor' see PARA 1938 note 1 ante.

2 Ie under the Criminal Justice Act 2003 s 76(1) or (2): see PARA 1938 ante.

3 See *ibid* s 80(1). As to the jurisdiction of the Court of Appeal see PARA 1938 note 2 ante.

4 Ie in accordance with *ibid* s 87(4): see PARA 1945 note 4 post.

5 *Ibid* s 80(2). Section 80(2) applies whether the person to whom the application relates is in the United Kingdom or elsewhere, but the Court of Appeal may, on application by the prosecutor, extend the time for service under that provision if it considers it necessary to do so because of that person's absence from the United Kingdom: s 80(3).

6 *Ibid* s 80(4). The person to whom the application relates: (1) is entitled to be present at the hearing, although he may be in custody, unless he is in custody elsewhere than in England and Wales or Northern Ireland; and (2) is entitled to be represented at the hearing, whether he is present or not: s 80(5). The Court of Appeal may at one hearing consider more than one application (whether or not relating to the same person), but only if the offences concerned could be tried on the same indictment: s 80(7).

7 *Ibid* s 80(6)(a).

8 Ibid s 80(6)(b). An application for an order under s 80(6) must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA, and must be sent to the Registrar of Criminal Appeals and to each party to the application under the Criminal Justice Act 2003 s 76: CrimPR 41.4(2). An application must set out the reasons why the order was not sought from the court when the notice was served on the Registrar of Criminal Appeals under CrimPR 41.2 if the application is made by the prosecutor; or the response was served on the Registrar under CrimPR 41.3 if the application is made by the acquitted person: CrimPR 41.4(3). The application must be made at least 14 days before the day of the hearing of the application made under the Criminal Justice Act 2003 s 76 (see PARA 1938 ante): CrimPR 41.4(4). If the Court of Appeal makes an order on its own motion under the Criminal Justice Act 2003 s 80(6) or on application by the prosecutor it must serve notice and its reasons on all parties to the application for re-trial: CrimPR 41.4(5). The powers under the Criminal Justice Act 2003 s 80(6) may be exercised by a single judge of the Court of Appeal; in the event of a refusal of the application, the applicant is entitled to have his application determined by the Court of Appeal: Criminal Justice Act 2003 (Retrial for Serious Offences) Order 2005, SI 2005/679, art 2; CrimPR 41.10, 41.12. Notice of renewal of the application in the prescribed form must be served on the Registrar of Criminal Appeals within 14 days of notice of the single judge's decision being served on the applicant, unless that period is extended by the Court of Appeal: CrimPR 41.12(2). The powers under the Criminal Justice Act 2003 s 80(6) are also exercisable by the Registrar of Criminal Appeals; if the Registrar refuses an application for an order, the applicant is entitled to have his application determined by a single judge of the Court of Appeal: Criminal Justice Act 2003 (Retrial for Serious Offences) Order 2005, SI 2005/679, art 3; CrimPR 41.11. The notice of renewal in the prescribed form must be served within 14 days of notice of the Registrar's decision being served on the applicant, unless that period is extended by the Court of Appeal: CrimPR 41.11.

9 Criminal Justice Act 2003 (Retrial for Serious Offences) Order 2005, SI 2005/679, arts 2(1), 3(1).

10 Ibid art 2(2).

11 Ibid art 3(2).

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APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(ii) Application for Re-trial/1941. Restrictions on publication in the interests of justice.

#### **1941. Restrictions on publication in the interests of justice.**

Where it appears to the Court of Appeal<sup>1</sup> that the inclusion of any matter in a publication<sup>2</sup> would give rise to a substantial risk of prejudice to the administration of justice in a re-trial<sup>3</sup>, the court may order that the matter is not to be included in any publication while the order has effect<sup>4</sup>. The court may make such an order only if it appears to it necessary in the interests of justice to do so<sup>5</sup>. Such an order may apply to a matter which has been included in a publication published before the order takes effect, but such an order:

- 2528 (1) applies only to the later inclusion of the matter in a publication (whether directly or by inclusion of the earlier publication)<sup>6</sup>; and
- 2529 (2) does not otherwise affect the earlier publication<sup>7</sup>.

The court may at any time, of its own motion or on an application made by the Director of Public Prosecutions or the acquitted person, vary or revoke such an order<sup>8</sup>.

Where such an order is made, whether in England and Wales or Northern Ireland, and (while the order has effect) any matter is included in a publication in any part of the United Kingdom<sup>9</sup>, in contravention of the order, an offence is committed as follows:

- 2530 (a) where the publication is a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical is guilty of an offence<sup>10</sup>;
- 2531 (b) where the publication is a relevant programme:  
595
  - 75. (i) any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included; and
  - 76. (ii) any person having functions in relation to the programme corresponding to those of an editor of a newspaper,
- 596 2532 is guilty of an offence<sup>11</sup>.
- 2533 (c) In the case of any other publication, any person publishing it is guilty of an offence<sup>12</sup>.

A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>13</sup>.

If such an offence committed by a body corporate is proved: (A) to have been committed with the consent or connivance of; or (B) to be attributable to any neglect on the part of, an officer, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly<sup>14</sup>.

1 See PARA 1938 ante.

2 For the meaning of 'publication' see PARA 1917 note 2 ante.

3 'Re-trial' in the Criminal Justice Act 2003 s 82(1) means the trial of an acquitted person for a qualifying offence (see PARA 1937 ante) pursuant to an order made or that may be made under s 77 (see PARA 1939 ante): s 82(2).

4 Ibid s 82(1). Sections 82, 83 (see the text and notes 9-14 infra) extend to Scotland and Northern Ireland (see s 337(2)), with the result that the restrictions on reporting apply throughout the whole of the United Kingdom. After notice of an application has been given under s 80(1) (see PARA 1940 ante) relating to the acquitted person and the qualifying offence, the court may make an order under s 82 only: (1) of its own motion; or (2) on the application of the Director of Public Prosecutions: s 82(5). As to the Director of Public Prosecutions see PARA 1938 note 10 ante. Before such notice has been given, an order under s 82: (a) may be made only on the application of the Director of Public Prosecutions; and (b) may not be made unless, since the acquittal concerned, an investigation of the commission by the acquitted person of the qualifying offence has been commenced by officers: s 82(6).

An application by the Director of Public Prosecutions under s 82 must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA, and be served on the Registrar of Criminal Appeals and the acquitted person: CrimPR 41.8(1). However, if a notice of an application for re-trial has not been given and the Director of Public Prosecutions has indicated that there are reasons for not notifying the acquitted person of the application under the Criminal Justice Act 2003 s 82, the Court of Appeal (or a single judge of that court) may order that the acquitted person is not to be served with notice of that application until notice of an application for re-trial is served: CrimPR 41.8(2), 41.10(1)(d). Unless CrimPR 41.8(2) applies, the Registrar must serve on all parties notice of an order under the Criminal Justice Act 2003 s 82 (and reasons therefor) whether it makes that order of its own motion or on an application by the Director of Public Prosecutions: see CrimPR 41.8(3). The provisions of CrimPR 41.12 apply in the event of a refusal of a single judge to delay service under CrimPR 41.8(2): CrimPR 41.12.

Any order under the Criminal Justice Act 2003 s 82 made before notice of an application has been given under s 80(1) relating to the acquitted person and the qualifying offence must specify the time when it ceases to have effect: s 82(8). Such an order which is made or has effect after such notice has been given ceases to have effect, unless it specifies an earlier time: (i) when there is no longer any step that could be taken which would lead to the acquitted person being tried pursuant to an order made on the application; or (ii) if he is tried pursuant to such an order, at the conclusion of the trial: s 82(9). Nothing in s 82 affects any prohibition or restriction by virtue of any other enactment on the inclusion of any matter in a publication or any power, under an enactment or otherwise, to impose such a prohibition or restriction: s 82(10).

See also *Re D (acquitted person: retrial)* [2006] 1 WLR 1998, [2006] All ER (D) 387 (Feb), CA.

5 Criminal Justice Act 2003 s 82(3).

6 Ibid s 82(4)(a).

7 Ibid s 82(4)(b).

8 Ibid s 82(7). As to the Director of Public Prosecutions see PARA 1938 note 10 ante. For the procedure see CrimPR 41.9.

9 For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

10 Criminal Justice Act 2003 s 83(1), (2).

11 Ibid s 83(1), (3).

12 Ibid s 83(1), (4).

13 Ibid s 83(9). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. Proceedings for an offence under s 82 may not be instituted in England and Wales otherwise than by or with the consent of the Attorney General: s 83(10)(a). As to the effect of this limitation see PARA 1071 ante.

14 Ibid s 83(5). See further as to this type of provision para 38 ante. 'Officer' means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity: s 83(6). If the affairs of a body corporate are managed by its members, 'director' in s 83(6) means a member of that body: s 83(7). Where an offence under s 82 is committed by a Scottish partnership and is proved to have been committed with the consent or connivance of a partner, he as well as the partnership is guilty of the offence and is liable to be proceeded against and punished accordingly: s 82(8).

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### (iii) Re-trial

#### 1942. Re-trial.

Where a person is tried pursuant to an order for re-trial<sup>1</sup> the trial must be on an indictment preferred by direction of the Court of Appeal<sup>2</sup>. After the end of two months after the date of the order, the person may not be arraigned on an indictment preferred in pursuance of such a direction unless the Court of Appeal gives leave<sup>3</sup>. The Court of Appeal must not give leave unless satisfied that: (1) the prosecutor has acted with due expedition<sup>4</sup>; and (2) there is a good and sufficient cause for trial despite the lapse of time since the order<sup>5</sup> for re-trial<sup>6</sup>. Where the person may not be arraigned without leave, he may apply to the Court of Appeal to set aside the order and:

- 2534 (a) for any direction required for restoring an earlier judgment and verdict of acquittal<sup>7</sup> of the qualifying offence<sup>8</sup>; or
- 2535 (b) in the case of a person acquitted elsewhere than in the United Kingdom, for a declaration to the effect that the acquittal is a bar to his being tried for the qualifying offence<sup>9</sup>.

<sup>1</sup> ie an order under the Criminal Justice Act 2003 s 77(1) or (3) (where the trial is on indictment): see PARA 1939 ante.

<sup>2</sup> Ibid s 84(1). An indictment under s 84(1) may relate to more than one offence, or more than one person, and may relate to an offence which, or a person who, is not the subject of an order or declaration under s 77: s 84(5). Evidence given at a trial pursuant to an order under s 77(1) or (3) must be given orally if it was given orally at the original trial, unless:

246 (1) all the parties to the trial agree otherwise (s 84(6)(a));

247 (2) s 116 (hearsay evidence where witness unavailable: see PARA 1521 ante) applies (s 84(6)(b)); or

248 (3) the witness is unavailable to give evidence, otherwise than as mentioned in s 116(2), and s 114(1)(d) (hearsay evidence admissible if court satisfied that it is in the interests of justice for it to be admissible: see PARA 1520 head (4) ante) applies (s 84(6)(c)).

At a trial pursuant to an order under the Crime and Disorder Act 1998 s 77(1), Sch 3 para 5 (use of depositions) does not apply to a deposition read as evidence at the original trial: Criminal Justice Act 2003 s 84(7). As to the jurisdiction of the Court of Appeal see PARA 1938 note 2 ante.

<sup>3</sup> Ibid s 84(2). If an acquitted person has not been arraigned before the end of two months after the date of the order he or the prosecutor may apply in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA, to the Court of Appeal to set aside the order: CrimPR 41.14(1), 41.15(1). Such an application must be served on the Registrar and the prosecutor, or the acquitted person, as the case may be: CrimPR 41.14(2), 41.15(2).

<sup>4</sup> Criminal Justice Act 2003 s 84(3)(a).

<sup>5</sup> ie the order under ibid s 77 (see PARA 1939 ante).

<sup>6</sup> Ibid s 84(3)(b).

7 References to acquittal are to acquittal in circumstances within *ibid* s 75(1), (4) (see *PARA 1937 ante*): ss 75(7), 95(1).

8 *Ibid* s 84(4)(a). For the meaning of 'qualifying offence' see s 75(8), Sch 5 Pt 1; and *PARA 1937 note 2 ante* (definition applied by s 95(1)).

9 *Ibid* s 84(4)(b).

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APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(iv) Investigations/1943. Authorisation of investigations.

## **(iv) Investigations**

### **1943. Authorisation of investigations.**

The following provisions apply to the investigation of the commission of a qualifying offence<sup>1</sup> by a person:

- 2536 (1) acquitted<sup>2</sup> in specified proceedings<sup>3</sup>; or
- 2537 (2) acquitted elsewhere than in the United Kingdom<sup>4</sup> of an offence the commission of which as alleged would have amounted to or included the commission (in the United Kingdom or elsewhere) of the qualifying offence<sup>5</sup>.

Except in the case of urgent investigative steps<sup>6</sup>, an officer<sup>7</sup> may not do any of a number of specified things for the purposes of the investigation of the commission of a qualifying offence by a person so acquitted, either with or without that person's consent, unless the Director of Public Prosecutions: (a) has certified that in his opinion the acquittal would not be a bar to the trial of the acquitted person in England and Wales for the qualifying offence<sup>8</sup>; or (b) has given his written consent to the investigation (whether before or after the start of the investigation)<sup>9</sup>. The specified things which the officer may not do are to:

- 2538 (i) arrest or question the acquitted person<sup>10</sup>;
- 2539 (ii) search him or premises owned or occupied by him<sup>11</sup>;
- 2540 (iii) search a vehicle owned by him or anything in or on such a vehicle<sup>12</sup>;
- 2541 (iv) seize anything in his possession<sup>13</sup>; or
- 2542 (v) take his fingerprints or take a sample from him<sup>14</sup>.

The Director of Public Prosecutions may only give his consent on a written application, and such an application may be made only by an officer who, if he is an officer of the metropolitan police force or the City of London police force, is of the rank of commander or above, or, in any other case, is of the rank of assistant chief constable or above<sup>15</sup>. The Director of Public Prosecutions may not give his consent unless satisfied that:

- 2543 (A) there is, or there is likely as a result of the investigation to be, sufficient new evidence<sup>16</sup> to warrant the conduct of the investigation<sup>17</sup>; and
- 2544 (B) it is in the public interest for the investigation to proceed<sup>18</sup>.

<sup>1</sup> For the meaning of 'qualifying offence' see the Criminal Justice Act 2003 s 75(8), Sch 5 Pt 1; and PARA 1937 note 2 ante (definition applied by s 95(1)).

<sup>2</sup> References to acquittal are to acquittal in circumstances within *ibid* s 75(1), (4) (see PARA 1937 ante): ss 75(7), 95(1).

<sup>3</sup> *Ibid* s 85(1)(a). The specified proceedings referred to in the text are proceedings within s 75(1): see PARA 1937 ante.

<sup>4</sup> For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 Criminal Justice Act 2003 s 85(1)(b).

6 le subject to *ibid* s 86: see PARA 1944 post.

7 le an officer of a police force or an officer of revenue and customs: *ibid* s 95(1); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). 'Police force' has the meaning given by the Prosecution of Offences Act 1985 s 3(3) (as substituted: see PARA 1080 note 5 ante). As to the Director of Public Prosecutions see PARA 1938 note 10 ante.

8 Criminal Justice Act 2003 s 85(2)(a).

9 *Ibid* s 85(2)(b).

10 *Ibid* s 85(3)(a).

11 *Ibid* s 85(3)(b).

12 *Ibid* s 85(3)(c).

13 *Ibid* s 85(3)(d).

14 *Ibid* s 85(3)(e).

15 *Ibid* s 85(4). An officer may make an application under s 85(4) only if: (1) he is satisfied that new evidence has been obtained which would be relevant to an application under s 76(1) or (2) (see PARA 1938 ante) in respect of the qualifying offence to which the investigation relates; or (2) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation: s 85(5).

16 'New evidence' is to be read in accordance with *ibid* s 78(2) (see PARA 1939 note 11 ante): s 95(1).

17 *Ibid* s 85(6)(a).

18 *Ibid* s 85(6)(b). In giving his consent, the Director of Public Prosecutions may recommend that the investigation be conducted otherwise than by officers of a specified police force or specified team of officers of Revenue and Customs: s 85(7); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). As to the officers of Revenue and Customs see PARA 354 note 2 ante.



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APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(iv) Investigations/1944. Urgent investigative steps.

#### **1944. Urgent investigative steps.**

The provisions relating to the investigation of a qualifying offence<sup>1</sup> do not prevent an officer from taking any action for the purposes of an investigation if:

- 2545 (1) the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced<sup>2</sup>;
- 2546 (2) there has been no undue delay in applying for the Director of Public Prosecutions' written consent<sup>3</sup> to the investigation, that consent has not been refused, and taking into account the urgency of the situation, it is not reasonably practicable to obtain that consent before taking the action<sup>4</sup>; and
- 2547 (3) either the action is authorised as explained in heads (a) and (b) below<sup>5</sup>, or specified requirements<sup>6</sup> are met<sup>7</sup>.

Such an authorisation of investigative action may be given by an officer<sup>8</sup> of the rank of superintendent or above<sup>9</sup> if:

- 2548 (a) he is satisfied that new evidence<sup>10</sup> has been obtained which would be relevant to an application<sup>11</sup> in respect of the qualifying offence<sup>12</sup> to which the investigation relates<sup>13</sup>; or
- 2549 (b) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation<sup>14</sup>.

The specified requirements are met if:

- 2550 (i) there has been no undue delay in applying for such authorisation<sup>15</sup>;
- 2551 (ii) that authorisation has not been refused<sup>16</sup>; and
- 2552 (iii) taking into account the urgency of the situation, it is not reasonably practicable to obtain that authorisation before taking the action<sup>17</sup>.

<sup>1</sup> I.e. the Criminal Justice Act 2003 s 85: see PARA 1943 ante.

<sup>2</sup> Ibid s 86(1)(a).

<sup>3</sup> I.e. under ibid s 85(2): see PARA 1943 ante.

<sup>4</sup> Ibid s 86(1)(b), (2).

<sup>5</sup> I.e. under ibid s 86(3) (see the text and notes 13-14 infra).

<sup>6</sup> I.e. under s 86(5) (see the text and notes 15-17 infra).

<sup>7</sup> Ibid s 86(1)(c).

<sup>8</sup> I.e. an officer of a police force or an officer of Revenue and Customs: ibid s 95(1); Commissioners for Revenue and Customs Act 2005 s 50(2), (7). 'Police force' has the meaning given by the Prosecution of Offences Act 1985 s 3(3) (as substituted: see PARA 1080 note 5 ante): Criminal Justice Act 2003 s 95(1). As to officers of Revenue and Customs see PARA 354 note 2 ante.

9 References in *ibid* Pt 10 (ss 75-97) to an officer of a specified rank or above are, in the case of an officer of Revenue and Customs, references to an officer of such description as: (1) appears to the Commissioners for Her Majesty's Revenue and Customs to comprise officers of equivalent rank or above; and (2) is specified by the Commissioners for the purposes of the provision concerned: s 95(3); Commissioners for Revenue and Customs Act 2005 s 50(1), (2), (7). As to the Commissioners for Revenue and Customs see *PARA 354* note 2 *ante*.

10 'New evidence' is to be read in accordance with the Criminal Justice Act 2003 s 78(2) (see *PARA 1939* note 11 *ante*): s 95(1).

11 *Ie* under *ibid* s 76(1) or (2): see *PARA 1936 ante*.

12 For the meaning of 'qualifying offence' see *ibid* s 75(8), Sch 5 Pt 1; and *PARA 1937* note 2 *ante* (definition applied by s 95(1)).

13 *Ibid* s 86(3)(a). An authorisation under s 86(3) must: (1) if reasonably practicable, be given in writing; (2) otherwise, be recorded in writing by the officer giving it as soon as is reasonably practicable: s 86(4).

14 *Ibid* s 86(3)(b). See note 13 *supra*.

15 *Ibid* s 86(5)(a). Where the requirements of s 86(5) are met, the action is nevertheless to be treated as having been unlawful unless, as soon as reasonably practicable after the action is taken, an officer of the rank of superintendent or above certifies in writing that he is satisfied that, when the action was taken:

249 (1) new evidence had been obtained which would be relevant to an application under s 76(1) or (2) (see *PARA 1936 ante*) in respect of the qualifying offence to which the investigation relates (s 86(6)(a)); or

250 (2) the officer who took the action had reasonable grounds for believing that such new evidence was likely to be obtained as a result of the investigation (s 86(6)(b)).

16 *Ibid* s 86(5)(b). See note 15 *supra*.

17 *Ibid* s 86(5)(c). See note 15 *supra*.

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APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(v) Arrest, Custody and Bail/1945. Arrest and charge.

## **(v) Arrest, Custody and Bail**

### **1945. Arrest and charge.**

Where the provisions relating to the investigation of a qualifying offence<sup>1</sup> apply to the investigation of the commission of an offence by any person and no certification<sup>2</sup> has been given:

2553 (1) a justice of the peace may issue a warrant to arrest that person for that offence only if satisfied by written information that new evidence has been obtained which would be relevant to an application for a re-trial<sup>3</sup> in respect of the commission by that person of that offence<sup>4</sup>; and

2554 (2) that person may not be arrested for that offence except under a warrant so issued<sup>5</sup>.

1 le the Criminal Justice Act 2003 s 85: see PARA 1943 ante.

2 le no certification under ibid s 85(2): see PARA 1944 ante.

3 le an application under ibid s 76(1) or (2): see PARA 1938 ante.

4 Ibid s 87(1)(a). Section 87(1) does not affect s 89(3)(b) (see PARA 1942 head (2) post) or s 91(3) (see PARA 1949 post), or any other power to arrest a person, or to issue a warrant for the arrest of a person, otherwise than for an offence: s 87(2). The Police and Criminal Evidence Act 1984 Pt IV (ss 34-51) (as amended) (detention) (see PARA 938 et seq ante) applies as follows where a person:

251 (1) is arrested for an offence under a warrant issued in accordance with the Criminal Justice Act 2003 s 87(1)(a) (s 87(3)(a)); or

252 (2) having been so arrested, is subsequently treated under the Police and Criminal Evidence Act 1984 s 34(7) as arrested for that offence (Criminal Justice Act 2003 s 87(3)(b)).

For the purposes of the Police and Criminal Evidence Act 1984 Pt IV (as amended) there is sufficient evidence to charge the person with the offence for which he has been arrested if, and only if, an officer of the rank of superintendent or above (who has not been directly involved in the investigation) is of the opinion that the evidence available or known to him is sufficient for the case to be referred to a prosecutor to consider whether consent should be sought for an application in respect of that person under the Criminal Justice Act 2003 s 76 (see PARA 1938 ante): s 87(4).

For the purposes of the Police and Criminal Evidence Act 1984 Pt IV (as amended) it is the duty of the custody officer at each police station where the person is detained to make available or known to an officer at that police station of the rank of superintendent or above any evidence which it appears to him may be relevant to an application under the Criminal Justice Act 2003 s 76(1) or (2) in respect of the offence for which the person has been arrested, and to do so as soon as practicable: (a) after the evidence becomes available or known to him; or (b) if later, after he forms that view: s 87(5).

The Police and Criminal Evidence Act 1984 s 37 (see PARA 941 ante) (including any provision of s 37 as applied by s 40(8): see PARA 941 ante) has effect subject to modifications which provide for an officer of the rank of superintendent or above (who has not been directly involved in the investigation) to determine, in accordance with the Criminal Justice Act 2003 s 87(4), whether there is sufficient evidence to charge the arrested person with the offence for which he was arrested and to detain him at the police station for such period as is necessary to enable that determination to be made: see s 87(6). The Police and Criminal Evidence Act 1984 ss 40, 42 (see PARAS 1001, 1003 ante) are also accordingly modified: see the Criminal Justice Act 2003 s 87(7), (8).

As to the meaning of 'officer' and 'officer of a specified rank or above' see PARA 1944 note 9 ante.

5 Ibid s 87(1)(b). See note 4 supra.

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APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(v) Arrest, Custody and Bail/1946. Bail and custody before application.

### **1946. Bail and custody before application.**

Where a person, after being charged<sup>1</sup>, is:

- 2555 (1) kept in police detention<sup>2</sup>; or
- 2556 (2) detained by a local authority in pursuance of arrangements made under the Police and Criminal Evidence Act 1984<sup>3</sup>,

he must be brought before the Crown Court as soon as practicable and, in any event, not more than 24 hours after he is charged<sup>4</sup>.

Where a person so appears or is brought before the Crown Court<sup>5</sup>, the Crown Court may either:

- 2557 (a) grant bail for the person to appear, if notice of an application is served on him<sup>6</sup>, before the Court of Appeal at the hearing of that application<sup>7</sup>; or
- 2558 (b) remand the person in custody to be brought<sup>8</sup> before the Crown Court<sup>9</sup>.

If the Crown Court grants bail, it may revoke bail and remand the person in custody as referred to in head (b) above<sup>10</sup>.

If at the end of the relevant period<sup>11</sup> no notice of an application for a re-trial<sup>12</sup> in relation to the person has been given<sup>13</sup>, the person:

- 2559 (i) if on bail subject to such a duty to appear<sup>14</sup>, ceases to be subject to that duty and to any conditions of that bail<sup>15</sup>; and
- 2560 (ii) if in custody on remand<sup>16</sup>, must be released immediately without bail<sup>17</sup>.

The Crown Court may, on the application of a prosecutor<sup>18</sup>, extend or further extend the relevant period<sup>19</sup> until a specified date, but only if satisfied that:

- 2561 (A) the need for the extension is due to some good and sufficient cause<sup>20</sup>; and
- 2562 (B) the prosecutor has acted with all due diligence and expedition<sup>21</sup>.

<sup>1</sup> He charged in accordance with the Criminal Justice Act 2003 s 87(4): see PARA 1945 note 4 ante. In relation to such a person:

253 (1) the Police and Criminal Evidence Act 1984 s 38 (see PARA 944 ante) (including any part of that provision as applied by s 40(10)) has effect as if, in s 38(1), for 'either on bail or without bail' there were substituted 'on bail';

254 (2) s 47(3) does not apply and references in s 38 to bail are references to bail subject to a duty to appear before the Crown Court at such place as the custody officer may appoint and at such time, not later than 24 hours after the person is released, as that officer may appoint; and

255 (3) the Magistrates' Courts Act 1980 s 43B (as added) (power to grant bail where police bail has been granted: see MAGISTRATES vol 29(2) (Reissue) PARA 681) does not apply: Criminal Justice Act 2003 s 88(1).

2 Ibid s 88(2)(a).

3 Ibid s 88(2)(b). The reference to arrangements made in the text refers to arrangements made under the Police and Criminal Evidence Act 1984 s 38(6): see PARA 944 ante.

4 Criminal Justice Act 2003 s 88(2). The Police and Criminal Evidence Act 1984 s 46 (see PARA 1043 ante) does not apply: Criminal Justice Act 2003 s 88(2). For the purpose of calculating the period referred to in s 88(1) or (2), the following are to be disregarded: (1) Sunday; (2) Christmas Day; (3) Good Friday; and (4) any day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321) in the part of the United Kingdom where the person is to appear before the Crown Court as mentioned in the Criminal Justice Act 2003 s 88(1) or, where s 88(2) applies, is for the time being detained: s 88(3). CrimPR 19.18, 19.22, 19.23 (see PARAS 1187-1188 ante) apply (with modifications) where a person is to appear or be brought before the Crown Court pursuant to the Criminal Justice Act 2003 ss 88, 89: CrimPR 41.5. For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 Ie in accordance with the Criminal Justice Act 2003 s 88(1) or (2).

6 Ie under ibid s 80(2): see PARA 1940 ante.

7 Ibid s 88(4)(a).

8 Ie under ibid s 89(2): see PARA 1947 post.

9 Ibid s 88(4)(b).

10 Ibid s 88(5).

11 The 'relevant period', in relation to a person granted bail or remanded in custody under ibid s 88(4), means: (1) the period of 42 days beginning with the day on which he is granted bail or remanded in custody under s 88(4); or (2) that period as extended or further extended under s 88(8): s 88(6).

12 Ie under ibid s 76(1) or (2): see PARA 1938 ante.

13 Ie under ibid s 80(1): see PARA 1940 ante.

14 Ie as mentioned in ibid s 88(4)(a) (see the text to note 7 supra).

15 Ibid s 88(7)(a).

16 Ie under ibid s 88(4)(b) or (5) (see the text to notes 9-10 supra).

17 Ibid s 88(7)(b).

18 Such an application must be made before the relevant period has expired and must be served on the Crown Court officer and the acquitted person: CrimPR 41.6(1).

19 Ie the period mentioned in the Criminal Justice Act 2003 s 88(6)(a) (see note 11 head (1) supra).

20 Ibid s 88(8)(a).

21 Ibid s 88(8)(b).

## **UPDATE**

### **1946 Bail and custody before application**

NOTE 4--Criminal Justice Act 2003 s 88(3) amended to include Saturday: Criminal Justice and Immigration Act 2008 Sch 26 para 63.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(v) Arrest, Custody and Bail/1947. Bail and custody before hearing.

### **1947. Bail and custody before hearing.**

The following provisions apply where notice of an application for an order for re-trial is given<sup>1</sup> to the Court of Appeal<sup>2</sup>.

If the person to whom the application relates is in custody<sup>3</sup>, he must be brought before the Crown Court as soon as practicable and, in any event, within 48 hours after the notice is given<sup>4</sup>.

If that person is not in custody, the Crown Court may, on application by the prosecutor<sup>5</sup>:

- 2563 (1) issue a summons requiring the person to appear before the Court of Appeal at the hearing of the application<sup>6</sup>; or
- 2564 (2) issue a warrant for the person's arrest<sup>7</sup>;

and a warrant under head (2) above may be issued at any time even though a summons has previously been issued<sup>8</sup>. Where a summons is issued under head (1) above, the time and place<sup>9</sup> at which the person must appear may be specified either: (a) in the summons<sup>10</sup>; or (b) in a subsequent direction of the Crown Court<sup>11</sup>.

A person arrested under a warrant under head (2) above must be brought before the Crown Court as soon as practicable and in any event within 48 hours after his arrest<sup>12</sup>.

If a person is so brought<sup>13</sup> before the Crown Court the court must either:

- 2565 (i) remand him in custody to be brought before the Court of Appeal at the hearing of the application<sup>14</sup>; or
- 2566 (ii) grant bail for him to appear before the Court of Appeal at the hearing<sup>15</sup>.

If bail is granted under head (ii) above, the Crown Court may revoke the bail and remand the person in custody as referred to in head (i) above<sup>16</sup>.

1    Ie under the Criminal Justice Act 2003 s 80(1): see PARA 1940 ante.

2    Ibid s 89(1). As to the jurisdiction of the Court of Appeal see PARA 1938 note 2 ante.

3    Ie under ibid s 88(4)(b) or (5): see PARA 1946 ante.

4    Ibid s 89(2). For the purpose of calculating the period referred to in s 89(2) or (6) (see the text to note 12 infra), the following are to be disregarded: (1) Sunday; (2) Christmas Day; (3) Good Friday; and (3) any day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321) in the part of the United Kingdom where the person is for the time being detained: s 89(9). See CrimPR 41.5 (see PARA 1946 note 4 ante). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5    Ie an individual or body charged with duties to conduct criminal prosecutions: Criminal Justice Act 2003 s 95(1).

6    Ibid s 89(3)(a). See s 87(2): para 1945 ante. An application for a summons or warrant under s 89(3)(a) or (b) must be served on the Crown Court officer and the acquitted person: CrimPR 41.6(2).

7    Criminal Justice Act 2003 s 89(3)(b). See note 6 supra.

8 Ibid s 89(3).

9 The time or place specified may be varied from time to time by a direction of the Crown Court: *ibid* s 89(5).

10 Ibid s 89(4)(a).

11 Ibid s 89(4)(b).

12 Ibid s 89(6). See note 4 *supra*. The Supreme Court Act 1981 s 81(5) (see *PARA 1261 ante*) does not apply: Criminal Justice Act 2003 s 89(6). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

13 *Ie* under the Criminal Justice Act 2003 s 89(2) or (6).

14 Ibid s 89(7)(a).

15 Ibid s 89(7)(b).

16 Ibid s 89(8).

## **UPDATE**

### **1947 Bail and custody before hearing**

NOTE 4--Criminal Justice Act 2003 s 89(9) amended to include Saturday: Criminal Justice and Immigration Act 2008 Sch 26 para 63.

NOTE 12--Appointed day is 1 October 2009: SI 2009/1604.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(v) Arrest, Custody and Bail/1948. Bail and custody during and after hearing.

### **1948. Bail and custody during and after hearing.**

The Court of Appeal may, at any adjournment of the hearing of an application<sup>1</sup> for re-trial: (1) remand the person to whom the application relates on bail<sup>2</sup>; or (2) remand him in custody<sup>3</sup>.

At a hearing at which the Court of Appeal:

- 2567 (a) makes an order<sup>4</sup>
- 2568 (b) makes a declaration<sup>5</sup> that an acquittal elsewhere than in the United Kingdom is not a bar to trial<sup>6</sup>; or
- 2569 (c) dismisses the application or makes a declaration<sup>7</sup> that such an acquittal is a bar to trial, if it also gives the prosecutor<sup>8</sup> leave to appeal against its decision or the prosecutor gives notice that he intends to apply for such leave<sup>9</sup>,

the court may make such order as it sees fit for the custody or bail of the acquitted person pending trial pursuant to the order or declaration, or pending determination of the appeal<sup>10</sup>.

The court may at any time, as it sees fit: (i) revoke bail granted under the above provisions and remand the person in custody<sup>11</sup>; or (ii) vary such an order<sup>12</sup>.

<sup>1</sup> I.e. under the Criminal Justice Act 2003 s 76(1) or (2): see PARA 1938 ante. As to the jurisdiction of the Court of Appeal see PARA 1938 note 2 ante.

<sup>2</sup> Ibid s 90(1)(a).CrimPR 68.8, 68.9 (see PARA 1194 ante) apply to a bail or custody order under the Criminal Justice Act 2003 s 90 as if it was an order made pursuant to CrimPR 68.7 (see PARA 1193 ante): CrimPR 41.7.

<sup>3</sup> Criminal Justice Act 2003 s 90(1)(b). See note 2 supra.

<sup>4</sup> Ibid s 90(2)(a). The order referred to in the text is one made under s 77: see PARA 1939 ante.

<sup>5</sup> I.e. a declaration under ibid s 77(4): see PARA 1939 ante.

<sup>6</sup> Ibid s 90(2)(b). For the meaning of 'United Kingdom' see PARA 45 note 2 ante.

<sup>7</sup> I.e. a declaration under ibid s 77(3): see PARA 1939 ante.

<sup>8</sup> I.e. an individual or body charged with duties to conduct criminal proceedings: ibid s 95(1).

<sup>9</sup> Ibid s 90(2)(c).

<sup>10</sup> Ibid s 90(2). For these purposes, the determination of an appeal is pending: (1) until any application for leave to appeal is disposed of, or the time within which it must be made expires; (2) if leave to appeal is granted, until the appeal is disposed of: s 90(3). The Bail Act 1976 s 4 (see PARA 1169 ante) applies in relation to the grant of bail under the Criminal Justice Act 2003 s 90 as if in s 90(2) the reference to the Crown Court included a reference to the Court of Appeal: s 90(4).

<sup>11</sup> Ibid s 90(5)(a).

<sup>12</sup> Ibid s 90(5)(b).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(4) RE-TRIAL FOR SERIOUS OFFENCES/(v) Arrest, Custody and Bail/1949. Revocation of bail.

### **1949. Revocation of bail.**

Where:

- 2570 (1) a court revokes a person's bail<sup>1</sup>; and
- 2571 (2) that person is not before the court when his bail is revoked<sup>2</sup>,

the court must order him to surrender himself forthwith to the custody of the court<sup>3</sup>.

Where a person surrenders himself into the custody of the court in compliance with such an order, the court must remand him in custody<sup>4</sup>. A person who has been so ordered to surrender to custody may be arrested without a warrant by an officer<sup>5</sup> if he fails without reasonable cause to surrender to custody in accordance with the order<sup>6</sup>. A person so arrested must be brought as soon as practicable, and, in any event, not more than 24 hours after he is arrested, before the court and the court must remand him in custody<sup>7</sup>.

1 Criminal Justice Act 2003 s 91(1)(a). The revoking of a person's bail referred to in the text is where a court revokes a person's bail under Pt 10 (ss 75-97) (see PARA 1937 et seq ante).

2 Ibid s 91(1)(b).

3 Ibid s 91(1).

4 Ibid s 91(2).

5 Ie an officer of a police force or a revenue and customs officer; 'police force' has the meaning given by the Prosecution of Offences Act 1985 s 3(3) (as substituted) (see PARA 1080 note 5 ante); Criminal Justice Act 2003 s 95(1); Commissioners for Revenue and Customs Act 2005 s 50(2), (7).

6 Criminal Justice Act 2003 s 91(3). Section 87(1) (see PARA 1945 ante) does not affect s 91(3); s 87(2).

7 Ibid s 91(4). For the purpose of calculating the period referred to in s 91(4), the following are to be disregarded: (1) Sunday; (2) Christmas Day; (3) Good Friday; (4) any day which is a bank holiday under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321) in the part of the United Kingdom where the person is for the time being detained: s 91(5). For the meaning of 'United Kingdom' see PARA 45 note 2 ante. The conviction of an incorrigible rogue who is committed to the Crown Court to be dealt with under the Vagrancy Act 1824 (see PARA 835 ante) is not a conviction on indictment, the conviction being by the committing magistrates; and no appeal lies to the Court of Appeal against the conviction: *R v Johnson* [1909] 1 KB 439, 2 Cr App Rep 13, CA. See PARA 1981 note 2 post.

### **UPDATE**

#### **1949 Revocation of bail**

NOTE 7--Criminal Justice Act 2003 s 91(5) amended to include Saturday: Criminal Justice and Immigration Act 2008 Sch 26 para 63.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(5) REFERENCES TO THE COURT OF APPEAL/(i) Points of Law/1950. Reference of a point of law by the Attorney General.

## **(5) REFERENCES TO THE COURT OF APPEAL**

### **(i) Points of Law**

#### **1950. Reference of a point of law by the Attorney General.**

Where a person tried on indictment has been acquitted, whether in respect of the whole or part of the indictment, the Attorney General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court; and the court must consider the point and give its opinion on it<sup>1</sup>.

Where the Court of Appeal has given its opinion on a point so referred, the court may, of its own motion or in pursuance of an application in that behalf, refer the point to the House of Lords if it appears to the court that the point ought to be considered by that House<sup>2</sup>.

A reference so made does not affect the trial in relation to which the reference is made or any acquittal in that trial<sup>3</sup>. The Attorney General may withdraw or amend the reference at any time before the court has begun the hearing or, after that, and until the court has given its opinion, may withdraw or amend the reference by leave of the court<sup>4</sup>.

1 Criminal Justice Act 1972 s 36(1). The jurisdiction of the Court of Appeal under s 36 is exercisable by the criminal division of the court: see s 36(6). The power to refer a point of law is not confined to cases where weighty questions of law arise; it may be used for short but important points which require a quick ruling by the Court of Appeal before a potentially false decision of law has too wide a circulation: *A-G's Reference (No 1 of 1975)* [1975] QB 773, [1975] 2 All ER 684, CA. The power is to refer a point of law which arose in a case; there is no power to refer theoretical questions of law: *A-G's Reference (No 4 of 1979)* [1981] 1 All ER 1193 at 1196, 71 Cr App Rep 341 at 346, CA, per Lord Lane CJ; and see *A-G's Reference (No 2 of 1975)* [1976] 2 All ER 753 at 765, 62 Cr App Rep 255 at 258, CA, per James LJ.

As to the procedure see PARA 1951 post.

2 Criminal Justice Act 1972 s 36(3). As from a day to be appointed, the words 'the Supreme Court' are substituted for the words 'the House of Lords', the words 'Court of Appeal that' are substituted for the words 'court that' and the words 'the Supreme Court' are substituted for the words 'that House' by the Constitutional Reform Act 2005 s 40, Sch 9 para 23(a). At the date at which this volume states the law no such day had been appointed. An application under the Criminal Justice Act 1972 s 36(3) may be made orally immediately after the court gives its opinion or by notice served on the Registrar of Criminal Appeals within the 14 days next following: CrimPR 69.5.

3 Criminal Justice Act 1972 s 36(7).

4 CrimPR 69.3. Notice of such withdrawal or amendment must be served on the respondent on behalf of the Attorney General: CrimPR 69.3.

### **UPDATE**

#### **1950-1951 Reference of a point of law by the Attorney General, Procedure on reference of a point of law by the Attorney General**

CrimPR Pt 69 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 70.

**1950 Reference of a point of law by the Attorney General**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/(5) REFERENCES TO THE COURT OF APPEAL/(i) Points of Law/1951. Procedure on reference of a point of law by the Attorney General.

### **1951. Procedure on reference of a point of law by the Attorney General.**

Every reference of a point of law by the Attorney General<sup>1</sup> must be in writing and must:

- 2572 (1) specify the point of law referred and, where appropriate, such facts of the case as are necessary for the proper consideration of the point of law<sup>2</sup>;
- 2573 (2) summarise the arguments intended to be put to the court<sup>3</sup>; and
- 2574 (3) specify the authorities intended to be cited<sup>4</sup>.

No mention may be made in the reference, however, of the proper name of any person or place which is likely to lead to the identification of the respondent<sup>5</sup>.

The Registrar of Criminal Appeals must cause to be served<sup>6</sup> on the respondent notice of the reference which must also:

- 2575 (a) inform the respondent that the reference will not affect the trial in relation to which it is made or any acquittal in that trial<sup>7</sup>;
- 2576 (b) invite the respondent, within such period as may be specified in the notice, being not less than 28 days from the date of service of the notice, to inform the Registrar if he wishes to present any argument to the court and, if so, whether he wishes to present such argument in person or by counsel on his behalf<sup>8</sup>.

The court may not hear argument by or on behalf of the Attorney General until the period specified in the notice has expired unless the respondent agrees or has indicated that he does not wish to present any argument to the court<sup>9</sup>.

The court must ensure that the identity of the respondent is not disclosed during the proceedings except where the respondent has given his consent to the use of his name in the proceedings<sup>10</sup>.

<sup>1</sup> ie under the Criminal Justice Act 1972 s 36; see PARA 1950 ante. A reference must be entitled 'Reference under section 36 of the Criminal Justice Act 1972' together with the year and number of the reference: CrimPR 69.1(2).

<sup>2</sup> CrimPR 69.1(1)(a).

<sup>3</sup> CrimPR 69.1(1)(b).

<sup>4</sup> CrimPR 69.1(1)(c).

<sup>5</sup> CrimPR 69.1(1) proviso. The acquitted person is the 'respondent'.

<sup>6</sup> For the purposes of the rules relating to references to the Court of Appeal on a point of law, service of a document on the respondent may be effected:

256 (1) in the case of a document to be served on a body corporate by delivering it to the secretary or clerk of the body at its registered or principal office or sending it by post addressed to the secretary or clerk of that body at that office (CrimPR 69.6(1)(a));

257 (2) in the case of a document to be served on any other person by:

1. (a) delivering it to the person to whom it is directed (CrimPR 69.6(1)(b)(i));
2. (b) leaving it for him with some person at his last known or usual place of abode (CrimPR 69.6(1)(b)(ii)); or
3. (c) sending it by post addressed to him at his last known or usual place of abode (CrimPR 69.6(1)(b)(iii));

and service of a document on the Registrar of Criminal Appeals may be effected by:

258 (i) delivering it to the Registrar (CrimPR 69.6(2)(a));

259 (ii) addressing it to him and leaving it at his office in the Royal Courts of Justice, London, WC2 (CrimPR 69.6(2)(b)); or

260 (iii) sending it by post addressed to him at such office (CrimPR 69.6(2)(c)).

7 CrimPR 69.2(1)(a).

For the purposes of its consideration of a point of law referred to it, the Court of Appeal must hear argument: (1) by, or by counsel on behalf of, the Attorney General; and (2) if the acquitted person desires to present argument to the court, by counsel on his behalf or, with the leave of the court, by the acquitted person himself: Criminal Justice Act 1972 s 36(2).

The court must not hear argument by or on behalf of the Attorney General until the period specified in the Registrar's notice to respondent (see CrimPR 69.2(1)) has expired unless the respondent agrees or has indicated that he does not wish to present any argument to the court: CrimPR 69.2(2).

8 CrimPR 69.2(1)(b). See note 7 supra.

9 CrimPR 69.2(2).

10 CrimPR 69.4.

For an example of a reference where the respondent's name was disclosed with consent see *A-G's Reference (No 2 of 1975)* [1976] 2 All ER 753, 62 Cr App Rep 255, CA.

## UPDATE

### **1950-1951 Reference of a point of law by the Attorney General, Procedure on reference of a point of law by the Attorney General**

CrimPR Pt 69 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 70.

## UPDATE

### **1952-1962 Unduly lenient sentence**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 55-66.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.  
APPEALS/(5) REFERENCES TO THE COURT OF APPEAL/(ii) Unduly Lenient Sentence

**(ii) Unduly Lenient Sentence**

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(5) REFERENCES TO THE COURT OF APPEAL/(iii) References to the Court of Appeal by the Criminal Cases Review Commission/1963. When a case may be referred to the Court of Appeal.

### **(iii) References to the Court of Appeal by the Criminal Cases Review Commission**

#### **1963. When a case may be referred to the Court of Appeal.**

Where a person has been convicted of an offence on indictment in England and Wales, the Criminal Cases Review Commission<sup>1</sup> may at any time refer the conviction to the Court of Appeal<sup>2</sup>, and (whether or not it refers the conviction) may at any time refer to the Court of Appeal any sentence (not being a sentence fixed by law<sup>3</sup>) imposed on, or in subsequent proceedings relating to, the conviction<sup>4</sup>. Such a reference of a person's conviction is to be treated for all purposes as an appeal<sup>5</sup> by the person against the conviction<sup>6</sup>. Such a reference of a sentence imposed on, or in subsequent proceedings relating to, a person's conviction on an indictment is to be treated for all purposes as an appeal by the person<sup>7</sup> against the sentence<sup>8</sup>, and against any other sentence (not being a sentence fixed by law) imposed on, or in subsequent proceedings relating to, the conviction or any other conviction on the indictment<sup>9</sup>.

On a reference<sup>10</sup> of a person's conviction on an indictment the Commission may give notice to the Court of Appeal that any other conviction on the indictment which is specified in the notice is to be treated as referred<sup>11</sup> to the Court of Appeal<sup>12</sup>.

Where a verdict of not guilty by reason of insanity has been returned in England and Wales in the case of a person, the Commission may at any time refer the verdict to the Court of Appeal<sup>13</sup>.

Where, in England and Wales, there have been findings that a person is under a disability and that he did the act or made the omission charged against him, the Commission may at any time refer either or both of those findings to the Court of Appeal<sup>14</sup>.

1 See PARA 2028 et seq post.

2 Criminal Appeal Act 1995 s 9(1)(a).

3 As to the meaning of 'sentence fixed by law' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 15.

4 Criminal Appeal Act 1995 s 9(1)(b). The Commission has a discretion as to whether to make a reference: *R v Clark (Brian)* [2001] EWCA Crim 884, [2002] 1 Cr App Rep 141; *R (on the application of Westlake) v Criminal Cases Review Commission* [2004] EWHC 2779 (Admin), (2003) Times, 19 November, DC. That discretion must be exercised fairly and reasonably; only in rare and exceptional cases will fairness and reasonableness require a reference because of a change in the law many years after a plea of guilty: *R v Clark (Brian)* supra. The Commission must take into account relevant considerations and ignore the irrelevant: *R (on the application of Westlake) v Criminal Cases Review Commission* supra. See also PARA 1964 post. The Commission should bear in mind that its role is to refer those cases to the Court of Appeal where it considers that there might have been some real injustice, which is not the case where the likely result of the appeal is to substitute a conviction for an alternative offence: *R v Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631, [2004] QB 1418, [2004] 3 WLR 229.

5 Ie under the Criminal Appeal Act 1968 s 1 (see PARA 1837 ante).

6 Criminal Appeal Act 1995 s 9(2).



7 le under the Criminal Appeal Act 1968 s 9 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 46, 48). The Court of Appeal has power to adjourn an appeal referred to it by the Commission: *R v Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631, [2004] QB 1418, [2004] 3 WLR 229.

8 Criminal Appeal Act 1995 s 9(3)(a).

9 Ibid s 9(3)(b).

10 le under ibid s 9(1).

11 le under ibid s 9(1).

12 Ibid s 9(4).

13 Ibid s 9(5). Where a verdict to the effect that a person was guilty of the act or omission charged against him but was insane at the time (abolished by the Criminal Procedure (Insanity) Act 1964) has been returned in England and Wales, the Commission may at any time also refer the verdict to the Court of Appeal: see the Criminal Cases Review (Insanity) Act 1999 s 1(1). A reference under the Criminal Appeal Act 1995 s 9(5) or the Criminal Cases Review (Insanity) Act 1999 s 1(1) of a verdict returned in England and Wales in the case of a person must be treated for all purposes as an appeal by the person under the Criminal Appeal Act 1968 s 12 (see PARA 1838 ante) against the verdict: Criminal Appeal Act 1995 s 9(5); Criminal Cases Review (Insanity) Act 1999 s 2(1).

The Criminal Appeal Act 1995 s 14 (see PARA 1965 post) applies in relation to a reference under the Criminal Cases Review (Insanity) Act 1999 s 1(1) as it applies in relation to references under the Criminal Appeal Act 1995 s 9: Criminal Cases Review (Insanity) Act 1999 s 1(3). The Criminal Appeal Act 1968 ss 13, 14 (see PARAS 1887-1889 ante) have effect in their application to such a reference: (1) as if references to the verdict of not guilty by reason of insanity were to the verdict of guilty but insane; and (2) as if, for the Criminal Appeal Act 1968 s 14(1)(b) (see PARA 1889 note 4 ante) there were substituted 'the accused was under a disability and': Criminal Cases Review (Insanity) Act 1999 s 2(2).

14 Criminal Appeal Act 1995 s 9(6) (amended by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 31)). A reference under the Criminal Appeal Act 1995 s 9(6) (as amended) is to be treated for all purposes as an appeal by the person under the Criminal Appeal Act 1968 s 15 (see PARA 1839 ante) against the finding or findings referred: Criminal Appeal Act 1995 s 9(6) (as so amended).

## UPDATE

### 1963-1965 References to the Court of Appeal by the Criminal Cases Review Commission

As to the power of the Criminal Cases Review Commission to refer cases dealt with by service courts, see the Criminal Appeal Act 1995 ss 12A, 12B (added by the Armed Forces Act 2006 Sch 11 para 2).

### 1963 When a case may be referred to the Court of Appeal

TEXT AND NOTES--See Criminal Appeal Act 1968 s 16C (added by Criminal Justice and Immigration Act 2008 s 42) (power to dismiss certain appeals following references by the CCRC). For transitional provisions and savings see Criminal Justice and Immigration Act 2008 Sch 27 para 14.

NOTE 4--See also *R (on the application of Director of Revenue and Customs Prosecutions) v Criminal Cases Review Commission* [2006] EWHC 3064 (Admin), [2006] All ER (D) 48 (Dec); and *R v Cottrell*; *R v Fletcher* [2007] EWCA Crim 2016, [2007] 1 WLR 3262.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(5) REFERENCES TO THE COURT OF APPEAL/(iii) References to the Court of Appeal by the Criminal Cases Review Commission/1964. Conditions for making of references.

### 1964. Conditions for making of references.

A reference of a conviction, verdict, finding or sentence must not be made by the Criminal Cases Review Commission<sup>1</sup> unless:

2577 (1) it considers that there is a real possibility<sup>2</sup> that the conviction, verdict, finding or sentence would not be upheld were the reference to be made<sup>3</sup>;

2578 (2) it so considers:

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77. (a) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it<sup>4</sup>; or

78. (b) in the case of a sentence, because of an argument on a point of law, or information<sup>5</sup>, not so raised<sup>6</sup>; and

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2579 (3) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused<sup>7</sup>.

1. See under the Criminal Appeal Act 1995 s 9 or s 11 (see PARA 1982 post). As to the Commission see PARA 2028 post. See also PARA 1963 ante.

2. See *R v Criminal Cases Review Commission, ex p Pearson* [1999] 3 All ER 498, [2000] 1 Cr App Rep 141, DC; *R v Ballard* [2004] EWCA Crim 3305, [2005] 2 Cr App Rep (S) 186.

3. Criminal Appeal Act 1995 s 13(1)(a).

4. Ibid s 13(1)(b)(i). Nothing in head (2)(a) in the text prevents the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it: s 13(2). See *R v Thomas (Ian)* [2002] EWCA Crim 941, [2003] 1 Cr App Rep 168; *R v Mills (No 2)* [2003] EWCA Crim 1753, [2004] 1 Cr App Rep 78; *R v Hussain* [2005] EWCA Crim 31, [2005] 3 Archbold News 1.

5. For these purposes, 'information' does not include decisions in comparable cases: *R v Ballard* [2004] EWCA Crim 3305, [2005] 2 Cr App Rep (S) 186.

6. Criminal Appeal Act 1995 s 13(1)(b)(ii).

7. Ibid s 13(1)(c). Nothing in head (3) in the text prevents the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it: s 13(2). See *R v Gerald* [1999] Crim LR 315, CA.

If the conditions in the Criminal Appeal Act 1995 s 13(1) are met, and the convicted person is alive, the interests of fairness usually raise a presumption in favour of referral, but different considerations apply where the convicted person is deceased; consideration of the cost to the public and the resources of the court involved in an appeal are relevant considerations to be taken into account by the Commission when exercising its discretion in posthumous cases: *R v Hanratty (James) (Deceased)* [2002] EWCA Crim 1141, [2002] 3 All ER 534, [2002] 2 Cr App Rep 419; *R (on the application of Westlake) v Criminal Cases Review Commission* [2004] EWHC 277 (Admin), (2004) Times, 19 November, DC. A reference under the Criminal Cases Review (Insanity) Act 1999 s 1(1) (see PARA 1963 note 13 ante) may be made if the Commission considers that there is a real possibility that the verdict would not be upheld were the reference to be made and either: (1) the Commission so considers because of an argument, or evidence, not raised in the proceedings which led to the verdict; or (2) it appears to the Commission that there are exceptional circumstances which justify the making of the reference: Criminal Cases Review (Insanity) Act 1999 s 1(2).

## **UPDATE**

### **1963-1965 References to the Court of Appeal by the Criminal Cases Review Commission**

As to the power of the Criminal Cases Review Commission to refer cases dealt with by service courts, see the Criminal Appeal Act 1995 ss 12A, 12B (added by the Armed Forces Act 2006 Sch 11 para 2).

### **1964 Conditions for making of references**

TEXT AND NOTES--Criminal Appeal Act 1995 s 13(1) amended: Armed Forces Act 2006 Sch 11 para 3.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/(5) REFERENCES TO THE COURT OF APPEAL/(iii) References to the Court of Appeal by the Criminal Cases Review Commission/1965. Further provisions about references.

### **1965. Further provisions about references.**

A reference of a conviction, verdict, finding or sentence may be made by the Criminal Cases Review Commission<sup>1</sup> either after an application has been made by or on behalf of the person to whom it relates or without an application having been so made<sup>2</sup>. In considering whether to make such a reference, the Commission must have regard to: (1) any application or representations made to it by or on behalf of the person to whom it relates<sup>3</sup>; (2) any other representations made to it in relation to it<sup>4</sup>; and (3) any other matters which appear to it to be relevant<sup>5</sup>. In considering whether to make a reference to the Court of Appeal<sup>6</sup> the Commission may at any time refer any point on which it desires the assistance of the Court of Appeal to that court for the court's opinion on it; and on such a reference the Court of Appeal must consider the point referred and furnish the Commission with the court's opinion on the point<sup>7</sup>.

Where the Commission makes a reference<sup>8</sup> of a case it must: (a) give to the court to which the reference is made a statement of the Commission's reasons for making the reference<sup>9</sup>; and (b) send a copy of the statement to every person who appears to the Commission to be likely to be a party to any proceedings on the appeal arising from the reference<sup>10</sup>.

Where such a reference to the Court of Appeal is treated as an appeal against any conviction, verdict, finding or sentence, the appeal may not, without the leave of the Court of Appeal, be on any ground which is not related to any reason given by the Commission for making the reference<sup>11</sup>.

Where a reference to the Crown Court in respect of a case dealt with summarily<sup>12</sup> is treated as an appeal against any conviction, verdict, finding or sentence, the appeal may be on any ground relating to the conviction, verdict, finding or sentence (whether or not the ground is related to any reason given by the Commission for making the reference)<sup>13</sup>.

In every case in which an application has been made to the Commission by or on behalf of any person for the reference of any conviction, verdict, finding or sentence, but the Commission decides not to make such a reference, the Commission must give a statement of the reasons for its decision to the person who made the application<sup>14</sup>.

<sup>1</sup> *Ie* under the Criminal Appeal Act 1995 s 9 or s 11 (see PARA 1982 post). As to the application of s 14 to a reference under the Criminal Cases Review (Insanity) Act 1999 s 1(1) see s 1(3) (see PARA 1963 note 13 ante). As to references to the Commission see PARA 1963 ante.

<sup>2</sup> Criminal Appeal Act 1995 s 14(1).

<sup>3</sup> *Ibid* s 14(2)(a).

<sup>4</sup> *Ibid* s 14(2)(b).

<sup>5</sup> *Ibid* s 14(2)(c).

<sup>6</sup> *Ie* under *ibid* s 9: see PARA 1982 post.

<sup>7</sup> *Ibid* s 14(3).

<sup>8</sup> *Ie* under *ibid* s 9 or s 11 (see PARA 1982 post). Where a reference is made to the Court of Appeal, the Registrar of Criminal Appeals must serve on the appellant written notice of receipt of a reference: CrimPR

68.4(2). The appellant must give notice of appeal under CrimPR 68.3 (see PARA 1863 ante) by serving it on the Registrar within: (1) 28 days of the date of the notice served under CrimPR 68.4(2), in the case of an appeal against sentence; or (2) 56 days of the date of that notice, in the case of an appeal against conviction, verdict of not guilty by reason of insanity, finding that the appellant was under a disability, or finding that the appellant did the act or made the omission charged: CrimPR 68.4(3). The court may extend the time for giving notice of appeal, either before or after it expires: CrimPR 68.4(4). The grounds of appeal accompanying a notice of appeal must include: (a) where a ground of appeal is said to relate to a reason given by the Commission for making the reference, an explanation of how it is related; and (b) where a ground of appeal is said not to be so related, notice of application for leave to appeal on that ground: CrimPR 68.4(5). If a notice of appeal is not received within the time specified in CrimPR 68.4(3), or within such longer period as the court allows under CrimPR 68.4(4), the reasons given by the Commission for making the reference stand as the grounds for appeal: CrimPR 68.4(6). On receiving the notice of appeal the Registrar must serve a copy on the prosecutor and on any other party to the appeal: CrimPR 68.4(7).

9 Criminal Appeal Act 1995 s 14(4)(a).

10 Ibid s 14(4)(b).

11 See *ibid* s 14(4A), (4B) (added by the Criminal Justice Act 2003 s 315(1), (2)).

12 *Ie* under the Criminal Appeal Act 1995 s 11 (see PARA 1982 post).

13 *Ibid* s 14(5) (amended by the Criminal Justice Act 2003 s 315(1), (3)). See *R v Smith (Wallace) (No 3)* [2002] EWCA Crim 2907, [2003] 1 WLR 1647, [2003] 1 Cr App Rep 648 (notwithstanding that the Commission specifically rejected one of the grounds, defendant not precluded from pleading the same ground on appeal).

14 Criminal Appeal Act 1995 s 14(6). As to the Commission see PARA 2028 et seq post.

## UPDATE

### **1963-1965 References to the Court of Appeal by the Criminal Cases Review Commission**

As to the power of the Criminal Cases Review Commission to refer cases dealt with by service courts, see the Criminal Appeal Act 1995 ss 12A, 12B (added by the Armed Forces Act 2006 Sch 11 para 2).

### **1965 Further provisions about references**

TEXT AND NOTES--Criminal Appeal Act 1995 s 14(1)-(4B), (6) amended, s 14(5) further amended: Armed Forces Act 2006 Sch 11 para 4.

NOTE 8--CrimPR Pt 68 substituted: see PARA 1856-1861.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1966. Right of appeal to the House of Lords.

## **(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS**

### **1966. Right of appeal to the House of Lords.**

An appeal to the House of Lords lies, at the instance of the appellant<sup>1</sup> or the prosecutor<sup>2</sup>, from any decision of the Court of Appeal on an appeal<sup>3</sup> to that court<sup>4</sup>. An appeal also lies to the House of Lords, at the instance of the acquitted person or the prosecutor, from any decision of the Court of Appeal on an application<sup>5</sup> by the prosecution: (1) for an order quashing a person's acquittal, and ordering his re-trial, for a serious offence; or (2) for a determination whether an acquittal elsewhere than in the United Kingdom is a bar to the person being tried in England and Wales for a serious offence and, if it is, an order to that effect<sup>6</sup>. An appeal of these two types<sup>7</sup> lies only with the leave of the Court of Appeal or the House of Lords; and leave may not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the House of Lords (as the case may be) that the point is one which ought to be considered by that House<sup>8</sup>.

An appeal also lies to the House of Lords from an order or decision of the Court of Appeal under the provisions<sup>9</sup> relating to contempt of court<sup>10</sup>. No such appeal lies without the leave of the Court of Appeal or the House of Lords<sup>11</sup>. Where the appeal is itself against a decision on appeal, leave will be granted only if the court below certifies that a point of law of general public importance is involved and it appears to the Court of Appeal or the House of Lords (as the case may be) that the point is one which ought to be considered by that House<sup>12</sup>, but these restrictions on granting leave do not apply where the appeal is against an original order of the Court of Appeal when leave may be given without such a certificate<sup>13</sup>.

Except as provided by the above provisions<sup>14</sup>, no appeal lies from any decision of the criminal division of the Court of Appeal<sup>15</sup>.

1    Ie the person who was the appellant before the criminal division of the Court of Appeal.

2    The reference to the prosecutor includes a reference to the Director of the Assets Recovery Agency in a case where (and to the extent that) he is a party to the appeal to the Court of Appeal: Criminal Appeal Act 1968 s 33(1A) (added by the Proceeds of Crime Act 2002 s 456, Sch 11 paras 1, 4(1), (2)).

3    Ie under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended) (see PARA 1837 et seq ante), the Criminal Justice Act 2003 Pt 9 (ss 57-74) (prosecution appeals: see PARA 1898 ante), the Criminal Justice Act 1987 s 9 (as amended) (preparatory hearings: see PARA 1921 ante), the Criminal Procedure and Investigations Act 1996 s 35 (prospectively amended) (preparatory hearings: see PARA 1922 ante) or the Criminal Justice Act 2003 s 47 (order to discharge jury because of jury tampering; order to continue trial without jury after such discharge: see PARA 1933 ante): Criminal Appeal Act 1968 s 33(1) (amended by the Criminal Procedure and Investigations Act 1996 s 36(1)(a); the Criminal Justice Act 1987 s 15, Sch 2 para 3; and the Criminal Justice Act 2003 ss 47(6), 68(1)). The right exists only in relation to appeals and not to applications for leave to appeal: *R v Jefferies* [1969] 1 QB 120, 52 Cr App Rep 654, CA; *R v Mealey*, *R v Sheridan* [1975] Crim LR 154, CA.

4    Criminal Appeal Act 1968 s 33(1). As from a day to be appointed the words 'Supreme Court' in s 33(1), (2) and in the Administration of Justice Act 1960 s 1 are substituted for the words 'House of Lords' by the Constitutional Reform Act 2005 s 40(4), Sch 9 paras 13, 16. At the date at which this volume states the law no such day had been appointed.

5    Ie under the Criminal Justice Act 2003 s 76(1), (2).

6 Criminal Appeal Act 1968 s 33(1B) (added by the Criminal Justice Act 2003 s 81(1), (2)). In relation to an appeal under the Criminal Appeal Act 1968 s 33(1B) (as added) references in the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended) to a defendant are references to the acquitted person: s 33(4) (added by the Criminal Justice Act 2003 s 81(1), (3)). As from a day to be appointed, the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court (see the Administration of Justice Act 1960 s 1(1) (prospectively amended: see PARA 2020 post) and accordingly in the Criminal Appeal Act 1968 s 33 (as amended) and in the Administration of Justice Act 1960 s 1, the words 'Supreme Court' are substituted for the words 'House of Lords' and the words 'the Supreme Court' are substituted for the words 'that House' by the Constitutional Reform Act 2005 s 40, Sch 9 paras 13, 16). At the date at which this volume states the law no such day had been appointed.

7 le under the Criminal Appeal Act 1968 s 33(1) or (1B) (as added).

8 Ibid s 33(2) (as prospectively amended: see note 6 supra). Criminal petitions for leave to appeal to the House of Lords in respect of which no such certificate has been granted will not be received in the judicial office: see *Procedure Direction* [1979] 2 All ER 359, 69 Cr App Rep 497, HL; and COURTS vol 10 (Reissue) PARA 380. Where the trial judge has passed a sentence which was within his discretion, no point of law of general public importance can arise for the purposes of an appeal against such sentence: *R v Ashdown* [1974] 1 All ER 800, 58 Cr App Rep 339, CA. When the Court of Appeal refuses an application for a certificate, it is not the practice of the court to give reasons for its refusal: *R v Cooper*, *R v McMahon* (1975) 61 Cr App Rep 215, CA; cf *R v Blaue* as reported in (1975) 61 Cr App Rep 271 at 275, CA, per Lawton LJ. There is no appeal against a refusal to grant a certificate: *Gelberg v Miller* [1961] 1 All ER 618n, [1961] 1 WLR 459, HL. As to applications for leave to appeal see PARA 1967 post; as to bail pending the appeal see PARAS 1198 ante, 1969 post; and as to the hearing and disposal of the appeal see PARA 1974 post.

9 le under the Administration of Justice Act 1960 s 13 (as amended): see PARA 1920 ante.

10 See *ibid* s 13(1), (2)(c).

11 See *ibid* s 1(2) (as prospectively amended: see note 6 supra); applied by s 13(4).

12 Ibid s 1(2) (as prospectively amended: see note 6 supra).

13 See *ibid* s 13(4).

14 le the Criminal Appeal Act 1968 Pt II (as amended) or the Administration of Justice Act 1960 s 13 (as amended).

15 Criminal Appeal Act 1968 s 33(3) (added by the Supreme Court Act 1981 s 152(1), Sch 5). This does not prevent an appeal to the House of Lords under the Proceeds of Crime Act 2002 Pt 2 (ss 6-91) (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391 et seq): s 90(1).

## UPDATE

### 1966 Right of appeal to the [Supreme Court]

NOTE 2--1968 Act s 33(1A) repealed: Serious Crime Act 2007 Sch 8 para 144, Sch 14.

NOTES 4, 6--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1967. Application for leave to appeal.

### **1967. Application for leave to appeal.**

An application to the Court of Appeal for leave to appeal<sup>1</sup> to the House of Lords must be made within the period of 28 days beginning with the date of the Court of Appeal's decision, or, if later, the date on which the Court gives reasons for its decision<sup>2</sup>; and an application to the House of Lords for leave must be made within the period of 28 days<sup>3</sup> beginning with the date on which the application for leave is refused by the Court of Appeal<sup>4</sup>. The House of Lords or the Court of Appeal may, upon application<sup>5</sup> made at any time by the defendant or, in certain appeals<sup>6</sup>, by the prosecution, extend the time within which an application may be made by him to that House or the Court of Appeal<sup>7</sup>.

1 Application to the Court of Appeal for leave to appeal to the House of Lords under the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended) must either be made orally immediately after the decision of the Court of Appeal or by notice of appeal served on the Registrar of Criminal Appeals: CrimPR 74.1(1)(a). The notice of appeal must be in the form set out in *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533, Annex D, CA; *Amendment to the Consolidated Criminal Practice Direction (Forms for use in criminal proceedings)* [2005] 2 All ER 916, [2005] 1 WLR 1479, Annex D, CA. The same procedure also applies to: (1) an application for leave to appeal under the Administration of Justice Act 1960 s 13 (as amended) (see PARA 1920 ante); (2) an application to extend the time within which an application may be made by the defendant to the House of Lords or to the court for leave to appeal under the Criminal Appeal Act 1968 s 34(1) (see *infra*) or under s 34(1) as applied by the Administration of Justice Act 1960 s 13(4) (see PARA 1920 ante); (3) an application by the defendant to be given leave to be present on the hearing of the appeal or of any proceedings preliminary or incidental thereto; and (4) an application by the defendant to be granted bail pending the appeal: CrimPR 74.1(1)(a)-(d). In CrimPR 74.1 any reference to a defendant includes an appellant under the Administration of Justice Act 1960 s 13 (as amended) (see PARA 1920 ante): CrimPR 74.1(8). As to bail pending the appeal see PARAS 1198 ante, 1969 post; and as to the mode of service see PARA 1862 ante.

An application to the Court of Appeal for leave to appeal to the House of Lords under the Criminal Justice Act 2003 Pt 9 (ss 57-74) (prosecution appeals against rulings: see PARA 1898 et seq ante) may be made orally after the decision of the Court of Appeal from which an appeal lies to the House of Lords; or in writing and served on the Registrar within seven business days of the reasons for the decision: CrimPR 66.16(1). If leave to appeal to the House of Lords is granted by the Court of Appeal, or a party has made an application to the House of Lords for leave, in a case where the judge of the court has decided that the appeal should be expedited under the Criminal Justice Act 2003 s 59(1) (see PARA 1900 ante) and that decision has not subsequently been reversed under s 59(4) (see PARA 1900 ante), the Registrar must inform the court officer that the jury is to be discharged from giving a verdict in respect of that defendant: CrimPR 66.16(2).

If there does not seem to be a point of law of general public importance, the court may deal with an application for leave to appeal on the papers without granting legal aid or leave to be present: *R v Daines*, *R v Williams* [1961] 1 All ER 290n, 45 Cr App Rep 57, CCA.

An application for leave to appeal to the House of Lords under the Criminal Appeal Act 1968 Pt II (as amended), or the Administration of Justice Act 1960 s 13 (as amended) may be abandoned before the hearing of the application by serving on the Registrar notice to that effect: CrimPR 74.1(4). CrimPR 68.11 (supply of documentary and other exhibits: see PARA 1857 ante), 68.13(2) (supply of transcripts: see PARA 1860 ante), 68.23 (Registrar's powers and duties: see PARA 1856 ante) apply in relation to an appeal under the Criminal Appeal Act 1968 Pt II (as amended) or the Administration of Justice Act 1960 s 13 (as amended) (see PARA 1920 ante) as they apply in relation to an appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended) (see PARA 1837 et seq ante), except that any reference to s 31 is to be construed as a reference to s 44: CrimPR 74.1(7). CrimPR 68.29 (notice of determination of court: see PARA 1894 ante) applies to a determination under the Criminal Appeal Act 1968 Pt II (as amended) or the Administration of Justice Act 1960 s 13 (as amended) with the necessary modifications: CrimPR 74.1(6). As from a day to be appointed the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (as prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed.



2 le the 'relevant date': Criminal Appeals Act 1968 s 34(1A) (added by the Courts Act 2003 s 88(4), (6)).

3 Where the time prescribed expires on a Saturday, Sunday, bank holiday or other day on which the Judicial Office is closed, the application will be received if made on the next ensuing day on which the Judicial Office is open: House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 3.2.

4 Criminal Appeal Act 1968 s 34(1) (amended by the Courts Act 2003 s 88(4), (5)). As from a day to be appointed, in the Criminal Appeal Act 1968 s 34 (as amended), the words 'Supreme Court' are substituted for the words 'House of Lords' and the words 'the Supreme Court' are substituted for the words 'that House' by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 16(1), (4) (see note 1 supra). At the date at which this volume states the law no such day had been appointed.

Only in exceptional circumstances can the Court of Appeal entertain more than one application for leave to appeal to the House of Lords: *R v Ashdown* [1974] 1 All ER 800, 58 Cr App Rep 339, CA, applying *R v Grantham* [1969] QB 574, 53 Cr App Rep 369, CA. Application to the House of Lords is made by petition. For the form of petition see House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 4.1-4.3, Appendix A, Form 1. As to the procedure generally see Directions 3-7; and as to the hearing of the application see PARA 1967 post.

5 As to the mode of application to the Court of Appeal for extension of time see note 1 supra. Such application to the House of Lords is by petition. For the form of petition see House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 3.2, Appendix A, Form 3. As to the prospective replacement of the House of Lords by the Supreme Court see note 1 supra.

6 le appeals under the Criminal Appeal Act 1968 s 33(1B) (as added): see PARA 1966 note 6 ante. Apart from these appeals, there is no power to extend the time limit on an application by the prosecution: *R v Weir* [2001] 2 All ER 216, [2001] 1 WLR 421, HL.

7 Criminal Appeal Act 1968 s 34(2) (amended by the Criminal Justice Act 2003 s 81(1), (4); and prospectively amended (see note 4 supra)). As to a representation order on appeals to the House of Lords see LEGAL AID vol 65 (2008) PARA 151; as to the suspension of orders for the restitution of property and compensation orders pending an appeal to the House of Lords see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 382, 389; and as to bail pending such appeal see PARA 1969 post.

An appeal to the House of Lords is to be treated as pending until any application for leave to appeal is disposed of and, if leave to appeal is granted, until the appeal is disposed of; and for purposes of the Criminal Appeal Act 1968 Pt II (as amended) an application for leave to appeal is to be treated as disposed of at the expiration of the time within which it may be made, if it is not made within that time: s 34(3) (prospectively amended: see note 4 supra).

## UPDATE

### 1967 Application for leave to appeal

NOTES 1, 4--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 1--CrimPR Pt 74 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 74.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1968. Petition for leave to appeal; reference to Appeal Committee.

### **1968. Petition for leave to appeal; reference to Appeal Committee.**

A petition<sup>1</sup> for leave to appeal to the House of Lords<sup>2</sup> is referred to an Appeal Committee<sup>3</sup> consisting of three Lords of Appeal, who will consider whether the petition appears to be competent to be received by the House and, if so, whether it should be dismissed, allowed or referred for an oral hearing<sup>4</sup>. If the members of the Appeal Committee are unanimously of the opinion that they do not require further argument, the House grants leave outright<sup>5</sup>. Where the Appeal Committee are not unanimous, or where further argument is required, the petition will be referred to an oral hearing<sup>6</sup>. If the respondents have not already been invited to lodge objections, they should do so within 14 days of being informed that the petition has been referred to a hearing<sup>7</sup>.

1 As to petitions for leave to appeal see PARA 1967 ante.

2 As from a day to be appointed, the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (as prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed.

3 See COURTS vol 10 (Reissue) PARA 368.

4 *Procedure Direction* [1979] 2 All ER 224, [1979] 1 WLR 498; House of Lords Practice Direction Applicable to Criminal Appeals (2006) Direction 5.1. As to papers for the Appeal Committee see Direction 5.2-5.4.

5 Ibid Direction 5.9.

6 Ibid Direction 5.16.

7 Ibid Direction 5.17. As to costs on an oral hearing see Direction 6.2; and as to costs where the petition is not referred for an oral hearing see Direction 6.1. Where a petition for leave is allowed, costs of the petition will be costs in the ensuing appeal: Direction 6.3.

### **UPDATE**

### **1968 Petition for leave to appeal; reference to Appeal Committee**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1969. Bail or detention pending appeal to the House of Lords.

### **1969. Bail or detention pending appeal to the House of Lords.**

The Court of Appeal may, if it thinks fit, on the application of a person<sup>1</sup> appealing or applying for leave to appeal to the House of Lords, grant him bail pending the determination of his appeal<sup>2</sup>.

<sup>1</sup>   le other than a person appealing or applying for leave to appeal from a decision under: (1) the Criminal Justice Act 2003 Pt 9 (ss 57-74) (see PARA 1898 et seq ante); (2) the Criminal Justice Act 1987 s 9(11) (appeals against orders or rulings at preparatory hearings: see PARA 1921 ante); (3) the Criminal Procedure and Investigations Act 1996 s 35 (appeal from judge's ruling in preparatory proceedings: see PARA 1922 ante); or (4) the Criminal Justice Act 2003 s 47 (appeal in relation to the discharge of jury on ground of jury tampering: see PARA 1933 ante): see the Criminal Appeal Act 1968 s 36 (amended by the Criminal Procedure and Investigations Act 1996 s 36(1)(b); and the Criminal Justice Act 2003 s 68(2)).

<sup>2</sup>   See the Criminal Appeal Act 1968 s 36 (as amended); and PARA 1198 ante. The House of Lords does not grant bail: House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 27.1. As from a day to be appointed the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Criminal Appeal Act 1968 s 36 (prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 16(1), (6)). At the date at which this volume states the law no such day had been appointed.

### **UPDATE**

### **1969 Bail or detention pending appeal to the [Supreme Court]**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1970. Effect of appeal to the House of Lords on sentence.

### **1970. Effect of appeal to the House of Lords on sentence.**

Where a person subject to a sentence<sup>1</sup> is granted bail<sup>2</sup>, the time during which he is released on bail is to be disregarded in computing the term of his sentence<sup>3</sup>.

Subject to the above provision, and unless the House of Lords or the Court of Appeal otherwise directs, any sentence passed<sup>4</sup> on an appeal to the House of Lords in substitution for another sentence begins to run from the time when the other sentence would have begun to run<sup>5</sup>.

1 For the meaning of 'sentence' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 45.

2 Ie under the Criminal Appeal Act 1968 s 36 (as amended) or s 37 (as amended): see PARA 1198 ante.

3 Ibid s 43(1) (amended by the Bail Act 1976 s 12(1), Sch 2 para 44).

4 Ie under the Criminal Appeal Act 1968 s 35(3) (as prospectively amended): see PARA 1974 post.

5 Ibid s 43(2). As to the commencement of sentences passed by the Court of Appeal see PARA 1845 ante. As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords' in s 43 by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 16(1), (8). At the date at which this volume states the law no such day had been appointed.

### **UPDATE**

### **1970 Effect of appeal to the [Supreme Court] on sentence**

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1971. Presence of appellant before the House of Lords.

### **1971. Presence of appellant before the House of Lords.**

A defendant who has been convicted of an offence, or in whose case an order for re-trial<sup>1</sup> or a declaration that an acquittal is not a bar to trial for a qualifying offence<sup>2</sup> has been made, and who is detained pending an appeal to the House of Lords is not entitled to be present on the hearing of the appeal or of any preliminary or incidental proceedings, except where an order of the House of Lords authorises him to be present or where the House or the Court of Appeal, as the case may be, gives him leave to be present<sup>3</sup>.

1    le under the Criminal Justice Act 2003 s 77: see PARA 1939 ante.

2    le under ibid s 77(4): see PARA 1939 ante.

3    Criminal Appeal Act 1968 s 38 (amended by the Criminal Justice Act 1987 s 15, Sch 2 para 5; and the Criminal Justice Act 2003 s 81(1), (5)). Leave to be present at preliminary or incidental proceedings may be granted by a single judge: see PARA 1972 post. As to the mode of application for such leave see PARA 1967 note 1 ante. As from a day to be appointed, the words 'the Supreme Court' are substituted for the words 'the House of Lords' and 'the House' by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 16(1), (7). At the date at which this volume states the law no such day had been appointed.

### **UPDATE**

### **1971 Presence of appellant before the [Supreme Court]**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1972. Powers of Court of Appeal exercisable by a single judge.

### **1972. Powers of Court of Appeal exercisable by a single judge.**

A single judge<sup>1</sup> may exercise any of the following powers of the Court of Appeal:

- 2580 (1) to make orders<sup>2</sup> for the payment of costs out of central funds on the determination<sup>3</sup> of an application for leave to appeal to the House of Lords<sup>4</sup>;
- 2581 (2) to extend the time<sup>5</sup> for making an application for leave to appeal to the House of Lords<sup>6</sup>;
- 2582 (3) to make an order for or in relation to bail<sup>7</sup>;
- 2583 (4) to give leave for a person to be present<sup>8</sup> at the hearing of any proceedings preliminary or incidental to an appeal to the House of Lords<sup>9</sup>; and
- 2584 (5) to suspend a person's disqualification<sup>10</sup> for driving etc<sup>11</sup>.

Where the judge refuses an application to exercise any of the above powers, the applicant is entitled to have it determined by the full court<sup>12</sup>.

1    le any judge of the Court of Appeal or the High Court: see PARA 1854 note 1 ante.

2    le under the Prosecution of Offences Act 1985 ss 16, 17 (as amended): see PARAS 2059, 2062 post.

3    le under the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended): see PARA 1966 et seq ante.

4    Ibid s 44(1)(b) (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 paras 20, 31).

5    As to the time for applying for leave to appeal see PARA 1967 ante.

6    Criminal Appeal Act 1968 s 44(1)(a)(i) (s 44(1)(a) substituted by the Criminal Justice Act 1988 Sch 15 paras 20, 31).

7    Criminal Appeal Act 1968 s 44(1)(a)(ii) (as substituted: see note 6 supra). As to orders for bail see PARA 1198 ante.

8    As to applications to be present see PARA 1971 ante.

9    Criminal Appeal Act 1968 s 44(1)(a)(iii) (as substituted: see note 6 supra). As to the powers of a single judge in relation to an appeal to the Court of Appeal see PARA 1854 ante.

10   le under the Road Traffic Offenders Act 1988 s 40(3): see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1075.

11   Criminal Appeal Act 1968 s 44(2) (added by the Road Traffic Act 1974 s 24(2), Sch 6 para 11; and amended by the Road Traffic (Consequential Provisions) Act 1988 s 4, Sch 2 para 4(2)).

12   Criminal Appeal Act 1968 s 44(1), (2) (as amended: see the text and notes 1-11 supra).

For the purpose of having an application determined by the court in pursuance of s 44 (as amended), CrimPR 68.5 (exercise of the court's power to give leave) and CrimPR 68.6 (further application to the court: see PARA 1855 ante) apply with the necessary modifications: CrimPR 74.1(5).

## **UPDATE**

### **1972 Powers of Court of Appeal exercisable by a single judge**

NOTE 12--CrimPR Pt 74 now Criminal Procedure Rules 2010, SI 2010/60, Pts 65, 74.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1973. Appeal petition; procedure.

### **1973. Appeal petition; procedure.**

Where the Court of Appeal has granted leave to appeal<sup>1</sup> to the House of Lords<sup>2</sup>, a petition of appeal must be lodged<sup>3</sup> in the Judicial Office within three months of the date on which the order appealed against was made<sup>4</sup>. However, this time limit may be varied (but not increased) by an order of the House when granting leave or by an order of the court below<sup>5</sup>. Where a petition of appeal is not lodged within the time allowed, a petition for leave to present the appeal out of time may be lodged<sup>6</sup>.

The appellants and respondents must respectively lodge a case<sup>7</sup>. All cases must conclude with a numbered summary of reasons upon which the argument is founded<sup>8</sup>. The lodgment of a joint case on behalf of both appellants and respondents may be permitted in certain circumstances<sup>9</sup>.

Applications to consolidate<sup>10</sup> or to conjoin<sup>11</sup> appeals and other incidental applications must be made by petition<sup>12</sup>.

Parties are notified of the date of judgment<sup>13</sup>.

<sup>1</sup> See PARA 1967 ante.

<sup>2</sup> As from a day to be appointed, the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1969 s 1(1) (as prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed.

<sup>3</sup> 'Lodged' means delivery to a member of the Judicial Office staff, either in person during opening hours or by post; and where the time for lodging expires on a Saturday, Sunday bank holiday, or any other day on which the Judicial Office is closed, it is received if it is lodged on the first day on which the Office is next open: House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 26.1. Communications may be transmitted by facsimile or email only where urgent circumstances make this appropriate and no document which is to be presented to the House may be so transmitted: Direction 26.2.

<sup>4</sup> Ibid Direction 8.1. For the form of petition see Directions 10.1-10.3, Appendix A, Form 4.

<sup>5</sup> Ibid Direction 8.2. The order appealed against is the substantive order complained of: Direction 8.2.

<sup>6</sup> Ibid Direction 8.4. This petition is referred to an Appeal Committee: Direction 8.4.

<sup>7</sup> Ibid Direction 16.11.

<sup>8</sup> Ibid Direction 16.8. As to preparation of cases see generally Direction 16. As to exchange of cases, lodging of bound cases, and other procedural matters see Directions 16-42. As to the number of documents normally required for the hearing of an appeal see Direction 24.4.

<sup>9</sup> Ibid Direction 16.13.

<sup>10</sup> I.e. when two or more appeals are carried on as a single cause with one set of counsel and one case on each side and a single Appendix. As to the Appendix, the contents of which must be agreed between the parties, see ibid Direction 13.

<sup>11</sup> I.e. usually where there is one case and one set of counsel for each of the respective appellants and/or for each of the respective respondents in two or more appeals, with one Appendix common to both or all the conjoined appeals. However, a number of variations is possible.



12 House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 28.5. For the form of petition see Appendix A, Form 7.

13 Ibid Direction 21.1. As to the draft order after the House has given judgment and final order see Direction 22; and as to the hearing and disposal of the appeal see PARA 1974 post.

## **UPDATE**

### **1973 Appeal petition; procedure**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1974. Hearing and disposal of appeal by the House of Lords.

### **1974. Hearing and disposal of appeal by the House of Lords.**

Until a day to be appointed<sup>1</sup>, an appeal<sup>2</sup> must not be heard or determined by the House of Lords unless there are present at least three of the persons designated<sup>3</sup> Lords of Appeal<sup>4</sup>.

For the purpose of disposing of an appeal, the House of Lords may exercise any powers of the Court of Appeal or may remit the case to that court<sup>5</sup>.

1 The Criminal Appeal Act 1968 s 35(1), (2) is repealed by the Constitutional Reform Act 2005 ss 40(4), 146, Sch 9 para 16(1), (5)(a), Sch 18 Pt 5 as from a day to be appointed under s 148(1). At the date at which this volume states the law no such day had been appointed.

2 Ie under the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended): see PARA 1966 et seq ante.

3 Ie by the Appellate Jurisdiction Act 1876 s 5: see COURTS vol 10 (Reissue) PARA 365.

4 Criminal Appeal Act 1968 s 35(1) (prospectively repealed: see note 1 supra). Section 35(1) applies on a reference to the House of Lords under the Criminal Justice Act 1972 s 36 (as amended) or the Criminal Justice Act 1988 s 36 (as amended): see PARA 1976 post. Applications for leave to appeal may be heard by a committee constituted in accordance with the Appellate Jurisdiction Act 1876 s 5; and any order of the House so providing may direct that the decision of that committee be taken on behalf of the House: see the Criminal Appeal Act 1968 s 35(2) (prospectively repealed: see note 1 supra); and COURTS vol 10 (Reissue) PARA 365. As to applications for leave to appeal see PARAS 1967-1968 ante. As from a day to be appointed, the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (as prospectively amended); and PARA 2020 post. The Supreme Court is duly constituted in any proceedings only if all the following conditions are met: (1) the court consists of an uneven number of judges; (2) the court consists of at least three judges; (3) more than half of those judges are permanent judges: Constitutional Reform Act 2005 s 42(1) (not yet in force). For powers to make directions increasing the minimum number of judges in specified proceedings see s 42(2), (3), (5) (not yet in force). At the date at which this volume states the law no such days had been appointed.

5 Criminal Appeal Act 1968 s 35(3). As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords' by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 16(1), (5) (b). At the date at which this volume states the law no such day had been appointed.

When a case is remitted to the Court of Appeal, its powers under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended) revive and it deals with the matter as if it were an appeal from an inferior court: *R v Kearley (No 2)* [1994] 2 AC 414, [1994] 3 All ER 246, HL; as to these powers see PARA 1877 et seq ante. As to the commencement of sentences passed by the House of Lords see PARA 1970 ante; and as to the power of the House of Lords to make compensation orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 382.

Where the Court of Appeal has left a ground of appeal unresolved because it has decided that another ground is conclusively in favour of the appellant, and the House of Lords on an appeal by the prosecution holds in favour of the prosecution on that latter ground, the House of Lords can either consider the unresolved ground or remit it to the Court of Appeal: *R v Mandair* [1995] 1 AC 208, [1994] 2 All ER 715, HL.

### **UPDATE**

### **1974 Hearing and disposal of appeal by the House of Lords**

NOTES 1, 4, 5--Provisions of Constitutional Reform Act 2005 in force 1 October 2009: SI 2009/1604.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(6) APPEAL FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1975. Costs in the House of Lords.

### **1975. Costs in the House of Lords.**

Where the House of Lords determines an appeal, or application for leave to appeal<sup>2</sup>, the House may make an order that the appellant's costs be paid out of central funds<sup>3</sup>; and in any proceedings in respect of an indictable offence, or in respect of a summary offence, the House may order the payment out of central funds of private prosecution costs<sup>4</sup>.

1 As from a day to be appointed, the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (as prospectively amended); and PARA 2020 post. At the date at which this volume states the law no such day had been appointed.

2 Ie under the Criminal Appeal Act 1968 Pt II (ss 33-44) (as amended): see PARA 1966 et seq ante.

3 See PARA 2059 post.

4 See PARA 2062 post. The power to make orders as to costs is exercisable by a single judge: see PARA 1972 ante.

### **UPDATE**

### **1975 Costs in the House of Lords**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(7) REFERENCES FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS/1976.

References to the House of Lords.

## **(7) REFERENCES FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS**

### **1976. References to the House of Lords.**

The Court of Appeal may refer to the House of Lords a point of law referred to it by the Attorney General<sup>1</sup>; and the House must then consider the point and give its opinion on it accordingly<sup>2</sup>.

Where the Court of Appeal has concluded its review of sentencing in a case referred to it<sup>3</sup>, the Attorney General or the person to whose sentencing the reference relates may refer a point of law involved in any sentence passed on that person in the proceeding to the House of Lords for its opinion; and the House must consider the point and give its opinion on it accordingly, and either remit the case to the Court of Appeal to be dealt with or deal with it itself<sup>4</sup>. Any such reference may be made only with the leave of the Court of Appeal or the House of Lords; and leave may not be granted unless it is certified by the Court of Appeal that the point of law is of general public importance and it appears to the Court of Appeal or the House of Lords (as the case may be) that the point is one which ought to be considered by the House<sup>5</sup>. An application to the Court of Appeal for leave to refer a case to the House of Lords must be made within the period of 14 days beginning with the date on which the Court of Appeal concludes its review of the case; and an application to the House of Lords for leave must be made within the period of 14 days beginning with the date on which the Court of Appeal concludes its review or refuses leave to refer the case to the House of Lords<sup>6</sup>. For the purposes of dealing with any such case, the House of Lords may exercise any powers of the Court of Appeal<sup>7</sup>.

<sup>1</sup> *Ibid* under the Criminal Justice Act 1972 s 36(3) (as prospectively amended): see PARA 1950 ante.

<sup>2</sup> *Ibid* s 36(4). As from a day to be appointed, the Criminal Justice Act 1972 s 36 and the Criminal Justice Act 1988 s 36, Sch 3 paras 4, 9 are amended and the words 'Supreme Court' are substituted for the words 'House of Lords' and the words 'the Supreme Court' are substituted for 'the House' by the Constitutional Reform Act 2005 s 40, Sch 9 paras 10, 23, 48). At the date at which this volume states the law no such day had been appointed. The Criminal Appeal Act 1968 s 35(1) (composition of the House of Lords for appeals) (prospectively repealed: see PARA 1974 ante) applies also to any proceedings of the House under the Criminal Justice Act 1972 s 36: s 36(4) (prospectively amended by the Constitutional Reform Act 1972 s 40(4), Sch 9 para 23(b)). As to costs on such a reference see PARA 2065 post.

<sup>3</sup> *Ibid* under the Criminal Justice Act 1988 s 36: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 55-57.

<sup>4</sup> *Ibid* s 36(5) (prospectively amended: see note 2 supra). The Criminal Appeal Act 1968 s 35(1) (composition of House for appeals) (prospectively repealed: see PARA 1974 ante) applies also in relation to any proceedings of the House of Lords under the Criminal Justice Act 1988 s 36 (as prospectively amended): s 36(5) (as so prospectively amended).

A person whose sentencing is the subject of a reference to the House of Lords under s 36(5) (as prospectively amended) and who is detained pending the hearing of that reference is not entitled to be present on the hearing of the reference or of any proceeding preliminary or incidental thereto except where an order of the House authorises him to be present, or where the House or the Court of Appeal, as the case may be, gives him leave to be present: s 36(8), Sch 3 para 9 (prospectively amended: see note 2 supra). As to the right to be present on the hearing of a reference to the Court of Appeal see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 65.

5 Ibid s 36(6) (prospectively amended: see note 2 supra). As to costs on such a reference see PARA 2066 post.

6 Ibid Sch 3 para 4 (prospectively amended: see note 2 supra).

7 Ibid s 36(7) (prospectively amended: see note 2 supra). The term of any sentence passed by the House of Lords begins to run, unless the House otherwise directs, from the time when it would have begun to run if passed in the proceeding in relation to which the reference was made: Sch 3 para 10.

## **UPDATE**

### **1976 References to the House of Lords**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.  
 APPEALS/(8) APPEALS IN CASES OF DEATH/1977. Appeals in cases of death.

## **(8) APPEALS IN CASES OF DEATH**

### **1977. Appeals in cases of death.**

Where a person has died:

- 2585 (1) any relevant appeal<sup>1</sup> which might have been begun by him had he remained alive may be begun by a person approved<sup>2</sup> by the Court of Appeal<sup>3</sup>; and  
 2586 (2) where any relevant appeal was begun by him while he was alive or is begun in relation to his case by virtue of head (1) above or by a reference by the Criminal Cases Review Commission<sup>4</sup>, any further step which might have been taken by him in connection with the appeal if he were alive may be taken by a person so approved<sup>5</sup>.

Except in the case of an appeal begun by a reference by the Criminal Cases Review Commission, an application for such approval may not be made after the end of the period of one year beginning with the date of death<sup>6</sup>.

1 le: (1) an appeal under the Criminal Appeal Act 1968 ss 1, 9, 12 or 15 (all as amended) (see PARAS 1837-1839, 1940, 1943 ante); or (2) an appeal under s 33 (as amended) (see PARA 1966 ante) from any decision of the Court of Appeal on an appeal under any of those provisions: Criminal Appeal Act 1968 s 44A(2) (s 44A added by the Criminal Appeal Act 1995 s 7(1)).

2 For these purposes, approval may only be given to: (1) the widow or widower or surviving civil partner of the dead person; (2) a person who is the personal representative (within the meaning of the Administration of Estates Act 1925 s 55(1)(xi) (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 4) of the dead person; or (3) any other person appearing to the Court of Appeal to have, by reason of a family or similar relationship with the dead person, a substantial financial or other interest in the determination of a relevant appeal relating to him: Criminal Appeal Act 1968 s 44A(3) (as added (see note 1 supra); and amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 26).

Where the Criminal Appeal Act 1968 s 44A (as added and amended) applies, any reference in the Criminal Appeal Act 1968 to the appellant is, where appropriate, to be construed as being or including a reference to the person approved under s 44A (as added and amended): s 44A(5) (as so added).

3 Ibid s 44A(1)(a) (as added: see note 1 supra). The power of the Court of Appeal to approve a person under s 44A (as added and amended) may be exercised by a single judge in the same manner as by the Court of Appeal and subject to the same provisions; but if the single judge refuses the application, the applicant is entitled to have the application determined by the Court of Appeal: s 44A(6) (as so added).

4 See PARA 1963 et seq ante.

5 Criminal Appeal Act 1968 s 44A(1)(b) (as added: see note 1 supra).

6 Ibid s 44A(4) (as added: see note 1 supra).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.  
 APPEALS/(9) PREROGATIVE OF MERCY/1978. Grant of pardon.

## **(9) PREROGATIVE OF MERCY**

### **1978. Grant of pardon.**

The royal prerogative of mercy may be exercised irrespective of any appeal and after the failure of an appeal to the court<sup>1</sup>. A pardon does not eliminate the conviction; it merely removes the penalty<sup>2</sup>.

Besides a royal pardon under the Great Seal or under the sign manual there may be a pardon by an Act of Parliament<sup>3</sup>.

<sup>1</sup> Nothing in the Criminal Appeal Act 1968 affects the prerogative of mercy: see s 49. See also the Criminal Law Act 1967 s 9. As to the Sovereign's prerogative to grant pardons and reprieves see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 823-828.

<sup>2</sup> *R v Foster (Barry)* [1985] QB 115, 79 Cr App Rep 61, CA.

<sup>3</sup> See *R v Crosby* (1695) 12 State Tr 1291; *R v Rookwood* (1696) 13 State Tr 139 at 186; and cf *Phillips v Eyre* (1869) LR 4 QB 225; affd (1870) LR 6 QB 1, Ex Ch (colonial Act of Indemnity).



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APPEALS/(9) PREROGATIVE OF MERCY/1979. Assistance in connection with prerogative of mercy.

### **1979. Assistance in connection with prerogative of mercy.**

Where the Secretary of State refers to the Criminal Cases Review Commission<sup>1</sup> any matter which arises in the consideration of whether to recommend the exercise of Her Majesty's prerogative of mercy in relation to a conviction and on which he desires its assistance, the Commission must consider the matter referred, and give to the Secretary of State a statement of its conclusions on it; and the Secretary of State must, in considering whether so to recommend, treat the Commission's statement as conclusive of the matter referred<sup>2</sup>. Where in any case the Commission is of the opinion that the Secretary of State should consider whether to recommend the exercise of Her Majesty's prerogative of mercy in relation to the case it must give him the reasons for its opinion<sup>3</sup>.

1 See PARA 2028 et seq post.

2 Criminal Appeal Act 1995 s 16(1).

3 Ibid s 16(2). As to the Commission see PARA 2028 et seq post.

### **UPDATE**

### **1979 Assistance in connection with prerogative of mercy**

NOTES--In the Criminal Appeal Act 1995 s 16(1) 'conviction' includes a conviction by the Court Martial or the Service Civilian Court, and in s 16(2) 'case' includes the case of such a conviction: s 16(3) (added by the Armed Forces Act 2006 Sch 11 para 6).

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## **(10) APPEALS TO THE CROWN COURT**

### **(i) Right of Appeal**

#### **1980. Right of appeal from magistrates' courts.**

A person convicted by a magistrates' court may appeal to the Crown Court<sup>1</sup>: (1) if he pleaded guilty, against his sentence<sup>2</sup>; and (2) if he did not, against the conviction or sentence<sup>3</sup>. Where a person is ordered<sup>4</sup> by a magistrates' court<sup>5</sup> to enter into a recognisance with or without sureties to keep the peace or to be of good behaviour, he may appeal to the Crown Court<sup>6</sup>.

For these purposes, 'sentence' includes any order made on conviction<sup>7</sup> by a magistrates' court, not being: (a) an order for the payment of costs<sup>8</sup>; (b) an order<sup>9</sup> for the destruction of an animal<sup>10</sup>; or (c) an order made in pursuance of an enactment under which the court has no discretion as to the making of the order or its terms<sup>11</sup>.

A person in respect of whom a relevant order<sup>12</sup> is revoked and another substituted may appeal to the Crown Court against the sentence<sup>13</sup>.

There is no right of appeal against the dismissal of an information<sup>14</sup> or complaint before a magistrates' court unless the statute concerned expressly confers it<sup>15</sup>.

A defendant may appeal to the Crown Court against a magistrates' court's decision to extend or further extend<sup>16</sup> a custody time limit or an overall time limit<sup>17</sup> or (at any time after the person arrested has been charged with the offence in question) an initial stage time limit<sup>18</sup>; but the extension of any such time limit may not be called into question in any appeal against conviction<sup>19</sup>. The prosecution may appeal to the Crown Court against a decision by a magistrates' court to refuse to extend such a limit<sup>20</sup>.

A parent or guardian may appeal to the Crown Court against: (i) an order<sup>21</sup> requiring him to pay a fine etc on behalf of a child or young person<sup>22</sup> imposed by a magistrates' court<sup>23</sup>; or (ii) an order<sup>24</sup> made by a magistrates' court binding him over, consequent on the conviction of his child or ward who is a child or young person<sup>25</sup>.

Any person aggrieved by the decision of a magistrates' court making a banning order arising out of an offence outside England and Wales<sup>26</sup> may appeal to the Crown Court against the decision<sup>27</sup>.

In certain circumstances the prosecution may appeal to the Crown Court against the grant of bail by a magistrates' court<sup>28</sup>.

A party to the proceedings or, with the leave of the Crown Court, any other person may appeal to the Crown Court against the making or refusal to make an order<sup>29</sup> dispensing with the restriction<sup>30</sup> on reports relating to a person under 18 involved in an offence if it is likely to lead members of the public to identify him as a person involved in the offence<sup>31</sup>.

1 As to the Crown Court's appellate jurisdiction see COURTS vol 10 (Reissue) PARAS 628-630.

2 Magistrates' Courts Act 1980 s 108(1)(a). The Crown Court has no jurisdiction to hear an appeal against conviction by a person who pleaded guilty unless the plea was made under duress: *R v Crown Court at Huntingdon, ex p Jordan* [1981] QB 857, 73 Cr App Rep 194, DC (Crown Court may investigate an apparently unequivocal plea where duress is alleged) or unless the plea was equivocal: *R v West Kent Quarter Sessions Appeal Committee, ex p Files* [1951] 2 All ER 728, DC; *R v Durham Quarter Sessions, ex p Virgo* [1952] 2 QB 1, [1952] 1 All ER 466, DC; *R v London County Quarter Sessions Appeal Committee Deputy Chairman, ex p Borg* [1958] 1 QB 43, [1957] 3 All ER 28, DC (explaining *Mittelman v Denman* [1920] 1 KB 519, DC). Where it appears to the Crown Court that a person is seeking to appeal against conviction on the ground that the plea of guilty was equivocal, the court is bound to determine the validity of that plea as a preliminary point: see *R v Marylebone Justices, ex p Westminster City Council* [1971] 1 All ER 1025, [1971] 1 WLR 567, DC. See also *R v Tottenham Justices, ex p Rubens* [1970] 1 All ER 879, [1970] 1 WLR 800, DC. However, the Crown Court should not set about making such an inquiry unless it is told something which prima facie raises the issue of an equivocal plea having been tendered: *R v Crown Court at Coventry, ex p Manson* (1978) 67 Cr App Rep 315, DC. In considering whether the plea was equivocal, the court may have regard only to what happened before the magistrates; the Crown Court has no jurisdiction to hear an appeal against conviction merely because the defendant later regrets pleading guilty and thinks that he has an arguable case: *R v Marylebone Justices, ex p Westminster City Council* supra. Also see *R v Crown Court at Birmingham, ex p Sharma* [1988] Crim LR 741, DC (Crown Court had no jurisdiction to hear appeal against conviction after defendant unintentionally pleaded guilty by post). Provided that it has conducted a proper inquiry into the circumstances of the acceptance of a guilty plea, the Crown Court may direct a magistrates' court that a not guilty plea be entered and a summary trial be held: *R v Plymouth Justices, ex p Hart* [1986] QB 950, 83 Cr App Rep 81, DC. In order to decide safely whether a plea was equivocal the Crown Court must have sufficient evidence of what happened at the hearing in the magistrates' court when the defendant was convicted and sentenced: *R v Plymouth Justices, ex p Hart* supra. Evidence as to what happened before the magistrates should normally be supplied by way of affidavits from the chairman of the bench and the justices' clerk: see *R v Rochdale Justices, ex p Allwork* [1981] 3 All ER 434, 73 Cr App Rep 319, DC; *R v Plymouth Justices, ex p Hart* supra. An appeal lies against an invalid sentence: *R v Birmingham Justices, ex p Wyatt* [1975] 3 All ER 897, [1976] 1 WLR 260, DC.

3 Magistrates' Courts Act 1980 s 108(1)(b). The Powers of Criminal Courts (Sentencing) Act 2000 s 14 (under which a conviction of an offence for which an order for conditional or absolute discharge is made is deemed not to be a conviction except for certain purposes: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 41) does not prevent an appeal under the Magistrates' Courts Act 1980 s 108 (as amended), whether against conviction or otherwise: s 108(1A) (added by the Criminal Justice Act 1982 s 66(2); and amended by the Criminal Justice Act 1991 s 101(2), Sch 13; Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 71).

4 lie under the Justices of the Peace Act 1361 or otherwise.

5 lie as defined in the Magistrates' Courts Act 1980: see MAGISTRATES vol 29(2) (Reissue) PARA 583.

6 Magistrates' Courts (Appeals from Binding over Orders) Act 1956 s 1(1) (amended by the Courts Act 1971 s 56(2), Sch 9 Pt I; and the Magistrates' Courts Act 1980 s 154, Sch 7 para 16). Nothing in the Magistrates' Courts (Appeals from Binding over Orders) Act 1956 s 1 (as amended) applies in relation to any order an appeal from which lies to the Crown Court apart from the provisions of s 1 (as amended): s 1(3) (amended by the Courts Act 1971 s 56(2), Sch 9 Pt I). As to the grounds of appeal against a binding over order see *Hughes v Holley* (1988) 86 Cr App Rep 130, DC. Such an appeal is by way of a rehearing; unless the appellant admits the facts on which the order was based, sworn evidence must be adduced which may be cross-examined: *Shaw v Hamilton* [1982] 2 All ER 718, 4 Cr App Rep (S) 80, DC.

7 An 'order made on conviction' means an order made in consequence of a conviction and therefore does not include an order to find sureties even when such an order is made following the imposition of a penalty for an offence: *R v London Sessions, ex p Beaumont* [1951] 1 KB 557, [1951] 1 All ER 232, DC; but as to an appeal against a binding over order see the text to note 6 supra. An order of examining justices committing an defendant for trial is not an order made on conviction: see *Card v Salmon* [1953] 1 QB 392 at 396, [1953] 1 All ER 324 at 326 per Lord Goddard CJ; *Atkinson v United States of America Government* [1971] AC 197, [1969] 3 All ER 1317, HL. Nor is a committal to the Crown Court for sentence: *R v London Sessions Appeal Committee, ex p Rogers* [1951] 2 KB 74, [1951] 1 All ER 343, DC. However, an appeal may be brought against the conviction upon which the committal for sentence is based: see PARA 1981 post.

An order forfeiting recognisances is not an order made upon conviction: *R v Durham Justices, ex p Laurent* [1945] KB 33, [1944] 2 All ER 530, DC. There is no appeal to the Crown Court against an order by a justice of the peace condemning food as unfit for human consumption: *R v Cornwall Quarter Sessions Appeal Committee, ex p Kerly* [1956] 2 All ER 872, [1956] 1 WLR 906, DC. A sentence of imprisonment in default of payment of an estreated recognisance is not an order made on conviction: *R v Harman* [1959] 2 QB 134, 43 Cr App Rep 161, CCA. For the purposes of an appeal to the Crown Court, a discretionary order of disqualification under the Road Traffic Acts is an order made on conviction: see *R v Surrey Quarter Sessions, ex p Metropolitan Police Comr* [1963] 1 QB 990, [1962] 1 All ER 825, DC. A mandatory disqualification may not be the subject of an appeal against sentence, since the magistrates have no discretion as to the making of it (see the text to note 11 infra);

but appeal lies against a disqualification under the Road Traffic Offenders Act 1988 s 34 or s 35 (as amended: see ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 1057 et seq) as it does against a conviction (s 38(1)).

An appeal lies against a hospital or guardianship order made by a magistrates' court under the Mental Health Act 1983 s 37(3) without convicting the defendant as if it had been made on his conviction (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332): see s 45; and MENTAL HEALTH vol 30(2) (Reissue) PARA 505. A recommendation for deportation under the Immigration Act 1971 s 6 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 9) is treated as a sentence for the purposes of appeal: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 160. 'Sentence' for the purposes of appeal also includes a declaration of relevance under the Football Spectators Act 1989: see s 23(3); and THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARA 112. A banning order made on conviction of a relevant offence must be quashed if the declaration of relevance in respect of that offence is quashed on appeal: see s 23(4); and THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARA 112.

8 Magistrates' Courts Act 1980 s 108(3)(b). A person sentenced by a magistrates' court for an offence in respect of which an order for conditional discharge has been previously made may appeal to the Crown Court against the sentence: s 108(2) (amended by the Crime and Disorder Act 1998 ss 119, 120, Sch 8 para 43, Sch 10).

9 le under the Protection of Animals Act 1911 s 2: see ANIMALS vol 2 (2008) PARA 854.

10 Magistrates' Courts Act 1980 s 108(3)(c).

11 Ibid s 108(3)(d). See *R v Surrey Quarter Sessions, ex p Metropolitan Police Comr* [1963] 1 QB 990, [1962] 1 All ER 825, DC. As from a day to be appointed, the Magistrates' Courts Act 1980 s 108(3)(d) does not prevent an appeal against a surcharge imposed under the Criminal Justice Act 2003 s 161A (as added): Magistrates' Courts Act 1980 s 108(4) (prospectively added by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 10). At the date at which this volume states the law no such day had been appointed.

12 For the meaning of 'relevant order' see PARA 1710 ante.

13 See the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 para 10(3)(b), (6); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 236. As from 4 April 2007, the Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 is substituted by the Criminal Justice Act 2003 s 304, Sch 32 paras 90, 125: (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 233) but not so as to affect the meaning of Sch 3 para 10(3)(b), (6), which is recast in the substituted Sch 3 as para 10(3)(b), (5) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 236).

14 As from a day to be appointed, any reference (however expressed) in any enactment which is or includes a reference to an information within the meaning of the Magistrates' Courts Act 1980 s 1 (or to the laying of such an information) is to be read as including a reference to a written charge (or to the issue of a written charge): Criminal Justice Act 2003 s 30(5)(a) (not yet in force). At the date at which this volume states the law, no such day had been appointed.

15 See COURTS vol 10 (Reissue) PARA 628.

16 le under the Prosecution of Offences Act 1985 s 22(3) (as substituted: see PARA 1152 ante).

17 See *ibid* s 22(7) (amended by the Crime and Disorder Act 1998 s 43(6)); and PARA 1152 ante. The defendant may also appeal to the Crown Court against a direction under the Prosecution of Offences Act 1985 s 22(6A) (as added): see s 22(7) (as so amended); and PARA 1152 ante. See also note 20 *infra*.

18 Ibid s 22(7) (as amended (see note 17 *supra*); and applied by the Prosecution of Offences Act 1985 s 22A(7) (s 22A added by the Crime and Disorder Act 1998 s 44)). For the meaning of 'initial stage time limit' see PARA 1157 ante.

19 See the Prosecution of Offences Act 1985 ss 22(10), 22A(8) (as added: see note 18 *supra*).

20 See *ibid* s 22(8) (amended by the Crime and Disorder Act 1998 s 43(7); and applied in the case of an initial stage time limit by s 22A(7) (as added: see note 18 *supra*)). The prosecution may also appeal against the refusal to make a direction under the Prosecution of Offences Act 1985 s 22(6A) (as added): s 22(8) (as so amended). An appeal under s 22(8) (as amended) may not be commenced after the expiry of the limit in question: but where such an appeal is commenced before the expiry of the limit the limit is deemed not to have expired before the determination or abandonment of the appeal: s 22(9) (applied in the case of an initial stage time limit by s 22A(7) (as so added)).

21 le under the Powers of Criminal Courts (Sentencing) Act 2000 s 137 (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 383.

22 le a person under 18.

23 See the Powers of Criminal Courts (Sentencing) Act 2000 s 137(6); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 383.

24 le under ibid s 150: see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1288.

25 See ibid s 150(8); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1288.

26 le a banning order under the Football Spectators Act 1989 s 22: see THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARA 123.

27 See ibid s 22(7) (as amended); and THEATRES AND OTHER FORMS OF ENTERTAINMENT vol 45(2) (Reissue) PARA 123.

28 See the Bail (Amendment) Act 1993 s 1 (as amended); and PARA 1186 ante.

29 See the Youth Justice and Criminal Evidence Act 1999 s 44(7); and MAGISTRATES vol 29(2) (Reissue) PARA 755.

30 See ibid s 44(2); and MAGISTRATES vol 29(2) (Reissue) PARA 755.

31 See ibid s 44(11); and MAGISTRATES vol 29(2) (Reissue) PARA 755.

## **UPDATE**

### **1980 Right of appeal from magistrates' courts**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTE 7--In the 1989 Act s 23 'declaration of relevance' means a declaration by a court for the purposes of Sch 1 that an offence related to football matches, or that it related to one or more particular football matches: s 23(5) (added by Violent Crime Reduction Act 2006 Sch 3 para 12).

TEXT AND NOTE 10--1980 Act s 108(3)(c) amended: Animal Welfare Act 2006 Sch 3 para 10.

NOTE 13--Powers of Criminal Courts (Sentencing) Act 2000 Sch 3 repealed: Criminal Justice and Immigration Act 2008 Sch 28 Pt 1.

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### **1981. Appeal by person committed to the Crown Court for sentence etc.**

A person convicted by a magistrates' court and committed to the Crown Court for sentence<sup>1</sup>, or to be otherwise dealt with<sup>2</sup>, may appeal to the Crown Court against the conviction on which the committal was based, but not against the order of committal itself<sup>3</sup>. Opportunity must be given for the appeal to be heard before the Crown Court proceeds to pass sentence or otherwise deals with the offender<sup>4</sup>.

1 As to the power to commit to the Crown Court for sentence see PARA 1123 ante; and MAGISTRATES vol 29(2) (Reissue) PARA 777 et seq.

2 As to persons committed to the Crown Court to be dealt with as incorrigible rogues under the Vagrancy Act 1824 (as amended; prospectively repealed) see PARA 835 ante.

3 *R v London Sessions Appeal Committee, ex p Rogers* [1951] 2 KB 74, [1951] 1 All ER 343, DC. The decision relates specifically to committal for sentence under the Criminal Justice Act 1948 s 29 (repealed); but the same considerations apply in the case of committals to the Crown Court under other statutory provisions. See also *R v Tottenham Justices, ex p Rubens* [1970] 1 All ER 879, [1970] 1 WLR 800, DC.

4 *R v Faithful* [1950] 2 All ER 1251, 34 Cr App Rep 220, CCA. Where, however, the defendant does not seek leave to appeal before the Crown Court passes sentence on him, but seeks leave to appeal at a later date, the decision by the Crown Court determining sentence does not render the court functus officio in regard to its jurisdiction to hear an appeal against conviction: *R v Crown Court at Croydon, ex p Bernard* [1980] 3 All ER 106, 72 Cr App Rep 29, DC.

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**1982. Reference by Criminal Cases Review Commission of cases dealt with summarily.**

Where a person has been convicted of an offence by a magistrates' court, the Criminal Cases Review Commission<sup>1</sup>: (1) may at any time refer the conviction to the Crown Court<sup>2</sup>; and (2) (whether or not it refers the conviction) may at any time refer to the Crown Court any sentence imposed on, or in subsequent proceedings relating to, the conviction<sup>3</sup>. Such a reference of a person's conviction is to be treated for all purposes as an appeal by the person<sup>4</sup> against the conviction (whether or not he pleaded guilty)<sup>5</sup>. Such a reference of a sentence imposed on, or in subsequent proceedings relating to, a person's conviction is to be treated for all purposes as an appeal by the person<sup>6</sup> against: (a) the sentence; and (b) any other sentence imposed on, or in subsequent proceedings relating to, the conviction or any related conviction<sup>7</sup>.

On such a reference of a person's conviction the Commission may give notice to the Crown Court that any related conviction<sup>8</sup> which is specified in the notice is to be treated as referred<sup>9</sup> to the Crown Court<sup>10</sup>.

On a reference under the above provisions the Crown Court may not award any punishment more severe than that awarded by the court whose decision is referred<sup>11</sup>. The Crown Court may grant bail to a person whose conviction or sentence has been so referred; and any time during which he is released on bail does not count as part of any term of imprisonment or detention under his sentence<sup>12</sup>.

1 See PARA 2028 et seq post.

2 Criminal Appeal Act 1995 s 11(1)(a).

3 Ibid s 11(1)(b).

4 Ie under the Magistrates' Courts Act 1980 s 108(1) (see PARA 1980 ante).

5 Criminal Appeal Act 1995 s 11(2).

6 Ie under the Magistrates' Courts Act 1980 s 108(1).

7 Criminal Appeal Act 1995 s 11(3).

8 For these purposes, convictions are related if they are convictions of the same person by the same court on the same day: *ibid* s 11(5).

9 Ie under *ibid* s 11(1).

10 *Ibid* s 11(4).

11 *Ibid* s 11(6).

12 *Ibid* s 11(7). For further provisions relating to references by the Criminal Cases Review Commission see PARA 1965 ante.

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### **1983. Respondent to the appeal.**

It is the duty of the Director of Public Prosecutions to have the conduct of any criminal proceedings, other than specified proceedings, instituted on behalf of a police force<sup>1</sup>. The justices whose decision is appealed against also have an absolute right to appear, to instruct counsel, and to call evidence in support of the decision at which they have arrived and which is under consideration by the Crown Court<sup>2</sup>. In so doing they do not make themselves a party to the appeal, and no order may be made against them in respect of costs<sup>3</sup>.

In appeals against binding over orders the other party to the proceedings which were the occasion of making the order is the respondent to the appeal<sup>4</sup>.

1 See the Prosecution of Offences Act 1985 s 3(2); and PARA 1080 ante.

2 *R v Kent Justices, ex p Metropolitan Police Comr* [1936] 1 KB 547, 100 JP 17, DC.

3 *R v Davidson, Nanson and Marley* (1871) 35 JP 500.

4 Magistrates' Courts (Appeals from Binding over Orders) Act 1956 s 1(2)(a).



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#### **1984. Practice on appeal.**

The practice governing appeals to the Crown Court against conviction or sentence in a magistrates' court is regulated partly by statute<sup>1</sup> and partly by custom<sup>2</sup>.

<sup>1</sup> See the Magistrates' Courts Act 1980 s 108 (as amended) (see PARA 1980 ante), s 109 (see PARA 1993 post); CrimPR 63.1-63.9.

<sup>2</sup> The transfer of the appellate jurisdiction of the courts of quarter sessions to the Crown Court (see COURTS vol 10 (Reissue) PARA 626) did not affect the practice and procedure on appeal: see now the Supreme Court Act 1981 s 79(3) (see COURTS vol 10 (Reissue) PARA 625). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. As to the role of a Crown Court judge when hearing appeals see *R v Crown Court at Leeds, ex p Barlow* [1989] RTR 246, 153 JP 113, DC.

#### **UPDATE**

#### **1984 Practice on appeal**

NOTE 1--CrimPR Pt 63 now Criminal Procedure Rules 2010, SI 2010/60, Pt 63.

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### **1985. Location of appeal.**

Directions may be given<sup>1</sup> for the transfer of appeals from one location of the Crown Court to another<sup>2</sup>. Such directions may be given in a particular case by an officer of the Crown Court, or generally, in relation to a class or classes of case, by the presiding judge or a judge acting on his behalf<sup>3</sup>.

If dissatisfied with such directions given by an officer of the Crown Court, any party to the proceedings may apply to a judge of the Crown Court, who may hear the application in chambers<sup>4</sup>.

1   le without prejudice to the Supreme Court Act 1981 s 76 (as amended): see PARA 1228 ante. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

2   *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.32.1, CA; *Amendment No 12 to the Consolidated Criminal Practice Direction (Classification and allocation of business)* [2005] All ER (D) 436 (May) at IV.32.1. Appeals from decisions of magistrates must be heard by: (1) a resident judge; (2) a circuit judge, nominated by the resident judge, who regularly sits at the Crown Court centre; (3) an experienced recorder or deputy circuit judge specifically approved by or under the direction of the presiding judges for the purpose; or (4) where no circuit judge or recorder satisfying the requirements above is available and it is not practicable to obtain the approval of the presiding judges, by a circuit judge, recorder or circuit judge selected by the resident judge to hear a specific case or cases listed on a specific day: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.33.4, CA; *Amendment No 12 to the Consolidated Criminal Practice Direction (Classification and allocation of business)* [2005] All ER (D) 436 (May) at IV.33.4. As to appeals relating to custody time limits see PARA 1986 post.

3   *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.32.2, CA; *Amendment No 12 to the Consolidated Criminal Practice Direction (Classification and allocation of business)* [2005] All ER (D) 436 (May) at IV.32.2.

4   *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at IV.32.3, CA; *Amendment No 12 to the Consolidated Criminal Practice Direction (Classification and allocation of business)* [2005] All ER (D) 436 (May) at IV.32.3. As to parties to an appeal, other than the appellant, see PARA 1983 ante.

## **UPDATE**

### **1985 Location of appeal**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/ (10) APPEALS TO THE CROWN COURT/(ii) Practice and Procedure/A. APPEALS RELATING TO CUSTODY TIME LIMITS/1986. Appeals relating to custody time limits.

## **(ii) Practice and Procedure**

### ***A. APPEALS RELATING TO CUSTODY TIME LIMITS***

#### **1986. Appeals relating to custody time limits.**

An appeal relating to a custody time limit<sup>1</sup> must be commenced by the appellant's giving notice<sup>2</sup> in writing of appeal:

- 2587 (1) to the court officer for the magistrates' court which took the decision<sup>3</sup>;
- 2588 (2) if the appeal is brought by the defendant, to the prosecutor and, if the prosecution is to be carried on by the Crown Prosecution Service<sup>4</sup>, to the appropriate Crown Prosecutor<sup>5</sup>;
- 2589 (3) if the appeal is brought by the prosecution, to the defendant<sup>6</sup>; and
- 2590 (4) to the Crown Court officer<sup>7</sup>.

On receiving such notice, the Crown Court officer must enter the appeal and give notice of the time and place of the hearing to the appellant, the other party to the appeal and the clerk to the magistrates' court which took the decision<sup>8</sup>. An appellant may<sup>9</sup> abandon such an appeal by giving notice in writing to any person to whom notice of appeal is required to be given under heads (1) to (4) above not later than the third day<sup>10</sup> preceding the day fixed for the hearing of the appeal<sup>11</sup>.

1    le an appeal brought by the defendant under the Prosecution of Offences Act 1985 s 22(7) (as amended) or by the prosecution under s 22(8) (as amended): see PARA 1152 ante.

2    The notice must state the date on which the custody time limit applicable to the case is due to expire, and, if the appeal is brought by the defendant under *ibid* s 22(7) (as amended) (see PARA 1152 ante), the date on which the time limit would have expired had the court decided not to extend or further extend the time limit: CrimPR 20.1(1), (3).

3    CrimPR 20.1(1), (2)(a).

4    As to the Crown Prosecution Service see PARA 1079 et seq ante.

5    CrimPR 20.1(1), (2)(b).

6    CrimPR 20.1(1), (2)(c).

7    CrimPR 20.1(1), (2)(d).

8    CrimPR 20.1(1), (4).

9    le without prejudice to the power of the Crown Court to give leave for an appeal to be abandoned.

10   For the purposes of determining whether notice was properly given for these purposes, there is to be disregarded any Saturday and Sunday and any day which is specified to be a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971 s 1(1) (see TIME vol 97 (2010) PARA 321): CrimPR 20.1(1), (5) proviso.

11 CrimPR 20.1(1), (5).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/ (10) APPEALS TO THE CROWN COURT/(ii) Practice and Procedure/B. APPEALS AGAINST CONVICTION OR SENTENCE/1987. Notice of appeal.

## **B. APPEALS AGAINST CONVICTION OR SENTENCE**

### **1987. Notice of appeal.**

An appeal<sup>1</sup> is commenced by the appellant giving notice of appeal not later than 21 days<sup>2</sup> after the day on which the decision appealed against is given<sup>3</sup>. The notice must be in writing<sup>4</sup> and must be given to a court officer for the magistrates' court and to any other party to the appeal<sup>5</sup>. The notice must state the grounds of appeal<sup>6</sup>.

1 le under the Magistrates' Courts Act 1980 s 108(1) (see PARA 1980 ante).

2 le excluding the day of decision but including the twenty-first day: *Goldsmiths' Co v West Metropolitan Rly Co* [1904] 1 KB 1, CA; *Stewart v Chapman* [1951] 2 KB 792, 35 Cr App Rep 102, DC.

3 CrimPR 63.2(1), (3). For these purposes, where the magistrates' court has adjourned the trial of an information after conviction, the day on which the court's decision is given is the day on which the court sentences or otherwise deals with the offender: CrimPR 63.2(3).

However, where a court exercises its power to defer sentence under the Powers of Criminal Courts (Sentencing) Act 2000 s 1(1) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 22), that day is, for the purposes of an appeal against conviction, the day on which the court exercises that power: CrimPR 63.2(3) proviso. The time for giving notice may be extended by the Crown Court: see CrimPR 63.2(1), (5)-(7); and PARA 1988 post.

4 For the meaning of 'writing' see PARA 578 note 3 ante.

5 CrimPR 63.2(1), (2). As to the parties to an appeal, other than the appellant, see PARA 1983 ante; and as to service of notices see PARA 1992 post.

Service on the solicitors to the other party is not sufficient if they are no longer instructed: *R v Oxfordshire Justices* [1893] 2 QB 149, CA. See also *R v Essex Justices, ex p Holmes* (1895) 11 TLR 187, DC (wrong address). Where the other party consists of a number of joint owners, service on one is sufficient: *R v Liverpool Recorder* (1861) 31 LJMC 127. In third party proceedings notice of appeal must be given to the original prosecutor and to the third party: *R v Derby Recorder, ex p Spalton* [1944] KB 611, [1944] 1 All ER 721, DC; *R v Epsom Justices, ex p Dawnier Motors Ltd* [1961] 1 QB 201, [1960] 3 All ER 635, DC.

6 CrimPR 63.2(1), (4). The appellate court is the sole judge of the sufficiency of the notice, and a decision on it is not liable to judicial review: *R v Durham Justices* (1891) 7 TLR 453, DC. See also *Provincial Motor Cab Co Ltd v Dunning* (1909) as reported in 25 TLR 646 at 647, DC. It is questionable whether the Crown Court has power to hear an appeal against conviction when the notice refers only to appeal against sentence: see PARA 2000 post.

## **UPDATE**

### **1987-1988 Notice of appeal, Extension of time for appealing**

CrimPR Pt 63 now Criminal Procedure Rules 2010, SI 2010/60, Pt 63.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/ (10) APPEALS TO THE CROWN COURT/(ii) Practice and Procedure/B. APPEALS AGAINST CONVICTION OR SENTENCE/1988. Extension of time for appealing.

### **1988. Extension of time for appealing.**

The time for giving notice of appeal may be extended, either before or after it expires, by the Crown Court<sup>1</sup>.

An application for an extension of time must be made in writing, specifying the grounds of the application<sup>2</sup> and be sent to a Crown Court officer<sup>3</sup>. The application is considered by a judge on the written grounds. An applicant does not have the right to an oral hearing; it is for the judge considering the written application to decide whether he, or another judge, should hear oral argument. An oral hearing may be held in chambers or in open court<sup>4</sup>.

Where the Crown Court extends the time for giving notice of appeal, the Crown Court officer must give notice of the extension to the appellant and to the magistrates' court officer<sup>5</sup>; and the appellant must give notice of the extension to any other party to the appeal<sup>6</sup>.

1 CrimPR 63.2(1), (5). As to the Crown Court's discretion in this matter see *R v Middlesex Quarter Sessions Chairman, ex p M (an infant)* [1967] Crim LR 474, DC.

2 See the reasons for applying for the extension and the proposed grounds of appeal: *R v Crown Court at Croydon, ex p Smith* (1983) 77 Cr App Rep 277, DC.

3 CrimPR 63.2(1), (6).

4 *R v Crown Court at Croydon, ex p Smith* (1983) 77 Cr App Rep 277, DC.

5 CrimPR 63.2(1), (7).

6 CrimPR 63.2(1), (7). As to the parties to an appeal, other than the appellant, see PARA 1983 ante; and as to service of notices etc see PARA 1992 post.

### **UPDATE**

### **1987-1988 Notice of appeal, Extension of time for appealing**

CrimPR Pt 63 now Criminal Procedure Rules 2010, SI 2010/60, Pt 63.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/ (10) APPEALS TO THE CROWN COURT/(ii) Practice and Procedure/B. APPEALS AGAINST CONVICTION OR SENTENCE/1989. Bail pending appeal.

### **1989. Bail pending appeal.**

Where a person has given notice of appeal<sup>1</sup> to the Crown Court against the decision of a magistrates' court, then, if he is in custody, the magistrates' court may<sup>2</sup> grant him bail<sup>3</sup>. If a person is granted bail, the time and place at which he is to appear is the Crown Court at the time appointed for the hearing of the appeal; and any recognisance that may be taken from any surety must be conditioned accordingly<sup>4</sup>.

The Crown Court may<sup>5</sup> grant bail to any person who is in custody pursuant to a sentence imposed by a magistrates' court, and who has appealed to the Crown Court against his conviction or sentence<sup>6</sup>.

1 As to notice of appeal see PARA 1987 ante.

2 Ie subject to the Criminal Justice and Public Order Act 1994 s 25: see PARA 1170 ante.

3 Magistrates' Courts Act 1980 s 113(1) (amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 44). The Magistrates' Courts Act 1980 s 113(1) (as amended) does not apply, however, where the defendant has been committed to the Crown Court for sentence under s 37 (repealed) or the Powers of Criminal Courts (Sentencing) Act 2000 s 3 (see PARA 1123 ante): Magistrates' Courts Act 1980 s 113(3) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 72). *R v Watton* (1978) 68 Cr App Rep 293, CA, suggests that only in exceptional circumstances should bail be granted to an appellant to the Crown Court who has been given a custodial sentence.

4 Magistrates' Courts Act 1980 s 113(2)(a).

5 Ie subject to the Criminal Justice and Public Order Act 1994 s 25: see PARA 1170 ante.

6 Supreme Court Act 1981 s 81(1)(b). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. See further PARA 1187 ante. The time during which a person is released on bail does not count as part of any term of imprisonment or detention under his sentence: s 81(1). As to the procedure on application to the Crown Court see PARA 1188 ante.

### **UPDATE**

#### **1989 Bail pending appeal**

NOTE 6--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/ (10) APPEALS TO THE CROWN COURT/(ii) Practice and Procedure/B. APPEALS AGAINST CONVICTION OR SENTENCE/1990. Documents to be sent to the Crown Court on appeal.

### **1990. Documents to be sent to the Crown Court on appeal.**

As soon as practicable, the magistrates' court officer must send to the Crown Court officer any notice of appeal<sup>1</sup> to the Crown Court given to him, together with a copy of the extract of the magistrates' court register relating that decision and of the last known or usual place of abode of the parties to the appeal<sup>2</sup>. Where any person, having given notice of appeal to the Crown Court, has been granted bail for the purposes of the appeal<sup>3</sup>, the magistrates' court officer for the court from whose decision the appeal is brought must, before the day fixed for the hearing of the appeal, send to the Crown Court officer a copy of the record made<sup>4</sup> relating to such bail<sup>5</sup>. Where notice of appeal is given in respect of a hospital order or guardianship order<sup>6</sup>, a magistrates' court officer for the court from which the appeal is brought must send with the notice of appeal to the Crown Court officer any written evidence<sup>7</sup> considered by the court<sup>8</sup>. Where a notice of appeal is given in respect of an appeal against conviction by a magistrates' court, the magistrates' court officer must send with the notice to the Crown Court officer any admission of facts<sup>9</sup> made for the purposes of the summary trial<sup>10</sup>. Where a notice of appeal is given in respect of an appeal against sentence by a magistrates' court, and where that sentence was a custodial sentence, the magistrates' court officer must send with the notice to the Crown Court officer a statement of whether the magistrates' court obtained and considered a pre-sentence report before passing such sentence<sup>11</sup>.

1 As to notice of appeal see PARA 1987 ante.

2 See CrimPR 63.3(1), (2). As to the parties to an appeal, other than the appellant, see PARA 1983 ante.

Any case notes should be sent to the Crown Court, thereby making them available to the judge if the judge requires them in order to decide before the hearing questions of listing or representation or the like. They will also be available to the court during the hearing if it becomes necessary or desirable for the court to see what happened in the lower court. Any reasons for the magistrates' decision should be included with the notes: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at V.52.1, CA (incorrectly numbered V.52.2 in the revised version of the *Practice Direction* issued on 28 March 2006).

3 As to the granting of bail see PARA 1989 ante.

4 I.e. under the Bail Act 1976 s 5 (as amended): see PARA 1173 ante.

5 CrimPR 63.3(3).

6 I.e. made under the Mental Health Act 1983 s 37: see MENTAL HEALTH vol 30(2) (Reissue) PARAS 486, 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332, 333.

7 I.e. written evidence considered by the court under the Mental Health Act 1983 s 37(2): see MENTAL HEALTH vol 30(2) (Reissue) PARAS 491, 502; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 333.

8 CrimPR 63.3(4).

9 I.e. under the Criminal Justice Act 1967 s 10 (proof by formal admission): see PARA 1538 ante.

10 CrimPR 63.3(5).

11 CrimPR 63.3(6).

### **UPDATE**



**1990-1991 Documents to be sent to the Crown Court on appeal, Entry of appeal and notice of hearing**

CrimPR Pt 63 now Criminal Procedure Rules 2010, SI 2010/60, Pt 63.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/ (10) APPEALS TO THE CROWN COURT/(ii) Practice and Procedure/B. APPEALS AGAINST CONVICTION OR SENTENCE/1991. Entry of appeal and notice of hearing.

### **1991. Entry of appeal and notice of hearing.**

On receiving notice of appeal<sup>1</sup>, the Crown Court officer must enter the appeal and give notice of the time and place of the hearing<sup>2</sup> to the appellant, to any other party to the appeal<sup>3</sup> and to the magistrates' court officer<sup>4</sup>.

1 As to notice of appeal see PARA 1987 ante; and as to the documents to be sent to the Crown Court with the notice see PARA 1990 ante.

2 As to the service of notices see PARA 1992 post. A quashing order does not lie to the Crown Court to postpone the date of hearing of an appeal which is a matter lying within the day to day control of the Crown Court: *Crawley UDC v Cosmos Tours Ltd* [1973] Crim LR 37, DC. The word 'hearing' includes 'hearings'; and, if an appeal is adjourned indefinitely, the appellant must be notified in the same manner as for the original hearing: *R v London County Quarter Sessions Appeals Committee, ex p Rossi* [1956] 1 QB 682, [1956] 1 All ER 670, CA. If the registered letter is returned, notice has not been given: *R v London County Quarter Sessions Appeals Committee, ex p Rossi* supra; *Beer v Davies* [1958] 2 QB 187, 42 Cr App Rep 198, DC.

3 As to parties to an appeal, other than the appellant, see PARA 1983 ante.

4 CrimPR 63.4. As to service of notices etc see PARA 1992 post.

### **UPDATE**

#### **1990-1991 Documents to be sent to the Crown Court on appeal, Entry of appeal and notice of hearing**

CrimPR Pt 63 now Criminal Procedure Rules 2010, SI 2010/60, Pt 63.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/ (10) APPEALS TO THE CROWN COURT/(ii) Practice and Procedure/B. APPEALS AGAINST CONVICTION OR SENTENCE/1992. Service of notices etc.

## **1992. Service of notices etc.**

Any notice or other document which is required<sup>1</sup> to be given to any person in respect of Crown Court proceedings may be served personally on that person or sent to him by post at his usual or last known residence or place of business in England or Wales or, in the case of a company, at the company's registered office in England or Wales<sup>2</sup>.

<sup>1</sup> ie by the Criminal Procedure Rules 2005.

<sup>2</sup> CrimPR 4.3. CrimPR 4.3 does not apply if any other rule contains a provision to the contrary; there is no such provision in the present context. See also PARA 1987 note 5 ante.

### **UPDATE**

## **1992 Service of notices etc**

NOTES--CrimPR Pt 4 now Criminal Procedure Rules 2010, SI 2010/60, Pt 4.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/ (10) APPEALS TO THE CROWN COURT/(ii) Practice and Procedure/B. APPEALS AGAINST CONVICTION OR SENTENCE/1993. Abandonment of appeal.

### **1993. Abandonment of appeal.**

An appellant may<sup>1</sup> abandon an appeal by giving notice in writing<sup>2</sup>, not later than the third day before the day fixed for hearing the appeal<sup>3</sup>, to the magistrates' court officer, to the Crown Court officer and to any other party to the appeal<sup>4</sup>. Thereafter the appellant must obtain leave of the court to abandon an appeal<sup>5</sup>.

Where notice to abandon an appeal has been duly given by the appellant:

2591 (1) the court against whose decision the appeal<sup>6</sup> was brought may issue process for enforcing that decision, subject to anything already suffered or done under it by the appellant<sup>7</sup>; and

2592 (2) the court may, on the application of the other party to the appeal, order the appellant to pay to that party such costs as appear to the court to be just and reasonable in respect of expenses properly incurred by that party in connection with the appeal before notice of the abandonment<sup>8</sup> was given to that party<sup>9</sup>.

1 le without prejudice to the power of the Crown Court to give leave for an appeal to be abandoned.

2 As to service of notices etc see PARA 1992 ante. Where an appellant is deliberately absent from the appeal hearing, the Crown Court is not able to conclude that the appeal has impliedly been abandoned: *R (on the application of Hayes) v Crown Court at Chelmsford* [2003] EWHC 73 (Admin), [2003] Crim LR 400, 167 JP 65.

3 For the purposes of determining whether notice of abandonment was given in time, there are to be disregarded any Saturday, Sunday and any day which is specified to be a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971 s 1(1) (see TIME vol 97 (2010) PARA 321): CrimPR 63.5(3).

4 CrimPR 63.5(1), (2). As to the parties to an appeal, other than the appellant, see PARA 1983 ante.

A notice of abandonment deliberately given without fraudulent inducement or material mistake may not subsequently be withdrawn. The Crown Court is, however, empowered to treat an abandonment as a nullity and remain seised of the appeal where, after investigation, it finds that there has been no real abandonment because notice has been given under a mistake or as a result of fraudulent inducement: *R v Essex Quarter Sessions Appeals Committee, ex p Larkin* [1962] 1 QB 712, [1961] 3 All ER 930, DC; *R v Crown Court at Croydon, ex p Clair* [1986] 2 All ER 716, 83 Cr App Rep 202, DC. Unless the Crown Court is satisfied that the notice of abandonment was a nullity, there is no jurisdiction to reinstate an abandoned appeal: *R v Crown Court at Knightsbridge, ex p Comrs of Customs and Excise* [1986] Crim LR 324, DC. The powers of the Crown Court, the Court of Appeal and the Courts-martial Appeal Court in this respect are probably identical: *R v Essex Quarter Sessions Appeals Committee, ex p Larkin* supra at 717 and 932 per Lord Parker CJ. As to the abandonment of appeals to the Court of Appeal see PARA 1876 ante.

5 *R v Crown Court at Guildford, ex p Brewer* (1987) 87 Cr App Rep 265, DC. If an application is made before the hearing of the appeal begins, leave will be refused only in the most exceptional circumstances; but, once the hearing has begun, leave will only be granted in such circumstances: *R v Crown Court at Manchester, ex p Welby* (1981) 73 Cr App Rep 248, DC (application to abandon appeal against sentence made immediately before hearing refused and sentence increased: sentence quashed).

6 For these purposes, 'appeal' means an appeal from a magistrates' court to the Crown Court: Magistrates' Courts Act 1980 s 109(2).

7 Ibid s 109(1)(a). Where notice to abandon an appeal has been given by the appellant, any recognisance conditioned for his appearance at the hearing of the appeal has effect as if conditioned for his appearance

before the court from whose decision the appeal was brought at a time and place to be notified to the appellant by the court officer for that court: CrimPR 63.6.

8 For these purposes, the reference to a notice to abandon an appeal is a reference to a notice shown to the satisfaction of the magistrates' court to have been given in accordance with rules of court: Magistrates' Courts Act 1980 s 109(2) (amended by the Courts Act 2003 s 109(1), Sch 8 para 234).

9 Magistrates' Courts Act 1980 s 109(1)(b).

## **UPDATE**

### **1993 Abandonment of appeal**

NOTES 3, 4, 7--CrimPR Pt 63 now Criminal Procedure Rules 2010, SI 2010/60, Pt 63.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/ (10) APPEALS TO THE CROWN COURT/(ii) Practice and Procedure/B. APPEALS AGAINST CONVICTION OR SENTENCE/1994. Effect of death of parties.

#### **1994. Effect of death of parties.**

An appeal to the Crown Court does not necessarily lapse upon the death of the respondent<sup>1</sup>, but it would seem to be otherwise in the event of the death of the appellant<sup>2</sup>, unless the appellant was acting in a nominal capacity<sup>3</sup>.

1 *R v Truelove* (1880) 5 QBD 336, DC. As to the respondent to an appeal see PARA 1983 ante.

2 *R v Spokes, ex p Buckley* (1912) 76 JP 354, DC; *R v Jefferies* [1969] 1 QB 120, 52 Cr App Rep 654, CA. Cf *Hodgson v Lakeman* [1943] 1 KB 15, DC (personal representatives of deceased appellant granted leave to continue appeal where conviction had resulted in a fine).

3 *Hawkins v Bepey* [1980] 1 All ER 797, 70 Cr App Rep 64, DC.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/ (10) APPEALS TO THE CROWN COURT/(ii) Practice and Procedure/B. APPEALS AGAINST CONVICTION OR SENTENCE/1995. Non-appearance of parties.

### **1995. Non-appearance of parties.**

When the appeal is called on for hearing, if neither of the parties appears personally or by advocate, it is the ordinary practice for the appeal to be struck out<sup>1</sup>. The reinstatement of such an appeal will be a matter for the discretion of the Crown Court, and will not generally be allowed without the consent of the other party to the appeal, or satisfactory evidence as to the circumstances of non-appearance.

If an appellant is legally represented on appeal, he is deemed to be present; consequently he is entitled to be absent and any application to hear the appeal in his absence is unnecessary<sup>2</sup>. If an appellant who fails to appear at the hearing is not represented, the court may dismiss the appeal if satisfied that he received notice of the hearing<sup>3</sup>, but there is no rule of practice that the appeal must be dismissed<sup>4</sup>.

Where the appellant alone appears, upon proof of service of notice of appeal and other formalities, the court may quash the order, sentence or conviction<sup>5</sup>. Where the appeal is against sentence only, and not against conviction, the Crown Court may not quash the conviction upon the non-appearance of the respondent<sup>6</sup>.

1 See *R v Crown Court at Croydon, ex p Clair* [1986] 2 All ER 716 at 719, 83 Cr App Rep 202 at 205, DC, per Croom-Johnson LJ. As to the parties to an appeal, other than the appellant, see PARA 1983 ante.

2 *R v Crown Court at Croydon, ex p Clair* [1986] 2 All ER 716, 83 Cr App Rep 202, DC. Where an absent appellant is represented, the Crown Court has no power to dismiss the appeal without hearing the evidence: *Podmore v DPP* [1993] COD 80, DC. Where an absent appellant has a legal representative present in court who cannot proceed because he has not been instructed, the Crown Court should proceed to hear the appeal in the absence of the appellant but in the presence of the legal representative: see *R v Crown Court at Guildford, ex p Brewer* (1987) 87 Cr App Rep 265, DC; see note 4 infra.

3 See *R v Spokes, ex p Buckley* (1912) 76 JP 354, DC; *R v Lancashire Justices* (1838) 2 Jur 468; cf *R v Stoke Bliss Inhabitants* (1844) 6 QB 158.

4 *R v Crown Court at Guildford, ex p Brewer* (1987) 87 Cr App Rep 265, DC (on appeal against sentence for speeding, appellant was neither present nor represented save to ask for an adjournment; prosecution ready to proceed; facts outlined to court which substituted larger fine and longer disqualification).

5 *R v Purdey* (1864) 5 B & S 909; *R v Surrey Justices and Bell* [1892] 2 QB 719, DC; *R v Kent Justices, ex p Metropolitan Police Comr* [1936] 1 KB 547, DC. A decision to quash an order, sentence or conviction because the respondent's advocate is not present in court will be quashed on judicial review if the Crown Court has come to a conclusion to which no reasonable tribunal, taking into account all the relevant matters, would have come: *R (on the application of the Crown Prosecution Service Harrow) v Crown Court at Portsmouth* [2003] EWHC 1079 (Admin), [2004] Crim LR 224, DC.

6 *R v Kent Justices, ex p Metropolitan Police Comr* [1936] 1 KB 547, DC. If there is insufficient evidence before the court to enable it to determine the appeal, the hearing should be adjourned until there is satisfactory representation of both parties: *R v Kent Justices, ex p Metropolitan Police Comr* supra. When it is known that a party does not intend to appear at the hearing, the clerk to the justices should bring the matter to the attention of the court so that it may endeavour to ensure that the reasons for the decision appealed against may be made known to the court: *R v Kent Justices, ex p Metropolitan Police Comr* supra at 562 per Humphreys J.

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### **1996. Preliminary matters to be heard.**

At the hearing of the appeal the conviction or order appealed against must be produced<sup>1</sup> and the appellant may be called upon to prove that notice of appeal has been duly given<sup>2</sup>. The grounds of appeal may be stated in general terms and the Crown Court is the judge of their sufficiency<sup>3</sup>.

If the appellant maintains that his plea before the magistrates' court was equivocal, the Crown Court will determine this as a preliminary issue<sup>4</sup>. If the Crown Court finds that the plea entered was equivocal, it may remit the case to the magistrates' court<sup>5</sup>.

1 If necessary, the conviction or order will be read by the appropriate officer of the Crown Court but this formality is usually dispensed with particularly when the parties are represented. As to the responsibility for forwarding documents to the Crown Court see PARA 1990 ante. If there appears to be a variance between the statement of the decision supplied to the Crown Court and the note of it given to the appellant, he may apply for an adjournment to consider the disparity: see *R v Allen* (1812) 15 East 333 at 346-347.

2 As to the giving of notice see PARA 1987 ante.

3 *R v Durham Justices* (1891) 7 TLR 453, DC. See also *R v Cornwall Justices* (1844) 1 New Sess Cas 161n; cf *R v Carnarvonshire Justices* (1841) 2 QB 325.

4 Where the appellant tenders credible prima facie evidence that his plea was equivocal, the Crown Court should obtain affidavit evidence from the clerk, the chairman of the bench or both: *R v Rochdale Justices, ex p Allwork* [1981] 3 All ER 434, 73 Cr App Rep 319, DC. See PARA 1980 text and note 2 ante.

5 *R v Durham Quarter Sessions, ex p Virgo* [1952] 2 QB 1, [1952] 1 All ER 466, DC. As to the powers of the Crown Court on hearing an appeal see PARA 2000 et seq post.



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### **1997. Reference to the European Court of Justice for preliminary ruling.**

An order<sup>1</sup> referring a question to the European Court of Justice for a preliminary ruling<sup>2</sup> may be made by the Crown Court of its own motion or on application by a party to proceedings in the Crown Court<sup>3</sup>; and, where such an order is made<sup>4</sup>, the proceedings must, unless the court otherwise determines, be adjourned until the European Court has given a preliminary ruling on the question referred to it<sup>5</sup>.

1 The order must set out in a schedule the request for the preliminary ruling of the European Court, and the Crown Court may give directions as to the manner and form in which the schedule is to be prepared: CrimPR 75.1(3).

2 Under the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) ('the EC Treaty') art 234 (formerly art 177), the Treaty establishing the European Atomic Energy Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) ('the Euratom Treaty') art 150 or the Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951; TS 16 (1979); Cmnd 7461) ('the ECSC Treaty') art 41: CrimPR 75.1(1).

3 CrimPR 75.1(1), (2)(a). As to the parties to an appeal, other than the appellant, see PARA 1983 ante.

4 Where such an order has been made, a copy must be sent to the senior master of the Queen's Bench Division for transmission to the Registrar of the European Court: CrimPR 75.1(4).

5 CrimPR 75.1(5). Nothing in CrimPR 75.1(5) prevents the Crown Court from deciding any preliminary or incidental question which may arise in the proceedings after an order is made and before a preliminary ruling is given by the European Court: CrimPR 75.1(6).

### **UPDATE**

#### **1997 Reference to the European Court of Justice for preliminary ruling**

TEXT AND NOTES--CrimPR Pt 75 now Criminal Procedure Rules 2010, SI 2010/60, Pt 75.

TEXT AND NOTE 2--By virtue of art 97, the ECSC Treaty has now expired. Since 24 July 2002, the sectors previously covered by this Treaty, and the procedural rules and other secondary legislation derived from it, have been subject to the rules of the EC Treaty as well as the procedural rules and other secondary legislation derived from the EC Treaty.

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### **1998. Correction of order or judgment.**

In the course of hearing any appeal, the Crown Court may correct any error or mistake in the order or judgment incorporating the decision which is the subject of the appeal<sup>1</sup>. However, the Crown Court does not have power on appeal to amend the original information<sup>2</sup> on which the appellant was tried<sup>3</sup>.

1 Supreme Court Act 1981 s 48(1). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. As to the application of the Supreme Court Act 1982 s 48 see PARA 2001 post.

2 As from a day to be appointed, the same rules can be assumed to apply to a written charge on which the appellant was tried: see the Criminal Justice Act 2003 s 29 (as amended) (not yet in force); and PARA 915 ante.

3 *Meek v Powell* [1952] 1 KB 164, [1952] 1 All ER 347, DC; *Garfield v Maddocks* [1974] QB 7, 57 Cr App Rep 372, DC. Cf *Wright v Nicholson* [1970] 1 All ER 12, [1970] 1 WLR 142, DC; *R v Crown Court at Newcastle-upon-Tyne, ex p Connor* (25 July 1980, unreported), DC; *R v Crown Court at Swansea, ex p Stacey* (1989) 154 JP 185, DC. See also *Lee v Chief Constable of Wiltshire* [1979] Crim LR 319, DC (information could be amended as defect was wholly immaterial), distinguishing *Meek v Powell* supra. Where a defendant is convicted on an amended information, the Crown Court on appeal must rehear the information not in its original, but in its amended, form: *Fairgrieve v Newman* (1985) 82 Cr App Rep 60, DC.

### **UPDATE**

### **1998 Correction of order or judgment**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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### **1999. Appeal by way of rehearing.**

After any preliminary points have been dealt with, the hearing of the matter is proceeded with, the party who began in the court below beginning again and proving his case anew<sup>1</sup>.

The fact that the appeal is treated as a rehearing apparently does not prevent the Crown Court dealing with an irregularity in the magistrates' court<sup>2</sup>, nor is the prosecution (respondent) obliged to put its case in the same way as in the magistrates' court<sup>3</sup>. It is open to the Crown Court to find the case proved on a different basis from that in the magistrates' court<sup>4</sup>.

Either party is within his rights in calling any relevant and admissible evidence in support of his case, whether called by him in the court below or not<sup>5</sup>.

When dismissing an appeal against conviction by a magistrates' court, the Crown Court must give sufficient reasons to demonstrate that it has identified the main contentious issues in the case and how it has resolved them<sup>6</sup>. However, failure to give reasons will not be fatal to the decision of the Crown Court where, for example, the reasons are obvious, the case is simple or the subject matter of the appeal is unimportant<sup>7</sup>.

1 *R v Newbury Inhabitants* (1791) 4 Term Rep 475; *Drover v Rugman* [1951] 1 KB 380, sub nom *Rugman v Drover* [1950] 2 All ER 575, DC; *R v Crown Court at Swindon, ex p Murray* (1998) 162 JP 36, DC. The position by which an appeal to the former courts of quarter session was a rehearing was expressly preserved by the Supreme Court Act 1981 s 79(3): see COURTS vol 10 (Reissue) PARA 625. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. In practice, in appeals against convictions or orders made in proceedings begun by an information or complaint, it is the respondent who begins. As from a day to be appointed, the same can be assumed to apply to proceedings begun by a written charge: see the Criminal Justice Act 2003 s 29 (as amended) (not yet in force); and PARA 915 ante. The conviction may be quashed without hearing evidence if the allegations of respondent's counsel do not make out a case of upholding the conviction: *R v Colam* (1872) 36 JP 660. As to the respondent to an appeal see PARA 1983 ante. The rule that an appeal to the Crown Court is by rehearing applies to the Magistrates' Courts (Appeals from Binding Over Orders) Act 1956 s 1: *Shaw v Hamilton* (1982) 75 Cr App Rep 288, DC.

2 *R v Teeside Magistrates' Court, ex p Bujnowski* (1996) 161 JP 302, [1997] Crim LR 51, DC (appeal against conviction for failing to surrender to bail: held Crown Court had jurisdiction to determine appeal additionally on ground that magistrates' court had clearly contravened relevant practice direction).

3 *Hingley-Smith v DPP* [1998] 1 Archbold News 2, DC.

4 *Hingley-Smith v DPP* [1998] 1 Archbold News 2, DC.

5 *R v Hall* (1866) LR 1 QB 632. As to notes taken in the course of the proceedings before the magistrates' court see PARA 1990 note 2 ante; and as to the composition of the Crown Court on hearing an appeal see COURTS vol 10 (Reissue) PARA 623.

6 *R v Crown Court at Harrow, ex p Dave* [1994] 1 All ER 315, 98 Cr App Rep 114, DC; *R v Crown Court at Snaresbrook, ex p Input Management Ltd* (1999) 163 JP 533, 143 Sol Jo LB 113, DC. The reasons do not need to be elaborate: *R v Crown Court at Harrow, ex p Dave* supra.

7 *R v Crown Court at Kingston, ex p Bell* (2000) 164 JP 633, DC.

### **UPDATE**

**1999 Appeal by way of rehearing**

NOTE 1--2005 Act Sch 11 in force on 1 October 2009: SI 2009/1604.

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## **2000. Appeal against sentence.**

Where there is an appeal to the Crown Court against sentence, the Crown Court, having reheard the case, must form an independent view, on all the evidence, of the correct sentence; its function is not simply to review the magistrates' court's decision and determine whether it was within the ambit of that court's decision<sup>1</sup>. If its view of the correct sentence differs significantly from the sentence, the sentence should be varied to that extent<sup>2</sup>.

On an appeal against sentence, the Crown Court can pass sentence on a different factual basis from that adopted by the magistrates' court<sup>3</sup>.

On an appeal against sentence only, the same strictness of proof is not required as on an appeal against conviction<sup>4</sup>. The practice in these cases is similar to that at first instance after a plea of guilty<sup>5</sup>. When the notice of appeal is against sentence only, the Crown Court has no power to give leave to appeal against conviction<sup>6</sup>. Where there is a disputed question of fact following a plea of guilty, the Crown Court may either hear evidence to resolve the dispute or should proceed on the defendant's version of the facts<sup>7</sup>.

1 *R v Crown Court at Swindon, ex p Murray* (1998) 162 JP 36, DC.

2 *R v Crown Court at Knutsford, ex p Jones* (1985) 7 Cr App Rep (S) 448, DC. The Crown Court cannot impose a sentence (eg a custodial sentence) if the defendant has a legitimate expectation that such a sentence would not be imposed if reports were favourable, which was created when the magistrates' court adjourned for reports and the reports were favourable: *R v Crown Court at Isleworth, ex p Irvin* [1992] RTR 281, DC.

3 *Bussey v DPP* [1999] 1 Cr App Rep (S) 125, [1998] Crim LR 908, DC. If the court proposes to depart from the view of the facts adopted by the magistrates' court, this should be made clear to the appellant so that he has the opportunity to deal with the matter: *Bussey v DPP* supra.

4 *Paprika Ltd v Board of Trade* [1944] KB 327, [1944] 1 All ER 372, DC. On an appeal against a binding over order, however, unless the appellant is prepared to admit the evidence which was before the magistrates, the facts justifying the making of the binding over order must be strictly proved in the Crown Court by sworn evidence which may be cross-examined: *Shaw v Hamilton* [1982] 2 All ER 718, 75 Cr App Rep 288, DC.

5 See *Dyson v Ellison* [1975] 1 All ER 276 at 278, 60 Cr App Rep 191 at 193-194, DC, per Lord Widgery CJ ('Appeal to the Crown Court against sentence is . . . a rehearing from conviction onwards. In other words, the court should take the matter up, as it were, at the moment when the conviction is announced and then proceed to fix the sentence on a rehearing basis'). When an appeal against sentence has been allowed to proceed on the evidence given without objection in the court below, the appellant cannot afterwards be heard to say that on that ground alone the sentence cannot stand: *Paprika Ltd v Board of Trade* [1944] KB 327, [1944] 1 All ER 372, DC.

6 *Paprika Ltd v Board of Trade* [1944] KB 327, [1944] 1 All ER 372, DC. This case was determined before there was jurisdiction to extend the time for giving notice of appeal (see PARA 1988 ante); however, it is not clear whether the Crown Court would permit notice of appeal against conviction to be given out of time once the appeal against sentence had been called on for hearing.

7 *Williams v R* (1982) 77 Cr App Rep 329, 5 Cr App Rep (S) 134, DC. As to the similar procedure at first instance see PARAS 1353-1355 ante.

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## **2001. Powers on termination of hearing.**

On the termination of the hearing of an appeal<sup>1</sup>, the Crown Court may:

- 2593 (1) confirm, reverse or vary any part of the decision appealed against, including a determination not to impose a separate penalty in respect of the offence<sup>2</sup>;
- 2594 (2) remit the matter with its opinion on it to the authority whose decision is appealed against<sup>3</sup>; or
- 2595 (3) make such other order in the matter as it thinks just, and by such order exercise any power which the authority might have exercised<sup>4</sup>.

However, the above powers do not authorise the Crown Court to substitute on appeal a conviction for an offence different from that of which the appellant was convicted<sup>5</sup>; nor do they empower the Crown Court to commit an appellant to itself for sentence<sup>6</sup>.

Subject to certain restrictions relating to cases referred by the Criminal Cases Review Commission<sup>7</sup>, if the appeal is against a conviction or a sentence<sup>8</sup>, the Crown Court is empowered to award any punishment, whether more or less severe than that awarded by the magistrates' court whose decision is appealed against, if that is a punishment which the lower court might have awarded<sup>9</sup>.

1 As to the power of the Crown Court to correct the decision appealed against in the course of the hearing see PARA 1998 ante. The Supreme Court Act 1981 s 48 (as amended) applies whether or not the appeal is against the whole of the decision: s 48(5). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

2 Supreme Court Act 1981 s 48(2)(a) (amended by the Criminal Justice Act 1988 s 156). See note 1 supra. On an appeal against one of several convictions or sentences, the Crown Court has power to vary all the sentences imposed by the magistrates' court: *Dutta v Westcott* [1987] QB 291, 84 Cr App Rep 103, DC. The Supreme Court Act 1981 s 48(2) (as amended) has effect subject to any enactment relating to any such appeal which expressly limits or restricts the powers of the court on appeal: s 48(3). As to appeals from local and other authorities see COURTS vol 10 (Reissue) PARA 629.

A Crown Court judge giving the decision of the court on an appeal has to say enough to demonstrate that the court has identified the main contentious issues in the case: *R v Crown Court at Harrow, ex p Dave* (1994) 158 JP 250, DC. On an appeal from a magistrates' court, the Crown Court is obliged to give reasons for its decision at the time of the decision or immediately afterwards: *R v Crown Court at Snaresbrook, ex p Input Management Ltd* (1999) 163 JP 533, DC.

3 Supreme Court Act 1981 s 48(2)(b). See note 1 supra.

4 Ibid s 48(2)(c). See note 1 supra.

5 *Lawrence v Same* [1968] 2 QB 93, [1968] 1 All ER 1191, DC. As to amendment on appeal of the information on which the appellant was convicted see PARA 1998 ante.

6 *R v Bullock* [1964] 1 QB 481, 47 Cr App Rep 288, CCA.

7 le subject to the Criminal Appeal Act 1995 s 11(6) (as amended: see PARA 1982 ante): Supreme Court Act 1981 s 48(4) (amended by the Criminal Appeal Act 1995 s 29, Sch 2 para 14). See note 1 supra.

8 For these purposes, 'sentence' includes any order made by a court when dealing with an offender, including: (1) a hospital order under the Mental Health Act 1983 Pt III (ss 35-55) with or without a restriction order (see MENTAL HEALTH vol 30(2) (Reissue) PARAS 491, 496; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332, 337), and an interim hospital order under that Act (see MENTAL HEALTH vol 30(2) (Reissue) PARA 491; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334); and (2) a recommendation for deportation made when dealing with an offender (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 9); Supreme Court Act 1981 s 48(6) (amended by the Mental Health (Amendment) Act 1982 s 65(1), Sch 3 para 61; and the Mental Health Act 1983 s 148, Sch 4 para 58). See note 1 supra. The fact that an appeal is pending against such an interim hospital order does not affect the power of the magistrates' court that made it to renew or terminate the order or to deal with the appellant on its termination; and, where the Crown Court quashes such an order but does not pass any sentence or make any other order in its place, the court may direct the appellant to be kept in custody or released on bail pending his being dealt with by that magistrates' court: Supreme Court Act 1981 s 48(7) (added by the Mental Health (Amendment) Act 1982 Sch 3 para 61; and amended by the Mental Health Act 1983 Sch 4 para 58).

9 Supreme Court Act 1981 s 48(4) (amended by the Criminal Appeal Act 1995 s 29, Sch 2 para 14); *R v Birmingham Justices, ex p Wyatt* [1975] 3 All ER 897, 61 Cr App Rep 306, DC. See note 1 supra. As to where the Crown Court wishes to substitute a suspended sentence for an immediate sentence of imprisonment see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 49 note 3. Where an appellant is granted bail pending the hearing of the appeal and is convicted of a fresh offence before the appeal is heard, the Crown Court has no power, on dismissing the appeal, to order that the original sentence passed by the magistrates should be made consecutive to the subsequent sentence passed in respect of the fresh offence: *R v Crown Court at Portsmouth, ex p Ballard* (1990) 154 JP 109, DC. The operational period of a suspended sentence imposed by the Crown Court runs from the date of that substitution: *R v Burn* (1976) 63 Cr App Rep 289, CA. Where the Crown Court substitutes a suspended sentence of imprisonment for a sentence of imprisonment having immediate effect, it should have in mind any period which the appellant has spent in custody: *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 3 All ER 904, [2002] 2 Cr App Rep 533 at I.9.1, CA.

Where the Crown Court makes an interim hospital order by virtue of the Supreme Court Act 1981 s 48(2) (as amended: see note 2 supra), the power of renewing or terminating the order and of dealing with the appellant on its termination is exercisable by the magistrates' court whose decision is appealed against and not by the Crown Court; and that magistrates' court is treated for the purposes of the Mental Health Act 1983 s 38(7) (absconding offenders: see MENTAL HEALTH vol 30(2) (Reissue) PARA 494; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 334) as the court that made the order: Supreme Court Act 1981 s 48(8) (added by the Mental Health (Amendment) Act 1982 Sch 3 para 61; and amended by the Mental Health Act 1983 Sch 4 para 58).

Where the Crown Court has granted leave to abandon an appeal against sentence, it has no jurisdiction under the Supreme Court Act 1981 s 48 (as amended) to increase the sentence previously imposed, as the power to do so under s 48 (as amended) only arises on termination of the appeal itself: *R v Crown Court at Gloucester, ex p Betteridge* (1997) 161 JP 721, [1998] Crim LR 218, DC.

## UPDATE

### 2001 Powers on termination of hearing

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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**2002. Notification of result of appeal.**

It is the ordinary practice for the appropriate officer of the Crown Court to send a copy of the court record sheet to the appropriate officer of the magistrates' court by which the decision appealed against was given showing the result of the appeal<sup>1</sup>.

<sup>1</sup> As to appeals to the Crown Court see PARA 1980 et seq ante. As to enforcement of the decision see PARA 2004 post.



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### **2003. Costs on appeal.**

Where a person convicted of an offence by a magistrates' court appeals<sup>1</sup> to the Crown Court against conviction or sentence, the Crown Court has power to make the following orders as to costs:

- 2596 (1) an order that the appellant's costs be paid out of central funds<sup>2</sup>;
- 2597 (2) an order that private prosecution costs be paid out of central funds<sup>3</sup>;
- 2598 (3) an award of costs against the defendant<sup>4</sup>;
- 2599 (4) a wasted costs order against a legal or other representative<sup>5</sup>;
- 2600 (5) an order for costs against a third party<sup>6</sup>;
- 2601 (6) an order that costs unnecessarily or improperly incurred be paid by the party responsible<sup>7</sup>.

1   le under the Magistrates' Courts Act 1980 s 108: see PARA 1980 ante.

2   See PARA 2059 post.

3   See PARA 2062 post.

4   See PARA 2063 post.

5   See PARA 2060 post.

6   See PARA 2061 post.

7   See PARA 2064 post. As to costs where an appeal is abandoned see PARA 1993 ante.

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#### **2004. Enforcement of decision.**

After the determination by the Crown Court of an appeal from a magistrates' court, the decision appealed against as confirmed or varied by the Crown Court, or any decision of the Crown Court substituted for the decision appealed against, may, without prejudice to powers of the Crown Court to enforce the decision<sup>1</sup>, be enforced:

- 2602 (1) by the issue by the court by which the decision appealed against was given of any process that it could have issued if it had decided the case as the Crown Court decided it<sup>2</sup>; or
- 2603 (2) so far as the nature of any process already issued to enforce the decision appealed against permits, by that process<sup>3</sup>;

and the decision of the Crown Court has effect as if it had been made by the magistrates' court against whose decision the appeal is brought<sup>4</sup>.

1 The Crown Court as a court of record has inherent power to enforce its own decisions: see COURTS vol 10 (Reissue) PARA 308. As to enforcement of the decision appealed from when an appeal is abandoned see PARA 1993 ante.

2 Magistrates' Courts Act 1980 s 110(a). As to the collection etc of fines imposed or recognisances forfeited by the Crown Court see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 159.

3 Ibid s 110(b).

4 Ibid s 110.

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APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/(i) Appeal by Case Stated/2005. Appeal by case stated from the Crown Court.

## **(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT**

### **(i) Appeal by Case Stated**

#### **2005. Appeal by case stated from the Crown Court.**

There is no right of appeal from any order, judgment or other decision on the facts by the Crown Court acting in its appellate capacity, but proceedings on appeal to that court may be questioned by any party to them on the ground that the order, judgment or other decision is wrong in law or is in excess of jurisdiction<sup>1</sup>. Such a person may apply to the Crown Court to have a case stated by the Crown Court for the opinion of the High Court<sup>2</sup>.

Where a case is stated for the opinion of the High Court, the High Court may, if it thinks fit, cause the case to be sent back for amendment, whereupon it must be amended accordingly<sup>3</sup>.

1 See the Supreme Court Act 1981 s 28(1). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. The Supreme Court Act 1981 s 28(1) does not apply to: (1) a judgment or other decision of the Crown Court relating to trial on indictment (see PARA 2008 post); or (2) any decision of that court under the Betting, Gaming and Lotteries Act 1963, the Gaming Act 1968 or the Local Government (Miscellaneous Provisions) Act 1982 which, by any provision of any of those Acts, is to be final: Supreme Court Act 1981 s 28(2) (amended by the Local Government (Miscellaneous Provisions) Act 1982 s 2, Sch 3 para 27(6); and prospectively amended). As from a day to be appointed, the Supreme Court Act 1981 s 28(2) is amended by the Gambling Act 2005 s 356(4), Sch 17 so that the Betting, Gaming and Lotteries Act 1963 and the Gaming Act 1968 are no longer in head (2) supra. For the purposes of the Supreme Court Act 1981 s 28(1): (a) 'decision' means 'final decision' and the High Court will not entertain an appeal by way of case stated unless a final determination has been reached; it is not open to the court to adjudicate on preliminary issues: *Loade v DPP* [1990] 1 QB 1052, [1990] 1 All ER 36, DC; and (b) 'decision' in head (1) supra does not include a decision relating to an order under the Access to Justice Act 1999 s 17 (order requiring payment of cost of representation: see LEGAL AID vol 65 (2008) PARA 174): Supreme Court Act 1981 s 28(4) (added by the Access to Justice Act 1999 s 24, Sch 4 para 22).

A discretionary sentence may be wrong in law or in excess of jurisdiction if it is harsh and oppressive or so far outside the normal sentence imposed for the offence as to enable the High Court to hold that the sentence involves an error of law: *R v Crown Court at St Albans, ex p Cinnamond* [1981] QB 480, [1981] 1 All ER 802, DC; explained in *R v Crown Court at Acton, ex p Bewley* (1988) 10 Cr App Rep (S) 105, 152 JP 327, DC. Although an appeal against a sentence on the above grounds may be by way of case stated, the appropriate forum is the Court of Appeal, Criminal Division: *Bermeo v Crown Court at Middlesex Guildhall* [2005] All ER (D) 37 (Nov), DC. Any challenge to a sentence imposed by a magistrates' court should be by way of appeal to the Crown Court, rather than by way of case stated to the High Court, save in the most exceptional case: *Tucker v DPP* [1992] 4 All ER 901, 156 JP 449, DC. A finding on an issue of fact can only involve an error of law if it is perverse: *R v Mildenhall Magistrates' Court, ex p Forest Heath District Council* (1997) 161 JP 401, CA (preferring the evidence of one witness to that of another cannot be perverse in this sense).

2 Supreme Court Act 1981 s 28(1). See note 1 supra. As to the judicial review powers of the High Court see PARA 2013 et seq post. The High Court's jurisdiction to hear appeals in criminal causes or matters from the Crown Court by case stated is exercised through the Administrative Court of the Queen's Bench Division, either by a single judge or by a Divisional Court. As to the Administrative Court and the composition of the Divisional Court see COURTS vol 10 (Reissue) PARA 609.

An appeal by way of case stated is by nature a form of consultation with the court to obtain an answer on a point of law and is not a rehearing of the case; in this respect an appeal by way of case stated by the Crown Court is analogous to an appeal by way of case stated by justices: *Harris, Simon & Co Ltd v Manchester City Council* [1975] 1 All ER 412, [1975] 1 WLR 100, DC.

3 Supreme Court Act 1981 s 28A(1), (2) (added by the Statute Law (Repeals) Act 1993 s 1(2), Sch 2 para 9; and substituted by the Access to Justice Act 1999 s 61). See note 1 supra.

## **UPDATE**

### **2005 Appeal by case stated from the Crown Court**

NOTE 1--Appointed day in relation to Constitutional Reform Act 2005 Sch 11 is 1 October 2009: SI 2009/1604. Day appointed in relation to Gambling Act 2005 s 356(4), Sch 17 is 1 September 2007: SI 2006/3272.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/(i) Appeal by Case Stated/2006. Procedure on application to state a case.

## **2006. Procedure on application to state a case.**

An application to the Crown Court to state a case for the opinion of the High Court<sup>1</sup> must be made in writing to a court officer within 21 days after the date of the decision in respect of which the application is made<sup>2</sup>. However, the time for making the application may be extended, either before or after it expires, by the Crown Court<sup>3</sup>. The application must state the ground on which the decision of the Crown Court is questioned<sup>4</sup>; and, after making the application, the applicant must forthwith send a copy of it to the parties to the proceedings in the Crown Court<sup>5</sup>. On receipt of the application, the Crown Court officer must forthwith send it to the judge who presided at the proceedings in which the decision was made<sup>6</sup>.

1 le under the Supreme Court Act 1981 s 28(1) (see PARA 2005 ante).

2 CrimPR 64.7(1). The common law procedure exemplified by *Chesterton RDC v Ralph Thompson Ltd* [1944] KB 447, [1944] 1 All ER 66, DC and *R v Northumberland Quarter Sessions Justices, ex p Williamson* [1965] 2 All ER 87, [1965] 1 WLR 700, DC is obsolete. The jurisdiction of the Crown Court specified in CrimPR 64.7 may be exercised by a judge of the Crown Court sitting in chambers: CrimPR 16.11(1), (2)(d).

3 CrimPR 64.7(14). As to the procedure relating to an application to extend time see *DPP v Coleman* [1998] 1 All ER 912, [1998] 2 Cr App Rep 7, DC.

4 CrimPR 64.7(2).

5 CrimPR 64.7(3).

6 CrimPR 64.7(4).

## **UPDATE**

### **2006 Procedure on application to state a case**

TEXT AND NOTES--CrimPR Pt 64.7 now Criminal Procedure Rules 2010, SI 2010/60 ('CrimPR'), r 64.6.

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: CrimPR 64.6.

NOTE 2--CrimPR 16.11 now Criminal Procedure Rules 2010, SI 2010/60, r 16.11.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/(i) Appeal by Case Stated/2007. Procedure following application to state case.

## **2007. Procedure following application to state case.**

On receipt of the application<sup>1</sup>, the judge must inform the Crown Court officer as to whether or not he has decided to state a case and that officer must give notice in writing to the applicant of the judge's decision<sup>2</sup>. If the judge considers that the application is frivolous<sup>3</sup>, he may refuse to state a case and must in that case, if the applicant so requires, cause a certificate stating the reasons for the refusal to be given to him<sup>4</sup>.

If the judge decides to state a case, the following procedure<sup>5</sup>, must be followed unless the judge in a particular case otherwise directs<sup>6</sup>. The applicant must, within 21 days<sup>7</sup> of receiving notice, draft a case and send a copy of it to the Crown Court officer and to the parties to the proceedings in the Crown Court<sup>8</sup>. Each party to the proceedings in the Crown Court must, within 21 days<sup>9</sup> of receiving a copy of the draft either: (1) give notice in writing to the applicant and the Crown Court officer that he does not intend to take part in the proceedings before the High Court<sup>10</sup>; (2) indicate in writing on the copy of the draft case that he agrees with it and send the copy to the Crown Court officer<sup>11</sup>; or (3) draft an alternative case and send it, together with the copy of the applicant's case, to the Crown Court officer<sup>12</sup>. The judge must consider the applicant's draft case and any alternative draft case sent to the Crown Court officer<sup>13</sup>.

If the Crown Court so orders, the applicant must, before the case is stated and delivered to him, enter before the Crown Court officer into a recognisance, with or without sureties and in such sum as the Crown Court considers proper, having regard to the applicant's means, conditioned to prosecute the appeal without delay<sup>14</sup>.

1    Ie under CrimPR 64.7: see PARA 2006 ante.

2    CrimPR 64.7(5). As to the service of notices etc see PARA 1992 ante.

3    'Frivolous' means 'futile, misconceived, hopeless or academic'; if the judge concludes that an application is frivolous it would be helpful if he briefly states his reasons for doing so: *R v Mildenhall Magistrates' Court, ex p Forest Heath District Council* (1997) 161 JP 401, CA.

4    CrimPR 64.7(6). If the judge refuses to state a case, the aggrieved party may seek a mandatory order in judicial review proceedings (see PARA 2014 post) requiring the judge to state a case, or an order quashing the order sought to be appealed, or both: *Sunworld Ltd v Hammersmith and Fulham Borough Council* [2000] 2 All ER 837, [2000] 1 WLR 2102, DC.

5    Ie the procedure set out in CrimPR 64.7(8)-(12). See further PARA 2009 post.

6    CrimPR 64.7(7).

7    The time limit of 21 days may be extended either before or after it expires by the Crown Court: CrimPR 64.7(14).

8    CrimPR 64.7(7), (8).

9    See note 7 supra.

10   CrimPR 64.7(7), (9)(a).

11   CrimPR 64.7(7), (9)(b).

12 CrimPR 64.7(7), (9)(c).

13 CrimPR 64.7(7), (10).

14 CrimPR 64.7(7), (11). If the judge decides not to state a case but the stating of a case is subsequently required by the High Court by a mandatory order (see PARA 2014 post), the provisions of CrimPR 64.7(7)-(14) apply: CrimPR 64.7(15). In such a case the 21-day period referred to in CrimPR 64.7(8) (see the text and notes 7-8 supra) runs from the day on which the mandatory order was made (CrimPR 64.7(15)(b)) and the provisions of CrimPR 64.7(8)-(12) apply notwithstanding that the judge has not decided to state a case (CrimPR 64.7(15)(a)).

## **UPDATE**

### **2007 Procedure following application to state case**

TEXT AND NOTES--CrimPR Pt 64.7 now Criminal Procedure Rules 2010, SI 2010/60, r 64.6.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/(i) Appeal by Case Stated/2008. No case to be stated in relation to trial on indictment.

**2008. No case to be stated in relation to trial on indictment.**

There is no power to state a case in relation to the jurisdiction of the Crown Court on indictment<sup>1</sup>.

<sup>1</sup> Supreme Court Act 1981 s 28(2)(a). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. As to the High Court's jurisdiction to make a mandatory order, prohibitory order or quashing order in relation to the jurisdiction of the Crown Court see PARA 2013 post; and as to appeals against conviction or sentence after conviction on indictment see PARA 1837 et seq ante.

**UPDATE**

**2008 No case to be stated in relation to trial on indictment**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/(i) Appeal by Case Stated/2009. Form of case stated.

### **2009. Form of case stated.**

The judge must state and sign a case within 14 days after whichever is the sooner of either: (1) the receipt of all the documents required to be sent<sup>1</sup> to the appropriate officer of the Crown Court; or (2) the expiration of the period of 21 days<sup>2</sup> of receipt of a copy of the draft case<sup>3</sup>. A case stated by the Crown Court must state the facts found by the Crown Court, the submissions of the parties (including any authorities relied on by the parties during the course of those submissions), the decision of the Crown Court in respect of which the application is made<sup>4</sup> and the question on which the opinion of the High Court is sought<sup>5</sup>.

1    le under CrimPR 64.7(9): see PARA 2007 ante.

2    le the period of 21 days referred to in CrimPR 64.7(9): see PARA 2007 ante.

3    CrimPR 64.7(7), (12). See PARA 2007 ante.

4    The case should not disclose that the decision of the Crown Court was not unanimous: *More O'Ferrall Ltd v Harrow UDC* [1947] KB 66, [1946] 2 All ER 489, DC.

5    CrimPR 64.7(7), (13). If the judge decides not to state a case but the stating of a case is subsequently required by a mandatory order (see PARA 2014 post), CrimPR 64.7(12), (13) applies: see CrimPR 64.7(15); and PARA 2007 note 14 ante.

### **UPDATE**

### **2009 Form of case stated**

TEXT AND NOTES--CrimPR Pt 64.7 now Criminal Procedure Rules 2010, SI 2010/60, r 64.6.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/(i) Appeal by Case Stated/2010. Bail pending case stated.

### **2010. Bail pending case stated.**

The Crown Court may<sup>1</sup> grant bail to any person who, after the decision of his case by the Crown Court, has applied to that court for the statement of a case for the High Court on that decision<sup>2</sup>. Such a person may<sup>3</sup> also be released on bail by the High Court<sup>4</sup>.

The procedure for the granting of bail by the High Court is laid down in the rules of court<sup>5</sup>.

1    le subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended): see PARA 1170 ante.

2    Supreme Court Act 1981 s 81(1)(d) (amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 48). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. See PARA 1187 ante. The time during which a person is released on bail under the Supreme Court Act 1981 s 81(1)(d) (as amended) does not count as part of any term of imprisonment or detention under his sentence: s 81(1).

3    le subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended): see PARA 1170 ante.

4    Criminal Justice Act 1948 s 37(1)(b)(i) (amended by the Bail Act 1976 s 12, Sch 2 para 11(1), (2); and the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 6). The time during which a person is released on bail under the Criminal Justice Act 1948 s 37(1)(b) (as amended) does not count as part of any term of imprisonment under his sentence; and any sentence of imprisonment imposed by a court of summary jurisdiction or, on appeal, by the Crown Court, after the imposition of which a person is released on bail, is deemed to begin to run or to be resumed as from the day on which he is received in prison under the sentence: Criminal Justice Act 1948 s 37(6) (amended by the Criminal Justice Act 1967 s 103(2), Sch 7 Pt I; the Courts Act 1971 s 56(1), Sch 8 para 24(b); and the Bail Act 1976 s 12(1), Sch 2 para 11(1), (5)). For these purposes, 'prison' is deemed to include a young offender institution and remand home and the expression 'imprisonment' is to be construed accordingly: Criminal Justice Act 1948 s 37(6) (amended by the Criminal Justice Act 1988 s 123(6), Sch 8 para 1).

5    See PARA 1192 ante.

### **UPDATE**

### **2010 Bail pending case stated**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/(i) Appeal by Case Stated/2011. Powers of the High Court on an appeal by case stated.

### **2011. Powers of the High Court on an appeal by case stated.**

The High Court must hear and determine the question arising on the case stated<sup>1</sup> (or the case as amended)<sup>2</sup>, that is give answers to the questions incorporated in the case stated<sup>3</sup>. It is confined to the facts as found by the Crown Court unless those findings are without foundation<sup>4</sup> and, in general, it will not allow a point to be taken in argument before it which was not taken before the Crown Court<sup>5</sup>. Having determined the question arising on the case stated (or the case as amended), the High Court must: (1) reverse, affirm or amend the determination in respect of which the case has been stated; or (2) remit the matter to the Crown Court with the opinion of the High Court, and may make such other order in relation to the matter (including as to costs) as it thinks fit<sup>6</sup>.

Except for the provisions relating to an appeal to the House of Lords<sup>7</sup>, a decision of the High Court on a case stated in a criminal cause or matter is final<sup>8</sup>.

1 See PARA 2005 note 1 ante.

2 Supreme Court Act 1981 s 28A(3) (s 28A added by the Statute Law (Repeals) Act 1993 s 1(2), Sch 2 para 9; and substituted by the Access to Justice Act 1999 s 61). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. See *Kilhey Court Hotels Ltd v Wigan Metropolitan Borough Council* [2004] EWHC 2890 (Admin), 169 JP 1.

3 As to the form of the case stated see PARA 2009 ante. The court will not consider the contents of a draft of the case stated so as to contrast a passage in it with the same passage in the final signed version: *Tesco Stores Ltd v Seabridge* [1988] Crim LR 517, DC.

4 *R v St Andrew the Great, Cambridge, Inhabitants* (1828) 8 B & C 664; *R v Rosliston Inhabitants* (1828) 8 B & C 668; *R v St Martin, Leicester, Inhabitants* (1828) 8 B & C 674; *R v Kesteven Justices* (1844) 3 QB 810. Cf *R v Great Glenn Inhabitants* (1883) 5 B & Ald 188.

5 See *Smith's Dock Co Ltd v Tynemouth Corpn* [1908] 1 KB 315, DC; on appeal [1908] 1 KB 948, CA.

6 Supreme Court Act 1981 s 28A(3) (as added and substituted: see note 2 supra). See note 2 supra.

7 As provided by the Administration of Justice Act 1960 s 1: see PARA 2020 post.

8 Supreme Court Act 1981 s 28A(4) (as added and substituted). As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords' by the Constitutional Reform Act 2005 s 40, Sch 9 para 36(1), (4). At the date at which this volume states the law no such day had been appointed. See note 2 supra. The High Court has the power to order a rehearing: *Griffith v Jenkins* [1992] 2 AC 76, 95 Cr App Rep 35, HL.

### **UPDATE**

### **2011 Powers of the High Court on an appeal by case stated**

NOTES 2, 8--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/(i) Appeal by Case Stated/2012. Costs on appeal to High Court.

## **2012. Costs on appeal to High Court.**

Where any proceedings in a criminal cause or matter are determined before a Divisional Court, the court may order the payment out of central funds of: (1) the costs of the defendant<sup>1</sup>; (2) private prosecution costs<sup>2</sup>. The High Court also has power to award costs inter partes and to make a wasted costs order<sup>3</sup>.

1 See PARA 2059 post.

2 See PARA 2062 post.

3 See the Supreme Court Act 1981 ss 28A(3), 51 (s 28A added by the Law (Repeals) Act 1993 s 1(2), Sch 2 para 4 and substituted by the Access to Justice Act 1999 s 61; the Supreme Court Act 1981 s 51 substituted by the Courts and Legal Services Act 1990 s 4 and amended by the Access to Justice Act 1999 s 31). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. As to the award of costs against the Legal Services Commission in favour of an unassisted party see *R v Secretary of State for the Home Department, ex p Gunn, R (on the application of Kelly) v Secretary of State for the Home Department*, *R (on the application of Khan) v Secretary of State for the Home Department* [2001] EWCA Civ 891, [2001] 3 All ER 481, [2001] 1 WLR 1634.

## **UPDATE**

### **2012 Costs on appeal to High Court**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/ (ii) Judicial Review/2013. Control by judicial review.

## (ii) Judicial Review

### 2013. Control by judicial review.

In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment<sup>1</sup>, the High Court has all such jurisdiction to make mandatory, prohibitory or quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court<sup>2</sup>.

In general, a mandatory order should be applied for where the Crown Court refuses to exercise its jurisdiction<sup>3</sup>; a quashing order should be applied for where it is desired to quash the proceedings in that court<sup>4</sup>; and a prohibitory order should be applied for where it is sought to prevent that court from embarking on or continuing proceedings in excess of its jurisdiction or in contravention of the law<sup>5</sup>.

Every such order is final, subject to any right of appeal therefrom<sup>6</sup>.

<sup>1</sup> A Crown Court decision is under its jurisdiction in matters relating to trial on indictment if it is one affecting the conduct of a trial on indictment, including sentence, given in the course of the trial or by way of pre-trial directions: *Re Smalley* [1985] AC 622, 80 Cr App Rep 205, HL (an order to estreat the recognisance of a surety for an accused committed for trial at a Crown Court is not a matter relating to a trial on indictment). *Re Smalley* supra was applied in *Re Ashton; R v Crown Court at Manchester, ex p DPP* [1994] AC 9, sub nom *DPP v Crown Court at Manchester and Ashton* [1993] 2 All ER 663, HL (see infra). *Re Smalley* supra and *Re Ashton* supra were applied in *DPP v Crown Court at Manchester and Huckfield* [1993] 4 All ER 928, HL (see infra).

An order of the Crown Court staying proceedings on an indictment is a decision 'relating to trial on indictment' within the Supreme Court Act 1981 s 29(3) (as amended) (see PARA 1232 ante): *Re Ashton* supra overruling *R v Central Criminal Court, ex p Randle* [1992] 1 All ER 370, [1991] 1 WLR 1087, DC and *R v Crown Court at Norwich, ex p Belsham* [1992] 1 All ER 394, [1992] 1 WLR 54, DC. *Re Ashton* supra was applied in *R (on the application of Customs and Excise Comrs) v Crown Court at Leicester* [2001] EWHC Admin 33, [2001] All ER (D) 163 (Jan), DC. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. The dismissal of an application for dismissal of a charge under the Crime and Disorder Act 1998 s 52(6), Sch 3 para 2 is a decision 'relating to trial on indictment' within the Supreme Court Act 1981 s 29(3) (as amended): *R (on the application of Snelgrove) v Crown Court at Woolwich* [2004] EWHC 2172 (Admin), [2005] 1 WLR 3223, [2005] 1 Cr App Rep 253, DC. So is a refusal to hear any evidence on such an application or a refusal to dismiss a case: *R (on the application of O) v Central Criminal Court* [2006] EWHC 256 (Admin), [2006] All ER (D) 201 (Jan). The decision of a Crown Court judge to quash an indictment is a matter 'relating to trial on indictment': *DPP v Crown Court at Manchester and Huckfield* supra. The High Court does not have the jurisdiction to hear an application by way of judicial review to reinstate an original legal aid order where a judge has previously discharged that order as it is a matter 'relating to trial on indictment': *R v Crown Court at Isleworth, ex p Willington* [1993] 2 All ER 390, [1993] 1 WLR 713, DC. A costs order made in the Crown Court is a matter 'relating to trial on indictment': *R (on the application of Customs and Excise Comrs) v Crown Court at Leicester* [2001] EWHC Admin 33, (2001) Times, 23 February, DC.

An order about taking steps to vet a jury panel is a 'matter relating to trial on indictment' and therefore not judicially reviewable: *R v Crown Court at Sheffield, ex p Brownlow* [1980] QB 530, 71 Cr App Rep 19, CA. See also *R v Crown Court at Harrow, ex p Perkins* (1998) 162 JP 527 (decision to make no order as to costs not judicially reviewable). Contrast *R v Crown Court at Cardiff, ex p M (A Minor)* (1998) 162 JP 527 (exercise of decision to protect a child or young person's identity under the Children and Young Person's Act 1933 s 39 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 1271) is reviewable), but see *R v Crown Court at Winchester, ex p B (A Minor)* [1999] 4 All ER 53, [2000] 1 Cr App Rep 11, DC (decision to lift reporting restrictions under the Children and Young Person's Act 1933 s 39 (as amended) not reviewable); *R v Crown Court at Cardiff, ex p M (A Minor)* supra was preferred to *Crown Court at Winchester in R v Crown Court at Manchester, ex p H* [2000] 2 All ER 166, [2000] 1 Cr App Rep 262, DC (decision to lift reporting restrictions

under the Children and Young Person's Act 1933 s 39 (as amended) judicially reviewable). A decision by the Crown Court to refuse bail is not a matter relating to trial on indictment and is judicially reviewable (see further *infra*): *R (on the application of M) v Crown Court at Isleworth* [2005] EWHC 363 (Admin), [2005] 5 Archbold News 2. See also *R v Crown Court at Maidstone, ex p Gill* [1987] 1 All ER 129, 84 Cr App Rep 96, DC (forfeiture order made in respect of property belonging to person other than defendant not a matter relating to trial on indictment; High Court may entertain application for judicial review).

If the Crown Court decision is made without jurisdiction, it is not within its jurisdiction relating to trial on indictment even though the decision relates to a trial on indictment: *R v Crown Court at Maidstone, ex p Harrow London Borough Council* [2000] QB 719, [1999] 3 All ER 542, DC (order made under the Criminal Procedure (Insanity) Act 1964 s 5 (see PARA 1265 ante) judicially reviewable because issue of whether defendant not guilty by reason of insanity had not been put to the jury). See also *R (on the application of Kenneally) v Crown Court at Snaresbrook*; *R (on the application of Kenneally) v Rampton Hospital Authority* [2001] EWHC Admin 968, [2002] QB 1169, [2002] 2 WLR 1430, DC.

The interpretation placed on the Supreme Court Act 1981 s 29(3) (as amended) that a decision relating to a trial on indictment is not judicially reviewable is not a breach of the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6 since there is no Convention right to have all decisions reviewed, notwithstanding that some decisions might breach a Convention right: *R (on the application of Regentford Ltd) v Crown Court at Canterbury* [2001] HRLR 18, DC; see also for the same view *R (on the application of Shields) v Crown Court at Liverpool* [2001] EWHC Admin 90, [2001] AC 325, DC. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

An order under the Access to Justice Act 1999 s 17 (order requiring defendant to pay some or all of cost of representation funded by Criminal Defence Service: see LEGAL AID vol 65 (2008) PARA 174) is expressly stated not to fall within the reference to the Crown Court's jurisdiction in matters relating to trial on indictment: Supreme Court Act 1981 s 29(6) (added by the Access to Justice Act 1999 s 24, Sch 4 para 23).

2 Supreme Court Act 1981 s 29(3) (substituted by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, art 3(b)). As to the prospective renaming of the Supreme Court Act 1981 see note 1 *supra*. On an application for judicial review the High Court may not grant a declaration in respect of the decision of the Crown Court pertaining to its jurisdiction in matters relating to trial on indictment: *R v Crown Court at Chelmsford, ex p Chief Constable of Essex Police* [1994] 1 All ER 325, [1994] 1 WLR 359, DC. As to the prerogative orders generally see JUDICIAL REVIEW vol 61 (2010) PARA 687 et seq. Application for judicial review is inappropriate in cases, for example: (1) involving complicated findings of fact by the Crown Court (*R v Crown Court at Ipswich, ex p Baldwin* [1981] 1 All ER 596, sub nom *R v Felixstowe Justices, ex p Baldwin* (1980) 72 Cr App Rep 131, DC); (2) where the identification of facts as found is, or may be, critical to the resolution of the issue (*R v Morpeth Ward Justices, ex p Ward* (1992) 95 Cr App Rep 215 at 222, DC, per Mann LJ); (3) where an appeal is based on insufficiency of the evidence (*R v Derwentside Justices, ex p Swift*, *R v Sunderland Justices, ex p Bate* [1997] RTR 89, DC). The appropriate procedure in such cases is an appeal by way of case stated. As to appeals by way of case stated see PARA 2005 et seq ante.

Subsequent to the abolition, by the Criminal Justice Act 2003 s 17(3) (see PARA 1190 ante), of the right to apply to a High Court judge against the refusal of bail by the Crown Court, it has been held that the High Court has jurisdiction to judicially review a refusal of bail in the Crown Court: *R (on the application of M) v Crown Court at Isleworth and HM Customs and Excise* [2005] EWHC 363 (Admin), [2005] 5 Archbold News 2. However, that jurisdiction should be exercised sparingly and the *Wednesbury* principles (see JUDICIAL REVIEW vol 61 (2010) PARA 617 et seq) should be applied robustly: *R (on the application of M) v Crown Court at Isleworth and HM Customs and Excise* *supra*; *R (on the application of AW) v Crown Court at Kingston-upon-Thames* [2005] EWHC 703 (Admin), [2005] 6 Archbold News 2; *R (on the application of Galliano) v Crown Court at Manchester* [2005] EWHC 1125 (Admin) 1190, [2005] All ER (D) 320 (May). Where a claimant brings an application for judicial review of the decision of the Crown Court to withhold bail, the prosecution and the Crown Court should be notified and the matter put before the Administrative Court as a matter for urgent consideration and an oral hearing on notice requested in as short a time as possible. Generally it will not be appropriate to grant bail on an interim application on the papers. The Administrative Court (normally a single judge) should direct an oral hearing within a day or two to effectively determine the issue; and if, at that hearing, the court is minded to review the Crown Court's decision, permission will be granted, all procedural requirements will be abridged, and the matter remitted to the Crown Court to formally grant bail: *R (on the application of Allwin) v Crown Court at Snaresbrook* [2005] EWHC 742 (Admin), [2005] All ER (D) 40 (Apr).

As a general rule a judicial review application will be refused where the complaint could be raised within the criminal trial and appeal process: *R v DPP, ex p Kebilene* [2000] 2 AC 326, [1999] 4 All ER 801, HL.

Save in the case of dishonesty, mala fides or wholly exceptional circumstances, a decision to prosecute is not amenable to judicial review: *R v DPP, ex p Kebilene* *supra*. See also *R (on the application of Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), (2004) Times, 21 May. A decision not to prosecute is amenable to judicial review: *R v DPP, ex p C* [1995] 1 Cr App Rep 136, CA. In such a case there is no other remedy: see *R v DPP, ex p Kebilene* *supra* at 369 and 834 per Lord Steyn.

3 See PARA 2014 post.

4 See PARA 2015 post.

5 See PARA 2016 post.

6 Supreme Court Act 1981 s 29(2). As to the prospective renaming of the Supreme Court Act 1981 see note 1 supra. As to the right of appeal from such an order see PARA 2020 et seq post.

## **UPDATE**

### **2013 Control by judicial review**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

A decision taken in the course of a trial by the trial judge to detain a witness pending receipt of further evidence is a matter relating to trial on indictment within the meaning of the 1981 Act s 29(3): *R (on the application of TH) v Crown Court at Wood Green* [2006] EWHC 2683 (Admin), [2007] 2 All ER 259. The High Court does not have the power in judicial review proceedings to quash or correct any sentence that exceeds the jurisdiction of the sentencing court, specifically where the trial was on indictment: *R (on the application of the Crown Prosecution Service) v Crown Court Guildford* [2007] EWHC 1798 (Admin), [2007] 1 WLR 2886.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/ (ii) Judicial Review/2014. Mandatory order.

## 2014. Mandatory order.

A mandatory order may lie<sup>1</sup> to compel the Crown Court to exercise jurisdiction on appeal<sup>2</sup> which it has declined to exercise<sup>3</sup>, or where it has come to a wrong decision in point of law upon a preliminary objection<sup>4</sup>, or where it has failed to exercise its discretion<sup>5</sup>. A mandatory order will merely direct the Crown Court to exercise its jurisdiction or discretion; it will not specify the manner in which it is to exercise it<sup>6</sup>.

A mandatory order will not lie to the Crown Court in the exercise of its jurisdiction in matters relating to trials on indictment<sup>7</sup>; nor will it lie in respect of any matter in which the Crown Court has exercised its jurisdiction<sup>8</sup>, whether its decision be right or wrong<sup>9</sup> and even if the matter is one of law<sup>10</sup>. Further, in matters where the Crown Court has a discretion and has exercised it, a mandatory order will not lie<sup>11</sup>.

Where an application to state a case<sup>12</sup> is refused by the Crown Court, the High Court may require it to state a case by a mandatory order<sup>13</sup>. However, the High Court will not intervene to review the Crown Court's decision by compelling it to state its reasons for the decision<sup>14</sup> or to alter the form of the record<sup>15</sup>.

1 A mandatory order (formerly known as an order of mandamus and renamed by the Supreme Court Act 1981 s 29(1) (substituted by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, art 2, 3(a))), is discretionary: see JUDICIAL REVIEW vol 61 (2010) PARA 692. As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. The High Court has jurisdiction to make mandatory orders in those classes of case in which, immediately before 1 April 2004, it had jurisdiction to make orders of mandamus: Supreme Court Act 1981 s 29(1A) (as substituted).

2 See PARA 2013 ante.

3 *R v Carnarvon Justices* (1820) 4 B & Ald 86 at 88 per Holroyd J (mandatory order would lie if in effect sessions had not heard the case); *R v Colchester Justices* (1822) 5 B & Ald 535 (appeal dismissed on ground of no jurisdiction); *R v Monmouthshire Justices* (1825) 4 B & C 844 at 849 (jurisdiction to compel hearing and determination of appeal); *R v Wiltshire Justices* (1828) 8 B & C 380 (refusal to hear appeal on ground of no jurisdiction); *R v Oxfordshire Justices* (1843) 4 QB 177 (refusal to hear appeal on ground that notice of appeal misdescribed convictions); *R v Kesteven Justices* (1844) 3 QB 810 (wrong decision on preliminary point of law); *R v Surrey Justices* (1849) 18 LJM 175 (decision based on general considerations rather than those particular to the case); *R v Boteler* (1864) 33 LJM 101 (issue of distress warrant within discretionary power; issue refused on ground that statutory power unjustified); *R v Evans* (1890) 62 LT 570, DC (discretion exercised by reference to extraneous considerations); *R v Ogden, ex p Long Ashton RDC* [1963] 1 All ER 574, [1963] 1 WLR 274, DC (justices believing their jurisdiction had been ousted). As to declining jurisdiction see also *R v Kent Justices* (1811) 14 East 395; *R v Tottenham Justices, ex p Rubens* [1970] 1 All ER 879, [1970] 1 WLR 800, DC; *R v Mutford and Lothingland Justices, ex p Harber* [1971] 2 QB 291, 55 Cr App Rep 57, DC; and see further JUDICIAL REVIEW vol 61 (2010) PARA 615.

4 *R v Kesteven Justices* (1844) 3 QB 810; *R v Colchester Justices* (1822) 5 B & Ald 535; *R v Wiltshire Justices* (1828) 8 B & C 380. See also *Ex p Curtis* (1877) 3 QBD 13 at 14n, DC.

5 *R v Glamorganshire Justices* (1850) 19 LJM 172; *R v Derbyshire Justices* (1852) 22 LJM 31.

6 *R v Derbyshire Justices* (1852) 22 LJM 31; *R v West Riding of Yorkshire Justices* (1833) 5 B & Ald 667; *R v Hewes* (1835) 3 Ad & El 725; *Ex p Ackworth Overseers* (1843) 3 QB 397.



7 See PARA 2013 ante; and JUDICIAL REVIEW vol 61 (2010) PARA 709.

8 *R v Worcestershire Justices* (1854) 3 E & B 477; *R v Middlesex Justices* (1877) 2 QBD 516. See also *R v Surrey Justices* (1824) 5 Dow & Ry KB 308; *Ex p Martin* (1876) 40 JP Jo 133.

9 *R v Carnarvon Justices* (1820) 4 B & Ald 86; *R v West Riding of Yorkshire Justices* (1834) 5 B & Ad 1003.

10 *Re Pratt* (1837) 7 Ad & El 21.

11 *R v North Riding of Yorkshire Justices* (1823) 2 B & C 286; *R v Derbyshire Justices* (1852) 22 LJMC 31; *Ex p Macmahon* (1883) 48 JP 70, DC; *Ex p Reid* (1885) 49 JP 600, DC; cf *R v Nuneaton Justices, ex p Parker* [1954] 3 All ER 251, [1954] 1 WLR 1318, DC. See further JUDICIAL REVIEW.

12 See PARA 2005 et seq ante.

13 See PARA 2013 ante. However, a person may question in this way only decisions to which the Supreme Court Act 1981 s 28(1) applies (see PARA 2005 note 1 ante). As to the prospective renaming of the Supreme Court Act 1981 see note 1 supra. The grant of mandatory order may be refused where the Crown Court has rejected a frivolous application to state a case: see PARA 2007 ante.

As to the procedure where a case is stated on a mandatory order see PARAS 2007 note 14, 2009 note 5 ante.

14 *R v Devon Justices* (1819) 1 Chit 34; *R v Cottingham Inhabitants* (1834) 4 Nev & MKB 215.

15 *R v Devon Justices* (1819) 1 Chit 34; *R v Suffolk Justices* (1835) 5 Nev & MKB 139; *Ex p Ackworth Overseers* (1843) 3 QB 397; *R v Middlesex Justices* (1877) 2 QBD 516, DC. Cf *R v West Riding of Yorkshire Justices* (1843) 5 QB 1 (mandatory order granted where entry in court record manifestly false and made without jurisdiction).

## UPDATE

### 2014 Mandatory order

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/ (ii) Judicial Review/2015. Quashing order.

## 2015. Quashing order.

A quashing order may lie<sup>1</sup> to the Crown Court in its appellate jurisdiction relating or in relation to any other matter than one to a trial on indictment<sup>2</sup> in respect of a judgment or order<sup>3</sup>:

- 2604 (1) which has been made in breach of the rules of natural justice<sup>4</sup>;
- 2605 (2) which has been made in excess of jurisdiction<sup>5</sup>;
- 2606 (3) where there is an error of law on the fact of the record<sup>6</sup>;
- 2607 (4) which is so unreasonable that no reasonable court could have made it; or (where a Convention right is at stake) which is disproportionate, which involves a more intense review than under the test of unreasonableness<sup>7</sup>.

A quashing order will also lie where a judgment on appeal has been obtained by fraud or by perjured evidence<sup>8</sup>.

1 A quashing order (formerly known as the order of certiorari: renamed by the Supreme Court Act 1981 s 29(1) (substituted by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, arts 2, 3(a))) is a discretionary remedy, but there is no rule that it will only lie where there is no alternative remedy: see JUDICIAL REVIEW vol 61 (2010) PARAS 657, 692. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. The High Court has jurisdiction to make quashing orders in those classes of case in which, immediately before 1 April 2004, it had jurisdiction to make orders of certiorari: Supreme Court Act 1981 s 29(1A) (added by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, arts 2, 3(a)). See further JUDICIAL REVIEW vol 61 (2010) PARA 693 et seq.

2 A quashing order cannot be made in relation to a decision where the proceedings in question are incomplete: *R v Rochford Magistrates' Court, ex p Buck* (1978) 68 Cr App Rep 114, DC; *R (on the application of Hoar-Stevens) v Richmond upon Thames Magistrates' Court* [2003] EWHC 2660 (Admin), [2004] Crim LR 474, DC.

3 See PARA 2013 ante.

4 JUDICIAL REVIEW vol 61 (2010) PARA 629 et seq.

5 JUDICIAL REVIEW vol 61 (2010) PARAS 610-611.

6 JUDICIAL REVIEW vol 61 (2010) PARAS 612-613.

7 See JUDICIAL REVIEW vol 61 (2010) PARA 617 et seq. As to the circumstances in which the High Court will interfere with a sentence passed by the Crown Court, it has been held that the sentence will only be wrong in law or in excess of jurisdiction if it is truly astonishing by any acceptable standard: *R v Crown Court at Croydon, ex p Miller* (1986) 85 Cr App Rep 152, DC, explaining *R v Crown Court at St Albans, ex p Cinnamond* [1981] QB 480, [1981] 1 All ER 802, DC; *R v Crown Court at Acton, ex p Bewley* (1988) 10 Cr App Rep (S) 105, DC. However, it has also been held more recently that a sentence will be in excess of jurisdiction or otherwise wrong in law if it falls so far outside the broad area of the Crown Court's sentencing discretion as to constitute an excess of jurisdiction or an error of law (*R (on the application of Sogbesan) v Inner London Crown Court* [2002] EWHC Admin 1581, [2003] 1 Cr App Rep (S) 408, DC), or if it went beyond the spectrum of the Crown Court's discretion (*R v Southwark Crown Court, ex p Smith* [2001] 2 Cr App Rep (S) 163, DC), or if it was manifestly excessive (*R v Bow Street Metropolitan Magistrate, ex p Screen Multimedia Ltd* (1998) Times, 28 January, DC).

8 See JUDICIAL REVIEW vol 61 (2010) PARA 621.

**UPDATE**

**2015 Quashing order**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/ (ii) Judicial Review/2016. Prohibitory order.

## **2016. Prohibitory order.**

A prohibitory order<sup>1</sup> will lie to the Crown Court in its appellate jurisdiction or in respect of any other matter than one relating to a trial on indictment<sup>2</sup> in the same manner and on the same grounds as to any inferior court which acts without or in excess of its jurisdiction, or in contravention of the laws of the land<sup>3</sup>.

1 Formerly known as the order of prohibition: renamed by the Supreme Court Act 1981 s 29(1) (substituted by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, arts 2, 3(a)). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. The High Court has jurisdiction to make prohibitory orders in those classes of case in which, immediately before 1 April 2004, it had jurisdiction to make orders of prohibition: Supreme Court Act 1981 s 29(1A) (added by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, arts 2, 3(a)).

2 See PARA 2013 ante.

3 See JUDICIAL REVIEW vol 61 (2010) PARA 695. As to the grounds on which a prohibitory order will be made see JUDICIAL REVIEW vol 61 (2010) PARAS 693, 699. A prohibitory order is a discretionary remedy: see JUDICIAL REVIEW vol 61 (2010) PARA 692.

## **UPDATE**

### **2016 Prohibitory order**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/ (ii) Judicial Review/2017. Bail on application for quashing order.

### **2017. Bail on application for quashing order.**

The Crown Court may<sup>1</sup> grant bail to any person who has applied to the High Court for a quashing order to remove proceedings in the Crown Court in his case into the High Court, or has applied to the High Court for leave to make such an application<sup>2</sup>. In such circumstances the High Court may<sup>3</sup> also grant bail to any such person<sup>4</sup>.

1 le subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended); see PARA 1170 ante.

2 Supreme Court Act 1981 s 81(1)(e) (amended by the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 48; and the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, arts 2, 6). See further PARAS 1187-1188, 2010 ante. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

3 le subject to the Criminal Justice and Public Order Act 1994 s 25 (as amended); see PARA 1170 ante.

4 Criminal Justice Act 1948 s 37(1)(b)(ii) (substituted by the Courts Act 1971 s 56(1), Sch 8 para 28(1); and amended by the Bail Act 1976 s 12, Sch 2 para 11(1), (2); and the Criminal Justice and Public Order Act 1994 s 168(2), Sch 10 para 6). See further PARA 2010 note 4 ante. As to the procedure on an application to the High Court see PARA 1192 ante.

### **UPDATE**

### **2017 Bail on application for quashing order**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/ (ii) Judicial Review/2018. Alteration of sentence on application for quashing order.

## **2018. Alteration of sentence on application for quashing order.**

Where a person who has been sentenced for an offence: (1) by the Crown Court after being convicted of the offence by a magistrates' court and committed to the Crown Court for sentence; or (2) by the Crown Court on appeal against conviction or sentence, applies to the High Court<sup>1</sup> for a quashing order to remove the proceedings of the Crown Court into the High Court, then, if the High Court determines that the Crown Court had no power to pass the sentence, the High Court may, instead of quashing the conviction, amend the sentence by substituting for the sentence passed any sentence which the Crown Court had power to impose<sup>2</sup>.

Any sentence so passed by the High Court in substitution for the sentence passed in the proceedings of the Crown Court begins to run, unless the High Court otherwise directs, from the time when it would have begun to run if passed in those proceedings<sup>3</sup>.

<sup>1</sup> le under the Supreme Court Act 1981 s 31 (as amended): see JUDICIAL REVIEW. As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed.

<sup>2</sup> Supreme Court Act 1981 s 43(1) (amended by the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004, SI 2004/1033, arts 2, 5(a)). The High Court will exercise its powers under the Supreme Court Act 1981 s 43 (as amended) if the Crown Court's sentence is in excess of jurisdiction or otherwise wrong in law: see PARA 2015 note 5 ante.

An order which would not have been made but for a conviction, but which was made after and for a different reason than that for which the original sentence was made, is not an order made on conviction: *R v St Helen's Justices, ex p Jones*; *R v Ealing Justices, ex p Saleem*; *R v Stoke on Trent Justices, ex p Wilby*; *R v Manchester City Justices, ex p Lee*; *R v Greenwich Justices, ex p Wright*; *R v Same, ex p Davidson* [1999] 2 All ER 73, 163 JP 369, DC.

The Supreme Court Act 1981 s 43(1), (2) (s 43(1) as amended) applies, with the necessary modifications, in relation to any order of the Crown Court which is made on, but does not form part of, the conviction of an offender as it applies in relation to a conviction and sentence: s 43(3). As to the prospective renaming of the Supreme Court Act 1981 see note 1 supra.

<sup>3</sup> Ibid s 43(2). In computing the term of the sentence, any time during which the offender was released on bail in pursuance of the Criminal Justice Act 1948 s 37(1)(d) (as substituted) (bail for person convicted or sentenced by magistrates' court on application for quashing order: see MAGISTRATES vol 29(2) (Reissue) PARA 884) is to be disregarded: Supreme Court Act 1981 s 43(2). See also note 2 supra. As to the prospective renaming of the Supreme Court Act 1981 see note 1 supra.

## **UPDATE**

## **2018 Alteration of sentence on application for quashing order**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(11) REVIEW OF APPELLATE DECISIONS OF THE CROWN COURT/ (ii) Judicial Review/2019. Costs in the High Court.

### **2019. Costs in the High Court.**

Where any proceedings in a criminal cause or matter are determined before a Divisional Court, the court may order the payment out of central funds of: (1) the costs of the defendant<sup>1</sup>; (2) private prosecution costs<sup>2</sup>. The High Court also has power to order costs inter partes and to make a wasted costs order<sup>3</sup>.

1 See PARA 2059 post.

2 See PARA 2062 post.

3 See the Supreme Court Act 1981 s 51 (substituted by the Courts and Legal Services Act 1990 s 4; and amended by the Access to Justice Act 1999 s 31). As from a day to be appointed, the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. As to the award of costs against the Legal Services Commission in favour of an unassisted party see *R v Secretary of State for the Home Department, ex p Gunn, R (on the application of Kelly) v Secretary of State for the Home Department, R (on the application of Khan) v Secretary of State for the Home Department* [2001] EWCA Civ 891, [2001] 3 All ER 481, [2001] 1 WLR 1634.

### **UPDATE**

### **2019 Costs in the High Court**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(12) APPEALS FROM THE HIGH COURT TO THE HOUSE OF LORDS/2020. Right of appeal.

## **(12) APPEALS FROM THE HIGH COURT TO THE HOUSE OF LORDS**

### **2020. Right of appeal.**

An appeal lies to the House of Lords from any decision of the High Court in a criminal cause or matter<sup>1</sup>, at the instance either of the defendant or the prosecutor<sup>2</sup>. However, no such appeal lies except with the leave of the High Court or of the House of Lords<sup>3</sup>; and such leave may not be granted unless it is certified by the High Court that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by that House<sup>4</sup>.

1 For the meaning of 'criminal cause or matter' see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 247.

2 Administration of Justice Act 1960 s 1(1)(a) (amended by the Access to Justice Act 1999 s 63(1)). As from a day to be appointed, in the Administration of Justice Act 1960 s 1 (as amended), the words 'Supreme Court' are substituted for the words 'House of Lords' and the words 'the Supreme Court' are substituted for the words 'that House' by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 13(1), (2). At the date at which this volume states the law no such day had been appointed. For the purposes of disposing of any such appeal the House of Lords may exercise any powers of the court below or may remit the case to that court: Administration of Justice Act 1960 s 1(4) (as so prospectively amended).

3 There is no appeal against a refusal to grant a certificate: *Gelberg v Miller* [1961] 1 All ER 618n, [1961] 1 WLR 459, HL. A petition for leave to appeal will not be received in the Judicial Office of the House of Lords if no certificate has been granted by the High Court: *Procedure Direction* [1979] 2 All ER 359, [1979] 1 WLR 497, HL.

4 Administration of Justice Act 1960 s 1(2) (prospectively amended: see note 2 supra).

The Appellate Jurisdiction Act 1876 s 5 (composition of the House of Lords for the hearing and determination of appeals: see COURTS vol 10 (Reissue) PARA 365) applies to the hearing and determination of an appeal or application for leave to appeal under the Administration of Justice Act 1960 s 1 (as amended; prospectively amended) as it applies to the hearing and determination of an appeal under the Appellate Jurisdiction Act 1876; and any order of that House which provides for the hearing of such applications by a committee constituted in accordance with s 5 may direct that the decision of that committee is to be taken on behalf of the House: Administration of Justice Act 1960 s 1(3). As from a day to be appointed, s 1(3) is repealed by the Constitutional Reform Act 2005 ss 40(4), 146, Sch 18 Pt 5, Sch 9 para 13. At the date at which this volume states the law no such day had been appointed.

### **UPDATE**

#### **2020 Right of appeal**

TEXT AND NOTES--Where the defendant in any proceedings from which an appeal lies under these provisions would, but for the decision of the court below, be liable to recall (because he is subject to a community treatment order and, when it was made, he was liable to be detained) (see MENTAL HEALTH vol 30(2) (Reissue) PARA 528A), and immediately after that decision the prosecutor is granted, or gives notice that he intends to apply for, leave to appeal, the court may make an order for the continuation of the community treatment order: Administration of Justice Act 1960 s 5A (added by Mental Health Act 2007 Sch 4 para 1).



NOTES 2, 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(12) APPEALS FROM THE HIGH COURT TO THE HOUSE OF LORDS/2021. Application for leave to appeal.

## **2021. Application for leave to appeal.**

An application to the High Court for leave to appeal to the House of Lords must be made within the period of 28 days beginning with the date of the decision of the court below, or, if later, the date on which that court gives reasons for its decision<sup>1</sup>; and an application to the House of Lords for such leave must be made within the period of 28 days beginning with the date on which the application is refused by the High Court<sup>2</sup>.

The House of Lords or the High Court may, upon application made at any time by the accused, extend the time within which an application may be made by him to that House or that court<sup>3</sup>.

No application for leave may be made to the House of Lords if the High Court refuses to certify that a point of law of general public importance is involved<sup>4</sup>.

<sup>1</sup> le 'the relevant date': Administration of Justice Act 1960 s 2(1A) (added by the Courts Act 2003 s 88(1), (3)).

<sup>2</sup> Administration of Justice Act 1960 s 2(1) (amended by the Courts Act 2003 s 88(1), (2)). As from a day to be appointed, in the Administration of Justice Act 1960 s 2, the words 'Supreme Court' are substituted for the words 'House of Lords' and the words 'the Supreme Court or the High Court' are substituted for the words 'that House or that court' by virtue of the Constitutional Reform Act 2005 s 40(4), Sch 9 para 13(1), (3). See further COURTS vol 10 (Reissue) PARA 380. At the date at which this volume states the law no such day had been appointed. Application to the House of Lords is by petition. Where the time prescribed expires on a Saturday, Sunday, bank holiday or other day on which the Judicial Office is closed, the application will be received if made on the next ensuing day on which the Judicial Office is open: House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 3.2. For the form of petition see House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 4.1-4.6, Appendix A, Form 1.

<sup>3</sup> Administration of Justice Act 1960 s 2(3) (amended by the Courts Act 2003 s 109(1), (3), Sch 8 para 111, Sch 10; and prospectively amended (see note 2 supra)). For the form of petition see House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 3.4, Appendix A, Form 3.

<sup>4</sup> See COURTS vol 10 (Reissue) PARA 362. For the procedure relating to petitions for leave to appeal to the House of Lords see House of Lords Directions Applicable to Criminal Appeals (2006) Directions 3-7; and see, with the necessary modifications, PARAS 1967-1968 ante. As from a day to be appointed the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (as prospectively amended); and PARA 2020 ante. At the date at which this volume states the law no such day had been appointed.

## **UPDATE**

## **2021 Application for leave to appeal**

NOTES 2, 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/(12) APPEALS FROM THE HIGH COURT TO THE HOUSE OF LORDS/2022. The certificate.

## **2022. The certificate.**

No right of appeal to the House of Lords arises unless the High Court certifies that a point of law of general public importance is involved<sup>1</sup>. If the appeal is granted, it seems that the House of Lords is not confined to considering the question certified and matters relating to that question; if, in order to dispose of the appeal, it ought to consider other matters, it will do so<sup>2</sup>; but, where a certificate is given in relation to a conviction, the House will not hear argument as to sentence<sup>3</sup>.

1 See PARA 2020 ante. As from a day to be appointed, the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (as prospectively amended); and PARA 2020 ante. At the date at which this volume states the law no such day had been appointed.

2 *A-G for Northern Ireland v Gallagher* [1963] AC 349, 45 Cr App Rep 316, HL. Both this case and the case cited in note 3 infra were decided under the Administration of Justice Act 1960 s 1(1)(b) (repealed) (appeals from decisions of the Court of Appeal: see now the Criminal Appeal Act 1968 s 33(1) (as amended); and PARA 1966 ante). See also *R v Jones* [2006] UKHL 16 at [69], [2006] 2 All ER 741 at [69] per Lord Hoffmann.

3 *Jones v DPP* [1962] AC 635 at 648, [1962] 1 All ER 569 at 573, HL, per Viscount Simonds. See also note 2 supra.

## **UPDATE**

### **2022 The certificate**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(12) APPEALS FROM THE HIGH COURT TO THE HOUSE OF LORDS/2023. Bail pending appeal.

### **2023. Bail pending appeal.**

The power of the High Court under any enactment or rule of law to grant bail in connection with proceedings pending before a High Court<sup>1</sup> includes power to grant bail pending the appeal<sup>2</sup> to an appellant<sup>3</sup> or a person applying for leave to appeal to the House of Lords<sup>4</sup>.

1 As to the powers of the High Court to grant bail see PARAS 1190-1191, 2010, 2017 ante.

2 As to when an appeal is pending for these purposes see PARA 1191 note 3 ante.

3 Is an applicant under the Administration of Justice Act 1960 s 1(1)(a) (as amended): see PARA 2020 ante.

4 See PARA 1191 ante. See also the House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 27.1. As from a day to be appointed, the appellate jurisdiction of the House of Lords is replaced with that of the new Supreme Court: see the Administration of Justice Act 1960 s 1(1) (as prospectively amended); and PARA 2020 ante. At the date at which this volume states the law no such day had been appointed.

### **UPDATE**

### **2023 Bail pending appeal**

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(12) APPEALS FROM THE HIGH COURT TO THE HOUSE OF LORDS/2024. Appeal petition; procedure.

## **2024. Appeal petition; procedure.**

Where leave to appeal to the House of Lords<sup>1</sup> has been given, a petition of appeal must be lodged<sup>2</sup> in the Judicial Office within three months of the date on which the order appealed against was made<sup>3</sup>. However, this time limit may be varied (but not increased) by an order of the House when granting leave or by an order of the court below<sup>4</sup>. Where a petition of appeal is not lodged within the time allowed, a petition for leave to present the appeal out of time may be lodged<sup>5</sup>. The procedural requirements which apply on an appeal from the High Court to the House of Lords are the same as those which apply on an appeal from the Court of Appeal<sup>6</sup>.

1 As to appeals to the House of Lords and as to the prospective replacement of the House of Lords with that of the new Supreme Court see the Administration of Justice Act 1960 s 1(1) (as prospectively amended); and PARA 2020 post.

2 'Lodged' means delivery to a member of the Judicial Office staff, either in person during opening hours or by post; and where the time for lodging expires on a Saturday, Sunday, bank holiday, or any other day on which the Judicial Office is closed, it is received if it is lodged on the first day on which the Office is next open: House of Lords Practice Directions Applicable to Criminal Appeals (2006) Direction 26.1. Communications may be transmitted by facsimile or email only where urgent circumstances make this appropriate and no document which is to be presented to the House may be so transmitted: Direction 26.2.

3 See House of Lords Directions Applicable to Criminal Appeals (2006) Direction 8.1. For the form of petition of appeal see Appendix A.

4 Ibid Direction 8.2. The order appealed against is the substantive order complained of: Direction 8.2.

5 Ibid Direction 8.4. This petition is referred to an Appeal Committee: Direction 8.4.

6 Ie ibid Directions 16-42: see PARA 1973 ante. As to the hearing and disposal of the appeal see PARA 2026 post.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(12) APPEALS FROM THE HIGH COURT TO THE HOUSE OF LORDS/2025. Leave to be present.

## **2025. Leave to be present.**

A defendant who is detained pending an appeal<sup>1</sup> to the House of Lords is not entitled to be present at the hearing of the appeal, or of any proceedings preliminary or incidental to it, except where an order of the House of Lords authorises him to be present or where that House or the High Court, as the case may be, gives him leave to be present<sup>2</sup>.

<sup>1</sup> See under the Administration of Justice Act 1960 s 1(1)(a) (as amended): see PARA 2020 ante. As to when an appeal is pending see PARA 1191 note 3 ante.

<sup>2</sup> Ibid s 9(3) (amended by the Criminal Justice Act 1967 s 98(6), Sch 4 para 30). As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords' and the words 'the Supreme Court' are substituted for the words 'that House' by the Constitutional Reform Act 2005 s 40, Sch 9 para 13(1), (6). At the date at which this volume states the law no such day had been appointed.

## **UPDATE**

### **2025 Leave to be present**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(12) APPEALS FROM THE HIGH COURT TO THE HOUSE OF LORDS/2026. Disposal of appeal by the House of Lords.

## **2026. Disposal of appeal by the House of Lords.**

For the purpose of disposing of an appeal<sup>1</sup> the House of Lords may exercise any powers of the High Court or may remit the case to that court<sup>2</sup>.

1     le an appeal under the Administration of Justice Act 1960 s 1(1)(a) (as amended): see PARA 2020 ante.

2     Ibid s 1(4). As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords' by the Constitutional Reform Act 2005 s 40, Sch 9 para 13(1), (2)(d). At the date at which this volume states the law no such day had been appointed.

### **UPDATE**

## **2026 Disposal of appeal by the House of Lords**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22.

APPEALS/(12) APPEALS FROM THE HIGH COURT TO THE HOUSE OF LORDS/2027. Costs in the House of Lords.

### **2027. Costs in the House of Lords.**

Where the House of Lords determines an appeal, or application for leave to appeal, from the High Court, it may order the payment out of central funds of: (1) the costs of the defendant<sup>1</sup>; (2) private prosecution costs<sup>2</sup>. It may also make an order in respect of inter partes costs<sup>3</sup>.

1 See PARA 2059 post.

2 See PARA 2062 post.

3 Administration of Justice Act 1960 s 1(4). As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords' by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 13(1), (2). At the date at which this volume states the law no such day had been appointed.

### **UPDATE**

### **2027 Costs in the House of Lords**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/(13) CRIMINAL CASES REVIEW COMMISSION/2028. Criminal Cases Review Commission.

## **(13) CRIMINAL CASES REVIEW COMMISSION**

### **2028. Criminal Cases Review Commission.**

A body corporate known as the Criminal Cases Review Commission has been established<sup>1</sup>. The Commission is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown; and the Commission's property is not to be regarded as property of, or held on behalf of, the Crown<sup>2</sup>. The Commission consists of not fewer than 11 members<sup>3</sup> who are appointed by Her Majesty on the recommendation of the Prime Minister<sup>4</sup>. At least one-third of its members must be persons who are legally qualified<sup>5</sup>. At least two-thirds of the members of the Commission must be persons who appear to the Prime Minister to have knowledge or experience of any aspect of the criminal justice system and of them at least one must be a person who appears to him to have knowledge or experience of any aspect of the criminal justice system in Northern Ireland, and for these purposes, the criminal justice system includes, in particular, the investigation of offences and the treatment of offenders<sup>6</sup>.

The Commission has the following functions:

- 2608 (1) the reference to the Court of Appeal of any conviction of an offence on indictment or any sentence imposed in respect of it<sup>7</sup>;
- 2609 (2) the reference to the Crown Court of a conviction by a magistrates' court or any sentence imposed in respect of it<sup>8</sup>;
- 2610 (3) the investigation of matters at the direction of the Court of Appeal<sup>9</sup>; and
- 2611 (4) the provision of assistance to the Secretary of State in connection with the prerogative of mercy<sup>10</sup>.

1 Criminal Appeal Act 1995 s 8(1). A document purporting to be duly executed under the seal of the Commission, or signed on behalf of the Commission, must be received in evidence and, unless the contrary is proved, taken to be so executed or signed: s 8, Sch 1 para 7. As to membership, remuneration, expenses etc of members and employees, procedure, annual report and accounts see Sch 1 paras 1-6, 8-11.

2 Ibid s 8(2).

3 Ibid s 8(3).

4 Ibid s 8(4).

5 Ibid s 8(5). A person is legally qualified if he has a ten year general qualification, within the meaning of the Courts and Legal Services Act 1990 s 71 (see LEGAL PROFESSIONS vol 65 (2008) PARA 742) or is a member of the Bar of Northern Ireland, or solicitor of the Supreme Court of Northern Ireland, of at least ten years' standing: Criminal Appeal Act 1995 s 8(5). As from a day to be appointed, the words 'Court of Judicature' are substituted for the words 'Supreme Court' by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 5. At the date at which this volume states the law no such day had been appointed.

6 Criminal Appeal Act 1995 s 8(6).

7 See PARA 1963 ante.

8 As to the right of appeal from a magistrates' court see PARA 1980 ante.

9 See PARA 1869 ante.

10 See PARA 1979 ante.

## **UPDATE**

### **2028 Criminal Cases Review Commission**

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

TEXT AND NOTES 7-10--As to the power of the Criminal Cases Review Commission to refer cases dealt with by the service courts, see the Criminal Appeal Act 1995 ss 12A, 12B (added by the Armed Forces Act 2006 Sch 11 para 2).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/(13) CRIMINAL CASES REVIEW COMMISSION/2029. Power to obtain documents etc.

## **2029. Power to obtain documents etc.**

Where the Criminal Cases Review Commission<sup>1</sup> believes that a person serving in a public body<sup>2</sup> has possession or control of a document or other material which may assist the Commission in the exercise of any of its functions, it may, where it is reasonable to do so, require the person who is the appropriate person<sup>3</sup> in relation to the public body: (1) to produce the document or other material to the Commission or to give the Commission access to it; and (2) to allow the Commission to take away the document or other material or to make and take away a copy of it in such form as it thinks appropriate, and may direct that person that the document or other material must not be destroyed, damaged or altered before the direction is withdrawn by the Commission<sup>4</sup>.

The documents and other material covered by the above provisions include, in particular, any document or other material obtained or created during any investigation or proceedings relating to the case in relation to which the Commission's function is being or may be exercised, or any other case which may be in any way connected with that case (whether or not any function of the Commission could be exercised in relation to that other case)<sup>5</sup>. The duty to comply with a requirement under those provisions is not affected by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) which would otherwise prevent the production of the document or other material to the Commission or the giving of access to it to the Commission<sup>6</sup>.

Where a person on whom a requirement is imposed under the above provisions notifies the Commission that any information contained in any document or other material to which the requirement relates is not to be disclosed by the Commission without his prior consent, the Commission must not disclose the information without such consent<sup>7</sup>. Such consent may not be withheld unless the person would have been prevented by any obligation of secrecy or other limitation on disclosure from disclosing the information to the Commission<sup>8</sup>, and it is reasonable for the person to withhold his consent to disclosure of the information by the Commission<sup>9</sup>.

The Commission's power to obtain documents<sup>10</sup> does not apply to any document or other material in the possession or control of a person serving in a government department if the document or other material is relevant to a case which the Secretary of State is already reviewing<sup>11</sup> and is in the possession or control of the person in consequence of the Secretary of State's consideration of the case<sup>12</sup>.

The Secretary of State must give to the Commission any document or other material which: (a) contains representations made to him in relation to any case to which this provision applies<sup>13</sup>; or (b) was received by him in connection with any such case otherwise than from a person serving in a government department, and may give to the Commission any document or other material which is relevant to any such case but does not fall within head (a) or head (b) above<sup>14</sup>.

The above provisions<sup>15</sup> are without prejudice to the taking by the Commission of any steps which it considers appropriate for assisting it in the exercise of any of its functions including, in particular, undertaking, or arranging for others to undertake, inquiries, and obtaining, or arranging for others to obtain, statements, opinions and reports<sup>16</sup>.

1 See PARA 2028 et seq ante.

2 'Public body' means: (1) any police force; (2) any government department, local authority or other body constituted for purposes of the public service, local government or the administration of justice; or (3) any other body whose members are appointed by Her Majesty, any Minister or any government department or whose revenues consist wholly or mainly of money provided by Parliament or appropriated by Measure of the Northern Ireland Assembly: Criminal Appeal Act 1995 s 22(1). 'Police force' includes the Police Service of Northern Ireland, the Police Service of Northern Ireland Reserve and any body of constables maintained otherwise than by a police authority: s 22(2)(a) (amended by the Police Act 1997 s 134(1), Sch 9 para 71; the Serious Organised Crime and Police Act 2005 ss 59, 174, Sch 4 para 63(1), (2)(a), Sch 17 Pt 2; and the Police (Northern Ireland) Act 2000 s 78(2)(e), (f)). References to the chief officer of police, in relation to the Police Service of Northern Ireland and the Police Service of Northern Ireland Reserve, are to the Chief Constable of the Police Service of Northern Ireland; and, in relation to any other police force maintained otherwise than by a police authority, are to the chief constable: Criminal Appeal Act 1995 s 22(2)(b) (substituted by the Police Act 1997 Sch 9 para 71(1); and amended by the Police (Northern Ireland) Act 2000 s 78(10), Sch 6 para 20(1), (2); and the Serious Organised Crime and Police Act 2005 s 59, Sch 4 para 63(1), (2)(b), Sch 17 Pt 2). References to an England and Wales police force are to a police force maintained under the Police Act 1996 s 2, the metropolitan police force or the City of London police force: Criminal Appeal Act 1995 s 22(2)(c) (amended by the Police Act 1996 s 103(1), Sch 7 para 47; the Police Act 1997 Sch 9 para 71(1), (2); and the Serious Organised Crime and Police Act 2005 Sch 4 para 63(1), (2)(c)). References to a government department include a Northern Ireland department and the Public Prosecution Service for Northern Ireland: Criminal Appeal Act 1995 s 22(3)(a) (amended by the Justice (Northern Ireland) Act 2002 s 85, Sch 12 para 49(1), (2)). 'Minister' means a Minister of the Crown as defined by the Ministers of the Crown Act 1975 s 8 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS VOL 8(2) (Reissue) PARA 363) but also includes the head of a Northern Ireland department: Criminal Appeal Act 1995 s 22(3)(b).

3 'The appropriate person' means:

261 (1) in relation to a police force, the chief officer of police (ibid s 22(4)(a));

262 (2) in relation to the Serious Organised Crime Agency, the Director General of that Agency (s 22(4)(aa) (added by the Police Act 1997 Sch 9 para 71(3); and substituted by the Serious Organised Crime and Police Act 2005 Sch 4 para 63(1), (3));

263 (3) in relation to the Crown Prosecution Service, the Director of Public Prosecutions (Criminal Appeal Act 1995 s 22(4)(b));

264 (4) in relation to the Public Prosecution Service for Northern Ireland, the Director of Public Prosecutions for Northern Ireland (s 22(4)(c) (amended by the Justice (Northern Ireland) Act 2002 Sch 12 para 49(1), (3));

265 (5) in relation to the Serious Fraud Office, the Director of the Serious Fraud Office (Criminal Appeal Act 1995 s 22(4)(d));

266 (6) in relation to the Her Majesty's Revenue and Customs, the Commissioners for Her Majesty's Revenue and Customs (s 22(4)(e) (substituted by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 62));

267 (7) in relation to the Revenue and Customs Prosecutions Office, the Director of Revenue and Customs (Criminal Appeal Act 1995 s 22(4)(f) (substituted by the Commissioners for Revenue and Customs Act 2005 s 50(6), Sch 4 para 62));

268 (8) in relation to any government department not within heads (1)-(7) supra, the minister in charge of the department (Criminal Appeal Act 1995 s 22(4)(g)); and

269 (9) in relation to any public body not within heads (1)-(9) supra, the public body itself (if it is a body corporate) or the person in charge of the public body (if it is not) (s 22(4)(h)).

4 Ibid s 17(1), (2).

5 Ibid s 17(3).

6 Ibid s 17(4).

7 Ibid s 25(1).

8 Ibid s 25(2)(a), which applies apart from s 17. An obligation of secrecy or other limitation on disclosure which applies to a person only where disclosure is not authorised by another person must not be taken for these purposes to prevent the disclosure by the person of information to the Commission unless reasonable steps have been taken to obtain the authorisation of the other person, or such authorisation could not reasonably be expected to be obtained: s 25(3).

9 Ibid s 25(2)(b).

10 Ie under ibid s 17.

11 Ie if the Secretary of State was, immediately before 31 March 1997, considering the case with a view to deciding whether to make a reference under the Criminal Appeal Act 1968 s 17 (repealed) or whether to recommend the exercise of Her Majesty's prerogative of mercy in relation to a conviction by a magistrates' court, or he has at any earlier time considered the case with a view to deciding whether to make such a reference or whether so to recommend: Criminal Appeal Act 1995 s 18(2).

12 Ibid s 18(1).

13 Ie ibid s 18(3). Section 18(3) applies to a case if the Secretary of State was, immediately before 31 March 1997, considering the case with a view to deciding whether to make a reference under the Criminal Appeal Act 1968 s 17 (repealed) or whether to recommend the exercise of Her Majesty's prerogative of mercy in relation to a conviction by a magistrates' court, or he has at any earlier time considered the case with a view to deciding whether to make such a reference, or whether so to recommend, and the Commission at any time notifies him that it wishes the Criminal Appeal Act 1995 s 18(3) to apply to the case: s 18(4).

14 Ibid s 18(3); and see note 13 supra.

15 Ie ibid ss 17, 18: s 21.

16 Ibid s 21.

## **UPDATE**

### **2029 Power to obtain documents etc**

NOTE 3--Criminal Appeal Act 1995 s 22(4) further amended, s 22(4A)-(4C) added: Armed Forces Act 2006 Sch 11 para 9.

TEXT AND NOTES 11-14--Criminal Appeal Act 1995 s 18(2) amended, s 18(5), (6) added: Armed Forces Act 2006 Sch 11 para 7.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/22. APPEALS/(13) CRIMINAL CASES REVIEW COMMISSION/2030. Power to require appointment of investigating officers.

### **2030. Power to require appointment of investigating officers.**

Where the Criminal Cases Review Commission<sup>1</sup> believes that inquiries should be made for assisting it in the exercise of any of its functions in relation to any case it may require the appointment of an investigating officer to carry out the inquiries<sup>2</sup>. Where any offence to which the case relates was investigated by persons serving in a public body<sup>3</sup>, a requirement may be imposed on the person who is the appropriate person<sup>4</sup> in relation to the public body, or where the public body has ceased to exist, on any chief officer of police or on the person who is the appropriate person in relation to any public body which appears to the Commission to have functions which consist of or include functions similar to any of those of the public body which has ceased to exist<sup>5</sup>. Where no offence to which the case relates was investigated by persons serving in a public body, such a requirement may be imposed on any chief officer of police<sup>6</sup>. Such a requirement imposed on a chief officer of police<sup>7</sup> may be a requirement to appoint a person serving in the police force<sup>8</sup> in relation to which he is the chief officer of police, or a requirement to appoint a person serving in another police force selected by the chief officer<sup>9</sup>. A requirement<sup>10</sup> imposed on a person who is the appropriate person in relation to a public body other than a police force may be a requirement to appoint a person serving in the public body, or a requirement to appoint a person serving in a police force, or in a public body (other than a police force) having functions which consist of or include the investigation of offences, selected by the appropriate person<sup>11</sup>. The Commission may direct that a person must not be appointed, or that a police force or other public body must not be selected, without the Commission's approval<sup>12</sup>.

Where an appointment is made<sup>13</sup> by the person who is the appropriate person in relation to any public body, that person must inform the Commission of the appointment; and if the Commission is not satisfied with the person appointed it may direct that the person who is the appropriate person in relation to the public body must, as soon as is reasonably practicable, select another person in his place and notify the Commission of the proposal to appoint the other person, and the other person must not be appointed without the Commission's approval<sup>14</sup>.

The above provisions are without prejudice to the taking by the Commission of any steps which it considers appropriate for assisting it in the exercise of any of its functions including, in particular, undertaking, or arranging for others to undertake, inquiries, and obtaining, or arranging for others to obtain, statements, opinions and reports<sup>15</sup>.

1 See PARA 2028 ante.

2 Criminal Appeal Act 1995 s 19(1).

3 For the meaning of 'public body' see PARA 2029 note 2 ante.

4 For the meaning of 'appropriate person' see PARA 2029 note 3 ante.

5 Criminal Appeal Act 1995 s 19(2).

6 Ibid s 19(3).

7 For the meaning of the 'chief officer of police' see PARA 2029 note 2 ante.

8 For the meaning of 'police force' see PARA 2029 note 2 ante.

9 Criminal Appeal Act 1995 s 19(4).

10 Ie under ibid s 19.

11 Ibid s 19(5).

12 Ibid s 19(6).

13 Ie under ibid s 19.

14 Ibid s 19(7).

15 Ibid s 21.

## **UPDATE**

### **2030 Power to require appointment of investigating officers**

TEXT AND NOTES 6-12--Criminal Appeal Act 1995 s 19(3), (4), (5), (6) amended, s 19(4A) added: Armed Forces Act 2006 Sch 11 para 8.

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APPEALS/(13) CRIMINAL CASES REVIEW COMMISSION/2031. Inquiries by investigating officers.

### **2031. Inquiries by investigating officers.**

A person appointed as the investigating officer<sup>1</sup> in relation to a case must undertake such inquiries as the Criminal Cases Review Commission<sup>2</sup> may from time to time reasonably direct him to undertake in relation to the case<sup>3</sup>. A person so appointed must be permitted to act as such by the person who is the appropriate person<sup>4</sup> in relation to the public body<sup>5</sup> in which he is serving<sup>6</sup>. Where the chief officer of an England and Wales police force<sup>7</sup> appoints a member of the Police Service of Northern Ireland as an investigating officer, the member appointed has in England and Wales the same powers and privileges as a member of the police force has there as a constable; and where the Chief Constable of the Police Service of Northern Ireland appoints a member of an England and Wales police force as an investigating officer, the member appointed has in Northern Ireland the same powers and privileges as a member of the Police Service of Northern Ireland has there as a constable<sup>8</sup>.

The Commission may take any steps which it considers appropriate for supervising the undertaking of inquiries by an investigating officer<sup>9</sup>. It may at any time direct that a person appointed as the investigating officer in relation to a case cease to act as such; but the making of such a direction does not prevent the Commission from imposing a requirement<sup>10</sup> to appoint another investigating officer in relation to the case<sup>11</sup>.

When a person appointed as the investigating officer in relation to a case has completed the inquiries which he has been directed by the Commission to undertake in relation to the case, he must prepare a report of his findings, submit it to the Commission, and send a copy of it to the person by whom he was appointed<sup>12</sup>. When a person so appointed submits to the Commission a report of his findings he must also submit to it any statements, opinions and reports received by him in connection with the inquiries which he was directed to undertake in relation to the case<sup>13</sup>.

The above provisions are without prejudice to the taking by the Commission of any steps which it considers appropriate for assisting it in the exercise of any of its functions including, in particular, undertaking, or arranging for others to undertake, inquiries, and obtaining, or arranging for others to obtain, statements, opinions and reports<sup>14</sup>.

1 For the meaning of 'an investigating officer' see s 19; and PARA 2030 ante (definition applied by s 30(1)).

2 See PARA 2028 ante.

3 Criminal Appeal Act 1995 s 20(1).

4 For the meaning of 'appropriate person' see PARA 2029 note 3 ante.

5 For the meaning of 'public body' see PARA 2029 note 2 ante.

6 Criminal Appeal Act 1995 s 20(2).

7 As to references to a police force see PARA 2029 note 2 ante.

8 Criminal Appeal Act 1995 s 20(3) (amended by the Police (Northern Ireland) Act 2000 s 78(2)(a), (c)).

9 Criminal Appeal Act 1995 s 20(4).



10    le under *ibid* s 19: see *PARA 2030 ante*.

11    *Ibid* s 20(5).

12    *Ibid* s 20(6).

13    *Ibid* s 20(7).

14    *Ibid* s 21.

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### **2032. Disclosure of information.**

A person who is or has been a member or employee of the Criminal Cases Review Commission<sup>1</sup> must not disclose any information obtained by the Commission in the exercise of any of its functions unless the disclosure of the information is excepted<sup>2</sup> from the obligations of non-disclosure<sup>3</sup>; and a person who is or has been an investigating officer<sup>4</sup> must not disclose any information obtained by him in his inquiries unless the disclosure of the information is so excepted<sup>5</sup>.

A member of the Commission may not authorise the disclosure by an employee of the Commission of any information obtained by it in the exercise of any of its functions, or the disclosure by an investigating officer of any information obtained by him in his inquiries, unless the authorisation of the disclosure of the information is excepted<sup>6</sup> from the obligations of non-disclosure<sup>7</sup>.

A person who contravenes the above provisions is guilty of an offence and liable on summary conviction to a fine of an amount not exceeding level 5 on the standard scale<sup>8</sup>.

The disclosure of information, or the authorisation of the disclosure of information, is excepted from the above requirements if the information is disclosed, or is authorised to be disclosed: (1) for the purposes of any criminal, disciplinary or civil proceedings<sup>9</sup>; (2) in order to assist in dealing with an application made to the Secretary of State for compensation for a miscarriage of justice<sup>10</sup>; (3) by a person who is a member or an employee of the Commission either to another person who is a member or an employee of the Commission or to an investigating officer<sup>11</sup>; (4) by an investigating officer to a member or an employee of the Commission<sup>12</sup>; (5) in any statement or report required by the Criminal Appeal Act 1995<sup>13</sup>; (6) in or in connection with the exercise of any function under the Criminal Appeal Act 1995<sup>14</sup>; or (7) in any circumstances in which the disclosure of information is permitted by an order made by the Secretary of State<sup>15</sup>. The disclosure of information is also excepted if the information is disclosed by an employee of the Commission, or an investigating officer, who is authorised to disclose the information by a member of the Commission<sup>16</sup>. The disclosure of information, or the authorisation of the disclosure of information, is also excepted if the information is disclosed, or is authorised to be disclosed, for the purposes of the investigation of an offence, or deciding whether to prosecute a person for an offence, unless the disclosure is or would be prevented by an obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) otherwise<sup>17</sup> arising<sup>18</sup>.

<sup>1</sup> See PARA 2028 ante.

<sup>2</sup> ie by the Criminal Appeal Act 1995 s 24 (see the text and notes 9-18 infra).

<sup>3</sup> Ibid s 23(1). Where the disclosure of information is excepted from s 23 by s 24(1) or (2) (see the text and notes 9-16 infra), the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment) arising otherwise than under s 23: s 24(4).

<sup>4</sup> For the meaning of 'an investigating officer' see s 19; and PARA 2030 ante (definition applied by s 30(1)).

<sup>5</sup> Ibid s 23(2). See also note 3 supra.

6     Ie by *ibid* s 24 (see the text and notes 9-18 *infra*).

7     *Ibid* s 23(3). See also note 3 *supra*.

8     *Ibid* s 23(4). As to the standard scale see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. See also note 3 *supra*.

9     *Ibid* s 24(1)(a).

10    *Ibid* s 24(1)(b).

11    *Ibid* s 24(1)(c).

12    *Ibid* s 24(1)(d).

13    *Ibid* s 24(1)(e).

14    *Ibid* s 24(1)(f).

15    *Ibid* s 24(1)(g). The power to make an order under head (7) in the text is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 24(5).

16    *Ibid* s 24(2).

17    Ie otherwise than under *ibid* s 23 (see the text and notes 1-8 *supra*).

18    *Ibid* s 24(3).

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## **23. COMPENSATION, REWARDS AND COSTS**

### **(1) THE CRIMINAL INJURIES COMPENSATION SCHEME**

#### **2033. The Criminal Injuries Compensation Scheme.**

In accordance with a statutory duty to do so<sup>1</sup>, the Secretary of State has made arrangements for the payment of compensation to, or in respect of, persons who have sustained one or more criminal injuries<sup>2</sup>. Those arrangements include the making of a scheme<sup>3</sup>, providing in particular for: (1) the circumstances in which awards may be made; and (2) the categories of person to whom awards may be made<sup>4</sup>. The scheme is entitled the Criminal Injuries Compensation Scheme<sup>5</sup>.

1    In accordance with the Criminal Injuries Compensation Act 1995 s 1(1).

2    'Criminal injury' has such meaning as may be specified: *ibid* s 1(4); see PARA 2035 post.

3    Copies of the Scheme can be obtained, together with notes for guidance and application forms, from the Criminal Injuries Compensation Authority, Tay House, 300 Bath St, Glasgow G2 4LN.

The current scheme came into force on 1 April 2001. The Scheme provides transitional arrangements for applications for compensation made before that date under its predecessors: see Criminal Injuries Compensation Scheme (2001) PARAS 84-86.

As required by the Criminal Injuries Compensation Act 1995 s 6(1), (3), the Scheme includes provision as to annual reports, accounts and financial records: Criminal Injuries Compensation Scheme (2001) PARA 1.4. The general working of the Scheme is kept under review by the Secretary of State. The Accounting Officers for the Criminal Injuries Compensation Authority and the Criminal Injuries Compensation Appeals Panel ('the Panel') must each submit reports to the Secretary of State and the Scottish Ministers as soon as possible after the end of each financial year, dealing with the operation of the Scheme and the discharge of functions under it. The Accounting Officers must each keep proper accounts and proper records in relation to those accounts, and must each prepare a statement of accounts in each financial year in a form directed by the Secretary of State. These statements of accounts must be submitted to the Secretary of State and the Scottish Ministers as soon as possible after the end of each financial year: Criminal Injuries Compensation Scheme (2001) PARA 4.

The Secretary of State must lay before each House of Parliament, and the Scottish Ministers (as defined by the Scotland Act 1998 s 44) must lay before the Scottish Parliament, a copy of every such annual report: Criminal Injuries Compensation Act 1995 s 6(2) (amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999, SI 1999/1820, art 4, Sch 2 para 123(1), (3)). A statement of accounts must be submitted to the Secretary of State at such time as the Secretary of State may direct, and where such a statement is so submitted the Secretary of State must send a copy of it to the Comptroller and Auditor General as soon as is reasonably practicable; and the Comptroller and Auditor General must examine, certify and report on any statement of accounts so sent to him; and lay copies of the statement and of his report before each House of Parliament and the Scottish Parliament: Criminal Injuries Compensation Act 1995 s 6(4), (5) (amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999, SI 1999/1820, Sch 2 para 123(1), (5)).

The Secretary of State may: (1) pay such remuneration, allowances or gratuities to or in respect of claims officers and other persons appointed by him under the Criminal Injuries Compensation Act 1995 (other than adjudicators) as he considers appropriate; (2) pay, or make such payments towards the provision of, such remuneration, pensions, allowances or gratuities to or in respect of adjudicators, as he considers appropriate; (3) make such payments by way of compensation for loss of office to any adjudicator who is removed from office under the Criminal Injuries Compensation Act 1995 s 5(7) (see PARA 2034 note 3 post), as he considers appropriate: Criminal Injuries Compensation Act 1995 s 9(1)-(3).

Sums required for the payment of compensation in accordance with the Scheme must be provided by the Secretary of State out of money provided by Parliament: s 9(4). Where a Scheme manager (ie a person appointed by the Secretary of State to have overall responsibility for managing the provisions of the Scheme except those relating to appeals: see s 1(4)) has been appointed, the Secretary of State may make such payments to him, in respect of the discharge of his functions in relation to the Scheme, as the Secretary of State considers appropriate: s 9(5). Any expenses incurred by the Secretary of State under the Criminal Injuries Compensation Act 1995 must be paid out of money provided by Parliament: s 9(6). Any expenses incurred by the Secretary of State under s 9(6) as regards Scotland must be reimbursed to the Secretary of State by the Scottish Ministers: s 9(6A) (added by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999, SI 1999/1820, Sch 2 para 123(1), (6)). Any sums received by the Secretary of State under any provision of the Scheme providing for repayment of compensation (ie under the Criminal Injuries Compensation Act 1995 s 3(1)(c)) or, as from a day to be appointed, by virtue of regulations made under s 7A(1) (as added: see PARA 2053 post) must be paid by him into the Consolidated Fund: s 9(7) (prospectively amended by the Domestic Violence, Crime and Victims Act 2004 s 57(1), (3)). At the date at which this volume states the law no such day had been appointed.

4 See the Criminal Injuries Compensation Act 1995 s 1(2). Section 2 provides the basis on which compensation is to be calculated; s 3 sets out the basic framework in relation to claims and awards to be adopted by the Scheme; ss 4, 5 respectively require the Scheme to make provision for reviews of decisions on claims for compensation and for appeals.

5 Ibid s 1(3). As to Parliamentary control over the making of the Scheme or over alterations to the Scheme or to the tariff under it see s 11 (amended by the Sexual Offences Act 2003 s 139, Sch 6 para 34; and prospectively amended by the Domestic Violence, Crime and Victims Act 2004 s 57(1), (4) from a day to be appointed).

## **UPDATE**

### **2033 The Criminal Injuries Compensation Scheme**

NOTE 3--References to adjudicators omitted, consequent to the transfer of their role to the First-tier Tribunal (see PARA 2034) (Criminal Injuries Compensation Act 1995 s 9(1) amended, s 9(2), (3) repealed by SI SI 2008/2833).

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## **2034. Administration of the Scheme.**

Claims officers<sup>1</sup> in the Criminal Injuries Compensation Authority ('the Authority') determine claims for compensation in accordance with the Criminal Injuries Compensation Scheme<sup>2</sup>. Appeals against decisions taken on reviews under the Scheme are determined by adjudicators<sup>3</sup>. Persons appointed as adjudicators are appointed as members of the Criminal Injuries Compensation Appeals Panel ('the Panel'). One of the adjudicators is appointed as Chairman of the Panel by the Secretary of State. The Secretary of State also appoints persons as staff of the Panel to administer the provisions of the Scheme relating to the appeal system<sup>4</sup>.

Claims officers are responsible for deciding, in accordance with the Scheme, what awards (if any) should be made in individual cases, and how they should be paid. Their decisions are open to review and thereafter to appeal to the Panel, in accordance with the Scheme. No decision, whether by a claims officer or the Panel, is open to appeal to the Secretary of State<sup>5</sup>.

The Panel advises the Secretary of State on matters on which he seeks its advice, as well as on such other matters and at such times as it considers appropriate. Any advice given by the Panel is referred to by the Accounting Officer for the Panel in his annual report<sup>6</sup>.

1     le a person appointed by the Secretary of State under the Criminal Injuries Compensation Act 1995 s 3(4) (b): s 1(4). Claims officers are appointed by the Secretary of State (on such terms and conditions as he consider appropriate: s 3(5)(a)) to determine claims for compensation, and to make awards and payments of compensation, under the Criminal Injuries Compensation Scheme: s 3(4)(b). A claims officer is not to be regarded as having been appointed to exercise functions of the Secretary of State or to act on his behalf: s 3(5) (b). No decision taken by a claims officer is to be regarded as having been taken by, or on behalf of, the Secretary of State: s 3(6).

2     Criminal Injuries Compensation Scheme (2001) PARA 2.

3     Criminal Injuries Compensation Scheme (2001) PARA 2. Adjudicators are appointed by the Secretary of State after consultation with the Scottish Ministers, except that five (or such greater number as the Secretary of State may agree) are appointed by the Scottish Ministers after consultation with the Secretary of State): Criminal Injuries Compensation Act 1995 s 5(1A), (1B) (added by the Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc) Order 1999, SI 1999/1747, art 3, Sch 10 para 2(1), (4)). Adjudicators are appointed on such terms as the Secretary of State or the Scottish Ministers consider appropriate, but are not to be regarded as having been appointed to exercise functions of the Secretary of State or the Scottish Ministers or to act on his or their behalf: Criminal Injuries Compensation Act 1995 s 5(4) (substituted by the Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc) Order 1999, SI 1999/1747, Sch 10 para 2(1), (5)). No decision taken by an adjudicator is to be regarded as having been taken by, or on behalf of, the Secretary of State or, as the case may be, the Scottish Ministers: Criminal Injuries Compensation Act 1995 s 5(5) (amended by the Scotland Act 1998 (Cross-Border Public Authorities) (Adaptation of Functions etc) Order 1999, SI 1999/1747, Sch 10 para 2(1), (6)). The Secretary of State may at any time after consultation with the Scottish Ministers or, in the case of an appointment made by the Scottish Ministers, the Scottish Ministers may at any time, after consultation with the Secretary of State, remove a person from office as an adjudicator if satisfied that: (1) he has been convicted of a criminal offence; (2) he has become bankrupt or had his estate sequestrated or has made an arrangement with, or granted a trust deed for, his creditors; or (3) he is otherwise unable or unfit to perform his duties: Criminal Injuries Compensation Act 1995 s 5(7).

The other provisions of s 5 (as amended) provide for the establishment of the appeals system contained in the Criminal Injuries Compensation Scheme (2001): see PARA 2048 post.

4     Criminal Injuries Compensation Scheme (2001) PARA 2.

5     Criminal Injuries Compensation Scheme (2001) PARA 3.

6 Criminal Injuries Compensation Scheme (2001) PARA 5. The 'annual report' is that under the Criminal Injuries Compensation Scheme (2001) PARA 4 (see PARA 2033 note 3 ante).

## **UPDATE**

### **2034 Administration of the Scheme**

NOTE 3--Appeals are now to be made to the First-tier Tribunal: Criminal Injuries Compensation Act 1995 s 5(1) (s 5(1)-(7) substituted by SI 2008/2833).

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### **2035. Eligibility to apply for compensation.**

Compensation may be paid in accordance with the Criminal Injuries Compensation Scheme:

2612 (1) to an applicant who has sustained a criminal injury on or after 1 August 1964<sup>1</sup>;

2613 (2) where the victim of a criminal injury sustained on or after 1 August 1964 has since died, to an applicant who is a qualifying claimant<sup>2</sup>; and

for the purposes of this Scheme, 'applicant' means any person for whose benefit an application for compensation is made, even where it is made on his behalf by another person<sup>3</sup>.

No compensation will be paid under the Scheme in the following circumstances:

2614 (a) where the applicant has previously lodged any claim for compensation in respect of the same criminal injury under this or any other scheme for the compensation of the victims of violent crime in operation in Great Britain<sup>4</sup>; or

2615 (b) where the criminal injury was sustained before 1 October 1979 and the victim and the assailant were living together at the time as members of the same family<sup>5</sup>.

For the purposes of the Scheme, 'criminal injury' means one or more personal injuries<sup>6</sup>, being an injury sustained in Great Britain<sup>7</sup> and directly attributable to:

2616 (i) a crime of violence<sup>8</sup> (including arson, fire-raising or an act of poisoning)<sup>9</sup>;

2617 (ii) an offence of trespass on a railway<sup>10</sup>; or

2618 (iii) the apprehension or attempted apprehension of an offender or a suspected offender, the prevention or attempted prevention of an offence, or the giving of help to any constable who is engaged in any such activity<sup>11</sup>.

It is not necessary for the assailant to have been convicted of a criminal offence in connection with the injury. Moreover, even where the injury is attributable to such conduct in respect of which the assailant cannot be convicted of an offence by reason of age, insanity or diplomatic immunity, the conduct may nevertheless be treated as constituting a criminal act<sup>12</sup>.

A personal injury is not a criminal injury for the purposes of the Scheme where the injury is attributable to the use of a vehicle, except where the vehicle was used so as deliberately to inflict, or attempt to inflict, injury on any person<sup>13</sup>.

Where an injury is sustained accidentally by a person who is engaged in any of the law enforcement activities described in head (iii) above, or any other activity directed to containing, limiting or remedying the consequences of a crime, compensation will not be payable unless the person injured was, at the time he sustained the injury, taking an exceptional risk which was justified in all the circumstances<sup>14</sup>.



- 1 Criminal Injuries Compensation Scheme (2001) PARA 6(a).
- 2 Criminal Injuries Compensation Scheme (2001) PARA 6(b). The reference to a qualifying claimant in the text refers to a qualifying claimant for the purposes of the Criminal Injuries Compensation Scheme (2001) PARA 38: see PARA 2042 post.
- 3 Criminal Injuries Compensation Scheme (2001) PARA 6.
- 4 Criminal Injuries Compensation Scheme (2001) PARA 7(a).
- 5 Criminal Injuries Compensation Scheme (2001) PARA 7(b). As to the meaning of 'family' see *R (on the application of M) v Criminal Injuries Compensation Appeals Panel* [2005] EWCA Civ 566, [2006] PIQR P75 (case decided under the Criminal Injuries Compensation Scheme 1969; suffered injuries by a foster parent; blood relationship not required for the exclusion to apply).
- 6 For the purposes of the Criminal Injuries Compensation Scheme, personal injury includes physical injury (including fatal injury), mental injury (that is temporary mental anxiety, medically verified, or a disabling mental illness confirmed by psychiatric diagnosis) and disease (that is a medically recognised illness or condition): Criminal Injuries Compensation Scheme (2001) PARA 9. Mental injury or disease may either result directly from the physical injury or from a sexual offence or may occur without any physical injury: Criminal Injuries Compensation Scheme (2001) PARA 9. Compensation will not be payable for mental injury or disease without physical injury, or in respect of a sexual offence, unless the applicant:
  - 270 (1) was put in reasonable fear of immediate physical harm to his own person (Criminal Injuries Compensation Scheme (2001) PARA 9(a)); or
  - 271 (2) had a close relationship of love and affection with another person at the time when that person sustained physical and/or mental injury (including fatal injury) directly attributable to conduct within heads (i), (ii) or (iii) in the text, and:
    4. (a) that relationship still subsists (unless the victim has since died) (Criminal Injuries Compensation Scheme (2001) PARA 9(b)(i)); and
    - 5
    5. (b) the applicant either witnessed and was present on the occasion when the other person sustained the injury, or was closely involved in its immediate aftermath (Criminal Injuries Compensation Scheme (2001) PARA 9(b)(ii)); or
    - 6
  - 272 (3) in a claim arising out of a sexual offence, was the non-consenting victim of that offence (which does not include a victim who consented in fact but was deemed in law not to have consented) (Criminal Injuries Compensation Scheme (2001) PARA 9(c)); or
  - 273 (4) being a person employed in the business of a railway, either witnessed and was present on the occasion when another person sustained physical (including fatal) injury directly attributable to an offence of trespass on a railway, or was closely involved in its immediate aftermath (Criminal Injuries Compensation Scheme (2001) PARA 9(d)).

Criminal Injuries Compensation Scheme (2001) PARA 12 (see the text to note 14 *infra*) does not apply where mental anxiety or mental illness is sustained as described in head (4) *supra*: Criminal Injuries Compensation Scheme (2001) PARA 9(d).

- 7 An injury is sustained in Great Britain where it is sustained:

- 274 (1) on a British aircraft, hovercraft or ship (Criminal Injuries Compensation Scheme (2001) note 1(a)(i));
- 275 (2) on, under or above an installation in a designated area within the meaning of the Continental Shelf Act 1964 s 1(7) or any waters within 500 metres of such an installation (Criminal Injuries Compensation Scheme (2001) note 1(a)(ii)); or
- 276 (3) in a lighthouse off the coast of Great Britain (Criminal Injuries Compensation Scheme (2001) note 1(a)(iii)).

An injury is sustained in Great Britain where it is sustained in that part of the Channel Tunnel system incorporated into England under the Channel Tunnel Act 1987 s 10: Criminal Injuries Compensation Scheme (2001) note 1(b)(i). However, if such an injury is sustained or caused by a non-United Kingdom officer acting in

the exercise of his functions under the Channel Tunnel (International Arrangements) Order 1993, SI 1993/1813 (as amended), and the Channel Tunnel (Miscellaneous Provisions) Order 1994, SI 1994/1405 (see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 324), no compensation may be payable under the Criminal Injuries Compensation Scheme: Criminal Injuries Compensation Scheme (2001) note 1(b)(i).

Any injury caused in the following circumstances must be treated for the purposes of any application for compensation under the Criminal Injury Compensation Scheme as if the circumstances giving rise to the claim had occurred in Great Britain:

- 277 (a) an injury sustained by a United Kingdom officer acting in the exercise of his functions within French or Belgian territory under the Channel Tunnel (International Arrangements) Order 1993, SI 1993/1813 (as amended) and the Channel Tunnel (Miscellaneous Provisions) Order 1994, SI 1994/1405 (Criminal Injuries Compensation Scheme (2001) note 1(b)(ii)(a)); or
- 278 (b) an injury caused by a United Kingdom officer acting in the exercise of those functions within French or Belgian territory, other than an injury to any non-United Kingdom officer acting in the exercise of his functions (Criminal Injuries Compensation Scheme (2001) note 1(b)(ii)(b)).

'Officer' has the same meaning as in the Channel Tunnel (International Arrangements) Order 1993, SI 1993/1813 (as amended) and the Channel Tunnel (Miscellaneous Provisions) Order 1994, SI 1994/1405: Criminal Injuries Compensation Scheme (2001) note 1.

For the above purposes:

- 279 (i) 'British aircraft' means a British controlled aircraft within the meaning of the Civil Aviation Act 1982 s 92 (application of criminal law to aircraft: see AIR LAW vol 2 (2008) PARA 619), or one of Her Majesty's aircraft (Criminal Injuries Compensation Scheme (2001) note 2(a));
- 280 (ii) 'British hovercraft' means a British controlled hovercraft within the meaning of the Civil Aviation Act 1982 s 92 (as applied in relation to hovercraft by virtue of provision made under the Hovercraft Act 1968), or one of Her Majesty's hovercraft (Criminal Injuries Compensation Scheme (2001) note 2(b)); and
- 281 (iii) 'British ship' means one of Her Majesty's Ships or any vessel used in navigation which is owned wholly by persons of the following descriptions, namely, British citizens, or bodies corporate incorporated under the law of some part of, and having their principal place of business in, the United Kingdom, or Scottish partnerships (Criminal Injuries Compensation Scheme (2001) note 2(c)).

For these purposes, the references to Her Majesty's aircraft, hovercraft or ships are references to aircraft, hovercraft or ships which belong to, or are exclusively used in the service of, Her Majesty in right of the government of the United Kingdom: Criminal Injuries Compensation Scheme (2001) note 2.

8 le an offence of a violent nature, and not an offence with violent consequences: *R v Criminal Injuries Compensation Board, ex p Webb* [1987] QB 74, sub nom *R v Criminal Injuries Compensation Board, ex p Warner* [1986] 2 All ER 478, CA. The claimant's consent to the crime in respect of which he is claiming compensation, while not conclusive, is relevant to the question whether the crime is a crime of violence: *R v Criminal Injuries Compensation Appeals Panel, ex p August*; *R v Criminal Injuries Compensation Appeals Panel, ex p Brown* [2001] QB 774, [2001] 2 All ER 874, CA (boys aged 12-14 years old consenting to buggery; not a crime of violence). See also *Gray v Criminal Injuries Compensation Board* 1999 SC 137, 1999 SLT 425, IH (sexual intercourse by deception in a bigamous marriage entered into unknowingly by the claimant is a crime of fraud, not one of violence; no compensation payable), applied in *LC v Criminal Injuries Compensation Board* (1999) Times, 3 June, OH (indecent exposure not a crime of violence). A push can amount to a crime of violence unless done in self defence: *R v Criminal Injuries Compensation Board, ex p Cowan* (11 June 1998, unreported). The test of foreseeability has no application to compensation claims for criminal injury directly attributable to nervous shock: *R v Criminal Injuries Compensation Board, ex p Johnson* (1994) 21 BMLR 48, DC. The fact that a person suffers a psychiatric injury as a result of being told about an offence on another does not of itself necessarily mean that the injury is not directly attributable to the offence, but the more remote from the offence in time and place is the recounting of the experience, the more difficult it is to say that the psychiatric illness was directly attributable to the offence: *R v Criminal Injuries Compensation Board, ex p K and M* [1998] 1 WLR 1458.

'Injury' presupposes a pre-injury state capable of being assessed and compared with the post-injury state: *P's Curator Bonis v Criminal Injuries Compensation Board* 1997 SLT 1180 (child conceived and born as a result of an incestuous rape and suffering congenital defects did not have 'injuries' within the meaning of the Scheme).

9 Criminal Injuries Compensation Scheme (2001) PARA 8(a).

10 Criminal Injuries Compensation Scheme (2001) PARA 8(b).

11 Criminal Injuries Compensation Scheme (2001) PARA 8(c). Head (iii) in the text does not cover an injury to a bystander who was not assisting a person who was making the arrest etc or attempting to do so; the person injured must have been actively participating in the arrest etc: *Connolly v Secretary of State for Northern Ireland* [1994] NI 75, NI CA (corresponding provision under Northern Irish scheme).

12 Criminal Injuries Compensation Scheme (2001) PARA 10.

13 Criminal Injuries Compensation Scheme (2001) PARA 11. See *R v Criminal Injuries Compensation Board, ex p M (A Minor)* [2000] RTR 21, CA.

14 Criminal Injuries Compensation Scheme (2001) PARA 12.

## UPDATE

### 2035 Eligibility to apply for compensation

NOTE 2--As to the eligibility of persons from other member states for criminal compensation under national rules see Case C-164/07 *Wood v Fonds de garantie des victimes des actes de terrorisme et d'autres infractions* [2008] 3 CMLR 265, [2008] All ER (D) 31 (Jun), ECJ.

NOTE 13--See *R (on the application of Tait) v Criminal Injuries Compensation Appeals Panel* [2009] EWHC 767 (Admin), [2010] RTR 66, [2009] All ER (D) 72 (Apr) (primary purpose of ramming police car to escape not incompatible with intent to injure policeman).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23. COMPENSATION, REWARDS AND COSTS/(1) THE CRIMINAL INJURIES COMPENSATION SCHEME/2036. Eligibility to receive compensation.

### **2036. Eligibility to receive compensation.**

A claims officer<sup>1</sup> may withhold or reduce an award<sup>2</sup> where he considers that:

- 2619 (1) the applicant failed to take<sup>3</sup>, without delay, all reasonable steps to inform the police, or other body or person considered by the Criminal Injuries Compensation Authority to be appropriate for the purpose, of the circumstances giving rise to the injury<sup>4</sup>;
- 2620 (2) the applicant failed to co-operate with the police or other authority in attempting to bring the assailant to justice<sup>5</sup>;
- 2621 (3) the applicant has failed to give all reasonable assistance to the Authority or other body or person in connection with the application<sup>6</sup>;
- 2622 (4) the conduct of the applicant before, during or after the incident giving rise to the application makes it inappropriate that a full award or any award at all be made<sup>7</sup>; or
- 2623 (5) the applicant's character as shown by his criminal convictions (excluding convictions spent under the Rehabilitation of Offenders Act 1974<sup>8</sup> at the date of application or death) or by evidence available to the claims officer makes it inappropriate<sup>9</sup> that a full award or any award at all be made<sup>10</sup>.

A claims officer will make an award only where he is satisfied:

- 2624 (a) that there is no likelihood that an assailant would benefit if an award were made<sup>11</sup>; or
- 2625 (b) where the applicant is under 18 years of age when the application is determined, that it would not be against his interest for an award to be made<sup>12</sup>.

1 See PARA 2034 note 1 ante.

2 Only if it concludes that an award should be given is it required to consider whether it should be a full award or a reduced sum: *R v Criminal Injuries Compensation Board, ex p Cook* [1996] 2 All ER 144, [1996] 1 WLR 1037, CA. As to the power to refuse an award where the applicant has criminal convictions see *R v Criminal Injuries Compensation Board, ex p Thomas* [1995] PIQR P99.

3 See *R v Criminal Injuries Compensation Board, ex p A* [1992] COD 379.

4 Criminal Injuries Compensation Scheme (2001) PARA 13(a).

5 Criminal Injuries Compensation Scheme (2001) PARA 13(b). See also *R v Criminal Injuries Compensation Board, ex p Pearce* [1994] COD 235, DC.

6 Criminal Injuries Compensation Scheme (2001) PARA 13(c).

7 Criminal Injuries Compensation Scheme (2001) PARA 13(d). See also *R v Criminal Injuries Compensation Board, ex p Gambles* [1994] PIQR P314. In considering the issue of conduct under head (4) in the text, a claims officer may withhold or reduce an award where he considers that excessive consumption of alcohol or use of illicit drugs by the applicant contributed to the circumstances which gave rise to the injury in such a way as to make it inappropriate that a full award, or any award at all, be made: Criminal Injuries Compensation Scheme (2001) PARA 14. Where the victim has died since sustaining the injury (whether or not in consequence of it), the

Criminal Injuries Compensation Scheme (2001) PARAS 13, 14 will apply in relation both to the deceased and to any applicant for compensation under paras 37-44 (fatal awards: see PARA 2042 post): Criminal Injuries Compensation Scheme (2001) PARA 15.

8 See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660 et seq.

9 Compensation may be withheld or reduced even though the applicant's character had no ascertainable bearing on the occurrence of the injury: *R v Criminal Injuries Compensation Board, ex p Thompson* [1984] 3 All ER 572, [1984] 1 WLR 1234, CA. A conviction of the applicant subsequent to the injury up until the final award can be taken into account: *R v Criminal Injuries Compensation Board, ex p Moore* [1999] COD 241, CA.

10 Criminal Injuries Compensation Scheme (2001) PARA 13(e).

11 Criminal Injuries Compensation Scheme (2001) PARA 16(a). Where a case is not ruled out under the Criminal Injuries Compensation Scheme (2001) PARA 7(b) (injury sustained before 1 October 1979: see PARA 2035 head (b) ante) but at the time when the injury was sustained, the victim and any assailant (whether or not that assailant actually inflicted the injury) were living in the same household as members of the same family, an award will be withheld unless:

282 (1) the assailant has been prosecuted in connection with the offence, except where a claims officer considers that there are practical, technical or other good reasons why a prosecution has not been brought (Criminal Injuries Compensation Scheme (2001) PARA 17(a)); and

283 (2) in the case of violence between adults in the family, a claims officer is satisfied that the applicant and the assailant stopped living in the same household before the application was made and are unlikely to share the same household again (Criminal Injuries Compensation Scheme (2001) PARA 17(b)).

For these purposes, a man and woman living together as husband and wife will be treated as members of the same family: Criminal Injuries Compensation Scheme (2001) PARA 17.

12 Criminal Injuries Compensation Scheme (2001) PARA 16(b). See note 11 supra.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23. COMPENSATION, REWARDS AND COSTS/(1) THE CRIMINAL INJURIES COMPENSATION SCHEME/2037. Consideration of applications.

### **2037. Consideration of applications.**

An application for compensation under the Criminal Injuries Compensation Scheme in respect of a criminal injury must be made in writing on a form obtainable from the Criminal Injuries Compensation Authority. It should be made as soon as possible after the incident giving rise to the injury and must be received by the Authority within two years of the date of the incident. A claims officer<sup>1</sup> may waive this time limit where he considers that, by reason of the particular circumstances of the case, it is reasonable and in the interests of justice to do so<sup>2</sup>.

It will be for the applicant to make out his case<sup>3</sup> including, where appropriate:

- 2626 (1) making out his case for a waiver of the relevant time limit<sup>4</sup>; and
- 2627 (2) satisfying the claims officer dealing with his application<sup>5</sup> that an award should not be reconsidered, withheld or reduced under any provision of this Scheme<sup>6</sup>.

Where an applicant is represented, the costs of representation will not be met by the Authority<sup>7</sup>.

A claims officer may make such directions and arrangements for the conduct of an application, including the imposition of conditions, as he considers appropriate in all the circumstances. The standard of proof to be applied by a claims officer in all matters before him will be the balance of probabilities<sup>8</sup>.

Where a claims officer considers that an examination of the injury is required before a decision can be reached, the Authority will make arrangements for such an examination by a duly qualified medical practitioner. Reasonable expenses incurred by the applicant in that connection will be met by the Authority<sup>9</sup>.

<sup>1</sup> See PARA 2034 note 1 ante.

<sup>2</sup> Criminal Injuries Compensation Scheme (2001) PARA 18. The interests of natural justice may require reasons to be given for a refusal to waive the time limit: *X v Criminal Injuries Compensation Board* (1999) Times, 5 July, OH.

<sup>3</sup> It is not for the Criminal Injuries Compensation Authority to seek evidence of its own motion: *R v Criminal Injuries Compensation Board, ex p Milton* [1997] PIQR P74. It is important that the police and the Authority co-operate, even though neither is under a duty to supply or obtain evidence in support of a claim: *R v Criminal Injuries Compensation Board, ex p A* [1999] 2 AC 330, HL.

<sup>4</sup> Criminal Injuries Compensation Scheme (2001) PARA 19(a). The reference in the text to the relevant time limit is the time limit under the Criminal Injuries Compensation Scheme (2001) PARA 18 (see the text and note 2 supra).

<sup>5</sup> Ie including an officer reviewing a decision under the Criminal Injuries Compensation Scheme (2001) PARA 60: see PARA 2047 post.

<sup>6</sup> Criminal Injuries Compensation Scheme (2001) PARA 19(b).

<sup>7</sup> Criminal Injuries Compensation Scheme (2001) PARA 19. This is not incompatible with the claimant's right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4

November 1950; TS 71 (1953); Cmd 8969) art 6(1): *C (A Child) v Secretary of State for the Home Department* (2004) Times, 11 March, CA. The Convention is commonly referred to as the European Convention on Human Rights and is enshrined in the Human Rights Act 1998 Sch 1: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq.

8 Criminal Injuries Compensation Scheme (2001) PARA 20.

9 Criminal Injuries Compensation Scheme (2001) PARA 21.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23. COMPENSATION, REWARDS AND COSTS/(1) THE CRIMINAL INJURIES COMPENSATION SCHEME/2038. Types and limits of compensation.

### **2038. Types and limits of compensation.**

Subject to the other provisions of the Criminal Injuries Compensation Scheme, the compensation payable under an award will be:

- 2628 (1) a standard amount of compensation determined by reference to the nature of the injury<sup>1</sup>;
- 2629 (2) where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury (other than injury leading to his death), an additional amount in respect of such loss of earnings<sup>2</sup>;
- 2630 (3) where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury (other than injury leading to his death) or, if not normally employed, is incapacitated to a similar extent, an additional amount in respect of any special expenses<sup>3</sup>;
- 2631 (4) where the victim has died in consequence of the injury, an additional amount or amounts<sup>4</sup>;
- 2632 (5) where the victim has died otherwise than in consequence of the injury, a supplementary amount<sup>5</sup>.

The maximum award that may be made in respect of the same injury may not exceed £500,000. For these purposes, where the victim has died in consequence of the injury, any application made by the victim before his death and any application made by any qualifying claimant or claimants after his death will be regarded as being in respect of the same injury<sup>6</sup>.

1 Criminal Injuries Compensation Scheme (2001) PARA 23(a). The amount of compensation by reference to the nature of the injury referred to in head (1) in the text is that determined in accordance with the Criminal Injuries Compensation Scheme (2001) PARAS 26-29: see PARA 2039 post.

2 Criminal Injuries Compensation Scheme (2001) PARA 23(b). The additional amount referred to in head (2) in the text is that calculated in accordance with the Criminal Injuries Compensation Scheme (2001) PARAS 30-34: see PARA 2040 post.

3 Criminal Injuries Compensation Scheme (2001) PARA 23(c). The additional amount referred to in head (3) in the text is that calculated in accordance with the Criminal Injuries Compensation Scheme (2001) PARAS 35-36: see PARA 2041 post.

4 Criminal Injuries Compensation Scheme (2001) PARA 23(d). The additional amount or amounts referred to in head (4) in the text is that calculated in accordance with the Criminal Injuries Compensation Scheme (2001) PARAS 37-43: see PARA 2042 post.

5 Criminal Injuries Compensation Scheme (2001) PARA 23(e). The supplementary amount referred to in head (5) in the text is that calculated in accordance with the Criminal Injuries Compensation Scheme (2001) PARA 44: see PARA 2042 post.

6 Criminal Injuries Compensation Scheme (2001) PARA 24. The injury, or any exacerbation of a pre-existing condition, must be sufficiently serious to qualify for compensation equal at least to the minimum award under the Scheme in accordance with the Criminal Injuries Compensation Scheme (2001) PARA 26, but lesser compensation may be paid if an award is reduced under the Criminal Injuries Compensation Scheme (2001) PARAS 13, 14, or 15 (see PARA 2036 ante): Criminal Injuries Compensation Scheme (2001) PARA 25.



**UPDATE**

**2038 Types and limits of compensation**

NOTE 6--As to the burden of proof, see *R (on the application of B) v Criminal Injuries Compensation Appeals Panel* [2007] EWHC 180 (Admin), [2007] PIQR Q66.

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### **2039. Standard amount of compensation.**

The standard amount of compensation is the amount shown in respect of the relevant description of injury in the Tariff of Injuries and Standard Amounts of Compensation<sup>1</sup>, which sets out:

- 2633 (1) a scale of fixed levels of compensation<sup>2</sup>;
- 2634 (2) the level and corresponding amount of compensation for each description of injury<sup>3</sup>; and
- 2635 (3) qualifying notes<sup>4</sup>.

Where the injury has the effect of accelerating or exacerbating a pre-existing condition, the compensation awarded will reflect only the degree of acceleration or exacerbation<sup>5</sup>.

Minor multiple physical injuries, eg grazing, lacerations with no permanent scarring, black eye(s) and loss of fingernails, will qualify for compensation only where the applicant has sustained at least three separate physical injuries of such type, at least one of which must still have had significant residual effects six weeks after the incident. The injuries must also have necessitated at least two visits to or by a medical practitioner within that six-week period<sup>6</sup>.

The standard amount of compensation for more serious but separate multiple injuries will, unless expressly provided for otherwise in the Tariff, be calculated as:

- 2636 (a) the Tariff amount for the highest-rated description of injury; plus
- 2637 (b) 30 per cent of the Tariff amount for the second highest-rated description of injury; plus, where there are three or more injuries,
- 2638 (c) 15 per cent of the Tariff amount for the third highest-rated description of injury<sup>7</sup>.

1 The Tariff is set out at the end of the Criminal Injuries Compensation Scheme (2001).

2 Criminal Injuries Compensation Scheme (2001) PARA 26(a).

3 Criminal Injuries Compensation Scheme (2001) PARA 26(b).

4 Criminal Injuries Compensation Scheme (2001) PARA 26(c).

5 Criminal Injuries Compensation Scheme (2001) PARA 26.

6 Criminal Injuries Compensation Scheme (2001) PARA 27, Tariff note 12.

7 Criminal Injuries Compensation Scheme (2001) PARA 27. Where the Authority considers that any description of injury for which no provision is made in the Tariff is sufficiently serious to qualify for at least the minimum award under this Scheme, it will, following consultation with the Panel, refer the injury to the Secretary of State. In doing so the Authority will recommend to the Secretary of State both the inclusion of that description of injury in the Tariff and also the amount of compensation for which it should qualify. Any such consultation with the Panel or reference to the Secretary of State must not refer to the circumstances of any individual application for compensation under this Scheme other than the relevant medical reports: Criminal Injuries Compensation Scheme (2001) PARA 28.

Where an application for compensation is made in respect of an injury for which no provision is made in the Tariff and the Authority decides to refer the injury to the Secretary of State under the Criminal Injuries Compensation Scheme (2001) PARA 28, an interim award may be made of up to half the amount of compensation for which it is recommended that such description of injury should qualify if subsequently included in the Tariff. No part of such an interim award will be recoverable if the injury is not subsequently included in the Tariff or, if included, qualifies for less compensation than the interim award paid: Criminal Injuries Compensation Scheme (2001) PARA 29.

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 COMPENSATION, REWARDS AND COSTS/(1) THE CRIMINAL INJURIES COMPENSATION SCHEME/2040. Compensation for loss of earnings.

## **2040. Compensation for loss of earnings.**

Where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury (other than injury leading to his death), no compensation in respect of loss of earnings or earning capacity will be payable for the first 28 weeks of loss. The period of loss for which compensation may be payable will begin after 28 weeks incapacity for work and continue for such period as a claims officer may determine<sup>1</sup>.

For a period of loss ending before or continuing to the time the claim is assessed, the net loss of earnings or earning capacity will be calculated on the basis of:

- 2639 (1) the applicant's emoluments (being any profit or gain accruing from an office or employment) at the time of the injury and what those emoluments would have been during the period of loss<sup>2</sup>;
- 2640 (2) any emoluments which have become payable to the applicant in respect of the whole or part of the period of loss, whether or not as a result of the injury<sup>3</sup>;
- 2641 (3) any changes in the applicant's pension rights<sup>4</sup>;
- 2642 (4) in accordance with the Scheme's provisions for reductions to take account of other payments<sup>5</sup>, any social security benefits, insurance payments and pension which have become payable to the applicant during the period of loss<sup>6</sup>; and
- 2643 (5) any other pension which has become payable to the applicant during the period of loss, whether or not as a result of the injury<sup>7</sup>.

Where, at the time the claim is assessed, a claims officer considers that the applicant is likely to suffer continuing loss of earnings and/or earning capacity, an annual rate of net loss (the multiplicand) or, where appropriate, more than one such rate will be calculated on the basis of:

- 2644 (a) the current rate of net loss<sup>8</sup>;
- 2645 (b) such future rate or rates of net loss (including changes in the applicant's pension rights) as the claims officer may determine<sup>9</sup>;
- 2646 (c) the claims officer's assessment of the applicant's future earning capacity<sup>10</sup>;
- 2647 (d) in accordance with the Scheme's provisions for reductions to take account of other payments<sup>11</sup>, any social security benefits, insurance payments and pension which will become payable to the applicant in future<sup>12</sup>; and
- 2648 (e) any other pension which will become payable to the applicant in future, whether or not as a result of the injury<sup>13</sup>.

1 Criminal Injuries Compensation Scheme (2001) PARA 30.

2 Criminal Injuries Compensation Scheme (2001) PARA 31(a).

3 Criminal Injuries Compensation Scheme (2001) PARA 31(b).

4 Criminal Injuries Compensation Scheme (2001) PARA 31(c).

5 Criminal Injuries Compensation Scheme (2001) PARAS 45-47: see PARA 2043 post.

- 6 Criminal Injuries Compensation Scheme (2001) PARA 31(d).
- 7 Criminal Injuries Compensation Scheme (2001) PARA 31(e).
- 8 Criminal Injuries Compensation Scheme (2001) PARA 32(a). The current rate of net loss in head (a) in the text is that calculated in accordance with the Criminal Injuries Compensation Scheme (2001) PARA 31.
- 9 Criminal Injuries Compensation Scheme (2001) PARA 32(b).
- 10 Criminal Injuries Compensation Scheme (2001) PARA 32(c).
- 11 Criminal Injuries Compensation Scheme (2001) PARAS 45-47: see PARA 2043 post.
- 12 Criminal Injuries Compensation Scheme (2001) PARA 32(d).
- 13 Criminal Injuries Compensation Scheme (2001) PARA 32(e). The compensation payable in respect of each period of continuing loss will be a lump sum, which is the product of that multiplicand and an appropriate multiplier. When the loss does not start until a future date, the lump sum will be discounted to provide for the present value of the money. The claims officer will assess an appropriate multiplier, discount factor, or life expectancy by reference to the tables in note 3 of the Tariff, and may make such adjustments as he considers appropriate to take account of any factors and contingencies which appear to him to be relevant. The tables in note 3 of the Tariff set out the multipliers and (where applicable) discounts and life expectancies to be applied: Criminal Injuries Compensation Scheme (2001) PARA 32.

Where a claims officer considers that the approach in the Criminal Injuries Compensation Scheme (2001) PARA 32 is impracticable, the compensation payable in respect of continuing loss of earnings and/or earning capacity will be such other lump sum as he may determine: Criminal Injuries Compensation Scheme (2001) PARA 33.

Any rate of net loss of earnings or earning capacity (before any reduction in accordance with this Scheme) which is to be taken into account in calculating any compensation payable under the Criminal Injuries Compensation Scheme (2001) PARAS 30-33 must not exceed one and a half times the gross average industrial earnings at the time of assessment according to the latest figures published by the Office for National Statistics: Criminal Injuries Compensation Scheme (2001) PARA 34.

## **UPDATE**

### **2040 Compensation for loss of earnings**

NOTE 13--Office for National Statistics replaced by Statistics Board: see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 605.

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## **2041. Compensation for special expenses.**

Where the applicant has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury (other than injury leading to his death), or, if not normally employed, is incapacitated to a similar extent, additional compensation may be payable in respect of any special expenses incurred by the applicant from the date of the injury<sup>1</sup> for:

- 2649 (1) loss of or damage to property or equipment belonging to the applicant on which he relied as a physical aid, where the loss or damage was a direct consequence of the injury<sup>2</sup>;
- 2650 (2) costs (other than by way of loss of earnings or earning capacity) associated with National Health Service treatment for the injury<sup>3</sup>;
- 2651 (3) the cost of private health treatment for the injury, but only where a claims officer considers that, in all the circumstances, both the private treatment and its cost are reasonable<sup>4</sup>;
- 2652 (4) the reasonable cost, to the extent that it falls to the applicant, of:
  - 599 79. (a) special equipment<sup>5</sup>; and/or
  - 80. (b) adaptations to the applicant's accommodation<sup>6</sup>; and/or
  - 81. (c) care, whether in a residential establishment or at home, which are not provided or available free of charge from the National Health Service, local authorities or any other agency, provided that a claims officer considers such expense to be necessary as a direct consequence of the injury<sup>7</sup>; and
  - 82. (d) the cost of the Court of Protection<sup>8</sup> or of the curator bonis<sup>9</sup>.

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1 Where, at the time the claim is assessed, a claims officer is satisfied that the need for any of the special expenses mentioned in heads (1)-(4) in the text is likely to continue, he will determine the annual cost and select an appropriate multiplier in accordance with Criminal Injuries Compensation Scheme (2001) PARA 32 (future loss of earnings), taking account of any other factors and contingencies which appear to him to be relevant: Criminal Injuries Compensation Scheme (2001) PARA 36.

2 Criminal Injuries Compensation Scheme (2001) PARA 35(a).

3 Criminal Injuries Compensation Scheme (2001) PARA 35(b).

4 Criminal Injuries Compensation Scheme (2001) PARA 35(c).

5 Criminal Injuries Compensation Scheme (2001) PARA 35(d)(i).

6 Criminal Injuries Compensation Scheme (2001) PARA 35(d)(ii).

7 Criminal Injuries Compensation Scheme (2001) PARA 35(d)(iii). The expense of unpaid care provided at home by a relative or friend of the victim will be compensated by having regard to the level of care required, the cost of a carer, assessing the carer's loss of earnings or earning capacity and/or additional personal and living expenses, as calculated on such basis as a claims officer considers appropriate in all the circumstances. Where the foregoing method of assessment is considered by the claims officer not to be relevant in all the circumstances, the compensation payable will be such sum as he may determine having regard to the level of care provided: Criminal Injuries Compensation Scheme (2001) PARA 35.

- 8 See MENTAL HEALTH vol 30(2) (Reissue) PARA 674 et seq.
- 9 Criminal Injuries Compensation Scheme (2001) PARA 35(d)(iv). The curator bonis is a Scottish institution.

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## **2042. Compensation in fatal cases.**

Where the victim has died in consequence of the injury, no compensation other than funeral expenses will be payable for the benefit of his estate. Such expenses will<sup>1</sup> be payable up to an amount considered reasonable by a claims officer, even where the person bearing the cost of the funeral is otherwise ineligible to claim under the Criminal Injuries Compensation Scheme<sup>2</sup>.

Where the victim has died since sustaining the injury, compensation may be payable<sup>3</sup> to any claimant (a 'qualifying claimant') who at the time of the deceased's death was:

- 2653 (1) the partner of the deceased, being only, for these purposes:  
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  - 83. (a) a person who was living together with the deceased as husband and wife or as a same sex partner in the same household immediately before the date of death and who, unless formally married to him, had been so living throughout the two years before that date<sup>4</sup>; or
  - 84. (b) a spouse or former spouse of the deceased who was financially supported by him immediately before the date of death<sup>5</sup>;
- 602 2654 (2) a natural parent of the deceased, or a person who was not the natural parent, provided that he was accepted by the deceased as a parent of his family<sup>6</sup>; or
- 2655 (3) a natural child of the deceased, or a person who was not the natural child, provided that he was accepted by the deceased as a child of his family or was dependent on him<sup>7</sup>.

Where the victim has died in consequence of the injury, compensation may be payable to a qualifying claimant<sup>8</sup>. Where the victim has died otherwise than in consequence of the injury, and before title to the award has been vested in the victim<sup>9</sup>, no standard amount or other compensation will be payable to the estate or to a qualifying claimant other than supplementary compensation<sup>10</sup>.

A person who was criminally responsible for the death of a victim may not be a qualifying claimant<sup>11</sup>.

Additional compensation<sup>12</sup> may be payable to a qualifying claimant where a claims officer is satisfied that the claimant was financially or physically dependent on the deceased. A financial dependency will not be established where the deceased's only normal income was from:

- 2656 (i) United Kingdom social security benefits; or
- 2657 (ii) social security benefits or similar payments from the funds of other countries<sup>13</sup>.

Where a qualifying claimant was under 18 years of age at the time of the deceased's death and was dependent on him for parental services, additional compensation may also be payable<sup>14</sup>.



- 1    le subject to the application of the Criminal Injuries Compensation Scheme (2001) PARAS 13, 14 (see PARA 2036 ante) in relation to the actions, conduct and character of the deceased.
- 2    Criminal Injuries Compensation Scheme (2001) PARA 37.
- 3    le subject to the Criminal Injuries Compensation Scheme (2001) PARAS 13-15 (actions, conduct and character) (see PARA 2036 ante).
- 4    Criminal Injuries Compensation Scheme (2001) PARA 38(a)(i). The Criminal Injuries Compensation Scheme (2001) PARA 38 does not apply to applications in respect of injuries incurred before 1 April 2001 in so far as it applies to a same sex partner: Criminal Injuries Compensation Scheme (2001) PARA 83.
- 5    Criminal Injuries Compensation Scheme (2001) PARA 38(a)(ii). See note 4 supra.
- 6    Criminal Injuries Compensation Scheme (2001) PARA 38(b). See note 4 supra.
- 7    Criminal Injuries Compensation Scheme (2001) PARA 38(c). See note 4 supra.
- 8    le under the Criminal Injuries Compensation Scheme (2001) PARAS 39-42 (see the text and notes 11-14 infra) (standard amount of compensation, dependency, and loss of parent).
- 9    See the Criminal Injuries Compensation Scheme (2001) PARA 50; and PARA 2044 post.
- 10   Criminal Injuries Compensation Scheme (2001) PARA 38.
- 11   Criminal Injuries Compensation Scheme (2001) PARA 39. In cases where there is only one qualifying claimant, the standard amount of compensation will be Level 13 of the Tariff, save that where a claims officer is aware of the existence of one or more other persons who would in the event of their making a claim become a qualifying claimant, the standard amount of compensation will be Level 10 of the Tariff. Where there is more than one qualifying claimant, the standard amount of compensation for each claimant will be Level 10 of the Tariff: Criminal Injuries Compensation Scheme (2001) PARA 39. A former spouse of the deceased is not a qualifying claimant for these purposes: Criminal Injuries Compensation Scheme (2001) PARA 39.
- 12   The additional compensation is calculated in accordance with the Criminal Injuries Compensation Scheme (2001) PARA 41.
- 13   Criminal Injuries Compensation Scheme (2001) PARA 40. Each dependant has a separate claim for the value of his or her own dependency; and a child's dependency is the cost of the care he or she was receiving from the deceased person: *R v Criminal Injuries Compensation Board, ex p Barreti* [1994] 1 FLR 587, [1994] PIQR Q44. See also *R v Criminal Injuries Compensation Board, ex p K* [1999] QB 1131, [1999] 2 WLR 948.
- 14   Criminal Injuries Compensation Scheme (2001) PARA 42. See further the Criminal Injuries Compensation Scheme (2001) PARA 42(a), (b). Each of these payments will be multiplied by an appropriate multiplier selected by a claims officer in accordance with the Criminal Injuries Compensation Scheme (2001) PARA 32 (future loss of earnings), taking account of the period remaining before the qualifying claimant reaches age 18 and of any other factors and contingencies which appear to the claims officer to be relevant: Criminal Injuries Compensation Scheme (2001) PARA 42.

Application may be made under the Criminal Injuries Compensation Scheme (2001) PARAS 37-42 (compensation in fatal cases) even where an award had been made to the victim in respect of the same injury before his death. Any such application will be subject to the conditions set out in the Criminal Injuries Compensation Scheme (2001) PARAS 56-57 (see PARA 2046 post) for the re-opening of cases, and any compensation payable to the qualifying claimant or claimants, except payments made under the Criminal Injuries Compensation Scheme (2001) PARAS 37, 39 (funeral expenses and standard amount of compensation), will be reduced by the amount paid to the victim. The amounts payable to the victim and the qualifying claimant or claimants will not in total exceed £500,000: Criminal Injuries Compensation Scheme (2001) PARA 43.

Where a victim who would have qualified for additional compensation under the Criminal Injuries Compensation Scheme (2001) PARA 23(b) (loss of earnings: see PARA 2038 head (2) ante) and/or the Criminal Injuries Compensation Scheme (2001) PARA 23(c) (special expenses: see PARA 2038 head (3) ante) has died, otherwise than in consequence of the injury, before such compensation was awarded, supplementary compensation under the Criminal Injuries Compensation Scheme (2001) PARA 44 may be payable to a qualifying claimant who was financially dependent on the deceased within the terms of the Criminal Injuries Compensation Scheme (2001) PARA 40 (dependency), whether or not a relevant application was made by the victim before his death. Payment may be made in accordance with the Criminal Injuries Compensation Scheme (2001) PARA 31 in respect of the victim's loss of earnings (except for the first 28 weeks of the victim's loss of earnings and/or earning capacity) and in accordance with the Criminal Injuries Compensation Scheme (2001) PARA 35 (see PARA 2041 ante) in respect of any special expenses incurred by the victim before his death. The amounts payable to the victim and

the qualifying claimant or claimants will not in total exceed £500,000: Criminal Injuries Compensation Scheme (2001) PARA 44.

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 COMPENSATION, REWARDS AND COSTS/(1) THE CRIMINAL INJURIES COMPENSATION SCHEME/2043. Effect on awards of other payments.

### **2043. Effect on awards of other payments.**

All awards payable under the Criminal Injuries Compensation Scheme<sup>1</sup> will be subject to a reduction to take account of social security benefits (or other state benefits) or insurance payments made by way of compensation for the same contingency. The reduction will be applied to those categories or periods of loss or need for which additional or supplementary compensation is payable, including compensation calculated on the basis of a multiplicand or annual cost<sup>2</sup>.

Where, in the opinion of a claims officer, an applicant may be or may become eligible for any of the benefits and payments so mentioned, an award may be withheld until the applicant has taken such steps as the claims officer considers reasonable to claim them<sup>3</sup>.

Where the victim is alive, any compensation payable for loss of earnings<sup>4</sup> will be reduced to take account of any pension accruing as a result of the injury. Where the victim has died in consequence of the injury, any compensation in respect of dependency<sup>5</sup> will similarly be reduced to take account of any pension payable, as a result of the victim's death, for the benefit of the applicant<sup>6</sup>.

An award payable under the Scheme will be reduced by the full value of any payment in respect of the same injury which the applicant has received by way of:

- 2658 (1) any criminal injury compensation award made under or pursuant to arrangements in force at the relevant time in Northern Ireland<sup>7</sup>;
- 2659 (2) any compensation award or similar payment from the funds of other countries<sup>8</sup>;
- 2660 (3) any award where:
  - 603 85. (a) a civil court has made an order for the payment of damages<sup>9</sup>;
  - 86. (b) a claim for damages and/or compensation has been settled on terms providing for the payment of money<sup>10</sup>;
  - 87. (c) payment of compensation has been ordered by a criminal court in respect of personal injuries<sup>11</sup>.

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In the case of head (1) or head (2) above, the reduction will also include the full value of any payment to which the applicant has any present or future entitlement<sup>12</sup>.

<sup>1</sup> le except those payable under the Criminal Injuries Compensation Scheme (2001) PARAS 26, 27 (see PARA 2039 ante), 39, 42(a) (see PARA 2042 ante) (tariff-based amounts of compensation).

<sup>2</sup> Criminal Injuries Compensation Scheme (2001) PARA 45. The amount of the reduction will be the full value of any relevant payment which the applicant has received, or to which he has or may have any present or future entitlement, by way of: (1) United Kingdom social security benefits (or other state benefits); (2) social security benefits or similar payments from the funds of other countries; (3) payments under insurance arrangements, including, where a claim is made under the Criminal Injuries Compensation Scheme (2001) PARAS 35(c), (d), 36 (special expenses), insurance personally effected, paid for and maintained by the personal income of the victim or, in the case of a person under 18 years of age, by his parent. Insurance so personally effected

will otherwise be disregarded: Criminal Injuries Compensation Scheme (2001) PARA 45. In assessing the value of any such benefits and payments, account may be taken of any income tax liability likely to reduce their value: Criminal Injuries Compensation Scheme (2001) PARA 45.

In the case of a child whose parent has been murdered, the benefit gained from care and support given by relatives is not a benefit for these purposes: *R v Criminal Injuries Compensation Board, ex p K* [1999] QB 1131, [1999] 2 WLR 948. A child's criminal injury compensation claim should be calculated and treated as distinct from his parent's claim, so as to avoid depletion due to any insurance benefit which was personal to the parent: *R v Criminal Injuries Compensation Board, ex p Barrett* [1994] 1 FLR 587, [1994] PIQR Q44.

3 Criminal Injuries Compensation Scheme (2001) PARA 46.

4 Ie under the Criminal Injuries Compensation Scheme (2001) PARAS 30-34: see PARA 2040 ante.

5 Ie under the Criminal Injuries Compensation Scheme (2001) PARAS 40-41: see PARA 2042 ante.

6 Criminal Injuries Compensation Scheme (2001) PARA 47. Where such pensions are taxable, one half of their value will be deducted, but they will otherwise be deducted in full (where, for example, a lump sum payment not subject to income tax is made). For these purposes, 'pension' means any payment payable as a result of the injury or death in pursuance of pension or any other rights connected with the victim's employment, and includes any gratuity of that kind and similar benefits payable under insurance policies paid for by the victim's employers. Pension rights accruing solely as a result of payments by the victim or a dependant will be disregarded: Criminal Injuries Compensation Scheme (2001) PARA 47.

7 Criminal Injuries Compensation Scheme (2001) PARA 48(a).

8 Criminal Injuries Compensation Scheme (2001) PARA 48(b).

9 Criminal Injuries Compensation Scheme (2001) PARA 48(c)(i).

10 Criminal Injuries Compensation Scheme (2001) PARA 48(c)(ii).

11 Criminal Injuries Compensation Scheme (2001) PARA 48(c)(iii).

12 Criminal Injuries Compensation Scheme (2001) PARA 48. Where a person in whose favour an award under this Scheme is made subsequently receives any other payment in respect of the same injury in any of the circumstances mentioned in the Criminal Injuries Compensation Scheme (2001) PARA 48, but the award made under this Scheme was not reduced accordingly, he will be required to repay the Authority in full up to the amount of the other payment: Criminal Injuries Compensation Scheme (2001) PARA 49.

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#### **2044. Determination of applications and payment of awards.**

An application for compensation under the Criminal Injuries Compensation Scheme will be determined by a claims officer<sup>1</sup>, and written notification of the decision will be sent to the applicant or his representative<sup>2</sup>.

Compensation will normally be paid as a single lump sum, but one or more interim payments may be made where a claims officer considers this appropriate<sup>3</sup>.

<sup>1</sup> See PARA 2034 note 1 ante.

<sup>2</sup> Criminal Injuries Compensation Scheme (2001) PARA 50. The claims officer may make such directions and arrangements, including the imposition of conditions, in connection with the acceptance, settlement or trust, payment, repayment and/or administration of an award as he considers appropriate in all the circumstances. Any such directions and arrangements, including any settlement or trust may be made having regard to the interests of the applicant (whether or not a minor or a person under an incapacity) as well as to considerations of public policy (including the desirability of providing for the return of any parts of an award which may prove to be surplus to the purposes for which they were awarded) on terms which do not exhaust the beneficial interest in the award and which provide, either expressly or by operation of law, for the balance of any trust fund to revert to the Criminal Injuries Compensation Authority. Subject to any such arrangements, including the special procedures in the Criminal Injuries Compensation Scheme (2001) PARA 52 (purchase of annuities: see note 3 infra), and to the Criminal Injuries Compensation Scheme (2001) PARAS 53-55 (reconsideration of decisions: see PARA 2045 post), title to an award offered will be vested in the applicant when the Authority has received notification in writing that he accepts the award: Criminal Injuries Compensation Scheme (2001) PARA 50.

As a matter of procedural fairness, proper reasons must be provided, together with at least general supporting evidence, for a decision to reduce or refuse compensation claims: *R v Criminal Injuries Compensation Authority, ex p Leatherland*; *R v Criminal Injuries Compensation Board, ex p Bramall*; *R v Criminal Injuries Compensation Panel, ex p Kay* [2001] ACD 76.

<sup>3</sup> Criminal Injuries Compensation Scheme (2001) PARA 51. Where prior agreement is reached between the Authority and the applicant or his representative, an award may consist in whole or in part of an annuity or annuities, purchased for the benefit of the applicant or to be held on trust for his benefit. Once that agreement is reached, the Authority will take the instructions of the applicant or his representative as to which annuity or annuities should be purchased. Any expenses incurred will be met from the award: Criminal Injuries Compensation Scheme (2001) PARA 52. However, once an award has been paid to an applicant or his representative under the Criminal Injuries Compensation Scheme (2001) PARA 51, then para 52 does not apply: Criminal Injuries Compensation Scheme (2001) PARA 51.

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COMPENSATION, REWARDS AND COSTS/(1) THE CRIMINAL INJURIES COMPENSATION SCHEME/2045. Reconsideration of decisions.

## **2045. Reconsideration of decisions.**

A decision made by a claims officer<sup>1</sup> may be reconsidered at any time before actual payment of a final award where there is new evidence or a change in circumstances. In particular, the fact that an interim payment has been made does not preclude a claims officer from reconsidering issues of eligibility for an award<sup>2</sup>.

<sup>1</sup> Is other than a decision made in accordance with a direction by adjudicators on determining an appeal under the Criminal Injuries Compensation scheme (2001) PARA 77: see PARA 2051 post. As to a 'claims officer' see PARA 2034 note 1 ante.

<sup>2</sup> Criminal Injuries Compensation Scheme (2001) PARA 53. Where an applicant has already been sent written notification of the decision on his application, he will be sent written notice that the decision is to be reconsidered, and any representations which he sends to the Criminal Injuries Compensation Authority within 30 days of the date of such notice will be taken into account in reconsidering the decision. Whether or not any such representations are made, the applicant will be sent written notification of the outcome of the reconsideration, and where the original decision is not confirmed, such notification will include the revised decision: Criminal Injuries Compensation Scheme (2001) PARA 54.

Where a decision to make an award has been made by a claims officer in accordance with a direction by adjudicators on determining an appeal under the Criminal Injuries Compensation Scheme (2001) PARA 77 (see PARA 2051 post), but before the award has been paid the claims officer considers that there is new evidence or a change in circumstances which justifies reconsidering whether the award should be withheld or the amount of compensation reduced, the Authority will refer the case to the Panel for rehearing under the Criminal Injuries Compensation Scheme (2001) PARA 82 (see PARA 2052 post): Criminal Injuries Compensation Scheme (2001) PARA 55.

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 COMPENSATION, REWARDS AND COSTS/(1) THE CRIMINAL INJURIES COMPENSATION SCHEME/2046. Re-opening of cases.

#### **2046. Re-opening of cases.**

A decision made by a claims officer<sup>1</sup> and accepted by the applicant, or a direction by adjudicators, will normally<sup>2</sup> be regarded as final. A claims officer may, however, subsequently re-open a case where there has been such a material change in the victim's medical condition that injustice would occur if the original assessment of compensation were allowed to stand, or where he has since died in consequence of the injury<sup>3</sup>.

A case will not be re-opened more than two years after the date of the final decision unless the claims officer is satisfied, on the basis of evidence presented in support of the application to re-open the case, that the renewed application can be considered without a need for further extensive inquiries<sup>4</sup>.

1 See PARA 2034 note 1 ante.

2 Ie except where an appeal is reheard under the Criminal Injuries Compensation Scheme (2001) PARAS 79-82 (see PARA 2052 post).

3 Criminal Injuries Compensation Scheme (2001) PARA 56.

4 Criminal Injuries Compensation Scheme (2001) PARA 57.

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 COMPENSATION, REWARDS AND COSTS/(1) THE CRIMINAL INJURIES COMPENSATION SCHEME/2047. Review of decisions.

## **2047. Review of decisions.**

An applicant may seek a review of any decision under the Criminal Injuries Compensation Scheme by a claims officer:

- 2661 (1) not to waive the time limit for application for compensation<sup>1</sup> or for application for review<sup>2</sup>;
- 2662 (2) not to re-open a case<sup>3</sup>;
- 2663 (3) to withhold an award, including such decision made on reconsideration of an award<sup>4</sup>;
- 2664 (4) to make an award, including a decision to make a reduced award whether or not on reconsideration of an award<sup>5</sup>; or
- 2665 (5) to seek<sup>6</sup> repayment of an award<sup>7</sup>.

An applicant may not, however, seek the review of any such decision where the decision was itself made on a review<sup>8</sup> and either the applicant did not appeal against it or the appeal was not referred for determination on an oral hearing, or where the decision was made in accordance with a direction by adjudicators on determining<sup>9</sup> an appeal<sup>10</sup>.

1    Ie under the Criminal Injuries Compensation Scheme (2001) PARA 18: see PARA 2037 ante.

2    Criminal Injuries Compensation Scheme (2001) PARA 58(a). An application for review is made under the Criminal Injuries Compensation Scheme (2001) PARA 59: see note 10 infra.

3    Criminal Injuries Compensation Scheme (2001) PARA 58(b). A case is re-opened under the Criminal Injuries Compensation Scheme (2001) PARAS 56-57: see PARA 2046 ante.

4    Criminal Injuries Compensation Scheme (2001) PARA 58(c). The reconsideration of an award is under the Criminal Injuries Compensation Scheme (2001) PARAS 53-54: see PARA 2045 ante.

5    Criminal Injuries Compensation Scheme (2001) PARA 58(d). See note 4 supra.

6    Ie under the Criminal Injuries Compensation Scheme (2001) PARA 49: see PARA 2043 ante.

7    Criminal Injuries Compensation Scheme (2001) PARA 58(e); see note 10 infra.

8    Ie under the Criminal Injuries Compensation Scheme (2001) PARA 60; see note 10 infra.

9    Ie under the Criminal Injuries Compensation Scheme (2001) PARA 77: see PARA 2051 post.

10   Criminal Injuries Compensation Scheme (2001) PARA 58. An application for the review of a decision by a claims officer must be made in writing to the Criminal Injuries Compensation Authority and must be supported by reasons together with any relevant additional information. It must be received by the Authority within 90 days of the date of the decision to be reviewed, but this time limit may, in exceptional circumstances, be waived where a claims officer more senior than the one who made the original decision considers that: (1) any extension requested by the applicant and received within the 90 days is based on good reasons; and (2) it would be in the interests of justice to do so: Criminal Injuries Compensation Scheme (2001) PARA 59.

All applications for review will be considered by a claims officer more senior than any claims officer who has previously dealt with the case. The officer conducting the review will reach his decision in accordance with the provisions of the Scheme applying to the original application, and he will not be bound by any earlier decision either as to the eligibility of the applicant for an award or as to the amount of an award. The applicant will be



sent written notification of the outcome of the review, giving reasons for the review decision, and the Authority will, unless it receives notice of an appeal, ensure that a determination of the original application is made in accordance with the review decision: Criminal Injuries Compensation Scheme (2001) PARA 60.

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## **2048. Appeals against review decisions.**

An applicant who is dissatisfied with a decision taken on a review<sup>1</sup> may appeal against the decision by giving written notice of appeal to the Criminal Injuries Compensation Appeals Panel ('the Panel')<sup>2</sup>. Such notice of appeal must be supported by reasons for the appeal together with any relevant additional material which the appellant wishes to submit, and must be received by the Panel within 90 days<sup>3</sup> of the date of the review decision. The Panel will send to the Criminal Injuries Compensation Authority a copy of the notice of appeal and supporting reasons which it receives and of any other material submitted by the appellant<sup>4</sup>.

The standard of proof to be applied by the Panel in all matters before it is the balance of probabilities. It is for the appellant to make out his case including, where appropriate:

- 2666 (1) making out his case for a waiver of the time limit for appeals<sup>5</sup>; and
- 2667 (2) satisfying the adjudicator or adjudicators responsible for determining his appeal that an award should not be reconsidered, withheld or reduced under any provision of the Criminal Injuries Compensation Scheme. The adjudicator or adjudicators concerned must<sup>6</sup> ensure, before determining an appeal, that the appellant has had an opportunity to submit representations on any evidence or other material submitted by or on behalf of the Authority<sup>7</sup>.

1 le under the Criminal Injuries Compensation Scheme (2001) PARA 60: see PARA 2047 ante.

2 A form of appeal is obtainable from the Criminal Injuries Compensation Authority. As to the Panel see PARA 2034 ante.

3 A member of the staff of the Panel may, in exceptional circumstances, waive this time limit where he considers that: (1) any extension requested by the appellant and received within the 90 days is based on good reasons; and (2) it would be in the interests of justice to do so: Criminal Injuries Compensation Scheme (2001) PARA 62.

Where, on considering a request to waive the time limit, a member of the staff of the Panel does not waive it, he will refer the request to the Chairman of the Panel or to another adjudicator nominated by the Chairman to decide requests for waiver, and a decision by the adjudicator concerned not to waive the time limit will be final. Written notification of the outcome of the waiver request will be sent to the appellant and to the Authority, giving reasons for the decision where the time limit is not waived: Criminal Injuries Compensation Scheme (2001) PARA 62.

4 Criminal Injuries Compensation Scheme (2001) PARA 61. Where the applicant is represented for the purposes of the appeal, the costs of representation will not be met by the Authority or the Panel: Criminal Injuries Compensation Scheme (2001) PARA 61.

Where the Panel receives notice of an appeal against a review decision relating to a decision mentioned in the Criminal Injuries Compensation Scheme (2001) PARA 58(a) or (b) (see PARA 2047 heads (1), (2) ante), the appeal will be dealt with in accordance with the Criminal Injuries Compensation Scheme (2001) PARAS 66-68 (see PARA 2049 post). Where the Panel receives notice of an appeal against a review decision relating to a decision mentioned in the Criminal Injuries Compensation Scheme (2001) PARA 58(c), (d) or (e) (see PARA 2047 heads (3)-(5) ante), the appeal will be dealt with in accordance with the Criminal Injuries Compensation Scheme (2001) PARAS 69-71 (see PARA 2050 post) and may under those provisions be referred for an oral hearing in accordance with the Criminal Injuries Compensation Scheme (2001) PARAS 72-78 (see PARA 2051 post). The Panel may publish information in connection with individual appeals, but such information must not identify any appellant or other person appearing at an oral hearing or referred to during an appeal, or enable identification to be made of any such person without that person's consent: Criminal Injuries Compensation Scheme (2001) PARA 63.

The Panel may make such arrangements for the inspection of the injury as it considers appropriate. Reasonable expenses incurred by the appellant in that connection will be met by the Panel: Criminal Injuries Compensation Scheme (2001) PARA 65.

5 Criminal Injuries Compensation Scheme (2001) PARA 64(a). A waiver of the time limit for appeals referred to in the text refers to the time limit under the Criminal Injuries Compensation Scheme (2001) PARA 61 (see note 4 *supra*).

6 le subject to the Criminal Injuries Compensation Scheme (2001) PARA 78 (determination of appeal in appellant's absence): see PARA 2051 post.

7 Criminal Injuries Compensation Scheme (2001) PARA 64(b).

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## **2049. Appeals concerning time limits and re-opening of cases.**

The Chairman of the Criminal Injuries Compensation Appeals Panel<sup>1</sup> or another adjudicator<sup>2</sup> nominated by him will determine any appeal against a decision taken on a review<sup>3</sup>: (1) not to waive the time limit<sup>4</sup>; or (2) not to re-open<sup>5</sup> a case<sup>6</sup>.

In determining such an appeal<sup>7</sup>, the adjudicator will allow the appeal where he considers it appropriate to do so. Where he dismisses the appeal, his decision will be final. Written notification of the outcome of the appeal, giving reasons for the decision, will be sent to the appellant and to the Criminal Injuries Compensation Authority<sup>8</sup>.

1 See PARA 2034 ante.

2 See PARA 2034 ante.

3 Ie under the Criminal Injuries Compensation Scheme (2001) PARA 60: see PARA 2047 ante.

4 Criminal Injuries Compensation Scheme (2001) PARA 66(a). The time limit referred to in head (1) in the text is the time limit in the Criminal Injuries Compensation Scheme (2001) PARA 18 (application for compensation: see PARA 2037 ante) or para 59 (application for review: see PARA 2047 ante).

5 Ie under the Criminal Injuries Compensation Scheme (2001) PARAS 56, 57: see PARA 2046 ante.

6 Criminal Injuries Compensation Scheme (2001) PARA 66(b). Where the appeal concerns a decision not to re-open a case and the application for re-opening was made more than two years after the date of the final decision, the adjudicator must be satisfied that the renewed application can be considered without a need for further extensive inquiries by the Criminal Injuries Compensation Authority: Criminal Injuries Compensation Scheme (2001) PARA 66.

7 Ie under the Criminal Injuries Compensation Scheme (2001) PARA 66.

8 Criminal Injuries Compensation Scheme (2001) PARA 67. Where the adjudicator allows an appeal, he will direct the Authority:

284 (1) in a case where the appeal was against a decision not to waive the time limit in the Criminal Injuries Compensation Scheme (2001) PARA 18 (see PARA 2037 ante), to arrange for the application for compensation to be dealt with under the Scheme as if the time limit had been waived by a claims officer (Criminal Injuries Compensation Scheme (2001) PARA 68(a));

285 (2) in a case where the appeal was against a decision not to waive the time limit in the Criminal Injuries Compensation Scheme (2001) PARA 59 (see PARA 2047 ante), to conduct a review under the Criminal Injuries Compensation Scheme (2001) PARA 60 (see PARA 2047 ante) (Criminal Injuries Compensation Scheme (2001) PARA 68(b));

286 (3) in a case where the appeal was against a decision not to re-open a case, to re-open the case under the Criminal Injuries Compensation Scheme (2001) PARAS 56-57 (Criminal Injuries Compensation Scheme (2001) para 68(c)).

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## **2050. Appeals concerning awards.**

A member of the staff of the Criminal Injuries Compensation Appeals Panel may refer for an oral hearing<sup>1</sup> any appeal against a decision taken on a review:

- 2668 (1) to withhold an award, including such decision<sup>2</sup> made on reconsideration of an award<sup>3</sup>;
- 2669 (2) to make an award, including a decision<sup>4</sup> to make a reduced award whether or not on reconsideration of an award<sup>5</sup>; or
- 2670 (3) to seek repayment<sup>6</sup> of an award<sup>7</sup>.

A request for an oral hearing in such cases may also be made by the Criminal Injuries Compensation Authority<sup>8</sup>.

Where a member of the staff of the Panel does not refer an appeal for an oral hearing<sup>9</sup>, he will refer it to an adjudicator<sup>10</sup>. The adjudicator will refer the appeal for determination on an oral hearing<sup>11</sup> where, on the evidence available to him, he considers:

- 2671 (a) in a case where the review decision was to withhold an award on the ground that the injury was not sufficiently serious to qualify for an award equal to at least the minimum award payable under the Criminal Injuries Compensation Scheme, that an award in accordance with the Scheme could have been made<sup>12</sup>; or
- 2672 (b) in any other case, that there is a dispute as to the material facts or conclusions upon which the review decision was based and that a different decision in accordance with the Scheme could have been made<sup>13</sup>.

He may also refer the appeal for determination on an oral hearing<sup>14</sup> where he considers that the appeal cannot be determined on the basis of the material before him or that for any other reason an oral hearing would be desirable<sup>15</sup>.

Where an appeal is not referred<sup>16</sup> for an oral hearing, the adjudicator's dismissal of the appeal will be final and the decision taken on the review will stand. Written notification of the dismissal of the appeal, giving reasons for the decision, will be sent to the appellant and to the Authority<sup>17</sup>.

1 le in accordance with the Criminal Injuries Compensation Scheme (2001) PARAS 72-78: see PARA 2051 post.

2 le under the Criminal Injuries Compensation Scheme (2001) PARAS 53, 54: see PARA 2045 ante.

3 Criminal Injuries Compensation Scheme (2001) PARA 69(a).

4 le under the Criminal Injuries Compensation Scheme (2001) PARAS 53, 54: see PARA 2045 ante.

5 Criminal Injuries Compensation Scheme (2001) PARA 69(b).

6 le under the Criminal Injuries Compensation Scheme (2001) PARA 49: see PARA 2043 ante.

7 le under the Criminal Injuries Compensation Scheme (2001) PARA 69(c).

- 8 Criminal Injuries Compensation Scheme (2001) PARA 69.
- 9 le under the Criminal Injuries Compensation Scheme (2001) PARA 69.
- 10 Criminal Injuries Compensation Scheme (2001) PARA 70.
- 11 le in accordance with the Criminal Injuries Compensation Scheme (2001) PARAS 72-78: see PARA 2051 post.
- 12 Criminal Injuries Compensation Scheme (2001) PARA 70(a).
- 13 Criminal Injuries Compensation Scheme (2001) PARA 70(b).
- 14 le in accordance with the Criminal Injuries Compensation Scheme (2001) PARAS 72-78: see PARA 2051 post.
- 15 Criminal Injuries Compensation Scheme (2001) PARA 70.
- 16 le under the Criminal Injuries Compensation Scheme (2001) PARAS 69 or 70: see the text and notes 1-15  
supra.
- 17 Criminal Injuries Compensation Scheme (2001) PARA 71.

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## **2051. Oral hearing of appeals.**

Where an appeal is referred for determination on an oral hearing, the hearing will take place before at least two adjudicators. Where the referral was made by an adjudicator<sup>1</sup>, that adjudicator<sup>2</sup> will not take part in the hearing. On application by the appellant, pending determination, the Chairman or an adjudicator nominated by him may direct that an interim payment be made. The procedure to be followed<sup>3</sup> for any particular appeal will be a matter for the adjudicators hearing the appeal<sup>4</sup>.

Written notice of the date proposed for the oral hearing will normally be sent to the appellant and the Criminal Injuries Compensation Authority at least 21 days beforehand. Any documents to be submitted to the adjudicators for the purposes of the hearing by the appellant, or by or on behalf of the Authority, will be made available at the hearing, if not before, to the Authority or the appellant respectively<sup>5</sup>.

The procedure at hearings will be as informal as is consistent with the proper determination of appeals<sup>6</sup>. Hearings will take place in private<sup>7</sup>.

Where the adjudicators adjourn the hearing, they may direct that an interim payment be made. Where the only issue remaining is the determination of the amount of compensation, the adjudicators may remit the application for final determination by one of themselves in the absence of the appellant, but subject to the right of the appellant to have a further oral hearing if not satisfied with that determination, in which the adjudicator who made that determination will not take part. On determining the appeal, the adjudicators will, where necessary, make such direction as they think fit as to the decision to be made by a claims officer on the application for compensation, but any such direction must be in accordance with the relevant provisions of the Criminal Injuries Compensation Scheme. Where they are of the opinion that the appeal was frivolous or vexatious, the adjudicators may reduce the amount of compensation to be awarded by such amount as they consider appropriate. The appellant and the Authority will be informed of the adjudicators' determination of the appeal and the reasons for it, normally at the end of the hearing, but otherwise by written notification as soon as is practicable thereafter<sup>8</sup>.

Adjudicators may determine an appeal on the available evidence in the absence of an appellant when they are satisfied that:

- 2673 (1) he has so requested, or agreed<sup>9</sup>;
- 2674 (2) he has failed to attend a hearing and has given no reasonable excuse for his non-attendance<sup>10</sup>;
- 2675 (3) he is at the time of the hearing detained in custody or in hospital and is likely to remain so for a period of at least six months<sup>11</sup>; or
- 2676 (4) he is not living in Great Britain<sup>12</sup>;

and it would not be against the interests of justice to do so<sup>13</sup>.

<sup>1</sup> ie under the Criminal Injuries Compensation Scheme (2001) PARA 70: see PARA 2050 ante.

2 See PARA 2034 note 1 ante.

3 le subject to the provisions of the Criminal Injuries Compensation Scheme (2001).

4 Criminal Injuries Compensation Scheme (2001) PARA 72.

5 Criminal Injuries Compensation Scheme (2001) PARA 73.

6 Criminal Injuries Compensation Scheme (2001) PARA 75. It will be open to the appellant to bring a friend or legal adviser to assist in presenting his case at the hearing, but the costs of representation will not be met by the Authority or the Criminal Injuries Compensation Appeals Panel. The adjudicators may, however, direct the Panel to meet reasonable expenses incurred by the appellant and any person who attends to give evidence at the hearing: Criminal Injuries Compensation Scheme (2001) PARA 74. The adjudicators will not be bound by any rules of evidence which may prevent a court from admitting any document or other matter or statement in evidence. The appellant, the claims officer presenting the appeal and the adjudicators may call witnesses to give evidence and may cross-examine them: Criminal Injuries Compensation Scheme (2001) PARA 75.

7 Criminal Injuries Compensation Scheme (2001) PARA 76. The Panel may, however, subject to the consent of the appellant, give permission for the hearing to be attended by observers such as representatives of the press, radio and television: Criminal Injuries Compensation Scheme (2001) PARA 76. Any such permission will be subject to written undertakings being given:

287 (1) that the identity of the appellant and of any other persons appearing at the hearing or referred to during the appeal will be kept confidential and will not be disclosed in any account of the proceedings which is broadcast or in any way published without that person's consent (Criminal Injuries Compensation Scheme (2001) PARA 76(a)); and

288 (2) that no material will be disclosed or in any other way published from which those identities could be discovered without the consent of the subject (Criminal Injuries Compensation Scheme (2001) PARA 76(b)).

8 Criminal Injuries Compensation Scheme (2001) PARA 77.

9 Criminal Injuries Compensation Scheme (2001) PARA 78(a).

10 Criminal Injuries Compensation Scheme (2001) PARA 78(b).

11 Criminal Injuries Compensation Scheme (2001) PARA 78(c).

12 Criminal Injuries Compensation Scheme (2001) PARA 78(d).

13 Criminal Injuries Compensation Scheme (2001) PARA 78.



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## **2052. Rehearing of appeals.**

Where an appeal is determined in the appellant's absence, he may apply to the Criminal Injuries Compensation Appeals Panel<sup>1</sup> in writing for his appeal to be reheard, giving the reasons for his non-attendance or otherwise why it should be reheard. Any such application must be received by the Panel within 30 days<sup>2</sup> of the date of notification to the appellant of the outcome of the hearing which he did not attend. The Panel will send a copy of the application to the Criminal Injuries Compensation Authority<sup>3</sup>.

Where a member of the staff of the Panel considers that there are good reasons for an appeal determined in the appellant's absence to be reheard, he will refer it for a rehearing. Where he does not refer it for a rehearing, he will refer the application to the Chairman of the Panel or to another adjudicator nominated by the Chairman to decide such applications, and a decision by the adjudicator concerned not to rehear the appeal will be final. Written notification of the decision on the application for a rehearing will be sent to the appellant and to the Authority, giving reasons for the decision where the application is refused<sup>4</sup>.

Where an appeal is to be reheard, any adjudicator or adjudicators who determined the appeal originally will not take part in the rehearing<sup>5</sup>.

1 See PARA 2034 ante.

2 A member of the staff of the Panel may waive the time limit in Criminal Injuries Compensation Scheme (2001) PARA 79 where he considers that it would be in the interests of justice to do so. Where he does not waive the time limit, he will refer the application to the Chairman of the Panel or to another adjudicator nominated by the Chairman to decide such applications, and a decision by the adjudicator concerned not to waive the time limit will be final. Written notification of the waiver decision will be sent to the appellant and to the Authority, giving reasons for the decision where the time limit is not waived: Criminal Injuries Compensation Scheme (2001) PARA 80.

3 Criminal Injuries Compensation Scheme (2001) PARA 79.

4 Criminal Injuries Compensation Scheme (2001) PARA 81.

5 Criminal Injuries Compensation Scheme (2001) PARA 82. Criminal Injuries Compensation Scheme (2001) PARA 64 (onus on appellant), PARA 65 (inspection of injury) (see PARA 2048 ante) and PARAS 72-78 (oral hearings) (see PARA 2051 ante) apply to the rehearing of appeals: Criminal Injuries Compensation Scheme (2001) PARA 82.

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### **2053. Recovery of criminal injuries compensation from offenders.**

As from a day to be appointed, the following provisions have effect<sup>1</sup>. The Secretary of State may, by regulations made by statutory instrument, make provision for the recovery from an appropriate person of an amount equal to all or part of the compensation paid in respect of a criminal injury<sup>2</sup>. An appropriate person is a person who has been convicted of an offence in respect of the criminal injury<sup>3</sup>. The amount recoverable from a person under the regulations is to be determined by reference only to the extent to which the criminal injury is directly attributable to an offence of which he has been convicted<sup>4</sup>. The regulations may confer functions in respect of recovery on: (1) claims officers<sup>5</sup>; (2) if a Scheme manager<sup>6</sup> has been appointed, persons appointed<sup>7</sup> by the Scheme manager<sup>8</sup>.

If, under regulations so made<sup>9</sup>, an amount has been determined as recoverable from a person, he must be given a notice (a 'recovery notice') in accordance with the regulations which requires him to pay that amount, and contains the specified information<sup>10</sup>.

Regulations<sup>11</sup> must include provision for the review, in such circumstances as may be prescribed by the regulations, of a determination that an amount is recoverable from a person, and of the amount determined as recoverable from a person<sup>12</sup>.

A person from whom an amount has been determined as recoverable under the regulations may seek such a review only on the grounds:

- 2677 (a) that he has not been convicted of an offence to which the injury is directly attributable<sup>13</sup>;
- 2678 (b) that the compensation paid was not determined in accordance with the Scheme<sup>14</sup>;
- 2679 (c) that the amount determined as recoverable from him was not determined in accordance with the regulations<sup>15</sup>.

Any such review must be conducted by a person other than the person who made the determination under review<sup>16</sup>.

An amount determined as recoverable from a person under the regulations<sup>17</sup> is recoverable from him as a debt due to the Crown if (but only if):

- 2680 (i) he has been given a recovery notice<sup>18</sup>; and
- 2681 (ii) he has failed to pay the amount in accordance with the notice<sup>19</sup>.

In any proceedings for the recovery of the amount from a person<sup>20</sup>, it is a defence for the person to show: (A) that he has not been convicted of an offence to which the injury is directly attributable<sup>21</sup>; (B) that the compensation paid was not determined in accordance with the Scheme<sup>22</sup>; or (C) that the amount determined as recoverable from him was not determined in accordance with the regulations<sup>23</sup>.

<sup>1</sup> The Criminal Injuries Compensation Act 1995 ss 7A-7D (see the text and notes 2-23 infra) are prospectively added by the Domestic Violence, Crime and Victims Act 2004 s 57(1), (2) and are to be brought

into force by order made by the Secretary of State under s 60 of that Act as from a day to be appointed. At the date at which this volume states the law no such day had been appointed.

2 Criminal Injuries Compensation Act 1995 s 7A(1) (as prospectively added: see note 1 supra). For the meaning of 'criminal injury' see the Criminal Injuries Compensation Scheme (2001) PARA 8; and PARA 2035 ante (definition applied by the Criminal Injuries Compensation Act 1995 s 3(4)). The regulations may not authorise the recovery of an amount in respect of compensation from a person to the extent that the compensation has been repaid in accordance with the Scheme: s 7A(5) (as so added). No regulations under s 7A(1) (as added) or order under s 7B(3) (as added) (see note 10 infra) may be made unless a draft of the regulations or order has been laid before Parliament and approved by a resolution of each House: s 11(8A) (added by the Domestic Violence, Crime and Victims Act 2004 s 57(1), (4)).

3 Criminal Injuries Compensation Act 1995 s 7A(2) (as added: see note 1 supra).

4 Ibid s 7A(3) (as added: see note 1 supra).

5 Ibid s 7A(4)(a) (as added: see note 1 supra). As to claims officers see PARA 2034 note 1 ante.

6 See PARA 2033 note 3 ante.

7 Ie a person appointed for the purpose of determining compensation and making awards and payments of compensation by a Scheme manager (if a Scheme manager has been appointed) under the Criminal Injuries Compensation Act 1995 s 3(4)(a): see PARA 2034 ante.

8 Ibid s 7A(4) (as added: see note 1 supra).

9 Ie under ibid s 7A(1) (as added) (see note 2 supra).

10 Ibid s 7B(1) (as added: see note 1 supra). The specified information is:

289 (1) the reasons for the determination that an amount is recoverable from the person (s 7B(2)(a) (as so added));

290 (2) the basis on which the amount has been determined (s 7B(2)(b) (as so added));

291 (3) the way in which and the date before which the amount is required to be paid (s 7B(2)(c) (as so added));

292 (4) the means by which the amount may be recovered if it is not paid in accordance with the notice (s 7B(2)(d) (as so added));

293 (5) the grounds on which and the procedure by means of which he may seek a review if he objects to:

6. (a) the determination that an amount is recoverable from him (s 7B(2)(e)(i) (as so added));

7

7. (b) the amount determined as recoverable from him (s 7B(2)(e)(ii) (as so added)).

8

The Secretary of State may by order made by statutory instrument amend s 7B(2) by: (i) adding information; (ii) omitting information; (iii) changing the description of information: s 7B(3).

11 Ie under ibid s 7A(1) (as added) (see note 1 supra).

12 Ibid s 7C(1) (as added: see note 1 supra).

13 Ibid s 7C(2)(a) (as added: see note 1 supra).

14 Ibid s 7C(2)(b) (as added: see note 1 supra).

15 Ibid s 7C(2)(c) (as added: see note 1 supra).

16 Ibid s 7C(3) (as added: see note 1 supra). The person conducting any such review may: (1) set aside the determination that the amount is recoverable; (2) reduce the amount determined as recoverable; (3) increase the amount determined as recoverable; (4) determine to take no action under heads (1)-(3) supra: s 7C(4) (as so added). But the person conducting any such review may increase the amount determined as recoverable if

(but only if) it appears to that person that the interests of justice require the amount to be increased: s 7C(5) (as so added).

17     Ie regulations made under *ibid* s 7A(1) (as added) (see note 2 *supra*).

18     *Ibid* s 7D(1)(a) (as added: see note 1 *supra*). A recovery notice referred to in the text is one given in accordance with the regulations which complies with s 7B (as added) (see the text and notes 9-10 *supra*).

19     *Ibid* s 7D(1)(b) (as added: see note 1 *supra*).

20     In any such proceedings, except for the purposes of head (B) in the text, no question may be raised or finding made as to the amount that was, or ought to have been, the subject of an award: *ibid* s 7D(3) (as added: see note 1 *supra*). For the purposes of the Limitation Act 1980 s 9 (time limit for actions for sums recoverable by statute to run from date on which cause of action accrued: see LIMITATION PERIODS vol 68 (2008) PARA 952) the cause of action to recover that amount is taken to have accrued on the date on which the compensation was paid, or, if later, on the date on which a person from whom an amount is sought to be recovered was convicted of an offence to which the injury is directly attributable: s 7D(4) (as so added). If that person is convicted of more than one such offence and the convictions are made on different dates, the reference to the date on which he was convicted of such an offence is taken to be a reference to the earlier or earliest (as the case may be) of the dates on which he was convicted of such an offence: s 7D(5) (as so added).

21     *Ibid* s 7D(2)(a) (as added: see note 1 *supra*).

22     *Ibid* s 7D(2)(b) (as added: see note 1 *supra*).

23     *Ibid* s 7D(2)(c) (as added: see note 1 *supra*). The regulations referred to in the text are regulations under s 7A (as added) (see note 2 *supra*).

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COMPENSATION, REWARDS AND COSTS/(1) THE CRIMINAL INJURIES COMPENSATION SCHEME/2054. Inalienability of compensation awards.

**2054. Inalienability of compensation awards.**

Every assignment of, or charge on, an award of compensation<sup>1</sup> and every agreement to assign or charge such an award is void; and, on the bankruptcy of a person in whose favour an award is made, the award does not pass to any trustee or other person acting on behalf of his creditors<sup>2</sup>.

1     Ie an award of compensation made in accordance with the provisions of the Criminal Injuries Compensation Scheme: Criminal Injuries Compensation Act 1995 s 1(4): see PARA 2033 et seq ante.

2     See *ibid* s 7.

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## **(2) COMPENSATION FOR MISCARRIAGES OF JUSTICE**

### **2055. Compensation for miscarriages of justice.**

When a person<sup>1</sup> has been convicted of a criminal offence and when subsequently his conviction has been reversed<sup>2</sup> or he has been pardoned<sup>3</sup> on the ground that<sup>4</sup> a new or newly discovered fact<sup>5</sup> shows beyond reasonable doubt that there has been a miscarriage of justice<sup>6</sup>, the Secretary of State must pay compensation for the miscarriage of justice to the person who has suffered punishment<sup>7</sup> as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted<sup>8</sup>. No such payment may be made, however, unless an application for such compensation has been made to the Secretary of State<sup>9</sup>; and the question whether there is a right to compensation must be determined by the Secretary of State<sup>10</sup>.

If the Secretary of State determines that there is a right to such compensation, the amount of the compensation must be assessed<sup>11</sup> by an assessor<sup>12</sup> appointed by him<sup>13</sup>. In assessing so much of any compensation payable to or in respect of a person as is attributable to suffering, harm to reputation or similar damage, the assessor must have regard in particular to:

- 2682 (1) the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from the conviction<sup>14</sup>;
- 2683 (2) the conduct of the investigation and prosecution of the offence<sup>15</sup>; and
- 2684 (3) any other convictions of the person and any punishment resulting from them<sup>16</sup>.

1 le a natural person, and not a company: *R v Secretary of State for the Home Department, ex p Atlantic Commercial Ltd* [1997] BCC 692, [1997] COD 381.

2 For these purposes, 'reversed' is to be construed as referring to a conviction having been quashed: (1) on an appeal out of time; (2) on a reference under the Criminal Appeal Act 1995 (see PARA 1963 et seq ante); (3) on an appeal under the Terrorism Act 2000 s 7 (see PARA 386 ante); or (4) on an appeal under the Prevention of Terrorism Act 2005 s 12 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 524): Criminal Justice Act 1988 s 133(5) (amended by the Criminal Appeal Act 1995 s 29, Sch 2 para 16(4), Sch 3; the Terrorism Act 2000 s 7(8); and the Prevention of Terrorism Act 2005 s 12(8)). For these purposes, a conviction is not 'quashed' when a lesser verdict is substituted on appeal; 'quashed' requires that the appeal must have been allowed in full: *R (on the application of Christofides) v Secretary of State for the Home Department* [2002] EWHC 1083 (Admin), [2002] 1 WLR 2769, DC.

3 As to pardons see PARAS 1271, 1978 ante. These provisions do not apply to a pardon granted during the course of a trial; as to compensation in such a case see note 5 infra.

4 'On the ground that' means that the new or newly discovered fact must be the principal, if not the only, reason for the quashing of a conviction; it is not enough that such a fact made some contribution to the quashing of that conviction: *R (on the application of Murphy) v Secretary of State for the Home Department, R (on the application of Brannan) v Secretary of State for the Home Department* [2005] EWHC 140 (Admin), [2005] 2 All ER 763, [2005] 1 WLR 3516, DC.

5 Neither judicial error, nor the subsequent declaration as invalid of the byelaws under which a person has been convicted and imprisoned, can amount to a 'new fact or newly discovered fact': *R v Secretary of State for the Home Department, ex p Bateman and Howse* (1994) 7 Admin LR 175, CA.

The Criminal Justice Act 1988 s 133 (as amended) is concerned only with facts which emerge after the ordinary appellate process has been exhausted. Where new evidence results in a finding of fact, and the fact so found can properly be described as a new or newly discovered fact, the present condition in s 133 (as amended) can be met even if the evidence and resulting finding of fact relate to a matter that was in issue at trial; but the disclosure of a fact between trial and the determination of an appeal brought within the normal time limit cannot engage the operation of s 133 (as amended): *R (on the application of Murphy) v Secretary of State for the Home Department*, *R (on the application of Brannan) v Secretary of State for the Home Department* [2005] EWHC 140 (Admin), [2005] 2 All ER 763, [2005] 1 WLR 3516, DC.

6 'Miscarriage of justice' includes cases where a person is convicted who is demonstrably innocent, and may also include cases where a person should not have been convicted due to a failure in the trial process, irrespective of whether he was guilty: *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1, [2004] 3 All ER 65 (no entitlement to compensation arising from unlawful deportation to United Kingdom prior to commencement of trial process as it was an abuse of executive power rather than a failure in the trial process).

7 For these purposes, a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted: Criminal Justice Act 1988 s 133(6).

8 Ibid s 133(1). Section 133 (as amended) was enacted to incorporate into domestic law the International Covenant on Civil and Political Rights art 14(6). The discretionary scheme of ex gratia payments to persons who had spent a period in custody in circumstances which do not fall within the Criminal Justice Act 1988 s 133(1) no longer exists: see Home Office Press Release *Home Secretary Outlines Changes to System for Compensating Miscarriages of Justice* (19 April 2006).

9 Criminal Justice Act 1988 s 133(2).

10 Ibid s 133(3).

11 The assessment must be by the application of all relevant common law principles governing the assessment of damages, whenever they are clear and analogous: *R (on the application of O'Brien) v Independent Assessor*, *R (on the application of Hickey (Vincent)) v Independent Assessor*, *R (on the application of Hickey (Michael)) v Independent Assessor* [2003] EWHC 855 (Admin), [2003] 26 LS Gaz R 36, [2003] NLJR 668.

12 As to assessors of compensation for miscarriages of justice see PARA 2056 post.

13 Criminal Justice Act 1988 s 133(4).

14 Ibid s 133(4A)(a) (s 133(4A) added by the Criminal Appeal Act 1995 s 28).

15 Criminal Justice Act 1988 s 133(4A)(b) (as added: see note 14 supra).

16 Ibid s 133(4A)(c) (as added: see note 14 supra).

## UPDATE

### 2055 Compensation for miscarriages of justice

NOTE 2--The scheme should be interpreted purposively and cannot be interpreted to exclude detention resulting from the serious default of the police or a public authority in the context of extradition proceedings: *R (on the application of Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72, [2008] QB 836, [2008] 2 All ER 1023.

See also Criminal Justice Act 1988 s 133(5A), (5B) (added by Criminal Justice and Immigration Act 2008 s 61(5)). For transitional provision see Criminal Justice and Immigration Act 2008 Sch 27 para 22.

NOTE 5--See *R (on the application of Adams) v Secretary of State for Justice* [2009] EWCA Civ 1291, [2010] 1 Cr App Rep 371, [2009] All ER (D) 300 (Nov) (application for compensation refused as conviction not reversed on new or newly discovered fact).

NOTE 7--Criminal Justice Act 1988 s 133(6) amended: Criminal Justice and Immigration Act 2008 s 61(6). For transitional provision see Criminal Justice and Immigration Act 2008 Sch 27 para 22.

NOTE 8--See *R (on the application of Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin), [2007] All ER (D) 459 (Jul), DC; and *R (on the application of Allen, formerly Harris) v Secretary of State for Justice* [2008] EWCA Civ 808, [2009] 2 All ER 1.

TEXT AND NOTE 9--Criminal Justice Act 1988 s 133(2) amended to impose a time limit of two years within which an application must be made: Criminal Justice and Immigration Act 2008 s 61(3). But the Secretary of State may direct that an application for compensation made after the end of that period is to be treated as if it had been made within that period if the Secretary of State considers that there are exceptional circumstances which justify doing so: Criminal Justice Act 1988 s 133(2A) (added by Criminal Justice and Immigration Act 2008 s 61(3)). For transitional provision see Criminal Justice and Immigration Act 2008 Sch 27 para 22.

NOTE 10--The withdrawal of the ex gratia scheme for compensation for miscarriages of justice without notice or consultation was not unlawful: *R (on the application of Bhatt Murphy (a firm) v Independent Assessor*; *R (on the application of Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755, [2008] All ER (D) 127 (Jul).

NOTE 11--*O'Brien*, cited, affirmed sub nom *R (on the application of O'Brien) v Independent Assessor* [2007] UKHL 10, [2007] 2 All ER 833.

TEXT AND NOTES 14-16--Criminal Justice Act 1988 s 133(4A) substituted: Criminal Justice and Immigration Act 2008 s 61(4). As to the amount of compensation see Criminal Justice Act 1988 s 133A (ss 133A, 133B added by Criminal Justice and Immigration Act 2008 s 61(7)). For transitional provision see Criminal Justice and Immigration Act 2008 Sch 27 para 22. For cases where a person has been detained for at least ten years see Criminal Justice Act 1988 s 133B.



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## **2056. Assessors of compensation for miscarriages of justice.**

A person holds<sup>1</sup> and vacates<sup>2</sup> office as an assessor in accordance with the terms of his appointment<sup>3</sup>; but he may at any time resign his office as an assessor by giving notice in writing to that effect to the Secretary of State<sup>4</sup>. The Secretary of State may at any time remove a person from office as an assessor if satisfied that:

- 2685 (1) he has been convicted of a criminal offence<sup>5</sup>;
- 2686 (2) he has become bankrupt or has had his estate sequestrated or has made an arrangement with, or granted a trust deed for, his creditors<sup>6</sup>;
- 2687 (3) he is incapacitated by physical or mental illness<sup>7</sup>; or
- 2688 (4) he is otherwise unable or unfit to perform his duties<sup>8</sup>.

An assessor is paid such remuneration and allowances as the Secretary of State may, with the approval of the Treasury, determine<sup>9</sup>.

1 A person may only be appointed to be an assessor for the purposes of the Criminal Justice Act 1988 s 133 (as amended) (see PARA 2055 ante) if he is:

- 294 (1) a person who has a seven year general qualification, within the meaning of the Courts and Legal Services Act 1990 s 71 (ie a right of audience in relation to any class of proceedings in any part of the Supreme Court, or any proceedings in the county or magistrates' courts: see LEGAL PROFESSIONS vol 65 (2008) PARA 742) (Criminal Justice Act 1988 s 133(7), Sch 12 para 1(a) (Sch 12 para 1(a)-(c) substituted by the Courts and Legal Services Act 1990 s 71(2), Sch 10 para 72(1)));
- 295 (2) an advocate or solicitor in Scotland (Criminal Justice Act 1988 Sch 12 para 1(b) (as so substituted));
- 296 (3) a member of the Bar of Northern Ireland or solicitor of the Supreme Court of Northern Ireland of at least seven years' standing (Sch 12 para 1(c) (as so substituted));
- 297 (4) a person who holds or has held judicial office in any part of the United Kingdom (Sch 12 para 1(d)); or
- 298 (5) a member (whether the chairman or not) of the Criminal Injuries Compensation Board (Sch 12 para 1(e)).

As from a day to be appointed, the words 'solicitor of the Court of Judicature of Northern Ireland' in head (3) supra are substituted for the words 'solicitor of the Supreme Court of Northern Ireland' by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 5. At the date at which this volume states the law no such day had been appointed.

2 A person must vacate office as an assessor: (1) if he ceases to be qualified for appointment as an assessor; or (2) on attaining the age of 72, unless the Secretary of State considers that it is in the interests of the efficient operation of the Criminal Justice Act 1988 s 133 (as amended) that he should continue to hold office: Sch 12 para 3.

3 Ibid Sch 12 para 2.

4 Ibid Sch 12 para 4.

5 Ibid Sch 12 para 5(a). The exercise of power conferred by Sch 12 para 5 is subject to the following provisions:

- 299 (1) in the case of a person who qualifies for appointment under Sch 12 para 1(a) (see note 1 head (1) supra), or Sch 12 para 1(d) (see note 1 head (4) supra) by virtue of holding or having held judicial office in England and Wales, that power is only exercisable with the consent of the Lord Chancellor, which may only be given with the concurrence of the Lord Chief Justice of England and Wales (Sch 12 para 6(1), (2) (Sch 12 para 6 substituted by the Constitutional Reform Act 2005 s 15(1), Sch 4 para 196));
- 300 (2) in the case of a person who qualifies for appointment under the Criminal Justice Act 1988 Sch 12 para 1(b) (see note 1 head (2) supra) or Sch 12 para 1(d) (see note 1 head (4) supra) by virtue of holding or having held judicial office in Scotland, that power is only exercisable with the consent of the Lord President of the Court of Session (Sch 12 para 6(1), (3) (as so substituted));
- 301 (3) in the case of a person who qualifies for appointment under Sch 12 para 1(c) (see note 1 head (3) supra) or Sch 12 para 1(d) (see note 1 head (4) supra) by virtue of holding or having held judicial office in Northern Ireland, that power is only exercisable with the consent of the Lord Chancellor, which may only be given with the concurrence of the Lord Chief Justice of Northern Ireland (Sch 12 para 6(1), (4) (as so substituted)).

6 Ibid Sch 12 para 5(b). See note 5 supra.

7 Ibid Sch 12 para 5(c). See note 5 supra.

8 Ibid Sch 12 para 5(d). See note 5 supra.

9 Ibid Sch 12 para 7.

## UPDATE

### 2056 Assessors of compensation for miscarriages of justice

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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### **(3) REWARDS**

#### **2057. Persons active in the apprehension of arrestable offenders; rewards.**

Where any person appears to the Crown Court to have been active in or towards the apprehension of any person charged with an indictable offence<sup>1</sup>, the court may order the sheriff<sup>2</sup> to pay to such person such sum of money as seems to the court reasonable and sufficient to compensate him for his expenses, exertions and loss of time in or towards the apprehension<sup>3</sup>.

1 For indictable offences see PARA 1202 et seq ante.

2 I.e. the sheriff of the county in which the offence was committed.

3 Criminal Law Act 1826 s 28 (amended by the Statute Law Repeals (No 2) Act 1890; the Criminal Law Act 1967 s 10(1), (2), Sch 2 para 3(1), Sch 3 Pt III; the Courts Act 1971 s 56(1), Sch 8 para 2; the Statute Law (Repeals) Act 1998; and the Serious Organised Crime and Police Act 2005 s 111, Sch 7 para 39).

Rewards are not confined to cases where loss of time or money can be proved: *R v Barnes* (1835) 7 C & P 166. See eg *R v Womersley* (1836) 2 Lew CC 162 (giving description of defendant); *R v Dunning* (1851) 17 LTOS 8, 5 Cox CC 142 (locking burglar in room); *R v Platt*, *R v Sines* (1905) 69 JP 424 (blowing police whistle); *R v Newman* (1990) 154 JP 113, [1990] Crim LR 203, CA (giving chase to defendant and detaining him until police arrived). A reward may be paid to an investigating officer: see *R v Beard (Graham)* [1974] 1 WLR 1549. Any such reward to a witness must be granted in the absence of the jury: *R v Newman* supra.

The order for payment must be made out and delivered by the proper officer of the court to the person to be compensated; and the sheriff, on sight of such order, is authorised and requested forthwith to pay such person, or to any one duly authorised on his or her behalf, the money mentioned in such order: see the Criminal Law Act 1826 s 29 (amended by the Statute Law (Repeals) Act 1998). The sheriff may immediately apply for repayment to the Lord Chancellor: see the Criminal Law Act 1826 s 29; and the Transfer of Functions (Treasury and Lord Chancellor) Order 1976, SI 1976/229, art 4(a).

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/A. REGULATIONS/2058. Lord Chancellor's power to make regulations.

## **(4) COSTS AND ALLOWANCES**

### **(i) Award of Costs**

#### **A. REGULATIONS**

##### **2058. Lord Chancellor's power to make regulations.**

The Lord Chancellor may by regulations<sup>1</sup> make provision empowering magistrates' courts, the Crown Court and the Court of Appeal, in any case where the court is satisfied that one party to criminal proceedings<sup>2</sup> has incurred costs as a result of an unnecessary or improper<sup>3</sup> act or omission by, or on behalf of, another party to the proceedings, to make an order as to the payment of those costs<sup>4</sup>.

Regulations so made may, in particular:

- 2689 (1) allow the making of such an order at any time during the proceedings<sup>5</sup>;
- 2690 (2) make provision as to the account to be taken, in making such an order, of any other order as to costs which has been made in respect of the proceedings or any grant of a right to representation funded by the Legal Services Commission as part of the Criminal Defence Service<sup>6</sup>;
- 2691 (3) make provision as to the account to be taken of any such order in the making of any other order as to costs in respect of the proceedings<sup>7</sup>; and
- 2692 (4) contain provisions similar to the statutory provisions relating to the restrictions<sup>8</sup> on orders for costs in a magistrates' court: (a) where the sum ordered to be paid as a fine, penalty, forfeiture or compensation does not exceed £5; and (b) in the case of a person under the age of 18<sup>9</sup>.

The Lord Chancellor may by regulations provide that any provision which would not otherwise apply in relation to any category of proceedings in which an offender is before a magistrates' court or the Crown Court is to apply in relation to proceedings of that category, subject to any specified modifications<sup>10</sup>.

The Lord Chancellor may make regulations<sup>11</sup> for carrying the statutory provisions relating to costs<sup>12</sup> into effect and the regulations may, in particular, make provision as to:

- 2693 (i) the scales or rates of payments of any costs payable out of central funds<sup>13</sup> in pursuance of any costs order<sup>14</sup>, the circumstances in which and the conditions under which such costs may be allowed and paid and the expenses which may be included in such costs<sup>15</sup>; and
- 2694 (ii) the review, as respects costs payable out of central funds in pursuance of any costs order, of any decision on taxation, or determination of the amount, of the costs<sup>16</sup>;

and any statutory provision<sup>17</sup> enabling any sum to be paid out of central funds has effect subject to any such regulations<sup>18</sup>.

The Lord Chancellor may by regulations make provision for the recovery of sums paid by the Legal Services Commission or out of central funds in cases where:

- 2695 (A) a costs order has been made against a person; and
- 2696 (B) the person in whose favour the order was made is a legally assisted person<sup>19</sup> or a person in whose favour a defendant's costs order<sup>20</sup> or, as the case may be, an order for the payment of prosecution costs<sup>21</sup> has been made<sup>22</sup>.

1 In exercise of such power the Lord Chancellor has made the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335 (as amended).

2 In order for proceedings to constitute criminal proceedings, they must involve a formal accusation that a defendant is in breach of the criminal law and be proceedings which may lead to his conviction and condemnation: *Customs and Excise Comrs v City of London Magistrates' Court* [2000] 4 All ER 763, [2000] 2 Cr App Rep 348, DC.

3 See *DPP v Denning* [1991] 2 QB 532, [1991] 3 All ER 439, DC.

4 Prosecution of Offences Act 1985 s 19(1). Before making any regulations under ss 19(1), 19A (as added) (see PARA 2060 post) or s 19B (as added) (see PARA 2061 post) which affect the procedure of any court, the Lord Chancellor must, so far as is reasonably practicable, consult any rule committee by whom, or on whose advice, rules of procedure for the court may be made or whose concurrence is required to any such rules: s 20(7) (amended by the Courts Act 2003 s 109(1), Sch 8 para 288(1), (4)). Any regulation under the Prosecution of Offences Act 1985 Pt II (ss 16-21) (as amended) may contain such incidental and supplemental and transitional provisions as the Lord Chancellor considers appropriate: s 20(6) (amended by the Courts Act 2003 Sch 8 para 288(1), (3)).

5 Prosecution of Offences Act 1985 s 19(2)(a).

6 Ibid s 19(2)(b) (amended by the Legal Aid Act 1988 s 45, Sch 6; and the Access to Justice Act 1999 s 24, Sch 4 paras 27, 28). As to the grant of a right to representation under the Legal Aid Act 1988 see LEGAL AID.

7 Prosecution of Offences Act 1985 s 19(2)(c).

8 Ie the provisions in ibid ss 18(4), (5): see PARA 2063 post.

9 Ibid s 19(2)(d).

10 Ibid s 19(5). See also s 20(6); and note 4 supra.

11 See note 1 supra.

12 Ie the Prosecution of Offences Act 1985 Pt II (as amended).

13 'Central funds', in an enactment providing in relation to England and Wales for the payment of costs out of central funds, means money provided by Parliament: Interpretation Act 1978 s 5, Sch 1.

14 For these purposes, 'costs order' means: (1) an order made under or by virtue of the Prosecution of Offences Act 1985 Pt II (as amended) for payment to be made out of central funds or by any person; or (2) an order made in a criminal case by the House of Lords for the payment of costs by a party to proceedings: s 20(8) (amended by the Courts Act 2003 Sch 8 para 288(1), (5)).

15 Prosecution of Offences Act 1985 s 20(1)(a).

16 Ibid s 20(1)(b).

17 Ie any provision made by or under ibid Pt II (as amended).

18 Ibid s 20(1). Regulations made under s 20(1) may provide that rates or scales of allowances payable out of central funds under a costs order is to be determined by the Lord Chancellor with the consent of the Treasury: s 20(3). See also s 20(6); and note 4 supra.

19 For these purposes, 'legally assisted person', in relation to any proceedings, means a person to whom a right to representation funded by the Legal Services Commission as part of the Criminal Defence Service has been granted for the purposes of the proceedings: *ibid* s 21(1) (substituted by the Legal Aid Act 1988 Sch 5 para 14; and amended by the Access to Justice Act 1999 s 24, Sch 4 paras 27, 30(1), (2)).

Where one party to any proceedings is a legally assisted person, then: (1) for the purposes of the Prosecution of Offences Act 1985 s 16 (as amended) (see *PARA 2059* post), s 17 (see *PARA 2062* post), his costs are to be taken not to include the cost of representation funded for him by the Legal Services Commission as part of the Criminal Defence Service (see *LEGAL AID* vol 65 (2008) *PARAS 17 et seq, 120 et seq*); and (2) for the purposes of the Prosecution of Offences Act 1985 s 18 (as amended) (see *PARA 2063* post), s 19 (as amended), s 19A (as added), s 19B (as added) and s 20 (as amended) (see *PARA 2060* post), his costs are to be taken to include the cost of representation funded for him by the Legal Services Commission as part of the Criminal Defence Service: Prosecution of Offences Act 1985 s 21(4A) (added by the Legal Aid Act 1988 s 45(1), (3), Sch 5 para 15; and amended by the Access to Justice Act 1999 Sch 4 paras 27, 30(1), (3)).

20 For the meaning of 'defendant's costs order' see *PARA 2059* note 3 post.

21 It is an order under the Prosecution of Offences Act 1985 s 17: see *PARA 2062* post.

22 *Ibid* s 20(2) (amended by the Legal Aid Act 1988 s 45(1), (3), Sch 5 para 13; the Courts and Legal Services Act 1990 s 125(3), Sch 18 para 53; and the Access to Justice Act 1999 Sch 4 paras 27, 29). Regulations made under the Prosecution of Offences Act 1985 s 20(2) (as amended) may, in particular: (1) require the person mentioned in s 20(2)(a) (see head (A) in the text) to pay sums due under the costs order in accordance with directions given by the Lord Chancellor (either generally or in respect of the particular case); and (2) enable the Lord Chancellor to enforce those directions in cases to which they apply: s 20(4).

## **UPDATE**

### **2058 Lord Chancellor's power to make regulations**

NOTE 6--Legal Aid Act 1988 repealed: Access to Justice Act 1999 Sch 15 Pt I. See *LEGAL AID* vol 65 (2008) *PARA 2 et seq*.

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/B. COST ORDERS/2059. Award out of central funds; defence costs.

## **B. COST ORDERS**

### **2059. Award out of central funds; defence costs.**

An order in favour of the defendant<sup>1</sup> for a payment to be made out of central funds in respect of his costs<sup>2</sup> (a 'defendant's costs order')<sup>3</sup> may be made<sup>4</sup>:

2697 (1) by a magistrates' court<sup>5</sup> where:

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- 88. (a) an information laid<sup>6</sup> before a justice of the peace for any area, charging any person with an offence, is not proceeded with<sup>7</sup>;
- 89. (b) the court inquiring into an indictable offence as examining justices determines not to commit the defendant for trial<sup>8</sup>;
- 90. (c) the court dealing summarily with an offence dismisses the information<sup>9</sup>;

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2698 (2) by the Crown Court<sup>10</sup> where:

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- 91. (a) any person is not tried for an offence for which he has been indicted or committed or sent for trial<sup>11</sup>;
- 92. (b) a notice of transfer is given under a relevant transfer provision<sup>12</sup> but a person in relation to whose case it is given is not tried on a charge to which it relates<sup>13</sup>;
- 93. (c) any person is tried on indictment and acquitted on any count in the indictment<sup>14</sup>; or
- 94. (d) a person convicted of an offence before a magistrates' court appeals to the Crown Court against conviction or sentence<sup>15</sup> and, in consequence of the decision on appeal, his conviction is set aside or a less severe punishment is awarded<sup>16</sup>;

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2699 (3) by the High Court where any proceedings in a criminal cause or matter are determined before it<sup>17</sup>;

2700 (4) by the Court of Appeal<sup>18</sup> where:

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- 95. (a) it allows an appeal<sup>19</sup> against conviction, a verdict of not guilty by reason of insanity<sup>20</sup> or a finding<sup>21</sup> that the appellant is under disability, or that he did the act or made the omission charged against him<sup>22</sup>;
- 96. (b) it directs<sup>23</sup> the entry of a judgment and verdict of acquittal<sup>24</sup>;
- 97. (c) on an appeal against conviction it substitutes a verdict of guilty of another offence; in a case where a special verdict has been found, it orders a different conclusion on the effect of that verdict to be recorded; or it is of the opinion<sup>25</sup> that the case is one where a finding of insanity or unfitness to plead should be substituted<sup>26</sup>;
- 98. (d) on an appeal against sentence<sup>27</sup>, it exercises its power<sup>28</sup> to sentence the appellant differently<sup>29</sup>;

99. (e) it allows, to any extent, an appeal<sup>30</sup> against an order made in cases of insanity or unfitness to plead<sup>31</sup>;
100. (f) it determines<sup>32</sup> an application for leave to appeal to the House of Lords<sup>33</sup>;
101. (g) the defendant appeals against an order or ruling<sup>34</sup> at a preparatory hearing or under the provisions<sup>35</sup> relating to prosecution appeals<sup>36</sup>;
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2701 (5) by the House of Lords where:
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102. (a) it determines an appeal, or application for leave to appeal, from the High Court in a criminal cause or matter<sup>37</sup>;
103. (b) it determines<sup>38</sup> an appeal, or application for leave to appeal, from the Court of Appeal<sup>39</sup>.
- 612

Where the court makes a defendant's costs order but is of the opinion that there are circumstances which make it inappropriate that the person in whose favour the order is made should recover the full amount<sup>40</sup>, the court must assess what amount would, in its opinion, be just and reasonable, and specify that amount in the order<sup>41</sup>.

The amount to be paid out of central funds in pursuance of a defendant's costs order must be specified in the order, in any case where the court considers it appropriate for the amount to be so specified and the person in whose favour the order is made agrees the amount; and in any other case, must be determined in accordance with regulations made by the Lord Chancellor<sup>42</sup>.

Where a person ordered to be retried is acquitted at his re-trial, the costs which may be ordered to be paid out of central funds include any costs which, at the original trial, could have been ordered to be so paid if he had been acquitted, and, if no such order was made in respect of his expenses on appeal, any sums for the payment of which such an order could have been made<sup>43</sup>.

A court should give reasons for declining to make a defendant's costs order<sup>44</sup>.

1 In *R v Crown Court at Preston, ex p Lancashire County Council, R v Crown Court at Burnley, ex p Lancashire County Council* [1998] 3 All ER 765, [1999] 1 WLR 142, DC, a decision under the Prosecution of Offences Act 1985 s 16(5)(a) (see note 17 *infra*), it was held that, although a local authority in whose care a defendant child was, was not the defendant, it was to be treated as the defendant for these purposes. 'Defendant' includes 'appellant' (as the context requires); and 'defendant' and 'appellant' include a person approved under the Criminal Appeal Act 1968 s 44A (as added) (see PARA 1977 *ante*): see the Prosecution of Offences Act 1985 s 21(1) (added by the Criminal Appeal Act 1995 s 29(1), Sch 2 para 15).

2 For the purposes of the Prosecution of Offences Act 1985 s 16 (as amended) (see the text and notes 3-43 *infra*), s 17 (see PARA 2062 *post*), the costs of any party to proceedings are to be taken to include the expense of compensating any witness for the expenses, trouble or loss of time properly incurred in or incidental to his attendance: s 21(4). For these purposes, 'witness' means any person properly attending to give evidence, whether or not he gives evidence or is called at the instance of one of the parties or of the court, but does not include a person attending as a witness to character only unless the court has certified that the interests of justice required his attendance: s 21(1). See also s 21(4A) (as added and amended); and PARA 2058 note 19 *ante*.

Where an interpreter is required because of the defendant's lack of English: (1) in any proceedings in a criminal cause or matter; (2) where an information charging the defendant with an offence is laid before a justice of the peace but not proceeded with and the expenses are incurred on the employment of an interpreter for the proceedings on the information; or (3) where the defendant is committed or sent for trial but not tried and the expenses are incurred on the employment of an interpreter for the proceedings in the Crown Court, the expenses properly incurred on his employment may not be treated as costs of any party to the proceedings: s 21(5), (6) (amended by the Access to Justice Act 1999 s 106, Sch 15, Pt V(3)). The Criminal Justice Act 2003 s 41, Sch 3 para 57(1), (4) amends the Prosecution of Offences Act 1985 s 21(5), (6) so as to refer to persons being sent rather than committed for trial, but at the date at which this volume states the law this amendment only has effect in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 or s 51A(3)(d) (as added) (see PARAS 1132-1133 *ante*).



Except as provided by or under the Prosecution of Offences Act 1985 Pt II (ss 16-21) (as amended), no costs may be allowed on the hearing or determination of, or of any proceedings preliminary or incidental to, an appeal to the Court of Appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended) (see PARA 1837 et seq ante): Prosecution of Offences Act 1985 s 21(2).

No interest is payable on costs awarded from central funds: *Westminster City Council v Wingrove* [1991] 1 QB 652, 92 Cr App Rep 179, DC.

Further provisions relating to a defendant's costs order are set out in PARAS 2067-2073 post.

3 A defendant's costs order is an order for the payment out of central funds, to the person in whose favour the order is made, of such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings: Prosecution of Offences Act 1985 ss 16(6), 21(1). For these purposes, 'proceedings' includes proceedings in any court below and, in relation to the determination of an appeal by any court, any application made to that court for leave to bring the appeal: s 21(1). Where a court orders that costs of a defendant or an appellant should be paid from central funds, the order will be for such amount as the court considers sufficient reasonably to compensate the party for expenses incurred by him in the proceedings. This will include the costs incurred in the proceedings in the lower courts unless for good reason the court directs that such costs are not included in the order, but it cannot include expenses incurred which do not directly relate to the proceedings themselves, such as loss of earnings. Where the party in whose favour the costs order is made is Criminal Defence Service funded he will only recover his personal costs: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at I.3.1, CA. Costs incurred for a solicitor's attendance when the defendant was on bail before being charged are expenses incurred in the proceedings: *R (on the application of Hale) v North Sefton Justices* [2002] EWHC 257 (Admin), [2002] All ER (D) 10 (Jan), (2002) Times 29 January, DC.

For the meaning of 'central funds' see PARA 2058 note 13 ante.

The Prosecution of Offences Act 1985 s 16(6) has effect, in relation to any case falling within s 16(1)(a) or s 16(2)(a) (see heads (1)(a), (2)(a) in the text), as if for the words 'in the proceedings' there were substituted the words 'in or about the defence': s 16(10).

A solicitor's fees and expenses incurred in acting for himself in defending a criminal charge before a magistrates' court are expenses for these purposes and may be paid out of central funds: *R v Stafford, Stone and Eccleshall Magistrates' Court, ex p Robinson* [1988] 1 All ER 430, [1987] 1 WLR 369, DC (decided under the Costs in Criminal Cases Act 1973 s 1(3) (repealed)).

Costs are incurred by a defendant if he, as a client, is personally responsible and liable for those costs, even though they are in fact paid by a third party, such as his employer, and may be paid out of central funds (*R v Miller (Raymond)* [1983] 3 All ER 186, 78 Cr App Rep 71 (decided under the Costs in Criminal Cases Act 1973 s 3(3)(a) (repealed))), or even though the defendant knew, when forming his contract with his solicitors, that he would be unlikely to be able to pay them (*R (on the application of McCormick) v Liverpool City Magistrates' Court; R (on the application of L) v Liverpool City Magistrates' Court* [2001] 2 All ER 705, 165 JP 3, DC). Payment to an informer by an appellant to support his appeal is not included in the phrase 'properly incurred by' the applicant: *R v Whitby* (1977) 65 Cr App Rep 257, CA (decided under the Costs in Criminal Cases Act 1973 s 7 (repealed)).

4 Prosecution of Offences Act 1985 s 16(1).

5 It is not a proper exercise of discretion where the justices' approach is not to award costs against the police: *R v Lytham Justices, ex p Carter* [1975] Crim LR 225, DC; see also *Mercer v Oldham* [1984] Crim LR 232, DC (both applying *David v Metropolitan Police Comr* [1962] 2 QB 135, [1962] 1 All ER 491n, DC). The magistrates cannot delegate this function to a clerk: *Bunston v Rawlings* [1982] 2 All ER 697, 75 Cr App Rep 40, DC (decided under the Costs in Criminal Cases Act 1973 s 2 (repealed)). Such an award of costs out of central funds should normally be made whether or not an order for costs between the parties is made, unless there are positive reasons for not doing so, as for example, where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it is: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at II.1.1, CA. See also *R v Dengie and Maldon Justices, ex p Saunders and Southend Transport Ltd* (1988) 152 JP 539, DC. Also see *R v Spens (No 2)* [1992] NIJR 528, Crown Ct (fact that defendant had brought prosecution on himself a reason for not making order, as to which see also *Mooney v Cardiff Magistrates' Court* (1999) 164 JP 220, DC; *R v South West Surrey Justices, ex p James* [2000] Crim LR 690, DC; *R v Stewart (Christopher)* [2004] 3 Costs LR 501).

6 As from a day to be appointed, any reference (however expressed) in any enactment which is or includes a reference to an information within the meaning of the Magistrates' Courts Act 1980 s 1 (or to the laying of such an information) is to be read as including a reference to a written charge (or to the issue of a written charge): Criminal Justice Act 2003 s 30(5)(a) (not yet in force): see MAGISTRATES vol 29(2) (Reissue) PARA 681. At the date at which this volume states the law no such day had been appointed.

Costs can be ordered in favour of the defendant where the magistrates' court has no jurisdiction to proceed because the information was laid outside the limitation period under the Magistrates' Courts Act 1980 s 127(1)

(see MAGISTRATES vol 29(2) (Reissue) PARA 589); and information is laid when the contents of the information and the fact that the prosecutor wished to pursue criminal process are brought to the attention of a magistrate or justices' clerk as part of the prosecution process: *Patel and Patel v Blakey* [1988] RTR 65, DC (decided under the Costs in Criminal Cases Act 1973 s 12(3) (repealed)). As to the laying of informations see PARA 912 ante.

7 Prosecution of Offences Act 1985 s 16(1)(a). In a case falling within head (1)(a) in the text the court is a magistrates' court for the area in question: s 16(1). Where an information is withdrawn, an application for costs may be made to a magistrates' court for the same area as that in which the information was laid either on the date on which the proceedings were withdrawn or at a later date: *R v Bolton Justices, ex p Wildish* (1982) 147 JP 309, DC.

8 Prosecution of Offences Act 1985 s 16(1)(b). As from a day to be appointed, s 16(1)(b) is repealed by the Criminal Justice Act 2003 ss 41, 332, Sch 3 para 57(1), (3), Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

9 Prosecution of Offences Act 1985 s 16(1)(c). The power in head (1)(c) in the text confers a wide discretion with which, unless not exercised judicially, the High Court will not interfere: *R v Scunthorpe Justices, ex p Holbrey* (1985) Times, 24 May, DC (decided under the Costs in Criminal Cases Act 1973 s 2(1) (repealed)). As to assessment of costs see *R v Dudley Magistrates' Court, ex p Power City Stores Ltd* (1990) 154 JP 654, Times, 18 January, CA; *R v Leeds Magistrates' Court, ex p Castle* [1991] Crim LR 770, DC; *R (on the application of Hale) v North Sefton Justices* [2002] EWHC 257 (Admin), [2002] All ER (D) 10 (Jan), (2002) Times, 29 January, DC.

Any magistrates' court has jurisdiction to make an order under the Prosecution of Offences Act 1985 s 16(1)(c), and not only the bench of magistrates which dismissed the information; an order does not have to be made in a timely manner: *R v Liverpool Magistrates' Court, ex p Abiaka* (1999) 163 JP 497, DC. An order can be made under the Prosecution of Offences Act 1985 s 16(1)(c) where information is dismissed on the prosecution offering no evidence against a defendant who has accepted a caution: *R (on the application of Stoddart) v Oxford Magistrates' Court* [2005] EWHC 2733 (Admin), 169 JP 683, [2005] All ER (D) 97 (Oct), DC.

The Prosecution of Offences Act 1985 s 16 (as amended) applies also to proceedings in a magistrates' court or the Crown Court in which it is alleged that an offender required to enter into a recognisance to keep the peace or be of good behaviour has failed to comply with a condition of that recognisance, as if that failure were an indictable offence: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 14(4).

10 See note 3 supra. Where a person is convicted of some count(s) in the indictment but acquitted on others, the court may exercise its discretion to make a defendant's costs order but may order that only part of the costs incurred be paid. Where the court considers that it would be inappropriate that the defendant recovers all the costs properly incurred, the amount must be specified in the order: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at II.2.2, CA.

11 Prosecution of Offences Act 1985 s 16(2)(a). The Criminal Justice Act 2003 s 41, Sch 3 para 57(1), (3)(b)(i) amends the Prosecution of Offences Act 1985 s 16(2)(a) so as to refer to persons being sent rather than committed for trial, but at the date at which this volume states the law this amendment only has effect in relation to cases sent for trial under the Crime and Disorder Act 1998 s 51 or s 51A(3)(d) (as added) (see PARAS 1132-1133 ante). See note 14 infra.

12 For these purposes, 'relevant transfer provision' means the Criminal Justice Act 1987 s 4 (as amended; prospectively repealed) or the Criminal Justice Act 1991 s 53 (as amended; prospectively repealed) (see PARA 1105 ante): Prosecution of Offences Act 1985 s 16(12) (added by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 25(b)). As from a day to be appointed, this definition of relevant transfer provision is repealed by the Criminal Justice Act 2003 Sch 3 para 57(1), (3)(c). At the date at which this volume states the law no such day had been appointed.

13 Prosecution of Offences Act 1985 s 16(2)(aa) (added by the Criminal Justice Act 1987 s 15, Sch 2 para 14). As from a day to be appointed, head (2)(b) in the text is repealed by the Criminal Justice Act 2003 ss 41, 331, Sch 3 para 57(1), (3)(b)(ii), Sch 37 Pt 4. At the date at which this volume states the law no such day had been appointed. See note 14 infra.

14 Prosecution of Offences Act 1985 s 16(2)(b). In respect of s 16(2)(a), (aa), (b) (s 16(2)(a) as amended; s 16(2)(aa) as added and amended) see also *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at II.2.1, CA which includes the same provision as that in *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at II.1.1, CA (see note 5 supra).

15 le under the Magistrates' Courts Act 1980 s 108 (as amended): see PARA 1980 ante.

16 Prosecution of Offences Act 1985 s 16(3).

17 Ibid s 16(5)(a). See also *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at II.3.1, CA. See *Cannings v Houghton (No 2)* [1977] RTR 507, DC (successful respondent to motorist's appeal by way of case stated granted an order for costs nine months after appeal dismissed).

18 See *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at II.4.1-II.4.2, CA. In considering whether to make an order, the court will have in mind the principles applied by the Crown Court in relation to an acquitted defendant: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at II.4.3, CA; as to these principles see *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at II.2.1-II.2.2, CA (see notes 5, 14 supra). Subject to rules of court made under the Supreme Court Act 1981 s 53(1) (power by rules to distribute business of Court of Appeal between its civil and criminal divisions: see COURTS vol 10 (Reissue) PARAS 639-640), the jurisdiction of the Court of Appeal under the Prosecution of Offences Act 1985 Pt II (ss 16-21) (as amended), or under regulations made under Pt II (as amended), must be exercised by the criminal division of that court; and references in Pt II (as amended) to the Court of Appeal are to be construed as references to that division: s 21(3). As from a day to be appointed the Supreme Court Act 1981 is renamed the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1. At the date at which this volume states the law no such day had been appointed. The Court of Appeal, Civil Division, has no power to order the payment of costs out of central funds to solicitors representing defendants in criminal trials who have successfully appealed against orders that they pay prosecution costs: *Steele Ford & Newton (a firm) v Crown Prosecution Service* [1994] 1 AC 22, [1993] 2 All ER 769, HL.

19 Ie an appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended): see PARA 1877 et seq ante. The Court of Appeal may also order the payment out of central funds of such sums as appear to it to be reasonably sufficient to compensate an appellant who is not in custody and who appears before it on, or in connection with, his appeal under the Criminal Appeal Act 1968 Pt I (as amended) (see PARA 1877 et seq ante): Prosecution of Offences Act 1985 s 19(4).

20 See PARA 1887 ante.

21 Ie under the Criminal Procedure (Insanity) Act 1964 s 4: see PARA 1265 ante.

22 Prosecution of Offences Act 1985 s 16(4)(a) (amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 7, Sch 3 para 7).

23 Ie under the Criminal Appeal Act 1968 s 8(1B) (as added and amended): see PARA 1896 ante.

24 Prosecution of Offences Act 1985 s 16(4)(aa) (added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 103).

25 Ie that the case falls within the Criminal Appeal Act 1968 s 6(1)(a) or (b): see PARA 1883 ante.

26 Prosecution of Offences Act 1985 s 16(4)(b) (amended by the Domestic Violence, Crime and Victims Act 2004 s 58(2), Sch 11). See note 18 supra.

27 Ie under the Criminal Appeal Act 1968 Pt I (as amended): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 46 et seq.

28 Ie under ibid s 11(3): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 49.

29 Prosecution of Offences Act 1985 s 16(4)(c).

30 Ie under the Criminal Appeal Act 1968 s 16A (as added): see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332, 334, 368.

31 Prosecution of Offences Act 1985 s 16(4)(d) (added by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 25).

32 Ie under the Criminal Appeal Act 1968 Pt II (ss 33-44): see PARA 1966 et seq ante.

33 Prosecution of Offences Act 1985 s 16(5)(c). As from a day to be appointed, the words 'Supreme Court' in s 16 are substituted for the words 'House of Lords' by the Constitutional Reform Act 2005 s 40, Sch 9 para 41(1), (3). At the date at which this volume states the law no such day had been appointed.

34 Ie under the Criminal Justice Act 1987 s 9(11) or under the Criminal Procedure and Investigations Act 1996 s 35(1) (see PARAS 1921-1922 ante): Prosecution of Offences Act 1985 s 16(4A) (added by the Criminal Justice Act 1987 s 15, Sch 2 para 15; and amended by the Constitutional Reform Act 2005 Sch 9 para 41(1), (3)).

35 le under the Criminal Justice Act 2003 Pt 9 (ss 57-74): see PARA 1898 et seq ante.

36 Prosecution of Offences Act 1985 s 16(4A) (as added (see note 34 supra); and amended by the Criminal Justice Act 2003 ss 69(1), (2), 312(1), (2)).

37 Prosecution of Offences Act 1985 s 16(5)(b) (prospectively amended: see note 33 supra). In the case of proceedings in the House of Lords, the costs payable to any person under s 16(5) or s 17(1) (see PARA 2062 post) must be determined by such officer as may be prescribed by order of the House of Lords: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 13(1). Subject to reg 13(1), the Costs in Criminal Cases (General) Regulations 1986 Pt III (regs 4-13) (costs out of central funds) do not apply to proceedings in the House of Lords: reg 13(2).

38 le under the Criminal Appeal Act 1968 s 35: see PARA 1974 ante.

39 Prosecution of Offences Act 1985 s 16(5)(d) (prospectively amended: see note 33 supra). Defence costs out of central funds cannot be awarded where a defendant successfully appeals under the Administration of Justice Act 1960 s 13 (see PARA 1920 ante) against a finding of contempt of court: *R v Moore* [2003] EWCA Crim 1574, [2003] 1 WLR 2170, [2003] 2 Cr App Rep 481.

40 le the full amount mentioned in the Prosecution of Offences Act 1985 s 16(6): see note 3 supra.

41 Ibid s 16(7). Where the court is required to specify the amount of costs to be paid, it cannot delegate the decision. Wherever practicable, instructing solicitors should provide advocates with details of costs incurred at each stage of proceedings. The court may, however, require the appropriate officer of the court to make inquiries to inform the court as to the costs incurred and may adjourn the proceedings for inquiries to be made, if necessary: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at I.4.3, CA.

42 Prosecution of Offences Act 1985 s 16(9). As to the amount of the order, see also s 16(6), (7) (see note 3 and the text to notes 40-41 supra); and the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 7. Except where the court has directed in an order for costs from central funds that only a specified sum is to be paid, the amount of costs to be paid is determined by the appropriate officer of the court. The court may, however, order the disallowance of costs out of central funds not properly incurred or direct the determining officer to consider whether or not specific items have been properly incurred. The court may also make observations regarding Criminal Defence Service funded costs: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at I.4.1, CA.

43 Prosecution of Offences Act 1985 s 16(11).

44 *R (on the application of Cunningham) v Exeter Crown Court* [2003] EWHC 184 (Admin), [2003] 2 Cr App Rep (S) 374, DC.

## UPDATE

### 2059 Award out of central funds; defence costs

NOTE 3--See *Brewer v Secretary of State for Justice* [2009] EWHC 987 (QB), [2009] 3 All ER 861; *R (on the application of Schwartz) v Highbury Corner Magistrates' Court* [2009] EWHC 1397 (Admin), [2009] All ER (D) 119 (Nov).

NOTE 16--An order should not be refused purely because the judge has stated that the defendant brought the prosecution entirely on himself or succeeded on a technicality: *R (on the application of Spiteri) v Crown Court at Basildon* [2009] EWHC 665 (Admin), (2009) 173 JP 327. See also *R (on the application of Pluckrose) v Crown Court at Snaresbrook* [2009] EWHC 1506 (Admin), (2009) 173 JP 492, DC (Crown Court entitled not to award costs as it allowed appeal as act of mercy).

NOTES 18, 33--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 37--References to the House of Lords are now to the Supreme Court: SI 1986/1335 reg 13(1), (2) (amended by SI 2009/2720).

NOTE 42--SI 1986/1335 reg 7 substituted: SI 2009/2720.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23.

COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/B. COST ORDERS/2060. Costs against legal representatives etc.

## **2060. Costs against legal representatives etc.**

In any criminal proceedings<sup>1</sup>:

- 2702 (1) the Court of Appeal<sup>2</sup>;
- 2703 (2) the Crown Court<sup>3</sup>; or
- 2704 (3) a magistrates' court<sup>4</sup>,

may disallow, or (as the case may be) order the legal or other representative<sup>5</sup> concerned to meet, the whole of any wasted costs<sup>6</sup> or such part of them as may be determined in accordance with regulations<sup>7</sup>. Such regulations must provide that a legal or other representative against whom action is so taken by a magistrates' court may appeal to the Crown Court and that a legal or other representative against whom action is so taken by the Crown Court may appeal to the Court of Appeal<sup>8</sup>.

The jurisdiction to make such an order (known as a 'wasted costs order') is not restricted to making orders against the applicant's own legal representatives<sup>9</sup>.

1 As to 'criminal proceedings' see PARA 2058 note 2 ante. For these purposes, 'in any criminal proceedings' includes proceedings initiated by summons for the attendance of a witness before the Crown Court to produce a document or documents: *Re a Solicitor (Wasted Costs Order) (No 1 of 1994)* [1996] 3 FCR 365, [1996] 1 FLR 40, CA.

2 Prosecution of Offences Act 1985 s 19A(1)(a) (s 19A added by the Courts and Legal Services Act 1990 s 111).

3 Prosecution of Offences Act 1985 s 19A(1)(b) (as added: see note 2 supra).

4 Ibid s 19A(1)(c) (as added: see note 2 supra).

5 'Legal or other representative', in relation to any proceedings, means a person who is exercising a right of audience, or a right to conduct litigation, on behalf of any party to the proceedings: ibid s 19A(3) (as added: see note 2 supra).

6 'Wasted costs' means any costs incurred by a party: (1) as a result of any improper, unreasonable or negligent act or omission on the part of any representative or any employee of a representative; or (2) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay: ibid s 19A(3) (as added: see note 2 supra).

'Improper' covers any significant breach of a substantial duty imposed by the relevant code of professional conduct, as well as conduct which would be improper according to the consensus of professional opinion, whether it violated the letter of a professional code or not. 'Unreasonable' describes conduct which was vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct was the product of excessive zeal and not improper motive, since the acid test is whether the conduct permitted of a reasonable explanation. 'Negligent' is to be understood in an untechnical way to denote failure to act with the competence reasonably expected of ordinary members of the profession: *Ridehalgh v Horsefield* [1994] Ch 205, [1994] 3 All ER 848, CA (case concerned with identical definition of 'wasted costs', for purposes of a civil wasted costs order, in the Supreme Court Act 1981 s 51(7)). See also *R v Duffy (Michael) (wasted costs)* [2004] EWCA Crim 330, [2004] PNLR 717.

It is generally appropriate for the trial judge to preside in wasted costs proceedings brought against a legal representative, even where they are brought on the basis of alleged incompetence and the trial judge is a witness of fact: *Re a Barrister (Wasted Costs Order)* [2001] EWCA Crim 1728, [2002] 1 Cr App Rep 207.

7 Prosecution of Offences Act 1985 s 19A(1) (as added: see note 2 supra). 'Regulations' means regulations made by the Lord Chancellor: s 19A(7) (as so added). For guidance as to the making of such an order see *Re A Barrister (Wasted Costs Order No 1 of 1991)* [1993] QB 293, [1992] 3 All ER 429, CA; *Re a Barrister (Wasted Costs Order)* [2001] EWCA Crim 1728, [2002] 1 Cr App Rep 207; *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at VIII.1.1-VIII.2.1, CA. An order should not be made without taking account of the daily demands of practice, and the difficulties associated with time estimates: *Re A Barrister (Wasted Costs Order No 4 of 1993)* (1995) Times 21 April, CA. Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the court should not make an order unless, proceeding with extreme care, it is: (1) satisfied that there was nothing the practitioner could say, if unconstrained, to resist the order; and (2) that it was in all the circumstances fair to make the order: *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721.

Where the court disallows or orders a legal or other representative to meet any wasted costs, the order for costs must specify the sum to be paid or disallowed. Where the court is required to specify the amount of costs to be paid it cannot delegate the decision. Wherever practicable those instructing counsel should provide counsel with details of costs incurred at each stage in the proceedings. The court may, however, require the appropriate officer of the court to make inquiries to inform the court as to the costs incurred and may adjourn the proceedings for inquiries to be made if necessary: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at I.4.2-I.4.3, CA.

A wasted costs order may provide for the whole or any part of the wasted costs to be disallowed or ordered to be paid and the court must specify the amount of such costs: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3B(1) (regs 3A-3D added by SI 1991/789).

Where a wasted costs order has been made, the court must notify any interested party of the order and the amount disallowed or ordered to be paid: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3B(4) (as so added; and amended by SI 2004/2408). 'Interested party' means the party benefiting from the wasted costs order and, where he was receiving services funded for him as part of the Criminal Defence Service, or an order for the payment of costs out of central funds was made in his favour, includes the authority responsible for determining costs payable in respect of work done under the representation order or out of central funds as the case may be: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3A (as so added; and amended by SI 2004/2408). Before making a wasted costs order the court must allow the legal or other representative and any party to the proceedings to make representations: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3B(2) (as so added). When making a wasted costs order the court may take into account any other order as to costs in respect of the proceedings and may take the wasted costs order into account when making any other such order: reg 3B(3) (as so added; and amended by SI 2004/2408).

Where the person required to make a payment in respect of sums due under a wasted costs order fails to do so, the payment may be recovered summarily as a sum adjudged to be paid as a civil debt by order of a magistrates' court by the party benefiting from the order, save that where he was receiving services funded for him as part of the Criminal Defence Service or an order for the payment of costs out of central funds was made in his favour, the power to recover is exercisable by the Lord Chancellor: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3D (as so added; and amended by SI 2004/2408).

8 Prosecution of Offences Act 1985 s 19A(2) (as added: see note 2 supra). A legal or other representative against whom the wasted costs order is made may appeal: (1) in the case of an order made by a magistrates' court, to the Crown Court; and (2) in the case of an order made at first instance by the Crown Court, to the Court of Appeal: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3C(1) (as added: see note 7 supra). An appeal must be instituted within 21 days of the wasted costs order being made by the appellant's giving notice in writing to the court which made the order, stating the grounds of appeal: reg 3C(2) (as so added). The appellant must serve a copy of the notice of appeal and grounds, including any application for an extension of time in which to appeal, on any interested party: reg 3C(3) (as so added).

The time limit within which an appeal may be instituted may, for good reason, be extended before or after it expires: (a) in the case of an appeal to the Crown Court, by a judge of that court; (b) in the case of an appeal to the Court of Appeal, a judge of the High Court or Court of Appeal, or by the Registrar of Criminal Appeals, and in each case the court to which the appeal is made must give notice of the extension to the appellant, the court which made the wasted costs order and any interested party: reg 3C(4) (as so added; and amended by SI 2004/2408).

The court must give notice of the hearing date to the appellant, the court which made the wasted costs order and any interested party and must allow the interested party to make representations which may be made orally or in writing: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3C(5) (as so added). The court may affirm, vary or revoke the order as it thinks fit and must notify its decision to the appellant, any interested party and the court which made the order: reg 3C(6) (as so added). On an appeal under reg 3C (as added), there is no power to award the costs of a successful appellant out of central funds: *Steele Ford & Newton (a firm) v Crown Prosecution Service* [1994] 1 AC 22, [1993] 2 All ER 769, HL. See also *Re A Barrister (Wasted Costs Order) (No 1 of 1991)* [1993] QB 293, [1992] 3 All ER 429, CA.

9 *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721, HL. In the case of barristers such an order is not restricted to their conduct when exercising their right of audience, since such an order can be made in respect of conduct immediately relevant to that right but not involving advocacy in open court: *Medcalf v Mardell* *supra*.

## **UPDATE**

### **2060 Costs against legal representatives etc**

NOTE 6--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 7--SI 1986/1335 reg 3B(2), (4) omitted: SI 2009/2720.

NOTE 8--SI 1986/1335 reg 3C(2)-(5) omitted, reg 3C(6) amended: SI 2009/2720.



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## **2061. Provision for award of costs against third parties.**

The Lord Chancellor may by regulations<sup>1</sup> make provision empowering magistrates' courts, the Crown Court and the Court of Appeal to make a third party costs order, that is an order as to the payment of costs incurred by a party to criminal proceedings by a person who is not a party to those proceedings ('the third party')<sup>2</sup> if the following condition is satisfied:

- 2705 (1) there has been serious misconduct (whether or not constituting a contempt of court) by the third party<sup>3</sup>; and
- 2706 (2) the court considers it appropriate, having regard to that misconduct, to make a third party costs order against him<sup>4</sup>.

The Lord Chancellor has made such regulations<sup>5</sup>, which provide as follows where there are, or have been, criminal proceedings in a magistrates' court, the Crown Court and the Court of Appeal<sup>6</sup>. If:

- 2707 (a) there has been serious misconduct (whether or not constituting a contempt of court) by a third party<sup>7</sup>; and
- 2708 (b) the court<sup>8</sup> considers it appropriate, having regard to that misconduct, to make a third party costs order<sup>9</sup> against him<sup>10</sup>,

the court may order the third party to pay all or part of the costs incurred or wasted by any party<sup>11</sup> as a result of the misconduct<sup>12</sup>.

The court may make a third party costs order at any time during or after the criminal proceedings; and on the application of any party or of its own initiative (but not otherwise)<sup>13</sup>.

The court must make a third party costs order during the proceedings only if it decides that there are good reasons to do so, rather than making the order after the proceedings, and it must notify the parties and the third party of those reasons and allow any of them to make representations<sup>14</sup>.

Before making a third party costs order the court must allow the third party and any party to make representations and may hear evidence<sup>15</sup>. When making a third party costs order the court may vary or take into account any other order as to costs in respect of the criminal proceedings and may take the third party costs order into account when making any other order as to costs in respect of the criminal proceedings<sup>16</sup>. When a third party costs order has been made the court must notify the third party and any interested party<sup>17</sup> of the order and the amount ordered to be paid<sup>18</sup>.

An application by a party ('the applicant') for a third party costs order must be in writing and must contain:

- 2709 (i) the name and address of the applicant<sup>19</sup>;
- 2710 (ii) the names and addresses of the other parties<sup>20</sup>;
- 2711 (iii) the name and address of the third party against whom the order is sought<sup>21</sup>;

- 2712 (iv) the date of the end of the criminal proceedings<sup>22</sup>;
- 2713 (v) a summary of the facts upon which the applicant intends to rely in making the application, including details of the alleged misconduct of the third party<sup>23</sup>.

The application must be sent to the appropriate officer<sup>24</sup> and, upon receiving it, the appropriate officer must serve<sup>25</sup> copies of it on the third party and on the other parties<sup>26</sup>.

Where the court decides that it might make a third party costs order of its own initiative the appropriate officer must serve notice in writing accordingly on the third party and the parties<sup>27</sup>. At the same time as serving such a notice the appropriate officer must serve a summary of the reasons why the court might make a third party costs order, including details of the alleged misconduct of the third party<sup>28</sup>. When the appropriate officer serves copies<sup>29</sup> or serves notice<sup>30</sup> he must at the same time serve notice on the parties and the third party of the time and place fixed for the hearing<sup>31</sup>. At the time notified the court may proceed in the absence of the third party and of any party if it is satisfied that they have been duly served with the notice of the time and place of the hearing<sup>32</sup> and the copy of the application or (as the case may be) the notices given<sup>33</sup>, but the court may set aside any third party costs order if it is later shown that the third party did not receive them<sup>34</sup>.

A third party against whom a third party costs order is made may appeal in the case of an order made by a magistrates' court, to the Crown Court; and in the case of an order made at first instance by the Crown Court, to the Court of Appeal<sup>35</sup>. An appeal must be instituted within 21 days of the third party costs order being made by the appellant giving notice in writing to the court which made the order, stating the grounds of appeal<sup>36</sup>. The appellant must serve a copy of the notice of appeal and grounds, including any application for extension of time in which to appeal, on any interested party<sup>37</sup>. The time limit within which an appeal may be instituted may, for good reason, be extended before or after it expires:

- 2714 (A) in the case of an appeal to the Crown Court, by a judge of that court;
- 2715 (B) in the case of an appeal to the Court of Appeal, by a judge of the High Court or Court of Appeal, or by the Registrar of Criminal Appeals,

and in each case the court to which the appeal is made ('the appeal court') must give notice of the extension to the appellant, the court which made the third party costs order and any interested party<sup>38</sup>. The appeal court must give notice of the hearing date to the appellant, the court which made the third party costs order and any interested party and must allow the interested party to make representations which may be made orally or in writing<sup>39</sup>. The appeal court may affirm, vary or revoke the order as it thinks fit and must notify its decision to the appellant, any interested party and the court which made the order<sup>40</sup>.

Where the person required to make a payment in respect of sums due under a third party costs order fails to do so, the payment may be recovered summarily as a sum adjudged to be paid as a civil debt by order of a magistrates' court by the party benefiting from the order, save that where he was receiving services funded for him as part of the Criminal Defence Service or an order for the payment of costs out of central funds was made in his favour, the power to recover is exercisable by the Lord Chancellor<sup>41</sup>.

1 Regulations made under the Prosecution of Offences Act 1985 s 19B (added by the Courts Act 2003 s 93) may, in particular:

- 302 (1) specify types of misconduct in respect of which a third party costs order may not be made (Prosecution of Offences Act 1985 s 19B(4)(a) (as so added));
- 303 (2) allow the making of a third party costs order at any time (s 19B(4)(b) (as so added));

304 (3) make provision for any other order as to costs which has been made in respect of the proceedings to be varied on, or taken account of in, the making of a third party costs order (s 19B(4)(c) (as so added));

305 (4) make provision for account to be taken of any third party costs order in the making of any other order as to costs in respect of the proceedings (s 19B(4)(d) (as so added)).

Regulations made under s 19B (as added) in relation to magistrates' courts must provide that the third party may appeal to the Crown Court against a third party costs order made by a magistrates' court: s 19B(5) (as so added). Regulations made under s 19B (as added) in relation to the Crown Court must provide that the third party may appeal to the Court of Appeal against a third party costs order made by the Crown Court: s 19B(6) (as so added).

2 Ibid s 19B(2) (as added: see note 1 supra).

3 Ibid s 19B(1), (3)(a) (as so added).

4 Ibid s 19B(1), (3)(b) (as so added).

5 See the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, regs 3E-3H (added by SI 2004/2408). A third party costs order may not be made in respect of any misconduct which occurred before 18 October 2004: Costs in Criminal Cases (General) (Amendment) Regulations 2004, SI 2004/2408, reg 2(1). Where a court makes a third party costs order in respect of misconduct which occurred on or after 18 October 2004, it must disregard any misconduct which occurred before that date: reg 2(2).

6 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3E(1) (as added: see note 5 supra).

7 Ibid reg 3F(1)(a) (as added: see note 5 supra). A 'third party' referred to in the text means a person who is not a party: reg 3E(2) (as so added).

8 Ie the court in which the criminal proceedings are taking, or took, place: ibid reg 3E(2) (as added: see note 5 supra).

9 Ie an order as to the payment, by a third party, of costs incurred by a party in accordance with ibid reg 3F (as added) (see the text and notes 10-18 infra): reg 3E(2) (as added: see note 5 supra).

10 Ibid reg 3F(1)(b) (as added: see note 5 supra).

11 Ie a party to the criminal proceedings: ibid reg 3E(2) (as added: see note 5 supra).

12 Ibid reg 3F(1) (as added: see note 5 supra).

13 Ibid reg 3F(2) (as added: see note 5 supra).

14 Ibid reg 3F(3) (as added: see note 5 supra).

15 Ibid reg 3F(4) (as added: see note 5 supra).

16 Ibid reg 3F(5) (as added: see note 5 supra). A third party costs order must specify the amount of costs to be paid in pursuance of the order: reg 3F(6) (as so added).

17 'Interested party' means the party benefiting from the third party costs order and, where he was receiving services funded for him as part of the Criminal Defence Service, includes the authority responsible for determining costs payable in respect of work done under the representation order or out of central funds as the case may be: ibid reg 3E(2) (as added: see note 5 supra).

18 Ibid reg 3F(7) (as added: see note 5 supra).

19 Ibid reg 3G(1), (3)(a) (as added: see note 5 supra).

20 Ibid reg 3G(1), (3)(b) (as added: see note 5 supra).

21 Ibid reg 3G(1), (3)(c) (as added: see note 5 supra).

22 Ibid reg 3G(1), (3)(d) (as added: see note 5 supra).

23 Ibid reg 3G(1), (3)(e) (as added: see note 5 supra).

24 le: (1) in relation to a magistrates' court, a designated officer (as defined in the Courts Act 2003 s 37(1) (namely a person appointed by the Lord Chancellor under s 2(1) or provided under a contract by virtue of s 2(4), and designated by the Lord Chancellor in relation to that court)); (2) in relation to the Crown Court, an officer appointed by the Lord Chancellor; and (3) in relation to the Court of Appeal, the Registrar of Criminal Appeals: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3G(1), (2) (as added: see note 5 supra).

25 le in accordance with rules of court: *ibid* reg 3G(1), (2) (as added: see note 5 supra).

26 *Ibid* reg 3G(1), (4) (as added: see note 5 supra).

27 *Ibid* reg 3G(1), (5) (as added: see note 5 supra).

28 *Ibid* reg 3G(1), (6) (as added: see note 5 supra).

29 le under *ibid* reg 3G(1), (4) (as added) (see the text to note 26 supra).

30 le under *ibid* reg 3G(1), (5) (as added) (see the text to note 27 supra).

31 *Ibid* reg 3G(1), (7) (as added: see note 5 supra).

32 le under *ibid* reg 3G(1), (7) (as added) (see the text to note 31 supra).

33 le under *ibid* reg 3G(1), (5), (6) (as added) respectively (see the text to notes 27-28 supra).

34 *Ibid* reg 3G(1), (8) (as added: see note 5 supra).

35 *Ibid* reg 3H(1) (as added: see note 5 supra).

36 *Ibid* reg 3H(2) (as added: see note 5 supra).

37 *Ibid* reg 3H(3) (as added: see note 5 supra).

38 *Ibid* reg 3H(4) (as added: see note 5 supra).

39 *Ibid* reg 3H(5) (as added: see note 5 supra).

40 *Ibid* reg 3H(6) (as added: see note 5 supra).

41 *Ibid* reg 3I (as added: see note 5 supra).

## **UPDATE**

### **2061 Provision for award of costs against third parties**

TEXT AND NOTES 13-16--SI 1986/1335 reg 3F(2)-(5) omitted: SI 2009/2720.

NOTE 17--Definition of 'interested party' amended: SI 2008/2448.

TEXT AND NOTES 19-34--SI 1986/1335 reg 3G omitted: SI 2009/2720.

TEXT AND NOTES 36-39--SI 1986/1335 reg 3H(2)-(5) omitted: SI 2009/2720.

TEXT AND NOTE 40--SI 1986/1335 reg 3H(6) omitted: SI 2009/2720.

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/B. COST ORDERS/2062. Award out of central funds; private prosecution costs.

## **2062. Award out of central funds; private prosecution costs.**

A court may, in any proceedings<sup>1</sup> in respect of an indictable offence, and in any proceedings before a Divisional Court of the Queen's Bench Division or the House of Lords in respect of a summary offence, order the payment out of central funds<sup>2</sup> of such amount as the court considers reasonably sufficient to compensate the prosecutor<sup>3</sup> for any expenses properly incurred by him in the proceedings<sup>4</sup>. However, no order may be made in favour of: (1) a public authority<sup>5</sup>; or (2) a person acting on behalf of a public authority or in his capacity as an official appointed by such an authority<sup>6</sup>.

Where a court makes such an order but is of the opinion that there are circumstances which make it inappropriate that the prosecution should recover the full amount, the court must: (a) assess what amount would, in its opinion, be just and reasonable<sup>7</sup>; and (b) specify that amount in the order<sup>8</sup>. The amount to be paid out of central funds in pursuance of such an order must: (i) be specified in the order, in any case where the court considers it appropriate for the amount to be so specified and the prosecutor agrees the amount<sup>9</sup>; and (ii) in any other case, be determined in accordance with regulations<sup>10</sup> made by the Lord Chancellor<sup>11</sup>.

1 For the meaning of 'proceedings' see PARA 2059 note 2 ante.

2 For the meaning of 'central funds' see PARA 2058 note 13 ante.

3 Where the conduct of proceedings to which the Prosecution of Offences Act 1985 s 17(1) applies is taken over by the Crown Prosecution Service, s 17(1) has effect as if it referred to the prosecutor who had the conduct of the proceedings before the intervention of the Service and to expenses incurred by him up to the time of intervention: s 17(5). As to the Crown Prosecution Service see PARA 1079 et seq ante.

Further provisions relating to an order for private prosecution costs are set out in PARAS 2067-2073 post.

4 Ibid s 17(1). As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords' by the Constitutional Reform Act 2005 s 40, Sch 9 para 41(1), (3). At the date at which this volume states the law no such day had been appointed. The Prosecution of Offences Act 1985 ss 17, 18 (as amended) (see PARA 2063 post) apply to proceedings in the Crown Court in respect of a person committed by a magistrates' court to that court: (1) with a view to his being sentenced for an indictable offence in accordance with the Powers of Criminal Courts (Sentencing) Act 2000 s 5 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 17); (2) with a view to his being sentenced by the Crown Court under the Bail Act 1976 s 6(6) (see PARA 1199 ante) or s 9(3) (see PARA 1201 ante); or (3) with a view to the making of a hospital order with an order restricting his discharge under the Mental Health Act 1983 Pt III (ss 35-55) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 332 et seq), as they apply where a person is convicted in proceedings before the Crown Court: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 14(1) (amended by SI 1992/2956).

Where a court orders that the costs of a private prosecutor should be paid from central funds, the order will be for such amount as the court considers sufficient reasonably to compensate the party for expenses incurred by him in the proceedings. This will include the costs incurred in the proceedings in the lower courts unless for good reason the court directs that such costs are not included in the order, but it cannot include expenses incurred which do not directly relate to the proceedings themselves, such as loss of earnings: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at I.3, CA.

5 Prosecution of Offences Act 1985 s 17(2)(a). For these purposes, 'public authority' means: (1) a police force within the meaning of s 3 (see PARA 1080 note 5 ante); (2) the Crown Prosecution Service or any other government department; (3) a local authority or other authority or body constituted for the purposes of: (a) the public service or of local government; or (b) carrying on under national ownership any industry or undertaking or part of an industry or undertaking; or (4) any other authority or body whose members are appointed by Her

Majesty or by any Minister of the Crown or government department or whose revenues consist wholly or mainly of money provided by Parliament: s 17(6).

6 Ibid s 17(2)(b). See also *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at III.1.1, CA.

7 Prosecution of Offences Act 1985 s 17(3)(a).

8 Ibid s 17(3)(b).

9 Ibid s 17(4)(a). Except where the court has directed in an order for costs from central funds that only a specified sum is to be paid, the amount of costs to be paid is determined by the appropriate officer of the court. The court may, however, order the disallowance of costs out of central funds not properly incurred or direct the determining officer to consider whether or not specific items have been properly incurred. The court may also make observations regarding Criminal Defence Service funded costs. The order for costs must specify the sum to be paid. Where the court is required to specify the amount of costs to be paid, it cannot delegate the decision. Wherever practicable, those instructing counsel should provide counsel with details of the costs incurred at each stage of proceedings. The court may, however, require the appropriate officer of the court to make inquiries to inform the court as to the costs incurred and may adjourn the proceedings for inquiries to be made if necessary: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at I.4.1-I.4.2, CA.

10 Ie regulations made under the Prosecution of Offences Act 1985 s 20: see PARA 2058 ante.

11 Ibid s 17(4)(b). See note 9 supra.

## **UPDATE**

### **2062 Award out of central funds; private prosecution costs**

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/B. COST ORDERS/2063. Award of costs against defendant.

### **2063. Award of costs against defendant.**

Where:

- 2716 (1) any person is convicted of an offence before a magistrates' court;
- 2717 (2) the Crown Court dismisses an appeal against such a conviction or against the sentence imposed on that conviction; or
- 2718 (3) any person is convicted of an offence before the Crown Court,

the court may make such order as to the costs<sup>1</sup> to be paid by the defendant<sup>2</sup> to the prosecutor as it considers just and reasonable<sup>3</sup>.

Where the Court of Appeal dismisses:

- 2719 (a) an appeal or application for leave to appeal<sup>4</sup>;
- 2720 (b) an application by the defendant for leave to appeal to the House of Lords<sup>5</sup>;
- or
- 2721 (c) an appeal or application for leave to appeal from any order or ruling by a judge in a preparatory hearing<sup>6</sup>,

the court may make such order as to the costs to be paid by the defendant, to such person as may be named in the order, as it considers just and reasonable<sup>7</sup>.

Where the Court of Appeal reverses or varies<sup>8</sup> a ruling on an appeal against a ruling by the trial judge, it may make such order as to costs to be paid by the defendant, to such person named in the order, as it considers just and reasonable<sup>9</sup>.

The amount to be paid by the defendant in pursuance of such an order must be specified in the order<sup>10</sup>.

Where any person is convicted of an offence before a magistrates' court and: (i) under the conviction the court orders payment of any sum as a fine, penalty, forfeiture or compensation; and (ii) the sum so ordered to be paid does not exceed £5, the court may not order the defendant to pay any costs under the above provisions unless in the particular circumstances of the case it considers it right to do so<sup>11</sup>.

Where any person under the age of 18 is convicted of an offence before a magistrates' court, the amount of any costs ordered to be paid by the defendant under the above provisions may not exceed the amount of any fine imposed on him<sup>12</sup>.

<sup>1</sup> The discretion to award costs extends to an award relating to an amount in respect of the time of the officer or person who investigated the alleged offence; prima facie such an award should be made: *Neville v Gardner Merchant Ltd* (1983) 5 Cr App Rep (S) 349, DC (decided under the Costs in Criminal Cases Act 1973 s 2(2) (repealed)); followed in *R v Associated Octel Co Ltd* [1997] 1 Cr App Rep (S) 435, CA.

<sup>2</sup> Not every defendant convicted after pleading not guilty should be ordered to pay the costs of the prosecution, but there is a discretion which the judge should exercise if he takes into account such matters as the fact that the defendant has chosen to contest a strong case against him or the fact that the defendant must

have known the real truth of the matter. If the defendant, knowing his guilt, has elected trial by jury, it is permissible, if the trial judge decides on all the facts that costs ought to be paid, to refer to the waste of time and money when passing sentence: *R v Singh* (1982) 4 Cr App Rep (S) 38, CA (decided under the Costs in Criminal Cases Act 1973 (repealed)). As to the meaning of 'defendant' see PARA 2059 note 1 ante. Such a rule of practice does not necessarily have to be followed in all cases: *R v Mountain*, *R v Kilminster* (1978) 68 Cr App Rep 41, CA.

3 Prosecution of Offences Act 1985 s 18(1). An order should be made where the court is satisfied that the offender or appellant has the means and ability to pay: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at VI.1.4, CA. It is unlawful to impose an order for costs which a defendant has no chance of paying in the expectation that it would be paid by a third party, even if the third party is a discretionary trust under the control of the defendant's family: *R v Barnet Magistrates' Court, ex p Cantor* [1998] 2 All ER 333, [1999] 1 WLR 334, DC. It is wholly wrong to impose an order in relation to costs, backed with a sentence of imprisonment, unless there is evidence from which the trial judge can infer that the sum concerned can be paid, and, if it is not paid, it is as a result of the wilful default of the defendant: *R v Carter* (1980) 2 Cr App Rep (S) 71, CA; *R v Murruzzaman* (1979) 1 Cr App Rep (S) 320, CA. Where a fine is imposed, a costs order should not be disproportionate to the level of fine and, if the total of fine and costs is excessive, the latter should be reduced accordingly: *R v Northallerton Magistrates' Court, ex p Dove* [2000] 1 Cr App Rep (S) 136, (1999) 163 JP 657, DC, considering *R v Whalley* (1972) 56 Cr App Rep 304, CA (wrong in principle to impose small fine and heavy order for costs); *R v Firmston* (1984) 6 Cr App Rep (S) 189, DC (order for costs and fine should go in step); *R v Nottingham Magistrates' Court, ex p Fohmann* (1986) 84 Cr App Rep 316, DC (order for costs should be at reasonable level having regard to fine imposed); *R v Jones (NCJ)* (1988) 10 Cr App Rep (S) 95, DC (see below); *R v Bushell* (1980) 2 Cr App Rep (S) 77, CA (no necessary relationship between fine and costs); *Cozens v Hobbs* [1999] COD 24, DC (to same effect). The order as made should be within the means of the person ordered to pay, such that it can be paid off within a reasonable time, which should be about 12 months (*R v Nottingham Magistrates' Court, ex p Fohmann* supra (decided under the Costs in Criminal Cases Act 1973 s 2(2) (repealed))). See, however, *R v Olliver*, *R v Olliver* (1989) 11 Cr App Rep (S) 10, CA (a period of two years for payment is seldom too long) and *R v Rollco Screw and Rivet Co Ltd* [1999] 2 Cr App Rep (S) 436, CA (legitimate for a costs order against a corporate defendant to be payable over a longer period of time than would be reasonable for an individual defendant). If the defendant fails to provide evidence of his means, the court is entitled to draw reasonable inferences as to his means from the evidence and all the circumstances of the case: *R v Northallerton Magistrates' Court, ex p Dove* supra. Although it is wrong in principle to award a very heavy costs order after imposing a small fine, it is right to consider the lateness of the guilty plea: *R v Jones* (1988) 10 Cr App Rep (S) 95, DC. The conduct of the defendant should be taken into account, but an order to pay costs cannot be imposed as a penalty: *R v Hall* [1989] Crim LR 228, CA. Where a defendant was convicted at a third trial on some counts and acquitted on others, after two previous trials had been aborted due to the unsatisfactory nature of CCTV evidence, it was held that the judge had been wrong in making a prosecution costs order by adopting a global approach. The defendant should not have been ordered to pay the prosecution costs of the aborted trials, and allowance should have been made for the defendant's acquittals on some counts: *R v B & Q plc* [2005] EWCA Crim 2297, (2005) Times, 3 November. There is no rule that an order for costs cannot be made against a defendant who pleads guilty; such a plea is a factor to be taken into account in deciding whether to make an order, and its weight depends on the nature of the case: *R v Maher* [1983] QB 784, 76 Cr App Rep 309, CA. Where there are several defendants and only some of them have the means to pay costs, it is wrong to divide up the total costs between those defendants with the means; if it is impossible to say what part of the total costs is attributable to any defendant, the court should divide the total costs between all the defendants and order those defendants with the means to pay their share only: *R v Ronson*, *R v Parnes* (1992) 13 Cr App Rep (S) 153, CA. Contrast *R v Harrison (Bernard)* (1993) 14 Cr App Rep (S) 419, CA (where several defendants, usually appropriate to look to see what would be a reasonable estimate of costs if each defendant were tried alone; fact that a particular defendant was the principal defendant relevant; substantial costs order upheld, although no order had been made against the defendant who had played a minor role); *R v Fresha Bakeries Ltd* [2002] EWCA Crim 1451, [2003] 1 Cr App Rep (S) 202 (greater amount of costs order against corporate defendant than against individual co-defendants upheld because corporate defendant held to bear a greater responsibility than the individuals).

On an appeal to the Crown Court, the Crown Court is not expected normally to interfere with a costs order made by a magistrates' court: *Johnson v Royal Society for the Prevention of Cruelty to Animals* (2000) 164 JP 345, DC.

An order for costs against the defendant is a 'sentence' for the purposes of an appeal to the Court of Appeal against sentence (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 45): *R v Hayden* [1975] 2 All ER 558, 60 Cr App Rep 304, CA. An order for costs against the defendant by a magistrates' court cannot be appealed to the Crown Court, but an appeal can be made to the High Court if the magistrates' court acted so far outside the normal discretionary limits as to show that they acted on an improper principle, took into consideration something which they should not or failed to take into consideration something which they should have considered: *R v Tottenham Justices, ex p Joshi* [1982] 2 All ER 507, 75 Cr App Rep 72, DC.

As to the application of the Prosecution of Offences Act 1985 s 18 (as amended: see note 7 infra) in the case of persons committed by a magistrates' court to the Crown Court see PARA 2062 note 4 ante. Section 18 (as amended) applies to proceedings in the Crown Court: (1) in respect of a person committed by a magistrates' court as an incorrigible rogue under the Vagrancy Act 1824 s 5 (as amended; prospectively repealed) (see PARA



835 ante) as if he were committed for trial before the Crown Court and as if the committing court were examining justices; and (2) in respect of an appeal under the Vagrancy Act 1824 s 14 (as amended) (see PARA 836 ante) as if the hearing of the appeal were a trial on indictment and as if the magistrates' court from which the appeal was brought were examining justices: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 14(2). The Prosecution of Offences Act 1985 s 18 (as amended) applies to proceedings in a magistrates' court or the Crown Court: (a) for dealing with an offender under the Powers of Criminal Courts (Sentencing) Act 2000 s 13, Sch 3 paras 4, 5 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 234-235); (b) under ss 119(1), (2), 123, 125 (repealed); (c) under Sch 5 paras 2, 3 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 268-269), as if the offender had been tried in such proceedings for the offence for which the order was made or the sentence passed: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 14(3) (amended by SI 1992/2956).

Where the court orders an offender to pay costs to the prosecutor, or orders one party to pay costs to another party, the order for costs must specify the sum to be paid. Where the court is required to specify the amount of costs to be paid, it cannot delegate the decision. Wherever practicable, those instructing counsel should provide advocates with details of costs incurred at each stage of proceedings. The court may, however, require the appropriate officer of the court to make inquiries to inform the court as to the costs incurred and may adjourn the proceedings for inquiries to be made if necessary: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at I.4.2-I.4.3, CA.

As to orders for costs where an appeal is abandoned see PARA 1993 ante.

4 Prosecution of Offences Act 1985 s 18(2)(a). An appeal or application for leave to appeal mentioned in the text refers to an appeal or application for leave to appeal under the Criminal Appeal Act 1968 Pt I (ss 1-32) (as amended): see PARA 1837 et seq ante.

5 Prosecution of Offences Act 1985 s 18(2)(b). An application for leave to appeal mentioned in the text refers to an application under Pt II (ss 33-44) (as amended): see PARA 1966 et seq ante. As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords' by the Constitutional Reform Act 2005 s 40, Sch 9 para 41(1), (3). At the date at which this volume states the law no such day had been appointed.

6 Prosecution of Offences Act 1985 s 18(2)(c), (d) (added by the Criminal Justice Act 2003 s 312(1), (3)). An appeal or application for leave to appeal mentioned in the text refers to an appeal or application for leave to appeal under the Criminal Justice Act 1987 s 9(11) (see PARA 1921 ante) or under the Criminal Procedure and Investigations Act 1996 s 35(1) (as amended) (see PARA 1922 ante).

7 Prosecution of Offences Act 1985 s 18(2). See also *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at VI, CA. Costs ordered to be paid under the Prosecution of Offences Act 1985 s 18(2), (2A) (as added: see note 9 infra) may include the reasonable cost of any transcript of a record of proceedings made in accordance with rules of court made for the purposes of the Criminal Appeal Act 1968 s 32: Prosecution of Offences Act 1985 s 18(6) (amended by the Criminal Justice Act 2003 s 69(1), (3)). See PARAS 1859-1860 ante.

8 le under the Criminal Justice Act 2003 Pt 9 (ss 57-74): see PARAS 1897-1918 ante.

9 Prosecution of Offences Act 1985 s 18(2A) (added by the Criminal Justice Act 2003 s 69(1), (3)).

10 Prosecution of Offences Act 1985 s 18(3). See also note 3 supra. Orders for costs against a defendant may be enforced in accordance with the provisions of the Administration of Justice Act 1970 s 41, Sch 9 (as amended): see PARA 2100 post.

11 Prosecution of Offences Act 1985 s 18(4).

12 Ibid s 18(5) (amended by the Criminal Justice and Public Order Act 1994 s 168(1), Sch 9 para 26).

## UPDATE

### 2063 Award of costs against defendant

NOTE 3--SI 1986/1335 reg 14(3) substituted: SI 2008/2448. It may be just and reasonable to order a defendant to pay to the prosecutor costs incurred by a third party where the prosecutor will pass on those costs to the third party: *R v Balshaw* [2009] EWCA Crim 470, [2009] 1 WLR 2301, [2009] All ER (D) 184 (Mar) (costs incurred by police in commissioning expert report).

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23.

COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/B. COST ORDERS/2064. Costs unnecessarily or improperly incurred.

## **2064. Costs unnecessarily or improperly incurred.**

Where at any time during criminal proceedings<sup>1</sup> a magistrates' court<sup>2</sup>, the Crown Court or the Court of Appeal is satisfied that costs have been incurred in respect of the proceedings by one of the parties as a result of an unnecessary or improper<sup>3</sup> act or omission<sup>4</sup> by, or on behalf of, another party to the proceedings, the court may, after hearing the parties, order that all or part of the costs<sup>5</sup> so incurred by that party are to be paid to him by the other party<sup>6</sup>. Before making such an order, the court must take into account any other order as to costs (including any legal aid order<sup>7</sup>) which has been made in respect of the proceedings<sup>8</sup>.

1 See PARA 2058 note 2 ante.

2 No such order may be made by a magistrates' court which requires a person under the age of 17 who has been convicted of an offence to pay an amount by way of costs which exceeds the amount of any fine imposed upon him: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3(5).

3 'Improper' in this context encompasses an act or omission resulting in costs which could not have been incurred in the proper conduct of the party's case; it does not connote 'grave impropriety': *DPP v Denning* [1991] 2 QB 532, 94 Cr App Rep 272, DC.

4 A causal connection must be established between the unnecessary or improper act or omission and the costs incurred: *R v Crown Court at Wood Green, ex p DPP* [1993] 2 All ER 656, [1993] 1 WLR 723, DC.

5 An order so made must specify the amount of costs to be paid in pursuance of the order: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3(3).

6 *Ibid* reg 3(1). Where an order under reg 3(1) has been made, the court may take that order into account when making any other order as to costs in respect of the proceedings: reg 3(4).

As to the disallowance of costs out of central funds see *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at V.1.1, CA; and as to the award of costs against solicitors see *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at IX, CA.

An order made by a trial judge in the Crown Court is not susceptible to judicial review if he has acted within the scope of his jurisdiction because his decision will constitute a matter 'relating to trial on indictment': *R v Leicester Crown Court, ex p Comrs of Customs and Excise* [2001] EWHC Admin 33, (2001) Times, 23 February, DC.

7 The reference to a legal aid order has yet to be revoked.

8 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 3(2).

## **UPDATE**

### **2064 Costs unnecessarily or improperly incurred**

TEXT AND NOTES 7, 8--SI 1986/1335 reg 3(2) substituted: SI 2008/1448.

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### **C. COSTS ON REFERENCES**

#### **2065. Costs on reference to Court of Appeal on point of law.**

Where a point of law is referred to the Court of Appeal following acquittal on indictment, or is further referred<sup>1</sup> to the House of Lords, and the acquitted person appears by counsel for the purpose of presenting any argument to the court or to the House, he is entitled to his costs<sup>2</sup>; and any amount so recoverable must be ascertained, as soon as practicable, by the Registrar of Criminal Appeals or, as the case may be, such officer as may be prescribed by order of the House of Lords<sup>3</sup>.

<sup>1</sup> He under the Criminal Justice Act 1972 s 36: see PARA 1950 ante. As to further reference to the House of Lords see PARA 1976 ante.

<sup>2</sup> He to the payment out of central funds of such sums as are reasonably sufficient to compensate him for expenses properly incurred by him for the purpose of being represented on the reference or further reference.

<sup>3</sup> Criminal Justice Act 1972 s 36(5). As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords' and the words 'the Court of Appeal or the Supreme Court' are substituted for the words 'court or to the House' by the Constitutional Reform Act 2005 s 40, Sch 9 para 23(c). At the date at which this volume states the law no such day had been appointed. The Prosecution of Offences Act 1985 s 20(1) (regulations as to scales and rates of payment of costs payable out of central funds: see PARA 2058 ante) applies in relation to the Criminal Justice Act 1972 s 36 as it applies to the Prosecution of Offences Act 1985 Pt II (ss 16-21) (as amended) (see PARA 2058 et seq ante): Criminal Justice Act 1972 s 36(5A) (added by the Prosecution of Offences Act 1985 s 31(5), Sch 1 para 8). See *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at II.4.1-II.4.3, CA.

### **UPDATE**

#### **2065 Costs on reference to Court of Appeal on point of law**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23.

COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/C. COSTS ON REFERENCES/2066. Costs on reference of unduly lenient sentence.

## **2066. Costs on reference of unduly lenient sentence.**

Where on a reference to the Court of Appeal<sup>1</sup> or a reference to the House of Lords<sup>2</sup> the person whose sentencing is the subject of a reference appears by counsel for the purpose of presenting any argument to the court or the House, he is entitled to his costs, that is to say to the payment out of central funds of such funds as are reasonably sufficient to compensate him for expenses properly incurred by him for the purpose of being represented on the reference; and any amount so recoverable must be ascertained as soon as practicable by the Registrar of Criminal Appeals or, as the case may be, such officer as may be prescribed by order of the House of Lords<sup>3</sup>.

<sup>1</sup> *Ie* under the Criminal Justice Act 1988 s 36: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 55 et seq.

<sup>2</sup> *Ie* under *ibid* s 36(5): see PARA 1976 ante.

<sup>3</sup> *Ibid* s 36(8), Sch 3 para 11. As from a day to be appointed, the words 'Supreme Court' are substituted for the words 'House of Lords'; the words 'Court of Appeal or to the Supreme Court' are substituted for the words 'court or the House' and the words 'under Supreme Court Rules' are substituted for the words 'such officer as may be prescribed by order of the House of Lords' by the Constitutional Reform Act 2005 s 40, Sch 9 para 48(1), (3)(d). At the date at which this volume states the law no such day had been appointed. See also *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at II.4.1-II.4.3, CA.

## **UPDATE**

### **2066 Costs on reference of unduly lenient sentence**

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23. COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/D. GENERAL POINTS ABOUT COSTS PAYABLE OUT OF CENTRAL FUNDS/2067. Meaning of 'appropriate authority'.

## **D. GENERAL POINTS ABOUT COSTS PAYABLE OUT OF CENTRAL FUNDS**

### **2067. Meaning of 'appropriate authority'.**

Costs payable out of central funds<sup>1</sup> must be determined<sup>2</sup> by the appropriate authority<sup>3</sup>.

The appropriate authority is:

- 2722 (1) the Registrar of Criminal Appeals in the case of proceedings in the Court of Appeal<sup>4</sup>;
- 2723 (2) the master of the Crown Office in the case of proceedings in a Divisional Court of the Queen's Bench Division<sup>5</sup>;
- 2724 (3) an officer appointed by the Lord Chancellor in the case of proceedings in the Crown Court<sup>6</sup>;
- 2725 (4) the justices' clerk in the case of proceedings in a magistrates' court<sup>7</sup>.

The appropriate authority may appoint or authorise the appointment of determining officers to act on its behalf in accordance with directions given by it or on its behalf<sup>8</sup>.

<sup>1</sup> ie so payable in pursuance of an order made under or by virtue of the Prosecution of Offences Act 1985 Pt II (ss 16-21) (as amended): see PARAS 2059, 2062 ante.

<sup>2</sup> ie in accordance with the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335 (as amended): see PARA 2069 et seq post.

<sup>3</sup> Ibid reg 5(1). The appropriate authority may consult the court on any matter touching the allowance or disallowance of costs out of central funds; but it is not appropriate for the court to make a direction to disallow costs when so consulted: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at V.1.3, CA.

<sup>4</sup> Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, regs 4, 5(2)(a).

<sup>5</sup> Ibid regs 4, 5(2)(b).

<sup>6</sup> Ibid regs 4, 5(2)(c).

<sup>7</sup> Ibid regs 4, 5(2)(d). In the case of proceedings in the House of Lords, the costs payable out of central funds are to be determined by such officer as may be prescribed by order of the House of Lords: reg 13(1). Subject to reg 13(1), Pt III (regs 4-13) (see the text and notes 1-6 supra, 8 infra; and PARA 2068 et seq post) does not apply to proceedings in the House of Lords: reg 13(2).

<sup>8</sup> Ibid reg 5(3).

## **UPDATE**

### **2067 Meaning of 'appropriate authority'**

TEXT AND NOTE 6--SI 1986/1335 reg 5(2)(c) amended: SI 2008/2448.

TEXT AND NOTE 7--SI 1986/1335 reg 5(2)(d) amended: SI 2008/2448.

NOTE 7--References to the House of Lords are now to the Supreme Court: SI 1986/1335 reg 13(1), (2) (amended by SI 2009/2720).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23. COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/D. GENERAL POINTS ABOUT COSTS PAYABLE OUT OF CENTRAL FUNDS/2068. Claims for costs payable out of central funds.

## **2068. Claims for costs payable out of central funds.**

No claim for costs payable out of central funds<sup>1</sup> may be entertained<sup>2</sup> unless it is submitted within three months of the date on which the costs order<sup>3</sup> was made<sup>4</sup>.

A claim for costs must be submitted to the designated officer in the case of proceedings in a magistrates' court, or to the appropriate authority<sup>5</sup> in the case of proceedings in the Court of Appeal, a Divisional Court of the Queen's Bench Division, or the Crown Court, in such form and manner as he or it may direct and must be accompanied by any receipts or other evidence of the applicant's payment of the costs claimed, and any receipts or other documents in support of any disbursements claimed<sup>6</sup>. A claim must:

- 2726 (1) summarise the items of work done by a solicitor<sup>7</sup>;
- 2727 (2) state, where appropriate, the dates on which items of work were done, the time taken and the sums claimed<sup>8</sup>;
- 2728 (3) specify any disbursements<sup>9</sup> claimed, including counsel's fee, the circumstances in which they were incurred and the amounts claimed in respect of them<sup>10</sup>; and
- 2729 (4) contain either full particulars, including the date and outcome, of any claim that provisions<sup>11</sup> relating to urgently needed representation or advice in proceedings in a magistrates' court should be applied in respect of any work comprised in the claim<sup>12</sup>, or a certificate by the solicitor that he has not made, and will not make, any such claim<sup>13</sup>.

Where there are any special circumstances which should be drawn to the attention of the appropriate authority, the applicant<sup>14</sup> must specify them<sup>15</sup>.

The applicant must supply such further particulars, information and documents as the appropriate authority may require<sup>16</sup>.

<sup>1</sup> le so payable in pursuance of an order made under or by virtue of the Prosecution of Offences Act 1985 Pt II (ss 16-21) (as amended): see PARAS 2059, 2062 ante.

<sup>2</sup> le subject to the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 12: see PARA 2073 post.

<sup>3</sup> For these purposes, 'costs order' means an order made under or by virtue of the Prosecution of Offences Act 1985 Pt II (as amended) (see PARA 2058 et seq ante): Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 4.

<sup>4</sup> Ibid reg 6(1).

<sup>5</sup> For the meaning of 'appropriate authority' see PARA 2067 ante.

<sup>6</sup> Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 6(2) (amended by SI 1999/2096; SI 2001/611; SI 2005/617). The requirement to produce evidence of payment applies only where an applicant has made such a payment: *R (on the application of McCormick) v Liverpool City Magistrates' Court*; *R (on the application of L) v Liverpool City Magistrates' Court* [2001] 2 All ER 705, 165 JP 3, DC.



7 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 6(3)(a).

8 Ibid reg 6(3)(b).

9 For these purposes, 'disbursements' do not include any payment made out of central funds to a witness, interpreter or medical practitioner in accordance with *ibid* Pt V (regs 15-25) (see *PARA 2077 et seq post*): reg 4.

10 Ibid reg 6(3)(c).

11 *Ie* the Legal Aid in Criminal Care Proceedings (General) Regulations 1989, SI 1989/344, reg 44(7).

12 *Ie* under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335 (as amended).

13 Ibid reg 6(3)(c) (added by SI 1999/2096).

14 For these purposes, 'applicant' means the person in whose favour a costs order has been made: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 4.

15 Ibid reg 6(4).

16 Ibid reg 6(5).

## **UPDATE**

### **2068 Claims for costs payable out of central funds**

TEXT AND NOTES 5, 6--SI 1986/1335 reg 6(2) further amended: SI 2008/2448.

NOTE 9--Definition of 'disbursements' amended: SI 2008/2448. As to what qualifies as a disbursement and which payments should include value added tax, see *Amendment to the Practice Direction on Costs in Criminal Proceedings (Value Added Tax on Disbursements)* [2007] All ER (D) 13 (Dec).

TEXT AND NOTES 11-13--Reference to SI 1986/1335 reg 6(3)(c) should be to reg 6(3)(d). Regulation 6(3)(d) amended: SI 2008/2448.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23.

COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/D. GENERAL POINTS ABOUT COSTS PAYABLE OUT OF CENTRAL FUNDS/2069. Determination and payment of costs payable out of central funds.

## **2069. Determination and payment of costs payable out of central funds.**

The appropriate authority<sup>1</sup> must consider the claim, any further particulars, information or documents submitted<sup>2</sup> by the applicant<sup>3</sup> and must allow such costs in respect of:

- 2730 (1) such work as appears to it to have been actually and reasonably done;
- 2731 (2) such disbursements<sup>4</sup> as appear to it to have been actually and reasonably incurred,

as it considers reasonably sufficient to compensate the applicant for any expenses properly incurred by him in the proceedings<sup>5</sup>.

In determining costs, the appropriate authority must take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved<sup>6</sup>. When determining costs, there must be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the appropriate authority may have as to whether the costs were reasonably incurred or were reasonable in amount must be resolved against the applicant<sup>7</sup>.

When the appropriate authority has determined<sup>8</sup> the costs payable to an applicant, the designated officer for the court, in the case of proceedings in a magistrates' court, or the appropriate authority<sup>9</sup>, in the case of proceedings in the Court of Appeal, Divisional Court of the Queen's Bench Division or the Crown Court, must notify the applicant of the costs payable and authorise payment accordingly<sup>10</sup>.

1 For the meaning of 'appropriate authority' see PARA 2067 ante.

2 I.e. under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 6: see PARA 2068 ante.

3 For the meaning of 'applicant' see PARA 2068 note 14 ante.

4 For the meaning of 'disbursements' see PARA 2068 note 9 ante.

5 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 7(1).

6 Ibid reg 7(2).

7 Ibid reg 7(3).

8 I.e. payable under ibid reg 7(1): see the text and notes 1-5 supra.

9 See PARA 2067 ante.

10 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 8(1) (amended SI 2001/611; SI 2005/617). Where the costs so payable are varied as a result of a redetermination under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 9 (see PARA 2070 post), an appeal to a costs judge under reg 10 (see PARA 2071 post), or an appeal to the High Court under reg 11 (see PARA 2072 post), then: (1) where the costs are increased, the appropriate authority must authorise payment of the increase; (2) where the costs are decreased, the applicant must repay the amount of such decrease; and (3) where the payment of the costs

of an appeal is ordered under reg 10(14) (see PARA 2071 post) or reg 11(8) (see PARA 2072 post), the appropriate authority must authorise such payment to the applicant: reg 8(2) (amended by SI 1999/2096).

## **UPDATE**

### **2069 Determination and payment of costs payable out of central funds**

TEXT AND NOTES 1-7--SI 1986/1335 reg 7 substituted: SI 2009/2720.

TEXT AND NOTES 8-10--SI 1986/1335 reg 8(1) further amended: SI 2008/2448.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23. COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/D. GENERAL POINTS ABOUT COSTS PAYABLE OUT OF CENTRAL FUNDS/2070. Redetermination of costs payable out of central funds.

## **2070. Redetermination of costs payable out of central funds.**

An applicant<sup>1</sup> who is dissatisfied with the costs payable out of central funds<sup>2</sup> determined<sup>3</sup> by an appropriate authority<sup>4</sup> in respect of proceedings, other than proceedings before a magistrates' court, may apply to the appropriate authority to redetermine them<sup>5</sup>.

The application must be made<sup>6</sup>, within 21 days of the receipt of notification of the costs payable<sup>7</sup>, by giving notice in writing to the appropriate authority specifying the items in respect of which the application is made and the grounds of objection and must be made in such form and manner as the appropriate authority may direct<sup>8</sup>. The notice of application must state whether the applicant wishes to appear or to be represented and, if the applicant so wishes, the appropriate authority must notify the applicant of the time at which it is prepared to hear him or his representative<sup>9</sup>.

The appropriate authority must redetermine the costs, whether by way of increase, decrease or at the level previously determined, in the light of the objections made by the applicant or on his behalf and must notify him of its decision<sup>10</sup>. The applicant may request the appropriate authority to give reasons in writing for its decision and, if so requested, the appropriate authority must comply with the request<sup>11</sup>.

1 For the meaning of 'applicant' see PARA 2068 note 14 ante.

2 I.e. payable in pursuance of an order made under or by virtue of the Prosecution of Offences Act 1985 Pt II (ss 16-21) (as amended): see PARAS 2059, 2062 ante.

3 I.e. under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 7: see PARA 2069 ante.

4 For the meaning of 'appropriate authority' see PARA 2067 ante.

5 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 9(1).

6 I.e. subject to *ibid* reg 12: see PARA 2073 post.

7 I.e. under *ibid* reg 8(1): see PARA 2069 ante.

8 *Ibid* reg 9(2). The notice of application must be accompanied by any particulars, information and documents supplied under reg 6 (as amended) (see PARA 2068 ante) and the applicant must supply such further particulars, information and documents as the appropriate authority may require: reg 9(4).

9 *Ibid* reg 9(3).

10 *Ibid* reg 9(5).

11 *Ibid* reg 9(6). Subject to reg 12 (see PARA 2073 post), any such request must be made within 21 days of receiving notification of the decision: reg 9(7).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23. COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/D. GENERAL POINTS ABOUT COSTS PAYABLE OUT OF CENTRAL FUNDS/2071. Appeals to a costs judge.

## **2071. Appeals to a costs judge.**

Where the appropriate authority<sup>1</sup> has given its reasons for its decision on a redetermination<sup>2</sup>, an applicant<sup>3</sup> who is dissatisfied with that decision may appeal to a costs judge<sup>4</sup>. An appeal must be instituted<sup>5</sup> within 21 days of the receipt of the appropriate authority's reasons by giving notice in writing to the Senior Costs Judge specifying the items in respect of which the appeal is brought and the grounds of objection<sup>6</sup>.

The notice of appeal must be accompanied by:

- 2732 (1) a copy of the written notice from the applicant<sup>7</sup>;
- 2733 (2) any particulars, information and documents supplied to the appropriate authority<sup>8</sup>;
- 2734 (3) the appropriate authority's reasons for giving<sup>9</sup> its decision<sup>10</sup>.

The notice of appeal must state whether the appellant wishes to appear or to be represented or whether he will accept a decision in his absence<sup>11</sup>.

The Senior Costs Judge may, and if so directed by the Lord Chancellor either generally or in a particular case must, send to the Lord Chancellor a copy of the notice of appeal together with copies of such other documents as the Lord Chancellor may require<sup>12</sup>.

With a view to ensuring that the public interest is taken into account, the Lord Chancellor may arrange for written or oral representations to be made on his behalf and, if he intends to do so, he must inform the Senior Costs Judge and the appellant<sup>13</sup>. Any written representations so made on behalf of the Lord Chancellor must be sent to the Senior Costs Judge and to the appellant and, in the case of oral representations, the Senior Costs Judge and the appellant must be informed of the grounds on which such representations will be made<sup>14</sup>. The appellant must be permitted a reasonable opportunity to make representations in reply<sup>15</sup>. The costs judge must inform the appellant (or his representative) and the Lord Chancellor, where representations have been or are to be made on his behalf, of the date of any hearing and may<sup>16</sup> give directions as to the conduct of the appeal<sup>17</sup>. The costs judge may consult the presiding judge<sup>18</sup>, and the appropriate authority or the determining officer who redetermined the costs on its behalf, as the case may be, and may require the appellant to provide any further information which he requires for the purposes of the appeal and, unless the costs judge otherwise directs, no further evidence may be received on the hearing of the appeal and no ground of objection is valid which was not raised on the redetermination<sup>19</sup>. The costs judge has the same powers<sup>20</sup> as the appropriate authority and, in the exercise of such powers, may alter the redetermination of the appropriate authority in respect of any sum allowed, whether by increase or decrease, as he thinks fit<sup>21</sup>. The costs judge must communicate his decision and the reasons for it in writing to the appellant, the Lord Chancellor, and the appropriate authority or the determining officer who redetermined the costs on its behalf, as the case may be<sup>22</sup>. Save where he confirms or decreases the sums redetermined<sup>23</sup>, the costs judge may allow the appellant a sum in respect of part or all of any reasonable costs (including any fee payable in respect of an appeal) incurred by him in connection with the appeal<sup>24</sup>.

- 1 For the meaning of 'appropriate authority' see PARA 2067 ante.
- 2 Ie under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 9: see PARA 2070 ante.
- 3 For the meaning of 'applicant' see PARA 2068 note 14 ante.
- 4 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 10(1) (amended by SI 1999/2096). 'Costs judge' means a taxing master of the Supreme Court: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 4 (amended by SI 1999/2096). As to the procedure see also *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at XIII, CA. For the form of notice see Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, Sch 3 Form A.
- 5 Ie subject to ibid reg 12 (as amended): see PARA 2073 post.
- 6 Ibid reg 10(2) (amended by SI 1999/2096). The appellant must send a copy of any notice so given to the appropriate authority: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 10(3).
- 7 Ie under ibid reg 9(2): see PARA 2070 ante.
- 8 Ie under ibid reg 9: see PARA 2070 ante.
- 9 Ie under ibid reg 9(6): see PARA 2070 ante.
- 10 Ibid reg 10(4).
- 11 Ibid reg 10(5).
- 12 Ibid reg 10(6) (amended by SI 1999/2096).
- 13 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 10(7) (amended by SI 1999/2096).
- 14 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 10(8) (amended by SI 1999/2096).
- 15 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 10(9).
- 16 Ie subject to the provisions of ibid reg 10 (as amended).
- 17 Ibid reg 10(10) (amended by SI 1999/2096).
- 18 'Presiding judge' means the judge who presided at the hearing in respect of which the costs are payable: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 4.
- 19 Ibid reg 10(11) (amended by SI 1999/2096).
- 20 Ie under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335 (as amended).
- 21 Ibid reg 10(12) (amended by SI 1999/2096).
- 22 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 10(13) (amended by SI 1999/2096).
- 23 Ie under Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 9: see PARA 2070 ante.
- 24 Ibid reg 10(14) (amended by SI 1999/2096). For the prescribed fee in respect of such appeals see the Supreme Court (Review of Taxation in Criminal Cases) Fees Order 1984, SI 1984/340, art 3, Schedule Fee 1 (amended by SI 2003/647); Interpretation Act 1978 s 17(2)(b).

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/D. GENERAL POINTS ABOUT COSTS PAYABLE OUT OF CENTRAL FUNDS/2072. Appeals to the High Court.

## **2072. Appeals to the High Court.**

An applicant<sup>1</sup> who is dissatisfied with the decision of a costs judge<sup>2</sup> on an appeal<sup>3</sup> may apply to a costs judge to certify a point of principle of general importance<sup>4</sup>. Any such application must be made<sup>5</sup> within 21 days of notification<sup>6</sup> of a costs judge's decision<sup>7</sup>. Where a costs judge certifies such a point of principle, the applicant may appeal to the High Court against the decision of the costs judge on an appeal against redetermination of costs<sup>8</sup>, and the Lord Chancellor must be a respondent to that appeal<sup>9</sup>. Any such appeal must be instituted<sup>10</sup> within 21 days of receiving a costs judge's certificate<sup>11</sup>. Where the Lord Chancellor is dissatisfied with the decision of a costs judge on an appeal, he may, if no such appeal has been made by the applicant, appeal to the High Court against that decision and the applicant must be a respondent to such an appeal<sup>12</sup>. Such an appeal must be instituted<sup>13</sup> within 21 days of receiving notification of the costs judge's decision<sup>14</sup>.

An appeal by either an applicant<sup>15</sup> or the Lord Chancellor<sup>16</sup> must be brought in the Queen's Bench Division, follow the prescribed procedure<sup>17</sup> and be heard and determined by a single judge whose decision is final<sup>18</sup>. The judge has the same powers<sup>19</sup> as the appropriate authority<sup>20</sup> and a costs judge and may reverse, affirm or amend the decision appealed against or make such other order as he thinks fit<sup>21</sup>.

1 For the meaning of 'applicant' see PARA 2068 note 14 ante.

2 For the meaning of 'costs judge' see PARA 2071 note 4 ante.

3 Ie under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 10 (as amended): see PARA 2071 ante.

4 Ibid reg 11(1) (amended by SI 1999/2096).

5 Ie subject to the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 12: see PARA 2073 post.

6 Ie under ibid reg 10(13): see PARA 2071 ante.

7 Ibid reg 11(2) (amended by SI 1999/2096).

8 Ie under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 10 (as amended): see PARA 2071 ante.

9 Ibid reg 11(3) (amended by SI 1999/2096).

10 Ie subject to the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 12: see PARA 2073 post.

11 Ibid reg 11(4) (amended by SI 1999/2096). As to the procedure see also *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at XIII.4.1-XIII.4.3, CA.

12 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 11(5) (amended by SI 1999/2096).

13 Ie subject to the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 12: see PARA 2073 post.

14 Ibid reg 11(6) (amended by SI 1999/2096).

15 Ie under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 11(3) (as amended): see the text and notes 8-9 supra.

16 Ie under ibid reg 11(5) (as amended): see the text to note 12 supra.

17 Ie the procedure set out in CPR Pt 52: see CIVIL PROCEDURE vol 12 (2009) PARA 1658 et seq.

18 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 11(7) (amended by SI 1999/2096; SI 2005/2622). The judge will normally sit with two assessors, one of whom will be a costs judge and the other a practising barrister or solicitor: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at XIII.4.4, CA.

19 Ie under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335 (as amended).

20 For the meaning of 'appropriate authority' see PARA 2067 ante.

21 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 11(8) (amended by SI 1999/2096).



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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/D. GENERAL POINTS ABOUT COSTS PAYABLE OUT OF CENTRAL FUNDS/2073. Time limits.

## **2073. Time limits.**

The time limit within which there must be made or instituted:

- 2735 (1) a claim for costs by an applicant<sup>1</sup>, an application for a redetermination<sup>2</sup>, or a request for an appropriate authority<sup>3</sup> to give reasons for its decision on a redetermination<sup>4</sup>;
- 2736 (2) an appeal to a Senior Costs Judge<sup>5</sup> or an application for a certificate<sup>6</sup>; or
- 2737 (3) an appeal to the High Court<sup>7</sup>,

may, for good reason, be extended by the appropriate authority, the Senior Costs Judge or the High Court, as the case may be<sup>8</sup>. Where an applicant without good reason has failed (or, if an extension were not granted, would fail) to comply with a time limit, the appropriate authority, the Senior Costs Judge or the High Court, as the case may be, may, in exceptional circumstances, extend the time limit and must consider whether it is reasonable in the circumstances to reduce the costs; provided that the costs are not to be reduced unless the representative has been allowed a reasonable opportunity to show cause orally or in writing why the costs should not be reduced<sup>9</sup>.

An applicant may appeal to the Senior Costs Judge against a decision made<sup>10</sup> by an appropriate authority in respect of proceedings other than proceedings before a magistrates' court and such an appeal must be instituted within 21 days of the decision being given by giving notice in writing to the Senior Costs Judge specifying the grounds of appeal<sup>11</sup>.

1    Ie under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 6 (as amended): see PARA 2068 ante.

2    Ie under *ibid* reg 9: see PARA 2070 ante.

3    For the meaning of 'appropriate authority' see PARA 2067 ante.

4    Ie under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 9: see PARA 2070 ante.

5    Ie under *ibid* reg 10 (as amended): see PARA 2071 ante.

6    Ie under *ibid* reg 11 (as amended): see PARA 2072 ante.

7    Ie under *ibid* reg 11 (as amended): see PARA 2072 ante.

8    *Ibid* reg 12(1) (amended by SI 1999/2096). Regulation 12(1) (as amended) applies to applications within the time limit and to applications outside it; and where an application is made after the expiry of the limit the 'good reason' under reg 12(1) (as amended) needs to relate to the reason why the application was not made within the time limit: *R v Clerk to the North Kent Justices, ex p McGoldrick & Co* (1995) 160 JP 30, DC.

9    Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 12(2) (amended by SI 1999/2096; SI 2005/2622). The Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 12(2) (as amended) is not concerned with why the delay has occurred; it is concerned with whether there are exceptional circumstances for extending the time notwithstanding that there was no good reason for the delay: *R v Clerk to the North Kent Justices, ex p McGoldrick & Co* (1995) 160 JP 30, DC.

10   Ie under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 12 (as amended).

- 11 Ibid reg 12(3) (amended by SI 1999/2096).

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/E. FEES OF COURT APPOINTEES/2074. Fees of court appointees.

## ***E. FEES OF COURT APPOINTEES***

### **2074. Fees of court appointees.**

The provisions about costs out of central funds<sup>1</sup> apply<sup>2</sup> to the determination of the proper fee or costs of a court appointee<sup>3</sup>.

<sup>1</sup> I.e. the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, Pt III (regs 4-13) (as amended): see PARAS 2067-2073 ante.

<sup>2</sup> I.e. subject to the following modifications (see *ibid* reg 13B (added by SI 1992/323)):

306 (1) the reference to 'solicitor' in the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 6(3)(a) (see PARA 2068 ante) and any reference to 'applicant' in Pt III (as amended) is to be construed as including a reference to a court appointee;

307 (2) any reference to 'costs' in Pt III (as amended) is to be construed as including a reference to the proper fee or costs of a court appointee; and

308 (3) the words after reg 7(1)(b) (see PARA 2069 ante) are omitted.

<sup>3</sup> *Ibid* reg 13A (added by SI 1992/323). For these purposes, 'court appointee' means: (1) a person appointed by the Crown Court under the Criminal Procedure (Insanity) Act 1964 s 4A (as added and amended: see PARA 1265 ante) to put the case for the defence in respect of whether a defendant found to be under a disability did the act or omission charged against him; (2) a legal representative appointed by the court under the Youth Justice and Criminal Evidence Act 1999 s 38(4) (see PARA 1441 ante) to represent a defendant prevented by ss 34, 35 or s 36 (see PARA 1441 ante) from cross-examining a witness in person: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 13C (added by SI 1992/323; substituted by SI 2000/2094). The Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 13A (as added) should be understood to extend to the determination of the costs in the Court of Appeal of a person appointed within head (1) *supra*: *R v Antoine* [1999] 3 WLR 1204, [1999] 2 Cr App Rep 225, CA (point not considered on appeal: [2001] AC 340, [2000] 2 All ER 208, HL).

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(i) Award of Costs/F. RECOVERY BY LORD CHANCELLOR/2075. Recovery of sums paid out of the Criminal Defence Service or central funds.

## ***F. RECOVERY BY LORD CHANCELLOR***

### **2075. Recovery of sums paid out of the Criminal Defence Service or central funds.**

The Lord Chancellor must recover in accordance with directions given by him<sup>1</sup> any sums paid out of the Criminal Defence Service or central funds<sup>2</sup> where a costs order<sup>3</sup> has been made against a person in favour of a person receiving services funded for him as part of the Criminal Defence Service or a person in whose favour an order for the payment of costs out of central funds has been made<sup>4</sup>.

Where the person required to make a payment in respect of sums due under a costs order fails to do so, the payment may be recovered summarily by the Lord Chancellor as a sum adjudged to be paid as a civil debt by order of a magistrates' court<sup>5</sup>.

1 Directions so given by the Lord Chancellor may be given generally or in respect of a particular case and may require the payment of sums due under a costs order and stipulate the mode of payment and the person to whom payment is to be made: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 26(2).

2 For the meaning of 'central funds' see PARA 2058 note 13 ante.

3 For the meaning of 'costs order' see PARA 2068 note 3 ante. For these purposes, and for the purposes of the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 27 (see the text to note 5 infra), 'costs order' also includes a wasted costs order as defined by reg 3A (as added) (see PARA 2060 ante), or a third party costs order as defined by reg 3E (as added) (see PARA 2061 ante): reg 26(3) (added by SI 1991/789; amended by SI 2004/2408).

4 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 26(1) (amended by SI 1991/789; SI 2004/2408).

5 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 27.

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## **(ii) Witnesses' Allowances**

### **A. PAYMENT FROM CENTRAL FUNDS**

#### **2076. Lord Chancellor's power to make regulations.**

The Lord Chancellor may by regulations<sup>1</sup> make provision for the payment out of central funds<sup>2</sup>, in such circumstances and in relation to such criminal proceedings as may be specified, of such sums as appear to the court to be reasonably necessary:

2738 (1) to compensate any witness in the proceedings, and any other person who, in the opinion of the court, necessarily attends<sup>3</sup> for the purpose of proceedings otherwise than to give evidence, for the expense, trouble or loss of time properly incurred in or incidental to his attendance<sup>4</sup>;

2739 (2) to cover the proper expenses of an interpreter who is required because of the defendant's lack of English<sup>5</sup>;

2740 (3) to compensate a duly qualified medical practitioner who:

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104. (a) makes a report otherwise than in writing in the case of a remand for a medical examination<sup>6</sup>;

105. (b) makes a written report to a court, being a report by a medical practitioner on the medical condition of a defendant<sup>7</sup>,

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2741 for the expenses properly incurred in or incidental to his reporting to the court<sup>8</sup>;

2742 (4) to cover the proper fee or costs of a person appointed<sup>9</sup> by the Crown Court to put the case for the defence in respect of whether a defendant found to be under a disability did the act or omission charged against him<sup>10</sup>; or

2743 (5) to cover:

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106. (a) the proper fee or costs of a legal representative appointed<sup>11</sup> to represent a defendant who is prevented<sup>12</sup> from cross-examining a witness in person<sup>13</sup>; and

107. (b) any expenses properly incurred in providing such a person with evidence or other material in connection with his appointment<sup>14</sup>.

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1 In exercise of such power the Lord Chancellor has made the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335.

2 For the meaning of 'central funds' see PARA 2058 note 13 ante.

3 For these purposes, 'attendance' means attendance at the court or elsewhere: Prosecution of Offences Act 1985 s 19(3A) (added by the Criminal Justice Act 1988 s 166(3)).

4 Prosecution of Offences Act 1985 s 19(3)(a) (amended by the Criminal Justice Act 1988 s 166(2)).

5 Prosecution of Offences Act 1985 s 19(3)(b).

6 Prosecution of Offences Act 1985 s 19(3)(c)(i) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 99). A report for the purposes of a medical examination is one made for the purposes of the Powers of Criminal Courts (Sentencing) Act 2000 s 11 (remand by magistrates' court for medical examination: see MAGISTRATES vol 29(2) (Reissue) PARA 723).

7 Prosecution of Offences Act 1985 s 19(3)(c)(ii). A report by a medical practitioner on the medical condition of a defendant is one made in pursuance of a request to which the Criminal Justice Act 1967 s 32(2) (as amended) applies: s 32(2) (amended by the Courts Act 1971 s 51(2), Sch 6 para 9(1); the Costs in Criminal Cases Act 1973 s 21, Sch 1 para 4, Sch 2; and the Prosecution of Offences Act 1985 s 31(5), (6), Sch 1 Pt II, Sch 2). The Criminal Justice Act 1967 s 32(2) (as amended) applies to a request to a registered medical practitioner by the court to make a written or oral report on an offender's or defendant's medical condition: (1) for the purpose of determining whether or not to include in a community order (within the meaning of the Criminal Justice Act 2003 Pt 12 (ss 142-305) (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 163)) a mental health requirement under s 207 or make an order under the Mental Health Act 1983 s 37 (as amended) (hospital orders and guardianship orders: see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 332-333) or otherwise for the purpose of determining the most suitable method of dealing with an offender; (2) in exercise of the powers conferred by the Powers of Criminal Courts (Sentencing) Act 2000 s 11 (remand by magistrates' court of a defendant for medical examination: see MAGISTRATES vol 29(2) (Reissue) PARA 723); Criminal Justice Act 1967 s 32(3) (amended by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 24(b); and the Criminal Justice Act 2003 s 304, Sch 32 paras 4, 5).

8 Prosecution of Offences Act 1985 s 19(3)(c).

9 Ie under the Criminal Procedure (Insanity) Act 1964 s 4A (as added and amended): see PARA 1265 ante.

10 Prosecution of Offences Act 1985 s 19(3)(d) (added by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 s 7, Sch 3 para 8).

11 Ie under the Youth Justice and Criminal Evidence Act 1999 s 38(4): see PARA 1441 ante.

12 Ie under ibid ss 34, 35 (as amended) or s 36: see PARA 1441 ante.

13 Prosecution of Offences Act 1985 s 19(3)(e) (added by the Youth Justice and Criminal Evidence Act 1999 ss 40(1), 67(4), Sch 7 para 4).

14 Prosecution of Offences Act 1985 s 19(3)(e) (as added: see note 13 supra).

## UPDATE

### 2076 Lord Chancellor's power to make regulations

TEXT AND NOTE 7--Prosecution of Offences Act 1985 s 19(3)(c)(ii) amended, s 19(3B) added: Armed Forces Act 2006 Sch 16 para 107; Criminal Justice and Immigration Act 2008 Sch 4 para 32(2)). See also Prosecution of Offences Act 1985 s 19(3C) (added by Criminal Justice and Immigration Act 2008 Sch 4 para 32(3)). Criminal Justice Act 1967 s 32 repealed: Armed Forces Act 2006 Sch 17.

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## **2077. In general.**

Where, in any proceedings in a criminal cause or matter<sup>1</sup> in a magistrates' court, the Crown Court, a Divisional Court of the Queen's Bench Division, the Court of Appeal or the House of Lords:

- 2744 (1) a witness<sup>2</sup> attends at the instance of the defendant, a private prosecutor<sup>3</sup> or the court<sup>4</sup>;
- 2745 (2) an interpreter is required because of the defendant's lack of English<sup>5</sup>; or
- 2746 (3) a medical practitioner makes a report otherwise than in writing<sup>6</sup>,

the expenses<sup>7</sup> properly incurred by that witness, interpreter or medical practitioner must be allowed<sup>8</sup> out of central funds<sup>9</sup>, unless the court directs that the expenses are not to be so allowed<sup>10</sup>.

Any entitlement to such an allowance is the same whether the witness, interpreter or medical practitioner attends on the same day in one case or more than one case<sup>11</sup>.

The Lord Chancellor must, with the consent of the Treasury, determine the rates or scales of allowances payable to witnesses, interpreters or medical practitioners<sup>12</sup>.

1 For these purposes, 'proceedings in a criminal cause or matter' includes any case in which: (1) an information charging the defendant with an offence is laid before a justice of the peace for any area but not proceeded with; or (2) the defendant is committed for trial but not tried: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 15. As from a day to be appointed, any reference (however expressed) in any enactment which is or includes a reference to an information within the meaning of the Magistrates' Courts Act 1980 s 1 (or to the laying of such an information) is to be read as including a reference to a written charge (or to the issue of a written charge): Criminal Justice Act 2003 s 30(5)(a) (not yet in force): see MAGISTRATES vol 29(2) (Reissue) PARA 681. At the date at which this volume states the law, no such day had been appointed.

2 For these purposes, 'witness' means any person properly attending to give evidence, whether or not he gives evidence or is called at the instance of one of the parties or of the court, but does not include: (1) a person attending as a witness to character only unless the court has certified that the interests of justice required his attendance; (2) a member of a police force attending court in his capacity as such; (3) a full-time officer of an institution to which the Prison Act 1952 (see PRISONS) applies attending court in his capacity as such; or (4) a prisoner in respect of any occasion on which he is conveyed to court in custody: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 15.

3 For these purposes, 'private prosecutor' means any person in whose favour an order for the payment of costs out of central funds could be made under the Prosecution of Offences Act 1985 s 17 (see PARA 2062 ante): Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 15.

4 Ibid reg 16(1)(a).

5 Ibid reg 16(1)(b).

6 Ibid reg 16(1)(c).

7 For these purposes, 'expenses' includes compensation to a witness for his trouble or loss of time and out of pocket expenses: ibid reg 15.

8 Ie in accordance with ibid Pt V (regs 15-25): see PARA 2078 et seq post.

9 For the meaning of 'central funds' see PARA 2058 note 13 ante.

10 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 16(1). If, and only if, the court makes such a direction can the expense of the witness be claimed as a disbursement out of Criminal Defence Service funds: *Practice Direction (Costs: Criminal Proceedings)* [2004] 2 All ER 1070, [2004] 2 Cr App Rep 395 at IV.1, CA.

11 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 16(2). Regulation 16(2) does not apply to allowances under reg 25 (written medical reports: see PARA 2085 post): reg 16(3).

12 Ibid reg 17. A reference in Pt V (regs 15-25) to an allowance not exceeding the relevant amount means an amount calculated in accordance with the rates or scales so determined: regs 15, 17.

## **UPDATE**

### **2077 In general**

TEXT AND NOTES 1-10--SI 1986/1335 reg 16(1)(ba) added: SI 2008/2448. References to the House of Lords are now to the Supreme Court: SI 1986/1335 reg 16(1) (amended by SI 2009/2720).

TEXT AND NOTE 12--SI 1986/1335 reg 17 amended: SI 2008/2448.



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## **2078. Witnesses other than professional or expert witnesses.**

A witness, other than a professional<sup>1</sup> or expert<sup>2</sup> witness, may be allowed:

2747 (1) a loss allowance not exceeding the relevant amount<sup>3</sup> in respect of:  
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108. (a) any expenditure incurred (other than on travelling, lodging or subsistence) to which the witness would not otherwise be subject<sup>4</sup>; or

109. (b) any loss of earnings or of benefit under the enactments relating to National Insurance<sup>5</sup>; and

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2748 (2) a subsistence allowance not exceeding the relevant amount<sup>6</sup>.

Any other person<sup>7</sup> who, in the opinion of the court, necessarily attends for the purpose of any proceedings otherwise than to give evidence may be allowed the same such allowances as if he attended as a witness other than a professional or expert witness<sup>8</sup>.

1 See PARA 2079 post.

2 See PARA 2080 post.

3 For the meaning of 'relevant amount' see PARA 2077 note 12 ante.

4 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 18(1)(a)(i). No allowance may be paid under reg 18 to a seaman who is paid an allowance under reg 22(1) (see PARA 2082 post): reg 22(2).

5 Ibid reg 18(1)(a)(ii).

6 Ibid reg 18(1)(b).

7 Ibid reg 18(2) does not, however, apply to: (1) a member of a police force attending court in his capacity as such; (2) a full-time officer of an institution to which the Prison Act 1952 (see PRISONS) applies attending court in his capacity as such; or (3) a prisoner in respect of any occasion on which he is conveyed to court in custody: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 18(3).

8 Ibid reg 18(2).

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### **2079. Professional witnesses.**

A professional witness<sup>1</sup> may be allowed a professional witness allowance not exceeding the relevant amount<sup>2</sup>.

1 For these purposes, 'professional witness' means a witness practising as a member of the legal or medical profession or as a dentist, veterinary surgeon or accountant who attends to give professional evidence as to matters of fact: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 15.

2 Ibid reg 19. For the meaning of 'relevant amount' see PARA 2077 note 12 ante. As to overnight allowances see PARA 2081 post.

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## **2080. Expert witnesses.**

The court may make an allowance in respect of an expert witness<sup>1</sup> for attending to give expert evidence and for work in connection with its preparation of such an amount as it may consider reasonable having regard to the nature and difficulty of the case and the work necessarily involved<sup>2</sup>.

1 The expert witnesses so recognised are: a medical practitioner; a psychiatrist; a pathologist; a handwriting expert; a fire expert (assessor); an explosives expert; a forensic scientist; a surveyor; an accountant; an engineer; an architect; and a fingerprint expert: see the Lord Chancellor's letter L43/59/33.

2 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 20(1). Regulation 20(1) applies, with the necessary modifications, to: (1) an interpreter; or (2) a medical practitioner who makes a report otherwise than in writing for the purpose of the Powers of Criminal Courts (Sentencing) Act 2000 s 11 (see MAGISTRATES vol 29(2) (Reissue) PARA 723), as it applies to an expert witness: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 20(2); Interpretation Act 1978 s 17(2). As to overnight allowances see PARA 2081 post.

A contract entered into by a firm of solicitors with an expert witness to pay him personally for his attendance at court is valid: *Goulden v Wilson Barca (a firm)* [2000] 1 All ER 169, [2000] 1 WLR 167, CA.

## **UPDATE**

## **2080 Expert witnesses**

NOTE 2--SI 1986/1335 reg 20(2) amended: SI 2008/2448.

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## **2081. Night allowances.**

A professional<sup>1</sup> or expert<sup>2</sup> witness who is necessarily absent from his place of residence overnight may be allowed a night allowance not exceeding the relevant amount<sup>3</sup>.

1 See PARA 2079 ante.

2 See PARA 2080 ante.

3 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 21(1). An interpreter or medical practitioner who receives an allowance under reg 20 (see PARA 2080 note 2 ante) may be allowed the same night allowance as if he attended as a professional or expert witness: reg 21(2). For the meaning of 'the relevant amount' see PARA 2077 note 12 ante.

## **UPDATE**

## **2081 Night allowances**

NOTE 3--SI 1986/1335 reg 21(2) amended: SI 2008/2448.

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 COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(ii) Witnesses' Allowances/A. PAYMENT FROM CENTRAL FUNDS/2082. Seamen.

## **2082. Seamen.**

A seaman who is detained on shore as a witness<sup>1</sup> may be allowed:

- 2749 (1) an allowance not exceeding the relevant amount<sup>2</sup> in respect of any loss of earnings, unless for special reasons the court allows a greater sum<sup>3</sup>; and
- 2750 (2) an allowance not exceeding the sum actually and reasonably incurred for his maintenance, for the time during which he is necessarily detained on shore<sup>4</sup>.

1 For the meaning of 'witness' see PARA 2077 note 2 ante.

2 For the meaning of 'the relevant amount' see PARA 2077 note 12 ante. No allowance may be paid under the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 18 (see PARA 2078 ante) to a seaman who is paid an allowance under reg 22(1): reg 22(2).

3 Ibid reg 22(1)(a).

4 Ibid reg 22(1)(b).

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### **2083. Prosecutors and defendants.**

A person in whose favour an order for costs is made<sup>1</sup> may be allowed the same subsistence allowance<sup>2</sup> and travelling expenses<sup>3</sup> as if he attended as a witness other than a professional<sup>4</sup> or expert<sup>5</sup> witness<sup>6</sup>.

<sup>1</sup> See under the Prosecution of Offences Act 1985 s 16 (as amended) (see PARA 2059 ante), s 17 (see PARA 2062 ante) or s 19(4) (see PARA 2059 note 19 ante).

<sup>2</sup> See PARA 2078 ante.

<sup>3</sup> See PARA 2084 post.

<sup>4</sup> See PARA 2079 ante.

<sup>5</sup> See PARA 2080 ante.

<sup>6</sup> Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 23.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/23. COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(ii) Witnesses' Allowances/A. PAYMENT FROM CENTRAL FUNDS/2084. Travelling expenses.

## **2084. Travelling expenses.**

A witness<sup>1</sup> who travels to or from court by public transport (including by air) may be allowed the fare actually paid<sup>2</sup>.

Unless the court otherwise directs, only the second class fare may be allowed for travel by railway<sup>3</sup>.

A witness who travels to or from court by air may be allowed the fare actually paid only if:

- 2751 (1) there was no reasonable alternative to travel by air and the class of fare paid was reasonable in all the circumstances<sup>4</sup>; or
- 2752 (2) travel by air was more economical in the circumstances taking into account any savings of time resulting from the adoption of such mode of travel and its consequent effect in reducing the amount of allowances otherwise payable<sup>5</sup>,

and, where the air fare is not allowed, there may be allowed such amount as the court considers reasonable<sup>6</sup>.

A witness who travels to or from court by hired vehicle may be allowed:

- 2753 (a) the fare actually paid and any reasonable gratuity paid in a case of urgency or where public transport is not reasonably available<sup>7</sup>; or
- 2754 (b) in any other case, the amount of fare for travel by public transport<sup>8</sup>.

A witness who travels to or from court by private vehicle may be allowed an appropriate private vehicle allowance not exceeding the relevant amount<sup>9</sup>.

Where a witness is in the opinion of the court suffering from a serious illness, or heavy exhibits have to be taken to court, the court may allow reasonable additional sums in excess of those allowed under the above provisions<sup>10</sup>.

An interpreter or a medical practitioner who incurs travelling expenses in providing the court with a report otherwise than in writing may be allowed a travelling allowance not exceeding the relevant amount<sup>11</sup>.

1 For the meaning of 'witness' see PARA 2077 note 2 ante.

2 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 24(1).

3 Ibid reg 24(2).

4 Ibid reg 24(3)(a).

5 Ibid reg 24(3)(b).

6 Ibid reg 24(3).

7 Ibid reg 24(4)(a).

8 Ibid reg 24(4)(b).

9 Ibid reg 24(5). For the meaning of 'the relevant amount' see PARA 2077 note 12 ante.

10 Ibid reg 24(6).

11 Ibid reg 24(7).

## **UPDATE**

### **2084 Travelling expenses**

TEXT AND NOTE 11--SI 1986/1335 reg 24(7) amended: SI 2008/2448.



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## **2085. Written medical reports.**

A medical practitioner who makes a written report to a court<sup>1</sup> may be allowed a medical report allowance not exceeding the relevant amount<sup>2</sup>. A medical practitioner who makes such a report and incurs travelling expenses in connection with the preparation of that report may be allowed a travelling allowance not exceeding the relevant amount<sup>3</sup>.

The Crown Court may order the payment out of central funds of such sums as appear to be sufficient reasonably to compensate any medical practitioner for the expenses, trouble or loss of time properly incurred in preparing and making a report on the mental condition of a person accused of murder<sup>4</sup>.

1 le under the Criminal Justice Act 1967 s 32(2) (as amended): see PARA 2076 note 7 ante.

2 Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 25(1). Nothing in reg 25 applies to a report by the medical officer of an institution to which the Prison Act 1952 (see PRISONS) applies: Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 25(3). For the meaning of 'the relevant amount' see PARA 2077 note 12 ante.

3 Ibid reg 25(2).

4 Mental Health (Amendment) Act 1982 s 34(5) (amended by the Statute Law (Repeals) Act 2004).

## **UPDATE**

## **2085 Written medical reports**

NOTES 1, 2--SI 1986/1335 reg 25(1) amended: SI 2009/2720.

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## ***B. CROWN PROSECUTION SERVICE***

### **2086. Attorney General's power to make regulations.**

The Attorney General may, with the approval of the Treasury, by regulations<sup>1</sup> make such provision as he considers appropriate in relation to the costs and expenses of: (1) witnesses attending to give evidence at the instance of the Crown Prosecution Service<sup>2</sup>; and (2) any other person who, in the opinion of the Service, necessarily attends<sup>3</sup> for the purpose of the case otherwise than to give evidence<sup>4</sup>. The power so conferred on the Attorney General by head (2) above only relates to the costs and expenses of an interpreter if the interpreter is required because of the lack of English of a person attending to give evidence at the instance of the Service<sup>5</sup>.

1 In exercise of such power the Attorney General has made the Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862: see PARA 2087 et seq post.

2 As to the Crown Prosecution Service see PARA 1079 et seq ante.

3 For these purposes, 'attending' means attending at the court or elsewhere: Prosecution of Offences Act 1985 s 14(1B) (added by the Criminal Justice Act 1988 s 166(1)).

4 Prosecution of Offences Act 1985 s 14(1)(b) (amended by the Criminal Justice Act 1988 s 166(1)). Regulations made under the Prosecution of Offences Act 1985 s 14(1)(b) (as amended) may provide that scales or rates of costs and expenses are to be determined by the Attorney General with the consent of the Treasury: s 14(3) (added by the Criminal Justice Act 1988 s 166(1)). As to the power to make such regulations see PARA 1077 note 2 ante.

5 Prosecution of Offences Act 1985 s 14(1A) (added by the Criminal Justice Act 1988 s 166(1)).

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## **2087. In general.**

Without prejudice to the power of the Director of Public Prosecutions to allow more than the prescribed entitlements where he sees fit to do so, the Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988<sup>1</sup> provide for the entitlements to costs and expenses of:

- 2755 (1) a witness who attends court or elsewhere to give evidence at the instance of the Crown Prosecution Service<sup>2</sup>, whether he gives evidence or not<sup>3</sup>; and
- 2756 (2) any other person who, in the opinion of the appropriate officer<sup>4</sup>, necessarily attends court or elsewhere for the purpose of the prosecution case otherwise than to give evidence, including an interpreter<sup>5</sup>, but only if he is required because of the lack of English of a person attending to give evidence at the instance of the Service<sup>6</sup>,

in any proceedings conducted by the Director in the discharge of his functions<sup>7</sup>; but nothing in the regulations gives an entitlement to a person who, when called, refuses to give evidence<sup>8</sup>.

Such entitlements are the same for a person whether his attendance on any occasion is for the purpose of one case or more than one case<sup>9</sup>.

Where a person claims such an entitlement, it is for the appropriate officer to satisfy himself of the person's entitlement before authorising the claim to be met<sup>10</sup>.

The scales or rates of the costs and expenses for which entitlements are so provided are to be determined by the Attorney General with the consent of the Treasury<sup>11</sup>.

However, in the case of:

- 2757 (a) a member of, or special constable appointed or person employed for the purposes of, a police force, attending in his capacity as such<sup>12</sup>;
- 2758 (b) a whole-time officer of an institution to which the Prison Act 1952<sup>13</sup> applies attending in his capacity as such<sup>14</sup>;
- 2759 (c) an inmate of such an institution in respect of any occasion on which he is conveyed to attend at any place in custody<sup>15</sup>,

there is no entitlement to any allowance or reimbursement of travelling expenses<sup>16</sup>.

<sup>1</sup> ie the Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862: see the text and notes 2-16 infra; and PARA 2088 et seq post.

<sup>2</sup> As to the Crown Prosecution Service see PARA 1079 et seq ante.

<sup>3</sup> Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, reg 4(1)(a).

<sup>4</sup> For these purposes, 'appropriate officer' means any member of the Crown Prosecution Service as may be designated by the Director of Public Prosecutions for these purposes: *ibid* reg 3.

<sup>5</sup> For these purposes, 'interpreter' is to be construed in accordance with the qualification imposed by *ibid* reg 4(1)(b): reg 3.

6 Ibid reg 4(1)(b).

7 ie under the Prosecution of Offences Act 1985 Pt I (ss 1-15) (as amended): see PARA 1080 et seq ante.

8 Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, reg 4(1).

9 Ibid reg 4(2).

10 Ibid reg 4(3).

11 Ibid reg 5. For the purposes of Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, a reference to an allowance of or not exceeding the relevant amount is a reference to an allowance of or not exceeding an amount calculated in accordance with the scales or rates so determined: reg 5. For these purposes, 'relevant amount' is to be construed in accordance with reg 5: reg 3.

12 Ibid reg 11(a).

13 See PRISONS.

14 Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, reg 11(b).

15 Ibid reg 11(c).

16 Ibid reg 11.

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## **2088. Allowances to professional witnesses for attendance.**

A professional witness<sup>1</sup> is entitled for attending to give professional evidence on any day to receive a professional witness allowance, which may be either:

- 2760 (1) where the witness has necessarily incurred expenditure in providing a substitute professional person to take care of his practice during that day, a locum allowance of an amount equal to actual expenditure incurred not exceeding the relevant amount<sup>2</sup>; or
- 2761 (2) where no claim is made under head (1) above, a compensatory allowance of the relevant amount<sup>3</sup>.

The above provisions do not apply to an expert witness attending to give expert evidence<sup>4</sup>.

<sup>1</sup> For these purposes, 'professional witness' means a witness practising as a member of the legal or medical profession or as an accountant, dentist or veterinary surgeon: Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, reg 3.

<sup>2</sup> Ibid reg 6(1)(a). For the meaning of 'relevant amount' see PARA 2087 note 11 ante.

<sup>3</sup> Ibid reg 6(1)(b).

<sup>4</sup> Ibid reg 6(2).

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(ii) Witnesses' Allowances/B. CROWN PROSECUTION SERVICE/2089. Overnight subsistence allowances to professional or expert witnesses and to interpreters.

**2089. Overnight subsistence allowances to professional or expert witnesses and to interpreters.**

Any professional witness who receives an allowance for attendance<sup>1</sup>, any expert witness who attends to give evidence or any interpreter<sup>2</sup> whose attendance causes him to be necessarily absent from his place of residence overnight is entitled to an overnight subsistence allowance of the relevant amount<sup>3</sup> in respect of each such night of absence<sup>4</sup>.

1     le under the Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, reg 6: see PARA 2088 ante.

2     For the meaning of 'interpreter' see PARA 2087 note 5 ante.

3     For the meaning of 'relevant amount' see PARA 2087 note 11 ante.

4     Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, reg 7.

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**2090. Allowances to witnesses, other than professional or expert, and to others for attendance.**

Any witness who attends to give evidence, other than professional or expert evidence, and any other person who, in the opinion of the appropriate officer<sup>1</sup>, necessarily attends for the purpose of the prosecution case otherwise than to give evidence, excluding an interpreter<sup>2</sup>, whose attendance causes him:

- 2762 (1) to incur any expenditure, other than on travelling, lodging or subsistence, to which he would not otherwise be subject; or
- 2763 (2) to suffer any loss of earnings, or of benefit under the enactments relating to National Insurance, which he would otherwise have received,

is entitled to receive a financial loss allowance of an amount equal to the actual expenditure incurred or loss suffered not exceeding any relevant amount<sup>3</sup> in respect of that expense or loss<sup>4</sup>.

1 For the meaning of 'appropriate officer' see PARA 2087 note 4 ante.

2 For the meaning of 'interpreter' see PARA 2087 note 5 ante.

3 For the meaning of 'relevant amount' see PARA 2087 note 11 ante.

4 Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, reg 8.

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(ii) Witnesses' Allowances/B. CROWN PROSECUTION SERVICE/2091. Subsistence allowances to witnesses, other than professional or expert, and to others.

**2091. Subsistence allowances to witnesses, other than professional or expert, and to others.**

Any witness who attends to give evidence, other than professional or expert evidence, and any other person who, in the opinion of the appropriate officer<sup>1</sup>, necessarily attends for the purpose of the prosecution case otherwise than to give evidence, excluding an interpreter<sup>2</sup>, who attends court or elsewhere is entitled to a day subsistence allowance of the relevant amount<sup>3</sup> or, if his attendance makes it necessary for him to stay overnight away from home, to an overnight subsistence allowance<sup>4</sup> of the relevant amount for each night of absence<sup>5</sup>.

1 For the meaning of 'appropriate officer' see PARA 2087 note 4 ante.

2 For the meaning of 'interpreter' see PARA 2087 note 5 ante.

3 For the meaning of 'relevant amount' see PARA 2087 note 11 ante.

4 An overnight subsistence allowance is in respect of a period of 24 hours and a witness who receives such an allowance is entitled to a further allowance in respect of any period in excess of 24 hours which is not covered by such an allowance at the rate appropriate to a day subsistence allowance: Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, reg 9(2).

5 Ibid reg 9(1), (3).



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## **2092. Reimbursement of travelling expenses incurred by witnesses and others.**

Where a person who is entitled to an allowance<sup>1</sup> travels to or from the place of his attendance by public transport, including by air, he is entitled to be reimbursed the fare actually paid<sup>2</sup>.

Unless the appropriate officer<sup>3</sup> for special reason authorises otherwise, only the standard fare may be reimbursed for travel by railway<sup>4</sup>.

Where such a person travels to or from such place by air, his entitlement to be reimbursed the fare actually paid arises only if, in the opinion of the appropriate officer:

- 2764 (1) there was no reasonable alternative to travel by air and the class of fare paid was reasonable in all the circumstances<sup>5</sup>; or
- 2765 (2) travel by air was more economical in the circumstances, taking into account any savings of time resulting from the adoption of such mode of travel and its consequent effect in reducing the amount of allowances otherwise payable<sup>6</sup>.

Where such person travels to or from such place by a hired vehicle, he is entitled to be reimbursed in respect thereof:

- 2766 (a) in a case of urgency or where no public service is reasonably available, the amount of the fare and any reasonable gratuity paid<sup>7</sup>; and
- 2767 (b) in any other case, the amount of the fare for travel by the appropriate public service<sup>8</sup>.

Where such person travels to or from such place by a private motor vehicle, other than one in respect of which reimbursement is otherwise claimed by another person in respect of the same journey, he is entitled to be reimbursed in respect thereof:

- 2768 (i) where a journey to or from such place is necessarily undertaken by private motor vehicle or where the use of the vehicle is more economical in the circumstances<sup>9</sup> or is otherwise reasonable, by payment of mileage at the standard rate<sup>10</sup> and of any parking fee actually and reasonably incurred; and
- 2769 (ii) in any other case, by payment of mileage at the public transport rate<sup>11</sup>.

<sup>1</sup> ie under any of the Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, regs 6-9: see PARAS 2088-2091 ante.

<sup>2</sup> Ibid reg 10(1).

<sup>3</sup> For the meaning of 'appropriate officer' see PARA 2087 note 4 ante.

<sup>4</sup> Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, reg 10(2).

<sup>5</sup> Ibid reg 10(3)(a).

<sup>6</sup> Ibid reg 10(3)(b).

7 Ibid reg 10(4)(a).

8 Ibid reg 10(4)(b).

9 Ie taking into account any savings of time resulting from the adoption of such mode of travel and its consequent effect in reducing the amount of allowances otherwise payable.

10 Ie the rate determined under the Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862, reg 5: see PARA 2087 ante.

11 Ibid reg 10(5), (6). The public transport rate is to be determined in accordance with reg 5 (see PARA 2087 ante): reg 10(5).

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### ***C. SERIOUS FRAUD OFFICE***

#### **2093. Attorney General's power to make regulations.**

The Attorney General may, with the approval of the Treasury, by regulations<sup>1</sup> make such provision as he considers appropriate in relation to the costs and expenses of: (1) witnesses attending to give evidence at the instance of the Serious Fraud Office<sup>2</sup>; and (2) any other person who, in the opinion of the Serious Fraud Office, necessarily attends<sup>3</sup> for the purpose of the case otherwise than to give evidence<sup>4</sup>. The power so conferred on the Attorney General by head (2) above only relates to the costs and expenses of an interpreter if the interpreter is required because of the lack of English of a person attending to give evidence at the instance of the Serious Fraud Office<sup>5</sup>.

1 In exercise of such power the Attorney General has made the Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863: see PARA 2094 et seq post.

2 As to the Serious Fraud Office see PARA 1089 et seq ante.

3 For these purposes, 'attends' means attends at the court or elsewhere: Criminal Justice Act 1987 s 1(15), Sch 1 para 8(5) (added by the Criminal Justice Act 1988 s 166(5)).

4 Criminal Justice Act 1987 Sch 1 para 8(1)(b) (amended by the Criminal Justice Act 1988 s 166(5)). Regulations made under the Criminal Justice Act 1987 Sch 1 para 8(1)(b) (as amended) may: (1) prescribe scales or rates of costs or expenses and specify conditions for the payment of costs or expenses; and (2) provide that scales or rates of costs and expenses are to be determined by the Attorney General with the consent of the Treasury: Sch 1 para 8(3), (4). The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament; and any such regulations may make different provisions with respect to different cases or classes of case: Sch 1 para 9.

5 Ibid Sch 1 para 8(2).

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## **2094. In general.**

Without prejudice to the power of the Director of the Serious Fraud Office to allow more than the prescribed entitlements where he sees fit to do so, the Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988<sup>1</sup> provide for the entitlements to costs and expenses of:

- 2770 (1) a witness who attends court or elsewhere to give evidence at the instance of the Serious Fraud Office<sup>2</sup>, whether he gives evidence or not<sup>3</sup>; and
- 2771 (2) any other person who, in the opinion of the appropriate officer<sup>4</sup>, necessarily attends court or elsewhere for the purpose of the prosecution case otherwise than to give evidence, including an interpreter<sup>5</sup>, but only if he is required because of the lack of English of a person attending to give evidence at the instance of the Serious Fraud Office<sup>6</sup>,

in any proceedings conducted by the Director in the discharge of his functions<sup>7</sup>; but nothing in the regulations gives an entitlement to a person who, when called, refuses to give evidence<sup>8</sup>.

Such entitlements are the same for a person whether his attendance on any occasion is for the purpose of one case or more than one case<sup>9</sup>.

Where a person claims such an entitlement, it is for the appropriate officer to satisfy himself of the person's entitlement before authorising the claim to be met<sup>10</sup>. The scales or rates of the costs and expenses for which entitlements are so provided are to be determined by the Attorney General with the consent of the Treasury<sup>11</sup>.

However, in the case of:

- 2772 (a) a member of, or special constable appointed or person employed for the purposes of, a police force, attending in his capacity as such<sup>12</sup>;
- 2773 (b) a whole-time officer of an institution to which the Prison Act 1952<sup>13</sup> applies attending in his capacity as such<sup>14</sup>;
- 2774 (c) an inmate of such an institution in respect of any occasion on which he is conveyed to attend at any place in custody<sup>15</sup>,

there is no entitlement to any allowance or reimbursement of travelling expenses<sup>16</sup>.

<sup>1</sup> I.e. the Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863: see the text and notes 2-16 *infra*; and PARA 2095 *et seq post*.

<sup>2</sup> As to the Serious Fraud Office see PARA 1089 *et seq ante*.

<sup>3</sup> Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 3(a).

<sup>4</sup> For these purposes, 'appropriate officer' means any member of the Serious Fraud Office as may be designated by the Director of the Serious Fraud Office for these purposes: Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 2.

5 For these purposes, 'interpreter' is to be construed in accordance with the qualification imposed by *ibid* reg 3(1)(b) (see the text to notes 7-8 *infra*): reg 2.

6 *Ibid* reg 3(b).

7 *Ie* under the Criminal Justice Act 1987 Pt I (ss 1-12) (as amended): see *PARA* 1089 *et seq ante*.

8 Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 3(1).

9 *Ibid* reg 3(2).

10 *Ibid* reg 3(3).

11 *Ibid* reg 4. For the purposes of the Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, a reference to an allowance of or not exceeding the relevant amount is a reference to an allowance of or not exceeding an amount calculated in accordance with the scales or rates so determined: reg 4. For these purposes, 'relevant amount' is to be construed in accordance with reg 4: reg 2.

12 *Ibid* reg 10(a).

13 See *PRISONS*.

14 Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 10(b).

15 *Ibid* reg 10(c).

16 *Ibid* reg 10.

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## **2095. Allowances to professional witnesses for attendance.**

A professional witness<sup>1</sup> is entitled for attending to give professional evidence on any day to receive a professional witness allowance, which may be either:

- 2775 (1) where the witness has necessarily incurred expenditure in providing a substitute professional person to take care of his practice during that day, a locum allowance of an amount equal to actual expenditure incurred not exceeding the relevant amount<sup>2</sup>; or
- 2776 (2) where no claim is made under head (1) above, a compensatory allowance of the relevant amount<sup>3</sup>.

The above provisions do not apply to an expert witness attending to give expert evidence<sup>4</sup>.

<sup>1</sup> For these purposes, 'professional witness' means a witness practising as a member of the legal or medical profession or as an accountant, dentist or veterinary surgeon: Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 2.

<sup>2</sup> Ibid reg 5(1)(a). For the meaning of 'relevant amount' see PARA 2094 note 11 ante.

<sup>3</sup> Ibid reg 5(1)(b).

<sup>4</sup> Ibid reg 5(2).

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**2096. Overnight subsistence allowances to professional or expert witnesses and to interpreters.**

Any professional witness who receives an allowance for attendance<sup>1</sup>, any expert witness who attends to give expert evidence or any interpreter<sup>2</sup> whose attendance causes him to be necessarily absent from his place of residence overnight is entitled to an overnight subsistence allowance of the relevant amount<sup>3</sup> in respect of each such night of absence<sup>4</sup>.

1     le under the Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 5: see PARA 2095 ante.

2     For the meaning of 'interpreter' see PARA 2094 note 5 ante.

3     For the meaning of 'relevant amount' see PARA 2094 note 11 ante.

4     Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 6.

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(ii) Witnesses' Allowances/C. SERIOUS FRAUD OFFICE/2097. Allowances to witnesses, other than professional or expert, and to others for attendance.

**2097. Allowances to witnesses, other than professional or expert, and to others for attendance.**

Any witness who attends to give evidence, other than professional or expert evidence, and any other person who, in the opinion of the appropriate officer<sup>1</sup>, necessarily attends for the purpose of the prosecution case otherwise than to give evidence, excluding an interpreter<sup>2</sup>, whose attendance causes him:

- 2777 (1) to incur any expenditure, other than on travelling, lodging or subsistence, to which he would not otherwise be subject<sup>3</sup>; or
- 2778 (2) to suffer any loss of earnings, or of benefit under the enactments relating to National Insurance, which he would otherwise have received<sup>4</sup>,

is entitled to receive a financial loss allowance of an amount equal to the actual expenditure incurred or loss suffered not exceeding any relevant amount<sup>5</sup> in respect of that expense or loss<sup>6</sup>.

1 For the meaning of 'appropriate officer' see PARA 2094 note 4 ante.

2 For the meaning of 'interpreter' see PARA 2094 note 5 ante.

3 Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 7(a).

4 Ibid reg 7(b).

5 For the meaning of 'relevant amount' see PARA 2094 note 11 ante.

6 Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 7.



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**2098. Subsistence allowances to witnesses, other than professional or expert, and to others.**

Any witness who attends to give evidence, other than professional or expert evidence, and any other person who, in the opinion of the appropriate officer<sup>1</sup>, necessarily attends for the purpose of the prosecution case otherwise than to give evidence, excluding an interpreter<sup>2</sup>, who attends court or elsewhere is entitled to a day subsistence allowance of the relevant amount<sup>3</sup> or, if his attendance makes it necessary for him to stay overnight away from home, to an overnight subsistence allowance<sup>4</sup> of the relevant amount for each night of absence<sup>5</sup>.

1 For the meaning of 'appropriate officer' see PARA 2094 note 4 ante.

2 For the meaning of 'interpreter' see PARA 2094 note 5 ante.

3 For the meaning of 'relevant amount' see PARA 2094 note 11 ante.

4 An overnight subsistence allowance is in respect of a period of 24 hours and a witness who receives such an allowance is entitled to a further allowance in respect of any period in excess of 24 hours which is not covered by such an allowance at the rate appropriate to a day subsistence allowance: Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 8(2).

5 Ibid reg 8(1), (3).

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## **2099. Reimbursement of travelling expenses incurred by witnesses and others.**

Where a person who is entitled to an allowance<sup>1</sup> travels to or from the place of his attendance by public transport, including by air, he is entitled to be reimbursed the fare actually paid<sup>2</sup>.

Unless the appropriate officer<sup>3</sup> for special reason authorises otherwise, only the standard fare may be so reimbursed for travel by railway<sup>4</sup>.

Where such a person travels to or from such place by air, his entitlement to be reimbursed the fare actually paid arises only if, in the opinion of the appropriate officer:

- 2779 (1) there was no reasonable alternative to travel by air and the class of fare paid was reasonable in all the circumstances<sup>5</sup>; or
- 2780 (2) travel by air was more economical in the circumstances, taking into account any savings of time resulting from the adoption of such mode of travel and its consequent effect in reducing the amount of allowances otherwise payable<sup>6</sup>.

Where such person travels to or from such place by a hired vehicle, he is entitled to be reimbursed in respect thereof:

- 2781 (a) in a case of urgency or where no public service is reasonably available, the amount of the fare and any reasonable gratuity paid<sup>7</sup>; and
- 2782 (b) in any other case, the amount of the fare for travel by the appropriate public service<sup>8</sup>.

Where such person travels to or from such place by a private motor vehicle, other than one in respect of which reimbursement is otherwise claimed by another person in respect of the same journey, he is entitled to be reimbursed in respect thereof:

- 2783 (i) where a journey to or from such place is necessarily undertaken by private motor vehicle or where the use of the vehicle is more economical in the circumstances<sup>9</sup> or is otherwise reasonable, by payment of mileage at the standard rate<sup>10</sup> and of any parking fee actually and reasonably incurred<sup>11</sup>; and
- 2784 (ii) in any other case, by payment of mileage at the public transport rate<sup>12</sup>.

<sup>1</sup> ie under any of the Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, regs 5-8: see PARAS 2095-2098 ante.

<sup>2</sup> Ibid reg 9(1).

<sup>3</sup> For the meaning of 'appropriate officer' see PARA 2094 note 4 ante.

<sup>4</sup> Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 9(2).

<sup>5</sup> Ibid reg 9(3)(a).

<sup>6</sup> Ibid reg 9(3)(b).

7 Ibid reg 9(4)(a).

8 Ibid reg 9(4)(b).

9 Ie taking into account any savings of time resulting from the adoption of such mode of travel and its consequent effect in reducing the amount of allowances otherwise payable.

10 Ie the rate determined under the Serious Fraud Office (Witnesses' etc Allowances) Regulations 1988, SI 1988/1863, reg 4: see PARA 2094 ante.

11 Ibid reg 9(5)(a), (6).

12 Ibid reg 9(5)(b), (6). The public transport rate is to be determined in accordance with reg 4 (see PARA 2094 ante): reg 9(5).

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COMPENSATION, REWARDS AND COSTS/(4) COSTS AND ALLOWANCES/(iii) Enforcement/2100. Enforcement of costs etc payable by parties.

### **(iii) Enforcement**

#### **2100. Enforcement of costs etc payable by parties.**

Where, in specified<sup>1</sup> criminal proceedings, a court makes an order against the defendant for the payment of costs, compensation etc, any sum required to be paid by such an order is to be treated, for the purposes of collection and enforcement, as if it had been adjudged to be paid on a conviction by a magistrates' court, being:

- 2785 (1) where the order is made by a magistrates' court, that court; and
- 2786 (2) in any other case, such magistrates' court as may be specified in the order<sup>2</sup>.

Where a court makes an order against the prosecutor in specified<sup>3</sup> criminal proceedings, any sum required to be paid by such an order is enforceable as if the order were for the payment of money recoverable summarily as a civil debt<sup>4</sup>.

Any sum required to be paid by such an order<sup>5</sup> is enforceable by the High Court or a county court (otherwise than by issue of a writ of fieri facias or other process against goods or by imprisonment or attachment of earnings) as if the sum were due in pursuance of a judgment or order of the High Court or county court, as the case may be<sup>6</sup>.

Where the Crown Court makes any order against a person for the payment of costs<sup>7</sup>, compensation etc, then, if that person is before it, the Crown Court may order him to be searched<sup>8</sup>. Any money found on a person in such a search may be applied towards payment of the fine or other sum payable by him, unless the court otherwise directs; and the balance, if any, must be returned to him<sup>9</sup>.

1 The specified criminal proceedings are:

- 309 (1) where a magistrates' court, on the summary trial of an information, makes an order as to costs to be paid by the defendant to the prosecutor (Administration of Justice Act 1970 s 41, Sch 9 para 1);
- 310 (2) where a magistrates' court makes an order as to costs to be paid by the defendant in exercise of any power in that behalf conferred by regulations made under the Prosecution of Offences Act 1985 s 19(1) (see PARA 2058 ante) (Administration of Justice Act 1970 Sch 9 para 1A (added by the Prosecution of Offences Act 1985 s 31(5), Sch 1 Pt II));
- 311 (3) where an appellant to the Crown Court against conviction or sentence by a magistrates' court abandons his appeal and the magistrates' court orders him to pay costs to the other party to the appeal (Administration of Justice Act 1970 Sch 9 para 2 (amended by the Courts Act 1971 s 56(1), Sch 8 para 60));
- 312 (4) where a person appeals to the Crown Court against conviction or sentence by a magistrates' court, and the Crown Court makes an order as to costs to be paid by him (Administration of Justice Act 1970 Sch 9 para 3 (amended by the Courts Act 1971 Sch 8 para 60));

- 313 (5) where a person is prosecuted or tried on indictment before the Crown Court and is convicted, and the court makes an order as to costs to be paid by him (Administration of Justice Act 1970 Sch 9 para 4 (amended by the Criminal Law Act 1977 s 65, Sch 13; the Courts Act 1971 Sch 8 para 60; and the Prosecution of Offences Act 1985 Sch 1 Pt II));
- 314 (6) where the Crown Court makes an order as to costs to be paid by the defendant in exercise of any power in that behalf conferred by regulations made under the Prosecution of Offences Act 1985 s 19(1) (see PARA 2058 ante) (Administration of Justice Act 1970 Sch 9 para 4A (added by the Prosecution of Offences Act 1985 Sch 1 Pt II));
- 315 (7) where the criminal division of the Court of Appeal makes an order as to costs to be paid by: (a) an appellant; (b) an applicant for leave to appeal to that court; or (c) in the case of an application for leave to appeal to the House of Lords, an applicant who was the appellant before the criminal division (Administration of Justice Act 1970 Sch 9 para 6 (substituted by the Prosecution of Offences Act 1985 Sch 1 Pt II));
- 316 (8) where a court makes an order by virtue of regulations made under the Prosecution of Offences Act 1985 s 19(5) for the payment of costs by an offender (see PARA 2058 ante) (Administration of Justice Act 1970 Sch 9 para 9 (substituted by the Costs in Criminal Cases Act 1973 s 21, Sch 1 para 6; and amended by the Prosecution of Offences Act 1985 Sch 1 Pt II));
- 317 (9) where under the Powers of Criminal Courts (Sentencing) Act 2000 s 130 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 375-378) a court orders the payment of compensation (Administration of Justice Act 1970 Sch 9 para 10 (substituted by the Powers of Criminal Courts (Sentencing) Act 2000 s 165(1), Sch 9 para 43(1), (2));
- 318 (10) where under the Powers of Criminal Courts (Sentencing) Act 2000 s 137 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 383) a court orders any fine, compensation or costs, or any sum awarded by way of satisfaction or compensation to be paid by the parent or guardian of a child or young person (Administration of Justice Act 1970 Sch 9 para 12 (amended by the Criminal Justice Act 1972 s 64(2), Sch 6 Pt II; the Powers of Criminal Courts (Sentencing) Act 2000 Sch 9 para 43(1), (3));
- 319 (11) as from a day to be appointed, where a court under the Criminal Justice Act 2003 s 161A (as added) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 158) orders a surcharge (Administration of Justice Act 1970 Sch 9 para 13 (added by the Domestic Violence, Crime and Victims Act 2004 s 14(3) (not yet in force)). At the date at which this volume states the law no such day had been appointed.

As from days to be appointed:

- 320 (i) the reference in head (1) supra to an information within the meaning of the Magistrates' Courts Act 1980 s 1 (or to the laying of such an information) is to be read as including a reference to a written charge (or to the issue of a written charge) (Criminal Justice Act 2003 s 30(5)(a) (not yet in force): see MAGISTRATES vol 29(2) (Reissue) PARA 681);
- 321 (ii) in head (7) supra the words 'Supreme Court' are substituted for the words 'House of Lords' by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 22 (not yet in force).

At the date at which this volume states the law no such days had been appointed.

Where in the case specified in head (9) supra the Crown Court thinks that the period for which the person subject to the order is otherwise liable to be committed to prison for default under the order is insufficient, it may specify a longer period for that purpose; and then, in the case of default: (A) the specified period must be substituted as the maximum for which the person may be imprisoned under the Magistrates' Courts Act 1980 s 76 (as amended) (see MAGISTRATES vol 29(2) (Reissue) PARA 860); and (B) Sch 4 para 2 (see MAGISTRATES vol 29(2) (Reissue) PARA 865) applies, with any necessary modifications, for the reduction of the specified period where, at the time of the person's imprisonment, he has made part payment under the order: Administration of Justice Act 1970 s 41(8) (substituted by the Criminal Justice Act 1988 s 106). However, the Crown Court may not specify a period of imprisonment longer than that which it could order a person to undergo on imposing on him a fine equal in amount to the sum required to be paid by the order: Administration of Justice Act 1970 s 41(8A) (added by the Criminal Justice Act 1988 s 106).

A magistrates' court may make an attachment of earnings order to secure the payment of any sum adjudged to be paid by a conviction or treated (by any enactment relating to the collection and enforcement of fines, costs, compensation or forfeited recognisances) as so adjudged to be paid: see the Attachment of Earnings Act 1971 s 1(3)(b).

2 Administration of Justice Act 1970 s 41(1). Where a magistrates' court has power to commit a person to prison for default in paying a sum due under an order enforceable as mentioned in s 41 (as amended), the court may not exercise the power unless it is satisfied that all other methods of enforcing payment have been tried or considered and either have proved unsuccessful or are likely to do so: s 41(9).

3 The specified criminal proceedings are:

322 (1) where a magistrates' court makes an order as to costs to be paid by the prosecutor in exercise of any power in that behalf conferred by regulations made under the Prosecution of Offences Act 1985 s 19(1) (see PARA 2058 ante) (Administration of Justice Act 1970 s 41(2), Sch 9 para 13 (substituted by the Prosecution of Offences Act 1985 s 31(5), Sch 1 para 7(7));

323 (2) where an appellant to the Crown Court from a magistrates' court (otherwise than against conviction or sentence) abandons his appeal and the magistrates' court orders him to pay costs to the other party to the appeal (Administration of Justice Act 1970 Sch 9 para 14 (amended by the Courts Act 1971 Sch 8 para 60));

324 (3) any order for the payment of costs made by the Crown Court, other than an order falling within the Administration of Justice Act 1970 Sch 9 Pt I (as amended) (see note 1 supra), or an order for costs to be paid out of money to be provided by Parliament (Administration of Justice Act 1970 Sch 9 para 16 (substituted by the Courts Act 1971 Sch 8 para 60));

325 (4) where the criminal division of the Court of Appeal makes an award as to costs to be paid by the respondent or, in the case of an application for leave to appeal to the House of Lords, an applicant who was the respondent before the criminal division, and does so in exercise of any power in that behalf conferred by regulations made under the Prosecution of Offences Act 1985 s 19(1) (see PARA 2058 ante) (Administration of Justice Act 1970 Sch 9 para 16A (added by the Prosecution of Offences Act 1985 Sch 1 Pt II)).

As from a day to be appointed, in head (4) supra the words 'Supreme Court' are substituted for the words 'House of Lords' by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 22. At the date at which this volume states the law no such day had been appointed.

4 Administration of Justice Act 1970 s 41(2).

5 Ie in the cases specified in *ibid* Sch 9 (as amended): see notes 1, 3 supra.

6 *Ibid* s 41(3).

7 Ie any order such as is mentioned in note 1 heads (4), (5) or (8) supra.

8 Powers of Criminal Courts (Sentencing) Act 2000 s 142(1). It is the duty of a prisoner custody officer acting in pursuance of prisoner escort arrangements who is on any premises in which the Crown Court is sitting to give effect to any order of that court under s 34A (as added): Criminal Justice Act 1991 s 82(4). The powers arising by virtue of s 82(4) include power to use reasonable force where necessary: s 82(5).

9 Powers of Criminal Courts (Sentencing) Act 2000 s 142(2).

## UPDATE

### 2100 Enforcement of costs etc payable by parties

NOTES 1, 3--Constitutional Reform Act 2005 Sch 9 in force 1 October 2009: SI 2009/1604.

NOTE 1--Attachment of Earnings Act 1971 s 1(3)(b) repealed: SI 2006/1737. See now Courts Act 2003 Sch 5; and MAGISTRATES vol 29(2) (Reissue) PARA 877A.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/24.

PROTECTION OF WITNESSES ETC UNDER SOCPA 2005/2101. Protection of persons involved in investigations or proceedings.

## **24. PROTECTION OF WITNESSES ETC UNDER**

### **2101. Protection of persons involved in investigations or proceedings.**

A protection provider<sup>1</sup> may make such arrangements under the Serious Organised Crime and Police Act 2005 as he considers appropriate for the purpose of protecting a person of a specified description<sup>2</sup> if:

- 2787 (1) the protection provider considers that the person's safety is at risk by virtue of his being a person of a description so specified<sup>3</sup>; and
- 2788 (2) the person is ordinarily resident in the United Kingdom<sup>4</sup>.

A protection provider may vary or cancel any such arrangements if he considers it appropriate to do so<sup>5</sup>, and if he makes or cancels arrangements he must record that he has done so<sup>6</sup>. A person is a protected person if arrangements have been made for his protection, and those arrangements have not been cancelled<sup>7</sup>.

In determining whether to make arrangements or to vary or cancel such arrangements, a protection provider must, in particular, have regard to:

- 2789 (a) the nature and extent of the risk to the person's safety<sup>8</sup>;
- 2790 (b) the cost of the arrangements<sup>9</sup>;
- 2791 (c) the likelihood that the person, and any person associated with him, will be able to adjust to any change in their circumstances which may arise from the making of the arrangements or from their variation or cancellation (as the case may be)<sup>10</sup>; and
- 2792 (d) if the person is or might be a witness in legal proceedings (whether or not in the United Kingdom), the nature of the proceedings and the importance of his being a witness in those proceedings<sup>11</sup>.

Any power which a person has (otherwise than by virtue of the power under the Serious Organised Crime and Police Act 2005 described above) to make arrangements for the protection of another person is not affected by this provision<sup>12</sup>.

The protection provider must inform the person to whom the arrangements relate of the provisions of the Serious Organised Crime and Police Act 2005<sup>13</sup> as they apply in relation to the arrangements<sup>14</sup>. If the protection provider considers that the person would be unable to understand the information, by reason of his age or of any incapacity, the information must instead be given to a person who appears to the protection provider to be interested in the welfare of the person to whom the arrangements relate, and to be the appropriate person to whom to give the information<sup>15</sup>.

1 A protection provider is: (1) a chief officer of a police force in England and Wales; (2) a chief constable of a police force in Scotland; (3) the Chief Constable of the Police Service of Northern Ireland; (4) the Director General of SOCA; (5) any of the Commissioners for Her Majesty's Revenue and Customs; (6) the Director of the Scottish Drug Enforcement Agency; (7) a person designated by any such person to exercise his functions under

the Serious Organised Crime and Police Act 2005 s 82: ss 82(5), 94(1), (2). See further CUSTOMS AND EXCISE; POLICE.

2 The persons specified for the purposes of *ibid* s 82 are as follows: (1) a person who is or might be, or who has been, a witness in legal proceedings (whether or not in the United Kingdom: see *infra*) (s 82, Sch 5 para 1); (2) a person who has complied with a disclosure notice given to him by virtue of s 62(1) (see *PARA 1087 ante*) (Sch 5 para 2); (3) a person who has been given an immunity notice under s 71(1) (see *PARA 48 ante*) if the notice continues to have effect in relation to him (Sch 5 para 3(1)); (4) a person who has been given a restricted use undertaking under s 72(1) (see *PARA 1478 ante*) if the undertaking continues to have effect in relation to him (Sch 5 para 3(2)); (5) a person who is or has been a member of a jury (Sch 5 para 4); (6) a person who holds or has held judicial office (whether or not in the United Kingdom) (Sch 5 para 5); (7) a person who is or has been a justice of the peace or who holds or has held a position comparable to that of a justice of the peace in a place outside the United Kingdom (Sch 5 para 6); (8) a person who is or has been a member of an international tribunal which has jurisdiction in criminal matters (Sch 5 para 7); (9) a person who conducts or has conducted criminal prosecutions (whether or not in the United Kingdom) (Sch 5 para 8); (10) a person who is or has been the Director of Public Prosecutions for England and Wales (Sch 5 para 9(1)); (11) a person who is or has been a member of staff of the Crown Prosecution Service for England and Wales (Sch 5 para 9(2)); (12) a person who is or has been the Director or deputy Director of Public Prosecutions for Northern Ireland (Sch 5 para 10(1)); (13) a person who is or has been a person appointed under the Prosecution of Offences (Northern Ireland) Order 1972, SI 1972/538 (NI 1) to assist the Director of Public Prosecutions for Northern Ireland (Serious Organised Crime and Police Act 2005 Sch 5 para 10(2)); (14) a person who is or has been under the direction and control of the Lord Advocate in the Lord Advocate's capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland (Sch 5 para 11); (15) a person who is or has been the Director of Revenue and Customs Prosecutions (Sch 5 para 12(1)); (16) a person who is or has been a member of staff of the Revenue and Customs Prosecutions Office (Sch 5 para 12(2)); (17) a person who is or has been a constable (Sch 5 para 13); (18) a person who is or has been designated under the Police Reform Act 2002 s 38(1) (police powers for police authority employees) or the Police (Northern Ireland) Act 2003 s 30(1) (police powers for designated police support staff) (Serious Organised Crime and Police Act 2005 Sch 5 para 14); (19) a person who is a police custody and security officer (within the meaning of the Police (Scotland) Act 1967 of a police authority in Scotland (Serious Organised Crime and Police Act 2005 Sch 5 para 15); (20) a person who is or has been an officer of Revenue and Customs, or who is or has been a member of staff of Her Majesty's Customs and Excise (Sch 5 para 16); (21) a person who is or has been a person appointed as an immigration officer under the Immigration Act 1971 (Serious Organised Crime and Police Act 2005 Sch 5 para 17); (22) a person who is or has been a member of staff of SOCA (Sch 5 para 18); (23) a person who is or has been the Director General of the National Criminal Intelligence Service or the Director General of the National Crime Squad (Sch 5 para 19(1)); (24) a person who is or has been under the direction and control of the Director General of the National Criminal Intelligence Service or the Director General of the National Crime Squad (Sch 5 para 19(2)); (25) a person who is or has been the Director of the Scottish Drug Enforcement Agency (Sch 5 para 20(1)); (26) a person who is or has been under the direction and control of the Director of the Scottish Drug Enforcement Agency (Sch 5 para 20(2)); (27) a person who is or has been the Director of the Assets Recovery Agency (Sch 5 para 21(1)); (28) a person who is or has been a member of staff of the Assets Recovery Agency or a person with whom the Director of that Agency has made arrangements for the provision of services under the Proceeds of Crime Act 2002 s 1(4) (Serious Organised Crime and Police Act 2005 Sch 5 para 21(2)); (29) a person who is or has been the head of the Civil Recovery Unit, ie of the organisation known by that name which acts on behalf of the Scottish Ministers in proceedings under the Proceeds of Crime Act 2002 Pt 5 (civil recovery of the proceeds etc of unlawful conduct) (Serious Organised Crime and Police Act 2005 Sch 5 para 22(1)); (30) a person who is or has been a member of staff of the Civil Recovery Unit (Sch 5 para 22(2)); (31) a person who is or has been a person appointed by virtue of the Proceeds of Crime Act 2002 s 246(1) as an interim receiver (see *PARA 2153 post*) (Serious Organised Crime and Police Act 2005 Sch 5 para 23(1)); (32) a person who assists or has assisted an interim receiver so appointed in the exercise of such functions as are mentioned in the Proceeds of Crime Act 2002 s 247 (see *PARA 2153 post*) (Serious Organised Crime and Police Act 2005 Sch 5 para 23(2)); (33) a person who is or has been a person appointed by virtue of the Proceeds of Crime Act 2002 s 256(1) as an interim administrator in Scotland (Serious Organised Crime and Police Act 2005 Sch 5 para 24(1)); (34) a person who assists or has assisted an interim administrator so appointed in the exercise of such functions as are mentioned in the Proceeds of Crime Act 2002 s 257 (Serious Organised Crime and Police Act 2005 Sch 5 para 24(2)); (35) a person who is or has been the head of the Financial Crime Unit, ie of the organisation known by that name which, among other activities, acts on behalf of the Lord Advocate in proceedings under the Proceeds of Crime Act 2002 Pt 3 (confiscation: Scotland) (Serious Organised Crime and Police Act 2005 Sch 5 para 25(1)); (36) a person who is or has been a member of staff of the Financial Crime Unit (Sch 5 para 25(2)); (37) a person who is or has been a prison officer (Sch 5 para 26); (38) a person who is or has been a covert human intelligence source (within the meaning of the Regulation of Investigatory Powers Act 2000 s 26(8) or of the Regulation of Investigatory Powers (Scotland) Act 2000 s 1(7)) (Serious Organised Crime and Police Act 2005 Sch 5 para 27); (39) a person (a) who is a member of the family of a person specified in any of the heads *supra*; (b) who lives or has lived in the same household as a person so specified; (c) who has or has had a close personal relationship with a person so specified (Sch 5 para 28). The Secretary of State may, after consulting the Scottish Ministers, by order amend Sch 5 so as to add, modify or omit any entry: s 82(6).

A reference to a person who is a witness in legal proceedings includes a reference to a person who provides any information or any document or other thing which might be used in evidence in those proceedings or which



(whether or not admissible as evidence in those proceedings): (i) might tend to confirm evidence which will or might be admitted in those proceedings; (ii) might be referred to in evidence given in those proceedings by another witness; or (iii) might be used as the basis for any cross examination in the course of those proceedings: s 94(6). A reference to a person who might be, or to a person who has been, a witness in legal proceedings is to be construed accordingly: s 94(6). A reference to a person who is a witness in legal proceedings does not include a reference to a person who is an accused person in criminal proceedings unless he is a witness for the prosecution and a reference to a person who might be, or to a person who has been, a witness in legal proceedings is to be construed accordingly: s 94(7).

A reference to a person who is or has been a member of staff of an organisation includes a reference to a person who is or has been seconded to the organisation to serve as a member of its staff: s 94(8).

3 Ibid s 82(1)(a).

4 Ibid s 82(1)(b). As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

5 Ibid s 82(2).

6 Ibid s 82(3).

7 Ibid s 94(3).

8 Ibid s 82(4)(a).

9 Ibid s 82(4)(b).

10 Ibid s 82(4)(c).

11 Ibid s 82(4)(d).

12 Ibid s 82(7).

13 Ie ibid Ch 4 (ss 82-94): see PARAS 2102-2107 post.

14 Ibid s 93(2). This applies whether (1) a protection provider makes arrangements under s 82(1); or (2) a protection provider determines under s 91(5) (see PARA 2107 post) that it is appropriate to treat arrangements as having been made under s 82(1): s 93(1). If arrangements are made jointly under s 82(1) (by virtue of s 83; see PARA 2102 post), the protection providers involved in the arrangements must nominate one of those protection providers to perform the duties imposed by s 93: s 93(4).

15 Ibid s 93(3); and see note 14 supra.

## **UPDATE**

### **2101 Protection of persons involved in investigations or proceedings**

NOTE 2--2005 Act Sch 5 para 21(1), (2) amended: Serious Crime Act 2007 Sch 8 para 175, Sch 14.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/24.

PROTECTION OF WITNESSES ETC UNDER SOCPA 2005/2102. Joint arrangements and transfer of responsibility between protection providers.

## **2102. Joint arrangements and transfer of responsibility between protection providers.**

Arrangements may be made by two or more protection providers<sup>1</sup> acting jointly<sup>2</sup>, and if they are, any powers conferred on such a protection provider<sup>3</sup> are exercisable in relation to the arrangements by (1) all of the protection providers acting together<sup>4</sup>; or (2) one of the protection providers, or some of the protection providers acting together, with the agreement of the others<sup>5</sup>.

A protection provider who makes arrangements for the protection of a person of a specified description may agree with another protection provider that, as from a date specified in the agreement the protection provider will cease to discharge any responsibilities which he has in relation to the arrangements, and the other protection provider will discharge those responsibilities instead<sup>6</sup>. If such an agreement is made, any powers conferred on a protection provider<sup>7</sup> are, as from the date specified in the agreement, exercisable by the other protection provider as if he had made the arrangements for the protection of the specified person<sup>8</sup>. Each protection provider who makes an agreement must record that he has done so<sup>9</sup>.

These provisions do not affect any power which a protection provider has to request or obtain assistance from another protection provider<sup>10</sup>.

<sup>1</sup> I.e. under the Serious Organised Crime and Police Act 2005 s 82(1) (see PARA 2101 ante). For the meaning of 'protection provider' see PARA 2101 note 1 ante.

<sup>2</sup> Ibid s 83(1).

<sup>3</sup> I.e. by virtue of ibid Ch 4 (ss 82-94).

<sup>4</sup> Ibid s 83(2)(a).

<sup>5</sup> Ibid s 83(2)(b). If arrangements are made jointly by virtue of s 83, the protection providers involved in the arrangements must nominate one of those protection providers to inform the person to whom the arrangements relate of the provisions of the Serious Organised Crime and Police Act 2005 as they apply to such arrangements: see s 93(4); and PARA 2101 note 14 ante.

<sup>6</sup> Ibid s 84(1). Any such agreement may include provision for the making of payments in respect of any costs incurred or likely to be incurred in consequence of the agreement: s 84(2).

<sup>7</sup> I.e. powers conferred by ibid Ch 4 (including the power conferred by s 84(1): see s 84(3).

<sup>8</sup> Ibid s 84(3).

<sup>9</sup> Ibid s 84(4).

<sup>10</sup> Ibid s 83(3).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/24.  
 PROTECTION OF WITNESSES ETC UNDER SOCPA 2005/2103. Duty of public authorities to assist protection providers.

### **2103. Duty of public authorities to assist protection providers.**

Where a protection provider<sup>1</sup> requests assistance from a public authority<sup>2</sup> in connection with the making of arrangements for the protection of a person of a specified description<sup>3</sup> or the implementation, variation or cancellation of such arrangements<sup>4</sup>, the public authority must take reasonable steps to provide the assistance requested<sup>5</sup>.

1 For the meaning of 'protection provider' see PARA 2101 note 1 ante.

2 'Public authority' includes any person certain of whose functions are of a public nature but does not include: (1) a court or tribunal; (2) either House of Parliament or a person exercising functions in connection with proceedings in Parliament; or (3) the Scottish Parliament or a person exercising functions in connection with proceedings in the Scottish Parliament: Serious Organised Crime and Police Act 2005 s 85(3).

3 The arrangements under ibid s 82(1): see PARA 2101 ante.

4 See PARA 2101 ante.

5 Serious Organised Crime and Police Act 2005 s 85(1), (2).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/24.

PROTECTION OF WITNESSES ETC UNDER SOCPA 2005/2104. Offence of disclosing information about protection arrangements.

## **2104. Offence of disclosing information about protection arrangements.**

A person commits an offence if (1) he discloses information which relates to the making of arrangements for the protection of a person of a specified description<sup>1</sup> or to the implementation, variation or cancellation of such arrangements<sup>2</sup>; and (2) he knows or suspects that the information relates to the making of such arrangements or to their implementation, variation or cancellation<sup>3</sup>.

Such a person is liable on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both, and on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum or to both<sup>4</sup>.

There are the following defences to the above offence<sup>5</sup>.

A person (P) is not guilty of the offence if (a) at the time when P disclosed the information, he was or had been a protected person<sup>6</sup>; (b) the information related only to arrangements made for the protection of P or for the protection of P and a person associated with him<sup>7</sup>; and (c) at the time when P disclosed the information, it was not likely that its disclosure would endanger the safety of any person<sup>8</sup>.

A person (D) is not guilty of the offence if (i) D disclosed the information with the agreement of a person (P) who, at the time the information was disclosed, was or had been a protected person<sup>9</sup>; (ii) the information related only to arrangements made for the protection of P or for the protection of P and a person associated with him<sup>10</sup>; and (iii) at the time when D disclosed the information, it was not likely that its disclosure would endanger the safety of any person<sup>11</sup>.

A person is not guilty of the offence if he disclosed the information for the purposes of safeguarding national security or for the purposes of the prevention, detection or investigation of crime<sup>12</sup>.

A person is not guilty of the offence if (A) at the time when he disclosed the information, he was a protection provider or involved in the making of arrangements for the protection of a specified person or in the implementation, variation or cancellation of such arrangements<sup>13</sup>; and (B) he disclosed the information for the purposes of the making, implementation, variation or cancellation of such arrangements<sup>14</sup>.

If sufficient evidence is adduced to raise an issue with respect to a defence mentioned above, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not<sup>15</sup>.

1    Ie under the Serious Organised Crime and Police Act 2005 s 82(1): see PARA 2101 ante.

2    Ibid s 86(1)(a). See note 3 infra.

3    Ibid s 86(1)(b). In relation to arrangements made before 1 April 2006, a person does not commit an offence under s 86(1) by disclosing information relating to the arrangements (ie the arrangements which are treated as having been made by a protection provider by virtue of s 91(2); see PARA 2107 post) unless the information is disclosed on or after the relevant date (ie the date of the record made by the protection provider, in relation to the arrangements, in pursuance of s 91(7); see PARA 2107 post): s 92(1)(a), (b), (2). It is immaterial whether the information relates to something done in connection with the arrangements before or on or after the relevant date: s 92(3).

4 Ibid s 86(2). As to the statutory maximum see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140.

5 See ibid s 87; and the text and notes infra. The Secretary of State may by order make provision prescribing circumstances in which a person who discloses information as mentioned in s 86(1) is not guilty in England and Wales or in Northern Ireland of an offence under that section: s 87(5). Similar provision applies to the Scottish Ministers in relation to Scotland: see s 87(6).

6 Ibid s 87(1)(a). As to protected persons see PARA 2101 ante.

7 Ibid s 87(1)(b). A person is associated with another person if any of the following apply (1) they are members of the same family; (2) they live in the same household; (3) they have lived in the same household: s 94(4).

8 Ibid s 87(1)(c).

9 Ibid s 87(2)(a).

10 Ibid s 87(2)(b).

11 Ibid s 87(2)(c).

12 Ibid s 87(3).

13 Ibid s 87(4)(a).

14 Ibid s 87(4)(b).

15 Ibid s 87(7).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/24.

PROTECTION OF WITNESSES ETC UNDER SOCPA 2005/2105. Offences of disclosing information relating to persons assuming new identity.

## **2105. Offences of disclosing information relating to persons assuming new identity.**

A person (P) commits an offence if (1) P is or has been a protected person<sup>1</sup>; (2) P assumed a new identity in pursuance of arrangements for his protection<sup>2</sup>; (3) P discloses information which indicates that he assumed, or might have assumed, a new identity<sup>3</sup>; and (4) P knows or suspects that the information disclosed by him indicates that he assumed, or might have assumed, a new identity<sup>4</sup>.

A person (D) commits an offence if (a) D discloses information which relates to a person (P) who is or has been a protected person<sup>5</sup>; (b) P assumed a new identity in pursuance of arrangements for his protection<sup>6</sup>; (c) the information disclosed by D indicates that P assumed, or might have assumed, a new identity<sup>7</sup>; and (d) D knows or suspects that P is or has been a protected person, and that the information disclosed by D indicates that P assumed, or might have assumed, a new identity<sup>8</sup>.

A person who commits either such offence is liable on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both, and on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum or to both<sup>9</sup>.

There are the following defences to the above offence<sup>10</sup>.

P is not guilty of an offence under heads (1) to (3) above<sup>11</sup> if, at the time when he disclosed the information, it was not likely that its disclosure would endanger the safety of any person<sup>12</sup>.

D is not guilty of an offence under heads (a) to (d) above<sup>13</sup> if he disclosed the information with the agreement of P, and at the time when D disclosed the information, it was not likely that its disclosure would endanger the safety of any person<sup>14</sup>. D is not guilty of such an offence if he disclosed the information for the purposes of safeguarding national security or for the purposes of the prevention, detection or investigation of crime<sup>15</sup>. Nor is D guilty of such an offence if (i) at the time when he disclosed the information, he was a protection provider or involved in the making of arrangements for the protection of a specified person or in the implementation, variation or cancellation of such arrangements; and (ii) he disclosed the information for the purposes of the making, implementation, variation or cancellation of such arrangements<sup>16</sup>.

If sufficient evidence is adduced to raise an issue with respect to a defence mentioned above, the court or jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not<sup>17</sup>.

1 Serious Organised Crime and Police Act 2005 s 88(1)(a). As to protected persons see PARA 2101 ante. As to arrangements made before 1 April 2006 see note 4 infra.

2 Ibid s 88(1)(b). The arrangements referred to in the text are those made under s 82(1): see PARA 2101 ante. A person assumes a new identity if either or both of the following apply: (1) he becomes known by a different name; (2) he makes representations about his personal history or circumstances which are false or misleading: s 94(5). As to arrangements made before 1 April 2006 see note 4 infra.

3 Ibid s 88(1)(c). As to arrangements made before 1 April 2006 see note 4 infra.

4 Ibid s 88(1)(d). In relation to arrangements made before 1 April 2006, a person does not commit an offence under s 88(1) or s 88(2) by disclosing information relating to a person who assumed a new identity in pursuance

of the arrangements (ie the arrangements which are treated as having been made by a protection provider by virtue of s 91(2); see PARA 2107 post) unless the information is disclosed on or after the relevant date (ie the date of the record made by the protection provider, in relation to the arrangements, in pursuance of s 91(7); see PARA 2107 post): s 92(1)(a), (b), (4). It is immaterial whether the person assumed a new identity before or on or after the relevant date: s 92(5).

5 Ibid s 88(2)(a); and see note 4 supra.

6 Ibid s 88(2)(b); and see note 4 supra.

7 Ibid s 88(2)(c); and see note 4 supra.

8 Ibid s 88(2)(d); and see note 4 supra.

9 Ibid s 88(3).

10 See *ibid* s 89; and the text and notes *infra*. The Secretary of State may by order make provision prescribing circumstances in which a person who discloses information as mentioned in s 88(1) or s 88(2) is not guilty in England and Wales or in Northern Ireland of an offence under that provision: s 89(5). Similar provision applies to the Scottish Ministers in relation to Scotland: see s 89(6).

11 Ie an offence under *ibid* s 88(1).

12 Ibid s 89(1).

13 Ie an offence under *ibid* s 88(2).

14 Ibid s 89(2).

15 Ibid s 89(3).

16 Ibid s 89(4).

17 Ibid s 89(7).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/24.  
PROTECTION OF WITNESSES ETC UNDER SOCPA 2005/2106. Protection from liability.

## **2106. Protection from liability.**

Where arrangements are made for the protection of a person of a specified description<sup>1</sup>, and the protected person assumes a new identity in pursuance of the arrangements<sup>2</sup> the following provisions apply. No proceedings (whether civil or criminal) may be brought against:

- 2793 (1) the protected person<sup>3</sup>;
- 2794 (2) a person who is associated with the protected person<sup>4</sup>;
- 2795 (3) a protection provider<sup>5</sup>;
- 2796 (4) a person involved in the making of protection arrangements<sup>6</sup> or in the implementation, variation or cancellation of such arrangements<sup>7</sup>,

in respect of the making by him of a false or misleading representation if the representation (a) relates to the protected person; and (b) is made solely for the purpose of ensuring that the arrangements made for him to assume a new identity are, or continue to be, effective<sup>8</sup>.

<sup>1</sup> Serious Organised Crime and Police Act 2005 s 90(1)(a). As to the specified persons see PARA 2101 note 2 ante.

<sup>2</sup> Ibid s 90(1)(b). As to assuming a new identity see PARA 2105 note 2 ante.

<sup>3</sup> Ibid s 90(3)(a). As to protected persons see PARA 2101 ante.

<sup>4</sup> Ibid s 90(3)(b).

<sup>5</sup> Ibid s 90(3)(c). For the meaning of 'protection provider' see PARA 2101 note 1 ante.

<sup>6</sup> Ie arrangements under ibid s 82(1): see PARA 2101 ante.

<sup>7</sup> Ibid s 90(3)(d).

<sup>8</sup> Ibid s 90(2). In relation to arrangements made before 1 April 2006, s 90 applies in relation to a false or misleading representation relating to a person who assumed a new identity in pursuance of the arrangements (ie the arrangements which are treated as having been made by a protection provider by virtue of s 91(2); see PARA 2107 post) only if the false or misleading representation is made on or after the relevant date (ie the date of the record made by the protection provider, in relation to the arrangements, in pursuance of s 91(7); see PARA 2107 post): s 92(1)(a), (b), (6). It is immaterial whether the person assumed a new identity before or on or after the relevant date: s 92(7).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/24.

PROTECTION OF WITNESSES ETC UNDER SOCPA 2005/2107. Arrangements made before 1 April 2006.

## **2107. Arrangements made before 1 April 2006.**

Where arrangements were made before 1 April 2006<sup>1</sup> by a protection provider<sup>2</sup>, or any person acting with his authority, for the purpose of protecting a person of a specified description<sup>3</sup> then if the following three conditions are satisfied, the arrangements are to be treated as having been made by the protection provider under the relevant provision of the Serious Organised Crime and Police Act 2005<sup>4</sup>.

The first condition is that the protection provider could have made the arrangements under the relevant provision of the Serious Organised Crime and Police Act 2005<sup>5</sup> had it been in force at the time when the arrangements were made<sup>6</sup>. The second condition is that the arrangements were in operation immediately before the commencement of the relevant statutory provision<sup>7</sup>. The third condition is that the protection provider determines that it is appropriate to treat the arrangements as having been made under that provision<sup>8</sup>.

If (1) at any time before 1 April 2006, arrangements were made by the Director General of the National Criminal Intelligence Service, the Director General of the National Crime Squad, or any of the Commissioners of Her Majesty's Customs and Excise (now the Commissioners for Her Majesty's Revenue and Customs)<sup>9</sup>, or any person acting with the authority of such a person, for the purpose of protecting a specified person<sup>10</sup>; and (2) functions in relation to the arrangements were, at any time before the end of the period of six months from 1 April 2006<sup>11</sup>, exercisable by a protection provider<sup>12</sup>, then the provisions described above<sup>13</sup> apply in relation to the arrangements as if they had been made by the protection provider<sup>14</sup>. Accordingly, if the three conditions<sup>15</sup> are satisfied in relation to the arrangements, they are to be treated as having been made by the protection provider under the relevant provision<sup>16</sup> of the Serious Organised Crime and Police Act 2005<sup>17</sup>.

1    Ie the date on which the Serious Organised Crime and Police Act 2005 s 82 came into force: see s 178(4) (c), (8); and the Serious Organised Crime and Police Act 2005 (Commencement No 1, Transitional and Transitory Provisions) Order 2005, SI 2005/1521.

2    For the meaning of 'protection provider' see PARA 2101 note 1 ante.

3    Serious Organised Crime and Police Act 2005 s 91(1). As to the specified persons see PARA 2101 note 2 ante.

4    Ibid s 91(2). As to arrangements made under s 82 see PARA 2101 ante.

5    Ie ibid s 82(1): see PARA 2101 ante.

6    Ibid s 91(3).

7    Ibid s 91(4); and see note 5 supra.

8    Ibid s 91(5); and see note 5 supra. A determination may be made at any time before the end of the period of six months beginning with the day on which s 82 came into force (ie 1 April 2006): s 91(6). A protection provider must make a record of the determination: s 91(7).

9    Ibid s 91(11). See further CUSTOMS AND EXCISE; POLICE.

10   Ibid s 91(8)(a). As to the specified persons see PARA 2101 note 2 ante.

- 11    le the period mentioned in *ibid* s 91(6): see note 8 *supra*.
- 12    *Ibid* s 91(8)(b).
- 13    le *ibid* s 91(1)-(7): see the text and notes 1-8 *supra*.
- 14    *Ibid* s 91(9).
- 15    See the text and notes 5-8 *supra*.
- 16    le the Serious Organised Crime and Police Act 2005 s 82(1).
- 17    *Ibid* s 91(10).

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REHABILITATION OF OFFENDERS

## **25. REHABILITATION OF OFFENDERS**

### **UPDATE**

#### **2108-2136 Rehabilitation of Offenders**

Material relating to this part has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 202 et seq and 660 et seq.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/26. CRIMINAL CONVICTION AND CRIMINAL RECORD CERTIFICATES/27. CIVIL RECOVERY OF PROCEEDS OF CRIME

## **26. CRIMINAL CONVICTION AND CRIMINAL RECORD CERTIFICATES**

### **UPDATE**

#### **2137-2146 Criminal Conviction and Criminal Record Certificates**

Material relating to these paragraphs has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 711 et seq.

## **27. CIVIL RECOVERY OF PROCEEDS OF CRIME**

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/26. CRIMINAL CONVICTION AND CRIMINAL RECORD CERTIFICATES/(1) IN GENERAL/2147. General purpose.

## **(1) IN GENERAL**

### **2147. General purpose.**

Provision is made<sup>1</sup> for the purposes of:

- 2797 (1) enabling the enforcement authority<sup>2</sup> to recover, in civil proceedings before the High Court, property<sup>3</sup> which is, or represents, property obtained through unlawful conduct<sup>4</sup>; and
- 2798 (2) enabling cash<sup>5</sup> which is, or represents, property obtained through unlawful conduct, or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before a magistrates' court<sup>6</sup>.

The powers conferred by these provisions are exercisable in relation to any property (including cash) whether or not any proceedings have been brought for an offence in connection with the property<sup>7</sup>.

1    Ie in the Proceeds of Crime Act 2002 Pt 5 (ss 240-316) (as amended) (see PARA 2148 et seq post).

2    The enforcement authority is the Director of the Assets Recovery Agency: *ibid* s 316(1).

In spite of s 1(6), nothing which the Director is authorised or required to do for the purposes of Pt 5 (as amended) may be done by a member of a police force: s 313(1)(a). For these purposes, 'member of a police force' has the same meaning as in the Police Act 1996 (see POLICE vol 36(1) (2007 Reissue) PARA 102) and includes a person who would be a member of a police force but for s 97(3) (police officers engaged on service outside their force: see POLICE vol 36(1) (2007 Reissue) PARA 428): Proceeds of Crime Act 2002 s 313(2)(a).

3    'Property' is all property wherever situated and includes money (*ibid* s 316(4)(a)), all forms of property, real or personal, heritable or moveable (s 316(4)(b)), and things in action and other intangible or incorporeal property (s 316(4)(c)). Any reference to a person's property (whether expressed as a reference to the property he holds or otherwise) is to be read as follows (s 316(5)): in relation to land, it is a reference to any interest which he holds in the land (s 316(6)); and in relation to property other than land, it is a reference either to the property (if it belongs to him) (s 316(7)(a)) or to any other interest which he holds in the property (s 316(7)(b)). 'Interest', in relation to land, means any legal estate and any equitable interest or power (in the case of land in England and Wales or Northern Ireland) or any estate, interest, servitude or other heritable right in or over land, including a heritable security (in the case of land in Scotland); and in relation to property other than land includes any right (including a right to possession of the property): s 316(1).

4    *Ibid* s 240(1)(a). As to 'unlawful conduct', and as to when property is obtained through unlawful conduct, see PARA 2148 post.

5    'Cash' means: (1) notes and coins in any currency (*ibid* ss 289(6)(a), 316(1)); (2) postal orders (s 289(6)(b)); (3) cheques of any kind, including travellers' cheques (s 289(6)(c)); (4) bankers' drafts (s 289(6)(d)); and (5) bearer bonds and bearer shares (s 289(6)(e)), found at any place in the United Kingdom (s 289(6)). 'Cash' also includes any kind of monetary instrument which is found at any place in the United Kingdom, if the instrument is specified by the Secretary of State by an order made after consultation with the Scottish Ministers: s 289(7). At the date at which this volume states the law no such order had been made. As to the making of orders under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante. As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

6    *Ibid* s 240(1)(b).

7 Ibid s 240(2). The emphasis of the Proceeds of Crime Act 2002 is on the criminal side of the recovery of the proceeds of crime process (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 390 et seq), and civil process is intended to be subsidiary to the criminal process: *Singh v Director of the Assets Recovery Agency* [2005] EWCA Civ 580, [2005] 1 WLR 3747, [2005] Crim LR 665.

## **UPDATE**

### **2147 General purpose**

TEXT AND NOTE 2--Definition of 'enforcement authority' amended: Serious Crime Act 2007 Sch 8 para 91.

NOTE 2--2002 Act s 313 repealed: 2007 Act Sch 8 para 90, Sch 14.

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## **2148. Unlawful conduct; property obtained through unlawful conduct.**

Conduct occurring in any part of the United Kingdom<sup>1</sup> is 'unlawful conduct' if it is unlawful under the criminal law of that part of the United Kingdom<sup>2</sup>. Conduct which: (1) occurs in a country or territory outside the United Kingdom and is unlawful under the criminal law applying in that country or territory<sup>3</sup>; and (2) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part of the United Kingdom, is also unlawful conduct<sup>4</sup>. The court must decide on a balance of probabilities whether it is proved that any matters alleged to constitute unlawful conduct have occurred<sup>5</sup> or that any person intended to use any cash<sup>6</sup> in unlawful conduct<sup>7</sup>.

A person obtains property<sup>8</sup> through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct<sup>9</sup>. In deciding whether any property was obtained through unlawful conduct, it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct<sup>10</sup>; and it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct<sup>11</sup>.

1 As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

2 Proceeds of Crime Act 2002 ss 241(1), 316(1).

3 Ibid s 241(2)(a) (amended by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 para 8).

4 Proceeds of Crime Act 2002 s 241(2)(b).

5 Ibid s 241(3)(a). It is not necessary to allege the commission of any specific criminal offence, but is necessary to set out the matters alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained: *R (on the application of the Director of the Assets Recovery Agency) v Green* [2005] EWHC 3168 (Admin), [2005] All ER (D) 261 (Dec). A claim for civil recovery cannot be sustained solely upon the basis that a defendant has no identifiable lawful income to warrant his lifestyle and purchases: *R (on the application of the Director of the Assets Recovery Agency) v Green* supra.

6 For the meaning of 'cash' see PARA 2147 note 5 ante.

7 Proceeds of Crime Act 2002 s 241(3)(b). In assessing whether property has been obtained through unlawful conduct, the absence of a regular documented source of income is not the same as proof of a criminal source: see *Director of the Assets Recovery Agency v Woodstock* [2006] All ER (D) 271 (May), CA.

8 For the meaning of 'property' see PARA 2147 note 3 ante.

9 Proceeds of Crime Act 2002 s 242(1).

10 Ibid s 242(2)(a).

11 Ibid s 242(2)(b). As to proceedings for recovery orders see PARA 2150 et seq post.

## **UPDATE**

## **2148 Unlawful conduct; property obtained through unlawful conduct**

NOTE 5--A foreign judgment containing a summary of the matters found to be proved by a foreign court is evidence of the truth of those matters: *Director of the Assets Recovery Agency v Virtosu* [2008] EWHC 149 (QB), [2009] 1 WLR 2808, [2008] All ER (D) 63 (Feb).

NOTE 11--See *Director of the Assets Recovery Agency v Olupitan* [2008] EWCA Civ 104, [2008] All ER (D) 337 (Feb).



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## **2149. Recoverable property.**

Property<sup>1</sup> obtained through unlawful conduct<sup>2</sup> is 'recoverable property'<sup>3</sup>. But if property obtained through unlawful conduct has been disposed of (since it was so obtained)<sup>4</sup>, it is recoverable property only if it is held by a person into whose hands it may be followed<sup>5</sup>.

In general, recoverable property obtained through unlawful conduct may be followed into the hands of a person obtaining it on a disposal by the person who through the conduct obtained the property<sup>6</sup> or by a person into whose hands it may (by virtue of this provision) be followed<sup>7</sup>.

Where property obtained through unlawful conduct ('the original property') is or has been recoverable, property which represents the original property is also recoverable property<sup>8</sup>.

If a person enters into a transaction by which:

- 2799 (1) he disposes of recoverable property, whether the original property or property which (by virtue of these provisions) represents the original property<sup>9</sup>; and
- 2800 (2) he obtains other property in place of it<sup>10</sup>,

the other property represents the original property<sup>11</sup>.

If a person disposes of recoverable property which represents the original property, the property may be followed into the hands of the person who obtains it (and it continues to represent the original property)<sup>12</sup>.

If a person's recoverable property is mixed with other property (whether his property or another's), the portion of the mixed property which is attributable to the recoverable property represents the property obtained through unlawful conduct<sup>13</sup>.

Where a person who has recoverable property obtains further property consisting of profits accruing in respect of the recoverable property, the further property is to be treated as representing the property obtained through unlawful conduct<sup>14</sup>.

If a person disposes of recoverable property, and the person who obtains it on the disposal does so in good faith, for value and without notice that it was recoverable property, the property may not be followed into that person's hands and, accordingly, it ceases to be recoverable<sup>15</sup>. There are a number of other exceptions under which property ceases to be recoverable property<sup>16</sup>. In addition, orders may be made providing that property within the terms of the order is not recoverable<sup>17</sup>.

If a person grants an interest in his recoverable property, the question whether the interest is also recoverable is to be determined in the same manner as it is on any other disposal of recoverable property<sup>18</sup>. Accordingly, on his granting an interest in the property ('the property in question'):

- 2801 (a) where the property in question is property obtained through unlawful conduct, the interest is also to be treated as obtained through that conduct<sup>19</sup>; and

2802 (b) where the property in question represents in his hands property obtained through unlawful conduct, the interest is also to be treated as representing in his hands the property so obtained<sup>20</sup>.

1 For the meaning of 'property' see PARA 2147 note 3 ante.

2 For the meaning of 'unlawful conduct', and as to when property is obtained through unlawful conduct, see PARA 2148 ante.

3 Proceeds of Crime Act 2002 s 304(1). For the purposes of Pt 5 (ss 240-316) (as amended) and Pt 8 (ss 341-416), 'recoverable property' is to be read in accordance with ss 304-310 (see the text and notes 4-20 infra): ss 316(1), 414(2), 416(9).

4 References to a person disposing of his property include a reference to his disposing of a part of it or to his granting an interest in it or to both; and references to the property disposed of are references to any property obtained on the disposal: s 314(1). 'Part' in relation to property, includes a portion: s 316(1). A person who makes a payment to another is to be treated as making a disposal of his property to the other, whatever form the payment takes: s 314(2). Where a person's property passes to another under a will or intestacy or by operation of law, it is to be treated as disposed of by him to the other: s 314(3). A person is only to be treated as having obtained his property for value in a case where he gave unexecuted consideration if the consideration has become executed consideration: s 314(4). For the meaning of 'interest' see PARA 2147 note 3 ante.

5 Ibid s 304(2).

6 Ibid s 304(3)(a). For an exception to this rule see s 308(1); and the text and note 15 infra.

7 Ibid s 304(3)(b).

8 Ibid s 305(1).

9 Ibid s 305(2)(a).

10 Ibid s 305(2)(b).

11 Ibid s 305(2).

12 Ibid s 305(3).

13 Ibid s 306(1), (2). Recoverable property is mixed with other property if eg it is used: (1) to increase funds held in a bank account (s 306(3)(a)); (2) in part payment for the acquisition of an asset (s 306(3)(b)); (3) for the restoration or improvement of land (s 306(3)(c)); (4) by a person holding a leasehold interest in the property to acquire the freehold (s 306(3)(d)).

14 Ibid s 307(1), (2).

15 Ibid s 308(1).

16 See ibid s 308(2)-(10). Inter alia, property is not recoverable if it has been taken into account in deciding the amount of a person's benefit from criminal conduct for the purpose of making a (criminal) confiscation order under s 6 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391) or a corresponding repealed provision: s 308(9). Section 308(9) does not apply where such an order is void and of no effect: *Singh v Director of the Assets Recovery Agency* [2005] EWCA Civ 580, [2005] 1 WLR 3747, [2005] Crim LR 665.

17 Proceeds of Crime Act 2002 s 309. See the Proceeds of Crime Act 2002 (Exemption from Civil Recovery) Order 2003, SI 2003/336. As to the making of orders under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante.

18 Proceeds of Crime Act 2002 s 310(1).

19 Ibid s 310(2)(a).

20 Ibid s 310(2)(b).

## UPDATE

### 2149 Recoverable property

NOTE 16--Proceeds of Crime Act 2002 s 308(4) amended: Armed Forces Act 2006 Sch 16 para 197.

NOTE 17--SI 2003/336 amended: SI 2009/2054.

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## **(2) CIVIL RECOVERY IN THE HIGH COURT**

### **(i) Proceedings for Recovery Orders**

#### **2150. Proceedings for recovery orders.**

Proceedings for a recovery order<sup>1</sup> may be taken by the enforcement authority<sup>2</sup> in the High Court against any person who the authority thinks holds recoverable property<sup>3</sup>.

The enforcement authority must serve the claim form<sup>4</sup>:

- 2803 (1) on the respondent<sup>5</sup>; and
- 2804 (2) unless the court dispenses with service, on any other person who the authority thinks holds any associated property<sup>6</sup> which the authority wishes to be subject to a recovery order<sup>7</sup>,

wherever domiciled, resident or present<sup>8</sup>.

If any property which the enforcement authority wishes to be subject to a recovery order is not specified in the claim form, it must be described in the form in general terms; and the form must state whether it is alleged to be recoverable property or associated property<sup>9</sup>.

The enforcement authority may not start proceedings for a recovery order unless the authority reasonably believes that the aggregate value of the recoverable property which it wishes to be subject to such an order is not less than £10,000<sup>10</sup>.

In seeking to recover money pursuant to these provisions<sup>11</sup> there is no reason why the Director of the Assets Recovery Agency cannot apply<sup>12</sup> for summary judgment<sup>13</sup>.

1 See PARA 2154 post.

2 For the meaning of 'enforcement authority' see PARA 2147 note 2 ante.

3 Proceeds of Crime Act 2002 s 243(1). For the meaning of 'property' see PARA 2147 note 3 ante. For the meaning of 'recoverable property' see PARA 2149 ante. Nothing in ss 245A-255 (as amended) (see PARAS 2151-2153 post) limits any power of the court apart from those provisions to grant interim relief in connection with proceedings (including prospective proceedings) under ss 243-288 (as amended): s 243(5) (added by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 para 9). An order may be made providing that property within the terms of the order is not recoverable property: Proceeds of Crime Act 2002 s 309; and see the Proceeds of Crime Act 2002 (Exemption from Civil Recovery) Order 2003, SI 2003/336. As to the making of orders under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante. Property which, apart from the Proceeds of Crime Act 2002 (Exemption from Civil Recovery) Order 2003, SI 2003/336, would be recoverable property and is: (1) prescribed in Schedule Pt 1 (art 2(1)(a)); or (2) disposed of in pursuance of an enactment prescribed in Schedule Pt 2 (art 2(1)(b)), is not recoverable or (as the case may be) associated property (art 2(1)). However, where particular circumstances are prescribed in Schedule Pt 2 in relation to an enactment, head (2) supra applies only in those circumstances: art 2(2).

See *Practice Direction--Proceeds of Crime Act 2002 Pts 5 and 8: Civil Recovery* (RSC PD 115B) PARAS I.2.1, I.2.2, II.4.1, II.4.5.

4 The references in the text to the 'claim form' include the particulars of claim, where they are served subsequently: Proceeds of Crime Act 2002 s 243(4).

5 Ibid s 243(2)(a). 'Respondent' means: (1) where proceedings are brought by the enforcement authority by virtue of Pt 5 Ch 2 (ss 242-288) (as amended), the person against whom the proceedings are brought; and (2) where no such proceedings have been brought but the enforcement authority has applied for a property freezing order (see PARAS 2151-2152 post), an interim receiving order (see PARA 2153 post), a prohibitory property order or an interim administration order, the person against whom he intends to bring such proceedings: s 316(1) (amended by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 paras 4, 22(1), (3)). Prohibitory property orders and interim administration orders are Scottish orders which are not dealt with in this work.

6 'Associated property' means property of any of the following descriptions (including property held by the respondent) which is not itself the recoverable property: (1) any interest in the recoverable property (Proceeds of Crime Act 2002 ss 245(1)(a), 316(1)); (2) any other interest in the property in which the recoverable property subsists (s 245(1)(b)); (3) if the recoverable property is a tenancy in common, the tenancy of the other tenant (s 245(1)(c)); (4) if (in Scotland) the recoverable property is owned in common, the interest of the other owner (s 245(1)(d)); and (5) if the recoverable property is part of a larger property, but not a separate part, the remainder of that property (s 245(1)(e)). References to property being 'associated' with recoverable property are to be read accordingly: s 245(2). No property is to be treated as 'associated' with recoverable property consisting of rights under a pension scheme (within the meaning of ss 273-275): s 245(3). For the meaning of 'interest' (in property) see PARA 2147 note 3 ante. For the meaning of 'part' (in relation to property) see PARA 2149 note 4 ante. An order may be made providing that property within the terms of the order is not associated property: s 309; and see the Proceeds of Crime Act 2002 (Exemption from Civil Recovery) Order 2003, SI 2003/336. For the purposes of Pt 5 (ss 240-316) (as amended) and Pt 8 (ss 341-416), 'associated property' has the meaning given by s 245: ss 316(1), 414(2), 416(9).

7 Ibid s 243(2)(b).

8 Ibid s 243(2).

9 Ibid s 243(3).

10 See ibid s 287(1); the Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003, SI 2003/175, art 2; and PARA 2163 post.

11 Ie under the Proceeds of Crime Act 2002 s 243 (see the text and notes 1-9 supra).

12 Ie under CPR 24.2 (see CIVIL PROCEDURE vol 11 (2009) PARA 524 et seq).

13 See *Director of the Assets Recovery Agency v Woodstock* [2006] All ER (D) 271 (May), CA.

## UPDATE

### 2150 Proceedings for recovery orders

NOTES 3, 6--SI 2003/336 amended: SI 2009/2054.

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## **(ii) Property Freezing Orders**

### **2151. Application for property freezing order.**

Where the enforcement authority<sup>1</sup> may take proceedings for a recovery order<sup>2</sup> in the High Court, the authority may apply to the court for a property freezing order (whether before or after starting the proceedings)<sup>3</sup>.

A property freezing order is an order that:

- 2805 (1) specifies or describes the property to which it applies<sup>4</sup>; and
- 2806 (2) subject to any exclusions<sup>5</sup>, prohibits any person to whose property the order applies from in any way dealing with the property<sup>6</sup>.

The court may make a property freezing order on an application if it is satisfied that the first condition below is met and, where applicable, that the second condition below is met<sup>7</sup>.

The first condition is that there is a good arguable case that the property to which the application for the order relates is or includes recoverable property<sup>8</sup>, and that, if any of it is not recoverable property, it is associated property<sup>9</sup>. The second condition is that, if:

- 2807 (a) the property to which the application for the order relates includes property alleged to be associated property<sup>10</sup>; and
- 2808 (b) the enforcement authority has not established the identity of the person who holds it<sup>11</sup>,

the authority has taken all reasonable steps to do so<sup>12</sup>.

If it has not already started proceedings for a recovery order, the enforcement authority may not apply for a property freezing order unless it reasonably believes that the aggregate value of the recoverable property which it wishes to be subject to the recovery order is not less than £10,000<sup>13</sup>.

Provision is made for the mutual enforcement of freezing orders issued by the authorities of the member states of the European Community<sup>14</sup>.

1 For the meaning of 'enforcement authority' see PARA 2147 note 2 ante.

2 For the meaning of 'recovery order' see PARA 2154 post.

3 Proceeds of Crime Act 2002 s 245A(1) (ss 245A-245D added by the Serious Organised Crime and Police Act 2005 s 98(1)). An application for a property freezing order may be made without notice if the circumstances are such that notice of the application would prejudice any right of the enforcement authority to obtain a recovery order in respect of any property: Proceeds of Crime Act 2002 s 245A(3) (as so added). For the meaning of 'property' see PARA 2147 note 3 ante.

See *Practice Direction--Proceeds of Crime Act 2002 Pts 5 and 8: Civil Recovery* (RSC PD 115B) PARAS I.2.1, I.2.2, II.5.1, II.5.6.

4 Proceeds of Crime Act 2002 s 245A(2)(a) (as added: see note 3 supra).

5 See *ibid* s 245C(1)(b), (2) (as added); and PARA 2152 post.

6 *Ibid* s 245A(2)(b) (as added: see note 3 supra). 'Dealing' with property includes disposing of it, taking possession of it or removing it from the United Kingdom: s 316(1). As to references to a person 'disposing' of his property see PARA 2149 note 4 ante. As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

While a property freezing order has effect: (1) the court may stay any action, execution or other legal process in respect of the property to which the order applies (s 245D(1)(a) (as so added)); and (2) no distress may be levied against the property to which the order applies except with the leave of the court and subject to any terms the court may impose (s 245D(1)(b) (as so added)). See also s 245D(2)-(4) (as so added).

The registration Acts (ie the Land Registration Act 1925 (repealed), the Land Charges Act 1972 and the Land Registration Act 2002 (see LAND REGISTRATION): see the Proceeds of Crime Act 2002 s 248(2) (prospectively amended, so as to remove the reference to the Land Registration Act 1925, by the Proceeds of Crime Act 2002 s 457, Sch 12)):

326 (a) apply in relation to property freezing orders as they apply in relation to orders which affect land and are made by the court for the purpose of enforcing judgements or recognisances (Proceeds of Crime Act 2002 s 248(1)(a) (s 248(1), (3) amended by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 para 11)); and

327 (b) apply in relation to applications for property freezing orders as they apply in relation to other pending land actions (Proceeds of Crime Act 2002 s 248(1)(b) (as so amended)).

However, no notice may be entered in the register of title under the Land Registration Act 2002 in respect of a property freezing order: Proceeds of Crime Act 2002 s 248(3) (as so amended)). The object of these provisions is to ensure that property freezing orders are registered as pending land actions.

If a person acting as an insolvency practitioner (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 424 note 5) seizes or disposes of any property in relation to which his functions are not exercisable because it is for the time being subject to a property freezing order made under s 245A (as added) or an interim receiving order made under s 246 (see PARA 2153 post) (or corresponding Scottish provisions), and at the time of the seizure or disposal he believes on reasonable grounds that he is entitled (whether in pursuance of an order of a court or otherwise) to seize or dispose of the property (s 432(1)(b) (amended by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 paras 4, 23)), he is not liable to any person in respect of any loss or damage resulting from the seizure or disposal, except so far as the loss or damage is caused by his negligence (Proceeds of Crime Act 2002 s 432(2)) (without prejudice to the generality of any provision of the Insolvency Act 1986 or any other Act or Order which confers protection from liability on him (Proceeds of Crime Act 2002 s 432(4))), and he has a lien on the property or the proceeds of its sale for such of his expenses as were incurred in connection with the liquidation, bankruptcy, sequestration or other proceedings in relation to which he purported to make the seizure or disposal (s 432(3)(a)) and for so much of his remuneration as may reasonably be assigned to his acting in connection with those proceedings (s 432(3)(b)).

7 *Ibid* s 245A(4) (as added: see note 3 supra).

8 *Ibid* s 245A(5)(a) (as added: see note 3 supra). For the meaning of 'recoverable property' see PARA 2149 ante.

9 *Ibid* s 245A(5)(b) (as added: see note 3 supra). For the meaning of 'associated property' see PARA 2150 note 6 ante.

10 *Ibid* s 245A(6)(a) (as added: see note 3 supra).

11 *Ibid* s 245A(6)(b) (as added: see note 3 supra).

12 *Ibid* s 245A(6) (as added: see note 3 supra).

13 See *ibid* s 287(1), (3) (as amended); the Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003, SI 2003/175, art 2; and PARA 2163 post.

14 See the Serious Organised Crime and Police Act 2005 s 96, making provision for the implementation of EC Council Framework Decision 2003/577 (OJ L196, 02.08.2003, p 45) on the execution in the European Union of orders freezing property or evidence (whose purpose is to establish the rules under which a member state must recognise and execute in its territory a freezing order issued by a judicial authority of another member state in the framework of criminal proceedings).

## UPDATE

## **2151-2152 Property Freezing Orders**

See also Proceeds of Crime Act 2002 s 245E (ss 245E-245G added by Serious Crime Act 2007 s 83(1)) which provides for a new type of receiver in civil recovery proceedings whose only function is to manage property subject to a property freezing order. See further 2002 Act s 245F (powers of receivers appointed under s 245E) and s 245G (supervision of s 245E receiver and variations). The Taxes Management Act 1970 ss 75, 77 (receivers: income tax and capital gains tax) do not apply in relation to a receiver appointed under the Proceeds of Crime Act 2002 s 245E: Sch 10 para 1(ca) (added by 2007 Act s 83(3)).



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/26. CRIMINAL CONVICTION AND CRIMINAL RECORD CERTIFICATES/ (2) CIVIL RECOVERY IN THE HIGH COURT/ (ii) Property Freezing Orders/2152. Variation and setting aside of property freezing order.

## **2152. Variation and setting aside of property freezing order.**

The court may at any time vary or set aside a property freezing order<sup>1</sup>. If the court makes an interim receiving order<sup>2</sup> that applies to all of the property<sup>3</sup> to which a property freezing order applies, it must set aside the property freezing order<sup>4</sup>. If the court makes an interim receiving order that applies to some but not all of the property to which a property freezing order applies, it must vary the property freezing order so as to exclude any property to which the interim receiving order applies<sup>5</sup>. If the court decides that any property to which a property freezing order applies is neither recoverable property<sup>6</sup> nor associated property<sup>7</sup>, it must vary the order so as to exclude the property<sup>8</sup>. Before exercising a power<sup>9</sup> to vary or set aside a property freezing order, the court must (as well as giving the parties to the proceedings an opportunity to be heard) give such an opportunity to any person who may be affected by its decision<sup>10</sup>.

The power to vary a property freezing order includes (in particular) power to make exclusions as follows:

- 2809 (1) power to exclude property from the order<sup>11</sup>; and
- 2810 (2) power, otherwise than by excluding property from the order, to make exclusions from the prohibition on dealing with the property<sup>12</sup> to which the order applies<sup>13</sup>.

Exclusions from the prohibition on dealing with the property to which the order applies (other than exclusions of property from the order) may also be made when the order is made<sup>14</sup>. An exclusion may, in particular, make provision for the purpose of enabling any person to meet his reasonable living expenses<sup>15</sup> or to carry on any trade, business, profession or occupation<sup>16</sup>. An exclusion may be made subject to conditions<sup>17</sup>.

Where the court exercises the power to make an exclusion for the purpose of enabling a person to meet legal expenses that he has incurred, or may incur, in respect of proceedings<sup>18</sup>, it must ensure that the exclusion:

- 2811 (a) is limited to reasonable legal expenses that the person has reasonably incurred or that he reasonably incurs<sup>19</sup>;
- 2812 (b) specifies the total amount that may be released for legal expenses in pursuance of the exclusion<sup>20</sup>; and
- 2813 (c) is made subject to the required conditions<sup>21</sup> in addition to any other conditions<sup>22</sup> imposed<sup>23</sup>.

The court, in deciding whether to make an exclusion for the purpose of enabling a person to meet legal expenses of his in respect of proceedings<sup>24</sup>:

- 2814 (i) must have regard (in particular) to the desirability of the person being represented in any such proceedings in which he is a participant<sup>25</sup>; and
- 2815 (ii) must, where the person is the respondent<sup>26</sup>, disregard the possibility that legal representation of the person in any such proceedings might, were an

exclusion not made, be funded by the Legal Services Commission or the Northern Ireland Legal Services Commission<sup>27</sup>.

The power to make exclusions must<sup>28</sup> be exercised with a view to ensuring, so far as practicable, that the satisfaction of any right of the enforcement authority<sup>29</sup> to recover the property obtained through unlawful conduct<sup>30</sup> is not unduly prejudiced<sup>31</sup>.

- 1     Proceeds of Crime Act 2002 s 245B(1) (ss 245B, 245C added by the Serious Organised Crime and Police Act 2005 s 98(1)). For the meaning of 'property freezing order' see PARA 2151 ante.
- 2     As to interim receiving orders see PARA 2153 post.
- 3     For the meaning of 'property' see PARA 2147 note 3 ante.
- 4     Proceeds of Crime Act 2002 s 245B(2) (as added: see note 1 supra).
- 5     Ibid s 245B(3) (as added: see note 1 supra).
- 6     For the meaning of 'recoverable property' see PARA 2149 ante.
- 7     For the meaning of 'associated property' see PARA 2150 note 6 ante.
- 8     Proceeds of Crime Act 2002 s 245B(4) (as added: see note 1 supra).
- 9     Ie a power under ibid Pt 5 Ch 2 (ss 243-288) (as amended).
- 10    Ibid s 245B(5) (as added: see note 1 supra). This does not apply where the court is acting as required by s 245B(2) (as added) or s 245B(3) (as added) (see the text and notes 2-5 supra): s 245B(6) (as so added).
- 11    Ibid s 245C(1)(a) (as added: see note 1 supra). If excluded property is not specified in the order, it must be described in the order in general terms: s 245C(7) (as so added).
- 12    As to the meaning of 'dealing' with property see PARA 2151 note 6 ante.
- 13    Proceeds of Crime Act 2002 s 245C(1)(b) (as added: see note 1 supra).
- 14    Ibid s 245C(2) (as added: see note 1 supra). See *Practice Direction--Proceeds of Crime Act 2002 Pts 5 and 8: Civil Recovery* (RSC PD 115B) PARAS II.5B.1, II.5B.3, II.7A.1, II.7A.8.
- 15    Proceeds of Crime Act 2002 s 245C(3)(a) (as added: see note 1 supra).
- 16    Ibid s 245C(3)(b) (as added: see note 1 supra).
- 17    Ibid s 245C(4) (as added: see note 1 supra).
- 18    Ie proceedings under ibid Pt 5 Ch 2 (as amended).
- 19    Ibid s 245C(5)(a) (as added: see note 1 supra).
- 20    Ibid s 245C(5)(b) (as added: see note 1 supra).
- 21    The Lord Chancellor may by regulations specify the required conditions for these purposes (see ibid ss 286A, 286B(1)(b) (ss 286A, 286B added by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 paras 4, 20)). Such regulations may (in particular) limit the amount of remuneration allowable to representatives for a unit of time worked (s 286B(2)(a) (as so added)), limit the total amount of remuneration allowable to representatives for work done in connection with proceedings or a step in proceedings (s 286B(2)(b) (as so added)), and limit the amount allowable in respect of an item of expense incurred by a representative or incurred, otherwise than in respect of the remuneration of a representative, by a party to proceedings (s 286B(2)(a) (as so added)). Before making regulations under s 286B (as added), the Lord Chancellor must consult such persons as he considers appropriate: s 286B(3) (as so added). Under this power the Lord Chancellor has made the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005, SI 2005/3382. As to the making of regulations under the Proceeds of Crime Act 2002 see PARA 789 note 6 ante.
- 22    Ie conditions imposed under ibid s 245C(4) (as added) (see the text and note 17 supra).

- 23 Ibid s 245C(5)(c) (as added: see note 1 supra).
- 24 Ie under ibid Pt 5 (240-316) (as amended).
- 25 Ibid s 245C(6)(a) (as added: see note 1 supra).
- 26 For the meaning of 'respondent' see PARA 2150 note 5 ante.
- 27 Proceeds of Crime Act 2002 s 245C(6)(b) (as added: see note 1 supra).
- 28 Ie subject to s 245C(6) (as added) (see the text and notes 24-27 supra).
- 29 For the meaning of 'enforcement authority' see PARA 2147 note 2 ante.
- 30 For the meaning of 'unlawful conduct', and as to when property is obtained through unlawful conduct, see PARA 2148 ante.
- 31 Proceeds of Crime Act 2002 s 245C(8) (as added: see note 1 supra). Section 245C(8) (as added) does not apply where the court is acting as required by s 245B(3) (as added) or s 245B(4) (as added) (see the text and notes 5-8 supra): s 245C(9) (as so added).

## **UPDATE**

### **2151-2152 Property Freezing Orders**

See also Proceeds of Crime Act 2002 s 245E (ss 245E-245G added by Serious Crime Act 2007 s 83(1)) which provides for a new type of receiver in civil recovery proceedings whose only function is to manage property subject to a property freezing order. See further 2002 Act s 245F (powers of receivers appointed under s 245E) and s 245G (supervision of s 245E receiver and variations). The Taxes Management Act 1970 ss 75, 77 (receivers: income tax and capital gains tax) do not apply in relation to a receiver appointed under the Proceeds of Crime Act 2002 s 245E: Sch 10 para 1(ca) (added by 2007 Act s 83(3)).

### **2152 Variation and setting aside of property freezing order**

NOTE 21--SI 2005/3382 amended: SI 2008/523, SI 2009/3348.

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### **(iii) Interim Receiving Orders**

#### **2153. Interim receiving orders.**

Where the enforcement authority<sup>1</sup> may take proceedings for a recovery order<sup>2</sup> in the High Court, the authority may apply to the court for an interim receiving order (whether before or after starting the proceedings)<sup>3</sup>. If it has not already started proceedings for a recovery order, the enforcement authority may not apply for an interim receiving order unless it reasonably believes that the aggregate value of the recoverable property<sup>4</sup> which it wishes to be subject to the recovery order is not less than £10,000<sup>5</sup>.

An interim receiving order is an order for the detention, custody or preservation of property<sup>6</sup>, and the appointment of an interim receiver<sup>7</sup>.

An application for an interim receiving order may be made without notice if the circumstances are such that notice of the application would prejudice any right of the enforcement authority to obtain a recovery order in respect of any property<sup>8</sup>. The court may make an interim receiving order on the application if it is satisfied that the first condition below and, where applicable, the second is met<sup>9</sup>.

The first condition is that there is a good arguable case that the property to which the application for the order relates is or includes recoverable property<sup>10</sup>, and that, if any of it is not recoverable property, it is associated property<sup>11</sup>. The second condition is that, if the property to which the application for the order relates includes property alleged to be associated property<sup>12</sup> and the enforcement authority has not established the identity of the person who holds it, the authority has taken all reasonable steps to do so<sup>13</sup>.

An interim receiving order may authorise or require the interim receiver to exercise any of a number of specified<sup>14</sup> powers (namely, power to seize property to which the order applies<sup>15</sup>, to obtain information or to require a person to answer any question<sup>16</sup>, to enter any premises<sup>17</sup> in the United Kingdom to which the interim order applies<sup>18</sup> and to take a number of specified steps<sup>19</sup>, and to manage any property to which the order applies<sup>20</sup>) and to take any other steps the court thinks appropriate<sup>21</sup>, for the purpose of securing the detention, custody or preservation of the property to which the order applies or of taking any steps under the following<sup>22</sup> provisions<sup>23</sup>.

An interim receiving order must require the interim receiver to take any steps which the court thinks necessary to establish whether or not the property to which the order applies is recoverable property or associated property<sup>24</sup> and whether or not any other property is recoverable property (in relation to the same unlawful conduct<sup>25</sup>) and, if it is, who holds it<sup>26</sup>.

An interim receiving order must, subject to any permitted exclusions made<sup>27</sup>, prohibit any person to whose property the order applies from dealing with the property<sup>28</sup>.

An interim receiving order must require the interim receiver to inform the enforcement authority and the court as soon as reasonably practicable if he thinks that:

- 2816 (1) any property to which the order applies by virtue of a claim that it is recoverable property is not recoverable property<sup>29</sup>;

- 2817 (2) any property to which the order applies by virtue of a claim that it is associated property is not associated property<sup>30</sup>;
- 2818 (3) any property to which the order does not apply is recoverable property (in relation to the same unlawful conduct) or associated property<sup>31</sup>; or
- 2819 (4) any property to which the order applies is held by a person who is different from the person it is claimed holds it<sup>32</sup>,

or if he thinks that there has been any other material change of circumstances<sup>33</sup>. An interim receiving order must require the interim receiver to report his findings to the court<sup>34</sup> and to serve copies of his report on the enforcement authority and on any person who holds any property to which the order applies or who may otherwise be affected by the report<sup>35</sup>.

While an interim receiving order has effect:

- 2820 (a) the court may stay any action, execution or other legal process in respect of the property to which the order applies<sup>36</sup>; and
- 2821 (b) no distress may be levied against the property to which the order applies except with the leave of the court and subject to any terms the court may impose<sup>37</sup>.

The court may at any time vary or set aside an order<sup>38</sup>. If the court decides that any property to which an interim receiving order applies is neither recoverable property nor associated property, it must vary the order so as to exclude it<sup>39</sup>. The court may vary an interim receiving order so as to exclude from the property to which the order applies any property which is alleged to be associated property if the court thinks that the satisfaction of any right of the enforcement authority to recover the property obtained through unlawful conduct will not be prejudiced<sup>40</sup>.

1 For the meaning of 'enforcement authority' see PARA 2147 note 2 ante.

2 For the meaning of 'recovery order' see PARA 2154 post.

3 Proceeds of Crime Act 2002 s 246(1). See *Practice Direction--Proceeds of Crime Act 2002 Pts 5 and 8: Civil Recovery* (RSC PD 115B) PARAS I.2.1, I.2.2, II.5.1, II.5.6. In its application for an interim receiving order, the enforcement authority must nominate a suitably qualified person for appointment as interim receiver, but the nominee may not be a member of the staff of the Assets Recovery Agency: Proceeds of Crime Act 2002 s 246(7). The extent of the power to make an interim receiving order is not limited by ss 247-255: s 246(8).

4 For the meaning of 'property' see PARA 2147 note 3 ante. For the meaning of 'recoverable property' see PARA 2149 ante.

5 See the Proceeds of Crime Act 2002 s 287(1), (3); the Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003, SI 2003/175, art 2; and PARA 2163 post.

6 Proceeds of Crime Act 2002 s 246(2)(a). An interim receiving order may require any person to whose property the order applies to bring the property to a place in England and Wales specified by the interim receiver or to place it in the custody of the interim receiver (if, in either case, he is able to do so) (s 250(1)(a)) and to do anything he is reasonably required to do by the interim receiver for the preservation of the property (s 250(1)(b)). An interim receiving order may require any person to whose property the order applies to bring any documents relating to the property which are in his possession or control to a place in England and Wales specified by the interim receiver or to place them in the custody of the interim receiver: s 250(2). For these purposes, 'document' means anything in which information of any description is recorded: s 250(2).

The registration Acts (ie the Land Registration Act 1925 (repealed), the Land Charges Act 1972 and the Land Registration Act 2002 (see LAND REGISTRATION): see the Proceeds of Crime Act 2002 s 248(2) (prospectively amended, so as to remove the reference to the Land Registration Act 1925, by the Proceeds of Crime Act 2002 s 457, Sch 12));

328 (1) apply in relation to interim receiving orders as they apply in relation to orders which affect land and are made by the court for the purpose of enforcing judgements or recognisances (s

248(1)(a) (s 248(1), (3) amended by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 para 11)); and

329 (2) apply in relation to applications for interim receiving orders as they apply in relation to other pending land actions (Proceeds of Crime Act 2002 s 248(1)(b) (as so amended)).

However, no notice may be entered in the register of title under the Land Registration Act 2002 in respect of an interim receiving order: Proceeds of Crime Act 2002 s 248(3) (as so amended). Until a day to be appointed a person applying for an interim receiving order must be treated for the purposes of the Land Registration Act 1925 s 57 (repealed) (inhibitions) as a person interested in relation to any registered land to which the application relates, or to which an interim receiving order made in pursuance of the application relates: Proceeds of Crime Act 2002 s 248(4) (prospectively repealed by s 457, Sch 12). At the date at which this volume states the law no such day had been appointed. The object of the provisions in s 248 (as amended) is to ensure that interim receiving orders are registered as pending land actions.

7 Ibid s 246(2)(b). The provisions of the Taxes Management Act 1970 ss 75, 77 (receivers: income tax and capital gains tax: see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 418; INCOME TAXATION vol 23(2) (Reissue) PARA 1247) do not apply in relation to an interim receiver appointed under the Proceeds of Crime Act 2002 s 246: s 488, Sch 10 para 1(d).

8 Ibid s 246(3).

9 Ibid s 246(4).

10 Ibid s 246(5)(a).

11 Ibid s 246(5)(b). For the meaning of 'associated property' see PARA 2150 note 6 ante.

12 Ibid s 246(6)(a).

13 Ibid s 246(6)(b).

14 Ibid s 247(1)(a). The powers referred to in the text are those specified in Sch 6 (see the text and notes 15-20 infra).

15 Ibid Sch 6 para 1.

16 Ibid Sch 6 para 2(1). A requirement imposed in the exercise of this power has effect in spite of any restriction on the disclosure of information (however imposed): Sch 6 para 2(2). An answer given by a person in pursuance of such a requirement may not be used in evidence against him in criminal proceedings (Sch 6 para 2(3)), although this does not apply:

330 (1) on a prosecution for an offence under the Perjury Act 1911 s 5 (see PARA 717 ante), the Criminal Law (Consolidation) (Scotland) Act 1995 s 44(2) or the Perjury (Northern Ireland) Order 1979, SI 1979/1709 (NI 16), art 10 (false statements) (Proceeds of Crime Act 2002 Sch 6 para 2(4)(a)); or

331 (2) on a prosecution for some other offence where, in giving evidence, he makes a statement inconsistent with it (Sch 6 para 2(4)(b)),

but an answer may not be used by virtue of head (2) supra against a person unless evidence relating to it is adduced (Sch 6 para 2(5)(a)) or a question relating to it is asked (Sch 6 para 2(5)(b)) by him or on his behalf in the proceedings arising out of the prosecution (Sch 6 para 2(5)).

An order making any provision under Sch 6 para 2 or Sch 6 para 3 (see the text and notes 17-19 infra) must make provision in respect of legal professional privilege: Sch 6 para 4(1).

17 For the meaning of 'premises' see the Police and Criminal Evidence Act 1984 s 23 (as amended); and PARA 872 note 5 ante (definition applied by the Proceeds of Crime Act 2002 s 316(1)).

18 Ibid Sch 6 para 3(1)(a). See note 19 infra.

19 Ibid Sch 6 para 3(1)(b). Those steps are: (1) to carry out a search for or inspection of anything described in the order (Sch 6 para 3(2)(a)); (2) to make or obtain a copy, photograph or other record of anything so described (Sch 6 para 3(2)(b)); or (3) to remove anything which he is required to take possession of in pursuance of the order or which may be required as evidence in the proceedings under Pt 5 Ch 2 (ss 243-288) (as amended) (Sch 6 para 3(2)(c)).

The order may describe anything generally, whether by reference to a class or otherwise: Sch 6 para 3(3). An order making any provision under Sch 6 para 3 may require any person: (a) to give the interim receiver or administrator access to any premises which he may enter in pursuance of Sch 6 para 3 (Sch 6 para 4(2)(a)); or (b) to give the interim receiver or administrator any assistance he may require for taking the steps mentioned in Sch 6 para 3 (Sch 6 para 4(2)(b)). See Sch 6 para 4(1); and note 16 supra.

20 Ibid Sch 6 para 5(1). 'Managing property' includes: (1) selling or otherwise disposing of assets comprised in the property which are perishable or which ought to be disposed of before their value diminishes (Sch 6 para 5(2)(a)); (2) where the property comprises assets of a trade or business, carrying on, or arranging for another to carry on, the trade or business (Sch 6 para 5(2)(b)); and (3) incurring capital expenditure in respect of the property (Sch 6 para 5(2)(c)). As to references to a person 'disposing' of his property see PARA 2149 note 4 ante.

21 Ibid s 247(1)(b).

22 Ie under ibid s 247(2) (see the text and notes 24-26 infra).

23 Ibid s 247(1). The interim receiver, any party to the proceedings and any person affected by any action taken by the interim receiver, or who may be affected by any action proposed to be taken by him, may at any time apply to the court for directions as to the exercise of the interim receiver's functions: s 251(1). See *Practice Direction--Proceeds of Crime Act 2002 Pts 5 and 8: Civil Recovery* (RSC PD 115B) PARAS II.6.1, II.6.2. Before giving any directions under the Proceeds of Crime Act 2002 s 251(1), the court must (as well as giving the parties to the proceedings an opportunity to be heard) give such an opportunity to the interim receiver and to any person who may be interested in the application: s 251(2).

24 Ibid s 247(2)(a). If the interim receiver deals with any property which is not property to which the order applies (s 247(3)(a)) and at the time he deals with the property he believes on reasonable grounds that he is entitled to do so in pursuance of the order (s 247(3)(b)), the interim receiver is not liable to any person in respect of any loss or damage resulting from his dealing with the property except so far as the loss or damage is caused by his negligence (s 247(3)). As to the meaning of 'dealing' with property see PARA 2151 note 6 ante.

25 For the meaning of 'unlawful conduct' see PARA 2148 ante.

26 Proceeds of Crime Act 2002 s 247(2)(b). See note 24 supra.

27 Exclusions may be made when the interim receiving order is made or on an application to vary the order: s 252(2). An exclusion may, in particular, make provision for the purpose of enabling any person to meet his reasonable living expenses (s 252(3)(a)) or to carry on any trade, business, profession or occupation (s 252(3)(b)), and may be made subject to conditions (s 252(3)).

Where the court exercises the power to make an exclusion for the purpose of enabling a person to meet legal expenses that he has incurred, or may incur, in respect of proceedings under Pt 5 (ss 240-316) (as amended), it must ensure that the exclusion:

332 (1) is limited to reasonable legal expenses that the person has reasonably incurred or that he reasonably incurs (s 252(4)(a) (s 252(4) substituted, s 252(4A) added, and s 252(6) amended, by the Serious Organised Crime and Police Act 2005 s 109, Sch 9 paras 4, 14));

333 (2) specifies the total amount that may be released for legal expenses in pursuance of the exclusion (Proceeds of Crime Act 2002 s 252(4)(b) (as so substituted)); and

334 (3) is made subject to the required conditions (ie under s 286A (as added)) in addition to any conditions imposed under s 252(3) (s 252(4)(c) (as so substituted)).

The Lord Chancellor may make regulations specifying the required conditions for the purposes of s 252(4) (see head (3) supra): see s 286A (added by the Serious Organised Crime and Police Act 2005 Sch 6 para 20). Pursuant to this power the Lord Chancellor has made the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005, SI 2005/3382. As to the making of regulations under the Proceeds of Crime Act 2002 see PARA 789 note 6 ante.

The court, in deciding whether to make an exclusion for the purpose of enabling a person to meet his legal expenses in respect of proceedings under Pt 5 (as amended) must have regard (in particular) to the desirability of the person being represented in any proceedings under Pt 5 (as amended) in which he is a participant (s 252(4A)(a) (as so added)) and must, where the person is the respondent, disregard the possibility that legal representation of the person in any such proceedings might, were an exclusion not made, be funded by the Legal Services Commission (s 252(4A)(b) (as so added)). See *Practice Direction--Proceeds of Crime Act 2002 Pts 5 and 8: Civil Recovery* (RSC PD 115B) PARAS II.5B.1, II.5B.3, II.7A.1, II.7A.8. If the excluded property is not specified in the order it must be described in the order in general terms: Proceeds of Crime Act 2002 s 252(5). The power to make exclusions must, subject to s 252(4A) (as added), be exercised with a view to ensuring, so far as practicable, that the satisfaction of any right of the enforcement authority to recover the property

obtained through unlawful conduct is not unduly prejudiced: s 252(6) (as so amended). As to when property is obtained through unlawful conduct see PARA 2148 ante. Section 279 gives examples of the satisfaction of the enforcement authority's right to recover the original property.

28 Ibid s 252(1).

29 Ibid s 255(1)(a).

30 Ibid s 255(1)(b).

31 Ibid s 255(1)(c).

32 Ibid s 255(1)(d).

33 Ibid s 255(1).

34 Ibid s 255(2)(a).

35 Ibid s 255(2)(b).

36 Ibid s 253(1)(a). If a court (whether the High Court or any other court) in which proceedings are pending in respect of any property is satisfied that an interim receiving order has been applied for or made in respect of the property, the court may either stay the proceedings or allow them to continue on any terms it thinks fit: s 253(2). If the interim receiving order applies to a tenancy of any premises, no landlord or other person to whom rent is payable may exercise any right of forfeiture by peaceable re-entry in relation to the premises in respect of any failure by the tenant to comply with any term or condition of the tenancy, except with the leave of the court and subject to any terms the court may impose: s 253(3). Before exercising any power conferred by s 253, the court must (as well as giving the parties to any of the proceedings in question an opportunity to be heard) give such an opportunity to the interim receiver (if appointed) and any person who may be affected by the court's decision: s 253(4).

37 Ibid s 253(1)(b). See note 36 supra.

38 Ibid s 251(3). Before exercising any power under Pt 5 Ch 2 (as amended) to vary or set aside an interim receiving order, the court must (as well as giving the parties to the proceedings an opportunity to be heard) give such an opportunity to the interim receiver and to any person who may be affected by the court's decision: s 251(4).

39 Ibid s 254(1).

40 Ibid s 254(2). The court may exclude any property within s 254(2) on any terms or conditions, applying while the interim receiving order has effect, which the court thinks necessary or expedient: s 254(3).

## UPDATE

### 2153 Interim receiving orders

NOTE 3--2002 Act s 246(7) amended: Serious Crime Act 2007 Sch 8 para 86.

NOTE 10--See *Director of the Assets Recovery Agency v Szepietowski* [2007] EWCA Civ 766, [2007] All ER (D) 364 (Jul) (claimant not required to establish a good arguable case that any property was obtained through a specific criminal offence).

NOTE 27--SI 2005/3382 amended: see PARA 2152 NOTE 21. As to the approach of the court when considering the application of the statutory exclusion regime to a trustee, see *Serious Organised Crime Agency v Szepietowski* [2009] EWHC 344 (Ch), [2009] 4 All ER 393. Where an order has been made excluding part of the property subject to an interim receiving order, so as to enable the person against whom the order is made to pay legal expenses, the court has the power to set that exclusion aside if there is good reason to do so: *Serious Organised Crime Agency v Szepietowski* [2009] EWHC 1560 (Ch), [2009] All ER (D) 58 (Jul).



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## **(iv) Vesting and Realisation of Recoverable Property**

### **2154. Recovery orders.**

If in civil proceedings<sup>1</sup> in the High Court<sup>2</sup> for the recovery of property<sup>3</sup>, the court is satisfied that any property is recoverable<sup>4</sup>, the court must make a recovery order<sup>5</sup>. The recovery order must vest the recoverable property in the trustee for civil recovery<sup>6</sup>.

The court may not, however, make in a recovery order:

- 2822 (1) any provision in respect of any recoverable property if:
- 619
- 110. (a) the respondent obtained the recoverable property in good faith<sup>7</sup>;
  - 111. (b) he took steps after obtaining the property which he would not have taken if he had not obtained it or he took steps before obtaining the property which he would not have taken if he had not believed he was going to obtain it<sup>8</sup>;
  - 112. (c) when he took the steps, he had no notice that the property was recoverable<sup>9</sup>; and
  - 113. (d) if a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to him<sup>10</sup>,
- 620
- 2823 and it would not be just and equitable to do so<sup>11</sup>; or
- 2824 (2) any provision which is incompatible with any of the Convention rights<sup>12</sup>.

A recovery order may: (i) sever any property<sup>13</sup>; (ii) impose conditions as to the manner in which the trustee for civil recovery may deal with any property vested by the order for the purpose of realising it<sup>14</sup>; (iii) provide for payment<sup>15</sup> of reasonable legal expenses that a person has reasonably incurred, or may reasonably incur, in respect of the proceedings<sup>16</sup> in which the order is made<sup>17</sup> or any related<sup>18</sup> proceedings<sup>19</sup>.

A recovery order overrides provisions that would otherwise prevent, or limit, the vesting of property in the trustee for civil recovery<sup>20</sup>.

The enforcement authority may not start proceedings for a recovery order unless the authority reasonably believes that the aggregate value of the recoverable property which the authority wishes to be subject to a recovery order is not less than £10,000<sup>21</sup>.

1    le proceedings under the Proceeds of Crime Act 2002 Pt 5 Ch 2 (ss 243-288) (as amended).

2    Ibid s 316(1).

3    For the meaning of 'property' see PARA 2147 note 3 ante.

4    For the meaning of 'recoverable property' see PARA 2149 ante.

5    Proceeds of Crime Act 2002 s 266(1). Section 266 is subject to ss 270-278 (see PARAS 2155-2158 post): s 266(9). Proceedings for a recovery order may not be taken or continued in respect of recoverable property or

associated property to which specified insolvency provisions apply unless the appropriate court gives leave and the proceedings are taken or (as the case may be) continued in accordance with any terms imposed by that court: see s 311(1), (3); and see further s 311(4)-(8). For the meaning of 'associated property' see PARA 2150 note 6 ante.

6 Ibid s 266(2). The 'trustee for civil recovery' is a person appointed by the court to give effect to a recovery order: s 267(1). The enforcement authority must nominate a suitably qualified person for appointment as the trustee: s 267(2). For the meaning of 'enforcement authority' see PARA 2147 note 2 ante.

The functions of the trustee are: (1) to secure the detention, custody or preservation of any property vested in him by the recovery order (s 267(3)(a)); (2) in the case of property other than money, to realise the value of the property for the benefit of the enforcement authority (s 267(3)(b)); and (3) to perform any other functions conferred on him by virtue of Pt 5 Ch 2 (as amended) (s 267(3)(c)). In performing his functions, the trustee acts on behalf of the enforcement authority and must comply with any directions given by the authority: s 267(4).

The trustee is to realise the value of property vested in him by the recovery order, so far as practicable, in the manner best calculated to maximise the amount payable to the enforcement authority: s 267(5).

The trustee has the powers mentioned in Sch 7: s 267(6). Those powers are: power to sell property or any part of it or interest in it (Sch 7 para 1); power to incur expenditure for the purpose of acquiring any part of property, or any interest in it, which is not vested in him, and discharging any liabilities, or extinguishing any rights, to which property is subject (Sch 7 para 2); power to manage property (which includes doing anything mentioned in Sch 6 para 5(2) (see PARA 2153 note 20 ante)) (Sch 7 para 3); power to start, carry on or defend any legal proceedings in respect of property (Sch 7 para 4); power to make any compromise or other arrangement in connection with any claim relating to property (Sch 7 para 5); for the purposes of, or in connection with, the exercise of any of his powers, power by his official name to hold property, enter into contracts, sue and be sued, employ agents, and execute a power of attorney, deed or other instrument, and power to do any other act which is necessary or expedient (Sch 7 para 6). For special taxation provisions applicable when property is vested in the trustee for civil recovery or any other person by a recovery order see s 448, Sch 10 paras 2-33.

References in s 267 to a 'recovery order' include an order under s 276 (consent orders: see PARA 2157 post); and references to 'property vested in the trustee by a recovery order' include property vested in him in pursuance of an order under s 276: s 267(7).

7 Ibid s 266(4)(a).

8 Ibid s 266(4)(b).

9 Ibid s 266(4)(c).

10 Ibid s 266(4)(d).

11 Ibid s 266(3)(a). In deciding whether it would be just and equitable to make the provision in the recovery order where the relevant conditions are met, the court must have regard to:

335 (1) the degree of detriment that would be suffered by the respondent if the provision were made (s 266(6)(a)); and

336 (2) the enforcement authority's interest in receiving the realised proceeds of the recoverable property (s 266(6)(b)).

12 Ibid s 266(3)(b). The reference in the text to the 'Convention rights' is a reference to the Convention rights within the meaning of the Human Rights Act 1998 (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 122 et seq).

13 Proceeds of Crime Act 2002 s 266(7).

14 Ibid s 266(8).

15 Ie under ibid s 280 (see PARA 2159 post). If regulations under s 286B(1)(a) (as added ) apply to an item of expenditure, a sum in respect of the item is not payable under s 280 in pursuance of provision under s 266(8A) (as added) unless: (1) the enforcement authority agrees to its payment (s 266(8B)(a) (s 266(8A), (8B) added by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 paras 4, 15)); or (2) the court has assessed the amount allowed by the regulations in respect of that item and the sum is paid in respect of the assessed amount (s 266(8B)(b) (as so added)). As to the power of the Lord Chancellor to make regulations for these purposes see s 286B(1)(a) (s 286B added by the Serious Organised Crime and Police Act 2005 Sch 6 paras 4, 20). As to the regulations that have been made see the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005, 2005/3382. As to the making of regulations under the Proceeds of Crime Act 2002 see PARA 789 note 6 ante. Regulations under s 286B (as added) may (in particular) limit the

amount of remuneration allowable to representatives for a unit of time worked (s 286B(2)(a) (as so added)), limit the total amount of remuneration allowable to representatives for work done in connection with proceedings or a step in proceedings (s 286B(2)(b) (as so added)), and limit the amount allowable in respect of an item of expense incurred by a representative or incurred, otherwise than in respect of the remuneration of a representative, by a party to proceedings (s 286B(2)(a) (as so added)). Before making regulations under s 286B (as added), the Lord Chancellor must consult such persons as he considers appropriate: s 286B(3) (as so added).

16     Ie proceedings under *ibid* Pt 5 (ss 240-316) (as amended).

17     *Ibid* s 266(8A)(a) (as added: see note 15 *supra*).

18     Ie related proceedings under *ibid* Pt 5 (as amended).

19     *Ibid* s 266(8A)(b) (as added: see note 15 *supra*).

20     See *ibid* s 269.

21     See *ibid* s 287(1); the Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003, SI 2003/175, art 2; and *PARA* 2163 *post*.

## **UPDATE**

### **2154 Recovery orders**

NOTE 15--SI 2005/3382 amended: see *PARA* 2152 NOTE 21.

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## **2155. Associated and joint property.**

If the High Court makes a recovery order<sup>1</sup> in respect of any recoverable property<sup>2</sup> where:

- 2825 (1) the property to which the proceedings relate includes property which is associated<sup>3</sup> with the recoverable property and is specified or described in the claim form<sup>4</sup> and (if the associated property is not the respondent's property) the claim form or application has been served on the person whose property it is or the court has dispensed with service<sup>5</sup>; or
- 2826 (2) the recoverable property belongs to joint tenants<sup>6</sup> and one of the tenants is an excepted joint owner<sup>7</sup>,

the following provisions apply<sup>8</sup>.

Where the enforcement authority<sup>9</sup> (on the one hand) and the person who holds the associated property or who is the excepted joint owner (on the other) agree, the recovery order may, instead of vesting the recoverable property in the trustee for civil recovery<sup>10</sup>, require the person who holds the associated property or who is the excepted joint owner to make a payment<sup>11</sup> to the trustee<sup>12</sup>. A recovery order which makes any such requirement may, so far as required for giving effect to the agreement, include provision for vesting, creating or extinguishing any interest in property<sup>13</sup>.

Where there is no such agreement<sup>14</sup> and the court thinks it just and equitable to do so<sup>15</sup>, the recovery order may provide:

- 2827 (a) for the associated property to vest in the trustee for civil recovery or (as the case may be) for the excepted joint owner's interest to be extinguished<sup>16</sup>; or
- 2828 (b) in the case of an excepted joint owner, for the severance of his interest<sup>17</sup>.

A recovery order making any provision by virtue of head (a) above may provide:

- 2829 (i) for the trustee to pay an amount to the person who holds the associated property or who is an excepted joint owner<sup>18</sup>; or
- 2830 (ii) for the creation of interests in favour of that person, or the imposition of liabilities or conditions, in relation to the property vested in the trustee<sup>19</sup>,

or for both<sup>20</sup>. In making any such provision<sup>21</sup> in a recovery order, the court must have regard to:

- 2831 (A) the rights of any person who holds the associated property or who is an excepted joint owner and the value to him of that property or, as the case may be, of his share (including any value which cannot be assessed in terms of money)<sup>22</sup>; and
- 2832 (B) the enforcement authority's interest in receiving the realised proceeds of the recoverable property<sup>23</sup>.

- 1 For the meaning of 'recovery order' see PARA 2154 ante.
  - 2 For the meaning of 'property' see PARA 2147 note 3 ante. For the meaning of 'recoverable property' see PARA 2149 ante.
  - 3 For the meaning of 'associated property' see PARA 2150 note 6 ante.
  - 4 Proceeds of Crime Act 2002 s 270(2)(a).
  - 5 Ibid s 270(2)(b).
  - 6 Ibid s 270(3)(a).
  - 7 Ibid s 270(3)(b). An 'excepted joint owner' is a person who obtained the property in circumstances in which it would not be recoverable as against him; and references to the excepted joint owner's share of the recoverable property are references to so much of the recoverable property as would have been his if the joint tenancy had been severed: ss 270(4), 316(1).
  - 8 Ibid s 270(1).
  - 9 For the meaning of 'enforcement authority' see PARA 2147 note 2 ante.
  - 10 As to the trustee for civil recovery see PARA 2154 note 6 ante.
  - 11 The amount of the payment is to be the amount which the enforcement authority and that person agree represents:
    - 337 (1) in a case within s 270(2) (see head (1) in the text), the value of the recoverable property (s 271(3)(a));
    - 338 (2) in a case within s 270(3) (see head (2) in text), the value of the recoverable property less the value of the excepted joint owner's share (s 271(3)(b)).
- However, if:
- 339 (a) a property freezing order, an interim receiving order, a prohibitory property order or an interim administration order applied at any time to the associated property or joint tenancy (s 271(4)(a) (ss 271(4)(a), (b), 272(5)(a), (b) amended by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 paras 4, 16, 17)); and
  - 340 (b) the enforcement authority agrees that the person has suffered loss as a result of such order (Proceeds of Crime Act 2002 s 271(4)(b) (as so amended)),
- the amount of the payment may be reduced by any amount the enforcement authority and that person agree is reasonable, having regard to that loss and to any other relevant circumstances (s 271(4)). For the meaning of 'property freezing order' see PARA 2151 ante. For the meaning of 'interim receiving order' see PARA 2153 ante. Prohibitory property orders and interim administration orders are Scottish orders which are not dealt with in this work.
- If there is more than one item of associated property or excepted joint owner, the total amount to be paid to the trustee, and the part of that amount which is to be provided by each person who holds any such associated property or who is an excepted joint owner, is to be agreed between both (or all) of them and the enforcement authority: s 271(5).
- 12 Ibid s 271(1). A recovery order which makes any requirement under s 271(1) must make provision for any recoverable property to cease to be recoverable: s 271(6).
  - 13 Ibid s 271(2).
  - 14 Ibid s 272(1)(a). The agreement referred to in the text is an agreement under s 271 (see the text and notes 1-13 supra).
  - 15 Ibid s 272(1)(b).
  - 16 Ibid s 272(2)(a).
  - 17 Ibid s 272(2)(b). For the meaning of 'interest' (in property) see PARA 2147 note 3 ante.

18 Ibid s 272(3)(a).

19 Ibid s 272(3)(b).

20 Ibid s 272(3).

21 Ie by virtue of ibid s 272(2) or (3) (see the text and notes 16-20 supra).

22 Ibid s 272(4)(a). If: (1) a property freezing order, an interim receiving order, a prohibitory property order or an interim administration order applied at any time to the associated property or joint tenancy (s 272(5)(a) (as amended: see note 11 supra)); and (2) the court is satisfied that the person who holds the associated property or who is an excepted joint owner has suffered loss as a result of the order mentioned in head (1) supra (s 272(5)(b) (as so amended)), a recovery order making any provision by virtue of s 272(2) or (3) (see the text and notes 16-20 supra) may require the enforcement authority to pay compensation to that person (s 272(5)). The amount of compensation to be paid under these provisions is the amount the court thinks reasonable, having regard to the person's loss and to any other relevant circumstances: s 272(6).

23 Ibid s 272(4)(b). See note 22 supra.

## **UPDATE**

### **2155 Associated and joint property**

TEXT AND NOTES 11-23--See further 2002 Act s 272(7) (added by Serious Crime Act 2007 Sch 8 para 87).

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## **2156. Payment in respect of rights under pension schemes.**

Where recoverable property<sup>1</sup> consists of rights under a pension scheme<sup>2</sup>, the following provisions apply<sup>3</sup>.

A recovery order<sup>4</sup> in respect of the property<sup>5</sup> must, instead of vesting the property in the trustee for civil recovery<sup>6</sup>, require the trustees or managers of the pension scheme<sup>7</sup>:

2833 (1) to pay to the trustee for civil recovery within a prescribed period the amount determined by the trustees or managers to be equal to the value of the rights<sup>8</sup>; and

2834 (2) to give effect to any other provision so made<sup>9</sup> in respect of the scheme<sup>10</sup>.

A recovery order so made<sup>11</sup> overrides the provisions of the pension scheme to the extent that they conflict with the provisions of the order<sup>12</sup>. A recovery order so made may provide for the recovery by the trustees or managers of the scheme (whether by deduction from any amount which they are required to pay to the trustee for civil recovery or otherwise) of costs incurred by them in:

2835 (a) complying with the recovery order<sup>13</sup>; or

2836 (b) providing information, before the order was made, to the enforcement authority, interim receiver or interim administrator<sup>14</sup>.

1 For the meaning of 'recoverable property' see PARA 2149 ante.

2 'Pension scheme' means an occupational pension scheme or a personal pension scheme; and those expressions have the same meaning as in the Pension Schemes Act 1993 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARAS 710, 853): Proceeds of Crime Act 2002 s 275(4). As to references to a pension scheme see also s 275(6).

3 Ibid s 273(1).

4 For the meaning of 'recovery order' see PARA 2154 ante.

5 For the meaning of 'property' see PARA 2147 note 3 ante.

6 As to the trustee for civil recovery see PARA 2154 note 6 ante.

7 In relation to an occupational pension scheme or a personal pension scheme, 'the trustees or managers' means in the case of a scheme established under a trust, the trustees, and, in any other case, the managers: Proceeds of Crime Act 2002 s 275(5). See also s 275(7).

8 Ibid s 273(2)(a). Section 273(2) is subject to ss 276-278 (see PARAS 2157-2158 post): s 273(2). None of the following provisions applies to a court making a recovery order by virtue of s 273(2):

341 (1) any provision of the Pension Schemes Act 1993 s 159 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 928) or the Pensions Act 1995 s 91( see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 865) (Proceeds of Crime Act 2002 s 273(5)(a));

342 (2) any provision of any enactment (whenever passed or made) corresponding to any of those provisions (s 273(5)(b)); and

343 (3) any provision of the pension scheme in question corresponding to any of those provisions (s 273(5)(c)).

A recovery order made by virtue of s 273(2) must require the trustees or managers of the pension scheme to make such reduction in the liabilities of the scheme as they think necessary in consequence of the payment made in pursuance of s 273(2): s 274(1). Accordingly, the order must require the trustees or managers to provide for the liabilities of the pension scheme in respect of the respondent's recoverable property to which s 273 applies to cease: s 274(2). So far as the trustees or managers are required by the recovery order to provide for the liabilities of the pension scheme in respect of the respondent's recoverable property to which s 273 applies to cease, their powers include (in particular) power to reduce the amount of any benefit or future benefit to which the respondent is or may be entitled under the scheme (s 274(3)(a)) and any future benefit to which any other person may be entitled under the scheme in respect of that property (s 274(3)(b)). For the meaning of 'respondent' see PARA 2150 note 5 ante.

The Proceeds of Crime Act 2002 (Recovery from Pension Schemes) Regulations 2003, SI 2003/291, make provision under the Proceeds of Crime Act 2002 s 275(1)-(3) as to the exercise by trustees or managers of pension schemes of their powers under ss 273, 274.

9 le by virtue of *ibid* s 273 and ss 274-275 (see notes 2, 7, 8 *supra*; and PARA 2150 ante).

10 *Ibid* s 273(2)(b). See note 8 *supra*.

11 le by virtue of *ibid* s 273(2).

12 *Ibid* s 273(3).

13 *Ibid* s 273(4)(a).

14 *Ibid* s 273(4)(b).

## **UPDATE**

### **2156 Payment in respect of rights under pension schemes**

TEXT AND NOTE 14--2002 Act s 273(4)(b) amended: Serious Crime Act 2007 s 83(2).



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## **2157. Consent orders.**

The High Court may make an order staying any proceedings for a recovery order<sup>1</sup> on terms agreed by the parties for the disposal of the proceedings if each person to whose property<sup>2</sup> the proceedings, or the agreement, relates is a party both to the proceedings and the agreement<sup>3</sup>. Such an order may, as well as staying the proceedings on terms:

- 2837 (1) make provision for any property which may be recoverable property<sup>4</sup> to cease to be recoverable<sup>5</sup>; and
- 2838 (2) make any further provision which the court thinks appropriate<sup>6</sup>.

Where recoverable property to which proceedings in the High Court for civil recovery relate includes rights under a pension scheme<sup>7</sup>, such an order may not stay the proceedings on terms that the rights are vested in any other person<sup>8</sup> but may include provision imposing the following requirement, if the trustees or managers<sup>9</sup> of the scheme are parties to the agreement by virtue of which the order is made<sup>10</sup>. The requirement is that the trustees or managers of the pension scheme make a payment in accordance with the agreement<sup>11</sup> and give effect to any other provision made<sup>12</sup> in respect of the scheme<sup>13</sup>. The trustees or managers of the pension scheme have power to enter into an agreement in respect of the proceedings on any terms on which a consent order<sup>14</sup> may stay the proceedings<sup>15</sup>.

1 For the meaning of 'recovery order' see PARA 2154 ante.

2 For the meaning of 'property' see PARA 2147 note 3 ante.

3 Proceeds of Crime Act 2002 s 276(1).

4 For the meaning of 'recoverable property' see PARA 2149 ante.

5 Proceeds of Crime Act 2002 s 276(2)(a). Section 280 (see PARA 2159 post) applies to property vested in the trustee for civil recovery, or money paid to him, in pursuance of the agreement as it applies to property vested in him by a recovery order or money paid under s 271 (see PARA 2155 ante): s 276(3). As to the trustee for civil recovery see PARA 2154 note 6 ante. For special taxation provisions applicable when property is vested in the trustee for civil recovery or any other person in pursuance of an order under s 276 see s 448, Sch 10 paras 2-33.

6 Ibid s 276(2)(b). See note 5 supra.

7 Ibid s 277(1). For the meaning of 'pension scheme' see PARA 2156 note 2 ante.

8 Ibid s 277(2)(a).

9 As to the trustees or managers in connection with a pension scheme see PARA 2156 note 7 ante.

10 Proceeds of Crime Act 2002 s 277(2)(b).

11 Ibid s 277(3)(a). The following provisions apply in respect of an order under s 276, so far as it includes the requirement mentioned in s 277(3): s 277(5). The order overrides the provisions of the pension scheme to the extent that they conflict with the requirement: s 277(6). The order may provide for the recovery by the trustees or managers of the scheme (whether by deduction from any amount which they are required to pay in pursuance of the agreement or otherwise) of costs incurred by them in complying with the order (s 277(7)(a)) or

providing information, before the order was made, to the enforcement authority, interim receiver or interim administrator (s 277(7)(b)). Sections 273(5), 274 (read with s 275) (see PARA 2156 ante) apply as if the requirement were included in an order made by virtue of s 273(2) (see PARA 2156 ante): s 277(8). For the meaning of 'enforcement authority' see PARA 2147 note 2 ante.

12     Ie by virtue of ibid s 277.

13     Ibid s 277(3)(b). See note 11 supra.

14     Ie an order made under ibid s 276 (see the text and notes 1-6 supra).

15     Ibid s 277(4).

## **UPDATE**

### **2157 Consent orders**

NOTE 11--2002 Act s 277(7)(b) amended: Serious Crime Act 2007 s 83(2).

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## **2158. Limit on recovery.**

If the enforcement authority<sup>1</sup> seeks a recovery order<sup>2</sup>:

2839 (1) in respect of both property<sup>3</sup> which is or represents property obtained through unlawful conduct<sup>4</sup> and related property<sup>5</sup>; or

2840 (2) in respect of property which is or represents property obtained through unlawful conduct where such an order, or a consent order<sup>6</sup>, has previously been made in respect of related property<sup>7</sup>,

the court is not to make a recovery order if it thinks that the enforcement authority's right to recover the original property has been satisfied by a previous recovery order or a consent order<sup>8</sup>.

Subject to this, if the court thinks that a recovery order may be made in respect of two or more related items of recoverable property<sup>9</sup> but the making of a recovery order in respect of both or all of them is not required in order to satisfy the enforcement authority's right to recover the original property<sup>10</sup>, the court may, in order to satisfy that right to the extent required, make a recovery order in respect of:

2841 (a) only some of the related items of property<sup>11</sup>; or

2842 (b) only a part of any of the related items of property<sup>12</sup>,

or both<sup>13</sup>.

1 For the meaning of 'enforcement authority' see PARA 2147 note 2 ante.

2 For the meaning of 'recovery order' see PARA 2154 ante.

3 For the meaning of 'property' see PARA 2147 note 3 ante.

4 For the meaning of 'unlawful conduct', and as to when property is obtained through unlawful conduct, see PARA 2148 ante.

5 Proceeds of Crime Act 2002 s 278(1)(a). For these purposes, the original property and any items of property which represent the original property are to be treated as related to each other (s 278(2)(b)); and 'the original property' means the property obtained through unlawful conduct (s 278(2)(a)).

6 ie an order under *ibid* s 276 (see PARA 2157 ante).

7 *Ibid* s 278(1)(b).

8 *Ibid* s 278(3). Where the court may make a recovery order in respect of any property, s 278 does not prevent the recovery of any profits which have accrued in respect of the property: s 278(6).

If:

344 (1) an order is made under s 298 (see PARA 2168 post) for the forfeiture of recoverable property (s 278(7)(a)); and

- 345 (2) the enforcement authority subsequently seeks a recovery order in respect of related property (s 278(7)(b)),

the order under s 298 is to be treated for the purposes of s 278 as if it were a recovery order obtained by the enforcement authority in respect of the forfeited property (s 278(7)).

If:

- 346 (a) in pursuance of a judgment in civil proceedings (whether in the United Kingdom or elsewhere), the claimant has obtained property from the defendant ('the judgment property') (s 278(8)(a));

- 347 (b) the claim was based on the defendant's having obtained the judgment property or related property through unlawful conduct (s 278(8)(b)); and

- 348 (c) the enforcement authority subsequently seeks a recovery order in respect of property which is related to the judgment property (s 278(8)(c)),

the judgment is to be treated for the purposes of s 278 as if it were a recovery order obtained by the enforcement authority in respect of the judgment property (s 278(8)). As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

If:

- 349 (i) property has been taken into account in deciding the amount of a person's benefit from criminal conduct for the purpose of making a confiscation order (s 278(9)(a)); and

- 350 (ii) the enforcement authority subsequently seeks a recovery order in respect of related property (s 278(9)(b)),

the confiscation order is to be treated for the purposes of s 278 as if it were a recovery order obtained by the enforcement authority in respect of the property referred to in head (i) above (s 278(9)). For these purposes, a 'confiscation order' is an order under s 6 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391) (or its Scottish or Northern Ireland equivalent under s 92 or s 156) (s 278(10)(a)) or an order under a corresponding provision of one of the repealed enactments listed in s 8(7)(a)-(g) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 394 note 16) (s 278(10)(b)); and, in relation to this type of order, the reference to the amount of a person's benefit from criminal conduct is to be read as a reference to the corresponding amount under the enactment in question (s 278(10)).

Section 279 gives examples of the satisfaction of the enforcement authority's right to recover the original property.

9 Ibid s 278(4)(a).

10 Ibid s 278(4)(b).

11 Ibid s 278(5)(a).

12 Ibid s 278(5)(b).

13 Ibid s 278(5).

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## **2159. Applying realised proceeds.**

The trustee for civil recovery<sup>1</sup> is to make out of the realised proceeds<sup>2</sup>:

- 2843 (1) first, any payment required to be made by him by virtue of the provisions which apply to associated and joint property in default of agreement<sup>3</sup>;
- 2844 (2) next, any payment of legal expenses which are payable<sup>4</sup> in pursuance of a provision contained in the recovery order<sup>5</sup>;
- 2845 (3) then, any payment of any payable<sup>6</sup> expenses incurred by a person acting as an insolvency practitioner<sup>7</sup>,

and any sum which remains is to be paid to the enforcement authority<sup>8</sup>.

The Director of the Assets Recovery Agency<sup>9</sup> may apply a sum received by him under these provisions in making payment of the remuneration and expenses of: (a) the trustee<sup>10</sup>; or (b) any interim receiver appointed in, or in anticipation of, the proceedings for the recovery order<sup>11</sup>.

1 As to the trustee for civil recovery see PARA 2154 note 6 ante.

2 I.e: (1) sums which represent the realised proceeds of property which was vested in the trustee for civil recovery by a recovery order or which he obtained in pursuance of a recovery order (Proceeds of Crime Act 2002 s 280(1)(a)); and (2) sums vested in the trustee by a recovery order or obtained by him in pursuance of a recovery order (s 280(1)(b)). For the meaning of 'property' see PARA 2147 note 3 ante. For the meaning of 'recovery order' see PARA 2154 ante.

3 Ibid s 280(2)(a). The provisions in question are the provisions of s 272 (see PARA 2155 ante).

4 I.e payable under ibid s 280(2), after giving effect to s 266(8B) (as added) (see PARA 2154 ante), in pursuance of provisions under s 266(8A) (as added) (see PARA 2154 ante).

5 Ibid s 280(2)(aa) (s 280(2)(aa) added, and s 280(2)(b) amended, by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 paras 4, 18). If property is subject to a property freezing order made under the Proceeds of Crime Act 2002 s 245A (as added) (see PARA 2151 ante) or an interim receiving order made under s 246 (see PARA 2153 ante) (or corresponding Scottish provisions) (s 432(8)(a), (9)(a) (amended by the Serious Organised Crime and Police Act 2005 Sch 6 paras 4, 23)) and either a person acting as an insolvency practitioner (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 424 note 5) incurs expenses in respect of property subject to the order in circumstances where he does not know (and has no reasonable grounds to believe) that the property is subject to the order (Proceeds of Crime Act 2002 s 432(8)(b), (c)), or a person acting as an insolvency practitioner incurs expenses which are not ones in respect of property subject to the order in circumstances where the expenses are ones which (but for the effect of the order) might have been met by taking possession of and realising property subject to it (s 432(9)(b), (c)), then whether or not that person has seized or disposed of any property, he is entitled to payment of the expenses under s 280 (as amended) (s 432(10)).

6 I.e payable under ibid s 280(2) (as amended) by virtue of s 432(10) (see note 5 supra).

7 Ibid s 280(2)(b).

8 Ibid s 280(2).

9 As to the Director see PARA 1743 note 7 ante. See also PARA 2147 note 2 ante.

10 Proceeds of Crime Act 2002 s 280(3)(a) (s 280(3), (4) added by the Serious Organised Crime and Police Act 2005 s 99(1), (2)). This does not apply in relation to the remuneration of the trustee if the trustee is a member of the staff of the Assets Recovery Agency: Proceeds of Crime Act 2002 s 280(4) (as so added).

11 Ibid s 280(3)(b) (as added: see note 10 supra).

## **UPDATE**

### **2159 Applying realised proceeds**

TEXT AND NOTES 10, 11--Proceeds of Crime Act s 280(3) amended, s 280(4) further amended: Serious Crime Act 2007 Sch 8 para 88.

NOTE 10--2002 Act s 280(4) amended: SI 2008/949.

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## **(v) Exemptions**

### **2160. Victims of theft etc.**

In proceedings for a recovery order<sup>1</sup>, a person who claims that any property<sup>2</sup> alleged to be recoverable property<sup>3</sup>, or any part<sup>4</sup> of the property, belongs to him may apply for a declaration to that effect<sup>5</sup>. If the applicant appears to the court to meet the following condition, the court may make such a declaration<sup>6</sup>. The condition is that:

- 2846 (1) the person was deprived of the property he claims, or of property which it represents, by unlawful conduct<sup>7</sup>;
- 2847 (2) the property he was deprived of was not recoverable property immediately before he was deprived of it<sup>8</sup>; and
- 2848 (3) the property he claims belongs to him<sup>9</sup>.

Property to which such a declaration applies is not recoverable property<sup>10</sup>.

1 For the meaning of 'recovery order' see PARA 2154 ante.

2 For the meaning of 'property' see PARA 2147 note 3 ante.

3 For the meaning of 'recoverable property' see PARA 2149 ante.

4 For the meaning of 'part' (in relation to property) see PARA 2149 note 4 ante.

5 Proceeds of Crime Act 2002 s 281(1).

6 Ibid s 281(2).

7 Ibid s 281(3)(a). For the meaning of 'unlawful conduct', and as to when property is obtained through unlawful conduct, see PARA 2148 ante.

8 Ibid s 281(3)(b).

9 Ibid s 281(3)(c).

10 Ibid s 281(4).

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## **2161. Other exemptions.**

Proceedings for a recovery order<sup>1</sup> may not be taken against any person in circumstances of a prescribed<sup>2</sup> description; and the circumstances may relate to the person himself or to the property<sup>3</sup> or to any other matter<sup>4</sup>.

Proceedings for a recovery order may not be taken in respect of cash<sup>5</sup> found at any place in the United Kingdom<sup>6</sup> unless the proceedings are also taken in respect of property other than cash which is property of the same person<sup>7</sup>.

Proceedings for a recovery order may not be taken against the Financial Services Authority<sup>8</sup> in respect of any recoverable property<sup>9</sup> held by the Authority<sup>10</sup>.

Proceedings for a recovery order may not be taken in respect of any property which is subject to certain charges<sup>11</sup> under legislation relating to financial markets<sup>12</sup>.

Proceedings for a recovery order may not be taken against any person in respect of any recoverable property which he holds by reason of his acting, or having acted, as an insolvency practitioner<sup>13</sup>.

1 For the meaning of 'recovery order' see PARA 2154 ante.

2 'Prescribed' means prescribed by an order made by the Secretary of State after consultation with the Scottish Ministers: Proceeds of Crime Act 2002 s 282(1). At the date at which this volume states the law no such order had been made.

3 For the meaning of 'property' see PARA 2147 note 3 ante.

4 Proceeds of Crime Act 2002 s 282(1).

5 For the meaning of 'cash' see PARA 2147 note 5 ante.

6 As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

7 Proceeds of Crime Act 2002 s 282(2).

8 As to the Financial Services Authority see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 4 et seq.

9 For the meaning of 'recoverable property' see PARA 2149 ante.

10 Proceeds of Crime Act 2002 s 282(3).

11 ie any of the following:

351 (1) a collateral security charge within the meaning of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979 (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 7) (Proceeds of Crime Act 2002 s 282(4)(a));

352 (2) a market charge within the meaning of the Companies Act 1989 Pt 7 (ss 154-191) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 73) (Proceeds of Crime Act 2002 s 282(4)(b));



353 (3) a money market charge, within the meaning of the Financial Markets and Insolvency (Money Market) Regulations 1995, SI 1995/2049 (revoked) (Proceeds of Crime Act 2002 s 282(4)(c));

354 (4) a system charge, within the meaning of the Financial Markets and Insolvency Regulations 1996, SI 1996/1469 or the Financial Markets and Insolvency Regulations (Northern Ireland) 1996, SR 1996/252 (Proceeds of Crime Act 2002 s 282(4)(d)).

12 See *ibid* s 282(4).

13 *Ibid* s 282(5). For the meaning of 'insolvency practitioner' see s 433: s 282(5).

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## **(vi) Miscellaneous**

### **2162. Compensation.**

If, in the case of any property<sup>1</sup> to which a property freezing order<sup>2</sup> or an interim receiving order<sup>3</sup> has at any time applied, the court does not in the course of the proceedings decide that the property is recoverable property<sup>4</sup> or associated property<sup>5</sup>, the person whose property it is may make an application to the court for compensation<sup>6</sup>.

If the court has made a decision by reason of which no recovery order<sup>7</sup> could be made in respect of the property, the application for compensation must be made within the period of three months beginning with the date of the decision or, if any application is made for leave to appeal, with the date on which the application is withdrawn or refused or (if the application is granted) on which any proceedings on appeal are finally concluded<sup>8</sup>.

If the proceedings in respect of the property have been discontinued, the application for compensation must be made within the period of three months beginning with the discontinuance<sup>9</sup>.

If the court is satisfied that the applicant has suffered loss as a result of the property freezing order or interim receiving order, it may require the enforcement authority<sup>10</sup> to pay compensation to him<sup>11</sup>.

If, but for being overridden<sup>12</sup>, any right of pre-emption or the like would have operated in favour, or become exercisable by, any person, he may make an application to the court for compensation<sup>13</sup>.

If the court is satisfied that, in consequence of the operation of the provisions whereby a recovery order overrides provisions that would otherwise prevent, or limit, the vesting of property in the trustee for civil recovery<sup>14</sup>, the right in question cannot subsequently operate in favour of the applicant or (as the case may be) become exercisable by him, it may require the enforcement authority to pay compensation to him<sup>15</sup>.

The amount of compensation to be paid under these provisions is the amount the court thinks reasonable, having regard to the loss suffered and any other relevant circumstances<sup>16</sup>.

1 For the meaning of 'property' see PARA 2147 note 3 ante.

2 For the meaning of 'property freezing order' see PARA 2151 ante.

3 For the meaning of 'interim receiving order' see PARA 2153 ante.

4 For the meaning of 'recoverable property' see PARA 2149 ante.

5 For the meaning of 'associated property' see PARA 2150 note 6 ante.

6 Proceeds of Crime Act 2002 s 283(1) (s 283(1), (5) amended by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 paras 4, 19). The Proceeds of Crime Act 2002 s 283(1) (as amended) does not apply if the court: (1) has made a declaration in respect of the property by virtue of s 281 (see PARA 2160 ante) (s 283(2) (a)); or (2) makes an order under s 276 (see PARA 2157 ante) (s 283(2)(b)).

- 7 For the meaning of 'recovery order' see PARA 2154 ante.
- 8 Proceeds of Crime Act 2002 s 283(3)(a).
- 9 Ibid s 283(4).
- 10 For the meaning of 'enforcement authority' see PARA 2147 note 2 ante.
- 11 Proceeds of Crime Act 2002 s 283(5) (as amended: see note 6 supra).
- 12 See ibid s 269; and PARA 2154 ante.
- 13 Ibid s 283(6). The application for compensation under s 283(6) must be made within the period of three months beginning with the vesting of property under a recovery order (see PARA 2154 ante): s 283(7).
- 14 As to these provisions see ibid s 269; and PARA 2154 ante. As to the trustee for civil recovery see PARA 2154 note 6 ante.
- 15 Ibid s 283(8).
- 16 Ibid s 283(9).

## **UPDATE**

### **2162 Compensation**

TEXT AND NOTES--See further 2002 Act s 283(10) (added by Serious Crime Act 2007 Sch 8 para 89).

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### **2163. Financial threshold.**

The financial threshold for the institution of proceedings for a recovery order<sup>1</sup>, an interim receiving order<sup>2</sup> or a property freezing order<sup>3</sup> is specified by an order made by the Secretary of State after consultation with the Scottish Ministers<sup>4</sup>, and as such is variable by such an order<sup>5</sup>. At the date at which this volume states the law the threshold is £10,000<sup>6</sup>.

1 See PARA 2150 ante.

2 See PARA 2153 ante.

3 See PARAS 2151-2152 ante.

4 Proceeds of Crime Act 2002 s 287(1), (2). As to the making of orders under the Proceeds of Crime Act 2002 see PARA 789 note 7 ante.

5 Ibid s 287 does not affect the continuation of proceedings for a recovery order which have been properly started or the making or continuing effect of a property freezing order or an interim receiving order which has been properly applied for: s 287(4) (amended by the Serious Organised Crime and Police Act 2005 s 109, Sch 6 paras 4, 21).

6 Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003, SI 2003/175, art 2.

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## **2164. External orders.**

Provision has been made broadly corresponding with the provisions relating to recovery orders<sup>1</sup>, property freezing orders<sup>2</sup> and interim receiving orders<sup>3</sup> in order to give effect to an external order<sup>4</sup> where such an order is received in the United Kingdom<sup>5</sup>.

1 See PARAS 2150, 2154 et seq ante.

2 See PARAS 2151-2152 ante.

3 See PARA 2153 ante.

4 For the meaning of 'external order' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 391 note 17.

5 See the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, SI 2005/3181, Pt 5 (arts 142-213) (made under the Proceeds of Crime Act 2002 s 444). See also *Practice Direction--Proceeds of Crime Act 2002 Pts 5 and 8: Civil Recovery* (RSC PD 115B).

## **UPDATE**

### **2164 External orders**

NOTE 5--2002 Act s 444 amended: Serious Crime Act 2007 Sch 8 para 138. SI 2005/3181 amended: SI 2008/302, SI 2009/2054.

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### **(3) RECOVERY OF CASH IN SUMMARY PROCEEDINGS**

#### **(i) Searches**

##### **2165. Searches.**

If an officer of Revenue and Customs<sup>1</sup> or constable<sup>2</sup> who is lawfully on any premises<sup>3</sup> has reasonable grounds for suspecting that there is on the premises cash<sup>4</sup>:

- 2849 (1) which is recoverable property<sup>5</sup> or is intended by any person for use in unlawful conduct<sup>6</sup>; and
- 2850 (2) the amount of which is not less than the minimum amount<sup>7</sup>,

he may search for the cash there<sup>8</sup>.

If an officer of Revenue and Customs or constable has reasonable grounds for suspecting that a person (the suspect) is carrying cash:

- 2851 (a) which is recoverable property or is intended by any person for use in unlawful conduct<sup>9</sup>; and
- 2852 (b) the amount of which is not less than the minimum amount<sup>10</sup>,

he may exercise the following powers<sup>11</sup>. The officer or constable may, so far as he thinks it necessary or expedient, require the suspect:

- 2853 (i) to permit a search of any article he has with him<sup>12</sup>; and
- 2854 (ii) to permit a search of his person<sup>13</sup>.

An officer or constable exercising powers by virtue of head (ii) above may detain the suspect for so long as is necessary for their exercise<sup>14</sup>.

The above powers are exercisable only so far as reasonably required for the purpose of finding cash<sup>15</sup> and are exercisable by an officer of Revenue and Customs only if he has reasonable grounds for suspecting that the unlawful conduct in question relates to an assigned matter<sup>16</sup>.

These powers may be exercised only with the appropriate approval<sup>17</sup> unless, in the circumstances, it is not practicable to obtain that approval before exercising the power<sup>18</sup>. If the powers are exercised without the approval of a justice of the peace in a case where no cash is seized<sup>19</sup>, or any cash so seized is not detained for more than 48 hours<sup>20</sup>, the officer of Revenue and Customs or constable who exercised the powers must give a written report to the appointed person<sup>21</sup>.

The Secretary of State has issued<sup>22</sup> a code of practice<sup>23</sup> in connection with the exercise by officers of Revenue and Customs and constables of these powers. A failure by an officer or constable to comply with a provision of the code does not make him liable to criminal or civil proceedings<sup>24</sup>. The code is admissible in evidence in criminal or civil proceedings and is to be

taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant<sup>25</sup>.

1 See the Proceeds of Crime Act 2002 s 454 (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 59(1), (2), (7)). As to the officers of Revenue and Customs see PARA 354 note 2 ante.

2 Ie a holder of the office of constable, whatever his rank in the police force.

3 For the meaning of 'premises' see the Police and Criminal Evidence Act 1984 s 23 (as amended); and PARA 872 note 5 ante (definition applied by the Proceeds of Crime Act 2002 s 316(1)).

4 For the meaning of 'cash' see PARA 2147 note 5 ante.

5 For the meaning of 'property' see PARA 2147 note 3 ante. For the meaning of 'recoverable property' see PARA 2149 ante.

6 Proceeds of Crime Act 2002 s 289(1)(a). For the meaning of 'unlawful conduct' see PARA 2148 ante.

7 Ibid s 289(1)(b). The 'minimum amount' is the amount in sterling specified in an order made by the Secretary of State after consultation with the Scottish Ministers: s 303(1). For that purpose, the amount of any cash held in a currency other than sterling must be taken to be its sterling equivalent, calculated in accordance with the prevailing rate of exchange: s 303(2). At the date at which this volume states the law the minimum amount specified is £1,000: see the Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006, SI 2006/1699, art 2.

8 Proceeds of Crime Act 2002 s 289(1) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)).

9 Proceeds of Crime Act 2002 s 289(2)(a).

10 Ibid s 289(2)(b).

11 Ibid s 289(2) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)).

12 Proceeds of Crime Act 2002 s 289(3)(a).

13 Ibid s 289(3)(b).

14 Ibid s 289(4).

15 Ibid s 289(5)(a).

16 Ibid s 289(5)(b) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)). An 'assigned matter' means an assigned matter within the Customs and Excise Management Act 1979 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 904); Proceeds of Crime Act 2002 s 289(5)(b).

17 Ie the approval of a justice of the peace or (if that is not practicable in any case) the approval of a senior officer: ibid s 290(2), (3)(a). A 'senior officer' means: (1) in relation to the exercise of the power by an officer of Revenue and Customs, an officer of a rank designated by the Commissioners for Her Majesty's Revenue and Customs as equivalent to that of a senior police officer (s 290(4)(a) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7))); or (2) in relation to the exercise of the power by a constable, a senior police officer (Proceeds of Crime Act 2002 s 290(4)(b)). A 'senior police officer' means a police officer of at least the rank of inspector: s 290(5). As to applications for approval see the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002, SI 2002/2998, r 3.

18 Proceeds of Crime Act 2002 s 290(1).

19 Ie by virtue of ibid s 294 (see PARA 2166 post).

20 Ie calculated in accordance with ibid s 295(1B) (as added) (see PARA 2166 post).

21 Ibid s 290(6) (amended by the Serious Organised Crime and Police Act 2005 s 100(1), (3); and by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)). The report must give particulars of the circumstances which led the officer of Revenue and Customs or constable to believe that the powers were exercisable (Proceeds of Crime Act 2002 s 290(7)(a) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7))) and that it was not practicable to obtain the approval of a justice of the peace (Proceeds of Crime Act 2002 s 290(7)(b)).

In ss 290, 291, the 'appointed person' means a person appointed by the Secretary of State: s 290(8)(a). The appointed person must not be a person employed under or for the purposes of a government department or the Scottish Administration; and the terms and conditions of his appointment, including any remuneration or expenses to be paid to him, are to be determined by the person appointing him: s 290(9).

As soon as possible after the end of each financial year, the appointed person must prepare a report for that year: s 291(1). 'Financial year' means each period of 12 months beginning with 1 April: see s 291(1). The report must give the appointed person's opinion as to the circumstances and manner in which the powers conferred by s 289 (see the text and notes 1-16 supra) are being exercised in cases where the officer of Revenue and Customs or constable who exercised them is required to give a report under s 290(6) (as amended): s 291(2) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)). In the report, he may make any recommendations he considers appropriate: Proceeds of Crime Act 2002 s 291(3). He must send a copy of his report to the Secretary of State, who must arrange for it to be published: s 291(4). The Secretary of State must lay a copy of any report he receives under s 291 (as amended) before Parliament: s 291(5).

22     le as required by *ibid* s 292(1). As to the procedure for issuing or revising such a code see s 292(2)-(5).

23     The code was brought into operation by the Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2002, SI 2002/3115.

24     Proceeds of Crime Act 2002 s 292(6) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)).

25     Proceeds of Crime Act 2002 s 292(7).

## **UPDATE**

### **2165-2171 Recovery of Cash in Summary Proceedings**

As to the application of the Proceeds of Crime Act 2002 Pt 5 Ch 3 (ss 289-303A) to an immigration officer see UK Borders Act 2007 s 24.

See also 2002 Act s 302A (added by Serious Crime Act 2007 s 84(1); amended by 2007 Act Sch 11 para 12) (powers for prosecutors to appear in proceedings).

See further 2002 Act s 303A (added by Serious Crime Act 2007 Sch 11 para 13) (financial investigators).

### **2165 Searches**

TEXT AND NOTES--2002 Act ss 289-292 further amended in order to give accredited financial investigators powers to recover cash under the 2002 Act Pt 5 Ch 3: Serious Crime Act 2007 Sch 11 paras 2-5.

NOTE 23--See the Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2008, SI 2008/947, which gives effect to a revised code of practice effective from 6 April 2008.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/26. CRIMINAL CONVICTION AND CRIMINAL RECORD CERTIFICATES/(3) RECOVERY OF CASH IN SUMMARY PROCEEDINGS/(ii) Seizure and Detention/2166. Seizure and detention of cash.

## (ii) Seizure and Detention

### 2166. Seizure and detention of cash.

An officer of Revenue and Customs or constable<sup>1</sup> may seize any cash<sup>2</sup> if he has reasonable grounds for suspecting that it is recoverable property<sup>3</sup>, or intended by any person for use in unlawful conduct<sup>4</sup>. An officer of Revenue and Customs or constable may also seize cash part<sup>5</sup> of which he has reasonable grounds for suspecting to be recoverable property<sup>6</sup> or intended by any person for use in unlawful conduct<sup>7</sup>, if it is not reasonably practicable to seize only that part<sup>8</sup>. These provisions do not authorise the seizure of an amount of cash if it or, as the case may be, the part to which the officer or constable's suspicion relates, is less than the minimum amount<sup>9</sup>.

While the officer of Revenue and Customs or constable continues to have reasonable grounds for his suspicion, cash so seized may be detained initially for a period of 48 hours<sup>10</sup>. The period for which the cash or any part of it may be detained may be extended by an order made by a magistrates' court; but the order may not authorise the detention of any of the cash beyond the end of the period of three months beginning with the date of the order<sup>11</sup> or in the case of any further such order, beyond the end of the period of two years beginning with the date of the first order<sup>12</sup>.

An application for such an order may be made by the Commissioners for Her Majesty's Revenue and Customs or a constable, and the court or justice may make the order if satisfied, in relation to any cash to be further detained, that either of the following conditions is met<sup>13</sup>:

2855 (1) that there are reasonable grounds for suspecting that the cash is recoverable property and that:

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114. (a) its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected<sup>14</sup>; or

115. (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded<sup>15</sup>; or

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2856 (2) that there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct and that:

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116. (a) its continued detention is justified while its intended use is further investigated or consideration is given to bringing (in the United Kingdom or elsewhere) proceedings against any person for an offence with which the cash is connected<sup>16</sup>; or

117. (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded<sup>17</sup>.

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An application for such an order may also be made in respect of any cash seized<sup>18</sup> on the ground that part of it is reasonably suspected to be recoverable property, or intended for use in unlawful conduct, and it is not reasonably practicable to seize only that part; and the court or justice may make the order if satisfied that head (1) or (2) above is met in respect of that part of the cash and that it is not reasonably practicable to detain only that part<sup>19</sup>.

If cash is so detained<sup>20</sup> for more than 48 hours<sup>21</sup>, it is at the first opportunity to be paid into an interest-bearing account and held there; and the interest accruing on it is to be added to it on its forfeiture or release<sup>22</sup>.

1 See PARA 2165 note 2 ante.

2 For the meaning of 'cash' see PARA 2147 note 5 ante.

3 Proceeds of Crime Act 2002 s 294(1)(a). For the meaning of 'property' see PARA 2147 note 3 ante. For the meaning of 'recoverable property' see PARA 2149 ante.

4 Ibid s 294(1)(b) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)). For the meaning of 'unlawful conduct' see PARA 2148 ante. As to officers of Revenue and Customs see PARA 354 note 2 ante. Cash seized under the Police and Criminal Evidence Act 1984 s 19 (see PARA 886 ante) can be re-seized under the Proceeds of Crime Act 2002 s 294 (as amended): *Chief Constable of Merseyside Police v Hickman* [2006] EWHC 451 (Admin), (2006) Times, 7 April.

5 For the meaning of 'part' (in relation to property) see PARA 2149 note 4 ante.

6 Proceeds of Crime Act 2002 s 294(2)(a) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)).

7 Proceeds of Crime Act 2002 s 294(2)(b).

8 Ibid s 294(2).

9 Ibid s 294(3). As to the minimum amount see PARA 2165 note 7 ante.

10 Ibid s 295(1). The period of 48 hours mentioned in s 295(1) is to be calculated in accordance with s 295(1B) (as added): s 295(1A) (s 295(1A), (1B) added by the Serious Organised Crime and Police Act 2005 s 100). In so calculating a period of 48 hours, no account is to be taken of: (1) any Saturday or Sunday (s 295(1B)(a)); (2) Christmas Day (s 295(1B)(b)); (3) Good Friday (s 295(1B)(c)); (4) any day that is a bank holiday under the Banking and Financial Dealings Act 1971 (see TIME vol 97 (2010) PARA 321) in the part of the United Kingdom within which the cash is seized (Proceeds of Crime Act 2002 s 295(1B)(d)); or (5) any day prescribed under the Criminal Procedure (Scotland) Act 1995 s 8(2) as a court holiday in a sheriff court in the sheriff court district within which the cash is seized (Proceeds of Crime Act 2002 s 295(1B)(e)). As to the meaning of 'United Kingdom' see PARA 45 note 2 ante.

11 Ibid s 295(2)(a) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)). A justice of the peace may also exercise the power of a magistrates' court to make the first order under the Proceeds of Crime Act 2002 s 295(2) (as amended) extending the period: s 295(3). An order under s 295(2) (as amended) must provide for notice to be given to persons affected by it: s 295(8). For the procedure in relation to an application under s 295(2) (as amended) or s 295(7) (see the text and note 19 infra), see the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002, SI 2002/2998; and see also *Chief Constable of Merseyside v Reynolds* [2004] EWHC 2862 (Admin), (2004) Times 27 November, DC.

12 Proceeds of Crime Act 2002 s 295(2)(b). See note 11 supra.

13 Ibid s 295(4) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1), (7)). As to applications under the Proceeds of Crime Act 2002 s 295(4) (as amended) see the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002, SI 2002/2998, rr 4, 5 (amended by SI 2003/1236; SI 2005/617). As to the Commissioners for Her Majesty's Revenue and Customs see PARA 354 note 2 ante.

14 Proceeds of Crime Act 2002 s 295(5)(a).

15 Ibid s 295(5)(b). Proceedings against any person for an offence are 'concluded' when the person is convicted or acquitted, the prosecution is discontinued, or the jury is discharged without a finding otherwise than in circumstances where the proceedings are continued without a jury: s 316(9) (amended by the Criminal Justice Act 2003 s 331, Sch 36 para 78).

16 Proceeds of Crime Act 2002 s 295(6)(a).

17 Ibid s 295(6)(b).

18 Ie under ibid s 294(2) (see the text and notes 5-8 supra).

19 Ibid s 295(7). See note 11 supra.

20 Ie detained under ibid s 295 (as amended) (see the text and notes 10-19 supra).

21 Ie calculated in accordance with s 295(1B) (as added) (see note 10 supra).

22 Ibid s 296(1) (amended by the Serious Organised Crime and Police Act 2005 s 100). In the case of cash detained under the Proceeds of Crime Act 2002 s 295 (as amended) which was seized under s 294(2), the officer of Revenue and Customs or constable must, on paying it into the account, release the part of the cash to which the suspicion does not relate: s 296(2) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)). The Proceeds of Crime Act 2002 s 296(1) (as amended) does not apply if the cash or, as the case may be, the part to which the suspicion relates is required as evidence of an offence or evidence in proceedings under Pt 5 Ch 3 (ss 289-303) (as amended): s 296(3).

## **UPDATE**

### **2165-2171 Recovery of Cash in Summary Proceedings**

As to the application of the Proceeds of Crime Act 2002 Pt 5 Ch 3 (ss 289-303A) to an immigration officer see UK Borders Act 2007 s 24.

See also 2002 Act s 302A (added by Serious Crime Act 2007 s 84(1); amended by 2007 Act Sch 11 para 12) (powers for prosecutors to appear in proceedings).

See further 2002 Act s 303A (added by Serious Crime Act 2007 Sch 11 para 13) (financial investigators).

### **2166 Seizure and detention of cash**

TEXT AND NOTES--2002 Act ss 294-296 further amended in order to give accredited financial investigators powers to recover cash under the 2002 Act Pt 5 Ch 3: Serious Crime Act 2007 Sch 11 paras 6-8.

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## **2167. Release of detained cash.**

While any cash<sup>1</sup> is detained<sup>2</sup>, a magistrates' court may direct the release of the whole or part<sup>3</sup> of it if satisfied that the conditions<sup>4</sup> for the detention of the cash are no longer met in relation to the cash to be released<sup>5</sup>.

An officer of Revenue and Customs or constable<sup>6</sup> may, after notifying the magistrates' court or justice under whose order cash is being detained, release the whole or any part of it if satisfied that the detention of the cash to be released is no longer justified<sup>7</sup>.

1 For the meaning of 'cash' see PARA 2147 note 5 ante.

2 Ie under the Proceeds of Crime Act 2002 s 295 (as amended) (see PARA 2166 ante).

3 As to the meaning of 'part' see PARA 2149 note 4 ante.

4 Ie under the Proceeds of Crime Act 2002 s 295 (as amended).

5 Ibid s 297(1)-(3). An application for the further detention of any cash to which specified insolvency provisions apply may not be made under s 295 (as amended) unless the appropriate court gives leave: s 311(2), (3). See further s 311(4)-(8). As to applications under s 297(3) see the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002, SI 2002/2998, r 6 (amended by SI 2003/1236; SI 2005/617).

6 See PARA 2165 note 2 ante.

7 Proceeds of Crime Act 2002 s 297(4) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(2), (7)). As to the officers of Revenue and Customs see PARA 354 note 2 ante.

## **UPDATE**

### **2165-2171 Recovery of Cash in Summary Proceedings**

As to the application of the Proceeds of Crime Act 2002 Pt 5 Ch 3 (ss 289-303A) to an immigration officer see UK Borders Act 2007 s 24.

See also 2002 Act s 302A (added by Serious Crime Act 2007 s 84(1); amended by 2007 Act Sch 11 para 12) (powers for prosecutors to appear in proceedings).

See further 2002 Act s 303A (added by Serious Crime Act 2007 Sch 11 para 13) (financial investigators).

### **2167 Release of detained cash**

TEXT AND NOTE 7--2002 Act s 297(4) further amended: Serious Crime Act 2007 Sch 11 para 9.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/26. CRIMINAL CONVICTION AND CRIMINAL RECORD CERTIFICATES/(3) RECOVERY OF CASH IN SUMMARY PROCEEDINGS/(iii) Forfeiture/2168. Forfeiture.

### **(iii) Forfeiture**

#### **2168. Forfeiture.**

While cash<sup>1</sup> is detained<sup>2</sup> an application for the forfeiture of the whole or any part<sup>3</sup> of it may be made to a magistrates' court by the Commissioners for Her Majesty's Revenue and Customs or a constable<sup>4</sup>. The court may order the forfeiture of the cash or any part of it if satisfied that the cash or part: (1) is recoverable property<sup>5</sup>; or (2) is intended by any person for use in unlawful conduct<sup>6</sup>. However, in the case of recoverable property which belongs to joint tenants, one of whom is an excepted joint owner<sup>7</sup>, the order may not apply to so much of it as the court thinks is attributable to the excepted joint owner's share<sup>8</sup>. Where such an application for the forfeiture of any cash is made, the cash is to be detained (and may not be released<sup>9</sup>) until any proceedings in pursuance of the application (including any proceedings on appeal) are concluded<sup>10</sup>.

Cash forfeited<sup>11</sup> by a magistrates' court in England and Wales, and any accrued interest on it, is to be paid into the Consolidated Fund<sup>12</sup>.

1 For the meaning of 'cash' see PARA 2147 note 5 ante.

2 *Ie* under the Proceeds of Crime Act 2002 s 295 (as amended) (see PARA 2166 ante).

3 As to the meaning of 'part' see PARA 2149 note 4 ante.

4 Proceeds of Crime Act 2002 s 298(1)(a) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1), (7)). See PARA 2165 note 2 ante. As to the Commissioners for Revenue and Customs see PARA 354 note 2 ante. As to applications under the Proceeds of Crime Act 2002 s 298(1) (as amended) see the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002, SI 2002/2998, r 7 (amended by SI 2003/1236; SI 2005/617).

5 Proceeds of Crime Act 2002 s 298(2)(a). For the meaning of 'recoverable property' see PARA 2149 ante.

6 *Ibid* s 298(2)(b). For the meaning of 'unlawful conduct' see PARA 2148 ante.

7 For the meaning of 'excepted joint owner', and as to his 'share', see PARA 2155 note 7 ante.

8 Proceeds of Crime Act 2002 s 298(3).

9 *Ie* may not be released under any power conferred by *ibid* Pt 5 Ch 3 (ss 289-303) (as amended).

10 *Ibid* s 298(4).

11 *Ie* under *ibid* Pt 5 Ch 3 (as amended).

12 *Ibid* s 300(1)(a). However, it is not to be paid in: (1) before the end of the period within which an appeal under s 299 (as substituted) (see PARA 2169 post) may be made (s 300(2)(a)); or (2) if a person appeals under s 299 (as substituted), before the appeal is determined or otherwise disposed of (s 300(2)(b)). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARAS 1028-1031.

### **UPDATE**

### **2165-2171 Recovery of Cash in Summary Proceedings**

As to the application of the Proceeds of Crime Act 2002 Pt 5 Ch 3 (ss 289-303A) to an immigration officer see UK Borders Act 2007 s 24.

See also 2002 Act s 302A (added by Serious Crime Act 2007 s 84(1); amended by 2007 Act Sch 11 para 12) (powers for prosecutors to appear in proceedings).

See further 2002 Act s 303A (added by Serious Crime Act 2007 Sch 11 para 13) (financial investigators).

### **2168 Forfeiture**

TEXT AND NOTE 4--2002 Act s 298(1)(a) further amended: Serious Crime Act 2007 Sch 11 para 10.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/26. CRIMINAL CONVICTION AND CRIMINAL RECORD CERTIFICATES/(3) RECOVERY OF CASH IN SUMMARY PROCEEDINGS/(iii) Forfeiture/2169. Appeal against forfeiture.

### **2169. Appeal against forfeiture.**

Any party to proceedings for an order for the forfeiture of cash<sup>1</sup> who is aggrieved by such an order or by the decision of the court not to make such an order may appeal, in relation to England and Wales, to the Crown Court<sup>2</sup>. Such an appeal must be made within the period of 30 days beginning with the date on which the court makes the order or decision<sup>3</sup>. The court hearing the appeal may make any order it thinks appropriate<sup>4</sup>. If the court upholds an appeal against an order forfeiting the cash, it may order the release of the cash<sup>5</sup>.

<sup>1</sup> *Ibid* under the Proceeds of Crime Act 2002 s 298 (see PARA 2168 ante). For the meaning of 'cash' see PARA 2147 note 5 ante.

<sup>2</sup> *Ibid* s 299(1)(a) (s 299 substituted by the Serious Organised Crime and Police Act 2005 s 101(1)). The Proceeds of Crime Act 2002 s 299 (as substituted) does not apply to a decision of a court not to order forfeiture under s 298 before 1 July 2005: Serious Organised Crime and Police Act 2005 s 101(2).

<sup>3</sup> Proceeds of Crime Act 2002 s 299(2) (as substituted: see note 2 supra).

<sup>4</sup> *Ibid* s 299(3) (as substituted: see note 2 supra).

<sup>5</sup> *Ibid* s 299(4) (as substituted: see note 2 supra).

## **UPDATE**

### **2165-2171 Recovery of Cash in Summary Proceedings**

As to the application of the Proceeds of Crime Act 2002 Pt 5 Ch 3 (ss 289-303A) to an immigration officer see UK Borders Act 2007 s 24.

See also 2002 Act s 302A (added by Serious Crime Act 2007 s 84(1); amended by 2007 Act Sch 11 para 12) (powers for prosecutors to appear in proceedings).

See further 2002 Act s 303A (added by Serious Crime Act 2007 Sch 11 para 13) (financial investigators).

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#### **(iv) Supplementary**

##### **2170. Victims and other owners.**

A person who claims that any cash<sup>1</sup> detained<sup>2</sup>, or any part<sup>3</sup> of it, belongs to him may apply to a magistrates' court for the cash or part to be released to him<sup>4</sup>.

If it appears to the court concerned that:

- 2857 (1) the applicant was deprived of the cash to which the application relates, or of property<sup>5</sup> which it represents, by unlawful conduct<sup>5</sup>;
- 2858 (2) the property he was deprived of was not, immediately before he was deprived of it, recoverable property<sup>6</sup>; and
- 2859 (3) that cash belongs to him<sup>7</sup>,

the court may order the cash to which the application relates to be released to the applicant<sup>8</sup>.  
If:

- 2860 (a) the applicant is not the person from whom the cash to which the application relates was seized<sup>9</sup>;
- 2861 (b) it appears to the court that that cash belongs to the applicant<sup>10</sup>;
- 2862 (c) the court is satisfied that the conditions<sup>11</sup> for the detention of that cash are no longer met or, if an application has been made<sup>12</sup>, the court decides not to make an order in relation to that cash<sup>13</sup>; and
- 2863 (d) no objection to the making of an order<sup>14</sup> has been made by the person from whom that cash was seized<sup>15</sup>,

the court may order the cash to which the application relates to be released to the applicant or to the person from whom it was seized<sup>16</sup>.

1 For the meaning of 'cash' see PARA 2147 note 5 ante.

2 Is detained under the Proceeds of Crime Act 2002 Pt 5 Ch 3 (ss 289-303) (as amended).

3 As to the meaning of 'part' see PARA 2149 note 4 ante.

4 Proceeds of Crime Act 2002 s 301(1). The application may be made in the course of proceedings under s 295 (see PARA 2166 ante) or s 298 (see PARA 2168 ante) or at any other time: s 301(2). As to applications under s 301(1) see the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002, SI 2002/2998, r 6 (amended by SI 2003/1236; SI 2005/617; SI 2006/594).

5 For the meaning of 'property' see PARA 2147 note 3 ante.

6 Proceeds of Crime Act 2002 s 301(3)(a). For the meaning of 'unlawful conduct' see PARA 2148 ante.

6 Ibid s 301(3)(b). For the meaning of 'recoverable property' see PARA 2149 ante.

7 Ibid s 301(3)(c).



- 8 Ibid s 301(3).
- 9 Ibid s 301(4)(a).
- 10 Ibid s 301(4)(b).
- 11 Ie the conditions in ibid s 295 (see PARA 2166 ante).
- 12 Ie made under ibid s 298 (see PARA 2168 ante).
- 13 Ibid s 301(4)(c).
- 14 Ie under ibid s 301(4).
- 15 Ibid s 301(4)(d).
- 16 Ibid s 301(4).

## **UPDATE**

### **2165-2171 Recovery of Cash in Summary Proceedings**

As to the application of the Proceeds of Crime Act 2002 Pt 5 Ch 3 (ss 289-303A) to an immigration officer see UK Borders Act 2007 s 24.

See also 2002 Act s 302A (added by Serious Crime Act 2007 s 84(1); amended by 2007 Act Sch 11 para 12) (powers for prosecutors to appear in proceedings).

See further 2002 Act s 303A (added by Serious Crime Act 2007 Sch 11 para 13) (financial investigators).

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## **2171. Compensation.**

If no forfeiture order<sup>1</sup> is made in respect of any cash<sup>2</sup> detained<sup>3</sup>, the person to whom the cash belongs or from whom it was seized may make an application to the magistrates' court for compensation<sup>4</sup>. If, for any period beginning with the first opportunity to place the cash in an interest-bearing account after the initial detention of the cash for 48 hours<sup>5</sup>, the cash was not held in an interest-bearing account while detained, the court may order an amount of compensation to be paid to the applicant<sup>6</sup>. The amount of compensation to be so paid is the amount the court thinks would have been earned in interest in the period in question if the cash had been held in an interest-bearing account<sup>7</sup>.

If the cash was seized by an officer of Revenue and Customs, the compensation is to be paid by the Commissioners for Her Majesty's Revenue and Customs<sup>8</sup>. If the cash was seized by a constable<sup>9</sup>, the compensation is to be paid out of the police fund from which the expenses of the police force are met<sup>10</sup>.

If a forfeiture order is made in respect only of a part of any cash detained, these provisions have effect in relation to the other part<sup>11</sup>.

1 As to forfeiture orders see the Proceeds of Crime Act 2002 s 298; and PARA 2168 ante.

2 For the meaning of 'cash' see PARA 2147 note 5 ante.

3 Ie detained under the Proceeds of Crime Act 2002 Pt 5 Ch 3 (ss 289-303) (as amended).

4 Ibid s 302(1). As to applications under s 302(1) see the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002, SI 2002/2998, r 8 (amended by SI 2005/617; SI 2006/594).

5 Ie 48 hours calculated in accordance with the Proceeds of Crime Act 2002 s 295(1B) (as added) (see PARA 2166 ante).

6 Ibid s 302(2) (amended by the Serious Organised Crime and Police Act 2005 s 100(1), (3)).

7 Proceeds of Crime Act 2002 s 302(3). If the court is satisfied that, taking account of any interest to be so paid or any amount to be paid under s 296 (see PARA 2166 ante) or any amount to be paid under s 302(2) (as amended) (see the text and notes 5-6 supra), the applicant has suffered loss as a result of the detention of the cash and that the circumstances are exceptional, the court may order compensation (or additional compensation) to be paid to him: s 302(4). The amount of compensation to be paid under s 302(4) is the amount the court thinks reasonable, having regard to the loss suffered and any other relevant circumstances: s 302(5).

8 Proceeds of Crime Act 2002 s 302(6) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1), (2), (7)). As to the Commissioners for Revenue and Customs see PARA 354 note 2 ante.

9 See PARA 2165 note 2 ante.

10 Proceeds of Crime Act 2002 s 302(7)(a).

11 Ibid s 302(8). As to the meaning of 'part' see PARA 2149 note 4 ante.

## **UPDATE**

## **2165-2171 Recovery of Cash in Summary Proceedings**

As to the application of the Proceeds of Crime Act 2002 Pt 5 Ch 3 (ss 289-303A) to an immigration officer see UK Borders Act 2007 s 24.

See also 2002 Act s 302A (added by Serious Crime Act 2007 s 84(1); amended by 2007 Act Sch 11 para 12) (powers for prosecutors to appear in proceedings).

See further 2002 Act s 303A (added by Serious Crime Act 2007 Sch 11 para 13) (financial investigators).

## **2171 Compensation**

TEXT AND NOTE 10--See also 2002 Act s 302(7A), (7B) (added by Serious Crime Act 2007 Sch 11 para 11) which make provision where cash seized by an accredited financial investigator.

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## **28. VICTIMS OF CRIME**

### **(1) THE VICTIMS' CODE OF PRACTICE**

#### **2172. The Victims' Code of Practice.**

The Domestic Violence, Crime and Victims Act 2004 imposes a duty on the Secretary of State to issue a code of practice as to the services to be provided to a victim of criminal conduct<sup>1</sup> by persons appearing to him to have functions relating to victims of criminal conduct, or to any aspect of the criminal justice system<sup>2</sup>.

The code may restrict the application of its provisions to: (1) specified descriptions of victims<sup>3</sup>; (2) victims of specified offences or descriptions of conduct<sup>4</sup>; (3) specified persons or descriptions of persons appearing to the Secretary of State to have functions relating to victims of criminal conduct, or to any aspect of the criminal justice system<sup>5</sup>. The code may include provision requiring or permitting the services which are to be provided to a victim to be provided to one or more others instead of the victim (for example where the victim has died), or as well as the victim<sup>6</sup>. It may make different provision for different purposes, including different provision for different descriptions of victims, for persons who have different functions or descriptions of functions or for different areas<sup>7</sup>. However, the code may not require anything to be done by a person acting in a judicial capacity or by a person acting in the discharge of a function of a member of the Crown Prosecution Service which involves the exercise of a discretion<sup>8</sup>.

The Secretary of State may from time to time revise the code<sup>9</sup>, but only if it appears to him that the proposed revisions would not result in a significant reduction in the quality or extent of the services to be provided under the code, or a significant restriction in the description of persons to whom services are to be provided under the code<sup>10</sup>.

If a person fails to perform a duty imposed on him by the code, the failure does not of itself make him liable to criminal or civil proceedings<sup>11</sup>. The code is admissible in evidence in criminal or civil proceedings and a court may take into account a failure to comply with the code in determining a question in the proceedings<sup>12</sup>.

1 'Criminal conduct' means conduct constituting an offence: Domestic Violence, Crime and Victims Act 2004 s 32(7). In determining whether a person is a victim of criminal conduct for these purposes, it is immaterial that no person has been charged with or convicted of an offence in respect of the conduct: s 32(6).

2 Ibid s 32(1).

The Code of Practice for Victims of Crime (A Guide for Victims), made in pursuance of this power, was published and came into operation on 3 April 2006: see the Domestic Violence, Crime and Victims Act 2004 (Victims' Code of Practice) Order 2006, SI 2006/629. Before publication, a draft of the code had to be prepared in consultation with the Attorney General and Lord Chancellor and then published and laid before Parliament: see the Domestic Violence, Crime and Victims Act 2004 s 33(1)-(7).

3 Ibid s 32(2)(a). 'Specified' means specified in the code: s 32(7).

4 Ibid s 32(2)(b).

5 Ibid s 32(1), (2)(c).

6 Ibid s 32(3).

7 Ibid s 32(4).

8 Ibid s 32(5). As to the Crown Prosecution Service see PARA 1079 et seq ante.

9 Ibid s 33(8).

10 Ibid s 33(9).

11 Ibid s 34(1).

12 Ibid s 34(2). As to the rules of evidence in criminal proceedings see PARA 1359 et seq ante. As to the rules of evidence in civil proceedings see CIVIL PROCEDURE vol 11 (2009) PARA 749 et seq.

## **UPDATE**

### **2172 The Victims' Code of Practice**

TEXT AND NOTES 1-10--References to the Secretary of State are now to the Secretary of State for Justice, and reference to the Lord Chancellor is now to the Secretary of State for the Home Department: 2004 Act ss 32, 33 (both amended by SI 2007/2128).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/28. VICTIMS OF CRIME/(2) RIGHT TO REPRESENTATIONS AND INFORMATION

## **(2) RIGHT TO REPRESENTATIONS AND INFORMATION**

### **UPDATE**

#### **2173-2176 Right to representations and information**

Material relating to these paragraphs has been revised and published under the title SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 635 et seq.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/28. VICTIMS OF CRIME/(3) COMMISSIONER FOR VICTIMS AND WITNESSES/2177. Appointment of the Commissioner and his deputy.

### **(3) COMMISSIONER FOR VICTIMS AND WITNESSES**

#### **2177. Appointment of the Commissioner and his deputy.**

As from a day to be appointed the following provisions have effect<sup>1</sup>.

The Domestic Violence, Crime and Victims Act 2004 imposes a duty on the Secretary of State to appoint a Commissioner for Victims and Witnesses ('the Commissioner')<sup>2</sup>. Before appointing the Commissioner the Secretary of State must consult the Attorney General and the Lord Chancellor as to the person to be appointed<sup>3</sup>. The Secretary of State must also appoint a Deputy Commissioner for Victims and Witnesses ('the Deputy Commissioner')<sup>4</sup> who must act as the Commissioner during any period when the office of Commissioner is vacant and at any time when the Commissioner is absent or is unable to act<sup>5</sup>. Before making the appointment the Secretary of State must consult the Attorney General and the Lord Chancellor as to the person to be appointed<sup>6</sup>.

The period for which the Commissioner and Deputy Commissioner are appointed must not exceed five years<sup>7</sup>. The person is eligible for re-appointment<sup>8</sup>, but he must not hold office for more than 10 years in total<sup>9</sup>. The person may at any time resign from office by giving notice in writing to the Secretary of State<sup>10</sup>. The Secretary of State may (after consulting the Attorney General and the Lord Chancellor<sup>11</sup>) at any time remove the person from office if he is satisfied that the person has become bankrupt, has had his estate sequestrated or has made a composition or arrangement with, or granted a trust deed for, his creditors, or is otherwise unable or unfit to carry out his functions<sup>12</sup>.

The Commissioner may appoint such persons as members of his staff as he thinks fit<sup>13</sup>, but he must obtain the approval of the Secretary of State as to the number of persons appointed as members of his staff, and their terms and conditions of service<sup>14</sup>. The Commissioner may authorise any member of his staff or the Deputy Commissioner to carry out any of his functions<sup>15</sup>.

1 The Domestic Violence, Crime and Victims Act 2004 ss 48-53, Sch 8 come into force on a day to be appointed by the Secretary of State by order made under s 60. At the date at which this volume states the law no such day had been appointed.

2 Ibid s 48(1) (not yet in force). The Commissioner is a corporation sole (s 48(3) (not yet in force)) and he is not to be regarded as the servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown (s 48(4) (not yet in force)). As to corporations sole see CORPORATIONS vol 9(2) (2006 Reissue) PARA 1111. The Commissioner's property is not to be regarded as property of, or held on behalf of, the Crown: s 48(5) (not yet in force). As to Crown property see further CROWN PROPERTY. The Commissioner is disqualified for membership of the House of Commons: see Sch 8 para 10 (not yet in force); the House of Commons Disqualification Act 1975 s 1, Sch 1 Pt III (as amended); and PARLIAMENT vol 78 (2010) PARA 908.

3 Domestic Violence, Crime and Victims Act 2004 s 48(2) (not yet in force).

4 Ibid s 48(6), Sch 8 para 1(1) (not yet in force). The Deputy Commissioner is not to be regarded as the servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown: Sch 8 para 1(4) (not yet in force). The Deputy Commissioner is disqualified for membership of the House of Commons: see Sch 8 para 10 (not yet in force); the House of Commons Disqualification Act 1975 s 1, Sch 1 Pt III (as amended); and PARLIAMENT vol 78 (2010) PARA 908.

- 5 Domestic Violence, Crime and Victims Act 2004 Sch 8 para 1(3) (not yet in force).
- 6 Ibid Sch 8 para 1(2) (not yet in force).
- 7 Ibid Sch 8 para 2(1), (2) (not yet in force). The Secretary of State must pay the remuneration of the Commissioner and the Deputy Commissioner: Sch 8 para 6(a) (not yet in force). He must also pay such sums as he thinks fit in respect of the expenses of the Commissioner and the Deputy Commissioner: Sch 8 para 6(b) (not yet in force).
- 8 Ibid Sch 8 para 2(3) (not yet in force).
- 9 Ibid Sch 8 para 2(4) (not yet in force).
- 10 Ibid Sch 8 para 2(5) (not yet in force).
- 11 Ibid Sch 8 para 2(7) (not yet in force). Subject to Sch 8 para 2(2)-(7), the person holds office on the terms specified by the Secretary of State after consulting the Attorney General and the Lord Chancellor: Sch 8 para 2(8) (not yet in force).
- 12 Ibid Sch 8 para 2(6) (not yet in force). See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY.
- 13 Ibid Sch 8 para 3(1) (not yet in force). No member of the staff of the Commissioner is to be regarded as the servant or agent of the Crown, or as enjoying any status, immunity or privilege of the Crown: Sch 8 para 3(3) (not yet in force).
- 14 Ibid Sch 8 para 3(2) (not yet in force). Provision is made for staff pensions under Sch 8 para 5 (not yet in force).
- 15 Ibid Sch 8 para 4 (not yet in force). As to the Commissioner's functions see PARA 2178 post.

## **UPDATE**

### **2177-2180 Appointment of the Commissioner and his deputy ... Victims' Advisory Panel**

References in these provisions to the Secretary of State are now to the Secretary of State for Justice, and references to the Lord Chancellor are now to the Secretary of State for the Home Department: see SI 2007/2128.

### **2177-2178 Appointment of the Commissioner and his deputy, Functions of the Commissioner**

These provisions have effect as from 1 February 2010: SI 2010/129.



Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/28. VICTIMS OF CRIME/(3) COMMISSIONER FOR VICTIMS AND WITNESSES/2178. Functions of the Commissioner.

## **2178. Functions of the Commissioner.**

As from a day to be appointed the following provisions have effect<sup>1</sup>.

The Commissioner for Victims and Witnesses has a statutory duty to: (1) promote the interests of victims and witnesses<sup>2</sup>; (2) take such steps as he considers appropriate with a view to encouraging good practice in the treatment of victims and witnesses<sup>3</sup>; (3) keep under review the operation of the Victims' Code of Practice<sup>4</sup>.

In connection with these duties he may (a) make proposals to the Secretary of State for amending the code (at the request of the Secretary of State or on his own initiative)<sup>5</sup>; (b) make a report to the Secretary of State<sup>6</sup>; (c) make recommendations to an authority within his remit<sup>7</sup>; (d) undertake or arrange for or support (financially or otherwise) the carrying out of research<sup>8</sup>; (e) consult any person he thinks appropriate<sup>9</sup>.

If he is required to do so by a Minister of the Crown, the Commissioner must give advice to the Minister in connection with any matter which is specified by the Minister, and which relates to victims or witnesses<sup>10</sup>. If he is required to do so by or on behalf of an authority within his remit<sup>11</sup>, the Commissioner must give advice to the authority in connection with the information provided or to be provided by or on behalf of the authority to victims or witnesses<sup>12</sup>.

Although the Commissioner is under a duty to promote the interests of victims and witnesses<sup>13</sup>, he must not exercise any of his functions in relation to a particular victim or witness<sup>14</sup> or in relation to the bringing or conduct of particular proceedings<sup>15</sup>, or in relation to anything done or omitted to be done by a person acting in a judicial capacity or on the instructions of or on behalf of such a person<sup>16</sup>.

The Commissioner must also fulfil various administrative functions in connection with his office. In particular he must keep proper accounts and proper records in relation to the accounts<sup>17</sup>. He must also, before the beginning of each financial year apart from the first, prepare an annual plan setting out how he intends to exercise his functions during the financial year<sup>18</sup>. In preparing the plan, the Commissioner must consider whether to deal in the plan with any issues specified by the Secretary of State<sup>19</sup>. The Commissioner must, as soon as possible after the end of each financial year, prepare a report on how he has exercised his functions during the financial year<sup>20</sup>.

1 The Domestic Violence, Crime and Victims Act 2004 ss 48-57, Sch 8 come into force on a day to be appointed by the Secretary of State by order made under s 60. At the date at which this volume states the law no such day had been appointed.

2 Ibid s 49(1)(a) (not yet in force). 'Victim' means a victim of an offence, or a victim of anti-social behaviour: s 52(1), (2) (not yet in force). It is immaterial for these purposes that no complaint has been made about the offence, or that no person has been charged with or convicted of the offence: s 52(3) (not yet in force). In this context, 'anti-social behaviour' means behaviour by a person which causes or is likely to cause harassment, alarm or distress to one or more persons not of the same household as the person: s 52(8)(a) (not yet in force). A person is a victim of anti-social behaviour if the behaviour has caused him harassment, alarm or distress and he is not of the same household as the person who engages in the behaviour: s 52(8)(b) (not yet in force).

'Witness' means a person (other than a defendant):

- 355 (1) who has witnessed conduct in relation to which he may be or has been called to give evidence in relevant proceedings (s 52(4)(a) (not yet in force));
- 356 (2) who is able to provide or has provided anything which might be used or has been used as evidence in relevant proceedings (s 52(4)(b) (not yet in force)); or
- 357 (3) who is able to provide or has provided (whether or not admissible in evidence in relevant proceedings):
8. (a) anything which might tend to confirm, has tended to confirm or might have tended to confirm evidence which may be, has been or could have been admitted in relevant proceedings (s 52(4)(c), (5)(a) (not yet in force));
- 9
9. (b) anything which might be, has been or might have been referred to in evidence given in relevant proceedings by another person (s 52(4)(c), (5)(b) (not yet in force));
- 10
10. (c) anything which might be, has been or might have been used as the basis for any cross examination in the course of relevant proceedings (s 52(4)(c), (5)(c) (not yet in force)).
- 11

A person is a defendant in relation to any criminal proceedings if he might be, has been or might have been charged with or convicted of an offence in the proceedings: s 52(6)(a) (not yet in force). A person is a defendant in relation to any other relevant proceedings if he might be, has been or might have been the subject of an order made in those proceedings: s 52(6)(b) (not yet in force). For these purposes, 'relevant proceedings' means criminal proceedings, or proceedings of any other kind in respect of anti-social behaviour: s 52(7) (not yet in force).

- 3 Ibid s 49(1)(b) (not yet in force).
- 4 Ibid s 49(1)(c) (not yet in force). As to the Victims' Code of Practice see s 32; and PARA 2172 ante.
- 5 Ibid s 49(2)(a) (not yet in force).
- 6 Ibid s 49(2)(b) (not yet in force). If the Commissioner makes a report to the Secretary of State the Commissioner must send a copy of the report to the Attorney General and the Lord Chancellor, and the Secretary of State must lay a copy of the report before Parliament and arrange for the report to be published: s 49(3) (not yet in force).
- 7 Ibid s 49(2)(c) (not yet in force).
- 8 Ibid s 49(2)(d) (not yet in force).
- 9 Ibid s 49(2)(e) (not yet in force).
- 10 Ibid s 50(1) (not yet in force). In s 50, 'Minister of the Crown' includes the Treasury: s 50(3) (not yet in force).
- 11 The authorities within the Commissioner's remit are as follows: the Department for Constitutional Affairs; the Department for Education and Skills; the Department of Health; the Department of Trade and Industry; the Department for Transport; the Department for Work and Pensions; the Foreign and Commonwealth Office; the Home Office; the Office of the Deputy Prime Minister; Commissioners for Her Majesty's Revenue and Customs; a police force for a police area in England or Wales; the Serious Fraud Office; the Serious Organised Crime Agency; the British Transport Police; the Ministry of Defence Police; the Criminal Injuries Compensation Appeals Panel; the Criminal Injuries Compensation Authority; the Health and Safety Commission; the Health and Safety Executive; the Legal Services Commission; persons exercising functions relating to the carrying on of the business of a court; the Criminal Cases Review Commission; the Crown Prosecution Service; a local probation board; the Parole Board; the Prison Service; the Youth Justice Board for England and Wales; a youth offending team; the Maritime and Coastguard Agency: *ibid* s 53, Sch 9 (not yet in force) (amended by the Serious Organised Crime and Police Act 2005 s 59, Sch 4 para 200; and by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1), (7)).
- 12 Domestic Violence, Crime and Victims Act 2004 s 50(2) (not yet in force).
- 13 See *ibid* s 49(1)(a) (not yet in force); and the text and note 2 *supra*.

14 Ibid s 51(a) (not yet in force).

15 Ibid s 51(b) (not yet in force).

16 Ibid s 51(c) (not yet in force).

17 Ibid s 48, Sch 8 para 7(1)(a) (not yet in force). He must also prepare a statement of accounts in respect of each financial year, in the form directed by the Secretary of State, and he must send copies of the statement to the Secretary of State and the Comptroller and Auditor General, not later than the 31 August following the end of the financial year to which it relates: Sch 8 paras 7(1)(b), (c), 11 (not yet in force). The Comptroller and Auditor General must examine, certify and report on the statement of accounts and lay copies of the statement and of his report before Parliament: Sch 8 para 7(2) (not yet in force).

18 Ibid Sch 8 para 8(1) (not yet in force).

19 Ibid Sch 8 para 8(2) (not yet in force). The Commissioner must send a copy of the plan to the Secretary of State for his approval (Sch 8 para 8(3) (not yet in force)) and the Secretary of State must consult the Attorney General and the Lord Chancellor in deciding whether to approve the plan (Sch 8 para 8(4) (not yet in force)). If the Secretary of State does not approve the plan he must give the Commissioner his reasons for not approving it, and the Commissioner must revise the plan: Sch 8 para 8(5), (6) (not yet in force).

20 Ibid Sch 8 para 9(1) (not yet in force). The report for any financial year apart from the first must include: (1) the Commissioner's annual plan for the financial year; and (2) an assessment of the extent to which the plan has been carried out: Sch 8 para 9(2) (not yet in force). The Commissioner must send a copy of the report to the Secretary of State, the Attorney General, and the Lord Chancellor: Sch 8 para 9(3) (not yet in force). The Secretary of State must then lay a copy of the report before Parliament and arrange for the report to be published: Sch 8 para 9(4) (not yet in force).

## **UPDATE**

### **2177-2180 Appointment of the Commissioner and his deputy ... Victims' Advisory Panel**

References in these provisions to the Secretary of State are now to the Secretary of State for Justice, and references to the Lord Chancellor are now to the Secretary of State for the Home Department: see SI 2007/2128.

### **2177-2178 Appointment of the Commissioner and his deputy, Functions of the Commissioner**

These provisions have effect as from 1 February 2010: SI 2010/129.

### **2178 Functions of the Commissioner**

NOTE 11--Health and Safety Commission replaced by Health and Safety Executive: see Legislative Reform (Health and Safety Executive) Order 2008, SI 2008/960; and HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 361 et seq. Domestic Violence, Crime and Victims Act 2004 s 53, Sch 9 further amended: SI 2007/2128, SI 2007/3224, SI 2008/912, SI 2008/960, SI 2008/2833, SI 2009/2748.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/28. VICTIMS OF CRIME/(4) AUTHORISED DISCLOSURE OF INFORMATION/2179. Disclosure of information.

## **(4) AUTHORISED DISCLOSURE OF INFORMATION**

### **2179. Disclosure of information.**

A person may disclose information to a relevant authority<sup>1</sup> for purposes connected with<sup>2</sup>: (1) compliance with the Victims' Code of Practice<sup>3</sup>; (2) compliance with the statutory provisions relating to victims' rights to representation and information<sup>4</sup>; (3) the carrying out of the functions of the Commissioner for Victims and Witnesses<sup>5</sup>. However, this does not authorise the making of a disclosure which contravenes the Data Protection Act 1998<sup>6</sup>, and it does not affect any power to disclose which otherwise exists<sup>7</sup>.

1 These are relevant authorities: (1) a person required to do anything under the Victims' Code of Practice issued under the Domestic Violence, Crime and Victims Act 2004 s 32 (see PARA 2172 ante) (s 54(3)(a)); (2) a local probation board established under the Criminal Justice and Court Services Act 2000 s 4 (s 54(3)(b)); (3) the Commissioner for Victims and Witnesses (s 54(3)(c) (not yet in force)); (4) an authority within the Commissioner's remit (s 54(3)(d) (not yet in force)). At the date at which this volume states the law no order had been made under s 60 bringing s 54(2)(c), (3)(c), (d) into force. As to the Commissioner see PARAS 2177-2178 ante. The Secretary of State may, after consulting the Attorney General and Lord Chancellor, by order amend s 54(3) by adding any authority appearing to him to exercise functions of a public nature: s 54(4)(b), (6).

2 Ibid s 54(1).

3 Ibid s 54(2)(a). As to the Victims' Code of Practice see PARA 2172 ante. The Secretary of State may, after consulting the Attorney General and Lord Chancellor, by order amend s 54(2) by adding any purpose appearing to him to be connected with the assistance of victims of offences or anti-social behaviour, witnesses of offences or anti-social behaviour or other persons affected by offences or anti-social behaviour (but not including persons accused or convicted of offences): s 54(4)(a), (5), (6).

4 Ibid s 54(2)(b). See note 3 supra. As to victims' rights to representation and information see ss 35-44; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARAS 340-342, 633.

5 Ibid s 54(2)(c) (not yet in force). See note 3 supra.

6 Ibid s 54(7). See further CONFIDENCE AND DATA PROTECTION.

7 Ibid s 54(8).

### **UPDATE**

#### **2177-2180 Appointment of the Commissioner and his deputy ... Victims' Advisory Panel**

References in these provisions to the Secretary of State are now to the Secretary of State for Justice, and references to the Lord Chancellor are now to the Secretary of State for the Home Department: see SI 2007/2128.

### **2179 Disclosure of information**

NOTE 1--Also, head (4) a provider of probation services (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 733 et seq): Domestic Violence, Crime and Victims Act 2004 s 54(3) (amended by SI 2008/912).

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/28. VICTIMS OF CRIME/(5) VICTIMS' ADVISORY PANEL/2180. Victims' Advisory Panel.

## **(5) VICTIMS' ADVISORY PANEL**

### **2180. Victims' Advisory Panel.**

The Domestic Violence, Crime and Victims Act 2004<sup>1</sup> provides that the Secretary of State must appoint<sup>2</sup> persons to form a panel, to be known as the Victims' Advisory Panel<sup>3</sup>, and he must consult the Panel at such times and in such manner as he thinks appropriate on matters appearing to him to relate to victims of offences or anti-social behaviour or witnesses of offences or anti-social behaviour<sup>4</sup>. If the Secretary of State consults the Panel in a particular year<sup>5</sup>, he must arrange for the Panel to prepare a report for the year summarising what the Panel has done in response to the consultation, and dealing with such other matters as the Panel considers appropriate<sup>6</sup>.

1 The Domestic Violence, Crime and Victims Act 2004 s 55 came into force on 4 October 2006: see the Domestic Violence, Crime and Victims Act 2004 (Commencement No 6) Order 2006, SI 2006/2662.

2 The Secretary of State must consult the Attorney General and the Lord Chancellor before appointing a person to the Panel, or removing a person from the Panel: Domestic Violence, Crime and Victims Act 2004 s 55(2). The Secretary of State may reimburse the members of the Panel for such of their travelling and other expenses as he thinks appropriate: s 55(4).

3 Ibid s 55(1). The unincorporated body of persons known as the Victims' Advisory Panel (the 'non-statutory Victims' Advisory Panel') established by the Secretary of State before the date on which s 55 comes into force is to be treated as having been established in accordance with s 55: s 55(7), (9).

4 Ibid s 55(3). If the Secretary of State consults the non-statutory Victims' Advisory Panel on a matter mentioned in s 55(3) before the date on which s 55 comes into force, the consultation is to be treated as taking place under s 55(3): s 55(8).

5 In ibid s 55, 'year' means a period of 12 months beginning on 1 April: s 55(10).

6 Ibid s 55(5). If a report is prepared under s 55(5), the Secretary of State must arrange for it to be published, and lay it before Parliament: s 55(6).

## **UPDATE**

### **2177-2180 Appointment of the Commissioner and his deputy ... Victims' Advisory Panel**

References in these provisions to the Secretary of State are now to the Secretary of State for Justice, and references to the Lord Chancellor are now to the Secretary of State for the Home Department: see SI 2007/2128.

Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE (VOLUME 11(1) (2006 REISSUE) PARAS 1-620; VOLUME 11(2) (2006 REISSUE) PARAS 621-1049; VOLUME 11(3) (2006 REISSUE) PARAS 1050-1557; VOLUME 11(4) (2006 REISSUE) PARAS 1558-2180)/28. VICTIMS OF CRIME/(6) GRANTS/2181. Grants for assisting victims and witnesses etc.

## **(6) GRANTS**

### **2181. Grants for assisting victims and witnesses etc.**

As from a day to be appointed the following provisions have effect<sup>1</sup>.

The Secretary of State may pay such grants to such persons as he considers appropriate in connection with measures which appear to him to be intended to assist victims, witnesses or other persons affected by offences<sup>2</sup>. Such a grant may be made subject to such conditions as he considers appropriate<sup>3</sup>.

1 The Domestic Violence, Crime and Victims Act 2004 s 56 comes into force on a day to be appointed by the Secretary of State by order made under s 60. At the date at which this volume states the law no such day had been appointed for the commencement of s 56.

2 Ibid s 56(1) (not yet in force).

3 Ibid s 56(2) (not yet in force).

## **UPDATE**

### **2181 Grants for assisting victims and witnesses etc**

TEXT AND NOTE 1--Day appointed is 8 January 2007: SI 2006/3423.